REVERSE and RENDER; Opinion Filed November 13, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00840-CV

KEN TEEL, CHALON INVESTMENTS, LLC, AND CHALON DEVELOPMENT CORPORATION, Appellants
V.
GALEN RAY SUMROW, Appellee

On Appeal from the 439th Judicial District Court
Rockwall County, Texas
Trial Court Cause No. 1-14-814

MEMORANDUM OPINION

Before Justices Lang, Evans, and Schenck
Opinion by Justice Schenck

Ken Teel, Chalon Investments, LLC, and Chalon Development Corporation appeal from the trial court's judgment in favor of Galen Ray Sumrow on his breach-of-fiduciary duty claim. In their first and second issues, appellants challenge the legal and factual sufficiency of the evidence supporting the jury's finding that Sumrow should have discovered Teel's conduct by June 1, 2010, so as to initiate the running of limitations. In their third and fourth issues, appellants challenge the legal and factual sufficiency of the evidence supporting the jury's finding that Teel fraudulently concealed his conduct from Sumrow. We reverse the trial court's judgment and render judgment that Sumrow take nothing on his claims. Because all issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

FACTUAL AND PROCEDURAL BACKGROUND

In late 2004, Teel approached Sumrow to seek his help in developing a hospital (the "Hospital") in the City of Rockwall. Teel also sought out Texas Health Resources ("THR") to provide financing. Teel then created Chalon Investment, LLC to own approximately 5% of the Hospital.[1] Teel managed and initially owned Chalon Investment and invited five other individuals, including Sumrow, to purchase an interest in Chalon Investment. Sumrow purchased five units at $5,000 each, for a total of $25,000. Teel also created Chalon Development Corporation to act as the on-site manager of the Hospital, for which it was paid management fees that Teel agreed to share fees with Sumrow.

Teel planned for the Hospital to open in mid-2007. However, by late 2006, Sumrow was under investigation for criminal activity. Concerned about how the allegations against Sumrow might negatively affect the Hospital, Teel decided that if the investigation led to an indictment, he, on behalf of Chalon Investment, would repurchase Sumrow's units. In March 2007, Teel sought and obtained authorization from THR for Chalon Investment to repurchase Sumrow's units. Teel also ceased paying Sumrow a portion of the management fees.

In April 2007, Sumrow was indicted by a grand jury. That same month, Teel, on behalf of Chalon Investment, purchased Sumrow's units by paying $25,000 towards the $35,000 loan Sumrow obtained to initially purchase the units. Because Teel's payment left a small amount still due and owing, the bank continued to automatically debit Sumrow's bank account for monthly loan payments of $1,013.97 through October 2007.

In March 2008, and again on June 11, 2008, Sumrow was convicted on separate counts of theft by a public servant.[2] In May 2008, Teel sent all of the individual members of Chalon Investment schedule K-1 tax forms indicating each member's interest in the company in the year

[1] The remaining 95% was owned by physicians, THR, and a partnership comprised of THR and another company.

[2] Sumrow was the elected District Attorney of Rockwall County.

2007. In addition to the schedule K-1, Teel sent Sumrow a cover letter that stated as follows: "This is your final year of ownership in Chalon Investments, LLC. Therefore, this will be the last Schedule K-1 that you will receive."

In June 2008, Sumrow was incarcerated. The following month, he wrote a letter to a friend, Dr. Timothy Bray, in which he stated that he "just never thought [Teel] would screw me out of my money." The money in question was an amount Sumrow had advanced and expected to be repaid when the Hospital opened.[3]

On January 29, 2010, Sumrow was released from incarceration. In June 2010, he asked Dr. Bray how the Hospital was doing and whether THR had exercised its option to repurchase the units. Dr. Bray responded by telling Sumrow that Teel had in fact repurchased Sumrow's units. That same month, Sumrow contacted his bank and learned that Teel, on behalf of Chalon Investments, had repaid $25,000 of Sumrow's loan nearly three years earlier. In July 2013, THR purchased all of the ownership units held by Chalon Investments, and because Chalon Investments had already repurchased Sumrow's units, Teel did not distribute any proceeds to Sumrow.

