



SO ORDERED,

Jason D. Woodard
Judge Jason D. Woodard
United States Bankruptcy Judge

The Order of the Court is set forth below. The case docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

In re)	
)	
THOMAS L. WINDHAM AND)	Case No.: 14-11544-JDW
LINDA T. WINDHAM,)	
)	
Debtors.)	Chapter: 11

THOMAS L. WINDHAM, SR., M.D,)	
<i>et. al</i> ,)	
)	
Plaintiffs,)	
)	
v.)	A.P. No.: 14-01038-JDW
)	
RENASANT BANK,)	
)	
Defendant.)	

**ORDER GRANTING IN PART, AND DENYING IN PART, DEFENDANT'S
RENEWED MOTION FOR JUDGMENT ON THE PLEADINGS (Dkt. # 61)**

This adversary proceeding came before the Court for hearing on December 13, 2017, on the Renewed Motion for Judgment on the Pleadings

and brief in support thereof (the “Motion”)(Dkt. # 61, 62) filed on behalf of defendant Renasant Bank (the “Defendant”). Attorneys Scott Hendrix and David Houston appeared at the hearing on behalf of the Defendant, and Hale Freeland and Beth Smith appeared on behalf of plaintiffs Thomas L. Windham Sr., M.D. (“Dr. Windham”), Linda Windham (“Mrs. Windham”), R. Taylor Windham (“Taylor”), North Mississippi Spine Center, Inc. (“Spine Center”), Mid-South Business Associates, LLC (“Mid-South”), and TLW Properties, LLC (“TLW”)(collectively, the “Plaintiffs”) in opposition to the Motion.

The Plaintiffs filed a state court action in 2011 against an individual who is not a defendant in this adversary proceeding. That action alleged conversion, misappropriation of company funds, breach of fiduciary duties, negligence, gross negligence against Thomas L. Windham, Jr. (“Junior”), whom the Plaintiffs contend was involved in a check-kiting scheme that depleted and misappropriated the Plaintiffs’ assets. In this adversary proceeding, filed in 2014, the Plaintiffs assert that this Defendant, a bank, helped perpetrate these bad acts.¹ The Defendant contests those claims, generally, but more importantly here, contends that the applicable statutes of limitations had expired prior to the filing of this adversary proceeding. The

¹ Renasant Bank is the successor-in-interest by merger to M&F Bank. Renasant Bank acquired M&F Bank in 2013.

Court agrees as to some counts. Accordingly, the Motion will be granted in part and denied in part.

I. JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C §§ 151, 157(a), 1334(b) and the *United States District Court for the Northern District of Mississippi's Order of Reference of Bankruptcy Cases and Proceedings Nunc Pro Tunc Dated August 6, 1984*. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B), (C), (K), and (O).

II. RELEVANT FACTUAL BACKGROUND & PROCEDURAL HISTORY

A. State Court Action Background

On April 18, 2011, Spine Center and Taylor filed a Petition for Injunctive Relief, Damages at Law, and Other Relief in the Chancery Court of Lafayette County, Mississippi, against Junior. An amended Petition against Junior was later filed in the State Court Action by Spine Center, Mid-South, Taylor, and Dr. Windham (Civil Action No. 2011-0205(W); the “State Court Action”). The State Court Action was filed by the extended Windham family and their related companies against Junior, who is Dr. and Mrs. Windham’s son and Taylor’s brother. The basis of the State Court Action was the alleged check-kiting scheme perpetrated by Junior, along with other bad acts, including conversion, misappropriation of loan proceeds due to TLW and Spine Center, and forgery. The check-kiting scheme ended in 2009, at the

latest, when Junior was ousted from the corporate plaintiffs, and Taylor took control of those entities. The alleged unauthorized loans and misappropriation of loan proceeds occurred in 2006 (TLW loan) and June 2007 (Spine Center loan). Accordingly, the conversions alleged by the Plaintiffs also occurred prior to 2008. The Plaintiffs do not allege that any check kiting took place after 2009, nor do they allege that any unauthorized loans were made after 2007 or renewed after 2009.

B. Bankruptcy Court Background

Thomas and Linda Windham filed their joint voluntary chapter 11 petition on April 21, 2014 (Case No. 14-11544-JDW Dkt. # 1). On that same day, Spine Center (Case No. 14-11547-JDW Dkt. # 1), Mid-South Business Associates, LLC (Case No. 14-11546-JDW Dkt. # 1), and TLW Properties, LLC (Case No. 14-11545-JDW Dkt. #1) also filed voluntary chapter 11 petitions.² Taylor later filed his voluntary chapter 7 petition on May 4, 2014 (Case No. 14-11728-JDW Dkt. # 1).

