

NOT FOR PUBLICATION

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

)	
)	
AIRLINES REPORTING CORPORATION,)	
)	
Plaintiff,)	Civ. No. 2003-146
)	
v.)	
)	
ANGELA BELFON a/k/a ANGELA)	
HEDRINGTON, RONALD BELFON AND VERNE)	
DAVID,)	
)	
Defendants.)	

MEMORANDUM

This matter comes before the Court on the motion to dismiss of defendants Verne David and Ronald Belfon arguing that they have individual immunity from the liabilities of a corporation and that the plaintiff has not met Rule 9's particularity requirements in pleading fraud.

I. FACTUAL AND PROCEDURAL BACKGROUND

Airlines Reporting Corporation ["ARC"] issues blank ticket stock and other traffic documents to travel agents to be used as tickets for air travel. ARC also serves as an intermediary through which travel agents report sales and remit proceeds to the airline carriers.

Angela Belfon is a shareholder, president and director of

the travel agency World Wide Travel Inc. ["WWT"] and a signatory on all WWT bank accounts. ARC alleges that Ronald Belfon, vice president, served as a full time managerial employee of WWT. ARC also alleges that Verne David, WWT's treasurer, served as finance and administration director, was actively involved in the financial management, and was a signatory on several WWT bank accounts.

ARC entered into an Agent Reporting Agreement ["ARA"] with WWT, which authorized the travel agency to issue ARC traffic documents. Angela Belfon was the only officer who signed the ARA. Under the ARA, WWT agreed that the proceeds of the ticket sales were the property of the carriers and were to be held in trust in a designated bank account until properly accounted for. WWT designated account no. 193-331879 at Banco Popular ["WWT escrow account"] for this purpose and allowed ARC's bank to issue direct electronic debits against the account.

ARA also required WWT to submit a sales reports at the end of each week listing the traffic documents issued to travelers for that seven-day period. In each weekly sales report, WWT was to include a settlement authorization form notifying ARC of the maximum amount of money that could be withdrawn from the WWT escrow account for that period.

In June 2001, ARC first exercised its right under the ARA to

audit WWT's ticket records because it was receiving the weekly sales reports late and those reports were listing sales that were outside the relevant seven-day period. As a result of the June 2001 audit, ARC discovered that WWT had failed to report \$283,577.66 in sales of their traffic documents. Ms. Belfon explained that the errors were inadvertent and provided a certified check to cover the unreported sales. ARC now alleges that this was a fraudulent representation meant to conceal WWT's conversion of ARC's funds for their own personal gain. ARC also now alleges that Ms. Belfon fraudulently issued the certified check because she knew it would cause an overdraft on the designated account.

ARC alleges that in April or May of 2002, WWT again began to convert sales proceeds for other purposes. After further reporting irregularities, ARC notified WWT of their intention to perform a second audit. Upon this notice and against ARC's explicit instructions, WWT sent several weekly sales reports which contained hundreds of previously unreported sales in an attempt to rectify their inadequate bookkeeping before the second audit. After the second audit, ARC's agents asked for immediate payment of the \$12,642.99 in unreported sales found during the audit and Ms. Belfon refused to pay. They also asked for the immediate return of all ticket stock and plates and were again

refused. On August 5, 2002, ARC notified WWT of the automatic termination of their agreement, unless these demands were met.

On August 7, 2002, ARC attempted to collect on the several weekly sales reports which had contained hundreds of out-of-period sales. Banco Popular denied these requests for insufficient funds. ARC alleges that WWT wrongfully instructed Banco Popular not to honor those settlement authorization forms.

On August 8, 2002, WWT filed a voluntary petition under Chapter 11 of the Bankruptcy Code and became a Debtor in Possession ["DIP"]. ARC alleges that while operating as a DIP, WWT converted over \$400,000.00 in sales proceeds from ARC traffic documents from the escrow account to use for their personal purposes, including financing their Chapter 11 operations.

On August 29, 2003, ARC filed this action against the officers of WWT, namely, Angela Belfon, Ronald Belfon and Verne David, as individuals. ARC claims breach of fiduciary duty in Count I, conversion in Count II, fraud in Count III, common law conspiracy to commit fraud in Count IV, and breach of corporate fiduciary duty in Count V. ARC sues only the Belfons for tortious interference with contract in Count VI. Angela Belfon has filed an answer denying all claims. Ronald Belfon and Verne

David have now moved for dismissal.¹

II. DISCUSSION

A. Whether Count I fails to state a claim against defendants Verne David and Ronald Belfon

In Count I, ARC claims that the ARA's execution and the designation of the WWT escrow account created an *express trust relationship* between ARC and WWT. ARC further alleges that the defendants knowingly caused WWT to breach its fiduciary obligations to ARC by converting the trust funds, *i.e.*, the sale proceeds, to other purposes. ARC's asserts that Verne David and Ronald Belfon are personally liable for this breach of fiduciary duty.

Defendants David and Ronald Belfon move to dismiss the claim against them as individuals. They contend that WWT was not a fiduciary of ARC in the express trust agreement under the terms of the ARA. Defendants claim that since there was no express trust relationship, only the corporate entity, WWT, is a party to the contract. Defendants cite 13 V.I.C. § 344(a) as barring suit against them as officer's for WWT's liability regarding the ARA.

