UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GEORGE W. LYONS, JR., ET AL.,	:	
	:	
Plaintiffs,	:	
	:	
V.	:	CASE NO. 3:01CV1106 (RNC)
	:	
THE BILCO COMPANY,	:	
	:	
Defendant.	:	

RULING AND ORDER

Plaintiffs, former shareholders of defendant, The Bilco Company, bring this action against Bilco alleging federal and state securities fraud, common law fraud, breach of contract, and violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. § 42-110a, et seq.. Defendant has moved for summary judgment on all counts of the complaint [Doc. #27] contending that the plaintiffs' securities fraud claims are barred by the statute of limitations, that they cannot prove the essential element of reliance on any of the alleged misrepresentations, and that there was no breach of contract or other illegality as a matter of law. Plaintiffs have filed a cross motion for summary judgment on the breach of contract and CUTPA counts [Doc. #36] contending that excerpts of deposition testimony by defendant's executives conclusively establish defendant's liability.

Under Rule 56(c), summary judgment is appropriate when,

viewing the evidence fully and most favorably to the non-moving party, it is clear that no reasonable jury could return a verdict for the non-moving party and a trial would therefore be a needless waste of public and private resources. Summary judgment is a "drastic procedural weapon because 'its prophylactic function, when exercised, cuts off a party's right to present his case to the jury.'" Garza v. Marine Trans. Lines, Inc., 861 F.2d 23, 26 (2d Cir. 1988) (citation omitted). Because summary judgment has this effect, trial courts must act with caution in granting it and may deny it in the exercise of their discretion when "there is reason to believe that the better course would be to proceed to a full trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (citing Kennedy v. Silas Mason Co., 334 U.S. 249 (1948).[1]

---

[1] In Kennedy, the Court recognized that summary judgment may not be the most appropriate way to resolve complex matters, even if the motion for summary judgment technically satisfies the requirements of Rule 56. The Court stated:

> While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide.

334 U.S. at 256-57. Judicial discretion to deny summary judgment in favor of a full trial has been approved by most courts of appeals. See Jack H. Friedenthal and Joshua E. Gardner, Judicial Discretion to Deny Summary Judgment in the

(continued...)

The defendant's arguments in support of its motion involve intensely factual matters such as what the plaintiffs knew and when they knew it, what they should have known in the exercise of reasonable diligence, and the intent behind a written agreement the pertinent terms of which are less than completely clear. The arguments advanced in support of the cross-motion also involve intensely factual issues of contractual intent, motive, and state of mind. Resolving these issues requires credibility determinations, weighing of evidence, and drawing of legitimate inferences, functions that should be performed not by a judge acting on the basis of a limited paper record but by a jury after a complete, live trial, where the witnesses' credibility and the weight to be given their testimony can be fully explored and reliably determined. Accordingly, both motions are denied.

I. Background

This lawsuit arises out of a reorganization of Bilco in 1999, which was undertaken in an effort to resolve a dispute between two factions of the family of Bilco's founder. The

---

[1](...continued)
Era of Managerial Judging, 31 Hofstra L. Rev. 91, 104 (2002). See also Arthur R. Miller, The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day In Court and Jury Trial Commitments?, 78 N.Y.U.L.Rev. 982 (2003).

reorganization was supposed to enable one faction to buy the other's Bilco stock on terms that produced an equitable division of family assets. In essence, the plaintiffs complain that their Bilco stock was so undervalued as to produce a division of assets that is exceedingly unfair to them.

The reorganization of Bilco was carried out through an agreement dated June 21, 1999 ("the 1999 Agreement") and an additional agreement known as the Fifth Amendment to the Patent Pool Agreement dated May 24, 1999 ("PPA"). In the 1999 Agreement, plaintiffs agreed to accept cash and ownership of Bilco's real estate subsidiary, Fairfax Properties, in return for their Bilco stock. Under the PPA, Bilco is obligated to make payments to owners of a patent pool, including plaintiff George Lyons, Jr.

Plaintiffs claim that they were defrauded in the sale of their Bilco stock in violation of 15 U.S.C. § 78j, Conn. Gen. Stat. §36b-29(a)(2), and Connecticut common law. They allege that Bilco induced them to rely on a Duff & Phelps report that overstated Bilco's future payments to the patent pool ("the D&P report"); failed to disclose that it had a plan to modify its products in minor ways in order to reduce its liability to the patent pool; and concealed certain patent applications

that it had on hand reflecting such redesigns.

In addition, plaintiff George Lyons, Jr. brings claims for breach of contract and violation of CUTPA. He alleges that since 1999 Bilco has designed and sold products differing only slightly from those in the patent pool for the sole purpose of reducing payments to the patent pool owners. He alleges that by designing around the patents in the pool, defendant has violated an implied covenant of good faith and fair dealing contained in the PPA.

II. Discussion

Defendant's Motion for Summary Judgment

A. Fraud Claims

Defendant contends that it is entitled to summary judgment on plaintiffs' fraud claims because they are time-barred and plaintiffs cannot prove the essential element of reliance.

1. Statute of Limitations

The statute of limitations for federal securities fraud provides that "[n]o action shall be maintained ... unless brought within one year after the discovery of the facts constituting the violation." 15 U.S.C. § 78i(e). The one-year period begins to run when the plaintiff "obtains actual knowledge of the facts giving rise to the action or notice of

the facts, which in the exercise of reasonable diligence, would have led to actual knowledge." LC Capital Partners v. Frontier Ins. Group, 318 F.3d 148, 154 (2d Cir. 2003). The statute of limitations for securities fraud under Connecticut law is the same. Conn. Gen. Stat. § 36b-29(f)(2).

Defendant contends that the one-year limitations period began to run before the 1999 Agreement was signed, and that the securities claims are therefore time-barred. It relies primarily on communications among plaintiffs, their family members and agents concerning Bilco's obligation to make payments to the patent pool. See Exhibits H, L, T, U, X, Z, and CC.[2] These documents show that before the 1999 Agreement was reached, some of the plaintiffs realized that Bilco might be redesigning (or might later redesign) products in order to reduce payments to the pool and that their Bilco stock was therefore undervalued.[3] The documents also show that before

---

[2] Plaintiffs' argument that these documents are privileged and therefore should not be considered is unpersuasive because no privilege applies, see Exs. H, L, CC (communications among clients regarding business negotiation rather than litigation) and Ex. T (communications from accountant regarding financial advice), or any privilege has been waived, see Exs. H, L, CC (documents produced without objection, and Exs. X, Z (documents given to third party not covered by the common interest rule).

[3] For example, in March 1999 plaintiff George Lyons, Jr. sent a fax to plaintiff Mark Lyons (Ex. CC) stating that "I

(continued...)

June 1999, Bilco disclosed that it had some patent applications in process.

Plaintiffs deny that the one-year statute of limitations bars their securities fraud claims as a matter of law. I agree. Plaintiffs' claims are based on defendant's failure to disclose the existence of both a plan to reduce payments to the patent pool by making minor design changes in the company's products and certain patent applications evidencing such redesigns. The present record, viewed fully and most favorably to the plaintiffs, does not compel a finding that they had actual knowledge of the alleged plan and patent applications or would have known about them if they had exercised reasonable diligence. These disputed issues of fact concerning what the plaintiffs knew or reasonably should have known before they signed the 1999 Agreement must therefore be decided by a jury. See Garter-Bare Company v. Munsingwear, Inc., 650 F.2d 975, 981 (9th Cir. 1980) (disputed fact question as to when plaintiffs were put on notice could not be disposed

---

[3](...continued)
have the evidence that they [Bilco] are designing products for the purpose of reducing patent pool payments," and in the same month Mark Lyons wrote a memo to his attorney (Ex. X) stating that "[There is a] distinct possibility that Bilco management will eliminate or reduce the amount of the payments in the future by eliminating the patentable feature in certain of its products ... If these valuations are wrong, then the value of the Bilco stock is wrong."

of by summary judgment).

