

IN THE SUPREME COURT OF GUAM

ANDREW M. GAYLE,
Plaintiff/Counter-Defendant/Appellee

vs.

P. D. HEMLANI,
Defendant/Counter Claimant/Appellant

HOWARD TRAPP,
Plaintiff/Counter-Defendant

vs.

P. D. HEMLANI,
Defendant/Counter Claimant-Appellant

Supreme Court Case No. CVA99-047
Superior Court Case Nos. CV0074-98 and 0325-98

OPINION

Filed: September 8, 2000

Cite as: 2000 Guam 25

Appeal from the Superior Court of Guam
Argued and submitted on June 15, 2000
Hagåtña, Guam

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BEFORE: BENJAMIN J. F. CRUZ, Chief Justice, PETER C. SIGUENZA, Associate Justice and JOHN A. MANGLONA, Designated Justice.

SIGUENZA, J.:

[1] The Appellant, P.D. Hemlani, appeals an adverse decision of the Superior Court of Guam on a Motion for Summary Judgment by Appellees Andrew M. Gayle and Howard Trapp. We agree with the lower court’s disposition of the Appellant’s counterclaims of breach of fiduciary duty, constructive fraud and professional negligence, and therefore affirm its decision in the entirety.

I. PROCEDURAL AND FACTUAL BACKGROUND

[2] On June 15, 1971, ABC Company of Guam (hereinafter “ABC”) entered into an Option Agreement with Jose L.G. Crisostomo. The Option gave ABC the right to purchase certain real property located in Inarajan, Guam. It was anticipated that Jose L.G. Crisostomo would obtain ownership from the estate of Crisostomo’s father, for which he had been appointed administrator. However, Jose L.G. Crisostomo died shortly thereafter, and probate was opened for his estate. (In the Matter of the Estate of Jose Leon Guerrero Crisostomo, Island Court Probate Matter No. 114-71). In December of 1971, the administrator of his estate filed a Petition with the Island Court to order and approve the sale and conveyance of the subject property to ABC. Ostensibly, the court granted the Petition, conditioned upon the closure of Mr. Crisostomo’s father’s probate.¹

¹Neither party was able to provide a copy of the order. The essentials of the order, however, were contained in the preliminary recitals of the subsequent extensions of the Option Agreement.

[3] On January 4, 1972, ABC, as seller, and P.D. Hemlani (hereinafter “Hemlani”), as buyer, executed an Option Agreement. In consideration for the payment of \$2,000.00, Hemlani was given the exclusive option to purchase the subject property at a higher price than what ABC would have paid in the exercise of its option. The Option Agreement contained the following recital:

7. *Representation.* The Seller warrants and represents that the grant of this option is contingent upon the Island Court of Guam authorizing the sale of said real property from the estate of Jose Leon Guerrero Crisostomo (Probate Matter 114-71). In the event the Island Court shall fail to authorize the sale the Seller shall refund to the Buyer the full amount of the option payment.

Further, the Option Agreement, by its terms, provided that Hemlani had by February 12, 1972, to exercise the option.

[4] However, on February 10, 1972, ABC and Hemlani executed the first of two extensions of the Option Agreement. In addition to extending the time within which Hemlani could exercise the option to purchase from February 12, 1972 to August 12, 1972, it also was provided that:

“Said ABC Company does further agree to exercise all diligent and reasonable efforts to assist in the closing of the probate matters which have prevented the said company from now conveying title to the said lots.”

[5] The second extension was executed by the parties on October 12, 1972, and again extended the time for exercise of the option “until execution by the administrator of the estate of the agreement of sale” of the Inarajan property has been made in the estate of Jose Leon Guerrero Crisostomo.

[6] On November 29, 1973, Robert E. Shelton, then-counsel for Hemlani, requested an update of the status of the probate matter and documentation of any and all efforts made to assist in the closing of the matter. It was asserted that Hemlani was ready, willing and able to perform under the terms of the option

and extension; and, if the documentation requested was not received, that he would take whatever steps were proper.

[7] In 1974, Hemlani, now represented by attorney Jack A. Rosenzweig, filed suit against ABC Company in the Superior Court of Guam, Civil Case No. CV 0806-74, for the specific performance of the Option Agreement. During the course of discovery, it was learned that Andrew M. Gayle and Howard Trapp (hereinafter “Gayle” and “Trapp”, respectively) were partners in ABC. At all relevant times, both Gayle and Trapp were attorneys licensed to practice in Guam. We further observe that the firm of Trapp & Gayle represented the administrator of the Estate of Jose L.G. Crisostomo.

