



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

NICHOLAS A. RUGGERIO,)
)
 Plaintiff,)
)
 v.) Civil Action No. 18961-NC
)
 ESTATE OF MICHAEL A. POPPITI, SR.,)
 EDMUND F. LYNCH, ADM CTA,)
 CIRO C. POPPITI, MICHAEL A.)
 POPPITI, JR., SANDY POPPITI and)
 CRICKLEWOOD ASSOCIATES, L.P.,)
)
 Defendants.)

MEMORANDUM OPINION

Submitted: October 25, 2004
Decided: February 23, 2005

Nicholas A. Ruggerio, Wilmington, Delaware, Plaintiff *Pro Se*

Jeffrey M. Weiner, Esquire, FOX ROTHSCHILD LLP, Wilmington, Delaware, Attorney
for Defendants

PARSONS, Vice Chancellor.

This action stems from equity interests in two Delaware businesses held by Plaintiff, Nicholas Ruggerio (“Ruggerio”). Ruggerio entered into the two businesses in the mid-1990s with his longtime friend Michael A Poppiti, Sr. (“Poppiti, Sr.”). Both businesses were involved in the purchase, development and sale of real estate. Until his death on August 15, 1999, Poppiti, Sr. largely controlled the two businesses, along with members of his family, including Defendants Ciro Poppiti, Sandy Poppiti and Michael Poppiti, Jr. (“Poppiti, Jr.”). Ruggerio alleges that the Poppitis and the administrator of Poppiti, Sr.’s estate, Edmund F. Lynch (“Lynch”), never reported or accounted to him with respect to his share of the assets of the two businesses.

Poppiti, Sr. formed the first entity, Cricklewood Associates, L.P. (the “Cricklewood Partnership”), on July 24, 1995, in connection with efforts to develop property called Cricklewood Greene. Ruggerio owned a 33% interest in the Cricklewood Partnership.

The second entity was formed in 1997. In the early to mid-1990s, Ruggerio found himself in dire financial condition. He was exposed, for example, to foreclosure actions against his residence and several investment properties. On March 25, 1997, Poppiti, Sr. formed ENAR, Inc., a Delaware corporation (“ENAR”), to help Ruggerio avoid foreclosure on his home and other properties and accomplish an orderly liquidation of certain of his assets.

On June 18, 2001, Ruggerio filed this action against the Cricklewood Partnership and certain persons involved in administering the two entities (collectively “Defendants”), alleging breach of fiduciary duty, commingling of assets and failure to

account. Ruggiero seeks an accounting as to the two businesses, any damages demonstrated through the accounting and an award of attorneys' fees.

On July 23, 2001, the Estate of Poppiti, Sr. (the "Poppiti Estate") and its administrator, Lynch, filed a motion to dismiss for failure to state a claim. The motion seeks to dismiss all claims against the Estate and Lynch because the action was filed more than six months after Poppiti, Sr.'s death and thus outside the time period mandated by 10 *Del. C.* § 8113.¹ On August 30, 2004, Defendants moved for summary judgment on all claims based on transactions pre-dating June 18, 1998, as being time-barred based on an analogous three-year statute of limitations, and on all claims generally for failure to state a claim.

These are the Court's rulings on both of the pending motions. The Poppiti Estate and Lynch's motion to dismiss is denied. Assuming the well-pled allegations of the Complaint are true, the Poppiti Estate may be found to hold property in constructive trust for the benefit of Ruggiero. Property held in constructive trust by a decedent does not become property of the decedent's estate; therefore, claims regarding such property are not subject to the limitations period of § 8113.

The Court grants summary judgment in favor of Defendants on all claims regarding pre-June 18, 1998 transactions. This includes: (1) ENAR's sale of 5076 W. Brigantine Court, (2) ENAR's sale of 14 Wineberry Drive, and (3) the Cricklewood

¹ Plaintiff responded to the motion to dismiss on September 5, 2001. The record, however, does not contain a reply or other indication that the Estate or Lynch actively pursued the motion after Plaintiff's response.

