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

MILANDCO LTD., INC., et al.	:	CIVIL ACTION
v.	:	
WASHINGTON CAPITAL CORPORATION and J.L. WOLGIN	:	NO. 97-8119

MEMORANDUM AND ORDER

McLaughlin, J. December ___, 2001

This dispute arises out of negotiations between the defendant, Washington Capital Corporation ("WCC"), and the plaintiff, Milandco Ltd., Inc. ("Milandco"), relating to a proposal for WCC to provide financing to Milandco for the purchase and development of a Florida property for a golf community. The parties entered into a letter of intent, stating that "[t]he loan will be placed only upon the satisfactory completion of the conditions precedent and the execution of a definitive agreement incorporating the terms and conditions described herein." Several months of negotiations followed. Drafts of agreements were exchanged between the parties, but no agreement was ever signed by WCC. The Court decides here the defendants' motion for summary judgment, which the Court grants in part and denies in part.

Milandco claims in count 1 that the January 4 letter of intent constitutes an enforceable loan agreement or an

enforceable contract to negotiate in good faith. The Court holds that the January 4 letter is not an enforceable contract because the defendants did not agree to be bound by the letter and the plaintiffs seek to enforce terms different from those contained in the letter of intent. Milandco's attempt in count 2 to enforce a March 28 draft sent by the defendants to the plaintiffs is similarly unsuccessful. The March 28 draft contained blanks and was never signed by the defendants. Both the January 4 letter and the March 28 draft also fail to comply with the Statute of Frauds. Summary judgment will be granted for the same reasons on count 3 which is based on an implied-in-fact contract. The plaintiffs conceded that if the contract claims are dismissed, count 5 - breach of fiduciary duty - should also be dismissed.

The other claims brought by the plaintiffs are for promissory estoppel (count 4) and misrepresentation (counts 6-7). Because the Court finds that there are disputed issues of material fact with respect to the promissory estoppel claim, it will deny summary judgment on that claim. It will grant summary judgment on the misrepresentation claims because they were filed after the expiration of the statute of limitations.

I. Background

A. The Undisputed Facts

Plaintiff Milandco is a Florida corporation formed by Albert Miller and his son Robert. Defendant WCC is a Pennsylvania corporation, engaged in the business of commercial lending. Defendant Jack L. Wolgin was the sole shareholder, officer and director of WCC.

On October 23, 1993, Smigiel Partners Ltd. and Polo West Ventures ("Sellers") entered into a purchase agreement with Sheldon Rubin relating to 653 acres of unimproved land in Palm Beach County, Florida, known as the Polo Club West. On October 26, 1993, Rubin, by agreement, assigned to Milandco all of his right, title, and interest in the Purchase Agreement for a $200,000 payment. Milandco paid the Sellers an additional $50,000 on October 29, 1993. The two payments, totaling $250,000, were non-refundable. On January 9, 1994, Milandco paid the Sellers' escrow agent an additional deposit of $750,000. This, too, was non-refundable.

Milandco and Roger Friedman executed an agreement on November 8, 1993, by which Friedman and his company, Remington Financial Group, agreed to help Milandco obtain financing for the project.

In late December 1993, Roger Friedman, Albert Miller, and David Stein, another financial consultant, drafted a letter containing a proposal for financing. On January 4, 1994, Friedman signed and sent a revised version of the letter on WCC stationery, containing a proposal for WCC to provide financing to purchase the land for the proposed Polo Club West project.

The January 4, 1994 letter says, in the first paragraph:

> The loan will be placed only upon the satisfaction of the conditions precedent and the execution of a definitive agreement incorporating the terms and conditions described herein.

Jan. 4, 1994 Letter, Amended Compl. Ex. A. The letter contained a list of ten types of "documentation" that would be required before closing.[1] In its penultimate paragraph, the letter stated that "[i]t is understood and agreed that in the event that Washington Capital Corporation issues a commitment and Applicant obtains a real estate loan commitment for the project described herein from any source, other than Washington Capital...then a fee of 2 1/2% of loan amount accepted by borrower, shall be due and payable to Washington Capital Corporation." Id.

