<u>EXHIBIT A – UNPUBLISHED DECISIONS</u>

LEXSEE 2004 U.S. DIST. LEXIS 7072

UNITED STATES OF AMERICA, Plaintiff, -against- UNITED STATES CURRENCY IN THE AMOUNT OF TWO HUNDRED FORTY-EIGHT THOUSAND FOUR HUNDRED THIRTY DOLLARS ($ 248,430), MORE OR LESS, AND ALL PROCEEDS TRACEABLE THERETO, Defendants.

CV-01-5036 (SJF)(ASC)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

2004 U.S. Dist. LEXIS 7072

April 14, 2004, Decided

DISPOSITION: [*1] Claimant's application for appointment of counsel denied. Government's motion for summary judgment and forfeiture granted.

COUNSEL: For United States of America, Plaintiff: Carolyn Lisa Miller, LEAD ATTORNEY, United States Attorney's Office, Eastern District of New York, Brooklyn, NY.

JUDGES: Sandra J. Feuerstein, United States District Judge.

OPINION BY: Sandra J. Feuerstein

OPINION:

OPINION & ORDER

FEUERSTEIN, J.

I. Introduction

The United States brought this action pursuant to *31 U.S.C. § 5317*, *21 U.S.C. § 881*, and *18 U.S.C. § 981* seeking the forfeiture of $ 248,430 in United States currency seized by United States Customs Service ("Customs") inspectors from claimant Jean Joseph Dufort ("claimant" or "Dufort") on February 3, 1999 at John F. Kennedy International Airport ("JFK Airport"). Dufort, who was boarding a flight to Haiti, failed to declare the funds as he attempted to transport them out of the United States in violation of *31 U.S.C. § 5316*. Presently before this Court is plaintiff's motion for summary judgment pursuant to *Rule 56 of the Federal Rules of Civil Procedure*. For the [*2] reasons set forth below, the motion is GRANTED.

II. Background

On May 23, 1996, law enforcement agents found carry-on luggage containing fifty kilograms of cocaine on a plane on which Dufort was a passenger. (Pl.'s Local Civ. R. 56.1 Statement at 9). Dufort was indicted on March 3, 1999 in the United States District Court for the Southern District of Florida for knowingly and intentionally conspiring with others to import cocaine into the United States in violation of *21 U.S.C. §§ 952(a)* and*963*. (Id.).

On January 12, 2000, Dufort was arrested for the narcotics trafficking offenses. (Id. at 9). He pleaded guilty to those charges before Judge Donald L. Graham of the United States District Court for the Southern District of Florida on June 20, 2000. (Id. at 10). Prior to sentencing, Judge Graham denied Dufort's motion to withdraw his guilty plea. (Id. at 11). On August 31, 2000, Judge Graham sentenced Dufort to two-hundred and twelve (212) months imprisonment. (Id.).

On February 3, 1999, Customs inspectors at JFK Airport selected American Airlines flight 657, destined for Port-au-Prince, Haiti, for an examination of checked luggage. ([*3] Id. at 4). Upon examination of two suitcases checked in Dufort's name. Customs inspectors found $ 245,495 in U.S. currency wrapped in aluminum foil and newspaper and covered with clothing. (Id. at 4-5). As he was boarding the plane, Dufort was approached by Customs inspectors and informed of the currency reporting requirements. (Id. at 5). Dufort declared $ 3,000 in U.S. currency and produced $ 2,935 for verification. (Id.). Although a search of Dufort failed to reveal any additional currency, claim tickets for the two suitcases containing currency were found in his possession. (Id. at 5-6). The inspectors arrested Dufort for failing to file an accurate currency and monetary instrument report, in violation of *31 U.S.C. § 5316*, (Id. at 7), and seized the suitcases and the currency taken from Dufort's person. (Miller Decl., exh. D).

On July 26, 1999, before Judge A. Simon Chrein of this Court, Dufort pleaded guilty to failing to file an accurate report when knowingly transporting monetary instruments of more than $ 10,000 at one time out of the United States, in violation of *31 U.S.C. § 5316(a)(1)(A)*. (Pl.'s Local [*4] Civ. R. 56.1 Statement at 7).

For his violation of *31 U.S.C. § 5316*, Dufort was sentenced on December 15, 2000 by Judge Frederic Block to a prison term of eighteen (18) months plus two years supervised release to run concurrently with the sentence imposed in the Southern District of Florida. (Id. at 7). The government has moved for summary judgment. (Pl.'s Notice of Mot. for Summ. J.). Defendant has opposed the government's motion only as to the two thousand nine hundred and thirty-five dollars ($ 2,935.00) seized from his person. (Dufort's Mot. to Challenge at 1-3).

III. Analysis

A. Appointment of Counsel

In his petition challenging the government's motion. Dufort requests the appointment of counsel. *Cooper v. A. Sargenti Co., 877 F.2d 170 (2d Cir. 1989)*, articulates the factors the Court must consider before appointing counsel for an indigent litigant: (1) whether the indigent's position seems likely to be of substance, (2) the indigent's ability to investigate the crucial facts, (3) whether conflicting evidence implicating the need for cross-examination will be the major proof presented to the fact finder, (4) the indigent's ability [*5] to present the case or obtain private counsel, (5) the complexity of the legal issues, (6) the availability of counsel, and (7) special reasons why appointment of counsel would be likely to lead to a more just determination. *Id. at 172*.

The Court emphasized that the apparent merits of the indigent's claim should be scrutinized to determine if it is likely to be of substance. Id. Only if the claim meets this "threshold requirement" should the other criteria be considered. Id. (quoting *Hodge v. Police Officers, 802 F.2d 58 (2d Cir. 1986))*. Since I find Dufort's claim to lack substance, his application for the appointment of counsel is denied.

B. Summary Judgment Standard of Review

Summary judgment should not be granted unless "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 and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. A fact is material "if it might affect the outcome of the suit under the governing law." *Holtz v. Rockefeller & Co., 258 F.3d 62.* [*6] *69 (2d Cir. 2001)*. An issue of fact is genuine only if a jury could reasonably find in favor of the nonmoving party based on that fact. Id. The moving party bears the initial burden of establishing the absence of any genuine issue of material fact, after which the burden shifts to the nonmoving party to establish the existence of a factual question that must be resolved at trial. *Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 256, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*.

The trial court is required to construe the evidence in the light most favorable to the nonmoving party, and draw all reasonable inferences in its favor. *Id. at 252*; *Cifarelli v. Vill. of Babylon, 93 F.3d 47, 51 (2d Cir. 1996)*. However, the nonmoving party may not rely on conclusory allegations, but must set forth "concrete particulars" showing that a trial is needed. *Cameron v. Cmty. Aid for Retarded Children. Inc., 335 F.3d 60, 63 (2d Cir. 2003)*. Merely asserting a conclusion without providing supporting arguments or facts is insufficient to defeat summary judgement. *BellSouth Telecomms., Inc. v. W.R. Grace & Co., 77 F.3d 603, 615 (2d Cir. 1996)*. [*7]

A court must "read the pleadings of a *pro se* plaintiff liberally and interpret them to raise the strongest arguments that they suggest.'" *McPherson v. Coombe, 174 F.3d 276, 280 (2d Cir. 1999)* (quoting *Burgos v. Hopkins, 14 F.3d 878, 790 (2d Cir. 1994))*. Nonetheless, a *pro se* plaintiff is not exempt from compliance with relevant rules of procedural and substantive law. *Traguth v. Zuck, 710 F.2d 90, 92 (2d Cir. 1983)*.

C. Statutory Basis for Forfeiture

United States Code Title 31 § 5316 provides, in pertinent part, that "a person ... shall file a report under subsection (b) of this section when the person ... knowingly transports, is about to transport, or has transported monetary instruments of more than $ 10,000 at one time from a place in the United States to or through a place outside the United States ...." *31 U.S.C. § 5316(a)*. Pursuant to *31 U.S.C. § 5317*:

> Any property involved in a violation of *section ... 5316* ... of this title, or any conspiracy to commit any such violation, and any property traceable to any such violation or conspiracy, may be seized and forfeited [*8] to the United States in accordance with the procedures governing civil forfeitures in money laundering cases pursuant to *section 981(a)(1)(A)* of title 18, United States Code.

31 U.S.C. § 5317(c)(2). United States currency is a type of monetary instrument for purposes of *31 U.S.C. §§ 5316* and*5317*. *31 U.S.C. § 5312(a)(3)(A)*.

D. *Civil Asset Forfeiture Reform Act of 2000*

On April 25, 2000, Congress enacted the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), Pub. L. No. 106-185, 114 Stat. 202, *18 U.S.C. § 983 (2000)*, which amended the procedures for civil forfeiture proceedings. Pursuant to CAFRA, the government must prove its right to asset forfeiture by a preponderance of the evidence. *18 § U.S.C. 983(c)(1)*; see also *United States v. $ 557,933.89, 287 F.3d 66, 76 n.5 (2d Cir. 2002)*; United States v. $ 49,766.29 U.S. Currency, No. 01-191, 2003 WL 21383277, at *3 (W.D.N.Y. Jan. 22, 2003); cf. *United States v. 4492 S. Livonia Rd., 889 F.2d 1258, 1267 (2d Cir. 1989)* (outlining the previously used burden-shifting framework under which the government [*9] first had to establish probable cause that an asset was subject to forfeiture and the claimant then bore the burden of rebutting this showing). Whereas CAFRA applies to "any forfeiture proceeding commenced on or after [August 23, 2000]," this action, filed July 27, 2001, is governed by that statute. Pub. L. No. 106-185, § 21, 114 Stat. 202, 225; see also *Fed. R. Civ. P. 3* ("A civil action is commenced by filing a complaint with the court.").

Transportation of more than $ 10,000 outside the United States requires the filing of a currency and monetary instrument report ("CMIR") in a manner prescribed by the Secretary of the Treasury. *31 U.S.C. § 5316(a)(1)(A)*. Duford's failure to file a CMIR constituted a violation of *§ 5316*, a charge to which he pleaded guilty. "A violation of *31 U.S.C. § 5316* automatically triggers forfeiture under *31 U.S.C. § 5317*." United States v. Eighty Three Thousand, One Hundred & Thirty-Two Dollars 1996 U.S. Dist. LEXIS 20103, No. 95-2844, 1996 WL 599725, at *4 (E.D.N.Y. Oct. 11, 1996); see also United States v. $ 49,766.29 U.S. Currency, 2003 WL 21383277, at *3; *United States* [*10] *v. $ 170.000, 903 F. Supp. 373, 375 (E.D.N.Y. 1995)*. As a result of Dufort's guilty plea to violating *§ 5316*, the principle of collateral estoppel prohibits him from challenging the facts underlying his conviction. See *Adames v. United States, 171 F.3d 728, 732 (2d Cir. 1999)* (holding that claimant's "own statements at his plea allocution conclusively demonstrate that he had forfeited any interest in ... the currency"); United States v. U.S. Currency in Sum of $ 97.253, No. 95-3982, 2000 WL 194683, at *6 n.1 (E.D.N.Y. Feb. 15, 2000); *United States v. U.S. Currency in the Amount of $ 145.139, 803 F. Supp. 592, 597 (E.D.N.Y. 1992)*; *United States v. U.S. Currency in the Amount of $ 41,807, 795 F. Supp. 540, 544 (E.D.N.Y. 1992)*. In light of the undisputed record that Dufort attempted to transport more than $ 10,000 out of the United States, but failed to report the same to Customs, the government has proved by a preponderance of the evidence that the funds are subject to forfeiture.

Where, as here, the government's basis for forfeiture is that the funds were involved in the commission of a criminal offense, [*11] it must establish by a preponderance of the evidence that there was a substantial connection between the funds and the offense. *18 U.S.C. § 983(c)(3)*. The government is not required to link the funds to a particular drug transaction, but instead may rely on circumstantial evidence to establish a substantial connection between the funds and illegal conduct. *United States v. Daccarett, 6 F.3d 37, 57 (2d Cir. 1993)*; *United States v. All Right, Title and Interest, 983 F.2d 396, 405 (2d Cir. 1993)*; United States v. $ 94,010.00 U.S. Currency, No. 98-0171E(F), 1998 WL 567837, at *2 (W.D.N.Y. Aug. 21, 1998). Upon a such a showing, the burden of proof shifts to the claimant to show that he is an "innocent owner." *18 U.S.C. § 983(d)(1)*. The "innocent owner" defense allows the claimant to present, by a preponderance of the evidence, that he "did not know of the conduct giving rise to forfeiture" or "upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property." Id. *§ 983(d)(2)(A)(i)-(ii)*. Dufort [*12] has not claimed that he is an innocent owner but only that the money taken from his person was not secured through illegal activity and that it should be segregated from the currency in the suitcases and returned to him. (Dufort's Mot. to Challenge at 1-3).

