IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:14-cv-03074-CMA

JOHANA PAOLA BELTRAN; et al.

Plaintiffs,

v.

INTEREXCHANGE, INC.; et al.

Defendants.

**MOTION OF DEFENDANT CULTURAL CARE, INC.
TO DISMISS THE THIRD AMENDED COMPLAINT
IN PART PURSUANT TO FED. R. CIV. P. 12(b)(6)**

Defendant Cultural Care, Inc. ("CCI") hereby moves to dismiss in part claims asserted by newly named Plaintiffs Cathy Caramelo ("Ms. Caramelo") and Linda Elizabeth ("Ms. Elizabeth") added in Plaintiffs' Third Amended Complaint, ECF 983 ("TAC").[1] Ms. Elizabeth, who is not even a member of the Cultural Care Pennsylvania Subclass that she purports to represent (*see infra* pt. I), waited too long to assert her claims under Pennsylvania law, and all of her claims are time-barred. In addition, Plaintiffs' generalized claims for breach of fiduciary duty, constructive fraud, and

[1] In their motion for leave to file the TAC, Plaintiffs posited that Ms. Caramelo, Ms. Elizabeth, and a third new named plaintiff would not be asserting new claims. Pls.' Mot. to Amend at 2, ECF 561. That is true only insofar as Plaintiffs have pleaded non-specific, categorical common law and statutory claims under the laws of the 50 states and the District of Columbia. *See* TAC ¶¶ 605-16, 628-36. As this Court recognized, the addition of these new plaintiffs allows Plaintiffs to assert new claims under the laws of Pennsylvania, Texas, and Illinois. *See* Order on Jt. Report for R.23 Notif. Plan at 3, 6-8, ECF 977. Presumably, Ms. Caramelo and Ms. Elizabeth intend to encompass such state-specific claims, without state-specific allegations, under Counts III (Breach of Fiduciary Duty), IV (Negligent Misrepresentation), V (Constructive Fraud or Fraudulent Concealment), VI (Consumer Protection), and IX (Claims for Unpaid Wages).

violation of consumer protection statutes are not cognizable under the substantive legal doctrines of Pennsylvania and Texas law. Finally, Ms. Caramelo's and Ms. Elizabeth's claims founded on the Texas Minimum Wage Act, Tex. Lab. Code § 62.001, *et seq.* are barred by a number of statutory prohibitions. For these reasons, and as discussed below, the Court should dismiss the referenced new claims asserted in the TAC.

CERTIFICATION OF COMPLIANCE WITH CMA CIV. PRACTICE STANDARD 7.1D

The Court granted Plaintiffs leave to file a Third Amended Complaint in order to add certain new named Plaintiffs. ECF 977. Plaintiffs have now filed that Third Amended Complaint, and they do not have leave to make further amendments. Nevertheless, pursuant to this Court's Civil Practice Standard 7.1D(a), counsel for CCI emailed Plaintiffs' counsel on April 25, 2018 outlining the grounds for dismissal set forth below and inviting further conferral. Following further email exchanges, counsel agreed to schedule a teleconference. Counsel participated in a teleconference on April 26, 2018. During the telephonic conferral, the parties discussed the grounds for Cultural Care's motion and Plaintiffs' position. Given that Cultural Care's motion addresses issue of law, Cultural Care determined that these issues are not subject to correction as contemplated by CMA Civ. Practice Standard 7.1D(a).

BACKGROUND

Plaintiffs initiated this Action on November 13, 2014, identifying a single named plaintiff who was sponsored by defendant InterExchange, Inc. and who spent her au pair program term in Colorado. Compl. at 3, ECF 1. When Plaintiffs sought to amend the complaint on June 3, 2017 to add Ms. Caramelo and Ms. Elizabeth, there were no

named plaintiffs sponsored by CCI who had spent their au pair program term in Pennsylvania or Texas. *See* App. A to Pls.' Mot. for R.23 Cert. at 7, ECF 559-1 (identifying Ms. Caramelo and Ms. Elizabeth as the purported class representatives for the putative Cultural Care Pennsylvania and Texas Subclasses).

On February 13, 2018, the Court denied Plaintiffs leave to amend to add Ms. Caramelo and Ms. Elizabeth and a third former au pair as named plaintiffs. Order Denying Mot. to Amend, ECF 850. On April 9, 2018, the Court *sua sponte* reversed the Order in part, to the extent that Plaintiffs were granted leave to file a third amended complaint adding the three new plaintiffs. Order on Jt. Report for R.23 Notif. Plan at 3, 6-8, ECF 977. Plaintiffs filed the TAC on April 11, 2018.

ARGUMENT

"The court's function on a Rule 12(b)(6) motion is . . . to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1201 (10th Cir. 2003). To survive a Rule 12(b)(6) motion, "[t]he complaint must plead sufficient facts, taken as true, to provide 'plausible grounds' that discovery will reveal evidence to support the plaintiff's allegations." *Shero v. City of Grove*, 510 F.3d 1196, 1200 (10th Cir. 2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). For the reasons discussed below, the referenced new state claims fail both procedurally and substantively.

I. MS. ELIZABETH IS NOT A MEMBER OF THE SUBCLASS THAT SHE PURPORTS TO REPRESENT.

Ms. Elizabeth completed her au pair program term in Pennsylvania in 2008. TAC

¶ 530.[2] Plaintiffs sought certification of a national class of au pairs sponsored by Defendants from 2009 to the present, and the state-based subclasses are subgroups within that national class. Rodriguez Decl. for R.23 Cert. ¶ 162, ECF 558 (identifying size of putative class based on au pairs joining the program from 2009 onwards); R.23 Notice Plan ¶ V, ECF 1011-1 ("You are receiving this email because you were an au pair from 2009 – present. . . . [Y]ou are now a member of a Class of Au Pairs . . . ."); Proposed Class Notice at 1, ECF 1011-2 ("The Court has allowed this lawsuit to be a class action on behalf of au pairs who were sponsored by . . . J-1 visa sponsors at any time from 2009 to the present."); *id.* at 7 ("If you were an au pair sponsored by one of the Sponsors **before January 1, 2009**, you are not included in the Class.").

Plaintiffs sought to add Ms. Elizabeth as a plaintiff because no named plaintiff had standing to assert the Pennsylvania subclass claims against CCI. *See* Class Cert. Order at 15, ECF 828. In addition to the fact that Ms. Elizabeth's claims are barred by the statutes of limitation, *see infra* pt. II*,* leaving her without standing to assert these claims,[3] Ms. Elizabeth is not a member of the Cultural Care Pennsylvania Subclass because her tenure as a Pennsylvania au pair concluded before 2009. Her claims must

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[2] After returning to Germany for several years, Ms. Elizabeth returned as an au pair in Texas in 2013. *See* TAC ¶¶ 531, 533-34.

[3] Ms. Elizabeth cannot rely on the class's membership to supply standing: "[A] plaintiff 'may not use the procedural device of a class action to boot strap [her]self into standing [s]he lacks under the express terms of the substantive law.'" *Warnick v. Dish Network LLC*, 301 F.R.D. 551, 560 (D. Colo. 2014) (quoting *Akerman v. Oryx Comm'ns, Inc.*, 609 F. Supp. 363, 377 (S.D.N.Y. 1984)). Moreover, Plaintiffs cannot rely upon Rule 15 to relate claims of subsequent intervenors like Ms. Elizabeth back to the original complaint where the single named Plaintiff lacked Article III standing to assert those Pennsylvania claims—and the Court lacked jurisdiction over those claims—at the outset. *Police & Fire Ret. Sys. v. IndyMac MBS, Inc.*, 721 F.3d 95, 111 (2d Cir. 2013).

therefore be dismissed, and the Cultural Care Pennsylvania Subclass decertified.

