IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

HEISTER H. LINN, JR., and	:	
HEISTER H. LINN, JR. DDS, INC.	:	
Plaintiffs	:	
	:	
v.	:	NO. 96-00,803
	:	
PENSION CONSULTANTS, INC.,	:	
Defendant	:	

OPINION and ORDER

The crucial question raised by this case is whether the plaintiffs may collect damages for *potential* IRS fines and penalties. Benjamin Franklin once said that in this life only two things are certain: death and taxes. We all know, however, that on this point the wise statesman was wrong. All human beings must die, but a few lucky individuals benefit from the notorious incompetency of the IRS. The plaintiffs in this case may well turn out to be among the lucky ones; therefore, the court finds that such damages are far too speculative, and the case must be dismissed.

Factual Background

This suit evolves around an oral contract between Pension Consultants, Inc. (PCI) and the plaintiffs, Dr. Heister Linn and his corporation, Heister H. Linn, Jr. DDS, Inc. Under the agreement PCI was to administer a defined benefit plan and a money purchase plan for the benefit of the employees of Dr. Linn's company. Services included determining required annual contributions to the plans and preparing forms for submission to the United States Internal Revenue Service and the Department of Labor.

PCI began performing services for the plaintiffs in 1989 and stopped in

December 1994. PCI claims it terminated the agreement because it did not receive payment for the services performed and because Dr. Linn and his corporation would not provide the information necessary to file the forms. Dr. Linn and his corporation disagree and filed this suit, alleging that PCI failed to properly administer the pension plans and did not prepare the forms to submit to the IRS and the Department of Labor. PCI now seeks to have the complaint dismissed on several grounds.

DISCUSSION

A motion for summary judgment may be granted when there is no genuine issue of material fact regarding a necessary element of the cause of action or if, after completion of discovery, the plaintiff has failed to produce evidence of a fact essential to prove the cause of action. Pa.R.Civ.P. 1035.2. The purpose of the rule is to eliminate cases where a party cannot prevail on a claim or a defense. Eaddy v. Hamaty, 694 A.2d 639, 649 (Pa. Super. 1997). In considering a motion for summary judgment the court must examine the record in the light most favorable to the non-moving party. Kerns v. Methodist Hospital, 393 Pa. Super. 533, 574 A.2d 1068 (1990).

PCI has argued six different bases upon which it believes summary judgment should be granted. Four of these arguments have no merit, one constitutes grounds for partial summary judgment, and one warrants dismissal of the case.

A. Arguments Without Merit

The following four arguments for summary judgment must fail because there

are factual disputes that must be submitted to a jury. First, PCI claims Dr. Linn has no cause of action because he was not a party to the contract. While it is true Dr. Linn's corporation was the plans' official sponsor, Dr. Linn would be testifying at trial that he personally contracted with PCI for its services on behalf of his corporation, and that the corporation was a third party beneficiary to the contract. Since this was an oral contract whose terms are in dispute, this is a factual issue to be resolved by the jury.

Second, PCI claims the plaintiffs will not be able to prove their allegation that they relied on PCI's advice not to notify the IRS about the failure to file tax returns.[1] PCI points to one letter which it claims is the sole piece of evidence on this issue,[2] and argues the document does not advise the plaintiffs to refrain from filing the returns. PCI then points to Dr. Linn's deposition, where he stated that when he received the letter he did not believe it would be prudent to refrain from filing with the IRS. Lastly, PCI points to the deposition of accountant Kenneth Butler, who claims he told Linn that Mr. Hopkins was not advising him not to file. It was clear at argument, however, that Dr. Linn plans to testify that the plaintiffs relied on statements other than the letter. Therefore, this is another factual dispute that should

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[1] It is unclear as to how this issue is even relevant to a breach of contract claim, especially as the court has previously dismissed the plaintiffs' claim for tortious breach of contract.

[2] The letter was written from John G. Hopkins, employee of PCI, to Dr. Linn shortly after PCI terminated services. It reads, "If you have not been receiving notices from the IRS, you may actually be 'lost.' Sometime back in 1990 or 1991, I am told, a computer conversion occurred. Are you receiving notices? Simply stated, you <u>may</u> be opening Pandora's box by filing past tax returns. You would also be subject to penalties. It seems to be a 'damned if do, damned if you don't situation.'"

properly be submitted to a jury.

Third, PCI contends it cannot be held liable for the previous pension plan administrator's defective attempt to amend the plan and freeze contributions. PCI appears to have misunderstood the plaintiffs' claim on this issue. In their Amended Complaint the plaintiffs allege that PCI itself executed revised amendments to the plan, which were also defective because no fifteen day notice was given to plan participants. Therefore, if the court were not dismissing this case on other grounds, the plaintiffs would be able to pursue this claim.

