

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

JAMES G. DIEFENDERFER	:	
Individually and d/b/a Delaware Valley	:	NO. 08-01322
Industrial Maintenance	:	
v.	:	CIVIL ACTION - LAW
	:	
RONALD J. BOOSE, R.T. MACHINES	:	
CO and RBJD HOLDINGS, LLC	:	

ORDER

AND NOW, this ___ day of March, 2009, upon consideration of the Plaintiff's Petition for Clarification and/or Reconsideration of Court Order and Defendant's Crossmotion for Reconsideration and Defendant's Motion for Preliminary Objections, the Court finds as follows.

The Court first addresses Defendant's Petition for Reconsideration regarding its Preliminary Objections, oral argument which was originally scheduled for October 6, 2008.

Defendant first argues for dismissal of Plaintiff's Complaint based upon an agreement for dispute resolution. The Court relies on its Opinion dated November 24, 2008 and further discussion below in OVERRULING Plaintiff's objection in part and SUSTAINING in part.

Defendant next argues that all of Plaintiff's claims should be dismissed for legal insufficiency or, in the alternative, for insufficient specificity. First, Defendant argues that Plaintiff's claim for a Breach of Contract should be dismissed. In Plaintiff's Complaint, he lists numerous actions allegedly taken by Defendants, alleges oral agreements and alleges damage by way of Defendant's failure to provide certain alleged profits to Plaintiff. The Court finds that Plaintiff's claim for Breach of Contract is legally sufficient and sufficiently pled.

Defendant next argues that Plaintiff's claim for a Breach of Fiduciary Duty should be dismissed. The elements a Plaintiff must prove in a claim of Breach of Fiduciary Duty are: "(1) that the defendant negligently or intentionally failed to act in good faith and solely for the benefit of plaintiff in all matters for which he or she was employed; (2) that the plaintiff suffered injury; and (3) that the agent's failure to act solely for the plaintiffs' benefit...was a real factor in bringing about plaintiff's injuries." McDermott v. Party City Corp., 11 F. Supp. 2d 612, 626 (E.D. Pa. 1998). In Plaintiff's Complaint he alleges that Defendants agreed to keep and maintain accurate books, records and accounts for the profits of the machine joint ventures and stood in fiduciary relationship due to these obligations. Plaintiff further alleged that Defendants failed to provide an accounting and that Defendants improperly spent, wasted, disbursed and utilized the proceeds of the machinery joint ventures. Therefore the Court finds that Plaintiff's pleading of Breach of Fiduciary Duty was legally sufficient and sufficiently pled.

Defendant next argues that Plaintiff's claim for Fraud should be dismissed. In Pennsylvania, in order to maintain a cause of action for fraud, the plaintiff must allege the following: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance. Bortz v. Noon, 729 A.2d 555, 560 (Pa. 1999). In Plaintiff's Complaint, he alleges that, (21) Defendant Boose advised Plaintiff that he would organize and use a Pennsylvania Limited Liability Company to acquire and hold legal title to the Property on behalf of himself and Plaintiff; (22) Based upon the parties' past business and fiduciary practices, Defendant lead Plaintiff to believe that: Defendant Boose and Plaintiff would

each own one half the Limited Liability Company; and Defendant Boose would cause the Limited Liability Company to procure commercial bank financing (along with the personal guarantees of Plaintiff, Defendant Boose and their spouses) to help finance part of the purchase price and provide funds for repairs and renovations at the Property; (26) Thereafter, Defendant Boose, by and through his legal counsel, prepared Defendant LLC's Operating Agreement; and (28) The executed Operating Agreement provided in part: That Plaintiff only owned and had voting rights to a forty-nine (49%) percent minority ownership and voting interest in Defendant LLC; That Defendant Ronald J. Boose owned and had a fifty-one (51%) percent majority ownership and voting interest in Defendant LLC; and That Defendant Boose was the sole manager of Defendant LLC.

The Court assumes that the above mentioned averments are what Plaintiff's Fraud claim relies upon although it is unclear to the Court what allegations specifically support Plaintiff's claim. An allegation of fraud must "explain the nature of the claim to the opposing party so as to permit the preparation of a defense" and be "sufficient to convince the court that the averments are not merely subterfuge." Martin v. Lancaster Battery Co. Inc., 606 A.2d 444 (Pa. 1992). Furthermore, a claim of fraud must be pled with specificity. Pa.R.C.P. 1019. The Court finds that the Plaintiff's claim for Fraud should be more specifically pled, with reference to the specific averments in Plaintiff's Complaint which form the basis for the Fraud claim.

