

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

GRAND POINTE PROPERTY, L.L.C.,

Plaintiff,

vs.

Case No. 12-07912-CZB

HON. CHRISTOPHER P. YATES

JOHN P. OOSTERBAAN; DAMION FRASIER; GOLDEN HORSESHOE HOLDINGS, LLC, a Michigan limited liability company; MASS HOLDINGS, LLC, a Michigan limited liability company; MAS DEVELOPMENT, LLC, a Michigan limited liability company; and SPOHN CONSTRUCTION SERVICES, LLC, a Michigan limited liability company, jointly and severally,

Defendants.

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ORDER GRANTING IN PART, AND DENYING IN PART, DEFENDANTS' MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(7)

Prior to commencing this case, Grand Pointe Property, L.L.C. ("Grand Pointe") prevailed in a lawsuit against SEC Grand Pointe, L.L.C. ("SEC") for fraudulent misrepresentation of facts related to the sale of a shopping center. See Grand Pointe Property, LLC v SEC Grand Pointe, LLC, No 301293 (Mich App Jan 17, 2013) (unpublished decision). But when Grand Pointe encountered difficulty collecting on that judgment, it decided to initiate a whole new suit against a new crop of defendants related to that same transaction. The Court has already dismissed the claims against John Oosterbaan and Jeffrey Smith based on the doctrine of *res judicata*, and it has also dismissed all counts other than civil conspiracy against Damion Frasier. Subsequently, Grand Pointe filed three amended complaints seeking to add claims against MAS Development, LLC ("MAS Development") and causes of action

against John Oosterbaan and Golden Horseshoe Holdings, LLC (“Golden Horseshoe”) for violations of the Uniform Fraudulent Transfer Act (“UFTA”), MCL 566.31, *et seq*, as well as MCL 450.4307 and 450.4308. John Oosterbaan, Golden Horseshoe, and MAS Development now request summary disposition on each of these amended claims pursuant to MCR 2.116(C)(7), asserting that these claims are all barred by the applicable statutes of limitations.

I. Factual Background

The Court has furnished a detailed explication of the factual background of this dispute in two previous orders, so the Court can now limit its recitation of the facts to those that are pertinent to the present summary-disposition motion. Plaintiff Grand Pointe purchased a shopping center from SEC on May 5, 2007. See Third Amended Complaint, ¶ 25. Sometime thereafter, Grand Pointe learned that SEC has wrongfully misrepresented the financial status of an anchor tenant in the shopping center, which significantly impaired the value of the property, so Grand Pointe filed a lawsuit against SEC in December 2008. Grand Pointe obtained a jury verdict of \$630,000.00 against SEC, which was later affirmed by our Court of Appeals. See Grand Pointe Property, LLC v SEC Grand Pointe, LLC, No 301293 (Mich App Jan 17, 2013) (unpublished decision). After running into trouble collecting from SEC, Grand Pointe filed this action on August 24, 2012, against several other entities allegedly involved in the May 5, 2007, transaction.

Grand Pointe initially named Mass Holdings, LLC (“Mass Holdings”) as a defendant, but it later discovered that the proper defendant is MAS Development. Thus, Grand Pointe has attempted to substitute MAS Development for Mass Holdings under the misnomer doctrine. MAS Development contends, however, that the misnomer doctrine does not apply and that the Court must dismiss the allegations against it under MCR 2.116(C)(7) because these claims are barred by the statute of limitations.

Grand Pointe also recently added claims against John Oosterbaan and Golden Horseshoe for violations of the UFTA as well as MCL 450.4307 and 450.4308. In particular, Grand Pointe contends that SEC made improper distributions to its members, Defendants Oosterbaan and Golden Horseshoe, between May 5, 2007, and December 31, 2007, and that these transfers were made with the intent to defraud Grand Pointe. See Third Amended Complaint, ¶ 64; see also Plaintiff's Supplemental Brief in Support of Response to Motion for Summary Disposition, Exhibit A. Oosterbaan and Golden Horseshoe contend that these claims are also barred by the governing statutes of limitations and must be dismissed pursuant to MCR 2.116(C)(7).

