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Schlissel v Subramanian
2009 NY Slip Op 52188(U)
Decided on October 26, 2009
Supreme Court, Kings County
Demarest, J.
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<p>Jeanne Schlissel, Plaintiff,</p> <p>against</p> <p>Manickawasagar Subramanian, Tim & Tom Donuts, Inc., Sungary Donuts, Inc., and James B. Van Epps, Defendants.</p>

25384/08

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Carolyn E. Demarest, J.

Defendant James Byron Van Epps (Van Epps or defendant) moves for an order, pursuant to CPLR 3211 (a) (1), (5) and (7), dismissing the complaint and each cause of action alleged therein insofar as asserted against him on the grounds that a defense is founded upon documentary evidence, that certain causes of action are barred by the statute of limitations, and that plaintiff fails to state a cause of action. Plaintiff cross-moves for an order, pursuant to CPLR 3025 (b), for leave to serve a proposed amended complaint, which asserts a new cause of action for fraud and contains additional, more detailed allegations in support of her breach of fiduciary duty claim.

*[*2]BACKGROUND*

Plaintiff Jeanne M. Schlissel and defendant Manickawasagar Subramanian (Wasan) decided to buy a Dunkin' Donuts franchise in Brooklyn, New York, with plaintiff owning 25% and Wasan owning the remaining 75%. According to plaintiff, she sought out and first contacted Van Epps, a New York State-licensed attorney, in February 2002 to have him form a sub-chapter "S" corporation, Tim & Tab Donuts, Inc. (T & T), prepare the necessary corporate documents, and make the appropriate tax elections. However, an engagement letter, dated January 22, 2002, lists Wasan as the client but does not mention plaintiff (the initial engagement letter) (Richman Affirmation in Support of the Motion to Dismiss, Exhibit F).

In April-May 2002, Van Epps prepared a set of corporate by-laws for T & T, a stock certificate listing plaintiff as holding 25 shares, a stock certificate listing Wasan as holding 75 shares, ^[EN1] as well as an IRS Form 2553 and a NYS Form CT-B, which identified plaintiff and Wasan respectively as the 25% and the 75% shareholders of T & T. ^[EN2] All of these documents were executed jointly by plaintiff and Wasan. A set of by-laws was executed in Van Epps's office on April 22, 2002; it is unclear when and where the other documents were executed.

The intended consideration for plaintiff's 25% ownership in T & T was the non-financial

assistance she and her minister husband had allegedly provided to Wasan over the years, including providing living accommodations in their home for Wasan's family upon their immigration from Sri Lanka, and in helping him legalize his operation of a Dunkin Donuts franchise. However, following the execution of the initial documents, in the early part of 2003, Van Epps proposed to Wasan (but not to plaintiff) that (1) plaintiff's ownership interest in T & T be set at 12.5% (rather than at 25%), and (2) she should be obligated to pay Wasan for the right to own a 12.5% interest in T & T, as follows:

With respect to the initial investment, I recommend that you [Wasan] provide a loan to Jeanne [Schlissel] in the amount of \$90,625. Jeanne in turn will contribute this amount to the corporation [T & T] and you will contribute [*3]\$634,375 to the corporation, bringing the total initial capital to \$725,000. Jeanne will own 12.5% of the stock and you will own 87.5% of the stock of the corporation . . .

The note to be signed by Jeanne in connection with your loan to her will require that distributions by the corporation to Jeanne in excess of amounts required by her to pay taxes on the income of the corporation will be paid to you to reduce the loan balance. Under this approach, Jeanne will not be entitled to any distributions from the corporation (except to cover taxes owed by her) until the loan is fully paid. Subject to the loan repayment obligation, Jeanne will be a full 12.5% owner, entitled to 12.5% of the profits and 12.5% of the funds upon a dissolution or sale of the corporation.

(Exhibit 14 to the Schlissel Affidavit sworn to September 4, 2008 and submitted in Support of the Order to Show Cause dated September 5, 2008).

With this arrangement accepted by to Wasan, but allegedly unknown to plaintiff, Van Epps prepared the effectuating documents for the parties' signatures: (1) a shareholders' agreement listing plaintiff's ownership interest in T & T as 12.5% and Wasan's as 87.5%; (2) a stock certificate for an additional 100 shares in Wasan's name, thereby reducing plaintiff's final ownership interest in T & T from 25% (25 out of 100 shares) to 12.5% (25 out of 200) shares; and (3) a promissory note in the principal amount of \$90,625 from plaintiff to Wasan, the amount allegedly contributed by Wasan to T & T on plaintiff's behalf to enable her to acquire a 12.5% interest in T & T (collectively, the corporate documents). All of these documents were dated "as of" February 1, 2003, although Van Epps claims that he finalized them on February 10, 2003.

