

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

IAN J. WESTWOOD-BOOTH : CIVIL ACTION  
: :  
v. : :  
: :  
DAVY-LOEWY LTD., A SUBSIDIARY :  
OF DAVY INTERNATIONAL, DAVY :  
MCKEE CONSTRUCTION CORP., A :  
SUBSIDIARY OF DAVY INTER- :  
NATIONAL AND DAVY INTERNATIONAL :  
N/K/A KVAERNER DAVY : NO. 97-7539

M E M O R A N D U M

WALDMAN, J.

April 13, 1999

I. Introduction

Plaintiff has asserted claims against defendants for breach of contract, breach of a duty of good faith and fair dealing, fraud and tortious interference with contractual relations. He seeks damages of \$200,000,000. The underlying conduct of which plaintiff complains occurred in 1978, nineteen years before he filed his initial complaint in this action.

Presently before the court is defendant's motion to dismiss plaintiff's amended complaint. Defendant asserts that plaintiff has failed to plead a cognizable fraud claim and that, in any event, his claims are time-barred.

## II. Legal Standard

The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of a complaint. See Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). In deciding such a motion, the court accepts as true the factual allegations in the complaint and reasonable inferences therefrom, and views them in a light most favorable to the nonmovant. See Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). Dismissal of a claim is appropriate when it clearly appears that the facts alleged and reasonable inferences therefrom are legally insufficient to entitle plaintiff to relief. See Pennsylvania ex. rel. Zimmerman v. PepsiCo, Inc., 836 F.2d 173, 179 (3d Cir. 1988); Robb v. Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984).

In considering a motion to dismiss, the court may also consider exhibits appended to the complaint and matters of public record. See Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.2 (3d Cir. 1994); Pension Benefit Guaranty Corp. v. White Consolidated Industries, Inc., 998 F.2d 1192, 1196 (3d Cir. 1993).

The expiration of the limitations period may be asserted by motion to dismiss when it clearly appears on the face of the complaint that a claim is time-barred. See Oshiver, 38 F.3d at 1384 n.1; Ledesma v. Jack Stewart Produce, Inc., 816 F.2d 482, 484 n.1 (9th Cir. 1987); Guy v. Swift and Co., 612 F.2d 383,

385 (8th Cir. 1980); White v. Padgett, 475 F.2d 79, 82 (5th Cir.), cert. denied, 414 U.S. 861 (1973); Velez v. City of New London, 903 F. Supp. 286, 289 (D. Conn. 1995); Wameo III, Ltd. v. First Piedmont Mortg. Corp., 856 F. Supp. 1076, 1079 (E.D. Va. 1994); Sabo v. Parisi, 583 F. Supp. 1468, 1470 (E.D. Pa. 1984).

### **III. Facts**

The facts as alleged by plaintiff are as follow.

In 1978, plaintiff was chairman of Midvale Forge Corporation. Midvale Forge is now defunct. On August 18, 1978, plaintiff and defendant Davy-Loewy Ltd. entered into an agreement under which Davy-Loewy would assist in the acquisition and refurbishing of the Midvale Forge plant. Davy-Loewy agreed to provide a recourse guarantee for 10 percent of the costs of financing the acquisition and refurbishment, provided that Midvale Forge obtained the remaining 90 percent subject to a guarantee of the United States Economic Development Administration ("EDA"). Davy-Loewy also agreed to manage the refurbishment of the plant and to invest \$12 million in a corporation which would be created to acquire Midvale Forge.

Plaintiff obtained a written commitment dated August 15, 1978 from Bank Brussels Lambert, Ltd. ("Bank Brussels"), providing for a line of credit of \$73.8 million which represented 90 percent of the refurbishment costs. The Bank Brussels guarantee required Davy-Loewy to manage the refurbishment.

Plaintiff also obtained a repayment guarantee from the EDA in the amount of \$55 million, subject to Davy-Loewy's final agreement.

A meeting was held in late August or early September of 1978 to finalize plaintiff's application to the EDA. John Lepp, Davy-Loewy's contract finance manager, announced at the meeting that Davy-Loewy was withdrawing its commitment and would not participate in acquiring or refurbishing the Midvale Forge plant because British Intelligence had discovered that a Midvale Forge financial consultant was "a KGB double agent."<sup>1</sup> Mr. Lepp's statement was "backed" by a British ambassador.<sup>2</sup>

Mr. Lepp knew the consultant was not actually a KGB double agent. Plaintiff attempted unsuccessfully to persuade the EDA representatives that his consultant was not a KGB operative. The EDA, as well as Davy-Loewy, then withdrew from the project.