II. Legal Analysis

In reviewing a motion for summary disposition pursuant to MCR 2.116(C)(7), the Court must review "affidavits, depositions, admissions, or other documentary evidence" submitted by the parties, Maiden v Rozwood, 461 Mich 109, 119 (1999), but the complaint should be "accepted as true unless contradicted by documentation submitted by the movant." Id. "If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide." RDM Holdings, Ltd v Continental Plastics Co, 281 Mich App 678, 687 (2008). "If a factual dispute exists, however, summary disposition is not appropriate." Id. Here, Defendant MAS Development argues that all of the claims against it must be dismissed because they fall outside the applicable statutes of limitations and do not relate back to the filing date of the original complaint. Likewise, Defendants Oosterbaan and Golden Horseshoe contend that the Court must dismiss Grand Pointe's claims for violations of the UFTA and MCL 450.4307 and 450.4308 because these claims also do not relate back to the filing date of the initial complaint and are therefore barred by the statute of limitations. The Court considers these issues in turn.

A. Counts One Through Five Against MAS Development.

Grand Pointe added MAS Development as a defendant in its First Amended Complaint filed on September 20, 2013. All of the events that give rise to the allegations against MAS Development occurred prior to the sale of the shopping center on May 5, 2007, so MAS Development contends that the claims are barred by statutes of limitations and, therefore, must be dismissed pursuant to MCR 2.116(C)(7). In response, Grand Pointe asserts that these claims relate back to the date it filed the original complaint, *i.e.*, August 24, 2012. See MCR 2.118(D). To be sure, an “amendment that adds a claim or a defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading.” MCR 2.118(D). But the “relation-back doctrine does not apply to the addition of new parties[.]” Miller v Chapman Contracting, 477 Mich 102, 106 (2007), such as MAS Development.

Grand Pointe also cannot rely upon the misnomer doctrine, which “applies only to correct inconsequential deficiencies or technicalities in the naming of parties, for example, ‘[w]here the right corporation has been sued by the wrong name, and service has been made upon the right party, although by a wrong name[.]’” Miller, 477 Mich at 106-107. Where “the plaintiff seeks to substitute or add a wholly new and different party to the proceedings, the misnomer doctrine is inapplicable.” Id. at 107. Here, Grand Pointe initially named Mass Holdings, which is a distinct entity from MAS Development, in its original complaint and served that complaint upon Mass Holdings, not MAS Development. Therefore, MAS Development received notice of this lawsuit only after Grand Pointe filed its First Amended Complaint on September 20, 2013. Accordingly, the Court concludes that the claims against MAS Development relate back only to September 20, 2013, the filing date of the First Amended Complaint.

Grand Pointe has advanced the following five claims against MAS Development: silent fraud; fraudulent misrepresentation; innocent misrepresentation; constructive trust; and civil conspiracy. The first three claims are governed by the six-year statute of limitations prescribed in MCL 600.5813, see Adams v Adams, 276 Mich App 704, 710 (2007), so the claims against MAS Development can only survive if they accrued after September 20, 2007. But here, the alleged fraud occurred prior to the close of the sale of the shopping center on May 5, 2007, so the fraud claims are all barred by the six-year statute of limitations. Furthermore, Grand Pointe cannot seek refuge in MCL 600.5855, which prescribes a two-year statute of limitations for claims that have been fraudulently concealed, because Grand Pointe did not plead fraudulent concealment and it certainly was aware of the claims against MAS Development by December of 2008, when it filed the first lawsuit against SEC alleging fraud. Consequently, the fraud claims must be dismissed under MCR 2.116(C)(7) because they are all barred by the six-year statute of limitations.

Likewise, the claims for constructive trust and civil conspiracy are barred by the governing statute of limitations. Claims for constructive trust are equitable in nature, see Arndt v Vos, 83 Mich App 484, 487 (1978), and the statute of limitations for an equitable claim is the same as the statute of limitations for its legal counterpart. Taxpayers Allied for Constitutional Taxation v Wayne County, 450 Mich 119, 127 n9 (1995). Similarly, the statute of limitations for civil conspiracy depends upon the underlying claim. Terlecki v Stewart, 278 Mich App 644, 653 (2008). Therefore, the claims for constructive trust and civil conspiracy both must comply with the six-year statute of limitations for the fraud claims. Because the fraud claims against MAS Development are barred by the six-year statute of limitations, the claims for constructive trust and civil conspiracy are likewise barred by the statute of limitations and must be dismissed pursuant to MCR 2.116(C)(7).

