STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

[FILED: June 9, 2014]

JAMES OTTENBACHER,	:	
Plaintiff,	:	
VS.	:	**C.A. No. KC 08-1087**
	:	**(*Consolidated with)***
RALPH PALUMBO,	:	
PILGRIM TITLE INSURANCE COMPANY,	:	
and JONATHAN SAVAGE,	:	
Defendants.	:	

CHARLES E. FOGARTY	:	
	:	
VS.	:	**C.A. No. KC 08-1073**
	:	
RALPH PALUMBO, PILGRIM TITLE	:	
INSURANCE COMPANY, JONATHAN	:	
SAVAGE	:	

DECISION

STERN, J. Plaintiffs Charles Fogarty (Fogarty) and James Ottenbacher (Ottenbacher) filed pro se complaints against Defendants Ralph Palumbo (Palumbo) and Jonathan Savage (Savage) in Kent County Superior Court in mid-August 2008.[1] After retaining counsel in March 2009, the Plaintiffs' individual complaints were consolidated on June 11, 2009. Thereafter, on April 1, 2010, the Plaintiffs moved and were granted leave to amend their complaint to add Pilgrim Title Insurance Company (Pilgrim) as a Defendant. The case was transferred to the Business Calendar on May 13, 2013. Before the Court is Pilgrim's Motion for Summary Judgment.

[1] Fogarty's complaint against Palumbo was filed on August 14, 2008 as C.A. No. KC-08-1073. Ottenbacher's complaint against Palumbo was filed on August 18, 2008 as C.A. No. KC-08-1087.

I

Facts and Travel

According to the Plaintiffs, Fogarty owned a three hundred acre tract of land in Hopkinton, Rhode Island. Plaintiffs Fogarty and Ottenbacher, along with Grant Schmidt, M.D. (Schmidt) and William McComb (McComb) (collectively, Shareholders) became the four shareholders of Stone Ridge, Inc. (Stone Ridge), which purchased Fogarty's property from Fogarty's Chapter 11 bankruptcy estate in 1994. In either 2002 or 2003, the Shareholders transferred the property from Stone Ridge to Brushy Brook Development, LLC (Brushy Brook), which was, apparently, a holding company for Stone Ridge. The Shareholders, through Brushy Brook, sought to develop the property and obtained financing for their project through Pioneer Bank.

By late 2004, in the face of financial problems, internal squabbling, and, according to the Plaintiffs, a scheduled foreclosure of the property by Pioneer Bank, the Shareholders began to try to sell off the property. Ottenbacher and Fogarty, according to the Plaintiffs, wanted to obtain the property from Brushy Brook and retained Palumbo as a tax and financial advisor; and Savage, as an attorney, to accomplish their task. The Plaintiffs allege that Savage was to purchase the property from Brushy Brook and then enter into a separate option agreement with Fogarty and Ottenbacher for the property.

Savage—acting as an unincorporated entity called Boulder Brook Development Co. (Boulder Brook)—and Brushy Brook agreed on a $5.5 million deal for the purchase of the property. That deal, according to the Plaintiffs, was never consummated, and the purchase agreement, again according to the Plaintiffs, lapsed by May 2005. In June 2005, according to the

Plaintiffs, Ottenbacher—with Fogarty as his partner[2]—made an offer of $4.1 million for the property, and Schmidt, acting as Managing Member of Brushy Brook, agreed to that deal. The Plaintiffs claim that Ottenbacher sensed that Schmidt was considering reviving the original deal with Savage instead of closing on the deal with the Plaintiffs, and they allege that, consequently, Ottenbacher specifically instructed Schmidt and Savage not to proceed with the conveyance to Savage and Boulder Brook. The Plaintiffs claim that Schmidt and McComb agreed to sell the property to Ottenbacher and Fogarty, and the parties set a closing date for August 15, 2005. The Plaintiffs claim that $3.6 million was wired to the trust account of Attorney Mark Spangler (Spangler) prior to the date of the closing. On August 16, 2005, according to the Plaintiffs, Spangler was dispatched by the Plaintiffs to the office of the Hopkinton Land Evidence Records, and there Spangler discovered that Schmidt had transferred the property not to the Plaintiffs, but to Boulder Brook on the previous day.[3] The records that Spangler reviewed included nine "Municipal Lien Certificates" that were dated "08/12/2005.[4]" At the bottom of each of these one-page lien certificates, just above the signature of the Hopkinton "Tax Collector/Authorized Representative" in a section titled "CERTIFICATION" is the following words, appearing in regular-sized font:

