

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

RICHARD J. HAYDINGER, SR. : CIVIL ACTION
: :
v. : :
: :
ROBERT and BARBARA FREEDMAN : NO. 98-3045
: :
v. : :
: :
RICHARD J. HAYDINGER, SR., MARIANNE :
HAYDINGER, individually and :
as trustee U/T/D 1/1/95, First :
Montgomery Management-n.j., Inc., :
Westgate Properties, Inc., and FMP/ :
Appleby, Inc., and nominal defendants :
FMP/FAIRWAYS ASSOCIATES, L.P., FMP/ :
WESTGATE ASSOCIATES, L.P., and FMP/ :
APPLEBY APARTMENT INVESTORS, L.P. :

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

June 8, 2000

The general partner of real estate partnerships asserted claims of fraud, negligent misrepresentation, breach of fiduciary duty, and conspiracy against a stock broker/advisor, the broker's wife, and the broker's employer, Smith Barney, Inc.¹ Defendant Barbara Freedman, individually and derivatively, counterclaimed to allege fiduciary abuses and conspiracy against the general partner plaintiff and additional counterclaim defendants. Defendants and counterclaim defendants have each moved for summary judgment; counterclaim defendants also filed two motions in limine.

BACKGROUND

¹ All claims against Smith Barney, Inc. were settled in October, 1999.

I. The Parties

Plaintiff and counterclaim defendant Richard Haydinger ("R. Haydinger") and Mitchell Morgan, Esq. ("M. Morgan"), a non-party, were principals in a real estate investment partnership called First Montgomery Properties ("FMP") created in the mid-1980's. M. Morgan, an attorney and accountant, was responsible for financial and legal aspects of FMP and R. Haydinger, a former school teacher, managed FMP's day to day operations. Defendant plaintiff Robert Freedman ("R. Freedman") is a stockbroker and investment advisor employed at all relevant times by Smith Barney, Inc., its predecessors or successors ("Smith Barney"). Defendant and counterclaim plaintiff Barbara Freedman ("B. Freedman"), a school administrator, is R. Freedman's wife. M. Morgan became friends with R. Freedman and B. Freedman in 1980; R. Haydinger and R. Freedman met in 1984 or 1985. R. Haydinger and M. Morgan placed some of their real estate interests in their wives' names; R. Haydinger's wife is Marianne Haydinger ("M. Haydinger"), and M. Morgan's wife is Hillarie Morgan ("H. Morgan"). Robert Grass ("Grass, Jr.") and his father Alex Grass ("Grass") are real estate investors; R. Haydinger and Grass, Jr. were friends since childhood. R. Haydinger, M. Morgan, Grass, Jr. and Grass all have investment accounts at Smith Barney, Inc.

II. The Properties

In 1991, Grass, Jr. called R. Freedman to find a

Philadelphia real estate partner to assist Grass in managing Wallingford Estates ("Wallingford"), a struggling apartment complex owned by Grass. R. Freedman referred Grass to M. Morgan; Grass later hired FMP to manage Wallingford. Over the next several years, Grass and FMP jointly acquired properties, including: 1) Westgate Village Apartments ("Westgate"), acquired in June, 1992;² 2) Fairways Apartments ("Fairways"), acquired in November, 1992;³ and 3) Appleby Apartments ("Appleby"), acquired in January, 1993.⁴ Westgate, Fairways, and Appleby were acquired by Grass, managed by FMP, and majority-owned by Grass through a

² Westgate Village Associates, a general partnership, was created to acquire the Westgate Village Apartments. Grass owned 80% of Westgate Village Associates through a limited partnership. The other 20% of Westgate Village Associates was owned by FMP/Westgate Associates, L.P. FMP/Westgate Associates, L.P. was owned by: 1) Westgate Properties, Inc., a 2% general partner; 2) M. Haydinger, a 44% limited partner; 3) H. Morgan, a 44% limited partner; and 4) B. Freedman, a 10% limited partner.

³ Fairways Apartments Associates, L.P., a limited partnership, was created to acquire and manage Fairways Apartments. The general partner of Fairways Apartments Associates, L.P. was Genparac, Inc., in which Grass was a 70% owner and R. Haydinger and M. Morgan were jointly 30% owners. The limited partner of Fairways Apartments Associates, L.P. was AMT-FMP/Fairways, L.P. AMT-FMP/Fairways, L.P. was owned by: 1) AMT/FMP Corporation, a 1% general partner; 2) AMT Apartment Investors, a 69% limited partner owned by Grass; and FMP/Fairways Associates, L.P., a 29% limited partner. FMP/Fairways Associates, L.P. was owned by FMP/Fairways, Inc., which was owned in equal shares by R. Haydinger, M. Morgan, and three limited partners: 1) M. Haydinger, with 44.5%; 2) H. Morgan, with 44.5%; and 3) B. Freedman, with 10%.