On January 9, 1994, Milandco executed the letter, and returned it the next day with a $5,000 due diligence fee. In the

---

1. Specifically, the section reads: "Closing: Immediately upon receipt of appropriate documentation: (1) A first mortgage on Phase I consisting of 104.2 residential acres (more or less). (2) Satisfactory appraisal of $23,000,000. Said appraisal shall be at no cost to the borrower, and will be performed by Roger Friedman. (3) Satisfactory environmental reports on said property. (4) Satisfactory title reports[.] (5) Corporate tax returns[.] (6) 3 year's personal tax returns[.] (7) Personal guarantee by Borrower[.] (8) All other documentation deemed necessary by lender. (9) All governmental approvals necessary to develop, build, and sell the above described Planned Residential Development. (10) Satisfactory agreements of sale for 5 pods representing all of Phase 1 in the amount of at least $23,000,000." Id.

cover letter, Robert Miller wrote, "enclosed please find the executed Letter of Intent".[2] Jan. 10, 1994 Letter, Def. Ex. 12.

During February and March of 1994, Milandco participated in meetings and negotiations with WCC and the Hascoe family, whom Milandco understood might wish to participate in a deal with WCC relating to the property. Milandco gave WCC and the other potential participants a tour of the Polo Club West property and other developments on February 7, 1994.

Also during February and March 1994, the parties' attorneys worked on drafts of a proposed financing agreement. On February 25, 1994, Ed Fitzgerald, one of WCC's attorneys, sent a draft document to Carl Siegel, counsel for Milandco (the "February 25 Draft"). The draft was under cover of a memorandum, the first paragraph of which read:

> Attached is a draft of proposed commitments from Washington Capital Corporation relating to the Polo West property. These drafts have not been reviewed by my client and hence I must reserve the right to make changes and modification based upon their comments. In particular my clients have not finally agreed to fund any monies other than the additional down payment required under the Agreement of Sale.

Feb. 25, 1994 Letter, Pl. App. 3, Ex. 2.

The February 25 Draft proposed a loan in the amount of $5 million plus closing costs and other fees to be approved. The loan was to be repaid in full on the first day of the month

---

2. In a later letter to Edward Fitzgerald, counsel for WCC, Robert Miller wrote, "[a]s soon as the Commitment is received and accepted, we will settle on a mutually agreeable fee for the balance of the documentation." Feb. 9, 1994 Letter, Def. Ex. 16.

following disbursement. The draft also had another part, Exhibit II, relating to a one-year option granted to WCC to arrange for the financing of Phases I-III of the Polo West Club. Exhibit II was a proposal for Washington Capital Corporation to itself obtain a loan to be used for the acquisition and construction of the development. It contained numerous blanks, including the proposed loan amount, the maturity date, acreage amount, application fee, required appraisal value, and the expiration date for the commitment. The plaintiffs did not sign this draft, and negotiations continued. Feb. 25 Draft, Def. Ex. 23.

On March 22, 1994, Albert Janke, one of WCC's attorneys, sent another draft agreement to Milandco's counsel (the "March 22 Draft") with a cover letter that stated:

> I am enclosing herewith a revised draft of the Commitment reflecting certain of the changes which we recently discussed. As you will observe several modifications which you requested have not been incorporated into this draft. I have not been able to discuss these issues with my client and obviously can not make such revisions until such time as I have his approval.
>
> As there are several different structures being discussed between our respective clients as to the nature of this transaction, including, inter alia, loan, equity investment, or a combination thereof, the draft of the Commitment is furnished to you for discussion purposes only and no legal obligations or rights shall accrue thereunder pending a resolution of the various business and legal issues, the finalization of the Commitment and the execution thereof by our respective clients.

Mar. 22, 1994 Letter, Def. Ex. 13.

The March 22 Draft reflected a loan amount of $8.9 million, which included closing costs and other fees. The date for repayment of the loan and disbursement had been left blank. There were also blanks in place of the commitment fee to be paid by Milandco. Like the February 25 Draft, the March 22 Draft contained a second portion, in which WCC proposed to obtain a loan or investment for acquisition and construction of Phases I-III. There were blanks in place of the loan amount, the maturity date, acreage amounts, appraisal values, due date for a Plat Plan, the expiration date for WCC's commitment, and the date for acceptance. The parties did not sign the March 22 Draft. Mar. 22 Draft, Def. Ex. 13.

On March 28, 1994, a person in the office of WCC's counsel faxed a version of the proposed financing agreement to Robert Miller's wife's office (the "March 28 Document"). There was no cover letter attached, only a fax cover sheet. Mar. 28, 1994 Letter, Def. Ex. 14. Like the February 25 Draft and the March 22 Draft, the document consisted of two parts.

The first part, Exhibit I, proposed a $8.9 million loan from WCC to Milandco, which included closing costs and other fees. This part of the document reflected changes made since March 22 – among them, the addition of a closing date, and some different language regarding approval standards and commitment fees. A blank still remained in place of the term of the loan. March 28 Document, Amended Compl. Ex. B.

The second part of the document, Exhibit II, also reflected the incorporation of some changes since the March 22 Draft. However, when the March 28 Document was transmitted to plaintiffs, the following terms were blank: the loan amount, appraisal value required, commitment expiration date, and date for acceptance. Id.

The next day, Albert Miller had text typed into the blank spaces on the draft. Robert Miller then executed the document and initialed the filled-in blanks. The document was delivered for WCC's countersignature, but the document was never signed by Wolgin or any other representative of WCC.

B. The Litigation

Milandco filed a civil action against WCC and Jack Wolgin in Florida state court in 1995. Washington Capital Corp. v. Milandco, 695 So.2d 838 (Fla. D.C.A. 4th 1997). The complaint, brought in the name of Milandco Ltd., Inc., alleged two counts of breach of contract against WCC, and one count of breach of fiduciary duty against Jack Wolgin. Florida Compl. That case was dismissed for lack of jurisdiction. See Washington Capital Corp., 695 So.2d at 843.

The present case was filed on December 30, 1997. The complaint contained allegations of breach of contract (counts 1 and 2), breach of a contract implied-in-fact (count 3), promissory estoppel (count 4), breach of fiduciary duty (count 5), and misrepresentation (count 6). Milandco later amended its

complaint to join plaintiffs Eugene Heller, Russell Novak, Milton Podolsky, Philip Rootberg, and Kenneth Tucker, alleged to comprise the Milandco Limited Partnership. The plaintiffs also divided the misrepresentation claim into three claims: willful misrepresentation (count 6); grossly negligent misrepresentation (count 7); and negligent misrepresentation (count 8). Id. They have since withdrawn count 8.

II. Analysis

A. Count One – Breach of Contract: January 4, 1994 Letter

Plaintiffs allege in count 1 that the January 4, 1994 letter (the "January 4 Letter") creates either a binding loan agreement or, in the alternative, an agreement to negotiate in good faith. The defendants argue that the letter created no loan agreement, because it does not show an intent to be bound, nor does it comply with the Statute of Frauds. They also argue that the letter does not give rise to an agreement to negotiate in good faith. The Court agrees with the defendants.

1. Binding Loan Agreement

An agreement is enforceable only if both parties have manifested an intention to be bound by its terms, and those terms are sufficiently definite to be specifically enforced. See Channel Home Centers v. Grossman, 795 F.2d 291, 298-99 (3d Cir. 1986). Evidence of preliminary negotiations or an agreement to

enter into a binding contract in the future does not alone constitute a contract. See id. at 298 (citations omitted).

In determining whether there is an intent to be bound, courts must examine the entire document in question and the circumstances surrounding its adoption. See id. at 299. Under Pennsylvania law, when one party has expressed an intent not to be bound until a written contract is executed, the parties are not bound until that event has occurred. See Schulman v. J.P. Morgan Invest. Mgt., 35 F.3d 799, 808 (3d Cir. 1994) (citation omitted).

