

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

STERLING MORTGAGE & INVESTMENT
CO., a Michigan Corporation, and MAURICE
JANOWITZ,

Plaintiffs,

v

Case No. 2015-145498-CZ
Hon. Wendy Potts

CONNIE SWITZER a/k/a CONNIE MAE
SWITZER, BRUCE J. KRIEGEL d/b/a BRUCE J.
KRIEGEL, CPA, and AMANDA SWITZER a/k/a
AMANDA BRASSEUR,

Defendants.

OPINION AND ORDER RE: DEFENDANT BRUCE KRIEGEL'S MOTION FOR
SUMMARY DISPOSITION OF PLAINTIFFS' FIRST AMENDED COMPLAINT AS TO
DEFENDANT KRIEGEL PURSUANT TO MCR 2.116(C)(7) and (C)(8)

At a session of Court
Held in Pontiac, Michigan

On
APR 08 2016

Plaintiffs Sterling Mortgage & Investment Co and its principal Maurice Janowitz filed this action claiming that Sterling Mortgage's former employee, Defendant Connie Switzer, embezzled more than \$10 million from 2007 until she was terminated in December 2013. Plaintiffs further allege that Defendant Bruce Kriegel, who was Plaintiffs' CPA, knew or should have known about the embezzlement. Switzer did not timely answer the complaint and Plaintiffs obtained a default judgment against her.

The matter is now before the Court on Kriegel's motion for summary disposition under MCR 2.116(C)(7), which tests whether a claim is barred, and (C)(8), which tests the legal

sufficiency of the pleading. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). Kriegel first asserts that Plaintiffs have affirmed under oath that 100% of the liability is attributable to Connie Switzer, as a result of the entry of a default judgment, and therefore no liability could be attributable to Kriegel. Plaintiffs obtained a default judgment against Switzer in the amount of \$10,579,725, allegedly the entire amount of Plaintiffs' claimed damages. Kriegel argues that since Plaintiffs attribute 100% of the liability to Connie Switzer, they cannot now assert any other liability to Kriegel. "[T]he default of one party is not an admission of liability on the part of a nondefaulting coparty." *Rogers v JB Hunt Transport, Inc*, 466 Mich 645, 653; 649 NW2d 23 (2002), citing *Allstate Ins Co v Hayes*, 442 Mich 56, 73; 499 NW2d 743 (1993). When a trial court enters a default judgment against a defendant, the defendant's liability is admitted and the defendant is estopped from litigating the issues of liability. A default judgment, however, is not an admission regarding damages. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 79-80; 618 NW2d 66 (2000). Thus, the default judgment of Connie Switzer is not an admission regarding the amount of damages attributable to her. It would be erroneous to conclude that the remaining defendants are not liable. Accordingly, the default judgment of Connie Switzer does not bar Plaintiffs' claims against Kriegel or any other defendant.

Kriegel next asserts that Janowitz has once again failed to plead any individual claims as a matter of law and lacks standing to bring such claims. In evaluating a motion under MCR 2.116(C)(8), the court must accept all factual allegations in the complaint as true, along with all reasonable inferences or conclusions that can be drawn from them. *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 63; 852 NW2d 103 (2014). The Court has reviewed Janowitz's individual claims in the first amended complaint and finds, taking into account only the pleadings, and accepting all well-pled factual allegations as true, that Janowitz properly asserted

specific individual claims. Kriegel has not provided any authority in support of its argument that the claims alleged by Janowitz in the first amended complaint should be dismissed. Accordingly, Kriegel's motion to dismiss Janowitz's individual claims is denied.

Kriegel next asserts that Plaintiffs' claims for fraud and misrepresentation and breach of the fiduciary duty are barred by the Michigan Accountant Liability Act. In furtherance of his argument, he cites to *Yadlosky v Grant Thornton, LLP*, 120 FSupp 2d 622 (ED Mich 2000) wherein the United States District Court of the Eastern District of Michigan held that defendant accountants were entitled to dismissal of the plaintiff's claims for breach of the fiduciary duty, negligent misrepresentation, and negligent and wanton supervision claims as a matter of law pursuant to MCL 600.2962. Kriegel's reliance on *Yadlosky* is misplaced. In *Yadlosky*, the Court found that plaintiff did not allege that he was a client of the defendant accountants, which is required under MCL 600.2962(a). The Court went on with its analysis and found that the plaintiff did not satisfy MCL 600.2962(b) or (c) either, and thus his claims were dismissed as a matter of law pursuant to MCL 600.2962.

