NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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September 27, 2023

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Re: *Timothy Rizer, et al. v. Illinois Land Investors I, LLC, et al.*, No. CL-2022-4524

Dear Counsel:

This matter comes before the Court on Defendants Michael Ferraguto, Jr., and John Carroll's Plea in Bar to the First Amended Complaint. For the reasons that follow, the Plea in Bar is granted in part and overruled in part.

FACTS

Plaintiffs invested and held interests in a Delaware limited partnership. The partnership existed to develop land in Illinois.

- March 8, 2011—Defendant Caroll emailed Plaintiff Rizer a copy of the Contract of Purchase and Sale between Vine Properties, LLC and First Midwest Bank for pods 3 and 8. Caroll explained that Vine Properties was an entity they used to purchase property in Chicago.
- March 16, 2011—Plaintiffs and Defendants formed Southbury Land Venture, LLLP (SLV) as a Delaware limited partnership. Plaintiffs were limited partners and Defendant Illinois Land was the general partner. The SLV agreement precluded the general partner from doing

certain acts without written consent and ratification by all Partners. Specifically, Article VI, Section 6.6d prohibited encumbering any portion of SLV property.

- Plaintiffs invested $2,006,000.00 towards the purchase of pods 3 and 8. Defendants caused Illinois Land to delegate some of its general partner duties to OA Management.
- April 6, 2011—Another defendant, Marto, who is not participating in this plea in bar, assigned its rights, interests and obligations in Southbury Land Venture to Marto 2, a limited liability company owned by and controlled by Rizer.
- Early April 2011—Rizer met with Defendant Hughes in Illinois. Hughes gave Rizer a tour of pods 3 and 8 and assured Rizer that Carroll and Ferraguto were successful, reliable developers, and all the involved entities were legitimate operations.
- Early 2012—Plaintiffs learned that the master HOA for pods 3 and 8 had obtained a default judgment against Southbury Land Venture. The default judgment was eventually vacated, but subsequent litigation lasted into 2014.
- July 26, 2012—Carroll emailed Rizer asking Rizer to fund the initial deposit of $50,000 in connection with two new deals. Rizer complied with this request in August 2012.
- May 2013—The first encumbrance on the property recorded.
- October 2013—Second encumbrance recorded.
- January 2015—Third encumbrance recorded.
- March 2018—Fourth encumbrance recorded.
- July 8, 2013—Carroll emailed Rizer stating that OA Enterprise was still in its due diligence period on the new acquisitions.
- 2014—Later that year, Defendants asked Plaintiffs for more money for Southbury Land Venture. In exchange for the new funding, the parties executed an amended Partnership Agreement that increased Plaintiffs' partnership interest. The parties executed another agreement that would take effect upon the nonpayment of certain funds. The purpose of the additional agreement was to allay Plaintiffs' concerns about the increasing costs of developing pods 3 and 8.
- December 3, 2014—Illinois Land, Marto 2, and Rizer executed a second amendment to the SLV agreement. Rizer contributed yet more funds to the endeavor.
- January 2016—Litigation with the master HOA began, related to the control of amenities and easements that Southbury needed to work on pods 3 and 8. Plaintiffs were asked to fund the litigation after Defendants warned of dire consequences.
- February 4, 2016—Carroll forwarded an email to Rizer advising of an "urgent problem" that ran the risk of permanently damaging the Southbury project.
- June 5, 2016—Rizer emailed Ferraguto requesting the amenities and easements necessary for pods 3 and 8.
- June 8, 2016—Ferraguto emailed Rizer telling him that it was the intent to convey the necessary easements but that the lawyers in the litigation need to be paid as soon as possible.
- June 10, 2016—Rizer wires more funds.
- Early 2017—Defendants asked for more funding from Plaintiffs.
- September 21, 2020—Pods 3 and 8 appeared to be ready for sale.

