Circuit Court for Baltimore City
Case No. 24-C-14-007867

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 282

September Term, 2017

PROSPECT CAPITAL CORPORATION

v.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, *et al.*

Meredith,
Nazarian,
Friedman,

JJ.

Opinion by Nazarian, J.

Filed: July 5, 2018

This appeal arises from an unpaid loan. In 2007, Prospect Capital Corporation ("Prospect") loaned ESA Environmental Specialists, Inc. ("ESA") approximately $13.75 million. Zurich American Insurance Company and Fidelity & Deposit Company of Maryland (collectively "F&D") had issued payment and performance surety bonds on ESA's behalf. Four months later, ESA sought protection under federal bankruptcy law. Prospect later sued ESA and settled, albeit for less than the full loan amount.

On December 17, 2014, Prospect sued F&D in the Circuit Court for Baltimore City, alleging that F&D aided, abetted, and conspired with ESA to commit fraud. F&D moved for summary judgment and requested a hearing. The circuit court granted F&D's motion and entered an order to that effect. Prospect appeals and we affirm.

I. BACKGROUND

In January 2007, Prospect, a sophisticated business development company that provides loans to small and medium sized business, received a confidential memorandum offering an opportunity to invest in ESA, a government contractor. Based on ESA's Earnings Before Interest, Tax, Depreciation and Amortization ("EBITDA")[1] and an initial investigation, Prospect and ESA signed a term sheet, and Prospect requested financial documents from ESA. After reviewing the documents and meeting with ESA's managers, Prospect loaned ESA $12.2 million in April 2007. ESA reported a liquidity crisis just three

[1] EBITDA is an indicator of a company's financial health and performance and is frequently used as a loan covenant. Karen Berman & Joe Knight, *How EBITDA Can Mislead*, HARVARD BUS. REV. (Nov. 19, 2009), https://hbr.org/2009/11/how-ebidta-can-mislead.html.

weeks after the initial loan, and Prospect loaned ESA an additional $1.5 million in May 2007. At the time the loans were issued, F&D had issued surety bonds on ESA's behalf.

Prospect investigated ESA in July 2007 and discovered that ESA had misrepresented its EBITDA in the memorandum—it stated $2.5 million, rather than *negative* $2.9 million—and declared a default. On August 1, 2007, ESA filed a petition under Chapter 11 of the United States Bankruptcy Code in the U.S. Bankruptcy Court for the Western District of North Carolina.

Prospect hired a private firm in 2008 to investigate ESA's collapse and learned that ESA had committed fraud to induce the loan. It sued ESA and 15 other defendants in the United States District Court for the Southern District of New York alleging, among other things, that ESA officers Charles Cole and Nathan Bender had committed fraud. In November 2011, Prospect settled with Messrs. Cole and Bender and other ESA employees.

Prospect also alleges that it engaged a forensic data recovery firm in 2013 and discovered emails that ESA had deleted from its server. Prospect alleged F&D "struck a deal with ESA to help ESA survive the diligence period" by paying off certain debts ESA owed "in exchange for ESA's promise to seek a fraudulent loan from Prospect and reimburse [F&D] with the proceeds of the loan." Prospect claims the newly discovered emails revealed that F&D had played a role in ESA's alleged fraud.

In December 2014, Prospect filed the complaint that initiated this case. Prospect alleged that (a) F&D knew or should have known about ESA's alleged fraud because F&D stood to benefit from it, since ESA couldn't repay F&D without Prospect's loan to ESA,

and (b) F&D agreed with ESA in March 2007 to pay off $1.1 million ESA owed to contractors "in exchange for ESA's promise to procure a loan and use the ill-gotten proceeds of that loan to reimburse [F&D]." F&D responded and asserted several affirmative defenses, including limitations.

After discovery, F&D moved for summary judgment and argued, among other things, that Prospect's claims were barred by the applicable three-year statute of limitations. F&D asserted that Prospect (a) had discovered ESA's alleged fraud in 2007 and suffered damages at that time; (b) knew of F&D's existence and relationship to ESA in 2007; and (c) identified F&D on a "list of defendants" in January 2008, but didn't sue F&D until December 17, 2014—over seven years after it discovered the alleged fraud. Prospect opposed F&D's motion and filed a cross-motion that argued, among other things, that F&D's statute of limitations defense raised disputed issues of fact, and, in any event, that because F&D conspired with ESA to defraud Prospect, ESA's fraud is imputed to F&D and tolled the limitations period. After a hearing, the circuit court granted F&D's motion and concluded that "the statute of limitations was not tolled by the fraudulent concealment of emails by ESA as they were not an adverse party as required and therefore Prospect's complaint filed against F&D was done outside of the statute of limitations." Prospect appealed. We will supply additional facts as necessary below.