In the instant case, there is no question that Sterling Mortgage and Janowitz alleged in their first amended complaint that they engaged Kriegel as their independent certified public accountant. Under the plain language of the statute, malpractice liability is limited to the circumstances described in the statute, but other claims against an accountant may go forward. MCL 600.2962, by its own language, applies only to an action for professional malpractice against an accountant. MCL 600.2962(1). Kriegel provides no additional authority for his argument that Plaintiffs' common law claims are barred as a matter of law. Michigan law is clear that, "A party may not merely announce a position and leave it to [the] Court to discover and rationalize the basis for the claim." *National Waterworks, Inc v International Fidelity &*

Surety, Ltd, 275 Mich App 256, 265; 739 NW2d 121 (2007). Accordingly, Kriegel's argument fails.

Kriegel next argues that if Plaintiffs can bring separate claims for fraud and misrepresentation, they have failed to plead their claims for fraud and misrepresentation with sufficient particularity. "In allegations of fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity." MCR 2.112(B)(1); *Kassab v Michigan Basic Property Ins Assn*, 441 Mich 433, 442; 491 NW2d 545 (1992), overruled on other grounds, *Haynes v Neshewat*, 477 Mich 29, 38-39; 729 NW2d 488 (2007). In reviewing a motion brought under MCR 2.116(C)(8), the court considers only the pleadings. The court must accept all factual allegations in the complaint as true, along with all reasonable inferences or conclusions that can be drawn from them. However, conclusory statements that are unsupported by allegations of fact on which they may be based will not suffice to state a cause of action.

Plaintiffs' claims are based on alleged fraudulent activity, so the heightened pleading standard for fraud claims applies. MCR 2.112(B)(1). When pleading allegations of fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity. *State ex rel Gurganus*, 496 Mich at 63. In Count IV alleging fraud/misrepresentation and innocent/negligent misrepresentation, Plaintiffs generally allege that Kriegel expressly and impliedly represented that Sterling Mortgage's books were properly and accurately maintained by Switzer. Plaintiffs do not allege any particular express or implied misrepresentation. In Count V alleging fraud/misrepresentation innocent/negligent misrepresentation, Plaintiffs generally allege that Kriegel expressly and impliedly represented to Janowitz that his personal books and records were properly accurately maintained by Defendant Switzer. Plaintiffs fail to allege any other particulars related to Count IV or Count V. Plaintiffs' overbroad pleading is

deficient in light of the requirement that instances of fraud be pleaded with particularity. *Id.* Accordingly, summary disposition as to Counts IV and V of Plaintiffs' first amended complaint is granted and those claims are dismissed.

Kriegel next alleges that if Plaintiffs could bring an action for silent fraud, that the claims for silent fraud fail as a matter of law. Count VI of the first amended complaint is a claim for silent fraud against Kriegel as to Sterling Mortgage. Count VII of the first amended complaint is a claim for silent fraud against Kriegel as to Janowitz. Kriegel argues that Connie Switzer took elaborate steps to conceal, secrete, and cover up her theft, embezzlement and conversion through misrepresentation, fabrication, manipulation, falsification, and lies. Kriegel argues that as a matter of law he could not have had actual knowledge of any misrepresentation, however, in evaluating a motion under MCR 2.116(C)(8), the court must accept all factual allegations in the complaint as true, along with all reasonable inferences or conclusions that can be drawn from them. *Id.* At paragraph 84 of the first amended complaint, Plaintiffs pled that "Kriegel intentionally suppressed, concealed, and failed to disclose material facts to Plaintiff SMIC concerning, inter alia, the accuracy of Plaintiff SMIC's books and records so as to create the impression that Plaintiff SMIC's books and records provided an accurate reflection." At paragraph 93, Plaintiffs pled that "Kriegel intentionally suppressed, concealed, and failed to disclose material facts to Plaintiff Janowitz concerning, inter alia, the accuracy of Plaintiff Janowitz's personal books and records, so as to create the impression that plaintiff Janowitz's books and records provided an accurate reflection." Kriegel's argument fails under MCR 2.116(C)(8) where the court must accept all factual allegations in the complaint as true. Accordingly, considering only the pleadings, and accepting all well-pled factual allegations as

true, the Court denies Kriegel's motion for summary disposition as to Plaintiffs' silent fraud claims, Counts VI and VII.

