IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

RICH REALTY, INC., CARSON M. GRAY, ADELIA H. GRAY, RICHARD E. GRAY, JR. And JOSSLYN GRAY,	)	
Plaintiffs,	)	C.A. No. N09C-12-273 MMJ
v.	)	
POTTER ANDERSON & CORROON LLP, and HAROLD I. SALMONS III, ESQUIRE,	)	
Defendants.	)	

Submitted: April 7, 2011
Decided: April 26, 2011

On Plaintiff's Motion to Amend Complaint
DENIED

MEMORANDUM OPINION

Gilbert F. Shelsby, Jr., Esquire, Shelsby & Leoni, P.A., Stanton, DE, Jack Meyerson, Esquire (argued), Meyerson & O'Neill, Philadelphia, PA, Attorneys for Plaintiff

Joseph Scott Shannon, Esquire, John L. Slimm, Esquire (argued), Dante C. Rohr, Esquire, Marshall Dennehey Warner Coleman & Goggin, Wilmington, DE, Attorneys for Defendants

JOHNSTON, J.

The complaint in this action was filed on December 30, 2009. In response, defendants, Potter Anderson & Corroon LLP and Harold I. Salmons III, Esquire, asserted that the action was barred by the applicable statute of limitations. Plaintiffs, Rich Realty, Inc. ("RRI"), Carson M. Gray, Adelia H. Gray, Richard E. Gray, Jr., and Josslyn Gray, filed an amended complaint on July 7, 2010 to address the statute of limitations issue.

Defendants moved to dismiss the case on the grounds that plaintiffs failed to state claims upon which relief can be granted. Following full briefing, the Court held oral argument, and issued its Memorandum Opinion on February 21, 2011. The Court held:

> The Court dismisses plaintiffs' breach of fiduciary duty claims pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. The Court of Chancery has exclusive jurisdiction over such claims. In any event, plaintiffs have failed to allege facts sufficient to create the special trust or relationship requisite to an actionable fiduciary duty claim.
>
> Individual Plaintiffs' legal malpractice claims regarding the lease transaction are wholly derivative, and therefore, Individual Plaintiffs do not have a cause of action separate from RRI.
>
> RRI's claims and Carson's claims are barred by the three-year statute of limitations established by 10 *Del. C.* § 8106(a). Plaintiffs have failed to allege with sufficient specificity that RRI or Carson were blamelessly ignorant of Potter Anderson's alleged malpractice, in such a manner that would toll the statute of limitations.

> The statute of limitations is tolled as to Minor Plaintiffs' claim that Potter Anderson committed legal malpractice by drafting documents issuing common stock directly to Minor Plaintiffs, rather than pursuant to the UTMA. The Court finds that this contention states a claim upon which relief may be granted for purposes of Rule 12(b)(6).
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> **THEREFORE**, Defendants' Amended Motion to Dismiss is hereby **GRANTED IN PART.** All claims except Minor Plaintiffs' claim that Potter Anderson committed legal malpractice by drafting documents issuing common stock directly to Minor Plaintiffs, rather than pursuant to the UTMA, are hereby **DISMISSED**.
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> **IT IS SO ORDERED**.

On February 28, 2011, plaintiffs filed a motion for reargument. That motion was denied on March 15, 2011.

On March 2, 2011, plaintiffs filed a motion to amend the complaint. Plaintiffs propose to add the following italicized language to their complaint:

> 40. Although aware of the *existence of the lease* from its inception, RRI remained controlled by individuals aligned with BFR as installed by defendants and could not address the inequities in the lease prior to the time that non-BFR *affiliated management of RRI for the first time* obtained absolute control of RRI in December 2008. *(It is not the case that any of the individual plaintiffs were aware of the existence of the lease from its inception. Only RRI was – and it was controlled by BFR people.)*
>
> *41. Plaintiff Carson Gray repeatedly over a period of years attempted to obtain information about the affairs of RRI, including the lease. Such attempts included, among other things, (a) retaining an attorney to attempt to obtain such information from RRI personnel who had been installed by*

Defendants, (b) the issuance of document requests to RRI and Defendants in their capacity as counsel to RRI, and (c) when such attempts failed, initiation of a Section 220 action to obtain RRI's documents. In short, all of such efforts were either ignored and/or thwarted until individual Plaintiffs obtained absolute control of RRI in December 2008.