Plaintiff alleges that on December 20, 1995, he "received" a copy of memorandum dated September 5, 1978 on a Davy-Loewy letterhead purporting to be drafted by Mr. Lepp and signed by him, K. Ross and K.L. Jackson. The latter are respectively identified as director of Davy-Loewy's Hydraulic

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<sup>1</sup> Plaintiff does not allege where this meeting occurred, but it may be inferred that it was held in the offices of the EDA.

<sup>2</sup> Plaintiff does not allege the identity of the ambassador or the country to which he was assigned. Plaintiff does not allege that this ambassador was at the meeting and, if he was not, when, where or to whom he "backed" Mr. Lepp's statement.

Machinery Division and its commercial director. In the memorandum, the three individuals confess to orchestrating an underhanded scheme to subvert the Midvale Forge deal with the assistance of British Intelligence, the British Foreign Ministry and an unidentified British ambassador. They acknowledge in the memorandum that they and Davy-Loewy would be liable if any lawsuit were filed as a result of the nefarious scheme.

The memorandum also recites that the real reason Davy-Loewy withdrew from the Midvale Forge project was because it wanted to acquire Cleveland-based McKee Construction Company and thus "had to get out from under the Midvale Forge agreement" as "it would not be proper for Davy-Loewy to have an ongoing interest in the largest open die forge in the Western Hemisphere; at the same time owning the largest steel mill builders in the U.S.A." The memorandum further recites that at a meeting in London, various officials of Davy-Loewy and its parent, Davy International, decided that Mr. Lepp should "meet in secret with the British Ambassador in the chancellery with his staff and British Intelligence to plot a plausible story." It was decided that "the way to topple Midvale Forge was to attack the credibility of the two financial consultants hired by Ian Westwood-Booth."<sup>3</sup>

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<sup>3</sup> Presumably, Davy-Loewy's parent is a named defendant because its officials participated in the nefarious meeting described in the memorandum. The factual basis for the assertion of claims against Davy McKee Construction Corporation cannot be readily discerned from the amended complaint.

Plaintiff filed an initial complaint one year and 359 days after receiving a copy of this self-incriminating memorandum.

#### IV. Discussion

The Pennsylvania limitations period for causes of action for breach of contract arising prior to 1982 is six years. The 1982 legislation setting a four year period provides that it applies only to causes of action arising after enactment. See 42 Pa. C.S.A. § 5525(8); Woody v. State Farm Fire & Cas. Co., 965 F. Supp. 691, 694 (E.D. Pa. 1997). The statute of limitations runs from the time of the breach. Dunoff v. Corestates Bank, N.A., 1997 WL 214856, at \*2 (E.D. Pa. Apr. 24, 1997); Romeo & Sons, Inc. v. P.C. Yezbak & Son, Inc., 652 A.2d 830, 832 (Pa. 1995).<sup>4</sup>

Plaintiff maintains that this claim is not time-barred because he only learned the true reason Davy-Loewy breached the contract when he "received" a copy of the self-incriminating memorandum.

Motive, however, is not an element of a breach of contract claim. Plaintiff knew that Davy-Loewy had reneged on its commitment in 1978. Plaintiff was aware of the operative

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<sup>4</sup> In addressing all of the claims, the parties rely exclusively on and assume the applicability of Pennsylvania law. The court also notes that the alleged objective and effect of each claimed breach of duty by defendants was to avoid contractual obligations largely to have been performed in Pennsylvania.

facts giving rise to a breach of contract claim at that time.<sup>5</sup> Plaintiff's contract claim is time-barred.

Pennsylvania courts have cited Restatement (Second) of Contracts § 205 for the proposition that every contract has an implied term that the parties will perform their duties in good faith. See, e.g., Somers v. Somers, 613 A.2d 1211, 1213 (Pa. Super. 1992). The courts in fact, however, have recognized an independent cause of action for breach of a duty of good faith and fair dealing only in very limited circumstances. See Creeger Brick and Building Supply, Inc. v. Mid-State Bank and Trust Co., 560 A.2d 151, 153, 154 (Pa. Super. 1989) (duty is limited to insurers' dealings with insured and franchisors' dealings with franchisees). See also Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 701 (3d Cir. 1993) ("under Pennsylvania law, every contract does not imply a duty of good faith"). It is most doubtful that the Pennsylvania Supreme Court would recognize an independent cause of action for bad faith in the context of a typical arms length business contract.