The Plaintiffs commenced this adversary proceeding on April 23, 2014 (A.P. Dkt. # 1), alleging various contractual and common law claims against the Defendant, all related to Junior's bad acts. The Defendant filed its first

² The bankruptcy case of Mid-South Business Associates, LLC ("Mid-South") was later dismissed by the Court due to the lack of corporate authorization to file the case (Case No. 14-11546-JDW Dkt. # 271). On September 28, 2016, Mid-South was likewise dismissed as a plaintiff in this adversary proceeding (A.P. Dkt. # 44), but was re-joined as a plaintiff on May 4, 2017 (A.P. Dkt. # 59).

Motion for Judgment on the Pleadings on April 19, 2016 (A.P. Dkt. # 27), which the Court granted in part and denied in part (A.P. Dkt. # 44). In response to that order, the Plaintiffs filed the Amended Complaint against the Defendant on October 31, 2016 (A.P. Dkt. # 46). In response, the Defendant filed the renewed Motion, which asserts that certain counts from the Amended Complaint should be dismissed due to the expiration of various statutes of limitations and for other reasons (Dkt. # 61).³

The Defendant contends that Counts I through VIII and X (which is identified as a second Count IX in the Amended Complaint) are each barred by the applicable statute of limitations. The Defendant further contends that Count IX fails, because there can be no setoff when all of the Plaintiffs' other claims are time-barred.

III. CONCLUSIONS OF LAW

A motion for judgment on the pleadings under Rule 12(c)⁴ is treated essentially the same as a motion to dismiss for failure to state a claim under

³ The Plaintiffs then filed a Motion to Stay Ruling Pending Discovery (the "Motion to Stay")(Dkt. # 69), requesting that the Court defer its ruling on the Motion for Judgment until after the conclusion of discovery. The Court held a hearing on the Motion to Stay on September 7, 2017, and on October 17, 2017, entered its Order Granting in Part and Denying in Part the Motion to Stay (the "Stay Order")(Dkt. # 81). In the Order, the Court granted the Motion to Stay regarding all arguments raised in the Motion for Judgment, except for the Defendant's statute of limitations and setoff arguments.

⁴ All rule references are to the Federal Rules of Civil Procedure unless otherwise noted.

Rule 12(b)(6).⁵ *Great Plains Trust Co. v. Morgan Stanley*, 313 F.3d 305, 313 n.8 (5th Cir. 2002). In ruling on a 12(c) motion, a court may consider the allegations of the complaint, documents attached to the complaint, documents incorporated in the complaint by reference, documents attached to the answer mentioned in the complaint, and matters appropriate for judicial notice. *Wolcott v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011); *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017-18 (5th Cir. 1996). While a court may refer to matters of public record or take judicial notice of documents, those documents “should be considered only for the purpose of determining what statements the documents contain, not to prove the truth of the documents’ contents.” *Lovelace*, 78 F.3d at 1018.

In the Stay Order, the Court previously declined to consider extraneous evidence and convert this Motion into a motion for summary judgment governed by Rule 56 (Dkt. # 81). The Court also previously concluded that the Plaintiffs’ own pleadings in the State Court Action against Junior, including the dates asserted by the Plaintiffs therein, could be considered by the Court along with the Complaint and its exhibits to determine whether the Plaintiffs’ claims against this Defendant are barred by the applicable statutes of limitations. *Id.*

⁵ Rule 12 of the Federal Rules of Civil Procedure is made applicable to adversary proceedings by Rule 7012(b) of the Federal Rules of Bankruptcy Procedure.

