

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

RICH REALTY, INC., and)	
CARSON M. GRAY,)	
)	
Plaintiffs,)	
)	
v.)	C.A. No. N13C-06-270 MMJ
)	
MEYERSON & O'NEILL,)	
SHELBY & LEONI, P.A.,)	
JACK MEYERSON and)	
GILBERT F. SHELBY,)	
)	
Defendants.)	

Submitted: February 20, 2014
Decided: April 14, 2014

Upon Defendants' Motion to Dismiss
GRANTED

OPINION

Jeffrey S. Cianciulli, Esquire, Steven E. Angstreich, Esquire (Argued), Weir & Partners LLP, Attorneys for Plaintiffs

John A. Elzufon, Esquire (Argued), Peter C. McGivney, Esquire, Elzufon Austin Tarlov & Mondell, Attorneys for Defendants Meyerson & O'Neill and Jack Meyerson, John D. Balaguer, Esquire, White and Williams LLP, Attorney for Defendants Shelsby & Leoni, P.A. and Gilbert F. Shelsby

JOHNSTON, J.

FACTUAL AND PROCEDURAL CONTEXT

Rich Realty, Inc. (“RRI”) and Carson M. Gray (“Gray”) (collectively “Plaintiffs”) filed a Complaint in the Delaware Superior Court on June 26, 2013, against the above-captioned attorneys and their respective law firms (collectively “Defendants”). Plaintiffs seek compensation for alleged legal malpractice. This action is based on the Defendants’ representation of Plaintiffs in a previous legal malpractice action litigated from 2009 through 2011.

Defendants have moved to dismiss the Complaint pursuant to Superior Court Civil Rule 12(b)(6).

Parties

RRI is a Delaware corporation with its principal place of business in Newark, Delaware. RRI was created on July 3, 1997, for the purpose of acquiring a Newark, Delaware property, where it subsequently constructed a manufacturing facility. Gray was issued 29 shares of RRI upon its creation in 1997. Gray was of the age of majority at all relevant times.

Meyerson & O’Neill is a partnership and law firm with its principal place of business in Philadelphia, Pennsylvania. Jack Meyerson is the managing partner of Meyerson & O’Neill. Shelsby & Leoni, P.A. is a professional association and law firm with its principal place of business in Wilmington, Delaware. Gilbert F. Shelsby is a partner with Shelsby & Leoni.

Previous Litigation

In April 2009, Defendant Meyerson & O'Neill was hired to represent Plaintiffs and others ("PAC Litigation Plaintiffs") in a legal malpractice action against Potter Anderson & Corroon LLP and Harold I. Salmons, III, Esquire ("PAC Litigation Defendants"). Shortly thereafter, Meyerson & O'Neill contacted Defendant Shelsby & Leoni for the purpose of having Shelsby & Leoni act as Delaware counsel for the PAC Litigation Plaintiffs.

In its December 30, 2009 complaint, Defendants (on behalf of PAC Litigation Plaintiffs) alleged that PAC Litigation Defendants committed legal malpractice by drafting corporation creation documents that issued common stock directly to minors, rather than pursuant to the Uniform Transfer to Minors Act. As a result, B.F. Rich & Co. ("BFR"), which was issued approximately 2.5% of RRI stock, assumed total control over the affairs of RRI. It also was alleged that PAC Litigation Defendants committed legal malpractice by drafting a lease for the property in Newark, and representing both PAC Litigation Plaintiffs and BFR without obtaining a conflict of interest waiver.

On December 3, 2010, PAC Litigation Defendants moved to dismiss the 2009 complaint. Subsequently, PAC Litigation Plaintiffs amended their complaint. In response, PAC Litigation Defendants amended their motion to dismiss on the

grounds that the PAC Litigation Plaintiffs' claims were barred by the statute of limitations. The Court heard oral argument on December 16, 2010.