[2] Pilgrim alleges that Ottenbacher and someone named Steve Kaufman would purchase the property, with Fogarty being paid ten percent of the purchase price and ten percent of all profits from the enterprise.

[3] The Plaintiffs maintain that Savage and Palumbo were Boulder Brook's principals.

[4] With respect to the content of the records he analyzed, Spangler testified in his deposition that:

> "I found a series of documents, including a warranty deed, from Brush Brook to Boulder Brook, and a mortgage deed from Boulder Brook to LR6-A and a mortgage deed from Boulder Brook to Brushy Brook, and there may have been municipal lien certificates, I don't recall if they were included in that recording." Spangler Tr. at 26.

> "This is to certify that the above is true and correct. Said Certification is given in accordance with 44-7-11 of the General Laws of Rhode Island, 1956, as of this 12th day of August, 2005.
>
> "Certificate requested by Pilgrim Title Ins [sic] Co., 50 Park Row West, S 102, Providence, RI 02903." Aff. of Elizabeth J. Cook-Martin, Ex. A.[5]

Ottenbacher and Fogarty, individually and acting pro se, sued Savage and Palumbo in August 2008, claiming that this conveyance was unauthorized and was executed in contravention of the Brushy Brook Operating Agreement. The Plaintiffs' individual cases were consolidated in June 2009. Subsequently, in response to Ottenbacher's Request for Production of Documents, the Plaintiffs obtained Palumbo's records. The Plaintiffs admit that they became aware, at that point, that Pilgrim had acted as the designated closing agent for the property and had closed on the deal despite numerous "irregularities" that the Plaintiffs allege should have been readily apparent to Pilgrim. Pilgrim was served with a subpoena on October 7, 2009. In response, Pilgrim provided the Plaintiffs with documents that the Plaintiffs claim reveal the extent of Pilgrim's role in the transaction; that Pilgrim knew that the Shareholders had not assented to the conveyance to Boulder Brook; and that Pilgrim was negligent in closing the deal with Boulder Brook. The Plaintiffs allege that it was only when they obtained these documents from Pilgrim that they came to understand Pilgrim's potential liability for negligence. Fogarty and Ottenbacher asserted negligence claims against Pilgrim in March and April 2010, respectively. Pilgrim has moved the Court for Summary Judgment, arguing that the complaint against it is barred by the statute of limitations.

[5] While Spangler testified in his deposition that the municipal lien certificates "[did not] affect the validity or invalidity or any substance of the transaction," Spangler Tr. at 28, he also admitted that the certification statements contained in those certificates "would've indicated they [i.e., Pilgrim] were involved in the transaction, at some level." Spangler Tr. at 30.

II

Standard of Review

Summary judgment is proper when "no genuine issue of material fact is evident from the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and the motion justice finds that the moving party is entitled to prevail as a matter of law." Smiler v. Napolitano, 911 A.2d 1035, 1038 (R.I. 2006) (quoting Rule 56(c)). When considering a motion for summary judgment, this Court must draw "'all reasonable inferences in the light most favorable to the nonmoving party."' Hill v. Nat'l Grid, 11 A.3d 110, 113 (R.I. 2011) (quoting Fiorenzano v. Lima, 982 A.2d 585, 589 (R.I. 2009)). The burden lies on the nonmoving party to "prove the existence of a disputed issue of material fact by competent evidence," rather than resting on the pleadings or mere legal opinions and conclusions. Hill, 11 A.3d at 113. Where it is concluded "'that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law,"' summary judgment shall enter. Malinou v. Miriam Hosp., 24 A.3d 497, 508 (R.I. 2011) (quoting Poulin v. Custom Craft, Inc., 996 A.2d 654, 658 (R.I. 2010)). However, "if the record evinces a genuine issue of material fact, summary judgment is improper." Shelter Harbor Conservation Soc'y, Inc. v. Rogers, 21 A.3d 337, 343 (R.I. 2011) (citations omitted).