⁴ Appleby Apartment Associates, L.P., a limited partnership, was created to acquire and manage Appleby Apartments. The general partner of Appleby Apartment Associates, L.P. was controlled by Grass, with a 1% ownership share. The 99% limited partner of Appleby Apartment Associates, L.P. was AMT/FMP Appleby, L.P. AMT/FMP Appleby, L.P. was owned by: 1) a 1% general partner controlled by Grass; 2) a 69% limited partnership owned by Grass; and 3) a 30% limited partnership called FMP/Appleby Apartment Investors, L.P. FMP/Appleby Apartment Investors, L.P. was owned by: 1) a 1% general partner known as FMP/Appleby, Inc.; 2) R. Haydinger, a 44.5% limited partner; 3) M. Morgan, a 44.5% limited partner; and 4) B. Freedman, a 10% limited partner.

tiered partnership structure giving FMP a twenty to thirty percent limited partnership share in each apartment complex.

As a general business practice, FMP paid ten percent finders fees to individuals who introduced them to investors, like Grass, who financed FMP real estate acquisition and/or management deals. FMP gave R. Freedman ten percent of its ownership interest in the limited partnerships (in the case of Wallingford estates, ten percent of the management fees earned) as "finder's fees," or "gifts," for R. Freedman's referral of the Grasses. R. Freedman transferred all his ten percent partnership interests to B. Freedman. R. Freedman and B. Freedman claim the ten percent partnership interests were expressions of FMP's appreciation, not finder's fees; they were put in B. Freedman's name for estate planning or some other purpose. Grass did not know of R. Freedman or B. Freedman's interests when FMP transferred them; he found out at a later time.

Smith Barney publishes and enforces regulations tracking federal and state securities regulations and prohibiting licensed employees from entering into partnerships, obtaining interests in partnerships, acting as finders, or obtaining any compensation of any nature in any business other than from Smith Barney, unless prior written disclosures are made to and approved by Smith Barney. At some point in 1996 or 1997, R. Haydinger contacted Smith Barney to inquire about the propriety and legality of the

Freedmans' acceptance of the partnership interests. Smith Barney, conducting an investigation of R. Freedman's business dealings with FMP, found no wrongful conduct by R. Freedman.

In August, 1996, M. Morgan and R. Haydinger severed their joint interests in FMP. R. Haydinger formed a new management company: First Montgomery Management-n.j. ("Fmm-n.j."); M. Morgan remained as principal of FMP. In November, 1996, Grass sold all of Wallingford and his controlling interest in the general partnerships and majority limited partnerships of Westgate, Fairways, and Appleby, to M. Morgan for \$4 million. Some of the acquisitions were made in H. Morgan's name. In December, 1996, R. Haydinger acquired all of M. Morgan's and H. Morgan's partnership interests in FMP/Westgate Associates L.P., FMP/Fairways Associates, L.P. and FMP/Appleby Apartment Investors, L.P., as well as M. Morgan's shareholder interests in Westgate Properties, Inc., FMP/Fairways, Inc. and FMP/Appleby, Inc., the general partners of these limited partnerships. R. Haydinger also purchased the Grass majority interests and M. Morgan's interest in the limited partnerships. By December 30, 1996, R. Haydinger and M. Haydinger owned a majority of the limited partner shares in FMP/Fairways Associates, L.P., FMP/Westgate associates, L.P. and FMP/Appleby Apartment Investors, L.P.; fmm-n.j. managed Westgate, Fairways, and Appleby.

III. The Conflict

By December 30, 1996, R. Haydinger had consolidated his interest in the various partnerships by purchasing the shares of Grass and the Morgans. B. Freedman was the only party unwilling to sell her shares to R. Haydinger at the price he offered. On December 16, 1997, R. Haydinger caused the general partners of FMP/Westgate Associates, L.P., FMP/Westgate Associates, L.P., and FMP/Appleby Apartment Investors, L.P. to sell the underlying real estate to other entities controlled by R. Haydinger. The Westgate property was sold to Fmm-n.j., Inc.; the Fairways and Appleby properties were sold to a Haydinger family trust, with M. Haydinger as trustee. R. Haydinger then requested that B. Freedman sign a formal release of her ownership share, in exchange for a percentage of the sale proceeds. B. Freedman refused to consent.

DISCUSSION

I. Subject Matter Jurisdiction

Richard Haydinger is a citizen of New Jersey; defendants R. Freedman and B. Freedman are citizens of Pennsylvania. This court has subject matter jurisdiction over plaintiff's claims because of the diversity of citizenship. See 28 U.S.C. § 1332.

M. Haydinger is a citizen of New Jersey; this court has subject matter jurisdiction over counterclaim plaintiff's claims against counterclaim defendants R. Haydinger and M. Haydinger.

