

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-1428

MICHAEL HOLIDAY

vs.

SANDRA BOWDEN, personal representative,¹ & others.²

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, Michael Holiday, brought this action against the personal representatives of the estate of his father, Ernest M. Helides, Jr., after learning that Helides's will specifically excluded Holiday and that the majority of the estate passed to the Epsilon & Epsilon Revocable Trust of September 1985 (Epsilon trust), of which Holiday was not a beneficiary. Holiday claimed that there were undiscovered papers showing that Helides amended or intended to amend his estate plans to name Holiday as a beneficiary of the Epsilon trust or some other trust. Holiday also brought claims pertaining to assets he was gifted as a

¹ Of the estate of Ernest M. Helides, Jr.

² J. Richard Kraycir and Cape Cod Five Cents Savings Bank, personal representatives of the estate of Ernest M. Helides, Jr.

child and young adult, which he alleged the estate had in its possession.³ A Superior Court judge granted summary judgment in favor of the defendants on all of Holiday's claims. We affirm in part, vacate in part, and remand for further proceedings consistent with this memorandum and order.

Background. We take the facts from the summary judgment record, construing them and all reasonable inferences in the light most favorable to Holiday to determine whether the defendants were entitled to judgment as a matter of law. See Pinti v. Emigrant Mtge. Co., 472 Mass. 226, 231 (2015).

Holiday was born in 1954 and was given the name Ernest Michael Helides, III, which he later changed to Ernest Michael Helides Holiday. With the assent of Holiday's mother, Holiday's father (Helides) petitioned to be and was appointed Holiday's guardian. Helides also established various trusts that held assets for Holiday's benefit.

Throughout Holiday's childhood and early adulthood, his grandfather gave him gifts of stock. The stocks were held by Helides, although there is some ambiguity regarding the precise manner in which that occurred. Holiday testified at his deposition that some stock certificates were issued to Holiday,

³ In a prior proceeding in the Probate and Family Court, Holiday sought to challenge the will, which was nonetheless admitted to probate.

under guardianship, while others were issued to Holiday and his grandfather, jointly.⁴ Holiday further testified that when he became an adult, he signed over at least some of the stock certificates to Helides to hold in trust.⁵ Holiday felt that he had no choice but to sign over the stock certificates to Helides, who promised that Holiday would inherit from Helides's estate if Holiday did not challenge Helides's administration of the family's assets. Holiday believed that fighting Helides on the stock certificates would irreparably harm their relationship, with "no possibility of any kind of reconciliation."

Helides also kept the dividend income from the stocks but maintained ledgers showing that the dividend income came from Holiday's stocks, including one ledger that itemized dividend income received on various stocks under a column heading titled

⁴ At another point, Holiday testified that some stock certificates were issued to Holiday and Helides, jointly.

⁵ Holiday initially testified at his deposition that there was "always . . . some event around Christmas" where he had to sign over stock certificates to Helides. Then, when asked whether he signed over stock certificates to Helides as a minor, Holiday explained that, as a child, he probably gave the stock certificates to Helides and that, later in life and on various different occasions, Helides asked Holiday to sign over documents to Helides. On one such occasion, Helides presented Holiday with a stack of stock certificates to sign over. It was Holiday's understanding that he was signing over the stock certificates to Helides to hold in trust.

"[s]ource of [t]rust [i]ncome." While Helides kept the dividend income from the stocks, it was reported on Holiday's tax returns. Helides then reimbursed Holiday for the associated taxes so that Holiday would not have to pay them "out of [his] own money." Some of the checks that Helides gave to Holiday for purposes of paying taxes on the dividend income came from an account in the name of "E.M. Helides, trustee."

Holiday had a strained relationship with Helides that involved periods of time during which the two had little contact. Their first estrangement began in or around 1985, when Holiday was about to get married. At that time, Helides threatened that Holiday would be out of the family and disinherited if he proceeded with the wedding. Helides also showed Holiday a deed that was in Holiday's name⁶ and asked Holiday to transfer title to the property to Helides, for Holiday's protection should the marriage end in divorce. Holiday refused, which infuriated Helides. For approximately a decade, the two had little contact.

Beginning in 1995 and continuing for approximately fourteen years, Holiday was back in contact with Helides. During this reconciliation, in 2004, Helides returned some of Holiday's

⁶ Unbeknownst to Holiday, Helides had purchased the property as Holiday's guardian when Holiday was a child.

stock certificates to him. These stock certificates included at least some of the stock certificates that were issued under guardianship. Around the same time, Holiday discovered, through the unclaimed property division of the office of the Treasurer and General Receiver, other stocks that he owned and he was able to receive some money in connection with those stocks. Still, there were additional stocks that remained unaccounted for; an expert forensic accountant, hired by Holiday after Helides's death, reviewed the ledgers of dividend income and concluded that Helides held additional stocks for Holiday that were never returned to him.

