

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

FRANK CANU, STEVEN CANU,
SUZANNE CANU, DAVID CANU
and ROBERT KOLLAR,

Plaintiffs,

vs.

Case No. 2015-3693-CB

CLARK GRAPHIC SERVICES, INC,
CHARLES CLARK, JUDY CLARK,
JEFF CLARK and STEVEN BELOTE,

Defendants.

OPINION AND ORDER

Defendants have filed a motion for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10). Plaintiffs have filed a response and request that the motion be denied.

I. Factual and Procedural History

Defendant Clark Graphic Services, Inc. ("CGS") is a corporation that has been involved in the printing business since 1967. CGS was incorporated by Defendant Charles Clark ("Defendant C. Clark"), Plaintiff Frank Canu ("Plaintiff F. Canu") and a third party, whose interest has since been redeemed. Since that time, all of the individual parties, as well as Doug Menary, have held stock in CGS, and all of the individual plaintiffs remain some of CGS' shareholders.

On October 16, 2015, Plaintiff filed their original complaint in this matter. On January 6, 2016, Plaintiffs filed their amended complaint in this matter ("Complaint"). In

the Complaint, Plaintiffs assert the following claims: Count I- Shareholder Oppression; Count II- Breach of Duty of Good Faith in Violation of MCL 450.1541a; Count III- Breach of Fiduciary Duty; Count IV- "Interested Transactions and Self-Dealing in Violation of Common Law and MCL 450.1545a; Count V- "Removal of Judy Clark and Charles H. Clark as Directors of Clark Graphic Services, Inc.", Count VI- Dissolution pursuant to MCL 450.1823; and Count VII- Accounting.

On January 27, 2016, Defendants filed their instant motion for summary disposition as to the Complaint. On February 29, 2016, Plaintiffs filed their response to the motion. On March 7, 2016, the Court held a hearing in connection with the motion and took the matter under advisement.

II. Standards of Review

MCR 2.116(C)(7) permits summary disposition where the claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action. In reviewing a motion under MCR 2.116(C)(7), the Court accepts as true the plaintiff's well-pleaded allegations, construing them in the plaintiff's favor. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). The Court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties when determining whether a genuine issue of material fact exists. *Id.* Where a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. *Kent v Alpine Valley Ski Area, Inc*, 240 Mich App 731, 736; 613 NW2d 383 (2000). Where no material facts

are in dispute, whether the claim is barred is a question of law. *Id*

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party has failed to state a claim upon which relief may be granted. *Radtke v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993). A motion under MCR 2.116(C)(10), on the other hand, tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id*. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id*. The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

III. Law and Analysis

A. Statute of Limitations as to Counts I-IV

In their motion, Defendants assert that Counts I-IV of the Complaint are barred by the three year statutes of limitation that apply to each of the claims.

Count I of the Complaint states a claim for minority oppression. MCL 450.1489(1)(f) provides the statute of limitations for oppression claims, and provides that an action under that section seeking damages must be commenced “within three years after the cause of action has accrued, or within 2 years after the shareholder discovers or reasonably should have discovered the cause of action under this section, whichever occurs first.”

Counts II-IV state claims for breach of fiduciary duty. The statute of limitations for breach of fiduciary duty claims is three years from the date of accrual. *Wayne Co Employees Retirement Sys v Wayne Co*, 301 Mich App 1, 67; 836 NW2d 279 (2013); MCL 450.1541a.

MCL 600.5827 sets forth the rule for when a claim “accrues”. Specifically, MCL 600.5827 provides, in pertinent part: “the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.” The “time the wrong upon which the claim is based” is the date on which the plaintiff was harmed by the defendant’s act, not the date on which the defendant acted.” *Frank v Linkner*, 310 Mich App 169, 189; 871 NW2d 363 (2015), citing *Moll v Abbott Laboratories*, 444 Mich 1, 12; 506 NW2d 816 (1993). However, where a party is harmed but does not realize it is harmed until a later time, the statute of limitations begins on the date the harm was inflicted, not the date it is discovered. See *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378; 738 NW2d 664 (2007).

