

IN THE UNITED STATES BANKRUPTCY COURT
 FOR THE
 SOUTHERN DISTRICT OF GEORGIA
 Savannah Division

IN RE:) ROSE MARINE, INC.) Debtor) <hr style="width: 50%; margin-left: 0;"/> W. JAN JANKOWSKI, TRUSTEE FOR) ROSE MARINE, INC.) Plaintiff) vs.) MARINE CONTRACTING CORPORATION) EARL J. HADEN, JR.) ROBERT H. THOMPSON AND) JOHN H. BUDGE) Defendants)	Chapter 7 Case Number <u>86-40143</u> FILED at 8 O'clock & 45 min. A.M. Date: 3-30-93 Adversary Proceeding Number <u>88-4038</u>
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ORDER

Rose Marine, Inc. (Rose Marine), the debtor in the underlying bankruptcy case, brought this adversary proceeding in its capacity as debtor-in-possession against Marine Contracting Corporation (Marine Contracting), Earl J. Haden Jr., Robert H. Thompson, and John H. Budge alleging various state law causes of action. By order dated May 21, 1990, W. Jan Jankowski the Chapter 7 trustee succeeded the debtor-in-possession as plaintiff upon conversion of the underlying case from a Chapter 11 to a Chapter 7

proceeding. Based on the evidence presented at trial and relevant legal authority, I make the following findings.

FINDINGS OF FACT

Rose Marine was incorporated as a marine construction business in 1975 in the State of Georgia. Rose Marine performed various construction jobs associated with waterways from Maryland to Florida. The company maintained two offices, one in Norfolk, Virginia, and one in Savannah, Georgia. Most of Rose Marine's jobs were in the Norfolk, Virginia area, where a large Naval center is located.

Vital to any marine construction firm is the firm's bonding capacity, the extent to which an insurer will issue, for a fee, payment and performance bonds insuring the firm's performance of its contract and payment of all subcontractors and material suppliers under the contract. In 1979 Rose Marine lost its bonding capacity and, with few exceptions, could no longer win construction jobs. Defendants Haden and Thompson, and Benjamin Flint, employees of Rose Marine, organized and incorporated Marine Contracting for the sole purpose of bidding and securing construction jobs to subcontract to Rose Marine. Mr. Haden was employed by Rose Marine as president, and Messrs. Thompson and Flint were vice presidents of Rose Marine. Shortly after he became president of Rose Marine, Mr. Haden acquired a 10% share of Rose Marine stock. All three incorporators of Marine Contracting worked out of Rose Marine's

Virginia office. Marine Contracting was incorporated in the State of Virginia, capitalized solely on the investments of Messrs. Haden, Thompson and Flint.¹

Marine Contracting was organized as a shell corporation, which, for reasons not relevant to this litigation, could secure payment and performance bonds. Rose Marine had at its disposal substantial construction equipment that it either owned or leased from Donald Austin or other third parties, the personnel and the expertise necessary to perform marine construction jobs. Messrs. Haden, Thompson and Flint incorporated Marine Contracting intending to bid on and win contracts in its name, and subcontract the jobs to Rose Marine to do the work, as Rose Marine could no longer win jobs on its own without bonding.

At the time Marine Contracting was incorporated, Donald Austin was a 90% shareholder of Rose Marine and Chairman of its Board of Directors. An agreement between Messrs. Austin and Haden to be carried out by Rose Marine and Marine Contracting is the essence of this case. Mr. Austin testified that prior to Marine Contracting's incorporation Mr. Haden informed him that Mr. Haden intended to organize a company that could win construction jobs which could be subcontracted to Rose Marine. Mr. Austin testified

¹Mr. Haden invested Forty Thousand and No/100 (\$40,000-00) Dollars, Mr. Thompson Thirty Thousand and No/100 (\$30,000.00) Dollars, and Mr. Flint Thirty Thousand and No/100 (\$30,000.00) Dollars.

that he reached an oral agreement with Mr. Haden that Marine Contracting would subcontract all jobs on which it successfully bid to Rose Marine and retain 1% of the gross revenue from each job, plus the cost of its bonding fee, off the top, as its profit. Under the agreement, the balance of the proceeds from each job would be paid to Rose Marine, and Rose Marine was to meet all expenses, absorb any loss and make any profit. Rose Marine would perform the work each job required as "subcontractor."

(Transcript of trial October 14, 1992 (TR) at 227, 235-38, 476). (This agreement will be referred to as "the 1% agreement."). Mr. Haden denies there was a 1% agreement. According to Mr. Haden, Marine Contracting subcontracted work to Rose Marine on an individual job basis. (TR at 58, 65). Mr. Thompson and Mr. Flint testified that they did not know of any 1% agreement at the time they incorporated Marine Contracting. (TR at 326, 439). The 1% agreement was not reduced to writing. Although the parties disagree about the contractual arrangement pursuant to which jobs were subcontracted to Rose Marine, they agree that Marine Contracting would subcontract jobs to Rose Marine only until Rose Marine regained its bonding capacity and that the arrangement could be terminated at any time. (TR at 121, 236-37).

Clarence Taylor is a certified public accountant employed by an independent accounting firm that performed accounting and auditing services for Rose Marine during the years 1980-1986. Mr.

Taylor testified that he was present at meetings in Savannah, Georgia attended by Messrs. Austin, Haden and Hugh Cheshire, who was a vice president of Rose Marine in its Savannah office. At these meetings, according to Mr. Taylor, the details of the incorporation of Marine Contracting and its relationship with Rose Marine were discussed, including the 1% agreement. Mr. Taylor testified that during the meetings those present discussed the fact that Marine Contracting "was set up by three individuals in Virginia to provide bonding for Rose Marine, and that in the early period of time they were to get one percent of the gross amount of the jobs for providing that bonding." (TR at 154; see also TR at 173-75). Mr. Taylor testified that Mr. Haden voiced no objection to these representations. (TR at 154-55). Mr. Taylor is the only truly disinterested witness in this case.

