S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

In re Estate of MARIANN ZSENYUK, Protected Individual.

GERALD ZSENYUK,

Plaintiff-Appellee/Cross-Appellant,

v

ESTATE OF MARIANN ZSENYUK,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
May 16, 2006

No. 265080
Wayne Probate Court
LC No. 2003-670109-CZ

Before: Smolenski, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's June 9, 2005 denial of its summary disposition motion and the court's grant of summary disposition to plaintiff pursuant to MCR 2.116(I)(2). Plaintiff cross-appeals by leave granted the court's refusal to grant a constructive trust and its denial of plaintiff's motion for compound interest on the award. We affirm in part, reverse in part, and remand for actions consistent with this opinion.

Plaintiff was born May 26, 1955, to Steven and Mariann Zsenyuk. As a result of a medical injury plaintiff suffered when he was two years old, he received a net medical malpractice settlement of $19,955. Because he was a minor at the time, his father was appointed conservator of the proceeds. His father petitioned the court to borrow $14,000 of plaintiff's proceeds to buy a home. The petition was granted; the July 27, 1964 mortgage granted by his parents provided for monthly payments of sixty-nine dollars with repayment in full at plaintiff's option when plaintiff reached majority.

Plaintiff testified he learned shortly before his eighteenth birthday that he had been accepted to the University of Detroit. He met with his parents to discuss funding for college. His father informed plaintiff that investments had not been successful, and the money had been used to feed and clothe him and his four siblings. Although he was bitter and disappointed, plaintiff testified, it did not occur to him to question or sue his father. A May 29, 1973 quit claim deed indicating that the mortgage was paid in full and a receipt for liquid assets totaling

$13,676.96, both purporting to contain plaintiff's signature, were filed with probate court. The quit claim deed was prepared by his mother.

Plaintiff's father subsequently died. His mother was declared a protected individual, and eventually the current conservator was appointed December 12, 2003. Plaintiff claimed the signatures on the quit claim deed and receipt for liquid assets were forged, he never received payment for the loan, and he first learned about the quit claim deed and receipt for liquid assets in April 2004. On August 2, 2004, plaintiff brought suit against his mother's estate on grounds of fraud, breach of fiduciary duty, and conversion, to invalidate the 1973 quit claim deed, to impose a constructive trust on the property referenced in the mortgage, and for other proper relief.

Defendant estate filed two summary disposition motions. The first motion, pursuant to MCR 2.116(C)(8), sought to preclude claims against the estate that should have been brought against plaintiff's father as conservator and to limit the equitable lien to the value of the mortgage note. The second motion, and the one relevant to this appeal, asserted that plaintiff's claims were barred under applicable statutes of limitation. It argued that the court-approved loan matured on plaintiff's reaching majority on May 27, 1973, and plaintiff was aware that his father denied him his right to the proceeds but neglected to pursue a cause of action until thirty years after his right accrued. According to defendant, the apparently forged documents were part of public record, and plaintiff could easily have ascertained the nature of his cause of action. It asserted that plaintiff's claim was against his father as fiduciary, not his mother. Defendant alternatively argued plaintiff's claim was barred by laches; plaintiff unduly delayed more than thirty years to bring suit, and defendant was prejudiced by the fact that one of the actors was dead and the other legally incompetent.

Plaintiff responded that he was not required to investigate because he and his parents had a fiduciary relationship, his father's explanation to him with respect to the expenditure of funds did not indicate wrongdoing, and his parents actively participated in fraud by forging his signatures to cover up his potential cause of action.[1] With respect to the undue prejudice caused by the delay, plaintiff argued that defendant had only its ward's fraudulent actions to blame for the delay.

The trial court found the defense of laches was unavailable to defendant because its ward participated in the fraud and, thus, had unclean hands. Likewise, the court found defendant was equitably estopped from raising a statute of limitations defense when its ward was involved in false representations and concealing material facts. On the evidence before it, the court found the quit claim deed was forged, and plaintiff was entitled to enforce the mortgage. It declined to impose compound interest, but imposed seven percent interest from the time plaintiff turned eighteen. It appeared to find that the equitable remedy of a constructive trust was not required when an adequate remedy at law existed. Plaintiff's motion for reconsideration was denied. This appeal and cross-appeal followed.

