SEMTEK INTERNATIONAL INCORPORATED	*	**IN THE**
Plaintiff	*	**CIRCUIT COURT**
v.	*	**FOR**
LOCKHEED MARTIN CORPORATION, et al.	*	**BALTIMORE CITY, Part 20**
Defendants.	*	**Case No. 97183023/CC3762** **[*2003 MDBT 4*]**

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MEMORANDUM AND OPINION

PROCEDURAL HISTORY

This case arises out of an unconsummated commercial enterprise between Semtek International Incorporated (hereinafter "Semtek") and Merkuriy, Ltd. (a Russian entity) involving the commercialization of a former Soviet military satellite and the launch of additional satellites as part of an international communications system.

Plaintiff Semtek filed suit against Merkuriy, Ltd. and Pyotr Sivirin in the United States District Court for the District of Massachusetts in August 1995 for fraud, R.I.C.O.[1] violations, breach of contract, breach of a written agency contract and breach of fiduciary duties. A default judgment was entered on April 24, 1996 in the amount of $381,396,000. That judgment was vacated on August 13, 1996 so that defendants could be properly served. On April 12, 2000 a default judgment was re-entered against defendants in the same amount. Plaintiff has never collected any portion of its judgment from defendants.

[1] The Racketeer Influenced and Corrupt Organizations Act of 1970 (R.I.C.O.) is codified as 18 U.S.C. §1961.

After the first default judgment was entered, plaintiff served a subpoena *duces tecum* on Lockheed Martin Corporation (hereinafter "Lockheed") at its corporate office in Johnson City, New York. Lockheed failed to produce the requested documents and plaintiff then sought an order in the United States District Court for the Northern District of New York compelling Lockheed to comply. A show cause order was issued on March 11, 1996 by the federal court in New York. On May 1, 1996, the court denied without prejudice the plaintiff's request to compel compliance. Additionally, plaintiff filed a motion to compel compliance with the subpoena on March 30, 1999 in the United States District Court for the District of Massachusetts, and the docket entries indicate that a renewed motion to compel was filed on April 21, 1999, but was denied on June 30, 1999 without prejudice.

On February 26, 1997, plaintiff filed suit against Lockheed Martin Corporation and Samuel Ursini, *et al.* in the Superior Court of the State of California for the County of Los Angeles. Defendant Lockheed removed the case to the United States District Court for the Central District of California on March 11, 1997. Because the two year statute of limitations barred the suit, the court granted defendant's motion to dismiss and the suit was dismissed with prejudice on May 5, 1997. The United States Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court on February 25, 1999.[2]

[2] While not relevant to the motions *sub judice*, in order to present a complete procedural history, it should be noted that Lockheed unsuccessfully sought injunctive relief from the California federal court against further suit pursuant to the All Writs Act, 28 U.S.C. § 1651.

Then, on July 2, 1997 plaintiff filed suit solely[3] against Lockheed Martin Corporation in the Circuit Court for Baltimore City for inducing a breach of contract (Count I), intentional interference with prospective economic advantage (Count II), negligent interference with prospective economic advantage (Count III), and conspiracy to interfere with prospective economic advantage (Count IV). After an unsuccessful attempt to remove the case to federal court,[4] defendant's motion to dismiss on the ground of *res judicata* was granted by Judge Joseph H.H. Kaplan on April 30, 1998.[5] The Maryland Court of Special Appeals affirmed Judge Kaplan's dismissal on September 7, 1999, stating that the "earlier dismissal of the suit by the United States District Court for the Central District of California was a judgment on the merits and was entitled to the preclusive effect that Judge Kaplan gave it." *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 128 Md. App. 39, 70 (1999). The Court of Appeals denied a petition for writ of certiorari on December 21, 1999, but the United States Supreme Court granted certiorari and on February 27, 2001, held

> [b]ecause the claim-preclusive effect of the California federal court's dismissal "upon the merits" of petitioner's action on statute-of-limitations grounds is governed by a federal rule that in turn incorporates California's law of claim preclusion (the content of which we do not pass upon today), the Maryland Court of Special Appeals erred in holding that the dismissal necessarily precluded the bringing of this action in the Maryland courts. The judgment is reversed, and the case remanded for further proceedings not inconsistent with this opinion.

