

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

THE ESTATE OF JOSEPHINE QUIGLEY and
KARIBA HOLDINGS LIMITED,

Plaintiffs,

v.

EAST BAY MANAGEMENT, INC., TED
KARKUS, EAST BAY MANAGEMENT, LTD,
SCOTT STRADY, and JOHN DOE,

Defendants.

CIVIL ACTION
NO. 13-5547

MEMORANDUM

SCHMEHL, J.

June 17, 2014

Plaintiffs bring claims based on allegedly unauthorized stock transfers in 1997 and 2002. The claims related to the 2002 transfer from Plaintiff Kariba to Defendants East Bay Management, Inc., and Scott Strady, are time-barred and will be dismissed with prejudice because it is apparent even at this stage that Kariba did not exercise the diligence necessary to toll the statute of limitations. The allegations regarding the 1997 transfer from Plaintiff Estate of Josephine Quigley to Defendant East Bay Management, Ltd., are insufficient to assess statute of limitations issues at this time; however, that same lack of specificity compels dismissal of the Estate's fraud and conspiracy claims without prejudice.

Factual and Procedural Background

The individual actuating this suit for both Plaintiffs is Guy Quigley, Chairman, President, and CEO of The Quigley Corporation at least from 1996 through 2008. In

2009, Defendant Ted Karkus replaced Guy Quigley as CEO of the company, now called ProPhase Labs, Inc., after a contested proxy fight. Guy Quigley was authorized to bring suit on behalf of Plaintiff Kariba Holdings Limited, a Bahamian company set up (possibly in the names of Guy Quigley and his wife, with Quigley and his sisters acting as directors at various times) for the purpose of holding shares of The Quigley Corporation belonging to Quigley's mother, Josephine Quigley.¹

Facts of Kariba's Claims

As of August 2002, Kariba held 210,000 shares of Quigley Corporation stock under certificate TQC2695, allegedly valued at \$8.03 per share. On August 15, 2002, these shares were transferred to several recipients: 100,000 shares to Joseph Currivan (notably, Plaintiffs do not take issue with this aspect of the transfer); 25,000 shares to William J. Reilly, Esq., who controlled Kariba until shortly before the transfer (as with Currivan, Plaintiffs bring no claims against Reilly); 50,000 shares to East Bay Management, Inc., an entity with which Karkus may have been involved; and 35,000 shares to Scott Strady, about whom very little information appears of record. According to Plaintiffs, Kariba was not paid for the shares.

Plaintiffs allege that no one acting for Kariba authorized the transfer, and that the new officers of Kariba, who took over when Reilly ceased control prior to the transfer, were unaware of Kariba's ownership of these shares. The transfer record lists an address for Kariba (which actually happens to be at The Quigley Corporation), suggesting the record would have reached one or more people responsible for Kariba. Plaintiffs allege Karkus directed the transfer. The complaint notes that Karkus knew the transfer would

¹ Defendant offers deposition testimony regarding Guy Quigley's involvement with Kariba, but Plaintiffs deny any relationship beyond authorization to bring this suit. The details are ultimately irrelevant because Kariba itself, not Guy Quigley, is the Plaintiff.

require Kariba's approval, and describes a process by which Karkus would typically purchase shares of The Quigley Corporation through Reilly; however, it does not offer a description of the way in which Karkus departed from that process and effected the transfer on this occasion, without Kariba approval and with Reilly no longer running Kariba.

Facts of the Estate's Claims

Josephine Quigley died on October 26, 1996. She left a will naming her son, Guy Quigley, as executor of her estate, though Guy Quigley did not act to probate the will until August 8, 2013. The complaint alleges that at the time, Josephine Quigley owned 96,000 shares of Quigley Corporation stock, worth \$17.50 per share. On April 21, 1997, according to the complaint, all of these shares were transferred to Defendant East Bay Management, Ltd., an entity with which Defendant Karkus has somewhat more readily admitted involvement than with the incorporated entity of the same name. As with Kariba's claims, Plaintiffs allege that no compensation was paid for these shares. Again, Plaintiffs allege Karkus orchestrated this transfer and describe his usual process of purchasing Quigley Corporation shares, but again they fail to explain how the transfer occurred in this instance. The complaint is also devoid of any facts as to who may have been conducting affairs on behalf of the deceased Josephine Quigley at the time of the transfer or during the many years preceding the recent raising of her estate.