Defendants tendered into evidence numerous written subcontract agreements pursuant to which Marine Contracting subcontracted individual jobs to Rose Marine on a fixed price basis during 1979-1984. These subcontract agreements were prepared in Virginia by Mr. Haden or Mr. Thompson, or at their direction. Each written subcontract agreement executed before December 1983 is signed by Messrs. Haden or Cheshire on behalf of Rose Marine and Mr. Thompson on behalf of Marine Contracting.² Defendants rely on the

²As discussed below in greater detail, Mr. Haden resigned as president in November of 1983 and Mr. Austin became president of Rose Marine. Mr. Austin then began signing contracts on behalf of Rose Marine.

existence of the written subcontract agreements in support of their contention that there was no oral 1% agreement that governed all subcontracts to Rose Marine. They contend such an agreement would be inconsistent with the fact that written agreements were executed in connection with individual jobs. This argument is unpersuasive under the circumstances of this case. Mr. Austin was not a party to any of the written subcontract agreements prior to December 1983. Up to that point, the written subcontract agreements were executed by either Mr. Haden or Mr. Cheshire on behalf of Rose Marine and Mr. Thompson on behalf of Marine Contracting. All of the written subcontract agreements were prepared in Virginia at Mr. Haden's or Mr. Thompson's direction. Beginning December 8, 1983, Mr. Austin, as successor president to Mr. Haden, began to sign written subcontract agreements on behalf of Rose Marine. The fact that Mr. Austin signed written subcontract agreements does not in this case indicate that he had no oral agreement with Mr. Haden. Mr. Haden testified that Marine Contracting's payment and performance bonds could not have been obtained had the bonding company known of a 1% agreement. (TR at 68). Had such an agreement been documented, according to Mr. Haden, Marine Contracting "would never have been able to start." (TR at 68).

Based on Mr. Taylor's testimony and compelling circumstantial evidence pertaining to the purpose of Marine

Contracting's incorporation, I find Mr. Austin and Mr. Haden reached the 1% agreement. The 1% agreement was in force until January, 1984. In January 1984 Mr. Austin and Mr. Haden agreed that Marine Contracting would subcontract jobs to Rose Marine and retain, as its profit 2% of job revenues, off the top, plus the cost of the bonding fee. (TR at 87, 113).

Marine Contracting used Rose Marine's office, equipment, personnel and expertise to bid and perform contracts in Marine Contracting's name. Initially, Marine Contracting had only three employees, Messrs. Haden, Thompson, and Flint, and owned no equipment. Although Mr. Thompson was "president" of Marine Contracting and "vice president" of Rose Marine, the evidence established that in practice his role in these positions was merely as a figurehead, acting under the direction and authority of Mr. Haden who ran the business, and that Mr. Thompson's actual job was an on-site job supervisor. (TR at 193). Messrs. Haden, Thompson and Flint received salaries from Rose Marine and Marine Contracting. The estimators that worked up bids were paid by Rose Marine. Defendant John Budge was a bookkeeper for Rose Marine in its Virginia office who handled paperwork concerning purchasing, payroll and bidding. (Deposition of John Budge November 30, 1992 at 4).

Mr. Austin placed great trust in Mr. Haden based on Mr. Haden's favorable reputation in the marine construction business and left complete control of the business operations to Mr. Haden. Mr.

Haden ran Marine Contracting and Rose Marine's Virginia office as one business. He had full charge and responsibility for running Rose Marine and ultimately controlled a process of winning jobs through Marine Contracting, subcontracting some work on each job to Rose Marine, and utilizing Rose Marine's Virginia office, equipment, personnel and expertise to carry out Marine Contracting's obligations as general contractor. Mr. Haden testified that he "was Rose [Marine]," (TR. at 77; see also Mr. Austin's testimony at 278), and that the bidding-subcontracting arrangement between Marine Contracting and Rose Marine "was an agreement between me -as president of Rose [Marine] and me as vice president of Marine Contracting." (TR at 367).

After calculating the cost to do a construction job for bidding purposes, the estimators added a percentage for Rose Marine's profit margin, and on top of that, a percentage for Marine Contracting's profit margin. (TR at 64-65, 93, 191-92). Rather than subcontract each job in its entirety to Rose Marine, on many projects Marine Contracting subcontracted work to other subcontractors (TR at 95) and made a profit on these subcontracts. (TR at 464-65). Marine Contracting's corporate tax returns reveal the following information:

Year	<u>Gross Revenue</u>	Cost of ³ Goods Sold	<u>Gross Profit</u>
1981	\$2,592,791	\$2,477,268	\$115,523
1982	1,291,540	1,166,761	124,779
1983	5,762,674	5,429,914	332,760
1984	3,551,830	3,301,766	250,064

Marine Contracting's corporate tax returns for 1979 and 1980 are not in evidence. Rose Marine presented records of jobs subcontracted to Rose Marine during 1979 and 1980 which show that Marine Contracting's gross revenue for 1979 was approximately Six Hundred Thirteen Thousand One Hundred Eighty-One and No/100 (\$613,181.00) Dollars and, for 1980, One Million Two Hundred Eighty-Two Thousand Nine Hundred Seventy-Three and No/100 (\$1,282,973.00) Dollars. (Plaintiff's exhibit No. 38).

Marine Contracting's gross profit for the years 1979-1983 exceeded 1% of its revenues and in 1984 exceeded 2% of its revenues. Because implementation of the bidding-subcontracting arrangement was under Mr. Haden's undisputed full control, Mr. Austin was unaware of Marine Contracting's actual profits while Mr. Haden ran the

³Marine Contracting was not a mere conduit whereby job proceeds, less its profit, were paid to Rose Marine. Marine Contracting's corporate tax returns for the years in question reveal that the costs of performing the jobs, in addition to payments to Rose Marine for its work as a subcontractor, were borne by Marine Contracting. Because Marine Contracting bore such costs, Rose Marine is not entitled under the 1% and 2% agreements to receive all of the job proceeds, less 1% or 2%. Rose Marine is entitled to receive the difference between Marine Contracting's gross profit (gross revenue less cost of goods sold) and 1% of gross revenue (for the years 1979-1983) or 2% of gross revenue (for 1984). (TR at 30507).

business. Mr. Austin testified that he did not know, suspect, or have reason to know or suspect that Marine Contracting was making a greater profit than it was entitled to under his agreements with Mr. Haden. (TR at 233, 238, 239, 241, 244-45, 251, 258, 260, 270. Mr. Austin's testimony in this regard is consistent with Mr. Haden's. Mr. Haden testified that only he, Mr. Flint and Mr. Thompson (the incorporators and owners of Marine Contracting) knew what Marine Contracting's actual profits were (TR at 119) and that Mr. Austin had no reason to be suspicious of Mr. Haden. (TR at 133). Mr. Cheshire, Rose Marine's vice president in Savannah, testified that he also was unaware of Marine Contracting's actual profits. (TR at 393-94). Although at times Mr. Austin heard rumors that Mr. Haden was using Marine Contracting to make more money than permitted under the 1% agreement, Mr. Austin testified that his investigations into these rumors only strengthened his confidence and trust in Mr. Haden. (TR at 277; see also Mr. Cheshire's testimony at 388-89). Mr. Austin did not learn of Marine Contracting's profits for 1979-1984 until some time after October 1987, when, as discussed below, he first discovered that Marine Contracting misappropriated proceeds from an insurance settlement in connection with an accident involving Rose Marine's equipment. This discovery led to a personal investigation by Mr. Austin of Marine Contracting's financial records, which, according to Mr. Austin, required a lawyer in order to obtain Marine Contracting's corporate tax returns. Upon review