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[1] Although plaintiff claimed a handwriting expert opined that the signatures were not plaintiff's, there is no evidence in the record provided to this Court to support the claim.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10); however, summary disposition on the basis that a claim is barred by a statute of limitation is properly brought under MCR 2.116(C)(7). Nevertheless, summary disposition under the wrong subrule is not fatal if the record supports review under the proper subrule. *Detroit News, Inc v Policemen & Firemen Retirement Sys of Detroit,* 252 Mich App 59, 66; 651 NW2d 127 (2002). In a motion pursuant to MCR 2.116(C)(7), admissible evidence may, but need not, be submitted if the asserted grounds appear on the face of the pleadings. MCR 2.116(G)(2), (3). Although our review of a trial court's decision is de novo, we accept the plaintiff's well-pleaded factual allegations in the complaint as true unless contradicted by admissible evidence, and view the evidence in a light most favorable to plaintiff. *Geralds v Munson Healthcare,* 259 Mich App 225, 229-230; 673 NW2d 792 (2003), *Waltz v Wyse,* 469 Mich 642, 647-648; 677 NW2d 813 (2004).

Defendant first argues the court erred in denying it summary disposition when the promissory note owed to plaintiff became due on his eighteenth birthday on May 26, 1973, and MCL 600.5807(8), the six-year statute of limitation pertaining to contract actions, barred plaintiff's claims as of May 26, 1979. It further argues that the public policy behind statutes of limitation was to prevent a defendant from having to defend stale claims, and the conservator, who was appointed thirty years after disclosure of the alleged wrongdoing, had no means to investigate or defend the claims when plaintiff's father had died and his mother had become a protected and partially incapacitated individual. Plaintiff argues that the statute of limitation was tolled by the fraudulent acts of his parents under MCL 600.5855, when his father told plaintiff he had lost the funds through bad investments, his mother prepared a fraudulent quit claim deed indicating the funds had been repaid, the forged quit claim deed filed with the court stopped the court from putting plaintiff on notice regarding his cause of action, and the fiduciary relationship between plaintiff and his parents negated his responsibility to search public records when his parents told him nothing that would indicate a need to investigate.

Absent disputed issues of fact, whether a claim is barred by a statute of limitation is reviewed de novo as a question of law. *Citizens Ins Co v Scholz,* 268 Mich App 659, 662; 709 NW2d 164 (2005). Unless expressly provided otherwise, a period of limitation begins to run at the time a claim accrues. MCL 600.5827. Under MCL 600.5827, a claim generally accrues when the wrong is done. *Boyle v Gen Motors Corp,* 468 Mich 226, 231; 661 NW2d 557 (2003). The period of limitation for an action premised upon a covenant in a mortgage of real estate is ten years. MCL 600.5807(4); *Visioneering Inc Profit Sharing Trust v Belle River Joint Venture,* 149 Mich App 327, 332-333; 386 NW2d 185 (1986). The period of limitation on a breach of contract action is six years. MCL 600.5807(8). The period of limitation for a claim of fraud is six years. *Boyle, supra* at 230. And the period of limitation for any other action for injury to a person or property is three years. MCL 600.5805(10). Regardless which period is applied, a claim filed more than thirty years after the accrual of the action is time barred.

While we acknowledge, as defendant argues, that the purposes of statutes of limitation are to protect defendants from having to defend stale claims and to prevent plaintiffs from being dilatory, *Stephens v Dixon,* 449 Mich 531, 534; 536 NW2d 755 (1995), we nevertheless note that MCL 600.5855 provides a special period of limitation when the existence of a cause of action is fraudulently concealed, *Brownell v Garber,* 199 Mich App 519, 523; 503 NW2d 81 (1993). Under MCL 600.5855, a plaintiff has two years to bring an action from the time the person

discovered or should have discovered the existence of the claim. The record indicates that plaintiff brought his claim of action within this two-year period. Fraudulent concealment occurs when a defendant uses an artifice with the intent to prevent inquiry or avoid investigation, and to mislead or hinder discovery of information that would provide notice of a cause of action. *Doe v Roman Catholic Archbishop,* 264 Mich App 632, 642; 692 NW2d 398 (2004). The plaintiff must show that defendant concealed the existence of a claim or the identity of the actor. *Id.* at 643. In his complaint, plaintiff alleged he was unaware of the documents until he was notified by his brother that there was a cloud on the title of his mother's house. He claimed that the quit claim deed and receipt for liquid assets were forged and alleged they were prepared to conceal the fact that he did not receive his assets. Hence, plaintiff properly alleged that his father used fraudulent devices to conceal the failure to turn over funds.

