IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MARK DOTTORE, *et al.*	)	**CASE NO. CV 10 741375**
	)	
Plaintiffs,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	**JOURNAL ENTRY**
	)	
VORYS, SATER, *etc.*, *et al.*	)	
	)	
Defendants.	)	

John P. O'Donnell, J.:

STATEMENT OF THE CASE

On March 7, 2011, the plaintiffs filed an amended complaint for legal malpractice, breach of contract, breach of fiduciary duty, promissory estoppel, "breach of confidentiality,"[1] fraud, civil conspiracy, spoliation of evidence and engaging in a pattern of corrupt activity. The plaintiffs are Mark Dottore, Dottore Companies, LLC and Dottore Brothers, LLC. The defendants include the law firm of Vorys, Sater, Seymour and Pease, LLP and seven of the firm's lawyers: Anthony J. O'Malley, Anthony O. Calabrese, III, Drew T. Parobek, John Winship Read, Bryan J. Farkas, Joseph D. Lonardo and David W. Hardymon. (The amended complaint refers to this group of seven individual defendants as the "Vorys Defendants."[2]) The other defendants are PNC Financial Services Group, Inc. and Kevin T. Duffy, a lawyer who worked for PNC and has since become an attorney at Vorys.

Defendants Vorys, O'Malley, Parobek, Lonardo and Hardymon filed a counterclaim on March 21, 2011. The counterclaim asserts a cause of action for declaratory judgment that all of

[1] Page 16 of the amended complaint.
[2] Am. comp., p. 3, ¶37. The court will refer in this entry to the lawyers and law firm together as Vorys, unless context shows otherwise.

the plaintiffs' causes of action against Vorys and the four lawyers[3] are time-barred by the applicable statute of limitations.

The following motions are now fully briefed and decided by this entry: PNC and Duffy's motion to dismiss the amended complaint against them; Vorys, O'Malley, Parobek, Lonardo and Hardymon's motion for judgment on the pleadings on the claims for spoliation and engaging in a pattern of corrupt activity; Vorys, O'Malley, Parobek, Lonardo and Hardymon's motion for summary judgment on the remaining claims against them; Calabrese's motion for summary judgment; and the plaintiffs alternative motion pursuant to Rule 56(F)[4] of the Ohio Rules of Civil Procedure to conduct further discovery before having to oppose the pending summary judgment motions.

STATEMENT OF THE FACTS

General allegations in the amended complaint against Vorys, O'Malley, Parobek, Lonardo, Hardymon and Calabrese

The plaintiffs[5] were clients of Vorys and its lawyers. The amended complaint does not allege a date when the plaintiffs became Vorys clients, but alleges that Vorys "never told Plaintiffs that the scope of their representation of Plaintiffs was ever limited to a particular matter"[6] and that the representation continued through November 5, 2010.

The amended complaint describes several instances of alleged wrongful conduct by Vorys and its lawyers toward the plaintiffs. First, the plaintiffs complain that Vorys, acting through the various individual defendants, "engaged in a pattern of corrupt activities with

[3] Defendant Calabrese no longer works at Vorys and is represented by separate counsel. Defendants Read and Farkas were not parties to the original complaint and the docket is devoid of any request by the plaintiffs for service of the amended complaint on Read and Farkas. Accordingly, they have not yet been served and have not entered appearances.

[4] Referred to incorrectly in the caption of the plaintiffs' May 2, 2011, motion as Rule 56(C).

[5] paragraphs describing the plaintiffs as an individual and two limited liability companies.

[6] Am. comp., p. 3, ¶40.

various Cuyahoga County officials to the [detriment] of their clients, including plaintiffs."[7] As an example of these "corrupt activities" the amended complaint alleges that Vorys hired sons of two Cuyahoga County commissioners, Jimmy Dimora and Peter Lawson Jones, who "did little or no work"[8] for Vorys but were generously paid, with their wages then being turned over to the commissioners as bribes. According to the plaintiffs, to pay the cost of these bribes an expense for which Vorys was supposedly not getting adequate value in the form of meaningful work from the sons – the Vorys lawyers "overbilled and included unauthorized and improper expenses in the bills to several clients, including plaintiffs."[9]

The amended complaint alleges that this conduct made Vorys and its lawyers targets of "the federal corruption probe"[10] in Cuyahoga County. Because they were targets, the Vorys lawyers met among themselves and with others, including commissioner Jimmy Dimora, and then destroyed or attempted to destroy "all documents confirming these meetings."[11] The amended complaint does not allege the subject of these meetings, but the plaintiffs do claim that because Vorys and its lawyers engaged in these "corrupt activities"[12] the office of the United States Attorney for the Northern District of Ohio subpoenaed the plaintiffs' "legal files,"[13] causing the plaintiffs to incur legal fees, to lose business, and to sustain damage to their reputations. In particular, the plaintiffs claim that Vorys should have notified them immediately when the federal subpoena for the plaintiffs' "client files"[14] was served on Vorys in February, 2009, and that furthermore Vorys knew that the corruption probe "involved issues

[7] Id., p. 4, ¶46.
[8] Id., p. 4, ¶54.
[9] Id., p. 4, ¶53.
[10] Id., p. 5, ¶56.
[11] Id., p. 5, ¶59 and 60.
[12] Id., p. 5, ¶63 and 64.
[13] Id.
[14] Id.,p. 11, ¶125.