of the returns, Mr. Austin and his lawyer learned of Marine Contracting's profits during the years in question. Mr. Austin did not see any financial records of Marine Contracting prior to October 1987. (TR at 251; see also TR at 220, 239). There is no evidence that while Mr. Haden was in control of Rose Marine, Marine Contracting's tax returns, or other financial records of Marine Contracting relevant to this litigation, were not accessible to Mr. Austin. Mr. Austin testified that prior to October 1987, he had no reason to suspect Marine Contracting of breaching the 1% and 2% agreements and thus no reason to request its financial records. (TR at 238-51). Mr. Taylor, Rose Marine's accountant, testified that all appearances were that Marine Contracting was complying with the terms of the 1% agreement and that he therefore saw no need to examine the tax returns or other financial records of Marine Contracting. (TR at 155-56).

Marine Contracting subcontracted a job to Rose Marine to do repairs to the James River bridge fender system in Newport News, Virginia.⁴ On September 26, 1983 several tug boats owned by the Curtis Bay Towing Company of Virginia (Curtis Bay) collided with equipment provided by Rose Marine on the James River Bridge project. Mr. Haden, as vice president of Marine Contracting, made a claim for

⁴A written agreement dated August 31, 1983 was executed, which provided that Rose Marine would conduct the repairs for a fixed price. The written agreement is signed by Mr. Cheshire as vice president of Rose Marine and by Mr. Thompson in his capacity as president of Marine Contracting.

damages to Curtis Bay in the amount of Eighty-Seven Thousand Six Hundred Eighty-Seven and 05/100 (\$87,687.05) Dollars.⁵ No claim was made on behalf of Rose Marine. Curtis Bay made an offer of settlement for Fifty-One Thousand Five Hundred and No/100 (\$51,500.00) Dollars, which Mr. Thompson, as president of Marine Contracting, accepted. On May 4, 1984 Mr. Thompson, on behalf of Marine Contracting, executed a release of Curtis Bay of any liability stemming from the James River Bridge accident. Rose Marine (other than Mr. Haden and Mr. Thompson) was not informed of the settlement negotiations with Curtis Bay. Curtis Bay issued a check payable to Marine Contracting for Fifty-One Thousand Five Hundred and No/100 (\$51,500.00) Dollars, which was deposited in Marine Contracting's corporate bank account. Rose Marine did not receive any settlement proceeds.

Mr. Haden resigned as president of Rose Marine in November 1983. Mr. Austin testified that Mr. Haden resigned purportedly to avoid potential personal liability for taxes owed by Rose Marine. (TR at 223). Mr. Austin became president of Rose Marine when Mr. Haden resigned. For several months following his resignation as president, Mr. Haden continued to run Rose Marine and controlled the bidding-subcontracting arrangement with Marine Contracting as an employee of Rose Marine. It is undisputed that Mr. Haden's

⁵Mr. Haden wrote a representative of Curtis Bay on Marine Contracting stationery and signed the letter in his capacity as vice president of Marine Contracting.

employment with Rose Marine and his control of the business ceased in March or April 1984. (Stipulation No. 11; TR at 50). Mr. Haden began working for another corporation, Sayler Marine, Inc., on May 15, 1984. (TR at 117). Mr. Thompson resigned as vice president of Rose Marine in December of 1983 or January of 1984. (TR at 207).

Defendants tendered as evidence "subcontract affidavits" executed during or after July 1984 by Donald Austin as president of Rose Marine (or by Leon White as general manager acting under Mr. Austin's authority) purporting to release Marine Contracting "from any and all claims, demands and liabilities arising out of or in any way connected with work performed by SUBCONTRACTOR [Rose Marine] for CONTRACTOR [Marine Contracting] and payment therefor" with respect to the job listed in each affidavit. Each affidavit provides that the release is effective upon payment of a specified sum of money. Mr. Austin testified that he executed the affidavits not knowing Marine Contracting was making a greater profit than it was entitled to under his agreements with Mr. Haden, and that had he known he would not have executed the releases. (TR at 259).

On June 6, 1988 Rose Marine filed this adversary proceeding. From the convoluted complaint it is difficult to decipher the specific alleged causes of action and which defendant is liable under each cause of action asserted. Nevertheless, liberally construed and as developed by subsequent pleadings and the pretrial order, the complaint sets forth the following causes of

action against the defendants: 1) for breach of contract against defendants Haden and Marine Contracting, contending that with respect to all jobs which Marine Contracting subcontracted to Rose Marine during 1979-1983 Marine Contracting withheld from Rose~Marine more than 1% of the gross revenue plus the bonding fee, and, for 1984, more than 2% of the gross revenue plus the bonding fee; 2) for conversion against all defendants, contending the individual defendants unlawfully appropriated proceeds from the settlement with Curtis Bay, and against Marine Contracting acting through the individual defendants; and 3) against defendants Haden and Thompson for breach of fiduciary duty by a corporate officer.⁶ In addition to actual damages, the complaint requests punitive damages and attorneys' fees.

⁶The complaint also asserts a cause of action for tortious interference with a contractual relationship. At the close of plaintiff's case, defendants moved for a directed verdict on all counts of the complaint. No evidence having been introduced that defendants did anything to misappropriate a business opportunity of Rose Marine, as Rose Marine during the time at issue was without bonding capacity, defendants' motion was granted as to Rose Marine's cause of action for tortious interference with a contractual relationship. (TR at 319). Additionally, defendants' motion for a directed verdict was granted to the extent the complaint asserts a cause of action against defendant Budge for breach of a fiduciary duty. (TR at 320). Defendants' motion was otherwise denied.

