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2004 WL 1878237 (E.D.Pa.)

(Cite as: 2004 WL 1878237 (E.D.Pa.))

Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
E.D. Pennsylvania.
EASTERN STEEL CONSTRUCTORS, INC.
v.
Sumner E. NICHOLS, II, et al.
No. Civ.A. 03-6680.

Aug. 23, 2004.

Brian S. Jablon, Ellicott City, MD, Harvey A. Sernovitz, Philadelphia, PA, for Plaintiff.

Sumner E. Nichols, II, Nichols & Myers P.C., Erie, PA, Abraham C. Reich, Gerald E. Arth, Nicholas Deenis, Stradley Ronon Stevens & Young LLP, Philadelphia, PA, for Defendants.

MEMORANDUM

DAVIS, J.

***1** Plaintiff Eastern Steel Constructors, Inc. ("Eastern") filed the instant action against Defendants Sumner E. Nichols, II, ("Nichols"), Nichols Krill & Taggart ("NK1"), Jane Landes Foster ("Foster"), Stradley, Ronon, Stevens & Young, LLP ("Stradley"), Scott D. Allen ("Allen") and Whipple-Allen Real Estate [FN1] (collectively, "Defendants"), alleging Defendants violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(c) and (d). The gravamen of Eastern's complaint is that Defendants engaged in racketeering, fraud and conspiracy in connection with an alleged scheme to defraud Eastern, a creditor of Whipple-Allen Construction ("Whipple-Allen" or "Whipple"), by placing Whipple-Allen's funds in a trust account (the "Trust Account") to shield them from execution by Eastern. In terms of relief, Eastern seeks damages as well as the imposition of a constructive trust. Defendants now move to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) , arguing, *inter alia,* that this action is barred by the applicable statute of limitations. (Dkt. Nos. 5 & 17). For the reasons that follow, the Court grants Defendants' motions.

FN1. Whipple-Allen Real Estate has been voluntarily dismissed from this action. (Dkt. No. 7).

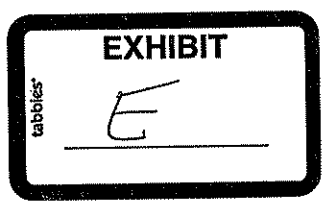
I. BACKGROUND

On or about January 2, 1993, Eastern, a Maryland corporation, entered into a subcontract with Whipple-Allen, a Pennsylvania corporation, for a construction project at St. Vincent Health Center in Erie, Pennsylvania (the "Project"). Compl. ¶ 16. St. Paul Mercury Insurance ("St.Paul") issued the surety bond for the Project (the "Surety Bond"). *Id.*

Upon completion of its work on the Project, Eastern submitted a bill to Whipple-Allen, which Whipple-Allen allegedly failed to pay. *Id.* ¶¶ 17-19. On July 1994, Eastern filed a demand for arbitration against Whipple-Allen. *Id.* ¶ 19. On October 6, 1995, the arbitrators awarded Eastern $220,533.72 for, *inter alia,* contract damages, interest and attorney's fees. *Id.* ¶ 20. Following the arbitration, Eastern demanded that St. Paul, as surety for Whipple-Allen, pay the award. St. Paul refused.

A. The State Court Action

Meanwhile, on September 14, 1995, Eastern filed suit in Pennsylvania State Court (the "State Court Action") against St. Paul, alleging breach of contract and bad faith for St. Paul's failure to pay Eastern pursuant to the Surety Bond. Compl. ¶ 23. Foster and Stradley represented St. Paul in the State Court Action. [FN2]



> FN2. Foster is an attorney licensed to practice law in the state of Pennsylvania and Stradley is a Pennsylvania law firm in which Foster is a partner.