[8] On February 17, 1978, Hemlani, ABC Company, Gayle and Trapp stipulated to the dismissal, with prejudice, of the suit. As part of the stipulated dismissal, the parties executed a Revised Option Agreement which purported to reaffirm the grant of the option to purchase originally given on January 4, 1972. The Revised Option Agreement provided that Hemlani would have until February 17, 1983, to exercise the option to purchase. The Agreement further affirmed the other terms of the original Option with some modification as to the schedule of payments. The Revised Agreement reiterated the fact that the court had permitted the administrator of the estate of Jose L.G. Crisostomo to execute an agreement to sell the property to ABC but only upon the closing of the estate of Crisostomo’s father; and further stated that ABC, Gayle and Trapp, collectively “seller”, agree to:

[U]ndertake to obtain the closing of the said estate of Joaquin Maria Crisostomo so that the Property will be distributed to the estate of Jose Leon Guerrero Crisostomo and thereafter the Seller shall obtain equitable title thereto by means of an executed and approved contract of sale from the estate of Jose Leon Guerrero Crisostomo, pursuant to the order of the Court. Such efforts shall be at no cost to the Buyer.

[9] On March 4, 1980, a little over two years after the Revised Option Agreement had been executed, Rosenzweig inquired of Gayle and Trapp the status of the estate of Joaquin Maria Crisostomo, and requested a plan of action for resolution of the probate matter. Rosenzweig again communicated to Gayle and Trapp on January 26, 1981, about concerns that the property had a tax lien imposed upon it and of his disappointment that progress had not been made to clear up title on the property because an adverse claimant in the probate case had not been available. Moreover, it was stated that:

I cannot impress too much upon you the fact that my client is coming to the belief that your client (i.e. Messrs. Trapp & Gayle) are merely stringing him along and have no intention of ever clearing up the title to the lots, thus preventing him from exercising the option in a meaningful manner. I have kept Mr. Hemlani at bay by insisting that responsible individuals would not recommit themselves to an option as Howard and Andy did, unless they were confident that they could fulfill the promises that they made regarding title. As time goes on and on and on without there being any discernible progress in clearing up the title difficulties, I lose more and more credibility with my client who is inclined to take the hard-line approach. I have no doubt that the time is getting closer when my client will either recommence litigation or simply take the case from this office and place it in the hands of an attorney who is less patient and amiable than I. I would expect that any subsequent litigation would not be limited to merely a breach of contract claim, but would also raise issues of fraud and bad faith.

[10] The Revised Option Agreement was extended, in writing, on September 13, 1983. It provided that Hemlani would have until July 17, 1985 to exercise the option and that ABC agrees to “continue to undertake to obtain the closing of the Estate of Joaquin Maria Crisostomo”.

[11] On November 1, 1985, an Extension to Option Agreement was filed with the Department of Land Management which provided, *inter alia*, (1) that ABC shall have until January 1, 1987 to undertake the closing of the Estate of Joaquin Maria Crisostomo; (2) that the deadline for Hemlani’s exercise of the option is extended to July 17, 1988; and (3) that the instrument dated October 29, 1985, be retroactively effective

as of July 17, 1985. All other terms of the various agreements would remain in full force and effect.

[12] On September 6, 1988, Hemlani's new counsel, Jerry E. Hogan, had written to Gayle's attorney requesting an update. In addition, the letter alleged that Hemlani had even paid real property taxes at the request of Gayle. On December 23, 1988, ABC's counsel responded and confirmed that ABC was not delaying the matter to defeat Hemlani's option rights. Another letter was sent by Hogan on December 30, 1988. In that letter, ABC's attorney, by way of acknowledgement dated February 10, 1987, agreed that Hemlani was to have ten days to exercise the option to purchase after ABC Company obtained ownership of the property and notified Hemlani of the same in writing.

[13] Hogan wrote to Gayle on February 9, 1989, and requested Gayle's position on whether Hemlani's option had been forfeited. Additionally, Hogan stated that "I must insist that this question be resolved. My client is pushing me to resolve this matter and has authorized me to file a declaratory judgment action if need be."