In an Opinion dated February 21, 2011, the Court found, *inter alia*, that the legal malpractice claims regarding the lease transaction with BFR were wholly derivative, thus only available to RRI as a corporation. The Court also found that because PAC Litigation Defendants drafted the corporate documents and lease agreement in 1997, RRI's and Gray's claims of legal malpractice were barred by the three-year statute of limitations under 10 *Del. C.* § 8106(a). Finally, the Court found that the statute of limitations was not tolled. The PAC Litigation Plaintiffs failed to allege facts with sufficient specificity, which would establish that any party was blamelessly ignorant of PAC Litigation Defendants alleged malpractice. The Court granted PAC Litigation Defendants' motion to dismiss as to PAC Litigation Plaintiffs. The Court denied the motion to dismiss as to a group of minor plaintiffs' claims.

On March 2, 2011, PAC Litigation Plaintiffs filed a motion to amend the complaint.¹ The amendment sought to add language in the complaint to correct the deficiencies the Court noted in the February 21, 2011 Opinion. The amended language added facts about Gray's attempts to obtain information about RRI from

¹ Between February 21 and March 2, 2011, PAC Litigation Plaintiffs filed a motion for reargument, which the Court denied on March 15, 2011.

BFR and from PAC Litigation Defendants. The Court heard oral argument on this motion on April 7, 2011.

In an Opinion dated April 26, 2011, the Court denied the motion to amend the complaint. The Court found that as a result of the dismissal of their claims in the February 21, 2011 Opinion, RRI and Gray did not have standing to file a motion to amend. However, in the interest of judicial economy, the Court analyzed the proposed amendment. The Court found that the additional facts still were not sufficient for a *prima facie* case of blameless ignorance that would toll the statute of limitations. The Court noted that the same result would have occurred even if these facts had been included in the complaint prior to the motion to dismiss. Further, the Court found that the newly-alleged facts illustrated that Gray was at least on inquiry notice of PAC Litigation Defendants' alleged malpractice prior to the three-year statute of limitations period. The Court denied the PAC Litigation Plaintiffs' motion to amend the complaint.

Current Litigation

Plaintiffs filed a Complaint in this legal malpractice action on June 26, 2013. In response, Defendants moved pursuant to Rule 12(b)(6) to dismiss the Complaint for failure to state a claim upon which relief can be granted.

STANDARD OF REVIEW

Motion to Dismiss

When reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court must determine whether the claimant “may recover under any reasonably conceivable set of circumstances susceptible of proof.”² The Court must accept as true all non-conclusory, well-plead allegations.³ Every reasonable factual inference will be drawn in favor of the non-moving party.⁴ If the claimant may recover under that standard of review, the Court must deny the motion to dismiss.⁵

DISCUSSION

Parties’ Contentions

Defendants argue they cannot be liable for legal malpractice because the Plaintiffs’ underlying claims of legal malpractice against PAC Litigation Defendants were time barred by the three-year statute of limitations prior to Defendants retention as counsel. Defendants offer this timeline outlining the major events concerning the litigation:

² *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

³ *Id.*

⁴ *Wilmington Sav. Fund. Soc’y, F.S.B. v. Anderson*, 2009 WL 597268, at *2 (Del. Super.) (citing *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005)).

⁵ *Spence*, 396 A.2d at 968.

- From July 3, 1997 to August 1, 1997, PAC Litigation Defendants drafted the corporate documents for Plaintiffs.
- The statute of limitations applicable to Plaintiffs' claims of alleged malpractice against PAC Litigation Defendants began to run on August 1, 1997.
- On August 1, 2000, the three-year statute of limitations expired for Plaintiffs' claim of legal malpractice.
- In 2004, Richard M. Gray, Sr. and Gray attempted to take control of RRI.
- On October 11, 2005, Gray filed an action pursuant to 8 *Del.C.* § 220 in the Court of Chancery against RRI and its officers and directors, seeking inspection of certain books and records.
- On January 20, 2006, BFR commenced an action pursuant to 8 *Del.C.* § 225 in the Court of Chancery against Richard M. Gray, Sr. and RRI, to determine the proper directors and officers of RRI.
- On December 17, 2008, the Chancery Court actions were settled.
- In December 2008, pursuant to the Chancery Court settlement, the manufacturing facility in Newark was sold by RRI to BFR.
- In April 2009, Defendants were retained to represent Plaintiffs in connection with PAC Litigation.
- On December 30, 2009, the PAC Litigation complaint was filed.