Semtek Int'l Inc. v. Lockheed Martin Corp., 121 S. Ct. 1021, 1029 (2001).

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[3] The complaint also names as defendants Does 1 through 100, but these defendants have not been identified or served.

[4] After the California court denied the injunctive relief Lockheed sought under the All Writs Act, Lockheed removed this case to the United States District Court for the District of Maryland on federal question grounds. Because the federal question was only raised by way of a defense, the case was remanded to state court.

[5] The accompanying Memorandum and Opinion, however, was not filed until May 6, 1998.

When the motion was renewed in this court, it was denied on November 20, 2001. The present motion to dismiss on grounds of judicial estoppel and/or failure state a claim was then filed on December 7, 2001, along with a motion for costs and legal expenses pursuant to Maryland Rule 1-341. After reviewing the motions, the oppositions of plaintiff, the reply memoranda and the exhibits attached to the respective memoranda, the Court conducted a hearing on February 22, 2002. This Memorandum and Opinion addresses the merits of the defendant's motions.

II. THE SECOND MOTION TO DISMISS

Semtek contends that the motion to dismiss now before the Court must be denied because Lockheed has waived its right to raise the defenses contained therein by failing to join those defenses in its first preliminary motion under Maryland Rule 2-322. The Court disagrees.

Because the defense of judicial estoppel may be raised at any stage of litigation, *Gordon v. Posner*, 2002 Md. App. LEXIS 18, *34-35 (2002), citing *Eagan v. Calhoun*, 347 Md. 72, 88 (1997), and because the defense of failure to state a claim upon which relief can be granted is specifically preserved pursuant to Maryland Rule 2-324, defendant is not precluded from raising these defenses in a second motion to dismiss. Moreover, because the motion necessarily requires consideration of matters outside the complaint, and because both plaintiff and defendant have presented to the Court pertinent material going beyond the allegations contained in the complaint, the Court shall treat the present motion as one for summary judgment, to be governed by Maryland Rule 2-501.[6] The Court will, therefore, address the contentions raised by the papers and presented by counsel at oral

[6] Plaintiff objects to the Court's consideration of Exhibit 11 (defendant's motion to dismiss) for summary judgment purposes. Without addressing the objections specifically, the Court indicates that its determination of the motion is not predicated upon that document.

argument.

III. THE JUDICIAL ESTOPPEL DOCTRINE

Judicial estoppel, which prohibits litigants from taking advantage of inconsistent positions in different cases to the detriment of opposing parties, thereby creating the perception that either the first or the second court was misled, has long been recognized in the Maryland courts. *See Stone v. Stone*, 230 Md. 248, 253 (1962); *Eagan v. Calhoun*, 347 Md. 72, 87-88 (1997); *Gordon v. Posner*, 2002 Md. App. LEXIS 18, *35 (2002); *Roane v. Washington County Hosp.*, 137 Md. App. 582, 592, *cert. denied*, 364 Md. 463 (2001); *United Book Press, Inc. v. Maryland Composition Co., Inc.*, 141 Md. App. 460, 469 (2001).

Recently, the doctrine has been applied by the United States Supreme Court to preclude the State of New Hampshire from assuming an inconsistent position against the State of Maine, with respect to the boundary of the Piscataqua River.[7] In that case, which invoked the original jurisdiction of the Supreme Court, Justice Ginsburg noted that the judicial estoppel doctrine has long been recognized by American courts "'to protect the integrity of the judicial process,'" by "'prohibiting parties from deliberately changing positions according to the exigencies of the moment.'" *New Hampshire v. Maine*, 121 S. Ct. 1808, 1814 (2001) (citations omitted). Further, Justice Ginsburg identified several factors generally present in cases where courts have invoked the doctrine. These include: (1) a party's later position must be "clearly inconsistent" with its earlier position; (2) the party has "succeeded in persuading a court to accept that party's earlier position, so

[7] In 2000, New Hampshire brought suit against Maine "claiming that the Piscataqua River boundary runs along the Maine shore and that the entire river and all of Portsmouth Harbor belong to New Hampshire." *New Hampshire v. Maine*, 121 S. Ct. 1808, 1812 (2001). Maine countered by noting that in two prior proceedings, one in 1740 decided by King George II and the other a consent decree entered in 1977, the inland river boundary had been conceded by New Hampshire to run along the middle of the river. *Id*. at 1812.

that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled;'" and (3) the party "seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." 121 S. Ct. at 1815 (citations omitted).

