IN THE COURT OF COMMON PLEAS
COUNTY OF PHILADELPHIA
CIVIL TRIAL DIVISION

Bancorp, Inc.,	:	
Plaintiff	:	**October Term, 2013**
	:	**No. 2278**
v.	:	
	:	**Commerce Program**
Michael Yaron, et al.,	:	
	:	**Control Number 17102158**
Defendants	:	

ORDER

And now, this 25th day of May, 2018, upon consideration of defendants Friedman, LLP and Bagell, Josephs, Levine & Co.'s motion for summary judgment, and Plaintiff Bancorp, Inc.'s opposition thereto, it is hereby **ORDERED** and **DECREED** that the motion for summary judgment is DENIED on all counts.

MEMORANDUM OPINION

Plaintiff, Bancorp, Inc. ("Bancorp") brought suit against defendants Michael Yaron, Harrise Yaron, and Jarred Yaron as individuals, and Yaron Properties, along with Friedman, LLP ("Friedman"), 218 Arch Street, L.P. 218 Arch Street, LLC, Oxford Construction Development Corp. ("OCDC"), Oxford Construction of Pennsylvania, Inc., Bagell, Josephs, Levine & Co.("Bagell") and Cambridge Environmental & Construction Corp, as corporate defendants.

In its Complaint, Bancorp alleges that defendants Bagell and Friedman and others violated the U.S. Racketeer Influenced and Corrupt Organizations statute ("RICO") by committing fraud and engaging in negligent misrepresentation.[1] Bancorp alleges Friedman's

[1] 18 U.S.C. §§1961-1968.

activities were outside the bounds of professional accounting conduct and were made by in agreement with Michael Yaron and OCDC. Bancorp contends, the agreement was a scheme to persuade Bancorp that OCDC was creditworthy when the accountants knew it was insolvent. Bancorp further claims this scheme was a conspiracy to violate RICO.

For the reasons explained here, Defendants' motion for summary judgment is denied.

I. FACTS

On June 3, 2004, Bancorp extended an interest only "Line-of-Credit" ("LOC") to OCDC for $3 million.[2] This LOC was later increased to $5.5 million in 2006.[3] One of the conditions of the LOC was that OCDC had to submit yearly tax returns to Bancorp so the bank could evaluate the status of its loan, a review based on OCDC's claimed accounts receivable for the year.[4] On August 6, 2009, the credit balance on the LOC was increased to $8 million, Oxford Construction of Pennsylvania became a co-borrower, and Michael Yaron, Cambridge Environmental, and 218 Arch Street, LP became guarantors. Bancorp also took a third mortgage lien position on a Michael Yaron's property located at 218-220 Arch Street, Philadelphia, PA, and was assigned a $1 million life insurance policy in Yaron's name.[5]

In 2010, a grand jury in New York indicted Michael Yaron for bid rigging relating to OCDC work at New York Presbyterian Hospital ("NYPH").[6] Throughout this period,

[2] Defendant Motion for Summary Judgment, at p. 10.

[3] *Id.*

[4] *Id.*

[5] *Id.* at 12-14.

[6] Response in Opposition to Defendants' Motion for Summary Judgment, at p. 12. At that time OCDC was also a contractor at Mt. Sinai Hospital in New York ("Mt. Sinai").

Defendant accountants prepared OCDC tax returns and submitted them to Bancorp analysts for their annual reviews of OCDC's financial position. The accuracy of the accounts receivable numbers included in these tax returns is disputed and must be determined as a question of fact at trial.

Originally, Bagell, Josephs, Levine & Co. prepared OCDC's tax returns. When Friedman merged with Bagell, accountants at the firm continued to prepare OCDC's tax returns under the Friedman name.[7] Bancorp alleges both Bagell and Friedman knowingly provided false information to Bancorp. Bagell and Friedman deny all wrongdoing and claim Bancorp failed to apply ordinary care and due diligence to its OCDC loans.[8]

On October 16, 2017, Friedman and Bagell filed a motion for summary judgment for all counts. On November 30, 2017, Bancorp filed a response and a memorandum in opposition, pointing to several disputes of issues of fact material to its RICO claims.

II. ANALYSIS

Defendants fail to establish their motion for summary judgment. Summary judgment is proper when there is no material issue of fact and the party who would have the burden to prove liability at trial fails to do so.[9] The evidence presented is viewed in the light most favorable to the non-moving party.[10] If an issue of fact remains disputed, even after evidence is looked at in a light most favorable to the non-moving party, then a motion for summary judgment must be denied.

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[7] *Id.* at 4.

[8] Defendant's Motion for Summary Judgment, at pp. 18-28.

[9] Pa.R.C.P. 1035.2; *Jones v. SEPTA*, 772 A.2d 435 (Pa. 2001).

[10] Pa.R.C.P. 1035.2.

a. Count I - RICO

In their motion for summary judgment, the accountants claim they took no action that may be reasonably viewed as a course of conduct in violation of RICO.[11]

To prove a RICO violation, a plaintiff must show that there was a culpable person who willfully or knowingly committed, or conspired to commit, the commission of racketeering activity, based on a pattern, involving a separate "enterprise" or "association-in-fact," and there was an effect on interstate or foreign commerce.[12]

A host of factual issues in this case arise from the second prong—defendants' mental state. The requisite mental state for a successful RICO claim is an act done "willfully or knowingly."[13]

In this case, Bancorp must show that Bagell and Friedman had the intent to defraud, as opposed to a good faith belief that information they provided was true.[14] Defendants' actual knowledge of Mt. Sinai's charge orders and OCDC's accounts receivable is a question of fact.