Fourth, PCI contends that the plaintiffs cannot prevail on their breach of contract claim because they themselves were in material breach of the contract by refusing to provide PCI with the information necessary to prepare the forms. The plaintiffs, of course, vehemently deny this allegation and plan to present testimony to the contrary. The letters from PCI requesting the information will certainly be important evidence, but the matter is clearly a factual dispute for the jury to resolve.

B. Statute of Limitations

PCI next argues that the complaint should be dismissed because the statute of limitations has run. The statute of limitations for a breach of contract action is four years and normally begins to run when the contract is breached. 42 Pa.C.S. § 5525(8). Crouse v. Cyclops Industries, 704 A.2d 1090 (Pa. Super. 1997). However, the discovery rule provides that the statute of limitations does not begin to run until the injured party is aware or reasonably should be aware of his injury or its cause. Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc., 503 Pa. 80, 468 A.2d 468, 471 (1983). A party is under a duty to use all reasonable diligence to become properly

informed of the facts and circumstances upon which a potential right of recovery is based and to file a lawsuit within the prescribed statutory period. Id. at 471.

The complaint was filed by Dr. Linn on 30 May 1996. Dr. Linn's corporation joined on 23 December 1996. The 5500 CR tax forms were to be prepared by PCI each year, from 1989 through 1994. None were ever filed. Dr. Linn and his corporation undoubtedly knew of this failure. In a 7 May 1992 letter to Mr. Hopkins, Dr. Linn wrote: "I understand your need to be paid but I don't understand purposely not filing returns when due." Linn Deposition Exhibit 40. Similarly, a 10 September 1991 letter from Mr. Hopkins to Dr. Linn advises him that the 1989 and 1990 valuations and tax filings are overdue. He warns, "Internal Revenue's patience is not inexhaustible." Linn Deposition Exhibit 30. Both these letters establish that Dr. Linn and his corporation knew of the alleged breach of contract in 10 September 1991 and 7 May 1992.

PCI argues that the entire case must be dismissed because the complaint was filed more than four years after a breach was discovered. The court does not agree, for PCI was under an obligation to file the forms each year, and each year it failed to file constitutes a separate potential breach. Therefore, if this court were not dismissing the case on other grounds, the plaintiffs could pursue their claim for the years 1992, 1993, and 1994.

C. Speculative Damages

PCI's most important argument is that the damages alleged by the plaintiffs are too speculative to sustain their cause of action. In the complaint, the plaintiffs

claim they have sustained damages of:

> $359,000.00 in contributions required to the Money Purchase Pension Plan and excise taxes of $35,900.00 with respect thereto and $38,000.00 in contributions required to the Pension Plan and excise taxes of $3,800.00 with respect thereto because the first Amendment and the Second Amendment to such Plans were invalid for lack of notice and $481,640.00 in penalties plus interest for failure to file Forms 5500 C/R for 1989-1994, inclusive.

In a breach of contract action the aggrieved party can recover damages only for losses sustained, and cannot collect more than the amount that will provide compensation. Lambert v. Durallium Products Corp., 72 A.2d 66, 364 Pa. 284 (1950); Com., Dept. of Transp. v. Brozetti, 684 A.2d 658 (Pa. Cmwlth. 1996). This is sometimes expressed as "benefit of the bargain" damages, or the amount necessary to place the injured party in the position he or she would be in if no breach had occurred. The policy emanates from the "efficient breach" theory, which holds that in some cases breaching a contract is socially and economically desirable and should not be discouraged, so long as the non-breaching party is compensated for the losses sustained.

Assuming Dr. Linn and his corporation could prove PCI breached its contract, they would be entitled to benefit of the bargain damages, which would include, for example, the cost to hire another firm to perform the necessary calculations and file the forms. Dr. Linn and his company have not asked for such damages, however–presumably because they do not intend to ever file the forms. It is clear from the evidence that no forms have been filed from 1988 to the present, which means Dr. Linn and his corporation have not paid the appropriate taxes, either. The failure to file after 1994 cannot be blamed on PCI. It is more likely due to the plaintiffs' reluctance to tip off the IRS to the deficiency and incur its wrath.

That brings us to the salient point: the damages Dr. Linn and his corporation request are too speculative because the IRS might never find out about plaintiffs' failure to file. If the IRS never knows, Dr. Linn and his corporation will never have to pay the additional contributions to the plans, nor the taxes, nor the penalties, nor the interest.

