

Erik F. Stidham, ISB #5483
efstidham@stoel.com
G. Rey Reinhardt, ISB #6209
grreinhardt@stoel.com
STOEL RIVES LLP
101 South Capitol Boulevard, Suite 1900
Boise, ID 83702-5958
Telephone: (208) 389-9000
Facsimile: (208) 389-9040

U.S. DISTRICT COURT
U.S. BANKRUPTCY COURT
DISTRICT OF IDAHO

MAR 11 2004

----- M. RECD -----
LODGED ----- FILED -----

Scott J. Kaplan, Pro Hac Vice
sjkaplan@stoel.com
STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204-1268
Telephone: (503) 224-3380
Facsimile: (503) 220-2480

Attorneys for Defendant/Third-Party Plaintiff
InterDent Service Corporation

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

POCATELLO DENTAL GROUP, P.C., an
Idaho professional corporation,

Plaintiff,

v.

INTERDENT SERVICE CORPORATION, a
Washington corporation,

Defendant.

INTERDENT SERVICE CORPORATION, a
Washington corporation,

Third-Party Plaintiff,

Case No. CV-03-450-E-LMB

DEFENDANT ISC'S OPPOSITION TO
THIRD-PARTY DEFENDANT LARRY
R. MISNER'S RULE 12(B)(6) MOTION
TO DISMISS COUNTERCLAIM

73

v.

POCATELLO DENTAL GROUP, P.C., an Idaho professional corporation; DWIGHT G. ROMRIELL, individually; LARRY R. MISNER, JR., individually; PORTER SUTTON, individually; ERNEST SUTTON, individually; GREGORY ROMRIELL, individually; ERROL ORMOND, individually; and ARNOLD GOODLIFFE, individually,

Third-Party Defendants.

Defendant and counterclaimant InterDent Service Corporation ("ISC") submits the following memorandum in opposition to third-party defendant Larry R. Misner, Jr.'s Motion to Dismiss.¹ ISC also submits an Affidavit of Scott Kaplan In Support of ISC's Opposition to Third-Party Defendant Larry R. Misner, Jr.'s Motion to Dismiss ("Kaplan Aff.").

I. Introduction

On October 11, 1996, ISC's predecessor, GMS Dental Group Management, Inc., entered into a Management Agreement with the Pocatello Dental Group (the "Group") whereby ISC acquired the nonprofessional assets of the dental practice presently conducted by the Group in exchange for \$2.8 million in cash and stock to the Group shareholders. (ISC's Counterclaim ¶ 14). Misner, a Group shareholder and former president, personally received \$400,000 in this transaction. (Kaplan Aff. ¶ 2, Ex. 1.)

¹ ISC is somewhat perplexed by the fact that Misner both filed this motion pursuant to Fed. R. Civ. P. 12(b)(6) and an answer and counterclaims. A party may respond to a complaint *either* by answering or filing a motion pursuant to Rule 12, but not both. As a precaution, however, ISC will respond to Misner's counterclaims without waiving its position that either Misner's answer or this motion must be withdrawn.

Since the sale, the Group has experienced seller's remorse and has attempted through various means to usurp rights of control that it sold and that legally belong to ISC. Such attempts culminated in October 2003, when the Group sued ISC for alleged breach of contract and equitable relief, in particular alleging in relevant part that the consideration for agreement under which Misner and the other Group shareholders received millions of dollars, the right to manage the practice in a businesslike way under the Management Agreement between the parties, purportedly is "illegal" as constituting the "corporate practice of dentistry." The Group shareholders have not offered to return the proceeds they received in the allegedly illegal transaction.

In response to the Group Shareholders' supposed discovery that the business arrangement they had been working under for seven years was unlawful, in ISC's Answer to Complaint and Counterclaims ("ISC's Counterclaims"), ISC asserted (among other claims and other defendants) two claims against Misner: fraud in the inducement (counterclaim 6) and, in the alternative, rescission and restitution (counterclaim 7). ISC offered counterclaim 7 merely as an alternative to the tort remedies sought in counterclaim 6; counterclaim 7 is also for fraud. The gist of the claims is that if what ISC's predecessor paid millions of dollars for in 1996 is illegal, ISC is entitled to its money back.

Misner has moved to dismiss such claims on three grounds: (1) that the claims are insufficiently pled, (2) that they fail to state a claim and (3) that they are barred by the statute of limitations. As detailed below, Misner's arguments are without merit. The Court should deny the motion to dismiss or, in the alternative, grant ISC leave to amend its pleading.

////

////

II. Argument

A. ISC's Claims Against Misner Are Sufficiently Pled

Fed. R. Civ. P. 9(b) states: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." The 9th Circuit has interpreted Fed. R. Civ. P. 9(b) to "mean that the pleader must state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Snowbird Construction Co. v. U.S. Dept. of Housing and Urban Development*, 666 F. Supp. 1437, 1442 (D Idaho 1987) citing *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F. 2d 1393, 1401 (9th Cir. 1986).