A. Statutes of Limitation

Statutes of limitation are “statutes of repose which reflect a public policy and underlying legislative judgment that claims for redress shall be settled within a reasonable time so that a party against whom a claim is asserted will have a fair opportunity to defend” against that claim. *In re Bingham Systems, Inc.*, 139 B.R. 809, 813 (Bankr. N.D. Miss. 1991) (citation omitted). A bankruptcy court must apply state law statutes for state law causes of action, such as those asserted in this adversary proceeding. *See id.* An equitable exception may toll the running of certain statutes. *Id.* These exceptions provide a means of “mitigating harsh and unjust results which sometimes flow from rigid adherence to a rule of law.” *Id.*

One of the exceptions applicable to certain claims is known as the discovery rule, which “provides a tolling of the running of a statute of limitations until a plaintiff ‘should have reasonably known of some negligent conduct, even if the plaintiff does not know with absolute certainty that the conduct was legally negligent.’” *Boyles v. Schlumberger Technology Corp.* 832 So.2d 503, 506 (Miss. 2002) (quoting *Sarris v. Smith*, 782 So.2d 721, 725 (Miss. 2001)). For some causes of action, the running of a statute of limitations may also be tolled under the doctrine of “fraudulent concealment,” if a defendant conceals the basis of a cause of action from a plaintiff. Some affirmative act or conduct by the defendant is required. *Crummer Co. v.*

DuPont, 255 F.2d 425, 432 (5th Cir. 1958) (citation omitted); *Woods v. R.J. Reynolds Tobacco Co.*, 635 F.Supp.2d 530, 537-38 (S.D.Miss. 2009). Only a fiduciary may “fraudulently conceal” by mere silence or nondisclosure of facts. *See Woods*, 634 F.Supp.2d at 538. The Plaintiffs here do not allege that the Defendant had a qualifying fiduciary duty to the Plaintiffs.

To the extent that the Court determines that the application of the discovery rule or the doctrine of fraudulent concealment may apply, those claims are necessarily fact-intensive and beyond the scope of the Motion. The Court will reserve ruling on those issues for a later stage of these proceedings. Accordingly, the Court will consider the Motion well-taken only as to causes of action for which the statute of limitations had clearly expired. The Court has grouped claims with similar statutes of limitations and will address each group in turn.

1. UCC Claims Regarding Check Activity and Loans

First, Counts II, IV, V, VI, VII, and VIII are governed by Mississippi’s version of the Uniform Commercial Code and must be brought within three years after the cause of action accrues. MISS. CODE. ANN. § 75-4-111 (2017). A claim “accrues” when it “comes into existence as an enforceable claim; that is, when the right to sue becomes vested.” *Owens-Illinois, Inc. v. Edwards*, 573 So.2d 704, 706 (Miss. 1990) (citing *Rankin v. Mark*, 120 So.2d 435 (Miss.

1960)); *see also People's Bank of Biloxi v. McAdams*, 171 So.3d 505, 508-09 (Miss. 2015).

Counts II and VI concern the misappropriation of loan proceeds and allegedly unauthorized loans. Counts III, IV, VII, and VIII involve the alleged “check kiting scheme” perpetrated by Junior and Steve Thompson and allegedly assisted by the Defendant. In this case, it is clear that all of these claims accrued no later than September 2009, when the alleged check kiting ended, because the allegedly unauthorized loans were made even earlier, in 2006 and 2007.

The Plaintiffs do not argue that the discovery rule applies to UCC claims. Plaintiffs do argue that fraudulent concealment applies and that Defendant fraudulently concealed material facts, which, under Mississippi law, can serve to toll the running of these statutes of limitations for these counts. *Robinson v. Cobb*, 763 So.2d 883 (Miss. 2000)(“the fraudulent concealment doctrine . . . applies to any cause of action”).

The Plaintiffs allege that the Defendant fraudulently concealed material facts and thus the statute of limitations was equitably tolled for some period of time. Even if the Court were to find that the Defendant fraudulently concealed material facts from the Plaintiffs, these claims would still be time-barred, because the Plaintiffs had actual knowledge, or were on notice, of those material facts before the limitations period expired. The

Plaintiffs removed Junior from management of the corporate entities in 2009. At the latest, the Plaintiffs demonstrated their knowledge of the existence of the alleged check-kiting scheme, unauthorized loans, and misappropriation of loan proceeds by filing the State Court Action in April 2011. The State Court Action pleadings may be considered because the presence of the complaint, not the substance of the complaint, demonstrates the Plaintiffs' knowledge. *Cinel v. Connick*, 15 F.3d 1338, 1346 n. 6 (5th Cir. 1994); *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017-18 (5th Cir. 1996). The petition filed in the State Court Action specifically references the facts surrounding the check-kiting scheme, the conversion and misappropriation of loan proceeds, and the alleged fraud and negligence that led to the Plaintiffs' losses. It is clear from the petition that the Plaintiffs knew that the Defendant was the bank that made the loans and the bank through which the money flowed. Accordingly, these claims accrued more than three years prior to the filing of this adversary proceeding, and are time-barred as a matter of law.