In the Fourth Circuit, the "determinative factor" appears to be whether the party who is alleged to be estopped "intentionally misled the court to gain unfair advantage." *Tenneco Chems., Inc., v. William T. Burnette & Co., Inc.,* 691 F.2d 658, 665 (4th Cir. 1982); *John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26 (4th Cir. 1995); *Lowery v. Stovall, et al.*, 92 F.3d 219, 225 (4th Cir. 1996).

In the present action, Lockheed seeks to estop Semtek from asserting that it intentionally interfered with any contractual relationship or economic advantage between plaintiff and Merkuriy, Ltd., since plaintiff took the position in the Massachusetts litigation that Merkuriy, Ltd. was solely responsible for perpetrating fraud upon Semtek, Lockheed being an innocent third party to Merkuriy's fraudulent acts. Because Semtek obtained a default judgment in excess of $381,000,000 against Merkuriy, Ltd. in Massachusetts on the basis of these allegations, Lockheed contends that it should be estopped from presenting contrary allegations in a Maryland court. In essence, defendant asserts that because plaintiff was unable to collect any of its judgment in Massachusetts, it should not be permitted to alter its theory materially and proceed against another defendant in Maryland, simply because it is more likely to collect on any judgment obtained. Having made its election to proceed against Merkuriy, Ltd. first in Massachusetts, Lockheed argues that Semtek is foreclosed from changing its course now in Maryland, simply because its earlier endeavor led it to a dead end.[8]

[8] Further, Lockheed asserts that Semtek is charged with full knowledge of the facts regarding this

defendant when it filed suit in Massachusetts in 1995. The Court notes, however, that, although the federal courts in California fixed the date of Merkuriy's breach, August 8, 1994, as the date this cause of action accrued, that is not dispositive here of the fact question as to what Semtek actually knew about Lockheed's role in that breach.

The Court believes that the doctrine of judicial estoppel is inapplicable under the circumstances of this case. To begin with, Lockheed concedes that Semtek never intentionally misled the Court in either the Massachusetts or Maryland proceedings. Because the primary purpose of the judicial estoppel doctrine is to protect the integrity of the judicial process and because a party is precluded from "deliberately changing positions," it is reasonable to infer that the doctrine applies principally in cases where a court was intentionally misled. *Maine,* 121 S. Ct. at 1814. If there is no deliberate act involved, the integrity of the judicial process is less likely to be implicated. As the Court of Special Appeals noted in *Posner*, judicial estoppel focuses on the relationship between the litigants and the judicial system, while equitable estoppel concentrates on the relationship between the parties involved. *Posner*, 2002 Md. App. LEXIS 18, *37-38 (citing *United Book Press,* 141 Md. App. at 471-72). Since the focus of judicial estoppel is not merely on the relationship between parties, it is appropriate to require scienter before a party is deemed judicially estopped from bringing a varying claim in a subsequent action. The Court of Appeals has recognized, in fact, that a party can only be estopped if it had full knowledge of the facts and this prerequisite further supports the Court's view that an intent to mislead is a necessary component of judicial estoppel. *Stone v. Stone*, 230 Md. 248, 253 (1962) (quoting 19 Am. Jur., *Estoppel*, § 50).[9]

Additionally, the parties are not identical in the proceedings sought to be compared. While this is more typically an issue which arises upon analysis of collateral estoppel or issue preclusion doctrines, it is relevant to inquire how Lockheed was actually disadvantaged by the default judgment entered against Merkuriy, Ltd. in the federal court in Massachusetts. Counsel's response to that question during the hearing was to point to the enormous default judgment entered against Merkuriy,

[9] *See infra* note 11.

Ltd. and its obvious impact on the ability of the Russian enterprise to participate successfully with Lockheed in this commercial venture, involving the launching and development of a satellite communications system.