II. DISCUSSION

Prospect argues on appeal[2] that the circuit court erred in granting F&D's motion for summary judgment. We review a trial court's grant of summary judgment *de novo*. *Koste v. Town of Oxford*, 431 Md. 14, 25 (2013). Before deciding whether the circuit court correctly entered judgment as a matter of law in F&D's favor, we review the record independently to determine whether there were any genuine disputes of material fact. *Hill v. Cross Country Settlements, LLC*, 402 Md. 281, 294 (2007). A genuine dispute of material fact exists when there is evidence "upon which the jury could reasonably find for the plaintiff." *Beatty v. Trailmaster Prods., Inc.*, 330 Md. 726, 739 (1993) (citation omitted). "We review the record in the light most favorable to the nonmoving party and construe any reasonable inferences that may be drawn from the facts against the moving party." *Myers v. Kayhoe*, 391 Md. 188, 203 (2006) (citation omitted).

A. The Circuit Court Did Not Err in Granting F&D's Motion For Summary Judgment.

Relying on the language of Courts and Judicial Proceedings Article ("CJ") § 5-203, Prospect argues *first* that the court erred in declining to impute ESA's fraudulent

[2] Prospect phrased its Questions Presented as follows:

> 1. Whether the Court erred in finding, as a matter of law, that acts of concealment by one or more of Zurich's co-conspirators cannot be imputed to Zurich for purposes of tolling the statute of limitations.
> 2. Whether the Court erred by failing to conclude that the question of when Prospect knew or should have known of its potential claims against Zurich was a question of fact for a jury to decide.

concealment to F&D and in refusing to toll the limitations period. Section § 5-203 provides that "[i]f the knowledge of a cause of action is kept from a party by the fraud of an adverse party, the cause of action shall be deemed to accrue at the time when the party discovered, or by the exercise of ordinary diligence should have discovered the fraud." For this provision to apply and extend the applicable statute of limitations, a plaintiff must plead fraud or fraudulent concealment with particularity, and the complaint must "contain specific allegations of how the fraud kept the plaintiff in ignorance of a cause of action, how the fraud was discovered, and why there was a delay in discovering the fraud, despite the plaintiff's diligence." *Doe v. Archdiocese of Washington*, 114 Md. App. 169, 187–88 (1997).

In granting F&D's motion, the trial court found that "ESA is not a party to this suit and therefore is not an adverse party to Prospect as required by [CJ §] 5-203. The statute of limitations cannot be tolled under the rule by the actions of a non-party." Maryland follows an "inquiry notice rule," under which a cause of action accrues when the plaintiff has "knowledge of circumstances which would cause a reasonable person in her position to undertake an investigation which, if pursued with reasonable diligence, would have led to knowledge of the wrong." *Lumsden v. Design Tech Builders, Inc.*, 358 Md. 435, 446 (2000) (cleaned up). Prospect maintains it "did not discover its cause of action against Zurich until 2013" when Prospect retrieved and restored e-mails from ESA's server.

But the record reveals Prospect was at least on inquiry notice of F&D's relationship to ESA long before 2013. *First*, Prospect discovered ESA's fraud in July 2007, when it

issued a notice of default to ESA after ESA's reported liquidity crisis prompted an investigation. In that notice, dated July 22, 2007, Prospect identified F&D as "a surety which was forced to pay claims of subcontractors who had not been paid by [ESA]" and alleged that ESA "failed to disclose the [F&D] obligation at closing." *Second*, when Prospect sued Messrs. Cole and Bender for fraud in 2007, Prospect alleged that the relationship between Prospect and F&D, ESA's fraudulent misrepresentation of its financial status, and ESA's failure to disclose the debt ESA owed to F&D, induced Prospect to lend millions of dollars to ESA in 2007. *And third*, before initiating the suit against ESA, Prospect identified F&D as a potential defendant "related to" ESA's default in a January 24, 2008 e-mail and acknowledged, again, during ESA's bankruptcy proceeding that ESA never disclosed its debt to F&D prior to the closing date of the loan. Although Prospect neglected to name F&D as a defendant in its 2011 suit, the record amply supports the conclusion that ESA was well aware of F&D's relationship with ESA and therefore had inquiry notice to "undertake an investigation which, if pursued with reasonable diligence, would have led to knowledge of the wrong." *See Lumsden*, 358 Md. at 446.

Next, Prospect contends that F&D is an adverse party within the meaning of § 5-203 because F&D allegedly conspired with ESA to defraud Prospect and, because they were conspirators, ESA's fraudulent concealment is imputed to F&D for purposes of tolling the statute of limitations. F&D responds *first* that § 5-203 doesn't apply because ESA is not an adverse party in the case. Section 5-203 applies when two conditions are

satisfied: "(1) the plaintiff has been kept in ignorance of the cause of action by the fraud of the adverse party, and (2) the plaintiff has exercised usual or ordinary diligence for the discovery and protection of his or her rights." *Frederick Rd. Ltd. P'ship v. Brown & Sturm*, 360 Md. 76, 98–99 (1998).

Prospect bases its case against F&D on conduct committed wholly by ESA. Prospect alleges it didn't discover its cause of action against F&D until Prospect recovered data that *ESA* had erased from its server. And by Prospect's own reckoning, ESA committed the fraudulent concealment, not F&D. This is Prospect's biggest hurdle: since Prospect already had sued ESA under the same fraud theory in 2008, and recovered from and released ESA when they settled in 2011, how can it say that the fraud was concealed for another three years? There may have been strategic or tactical reasons not to sue F&D at that time, but Prospect knew the facts bearing on the alleged fraud and knew F&D's relationship to ESA when it litigated these issues against ESA directly. And indeed, ESA had identified F&D as a potential defendant back then.

Moreover, Prospect's claims against F&D fail as a matter of law because civil conspiracy and aiding and abetting are not independent causes of action "capable of independently sustaining an award of damages in the absence of other tortious injury to the plaintiff." *Alleco Inc. v. Harry & Jeanette Weinberg Foundation, Inc.*, 340 Md. 176, 189 (1995) (cleaned up). "One of the requirements for tort liability as an aider and abettor is that there be a direct perpetrator of the tort. Thus, civil aider and abettor liability, somewhat like civil conspiracy, requires that there exist underlying tortious activity in order for the

alleged aider and abettor to be held liable." *Id.* at 200–01 (cleaned up). It's true that a conspirator can be liable for the conduct of a co-conspirator. *See e.g.*, *Mackey v. Compass Mktg. Inc.*, 391 Md. 117, 128 (2006). But here, ESA has already been released from Prospect's fraud claim, and Prospect can't piggyback on that resolved claim seven years later.

And in any event, even if F&D knew about ESA's plan to induce Prospect to loan millions of dollars, F&D was under no obligation to disclose ESA's true financial status. Nondisclosure is not fraud without a duty to disclose. *Frederick Road*, 360 Md. at 100 n.14. Absent a fiduciary relationship, Prospect can't establish fraudulent concealment unless it can demonstrate that F&D acted affirmatively to conceal the cause of action. *Id.* Here, F&D held no fiduciary, confidential, or contractual relationship with Prospect, and only owed a duty to ESA, as its surety. Nor has Prospect produced any evidence that F&D took any actions to conceal the cause of action. And Prospect's counsel conceded at oral argument that F&D hadn't committed any fraud of its own.

Nevertheless, Prospect argues that because F&D agreed to forbear notifying the obligees on ESA project, F&D was complicit in ESA's fraud. We disagree. Nothing in the e-mails Prospect discovered in 2013 revealed F&D's involvement in ESA's fraud, let alone F&D's knowledge of it. Indeed, F&D was entitled, as a surety, to demand assurances that ESA would reimburse it. Because Prospect was on inquiry notice of ESA's conduct as of June 2007, when ESA reported a liquidity crisis and filed for bankruptcy, we agree that the claims in this complaint are time-barred.

B. Limitations Is Not A Jury Question In This Case.

Prospect urges us to remand the case to allow a jury to resolve what it characterizes as disputed material facts about whether (and when) it was on inquiry notice for limitations purposes. Prospect notes, correctly, that "[w]hether a plaintiff's failure to discover a cause of action was attributable to fraudulent concealment by the defendant is ordinarily a question of fact to be determined by the factfinder, typically a jury." *Mathews v. Cassidy Turley Maryland, Inc.*, 435 Md. 584, 620 (2013). But "when a cause of action accrues is usually a legal question for the court." *Moreland v. Aetna U.S. Healthcare, Inc.*, 152 Md. App. 288, 296 (2003). And in this case, there was no fact-finding required to determine when Prospect was on "notice of the nature and cause of [its] . . . injury." *Frederick Rd.*, 360 Md. at 96; *cf. Poffenberger v. Risser*, 290 Md. 631, 637 (1981).

As such, summary judgment in favor of F&D was appropriate. Unlike *Frederick Road*, there was no fiduciary or confidential relationship between the parties that prevented Prospect from gaining knowledge about all potential tortfeasors through reasonable diligence. Accordingly, the three-year limitations period for civil actions bars Prospect's claim against F&D, and no exception to the discovery rule saves these claims. The limitations period had begun to run from the date of injury, and Prospect was, at that point, "charged with knowledge of facts that would have been disclosed by a reasonably diligent investigation." *O'Hara v. Kovens*, 305 Md. 280, 289 (1986) (quoting *Lutheran Hosp. of Maryland v. Levy*, 60 Md. App. 227, 237 (1984)). Indeed, "[t]he beginning of limitations is not postponed until the end of an additional period deemed reasonable for making [an]

investigation . . . . From that date the statute itself allows sufficient time—three years—for reasonably diligent inquiry and for making a decision as to whether to file suit." *Id.* (quoting *Lutheran Hosp.*, 60 Md. App. at 237–38).

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. APPELLANT TO PAY COSTS.