

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

ROBERT DAMERJIAN, ET. AL.,	:	May Term 2008
Plaintiffs,	:	
v.	:	No. 2383
JOSE BARDELAS, ET. AL.,	:	
Defendants.	:	Commerce Program
	:	
	:	Control Nos. 116126/111075/ 105308/097443

ORDER

AND NOW, this 15th day of May 2009, upon consideration of Defendants Steven Wit, Alan Guggenheim, Howard Lucas and Jose Bardelas' respective preliminary objections to Plaintiffs' complaint, all responses in opposition and after oral argument, it hereby is Ordered that the Preliminary Objections are sustained in part and overruled in part as follows:

1. Defendants Lucas and Bardelas' Preliminary Objection regarding jurisdiction is Overruled.
2. Defendants Lucas, Bardelas, Wit and Guggenheim's Preliminary Objection regarding venue is Overruled.
3. Defendants Bardelas and Guggenheim's Preliminary Objections to Count I (fraud), Count II (negligent misrepresentation), Count III (Conspiracy), and Count V (unjust enrichment) are Sustained. These counts are dismissed and plaintiffs are granted leave to amend the complaint within (20) days from the date of this order.

4. Defendants Lucas, Bardelas, Wit and Guggenheim's Preliminary Objections to Count IV (UTPCPL) are sustained and Count IV is dismissed.
5. All other preliminary objections are Overruled.

BY THE COURT,

MARK I. BERNSTEIN, J.

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

ROBERT DAMERJIAN, ET. AL.,	:	May Term 2008
Plaintiffs,	:	
v.	:	No. 2383
JOSE BARDELAS, ET. AL.,	:	
Defendants.	:	Commerce Program
	:	
	:	Control Nos. 116126/111075
	:	105308/097443

OPINION

In this action plaintiffs Robert Damerjian, Jr., Kathleen T. Sawin, Henry S. Sawin Jr., M.D., Steven Potash, Susan W. Sussman, and Bruce Sussman (hereinafter “Plaintiffs”) seek to recover moneys invested in an alleged sham corporation. The allegations of the complaint center upon Efoora, Inc. a company located in Buffalo Grove, Illinois in the business of designing, manufacturing and marketing rapid medical diagnostic test products for HIV testing, glucose, wasting and mad cow disease.

From January 2000 through May 2006, Efoora raised \$40 million by selling over 100 million shares of its stock to approximately 5000 investors including plaintiffs. Plaintiffs allege that they were solicited by defendants¹ and their co-conspirators to invest in the company with false and misleading statements concerning Efoora’s manufacturing capabilities, projected sales revenues, viability of Efoora’s tests, the possibility of Efoora’s becoming a publicly traded company within a certain period of time, the existence of certain sales contracts, the amount of commissions paid by Efoora in

¹ The defendants in this action are Jose Bardelas, Eric Bazilian, Stan Bazilian, Fiona Bazilian, Steve Bryant, Daniel Caravette, Alan Guggenheim, Teena Harriott, Howard Isaacs, William Milles, Jr., Brenda Range, Steven Wit, Howard Lucas.

connection with the sale of stock, the imminence of FDA approval and other regulatory approval and the risk involved in investing in Efoora.

Plaintiffs allege that defendants offered tours conducted by employees who falsely created the appearance that products were being manufactured and shipped to paying customers to individuals, including investors and customers. Plaintiffs allege that no manufacturing took place.

In May 2008, plaintiffs filed a complaint against defendants including Jose Bardelas, Alan Guggenheim, Howard Lucas and Steven Wit. The complaint alleges five causes of action: fraud, negligent misrepresentation, conspiracy, violations of the UTPCPL, and unjust enrichment.

Presently before the court are the preliminary objections of Jose Bardelas, Howard Lucas, Alan Guggenheim and Steven Wit to plaintiffs' complaint. The defendants object on the basis of personal jurisdiction, venue and legal and factual sufficiency of the complaint. Oral argument on the issues of jurisdiction and venue occurred on March 1, 2009.

DISCUSSION

I. The court has personal jurisdiction over defendants Bardelas and Lucas.

Pennsylvania confers jurisdiction over persons by, general jurisdiction or specific jurisdiction. General jurisdiction is founded upon the defendant's general activities within the forum, as evidenced by systematic contacts with the state. Specific jurisdiction is premised upon the particular acts of the defendant that give rise to an underlying cause of action.²

² Nutrition Management Services, Co. v. Hinchcliff, 926 A.2d 531, 535 (Pa. Super. 2007).

