

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

FRANK DALICANDRO	:	
Plaintiff	:	CIVIL ACTION
	:	
v.	:	
	:	
LEGALGARD, INC. d/b/a SANDENHILL, INC.	:	NO. 99-3778
and RELIANCE INSURANCE CO.	:	
Defendant	:	

**MEMORANDUM AND ORDER**

YOHN, J. March , 2000

Plaintiff Frank Dalicandro brought suit against his former employer Legalgard, Inc. [“Legalgard”], now doing business as Sandenhill, Inc., and Reliance Insurance Co. [“Reliance”], the former eighty-percent owner of Legalgard, for violations of federal and state securities laws, fraud, breach of fiduciary duty, and breach of contract. Pending before the court is the defendants’ motion to dismiss (Doc. No. 10). Because the defendants fail to demonstrate that no relief could be granted on facts consistent with the plaintiff’s allegations, the court will deny the defendants’ motion.

**I. Background**

The amended complaint contains the following allegations. Dalicandro and several others founded Legalgard in 1987. *See* First Am. Compl. (Doc. No. 7) [“Am. Compl.”] ¶ 8. In 1996, Reliance acquired an eighty-percent interest in Legalgard. *See id.* ¶ 10. When Reliance became the majority shareholder of Legalgard, the employee shareholders entered into a shareholders’ agreement with Reliance, Legalgard, and each other. *See id.* ¶ 12. If a shareholder

left the employ of Legalgard, this agreement [“1996 agreement”] required the shareholder to sell his shares to Reliance, the other employee shareholders, or Legalgard at one of the following prices: (1) if terminated for cause, the lower of \$0.70/share or the adjusted book value of the shares; (2) if terminated without cause or if voluntarily terminated, the higher of \$0.70/share or the adjusted book value of the shares. *See id.* The buyout provisions of the 1996 agreement remained in effect until December 10, 1998, two years from the date of the 1996 agreement. *See id.*

In October 1998, Reliance committed to investing new funds of \$1.36/share in Legalgard. *See id.* ¶ 14. At a board meeting on October 16, 1998, Reliance further agreed that the buyout provisions of the 1996 agreement would be extended through December 31, 2000 [“October 1998 agreement”]. *See id.* ¶ 17. Soon after the board meeting, Reliance changed its mind and stated that it would not honor the October 1998 agreement. *See id.* ¶ 18. Instead, Reliance insisted on buyout provisions requiring the sale of a departing employee shareholder’s shares at the lower of \$0.70/share or the adjusted book value of the shares in the event of a termination without cause or a voluntary termination [“Reliance proposal”]. *See id.* Pursuant to the Reliance proposal, these buyout provisions would remain in effect through June 10, 2000. *See id.*

Reliance refused to invest the additional funds until Dalicandro agreed to the Reliance proposal. *See id.* ¶ 19. In order to get the benefit of the buyout provisions of the 1996 agreement, which was still in effect, and to avoid disappointing his colleagues at Legalgard by preventing Reliance’s investment, Dalicandro resigned. *See id.* ¶¶ 20, 23-24. The date of Dalicandro’s resignation is not, however, set forth in the amended complaint.

At the time of his resignation, due to statements made by the CEO of Legalgard, Dalicandro believed that Policy Management Systems Corp. [“PMSC”] was not interested in purchasing Legalgard. *See id.* ¶ 31. In fact, by October 1998, the CEO of Legalgard knew that PMSC was interested in purchasing Legalgard and deliberately deceived Dalicandro. *See id.* ¶¶ 25, 31-32, 38-39. The purpose of this deceit, as well as Reliance’s earlier demand that Dalicandro agree to the Reliance proposal, was to trick Dalicandro into resigning and selling his shares to Legalgard, thereby increasing the value of the Legalgard shares held by Reliance in the event of the company’s sale to PMSC. *See id.* ¶¶ 34-35, 38-40. If Dalicandro had known of PMSC’s interest in Legalgard, he would not have resigned. *See id.* ¶ 44. Instead, he would have remained an employee and a shareholder of Legalgard and would have benefitted from PMSC’s purchase of Legalgard for approximately \$4.00/share in March 1999. *See id.* ¶¶ 37, 44.