As to the Plaintiffs' claim of fraudulent misrepresentation, Counts II and VI, the only affirmative misrepresentations alleged in the Complaint reference the allegedly unauthorized loans extended by the Defendant to Spine Center and TLW. These "misrepresentations" were allegedly made at the time the Plaintiffs renewed those loans in 2009. The Plaintiffs contend

that the Defendant represented to them that the loans were made for legitimate business reasons to TLW and Spine Center, but that the real reason for the loans was so Junior could misappropriate the proceeds. It is clear from the pleadings filed here and in the State Court Action that the Plaintiffs were, in fact, aware of the unauthorized loans and misappropriation of the loan proceeds prior to the date the State Court Action was filed on April 2011. That petition includes the allegation that Junior stole the funds on the day the loans were made, in 2006 and 2007. The Plaintiffs necessarily knew of the misappropriation, and thus the statute of limitations began to run, no later than the day the State Court Action was filed, which was over three years prior to filing this lawsuit against the Defendant. Accordingly, the Plaintiffs' claims relating to the misappropriation of the loan proceeds are barred by the applicable statutes of limitations.

In addition, the Plaintiffs allege that the Defendant misrepresented that the signatures on the loan documents were Dr. Windham's signatures. Dr. Windham is a plaintiff. It stands to reason that even if the Defendant represented to Dr. Windham that it was his signature on a document, he would know whether that was true. No one, including the Defendant, would be in a better position than Dr. Windham to know whether the signature was a forgery. A defendant's concealment of facts that the plaintiffs already knew

cannot be the basis of tolling the statute of limitations under a theory of fraudulent concealment. *Stephens v. Equitable Life Assur. Society of U.S.*, 850 So.2d 78, 83 (Miss. 2003)(holding that in order to establish fraudulent concealment, there must be some act of an affirmative nature “designed to prevent *and which does prevent* discovery of the claim”) (emphasis added)).

2. UCC Conversion Claims

Counts V, VII, and VIII also include causes of action for conversion under the Mississippi Commercial Code, and are also subject to a three-year statute of limitations under § 75-3-118(g) of the Mississippi Code.⁶ Under this statute, claims accrue when the instrument is converted, not when the conversion is discovered. *McAdams*, 171 at 508-00. All alleged conversions were complete before November 2008. Accordingly, the statute of limitations for all conversion claims (Counts V, VII, and VIII) expired by November 2011 at the latest, well before these proceedings were commenced in April 2014.

3. Common Law Claims

Count I, which alleges common-law breach of contract, Count III, which alleges bad faith, and the portion of Count VI regarding fraud are each based on the allegations that the Defendant fraudulently induced the Plaintiffs to renew, make payments on, or give security for, certain loans. Both claims are

⁶ The Plaintiffs sometimes allege more than one cause of action in a single Count of the Amended Complaint, so some Counts are addressed more than once, because they contain more than one cause of action.

based on the Defendant's alleged fraud and are governed by § 15-1-49 of the Mississippi Code, which provides that all actions must be commenced within three years after the cause of action accrued. Accrual of a claim occurs upon the discovery of a latent injury, but an action for fraud in the inducement accrues upon completion of the transaction induced by the false representation. *Sanderson Farms, Inc. v. Ballard*, 917 So.2d 783, 789 (Miss. 2005). Accordingly, the injury occurred at time of the transaction and was not inherently undiscoverable (e.g., it was not a misrepresentation about future facts which were not ascertainable at the time). *See Holland v. Mayfield*, 827 So.2d 664 (Miss. 1989) (finding that misrepresentations as to future conduct render the injury "inherently undiscoverable" at the time the transaction was completed). In any event, it is clear that the Plaintiffs were on notice regarding the alleged fraud in the inducement more than three years prior to the filing of this action, because when they filed the State Court Action on April 18, 2011, they alleged that Junior had misappropriated funds on the day the Defendant made to loans to TLW (in 2006, renewed in 2009) and Spine Center (in 2007, also renewed in 2009). Accordingly, the Defendants' own contentions in the State Court Action petition regarding the misappropriation of the loan proceeds make it clear that the Plaintiffs were aware of that misappropriation by April 18, 2011, at the very latest -- more than three years prior to this action being commenced on April 23, 2014.