CONCLUSIONS OF LAW⁷

I. BREACH OF CONTRACT

Having made a factual determination that Mr. Austin and Mr. Haden orally reached the 1% agreement, I must determine its

⁷I note that the parties have not raised any question as to this court's jurisdiction to enter a final order in this adversary proceeding. The complaint is defective in failing to plead whether this adversary proceeding is a core or non-core proceeding. See 28 U.S.C. §157(b) and Federal Rule of Bankruptcy Procedure (FRBP) 7008(a). This is a technical defect which could have been amended, In re: Painter, 84 B.R. 59, 61 (Bankr. W.D. Va. 1988); however, defendants did not raise the defect and Rose Marine failed to correct the mistake on its own. The core/non-core distinction has not been addressed in this adversary proceeding. As the causes of action asserted are based purely on state law, this adversary proceeding is a non-core proceeding. See 28 U.S.C. §157(b)(2). In a non-core proceeding the bankruptcy court cannot enter a final order, but must submit proposed findings of fact and conclusions of law to the district court, unless the parties consent to entry of a final order by the bankruptcy court. 28 U.S.C. §157(c). Where as here the adversary proceeding has been fully litigated in the bankruptcy court without a jurisdictional objection, "the absence of a timely objection to the bankruptcy court's jurisdiction constitutes implied consent to the resolution of the controversy [by the bankruptcy court]." In re: Southern Indus. Banking Corp., 809 F.2d 329, 331 (6th Cir. 1987). Accord In re: G.S.F. Corp., 938 F.2d 1467, 1477 (1st Cir. 1991); In re: Men's Sportswear, Inc., 834 F.2d 1134, 1137-38 (2d Cir. 1987); In re: Daniels-Head & Associates, 819 F.2d 914, 918-19 (9th Cir. 1987); In re: Lombard-Wall, Inc., 48 B.R. 986, 992 (S.D. N.Y. 1985); In re: Energy Sav. Center, Inc., 54 B.R. 100, 102 (Bankr. E.D. Pa. 1985), aff'd in part and appeal dismissed in part, 61 B.R. 732 (E.D. Pa. 1986); In re: Alloy Metal Wire Works, Inc., 52 B.R. 39, 40 (Bankr. E.D. Pa. 1985); contra Interconnect Telephone Services, Inc. v. Farren, 59 B.R. 397, 401-02 (S.D.N.Y. 1986). The parties proceeded through trial without objecting to this court's jurisdiction to enter a final order. In doing so they implied their consent to a final order by this court.

legal effect. In Virginia⁸ a valid, enforceable oral agreement "must be reasonably certain, definite, and complete to enable the parties and the courts to give the agreement exact meaning. . . . The provisions must be clear and definite as to what is required of the parties." Richardson v. Richardson, 10 Va. App. 391, 395-96, 392 S.E.2d 688 (1990) (citation omitted). Additionally the contracting parties must come to a "meeting of the minds," id., see also Wells v. Weston, 229 Va. 72, 326 S.E.2d 672 (1985), which

⁸As Georgia is the forum state, its choice of law rules determine applicable state law. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed 1477 (1941); see also Day & Zimmerman Inc. v. Challoner, 423 U.S. 3, 96 S.Ct. 167, 46 L.E.2d 3 (1975); Erie R.R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Under Georgia's choice of law rules (see generally the order entered in this case dated June 24, 1992), the construction and interpretation of a contract is governed by the law of the state where the contract is made, unless it is to be performed in another state, in which case the law of the state of performance controls. Federal Ins. Co. v. Nat. Distributing Co., Inc., 203 Ga.App. 763, 417 S.E.2d 671, 673-74 (1992); General Telephone Co. of Southeast v. Trimm, 252 Ga. 95, 311 S.E.2d 460, 461 (1984). There is no evidence before me as to where the 1% agreement was reached. Mr. Austin did not testify where he and Mr. Haden reached the 1% agreement. In contending Georgia law governs the 1% agreement, counsel for Rose Marine relies on the fact that the 1% agreement was discussed in Georgia at corporate meetings. The evidence, however, does not establish that the 1% agreement was reached at those meetings, but that it was discussed, after the fact. Based on the evidence presented, I find that the 1% agreement was to be performed in Virginia. Under the 1% agreement Marine Contracting, a Virginia corporation, subcontracted jobs to Rose Marine through its Virginia office. Rose Marine and Marine Contracting operated as one business out of Rose Marine's Virginia office. Construction bids were placed in Virginia. Messrs. Haden, Thompson and Flint resided in Virginia and worked in Rose Marine's Virginia office. The role of Rose Marine's Savannah, Georgia office in the events giving rise to this litigation was peripheral. Virginia law, therefore, governs plaintiff's breach of contract claim.

requires "a manifestation of mutual assent." Wells, supra, 229 Va. at 79. The 1% and 2% agreements are straight forward: Marine Contracting retains 1% of gross revenue from each job, or 2% beginning in January 1984, plus the bonding fee; Rose Marine does the work and is paid the balance of the proceeds.⁹ The terms of this agreement are "sufficiently definite to enable the trial court to determine the intent and agreement of the parties and to enforce the contract." Richardson, supra, 10 Va.App. at 396. Further, weighing all the evidence as a whole, I find Mr. Austin and Mr. Haden reached a mutual agreement, a "meeting of the mind," sufficient to bind them under Virginia law. Mr. Austin testified that the 1% agreement was the deal; Mr. Haden denies such an agreement. Obviously, these two witnesses are interested in this litigation's outcome. However, Clarence Taylor, a nonparty who holds no financial interest in Rose Marine or Marine Contracting, testified that the 1% agreement was discussed in Mr. Haden's presence without objection or other indication by Mr. Haden that the 1% agreement did not exist. "In evaluating a party's intent . . . [the court] must examine his outward expression rather than his secret, unexpressed intention." Wells, supra, 229 Va. at 78. Mr. Haden's silence manifested his prior assent to the 1% agreement with

⁹As discussed above, however, because the costs of performing the jobs was borne by Marine Contracting, Rose Marine is only entitled under the 1% and 2% agreements to receive Marine Contracting's gross profit less 1% or 2% of gross revenue.

Mr. Austin. The 1% agreement is binding under Virginia law. Likewise, the subsequent 2% agreement is binding. The 1% agreement is a pre-incorporation contract between Mr. Austin, on behalf of Rose Marine, and Mr. Haden. Although Marine Contracting did not exist when the contract was made, under Virginia law the 1% agreement is binding on Marine Contracting by virtue of Marine Contracting's "'acquiescing, or by its accepting the benefits of the transaction. . . .'" Boyd. Payne, Gates & Farthing, P.C. v. Payne, Gates, Farthing & Radd, P.C., 244 Va. 418, 422 S.E.2d 784, 788 (1992) [quoting Sterling v. Trust Co. of Norfolk, 149 Va. 867, 8~081, 141 S.E. 856 (1928)].

Defendants maintain that the applicable statute of frauds and statute of limitations bar Rose Marine's breach of contract action. Defendants argue that the 1% and 2% agreements are within the statute of frauds because they were intended to last more than one year. In Georgia,¹⁰ "[a]ny agreement that is not to be performed within one year from the making thereof" must be in writing. O.C.G.A. §13-5-30(5). The statute does not apply to an agreement for an indefinite period terminable at will, an agreement with performance possible within one year, or an agreement as to which either party has partially or fully performed. Vitner v. Funk,

¹⁰Defendants cite Virginia's Statute of Frauds. These defenses are procedural matters that impact the plaintiff's remedy. Under Georgia's choice of law rules, Georgia law controls their application. Gaffe v. Williams, 194 Ga. 673, 22 S.E.2d 512 (1942).