Plaintiffs dispute that their underlying claims of legal malpractice against PAC Litigation Defendants are time-barred by the statute of limitations. Rather, Plaintiffs allege Defendants committed legal malpractice by failing to present sufficient facts, of which they were aware, in the December 2009 complaint, and subsequent amended complaint, which would have convinced the Court the three-year statute of limitations had been tolled. Plaintiffs argue these facts were crucial to establish predicates of blameless ignorance. Thus, Defendants' failure to include those facts in the pleadings constitutes legal malpractice.

The facts that purportedly should have been in the 2009 complaint include that Defendants knew Gray was unaware she was a shareholder of RRI until 2004. Defendants also failed to include that no person, not controlled by BFR, was aware of the terms of the lease unfair to RRI. There was no one who could have commenced a derivative action on behalf of RRI against the PAC Litigation Defendants.

Defendants counter that the Court was made aware of these facts by Meyerson at the April 7, 2011 oral argument, and still found that Gray and RRI were not blamelessly ignorant.

Legal Malpractice and Blameless Ignorance

A plaintiff in a legal malpractice action must sufficiently plead: (1) the existence of an attorney-client privilege; (2) the acts of the attorney that constitute negligence; and (3) that the alleged negligence of the attorney was the proximate cause of the resulting injury.⁶ To establish the causation element the plaintiff must demonstrate that but for the defendant/former attorney's negligent handling of the case, the plaintiff would have been successful in the underlying action.⁷

⁶ *Farmers Bank of Willards v. Becker*, 2011 WL 3925428, at *3 (Del. Super.).

⁷ *Keith v. Sioris*, 2007 WL 544039, at *5 (Del. Super.).

Pursuant to 10 *Del.C.* § 8106(a), claims for legal malpractice are subject to a three-year statute of limitations.⁸ “The statute begins to run at the time of the alleged malpractice and even ignorance of the facts constituting a cause of action is no obstacle to the operation of the statute.”⁹ However, if an injury is inherently unknowable and the claimant is blamelessly ignorant of the wrongful act, the statute of limitations may be tolled.¹⁰ In circumstances where blameless ignorance is present, the limitations period will not begin to run until the “plaintiff is *objectively* aware of the facts giving rise to the wrong, *i.e.*, when the plaintiff is on inquiry notice.”¹¹ Inquiry notice can be found when a plaintiff is aware of the “‘existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry, which, if pursued, would lead to the discovery’ of such facts.”¹² Inquiry notice is satisfied once a plaintiff is in possession of facts sufficient to make a reasonable person suspicious of the alleged wrongdoing.¹³

⁸ *Conaway v. Griffin*, 2009 WL 562617, at *2 (Del.).

⁹ *Id.*

¹⁰ *Boerger v. Heiman*, 965 A.2d 671, 674 (Del. 2009) (citing *Coleman v. PricewaterhouseCoopers, LLC*, 854 A.2d 838, 842 (Del. 2004)).

¹¹ *Jepsco, Ltd. v. B.F. Rich Co., Inc.*, 2013 WL 593664, at *8 (Del. Ch.).

¹² *Boerger*, 965 A.2d at 674 (citing *Coleman*, 854 A.2d at 842).

¹³ *In re Dean Witter P’ship. Litig.*, 1998 WL 442456, *7 n.49 (Del. Ch.).

The Court must accept as true all well-plead allegations that Plaintiffs were blamelessly ignorant.