Partnership's sale of a portion of the Pike Creek Office Park to Avanti. The Court denies summary judgment with respect to all other claims and transactions, because Defendants failed to meet their burden of proving that there are no material issues of fact and that they are entitled to judgment as a matter of law. Thus, Ruggerio's claims for an accounting, damages and attorney's fees may proceed with respect to any Cricklewood Partnership and ENAR activities after June 18, 1998, that are challenged in the relevant pleadings.

I. BACKGROUND²

A. The Cricklewood Partnership

The Cricklewood Partnership was formed in 1995 and funded by loans of \$2,909,246 from the Ruth E. Poppiti Trust ("REP Trust") and \$840,253 from Poppiti, Sr. Cricklewood Associates, Inc. ("Cricklewood Corporation"), a Delaware corporation, is the Cricklewood Partnership's general partner and a 1% shareholder. Ruggerio, Poppiti, Sr. and Poppiti, Jr. were the limited partners, each with a 33% ownership interest.

In April 1996, the Cricklewood Partnership purchased property known as the Pike Creek Office Park. In March 1998, the Partnership sold a portion of the Pike Creek Office Park ("Parcel I") to Avanti, LLC ("Avanti").³ Avanti was founded by Poppiti, Sr.

² Unless otherwise noted, the facts set forth in this opinion are taken from the well-pleaded allegations of the Complaint or, to the extent they relate to Defendants' summary judgment motion, from Defendants' appendix.

³ The Cricklewood Partnership sold the remainder of the Pike Creek Office Park in 2001.

and two non-parties.⁴ Around the time of the sale to Avanti, the Cricklewood Partnership guaranteed a mortgage to PNC Bank for Avanti in the amount of \$1,900,000 and, as collateral, encumbered the remaining property of the Partnership. Avanti constructed a building on Parcel I before reselling the property in 1999.

Ruggerio complains that the Cricklewood Partnership never received any consideration for its guarantee of the Avanti mortgage or any part of the proceeds of Avanti's sale of Parcel I. Ruggerio also alleges that, since its inception, the Partnership has never given him an accounting of its income and disbursements. The record contains no evidence, however, that Ruggerio ever asked for such an accounting before June 18, 1998, the critical date for statute of limitations purposes.

Ruggerio also alleges that the Cricklewood Partnership sold a number of lots in Cricklewood Greene at various times and entered into mortgage transactions in connection with the development of that property. In addition, in July 1996, the Cricklewood Partnership purchased some real estate known as the Marker Property in New Castle County, Delaware. The Partnership sold that property in April of 2001.

B. ENAR, Inc.

In the early to mid 1990s, Ruggerio encountered financial difficulty. In March 1995, with 10 months of mortgage payments in arrears, the Wilmington Trust Company ("Wilmington Trust") began foreclosure proceedings against Ruggerio's residence, 14 Wineberry Drive. On December 30, 1996, Wilmington Trust gained title to the

⁴ Ruggerio apparently had no ownership interest in Avanti.

residence through a sheriff's sale. Soon thereafter, Poppiti, Sr. stepped in to aid his friend and business partner.

On March 25, 1997, Poppiti, Sr. formed ENAR for the benefit of Ruggerio, its only shareholder. Poppiti, Sr. was elected ENAR's president, secretary and treasurer; Ciro Poppiti was elected a vice president and assistant secretary; and Sandy Poppiti was elected a vice president and assistant secretary. The purpose of ENAR was to use Poppiti, Sr.'s credit to stabilize Ruggerio's situation and allow for the orderly liquidation of certain property he had owned.

On May 1, 1997, Wilmington Trust conveyed 14 Wineberry Drive to ENAR, and Ruggerio conveyed five other properties to ENAR.⁵ ENAR concurrently paid off Ruggerio's substantial debt to Wilmington Trust through mortgage refinancing with a personal guarantee by Poppiti, Sr. In August and September 1997, ENAR sold 5706 W. Brigantine Court to Ruggerio's daughter and her husband and 14 Wineberry Drive to a third party. In October 1997, ENAR purchased 123 Bunting Drive, again subject to a bank mortgage and a personal guarantee from Poppiti, Sr. ENAR also engaged in a number of other real estate transactions after June 18, 1998.

