

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

21-P-1023

MICHAEL J. TOCCI

vs.

HOLLAND & KNIGHT, LLP & others.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, Michael J. Tocci, appeals from the dismissal of his Superior Court complaint against the defendants alleging breach of contract, breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, negligence, fraud, unjust enrichment, and breaches of G. L. c. 93A. Because we, like the judge, conclude that each of the plaintiff's claims are barred by the applicable statute of limitations, we affirm.

Background. We summarize the relevant allegations of the plaintiff's complaint and briefly address the procedural history of the case. In 1975, the plaintiff's father, Valentino,² formed a business that ultimately became Tocci Corporation. The

¹ C. Thomas Swaim and Robert Lizza.

² For clarity, we refer to Michael J. Tocci as the plaintiff, and the other members of the Tocci family by their first names.

plaintiff and his two brothers, John and William, were equal shareholders in the company; along with Valentino, they were also the members of its board of directors (board).

In 1985, C. Thomas Swaim and his law firm, Sherburne, Powers & Needham (SP&N), represented Tocci Corporation. In August of that year, Swaim and SP&N helped John create a new entity, Tocci Building Corporation (TBC), with John as its sole director and officer. None of the other directors of Tocci Corporation were made aware of the creation of TBC at the time it was formed.

John diverted new business from Tocci Corporation to TBC. Additionally, when Tocci Corporation settled a lawsuit in 1991, while represented by Robert Lizza (who also practiced at SP&N), John signed the settlement agreement certifying that the board had approved the settlement. Neither John nor Lizza informed the board members of the settlement, and John diverted the proceeds of the settlement either to himself or to TBC.

SP&N continued to represent both Tocci Corporation and TBC until 1995, when, without informing the other board members, John dissolved Tocci Corporation and transferred its assets to TBC. SP&N continued to represent TBC until 2001, when it merged with TBC's present counsel, Holland & Knight, LLP (Holland & Knight).

In January 2013, the plaintiff and William learned about John's dissolution of Tocci Corporation and sought to revive it. In 2014, John and TBC filed suit against the plaintiff to enjoin him from doing so but were unsuccessful.³

The plaintiff filed this action on December 15, 2020. The defendants moved to dismiss on the grounds that the complaint made out only shareholder derivative claims that the plaintiff was prohibited from litigating pro se, that the complaint was time-barred, and that the complaint failed to state claims for which relief could be granted. In support of their motion, the defendants relied on, inter alia, statements made by the plaintiff in June 2014 (2014 statements) and the plaintiff's February 2016 affidavit (February 2016 affidavit), both of which were offered by the plaintiff in connection with another lawsuit.

The judge allowed the defendants' motion to dismiss, and this appeal followed.

Discussion. 1. Standard of review. "We review an order on a motion to dismiss de novo." A.L. Prime Energy Consultant, Inc. v. Massachusetts Bay Transp. Auth., 479 Mass. 419, 424 (2018). In doing so, we take all allegations of the complaint as true, and draw reasonable inferences in the plaintiff's

³ That effort led to additional litigation which it is unnecessary to detail here.

favor. See Iannacchino v. Ford Motor Co., 451 Mass. 623, 625 n.7 (2008). "Further, a judge may take judicial notice of the court's records in a related action." Jarosz v. Palmer, 436 Mass. 526, 530 (2002).

2. Statutes of limitation. We, like the judge, conclude that all of the plaintiff's claims in this action are time-barred.⁴ The claims for breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, common law fraud, and negligence are all governed by three-year statutes of limitation. See G. L. c. 260, § 2A. The plaintiff's contract claim, which alleges only that the defendants breached a contractual duty "of undivided loyalty and due diligence," is based exclusively on the plaintiff's claim that the defendants violated a fiduciary obligation, albeit a "contractual" one. Although "[a] course of conduct may give rise to more than one cause of action," Cohen v. State St. Bank & Trust Co., 72 Mass. App. Ct. 627, 633 (2008), the allegations of the plaintiff's contract claim are merely a recasting of the plaintiff's breach of fiduciary duty claim. Accordingly, it is subject to the same three-year statute of limitations as the plaintiff's direct

⁴ For the purposes of this analysis, we assume without deciding that the plaintiff could properly represent himself on these claims. But see Varney Enters., Inc. v. WMF, Inc., 402 Mass. 79, 79 (1988) (other than in context of small claims action, corporation must be represented by counsel).

