

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 TRUSTEES OF THE PLUMBERS AND)
4 PIPEFITTERS NATIONAL PENSION FUND)
5 AND INTERNATIONAL TRAINING FUND,)

Case No.: 2:14-cv-00436-GMN-GWF

6 Plaintiffs,)

ORDER

7 vs.)

8 ALL SEASONS INTERIOR & EXTERIOR)
9 MAINTENANCE, INC., a NEVADA)
10 CORPORATION, et al.,)

11 Defendants.)

12 Pending before the Court is the Motion for Summary Judgment (ECF No. 11) filed by
13 Defendants Gamma Construction Company ("Gamma") and Fidelity and Deposit Company of
14 Maryland ("FDCM") on May 5, 2014. On May 29, 2014, Plaintiffs the Trustees of the
15 Plumbers and Pipefitters National Pension Fund and International Training Fund ("Plaintiffs")
16 filed their Response in Opposition (ECF No. 16) on May 29, 2014, and Gamma and FDCM
17 filed their Reply (ECF No. 17) on June 2, 2014. For the reasons addressed below, the Court
18 Denies the Motion for Summary Judgment.

19 I. BACKGROUND

20 According to their Complaints (ECF No. 1), Plaintiffs are express trusts created to
21 represent certain organized labor unions. (Compl. ¶¶ 2-3, ECF No. 1). On June 12, 2006,
22 Defendant All Seasons Interior & Exterior Maintenance, Inc. ("All Seasons") entered into a
23 collective bargaining agreement ("CBA") with a union represented by Plaintiffs. (Id. ¶ 12).
24 According to Plaintiffs, this initial CBA and a successor CBA obligated All Seasons to make
25 employee benefit contributions to the trusts. (Id. ¶¶ 13-14, 26-29). However, All Seasons

1 failed to make the agreed upon contributions for a period between May 20, 2009 and January
2 20, 2010 relating to projects for which All Seasons was operating as a subcontractor for
3 Gamma, and All Seasons failed to report these delinquencies. (Id. ¶¶ 30–32, 70; Audit, Ex. A to
4 MSJ, ECF No. 11).

5 On May 25, 2012, All Seasons filed Chapter 11 bankruptcy petition, and Plaintiffs
6 subsequently decided to audit All Season’s payroll and business records. (Resp. to MSJ 4:25-
7 5:7, ECF No. 16). The audit, showing the payment deficiencies, was preliminarily completed
8 on July 21, 2013, and on August 30, 2013, Plaintiffs advised the general contractors identified
9 in the audit, including Gamma, of the deficiency. (Id. 5:18-19; Compl. ¶¶ 35–37, ECF No. 1).
10 On September 11, 2013, Plaintiffs filed a motion in All Seasons bankruptcy proceeding entitled
11 a “Precautionary Motion for Order Confirming that Stay is Inapplicable, or in the Alternative,
12 for Relief from Automatic Stay, requesting that the Bankruptcy Court explicitly acknowledge
13 that Plaintiffs had a right to pursue their claims against the general contractors, like Gamma,
14 and their bonding companies, like FDCM. (Resp. to MSJ 5:20-25, ECF No. 16). On February
15 21, 2014, however, the Bankruptcy Court dismissed All Seasons’ bankruptcy proceeding
16 without ruling on the pending motion. (Id. 7:4-11).

17 Plaintiffs subsequently filed their Complaint on March 21, 2014, alleging, inter alia,
18 breach of contract against All Seasons, general contractor liability against Gamma, and Relief
19 on Bond from FDCM. (Compl., ECF No. 1).

20 **II. LEGAL STANDARD**

21 The Federal Rules of Civil Procedure provide for summary adjudication when the
22 pleadings, depositions, answers to interrogatories, and admissions on file, together with the
23 affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant
24 is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those that
25 may affect the outcome of the case. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248

1 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable
2 jury to return a verdict for the nonmoving party. See *id.* “Summary judgment is inappropriate if
3 reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict
4 in the nonmoving party’s favor.” *Diaz v. Eagle Produce Ltd. P’ship*, 521 F.3d 1201, 1207 (9th
5 Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A
6 principal purpose of summary judgment is “to isolate and dispose of factually unsupported
7 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

8 In determining summary judgment, a court applies a burden-shifting analysis. “When
9 the party moving for summary judgment would bear the burden of proof at trial, it must come
10 forward with evidence which would entitle it to a directed verdict if the evidence went
11 uncontroverted at trial. In such a case, the moving party has the initial burden of establishing
12 the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp.*
13 *Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In
14 contrast, when the nonmoving party bears the burden of proving the claim or defense, the
15 moving party can meet its burden in two ways: (1) by presenting evidence to negate an
16 essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving
17 party failed to make a showing sufficient to establish an element essential to that party’s case
18 on which that party will bear the burden of proof at trial. See *Celotex Corp.*, 477 U.S. at 323–
19 24. If the moving party fails to meet its initial burden, summary judgment must be denied and
20 the court need not consider the nonmoving party’s evidence. See *Adickes v. S.H. Kress & Co.*,
21 398 U.S. 144, 159–60 (1970).

