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Page 1

Not Reported in B.R., 2004 WL 2074169 (Bkrcty.N.D.Tex.)
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In re Precept Business Services, Inc.
 Bkrcty.N.D.Tex.,2004.

Only the Westlaw citation is currently available.
 United States Bankruptcy Court,N.D. Texas, Dallas
 Division.

In re: PRECEPT BUSINESS SERVICES, INC., et
 al., Debtor(s).

Steven S. TUROFF, as the Chapter 7 Trustee for
 Precept Business Services, Inc., et al., Plaintiff,
 v.

JACKSON WALKER, L.L.P., et al., Defendants.
 No. 01-31351-SAF-7, 04-3216.

Aug. 23, 2004.

James D. McCarthy, **EricD. Madden**, and Sean J.
 McCaffity of Diamond, McCarthy, Taylor, Finley,
 Bryant & Lee, LLP, Dallas, TX, for Plaintiff.
 Joe Harrison and Joanne Early of Gardere Wynne
 of Dallas, TX, for Defendant.

MEMORANDUM OPINION AND ORDER

FELSENTHAL, Bankruptcy J.

*1 Jackson Walker, L.L.P., and Charles D.
 Maguire, Jr., defendants, move the court for partial
 summary judgment regarding liability for seven
 claims alleged by Steven S. Turoff, the plaintiff and
 the Chapter 7 trustee of the bankruptcy estate of
 Precept Business Services, Inc., the debtor. Jackson
 Walker and Maguire also move for partial summary
 judgment regarding the elements of causation and
 damages for the seven claims. Turoff opposes the
 motions. The court conducted a hearing on the
 motions on May 26, 2004.

Turoff alleges eight claims for relief against the
 defendants: (1) breach of fiduciary duty; (2) aiding
 and abetting the Precept officers' and directors'
 breach of fiduciary duties; (3) aiding and abetting
 bank fraud; (4) civil conspiracy; (5) negligent
 misrepresentation; (6) constructive fraud; (7) legal
 malpractice; and (8) equitable subordination.

The defendants contend that Turoff cannot establish
 liability for the first seven claims. Jackson Walker
 asserts that the negligent misrepresentation and civil
 conspiracy claims are barred by limitations. On the
 aiding and abetting bank fraud claim, Jackson
 Walker asserts that Turoff lacks summary judgment
 evidence to prove that Precept committed fraud to
 obtain a March 22, 1999, \$40 million Credit
 Facility or that Jackson Walker intended to assist or
 did assist in the alleged fraud. On the negligent
 misrepresentation claim, Jackson Walker asserts
 that Turoff lacks summary judgment evidence
 establishing that Jackson Walker supplied false
 information to the banks. On the civil conspiracy
 claim, Jackson Walker asserts that Turoff lacks
 summary judgment evidence of any underlying tort.
 Jackson Walker also argues that there is no genuine
 issue of material fact that it committed legal
 malpractice. Jackson Walker argues that the
 trustee's complaints under his cause of action for
 breach of fiduciary duty states a claim for legal
 malpractice and not a claim for breach of fiduciary
 duty. Jackson Walker states that even if the trustee
 does state a claim for breach of fiduciary duty, he
 has not offered summary judgment evidence of the
 essential elements for that claim. Regarding the
 trustee's claim for aiding and abetting breach of
 fiduciary duty, Jackson Walker states that the
 trustee has failed to prove that the Precept directors
 and officers breached a fiduciary duty to the
 company or that their alleged breaches resulted in
 injury to the plaintiff. Jackson Walker also states
 that there is no evidence that Jackson Walker
 knowingly participated in the alleged breaches of
 fiduciary duty. In response to the trustee's claim for
 constructive fraud, Jackson Walker argues that there
 is no evidence that Jackson Walker breached any
 legal duty to Precept and that the claim, therefore,
 fails as a matter of law.

The defendants also contend that Turoff cannot
 establish damages or causation for the first seven
 claims. The damages summary judgment motion
 does not apply to the equitable subordination claim.

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Not Reported in B.R.

Page 2

Not Reported in B.R., 2004 WL 2074169 (Bkrcty.N.D.Tex.)
(Cite as: Not Reported in B.R.)