In transmitting these documents to Wasan, Van Epps requested that Wasan:

review this [shareholders'] agreement with Jeanne Schlissel and advise if any additional changes are required. As I mentioned in our meeting, Jeanne should hire an attorney to review this agreement and the note on her behalf.

Also enclosed is the stock certificate for Tim & Tab Donuts, Inc. Please sign and ask Jeanne to sign this certificate where indicated.

(Richman Affirmation in Support of the Motion to Dismiss, Ex. J, letter dated Feb. 10, 2003).

Van Epps also prepared another engagement letter dated February 5, 2003 (the "subsequent engagement letter"). The subsequent engagement letter was to be signed by Wasan as the client and by plaintiff as consenting to defendant's representation of Wasan. This letter provided, in relevant part:

I am pleased to represent you in connection with the preparation of a [*4] shareholders agreement for Tim & Tab Donuts, Inc.

[After stating the terms of the engagement, the letter continued:] If you agree with the foregoing terms, please indicate by signing below and returning a copy of this letter to me at the above address. Please ask Jeanne Schlissel to sign below indicating her approval of my representation of you.

Immediately above the signature line reserved for plaintiff, the letter stated:

With my signature below, I hereby consent to your representation of Manickawasagar Subramanian in connection with the preparation of a Shareholders Agreement for Tim & Tab Donuts, Inc. and other matters when and as requested by him.

(Richman Affirmation in Support of the Motion to Dismiss, Ex. I, Letter dated Feb. 5, 2003, at 1-2).

According to plaintiff, on February 5, 2003, Van Epps allegedly telephoned plaintiff and "during a very curt discussion he advised [her] that he [was] no longer representing [her]. Mr. Van Epps told [her] that this was in [her] best interests. Mr. Van Epps provided [her] with no

further information" (Schlissel Affidavit in opposition to the Motion to Dismiss ¶ 11). Van Epps denies speaking with plaintiff on that day claiming that "[a]fter May 30, 2002, there were no communications (telephone or otherwise) between Plaintiff . . . and me" (Van Epps Reply Affidavit dated June 22, 2009 ¶ 10).

According to plaintiff, on February 1, 2003, Wasan delivered the shareholders' agreement, the additional stock certificate, and the promissory note to plaintiff's home. Plaintiff claims that she signed all of the corporate documents at home, and signed the subsequent engagement letter several days thereafter:

I am positive that I signed the February 1st Documents [*i.e.*, the corporate documents which are dated as of February 1, 2003] at least three or four days before Mr. Van Epps notified me that he was terminating our attorney-client relationship.

Although this was a relatively long time ago, my recollection concerning the sequence of events is strong because I was shocked and surprised that Mr. Van Epps waited until after I signed the February 1st Documents to notify me that he was terminating our attorney-client relationship. I experienced a sense of panic about this curious sequence of events when I learned that Mr. Van Epps intended to continue to represent Wasan.

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(Schlissel Reply Affidavit dated July 15, 2009 to the cross-motion to amend the complaint ¶¶ 3-4).

Plaintiff explains that she signed the corporate documents "without having the opportunity to discuss them with Van Epps" because she believed that "as my attorney Mr. Van Epps was protecting my interests. At no point prior to my execution of the [corporate documents], did Mr. Van Epps communicate with me in any manner concerning these documents, in no way did he suggest that any material change in the corporation was occurring, nor did he remotely hint that a notable change effecting [*sic*] me was in view" (Schlissel Affidavit in opposition to the Motion to Dismiss ¶ 10).

Approximately five years later, in September 2008, plaintiff commenced the instant action against Van Epps and Wasan for, *inter alia*, breach of fiduciary duty (the fourth cause of action) and breach of implied covenant of good faith (the sixth cause of action). In October 2008, Van Epps interposed an answer and separately responded to Wasan's cross-claim for

common-law contribution against him. In May 2009, in response to defendant's motion to dismiss, plaintiff cross-moved to add a fraud claim (the renumbered third cause of action) and to elaborate on the breach of fiduciary duty claim (the renumbered sixth cause of action), while leaving unchanged her claim of breach of implied covenant of good faith (the renumbered eighth cause of action). The causes of action contained within the original and the proposed amended complaint are largely similar, except for the new fraud claim against Van Epps. As defendant's motion to dismiss addresses both the breach of fiduciary duty allegations and the fraud allegations, the motion will be treated as addressed to the amended complaint for the sake of both brevity and clarity.^[EN3]

DISCUSSION

I. Defendant's Motion to Dismiss

Defendant Van Epps moves to dismiss, pursuant to CPLR 3211(a)(1), (5), and (7), plaintiff's claims and Wasan's cross-claims against him. CPLR 3211 (a)(1) provides, in pertinent part, that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . a defense is founded upon documentary evidence." "Under CPLR 3211 (a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of [*6]law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Douglas v Dashevsky*, 62 AD3d 937, 938 [2d Dept 2009]).