## **II. Legal Standard**

The defendants have filed a motion to dismiss for failure to state a claim upon which relief can be granted. *See Fed. R. Civ. P. 12 (b)(6)*. The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the complaint. *See Sturm v. Clark*, 835 F.2d 1009, 1011 (3d Cir. 1987). In deciding a motion to dismiss, the court must “accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the non-movant.” *Jordan v. Fox, Rothschild, O’Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994) (citing *Rocks v. Philadelphia*, 868 F.2d 644, 645 (3d Cir. 1989)). At this stage of the litigation, “[a] court may dismiss a complaint only if it is clear that no relief

could be granted under any set of facts that could be proved consistent with the allegations.”  
*Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

### **III. Discussion**

#### **A. Counts I-IV: Proximate Causation**

In their memorandum in support of the motion to dismiss, the defendants make only one argument<sup>1</sup> to challenge Dalicandro’s federal and state securities law claims (Counts I and IV,<sup>2</sup> respectively), his common law fraud claim (Count II), and his breach of fiduciary duty claim (Count III). Proximate cause is an element of each of these causes of action, and the defendants argue that the misrepresentations of Legalgard’s CEO were not the proximate cause of Dalicandro’s sale of stock or the alleged losses that resulted from that sale. *See* Mem. of Law in Supp. of Defs.’ Mot. to Dismiss the First Am. Compl. (Doc. No. 10) [“Defs.’ Mem.”] at 11-15. To support their proximate cause argument, the defendants rely almost exclusively on *Ketchum v. Green*, 557 F.2d 1022 (3d Cir. 1977). Because *Ketchum* is distinguishable, I find the defendants’ argument unpersuasive at this early stage of the proceedings. Therefore, the court will deny the defendants’ motion to dismiss with respect to Counts I through IV.

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<sup>1</sup>In their reply memorandum, the defendants cursorily question the materiality of the alleged misrepresentations and the existence of a duty on the part of Legalgard to notify Dalicandro of PMSC’s interest. *See* Reply Mem. of Law in Further Supp. of Defs.’ Mot. to Dismiss the First Am. Compl. (Doc. No. 17) at 3-4, 6. Because neither party adequately addresses these issues in their filings, the court will not consider them at this time.

<sup>2</sup>Dalicandro’s amended complaint contains two counts designated “Count IV.” *See* Am. Comp. at 11, 12. I will refer to Dalicandro’s breach of contract claim, the second Count IV, as “Count V.”

In *Ketchum*, the plaintiffs claimed that misrepresentations by the defendants forced the plaintiffs to leave the corporation that employed them and to sell their shares of the corporation's stock at an unfair price. *See id.* at 1023-24. The plaintiffs were required to sell their shares pursuant to the terms of a stock retirement agreement—similar to the 1996 agreement—that stated that when an employee shareholder's employment was terminated, he had to sell his shares to the corporation at a predetermined price. *See id.* The Third Circuit gave two reasons for affirming the dismissal of the plaintiffs' complaint that are pertinent to the case at hand. First, the *Ketchum* court stated that the sale of stock was too far removed from the defendants' fraud due to the "substantial number of intermediate steps between the fraud and the accomplishment of the forced sale of plaintiffs' shares." *Id.* at 1028. Second, the Third Circuit considered the stock retirement agreement to have operated "as an independent and intervening cause" of the sale of the plaintiffs' shares. *See id.* at 1029. Despite the defendants' arguments to the contrary, neither of these reasons persuades me that dismissal of Counts I through IV of Dalicandro's complaint is appropriate at this stage of the proceedings.

According to the *Ketchum* court, the existence of three intermediate steps between the fraud and the sale of stock rendered the sale too far removed from the fraud to allow the survival of the plaintiffs' 10b-5 claim. *See id.* at 1028. In this case, however, there is only one intermediate step between the fraud and the sale of stock: Dalicandro's resignation. *See supra* Part I. This single step is not a "substantial number," and it does not render the defendants' alleged fraud so far removed from the sale of Dalicandro's stock as to jeopardize his claims for relief in Counts I through IV. Consequently, I find this portion of the *Ketchum* court's reasoning to be inapposite to this case.