As part of the State Court Action, Eastern served St. Paul with a request to produce documents in connection with the proposed taking of a deposition. *See* Defendants Foster and Stradley's Memorandum of Law in Support of Their Motion to Dismiss ("Defs.' Mem."), Ex. 2. St. Paul objected on several grounds, including that the documents requested by Eastern were attorney-work product and/or protected by the attorney-client privilege. *Id.*, Ex. 3. St. Paul did not produce a privilege log, however, describing the withheld documents. *Id.* Accordingly, on October 31, 1996, Eastern filed a motion to compel production of those documents. *Id.*, Ex. 4. St. Paul opposed the motion. *Id.*, Ex. 5.

*2 On November 13, 1997, the court granted Eastern's motion to compel. *Id.*, Ex. 13. On August 23, 1999, Eastern filed a second motion to compel. *Id.*, Ex. 14. Following an *in camera* inspection of the documents respecting the second motion to compel, the court released the withheld documents to Eastern on November 10, 1999. *Id.*, Ex. 15. After receiving these documents, Eastern filed a second amended complaint on July 18, 2000 against St. Paul, alleging that St. Paul had committed illegal fraudulent transfers of monies by establishing the Trust Account and depositing funds into the Trust Account. *Id.*, Ex. 17.

On January 3, 2001, "on the eve of trial in trial" in the State Court Action, Eastern sought leave to introduce an expert to testify about Eastern's alleged damages to its business, which were allegedly sustained as a result of its thwarted efforts to collect its award against Whipple-Allen. *Id.*, Ex. 18 at 45. The trial court denied as untimely Eastern's request to introduce expert testimony. *Id.*, Ex. 18. The remaining claims were submitted to a jury, which awarded damages to Eastern in the amount of $444,868.93: $184,868.93 for labor and $260,000 in punitive damages. *Id.*, Ex. 19. On post-trial motions, the court rejected Eastern's claims for more than $624,000 in pretrial interest and attorneys' fees. *Id.*, Ex. 21. On cross-appeals by Eastern and St. Paul, the Pennsylvania Superior Court affirmed the trial court's denial of attorneys' fees and interest, and the amount of the jury verdict. Compl., Ex. 2. St. Paul satisfied the judgment in full on April 30, 2003. Defs.' Mem., Ex. 23.

B. The Federal Court Confirmation Action

While litigating against St. Paul, Eastern continued to pursue Whipple-Allen. In November 1995, Eastern filed a petition to confirm the arbitration award in the United States District Court for the Western District of Pennsylvania (the "Federal Court Confirmation Action"). Compl. ¶ 21. On August 5, 1996, the court granted Eastern's petition and entered judgment in Eastern's favor for the full amount of the arbitration award ($220,533.72). The court subsequently amended the judgment, adding post-judgment attorneys' fees and costs. *Id.*

In an attempt to collect the judgment, on September 23, 1996, Eastern issued writs of execution against Whipple-Allen, PNC Bank and St. Paul as garnishees. *Id.* ¶ 52. The following day, Eastern served garnishment interrogatories on St. Paul, asking:

> At the time St. Paul was served with these Interrogatories or at any subsequent time, did St. Paul have in its possession, custody or control (as fiduciary, trustee, bonding company or otherwise, in which the Defendant Whipple-Allen had any interest whatsoever, including, but not limited to, trust account, certificates of deposit, pledges, letters of credit, promissory noted, personal guarantees, etc.

Id. ¶ 53. St. Paul's attorney, Foster, served answers on Eastern on October 24, 1996, which identified the existence of a trust account for Whipple-Allen:

> *3 No. By way of further answer, there is a trust account in which funds, from St. Paul and owners of certain contracts bonded by St. Paul, were deposited for the benefit of St. Paul and subcontractors and/or suppliers who performed work on those bonded contracts. All such funds have been paid to subcontractors and suppliers. None of the funds came from the owner of the St. Vincent Project. Whipple-Allen has no property

interest in those funds or in that account. *Id.* ¶ 54.

