

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. K. Moskowitz

PART 3

Justice

VICK, JONATHAN, ROSE

INDEX NO.

605143-99

- v -

MOTION DATE

MOTION SEQ. NO.

01

MOTION CAL. NO.

ALBERT, RICHARD, et al.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying decision and order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

J.S.C.

DATED:

Dated: 8/2/01

FILED

AUG 08 2001

COUNTY CLERK'S OFFICE
NEW YORK

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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JONATHAN E. VICK and LINDA ROSE, as
Co-Executors of the Estate of Susan
Vick, Deceased,

Plaintiffs,

-against-

Index No. 605143/99

DECISION AND ORDER

RICHARD ALBERT, EVELYN RENEE ALBERT,
LAWRENCE HESSOL, JERRI HESSOL, HELEN
HESSOL, MICHAEL HESSOL, ALBERT
GREENBERG & VICK, A Partnership, ALBERT
HESSOLS & VICK, A Partnership,
GOODWIN REALTY ASSOCIATES, A Partnership,
3054 TERRACE REALTY CO., A Partnership,
222 REALTY LLC, A Limited Liability Co.,
and DELAFIELD, HOPE & LINKER, A Partnership

Defendants.

-----x
Karla Moskowitz, J.:

Motion sequence numbers 001 and 002 are consolidated for
disposition.

In motion sequence 001, defendants Richard Albert, Evelyn
Renee Albert, Godwin Realty Associates, 3054 Terrace Realty Co.,
222 Realty LLC, Alberts Greenberg & Vick (sued herein as Albert
Greenberg & Vick) and Albert Hessols & Vick move, pursuant to CPLR
3211(a)(1), (3), (5), (7) and (8), to dismiss the complaint, or, in
the alternative, for an order: 1) severing and changing venue of
the claims against defendants Godwin Realty Associates, 3054
Terrace Realty Co. and Albert Hessols and Vick to counties in which

the various properties are located; 2) directing that plaintiffs serve defendants with evidence of authority of plaintiffs' attorney to commence this action; 3) directing that plaintiffs separately state and number the claims against the respective defendants and 4) directing the parties to proceed to arbitration with respect to the claims asserted against 222 Realty LLC.¹

Plaintiffs cross-move: 1) pursuant to CPLR 3025(b), for leave to serve and file a Second Amended and Supplemental Summons and Complaint; and 2) disqualification of the law firm of Robert A. Ross from representing defendant 222 Realty LLC on the grounds of a conflict of interest.

In motion sequence 002, defendant law firm Delafield, Hope & Linker ("Delafield" or "the law firm") moves pursuant to CPLR 3211(a)(1), (5), (7) and (8), to dismiss the Amended and Supplemental Complaint.

Motion 001

This action concerns the property and financial interests of the late Susan Vick ("Vick"). Vick died on March 3, 1999 and plaintiffs, Vick's children, are the sole beneficiaries under

¹As discussed, infra, the moving defendants have withdrawn all aspects of their motion, except as to venue, to the extent that the court grants plaintiffs' cross motion

Vick's will.

ALLEGATIONS OF THE COMPLAINT

The complaint alleges that, beginning in 1975, Vick and several of the defendants, including her brother Richard Albert, joined in the business of buying, developing, leasing and managing residential and commercial real estate in New York City. The complaint states that at the time of her death, Vick owned interests in real properties in several New York counties. She was also a partner in several partnerships that managed real properties. Specifically, Vick owned an undivided 20% interest in a property located at 233 East 32nd Street in New York City. Vick, Richard Albert and Evelyn Albert were the sole partners of defendant partnership Albert, Greenberg & Vick, the entity that manages the East 32nd Street property. Vick had a 20% interest in the partnership.

Vick also owned an undivided 25% interest as a tenant in common of a property located at 140-70 Ash Avenue in Queens County. Defendant partnership Albert Hessols & Vick managed that property. Vick, Richard Albert, Lawrence Hessol and Helen Hessol were the sole partners of the defendant partnership. Vick had a 25% interest in Albert Hessols & Vick.

