

STATE OF MICHIGAN
COURT OF APPEALS

ALLIANCE ASSOCIATES, L.C. and MICHAEL
S. LITT,

UNPUBLISHED
June 1, 2006

Plaintiffs-Appellants,

v

ALLIANCE SHIPPERS, INC., RONALD
LEFCOURT, RONALD SCHWED, and
BARBARA SATWICZ,

No. 265101
Wayne Circuit Court
LC No. 05-507573-CK

Defendants-Appellees.

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendants' motions for summary disposition pursuant to MCR 2.116(C)(5) (lack of capacity to sue) (C)(7) (statute of limitations) and (C)(8) (failure to state claim on which relief can be granted). We reverse the dismissal of plaintiff Michael Litt's breach of contract claim against defendant Barbara Satwicz (count XI), but affirm the dismissal of all other claims.

I. FACTS

Plaintiff Litt and defendant Satwicz each own a 50 percent interest in plaintiff Allied Associates, L.C. ("AALC"), a limited liability company. Defendants Ronald Lefcourt and Ronald Schwed are the owners of defendant Allied Shippers, Inc. ("ASI").¹ AALC and ASI entered into a management contract whereby AALC agreed to manage ASI's Detroit office ("ASI Detroit") in exchange for a one-third share of ASI Detroit's profits less AALC's management fee. In 1986, a dispute arose between ASI and AALC concerning how the profit-sharing agreement applied to profits generated by line-haul incentives and rebates offered by railways and other carriers. This disagreement continued into the 1990s, and plaintiffs allege that Lefcourt and Schwed continually reassured Litt and Satwicz that they were considering the problem and that AALC would eventually be paid its full share of ASI's profits.

¹ Defendants Lefcourt, Schwed, and ASI will be collectively referred to as the "ASI defendants."

In 1996, ASI transferred Litt to its Atlanta office for a purportedly temporary assignment. Originally, Litt was to stay for six months, but the assignment was extended to a year. At the end of the first year, Lefcourt asked Litt to stay a second year. Litt alleges that he agreed to stay a second year only because Lefcourt assured him that he could return to his position in Detroit after the second year was completed. Litt was never transferred back to Detroit, however, and he remained in Atlanta until his termination in 2004.

Litt alleges that Satwicz agreed to pursue the matter of AALC's entitlement to profits generated from the line-haul incentives and rebates while he was in Atlanta. He alleges that the ASI defendants took advantage of his absence to colluded with Satwicz, persuading her to accept personal salary increases and other remuneration in exchange for abandoning AALC's rights to the disputed profits. In 2004, Litt was terminated from his employment with ASI, and ASI terminated AALC's management agreement.

On March 15, 2005, this action was brought in AALC's name and by Litt individually against ASI, Satwicz, Lefcourt, and Schwed. Plaintiffs' complaint included a breach of contract claim by AALC against ASI (count I), based on ASI's alleged breach of the management agreement between AALC and ASI by failing to pay AALC its full share of profits, and by terminating the agreement without giving three months' written notice. AALC also asserted three quasi-contractual claims against ASI for "Breach of Implied in Fact Contract," "Unjust Enrichment," and "Quantum Meruit" (counts IV, VI, and VIII, respectively), in which AALC generally asserted that ASI was unjustly enriched by withholding AALC's full share of the profits. AALC also asserted claims against ASI, Lefcourt, and Schwed for fraud and misrepresentation (count II), and innocent misrepresentation (count III), based on allegedly false representations by the ASI defendants that they would eventually pay AALC its full share of the profits.

In count V, Litt asserted a claim for promissory estoppel against ASI and Lefcourt, alleging that Lefcourt promised to transfer Litt back to Detroit if he agreed to a temporary assignment in Atlanta. In count VIII, AALC asserted a claim for tortious interference with contract or business relationship against Lefcourt, alleging that Lefcourt "systematically cut off and undermined AALC's business relationship with Satwicz" by "convinc[ing] Satwicz to usurp AALC's contractual relationship with ASI, and manage ASI Detroit independently and without AALC for her own personal gain and benefit." In count X, AALC asserted a claim for breach of fiduciary duty against ASI, based on ASI's failure to properly account for and calculate ASI Detroit's profits, failure to disclose the amount of ASI Detroit's profits, and its retention of a portion of AALC's share of ASI Detroit's profits.