relating to the conduct"[15] of its lawyers, so that "the moment allegations arose out of the corruption probe, an actual conflict of interest existed between"[16] Vorys and the plaintiffs, yet Vorys never made the plaintiffs aware of the conflict. According to the plaintiffs, those failures by Vorys amounted to a breach of Vorys's "ethical and fiduciary obligation"[17] to them and a breach of oral and written contracts requiring Vorys to notify the plaintiffs "immediately upon receiving a request for their confidential and/or privileged documents."[18]

Not only did Vorys fail the plaintiffs by never telling them about the subpoena and Vorys's own position as a subject of the federal investigation, but Vorys's response to the subpoena – retaining outside counsel to review the plaintiffs' files and advise Vorys on what should and should not be produced in response to the subpoena – also wronged the plaintiffs because Vorys's counsel from the law firm of Walter & Haverfield "obviously reviewed privileged materials"[19] in preparing a privilege log created as a partial response to the subpoena, and the plaintiffs never gave permission to Vorys to let Walter & Haverfield see privileged documents.

As other examples of corrupt activities, the plaintiffs allege that Vorys demanded "free gifts and services"[20] like meals, alcohol and sports tickets from the plaintiffs that Vorys used to "entertain its other clients, potential clients, politicians and judges."[21]

The amended complaint also alleges that Vorys intentionally "billed plaintiffs for amounts excessive as to amount of time and rate,"[22] "billed plaintiffs for work that was not

[15] Id., p. 11, ¶128.
[16] Id., p. 11, ¶129.
[17] Id., p. 11, ¶132.
[18] Id., p. 11, ¶133.
[19] Id., p. 13, ¶151.
[20] Id., p. 5, ¶65.
[21] Id.
[22] Id., p. 15, ¶170.

performed,"[23] and "overstated the time for work performed."[24] By submitting these allegedly fraudulent bills to the plaintiffs by U.S. mail, Vorys, according to the amended complaint, committed the federal crime of mail fraud.

General allegations in the amended complaint against Vorys, PNC and Duffy

PNC and Duffy are included as defendants because they allegedly conspired with Vorys "to illegally steal information from plaintiffs."[25] This claim has its genesis in a 2004 claim against PNC (then known as National City Bank) by the plaintiffs for unpaid fees in connection with a receivership. The plaintiffs approached Vorys to represent them in the dispute with PNC. What the plaintiffs did not know and what Vorys allegedly did not tell them was that PNC was also a Vorys client. The plaintiffs, unaware of this divided loyalty, were fraudulently induced by Vorys, conspiring with PNC, to accept a low settlement amount in exchange for pledges of future paid engagements from PNC's workout department. However, because the plaintiffs accepted a "substantially reduced fee,"[26] PNC was unimpressed with the plaintiffs' negotiating skills and never hired them again.

Then, in 2005, PNC obtained judgments against the plaintiffs on two cognovit notes totaling about $1 million. After getting the judgments, PNC received from Vorys – specifically Parobek – information from the plaintiffs' separate client files about where the plaintiffs had bank accounts. PNC used that information to file bank attachments in aid of execution on the cognovit judgments. Besides alleging that Vorys's conduct in giving their information to PNC was tortious and a breach of contract, the plaintiffs also complain that Vorys breached a

[23] Id., p. 15, ¶173.
[24] Id., p. 15, ¶172.
[25] Id., p. 17, ¶204.
[26] Id., p. 6, ¶74.

fiduciary duty by not warning them of the "impending sweeping of accounts."[27] Because Vorys did not alert the plaintiffs that their bank accounts were about to be attached – which, presumably, would have given the plaintiffs the chance to empty the accounts first – the money was attached, causing the plaintiffs to experience cash flow difficulty that made them "abandon certain projects"[28] and damaged their relationships with their other banks.

Besides tort and contract claims against Vorys, these allegations are also pled to support a cause of action against Duffy and PNC for civil conspiracy. The other claim against Duffy and PNC – as well as Vorys – is for spoliation of evidence. To support that claim, the plaintiffs allege that PNC and Vorys, knowing the plaintiffs were likely to sue them, each destroyed files demonstrating the wrongful exchange of information, *i.e.* the civil conspiracy, thereby impairing the plaintiffs' ability to prove their claims.

Finally, the amended complaint pleads a breach of contract claim against Vorys for failing to honor an agreement that was made between Vorys and the plaintiffs after they learned that it was Vorys that gave PNC information leading to the bank attachments. By the plaintiffs' telling, once they found out that Vorys had helped PNC find their money they threatened Vorys with a lawsuit. Because of that, O'Malley and Calabrese met with plaintiff Mark Dottore to try to iron out the situation. At the meeting, O'Malley and Calabrese acknowledged that Parobek was wrong to use one client's information against another and admitted that the plaintiffs had a valid claim against Vorys for damages. Ultimately, the plaintiffs agreed not to pursue their claim in exchange for several promises from Vorys. First, O'Malley promised that "Parobek's theft of [plaintiffs'] confidential information would be addressed harshly."[29] Second, Vorys

[27] Id., p. 7, ¶87.
[28] Id. p. 7, ¶89.
[29] Id., p. 9, ¶111.

agreed that the plaintiffs' confidential information would always be "completely protected"[30] and "would not be released without plaintiffs' express consent."[31] Last, Vorys agreed that the plaintiffs would be "immediately notified of any attempt to gain their"[32] information. Despite these promises, according to the amended complaint, Vorys never punished Parobek and, when the federal subpoena came, Vorys broke the other two promises.