At the same time it sought discovery from St. Paul in the State Court Action, Eastern served discovery requests on Whipple-Allen. Def.'s Mem., Ex. 6. On February 6, 1997, Nichols, then counsel for Whipple-Allen, responded to the discovery request and included a copy of the agreement dated August 6, 1996 (the "Trust Agreement"), establishing the Trust Account. *Id.*, Exs. 7-9. Whipple-Allen also produced copies of bank statements, including cancelled checks, related to the Trust Account through November 1996. *Id.*, Ex. 11. The November 1996 bank statement showed deposits and withdrawals into and out of the Trust Account, which had a balance of $52,548.17. *Id.*

C. The Instant Action

On November 14, 2003, Eastern brought this action by filing a writ of summons in the Court of Common Pleas of Philadelphia County. [FN3] Thereafter, Foster and Stradley removed the case to this Court. At the Court's direction, Eastern filed its complaint on January 5, 2004. Eastern seeks relief under RICO, 18 U.S.C. §§ 1962(c) and (d), against the attorneys who represented its adversaries in the disputes recited above. Eastern essentially argues that Defendants engaged in a RICO conspiracy to prevent it from collecting its award against Whipple-Allen. At its core, however, Eastern's complaint reveals itself to be an attempt to revive previously-litigated claims in its effort to recover damages which were specifically denied in prior litigations. Although styled as RICO claims, Eastern's allegations in this case are virtually identical to those made in an unsuccessful lawsuit it filed on May 14, 1999, in the Western District of Pennsylvania, against nearly the same defendants. [FN4] *See* Defendants Foster and Stradley's Reply Memorandum of Law in Support of Their Motion to Dismiss Plaintiff's Complaint ("Defs.' Reply"), Ex. A. Defendants now move to dismiss, raising the statute of limitations as a bar to Eastern's claims.

FN3. The following day, Eastern filed a petition to amend judgment in the United States District Court for the Western District of Pennsylvania, requesting an award of $475,148.51 in counsel fees and expenses against Whipple-Allen for expenses incurred by Eastern in the State Court Action against St. Paul.

FN4. Eastern alleged, as it does here, that the defendants: (1) withheld from Eastern crucial facts of Whipple-Allen's insolvency, *compare* Defs.' Reply, Ex. A ¶ 71 *with* Compl. ¶ 27; (2) "diverted [Whipple-Allen's] funds" so as to make Eastern's demand on Whipple-Allen to pay the arbitration award "unavailing," *compare id.* ¶ 75 *with* Compl. ¶¶ 26, 57, 59; (3) used "Whipple-Allen's insolvency to unnecessarily delay the entry of a judgment on the arbitration award," *compare id.* ¶ 88 *with* Compl. ¶ 38(4) made Whipple-Allen "levy proof" through "preferential asset transfers," *compare id.* ¶ 89 *with* Compl. ¶¶ 38, 48; (5) created a Trust Account for no other purpose that to prevent Eastern from collecting its award against Whipple-Allen, *compare id.* ¶ 106 *with* Compl ¶¶ 45, 59; and (6) adopted a litigation strategy to increase cost and delay to Eastern, *compare id.* ¶¶ 120, 126-27 *with* Compl. ¶¶ 44-45, 50, 55-56, 58.

II. STANDARD OF REVIEW

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the complaint. *See Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir.1990); *Sturm v. Clark*, 835 F.2d 1009, 1011 (3d Cir.1987). In considering a motion to dismiss, the court must accept as true all factual allegations of the complaint and draw all reasonable inferences in the light most favorable to the plaintiff. *See Board of Trs. of Bricklayers and Allied Craftsmen Local 6 of N.J. v. Wettlin Assoc., Inc.*, 237 F.3d 270, 272 (3d Cir.2001). A court will grant a motion to dismiss only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations. *See Ramadan v. Chase Manhattan Corp.*, 229 F.3d 194, 195-96 (3d

Cir.2000) (citing *Alexander v. Whitman,* 114 F.3d 1392, 1398 (3d Cir.1997)).

