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Order (COCHRAN MILL ASSOCIATES)

Elizabeth E. Long
Superior Court of Fulton County

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Recommended Citation
Long, Elizabeth E., "Order (COCHRAN MILL ASSOCIATES)" (2006). *Georgia Business Court Opinions.* Paper 99.
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FILED IN OFFICE
MAR - 8 2006
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

COCHRAN MILL ASSOCIATES,	*	
	*	
Plaintiff,	*	
v.	*	Civil Action File No. 2003-CV-77895
	*	
JOHN A. STEPHENS a/k/a	*	
JACK STEPHENS, d/b/a	*	
ADANAC PROPERTIES,	*	
	*	
Defendants.	*	

ORDER

Defendant's motion for summary judgment in the above-styled case is before the Court for consideration. The Court has reviewed the file, including the briefs submitted by the parties, and heard the oral argument of counsel on March 3, 2006.

Defendant's Motion for Summary Judgment

In 1998, Defendant, a real estate agent, arranged for the sale of raw land located in south Fulton County to the J.R. Oviedo Profit Sharing Trust ("Oviedo"). Defendant represented Oviedo in the purchase as his real estate agent and received a commission in conjunction with the sale. Thereafter, Defendant solicited a number of individuals to form a partnership for the purpose of purchasing a portion of the Oviedo property. Sixteen people, including Defendant, agreed to invest in the new partnership, Cochran Mill Associates. The partnership was formed and purchased the property on June 30, 1989. Defendant served as Managing Partner for Cochran Mill until March 25, 1999, when he was replaced.

Plaintiff Cochran Mill Associates initially filed suit against Defendant on March 7, 2000, alleging two general categories of claims: (1) claims arising from the purchase of the land; and (2) claims that Defendant mismanaged Plaintiff's financial affairs. Specifically, Plaintiff alleges that it overpaid for the property and that Defendant failed to disclose certain material facts

regarding his role in and the details regarding the previous purchase of the property by Oviedo. Plaintiff's claims regarding the purchase of the land include breach of fiduciary duty, fraud, and misrepresentation. Plaintiff asserted the following claims against Defendant regarding his management of Plaintiff's financial affairs: a demand for an accounting; breach of fiduciary duty; actions outside of partnership authority; conversion; and negligence.

Plaintiff dismissed the initial complaint and thereafter filed the instant complaint on November 18, 2003, as a renewal action pursuant to O.C.G.A. § 9-2-61(a). On February 24, 2005, Plaintiff filed an amended complaint, adding RICO claims against Defendant with respect to his management of Plaintiff's financial affairs. Defendant filed the instant motion for summary judgment on August 3, 2005, arguing primarily that Plaintiff's claims are time-barred.

The Court agrees that Plaintiff's claims arising from the purchase of the land at issue are barred by the applicable statutes of limitation. The land sale occurred in 1989 and Plaintiff was or could have been aware of the details regarding the purchase in the early 1990s, yet the initial complaint was not filed until 2000. The statutes of limitation for fraud and breach of fiduciary duty are four and six years, respectively. O.C.G.A. §§9-3-31 and 9-3-24; Crosby v. Kendall, 247 Ga. App. 843 (2001); Hartley v. Gago, 202 Ga. App. 770 (1992).

Plaintiff concedes that the initial complaint was filed long after the statutes of limitation expired, but argues that the limitation statutes are tolled by Defendant's conduct. However, Plaintiff has not submitted any evidence that Defendant's conduct deterred or debarred Plaintiff from bringing an action in a timely manner. O.C.G.A. § 9-3-36; Allen v. Columbus Bank & Trust Co., 244 Ga. App. 271 (2000).

Accordingly, Defendant's motion for summary judgment as to Plaintiff's claims arising

from the purchase of the land is hereby **GRANTED**.

Defendant argues that he is entitled to summary judgment as to Plaintiff's claims regarding his mismanagement of the partnership's affairs because they too are time-barred. Unfortunately, the precise dates of Defendant's actions that purportedly give rise to Plaintiff's claims regarding mismanagement are not clearly set forth in the pleadings in this case.