II. MS. ELIZABETH'S CLAIMS UNDER PENNSYLVANIA LAW ARE BARRED BY THE APPLICABLE STATUTES OF LIMITATIONS.

A. The Allegations in the Third Amended Complaint Establish that the Pennsylvania Claims Are Barred by the Statutes of Limitations.

"Pennsylvania favors strict application of the statutes of limitation." *Wachovia Bank, N.A. v. Ferretti*, 2007 PA Super 320, ¶ 22. Upon establishing the applicability of the statute of limitations, Plaintiffs must prove that an exception applies. *Van Buskirk v. Carey Canadian Mines, Ltd.*, 760 F.2d 481, 487 (3d Cir. 1985). As discussed below, there is no applicable exception to the bars against recovery for these untimely claims.

Even if Ms. Elizabeth were a member of the subclass, which she is not, the five claims that she asserts under Pennsylvania law arising out of her time as an au pair from 2007 to 2008—breach of fiduciary duty, negligent misrepresentation, constructive fraud, consumer protection, and a claim for unpaid wages, *see* TAC ¶¶ 526, 605-16, 628-36—are all untimely. The statutes of limitations for these claims were from two to six years duration, and all expired before the filing of this litigation. *See generally Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc.,* 468 A.2d 468, 471 (Pa. 1983) ("[T]he statute of limitations begins to run as soon as the right to institute and maintain a suit arises; lack of knowledge, mistake or misunderstanding do not toll the running of the statute of limitations, . . . even though a person may not discover his injury until it is too late to take advantage of the appropriate remedy . . . .") (citations omitted); *accord* Class Cert. Order at 26, ECF 828 (claims accrued when plaintiffs began working).

Pennsylvania law requires Ms. Elizabeth to have asserted her common law claims (breach of fiduciary duty, negligent misrepresentation, and constructive fraud)

within two years of accrual. *See* 42 Pa. Cons. Stat. § 5524(7) (two-year statute of limitations for tort actions).[4] Accrual occurred at the beginning of her tenure in 2007, such that statute of limitations ran in 2009, five years before the filing of the litigation. Even if the claims were incorrectly deemed to run from the last date of her au pair tenure in 2008, the statute of limitations had still run well before the filing.

The statute of limitations for Ms. Elizabeth's consumer protection claim asserted pursuant to the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. § 201-1, *et seq.* is six years from accrual. Accrual occurred "as soon as the right to institute and maintain a suit arises, which generally is when the injury was inflicted." *Drelles v. Mfrs. Life Ins. Co.*, 2005 PA Super 249, ¶ 13; *see also Yenchi v. Ameriprise Fin., Inc.*, 161 A.3d 811, 816 n.4 (Pa. 2017) (claim accrued upon customer's purchase of insurance policy). In this instance, accrual would be on her first day as an au pair, or no later than the first date on which a stipend was paid, because the basis for this claim is that the sponsors allegedly "tricked the *au pairs* to sign up for their programs based on false and misleading representations about the wage."[5] TAC ¶ 616.

The statute of limitations for Ms. Elizabeth's claim for unpaid wages under the Pennsylvania Wage Payment and Collection Law, 43 Pa. Stat. § 260.9a, is three years from accrual. *Evans v. Sodexho*, 2008 PA Super 53, ¶ 18 & n.7. Even an accrual date

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[4] *Mariner Chestnut Partners, L.P. v. Lenfest*, 152 A.3d 265, 277 (Pa. Super. Ct. 2016) (breach of fiduciary duty); *Toy v. Metro. Life Ins. Co.*, 2004 PA Super 404, ¶ 17 (negligent misrepresentation); *Frost v. Zeff*, No. 003279, 2015 Phila. Ct. Com. Pl. LEXIS 100, at *5-6 (Pa. Ct. Com. Pl. Apr. 27, 2015) (constructive fraud) (attached hereto as Exhibit A).

[5] As discussed *infra*, *see especially* n.7 and p. 10, CCI did not recruit or contract with Ms. Elizabeth or any other au pair. CCI recruits and contracts with host families.

on her last day as an au pair in 2008 would result in extinguishment of claims by 2011.

B. Ms. Elizabeth's Claims Are Not Saved by the Relation-Back Rule.

While Colorado's relation-back rule is in accord with the federal relation-back rule, *see* Colo. R. Civ. P. 15(c), Ms. Elizabeth's tenure as an au pair in Pennsylvania ended in September 2008, more than six years (the longest applicable statute of limitation) before the November 2014 filing. Hence, all of Ms. Elizabeth's claims founded on Pennsylvania law are barred by the applicable statutes of limitation.

C. There Is No Legal Basis to Toll the Statutes of Limitations.

1. Pennsylvania's Discovery Rule Does Not Apply in the Absence of Reasonable Diligence by an Untimely Plaintiff.

Pennsylvania recognizes an exception to the statute of limitations known as the discovery rule in circumstances that "arise[] from the inability, despite the exercise of diligence, to determine the injury or its cause, not upon a retrospective view of whether the facts were actually ascertained within the period." *Pocono Int'l Raceway*, 468 A.2d at 471-72. "The party seeking to invoke the discovery rule bears the burden of establishing the inability to know of the injury despite the exercise of reasonable diligence." *Dalrymple v. Brown*, 701 A.2d 164, 167 (Pa. 1997). Reasonable diligence is an objective standard as applied to a reasonable person. *Id.*

Ms. Elizabeth cannot invoke the discovery rule because "[m]ere mistake, misunderstanding or lack of knowledge is not sufficient to toll the running of the statute." *Taylor v. Tukanowicz*, 435 A.2d 181, 183 (Pa. Super. Ct. 1981). Lack of understanding of the law or legal process likewise does not toll the statute. *See Wachovia Bank*, 2007 PA Super 320, ¶¶ 22-23; *Namani v. Bezark, Lerner, & DeVirgilis, P.C.*, 160 A.3d 244

(table), 2017 WL 57153, at *2-3 (Pa. Super. Ct. Jan. 5, 2017).

The death knell for any claim of tolling is this: Publicly available documents comprise the factual foundation of Plaintiffs' claims, however meritorious or lacking in merit such claims may prove to be. Official public postings were readily available for review between 2008 and 2014 that indicated the purported basis for these claims. Such postings included the Department of State minimum weekly stipend notice on the Department's J-1 visa website, and the federal and state minimum wage laws. Non-governmental, but nonetheless publicly available, postings included the various sponsors' websites referencing the Department of State stipend and other applicable information. If Ms. Elizabeth had exercised objectively reasonable diligence, she would have discovered the basis for her alleged claims, however meritorious or lacking in merit such claims may prove to be, well before November of 2014, much less May of 2017 when she first came forward. Therefore, the discovery rule does not apply. *Pocono Int'l Raceway*, 468 A.2d at 471 ("The salient point giving rise to the equitable application of the exception of the discovery rule is the inability, despite the exercise of diligence by the plaintiff, to know of the injury.").