Vick, the Alberts, the Hessols, and the partnership of

Albert, Greenberg & Vick were the sole partners of defendant Godwin Realty Associates, that owned and managed a property located at 3045 Godwin Terrace in the Bronx. Vick owned a 9% interest in Godwin based on a 5% direct interest and a 4% interest through Albert Greenberg & Vick.

Vick held a 4% interest in defendant partnership 3054 Terrace Realty through her interest in Albert, Greenberg & Vick. 3054 Terrace Realty owned and managed the property located at 3054 Godwin Terrace in the Bronx.

Finally, Vick owned an undivided 20% interest as tenant in common in real property located on 222nd Street in Queens County ("Queens Village Property"). Richard Albert now owns an 80% interest in the property.

Plaintiffs state that defendant Richard Albert was the managing partner for each of the defendant partnerships and, as such, he collected rents and profits in the name of the respective partnerships. Among other things, the Complaint alleges that Richard Albert took exclusive control of the partnerships' books, records, properties and assets and that he misappropriated certain assets, including rental income, for his own benefit and incurred new debts and liabilities for the partnerships without Vick's consent. The Complaint also alleges that Albert failed to wind up

the partnerships' affairs after Vick died and failed to provide a final accounting for each of the partnerships.

PROCEDURAL BACKGROUND

Plaintiffs commenced this action in November, 1999 against Richard Albert and several of the other named defendants. The original complaint sought, among other things, a partition of the East 32nd Street property, and a dissolution, an accounting and the appointment of a Receiver with respect to the various partnerships. Thereafter, on April 11, 2000, plaintiffs filed an Amended and Supplemental Complaint that added Delafield as a party. The amended and supplemental complaint asserted claims for breach of fiduciary duty, breach of contract and negligence against Delafield based on the law firm's 1997 representation of Vick in connection with Vick and Albert's formation of defendant 222 Realty LLC.

Plaintiffs now request leave to serve and file a Second Amended and Supplemental Summons and Complaint, asserting twelve causes of action and seeking compensatory and punitive damages.

The moving defendants state that they withdraw all aspects of their motion to dismiss to the extent that the court grants the cross-motion to amend the complaint.² Therefore, the court will

² Defendants have not withdrawn their request to sever and change the venue of the claims against defendants Godwin Realty Associates, 3054 Terrace Realty Co., Albert Hessols and Vick and

first consider the cross-motion to amend the complaint.

THE CROSS MOTION

In general, leave to amend a pleading should be freely given, absent prejudice or surprise. CPLR 3025[b]; McCaskey, Davies and Assocs. v. New York City Health & Hosp. Corp., 59 NY2d 755 [1983]; Ebasco Constructors, Inc. v. Aetna Ins. Co., 260 AD2d 287 [1st Dept. 1999]. However, the court must first examine the sufficiency of the proposed amendment and leave must be denied if the movant fails to make an evidentiary showing that the proposed amendment has merit. Tishman Const. Corp. of New York v. City of New York, 280 AD2d 374 [1st Dept. 2001]; Citarelli v. American Ins. Co., ___ AD2d ___, 722 NYS2d 895 [2d Dept. 2001]; Ferran v. Williams, 281 AD2d 819 [3d Dept. 2001]. "[T]he court should examine, but need not decide, the merits of the proposed new pleading unless it is patently insufficient on its face." Hospital for Joint Diseases Orthopaedic Institute v. James Katsikis Environmental Contractors, Inc., 173 AD2d 210 [1st Dept. 1991], citations omitted. "Once a prima facie basis for the amendment has been established, that should end the inquiry, even in the face of a rebuttal that might provide the ground for a subsequent motion for summary judgment." Id.,

140-70 Ash Avenue, Queens. Defendants also reserve their right to raise any appropriate defenses and other objections to service and to the proposed amended pleading itself.

citations omitted

PROPOSED AMENDED COMPLAINT

FIRST THROUGH FOURTH CAUSES OF ACTION FOR ACCOUNTINGS

The first four causes of action seek accountings with respect to the four partnerships: Albert, Greenberg & Vick; Albert, Hessols & Vick; Godwin Realty Associates and 3054 Terrace Realty. In each cause of action, plaintiffs state that they seek to determine Vick's allocable share in all assets, profits and rights of the partnerships, including rents and other profits from the various properties that the partnerships managed. Plaintiffs also seek to wind up the affairs of each partnership.