B. Counts Six and Seven Against John Oosterbaan and Golden Horseshoe.

In its First Amended Complaint filed on September 20, 2013, Grand Pointe added two new claims against John Oosterbaan and Golden Horseshoe – one for violations of the UFTA and the other for violations of MCL 450.4307 and 450.4308. Essentially, these claims rest upon allegations that Oosterbaan and Golden Horseshoe wrongfully accepted member distributions from SEC between May 5, 2007, (the date of the close on the sale of the shopping center) and December 31, 2007. See Third Amended Complaint, ¶ 64. The claims set forth in the original complaint, in contrast, all relate to wrongful conduct that occurred prior to the closing date on the shopping center. Therefore, the new claims rely upon a completely separate set of facts and require the Court to determine whether Oosterbaan and Golden Horseshoe, as members of SEC, were entitled to receive distributions from SEC after the sale of the shopping center or whether those distributions were made for some wrongful purpose in violation of the UFTA and MCL 450.4307 and 450.4308. Accordingly, the new claims do not arise “out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading[.]” see MCR 2.118(D), so these claims relate back only to September 20, 2013, the date that Grand Pointe filed its First Amended Complaint.

Having determined that the new claims against Defendants Oosterbaan and Golden Horseshoe relate back to September 20, 2013, the Court must address whether these claims were filed within the period of limitations. Grand Pointe alleges that Oosterbaan and Golden Horseshoe accepted member distributions from SEC in contravention of MCL 450.4307 and 450.4308 between May 5, 2007, and December 31, 2007. Such a claim must be asserted within two years of the date of distribution, see MCL 450.4308(5), so that claim is barred by the statute of limitations.¹

¹ Moreover, Grand Pointe’s claim fails on the merits. If Oosterbaan and Golden Horseshoe accepted or voted for distributions in violation of MCL 450.4307, they would be liable exclusively to the limited liability company, *i.e.*, SEC, see MCL 450.4308(1) and (3), as opposed to third parties.

Plaintiff Grand Pointe also alleges that Defendants Oosterbaan and Golden Horseshoe violated the UFTA by accepting member distributions between May 5, 2007, and December 31, 2007. An UFTA claim must be commenced within six years of the fraudulent conduct or within two years of the discovery of such conduct. MCL 566.39(a). Grand Pointe does not rely upon the two-year discovery rule, so its UFTA claim must have accrued after September 20, 2007, to fall within the six-year statute of limitations. Because Grand Pointe alleges that the fraudulent transfers occurred sometime between May 5, 2007, and December 31, 2007, the Court cannot yet determine whether Grand Pointe's UFTA claim is barred by the six-year statute of limitations. Therefore, the Court shall permit Grand Pointe to proceed with its UFTA claim subject to the caveat that dismissal will ensue if discovery reveals that the UFTA claim accrued before September 20, 2007.²

III. Conclusion

In sum, the Court must grant in part, and deny in part, the defendants' most recent motion for summary disposition pursuant to MCR 2.116(C)(7). The claims against MAS Development must all be dismissed because they were filed on September 20, 2013, and fall outside the applicable statute of limitations. The claim against Defendants John Oosterbaan and Golden Horseshoe for violation of MCL 450.4307 and 450.4308 also must be dismissed because it is subject to a two-year statute of limitations. But the Court cannot yet dismiss Grand Pointe's UFTA claim against Defendants Oosterbaan and Golden Horseshoe. To fall within the applicable six-year statute of limitations, this

² The Court is skeptical that Plaintiff Grand Pointe's UFTA claim will even hold water. SEC received a large sum of money from the sale of the shopping center on May 5, 2007, and it stands to reason that SEC would have made significant distributions to its members soon thereafter. These distributions may have violated the UFTA if the distributions were made knowing that SEC did not have enough assets to cover its current debts to creditors, but SEC did not even have an obligation to Grand Pointe in 2007. SEC's debt to Grand Pointe arose out of a judgment in a lawsuit that was not even commenced until December 2008. Thus, Grand Pointe has many miles to cover in convincing the Court that its claim for violations of the UFTA is viable.

claim must have accrued after September 20, 2007, and Grand Pointe has pleaded that some transfers took place after that date. Accordingly, the Court must deny the motion for summary disposition filed by Oosterbaan and Golden Horseshoe under MCR 2.116(C)(7) as to Grand Pointe's UFTA claim.

IT IS SO ORDERED.

Dated: February 24, 2014



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge