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Order on Motions to Dismiss (RLP HOLDINGS, LP)

Alice D. Bonner
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

RLP HOLDINGS, LP,

v.

Plaintiff,

BAYERISCHE HYPO-UND VEREINSBANK, AG, HVB U.S. FINANCE, INC., DOMENICK DEGIORGIO, CHENERY ASSOCIATES, a general partnership, CHENERY ASSOCIATES, INC., CHENERY MANAGEMENT, INC., CHENERY INVESTMENTS, INC., CHENERY SERVICES, INC., CHENERY CAPITAL, INC., ROY E. HAHN, SIDLEY, AUSTIN, BROWN & WOOD, LLP, RAYMOND J. RUBLE, MICHAEL G. WOLFSON, BUSHEY FINANCIAL TRADING, LLC, MIO SYLVESTER, ELIZABETH A.D. SYLVESTER, and MICHAEL SHERRY,

Defendants.

Civil Action File No. 2006CV127554

FILED IN OFFICE
DEC 12 2008
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

ORDER ON MOTIONS TO DISMISS

The above-styled case is before this Court on Defendants' Motions to Dismiss for Lack of Personal Jurisdiction and for Failure to State a Claim upon which Relief can be Granted. On October 10, 2008, the Parties presented oral arguments on these motions, and the Court requested supplemental briefing to be submitted by November 12, 2008. After reviewing the briefs, the arguments made by counsel, and the record of the case, the Court finds as follows:

Plaintiff, RLP Holdings, LP ("RLP"), is a Georgia limited partnership with its principal place of business in the state of Missouri. In January 2000, RLP, known at that time as Direct Sales International, LP, sold substantially all of its assets for $26 million. In October 2000, RLP investigated various investment opportunities for its capital as well as tax planning options for that year. Subsequently, RLP, through its accountant, was introduced to Defendant Roy E. Hahn ("Hahn"), the principal agent and owner of Defendant Chenery Associates, Inc. ("Chenery"). Hahn solicited RLP's participation in an investment program known as Custom Adjustable Rate Debt Structure ("CARDS"). The CARDS transaction involved a loan from Defendant Bayeriche Hypo-Und Vereinsbank, AG and HVB U.S. Finance, Inc. (collectively, "HVB"). As part of the solicitation by Defendants Hahn and Chenery, Hahn forwarded to RLP's accountant in Atlanta a sample legal opinion from Brown & Wood LLP ("Brown & Wood"), the predecessor of Defendant Sidley, Austin, Brown & Wood LLP, analyzing the tax benefits of the CARDS transaction. RLP discussed the transaction with Defendant Hahn who represented that RLP through its participation in CARDS would receive inexpensive long-term investment capital as well as attendant tax benefits for the tax year 2000.

In November, 2000, RLP agreed to pay Chenery $1.8 million to facilitate the CARDS transaction on RLP's behalf. Thereafter, Plaintiff engaged in discussions with Defendants Hahn, Chenery, HVB, and Michael G. Wolfson ("Wolfson"), an attorney of Defendant Brown & Wood, regarding the logistics and documentation of the transaction. RLP finally entered into the CARDS transaction in December 2000 through which it received in hand about $4.8 million and sustained a tax loss sufficient to offset its gains (i.e. the $26 million asset sale) for the year. Specifically, the CARDS transaction

operated as follows: HVB entered into a loan with a U.S. corporation with foreign owners for which RLP served as the guarantor. In consideration for RLP's guarantee, RLP would receive a portion of the loan proceeds which it would sell back to HVB. According to the U.S. Internal Revenue Code, selling the proceeds would generate a loss in the amount of the entire loan minus the portion RLP received as proceeds (i.e., the $4.8 million). The terms of the CARDS transaction provided for a thirty year renewable term loan, meaning that each year HVB had a right to reset the interest rate on the anniversary of the loan. Additionally, both RLP and HVB had a right to terminate the loan around the anniversary date of the loan.

On January 2, 2002, a little over one year after RLP entered into the CARDS transaction, HVB called its loan to RLP. RLP expressed its dissatisfaction to Defendant HVB and its desire to continue the CARDS transaction; however, in March, 2002, RLP obtained additional financing to repay the outstanding amount of the loan. In June, 2005, finding that RLP had no legitimate business purpose for the CARDS transaction and that RLP intended to unwind the transaction after one year, the IRS concluded that the tax loss sustained through the CARDS transaction was not properly claimed in the tax year 2000. The IRS proposed millions of dollars in tax adjustments and penalties to RLP. The IRS also investigated Defendant HVB. In February 2006, HVB signed a deferred prosecution agreement (the "DPA") with the United States Department of Justice, in which HVB admits that it implemented fraudulent tax shelter transactions. The DPA also contains HVB's admission that the CARDS transactions, such as the one entered into with the Plaintiffs, were intended to be only one year in length, even though the transaction had a stated term of up to thirty years.

Discussion

"The standard used to evaluate the grant of a motion to dismiss when the sufficiency of the complaint is questioned is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff with all doubts resolved in the plaintiff's favor, disclose with certainty that the plaintiff would not be entitled to relief under any state of provable facts." Baker v. McIntosh County Sch. Dist., 264 Ga. App. 509, 509 (2003); Croxton v. MSC Holding, Inc., 227 Ga. App. 179, 180, (1997); Mathews v. Greiner, 130 Ga. App. 817,821(1974).

Defendants HVB, Domenick DeGiorgio ("DeGiorgio), an agent of HVB, Raymond J. Ruble ("Ruble"), an attorney at Brown & Wood, Brown & Wood, and Wolfson (hereafter the "Moving Defendants") move to dismiss Plaintiff's second amended complaint. The grounds for dismissal are as follows: (1) Defendants Brown & Wood, Wolfson, Ruble, and DeGiorgio argue that the Court lacks personal jurisdiction over them; (2) all Moving Defendants claim that Plaintiff failed to state a claim upon which relief can be granted because (a) Plaintiff is time barred from its complaint by the statute of limitations for common law fraud; (b) Plaintiff did not plead the necessary elements of fraud, Georgia RICO, and the implied duty of good faith and fair dealing, and (c) Plaintiff failed to allege fraud and Georgia RICO with particularity.

I. Motions to Dismiss for Lack of Personal Jurisdiction

Defendants Brown & Wood, Wolfson, DeGiorgio, and Ruble, have moved to dismiss for lack of personal jurisdiction. A court may exercise personal jurisdiction over a non-resident defendant if there is sufficient basis under the forum's long arm statute and the non-resident defendant's actions demonstrate minimum contacts sufficient to

meet the United States Constitutional due process considerations. Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). The Georgia Long Arm Jurisdiction statute provides for personal jurisdiction over persons who "transact any business within this state." O.C.G.A. § 9-10-91. This statute provides for the court to exercise personal jurisdiction to the maximum extent permitted by procedural due process. Innovative Clinical & Consulting Servs., LLC v. First Nat'l Bank, 279 Ga. 672, 675 (2005).

For the purposes of exercising personal jurisdiction, a person "transacts any business within the state" when (1) the person purposefully consummated transactions or did an act within the state; (2) the cause of action arises from such transactions or the act; and (3) the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. Aero Toy Store, LLC v. Grieves, 279 Ga. App. 515, 517 (2006); Innovative Clinical, 280 Ga. App. 337, 338 (2006).

A person will be found to have minimum contacts within the state of Georgia if the person meets the first two factors of the test stated above; that the person (1) purposefully consummated transactions or did an act within the state and (2) the cause of action arises from such transactions or the act. The requirement that a person purposefully act within state embodies the due process requirement that personal jurisdiction may be exercised only when a person purposefully availed him or herself of the privileges of the state by directing activities towards the state. Mitsubishi Motors Corp. v. Colemon, 290 Ga. App. 86, 88 (2008). Correspondingly, the requirement that the transaction or act be within the state does not require that the person have a physical presence within the state, rather "postal, telephone, and other intangible Georgia contacts suffice." Innovative Clinical, 280 Ga. App. 337, 338; see also,

Diamond Crystal Brands, Inc. v. Food Movers Int'l, Inc., 2007 WL 2258715 (S.D. Ga. 2007) (holding that continuous payments made for three months to a Georgia corporation are sufficient minimum contacts). An additional action that establishes minimum contracts is contracting with an out-of-state party, though the existence of the contract alone will not suffice. Demere v. Koy, 2008 WL 821614, *10 (S.D. Ga. 2008) ("[P]arties who... create continuing legal obligations with citizens of another state' are subject to regulations and sanctions in the other State for the consequences of their activities.").

Taking Plaintiff's allegations as true and viewing them in the light most favorable to the exercise of personal jurisdiction, Home Depot Supply, Inc. v. Hunter Management LLC, 289 Ga.App. 286, 286 (2008), Defendant Brown & Wood, by way of Defendant Chenery, sent Plaintiff an opinion letter in Atlanta, Georgia that evaluated the CARDS transaction. Additionally, Defendant Brown & Wood through, Wolfson and Ruble, communicated by telephone and by email with RLP to discuss and negotiate the terms of the CARDS transaction. Brown & Wood was compensated for these services, in part from the $1.8 million fee RLP paid to Chenery, and therefore derived an economic benefit from its activities within Georgia. Brown & Wood purposefully availed itself to the privileges of Georgia by directing its activities toward the State through mail, email, and telephonic contacts and therefore is subject to personal jurisdiction. Similarly, Defendant Wolfson is subject to personal jurisdiction by way of those same telephonic and email contacts with RLP in Georgia. In addition, Defendant Ruble is also subject to personal jurisdiction by way of his telephonic contact with RLP as well as his participation in creating the sample legal opinion.

In regards to Defendant DeGiorgio, Plaintiff's complaint does not attribute any acts to DeGiorgio, but instead relies on upon the facts provided in the DPA. In the Statement of Admitted Facts portion of the DPA, HVB admits that it participated in "transactions purporting to be loans that were not bona fide loans" and that it did so under the supervision and direction of DeGiorgio. HVB also admits that DeGirgio "invaded the internal controls of HVB" in regards to the receipt and distribution of tax shelter profits to himself. Viewed in the light most favorable to Plaintiff and given the level of benefit that Defendant DeGiorgio may have received from the CARDS transaction with RLP, the Court finds that DeGiorgio purposefully availed himself of the privileges of doing business in Georgia and therefore could have reasonably anticipated being drawn into court in Georgia. Burger King, 471 U.S. 462, 471 (1985).

Accordingly, the Court hereby **DENIES** Defendants Brown & Wood, Wolfson, Ruble, and DeGiorgio's Motions to Dismiss for Lack of Personal Jurisdiction.

II. Motions to Dismiss for Failure to State a Claim

A. Statute of Limitations

Moving Defendants argue that Plaintiff's common law fraud claim is barred by the statute of limitations and by the doctrine of collateral estoppel. The statute of limitations for fraud is four years after the right of action accrues. O.C.G.A. § 9-3-31; Schapiro v. Southern Corp. 185 Ga. 677, 677 (1988). Plaintiff brought the current action on December 28, 2006, based on the injury it suffered when the CARDS loan was recalled on January 2, 2002. Plaintiffs, however, argue that the statute of limitations was tolled until the DPA became public on February 13, 2006, making its complaint timely. Moving Defendants counter that Plaintiff knew of their potential claim for fraud when it was

notified that the loan would be recalled on January 2, 2002, is collaterally estopped for arguing otherwise, and is time barred from bringing this action.

Where the gravamen of an action is actual fraud, the statute of limitations is tolled until the fraud is discovered or by reasonable diligence should have been discovered. Shipman v. Horizon Corp., 245 Ga. 808 (1980) (interpreting O.C.G.A. § 3-807, now O.C.G.A § 9-3-96, which allows for the statute of limitations to be tolled for fraud); see also Federal Ins. Co. v. Westside Supply Co., 264 Ga. App. 240 (2003) (holding that the question of whether a plaintiff discovered the fraud within a reasonable amount of time is a question for the jury). Because of HVB's contractual right to recall the loan, recalling the loan, by itself, does not constitute fraud because in other circumstances the loan could have been recalled with the absence of fraud, such as a shortage of capital or better use of capital. In fact, HVB stated in its January 2, 2002 letter to RLP that it had determined a better use for its capital and would recall the CARDS loan in January. This letter in effect concealed Defendant' HVB's original intentions to not maintain the loan long-term (up to thirty years). Though it is true that RLP may have suspected fraud when the loan was withdrawn, it had no evidence of that fact until the public release of the DPA in February, 2006.

Moving Defendants argue that RLP is collaterally estopped from arguing anything contrary to the order dismissing RLP's Federal RICO claim, in which a Federal District Court decided that the statute of limitations began to run from January 2, 2002, at the latest. Collateral estopel prevents a party from arguing an issue that previously has been litigated and is central to the issue before the court. Flemming v. Flemming, 246 Ga. App. 69, 71 (2000).

Collateral estoppel does not apply to RLP's common law fraud claim because the law governing Georgia's statute of limitations for common law fraud is distinct from the statue of limitations governing Federal RICO claims. Specifically, Georgia's statute of limitations is tolled in fraud cases until the fraud is discovered, Shipman, at 246, whereas the Federal statute runs from the date that the injury was discovered. Rotella v. Wood, 528 U.S. 549, 558-59 (2000). Under Georgia law for common law fraud, the date of injury is essentially *secondary* to the date of when the fraud was discovered. See Shipman v. Horizon Corp., 245 Ga. 808 (1980). The issue of when the statute of limitations began to run was not litigated in the federal case under the appropriate standard and therefore Defendants' contention that Plaintiff is barred from arguing tolling is not tenable. Additionally, whether common law fraud existed and when such fraud was discovered were not central to the District Court's dismissal of Plaintiff's Federal RICO claim.

The Court finds that Plaintiff did not know and should not have known of their claim for fraud until HVB entered into the DPA, thus, the statute of limitations was tolled until February 13, 2006, and Plaintiff's Complaint was timely filed. Defendants' Motion to Dismiss by reason of time bar or collateral estoppel is hereby **DENIED.**

B. Necessary Elements of Fraud

An action for fraud requires that a plaintiff establish (1) a false representation or omission of a material fact; (2) scienter; (3) an intent to induce the party alleging fraud to act or refrain from acting; (4) justifiable reliance; and (5) damages. Paul v. Desito, 250 Ga. App. 631 (2001). Moving Defendants argue that Plaintiff has failed to state a claim upon which relief can be granted because RLP did not allege facts that, under any

circumstances, would constitute fraud. Most notably, Defendants cite First Data POS, Inc. v. Willis, 273 Ga. 792 (2001) as specifically barring Plaintiff's claim.

In First Data, the plaintiff, Willis, entered into a contract to sell its software development company to First Data. As consideration for the sale, First Data paid Willis $2.5 million and agreed to give Willis additional payments if the acquired company reached certain levels of revenues in the next three years. However, the contract also provided that First Data was under no obligation to continue the business of the company and could, at any time, reorganize it or merge it out of existence. Plaintiff Willis sued First Data when First Data did not increase the company's business citing First Data's pre-contractual representations that it promised an increase in the business. The Court held that Willis's claim was barred by the rule disallowing parol evidence that alters, varies or changes the unambiguous terms of a written contract and by a merger clause restricting the parties agreement to what was contained in the contract. Id. at 793. First Data makes clear the rule that oral representations contradictory to the terms of the contract cannot be misrepresentations for the purpose of fraud when the contract contains a merger clause.

The nature of the fraud claimed in First Data upon which the Court made its decision is distinguishable from RLP's claim. In First Data the Court denied the plaintiff's claim based on the fact that there is no cause of action when a defendant makes a representation that is contrary to a contractual term, which in First Data was to increase the business of the acquired company even though First Data had a right to terminate the company. Here, RLP is not basing its fraud claim on the fact that HVB *promised* that it would keep the loan long term or that it would not pull the loan early, but that HVB

represented that it had no present intent to exercise its right to recall the loan after one year. Essentially, Plaintiff argues that Defendants misrepresented the *possibility* that the loan could be long term, when in fact it was intended to be recalled within on year.[1] An alleged misrepresentation as to the possibility of long term financing is not contrary to the contractual right to recall the loan, but commensurate with the terms of the loan and therefore such representation is not barred by the merger clause or by the parol evidence rule. Woodhull Corporation v. Saiba Corporation, 247 Ga. App. 707, 711-12 (1998) (misrepresentations that go to the essence of the contract and are part of the contract can provide an action for fraud); see also China Family Partnership, LP v. S-K Group of Motels, Inc., 275 Ga. App. 811, 812-13 (2005).

