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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8
9 Eduardo Moros,

10 Plaintiff,

11 v.

12 Stephen Kimble, et al.,

13 Defendants.

No. CV-16-00312-TUC-RCC

ORDER

14
15 Pending before the Court is Defendants' motion for summary judgment. Doc. 47
16 For the following reasons, this Court shall grant the motion.

17 **Standard of Review**

18 A court must grant summary judgment if the pleadings and supporting documents,
19 viewed in the light most favorable to the non-moving party, "show that there is no
20 genuine issue as to any material fact and that the moving party is entitled to judgment as
21 a matter of law." Fed.R.Civ.P. 56(a). Substantive law determines which facts are
22 material, and "[o]nly disputes over facts that might affect the outcome of the suit under
23 the governing law will properly preclude the entry of summary judgment." *Anderson v.*
24 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In addition, the dispute must be genuine,
25 that is, "the evidence is such that a reasonable jury could return a verdict for the
26 nonmoving party." *Anderson*, 477 U.S. at 248.

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28 There is no issue for trial unless there is sufficient evidence favoring the non-
moving party; if the evidence is merely colorable or is not significantly probative,

1 summary judgment may be granted. *Anderson*, 477 U.S. at 249–50. However, because
2 “[c]redibility determinations, the weighing of evidence, and the drawing of inferences
3 from the facts are jury functions, not those of a judge . . . [t]he evidence of the non-
4 movant is to be believed, and all justifiable inferences are to be drawn in his favor” at the
5 summary judgment stage. *Id.* at 255, 106 S.Ct. 2505.

6 7 **Background**

8 In April 1990, the parties signed an agreement formalizing the division of income
9 and expenses associated with the joint development of a web shooting toy that simulated
10 the fictional superhero Spider-Man’s ability to shoot spider webs from his palm. Doc. 48-
11 4. The parties dispute who actually invented the toy, but the parties agree that Moros
12 would be listed as a co-inventor on the patent. Doc. 50 at 3.

13 In August 1990, Plaintiff moved to Wisconsin. Doc. 49 at 5. In 1992, Defendants
14 mailed Plaintiff a newspaper article that stated Kimble “received a U.S. patent for his
15 invention,” that Kimble and Grabb accrued nearly \$10,000 in expenses and that two
16 companies were interested in developing the toy. Doc. 48-10. The newspaper article was
17 also accompanied with a letter. Doc. 48-12. In the letter, Kimble stated that he “had some
18 initial success” but needed help convincing Marvel and Toy Biz that there was a market
19 for the toy. Kimble requested that Moros make three phone calls to the local paper,
20 Marvel and Toy Biz.

21 After receiving the letter, Moros made no attempt to either pay his share of the
22 expenses or inquire as to what Kimble meant by having “had some initial success.”

23 In 1997, Toy Biz released the “Web-Blaster,” a toy that had similarities to the toy
24 at issue in this case. Toy Biz previously rejected the design Kimble and Grabb submitted.
25 In 2001, Kimble and Grabb reached a settlement with Marvel, the owner of Toy Biz,
26 stemming from the patent infringement of the web shooter. In May 2016, Moros filed his
27 complaint, alleging, among other things, breach of contract, breach of implied covenant
28

1 of good faith and conversion. This Court previously dismissed Moros’s unjust enrichment
2 claim. Doc. 20.

3 **Discussion**

4 Plaintiff alleges that his breach of contract claim survives the limitations period
5 because the discovery rule should be applied to his complaint.

6 A claim for a breach of contract has a limitations period of six years. A.R.S. § 12-
7 548. Generally, a cause of action accrues and the statute of limitations begins to run when
8 one party is able to sue another. *See Gust, Rosenf Gust, Rosenfeld & Henderson v.*
9 *Prudential Ins. Co. of Am.*, 182 Ariz. 586, 587, 898 P.2d 964, 965 (Ariz. 1995).