By July 29, 1999, ENAR had sold all six of the properties it originally owned. At that time, \$188,899.92 remained outstanding on the loan made to ENAR by Wilmington Trust and guaranteed by Poppiti, Sr. On August 16, 1999, the Cricklewood Partnership

⁵ Ruggerio personally conveyed 2717, 2719 and 2721 W. Third Street and 221 N. DuPont Street to ENAR. The conveyance of 5076 Brigantine Court was by Nicholas A. Ruggerio, Inc.

paid the note in full and correspondingly debited Ruggerio's Partnership interest. There is no evidence, however, that Ruggerio ever approved of, authorized or even knew about this charge against his Partnership interest until long after it occurred. Ruggerio cites this transaction as supporting his claim for breach of fiduciary duty. Ruggerio also alleges that ENAR has never given him an accounting of its various transactions.

II. ANALYSIS

A. Motion to Dismiss

The Poppiti Estate and Lynch move to dismiss for failure to state a claim. A motion to dismiss under Rule 12(b)(6) will be granted where it appears with reasonable certainty that the plaintiff cannot prevail on any set of facts that can be inferred from the pleadings.⁶ Plaintiff is entitled to all reasonable inferences that can be drawn from the Complaint.⁷

Section 8113 of Title 10 of the Delaware Code limits the time for commencing an action against a decedent's estate to either six months from the date of the decedent's death or three months from notice of rejection of a claim submitted to the administrator. The Poppiti Estate and Lynch have moved to dismiss Ruggerio's claims against them because Ruggerio's Complaint was filed more than 22 months after Poppiti, Sr.'s death. Ruggerio replies that the Poppiti Estate holds property of his in constructive trust and that

⁶ See *Leonard Loventhal Account v. Hilton Hotels Corp.*, 2000 WL 1528909, at *3 (Del. Ch. Oct. 10, 2000).

⁷ See *Growbow v. Perot*, 539 A.2d 180, 187 n.6 (Del. 1988).

such property does not become part of a decedent's estate. Therefore, according to Ruggiero, § 8113's six-month time limitation does not apply to his claims.

A constructive trust is "an equitable remedy of great flexibility and generality."⁸ A constructive trust is proper when "a defendant's fraudulent, unfair or unconscionable conduct causes him to be unjustly enriched at the expense of another to whom he owed some duty."⁹ The Complaint alleges facts relating to Ruggiero's claims for breach of fiduciary duties, fraud and self-dealing that, if proven, could give rise to a constructive trust.

Our courts have held that property within an express, constructive, or resulting trust is held for the beneficiary and does not become part of a decedent's estate.¹⁰ Applying this rationale, courts have held statutes limiting the time period to bring an action against an estate inapplicable to property held in constructive or resulting trusts because claims against such property are not claims against the decedent's estate.¹¹

⁸ *Cannon v. Sisneros*, 1987 WL 16286, at *2 (Del. Ch. Aug. 31, 1987).

⁹ *Adams v. Jankouskas*, 452 A.2d 148, 152 (Del. 1982).

¹⁰ *Adams*, 452 A.2d at 154 (trust property cannot become part of the estate because "a trustee has only legal, and not beneficial or equitable title to the trust res"); *see also Everett v. Lanouette*, 1994 WL 681106, at *9 (Del. Ch. Nov. 10, 1994).

¹¹ *See Everett*, 1994 WL 681106, at *9 ("[t]he party seeking the imposition of a trust over assets in the estate alleged to have been held in trust by the decedent is not a creditor of the estate and is not required to present a claim"); *Adams*, 452 A.2d at 154 (allowing claim notwithstanding expiration of 12 *Del. C.* § 2102's six-month period of limitations); *Wagner v. Ware*, 1988 WL 30184, at *2 (Del. Ch. Mar. 29, 1998) (holding action seeking constructive trust not barred by expiration of time to review proof of will under 12 *Del. C.* § 1309).

Ruggerio's claims against the Poppiti Estate and Lynch relate to property in which he claims equitable title. Drawing all inferences in Ruggerio's favor, that property may be found to be held in constructive trust by the Poppiti Estate, rather than part of the Estate itself. Therefore, because § 8113's time limit only applies to actions against property of the estate, the statute does not bar Ruggerio's claims against the Poppiti Estate and Lynch in this action.¹²

B. Defendants' Motion for Summary Judgment

Defendants have moved for summary judgment on two grounds. First, Defendants argue that any claims that arose prior to June 18, 1998 are time-barred. Second, Defendants contend Ruggerio's request for an accounting or constructive trust has no merit.

Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.¹³ The burden is on the moving party to prove absence of a material issue of fact, and any doubt

¹² Ruggerio's Complaint does not explicitly refer to either a constructive or resulting trust. The Complaint's repeated references to fiduciary duties owed to Ruggerio in connection with property and monies held by ENAR and the Cricklewood Partnership for his benefit, however, are sufficient to put Defendants on notice of his claims for equitable relief. Furthermore, Ruggerio's response to the motion to dismiss in 2001 explicitly mentioned the constructive trust theory. Thus, Defendants could not reasonably complain about lack of notice of that theory.

¹³ Ch. Ct. Rule 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

regarding the existence of such an issue will be resolved against the movant.¹⁴ Once a motion for summary judgment is made and supported, however:

an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial.¹⁵

In assessing a motion for summary judgment, the court must draw all factual inferences against the moving party.¹⁶

1. Are any of Ruggerio's claims time-barred?

Where the relief sought from an accounting is merely the recovery of money, the case is analogous to an action for monetary damages.¹⁷ In such cases, the court applies the equivalent statute of limitations by analogy.¹⁸ The statute of limitations for a breach of fiduciary duty is three years.¹⁹ In addition, "[a] right to an accounting ... does not revive a claim barred by law."²⁰

¹⁴ *Scureman v. Judge*, 626 A.2d 5, 10–11 (Del. Ch. 1992).

¹⁵ Ch. Ct. R. 56(e).

¹⁶ *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977).

¹⁷ *Artesian Water Co. v. Lynch*, 283 A.2d 690, 692 (Del. Ch. 1971).

¹⁸ *Merck & Co. v. SmithKline Beecham Pharms. Co.*, 1999 WL 669354, at *42 (Del. Ch. Aug. 5, 1999).

¹⁹ 10 *Del. C.* § 8106

²⁰ *Fike v. Ruger*, 754 A.2d 254, 264 (Del. Ch. 1999) (quoting the *Revised Uniform Partnership Act* § 405(c) (1996) to interpret 6 *Del. C.* §§ 1521–22).

Ruggerio filed this action on June 18, 2001. At least three of the transactions at issue occurred more than three years earlier, before June 18, 1998: (1) ENAR's sale of 5076 W. Brigantine Court, (2) ENAR's sale of 14 Wineberry Drive, and (3) the Cricklewood Partnership's sale of a Parcel I of the Pike Creek Office Park to Avanti. Defendants argue that any claims based on transactions pre-dating June 18, 1998 are time-barred.

In response, Ruggerio urges the Court not to apply the statute of limitations inflexibly. Ruggerio relies on *Yaw v. Talley* for the proposition that "fiduciaries who benefit personally from their wrongdoing ... will not to be afforded the protection of the statute."²¹ The rule *Yaw* refers to comes from a line of cases holding that in extraordinary instances the statute of limitations will not protect a defendant who personally profited from a fraudulent, self-dealing transaction.²² A defendant's actionable self-dealing, however, only works to toll the statute until the plaintiff becomes aware of the wrong.²³

²¹ 1994 WL 89019, at *5–6 (Del. Ch. Mar. 2, 1994) (dismissing plaintiff's claim that defendants wasted corporate assets in a self-dealing transaction because the three-year statute of limitations had run).