22 If the moving party satisfies its initial burden, the burden then shifts to the opposing
23 party to establish that a genuine issue of material fact exists. See *Matsushita Elec. Indus. Co. v.*
24 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute,
25 the opposing party need not establish a material issue of fact conclusively in its favor. It is

1 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the
2 parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*
3 *Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid
4 summary judgment by relying solely on conclusory allegations that are unsupported by factual
5 data. See *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go
6 beyond the assertions and allegations of the pleadings and set forth specific facts by producing
7 competent evidence that shows a genuine issue for trial. See *Celotex Corp.*, 477 U.S. at 324.

8 At summary judgment, a court’s function is not to weigh the evidence and determine the
9 truth but to determine whether there is a genuine issue for trial. See *Anderson*, 477 U.S. at 249.
10 The evidence of the nonmovant is “to be believed, and all justifiable inferences are to be drawn
11 in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is
12 not significantly probative, summary judgment may be granted. See *id.* at 249–50.

13 **III. DISCUSSION**

14 In their Motion for Summary Judgment, Gamma and FDCM point out that the statutes of
15 limitations for Plaintiffs’ claims against them had both already run by the time Plaintiffs filed
16 their Complaint on March 21, 2014. (MSJ 1:26-2:17, ECF No. 11). Under Nevada law,
17 Plaintiffs’ claim for out-of-state general contractor liability against Gamma is limited to “three
18 years ... after the date ... contributions or premiums should have been made or paid by the
19 subcontractor.” Nev. Rev. Stat. § 11.209(1)(b). Likewise, Plaintiffs’ claim on FDCM’s
20 contractor license bond is limited to “2 years after the commission of the act on which the
21 action is based.” Nev. Rev. Stat. § 624.273(2). Therefore, according to Gamma and FDCM,
22 because the contributions at issue here were due between May 20, 2009 and January 20, 2010,
23 the applicable statute of limitations for Plaintiffs’ claims against Gamma had run by January
24 20, 2013 and the applicable statute of limitations for their claims against FDCM had run by
25 January 20, 2012. (MSJ 2:20-4:26, ECF No. 11).

1 Plaintiffs do not dispute that their Complaint was filed after the running of the applicable
2 statutes of limitations for their claims against Gamma and FDCM. (Resp. to MSJ 8:12-13, ECF
3 No. 16). Instead, Plaintiffs assert that Defendants’ Motion for Summary Judgment should be
4 denied because of the doctrine of equitable tolling. (Id. 8:13-15). Specifically, Plaintiffs
5 contend that the statutes of limitations should be equitably tolled because “despite all due
6 diligence,” Plaintiffs were unable to learn who All Seasons contractors were until the audit was
7 completed and were unable to pursue claims against those contractors until their Precautionary
8 Motion was ruled on or the bankruptcy case dismissed. (Id. 12:21-13:7). However, the Court
9 will not address the issue of equitable tolling because—despite Plaintiffs’ acquiescence on this
10 point—it finds that that Gamma and FDCM have failed to present sufficient evidence showing
11 that there is not a genuine issue of material fact concerning whether the statutes of limitations
12 have run on Plaintiffs’ claims.

13 The parties are correct that “[i]n ERISA actions the federal courts employ a state statute
14 of limitations.” *N. California Retail Clerks Unions & Food Employers Joint Pension Trust*
15 *Fund v. Jumbo Markets, Inc.*, 906 F.2d 1371, 1372 (9th Cir. 1990) (citing *Hawaii Carpenters*
16 *Trust Fund v. Waiola Carpenter Shop*, 823 F.2d 289, 298 (9th Cir. 1987)). “Because the cause
17 of action is federal, however, federal law determines the time at which the cause of action
18 accrues.” *Id.*; see also *Wetzel v. Lou Ehlers Cadillac Grp. Long Term Disability Ins. Program*,
19 222 F.3d 643, 649 (9th Cir. 2000) (“the accrual of an ERISA cause of action is determined by
20 federal, rather than state, law.”); *Chuck v. Hewlett Packard Co.*, 455 F.3d 1026, 1031 (9th Cir.
21 2006) (“Because there is no specific federal statute of limitations governing claims for benefits
22 under an ERISA plan, we look to the most analogous state statute of limitations to determine
23 the length of the limitations period. . . . Federal law, however, governs the issue of when a
24 cause of action accrues and thereby triggers the start of the limitations period.”) (internal
25 quotations omitted). Under federal law, a plaintiff’s claim accrues and the statute of limitations

1 begins to run, “when the plaintiff knows or has reason to know of the injury that is the basis of
2 the action.” Jumbo Markets, 906 F.2d at 1372. “Therefore, the relevant inquiry here is ‘the
3 time at which [Plaintiffs] knew or had reason to know of any underpayment.’” Trustees of
4 Operating Engineers Pension Trust v. Smith-Emery Co., 906 F. Supp. 2d 1043, 1058 (C.D. Cal.
5 2012) (citing Jumbo Markets, 906 F.2d at 1372).