2. Plaintiffs Have Not Alleged the Fraudulent Concealment Exception.[6]

Pennsylvania also recognizes the equitable exception of fraudulent concealment to toll statutes of limitation. "[I]n order for fraudulent concealment to toll the statute of limitations, the defendant must have committed some affirmative independent act of

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[6] Plaintiffs have asserted Restraint of Trade in Violation of 15 U.S.C. §§ 1 *et seq.* (Count I), RICO violations (Count II), and FLSA violations (Count VIII), which relate to the national class and are not the subject of this motion. TAC ¶¶ 589-603, 617-27.

concealment upon which the plaintiffs justifiably relied." *Kingston Coal Co. v. Felton Mining Co.*, 690 A.2d 284, 291 (Pa. Super. Ct. 1997). "The plaintiff has the burden of proving fraudulent concealment by clear, precise, and convincing evidence." *Fine v. Checcio*, 870 A.2d 850, 860 (Pa. 2005). “Mere mistake or misunderstanding is insufficient. Also, mere silence in the absence of a duty to speak cannot suffice to prove fraudulent concealment.” *Glenbrook Leasing Co. v. Beausang*, 2003 PA Super 489, ¶ 10 (quoting *Lange v. Burd*, 2002 PA Super 158).

With regard to Count III for Breach of Fiduciary Duty, Ms. Elizabeth claims that she had a “special relationship of trust” with her sponsor (TAC ¶ 607); but, at the same time, she alleges that the sponsor was her “third party” employer. *See, e.g.,* TAC ¶ 361. Employers do not stand in a fiduciary relationship to their employees, as discussed *infra* pt. III.A. In addition, a fiduciary relationship exists only under extraordinary circumstances that are not alleged to, and do not, exist here. *See infra* pt. III.A. The purported breach of the alleged duty was ”setting an illegal wage and [] misleading the au pairs to believe that the weekly wage was fixed by law and could not be altered.” TAC ¶ 607. But, purportedly “misleading” a plaintiff—which, of course, is denied—is not the equivalent of “an affirmative independent act of concealment upon which the plaintiffs justifiably relied." *Kingston Coal Co.*, 690 A.2d at 291. Ms. Elizabeth does not assert a single allegation of affirmative concealment by CCI that the Department of State-calculated stipend was a minimum, or that it was calculated on the basis of federal—not state—minimum wage. Such facts, including the public postings

referenced *supra*, belie any suggestion or inference of affirmative concealment.[7]

With regard to Count IV for negligent misrepresentation, Ms. Elizabeth alleged that the sponsors "made misstatements of material facts for the *au pairs'* guidance," including with regard to the legality and fixed nature of the stipend. TAC ¶ 610. An alleged *negligent* "misstatement" is the antithesis of an act of affirmative concealment.

With regard to Count V for constructive fraud,[8] Plaintiff alleges that "[t]he Sponsors, with the intent to get the *au pairs* to sign up at an exact wage of $195.75, failed to disclose" that "the $195.75 weekly wage could be illegal." TAC ¶ 613. But, this allegation highlights the pleading deficiencies that treat all sponsors as if they operate in the same manner, when in fact they do not: CCI recruits only host families, not au pairs, and therefore did not "sign up" Ms. Elizabeth, or any other au pair, at any wage level. ECF 862-19 (Defs. S.J. R. App. 535 – Jordan Dep. 37; Defs. S.J. R. App. 565 – Rannefors Dep. 242-43). While Count V lacks allegations sufficient to sustain a constructive fraud claim in any event, *see infra* pt. III.B, the allegations are inapplicable to CCI. Fraudulent concealment will not save Ms. Elizabeth's untimely claims.

III. CERTAIN OF PLAINTIFFS' PENNSYLVANIA AND TEXAS CLAIMS ARE INAPPLICABLE OR OTHERWISE FAIL AS A MATTER OF LAW.

Plaintiffs have elected a broad brush, non-specific approach to pleading, *i.e.*,

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[7] In addition, CCI does not recruit or perform initial screening of prospective au pairs or assign them to homes. A non-defendant entity handles recruitment and preliminary screening (ECF 862-19 (Defs. S.J. R. App. 535 – Jordan Dep. 37; Defs. S.J. R. App. 565 – Rannefors Dep. 242-43)), and au pairs choose their own host families (ECF 862-19 (Defs. S.J. R. App. 543 – Jordan Dep. 181-84)).

[8] Although Plaintiffs label Count V as "Constructive Fraud or Fraudulent Concealment," there is no independent cause of action for fraudulent concealment in Pennsylvania. *Battle v. Prison Health Servs.*, No. 1864 WDA 2013, 120 A.3d 391 (table), 2015 WL 6181266, at *5 (Pa. Super. Ct. Feb. 24, 2015).

identifying general common law doctrines (*e.g.*, negligent misrepresentation) and categories of state statutes (*e.g.*, consumer protection statutes), rather than alleging state-specific claims for each named Plaintiff. *See* TAC ¶¶ 605-16, 628-36. This approach necessarily limits the attention paid to the substantive law in each jurisdiction. The causes of action now claimed against CCI by Ms. Caramelo and Ms. Elizabeth under Pennsylvania and Texas law suffer from substantive deficiencies that require dismissal as a matter of law.

A. Plaintiffs' Breach of Fiduciary Duty Claims Fail Under Pennsylvania and Texas Law.

It is difficult to discern upon which of the preceding 604 paragraphs of the TAC Mses. Caramelo and Elizabeth are relying in support of their breach of fiduciary duty claims (*see* TAC ¶ 605 (incorporating by reference each of the previous paragraphs to support the fiduciary duty claim)). It appears that they are positing that the au pairs' mere participation in the au pair program establishes a fiduciary relationship with the sponsors. In other words, CCI's purported fiduciary obligations are allegedly derived from the contract executed by the au pair—which CCI did not have with Mses. Caramelo or Elizabeth, or any other au pair, *see supra* n.7 & p. 10—or the regulations promulgated by the Department of State. *See* TAC ¶ 607.

In Pennsylvania, a fiduciary duty will be imposed only where it is proven to exist by clear and convincing evidence. *Yenchi*, 161 A.3d at 820 & n.10. "The superior knowledge or expertise of a party does not impose a fiduciary duty on that party or otherwise convert an arms'-length transaction into a confidential relationship." *Id.* at 823. Ms. Elizabeth has asserted no allegations that CCI assumed decision-making

authority for her that would convert this arms-length relationship into a fiduciary duty.

Similarly, Texas requires more than an arms-length commercial transaction to create fiduciary duties. *E-Learning LLC v. AT&T Corp.*, 517 S.W.3d 849, 861 (Tex. App. 2017) ("[T]o impose an informal fiduciary duty in a business transaction, the special relationship of trust and confidence must exist prior to, and apart from, the agreement made the basis of the suit."). Plaintiffs offer no allegations that a special relationship of trust and confidence existed between CCI and either plaintiff, and subjective trust will not create a fiduciary obligation under Texas law. *Id.*

Plaintiffs' allegations do not state a plausible basis for the existence of a fiduciary relationship with respect to Ms. Caramelo and Ms. Elizabeth.

