

**VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 28th day of February, 2019.*

Frank T. Gadams, et al., Appellants,

against Record No. 180397  
Circuit Court No. 760CL16000-409-00-2

The Nolde Bakery Condominium Association, Inc., Appellee.

The Nolde Bakery Condominium Association, Inc., Appellant,

against Record No. 180398  
Circuit Court No. 760CL16000-409-00-2

Nolde Bakery, LLC, et al., Appellees.

Upon appeals from a judgment rendered by the Circuit Court of the City of Richmond.

Upon consideration of the record, briefs, and argument of counsel, for the reasons set forth below, the Court is of opinion that the judgment of the circuit court should be affirmed as to its granting of defendants' plea in bar and reversed as to its denial of the award of attorneys' fees and costs.

BACKGROUND

The Nolde Bakery Condominium Association, Inc. (the Association) was created on June 30, 2006, by Nolde Bakery, LLC (Nolde Bakery) to manage a 77-unit condominium (the Condominium) Nolde Bakery had renovated. The Association was formed as a non-stock corporation, governed by articles of incorporation (Articles), bylaws (Bylaws), and the Declaration for The Nolde Bakery Condominiums at Church Hill. The members of the Association, the Condominium's unit owners, were eligible for election to the Association's Board of Directors (the Board).

Under the Bylaws, the Board was to hold annual meetings every November, and to create and adopt an annual budget “in which there shall be expressed the assessments of each Unit Owner for the Common Expenses.” The Board was also to “accumulate and maintain reasonable reserves for working capital, operations, contingencies and replacements.” “If the reserves are inadequate for any reason, including nonpayment of any Unit Owner’s assessment, the Board of Directors may at any time levy a further assessment, which shall be assessed against the Units according to their respective Percentage Interests.”

The Articles and Bylaws provided for indemnification of a current or former director, “to the fullest extent permitted by law,” against “any and all expenses, including attorneys’ fees, reasonably incurred” in any action to which the director was made a party “by reason of being or having been . . . [a] director of the Association.”

On January 27, 2016, the Association filed a complaint (Complaint) in the Circuit Court of the City of Richmond against Frank T. Gadams (Gadams), R. Craig Burns (Burns), Judy Turner (Turner), Matt Gass (Gass) (collectively Former Directors), and Nolde Bakery (collectively Defendants). The Association was granted leave and filed an amended complaint on October 3, 2016 (amended complaint).

As alleged in the amended complaint, the first unit of the Condominium was sold on July 14, 2006. Only 23 units were sold by December 2006, and Nolde Bakery converted the remaining 54 units into rentals. The 54 rental units remained rentals until February 2013, and were sold as leases expired, the last having been sold in December 2015.

Pursuant to the Bylaws, Nolde Bakery appointed Gadams, Turner, and Burns to the Board as the initial directors. At the time, Gadams was the sole owner of Nolde Bakery and another business, Marathon Development Group, Inc. (Marathon), at which Burns and Turner were employed.

The Board hired Marathon as the management company for the Association for a monthly fee of \$1500, which was later increased to \$1800. On December 20, 2012, at the 2012 annual meeting, Gass, another employee of Marathon, replaced Gadams on the Board. The remaining Former Directors remained on the Board until they resigned on November 3, 2014.

The amended complaint asserted 10 counts. Count 1 alleged that Nolde Bakery breached warranties by defectively renovating the common areas of the Condominium. Count 2 alleged

breach of fiduciary duties in that the Former Directors failed to levy sufficient assessments to adequately maintain the reserve and operating accounts “during all of the time” the Former Directors served on the Board, and realized operating losses from 2006 to 2013. It further noted that, pursuant to a reserve study conducted in 2014, the reserve balance was expected to be \$362,398.09, but it was only \$26,766.37 in November 2014.