Semtek points out that by the time the final default judgment was entered by the Massachusetts court in 1997, Lockheed's commercial venture with Merkuriy, Ltd. was long dead. Rather than focus on the specific allegations which formed the bases for the judgment in Massachusetts,[10] Semtek would have the Court focus on the specific prejudice claimed here and whether it can be linked to the inconsistent positions said to be taken by plaintiff in the two cases. Since Merkuriy, Ltd. is not claiming that it is prejudiced here, plaintiff questions how Lockheed will be disadvantaged in defending the allegations presented by the present complaint. Under the circumstances presented here, the Court finds that defendant is unable to demonstrate direct prejudice (other than continuing the litigation).

The Court of Appeals of Maryland has recognized the significance of prejudice in the judicial estoppel analysis. *Stone v. Stone*, 230 Md. 248, 253 (1962) (quoting 19 Am. Jur., *Estoppel*, § 50).[11] The United States Supreme Court has expressly stated that prejudice to another is a major consideration when deciding whether judicial estoppel should be applied. *Maine*, 121 S. Ct. at 1815. Maryland case law may not always require direct prejudice against the party asserting judicial

[10] This analysis would, of course, be essential to a ruling that judicial estoppel applies to this situation. The Court's ruling here, however, that other factors are missing renders it moot.

[11] The Court of Appeals noted that

> "Generally speaking, a party will not be permitted to occupy inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, at least where he had, or was charged with, full knowledge of the facts and another will be prejudiced by his action."

Stone v. Stone, 230 Md. 248, 253 (1962) (quoting 19 Am. Jur., *Estoppel*, § 50).

estoppel, but, in its absence, the rationale for application of the doctrine has been intentional misconduct on the part of the offending party. *See, e.g., Wilson v. Stanbury*, 118 Md. App. 209, 214-215 (1997). Since both of these factors are lacking, the Court is not inclined to bar plaintiff from pursuing its claims in this case.

IV. THE FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

Count I. Intentional Interference with Contractual Relations

Lockheed contends that plaintiff's allegations, coupled with all the relevant documents which have been attached to the various memoranda, amount to nothing more than "an agreement to agree" on the part of Semtek and Merkuriy, Ltd. In the absence of a legally enforceable contractual agreement between those parties, defendant contends that no cause of action will lie under Count I of the complaint.

Semtek's response to this contention is that its course of conduct, oral agreements with Merkuriy, Ltd., the partial performance on both sides and the documentation (when all is fully developed at trial) will establish a joint venture agreement, if one cannot be discerned at this stage from the complaint and the exhibits now before the Court. At the very least, plaintiff asserts that the existence of a joint venture agreement between Semtek and Merkuriy, Ltd. poses a disputed question of material fact for which summary judgment disposition is inappropriate. With the latter statement, this Court agrees and it will deny defendant's motion with respect to Count I.

Under Maryland law, little, if any, distinction is drawn between the formation of a partnership and a joint venture. *Hobdey v. Wilkinson*, 201 Md. 517, 525-527 (1953). In order to establish either, "it is essential to show that they [the parties] have a joint proprietary interest, or that they are to share losses as well as profits, or that they have a joint control over the subject matter of the adventure or

of the manner in which it is to be carried out." *Atlas Realty Co. v. Galt*, 153 Md. 586, 590 (1927). The Maryland Court of Appeals has recognized that a joint venture has been defined as "an association of two or more persons to carry out a single business enterprise for profit," and as "a partnership for a single transaction." *Herring, et al. v. Offutt*, 266 Md. 593, 596-597 (1972) (citing *Joint Adventures*, 8 MD. L. REV. 22 (1943)).

In the judgment of this Court, the Business Agreement, Protocol and Letter of Intent, the agency agreement between Semtek and Merkuriy, Ltd. and the correspondence between those parties give rise to a material factual dispute as to whether or not Semtek can establish a joint venture agreement.[12]

The Court is unpersuaded that plaintiff is barred from establishing a joint venture agreement by virtue of the Maryland Statute of Frauds, MD. CODE ANN., CTS. & JUD. PROC. §5-901 (1993). Since joint ventures and partnerships are essentially indistinguishable under Maryland law, *McBriety v. Phillips*, 180 Md. 569, 573-574 (1942) (citations omitted), and since a written agreement is not necessary to create a partnership, *M. Lit, Inc. v. Berger*, 225 Md. 241, 248 (1961) (citations omitted), the underlying test here (as in an alleged partnership relationship without a written agreement) will be "the intention of the parties" to create such a joint venture, *Cohen v. Orlove*, 190 Md. 237, 243 (1948) (citations omitted).