1. History of Narcotics Trafficking

The government may rely upon a claimant's narcotics conviction, as one factor, to meet its burden of establishing the requisite connection between funds and drug activity. United States v. $ 557,933.89. *More or Less, in U.S. Funds, 287 F.3d 66, 88 (2d Cir. 2002)*. In June 2000, in the United States District Court for the Southern District of Florida, Dufort pleaded guilty to violating *21 U.S.C. §§ 952(a)* and*963*, knowingly and intentionally conspiring with others to import cocaine into the United States, from April 1995 through February 1997. (S.D.Fla. Plea Colloquy in United States v. Dufort, 99-CR-151 (DLG), at 17-18, 21).

2. Claimant's Financial Situation

Dufort failed to offer any bills, receipts, or other records regarding an alleged ten-year-old legitimate import-export enterprise. (Dufort Dep. at 90-92). Dufort testified at deposition that he [*13] had business receipts at his house in Haiti, yet upon further questioning, he recanted and stated that these records were missing. (Id.). Dufort's inability to corroborate his claim that the funds were obtained from his alleged legal business with documentary proof is a factor that may be considered to establish a connection between the funds and illegal activity. See United States v. 228 Acres of Land and Dwelling Located on *White Hills Rd. in Chester. Vt., 916 F.2d 808, 813 (2d Cir. 1990)* (holding that district court correctly inferred that forfeited properties were traceable to drug activity where, when combined with other factors, claimant failed to offer any bills, receipts, or other records to prove the named businesses were capable of generating large sums of cash).

In light of Dufort's conflicting and evasive deposition answers regarding his financial situation, it is questionable whether his import-export business ever existed at all. Since Dufort accumulated minimal earnings from his places of employment that can be verified, (Dufort Dep. at 22-23, 28-31), and has failed to offer any proof that his import-export business existed, let alone was lucrative, [*14] (id. at 90-92), I find that all of the funds with which he was traveling must have derived from an alternative source. See *Alli-Balogun v. United States, 281 F.3d 362, 372 (2d Cir. 2002)* (affirming the district court's refusal to credit claimant's testimony that he paid for a Range Rover out of his life savings from years of low-paying employment).

3. Amount of Currency

While the Second Circuit has declined to hold that a large amount of cash is evidence of drug trafficking, *United States v. $ 31,990 in U.S. Currency, 982 F.2d 851, 854 (2d Cir. 1993)*, it has noted that possession of large amounts of unexplained cash supports an inference of illegal activity in general. *United States v. $ 37,780 in U.S. Currency, 920 F.2d 159, 162 (2d Cir. 1990)* ("It may be well that through the byzantine world of forfeiture law, congress and the courts have implicitly created a rebuttable presumption that the possession of large amounts of cash is *per se* evidence of illegal activity."); see also *United States v. $ 175.260, 741 F. Supp. 45, 47 (E.D.N.Y. 1990)* (noting that $ 175,000 is substantially greater than an amount the [*15] average law-abiding citizen carries to the airport).

The large amount of cash, $ 248,430, seized from Dufort is inexplicable in light of his aforementioned self-proclaimed financial struggles, and therefore raises an inference of illegal conduct. See *United States v. All Right, Title and Interest, 983 F.2d 396, 405 (2d Cir. 1993)* ("Particularly in cases involving bank accounts, money or other fungible assets, the only proof demonstrating probable cause is likely to be circumstantial, revealing unexplained wealth in conjunction with evidence of drug trafficking."). Moreover, Dufort has failed to raise any basis for distinguishing between the currency found in the suitcases and the currency found on his person by substantiating a legitimate source of the currency taken from his person.

4. Cash Purchase of Airline Ticket

When viewed in combination with other supporting evidence, the purchase of an airline ticket in cash has probative significance in determining a connection between funds subject to forfeiture and illegal activity. In

United States v. Sokolow, 490 U.S. 1, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989), the Supreme Court noted:

> Paying [*16] $ 2,100 in cash for two airplane tickets is out of the ordinary, and it is even more out of the ordinary to pay that sum from a roll of $ 20 bills containing nearly twice that amount of cash. Most business travelers ... purchase airline tickets by credit card or check ...."

Id. at 8; see also United States v. $ 8.880 in *U.S. Currency, 945 F. Supp. 521, 526 (W.D.N.Y. 1996)* (noting that the cash purchase of airline tickets is probative when viewed along with other evidence of narcotics activity). Moreover, as the Second Circuit has stated, "drug dealers commonly make large cash purchases in order to avoid triggering bank reporting requirements." *United States v. 228 Acres of Land and Dwelling Located on White Hills Rd. in Chester, Vt., 916 F.2d 808, 813 (2d Cir. 1990)*. At his deposition, Dufort testified that he purchased his plane ticket to Haiti with $ 304 in cash. (Dufort Dep. at 73).

Viewing the aforementioned factors in the aggregate, I conclude that the government has demonstrated by a preponderance of the evidence that there was a substantial connection between all of the funds to be forfeited and Dufort's narcotics trafficking. [*17] Dufort has offered no evidence to refute the government's contention that all of the funds represent the proceeds of narcotics trafficking, and does not allege that he is an innocent owner of illegitimate proceeds.

In his response to the instant motion. Dufort contends that the $ 2,935 he produced when approached by Customs officials, as opposed to the $ 245,495 seized from his suitcases, was "personal traveling money" and should not be subject to forfeiture. (Dufort's Mot. to Challenge at 1-3) (stating that the government "stole his personal monies" that "have not ever been alleged to [have] been part of any crime [or] any illegal activity ...."). Nevertheless, the statutory language is unequivocal: "*Any property* involved in a violation of section ... 5316 ... of this title ... may be seized and forfeited to the United States ...." *31 U.S.C. § 5317(c)(2)* (emphasis added). The statute clearly permits the forfeiture of the entire amount of property if the required monetary instrument report is not filed in violation of *§ 5316*. United States v. U.S. Currency in Sum of $ 97,253, No. 95-3982, 2000 WL 194683, at *6-7 (E.D.N.Y. Feb. 15, 2000). [*18] Dufort pleaded guilty to attempting to transport monetary instruments of more than $ 10,000 from the United States to a foreign location without filing the required Customs report. (E.D.N.Y. Crim. Pleading in United States v. Dufort, 99-CR-173 (FB), at 17, 24-25). This guilty plea encompasses all the money he was carrying and renders the entire sum subject to forfeiture. See *United States v. U.S. Currency in the Amount of $ 41,807. More or Less, 795 F. Supp. 540, 544 (E.D.N.Y. 1992)*.

There is no genuine issue as to any material fact regarding forfeiture of the funds, and thus the government is entitled to judgment as a matter of law. Dufort's conclusory allegations, unsupported by specific evidence, are insufficient to defeat summary judgment.

IV. Conclusion

For the foregoing reasons, the government's motion for summary judgment and forfeiture of the funds is GRANTED in its entirety. The Clerk of Court is directed to close this case.

IT IS SO ORDERED.

Sandra J. Feuerstein
United States District Judge

Dated: April 19, 2004

H

Briefs and Other Related Documents

This case was not selected for publication in the Federal Reporter.

UNPUBLISHED

Please use FIND to look at the applicable circuit court rule before citing this opinion. Fourth Circuit Rule 36(c). (FIND CTA4 Rule 36(c).)

United States Court of Appeals,
Fourth Circuit.
ABT ASSOCIATES, INCORPORATED, Plaintiff-Appellant,
v.
JHPIEGO CORPORATION, Defendant-Appellee.
No. 00-2026.

Argued April 5, 2001.
Decided May 17, 2001.

Health-care research corporation which participated in preparation of successful government contract bid sued contract awardee, alleging breach of pre-award contract concerning scope of corporation's role in project and asserting various tort claims. Awardee's motion for summary judgment was granted by the United States District Court for the District of Maryland, Alexander Harvey, II, Senior District Judge, 104 F.Supp.2d 523, and research corporation appealed. The Court of Appeals held that: (1) the record did not support the contention that the parties entered into an enforceable oral contract to partner on the contract work; (2) research corporation could not recover under theories of quantum meruit and unjust enrichment for its work on the application; and (3) corporation could not recover under a theory of promissory estoppel.

Affirmed.

West Headnotes

[1] Contracts 28(3)
95k28(3) Most Cited Cases
Record did not support contention that awardee of a government contract and corporation which aided in preparation of the bid entered into an enforceable oral contract to partner on the contract work, where the deposition testimony established that significant open terms remained as of the date by which assisting corporation claimed a binding oral contract was made.

[2] Contracts 15
95k15 Most Cited Cases

[2] Contracts 16
95k16 Most Cited Cases
To establish that a binding contract was made, a plaintiff must adduce evidence of an offer and an acceptance, and of a meeting of the minds as to the essential terms of the contract.

[3] Contracts 25
95k25 Most Cited Cases

[3] Contracts 26
95k26 Most Cited Cases
A binding agreement governing performance of a government contract was not created by an exchange of letters between the awardee and another corporation, where material terms remained unresolved throughout the course of the negotiations between the parties; letter from awardee stating that it was pleased that other corporation had agreed to partner, and response by that corporation stating that it was pleased to be a partner, were insufficient absent statement of any terms.

[4] Contracts 26
95k26 Most Cited Cases
While a contract may be entered into by letters evincing an offer and an acceptance, the terms of such a contract must be in all respects definitely understood and agreed upon, and must be discernible from the face of the letters or, in certain circumstances, from parol evidence.

[5] Contracts 28(3)
95k28(3) Most Cited Cases
Terms of alleged contract for joint performance of government contract awarded to one corporation was not furnished extrinsically by the awardee's application to the contracting agency, where that application merely illustrated how the team would develop and implement a model country program, and the full amount of the award, the countries served

by the program, and the costs, expenses, and staffing needs of the program could not be determined until after the award was made.

[6] Contracts 326
95k326 Most Cited Cases
Absent a contract between the parties, there could be no recovery for breach of a duty of good faith and fair dealing, under Maryland law.

[7] Implied and Constructive Contracts 3
205Hk3 Most Cited Cases

[7] Implied and Constructive Contracts 30
205Hk30 Most Cited Cases
A plaintiff cannot recover under theories of quantum meruit and unjust enrichment, under Maryland law, unless he had a reasonable expectation of being paid for the benefit he conferred upon the defendant.

[8] Implied and Constructive Contracts 33.1
205Hk33.1 Most Cited Cases
Corporation which assisted on bid application for government contract awarded to second corporation could not, under Maryland law, recover under theories of quantum meruit and unjust enrichment for its work on the application, as it could not have had a reasonable expectation of payment for its effort on the application, which was a cost of business akin to a manufacturer's expenses in vying for a sale; rather, its reasonable expectations were limited to payment for any work actually performed on the program after the date of the award and to the opportunity to negotiate a long-term subagreement with the awardee, it was paid for post-award work, and during that time, the parties attempted unsuccessfully to negotiate a final subagreement.

[9] Federal Civil Procedure 2492
170Ak2492 Most Cited Cases
The parties' ultimate inability to reach a final agreement on performance of a government contract awarded to one party with the other's assistance did not, standing alone, create a genuine issue of material fact, precluding summary judgment, as to the awardee's lack of good faith in the negotiations.

[10] Estoppel 85
156k85 Most Cited Cases
To recover under a theory of promissory estoppel, under Maryland law, a plaintiff must demonstrate reliance upon a clear and definite promise by the defendant.

[11] Estoppel 85
156k85 Most Cited Cases
Corporation which assisted in bid for government contract awarded to second corporation could not recover under a theory of promissory estoppel, under Maryland law, for failure of awardee to enter into a subagreement for performance of the contract, absent a clear and definite promise by the awardee of a role in contract program as a partner.

[12] Fraud 13(2)
184k13(2) Most Cited Cases

[12] Fraud 13(3)
184k13(3) Most Cited Cases
Under Maryland law, there could be no recovery for alleged misrepresentations made without knowledge as to their falsity or reckless indifference as to their truth.
***174** Appeal from the United States District Court for the District of Maryland, at Baltimore. Alexander Harvey II, Senior District Judge. (CA-99-3238-H).

Robert Kelso Taylor, Patton Boggs, L.L.P., Washington, DC, for appellant.

Susan Martielli, Wesley Daniel Blakeslee, Office of the Vice President and General Counsel, The Johns Hopkins University, Baltimore, MD, for appellee.

ON BRIEF: Michael T. Wood, Patton Boggs, L.L.P., Washington, DC, for appellant. Frederick G. Savage, Office of the Vice President and General Counsel, The Johns Hopkins University, Baltimore, MD, for appellee.

Before WIDENER and LUTTIG, Circuit JJ., and SMITH, United States District Judge for the Eastern District of Virginia, sitting by designation.

OPINION

PER CURIAM.