Count 3 alleged breach of fiduciary duties in that the Former Directors, except Gass, authorized the payment of excessive fees to Marathon in 2010 and 2011. Count 4 alleged breach of fiduciary duties in that the Former Directors, except Gass, used Association funds to pay their personal phone bills and those of other Marathon employees. Count 5 alleged the Defendants conspired to commit the breaches of fiduciary duty alleged in Count 2. Count 6 alleged the Defendants, except Gass, conspired to commit the conduct alleged in Counts 3 and 4. Count 7 alleged that Gadams and Nolde Bakery conspired to prevent the relinquishment of control of the Board until November 3, 2014 and to commit Counts 2, and 4-6. Count 8 alleged breach of contract by Nolde Bakery for failing to pay assessments into the reserve account as required by the Bylaws. Counts 9 and 10 alleged the Defendants breached and conspired to breach fiduciary duties to enforce Nolde Bakery’s obligation to pay the assessments.

In the amended complaint, the Association also claimed that it was obstructed from filing suit until the Former Directors resigned, and thus, “the statute of limitations was tolled” until that time. It alleged that Defendants’ repeated wrongs created new causes of action after January 27, 2014, but also contended that Defendants’ decisions “constituted a continuing course of conduct that ended only when Nolde Bakery . . . lost voting control and control of the [Board] at a time less than two years before this case was filed.” The Association claimed that “[t]he respective breaches of fiduciary duties by defendants, through continuing wrongful actions, wrongful failures to act, and wrongful decisions, were not, in their scope and breadth, limited to discrete and succinct events, [but instead] constituted a continuing course of conduct.”

Defendants filed a demurrer, plea in bar of the statute of limitations, and a motion for summary judgment. Specific to Count 2, Defendants asserted that the claim was governed by the catch-all provision contained in Code § 8.01-248 of two years, and the alleged breaches of fiduciary duties occurred more than two years before the Complaint was filed. Defendants contended that the latest the alleged breach of duty for purported underfunding could have

occurred was December 2013 when the 2014 budget, the last budget proposed by the Former Directors, was adopted. Further, they argued that because Count 2 was time-barred, Count 5 was also time-barred because it alleged a conspiracy to commit the wrongs alleged in Count 2. As to all counts, Defendants claimed the statutes of limitations were not tolled. Defendants also asked that the Former Directors be awarded attorneys' fees and costs incurred in defending the lawsuit.

The circuit court held a hearing on the motion for summary judgment and plea in bar on November 16, 2016. On November 17, 2016, the court issued its letter opinion and sustained the plea in bar.

In its opinion, the circuit court first noted that, "[w]ith the exception of the breach of warranty claim [Count 1], discussed below, [the Association] does not dispute that in normal circumstances its suit is time-barred." As to Count 1, the court found that the statute of limitations began to run on July 14, 2006, when the first unit was sold. As to all counts, the court ruled that tolling did not apply because the breaches of fiduciary duties did not constitute obstruction or "extraordinary circumstances" that would toll the statute of limitations. The court further found that unit owners could have sued "derivatively to protect their rights while the Defendants wrongfully controlled the board."

On November 30, 2016, the circuit court entered an order, dismissing the amended complaint, with prejudice. The circuit court also denied the Former Directors' request for attorneys' fees and costs.

On December 7, 2016, the Former Directors filed a motion for indemnification, arguing that they were entitled to attorneys' fees and costs. The circuit court denied the motion, reasoning that:

I agree with counsel, bottom line. You won due to the statute of limitations. I didn't litigate the whole case. I freely admit it. I understand your point, but my point is I've heard argument back and forth. I have no doubt in my mind that the people who were placed on the board were operating at the behest of the guy that actually created this whole thing.

The Former Directors appeal the circuit court's ruling denying attorneys' fees and costs (Record No. 180397). Separately, the Association appeals the court's ruling dismissing the amended complaint (Record No. 180398).