Defendant argues that because plaintiff knew he was harmed by the lack of funds, he could not claim fraudulent concealment. If a plaintiff is aware of a possible cause of action, there can be no fraudulent concealment. *Doe, supra* at 643. A plaintiff is deemed aware of a possible cause of action when the plaintiff is aware of an injury and its possible cause. *Moll v Abbott Laboratories,* 444 Mich 1, 24; 506 NW2d 816 (1993). A breach of fiduciary duty occurs when a "position of influence has been acquired and abused, or when confidence has been reposed and betrayed." *Vicencio v Ramirez,* 211 Mich App 501, 508; 536 NW2d 280 (1995).

Here, plaintiff averred that his father never told him about the authorization to use his funds to purchase a house. Instead, he testified that when he asked his father about financing for college, his father informed him that the funds no longer existed because investments were unsuccessful and because the funds had been used to raise five children. Under the prior probate code, a fiduciary had a duty to exercise the standard of care a prudent person would exercise when dealing with the property of another and to avoid self dealing. *In re Messer Trust,* 457 Mich 371, 380; 579 NW2d 73 (1998); MCL 700.561. Thus, the explanation given by plaintiff's father would have put plaintiff on notice of a possible cause of action with respect to his breach of fiduciary duty claim, and this is what the trial court apparently found when it stated:

> [Steve Zsenyul] was wearing two hats throughout this entire process. One as fiduciary and one as debtor. And his debtor status doesn't [sic] change when his son turned 18. His debtor status didn't change when he was discharged as the conservator of the estate. And I tend to agree with the idea that as far as the fiduciary reliability [sic] of the father, that 31 years is too long. But what we have here I think is more of a proceeding where I am talking about something which was hidden from view, which Mr. Gerald Zsenyuk had interest in. And where the role of the parent is different I think.

However, it would not have put plaintiff on notice of a possible cause of action with respect to his fraud and conversion claims.[2] The elements of fraud relevant to the instant case

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[2] Neither fraud nor conversion is subject to the discovery rule. *Boyle, supra* at 231; *Brennan v Edward D Jones & Co,* 245 Mich App 156, 160; 626 NW2d 917 (2001). However, there is a distinction between the discovery rule doctrine and statutory fraudulent concealment. *Boyle,*
(continued…)

are: the making of a material misrepresentation, knowing it to be false, with the intent that the plaintiff rely on it, actual reliance, and injury. *Kuebler v Equitable Life Assurance Society,* 219 Mich App 1, 6; 555 NW2d 496 (1996). Had plaintiff known that his assets were legally preserved by the mortgage, he could have foreclosed on the mortgage. The father's representations led plaintiff to believe that his assets had been dissipated and were unrecoverable. Because of the father's actions, plaintiff was unaware of the material misrepresentation and could not have brought this claim.[3] Conversion is a distinct act of dominion that is wrongfully exerted over another person's property. *Brennan v Edward D Jones & Co,* 245 Mich App 156, 158; 626 NW2d 917 (2001). By preparing the fraudulent quit claim deed and receipt for liquid assets, plaintiff's parents demonstrated an intent to keep plaintiff's assets and, thus, to exert dominion over them. *Id.* Again, because of the father's representations, plaintiff was unaware his parents still retained his assets and could not have brought this claim.

Defendant appears to argue that plaintiff's injury – the dissipation of funds – should have put plaintiff on notice of all claims and required plaintiff to investigate. It claims that because the forged documents were matters of public record, plaintiff should have discovered them, and plaintiff's failure to do so indicated a lack of diligence that precluded his invocation of the fraudulent concealment statute to save his claims. While it is true that a period of limitations generally cannot be tolled if the plaintiff could have discovered the fraud from public records, *Heap v Heap,* 258 Mich 250, 263; 242 NW 252 (1932), a fiduciary duty between the parties creates an affirmative duty to disclose, *Brownell, supra* at 527-528. There can be no question that a fiduciary relationship exists between a parent and a child. Likewise, a fiduciary relationship exists between a conservator of a ward's estate and the ward to whom the estate belongs. Although the latter relationship may terminate when the ward reaches majority, the former relationship is lifelong. Therefore, we reject defendant's argument that plaintiff was responsible for searching public records for evidence of fraud and conversion against his parents. To summarize, plaintiff's breach of fiduciary claim did not fall within the purview of MCL 600.5855 because plaintiff was aware of the cause of action at the time he reached majority; however, plaintiff was unaware – and was given no facts to put him on notice – of the fraud and conversion claims, so MCL 600.5855 was the governing statute of limitation with respect to these claims.