Courts have utilized the good faith duty as an interpretive tool to determine the parties' justifiable

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<sup>5</sup> Indeed, it appears that plaintiff asserted a claim for breach of contract within the six year limitations period in this district at Civ. No. 84-2848 in which he alleged Davy-Loewy reneged on an agreement to provide funds "to revitalize the operations of Midvale." That claim was dismissed on a Rule 12(b)(6) motion by Judge Newcomer who also imposed sanctions on plaintiff's counsel.

expectations in the context of a breach of contract action, but that duty is not divorced from the specific clauses of the contract and cannot be used to override an express contractual term. See Duquesne Light Co. v. Westinghouse Electric Corp., 66 F.3d 604, 617 (3d Cir. 1995); USX Corp. v. Prime Leasing, Inc., 988 F.2d 433, 439 (3d Cir. 1993).

In any event, a claim for breach of the duty of good faith and fair dealing is subject to the same limitations period as an action for breach of contract. Anserphone, Inc. v. Bell Atlantic Corp., 955 F. Supp. 418, 431 (W.D. Pa. 1996). This claim is predicated on the alleged bad faith abrogation by David-Loewy of its 1978 commitment and is also time-barred.

The Pennsylvania limitations period for fraud in 1978 was six years. See A.J. Cunningham Packing Corp. v. Congress Financial Corp., 792 F.2d 330, 337 (3d Cir. 1986). In 1982 the limitations period was changed to two years but that period applies only to causes of action arising thereafter. See 42 Pa. C.S.A. § 5524(7).

The limitations period runs from the time a plaintiff knows, or by the exercise of reasonable diligence should know, that he has been injured by the conduct of another. Beauty Time, Inc. v. Vu Skin Systems, Inc., 118 F.3d 140, 144 (3d Cir. 1997); Bohus v. Beloff, 950 F.2d 919, 924 (3d Cir. 1991). Lack of knowledge, mistake or misunderstanding do not toll the running of

the limitations period. Pocono Int'l. Raceway, Inc. v. Pocono Produce, 468 A.2d 468, 471 (Pa. 1983). The period is tolled only if a person in the plaintiff's position exercising reasonable diligence would have been unaware of the salient facts concerning the occurrence of an injury and who or what caused it. Baily v. Lewis, 763 F. Supp. 802, 806 (E.D. Pa.), aff'd, 950 F.2d 721 (3d Cir. 1991). "There are very few facts which cannot be discovered through the exercise of reasonable diligence." Vernau v. Vic's Market, Inc., 896 F.2d 43, 46 (3d Cir. 1990).

If a claimant could evade a statute of limitations simply by alleging he only learned of events underlying his claim within the statutory period, courts would be unable to dismiss claims which are clearly time-barred. LRL Properties v. Portage Metro Housing Authority, 55 F.3d 1097, 1107 n.5 (6th Cir. 1995) (discussing identical federal discovery rule). Plaintiff's allegation that he "received" a copy of a virtual confession and admission of liability by Davy-Loewy officials is little more. There are no factual averments regarding how or from whom plaintiff received this document. There are no factual averments regarding the surrounding circumstances from which one could possibly find that the document or events it purports to memorialize could not have been discovered seven or more days earlier, in which case plaintiff's claims would be time-barred under his own theory as suit was initiated more than 103 weeks

after he allegedly received a copy of the memorandum.<sup>6</sup>

In any event, the acquisition of the document does not toll the limitations period for seventeen years. The limitations period runs from the time a plaintiff knows or reasonably should know of the salient facts and not from the time he acquires convincing evidence to prove a claim.

Plaintiff asserts that "the facts necessary for the claim to accrue" were concealed from plaintiff until 1995 when he received the self-incriminating memorandum. Mr. Lepp's statement about a KGB double agent was not concealed from plaintiff and he acknowledges that he "attempted to persuade representatives of the EDA that the statement was not true." Unless plaintiff was himself guilty of fraud, he presumably would not have done so unless he believed the statement to be untrue. Surely in the exercise of reasonable diligence, plaintiff could have asked his consultant if the charge of association with the KGB was true.

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<sup>6</sup> In failing to make any factual allegations regarding the circumstances of his acquisition of this document, plaintiff has also failed to make even a colorable showing of authenticity. Defendants point out that the same signatures which appear on the xerox copy of the memorandum appeared on a \$1,000,000 note issued by Davy-Loewy to plaintiff which he attempted to enforce in a Montgomery County Common Pleas Court action filed in September 1983. When no Davy-Loewy employee could recall ever issuing the note and after an expert found the signatures to be forgeries, the Court enjoined plaintiff from attempting to negotiate, enforce or transfer the note. Even assuming the authenticity and admissibility of the remarkable self-incriminating memorandum, it would constitute evidence and not salient facts necessary to assert his claims.

