

STATE OF MICHIGAN
COURT OF APPEALS

DARWIN KURT HOOP,

Plaintiff-Appellant,

V

RANDOLPH M. NESSE and DAVID M. BUSS,

Defendants-Appellees.

UNPUBLISHED
September 4, 2001

No. 221516
Washtenaw Circuit Court
LC No. 97-004254-NO

DARWIN KURT HOOP,

Plaintiff-Appellant,

V

UNIVERSITY OF MICHIGAN,

Defendant-Appellee.

No. 221559
Court of Claims
LC No. 98-017041-CM

Before: Holbrook, Jr., P.J., and Hood and Griffin, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's orders granting defendants' motion for summary disposition. We affirm.

Plaintiff first argues that the trial court erred in granting defendants' motion for summary disposition of the fraud claim. We disagree. Whether a cause of action is barred by the statute of limitations, absent disputed issues of fact, presents a question of law that we review de novo. *Colbert v Conybeare Law Office*, 239 Mich App 608, 613-614; 609 NW2d 208 (2000). Generally, the burden of proof is on the defendant to demonstrate that all facts necessary to show expiration of the statute has occurred. *Warren Consolidated Schools v W R Grace & Co*, 205 Mich App 580, 583; 518 NW2d 508 (1994). When it appears that the cause of action is prima facie barred, the burden of proof shifts to the party seeking to enforce the cause of action to present facts taking the case out of the operation of the statute of limitations. *Id.* A right of action for fraud accrues immediately upon ascertaining its falsity. *Mayhall v A H Pond Co, Inc*, 129 Mich App 178, 184; 341 NW2d 268 (1983).

Review of the complaint reveals that plaintiff allegedly provided information to defendants that was later allegedly utilized by defendants without giving plaintiff acknowledgment or credit. In the present case, plaintiff acknowledged release of various theories and ideas to defendants in 1989 and knew that the theories were released without credit to him as early as 1991. However, plaintiff failed to meet his burden of proof by demonstrating exact dates of accrual. *Mayhall, supra; Warren Consolidated Schools, supra*. Rather, plaintiff argues that the continuing violations theory applies to this case where defendants continued to release his work without acknowledgment throughout the 1990s. The continuing violation doctrine evolved in the federal courts to avoid the strict application of the ninety day limit for employment discrimination claims. *Sumner v The Goodyear Tire & Rubber Co*, 427 Mich 505, 525-526; 398 NW2d 368 (1986). There is no public policy basis for extending this doctrine to claims of fraud, regardless of whether a three or six year statute of limitations applies.

Alternatively, we note that an action for fraudulent misrepresentation must be based on a statement relating to a past or existing fact. *Eerdmans v Maki*, 226 Mich App 360, 366; 573 NW2d 329 (1997). Future promises cannot constitute actionable fraud. *Id.* The fraud alleged to have occurred in the present case related to future events. In order to satisfy the bad faith exception to the future events' rule, plaintiff must allege acts or statements at the time of the representation or shortly thereafter that demonstrate an intent not to carry out the representations. *Hi-Way Motor Co v International Harvester Co*, 398 Mich 330, 338-339; 247 NW2d 813 (1976); *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 90; 443 NW2d 451 (1989). Plaintiff's complaint failed to meet these requirements, and the trial court properly granted defendants' motion for summary disposition of the fraud claim based on the statute of limitations and the failure to state a claim.

Plaintiff next argues that the trial court erred in dismissing his claim for designation of false origin under the Lanham Act, 15 USC § 1125. We disagree. Our review of a summary disposition decision is de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The trial court properly granted summary disposition of this claim. The false designation of origin claim of the Lanham Act is utilized to prevent infringement of unregistered trademarks. *PHC, Inc v Pioneer Healthcare, Inc*, 75 F3d 75, 77-78 (CA 1, 1996). There is no indication that the material at issue here can be characterized as qualifying as an unregistered trademark.

Plaintiff next argues that the trial court erred in granting summary disposition of his claim for unjust enrichment. We disagree. Our review of this issue is de novo. *Spiek, supra*. Where no express contract governing a specific subject matters exists, the law operates to imply a contract to prevent unjust enrichment. *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). An action that arises based on "implication of law" is subject to a three-year limitation period despite the fact that it is based on a contract theory. *Lear v Brighton Twp*, 184 Mich App 605, 607-608; 459 NW2d 26 (1990). Because this limitation period expired and there is no reason to apply the continuing violations theory to this action, the trial court properly granted defendants' motion for summary disposition.

Plaintiff next argues that the trial court erred in granting defendants' motion for summary disposition of the breach of fiduciary cause of action. We disagree. A breach of fiduciary duty claim is an action that sounds in tort, *Miller v Magline, Inc*, 76 Mich App 284, 312-313; 256 NW2d 761 (1977), and is subject to the three year period of limitation. *Brennan v Edward D*

Jones & Co, 245 Mich App 156, 158; 626 NW2d 917 (2001). Accordingly, the trial court properly dismissed this claim.¹

Plaintiff next argues that the trial court erred in denying plaintiff's request to amend his complaint. A trial court's ruling regarding a motion for leave to amend a complaint is reviewed for an abuse of discretion. *Energy Reserves, Inc v Consumers Power Co*, 221 Mich App 210, 220; 561 NW2d 854 (1997). We note that plaintiff failed to file a formal motion in support of his request to amend and failed to file a proposed amended complaint. Nonetheless, we are able to conclude that the trial court did not abuse its discretion where amendment would have been futile. *Id.*

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Harold Hood
/s/ Richard Allen Griffin

¹ The vicarious claims against defendant University of Michigan were also properly dismissed based on the statute of limitations. MCL 600.6452(1).