CPLR 3211 (a)(5) provides, that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the cause of action may not be maintained because of . . . [the] statute of limitations . . ." To dismiss a cause of action pursuant to CPLR 3211 (a)(5) on the ground that it is barred by the statute of limitations, "a defendant bears the initial burden of establishing prima facie that the time in which to sue has expired" (*Savarese v Shatz*, 273 AD2d 219, 220 [2d Dept 2000]). Only if such prima facie showing is made will the burden then shift to the plaintiff to "aver evidentiary facts establishing that the case falls within an exception" to the statute of limitations (*id.* at 220

[internal quotation marks and citations omitted]).

On a motion to dismiss, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action, the pleading is to be afforded a liberal construction in the light most favorable to the plaintiff (*see Leon*, 84 NY2d at 87). The court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Kempf v Magida*, 37 AD3d 763, 764 [2d Dept 2007]). "The pleading is deemed to allege whatever can be implied from its statements by fair and reasonable intendment" (*Components Direct, Inc. v European Amn. Bank & Trust Co.*, 175 AD2d 227, 232 [2d Dept 1991]). It "can be pathetically drawn; it can reek of miserable draftsmanship. That is not the inquiry. We want only to know whether it states a cause of action — any cause of action. If it does, it is an acceptable CPLR pleading" (Siegel, *New York Practice*, § 208 [on-line version] [footnote omitted]). Thus, "[w]hether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss" (*Shaya B. Pacific, LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006]).

The Breach of Fiduciary Duty Claim

Plaintiff's fourth cause of action (expanded and renumbered as the sixth cause of action in the proposed amended complaint) is for breach of fiduciary duty by Van Epps. "In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct" (*Kurtzman v Bergstol*, 40 AD3d 588, 590 [2d Dept 2007]).

"An attorney stands in a fiduciary relation to the client" (*Graubard Mollen Dannett & Horowitz v Moskowitz*, 86 NY2d 112, 118 [1995]). As a fiduciary, an attorney "is charged with a high degree of undivided loyalty to his [or her] client" (*Matter of Kelly v Greason*, 23 NY2d 368, 375 [1968]). Previously, this court has held:

As a fiduciary, an attorney is obliged to exercise the highest degree of good faith, honesty, integrity, fairness, and fidelity. The unique, fiduciary nature of the attorney-client relationship mandates that an attorney "not place himself [or

herself] in a position where a conflicting interest may, even inadvertently, [*7] affect, or give the appearance of affecting, the obligations of the professional relationship.

Under the Code of Professional Responsibility, DR 5-105 [now the Rules of Professional Conduct, 22 NYCRR § 1200, Rule 1.7], a lawyer may not take on a representation in conflict with his or her representation of another client, or where his or her judgment could be adversely affected by the new representation, without the consent of each client after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.' . . . a lawyer must disclose not only conflicting representations, but any circumstance that might influence his or her judgment in representing a particular client. While the violation of a disciplinary rule is not per se actionable as malpractice, where a client has suffered actual damages as a result of a conflict of interest on the part of counsel, liability may be imposed.

An attorney has a fiduciary obligation to bring to his or her client's attention all relevant considerations when recommending a course of conduct. An attorney who fails to disclose a conflicting representation or circumstance that causes him or her to represent a client with diminished rigor, breaches his or her fiduciary duty to his or her client.

(*Macnish-Lenox, LLC v Simpson*, 17 Misc 3d 1118 [A], 2007 WL 3086028, *7, 2007 NY Slip Op 52055 [U] [Sup Ct, Kings County 2007] [internal quotation marks and citations omitted]).

In this case, plaintiff alleges that Van Epps was her attorney, that he unilaterally advanced Wasan's interests over those of plaintiff, that he prepared certain corporate documents for the purpose of diluting and diminishing plaintiff's interest in T & T, and that he concealed material information from plaintiff concerning the adverse contents of these documents (Stark Affirmation in support of the Cross Motion, Ex. 2, Proposed Amended Complaint, ¶¶ 46-47). In opposition, Van Epps contends that he was not plaintiff's attorney and that, in any event, his representation of her had ended by the time she signed the corporate documents.