On March 10, 2014, Sumrow sued Teel, Chalon Investments, and Chalon Development for breach of contract and breach of fiduciary duty. Appellants answered by asserting, among other things, Sumrow's claims were barred by applicable statutes of limitations. Sumrow responded that the discovery rule and Teel's fraudulent concealment operated to toll the limitations periods. The case proceeded to a jury trial, and the jury returned a verdict in Sumrow's favor, finding Teel breached his fiduciary duty with respect to Sumrow's units, fraudulently concealed his wrongful conduct, and that Sumrow could not have reasonably

[3] Sumrow testified: "Early on in the—when we got paid the development fee money, we agreed—each of the parties agreed to leave a little bit over a hundred thousand dollars that they could operate on until we got the financing and this kind of stuff. So when I got the check from Mr. Teel back in 2006, I knew that we had left—that we—he and I together had left up 30-something thousand dollars. That I was told once the hospital opened, they would write us a check for that balance."

learned of Teel's wrongful conduct until June 1, 2010.[4] Appellants moved for judgment notwithstanding the verdict, arguing the evidence was legally insufficient to support the jury's findings that Teel fraudulently concealed his breach of fiduciary duty from Sumrow and that Sumrow, in the exercise of reasonable diligence, should have discovered any claimed breach of fiduciary duty by June 1, 2010. The trial court denied appellant's motion and entered a judgment in favor of Sumrow on his breach-of-fiduciary-duty claim in accordance with the jury's verdict. Appellants filed a motion for new trial, challenging the factual sufficiency of the evidence to support the same jury's findings previously disputed. The trial court denied appellants' motion for new trial, and appellants appealed the judgment.

DISCUSSION

I. Applicable Law & Standard of Review

A plaintiff must bring a claim of breach of fiduciary duty no later than four years after the day the cause of action accrues. TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(5) (West 2002). Generally, a cause of action accrues when a wrongful act causes some legal injury, when facts come into existence that authorize a claimant to seek a judicial remedy, or whenever one person may sue another. *Am. Star Energy & Minerals Corp. v. Stowers*, 457 S.W.3d 427, 430 (Tex. 2015). Knowledge of injury initiates the accrual of the cause of action and triggers the claimant's duty to exercise reasonable diligence to investigate the problem, even if the claimant does not know the specific cause of the injury, the party responsible for it, or the full extent of it. *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 207, 209 (Tex. 2011). Under the discovery rule, a cause of action will not accrue until the plaintiff knew or should have known of the wrongfully caused injury. *Baxter v. Gardere Wynne Sewell LLP*, 182 S.W.3d 460, 462 (Tex. App.—Dallas 2006, pet. denied). Additionally, fraudulent concealment tolls limitations but only

[4] The jury found against Sumrow on his breach-of-contract claim.

until the fraud is discovered or could have been discovered with reasonable diligence. *Shell Oil Co. v. Ross*, 356 S.W.3d 924, 927 (Tex. 2011).

A defendant has the initial burden of pleading, proving, and securing findings to establish the affirmative defense of statute of limitations. *Weaver & Tidwell, L.L.P. v. Guarantee Co. of N. Am. USA*, 427 S.W.3d 559, 565 (Tex. App.—Dallas 2014, pet. denied). The plaintiff, as the party seeking to benefit from the discovery rule or the fraudulent concealment doctrine, bears the burden of proof with respect to the application of these exceptions. *See id.* at 565–66; *Leeds v. Cooley*, 702 S.W.2d 213, 215 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

When an appellant attacks the legal sufficiency of an adverse finding on an issue for which it did not have the burden of proof, the appellant must demonstrate there is no evidence to support the adverse finding. *Id.* at 564. We will sustain a no-evidence point when (1) the record discloses a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence establishes conclusively the opposite of the vital fact." *Id.*

When an appellant challenges the factual sufficiency of the evidence to support an adverse finding on which it did not have the burden of proof, the appellant must demonstrate there is insufficient evidence to support the adverse finding. *Id.* In reviewing a finding for factual sufficiency, we consider and weigh all of the evidence in support of and contrary to the jury's finding and will set aside the finding only if it is so against the overwhelming weight of the evidence that the finding is clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986).

II. Did Teel Breach a Duty to Sumrow within the Limitations Period?

Sumrow filed suit on March 10, 2014, such that any claim must have accrued no earlier than March 10, 2010. *See* CIV. PRAC. & REM. CODE ANN. § 16.004(a)(5). Sumrow asserts the

evidence supports a finding that Teel breached a fiduciary duty to Sumrow within the four-year limitations period, such that any error in the jury's findings on when the claim accrued, either under the discovery rule or the fraudulent concealment doctrine, would be harmless. Sumrow argues he pleaded that Teel breached his duty to Sumrow by engaging in self-dealing, by claiming ownership of Sumrow's units, and by failing to distribute profits from Chalon Investment to Sumrow. As support for his argument, he contends that the evidence established that in July 2013 Teel failed to make distributions to Sumrow after THR purchased the units owned by Chalon Investments.