182 Ga.App. 39, 354 S.E.2d 666, 670 (1987). It is undisputed that Marine Contracting would subcontract jobs to Rose Marine only until Rose Marine could get bonding, and that the arrangement could be terminated at any time. There was a possibility of performance within a year. Rose Marine at least substantially performed under the 1% and 2% agreements. Therefore, O.C.G.A. §13-5-30(5) does not apply to the 1% and 2% agreements.

Georgia's Statute of Limitations for oral contracts is O.C.G.A. §9-3-25. Leathers v. Timex Corp, 174 Ga.App. 430, 330 S.E.2d 102, 104 (1985). The limitations period is four years. The critical determination in this case is the point at which the limitations period began running.¹¹ Generally, it runs from the

¹¹In connection with their statute of limitations defenses, defendants argue that the complaint only asserts causes of action for conversion and breach of contract. Defendants maintain that the pretrial order adds causes of action for tortious interference with a contract, breach of fiduciary duty by a corporate officer and "contract claims for other projects," causes of action defendants contend "do not arise out of the conduct described in the original complaint." (Defendants' Proposed Findings of Fact and Conclusions of Law, p. 6). Defendants argue that the causes of action added by the pretrial order are deemed to have been brought October 10, 1991, the date of entry of the pretrial order. Although the complaint is difficult to follow in some respects, it alleges conduct sufficient to support all of Rose Marine's causes of action. The pretrial order does not raise for the first time any cause of action "separate and distinct" from that in the original complaint. See Nat. Distillers and Chemical Corp. v. Brad's Mach. Products, 666 F.2d 492, 496 (11th Cir. 1982). All of the conduct alleged by plaintiff in the pretrial order "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Federal Rule of Civil Procedure (FRCP) 15(c)(2), made applicable by FRBP 7015. Thus, to the extent plaintiff amends the complaint with the pretrial order, the amendment "relates back to the date of the original pleading." FRCP 15(c). Therefore, in determining whether the limitations period for each cause of action asserted in this case expired prior to the assertion of

moment the contract is breached. See McClain v. Johnson, 160 Ga.App. 548, 288 S.E.2d 9 (1981). However, regardless of when breach occurred, "[i]f the defendant or those under whom he claims are guilty of a fraud by which the plaintiff has been debarred or deterred from bringing an action, the period of limitation shall run only from the time of the plaintiff's discovery of the fraud." O.C.G.A. §9-3-96. Because such fraud occurred in this case, it is not necessary to determine when breach occurred.

To toll a limitations period in Georgia pursuant to O.C.G.A. §9-3-96, "actual fraud" on the part of the defendant must be shown. Shipman v. Horizon Corp., 245 Ga. 808, 267 S.E.2d 244, 245 (1980). By statute, "actual fraud" includes "any kind of artifice by which another is deceived." O.C.G.A. §23-2-51(b). "Actual fraud," for purposes of O.C.G.A. §9-3-96, must "involve[] moral turpitude and [have] the effect of debarring and deterring the plaintiff from his action." Shipman, supra, 267 S.E.2d at 245 (footnote omitted). Plaintiff bears the burden of establishing fraud sufficient to toll the limitations period. Bates v. Metropolitan Transit System, Inc., 128 Ga.App. 720, 197 S.E.2d 781, 782 (1973).

Plaintiff clearly carried its burden to prove fraud under

the cause of action, all causes of action were brought on June 6, 1988, the date of the complaint.

O.C.G.A. §9-3-96. Defendants Haden and Thompson, utilizing their positions as officers of Rose Marine and Marine Contracting and the trust placed in Mr. Haden to run the business, deceived Mr. Austin by Marine Contracting retaining the full general contractor's profits on each job when Rose Marine's supervisory and office personnel, expertise, facilities and equipment performed the role of general contractor. This deception resulted in Marine Contracting retaining more profits than called for under the 1% and 2% agreements, in essence all the general contractor's profit which should have been contracted to Rose Marine. "Concealment per se amounts to actual fraud when for any reason one party has a right to expect full communication of the facts from another." Comerford v. Hurley, 154 Ga. App. 387, 268 S.E.2d 358, 360 (1980), aff'd, 246 Ga. 501, 271 S.E.2d 782 (1980) (applying O.C.G.A. §9-3-96). Mr. Austin, a 90% shareholder and chairman of the Board of Directors of Rose Marine, had a right to know if Marine Contracting was honoring its agreement with Rose Marine. The conduct of Mr. Haden and Mr. Thompson amounts to "fraud" for purposes of O.C.G.A. §9-3-96.

The limitations period was tolled until Rose Marine discovered the fraud, or by "reasonable diligence" should have discovered the fraud. Shipman, supra, 267 S.E.2d at 246. However, "[f]ailure to exercise reasonable diligence to discover the fraud may be excused where a relationship of trust and confidence exists between the parties." Id. Mr. Austin did not learn of the fraud

until October 1987. Rose Marine filed its complaint on June 6, 1988, within four years after Mr. Austin discovered the fraud. Defendants maintain, however, that Mr. Austin was not diligent in discovering the fraud. Under Shipman, supra, if Mr. Austin with reasonable diligence should have discovered the fraud earlier, the limitations period was not tolled until his discovery.

There is no formula under Georgia law to apply to party's conduct in determining the party's "reasonable diligence," or lack of it. See generally Gibson v. Home Folks Mobile Home Plaza, Inc., 533 F.Supp 1211, 1217 (S.D. Ga. 1982) (Bowen, J.) (examining Georgia's "reasonable diligence" standard). "Reasonable diligence" "must be measured by the 'prudent man' standard," Jim Walter Corp. v. Ward, 245 Ga. 355, 265 S.E.2d 7, 9 (1980), which means simply that an objective rather than subjective standard must be applied to determine if the plaintiff's failure to discover the fraud any sooner is justified. Id. In applying this standard, "it [is not] necessary that the plaintiff exhaust all means at his command to ascertain the truth. . . ." Rodrique v. Mendenhall, 145 Ga.App. 666, 244 S.E.2d 598, 600 (1978). See also Braselton Brothers, Inc. v. Better Maid Dairy Products, Inc., 222 Ga. 472, 150 S.E.2d 620 (1966); Gaines v. Watts, 224 Ga. 321, 161 S.E.2d 830 (1968); Smith v. Holman, 117 Ga.App. 248, 160 S.E.2d 533 (1968).