There is no set of rigid rules that must be followed to form an attorney-client relationship (*see McLenithan v McLenithan*, 273 AD2d 757, 758 [3d Dept 2000]). It may exist without an explicit retainer agreement or payment of fee (*see Tropp v Lumer*, 23 AD3d 550, 551 [2d Dept 2005]). "Rather, to establish an attorney-client relationship there must be

an explicit undertaking to perform a specific task. In determining the existence of an attorney-client relationship, a court must look to the actions of the parties to ascertain the existence of such a relationship," (*id.*, at 551 [internal quotation marks and citations omitted]) [*8]bearing in mind that plaintiff's unilateral belief does not confer upon her the status of defendant's client (*see Volpe v Canfield*, 237 AD2d 282, 283 [2d Dept 1997], *lv denied* 90 NY2d 802 [1997]).

Plaintiff alleges that Van Epps took affirmative actions to assist plaintiff with the formation of T & T and the preparation and execution of the corporate documents. Specifically, plaintiff claims that: (1) in February 2002, Van Epps interviewed plaintiff and Wasan in his office about their desire to form a corporation, T & T, for the acquisition of a Dunkin' Donuts franchise; (2) in April 2002, he prepared a set of by-laws for T & T, had plaintiff and Wasan return to his office where he reviewed it with her and Wasan, and, based on his advice, she executed it; (3) in April 2002, he prepared the T & T stock certificates listing plaintiff and Wasan as holders of 25 and 75 shares, respectively, and plaintiff and Wasan signed these certificates; (4) in May 2002, he prepared an IRS Form 2553 and a NYS Form CT-B (both being tax elections for a sub-chapter "S" corporation), which identified plaintiff and Wasan as the 25% and the 75% shareholders of T & T, respectively, and which plaintiff and Wasan also co-signed; (5) between February 2002 and February 2003, he responded to several telephonic inquires from plaintiff or her husband concerning T & T; (6) in May 2002, he mailed certain documents at the request of plaintiff's husband to another law firm; and (7) in February 2003, he responded in writing to an inquiry made by that law firm concerning T & T's corporate documents. Thus, more than a unilateral belief by a putative client has been offered in this case (*see McLenithan*, 273 AD2d at 759; *see also Cohen v Handelman*, 62 Misc 2d 801, 807 [Civil Ct, New York County 1970] ["(w)here it appears that an attorney is consulted to extricate a person from his difficulties, and that the relationship commenced because of the position held by the attorney, and the attorney undertakes to act for the person consulting him, the relationship of attorney and client exists"] [internal quotation marks and citation omitted]).

In opposition, Van Epps argues, presumably in support of his motion to dismiss based upon documentary evidence, that the initial (January 2002) engagement letter states that he was representing Wasan and, by implication, that he was not representing plaintiff. However, the initial engagement letter, which pre-dates the February 11, 2002 meeting of Van Epps

with plaintiff and Wasan, raises an issue of fact warranting denial of the motion to dismiss. If, as Van Epps claims, he had been representing solely Wasan since before meeting plaintiff on February 11, 2002, it is not clear why plaintiff, as well as her husband, were present at that meeting, and at a subsequent meeting on April 16, 2002, between Wasan and Van Epps. Plaintiff claims that she initially sought out Van Epps' services by obtaining a recommendation from a congregant in plaintiff's husband's church and that she scheduled that first meeting. Even assuming, *arguendo*, that the initial engagement letter demonstrates that Van Epps represented only Wasan, it is not disputed that in April and May of 2002, Van Epps drafted corporate and tax documents for the corporation which were signed by both plaintiff and Wasan. The undisputed evidence suggests that plaintiff had reason to believe Van Epps was representing her as well as Wasan in the formation of Tim & Tab (*see* [*9]*Talansky v Schulman*, 2 AD3d 355, 359 [1st Dept 2003][finding that formality is not essential to create a fiduciary relationship but, rather, the court must look towards the words and actions of the parties]). Accordingly, plaintiff has sufficiently alleged the existence of an attorney-client relationship with defendant for the purposes of this motion to dismiss.