Appellants respond that no additional legal injury or breach occurred in July 2013 because Sumrow no longer owned the units in July 2013. Instead, they argue the sale of the units in July 2013 merely fixed the amount of Sumrow's claimed damages.

Review of the record reveals that while Sumrow pleaded that Teel breached a duty by failing to distribute the proceeds from the sale of the units owned by Chalon Investments to Sumrow, there is no evidence in the record to support a finding that Sumrow had any interest in the units in 2013 such that Teel owed him any duty to distribute proceeds from the sale. Instead, the only evidence regarding Sumrow's interest in the units is that he purchased the units in March 2006 and that Teel, on behalf of Chalon Investments, repurchased these units in 2007. Both Sumrow and another witness, Dr. Bray, testified that in June 2010, Dr. Bray informed Sumrow that Teel had repurchased Sumrow's units. The record contains the May 2008 cover letter Teel sent Sumrow informing him that 2007 was the last year Sumrow owned any interest in Chalon Investments. Thus, the evidence conclusively establishes the opposite of a vital fact: Teel did not owe any duty to Sumrow that he could have breached within the limitations period. *See Weaver & Tidwell*, 427 S.W.3d at 564. Accordingly, we will now address other arguments supporting appellants' issues.

III. Discovery Rule

In their first issue, appellants assert the evidence conclusively establishes Sumrow failed to exercise reasonable diligence and that a reasonable person exercising reasonable diligence would have discovered facts giving rise to his claim for breach of fiduciary duty more than four years before he filed suit, making his claim for breach of fiduciary duty barred by limitations. Alternatively, in their second issue, appellants argue the jury's finding that Sumrow's claim accrued by June 1, 2010, is against the overwhelming weight of the evidence.

Sumrow responds that the evidence shows he did not actually discover Teel's wrongful conduct until June 1, 2010, and that the evidence in the record would allow a reasonable juror to conclude that a person in Sumrow's circumstances would not have discovered Teel's wrongful conduct any earlier than June 1, 2010.

Even in a breach of fiduciary duty case, the claim accrues when the claimant knows, *or in the exercise of ordinary diligence should know*, of the wrongful act and resulting injury.[5] *Willard Law Firm, L.P. v. Sewell*, 464 S.W.3d 747, 752 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (emphasis added). Further, a plaintiff is held to "the objective duty of reasonable diligence, and is entitled to tolling of the statute of limitations only until [he] knew or should have known by exercising reasonable diligence of the facts giving rise to its cause of action." *See Syrian Am. Oil Corp., S.A. v. Pecten Orient Co.*, 524 S.W.3d 350, 360 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

Appellants argue the evidence shows Sumrow's bank statements beginning in October 2007 would have put him on notice that the loan he took out to pay for the units was paid off two years early. They also note the evidence that in May 2008, before Sumrow was incarcerated in

[5] Application of the discovery rule requires the nature of the plaintiff's injury to be both inherently undiscoverable and objectively verifiable. *See Weaver & Tidwell*, 427 S.W.3d at 565. Even assuming Sumrow's injury were inherently undiscoverable, if reasonable minds could not differ about the conclusion to be draw from the facts in the record, the start of the limitations period may be determined as a matter of law. *See Villarreal v. Wells Fargo Brokerage Servs., LLC*, 315 S.W.3d 109, 119 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

June 2008, Teel sent him a schedule K-1 and cover letter indicating Sumrow no longer owned any interest in Chalon Investment. Contending Teel had made no secret of his efforts to repurchase Sumrow's units, appellants point to a letter Sumrow admitted to writing to Dr. Bray in July 2008 in which he stated, "I just never thought [Teel] would screw me out of my money."

Sumrow counters that it was reasonable under the following circumstances for him not to have discovered Teel's wrongful conduct. He points to his testimony that beginning in February 2007, he was preoccupied with his pending criminal trials, that from June 2008 through Janaury 2010, he was incarcerated, that he never checks his bank statements, that he is not a very good record keeper, and that he does not pay attention or take care of small details. Sumrow's daughter testified she had his mail forwarded to her beginning in June 2008 and did not deliver it to him until June 2010.[6] She also testified that when she began collecting his mail in June 2008, she picked up approximately four to six weeks of mail being held at the post office.

