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.: 050790 Commerce Program
	:	
Defendants.	:	

O R D E R

AND NOW, this 27TH day of December, 2004, upon consideration of Defendants Shirley B. Chapman, CPA, Kristo Capital Management, Ltd., and Intrek Capital Management, LLC's Motion for Summary Judgment and Plaintiff's Response thereto, it is hereby **ORDERED** and **DECREED** as follows:

1) All Counts are **DISMISSED** against Defendant Kristo Capital Management, Ltd.;

2) All Counts are **DISMISSED** against Defendant Intrek Capital Management, LLC; and

3) Counts VI, VII, VIII, IX, X, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XXI, XXII, XXIII, XXIV, XXVII, XXVIII, and XXIX are **DISMISSED** against Defendant Shirley B. Chapman, CPA.

BY THE COURT,

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C. DARNELL JONES, II, J.

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MEMORANDUM OPINION

JONES, J.

Presently before the court is the Motion for Summary Judgment of Defendants Shirley B. Chapman, CPA ("Chapman"), Kristo Capital Management, Ltd. ("Kristo"), and Intrek Capital Management, LLC ("Intrek"). Plaintiff is Catherine Johnson ("Johnson").

BACKGROUND

The dispute between the parties (and others not participating in this motion) arises out of a series of failed investments.

Johnson is a retired educator. She contributed to a retirement program while working and has participated in various investment activities since retiring.

Chapman and Johnson met in 1997 through participation in an investment group unrelated to this matter. Chapman is a certified public accountant and she prepared Johnson's amended tax return for 1998 and her 1999 tax return. Chapman met Defendant Jay O. Marrs ("Marrs") at an investment seminar in 1997. Eventually, Chapman and Marrs developed a romantic relationship. In late 1998, Marrs gave Chapman $20,000 under circumstances that remain unclear.

Both Kristo and Intrek are investment clubs created as vehicles for investing with Marrs. Kristo was formed in late 1997 by Chapman, her family, and friends. Johnson was never a member of Kristo, but she did attend a seminar hosted by the group in the spring of 1998. Intrek was formed in October 1998 by investors who could not participate in Kristo. Johnson participated in Intrek and contributed to the club between October 16, 1998 and November 26, 1999. Intrek placed two investments with Marrs. Chapman served as the contact point between Marrs and the investment clubs and their investors.

Johnson met Marrs at a seminar sponsored by Chapman in 1998. Thereafter, Chapman set up a one-on-one meeting between Johnson and Marrs. At this meeting, Marrs told Johnson that he could help her with her investments and to use Chapman as her contact. On August 14, 1998, Marrs sent a letter to Johnson indicating that he had requested Chapman to serve as her CPA.

Prior to meeting Marrs, Johnson kept a total of $375,000 in retirement savings in accounts with Waddell & Reed and Equitable. Waddell & Reed held $147,000, but this

amount was transferred to TD Waterhouse ("Waterhouse") on April 8, 1999. Johnson granted Marrs power of attorney over the account, but, in a letter dated August 10, 1999, Waterhouse informed Johnson that it would revoke Marrs' power of attorney effective August 13, 1999. After querying Marrs, Johnson accepted his explanation for this action: his partners were having difficulty with Waterhouse. Johnson also checked with Chapman, but learned she had been told the same thing by Marrs. Equitable held $228,000 and this sum was transferred to Charles Schwab ("Schwab") with Marrs receiving power of attorney over this account on September 27, 1999. Johnson also paid Marrs $300 for his investment advice for the year beginning July 1, 1999.

On April 2, 1999, Chapman sent a note to Johnson and other Intrek investors, relating information about a potential investment in Y2K 2 Productions, Ltd. ("Y2K"), to be placed with Marrs. On April 7, 1999, Chapman and Marrs came to Johnson's home and, following a discussion of the investment, Johnson made a $20,000 investment in Y2K. Marrs told Johnson to contact Chapman if she had any problems.