Gray Was Not Blamelessly Ignorant

Consistent with its prior rulings, the Court now finds that Gray was not blamelessly ignorant of the facts establishing a cause of action against PAC Litigation Defendants for alleged legal malpractice.¹⁴

Upon learning she was a shareholder of RRI in 2004, Gray requested information and records about the company. These requests ultimately were denied. At or about the same time in 2004, Gray joined Richard M. Gray Sr. in executing a Written Consent by Holders in Excess of 50 Percent of the Issued and Outstanding Capital Stock in Lieu of Meeting (“Written Consent”). The Written Consent sought to remove all of the directors of RRI, increase the number of directors, and appoint Gray as a new director.

In October 2005, Gray further pursued information by retaining counsel and initiating a Section 220 action seeking to obtain financial information about RRI. Soon after Gray filed the Section 220 action, BFR filed a Section 225 action

¹⁴ Pursuant to the Court’s February 21, 2011 opinion, Gray’s underlying claim for legal malpractice is limited to the issuance of RRI’s stock. Therefore, the Court will only consider Gray’s alleged blameless ignorance as it relates to that claim.

against Richard M. Gray Sr. and RRI, challenging the validity of the Written Consent.

The Court finds the totality of the circumstances demonstrates that Gray was at least on inquiry notice of the alleged malpractice. A prudent person in Gray's situation would have been suspicious of a problem regarding the stock ownership of RRI when her requests for information were denied. Gray's affirmative execution of the Written Consent, which made her a director of RRI, is evidence that she acted on such suspicions.

Further, BFR's filing of the Section 225 action would have provided Gray with enough facts to substantiate her suspicion, independent of the previous events. In that action, BFR specifically challenged Richard M. Gray Sr.'s authority to vote the shares of RRI that were owned by his minor children (Gray's minor siblings). Gray should have been aware of this legal challenge because on February 22, 2006, Vice Chancellor Parsons stayed Gray's Section 220 action pending resolution of the Section 225 action.¹⁵

On March 15, 2006, Vice Chancellor Parsons conducted a trial for the Section 225 action. Viewing the facts in the light most favorable to Gray, the Court is satisfied that Gray was on inquiry notice at the very latest, as of March 15, 2006. The three-year limitations period would have expired on March 15, 2009.

¹⁵ *B.F. Rich Co., Inc. v. Gray*, 2006 WL 3337163, at *3 (Del. Ch.).

Therefore, Gray's underlying claims against PAC Litigation Defendants were barred by the statute of limitations when the complaint was filed on December 30, 2009.

Even if the above-referenced facts do not constitute inquiry notice, the underlying claims of legal malpractice still would be barred by the three-year statute of limitations because Gray had actual notice of the alleged malpractice. Plaintiffs concede in the Complaint in this action that Gray first learned during the discovery in the Chancery litigation with BFR of: (i) the self-dealing by BFR; (ii) the misconduct by PAC Litigation Defendants; and (iii) the fact that the lease was at a below-market rental rate.

Nevertheless, in the same Complaint, Plaintiffs allege that Gray did not become aware of these facts until PAC Litigation Plaintiffs obtained unrestricted control of RRI in December 2008. These allegations are inconsistent. The Court finds that the later allegation -- stating Gray first learned of the alleged malpractice in 2008 -- lacks supporting facts to make it sufficiently pled. The Court accepts the first allegation as true, and finds that Gray had actual notice of the facts constituting the underlying legal malpractice against PAC Litigation Defendants by no later than the close of the BFR Chancery litigation.

To determine the date of Gray's actual notice the Court draws all inferences in favor of the Plaintiff. The Court finds that Gray had actual notice on November

9, 2006, the day Vice Chancellor Parsons issued his Opinion in the Section 225 action. Therefore, the three-year statute of limitations period expired on November 9, 2009.

