STATE OF INDIANA) MARION SUPERIOR COURT
) ss: CIVIL DIVISION 10
COUNTY OF MARION) CAUSE NO. 49D10-0407-PL-001375

INDIANA LIONS EYE BANK, INC.,)
)
Plaintiff,)
)
vs.)
)
WACHOVIA CORPORATION, et.al.,)
)
Defendants.)

ORDER DENYING WACHOVIA'S MOTION FOR SUMMARY JUDGMENT

Statement of Case

Plaintiff Indiana Lions Eye Bank (ILEB) seeks damages for an approximately $1 million theft by its broker and fiduciary David Shaw, who was Defendant Wachovia Corporation's ("Wachovia") predecessor employee. IELB sues for breach of contract, fraud, conversion, violations of the Indiana Securities Act, and others. Wachovia moves for summary judgment largely arguing IELB's claims are time-barred since some revealing account information was received by IELB's agent before the allowed period.

The Court finds Wachovia fails to show the absence of undisputed material facts, and denies summary judgment

Issues

1. Does Wachovia show the absence of undisputed material fact?
2. Does inferred notice to IELB's agent impute knowledge to IELB?

Facts and Procedural History[1]

From approximately 1989 – 2002, David Shaw was a member of the Indiana Lions Eye Bank (ILEB) Board of Trustees, held various elected positions within the organization, and managed two ILEB accounts while working as an investment broker. Shaw stole at least $989,209 from the ILEB accounts while employed by Wachovia's predecessors during these years. IELB's actual knowledge of these thefts arose around November 2002.[2]

As Shaw was stealing, he also was lying to IELB. His Treasurer reports to IELB, both in writing and during board discussions, often overstated account values to conceal amounts stolen. In January 1991, for example, he reported one account value of $1,668,941.98, but the true value was $875, 822.40.

But IELB was also receiving accurate statements from Shaw's employers, such as Prudential-Bache and Kemper Securities, at all times during Shaw's thefts showing true account values. The statements were received by IELB's Executive Director, but never read. Instead, they relied on Shaw.

On July 19, 2004, the ILEB filed a complaint alleging violations of the Indiana Securities Act, constructive fraud, breach of contract, common-law fraud, and offenses against property. The Indiana statute of limitations for these claims is: breach of contracts, six (6) years, I.C. 34-11-2-7; fraud, two (2) years, Id.; Indiana Securities Act, three (3) years, I.C. 23-19-5-9 (g); and conversion, (2) two years, *see* Prime Mortgage USA v. Nichols (2008), Ind.App., 885 N.E.2d 628, 638.

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[1] A chronology of undisputed facts is appended.

[2] The record is unclear whether this fact is disputed by Wachovia. Regardless, it further precludes summary judgment.

On December 12, 2007, Wachovia filed its motion for summary judgment arguing that (1) the statute of limitations and laches bar all claims and (2) Wachovia is not vicariously liable for Shaw's actions. IELB"s filing is undisputedly within the statute of limitations when figured from the date of actual discovery. Wachovia mainly argues the claims are time-barred since IELB's Executive Director received accurate account statements, outside the allowed period, which infer knowledge of Shaw's actions.

Law

Summary judgment is proper if the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. T.R. 56 (C). The moving party must establish the "absence of any genuine issue of fact as to a determinative issue." Jarboe v. Landmark Community Newspaper, Inc. (1994), Ind., 664 N.E.2d 118, 123. If there is sufficient evidence to establish the elements of a determinative defense, the burden shifts to the plaintiff to make sufficient showing to establish the existence of a genuine issue for trial regarding such defense. Shell Oil Co. v. Lovold Co. (1998), Ind., 705 N.E.2d 981. On a motion for summary judgment**,** all doubts as to the existence of material issues of fact must be resolved against the moving party. Owens Corning Fiberglass Corp. v. Cobb (2001), Ind., 754 N.E.2d 905, 909.

Accrual of Action and Statute of Limitations

As noted above, the pertinent statutes of limitation run between two and six years for IELB's claims. But when does the time begin to run here?

