

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

ROBERT O. WRIGHT T/A )  
HOUSE OF WRIGHT MORTUARY, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
JOSEPH K. DUMIZO and )  
SAMJOS SERVICE CORP., )  
 )  
Defendants. )

C.A. No. 01C-08-292-JRJ

Date Submitted: July 30, 2002  
Date Decided: October 17, 2002

MEMORANDUM OPINION

*Upon Defendant's Motion for Summary Judgment –*  
**GRANTED IN PART AND DENIED IN PART**

Daryl K. Fountain, Esquire, Law Office of Daryl K. Fountain, 1225 King Street, Suite 400, Wilmington, Delaware 19801, for the plaintiff.

Clark C. Kingery, Esquire, Clark C. Kingery Attorney at Law, 914 Walnut Street, Wilmington, Delaware 19801, for the defendants.

JURDEN, J.

Before the Court is the defendants' Motion Summary Judgment on Plaintiff's Breach of Contract and Deceptive Trade Practices Act claims. For the reasons stated below, the defendants Motion for Summary Judgment is **GRANTED IN PART, DENIED IN PART.**

#### Background

This action stems from accounting services provided to the plaintiff, Robert O. Wright ("Wright"), t/a House of Wright Mortuary, by defendants, Joseph K. Dumizo ("Dumizo") and Samjos Serv. Corp. ("Samjos"), from 1994 to 1997. In his Complaint filed on August 31, 2001, the plaintiff alleges that the defendants are liable based on five theories: fraudulent misrepresentation (Count I), negligent misrepresentation (Count II), negligence (Count III), breach of contract (Count IV), and deceptive trade practices (Count V).

On January 2, 2002, the defendant filed a Motion for Summary Judgment alleging that all causes of action are barred by the three-year statute of limitations set forth in title 10, section 8106 of the Delaware Code. On February 14, 2002, the plaintiff filed his Opposition to the defendants' Motion for Summary Judgment. The Court heard oral argument on May 21, 2002. By Order dated May 21, 2002, the Court granted the defendants' Motion for Summary Judgment on Counts I, II and III. With respect to the two surviving counts, breach of contract and deceptive trade practices, the Court requested "verified evidence demonstrating the nature and extent of the 'irregularities' with [plaintiff's] business and personal tax returns, ...a documented time line showing

how and when he became aware of such irregularities, and legal authority relating to the tolling of the statute of limitations....”<sup>1</sup>

On July 18, 2002, the plaintiff filed his Supplemental Opposition to Defendant’s Motion for Summary Judgment. The plaintiff contends that the statute of limitations on the breach of contract and deceptive trade practices claims was tolled by the defendants’ fraudulent concealment of the fact that Dumizo was not a licensed or qualified accountant during the relevant period. The plaintiff claims that because of this fraudulent concealment, the plaintiff could not discover that defendant’s conduct rose to the level of a cause of action until the State of Delaware Division of Revenue (“Division of Revenue”) notified the plaintiff, on January 1, 2000, of errors in the calculation of the plaintiff’s corporate income tax returns. The defendant argues that there is substantial evidence in the record to demonstrate that the plaintiff had notice of the defendants’ alleged malfeasance in the preparation and analysis of the plaintiff’s taxes. The defendants assert that the plaintiff was aware of a cause of action for breach of contract as early as May 1997 or, at the latest, August 19, 1998.

#### Facts

For the time period 1994 through 1998, defendants, Dumizo and Samjos, were retained to prepare personal and business tax returns for the plaintiff, Wright. During this time, Dumizo represented to plaintiff that he was fully capable and qualified to perform such work. On or about May 1997, the plaintiff contacted Dumizo regarding certain penalties and interest incurred as a result of the plaintiff’s failure to file a return and

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<sup>1</sup> *Wright v. Dumizo*, Del. Super., C.A. No. 01C-08-292-JRJ (May 21, 2002) (Order granting summary judgment as to fraudulent misrepresentation (Count I), negligent misrepresentation (Count II) and negligence (Count III)).

failure to calculate certain taxes correctly. On May 9, 1997, Dumizo responded in writing to the plaintiff clarifying that plaintiff was liable for the tax, but Dumizo was liable for the penalties and interest incurred. During this same time period, plaintiff discovered that Dumizo was not a Certified Public Accountant (CPA) and that Dumizo was not licensed to prepare tax returns.

