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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

FILED
2017 AUG 25 P 12:10
CLERK OF COURTS
CUYAHOGA COUNTY

RONALD BELL
Plaintiff

FIRSTENERGY CORP.
Defendant

Case No: CV-13-810608

Judge: JOHN P O'DONNELL

JOURNAL ENTRY

96 DISP.OTHER - FINAL

THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, FILED 01/27/2017, IS GRANTED. O.S.J.

COURT COST ASSESSED TO THE PLAINTIFF(S).
PURSUANT TO CIV.R. 58(B), THE CLERK OF COURTS IS DIRECTED TO SERVE THIS JUDGMENT IN A MANNER PRESCRIBED BY CIV.R. 5(B). THE CLERK MUST INDICATE ON THE DOCKET THE NAMES AND ADDRESSES OF ALL PARTIES, THE METHOD OF SERVICE, AND THE COSTS ASSOCIATED WITH THIS SERVICE.

Judge Signature

Date
8/25/2017

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IN THE COURT OF COMMON PLEAS
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RONALD BELL, *etc.*	)	**CASE NO. CV 13 810608**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	**JUDGMENT ENTRY GRANTING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**
	)	
FIRSTENERGY CORP., *et al.*	)	
	)	
Defendants.	)	

John P. O'Donnell, J.:

Plaintiff Ronald Bell filed this lawsuit as the executor of the estate of Eleanor Rickett. The operative pleading is an amended complaint asserting five causes of action against defendants Venio, LLC and Valley Forge Mountain Partners, Inc.: unjust enrichment, breach of fiduciary duty, conspiracy to commit fraud, fraud and breach of privacy.[1]

After discovery the defendants filed a motion for summary judgment, which is fully briefed. This decision follows.

FirstEnergy loses track of Eleanor Rickett and asks Keane to find her

Eleanor Rickett died on February 19, 2007. Ronald Bell is the second administrator of her estate, having succeeded Ralph Rickett. At the time Eleanor Rickett died she was the owner of shares of the FirstEnergy Corporation. She bought the shares in 1986 when FirstEnergy was known as Ohio Edison. The company, acting as its own transfer agent, retained the shares and administered her account – including reinvesting the dividends – through its department of shareholder services.

[1] The amended complaint against the first named defendant, FirstEnergy Corporation, was voluntarily dismissed but, consistent with the practice of the Cuyahoga County Court of Common Pleas, the case caption still includes FirstEnergy's name.

The functions of a transfer agent include keeping a record of registered shareholders, maintaining shareholder accounts, sending account statements to shareholders in the dividend reinvestment program, transferring securities and paying dividends. The transfer agent is also responsible for maintaining current addresses of the shareholders.

Another obligation of a transfer agent is to determine whether the address used for a shareholder is outdated or otherwise incorrect. Once a transfer agent receives correspondence to a shareholder returned as undeliverable the shareholder is categorized as lost. At that point the agent is required by a rule of the Securities and Exchange Commission to search for the shareholder's current address in at least one information database at least twice over a period of up two years. The Keane Organization, Inc., dba Keane, was a company in the business of contracting with corporations to provide administrative services necessary to comply with SEC regulations, particularly Rule 17 Ad-17 governing lost shareholders. (Keane is the corporate predecessor of defendants Venio, LLC and Valley Forge Mountain Partners, Inc. I will simply refer to Keane in this decision unless it is necessary to distinguish among the three entities.)

In 2003 FirstEnergy contracted with Keane to do what was needed to keep FirstEnergy in compliance with SEC regulations pertaining to lost shareholders and state laws on unclaimed funds. The purpose of the contract is set forth in its second paragraph:

> FirstEnergy wishes to locate and provide certain services to investors of FirstEnergy whose current location is unknown to FirstEnergy, to search, report, and file in connection with SEC Rule 17 Ad-17 . . . and to obtain unclaimed property due diligence and reporting services.

The contract entitled Keane to a fee for its regulatory compliance services. If bare compliance with Rule 17 Ad-17 turned up a new address for the shareholder then the company

could resume normal communications with its shareholder. But if the minimal search required by law failed to uncover the shareholder's current address, or if a shareholder was determined to be exempt from Rule 17 Ad-17 because the shareholder is deceased, then the contract gave Keane the opportunity to charge a fee to lost shareholders, or their estates, to reunite them with their property.

Ohio and most other states have enacted unclaimed funds laws. In Ohio, Chapter 169 of the Ohio Revised Code governs the holding, reporting and disposition of unclaimed funds. Unclaimed funds include shares of stock whose owner has not transacted any business with the company possessing the shares for at least five years. R.C. 169.03 requires a holder of unclaimed funds to report those funds to Ohio's director of commerce. The unclaimed funds statute prohibits any agreement to pay a fee to assist in the recovery of unclaimed funds that is made within the first two years after funds are first reported as unclaimed, and after that the law limits such a fee to 10% of the amount recovered.

Keane's opportunity for profit exists in the five-year window between the time a shareholder is lost and when the funds must be reported under the unclaimed funds law. If a shareholder is exempt from Rule 17 Ad-17, or if the SEC-mandated search of one database doesn't reveal the shareholder's current address, then Keane uses its "deep search" tracing to locate a shareholder or, as in this case, her estate. Keane – acting at this point for itself, not FirstEnergy – then communicates with the shareholder and offers to "recover" the property for a contingency fee of 35% of the property's value.

Keane corresponds to the Rickett estate and Bell signs a contract

On February 21, 2008, Keane's search revealed Eleanor Rickett's death and the appointment of 81-year-old Ralph Rickett as the administrator of her estate in the Probate

Division of the Ashtabula County Court of Common Pleas. Accordingly, Eleanor Rickett was exempt from Rule 17 Ad-17 and Keane's contract with FirstEnergy did not require Keane to notify FirstEnergy that she was dead.

A Keane agent's first contact with Eleanor Rickett's estate was by a telephone call to Ralph Rickett on March 5, 2008. The agent left a message with Ralph Rickett's wife but did not get a call back. On April 22, 2008, the agent called and spoke to Ralph Rickett. After the agent explained the reason for the call, Ralph Rickett informed the agent that Keane's information might be wrong since most of Eleanor Rickett's stocks had already been transferred into the estate. Keane's agent then double-checked the account's dormant status and sent a proposed contract, apparently to Ralph Rickett. There is no record evidence of any other communication between Keane and Ralph Rickett.

Almost a year later, on March 31, 2009, Keane, through case manager Holly Altemose, sent an email to Joseph Rosalina, the Rickett estate's attorney. Altemose told Rosalina she was aware of an "account [that] has not been transferred or liquidated" and offered to get the asset, with a market value of $12,600, for a fee amounting to 35% "of the recovery." Rosalina responded:

> I have worked with Keene (*sic*) in the past on other estates. Please send me the rep agreement so we can get started. I will have Mr. Rickett execute same and return it to you. Thanks.

Keane's agent sent a few follow up emails to Rosalina over the next several months, with no substantive reply. On April 9, 2010, Altemose sent a letter addressed to Ralph Rickett at Rosalina's office to remind him of the availability of her "firm's services to facilitate the

recovery of an unclaimed asset." In the meantime Ralph Rickett had died and Bell was appointed as the successor administrator.

Eventually, on September 24, 2010, Bell signed a contract with Keane without ever having had direct communication, orally or in writing, with any agent of Keane. The contract begins by saying that Keane "has identified an unclaimed intangible asset" belonging to the estate and entitles Keane to 35% of the value of the asset if Keane identifies it and takes the steps necessary to "recover the asset." After the contract was signed, Keane sent Bell a letter of instruction identifying the asset as 338.876 shares of FirstEnergy, and on December 15, 2010, Bell authorized Keane to sell the shares and send the balance "after deducting [Keane's] 35% service fee from the sale proceeds." That balance, $9,080.66, was sent to Bell on March 3, 2011.

The plaintiff's claims: fraud and unjust enrichment

As mentioned above, the plaintiff's amended complaint includes five causes of action and the defendants have moved for summary judgment on all of them. The plaintiff concedes that summary judgment against the estate is warranted on the claims for breach of fiduciary duty and invasion of privacy, so this decision will only address the fraud and unjust enrichment claims.

To prove fraud, a plaintiff must demonstrate (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation; and (6) a resulting injury proximately caused by the reliance. *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 475 (1998).

Bell argues that Keane misrepresented the asset as "unclaimed," "at risk" and in need of "recovery" even though it had never been lost, and that Keane's help was necessary to avoid the

asset being turned over to the state. According to Bell, none of these things was true because the shares were not yet "unclaimed funds" as defined in R.C. 169.02 and they were safely in the hands of FirstEnergy's transfer agent.[2]

Construing the record evidence in the light most favorable to the plaintiff – as I must on a motion for summary judgment – there is no evidence at all of any representations made by Keane to the first administrator Ralph Rickett. Ralph Rickett only had had a single phone conversation with a Keane representative almost two years before he died at the end of 2009. The only evidence of the contents of that conversation is the Keane agent's running note saying "tried Mr. Rickett again & got him on the phone, explained everything, asked me to double check our Info b/c most stocks & mf's have been transferred, they're still waiting to sell some property she owned." Nothing about this phone conversation even hints at a misrepresentation. Additionally, since the contract was not entered into by the estate until more than two years after this conversation, by a successor administrator, there is no evidence at all that the estate relied on anything said or implied to Ralph Rickett to enter into the contract.

The only other evidence of any representation Keane made directly to the Rickett estate is the contract ultimately signed by Bell on September 24, 2010. What the plaintiff points to as misleading in that contract is this language from its first paragraph:

> The Keane Organization, Inc. of Wayne, Pennsylvania, through its research, has identified an unclaimed intangible asset ("the asset") which [the estate of Eleanor Rickett] is entitled to claim[.]

According to Bell it's "not true"[3] that Keane had identified an unclaimed asset since the FirstEnergy shares were not yet statutorily reportable to Ohio's director of commerce as an

[2] By 2009 FirstEnergy was no longer holding the shares and was using American Stock Transfer as its transfer agent.

unclaimed asset by the time the contract was signed in 2010. But the evidence is clear that for an unknown period of time before Eleanor Rickett's death in 2007 through the date Bell signed the contract nobody claimed, or even asked about, the FirstEnergy stock, making it unclaimed property according to the common meaning of that word even if it had yet to become "unclaimed funds" as statutorily defined. Moreover, Bell was the estate's administrator responsible for gathering assets – hunting them down if necessary – and he acknowledges he didn't know about the shares until Keane ultimately told him. And Bell admits to having no idea in 2010 what the statutory definition of unclaimed funds was, so he cannot say that, as of the time he signed the contract, he was deceived into thinking the shares qualified by statute as unclaimed funds. So, to the extent Bell relies on the contract's reference to an "unclaimed intangible asset" as the material misrepresentation giving rise to his fraud claim, the use of that term does not amount to a misrepresentation because it was true: the shares had not been claimed as that term is ordinarily understood.

The other misrepresentations Bell complains about were made to his lawyer: the April 9, 2010, letter to a then dead Ralph Rickett at Rosalina's office describing Keane's service as the "recovery of an unclaimed asset" and the October 5, 2010, letter, also addressed to Ralph Rickett at Rosalina's office, describing the asset as "still unclaimed" and "at risk." I have already found that describing the FirstEnergy shares as unclaimed was not, on the evidence here, a misrepresentation. But viewing the evidence most favorably toward Bell, there is at least an issue of fact about whether Keane accurately described what it does as "recovery." As for the shares being "at risk," that comment is vague almost to the point of meaninglessness, but Keane's implication is clear: if you don't hire us to get the asset you'll lose it. A reasonable finder of fact may deem that a material misrepresentation.

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[3] Ronald Bell deposition transcript, page 26, line 20; see also p. 74, l. 2-3, and p. 75

Yet the record is devoid of evidence that Bell, as the administrator of Rickett's estate, justifiably relied, to the estate's detriment, on these representations in agreeing to the contract. First, there is no evidence that he was aware of the statements. Second, Bell refused to say whether he relied on any advice of counsel when making the contract. Third, there is no evidence that Rosalina relied on the representations. Indeed, the evidence allows for an opposite inference: Rosalina acknowledged being aware of how Keane worked and more than 16 months passed from the time he learned there was an unidentified asset to the time Bell signed Keane's contract, suggesting that Rosalina and the estate used that time to try to identify the asset without Keane's involvement. Finally, even if there were evidence of reliance by Rosalina, I am unaware of legal authority imputing to a plaintiff an attorney's reliance on a defendant's misrepresentation.

On the record evidence in this case, reasonable minds can only conclude that Bell did not justifiably rely, to the estate's detriment, on any material misrepresentation by Keane.

For his fraud cause of action Bell claims not only the misrepresentations just discussed, but that Keane failed to disclose 1) that he "could obtain information regarding the asset for free from the state as unclaimed funds"[4] and 2) the date when the shares would escheat to the state as unclaimed funds. According to Bell, Keane had this duty to disclose "so that owners could determine the 'risk' involved if they declined to pay the Keane's (*sic*) extortionate fee."[5]

Ordinarily in business transactions where parties deal at arm's length, each party is presumed to have the opportunity to ascertain relevant facts available to others similarly situated and, therefore, neither party has a duty to disclose material information to the other. *Blon v.*

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[4] Plaintiff's brief in opposition to summary judgment, p. 7.

[5] *Id.*, p. 8. Here, Bell posits that Keane had a duty to disclose the very information that would put it out of business, raising the question of whether the imposition of such a duty is incompatible with the existence of asset locators in the first place. A single trial court case is not the optimal forum to decide such a public policy question.

Bank One, Akron, N.A., 35 Ohio St. 3d 98, 101 (1988). But full disclosure may be required of a party to a business transaction where such disclosure is necessary to dispel misleading impressions that are or might have been created by partial revelation of the facts. *Id.* In other words, a defendant's conduct in connection with a transaction may give rise to a duty that doesn't otherwise exist.