See 28 U.S.C. § 1332. Regardless of the citizenship of the additional counterclaim defendants (M. Haydinger as trustee for First Montgomery Management-n.j., Inc., FMP/Fairways, Inc., Westgate Properties, Inc., and FMP/Appleby, Inc.), there is supplemental jurisdiction over the claims raised by the counterclaim plaintiff. See 28 U.S.C. § 1367(a); In re Texas Eastern Trans Pub. Contamination Lit., 15 F.3d 1230, 1238 (3d Cir. 1994) (additional non-diverse counterclaim defendants do not destroy diversity jurisdiction when there is complete diversity of citizenship between the originally named parties).

Pennsylvania law applies to the claims and counterclaims.

II. Summary Judgment Standard

Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A defendant moving for summary judgment bears the initial burden of demonstrating that there are no facts supporting the plaintiff's claim; then the plaintiff must introduce specific, affirmative evidence that there is a genuine issue for trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-324 (1986).

"When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the

mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

The court must draw all justifiable inferences in the non-movant's favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). A genuine issue of material fact exists only when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Id. at 248. The non-movant must present sufficient evidence to establish each element of its case for which it will bear the burden at trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986). The court has a duty to grant summary judgment when the nonmoving party fails to proffer evidence sufficient to survive a motion for judgment as a matter of law at trial; if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation, the court must grant summary judgment. See Barnes Foundation v. Township of Lower Merion, 982 F. Supp. 970, 982 (E.D. Pa. 1997).

III. R. Freedman and B. Freedman's Motion For Summary Judgment

R. Haydinger claims R. Freedman made fraudulent ("Count I") and/or negligent representations ("Count II"), breached his fiduciary duty of loyalty ("Count III") and, in conspiracy with B. Freedman, breached an implied covenant of good faith and fair

dealing ("Count V") and conspired to induce R. Haydinger to give B. Freedman minority ownership of the limited partnerships ("Count VI"). Smith Barney, a defendant in Counts III and IV, settled all claims with R. Haydinger so Count IV was dismissed and Count III is proceeding against R. Freedman only. R. Freedman and B. Freedman move for summary judgment on all counts.

A. Fraudulent Misrepresentation and Breach of Fiduciary Duty (Counts I & III)

R. Haydinger can recover on Counts I and III only if R. Freedman owed him a duty to disclose certain information.⁵ R. Freedman owed R. Haydinger no duty pertaining to the real estate investments at issue, so these counts fail as a matter of law.

In Pennsylvania, fraudulent misrepresentation consists of:

1) false representation of an existing fact or nonprivileged failure to disclose, which is 2) material to the transaction at hand, 3) made with knowledge of its falsity or recklessness as to whether it is true or false; 4) with the intention of misleading another into relying on it; 5) justifiable reliance on the misrepresentation; and 6) a resulting injury proximately caused by the reliance.

Benevento v. Life USA Holding, Inc., 61 F. Supp. 2d 407, 417 (E.D. Pa. 1999) (citing Gibbs v. Ernst, 538 Pa. 193, 207 (1994)). A claim of fraud based on failure to disclose information "is actionable if there exists a confidential or fiduciary relationship." Thompson v. Glenmede Trust Co., No. 92-5233, 1993

⁵ R. Haydinger's main argument is that R. Freedman improperly induced R. Haydinger to give the Freedmans a minority ownership interest in the real estate partnerships formed by FMP and Grass; that R. Freedman breached his duty to disclose alleged conflicts of interest arising from R. Freedman's side-dealings with Smith Barney clients R. Haydinger and Grass.

WL 349352 at *4 (E.D. Pa. Sep. 8, 1993). To demonstrate the existence of a fiduciary duty, plaintiff must "show a relationship in which trust and confidence were reposed by one side, and domination and influence exercised by the other." Id.; see also Lazin v. Pavilion Partners, No. 95-601, 1995 WL 614018 at *5 (E.D. Pa. Oct. 11, 1995); City of Harrisburg v. Bradford Trust Co., 621 F. Suppl 463, 473 (M.D. Pa. 1985).

To proceed to a jury on his fraud claim, R. Haydinger must establish that R. Freedman had a duty to disclose conflicts of interest concerning R. Freedman's or Smith Barney's relationships with R. Haydinger, M. Morgan, or Grass. R. Freedman owed no such duty to R. Haydinger because there were no conflicts of interest between R. Freedman and R. Haydinger, Grass, or M. Morgan. R. Haydinger and R. Freedman did not have a relationship in which trust and confidence were reposed by one side, and domination and influence exercised by the other. M. Morgan initially contacted R. Freedman looking for real estate investors; R. Freedman did not initiate the subject transactions. All properties were managed by FMP; R. Freedman became a silent, limited partner. R. Haydinger reposed limited, if any, trust and confidence in R. Freedman, and R. Freedman exercised no domination or influence over R. Haydinger in the relevant real estate transactions. FMP urged R. Freedman to take the ten percent interests; it is undisputed that R. Freedman resisted the offer before accepting

the ten percent interests in accordance with FMP's ongoing business practice of paying referral fees. FMP could have rejected R. Freedman's Grass referral as easily as it accepted it; there is no evidence that R. Freedman pressured FMP, M. Morgan, or R. Haydinger to deal with Grass.⁶

