

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

JOSEPH A. ROBINSON,	:	NOVEMBER TERM, 2002
MOTORWORKS, INC., and AR22, INC.,	:	
	:	No. 00220
Plaintiffs,	:	
	:	Control No. 040106
v.	:	
	:	
BERWIND FINANCIAL, L.P., and	:	
BERWIND SECURITIES CORP.,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 31ST day of August, 2005, upon consideration of defendants' Motion for Summary Judgment, plaintiffs' response thereto, the memoranda in support and in opposition, and all other matters of record, and in accord with the contemporaneous Opinion being filed of record, it is hereby **ORDERED** that said Motion is **GRANTED** and plaintiffs' claims against defendants are **DISMISSED**.

BY THE COURT,

C. DARNELL JONES, II, J.

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

JOSEPH A. ROBINSON,	:	NOVEMBER TERM, 2002
MOTORWORKS, INC., and AR22, INC.,	:	
	:	No. 00220
Plaintiffs,	:	
	:	Control No. 040106
v.	:	
	:	
BERWIND FINANCIAL, L.P., and	:	
BERWIND SECURITIES CORP.,	:	
	:	
Defendants.	:	

OPINION

Presently before the court is the Motion for Summary Judgment of defendants, Berwind Financial, L.P. and Berwind Securities Corp. (collectively “Berwind”). Plaintiffs, Motorwork, Inc. and AR22, Inc. (collectively “Motorworks”), claim to be “the operator of the only national chain of automotive centers that produce, sell and install remanufactured engines.” Second Amended Complaint (“SAC”), ¶ 27. Motorworks retained Berwind, pursuant to a contract (the “Contract”), to serve as exclusive financial advisor to Motorworks “on a best efforts basis in two steps” to obtain the following financing for Motorworks:

- I. Senior Debt Financing
 - A. Revolving Credit Facility of \$2-3 million
 - B. Mortgage of approximately \$ 625,000 - \$1,237,500
 - C. Equipment Loan of \$1,750,000 plus
- II. Subordinated Debt or Equity Financing of \$5 million to fund additional franchises or other retail locations.

See SAC, Ex. A, p.1. The Contract further provides that it

shall remain in force for a period of six months from the date [of] this agreement, May 29, 1998 [i.e. November 29, 1998] (the “Term”). The Term will automatically renew for an additional nine (9) month period [i.e. August 29, 1999] (the “Renewal Period”), unless either [Motorworks] or Berwind serve the other party written notice 30 days prior to the end of the Term.¹

Id., Ex. A, p.7. Neither party served the requisite notice of termination, so the Contract continued in effect through the Renewal Period.

Berwind obtained Senior Debt Financing of \$5 million for Motorworks from Sovereign Bank as follows:

- A. Mortgage loan in the amount of \$1,875,000
- B. Revolving Credit Line secured by equipment in the amount of \$3,125,000

See SAC, ¶ 77; Response to Motion for Summary Judgment (“Response”), Ex. I.

However, at the December 31, 1998, closing of the Sovereign Bank loan, or shortly thereafter,² Motorworks received only \$3,065,000 from Sovereign. *See* SAC, ¶ 78.

Apparently, Sovereign refused to release the additional \$1,935,000 in credit line funds until Motorworks altered its accounting and reporting systems. *See id.* ¶ 127; Response, Ex. I, Summary of Terms and Conditions, p. 2.

In the present action, Motorworks claims that Berwind breached the Contract by failing to use its best efforts to obtain \$5 million in Senior Debt Financing. Motorworks does not set forth a claim in the Complaint for breach of contract based on Berwind’s failure to obtain the second level Subordinated Debt or Equity Financing. Instead, Motorworks asserts that Berwind breached the Contract as follows:

¹ Motorworks claims that since the Contract is dated June 5, 1998, not May 29, 1998, as contemplated in the termination provision, the Term does not end until December 5, 1998, and the Renewal Period does not end until September 5, 1999. *See* Response, p. 17. However, for the purpose of applying the statute of limitations in this case, this difference of 6 days is not determinative.

² Motorworks claims that Sovereign made the limited money from the closing available to Motorworks on January 5, 1999, not immediately at the closing. *See* Response, p. 2. Once again, this difference of 5 days is not determinative.

