

SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 15
NASSAU COUNTY

**KENNETH SCHLOSSBERG, individually
and derivatively on behalf and in the right of
STEUBEN FOODS, INC.,**

Decision and Order

Plaintiff,

**MOTION SUBMITTED:
June 20, 2013
MOTION SEQUENCE:04
INDEX NO.:014491-11**

-against-

**HENRY SCHWARTZ, STEUBEN SALES, INC.,
ELMHURST DAIRY, INC., DORA'S NATURALS, INC.,
WORCHESTER CREAMERIES CORP. and EMPACT
AMERICA, INC.,**

Defendants,

STEUBEN FOODS, INC.,

Nominal Defendant.

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Affirmation in Opposition	2
Reply Affirmation	3

The Plaintiff moves pursuant to CPLR 2221(d) to reargue those branches of the Defendants' prior motion pursuant to CPLR 3211 which were granted in a Decision and Order of this court dated April 5, 2013 and entered April 9, 2013 ("prior order").

For the reasons that follow, the court grants reargument and, upon reargument, adheres to its original determination except to the extent that any of the claims contained in the twelfth

cause of action are barred by the six-year statute of limitations, and such claims are dismissed (CPLR 213[7]).

With respect to the twelfth cause of action, the derivative unjust enrichment claim, the Plaintiff seeks reargument to the extent that the court barred any claims beyond the three-year statute of limitations.¹ The court notes that the arguments raised by Plaintiff in the motion to reargue were not before the court in the underlying motion papers. Specifically, in the underlying motion, the Plaintiff argued that “[b]ased upon the same reasons discussed in connection with the eleventh cause of action [direct unjust enrichment claim], the twelfth cause of action [derivative unjust enrichment claim] is properly stated as an unjust enrichment claim on behalf of Steuben Foods against Steuben Sales and Empact” (Ex. “C” to Motion at p 18). And with respect to the eleventh cause of action, the Plaintiff stated in the underlying motion that later decisions of the “Second Department apply a six-year statute of limitations to unjust enrichment claims that seek only damages especially where, as here, breach of contract and unjust enrichment claims are pleaded in the alternative (Ex. “C” to Motion at p 18). Notably, Plaintiff’s only discussion as to which statute of limitations applied to a derivative claim was contained in Plaintiff’s memorandum of law at page 14 dealing with the eighth cause of action asserting mismanagement, corporate waste and self dealing wherein Plaintiff stated that “[t]his “derivative action is governed by a six-year statute of limitations” (Plaintiff’s Memorandum of Law at p 14). In fact, no where in the Plaintiff’s motion papers did Plaintiff claim that a six-year statute of limitations applied to the derivative unjust enrichment claim. However, notwithstanding Plaintiff’s failure to specifically argue that a six-year statute of limitations applied to the derivative unjust enrichment claim, and given the Court of Appeals’ recent pronouncement, that “section 213 has provided a uniform six-year statute of limitations for any action by a corporation against its present or former officers, directors or stockholders, whether seeking equitable or legal relief” (*Roslyn Union Free school District v Barkan*, 16 NY3d 643 [2011]), the court concludes that a six-year statute of limitations applies to the twelfth cause of action. Accordingly, except to the extent that any of the claims contained in the twelfth cause of action are barred by the six-year statute of limitations, the twelfth cause of action, as pleaded, sets forth a viable claim for derivatively asserted unjust enrichment (CPLR 213[7]).

The Plaintiff also contends that the court erred in dismissing the thirteenth cause of action which derivatively asserts the imposition of a constructive trust. According to the Plaintiff:

Schlossberg sought a constructive trust derivatively on behalf of Steuben Foods

¹ With respect to the twelfth cause of action, this court held, “Except to the extent any of the claims contained in the twelfth cause of action are barred by the three-year statute of limitations, the twelfth cause of action, as pleaded, sets forth a viable claim for derivatively asserted unjust enrichment.”

based on allegations that Schwartz, *inter alia*, improperly directed Steuben Foods to transfer assets and monies to, *inter alia*, himself, Steuben Sales and Empact.