In opposition, Richard Albert states that plaintiffs never demanded that he wind up the partnerships' affairs. He also states that an accounting is unnecessary because he provided plaintiffs with a substantial amount of financial information about the partnerships.

The first four causes of action sufficiently state claims for accountings because the proposed complaint alleges that, when Vick died, Richard Albert took control of the various partnerships' records, properties and other assets. It further alleges that Albert failed to wind up the partnerships' affairs after Susan Vick died and has failed to provide a final accounting for each of the

partnerships. See, Partnership Law §§ 73, 74; Blaustein v. Lazar Borck & Mensch, 161 AD2d 507 [1st Dept. 1990].

At this point, factual disputes exist as to whether the parties intended the partnerships to continue after Vick's death. However, those disputes need not be resolved at this stage of the litigation. Therefore, the motion to amend is granted as to the first, second, third and fourth causes of action.

FIFTH CAUSE OF ACTION BREACH OF FIDUCIARY DUTY

by The fifth cause of action is purportedly a claim for breach of fiduciary duty against Richard Albert based on his management of the various partnerships. Plaintiffs allege that, among other things, Albert misappropriated certain assets, including rental income, and incurred new debts and liabilities for the partnerships without Vick's consent. Plaintiffs allege that Albert also breached his fiduciary duty by failing to wind up the partnerships' affairs and failing to provide a final accounting for each of the partnerships after Vick died.

To state a claim for breach of fiduciary duty, plaintiff must allege a relationship of trust and confidence and the defendant's specific actions that breached that relationship. See, Finkel v. D.H. Blair & Co., 213 A.D.2d 588 (2nd Dept 1995). The fifth cause of action fails to meet these pleading requirements because it

contains only vague, conclusory allegations of wrongdoing against Richard Albert. See, Lavin v. Kaufman, Greenhut, Liebowitz & Forman, 226 A.D.2d 107 (1st Dept. 1996) Accordingly, that branch of the motion that seeks to amend the complaint to add a fifth cause of action for breach of fiduciary duty against Richard Albert is denied

SIXTH CAUSE OF ACTION FOR PARTITION

Plaintiffs' sixth cause of action seeks partition of the East 32nd Street property, or, in the alternative, sale of that property. Plaintiffs allege that Vick owned an undivided 20% interest in the property as a tenant in common, and the interest passed to her estate upon her death. Plaintiffs have submitted the deed to the premises that states that Vick had a 20% interest in the property.

Defendants argue that the claim for partition is deficient because the court cannot partition a partnership property and, according to Richard Albert, the parties treated the premises as partnership property. Defendants also argue that, assuming arguendo, the 32nd Street property is owned individually, the claim is deficient because it fails to include plaintiffs in their individual capacities. Defendants claim that if Albert and Vick

owned the property as tenants in common, then plaintiffs are necessary parties because Vick's interest in the property passed directly to plaintiffs individually upon Vick's death.

Plaintiffs contend that they are not necessary parties because the 32nd Street property was not named in a specific bequest in Vick's will. Rather, it is part of her residuary estate and, as such, plaintiffs are entitled to bring this claim as the executors of the estate.

Section 901(4) of the Real Property Actions and Proceedings Law provides that the executor of an estate may bring a partition action, with the approval of the Surrogate, when the decedent's estate is the owner of an estate in common in real property. See also, Surrogate's Court Procedure Act § 1901. Here, it is undisputed that the deed to the premises states that Vick was a 20% owner of the property. It is also undisputed that the property became part of Vick's residuary estate. Moreover, plaintiffs have received permission from the Surrogate to commence a partition action. Therefore, the sixth cause of action for partition is sufficiently stated.

SEVENTH CAUSE OF ACTION FOR RECISSION

Plaintiffs' seventh cause of action states that, prior to 1997, Vick and Richard Albert each owned, as tenants in common, an

undivided 20% interest in the Queens Village Property. Defendants Lawrence, Jerri and Helen Hessol owned the other 60% of the Queens Village property as tenants in common. In December 1995, the Hessols commenced a partition action against Richard Albert and Vick, seeking the partition and public sale of the property. Delafield represented both Albert and Vick in that action.