[14] On March 16, 1993, Hemlani's counsel informed Gayle of his intention to sue. It appeared that nothing happened until February 3, 1994, when Hemlani's counsel gave notice to Gayle again of his intention to maintain an action against the principals of ABC Company if Gayle failed to file a motion in the probate case to seek enforcement of the original option agreement entered into by the parties. On April 22, 1994, ABC Company filed a Petition with Decree Confirming Contract for Sale and Order of Conveyance of Real Estate in the probate case for Jose Leon Guerrero Crisostomo. An Objection to the Petition was filed on July 13, 1994. On September 17, 1996, the Petition of ABC Company was dismissed with prejudice by stipulation.

[15] It is undisputed that Gayle and Trapp and their various law offices did legal work for Hemlani. In addition, it appeared that Trapp assigned all of his interest in ABC Company to Gayle around March of 1994.

[16] On January 9, 1998, Gayle filed a Complaint in the Superior Court of Guam, Civil Case No. CV0074-98, requesting a declaratory judgment that the Option Agreement was void and of no effect, that its enforcement was barred by the applicable statutes of limitations, and that Hemlani was barred under the doctrine of collateral estoppel and *res judicata* from pursuing any claims against Gayle. Hemlani, represented by present counsel, filed his Answer and Counterclaim basically admitting a majority of the allegations in the Complaint. He asserted as counterclaims: (1) professional negligence; (2) breach of fiduciary obligation; and (3) constructive fraud. On February 6, 1998, Trapp filed a similar complaint against Hemlani, Superior Court of Guam Civil Case No. CV0325-98. Hemlani filed his answer and counterclaim against Trapp. On October 15, 1998, both cases were consolidated.

[17] On March 8, 1999, Gayle filed a Motion for Summary Judgment which prayed for a declaration that he had no liability other than the return of the payment made by Hemlani for the option and for dismissal of Hemlani's counterclaims because (1) they were barred by the relevant statute of limitations, (2) they failed to state a claim upon which relief can be granted, (3) the counterclaims are based in part on claims which were raised or should have been raised in the 1974 litigation between the parties and are therefore precluded by *res judicata*, or (4) that Hemlani was precluded from basing any claim for damages on any transaction or event which occurred prior to the dismissal of the 1974 litigation.

[18] The matter came before the trial court for hearing on April 28, 1999. In its written Decision and Order of May 13, 1999, the trial court granted Gayle's Motion for Summary Judgment and held that Hemlani's only remedy was the return of the option payment. The court below found that 7 GCA § 11305 barred Hemlani's breach of fiduciary duty claim. It reasoned that any awareness Hemlani had of any injury and any fiduciary relationship between the parties had vanished as of 1974 when Hemlani first filed suit. The court rejected Hemlani's argument that the limitations period was tolled until 1996 because he could not have been aware of the breach until ABC had withdrawn its Petition in the probate proceedings. However, the court held that Hemlani was not able to advance an issue of material fact as it related to the existence of a fiduciary duty between the parties to survive summary judgment. Additionally, the court found that the constructive fraud claim was similarly barred by the statute of limitations. Similar to its analysis with respect to the fiduciary duty claim, the court concluded that any confidential relationship terminated upon the filing of the 1974 lawsuit. Finally, the court rejected Hemlani's claim for professional negligence finding that Hemlani was not an intended beneficiary of Gayle's representation of ABC Company. The court concluded that Hemlani was entitled only to a refund of the option payment.

[19] With respect to Trapp, the court found that some aspects in that case were not briefed by either party and that it would be inappropriate for it to rule on Hemlani's counterclaims against Trapp. Judgment was entered on October 19, 1999 dismissing Trapp's complaint and Hemlani's counterclaim without prejudice (CV0325-98) but ordering Hemlani's counterclaim against Gayle dismissed with prejudice and ordering the refund of the option payment (CV0074-98). By agreement of the parties, only the case involving Gayle is the subject of the instant appeal.

II. DISCUSSION

[20] Jurisdiction is not disputed and is found pursuant to Title 7 Guam Code Annotated §§ 3107 and 3108(a) (1994). We review a grant of summary judgment *de novo*. *Guam v. Marfega Trading*, 1998 Guam 4, ¶9; *Kim v. Hong*, 1997 Guam 11, ¶5; *Iizuka Corporation v. Kawasho Int'l*, 1997 Guam 10, ¶7. Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact.” Guam R. Civ. P. 56(c) (1995). There is a genuine issue if there is “sufficient evidence “which establishes a factual dispute requiring resolution by a fact-finder. *Iizuka*, 1997 Guam 10 at ¶7 (citation omitted). However, the dispute must be as to a “material fact.” *Id.* “A ‘material’ fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. . . Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment.” *Id.*

[21] If the movant can demonstrate that there are no genuine issues of material fact, the non-movant cannot merely rely on allegations contained in the complaint, but must produce at least some significant probative evidence tending to support the complaint. *Id.* at ¶8 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2510 (1986)). In addition, the court must view the evidence and draw inferences in the light most favorable to the non-movant. *Id.* (citation omitted).