Here, an intent not to be bound is evident on the face of the January 4 Letter. The letter explicitly states that a loan "will only be placed upon the satisfaction of the conditions precedent and the execution of a definitive agreement...." Jan. 4 Letter, Amended Compl. Ex. A. It speaks of a transaction as a hypothetical: "in the event that [WCC] issues a commitment...." Id. (emphasis added). Plaintiff itself recognized the tentative nature of the January 4 Letter in its January 10, 1994 letter, calling it a "Letter of Intent," and February 9, 1994 letter, noting that a commitment had yet to be "received and accepted...." Jan. 10 Letter, Def. Ex. 12; Feb. 9 Letter, Def. Ex. 16.

Plaintiffs have proffered the affidavit of Albert Miller, in which he states that Roger Friedman represented to him that the January 4 Letter was a binding commitment to provide financing for Phase I of the Polo Club West project. A. Miller

Aff., Pl. App. 1, Ex. 1, ¶ 13. Defendants argue that this should be disregarded, because it contradicts earlier deposition testimony of Albert Miller, and because the writing is unambiguous. The Court agrees. See Hackman v. Valley Fair, 932 F.2d 239, 241 (3d Cir. 1991) (contradictory affidavit comments may be disregarded); Resolution Trust Corp. v. Urban Redevelopment Authority, 638 A.2d 972, 975 (Pa. 1994) (parol evidence barred where writing is unambiguous). The January 4 Letter is unambiguous.

The letter is also not an enforceable contract because its terms are not sufficiently definite. The contract that the plaintiffs seek to enforce is different from the one discussed in this document. The terms of the January 4 Letter specify a loan for $21 million; plaintiffs argue that the January 4 Letter instead commits WCC to fund the purchase of the land – a commitment of only $5 million dollars, or $8.9 million with attendant fees. Oral Argument Trans. at 9. This loan amount does not appear in the document at all.

Moreover, the January 4 Letter fails to comply with Pennsylvania's Statute of Frauds. See 33 P.S. § 1. In Pennsylvania, an agreement to lend money that is secured by a mortgage on real property is subject to that statute. See Linsker v. Savings of America, 710 F. Supp. 598, 600 (E.D. Pa. 1989) (citing Bozzi v. Greater Del. Val. Sav. & L. Ass'n, 255 Pa. Super. 566, 569 (1978)). The Statute of Frauds mandates that the entirety of an agreement be embodied in a writing, or a body of

writings, that makes out a contract with no need for oral testimony. See Green v. Interstate United Mgmt., 748 F.2d 827, 830 (3d Cir. 1984). Moreover, a document that looks "toward some future contract," is "clearly insufficient" to satisfy the writing requirement of the Statute of Frauds. Id. The January 4 Letter is inadequate both because it looks forward to a final agreement, and because the terms plaintiff seeks to enforce cannot be explained in the absence of oral testimony.

2. Duty of Good Faith

Nor does the January 4 Letter impose on the parties a duty to negotiate in good faith. In Channel Home Centers v. Grossman, 795 F.2d 291, 299 (3d Cir. 1986), our Court of Appeals predicted that the Pennsylvania Supreme Court would find a duty to negotiate in good faith to arise from the letter of intent at issue there. The Court grounded its finding in an express provision in the letter of intent, in which the defendant had "unequivocal[ly] promise[d]" to withdraw a piece of property from the market, and to negotiate a lease only with plaintiff. Id. There were also other indicia of an intent to be bound by the letter's negotiation commitment that the Court found persuasive, including the level of detail in the letter, and the subsequent actions of both parties. See id. at 292, 299.

More recently, our Court of Appeals found no duty to negotiate in good faith in the absence of a definite term or assent to be bound. In U.S.A. Machinery Corp. v. CSC Ltd., 184 F.3d 257, 264 (3d Cir. 1999), the Third Circuit held that an oral "registration" between a broker of steel-making equipment and a purchaser and seller of equipment did not give rise to an agreement to negotiate in good faith, because there was not a detailed expression of the parties' intent to so negotiate, and the parties had not made extensive preparations.