The complaint alleges that Delafield negotiated a settlement of that action on behalf of Vick and Albert that provided that Albert and Vick would obtain a \$3.5 million dollar loan and buy the Hessols' 60% interest. The settlement agreement provided that the Hessols would transfer all of their interest in the Queens Village premises to Richard Albert. Plaintiffs allege that Vick's liability under the original mortgage was \$360,000, but that, under the buy-out, her liability increased to \$680,000, even though Vick's ownership interest did not increase. Plaintiffs allege that both Albert and Delafield advised Vick to accept this arrangement without informing her that the transactions were possibly against her interests and were unduly favorable to Albert.

The complaint also alleges that Delafield assisted Vick and Richard Albert to form a limited liability company (LLC), defendant 222 Realty, to own and manage the Queens Village property. Vick's interest in the company was 20% while Albert's interest was 80%,

comprised of his original 20% and the additional 60% from the Hessols. Moreover, pursuant to the operating agreement for the Queens Village property, Richard Albert exercised full control over the company's affairs and received a management fee. Plaintiffs allege that Vick agreed to this arrangement based on Delafield's advice, even though the transactions were possibly adverse to her interests and unduly favorable to Albert.

Plaintiffs now seek rescission or reformation of the operating agreement for the Queens Village property and a constructive trust of the 60% interest the Hessols formerly held. Alternatively, plaintiffs seek reformation of the Operating Agreement to provide, among other things, an equal division of the Hessols' 60% interest between Vick and Albert.

Defendants argue that this claim is insufficient on its face because plaintiffs fail to allege facts demonstrating that Vick entered into the agreement as the result of fraud or mutual mistake. Defendants also contend that plaintiffs fail to allege the elements required for the imposition of a constructive trust.

"Generally, a contract is voidable and subject to rescission if the parties enter into the contract under a mutual mistake of fact." Weissman v. Bondy & Schloss, 230 AD2d 465 [1st Dept. 1997], citing Matter of Gould v. Board of Education, 81 NY2d 446 [1993].

"The mutual mistake must exist at the time the parties enter into the contract and the mistake must be substantial." Id. "'The idea is that the agreement as expressed, in some material respect, does not represent the 'meeting of the minds' of the parties.'" Id., quoting Matter of Gould v. Board of Education, supra at 453. However, "[e]ven where a mistake is unilateral...not mutual, a court acting in equity may rescind the contract if failing to do so would result in unjust enrichment of the plaintiff." Id., citing Matter of Gould v. Board of Education, supra, at 453.

Alternatively, a party may seek reformation of a contract by demonstrating that the contract was based either on a mutual mistake or a fraudulently induced unilateral mistake. Goldberg v. Manufacturers Life Ins. Co., 242 AD2d 175 [1st Dept. 1998].

Here, plaintiffs do not allege mutual or unilateral mistake. Instead, they claim that Delafield and Richard Albert fraudulently induced Vick to enter into the operating agreement for the Queens Village property and that Delafield and Richard Albert failed to inform Vick that the terms of the agreement were adverse to her interests and unduly favorable to Albert's interests. The complaint further alleges that Richard Albert engineered the transaction to further his own interests to Vick's detriment, resulting in Albert's unjust enrichment.

Here, plaintiffs have adequately stated a claim for rescission or reformation because they allege that Vick entered into a one-sided and unfair deal at Richard Albert and Delafield's urging without the benefit of unbiased advice and that the deal resulted in Albert's unjust enrichment. See, Hospital for Joint Diseases Orthopaedic Institute v. James Katsikis Environmental Contractors, Inc., supra.

However, the complaint fails to allege the elements required for imposition of a constructive trust, that is: 1) the existence of a confidential or fiduciary relationship; 2) a promise; 3) a transfer in reliance on that promise; and 4) unjust enrichment. Size v. Size, 276 AD2d 329 [1st Dept. 2000]; see, Sharp v. Kosmalski, 40 NY2d 119, 121 [1976]. Among other things, plaintiffs have failed to allege that Vick transferred property in reliance on a promise. Therefore, the motion to amend to add a seventh cause of action is granted in part and denied to the extent that plaintiffs seek a constructive trust.