6 It is certainly true that Plaintiffs knew or had reason to know of All Seasons’ deficient
7 payments at least by the time the audit was concluded on July 21, 2013. It is also very likely
8 that Plaintiffs knew or should have had reason to know of the deficiencies at the time All
9 Seasons filed bankruptcy, which precipitated Plaintiffs decision to conduct the audit. See Smith-
10 Emery Co., 906 F. Supp. 2d at 1059 (“[T]he Court rejects plaintiffs’ argument that they had no
11 reason to know of any delinquent contributions until after the audit at issue in this litigation
12 was completed in July 2011. At a minimum, plaintiffs had reason to know of missing
13 contributions once they decided that an audit was necessary, not after the audit was
14 completed.”). All Seasons filed for bankruptcy on May 25, 2012. (Compl. ¶ 41, ECF No. 1).
15 Therefore, if the bankruptcy filing date begins the running of the limitations periods, then
16 Plaintiff had until May 25, 2014 and May 25, 2015 to file its claims against FDCM and
17 Gamma, respectively. Accordingly, the filing of Plaintiffs’ Complaint on March 21, 2014
18 would be timely for both claims.

19 It is possible that Plaintiffs knew or should have known of All Seasons’ deficient
20 payments prior to the bankruptcy filing. For example, it is possible that a sizable reduction in
21 the amount of contributions reported by All Seasons from one month to another should have
22 given Plaintiffs reason to know of All Seasons’ deficient payments. See Jumbo Markets, 906
23 F.2d at 1373 (“In determining the date the Trust Funds had reason to know, the district court
24 may consider evidence showing that the shift in September 1984 to reporting the correct
25 number of hours was so great a change that the Trust Funds should have been alerted to the fact

1 that the previous reporting had been erroneous.”); see also Locals 302 & 612 of Int'l Union of
2 Operating Engineers Const. Indus. Health & Sec. Fund v. Meko Const., Inc., No. C11-
3 1113RAJ, 2012 WL 3812025, at *2 (W.D. Wash. Sept. 4, 2012) (“In this case, the trust funds
4 might have had reason to know as early as July 2002 that Meko had not paid all required
5 contributions. Meko sent monthly reports to the trust funds for all of the contributions in
6 question, and a jury could certainly conclude that the trust funds knew or had reason to know of
7 the unpaid contributions as soon as they received the reports.”). In their Complaint, Plaintiffs
8 admit that they received late payments of partial amounts of contributions for the months of
9 October 2009 and January 2010 and that All Seasons “failed to submit reports after March
10 2012.”¹ (Compl. ¶¶ 30–31, ECF No. 1). The cessation of reporting and the fact that All
11 Seasons’ payments were late and potentially of a noticeably smaller amount could have put
12 Plaintiffs on notice that All Seasons was not fulfilling its obligations. However, Gamma and
13 FDCM focused their briefs upon the inapplicability of the doctrine of equitable tolling rather
14 than establishing the date Plaintiffs had reason to know of All Seasons’ deficient payments.
15 Therefore, they failed to satisfy their initial burden of establishing the absence of a genuine
16 issue of fact.

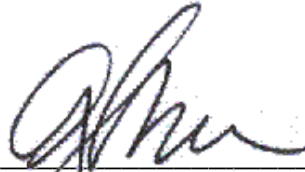
17 Accordingly, drawing all inferences in favor of Plaintiffs, the Court finds that a disputed
18 issue of material fact exists concerning when Plaintiffs knew or should have known that All
19 Seasons was not fulfilling its obligations under the CBA, triggering the limitations periods.
20 While it is certainly possible that Plaintiffs knew or had reason to know of All Seasons
21 delinquency two or three years before the filing of the Complaint, the Court cannot make that
22 determination as a matter of law.

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25 ¹ Reading this statement to mean that All Seasons failed to submit its remittance report for the month of April, it appears that Plaintiffs may have had reason to know of All Seasons’ underpayments when it failed to provide the April 2012 report. However, an April 2012 accrual date would still render as timely the March 21, 2014 filing date.

1 **IV. CONCLUSION**

2 **IT IS HEREBY ORDERED** that the Motion for Summary Judgment (ECF No. 11)
3 filed by Defendants Gamma and FDCM is **DENIED**.

4 **DATED** this 3rd day of February, 2015.

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Gloria M. Navarro, Chief Judge
United States District Judge

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