R. Haydinger claims that if he had known of R. Freedman's alleged conflict of interest in owning interests in property of Smith Barney clients, FMP would never have given the Freedmans any limited partnership interests. R. Haydinger also argues R. Freedman failed to disclose to Grass, a Smith Barney client, that R. Freedman was receiving ten percent interests in FMP's shares. Even if R. Freedman breached a disclosure duty to Grass,⁷ R. Freedman had no duty to disclose anything to R. Haydinger. Introducing M. Morgan to Grass did not oblige R. Freedman to disclose anything to R. Haydinger even if R. Haydinger had an unrelated Smith Barney account. No law or policy creates a duty to disclose; R. Haydinger cites none. R. Haydinger failed to establish fraud as a matter of law.

It is irrelevant whether R. Freedman violated New York Stock

⁶ R. Haydinger attempts to raise claims of Fmm-n.j., FMP, and the partnerships. The referral fees B. Freedman received were paid by FMP, not by R. Haydinger; even if his claims could prevail, R. Haydinger has no standing to raise the claims that belong to Fmm-n.j., FMP, or the partnerships.

⁷ Even if R. Freedman owed some disclosure duty to Grass, R. Haydinger would not have standing to raise a claim for breach of that duty. Grass testified he was indifferent when asked whether it would have mattered to him that B. Freedman was receiving fees and partnership interests. See Grass N.T. at 39:17-40:7.

Exchange, N.A.S.D., and Smith Barney regulations prohibiting stockbrokers from, inter alia, engaging in private real estate investment activity, engaging in investment activity with clients, accepting gratuities over \$100, acting as an agent, consultant, or finder in any investment advice, obtaining outside compensation of any nature, including management fees, or becoming a partner to any business, corporation, or partnership. R. Haydinger has no securities law claims, or other cause of action for R. Freedman's purported violation of Smith Barney regulations; Smith Barney itself found no wrongful conduct by R. Freedman.

It is undisputed that R. Haydinger had an account with Smith Barney, and that R. Freedman owed R. Haydinger a fiduciary duty concerning that account. But that account did not give rise to a disclosure duty in every future business relationship between them. The Grass-FMP transaction had nothing remotely to do with R. Haydinger's account at Smith Barney, and R. Freedman's duties to R. Haydinger regarding his trading account were irrelevant to separate transactions initiated by M. Morgan for FMP. If R. Freedman was obliged to disclose his relationship with Grass or others under New York Stock Exchange, Smith Barney, or N.A.S.D. regulations, these regulations are not the basis of a disclosure duty to R. Haydinger; the duties are owed to Smith Barney and the regulatory authorities, not to R. Haydinger.

R. Haydinger argues R. Freedman has a duty arising from their confidential relationship. Under Pennsylvania law, a confidential relationship is "any relation existing between parties to a transaction wherein one of the parties is bound to act with the utmost good faith for the benefit of the other party and can take no advantage to himself from his acts relating to the interest of the other party." In re Estate of Mihm, 497 A.2d 612, 615 (Pa. Super. 1985). Mihm and other Pennsylvania cases of confidential relationships involve agreements between family members; however, "a confidential relationship is not limited to any particular association of parties but exists wherever one occupies toward another such a position of advisor or counsellor [sic] as reasonably to inspire confidence that he will act in good faith for the other's interest." Id. The general test for determining the existence of a confidential relationship is "whether it is clear that the parties did not deal on equal terms." Id.

There is no evidence that R. Freedman failed to reveal anything to R. Haydinger that he was obliged to disclose. The parties dealt on equal terms concerning the real estate investments. M. Morgan, on behalf of FMP, approached R. Freedman to find real estate investors; no reasonable jury could find a confidential relationship giving R. Freedman a duty to disclose purported ulterior interests in obtaining ten percent interests

in real estate deals between R. Freedman and R. Haydinger.⁸ R. Freedman's introduction of M. Morgan to Grass did not create a legal obligation for R. Freedman to disclose anything to R. Haydinger.

R. Freedman's involvement in the FMP real estate transactions neither created nor breached any legal duty owed to R. Haydinger; R. Haydinger's first and third counts fail as a matter of law. Summary judgment will be granted on Counts I and III.