Statute of limitations evidence

While PNC's motion to dismiss and Vorys's motion for judgment on the pleadings will be decided based only on the allegations in the amended complaint, the Vorys and Calabrese motions for summary judgment will also entail a consideration of the evidence. That evidence includes the affidavit of Anthony O'Malley. O'Malley's affidavit asserts, among other things, that Vorys's only representation of any of the plaintiffs after 2007 was for plaintiff Mark Dottore as receiver's counsel in *Variable Annuity Life Insurance Co. v. 113 St. Clair Properties, et al*., a case where Dottore was appointed as a receiver. None of the plaintiffs' claims for which Vorys seeks summary judgment arise from that representation.

Also in evidence are the dockets in the bank attachment cases, which show that the attachments were complete by the middle of 2005.

There is evidence that the plaintiffs were well aware before November, 2009 (more than one year before the complaint here was filed) that Vorys had let Walter & Haverfield review their files to help decide what documents should be produced under the federal subpoena and that the plaintiffs knew that the disputed privilege log had been provided in response to the subpoena.

[30] Id., p. 9, ¶113.
[31] Id.
[32] Id., p. 9, ¶115.

In opposition to the motions for summary judgment the plaintiffs have produced the affidavit of Mark Dottore. Dottore asserts that he and the other plaintiffs "continued to call Vorys Defendants for legal advice on various matters and were last billed on November 5, 2010,"[33] *i.e.*, after this lawsuit was filed.

Other evidence produced by the parties to support or oppose summary judgment will be described as necessary in the rest of this journal entry.

LAW AND ARGUMENT

The first seven causes of action against Vorys are subsumed into one action for legal malpractice

Vorys's motion for summary judgment on the first seven counts of the amended complaint argues that all of those counts are really a single cause of action for legal malpractice and the legal malpractice claim is time-barred by the applicable one-year statute of limitations.

The elements of a legal malpractice action are (1) an attorney-client relationship giving rise to a duty, (2) a breach of that duty, and (3) damages proximately caused by the breach. *Krahn v. Kinney*, 43 Ohio St.3d 103, 105 (1989). The duty of care is to exercise the knowledge, skill and ability ordinarily possessed and exercised by similarly situated members of the legal profession. *Roselle v. Nims*, 10th Dist. No. 02AP-423, 2003-Ohio-630, ¶21. An action against one's attorney for damages resulting from the manner in which the attorney represented the client constitutes an action for malpractice within the meaning of the legal malpractice statute of limitations regardless of whether predicated upon contract or tort or whether for indemnification or direct damages. *Endicott v. Johrendt*, 10th Dist. No. 99AP-935, 2000 Westlaw 796576 (June 22, 2000). In determining which limitation period will apply, courts must look to the actual nature or subject matter of the case, rather than to the form in

[33] Dottore affidavit, exhibit 3 to the plaintiff's 05/02/2011 brief in opposition to summary judgment, ¶18.

which the action is pleaded. The grounds for bringing the action are the determinative factors, the form is immaterial. *Hambleton v. R.G. Barry Corp.*, 12 Ohio St. 3d 179, 183 (1982). So, if the duties that Vorys allegedly breached arose from the attorney-client relationship then an allegation that any of those duties has been breached is a claim for legal malpractice subject to the one-year statute of limitations set forth in section 2305.11 of the Ohio Revised Code.

The amended complaint's first cause of action is denominated by the plaintiffs as a legal malpractice claim and is clearly subject to the one-year statute of limitations.

The second cause of action is for the breach of "several contractual obligations"[34] that Vorys and its lawyers allegedly owed to the plaintiffs. The statement of facts in support of the existence of these contractual obligations apart from Vorys's obligations owed to the plaintiffs by virtue of the attorney-client relationship is the same statement of facts used to support count one's legal malpractice claim, namely: the unauthorized disclosure of confidential information to PNC, the failure to advise of a conflict of interest when mediating the plaintiffs' dispute with PNC, the unauthorized disclosure of confidential information to Walter & Haverfield and the production of confidential information to the United States Attorney in response to the subpoena. Vorys was only in a position to commit any of these wrongs by serving as legal counsel for the plaintiffs. If there were no attorney-client relationship then Vorys never would have possessed the plaintiffs' confidential information to give to PNC, Walter & Haverfield and the federal grand jury, and never would have been in a potential position of conflict between the plaintiffs and PNC. Because of that, the contractual duties that the plaintiffs claim Vorys owed and breached all arise from the attorney-client representation and are claims for legal malpractice subject to the one-year statute of limitations.

[34] Am. comp., p. 15, ¶181.

This is true even in the face of Dottore's averments in his affidavit that separate contracts existed in the form of 1) Calabrese's undated handwritten letter of apology and 2) O'Malley's assurance that any statute of limitations for a claim by the plaintiffs against Vorys because Parobek gave confidential information to PNC would be tolled if the plaintiffs kept their legal business with Vorys. As to the first, Calabrese's letter[35] can hardly be called a contract by offering a reassurance to the plaintiffs that Vorys would abide by a duty that was already owed and not disclose privileged information. As to the second, the plaintiffs knew they had a claim for malpractice against Vorys when O'Malley assured them that a settlement of that claim that included Dottore keeping legal business at Vorys would toll the statute of limitations on the claim. But O'Malley's opinion on whether the statute of limitations would be tolled does not have any weight – if suit were filed, that decision would ultimately be the court's – and the plaintiffs could never justifiably rely on an adverse party's representation about the effect that continued collaboration would have on the expiration of the applicable limitations period. Additionally, both so-called contracts would never have existed if the plaintiffs and Vorys did not have an attorney-client relationship.

Since these contract claims would not exist outside of the attorney-client relationship, the separate claim that late notice to the plaintiffs about the federal subpoena amounted to a wrong other than legal malpractice also fails.

