

FINAL ANALYSIS COMMUNICATION SERVICES, INC.	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
BALLARD SPAHR ANDREWS & INGERSOLL, LLP et al.	*	BALTIMORE CITY
Defendants	*	Part 20
	*	Case No. 24-c-04-009146

ORDER

Upon consideration of defendants’ motion to dismiss defendants Charles Hirsch, David Cohen, and Robert Boote, and defendants’ motion to dismiss based on the statute of limitations, plaintiff’s opposition, and defendants’ reply, arguments of counsel having been heard on June 22, 2005, it is this 8th day of July, 2005, by the Circuit Court for Baltimore City, Part 20,

ORDERED for the reasons set forth in the accompanying memorandum opinion of this date that defendants’ motion to dismiss defendants Charles Hirsch, David Cohen, and Robert Boote is **GRANTED**, with prejudice. The defendants’ motion to dismiss based on the statute of limitations is **DENIED**.

ALBERT J. MATRICCIANI, JR.
Judge

cc: All Counsel (via email)

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MEMORANDUM OPINION

I. Background

In 1993, Final Analysis Communication Services (FACS) and Final Analysis Inc. (FAI) were formed by Nader Modanlo and Michael Ahan to develop the FAISAT system, a system of satellites for wireless communication. Modanlo and Ahan each owned half of FAI’s shares and FAI owned the majority of FACS’ stock. In 1995, Modanlo, as an officer of the two companies, retained Ballard Spahr Andrews & Ingersoll, LLP (Ballard Spahr) to represent FACS and FAI in corporate matters. FACS received the last known Ballard Spahr invoice in September, 1999. There was no formal termination of representation.

For its current purpose, the Court does not need to recite the long and arduous history of the deterioration of Modanlo and Ahan’s relationship. It is sufficient to say that Modanlo and Ahan engaged in significant litigation as adverse parties over FACS and at one point Ballard Spahr provided legal services to Ahan without Modanlo’s knowledge. On November 17, 2000, Ballard Spahr authored two opinion letters per Ahan’s request, stating that the bylaws adopted by FACS and FAI in 1999 were invalid, thereby assisting Ahan in his disputes with Modanlo.

After learning of the letters in May of 2001, Modanlo and FACS attempted to convince Ballard Spahr to modify the letters, but Ballard Spahr refused. In addition, the plaintiff alleges that Ballard Spahr refused to speak with Modanlo personally because Modanlo was an opposing party and Ballard Spahr refused to provide Modanolo with FACS files. Amd. Compl. ¶¶ 67, 88-89.

On December 13, 2004, FACS, which was and is controlled by Modanlo, filed a legal malpractice claim in Baltimore City Circuit Court against Ballard Spahr. On April 20, 2004 the plaintiff filed its first amended complaint. In short, FACS alleges that Ballard Spahr acted in conflict with its duties to its client, FACS, by providing Ahan with legal advice and opinion letters, which damaged FACS by assisting Ahan's litigation efforts to take over FACS. Currently, Ahan is no longer a board member of the companies and Modanlo remains in control of FACS.

Ballard Spahr filed a motion to dismiss defendants Charles Hirsch (Hirsch), David Cohen (Cohen), and Robert Boote (Boote) for failure to state a claim, a motion to dismiss Ballard Spahr Andrews & Ingersoll for failure to state a claim, and a motion to dismiss based on the statute of limitations. On May 2, 2005, as to the amended complaint, the defendants renewed their motion to dismiss based on the statute of limitations and the motion to dismiss defendants Boote, Hirsch and Cohen. The plaintiff filed their opposition on May 17, 2005. A hearing was held on June 22, 2005.

II. Standard of Review

In reviewing a motion to dismiss for failure to state a claim, the Court assumes the truth of all well pleaded allegations and draws all reasonable inferences in the plaintiff's favor.

Bennett Heating & Air Conditioning, Inc. v. Nations Bank, 103 Md. App. 749 (1995), *rev'd in part on other grounds*, 342 Md. 169 (1996). Any ambiguity or uncertainty in allegations, however, is construed against the pleader. *Alleco v. Weinberg Foundation*, 340 Md. 175, 193 (1995).