1) by disregarding the input and professional opinions of [Motorworks' accountant] and by inflating [Motorworks'] financial projections when communicating same to Sovereign Bank. SAC, ¶ 122.

2) [by pressuring Motorworks] to settle on the loan on December 31, 1998, full well knowing of the dangers the lack of a proper accounting system would cause [Motorworks]. *Id.* ¶ 125.

3) in advising [Motorworks] to engage in the financing transaction and proceed with the settlement on December 31, 1998 . . . [particularly since] there was a substantial short fall in the borrowing base with respect to the short term capital requirements of [Motorworks]. *Id.* ¶ 126-127.

4) [by failing] to use its best efforts to ensure [Motorworks] obtained a loan which gave them the required [Senior Debt] financing totaling at least Five Million (\$5,000,000) Dollars and under terms and conditions which they could meet. *Id.* ¶ 128.

5) by not finding another financing source which would give [Motorworks] the required [Senior Debt] financing on appropriate terms and/or advising [Motorworks] not to proceed with the transaction with Sovereign because of its shortcomings. *Id.* ¶ 132.

[In summary,] Berwind breached its duties to [Motorworks] by presenting false financial projections, failing to duly advise [Motorworks] regarding the financing and obtaining financing under terms and conditions with which [Motorworks] could [not] comply. *Id.* ¶ 139.

In other words, Motorworks complains solely about the loan that Berwind did obtain (the Senior Debt) and not the one that Berwind failed to obtain (the Subordinate Debt or Equity).³

The statute of limitations for a breach of contract action is four years. *See* 42 Pa. C. S. § 5525. The statute “begins to run from the time of the breach” unless that breach is somehow concealed from the plaintiff. Romeo & Sons v. P.C. Yezbak & Son, 539 Pa. 390, 393, 652 A.2d 830, 832 (1995). Since the allegedly inadequate Sovereign Bank loan closed on December 31,

³ Motorworks claims that “according to the Complaint, Berwind breached the Contract by . . . 5) failing to use its best efforts as exclusive financial advisor to [Motorworks] by not finding other financing sources, including sources of equity, which would give [Motorworks] the required financing on appropriate terms.” Response, ¶ 3. However, the Complaint does not make such an allegation, and instead focuses on the purported failings of the Sovereign Bank loan. *See* SAC ¶¶ 122-142. If the nature of Motorworks' claim against Berwind changed during the course of these proceedings, then Motorworks should have filed a Motion to Amend its Complaint to add a new claim. *See* Pa. R. Civ. P. 1033.

1998, Berwind's alleged breach of the Contract in connection with that loan occurred on or before that date. Furthermore, since Sovereign refused to release all the loan funds to Motorworks on January 5, 1999, Motorworks was put on notice of the alleged inadequacy of the loan, and thereby of Berwind's alleged breach of the Contract, at that point, at the latest.⁴ Motorworks filed its original Complaint on April 8, 2003 and served it on Berwind on April 10, 2003, more than three months after the four year statute of limitations had run on Motorworks' claims arising out of the Sovereign Bank loan.⁵ Therefore, such claims must be dismissed as time barred.

CONCLUSION

For all the foregoing reasons, defendants' Motion for Summary Judgment is granted and the plaintiffs' claims are dismissed.

BY THE COURT,

C. DARNELL JONES, II, J.

⁴ As Motorworks takes pains to point out, the revised loan proposal between Sovereign Bank and Motorworks "did not provide [Motorworks] with the funding [it] needed. Essentially, the revised proposal represented a line of credit of \$3,125,000 of which only \$1,190,000 was available to [Motorworks] post closing. The remaining \$1,935,000 of credit would not be available to [Motorworks] until [its] accounting and reporting systems met Sovereign Bank's standards." Response, p. 10. The revised loan proposal was dated November 30, 1998, so the statute of limitations on some of Motorworks claims may have begun to run on that earlier date.

⁵ The fact that Motorworks commenced this action by Writ of Summons on November 5, 2002 does not change the court's analysis, as original service of process was not made within thirty days thereafter, but was instead made after the Complaint was filed four months later. See Witherspoon v. City of Philadelphia, 564 Pa. 388, 397-398, 768 A.2d 1079, 1084 (2001).