On March 18, 1998, plaintiff and the Division of Revenue executed a consent agreement concerning State of Delaware tax due. The consent agreement stated, “[t]hat the amount(s) of any State tax due under any return(s) made by or on behalf of the above-named taxpayer(s) for the tax year(s) ended December 31, 1994 under existing or prior revenue acts, may be assessed at any time on or before March 31, 1999.”<sup>2</sup>

On or about June 17, 1998, the plaintiff retained criminal and tax attorneys to assist in the correction of incorrectly calculated or filed returns and to exculpate the plaintiff of any wrongdoing. On or about August 19, 1998, the plaintiff terminated relations with Dumizo and Samjos.<sup>3</sup> During this time, the State ultimately concluded that the plaintiff had violated several tax laws, including the under reporting of income and falsifying tax documents. On September 20, 2001, defendant, Samjos, filed a certificate of dissolution.

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<sup>2</sup> Def’s Supplemental Submission to Mot. for Summ. J. Ex. B (July 30, 2002).

<sup>3</sup> Def’s Mot. Summ. J. App. (Jan. 3, 2002) (Delaware Superior Court Civil Rule 36 (a), (b) provides, “[e]ach matter of which an admission is requested ... is admitted unless, within 30 days after service of the request... the party to whom the request is directed serves upon the party requesting the admission a written answer or objection... . Any matter admitted under this Rule is conclusively established....”).

### Standard of Review

Superior Court Rule 56(c) provides that judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”<sup>4</sup> The burden is on the moving party to show, with reasonable certainty, that no genuine issue of material fact exists and judgment as a matter of law is permitted.<sup>5</sup> When considering a motion for summary judgment, the Court must consider the facts in the light most favorable to the non-moving party.<sup>6</sup> Further, if the record indicates that a material fact is disputed, or if further inquiry into the facts is necessary, summary judgment is not appropriate.

### Discussion

#### I. Deceptive Trade Practices

Plaintiff’s fifth cause of action alleges deceptive trade practices. Plaintiff does not have standing to bring a claim of deceptive trade practices under title 6, section 2531 *et. seq.* of the Delaware Code. “Deceptive trade practices arise only from those unfair trade practices that interfere with the business of another, so only competing businesses have standing to raise the claim.”<sup>7</sup> In this case, because Wright is a consumer, and not a competing business, Wright lacks standing to raise this issue under § 2531 *et. seq.*.

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<sup>4</sup> Del. Super. Ct. Civ. R. 56.

<sup>5</sup> See *Celotex Corp. v. Cattret*, 477 U.S. 317 (1986); *Martin v. Nealis Motors, Inc.*, 247 A.2d 831 (Del. 1968).

<sup>6</sup> *McCall v. Villa Pizza, Inc.*, 636 A.2d 912 (Del. 1994).

<sup>7</sup> *S&R Associates, L.P. v. Shell Oil Co.*, 725 A.2d 431 (Del. Super. Ct. 1998) (citing *Grand Ventures, Inc. v. Whaley*, 632 A.2d 63, 70 (Del. 1993)).

Consequently, the defendants' motion for summary judgment on this claim is **GRANTED**.

## II. Breach of Contract/ Statute of Limitations

Plaintiff's fourth cause of action alleges breach of contract. The issue to be decided is whether the cause of action based on breach of contract was brought too late, and is therefore time barred by the statute of limitations. The parties disagree on when the cause of action began to accrue and, thus, when the three-year statute began to run.

Under Delaware law, the applicable statute of limitations for a breach of contract is three years.<sup>8</sup> Typically, the cause of action in a contract dispute is said to accrue at the time of breach.<sup>9</sup> Thus, a service contract is breached when the service is due.<sup>10</sup> However, two exceptions exist to toll the statute of limitations. The Court will examine each in turn.

### A. Fraudulent Concealment of Breach

First, Delaware law recognizes that fraudulent concealment of a cause of action may toll the statute of limitations.<sup>11</sup> Fraudulent concealment requires a showing of (1) the defendant's knowledge of the alleged wrong, and (2) an affirmative act of concealment by the defendant thereby preventing the non-breaching party from

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<sup>8</sup> Del. Code Ann. tit. 10, § 8106 (2002).

<sup>9</sup> *Snyder v. Baltimore Trust Co.*, 532 A.2d 624, 627 (Del. Super. Ct. 1986) (citing *Nardo v. Guido DeAscanis & Sons, Inc.*, 254 A.2d 254, 255-56 (Del. Super. Ct. 1969)).

<sup>10</sup> *Shively v. Ken-Crest Centers for Exceptional Persons v. State*, 1998 WL 960719 (Del. Super.).