For equitable subordination, Turoff seeks the subordination of the Jackson Walker claim against the bankruptcy estate. Jackson Walker states in its motion for summary judgment regarding damages and causation that the motion applies to Turoff's legal malpractice claim, but the court does not consider the motion to apply to the legal malpractice claim because of Turoff's position in his response to the motion. For legal malpractice, Turoff seeks a disgorgement of fees paid and the disallowance of Jackson Walker's claim against the bankruptcy estate.

*2 Before addressing the summary judgment motions themselves, the court must first address several challenges to portions of the summary judgment evidence.

Deutscher Affidavit

In support of summary judgment, the defendant submitted the affidavit of Layne A. Deutscher, Precept's former general counsel. Turoff objects to Deutscher's affidavit and moves to strike it. The defendants filed a motion to extend the time to respond to Turoff's motion to strike. The court held a hearing on the motion to extend the time to respond on July 2, 2004. The court denied the motion to extend the time to respond to Turoff's motion to strike.

Turoff asserts three broad problems with Deutscher's affidavit. Turoff contends 1) that he lacked a reasonable opportunity to depose Deutscher; 2) that Deutscher, a former defendant in the case, is implicated in many of the allegations asserted against Jackson Walker; and 3) that Turoff has not had an adequate opportunity to explore Deutscher's biases or opinions. None of those general contentions warrant striking the affidavit.

In addition, Turoff launches a multi-page, multi-line attack on the affidavit, asserting that Deutscher's statements are self-serving because he is an interested witness, that he is offering expert opinions, that his statements are overly broad or conclusory, that he lacks personal knowledge or that he is offering hearsay testimony. None of these

specific contentions warrant striking the portions of the affidavit.

In his response to the summary judgment motions, Turoff argues that the court is not obligated to accept all of Jackson Walker's summary judgment evidence. The court may weigh evidence in its summary judgment analysis, considering the circumstances of a witness in the context of the transaction at issue. The court must view the evidence in the light most favorable to the party opposing the motion for summary judgment, drawing inferences in favor of the non-moving party. Competing inferences from summary judgment evidence mandates a trial.

The summary judgment decision-making process compels the denial of Turoff's motion to strike. The court expects that witnesses would be involved in the challenged transactions. A witness may, of course, have a vested interest to protect. Here, Deutscher was the general counsel, and even a defendant in this litigation. He was involved in the events that gave rise to this litigation. Turoff may certainly argue that his summary judgment averments are self-serving or otherwise biased to best portray his involvement in the events, but that does not support a motion to strike the affidavit. Rather, it supports an argument by Turoff in the context of the very standards for review of summary judgment motions he advocates.

Because of Deutscher's involvement as general counsel, he may opine, as a lay witness, about the transactions and the role played by the various parties.

With regard to the hearsay concerns, the court will not consider the affidavit for the truth of what Douglas Deason or David Neely, both of whom are former officers and directors of Precept, may have told Deutscher in the conversations he describes.

*3 With regard to the deposition contentions, Turoff has not filed a motion to compel the deposition nor requested that the court defer consideration of the summary judgment motions for further discovery pursuant to Fed.R.Civ.P. 56(f).

Not Reported in B.R.

Page 3

Not Reported in B.R., 2004 WL 2074169 (Bkrcty.N.D.Tex.)
(Cite as: Not Reported in B.R.)

For these reasons, the court will deny Turoff's motion to strike Deutscher's affidavit and overrule Turoff's objections, except with regard to the hearsay ruling.

Winters and Souza Declarations

Jackson Walker objects to and moves to strike testimony from the declarations of William Winters and Richard Souza, submitted by Turoff in support of his response to the motions for summary judgment. Specifically, Jackson Walker moves to strike paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of the Winters declaration and paragraphs 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the Souza declaration. Jackson Walker contends that the declarations should not be used to address reliance, false statements or fraudulent omissions. At the hearing, Jackson Walker acknowledged the court's order entered June 3, 2004, on a similar motion brought by Ernst & Young, LLP, in adversary proceeding no. 02-3583. But Jackson Walker contends that Ernst & Young's summary judgment motion ruling challenged the reliance element of Turoff's claim, whereas Jackson Walker also challenges the false statement and fraudulent omission elements. Turoff responds that the court should apply its Ernst & Young decision.

