COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-453

SHERMAN H. STARR, JR., personal representative,[1] & another[2]

vs.

KENNETH N. WEXLER[3] & another.[4]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a bench trial in the Superior Court, a judge found in favor of the plaintiff, Sherman H. Starr, on his claim of breach of fiduciary duty against the defendant, Kenneth N. Wexler, individually and as Nominee of K.N.W. Nominee Group (collectively "Wexler"). The judge also ordered Wexler to provide Starr an "accounting for the monies received for his partnership interest in 44 St. Paul Associates" for the three-year period preceding the filing of Starr's complaint "and to pay to [Starr] his one-third share of those monies." On appeal Wexler contends that no fiduciary duty was owed to Starr, and,

[1] Of the estate of Sherman H. Starr.

[2] Samuel M. Starr, personal representative of the estate of Sherman H. Starr.

[3] Individually and as nominee of the K.N.W. Nominee Group and as beneficiary of 44 St. Paul Associates.

[4] Stanley Shulman, trustee of 44 St. Paul Trust.

even if it was, Starr's breach of fiduciary duty claim was barred by the statute of limitations and the doctrine of laches. We affirm.[5]

Background. 1. Origins of parties' relationship. We summarize the facts as found by the trial judge, reserving further details for later discussion. Starr worked as an accountant and principal of Starr, Finer, Starr, LLP, where Wexler began utilizing his accounting services. Over time, the two engaged in joint business endeavors after Starr made Wexler aware of several business opportunities. They became close, with "Wexler coming to view Starr as a mentor and an adviser."

2. Formation of K.N.W. Nominee Group. In 1985, Wexler and another business partner, Stanley Shulman (Shulman), purchased a thirty-two-unit apartment building at 44 St. Paul Street in Brookline. In connection with the purchase, Wexler and Shulman formed two entities on February 11, 1986: the 44 St. Paul Trust, which held legal title to the real property; and a general partnership, the 44 St. Paul Associates, which was the sole beneficiary of the 44 St. Paul Trust, and provided each partner with a fifty percent partnership interest.[6]

[5] Starr raises various issues on cross appeal, none of which warrant appellate relief.

[6] The 44 St. Paul Trust began to "convey out" units in the building, ultimately conveying twenty-three units, with the 44 St. Paul Trust retaining nine units as of 2018.

On March 24, 1986, Wexler executed a document titled "K.N.W. Nominee Group." The document stated that Wexler held "as nominee, a 50 percent partnership interest in 44 St. Paul Associates, a Massachusetts general partnership, for the following people in said partnership." It then listed four individuals and their respective percentage interest: Wexler himself, 16.67 percent; Starr, 16.67 percent; Robert P. Wexler (Robert),[7] 8.33 percent; and Bruce Katz (Katz), 8.33 percent. Wexler neither asked for nor received any money from the other named individuals for "acquisition costs or subsequent expenses. There was no other paperwork, such as any formal partnership agreement executed concerning [the K.N.W. Nominee Group]." From 1986 through 1998, Wexler periodically sent checks payable to Starr, totaling $123,998. Most of the checks bore the notation "St. Paul St." or "St. Paul." The judge concluded that "at least most of the payments were made by Wexler to Starr as recognition of the share interest he had been given [in 44 St. Paul Associates]."[8]

During 1992, Wexler consolidated his interests in 44 St. Paul Associates. At that point, Robert had acquired Katz's 8.33 percent interest in 44 St. Paul Associates and therefore held a

[7] Robert and Kenneth Wexler are brothers. We refer to Robert by his first name to avoid confusion.

[8] The judge explicitly discredited Wexler's testimony and contention that the payments were unconnected to Starr's share in 44 St. Paul Associates.

16.66 percent interest. Robert agreed to convey this interest back to his brother, Wexler, for $75,000. The executed agreement stated that Robert's 16.66 percent share in 44 St. Paul Associates "as a member of K.N.W. Nominee Group" was transferred to Wexler. At or around this time, Wexler offered to purchase Starr's share for the same price. However, no agreement was ever finalized between the two.[9]

3. Dispute. In 1995, the relationship between Wexler and Starr deteriorated. At Shulman's request, 44 St. Paul Associates ceased using Starr's accounting firm and retained a new accounting firm for the association's needs.[10] Nonetheless, Wexler continued to send Starr periodic checks bearing the notation "St. Paul St.," and Starr continued to reference his interest in the K.N.W. Nominee Group on his personal tax returns.