B. Negligent Misrepresentation (Count II)

Liability for negligent misrepresentation arises when: 1) the misrepresentation is of a material fact; 2) the misrepresentation is made under circumstances in which the misrepresenter ought to have known its falsity; 3) the misrepresenter intended to induce another to act on it; and 4) an injury to a party acting in justifiable reliance on the misrepresentation results. Bortz v. Noon, 729 A.2d 555, 561 (Pa. 1999); see also Gibbs v. Ernst, 647 A.2d 882 (Pa. 1994). The misrepresentation must concern a material fact; the speaker need not know his words are untrue, but must have failed to make a reasonable investigation of the truth of these words. See Bortz,

⁸ R. Haydinger and M. Morgan were 50-50 partners in FMP when they initially contacted R. Freedman; they acted for and on behalf of each other. Morgan's knowledge regarding R. Freedman's position and the benefits or detriments of giving him ownership of real estate investments can be attributed to R. Haydinger.

729 A.2d at 561. “[L]ike any action in negligence, there must be an existence of a duty owed by one party to another.” Id.

While negligence turns on many factual inquiries, R. Freedman owed R. Haydinger no legal duty regarding the real estate transactions. In the absence of such a duty, the claim of negligent representation fails. Count II fails as a matter of law. Summary judgment will be granted on Count II.

C. Implied Covenant of Good Faith and Fair Dealing (Count V)

A covenant of good faith and fair dealing is not implied in every contract under Pennsylvania law. See, e.g., Baker v. Lafayette College, 504 A.2d 247, 275 (Pa. Super. 1986) (Spaeth, P.J. dissenting) (“[n]o Pennsylvania appellate case . . . has explicitly held that the covenant of good faith and fair dealing is to be implied into every contract). 13 P.S. § 1203 states “[e]very contract . . . imposes an obligation of good faith in its performance or enforcement,” but the comments to the statute make clear that “[t]his section does not support an independent cause of action for failure to perform or enforce in good faith.” Where a party can seek relief under an established cause of action, there is “no reason to imply a separate tort for breach of a duty of good faith.” Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 701 (3d Cir. 1993) (interpreting Pennsylvania law). Even if Pennsylvania recognized an implied covenant of good faith and fair dealing, an underlying contract

would be a prerequisite. See City of Rome v. Glanton, 958 F. Supp. 1026, 1038 (E.D. Pa. 1997).

There was no contract between R. Haydinger and R. Freedman concerning the real estate partnerships; R. Freedman could not have violated an implied covenant of good faith and fair dealing. See Glanton, 958 F. Supp. at 1038. Summary judgment will be granted on Count V as to R. Freedman.

There were contracts between B. Freedman and R. Haydinger (or entities controlled by R. Haydinger) concerning the real estate investments. B. Freedman was never more than a ten percent limited partner in anything. Limited partnership agreements, though creating complex tiered ownership and investment structures, do not impute the duties of good faith and fair dealing to the limited partners, in contrast to the general partner. See, e.g., In re Estate of Hall, 517 Pa. 115, 133, 535 A.2d 47, 56 (1987). R. Haydinger sought relief under established causes of action; he has no claim for breach of an implied covenant of good faith and fair dealing. Summary judgment will be granted in Count V as to B. Freedman.

D. Civil Conspiracy (Count VI)

To establish civil conspiracy, R. Haydinger must show that two or more persons combined with intent to do an unlawful act or to do an otherwise lawful act by unlawful means, with malice, i.e., intent to injure, without justification. See GMH Assoc.,

Inc. v. Prudential Realty Group, No. 198 EDA 1999, 2000 WL 228918, *13 (Pa. Super. Mar. 1, 2000) (citing Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 412 A.2d 466 (1979)). If no fraud has been committed, there can be no civil conspiracy to defraud. See id.

R. Haydinger claims B. Freedman and R. Freedman combined with intent to injure him by acting in concert to fraudulently conceal information, and induce him to diminish and impair his ownership of the partnerships. The unlawful agreement, R. Haydinger argues, is evidenced by B. Freedman's testimony that she and R. Freedman discussed and agreed to title the partnership interests in B. Freedman's name. Such communication, consultation and cooperation, R. Haydinger argues, constitutes an agreement upon which civil conspiracy can be found. R. Haydinger further argues that R. Freedman and B. Freedman fraudulently concealed that R. Freedman's "ownership" of the ten percent interests violated federal securities laws and Smith Barney Compliance Regulations, a tortious act in furtherance of their agreement to harm R. Haydinger. At the heart of R. Haydinger's conspiracy claim is that R. Freedman and B. Freedman fully benefitted from illegal ownership of the ten percent interests without penalty.

No formulation of facts presented by R. Haydinger allows him to succeed; he has established neither that B. Freedman and R. Freedman had an agreement with intent to do a wrongful act to

harm R. Haydinger, nor that they committed a wrongful or tortious act. B. Freedman and R. Freedman agreed to place the ten percent interests in B. Freedman's name, but there is no evidence they did so with intent to harm R. Haydinger. R. Freedman committed no fraud and was not negligent as to R. Haydinger; absent additional facts, there is no evidence that he and B. Freedman conspired to commit fraud or were negligent as to R. Haydinger. R. Haydinger only offers conjecture in support of his assertion that R. Freedman and B. Freedman intended to do an unlawful act;⁹ R. Haydinger adduced no evidence of malicious intent. No reasonable jury could find facts supporting a civil conspiracy against R. Haydinger by B. Freedman and R. Freedman. Summary judgment will be granted on Count VI.