2. Reliance

To prevail on their federal securities and common law fraud claims, plaintiffs must prove that they relied to their detriment on material misrepresentations or omissions concerning the value of their Bilco stock. See AUSA Life Ins. Co. v. Ernst & Young, 206 F.3d 202, 207 (2d Cir. 2000) (federal securities fraud); Benvenuti Oil Co. v. Foss Consultants, 2003 Conn. Super. LEXIS 2177, at *9, *52-55 (Conn. Super. Ct. Aug. 1, 2003) (common law fraud).[4] Defendant contends that plaintiffs cannot prove reliance on any statements by Bilco or its agents in the D&P report or elsewhere because of anti-reliance clauses in the 1999 Agreement and an associated shareholder waiver form, in which plaintiffs disclaimed reliance on statements by Bilco or its agents. Courts have enforced similar anti-reliance clauses. See, e.g., Harsco Corp. v. Segui, 91 F. 3d 337, 341-45 (2d Cir. 1996). In addition, defendant contends that plaintiffs' own statements require a finding that they were aware of the possibility of future reductions in patent pool payments and thus could not have relied on the D&P report.

[4] Reliance is not an element of an action under Conn. Gen. Stat. § 36b-29(a)(2). See Conn. Nat'l Bank v. Giacomi, 242 Conn. 17, 50 n.37 (1997).

Defendant's argument concerning plaintiffs' inability to prove reliance has some force. The anti-reliance clauses prohibit plaintiffs from basing their federal securities and common law fraud claims on the D&P report, and the record shows that at least some of the plaintiffs, notably George Lyons, Jr. and Mark Lyons, could not have relied on the D&P report. However, plaintiffs' claims are not based solely on alleged misrepresentations. The claims are based in part on Bilco's failures to disclose the existence of a plan to reduce patent pool payments by designing around the patents and the existence of patent applications reflective of the plan. Viewing the record most favorably to the plaintiffs, it does not conclusively establish that there was no such plan or patent applications, that they were not material, or that they were not concealed. Plaintiffs' fraud claims are therefore sufficient to withstand the motion for summary judgment.

B. Breach of Contract

Defendant contends that plaintiff George Lyons, Jr. cannot prevail on his breach of contract claim because language in the PPA explicitly permits Bilco to carry out the product redesigns that are the basis of his claim. Defendant points to paragraph 2(c) of the Fourth Amendment to the PPA, which grants Bilco the right "to implement research and

product development capabilities independent of those previously provided by [the patent pool owners]," and states that Bilco need not pay royalties on products that do not embody the patents in the pool. Defendant also relies heavily on the exhibits mentioned above, especially Exhibit Z.

Defendant has not sustained its burden of establishing that it is entitled to summary judgment on the breach of contract claim. Paragraph 2(c) does not foreclose the claim because it does not unambiguously provide that Bilco may make minor changes in its products solely to avoid patent pool payments. Nor is the claim foreclosed by Exhibit Z or plaintiffs' other written communications. Viewing the record most favorably to George Lyons, Jr., a jury would not have to find that he understood the PPA to permit Bilco to reduce its liability to the patent pool in this manner. Whether or not he had that understanding is best left to a jury to decide after he is examined and cross-examined at trial.

C. CUTPA

Defendant's motion for summary judgment on the CUTPA claim is premised on the same arguments it offers in connection with the fraud and contract claims. Since defendant has not shown that it is entitled to summary judgment on the other claims, it has not shown that it is

entitled to summary judgment on the CUTPA claim.

Plaintiffs' Motion for Summary Judgment

Plaintiffs move for summary judgment on the contract and CUTPA claims on the ground that Bilco executives have admitted redesigning certain products for the sole purpose of reducing payments to the patent pool.[5] Plaintiffs contend that these admissions prove a violation of an implied covenant of good faith and fair dealing in the PPA.

Plaintiffs are not entitled to summary judgment. The deposition testimony on which they rely, viewed most favorably to Bilco, does not preclude a finding that the product redesigns did not violate the PPA.

IV. Conclusion

Accordingly, defendant's motion for summary judgment [Doc. #27] and plaintiffs' cross motion for summary judgment [Doc. #36] are hereby denied.

So ordered.

Dated at Hartford, Connecticut this 30th day of September 2003.

---

[5] Plaintiffs rely on the deposition testimony of two Bilco executives: Robert Lyons, Sr., Bilco's president, who testified that the redesign of some products was motivated by a desire to reduce patent pool payments, rather than concern about customers; Tr. Robert Lyons Dep. at 25-26, 64-65; and Roger Joyce, a vice-president of Bilco, who testified that saving royalty payments was the reason for redesigning some components. Tr. Joyce Dep. at 12, 31-33, 54, 128-29, 141.

_____
Robert N. Chatigny
United States District Judge