UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE: READY-MIXED CONCRETE PRICE FIXING LITIGATION,	)	
THIS DOCUMENT RELATES TO: ALL ACTIONS	)	MASTER DOCKET NO. 1:05-CV-00979-SEB-VSS

ORDER DENYING THE IMI DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiff Boyle Construction Management, Inc., on behalf of itself and all individuals and entities who purchased ready-mixed concrete directly from defendant (hereinafter "the Class" or "Plaintiffs"), filed a Complaint alleging antitrust violations against Irving Materials, Inc. ("IMI") and unnamed co-conspirators on June 30, 2005, one day after IMI reached a plea agreement with the United States based on violations of the Sherman Act, 15 U.S.C. § 1. This matter is now before the Court on IMI, Fred R. ("Pete") Irving, John Huggins, Daniel C. Butler and Price Irving's (collectively the "IMI Defendants") motion for judgment on the pleadings seeking to bar the claims brought by the Class which arose prior to the four-year statute of limitations, pursuant to Federal Rule of Civil Procedure 12(c). For the reasons set forth below, the Court DENIES this motion.

LEGAL ANALYSIS

I. Standard of Review

A party moving to dismiss under Fed. R. Civ. P. 12(c) bears a weighty burden. The party must show beyond a doubt that the non-moving party "cannot prove any facts that support his claim for relief." N. Ind. Gun & Outdoor Shows, Inc. v. City of South Bend, 163 F.3d 449, 452 (7th Cir. 1998); Craigs, Inc. v. General Elec. Capital Corp., 12 F.3d 686, 688 (7th Cir. 1993). Where, as here, the parties submit no evidence outside the pleadings, a motion for judgment on the pleadings is reviewed under the standard of a Fed. R. Civ. P. 12(b)(6), Fed. R. Civ. P., motion to dismiss. Guise v. BMW Morg., LLC, 377 F.3d 795, 798 (7th Cir. 2004); R.J. Corman Derailment Serv., LLC v. Int'l Union of Operating Eng'rs, 335 F.3d 643, 647 (7th Cir. 2003). On a Rule 12(b)(6) motion, we treat all well-pleaded factual allegations as true. We also construe all reasonably drawn inferences from the facts in a light most favorable to the party opposing the motion: in this case, the Class. Lee v. City of Chicago, 330 F.3d 456, 459 (7th Cir. 2003); Szumny v. Am. Gen. Fin., 246 F.3d 1065, 1067 (7th Cir. 2001).

II. Statute of Limitations

The IMI Defendants seek judgment on the pleadings with respect to the claims against them arising out of purchases made prior to June 30, 2001, the date which allegedly marks the four-year statute of limitations. In their original motion, the IMI Defendants state:

> 1) The Clayton Act's four year statute of limitations, 15 U.S.C. § 15b, bars the Class's claims for any period prior to June 30, 2001.
>
> 2) The statute of limitations accrues at the time of the Class's alleged purchase at an allegedly inflated price. Thus, the Class's claims in this suit filed on June 30, 2005 are barred with respect to any purchase made prior to June 30, 2001.
>
> 3) The Class's attempt to plead fraudulent concealment to toll the statute does not satisfy the fraud pleading standards of particularity established by FRCP 9(b).
>
> 4) Accordingly, the IMI defendants are entitled to judgment on the pleadings with respect to all claims beyond the four year period.

IMI's Motion 1-2.

The IMI Defendants' subsequent reply acknowledged an intervening case, In re Copper Antitrust Litigation, 436 F.3d 782, 789-90 (7th Cir. February 6, 2006), "which requires that the Court deny, in part, this Motion" based on its holding that the four-year statute of limitations for antitrust actions is subject to the discovery accrual rule. IMI's Reply at 1; citing Copper at 789-90. However, the IMI Defendants maintain that their motion should be denied only in part because Plaintiffs' allegations of fraudulent concealment cannot survive under the Seventh Circuit's standard, which requires overt acts "above and beyond" the wrongdoing to establish fraudulent concealment. IMI Reply at 1-3, citing Flight Attendants v. Commissioner of Internal Revenue, 165 F.3d 572, 577 (7th Cir. 1999).

A. Discovery Rule

As stated previously, during the pendency of this motion, the Seventh Circuit issued the opinion in Copper, which articulates the application of the discovery rule in antitrust actions.

> As an initial matter, plaintiffs' antitrust claims are subject to a four-year statute of limitations. 15 U.S.C. § 15b; see also Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971) ("The basic rule is that damages are recoverable under the federal antitrust acts only if suit therefor is 'commenced within four years after the cause of action accrued' . . . ." (quoting 15 U.S.C. § 15(b)). Generally, an antitrust "cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." Zenith, 401 U.S. at 338. As in other areas of the law, however, in the absence of a contrary directive from Congress this rule is qualified by the discovery rule, which "postpones the beginning of the limitations period from the date when the plaintiff is wronged to the date when he discovers he has been injured." See Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450 (7th Cir. 1990). "This principle is based on the general rule that accrual occurs when the plaintiff discovers that 'he has been *injured* and who *caused* the injury.'" Barry Aviation, Inc. v. Land O'Lakes Mun. Airport Comm'n, 377 F.3d 682, 688 (7th Cir. 2004) (quoting United States v. Duke, 229 F.3d 627, 630 (7th Cir. 2000) (emphasis in original).

Copper at 789.

In the case at bar, the Class was initially injured when it purchased the illegally-priced product. Zenith, 401 U.S at 339. However, the discovery rule "postpones the beginning of the limitations period from the date when the plaintiff is wronged to the date when he discovers he has been injured." Copper at 789 (internal citation omitted). The Complaint states that the Class "had no knowledge of the wrongful conduct alleged

herein or of any of the facts that might have led to discovery thereof, until on or about June 2005, when the U.S. Department of Justice announced the guilty plea entered by Irving Materials, Inc." Compl. ¶ 27. Taking this well-pleaded allegation as true, the four-year statute of limitations began to accrue on June 1, 2005, the earliest date at which the Class could have discovered that it was injured and who caused the injury; according to the Complaint. See Compl. ¶¶ 52, 47. Accordingly, the IMI Defendants' Motion for Judgment on the Pleadings—that the Class's damages incurred before June 30, 2001 are barred by the Statute of Limitations—is hereby DENIED based on the required application of the discovery rule.

B. Fraudulent Concealment

The IMI Defendants ask the Court to grant their "motions for judgment on the pleadings, or for dismissal pursuant to Rule 12(b)(6), that plaintiff[s] may not extend or toll the limitations period because the asserted fraudulent concealment is legally insufficient." IMI's Reply at 6.

Quoting again from the decision in Copper, the Seventh Circuit states:

> Fraudulent concealment is a type of tolling within the doctrine of equitable estoppel. Fraudulent concealment "presupposes that the plaintiff has discovered, or, as required by the discovery rule, should have discovered, that the defendant injured him, and denotes efforts by the defendant—above and beyond the wrongdoing upon which the plaintiff's claim is founded—to prevent the plaintiff from suing in time." Copper at 791 (quoting Cada v. Baxter Healthcare Corp.,920 F.2d 446, 451 (7th Cir. 1990).

The IMI Defendants' argument thus misses the mark.[1] Whether or not the Complaint properly pled fraudulent concealment is irrelevant. As stated above, the four-year statute of limitations began to accrue on June 1, 2005, the earliest date according to the Complaint at which the Class could have discovered that it was injured and who caused the injury. Therefore, all of the Class's claims as stated in the Complaint are timely, and the statute of limitations does not bar those purchases made prior to June 30, 2001. Because all claims are timely there is no reason to discuss whether fraudulent concealment was properly pled in order to toll the statute of limitations. The statute of limitations simply does not need to be tolled.

CONCLUSION

For the reasons stated above, the Court DENIES the IMI Defendants' Motion for Judgment on the Pleadings. IT IS SO ORDERED.

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[1] In our view, the Class's argument is off-base as well. The Class argues in its Surreply that it pleaded with particularity that the Defendants engaged in independent affirmative acts of concealment, "above and beyond" the alleged price-fixing such as attending secret meetings and deliberately precluding the creation of evidence by restricting note-taking. Surreply at 3; citing Compl. ¶¶ 50-51. These alleged affirmative and fraudulent acts of concealment were allegedly designed specifically to prevent Plaintiffs and other Class members from detecting Defendants' unlawful conduct. Id. The Class argues that "[u]nder the standard confirmed in Copper, Plaintiffs' allegations of fraudulent concealment easily satisfy the generous standard for a motion for judgment on the pleadings, and support the conclusion that 'fraudulent concealment should be invoked to toll the statute of limitations.'" Surreply at 3-4; citing Copper, 436 F.3d at 790.

Date: 09/29/2006

SARAH EVANS BARKER, JUDGE
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