

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF YORK

CASE NO.: 2012-CP-46-2008

Eileen Critcher,

Plaintiff,

v.

ORDER FOR SUMMARY JUDGMENT

Susan Critcher Rhodes, individually and as
Personal Representative of the Estate of
Roy G. Critcher; Wanda C. Akers and
Belinda Critcher Thomas;

Defendants.

FILED - RECEIVED
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DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

This matter came before me on May 16, 2013, upon Defendants' Motion for Summary Judgment. Representing the parties were: J. Martin Foster for Plaintiff; and, B. Michael Brackett for Defendants. The Defendants moved for summary judgment on all causes of action.

In support of the motion, Defendants filed the transcript of Plaintiff's deposition and Plaintiff's answers to interrogatories, and submitted a detailed Memorandum of Law. Plaintiff submitted nothing additional in opposition to the motion.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56, SCRPC; *Osborne v. Adams*, 346 S.C. 4, 550 S.E.2d 319 (2001); *South Carolina Elec. & Gas v. Town of Awendaw*, 351 S.C. 491, 570 S.E.2d 542 (Ct.App. 2002). In *Russell v. Wachovia Bank*, 353 S.C. 208, 578 S.E.2d 329 (2003), the law of summary judgment is explained: "When opposing a summary judgment motion, the nonmoving party must do more than 'simply show that there is a metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial.'" *Russell v. Wachovia Bank*, 353 S.C. 208, 220, 578 S.E.2d 329, 335 (2003), citing *Baughman v. American Telephone & Telegraph Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). The party responding to a summary judgment motion may not rest on the allegations in his pleadings, but must set forth specific facts showing a genuine issue for trial. *Burry & Son Homebuilders, Inc., v. Ford*, 310 S.C. 529, 426 S.E.2d 313 (1992). To be

considered by the Court in deciding a summary judgment motion, submissions must contain specific probative facts and not just conclusory allegations. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990) (“The object of [Rule 56] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit.”); *Zarecki v. Nat'l R.R. Passenger Corp.*, 914 F.Supp. 1566, 1574 (N.D.Ill. 1996) (“An affidavit that does not set forth the facts and reasoning used in making a conclusion amounts to nothing more than a denial of the adverse party's pleading.”). In this case, Plaintiff's “facts” were in her deposition transcript, rather than in an affidavit, but the same standard applies.

Summary judgment can be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be “no genuine issue as to any material fact,” since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Baughman v. American Telephone & Telegraph Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991).

DISCUSSION

Based on the entire record, I find and conclude as follows.

Plaintiff's Amended Complaint generally alleges that Plaintiff had funds on deposit in a joint bank account with Roy Critcher, the Decedent, and that one or more of the Defendants improperly withdrew money from that account prior to Decedent's death, thereby converting Plaintiff's funds. There are numerous causes of action, alleging entitlement to relief on different legal theories; however, all are predicated upon the same facts.

1. Summary Judgment as to Claims Against Decedent Roy Critcher

In a September 24, 2012, Order, this Court has already dismissed Plaintiff's claims against Roy Critcher, with prejudice. Additionally, any claim or cause of action Plaintiff may have had against Roy Critcher, which arose before his death, are now time-barred. S.C. Code Ann. § 62-3-803(a) (1976, as amended) requires such claims against decedents to be presented within the earlier of eight months after the date of the first publication of notice to creditors, or one year after the decedent's death. Plaintiff admitted that her claims are based on things that happened before Roy Critcher died, so, the absolute deadline is one year after the date of his death. Roy Critcher died September 1, 2010. Consequently, actions for claims against him arising before his death must have been commenced not later than September 1, 2011. This action was filed on June 1, 2012, well beyond expiration of the one-year claims period. Those

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claims are, therefore, barred.

2. Summary Judgment as to Defendant Rhodes, as Personal Representative

In the September 24, 2012 Order, I have already dismissed Plaintiff's claims against Rhodes, as personal representative, with prejudice.

Additionally, Plaintiff admitted in her deposition that her claims are for events that occurred before Roy Critcher died. Thus, any claim against Rhodes, as personal representative, for claims arising before Roy Critcher's death, are also time-barred pursuant to § 62-3-803(a).

3. Summary Judgment in Favor of Defendants Akers and Thomas

After a thorough review of Plaintiff's deposition transcript, I find no facts that support the claims made against these Defendants. Plaintiff candidly admitted in her deposition testimony that she has no evidence implicating these Defendants in the events alleged in the Amended Complaint, and does not have a claim against either of these Defendants. Thus, they are entitled to summary judgment.