EIGHTH CAUSE OF ACTION ACCOUNTING QUEENS VILLAGE PROPERTY

The eighth cause of action seeks an accounting for the Queens Village property from March 18, 1997 to the present. Defendants argue that this cause of action is not sufficiently stated because plaintiffs fail to allege wrongdoing by Richard Albert. However,

based on the allegations in support of the seventh, ninth and tenth causes of action, the court finds that the eighth cause of action for an accounting is sufficiently pleaded.

NINTH CAUSE OF ACTION BREACH OF FIDUCIARY DUTY QUEENS VILLAGE

The ninth cause of action alleges that, with respect to the Queens Village property, Richard Albert breached his fiduciary duty to Vick by engaging in: 1) "self-dealing" by acquiring the Hessols' 60% interest in the property at Vick's expense; 2) self-dealing with respect to the rents, income and profits of the property and 3) failing to render an accounting for the rents, income and profits³. Plaintiffs seek an accounting and request that a Receiver be appointed for the property.

Defendants argue that the court should not permit this amendment because the ninth cause of action fails to allege Richard Albert's specific wrongdoing. However, given plaintiffs' allegations of Albert's "self-dealing" in connection with the acquisition and maintenance of the premises, as well as in connection with the formation of 222 Realty, plaintiffs have adequately stated a cause of action for breach of fiduciary duty.

TENTH CAUSE OF ACTION PERFORMANCE OF OPERATING AGREEMENT

³In the tenth cause of action plaintiffs allege that the tenants in the Queens Village property paid their rent directly to Albert rather than to 222 Realty, LLC

Plaintiffs plead the tenth cause of action in the alternative to the seventh, eighth and ninth causes of action. In this cause of action, plaintiffs seek access to 222 Realty's records based on a provision in the Operating Agreement that granted each member of the company the right to inspect the records upon prior notice to the managing agent. The complaint alleges that plaintiffs sought to examine those records after Vick died, but that Richard Albert denied them access to many of the items they sought. This claim also asks the court to appoint a Receiver for the Queens Village property.

Defendants argue that this cause of action is inappropriate because it seeks performance of the very operating agreement that plaintiffs seek to rescind or reform in the seventh cause of action. However, as noted above, this claim is pled in the alternative to the seventh cause of action. Accordingly, the tenth cause of action is sufficient.

DISQUALIFICATION

Finally, that branch of the cross-motion seeking disqualification of Robert Ross, Esq. as attorney for Richard Albert and 222 Realty LLC on the ground of conflict of interest is denied. Plaintiffs argue that Mr. Ross cannot represent both parties because Mr. Albert is charged with breach of fiduciary

duty and fraud in forming 222 Realty.

Albert and 222 Realty argue that there is no conflict of interest. They argue that plaintiffs' claims will neither benefit nor hurt 222 Realty LLC because Albert is the sole surviving member of the company and plaintiffs have already offered to sell Vick's interest in 222 Realty to Albert pursuant to the terms of the operating agreement.

Disqualifying an attorney "implicates not only the ethics of the profession but also the substantive rights of the litigants." S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., 69 NY2d 437 [1987]. In general, "[a] party is entitled to be represented by the attorney of his or her choice. Eisenstadt v. Eisenstadt, ___ AD2d ___, 723 NYS2d 395 [2d Dept. 2001]. "This is a valued right which should not be abridged absent a clear showing that disqualification is warranted." Id., citing S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., supra; Olmoz v. Town of Fishkill, 258 AD2d 447 [2d Dept. 1999]; Feeley v. Midas Props., 199 AD2d 238 [2d Dept. 1993]. "The right to counsel of choice is not absolute and may be overridden where necessary--for example, to protect a compelling public interest--but it is a valued right and any restrictions must be carefully scrutinized." S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., supra.