claims for breach of fiduciary duty.⁵ Cf. id. at 632-633 (breach of contract claim a distinct cause of action where based on rights and duties independent of those obligated by fiduciary relationship). The same is true of the plaintiff's claims that "in their breach of fiduciary duty to the [p]laintiffs, [the defendants] realize[d] substantial unjust enrichment," and those under G. L. c. 93A; we conclude that they, too, are governed by a three-year statute of limitations.⁶ See G. L. c. 260, §§ 2A, 5A; Sacks v. Dissinger, 488 Mass. 780, 791 (2021). Those procedural clocks began to run, at the latest, when the plaintiff had actual notice the particular wrongdoing that formed the basis of his claims, i.e., the defendants' alleged involvement in what the plaintiff contends were John's efforts to usurp Tocci Corporation's business opportunities. See Tocci

⁵ Where the allegations support an inference of something more than mere negligence, we do not agree with the defendants that they are essentially claims for legal malpractice. See Kiribati Seafood Co., LLC v. Dechert LLP, 478 Mass. 111, 117 (2017), quoting Global NAPS, Inc. v. Awiszus, 457 Mass. 489, 499 n.16 (2010) ("To prevail on a claim of negligence by an attorney, a client must demonstrate that the attorney failed to exercise reasonable care and skill in handling the matter for which the attorney was retained . . . ; that the client has incurred a loss; and that the attorney's negligence is the proximate cause of the loss . . .").

⁶ Even were we to consider the G. L. c. 93A claim under a four-year statute of limitations, the plaintiff's claims would be barred. As we discuss, infra, the plaintiff was aware more than four years before he filed his complaint that he had suffered harm as a result of the defendants' conduct. See International Mobiles Corp. v. Corroon & Black/Fairfield & Ellis, Inc., 29 Mass. App. Ct. 215, 221 (1990).

v. Tocci, 490 Mass. 1, 2 (2022); Doe v. Harbor Schs., Inc., 446 Mass. 245, 255 (2006); Lattuca v. Robsham, 442 Mass. 205, 213 (2004). Thus, if the plaintiff was aware that he had been harmed by the defendants' conduct more than three years before the December 15, 2020, filing of this action, then those claims are barred, even if he was not at that time aware of all details of the potential claims arising from that conduct.⁷ See Tocci, supra at 11-12; Sheila S. v. Commonwealth, 57 Mass. App. Ct. 423, 426 (2003).

The plaintiff's filings in this and another lawsuit satisfy us that he had the actual knowledge required to trigger the running of the statutes of limitation more than three years before his complaint was filed, and that his claims are barred as a result. The plaintiff's June 2014 statements outlined involvement by Swain's and Holland & Knight's predecessor law firm, SP&N, in John's creation of TBC and his efforts to "divert[] all business opportunities and assets [from Tocci Corporation] to this new corporation." The plaintiff's memorandum in opposition to the defendants' motion to dismiss in this case (opposition memo) demonstrated his awareness by 1993

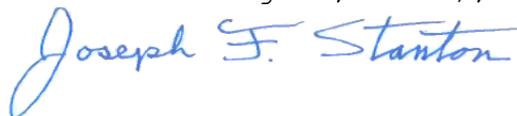
⁷ Given our conclusion, we need not address the plaintiff's argument that the statutes of limitation were tolled by the defendants' fraudulent concealment of any of his causes of action. See Demoulas v. Demoulas Super Mkts., Inc., 424 Mass. 501, 519 (1997).

of the "Park West" or "Yankee Savings Bank/FDIC" litigation. The opposition memo further states that the plaintiff received "detailed discovery" about the settlement Lizza reached in that action in response to a "court order in 2017."⁸ That March 2017 order, in turn, reflects the plaintiff's knowledge that at least as of that date Holland & Knight was the successor to SP&N. These facts underpin the plaintiff's claims and were, according to the plaintiff's own statements and representations, actually known to him by early 2017. Because none of the claims founded on these alleged facts was brought within three years, all are barred by the statutes of limitation.⁹

Conclusion. The judgment of dismissal is affirmed.

So ordered.

By the Court (Green, C.J.,
Hand & D'Angelo, JJ.¹⁰),



Clerk

Entered: August 5, 2022.

⁸ Review of the docket shows the order to have been issued in March 2017.

⁹ Given our conclusion, we do not decide whether dismissal was also warranted on other grounds.

¹⁰ The panelists are listed in order of seniority.