Appellant Abt Associates, Inc. ("Abt") appeals the district court's grant of summary judgment to appellee JHPIEGO Corporation ("JHPIEGO") in this action alleging a breach of contract and various torts. For the reasons set forth below, we affirm.

I.

In June 1998, the United States Agency for

International Development ("USAID") issued a formal request for the submission of applications to enter into a five-year cooperative agreement (the "Award") to provide services for USAID's maternal and neonatal health care efforts in developing countries (the "MNH Program"). Over the course of several weeks following ***175** USAID's request for applications, JHPIEGO met with Abt and three other members of a joint bidding group (the "Bidding Group") to discuss the structure of a prospective project team and to prepare an application. The members of the Bidding Group agreed that JHPIEGO would be the prime contractor in applying for the Award. They subsequently worked together to prepare the application, which contained two parts--a questionnaire concerning the strategies that the Award recipient would use to further the goals of the MNH Program, and a cost application setting forth a model budget. [FN1] JHPIEGO submitted the application to USAID on July 13, 1998.

FN1. Because the extent of the services offered by the MNH Program would not be known until after the Award was made, none of the applicants for the Award knew for certain the particular countries in which their services would be needed or the amount of funding they would receive.

Shortly before submitting the application, JHPIEGO sent a "Teaming Agreement" to Abt and the other members of the Bidding Group. The agreement provided that JHPIEGO would have "the full responsibility to prepare and submit the application" to USAID, with each member of the Bidding Group assisting in preparing that portion of the application pertaining to its area of expertise. The Teaming Agreement also stated that if JHPIEGO received the Award, it would use "its best efforts to negotiate a subagreement with the Subrecipients for work" on the MNH Program. J.A. 177-82. All of the members of the Bidding Group except Abt signed the Teaming Agreement. Thus, seeking confirmation of Abt's commitment to the Bidding Group, JHPIEGO sent Abt a letter on July 1, 1998, which stated that "[w]e are very pleased that Abt has agreed to partner with JHPIEGO on the technical bid in response to the USAID-funded Maternal and Neonatal health Project." J.A. 184. The letter asked Abt to confirm "our partnership agreement as soon as possible." Abt returned a letter stating that "Abt Associates Inc. is pleased to be a partner on the JHU Team lead by JHPIEGO ... should the JHU Team be selected to implement this project." J.A. 187.

JHPIEGO was notified on September 28, 1998 that it had been selected as the recipient of the USAID Award. USAID and JHPIEGO subsequently entered into a Cooperative Agreement that provided for incremental funding of the Award--$4.7 million in the first year, with funding in subsequent years contingent upon transfers of funds from USAID's overseas missions. After entering into the Cooperative Agreement with USAID, JHPIEGO met with Abt to discuss the terms of a subagreement between them. In the interim, JHPIEGO and Abt signed a temporary "pre-subagreement" designed to pay Abt for its work on the MNH Program "pending finalization of the formal sub-contract between JHPIEGO and Abt." J.A. 536-37. The initial pre-subagreement covered the period from October 6, 1998 to October 30, 1998, and was later amended to extend its coverage to November 6, 1998.

During the period covered by the pre-subagreement, Abt and JHPIEGO exchanged several draft subagreements and negotiated such terms as the period of the subagreement, Abt's fees for its services, and the number of Abt employees involved with the MNH Program. On November 18, 1998, JHPIEGO sent Abt a revised draft subagreement in which JHPIEGO changed many, but not all, of the earlier provisions that Abt found objectionable. In a letter accompanying that draft subagreement, JHPIEGO requested that Abt ***176** submit a budget for the first year of the program by November 20. When Abt failed to do so, JHPIEGO informed Abt that differences concerning staffing and Abt's profit and cost sharing allocation precluded them from entering into a subagreement. [FN2]

FN2. JHPIEGO successfully negotiated subagreements with the other members of the Bidding Group.

Abt sued JHPIEGO for breach of contract and various torts under Maryland law. Following extensive discovery, the district court granted summary judgment to JHPIEGO on all counts of Abt's complaint, and this appeal followed.

II.

Abt's principal argument is that JHPIEGO breached a contract with Abt to bid for *and* perform the MNH Program together, though it is undisputed that the parties did not sign a comprehensive written contract that evinces the terms of their relationship. [FN3] The lack of a comprehensive writing is all the more striking given the scope and significance of the alleged agreement--a five-year, multimillion-dollar, multinational contract to provide services to a major government agency. Nevertheless, Abt claims that a jury could find the existence of a binding agreement between Abt and JHPIEGO to implement the MNH Program under either of two theories. First, Abt contends that the parties entered into a binding oral agreement governing the MNH Program work. Second, Abt argues that the exchange of letters with JHPIEGO established an enforceable agreement to partner on the MNH Program, and that the precise terms of the agreement are demonstrated by the application submitted by JHPIEGO to USAID. Because we conclude that no jury could find, under either theory, that the parties entered into a binding agreement to perform the MNH Program work, we affirm the district court's grant of summary judgment to JHPIEGO on Abt's claim of breach of contract.

FN3. The only comprehensive writing in the record describing the relationship between Abt and JHPIEGO is the Teaming Agreement dated June 25, 1998, which Abt refused to sign.

A.

[1][2] First, the record belies Abt's argument that the parties entered into an enforceable oral contract to partner on the MNH Program work. To establish that a binding contract was made, a plaintiff must adduce evidence of an offer and an acceptance, and of a meeting of the minds as to the essential terms of the contract. *Safeway Stores, Inc. v. Altman*, 296 Md. 486, 463 A.2d 829, 831 (1983). The deposition testimony cited by Abt in support of the existence of an oral contract neither recounts the necessary sequence of offer and acceptance nor suggests mutual assent to the essential terms of the supposed agreement. On the contrary, the deposition testimony establishes that significant open terms remained as of July 13, 1998, the date by which Abt now claims a binding oral contract was made. J.A. 1260-67 (Abt's fee and cost-sharing contribution remained open issues); J.A. 1283 (location of program office not decided); J.A. 1404 (staffing issues remained unresolved as of July 13, 1998).

B.

[3][4] We also reject Abt's argument that a binding agreement governing performance of the MNH Program work was created by an exchange of letters, because material terms remained unresolved as of July 1998, and, indeed, throughout the course of the negotiations between the parties. While a contract may be entered into by letters evincing an offer and an acceptance, the terms of such a contract must be "in all respects definitely understood ***177** and agreed upon," *Peoples Drug Stores, Inc. v. Fenton Realty Corp.*, 191 Md. 489, 62 A.2d 273, 275 (1948), and must be discernible from the face of the letters or, in certain circumstances, from parol evidence. *Johns Hopkins Univ. v. Ritter*, 114 Md.App. 77, 689 A.2d 91, 93- 94 & n. 4 (Md.1996) (conversations between parties admissible to show terms of agreement where letters forming agreement did not "purport to be a complete and fully integrated contract").

In Abt's view, the requirement of an offer was satisfied by JHPIEGO's letter stating that "[w]e are very pleased that [Abt] has agreed to partner with JHPIEGO on the technical bid in response to the USAID-funded [MNH Program]." J.A. 184. Abt argues that it accepted JHPIEGO's offer--thus creating a binding contract--by returning a letter that stated that "Abt Associates Inc. is pleased to be a partner on the JHU Team led by [JHPIEGO] on the implementation of the Maternal and Neonatal Health RFA ... should the JHU Team be selected to implement this project." J.A. 187. Yet the letters cited by Abt are devoid of *any* terms concerning the implementation of the MNH Program. In the absence of evidence of the essential terms of an agreement, we agree with the district court that the exchange of letters did not create a valid contract to perform the MNH Program work.

[5] Nor are those terms furnished extrinsically by JHPIEGO's application to USAID, for that application merely "*illustrates* how the MNH Team would develop and implement a *model country program* that takes into consideration ... the MNH strategic objective." J.A. 204 (summary portion of application) (emphasis added). The application to USAID, by its terms, does no more than demonstrate how the Bidding Group would approach the MNH Program in a hypothetical country. *See also* J.A. 702 (deposition testimony that JHPIEGO and Abt, in preparing the application, did not know the countries in which the MNH Program would be implemented); J.A. 708, 712-13 (number of countries served by the MNH Program would not be determined until after the Award was made). Since the full amount of the Award, the countries served by the MNH Program, and the costs, expenses, and staffing needs of the Program could not be determined until after the Award was made, the illustrative budget in the application does not represent the parties' binding agreement as to the key terms of performing the

MNH Program work.

[6] Accordingly, because the record does not support Abt's contention that the parties mutually assented to the terms of an agreement to implement the MNH Program together, we affirm the district court's grant of summary judgment to JHPIEGO on Abt's claim of breach of contract. [FN4]

FN4. Because the parties never agreed to the essential terms of a contract to perform the MNH Program work, we also affirm the district court's grant of summary judgment to JHPIEGO on Abt's claims that JHPIEGO tortiously breached such contract and that JHPIEGO breached a duty of good faith and fair dealing arising out of such contract. *Cf. Howard Oaks, Inc. v. Maryland Nat'l Bank,* 810 F.Supp. 674, 677 (D.Md.1993) (explaining that Maryland law does not recognize a cause of action for breach of a duty of good faith and fair dealing in the absence of a contract between the parties).

III.

Abt next asserts a series of claims seeking to recover under various quasi-contract and tort theories. We agree with the district court that these claims are meritless, and we therefore affirm the district court's grant of summary judgment to JHPIEGO on the remaining counts of Abt's complaint.

***178** [7][8][9] First, Abt seeks to recover under theories of quantum meruit and unjust enrichment for its work on the Bidding Group's application to USAID. A plaintiff may not recover under these theories unless he had a reasonable expectation of being paid for the benefit he conferred upon the defendant. *Cleaves v. Sharp & Dohme,* 166 Md. 546, 171 A. 374, 377-78 (1934). Here, Abt could not have had a reasonable expectation of payment for its effort on the application, which is a cost of business akin to a manufacturer's expenses in vying for a sale. *Cf. id.* at 378 (manufacturer has no reasonable expectation of payment for cost of preparing bids and samples). Rather, Abt's reasonable expectations were limited to payment for any work actually performed on the MNH Program after the date of the Award and to the opportunity to negotiate a long-term subagreement with JHPIEGO. Pursuant to the pre-subagreement between the parties, Abt was paid $42,800 for post-Award work on the MNH Program between October 6 and November 23, 1998. J.A. 536-37. Moreover, during that time, the parties attempted unsuccessfully to negotiate a final subagreement. [FN5] Because Abt's only reasonable expectations were fulfilled, the district court properly granted summary judgment to JHPIEGO on Abt's quantum meruit and unjust enrichment claims.

FN5. To the extent Abt now argues that JHPIEGO breached a duty to negotiate a subagreement in good faith, such claim is not asserted on the face of Abt's complaint. J.A. 6-19. Even if it were, Abt has failed to adduce evidence that JHPIEGO breached any duty of good-faith negotiation. On the contrary, the parties negotiated extensively for over a month. During that time, they exchanged several draft subagreements in which JHPIEGO made numerous concessions to Abt. J.A. 571-72 (letter from JHPIEGO to Abt detailing concessions regarding, *inter alia,* scope of work, period of performance, cost rate, and intellectual property rights). The parties' ultimate inability to reach a final agreement does not, standing alone, create a genuine issue of material fact as to JHPIEGO's good faith in the negotiations.

[10][11] Second, Abt argues that the district court erred in granting summary judgment on its claim of promissory estoppel. To recover under a theory of promissory estoppel, a plaintiff must demonstrate reliance upon "a clear and definite promise" by the defendant. *Pavel Enters., Inc. v. A.S. Johnson Co.,* 342 Md. 143, 674 A.2d 521, 532 (1996). Abt has proffered no evidence that JHPIEGO promised it a role in the MNH Program as a partner pursuant to the supposedly binding terms set forth in the application to USAID. *See supra* at 4-6. Absent evidence of "a clear and definite promise" by JHPIEGO, we affirm the district court's grant of summary judgment on this count.

[12] Finally, Abt contends that JHPIEGO committed fraud by making numerous misrepresentations about Abt's intended role in the MNH Program, with the purpose of fraudulently inducing Abt to collaborate with JHPIEGO on the application for the Award. The record, however, contains no evidence that JHPIEGO's alleged misrepresentations were made with knowledge as to their falsity or with reckless indifference as to their truth. *Everett v. Baltimore Gas and Elec. Co.,* 307 Md. 286, 513 A.2d 882, 889-90 (1986) (setting forth the elements of fraud under Maryland law). Thus, the district court properly granted summary judgment to JHPIEGO on Abt's

claim of fraud.

CONCLUSION

For the reasons stated herein, we affirm the judgment of the district court.

AFFIRMED.

