UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

JUDGE PETER J. WALSH

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October 2, 2012

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Re: George L. Miller, Chapter 7 Trustee v. Kirkland & Ellis LLP
Adv. Proc. No. 12-50713 (PJW)

Dear Counsel:

This ruling is with respect to Kirkland & Ellis LLP's ("K&E") motion to dismiss the Trustee's Complaint (Doc. # 10). For the reasons briefly discussed below, I will deny the motion. I believe that the decision here is squarely within the Delaware Supreme Court's ruling in Laventhol, Krekstein, Horwath & Horwath v. Tuckman, 372 A.2d 168 (Del.Supr. 1976).

In order to juxtapose this matter with the Laventhol opinion, I note the following significant portions of the Trustee's Complaint:

> 28. On February 2, 2006, K&E, through Douglas C. Gessner, Esquire, issued a retention letter to Indalex Holdings Finance, Inc. relating to legal services to be provided by K&E to Indalex ("Retention Letter").
>
> 30. On information and belief, at the time Mr. Gessner issued the Retention Letter, two groups of K&E partners had already invested in one or more of the investment funds which owned Sun Indalex LLC.
>
> 31. On information and belief, the K&E partners invested through entities called Randolph Street Partners and K&E Investment Partners, LLC - 2003 PEF. The investments of Randolph Street Partners and K&E Investment Partners, LLP - 2003 PEF were not discovered until after discovery commenced in *Miller v. Sun Capital Partners, Inc., et al.*, Adversary No. 10-52279.
>
> 32. On April 17, 2012, Marc Leder, co-founder of Sun Capital Partners, Inc. revealed, for the first time, that Mr. Gessner is an investor in Randolph Street Partners.
>
> 33. The Retention Letter did not disclose that K&E partners, including Mr. Gessner, owned interests in various Sun investment funds including the funds which owned Indalex through Sun Indalex, LLC.

34. On information and belief, the fact that K&E partners had a financial interest in Indalex was deliberately concealed from Indalex.

37. Despite its duty to notify Indalex that the dividend transaction of June 1, 2007 represented a conflict of interest between Indalex, Sun and K&E, on information and belief, K&E never notified Indalex that a conflict of interest existed with respect to the June 1, 2007 dividend.

The Complaint accuses K&E of wrongdoing as follows:

39. Notwithstanding its duties to Indalex, K&E, including Mr. Gessner, provided legal advice with respect to the June 1, 2007 dividend which was adverse to Indalex but beneficial to K&E, Sun and various insiders.

40. In particular, while purporting to give Indalex legal advice with respect to the dividend transaction, and Indalex's legal obligations related thereto, and while charging Indalex for its counsel, K&E, among other things,

- prepared for execution a patently false Board of Directors resolution for Indalex UK Limited so that the proceeds from the sale of an interest in Asia Aluminum Group ("AAG") could be utilized for a dividend paid to, *inter alia*, its client Sun;

- failed to advise Indalex as to the illegality of the June 1, 2007 dividend under all applicable laws, including the laws of the United Kingdom;

- prepared for execution Board of Directors' Unanimous Consents for Indalex Holdings Finance, Inc. and Indalex Holding Corp. which it knew or should have known were patently false so that the dividend could be paid to, *inter alia*, its client Sun and so that each Board member could benefit financially;

- prepared for execution Board of Directors' Unanimous Consents for Indalex Holdings Finance, Inc. and Indalex Holding Corp. which it knew or

should have known were patently false so as to permit K&E partners to benefit financially;

- prepared for execution Board of Directors' Unanimous Consents for Indalex Holdings Finance, Inc. and Indalex Holding Corp. which it knew or should have known were patently false in an effort to protect the controlling insiders, including Sun, from liability under Delaware corporate law;

- failed to ensure that FTI Capital Advisors ("FTI") had any professional competence, experience, reputation or prominence in the area of business solvency;

- insisted on the inclusion of language in a letter issued by FTI in an effort to protect the controlling insiders, including Sun, from liability under Delaware's fraudulent transfer statute;

- insisted on the inclusion of language in a letter issued by FTI which protected Sun, but not Indalex, in any potential cause of action involving FTI;

- failed to advise Indalex that a K&E partner was on the Board of Directors of FTI and that the K&E partner had a financial interest in FTI; and

- advised Indalex that one or more entities paying the dividend did not have to be covered by the letter issued by FTI.

41. K&E's action [sic] were taken in complicity with the controlling insiders, including Sun.

42. On information and belief, and unbeknownst to Indalex, K&E partners received proceeds from the dividend upon which K&E rendered legal advice.