B. Plaintiffs' Constructive Fraud Claims Are Not Cognizable Under Pennsylvania and Texas Law.

Plaintiffs' constructive fraud claims are founded on the theory that CCI allegedly made misrepresentations regarding the minimum weekly stipend amount to induce Ms. Caramelo and Ms. Elizabeth to join the au pair program. *See* TAC ¶ 613 ("The Sponsors, with the intent to get the *au pairs* to sign up at an exact wage of $195.75, failed to disclose . . . ."). As previously noted, CCI does not recruit or enter into contracts with au pairs at all. *See supra* n.7 & p. 10. Its sole recruiting efforts and contracts are with host families. *See supra* p. 11. As with the claim for breach of fiduciary duty, Pennsylvania and Texas law require a relationship of trust or confidence, *Bucci v. Wachovia Bank, N.A.*, 591 F. Supp. 2d 773, 784 (E.D. Pa. 2008), and Texas requires "a preexisting special relationship of trust and confidence that is betrayed in *later* dealings." *Hubbard v. Shankle*, 138 S.W.3d 474, 483 (Tex. App. 2004) (emphasis

added). Because CCI did not recruit or contract with Ms. Caramelo or Ms. Elizabeth (*see supra* n.7 & p. 10), it had no pre-existing relationship with them.

C. The Pennsylvania and Texas Consumer Protection Laws Do Not Apply Because the Claims Are Not Connected to the Purchase of Goods or Services and Are Founded Upon a Purported (But Disputed) Employment Relationship.

Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. § 201-1, *et seq*. ("UTPCPL") applies only to purchasers of goods or services. *See* 73 Pa. Stat. § 201-9.2(a) ("Any person who purchases or leases goods or services . . . may bring a private action . . . ."); *Balderston v. Medtronic Sofamor Danek, Inc.*, 285 F.3d 238, 241 (3d Cir. 2002). "[Ms. Elizabeth] has not demonstrated that [s]he purchased or leased goods or services from [CCI], and therefore [her] UTPCPL claim must fail." *Shannon v. Equifax Info. Servs., LLC*, 764 F. Supp. 2d 714, 726 (E.D. Pa. 2011). Moreover, if Plaintiffs argue that Ms. Elizabeth purchased a service through her application fee to seek employment, a characterization that Defendants deny, her fee was paid to an international entity that recruits and contracts with au pairs. *See supra* n.7 & p. 10. And, in any event, such an allegation, if accepted, would constitute a commercial transaction, *i.e.*, her purported employment, to which the UTPCPL does not apply. *See Carpenter v. Shu-Bee's, Inc.*, No. 10-cv-0734, 2012 WL 2594276, at *6 (E.D. Pa. July 5, 2012) (dismissing UTPCPL claim based on purchase "for a commercial purpose which happened to take place in a residential setting" and "was not intended primarily for Plaintiff's personal, family or household use").

Plaintiffs' consumer protection claims are founded upon an alleged—and disputed—employment relationship with CCI. However, Texas' Deceptive Trade

Practices-Consumer Protection Act, Tex. Bus. & Com. Code Ann.§ 17.41, *et seq.* ("DTPA") prohibits false, misleading, or deceptive acts in connection with *consumer* transactions. An employment relationship is a commercial transaction, not a consumer transaction. As with the UTPCPL, the DTPA applies to any person that "seeks or acquires by purchase or lease, any goods or services" (*id.* § 17.45(4)), such that the plain language of the statute precludes Plaintiffs' employment-based claims. *Lukasik v. San Antonio Blue Haven Pools*, 21 S.W.3d 394, 400 (Tex. App. 2000) ("To have standing to pursue a DTPA cause of action, a plaintiff must be a consumer. Therefore, consumer status is an essential element . . . .") (citations omitted). Texas law is clear that employment relationships are not within the purview of the DTPA, and this claim must be dismissed. *Stanissis v. DynCorp. Int'l LLC*, No. 3:14-CV-2736-D, 2015 WL 9478184, at *6 (N.D. Tex. Dec. 29, 2015) ("[P]laintiffs do not explain how entering into an employment contract with [defendant] qualifies as a 'purchase' from [defendant] . . . . Accordingly, plaintiffs have not pleaded sufficient facts . . . that they qualify as DTPA consumers."); *id.* at *6-7 (collecting cases); *see also Johnson v. Walker*, 824 S.W.2d 184, 187 (Tex. App. 1991) ("[Plaintiff's relationship with defendant] is most closely akin to employment contracts, and no case has ever held employees are [DTPA] consumers under employment contracts.").

D. Plaintiffs' State-Based Wage-and-Hour Claims Are Exempted from the Texas Minimum Wage Act.

Both Ms. Caramelo and Ms. Elizabeth assert claims for unpaid wages under the Texas Minimum Wage Act, Tex. Lab. Code § 62.001, *et seq.* ("TMWA"). *See* TAC ¶¶ 628-36. Texas law, however, excludes domestic employment from the the TMWA:

> An employer is exempt from this [TMWA] with respect to the employment of a person who:
> (1) performs domestic services in or about a private home, including a person who performs the duties of baby-sitting in or out of the employer's home; or
> (2) lives in or about a private home and furnishes personal care for a resident of the home.

Tex. Lab. Code Ann. § 62.154. Ms. Caramelo's and Ms. Elizabeth's duties were performed in a private home, in which they resided. The exemption by its terms applies to joint employment relationships, including where the claimant resides in a home that is not the employer's. *See id.* These claims are expressly exempted from the TMWA.

Moreover, to the extent that Ms. Caramelo and Ms. Elizabeth are covered under the Fair Labor Standards Act, Texas law likewise excludes their claims from the TMWA. Tex. Lab. Code Ann. § 62.151. This Court has already dismissed unpaid wages claims based on similar statutory provisions. *See* Recommendation on Mot. to Dismiss at 35, ECF 240, *adopted in relevant part*, Order on Mot. to Dismiss at 35, ECF 258.

Finally, Texas law does not provide for overtime wages. *See* Tex. Lab. Code Ann. § 62.051. Plaintiffs cannot seek damages for overtime based on Texas law.

CONCLUSION

For the foregoing reasons, the Court should dismiss Ms. Elizabeth's Pennsylvania claims in their entirety, as well as Ms. Caramelo's and Ms. Elizabeth's Texas claims for breach of fiduciary duty and constructive fraud and violations of Texas' Deceptive Trade Practices-Consumer Protection Act and Texas' Minimum Wage Act.

Dated: April 27, 2018 Respectfully submitted,

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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on April 27, 2018, I have caused to be electronically filed the foregoing **Motion of Defendant Cultural Care, Inc. to Dismiss the Third Amended Complaint in Part Pursuant to Fed. R. Civ. P. 12(b)(6)** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

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Exhibit A

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As of: April 27, 2018 5:37 PM Z

Frost v. Zeff

Common Pleas Court of Philadelphia County, First Judicial District of Pennsylvania, Civil Trial Division

April 27, 2015, Decided; April 27, 2015, Filed

Case No. 003279 Commerce Program

Reporter
2015 Phila. Ct. Com. Pl. LEXIS 100 *

MARK B. FROST, et al., Plaintiffs v. GREGG L. ZEFF, et al., Defendants

Subsequent History: [*1] 827 EDA 2015, 829 EDA 2015.