Prior to May 14, 1984 Mr. Austin's diligence in

discovering the fraud is irrelevant as up to that point "a relationship of trust and confidence" existed between Mr. Austin and Mr. Haden. Shipman, supra, 267 S.E.2d at 246; see also Bates, supra, 197 S.E.2d at 782. Once Mr. Haden no longer controlled the running of Rose Marine and the bidding-subcontracting arrangement with Marine Contracting, the fraud perpetrated on Mr. Austin, which as it happened required Mr. Haden's control of the business, necessarily ended. At that point Mr. Austin took control of the business, and the relationship of trust which permitted Mr. Haden to run Rose Marine no longer existed. The parties stipulated that Mr. Haden resigned as president of Rose Marine in November of 1983 and that by March or April of 1984 he was no longer employed by Rose Marine in any capacity. At that point, at the latest, he could no longer have controlled Rose Marine's operations. As the trust relationship between Mr. Austin and Mr. Haden ended April 1984, the extent of Mr. Austin's diligence in discovering the fraud is relevant only after that date.

Mr. Austin testified that he had no reason to suspect any wrong doing on the part of Marine Contracting or Mr. Haden prior to October 1987. His testimony is supported by the testimony of Rose Marine's accountant, Mr. Taylor, that there was no indication that Marine Contracting was not acting in accordance with the 1% agreement. Defendants point to no evidence in the record that substantially contradicts Mr. Austin's or Mr. Taylor's testimony in

this regard. Mr. Haden himself admitted Mr. Austin had no reason to suspect any wrongdoing on his part. Applying an objective, prudent person standard, Mr. Austin's lack of suspicion and failure to realize the fraud is justified under the circumstances. He placed full trust in a person he reasonably believed very capable to run Rose Marine and who he reasonably believed would act in Rose Marine's best interests. The evidence shows Mr. Haden had an outstanding reputation in the marine construction business. He was a part owner of Rose Marine. There is no evidence before me that Mr. Austin was unreasonable in trusting Mr. Haden. This did not change when Mr. Haden left Rose Marine purportedly to avoid potential penalty liability for corporate taxes. The concealment continued, facilitated by the prior trust relationship. Defendants point to no evidence in the record of anything to alert Mr. Austin when he took over the business that Marine Contracting had breached the 1% and 2% agreements and that Mr. Haden and Mr. Thompson had fraudulently concealed this fact from him during Mr. Haden's control of the business. Defendants rely instead on their allegation that Rose Marine had "the right to inspect the books and records of Defendant Marine Contracting during the time when these parties performed contracts together." (Defendants' Proposed Findings of Fact and Conclusions of Law, p. 5). However, the availability of Marine Contracting's financial records while Mr. Haden controlled the business is irrelevant. To the extent Marine Contracting's

records were available to Rose Marine after Mr. Haden left Rose Marine, their availability alone would not, to an ordinarily prudent person, reveal the fraud that occurred during Mr. Haden's prior control of the business. Georgia's "reasonable diligence" standard did not require Mr. Austin to utilize all possible means of discovering the fraud, including retrieving Marine Contracting's financial records from a distant state and reviewing them for past breaches of his agreements with Mr. Haden.

Rodrique, supra, 244 S.E.2d at 600. Under these circumstances, something more than the mere availability of records, standing alone, was necessary to reveal the fraud to an ordinarily prudent person. Accordingly, I find Mr. Austin did not fail to exercise reasonable diligence under Georgia law in discovering the fraud. Thus, the limitations period did not begin to run until Mr. Austin discovered the fraud in or after October 1987. The complaint was filed on June 6, 1988, within four years of Mr. Austin's discovery of the fraud. Therefore, Rose Marine's breach of contract action is not time-barred.

Defendants argue that the releases executed by Mr. Austin as president of Rose Marine relieve Marine Contracting of any liability for payment on each written subcontract agreement for which such a release was executed. However, a written release executed under misapprehension or mistake of fact, or by fraud, is not valid under Virginia law. See Seaboard Ice Co. v. Lee, 199 Va.

243, 99 S.E.2d 721 (1957).¹² Mr. Austin testified that he executed the releases under the impression, an impression which I find is the result of Mr. Haden's and Mr. Thompson's deception, that the final payments reflected therein were within the confines of the 1% or 2% agreement. The releases, therefore, are not binding under Virginia law.

To the extent Marine Contracting retained more than 1% of the gross revenue from jobs between 1979-1983, plus the bonding fee, and more than 2% plus the bonding fee in 1984, the 1% and 2% agreements were breached. Plaintiff is entitled to be placed in the same position the estate would occupy had the contracts been performed, which is accomplished by appropriate monetary damages. Georgia Power and Light Co. v. Fruit Growers Express Co., 55 Ga.App. 520, 190 S.E. 669 (1937); Grahm Brothers' Co. v. Matthews Contracting Co., 159 Ga.App. 546, 284 S.E.2d 282 (1981); Darlington Corp. v. Evans, 88 Ga. App. 84, 76 S.E.2d 72 (1953); see O.C.G.A. §§13-6-1, 13-6-2.¹³ Damages must be proven by a preponderance of

¹²In Georgia a release is a contract, governed under Georgia's choice of law rules by the state of its making or performance. Menendez v. Perishable Distributors, Inc., 254 Ga. 300, 329 S.E.2d 149, 151 (1985). For choice of law purposes, I find the releases were to be performed in Virginia, for the same reasons discussed supra for finding the 1% and 2% agreements were to be performed in Virginia.

¹³Under Georgia's choice of law rules, damages, plaintiff's remedy, are governed by the law of the forum state, notwithstanding that different state law applies to the substantive claim. Menendez, supra, 329 S.E.2d at 151. See. e.g., Simon v. Shearson Lehman Bros. Inc., 895 F.2d 1304, 1320 (11th Cir. 1990).

the evidence. See Grahm, supra, 284 S.E.2d at 287. Based on Marine Contracting's corporate tax returns, plaintiff established breach of contract damages for the years 1981-1984 as follows:

<u>Year</u>	<u>Gross Revenue</u>	<u>Cost of Goods Sold</u>	<u>Gross Profit</u>	<u>Gross Profit</u>	
				1% (2% for '84) <u>of Gross Revenue</u>	-1% (2% for '84) <u>of Gross Revenue</u>
1981	\$2,592,791	\$4,277,268	\$115,523	\$25,928	\$89,595
1982	1,291,540	1,166,761	124,779	12,915	111,854
1983	5,762,674	5,429,914	332,760	57,627	275,133
1984	3,551,830	3,301,766	250,064	71,037	<u>179,027</u>
					\$655,619 ¹⁴

Defendants contend plaintiff has not shown damages for 1979 and 1980 because Marine Contracting's corporate tax returns for those years are not in evidence. Actual damages must be ascertainable with reasonable certainty. See e.g., Crawford & Associates, Inc. v. Groves-Keen Inc., 127 Ga.App. 646, 194 S.E.2d 499 (1972).