*4 Although the language of Federal Rule of Civil Procedure 8(c) indicates that a statute of limitations defense cannot be used in the context of a Rule 12(b)(6) motion to dismiss, an exception is made "where the claim is facially non-complaint with the limitations period and the affirmative defense [of failure to comply with the statute of limitations] clearly appears on the face of the pleading." *Oshiver v. Levin, Fishbein, Sedran, & Berman,* 38 F.3d 1380, 1385 n. 1 (3d Cir.1994) (citing *Trevino v. Union Pac. R .R. Co.,* 916 F.2d 1230 (7th Cir.1990)). When evaluating a Rule 12(b)(6) motion to dismiss on statute of limitations grounds, a court may consider matters of public record, orders, exhibits attached to the complaint and undisputedly authentic documents if the plaintiff's claims are based on those documents. *See Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.,* 998 F.2d 1192, 1196 (3d Cir.1993) (holding that a court may consider an undisputedly authentic document attached as an exhibit to defendant's motion to dismiss if the plaintiff's claims are based on the document); *see also In re Burlington Coat Factory Sec. Litig.,* 114 F.3d 1410, 1426 (3d Cir.1997) ("[A]n exception to the general rule is that a 'document *integral to or explicitly relied* upon in the complaint' may be considered 'without converting the motion [to dismiss] into one for summary judgment.' ") (quoting *Shaw v. Digital Equip. Corp.,* 82 F.3d 1194, 1220 (1st Cir.1994) (emphasis added)).

III. ANALYSIS

A. The RICO Statute of Limitations

Although the RICO statute does not expressly provide a statute of limitations, the Supreme Court in *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.,* 483 U.S. 143, 156, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987), established a four-year limitations period for civil RICO claims. *See Prudential Ins. Co. of Am. v. United States Gypsum Co.,* 359 F.3d 226, 232-33 (3d Cir.2004) (noting that the Supreme Court in *Malley-Duff* adopted a four-year limitations period for civil RICO claims). The *Malley-Duff* Court, however, left open the question of when the statute of limitations for civil RICO claims begins to accrue.

Three distinct approaches emerged in the wake of *Malley-Duff.* Some Circuits applied the "injury discovery accrual rule," which began the four-year period once "a plaintiff knew or should have known of his injury." *Rotella v. Wood,* 528 U.S. 549, 553, 120 S.Ct. 1075, 1080, 145 L.Ed.2d 1047 (2000). Others applied the "injury and pattern discovery rule ... under which a civil RICO claim accrues only when the claimant discovers, or should discover, both an injury and a pattern of RICO activity." The Third Circuit, alone, adopted the "last predicate act" rule. *See Keystone Ins. Co. v. Houghton,* 863 F.2d 1125, 1130 (3d Cir.1988). "Under this rule, the period began to run as soon as the plaintiff knew or should have known of the injury and the pattern of racketeering activity, but began to run anew upon each predicate act forming part of the same pattern." *Rotella,* 528 U.S. at 554, 120 S.Ct. at 1080.

*5 In *Klehr v. A.O. Smith Corp.,* 521 U.S. 179, 117 S.Ct. 1984, 138 L.Ed.2d 373 (1997), the Supreme Court rejected the last predicate act rule. "The decision in *Klehr* left two candidates favored by various Courts of Appeals: some form of the injury discovery rule ... and the injury and pattern discovery rule." *Rotella,* 528 U.S. at 554, 120 S.Ct. 1080. In *Rotella,* the Court further narrowed the possible approaches by rejecting the injury and pattern discovery rule. 528 U.S. at 555-559, 120 S.Ct. at 1080-83. The Court noted that "[a] pattern discovery rule would allow proof of a defendant's acts even more remote from time of trial and, hence, litigation even more at odds with the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Id.,* 120 S.Ct. at 1081.