RRI Was Not Blamelessly Ignorant

With respect to RRI's claims, Plaintiffs argue that the statute of limitations should have been tolled because RRI was blamelessly ignorant of the facts constituting the alleged malpractice. Plaintiffs allege that there was no one who was aware of the facts supporting a malpractice action, and who was not controlled by BFR, who could have commenced an action on behalf of RRI within three years of entry into the lease or issuance of the RRI stock. Additionally, Plaintiffs allege that BFR's officers and directors, who were also directors and officers of RRI, actively concealed the facts necessary to discover the terms of the lease and issuance of RRI stock.

The Court first will address RRI's underlying legal malpractice claim as it relates the issuance of RRI's stock. Plaintiffs' allegation overlooks the possibility that there was someone who could have commenced an action against PAC Litigation Defendants between 2000 and 2008. As previously discussed, Gray was on inquiry notice of the problems surrounding the issuance of RRI's stock at least by March 15, 2006. Gray could have commenced an action on behalf of RRI for legal malpractice against PAC Litigation Defendants. Therefore, the Court finds

that RRI was not blamelessly ignorant of the underlying alleged malpractice relating to the issuance of RRI's stock. The three-year statute of limitations for this claim began to run no later than March 15, 2006, and expired on March 15, 2009.

The Court next turns to the underlying malpractice claim as it relates to the lease. These allegations are substantially similar to the allegations considered in the February 2011 and April 2011 Opinions. In the February 21, 2011 Opinion, the Court found allegations -- that RRI was unable to bring an action against PAC Litigation Defendants because it was controlled by BFR -- insufficient to toll the statute of limitations. Moreover, the Court found no allegation of a specific impediment that prevented an individual plaintiff from bringing a derivative suit on behalf of RRI within the limitations period. Similarly, in the April 26, 2011 Opinion, the Court addressed amended allegations of BFR actively agreeing and conspiring to prevent individuals from acquiring knowledge of the affairs of RRI. Once again the Court found these allegations to be insufficient to justify blameless ignorance.

Plaintiffs' argue in this pending action that RRI's Vice President George W. Simmons' knowledge of the terms of the lease should not be imputed to RRI because Simmons was also President of BFR at the time. Plaintiffs contend that Simmons had reason to conceal such information from Plaintiffs.

The general rule in Delaware is that “knowledge of an officer or director of a corporation will be imputed to the corporation.”¹⁶ This rule extends to knowledge acquired by the officer or director even if such person does not communicate that knowledge to the corporation.¹⁷ Additionally, claims of concealment require “an affirmative act of concealment by a defendant – an actual artifice that prevents a plaintiff from gaining knowledge of the facts or some misrepresentation that is intended to put a plaintiff off the trail of inquiry.”¹⁸

The Court finds that Plaintiffs have not pled specific allegations of concealment to demonstrate that RRI was blamelessly ignorant. No particular artifice or misrepresentation by the directors of RRI, which would have put anyone off the trail of inquiry, was pled. Viewing the facts in the light most favorable to Plaintiffs, there are only two instances that could be construed as concealment. The first instance is RRI’s ignoring Gray’s requests for financial information. However, the Court is not persuaded this rises to the level of concealment. Gray’s subsequent filing of the Section 220 action to obtain information through the Court of Chancery shows that she was not put off the trail of inquiry. Therefore, the ignored requests cannot be concealment under the facts of this case.

¹⁶ *Teachers’ Ret. Sys. of La. v. Aidinoff*, 900 A.2d 654, 671 n.23 (Del. Ch. 2006).

¹⁷ *In re Wayport, Inc. Litig.*, 76 A.3d 296, 325 (Del. Ch. 2013).

¹⁸ *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618, 647 (Del. Ch. 2013).

The second instance is BFR's filing of the Section 225 action. Again, the Court is not persuaded this rises to the level of concealment. Gray concededly became aware of facts regarding the underlying alleged malpractice during the discovery period in the Section 225 action. The act that led Gray to discover the facts constituting the alleged malpractice cannot also be considered an act of concealment.