In this case, Plaintiffs filed their original complaint on October 16, 2015. Accordingly, Plaintiffs’ oppression and breach of fiduciary duty claims must have accrued no earlier than October 16, 2012 (three years before the original complaint was filed), barring any defenses.

Defendants address only one specific allegation that forms the basis of Plaintiffs claims -- that Defendant J. Clark’s shares were redeemed in 2009 for a higher amount than Plaintiff David Canu’s shares were redeemed for in the same year. (See Complaint at ¶¶45-47.) Since the harm caused to Plaintiffs by the alleged discrepancy was

suffered by Plaintiff D. Canu in 2009, under *Trentadue*, the statute of limitations began to run in 2009.

Plaintiffs do not dispute that their claims that accrued in 2009 would be barred by the statute of limitations, however, they aver that the applicable statutes of limitations did not begin to run until September 29, 2015 when they learned of the allegedly wrongful actions. Plaintiffs argue that even if the statute of limitations began to run in 2009, it does not apply in this case to bar the portion(s) of their oppression and breach of fiduciary duty claims that accrued before October 16, 2012, because Defendants fraudulently concealed the allegedly wrongful actions, causing them not to become aware of the wrongful conduct until September 29, 2015.

MCL 600.5585 sets forth the fraudulent concealment exception to the statute of frauds. Specifically, MCL 600.5585 provides:

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.

Plaintiffs specifically aver that Defendants fraudulently concealed their wrongful actions by (1) denying Plaintiffs' requests to inspect CGS' books and records and (2) breaching their fiduciary duties.

With regards to Defendants alleged refusal to allow Plaintiffs to inspect CGS' books and records, MCL 450.1487 governs a shareholder's right to access corporate books and records, and provides, in pertinent part:

(2) Any shareholder of record, in person or by attorney or other agent, shall have the right during the usual hours of business to inspect for any proper purpose the corporation's stock ledger, a list of its shareholders, and its other books and records, if the shareholder gives the corporation written demand describing with reasonable particularity his or her purpose and the records he or she desires to inspect, and the records sought are directly connected with the purpose. A proper purpose shall mean a purpose reasonably related to such person's interest as a shareholder. The demand shall be delivered to the corporation at its registered office in this state or at its principal place of business. In every instance where an attorney or other agent shall be the person who seeks to inspect, the demand shall be accompanied by a power of attorney or other writing which authorizes the attorney or other agent to act on behalf of the shareholder.

The only evidence of a request for inspection of the books and records pursuant to MCL 450.1487 in this case is Plaintiff Suzanne Canu's February 24, 2014 request to inspect various documents. (See Defendants' Exhibit 2.) However, Ms. Canu did not describe her purpose for requesting to inspect the documents she sought, nor did she describe how those documents served her proper purpose. *Id.* Accordingly, Ms. Canu's request did not comply with the requirements of section 1487, thus any denial would have been appropriate. While Plaintiffs assert that the denial of Ms. Canu's request acted to fraudulently conceal their actions, they have failed to cite any evidence whatsoever to support their assertion. It is well settled that "a party may not leave it to this Court to search for authority to sustain or reject its position." *In re Keifer*, 159 Mich App 288, 294; 406 NW2d 217 (1987). Based on their failure to support their fraudulent concealment defense, the Court is convinced that Plaintiff's request to deny Defendants' motion due to fraudulent concealment based on denial of access to CGS' books and records must be denied.

Plaintiffs also contend that Defendants concealed their wrongful actions by breaching their fiduciary duties. While Plaintiffs cite to authority holding that directors

and officers of corporations owe such corporations a duty of good faith and a duty to not usurp corporate opportunities, CGS is not a plaintiff in this matter. Moreover, even if Plaintiffs were to provide the Court with evidentiary support indicating that Defendants breached their fiduciary duties to CGS, which they have not, Plaintiffs have failed to provide the Court with any authority standing for the proposition that a director/officer's breach of his fiduciary duty to the corporation can form the basis for their fraudulent concealment defense. Based on Plaintiffs failure to provide any support for their position, the Court is satisfied that their position must be denied.