This Court granted four assignments of error in Record No. 180398:

1. The Circuit Court of the City of Richmond, Virginia (“the trial court”) erred in its Final Order (“the Final Order”) entered on December 20, 2017 dismissing with prejudice as time-barred all counts of the amended complaint (“the amended complaint”) of appellant, the Nolde Bakery Condominium Association (“the Nolde Association”), as to that part of the Final Order which ruled as a matter of law against the contention of the Nolde Association that the claims in Count Two of the amended complaint against appellees (defendants before the trial court) R. Craig Burns (“Burns”), Judy Turner (“Turner”) and Matt Gass (“Gass”) could not be time-barred because those claims included averments that Burns, Turner, and Gass, during the two years before this suit was brought, violated fiduciary duties to the Nolde Association and its members by failing—as the members of the board of the Nolde Association—to levy sufficient assessments to remedy inadequate reserves shown by a study reported to them during those two years. This part of the Final order was error because there was a material dispute of fact as to whether during the two years before this suit was filed these three board members, who were the sole members of the said board (a) were on notice that additional reserves were needed; (b) chose for reasons of self-interest not to levy assessments for such additional reserves, and (c) as a proximate result, the Nolde Association’s members (and therefore the Nolde Association) sustained damages.

2. The trial court erred in the Final Order as to that part of it which dismissed as time-barred Count Five of the amended complaint in which the Nolde Association charged that all of the appellees (defendants below) conspired to keep the Nolde Association’s payment too low to benefit themselves. This ruling by the trial court was in error as to that part of Count Five which averred such conspiracy by all appellees (defendants below) which occurred during the two-year period before the filing of this suit. This part of the Final Order was error because that part of the conspiracy which occurred during the two years before the filing of this suit could not be time-barred and there was a material issue of fact as to whether and to what extent all of the appellees engaged in action during the two years before the filing of this suit to benefit themselves by keeping such assessments too low, thereby proximately damaging the Nolde Association and its members at large.

3. The trial court erred in its Final order as to its dismissal of all of the counts of the amended complaint in ruling against the contention by the Nolde Association that, as to all counts, the statute of limitations was tolled by obstruction pursuant to Va. Code Ann. Section 8.01-229(D)(ii) or by the equitable doctrine of “extraordinary circumstances.” The trial court erred in such ruling and in the reliance on such ruling in the Final Order because there was a material factual dispute as to whether appellee Frank T. Gadams (“Gadams”) through his control of the board of the Nolde Association, and Turner, Burns, and Gass, acting under such control, and on the basis of the control by all of them of the

board, acting out of self-interest, obstructed this lawsuit, or any part of it, from being filed until they relinquished control of the board in November 2014, less than two years before this case was filed. There was also a material factual dispute as to whether Gadams' control constituted "extraordinary circumstances" sufficient to toll the statute of limitations.

4. The trial court erred in its entry of the Final Order as to its dismissal of all of the counts of the amended complaint in ruling against the contention by the Nolde Association that, as to all counts, there was a continuing course of action so that the statute of limitations was tolled as to all such actions. Such ruling and such order were error because there was a material dispute of fact as to whether there was a continuing series of actions taken by the appellees that should be held to have come within a continuing course of action doctrine and because, although this may be a case of first impression in Virginia, this Court should hold that the facts of this case fall within a continuing course of action doctrine like that applied in medical or legal malpractice.

This Court also granted one assignment of error in Record No. 180397:

The trial court erred in denying [the Former Directors] their attorneys' fees and costs incurred in defending this matter, which [the Former Directors] are entitled to receive pursuant to the terms of [the Association's] Bylaws and Articles of Incorporation and Va. Code § 13.1-877.

#### ANALYSIS

##### *A. Record No. 180398*

###### *1. Counts 2 and 5 were filed outside of the statute of limitations*

"Appeal of a decision on a plea in bar of the statute of limitations involves a question of law that we review de novo." *Van Dam v. Gay*, 280 Va. 457, 460 (2010). "[C]ourts are obligated to enforce statutes of limitation strictly and to construe any exception thereto narrowly." *Westminster Investing Corp. v. Lamps Unlimited, Inc.*, 237 Va. 543, 547 (1989).

The parties agree that Counts 2 and 5 are subject to a two-year statute of limitations and that the rights of action for Counts 2 and 5 accrued at the same time. The only issue in dispute on appeal is the accrual date.