Defendant next argues the trial court erred in failing to order the mortgage discharged as a matter of law when it was undisputed that no payments on the mortgage had been paid since May 26, 1973, and MCL 600.3175(2) requires a court to discharge the mortgage when competent evidence shows no payments have been made for fifteen years. For the reasons already discussed, we disagree. Moreover, we note that MCL 600.3175(1) requires a property

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(…continued)

supra at 230 n 3.

[3] Defendant argues that plaintiff's mother made no affirmative actions to fraudulently conceal plaintiff's causes of action. However, the subject property secured by the mortgage is part of the mother's estate. Moreover, the mother actively participated in the plan to deprive plaintiff of his assets when she drafted the quit claim deed designed to release the mortgage. Hence, it is clear plaintiff's parents were acting in concert, and we find no merit in defendant's argument.

owner to bring suit to discharge the mortgage. Because there is no indication plaintiff's parents or defendant did so in the instant case, defendant's argument is without merit.

Defendant next argues the court erred in finding that fraudulent concealment barred defendant's laches defense when (a) plaintiff's mother did not engage in any affirmative acts or misrepresentations, (b) the purchase of the family home was a matter of public record, and (c) plaintiff was aware of the existence of his possible cause of action in 1973 even if he was unaware of the facts necessary to prove his claim. It claims it was entitled to summary disposition because it presented evidence that plaintiff failed to exercise due diligence in a matter of public record, plaintiff waited until his parents could not change their estate plans before bringing suit, and it suffered prejudice because it could no longer obtain the testimony of either parent. Plaintiff argues that defendant was unable to raise laches as a defense because any prejudice suffered by defendant was caused by his parents' actions in concealing the existence of the mortgage. We agree with plaintiff.

A trial court's decision whether to apply laches is reviewed de novo, while its factual findings with respect to the decision are reviewed for clear error. *Shelby Twp v Papesh,* 267 Mich App 92, 108; 704 NW2d 92 (2005). Before laches is applied to bar a plaintiff's claim, a defendant must prove: (1) the plaintiff failed to exercise diligence, and (2) the defendant suffered prejudice as a result. *Univ of Michigan Regents v State Farm Mut Ins Co,* 250 Mich App 719, 734; 650 NW2d 129 (2002). It is undisputed that plaintiff did not bring his claim for approximately thirty years. Moreover, defendant convincingly argues that it suffered prejudice because one of the alleged actors is dead and the other is not competent to testify. However, although thirty years is a substantial delay, the delay must also be unexcused or unexplained. *Wayne Co v Wayne Co Retirement Comm,* 267 Mich App 230, 252; 704 NW2d 117 (2005). As previously discussed, plaintiff's delay in bringing his claim resulted from the fraudulent concealment of his claim by his parents. Hence, his delay was both explained and excused. *Id.* Furthermore, laches is an equitable doctrine. *Id.* Equity may not be invoked by a party who has unclean hands. *Rose v Nat'l Auction Group, Inc,* 466 Mich 453, 463; 646 NW2d 455 (2002). When a person engages in fraudulent conduct, and the conduct is inextricably tied to his invocation of equity, equitable relief will be denied. *Id.* at 463, 467. See also *McFerren v B&B Investment Group,* 253 Mich App 517; 655 NW2d 779 (2002).

Although we find the court properly denied summary disposition to defendant, we separately address whether it was proper to grant plaintiff summary disposition. MCR 2.116(I)(2) authorizes a court to grant judgment to the nonmoving party. MCR 2.116(I)(1) provides, "If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay." Defendant's summary disposition motions were brought pursuant to MCR 2.116(C)(10). Defendant was aware from the allegations in plaintiff's complaint that plaintiff claimed the quit claim deed and receipt for liquid assets were forged.

