

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ONTARIO

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LINDSEY LAMPMAN,

Plaintiff,

-against-

DECISION AND ORDER  
Index No. 114802-2016

KEYCORP, KEYBANK, NATIONAL ASSOCIATION,  
D/B/A KEYBANK AND PATRICK LAMPMAN,

Defendant.

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PRESENT: Hon. Frederick G. Reed  
Acting Supreme Court Justice

Appearances: Schwartzapfel Partners P.C., by Christopher Holbrook, Esq., of counsel  
for the Plaintiff

Morgan Karamouzis LLP, by Siobhan Moran, Esq., of counsel for  
Keybank Defendants

The Defendants Keycorp, Keybank N.A., d/b/a Keybank (Keybank Defendants) move for an Order, pursuant to CPLR §3211(5) and (7), dismissing Plaintiff's Verified Complaint.

Plaintiff's Complaint asserts that on September 7, 1996, she was an infant passenger in a vehicle operated by the Defendant, Patrick Lampman. That vehicle was struck by another vehicle and as a result of the accident she sustained serious injuries. Thereafter, Vicki Lampman, as guardian of her daughter Lindsey, commenced a lawsuit on behalf of Lindsey against the owner of the other vehicle. That case was settled for \$166,667.33 pursuant to the terms of an infant compromise order dated November 12, 1997. Pursuant to the terms of that settlement, \$55,222.33 was paid to Vicki Lampman, jointly with an officer of Key Savings Bank, to be deposited in the guardian's name in trust for said infant in an account. The terms of the account included that no withdrawals were permitted from the account until Plaintiff reached 18 or upon further order of the court.

It is alleged that the Keybank Defendants "negligently and wrongfully permitted and allowed Patrick Lampman to withdraw the sum of approximately \$55,222.33 together with any

interest that had accrued from this account during the time period March 1998 through January 2000 and permitted Patrick Lampman to misappropriate funds to the sole use and benefit of Patrick Lampman, all in violation of the Infant's Compromise Order of the Court dated November 12, 1997.

The Plaintiff was born on November 20, 1992 and is presently 24 years of age. The alleged misappropriation took place between the time she was 5 and 7 years old. The time to commence this action was tolled by infancy until she reached majority. The Plaintiff turned 18 on November 20, 2010. The Summons with Notice was filed on November 16, 2016. The Complaint alleges negligence, breach of fiduciary duty, conversion and fraud. CPLR §208 provides that "if a person entitled to commence an action is under a disability because of infancy or insanity at the time the cause of action accrues and the time otherwise limited for commencing the action is three years or more and expires no later than three years after the disability ceases...the time within which the action must be commenced shall be extended to three years after the disability ceases...". Failure to commence the action prior to November 20, 2013, bars the commencement as violative of the statute of limitations. Because this action was not commenced until November 16, 2016, almost six years later, the statute of limitations pertaining to all of Plaintiff's claims has run and this action must be dismissed.

The Plaintiff argues that the applicable statute of limitations did not run prior to the filing of the instant action since that period was tolled by infancy and then the discovery of the alleged claims not being made until February, 2016.

Plaintiff asserts that "a cause of action sounding in fraud must be commenced within 6 years from the date of the fraudulent act or 2 years from the date the party discovered the fraud or could, with due diligence, have discovered it". Further it is argued that this discovery accrual rule also applies to fraud-based breach of fiduciary duty claims. Plaintiff claims that it was only after her mother's death in 2015 when she discovered the fact that her father improperly withdrew \$55,222.33 from her Key Bank account and that Key Bank allowed this withdrawal prior to her 18<sup>th</sup> birthday and by her father in violation of the Infant's Compromise Order.

To dismiss a complaint pursuant to CPLR 3211(a)(5) on the ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. A cause of action based upon actual fraud under

Debtor and Creditor Law §276 must be brought within six years of the date that the fraud or conveyance occurs, or within two years of the date the fraud should have been discovered, whichever is longer (see Felshman v. Yamali, 106 AD 3d 948 [2d Dept 2013]). In that case it was “unclear when the plaintiff should have first been aware of the alleged fraud” and therefore the defendants failed to establish that the causes of action were barred. Therefore, the Supreme Court erred in granting the motion to dismiss which sought to set aside certain conveyances as fraudulent.

In a factual scenario very similar to the instant case, Gonik v. Israel Discount Bank of New York, 80 AD 3d 437 (1<sup>st</sup> Dept 2011) held that “even giving plaintiff the benefit of the tolling period during her infancy, the statutes of limitations applicable to her claims [breach of fiduciary duty, fraud, negligence, and breach of contract] began to run no later than March 1996, when plaintiff attained her majority (see CPLR 208) and her claims, which were not asserted until April 2009, are therefore time-barred”. The court went on to hold that “the discovery rule does not revive her claims. The discovery rule, which would arguably apply to the fraud and breach of fiduciary duty claims in any event...is inapplicable here because *plaintiff has failed to allege sufficient facts that she could not, with reasonable diligence, have discovered the fraud earlier than September 2008.*

Even had the Plaintiff established all of the elements of a cause of action for fraud, she has failed to establish that with the exercise of reasonable diligence that she could not have discovered the alleged fraud between her eighteenth birthday in 2010 and her mother’s death in 2015. Plaintiff’s cause of action for fraud is barred by the statute of limitations and therefore the motion of the Keybank Defendants to dismiss is granted.

This constitutes the Findings of Fact, Conclusions of Law and Order of the Court.

Signed this 16<sup>th</sup> day of October, 2017  
at Canandaigua, New York

  
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Hon. Frederick G. Reed      ASCJ