

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

PENNSYLVANIA SHIP SUPPLY, INC.,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	NO. 99-2418
	:	
FLEMING INTERNATIONAL, LTD.,	:	
	:	
Defendant.	:	

MEMORANDUM

ROBERT F. KELLY, J.

JUNE 9, 2000

Presently before the Court is the Motion for Partial Summary Judgment of Defendant, Fleming International, Ltd. ("Fleming"). Fleming seeks the dismissal of the claims filed by Plaintiff, Pennsylvania Ship Supply, Inc. ("Penn Ship"), against Fleming for conversion and fraud and misrepresentation. For the reasons that follow, Fleming's Motion is granted.

I. FACTS.

This lawsuit is based on business transactions between Penn Ship and Fleming beginning in 1994 under which Fleming sold food and food products to distributors in provinces in the former Soviet Union ("Russia"). The claim for conversion in Count I of Penn Ship's Complaint involves a transaction where sales were made to a Russian company named Sakhalin Pischetorg ("SP"). In transactions with SP, Fleming would ship a product directly to SP, SP would pay Penn Ship and then Penn Ship would pay Fleming less Penn Ship's profit margin of 20-25%. In early 1995,

according to Arie Ehieli ("Ehieli"), Penn Ship's President, food products were sold to SP valued at \$140,000.00. Fleming had previously extended a \$40,000.00 credit to SP for food quality claims. Penn Ship, according to Ehieli, erroneously paid Fleming \$140,000.00 and never received reimbursement.¹

Penn Ship originally produced no evidence that payment was ever made to Fleming, but following Ehieli's deposition, Penn Ship produced three checks totaling \$97,036.86 dated February 22, 1995, May 11, 1995 and May 23, 1995.² The three checks are drawn on the account of Global Import-Export, Inc. ("Global"), made payable to Fleming International, bear a memo referring to Sakhalin #3 and are signed by Miriam Ehieli.³ Penn Ship never produced any ledger or documents other than these checks to establish either that payment was made or when payment was made.

Count II of Penn Ship's Complaint alleges fraud and misrepresentation arising from a food exhibition which took place in Vladivostock in 1995. According to Penn Ship, Fleming agreed to share the costs of the food exhibition, but Fleming never paid any portion of the costs nor intended to make any payment for the

¹There is no claim that Fleming procured the payment from Penn Ship in an improper fashion.

²The total amount of the three checks paid to Fleming is incorrectly identified in Fleming's Motion as \$97,036.79.

³Ehieli stated at deposition that Global is "my company" and Fleming never had an agreement with Global. (Ehieli Dep. at 86.)

costs. The last written communication from Penn Ship to Fleming regarding food exhibition expenses is dated July 17, 1995.

Ehieli testified at deposition that after July 17, 1995, he repeatedly requested payment from Marc Itow ("Itow"), a Fleming employee. Itow, however, never told Ehieli that Fleming would pay. Rather, Itow told Ehieli that he would have to speak with Gary Sternberg ("Sternberg"), another Fleming employee. Ehieli never successfully contacted Sternberg. Two or three years later, Ehieli spoke with Wayne Epperson ("Epperson"), another Fleming representative, and complained to Epperson about expenses for the food exhibition. Epperson indicated that he would contact Ehieli after he spoke to Sternberg. Epperson never contacted Ehieli.

Penn Ship filed this lawsuit against Fleming on May 11, 1999 alleging conversion (Count I), fraud and misrepresentation (Count II), and breach of contract (Counts III and IV). On September 15, 1999, Penn Ship filed its Amended Complaint setting forth essentially the same claims contained in the original Complaint against Fleming.

II. STANDARD.

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, Summary Judgment is proper "if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The moving

party has the initial burden of informing the court of those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). An issue is genuine only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). A factual dispute is material only if it might affect the outcome of the suit under governing law. Id. at 248.

To defeat Summary Judgment, the non-moving party cannot rest on the pleadings, but rather that party must go beyond the pleadings and present "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). The non-moving party must produce evidence such that a reasonable juror could find for that party. Anderson, 477 U.S. at 248. If the court, in viewing all reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of material fact, then summary judgment is proper. Celotex, 477 U.S. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir. 1987).

III. DISCUSSION.

A. Count I - Conversion.⁴

⁴Penn Ship was not the entity which issued payment to Fleming. Rather, Global made three payments totaling \$97,036.86. Because neither party has briefed whether Penn Ship has standing

Under Pennsylvania law, conversion is defined as "the deprivation of another's right of property, or use or possession of a chattel, or other interference therewith, without the owner's consent and without legal justification." See Universal Premium Acceptance Corp. v. York Bank & Trust Co., 69 F.3d 695, 704 (3d Cir. 1995)(citation omitted); see also Federal Ins. v. Ayers, 772 F. Supp. 1503, 1509 (E.D. Pa. 1991). Conversion can be committed by:

(1) acquiring possession of the chattel with the intent to assert a right to it which is adverse to the owner; (2) transferring the chattel and thereby depriving the owner of control; (3) unreasonably withholding possession of the chattel from one who has the right to it; and (4) misusing or seriously damaging the chattel in defiance of the owner's rights.

Prudential Ins. Co. of America v. Stella, 994 F. Supp. 318, 323 (E.D. Pa. 1998)(citations omitted). The statute of limitations for conversion is two years. See 42 Pa. C.S.A. § 5524(3); Bednar v. Marino, 646 A.2d 573, 577 (Pa. Super. 1994).

Fleming argues that Penn Ship's claim for conversion is barred by the statute of limitations and Fleming is therefore entitled to summary judgment of Count I of Penn Ship's Complaint. Penn Ship contends that it first became aware that money had been erroneously paid to Fleming in late 1997 or early 1998 and it thereafter requested repayment both orally and in writing through

to bring a conversion claim, this issue will not be examined.

counsel.⁵ Thus, according to Penn Ship, Fleming converted Penn Ship's funds in late 1997 or early 1998 when it refused to return the funds after demand was made, and its conversion claim is timely filed.