In 2009, Holiday's mother died and Helides did not inform Holiday, which led to another period of time during which Holiday and Helides had little contact. During this estrangement, in 2012, Helides reached out to Holiday about reconnecting. Attempts at reconnecting quickly broke down, however, and Holiday did not speak to Helides again until 2015.

Until 2015, Holiday knew that there were periods of time during which he was included in Helides's estate and periods of time during which he was excluded from that estate. As Holiday testified at his deposition, "Sometimes I was in; sometimes I was out." During the times that Holiday was "out," he knew that, eventually, he would be back in Helides's "good graces" because, "ultimately, [they] love[d] each other."

In 2015, Helides reached out to Holiday to express remorse for the hurt he had caused and to say that Holiday "was back in [the estate]." Specifically, Holiday's testimony was that around Christmas 2015, Helides called Holiday to apologize and to convey his change of heart. Holiday testified that the two spoke for forty-five minutes and that Helides let Holiday "know that [Holiday] didn't have to worry; that [Holiday] was back in" and that Helides had "fixed things." Helides also told Rosemarie Gregoire, with whom he had begun a romantic relationship, and defendant J. Richard Kraycir, who was a friend, that he wanted to leave or give money to his children, including Holiday.

After Helides died in 2016, the defendants found a will and the Epsilon trust, neither of which included provisions for Holiday. The will was drafted in 2005 and was amended in 2009 and 2012. The original will provided that Helides was "steadfast in excluding [Holiday] from benefiting from [the] estate." The 2009 codicil appointed defendants Sandra Bowden and Kraycir as coexecutors, and confirmed the appointment of the defendant bank as a coexecutor. The 2012 codicil revoked contingent gifts to Helides's two other children and "affirm[ed] that the omission of provisions . . . for [Helides's] children and further issue . . . [was] intentional." The Epsilon trust was also drafted in 2005, was amended in 2009 and 2012, and

contained the same provision regarding Helides being "steadfast in excluding [Holiday] from benefiting from [the] estate."⁷

Discussion. 1. Claims based on allegations of an amendment to the Epsilon trust. Holiday brought claims for reformation of the trust, declaratory judgment, fraud,⁸ and violation of G. L. c. 93A⁹ that were based on the following allegations: (1) Helides amended or intended to amend his estate plans to name Holiday as a beneficiary of the Epsilon trust or some other trust and (2) the defendants did not appropriately review or catalog Helides's papers when cleaning out his home, and may have destroyed papers that documented the amendment. Because these allegations were based on speculation, Holiday's claims for reformation of the trust, declaratory judgment, fraud, and violation of G. L. c. 93A were properly

⁷ In an affidavit, the attorney who prepared the original will in 2005 averred that Helides was "adamant" that Holiday "never receive anything under the[] will or through any trust," and that Helides preferred that the "entire estate [be] wasted fighting a will contest than have . . . Holiday receive a penny."

⁸ Holiday's fraud claim was based on (1) allegations that the defendants fraudulently destroyed Helides's papers and (2) allegations that Helides fraudulently promised that Holiday would benefit from Helides's estate. We discuss the second aspect of Holiday's fraud claim at note 12, infra.

⁹ While the precise basis of Holiday's G. L. c. 93A claim is not apparent from the operative complaint, his sole demand letter, sent only to the bank, asserted that the bank violated G. L. c. 93A by destroying Helides's papers.

resolved in favor of the defendants. See Cesso v. Todd, 92 Mass. App. Ct. 131, 139 (2017) (on summary judgment, inferences drawn in favor of nonmoving party cannot be result of mere speculation).

Through affidavits and deposition testimony, the defendants described their efforts to clean out Helides's home. Kraycir and Debra Anderson, who worked for defendant Cape Cod Five Cents Savings Bank (bank), made numerous trips to Helides's home together. On the first such visit, they met with Gregoire, who showed them Helides's office and pointed out where Helides kept his financial records. Kraycir and Anderson subsequently conducted a search for documents related to Helides's estate plans and found all of his estate planning documents stored together. After locating Helides's estate planning documents, which did not include provisions for Holiday, Kraycir continued to look for other documents that may have reflected an intention to leave or give money to Holiday. No such documents were located.

Nor does the summary judgment record support an inference that any such documents were destroyed by the defendants. While Holiday contends that the defendants shredded twenty to thirty boxes' worth of papers and disposed of an additional six to seven dumpsters' worth of papers, that is not an accurate portrayal of the evidence in the summary judgment record. In an

affidavit, Anderson averred that twenty to thirty boxes' worth of papers were transported back to the bank for further inspection and that "[s]hredding arrangements were made for those documents that were not relevant to the administration of [Helides's] estate." Even assuming that Anderson's affidavit left open the possibility that all the papers in those boxes were shredded, she later clarified that six to eight boxes' worth of papers were destroyed, and that those papers had no relevance to the administration of the estate. Regarding the dumpsters, Kraycir testified that they contained "[c]ooking pots, half empty bottles of wine[,] . . . dirty bed linens, . . . an old microwave, [and] books." When asked whether the dumpsters were filled with papers, Kraycir responded, "No."