IV. Counterclaim Defendants' Motion for Summary Judgment

B. Freedman brings derivative claims on behalf of Fairways Associates, Westgate Associates, and Appleby Investors for misappropriation of partnership property ("Count I") and usurpation of corporate opportunity by R. Haydinger and related parties ("Count II"). B. Freedman individually claims R. Haydinger and M. Haydinger conspired to deprive her of the value of her interests in the limited partnerships ("Count III"); B.

⁹ R. Haydinger argues that R. Freedman's alleged violation of federal and state securities laws, and Smith Barney regulations, caused actionable injury. It did not. R. Haydinger has no private claims under the securities laws, and no private claim against R. Freedman or B. Freedman under Smith Barney regulations.

Freedman also claims R. Haydinger and Fmm-n.j. conspired to deprive B. Freedman of the value of her interest in Westgate Associates by causing Westgate to transfer its sole asset to M. Haydinger ("Count IV"). B. Freedman demands an accounting of all relevant limited partnerships to determine profits, losses, and the value of her shares ("Count V"). Counterclaim defendants move for summary judgment on Counts I-IV.

Counterclaim defendants' motion to disqualify B. Freedman as the derivative plaintiff on counterclaim Counts I and II has been denied. See Order, March 1, 2000.

A. Derivative Claims: Misappropriation of Partnership Property & Usurpation of Opportunity (Counts I and II)

B. Freedman, as derivative plaintiff on behalf of limited partnerships of which she owned ten percent (FMP/Westgate Associates, L.P., FMP/Fairways Associates, L.P., and FMP/Appleby Apartment Investors, L.P.) claims their respective general partners (Westgate Properties, Inc., FMP/Fairways, Inc., and FMP/Appleby, Inc.) misappropriated partnership property and usurped partnership opportunities when, under R. Haydinger's ownership and control, the general partners sold their underlying real estate for inadequate consideration.

The general partner of a limited partnership owes the partnership and his partners the fiduciary duty of loyalty. See Clement v. Clement, 260 A.2d 728, 729 (Pa. 1970). In Pennsylvania, a limited partner can bring an action against a

general partner for breach of fiduciary duties. See Engl v. Berg, 511 F. Supp. 1146, 1152-53 (E.D. Pa. 1981); cf. Kenworthy v. Hargrove, 855 F. Supp. 101, 105 (E.D. Pa. 1994). The "object of the derivative action is, in essence, to enforce the limited partners' rights against the Partnership, albeit by an action against the general partner, to protect their interest in the Partnership." Id. at 1153.

"Every partner must account to the partnership for any benefit and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct or liquidation of the partnership or from any use by him of its property." 15 Pa. C.S. § 8334.

The limited partnerships for whom B. Freedman brought Counts I and II were owed fiduciary duties of loyalty by their general partners. R. Haydinger, for himself and on behalf of his wife (individually and as trustee), controlled the general partners of Westgate Village Apartments, Fairways Apartments, and Appleby Apartments, as of January 1, 1997.

R. Haydinger and M. Haydinger, as officers or trustees of general partners, are not protected by the business judgment rule. In Pennsylvania, the business judgment rule "reflects a policy of judicial noninterference with business decisions of corporate managers, presuming that they pursue the best interests

of their corporations." Cuker v. Mikalauskas, 547 Pa. 600, 608, 692 A.2d 1042, 1046 (1997). The rule insulates officers and directors from judicial intervention in the absence of self-dealing, fraud, or irrational decisions. See id. at 612. A dispute of material fact has been raised whether counterclaim defendants engaged in self-dealing and acted against the best interests of the real estate partnerships. The business judgment rule does not protect counterclaim defendants if the factual allegations against them are proven. Where a general partner's self dealing and/or gross negligence is demonstrated, he is not entitled to the presumption of the business judgment rule; the burden of proof is shifted to the general partner to demonstrate the challenged transaction is intrinsically fair.

Liability for breach of fiduciary duty is established when a fiduciary is unjustly enriched by its actions. See In re Insulfoams, Inc., 184 B.R. 694, 708 (Bkrctcy. E.D. Pa. 1995). A fiduciary may not take personal advantage of a corporate opportunity when the corporation to which he owes a fiduciary duty can avail itself of the business opportunity. See CST, Inc. v. Mark, 360 Pa. Super. 303, 520 A.2d 469 (Pa. Super. 1987). Whether a business opportunity is a corporate opportunity is a question of fact to be determined from circumstances existing at the time. Id.