Overall, the accrual of an Indiana action will start time running when a plaintiff discovers, or in the exercise of ordinary diligence could have discovered, that an injury

has been sustained by the tortious acts of another. Wehling v. Citizens National Bank (1992), Ind., 586 N.E.2d 840, 843; Habig v. Bruning (1993), Ind.App., 613 N.E.2d 61. This rule also applies to Indiana claims for breach of contract. Meisenhelder v. Zipp Express, Inc. (2003), Ind.App., 788 N.E.2d 924.[3] More importantly, whether the claimant has discovered, or could have discovered, the claim is a question of fact. Wehling v. Citizens National Bank, supra. at 843; *see also* INR-Rohn v. Summit Bank (1997), Ind.App., 687 N.E.2d 235, 241.

Furthermore, Indiana law operates to delay accrual of an action, and the start of a limitations period, when the action has been concealed from the knowledge of the plaintiff. I.C. 34-1-2-9. The action does not accrue, and the time does not begin to run, until the "discovery of the cause of action." Id. *See also* Guy v. Schuldt (1956), Ind., 138 N.E.2d 891, 894. In addition, when the parties are in a fiduciary relationship, the concealment of the claim need not be active, and the failure to disclose, when there is a duty to disclose, may be sufficient to toll the statute of limitations. Id. at 895, Malachowski v. Bank One, Indianapolis (1992), Ind., 590 N.E.2d 559, 563. More importantly, whether a claimant's reliance on a fiduciary was reasonable is a question of fact. Id. at 564.

Inferred Notice vs. Imputed Knowledge

Wachovia strongly argues that the receipt of true account statements infers actual notice upon IELB's agent (the Executive Director), and therefore imputes actual knowledge to IELB itself - well before the allowable time limitation.

[3] Plaintiff's claim for violation of the Indiana Securities Act is limited, under I.C. 23-19-5-9 (g) to 3 years ". . . after **discovery** by the person bringing the action of a violation of this article . . ." (emphasis supplied). The statute is clear and unambiguous, so the Court finds the plain and ordinary meaning of the statute's words show the time begins upon actual knowledge. *See also* Poyser v. Flora (2003), Ind.App., 780 N.E.2d 1191, 1199.

Inferred notice upon receipt

An "inference," or "inferential fact," is a "fact established by conclusions drawn from other evidence rather than from direct testimony or direct evidence. . ." Black's Law Dictionary 629, 793 (8th Ed. 2004).[4] A "presumption," or "presumption of law," is a "legal assumption that a court is *required* to make if certain facts are established . . ." (emphasis supplied). Id. at 1224.

There is no direct Indiana authority prescribing any inference or presumption of knowledge upon receipt of a notice. Certainly other jurisdictions have occasionally allowed a discretionary "inference" of knowledge – for example, the *trier of fact may infer* a letter was read if its receipt is established. *See* M.D. and Assoc, Inc v. Sears, Roebuck and Co., (1988), Mo.App., 749 S.W.2d 454. But a determination of a fact by inference is never mandatory - and the Court finds no presumption of fact, that is, any *required* assumption that exists in Indiana law under such circumstances. Moreover, any doubt as to the existence of an issue of material fact, *or an inference to be drawn from the facts*, must be resolved against a party moving for summary judgment. Cowe v. Forum Group, Inc. (1991), Ind., 575 N.E.2d630,633; Alexander v. Marion County Sheriff, 2008 WL 2894270 (July 29, 2008).

Imputed knowledge from agent to principal

On the other hand, Indiana common law has long held that knowledge of an agent is constructively imputed to the principal, regardless of the principal's actual knowledge.

[4] This language is analogous to our Indiana Pattern Instruction 4.02 on circumstantial evidence: "Circumstantial evidence is proof of one or more facts from which you *could* find another fact." (emphasis supplied). But such finding is not automatic.