42. *Defendants, in conjunction with the BFR representatives who controlled RRI, actively agreed and conspired with one another to prevent individual Plaintiffs from acquiring knowledge of the affairs of RRI. They did this by (a) maintaining control of RRI and by denying Plaintiffs membership on the RRI board and not scheduling or holding regular shareholder meetings and (b) by Defendants and RRI's BFR-controlled management never communicating any information what so ever about the affairs of RRI to Carson Gray and/or the other individual Plaintiffs.*

The Court held argument on that motion on April 7, 2011.

Rule 15(a) Amended Pleadings

Rule 15(a) of the Superior Court Civil Rules provides that after a responsive pleading is filed, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Any amendment after the first amendment is within the discretion of the court.[1]

A party may be permitted to amend the complaint after dismissal for the purpose of correcting the defect that led to the dismissal, "or to correct

[1] *H&H Poultry Co., Inc. v. Whaley,* 408 A.2d 289, 291 (Del. 1979).

technicalities in their claims in situations where the amendment arises out of the exact same set of facts."[2] However, plaintiffs do not have a right to amend a dismissed complaint to allege a totally unrelated claim.[3]

ANALYSIS

The Court has ruled that the claims of plaintiffs RRI and Carson Gray have been dismissed because they are barred by the three-year statute of limitations established by 10 *Del. C.* § 8106(a). The dismissal did not grant leave to amend. The subsequent motion for reargument was denied. Therefore, RRI and Carson Gray have no standing to file a motion to amend.[4]

Nevertheless, in the interest of judicial economy, the Court will address the merits of the motion to amend as it applies to RRI and Carson Gray. The amendment proffers additional facts, purportedly refuting the court's finding that plaintiffs have failed to allege with sufficient specificity that RRI or Carson were blamelessly ignorant of alleged malpractice in such a manner that would toll the statute of limitations. The proposed amendment, however, does not cure the

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[2] *Playtex Family Products, Inc. v. St. Paul Surplus Lines Insurance Co.*, 1990 WL 35299, at *4 (Del. Super. 1990).

[3] *Id.*

[4] *See Powell v. McCormack,* 395 U.S. 486, 496 (1969) (case is moot as to parties who lack a legally cognizable interest in the case).

deficiencies in the first amended complaint.

The proposed amendment has superficial appeal. It states:

> 41. Plaintiff Carson Gray repeatedly over a period of years attempted to obtain information about the affairs of RRI, including the lease. Such attempts included, among other things, (a) retaining an attorney to attempt to obtain such information from RRI personnel who had been installed by Defendants, (b) the issuance of document requests to RRI and Defendants in their capacity as counsel to RRI, and (c) when such attempts failed, initiation of a Section 220 action to obtain RRI's documents. In short, all of such efforts were either ignored and/or thwarted until individual Plaintiffs obtained absolute control of RRI in December 2008.

During oral argument, the Court specifically questioned plaintiffs' counsel about this language. It became clear that none the actions purportedly taken by Carson Gray - to obtain information about the lease and the affairs of RRI - occurred prior to the running of the three-year statute of limitations.

Plaintiffs also state, in the proposed amendment:

> 42. Defendants, in conjunction with the BFR representatives who controlled RRI, actively agreed and conspired with one another to prevent individual Plaintiffs from acquiring knowledge of the affairs of RRI. They did this by (a) maintaining control of RRI and by denying Plaintiffs membership on the RRI board and not scheduling or holding regular shareholder meetings and (b) by Defendants and RRI's BFR-controlled management never communicating any information what so ever about the affairs of RRI to Carson Gray and/or the other individual Plaintiffs.

These allegations lack the specificity necessary to justify blameless ignorance.