Count three is for breach of fiduciary duty and count five alleges "breach of confidentiality." Any fiduciary duty or duty to maintain confidentiality that Vorys owed to the plaintiffs existed only because Vorys was the plaintiffs' legal counsel, and the facts alleged to support the legal malpractice claim are also those that support these two claims. Hence, counts three and five do not allege causes of action separate from the legal malpractice cause of action.

[35] Plaintiffs' brief in opp., Ex. 2.

Count four alleges promissory estoppel. That count is inadequate to set forth a cause of action apart from legal malpractice for the same reasons that the breach of contract cause of action does not allege a civil wrong other than legal malpractice.

Fraud is alleged in count six. By this cause of action the plaintiffs allege that Vorys defrauded the plaintiffs by not informing them of: the "transmittal of confidential and privileged information to PNC,"[36] "the impending sweeping"[37] of bank accounts by PNC in the collection case, and "the arrival of the federal grand jury subpoenas."[38] In other words, the plaintiffs are claiming as fraud Vorys's failure to advise them of the very conduct that the plaintiffs charge as legal malpractice. Not informing a client that malpractice even intentional malpractice occurred is simply not a tort separate from the malpractice itself, and count six fails to allege a tort apart from legal malpractice.

Count seven is for civil conspiracy. This claim, like part of the malpractice claim, rests upon the allegation that Vorys breached its duty to keep the plaintiffs' information confidential when it identified for PNC the location of the plaintiffs' bank accounts. That duty arose from the parties' attorney-client relationship so that any lawsuit alleging a breach of that duty is a lawsuit for legal malpractice, not civil conspiracy. Plus, any damages arising from the revelation of privileged information would have resulted from Vorys breaching its duty as counsel, not from combining maliciously with PNC.

Accordingly, despite the plaintiffs having asserted seven separate causes of action at counts one through seven of the amended complaint, all of the first seven counts of the amended complaint are claims for legal malpractice.

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[36] Am. comp., p. 17, ¶199.
[37] Id.
[38] Id.

The legal malpractice statute of limitations

This lawsuit was filed on November 15, 2010. R.C. 2305.11 provides that a legal malpractice action "shall be commenced within one year after the cause of action accrued." Under R.C. 2305.11(A), an action for legal malpractice accrues and the statute of limitations begins to run when there is a cognizable event whereby the client discovers or should have discovered that his injury was related to his attorney's act or non-act and the client is put on notice of a need to pursue his possible remedies against the attorney or when the attorney-client relationship for that particular transaction or undertaking terminates, whichever occurs later. *Zimmie v. Calfee, Halter & Griswold*, 43 Ohio St.3d 54 (1989), syllabus.

A cognizable event is defined as an event that is sufficient to alert a reasonable person that in the course of legal representation his attorney committed an improper act. *Spencer v. McGill*, 87 Ohio App.3d 267, 278 (8th Dist. 1993). Knowledge of a potential problem starts the statute to run, even when one does not know all the details. *Halliwell v. Bruner*, 8th Dist. No. 76933 (Dec. 14, 2000).

For statute of limitations purposes, the attorney-client relationship terminates when the attorney-client relationship for that particular transaction or undertaking terminates. *Trustees of Ohio Carpenters' Pension Fund v. U.S. Bank, Nat'l Assn.*, 189 Ohio App.3d 260, 2010-Ohio-911, ¶17 (8th Dist.). Both the Ohio Supreme Court and the Eighth District Court of Appeals have specifically rejected the argument that continued general representation of the business interests of a client by a law firm precludes a termination of the relationship and thereby tolls the statute of limitations. (See *Omni-Food & Fashion v. Smith*, 38 Ohio St. 3d 385, at 387-388 (1998) and *Kilko v. Haverfield*, 8th Dist. No. 94920, 2010-Ohio-6364, ¶28.) The reason, as the Ohio Supreme Court noted, is that "a different standard could defeat the purpose of the statute

of limitations where, for example, a client with knowledge of the attorney's malpractice may unduly perpetuate the attorney's potential liability and exposure to suit." *Omni-Food*, supra, id.

Notwithstanding that precedent, some breaches of an attorney's duty to a client cannot be connected to a "particular transaction or undertaking." One example is the plaintiffs' allegation here that Vorys breached a duty of confidentiality by identifying for PNC the location of the plaintiffs' accounts so PNC could attach the accounts to satisfy their judgments against the plaintiffs. Since the law firm apparently represented the plaintiffs in several matters, Vorys might have gone to different files from different "undertakings" to collect the information turned over to PNC. Because such wrongdoing is not part of any particular transaction or undertaking, only a cognizable event will begin the counting of the limitations period.

Summary judgment in Vorys's favor is therefore warranted if, before November 15, 2009, the plaintiffs had knowledge that Vorys committed an improper act and the improper act was not connected to a particular transaction or undertaking or the attorney-client relationship between Vorys and the plaintiffs for the particular undertaking giving rise to the improper act had terminated.

The first improper act alleged is the disclosure of privileged account information to PNC. The plaintiffs did not include in their amended complaint an allegation of when they discovered the disclosure and Calabrese's letter of apology does not have a date. Based on the bank attachments having been filed in mid-2005 it is likely the plaintiffs knew around that time. But in any event, since Calabrese wrote the letter and Calabrese did not work for Vorys after

August 26, 2009,[39] the plaintiffs' knowledge of the improper act undoubtedly came before August 26, 2009.

