SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

JONATHAN TROFFA and JOS. M. TROFFA LANDSCAPE AND MASON SUPPLY, INC.,	:	Index No. 609510/2016
Plaintiffs,	:	Hon. Jerry Garguilo
-against-	:	Motion Sequence No. 004
JOSEPH M. TROFFA, LAURA J. TROFFA, JOS. M. TROFFA MATERIALS CORPORATION, NIMT ENTERPRISES, LLC, L.J.T. DEVELOPMENT ENTERPRISES, INC., and JOS. M. TROFFA LANDSCAPE AND MASON SUPPLY, INC.,	:	
Defendants.	:	

MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR LEAVE TO REARGUE

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Defendants/Counterclaim Plaintiffs Joseph M. Troffa ("Joseph"), Laura J. Troffa, Jos. M. Troffa Materials Corporation, NIMT Enterprises LLC, L.J.T. Development Enterprises, Inc. and Jos. M. Troffa Landscape and Mason Supply, Inc. (the "Corporation," together "Defendants"), by their attorneys, Farrell Fritz, P.C., respectfully submit this Memorandum of Law in opposition to the motion of Plaintiff Jonathan Troffa ("Jonathan") for leave to reargue the Short Form Order of the Hon. Jerry Garguilo dated January 11, 2017 and entered January 12, 2017 (the "Order").

PRELIMINARY STATEMENT

This is a classic scattershot motion for reargument in which Jonathan merely rehashes his prior arguments on every aspect of the dismissal Order adverse to him. The Order, based on three sets of motion papers directed at two pleadings, was thorough and well-reasoned. Except to the very limited extent set forth in Joseph's cross-motion for reargument (*see* NYSECF Doc. Nos. 98-102), the Court did not overlook or misapprehend any matters of law or fact.

First, as the Court correctly held, the fiduciary duty claim primarily sought money damages, and the equitable component of the claim (most of which is now dismissed) was merely incidental to that relief (*see* Point I.A). The Court correctly declined to apply the fraud-based statute of limitations under CPLR § 213 (8) because the Amended Complaint's three-paragraph, stray allegations of "fraud" added nothing to the claim. The alleged "fraud" was just the means of accomplishing the breach of fiduciary duty. In any event, Jonathan failed to allege, and cannot prove, the elements of fraud, most importantly, a misrepresentation of material fact upon which Jonathan reasonably relied. As a result, Jonathan's "fraud" allegations were not "essential" to the First Cause of Action, Jonathan only alleged "fraud" as an anticipated defense to the statute of limitations (*see* Point I.B).

Second, contrary to Jonathan's assertions, the Court did not dismiss the Second Cause of Action based upon the statute of limitations. The Court may do so now, however, if it is inclined to grant reargument (*see* Point II.A). While a moot point since the Court did not dismiss based upon statute of limitations, the doctrine of equitable estoppel is inapplicable here as a matter of law to bar Defendants from relying upon the statute of limitations because Jonathan utterly failed to allege an act of fraud or deception, separate and apart from the underlying alleged torts, which prevented him from timely suing (*see* Point II.B). Finally, as the Court correctly held, Jonathan failed to plead, and cannot show, a transfer of property in reliance upon a promise by Joseph, which, contrary to Jonathan's assertions, is an essential element of constructive trust (*see* Point II.C).

Third, the Court should deny reargument of its dismissal of the Third Cause of Action to quiet title because, as the Court correctly held, Jonathan failed to allege the type of claim encompassed by Article 15 of the RPAPL. Jonathan did not seek to *clear title* to property, he sought to *convey title* to property in which he and the Corporation admittedly had no interest from Joseph to the Corporation. In other words, Jonathan failed to allege that he or the Corporation had an estate or interest in the real property adverse to that of Joseph, as required by statute, to state a viable to quiet title (*see* Point III). Again, Jonathan does not identify any facts or law overlooked or misapprehended by the Court.

THE PRIOR PROCEEDINGS

Joseph and his son, Jonathan, are the sole equal shareholders of the Corporation (*see* Affirmation in Support of Motion for Leave to Reargue of Jeffrey D. Powell, dated February 15, 2017 ["Powell Aff."], Ex. B, ¶¶ 19-24). The Corporation is a wholesale and retail landscape and masonry supply business in East Setauket, New York (*id.*, ¶¶ 12, 16). Joseph founded the

business in the 1970s (*id.*, ¶ 15). In December 1995, Joseph gifted Jonathan his stock (*id.*, ¶¶ 19-20). For many years Joseph and Jonathan worked well together and the business grew as a result (Powell Aff., Ex. C, Opening Dissolution Aff., ¶¶ 9-10). But in recent years their relationship soured (*id.*, ¶¶ 11-12, 14-34). Now, Joseph and Jonathan fundamentally disagree about how to run the business (*id.*, ¶¶ 14-34).