9 Fed.Appx. 172

Briefs and Other Related Documents (Back to top)

- 2000 WL 33988175 (Appellate Brief) Reply Brief of Appellant Abt Associates Inc. (Nov. 09, 2000)Original Image of this Document (PDF)

- 2000 WL 33988174 (Appellate Brief) Brief of Appellee Jhpiego Corporation (Oct. 23, 2000)Original Image of this Document (PDF)

- 2000 WL 33988176 (Appellate Brief) Brief of Appellant Abt Associates Inc. (Sep. 18, 2000)Original Image of this Document (PDF)

- 00-2026 (Docket) (Aug. 09, 2000)

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H

Briefs and Other Related Documents

This case was not selected for publication in the Federal Reporter.

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

Please use FIND to look at the applicable circuit court rule before citing this opinion. Second Circuit Rules § 0.23. (FIND CTA2 s 0.23.)

United States Court of Appeals,
Second Circuit.
Neil BRAUN, Plaintiff--Appellant,
v.
CMGI, INC., Icast Corp., David Wetherell,
Defendants--Appellees.
No. 02-7551.

May 19, 2003.

Former employee brought action against former employer for breach of contract, promissory estoppel, and quantum meruit, alleging that he had been terminated without cause, and therefore he was entitled to exercise promised stock options. The United States District Court for the Southern District of New York, William H. Pauley, III, J., 2001 WL 921170, granted summary judgment in favor of employer. Former employee appealed. The Court of Appeals held that parties did not intend oral understanding, which allegedly included promise of stock options, to be binding in absence of writing.

Affirmed.

West Headnotes

Corporations 🔑119

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Employee and employer did not intend their oral understanding, which allegedly included promise of stock options in connection with employment if employee was discharged without cause, to be binding in the absence of a writing, barring employee's claims for breach of contract, and promissory estoppel, under New York law, based upon employer's denial of stock options upon employee's discharge; employee wrote letter to employer indicating that he sought a written offer letter, employee received a draft offer letter, but did not sign it until after his discharge, and stock options package was type of complex employment agreement that would typically be put in writing.

***301** Appeal from the United States District Court for the Southern District of New York (Pauley, J.).

Lawrence O. Kamin (Christopher J. St. Jeanos, Kathryn H. Bodkin, of counsel), Willkie Farr & Gallagher, New York, NY, for Appellant.

Peter J. Macdonald (Gabrielle R. Wolohojian, Mary B. Strother, C. Tama Donovan, of counsel), Hale and Dorr LLP, Boston, MA, for Appellees.

PRESENT: JACOBS, F.I. PARKER, and Circuit Judges. [FN*]

FN* The Honorable Lewis A. Kaplan of the United States District Court for the Southern District of New York, sitting by designation, originally a member of the panel, recused himself subsequent to oral argument, and the appeal is being decided by the remaining members of the panel, who are in agreement. *See* 2d Cir. R. § 0.14(b).

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, *302 BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 19th day of May, two thousand and three.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be, and it hereby is, **AFFIRMED.**

Plaintiff-Appellant Neil Braun appeals from a judgment of the United States District Court for the Southern District of New York (Pauley, *J.*), granting summary judgment to Defendants-Appellees CMGI, Inc. ("CMGI") and iCAST Corp. ("iCAST") on Braun's breach of contract and promissory estoppel claims.

I.

At a January 31, 1999 meeting in Boca Raton, Florida, David Wetherell, the Chairman and Chief Executive Officer of CMGI, discussed with Braun the prospect that Braun would become President and CEO of a new internet-broadcasting company (later known as iCAST) to be formed and funded by CMGI. Wetherell and Braun discussed Braun's potential compensation, and agreed that stock options in CMGI and iCAST would be included as part of the package. According to Braun, Wetherell promised that all of Braun's stock options would immediately vest if Braun were ever terminated without "cause."

Braun began working for Wetherell on February 10, 1999, but the employment relationship soured over the ensuing months and ended with Braun's termination on November 12, 1999. On December 22, 1999, Braun filed claims for breach of contract, promissory estoppel, and *quantum meruit* against CMGI, iCAST, and Wetherell. Braun alleged that he had been terminated without cause, and therefore he was entitled to exercise the promised stock options (which were then purportedly worth $46 million), but the defendants disagreed.

By order dated August 15, 2001, Judge Pauley granted CMGI's and iCAST's motion for summary judgment on Braun's claim for breach of contract, concluding as a matter of law that the parties never intended to be bound by their oral agreement at the January 31, 1999 meeting absent a signed writing. At a February 6, 2002 hearing, Judge Pauley granted summary judgment to defendants on Braun's promissory estoppel claim, concluding that (i) the alleged promise that the stock options would immediately vest upon termination without "cause" was insufficiently definite prior to a March 1999 meeting at which the parties agreed on a definition of "cause," and (ii) Braun could not establish detrimental reliance after the March 1999 meeting by his continued service at CMGI. Braun's claim for *quantum meruit* proceeded to trial, and a jury awarded him $113,482.24. [FN1]

FN1. Wetherell won summary judgment as to all claims against him, and that ruling has not been appealed.

II.

We review the district court's grant of summary judgment *de novo*. *See* ***303**Young v. County of Fulton, 160 F.3d 899, 902 (2d Cir.1998). In doing so, we construe the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Maguire v. Citicorp Retail Servs., Inc.,* 147 F.3d 232, 235 (2d Cir.1998). Summary judgment is appropriate only where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

Braun's principal argument on appeal with respect to his breach of contract claim is that there is a genuine issue of material fact as to whether the parties intended their January 31, 1999 oral agreement to be binding despite the absence of a writing.

As Judge Pauley recognized, a contract can be formed under New York law without the execution of a written document, *see Mun. Consultants & Publishers v. Town of Ramapo,* 47 N.Y.2d 144, 148-49, 417 N.Y.S.2d 218, 390 N.E.2d 1143 (1979), and the binding nature of an oral agreement depends on (1) whether a party has made an "explicit statement that it reserves the right to be bound only when a written agreement is signed," (2) "whether one party has partially performed," (3) "whether there was literally nothing left to negotiate or settle, so that all that remained to be done was to sign what had already been fully agreed to," and (4) "whether the agreement concerns those complex and substantial business matters where requirements that contracts be in writing are the norm rather than the exception." *R.G. Group, Inc. v. Horn & Hardart Co.,* 751 F.2d 69, 75-76 (2d Cir.1984) (reciting New York law).

Braun's own testimony at depositions, as follows, establishes that the parties did not intend their oral understanding to be binding in the absence of a writing: Wetherell told Braun at the January 31, 1999 meeting that CMGI required a written offer letter reflecting the terms of employment; and Wetherell promised to send, and Braun expected to receive, a written offer letter setting forth the terms of employment discussed at the January 31, 1999 meeting (base compensation, quarterly performance bonuses, and stock options). Although Braun testified that he called Wetherell in early February to orally accept the offer, this "acceptance" did not vitiate CMGI's requirement of a writing. Moreover, Braun's oral "acceptance" is incompatible with Braun's contemporaneous written correspondence to Wetherell expecting and seeking a written offer letter; thus Braun sent Wetherell a February 5 email saying that he was "[p]oised and ready. When should I expect [the] document?" Braun received a draft offer letter the following day, however Braun did not sign an offer letter until *after* his termination in November 1999. Together, these facts (and others not recited herein) demonstrate an express reservation by CMGI to be bound only by a writing.

The second factor--partial performance--tilts in Braun's favor; but we agree with Judge Pauley's conclusion that the third and fourth factors militate the other way. The fourth factor--whether the agreement is the type typically committed to writing--is especially telling. A sophisticated party such as Braun could not reasonably have believed that an options package, which both parties hoped would become very valuable, would be fixed and made enforceable in a conversation.

We see no error in the district court's grant of summary judgment in favor of CMGI and iCAST on Braun's breach of contract claim, notwithstanding the undisputed ***304** evidence of Braun's partial performance. *See* Arcadian Phosphates, Inc. v. Arcadian Corp., 884 F.2d 69, 73 (2d Cir.1989) (affirming summary judgment notwithstanding partial performance by one party, finding intent readily determinable from exchanged documents or proposals).

III.

Under New York law, the elements of promissory estoppel are (i) a clear and unambiguous promise by the promisor; (ii) reasonable and foreseeable reliance by the promisee; and (iii) an injury to the promisee. *Reprosystem, B.V. v. SCM Corp.*, 727 F.2d 257, 264 (2d Cir.1984). Judge Pauley concluded that (i) before a March 1999 meeting at which the parties agreed on a definition of "cause," there was no clear and ambiguous promise, and (ii) Braun could not establish detrimental reliance after the March 1999 meeting by the mere fact that he remained at CMGI. For substantially the reasons stated by Judge Pauley at the February 6, 2002 hearing, we agree that CMGI and iCAST were entitled to summary judgment on Braun's claim for promissory estoppel.

IV.

We have reviewed all of Braun's remaining contentions, and conclude that they lack merit.

For the reasons set forth above, the judgment of the district court is hereby **AFFIRMED.**

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Briefs and Other Related Documents (Back to top)

- 2002 WL 32487772 (Appellate Brief) Reply Brief for Plaintiff-Appellant Neil Braun (Nov. 25, 2002)Original Image of this Document (PDF)
- 2002 WL 32487773 (Appellate Brief) Brief for Defendants-Appellees (Nov. 25, 2002)Original Image of this Document with Appendix (PDF)
- 2002 WL 32487774 (Appellate Brief) Brief for Plaintiff-Appellant Neil Braun (Sep. 20, 2002)Original Image of this Document with Appendix (PDF)
- 02-7551 (Docket) (May. 09, 2002)

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Only the Westlaw citation is currently available.

United States District Court, S.D. New York.
Paul S. DOPP, Plaintiff,
v.
TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA; North Coast Investment Corporation; Connecticut General Life Insurance Company; and Dorado Beach Hotel Corporation, Defendants.
No. 91 Civ. 1494 (CSH).

Oct. 1, 1993.

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

***1** In this diversity action, defendants Teachers Insurance and Annuity Association of America ("TIAA") and Connecticut General Life Insurance Company ("CG") move pursuant to Fed.R.Civ.P. 12(b)(6) for an order: (1) dismissing the complaint of plaintiff Paul S. Dopp for failure to state a claim upon which relief can be granted; and (2) dismissing the complaint because plaintiff's claims are barred by the statute of limitations. Defendant Dorado Beach Hotel Corporation ("DBHC") also moves pursuant to Fed.R.Civ.P. 12(b)(6) for an order dismissing the complaint. For the reasons provided below, the motions to dismiss are granted.

BACKGROUND

Plaintiff is a resident of the State of New Jersey who sues as the "successor and assignee" of Code Hospitality Group, Inc. ("Code"), a Delaware corporation whose principal place of business is located in New Jersey.

Defendant TIAA is a New York corporation whose principal place of business is in New York, New York. Defendant CG is a Connecticut corporation whose principal place of business is located in Bloomfield, Connecticut, a city within commuting distance of New York, New York. North Coast Investment Corporation ("North Coast") is a Delaware corporation whose principal place of business is also located in New York City. Defendant DBHC is a Delaware corporation whose principal place of business is in Illinois. At all relevant times herein, North Coast was the sole stockholder of DBHC. North Coast in turn was a wholly owned subsidiary of defendants TIAA and CG.

This action arises out of a contract dated May 9, 1984, between Code, North Coast, and DBHC, under which Code contracted to buy the stock or assets of DBHC. The complaint alleges that the purchase-sale agreement as amended by North Coast, DBHC and Code required that closing take place on or before December 3, 1984. If the deadline for closing were missed, Code would have forfeited $2,000,000.00 and all expenses and effort expended to complete the transaction.

Plaintiff next alleges that by late November, 1984, Code had commenced negotiations with Jay Pritzker, an Illinois investor, to provide financing for the acquisition. However, when negotiations between Pritzker and Code stalled, TIAA and CG, as sole stockholders of North Coast, commenced "secret negotiations" with Pritzker for the sale of DBHC to Pritzker notwithstanding the contract between Code, North Coast and DBHC, and notwithstanding having been informed by plaintiff that he was negotiating with Pritzker to obtain financing for the transaction. These secret negotiations allegedly resulted in Code entering into a "most unfavorable" agreement with Pritzker which placed Code as an oppressed 12% minority stockholder in HTP Corporation, the acquiring entity used by Pritzker to purchase DBHC. Defendants' alleged wrongful conduct, according to plaintiff, constituted a breach of contract, breach of good faith covenant, and breach of fiduciary duty. Plaintiff seeks monetary damages of at least $25,000,000.