Van Epps contends, in the alternative, that, even if he was plaintiff's attorney during the initial document signing, he was no longer representing plaintiff in May 2002 when plaintiff, Wasan, and T & T jointly retained The Goldstein Law Group, P.C. (Goldstein) "to represent [their] interests in [their] planned purchase of a Dunkin' Donuts franchise in Brooklyn, NY." (Richman Affirmation in support of the Motion to Dismiss, Ex. G, Retainer Agreement, dated May 22, 2002, at 1). Van Epps cites to his letter dated May 30, 2002, by which, "at the request of . . . Steve Schlissel," he transmitted to Goldstein copies of the documents pertaining to the joint purchase of the franchise by plaintiff and Wasan (Richman Affirmation in support of the Motion to Dismiss, Ex. H).^[FN4]

In response, plaintiff maintains that Goldstein was retained exclusively with respect to franchise law. The record contains a letter from Goldstein to Van Epps again requesting the corporate documents for Tim & Tab. Van Epps' response of February 6, 2003 indicates that the two lawyers were working concurrently on different aspects of the transaction, with Goldstein focusing on the franchise issues with Allied Domecq QSR (*i.e.*, the Dunkin' Donuts franchisor), while Van Epps was continuing to address the corporate/ownership issues (*see* Van Epps affidavit in opposition to the Cross Motion and in further support of the Motion to Dismiss, Ex D and Ex. E). According plaintiff's allegations every favorable inference,

whether Goldstein took over defendant's work with respect to all aspects of this transaction so as to terminate Van Epps' representation of plaintiff raises an issue of fact which is not resolved by documentary evidence as required by CPLR 3211(a)(1). (*see Bass & Ullman v Chanes*, 185 AD2d 750 [1st Dept 1992] [plaintiffs' retention of independent counsel to represent them in connection with a criminal prosecution arising out of plaintiffs' business practices did not signal the end of the attorney-client relationship between plaintiffs and defendant attorneys who continued to represent the plaintiffs in the review and approval of advertising copy for the plaintiff's mail-order business]).

Moreover, if plaintiff's allegations are taken as true, defendant's later services were related to his initial services and may have constituted a continuous representation (*see Shumsky v Eisenstein*, 96 NY2d 164, 168 [2001]). Thus, if Van Epps actually represented both plaintiff and Wasan from the initial retainer, Van Epps' attempt to terminate his attorney-client relationship with plaintiff while continuing to represent Wasan would be in violation of Rule 1.9 of the Rules of Professional Conduct (22 NYCRR § 1200). The cursory "consent" signed by plaintiff does not evidence the requisite informed consent to overcome the edict of the Rule. There is no claim that Van Epps met with plaintiff or specifically [*10] advised her of the conflict of interest implicated in the proposed representation of Wasan alone.

Van Epps argues, again in the alternative, that he terminated his alleged attorney-client relationship with plaintiff when she signed the subsequent engagement letter, which expressly provided that he was representing Wasan regarding the corporate documents. Apart from the insufficiency of this "consent," Van Epps is silent as to when he prepared the subsequent engagement letter. His time records on this matter do not indicate that he drafted it or sent it to Wasan on February 5, 2003, the date of the letter. Rather, Van Epps asserts that Wasan signed it "on or about February 5, 2003" and that plaintiff "subsequently" signed it. With respect to the corporate documents, Van Epps avers that they were not ready for execution until after February 10, 2003. He maintains that plaintiff had signed the consent to the subsequent engagement letter before she signed the corporate documents and, therefore, she knew when she signed the corporate documents that Van Epps was no longer representing her.

However, in direct contradiction to defendant's assertions, plaintiff states that Van Epps

telephoned her on February 5, 2003 to notify her that he was not representing her, and that Wasan delivered the subsequent engagement letter to her home that day. This is consistent with her statement that she "was not presented with or asked to . . . sign the [subsequent engagement letter] until four days after [she had] executed the [corporate] [d]ocuments" on February 1, 2003 (*id.*, ¶¶ 10-11; Proposed Amended Complaint, ¶ 18 [u]). As to defendant's contention that she could not have executed the corporate documents on February 5 because Wasan received them by federal express from defendant on February 11 (Van Epps affidavit in opposition to the Cross Motion and in further support of the Motion to Dismiss, Ex. G, Fed Ex Shipment Detail), plaintiff avers that she was "positive that [she] signed the [corporate] [d]ocuments at least three to four days before Mr. Van Epps notified me that he was terminating [their] attorney-client relationship" (Schlissel Reply Affidavit to the Cross Motion dated July 15, 2009, ¶ 3). Therefore, at the very least, an issue of fact exists as to when the letter was signed which cannot be resolved on a motion to dismiss.