The Pennsylvania Supreme Court has not spoken on this issue; but, in two decisions, the Pennsylvania Superior Court has refused to find that a letter of intent imposed on the parties a

duty to negotiate in good faith. In GMH Associates v. Prudential Realty Group, 752 A.2d 889, 903-904 (Pa. Super. 2000), the Pennsylvania Superior Court held that, where there was no express term regarding such a duty, or promise to keep property off the market, no duty to negotiate in good faith would arise. Likewise, in Philmar Mid-Atlantic, Inc. v. York Street Associates, 566 A.2d 1253, 1255 (Pa. Super. 1989), the Superior Court found a letter of intent created no agreement – either on its substantive terms, or to negotiate in good faith – where it disclosed no mutual assent to be bound.

The January 4 Letter contains no express provision or unequivocal promise comparable to the one in Channel Home, which either expresses the mutual assent of the parties to negotiate a deal in good faith, or is sufficiently definite to enforce. The language in the letter speaks of the deal hypothetically. Moreover, the letter notes that no loan will be placed in the absence of an executed agreement. As such, this case is more akin to GMH, Philmar, and U.S.A. Machinery.[3]

3. Plaintiffs rely on Teachers Insur. & Annuity Ass'n of Am. v. Tribune Co., 670 F. Supp. 491, 498 (S.D.N.Y. 1987) to argue that the January 4 Letter is a binding agreement. In Teachers, the exchange of letters constituting the agreement stated that the borrower and lender had made a "binding agreement" to borrow and to lend on the agreed terms, subject to the preparation and execution of final documents satisfactory to both sides and the approval of the borrower's Board of Directors. Id. at 491. There are two critical differences between Teachers and this case. First, this Court is bound by Pennsylvania, and not New York, law. Second, there is no language in the letter of intent here like the "binding agreement" language in Teachers.

B. Count Two – Breach of Contract: March 28, 1994 Document

Defendants move for summary judgment on Count Two, arguing that the March 28 Document does not fulfill the requirements of an enforceable contract or the Statute of Frauds. Plaintiffs allege that the March 28 Document constitutes a "Definitive Agreement" between the parties. I agree with defendants that this document fails to create a contract or to comply with the Statute of Frauds.

The March 28 Document comprises two parts. Exhibit I contains a proposal for WCC to loan to Milandco $8.9 million, for the purchase of the Polo Club West property. It also contains a term granting WCC an exclusive one-year option to finance the latter phases of the Polo Club West development. The details of that additional financing were set forth in Exhibit II. Both parts of the document contained blanks when it was received by plaintiffs. The first part lacked a repayment date for the $8.9 million loan. The second part lacked a loan amount, required appraisal value, expiration date for a commitment, and due date for acceptance.

The March 28 Document is not an enforceable contract, because it does not reflect mutual assent to all essential terms. It contained blanks in the place of material terms when it was transmitted, and the defendants did not assent to the filled-in terms by executing the agreement. See Essner v. Shoemaker, 143 A.2d 364, 366 (Pa. 1958).

In Essner, the Pennsylvania Supreme Court examined negotiations surrounding the assignment of a contract for the purchase of property. The court found that the parties had expressed an intent not to be bound before the execution of a final agreement. Therefore, even though the plaintiff had executed and returned a draft document, no contract arose because the document was never executed by the defendant. See Essner, 143 A.2d at 366.

As in Essner, the parties here contemplated no agreement would be complete or enforceable absent an executed writing. The January 4 Letter states that a "loan will be placed only upon...the execution of a definitive agreement...." Milandco acknowledged in writing that the document required WCC's signature to be enforceable, when it stated in a March 29, 1994 letter to David Stein that Mr. Stein would receive a partnership interest "upon the execution of the Commitment letter dated March 29, 1994...by Washington Capital." March 29, 1994 Letter, Def. Ex. 22. Finally, plaintiffs delivered the March 28 Document for countersignature by WCC.

