

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

WILLIAM B. PACKER, et al.,	:	CIVIL ACTION
Plaintiffs,	:	
	:	
v.	:	
	:	
MAGELLAN FINANCE CORP.,	:	
et al.,	:	
Defendants	:	NO. 98-380

Newcomer, J. May , 1999

M E M O R A N D U M

Presently before the Court is defendants' Motion for Summary Judgment, and plaintiffs' response thereto. For the reasons that follow, said Motion will be granted in part and denied in part.

A. Background¹

Plaintiffs in this case are various individual shareholders of Franklin Realty Development Corporation who, in 1988, sold a parcel of land in Blue Bell, Pennsylvania to Blue Bell Homes Associates, a limited partnership controlled by defendant Elmer Hansen. Plaintiffs received 13.5 million dollars in cash and four second mortgage notes worth 5.9 million dollars which were personally guaranteed by Hansen. This multi-million dollar tract of real estate was to be developed into a golf course and club by Hansen, and is now known as the Blue Bell Country Club. In 1990, however, due to the downturn in the real estate market, Blue Bell Homes defaulted on the interest payment which was due on

¹ Given that plaintiffs and defendants have together devoted some 140 pages of briefing to spelling out the facts of this fact-intensive case, the Court includes only a brief and cursory summary.

the notes. Defendant Hansen represented to the plaintiffs that because of financial difficulties, he was unable to pay the note. Plaintiffs therefore began to consider a number of different options as to what steps to take in order to recoup their money. Initiating litigation against Hansen personally was one option, although the plaintiffs realized that doing so would force Hansen into bankruptcy. According to plaintiffs, however, because of the longstanding business and personal relationships between plaintiffs, in particular plaintiff William Packer, and defendant Hansen, plaintiffs postponed taking any action to enforce their interest.

One option plaintiffs continued to investigate was whether another of Hansen's assets could be used to satisfy the notes. According to plaintiffs, Hansen began to steer plaintiffs away from other assets he owned, by telling plaintiffs that such assets had no value. Instead, plaintiffs contend that Hansen purposely steered them toward the yet-to-be-built Ballenrose Golf Course and Country Club. In March of 1992, plaintiffs entered into the Ballenrose Golf Course Management Company ("BGCMC") Partnership Agreement which provided, inter alia, that plaintiffs (and others who are not parties to this case) would own 33% of the limited partnership, Hansen would own 66%, and the general partner, Ballenrose Management, Inc. ("BMI") would own 1%. Plaintiffs thus relinquished their notes in exchange for a one-third interest in BGCMC. Plaintiffs contend that in entering into the partnership to construct a golf course, they relied exclusively on Hansen's

expertise and experience because none of the plaintiffs had had any experience with respect to golf courses. Plaintiffs also contend that they heavily relied on Hansen's statements that there was already sufficient capital to construct the golf course, and that they would not be expected to contribute any additional capital to the project.

According to plaintiffs, starting in September of 1992, Hansen began to paint an increasingly bleak picture of the golf course, allegedly to induce plaintiffs to sell their shares in the BGCMC partnership. Plaintiffs' theory is that Hansen originally wanted partners who could help finance any cost overruns in the building of the golf course, if necessary; but that once Toll Brothers, the builder, agreed to loan BGCMC up to \$1 million, Hansen no longer needed partners and instead embarked upon a scheme to convince plaintiffs to sell their shares so that he could have the golf course to himself. This plan allegedly consisted of projections showing cash flow shortages and the need for additional capital contributions, as well as letters detailing cost overruns and additional costs being incurred which Hansen expected plaintiffs to help pick up. Overall, the picture painted by Hansen entailed significant capital contributions by plaintiffs, and projections which showed that the golf course would not generate sufficient funds to pay the partners back. As a last measure, Hansen also allegedly revealed to plaintiffs the possibility that he might have to pledge his own interest in the golf course because of uncertainty as to whether he could fund his two-thirds interest

in the project, creating the possibility that plaintiffs could be left in a golf course venture without the one partner with expertise in golf courses.

At this point, Hansen then allegedly introduced into discussions with plaintiffs the possibility that a group of Doylestown doctors might be interested in purchasing plaintiffs' shares. Having been convinced that they were in a losing venture, plaintiffs agreed to sell out. According to plaintiffs, however, this "group" of doctors was actually one doctor, defendant Daniel Nesi, who was Hansen's best friend. Allegedly pretending to negotiate on behalf of plaintiffs, Hansen drove the price of plaintiffs' shares down and ultimately arranged for the sale of plaintiffs' shares to the "doctors" for a \$460,000.00 note and golf course credits. In the purchase agreement, however, the buyer was named Magellan Finance Corporation. Plaintiffs believed that Magellan was an entity formed by the purchasing doctors. Unknown to plaintiffs at the time, on the same day that the purchase agreement was executed, Magellan also entered into an agreement under which Magellan was to convey to Blue Bell Investors, G.P., a general partnership owned by Hansen's four adult children, its one-third interest in the golf course in payment of a past debt. Thereafter, plaintiffs entered into an amended purchase agreement under which Magellan paid plaintiffs in cash the present value of the note and in which Magellan assigned its interest in the golf course to Blue Bell Investors. Plaintiffs claim that during this entire time they were told and believed that these entities were

formed by a group of doctors, and that Hansen went to great lengths to conceal from plaintiffs that the true buyers of their one-third interest in the golf course were his own children. According to plaintiffs, they would not have sold their interest to Hansen's children because Hansen would not have permitted his children to buy an interest in the golf course if the prospects for the project were indeed as bleak as he had convinced plaintiffs that they were. In other words, according to plaintiffs, if Hansen had been forthright about the fact that his children were the buyers of plaintiffs' interest in the golf course, plaintiffs would have realized that the future of the golf course was not as bad as Hansen had made it out to be and would not have sold out. Plaintiffs bring claims under RICO, as well as state law claims of fraud, civil conspiracy, breach of fiduciary duty, and unjust enrichment.

This Court bifurcated discovery on plaintiff's claims so that the parties would initially conduct discovery on Counts IV through VII of plaintiffs' Amended Complaint, that is, the state law claims of fraud, civil conspiracy, breach of fiduciary duty, and unjust enrichment. Upon disposition of summary judgment motions, the Court anticipated the parties would commence the second phase of discovery on plaintiff's RICO claims, if the state law claims survived. Defendants now move for summary judgment on Counts IV through VII of plaintiff's Amended Complaint.

B. Summary Judgment Standard

A reviewing court may enter summary judgment where there

are no genuine issues as to any material fact and one party is entitled to judgment as a matter of law. White v. Westinghouse Elec. Co., 862 F.2d 56, 59 (3d Cir. 1988). The evidence presented must be viewed in the light most favorable to the non-moving party. Id. "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). In deciding the motion for summary judgment, it is not the function of the Court to decide disputed questions of fact, but only to determine whether genuine issues of fact exist. Id. at 248-49.

The moving party has the initial burden of identifying evidence which it believes shows an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Childers v. Joseph, 842 F.2d 689, 694 (3d Cir. 1988). The moving party's burden may be discharged by demonstrating that there is an absence of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 325. Once the moving party satisfies its burden, the burden shifts to the nonmoving party, who must go beyond its pleadings and designate specific facts, by use of affidavits, depositions, admissions, or answers to interrogatories, showing that there is a genuine issue for trial. Id. at 324. Moreover, when the nonmoving party bears the burden of proof, it must "make a showing sufficient to establish the existence of [every] element essential to that party's case." Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp., 812 F.2d 141, 144

(3d Cir. 1987) (quoting Celotex, 477 U.S. at 322). Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." White, 862 F.2d at 59 (quoting Celotex, 477 U.S. at 322).

C. Discussion

1. Fraud

Plaintiffs' fraud claim derives from two separate transactions, the 1992 "buy-in" transaction and the 1993 "buy-out" transaction. Plaintiffs bring their fraud claim against defendants Elmer F. Hansen, Jr., Elmer F. Hansen, III, David Sherman, Daniel Nesi, Magellan Corporation, and Blue Bell Investors. According to plaintiffs, after defendant Hansen defaulted on the second mortgage notes, plaintiffs considered different options with respect to collecting on the notes. Putting Hansen into bankruptcy was one such option; exchanging their notes in return for an interest in some other asset owned by Hansen was another. According to plaintiffs, Hansen purposely steered plaintiffs away from other assets which he owned, allegedly misrepresenting to them that two properties in particular, certain lots in Florida and the Dresherbrooke project in Pennsylvania, had no value. Plaintiffs contend that they reasonably relied on Hansen's misrepresentations that his other assets had no value and were thus induced to buy into the Ballenrose golf project.

The Court finds that this particular fraud claim related

to the 1992 buy-in transaction cannot stand. To sustain a claim for fraud, the claimant must prove the following elements by clear and convincing evidence: (1) a misrepresentation; (2) a fraudulent utterance thereof; (3) an intention by the maker that the recipient will thereby be induced to act; (4) justifiable reliance by the recipient on the misrepresentation; and (5) damage to the recipient as a proximate result. Bortz v. Noon, 698 A.2d 1311, 1315 (Pa. Super. 1997). Plaintiffs have produced no evidence that they were damaged by any alleged misrepresentations regarding the value of Hansen's other assets. Indeed, given plaintiffs' contention that the Ballenrose golf course to which Hansen purposely steered them was ultimately profitable, the Court cannot see how plaintiffs can then also claim that somehow inducing them to buy into a profitable deal was harmful to their financial interest. If plaintiffs were contending that both the buy-in/buy-out transactions were part of a larger overall scheme masterminded by Hansen, then the result could possibly be different; but given plaintiffs' theory that Hansen originally needed plaintiffs' partnership, but only decided to con them out of their shares upon receiving the loan from Toll Brothers, the Court finds that any fraud claim based on the 1992 buy-in transaction cannot survive. Accordingly summary judgment on that claim is granted.

However, as to plaintiffs' fraud claim as related to the buy-out transaction, the Court is satisfied that genuine issues of material fact exist which preclude summary judgment on that claim. As plaintiffs note, a fraudulent misrepresentation need not be in

the form of a positive assertion, but also includes misleading allegations or concealment of that which would have been disclosed, which deceived or is intended to deceive. Bortz, 698 A.2d at 1315. The Court is satisfied that plaintiffs have produced sufficient evidence showing that defendants Hansen, Hansen III, Sherman, Nesi, Magellan, and Blue Bell Investors concealed the true identity of the purchasing "doctors," Magellan, and Blue Bell Investors, and that plaintiffs relied upon this deception in selling their shares of Ballenrose to entities which they presumed to be unrelated third parties. Despite defendants' arguments that plaintiffs' self-serving after-the-fact testimony that they would not have sold their shares if they knew the true identity of the purchasers are insufficient to support their fraud claim, the Court finds that this is precisely the type of issue that a jury must determine.

Furthermore, defendants' arguments related to damages is also unavailing, as plaintiffs' contention is that but for defendants' deception of plaintiffs, plaintiffs would not have sold their shares and would still be in possession of a one-third interest in Ballenrose. The difficulty of assessing such damages is not grounds for granting summary judgment on this claim; it is sufficient that plaintiffs have shown that they were damaged by the allegedly fraudulent inducement to sell in that, if plaintiffs had kept their shares, they would now be one-third owners of a profitable golf course. The credibility of plaintiffs' testimony as to such facts are, of course, up to the jury to determine. Accordingly, defendants' Motion is denied with respect to

plaintiffs' fraud claim on the buy-out transaction.

2. Breach of Fiduciary Duty

Under Pennsylvania law, it is clear that as a partner, Hansen owed a fiduciary duty to his co-partners, the plaintiffs. See 15 Pa. Cons. Stat. Ann. § 8334; Boland v. Daly, 318 A.2d 329, 333 (Pa. 1974) (“[Title 15 Pa. Cons. Stat. Ann. § 8334] provides that partners owe a fiduciary duty to one another.”); Clement v. Clement, 260 A.2d 728, 729 (Pa. 1970) (“Our theory is simple[:] There is a fiduciary relationship between partners.”). According to the Pennsylvania Supreme Court, “[o]ne should not have to deal with his partner as though he were the opposite party in an arms-length transaction[;] [o]ne should be allowed to trust his partner, to expect that he is pursuing a common goal and not working at cross-purposes.” Clement, 260 A.2d at 729. Furthermore, according to the Court, co-partners owe one another “the duty of the finest loyalty,” and conduct that is otherwise permissible in arm's length transactions is forbidden to those bound by fiduciary ties. Id.

In view of the law, and viewing the evidence in a light most favorable to plaintiffs, the Court is amply satisfied that plaintiffs have created a triable issue regarding whether Hansen breached his fiduciary duty to his partners by either assigning his shares to his children in violation of the Limited Partnership Agreement and concealing this fact from his partners; or, by failing to reveal the true identity of the entity that bought out plaintiffs' shares and the true financial condition of the golf

course. Plaintiffs' evidence tends to show that instead of acting in the best interests of his partners, Hansen deceived his partners out of their shares in the partnership in favor of his children. The Court is therefore satisfied that triable issues exist as to plaintiffs' breach of fiduciary duty claim, and defendants' Motion is accordingly denied with respect to that claim.

