IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

CATHERINE JOHNSON	:	
	:	
Plaintiff,	:	
	:	
v.	:	July Term 2002
	:	
JAY O. MARRS, SHIRLEY B. CHAPMAN, CPA, ELITE CAPITAL MARKETS FBO, LEMARRS ONE FINANCIAL, LTD., KRISTO CAPITAL MANAGEMENT, LTD., DR. CARLOS A. CELLI, RENE J. SCHULER, INTREK CAPITAL MANAGEMENT, LLC, SCHIFFERLE LEMARRS, SCHIFFERLE LEMARRS ONE FINANCIAL, LTD., KEN MORELAND, Y2K-2 PRODUCTIONS, LTD., KRISTO PROPERTIES, L.P. and KRISTO INVESTMENTS, L.P.	:	No.: 4706 Control No.: 010380 Commerce Program
	:	
Defendants.	:	

O R D E R

AND NOW, this 20TH day of April, 2005, upon consideration of Plaintiff Catherine Johnson's Motion for Reconsideration of the Court's Order of December 27, 2004, the response and reply thereto, the supplemental memorandum, and in accordance with the attached memorandum opinion, it is hereby **ORDERED** and **DECREED** that Plaintiff's Motion is **DENIED**.

BY THE COURT,

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C. DARNELL JONES, II, J.

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	:	Control No.: 010380
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MEMORANDUM OPINION

JONES, J.

Presently before the court is the Motion for Reconsideration of the Court's Order of December 27, 2004 (the "Order"), of Plaintiff Catherine Johnson ("Johnson"). Defendants Shirley B. Chapman, CPA ("Chapman"), Kristo Capital Management, Ltd. ("Kristo"), and Intrek Capital Management, LLC ("Intrek") oppose the Motion.

The Motion seeks to reinstate several counts of the Complaint that were dismissed pursuant to the Order. These are Counts VI (negligence), VII (gross negligence), VIII (fraudulent misrepresentation), IX (negligent misrepresentation), XIII (Section 552(1) of the Restatment (Second) of Torts), XIV (breach of fiduciary duty), XV (breach of

confidential relationship), XVII (Pennsylvania Securities Act), XXII (Securities Act of 1933), and XXIII (Investment Advisors Act of 1940).[1]

Plaintiff argues the Order improperly applied the discovery rule to her claims against Chapman.[2] Relying on In re Mushroom Transportation Co., 382 F.3d 325 (3d Cir. 2004), Johnson contends that the alleged fiduciary relationship between herself and Chapman served to conceal Chapman's alleged wrongdoing. Her argument fails.

As a general rule, "a party asserting a cause of action is under a duty to use all reasonable diligence to be properly informed of the facts and circumstances upon which a potential right of recovery is based and to institute suit within the prescribed statutory period. Thus, the statute of limitations begins to run as soon as the right to institute and maintain a suit arises." Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc., 503 Pa. 80, 84-85, 468 A.2d 468, 471 (1983).

The discovery rule is an exception which tolls the statute of limitations "until the point where the complaining party knows or reasonably should know that he has been injured and that his injury has been caused by another party's conduct." Crouse v. Cyclops Indus., 560 Pa. 394, 404, 745 A.2d 606, 611 (2000). Under the discovery rule, "the limitations period begins to run when the injured party possesses sufficient critical facts to put him on notice that a wrong has been committed and that he need investigate to determine whether he is entitled to redress." Melley v. Pioneer Bank, N.A., 834 A.2d 1191, 1201 (Pa. Super. 2003). Determining whether Plaintiff became aware of her injury in a reasonable time is a question of law where the facts are so clear that reasonable

[1] Count VIII was dismissed due to lack of evidence and remains dismissed on this basis.

[2] Since laches was not raised by the pleadings, the motion for summary judgment and response thereto, or the Motion and response thereto, it is not properly before the court.

minds cannot differ. Murphy v. Saavedra, 560 Pa. 423, 426, 746 A.2d 92, 94 (2000). The burden of establishing the applicability of the discovery rule exception lies with Plaintiff. Cochran v. GAF Corp., 542 Pa. 210, 220, 666 A.2d 245, 250 (1995).

As set forth in the Order, applying the discovery rule tolled the applicable statutes of limitations until the end of March 2000. By this date, Johnson suspected that she was being defrauded. In other words, she reasonably knew that she had been injured by another party's conduct.

Certainly a fiduciary relationship is "pertinent to the question of when a plaintiff's duty to investigate arose." Mushroom, at 343. Plaintiff, however, attempts to use the mere existence of a fiduciary relationship to substitute for an adequate pursuit of the cause of her injury. More is required. Upon realizing she had been injured, Johnson needed to pursue the source in accordance with "those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interests and the interests of others." Cochran, at 220, 250. This standard is an objective one and requires her to act with the level of diligence of a reasonable person. Crouse, at 404-05, 611-12. Johnson has not met the standard.

The Order highlighted several facts that notified Plaintiff that Chapman may have played some role in her financial loss. For example, Johnson states that Jay O. Marrs ("Marrs") told her, "in Chapman's presence and without objection from Chapman, that Chapman was entrusted by Marrs to deal with problems with Plaintiff's independent (i.e., non-Intrek) investments." Plaintiff's Memorandum in Opposition, at 31. Johnson also received a letter from Marrs indicating that he had requested Chapman to act as her accountant. Complaint, Exhibit B. In addition, during a meeting at Johnson's house

regarding the investment in Y2K-2 Productions, Ltd. ("Y2K"), Marrs told her to contact Chapman if there were any problems. Johnson Deposition, at 22.

The Order did not enlist every piece of evidence triggering Plaintiff's responsibility to pursue Chapman. It is clear, however, that Johnson had additional information at her disposal implicating Chapman. For example, Chapman "encouraged" Johnson's investments with Marrs, Johnson Deposition, at 36-37, and "facilitated" Marrs' opportunity to sell her securities, Johnson Affidavit, at ¶3. Chapman also offered "shares to investors in Kristo and Intrek with the express understanding that each company would only invest in specified investment products offered by Mr. Marrs." Plaintiff's Memorandum in Opposition, at 15. Subsequently, Intrek placed two investments, including Y2K, with Marrs. Chapman Deposition, at 115-16.

These facts directly connect Chapman to the investments underlying Plaintiff's claims, leading to the conclusion that she needed to consider Chapman as a cause of her injuries and investigate.[3] "The failure to make inquiry when information is available is failure to exercise reasonable diligence as a matter of law." Cochran v. GAF Corp., 430 Pa. Super. 175, 180, 633 A.2d 1195, 1198 (1993).

To counter these facts and preclude summary judgment, Plaintiff asserts the current matter compares favorably to Fine v. Checcio, No. 68 WAP 2003, 2005 Pa. LEXIS 596 (Pa. March 30, 2005). Johnson contends that she received written assurance her funds would be returned when Chapman forwarded a January 26, 2001 letter written by Marrs, Complaint, Exhibit M. Similar to the Fine claimant, this communication served to provide Plaintiff with "hope and a chance of recovery." Fine, at *8. Plaintiff's

[3] By contrast, the Mushroom claimants had no indication of any injury caused by any source. Mushroom, at 332-34.

reliance on this letter is misplaced. Johnson has put forward no evidence to justify any reliance on any communication from Marrs subsequent to her suspicion that he was defrauding her in March 2000. More pointedly, Johnson learned Marrs had defrauded her when, in response to her complaint letter of June 6, 2000, Complaint, Exhibit M, she received the July 11, 2000 letter from the Securities and Exchange Commission ("SEC"), Complaint, Exhibit M. Against this backdrop, Plaintiff's reliance on Marrs' letter is unreasonable.

BY THE COURT,

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C. DARNELL JONES, II, J.