Penn Ship relies upon the discovery rule, claiming that its cause of action accrued upon its discovery of the alleged conversion. The Third Circuit Court of Appeals has held, however, that "under Pennsylvania law, in the absence of fraud by those invoking the statute of limitations, a cause of action for conversion of negotiable instruments accrues when, irrespective of the plaintiff's ignorance, the defendant wrongfully exercises dominion." Menichini v. Grant, 995 F.2d 1224, 1231-32 (3d Cir. 1993). Penn Ship does not allege any fraud or misrepresentation in connection with its conversion claim in Count I of its Amended Complaint. In the absence of fraud, therefore, Penn Ship's conversion claim accrued when Fleming cashed the Global checks. This Court reasonably concludes that the checks were cashed at some point in 1995 and Penn Ship's conversion claim is time-barred.

Even if Penn Ship does allege fraud in connection with its conversion claim which would delay the statutory time period,

⁵SP went bankrupt. (Ehieli Dep. at 119.) Both Penn Ship and Fleming sought payment from SP. (Id.) Later, Penn Ship realized that Fleming had been paid the alleged amount owed, \$140,000.00 less the 20-25% commission. (Id.)

there is no evidence that Penn Ship's actions enable Penn Ship to invoke the protection of the discovery doctrine. Indeed, Ehieli now asks this Court to reward him for his mistake and lack of diligence in discovering that mistake. Fleming is therefore granted summary judgment and Count I of Penn Ship's Amended Complaint is dismissed.

B. Count II - Fraud and Misrepresentation.

Fleming also moves for summary judgment of the fraud and misrepresentation claims filed against it in Count II of Penn Ship's Amended Complaint on the basis that these claims are barred by the two-year Pennsylvania statute of limitations. See 42 Pa. C.S.A. § 5524(7). Penn Ship's claims for fraud and misrepresentation relate to allegedly false promises by Fleming to pay a portion of the costs associated with the 1995 Vladivostock food exhibition. Penn Ship's Complaint was filed on May 11, 1999, therefore the relevant date for determining whether Penn Ship started its suit beyond the statute is May 11, 1997. Penn Ship contends that in 1998, Fleming falsely promised to pay its portion of the costs associated with the food exhibition. Penn Ship also states that it was prevented from discovering Fleming's fraud due to Fleming's ongoing misrepresentations, thereby tolling the statute of limitations.⁶

⁶Penn Ship states that this motion is premature because Fleming has not provided documentation which would provide additional support for Penn Ship's claim. This Court has,

Pennsylvania recognizes an exception to the statute of limitations "when the underlying cause of action sounds in fraud, and . . . the statute of limitations is tolled until the plaintiff learns or reasonably should have learned through the exercise of due diligence of the existence of the claim." Beauty Time v. VU Skin Sys., Inc., 118 F.3d 140, 148 (3d Cir. 1997). Reasonable diligence has been defined as "[a] fair, proper and due degree of care and acting, measured with reference to the particular circumstances; such diligence, care or attention as might be expected from a man of ordinary prudence and activity." Id. at 144 (citation omitted). Ehieli, when deposed, testified

however, denied Penn Ship's Motion to Enforce Discovery Requests. Discovery closed in this case on February 14, 2000. Penn Ship sent its first requests for Production of Documents on Fleming on January 20, 2000, but to the wrong address. Consequently, Fleming never received these Requests until March 1, 2000.

Despite Fleming's objections to these Requests, it advised Penn Ship that any responsive documents were located in Miami, Florida, housed in approximately 240 boxes with other non-responsive documents. Penn Ship, therefore, filed a Motion to Enforce Discovery Requests. The Court held a conference which Penn Ship's attorney did not attend, stating that she was unaware of the conference due to an administrative scheduling miscommunication in her office. Although the Court denied Penn Ship's Motion to Enforce Discovery Requests, Fleming turned over approximately 500 documents to Penn Ship.

Fleming's Motion for Summary Judgment was then reinstated and Penn Ship was permitted additional time to file a Supplemental Response to the Motion. No Supplemental Response was filed. Thus, this Court finds that Fleming's Motion is not premature.

that after July, 1995, he spoke with Itow, who never told him that Fleming would pay for the 1995 food exhibition. (Ehieli Dep. at 106-107.) Ehieli also testified that he left messages for Sternberg but never actually spoke with him. (Id. at 107-108.) Two to three years later, Ehieli spoke with Epperson who took notes of their conversation and said that he would get back to Ehieli after speaking with Sternberg. (Id. at 108.) Epperson never got back to Ehieli. (Id.) Fleming's representatives' statements do not amount to continuing misrepresentations regarding whether Fleming would or would not contribute to the food exhibition. Therefore, Penn Ship's fraud and misrepresentation claim is time-barred and Fleming is granted summary judgment for this claim. Count II of Penn Ship's Amended Complaint is dismissed.

IV. CONCLUSION.

Penn Ship has not met its summary judgment burden and proven that its claims for conversion, fraud and misrepresentation are not time-barred. Thus, Fleming's Motion for Summary Judgment is granted and Counts I and II of Penn Ship's Amended Complaint are dismissed.

An Order follows.

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v.	:	NO. 99-2418
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FLEMING INTERNATIONAL, LTD.,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this 9th day of June, 2000, it is hereby ORDERED that the Motion for Partial Summary Judgment filed by Defendant is GRANTED and Counts I and II of Plaintiff's Complaint are DISMISSED.

BY THE COURT:

Robert F. Kelly, J.