Additionally, Georgia case law supports the proposition that if a party makes an enforceable promise, but has no intention of performing, there is a cause of action for breach of contract and for fraud when that party does not perform. See Hall v. Stewart, 93 Ga. App. 792, 796 (1956) ("An action will lie when a false representation as to a future event is made when the person making such representation knows that such event will not take place"); see also Davidson v. Citizens & Southern Nat. Bank, 158 Ga. App. 868 (1981); Gowen v. Georgia Intern. Life Ins. Co., 163 Ga. App. 75, 76 (1986); see generally Georgia Real Estate Commission v. James, 152 Ga. App. 193, 195 (1979). In this case, HVB's representation as to as possibility that the loan could be long

[1] Plaintiff's argument that the Defendants misrepresented a possibility differs from the argument advanced in the complaint, which seems to posit that the Defendants promised Plaintiff long term financing, which itself is not actionable. However, the Court taking an expansive view of the pleadings for the Motion to Dismiss, accepts Plaintiff's theory as substantiated by briefing in response to the motion to dismiss and the facts pled.

term, may fall into this category of misrepresentations about the future events providing RLP with a cause of action for fraud.

As to the other necessary elements of fraud, specifically scienter, Plaintiff RLP has "provided some evidence by which [a] jury could find that [Defendants] made a misrepresentation that [they] knew was false." Ledee v. Devoe, 250 Ga. App. 12, 18 (2001). In the DPA, HVB admits that under Defendant DeGiorgio's supervision it entered into the CARDS transactions with no intention of extending the financing beyond one year, though the loan had terms extending it for as long as 30 years. Additionally, HVB stated that its understanding of the CARDS transaction was that its only purpose was to provide the investors with tax benefits. RLP claims that it would not have entered into the transaction if it had known of HVB's intention and characterization of the transaction. Therefore, by concealing those intentions, Plaintiff alleges that HVB intended to induce, and did in fact induce, RLP to enter into the transaction.

Accordingly, with regard to common law fraud, the Court hereby **DENIES** Defendants HVB and DeGiorgio's Motions to Dismiss for Failure to State a Claim upon which Relief can be Granted.

As to Defendants Brown & Wood, Wolfson, and Ruble, Plaintiff's claim for fraud is based on the opinion letter sent to Plaintiff analyzing the CARDS transaction and on Brown & Wood not disclosing the true nature of the CARDS transaction. First, the opinion letter cannot be the basis for fraud because it is a representation as to a matter of law. Howard v. Barron, 272 Ga. App. 360, 362-363 (2005); see also Bogle v. Bragg, 248 Ga. App. 632 (2001). Second, Plaintiff's claim of fraud based on omission also fails, because a claim for fraud based on omission can not be successful where there is no

confidential relationship. Howard v. Barron, 272 Ga. App. 360, 363 (2005); see also O.C.G.A. § 23-2-53. Plaintiff claims that Defendants Brown & Wood should have revealed to Plaintiff the one year nature of the CARDS transaction. However, Defendant Brown & Wood had no duty to disclose any information to Plaintiff, because its clients were Defendants HVB and Chenery, and thus it had no confidential relationship with Plaintiff. Bogle v. Bragg, 248 Ga. App. 632, 637- 638 (2001); Kienel v. Lanier, 190 Ga. App. 201, 202 (1989).

With regard to Plaintiff's claims of common law fraud, the Court hereby **GRANTS** the Motions to Dismiss for Failure to State a Claim upon which Relief can be Granted brought by Defendants Brown & Wood, Wolfson, and Ruble.

C. Necessary Elements of Georgia RICO

Moving Defendants argue that Plaintiff did not satisfy the necessary elements of Georgia RICO because of the absence of an underlying cause of action for fraud. As previously discussed, the Plaintiff may have a cause action for fraud against Defendant HVB and DeGiorgio, and the Court hereby **DENIES** Defendants HVB and DeGiorgio's Motions to Dismiss for Failure to State a Claim upon which Relief can be Granted.