ISC's pleading satisfies this standard and the elements of fraud under Idaho law. See *Aspiazu v. Mortimer*, 82 P.3d 830, 832 (Idaho Supreme Court 2003) (listing nine elements of fraud under Idaho law: (1) a representation, (2) its falsity, (3) its materiality, (4) speaker knew of falsity and (5) intended that representation be acted on, (6) the hearer's ignorance of falsity and (7-8) reliance on and right to rely on truth of representation and (9) speaker's consequent injury).

The fraudulent representation was that Misner and the Group would abide by Article 5.2 of the Management Agreement. (ISC's Counterclaim ¶ 92.) This representation occurred "[w]hen entering into the Management Agreement", which was in October 1996. (*Id.* and *Id.* ¶ 14.)² The Management Agreement and Article 5.2 are material. (*Id.* ¶¶ 15, 91, 93.) ISC relied on the representation and did so to its detriment. (*Id.* ¶¶ 92, 95.) As a Group shareholder and one-time Group president, Misner was a party to and beneficiary of the transaction between ISC and the Group. (*Id.* ¶¶ 14, 45, 93.)

² In his brief, Misner fails to note that ISC incorporated its earlier allegations into each claim

Although ISC's allegation that Misner "never intended to honor [his] agreement in, or abide by the terms of, Article 5.2" is "[b]ased upon information and belief," it is sufficient to survive a motion to dismiss. (ISC's Counterclaim ¶ 94.) Because this allegation goes to Misner's intent in October 1996, it is entirely consistent with Fed. R. Civ. P 9(b)'s language that "intent *** and other condition of mind of a person may be averred generally." This is precisely what ISC has done.

It is not possible for ISC to know, without taking discovery, precisely what Misner thought or intended in October 1996. However, ISC has subsequently learned, through the Group's complaint, its application for a temporary restraining order and Misner's negotiations with ISC president Ivar Chhina, that Misner and the Group believe that Article 5.2 is invalid, unenforceable and in violation of public policy. (Complaint ¶¶ 19-20; Affidavit of L.R. Misner ¶ 12.) ISC detailed the October 2003 negotiations between Chhina and Misner over counterdefendant Dr. Dwight Romriell's "request for additional time to establish his own office" and Misner/ the Group's concurrent but secret efforts to obtain a TRO. (ISC's Counterclaim ¶¶ 45-50.) Paragraphs 45-50 set forth specific dates, facts and conversations involving Misner, including:

- * In October 2003, Chhina and Misner discussed ISC's rights under the Management Agreement to permit or deny third-party defendant Romriell's entry onto the premises in order to obtain additional time to for Romriell to establish an office after leaving the Group (*Id.* ¶ 45);
- * Misner was the Group's president at the time (*Id.*);

- * Misner and the Group secretly obtained a TRO, arguing that the Management Agreement was illegal, at the same time Misner was purporting to negotiate with Chhina to obtain ISC's consent under the Management Agreement (*Id.* ¶ 46);
- * On October 10, 2003, after the Group obtained the secret TRO, Misner via letter to Chhina reneged on an earlier offer of the Group to resolve the dispute over Romriell (*Id.* ¶ 47);
- * Misner did not mention the TRO in the October 10 letter (*Id.*);
- * Chhina and Misner spoke again after the October 10 letter regarding the Romriell matter, and again Misner failed to mention the TRO (*Id.* ¶ 48);
- * Misner and the Group did not disclose the TRO until October 13, 2003 (*Id.* ¶ 49);
- * Misner and the Group's actions in obtaining the TRO materially impaired ISC's ability to fulfill its obligations under the Management Agreement (*Id.* ¶ 50).

This is sufficient circumstantial evidence from which a jury could infer Misner's fraudulent intent.

Misner correctly argues that a fraud claim should, where possible, "specify such facts as the times, places, benefits received, and other details of the alleged fraudulent activity." *Neubronner v. Milken*, 6 F. 3d 666, 672 (9th Cir. 1993) (citing *Semegen v. Weidner*, 780 F. 2d 727, 731 (9th Cir. 1985)). ISC specified all such facts available to it (detailed above) in support of its claims against Misner.

////

B. ISC's Allegations Establish a Claim for Fraud

Misner's second argument is essentially that ISC cannot establish a fraud claim against Misner because Misner did not sign the Management Agreement in 1996 and had no responsibilities under the Management Agreement. This is simply untrue. ISC's fraud claims against Misner are based not only on Misner's status in October 1996 as a minority shareholder of the Group, but also as an individual who personally signed a number of the documents for which he received \$400,000. (See Affidavit of Scott J. Kaplan in Opposition to Motion to Dismiss, Exhibits 1-8; ISC's Counterclaim ¶ 14.) Idaho law permits such claims.