***2** This action was commenced by plaintiff in the District of Puerto Rico on April 17, 1991. Defendants TIAA and CG moved in that district to transfer the case, under 28 U.S.C. § 1404, to New York or Connecticut. When North Coast was later served, TIAA and CG filed a joinder in the transfer motion on its behalf. On October 15, 1991, contemporaneously with the filing of the transfer motion, TIAA and CG moved to dismiss the complaint for failure to state a claim upon which relief could be granted, and because the claims were time barred by the statute of limitations. On the same day, DBHC filed a separate motion to dismiss. After North Coast was served, TIAA and CG filed on its behalf a joinder in their motion to dismiss.

By opinion and order dated March 31, 1992, the Puerto Rico District Court granted defendants' transfer motion and transferred the case to the Southern District of New York without deciding the dismissal motions. These motions are considered here.

DISCUSSION

The Statute of Limitations

I. Which State's Law Governs?

The issue of whether plaintiff's claims are time barred hinges on which statute of limitations the Court applies. Defendants argue that plaintiff's claims are barred because plaintiff failed to assert his claim within the three year period allowed by Delaware's applicable statute of limitations. Plaintiff counters that the applicable law is that of Puerto Rico, under which the statute of limitations for breach of contract claims is fifteen years, and, thus, his claims are not time barred.

In *H.L. Green v. McMahon*, 312 F.2d 650, 653 (2d Cir.1962), *cert. denied* 372 U.S. 928 (1963) the Second Circuit held that where dismissal was sought on statute of limitations and substantive grounds, the statute of limitations and substantive law of the transferor state should continue to apply. "The case should remain as it was in all respects but location." *Id.* at 653 (citing *Headrick v. Atchison, T. & S.F. Ry. Co.*, 182 F.2d 305 (10th Cir.1950); *Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co.*, 178 F.2d 866, 868 (2d Cir.1950)). This holding was expressly approved by the Supreme Court in *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964) ("[a] change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms"). Accordingly, this Court will examine the instant statute of limitations and substantive issues using the same law the Puerto Rico Court would have used.

In its decision on the transfer motion, the Puerto Rico District Court expressly stated that "Delaware law governs this dispute." Slip. Op. at 9. The court noted that the contract in question contains a clause stating that it would be governed not by Puerto Rico law, but rather, by Delaware law, and reasoned that:

> Since the contracting parties were Delaware corporations, who were negotiating for the purchase and sale of stock of another Delaware corporation, we will not upset their decision to have Delaware law govern their contract. *See* E. Scales & P. Hay, *Conflicts of Laws*, § 18.1 (1984) (it is well settled that contracting parties are free to select the law governing their contract); *Delhomme Industries, Inc. Houston Beechcraft, Inc.*, 669 F.2d 1049, 1058 (5th Cir.1982) ("Courts favor, and tend to uphold, choice of law provisions in contracts"); *Walborg Corp. v. Tribunal Superior*, 104 D.P.R. 184, 192 (1975) (when parties have agreed on a body of law to govern their transaction, their choice will be respected when the chosen jurisdiction has substantial contacts with the contract, and the law of the chosen state is not contrary to fundamental public policy considerations of the forum state).

*3 Slip. Op. at 8. The court elaborated:

> Plaintiff has not alleged that the relevant Delaware law is in any way offensive to the public policy of Puerto Rico. Since the parties voluntarily chose Delaware law to govern their transaction, and Delaware has a substantial interest in transactions involving sales of stock of one Delaware corporation by a second Delaware corporation to a third Delaware corporation, we find that Delaware law governs this dispute.

Id.

Plaintiff's arguments do not undermine the persuasiveness of the Puerto Rico court's reasoning. Plaintiff argues that the choice of law rule included in Code's contract with North Coast and DBHC does not require that the parties be irremediably bound to Delaware substantive law. Rather, courts defer to the parties' choice only when that selection has been made in good faith; the selection is not contrary to public policy; the contract is properly referable to the state selected; and such state has a real or substantial connection with the transaction or subject matter of the contract. 16 Am.Jur.2d § 78; 17 C.J.S. *Contracts* § 12(3), p. 595 (1963); Restatement of the Law, 2nd Conflicts of Law § 187; *Bartlett & Co., Grain v. Merchants Co.*, 323 F.2d 501 (5th Cir.1963); *National Union Fire Ins. Co. v. D & L Constr. Co.*, 353 F.2d 169 (8th Cir.1965), *rehearing denied* Dec. 27, 1965, *cert. denied* 384 U.S. 941 (1966). Plaintiff contends that as defendants do not have substantial connections with the state of Delaware, there is no logical basis for the Delaware choice of law clause.

This Court disagrees with the contention that the state of Delaware does not have a real and substantial connection with the instant transaction. Even if the subject matter of the contract was the purchase of real estate in Puerto Rico, and the contract was almost entirely negotiated in San Juan and Dorado as stated in plaintiff's affidavit, the fact that the transaction involved two Delaware corporations negotiating for the purchase and sale of stock in a third Delaware corporation provides a logical basis for recourse to Delaware law. Thus, the Court sees no reason to refute the Puerto Rico court's finding that Delaware substantive law applies.

As a final step in this analysis, the Court notes that under Puerto Rico's choice of law rules statutes of limitations are viewed as substantive rather than procedural issues, suggesting that in the instant case the Puerto Rico court would apply the statute of limitations of Delaware, the state whose substantive law governs. *See* *Rodriguez Narvaez v. Nazario*, 895 F.2d 38, 43 (1st Cir.1990) ("the rules governing the limitation of actions form part of the substantive, not procedural, law of Puerto Rico"); *Felix Davis v. Vieques Air Link*, 892 F.2d 1122, 1125 n. 2 (1st Cir.1990) ("[t]he Supreme Court of Puerto Rico, in *Febo Ortega v. Superior Court*, 102 P.R.R. 506 (1974), held that the limitation of actions is not a procedural issue but substantive"); *Santiago v. Becton Dickinson & Co., S.A.*, 539 F.Supp. 1149, 1151 (D.P.R.1982) ("[t]he Supreme Court of Puerto Rico has often held that the matter of extinctive prescription is a substantive, not procedural, question"); *Febo Ortega v. Superior Court*, 102 D.P.R. 506, 509 (1974) ("the limitation of actions is not a procedural, but a substantive matter"); *Olmo v. Young & Rubicam of Puerto Rico, Inc.*, 110 D.P.R. 965, 969 (1981) ("We have decided that 'prescription' is a substantive and not a procedural matter").

*4 In *Arrieta-Gimenez v. Arrieta-Negron*, 859 F.2d 1033, 1037 (1st Cir.1988), the First Circuit, although not ruling on this issue, agreed with this Court's conclusion that Puerto Rico choice of law rules treating statute of limitations questions as substantive rather than procedural suggest "that Puerto Rico courts would borrow the statutes of limitations of the state whose substantive law governs ..." The reasoning in that case provides further support for the application of the Delaware statute of limitations to the instant transaction.

Thus, the Court concludes that Delaware, not Puerto Rico, law applies.

II. Delaware's Statute of Limitations

Delaware's three year statute of limitations is applicable to this claim because it is an "action to recover damages caused by an injury unaccompanied with force." 10 Del.Code Ann. tit. Courts and Judicial Procedure, § 8106 (1975). [FN1] *See also* *Oliver B. Cannon & Son, Inc. v. Fidelity and Casualty Co.*, 484 F.Supp. 1375, 1388 (D.Del.1980) (section 8106 "imposes a three year limitation on actions sounding in contract and/or tort"); *Allstate Ins. Co. v. Spinelli*, 443 A.2d 1286 (Del.Super.1982) (section 8106 is ["Delaware's] statute of limitations for breach of contract"); *Dofflemeyer v. W.F. Hall Printing Co.*, 558 F.Supp. 372, 378 (D.Del.1983) (Delaware limitations period normally applicable for breach of fiduciary duty is three years).

The second issue between the parties is when the statute of limitations began to run. Plaintiff concedes that it is well established that "under general principles of contract law, the time limitation of a contract claim limitation statute begins to run from the date of breach of the contract." *Allstate Ins. Co. v. Spinelli*, 443 A.2d at 1292. *See also* *Murrey v. Nationwide Ins. Co.*, 674 F.Supp. 154, 157 (D.Del.1987). Nor does plaintiff dispute that tort actions are similarly constrained. *Kaufman v. C.L. Mc-*

Cabe & Sons, Inc., 603 A.2d 831, 834 (Del.Supr.1992) (a cause of action in tort occurs at the time of injury). However, plaintiff refutes defendants' argument that as the alleged breach of contract occurred at the time of defendants' negotiations in November or early December 1984, and this action was not commenced until April 17, 1991, it is barred by § 8106. Plaintiff claims that either the fraudulent concealment doctrine or the discovery rule properly tolls the statute of limitations in this case.

Delaware courts have held that fraudulent concealment tolls the running of the statute of limitations until such time as the cause of action is discovered or could have been discovered by the exercise of due diligence. Bradford, Inc. v. Travelers Indem. Co., 301 A.2d 519, 525 (Del.Super.1972). Fraudulent concealment requires that something affirmative be done by a defendant, some "actual artifice" which prevents a plaintiff from gaining knowledge of the facts, or a misrepresentation intended to put plaintiff off the trail of inquiry. Halpern v. Barran, 313 A.2d 139, 143 (Del.Ch.1973); *see also* Lecates v. Hertrich Pontiac Buick Co., 515 A.2d 163, 176 (Del.Super.1986) ("claim of fraudulent concealment requires the twin showing of (a) the defendant's knowledge of the alleged wrong, and (b) an affirmative act of concealment by defendant"). Mere "ignorance of the facts is, in the ordinary case, no obstacle to the operation of a Statute of Limitations." Mastellone v. Argo Oil Corp., 82 A.2d 379, 383 (Del.Supr.1951).

***5** Here, plaintiff has not indicated any affirmative acts of concealment on the part of defendants. Plaintiff's alternative contention, that defendants "failed to disclose" their "secret negotiations", boils down to a charge that their knowing silence qualifies as fraudulent concealment. However, this exception to the affirmative act requirement only applies where a plaintiff and defendant are in a fiduciary relationship. Dunleavy v. Dugan, 1990 WL 49421, (D.Del.) (directors owe plaintiff shareholder a fiduciary duty and therefore failure to notify plaintiff about merger which allegedly injured company and deprived plaintiff of the value of her stock might constitute fraudulent concealment) (citing Toner v. Baltimore Envelope Co., 498 A.2d 642, 648 (Md.1985) (directors owe fiduciary duty to shareholders)); Hood v. McConemy, 53 F.R.D. 435, 447 (1971) (because attorney-client relationship is fiduciary and attorney is held to strictest standard of fidelity and good faith, attorney's failure to inform his clients that action has been dismissed, with repeated assurances that action is progressing properly, is sufficient to constitute fraudulent concealment in a legal malpractice action); *see also* 51 Am.Jur.2d Limitation of Actions § 149 (1970) (if there is a fiduciary relationship between the parties, there need be no evidence of fraudulent concealment other than that implied from the transaction itself; mere failure to reveal may be fraudulent when there is a duty to reveal).

While the complaint alleges that defendants breached their fiduciary duties to Code or its assignee, it fails to allege how such a relationship came to exist between the parties. A fiduciary relationship is a relationship where, because one person reposes special trust and confidence in the integrity of another, or because one party's property is entrusted to the other, a special duty exists on the part of the latter to protect the former. *See* 36A C.J.S. *Fiduciary* (1961). The arm's-length relationship of parties in a business transaction is, if anything, antithetical to the notion that either would owe a fiduciary relationship to the other. Consequently the Court finds that defendants did not owe a fiduciary duty to plaintiff, and that defendants' alleged failure to disclose their negotiations cannot constitute fraudulent concealment.

The second element of plaintiff's argument is that the cause of action did not accrue until he learned of the negotiations between defendants and Pritzker during the deposition of Thomas Pritzker in the case of Dopp v. HTP Corporation, et al., 755 F.Supp.491 (D.P.R.1991), on January 23, 1989. Thus plaintiff seeks application of the "time of discovery rule." Layton v. Allen, 246 A.2d 794 (Del.Supr.1968); Rudginski v. Pullella, 378 A.2d 646 (Del.Supr.1977).