[22] The trial court’s determination that the claims advanced by Hemlani were time-barred by the relevant statute of limitations, is reviewed as a question of law, *de novo*. *Grimmett v. Brown*, 75 F. 3d 506, 510 (9th Cir. 1996); *Washington v. Garrett*, 10 F. 3d 1421, 1429 (9th Cir. 1993). When the statute of limitations begins to run is also question of law reviewed *de novo*. *In re Hanna*, 72 F. 3d 114, 115 (9th

Cir. 1996). However, if the question turns on what a reasonable person should know, a mixed question of law and fact is presented, and the lower court's conclusion is reviewed for clear error. *Rose v. United States*, 905 F. 2d 1257, 1259 (9th Cir. 1990) (citation omitted).

[23] The court below, and the parties agreed, that the relevant statute of limitations applicable to Hemlani's causes of action for breach of fiduciary duty and constructive fraud was found pursuant to Title 7 GCA Section 11305 which provides, in relevant part:

Within Three Years--.

(4) An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

7 GCA § 11305 (1996).

[24] We have held that the statute of limitations will begin to run when the plaintiff suspects or should suspect that his injury was caused by wrongdoing or that someone has done something wrong to him. *Custodio v. Boonprakong et. al.*, 1999 Guam 5, ¶ 27 (interpreting the discovery rule in the context of Title 7 GCA § 11308 (1994) with respect to a medical malpractice claim) (citation omitted). Further, we observed that:

A plaintiff need not be aware of the specific acts necessary to establish the claim. . . . [o]nce the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, he must decide whether to file suit or sit on his rights. . . . Consequently, if a suspicion exists, the plaintiff cannot sit back and wait for the facts to find him as the burden of finding the facts falls upon his shoulders.

Id. (citations and internal quotations omitted).

[25] The existence of a fiduciary relationship between the parties is a fact to consider in determining whether a plaintiff has exercised reasonable diligence in the inquiry of the existence and cause of his injury. See *Bourland v. Salas*, DCA Civ. No. 82-0224A, 1986 WL 68919 (D. Guam Ap. Div., Oct. 24, 1986) (citation omitted). However, although the relationship does relax the requirement of diligent inquiry, discovery does not mean actual knowledge. *Id.* at *4. Discovery occurs when a plaintiff could have discovered the wrongful acts with reasonable diligence. *Id.* (citation omitted). Reasonable diligence is tested by an objective standard, and when the uncontroverted evidence irrefutably demonstrates that the plaintiff discovered or should have discovered the fraudulent conduct, the issue may be resolved by summary judgment. *Id.* (citations omitted).

A. BREACH OF FIDUCIARY DUTY CLAIM

[26] Turning to Hemlani's first cause of action, the issue is whether this particular claim was brought within the limitations period of three years. Examining the record before us we conclude that any breach of a fiduciary claim that Hemlani could have asserted against Gayle was time-barred.

[27] We have dealt with a case involving the allegation of the breach of fiduciary duty owed by an attorney to his client. See *Estate of Benavente v. Maquera*, 2000 Guam 9. In that case, we analogized the attorney-client relationship with that of a beneficiary-trustee relationship, and held that there is a rebuttable presumption that "[t]ransactions between an attorney and client where an attorney obtains an advantage from his client are presumed to be without sufficient consideration and under undue influence exercised by the attorney." *Id.* at ¶ 15. (citing *Oliker v. Gershunoff*, 195 Cal. App. 3d 1288, 1294

(1988)). The primary effect of the presumption is to shift the burden of proof to the attorney. *Id.* We further held that:

In order for an attorney to overcome the presumption of undue influence which arises where the attorney enters into a business transaction with his client, the attorney is required to establish by “clear and satisfactory” extrinsic evidence that: (1) the business transaction entered into between the attorney and client had been equitable to the client in all material respects; (2) prior to entering into the business transaction with the client, the attorney made full disclosure to the client of all material information relating to the business transaction; and (3) the client had consented to the business transaction after full disclosure had been made by the attorney to the client.