Plaintiffs have not demonstrated that Richard Albert's interests conflict with or are adverse to those of 222 Realty LLC so that Mr. Ross cannot represent both parties. Therefore, the cross-motion to disqualify Robert Ross, Esq. is denied.

Because the court has granted plaintiffs' cross motion to amend the complaint in large part, defendants have concededly withdrawn all aspects of their motion (motion sequence #001) except that part seeking change of venue.

CHANGE OF VENUE

Defendants' argument that the court should sever the claims against defendants Godwin Realty Associates, 3054 Terrace Realty Co. and Albert Hessols and Vick and change the venue of those claims to the counties where the properties are located is without merit. Defendants reliance on CPLR § 507 that states that an action that affects "the title to, or the possession, use or enjoyment of, real property shall be in the county in which any part of the subject of the action is situated" is misplaced because the proposed second amended complaint only seeks partition of the East 32nd Street property, a property located in New York county. Therefore, New York County is the proper venue for that claim. Moreover, because the proposed second amended complaint joins various claims with potentially conflicting venue

provisions, the court finds that New York County is an appropriate venue to hear all those claims. See, CPLR § 502; Tashenberg v. Breslin, 89 AD2d 812 [4th Dept. 1982].

Motion 002

The proposed second amended and supplemental complaint asserts two causes of action against Delafield. The eleventh cause of action alleges that Delafield breached its fiduciary duty to Vick in the 1995 Queens Village property partition action and the subsequent formation of 222 Realty LLC by representing both Vick and Albert, to Vick's detriment. Plaintiffs also claim that Delafield failed to advise Vick of her rights with respect to the buy-out transaction and of consulting with independent counsel. Further, plaintiffs⁹ claim that Delafield failed to give Vick sufficient information to allow her to make an informed decision as to whether she needed independent counsel.

The twelfth cause of action states a claim for legal malpractice against Delafield. The complaint now alleges that Delafield's negligent representation resulted, among other things, in an unfair allocation of the Hessols' 60% interest to Albert. The cause of action also alleges that Delafield drafted the operating agreement for 222 Realty in a manner that unduly favored Albert.

Delafield argues that the court should deny plaintiffs' request for leave to file a second amended and supplemental complaint because plaintiffs' claims against Delafield are: 1) barred for lack of jurisdiction; 2) barred by the statute of limitations; and 3) fail to state cognizable claims against Delafield.

JURISDICTION

Delafield argues that the action should be dismissed as against it because this court lacks jurisdiction over it because plaintiffs did not obtain leave of court to amend the original complaint to add Delafield as a defendant. Plaintiffs contend that leave was not required. Even though plaintiffs now seek leave to serve a Second Amended Complaint, the issue of whether plaintiffs properly served the first amended complaint is relevant to Delafield's argument that plaintiffs' claims are barred by the applicable statutes of limitations. Accordingly, the court will address this issue.

CPLR 3025(b) provides that a party may amend his or her pleading, or supplement it, by setting forth additional or subsequent transactions or occurrences at any time by leave of court or by stipulation of all parties. Generally, "[t]he joinder of an additional defendant by the filing of a supplemental summons and amended complaint may be accomplished only with prior

judicial permission, and noncompliance renders the pleadings jurisdictionally defective." Perez v. Paramount Communications, Inc., 92 NY2d 749, 753 [1999], citing CPLR 1003, Crook v. du Pont de Nemours Co., 81 NY2d 807 [1993], Ospina v. Vimm Corp., 203 AD2d 440 [2d Dept. 1994], Dauernheim v Lendlease Cars, 202 AD2d 624 [2d Dept. 1994]. However, pursuant to CPLR 1003, a litigant may add a party without leave of court under certain circumstances. CPLR 1003 provides, in relevant part, that:

Parties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared, or once without leave of court within twenty days after service of the original summons or at anytime before the period for responding to that summons expires or within twenty days after service of a pleading responding to it.

Plaintiffs correctly argue that they did not require leave of court to add Delafield as a defendant because it is undisputed that some of the original defendants had not answered the original complaint and, therefore, plaintiffs served the first amended complaint before the period for responding to the original Complaint expired. See, Dynaire Corp. v. Germano, N.Y.L.J. 8/1/96, p.22 col.1

Delafield also argues that this court lacks jurisdiction over it because the law firm was not properly served with the summons with notice (CPLR 310). It is undisputed that plaintiffs served the summons with notice on March 27, 2000 by delivering a

copy of the summons with notice to an employee at Delafield's office and then by mailing a copy to the law firm's office.

CPLR 310(a) provides that a partnership may be served by personal service on one of the partners. CPLR 310(b) provides, in relevant part, that a partnership may also be served

by delivering the summons to the managing or general agent of the partnership or the person in charge of the office of the partnership within the state at such office and by either mailing the summons to the partner thereof intended to be served by first class mail to his last known residence or to the place of business of the partnership.

On its face, CPLR § 310(b) appears to make personal service on a partnership more difficult than service on a person. (CPLR § 308). However, in Bell v. Bell, Kalnick, Klee & Green, 246 AD2d 442 (1st Dept. 1998) the Appellate Division, First Department, held that:

(T)he only difference between CPLR 308(2), which permits delivery to "a person of suitable age and discretion", and CPLR 310(b), which limits delivery to "the managing or general agent of the partnership or the person in charge of the office of the partnership within the state at such office", appears to make service harder under the amended statute than it had been under the preamendment statute incorporating CPLR 308, and is therefore contrary to the legislative intent and should be disregarded. Accordingly, jurisdiction was properly sustained upon a finding that the summons and complaint were delivered to the receptionist

at the actual place of business of one of the individual defendants, who is one of the partners of defendant partnership, and then mailed the next day to that individual at his actual place of business in an envelope bearing the legend 'personal and confidential'.

Bell, supra at 442.

Based on the decision in Bell, the court finds that service upon Delafield was proper pursuant to CPLR § 310 because plaintiffs served Delafield by delivering the summons to an employee of Delafield at the law firm office and subsequently mailing a copy of the summons with notice to the office.

STATUTE OF LIMITATIONS

Delafield further argues that plaintiffs' claims for breach of fiduciary duty and negligence are barred by the statute of limitations. In general, "[a] breach of fiduciary duty claim falls under either a three-year or six-year limitation period, depending on the nature of the relief sought." Yatter v. William Morris Agency, Inc., 256 AD2d 260 [1st Dept. 1998] citing Loengard v. Santa Fe Industries, 70 NY2d 262, 266 [1987], Ghandour v. Shearson Lehman Brothers, 213 AD2d 304, 306 [1st Dept.], lv. denied 86 NY2d 710 [1995]. When a breach of fiduciary duty claim seeks only money damages, the applicable limitations period is three years. Yatter v. William Morris Agency, Inc. supra. Here, plaintiffs' claims against Delafield seek only

money damages. Therefore, the court finds that the applicable statute of limitations is three years. The limitations period for the negligence claim is also three years because that claim is one for legal malpractice. CPLR 214(6).

The Hessols and Vick and Albert settled the partition action on November 26, 1996 by executing a Settlement Agreement. Vick and Albert formed 222 Realty in February 1997 and they executed the Operating Agreement on March 18, 1997. Delafield argues that the limitations period began to run, at the latest, on March 18, 1997. However, Delafield also acknowledges that Albert and Vick closed on the Queens Village premises on March 25, 1997 and that the closing implemented the terms of the settlement agreement and the operating agreement. Delafield now claims that the closing was merely a formality. Delafield contends that the causes of action for breach of fiduciary duty and malpractice accrued when Vick executed the settlement and operating agreements.

Plaintiffs argue that their claims are timely because they filed the summons with notice on March 24, 2000, less than three years from the date of the closing on the Queens Village premises. Plaintiffs also argue Delafield's continuous representation of Vick until April or May, 1997 in connection with the Queens Village transaction tolled the statute of limitations as to the claims against Delafield. In support of

this argument, plaintiffs annex a memorandum from Delafield to Susan Vick, dated April 3, 1997, requesting that Vick and Richard Albert sign a FIRPTA affidavit and return it to Delafield. The memorandum's heading states that it concerns the "Queen Village Closing" [sic] and the memo has a notation from Susan Vick stating that she sent it back to Delafield on April 15, 1997.

Pursuant to CPLR 304 an action is commenced by filing a summons and complaint or summons with notice with the clerk of the court. See, Burrell v. Countrytowne Apartment Partnership, 247 AD2d 805 [3d Dept. 1998], citing Matter of Gershel v. Porr, 89 NY2d 327, 330 [1996]. Here, plaintiffs filed the Summons with Notice with the court on March 24, 2000, less than three years from the closing on the Queens Village premises and less than three years from the date of the memorandum. Therefore, plaintiffs' claims are not barred by the statute of limitations.

DOCUMENTARY EVIDENCE

Delafield also argues that the court should dismiss plaintiffs' claims based on documentary evidence. Delafield relies on a memorandum dated October 22, 1996 that it sent to Vick, along with a draft of the Settlement Agreement. The memorandum states that Vick should feel free to review the draft with other counsel. Delafield also relies on a March 14, 1997 memorandum that it sent to Richard Albert, along with a copy of

the operating agreement. In the March 14, 1997 memorandum, Delafield suggested that Albert give Vick a copy of the operating agreement to review with other counsel if she wished.

Delafield's evidence does not conclusively demonstrate that plaintiffs' proposed claims against it lack merit. See, Scadura v. Robillard, 256 AD2d 567 [2d Dept. 1998]. The October 22, 1996 memorandum does not, on its own, demonstrate that Delafield adequately discharged its duties to Vick. Moreover, there is no evidence that Albert ever sent Vick a copy of the March 14, 1997 memorandum and operating agreement. Therefore, Delafield has not demonstrated that plaintiffs' claims are insufficient on the basis of documentary evidence.

FAILURE TO STATE A CLAIM

Finally, Delafield argues that the complaint fails to state a claim for punitive damages because it does not allege that Delafield's actions were a fraud upon the court or fraud upon the public at large. Delafield also contends plaintiffs have not alleged any Delafield acts that would "shock the conscience." Plaintiffs argue that they are entitled to seek punitive damages because of allegations of breach of fiduciary duty.

"An award for punitive damages for conduct directed at the general public applies only in breach of contract cases, not in tort cases for breach of fiduciary duty." Don Buchwald &

Associates, Inc. v. Rich, 281 AD2d 229 [1st Dept. 2001]. citing, Sherry Assocs. v. Sherry-Netherland, Inc., 273 AD2d 14, 15 [1st Dept. 2000]. "To sustain a claim for punitive damages in tort, one of the following must be shown: intentional or deliberate wrongdoing, aggravating or outrageous circumstances, a fraudulent or evil motive, or a conscious act that willfully and wantonly disregards the rights of another." Id. citing Swersky v. Dreyer & Traub, 219 AD2d 321, 328 [1st Dept. 1996].

Here, the complaint does not allege conduct that rises to the level required for punitive damages. At most, the complaint alleges claims for malpractice and for breach of fiduciary duty. The complaint does not set forth any additional allegations of deliberate wrongdoing or other willful or wanton acts of Delafield that would sustain a claim for punitive damages. Accordingly, it is

ORDERED that defendants' motion to dismiss (sequence number 001) is denied; and it is further

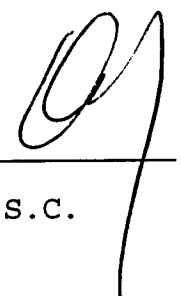
ORDERED that plaintiffs' cross-motion for leave to serve and file a Second Amended and Supplemental Summons and Complaint is granted except as to the proposed fifth cause of action (breach of fiduciary duty), the proposed claim for imposition of a constructive trust and the proposed claim for punitive damages. Leave to assert those claims is denied; and it is further

ORDERED that defendant Delafield's motion to dismiss (sequence number 002) is denied; and it is further

ORDERED that the plaintiffs serve the second amended and supplemental complaint within 30 days of the date of this order.

The parties are directed to appear for a preliminary conference in Part 3, 60 Centre Street, Room 248 on October 11, 2001 at 2:00 p.m.

DATED: 8/2/01

ENTER: 

J.S.C.