- October 12, 2020—At a Zoom meeting, Defendants confirmed that they would receive a significant return on their investment. However, one month later the Plaintiffs still had not seen the sales contract.
- January 2021—Defendants told Plaintiffs that closing would occur that spring. However, Plaintiffs never heard from Defendants again and no representative of the purchaser of pods 3 and 8 ever contacted the Plaintiffs.
- Plaintiffs' subsequent investigation revealed that the sale price of pods 3 and 8 was far less than what the Plaintiffs had been told. Moreover, Plaintiffs learned that pods 3 and 8 had been encumbered by several mortgages. Although the SLV Partnership required that the Plaintiffs' consent was necessary to encumber the property, the Plaintiffs never were consulted.
- September 21, 2020—Carroll emailed Rizer to advise him that West Point (another defendant not involved in this plea in bar) had completed its review with the Village of Oswego and had obtained financing for the development of the lots.
- October 5, 2020—Rizer emailed Carroll and Ferraguto requesting a management committee meeting on October 12, 2020.
- October 7, 2020—Ferraguto emailed a Zoom invite to the October 12 meeting.
- October 9, 2020—Carroll emailed Rizer the details of the proposed payments to the partners of SLV.
- October 12, 2020—At the Zoom meeting, Ferraguto and Carroll reiterated and confirmed to Rizer the prospective returns for the partners in SLV.
- November 3, 2020—Rizer emailed Ferraguto that he (Rizer) was still looking for a copy of the contract for sale.
- November 4, 2020—Carroll forwarded Rizer a copy of the executed Contract of Purchase and Sale. That document referenced a second contract between SLV and WPHG. Rizer emailed Ferraguto about this reference.
- November 5, 2020—Ferraguto emailed Rizer stating that the reference to a second contract was a mistake.
- January 19, 2021—Carroll responded to Rizer's email asking about the new contract by forwarding a new contract dated November 13, 2020 with the other contract provision deleted and referred to as a scrivener's error.
- June 2021—Rizer retained counsel.
- September 9, 2021—Rizer filed a Verified Complaint for the Books and Records of SLV in the Delaware Court of Chancery.
- November 11, 2021—Order of default entered against SLV directing SLV or Illinois Land to produce the information.
- April 5, 2022—Rizer and Marto 2 filed this action in this Court.
- May 5, 2022—Ferraguto called Rizer in an attempt to convince Rizer to stop this litigation. During this call, Rizer claims that Ferraguto acknowledged that he and Carroll did not keep Rizer informed of all the transactions of SLV.

The complaint in this case alleges nine Counts: (I) breach of the partnership agreement, (II) bread of fiduciary duty, (III) aiding and abetting a breach of fiduciary duty, (IV) aiding and

abetting a breach of fiduciary duty, (V) fraudulent misrepresentation, (VI) unjust enrichment, (VII) unjust enrichment, (VIII) conspiracy to injure another in trade, business or profession, and (IX) racketeer influenced and corrupt organizations (RICO).

There are numerous named defendants in this action. Only the defendants Ferraguto and Carroll have submitted the plea in bar and demurrer that is the subject of this opinion. At the July 19, 2023 hearing, I advised the parties that only the plea in bar would be heard. The demurrer will be considered at another time. Because this plea in bar involves only Defendants Ferraguto and Carroll, the only Counts that are under consideration are Count II (breach of fiduciary duty), Count III (aiding and abetting a breach of fiduciary duty), Count V (fraudulent misrepresentation), Count VI (unjust enrichment), Count VIII (violation of the Virginia Business Conspiracy Statute), and Count IX (RICO). The plea in bar alleges that these counts are time barred.

ANALYSIS

COUNT II
BREACH OF FIDUCIARY DUTY

The cases from our Court of Appeals and the Supreme Court of Virginia defining a plea in bar are legion. Repeatedly, our appellate courts have stated that a plea in bar, "Asserts a single issue, which, if proved, creates a bar to a plaintiff's recovery." *Hawthorne v. VanMarter*, 279 Va. 566, 577 (2010). The party submitting the plea in bar has the burden of proof. *Id.* The expiration of the statute of limitations is perhaps the best example of a plea in bar. If the statute of limitations expired before the complaint was filed, that fact (the expiration of the statute of limitations) precludes recovery. More problematic, for example, would be a plea in bar that alleges that another state court has already ruled on the issue, *viz.*, collateral estoppel. Analyzing a plea in bar on the issue of collateral estoppel requires determining what standard the other court used in its decision in the other case. *See Plofchan v. Plofchan*, 299 Va. 534 (2021). Fortunately, this case presents the more mundane analysis—has the statute of limitations expired?