"In every action for which a limitation period is prescribed, the right of action shall be deemed to accrue and the prescribed limitation period shall begin to run *from the date the injury is sustained* in the case of injury to the person or damage to property." Code § 8.01-230 (emphasis added). "It is not material that *all* the damages resulting from the act should have

been sustained at that time and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date.” *Forest Lakes Cmty. Ass’n v. United Land Corp. of Am.*, 293 Va. 113, 124 n.7 (2017) (citation and internal quotation marks omitted). “Difficulty in ascertaining the existence of a cause of action is similarly irrelevant” and the statute of limitations on a cause of action may be triggered “when the injury or damage is unknown or difficult or even incapable of discovery.” *Van Dam*, 280 Va. at 463.

*[W]hen the recurring injuries, in the normal course of things, will continue indefinitely*, there can be but a single action therefor, and the entire damage suffered, both past and future, must be recovered in that action, and as a result, the right to recover will be barred unless it is brought within the prescribed number of years from the time the cause of action accrued. . . . In this scenario, *the limitation period runs from the start of the continuous and indefinite injury* not the end of it.

*Forest Lakes Cmty. Ass’n*, 293 Va. at 126-27 (emphases added) (citations and internal quotation marks omitted). The issue is whether the injuries alleged were “merely a *continuation of the same injury* or were they so *temporary and episodic* as to imply the accrual of new causes of action,” which triggered distinct statute of limitations periods. *Id.* at 129 (emphases added).

In this case, Counts 2 and 5 allege that the Former Directors breached their fiduciary duties in that they failed to maintain adequate reserves and failed to levy sufficient assessments “during all of the time” that the Former Directors served on the Board. The Former Directors’ failure to maintain adequate reserve and operating accounts began in 2006 when the Association realized operating losses and remained underfunded. Their failure to levy adequate assessments also began in 2006. The alleged failures continued throughout the entire time the Former Directors served on the Board. Because damage—operating losses and inadequate reserves—occurred in 2006, the statute of limitations began running in 2006, more than two years before the complaint was filed.

Moreover, the 2014 reserve study does not alter the analysis because the amended complaint does not allege an additional duty of the Former Directors to respond to its results. Rather, the reserve study was only evidence of the Former Directors’ continuing violation of their duties to maintain adequate reserves and levy adequate assessments “during all of the time” they served. Also, the Former Directors’ failure to levy adequate assessments last occurred in December 2013, more than two years before the Complaint was filed, when they passed their last

budget before resigning the following November. Because the Association had the right to enforce a cause of action against the Former Directors for breach of their fiduciary duties by underfunding the reserve and operating accounts and levying insufficient assessments beginning in 2006, Counts 2 and 5 were filed outside of the two-year statute of limitations.

2. *Statutes of limitations were not tolled*

“A statute of limitations may not be tolled, or an exception applied, in the absence of a clear statutory enactment to that effect. Any doubt must be resolved in favor of the enforcement of the statute.” *Birchwood-Manassas Assocs. v. Birchwood at Oak Knoll Farm*, 290 Va. 5, 7 (2015) (citations and internal quotation marks omitted).

Under Code § 8.01-229(D),

[w]hen the filing of an action is obstructed by a defendant’s (i) filing a petition in bankruptcy or filing a petition for an extension or arrangement under the United States Bankruptcy Act or (ii) using *any other direct or indirect means to obstruct the filing of an action*, then the time that such obstruction has continued shall not be counted as any part of the period within which the action must be brought.

(Emphasis added.) “[A] plaintiff who seeks to rely upon the tolling provision in Code § 8.01-229(D) must establish that the defendant undertook an affirmative act designed or intended, directly or indirectly, to obstruct the plaintiff’s right to file her action.” *Newman v. Walker*, 270 Va. 291, 298 (2005) (citation and internal quotation marks omitted).

This Court has also “long recognized that equity will toll a statute of limitations under certain ‘extraordinary circumstances.’” *Birchwood-Manassas*, 290 Va. at 7. “Two such extraordinary circumstances that have arisen in the past are (1) where fraud prevents a plaintiff from asserting its claims, or (2) where the defendant has by affirmative act deprived the plaintiff of his power to assert his cause of action in due season.” *Id.* (citations and internal quotation marks omitted). “Neither an irrevocable conflict of interest nor a breach of fiduciary duty is listed within the Code of Virginia as a trigger for the tolling of the statute of limitations.” *Id.* (citing Code §§ 8.01-229 and -249).

