

Biz

STATE OF SOUTH CAROLINA )  
COUNTY OF GREENVILLE )

IN THE COURT OF COMMON PLEAS )  
THIRTEENTH JUDICIAL CIRCUIT )

EMIL P. KONDRA individually, and as )  
Trustee of the Emil P. Kondra )  
Revocable Trust, EMIL P. KONDRA, )  
LLC, EMIL P. KONDRA FAMILY )  
TRUST, EILEEN SAXTON AND )  
DOUGLASS E. KONDRA, as Trustees )  
of the Emil P. Kondra Family Trust, )  
DOUGLASS E. KONDRA, HELEN )  
PERRY, and LAWRENCE F. D' )  
ALESSIO, )

Plaintiffs, )

vs. )

ROBERT A. NITSCH and VERONICA )  
G. NITSCH, Individually, and as )  
Trustees of the Amended and Restated )  
Veronica G. Nitsch Revocable Trust and )  
the Amended and Restated Robert A. )  
Nitsch Revocable Trust, )

Defendants. )

John M. Campbell, Jr., Esq., )

Plaintiff, )

vs. )

ROBERT A. NITSCH and VERONICA )  
G. NITSCH, Individually, and as )  
Trustees of the Amended and Restated )  
Veronica G. Nitsch Revocable Trust and )  
the Amended and Restated Robert A. )  
Nitsch Revocable Trust, )

Defendants. )

Civil Action Nos. 2012-CP-23-06209 )  
2012-CP-23-06211 )

2015 DEC 21 AM 10 48

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENSINER

2015 DEC 21 AM 10 47

PAUL B. WICKENSINER

ORDER GRANTING SUMMARY

JUDGMENT RECEIVED

JAN 25 2016

SC Court of Appeals

This matter came before me on Motions for Summary Judgment filed on October 5, 2015  
by Plaintiffs Emil P. Kondra individually, and as Trustee of the Emil P. Kondra Revocable Trust;  
Emil P. Kondra, LLC; Emil P. Kondra Family Trust; Eileen Saxton and Douglass E. Kondra, as

#1  
by

Trustees of the Emil P. Kondra Family Trust; Douglass E. Kondra; Helen Perry; and Lawrence D'Alessio (collectively "the Kondra Plaintiffs") and Plaintiff John M. Campbell, Jr., Esq. ("Campbell") as to the counterclaims asserted by Robert A. Nitsch and Veronica G. Nitsch (collectively the "Motions"). The Motions are based upon the Discovery Referee's finding that the statute of limitations on the Nitsches' counterclaims expired. The Discovery Referee's finding was based upon the affidavits of Veronica Nitsch submitted to him during proceedings concerning certain discovery issues.

The Motions were heard before me on Thursday, December 3, 2015. The Kondra Plaintiffs and John M. Campbell appeared and were represented by A. Marvin Quattlebaum, Jr. and Samuel W. Outten, of Nelson Mullins Riley and Scarborough, LLP. The Nitsches appeared and were represented by Stephanie Burton of Gibbes & Burton, LLC, and Blair Fensterstock of Fensterstock & Partners, LLP.

#### I. PROCEDURAL HISTORY

Counsel for the Nitsches made a Motion to have a Discovery Referee appointed in this case on July 25, 2014. By Order dated February 12, 2015, I granted the Motion and appointed Mason A. Goldsmith, Esquire as Discovery Referee, who was suggested by counsel for the Nitsches. Based upon my review of the record, Mr. Goldsmith conducted an extensive analysis of the discovery issues assigned to him, including reviewing multiple submissions and briefs by the parties, as well as holding a hearing in his office on April 1, 2015. On August 21, 2015, Mr. Goldsmith submitted his findings in a Report and Recommendation to this Court. After reviewing the Report and Recommendation, and based upon my knowledge of the record in this case, I adopted the Report and Recommendation as the findings of fact and conclusions of law of the Court by Order entered September 29, 2015. The Kondra Plaintiffs and Mr. Campbell then filed the Motions which are now before me.

## II. STANDARD FOR SUMMARY JUDGMENT

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005). "Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues." Id. 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." Koester v. Carolina Rental Ctr., Inc., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994) (quoting Rule 56(c), SCRPC).

