IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

RICHARD AZPITARTE, Appellant, v. GAYLE SAUVE, JANE DOE SAUVE, and the marital community composed thereof and BURIEN COLLISION CENTER, INC., Respondent.	)	No. 67715-2-I UNPUBLISHED OPINION FILED: January 22, 2013

Verellen, J. — In this action for conversion and replevin, Richard Azpitarte contends that Gayle Sauve and/or Burien Collision Center illegally obtained possession of his 1970 Chevelle Supersport, as well as other cars and parts, from a tow yard. The superior court dismissed the suit on summary judgment because the statute of limitations had expired. Because Azpitarte fails to identify a genuine issue of material fact for the jury as to whether his claim was timely filed, we affirm.

FACTS

In June 2004, Azpitarte failed to comply with a court order requiring removal of several vehicles stored on his property in violation of King County zoning ordinances.[1] In August 2004, the county hired Cedar Rapids Towing to tow away several of Azpitarte's

[1] King County v. Azpitarte, noted at 136 Wn. App. 1021, 2006 WL 3720405, at *1.

vehicles, including a 1970 Chevelle Supersport. In September 2004, Cedar Rapids Towing filed an "Abandoned Vehicle Report- Affidavit of Sale" with the Department of Licensing listing the Chevelle as abandoned on September 2, 2004. On August 5, 2005, Gayle Sauve registered the Chevelle in his name with the Department of Licensing.

On December 10, 2010, Azpitarte filed an action for conversion and replevin against Sauve, his marital community, and his business, Burien Collision Center, Inc. In his complaint, Azpitarte alleges that Sauve admitted to him in December 2007 that when the car came into Sauve's possession in 2005, "it was not through a legal auction. The plaintiff had been monitoring the publications which the county had authorized tow yard operators to use to conduct legal auctions, but this automobile was never listed in an auction."[2] The complaint also alleges Azpitarte's belief that discovery will reveal that other cars and parts removed from his property were converted to Sauve's possession.

Sauve filed an answer asserting, among other affirmative defenses, that Azpitarte filed his suit after the expiration of the statute of limitations. Sauve also filed a motion for summary judgment, arguing that the applicable statute of limitations, RCW 4.16.080, expired in June 2008, three years after he purchased the car from Cedar Rapids Towing. Sauve provided a copy of the completed "Abandoned Vehicle Report- Affidavit of Sale" indicating that he purchased the car on June 28, 2005, as well as his registration certificate dated August 8, 2005. Sauve also filed a supporting declaration stating that he placed a bid on the car and it was accepted, although he was not present at the auction on June 28, 2005.

[2] Clerk's Papers at 3-4.

In response, Azpitarte argued that he did not discover until 2007 that Sauve obtained possession of the car in the fall of 2004, and that he did not buy the car at a legal auction pursuant to RCW 46.55.130. Relying on Crisman v. Crisman,[3] Azpitarte claimed he was entitled to application of the discovery rule because Sauve's fraud prevented him from discovering the factual basis of his allegations until 2007. In support of his argument, Azpitarte filed over 200 pages of documents, including declarations, Cedar Rapids Towing records, and portions of the record from his litigation with King County.

After a hearing, the trial court granted summary judgment to Sauve based on the expiration of the statute of limitations. Aziparte appeals.

DISCUSSION

A motion for summary judgment may be granted when there is "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."[4] A summary judgment motion must be supported by affidavits and set forth facts that would be admissible in evidence.[5] "[T]he moving party bears the initial burden of showing the absence of an issue of material fact."[6] If the moving party is a defendant who meets the initial burden, then the inquiry shifts to the party with the burden of proof at trial.[7] If that party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,"

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[3] 85 Wn. App. 15, 931 P.2d 163 (1997).

[4] CR 56(c).

[5] CR 56(e).

[6] Right-Price Recreation, L.L.C. v. Connells Prairie Comty. Council, 146 Wn.2d 370, 381-82, 46 P.3d 789 (2002) (internal quotation marks omitted) (quoting Young v. Key Pharms., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989)).