Id. at ¶ 16. (citation omitted).

[28] It is not necessarily determinative that the representation may have concluded before the transaction was entered. A transaction between an attorney and his former client must be scrutinized for signs of unfairness despite the fact that the attorney-client relationship has terminated for most purposes.

Hunnecutt v. State Bar, 44 Cal. 3d. 362, 371-372, 243 Cal.Rptr. 699 (Cal. 1988).

Since the duty of fidelity and good faith arising out of the confidential relation of an attorney and client is founded, not on the professional relation *per se*, but on the influence which the relation creates, such duty does not always cease immediately upon the termination of the relation but continues as long as the influence therefrom exists.

Id. at 372 (citing *Colstad v. Levine*, 67 N.W.2d 648, 654-655 (Minn. 1954)). Thus, inasmuch as a fiduciary obligation is owed by an attorney to a current or former client in a transaction wholly unrelated to the representation, it is relevant to make an inquiry into whether the influence of the relation still exists at the time of the transaction.

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[29] In this case, it was undisputed that Hemlani frequently utilized Gayle's services on other legal matters before and after the original option agreement between ABC and Hemlani was executed. It is also undisputed that Gayle had not disclosed his involvement as a partner in ABC Company to Hemlani and that he was unaware of the fact that Gayle represented the administrator of the Estate of Crisostomo, the original owner of the subject of the property, at the time of the Option Agreement. On these fact alone, it is very obvious that Gayle breached his duty to Hemlani by his self-dealing and non-disclosure of his interest in the transaction. However, it can not be disputed that Hemlani knew or should have known of the breach, at the latest, by the time it was disclosed during the discovery conducted in the 1974 litigation. Thus, any suit should have been brought within three years of its discovery in June 1976.

[30] We find incredulous Hemlani's contention that even after the 1974 litigation between himself and Gayle was terminated, he could still assert a breach of fiduciary duty against Gayle. In examining the nature of a fiduciary or confidential relationship, one California court has found that:

The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party.

Barbara A. v. John G., 145 Cal. App. 3d 369, 383, 193 Cal. Rptr. 422, 431-432 (Cal. Ct. App. 1983).

Thus, if the basis of the duty of fidelity and good faith and fair dealing arises not from the professional relation *per se* but from the influence the relation creates, then the ultimate issue before this court is whether Hemlani has come forward with evidence that demonstrates the existence of a genuine issue of fact, specifically, that he could have reposed trust and confidence even after he discovered Gayle's infidelity.

[31] Hemlani attempts to create a genuine issue of material fact by averring in his affidavit in support of the opposition to summary judgment that he had trust and confidence in Gayle and his firm. However, the evidence militates against a finding that Hemlani reposed within Gayle the trust and confidence typical in a fiduciary relationship as attorney-client. The record here indicates that Hemlani employed several attorneys to follow up on his interest in the exercise of the option. Mr. Rosenzweig's letter of January 26, 1981, indicated Hemlani's discontent with and suspicion of Gayle in his conduct to date on the issue of clearing up the title to the property. Moreover, Rosenzweig further represented to Gayle that Hemlani was more inclined to seek resolution via litigation and that it was his opinion that issues of fraud and bad faith could also be raised. Hemlani's subsequent counsel, Mr. Hogan, consistently sought to follow up on the status of the property's title. In a letter of February 9, 1989, Mr. Hogan indicated that Hemlani wanted to file a declaratory action. Over the passage of time, the record seems to indicate that Hemlani's legal representatives were diligent in their followup and aggressively seeking action from Gayle.

[32] Moreover, the Revised Option Agreement of February 17, 1978 and Gayle's conduct provide no basis for liability for the breach of fiduciary duty. Gayle's involvement with ABC Company and of his firm's representation in the probate matters were fully disclosed to Hemlani. Hemlani consented to entering into the Revised Option Agreement despite the disclosure and he had independent counsel throughout. In terms of the equity of the transaction, Hemlani paid a potentially refundable \$2,000 for the right to purchase property from ABC. ABC's ownership of the property was also contingent upon the confirmation of sale from the court in the probate matter. Thus, it does not appear that the transaction itself was not inequitable on its face and that Gayle and Hemlani stood as ordinary parties to a contract and not in any confidential

relationship.