Additionally, the *Ketchum* court's characterization of the stock retirement agreement as an intervening cause depended on facts not present in this case. Only after acknowledging "that the alleged misrepresentations on the part of the defendants were undertaken with the objective of inducing the expulsion of the plaintiffs as officers and employees—not to foster the surrender of their stock" did the Third Circuit conclude that the stock retirement agreement was the proximate cause of the sale of stock. *Id.* at 1028. The sale of stock in *Ketchum* was "at best . . . an indirect [consequence]" of the intra-corporate power struggle that took place. *Id.*

In this case, there was no power struggle. The purpose of the defendants' alleged fraud was not to take control of Legalgard but to trick Dalicandro into selling his shares. *See* Am. Compl. ¶ 39. Instead of being an intervening cause, the 1996 agreement is alleged to have played an integral part of the defendants' scheme. *See id.* Considering Dalicandro's allegations and the reasonable inferences that can be drawn from them in the light most favorable to him, the 1996 agreement cannot be characterized as an independent intervening cause of Dalicandro's sale and subsequent losses at this stage of the action. *See Jordan*, 20 F.3d at 1261.

The defendants' argument to the contrary notwithstanding, the court concludes that the plaintiff has sufficiently alleged proximate causation. Consequently, I will deny the defendants' motion to dismiss with respect to Counts I through IV.

#### **B. Count V: Foreseeability of Damages**

The defendants challenge Dalicandro's breach of contract claim (Count V) by contesting his ability to prove any damages. *See* Defs.' Mem. at 15-20; *see also Brader v. Allegheny Gen. Hosp.*, 64 F.3d 869, 878 (3d Cir. 1995) (recognizing proof of damages as an essential element of

a breach of contract claim). Specifically, the defendants argue that Dalicandro cannot recover any damages because his losses were not foreseeable when the parties allegedly entered into the October 1998 agreement, the contract at issue. *See* Defs.' Mem. at 18-20 (citing *Keystone Diesel Engine Co. v. Irwin*, 191 A.2d 376, 378 (Pa. 1963), which only allows recovery of damages if they are foreseeable at the time of the contract's making). The defendants base their argument on Dalicandro's allegations that the October 1998 agreement was entered into on October 16, 1998, but that the defendants did not know of PMSC's interest in Legalgard until sometime after October 16 in "late October." *Id.* at 19 (quoting Am. Compl. ¶ 38). According to their reasoning, if the defendants did not know of PMSC's interest on October 16, then both their future attempt to take advantage of PMSC's interest through fraud and Dalicandro's resulting losses were unforeseeable at that time. *See id.*

Although this reasoning is sound, a motion to dismiss may be granted only if it is clear that no relief can be granted, even accepting all allegations in the complaint and the inferences therefrom. *See supra* Part II. Dalicandro's amended complaint contains the allegations on which the defendants base their argument, but it also contains allegations that Reliance and Legalgard were negotiating the sale of Legalgard to PMSC at the time Reliance breached the October 1998 agreement. *See* Am. Compl. ¶¶ 25, 31-32. Presumably, these negotiations did not spring up overnight. Consequently, the court draws the reasonable inference that the defendants may have known of the possible sale of Legalgard to PMSC on October 16. Considering this inference in the light most favorable to Dalicandro, the court is unwilling to conclude on the record before it that Dalicandro's losses were unforeseeable on October 16. Therefore, I will deny the defendants' motion to dismiss with respect to Count V.

#### **IV. Conclusion**

Because the defendants do not show that no relief could be granted on facts consistent with the allegations in the plaintiff's amended complaint, the court will deny the defendants' motion to dismiss. An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

FRANK DALICANDRO	:	
Plaintiff	:	CIVIL ACTION
	:	
v.	:	
	:	
LEGALGARD, INC. d/b/a SANDENHILL, INC.	:	NO. 99-3778
and RELIANCE INSURANCE CO.	:	
Defendant	:	

**ORDER**

YOHN, J.

AND NOW, this     day of March, 2000, upon consideration of the defendants' motion to dismiss (Doc. No. 10) and their reply to the plaintiff's response to the motion to dismiss (Doc. No. 17), as well as the plaintiff's response to the motion to dismiss (Doc. No. 11) and his surreply (Doc. No. 19), IT IS HEREBY ORDERED that the motion to dismiss is DENIED.

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William H. Yohn, Jr.