"Under Rule 56(c), the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact." Lanham v. Blue Cross & Blue Shield of South Carolina, Inc., 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). "With respect to an issue upon which the nonmoving party has the burden of proof, this initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case." Id. "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings." Blumenthal Mills, Inc., 365 S.C. at 220, 616 S.E.2d at 730. "Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Id. "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party." Koester, 313 S.C. at 493, 443 S.E.2d at 394 (citing Hamilton v. Miller, 301 S.C. 45, 47, 389 S.E.2d 652, 653 (1990)).

### III. ANALYSIS

In opposing the Motions, Counsel for the Nitsches argue that Mr. Goldsmith exceeded the authority granted to him by this Court in making a finding regarding when the statute of limitations began to run on the claims of the Nitsches. I do not agree with this argument, as the Court would not direct a Discovery Referee to ignore material issues raised by the documents and evidence submitted to him, especially when such issues in turn affect the discovery issues. This is particularly true where, as here, counsel for the Nitsches voluntarily submitted the affidavits on which this finding is based to the Discovery Referee. After all, the purpose of the appointment of the Discovery Referee was to assist the Court in the resolution of various discovery issues. When an issue like the statute of limitations is recognized in the process of analyzing discovery issues, it should be called to the Court's attention, and set forth in the Report and Recommendation of the Discovery Referee, as discovery issues would be thereby affected.

Even were I to accept the argument from counsel for the Nitsches, I nevertheless hold that the statute of limitations for these claims has expired. I have reviewed the affidavits on which this finding is based. The testimony offered by Ms. Nitsch in these affidavits makes it clear that the statute of limitations for these claims has expired.

The following are excerpts from Ms. Nitsch's testimony:

- "My husband and I employed the following attorneys during the following time frames:

1998-1999: Leatherwood, Walker, Todd & Mann- To review Emil Kondra & John Campbell documents;

...

1999-Present: Merline & Meacham- Discussed questions about Emil Kondra's self-dealing under the guidance of John Campbell. Handled our personal estate planning. They also reviewed spreadsheets I created about Ellcon;

..."

(Veronica Nitsch P. Aff. at 4, ¶ 7 (May 12, 2015).)

- "Beginning in the early 2000's and continuing through 2007, Helen Kondra . . . came to my home ... provided me with stacks of unorganized (simply tossed into the bags) Ellcon documents for my review. Specifically, Helen Kondra provided me with multiple large black plastic trash bags filled with documents. I photocopied the documents and Helen Kondra returned to my home to collect the originals." (*Id.* at 2, ¶¶ 2-3.)<sup>1</sup>
- "I gave some or all of the documents I received from Helen Kondra to at least the following [attorneys]: Snow Becker Krauss, Merline & Meacham, Hutton Law Group, Blake Harper, Fensterstock & Partners and Gibbes Burton." (*Id.* at 4-5, ¶ 8.)
- "I initially kept copies of the disputed documents to sort and organized them... As my analysis of the documents progressed and I recognized that the documents I received from Helen Kondra demonstrated misconduct by Emil Kondra, John Campbell and others, I kept the documents to pursue any claims my husband and I might have against those individuals..." (*Id.* at 5, ¶ 11.)

<sup>1</sup> Another affidavit submitted by Mrs. Nitsch dated October 2, 2013, also provides that "[c]ommencing in and around late 2005 and ending in and around early 2008, Helen Kondra, Emil Kondra's wife and an Ellcon Shareholder, gave me several black plastic trash bags filled with documents that had been in Emil Kondra's possession . . . ." (Veronica P. Nitsch Aff. 2, ¶ 2 (Oct. 2, 2013).)

- “I have reviewed the documents I provided to my attorneys, Fensterstock & Partners LLP (“F&P”), for production to Plaintiffs in this matter . . . I created these documents from 2004 to 2008. Most of them are spreadsheets in which I evaluated Ellcon’s balance sheets and other financial records. I created these documents to aid my attorneys in evaluating my claims against Plaintiffs.”

(Veronica Nitsch Aff. 3-4, ¶¶ 3, 5 (Mar. 19, 2015) (emphasis added).)