By 2000, Wexler "was becoming more anxious to attempt to eliminate" Starr's interest in 44 St. Paul Associates. On April 10, 2000, Wexler wrote Starr acknowledging that Starr was entitled to a one-third share of $70,000 that Wexler had received in 1999 from 44 St. Paul Associates. The letter stated

[9] Wexler testified that he did buy out Starr's share. However, as the judge found, "[t]here was never any written or other agreement to this effect and no funds were paid to Starr."

[10] The new accounting firm "continued to list 'K.N.W. Nominee Group' as having a fifty percent beneficial ownership interest, but treated this as an interest owned exclusively by Wexler."

that Wexler would deduct $6,667 already paid to Starr and, in addition, asserted that he would be applying a $3,333 annual "management fee"[11] (Starr's proportional share of a $10,000 management fee) retroactively back to 1985 and going forward. The letter concluded that the remaining $16,500 owed to Starr from the 1999 distribution would be applied against the $49,995 in retroactive management fees owed, and that the remaining $33,495 in retroactive management fees would "be charged against future payments that may become due to you." There is no record of any response from Starr. In a September 20, 2000, letter to Starr, Wexler referred to an enclosed $16,000 check "for the balance of the money owed for 1999 at St. Paul Street." The letter purported to "reserv[e] all [Wexler's] rights for the monies I maintain are owed me as set forth in our previous correspondence."

On April 25, 2001, Starr sent a letter to Shulman, copying Wexler, "complaining that he had been provided with [the 44 St. Paul Associates partnership's] 2000 tax return late, impeding his ability to deal with his own tax filing." Starr requested 44 St. Paul Associates' "[c]ash receipts and disbursement journal," the "[y]ear end trial balance," and the "[c]umulative general ledger" for 1999 and 2000. Wexler returned the letter

[11] Wexler testified at trial that the dollar amount of this "management fee" was a "negotiating ploy" and was not derived from management fees actually charged.

to Starr with a handwritten notation, reading "you are not [Shulman]'s partner or a partner in the assoc. You have a piece of my share -- send any issues to me -- I will respond."

In a June 18, 2002, letter, counsel for Starr[12] wrote Wexler "in connection with [Starr's] partnership interest in 44 St. Paul Associates." Like the prior 2001 letter, this letter sought the partnership's financial records for 1999, 2000, and 2001. The letter asserted that "[Starr] is owed at least $36,168 from you based on the information received to date." There is no evidence of any response.

A December 4, 2014, letter from Starr informed Wexler that Starr had transferred his 16.67 percent interest in 44 St. Paul Associates to a trust and sought Wexler's acknowledgment of the interest. No response was received. In a July 1, 2015, letter addressed to Wexler and Shulman, present counsel for Starr demanded, inter alia, "[a]n accounting and copies of annual tax returns for" the 44 St. Paul Trust, the 44 St. Paul Associates, and the K.N.W. Nominee Group for the years 2000 through 2014. Starr then commenced the present action.

4. Legal action. On March 25, 2016, Starr filed a complaint in the Superior Court against Wexler as nominee of the K.N.W. Nominee Group and Shulman as trustee of the 44 St. Paul

[12] Starr's counsel in 2002 was not the same attorney that represents him in the present appeal.

Trust, later amending his complaint to include Wexler in his personal capacity. Starr's amended complaint alleged unjust enrichment, conversion, and breach of fiduciary duty and made demands for accounting, removal of Wexler as the nominee of the K.N.W. Nominee Group, and removal of Shulman as trustee of the 44 St. Paul Trust. Wexler and Shulman filed an answer and counterclaims, alleging Chapter 93A violations, abuse of process, and malicious prosecution. Starr moved for partial summary judgment as to liability on his claims for unjust enrichment, conversion, and breach of fiduciary duty, and moved to dismiss Wexler's and Shulman's counterclaims under Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), and under the "anti-SLAPP" statute, G. L. c. 231, § 59H. Wexler and Shulman filed cross motions for summary judgment. After a hearing, a judge denied both parties' motions for summary judgment but allowed Starr's motions to dismiss the counterclaims.[13]

A three-day bench trial was held before a different judge, who subsequently issued detailed findings of fact and rulings of law. The judge ordered judgment for Starr on the breach of fiduciary duty claim against Wexler and ordered judgment for

[13] The motion judge allowed Starr's motion to dismiss the G. L. c. 93A counterclaim and allowed the special motion to dismiss the malicious prosecution and abuse of process counterclaims under G. L. c. 231, § 59H.