The next improper act is Vorys's alleged conflict in mediating the plaintiffs' differences with PNC. Based on the available evidence, there is no question that the plaintiffs were on notice of Vorys's alleged wrongdoings no later than December 12, 2005, the date that all plaintiffs released PNC in exchange for a payment of $15,000.[40]

The other alleged improper acts are in connection with Vorys's receipt of, and responses to, the grand jury subpoena. As to that undertaking and the claim that Vorys breached a duty to the plaintiffs by letting the outside law firm of Walter & Haverfield see portions of their files, the plaintiffs were aware on July 28, 2009 that Ralph Cascarilla of Walter & Haverfield had assisted Vorys in its review of documents to decide what would be produced.[41] As to the claim that the ultimate production of the privilege log itself violated a duty that Vorys owed the plaintiffs, the plaintiffs were fully aware of the contents of the log on that same date. Based on this evidence, there is no question that the plaintiffs had knowledge of Vorys's possible improper acts in response to the subpoena, if not necessarily all of the details, no later than July 28, 2009.

Because all of the cognizable events here occurred by the end of July, 2009 – more than one year before this lawsuit was filed – the plaintiffs' amended complaint is time-barred unless Vorys's representation for a particular transaction or undertaking related to any of the improper acts terminated after November 15, 2009. On this subject, the only evidence is that beginning in 2008 Vorys represented the plaintiffs on only one matter, where plaintiff Mark Dottore acted

[39] Vorys motion for summary judgment, Anthony J. O'Malley affidavit, ¶10.
[40] Id., exhibit B, release.
[41] Vorys mtn. for sum. judg., Ex. I, 07/28/2009 email of plaintiffs' counsel confirming receipt of the privilege log prepared by Cascarilla and alerting him that the plaintiffs "will explore [their] options going forward."

as a receiver in *Variable Annuity*.[42] Since there is no suggestion in the pleadings or motions that any of Vorys's alleged improper acts were in connection with the *Variable Annuity* case, the attorney-client relationships for all relevant particular undertakings were clearly terminated by the end of 2007, well over one year before the November 15, 2010 filing of this case. No issue of fact on this question is created by Dottore's affidavit that the plaintiffs "continued to call [Vorys] for legal advice on various matters and were last billed on November 5, 2010"[43] since nothing in that statement rebuts O'Malley's affidavit testimony that the *Variable Annuity* case was the only identifiable matter that Vorys handled for any of the plaintiffs after 2007 and Dottore does not identify any of the particular undertakings pertinent to this case as any of the "various matters" he continued to consult Vorys about.

Calabrese's motion for summary judgment on counts one through seven

Calabrese makes essentially the same arguments as Vorys in support of his motion for summary judgment on the first seven causes of action in the amended complaint plus the additional argument that O'Malley's affidavit shows that he was on a leave of absence beginning in February, 2009 and therefore he could not have been involved in the allegedly wrongful conduct in responding to the federal grand jury subpoena. Because Vorys's arguments are well-taken, Calabrese's are too.

Count eight: spoliation of evidence

At count eight of the amended complaint the plaintiffs allege that all defendants committed the tort of spoliation of evidence by willfully destroying evidence to disrupt the plaintiffs' case when they knew litigation existed or was probable. The evidence referred to in

[42] O'Malley affidavit, supra, ¶3.
[43] Dottore affidavit, supra, ¶18.

this count apparently consists of documents "confirming [Vorys and PNC's] conspiracy"[44] to misuse the plaintiffs' confidential banking information.

Vorys has moved for judgment on the pleadings and Calabrese for summary judgment on this claim.

The elements of a claim for spoliation of evidence are (1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts. *Smith v. Howard Johnson Co., Inc*., 67 Ohio St.3d 28, 29 (1993).

In *Jeffrey Mining Prods., L.P. v. Left Fork Mining Co*., 143 Ohio App. 3d 708 (8th Dist. 2001) the Eighth District Court of Appeals affirmed the trial court's decision granting summary judgment, based on the expiration of the statute of limitations period, on the appellant's underlying affirmative causes of action in contract and tort. This left the court to consider the propriety of summary judgment on the appellant's claim for spoliation of evidence. The court concluded that because the underlying claims were time-barred the appellant "cannot demonstrate any prejudice from the destruction of evidence, so its spoliation claim must fail as a matter of law." *Id*., 718. The same reasoning applies here. Without a case to disrupt the willful destruction of evidence cannot cause damages; without damages there is nothing to litigate and judgment on the pleadings in Vorys's favor and summary judgment in Calabrese's favor are both appropriate.

[44] Am. comp., ¶95.

The cause of action for violation of the Racketeer Influenced and Corrupt Organizations Act

The last cause of action in the amended complaint alleges that Vorys and Calabrese violated the federal Racketeer Influenced and Corrupt Organizations Act at Title 18, section 1961 *et seq.* of the United States Code, by engaging in a pattern of racketeering activity in violation of 18 U.S.C. 1962(c).

Vorys has moved for judgment on the pleadings and Calabrese for summary judgment on this claim.

The RICO statute creates a civil cause of action for "any person injured in his business or property by reason of a violation of section 1962." 18 U.S.C. 1964(c). In turn, 18 U.S.C. 1962(c) provides as follows:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of s affairs through a pattern of racketeering activity or collection of unlawful debt.

An enterprise can include a law firm, and a "pattern of racketeering activity" requires at least two acts of "racketeering activity," defined to include specified state and federal crimes. (See 18 U.S.C. 1961(1).) The acts of "racketeering activity" needed to support a claim for a violation of the RICO statute are referred to as the "predicate acts." Vorys argues in its motion for judgment on the pleadings that the plaintiffs have not pled qualifying predicate acts that would support a pattern of racketeering activity.