The time of discovery rule originated in Delaware with Layton, 246 A.2d at 797, in which the Delaware Supreme Court held that the cause of action in a medical malpractice case did not accrue until the plaintiff had discovered the injury. The rule was subsequently extended to other types of professional malpractice cases. *See* Pioneer Nat'l Title Ins. Co. v. Sabo, 382 A.2d 265 (Del.Super.1978), *aff'd,* 401 A.2d 68 (Del.Supr.1979) (attorney error); Child, Inc. v. Jan Rodgers, Del., 377 A.2d 374 (1977) (same); Issacson, Stolper & Co. v. Artisan's Savings Bank, 330 A.2d 130 (Del.Supr.1974) (accountant and tax specialist error). Nonetheless, application of the rule has been narrowly constrained. As the district court of Delaware stated in Ontario Hydro v. Zallea Systems, Inc., 569 F.Supp. 1261 (D.Del.1983), the "common thread" in the malpractice cases to which the Delaware Supreme Court has applied the time of discovery rule is "the fact that a lay person has been injured by a professional person of superior knowledge such as a doctor, lawyer or accountant." *Id.* at 1269. The formal requirements for the application of the rule are (a) an "inherently unknowable" injury; (b) sustained by a "blamelessly ignorant" plaintiff who relied upon the professional expertise of the wrongdoer. Pioneer Nat'l Title Ins. Co., 382 A.2d at 266; *see also* Kaufman v. C.L. McCabe & Sons, Inc., 603 A.2d at 835; Isaacson, 330 A.2d at 133; Began v. Dixon, 547 A.2d 620 (Del.Super.1988); Hodges v. Smith, 517 A.2d 299 (Del.Super.1986).

***6** This case cannot be likened to a malpractice suit involving a lay person alleging injury by a professional person of superior knowledge. It is not about an "inherently unknowable" injury, such as those which occur in professional malpractice cases, or about an injury not "physically ascertainable by due diligence" until after the statute of limitations had run, *see, e.g.,* Rudginski, 378 A.2d at 649 (plumber installed defective septic tank). Rather, it is a breach of contract action arising out of an arm's length transaction between sophisticated parties. As the court found in Studiengesellschaft Kohle, MHB v. Hercules, Inc., 748 F.Supp. 247 (D.Del.1990), application of the time of discovery exception to such an action would essentially eviscerate Delaware's contract statute of limitations.

In *Studiengesellschaft Kohle,* the plaintiff sued for breach of contract, claiming that the defendant concealed sales and royalties due under the contract. *Id.* at 252. In response to defendant's § 8106 defense, plaintiff--as here--contended that it had "no notice" of the breach, and "therefore had no reason to suspect an injury was present" until after the limitations period had run. *Id.* at 253. In barring plaintiff's claim, the court stated:

> [I]f [plaintiff's] contention was adopted it would emasculate the purpose of statutes of limitation and always require actual knowledge of injury as a prerequisite for any limitations period to commence.

This Court believes that allowing the instant plaintiff to avail himself of the time of discovery exception would have the same undesired result.

The Court concludes that the statute of limitations was not tolled by operation of either the fraudulent concealment or time of discovery exceptions. As the alleged breach of contract occurred in November or December of 1984 when defendants engaged in negotiations for the sale of DBHC to Pritzker, but plaintiff failed to bring this action until April 17, 1991, in excess of six years after the claim accrued, it is clear that the action is barred by § 8106.

CONCLUSION

For the reasons set forth above, defendants' motions to dismiss the complaint are granted.

The Clerk of the Court is directed to dismiss the complaint as to all defendants with prejudice.

FN1. 10 Del.C. § 8106 reads:

No action to recover damages for trespass, no action to regain possession of personal chattels, no action to recover damages for the detention of personal chattels, no action to recover a debt not evidenced by a record or by an instrument under seal, no action based on a detailed statement of the mutual demands in the nature of debit and credit between parties arising out of contractual or fiduciary relations, no action based on a promise, no action based on a statute, and no action to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant shall be brought after the expiration of 3 years from the accruing of the cause of such action; subject, however, to the provisions of §§ 8108-8110, 8119 and 8127 of this title.

The sections referred to in the final phrase are not pertinent here.

Not Reported in F.Supp., 1993 WL 404076 (S.D.N.Y.)

END OF DOCUMENT

H

Briefs and Other Related Documents

This case was not selected for publication in the Federal Reporter.

UNPUBLISHED

Please use FIND to look at the applicable circuit court rule before citing this opinion. Fourth Circuit Rule 36(c). (FIND CTA4 Rule 36(c).)

United States Court of Appeals,
Fourth Circuit.
John W. LYON, Plaintiff-Appellee,
v.
Larry A. CAMPBELL, Defendant-Appellant,
and
Edward W. Storke; Robert B. Cook, Defendants.
No. 01-1694.

Argued Feb. 28, 2002.
Decided March 28, 2002.

Plaintiff brought diversity action against his former business partner, alleging breach of fiduciary duty in connection with the sale of a tract of land. The Court of Appeals, 217 F.3d 839, reversed grant of summary judgment to defendant, and on remand the United States District Court for the District of Maryland, Frederic N. Smalkin, Chief Judge, found a breach of fiduciary duty and imposed a constructive trust on proceeds of sale. Defendant appealed. The Court of Appeals held that: (1) case was properly tried on cause of action for breach of fiduciary duty; (2) defendant owed a fiduciary duty to his co-shareholder; (3) defendant breached his fiduciary duty to co-shareholder; and (4) co-shareholder's alleged false testimony was collateral to central issue of case and did not require application of doctrine of unclean hands.

Affirmed.

West Headnotes

[1] Trusts ⚷371(2)

390k371(2) Most Cited Cases

District court properly tried case based on cause of action under Maryland law for breach of fiduciary duty, and imposed remedy of a constructive trust, and therefore defendant was not unfairly surprised and prejudiced by alleged transformation of plaintiff's claim for breach of fiduciary duty into a claim for imposition of a constructive trust.

[2] Corporations ⚷312(5)

101k312(5) Most Cited Cases

[2] Corporations ⚷320(7)

101k320(7) Most Cited Cases

Defendant, who was in de facto control of a small, closely-held corporation, owed his co-shareholder a fiduciary duty, under Maryland law, and therefore co-shareholder could maintain his claim for breach of that duty, in connection with the sale of a tract of land, even though co-shareholder had failed to properly plead a shareholder derivative claim; defendant and the other directors had effectively frozen co-shareholder out of corporation's affairs.

[3] Corporations ⚷312(5)

101k312(5) Most Cited Cases

Defendant, who was in de facto control of a small, closely-held corporation, breached his fiduciary duty, under Maryland law, to his co-shareholder by causing the net proceeds of the sale of a tract of land to be distributed exclusively to himself; corporation was not liable to defendant on basis of alleged payment of a debt, even though the debt created a security interest in the land, where debt was owed by a different corporation and was personally guaranteed by defendant and co-shareholder.

[4] Equity ⚷65(3)

150k65(3) Most Cited Cases

Co-shareholder's alleged false testimony as to his payment of the debt of another corporation was collateral to central issue of his action under Maryland law for breach of fiduciary duty, and therefore district court did not abuse its discretion by refusing to apply doctrine of unclean hands to bar equitable relief sought by co-shareholder against former business partner who was in de facto control of small, closely-held corporation.

***660** Appeal from the United States District Court for the District of Maryland, at Baltimore. Frederic N. Smalkin, Chief District Judge. (CA-98- 1129-S).

ARGUED: Gerard Patrick Martin, Martin, Snyder & Bernstein, P.A., Baltimore, Maryland, for Appellant. David Schertler, Coburn & Schertler, Washington, D.C., for Appellee. **ON BRIEF:** Steven F. Wrobel, Martin, Snyder & Bernstein, P.A., Baltimore, Maryland; Thomas J. Zagami, Hodes, Ulman, Pessin & Katz, P.A., Towson, Maryland, for Appellant. Barry Coburn, Coburn & Schertler, Washington, D.C., for Appellee.

Before WILKINSON, Chief Judge, and NIEMEYER and MICHAEL, Circuit Judges.

Affirmed by unpublished PER CURIAM opinion.

OPINION

PER CURIAM.

John Lyon sued Larry Campbell, his former business partner, claiming that Campbell breached his fiduciary duty to Lyon by retaining for himself the entire proceeds from a sale of property owned by a corporation in which the two men were ***661** equal, 50 percent shareholders. Initially, the district court granted summary judgment to Campbell based on the business judgment rule and the doctrine of unclean hands. Lyon appealed, and we reversed and remanded for further proceedings. On remand, the district court held a two-day bench trial, found that Campbell had breached his fiduciary duty, and imposed a constructive trust on the proceeds of the sale. Campbell now appeals, arguing that the district court erred in finding a breach of fiduciary duty and that in no event is Lyon entitled to equitable relief because he has unclean hands. We affirm the judgment awarded to Lyon.

I.

Lyon and Campbell became business partners sometime around the early 1970s. Sometime in the 1980s their business relationship began to deteriorate, and for years now the two have been invoking the jurisdictions of various state and federal courts in their efforts to complete their messy split up. *See, e.g.,* *Campbell v. Lyon,* 26 Fed. Appx. 183 (4th Cir.2001) (per curiam); *Lyon v. Campbell,* 1994 WL 369453 (4th Cir.) (per curiam); *Lyon v. Campbell,* 324 Md. 178, 596 A.2d 1012 (Md.1991); *Lyon v. Campbell,* 120 Md.App. 412, 707 A.2d 850 (Md.Ct.Spec.App.1998). At trial the district court was faced with the unenviable task of sorting out 15 years of alleged debts, debt repayments, and business transactions, many of which were unsupported by proper documentation. The court then sought to apply the various doctrines of corporate law to those facts it could discern. As the district court noted, Lyon and Campbell behaved like "people in kindergarten in terms of observing [corporate] formalities," and thus reconstructing the legal relationships and liabilities between the two is "sort of like trying to rebuild the Titanic, [an] analogy ... chosen for a reason, from a deck chair and a billiard table." With this introduction, we turn to the facts of this case.

Lyon and Campbell were equal, 50 percent shareholders in, among other things, a corporation called ICE. ICE, in turn, was a holding company for other Lyon-Campbell ventures, two of which were L-C, Inc. and Excavation Corporation, Inc. (EC). Through L-C, Lyon and Campbell purchased a parcel of property known as Oxen Cove in 1972 for around $500,000. The Oxen Cove property was an 80- acre tract of land located partially in Maryland and partially in the District of Columbia. During the 1970s EC had taken out various bank loans. Lyon and Campbell had personally guaranteed these loans, and L-C's Oxen Cove property was pledged as a security interest on the loans. When EC went bankrupt, Dominic Antonelli, a business associate of Lyon, agreed to purchase the notes for these loans from the bank. At trial Lyon and Antonelli both testified that between 1984 and 1990 Lyon paid Antonelli the entire amount owed on the EC debt. The two testified that Campbell was kept in the dark about this repayment because Antonelli planned to seek repayment from Campbell of half of the debt and then return that money to Lyon. Campbell claims that Lyon never paid Antonelli anything, and indeed neither Lyon nor Antonelli were able to produce any documentary evidence of Lyon's repayment of the loan. In fact, they admitted that Antonelli had not even canceled the notes, but they attributed this failure to simple carelessness. In 1990 an associate of Campbell, Joel Broyhill, paid Campbell's one-half share of the loan to Antonelli on Campbell's behalf, and Antonelli assigned the notes to Broyhill.

As noted above, business relations between Lyon and Campbell eventually became strained, and they began the long ***662** process of extricating themselves from their various ventures. By 1995 the two men had ceased their joint business ventures except for their continued co-ownership of ICE. The only significant remaining asset at this point was the Oxen Cove property, still held by ICE's subsidiary, L-C. In early 1995 Lyon was approached by a representative of the Corrections Corporation of America (CCA) about purchasing the Oxen Cove property. Lyon relayed this information to L-C's board of directors, which consisted of himself, Campbell, and Edward Storke. In order to free up Oxen Cove for a potential sale, Campbell repaid Broyhill the amount Broyhill had paid on the Antonelli debt, and in 1996 Broyhill released the Oxen Cove property from the security interest he held as owner of the EC debt.

L-C eventually sold Oxen Cove to CCA for $4 million. Prior to the sale Campbell and Storke discovered that Lyon had pledged $1 million of his share of any proceeds from a potential Oxen Cove sale to his bankruptcy trustee. Because of this conflict of interest, Campbell and Storke voted to remove Lyon from the L-C board and replace him with Robert Cook. Campbell and the other L-C board members proceeded to freeze Lyon out of the Oxen Cove negotiations and eventual sale, refusing to provide him with information related to the sale. Several days before the sale the L-C directors agreed to pay $1 million of any sale proceeds to Lyon's bankruptcy trustee to settle all claims the trustee might have had against L-C and Oxen Cove. After the sale the board distributed $1 million of the proceeds to the bankruptcy trustee and the remainder to Campbell; the distribution to Campbell was supposedly to reimburse him for his personal payment of the EC debt.