Wexler on the unjust enrichment and conversion counts.[14] The judge ordered Wexler to provide an accounting of monies received for his partnership interest in 44 St. Paul Associates from March 25, 2013, "to the present," and to pay Starr "his one-third share of those monies." The judge dismissed all counterclaims against Starr. A final judgment entered on July 30, 2019. Wexler appealed from the motion judge's ruling on the cross motions for summary judgment and from the trial judge's final judgment. Starr cross-appealed the same.[15]

Discussion. 1. Fiduciary duty. Wexler first contends that there was no evidence that he and Starr were in a fiduciary relationship. Wexler argues that he "did not transfer complete control of Starr's alleged share [in 44 St. Paul Associates]," that "Starr had no dominion or control over any portion of Wexler's interest in [44 St. Paul Associates]," and therefore "[w]hatever Wexler transferred to Starr was not a completed gift." Instead, Wexler argues that his largesse towards Starr was an unenforceable gratuitous promise. This argument is unavailing.

[14] The judge ordered judgment for Shulman on all counts.

[15] On August 19, 2020, a suggestion of death was filed, indicating that Starr had died on April 22, 2020. Sherman H. Starr, Jr. and Samuel M. Starr, personal representatives of the estate of Starr, were substituted as plaintiffs on September 30, 2020.

"As a general rule, to sustain a transfer as a gift, there must be evidence of donative intent on the donor's part, combined with evidence of delivery of the property to the donee . . . in a manner that surrenders dominion and control." Edinburg v. Edinburg, 22 Mass. App. Ct. 199, 204 (1986). Delivery of the property can be satisfied by "actual or symbolic delivery of the subject matter of the gift to the donee." Schleifstein v. Greenstein, 9 Mass. App. Ct. 344, 351 (1980), quoting Kobrosky v. Crystal, 332 Mass. 452, 460 (1955).

The K.N.W. Nominee Group document serves as sufficient evidence of Wexler's donative intent and symbolic delivery of a share of Wexler's partnership proceeds. Wexler's continued acknowledgment of Starr's enforceable interest confirm this understanding.[16] Wexler may be correct that he did not grant Starr any partnership control over 44 St. Paul Associates, but it does not follow that Starr had no legal control over the share of proceeds gifted to him. See Hazen v. Warwick, 256 Mass. 302, 308 (1926), citing G. L. c. 108A, § 27 (assignment of partnership interest "d[oes] not entitle [the assignee] to interfere in the management or administration of the partnership

[16] The judge found, inter alia, that Wexler made numerous payments to Starr "as recognition of the share interest [Starr] had been given," in 1992 offered to pay Starr to "assign . . . his interest in [44 St. Paul] Associates" back to Wexler, in 2000 acknowledged that Starr was owed a one-third share of $70,000 Wexler had received from 44 St. Paul Associates, and in 2001 informed Starr that "[y]ou have a piece of my share."

business or affairs, but only entitle[s] him to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled"). Thus, on the record before us, we see no error in the judge's conclusion that delivery of the K.N.W. Nominee Group document was sufficient to satisfy symbolic delivery of a share of Wexler's partnership interest. See Edinburg, 22 Mass. App. Ct. at 205 ("where . . . actual delivery is impractical, some symbolic or constructive form of delivery may be present and sufficient to warrant a conclusion that a gift has been made").

Further, regardless of whether the gift was completed, Wexler's largesse could be viewed as a declaration of trust.

> "In order for a trust to be valid in the Commonwealth, it must 'unequivocally show an intention that the legal estate be vested in one person to be held in some manner or for some purpose on behalf of another.' In the case of an express trust . . ., this intention to separate legal and equitable control over particular property should be 'ascertained from the language of the whole [trust] instrument considered in the light of the attendant circumstances'" (citations omitted).

Ventura v. Ventura, 407 Mass. 724, 726 (1990). "No particular form of words is required to create a trust. But whether one exists or not is to be ascertained from the intention of the parties." Sawyer v. Cook, 188 Mass. 163, 165 (1905).

> "[N]otice given by the donor to the donee of the existence of the trust [is] in most cases . . . decisive on the question of intention. It takes the place of that delivery which is necessary to perfect a gift of personal property. It is not only satisfactory evidence of an executed

> intention, but it is a declaration in the nature of an act necessary to complete the transaction and create the trust."

Gerrish v. New Bedford Inst. for Sav., 128 Mass. 159, 164 (1880). See also Restatement (Third) of Trusts, § 10 comment e (2012) ("If the owner of property declares himself or herself trustee of the property for the benefit of one or more others, or for the declarant and one or more others, a trust is created, even though there is no transfer of the title to the trust property to another and even though no consideration is received for the declaration").