III

Analysis

The applicable statute of limitations is a question of law to be determined by a trial justice. Kougasian v. Davol, Inc., 687 A.2d 459, 461 (R.I. 1997); Ashey v. Kupchan, 618 A.2d 1268, 1270 (R.I. 1993). Because this case involves a legal transaction facilitated by attorneys acting in their legal capacities, the Rhode Island statute of limitations for legal malpractice is

applicable here.[6] Section 9-1-14.3 of the Rhode Island General Laws governs "[l]imitation[s] on legal malpractice actions" and provides, in pertinent part, that "an action for legal malpractice shall be commenced within three (3) years of the occurrence of the incident which gave rise to the action." Sec. 9-1-14.3. The statute, however, also provides for an exception to when the statute of limitations on legal malpractice actions starts running. The so-called "discovery rule"—previously recognized in Rhode Island in the context of medical malpractice, Canavan v. Lovett, Schrefrin and Harnett, 862 A.2d 778, 783 (R.I. 2004)— was codified in § 9-14.3(2), and provides that:

> "In respect to those injuries due to acts of malpractice which could not in the exercise of reasonable diligence be discoverable at the time of the occurrence of the incident which gave rise to the action, suit shall be commenced within three (3) years of the time that the act or acts of legal malpractice should, in the exercise of reasonable diligence, have been discovered." Sec. 9-1-14.3.

The purpose of the discovery rule is "to protect individuals suffering from latent or undiscoverable injuries who then seek legal redress after the statute of limitations has expired for a particular claim." Canavan, 862 A.2d at 783.

In medical malpractice cases, our Supreme Court has established that "the discovery rule employs an objective standard." Bustamante v. Oshiro, 64 A.3d 1200, 1204 (R.I. 2013) (in concluding that the three-year statute of limitations in a medical malpractice claim began to run on the date that the plaintiffs were provided with the results of an MRI examination and a cancer diagnosis, the Supreme Court finds that the discovery rule does not require "perfect crystallization of the nature and extent of the injury suffered"). In other words, "[i]f a reasonable person in similar circumstances should have discovered that the wrongful conduct of the

[6] Although § 9-1-14.3 applies here, the same analysis would be applicable under the three-year statute of limitations for insurance malpractice actions under § 9-1-14.1.

defendant caused [his or] her injuries as of some date before the plaintiff alleged that [he or] she made this discovery, then the earlier date will be used to start the running of the limitations period." Bustamante, 64 A.3d at 1204 (citing Hanson v. Singsen, 898 A.2d 1244, 1249 (R.I. 2006) (internal quotations omitted)). This objective standard for limitations on causes of action has carried over to legal malpractice cases. Canavan, 862 A.2d at 783-784. In legal malpractice cases, "the objective standard [under the discovery rule] requires only that the plaintiff be aware of facts that would place a reasonable person on notice that a potential claim exists." Id. (citing Riemers v. Omdahl, 687 N.W.2d 445, 449 (N.D. 2004)). The clock begins to tick "not when the plaintiff has actual knowledge of alleged acts of malpractice, but rather when he becomes aware of facts or by exercising reasonable diligence could discover facts that would place a reasonable person on notice that a potential claim exists." Zanni v. Voccola, 13 A.3d 1068, 1071 (R.I. 2011). So, while a court will draw "all reasonable inferences" in the plaintiff's favor "to determine whether, in the exercise of reasonable diligence, [the] plaintiff should have discovered the alleged act of malpractice," Canavan, 862 A.2d at 784 (citing Richmond Square Capital Corp. v. Mittleman, 689 A.2d 1067, 1069 (R.I. 1997) (mem.)), the onus is squarely on the plaintiff to discover any claims of malpractice in light of such facts that would place him on notice that potential claims exist. Zanni, 13 A.3d at 1072.[7]