In *L.B. Industries, Inc. v. Smith*, 817 F.2d 69 (9th Cir. 1987), the court considered whether, under Idaho law, a corporate director and a separate minority shareholder could be liable for fraudulent representations by the corporate president. The conclusion was that they could, provided that they "specifically direct, actively participate in, or knowingly acquiesce in the fraud or other wrongdoing of the corporation or its officers." *Id.* at 71 (internal citations omitted). In *L.B. Industries*, it was indisputable that the relevant parties did *not* direct, participate in, or know about the fraudulent representations, so they were not liable. *Id.*

Here, Misner actively participated in or knowingly acquiesced to the fraudulent representation of the Group in October 1996 that it would abide by Article 5.2 of the Management Agreement. (ISC's Counterclaim ¶¶ 91-92.) In fact, he made such fraudulent representations himself. (*Id.* ¶ 92.) It is simply absurd for Misner to claim he was nothing more than a minority shareholder (even though, under *L.B. Industries*, that is enough for ISC to bring a fraud claim against him) given that Misner received \$400,000 in the transaction and signed at least eight separate documents necessary to consummate the transaction, including the following:

- * October 7, 1996 Group Member Resolution (Kaplan Aff. ¶ 3, Ex. 2);

- * October 10, 1996 Assignment Agreement (*Id.* ¶ 4, Ex. 3);
- * October 11, 1996 Agreement & Plan of Reorganization (*Id.* ¶ 2, Ex. 1);
- * October 11, 1996 Non-Compete Agreement (*Id.* ¶ 5, Ex. 4);
- * October 11, 1996 Employment Agreement (*Id.* ¶ 6, Ex. 5);
- * October 11, 1996 Share Acquisition Agreement (*Id.* ¶ 7, Ex. 6);
- * October 11, 1996 Group Members' Certificate (*Id.* ¶ 8, Ex. 7); and
- * October 11, 1996 Waiver & Termination Agreement (*Id.* ¶ 9, Ex. 8).

Moreover, in his counterclaim against ISC, Misner admits that he is an intended beneficiary of the Management Agreement and that he was allegedly damaged as a result of a ISC's alleged breach. (Misner's Counterclaim Against ISC ¶ 24.)

For these reasons, ISC's claims against Misner are permissible and would be so even if Misner were merely a minority shareholder in the Group.

C. The Three-Year Statute of Limitations Does Not Bar ISC's Claims Against Misner

Misner's argument regarding the statute of limitations suffers the same defect as detailed in footnote 2—he failed to recognize that ISC incorporated its earlier allegations into each claim against him. (ISC's Counterclaim ¶¶ 90, 98.) Idaho's statute of limitation for fraud is three years from “the discovery, by the aggrieved party, of the facts constituting the fraud”. Idaho Code § 5-218.

ISC pled that it did not discover the fraud until October 2003 in connection with the Group's filing of the complaint, the TRO and Misner's negotiations with Chhina. (ISC's Counterclaim ¶¶ 45-50.) This is within the three-year limitation.

////

////

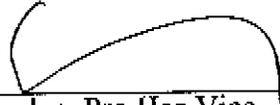
D. Even if the Court Determines That ISC's Claims Against Misner Are Deficient, The Court Should Grant ISC Leave to Amend Its Claims

If the Court feels that ISC's pleading against Misner is deficient, it should grant leave to amend unless the Court makes a determination that ISC cannot possibly allege facts consistent with the challenged pleading that will cure the deficiency. *Snowbird Construction Co.*, 666 F. Supp at 1442, citing *Bonanno v. Thomas*, 309 F. 2d 320 (9th Cir. 1962).

III. Conclusion

For the above reasons, the Court should deny the motion to dismiss or, in the alternative, grant ISC leave to amend its pleading.

DATED this 10 day of March, 2004.



Scott J. Kaplan, Pro Hac Vice

STOEL RIVES LLP
Attorneys for ISC

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **DEFENDANT ISC'S OPPOSITION TO THIRD-PARTY DEFENDANT LARRY R. MISNER'S RULE 12(B)(6) MOTION TO DISMISS COUNTERCLAIM** on the following named persons on the date indicated below by

- mailing with postage prepaid
- " hand delivery
- " facsimile transmission
- " overnight delivery

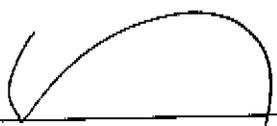
to said persons a true copy thereof, contained in a sealed envelope, addressed to said persons at his or her last-known addresses indicated below.

Gary L. Cooper
Ron Kerl
James P. Price
COOPER & LARSEN
151 N. 3rd Avenue, Ste. 210
PO Box 4229
Pocatello, ID 83205-4229
Phone: (208) 235-1145
Fax: (208) 235-1182

Lowell N. Hawkes
Law Office of Lowell N. Hawkes, Chtd.
1322 East Center
Pocatello, ID 83201
Phone: (208) 235-1600
Fax: (208) 235-4200

Richard A. Hearn
Stephen J. Muhonen
PO Box 1391/Center Plaza
Pocatello, ID 83204
Phone: (208) 232-6101
Fax: (208) 232-6109

DATED: this 10 day of March, 2004.



Scott J. Kaplan
Attorneys for Defendant

DEFENDANT ISC'S OPPOSITION TO THIRD-PARTY DEFENDANT LARRY R. MISNER'S RULE 12(B)(6) MOTION TO DISMISS COUNTERCLAIM – Page 10