The objecting party has the initial burden of supporting its objection to the court's jurisdiction.³ "Once that party has provided proof, the burden then shifts to the non-moving party to adduce evidence demonstrating there is a basis for asserting jurisdiction over the moving party."⁴

Bardelas and Lucas contend that this court lacks general and specific jurisdiction over them. In support thereof, Bardelas and Lucas submitted affidavits. Bardelas affirms he is a resident of North Carolina, does not conduct business, reside, have offices or own any property in Pennsylvania. Bardelas also affirms that he did not have any contacts with plaintiffs over the course of his dealings with Efoora, never traveled to Pennsylvania for any business related to Efoora, never conducted business with anyone who resided or resides in Pennsylvania in connection with Efoora, and never transferred, sold or assigned any of his Efoora shares to anyone or entity in Pennsylvania.⁵

Similarly, Lucas affirms he is a California resident, does not conduct business, reside, have offices or own any property in Pennsylvania, has not visited Pennsylvania in the last twenty years and does not own any property in Pennsylvania. Lucas affirms that he engaged in only one transaction in Pennsylvania unrelated to this lawsuit. Lucas also affirms he has not engaged in any Efoora related business in Pennsylvania, has not met or had any contacts with the plaintiffs, did not sell any Efoora stock or made any misrepresentations about Efoora to any of the plaintiffs, sold Efoora stock to any Pennsylvania resident or attended any meetings concerning Efoora in Pennsylvania.⁶

³ See Nutrition Management Services, Co. v. Hinchcliff, 926 A.2d 531, 535 (Pa. Super. 2007).

⁴ Haas v. Four Seasons Campground, Inc., 952 A.2d 688 (Pa. Super. 2008)

⁵ Affidavit of Jose A. Bardelas ¶¶ 3-6, 7-10.

⁶ Affidavit of Howard Lucas ¶¶ 3-20.

Plaintiffs argue that despite Bardelas and Lucas' lack of contacts with Pennsylvania, the court may still exercise specific jurisdiction over Bardelas and Lucas based on the jurisdictional contacts of defendants' co-conspirators. Courts have recognized jurisdiction over non-residents based upon the contacts of their alleged co-conspirators. Courts may look not only at the defendant's forum contact, but at those of the defendant resident co-conspirators. The contacts of the 'resident' co-conspirator over whom it has jurisdiction are imputed to the 'foreign' co-conspirator for jurisdictional determinations.⁷ Merely belonging to a civil conspiracy does not make the member subject to the jurisdiction of every other member's forum. There must be substantial acts in furtherance of the conspiracy within the forum, of which the out-of-state co conspirator was or should have been aware.⁸

In support of co-conspirator jurisdiction, plaintiffs submitted the affidavit of Craig Rappin, the former Chief Operations Officer of Efoora, Inc. from 1998 to 2004. Rappin avers that many of the defrauded investors came from the "Philadelphia area". Larry Irwin, a co-schemer and key person in Efoora's fund raising scheme, met with some investors from the Philadelphia area at his home in Philadelphia for presentations. Rappin also avers that Irwin met with the Chief Executive Officer, David Grosky, at his home in Philadelphia to discuss increasing investor sales. Rappin affirms that Lucas and

⁷ In re Automotive Refinishing Paint Antitrust Litigation, 2002 U.S. Dist. LEXIS 15099 (MDL 2002).(*citing* Massachusetts School of Law at Andover, Inc. v. American Bar Assoc., 846 F. Supp. 374, 379 (E.D. Pa. 1994).

⁸ Id.

Bardelas knew that Efoora shares were being sold in Philadelphia and the Philadelphia area and that the shares were being heavily marketed to the Philadelphia residents.⁹

The acts identified in Rappin's affidavit, meetings with potential investors and an unidentified number of meetings between Efoora officials and Larry Irwin to increase stock sales, constitute substantial acts committed in Pennsylvania in furtherance of the conspiracy to establish co-conspirator jurisdiction. Bardelas and Lucas are subject to the personal jurisdiction of this court. Defendants Bardelas and Lucas' preliminary objections are overruled.

II. Venue is proper in Philadelphia County

Pursuant to Pa. R. Civ. P. 1028 (a)(1), defendants Steven Wit (hereinafter "Wit") and Alan Guggenhiem (hereinafter "Guggenhiem") assert that there is no venue in Philadelphia County. Under the Rules of Civil Procedure, actions against an individual must comply with Pa. R. Civ. P. 1006(a). Under this rule venue exists in any county where a transaction or occurrence took place out of which the cause of action arose.¹⁰

The Pennsylvania Supreme Court interpreted the meaning of "transaction or occurrence" in Craig v. W.J. Thiele & Sons, Inc., 395 Pa. 129, 149 A.2d 35, 37 (Pa. 1959). In Thiele, the Supreme Court required that the transaction, and not merely some part of the transaction, take place in the county where venue is laid.¹¹ The Supreme Court explained that any other result "would lead only to confusion and . . . 'forum shopping' if the law were to permit suit to be commenced against a [defendant] in any county where

⁹ Affidavit of Craig Rappin ¶¶ 6, 7, 9.