The court overruled Ernst & Young's objections and denied its motion to strike the two declarations. Jackson Walker, like Ernst & Young, argues that the declarations are inconsistent with the declarants' depositions and therefore not proper summary judgment evidence. The court adopts its order entered June 3, 2004, in adversary proceeding no. 02-3583. Based on the court's review of the Winters and Souza declarations and the declarants' depositions, the court cannot conclude that the declarations are inconsistent with the depositions. As observed in the Ernst & Young ruling, while it appears that the declarants should have supplemented their deposition testimony, the declarations are not necessarily inconsistent with the deposition responses to counsel's questioning.

At the hearing, Turoff represented that he only presented the declarations as summary judgment

evidence on the element of reliance. The court accepts that representation and does not consider the declarations for the elements of false statement or fraudulent omission.

Nevertheless, the court addresses several components of Jackson Walker's motion in greater detail. Neither Souza nor Winters made the ultimate credit decisions for their respective banks. Souza was Wells Fargo's loan team manager for the Precept account. He made credit recommendations and thus functioned as part of Wells Fargo's decision-making process. Winters was Bank One's senior underwriter. He too made credit recommendations and functioned as part of Bank One's decision-making process. Both may therefore testify regarding recommendations they would make in their respective bank's decision-making process based on a set of information. Both may respond to hypothetical fact situations based on their function in their respective bank's decision-making process. Even though neither made the ultimate credit decision, both may testify from their perspective in the decision-making process.

*4 Jackson Walker states that Souza testified at deposition: "I am not aware of any misrepresentations or omissions by Jackson Walker in connection with the March 1999 Credit Facility or the amendments thereto [and] I do not recall Jackson Walker providing any information that was material to Wells Fargo's decision to enter into the March 1999 Credit Facility or any amendments thereto." In the deposition, Souza actually said:

Q: ... did you ever have any communications with anyone from Jackson Walker?

A: No, I did not.

Q: As the corporate representative of Wells Fargo Bank, are you aware of any communications between Wells Fargo and Jackson Walker relating to those issues?

A: No, I'm not.

Q: Did you ever try to contact Jackson Walker in connection with any of those issues?

A: No.

Q: Would it be accurate to say that in connection with the 1999 credit facility that from your perspective Jackson Walker did not provide any information that is-that is material to the bank's

Not Reported in B.R.

Page 4

Not Reported in B.R., 2004 WL 2074169 (Bkrcty.N.D.Tex.)
(Cite as: Not Reported in B.R.)

decision to enter into the credit facility?

A: I don't remember any information from Jackson.

Q: So, to your knowledge, were there any misrepresentations or omissions by Jackson Walker with regard to the credit facility?

A: None that I'm aware of.

Q: And the amendments?

A: None.

(Objections omitted.)

In his declaration, Souza opined on the recommendation he would have made based on, in effect, hypothetical assumptions put to him by Turoff's lawyers. Those comments are not inherently inconsistent with the above-quoted deposition testimony. Rather, the declaration suggests an evidentiary weight and credibility decision for the fact finder.

A similar exchange took place with Winters, with a similar declaration. The court draws the same inferences. The comments in the declaration are not inherently inconsistent with the deposition responses.

For the series of statements concerning what Souza and Winters would have done if certain facts exist, the court considers those as opinions of loan team members and underwriters about the impact on their credit recommendations of facts, posed as hypothetical questions. Loan officers and underwriters may offer that type of testimony. They may testify about the impact of assumed facts on how they perform their jobs. As discussed below, there are genuine issues of material fact about the basis of those hypothetical questions.

Both declarants make several vague references in their statements, for example, "among other information." While the court disregards vague statements, that does not mean that the declarations should not be considered. Rather, it means the court should read the declarations based on common sense. Both declarants refer to statements made by other persons. The court does not consider those statements for the truth of the matter asserted. Both declarants refer to written documents. The court does not consider the references to the documents to

establish the content of the documents. Both declarants comment on what Jackson Walker knew. The declarants lack a foundation to provide that testimony, so the court does not consider that testimony. Both declarants comment on GAAP standards for particular items. Jackson Walker contends that testimony amounts to unsubstantiated expert opinion. Turoff does not offer Souza or Winters as an expert. But they may testify about their understanding of GAAP as used to perform their functions in the banks' credit decision-making process. The declarants refer to a "scheme" in several instances. The court accords no significance to that label for purposes of the summary judgment motion.