There are also many other factual issues relating to whether certain actions by the Defendants were "commissioning of a racketeering activity." There is also a reasonable factual dispute as to whether Defendants' cooperation with Yaron implies an agreement to engage in racketeering activity. 18 U.S.C. §1961(1) sets forth a long list of various offenses

[11] Defendant's Motion for Summary Judgment, at p. 30.

[12] Emily Burke Buckley et al., *A Guide to Civil RICO Litigation in Federal Courts*, JENNER & BLOCK LLP, 6 (2014), https://jenner.com/system/assets/assets/9961/original/Civil%20RICO%202014.pdf.

[13] *Id.*

[14] *Id.* at 9.

that would amount to a racketeering activity.[15] Two of the offenses listed in §1961(1) are mail fraud and wire fraud,[16] and both are crimes Bancorp has alleged.[17] These are known as the predicate acts.

To be successful in proving RICO, a plaintiff must show that each defendant engaged in predicate acts.[18] The required elements of fraud under either mail or wire fraud are: (1) a plan or scheme to defraud, (2) information sent with the intent to defraud, (3) reasonable expectation that an alleged wrongdoer would use the mail or wires to defraud, and (4) that the mail or wires were actually used to defraud the target.[19] To rise to the level of a predicate offense under mail or wire fraud statutes, the *scheme* must be fraudulent—not just the individual, actual transmissions.[20] In other words, even if a mail or wire transmission is deliberately false, there is no statutory wire or mail fraud unless the false transmission was also the result of a plan or scheme to trick or mislead someone. Assuming for argument, that there are one or more false transmissions, the existence of a scheme to defraud is factually disputed and must go to trial.

Similarly, a factual disagreement clearly exists as to whether Defendants had the required intent to carry out mail and wire fraud; specifically, whether Bagell and Friedman's

[15] 18 U.S.C. §1961(1) (2016).

[16] *Id.*

[17] Response in Opposition, at p. 2.

[18] Buckley, *supra* note 15, at p. 12.

[19] *Id.*

[20] *Kolar v. Preferred Real Estate Investments, Inc.*, 361 Fed.Appx. 354, 362 (3d Cir. 2010).

level of knowledge mesh with bad intent and amount to a RICO plan or scheme to disseminate false information.

Finally, there is factual dispute as to whether an "enterprise" exists under the RICO statute. A RICO enterprise is an organization made up of at least two distinct persons, entities, corporations, etc. that are working together towards a common goal, generally the commission of a predicate act.[21] To be an enterprise or association-in-fact, those involved must share a common purpose and their relationship must be long enough to allow time for the enterprise's purpose to be reached.[22] One way to test whether a RICO enterprise exists is to determine if the defendant accounting firms participated in the operation or management of the overall RICO enterprise.[23] As outside professional organizations, Bagell and Friedman may have participated in the operation or management of the overall RICO enterprise if either or both of the firms helped direct the enterprise's affairs and then went beyond the scope of its professional duty to do so.

The existence of a RICO enterprise is now factually unsettled. Did either Bagell or Freidman accountants participate in a scheme in such a way that the scheme became an enterprise they were actively helping to direct? This is a question for the jury to decide when considering whether the accountants' help was outside the bounds of a professional licensed accounting firm.[24]

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[21] 18 U.S.C. §1961(4) (2016).

[22] Buckley, *supra* note 15 at 48.

[23] *Id.* at 58-59.

[24] *Id.* at 62.

b. Conspiracy

Plaintiff's conspiracy claim cannot be dismissed because a question of fact exists as to whether an agreement among two or more of the parties. A valid conspiracy claim under §1962(d) requires an agreement.[25] After consideration of Defendants' motion for summary judgment in which Bagell and Friedman assert that the conspiracy count must be dismissed[26] and Bancorp's answer in opposition,[27] we conclude the conspiracy claim is sufficiently pled with many facts in dispute. An appropriate verdict interrogatory might inquire whether a combination of the named defendants agreed to commit at least two predicate acts. Clearly, as part of their decision, the jury will have to decide what Bagell or Friedman knew, or did not know, about Yaron's own alleged fraudulent conduct in misrepresenting the truth of OCDC's account receivables.

c. Statute of Limitations

Bagell and Friedman contend the statute of limitations bars Bancorp's tort claims. Defendants' argument is grounded on whether Bancorp applied due diligence to prevent being defrauded. This is a factually based inquiry that is disputed. Defendants' statute of limitations defense is preserved and will be reviewed after the question of Bancorp's own due diligence is decided by the fact-finding jury.

d. Fraudulent and Negligent Misrepresentation

Factual issues are also disputed whether Bagell and Friedman made intentional misrepresentations to Bancorp. Since this is a threshold element in tort for both fraud and

[25] *Kolar*, 361 Fed.Appx at 354.

[26] Defendant's Motion for Summary Judgment, at pp. 31-32.

[27] Response in Opposition, at p. 2.

negligent misrepresentation, summary judgment is denied as to Counts II and III. Similarly, factual issues are in dispute on whether Bancorp was justified in relying on the tax returns prepared by Defendants.

On the merits, the chief factual dispute in this case is whether the financial accounting information received by Bancorp from Bagell and Friedman was submitted in good faith or were their submissions concocted as part of a scheme to deceive. A related factual question on the merits is whether Bancorp knew or should have known that relying on tax returns prepared by Defendants was not justified.

And then, on time limitations, did Bancorp exercise sufficient due diligence to discover its alleged injury and extend statutory time limitations in tort?

In sum, should this case go to trial, there are plenty of questions for a jury to answer.

Date: May 25, 2018 **BY THE COURT**

` **RAMY I. DJERASSI, J.**