Because Schlossberg asserted this claim derivatively the proper inquiry was not whether Schlossberg made the transfers as the Court mistakenly concluded; but rather, whether Steuben Foods made the transfers at Schwartz's direction. Here, the Second Amended Complaint properly alleges that, *inter alia*, Schwartz improperly caused Steuben Foods to transfer and/or misappropriate its assets to Schwartz and other companies owned and/or controlled by Schwartz and his family (Affirmation in Support at ¶¶ 18-19).

The allegations in the second amended complaint, namely, the existence of a fiduciary relationship, as well as the Company's transfer or misappropriation of assets at Schwartz's direction, are insufficient, in the absence of any showing of a promise and reliance thereon, to withstand dismissal of the constructive trust cause of action.

The Plaintiff further argues that the court erred in holding that the Plaintiff's first, fifth, eighth, eleventh and twelfth causes of action are time-barred to the extent they involve acts that occurred more than six years prior to the commencement of the action. However, Plaintiff's argument that its breach is not time-barred because Schwartz failed to "return the Private Label Business to Steuben Foods each year . . . constitut[ing] a continuing breach", is misplaced (Affirmation in Support of Motion to Reargue at ¶ 26 [emphasis in original]) (*see Silvester v Time Warner, Inc.*, 1 Misc3d 250 [Supreme Court New York County 2003]; *compare Barash v Estate of Sperlin*, 271 AD2d 558 [2d Dept 2000] [where plaintiff's claim of withholding profits constituted a continuing wrong which accrued each additional time the defendants collected income and profits and did not remit to the Plaintiff]).

Schlossberg also argues that the court erred in failing to find that the Defendants should be "equitably estopped from asserting the statute of limitations as a bar to any of his claims because he did not take any legal action in reliance on Schwartz's repeated assurances and promises that he would return the Private Label Business to Steuben Foods" (Affirmation in Support of Motion to Reargue at ¶ 28).

For equitable estoppel to apply, a plaintiff must demonstrate that it was induced by fraud, misrepresentations or deception to refrain from filing a timely action and that it relied on the defendant's misrepresentations (*Zumpano v Quinn*, 6 NY3d 666 [2006]). "It is therefore fundamental to the application of equitable estoppel for plaintiffs to establish that subsequent and specific actions by defendants somehow kept them from timely bringing suit" (*Id.*)

Initially, the court notes that the Plaintiff's equitable estoppel argument was only raised in

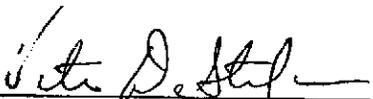
the underlying motion specifically with respect to the first cause of action for breach of fiduciary duty. In the Plaintiff's Memorandum of Law in Opposition to Defendants' underlying motion to dismiss, the Plaintiff argued that "although Schwartz improperly moved the Private Label Business from Steuben Foods to Steuben Sales sometime between 2002 and 2004, Schlossberg's breach of fiduciary duty claim as to *this particular breach* is not time-barred because . . . Defendants are equitably estopped from asserting statute of limitations as a bar where, as here, Schlossberg did not take any legal action because he relied upon Schwartz's repeated assurances and promises that he would return the Private Label Business to Steuben Foods" (Ex. "C" to Motion [Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss at p 6]) (emphasis added).

In any event, the Plaintiff has failed to demonstrate the applicability of equitable etoppel to the claims at bar insofar as the Plaintiff was aware that the Private Label Business was transferred out of Steuben Foods sometime between 2002 and 2004 and, at that time, had sufficient knowledge to commence an action. Subsequent conduct by Schwartz, that he would return the Private Label Business to Steuben Foods, did not alter the Plaintiff's awareness of the essential facts and circumstances underlying his causes of action or his ability to timely bring their claims (*see id.*).

Accordingly, it is hereby ordered that the Plaintiff's motion to reargue is granted and, upon reargument, the court adheres to its original determination except that, to the extent any of the claims contained in the twelfth cause of action are barred by the six-year statute of limitations, such claims are dismissed and the twelfth cause of action, as otherwise pleaded, sets forth a viable claim for derivatively asserted unjust enrichment (CPLR 213[7]). The motion is in all other respects denied.

This constitutes the decision and order of the court.

Dated: September 27, 2013



Hon. Vito M. DeStefano, J.S.C.

ENTERED

OCT 02 2013

NASSAU COUNTY
COUNTY CLERK'S OFFICE