Following *Rotella,* "at least two accrual rules remain[ed] possible: an injury discovery rule ... or an injury occurrence rule." *Mathews v. Kidder, Peabody & Co., Inc.,* 260 F.3d 239, 245 (3d Cir.2001). In *Forbes v. Eagleson,* the Third Circuit considered these two approaches and adopted the "injury discovery" rule. 228 F.3d 471, 484 (2000).

"Under the injury discovery rule, [the court] must determine when the plaintiffs knew or should have known of their injury." *Id.* In addition to the injury, plaintiffs must also have known or should have known of the source of their injury. *See id.* "[N]othing more" than these two requirements is "required to trigger the running of the four-year limitations period [of a civil RICO claim]." *Id.* [FN5] Eastern filed this action on November 14, 2003. Thus, if Eastern learned of its injury and the source of that injury before November 14, 1999, its RICO claims are time-barred.

> FN5. Eastern argues that its RICO claim was not "ripe" until April 29, 2003, when it "was able to collect the judgment" from St. Paul. In making this argument, Eastern cites *Mathews v. Kidder, Peabody & Co., Inc.*, 260 F.3d 239 (3d Cir.2001). Eastern's reliance is misplaced. In *Mathews,* the Third Circuit held that defrauded investors sustained an injury, and their RICO claims accrued under *Rotella v. Wood,* 528 U.S. 549, 552, 120 S.Ct. 1075, 1079-80, 145 L.Ed.2d 1047 (2000), when they purchased their securities, not when they sold them; therefore, the investors' claims brought more four years after the purchase date were time-barred. 260 F.3d 247-251 (applying the "injury discovery rule"). Responding to the investors' argument that the *Zenith Radio* exception (delaying the accrual of claims in antitrust cases where damages are merely speculative) applied to their RICO claims, the court "assumed without deciding" that the exception *"could apply"* despite RICO's " 'more lenient 'injury discovery' rule," *id.* at 246, n. 8 (emphasis added), yet still found the investors' claims time-barred because their damages were ascertainable at the time they purchased their securities. *Id.* at 247-250. Moreover, the Third Circuit in *Prudential* rejected the argument, very similar to the one Eastern urges here, that the statute of limitations for RICO claims should not begin to run until a plaintiff's injuries become "actual injuries." 359 F.3d at 236-37. Such a legal rule, according to the court, "would allow a civil RICO plaintiff to control when the relevant limitations periods accrue ... thereby producing precisely the long limitations periods frowned upon in *Rotella. Id.* Eastern attempts to distinguish *Prudential,* arguing that the plaintiff in that case had past and future injuries. Like the plaintiff in *Prudential,* however, Eastern's RICO claims look back in time and are intended to redress past injuries. Indeed, Eastern seeks attorneys' fees it has been incurring since 1995, and damages identified in its complaint filed in the Federal Court Declaratory Judgment Action in May 1999. *See* Defs.' Reply, Ex. A ¶¶ 127-28.

B. Defining Eastern's Injury

Eastern's RICO claims against Defendants are based on its contention that the creation of the Trust Account illegally shielded assets of Whipple-Allen from attachment and execution and thwarted Eastern in collecting on its arbitration award and judgment against Whipple-Allen. Eastern's injury (in its own words) was its being "delay[ed] and prevent[ed] ... from collecting its federal judgment" against Whipple-Allen. Compl. ¶ 12; *see also* Tr. at 41 ("[T]he injury is that Eastern was precluded ... from collecting its judgment from Whipple-Allen assets."). That injury was caused by Defendants' " 'insulat[ing]' Whipple-Allen through the device of having St. Paul [ ] lend monies to Whipple [Construction] and taking Whipple-Allen Real Estate's real property as collateral; transferring Whipple-Allen Construction Company's office and field equipment to Whipple-Allen Real Estate; and 'protecting' progress payments due to Whipple-Allen on a construction project by depositing these payments in a 'special account' "--i.e. the Trust Account. *Id.* ¶ 38.