[7] See also Mendes v. Factor, 41 A.3d 994 (R.I. 2012) (in holding that the discovery rule was inapplicable to the plaintiffs' cause of action against their attorneys, the Supreme Court finds that the plaintiffs were aware of the acts they alleged in their complaint by 1987, notwithstanding the plaintiffs' contention that the "true nature and scope of the causes of action did not become sufficiently clear to [them] until 2008"); Guay v. Dolan, 685 A.2d 269, 271 (R.I. 1996) (Supreme Court affirms trial court's finding that if the plaintiff had exercised reasonable diligence in attempting to obtain copies of purportedly deficient jury instructions, the plaintiff would have discovered the acts of alleged malpractice well before the date he actually received those copies, and therefore the statute of limitations began to run no later than the last day of the trial in which the jury instructions were delivered); Penn-Dutch Kitchens, Inc. v. Grady, 6551 A.2d 731 (R.I. 1994) (Supreme Court holds that plaintiff's legal malpractice action against his attorney was

Pilgrim argues that the Plaintiffs' claims against it are barred by § 9-1-14.3 because the property transfer to Boulder Brook Development occurred on August 15, 2005, and the Plaintiffs did not file their complaint against Pilgrim until March and April 2010—almost five years later. Pilgrim contends that the Plaintiffs learned—or should have learned—on August 16, 2005 that Pilgrim was involved in the property transfer, and that the public records that the Plaintiffs' own attorney searched and reviewed on that day should have alerted the Plaintiffs of Pilgrim's involvement. Pilgrim asserts that the Plaintiffs' cause of action against Pilgrim was discoverable as of August 16, 2005 in the exercise of reasonable diligence, and it points to statements by the Plaintiffs that they knew that Schmidt had no authority to transfer the property from Brushy Brook to Boulder Brook Development without the Plaintiffs' assent; and to municipal lien certificates recorded contemporaneously with the property transfer deed that explicitly described Pilgrim as the closing agent for the deed. Pilgrim also points out that the Plaintiffs were themselves experienced real estate professionals and developers, and that they had numerous attorneys available to them both before and after the August 15, 2005 sale of the property. Pilgrim alludes to a significant volume of legal activity occurring well within the three-year period after August 16, 2005, and that these attorneys had, in fact, special knowledge of real estate transactions; in particular, knowledge of what to look for as to who the closing agent for Boulder Brook was and whether that closing agent breached any duty. Pilgrim concludes that there is no genuine issue of fact as to when the Plaintiffs could have identified their cause of action against Pilgrim, and that there is no question that Pilgrim's participation in the allegedly unlawful property conveyance was readily discoverable.

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time-barred after finding that the plaintiff should have known about the defendant's alleged negligent failure to timely file a writ of attachment by the time his other attorney conceded as much in bankruptcy court—not at the time the plaintiff allegedly suffered his injury on the date the bankruptcy court rendered its final decision).

The Plaintiffs aver that they did not discover and could not have reasonably discovered Pilgrim's alleged negligence from any documents that were publicly available because the property transfer was a secretive fraudulent transaction—it was designed to be consummated without the Plaintiffs' knowledge or participation. The Plaintiffs deny knowing on August 15, 2005 that a closing on the property had taken place, and contend that the documents memorializing the closing do not disclose Pilgrim's actions that give rise to its liability in this cause of action. The Plaintiffs concede that they dispatched Spangler on August 16, 2005 to search the Land Evidence Records in anticipation of the sale of the property to the Ottenbacher partners, and they concede that Spangler, at that point, discovered the allegedly fraudulent transfer to Boulder Brook. But, the Plaintiffs contend that despite this reasonable diligence on the part of the attorney, they were unable to discover Pilgrim's potential liability and so the statute of limitations should not be deemed to have begun running at that time. The Plaintiffs argue that the appearance of Pilgrim's name on the Municipal Lien Certificate recorded in the Land Evidence Records did not give rise to any knowledge of Pilgrim's potential negligence because it was, according to the Plaintiffs, merely a "customary recording" by a closing attorney which would not have raised any red flags. It is the Plaintiffs' position that they had no reason to suspect that an outside closing agent—i.e., Pilgrim—would be involved in the fraudulent transaction because when the Plaintiffs dealt with defendant Savage in arranging the original deal, it was Savage himself who had arranged for his law firm to prepare all the legal documents necessary for the consummation of that agreement. The Plaintiffs argue that Savage's law firm "was well-known for its expertise in transactional work," and so the Plaintiffs had no reason to think that a company like Pilgrim would be retained to assist in completing the closing. The Plaintiffs claim that it was not until Defendant Palumbo's response to document requests that