Accepting Plaintiffs' allegation in the Complaint as true, the Court finds that RRI was not blamelessly ignorant with respect to the alleged malpractice concerning the lease. The three-year statute of limitations began to run when the lease was completed on August 1, 1997, and expired on August 1, 2000. Therefore, RRI's underlying claims against PAC Litigation Defendants are barred by the three-year statute of limitations.

Statute of Limitations Was Not Tolloed

Plaintiffs argue that the statute of limitations was tolled until late 2008 as a result of the subsequent procedural posture of BFR's Section 225 action.

The Court of Chancery conducted a trial on March 15, 2006 and issued an opinion on November 9, 2006.¹⁹ In the opinion, the Vice Chancellor upheld the

¹⁹ *B.F. Rich Co., Inc. v. Gray*, 2006 WL 3337163, at *1 (Del. Ch.).

validity of the Written Consent, ruling in favor of PAC Litigation Plaintiffs.²⁰ This ruling gave Gray, among other members of her family, operating control of RRI. Plaintiffs allege this control was subject to the restriction that PAC Litigation Plaintiffs could not cause RRI to take any actions outside the ordinary course of business, including the bringing of litigation, pending an appeal by BFR. In late 2007, the Delaware Supreme Court overturned the Chancery Court's ruling, and remanded the matter.²¹ The Chancery Court then appointed an independent custodian to manage and direct the affairs of RRI until late 2008.

Plaintiffs assert the statute of limitations should have been tolled until late 2008 because RRI was not permitted to bring any litigation against PAC Litigation Defendants until then. This tolling would make the filing of the PAC Litigation complaint on December 30, 2009 timely.

The Court has reviewed the public record of the Section 225 action in the Court of Chancery. Plaintiffs' assertions about Vice Chancellor Parsons' alleged restrictions on litigation are overly-broad and unsupported by necessary facts. This Court was unable to find a definitive ruling by the Court of Chancery that restricted RRI from taking any action outside the ordinary course of business. There were discussions about the potential need for restrictions. However, such

²⁰ *Id.* at *12.

²¹ *B.F. Rich & Co., Inc. v. Gray*, 933 A.2d 1231 (Del.).

restrictions never were memorialized in writing and approved by the Vice Chancellor.

In its December 15, 2006 Letter Opinion, the Court of Chancery reviewed the Protective Order governing the litigation.²² The Court found that the purpose of the Protective Order was to protect defined confidential information, including proprietary financial information, from being used or disclosed by unauthorized entities.²³ The Court declined to enter a stay pending appeal of the November 9, 2006 Memorandum Opinion, in part on the basis that the safeguards in the Protective Order were sufficient to protect against the potential harm of any feared disclosures or use of confidential information.²⁴

The Court is not persuaded that RRI was under any alleged restriction on litigation that would have tolled the statute of limitations until the end of 2008. There is no specific restriction in place prohibiting litigation. Further, the Chancery Court declined to impose a broad restriction against actions outside the ordinary course of business.

²² *B.F. Rich Co., Inc. v. Gray*, 2006 WL 3872830, at *2 (Del. Ch.).

²³ *Id.*

²⁴ *Id.* at *4.

CONCLUSION

The Court finds that under every reasonably conceivable set of circumstances susceptible of proof, Defendants cannot be liable for legal malpractice. Plaintiffs' underlying legal malpractice action against PAC Litigation Defendants was time barred by the three-year statute of limitations prior to Defendants' retention as counsel. Neither RRI nor Gray has demonstrated that they were blamelessly ignorant of the facts establishing a cause of action against PAC Litigation Defendants for legal malpractice. The three-year statute of limitations is not tolled as a result of the ruling of any other court.

THEREFORE, Defendants' Motion to Dismiss is hereby **GRANTED**.

This case is hereby **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

/s/ Mary M. Johnston

The Honorable Mary M. Johnston