On May 17, 1999, Marrs, Chapman, and Johnson met at Johnson's house to discuss another investment. As a result of the conversation, Johnson purchased a $10,000 investment in a viatical settlement (the "viatical investment") that day.

In October 1999, Johnson withdrew $147,000 from Waterhouse and sent it to Marrs for investment. On October 14, 1999, these funds, along with the $228,000 at Schwab, were invested by Marrs in a Brazilian real estate project that involved U.S. treasury bonds ("T-Bill investment"). In December 1999, $347,000 was returned to the respective accounts at Waterhouse and Schwab.

In January 2000, Marrs again invested $375,000 in T-bills for a Brazilian real estate project (this investment, together with the Y2K, viatical, and T-Bill investments, the "Investments"). As before, the funds came from Waterhouse and Schwab. Although Johnson withdrew the money from Waterhouse and sent it to Marrs, she did not realize he used his power of attorney over the Schwab account to take the $228,000 deposited there, until she received notice in the mail.

Johnson attempted to learn more about this last investment, but was dissatisfied with the responses she received from Marrs. On March 8, 2000, and again on March 19, 2000, she demanded that Marrs sell the viatical investment, return her principal on the Y2K investment, and terminate the Brazilian investment. Before the month was through, Johnson realized she was being defrauded.

Johnson sent a complaint letter to the Securities and Exchange Commission ("SEC") on June 6, 2000, concerning Marrs. On July 11, 2000, the SEC responded and indicated that Johnson had been defrauded.

Subsequently, on July 26, 2002, Johnson commenced this action.

DISCUSSION

At the outset, several counts included in the complaint filed by Plaintiff cannot proceed. This court lacks jurisdiction over Counts XXI (violations of the Securities Exchange Act of 1934) and XXIV (breach of fiduciary duty under the Investment Company Act of 1940). Plaintiff admits that she has no evidence to support Counts VIII (fraudulent misrepresentation) and XXVII (intentional infliction of emotional distress). Plaintiff withdraws Count XXVIII (breach of warranty) and XXIX (Racketeer Influenced

and Corrupt Organizations Act). There is no cause of action in Pennsylvania for Count X (grossly negligent misrepresentation). Therefore, Counts VIII, X, XXI, XXIV, XXVII, XXVIII, and XXIX are dismissed.

Pursuant to Pa. R.C.P. 1035.2, a party may move for summary judgment when (1) there is no genuine issue of material fact as to a necessary element of the cause of action or defense or (2) an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense. The court must review the entire record in the light most favorable to the nonmoving party and resolve all genuine issues of material fact against the moving party. Basile v. H & R Block, Inc., 563 Pa. 359, 365, 761 A.2d 1115, 1118 (2000).

All counts against Kristo are dismissed. Although Plaintiff states that "Defendants made no particular effort to identify issues which separate the companies from Ms. Chapman as an individual defendant," Plaintiff's Memorandum, at 76, this allegation is patently untrue. Defendants devoted a section of their Memorandum to Kristo and noted that Plaintiff was never a member of this organization. Defendants' Memorandum, at 6. Plaintiff concurs with this finding. Plaintiff's Memorandum, at 4 n.2 ("Plaintiff should make clear at this point that she did not invest in Kristo."). On the basis of this admission, all claims are dismissed against Kristo because Plaintiff has no connection to this Defendant.

In addition to the seven dismissed claims, Plaintiff brings claims for breach of contract (Count I), conspiracy (Count V), negligence (Count VI), gross negligence (Count VII), fraudulent misrepresentation (Count VIII), breach of the duty of good faith and fair dealing (Count XVI), violations under the Pennsylvania Securities Act (Count

XVII), conversion (Count XVIII), unjust enrichment (Count XIX), two counts under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa.C.S. §1-201 *et seq*. ("PUTPCPL") (Counts XX and XXV), violations of the Securities Act of 1933 (Count XXII), and violations of the Investment Advisors Act of 1940 (Count XXIII) against both Chapman and Intrek. She also brings claims against Chapman for negligent misrepresentation (Count IX), liability under Section 552(1) of the Restatement (Second) of Torts (Count XIII), breach of fiduciary duty (Count XIV), and breach of confidential relationship (Count XV).