Even applying a discovery rule, these counts are barred by the statute of limitations.

4. RICO Claim

On the other hand, the U.S. Court of Appeals for the Fifth Circuit has held that a RICO claim accrues not when an injury occurs, but when an injured party discovers the injury. *Rotella v. Wood*, 147 F.3d 438, 440 (5th Cir. 1998), *aff'd*, 528 U.S. 549 (2000). The discovery rule is therefore applicable to determine when the Plaintiffs' RICO claim accrued (Count X). A plaintiff has four years after discovery of an injury to inquire and determine whether the source of the injury was a pattern of racketeering activity and bring suit accordingly. *Id.* Because the statute of limitations on a RICO claim does not begin to run until the injury is discovered, the Court must necessarily inquire as to who knew what, and when. Because the State Court Action was filed within four years prior to the institution of this adversary proceeding, the presence of that petition does not demonstrate that the statute of limitations had already run as to the RICO claim when this adversary proceeding was filed. Accordingly, judgment on the pleadings on the RICO claim is not proper at this stage under a Rule 12(c) standard.

B. Setoff

The Plaintiffs assert that even if their claims are time-barred, they are still permitted to setoff the value of those claims against the loan balances

owed by the Plaintiffs to the Defendants. The Defendant's argument is three-fold: first, that the statute the Plaintiffs rely on, Mississippi Code § 15-1-71, applies only to mutual contract claims, and not to tort claims. Second, even if the statute applies to permit setoff of tort claims, it does not completely waive the statute; rather, it acts to permit a party with a timely claim at the time the other party first sues to assert its claim in setoff, even if the limitations period runs by the time the setoff is asserted. Finally, the Defendant argues that each individual Plaintiff could only setoff against the Defendant claims that each particular plaintiff owns (i.e., individual plaintiffs may not setoff claims of the companies against their personal debt to the Defendant). At this stage, the Court need only consider the second of the Defendant's arguments, which it finds to be well-taken.

Chapter 1 of title 15 of the Mississippi Code provides the limitations periods for various actions brought under Mississippi law. Regarding setoff against time-barred claims, § 15-1-71 of specifically provides:

All the provisions of this chapter shall apply to the case of any debt or demand on the contract, alleged by way of setoff on the part of a defendant. The time of limitation of such debt or demand shall be computed in like manner as if an action had been commenced therefor at the time when the plaintiff's action was commenced. The fact that a setoff is barred shall not preclude the defendant from using it as such if he held it against the debt sued on before it was barred.

MISS. CODE ANN. § 15-1-71 (2017). While setoff is not generally an “end run” around the statute of limitations, “a counterclaim that would ordinarily be barred by the statute of limitations is nonetheless valid *if the right to a setoff existed at the time the plaintiff filed his claim.*” *Songcharoen v. Plastic & Hand Surgery Assoc.*, 561 Fed.Appx. 327 (5th Cir. 2014) (emphasis added). Furthermore, because the expiration of the statute of limitation “defeat[s] and extinguish[es] the right as well as the remedy,” once the limitation period expires, the expired claim may no longer serve as the basis for a setoff, absent application of the specific circumstances set forth in § 15-1-71 of the Mississippi Code. MISS. CODE ANN. § 15-1-3 (2017).

Most of the Plaintiffs’ claims were already barred by the applicable statutes of limitations at the time this action was filed. The Plaintiffs do not contend that the Defendant ever sued any of the Plaintiffs under the loan documents prior to the filing of this adversary proceeding. Accordingly, the Plaintiffs cannot use § 15-1-71 to setoff its time-barred claims against amounts they owe to the Defendant. Judgment on the pleadings will therefore be granted as to Count IX as it relates to those time-barred claims.

VI. CONCLUSION

For these reasons, it is hereby **ORDERED, ADJUDGED** and **DECREED** that the Motion for Judgment on the Pleadings (A.P. Dkt. # 61) is **GRANTED IN PART AND DENIED IN PART**. The Motion is granted as to

Counts I, II, III, IV, V, VI, VII, and VIII, which are all barred as a matter of law by the applicable statutes of limitations. Further, the Motion is granted as to the Plaintiffs' claims of setoff (Count IX) regarding the time-barred claims. The Motion is DENIED as to Count X, the RICO claim, and as to any setoff, Count IX, that may be applicable with regard to that claim. The Court will set a scheduling conference for the remaining claims.

END OF ORDER