Additional Facts and Procedural History Common to All Claims

Plaintiffs' brief indicates they "became aware of the fraudulent transfer[s]" when Karkus admitted during the course of other litigation that he had some

relationship with one or both of the East Bay Management entities.² The parties have indeed engaged in other litigation, including: a related case currently also before the undersigned, *Gary Quigley v. East Bay Management, Inc.*, 13-3998; three earlier cases in this Court, *The Quigley Corporation v. Karkus*, 09-1725, *The Quigley Corporation v. Karkus*, 09-2438, and *Karkus v. The Quigley Corporation*, 09-2239; two cases in the Court of Common Pleas of Bucks County, *ProPhase Labs, Inc. v. Quigley*, No. 2010-08227, and *ProPhase Labs, Inc. v. Quigley*, No. 2011-09815; and a case in the Court of Common Pleas of Philadelphia County, *Quigley v. Karkus*, December Term 2011, No. 000409.

Plaintiffs initiated the present case by filing a complaint in the Court of Common Pleas of Bucks County on August 9, 2013. Defendant Karkus removed to this court on September 23, 2013. Defendant Karkus filed a motion to dismiss and stay discovery, and on January 7, 2014, the Court held oral argument on that motion as well as the motion to dismiss in related case *Gary Quigley v. East Bay Management, Inc.*, 13-3998.³ The motion in this case will be granted in part for reasons discussed below.⁴

² See Plaintiffs' Memorandum in Support of their Answer to Defendant's Motion to Dismiss (Docket #4) at 8.

³ The motion to dismiss in 13-3998 is granted with prejudice in its entirety as discussed in a separate opinion and order.

⁴ Attorneys for Karkus note they do not represent the other Defendants, and in fact dispute the existence of East Bay Management, Inc. Kariba's claims regarding the 2002 transfer (Counts I, III, V, and VII) will be dismissed with prejudice as to all Defendants against whom they are asserted (East Bay Management, Inc., Ted Karkus, and Scott Strady) because it is clear that the statute of limitations defense raised by Karkus would equally preclude any claims against the others. See *Jefferies v. D.C.*, 916 F. Supp. 2d 42, 46-47 (D.D.C. 2013); see also *Berg v. Obama*, 574 F. Supp. 2d 509, 515 n.6 (E.D. Pa. 2008), *aff'd*, 586 F.3d 234 (3d Cir. 2009); *Coggins v. Carpenter*, 468 F. Supp. 270, 279 (E.D. Pa. 1979). Further, this memorandum and the accompanying order will serve as notice that the Court may dismiss the remaining claims (brought by the Estate against Karkus, East Bay Management, Ltd., and John Doe) as to Defendant East Bay Management, Ltd., for lack of service. Any John Doe must of course eventually be identified. The Estate's claims against Karkus are addressed in this opinion. Finally, the Court will not address Count IX at this time because piercing the corporate veil is not an independent cause of action.

Discussion

The Court will continue to address Kariba's 2002 claims and the Estate's 1997 claims separately. The section on Kariba's claims will focus on statute of limitations, discovery rule, and diligence issues. The law discussed in that part will carry through to the section on the Estate's claims, which will consider timeliness issues but focus on pleading standards and the elements of the claims.

Kariba's Claims Regarding the 2002 Transfer

The complaint contains claims by Kariba against East Bay Management, Inc., Karkus, and Strady, regarding the 2002 transfer of shares to those Defendants (and others not parties to this action). Kariba asserts causes of action for fraud, conversion, unjust enrichment, and civil conspiracy; the time periods in which these claims must be brought are two years, two years, four years, and two years, respectively. *See* 42 Pa. C.S.A. §§ 5524 & 5525. Statutes of limitations such as these serve the purposes of finality and repose. *See Estate of Miller ex rel. Miller v. Hudson*, 528 F. App'x 238, 240 (3d Cir. 2013); *White-Squire v. U.S. Postal Serv.*, 592 F.3d 453, 459 (3d Cir. 2010). "Generally, a statute of limitations period begins to run when a cause of action accrues; i.e., when an injury is inflicted and the corresponding right to institute a suit for damages arises." *Gleason v. Borough of Moosic*, 15 A.3d 479, 484 (Pa. 2011).

