

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Galt Capital, LLP and Bruce
Randolph Tizes,

Plaintiffs,

v.

Edward A. Seykota and Peter Roizen,

Defendants.

Civ. No. 2002-63

Edward A. Seykota,

Counterclaimant,

v.

Galt Capital, LLP and Bruce
Randolph Tizes,

Counterclaim Defendants,

and Sydney Stern,

Additional Counterclaim
Defendant.

Sydney Stern,

Counterclaimant,

v.

Edward A. Seykota,

Counterclaim Defendants.

ATTORNEYS:

Galt Capital v. Seykota
Civ. Nos. 2002-63
Memorandum
page 2

A. Jeffrey Weiss, Esq.

St. Thomas, U.S.V.I.
For the plaintiffs,

Boyd L. Sprehn, Esq.

St. Thomas, U.S.V.I.
For defendant Seykota,

Michael C. Dunston, Esq.

St. Thomas, U.S.V.I.
For defendant Peter Roizen,

Karin A. Bentz, Esq.

St. Thomas, U.S.V.I.
For counterclaimant Stern.

MEMORANDUM

Defendant Peter Roizen ["Roizen"] has moved to dismiss the complaint of plaintiffs Galt Capital, LLP ["Galt Capital"] and Bruce Randolph Tizes ["Tizes"] [collectively "plaintiffs"] on the ground that the complaint fails to state a claim upon which relief can be given.¹ In addition, plaintiffs have moved to sever the respective counterclaims of defendant Edward A. Seykota ["Seykota"] and Sydney Stern ["Stern"]. For the reasons set forth below, I will deny Roizen's motion to dismiss and will grant in part and deny in part plaintiffs' motion to sever.

I. FACTS

¹ Roizen's motion to dismiss actually cites Rule 12(b)(1) of the Federal Rules of Civil Procedure, which relates to the lack of subject matter jurisdiction. As Roizen's pleadings, however, make no reference to this Court's lack of subject matter jurisdiction, but instead alleges that plaintiffs have failed to state a claim upon which relief can be granted, I will treat Roizen's motion as a Rule 12(b)(6) pleading rather than a Rule 12(b)(1) motion.

In November 2000, Seykota and Tizes entered into a partnership agreement to form Galt Capital, an investment advisor company. In September 2001, Galt Capital hired Roizen to develop investment software, known as Technical Tools 3 ["TT3"], for the company. Sometime later that year, Seykota and Tizes had a falling out, which culminated in Seykota allegedly abandoning Galt Capital in breach of the partnership agreement. Following this breach, Seykota and Tizes entered into a separation agreement that was intended to resolve all claims and disputes between them. At some unknown time during this period, Roizen delivered the TT3 software to Seykota. Plaintiffs now allege that Seykota has failed to comply with his obligations under the separation agreement and has sued him for specific performance, breach of separation agreement, breach of partnership agreement, declaratory relief, breach of fiduciary duty, and conversion. In addition, plaintiffs have brought claims for breach of contract and conversion against Roizen for his alleged failure to provide them with the TT3 software. Seykota, in turn, has filed counterclaims against plaintiffs and also brought claims against Stern, his ex-girlfriend, who has also filed claims against Seykota. This Court has diversity jurisdiction under section

22(a) of the Revised Organic Act of 1954² and 28 U.S.C. § 1332.

II. DISCUSSION

A. Roizen's Motion to Dismiss

In considering Roizen's motion to dismiss under Rule 12(b)(6), the Court "may dismiss [the] complaint if it appears certain the plaintiff[s] cannot prove any set of facts in support of [their] claims which would entitle [them] to relief." See *Bostic v. AT&T of the Virgin Islands*, 166 F. Supp. 2d 350, 354 (D.V.I. 2001) (internal quotations omitted); see also *Julien v. Committee of Bar Examiners*, 34 V.I. 281, 286, 923 F. Supp. 707, 713 (D.V.I. 1996); FED. R. CIV. P. 12(b)(6). The Court accepts as true all well-pled factual allegations, drawing all reasonable inferences in the plaintiff's favor. See *Bostic*, 166 F. Supp. 2d at 354; *Julien*, 34 V.I. at 286-87, 923 F. Supp. at 713.

