

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

ERIC NHAISSI,

Plaintiff,

v

MARSHA WALKER, et al,

Defendants.

Case No. <sup>14</sup>~~15~~-141385-CB  
Hon. Wendy Potts

OPINION AND ORDER RE: DEFENDANTS' MOTION FOR SUMMARY DISPOSITION  
PURSUANT TO MCR 2.116(C)(7), (8), AND (10)

At a session of Court  
Held in Pontiac, Michigan

NOV 19<sup>th</sup> 2015

Plaintiffs Eric Nhaissi and Spectrum Trading Limited are limited partners of Northland Towers Associates Limited Partnership (NTALP), which owns the Northland Towers office complex in Southfield. Plaintiffs collectively own a 24.25% interest in NTALP, the general partner Northland Towers Group, Inc. (NTG) holds a 1% interest, and the remaining 74.25% interest is held by entities owned or controlled by Defendant Marsha Walker. NTG was formed in 1990 by Walker, her late husband Haron Gabyzon, and Eric Nhaissi's brother Eli Nhaissi. When Gabyzon died in March 2003, Walker acquired his interest in NTG.

The property has been managed since 1990 by Defendant Northland Towers Management Group, Inc. (NTMG), which is owned by Walker. The partnership agreement states that NTMG will manage the day-to-day operations of the partnership property and will receive a management fee equal to 4% of the gross revenues. However, it also states that NTMG will manage the property "pursuant to a separate Management Agreement between the Affiliate and

the Partnership.” Walker conceded in her deposition that she did not have a copy of a written management agreement between NTALP and NTMG.

Plaintiffs filed this action in June 2014 claiming that Defendants took payments in excess of the 4% fee allowed by the partnership agreement and breached her contractual and fiduciary duties to the partnership and limited partners. Plaintiffs also alleged that Defendants were liable for conversion, however, the Court dismissed those claims on Defendants’ initial motion for summary disposition under MCR 2.116(C)(8). The Court also limited Plaintiffs’ breach of fiduciary duty claim to conduct occurring within the limitation period unless Plaintiffs could demonstrate fraudulent concealment and allowed Plaintiffs to file an amended complaint.

The matter is now before the Court on Defendants’ renewed motion for summary disposition under MCR 2.116(C)(7), which tests whether a claim is barred as a matter of law, (C)(8), which tests the legal sufficiency of the pleadings, and (C)(10), which tests whether there is a factual dispute for trial. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). Defendants first assert that Plaintiffs’ breach of contract claim fails because it is premised on the allegation that NTG paid assets of NTALP to Defendants and there is no evidence to support this claim. However, Defendants’ characterization of Plaintiffs’ contract claim is overly narrow. Because Plaintiffs also allege that Walker breached the NTALP partnership agreement by taking NTALP assets beyond the 4% management fee, Defendants are not entitled to summary disposition on this ground.

Defendants also reassert their position that Plaintiffs’ contract claim is barred by the six-year limitation period of MCL 600.5807(8) because the claim accrued, at the latest, in 1998. According to Defendants, Plaintiffs’ claim is based on alleged excessive management fees that Defendants began collecting in 1998. Although Plaintiffs contend that each instance of

overpayment of fees constitutes a separate breach of contract, this argument has no basis in fact or law. Plaintiffs' separate breach theory is based on *HJ Tucker & Assoc, Inc v Allied Chucker & Engg Co*, 234 Mich App 550; 595 NW2d 176, 183 (1999), which held that the "claims for payments due under the contract between the parties are analogous to claims for payments under an installment contract" and that the claim accrues as each payment becomes due. *Id* at 562-63. However, Plaintiffs' claims are not based on a failure to make payments when due. Rather, Plaintiffs assert that over the course of several years, beginning in 1998, Defendants took payments and funds from NTALP that they were not entitled to take. Thus, the *HJ Tucker* decision is inapposite to this case. To the extent that Plaintiffs are attempting to assert that each alleged wrongful payment that Defendants took from NTALP was a separate, actionable breach of the partnership agreement, the Court rejects that argument as a mere reiteration of the continuing wrongs theory the Court rejected on Defendants' first summary disposition motion.

A cause of action for breach of contract accrues when the breach occurs. *Blazer Foods, Inc v Rest Properties, Inc*, 259 Mich App 241, 245-46; 673 NW2d 805, 809 (2003). In order for Plaintiffs' breach of contract claim to be timely filed, the breach must have occurred no later than June 16, 2008. However, the conduct that Plaintiffs claim constitutes a breach – Defendants taking payments not authorized under the NTALP partnership agreement – began as early as 1998. By Plaintiffs own admission, this is when Defendants began collecting consulting fees and other expenses for managing the property. Because Plaintiffs' breach of contract action accrued in 1998, it was not filed within six years of accrual.