On this evidence, which describes a thorough search for Helides's estate planning documents, it would be wholly speculative to infer that an amendment to the Epsilon trust or some other trust may have been inadvertently destroyed, as Holiday's argument suggests.¹⁰

¹⁰ We note that Holiday submitted an affidavit signed by a trusts and estates expert, who faulted the defendants for not retaining all of Helides's papers until the estate was formally closed. This affidavit does not alter our conclusion, as the fact remains that the summary judgment record does not support an inference that the defendants destroyed papers documenting an amendment to the Epsilon trust or some other trust.

Nor are we persuaded by Holiday's argument that the Epsilon trust could be modified pursuant to G. L. c. 203E, § 412 (a), which permits a court to modify a trust in the event of unanticipated circumstances if doing so "will further the purposes of the trust." At most, the evidence in the summary judgment record shows that Helides wanted to make amends and made vague statements about leaving or giving money to his children. In affidavits, Gregoire averred that Helides told her "on more than one occasion that he was going to give each of his children at least \$1 million" and that "he was making a handwritten [w]ill naming his children as beneficiaries of his estate." Kraycir testified at his deposition that Helides mentioned wanting to give money to his children, and that Kraycir gave tax forms to Helides for the purpose of doing so. Even assuming that this sort of change of heart regarding estate plans could be considered an unanticipated circumstance, a question we do not decide, there is no evidence that Helides intended any such gift to occur through the Epsilon trust or that the requested modification was necessary to "further the purposes of the trust." G. L. c. 203E, § 412 (a).

2. Claims based on assets gifted to Holiday. Holiday also brought claims pertaining to assets he was gifted as a child and

young adult.¹¹ Holiday alleged that (1) he gave or signed over at least some of the assets to Helides on the promise of inheriting from Helides's estate (promissory estoppel) and (2) Helides held all the assets in trust for Holiday and engaged in wrongdoing as trustee (accounting, unjust enrichment, conversion, breach of the fiduciary duty).

On appeal, the defendants assume that "Helides was holding [Holiday's] property," of which Holiday was aware, and that Helides "held more assets that belonged to Holiday and had never disclosed to him." The defendants argue, however, that summary judgment was proper because the claims are time barred. They also argue that, independently, there is insufficient evidence of a concrete representation or of reasonable reliance and that summary judgment was proper with respect to the promissory estoppel claim for those reasons.¹² We disagree.

¹¹ The assets included the stocks listed in the expert forensic accountant's report. Holiday's brief also suggests that the assets may have included real estate. We leave this issue open for development on remand.

¹² Holiday also claimed that Helides's promises were fraudulently made, and the defendants argue that the representations made by Helides were insufficiently concrete to support the fraud claim. We need not address the issue with respect to the fraud claim, as there is no evidence that Helides's promises were knowingly false when made. Holiday's fraud claim therefore fails as a matter of law, and summary judgment on that claim will be affirmed. See, e.g., Brewster Wallcovering Co. v. Blue Mountain Wallcoverings, Inc., 68 Mass. App. Ct. 582, 536-537 (2007).

a. Claim for promissory estoppel. Turning first to the statute of limitations, "where summary judgment is sought on the basis of a statute of limitations, once the defendant establishes that the time period between the plaintiff's injury and the plaintiff's complaint exceeds the limitations period set forth in the applicable statute, the plaintiff bears the burden of alleging facts which would take his or her claim outside the statute" (quotation and citation omitted). O'Connor v. Redstone, 452 Mass. 537, 551 (2008). "If the plaintiff responds to a defendant's motion by alleging facts that, if proved at trial, would bring the plaintiff's claims outside the impact of the statute of limitations, then the defendant is not entitled to summary judgment." Id.

Holiday's claim for promissory estoppel was based on allegations that he gave or signed over assets to Helides on the promise of inheriting from Helides's estate. This claim could not have accrued until Holiday knew or should have known that he would not inherit from the estate. See AA&D Masonry, LLC v. South St. Business Park, LLC, 93 Mass. App. Ct. 693, 698 (2018) (cause of action accrues "on the happening of an event likely to put the plaintiff on notice of facts giving rise to the cause of action" [quotation omitted]).