However,

"[t]he rule against the recovery of vague, speculative, or uncertain damages relates more especially to the uncertainty as to cause, rather than uncertainty as to the measure or extent of the damages. Mere difficulty in fixing their exact amount, where proximately flowing from the alleged injury, does not constitute a legal obstacle in the way of their allowance, when the amount of the recovery comes within that authorized with reasonable certainty by the legal evidence submitted."

Kuhlke Const. Co. v. Mobley, Inc., 159 Ga.App. 777, 285 S.E.2d 236, 239 (1981) quoting Ayers v. John B. Daniel Co., 35 Ga.App. 511, 512, 133 S.E. 878 (1926)]. Rose Marine's breach of contract damages for 1979 and 1980 can be estimated "with reasonable

¹⁴Figures rounded to the nearest dollar.

certainty" based on

Marine Contracting's estimated gross revenue for those years and its estimated gross profit. On this basis I find plaintiff has proven by a preponderance of the evidence the following actual damages for 1979 and 1980:

<u>Year</u>	<u>Estimated Gross Revenue</u>	<u>Estimated¹⁵ Gross Profit</u>	<u>1% of Gross Revenue</u>	<u>Estimated Gross profit -1% of (Estimated Gross Revenue)</u>
1979	\$613,181	\$38,262	\$6,132	\$32,130
1980	1,282,973	80,058	12,830	67,228

Plaintiff has proven total actual damages from the breach of contract of Seven Hundred Fifty-Four Thousand Nine Hundred Seventy Seven and No/100 (\$754,977.00) Dollars.

II. CONVERSION

In Virginia¹⁶ a cause of action for conversion lies for "[a]ny wrongful exercise or assumption of authority, personally or by procurement, over another's goods, depriving him of their possession." Buckeye Nat. Bank of Findlay, Ohio v. Huff & Cook, 114 Va. 1, 75 S.E. 769, 772 (1912). See also Universal C.I.T. Credit

¹⁵Based on Marine Contracting's corporate tax returns for the years 1981-1984, Marine Contracting's gross profit averaged 6.24% of gross revenue. "Estimated Gross Profit" is the "Estimated Gross Revenue" multiplied by 6.24%.

¹⁶Under Georgia's choice of law rules, Virginia, the state where the alleged conversion occurred (see the June 24, 1992 order, p. 6), governs Rose Marine's cause of action for conversion. Karimi v. Crowley, 172 Ga.App. 761, 324 S.E.2d 583, 584 (1984).

Corp. v. Kaplan, 198 Va. 67, 92 S.E.2d 359 (1956); Nossen v. Hoy, 750 F.Supp. 740 (E.D. Va. 1990). Clearly Mr. Haden and Mr. Thompson, individually and on behalf of Marine Contracting, converted proceeds from an insurance settlement with Curtis Bay that belonged to Rose Marine, the entity legally responsible, either as owner or lessee, for the equipment damaged in the James River accident. Marine Contracting's contention that Rose Marine's lack of ownership bars its cause of action for conversion is incorrect. The claim against Curtis Bay for the damage to or loss of equipment was owned by Rose Marine, the entity responsible for and in possession and use of the equipment. Rose Marine was unlawfully deprived of its claim. Insufficient evidence was presented to hold Mr. Budge liable for the conversion.

Defendants maintain that plaintiff's conversion action is time-barred. The limitations period for conversion in Georgia is four years. O.C.G.A. 9-3-32. Talley-Corbett Box Co. v. Royals, 134 Ga.App. 769, 216 S.E.2d 358, 359 (1975). For reasons previously discussed pertaining to Mr. Austin's discovery of Mr. Haden's and Mr. Thompson's fraud, and further because defendants have shown no evidence that Mr. Austin's failure to discover the fact that Marine Contracting's conversion of Rose Marine's claim had been concealed from him was the result of his failure to exercise reasonable diligence, the limitations period began running in October 1987 when Mr. Austin discovered the conversion

and the fraud which had

concealed it. O.C.G.A. §9-3-96. The complaint was filed on June 6, 1988, within four years of October, 1987. Actual, damages for the conversion are Fifty-One Thousand Five Hundred and No/100 (\$51,500.00) Dollars, the amount of the settlement. See O.C.G.A. §51-12-4.

III. BREACH OF FIDUCIARY DUTY BY A CORPORATE OFFICER

It is undisputed that Mr. Haden and Mr. Thompson were officers of Rose Marine as president and vice president, respectively. In Georgia¹⁷ an action may be brought on behalf of a corporate entity against an officer that breaches a duty owed to the corporation. See O.C.G.A. §14-2-831(a)(1).¹⁸ A corporate

¹⁷Under Georgia's choice of law rules, plaintiff's cause of action for breach of fiduciary duty by a corporate officer is governed by the law of the state of incorporation, Georgia. Diedrich v. Miller & Meier & Associates, Architects and Planners, Inc., 254 Ga. 734, 334 S.E.2d 308, 310 (1985).

¹⁸O.C.G.A. §14-2-831(a)(1) provides in pertinent part as follows:

(a) . . . [A]n action may be brought by the corporation, against one or more directors or officers of the corporation to procure for the benefit of the corporation a judgment for the following relief:

(1) To compel the defendant to account for official conduct or to decree any other relief called for by his official conduct in the following cases:

(A) The neglect of, failure to perform, or other violation his duties in the management of the corporation or in the disposition of corporate assets;

officer owes the corporation a duty of good faith, requiring that the officer's responsibilities be discharged "(1) [i]n a manner he believes in good faith to be in the best interests of the corporation; and (2) [w]ith the care of an ordinarily prudent person in a like position would exercise under similar circumstances." O.C.G.A. §14-2-842(a) (officers). Cf. O.C.G.A. §14-2-830(a) (directors). Clearly Mr. Haden and Mr. Thompson breached duties of good faith owed Rose Marine as its officers in syphoning its profit for the benefit of Marine Contracting and by collecting Rose Marine's claim against Curtis Bay for the benefit of Marine Contracting.¹⁹

Defendants' statute of limitations defense is again without merit. The limitations period for an action brought pursuant to O.C.G.A. §14-2-831(a) is four years. O.C.G.A. §14-2-831(b). Regardless of when the limitations would have

(B) The acquisition, transfer to others, loss, or waste of corporate assets due to any neglect of, failure to perform, or other violation of duties; or

(C) The appropriation, in violation of his duties, of any business opportunity of the corporation[.]