Moreover, whether plaintiff is mistaken in her belief that she signed the corporate documents on February 1 is not significant as it is not material when plaintiff signed the corporate documents *per se*, but when she signed the corporate documents *vis-a-vis* the subsequent engagement letter. Defendant has not provided any temporal specificity as to when he prepared the subsequent engagement letter or when he sent it to Wasan (his otherwise detailed time records are silent in this respect), nor when plaintiff signed it. Furthermore, he denies telephoning plaintiff in February 2003. As defendant disclaims having knowledge of these alleged events, plaintiff's allegations that she had signed the corporate documents before she signed the subsequent engagement letter are sufficient for pleading purposes.

Ultimately, the evidence as to the alleged existence of an attorney-client relationship between plaintiff and defendant Van Epps is inconclusive, depends on a fact-finder's [*11] assessment of the parties' credibility, and thus is outside the scope of the court's review on a motion to dismiss. Assuming the truth of her affidavits, plaintiff sufficiently alleges that Van Epps represented conflicting interests at the time plaintiff signed the corporate documents (*see Shumsky*, 96 NY2d at 168). Plaintiff thus adequately alleges the first element of her breach of fiduciary duty claim — the existence of a fiduciary relationship. Furthermore, having alleged misconduct by defendant by his alleged simultaneous representation of adverse interests, and damages directly caused by his misconduct (Proposed Amended

Complaint, ¶¶ 47-50), plaintiff adequately pleads the other two elements of her claim. Defendant's motion seeking dismissal of the breach of a fiduciary duty cause of action pursuant to CPLR 3211(a) (7) is denied. Defendant's motion pursuant to CPLR 3211 (a) (1) is also denied inasmuch as defendant's affidavit and the documents attached thereto do not definitively and "conclusively establish[] a defense to the asserted action as a matter of law" (*Leon*, 84 NY2d at 88); the documentary evidence merely raises numerous issues of fact, rather than finally dispose of them (*see Bernstein v Oppenheim & Co., P.C.*, 160 AD2d 428, 435 [1st Dept 1990]).

Statute of Limitations

The defendant argues, pursuant to CPLR 3211 (a)(5), that the claims against him are barred by the three-year statute of limitations for breach of fiduciary duty where money damages are sought. New York law does not provide any single limitations period for breach of fiduciary duty claims (*see Kaufman v Cohen*, 307 AD2d 113, 118 [1st Dept 2003]). They are governed by a three- or six-year statute of limitations depending on whether money damages or equitable relief is sought (*see CPLR 213 [1]; CPLR 214[4]; see also Klein v Gutman*, 12 AD3d 417, 419 [2d Dept 2004]; *Kaufman*, 307 AD2d at 118). However, if a cause of action alleging a breach of fiduciary duty is based on allegations of fraud, it is generally subject to a six-year limitations period of CPLR 213 (8), unless "the fraud allegation is only incidental to the claim asserted" (*Klein*, 12 AD3d at 419; *Kaufman*, 307 AD2D at 121). In applying the statute of limitations, courts must look to the essence of the claim and not to the form in which the claim is pleaded (*see Green Bus Lines, Inc. v General Motors Corp.*, 169 AD2d 758, 759 [2d Dept 1991]). Thus, the timeliness of plaintiff's breach of fiduciary duty claim thus turns on the viability of her fraud cause of action (*see Kaufman*, 307 AD2d at 119).

In her proposed amended complaint, plaintiff adds a separate cause of action for fraudulent concealment by defendant. "In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and [resulting] injury" (*Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413, 421 [1996]). In addition, "[w]here it is alleged that the defendant fraudulently concealed a material fact, the

plaintiff must establish that the defendant had a duty to disclose the subject information" (*Sitar v Sitar*, 61 AD3d 739, 741 [2d Dept 2009]). In the context of a fraud claim, the [*12]existence of a fiduciary relationship, such as an attorney-client relationship, is not required, and an attorney may be held liable to a non-client "where the attorney has committed fraud or collusion or a malicious or tortious act" (*Singer v Whitman & Ransom*, 83 AD2d 862, 863 [2d Dept 1981]; *A. Morrison Trucking, Inc. v Bonfiglio*, 13 Misc 3d 1211 [A], 2006 WL 2726796, *6, 2006 NY Slip Op 51784 [U] [Sup Ct, Kings County 2006]).

When a plaintiff brings a cause of action based upon fraud, "the circumstances constituting the wrong shall be stated in detail" (CPLR 3016 [b]). The Court of Appeals recently held that:

The purpose of section 3016(b)'s pleading requirement is to inform a defendant with respect to the incidents complained of, thus, we have cautioned that section 3016 (b) should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud. What is critical to a fraud claim is that a complaint allege the basic facts to establish the elements of the cause of action, and although under CPLR 3016 (b) the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud. Necessarily, then, section 3016 (b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct. On a CPLR 3211 motion to dismiss, a court may consider affidavits to remedy pleading problems.