C. When Eastern Knew or Should Have Known of Its Injury

***6** Defendants contend that Eastern knew or should have known of its injury at the latest, on February 6, 1997, when it obtained a copy of the Trust Agreement. They are correct. The Trust Agreement

spells out in detail the purpose and mechanics of the Trust Account. [FN6] *See* Defs.' Mem., Ex. 8 ¶ 4. After reviewing the document, Eastern should have known that a Trust Account had been created on August 9, 1996, and that funds from owners of projects on which Whipple-Allen was working would not be turned over to Whipple-Allen, but would be deposited into the Trust Account, thus shielding the those funds from adverse judgments. This is precisely the conduct of which Eastern complains.

> FN6. The Trust Agreement states quite clearly that "Whipple-Allen ... granted a security interest in all of its receivable to PNC Bank." Yet Eastern waited almost seven years after receiving the Agreement to allege that while Defendants were delaying it from collecting its award against Whipple-Allen, Defendants executed a plan to defraud Eastern by, among other things, transferring to PNC Bank "security" and other interests in property owned by Whipple-Allen. Compl. ¶ 26. This is but one example of Eastern's untimeliness in bringing this lawsuit.

Eastern also received on February 6, 1997, bank statements and cancelled checks related to the Trust Account, showing the flow of funds into and out of the Trust Account. Based upon these records, Eastern should have known that the Trust Account was active as of the end of November 1996; and therefore, Foster allegedly untruthfully answered its garnishment interrogatories in October 1996, when she stated there was no money in the Trust Account. One of the predicate acts of mail fraud which forms the basis of Eastern's RICO claims is that "[o]n October 24, 1996, Foster placed in the U.S. Mails False Answers to Interrogatories, denying that her client held property of Whipple-Allen." Compl. ¶ 56. According to Eastern:

> Foster drafted the language of this answer to interrogatory in an effort to defraud and deceive Eastern and to hide from Eastern the fact that the trust account was created for the singular purpose of preventing Eastern from obtaining its judgment. Foster failed to tell Eastern that the account was still very active and substantial monies would be thereafter deposited by owners and paid to other creditors of Whipple-Allen Construction Company.

Compl. ¶ 55. Clearly, Eastern could have made these allegations in February 1997.

Judge Bozza recognized this very point during the State Court Action:

> MR. JABLON: With respect to discussing [Foster's] answer to [Eastern's garnishment] interrogatory, in closing argument, I think it's relevant and applicable to the *ex maleficio* [T]rust [Account].
>
> * * *
>
> THE COURT: Let's talk about given the application of the statute here because I think we ought to talk about that as well. Now, the problem here is, with fraud, it's also a two-year statute that applies, and the discovery rule can be a reasonable defense to delay in pursuing an action, and so we've got to ask what is it that ... [Eastern] learned between October and February.
>
> In February did, they know--the question becomes, [d]id they know, in February, that there were proceeds in t[he Trust Account]?
>
> MR. LUTSKY: Absolutely.
>
> MR. DEENIS: Absolutely.
>
> MR. LUTSKY: They had the bank statements.
>
> MR. DEENIS: They had the bank statements.
>
> THE COURT: The fraud that is being asserted here, the misrepresentation, was in October, that there was no money in [the Trust Account] that belonged to Whipple-Allen. They knew that there was money in there in February; therefore they knew that [St. Paul (through Foster)] lied in October.
>
> *7 MR. JABLON: Well, there's no evidence that [Eastern] knew there's money in there in February.
>
> THE COURT: Didn't they have the bank statements?
>
> MR. JABLON: They had the bank statements for October and, I believe, November, but not February.
>
> * * *

> THE COURT: My point is, they knew that as of October.
>
> * * *
>
> MR. DEENIS: Let me clarify something. The evidence in the record shows that [Eastern] had the bank statements through November 1996.... The point Your Honor is making is a correct one, is that [Eastern] knew at that point ... that [Foster's answer to Eastern's garnishment interrogatories] was not accurate, according to their allegations. That's the point that [Eastern is] making as to the fraud, and that's when the statute starts to run. [Eastern] knew it right at that moment. What's in the trust account in February '97, any time afterwards, has no bearing on that claim.
>
> THE COURT: And I believe that's true.
>
> MR. JABLON: I'm not going to argue with the court at this point.
>
> THE COURT: It's hard to miss.