On the other hand, the fact that the Court is unwilling to dismiss Semtek's complaint in its entirety should not be read as an adoption of plaintiff's view that the record before this Court, for summary judgment purposes, establishes a joint venture agreement and/or interference with such an

[12] Plaintiff also relies upon five affidavits in its opposition to Lockheed's motion to dismiss. Those which address the factual predicate for Semtek's claims provide additional support for the Court's ruling that there are material facts in dispute, prohibiting the entry of summary judgment at this stage in the proceedings.

agreement sufficient to submit those issues to a jury. Plaintiff will, however, have an opportunity to develop its case through discovery and present additional relevant evidence at trial.

Count II. Intentional Interference with Prospective Economic Advantage

Having denied defendant's motion with respect to Count I, the Court is not inclined to grant it with respect to Count II, at least at this point in the proceedings. If Semtek is able at trial to generate a jury issue concerning the establishment of a joint venture with Merkuriy, Ltd., then it is conceivable that certain related damage claims may go to the jury as well.

Because this is a situation in which plaintiff's case is built upon allegations that the defendant interfered in such a way as to prevent the completion of a formal joint venture agreement, plaintiff may be limited to the consequential damages incurred up to the point in time when its relationship with Merkuriy, Ltd. terminated.

In order to go beyond that point, and to establish a reasonable expectation of economic advantage for completion of the satellite communication enterprise, plaintiff will undoubtedly face significant obstacles, not the least of which will be evidence presented by Lockheed that this "Russian satellite project was an unmitigated financial disaster . . . ." Defendant's Memorandum in Support of Motion to Dismiss, page 2, n. 2.

Count III. Negligent Interference with Prospective Economic Advantage

Semtek concedes that Maryland does not recognize a cause of action for negligent interference with prospective economic advantage and, accordingly, defendant's motion with respect to Count III is **GRANTED**.

Count IV. Conspiracy to Interfere with Prospective Economic Advantage

Semtek concedes that the allegations contained in this count are duplicative of those

contained in Count II and, accordingly, defendant's motion with respect to Count IV is **GRANTED**.

V. LOCKHEED'S MOTION FOR COSTS AND LEGAL EXPENSES PURSUANT TO MARYLAND RULE 1-341

In light of the Court's rulings regarding Lockheed's motion to dismiss, it cannot say that Semtek has brought this case in bad faith or without substantial justification at this time. Because the Court has concerns about plaintiff's ability to prosecute this action successfully, however, the Court will reserve on defendant's motion for costs and legal expenses until plaintiff has had a full and fair opportunity to present evidence in support of its claims.

ALBERT J. MATRICCIANI, JR.
Judge

cc: Jack D. Lebowitz, Esquire
Vadim A. Mzhen, Esquire

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Leslie N. Reizes, Esquire

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O R D E R

Upon consideration of defendant Lockheed Martin Corporation's motion to dismiss and motion for costs and legal expenses, plaintiff Semtek International, Inc.'s oppositions thereto, the reply memoranda filed by defendant, the exhibits attached to the respective memoranda and the arguments of counsel heard on February 22, 2002, it is this 20th day of March, 2002, by the Circuit Court for Baltimore City, Part 20, **ORDERED** as follows:

1. Defendant's motion to dismiss is **GRANTED** in part and **DENIED** in part, as more fully set forth in the accompanying Memorandum and Opinion of this date.
2. The Court's ruling on defendant's motion for costs and legal expenses pursuant to Maryland Rule 1-341 is **RESERVED**.
3. Defendant is ordered to file an answer to the remaining counts of the complaint within fifteen (15) days of the date of this Order.

ALBERT J. MATRICCIANI, JR.
Judge

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