Nevertheless, the running of limitations periods may be tolled by the discovery rule "when 'the injured party is unable, despite the exercise of due diligence, to know of his injury or its cause.'" *Perelman v. Perelman*, 545 F. App'x 142, 149 (3d Cir. 2013) (quoting *Knopick v. Connelly*, 639 F.3d 600, 609 (3d Cir. 2011)). "To invoke the rule, a plaintiff must exercise reasonable diligence in discovering his injury." *Kach v. Hose*, 589

F.3d 626, 642 (3d Cir. 2009). A plaintiff must have “exhibited those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interests and the interests of others.” *Id.* at 642 (quoting *Wilson v. El-Daief*, 964 A.2d 354, 362 (Pa. 2009)).

The only other seriously contended basis for tolling the statutes in this case is the fact that the underlying substance of the claims involves fraud, but that does not fundamentally change the reasonable diligence analysis. While Plaintiff cites a case stating that the period will be tolled “without more” when the cause of action sounds in fraud, that simply means the more active cover-up sometimes described with respect to equitable tolling under fraudulent concealment is not necessary; the requirement of diligence on a plaintiff’s part still applies. *See Beauty Time, Inc. v. VU Skin Sys., Inc.*, 118 F.3d 140, 144 (3d Cir. 1997) (“Regardless of the grounds for seeking to toll the statute, the plaintiff is expected to exercise reasonable diligence in attempting to ascertain the cause of any injury.”); *Wise v. Mortgage Lenders Network USA, Inc.*, 420 F. Supp. 2d 389, 395 (E.D. Pa. 2006) (assessing, in the case Plaintiff cites, whether the plaintiffs had “alleged facts that are sufficient to show they did not, and could not, have discovered the fraud and breach until” a later time). Reasonable diligence is also required of plaintiffs seeking equitable tolling because of fraudulent concealment. *See Beauty Time, Inc.*, 118 F.3d at 144. Reasonable diligence also remains a separate element for tolling even when there is a so-called “self-concealing conspiracy,” which only makes it unnecessary to show affirmative acts of concealment. *See Bethlehem Steel Corp. v. Fischbach & Moore, Inc.*, 641 F. Supp. 271, 274-75 (E.D. Pa. 1986).

Here, Plaintiff Kariba's causes of action arise out of a supposedly unauthorized transfer of stock in 2002. Reasonable diligence on the part of Kariba and any individuals responsible for Kariba's affairs⁵ would have uncovered the unauthorized transaction almost immediately and certainly far too early to make a complaint filed in 2013 timely. Any company acting reasonably maintains some accounting of its assets that at a minimum would draw attention to a transfer of stock worth, by Plaintiff's numbers, \$1,686,300. A company that exists for the specific purpose of holding assets (particularly assets of one specific sort, namely stock shares of a specific company) surely should be aware of major transactions involving those holdings.

Kariba argues that it only became aware of the causes of action when Karkus admitted some relationship with one or both of the East Bay Management defendants. But the claim is that Kariba never authorized the transfer, not that Kariba did authorize the transfer but would not have done so had it known that Karkus was involved with the East Bay entities. This reading of the claim (that Kariba is asserting it was unaware of the transfer rather than merely unaware of Karkus's involvement) is borne out by the fact that Kariba has also sued East Bay Management, Inc., and Strady, even though both of those Defendants appear plainly on the transfer record. The claim would have been discovered, therefore, when the transfer was discovered, not when Karkus admitted involvement with East Bay. Reasonable diligence—as determined by any reasonable finder of fact—would have uncovered the transfer shortly after its occurrence, so there is no basis to toll the limitations periods and all of Kariba's claims are untimely. Given the long lapse of time

⁵ The parties spend effort in their briefs debating Guy Quigley's relationship with Kariba and his knowledge of the company's affairs, issues that are ultimately irrelevant. The plaintiff is Kariba, and the claims are Kariba's.

and the repeated litigation among these parties, the purposes of the statutes of limitations are well served by dismissal of these claims.