4. Summary Judgment in Favor of Defendant Rhodes, Individually

The only matters left for consideration are Plaintiff's allegations and causes of action against Defendant Rhodes, individually, for actions that occurred before Roy Critcher's death. The only possible factual basis for such claims against Rhodes relates to the withdrawal of \$41,000 from Wachovia Bank, account number 3899, on Aug. 1, 2008.

a. Statute of Limitations

As to that withdrawal, the statute of limitations has clearly run as to every alleged cause of action based on the withdrawal. The applicable statutes of limitations are found in S.C. Code Ann. §§15-3-530 and 535.

[A] statute of limitations is "a statute of repose, . . . founded on motives of public policy" and "after the lapse of a prescribed time, fixed arbitrarily, . . . the doors of the court are no longer open to him for the enforcement of a claim which he has neglected to assert within the prescribed time;" statutes of limitations "are not simply technicalities" and serve to "stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs"; "[l]imitation is not merely a presumption" but "a rule of law." *Whitfield Const. Co. v. Bank of Tokyo Trust Co.*, 338 S.C. 207, 225, 525 S.E.2d 888, 898 (Ct.App. 1999), footnote 27, quoting *Amaker v. New*, 33 S.C. 28, 34, 11 S.E. 386, 387 (1890); internal citations omitted.).

The statute of limitations for a tort action is three years. S.C. Code Ann. § 15-3-530(5).


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See Turner v. Milliman, 381 S.C. 101, 671 S.E.2d 636 (Ct.App. 2009). A tort action must be commenced not later than three years after the date when a cause of action reasonably ought to have been discovered. S.C. Code Ann. §15-3-530 and 535; *Rumph v. Massachusetts Mut. Life Ins. Co.*, 357 S.C. 386, 593 S.E.2d 183 (Ct. App. 2004). The date on which discovery of a cause of action should have been made is an objective, rather than subjective, question. *Rumph, supra*.

Whether Plaintiff actually knew she had a claim is not the test, rather, the court must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some claim against another person might exist. *Id.* Under the discovery rule, the limitations period commences when the plaintiff knows or by the exercise of reasonable diligence should know that she has a cause of action. S.C. Code Ann. §15-3-535. That "... the injured party may not at that time '... comprehend the full extent of the damage is immaterial.'" *Doe v. Crooks*, 364 S.C. 349, 352, 613 S.E.2d 536, 538 (2005), *citing Dean v. Ruscon Corp.*, 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996). Moreover, "[t]he statute is not delayed until the injured party seeks advice of counsel or develops a full-blown theory of recovery; instead, reasonable diligence requires a plaintiff to 'act with some promptness.'" *Maher v. Tietex Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct.App.1998).

The three-year limitation period, therefore, applies to most of Plaintiff's causes of action. A cause of action for civil conspiracy sounds in tort. *Gordon v. Busbee*, 397 S.C. 119, 723 S.E.2d 822 (Ct.App. 2011). Conversion is also a tort that is subject to the three-year limitations period. *Hennes v. Shaw*, 397 S.C. 391, 725 S.E.2d 501 (Ct.App. 2012). So, also, are fraud and constructive fraud. *See Rumph v. Massachusetts Mut. Life Ins. Co.*, *supra*; and, *Dorman v. Campbell*, 331 S.C. 179, 500 S.E.2d 786 (Ct.App. 1998). The same applies to a claim of breach of fiduciary duty. *See Mazloom v. Mazloom*, 382 S.C. 307, 675 S.E.2d 746 (Ct.App. 2009).

Constructive trust, identified by Plaintiff as her 10th and 11th causes of action, does not stand on its own as a claim or cause of action. It is solely an equitable remedy that must be based on some underlying cause of action for which such an equitable remedy is appropriate. *Hale v. Finn*, 388 S.C. 79, 694 S.E.2d 51 (Ct.App. 2010) (a claim for imposition of a constructive trust is not an independent cause of action . . . it is a flexible equitable remedy . . .) Without an actionable or enforceable underlying cause of action, due to the expiration of the statute of limitations, the equitable remedy of constructive trust is unavailable.

Plaintiff knew, objectively, on October 31, 2008, that Wachovia account no. 3899 then held only \$2,500, and she was closed the account that day. If Plaintiff thought that the account



balance was too low and that funds were wrongly withdrawn from the account, some of which she claims was hers, she had that notice at the very latest on October 31, 2008. Thus, she knew that some claim against another person might exist for funds taken that allegedly belonged to her. *See Rumph, supra*. In her deposition, Plaintiff was asked "So as of October 30, 2008, you knew that money you thought should have been in that account was not there?" She answered: "Right." This case was not commenced until June 1, 2012, which was 3 years, 7 months, after the statute of limitations began to run on October 31, 2008, well after the expiration of the limitation period.