City of Indianapolis v. Bates (1965), Ind.App., 205 N.E.2d 839, 846. If the agent has received sufficient information to "awaken inquiry," then the agent will be held to know that which he or she could have known by ordinary care. Id. But a careful reading of the established case law here shows that, regardless whether the agent is actually aware of the imputed knowledge, or receives information that "awaken[s] inquiry," the agent still has to have some actual knowledge of something in the first place. Id. (gas company employees saw prohibited pipe on gas range after report of leak); Prudential Life Ins v. Winans (1975), Ind., 325 N.E.2d 204 (insurance agent was informed of disqualifying medical information); Madison County Bank & Trust v. Kreegar (1987), Ind. 514 N.E.2d 279 (previous board directors had actual knowledge of bank litigation); Southport Little League v. Vaughn (2000), Ind.App., 734 N.E.2d 261 (baseball officials noticed peculiar facts about coach before he sexually assaulted players); Travelers Ins. Co. v. Eviston (1941), Ind.App., 37 N.E.2d 310 (insurance agent observes elderly applicant, but fails to ask applicant's age); Seymour Improvement Co. v. Viking Sprinkler Co. (1928), Ind.App., 161 N.E. 389 (agents read some, but not all, of a contract).

Respondeat Superior

The doctrine of *respondeat superior* imposes vicarious liability upon an employer for the wrongful or tortious acts of an employee where the employee's actions are within the scope of his employment. Trinity Lutheran Church, Inc. of Evansville, Ind.v. Miller (1983), Ind.App., 451 N.E.2d 1099. An employee is acting within the scope of employment when he is acting, at least in part, to further the interests of his employer. City of Wayne v. Moore (1999), Ind.App., 706 N.E.2d 604, 607. Where an employee acts partially in self-interest but is still "partially serving his employer's interests,"

liability will attach. Id. (quoting Sword v. NKC Hosps., Inc (1999), Ind., 714 N.E.2d 142, 147. Simply because an act could not have occurred without access to the employer's facilities does not bring it within scope of the employment. Doe v. Lafayette School Corp. (2006), Ind.App., 846 N.E.2d 691, 702.

On one hand, IELB must show that the acts committed by Shaw fell within the range of circumstances and activities over which Wachovia's predecessors would be expected to exercise control or direction such that they may rightfully be held liable. *See* Stropes v. Heritage House Children's' Center (1989), Ind., 547 N.E.2d 244, 249. On the other hand, an employee's wrongful act may still fall within the scope of his employment if his purpose was, to an appreciable extent, to further his employer's business, even if the act was predominantly motivated by an intention to benefit the employee himself. Id. Summary judgment under such circumstances may not be appropriate since the "focus must be on how the employment relates to the context in which the commission of the wrongful act arose," that is, a question of fact. Id.

Discussion

Statute of Limitations

Wachovia argues that IELB should have discovered Shaw's thefts when Wachovia sent accurate account statements in 1991 – that is, when IELB had conflicting information. Wachovia further argues that the receipt of its statements should have "awaken[ed] inquiry" for IELB to investigate Shaw, and thus imputes actual knowledge to IELB. First of all, IELB is entitled to rely upon Shaw as its fiduciary, and when he concelas the true account values, the time is tolled.Further, whether IELB's reliance is

reasonable is a question of fact. Secondly, there can be no imputation of knowledge without some prior actual knowledge by IELB's agent – its executive director.

Overall, Wachovia seems to argue an unwarranted link between the inference of knowledge and the imputation of actual knowledge. The receipt of account statements may only allow a discretionary inference at best – and Indiana law is far from clear. But the imputation of actual knowledge may only be done upon some actual knowledge in the first place – or some actual knowledge to at least "awaken inquiry." These two evidentiary exercises – inference or imputation – are clearly distinct. As shown above, there are issues of fact on each, so Wachovia fails to show the absence of undisputed facts.

Scope of Employment

The Court finds that the determination of respondeat superior under the record here is impermissible. Questions of fact are ubiquitous among Shaw's actions on IELB's accounts, and how the actions are related to the various stages of Shaw's employment.

Conclusion

Wachovia fails to show the absence of undisputed material facts on determinative issues.

Order

Wachovia's Motion for Summary Judgment is denied.

Dated this 20th day of August 2008. ______________________________

David J. Dreyer, Judge