In regard to Defendants Brown & Wood, Wolfson, and Ruble ("Brown & Wood Defendants"), because Plaintiff did not state a claim for common law fraud upon which relief could be granted, it becomes necessary to consider whether Plaintiff could nonetheless assert a cause of action against them under Georgia RICO. Plaintiff attempts to assert a cause of action against Brown & Wood Defendants based on O.C.G.A. §§ 16-14-4(a) and (c), which provide a cause of action for obtaining money through a pattern of racketeering activity and for conspiring to do so.

To obtain relief under O.C.G.A. § 16-14-4(a) for obtaining money through a pattern of racketeering activity a plaintiff must prove that the defendant, in furtherance of a scheme, committed at least two acts of racketeering activity, also known as predicate acts, as defined in O.C.G.A. § 16-4-3(9)(A). Here the predicate acts that the Plaintiff alleges are the acts of mail and wire fraud in violation of O.C.G.A. § 16-4-3(9)(A); see also 18 U.S.C. §§ 1341, 1343 (mail and wire fraud respectively).

To establish a predicate act based on mail fraud a plaintiff must show that (1) the defendant knowingly and intentionally participated in a scheme to defraud and (2) that the mails were used in furtherance of said scheme.[2] The second requirement does not require that the documents mailed contain fraudulent information. Marshall v. City of Atlanta, 195 B.R. 156, 175 (N.D. Ga. 1996) citing Kehr v. Packages, Inc. v. Fidelcor, Inc. 926 F.2d 1406, 1413-15 (3rd. Cir.), cert denied 501 U.S. 1222 (1991); see also Southern Intermodal Logistics, Inc. v. D.J. Powers Company, Inc., 10 F.Supp.2d 1337, 1353 (1998).

> "[I]n multi-party mail fraud schemes ..., an alleged participant may be held accountable for a mailing whether or not he specifically agreed to or knew of its commission under a conspiracy theory. Likewise, under a conspiracy to commit mail fraud, only a specific intent to defraud must be alleged as opposed to an intent to use the mails."

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[2] "Concerning wire fraud, [plaintiff] must prove that defendants (1) participated in a scheme to defraud which (2) was furthered by the use of interstate transmission facilities. A 'scheme to defraud' is one which is 'reasonably calculated to deceive persons of ordinary prudence and comprehension.'" Southern Intermodal Logistics, Inc. v. D.J. Powers Co., Inc., 10 F.Supp.2d 1337, 1353 (S.D.Ga. 1998) citing *U.S. v. Brown,* 79 F.3d 1550, 1557 (11th Cir.1996); see also 18 U.S.C. § 1343.

Marshall v. City of Atlanta, 195 B.R. at 175. Therefore, this Court's finding that the opinion letter did not contain misrepresentations sufficient for common law fraud does not bar Plaintiff's claim against Brown & Wood Defendants under Georgia RICO.

Plaintiff alleges that forwarding of the opinion letter to RLP in October, 2000, and Brown & Wood and Ruble's participation in CARDS transactions with others as described in the DPA form the predicate acts for mail fraud and wire fraud. See Marshall, 195 B.R at 175. Even if the predicate acts are not clearly established as to all Brown & Wood Defendants, under the conspiracy section of Georgia RICO, each defendant need not commit a predicate act and is responsible for the predicate acts of others. Faillace v. Columbus Bank & Trust Company, 269 Ga. App. 866, 868-870 (2004) (holding that under Georgia civil RICO "any combination" of the defendants' actions could create the necessary pattern and that each defendant was not required to have engaged in at least two defined predicate acts for liability to attach); see also Pasha v. State, 273 Ga. App. 788, 790 (2005) (holding that in a criminal conspiracy each actor is responsible for the actions taken by all co-conspirators). A claim based on the conspiracy prong of Georgia RICO is not without its limitations, as Plaintiff must still show that the Defendant knowingly and willfully joined a conspiracy which contained a common plan to commit two or more predicate acts. Southern Intermodal Logistics, 10 F.Supp.2d 1337, 1360-61 (1998) citing Salinas v. U.S., 522 U.S. 52, 61-66 (1997). As stated above, the standard on a motion is dismiss requires the Court to construe the facts in the light most favorable to the plaintiff. Therefore, the Court finds that RLP has alleged facts necessary to claim knowing participation by the Brown & Wood Defendants in order to survive the motion to dismiss.