Plaintiffs rely on a cover letter sent with the February 25 Draft as evidence that defendants had agreed to fund the purchase of the land. In that letter, defendants' counsel stated that defendants agreed to pay nothing "other than the additional down payments required by the Agreement of Sale." Feb. 25 Letter, Pl. App. 3, Ex. 2. But the February 25 Draft contained terms that were materially different from the terms set

forth in the March 28 Document. For instance, the February 25 Draft specified a $5,000,000 loan to be repaid in one month; the March 28 Document contemplates an $8.9 million loan to be repaid after 60 months. Thus, the statement contained in the cover letter to the February 25 Draft does not bear on the March 28 Document.

Plaintiffs also assert that defendants assented to the terms in the March 28 Document in a telephone conversation between Miller and Friedman, where the parties "confirmed...the numbers to be inserted into the blank spaces in that document." A. Miller. Aff., Pl. App. 1, Ex. 1, at ¶ 28. Thus, they contend, even if they did not enter into an executed written agreement, they entered into an enforceable oral agreement.

Under Pennsylvania law, parties may sometimes be bound by an oral agreement, even if it was intended that the agreement would be reduced to writing at some point. See Mazella v. Koken, 739 A.2d 531, 536 (Pa. 1999); see also Flight Sys. v. Elec. Data. Sys., 112 F.3d 124, 129 (3d Cir. 1997). This is true where the parties intend the writing as a mere formality, or for purposes of proof. This is not true, however, where the parties intended that the agreement would not be considered complete or enforceable without being reduced to writing, as is the case here. In that circumstance, as noted above, no contract exists until the execution of the writing. See Schulman, 35 F.3d at 807-08 (citing Essner, 143 A.2d at 366).

The March 28 Document also fails to comply with the Statute of Frauds. A writing is insufficient under the statute unless all of the essential terms and conditions of the contract are stated and the document discloses an intent to be bound. See Target Sportswear v. Clearfield Found., 474 A.2d 1142, 1148 (Pa. Super. 1984). Plaintiffs argue that the first part of the document, entitled Exhibit I, which concerns the purchase of the land, satisfies the statute when read in conjunction with the "admission" of defendants' counsel in the February 25, 1994 letter. But admissions have only been held to affect the Statute of Frauds when they are made "under oath." See Flight Systems, 112 F.3d at 128. Because this cover letter was not under oath, it does not affect our analysis. In addition, as described above, that letter pertained to a separate draft, which contained materially different terms from the March 28 Document.

C. Count Three – Implied-in-Fact Contract

Plaintiffs allege that the parties were also bound by an agreement implied-in-fact that committed WCC to provide a loan to Milandco, and to proceed in good faith. Defendants argue that no such agreement arose because the parties had no meeting of the minds. I agree with defendants that the conduct here gave rise to no implied-in-fact contract.

An implied-in-fact contract is one arising from a mutual agreement and intent to promise, but where the agreement and promise have not been verbally expressed. See In re Penn

Central Transp. Co., 831 F.2d 1221, 1228 (3d Cir. 1987). The elements necessary to form an implied-in-fact contract are identical to those required for an express agreement. See id. In the absence of a verbal agreement, a meeting of the minds is inferred from the conduct of the parties. See Hercules, Inc. v. United States, 516 U.S. 417, 116 S. Ct. 981, 986 (1996) (citation omitted).

Implied-in-fact contracts may arise, for example, in situations where there have been previous contractual dealings and performance continued even though written contracts have lapsed, or where at least one party has fully or partially performed. See Luden's Inc. v. Local Union No. 6, 28 F.3d 347, 354 (3d Cir. 1994) (contract expired but performance continued); Ingassia Constr. Co. v. Walsh, 486 A.2d 478, 483 (Pa. Super. 1984) (partial performance). See also Restatement (Second) of Contracts § 4, illus. 1 & 2.