If the consultant denied the charge, plaintiff would have known enough to proceed forthwith on any cognizable claim predicated on the misrepresentation. If the consultant acknowledged a KGB connection, of course, there would be no misrepresentation.

Moreover, plaintiff has failed to state a cognizable claim for fraud. He does not allege that he justifiably relied on Mr. Lepp's false statement. Plaintiff suggests that he can state a claim for fraud based on the reliance of the EDA on the misrepresentation. A plaintiff cannot state a claim for fraud based on a third party's reliance on a misrepresentation, even when it was made to influence the third party foreseeably to act in a manner detrimental to the plaintiff. See Kurtz v. American Motorists Ins. Co., 1995 WL 695111, at \*3-5 (E.D. Pa. Nov. 21, 1995); Elia v. Erie Ins. Exch., 581 A.2d 209, 212 (Pa. Super. 1990) (no cause of action for fraud absent misrepresentation intended to cause plaintiff to act and subsequent justifiable reliance by plaintiff).

A claim for tortious interference with contractual relations is generally subject to a two-year statute of limitations. See 42 Pa. C.S.A. § 5524(7). Where, however, a tortious interference claim is predicated on an allegedly defamatory statement, the one-year statute of limitations for defamation applies. See 42 Pa. C.S.A. § 5523; Tucker v. MTS, Inc., 1998 WL 67527, \*3 (E.D. Pa. Feb. 18, 1998); Hurst v. Beck,

1992 WL 396592, at \*4-5 (E.D. Pa. Dec. 17, 1992); Evans v. Philadelphia Newspapers, Inc., 601 A.2d 330, 334-35 (Pa. Super. 1991). As such, plaintiff's claim would be time-barred even if the limitations period did not run until 1995 when he received a copy of the self-incriminating memorandum.

Plaintiff acknowledges that "a potential claim for defamation could have been based on the KGB remark" but asserts that his "action for tortious interference is based upon an independent action from the KGB remark." He asserts the claim is based on the "secret scheme" revealed in the self-incriminating memorandum. The alleged secret scheme, however, was to denounce plaintiff for engaging an operative with KGB ties.

In any event, the limitations period began to run when plaintiff personally witnessed Mr. Lepp make the KGB comment to EDA representatives and was unsuccessful in convincing them it was false, and not seventeen years later when plaintiff allegedly discovered the precise reason Davy-Loewy acted to induce the EDA to withdraw its loan guarantee.

In a fifth unlabeled claim, plaintiff asserts that "Defendants' cover-up and secret scheme was purposely and intentionally designed to harm Plaintiff's reputation in the business community." Defendants reasonably assumed that plaintiff was attempting to state a claim for defamation and noted that even under plaintiff's theory, it would be barred by

the one year statute of limitations.

Plaintiff responded that he was not attempting to state a claim for defamation but rather for fraudulent concealment of the "secret scheme." Plaintiff does not further elaborate.

It is true that fraud is not limited to affirmative misrepresentations. It also encompasses an intentional concealment of material facts calculated to deceive the other party. See Sewak v. Lockhart, 699 A.2d 755, 759-60 (Pa. Super. 1997). It does not, however, encompass a failure to inform another party of the business reasons for having made an affirmative misrepresentation. As with the case of a misrepresentation, it also does not encompass the fraudulent concealment of information to deceive a party other than the plaintiff.<sup>7</sup>

#### **V. Conclusion**

Plaintiff has presented absolutely no factual information from which one could find that the copy of the remarkable memorandum is authentic or that the matters described therein could not have been discovered even one week earlier. Moreover, while plaintiff may have been unaware of defendants' perceived business interest in doing what they did and of the

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<sup>7</sup> If plaintiff is suggesting that he has pled a distinct cognizable claim against defendants for concocting a "secret scheme" at a meeting in London apart from the acts actually committed in the execution of the scheme, he has not.

complicity of the British Foreign Ministry and intelligence service, he was aware of the salient facts underlying his claims in 1978. Even assuming the authenticity of the self-incriminating memorandum could be established and that the events described were undiscoverable during the intervening seventeen years, plaintiff's claims are time-barred.

Accordingly, defendants' motion will be granted. An appropriate order will be entered.

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O R D E R

AND NOW, this            day of April, 1999 upon  
consideration of defendants' Motion to Dismiss (Doc. #10) and  
plaintiff's response thereto, consistent with the accompanying  
memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and  
the above action is **DISMISSED**.

BY THE COURT:

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JAY C. WALDMAN, J.