¹⁰ Pa. R. Civ. P. 1006 (a)(1).

¹¹ Craig v. W.J. Thiele & Sons, Inc., 395 Pa. 129, 149 A.2d 35, 37 (Pa. 1959).

any facet of a complex transaction occurred."¹² These principles provide clear guidance in the instant matter.

In Estate of Werner v. Werner¹³, the Superior Court determined that, in an action for civil conspiracy to fraudulently induce a decedent to execute a codicil to his will, two meetings and the drafting of relevant documents in Allegheny County were not sufficient transaction or occurrence to support venue in that county. The court explained, that even if the meeting in Allegheny County was the first step toward the later civil conspiracy forming the basis for the action, "such a meeting can hardly constitute more than a mere 'facet of the complex transaction'" which, under Theile, cannot support venue.¹⁴

Even preparation of documents by lawyers in Allegheny County and the fact that some of the defendants had engaged in long distance communications with those attorneys did not constitute a transaction or occurrence within the meaning of Pa.R.C.P. 1006.¹⁵

Plaintiffs herein allege a mass conspiracy to induce investors to invest in Efoora, Inc. knowing that the shares are worthless. The only factual evidence relied upon by plaintiffs in support of venue in Philadelphia County is the affidavit of Craig Rappin¹⁶ which says:

¹² Id.; see also Pennsylvania Higher Education Assistance Agency v. Devore, 267 Pa. Super. 74, 406 A.2d 343, 344 (Pa. Super. 1979) (for venue purposes, the phrase "transaction or occurrence" does not include the performance of any act in formation of the contract, but is the ultimate formation of the contract itself.).

¹³ 781 A.2d 188 (Pa. Super. 2001) (interpreting Pa.R.C.P. 1006).

¹⁴ Id. at 191.

¹⁵ Id. at 192.

¹⁶ On March 16, 2009, the court issued an order requesting plaintiffs to submit additional affidavits and deposition evidence on the issue of venue. On April 16, 2009, plaintiffs responded that other than the notarized affidavit of Craig Rappin, plaintiffs had no additional evidence to submit concerning the issue of venue.

6. ...Efoora sold its shares throughout the United States, however due in large part to Larry Irwin many of the defrauded investors come from the Philadelphia area. Some of the investors met with Larry Irwin at his home in Philadelphia. These potential investors were given a power point presentation by Irwin which lauded the great potential of an investment in Efoora. ...Efoora officials such as myself (Rappin) and C.E.O. David Grosky met with Larry Irwin in Philadelphia in order to advance the cause of increasing investor sales.
7. ...Lucas, like other Board members and key consultants, knew that the Efoora shares were being sold illegally throughout the country but especially in the Philadelphia area. Due to the connections Grosky had with key people such as Larry Irwin, Alan Guggenheim, Steven Wit, Dr. Bazilian and others from the Philadelphia area, Lucas, myself and others knew that the illegally sold shares were being heavily marketed to Philadelphia residents...
8. ...Guggenhiem, from the Philadelphia area, marketed shares directly or steered potential investors to Grosky. Grosky frequently used Guggenhiem to raise funds quickly through what we called the "Philly Contingent"...
9. ...He (Jose Bardelas) as a key "finder" was aware that our Efoora shares were being sold to investors throughout the United States, including Philadelphia.

The fact that many of the defrauded investors came from the Philadelphia area is insufficient to establish venue in Philadelphia since the affidavit fails to say whether any single sale actually occurred in Philadelphia. However, the fact that the Efoora shares were being heavily marketed to Philadelphia residents and meetings to induce Philadelphia residents to invest in Efoora stock were held in the home of Larry Irwin in Philadelphia, venue is proper in Philadelphia.¹⁷

¹⁷ Plaintiffs contend that meetings inducing plaintiffs to invest in worthless Efoora stock were held also at the home of defendant Stan Bazilian. Defendant Bazilian however, does not reside in Philadelphia. Bazilian resides in Elkins Park, Pennsylvania in Montgomery County.