Here, the respective statutes of limitations are not tolled by obstruction or “extraordinary circumstances.” The amended complaint alleges that 23 of the 77 units were sold by December 2006, and the Association does not state any reason those unit owners could not have filed a derivative action on behalf of the Association or allege any affirmative acts by Defendants that

prevented them from timely asserting the Association's claims. Further, Defendants' control of the Board does not toll the limitations periods because, as stated in *Birchwood-Manassas*, "[n]either an irrevocable conflict of interest nor a breach of fiduciary duty" tolls a statute of limitations. Accordingly, the Association does not allege any obstruction by Defendants or "extraordinary circumstances" that tolled the statutes of limitations.

*3. Continuous undertaking rule is inapplicable*

Under the continuous undertaking rule, "where there is an undertaking which requires a continuation of services, the statute of limitations does not begin to run until the termination of the undertaking." *Harris v. K & K Ins. Agency*, 249 Va. 157, 161 (1995). The rule only postpones the accrual date "with respect to a particular undertaking or transaction" and applies "only when a continuous or recurring course of professional services *relating to a particular undertaking* is shown to have taken place over a period of time." *Moonlight Enters., LLC v. Mroz*, 293 Va. 224, 230 (2017) (emphases added) (citation and internal quotation marks omitted). This rule is generally limited to "cases stating claims of breach of contract or negligence involving the professional services of physicians, attorneys, and accountants." *Harris*, 249 Va. at 161.

The Association admits that the continuous undertaking rule has not previously been applied to toll the accrual of a cause of action in circumstances like those presented in this case. We decline the Association's invitation to extend the continuous undertaking rule. Further, even if the rule applied to fiduciaries, the Former Directors' service on the Board was not a "particular undertaking," and the only particular undertaking alleged, the renovation by Nolde Bakery, concluded in 2006.

In summary, Counts 2 and 5 were filed outside of the statute of limitations, the continuous undertaking rule is not applicable in this instance, and the Association has not alleged any obstruction or "extraordinary circumstances" that prevented it from filing its claims within the applicable limitations periods. Accordingly, this Court affirms the circuit court's dismissal of the amended complaint.

*B. Record No. 180397*

The Articles and Bylaws state that the Former Directors are entitled to indemnification to the fullest extent of the law, including recovering reasonable attorneys' fees. Under Code

§ 13.1-877, “[u]nless limited by its articles of incorporation, *a corporation shall indemnify a director who entirely prevails* in the defense of any proceeding to which he was a party because he is or was a director of the corporation against reasonable expenses incurred by him in connection with the proceeding.” (Emphasis added.) Reasonable expenses include attorneys’ fees. Code § 13.1-875. The “prevailing party” is the “party in whose favor a judgment is rendered.” *Sheets v. Castle*, 263 Va. 407, 413 (2002) (citation and internal quotation marks omitted).

The Former Directors were directors of the Association and were named defendants in this action because they had been directors of the Association. They “entirely prevailed” in their defense when the amended complaint was dismissed based upon their plea in bar. Thus, the Former Directors are entitled to reasonable expenses incurred in connection with this case. The circuit court erred when it denied the Former Directors an award of attorneys’ fees and costs, seemingly based upon the determination that Gadams and Nolde Bakery acted in bad faith.

#### CONCLUSION

Accordingly, for the above reasons, upon consideration of the assignments of error in Record No. 180398, we affirm the judgment of the circuit court as to its dismissal of the amended complaint, and upon consideration of the assignment of error in Record No. 180397, we reverse and vacate the judgment of the circuit court concerning the denial of attorneys’ fees and costs to the Former Directors. We remand the case to the circuit court for a determination of the reasonable attorneys’ fees and costs to which the Former Directors may be entitled.

This order shall be certified to the Circuit Court of the City of Richmond.

A Copy,

Teste:

A handwritten signature in black ink, appearing to read "D B N", followed by a horizontal line extending to the right.

Clerk