¹ ARC has moved for leave to file supplemental information and authority in opposition to this motion to dismiss. Ronald Belfon has opposed this motion and asked that this Court strike the additional filings, sanction the plaintiff, and award him costs of \$300.00. Because I deny the defendants' motion to dismiss without considering these additional filings, I also deny ARC's motion for leave to supplement.

They further contend that even if the claims against them were not barred by statute, they should still be dismissed because only WWT's president Angela Belfon signed the ARA.

In determining a Rule 12(b)(6) motion to dismiss, "the material allegations of the complaint are taken as admitted," and the Court must liberally construe the complaint in plaintiff's favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) (citing Fed.R.Civ.P. 8(f) and *Conley v. Gibson*, 355 U.S. 41 (1957)). All reasonable inferences are drawn in favor of plaintiff. *Sturm v. Clark*, 835 F.2d 1009, 1011 (3d Cir. 1987). Thus the Court cannot dismiss Count I "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46; *Piecknick v. Commonwealth of Pennsylvania*, 36 F.3d 1250, 1255 (3d Cir. 1994).

Applying these rules, I cannot dismiss Count I because plaintiff has adequately stated a claim for breach of trust against defendants Verne David and Ronald Belfon as individuals. A trust is "a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it." RESTATEMENT (SECOND) OF TRUSTS § 2 (1959).

Taking the plaintiff's material allegations as true, as I must, it is clear that ARC could prove facts establishing that the ARA manifested an intent that WWT hold the sales proceeds in trust. See *In re Penn Central Transportation Company*, 486 F.2d 519, 527 (3d Cir. 1973) (finding an analogous relationship to be an express trust). An officer of a corporation "who knowingly causes the misappropriation of trust property by the corporation is personally liable for participation in the breach of trust committed by the corporation." *In Re Folliard*, 10 B.R. 875, 876 (D. Md. 1981) (citing 4 Scott on Trust s 326.3 at 2563 (3d ed. 1967)); see also *Forastieri v. Eastern Airlines, Inc.*, 1983 U.S. Dist. Lexis 15698 (D.P.R. 1983). Thus, plaintiff could prove that Ronald Belfon and Verne David knowingly caused the misappropriation of ARC's funds held in trust by WWT and as a result may be personally liable for WWT's breach of an express trust agreement.

B. Whether Counts II-VI should be dismissed against defendants David and Belfon pursuant to Rule 9(b)

In Counts I-VI of the complaint, ARC refers to WWT officers Angela Belfon, Ronald Belfon, and Verne David collectively as the "Defendants." Count III alleges that the "Defendants" committed certain fraudulent acts against ARC. Count IV alleges that the defendants conspired to defraud ARC. On Counts III and IV, ARC

asks that judgment be entered against each defendant "jointly and severally." (Compl., ¶ 128, 135.) Defendants argue that Counts II-VI are deficient in that they fail to attribute particular fraudulent acts to particular defendants, but instead "lump" the co-defendants together. (Def.'s Mot. Dism. at 4-5.) Defendants further contend that Rule 9(b) requires that ARC allege in the complaint what each individual defendant officer did that was fraudulent. I disagree.

Rule 9(b) provides that: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." In deciding whether this particularity requirement has been satisfied, a court must primarily determine "how much detail is necessary to give adequate notice to an adverse party and enable him to prepare a responsive pleading." 5 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1298 (2003). I find that ARC has given the three WWT officers adequate notice. ARC has alleged that all three WWT officers conspired and participated in the alleged fraud. Only WWT employees, like the three defendants named in this action, would know who participated in the alleged fraud. See *Curry v. Cayman Resources Corp.*, 595 F. Supp. 1364, 1372 (D. Ga. 1984) (relaxing 9(b)'s requirements when defendant is a director and controlling person of a small corporation). I will not require

ARC to plead how each participated without the benefit of discovery. See *In re Craftmatic Securities Litigation v. Kraftshow*, 890 F.2d 628, 645 (3d Cir. 1989) ("[p]articularly in cases of corporate fraud, plaintiffs cannot be expected to have personal knowledge of the details of corporate internal affair . . .").

At the hearing, defendants also argued that ARC has failed to comply with the Third Circuit Court of Appeals' requirements in *Shapiro v. UJB Financial Corp.* 964 F.2d 272 (3d Cir. 1992). In *Shapiro*, the Court of Appeals acknowledged that even a relaxed 9(b) standard required that when fraud was alleged upon information and belief, the plaintiff must state that the necessary information lies in defendants' exclusive control and provide a statement of facts upon which the belief is proffered. *Id.* at 285. Where ARC's complaint does make certain allegations upon information and belief, it does clearly state the supporting facts but it does not explicitly state in the pleadings that the necessary information lies in defendants' exclusive control. In this factual context, I will not require ARC to include such boilerplate language because it is clear by implication from the context that the necessary information lies in the defendant officers's control. Therefore, I will deny the motion to dismiss. ARC has given the defendants adequate notice of its

allegations of fraud and satisfied Rule 9(b).

III. CONCLUSION

I will deny the motion to dismiss because the plaintiff has adequately stated a claim in Count I and has met the requirements in pleading fraud in Counts II-VI.

ENTERED this 26th day of April, 2004.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

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ATTEST:
WILFREDO F. MORALES
Clerk of the Court

By: _____
Deputy Clerk

Copies to:
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