Here, the words of the K.N.W. Nominee Group document suggest just such an intent. Wexler was "holding" the interest on behalf of the individuals named in the K.N.W. Nominee Group document, including Starr. It evidences an intent to grant equitable title to the named people in the K.N.W. Nominee Group "partnership," even if Wexler continued to hold legal title as their trustee. See Ventura, 407 Mass. at 726. To the extent the document itself is not clear, the attendant circumstances warrant such a finding. See note 17, supra. In any event, we are not persuaded by Wexler's argument that he merely gave Starr an "unenforceable interest" in 44 St. Paul Associates.

Having concluded that Wexler gave Starr an enforceable interest in his share of 44 St. Paul Associates, we see no error in the judge's finding that a fiduciary relationship was

created. This is true whether the fiduciary duty was created by operation of law, see Markell v. Sidney B. Pfeifer Found., Inc., 9 Mass. App. Ct. 412, 442 (1980), citing Smith v. Smith, 222 Mass. 102, 106 (1915) ("[R]elationship between . . . trustee and beneficiary . . . is fiduciary as matter of law"), or found by the judge as a mixed question of law and fact, see Doe v. Harbor Schs., Inc., 446 Mass. 245, 252 (2006) ("Where the fiduciary relationship is not one created by law, the existence of the relationship ordinarily is a mixed question of law and fact").

2. Statute of limitations. Wexler asserts that even if a fiduciary obligation was created, Starr's claim is time barred by the three-year statute of limitations for tort actions, G. L. c. 260, § 2A. By contrast, Starr asserts in his cross appeal that the judge erred by limiting accounting and payments to him to the three-year period preceding this action and that, instead, he should be entitled to an accounting and payments from 2000 forward.

General Laws c. 260, § 2A creates a three-year statute of limitations for claims of breach of fiduciary duty. See Patsos v. First Albany Corp., 433 Mass. 323, 327 n.6 (2001).

> "Where claims arise out of a fiduciary relationship, the statute of limitations is tolled 'until a plaintiff has "actual knowledge" that [he or] she has been injured by the fiduciary's conduct.' The statute of limitations does not begin to toll once a plaintiff gains knowledge of any wrongdoing by the fiduciary but, rather, begins only once the plaintiff gains knowledge of the particular harm

> forming the basis for his or her claim. Constructive knowledge is irrelevant; '[o]nly when the beneficiary's harm at the fiduciary's hands has "come home" to the beneficiary does the limitations clock begin to run'" (citations omitted).

Tocci v. Tocci, 490 Mass. 1, 12-13 (2022). "Where a defendant raises the statute of limitations as an affirmative defense, the plaintiff bears the burden of proving that the action was timely commenced." Id. at 12. Thus, we turn to the question of when Starr had actual knowledge of the "particular harm forming the basis for his . . . claim" (citation omitted). Id.

To the extent Wexler argues that Starr had actual knowledge of Wexler's repudiation of Starr's interest in a share of 44 St. Paul Associates, the record belies the contention. Wexler repeatedly recognized Starr's interest in 44 St. Paul Associates. See note 17, supra. Most recently, in response to Starr's 2001 request for 44 St. Paul Associates' records, Wexler responded, "You have a piece of my share -- send any issues to me -- I will respond." In 2002, Starr again requested payment of monies he believed were owed to him, along with certain financial records from 44 St. Paul Associates. No response appears in the record. While these interactions may have alerted Starr to some wrongdoing by Wexler, we cannot say that the judge erred in concluding that these interactions did not

amount to actual knowledge of repudiation.[17] See Lattuca v. Robsham, 442 Mass. 205, 214 (2004) ("occasional refusal to honor recognized legal obligation not absolute and unconditional repudiation" [citation omitted]). In fact, many of Wexler's actions and communications confirmed Starr's continued interest in 44 St. Paul Associates. See id. ("Even if it could be said that [the beneficiary] made formal 'demand' in the contract sense, repudiation 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'"). Thus, the judge could have concluded that the "particular harm" of repudiation did not "come home" to Starr until 2014, when Wexler declined to acknowledge the existence of Starr's interest. See Tocci, 490 Mass. at 13.