Counts IX and XI were claims brought by both plaintiffs against defendant Satwicz. In count IX, plaintiffs alleged that Satwicz breached her fiduciary duty to Litt and AALC by accepting financial benefits from ASI that rightfully belonged to AALC, by usurping AALC's contractual relationship with ASI for her own benefit, by failing to carry out AALC's business affairs in its best interests, and by usurping Litt's interest in AALC for her personal benefit. In Count XI, plaintiffs alleged that Satwicz breached an operating agreement between Litt and Satwicz, which prohibited both Litt and Satwicz from receiving rebates, kickbacks, or reciprocal arrangements. Finally, in count XII, plaintiffs demanded an accounting of ASI's records to determine the distribution of profits owed to AALC.

All defendants moved for summary disposition. The trial court dismissed all claims brought in AALC's name on the ground that Litt lacked standing to sue in AALC's name, and that Litt did not comply with the demand procedures set forth in MCL 450.4510. The court rejected Litt's argument that he was excused from complying with MCL 450.4510 because it would be futile to do so. The court dismissed all claims against Lefcourt and Schwed, individually, concluding that they could not be individually liable for acts they allegedly committed while acting on behalf of ASI. Finally, the trial court dismissed plaintiffs' "remaining claims" on the ground that they were barred by the applicable statutes of limitations.

II. STANDARDS OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). Whether a party has standing to sue is a legal question subject to de novo review. *Crawford v Dep't of Civil Service*, 466 Mich 250, 255; 645 NW2d 6 (2002).

The trial court cited MCR 2.116(C)(5) as the applicable subrule for granting summary disposition of all claims brought by AALC. MCR 2.116(C)(5) provides that summary disposition may be granted when "[t]he party asserting the claim lacks the legal capacity to sue." It is unclear whether MCR 2.116(C)(5) or MCR 2.116(C)(8) (failure to state a claim) is the appropriate subrule to apply in this circumstance. See *46th Circuit Trial Court v Crawford Co*, 266 Mich App 150, 178; 702 NW2d 588 (2005), lv gtd 474 Mich 986 (2005), and *Leite v Dow Chemical Co*, 439 Mich 920; 478 NW2d 892 (1992). For purposes of this appeal, it is immaterial which subrule we apply because the standard of review is substantially the same. When reviewing a motion under MCR 2.116(C)(5), this Court considers the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties. *Rohde v Ann Arbor Pub Schools*, 265 Mich App 702, 705; 698 NW2d 402 (2005). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004). The court accepts all well-pleaded factual allegations as true and construes them in a light most favorable to the non-moving party. *Id.*

Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred by the statute of limitations. In reviewing a motion under this subrule, the court must accept a plaintiff's well-pleaded factual allegations as true, unless contradicted by any affidavits or other documentary evidence submitted by the parties. *Patterson v Kleiman*, 447 Mich 429, 433-434; 526 NW2d 879 (1994); *Terrace Land Dev Corp v Seeligson & Jordan*, 250 Mich App 452, 454-455; 647 NW2d 524 (2002).

III. ANALYSIS

A. Claims against AALC

A member's right to bring an action in the name of a limited liability company is governed by MCL 450.4510, which provides:

A member may commence and maintain a civil suit in the right of a limited liability company if all of the following conditions are met:

(a) Either management of the limited liability company is vested in a manager or managers who have the sole authority to cause the limited liability company to sue in its own right or management of the limited liability company is reserved to the members but the plaintiff does not have the authority to cause the limited liability company to sue in its own right under the provisions of an operating agreement.

(b) The plaintiff has made written demand on the managers or the members with the authority requesting that the managers or members cause the limited liability company to take suitable action.

(c) Ninety days have expired from the date the demand was made unless the member has earlier been notified that the demand has been rejected or unless irreparable injury to the limited liability company would result by waiting for the expiration of the 90-day period.

(d) The plaintiff was a member of the limited liability company at the time of the act or omission of which he or she complains, or his or her status as a member devolved upon him or her by operation of law or pursuant to the terms of an operating agreement from a person who was a member at that time.