Defendants argue that most of these claims are barred by the statute of limitations. Plaintiff asserts that the discovery rule has tolled the statute of limitations and kept her claims alive.

In general,

> "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; lack of knowledge, mistake or misunderstanding do not toll the running of the statute of limitations, even though a person may not discover his injury until it is too late to take advantage of the appropriate remedy, this is incident to a law arbitrarily making legal remedies contingent on mere lapse of time. Once the prescribed statutory period has expired, the party is barred from bringing suit unless it is established that an exception to the general rule applies which acts to toll the running of the statute."

Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc., 503 Pa. 80, 84-85, 468 A.2d 468, 471 (1983) (citations omitted).

One such exception that tolls the statute of limitations is the discovery rule. This judicial creation 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). Although the determination of whether the complainant became aware of her injury in a reasonable time is often the province of the jury, this determination is a question of law where the facts are so clear that reasonable 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 the plaintiff. Cochran v. GAF Corp., 542 Pa. 210, 220, 666 A.2d 245, 250 (1995). The plaintiff needs to show that she pursued the cause of her injury 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." Id.

Plaintiff did not meet this standard. She puts forward no competent evidence to explain why her claim was filed late. Instead, she baldly asserts that the claims against the Defendants "were filed within one year of Plaintiff's discovery of Chapman's involvement in an unlawful scheme." Plaintiff's Memorandum, at 34. Plaintiff, however, undercuts this assertion in her Memorandum. For example, she states that 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, at 31. Plaintiff also received a letter from Marrs indicating that he had requested Chapman to act as Plaintiff's accountant. Complaint, Exhibit B. In addition, during a meeting at Plaintiff's house regarding the Y2K investment, Marrs told Plaintiff she should contact Chapman if there were any problems. Johnson Deposition, at 22. Plaintiff does not explain how she could not

discover Chapman's involvement in the alleged scheme despite this evidence. The discovery rule protects against the inability to discover facts, not legal conclusions.

A review of the record reveals that Plaintiff did not know that Chapman may have been paid by Marrs or that these individuals had a romantic relationship. None of her claims, however, is affected by these revelations as they are not elements of any of the claims. Nor do these two facts establish an agency relationship between Chapman and Marrs. See Basile, at 367, 1119 (listing elements of agency relationship). Thus, there is no reason to apply the discovery rule to toll the statute of limitations until July 26, 2001 as Plaintiff insists.

Assuming, *arguendo*, that the discovery rule applies, the applicable statutes of limitations begin running more than a year earlier than Plaintiff asserts. For all claims related to the Investments, the statutes of limitations began running no later than the end of March 2000. It was this date that Plaintiff admitted that she feared she was being defrauded. Complaint, ¶45.[1] In other words, Plaintiff reasonably knew at this point that she had been injured by another party's conduct, which starts the statute of limitations. Crouse, at 404, 611. Plaintiff states that she did not pursue Chapman because of a misunderstanding of the law, while acknowledging she had sufficient facts to bring a claim against this Defendant. Johnson Affidavit, ¶3. For claims against Intrek, the statutes of limitations began running when Plaintiff purchased her interests in Intrek between October 16, 1998 and November 26, 1999. At bottom, since all of Plaintiff's

[1] As this is Defendants' motion for summary judgment, the court is weighing the evidence in Plaintiff's favor. The court notes that Plaintiff's mention of Marrs raised "red flags" at Waterhouse, Johnson Deposition, at 47, and her admission that she was concerned about Marrs before December 1999 and had no confidence in him even after her money was returned in December 1999, id., at 79, could trigger the statute of limitations.

claims involve the Investments or Intrek and this case was filed on July 26, 2002, all claims with statutes of limitation of two years or less are untimely.