[7] Id.

then the court should grant the motion.[8] The nonmoving party cannot rely on speculation but must assert specific facts to defeat summary judgment.[9]

Under the discovery rule, when there is a delay between an injury and the plaintiff's discovery of it, a cause of action accrues for purposes of the statute of limitations when the plaintiff knew, or in the exercise of due diligence should have known, the essential elements of the cause of action.[10] Courts may apply the discovery rule where the defendant fraudulently conceals a material fact from the plaintiff, thereby depriving the plaintiff of knowledge of the accrual of the action.[11] To establish fraudulent concealment or misrepresentation without affirmatively pleading and proving the nine elements of fraud, the plaintiff must show that the defendant breached an affirmative duty to disclose a material fact.[12]

It is undisputed that Sauve registered the Chevelle in his name in August 2005 and Azpitarte did not file suit until December 2010. Azpitarte claims that his suit was timely filed under the discovery rule because Sauve owed him an affirmative duty of candor, and fraudulently concealed the fact that he obtained the car from Cedar Rapids Towing in the fall of 2004, thereby depriving Azpitarte of knowledge of the accrual of an action for conversion until December 2007, when Sauve "admitted" that he did not obtain the car at a "legal auction." But Azpitarte's claim as to the application of the discovery rule fails for

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[8] Id. at 382 (internal quotation marks omitted) (quoting Young, 112 Wn.2d at 225).

[9] Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

[10] In re Estates of Hibbard, 118 Wn.2d 737, 752, 826 P.2d 690 (1992); Crisman, 85 Wn. App. at 20.

[11] Crisman, 85 Wn. App. at 20.

[12] Crisman, 85 Wn. App. at 21.

several reasons.

First, Azpitarte cites no relevant authority to support his bald claim that Sauve owed him an affirmative duty to disclose the details of his transactions with Cedar Rapids Towing. Azpitarte did not claim or establish that he had any special relationship with Sauve giving rise to any duty to disclose.[13]

Second, Azpitarte fails to identify any evidence to demonstrate that he could not have, through the exercise of due diligence, discovered the factual basis for his conversion claim within three years of the date on which Sauve testified that he obtained the Chevelle or registered it in his name. At the summary judgment hearing, Sauve provided his declaration stating that he obtained the car by submitting a bid to Cedar Rapids Towing in June 2005 and registered the car in his name in August 2005. Azpitarte responded with his own declaration stating that he repeatedly searched the Cedar Rapids Towing yard in 2004 and 2005 and never saw his gold Chevelle. He also submitted the declaration of Dennis Beggerly, who stated that he saw a gold 1970 Chevelle in Sauve's garage in the fall of 2004. But Azpitarte offers no evidence to establish when he learned of Beggerly's observation of the car in Sauve's garage and offers no indication that he could not have discovered, through the exercise of due diligence, the substance of Beggerly's statement before December 2007. Azpitarte does not contend that Sauve

[13] See, e.g., Favors v. Matzke, 53 Wn. App. 789, 796, 770 P.2d 686 (1989) (courts will find duty to disclose where there is quasi-fiduciary relationship, special relationship of trust and confidence, one party relies on superior specialized knowledge and experience of the other, seller has knowledge not easily discovered by buyer, or statutory duty to disclose exists); Crisman, 85 Wn. App. at 22-23 (defendants acting as agents of plaintiff had fiduciary duty to disclose transfer of corporate funds to their own benefit without plaintiff's knowledge or consent).

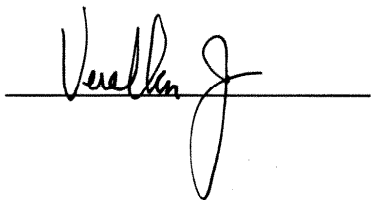
somehow prevented Beggerly from communicating such information to Azpitarte until December 2007 or thereafter.

Third, Azpitarte's argument regarding application of the discovery rule relies largely on conversations he claims he had with Sauve in early 2005 and December 2007. But such hearsay evidence[14] does not establish that Azpitarte was unable to independently discover the alleged fraud and conversion within three years of the August 5, 2005 registration of the Chevelle with the Department of Licensing.

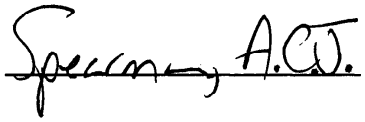
Finally, although Azpitarte claims he did not obtain documentary proof of his claims until March 2009, when he received a written report from Officer Darren Helton's investigation into the actions of Cedar Rapids Towing, he offers nothing more than speculation and suspicion based on those documents to support his allegation that Sauve obtained the Chevelle or any other cars or parts from Cedar Rapids Towing by means other than legal auctions at any time.

Under these circumstances, Azpitarte fails to identify any genuine issue of fact as to application of the discovery rule to toll or extend the statute of limitations. Because Azpitarte filed his suit more than three years after Sauve obtained possession of the Chevelle, the only property specifically identified in the complaint and admittedly possessed by Sauve, we affirm the order granting summary judgment.

Affirmed.



WE CONCUR:



v. Wayne, 105 Wn.2d 529, 535-36, 716 P.2d 842 (1986)