(e) The plaintiff fairly and adequately represents the interests of the limited liability company in enforcing the right of the limited liability company.

(f) The plaintiff continues to be a member until the time of judgment, unless the failure to continue to be a member is the result of action by the limited liability company in which the former member did not acquiesce and the derivative proceeding was commenced prior to the termination of the former member's status as a member.

Plaintiffs' complaint does not allege, nor do plaintiffs contend, that the required demand was made of AALC's members. Accordingly, the action was not properly brought with respect to AALC and all claims asserted by AALC were properly dismissed for this reason.

We disagree with plaintiff Litt that he was excused from complying with the demand requirement because it would be futile to expect Satwicz to consent to a lawsuit where she was named as a defendant and wrongdoer. The statute does not provide for an exception for futility. It is well settled that a court may not read into a statute that which is not within the manifest intent of the Legislature as indicated by the statute itself. *Tew v Hillsdale Tool & Mfg Co*, 268 Mich App 399, 408; 706 NW2d 883 (2005). The authority on which plaintiff Litt relies is distinguishable, because it applies to corporate shareholder derivative actions, not limited liability companies. See, e.g., *Burch v Norton Hotel Co*, 261 Mich 311, 314-315; 246 NW 131 (1933). Accordingly, we affirm the trial court's dismissal of all claims brought by AALC.

B. Claims against Lefcourt and Schwed

We agree that the trial court erred in additionally dismissing all claims against defendants Lefcourt and Schwed on the ground that they could not be individually liable for conduct

committed on behalf of a corporate entity. “It is a familiar principle that the agents and officers of a corporation are liable for torts which they personally commit, even though in doing so they act for the corporation, and even though the corporation is also liable for the tort.” *Hartman & Eichhorn Bldg Co, Inc v Dailey*, 266 Mich App 545, 549; 701 NW2d 749 (2005), quoting *Warren Tool Co v Stephenson*, 11 Mich App 274, 300; 161 NW2d 133 (1968). See also *Attorney Gen v Ankersen*, 148 Mich App 524, 557; 385 NW2d 658 (1986) (“It is beyond question that a corporate employee or official is personally liable for all tortious or criminal acts in which he participates, regardless of whether he was acting on his own behalf or on behalf of the corporation”). Nonetheless, for the reasons previously discussed, all claims brought by AALC against defendants Lefcourt and Schwed were properly dismissed for failure to comply with MCL 450.4510.

With respect to defendants Lefcourt and Schwed, this leaves only plaintiff Litt’s individual claim against Lefcourt for promissory estoppel. The trial court determined that this claim was barred by the statute of limitations.

A promissory estoppel claim is subject to the six-year statute of limitations for contract actions. MCL 600.5807(8); *Huhtala v Travelers Ins Co*, 401 Mich 118, 125; 257 NW2d 640 (1977). Promissory estoppel arises when (1) one party makes a promise, (2) which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person, (3) which does in fact induce such action or forbearance, and (4) in circumstances in which the promise must be enforced in order to avoid injustice. *State Bank of Standish v Curry*, 442 Mich 76, 83; 500 NW2d 104 (1993); *Ypsilanti Twp v Gen Motors Corp*, 201 Mich App 128, 132-133; 506 NW2d 556 (1993). A claim for breach of contract accrues when the promisor fails to perform under the contract. *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 245-246; 673 NW2d 805 (2003). By analogy, a claim for promissory estoppel accrues when the promisor fails to perform the alleged promise.