Regarding Count II, both defendant Carroll and Defendant Ferraguto, Jr., assert that there exists no fiduciary duty between the members of an LLC, or between a member and a manager of an LLC, citing *Remora Investments LLC v. Orr*, 277 Va. 316 (2009). This argument is, of course, a demurrer, and as noted earlier the subject of this opinion is exclusively the plea in bar.

Defendants then argue that, even if breach of fiduciary duty was recognized as a cause of action in Virginia, the claim would be barred because the statute of limitations has expired.

In the First Amended Complaint, at paragraph 141, the plaintiffs allege that when the defendants encumbered SLV property at least four times without written consent, they breached the fiduciary duty of care, loyalty, candor, and good faith to the plaintiffs. At paragraph 142, the plaintiffs allege that when the defendants failed to provide accurate financial reports and failed to

keep the Plaintiffs generally informed regarding the transactions of SLV and others, they breached the fiduciary duties of care, loyalty, candor, and good faith to the plaintiffs.

Assuming that these mortgages were improper—and it appears that they were—the most recent occurred in March 2018. Plaintiffs filed their complaint April 5, 2022, more than four years after the most recent improper mortgage. Virginia Code §8.01-248 prescribes a two-year statute of limitations for actions such as this. Virginia Code §8.01-249(1) states that a cause of action for fraud accrues when the fraud is discovered *or by the exercise of due diligence reasonably should have been discovered.* (Emphasis added). The plaintiffs filed this action more than four years after the last improper mortgage was recorded. The question becomes then, when did the Plaintiffs discover the breach, or, when should the Plaintiffs have discovered the breach by the exercise of due diligence. That question then raises the issue of whether the statute of limitations was equitably tolled by the defendants' alleged misconduct in hiding their alleged breaches from the Plaintiffs. The Plaintiffs recognize this when they state in their brief that the defendants have narrowed down the issue too far—in other words, it is not just the recording of the mortgages, but the entire misconduct of the defendants that is the basis for this Count. That matter will be discussed *infra.*

COUNT III
AIDING AND ABETTING A BREACH OF FIDUCIARY DUTY

Count III alleges an Aiding and Abetting Breach of Fiduciary Duty. Count III alleges an alternative to Count II. Count II alleges the actual breach of fiduciary duty whereas Count III alleges an aiding and abetting of the breach of fiduciary duty. The analysis above of Count II applies with equal force to this analysis of Count III. It comes down to whether the Defendants caused the Plaintiffs not to discover the breach. Plaintiffs claim that the statute has not expired because the misappropriation was not discovered until the property was sold in 2021.

COUNT V
FRAUDULENT MISREPRESENTATION

Count V alleges fraudulent misrepresentation. Specifically, Count V enumerates dates of the misrepresentations: April 6, 2011, May 19, 2016, July 23, 2013, January 7, 2016, February 26, 2016, March 10, 2016, June 8, 2016, September 21, 2020, October 9, 2020, October 12. 2020, November 4, 2020, and January 19, 2021.

Virginia Code §8.01-248 prescribes a two-year statute of limitations for fraudulent misrepresentation. Therefore, of the enumerated alleged fraudulent misrepresentations, only the statements of 2020 and 2021 were timely filed. Defendants allege that the 2020 and 2021 representations fail because the plaintiffs do not allege damages from those false representations. However, that is a matter to be decided on demurrer, not a plea in bar. Plaintiffs argue that the misappropriation of the funds is the source of the fraud, not the failure to secure ownership, and that the misappropriation was not discovered until the property was sold in 2021.