The December 16, 1997 sale of the underlying real estate was

directed by R. Haydinger on behalf of the general partners; there is a disputed issue of material fact whether he sold at a fair rate, the portion of each sales price to which the limited partners were entitled, and whether the sale was executed for the improper purpose of furthering R. Haydinger or the general partners at the expense of B. Freedman or the limited partnerships. It is disputed whether R. Haydinger, M. Haydinger, or M. Haydinger as trustee for the acquiring entities, were unjustly enriched by the December 16, 1997 sale of the properties. It is also disputed whether R. Haydinger's December 16, 1997 sales of the real estate to entities he controlled, and his subsequent application for a loan against some of those properties, constituted a usurpation of corporate opportunity for real estate partnerships that could be sold for more money in the open market.

B. Freedman has produced evidence supporting an attempt of counterclaim defendants to avoid liability by tiered partnership and corporate forms. Freedman as derivative plaintiff has produced evidence that FMP/Appleby, Inc., FMP/Fairways, Inc. and Westgate Properties, Inc. breached a fiduciary duty of care or loyalty to the limited partners by selling the underlying real estate for inadequate consideration, self-dealing by contracting for services in exchange for inappropriate consideration, and/or usurping corporate opportunities by not offering the underlying

properties for sale on the open market.

B. Freedman produced evidence that R. Haydinger attempted to borrow \$7 million against the equity of the two properties in late December, 1997; this, along with the alleged motive to "squeeze out" B. Freedman, is sufficient evidence of improper motivation in orchestrating the sales of the real estate to warrant trial on the issues of fact.

Summary judgment on Counts I and II will be denied.

B. Civil Conspiracy: M. & R. Haydinger (Count III)

B. Freedman's direct claims (Counts III and IV) must assert direct injury apart from that suffered by the limited partnership. "An injury to a corporation may, to be sure, result in injury to the corporation's stockholders. Such injury, however, is regarded as 'indirect,' and insufficient to give rise to a direct cause of action by the stockholders." Burden v. Erskine, 401 A.2d 369, 370 (Pa. Super. 1979); see also John L. Motley Associates, Inc. v. Robert Rumbaugh, et al., 104 B.R. 683, 686 (E.D. Pa. 1989) ("any diminution in the value of shares as a result of injury to the corporation is not sufficient ground for a shareholder to sue in his own right.") Where a shareholder can establish an injury personal to herself and apart from any injury done to the corporation, she may bring a suit in her own name. See, e.g., Gregory v. Correction Connection, Inc., No. 88-7990, 1991 WL 42992, at *15 (E.D. Pa. Mar. 27, 1991) (individual action

lies where a director acts to wrongfully entrench himself in an entity).

B. Freedman's personal claims are distinct from those asserted derivatively. B. Freedman's personal claims are for the harm caused by R. Haydinger's attempts to eliminate B. Freedman's interest in the partnerships. B. Freedman's derivative claims are for the reduction in value of the limited partnerships caused by R. Haydinger's conduct. There is a difference between the value of the limited partnerships and the physical shares B. Freedman held in those partnerships; R. Haydinger's alleged attempt to eliminate B. Freedman's ownership interest in the partnership shares can be the basis of a direct claim. B. Freedman's direct claims are not barred.

To establish civil conspiracy, B. Freedman must show that two or more persons combined with intent to do an unlawful act or to do an otherwise lawful act by unlawful means, with malice, i.e., intent to injure, without justification. See GMH Assoc., Inc. v. Prudential Realty Group, No. 198 EDA 1999, 2000 WL 228918, *13 (Pa. Super. Mar. 1, 2000) (citing Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 412 A.2d 466 (1979)).

Agreement with intent to harm can be demonstrated directly or by inference from conduct. See Centennial School District v. Independence Blue Cross, 885 F. Supp. 683, 689 (E.D. Pa. 1994). It is a jury question whether, based on the evidence of R.

Haydinger and M. Haydinger's actions restructuring and transferring ownership of the underlying Fairways and Appleby real estate in December, 1997, there was an implied agreement to deprive B. Freedman of her interest in the properties. Summary judgment on Count III will be denied.

C. Civil Conspiracy: R. Haydinger & Fmm-n.j. (Count IV)

B. Freedman also alleges R. Haydinger and Fmm-n.j. conspired on December 16, 1997 to deprive her of the value of her interest in Westgate Associates. A conspiracy requires at least two persons or corporate entities; a corporation is incapable of conspiring with itself because it can only act through its officers and employees. See Jagielski v. Package Mach. Co., 489 F. Supp. 232, 233 (E.D. Pa. 1980). R. Haydinger is the principal of Fmm-n.j., and cannot be liable for conspiracy with it. Summary judgment will be granted on Count IV.