The aforementioned interactions did, however, alert Starr to individual nonpayments by Wexler. Where a party is obligated to make "'continuous separate performances over a period of time

[17] There are numerous reasons short of repudiation that Starr might have temporarily stopped receiving distributions. For example, 44 St. Paul Associates may not have made any distributions during that period, or Starr may have believed that Wexler was withholding monies to pay down the aforementioned management fee. Indeed, Wexler even acknowledged that payment to Starr prior to 2000 occurred at "irregular intervals."

or . . . payment of money in separate installments,'" "we consider each alleged violation of the . . . obligation a new claim for statute of limitation purposes." Chambers v. Lemuel Shattuck Hosp., 41 Mass. App. Ct. 211, 213 (1996), quoting Larson v. Larson, 30 Mass. App. Ct. 418, 427 (1991). This is in contrast to a situation where "there is a clear and unequivocal repudiation," in which case "the statute of limitations begins to run from the date of the repudiation." Callender v. Suffolk County, 57 Mass. App. Ct. 361, 364 (2003). In light of the 2001 and 2002 communications between Starr and Wexler, the judge could have concluded that Starr failed to meet his "burden of proving that the action was timely commenced" with respect to any nonpayments occurring more than three years before the commencement of this action.[18] See Tocci, 490 Mass. at 12. Absent outright repudiation of Starr's interest, however, any later nonpayments could not have been raised earlier "because the times for payment had not yet occurred or given rise to any cause of action in favor of [Starr]," and were therefore not barred. See Larson, 30 Mass. App. Ct. at 426. Thus, we cannot say the judge erred in barring recovery for nonpayments that may have occurred more than three years prior to the commencement of

[18] In other words, the judge could have concluded that Starr had actual knowledge of nonpayments by virtue of his not receiving those payments, or at least that Starr had failed to meet his burden as the plaintiff to show otherwise.

this action, yet allowing recovery for the nonpayments that may have occurred within the three years prior to the commencement of this action.[19]

3. Laches. Wexler also contends that even assuming that Starr's claims are not time barred, any recovery is barred by the doctrine of laches. We disagree. "The doctrine of laches operates in equity as an affirmative defense against a plaintiff whose unreasonable delay in bringing a claim results in some injury or prejudice to the defendant." West Broadway Task Force v. Boston Hous. Auth., 414 Mass. 394, 400 (1993), citing Shea v. Shea, 296 Mass. 143, 148-149 (1936). "[L]aches does not operate to bar a claim simply because the events which established rights in the plaintiff occurred long ago." Id. Rather, a defendant bears the burden to establish that a delay in bringing claims was unreasonable and further that a disadvantage flowed from that unreasonable delay. See Srebnick v. Lo-Law Transit

[19] Starr's claim that his conversion claims were wrongly dismissed is also unavailing. Conversion claims are subject to the same three-year statute of limitations found in G. L. c. 260, § 2A. See Tocci, 490 Mass. at 12. "A demand is a necessary preliminary to an action for conversion where the defendant's possession is not wrongful in its inception and demand and refusal are required to put him in the position of a wrongdoer." Abington Nat'l Bank v. Ashwood Homes, Inc., 19 Mass. App. Ct. 503, 506-507 (1985). To the extent Starr's 2002 letter requesting accountings and payment can be considered a "demand" necessary to initiate a conversion claim, those claims are time barred. Any conversion claims based on subsequent nonpayments were properly dismissed where no "demand and refusal . . . put [Wexler] in the position of a wrongdoer" in the conversion sense. Id.

Mgt., Inc., 29 Mass. App. Ct. 45, 49 (1990) ("A judge may find as a fact that laches exists if there has been unjustified, unreasonable, and prejudicial delay in raising a claim").

Here, the judge found that Wexler failed to sustain his burden to show that he suffered a disadvantage or prejudice from Starr's delay. In view of the conclusory and speculative nature of Wexler's assertions of prejudice, we cannot say that the judge's finding was clearly erroneous. See id. at 49-50 ("As long as there is no statute of limitations problem, unreasonable delay in pressing a legal claim does not, as a matter of substantive law, constitute laches"). Contrast Garabedian v. Westland, 59 Mass. App. Ct. 427, 437-438 (2003). See also Brash v. Brash, 407 Mass. 101, 104-105 (1990); Burn v. McAllister, 321 Mass. 655, 659 (1947); New England Trust Co. v. Spaulding, 310 Mass. 424, 433 (1941).[20]

We see no error in the judgment of the trial court, and affirm.

Judgment affirmed.

By the Court (Neyman, Ditkoff & Hand, JJ.[21]),

Joseph F. Stanton

Clerk

Entered: August 4, 2022.

[20] We deny Starr's request for attorney's fees.

[21] The panelists are listed in order of seniority.