3. Civil Conspiracy

To state a cause of action for civil conspiracy, one must establish the following elements: (1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act done in pursuance of the common purpose; and (3) actual legal damage. Smith v. Wagner, 588 A.2d 1308, 1311-12 (Pa. Super. Ct. 1991). Also, proof of malice or an intent to injure is required. Skipworth v. Lead Industries Ass'n, Inc., 690 A.2d 169, 174 (Pa. 1997). A civil conspiracy may be proven by circumstantial evidence, provided the evidence is full, clear, and satisfactory. Rumbaugh v. Beck, 601 A.2d 319, 327 (Pa. Super. Ct. 1991).

Defendants' only argument with respect to plaintiffs' conspiracy claim is that because plaintiffs' underlying claims fail, the conspiracy claim must also fail. As the Court has found, however, that plaintiffs' underlying claims of fraud and breach of fiduciary duty remain, the Court likewise rejects this argument. Accordingly, defendants' Motion is denied with respect to plaintiffs' conspiracy claim.

4. Unjust Enrichment

Defendants next attack plaintiffs' claim for unjust enrichment asserted against the four Hansen children. The elements of an unjust enrichment claim are (1) benefits conferred on defendant by plaintiff; (2) appreciation of such benefits by defendant; and (3) acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value. Styer v. Hugo, 619 A.2d 347, 350 (Pa. Super. Ct. 1993). In determining whether the doctrine applies, courts focus not on the intention of the parties, but rather on whether the defendant was unjustly enriched. Id. "Where unjust enrichment is found, the law implies a contract between the parties pursuant to which the plaintiff must be compensated for the benefits unjustly received by the defendant." Id. Such an implied contract requires that the defendant pay the plaintiff the value of the benefits conferred, that is, that the defendant make restitution to the plaintiff in quantum meruit. Id.

The Court finds that triable issues exist with respect to plaintiffs' unjust enrichment claim. Although defendants argue that because the Hansen children paid value for plaintiffs' Ballenrose shares the doctrine of unjust enrichment is inapplicable, the Court finds that the factfinder in this case could find that plaintiffs sold their shares to the Hansen children for less than value due to Hansen's and other defendants' alleged misrepresentations about the financial viability of the golf

course, and that the Hansen children were unjustly enriched in purchasing and retaining plaintiffs' shares in the golf course. These are quintessential fact issues which the factfinder, whether it be the Court or the jury, must determine at trial, and are inappropriate for disposition at this juncture. Accordingly, defendants' Motion is denied with respect to this claim.

5. Statute of Limitations

Defendants' final challenge to plaintiffs' action is that plaintiffs' claims are time-barred by the statute of limitations because the alleged fraud occurred in 1993 and the instant action was filed in 1998. Under 42 Pa. Cons. Stat. Ann. § 5524 (7), fraud actions are subject to a two-year statute of limitations. However, as plaintiffs accurately note, under Pennsylvania case law, the limitations period is tolled until the plaintiff discovers, or through the exercise of reasonable diligence, should have discovered both that he has been injured and that his injury was caused by another's conduct. Cathcart v. Keene Industrial Insulation, 471 A.2d 493, 500 (1984) (en banc). Furthermore, where the underlying events being sued upon sound in fraud or deceit, then the statute of limitations is tolled until such time as the fraud has been revealed or should have been revealed by the exercise of due diligence by plaintiffs. Beauty Time, Inc. v. Vu Skin Systems, Inc., 118 F.3d 140, 146 (3d cir. 1997). In this case, defendants have not pointed to any evidence showing that plaintiffs knew, or, by the exercise of due diligence, should have known of defendants' alleged fraud on plaintiffs prior to the time

that plaintiffs discovered the alleged fraud. Accordingly, defendants' Motion is denied with respect to the statute of limitations argument.

D. Conclusion

In conclusion, Defendant's Motion for Summary Judgment will be granted in part and denied in part for the aforementioned reasons. The Motion will be granted as to plaintiffs' 1992 buy-in fraud claim, and denied as to all other claims.

An appropriate Order follows.

Clarence C. Newcomer, J.

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O R D E R

AND NOW, this day of May, 1999, upon consideration of defendants' Motion for Summary Judgment, and plaintiffs' response thereto, and consistent with the foregoing Memorandum, it is hereby ORDERED that said Motion is GRANTED in part and DENIED in part. The Motion is GRANTED as to plaintiffs' fraud claim regarding the 1992 buy-in transaction, and summary judgment is entered in favor of defendants and against plaintiffs on that claim. The Motion is DENIED as to all other claims.

It is further ORDERED that the parties shall comply with the following discovery schedule for Phase II of discovery:

1. Discovery completion date: 9/10/99
2. Dispositive motions due: 9/10/99
Responses due: 9/29/99
3. Ready for trial: 9/30/99

AND IT IS SO ORDERED.

Clarence C. Newcomer, J.