IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

LOUIS J. CAPANO, III,	)	
	)	
Plaintiff and Counterclaim Defendant,	)	
	)	
v.	)	C.A. No. 10C-11-228 WCC
	)	
DARIN A. LOCKWOOD and DON A. LOCKWOOD, jointly and severally,	)	
	)	
Defendants, Counterclaim Plaintiffs, and Third-Party Plaintiffs,	)	
	)	
LOUIS J. CAPANO, JR.,	)	
	)	
Third-Party Defendant.	)	

Submitted: April 10, 2015
Decided: August 21, 2015

On Plaintiff's Motion to Dismiss - **DENIED**

On Third-Party Defendant's Motion to Dismiss - **DENIED**

MEMORANDUM OPINION

Jeffrey M. Weiner, Esquire, 1332 King Street, Wilmington, DE 19801. Attorney for Plaintiff Louis J. Capano, III.

Walter J. O'Brien, Esquire, 48 The Green, Dover, DE 19901. Attorney for Defendant Don A. Lockwood.

CARPENTER, J.

This continues to be an unfortunate and very protracted litigation between Louis J. Capano, III ("LIII") and his father, Louis J. Capano, Jr. ("LJC") (collectively, the "Capanos") and Donald A. Lockwood ("DAL") and Darin Lockwood ("Darin")(collectively the "Lockwoods"). While the amount of the dispute is not insignificant, it would not surprise the Court if the parties have spent more in time, counsel fees and costs than the loan interest that is in dispute. There is no longer land to fight over as the bank has taken it; the bank which provided the funds (Wilmington Trust) no longer exists primarily due to investments like this; and the likelihood of the Capanos and Lockwoods ever again participating in a joint venture is nearly as great as the odds of winning the Powerball. But instead of coming to a fair resolution, the parties continue to fight and have now been given new life by the Delaware Supreme Court Opinion.

The Court will not set forth in detail the underlying facts again as they are contained in the Court's Opinion of January 9, 2014 and the Supreme Court Opinion of November 10, 2014. However, it is sufficient to say there is no question that each party created their own LLC from which another LLC was created to purchase the land and borrow the money from Wilmington Trust. As an afterthought of counsel when preparing the loan documents, a Contribution Agreement was created with the Capanos and the Lockwoods allegedly guaranteeing the loan. The Contribution

Agreement was executed by the Lockwoods and was handed over to LIII by a bank official. It appears there is no dispute that LIII signed the Contribution Agreement but it was never executed by his father, LJC. The Counterclaim and Third-Party Claim now asserts that if the Lockwoods had known that LJC had not guaranteed the loan, they would have walked away from the deal. To place it in a legal context that perhaps justifies continuing the litigation, they assert the failure to disclose that LJC had not guaranteed the loan acted as a fraudulent inducement for them to participate in the deal.

While admittedly intrinsically connected, it is important to remember that the present litigation is over interest payments and not one regarding the overall contractual relationship of the parties in this business venture. In that context, it would appear to the Court that the arguments made by the Lockwoods would have greater merit if they had been forced to pay the interest on the loan and now the Capanos were denying their contribution obligation. Unfortunately for them, that is not the case. But, since the Supreme Court has held that whether having all four parties sign the Contribution Agreement constituted a condition precedent to the contract's formation is a factual determination, not a legal one, sadly this case appears to be headed for trial.

