

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION
CIVIL ACTION NO. 4:98CV-99-M**

IN RE: BIG RIVERS ELECTRIC CORPORATION

DEBTOR

PIK-COAL COMPANY

APPELLANT

V. MEMORANDUM OPINION AND ORDER

BIG RIVERS ELECTRIC CORPORATION

APPELLEE

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This matter comes before the Court on Appeal from the Bankruptcy Court's Order dismissing the claim of Pik-Coal Company (hereinafter Pik-Coal), the appellant, against Big Rivers Electric Corporation (hereinafter Big Rivers), appellee. Both Pik-Coal and Big Rivers filed briefs in this matter [DN 3 and DN 4 respectively]. The Court, having considered said briefs, finds this matter ripe for decision. For the following reasons, the decision of the Bankruptcy Court dismissing the claim of Pik-Coal is **AFFIRMED**.

STATEMENT OF FACTS

Big Rivers operated a number of electric plants in the western part of Kentucky. In October of 1978, Big Rivers solicited bids for long term coal contracts to supply its Coleman plant near Hawesville, Kentucky and Reid plant near Sebree, Kentucky. This solicitation

sought a ten year supply contract for medium sulfur coal. In December of the same year, Alley-Cassetty Coal Company (hereinafter Alley-Cassetty) solicited what later proved to be the lowest bid. Big Rivers demanded a shipment of coal from Alley-Cassetty to run certain test burns to determine if the coal contained the proper sulfur content. The coal failed to meet Big Rivers' specifications as the tests revealed a slagging problem that occurs when ash from the coal melts and accumulates on the inner walls of the boiler. Big Rivers rejected the Alley-Cassetty proposal because of this problem in the summer of 1979.

Alley-Cassetty found another source of coal to meet Big Rivers' needs after entering into discussions with Pik-Coal. Pik-Coal previously entered into a coal brokering agreement with Solar Sources, Inc. (hereinafter Solar Sources). This agreement granted Pik-Coal the exclusive right to represent Solar Sources coal to entities such as Big Rivers for a period of "6 months and so long thereafter as any orders or contracts are in force, including any extension or renewal thereof." [DN 3 p 2]. This contract provided Pik-Coal a 6% commission of the FOB mine price of the coal supplied under the agreement. Alley-Cassetty, now with the required coal, informed Big Rivers it desired to proceed under its 1979 bid. However, Big Rivers received a competing bid from E&M Coal Company (hereinafter E&M) in April of 1980 at a price lower than Alley-Cassetty's bid. After testing E&M's coal, Big Rivers decided to accept this proposal despite not knowing for certain the origin of E&M's coal supply. E&M and Big Rivers officially entered into this agreement in September of 1980. In the end, E&M entered into an agreement with Solar Sources to supply the coal to fill the Big Rivers' contract.

It was no coincidence that E&M's bid was lower than all others. Eddie Ray Brown, owner of E&M, met with Shirley Pritchett about obtaining Big Rivers as a customer. Brown entered an agreement to pay Pritchett a portion of the profits from such sales. Pritchett then approached William Thorpe, then Big Rivers' General Manager, about such a contract. The end result of these discussions created an elaborate scheme of bribes and kickbacks from E&M to Thorpe from 1980 to 1992 in exchange for Big Rivers contracting with E&M for its coal supply. E&M fully performed the contract until its expiration in December of 1990.

In March of 1994, Pik-Coal filed a federal lawsuit in the Western District of Kentucky against Big Rivers, Eddie Ray Brown, E&M, Solar Sources, William Thorpe, Shirley Pritchett, and various others for their illegal actions in accepting and paying bribes for such coal contracts. On September 25, 1996, Big Rivers filed a Chapter 11 bankruptcy petition. Pik-Coal then filed a Proof of Claim on February 10, 1997 citing as the basis of the claim the contingent unliquidated claim for fraud based on respondeat superior as alleged in the federal lawsuit.¹ Big Rivers filed an objection to this claim. The Bankruptcy Court found that the statute of limitations barred Pik-Coal's claim. The Bankruptcy Court held that the "perpetration of the fraud' on Pik Coal occurred when the initial bribery arrangement was

¹ The federal lawsuit filed in the Western District of Kentucky entitled Pik-Coal Company v. Big Rivers Electric Corporation, et al, Civil Action No. 94CV-0049 was dismissed on June 18, 1998 on the ground Pik-Coal suffered no direct injury as a result of the bribery/kickback scheme. Pik-Coal appealed that decision to the United States Court of Appeals for the Sixth Circuit. At this time, the Court has not reached a decision on the merits. However, in an order dated October 2, 1998, the Court dismissed Big Rivers as an appellee because such claims against Big Rivers must be adjudicated by the United States Bankruptcy Court pursuant to the United States Bankruptcy Code.

made with Thorpe in 1980.” [DN 4 Addendum B, G p 5]. Therefore, by an order dated March 31, 1998 the Bankruptcy Court sustained the objection to Pik-Coal’s claim. It is from that decision that Pik-Coal appeals to this Court.

STANDARD OF REVIEW

The district court sits as a court of appellate review for decisions of the bankruptcy courts. 28 U.S.C. §158(a). “The district courts of the United States shall have jurisdiction to hear appeals (1) from final judgments, orders and decrees . . . of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title.” Id. The findings of fact of the bankruptcy court are reviewed under the clearly erroneous standard. FED. R. BANKR. 8013. The district court, however, gives “plenary review to questions of law.” Michigan Nat’l Bank v. Charfoos (In re Charfoos), 979 F.2d 390, 392 (6th Cir. 1992); see National Mortgage Co. v. Brengettcy, 223 B.R. 684, 689 (W.D. Tenn. 1998) (“[B]ankruptcy court’s findings of fact shall not be set aside unless those findings are ‘clearly erroneous.’ . . . Questions of law, however, are reviewed de novo.”). The order of the Bankruptcy Court is a final and appealable order. The issue of the correct application of the statute of limitations is a question of law that this Court reviews de novo. John Mitchell, Inc. v. Steinbrugge (In re Hanna), 72 F.3d 114, 115 (9th Cir. 1995); Resolution Trust Corp. v. McKendry (In re McKendry), 40 F.3d 331, 334 (10th Cir. 1994); Sloan v. Zions First Nat’l Bank (In re Castletons, Inc.), 154 B.R. 574, 577 (D. Utah 1992), aff’d 990 F.2d 551 (10th Cir. 1993).

DISCUSSION

The issue before this Court involves the determination of when the fraudulent act of soliciting bribes in exchange for information relating to coal bidding contracts was perpetuated for purposes of the statute of limitations. Pik-Coal contends the fraudulent acts continued through the “continuous stream of bribery payments, which do not appear to have terminated until some time in the 1990's.” [DN 3 p 7]. In sum, Pik-Coal argues that the fraud continued until 1992 when Brown made the last payment to Pritchette and Thorpe. Because Pik-Coal filed its lawsuit in 1994, their claim is not barred by the applicable statute of limitations. Alternatively, Big Rivers argues that the perpetration of the fraud occurred at the latest in September of 1980 when Brown, Pritchette, and Thorpe entered into their bribery agreement. This date signifies when the last act of fraud could have been committed against Pik-Coal.

The Kentucky Revised Statutes (KRS) §413.120 sets forth the applicable statute of limitations period for bringing a cause of action based on fraud. This sections states “[t]he following actions shall be commenced within five years after the cause of action accrued: . . . (11) An action for relief or damages on the ground of fraud or mistake.” KY. REV. STAT. ANN. § 413.120 (Michie 1992). KRS 413.130 establishes when a cause of action accrues.

This section provides

(3) In an action for relief or damages for fraud or mistake, referred to in subsection (12) (sic) of KRS 413.120, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake. However, the action shall be commenced within ten (10) years after the time of making the contract or the perpetration of the fraud.

KY. REV. STAT. ANN. §413.130 (Michie 1992). Thus, these statutes read together establish that a cause of action for fraud must be brought within five years of the discovery of the fraud, but such an action cannot be brought ten years after the actual perpetration of the fraud. Redding v Main, 196 S.W.2d 887, 889 (Ky. 1946).

As mentioned above, the question for the Court is an interpretation of the meaning of the “perpetration of the fraud.” The Court believes this term refers to the period in which the crime was committed. The Bankruptcy Court properly ruled that the crime was committed in 1980 when Brown, Pritchette, and Thorpe all agreed to engage in a scheme of kickbacks and bribes in awarding coal contracts and such contracts were so awarded.

The fact that payments to Pritchette and Thorpe continued until sometime in 1992 does not mean that the crime was continuously perpetrated until that period. In Schoolfield v. Provident Savings Life Assurance Society, 166 S.W. 207, 209 (Ky. 1914), the Kentucky Supreme Court addressed this similar issue in the context of an insurance fraud case. The plaintiff alleged that he was induced to purchase a new life insurance policy because of the fraudulent misrepresentations that the insurance company would pay certain sums at the time the policy matured. The plaintiff purchased this policy in 1900 and continued to pay premiums until 1911 when the policy matured. Upon maturity, the insurance company refused to pay these promised amounts.

The court held the statute of limitations barred the plaintiff’s action. According to the court, the fraud “was perpetrated in 1900, when the agent, by the alleged false representations, induced the insured to accept the new contract, and this action was not

brought for more than ten years thereafter.” Schoolfield, 166 S.W. at 208. Thus, the fraudulent act was practiced and occurred in 1900 when the defendant made certain fraudulent promises it later refused to honor. Id. at 209. The court rejected the plaintiff’s contention that the payment of the premiums suspended the running of the statute of limitations. Id. The court noted “[i]t was the representations of the agent, and not the payment or receipt of the premiums, that constituted the fraud complained of.” Id.; see also Fox v. Hudson’s Ex’x, 150 S.W. 49, 52 (Ky. 1912).

Likewise, the fraud complained of by Pik-Coal was the act of Brown offering bribes and kickbacks to Pritchette and Thorpe in exchange for coal contracts. These parties practiced their fraud by agreeing to enter such an arrangement in 1980, not by actually making payments as required by the agreement up until 1992. The date on which the parties actually paid or received the bribe or kickback is irrelevant for statute of limitations purposes. The important time is when the parties actually practiced the fraud. In this case, the Bankruptcy Court properly concluded the parties practiced the fraud by entering into an agreement in 1980 to arrange coal contracts in exchange for illegal bribes and kickbacks. This agreement prevented Pik-Coal from realizing any commission on its agreement with Solar Sources. Because such action occurred more than ten years before the filing of the lawsuit serving as the basis for Pik-Coal’s claim, such claim was barred by the applicable statute of limitations.

Pik-Coal’s reliance on Rison v. Shepherd, 186 S.W.2d 648 (Ky. 1945) and Jordan v. Howard, 54 S.W.2d 613 (Ky. 1932) is unavailing. In Rison, the Kentucky Supreme Court

addressed the issue of an administrator's failure to account for an insurance policy to the beneficiaries. The decedent was a soldier who died during World War I. In 1930, the administrator collected an insurance policy on the decedent but failed to account for it to the beneficiaries of the estate. A beneficiary discovered this fraudulent action in 1941 and brought suit against the administrator and his sureties in 1942. The trial court dismissed the action on the ground the statute of limitations barred the action. The court reversed citing that an action against an administrator for fraudulently concealing money of an estate does not accrue until the administrator fails to account for it. Rison, 186 S.W.2d at 649. The court held the fraud was not perpetrated by the administrator collecting the fund nor in holding it because an administrator may hold funds of an estate in his or her hands and Kentucky statutes authorize the payment of interest on such funds held for over two years. Id. The fraud was perpetuated when the administrator failed to account for it when the beneficiary demanded a settlement. Id.

Thus, in Rison, the fraudulent act lays in failing to account for the insurance policy when demanded in 1942 and not in taking the insurance money in 1930. The case does not lend support to Pik-Coal's argument that each individual payment is a continuous act from which the limitations period can be measured. The actual taking and holding of the insurance money by the administrator was not fraudulent. As noted above, the fraudulent act occurred when the administrator refused to account for such proceeds in 1942. In the present case, the fraudulent act resulted from the 1980 agreement to enter into an illegal scheme of bribes and kickbacks for coal contracts.

Jordan v. Howard, 54 S.W.2d 613 (Ky. 1932) involved a suit to recover money on a land sale contract. Jordan purchased the land pursuant to a court ordered sale from Howard in 1913. The deed and other information stated the land contained 1200 acres. In 1925, Jordan discovered that the land contained only 1063 acres. He filed suit in May of 1926 and the trial court found for Jordan. On appeal, the Kentucky Supreme Court reversed the lower court's decision holding that the statute of limitations barred Jordan's cause of action. Jordan, 54 S.W.2d at 616.

The court first addressed the issue of when the limitations period began to run. The court held the cause of action did not accrue until Jordan made the final payment for the land in 1918. Id. at 615. The court opined

Suits of this character when the purchase money has been paid are regarded as being founded upon an implied contract to refund money fraudulently or mistakenly collected. That doctrine rests upon the idea that the purchaser has paid for land he didn't get and there is no injury or loss until the money is paid. Hence, the cause of action arises upon the final payment and limitations begin to run then.

Id. Therefore, Jordan's cause of action for the mistake in the deed did not accrue until he made the final payment under the contract and bond for deed in 1918. Thus, his action was not barred by the ten year qualification to the statute of limitations.

The present case is distinguishable from Jordan. The court in Jordan relied on an implied contract to extended the time of accrual for the cause of action for mistake until the Jordan made the final payment for the land. No such implied contract existed between Big Rivers and Pik-Coal. The actual injury to Pik-Coal occurred in 1980 when Big Rivers

awarded the coal supply contract to E&M as a result of the illegal payments. Pik-Coal's cause of action arose in 1980 when these parties entered into their bribery and kickback scheme to award coal contracts. Pik-Coal's cause of action did not accrue in 1992 when Brown and E&M made the final payment to Pritchette and Thorpe. Thus, the statute of limitations prevents Pik-Coal from asserting its claim against Big Rivers.

CONCLUSION

For the foregoing reasons, the Court **affirms** the decision of the Bankruptcy Court to dismiss Pik Coal's claim as time barred by the applicable statute of limitations.

This the _____ day of November, 1998.

Joseph H. McKinley, Jr.
Judge, United States District Court

cc: counsel of record
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