At paragraph 214 of the amended complaint the plaintiffs assert as the predicate acts bribery in violation of R.C. 2921.02, telecommunications fraud in violation of R.C. 2913.05 and mail fraud in violation of 18 U.S.C. 1341. Bribery under Ohio law is a third degree felony, punishable by up to 36 months in prison. (See R.C. 2921.02(E) and 2929.14(A)(3)(b).) This

offense is a qualifying predicate act by 18 U.S.C. 1961(1), which defines racketeering activity to include the state law offense of bribery if it is punishable by more than one year in prison. Telecommunications fraud can be punishable by more than one year in prison as anywhere from a fourth to first degree felony, depending on the amount of money involved. R.C. 2913.05(C). However, it is not in section 1961(1)(A)'s list of qualifying state law offenses and therefore the allegation of telecommunications fraud in violation of R.C. 2913.05 does not support a civil RICO claim. As for mail fraud, section 1961(1)(B) does include mail fraud in violation of U.S.C. 1341 in the definition of racketeering activity. So, on its face, the amended complaint does plead the qualifying predicate acts of state bribery and federal mail fraud.

But it is not sufficient just to name two statutes the plaintiffs allege the defendants violated. Not only do the plaintiffs allege mail fraud as a predicate act, but the civil RICO claim itself is in the nature of a fraud and, pursuant to Rule 9(B) of the Ohio Rules of Civil Procedure, it must be pled with particularity. (See *Craighead v. E.F. Hutton & Co.*, 899 F.2d 485, 494 (6th Cir. 1990), where the Sixth Circuit upheld the trial court's dismissal of a civil RICO claim for failure to plead with the particularity required by the federal version of Ohio's Civil Rule 9(B).)

The elements of 18 U.S.C. 1341, the predicate act of mail fraud alleged by the plaintiffs, are a scheme or artifice to defraud and a mailing for the purpose of executing the scheme. The scheme to defraud must involve intentional fraud, consisting of deception intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed. *Epstein v. United States*, 174 F.2d 754, 765 (6th Cir. 1949). A scheme to defraud requires intent to deceive or defraud, and a plaintiff must allege that intent. *Id*. The scheme to defraud must also involve "misrepresentations or omissions reasonably

calculated to deceive persons of ordinary prudence and comprehension." *United States v. Van Dyke*, 605 F.2d 220, 225 (6th Cir.1979). Those misrepresentations too need to be alleged with particularity. *Bender v. Southland Corp.*, 749 F.2d 1205, 1216 (6th Cir. 1984).

Paragraph 214 of the amended complaint alleges that, "based on the acts described above," the Vorys lawyers committed state bribery and federal mail fraud offenses. A review of the paragraphs preceding that allegation shows the following "acts" that apparently constituted these crimes: "a pattern of corrupt activities with various Cuyahoga County officials" (¶46-47); hiring public officials' children, paying them salaries that went to the officials as bribes, and then overcharging the plaintiffs for services and expenses to "pay for the purported wages" (¶53) of the officials' children (¶47-55 and 61); and Vorys often billing the plaintiffs through the mail for "amounts excessive as to time and rate" (¶169-170) and "for work that was not performed" (¶171, 173; generally ¶169-176). The plaintiffs then assert at paragraph 216 that "the predicate acts above constitute a pattern of corrupt activity." Hence, the court will limit its review of the sufficiency of the amended complaint to only those allegations made through paragraph 216.[45]

Assuming the truth of the allegations as required when considering a motion for judgment on the pleadings, and assuming that most, if not all, of the evidence to support the allegations of bribery is in the possession of the defendants, the plaintiffs have adequately pled

[45] The amended complaint and the plaintiffs' briefing place great emphasis on the fact that a judge of this court in the *Variable Annuity* case approved for payment less than 100% of the fees claimed by Vorys as counsel for the receiver in that case, yet Vorys still seeks payment for the difference between the amount billed and the amount approved. Those circumstances alone do not plead fraud with particularity. The court's discretion in a receivership case is wide and is exercised to preserve the assets of the receivership estate, so that court could have had many reasons for trimming the amount sought (about which there is no allegation in this case) to the amount approved, with most of those reasons having nothing to do with fraud by Vorys. Moreover, the plaintiffs here never alleged that counsel agreed to accept as full payment the amount approved by the court, *i.e*. they could be liable for the difference. Finally, the court notes that it was plaintiff Mark Dottore himself who filed the motion seeking approval of the fees, suggesting that he did not believe then that the billing was "fraudulent." (Am. comp., ¶221.)

bribery as a predicate act. The same cannot be said for mail fraud. First, the plaintiffs do not allege an intent by Vorys to deceive. Even though the amended complaint alleges that Vorys "intentionally"[46] billed for work not done and overstated the amount of time spent on the work that was done, the plaintiffs do not allege with particularity a single time entry on a single bill over the course of a long-standing attorney-client relationship that the plaintiffs consider fraudulent. Second, the plaintiffs do not allege which of them were defrauded by which defendant lawyers. Were all three plaintiffs defrauded by all seven Vorys lawyers? Third, as with most of the other claims, no dates are alleged for the supposed crimes. Fourth, as to bills "excessive as to. . .rate,"[47] the plaintiffs do not allege the charged rate, the agreed rate (if any) and the correct rate, all of which is information surely in the plaintiffs' possession. Last, the plaintiffs do not identify any work the defendants billed for that was not actually done. All of these omissions add up to a failure to plead mail fraud as a predicate act on the civil RICO claim with the particularity required by Civil Rule 9(B). As a result, the RICO cause of action is insufficient to state a claim and subject to dismissal on the pleadings (Vorys) and summary judgment (Calabrese).

