

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

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|--------------------------------------|---|-----------------------------|
| READING INTERNATIONAL, INC., | : | |
| and CITADEL CINEMAS, INC., | : | |
| (successor in interest to FA, Inc.), | : | |
| | : | |
| Plaintiffs, | : | |
| | : | |
| v. | : | C.A. No. 02C-10-223 SCD |
| | : | [Consolidated with C.A. No. |
| RICHARD ST. FRANCIS, | : | 04C-07-110 SCD] |
| | : | |
| Defendant. | : | |

Submitted: December 16, 2004
Decided: June 17, 2005

ORDER

The defendants' Motion to Dismiss, treated here as a Motion for Summary Judgment, having been briefed and argued, and supplemental papers having been submitted, it appears that:

1. The plaintiffs' claims are based on allegations that their purchase of certain equipment in late 1996 was procured by fraud in that the value of the equipment was not as represented. In October 2002, plaintiffs filed a lawsuit against the corporate entities involved in the transaction, Equipment Leasing Associates 1995-VI Limited Partnership; TransCapital Corp.; TransCapital Computer Corp.; and Murray, Devine & Company ("First Action"). This second action, filed in July 2004, charges Richard St. Francis ("St. Francis") with personal liability arising from the equipment purchase transaction. Since the filing of this Motion to Dismiss, the two actions have been consolidated and recently two individuals, the corporate owners, have been added pursuant to the relation back provisions of Rule 15(c).

2. While initially presented as a Motion to Dismiss, this motion is converted to one for Summary Judgment pursuant to Rule 56 as matters outside the pleadings have been presented. As such, it must be denied if there are any issues of material fact.¹

3. The applicable statute of limitations is 10 *Del. C.* § 8106 which provides a limitations period for fraud that expires three (3) years from the time of accrual. A cause of action for fraud accrues at the time the fraud is perpetrated.²

¹ Superior Court Civil Rule 12(b).

² *State ex re. Brad v. Pettinaro Enterprises*, 870 A.2d 513, 531 (Del.Ch.2005).

4. The allegations in the Complaint set forth a cause of action which was completed in 1996, at the time the equipment was purchased. Thus, this action, commenced in July 2004, is barred unless there is an exception to the application of the three (3) year statute of limitations. Plaintiff argues that that statute of limitations is tolled because St. Francis intentionally concealed material facts.

5. The plaintiffs' complaint carefully describes the chronological sequence of the events involving the equipment. The purchase was in 1997. In January 1999, the Internal Revenue Service ("IRS") made an Information Document Request concerning the transaction.³ Then in March 2001, the IRS made additional requests for information, focusing on the actual number of computers.⁴

6. The complaint goes on to identify the point in time when the plaintiffs' predecessor, FA, sought to confirm the original value of the computer, the inference being that the IRS investigation required assurance in this regard:

33. On or about March 4, 2001, FA [predecessor corporation to Plaintiffs] asked Robert Jones [a Vice President of Murray Devine, the appraiser retained by plaintiff to verify the value of the computers] to check the consistency of the data contained in Francis' Memorandum against the conclusions reached in Murray Devine's appraisal as to the market value of the Equipment in December 1996, and the residual values of the Equipment in the years 1997-2001. In addition, FA requested that Robert Jones provide the [IRS] with a "unit based valuation of the portfolio," in order to allay any concerns the IRS might have regarding the methodology that Murray Devine had used to appraise the value of the Equipment.⁵

7. The allegations make it clear that Plaintiffs predecessor was on notice as of March 2001, that there was a need to be concerned about the valuation of the computers. Such an inquiry demonstrates that there were facts enough to raise a suspicion. When that occurs, the party is on notice for purposes of the statute of limitations.⁶

8. At the first deposition of St. Francis, taken December 15, 2003, he was asked whether he told the Murray Devine agent, Robert Jones, the original cost of the computer equipment. He responded: "No. Because I didn't know that."⁷ At his second deposition taken June 30, 2004, he responded: "I don't recall actually having said that, but based upon all the documentation that I see with handwritten notes and things, I must have."⁸

³ Amended Complaint, paragraph 28, p. 10

⁴ Amended Complaint, paragraphs 30 and 31, page 11.

⁵ Amended Complaint, paragraph 33, page 11-12.

⁶ *Becker v. Hamada, Inc.*, 455 A.2d 353, 356 (Del. 1982). See also *In Re Dean Witter Partnership Litigation*, 1998 Del. Ch. LEXIS 133 (Del.Ch.).

⁷ Deposition of Richard St. Francis taken December 15, 2003, p. 65

⁸ Deposition of Richard St. Francis taken June 30, 2004, p. 36.

9. Plaintiffs argument for tolling the statute of limitations is expressed as follows:

"[T]his Court should consider that in a deposition taken on December 15, 2003, St. Francis *denied* that he had ever provided the "original cost" information to the appraiser. Yet, in a second deposition taken on June 30, 2004, he totally changed his testimony on this crucial fact and admitted that he was the one who had told the appraiser that the original cost of the equipment was \$100 million. Likewise, St. Francis had also concealed the fact that *he knew* that the original cost of the equipment was *far less* than \$100 million and that the fair market value of the Equipment was *far less* than the \$40 million dollars reflected in the critical appraisal.⁹

10. Defendant argues that the testimony is not inconsistent, and that the role of St. Francis in the transaction at issue has been known from the time defendant had in its possession facts sufficient to raise suspicion, which occurred no later than March 2001.

11. Plaintiffs have been candid with the Court with regard to the objective in suing St. Francis who was paid between \$400,000 and \$500,000 as a result of this one transaction. Plaintiff believes that the corporate entity from which the computer equipment was purchased has no assets; that it was created for this transaction only; and that it is judgment proof. Thus, it now seeks to bring in St. Francis in his individual capacity to enhance its chances of collecting on a judgment.

12. Inconsistent statements, if indeed St. Francis' statements are inconsistent, are the fodder for trials. The statute of limitations would be eviscerated if it ran only from the point when a witness gives [allegedly] incriminating testimony. The circumstances presented here demonstrate that the statute of limitations commenced running no later than March 2001, the point in time when Plaintiff's predecessor had a factual basis to suspect a problem with this transaction. The testimony of St. Francis does not justify a tolling of the statute of limitations, his role in the deal having been known from the beginning.

WHEREFORE, the Motion for Summary Judgment as to the defense of statute of limitations, the action against St. Francis is dismissed.

IT IS SO ORDERED this 17th day of June, 2005.

Judge Susan C. Del Pesco

Original to Prothonotary

xc: Richard R. Wier, Jr., Esquire
Frederick L. Cottrell, III, Esquire
Anne Shea Gaza, Esquire

⁹ Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss, p. 4.