The defendants rely on Helides's threat to disinherit Holiday in 1985, coupled with Holiday's own testimony that there

were periods of time when he knew that he was out of the estate. Given the light in which we must view the summary judgment record, the defendants' reliance on this evidence takes too narrow a view of Holiday's relationship with Helides. As Holiday testified at his deposition, he always believed that he would wind up back in Helides's "good graces." This testimony was supported by (1) the fact that Holiday and Helides had periods of reconciliation and (2) evidence of which Holiday was aware during Helides's lifetime indicating that Helides had a last minute change of heart regarding excluding Holiday from the estate, including the evidence of Holiday's own conversation with Helides, even if that evidence was insufficient to support Holiday's claims described above. On the record before us, we cannot say as a matter of law that Holiday knew or should have known before Helides's death that he would not inherit from the estate.

We are likewise unpersuaded by the defendants' alternative arguments that Helides's promises were too ambiguous or that it was unreasonable, as a matter of law, for Holiday to rely on promises made by Helides. First, the promises were not ambiguous; according to Holiday, he was told that he would inherit from the estate if he did not challenge Helides's administration of the family's assets. Second, the nature of Holiday's relationship with Helides, and whether Holiday could

have reasonably relied on Helides's promise with respect to the estate, are questions of fact to be resolved by the jury. See, e.g., Suominen v. Goodman Indus. Equities Mgt. Group, LLC, 78 Mass. App. Ct. 723, 734 n.14 (2011).

b. Claims for an accounting, unjust enrichment, conversion, and breach of fiduciary duty.¹³ Holiday also brought claims for an accounting, unjust enrichment, conversion, and breach of the fiduciary duty based on allegations that Helides held assets in trust for Holiday and engaged in wrongdoing as trustee. Construing the facts in the light most favorable to Holiday, we assume that Helides held stocks and perhaps other assets in trust for Holiday. Whatever assets and their proceeds a jury might find were held by Helides in trust for Holiday -- whether they or their proceeds were held in Holiday's name or Helides's name, individually or as trustee or guardian -- were held by Helides as a fiduciary.¹⁴ In general, a cause of action for breach of fiduciary duty does not arise until one has "'actual knowledge' that [they] [have] been

¹³ Holiday also asserted a claim for a constructive trust, which is a remedy. We therefore do not address this claim separately.

¹⁴ We need not explore further what these assets might have been, or how they might have been held or converted, as the defendants have not raised any issue about this in their motion for summary judgment. Moreover, to be clear, we do not decide that Helides did, in fact, hold any assets in trust for Holiday, as that issue is not before us.

injured by the fiduciary's conduct." Doe v. Harbor Sch., Inc., 446 Mass. 245, 254 (2006). An example of injurious conduct (of which one must have actual knowledge) is repudiation of a trust. See, e.g., Lattuca v. Robsham, 442 Mass. 205, 213 (2004). Holiday's trust-related claims thus did not accrue until he became aware that the trust had been repudiated, and the defendants do not argue otherwise on appeal. See, e.g., Kearney v. Mechanics Nat'l Bank of Worcester, 343 Mass. 699, 703 (1962). Repudiation must be "open and notorious in order to start the operation of the statute" of limitations, Stuck v. Schumm, 290 Mass. 159, 163 (1935), and "does not occur if the trustee instead of flatly rejecting a demand or request . . . gives some apparently good or plausible reason for his noncompliance, or promises future compliance . . . [which] may well be regarded as being more nearly a recognition of the trust than a repudiation thereof" (quotation and citation omitted). Lattuca, supra at 214.

The defendants contend that Holiday knew for decades about the assets in Helides's possession, and that Holiday did not take any action to have those assets returned to him. This argument misses the mark, as the question is not whether Holiday knew about the assets in Helides's possession. The question, instead, is whether Holiday knew that Helides had repudiated the trust. There is evidence in the summary judgment record that

Helides returned some, but not all, of Holiday's stock certificates to him in 2004. There is also evidence that Holiday did not ask Helides about any remaining assets, because that would have been a "faux pas," and that Holiday and Helides were estranged for periods of time. However, viewing the evidence in the light most favorable to Holiday, it could support a conclusion that Helides did not repudiate before his death whatever trust may have held any remaining stocks, dividend income, or other assets. Consequently, we conclude that summary judgment should not have entered on Holiday's claims for an accounting, unjust enrichment, conversion, or breach of the fiduciary duty on the basis that they were time barred.

Conclusion. So much of the summary judgment entered on September 17, 2020, as dismissed the claims for reformation of the trust, declaratory judgment, fraud, and violation of G. L. c. 93A, is affirmed. In all other respects, the summary

judgment is vacated. The case is remanded for further proceedings consistent with this memorandum and order.

So ordered.

By the Court (Green, C.J.,
Rubin & Massing, JJ.¹⁵),



Clerk

Entered: May 25, 2022.

¹⁵ The panelists are listed in order of seniority.