Plaintiffs also assert that the claim is salvaged because Defendants fraudulently concealed their claims. If Defendants fraudulently concealed the existence of Plaintiffs' claim, Plaintiffs may file suit within two years after they discover or should have discovered the

existence of the claim. MCL 600.5855. In order to rely on the fraudulent concealment statute, Plaintiffs must allege that Defendants “engaged in some arrangement or contrivance of an affirmative character designed to prevent subsequent discovery.” *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 48; 698 NW2d 900 (2005). Plaintiffs note there is an exception to the “affirmative act” requirement where the Defendants are in a fiduciary relationship with Plaintiffs. *Brownell v Garber*, 199 Mich App 519, 527; 503 NW2d 81, 85 (1993). Although the parties do not dispute that Defendants owed Plaintiffs fiduciary duties, Defendants’ duty to disclose the alleged excessive fees arises under the Uniform Partnership Act, which requires partners to “render on demand true and full information of all things affecting the partnership to any partner . . .” MCL 449.20. Thus, Defendants would owe Plaintiffs a fiduciary duty to disclose only if Plaintiffs made a demand for disclosure.

Plaintiffs claim they began demanding information from Defendants in 2008 and made a formal demand in 2012. However, the breach at issue here occurred no later than 1998, and thus, the six-year limitation period began to run in 1998 and expired by 2004, more than four years before Plaintiffs’ first alleged demand. Plaintiffs cannot resurrect their stale breach of contract claim by manufacturing an alleged fraudulent concealment after the limitation period already expired. Because Plaintiffs’ breach of contract accrued more than six years before this case was filed, and the claim is not salvaged by the fraudulent concealment statute, the claim is barred.

Likewise, Plaintiffs’ breach of fiduciary duty claim fails because it is premised on conduct that occurred more than three years before this case was filed. Plaintiffs’ fiduciary duty claim is based on much of the same conduct as the breach of contract theory: Defendants took payments and funds from NTALP that they were not entitled to take. A breach of fiduciary duty claim accrues when Plaintiffs knew or should have known of the breach.

*Prentis Family Found., Inc. v Barbara Ann Karmanos Cancer Inst.*, 266 Mich App 39, 47; 698 NW2d 900 (2005). Although Plaintiffs again assert that Defendants fraudulently concealed the claim by failing to disclose, that argument fails because the demand for disclosure did not occur until 2008, more than ten years after the alleged conduct occurred. As Defendants note, Plaintiffs regularly received financial information from Defendants before 2008 and could have demanded additional information. Although Plaintiffs may not have known about the funds Defendants were taking from the partnership until 2013, Plaintiffs could have and should have discovered this information as early as 1998 when Defendants began taking the payments. Defendants breach of fiduciary duty claim accrued no later than 1998, the limitation period expired no later than 2001, and Plaintiffs cannot rely on alleged fraudulent concealment in 2008 to revive an already expired claim. Defendants are entitled to summary disposition of this claim as well.

Defendants also ask the Court to dismiss Plaintiffs' Count II seeking a constructive trust because it is a remedy, not a cause of action. Although Plaintiffs dispute Defendants' argument, the Court of Appeals has held that a constructive trust is only an equitable remedy, not an independent cause of action. See *CPAN v MCCA*, 305 Mich App 301, 325; 852 NW2d 229, 243-44 (2014), *opinion vacated in part on other grounds*, 870 NW2d 70 (Mich 2015). Thus, Defendants are entitled to summary disposition of that claim.

Defendants also argue, and the Court agrees, that Plaintiffs claim for an accounting is moot because Plaintiffs obtained or could have obtained the necessary information through discovery. Plaintiff and his expert accountant were given access to Defendants' financial and corporate records, and Plaintiffs have not identified any information they were unable to access. An accounting is unnecessary if Plaintiffs can determine the amount at issue through discovery.

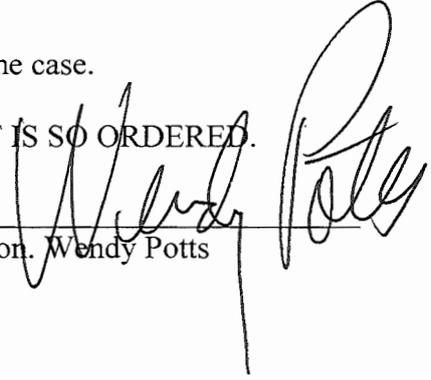
*Boyd v Nelson Credit Centers, Inc.*, 132 Mich App 774, 779; 348 NW2d 25 (1984). Thus, Defendants are entitled to summary disposition of the accounting claim.

For all of these reasons, the Court grants Defendants summary disposition and dismisses Plaintiffs' claims with prejudice. Because this case is dismissed, Plaintiffs request to appoint a receiver is moot.

This order resolves the last pending claim and closes the case.

Dated: **NOV 19 2015**

IT IS SO ORDERED.

  
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Hon. Wendy Potts