The course of dealings in this case present neither of these situations, nor any other to suggest the parties believed themselves to be bound. Rather, the course of dealings reflect only a prelude to a commitment, and no intent to be bound.

D. Count Four – Promissory Estoppel

Plaintiffs also assert a promissory estoppel claim, alleging that WCC and Jack Wolgin made promises and representations regarding providing financing, and that plaintiffs relied on them. Defendants argue that any promissory

estoppel claim is barred by the Statute of Frauds, or, in the alternative, that it is unsupported by the evidence. Because I find that issues of material fact remain, I will not grant summary judgment on this claim.

As to defendants' first argument, promissory estoppel claims are not necessarily barred, as a matter of law, in cases involving the Statute of Frauds. In Burns v. Baumgardner, 449 A.2d 590, 595-96 (Pa. Super. 1982), the Pennsylvania Superior Court, although noting that enforcing agreements that failed to meet the strictures of the Statute of Frauds was contrary to the policy underlying the statute, held that promissory estoppel claims could still sound "to the extent necessary to protect expenditures made in reasonable reliance upon" a promise. See also Green, 748 F.2d at 830-31 (affirming decision allowing promissory estoppel claim to proceed although lease failed to meet requirements of Statute of Frauds).

As to defendants' second argument, to succeed on a promissory estoppel claim, plaintiffs must make out the following elements: (1) misleading words, conduct, or silence by the defendants; (2) unambiguous proof of reasonable reliance on the misrepresentation by the plaintiffs; and (3) no duty of inquiry on the plaintiffs. See Thomas v. E.B. Jermyn Lodge No. 2, 693 A.2d 974, 977 (Pa. Super. 1997).

There is sufficient evidence in the record to allow plaintiffs to survive summary judgment on these elements. Plaintiffs have presented to the Court evidence in the record of

promises that were made to them suggesting that WCC would fund the first phase of the project and provide financing. They have also presented evidence that they were led to believe, through either statements or silence, that Wolgin and WCC were comfortable with Milandco's abilities and experience, and that funding was not contingent on outside investors.

Defendants argue that, as sophisticated business persons, plaintiffs should have been aware that no loan would be made absent a definitive agreement executed by defendants. The defendants claim that, therefore, the plaintiffs could not have reasonably relied on the conduct described. The defendants' argument has force, but whether any reliance by the plaintiffs was reasonable is more properly decided by a jury.

Defendants further argue that if summary judgment is denied on promissory estoppel, plaintiffs' damages are limited to reliance damages. The Court agrees. See Burns, 449 A.2d at 595-96. The plaintiffs conceded this at oral argument. Oral Argument Trans. at 66. The plaintiffs' claims for lost profits, therefore, are dismissed.[4]

E. Count Five – Breach of Fiduciary Duty

Plaintiffs conceded at oral argument that if summary judgment were granted to defendants as to counts 1 and 2, summary

4. Additionally, defendants have argued that the $250,000 payment made by plaintiffs before the January 4 Letter are not reliance damages. The Court will not parse out what the exact amount of reliance damages is at this stage.

judgment must also be granted as to this count as well. Oral Argument Trans. at 67. This is because this claim rests on plaintiffs' argument that the March 28 Document structured the proposed deal as a joint venture. Because this Court has found that no agreement was ever entered into by the parties, no joint venture was formed. The Court, therefore, will grant summary judgment on count 5.

F. Counts Six and Seven – Willful and Grossly Negligent Misrepresentation

Defendants move for summary judgment on the misrepresentation claims on the grounds that they are barred by the statute of limitations, the economic loss doctrine, and the gist of the action doctrine. Because the Court finds that the misrepresentation claims are barred by the Pennsylvania two-year statute of limitations for torts, it will grant summary judgment on that ground and will not decide the other grounds proffered by the defendants.

The alleged misrepresentations took place by April 4, 1994. This case was filed first in Florida in 1995, within the two-year statute of limitations. See Pa. C.S.A. § 5524 (two-year statute of limitations for torts). There was no misrepresentation claim in that complaint. The federal complaint did contain a misrepresentation claim, but it was not filed until December 30, 1997, after the statute of limitations had expired.