Affirmed by, Judgment entered by *Frost v. Zeff, 2015 Pa. Super. Unpub. LEXIS 4502 (2015)*

Core Terms

Plaintiffs', defendants', shareholder, summary judgment motion, statute of limitations, counterclaims, breach of fiduciary duty, Memorandum, unjust enrichment, law firm, conversion, breach of contract, individually, professional corporation, summary judgment, cause of action, derivative, cross-claimant, allegations, break-up, injuries, monies

Case Summary

Overview

HOLDINGS: [1]-The common pleas court entered an opinion in support of its orders dismissing an attorney's counterclaims because the attorney lacked standing; [2]-Any injuries to the attorney were sustained by virtue of his status as a shareholder in a corporation; [3]-Pursuant to *15 Pa.C.S. § 1717*, any claim for harm done to the corporation could only be redressed by its shareholders in an action filed to in the right of the corporation; [4]-The counterclaims were also properly dismissed because they were filed beyond the applicable statutes of limitations, *42 Pa.C.S. § 5524*; *[5]*-The two year statute of limitations for filing actions for fraud, conversion, misrepresentation, breach of fiduciary duty, and negligence expired by the time the counterclaims were filed.

Outcome

Recommended that order be affirmed.

LexisNexis® Headnotes

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

HN1[] **Pleadings, Crossclaims**

See *Pa.R.C.P. No. 1031.1*.

Business & Corporate Law > ... > Actions Against Corporations > Derivative Actions > Enforcement of Corporate Rights

HN2[] **Derivative Actions, Enforcement of Corporate Rights**

In Pennsylvania, only the corporation and a shareholder by an action in the right of the corporation may bring a lawsuit to recover injuries suffered by the corporation. Any claim for harm done to a professional corporation may only be redressed by its shareholders in an action filed to in the right of the corporation.

Business & Corporate Law > ... > Actions Against Corporations > Derivative Actions > General Overview

HN3[] **Actions Against Corporations, Derivative Actions**

Generally referred to as a "derivative action," *15 Pa.C.S. § 1717* explains: the duty of the board of directors,

committees of the board and individual directors under 15 Pa.C.S. § 1712, relating to standard of care and justifiable reliance, is solely to the business corporation and may be enforced directly by the corporation or may be enforced by a shareholder, as such, by an action in the right of the corporation, and may not be enforced directly by a shareholder or by any other person or group.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Procedural Matters > Statute of Limitations > General Overview

HN4[] Statute of Limitations, Time Limitations

See 42 Pa.C.S. § 5524.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN5[] Summary Judgment, Entitlement as Matter of Law

See Pa.R.C.P. No. 1035.2.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN6[] Summary Judgment, Entitlement as Matter of Law

Summary judgment is a means to eliminate the waste of time and resources of both the litigants and the courts.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

HN7[] Burdens of Proof, Movant Persuasion & Proof

The movant has the burden of demonstrating that no genuine issue of material fact exists and that they are entitled to summary judgment as a matter of law.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN8[] Entitlement as Matter of Law, Appropriateness

In deciding a motion for summary judgment, the record must be viewed in a light most favorable to the non-moving party and summary judgment may only be entered in cases where the right to summary judgment is clear and free from doubt.

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > Direct Actions

Business & Corporate Law > ... > Actions Against Corporations > Derivative Actions > Procedural Matters

Business & Corporate Law > ... > Actions Against Corporations > Derivative Actions > Enforcement of Corporate Rights

HN9[] Actions Against Corporations, Direct Actions

In Pennsylvania, only the corporation and a shareholder by an action in the right of the corporation may bring a lawsuit to recover injuries suffered by the corporation. A shareholder does not have standing to institute a direct suit for a harm that is peculiar to the corporation and that is only indirectly injuries to the shareholder. Rather, such a claim belongs to the corporation. A shareholder only has individual standing if the injury is one to the plaintiff as a stockholder and to him or her individually, and not to the corporation. Thus, if the injury is one to plaintiff as a shareholder as an individual, and not to the corporation, it is an individual action. By contrast, if the wrong is primarily against the corporation, the redress for it must be sought by the corporation, or by a shareholder on behalf of the corporation.

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > Direct Actions

HN10[] **Actions Against Corporations, Direct Actions**

A stockholder's claimed direct injury must be independent of any alleged injury to the corporation.

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > Direct Actions

HN11[] **Actions Against Corporations, Direct Actions**

If the action is based on a contract to which the shareholder is a party, or on a right that belongs severally to the shareholder, or on a fraud affecting the shareholder directly, or where there is a duty owed to the individual independent of the person's status as a shareholder, it is an individual action.

Business & Corporate Law > ... > Actions Against Corporations > Derivative Actions > Enforcement of Corporate Rights

HN12[] **Derivative Actions, Enforcement of Corporate Rights**

Courts determine whether the injury is peculiar to the corporation by looking to the gravamen of the complaint. The claim is peculiar to the corporation if it seeks to recover assets due to the corporation, even if damage to a shareholder results indirectly as the result of the injury to the corporation.

Business & Corporate Law > ... > Actions Against Corporations > Derivative Actions > Enforcement of Corporate Rights

HN13[] **Derivative Actions, Enforcement of Corporate Rights**

An action in which the holder can prevail only by showing an injury or breach of duty to the corporation should be treated as a derivative action.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN14[] **Amendment of Pleadings, Leave of Court**

Where the statute of limitations has run, amendments will not be allowed which introduce a new cause of action or bring in a new party.

Governments > Legislation > Statute of Limitations > General Overview

HN15[] **Legislation, Statute of Limitations**

Statutes of limitations require that an aggrieved plaintiff bring their claims within a certain time of the injury. Statutes of limitations are designed to effectuate three purposes: (1) preservation of evidence, (2) the right of potential defendants to repose, and (3) administrative efficiency and convenience.

Torts > Intentional Torts > Breach of Fiduciary Duty > Defenses

Torts > Intentional Torts > Conversion > Defenses

Torts > ... > Statute of Limitations > Begins to Run > General Overview

HN16[] **Breach of Fiduciary Duty, Defenses**

A two-year statute of limitations period applies to both breach of fiduciary duty claims and conversion claims. *42 Pa.C.S. § 5524*. The statute begins to run as soon as the right to institute and maintain a suit arises. Lack of knowledge, mistake or misunderstanding do not toll the running of the statute of limitations.

Governments > Legislation > Statute of Limitations > General Overview

HN17[] **Legislation, Statute of Limitations**

A person asserting a claim is under a duty to use all reasonable diligence to be properly informed of the facts and circumstances upon which a potential right of recovery is based and to institute suit within the prescribed statutory period.

Judges: PAMELA PRYOR DEMBE, J.

Opinion by: PAMELA PRYOR DEMBE

Opinion

Mark B. Frost, Esq, and Gregg L. Zeff, Esq. formed Frost & Zeff, PC. The law firm broke up and spawned litigation that has given rise to the instant appeal and cross appeal. Each party filed a motion for summary judgment and the lower court granted both motions after determining that neither party had properly pled a claim for relief against the other and that various claims were barred by the applicable Statute of Limitations. Both parties have appealed.