Importantly, we note that the letter Sumrow wrote to Dr. Bray in July 2008 indicates that by that time, Sumrow knew or suspected Teel had engaged in some wrongful conduct to wrongfully deprive Sumrow of money Sumrow believed Teel owed him ("screw me out of my money"). At trial, Sumrow testified the money he referred to in the letter was not the units or management fees he had contracted to receive from Teel, but it was money that he and Teel agreed Sumrow would be paid once the Hospital opened. At trial, Sumrow testified, "I knew obviously in December '07 that the hospital had opened and I never got—I never got my check . . . . So he was holding my money." Therefore, by late 2007, Sumrow knew Teel had not paid him money that Sumrow understood he was owed in relation to the Hospital. By that point, Sumrow had knowledge of facts that would cause a reasonably prudent person to inquire further. *See Town of Dish v. Atmos Energy Corp.*, 519 S.W.3d 605, 613 (Tex. 2017); *Collective Asset*

[6] Sumrow's daughter testified she was not allowed to deliver Sumrow's mail to him in prison, but she did not explain why she did not attempt to forward the delivery of his mail to him in prison or to inform him of the contents of his mail during her visits with him in prison.

Partners, LLC v. McDade, 400 S.W.3d 213, 217 (Dallas 2013, no pet.). Sumrow's letter to Dr. Bray is evidence he was able to send mail while he was incarcerated. There is also evidence that Sumrow's friends and daughter were able to visit him while he was incarcerated and that Sumrow's daughter on at least one occasion opened a letter addressed to Sumrow, read it, and informed him of its contents.[7] Therefore, Sumrow could have received answers to inquiries about his investment via visitors or through mail his daughter testified she collected for him while he was in prison. Moreover, had Sumrow asked his daughter to look through his mail for anything related to the Hospital, she would have discovered—and could have informed him about—the schedule K-1 and the cover letter informing him that 2007 was the last year he owned any interest in Chalon Investment.

As for Sumrow's arguments that he was not a good record keeper, never reviewed his bank statements, and did not pay attention to or take care of small details, we note that in financial affairs, many citizens take a good deal on faith—not everyone zealously checks his mail every day or his bank statement every month—but it would not require "daily" or even monthly diligence to discover the injury alleged in this case. The discovery rule only protects those who do exercise "reasonable" diligence, not those who eschew it. *See, e.g.*, *McNamara v. City of Nashua*, 629 F.3d 92 (1st Cir. 2011). We conclude the evidence conclusively establishes that by exercising reasonable diligence, Sumrow should have known of the facts giving rise to his cause of action well before June 1, 2008, such that his claim was barred by limitations. *See Syrian Am. Oil Corp.*, 524 S.W.3d at 360. Accordingly, we sustain appellants' first issue and need not address their second. *See* TEX. R. APP. P. 47.1.

[7] Although he testified he did not have ready access to a phone or computer while he was incarcerated, Sumrow, as the party with the burden of proof, did not produce any evidence that he could not receive mail or otherwise communicate in ways that would inform him of his essential affairs during his period of incarceration.

IV. Fraudulent Concealment

In their third and fourth issues, appellants argue there is legally and factually insufficient evidence to support the jury's finding that Teel fraudulently concealed his wrongful conduct.

Although a person cannot be permitted to avoid liability for his actions by deceitfully concealing wrongdoing until after limitations has run, if the plaintiff has actual or constructive notice of alleged injury-causing conduct, the limitations period commences, regardless of any fraudulent concealment. *Hooks v. Samson Lone Star, LP*, 457 S.W.3d 52, 57–59 (Tex. 2015). After being put on notice of the alleged harm or injury-causing actions, the claimant must exercise reasonable diligence to investigate the suspected harm and file suit, if at all, within the limitations period. *Exxon Corp.*, 348 S.W.3d at 207.

As discussed above, by December 2007 at the latest, Sumrow had knowledge of all the facts that would have caused a reasonably prudent person to inquire further. Because we have already concluded the evidence conclusively establishes that by exercising reasonable diligence, Sumrow should have known of the facts giving rise to his cause of action well before June 1, 2008, such that his claim was barred by limitations, we sustain appellants' third issue and need not address their fourth. *See* TEX. R. APP. P. 47.1.

CONCLUSION

We reverse the trial court's judgment and render judgment that Sumrow take nothing on his claims against appellants.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

KEN TEEL, CHALON INVESTMENTS, LLC, AND CHALON DEVELOPMENT CORPORATION, Appellants

No. 05-16-00840-CV V.

GALEN RAY SUMROW, Appellee

On Appeal from the 439th Judicial District Court, Rockwall County, Texas
Trial Court Cause No. 1-14-814.
Opinion delivered by Justice Schenck, Justices Lang and Evans participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and judgment is **RENDERED** that:

GALEN RAY SUMROW take nothing on his claims against appellants.

It is **ORDERED** that appellant KEN TEEL, CHALON INVESTMENTS, LLC, AND CHALON DEVELOPMENT CORPORATION recover their costs of this appeal from appellee GALEN RAY SUMROW.

Judgment entered this 13th day of November, 2017.