For the reasons set forth above, Plaintiffs have failed to establish a question of fact exists as to their assertion that Defendants fraudulently concealed their allegedly wrongful activities. Plaintiffs' position that the statute of limitations does not apply in this case due to fraudulent concealment exception must therefore be denied. Consequently, the Court is convinced that Plaintiffs' oppression and breach of fiduciary duty claims based on the 2009 redemptions are barred by the applicable statutes of limitations.

Plaintiffs also allege that in addition to the 2009 redemptions, Defendants engaged in other allegedly wrongful activities. However, Plaintiffs have not specifically identified which of those activities form the bases for their oppression and/or breach of fiduciary duty claims. Moreover, Defendants have not specifically addressed any of those allegations in their motion. Based on the uncertainty as to the bases for Plaintiffs' remaining claims, as well as Defendants' failure to specifically identify grounds for summary disposition as to those bases, the Court is convinced that summary disposition as to the remaining portion(s) of Plaintiffs' breach of fiduciary duty and

oppression claims is not warranted at this time. As a result, Defendants' request for summary disposition of the remainder of Plaintiffs' oppression and breach of fiduciary duty claims must be denied without prejudice.

B. Statute of Limitations as to Count V

Defendants also contend that Count V of the Complaint is barred by the statute of limitations. Count V of the Complaint seeks to remove Defendants Judy Clark and Defendant C. Clark as directors of MCL 450.1514. MCL 450.1514 provides:

- (1) The circuit court of the county in which the principal place of business or registered office of the corporation is located may remove a director of the corporation from office in a proceeding commenced either by the corporation or by its shareholders holding at least 10% of the outstanding shares of any class if the court finds that the director engaged in fraudulent, illegal, or dishonest conduct, or gross abuse of authority or discretion, with respect to the corporation, and removal is in the best interest of the corporation.
- (2) The court that removes a director may bar him or her from serving as a director of the corporation for a period prescribed by the court.
- (3) If shareholders commence a proceeding under subsection (1), they shall make the corporation a party defendant.

MCL 450.1514 does not contain its own limitations period. However, the absence of a limitations period is consistent with the fact that relief under MCL 450.1514 is equitable in nature. In equitable proceedings, timeliness is determined by applying the doctrine of laches rather than the statute of limitations. *Badon v General Motor Corp.*, 188 Mich App 430, 435; 470 NW2d 436 (1991).

Defendants have not made a laches argument with respect to Count V. As a result, their timeliness argument with respect to Count V is misplaced. While Defendants cite to caselaw holding that oppression actions seeking

equitable relief are subject to the limitations period set forth in MCL 450.1489(1)(f), Count V of the Complaint does not seek relief under that statute; rather, Plaintiffs seek relief under a completely separate statute providing for only equitable relief. Consequently, Defendants reliance on such caselaw is misplaced. Accordingly, Defendants request for summary disposition of Count V due to the statute of limitations must be denied.

C. Failure to State a Claim

Defendants also assert that the allegations supporting Counts I-III and V that are not barred by the applicable statute of limitations fail to sufficiently state a claim upon which relief can be granted. MCR 2.111(B) generally requires that a complaint contain a "statement of the facts" and the "specific allegations necessary reasonably to inform the adverse party of the nature of the claims" against it. *Nationsbanc Mortg. Corp. of Georgia v Luptak*, 243 Mich App 560, 566; 625 NW2d 385 (2000).

In their complaint, Plaintiffs set forth various activities Defendants have allegedly engaged in that may not be barred by the applicable statute(s) of limitations that they assert constitute, *inter alia*, oppression of their shareholder interests (Count I), breaches of Defendants' fiduciary duties (Counts II-IV), and grounds for removal as directors of CGS (Count V). (See Complaint, at ¶¶49-61.) The Court is satisfied that such allegations are sufficient to inform Defendants as to the nature of the claims against them. Consequently, the Court is convinced that Plaintiffs' claims as sufficiently pled to survive a motion for summary disposition under MCR 2.116(C)(8).