Defendant argues that Plaintiff's claim for Civil Conspiracy should be dismissed. To prove a civil conspiracy, it must be shown that two or more persons combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means. *See* Landau v. Western Pennsylvania National Bank, 282 A.2d 335 (Pa.1971); Fife v. Great Atlantic and Pacific Tea Co., 356 Pa. 265, 52 A.2d 24 (1947); Bausbach v. Reiff, 91 A. 224 (Pa. 1914); Baker v. Rangos, 324

A.2d 498 (Pa. Super. 1974). Proof of malice, *i. e.*, an intent to injure, is essential in proof of a conspiracy. Miller v. Post Publishing Co., 266 Pa. 533, 110 A. 265 (1920); Miller v. Harvey, 215 Pa. 103, 64 A.2d 330 (1906); Irvine v. Elliott, 206 Pa. 152, 55 A.2d 859 (1903). Plaintiff alleges that the result of the actions of Defendants Boose, RT Machine Co. and RBJD Holding, LLC was a conspiracy against Plaintiff. While a corporation or company may be considered to be a person in some limited circumstances, there is no way for Plaintiff to prove that a fictional entity acted with malice or intent to injure Plaintiff. Therefore the Court finds that Plaintiff's claim for conspiracy is legally insufficient and is hereby dismissed.

Defendant argues that Plaintiff's claim for Minority Member Oppression should be dismissed as not being actionable in Pennsylvania. Pennsylvania law provides that:

“Upon application of any shareholder, the court may appoint one or more Persons to be custodians of and for any business corporation when it is made to appear that *...in the case of a closely held corporation*, the directors or those in control of the corporation have acted illegally, oppressively or fraudulently toward one or more holders or owners of 5% or more of the outstanding shares of any class of the corporation in their capacities as shareholders, directors, officers or employees.”

15 Pa.C.S.A. Sec. 1767. (Emphasis added). The Courts of this Commonwealth have consistently held that this statute recognizes minority shareholder oppression in situations involving a closely held corporation and that it is actionable under state law, with a Plaintiff's remedy lying in the equitable appointment of a custodian. Audler v. Tuaberg, 881 A.2d 1267 (Pa. Super. 2005); Ford v. Ford, 878 A.2d 894 (Pa. Super. 2005); Nassberg v. Schultz, No. 02-00508 (Lyc. County Ct. of Common Pleas 2006). A cause of action for minority *member* oppression in a *limited liability company* however would be a matter of first impression for this court. In Douglas K. Moll's article “Minority Oppression The Limited Liability Company: Learning (Or Not) From Close

Corporation History”, he opines whether, “In light of the tremendous growth and popularity of the LLC... should the oppression doctrine apply to disputes in the LLC setting as well?” 40 Wake Forest L. Rev. 883. While the Court would enjoy discussing the scholarly aspects of applying the rules of minority oppression to a limited liability company, it is clear that Plaintiff’s claim is not governed by the above mentioned statute. In light of the lack of authority granted this Court by the legislature or the Pennsylvania Supreme Court, we are unwilling to recognize a cause of action for minority member oppression. Therefore Plaintiff’s claim for minority member oppression is hereby dismissed.

Defendant next argues that Plaintiff’s claim for an accounting should be dismissed. A claim for an equitable accounting is proper where a fiduciary relationship exists between the parties, where fraud or misrepresentation is alleged, or where the accounts are mutual or complicated, and plaintiff does not possess an adequate remedy at law. Rock v. Pyle, 720 A.2d 137, 142 (Pa. Super. 1998). This Court, having already found there to be sufficient allegations of a fiduciary relationship between Plaintiff and Defendants and Plaintiff having alleged a claim for Fraud, the Court finds the claim for an accounting to be sufficient as well.

Therefore, the Court finds that Defendant’s Preliminary Objections are **OVERRULED** in part and **SUSTAINED** in part. Plaintiff is **ORDERED** and **DIRECTED** to plead with specificity as mentioned above to Count III, Fraud. The Court further finds that Count IV, Minority Member Oppression, against Defendant Ronald J. Boose, is hereby **DISMISSED**. The Court further finds that Count V, Conspiracy, against Defendant’s Ronald J. Boose, RT Machine Co. and RBJD Holdings, LLC is hereby **DISMISSED**. As for Defendant’s Preliminary Objection regarding the arbitration provision, the Court finds that Count III against Defendant’s Ronald J. Boose in his

individual capacity and Counts I, II, III and VI against RBJD Holdings, LLC are severed and referred to arbitration. The Court further finds that Counts I, II and VI against Ronald J. Boose in his individual capacity are to remain before the trial court. The Court further finds that Counts I, II, III and VI against Defendant RT Machine Co. are to remain before the trial court.

In the interest of clarity, the Court reiterates that Count III, against Defendant Ronald J. Boose in his individual capacity and Counts I, II, III and VI, against RBJD Holdings, LLC, are SEVERED and REFERRED to arbitration.

Counts I, II and VI, against Defendant's Ronald J. Boose in his individual capacity are to REMAIN before the trial court.

Counts I, II, III and VI against Defendant RT Machine Co. are to remain before the trial court.

The Court DENIES Defendant's Ronald J. Boose, RT Machine Co. and RBJD Holdings Inc.'s Motion for Reconsideration in all other respects not mentioned above.

By the Court,

Judge Richard A. Gray

Cc: John Bonner, Esq
Matthew Chabal, III, Esq
Edward Seeber, Esq
Kimberly Bonner, Esq
Gary Weber, Esq