So the only issue now before the Court is whether the Counterclaim and Third-Party Claim can remain in this matter. After the case was remanded by the Supreme Court, DAL filed an Amended Answer adding a Counterclaim and a Third-Party Complaint. The Court notes this litigation began on November 27, 2010 and the underlying business venture occurred in 2004. There appears to be no dispute that the statute of limitation period for a claim of this nature is three years.[1]

Assuming every fact in the Counterclaim to be true, and that DAL has sufficiently pled a doctrine of fraudulent concealment, the real question raised in the Motions is when was DAL on inquiry notice of the claim? "Significantly, if the limitations period is tolled…it is tolled *only until* the plaintiff discovers (or exercising reasonable diligence should have discovered) his injury."[2] "Thus, the limitations period begins to run when the plaintiff is *objectively* aware of the facts giving rise to the wrong, *i.e.*, on inquiry notice."[3] The statute of limitations is tolled until such time "that persons of ordinary intelligence and prudence would have facts sufficient to put them on inquiry which, *if pursued,* would lead to the discovery of the injury."[4] "Inquiry notice does *not* require *actual* discovery of the reason for the injury. Nor

---

[1] 10 *Del. C.* § 8106.

[2] *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *6 (Del. Ch. July 17, 1998) aff'd. 725 A.2d 441 (Del. 1999).

[3] *Id.*

[4] *Id.* at *7.

does it require plaintiffs' awareness of all of the aspects of the alleged wrongful conduct. Rather, the statute of limitations begins to run when plaintiffs "would have facts sufficient to put them on 'inquiry which, if pursued, would lead to the discovery' of the injury."[5]

The Capanos contend that the very facts of the Counterclaim demonstrate the DAL was on inquiry notice of their alleged wrongful conduct in December 2004, and for the almost six years before LIII filed his Complaint in 2010, and for almost three years thereafter. Specifically, Defendants allege that DAL never inquired or complained that he had not received an executed copy of the Contribution Agreement from either or both of the Capanos until 2013, nine years after execution. Also, Defendants allege that the Acquisition Loan, when signed by the parties, did not mention LJC as a guarantor and yet DAL did not question the absence of LJC on the Agreement. DAL contends that he was not on notice of LJC's failure to execute the Contribution Agreement, until LJC's deposition on October 25, 2013 and as such that is when the statute of limitations began to run.

While the Capanos have attached a series of documents to their Motions, they are not part of the original Complaint or attached to the Counterclaim or Third-Party

[5] *Studiengesellschaft Kohle, mbH v. Hercules, Inc.,* 748 F.Supp. 247, 252 (D.Del.1990) (quoting *Wilson v. Simon,* 1990 WL 63922 (Del.Super.1990)).

Complaint. There are only two exceptions to the general rule prohibiting consideration of such extrinsic material on a Motion to Dismiss:

> "(i) where an extrinsic document is integral to a plaintiff's claim and is incorporated into the complaint by reference, and (ii) where the document is not being relied upon to prove the truth of its contents." [6]

Neither exception is applicable here. As such, the record that the Court is allowed to consider on these Motions to Dismiss is that contained in the Complaints which assert the Lockwoods were unaware of the failure of LJC to sign the Contribution Agreement or to guarantee the loan until his deposition in 2013. Since there appears to be no dispute that an executed Contribution Agreement was never provided to the Lockwoods, the Court cannot on its face find this assertion to be beyond any conceivable set of circumstances susceptible of proof. As such, at this juncture of the litigation the Court must deny the Motions to Dismiss.

Having made that finding, the Court would strongly suggest that Plaintiff not immediately jump into filing a summary judgment motion. The Court would suggest to the parties that the Court would be in a better position to consider a summary

---

[6] *Furman v. Delaware Department of Transportation*, 30 A.2d 771 (Del. 2011)(citing *Vanderbilt Income and Growth Associates v. Arvida/JMB Managers*, 691 A.2d 609, 613 (Del. 1996)).

judgment request with some discovery having been undertaken, particularly with an appropriate inquiry as to what the Lockwoods believe was meant by the guarantee listing in the Business Loan Agreement. In other words, the Court would suggest that counsel allow an appropriate time to fully explore this issue so it can be resolved with as complete a record as possible. The documentation will not change, but the Court prefers not to have the case sent back again with a finding that the Court did not give the parties sufficient opportunity to explore the statute of limitation issue.

Based on the above, the Motions to Dismiss are hereby DENIED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.