V. Counterclaim Defendants' Motion in Limine to Preclude Evidence Relating to Transactions of Non-Party Apartment Buildings in 1998 and 1999

Counterclaim plaintiff B. Freedman, individually and as derivative plaintiff, seeks to introduce evidence of transactions by counterclaim defendants after the December 16, 1997 sale of FMP/Fairways, Inc., Westgate Properties, Inc., and FMP/Appleby, Inc. to other entities controlled by R. Haydinger. Evidence of the transactions is relevant to R. Haydinger's alleged wrongful motives in the December 16, 1997 sale, and to damages if B.

Freedman proves liability. B. Freedman allegedly never owned any interest in the relevant properties after December 16, 1997, but this is not relevant if a jury finds the limited partners (or B. Freedman) were illegally deprived of the value of the ownership interest on December 16, 1997 or the ownership interest itself.

The motion in limine will be denied.

VI. Motion in Limine to Preclude Extrinsic Evidence of Understandings Contrary to the Partnership Agreement

The parol evidence rule bars all evidence of extrinsic understandings of a written agreement from contradicting or modifying the agreement. See Baker v. Cambridge Chase, Inc., 725 A.2d 757, 771 (Pa. Super. 1999). Counterclaim defendants seek exclusion of evidence which counterclaim plaintiff has not asserted she will introduce. To the extent that parol evidence is offered by the counterclaim plaintiff, unless it falls into an exception to the rule, it will not be allowed. This motion will be granted without prejudice to either party offering parol evidence at trial to clarify ambiguity or prove fraud, i.e., the parol evidence rule will apply.

CONCLUSION

R. Haydinger has neither standing nor any substantive legal basis for his claims. B. Freedman has established genuine issues of material fact on all but one count of the counterclaims. The parties will be realigned and the action will proceed to trial on all surviving claims.

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

RICHARD J. HAYDINGER, SR. : CIVIL ACTION
: :
v. : :
: :
ROBERT and BARBARA FREEDMAN : NO. 98-3045
: :
v. : :
: :
RICHARD J. HAYDINGER, SR., MARIANNE :
HAYDINGER, individually and :
as trustee U/T/D 1/1/95, First :
Montgomery Management-n.j., Inc., :
Westgate Properties, Inc., and FMP/ :
Appleby, Inc., and nominal defendants :
FMP/FAIRWAYS ASSOCIATES, L.P., FMP/ :
WESTGATE ASSOCIATES, L.P., and FMP/ :
APPLEBY APARTMENT INVESTORS, L.P. :

ORDER

AND NOW this 8th day of June, 2000, upon consideration of the motion of defendants Robert Freedman and Barbara Freedman for summary judgment, plaintiff Richard J. Haydinger's opposition thereto, counterclaim defendants' motion for summary judgment, the memorandum in opposition to counterclaim defendants' motion for summary judgment, counterclaim defendants' motion in limine to preclude evidence relating to transactions of non-party apartment buildings in 1998 and 1999, the memorandum in opposition, counterclaim defendants' motion in limine to preclude extrinsic evidence of understandings contrary to the Partnership Agreement, the memorandum in opposition, and the attached memorandum,

It is **ORDERED** that:

1. The Motion of Defendants Robert Freedman and Barbara Freedman for Summary Judgment is **GRANTED**. Judgment is entered for defendants Robert and Barbara Freedman and against plaintiff Richard Haydinger on all claims in Richard Haydinger's complaint.

2. Counterclaim Defendants' Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART**. Summary judgment is granted for counterclaim defendants on Count IV. Summary judgment is denied on all other Counts.

3. Counterclaim Defendants' Motion in Limine to Preclude Evidence Relating to Transactions of Non-Party Apartment Buildings in 1998 and 1999 is **DENIED** to the extent relevant to prove improper transactions or valuations by general partners in corporations in which B. Freedman had a ten percent interest.

4. Counterclaim Defendants' Motion in Limine to Preclude Extrinsic Evidence of Understandings Contrary to the Partnership Agreement is **GRANTED** without prejudice to either party offering parol evidence at trial to clarify ambiguity or prove fraud.

5. The parties will be realigned, and the caption amended, as follows:

BARBARA FREEDMAN	:	CIVIL ACTION
	:	
v.	:	
	:	
RICHARD J. HAYDINGER, SR., MARIANNE	:	
HAYDINGER, individually and	:	
as trustee U/T/D 1/1/95, First	:	
Montgomery Management-n.j., Inc.,	:	
Westgate Properties, Inc., and FMP/	:	
Appleby, Inc., and nominal defendants	:	
FMP/FAIRWAYS ASSOCIATES, L.P., FMP/	:	
WESTGATE ASSOCIATES, L.P., and FMP/	:	
APPLEBY APARTMENT INVESTORS, L.P.	:	NO. 98-3045

6. A final pretrial conference will be held on August 10, 2000 at 4:00 p.m. A settlement conference will be scheduled with Magistrate Judge Angell prior to that date.

Norma L. Shapiro, S.J.