The statute of limitations for violations of the Pennsylvania Securities Act, the Securities Act of 1933, and the Investment Advisors Act is one year from the date a reasonably diligent plaintiff would have discovered the violation. See 70 Pa.C.S. §1-504(a) (Pennsylvania Securities Act); 15 U.S.C. §77m (Securities Act of 1933); 28 U.S.C. §1658(b)(1) (Investment Advisors Act). There is no claim under the Investment Advisors Act against Intrek. For the remaining claims, as set forth above, the statutes of limitation expired more than a year before Plaintiff filed suit. Therefore, Counts XVII, XXII, and XXIII are dismissed.

The statute of limitations for negligence, gross negligence, liability under Section 552(1) of the Restatement (Second) of Torts, fraudulent misrepresentation, negligent misrepresentation, breach of fiduciary duty, breach of confidential relationship, and conversion is two years from the date of the injury. See 42 Pa.C.S. §§5524(3), 5524(7).

Plaintiff alleges that she discovered Chapman's breach of her fiduciary duty and her breach of their confidential relationship less than a year before filing suit. Plaintiff's Memorandum, at 63. This unsupported assertion cannot be true because these violations, if committed, occurred with respect to the Investments or Intrek. Counts XIV and XV are dismissed.

Similarly, Plaintiff alleges that she uncovered Chapman's culpability with respect to the claims for negligence, negligent misrepresentation, and liability under Section 552 of the Restatement (Second) of Torts less than a year before filing suit. Plaintiff states that the negligent misrepresentation claim is "based upon sales pitches made by Marrs

and Chapman to induce Plaintiff's investment of her retirement savings." Plaintiff's Memorandum, at 66. On the negligence claim, Plaintiff focuses on Chapman's role in the sales of the Investments. Plaintiff's Memorandum, at 64. Although Plaintiff supplies no particular facts for the tort claim, the elements of this claim point to the Investments or Intrek. See Restatement (Second) of Torts §552 ("supplies false information for the guidance of others in their business transactions"). Therefore, Plaintiff's own arguments show these claims to be untimely. Plaintiff presents no evidence that Intrek has any responsibility for the negligence claim. Thus, Counts VI, IX, and XIII are dismissed. Furthermore, as Plaintiff's gross negligence claim is derivative of her negligence claim, Count VII is dismissed.

Conversion is "the deprivation of another's right of property in, or use or possession of, a chattel, or other interference therewith, without the owner's consent and without lawful justification." McKeeman v. Corestates Bank, N.A., 751 A.2d 655, 659 n.3 (Pa. Super. 2000). Plaintiff's funds were converted in January 2000, making her claim untimely. Furthermore, Plaintiff cannot prove the elements of this claim. She alleges that Chapman aided Marrs in converting the funds from her "stock account for the final time, investing them in Brazilian securities." Plaintiff's Memorandum, at 69. Although Plaintiff argues that Marrs did not have permission to make this investment, she consented to the Waterhouse portion of the investment, Johnson Deposition, at 51, 75, and did not rescind Marrs' access to her Schwab account until March 30, 2000, Complaint, Exhibit M. Therefore, Plaintiff has not shown that Marrs did not have consent to make the investment at the time it was made. Count XVIII is dismissed.

To establish a claim for unjust enrichment, a plaintiff must demonstrate that there were benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value. Mitchell v. Moore, 729 A.2d 1200, 1203 (Pa. Super. 1999).[2] To support her unjust enrichment claim, Plaintiff alleges that Chapman "used the assets of Plaintiff and others to induce Marrs to pay her money for her role in establishing the investment funds." Plaintiff's Memorandum, at 71. This allegation does not establish a claim for unjust enrichment because there are no benefits flowing from Plaintiff to Chapman. Plaintiff puts forth no evidence to show that Intrek was unjustly enriched at her expense. Therefore, Count XIX is dismissed.