Plaintiff Litt’s promissory estoppel claim is based on defendant Lefcourt’s breach of his alleged promise to transfer Litt back to Detroit at the end of his second year in Atlanta. According to the complaint, Litt was transferred to Atlanta for a six-month assignment in 1996. In January 1997, “at the last minute,” Lefcourt extended the assignment to one year. Litt alleges that “[a]t the end of M. Litt’s first year in Atlanta, ASI asked M. Litt to stay in Atlanta for another year, which M. Litt reluctantly agreed to do provided that he could return to Detroit to manage ASI Detroit at the conclusion thereof.” The phrase “at the last minute” indicates that Litt was completing his six-month assignment in January 1997, when Lefcourt extended the assignment for another six months, i.e., until July 1997. Thus, Litt’s first year in Atlanta ended in July 1997, and he agreed to stay until July 1998 in reliance on Lefcourt’s promise to return him to Detroit. Consequently, accepting plaintiff Litt’s allegations in his complaint as true, Lefcourt breached the contract in July 1998, when he failed to transfer Litt back to Detroit. This occurred more than six years before Litt filed this action on March 15, 2005, therefore, the trial court properly dismissed Litt’s promissory estoppel claim against Lefcourt on the basis that it was barred by the statute of limitations.

C. Claims Against Satwicz

Finally, Litt challenges the trial court's dismissal of his individual claims against defendant Satwicz. We conclude that the trial court properly dismissed the breach of fiduciary duty claim, but erred in dismissing the breach of contract claim.

The trial court did not specifically explain why it was dismissing Litt's individual claims against Satwicz, although it generally stated that plaintiffs' "remaining claims" were untimely. However, Litt's breach of contract claim was based on Satwicz's conduct during the six-year period before this action was filed, and the breach of fiduciary duty claim was based on conduct committed during the three-year period before the complaint was filed. Accordingly, these claims are not barred by the six-year statute of limitations applicable to breach-of-contract actions, or the three-year statute of limitations that applies to claims for breach of fiduciary duty. MCL 600.5807(8) and (10); *Miller v Magline, Inc*, 76 Mich App 284, 313; 256 NW2d 761 (1977).

However, the trial court also cited MCR 2.116(C)(8) as a basis for dismissing Litt's claims. Satwicz argues that Litt could not sue her for breach of contract because § 6.1.9 of their operating agreement prohibits members of the company from suing each other without the other party's consent. However, § 6.1.9 requires members to obtain the consent of a majority of the membership to "institute, prosecute, defend, settle, compromise or dismiss lawsuits . . . brought on or in behalf or, or against, *the Company, or its property* in connection with activities arising out of . . . this Operating Agreement." This provision does not restrain members from bringing actions in their individual capacities against other members in their individual capacities. We therefore conclude that the trial court erred in dismissing this claim. Accordingly, we reverse the trial court's dismissal of plaintiff Litt's breach of contract claim against defendant Satwicz and remand for further proceedings.

We agree, however, that Litt's breach of fiduciary duty claim was properly dismissed. Satwicz correctly argues that Litt's pleadings fail to establish the existence of a fiduciary relationship between them. In *In re Karmey Estate*, 468 Mich 68, 74 n 2; 658 NW2d 796 (2003), our Supreme Court held that the term "fiduciary relationship" is a "legal term of art," and quoted the following definition from Black's Law Dictionary (7th ed):

A relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship. Fiduciary relationships—such as trustee-beneficiary, guardian-ward, agent-principal, and attorney-client—require the highest duty of care. Fiduciary relationships [usually] arise in one of four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer. [Bracketed material added by Supreme Court.]

The Court further noted that the term "confidential or fiduciary relationship" generally pertained to "relationships of inequality," and situations where one person may exercise dominion over another. *In re Karmey Estate, supra* at 74 n 3.

Plaintiff's allegations do not demonstrate that these characteristics are present in the relationship between Litt and Satwicz. They were business associates who held equal shares in AALC. Litt does not allege any facts suggesting that Satwicz had superiority, influence, control, or responsibility over him, or that she held a duty to advise him on business matters. He alleges that he relied on her to pursue AALC's interests while he attended to his responsibilities in Atlanta, but this division of duties between equal members of the company does not create the inequality inherent in a fiduciary relationship. Although Litt alleges that his distance from the Detroit office placed him at a disadvantage, this inconvenience does not establish that he was placed under Satwicz's control, influence, or responsibility. Litt's pleadings do not establish that a fiduciary relationship existed between him and Satwicz, consequently his breach of fiduciary duty claim fails as a matter of law.

In sum, we reverse the dismissal of plaintiff Litt's breach of contract claim against defendant Satwicz (count XI), but affirm the dismissal of all other claims.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Jessica R. Cooper