1. Continuing Wrong Doctrine

[33] Hemlani argues that the cause of action accrued when Gayle's firm stipulated to the dismissal of its petition to confirm the sale to ABC in the probate matter. To escape the operation of the statute of limitations, Hemlani asserts that the facts justify application of the continuing wrong doctrine enunciated in the case of *Tiberi v. Cigna*, 89 F. 3d 1423 (10th Cir. 1996). In that case, the Tenth Circuit Court of Appeals articulated the doctrine as follows:

In actions for relief, on the grounds of fraud or mistake . . . the cause of action shall not be deemed to have accrued until the fraud [or] mistake . . . shall have been discovered by the party aggrieved. . . . Normally, the limitations period begins to run when the plaintiff discovers the fraud or when, with reasonable diligence, the plaintiff could have discovered the fraud. . . . Under the continuing wrong doctrine, however, where a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from, the date of the last injury. . . . In other words, the statute of limitations does not begin to run until the wrong is over and done with.

Id. at 1430-1431. (citations and internal quotations omitted). In addition, the doctrine cannot be utilized where a plaintiff's injury is definite and discoverable, and nothing prevents him from coming forward to seek redress. *Id.* at 1431.

[34] In *Tiberi*, the plaintiff brought an action against an insurance company for breach of contract, fraud, misrepresentation, and unfair trade practices. In the original complaint, he alleged that the defendant's misleading conduct subjected it to liability for *inter alia* constructive fraud, fraud, and negligent misrepresentation. The appellate court held that there was a genuine issue of material fact as to whether the statute should have been tolled by virtue of the continuing wrong doctrine. *Id.* at 1430. The court

rejected the defendants' argument that the continuing wrong doctrine was inapplicable because the plaintiff had known of his injury and the cause thereof since at least four years before the final misrepresentation was made. *Id.* 1431. The court held that the plaintiff should not be penalized for his delay because it was defendant's misrepresentations that prevented him from ascertaining the cause of his injury. *Id.*

[35] Hemlani contends that, like the plaintiff in *Tiberi*, he was subjected to numerous false representations that tolled the statute. He argues that he was led to believe that the process of ABC's assumption of title in the probate proceedings was continuing and that he had no knowledge of any breach of fiduciary duty until Gayle had essentially prevented Hemlani from meaningfully exercising his option to purchase with ABC by dismissing the petition. It was at that time, Hemlani argues, his cause of action accrued because it was the final act of a continuing course of misconduct and only at that time could he have realized any damages.

[36] However, Hemlani misapprehends the applicability of the doctrine announced in *Tiberi*. As discussed above, the breach of any fiduciary duty because of non-disclosure of a conflict would have accrued as of three years after his discovery, at the latest in August 1979. Entering into the Revised Option Agreement and the subsequent extensions, Hemlani had full disclosure, consented to, and received the benefit of independent counsel. Any breach or non-performance on Gayle's part of the Option Agreement consequently sounds in contract, rather than on the basis of any breach of fiduciary duty. Moreover, unlike the plaintiff in *Tiberi*, Hemlani was not so beholden to Gayle's interests in the transaction that he could invest a great deal of trust in Gayle. To the contrary, it is evident that he was aware of the adversarial nature of his relationship with Gayle because he continually and aggressively sought performance from Gayle.

2. Estoppel

[37] In a somewhat related argument, Hemlani alleges that Gayle is estopped from asserting the defense because the issue of whether or not he was lulled into inaction as a result of Gayle's representations, is an issue of material fact and summary judgment is precluded. In support of the argument, Hemlani cites to the case of *Interdonato v. Interdonato*, 521 A. 2d 1124 (D.C. Ct. App. 1987). There the court observed that "[a] defendant is estopped from asserting the statute of limitations as a bar to plaintiff's action if he has done anything that would tend to lull the plaintiff into inaction and thereby permit the statutory limitation to run against him." *Id.* at 1135. (citations omitted). The district court found that issues of material fact existed as to whether the defendant was estopped from asserting the limitations bar. *Id.* In particular, because the plaintiff had alleged that promises were made which lulled her into inaction from bringing her suit for breach of fiduciary duty and fraud and the defendant had denied making such promises. *Id.*

[38] However, in this case Hemlani was already aware of a breach of fiduciary duty owed to him by Gayle as early as 1976. The flaw in Hemlani's argument is that it presumes that a fiduciary obligation inured to his benefit; but, as discussed above, Gayle and Hemlani merely stand in relation to each other as parties to a contract. While the issue of estoppel may be relevant for a cause of action for breach of contract or maybe for fraud, the cause of action for breach of fiduciary duty was time-barred.