Defs.' Mem., Ex. 10 at 12-14.

On brief and at oral argument, Eastern argued that it did not have knowledge of its injury until November 15, 1999, when it received documents showing that the Trust Account had been established for the purpose of hindering, delaying and preventing Eastern from collecting its award against Whipple-Allen. [FN7] *See* Plaintiff's Memorandum of Law in Opposition to Defendants' Motions to Dismiss ("Pl.'s Mem.") at 11-12; Tr. 43-45. As Defendants correctly point out, Eastern's knowledge of the *purpose* of the Trust Account is irrelevant for determining when its RICO claims began to accrue. *See* Defs.' Reply at 5. Whether the Trust Account was created for licit or illicit purposes, its alleged effect, of which Eastern should have been aware in February 1997, was the same: it shielded assets from attachment and execution by Eastern. *Id.*

> FN7. Among the documents Eastern received were three letters from Foster to St. Paul. After reviewing these letters, the Court concludes that there is nothing nefarious about them. They are innocuous communications between an attorney and her client. Assuming *arguendo* that the letters evidence Defendants wrongful conduct, the Court fails to see how they helped Eastern recognize its RICO claims. Eastern already knew as early as February 1997, and no later than August 1999, what it learned from these letters.

Regardless, Eastern knew, prior to November 1999, that the purpose of Trust Account was to prevent Eastern from collecting its arbitration award against Whipple-Allen. On May 14, 1999, Eastern filed a Complaint and Petition for Declaratory Judgment against St. Paul and related companies in the United States District Court for the Western District of Pennsylvania (the "Federal Court Declaratory Judgment Action") making this very allegation. [FN8] *Eastern Steel Constructors, Inc. v. The St. Paul Cos., et al.,* Civ. A. No. 99-CV-169 (W.D.Pa.). In its complaint, Eastern alleged that "[w]ith [Whipple-Allen] destined for either voluntary or involuntary bankruptcy, St. Paul ... decided ... that it was time to take action to keep [Whipple-Allen] out of bankruptcy so as to minimize its losses. Accordingly, on or about August 9, 1996, with imminent levy looming over [Whipple-Allen's head," St. Paul and Whipple-Allen executed the Trust Agreement. *Id.* ¶ ¶ 101, 102. The Trust Agreement, according to Eastern, "provided St. Paul with the means to literally snatch funds due on the seven completed contracts out from under Eastern-- funds, which but for the [Trust Agreement], would have been subject to Eastern's levy or which would have been subject to Eastern's claim as judgment creditor in any bankruptcy of [Whipple-Allen]." *Id.* ¶ 106.

> FN8. On February 9, 2000, the district court dismissed the Federal Court Declaratory Judgment Action with prejudice. *See* Defs.' Reply, Ed. B at 7.

***8** These allegations track those Eastern made in a second motion to compel filed on August 23, 1999, in the State Court Action. In its motion, Eastern offered the following scenario:

> St. Paul saved itself from Whipple's insolvency by obtaining from Whipple [the Trust

> Agreement] which gave St. Paul a "priority right" over all of the funds due Whipple on seven insured contracts.
> In return for the preferential assignment, St. Paul promised to and did provide Whipple with sufficient funding to keep it out of bankruptcy while its personal indemnitors formed a new company (and/or restructured its non-union sister company) to bleed the old company dry.
> St. Paul then collected these illegal funds, deposited them in a trust account set up for St. Paul's sole benefit, and used them to satisfy every single insured obligation for which it was jointly and severally bound, except one: the Federal Judgment.