Additionally the RICO claim as a whole fails for want of plausibility. Vorys's motion for judgment on the pleadings under Civil Rule 12(C) is considered under the same standard as a motion to dismiss. (See, *e.g.*, *Pinkerton v. Thompson*, 174 Ohio App. 3d 229, 2007-Ohio-6546, ¶18 (9th Dist).) The trial court must accept material allegations in the pleadings and all reasonable inferences as true and can only grant a dismissal if it appears beyond doubt that the nonmoving plaintiffs cannot prove any set of facts entitling them to the requested relief. *Id*. However, unsupported conclusions of a complaint are not considered admitted and are not

[46] Am. comp., ¶170, 172 and 173.
[47] Id., ¶170.

sufficient to withstand a motion to dismiss. *Allstate Ins. Co. v. Electrolux Home Prods.*, 8th Dist. No. 97065, 2012 Ohio 90, ¶8.

Only a complaint that states a plausible claim for relief survives a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 679; 129 S. Ct. 1937, 1949; 173 L. Ed. 2d 868, 884 (2009). In *Iqbal,* the United States Supreme Court described the plausibility requirement:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. *Id.* (Citations omitted).

The plaintiffs' RICO claim lacks facial plausibility. The plaintiffs allege that Vorys bribed elected officials by hiring their sons for work that did not exist or that they were not qualified to do, and then charged the expense of those bribes to the plaintiffs in the form of unjustified bills. That allegation ignores the purpose – indeed, the primary element of a bribe: getting something for the bribe. A bribe is supposed to pay for itself. To find the plaintiffs' allegations plausible, the court has to conclude that Vorys was so inept at making a bribe – defined at R.C. 2921.02(A) as giving a public official a thing of value with the purpose to improperly influence the official in the performance of his duties – that it had to cover the expense of the bribe by defrauding its clients and not by getting anything for the bribe. Such a "scheme or artifice to defraud" may be possible but it stops well short of crossing the line to plausibility.

The plaintiffs' Civil Rule 56(F) motion

The plaintiffs have opposed the Vorys and Calabrese motions for summary judgment. However, they have also filed a motion seeking additional discovery to develop additional

evidence in support of denying the motions. Civil Rule 56(F) permits a court to allow additional discovery before having to oppose a motion for summary judgment "should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essent ."

If a party opposing a motion for summary judgment cannot present by affidavit facts which are sufficient to justify his opposition he may seek a continuance or deferral of the court's action on the motion by filing affidavits which must state sufficient reasons why he cannot then present by affidavit facts essential to justify his opposition to the motion and why or how the continuance, deferral of action, or discovery would permit him to obtain such facts. *Gates Mills Inv. Co. v. Village of Pepper Pike*, 59 Ohio App.2d 155 (8th Dist. 1978).

The plaintiffs' motion is supported by an affidavit of counsel only, whereas Rule 56(F) requires affidavits of a party. Nevertheless, even counsel's affidavit fails to provide sufficient reasons why discovery is needed to oppose motions for summary judgment premised primarily upon the statute of limitations. A statute of limitations defense is necessarily decided with reference to relevant dates. In this case those are the dates the Vorys lawyers committed the wrongs alleged by the plaintiffs, the dates the plaintiffs became aware of the wrongdoing, and the dates the attorney-client relationships for particular undertakings terminated. Without discovery the plaintiffs might not have at their disposal the exact dates of the exact wrongful conduct by the defendants, but the plaintiffs do know when they became aware of what the defendants did as well as the dates that their relationships with Vorys for specific undertakings ended. Despite that, the plaintiffs not only mostly declined to allege specific dates in the amended complaint but also declined to offer an affidavit that includes that information.

Another reason to deny the motion for discovery is the plaintiffs' claim, in counsel's affidavit, that "additional discovery is still needed to identify what particular matters are reflected on the bills submitted to the plaintiffs by Vorys."[48] That claim makes no sense because, by definition, "bills submitted to the plaintiffs" are in their possession. The plaintiffs also argue that they need discovery to find out "when and how Vorys defendants transferred" their files to Walter & Haverfield. Why? The plaintiffs have evidence that Cascarilla of Walter & Haverfield clearly saw documents no later than his July 24 letter, so there is no reasonable prospect that discovery would reveal that Cascarilla actually received the documents any later than that.

Because there is no reason to believe that the additional discovery sought would reveal evidence creating a genuine issue of material fact on any of the matters supporting the defendants' motions for summary judgment the Civil Rule 56(F) motion is not well-taken.

PNC and Duffy's motion to dismiss

The only claims against PNC and Duffy in the amended complaint are causes of action for civil conspiracy and spoliation of evidence. The defendants' motion to dismiss these claims argues that the cause of action for civil conspiracy fails to state a claim because the plaintiffs do not allege damages incurred because of anything the defendants did and that the spoliation claim fails because there was no valid claim for these defendants to disrupt by destroying evidence.

In order to establish the tort of civil conspiracy, the following elements must be proven: (1) a malicious combination of two or more persons, (2) causing injury to another person or property, and (3) the existence of an unlawful act independent from the conspiracy itself. *Cleveland Constr., Inc. v. Roetzel & Andress, L.P.A.*, 8th Dist App. No. 94973, 2011 Ohio 1237,

[48] Plaintiffs' br. in opp. to motions for summary judgment, exhibit 4, Spitz affidavit, ¶6.