In its February 2, 2005 summary disposition motion, defendant alleged that discovery was complete, and there were no genuine issues of material fact. It anticipatorily argued that the claim that the quit claim deed was fraudulently executed was irrelevant. In its February 18, 2005 reply brief, defendant acknowledged, "Apparently, the deceitful act was his father executing an allegedly fraudulent quit claim deed." Hence, defendant was fully apprised of the fact that plaintiff claimed the release documents were forged. In its March 18, 2005 summary disposition

brief, defendant stated, "we are completely and forever unable to determine the Plaintiff's parents' version of facts regarding the conservatorship and the allocation of the funds." And again in its April 8, 2005 supplemental brief, defendant stated the court had all legal and factual arguments to make a decision, all discovery had taken place, and plaintiff's unreasonable delay prevented his parents from testifying. Therefore, defendant essentially acknowledged it had no evidence to rebut plaintiff's forgery claims. Because defendant was unable to establish the existence of a disputed fact with admissible evidence, summary disposition was appropriate. MCR 2.116(G)(6); *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002).

On cross-appeal, plaintiff argues the court erroneously failed to impose a constructive trust when the property, purchased with his money, in good conscience belonged to him. Defendant argues that although a constructive trust may be imposed when there is a breach of trust by a fiduciary, the fiduciary in the instant case was plaintiff's father, who has since died. We disagree that a constructive trust should have been imposed.

We review de novo a trial court's dispositional ruling on an equitable matter. *Blackhawk Dev Corp v Village of Dexter,* 473 Mich 33, 40; 700 NW2d 364 (2005). A court may impose a constructive trust when necessary to do equity or avoid unjust enrichment. *Kammer Asphalt v East China Twp,* 443 Mich 176, 188; 504 NW2d 635 (1993). Constructive trusts have been found proper in situations involving breaches of fiduciary relationships and fraud. *Id.* at 188 n 28. Plaintiff cites *Kent v Klein,* 352 Mich 652; 91 NW2d 11 (1958), as his sole authority for imposition of a constructive trust. "'When property has been acquired in such circumstances that the holder of legal title may not, in good conscience, retain the beneficial interest, equity converts him into a trustee.'" *Id.* at 656, quoting *Beatty v Guggenheim Exploration Co,* 225 NY 380, 386; 122 NE 378 (1919).

However, *Kent* is distinguishable from the instant case. In *Kent,* property was conveyed to the defendant to be held for her mentally incompetent brother. *Kent, supra* at 654. The trial court granted a constructive trust over the property. *Id.* at 655. In the instant case, plaintiff did not have an equitable claim to the house, but a legal claim to the funds used to purchase the house, which was secured by the mortgage. The trial court in the instant case essentially found that because a legal remedy was available to plaintiff, the equitable remedy of a constructive trust was not warranted. When a sufficient legal remedy is available, an equitable remedy is neither necessary nor appropriate. *Everett v Nickola,* 234 Mich App 632, 637; 599 NW2d 732 (1999). Here, the evidence indicated that the estate had ample resources to pay plaintiff's claim. Hence, the court properly refused to impose a constructive trust on the house.

Plaintiff next argues the court erroneously refused to impose compound interest on the award when his father was significantly delinquent in paying the debt, his parents concealed the existence of the debt and fraudulently prepared documents indicating the debt had been paid, the custom of the banking industry was to charge compound interest on mortgages, his mother's estate would still have received a substantial windfall if compound interest had been imposed, and plaintiff was forced to retain an attorney to enforce his right to the money. Defendant argues the court properly imposed simple interest because neither statute nor the mortgage provide for compound interest. We agree with plaintiff that compound interest should have been imposed, but not for the reasons stated by plaintiff.

Generally, the law disfavors compound interest; compound interest is only allowed if authorized by statute or contractual agreement. *Norman v Norman,* 201 Mich App 182, 184; 506 NW2d 254 (1993). Parties may specifically contract for the payment of compound interest. *Id.* at 186. "Compound interest means interest on interest, in that accrued interest is added periodically to the principal, and interest is computed on the new principal thus formed." *Niggeling v Transportation Dep't,* 195 Mich App 163, 166; 488 NW2d 791 (1992), citing *Rudolph v Hazen,* 124 Mich 570, 572-573; 83 NW 370 (1900). Here, the mortgage specifically provided, "payment of the principal sum of Fourteen Thousand (14,000.00) and no/100 Dollars, together with interest at the rate of …. Per cent, per annum from the date hereof upon the unpaid principal until fully paid, and with interest at the rate of seven per cent, per annum on all overdue principal *and interest* from the date of its or their maturity . . ." Hence, the agreement specifically provided for the payment of compound interest.

Affirmed in part, reversed in part, and remanded for actions consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Donald S. Owens
/s/ Pat M. Donofrio