The Estate's Claims Regarding the 1997 Transfer

With respect to the Estate's claims regarding the 1997 transfer of Josephine Quigley's shares to East Bay Management, Ltd., after her death, the Court is unable to conduct the above statute of limitations analysis that disposes of Kariba's claims. The key difficulty lies in assigning the obligation to exercise diligence. The complaint does not provide enough information about how the deceased's interests were handled in the long period of time between her death and the formal initiation of her estate. Who was the trustee, executor, or administrator? Who had the responsibility of watching her interests, assets, and accounts? Whose approval should have been sought for the transfer at issue? The complaint alleges that *no one* had authority over Josephine Quigley's assets at the time. That simply cannot be true. Although the transfer obviously happened many years ago, given Plaintiffs' assertion of the discovery rule and other tolling doctrines, the applicability of the statutes of limitations is not apparent on the face of the complaint.

This lack of clarity may save the Estate's claims from statute of limitations issues at this point, but it also calls into question whether the Estate has sufficiently pled its claims. "Under Rule 12(b)(6), a motion to dismiss may be granted only if, accepting all well-pleaded allegations in the complaint as true and viewing them in the light most favorable to the plaintiff, a court finds that plaintiff's claims lack facial plausibility." *Morrow v. Balaski*, 719 F.3d 160, 165 (3d Cir. 2013) (quoting *Warren Gen. Hosp. v. Amgen Inc.*, 643 F.3d 77, 84 (3d Cir. 2011)), *cert. denied*, 134 S. Ct. 824, 187 L. Ed. 2d 686 (U.S. 2013). "To survive a motion to dismiss, a complaint must contain sufficient

factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation marks omitted). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 678. “Though ‘detailed factual allegations’ are not required, a complaint must do more than simply provide ‘labels and conclusions,’ or ‘a formulaic recitation of the elements of a cause of action.’” *Perelman*, 545 F. App’x at 146 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Looking first at Count IV, the Estate’s claim for conversion, Defendant focuses on what he describes as Plaintiff’s failure to allege “intent to assert dominion or control over the chattel that is inconsistent with the owner’s right.” *Montgomery v. Fed. Ins. Co.*, 836 F. Supp. 292, 300 (E.D. Pa. 1993) (citing *Shonberger v. Oswell*, 530 A.2d 112, 114 (Pa. Super. Ct. 1987)). The Estate alleges Josephine Quigley owned shares of stock that were then transferred to Defendants’ ownership without authorization or compensation; no further citation is necessary to conclude that this is a sufficient allegation of interference with Plaintiff’s rightful dominion over the stock. For Count VI, the Estate’s claim for unjust enrichment, Defendant argues there is no well-pleaded link from Josephine Quigley’s shares to Karkus. To the contrary, the Estate has alleged Josephine Quigley’s shares were transferred to East Bay Management, Ltd., and “that Karkus was the owner/controlling shareholder/director of . . . EBM, Ltd.” Accepting that allegation as true, the linkage between Plaintiff’s shares and Karkus’s benefit is clear and complete. In any event, the unjust enrichment “remoteness” concern Defendant cites is far more conceptual than what is involved in this case. *See Century Indem. Co. v. URS Corp.*,

CIV.A. 08-5006, 2009 WL 2446990 (E.D. Pa. Aug. 7, 2009) (analyzing remoteness with respect to partial reimbursement of inflated insurance claims and comparing to cases involving claims by health care providers against tobacco companies).⁶

The Estate has not, however, sufficiently pled its claims for conspiracy (Count VIII) and fraud (Count II). “A civil conspiracy claim ‘must set forth allegations that address the period of the conspiracy, the object of the conspiracy, and the certain actions of the alleged conspirators taken to achieve that purpose.’” *ITP, Inc. v. OCI Co., Ltd.*, 865 F. Supp. 2d 672, 684 (E.D. Pa. 2012) (quoting *Gen. Refractories Co. v. Fireman's Fund Ins. Co.*, 337 F.3d 297, 313 (3d Cir. 2003)). The elements of a fraud claim are:

- (1) a representation;
- (2) which is material to the transaction at hand;
- (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false;
- (4) with the intent of misleading another into relying on it;
- (5) justifiable reliance on the misrepresentation; and
- (6) the resulting injury was proximately caused by the reliance.