Background

On March 1, 2013, Plaintiffs Mark B. Frost (Mark Frost") and Mark B. Frost & Associates (Frost Law Firm) filed a writ of summons against Defendants, Frost & Zeff, PC. Gregg L. Zeff ("Gregg Zeff"), Zeff Law Firm, LLC, and the Law Office of Gregg L. Zeff (Zeff Law Firm).[1] The complaint included claims against all defendants for (1) breach of contract (count **I**); (2) unjust enrichment (count **II**); (3) conversion (count **III**); and breach of Fiduciary duty (count IV). Defendants filed an answer, cross claim and counterclaims

On September 24, 2014, the court entered an order granting Defendant's Motion for Summary Judgment and dismissed **[*2]** Frost's complaint against the Defendants[2] and Defendant Zeff's cross claim against codefendant Frost & Zeff, PC. Plaintiff filed an appeal. (827 EDA 2015) The supporting memorandum of law is attached hereto as Exhibit A.

The remainder of this opinion is in support of the lower court's entry of an order granting on February 12, 2015 granting Plaintiff's Motion for Summary Judgment on Defendant's Counterclaim.

Defendants' answer to plaintiff's complaint included counterclaims which remained outstanding after the order of September 24, 2014. On September 26, 2015, the court returned the counterclaims case to the active docket.

On November 26, 2014, Plaintiff filed a Motion for Summary Judgment on the counterclaims arguing that while Defendants purported to countersue on behalf of the Frost & Zeff, PC they were in reality seeking a judgment in favor of Defendant Gregg L. Zeff. The lower court agreed and granted Plaintiffs Motion for Summary Judgment on February 12, 2015. This cross-appeal followed.

Discussion

Defendants' counterclaims filed on behalf of Zeff and the Zeff Law Firm (ZLF) against Frost and Mark B. Frost and Associates (FLF) consisted of counts: **[*3]** (1) Fraud; (2) Constructive Fraud (against Frost only), (3) Conversion, (4) Unjust Enrichment, (5) Misrepresentation, (6) Breach of Fiduciary Duty (against Frost only), (7) Accounting,(8) Negligence (Zeff v. Frost only), (9) Breach of Fiduciary Duty (Against Frost & Zeff, PC, only), and (10) Accounting (against Frost & Zeff, PC only) and (11) for relief pursuant to *PA R. CIV P. Rule 1031.1* (against Frost & Zeff, PC).[3]

The facts underlying the counterclaims consist of Zeff's allegations **[*4]** that Frost had an affair and used money from Frost and Zeff, PC to pay child support, that Frost used Frost & Zeff funds to pay personal expenses, borrowed money from the Frost & Zeff impeding the firm's cash flow, diverted funds from cases the Frost & Zeff had settled and that Frost did all of this without permission from the shareholders. The events that form the basis for the counterclaims occurred before Frost & Zeff, PC ceased conducting business in March, 2009. The counterclaims were filed on July 13, 2013.

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[1] Plaintiffs' Complaint at ¶¶ 1-5.

[2] Mark Frost and the Frost Law Firm.

[3] ***HN1***[] Any party may set forth in the answer or reply under the heading "Cross-claim" a cause of action against any other party to the action that the other party may be

(1) solely liable on the underlying cause of action or

Note: The term "underlying cause of action" refers to the cause of action set forth in the plaintiffs complaint or the defendant's counterclaim.

(2) liable to or with the cross-claimant on any cause of action arising out of the transaction or occurrence or series of transactions or occurrences upon which the underlying cause of action is based.

Note: Subparagraph (2) permits a cross-claimant to raise a claim that another party is liable over to the cross-claimant or jointly and severally liable with the cross-claimant.

Pa.R.C.P. No. 1031.1

Standing

HN2[] In Pennsylvania, only the corporation and "a shareholder ... by an action in the right of the corporation" may bring a lawsuit to recover injuries suffered by the corporation.[4] Any claim for harm done to Frost & Zeff, PC as a professional corporation may only be redressed by its shareholders in an action filed to in the right of the corporation. *See* Hill v. Ofalt, 2014 PA Super 17, 85 A. 3d 540, 548 (Pa. Super. Ct. 2014). Accepting the allegations of the counterclaims as true, any injuries to Zeff were sustained by virtue of his status as a shareholder in Frost v. Zeff PC, . See, E.g. *Morrison Informatics, Inc. v. Members 1st Credit Union, 2014 PA Super 166, 97 A.3d 1233, 1239 (Pa. Super. Ct. 2014) appeal granted in part sub nom. Morrison Informatics, Inc. v. Members 1st Fed. Credit Union, 111 A.3d 170, 2015 Pa. LEXIS 526 (Pa. Mar. 11, 2015).* Therefore the counterclaims were properly **[*5]** dismissed for lack of standing.

Statutes of Limitation

The counterclaims were also dismissed because they were filed beyond the applicable statutes of limitations

42 Pa.C.S.A. 5524 provides in pertinent part:

> HN4[] The following actions and proceedings must be commenced within two years
> (3) An action for taking, detaining or injuring personal property, including actions for specific recovery thereof.
> (7) Any other action or proceeding to recover damages for injury to person or property which is founded on negligent, intentional, or otherwise tortious conduct or any other action or proceeding sounding in trespass, including deceit or fraud, except an action or proceeding subject to another limitation specified in this subchapter."

The court properly dismissed **[*6]** the counterclaims for fraud (count I), constructive fraud (count II), conversion (count III), misrepresentation (count V), breach of fiduciary duty (count VI), negligence (count XI), breach of fiduciary duty, accounting (count X) because the two year statute of limitations for filing these actions had expired by the time the counterclaims were filed. The counterclaim for unjust enrichment (count IV) is also barred by the applicable statute of limitations. 42 Pa.C.S.A. § 5525(a)(4). Therefore, the order of the lower court should be affirmed.

DATE:

BY THE COURT

/s/ Pamela Pryor Dembe

Dembe, J.

EXHIBIT A

MEMORANDUM OPINION

I. BACKGROUND

On March 1, 2013, plaintiffs Mark B. Frost ("Frost") and Mark B. Frost & Associates ("Frost & Associates") (collectively referred to as "plaintiffs"), filed a writ of summons against defendants, Frost & Zeff, P.C., Gregg L. Zeff ("Zeff"), Zeff Law Firm, LLC, and the Law Office of Gregg L. Zeff (collectively referred to as "defendants").[1] Plaintiffs' complaint, filed on July 1, 2013, seeks monetary recovery against all defendants under alleged claims for: (1) breach of contract (count I); (2) unjust enrichment (count II); (3) conversion (count III); and breach of fiduciary duty (count IV). **[*7]** [2]

Plaintiff Frost is an attorney licensed in the Commonwealth of Pennsylvania.[3] Plaintiff Frost & Associates is a Philadelphia law firm and professional corporation.[4] Defendant Zeff is an attorney licensed in Pennsylvania and New Jersey.[5] Defendants Zeff Law Firm , LLC and the Law Office of Gregg L. Zeff are New

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[4] HN3[] Generally referred to as a "derivative action," 15 Pa. C.S.A. § 1717 explains: [t]he duty of the board of directors, committees of the board and individual directors under [15 Pa.C.S.A. §] 1712 (relating to standard of care and justifiable reliance) is solely to the business corporation and may be enforced directly by the corporation or may be enforced by a shareholder, as such, by an action in the right of the corporation, and may not be enforced directly by a shareholder or by any other person or group.

[1] Plaintiffs' Complaint at ¶¶ 1-5.

[2] Plaintiffs' Complaint at ¶¶ 88-105.