The plaintiffs argue that they are saved by Pennsylvania's discovery rule. Under that rule, the statute of limitations begins to run only at the time the complaining party knew or should have known of its injury. See Crouse v. Cyclops Indus., 745 A.2d 606, 611 (Pa. 2000). Plaintiffs argue that facts discovered after filing the federal complaint made clearer the nature of the conduct that constituted the misrepresentation claim. It was on this basis, they explain, that the general misrepresentation claim was split into three. Plaintiffs make no similar argument, however, as to what new information was discovered between the time that they filed the Florida suit – where no representation claim was made – and the federal suit. It is this time period that is relevant for the statute of limitations issue.

Plaintiffs knew, before discovery in this federal case, that they were injured by reliance on representations by WCC or Wolgin; otherwise, it would have been frivolous for them to include such a claim in the initial federal complaint. Plaintiffs do not argue that their injury differs, or that the misrepresentations underlying that initial claim are no longer the source of their injury[5]; rather, they argue that those

5. In requesting leave to amend the complaint in this case to include these claims, the plaintiffs represented that the three claims "were all present, in combined form, in Milandco's original misrepresentation claim" and that the change was merely to "clarify for the benefit of the defendants" the bases on which plaintiffs were seeking relief for alleged misrepresentations. Pl. Motion to Join its Individual Investors as Plaintiffs Pursuant to Fed. R. Civ. P. 17(a) and to Amend its Complaint Under Fed. R. Civ. P. 15(a), Docket (continued...)

misrepresentations were part of a larger scheme. But because the initial misrepresentation claim was stale when filed in 1997, all claims are barred.

G. Individual Plaintiffs' Claims

Defendants also argue that the claims made by individual plaintiffs Heller, Novak, Rootberg, Tucker, and Podolsky, joined in 1999, are time-barred. The Court rejects this argument. The claims of the individuals relate back to the original claims filed in 1997.

Milandco was intended to be the sole general partner of a limited partnership consisting of Milandco and the five individual investors – Eugene Heller, Russell Novak, Milton Podolsky, Philip Rootberg, and Kenneth Tucker. Because a limited partnership agreement was never executed, however, a general partnership arose under Florida law. See generally 3 Alan R. Bromberg & Larry E. Ribstein, Bromberg and Ribstein on Partnership § 12.03(a) (2001-2 Supp.) ("hoped-for limited partners" revert to general partners where limited partnership formation is deficient); Betz v. Chema Hot Springs Group, 657 P.2d 831, 834 (Alaska 1982) ("[w]hen a certificate [of limited

(...continued)
No. 41.

partnership] is not filed, most courts hold that a general partnership is formed").

Rule 17(b) of the Federal Rules of Civil Procedure states that the capacity of various entities, including partnerships, to "sue or be sued shall be determined by the law of the state in which the district court is held...." Fed. R. Civ. P. 17(b). In Pennsylvania, Rule of Civil Procedure 2127(a) states that "[a] partnership having a right of action shall prosecute such right in the names of the partners trading in the firm name." Pa. R. Civ. P. 2127(a). Accordingly, the individual plaintiffs' claims were joined under Rule 17(a) of the Federal Rules of Civil Procedure. See Order Granting Plaintiff's Motion to Join its Individual Investors as Plaintiffs Pursuant to Fed. R. Civ. P. 17(a), Docket No. 53.

The federal rule further states that joinders thereunder "shall have the same effect as if the action had been commenced in the name of the real party in interest." Fed. R. Civ. P. 17(a). Accordingly, claims properly added under Rule 17(a) relate back to the date of the filing of the federal suit.

H. Jack Wolgin's Individual Liability

Defendants move to dismiss the claims against Jack Wolgin because his liability is derivative of WCC's. All counts are dismissed as to defendant Wolgin, except for count 4, promissory estoppel.

An appropriate order follows.