III. Boote, Hirsch and Cohen

Defendants ask the Court to dismiss defendants Hirsch, Cohen, and Boote from the lawsuit because the complaint fails to plead any particulars as to how these defendants were involved in Ahan's representation.¹ Maryland law requires pleadings to be supported by adequate facts for which relief is available. MD Rule 2-305. The Court finds that the amended complaint contains sufficient factual allegations involving James Hanks (Hanks) and William Agee (Agee) for providing legal assistance to Ahan, but is void of facts that indicate personal involvement by Hirsch, Cohen, and Boote.

Paragraph 91 of the amended complaint alleges that Hirsch, as Ballard Spahr's corporate designee, perpetrated a continuing pattern of deception against FACS by stating at a deposition that he did not know who Ballard Spahr represented. This sole allegation is not sufficient to sustain a cause of action against defendant Hirsch. Neither is the assertion that he permitted Ahan to review documents for privilege claims as a part of the discovery process, after Hanks and Agee left the law firm.

¹ The Court does not address the motion to dismiss Ballard Spahr Andrews & Ingersoll as only Ballard Spahr Andrew & Ingersoll LLP was included in the amended complaint, and defendants did not renew this motion after the amended complaint.

Similarly, the amended complaint does not allege that Cohen was personally involved in giving legal advice to Ahan. When Modanlo attempted to convince Ballard Spahr to modify the opinion letters, Cohen, the chairman of Ballard Spahr at the time of the opinion letters, simply stated the firm's position. *See* Amd. Compl. ¶ 82. Lastly, Boote had no personal connection to Ahan's representation. Boote first appeared in the original complaint under Count VII, violation of the Uniform Partnership Act. The first amended complaint, however, no longer contains any allegations involving the Uniform Partnership Act, much less any factual allegations regarding Boote. Now Boote's name appears only in the introductory paragraph of the first amended complaint. Hence, the Court finds that the plaintiff has failed to state a claim for which relief may be granted as to defendants Hirsch, Cohen, and Boote. The Court is not persuaded that leave to amend should be granted as to these defendants because it is clear that the dismissed defendants had only minimal involvement in the subject matter of the amended complaint.

IV. Statute of Limitations

Defendants have argued to the Court that the statute of limitations for FACS began to accrue on the date of Ballard Spahr's opinion letters to Ahan, November 17, 2000. To calculate the statute of limitation, the clock starts when notice to corporations occurs via its agents. *Mercy Med. Ctr. v. United Healthcare*, 149 Md. App. 336, 366 (2003). As long as the agent acts within the scope of his duties and can be reasonably expected to communicate the information to the corporation, then the agent's knowledge is immediately imputed to the corporation. *Id.* Here, plaintiff has pleaded that because of Ahan's adverse interests, Ahan's knowledge cannot be imputed to FACS and FACS did not have notice of Ballard Spahr's involvement with Ahan or

the opinion letters until May of 2001. Amend. Compl. ¶¶ 38-47, 66.

Next, defendants assert that the plaintiff's claim is untimely and cannot be saved by the adverse interest exception because Ahan's interest was not "completely adverse" to that of the principal. While the adverse interest exception only allows the corporation to avoid imputation of the agent's knowledge if the agent's interest is sufficiently adverse to that of the principal, the agent's interest is only one of the three factors discussed in the case highlighted by the defendants, *Martin Marietta Corp. v. Gould, Inc.*, 70 F.3d 768 (4th Cir. 1995).