10
11 However, under the “discovery rule,” when the injury or the act causing the
12 injury has been difficult for the plaintiff to detect, the statute of limitations
13 does not begin to run until the plaintiff knows or with reasonable diligence
14 should know of the facts underlying the alleged breach. The discovery rule
15 is premised on the notion that “it is unjust to deprive a plaintiff of a cause
of action before the plaintiff has a reasonable basis for believing that a
claim exists.

16 *Talley v. Pembroke Occupational Health, Inc.*, 2010 WL 1640977 at *2 (D. Ariz. 2010)
17 (internal citations and quotations omitted). The “important inquiry in applying the
18 discovery rule is whether the plaintiff’s injury or the conduct causing the injury is
19 difficult for the plaintiff to detect.” *Gust*, 182 Ariz. at 586. In other words, there “must be
20 some positive act of concealment done to prevent detection.” *Jackson v. Am. Credit*
21 *Bureau, Inc.*, 23 Ariz. App. 199, 202, 531 P.2d 932, 935 (Ariz. Ct. App. 1975).

22
23 *The Discovery Rule Does Not Apply*

24 Simply put, the discovery rule does not apply because Moros does not allege any
25 affirmative acts of concealment by Kimble and Grabb. Instead, Moros claims that
26 Defendants never disclosed the activities to him. That is not enough. The discovery rule
27 requires the injury to be difficult to detect. Moros’s wife discovered that Kimble reached
28 a large settlement with Marvel through an internet search. Doc. 50 ¶¶ 60-61. Moros

1 claims he did not previously contact Kimble or run an internet search because he thought
2 Kimble would notify him of any news. This alone does not warrant the application of the
3 discovery rule.

4 Because the discovery rule does not apply, the statute of limitations began to toll
5 after Kimble and Grabb reached a settlement with Marvel in 2001. Moros did not file his
6 complaint until 2016, which is outside the limitations period. Thus, this Court must grant
7 Defendants' motion for summary judgment and dismiss Moros's complaint.
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9 *Moros's complaint is untimely under the discovery rule*

10 The parties agreed that Moros would be listed as a co-inventor of the patent.
11 Defendants mailed Moros a letter stating that Kimble "received a U.S. patent for *his*
12 invention." (emphasis added). However, Moros did not inquire as to whether his name
13 was listed on the patent or what Kimble meant by having "some initial success." Because
14 the parties agreed that Moros's name would be listed on the patent, but it was not, the
15 agreement was breached when Kimble received a patent without Moros's name. Under
16 the discovery rule, the statute of limitations began when Moros knew or with reasonable
17 diligence, should have known of the facts underlying the breach. Moros became aware of
18 the breach when he received the letter from Kimble in 1992. Therefore, Moros had six
19 years from the date of the letter to file a breach of contract claim. Moros filed his
20 complaint outside of the limitations period. Thus, this Court must grant Defendants'
21 motion for summary judgment and dismiss Moros's complaint.
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23 *Remaining claims*

24 Moros also brought claims for breach of implied covenant of good faith and
25 conversion. However, both claims have a limitations period of two years. *See* A.R.S. §
26 12-542. Thus, these claims must also be dismissed.
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Conclusion

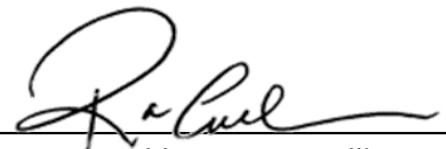
For the foregoing reasons, this Court must grant the Defendants’ motion for summary judgment and dismiss Moros’s complaint.

Accordingly,

IT IS HEREBY ORDERED that Defendants’ motion for summary judgment is granted. Doc. 47.

IT IS FURTHER ORDERED that Plaintiff’s motion to compel is denied as moot. Doc. 51.

Dated this 8th day of June, 2018.



Honorable Raner C. Collins
Chief United States District Judge