(*Sargiss v Magarelli*, 12 NY3d 527, 530-531 [2009] [internal quotation marks, citations, and brackets omitted]).

It is alleged that, in May 2002, Van Epps prepared two stock certificates stating that plaintiff had 25 shares and Wasan had 75 shares of the corporation, and two tax election forms reflecting the same. (See Exhibits 2 and 3 to the Schissel Affidavit sworn to September 4, 2008 submitted in Support of the Order to Show Cause dated September 5, 2008^[ENS]). However, approximately seven months later, Van Epps prepared a shareholders' agreement which reduced plaintiff's ownership to 12.5% and a stock certificate in Wasan's name for an additional 100 shares. (See Exhibit 10 to the Schissel Affidavit sworn to September 4, 2008 and submitted in Support of the Order to Show Cause dated September 5, 2008). Although the reduction of plaintiff's ownership percentage was allegedly complete in February 2003,

plaintiff's K-1 distribution schedules (IRS Form 1120S) for the years 2003 through 2007 still reflected that plaintiff's ownership remained at 25% each year. (See Exhibits 15 and 16 to the Schlissel Affidavit sworn to September 4, 2008 submitted in Support of the Order to Show Cause dated September 5, 2008). [*13]

Plaintiff alleges that she relied on Van Epps' representations regarding her stake in the corporation because he was allegedly her attorney. Taking the allegations in the complaint as true, this reliance appears reasonable. Therefore, to the extent it is alleged that Van Epps owed plaintiff a fiduciary duty, and the tax filings and other affirmative actions by Van Epps concealed the dilution of plaintiff's ownership in the corporation, plaintiff states an independent cause of action for fraud which is not merely incidental to her breach of fiduciary duty claim but separate and distinct. (*Kaufman*, 307 AD2d at 119-120; *Klein*, 12 AD3d at 419). The breach of fiduciary duty claim concerns the conflict inherent in the alleged simultaneous representation of adverse interests, while the fraud claim addresses the concealment of plaintiff's diluted interest in the corporation. Accordingly, the six year statute of limitations applies to plaintiff's breach of fiduciary duty claim which is clearly not barred by the statute of limitations since Van Epps' breach of duty allegedly occurred in 2003 and this action was commenced in 2008. (*Id.*). Defendant's motion to dismiss is denied.

Defendant contends that plaintiff's claims against him are in the nature of professional malpractice and, therefore, are barred by the three-year statute of limitations of CPLR 214 (6), which is applicable to legal malpractice actions. Defendant asserts that by formulating her proposed amended complaint using language such as fraud and breach of fiduciary duty, plaintiff is attempting to circumvent the three-year limitations period applicable to legal malpractice claims pursuant to CPLR 214 (6) regardless of whether the underlying theory is based in contract or tort. However, as discussed, plaintiff adequately pleads a distinct cause of action for fraud against Van Epps which goes beyond ordinary malpractice (*see Simcuski v Saeli*, 44 NY2d 442, 453 [1978][finding that an independent cause of action for fraud against a professional may be established when exposure to liability "is not based on errors of professional judgment, but is predicated on proof of the commission of an intentional tort, in this instance, fraud"]; *see also Mitschele v Schultz*, 36 AD3d 249 [1st Dept 2006]). Defendant's malpractice argument fails, as the gravamen of plaintiff's suit is fraud. The motion to dismiss the action is therefore denied.

The Claim of Breach of Implied Covenant of Good Faith

Plaintiff's sixth cause of action (renumbered as the eighth cause of action in the proposed amended complaint) is for defendant's alleged breach of implied covenant of good faith. This cause of action is merely a restatement of the allegations found elsewhere in the pleading. Being redundant as well as conclusory, such cause of action is dismissed as against Van Epps.

Wasan's Cross-Claim Against Defendant

Finally, defendant's request to dismiss Wasan's cross-claim against him is denied. Defendant has not addressed that branch of the motion in any of his papers.

II. Plaintiff's Cross Motion for Leave to Serve the Proposed Amended Complaint

Plaintiff cross-moves for leave to serve the proposed amended complaint which [*14] asserts a fraud claim and clarifies her breach of fiduciary duty claim. It is well settled that "leave to amend a pleading should be freely given (*see* CPLR 3025 [b]), provided that the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit" (*Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]). The Appellate Division, Second Department, has admonished that "cases involving CPLR 3025 (b) that place a burden on the pleader to establish the merit of the proposed amendment erroneously state the applicable standard and are no longer to be followed" (*Lucido v Mancuso*, 49 AD3d 220, 229 [2008], *appeal withdrawn* 12 NY3d 804 and 813 [2009]). Consequently, "[n]o evidentiary showing of merit is required under CPLR 3025 (b)" (*id.*). "If the opposing party wishes to test the merits of the proposed added cause of action or defense, that party may later move for summary judgment upon a proper showing (*see* CPLR 3212)" (*id.*).