As noted above, plaintiffs filed claims of breach of contract (Count VI) and conversion (Count VIII) against Roizen for his alleged failure to turn over the TT3 software to them. Roizen has moved to dismiss these claims on two grounds. Roizen first contends that he satisfied his contract obligations to Galt

² 48 U.S.C. § 1612(a). The complete Revised Organic Act of 1954 is found at 48 U.S.C. §§ 1541-1645 (1995 & Supp.2001), reprinted in V.I. CODE ANN. 73-177, Historical Documents, Organic Acts, and U.S. Constitution (1995 & Supp.2001) (preceding V.I. CODE ANN. tit. 1).

Capital by delivering the software to Seykota, who is or was a partner. (See Compl. ¶ 33 ("Upon information and belief, Seykota received said 'TT3' software from defendant Roizen and converted that software for his own use.")) Roizen next argues that the separation agreement between plaintiffs and Seykota effectively discharged him of his contractual duties. In particular, Roizen notes that the separation agreement provided that Galt Capital and Tizes "own no right, title, or interest in the 'TT3' software written by Seykota and Peter Roizen including any source codes and versions thereof." Although I am sympathetic to Roizen's argument and plight, at this preliminary stage I must deny his motion to dismiss.

The contract between Roizen and Galt Capital required Roizen to deliver all "property, tangible, intellectual or otherwise, created by . . . Roizen for Galt Capital, LLP, or pursuant to the Galt work, or derived somehow therefrom." Paragraph 59 of the complaint specifically alleges that Roizen failed to deliver not only the TT3 software, but "the source codes, and the other tangible and intangible intellectual property created or derived, directly or indirectly, as a result of his work for or on behalf of Galt" as well. Even assuming that Roizen provided Seykota with the software, I cannot determine whether Roizen delivered everything due under the contract to Seykota or, instead, whether

plaintiffs intended to relinquish all proprietary interests in the software. For example, the Roizen contract granted Galt Capital a proprietary interest in "[a]ll property, tangible or intellectual or otherwise" created by Roizen. Plaintiffs subsequently released their interest to the TT3 software, "including any source codes and versions thereof," in the Seykota separation agreement. Absent evidence outside the pleadings, I cannot reconcile the difference in language between these two contracts or whether Roizen has complied with his contractual obligations, nor can I determine that plaintiffs have failed to state a claim against Roizen. See *Bostic*, 166 F. Supp. 2d at 354; *Julien*, 34 V.I. at 286, 923 F. Supp. at 713. As much as it seems likely that Roizen does not belong in this lawsuit, I reluctantly must deny his motion. I will, however, urge plaintiffs to resolve their dispute with Roizen quickly for his sake and their own.³

B. Plaintiffs' Motion to Sever Seykota and Stern's Cross-Claims

Seykota responded to plaintiffs' complaint against Seykota with an answer and counterclaims against plaintiffs as well as joining Stern as a third party defendant per Rules 18 and 19 of

³ Although plaintiffs' have survived Roizen's motion to dismiss, it is unlikely that they could survive a motion for summary judgement and, if so, they will be required to reimburse Roizen's attorneys fees and costs pursuant to 5 V.I.C. § 541.

the Federal Rules of Civil Procedure. In particular, Seykota made the following allegations against Stern: conversion (Count III), tortious appropriation of name (Count IV), and wrongful possession of condominium (Count V). Stern, in turn, filed ten counterclaims against Seykota.⁴ Plaintiffs have moved to sever the claims between Seykota and Stern on the grounds that they are not proper counterclaims under Rule 13, they are not claims requiring joinder, and the nature of the claims would only serve to confuse the jury. Having reviewed the plaintiffs' argument, I concur with their assessment in part.

Seykota's claim of wrongful possession of the condominium and all of Stern's claims do not arise out of the same acts or transactions related to the partnership/separation agreement and the Roizen contract. These counterclaims arise out of Seykota and Stern's personal relationship. Accordingly, these claims do not even qualify for permissive joinder under Rule 20(a), much less would they qualify as compulsory counterclaims. Moreover, these identical claims are the subject of another suit in this Court between Seykota and Stern. See *Stern v. Seykota*, Civ. No. 2002-134.

⁴ Stern has sued Seykota for: breach of contract, unjust enrichment, fraudulent misrepresentation, detrimental reliance, equitable ownership, unjust enrichment (condo), breach of contract (condo), negligent infliction of emotional distress, intentional infliction of emotional distress, and slander.

