

# TWENTIETH JUDICIAL CIRCUIT OF VIRGINIA

Douglas L. Fleming, Jr., Chief Judge  
Stephen E. Sincavage, Judge  
Jeanette A. Irby, Judge  
James P. Fisher, Judge  
James E. Plowman Jr., Judge



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4 May 2021

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In re:

Thom Taengsap, et al. v. Dr. Phonexay Mingsisouphanh, et al.  
Case No. CL20-484  
Circuit Court of Fauquier County

Dear Counsel,

This matter came before the Court on April 13, 2021 for hearing on Defendant Mingsisouphanh's Plea in Bar Re: Statute of Limitations, filed November 3, 2020. The plea was filed in response to the Complaint filed by the Plaintiffs in this matter on October 13, 2020. Defendant Mingsisouphanh posits that count 1 (breach of fiduciary duty), count 3 (fraud) and count 4 (conversion) are time-barred.

The Court has received and reviewed the Plea in Bar (with brief in support interlined) and the Plaintiffs' Opposition. At hearing, no evidence was presented. The Court heard argument from Mr. Wilson (for Defendant Mingsisouphanh) and Mr. Ader (for the Plaintiffs) and took the matter under advisement.

Upon review of the pleadings and in consideration of the arguments of counsel, the Court rules as follows:

**1) The plea in bar to count 1 (breach of fiduciary duty) is sustained.**

The statute of limitations period for a common-law breach of fiduciary claim is two years as prescribed in §8.01-248. The Court is persuaded upon review of applicable Virginia law and by the reasoning of the U.S. District Court for the Eastern District of Virginia in Jones v. Shooshan, 855 F. Supp. 2d 594 (E.D. Va. 2012) that a breach of fiduciary duty claim accrues at the time of the first act that causes the breach, and not at the discovery thereof. In the instant matter, based on the complaint, the first act of breach occurred no later than April 2015, requiring the filing of a complaint by April 2017 to meet the statute of limitations.

The Court is not persuaded by the Plaintiff's position that §8.01-245 (A) and (B) prescribe the applicable time limitation on filing this claim. The Court finds that Count 1 is neither an action "brought upon the bond of any fiduciary" nor a suit to surcharge or falsify the subject account. Count 1 is a claim for a common law tort. Accordingly, the Court finds also that this claim also does not constitute a "suit to hold [a] fiduciary or his sureties liable for any balance stated in such account." A suit for breach of fiduciary duty is a suit to prove a civil wrong against the defendant, not to secure liability on a balance. That damages for a proven breach of fiduciary duty may be based, in part, on unpaid balances is merely incidental and does not convert the nature of the suit to those identified in §8.01-245 (A) and (B). The claim for breach of fiduciary duty is barred.

**2) The plea in bar to count 3 (fraud) is sustained.**

Under §8.01-243, the statute of limitations period for fraud is two years after the cause of action accrues. Virginia law holds that an action for fraud accrues when the fraud is discovered, or when, by the exercise of due diligence, it should have been discovered. Due diligence has been defined as “[s]uch a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.” Schmidt v. Household Finance Corp., 276 Va. 108 (2008). The Plaintiffs bear the burden of establishing that they acted with due diligence yet did not discover the subject fraud no earlier than October 14, 2018.

No evidence was adduced at the hearing, so the Court relies on the complaint to establish the due diligence. Even when taking the Plaintiffs’ allegations as true, the complaint states no facts demonstrating that, despite the exercise of due diligence, they could not have discovered the alleged fraud prior to October 13, 2018. The Court takes note of the circumstances of the Plaintiffs’ residence in a remote area of a foreign country, the language barrier, and the solicitousness (and the implication that such was with the intent to manipulate) of Defendant Mingsisouphanh toward the Plaintiffs.

However, there is no demonstration that the Plaintiffs took any steps that would amount to prudent, active or assiduous effort to investigate, confirm or question any aspect of their rights and/or Defendant Mingsisouphanh’s obligations as it relates to the instant controversy. There is no demonstration that their distance from Fauquier County, the language barrier, or any action by Defendant Mingsisouphanh frustrated, misdirected, or blocked their access to information that would have alerted them to the improprieties they now allege. The Court finds that their inaction and unforced and apparent blind faith in Defendant Mingsisouphanh do not amount to due diligence. The fraud claim is therefore barred.

**3) The plea in bar to count 4 (conversion) is sustained.**

A conversion claim must “be brought within five years after the cause of action accrues.” See Mackey v. McDannald, 298 Va. 645 (2020). Defendant Mingsisouphanh’s reliance on Forest Lakes v. United Land Corp., 293 Va. 113 (2017) is apt. As recited therein, the accrual of a cause of action injury to property, such as conversion, “take[s] place when the first measurable damage occurs.” Id. at 124.

The allegations in paragraphs 24 through 29 and 41 of the Complaint set out a claim of conversion that began between February 2015 and April 2015 when Defendant Mingsisouphanh is alleged to have not paid over to the Plaintiffs all of funds due them at that time.

The Court is not persuaded by Plaintiff's position that the five-year statute of limitations for conversion began to run on June 7, 2016, when the first accounting was filed. Notwithstanding what is reported in the accounting, injury in the claim as alleged by the Plaintiffs would be sustained no later than April 2015. Similar to Forest Lakes, the instant claim involves ongoing damages which began at a discrete time. In the instant claim, the Plaintiffs would have incurred injury starting at a specific albeit undefined time after the final order in the wrongful death case was entered and by April 2015 when Defendant Mingsisouphanh did not pay over the funds due to the Plaintiffs. The Plaintiffs, per the instant claim, would have suffered additional and cumulative injury each day that Defendant Mingsisouphanh did not pay over the amounts due to them.

Even with proper consideration of the tolling of statutes of limitations due to the Virginia Supreme Court's Orders declaring and extending a judicial emergency due to the COVID-19 pandemic, the filing of the conversion claim was untimely after July 20, 2020 and is therefore barred.

Mr. Wilson shall draft an Order consistent with and incorporating this letter opinion. The Order shall be circulated to counsel for endorsements and exceptions of counsel and submitted for entry.

Very truly yours,

A handwritten signature in black ink, appearing to read "Stephen E. Sincavage". The signature is stylized and somewhat cursive, with a long horizontal stroke extending to the right.

Stephen E. Sincavage, Judge