

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**WHOLESALE CAR CONNECTION, LLC, and
WHOLESALE CAR CONNECTION II, LLC,
Plaintiffs,**

v.

**Case No. 15-147938-CB
Hon. James M. Alexander**

**SHANT SHIRINAN and
COMERICA BANK,
Defendants.**

_____ /

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the court on Defendants Shant Shirinian’s and Comerica Bank’s motions for summary disposition. Plaintiffs generally claim that Shirinian fraudulently cashed checks meant for Plaintiffs and deposited the same in his personal Comerica bank account.

Plaintiffs are wholesale car dealers in the business of purchasing vehicles at auction and selling the same through dealers. Relevant to the current case, one such dealer is Summit Place Kia in Waterford.

Plaintiffs claim that Wholesale Car Connection (“WCC”) authorized non-party Sarmad Brikho to act as its agent for the purpose of buying and selling vehicles. Plaintiffs also claim that “WCC never authorized [Defendant Shirinian] to take any actions on its behalf.” In his role, Plaintiffs claim that Brikho “bought and sold hundreds of vehicles as an agent of WCC.”

And given the volume of purchases and sales, Plaintiffs claim that Brikho formed Wholesale Car Connection II (“WCC II”) “to better facilitate” his and WCC’s relationship. And

Plaintiffs claim that WCC II held its own bank account and received payments for the purchases and sales and remitted payments to WCC.

But Brikho and Shirinian apparently had a longstanding friendship, and based on the same, they verbally agreed to work together and divide the profits buying and selling vehicles through WCC.

But Plaintiffs claim that Shirinian used his unauthorized access to WCC-payable checks to fraudulently endorse and deposit the same into his own personal bank account. In this alleged scheme, Plaintiffs claim that Shirinian deposited checks totaling some \$527,600, and that Comerica permitted the same, despite no showing that these deposits were legal or appropriate.

On these allegations, Plaintiffs sued Shirinian and Comerica on varying claims based in fraud, unjust enrichment, conversion, civil conspiracy, and an accounting.

Comerica now moves for summary disposition under MCR 2.116(C)(7) and (C)(8), and Shirinian under (C)(7), (C)(8), and (C)(10). A motion under (C)(7) determines whether a claim is barred, among other grounds, by a statute of limitations. A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. And a motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

I. Comerica's Motion

Comerica argues that it is entitled to summary disposition of Plaintiffs' claims for a variety of reasons.

First, Comerica claims that Plaintiffs' claims are barred by a three-year statute of limitations on claims that it took disputed checks from October 2010 through February 2011. The applicable statute of limitations, MCL 440.3118(7), provides:

Unless governed by other law regarding claims for indemnity or contribution, an action (i) for conversion of an instrument, for money had and received, or like action based on conversion, (ii) for breach of warranty, or (iii) to enforce an obligation, duty, or right arising under this article and not governed by this section must be commenced within 3 years after the cause of action accrues.

And the limitations period “begins to run when the checks are paid on the forged indorsement.” *Ins Co of N Am v Manufacturers Bank of Southfield, NA*, 127 Mich App 278, 283; 338 NW2d (1983). As a result, Comerica argues that the limitations period ran in early 2014, and Plaintiffs’ First Amended Complaint was not filed until December 2015.

In response, Plaintiffs claim that Comerica and Shirinian were co-conspirators in concealing Plaintiffs’ claims, and as such, MCL 600.5855 applies to save their claims. The cited statute provides (emphasis added):

If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, **the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim** or the identity of the person who is liable for the claim, **although the action would otherwise be barred by the period of limitations.**

And, Plaintiffs claim, whether a defendant has concealed the existence of a cause of action is a question of fact, citing *Intl Union United Auto Workers of Am v Wood*, 337 Mich 8, 13; 59 NW2d 60 (1953) (reasoning “[q]uestions of concealment and diligence are questions of fact”).

But Comerica claims that MCL 600.5855 cannot save Plaintiffs’ claims because Michigan law is well settled that:

Absent a fiduciary relationship, fraudulent concealment extends the applicable limitations period **only when the defendant has made an affirmative act or representation**. “The plaintiff must show that the defendant **engaged in some arrangement or contrivance of an affirmative character designed to prevent subsequent discovery**.” *Dillard v Schlusell*, 308 Mich App 429, 443; 865 NW2d 648 (2014); quoting *Meyer & Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 48; 698 NW2d 900 (2005).

And in this case, Plaintiffs fail to allege that they had any fiduciary relationship with Comerica.

Plaintiffs' Complaint also fails to allege any affirmative act or representation made by Comerica to Plaintiffs. In fact, Plaintiffs fail to point to any communication (in any form) directly with Comerica. Rather than allege an affirmative act or representation, Plaintiffs simply allege that Comerica failed to seek Plaintiffs out. In other words, Plaintiffs allege Comerica's mere silence. But "[m]ere silence does not demonstrate fraudulent concealment." *Dillard*, 308 Mich App at 443; quoting *Meyer & Anna Prentis Family Foundation*, 266 Mich App at 48.

Because Plaintiffs allege the fraudulent deposit and/or conversion of specific checks only deposited during the time from October 2010 and February 2011, Plaintiffs claims are barred by MCL 440.3118(7).¹

And Plaintiffs claims are not saved by MCL 600.5855 because Plaintiffs only allege Comerica's silence, and not any affirmative act or representation required to extend the applicable limitations period.

For all of the foregoing reasons, the Court concludes that Plaintiff's claims are time barred by MCL 440.3118(7). As a result, Comerica's motion for summary disposition is GRANTED under (C)(7), and Plaintiffs' Complaint as to Comerica only is DISMISSED in its entirety.²

¹ "[T]he period of limitation begins to run when the checks are paid on the forged indorsement, not when the forgery is discovered. Application of a date of discovery rule to actions by a payee to recover for payment on a forged indorsement would frustrate the strong public policy of finality in commercial transactions." *Ins Co of N Am*, 127 Mich App at 283-84.

² Because the Court has granted summary based on the statute of limitations, it is unnecessary to consider Comerica's alternative grounds for relief.

II. Shirinian's Motion

Next, Shirinian moves for summary disposition of Plaintiffs' First Amended Complaint.³ Similar to Comerica, Shirinian argues that Plaintiffs' claims are barred by a three-year statute of limitations and cannot be saved by the fraudulent concealment statute because Plaintiffs knew or should have known about any claims.⁴

Initially, Plaintiffs' fraud claims are governed by a six-year statute of limitations under MCL 600.5813. *Kuebler v Equitable Life Assur Soc of the US*, 219 Mich App 1, 6; 555 NW2d 496 (1996). As a result, Plaintiffs' Counts I and II are not time barred. Similarly, the Court rejects Shirinian's claim that Plaintiffs failed to adequately plead their fraud claims. Generally, "[f]raud is a question of fact to be deduced from all the circumstances." *Kraus v Arthur Murray Studios of Mich, Inc*, 2 Mich App 130, 132; 138 NW2d 512 (1965).

Plaintiffs also (again) respond that whether a defendant has concealed the existence of a cause of action is a question of fact, citing *Intl Union United Auto Workers of Am v Wood*, 337 Mich 8, 13; 59 NW2d 60 (1953) (reasoning "[q]uestions of concealment and diligence are questions of fact"). Indeed, such questions may not be resolved on summary disposition because Plaintiffs' allegations of Shirinian's wrongdoing go beyond mere silence.

As a result, whether the fraudulent concealment statute saves Plaintiffs' claims remains a question of fact that may not be resolved on summary disposition.⁵

But Plaintiffs' Count IV for fraudulent concealment under MCL 600.5855 is not itself a substantive cause of action. Rather it is a tolling statute. *Shember v Univ of Michigan Med Ctr*,

³ Shirinian also moved for summary disposition of the original Complaint, but said motion was rendered moot by Plaintiffs' First Amended Complaint. Additionally, both motions raise the same issues. As such, it is unnecessary to consider Shirinian's original motion for summary disposition relating to the original Complaint.

⁴ Plaintiffs oddly claim that a six-year limitations period should apply to their conversion claim, but our Court of Appeals determined that a three-year limitations period applies to claims for conversion in *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47; 742 NW2d 622 (2007).

⁵ Additionally, Plaintiffs' fraud claims are governed by a six-year statute of limitations. *Kuebler v Equitable Life Assur Soc of the US*, 219 Mich App 1, 6; 555 NW2d 496 (1996); MCL 600.5813.

280 Mich App 309, 316; 760 NW2d 699, 706 (2008), vacated on other grounds 485 Mich 915 (2009), mod 485 Mich 1072 (2010) (reasoning “the fraudulent concealment tolling provision [of MCL 600.5855] is not itself a substantive cause of action for which a plaintiff may recover damages from a tortfeasor”). Although MCL 600.5855 may be available to Plaintiffs as a mechanism to save their otherwise time-barred claims, it simply does not present its own, substantive cause of action. As a result, Plaintiffs’ Count IV fails as a matter of law and is DISMISSED.

Shirinian next claims that Plaintiffs’ Accounting claim (Count IX) fails because discovery should be sufficient to determine the amounts at issue. “A suit for an accounting invokes the powers of a court of equity.” *Bellware v Wolffis*, 154 Mich App 715, 720; 397 NW2d 861 (1986). But, as a general rule, courts typically do not invoke equity where there is an adequate remedy at law. *Eberhard v Harper-Grace Hospitals*, 179 Mich App 24, 35; 445 NW2d 469 (1989); *Basinger v Provident Life & Accident Ins Co*, 67 Mich App 1, 5-6; 239 NW2d 735 (1976).

Because Plaintiffs have sufficiently pled claims that will survive summary disposition, the Court finds that this is not a case where equity should be invoked to save Plaintiffs’ accounting claim. As a result, the same (Plaintiffs’ Count IX) is DISMISSED under (C)(8).

Shirinian next claims that Plaintiffs’ unjust enrichment claim (Count III) fails because they fail to plead that Defendant received any benefit from WCC. But Plaintiffs allege that Shirinian absconded with checks due and payable to WCC and deposited the same into his own, personal account. These allegations sufficiently plead an unjust enrichment claim, and Shirinian’s motion with respect to this claim is DENIED.

Finally, Shirinian argues that Plaintiffs’ civil conspiracy claim must fail because “a claim

for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort.” *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384; 670 NW2d 569 (2003), quoting *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 632; 403 NW2d 830 (1986).

But Shirinian’s argument with respect to conspiracy is based on the assumption that the Court dismissed each of Plaintiffs’ tort claims on summary. But this is not the case. As a result, the Court must reject Shirinian’s argument on this issue.

In summary, Shirinian’s motion for summary disposition is GRANTED with respect to Plaintiffs’ Count VII (alleging a claim under MCL 600.5855) and Count IX (for an accounting), and these claims are DISMISSED.

In all other respects, Shirinian’s motion is DENIED.

IT IS SO ORDERED.

February 17, 2016
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge