STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: January 2, 2014)

WILLIAM J. BAXTER, and PAUL L. DANSEREAU,	:	
Plaintiffs,	:	
	:	
v.	:	**C.A. No. PB 11-7086**
	:	
WASHINGTON TRUST BANCORP, INC., WASHINGTON TRUST COMPANY OF WESTERLY, JOHN A. PARMELEE, and BERNARD A. POIRIER,	:	
Defendants.	:	

DECISION

SILVERSTEIN, J. William J. Baxter (Baxter) and Paul L. Dansereau (Dansereau) were former partners with John A. Parmelee (Parmelee) and Bernard A. Poirier (Poirier) in Parmelee, Poirier and Associates (PPA), an accounting firm. As a result of actions taken by Parmelee and Poirier (collectively, Individual Defendants) to remove Baxter as a signatory on certain PPA bank accounts maintained at Washington Trust Company of Westerly (WTC), Baxter and Dansereau (collectively, Plaintiffs) filed an amended complaint (Amended Complaint) alleging that WTC and Washington Trust Bancorp, Inc. (WTB) were negligent in handling the removal of Baxter as a signatory (Count I), tortiously interfered with contractual relations (Count II), and that WTC and WTB, along with Poirier, committed civil conspiracy (Count III). The Amended Complaint contains an additional count of fraud alleged against Individual Defendants. All claims made against Individual Defendants were referred to mediation as part of an Order dated June 25, 2013. Before the Court is WTB and WTC's joint motion for summary judgment as to Counts I, II, and III of the Amended Complaint, to which Plaintiffs objected.

I

Facts & Travel

The allegations against WTC and WTB arise from actions taken by partners of two different partnerships. One of the partnerships was PPA, which provided accounting, auditing, and related services to its clients. PPA was formed in 2003 among Baxter and the Individual Defendants, as equal partners. In 2006, Dansereau bought into the partnership and became the owner of a ten percent (10%) interest in PPA. As a result of the Dansereau buy-in, Baxter and Individual Defendants' interest in PPA was reduced from thirty-three and one-third percent (33.3%) to thirty percent (30%). The other partnership was PPB Associates (PPB). The partners of PPB were Baxter and the Individual Defendants. PPB owned real estate, including a property located at 469 Centerville Road in Warwick (Warwick Property), on which WTC had a mortgage. The Warwick Property consisted of several units in an office condominium from which PPA operated its accounting business.

Besides the relationship resulting from the mortgage which WTC held on the Warwick Property, PPA also had several deposit accounts with WTC. Specifically, PPA maintained two checking accounts (PPA Checking Accounts) and one savings account (PPA Savings Account) with WTC. Baxter and Individual Defendants were all authorized signers on the PPA Checking Accounts; Poirier was the only authorized signer on the PPA Savings Account. Dansereau was not an authorized signer on any of the three accounts.

On December 28, 2010, Individual Defendants, without notice to Plaintiffs, executed documents with WTC which caused Baxter to be removed as an authorized signer on the PPA Checking Accounts. On December 31, 2010, in an action brought by Plaintiffs two weeks earlier, a Special Master was appointed to "monitor, supervise, and referee [PPA's] business,

operations and affairs." (Order ¶ 1, Baxter et al. v. Parmelee, et al., C.A. No. KC 10-1809 (R.I. Super. Dec. 31, 2010)). By January 2, 2011, Baxter visited a local branch of WTC and was informed by a teller that he was no longer a signatory on the PPA Checking Accounts, and matters pertaining to the PPA Checking Accounts could not be discussed with him. As a result, Baxter was no longer able to access the monies in the PPA Checking Accounts. Baxter told Dansereau about his removal as a signatory to the PPA Checking Accounts.

On January 10, 2011, an Order was entered requiring forty-eight hours notice be given to the Special Master and to all other PPA partners of any proposed payment from the PPA Checking Accounts. As part of the Order, any partner could object within twenty-four hours, and any disputes would be referred to the Special Master if they could not be resolved.

On March 18, 2011, Plaintiffs questioned WTC about Baxter being removed as a signatory on the PPA Checking Accounts. Plaintiffs requested that WTC freeze the accounts. On the next business day, March 21, 2011, WTC informed Plaintiffs that they would not completely freeze the accounts, but did freeze $80,000, which had been transferred from one of the PPA Checking Accounts to the PPA Savings Account. On March 22, 2011, Judge Clifton of this Court ordered that the Special Master be the sole signatory to the PPA Checking Accounts, and thereafter, all disbursements needed the approval of the Special Master. Finally, on April 22, 2011, two Consent Orders which returned signature authority for the PPA Checking Accounts to Poirier and Parmelee were entered. Pursuant to the Consent Orders, a hold was placed on $56,500 of funds in the PPA Savings Account.

Later in 2011, the mortgage which WTC had on the Warwick Property matured. On the maturity date, November 21, 2011, approximately $580,000 was owed to WTC. On November 23, 2011, WTC gave notice of its intention to exercise the power of sale in its mortgage.

Plaintiffs filed their Amended Complaint on December 29, 2011, alleging harm from the foreclosure. However, the foreclosure sale did not take place until January 6, 2012, eight days after the Amended Complaint was filed. Between the filing of the Amended Complaint and the foreclosure sale, WTC's counsel gave notice to Baxter's counsel that all bids, including a potential bid from Baxter, would be entertained as long as the bidder appeared at the auction with a good faith deposit. At the auction, Poirier was the successful, and only, bidder, and he purchased the Warwick Property for $595,000. The sale price satisfied all outstanding principal and interest on the loan, but it did result in a small deficiency of $12,555.93, which represented a portion of the foreclosure costs.

II

Standard of Review

"Summary judgment is a proceeding in which the proponent must demonstrate by affidavits, depositions, pleadings and other documentary matter . . . that he or she is entitled to judgment as a matter of law and that there are no genuine issues of material fact." Palmisciano v. Burrillville Racing Ass'n, 603 A.2d 317, 320 (R.I. 1992) (citing Steinberg v. State, 427 A.2d 338 (R.I. 1981)). The court, during a summary judgment proceeding, "does not pass upon the weight or the credibility of the evidence but must consider the affidavits and other pleadings in a light most favorable to the party opposing the motion." Id. (citing Lennon v. MacGregor, 423 A.2d 820 (R.I. 1980)). Moreover, "the justice's only function is to determine whether there are any issues involving material facts." Steinberg, 427 A.2d at 340. The court's purpose during the summary judgment procedure is issue finding, not issue determination. O'Connor v. McKanna, 116 R.I. 627, 359 A.2d 350 (1976). Therefore, the only task for the judge in ruling on a

summary judgment motion is to determine whether there is a genuine issue concerning any material fact. Id.

"When an examination of the pleadings, affidavits, admissions, answers to interrogatories and other similar matters, viewed in the light most favorable to the party opposing the motion, reveals no such issue, the suit is ripe for summary judgment." Id. "[T]he opposing parties will not be allowed to rely upon mere allegations or denials in their pleadings. Rather, by affidavits or otherwise they have an affirmative duty to set forth specific facts showing that there is a genuine issue of material fact." Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998). However, it is not an absolute requirement that the nonmoving party file an affidavit in opposition to the motion. Steinberg, 427 A.2d at 338. If the affidavit of the moving party does not establish the absence of a material factual issue, the trial justice should deny the motion despite the failure of the nonmoving party to file a counter-affidavit.

Additionally, complaints sounding in negligence are typically not resolved by summary judgment and instead should be resolved by fact finding. See Ouch v. Khea, 963 A.2d 630, 633 (R.I. 2009). However, the existence of a duty is a question of law that can be resolved on a summary judgment motion. Id. (whether a defendant owes a plaintiff a duty of care "is a question of law to be determined by the court"). In the absence of a duty of care, "the trier of fact has nothing to consider and a motion for summary judgment must be granted." Berard v. HCP, Inc., 64 A.3d 1215, 1218 (R.I. 2013).

III

Discussion

A

Claims Against WTB

WTB argues that it should be dismissed from the case because it is a holding company for WTC, and all allegations by Plaintiffs are against WTC and have no relation to WTB. Specifically, WTB points out that it was neither a party to the PPA Checking and Savings Accounts nor to the mortgage loan to PPB. See Defs. WTB and WTC's Exs. 2-6, 19. Finally, WTB states that Plaintiffs are unable to produce any evidence of alleged misconduct performed by any agent of WTB. Plaintiffs do not specifically address the issue of whether WTB should be dismissed because it is only the holding company for WTC.[1]

This Court finds that WTB, as a holding company and non-party to any of the relationships from which the alleged misconduct originated, should be dismissed from the suit. See Black v. Unum Life Ins. Co. of Am., 324 F. Supp. 2d 206, 214-15 (D. Me. 2004) (granting summary judgment on behalf of holding company when no evidence or argument existed to prove that holding company, as opposed to subsidiary, committed wrongful acts). Furthermore, Plaintiffs failed to refute WTC's evidence that WTB was not a party to any of the contractual relationships and failed to set forth any evidence to show that WTB was involved in any of the alleged negligent activity. Accordingly, all claims made against WTB are dismissed and WTB's motion is granted.

[1] Plaintiffs failed to address the issue of whether WTB was a proper party to the suit. Previously, this Court has summarily granted summary judgment where the merits of an issue have not been addressed by the moving party. See Sangermano v. Roger Williams Realty Corp., No. 06-6628, 2009 WL 3328509 (R.I. Super. Ct. July 22, 2009).

B

Removal of Signatory Authority

1

Negligence

WTC argues that Plaintiffs' claim of negligence should be dismissed due to laches and failure to mitigate damages. WTC's entire basis for summary judgment concentrates on the issue of damages. WTC asserts that any damages that did occur could have been prevented by Plaintiffs had they informed WTC of the removal immediately, rather than waiting over two months to inform them. In fact, at the hearing, counsel for WTC stipulated to the fact that WTC did not properly exercise due diligence in removing Baxter from the PPA Checking Accounts, for the purpose of summary judgment only.[2] (Hr'g Tr. 11-12, May 20, 2013).

Plaintiffs argue that they sustained damages as a result of WTC's removal of Baxter from the PPA Checking Accounts. In Baxter's affidavit dated May 28, 2013, he specifically sets forth alleged damages that he and Dansereau sustained as a result of Baxter's signatory authority being removed.[3]

To establish a claim for negligence, "a plaintiff must establish a legally cognizable duty owed by a defendant to a plaintiff, a breach of that duty, proximate causation between the conduct and the resulting injury, and the actual loss or damage." Willis v. Omar, 954 A.2d 126, 129 (R.I. 2008). Our Supreme Court has held that whether a duty exists is a question of law. See Berman v. Sitrin, 991 A.2d 1038, 1043 (R.I. 2010). "Only when a party properly overcomes the duty hurdle in a negligence action is he or she entitled to a factual determination on each of the

[2] WTC specifically reserved the right to contest the issue at trial.

[3] Initially, WTC argued that Plaintiffs did not submit any evidence of damages sustained. Baxter's affidavit was submitted a week after the hearing on summary judgment and properly sets forth alleged damages.

remaining elements: breach, causation, and damages." Ouch, 963 A.2d at 633. Here, WTC stipulated that it breached its duty of due diligence that it owed to Baxter (for the purposes of summary judgment only). See supra note 2. Therefore, any determination as to both proximate causation and damages is properly reserved for a finder of fact. See Splendorio v. Bilray Demolition Co., 682 A.2d 461, 467 (R.I. 1996) ("Ordinarily the determination of proximate cause and, consequently, the existence of any superseding cause is a question of fact that should not be decided by summary judgment.").

However, WTC maintains that the negligence claim should be dismissed under the doctrine of laches.[4] Laches is an equitable defense that "precludes a lawsuit by a plaintiff who has negligently sat on his or her rights to the detriment of a defendant." O'Reilly v. Town of Glocester, 621 A.2d 697, 702 (R.I. 1993).[5] When considering the laches doctrine's applicability in a particular case, a court must determine (1) whether there was negligence on the part of the plaintiff that led to an unreasonable delay in the prosecution of the case; and, if so, (2) whether the delay prejudiced the defendant. Id. Whether there has been unreasonable delay and prejudice to the defendant, however, are both questions of fact; the resolution of which is dependent on the circumstances of the particular case. Raso v. Wall, 884 A.2d 391, 396 (R.I. 2005). However, our Supreme Court has, on at least one occasion, affirmed summary judgment

[4] WTC additionally argues that the doctrine of failure to mitigate damages should be a defense. To the extent that the same factual circumstances apply to the analysis of laches and mitigation of damages, the Court will treat them as one. Just as laches is typically an issue reserved for the finder of fact, so is the issue of whether there was a failure to mitigate damages. See Tomaino v. Concord Oil of Newport, Inc., 709 A.2d 1016, 1027 (R.I. 1998).

[5] This Court finds it unlikely that the doctrine of laches would apply in this case. Our Supreme Court has held that after the merger of law and equity, "the defense of laches may be asserted in civil actions seeking equitable relief[.]" Fitzgerald v. O'Connell, 120 R.I. 240, 245, 386 A.2d 1384, 1387 (1978). Here, the relief sought is not in the form of equity. Numerous other courts have specifically addressed and found that laches does not apply to traditional claims at law, even post-merger. See Naccache v. Taylor, 72 A.3d 149, 154 n.9 (D.C. 2013) (citing various state supreme courts).

on the grounds of laches in Hazard v. East Hills, Inc., 45 A.3d 1262, 1270 (R.I. 2012). There, plaintiffs delayed asserting their rights for over a hundred years prior to bringing their lawsuit. The Court there reasoned: "[w]e are hard-pressed to conceive of a clearer example of the proper application of laches than in the case before us, in which a party delays bringing a claim for more than a century." Id. at 1271. At the same time, the Court in Hazard declined to draw a bright line rule as to when delay might become unreasonable as a matter of law. See id. at 1270-1271 ("We need not address the issue of per se negligence as it relates to the doctrine of laches because we are satisfied that defendant otherwise is entitled to the benefits of this equitable defense."); see also Fitzgerald, 120 R.I. at 246, 386 A.2d at 1387 (finding that a ten-year delay does not constitute laches when it was not without explanation).

Under the Hazard Court's analysis, an extreme lapse of time may constitute an unreasonable delay as a matter of law. See Hazard, 45 A.3d at 1270-71. WTC contends that Plaintiffs' delay of approximately two months in informing WTC about the removal of Baxter was unreasonable. By comparison, the Hazard plaintiffs did not assert their rights until over a century had passed. Id. This Court cannot consider Plaintiffs' delay so egregious that it is unreasonable as a matter of law. See id.

2

Tortious Interference with Contractual Relations

WTC argues that Plaintiffs suffered no harm as a result of Baxter's removal. WTC also argues that there is no evidence that WTC intended to harm the contractual relationship amongst the partners by removing Baxter. Instead, WTC asserts that its actions were the execution of a routine transaction at the request of fifty percent (50%) of the PPA partners.

Plaintiffs contend that WTC interfered with Plaintiffs' ability to provide accounting services to clients. Specifically, Plaintiffs contend that they were unable to reach the PPA Checking Accounts, which hampered their ability to provide services to their respective clients.

A tortious interference claim requires the showing of "(1) the existence of a contract; (2) the alleged wrongdoer's knowledge of the contract; (3) his intentional interference; and (4) damages." Read & Lundy, Inc. v. Washington Trust Co. of Westerly, 840 A.2d 1099, 1102 (R.I. 2004). Additionally, it must be shown that there was no recognized privilege or other justification for the alleged tortfeasor's actions. Belliveau Bldg. Corp. v. O'Coin, 763 A.2d 622, 627 (R.I. 2000). When determining whether interference was unjustified, courts rely on seven factors set forth in the Restatement (Second) Torts: "(1) the nature of the actor's conduct; (2) the actor's motive; (3) the contractual interests with which the conduct interferes; (4) the interests sought to be advanced by the actor; (5) the balance of social interests in protecting freedom of action of the actor and the contractual freedom of the putative plaintiff; (6) the proximity of the actor's conduct to the interference complained of; and (7) the parties' relationship." Id. at 628 n.3. The burden is on the plaintiff to make a prima facie showing that the interference was without justification, "[b]ut after the plaintiff establishes these prima facie elements, '[t]he burden of proving sufficient justification for the interference shifts to the defendant.'" Id. at 627.

It is necessary, for a tortious interference claim, to prove legal malice; an intent to do harm without justification. See Jolicoeur Furniture Co., Inc. v. Baldelli, 653 A.2d 740, 753 (R.I. 1995). Here, Plaintiffs have not set forth evidence to support a conclusion that WTC acted with an intent to cause harm to Plaintiffs. Instead, Plaintiffs allege that WTC improperly removed Baxter as a signatory at the request of Individual Defendants. Additionally, Plaintiffs allege that the contractual relations that WTC interfered with were Plaintiffs' relations with their respective

clients. However, there is no evidence set forth by Plaintiffs to support a finding that WTC had knowledge of these contractual relationships. See Greensleeves, Inc. v. Smiley, 68 A.3d 425, 435 (R.I. 2013) (stating that element of tortious interference claim is knowledge by tortfeasor of contract interfered with). Therefore, summary judgment may enter with respect to Count II as it relates to the removal of Baxter's name.

3

Civil Conspiracy

To maintain a claim for civil conspiracy, there must also exist an underlying intentional tort. "[C]ivil conspiracy is not an independent basis of liability. It is a means for establishing joint liability for other tortious conduct; therefore, it 'requires a valid underlying intentional tort theory.'" Read & Lundy, Inc., 840 A.2d at 1102. As there exists no valid underlying intentional tort theory because summary judgment was granted with respect to the tortious interference claim, Plaintiffs cannot maintain a claim for civil conspiracy with respect to removal of Baxter's signatory authority.

C

Foreclosure of Warwick Property

With respect to the claims of tortious interference and civil conspiracy as it related to the foreclosure of the Warwick Property, Plaintiffs argue that the Individual Defendants contacted WTC and advised them that Poirier would purchase the Warwick Property. Plaintiffs suggest this contact caused WTC to foreclose on the Warwick Property and later have it purchased by Poirier. Plaintiffs allege that this conduct constituted an intentional interference with PPB's loan with WTC. In particular, Plaintiffs suggest that WTC failed to confirm with all partners whether it was their intention to let Poirier purchase the Warwick Property at any such foreclosure sale.

Alternatively, WTC argues that the foreclosure process was conducted in accordance with the law and held just as any other foreclosure sale. Specifically, WTC asserts that it was within its rights to foreclose on the property because the loan was in default, and that everyone, including Plaintiffs, was given the opportunity to bid at the foreclosure sale. To further support its contention that the sale was proper, WTC points to the fact that the purchase price was sufficient to cover all owing principal and interest on the loan. WTC disputes the claim that the foreclosure was an inside foreclosure in any way.

The elements of a tortious interference claim were discussed above and need not be restated. Quite simply, legal grounds for WTC to foreclose upon the Warwick property existed. WTC foreclosed while the loan was unpaid after its maturity date. However, "[e]ven where the defendant asserts that it was merely exercising its own contractual rights, [his] actions, if found to be unreasonable, can constitute improper interference with the plaintiff's contractual relationship." New England Multi-Unit Hous. Laundry Assoc. v. Rhode Island Hous. and Mortg. Fin. Corp., 893 F. Supp. 1180, 1192 (D.R.I. 1995). Therefore, the Restatement factors must still be weighed to determine if WTC's actions were justified. When analyzing the circumstances surrounding the foreclosure—the facts that the price was great enough to satisfy all the principal and interest; Baxter was invited to bid by WTC's counsel; and the foreclosure was carried out in accordance with proper procedures—there was not improper interference by WTC with Plaintiffs' rights. See Flintridge Station Assocs. v. Am. Fletcher Mortg. Co., 761 F.2d 434, 441 (7th Cir. 1985) (finding there to be "undeniably a justification" to foreclose on a property in default). Therefore, summary judgment is granted for WTC as to Count II as it relates to the foreclosure of the Warwick Property. Additionally, for the same reasons articulated above in section III.B.3, supra, summary judgment may enter for WTC as to Count III with

respect to the foreclosure because of the lack of a valid, underlying intentional tort theory. See Read & Lundy, Inc., 840 A.2d at 1102.

IV

Conclusion

Based on the foregoing analysis, this Court grants summary judgment in favor of WTB as to all counts. This Court also grants summary judgment with respect to WTC as to Counts II (Tortious Interference) and III (Civil Conspiracy). With respect to Count I (Negligence), based on the stipulations of the parties at argument, it is inappropriate for this Court to summarily decide the issues which are properly reserved for a finder of fact. Counsel for the Defendants WTB and WTC may present an order consistent herewith.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**William J. Baxter, and Paul L. Dansereau v. Washington Trust Bancorp, Inc., et al.**
CASE NO:	**PB 11-7086**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**January 2, 2014**
JUSTICE/MAGISTRATE:	**Silverstein, J.**
ATTORNEYS:	
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