²² See *Bovay v. H.M. Byllesby & Co.*, 38 A.2d 808 (Del. 1944) (holding fiduciaries responsible for corporation's insolvency could not rely on statute of limitations as a defense); *Halpern v. Barran*, 313 A.2d 139, 142 (Del. Ch. 1973) (interpreting *Bovay*). Furthermore, "where the complaint asserts a claim that on its face would otherwise be time-barred, the plaintiff bears the burden of pleading facts that would operate to toll the statute." *Yaw*, 1994 WL 89019, at *6.

²³ See *Bokat v. Getty Oil Co.*, 262 A.2d 246, 251 (Del. 1970) (affirming summary judgment in favor of defendants that allegedly engaged in self-dealing transactions because plaintiff was aware of all claims at least three years before he commenced suit); *Kahn v. Seaboard Corp.*, 625 A.2d 269, 274–76 (Del. Ch. 1993) (equity "treats the statute as running from the discovery of the fraud, not before").

Ruggerio alleges that Poppiti, Sr. benefited personally from breaches of fiduciary duty. Ruggerio claims, for example, that in connection with the Partnership's sale of Parcel I to Avanti in March 1998, it did not receive any consideration in exchange for guaranteeing Avanti's \$1.9 million mortgage from PNC Bank. In that transaction, the Cricklewood Partnership's assets were encumbered for the benefit of Avanti, a company in which Poppiti, Sr., but not Ruggerio, owned an interest. Ruggerio thus argues that Poppiti, Sr. should not be able to rely on a statute of limitations defense to claims based on the 1998 transaction involving Parcel I.²⁴

Ruggerio has not presented evidence sufficient to toll the time period. Ruggerio's response to Defendants' summary judgment motion did not include affidavits or other evidence proving specific facts that show there is a genuine issue for trial. Ruggerio's averment that Poppiti, Sr. profited personally from the payment of an ENAR debt after June 18, 1998 is not sufficient to create such an issue. For tolling to be applicable, Ruggerio would have to show, at a minimum, that the pre-June 18, 1998 transactions themselves were fraudulent, that Poppiti, Sr. or another defendant personally profited from them, and that Ruggerio did not know, and could not have known with the exercise

²⁴ The only argument Ruggerio explicitly makes as to why the statute of limitations should be tolled is that Poppiti, Sr. forced a distribution of Ruggerio's Cricklewood Partnership interest in order to pay an ENAR debt on or about August 19, 1998. Ruggerio's Answering Brief at 5-7. Ruggerio contends Poppiti, Sr. personally profited from satisfaction of the ENAR debt because he had personally guaranteed the note. This transaction, however, occurred after June 18, 1998 and thus is not time-barred.

of reasonable diligence, of the fraud until after June 18, 1998. Ruggiero has not made such a showing.

Defendants have shown that at least some of the transactions referenced in Ruggiero's complaint occurred more than three years before he filed this action. Ruggiero has failed to present evidence that shows there is a genuine issue of material fact as to whether the limitations period should be tolled as to any of the pre-June 18, 1998 transactions. Therefore, Defendants' motion for summary judgment is granted as to all claims based on pre-June 18, 1998 transactions.

2. Claims on the merits

Both ENAR and the Cricklewood Partnership made a number of transactions after June 18, 1998.²⁵ Ruggiero alleges breach of fiduciary duty by the commingling of funds among ENAR, the Cricklewood Partnership and Cricklewood Corporation. He also complains that he was never given an accounting for either ENAR or the Cricklewood Partnership.

In support of their motion for summary judgment on the merits of Ruggiero's claims, Defendants filed an extensive Appendix containing documentary evidence relating to the transactions referred to in the Complaint. According to Defendants, those documents show that there was nothing unusual about any of the challenged transactions and that there is no basis for Ruggiero's allegations of a breach of fiduciary duties. In

²⁵ Transactions after June 18, 1998 include: (1) ENAR's sales of 2717-21 W. Third Street and 212 N. DuPont Street, (2) the alleged forced distribution of a portion of Ruggiero's partnership interest in satisfaction of an ENAR debt, and (3) the Cricklewood Partnership's sale of Parcel I of the Pike Creek Office Park property.

addition, the record shows that before Ruggerio filed this suit Defendants supplied him with a number of documents relating to the two entities, including checking account records and financial compilations. During the litigation, Defendants produced many more documents, including tax returns for ENAR and the Cricklewood Partnership and bookkeeping ledgers. These are the types of documents upon which Defendants rely.