Id., Ex. 14 at 19. Regarding the Trust Agreement, Eastern stated: "This remarkable document was so tainted with illegality that it contained a non-disclosure clause [ ] prohibiting St. Paul and Whipple from disclosing its existence to anyone but insiders." *Id.* at 20. [FN9]

> FN9. This allegations contradicts Eastern's claim that, prior to November 1999, it did not know that the Trust Account was allegedly unlawful. *See* Tr. at 45 (asserting that Eastern did not know that the Trust Account was unlawful until it received the withheld documents on November 15, 1999); *see also* Pl.'s Mem. 11-12.

The second motion to compel, like the complaint filed in the Federal Court Declaratory Judgment Action, confirms that Eastern was aware of its injury (being prevented from collecting its award against Whipple-Allen) and the source (Defendants' actions generally and, more specifically, their creation of the Trust Account) well before November 1999. This is what is required for a RICO cause to accrue under the Third Circuit's injury discovery rule. *See Forbes,* 228 F.3d at 485. Eastern's claims filed on November 14, 2003, are therefore untimely unless equitably tolled.

D. Equitable Tolling

Eastern suggests that the four-year limitations period should be tolled because of Defendants' fraudulent concealment of the existence of a RICO claim. "The law is clear that courts must be sparing in their use of equitable tolling." *Seitzinger v. Reading Hosp. and Med. Ctr.,* 165 F.3d 236, 239-40 (3d Cir.1999). The "statute of limitations should be tolled only in the rare situations were equitable tolling is demanded by sound legal principles as well as the interest of justice." *Longenette v. Kinsing,* 322 F.3d 758, 768 (3d Cir.2003). This is not one of those situations. Eastern had, by its own admission, everything it needed to know to assert a RICO claim against Defendants on November 15, 1999, well before the statute of limitations was to expire, whether that date is August 2003 or February 2001. Yet Eastern did nothing for almost four years. A plaintiff may not sit by and fail to investigate a claim when presented with facts " 'that should excite his suspicion....' " *In re Lower Lake Erie Iron Ore Antitrust Litig.,* 998 F.2d 1144, 1179 (3d Cir.1993). " 'Equity aids the vigilant, not those who rest on their rights.' " *Valenti v. Mitchell,* 962 F.2d 288, 2999 (3d Cir.1992) (quoting *Int'l Union, UAW v. Mack Trucks, Inc.,* 820 F.2d 91, 95 (3d Cir.1987)). Eastern is not entitled to an equitable tolling of the statute of limitations.

IV. CONCLUSION

*9 The Court is satisfied that Eastern knew or should have known of its injury as early as February 1997, and certainly by August 1999, and that there is no basis for any equitable tolling of the statute of limitations. This lawsuit was filed in November 2003, more than four years after Eastern's RICO claim began to accrue. Therefore, Eastern's RICO claims are time-barred, and will be dismissed with prejudice. An appropriate order follows.

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Motions, Pleadings and Filings (Back to top)

• 2004 WL 2718878 (Trial Motion, Memorandum and Affidavit) Reply Memorandum of Law of Defendants, Sumner E. Nichols, II, Nichols, Krill & Taggart, Scott D. Allen and Whipple-Allen Real Estate, in Support of Their Motion to Dismiss or Strike Plaintiff's Complaint (Jun. 01, 2004)

• 2:03CV06680 (Docket)

(Dec. 11, 2003)

• 2003 WL 23906642 (Trial Motion, Memorandum and Affidavit) Memorandum in Support of Motion of Defendants, Sumner E. Nichols, II and Nichols, Krill & Taggart, Scott D. Allen, and Whipple-Allen Real Estate, to Dismiss or Strike Plaintiff's Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6) and 12(b)(7) (2003)

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