COUNT VI
UNJUST ENRICHMENT

Count VI alleges unjust enrichment. As to this count, the defendants primarily argue a demurrer—that a plaintiff cannot allege a written contract and a claim for unjust enrichment. As noted *supra*, this opinion discusses only the plea in bar. Whether the defendants' argument about alleging unjust enrichment and as well as a written contract is left for another day.

The Virginia three-year statute of limitations applicable to oral contracts also applies to unjust enrichment. *Tao of Systems Integration Inc. v. Analytical Services & Materials, Inc.*, 299 F. Supp. 2d 565 (E.D. VA. 2004). The accrual of a cause of action begins to run at the time the unjust enrichment occurred, which is the moment expected compensation is not paid, not when the party knew or should have known of the unjust enrichment. *Id.*

COUNT VIII

Count VIII alleges a violation of the Virginia Business Conspiracy Statute, 18 Va. Code §18.2-499. As with the other counts, defendants have first argued that the count fails to state a cause of action. Again, I will not address that assertion—a demurrer—in this opinion. Defendants claim that this count is based on the alleged breach of fiduciary duty which is subject to a two-year statute of limitations.

COUNT IX
CONSPIRACY TO INJURE ANOTHER IN TRADE, BUSINESS OR PROFESSION

The defendants allege that Count IX fails to state a cause of action. More importantly, for this opinion, the defendants allege that this count is barred by the four-year statute of limitations.

DISCUSSION

At the hearing on this matter, the plaintiffs argued that there has been an equitable tolling of the statute of limitations. The defendants argue that this argument was improper because the Plaintiffs did not raise this issue until the hearing. Specifically, Defendants argue that *Berry v. Klinger*, 225 Va. 201 (1983) prevents a litigant from taking a position contrary to his pleadings. While that is true, the Court gave both sides additional time to brief the issue of the equitable tolling of the statute of limitations, thus not only mitigating, but eliminating any surprise to the defendants. It is possible that the plaintiffs raised this issue because they realized, as they prepared for the hearing and after hearing the evidence at the hearing, that the statute of limitations has, in almost every count, other than the alleged fraudulent representations made in 2020 and 2021, expired.

As I just noted, I find that all statutes of limitations except those made in 2020 and 2021 in Count IV have expired. The Court will now assess whether an equitable tolling of the statute of limitations has occurred. I find that it has not.

First, "It is well-established that statutes of limitations are strictly enforced and must be applied unless the General Assembly has clearly created an exception to their application. A statute of limitations may not be tolled, or an exception applied, in the absence of a clear statutory enactment to that effect. Any doubt must be resolved in favor of enforcement of the statute." *Casey v. Merck & Co.*, 283 Va. 411, 416 (2012). Here, there certainly is no clear statutory enactment to support a tolling of the statute of limitations.

Next, Plaintiffs have alleged fraud on the part of the defendants. Fraud can be an extraordinary circumstance that can toll the statute of limitations. *Schmidt v. Household Finance Corp., II*, 276 Va. 108 (2008).

Throughout the nine-year relationship the litigants had, there were numerous red flags that should have put the plaintiffs on notice that the defendants were not dealing with the plaintiffs with candor. It appears that there were instances of possible fraud that might have caused the plaintiffs not to file suit against the defendants, but not so many instances that would have lulled Plaintiffs into waiting until 2022 to file this action. Plaintiffs did not act with due diligence and thus an equitable tolling of the statute of limitations is not available to them. *Birchwood-Manassas Associates, LLC v. Birchwood at Oak Knoll Farm, LLC.*, 290 Va. 5 (2015). "Equity aids the vigilant, not those who sleep on their rights." *Chesapeake & Ohio Ry. Co. v. Willis*, 200 Va. 299, 306 (1958).

The Plea in Bar is granted in its entirety except as to the statements made in 2020 and 2022 alleged in Count IV.

Counsel for the defendants shall prepare an order and submit it to Counsel for the plaintiff for signature. After Counsel for the plaintiff has signed the order, Counsel for the defendants shall submit the signed order to Law Clerk 6 for my signature.

Sincerely,

[redacted]

Robert J. Smith
Judge, Fairfax County Circuit Court