The Nitsches have asserted counterclaims against the Kondra Plaintiffs for fraudulent misrepresentation, negligent misrepresentation, fraudulent concealment, unjust enrichment, breach of fiduciary duty, negligence, and conversion. (See Kondra Pls.’ Compl.) All of the Nitsches’ claims against Campbell have been dismissed by Order dated October 24, 2013, except for fraud. The applicable statute of limitations for all of Defendants’ claims against the Kondra Plaintiffs and Campbell is three (3) years. See Turner v. Milliman, 381 S.C. 101, 109–10, 671 S.E.2d 636, 640 (Ct. App. 2009) (applying three-year statute of limitations in fraud action); S.C. Code Ann. § 15-3-530 (5) (three (3) year statute of limitations for tort actions, such as negligent misrepresentation, fraud, and unjust enrichment); S.C. Code Ann. § 33-8-300(e) (three (3) year statute of limitations for breach of fiduciary duty claims against a director); S.C. Code Ann § 33-8-420 (three (3) year statute of limitations for breach of fiduciary duty claims against an officer); S.C. Code Ann. § 15-3-530 (4) (three (3) year statute of limitations for conversion).

Under the discovery rule, “the statutory period of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto.” Burgess v. Am. Cancer Soc., S. Carolina Div., Inc., 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989) (emphasis in original).

“[A]lthough a party claims ignorance of existing facts and circumstances, the same result follows

if such facts and circumstances could have been known to the party through the exercise of ordinary care and reasonable diligence.” Id. at 186-87, 386 S.E.2d at 800. “In other words, the clock starts running when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist.” Gibson v. Bank of America, N.A., 383 S.C. 399, 406, 680 S.E.2d 778, 782 (Ct. App. 2009).

“The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist.” Id. (quoting Grillo v. Speedrite Prod., Inc., 340 S.C. 498, 503, 532 S.E.2d 1, 3 (Ct. App. 2000)) (emphasis added). “The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory has developed.” Id. (emphasis added). “The fact that an injured party may not comprehend the full extent of the damage is immaterial.” Id. “When there is no conflicting evidence or when only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that he or she had a claim becomes a matter of law to be decided by the trial court.” Id. at 406-07, 680 S.E.2d at 782.

Based on the foregoing, I find that the statute of limitations for all claims pled by the Nitsches against the Kondra Plaintiffs and Campbell has expired. In light of the affidavits of Ms. Nitsch, there is no genuine issue of material fact. The period of limitations was three years, and it is undisputed that the Nitsches’ claims were not initiated until 2012, well after the statute of limitations had expired.

The Nitsches argue that they have not been permitted to conduct sufficient discovery, and relying on Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991), contend that Summary Judgment is therefore inappropriate. I do not agree with this argument because Ms.

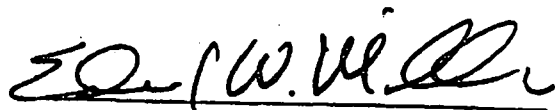
Nitsch's affidavits make it clear that the statute of limitations has expired on the claims of the Nitsches. That being the case, this Court cannot see the utility of allowing the parties to conduct further discovery as that will not change the finding on the statute of limitations, and thus would be futile.

The Nitsches also argue that their claims are based upon inadequate merger consideration. Further, that because the merger took place on July 31, 2008, their claims could not accrue until that time. I disagree with this analysis. A review of the Nitsches counter-claims reveals that they claim that they should have had more stock than they owned at the time of the merger, and that this resulted from the improper conduct of the Kondra plaintiffs, with the assistance of John Campbell. Therefore, these claims regarding inadequate stock ownership can be traced back to 1964 and forward. Regardless of when any alleged damages might have become known, the conduct the Nitsches allege to be improper goes back well before 2008. Further, the Nitsches argument is further defeated by Ms. Nitsch's own actions. That is, according to her affidavits, Ms. Nitsch was seeking advice from lawyers regarding claims against the Kondra plaintiffs and Mr. Campbell as early as 1998 and certainly by 2005. (see Burgess and Gibson above) Thus, I reject this argument as well. There are no genuine issues of material fact. Consequently, the Kondra plaintiffs and Mr. Campbell are entitled to summary judgment.

#### IV. CONCLUSION

I hereby find that the statute of limitations for the counterclaims of the Nitsches against the Kondra Plaintiffs and Campbell began to run no later than 2005, and therefore has expired. Therefore, judgment is awarded to the Kondra Plaintiffs and Campbell on the counterclaims of the Nitsches.

IT IS SO ORDERED.



12/21, 2015  
Greenville, South Carolina

The Honorable Edward W. Miller

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