Lyon brought this diversity action in federal court against Campbell for breach of fiduciary duty, claiming that the sale proceeds should have been distributed equally between the two of them as equal shareholders in ICE. The district court granted summary judgment to Campbell on the basis of the business judgment rule. We reversed and remanded, explaining that the evidence created a factual dispute as to whether Campbell had breached his fiduciary duty. On remand the district court noted for the first time that Lyon had failed to properly certify his complaint pursuant to Fed.R.Civ.P. 23.1 and thus could not maintain a shareholder derivative action. "[B]efore a stockholder will be permitted to maintain a suit for injury to the corporation, he must allege and prove that he requested the directors to institute suit in the name of the corporation, and they refused." *Waller v. Waller*, 187 Md. 185, 49 A.2d 449, 453 (Md.1946). Rule 23.1 establishes the procedures necessary to properly allege such a request and refusal. Lyon conceded that he had not met the requirements of Rule 23.1, and thus he could not maintain a shareholder derivative suit. The district court then proceeded to a bench trial solely on a direct breach of fiduciary duty claim. The court found a breach of fiduciary duty by Campbell and imposed a constructive trust on the proceeds of the Oxen Cove sale. Campbell now appeals. We review the district court's factual findings for clear error and its legal conclusion de novo. *Anita's New Mexico Style Mexican Food, Inc. v. Anita's Mexican Foods Corp.*, 201 F.3d 314, 316 (4th Cir.2000).

II.

Because Lyon cannot maintain a shareholder derivative suit against Campbell, we must first determine whether he can maintain some sort of direct claim for breach of fiduciary duty. If he can, we must then determine whether the district court properly ***663** placed the burden on Campbell to justify the fairness of the distribution of the proceeds and whether Campbell in fact met such a burden. We address these issues in turn. The parties agree that Maryland law applies.

[1] As a preliminary matter we address Campbell's claim that he suffered unfair surprise and prejudice because the district court at the last minute transformed Lyon's breach of fiduciary duty claim into a claim for imposition of a constructive trust. A constructive trust is an equitable remedy, not a cause of

action in and of itself. *See* 21 Maryland Law Encyclopedia *Trusts* § 61 (1997) ("A constructive trust ... is a mere remedy to which equity courts resort in granting relief."). It is true that in its pretrial order the district court characterized the cause of action for trial as that of "Imposition of a Constructive Trust." However, in its oral ruling the district court explained that "the appropriate remedy for breach of fiduciary duty [between shareholders], in such circumstances, is ... the imposition of a constructive trust." We conclude that despite any confusion created by the pretrial order, the district court properly tried the case based on the cause of action of breach of fiduciary duty and then imposed the remedy of a constructive trust. Campbell's argument that the district court allowed the case to be tried on an improper theory is therefore misplaced.

A.

[2] Ordinarily, Lyon's failure to properly plead a shareholder derivative claim would be the end of his breach of fiduciary duty claim. However, Maryland has recognized that in certain circumstances, shareholders in a small, closely held corporation owe each other a fiduciary duty apart from the fiduciary duty owed by the directors to the corporation. *See Toner v. Baltimore Envelope Co.*, 304 Md. 256, 498 A.2d 642, 647 (Md.1985). Here, ICE and L-C were small, closely held corporations with only two shareholders, Lyon and Campbell. The shareholders served on the board of directors and participated in the day-to-day management of corporate affairs, often disregarding corporate formalities in the course of such management. Additionally, at the time of the Oxen Cove sale Campbell had achieved de facto control over the corporation. Following Lyon's removal from the L-C board, Campbell and the other directors refused to give Lyon any information or allow him any input regarding the Oxen Cove sale, effectively freezing Lyon out of L-C's affairs. Under these circumstances, Campbell, in his capacity as shareholder, owed his co-shareholder Lyon a fiduciary duty. *See id.* at 647-52; *Cooperative Milk Service Inc. v. Hepner*, 198 Md. 104, 81 A.2d 219, 224 (Md.1951); *see also Donahue v. Rodd Electrotype Co. of New England*, 367 Mass. 578, 328 N.E.2d 505 (Mass.1975). Accordingly, Lyon can maintain a breach of fiduciary duty claim against Campbell.

B.

In most cases the burden of establishing a breach of fiduciary duty lies with the party asserting the breach, in this case Lyon. However, "transactions between a corporation and its officers or directors are always closely scrutinized." *Lynch v. Buchanan*, 37 Md.App. 413, 377 A.2d 592, 596 (Md.Ct.Spec.App.1977). Significantly, when a director or officer enters into a contract or transaction with the corporation such that his or her personal interest differs from that of the corporation, "the burden of proving that the contract is fair, adequate and equitable is upon the officer or director." *Chesapeake Constr. Corp. v. Rodman*, 256 Md. 531, 261 A.2d 156, 158 (Md.1970). This principle applies to dominant ***664** shareholders as well as to officers and directors. *Lynch*, 377 A.2d at 595. The burden of proving fairness shifts to the "director or shareholder once it is shown that he has dealt in a way to perfect his own interest." *Id.* In this case the district court found that once Lyon had been frozen out of L-C's dealings, Campbell became the de facto controlling shareholder and effectively dominated the L-C board. It is undisputed that the board distributed about three-fourths of the proceeds of the Oxen Cove sale directly to Campbell. In this situation, Campbell, the recipient of these proceeds, clearly faced a conflict between his own personal interests and those of the corporation. Because Campbell, acting as de facto controlling shareholder, caused the corporation to distribute the Oxen Cove sale proceeds to him at a time when he dominated the board, he bears the burden of proving that this self-interested transaction was fair and equitable. To establish this, Campbell must show that he was a bona fide creditor of L-C and thus was entitled to payment prior to the distribution of the proceeds to the shareholders, namely himself and Lyon.

At the time the board distributed the Oxen Cove sale proceeds to Campbell, the board justified the distribution as a repayment of money owed Campbell by L-C. Campbell concedes that there is no clear documentary evidence proving that L-C owed him anything. Before the district court and on appeal Campbell explains the source of this supposed obligation as follows. As mentioned above, L-C's property, Oxen

Cove, was pledged as a security interest for the loans taken out by EC and personally guaranteed by Campbell and Lyon. Campbell's lawyer explained that "[i]f Mr. Campbell hadn't stepped up to the plate [and paid Antonelli] ... someone could have foreclosed on L-C's properties, taking it to satisfy the debt, and L-C wouldn't have had any property to sell in 1996." In response to a question by the district court, Campbell's lawyer clarified that "L-C didn't owe anybody." The key, rather, was that "L-C property was pledged to secure the debts." Campbell argues that he is entitled to the proceeds of the Oxen Cove sale because if he had not paid off the debt, L-C could not have realized those proceeds.

Campbell's argument rests on a failure to understand the difference between a debt obligation and a security interest. The fact that L-C's property was subject to a security interest on the EC loan does not establish that L-C was itself liable to Campbell for paying off this loan. L-C undoubtedly benefitted from the release of this security interest on its property, but this benefit does not give rise to a legal liability. When property is pledged as security for a debt, the owner of the pledged property does not thereby become liable on the debt. Likewise, while the release of the security interest benefits the owner of the pledged property, the release does not trigger any legal obligation on the part of the owner. Campbell, as a personal guarantor of EC's debt, would be entitled to reimbursement from EC for his payment of that debt. The fact that Campbell cannot recover from EC, since EC is long-since bankrupt, is of no moment. Such is the risk of personally guaranteeing a corporate debt.

[3] Here, Campbell has proven only that L-C was subject to losing the Oxen Cove property (up to the outstanding value of the EC debt), not that L-C was liable on the loan. Accordingly, Campbell has failed to prove that he was a creditor of L-C. The district court thus concluded that Campbell failed to carry his burden as an interested party in this transaction to show "a sufficient case of justice, equity, or fairness, to allow him to retain the entire net ***665** proceeds of the Oxen Cove sale." We agree, and we affirm the district court's determination that Campbell breached his fiduciary duty to Lyon when he caused the net proceeds of the Oxen Cove sale to be distributed exclusively to himself.

III.

Aside from the merits of the case, Campbell argues that Lyon should be barred from any equitable relief based on the doctrine of unclean hands. The district court rejected this argument, and we review the court's decision not to apply the doctrine for abuse of discretion. *Hicks v. Gilbert,* 135 Md.App. 394, 762 A.2d 986, 990 (Md.Ct.Spec.App.2000). According to Campbell, the district court found that Lyon and Antonelli had lied when they testified that Lyon fully repaid Antonelli the EC debt. There is much evidence calling Lyon's and Antonelli's testimony into doubt. For example, Lyon's annual financial statements reflected a large debt owed to Antonelli that did not diminish over the years that Lyon supposedly paid off the EC debt. Indeed, at one point the district court commented that "I don't believe for a minute that [Lyon] paid Campbell's half. I think that's just a lie." In light of this finding of perjury, Campbell argues, the district court should have barred Lyon from any equitable relief based on the doctrine of unclean hands.

As we noted in the first appeal of this case, the doctrine of unclean hands permits a court to withhold equitable relief from a party who is guilty of "willful wrongdoing in relation to the controversy before it." *Manown v. Adams,* 89 Md.App. 503, 598 A.2d 821, 825 (Md.Ct.Spec.App.1991), *vacated on other grounds,* 328 Md. 463, 615 A.2d 611 (Md.1992). We explained that the doctrine applies only to willful wrongdoing that relates to the claim being litigated. We held that Lyon's failure to disclose his conflict of interest in the potential Oxen Cove sale was not sufficiently related to his breach of fiduciary duty claim to warrant application of the doctrine.

[4] As to Lyon's trial testimony, the district court determined that any false testimony was collateral to the central issue in the case and declined to apply the doctrine of unclean hands. Campbell argues that while the willful wrongdoing must relate to the controversy before the court, perjury during the actual trial proceedings is always a sufficient reason to apply unclean hands, regardless of whether the case ultimately turns on the subject matter of the perjury.

We acknowledge that perjury during a trial proceeding may warrant different treatment than willful wrongdoing outside the judicial proceedings. Nonetheless, even if the district court might have been justified in applying the doctrine of unclean hands based on Lyon's false testimony, the court was not compelled to do so. Application of the doctrine of unclean hands is largely in the discretion of the district court, *see Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.,* 324 U.S. 806, 815, 65 S.Ct. 993, 89 L.Ed. 1381 (1945), and the district court did not abuse its discretion by refusing to apply the doctrine here.

IV.

In conclusion, we affirm the district court's determination that Campbell failed to show that he was entitled to keep the net proceeds of the Oxen Cove sale. Additionally, the district court did not abuse its discretion in declining to apply the doctrine of unclean hands to bar Lyon's recovery. The judgment of the district court is therefore

AFFIRMED.

33 Fed.Appx. 659

Briefs and Other Related Documents **(Back to top)**

- 2001 WL 34386648 (Appellate Brief) Appellant's Reply Brief (Nov. 14, 2001)Original Image of this Document (PDF)

- 2001 WL 34386650 (Appellate Brief) Brief of Appellee (Oct. 31, 2001)Original Image of this Document (PDF)

- 2001 WL 34386649 (Appellate Brief) Appellant's Brief (Sep. 28, 2001)Original Image of this Document (PDF)

- 01-1694 (Docket) (May. 30, 2001)

END OF DOCUMENT

C

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA4 Rule 36 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Fourth Circuit.
Roy JEFFCOAT; Carolina Homebuilders, Inc.,
Plaintiffs-Appellants,
v.
BLYTH EASTMAN PAINE WEBBER, INC., Defendant-Appellee.
ENERGY CONVERSION CORPORATION,
Plaintiff-Appellant,
v.
BLYTH EASTMAN PAINE WEBBER, INC., Defendant-Appellee.
Nos. 88-2084, 88-2671.

Argued: Nov. 2, 1989.
Decided: Feb. 8, 1990.

D.S.C.

AFFIRMED.

Appeals from the United States District Court for the District of South Carolina, at Anderson. Joe F. Anderson, Jr., and Matthew J. Perry, Jr., District Judges. (CA-87-2976, CA-83-743).

Richard Mark Gergel (W. Allen Nickles, III, Cynthia Hall Ouzts, Gergel, Burnette, Nickles, Grant & Ouzts, P.A., on brief), for appellants.

William Douglas Gray (Watkins, Vandiver, Kirven, Gable & Gray, on brief); Edwin Russell Jeter, Jr. (Charles Porter, T. Parkin Hunter, McNair Law Firm, P.A., on brief), for appellee.

Before WIDENER and WILKINSON, Circuit Judges, and JOSEPH H. YOUNG, Senior United States District Judge for the District of Maryland, sitting by designation.

PER CURIAM:

****1** This consolidated appeal arises from two suits brought against Blyth Eastman Paine Webber (BEPW) for allegedly failing to fulfill its agreement to underwrite the construction of an ethanol fuel plant. The first suit was brought by Energy Conversion Corporation (ECC), and the second by ECC's owner, Roy Jeffcoat, and another of his corporations, Carolina Homebuilders, Inc. (CHB). BEPW prevailed in both suits. Appellants ECC, Jeffcoat, and CHB contend that the district judge in the first suit erred in denying ECC's motion for joinder of additional plaintiffs, in granting BEPW's motion for directed verdict on ECC's fraud claim, and in granting BEPW's motion for judgment notwithstanding the verdict on ECC's contract claim, and that the district judge in the second suit erred in barring the suit under the doctrines of judicial estoppel, equitable estoppel, and res judicata. Finding no merit in any of these contentions, we affirm the judgments of the district courts.