On a motion for summary judgment it is the movant's burden to show the absence of any material issue of fact. In this case, Defendants attempt to meet that burden by relying mainly upon documents they produced in discovery. In the context of a trial, those documents and any related testimony of witnesses with relevant knowledge may well be sufficient to support a judgment in Defendants' favor. The documentary evidence alone, however, does not provide a satisfactory basis for concluding that there are no material issues of fact in dispute.

During the relevant time period, ENAR and the Cricklewood Partnership entered into a number of different transactions. Some of the transactions involved multi-party financing arrangements.

The documents cited by Defendants are less than ideal in terms of reliability, especially on a motion for summary judgment. For example, the financial documents of ENAR and the Partnership are only compilations, as opposed to more reliable audited financial statements.²⁶ Defendants also rely on the tax returns of the two entities. Tax

²⁶ Unlike audited financial statements, which contain data independently verified by the preparer, compilations generally are merely a reformatting of information given to the preparer by the client. *See* Accountant's Compilation Report page 3, Defendants' Appendix at 108. Compilations are used in some cases because they

returns, however, are of limited aid in understanding the operation of the entities in question, because the tax code's definition of "income" is not identical to the definition under Generally Accepted Accounting Principles. Therefore, Defendants' showing that the Cricklewood Partnership consistently produced a *tax* loss, does not necessarily prove that it experienced a *financial* loss. Thus, even considering the totality of Defendants' disclosures, the Court is not convinced that their evidence elucidates the facts with sufficient clarity and reliability to show that no material issue of fact remains.

To prevail on summary judgment, Defendants also must prove that they are entitled to judgment as a matter of law. At this stage, Defendants have failed to prove that Ruggerio cannot succeed on any of his claims for breach of fiduciary duties. The ownership and management structure of both ENAR and the Cricklewood Partnership are complicated and have yet to be clarified. Both entities were run informally, without regular reporting to the owners, including Ruggerio, and often without documentation.²⁷ In addition, drawing all inferences in Ruggerio's favor, as it must, the Court cannot conclude as a matter of law that Ruggerio cannot succeed on any of his claims. Defendants have failed to demonstrate, for example, that none of the post-June 18, 1998 transactions of ENAR or the Cricklewood Partnership involved self-dealing by Poppiti,

are considerably cheaper than reviewed statements and audited statements for which more stringent preparation standards apply.

²⁷ See, e.g., Ruggerio Appendix at 5 (use of one "open account" to keep track of loans from the REP Trust to the Cricklewood Partnership in order to "cut down on expenses and costs"), 14 (explaining the lack of any writing memorializing Poppiti, Sr.'s lending of \$590,000 to the Cricklewood Partnership).

Sr. or other Defendants. On the contrary, the evidence of record on some of the transactions arguably could support an inference of self-dealing, in which case Defendants would have to demonstrate the entire fairness of the challenged transaction.

In summary, the financial documentation and other evidence produced by Defendants in support of their motion is not sufficient to demonstrate that there is no genuine issue of material fact for trial. Furthermore, the Court considers it desirable to inquire thoroughly into the facts of this case in order to clarify the application of the law to the circumstances.²⁸ Therefore, Defendants are not entitled to summary judgment on the merits of Ruggerio's claims.

III. CONCLUSION

For the foregoing reasons, the motion to dismiss filed by the Poppiti Estate and Lynch is denied. Defendants' motion for summary judgment is granted as to any and all claims based on transactions that occurred before June 18, 1998. The Court denies summary judgment as to all other claims. Thus, Ruggerio may continue to seek an accounting with respect to Cricklewood Partnership and ENAR transactions, income and disbursements that occurred on or after June 18, 1998.

IT IS SO ORDERED.

²⁸ See *Ebersole v. Lowengrub*, 180 A.2d 467, 469 (Del. 1962).