III. Count I (fraud) is dismissed against defendants Guggenheim and Bardelas for failing to state a claim.

Count I of the complaint purports to state a cause of action for fraud. To state a cause of action for fraud or intentional misrepresentation, the plaintiff must establish: "(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance."¹⁸

"It is well established that fraud consists of anything calculated to deceive, whether by single act or combination, or by suppression of truth, or suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or silence, word of mouth, or look or gesture."¹⁹ Allegations of fraud must be pled with specificity.

"Averments of fraud are meaningless epithets unless sufficient facts are set forth which will permit an inference that the claim is not without foundation nor offered simply to harass the opposing party and to delay the pleader's own obligations. For this reason our rules require that fraud in either a complaint or reply must be 'averred with particularity.' Pa.R.C.P. 1019(b). Admittedly the line between pleading facts and evidence is not always bright; therefore, we frequently condone the inclusion of statements, which except for this requirement, would be considered impertinent.... While it is impossible to establish precise standards as to the degree of particularity required in a given situation, two conditions must always be met. The pleadings must adequately explain the nature of the claim to the opposing party so as to permit him to prepare a defense and they must be sufficient to convince the court that the averments are not merely subterfuge."²⁰

In the complaint, plaintiffs specifically allege the following with respect to moving defendants Lucas, Bardelas, Guggenheim and Wit:

¹⁸ Gibbs v. Ernst, 538 Pa. 193, 207, 647 A.2d 882, 889 (1994).

¹⁹ Moser v. DeSetta, 527 Pa. 157, 163, 589 A.2d 679, 682 (1991).

²⁰ *Id.* at 379-80, 224 A.2d at 179. (citation omitted)

16. Defendant Alan Guggenheim improperly received Efoora shares from David Grosky. Guggenheim subsequently fraudulently resold and attempted to sell these shares to prospective investors.
17. Defendant Steven Wit entered into a secret and fraudulent deal with David Grosky whereby patents and intellectual property of Efoora was transferred from Efoora to Wit. Grosky transferred this property to Wit in an attempt to avoid detection in case the fraudulent scheme at Efoora were discovered.
18. Defendants Jose Bardelas and David Grosky entered into an improper arrangement whereby Grosky gave Bardelas Efoora shares for “services”. In turn, Bardelas sold these shares to unsuspecting investors. Bardelas enriched himself at the expense of these investors.
22. Defendant Howard Lucas was a member of the Board of Directors of Efoora. David Grosky improperly transferred Efoora shares to Lucas. In turn, Lucas sold the shares in a fraudulent manner to victims and diverted substantial sums away from Efoora and to himself.

A review of the complaint elucidates that plaintiffs fail to allege that defendants Guggenheim and Bardelas made any misrepresentations to plaintiffs. Plaintiffs make group allegations against all defendants, including defendants solicited investors and defendants fraudulently and consistently represented to plaintiffs. Lacking from the complaint are any allegations of any representations made by Guggenheim or Bardelas to plaintiffs. Allegations of fraud must be set out with particularity, and vague group allegations that all defendants in general made statements to the plaintiffs upon which plaintiffs detrimentally relied without any supporting specific factual averments is insufficient to state a cause of action for fraud. Consequently, defendants Guggenheim and Bardelas’ preliminary objections are sustained and count I (fraud) is dismissed against these defendants. Plaintiffs are granted leave to amend the complaint for plaintiffs to allege whether Guggenheim and Bardelas sold or attempted to sell shares of Efoora to plaintiffs.

Plaintiffs have with regard to defendants Wit and Lucas adequately pled fraud. Lucas was a member of Efoora’s Board of Directors and therefore can be held liable for

the misrepresentations made by individual finder/solicitors who sold Efoora shares to plaintiffs. Wit entered into a secret and fraudulent deal with Grosky whereby patents and intellectual property of Efoora was transferred from Efoora to Wit to avoid detection of the fraudulent scheme. By virtue of the fact that Wit accepted the transfer of the patents and intellectual property from Grosky, one could infer that Wit made the misrepresentations alleged to plaintiffs. Therefore, defendants Wit and Lucas' preliminary objections are overruled.

IV. Count II (negligent misrepresentation) fails to state a claim against Guggenheim and Bardelas.

In Count II of the complaint plaintiffs allege that the same representations that form the basis for fraud also give rise to a claim for negligent misrepresentation. Negligent misrepresentation requires proof of "(1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter [sic] ought to have known of its falsity; (3) with an intent to induce another to act on it; and (4) which results in injury to a party acting in justifiable reliance on the misrepresentation."²¹

The allegations of negligent misrepresentation as to Guggenheim and Bardelas are flawed. Similar to the claim for fraud, absent from the complaint any allegations of any representations made by Guggenheim or Bardelas to plaintiffs. Consequently, defendants Guggenheim and Bardelas' preliminary objections are sustained and count II (negligent misrepresentation) is dismissed against these defendants. Plaintiffs are granted leave to amend the complaint for plaintiffs to allege whether Guggenheim and Bardelas sold or attempted to sell shares of Efoora to plaintiffs. However, the allegations of negligent

²¹ Kramer v. Dunn, 2000 PA Super 101, 749 A.2d 984, 991 (Pa. Super. 2000).

misrepresentation with regard to Lucas and Wit are adequately plead. Consequently, defendants' preliminary objections as to Lucas and Wit are overruled.