Freeman v. Pittsburgh Glass Works, LLC, 709 F.3d 240, 257 (3d Cir. 2013) (quoting *EBC, Inc. v. Clark Bldg. Sys.*, 618 F.3d 253, 275 (3d Cir. 2010)). In addition to requiring those particular elements, a fraud claim entails a special pleading standard: “In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). The complaint here merely states that the transfer of shares occurred and was unauthorized; it offers no explanation whatsoever of the way in

⁶ Defendant also argues the unjust enrichment claim fails because there are no facts pled to plausibly explain how Karkus was able pull off the unauthorized transfer. That failure undermines the fraud and conspiracy claims as discussed below, but not conversion and unjust enrichment. Even if the transfer were transparent and authorized—meaning there would be no allegations of how the transfer was secretly accomplished—claims for conversion and unjust enrichment might still be viable if Plaintiff was never paid.

which it was accomplished. There is not one allegation describing any representation made by any defendant with regard to the transfer, and obviously there can be no allegations regarding the materiality, falsity, intent, or reliance characteristics of a representation that has not itself been alleged. Likewise, there are no allegations of what actions any alleged conspirator took to achieve the transfer. As noted in the factual recitation above, the complaint explains Karkus's normal process for acquiring Quigley Corporation shares but fails to allege in any way the process he used for the transfer at issue. The fraud and conspiracy claims must, therefore, be dismissed, though Plaintiff will be given an opportunity to amend and improve the pleadings.

Conclusion

All of the Kariba claims regarding the 2002 transfer are untimely, so Counts I, III, V, and VII are dismissed with prejudice. Count IX, the veil-piercing claim, does not present an independent cause of action, so while it need not be dismissed, it cannot on its own hold any party in the case; accordingly, Plaintiff Kariba and Defendants East Bay Management, Inc., and Scott Strady are out of the case entirely. The statutes of limitations do not bar the Estate's claims on the face of the complaint. The Estate's claims for conversion and unjust enrichment are sufficient at this stage, so Counts IV and VI will not be dismissed. The Estate's allegations are insufficient, however, to support claims of fraud and conspiracy, so Counts II and VIII will be dismissed with leave to amend.

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KARKUS, EAST BAY MANAGEMENT, LTD,
SCOTT STRADY, and JOHN DOE,

Defendants.

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ORDER

AND NOW, this 17th day of June, 2014, upon consideration of the Motion to Dismiss filed by Defendant Ted Karkus (Docket #2) and all supporting and opposing papers, and after argument held, it is hereby **ORDERED** as follows:

1. With respect to Counts I, III, V, and VII, the Motion is **GRANTED** and these counts are **DISMISSED WITH PREJUDICE**.⁷ The Clerk is directed to terminate Plaintiff Kariba Holdings Limited and Defendants East Bay Management, Inc., and Scott Strady as parties to this action.⁸
2. With respect to Counts IV and VI, the Motion is **DENIED**.
3. With respect to Counts II and VIII, the Motion is **GRANTED** and these counts are **DISMISSED WITHOUT PREJUDICE**. Plaintiff Estate of Josephine Quigley may file an amended complaint within **thirty** days.

⁷ As explained in the accompanying memorandum opinion, although only Defendant Karkus has appeared and moved to dismiss, these counts are dismissed with prejudice as to all Defendants against whom they are asserted.

⁸ Count IX is not an independent cause of action and is not dismissed, but no claims remain with respect to these parties.

It is further **ORDERED** that Plaintiff Estate of Josephine Quigley shall show cause within **fifteen** days why this case should not be dismissed with respect to East Bay Management, Ltd., for lack of service.

BY THE COURT:

/s/ Jeffrey L. Schmehl
Jeffrey L. Schmehl, J.