they learned of Pilgrim's involvement in the closing, and that it was not until the Plaintiffs obtained documents through discovery in October 2009 that the Plaintiffs acquired their "first glimpse" of Pilgrim's purported malfeasance.

The Plaintiffs cite three Rhode Island Supreme Court cases in support of their contention that their cause of action against Pilgrim is not time-barred under § 9-1-14.3: Canavan, 862 A.2d at 778; Sharkey v. Prescott, 19 A.3d 62 (R.I. 2011); and Richmond Square Capital Corp., 689 A.2d at 1067. In each of these cases, the Supreme Court permitted the plaintiffs to avail themselves of the discovery rule after finding that the plaintiffs, in exercising reasonable diligence, could not have discovered facts that would have placed a reasonable person on notice that a potential claim against the defendants existed. In Canavan, for instance, the Court found that certain letters from an insurance company to the plaintiff—the victim of a serious vehicle accident—were not enough to put the plaintiff on notice that his attorney had potentially been negligent in his handling of the plaintiff's claim. The Court was specific in pointing out that not only was the plaintiff not actually aware of any facts on which he should have, in exercising reasonable diligence, launched an investigation against his attorney's law firm, but also that the plaintiff's attorney was affirmatively "shielding" the plaintiff from the reason why the insurance claim was denied in an effort to cover up his own alleged malpractice. Similarly, in Sharkey, the Court found that there was a genuine issue of fact as to whether or not the plaintiff had registered a complaint to the defendant about the defendant's handling of the plaintiff and her husband's estate plan. It was the Court's opinion that whether or not this communication had in fact occurred was material to the question of whether or not the plaintiff was aware at that particular moment that something had gone wrong, and therefore, whether or not notice of a potential claim against the defendant had attached by that point. In Richmond Capital Corp., it was the

defendant attorney's assurance to the plaintiff that he would "take care" of a problem involving past-due property taxes that the Court found raised a genuine issue as to whether or not the plaintiff could have reasonably been charged with awareness that this lawyer had committed malpractice, thereby delaying the running of the statute of limitations by two months.

Each of these cases cited by the Plaintiffs, however—although they are instructional to a court seeking to apply the discovery rule to causes of action that would otherwise be time-barred—are reliant on the existence of factors that called into question the moment when a plaintiff should have been reasonably made aware that he had been wronged and that a potential cause of action existed as against the defendant. Such circumstances are not apparent here from the Plaintiffs' filings on the record, even when considered in a light most favorable to them. There was no question here that the Plaintiffs knew and understood on August 16, 2005 that they had been the victims of fraud—that the property belonging to their company had been unlawfully conveyed, without their permission. Moreover, the Plaintiffs were on notice at that precise moment—by virtue of Pilgrim's name appearing on the lien certificates—that Pilgrim was involved in the allegedly illicit transaction as a closing agent. See Spangler Tr. at 30.