¹⁹The fact that Mr. Thompson's position as an officer of Rose Marine was a figurehead position does not spare Mr. Thompson of liability. There is no evidence that his actual role as an on-site job supervisor meant he did not carry the full authority of an officer. He was paid a salary as vice president of Rose Marine and had authority to sign contracts and checks on behalf of Rose Marine. He was a responsible officer of Rose Marine.

otherwise

began to run, it was tolled by Messrs. Haden's and Thompson's fraud, O.C.G.A. §59-3-96, which Mr. Austin discovered in or after October 1987. As discussed above, Mr. Austin's failure to ascertain the fraud sooner was not the result of a failure to exercise reasonable diligence. Therefore, under Georgia law the limitations period began running upon his discovery of the fraud on or after October, 1987, within four years of June 6, 1988, the date Rose Marine filed its complaint. Plaintiff's causes of action against Messrs. Haden and Thompson for breach of fiduciary duty by a corporate officer are not time-barred.

IV. DAMAGES

The injury sustained by Rose Marine as a result of Messrs. Haden's and Thompson's breach of fiduciary duty is the same injury from the breach of contract. The result of their wrongdoing was that Marine Contracting retained more money than Mr. Austin's and Mr. Haden's agreements permitted. As shown above, the amount of Marine Contracting's excess retained revenues for the years in question is Seven Hundred Fifty-Four Thousand Nine Hundred Seventy Seven and No/100 (\$754,977.00) Dollars. This reflects the actual damages flowing from Messrs. Haden's and Thompson's breach of fiduciary duty, as well as from Marine

Contracting's and Mr. Haden's breach of contract. However, there can only be one recovery for the one injury. Mr. Thompson is jointly and severally liable for these damages by virtue of his breach of fiduciary duty as a corporate

officer of Rose Marine. Mr. Haden is jointly and severally liable for the damages by virtue of his breach of contract and breach of fiduciary duty as a corporate officer of Rose Marine. The corporate defendant, Marine Contracting, is jointly and severally liable for the damages by virtue of its breach of contract. As to the damages for conversion, Fifty-One Thousand Five Hundred and No/100 (\$51,500.00) Dollars, Messrs. Haden and Thompson, and Marine Contracting, are jointly and severally liable for those damages.

Plaintiff is not entitled to an award of punitive damages. In Georgia, punitive damages generally cannot be awarded for breach of contract, O.C.G.A. §13-6-10, but may be awarded if the defendant committed fraud in connection with the breach. See Clark v. Aenchbacher, 143 Ga. App. 282, 238 S.E.2d 442 (1977). In a conversion action punitive damages may be awarded if there are "aggravating circumstances," O.C.G.A. §51-12-5,²⁰

²⁰O.C.G.A. §51-12-5 (1933), which provided for "additional" damages for a tort committed with "aggravating circumstances," authorizes "punitive" damages in some tort cases. Westview Cemetery, Inc. v. Blanchard, 234 Ga. 540, 216 S.E.2d 776, 779 (1975). In 1987 O.C.G.A. §51-12-5 was amended and O.C.G.A. 51-12-5.1 was enacted, the latter of which expressly authorizes "punitive" damages and-establishes the conditions under which punitive damages may be awarded in a tort case. The amended version of O.C.G.A. §§51-12-5, as well as O.C.G.A. 51-12-5.1, are applicable only to torts committed on or after July 1, 1987, O.C.G.A. §§51-12-5(b) (1987), 51-12-5.1(h) (1987),

which includes fraud. Trailmobile, Inc. v. Barton Environmental, Inc., 167 Ga. App. 1, 306 S.E.2d 1, 2 (1983). Punitive damages may be awarded for breach of fiduciary duty by a corporate officer. Pelletier v.

Schultz 157 Ga. App. 64, 276 S.E.2d 118, 120 (1981). However, where punitive damages are authorized by Georgia law, whether such damages are warranted is left to the discretion of the trier of fact. See Privitera v. Addison, 190 Ga. App. 102, 378 S.E.2d 312, 315 (1989); Pelletier, supra, 276 S.E.2d at 121; see also O.C.G.A. §51-12-12. Although defendants Haden and Thompson committed "fraud" within the meaning of O.C.G.A. §9-3-96 inasmuch as their conduct concealed Rose Marine's causes of action from Mr. Austin, their conduct was not of such an aggravating nature that an award of punitive damages against them is warranted. Likewise, the evidence before me does not warrant an award of punitive damages against the corporate defendant, Marine Contracting. No punitive damages are awarded.

Under Georgia law the prevailing party generally is not entitled to recover attorneys' fees or other litigation expenses absent a statutory provision authorizing such an award. Bowers v. Fulton County, 227 Ga. 814, 183 S.E.2d 347 (1971); Solomon Refrigeration, Inc. v. Osburn, 148 Ga. App. 772, 252 S.E.2d 686 (1979). Pursuant to O.C.G.A. §13-6-11, attorneys' fees may be recovered in a contract action if the defendant acted

and therefore do not apply to this case.

in bad faith in entering the contract, or was stubbornly litigious or caused the plaintiff unnecessary trouble or expense. Plaintiff has not established a basis under O.C.G.A. §13-6-11 for recovering attorneys' fees from defendants. Neither has plaintiff established

grounds or recovering attorneys' fees pursuant to any other Georgia statute cited to the court. No attorneys fees are awarded.

It is therefore ORDERED that judgment be entered in favor of plaintiff against defendants Marine Contracting Corporation and Earl J. Haden on plaintiff's breach of contract count; for plaintiff against defendants Marine Contracting Corporation, Earl J. Haden, Jr. and Robert H. Thompson on plaintiff's conversion count; and for plaintiff against defendants Earl J. Haden, Jr. and Robert H. Thompson on plaintiff's breach of fiduciary duty count;

further ORDERED that monetary damages of Eight Hundred Six Thousand Four Hundred Seventy-Seven Thousand and No/100 (\$806,477.00) Dollars²¹ are awarded to plaintiff against defendants 1 Marine Contracting Corporation, Earl J. Haden, Jr. and Robert H. Thompson, jointly and severally, with interest thereon pursuant to applicable law;

²¹\$754,977 for breach of contract/breach of fiduciary duty plus \$51,500 for conversion.

further ORDERED that judgment be entered for all defendants on plaintiff's allegation of tortious interference with a contractual relationship and for defendant John H. Budge on all counts of the complaint.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 29th day of March, 1993.