Kriegel next argues that Plaintiffs' claim for accounting malpractice fails as a matter of law because Plaintiffs did not allege proximate cause. Sterling Mortgage and Janowitz respond by arguing that the claim for malpractice is not so clearly unenforceable as a matter of law that no factual development could justify recovery. In paragraph 181 of Plaintiffs' first amended complaint, Plaintiffs allege that "[a]s a direct and proximate result of Defendant Kriegel's malpractice breach of his contract with Plaintiff SMIC, it has suffered direct, consequential, and exemplary damages." Accordingly, considering only the pleadings, and accepting all well-pled factual allegations as true, the Court finds that Plaintiffs properly alleged proximate cause. Therefore, Kriegel's motion to dismiss Plaintiffs' claim for accounting malpractice for failure to allege proximate cause fails.

Kriegel's last argument alleges that Plaintiffs' claims are time barred by the statute of limitations. Kriegel argues that Plaintiffs' claim for breach of the fiduciary duty fails because Plaintiffs did not file their complaint within the three year limitation period of MCL 600.5805(10). Kriegel also argues that Plaintiffs' claim for accounting malpractice fails because a claim for accounting malpractice is subject to a two year statute of limitations. MCL 600.5805(4). A motion for summary disposition under (C)(7) tests whether a claim is barred, among other grounds, by expiration of a limitation period. *Turner v Mercy Hosp & Health Services*, 210 Mich App 345, 349 (1995). Kriegel notes that a breach of fiduciary duty claim accrues when the beneficiary knew or should have known of the breach, *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 47; 698 NW2d 900 (2005), and asserts that Plaintiffs knew or should have known of the alleged breach in 2009.

Plaintiffs respond by arguing that Kriegel's arguments are an untimely motion for reconsideration. On November 4, 2015, the Court concluded that it was premature to determine whether Plaintiffs knew or should have known of their claims for breach of fiduciary duty and accounting malpractice, and denied summary disposition without prejudice pending further discovery. Plaintiffs previously alleged that they did not know about Switzer's embezzlement until she admitted it in December 2013, and did not know that Kriegel should have but failed to discover the embezzlement until a forensic audit was completed in November 2014.

Plaintiffs' malpractice claim accrued when Kriegel discontinued serving Plaintiffs in a professional capacity as to the matters out of which the claim for malpractice arose. MCL 600.5838(1). Plaintiffs previously did not dispute that Kriegel's claim that he last provided professional service in January 2013, but they argued that they filed their complaint within the discovery period of MCL 600.5838(2), which allows a malpractice claim to be filed "within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later." *Id.* Plaintiffs previously argued that they did not discover Kriegel's malpractice until the November 2014 forensic audit, and the Court concluded that it was premature to conclude whether Plaintiffs should have discovered Kriegel's malpractice more than six months before this complaint was filed on February 12, 2015.

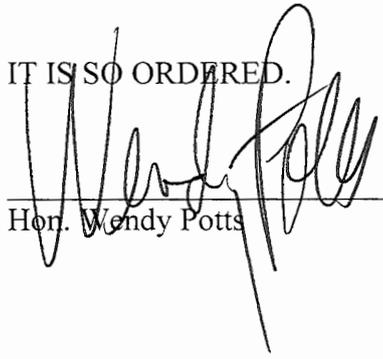
Although a motion under (C)(7) is generally based on the pleadings, Plaintiff's well-pleaded allegations are accepted as true and construed in Plaintiff's favor unless the allegations are contradicted by documentary evidence. *Maiden v Rozwood*, 461 Mich at 119. Kriegel does not present any contradictory documentary evidence in support of his argument. Because the motion pertaining to the statute of limitations is brought before the close of discovery, it is not possible to determine if there is a genuine factual dispute regarding when Plaintiffs discovered

their claims. Therefore, summary disposition on this ground is denied without prejudice and Kriegel may revisit the issue after the close of discovery.

In sum, the Court grants summary disposition of Plaintiffs' Counts IV alleging fraud/misrepresentation and innocent/negligent misrepresentation and V alleging fraud/misrepresentation innocent/negligent misrepresentation. In all other respects, the Court denies the motion.

Dated: APR 08 2016

IT IS SO ORDERED.



Hon. Wendy Potts