I.

Beginning in 1974, Roy Jeffcoat and CHB, a corporation owned and controlled by Jeffcoat, began investing time, effort, and financial resources toward development of an ethanol fuel plant. In 1980, Jeffcoat formed ECC specifically for development of an ethanol plant. He served as ECC's president.

In May 1980, ECC was awarded a $162,000 feasibility grant by the United States Department of Energy. Award of the grant was the first step toward eligibility for a 90% guaranteed government loan program for alternate fuel plants, though it in no way ensured ECC would be awarded a guaranteed loan.

BEPW was among a number of investment bankers which contacted Jeffcoat at this time about providing financing for his ethanol plant. BEPW first contacted Jeffcoat by a letter dated July 28, 1980. On August 6, 1980, it sent him a letter of intent setting forth a preliminary understanding between the parties regarding a proposed offering of securities to finance the project. In an economic analysis of the ECC project dated September 24, 1980, BEPW listed as a use for construction funds a "Developer's Risk Reimbursement Fee" of over three million dollars to be paid the general partner at closing from the equity contributions of the limited partners "for efforts expended in setting up the business and in managing the facility on behalf of the partnership." In another document with the heading "Compensation of the General Partner," BEPW lists an initial fee of $200,000 for the "performance of preformation feasibility, engineering, legal, financial and marketing studies." On November 18, 1980, BEPW was retained by ECC as investment banker for the project pursuant to an amended version of the letter of intent of August 6.

On August 22, 1981, ECC received a conditional commitment for a guaranteed government loan of $56 million for construction of the ethanol plant. The loan was contingent on several conditions, including requirements that a written commitment from the investment banker be submitted to the Department of Energy within 90 days and that evidence of $19.9 million in equity be submitted within 120 days.

****2** BEPW allegedly had a number of problems with the loan guarantee. These problems included the structure of the loan guarantee which left 10% of the debt completely unguaranteed, the government's insistence on a first lien, and ECC's failure to have prepared the detailed cost estimates supported by a final engineering design which the government was going to require. A meeting was held between ECC, BEPW, and the Department of Energy on September 22, 1981, to discuss details of the deal.

After this meeting, the alcohol fuels group within BEPW met to discuss the feasibility of the ECC ethanol fuel project. Because of the changing political climate, the declining price for gasoline and ethanol, the rising price of corn (one of the primary ingredients of ethanol), the Department of Energy's stringent requirements, and doubts about the ability of the industry to operate profitably, BEPW decided not to go forward with its financing of the project. It contends that this decision cost it $750,000 in invested time and expenses, plus the loss of millions of dollars in anticipated fees. BEPW offers substantial evidence that its decision was correct in hindsight, as the ethanol fuels industry has lost a great deal of money in the ensuing years, a number of plants have been forced to close, and the continued viability of the industry is in doubt. According to BEPW, ECC had an incentive to go forward with the project despite its economic unsoundness in order to recover the developer's reimbursement fee; as underwriter for the project, however, BEPW had a responsibility to the investors whose funds would be used to pay the fee to question the soundness of the project.

There is some disagreement as to when BEPW informed ECC that it would not be financing the project. BEPW claims that it informed Jeffcoat by telephone on October 12, 1981. Jeffcoat maintains that he was not informed until late November, which left him no time to seek alternative financing before the Department of Energy loan commitment expired. However, ECC obtained several extensions of the commitment from the Department of Energy, extending until June 1984. Nonetheless, it was unable to arrange suitable financing, and the deal fell through.

ECC filed suit against BEPW in federal court in March 1983 alleging breach of contract. Jurisdiction was based on diversity of citizenship. BEPW filed its initial answer, and then on March 29, 1985, with the court's permission filed an amended answer asserting the additional defense of statute of frauds. In June 1985, four months before trial, ECC moved to amend its complaint to add Jeffcoat and CHB as plaintiffs. The district judge denied the motion. ECC also moved to add causes of action to allege estoppel, breach of fiduciary duty, and "unfair methods, acts or practices in the services to be rendered and false and misleading statements on material matters which are unlawful." ECC contends that the quoted allegation was one of fraud. The district judge did not explicitly rule on ECC's motion at that time.

****3** At the conclusion of evidence at trial, BEPW moved for a directed verdict on the fraud claim. The district judge granted the motion. The jury was charged with breach of contract only, and it rejected ECC's claim for over $3 million based on the developer's reimbursement fee, but returned a verdict in ECC's favor for $200,000 based on the initial fee. BEPW moved for judgment notwithstanding the verdict based on the statute of frauds, which was granted by the court.

While the motion for judgment notwithstanding the verdict was pending, however, Jeffcoat and CHB filed a separate action against BEPW before a different federal district judge alleging breach of contract, fraud, breach of implied covenant of good faith and fair dealing, and estoppel. BEPW moved for summary judgment, and the district judge granted the motion based on principles of judicial estoppel, equitable estoppel, and res judicata. ECC, Jeffcoat, and CHB appeal from the judgments in their respective cases.

II.

Appellants contend that the district judge in the first suit erred in denying ECC's motion to join Jeffcoat and CHB as additional plaintiffs. They contend that since BEPW failed to demonstrate that it would suffer any unfair prejudice from joinder of the additional parties, there was no justification for the district judge's refusal to allow joinder.

We disagree. "The provisions for permissive joinder under Rule 20 [of the Federal Rules of Civil Procedure] are very broad and the court is given discretion to decide the scope of the civil action and to make such orders as will prevent delay or prejudice." *Arrington v. City of Fairfield*, 414 F.2d 687, 693 (5th Cir.1969). The motion for joinder here was made over two years after initiation of the lawsuit and only four months before trial. The trial judge clearly did not abuse his discretion in ruling that the motion was untimely.

In addition, the district judge would have been justified in ruling that Jeffcoat and CHB were not real parties in interest to the dispute in this case. BEPW never entered into any contract with Jeffcoat or CHB, and those parties had no claims against BEPW. Furthermore, ECC suffered no prejudice from the trial court's decision not to allow joinder. No evidence or cause of action of ECC was excluded at trial because Jeffcoat and CHB were not present in the case.

III.

Appellants next argue that the district court erred in directing a verdict in BEPW's favor on ECC's claim of fraud. They contend that ECC made clear to the court that it intended to allege fraud, and that the court therefore erred in ruling that ECC's complaint failed to state a claim of fraud. While ECC apparently did give some indication to the court that it intended to allege fraud, we nonetheless find that the grant of the directed verdict was proper because ECC failed to present any evidence of fraud or damages.

Appellants assert that BEPW fraudulently committed to a firm underwriting of the ECC ethanol fuel plant. They also maintain that BEPW made false representations regarding its knowledge, experience, and commitment to ethanol fuel projects. ECC failed to present evidence to support these claims, however. The letter on which appellants rely as evidence of an underwriting agreement was merely a letter of intent which, as the trial judge instructed the jury, "is rarely more than an agreement to agree and is, therefore, unenforceable." There is no evidence that BEPW committed itself to a firm underwriting of the ECC ethanol plant. ECC cannot plausibly argue that it reasonably believed that BEPW was entering into a firm commitment to underwrite $73 million in debt and equity in a high risk venture when numerous details concerning the project had not been resolved and the proposed closing date for the project was a year or more away. Similarly, any representations made by BEPW concerning its experience and knowledge were merely part of its sales pitch, and plainly do not rise to the level of a fraudulent misrepresentation.

****4** In addition, the district judge's grant of the directed verdict was justified on the ground that ECC's purported fraud claim was actually a cause of action for breach of contract. Under South Carolina law, a plaintiff cannot simply convert a contract cause of action into a tort cause of action, but rather is limited to the rights for which the parties bargained. *See Seebaldt v. First Federal Sav. & Loan Ass'n*, 239 S.E.2d 726, 727 (S.C.1977). Here, the parties never agreed to a firm underwriting of the ethanol project. Nor does there exist any type of duty arising out of the investment banker-client relationship which might provide the basis for a tort cause of action. *See Troutman v. Facetglas, Inc.*, 316 S.E.2d 424, 426

(S.C.App.1984).

Furthermore, even if BEPW had made fraudulent representations to ECC, we are skeptical that ECC suffered any damages. Any reliance expenses suffered by ECC were likely covered by the $162,000 feasibility grant it received from the Department of Energy. In addition, ECC had more than ample opportunity to secure another investment banker for its project after BEPW withdrew but before the Department of Energy loan commitment expired. Its failure to do so indicates that the project simply was not feasible in light of the changing political and economic climate. ECC was not damaged by any behavior of BEPW, but rather by changing conditions beyond the control of either party.

IV.

Appellants also assert that the district court erred in granting BEPW's motion for judgment notwithstanding the verdict on ECC's breach of contract claim based on the $200,000 initial fee provision. We disagree.

First, there was no evidence to support a finding of a contract for an initial fee for reimbursement for preparation of preformation studies. Appellants point to no testimony by Jeffcoat that he ever reached an oral agreement with BEPW to reimburse ECC $200,000 for expenses for preformation studies. The only time Jeffcoat mentioned that figure was in reading from an in-house report prepared by BEPW that he did not have access to at the time of negotiations. Nor is there any evidence of a written contract. The only document produced at trial which mentioned a $200,000 initial fee was by its own terms clearly a *draft* document which only discussed the *proposed* terms of financing. Again, this was an in-house document to which Jeffcoat did not have access.

Second, as we have discussed above, there is no indication that ECC suffered any damages. ECC was reimbursed for all expenses it incurred in connection with preformation studies by the Department of Energy grant.

V.

Finally, appellants argue that the trial judge in the second suit erred in ruling that the suit was barred under the doctrines of judicial estoppel, equitable estoppel, and res judicata. We disagree and hold that each of these grounds was an appropriate basis for dismissal of the suit.

Appellants assert that BEPW promised Jeffcoat in his personal capacity the $3 million developer's reimbursement fee. They argue that the statement in the contract that the fee was to be paid to the "general partner" intended that Jeffcoat personally be the recipient of the fee and not ECC. This claim is belied, however, by Jeffcoat's testimony during trial in the first suit that ECC was the general partner. The doctrines of judicial and equitable estoppel act to prevent Jeffcoat from altering his testimony in order to prevail in the second suit. According to the doctrine of judicial estoppel, "a party may properly be precluded as a matter of law from adopting a legal position in conflict with one earlier taken in the same or related litigation." *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir.1982). Similarly, the doctrine of equitable estoppel acts "to preclude a party from contradicting testimony or pleadings successfully maintained in a prior judicial proceeding." *Konstantinidis v. Chen*, 626 F.2d 933, 937 (D.C.Cir.1980). We think each of these doctrines prevents Jeffcoat from asserting that he has a separate cause of action against BEPW for the developer's reimbursement fee.

****5** Similarly, Jeffcoat and CHB are precluded from bringing any other causes of action against BEPW arising out of the alleged underwriting agreement by the doctrine of res judicata. Appellants do not, and indeed could not, contest that both Jeffcoat and CHB were in privity with ECC. Instead, they argue that the district judge in the first suit expressly reserved the right of Jeffcoat and CHB to bring a separate cause of action and that BEPW acquiesced in the splitting of the causes of action. We do not read any statement of the trial judge in the first suit to rise to the level of a determination that judgment in the first suit would be without prejudice to Jeffcoat and CHB. Nor did BEPW in any way acquiesce to Jeffcoat and CHB being allowed to maintain a second suit. As these exceptions to the doctrine of res judicata are inapposite, we hold that the doctrine was correctly applied to bar suit by Jeffcoat and CHB. *See*

First Nat. Bank of Greenville v. United States Fidelity & Guaranty Co., 35 S.E.2d 47, 57 (S.C.1945). Furthermore, Jeffcoat and CHB were at most third party beneficiaries of the ECC-BEPW contract, and therefore could have no greater right to recover on the contract than ECC, which lost at trial. *See Kingman v. Nationwide Mutual Ins. Co.*, 134 S.E.2d 217, 221 (S.C.1964). Nor is there any evidence to support a claim of tortious interference with contract against BEPW for procuring breach of alleged contracts between Jeffcoat and CHB with ECC. If such breaches did indeed occur, they were merely incidental to the termination of the contract between ECC and BEPW.

VI.

For the foregoing reasons, the judgments of the district courts are

AFFIRMED.

896 F.2d 1367 (Table), 1990 WL 15556 (4th Cir.(S.C.)), 15 Fed.R.Serv.3d 1232 Unpublished Disposition

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