*5 Except as pertains to hearsay and statements about what Jackson Walker knew, the court will overrule the objections and deny the motions. The court does not, however, consider the declarations with regarding to false statements and fraudulent omissions.

Summary Judgment Standards

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and other matters presented to the court show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Washington v. Armstrong World Indus., Inc.*, 839 F.2d 1121, 1122 (5th Cir.1988). On a summary judgment motion, the inference to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Anderson*, 477 U.S. at 255. A factual dispute bars summary judgment only when the disputed fact is determinative under governing law. *Id.* at 250.

The movant bears the initial burden of articulating the basis for its motion and identifying evidence which shows that there is no genuine issue of material fact. *Celotex*, 477 U.S. at 322. The

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Not Reported in B.R.

Page 5

Not Reported in B.R., 2004 WL 2074169 (Bkrcty.N.D.Tex.)
(Cite as: Not Reported in B.R.)

respondent may not rest on the mere allegations or denials in its pleadings but must set forth specific facts showing that there is a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

If the court concludes that summary judgment is inappropriate, it will merely enter an order denying the motion. Material fact disputes and competing factual inferences need not be discussed in an order denying a motion, as those factual disputes will necessarily be addressed at trial.

Liability

Banks' Claims-Public Policy Issues

Jackson Walker contends that the court should dismiss all claims Turoff asserts on behalf of Bank One and Wells Fargo. Jackson Walker asserts that the assignment from the banks to Turoff violates public policy. The banks transferred claims to Turoff as the Precept Chapter 7 trustee pursuant to a settlement approved by the court in the underlying bankruptcy case by order entered on April 11, 2002. Jackson Walker has filed a claim in the underlying bankruptcy case, is a party in interest in the underlying bankruptcy case, had notice of the motion to approve the settlement, did not contest the settlement and did not seek relief from the order approving the settlement. The order is final and cannot be collaterally attacked.

Jackson Walker argues that Precept and the defendants are joint tortfeasors, and that Texas public policy does not permit an assignment of a claim of a joint tortfeasor. Jackson Walker reluctantly recognizes that Turoff is not Precept, and that a Chapter 7 trustee is not the debtor. Turoff may be subject to the claims and defenses which might have been asserted against Precept or the banks pre-petition, but that does not mean that the Chapter 7 trustee may not prosecute for the benefit of creditors a creditor's claim transferred to the bankruptcy estate. The Bankruptcy Code provides that property may be transferred to a bankruptcy

estate. 11 U.S.C. § 541(a)(7). The trustee must then liquidate the property of the bankruptcy estate for the benefit of creditors. 11 U.S.C. § 704. Whether this federal authorization for the transfer of claims is superior to any state law to the contrary would be best determined after a trial on the merits of the claim. U.S. Const. art. VI, cl. 2.

*6 In a similar vein, the defendants suggest the doctrine of *in pari delicto* bars Turoff's claims. As the court held in its previous ruling on motions to dismiss in adversary proceeding no. 02-3583 and in the order entered June 3, 2004, denying the Ernst & Young motion for summary judgment in that adversary proceeding, the applicability of the doctrine of *in pari delicto* in this case cannot be determined until the facts have been found. Applying the Rule 12(b)(6) standards, the court previously held that it could not conclude that Turoff could not prove a set of facts for adverse actions which would make the *in pari delicto* doctrine inapplicable. Similarly, using summary judgment standards, there are genuine issues of material fact of whether there were adverse actions which would make the *in pari delicto* doctrine inapplicable. As the court discussed in the Rule 12(b)(6) motions in this case, developing case law questions whether the doctrine of *in pari delicto* should be applied to a Chapter 7 trustee. That case law may reach the Fifth Circuit. Without repeating that analysis in this decision, the court merely observes that the public policy consideration concerning the doctrine's applicability to a Chapter 7 trustee need not be considered if the court finds there were adverse actions that would make the doctrine not applicable on its own terms. Should the court find that there were no adverse actions, the question would then be ripe for adjudication.

In the above-referenced rulings on the motions to dismiss, the court determined that the banks' assignments did not create so-called Mary Carter agreements.

As there are genuine issues of material fact that must be decided, the court defers addressing any of these public policy issues until trial.

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Not Reported in B.R.