In *Martin Marietta*, Martin Marietta Corporation acquired Ocean System to produce a product that assists submarines with sound detection. The defendant sought to impute Ocean System employees' knowledge regarding a defect to Ocean System's new owner, Martin Marietta. The court asked three questions. First, was the knowledge acquired beyond the scope of the agency relationship? *Id.* at 773, *see also Lohmuller Building Co. v. Gamble*, 160 Md. 534 (1931). Second, to which transaction does the defendant seek to impute knowledge? *Id.* Third, as to that particular transaction, are the interests of the agent and principal sufficiently adverse that it is rational and natural to infer that agent will conceal its knowledge? *Id.* The court held first, that Ocean System acquired the knowledge before Martin Marietta purchased Ocean Systems, which was beyond the agency relationship between Ocean Systems and Martin Marietta; second, that the defendant sought to impute the knowledge for the purposes of the acquisition agreement between the two companies; and third, that the parties were completely adverse during the creation of the acquisition agreement. *Martin Marietta* at 774.

In the case at bar, although Ahan was a 50 percent shareholder and board member of FACS, plaintiff has pleaded the *Martin Marietta* factors to the Court's satisfaction. The amended complaint alleges that Ahan did not act within the scope of his agency relationship with

FACS when he “conducted a clandestine and unauthorized meeting” and entered into a “secret and unethical” relationship with Ballard Spahr to advance his “scheme” of taking over FACS. Amd. Compl. ¶¶ 42-44, 52. Furthermore, Ahan’s lawsuit on the behalf of FACS against Modanlo in Montgomery County Circuit Court indicates confusion at best as to which party could properly be characterized as an agent of FACS. *Id.* at 47. In an effort to minimize the effects of Ahan’s attempt to oust Modanlo as president and maintain FACS’ ability to function as a corporation, the Montgomery County Court ordered the management and control of FACS to remain the same as it was on August 14, 2000. This meant Modanlo was left as President and required anyone acting on behalf of FACS (operating FACS, making withdrawals from FACS accounts, and conducting meetings) to obtain the unanimous consent of the board of directors. Plaintiff claims that these Montgomery County Circuit Court orders enjoined Ahan and two other board members from representing themselves as FACS agents. Amd. Compl. ¶ 55. Hence, the Court finds that the plaintiff has pleaded adequately that Ahan was not an agent of FACS.

Defendants seek to impute Ahan’s knowledge of the November 17, 2000 opinion letters to FACS. As described above, the amended complaint includes sufficient allegations for the Court to infer that “it is rational and natural to infer that agent [Ahan] will conceal its knowledge.” *Martin Marietta Corp. v. Gould, Inc.*, 70 F.3d 768, 773 (4th Cir. 1995). Therefore, the Court finds that the plaintiff has adequately pleaded the adverse interest exception and denies the defendants’ motion to dismiss based on statute of limitations.

The Court may, however, treat a motion to dismiss as a motion for summary judgment if it considers matters outside the pleadings. Md. Rule 2-501. Summary judgment will be granted if there is no genuine dispute as to any material fact and judgment can be entered as a matter of law. *Boyd v. Hickman*, 114 Md. App. 108 (1997). Even if the Court treats the defendants’

statute of limitations argument as a motion for summary judgment, defendants will not be successful. Defendants argued vigorously at the June 22 hearing that the 2000 litigation in Montgomery County Circuit Court did not bar Ahan from seeking legal advice on behalf of the corporation. Moreover, Ahan was working with two other FACS board members, who constituted a majority. Therefore, defendants argued that Ahan was without question an agent of FACS. The Court believes, however, given the infighting and litigation involving control of FACS, that the question of who acted for the corporation was very much in dispute. Certainly, the Court cannot find as a matter of law that Ahan was an agent of FACS at this juncture. Lastly, whether Ahan could be “reasonably expected” to communicate his knowledge to Modanlo, FACS’ president, is a factual determination requiring further development. Consequently, the Court finds that there are disputes as to material facts and would deny the defendants’ motion as well, if treated as one for summary judgment.

The Court will not discuss the adverse domination theory as it only applies to lawsuits against corporate officers and directors. *Martin Marietta* at 772. As for the continuation of events theory, it was apparently abandoned during the hearing on these motions.

V. Conclusion

The motion to dismiss defendants Charles Hirsch, David Cohen, and Robert Boote is granted, with prejudice. The motion to dismiss based on the statute of limitations is denied.

ALBERT J. MATRICCIANI, JR.
Judge

cc: All Counsel (via email)