¶41. An action for civil conspiracy cannot be maintained unless an underlying unlawful act is committed. *Id*.

The damage is the gist of the action. *Gosden v. Louis*, 116 Ohio App. 3d 195 (9th Dist. 1996). In the amended complaint the plaintiffs claim that the unlawful acts by Vorys of sharing confidential information with PNC and not warning the plaintiffs of the "impending sweeping of accounts"[49] resulted in the bank attachments which, in turn, caused damages in the form of "an unforeseeable shortage of liquid assets"[50] that made the plaintiffs "abandon certain projects"[51] and ruined their "relationships with several banks."[52]

Implied in these allegations is that had the plaintiffs known their accounts would be attached they would have shifted assets to somewhere they couldn't be attached. To put it another way, the plaintiffs would have transferred assets with actual intent to hinder or delay their creditor, *i.e.* would have violated Ohio's uniform fraudulent transfer act at R.C. 1336.04(A)(1). A court cannot legitimately allow a claimant to proceed on a cause of action that will only succeed if the plaintiff proves he was deprived of the opportunity to defraud the defendant. For that reason alone the civil conspiracy claim against PNC and Duffy should be dismissed.

Additionally, because the claim that Vorys committed a wrongful act independent of the conspiracy is time-barred the plaintiffs are unable to prove an essential element of the civil conspiracy claim and it must be dismissed. With that dismissal, the spoliation claim must be dismissed too because it leaves no claim the bank defendants could have disrupted by the destruction of evidence.

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[49] Am. comp., p. 7, ¶87.
[50] Am. comp., p 7, ¶88.
[51] Id., ¶89.
[52] Id., ¶90.

The claims against defendants Read and Farkas

Defendants Read and Farkas were added to the lawsuit by the amended complaint. Civil Rule 4(A) requires the clerk of courts to issue a summons for service on every defendant. Although it is the clerk's obligation to issue the summons, it is plaintiff's counsel's duty to make sure service is accomplished. Civ. R. 4.6(E). Usually this is done by counsel filing with the complaint instructions known as a praecipe to the clerk for service. A copy of the complaint must be attached to the summons. Civ. R. 4(B). Failure to obtain service within six months of the filing of the complaint will result in a dismissal without prejudice unless a plaintiff, after notice and an opportunity to be heard, can show good cause why service was not made. Moreover, failure to obtain service on a defendant within a year of filing results in the action not being commenced for statute of limitations purposes. Civ. R. 3(A); R.C. 2305.01 *et seq*.

A review of the docket as recently as August 3, 2012, shows not only that Read and Farkas have not been served, but that the plaintiffs have not made any efforts at service by filing instructions with the clerk. Hence, the claims against Read and Farkas are subject to dismissal without prejudice under Civil Rule 4(E). Although notice to a plaintiff that the court is dismissing a claim under this rule is ordinarily required and has not been given in this case, where a plaintiff has completely failed in his duty under Civil Rule 4.6(E) it will be impossible for him to show good cause why service has not been made and a hearing would serve no purpose.

CONCLUSION

Consistent with the reasoning in this entry, the court denies the plaintiffs' Civil Rule 56(F) motion for additional discovery, grants the motions for summary judgment on the

amended complaint of the defendants Vorys, Sater, Seymour and Pease, LLP, Anthony J. O'Malley, Drew T. Parobek, Joseph D. Lonardo, David W. Hardymon and Anthony O. Calabrese, III, grants the motion for judgment on the pleadings of the defendants Vorys, Sater, Seymour and Pease, LLP, Anthony J. O'Malley, Drew T. Parobek, Joseph D. Lonardo and David W. Hardymon, and grants the motion to dismiss the amended complaint of the defendants PNC and Kevin T. Duffy.

On its own motion and pursuant to Civil Rule 4(E), the court dismisses without prejudice the amended complaint against defendants John Winship Read and Bryan J. Farkas.

The only remaining affirmative claim is Vorys's counterclaim for declaratory judgment. This claim seeks a declaration by the court that Vorys is "not liable to the Dottore parties and that the Dottore parties' purported claims against them are time-barred."[53] Putting aside any question about whether the counterclaim is a true affirmative claim or just another way of asserting the defense of statute of limitations,[54] the objective sought by the counterclaim no longer exists in light of the court's rulings in this entry. It therefore seems likely that the defendants will voluntarily dismiss the counterclaim as moot. However, the court cannot order such a dismissal. Therefore, if the counterclaim remains pending as of the pre-trial conference date of August 30, 2012, the court, if requested by the plaintiffs, will set a briefing schedule on a motion to dismiss and/or for summary judgment on the counterclaim.

IT IS SO ORDERED:

_____ Date: _____
Judge John P. O'Donnell

[53] Vorys 03/21/2011 answer and counterclaim, p. 46, ¶19.
[54] See the plaintiffs' 05/02/2011 motion to dismiss the amended counterclaim that was denied because the plaintiffs' malpractice claims were still pending.

SERVICE

A copy of this journal entry was sent by email, this ____day of August, 2012, to the following:

Brian D. Spitz, Esq.
brian.spitz@spitzlawfirm.com
Attorney for plaintiff

Robert J. Fogarty, Esq.
rjfogarty@hahnlaw.com
Attorney for defendants Vorys, O'Malley, Parobek, Lonardo and Hardymon

Timothy T. Brick, Esq.
tbrick@gallaghersharp.com
Attorney for defendant Calabrese

Donald S. Scherzer, Esq.
dscherzer@ralaw.com
Attorney for defendants PNC and Duffy

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