In order to establish the "knowing and intentional participation requirement on behalf of the Brown & Wood Defendants," Plaintiff highlights that Defendant Ruble received "side payments" apart from the regular fees for facilitating the CARDS transactions and admissions within the DPA. Specifically, in the DPA's Statement of Facts, HVB admits that *all* parties involved knew that the transactions would be unwound in one year. Plaintiff is permitted to disclaim its knowledge of the nature of the CARDS transaction and at the same time argue that HVB's statement shows that the Brown & Wood Defendants were aware of the one-year nature of the CARDS transaction. Taken in the light most favorable to Plaintiff, the scheme alleged in the DPA along with the allegations of Defendant Ruble's side payments constitute sufficient facts to support Plaintiff's claim against the Brown & Wood Defendants at this stage of the litigation. See Allen v. Jones, 269 Ga. App. 607, 611 (2004) (affirming the judgment because the plaintiff failed to show *any* evidence of knowing participation); cf. J. Kinson Cook of Georgia, Inc. v. Heery/Mitchell, 284 Ga. App. 552, 560 (2007) (affirming a grant of summary judgment for defendants on plaintiff's Georgia RICO conspiracy claims because plaintiff failed to point to any evidence of racketeering activity and predicate acts of fraud and conversion).

Accordingly, with regard to Georgia RICO, the Court hereby **DENIES** the Motions to Dismiss for Failure to State a Claim upon which Relief can be Granted brought by Defendants Brown & Wood, Wolfson, and Ruble.

D. Necessary Elements of Good Faith and Fair Dealing

Plaintiff alleges that Defendant HVB breached its implied duties of good faith and fair dealing by negotiating a credit agreement with terms extendable to 30 years with the

present intent to terminate the contract after one year. Defendant HVB again relies upon its argument that its decision to terminate the Credit Agreement after one year is not a violation of an implied duty of good faith and fair dealing because HVB expressly contracted for that right under the terms of the Credit Agreement.

Under New York law, a court will not imply a duty of good faith and fair dealing if it would be inconsistent with the terms of the contract between the parties. Chrysler Credit Corp., v. Dioguardi Jeep Eagle, Inc., 192 A.D. 2d 1066 (N.Y.S.D. 1993). Citing Dioguardi, HVB argues that "[a] financing institution does not act in bad faith when it exercises its contractual right to terminate financing." Id. at 1067. In Dioguardi, the parties entered into a financing agreement where the plaintiff had sole discretion to continue to extend financing. The District Court found that Plaintiff's failure to extend such financing, consistent with its rights under their agreement, could not form the basis of a claimed breach of the implied duty of good faith and fair dealing. The Court finds that Dioguardi to be distinguishable from the facts of this case. In the instant case, Plaintiff claims that the breach of the implied duty of good faith and fair dealing arises from Defendant HVB's *intent* to terminate the Credit Agreement after one year at the time it negotiated and entered into the Credit Agreement, and not from the actual decision to terminate the agreement.

Again, Plaintiff argues a narrow issue on its claimed breach: not that it was a breach to terminate the contract after one year, but that it was a breach to negotiate a contract with terms extending up to 30 years without the *possibility* of the contract lasting thirty years because HVB entered into it with the present intent to terminate it after one year. As discussed earlier, under the appropriate standard for a motion to

dismiss, the Court accepts this argument and finds that Plaintiff is not barred from bringing an implied duty of good faith and fair dealing claim against Defendants Brown & Wood, Wolfson, Ruble, and DeGiorgio.

Therefore, regarding the implied duty of good faith and fair dealing, the Court hereby **DENIES** Defendant HVB's Motion to Dismiss for Failure to State a Claim upon which Relief can be Granted.

Conclusion

This case presented the Court with a difficult set of factual and legal issues. Nonetheless, having reviewed the briefs, the record of the case, and the burden of proof on a motion to dismiss, the Court dismissed Plaintiff's claims of common law fraud against Defendants Brown & Wood, Wolfson, and Ruble. All other claims brought by Plaintiffs, however, survived the lenient standards of a motion to dismiss. The Court took great lengths in reaching this conclusion, and cautions Plaintiff that it will have a higher evidentiary burden at the summary judgment stage and that it cannot rely solely upon the DPA.

SO ORDERED this 12 day of December, 2008.

Alice D. Bonner

ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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