Finally, as plaintiffs correctly point out, Rule 21 permits me to sever claims in the interest of judicial efficiency. See FED. R. CIV. PRO. 21 ("Parties may be dropped or added by order of the court . . . of its own initiative at any stage of the action and on such terms that are just."). Factors I can consider when determining whether to sever a party are:

- (1) whether the issues sought to be tried separately are significantly different from one another,
- (2) whether the separable issues require the testimony of different witnesses and different documentary proof,
- (3) whether the party opposing the severance will be prejudiced if it is granted, and
- (4) whether the party requesting the severance will be prejudiced if it is not granted.

Official Comm. of Unsecured Creditors v. Shapiro, 190 F.R.D. 352, 355 (E.D. Pa. 2000). Clearly, plaintiffs have satisfied each of these factors. It is evident that the subject matter of Seykota's third-party claim, counterclaim Count V, is significantly different from the plaintiffs' dispute with Seykota. His Count V and all of Stern's claims against him will require different witnesses and evidence. Moreover, severing these counterclaims will not prejudice Seykota and Stern because these same issues are the subject matter of another suit before this Court. Finally, allowing these counterclaims to remain in this case would prejudice plaintiffs by distracting from the basic partnership dispute and, likely, confusing the jury. Therefore, I will sever Count V of Seykota's counterclaim against

Galt Capital v. Seykota
Civ. Nos. 2002-63
Memorandum
page 9

Stern and all of Stern's counterclaims against Seykota.⁵ Stern will remain as a counterclaim/third party defendant on Counts III and IV of Seykota's counterclaim, however, as these counts relate to the dispute between plaintiffs and Seykota.

An appropriate order follows.

ENTERED this 27th day of November, 2002.

For the Court

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
WILFREDO MORALES
Clerk of the Court

By: _____/s/_____
Deputy Clerk

⁵

I will consolidate these claims with *Stern v. Seykota*, Civ. No. 2002-134.

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

**Galt Capital, LLP and Bruce
Randolph Tizes,**)

Plaintiffs,)

v.)

Edward A. Seykota and Peter Roizen,)

Defendants.)

Civ. No. 2002-63

Edward A. Seykota,)

Counterclaimant,)

v.)

**Galt Capital, LLP and Bruce
Randolph Tizes,**)

Counterclaim Defendants,)

and Sydney Stern,)

Additional Counterclaim
Defendant.)

Sydney Stern,)

Counterclaimant,)

v.)

Edward A. Seykota,)

Counterclaim Defendants.)

ATTORNEYS :

A. Jeffrey Weiss, Esq.
St. Thomas, U.S.V.I.
For the plaintiffs,

Boyd L. Sprehn, Esq.
St. Thomas, U.S.V.I.
For defendant Seykota,

Michael C. Dunston, Esq.
St. Thomas, U.S.V.I.
For defendant Peter Roizen,

Karin A. Bentz, Esq.
St. Thomas, U.S.V.I.
For counterclaimant Stern.

ORDER

For the reasons set forth in the foregoing Memorandum of even date, it is hereby

ORDERED that defendant Peter Roizen's motion to dismiss (Docket Nos. 15 and 51) is **DENIED**; it is further

ORDERED that plaintiffs' motion to sever Count V of defendant Edward Seykota's counterclaim and all claims of Sydney Stern's counterclaim (Docket No. 33) is **GRANTED**; it is further

ORDERED that plaintiffs' motion to sever Counts III and IV of defendant Edward Seykota's counterclaim (Docket No. 33) is **DENIED**; and it is further

ORDERED that Count V of defendant Seykota's counterclaim and all claims of Stern's counterclaim will be consolidated with *Stern v. Seykota*, Civ. No. 2002-134.

ENTERED this 27th day of November, 2002.

For the Court

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
WILFREDO MORALES
Clerk of the Court

By: _____/s/_____
Deputy Clerk

Copies to:

Hon. G.W. Barnard
Mrs. Jackson
A. Jeffrey Weiss, Esq.
Boyd L. Sprehn, Esq.
Michael C. Dunston, Esq.
Karin A. Bentz, Esq.
Michael A. Hughes, Esq.