As aforementioned, Plaintiff filed the initial complaint on March 7, 2000. The statutes of limitation for Plaintiff's negligence and conversion claims are four years. O.C.G.A. §§ 9-3-31 and 9-3-32.[1] The statute of limitation for Plaintiff's breach of fiduciary duty claim is six years. O.C.G.A. § 9-3-24; Crosby, supra. Therefore, any negligence or conversion claims based upon Defendant's actions that occurred after March 7, 1996, are not time-barred. Any breach of fiduciary duty claim based upon Defendant's actions that occurred after March 7, 1994, is not time-barred.[2]

Moreover, the Court finds that there are questions of fact that preclude summary judgment regarding these claims. Accordingly, Defendant's motion for summary judgment as to Plaintiff's negligence and conversion claims based upon Defendant's actions that occurred on or prior to March 7, 1996, is **GRANTED**; Defendant's motion for summary judgment as to Plaintiff's negligence and conversion claims based upon Defendant's actions that occurred after March 7, 1996, is **DENIED**. Defendant's motion for summary judgment as to Plaintiff's breach of fiduciary duty claims regarding mismanagement based upon Defendant's actions that occurred

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1 The statute of limitations for negligent injuries to the person is two years. O.C.G.A. § 9-3-33. The statute of limitations for negligent injuries to personalty is four years. § 9-3-31.

2 Again, there is no evidence in the record that Defendant deterred Plaintiff from filing suit so as to toll the applicable statutes of limitation.

on or prior to March 7, 1994, is hereby **GRANTED**; Defendant's motion for summary judgment as to Plaintiff's breach of fiduciary duty claims based upon Defendant's actions that occurred after March 7, 1994, is hereby **DENIED**.

Plaintiff also asserts a demand for an accounting. Defendant contends that laches precludes the claim because Plaintiff delayed seeking an accounting until more than ten years after partners began questioning Defendant's management of the partnership. The Court is not persuaded by Defendant's argument. Defendant's motion for summary judgment as to Plaintiff's claim for an accounting is hereby **DENIED**.

Although Plaintiff filed its initial complaint on March 7, 2000, it did not assert its RICO claims until it filed an amended complaint on February 24, 2005. The statute of limitation for a RICO claim is five years. O.C.G.A. § 16-14-8. The five-year statute of limitation commences when the plaintiff discovers or reasonably should have discovered that he has been injured. Southern Intermodal Logistics, Inc. v. D.J. Powers Co., Inc., 251 Ga. App. 865 (1991). The statute of limitations begins to run at the time of the injury caused by the alleged wrongful conduct, not by the wrongful conduct itself. Id.

Again, Plaintiff's amended complaint regarding its RICO claims contains no reference to the dates upon which Defendant's actions purportedly occurred, making a statute of limitations analysis particularly difficult. There is evidence, however, that some of Plaintiff's partners began to question Defendant about partnership checks that he had written to himself "by no later than 1993." (Defendant's reply brief in support of summary judgment, p. 14).[3] Therefore, Plaintiff should have asserted its RICO claims no later than 1998. So, even if the Court were to find that Plaintiff's RICO claims relate back to the filing of the original complaint on March 7, 2000, they

are still time-barred. Accordingly, Defendant's motion for summary judgment as to Plaintiff's RICO claims is hereby **GRANTED**.

Discovery/Pretrial Conference

Having conferred with counsel, the Court orders that the following deadlines shall apply:

Defendant shall depose Plaintiff's expert some time during the week of **April 3, 2006**; the deposition should be concluded no later than April 7, 2006. Plaintiff shall depose Defendant's expert some time during the week of **April 24, 2006**; the deposition should be concluded no later than April 28, 2006.

The parties shall submit a proposed consolidated Pretrial Order to the Court on or before **May 12, 2006**. The lawyers shall appear before the Court on **May 17, 2006 at 10:00 a.m.** in Courtroom 8J for a pretrial conference.

SO ORDERED this 8th day of March, 2006.

ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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3 Plaintiff alleges that conversion and theft by deception are the predicate acts of its RICO claim.