Section 220 of the Delaware General Corporation Law was promulgated to enable shareholders to request corporate information for a "proper purpose." The purpose must be reasonably related to the person's interest as a shareholder. Proper purposes include:

> Seeking to investigate allegedly improper transactions or mismanagement.
>
> To clarify an unexplained discrepancy in the corporation's financial statements.
>
> To investigate the possibility of an improper transfer of assets out of the corporation.
>
> To ascertain the value of stocks.
>
> To discuss corporate finances and inadequacies of management, and then depending on the response, to determine stockholder sentiment for either a change in management or a sale.
>
> To communicate with other stockholders in order to effectuate changes in management policies.
>
> To determine an individual's suitability to serve as a director.[5]

Section 220 is "intended to provide stockholders of Delaware corporations an

[5] *Louisiana Mun. Police Employees Retirement System v. Morgan Stanley & Co., Inc.*, 2011 WL 773316, at *6 (Del. Ch.).

economical and expeditious mechanism for the inspection of documents."[6] These rights are fundamental. Even a charter provision purporting to limit a stockholder's right to inspect corporate books and records is invalid.[7]

Plaintiffs have conceded in their proposed amendment that it was possible to attempt to obtain information about RRI through instituting a Section 220 action. In fact, plaintiffs did indeed seek information pursuant to Section 220. Nevertheless, plaintiffs have failed to state any reasons, or provide the Court with any explanation in response to questioning during argument, why a Section 220 action could not have been prosecuted within the limitations period. Additionally, plaintiffs fail in their proposed amendment to allege facts demonstrating that they took any other action to obtain information, and that they were rebuffed by those in control of the corporation. Similarly, plaintiffs have not alleged specific facts that would form a *prima facie* case of concealment. The alleged facts illustrate that Carson Gray was at least on inquiry notice during the limitations period.

Even if the proposed amendments to the complaint had alleged blameless ignorance with sufficient specificity, it is too late in this case. Plaintiffs were aware of defendants' assertion of the statute of limitations defense at the time they

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[6] *Weinstein Enters., Inc. V. Orloff*, 870 A.2d 499, 505 (Del. 2005); *Brehm v. Eisner*, 746 A.2d 244, 267 (Del. 2000).

[7] *See Marmon v. Arbinet-Theexchange, Inc.*, 2004 WL 936512, at *5 (Del. Ch.).

filed their first amended complaint. Additionally, the facts asserted in the second proposed amendment could have been set forth in response to defendants' motion to dismiss.

Instead, after the parties engaged in full briefing on the motions to dismiss, and after the Court heard oral argument and wrote a detailed opinion, plaintiffs want yet another opportunity to cure the defects in their pleadings. The new language is not based on newly-discovered evidence. All of the facts have been well-known to plaintiffs for several years.

Parties cannot simply sit on their rights and then claim blameless ignorance excusing filing an action within the applicable limitations period. Plaintiffs knew that defendants claimed that the complaint and amended complaint were insufficient. Clearly, amendments may be freely permitted in the interest of justice. Nevertheless, judicial economy is not served by permitting repeated amendments - following a fully-briefed and argued motion to dismiss, and the Court's detailed written opinion - to give plaintiffs yet another chance to cure any previously-identified defects.

CONCLUSION

THEREFORE, Plaintiffs' Motion to Amend Complaint is hereby **DENIED.** In the exercise of judicial discretion, the Court finds that amendment at

this stage of the proceedings, in this particular case (following a first amended complaint, a fully-briefed and argued motion to dismiss, and the Court's written opinion granting the motion in part) is neither in the interest of justice nor consistent with judicial economy. There is no reason why the facts in the proposed amendment could not have been pleaded earlier in the proceedings. Even if these facts had been presented before the motion to dismiss was decided, the proposed amendment is not sufficient for a *prima facie* case of blameless ignorance tolling the statute of limitations. Finally, plaintiffs Rich Realty, Inc. and Carson M. Gray have no standing to move to amend the pleadings because they have been dismissed from the case.

IT IS SO ORDERED.

/s/ Mary M Johnston
The Honorable Mary M. Johnston