[3] Plaintiffs' Complaint at ¶ 1.

[4] Plaintiffs' Complaint at ¶ 2.

[5] Plaintiffs' Complaint at ¶ 3.

Jersey law firms and professional corporations.[6]

Defendant Frost & Zeff is a Philadelphia law firm and professional corporation.[7] On or about 1995, plaintiff Frost and defendant Zeff were both principals of Frost & Zeff, with plaintiff Frost as the majority shareholder owning sixty percent of the stock and defendant Zeff owning twenty percent of the stock.[8] In March 2009 defendant Zeff left the firm.[9] Frost & Zeff has not conducted business since approximately March 2009.[10]

Plaintiff brought direct suit against all defendants for "conduct that occurred prior to the break-up of Frost & Zeff, and allegations regarding the break-up of the firm and thereafter."[11] Such allegations include "wrongful withholding of monies, failing to pay monies for vendors and other creditors, and failing to comply with agreements made regarding the payment of monies owed."[12] Prior to the breakup of Frost & Zeff, and thereafter, plaintiffs contend that various vendors, individuals and entities sought payment on various debts and loans that Frost & Zeff had incurred.[13] Plaintiff Frost alleges that he was directly and individually responsible for such debts, and that defendant Zeff, as minority shareholder, was required to contribute to the payment of such debts accrued on behalf of Frost & Zeff.[14]

Frost & Zeff ceased operations in approximately 2009, and thereafter, several malpractice suits were filed against Frost & Zeff and bills from a variety of vendors and creditors were sent to Frost & Zeff.[15] Such suits and bills accrued around late 2009 to early 2010.[16]

Presently before this court is defendants' motion for summary judgment to dismiss all claims based on lack of standing and statute of limitations arguments.[17] This court addresses both arguments below.

II. DISCUSSION

The Pennsylvania Rules of Civil Procedure provide in pertinent part:

> *Rule 1035.2 Motion*
>
> HN5[] After the relevant **[*10]** pleadings are closed, but within such time as not to unreasonably delay trial, any part may move for summary judgment in whole or in part as a matter of law
>
> (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
>
> (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse part who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issue to be submitted to a jury.

HN6[] Summary judgment is a means to eliminate the waste of time and resources of both the litigants and the

[6] Plaintiffs' Complaint at ¶ 3; Defendants' Answer to plaintiffs' Complaint at ¶ 3.

[7] Plaintiffs' Complaint at ¶ 5; Defendants' Answer to plaintiffs' Complaint at ¶ 5.

[8] Plaintiffs' Complaint at 7; At the time Frost & Zeff incorporated in 1995 as a professional corporation, **[*8]** third party George Szymanski, Jr. ("Szymanski") was also a principal, owning the remaining twenty percent of the stock, however Szymanski left the firm one year later in 1996. Plaintiffs' Complaint at ¶¶7-8.

[9] Plaintiffs' Complaint at ¶ 41.

[10] Plaintiffs' Complaint at ¶ 5; Defendants' Answer to plaintiffs' Complaint at ¶ 5.

[11] Plaintiffs' Complaint ¶¶ 1-87; Plaintiffs' Memorandum in Opposition to defendants' **[*9]** Motion for Summary Judgment ¶ 9.

[12] Plaintiffs' Complaint ¶¶ 1-87; Plaintiffs' Memorandum in Opposition to defendants' Motion for Summary Judgment ¶ 9.

[13] Plaintiffs' Complaint ¶¶ 1-87; Plaintiffs' Memorandum in Opposition to defendants' Motion for Summary Judgment ¶¶ 9-10.

[14] See plaintiffs' Memorandum in Opposition to defendants' Motion for Summary Judgment.

[15] Plaintiffs' Complaint at ¶¶ 42-87; See plaintiffs' Memorandum in Opposition to defendants' Motion for Summary Judgment.

[16] Plaintiffs' Complaint at ¶¶ 42-87; See plaintiffs' Memorandum in Opposition to defendants' Motion for Summary Judgment.

[17] Defendants' Motion for Summary Judgment.

courts.[18] HN7[] The movant has the burden of demonstrating that no genuine issue of material fact exists and that they are entitled to summary judgment as a matter of law.[19] HN8[] In deciding a motion for summary judgment, the record must be viewed in a light most favorable to the non-moving party and summary judgment may only be entered in cases where the right to summary judgment is clear and free from doubt.[20]

Defendants' motion for **[*11]** summary judgment is premised upon lack of standing and statute of limitation arguments.[21] The court finds, for the reasons that follow, that (1) plaintiffs do not have standing to bring breach of contract or unjust enrichment claims against defendants; and (2) plaintiffs' conversion and breach of fiduciary duty claims are time-barred by the statute of limitations.

I. Plaintiffs Do Not Have Standing To Bring Breach of Contract or Unjust Enrichment Claims Against Defendants.

Defendants' Motion for Summary Judgment argues that plaintiffs do not have standing to sue defendants directly because any cognizable injury was to the Frost & Zeff professional corporation and not to plaintiffs individually.[22] Plaintiffs argue in response that they have standing to sue defendants directly because plaintiffs have personally incurred substantial damages resulting from defendant Zeff's failure to pay debts "due to the firm."[23]

HN9[] In Pennsylvania, only the corporation and "a shareholder ... by an action in the right of the **[*12]** corporation" may bring a lawsuit to recover injuries suffered by the corporation.[24] A shareholder does not have standing to institute a direct suit for "a harm that is peculiar to the corporation and that is only indirectly injuries to the shareholder."[25] Rather, such a claim belongs to the corporation. A shareholder only has individual standing "if the injury is one to the plaintiff as a stockholder and to him individually, and not to the corporation..."[26] Thus, if the injury is one to plaintiff as a shareholder as an individual, and not to the corporation, it is an individual action.[27] By contrast, if the wrong is primarily against the corporation, the redress for it must be sought by the corporation, or by a shareholder on behalf of the corporation.

HN12[] Courts determine whether the injury is peculiar to the corporation by looking to the "gravamen of the complaint."[28] The claim is peculiar to the corporation if it seeks to recover assets due to the corporation, even if damage to a shareholder results indirectly as the result of the injury to the corporation.[29]

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[18] Liles v. Balmer, 389 Pa. Super. 451, 567 A.2d 691, 692 (Pa. Super. 1989).

[19] Krug v. City of Philadelphia, 152 Pa. Commw. 475, 620 A.2d 46, 49 (Pa. Commw. 1993).

[20] O'Brien Energy v. American Employers' Insurance Co., 427 Pa. Super. 456, 629 A.2d 957, 960 (Pa. Super. 1993); American States v. Maryland Casualty Co., 427 Pa. Super. 170, 628 A.2d 880, 885 (Pa. Super. 1993).

[21] Defendants' Motion for Summary Judgment at ¶ 14.

[22] Defendants' Motion for Summary Judgment a ¶ 15.

[23] Plaintiffs' Memorandum of Law in Opposition to defendants' Motion for Summary Judgment at Page 18.

[24] Generally referred to as a "derivative action," 15 Pa. C.S.A. § 1717 explains: [t]he duty of the board of directors, committees of the board and individual directors under [15 Pa.C.S.A. §] 1712 (relating to standard of care and justifiable reliance) is solely to the business corporation and may be enforced directly by the corporation or may be enforced by a shareholder, as such, by an action in the right of the corporation, and may not be enforced directly by a shareholder **[*13]** or by any other person or group.