Here there was no "partial revelation of the facts." The essence of what Keane revealed to the estate, mostly through its attorney, is that Keane was aware of an asset of Eleanor Rickett's that the estate administrator had neither identified nor claimed. That was true. It was up to the estate to identify its options before deciding whether to avail itself of Keane's service.

An inference of the absence of a duty to disclose can even be found within the unclaimed funds statute itself. R.C. 169.13 specifically permits an asset locator to charge the owner of unclaimed funds already reported to the director of commerce up to 10% of the funds' value after the asset has been on the state's unclaimed funds list for more than two years. Under those circumstances the law does not require the asset locator to disclose to the owner that the owner is on the unclaimed funds list and he can easily apply directly to get the property without a fee. If the duty to disclose the statutory unclaimed funds process does not exist after property falls within its ambit then surely it doesn't exist before the property becomes subject to the statute.

As with the plaintiff's claim for misrepresentation, even if Keane did have a duty to disclose to Bell the likely eventuality that the asset would be reported to the state as unclaimed funds, where it could be gotten without Keane's charge, the elements of fraudulent nondisclosure are essentially the same as for a false representation, including justifiable reliance. Based on the evidence of record – namely, the fact that the estate was represented by an attorney who was admittedly familiar with the statutory unclaimed funds process – construed most favorably to the

plaintiff, reasonable minds could only conclude that Keane's failure to describe that process for Bell did not induce the estate into entering into the contract with Keane when it otherwise wouldn't have.

Bell's last fraud claim is for an alleged conspiracy between Keane and FirstEnergy to defraud the estate. Having found no genuine issue of material fact to prevent a summary judgment on the underlying fraud claims I see no reason for a detailed examination of the viability of a conspiracy to defraud cause of action. I will simply observe that there is a void in the record where evidence of a "malicious combination" between Keane and FirstEnergy must be in order to get the claim to a jury.[6]

Unjust enrichment is an equitable claim that exists to prevent a failure of justice where the conduct complained of may not fit the elements of a breach of contract or a traditional tort claim. To prevail on an unjust enrichment claim there must be: (1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment. *Ratcliff v. Seitz*, 2d Dist. No. 2014-CA-9, 2014-Ohio-4412, ¶46. Where there is a valid, enforceable contract the doctrine of unjust enrichment is not applicable. *Booth v. Copeco, Inc.*, 6th Dist. Lucas No. L-16-1227, 2017-Ohio-2897, ¶27.

Bell argues that the existence of the contract here should not eliminate consideration of the unjust enrichment claim because Keane procured the contract in bad faith. Putting aside whether there really is a "bad faith" exception to the bar against unjust enrichment claims in the face of a valid, enforceable contract – since a contract induced in bad faith is unenforceable in the first place – the plaintiff cites to the same conduct allegedly amounting to fraud to support

[6] The elements of a civil conspiracy claim include: (1) a malicious combination, (2) involving two or more persons, (3) causing injury to person or property, and (4) the existence of an unlawful act independent from the conspiracy itself. Marshall v. Cooper, 8th Dist. No. 104959, 2017-Ohio-5813, ¶20.

the exception in this case and, more importantly, to support the substantive element of the claim, i.e. that it would be unjust for Keane to retain 35% of the liquidated value of the shares. My examination of the record evidence failed to demonstrate legally sufficient factual support for the fraud claims, so the same must be said for the unjust enrichment claim premised on the same conduct as the fraud claim: if Keane did not defraud Bell then there is no injustice in allowing Keane to retain its contractually agreed contingency fee.

CONCLUSION

Bell cannot be blamed for feeling ill-used. After all, he had to pay for property already owned by the estate. The transaction at the heart of this case has the scent of extortion even though it is, in the absence of fraud, entirely lawful. But being treated shabbily and being defrauded are two different things. Fraud requires a false statement – or hiding information that must be disclosed – and Keane did not induce Bell to agree to the deal by lying to him that the property was "unclaimed" because the FirstEnergy shares had not been claimed by the estate more than three years after Eleanor Rickett's death, nor was it unlawful for Keane not to disclose that the shares would eventually qualify as statutory unclaimed funds. To the extent Keane's description of the funds as "at risk" and in need of "recovery" may be deemed misrepresentations, there is no evidence that Bell even knew about those statements, much less relied on them to enter into the contract. Accordingly, the defendants' motion for summary judgment on the amended complaint is granted.

IT IS SO ORDERED:

Judge John P. O'Donnell

Date: August 25, 2017

SERVICE

A copy of this judgment entry was sent by email on August 25, 2017 to the following:

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Judge John P. O'Donnell