[39] Therefore, we find that Hemlani could not have or, in fact, have ever reposed the trust and confidence in Gayle typical of a fiduciary relationship after the 1974 litigation. We see no error in the lower court's assessment that any fiduciary obligation that may have been owed to Hemlani vanished after that first suit and that he is time-barred from pursuing the cause of action for breach of a fiduciary duty.

B. CONSTRUCTIVE FRAUD CLAIM

[40] The court below similarly found Hemlani's claim for constructive fraud was precluded by the statute of limitations. Guam law defines constructive fraud as follows:

Constructive fraud consists:

1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him.

18 GCA § 85309 (1992).

[41] This provision is patterned after Section 1573 of the California Civil Code. "The elements of a cause of action for constructive fraud are (1) a fiduciary relationship; (2) non-disclosure; (3) intent to deceive; and (4) reliance and resulting injury (causation)." *General American Life Insurance Co. v. Rana*, 769 F. Supp. 1121, 1126 (N.D. Cal. 1991) (citation omitted). However, California law does not require that the fiduciary relationship element of constructive fraud constitute the legal requirements of establishing a fiduciary duty. *Id.* at 1127. "In cases of constructive fraud, the term "fiduciary relationship" has been used synonymously with the term confidential relationship." *Id.* (citation omitted). Further, the breach of duty referred to in section 1573 must be one created by the confidential relationship. *Id.* (citations omitted).

[42] Hemlani's claim in this regard is the non-disclosure of (1) Gayle's relationship with ABC and (2) that Gayle was failing to undertake the court approval of the sale of property in the probate matter. With respect to the non-disclosure of the relationship with ABC that is discussed above. Hemlani knew as of 1976 the relationship but did not pursue it. With respect to the inactivity on the probate matter, the objective facts militate against finding that Hemlani reposed into Gayle the trust and confidence necessary

to establish a confidential relationship for purposes of this cause of action after the 1974 litigation. Without such a relationship, there was no duty to disclose his inactivity.

[43] Moreover, Hemlani was well aware of the inactivity. As early as 2 years after the Revised Option Agreement was executed, Hemlani's attorneys consistently checked up on and communicated with Gayle and aggressively advocated their client's interest.

[44] Further, because we conclude that Hemlani can not prove an essential element of the cause of action for constructive fraud, that is a confidential relationship after the 1974 litigation, he can not claim relief from the statute of limitations bar under the continuing wrong doctrine or estoppel.

C. LEGAL MALPRACTICE CLAIM

[45] In the case of *Johnson v. Superior Court*, 38 Cal.App. 4th 463, 45 Cal. Rptr. 2d 312 (Cal. Ct. App. 1995) theories of attorney liability to a third party were discussed. Of relevance here, was the California court's articulation of the *Goodman v. Kennedy* theory. *Id.* at 471, 45 Cal. Rptr. 2d at 316. Essentially, a duty is imposed in favor of a third party if the purpose of the retention of the attorney was for the specific objective of benefiting the third party. *Id.*

[46] In the instant case, there is no dispute that Gayle and his firm were the attorneys for ABC at all times and that Gayle represented ABC in its acquisition of the property from Crisostomo, and in the sale of the property to Hemlani, for a profit to ABC. There is no allegation that Gayle breached a fiduciary duty to ABC nor has Hemlani provided any evidence that Gayle's representation of ABC was to inure to his specific benefit. Gayle's stipulation to withdraw ABC's petition for confirmation of the sale by the Estate

of Crisostomo was made in the face of a challenge by the heirs of Crisostomo and in the course of his representation of ABC. Every aspect of Gayle’s conduct was geared to the benefit of ABC and not to Hemlani.

[47] Therefore, we hold that the trial court’s conclusion that Gayle owed no professional or fiduciary duty to Hemlani and thus no action could have been maintained by Hemlani must be affirmed.

III. CONCLUSION

[48] Therefore, because we find no error in the lower court’s conclusions that the statute of limitations bars Hemlani’s counterclaims of breach of fiduciary duty and constructive fraud and that he can not maintain an action for professional negligence the trial court’s decision is AFFIRMED.

PETER C. SIGUENZA
Associate Justice

JOHN A. MANGLONA
Designated Justice

BENJAMIN J.F. CRUZ
Chief Justice