Inasmuch as plaintiff's claims against Van Epps are sufficient to withstand a more rigorous standard of review under CPLR 3211 (a), they are neither "palpably insufficient" to state a cause of action nor are patently devoid of merit under the liberal standard of CPLR 3025 (b). Further, Van Epps has not suggested that plaintiff's delay in seeking an amendment would cause him prejudice or surprise. With respect to the new claim of fraud, plaintiff asserted in her original complaint that she was seeking damages against Van Epps and his co-

defendants for "fraud and deceit" (¶ 1), thus giving notice of the substance of her proposed amended claims. Accordingly, plaintiff is granted leave to serve the proposed amended complaint, except as to the claim of breach of implied covenant of good faith, which is dismissed as to Van Epps.

CONCLUSION

Defendant's motion to dismiss is granted solely to the extent that plaintiff's claim of breach of implied covenant of good faith is dismissed as duplicative of her other claims against defendant, and is otherwise denied.

Plaintiff's cross motion is granted. Within ten days after service of this decision and order with notice of entry, plaintiff shall file and serve on defendant's counsel and on Wasan, who appears to be currently unrepresented,^[FN6] the amended complaint in the form annexed to the cross motion as Exhibit 2, except that the claim of breach of implied covenant of good faith as to Van Epps shall be omitted.

The court makes no determination concerning the merits of plaintiff's claims, as the motion to dismiss was addressed solely to the sufficiency of her pleadings and affidavits.

Defendant shall serve any opposition to plaintiff's motion to sever the claims against him from those of his co-defendants, pending determination of the instant motions, within ten days of service upon him of this decision. That motion will be calendared for argument [*15] on January 6, 2010.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

Footnotes

Footnote 1: These stock certificates, both dated April 22, 2002, are annexed as Exhibit B to Wasan's affidavit of Oct. 22, 2008, which was filed in opposition to a prior Order to Show Cause for a preliminary injunction in this case dated September 5, 2008 (*see Musick v 330 Wythe Ave. Assocs., LLC*, 41 AD3d 675, 676 [2d Dept 2007] ["(c)ourts may take judicial notice of their own prior proceedings and records, including exhibits"]).

Footnote 2: In support of the instant motion to dismiss, defendant's attorney, Evan A. Richman, attached as Exhibit B to his affirmation, plaintiff Schlissel's affidavit of September 4, 2008 which was submitted in support of the prior Order to Show Cause dated September 5, 2008. However, Richman fails to also attach the exhibits to that affidavit. The court's files reflect that Exhibit 3 to that affidavit is an IRS Form 2553 and Exhibit 2 is a NYS Form CT-B, both dated May 20, 2002.

Footnote 3: The filing of an amended pleading does not automatically abate a motion to dismiss that was addressed to the original pleading (*see Livadiotakis v Tzitzikalakis*, 302 AD2d 369, 370 [2d Dept 2003]). Rather, the moving party has the option to decide whether the motion should be applied to the new pleadings (*see Sage Realty Corp. v Proskauer Rose LLP*, 251 AD2d 35, 38 [1st Dept 1998]). Here, as defendant has addressed the sufficiency of both the original and the proposed amended complaint, the court will treat the original dismissal motion as also encompassing the proposed amended complaint (*see Sage*, 251 AD2d at 38; *see DiPasquale v Security Mut. Life Ins. Co. of New York*, 293 AD2d 394, 395 [1st Dept 2002]). The court notes that co-defendants Wasan, T & T, and Sungary Donuts, Inc. have taken no position on these motions.

Footnote 4: This argument is only advanced by defendant's counsel. There is nothing in the affidavit of Van Epps suggesting that Goldstein, in fact, replaced him in connection with this matter.

Footnote 5: As mentioned earlier, Defendant Van Epps attaches Schlissel's prior affidavit as Exhibit B to his affidavit in support of the instant motion to dismiss.

Footnote 6: By order dated February 18, 2009, the court relieved the then-current counsel of Wasan, T & T, and Sungary Donuts, Inc. and set April 29, 2009 as the deadline by which these defendants had to appear. Neither Wasan nor these entities have made the requisite appearance.

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