V. Count IV (UTPCPL) fails to state a claim.

Count IV of the complaint purports to state a claim for violation of Pennsylvania's Unfair Trade Practices & Consumer Protection Law (UTPCPL). The court finds that the UTPCPL claim must be dismissed because plaintiffs lack standing. The limited circumstances under which a private person may bring a claim under the UTPCPL are specifically set forth in Section 9.2 (a), which, provides:

Any person who leases or purchases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act, may bring a private action to recover actual damages or one hundred dollars (\$100), whichever is greater.²²

The UTPCPL unambiguously permits only purchasers or lessors of goods or services primarily for personal, family or household purposes to sue. Plaintiffs purchased shares for investment purposes not for "personal, family or household purposes." Plaintiffs are statutorily precluded from bringing a claim under the UTPCPL. Defendants' preliminary objections are sustained and this claim is dismissed.

VI. Count V for unjust enrichment fails to state a claim.

The elements of unjust enrichment are "benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the

²² 73 P.S. § 201-9.2 (a) (2008).

benefit without payment of value."²³

In the case at bar, plaintiffs did not confer any benefit upon defendants Guggenheim and Bardelas. The complaint fails to allege any direct dealings between the plaintiffs and these moving defendants. Therefore, defendants' preliminary objections as to these defendants are sustained. Plaintiffs however did confer a benefit upon defendants Wit and Lucas and therefore defendants' preliminary objections as it pertains to these defendants is overruled.

VII. Defendants' preliminary objection as to count III (conspiracy) is overruled in part and sustained in part.

Count III of the complaint purports to state a claim for conspiracy. In order for a claim of civil conspiracy to proceed, "It must be shown that two or more persons combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means."²⁴ In the case at bar, the complaint alleges that defendant Lucas and Wit combined and agreed with intent to do an unlawful act or a lawful act carried out by unlawful means.

The complaint alleges that Wit and Grosky entered into a secret and fraudulent deal with Grosky whereby the patents and intellectual property of Efoora was transferred to Wit by Grosky. The complaint also alleges that Lucas was a member of Efoora's Board of Directors who sold shares and diverted sums away from Efoora. Here, Wit and

²³ Schenck v. K.E. David Ltd., 446 Pa. Super. 94, 97, 666 A.2d 327, 328 (1995).

²⁴ Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 211, 412 A.2d 466, 472 (1979).

Lucas entered into an agreement to carry out the scheme and defraud plaintiffs. As such defendants preliminary objections are overruled as it pertains to Wit and Lucas.

The complaint however fails to allege how the conduct of Guggenheim and Bardelas, individualized selling of shares, constitutes knowing and substantial assistance to carry out the conspiracy. Lacking from the complaint are any allegations that these defendants actions assisted or encouraged the scheme. Therefore, defendants Guggenheim and Bardelas' preliminary objections are sustained. Plaintiffs are granted leave to amend the complaint to allege that defendants Guggenheim and Bardelas participated, assisted or encouraged the conspiracy.²⁵

CONCLUSION

Based on the foregoing, Defendants' preliminary objections are sustained in part and overruled in part as follows: Defendants Bardelas and Lucas preliminary objection regarding jurisdiction is overruled; Defendants Lucas, Bardelas, Wit and Guggenheim's Preliminary Objection regarding venue is Overruled; Defendants Bardelas and Guggenheim's Preliminary Objections to Count I (fraud), Count II (negligent misrepresentation), Count III (conspiracy) and Count V (unjust enrichment) are sustained. These counts are dismissed and plaintiffs are granted leave to amend the complaint within (20) days from the date of this order. Defendants Lucas, Bardelas, Wit

²⁵ As for the remaining preliminary objections, plaintiffs have voluntarily dismissed all claims for emotional damages and attorney fees or have been mooted as a result of this court's order and opinion. The preliminary objection as to the claim for punitive damages is overruled.

and Guggenheim's Preliminary Objections to Count VI (UTPCPL) are sustained. All other preliminary objections are overruled.

BY THE COURT,

MARK I. BERNSTEIN, J.