To bring a private action under the PUTPCPL, the plaintiff must purchase or lease goods or services primarily for personal, family, or household services. See 73 Pa.C.S. §201-9.2. Plaintiff bases her two PUTPCPL claims on securities brokerage and investment advisory services and on accounting and financial planning services she purchased from Chapman. Plaintiff puts forward no evidence that she purchased or leased any goods or services from Intrek. Therefore, Plaintiff cannot establish a violation of the PUTPCPL against Intrek and Counts XX and XXV are dismissed against this Defendant.

The two PUTPCPL claims require the existence of an agreement between Plaintiff and Chapman. Without an agreement, Plaintiff could not have purchased the services and would lack standing to bring these claims. There are few facts which bear

[2] If there is a contract between the parties, there is no claim for unjust enrichment. Birchwood Lakes Community Ass'n, Inc. v. Comis, 296 Pa. Super. 77, 87, 442 A.2d 304, 309 (1982).

on this issue. Essentially, Plaintiff testified that there was an agreement between herself and Chapman to provide accounting and investment services, Johnson Deposition, at 9, 10, and that she paid Chapman for tax services, id., at 32. Chapman testified that she did not consider tax preparation an accounting service, Chapman Deposition, 29-30, and did not provide investment services to Plaintiff, id., at 65, 66, 161. Plaintiff paid Chapman for certain services, but the extent and particulars of those services are in dispute. Although the evidence is slender, "the question of whether a contract was formed is for the jury to decide." Ingrassia Construction Co. v. Walsh, 337 Pa. Super. 58, 66, 486 A.2d 478, 482 (1984). Plaintiff does not demonstrate any contract between her and Intrek, so Count I is dismissed as to this Defendant.

A claim for breach of the duty of good faith and fair dealing must be based upon a contract. Gorski v. Smith, 812 A.2d 683, 710 (2002). Thus, Count XVI is dismissed against Intrek. Assuming the existence of an oral agreement between Plaintiff and Chapman, this claim is either based upon Chapman's role as a fiduciary towards Plaintiff, Complaint, ¶¶169, 170, Chapman's failure to invest properly Plaintiff's funds, Complaint, ¶171, or Chapman's conversion of the funds, Complaint, ¶172. Under the present circumstances, such allegations do not give rise to a separate claim. Plaintiff has elsewhere brought claims for breach of fiduciary duty and conversion. See Gorski, at 710 (specific allegations determine cause of action). Chapman's alleged failure to invest properly Plaintiff's funds is a straightforward breach of the agreement to provide investment services. Conomos, Inc. v. Sun Co., 831 A.2d 696, 706 (Pa. Super. 2003) ("Implied duties cannot trump the express provisions in the contract."). Therefore, Count XVI is dismissed.

Plaintiff's conspiracy claim against Chapman and Intrek is based upon fraud and conversion. Complaint, ¶¶94, 96. As all counts based upon these claims have been dismissed, there is no basis for a conspiracy count. Goldstein v. Phillip Morris, Inc., 854 A.2d 585, 590 (Pa. Super. 2004).

Accepting Plaintiff's assertion that the conspiracy claim covers a broader range of actions, Plaintiff's Memorandum, at 52 ("plead[ing] conspiracy as a separate count to provide Defendants fair notice that an averment of conspiracy would be a central part of this action"), her claim must be based upon the remaining claims against Defendants. No claims remain against Intrek, but claims for breach of contract and violations of the UTPCPL survive against Chapman. Since these claims rely upon undetermined contractual terms, it is premature to decide the conspiracy claim against Chapman. Therefore, to the extent it relies on any claims other than Counts I, XX, or XXV against Chapman, Count V is dismissed.

BY THE COURT,

C. DARNELL JONES, II, J.