<sup>11</sup> *Lecates v. Hertrich Pontiac Buick, Co.*, 515 A.2d 163, 176 (Del. Super. Ct. 1986).

discovering and pursuing a cause of action.<sup>12</sup> “[W]hile the Statute of Limitations may not apply when the acts complained of are fraudulently concealed from the plaintiff, such application is suspended only until his rights are discovered by the exercise of reasonable diligence.”<sup>13</sup> That is not to say that the plaintiff must have a defendant’s verification that a cause of action exists.<sup>14</sup>

Plaintiff argues that “the defendant fraudulently concealed the fact that he was not licensed nor qualified to prepare tax returns and that [defendant] had been incorrectly preparing [plaintiff’s] tax returns.”<sup>15</sup> The Court agrees that one who purports to provide accounting services knowing he is unauthorized to do so intends, by the very act of posing as a licensed accountant, to conceal the fact that he is not authorized to provide valid accounting services; however, the inquiry does not end here. Rather, the Court must further determine at what point plaintiff discovered or should have discovered by the exercise of due diligence the fraudulently concealed facts.

The defendants assert that since the plaintiff, as early as May 1997, confronted Dumizo regarding the payment of “[p]enalties and interest for failure to file a return” and “[p]enalties and interest for failure to calculate tax correctly resulting in [an] understatement of tax liability,” the plaintiff was on notice of the defendants’ alleged

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<sup>12</sup> *Id.*

<sup>13</sup> *Giordano v. Czerwinski*, 216 A.2d 874, 876 (Del. 1966).

<sup>14</sup> *Began*, 547 A.2d 620, 623 (Del. Super. Ct. 1988) (“If all parties were allowed to toll the statute until they learned of the legal theory of a proposed action or so pursued an action, there would be no purpose to the statute of limitations.”).

<sup>15</sup> Pl. Supplemental Opp’n to Def’s Mot. for Summ. J. ¶ 4 (July 18, 2002).

malfeasance.<sup>16</sup> Furthermore, the defendants argue that the plaintiff was on notice in March 1998, when the plaintiff entered into a consent agreement with the Division of Revenue concerning an audit of Delaware State tax due for the tax year ended December 31, 1994<sup>17</sup> and in June 1998, when the plaintiff retained a new accountant, Charles Seitz, CPA<sup>18</sup> to review his tax filings. However, the plaintiff contends that it was not until January 14, 1999, when the plaintiff began receiving notices from the Division of Revenue that he became aware that a cause of action existed, and thus the statute of limitations was tolled until that time.

It may be that the plaintiff should have recognized that defendants' failure to calculate the plaintiff's 1994 State of Delaware tax correctly, the audit by the Division of Revenue and the need for plaintiff to hire a new account indicated malfeasance on the part of the defendant, however, these questions must be resolved by the trier of fact. The Court finds that evidence exists sufficient to raise an issue of fact as to when the plaintiff, through the exercise of due diligence, should have discovered that the alleged accounting errors in the taxes prepared by the defendants constituted a cause of action.

#### B. Time of Discovery

“Generally, ignorance of the facts constituting a cause of action does not act as an obstacle to the operation of the statute [of limitations], except in the case of infancy, incapacity, and certain types of fraud. An exception occurs when there are no observable

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<sup>16</sup> Def's Supplemental Submission to Mot. for Summ. J. Ex. A (July 30, 2002); *Id.* ¶ 7.

<sup>17</sup>*Id.* Ex. B.

<sup>18</sup> *Id.* Ex. C.



or objective factors which put laymen on notice of a problem.”<sup>19</sup> Thus, “no cause of action accrues if the breach is inherently unknowable and the plaintiff was blamelessly ignorant that the cause of action existed.”<sup>20</sup>

While the plaintiff began questioning whether the plaintiff or defendants would be responsible for the penalties and interest due on the plaintiff’s taxes, the record is unclear as to why the plaintiff made the May 1997 inquiry. Furthermore, the plaintiff’s accountant, Charles F. Seitz, states that, “it is my professional opinion that a layman would not have the knowledge to have discovered these flaws and inaccuracies, and in any event, most of these matters were not discoverable until the tax authorities inquired in 1999.”<sup>21</sup> A factual question therefore also exists as to when the plaintiff was no longer “blamelessly ignorant” of the fact that the tax problems were a result of the defendants’ alleged malfeasance. Because the Court finds genuine issues of material fact with respect to when the plaintiff’s breach of contract action accrued the Court denies summary judgment on the breach of contract claim.

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<sup>19</sup> *Began v. Dixon*, 547 A.2d at 623 (legal malpractice action).

<sup>20</sup> *Henlopen Station Condominium Council of Unit Owners v. Henlopen Junction Condominium Council of Unit Owners & Piraeus Realty, Corp.*, 2000 WL 303635, at \*3 (Del Super.).

<sup>21</sup> Charles F. Seitz Aff. ¶ 47.

Conclusion

For the foregoing reasons, Defendants' Motion for Summary Judgment on the Deceptive Trace practices claim is **GRANTED** and the Defendants' Motion for Summary Judgment on the breach of contract claim is **DENIED**.

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Jan R. Jurden, Judge