

STATE OF MICHIGAN
COURT OF APPEALS

SAVIRO INTERNATIONAL COMPANY
ANSTALT,

UNPUBLISHED
June 2, 1998

Plaintiff-Appellee,

v

No. 199003
Macomb Circuit Court
LC No. 96-004277 CK

CADILLAC GAGE TEXTRON, INC.,

Defendant-Appellant.

Before: Holbrook, Jr., P.J. and Gribbs and R.J. Danhof*, JJ.

PER CURIAM.

Defendant makes this interlocutory appeal by leave granted from the trial court's opinion and order in which defendant's motion for summary disposition based on a statute of limitations argument was denied. We reverse and remand for further proceedings in accordance with this opinion.

Defendant argues that the trial court erred in applying the fraudulent concealment exception where plaintiff's claims were otherwise barred by the applicable statute of limitations and that summary disposition pursuant to MCR 2.116(C)(7) should have been granted in favor of defendant. We agree.

This Court reviews de novo a trial court's grant or denial of a motion for summary disposition pursuant to MCR 2.116(C)(7) in order to determine whether the prevailing party was entitled to judgment as a matter of law. *Smith v YMCA of Benton Harbor*, 216 Mich App 552, 554; 550 NW2d 262 (1996).

Plaintiff's claims are clearly barred by the applicable statute of limitations unless the fraudulent concealment exception applies. Under the fraudulent concealment statute, MCL 600.5855; MSA 27A.5855, the limitation period is tolled where a party conceals the fact that plaintiff has a cause of action. *Phinney v Perlmutter*, 222 Mich App 513, 562; 564 NW2d 532 (1997).

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Generally, in order to toll the limitations period on the basis of fraudulent concealment, a plaintiff must plead in his complaint the acts or misrepresentations which constituted the fraudulent concealment. *Id.* at 562-563. The plaintiff must then prove that the defendant committed affirmative acts of misrepresentation that were designed to prevent subsequent discovery. *Id.* at 563. Mere silence is insufficient. *Sills v Oakland General Hospital*, 220 Mich App 303, 310; 559 NW2d 348 (1996). In this case, other than silence, there is no act or misrepresentation alleged by plaintiff that indicates defendant ever concealed such a cause of action. However, where the basis of the action is a fraud perpetrated by the defendant, the original fraud is regarded as a continuing affirmative act, and mere silence of the defendant is treated as a concealment for purposes of tolling the period of limitations. *Draws v Levin*, 332 Mich 447; 52 NW2d 180 (1952).

Nevertheless, even assuming that plaintiff has shown affirmative acts sufficient to invoke the protection of the statute, the statute allows tolling only for a period of two years from the time the existence of the claim was discovered or should have been discovered. MCL 600.5855; MSA 27A.5855. Where a plaintiff knows of the cause of action, there can be no concealment. *Weast v Duffie*, 272 Mich 534, 539; 262 NW 401 (1935). A plaintiff is held to know what he ought to know through the exercise of ordinary diligence. *Id.*

In the present case, we find that plaintiff, through ordinary diligence, should have discovered the existence of the claim at the time of Canadian lawsuits between the parties. The claim defendant allegedly concealed through its silence was one of fraud, specifically, that defendant never intended to pay the commissions. Clearly, plaintiff knew that the commissions were not paid when it filed the Canadian litigation to recover the unpaid commissions. Moreover, during the course of the Canadian litigation, plaintiff's own representative indicated in a sworn statement that defendant had engaged in lies and misleading statements as to the commissions, that plaintiff was aware of rumors as to dishonest dealings on the part of defendant in the form of kickbacks, and that he personally believed that defendant had been actively trying to "circumvent their responsibilities" and avoid paying plaintiff commissions. We believe that this testimony would cause a reasonable person to question whether defendant ever intended to pay commissions. Whether plaintiff could prove its claim is irrelevant to the issue. It is not necessary that a plaintiff know all the details of the evidence by which to establish his cause of action; it is sufficient that he knows that a cause of action exists. *Id.* at 539.

The final Canadian lawsuit was dismissed in 1987. Therefore, under the statute, we find that plaintiff's claims were barred as of 1989, more than six years before this instant lawsuit was filed. The trial court incorrectly applied the fraudulent concealment statute and erred in denying defendant's motion for summary disposition.

Reversed and remanded for entry of a judgment in favor of defendant. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.

/s/ Roman S. Gibbs

/s/ Robert J. Danhof