44. The close relationship between K&E and Sun, and the financial interest of K&E partners in Indalex, rendered K&E an insider of Indalex.

Pertinent parts of the Laventhol decision are as follows:

Plaintiffs are stockholders of Old A. Corp. On January 15, 1973 they filed a derivative and class action in the Court of Chancery against Frank and other present

and former directors of Old A. Corp., New A. Corp. and I.T.C. In brief, the complaint states a wide-ranging violation of fiduciary duties, centered around overvaluation of I.T.C.'s assets, owed to Old A. Corp. and its shareholders by Frank and the other individual defendants.

The complaint joins as parties defendant the firm of Laventhol, Krekstein, Horwath & Horwath, the certified public accountant for I.T.C., and Horwarth & Horwath, the certified public accountant for Old A. Corp. and charges that they conspired with the directors of the respective corporations to defraud the shareholders of Old A. Corp.; specifically, it is charged that they "knew that the Financial Statements included in the Proxy Statement failed adequately to disclose" facts stated elsewhere in the complaint and that they "knew, or should have known, that the Proxy Statement was materially deficient, . . . false and misleading . . .."

Id. at 169.

* * *

Generally speaking, an action in the Court of Chancery for damages or other relief which is legal in nature is subject to the statute of limitations rather than the equitable doctrine of laches. Bokat v. Getty Oil Company supra. There is, however, an established exception to this principle which denies its protection to those who owe a fiduciary duty to a corporation. In brief, the benefit of the statute of limitations will be denied to a corporate fiduciary who has engaged in fraudulent self-dealing. Bovay v. H.M. Byllesby & Co. supra; Halpern v. Barran, Del.Ch., 313 A.2d 139 (1973),

Id. at 169-170.

* * *

Here, the Trial Court enlarged the Bovay exception in ruling on the motion to dismiss; the Chancellor refused to apply the three-year statute of limitations for the benefit of certified public accountants who allegedly conspired with corporate fiduciaries to defraud the shareholders of Old A. Corp. The Court said:

> The question then becomes one of policy. Should those who conspire to defraud with self-dealing fiduciaries be bound by the same standard for statute of limitations purposes as the fiduciaries themselves? Compare Jackson v. Smith, 254 U.S. 586, 41 S.Ct. 200, 65 L.Ed. 418 (1921). The answer to the question is difficult in the relative vacuum of the bare pleadings. But, if outside experts, on whom many must depend for the integrity of corporate affairs, knowingly conspire with self-dealing fiduciaries to defraud those very persons who in practicality must rely on their advice, it is difficult, to see why the same principles of Bovay should not apply to statute of limitations purposes.
>
> Accordingly, as to the Fifth Cause of Action, I think the Bovay exception is applicable and the motion to dismiss on the bare plea of a Statute of Limitations should be denied."

Id. at 170.

* * *

The complaint alleges fraudulent self-dealing on the part of the directors of Old A. Corp. and of I.T.C. As to these defendants, of course, the minimum requirements of Bovay have been satisfied.

The complaint charges that the defendant-accountants conspired with the directors of those two corporations to defraud the stockholders of Old A. Corp. It is a fundamental principle of our jurisprudence that co-conspirators are jointly and severally liable for the acts of their confederates committed in furtherance of the conspiracy, Board of Education, Asbury Park v. Hoek, 38 N.J. 213, 183 A.2d 633 (1962); 15A C.J.S. Conspiracy (Several Liability) § 18, and cases cited therein. Further, persons who knowingly join a fiduciary in an enterprise which constitutes a breach of his fiduciary duty of trust are jointly and severally liable for any injury which results. Jackson v. Smith, 254 U.S. 586, 41 S.Ct. 200, 65 L.Ed. 418 (1921).

For present purposes, it appears that both classes of defendants, fiduciaries and accountants, stand in the same position under the principles of law governing the merits of the complaint and there is, therefore, no

> reason why the principles of law governing applicability of the statute of limitations should not apply in like manner. In short, enlargements of the Bovay exception was both logical and proper. We so hold.

Id. at 170-171.

According to the Complaint, the Trustee on April 17, 2012 first learned from a Sun Capital Partners insider that K&E had a conflicting interest in the dividend transaction. The Trustee's Complaint was filed 27 days later. I find that response time to be quite reasonable.

For the foregoing reasons, I deny the motion to dismiss.

So Ordered.

Very truly yours,

Peter J. Walsh

PJW:ipm