D. Waiver/Estoppel

Defendants also contend that Plaintiffs waived their claims and/or are estopped from asserting them. First, Defendants assert that Plaintiffs may not challenge the propriety of the redemption of Defendant J. Clark's shares. With respect to Count I-IV, the Court has already held that the portions of said claim related to the share redemption are barred by the applicable statute of limitations. Accordingly, the remaining issue is whether Plaintiffs may rely on the redemption as a basis for their other claims. Defendants aver that Plaintiff D. Canu utilized the same mechanism to have his shares redeemed as Defendant J. Clark did, and that as a result he is estopped from challenging the transaction.

A shareholder that assents to a corporate transaction generally may not later challenge the validity of the transaction in Court. *Camden v Kaufman*, 240 Mich App 389, 392; 613 NW2d 335, 338 (2000). However, in this case Plaintiffs' are challenging the redemption of Defendant J. Clark's, a transaction they maintain they did not approve or even know about until 2015. Accordingly, the Court is convinced that Defendants have failed to establish that Plaintiffs are not estopped and/or have waived their ability to rely on the redemption as a basis for their claims.

Defendants also maintain that Plaintiffs have consented to, participated in, and waived any right to challenge informal nature in which CGS was operated. Specifically, Defendants assert that CGS has operated since 1967 and has never followed corporate formalities such as holding shareholder meetings and electing/appointing board members and officers. Further, Defendants contend

that Plaintiffs have been shareholders and/or board members/officers in CGS for many years without objecting to CGS' lack of formalities.

While Defendants have cited to caselaw standing for position that parties to a written contract may waive or modify parts of the contract by agreement or affirmative conduct indicating such waivers and/or modifications [*Quality Products and Concepts Co v Nagel Precision, Inc.*, 469 Mich 362; 666 NW2d 251 (2003)], they have failed to cite to any particular contractual provision that they contend has been waived and/or modified. Moreover, Defendants have failed to provide the Court with any evidence that Plaintiff have engaged in conduct that would operate to waive or modify their right to operate CGS in accordance with its corporate governance documents and the applicable statutes. Consequently, the Court is satisfied that Defendants have failed to establish that Plaintiffs have waived their ability to challenge CGS' lack of formality.

E. Accounting (Count VI)

Finally, Defendants contend that Plaintiffs account claim should be dismissed because Plaintiffs have failed to comply with the conditions they have imposed with respect to Plaintiffs' request to inspect CGS' books and records. However, the Court has already held that Plaintiffs' informal requests, as well as Plaintiff S. Canu's April 2014 written request to access to CGS' records did not comply with MCL 450.1487, and that as a result Defendants' denial of those requests may not form the basis for Plaintiffs' claims. As those denials are the only stated basis for Plaintiffs' request for an accounting, Defendants' request for summary disposition of Count VI must be granted. However, Plaintiffs, as

shareholders of CGS, retain the ability to request to inspect CGS' books and records consistent with MCL 450.1487, and may also obtain access to such documents via discovery. Accordingly, Plaintiffs retain the ability to inspect the books and records at issue even without their claim for an accounting.

IV. Conclusion

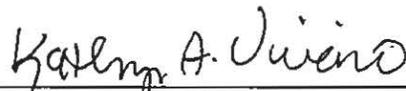
Based upon the reasons set forth above, Defendants' motion for summary disposition is GRANTED, IN PART, and DENIED, IN PART. Specifically:

- (1) Defendants' motion for summary disposition of Counts I-IV is GRANTED to the extent that Plaintiffs' claims are based on the 2009 redemption of Defendant July Clark's shares, the 2009 redemption of Plaintiff David Canu's shares, or Defendants' denial of Plaintiffs' requests to inspect CGS' books and records. Defendants' request for summary disposition as to the remainder of Count I-IV is DENIED.
- (2) Defendants' motion for summary disposition of Count V is DENIED; and
- (3) Defendants' motion for summary disposition of Plaintiffs' accounting claim is GRANTED.

In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order does not resolve the last claim and does not close the case.

IT IS SO ORDERED.

Date: MAY 04 2016



Hon. Kathryn A. Viviano, Circuit Court Judge