Plaintiff argued that because Defendant Rhodes is a resident of the State of Virginia, the statute of limitations is tolled pursuant to S.C. Code Ann. §15-3-30. § 15-3-30 does not toll the statute of limitations when the nonresident defendant is amenable to personal service, and the defendant is subject to the personal jurisdiction of South Carolina courts, which is the case here. The running of the statute is suspended only when the name and location of the defendant are not known to the Plaintiff. *Blyth v. Marcus*, 335 S.C. 363, 517 S.E.2d 433 (1999). Thus, § 15-3-30 is unavailable to the Plaintiff to avoid the operation of the statute of limitations in this case.

b. Other grounds for dismissal

In addition to the statute of limitations, other deficiencies with Plaintiff's claims warrant granting summary judgment in favor of the Defendant Rhodes, individually.

With respect to claims of civil conspiracy (causes of action 1, 2 and 3), Plaintiff has neither alleged, nor shown special damages. *Vaught v. Waites*, 300 S.C. 201, 387 S.E.2d 91 (Ct. App. 1989) (damages for conspiracy must go beyond the damages alleged in other causes of action).

The breach of fiduciary duty causes of action (4 and 5) relate to the same alleged improper withdrawal, and cannot escape the expiration of the statute of limitations. Further, in the 4th cause of action, Plaintiff alleges that Rhodes breached fiduciary duties owed to Roy Critcher. Even if true, Plaintiff would be a stranger to any fiduciary relationship, and would not suffer damage resulting from any breach of duty. Nor is there any showing that Plaintiff would be a real party in interest for pursuit of a cause of action on behalf of Roy Critcher, the decedent.

The 5th cause of action also asserts a breach of fiduciary duty claim. It, too, relates to the alleged improper withdrawal. However, there is no evidence in the record that Rhodes, individually, was a fiduciary in relation to Plaintiff or owed fiduciary duties to her.

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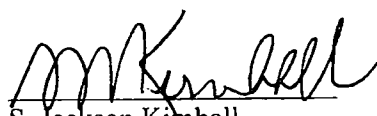
The 6th and 7th causes of action allege the tort of conversion. "Conversion is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or to the exclusion of the rights of the owner." *Hawkins v. City of Greenville*, 358 S.C. 280, 294, 597 S.E.2d 557, 562 (Ct.App. 2004); *Crave v. Citicorp Nat Services, Inc.*, 313 S.C. 70, 437 S.E. 2d 50 (1993). To prove conversion, a claimant must establish title to, or right to possession of property at time of conversion. *Crave v. Citicorp Nat Services, Inc.*, 313 S.C. 70, 73, 437 S.E. 2d 50, 52 (1993). With respect to the conversion, Plaintiff's claims fail on at least two counts. First, on August 1, 2008, the account belonged solely to Roy Critcher, which was established solely in his name, and Plaintiff had no legal claim to any funds withdrawn on August 1, 2008. Secondly, even if Rhodes withdrew the disputed funds on August 1, 2008, she had the right to do so, using Roy Critcher's Power of Attorney granted to her.

The 10th and 11th causes of action seek the imposition of a constructive trust. However, a constructive trust serves as an equitable remedy that requires a person holding title to property to convey that property to someone more deserving to hold the title. The inequitable circumstances justifying the imposition of a constructive trust include such wrongdoing as fraud, breach of fiduciary duty, and breach of a confidential relationship or undue influence. S. Alan Medlin, *The Law of Wills and Trusts*, Vol. I, Estate Planning in South Carolina (2002) §512. As already discussed, constructive trust does not stand on its own as a claim or cause of action. It is solely an equitable remedy that must be based on some underlying cause of action for which such an equitable remedy is appropriate. *Hale v. Finn*, 388 S.C. 79, 694 S.E.2d 51 (Ct.App. 2010). Without an actionable or enforceable underlying cause of action, which is the case here, the equitable remedy of constructive trust is unavailable.

Therefore, based on the record presented and the discussion herein, it is ordered that Defendants' Motion for Summary Judgment be granted, and the Amended Complaint is hereby dismissed with prejudice.

AND IT IS SO ORDERED.

June 20, 2013


S. Jackson Kimball
Special Circuit Court Judge
York County

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STATE OF SOUTH CAROLINA
 COUNTY OF YORK
 IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2012 CP-46-2008

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SEP 24 2013

EILEEN CRITCHER,

SUSAN CRITCHER RHODES, et. al.

SC Court of Appeals

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: B. Michael Brackett	Attorney for : <input type="checkbox"/> Plaintiff <input checked="" type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : Summary Judgment Order attached

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Summary Judgment in favor of Defendants on all causes of action		\$N/A
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

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 2013 JUN 24 10:57 AM
 DAVID HAMILTON
 C.C. C.P. & G.S.
 YORK COUNTY, S.C.

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Spec. [Signature]
 Circuit Court Judge

3063
 Judge Code

June 21 2013
 Date