Page 6

Not Reported in B.R., 2004 WL 2074169 (Bkrtcy.N.D.Tex.)
(Cite as: Not Reported in B.R.)

Banks' Claims-Limitations

Jackson Walker also contends that the negligent misrepresentation and civil conspiracy claims are barred by limitations. Both claims must be filed within two years of the accrual of the claim. Tex. Civ. Prac. & Rem.Code § 16.003 (2002); *see Texas Am. Corp. v. Woodbridge Joint Venture*, 809 S.W.2d 299, 303 (Tex.App.-Fort Worth 1991, writ denied); *Stevenson v. Koutzarov*, 795 S.W.2d 313, 318-19 (Tex.App.-Houston [1st Dist.] 1990, writ denied). Texas recognizes the discovery rule, which tolls the accrual of the cause of action until "the plaintiff knows or, by exercising reasonable diligence, should know of the facts giving rise to the claim." *Wagner & Brown, Ltd. v. Horwood*, 58 S.W.3d 732, 734 (Tex.2001). However, in Texas, the statute of limitation for claims of negligent misrepresentation is not tolled by application of the discovery rule. *See Kansa Reinsurance Co., Ltd. v. Congressional Mortgage Corp. of Texas*, 20 F.3d 1362, 1372 (5th Cir.1994).

The court next considers the doctrine of fraudulent concealment:

Fraudulent concealment is an equitable doctrine that, when properly invoked, estops a defendant from relying on the statute of limitations as an affirmative defense to a ... claim when a defendant is under a duty to make disclosure, but fraudulently conceals the existence of a cause of action from the plaintiff. [citation omitted] To show entitlement to the estoppel effect of fraudulent concealment, the plaintiff must show: (1) the defendant had actual knowledge of the wrong; (2) a duty to disclose the wrong; and (3) a fixed purpose to conceal the wrong.

*7 *Casey v. Methodist Hosp.*, 907 S.W.2d 898, 903 (Tex.App.-Houston [1st Dist.] 1995, no writ). Texas recognizes that fraudulent concealment has an estoppel effect which ends "when a party learns of facts, conditions, or circumstances which would cause a reasonably prudent person to make inquiry, which, if pursued, would lead to discovery of the concealed cause of action. Knowledge of such facts is in law equivalent to knowledge of the cause of action." *Casey*, 907 S.W.2d at 904.

The Credit Facility closed on March 22, 1999. Any

claims of negligent misrepresentation or civil conspiracy pertaining to the Credit Facility belonged to the banks. Creditors filed involuntary bankruptcy petitions against Precept in January 2001. The court entered an order for relief on February 22, 2001. The commencement of the bankruptcy case tolled the running of limitations for actions owned by Precept but not for actions owned by non-debtors-here, the banks. 11 U.S.C. § 108(a). The post-petition assignment of the banks' claims to Turoff did not affect the application of limitations to the claims.

Unless tolled by the discovery rule or the fraudulent concealment doctrine, limitations ran March 22, 2001. Turoff filed the complaint on November 27, 2002. Because the discovery rule is not applicable to a negligent misrepresentation claim, limitations on that claim ran March 22, 2001, unless the fraudulent concealment doctrine is applicable.

The parties summarize their respective summary judgment evidence concerning when the banks learned of sufficient facts and circumstances for a reasonably prudent person to make inquiry. For purposes of analyzing a summary judgment motion, the court must draw inferences in favor of the party opposing the motion. Drawing such inferences, the court concludes that there are genuine issues of material fact concerning the applicable accrual date for the causes of action under the discovery rule as it applies to the civil conspiracy claim and under the fraudulent concealment doctrine as it applies to both the civil conspiracy claim and the negligent misrepresentation claim. Those facts must therefore be determined at trial before the court can determine if the claims are time-barred.

Banks' Claims-Aiding and Abetting Fraud

While questioning whether Texas recognizes a claim for aiding and abetting fraud separate and apart from a conspiracy claim, *see, e.g., Ernst & Young, L.L.P. v. Pacific Mut. Life Ins. Co.*, 51 S.W.3d 573, 583 n. 7 (Tex.2001), Jackson Walker moves for summary judgment dismissing the claim for lack of evidence that Precept committed fraud to obtain the March 22, 1999, Credit Facility or that