[25] Hill v. Ofalt, 2014 PA Super 17, 85 A.3d 540, 548 (Pa. Super. 2014) (quoting Reifsnyder v. Pgh. Outdoor Adver. Co., 405 Pa. 142, 173 A.2d 319, 321 (Pa. 1961)).

[26] HN10[] A stockholder's claimed direct injury must be independent of any alleged injury to the corporation. See Hill, 85 A.3d at 548; White v. First Nat'l Bank, 252 Pa. 205, 97 A. 403, 405 (1916).

[27] For example, HN11[] if the action is based on a contract to which the shareholder is a party, or on a right that belongs severally to the shareholder, or on a fraud affecting the shareholder directly, or where there is a duty owed to the individual independent of the person's status as a shareholder, it is an individual action. See Hill, 85 A.3d at 548.

[28] Hill, 85 A.3d at 549.

[29] 12B Fletcher Cyclopedia of the Law of Corporations § 5911 (2013); ALI Principles of Corporate Governance § 7.01(a) (HN13[] "[a]n action in which the holder can prevail only by showing an injury or breach of duty to the corporation should be treated as a derivative action").

Upon review, this court finds plaintiffs lack standing to assert breach of contract and unjust enrichment because any breach of contract and unjust enrichment claims belong to Frost & Zeff as a professional **[*14]** corporation rather than to plaintiffs individually. Defendants' alleged failure to pay debts due to the firm is an injury suffered by the firm rather than plaintiffs individually. The difficulty with plaintiffs' case is any breach of contract or unjust enrichment claim for monies due to the firm is an asset of the firm rather than of plaintiff individually as a shareholder. Plaintiffs argue that they have standing to sue defendants directly because plaintiffs have personally incurred substantial damages resulting from defendants' failure to pay debts "due to the firm."[30] However, such injury is regarded as "indirect" and thus is insufficient to give rise to a direct cause of action by plaintiff as a stockholder.[31] Any injuries suffered by plaintiffs individually were as a result of harm done to Frost & Zeff. Therefore, this court determines the breach of contract claim and unjust enrichment claim is only proper as a derivative action, and because plaintiffs sought strategically to bring a direct suit alleging injury to the firm, plaintiffs do not have proper standing to assert their breach of contract and unjust enrichment claim for monies "due to the firm."[32]

II. Plaintiffs Conversion and Breach of Fiduciary Duty Claims Are Barred By The Statute Of Limitations.

Plaintiffs assert personal and direct claims of conversion and breach of fiduciary duty.[33] Defendants argue that such claims are barred by the statute of limitations. Plaintiffs do not argue an exception to the limitations period applies, and instead concede in their Memorandum of Law in Opposition to defendants' Motion for Summary Judgment:

> [a]dmittedly, the break-up of Frost & Zeff occurred outside of the two-year window from the filing of the instant action. However, had Zeff provided in discovery a full accounting of the Frost & Zeff cases that have been maintained by Zeff since the break-up of the firm, [p]laintiffs would be in a position to determine whether any of said cases were resolved within the past two years, thereby giving rise to a claim of conversion or breach of fiduciary duty.[34]

HN15[] Statutes of limitations require that an aggrieved plaintiff bring their claims within a certain time of the injury.[35] Statutes of limitations "are designed to effectuate three purposes: (1) preservation of evidence; (2) the right of potential defendants to repose; and (3) administrative efficiency and convenience."[36]

HN16[] A two-year statute of limitations period applies to both breach of fiduciary duty claims and conversion claims.[37] The statute begins to run "as soon as the right to institute and maintain a suit arises; lack of knowledge, mistake or misunderstanding do not toll the running of

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[30] Plaintiffs' Memorandum of Law **[*15]** in Opposition to defendants' Motion for Summary Judgment at Page 18.

[31] *Hill, 85 A.3d at 551* (affirming that plaintiff's injury was "indirect" to the corporate injury although the IRS had placed a tax lien upon plaintiff personally, and the IRS had threatened to file suit against plaintiff personally, reasoning that plaintiff's injury was "both dependent upon and derivative to the corporate injury").

[32] Plaintiffs ask this court to allow leave to amend plaintiffs' complaint to name Frost & Zeff as a plaintiff. Plaintiffs' Memorandum in Opposition to defendants' Motion for Summary Judgment at Page 2. However, given that discovery is complete, the statute of limitations has run on all possible breach of contract and unjust enrichment claims, and there is no reason that plaintiffs could not have asked for leave to amend their complaint earlier, this court does not grant leave to amend. In filing direct claims rather than derivative, plaintiffs have elected to disassociate themselves from the corporation rather than to avail themselves of the remedies set forth for individuals in this very situation, i.e., shareholder derivative suits. Plaintiff Frost elected to incorporate Frost & Zeff, and must follow the remedies **[*16]** set forth within the law for any damages he may have suffered as a result. *HN14*[] Where the statute of limitations has run, amendments will not be allowed which introduce a new cause of action or bring in a new party. *Saracina v. Cotoia, 417 Pa. 80, 208 A.2d 764, 766 (Pa. 1965)*.

[33] Plaintiffs have standing to assert such claims because such claims are individual in nature and not on behalf **[*17]** of the corporation.

[34] Plaintiffs' Memorandum of Law in Opposition to defendants' Motion for Summary Judgment at Page 16 Footnote 3.

[35] *Dalrymple v. Brown, 549 Pa. 217, 701 A.2d 164, 167 (Pa. 1997)*.

[36] *Kingston Coal Company v. Felton Min. Co., Inc., 456 Pa. Super. 270, 690 A.2d 284, 288 (Pa. Super. 1997)*; *Meehan v. Archdiocese of Philadelphia, 2005 PA Super 91, 870 A.2d 912, 919 (Pa. Super. 2005)*.

[37] *42. Pa. C.S.A. § 5524*.

the statute of limitations."[38]

Upon consideration, this court finds all facts alleged by plaintiffs, taken in the light most favorable to plaintiffs, that form the basis of the conversion and breach of fiduciary duty claims, are time-barred **[*18]** by the two-year statute of limitations. Unless plaintiffs establish an exception to this limitations period, plaintiffs claims are time-barred on its face[39] because the writ of summons was filed on March 1, 2013 and all facts alleged that make the basis of any conversion or breach of fiduciary duty claim accrued to plaintiffs personally prior to March 1, 2011.

III. CONCLUSION

For the forgoing reasons, defendants' Motion for Summary Judgment on all claims is granted, and all claims against defendants are dismissed with prejudice.

BY THE COURT,

/s/ Pamela Pryor Dembe

PAMELA PRYOR DEMBE, J.

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[38] *Pocono Int'l Raceway. Inc. v. Pocono Produce, Inc., 503 Pa. 80, 468 A.2d 468, 471 (Pa. 1983)* ***HN17***[] "A person asserting a claim "is under a duty to use all reasonable diligence to be properly informed of the facts and circumstances upon which a potential right of recovery is based and to institute suit within the prescribed statutory period," Id.

[39] See ***Aquilino v. Philadelphia Catholic Archdiocese, 2005 PA Super 339, 884 A.2d 1269, 1275 (Pa. Super. 2005)***.