It is well established, in Rhode Island, that "the discovery rule concerns discovery that one has suffered an injury, not the discovery of the identity of the party allegedly responsible for causing the injury." Renaud v. Sigma-Aldrich Corp., 662 A.2d 711, 715 (R.I. 1995) (emphasis added). It is "when the fact of the injury is unknown to the plaintiff when it occurs" that the discovery rule becomes applicable. Martin v. Howard, 784 A.2d 291, 299 (R.I. 2001) (emphasis added). The Plaintiffs' "certitude of negligence by [Pilgrim] cannot be the deciding factor to determine when the statute of limitations begins to run." Benner v. J.H. Lynch & Sons, Inc., 641 A.2d 332, 338 (R.I. 1994). Applying the discovery rule exception—as the Plaintiffs would have

it—to the statute of limitations rule would swallow up the statute of limitations and "would completely destroy the effectiveness of a limitations period." Benner, 641 A.2d at 338. The failure by the plaintiffs to bring suit against Pilgrim until March and April 2010 evidences either neglect or willful intent to postpone the action, and not an inability to discover that a cause of action existed. See Von Villas v. Williams, 117 R.I. 309, 315, 366 A.2d 545, 549 (1976). It was readily apparent from Spangler's review of the Land Evidence Records on August 16, 2005 that the Plaintiffs had suffered an injury the day before. "A potential plaintiff is under an affirmative duty to investigate diligently a claim and is not allowed to use the discovery rule to postpone indefinitely the running of the statute of limitations." Benner, 641 A.2d at 338. Because the Plaintiffs had discovered on August 16, 2005 that they had been defrauded, and because exercising reasonable diligence at that point would have revealed Pilgrim's potential liability for its role in the alleged fraudulent conveyance because it would have been apparent to a reasonable person that Pilgrim was involved in the transaction at some level, the Plaintiffs may not avail themselves of the discovery rule to postpone the running of the statute of limitations until they had achieved certitude of Pilgrim's negligence.

The Rhode Island Supreme Court case of Guay v. Dolan, 685 A.2d 269 (R.I. 1996) is particularly illuminating here. In Guay, the Supreme Court affirmed the Superior Court's finding that the plaintiff's cause of action against his attorney was time-barred. Guay, 685 A.2d at 271. At bottom in that case was alleged malpractice committed by the attorney over the course of the plaintiff's lawsuit against a third party. The plaintiff received an adverse jury verdict in his case, but waited eleven months before seeking a copy of the jury instructions that were used in that trial. Id. at 270. The defendant finally obtained the instructions two months later, and filed his lawsuit two years after that. Guay, 685 A.2d at 270. The Supreme Court

rejected the plaintiff's argument that the three-year statute of limitations began running on the date that the plaintiff received the instructions, and found that the statute of limitations began running on the date that the jury returned its verdict at the conclusion of the plaintiff's trial. Id. at 271. The Supreme Court concluded that if the plaintiff had exercised reasonable diligence rather than waiting eleven months before beginning his quest for copies of the jury instructions, the plaintiff "could have discovered any alleged infirmities in the requested jury instructions, as well as the final jury instructions, well before" he actually got ahold of the instructions. Id. The Court held that the plaintiff "should have discovered the acts of alleged malpractice at or about the time of the conduct that allegedly gave rise to his claims"—i.e., at or about the time the jury returned its verdict in his trial. Id. Just like the plaintiff in Guay, the Plaintiffs here should have discovered the acts of alleged malpractice at or about the time of the conduct that allegedly gave rise to their claims—i.e., at or about the time Spangler discovered the illicit conveyance of the property when he checked the Land Evidence Records on August 16, 2005. The operative date for the running of the statute of limitations is the discovery that the Plaintiffs had suffered an injury. Renaud, 662 A.2d at 715. That the lien certificates, filed contemporaneously with the conveyance deeds, state clearly that they were requested by "Pilgrim Title Ins [sic] Co." was enough to attach notice to the Plaintiffs of Pilgrim's potential liability in the transaction.

IV

Conclusion

Finding no genuine issue of material fact that Pilgrim's potential liability to the Plaintiffs' owing to its involvement in the alleged fraudulent conveyance was discoverable as of August 16, 2005—the date that the Plaintiffs became aware that the conveyance had taken place without their authorization—the Court hereby grants Pilgrim's Motion for Summary Judgment. Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	James Ottenbacher v. Ralph Palumbo, et al. Charles E. Fogarty v. Ralph Palumbo, et al.
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COURT:	Kent County Superior Court
DATE DECISION FILED:	June 9, 2014
JUSTICE/MAGISTRATE:	Stern, J.
ATTORNEYS:	
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