Undoubtedly, the *amount* of damages that would be incurred if the IRS finds out can be calculated with reasonable certainty. That, however, does not help the plaintiffs because it is the *right to recover damages* that is of primary importance in determining whether damages are too speculative–not the amount, which may be fairly estimated from the evidence. Damages are speculative or remote when the *existence of damages* is uncertain, rather than the amount. Kituskie v. Corbman, 552 Pa. 275, 714 A.2d 1027, 1030 (1998). Carroll v. Philadelphia Housing Authority, 168 Pa. Cmwlth 275, 650 A.2d 1097, 1100 (1994). In Delahanty v. First Pennsylvania Bank, N.A., 318 Pa. Super. 90, 464 A.2d 1243 (1983), the Superior Court explained that "mere uncertainty as to the amount of damages will not bar recovery where it is clear that the damages were the certain result of the defendant's conduct." Here, the IRS taxes and penalties, as well as the additional amounts owed to the plans, are far from a certain result of the defendant's conduct–especially as Dr. Linn and his corporation are deliberately keeping the IRS in the dark about the entire matter.

Nor can the plaintiffs prevail on the theory that the alleged damages are "future damages." While it is true that Pennsylvania permits plaintiffs in a tort action to collect for future consequences of a present injury, it does not permit recovery for *the possibility* of future harm caused by a tortious act. Martin v. Johns-

Manville Corp., 508 Pa. 154, 494 A.2d 1088, 1095 note 5 (1985).

Even if the plaintiffs had argued they have a present injury that will result in future consequences, which they did not, the plaintiffs could not meet their burden of establishing with reasonable certainty the possibility that they will ever incur the future costs associated with the IRS's discovery.[3] In personal injury cases a medical expert can testify to the probability that a plaintiff will require future medical care. This court doubts there are any "IRS experts" who could testify as to how likely it is the plaintiffs will be caught by the IRS, given that agency's notorious inaptitude and total unpredictability. In any case, the plaintiffs have not proposed any expert testimony in this regard.

Although we could find no case directly on point, we find Pashak v. Barish, 303 Pa. Super. 559, 450 A.2d 67 (1982) to be very similar. In Pashak, the wife of an injured longshoreman sued an attorney who had handled her husband's settlement of the claim. She alleged that the attorney committed malpractice because the settlement precluded her from receiving benefits under the Longshoremen's and Harbor Workers' Compensation Act. The Superior Court held that these damages were too speculative because the wife would be entitled to benefits only if she had survived him, and the amount would depend upon the number of surviving children. The court clearly stated, "[A]ppellant has not yet suffered, and may never suffer, the harm she alleges. Her bald assertion that she could present a sufficient evidentiary basis for valuing her claim is simply insufficient to change the speculative nature of her claim." Id. at 69, note 2. Similarly, Dr. Linn and his company have not been

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[3] The plaintiffs will fail even granting them a less exacting standard of proof, as suggested in Gradel v. Inouye, 491 Pa. 534, 421 A.2d 674 (1980).

assessed any penalties from the IRS and might never suffer that fate.

Leaving all the technical legal arguments aside, this court is somewhat appalled by the plaintiffs' grand scheme. On the one hand, they are attempting to collect potential damages based on the IRS's possible discovery of their delinquency while on the other hand, they are keeping that delinquency hidden from the IRS. If the plaintiffs wanted to establish a claim for damages that was not speculative, they could easily have done so by notifying the IRS of their failure.[4] Instead, they are attempting to collect from PCI the potential IRS costs and pocket those funds, hoping to elude the IRS forever.

In short, Dr. Linn and his company are attempting to use a tax liability to generate income. The purpose of the IRS is to *tax* income–not to *generate* it. This court will not permit Dr. Linn and his company to profit from the incompetence of the IRS.

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[4] In this respect Dr. Linn reminds us of another dentist who opted for the speculative rather than the certain. In Wujcik v. Yorktowne Dental Associates, 701 A.2d 581 (Pa. Super. 1997), the dentist was entitled to 35% of the fees collected by Yorktown Dental Associates for services he performed. Instead of obtaining the company's records to learn exactly how much money had been collected, the dentist attempted to prove his damages through an industry-wide average of collection of accounts receivable. The court rejected this proposed proof, stating that it would amount to little more than pure speculation, and noting that the dentist could have established the damages with absolute certainly.

O R D E R

AND NOW, this _____ day of September, 1999, for the reasons stated in the foregoing opinion, the motion for summary judgment filed by the defendant pertaining to damages is granted and the complaint is dismissed.

The remaining issues raised by the motion for summary judgment are rendered moot and are therefore denied.

BY THE COURT,

Clinton W. Smith, P.J.

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