On June 27, 2016, Jonathan filed a Verified Petition/Complaint (the "Petition/Complaint") alleging four claims against his father: (i) judicial dissolution under BCL § 1104 based upon shareholder and/or director deadlock; (ii) a direct claim for breach of fiduciary duty; (iii) constructive trust; and (iv) quiet title (Powell Aff., Ex. D, Opening Dismissal Aff., Ex. A thereto, ¶¶ 76-105).

On August 16, 2016, Jonathan filed a Verified Amended Complaint (the "Amended Complaint") withdrawing his judicial dissolution claim and alleging the following four claims: (i) a direct claim for breach of fiduciary duty, (ii) constructive trust; (iii) quiet title; and (iv) in the alternative to the first claim, a shareholder derivative claim under BCL § 626 (Powell Aff., Ex. B, ¶¶ 62-88).

On September 16, 2016, Joseph filed two motions: (i) a motion striking the Amended Complaint, including its unilateral withdrawal of Jonathan's dissolution claim, as non-compliant with BCL § 1116, and ordering judicial dissolution of the Corporation on the consent of Joseph; and (ii) a motion to dismiss all the non-dissolution claims in the Petition/Complaint, or in the alternative, to dismiss the Amended Complaint (Powell Aff., Exs. C and D; *see also* Exs. G and H).

On October 12, 2016, Jonathan filed a cross-motion for leave to withdraw the Petition/Complaint's claim for judicial dissolution (Powell Aff., Ex. F).

On January 11, 2017, the Hon. Jerry Garguilo issued the Order consolidating the three motions for determination (*see* Powell Aff., Ex. A, at 5). The Court denied Joseph's motion to strike and for dissolution on consent on procedural grounds, and denied Jonathan's cross-motion to withdraw his dissolution claim as academic (*see id.*, at 2-3, 5). The Court construed Joseph's motion to dismiss as directed against the Amended Complaint (*id.*, at 3). The Court granted Joseph's motion to partially dismiss the First Cause of Action for breach of fiduciary duty by dismissing all acts or events prior to June 27, 2013 as barred by the applicable three-year statute of limitations (*id.*, at 4, 5). The Court also dismissed the First Cause of Action's request for an accounting (*id.*). The Court dismissed the Second Cause of Action for constructive trust for failure to allege the essential elements of the claim (*id.*). The Court dismissed the Third Cause of Action to quiet title for failure to state a cause of action encompassed by Article 15 of the RPAPL (*id.*). The Court denied Joseph's motion to dismiss the Fourth Cause of Action for shareholder derivative liability under BCL § 626 (*id*. at 4-5). Thus, as the Court correctly held, only a limited portion of the First Cause of Action for breach of fiduciary duty, and the Fourth Cause of Action for shareholder derivative liability, remain (*id*. at 5).

ARGUMENT

The Applicable Standard

"A motion for leave to reargue 'shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion'" (*Ahmed v Pannone*, 116 AD3d 802, 805 [2d Dept 2014] [quoting CPLR 2221 [d][2]]). "While the determination to grant leave to reargue a motion lies within the sound discretion of the court, a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues

previously decided, or to present arguments different from those originally presented" (*Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819, 820 [2d Dept 2011] [internal citation and quotations omitted]). It is "an improvident exercise of discretion to grant leave to reargue" where the "plaintiff merely advanced arguments that had not been presented in its previous motion" or "made no effort to demonstrate to the court in what manner it had either overlooked or misapprehended the relevant facts or law" (*V. Veeraswamy Realty v Yenom Corp.*, 71 AD3d 874, 874 [2d Dept 2010]).

Point I

THE COURT DID NOT OVERLOOK OR MISAPPREHEND ANY MATTERS OF LAW OR FACT IN PARTIALLY DISMISSING THE FIRST CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY

The Court partially dismissed the First Cause of Action for breach of fiduciary duty. The Court ruled that a three-year statute of limitations applied to the fiduciary duty claim. The Court dismissed the claim as to all events more than three years before Jonathan filed the Petition/Complaint on June 27, 2016 (*see* Powell Aff., Ex. A, at 4). Specifically, the Court ruled:

> With regard to the first cause of action, breach of fiduciary duty, duty of loyalty and accounting, the applicable statute of limitations for breach of fiduciary duty claims depends upon the substantive remedy sought (***Kaufman v Cohen***, 307 AD2d 113, 760 NYS2d 157 [1st Dept 2003], citing ***Leongard v Santa Fe Industries, Inc.***, 70 NY2d 262, 267, 519 NYS2d 801 [1987]). Where the relief sought is equitable in nature, the six-year limitations period of CPLR 213 (1) applies (***Kaufman v Cohen***, *supra*, citing ***Leongard***, supra). "On the other hand, where suits alleging a breach of fiduciary duty seek only money damages, courts have viewed such actions as alleging 'injury to property,' to which a three-year statute of limitations applies" (***id***. citing CPLR 214 [4]).
>
> Here, the court finds that the statute of limitations for breach of fiduciary duty and duty of loyalty is three years since plaintiff seeks monetary damages (***Kaufman v Cohen***, *supra*). Thus, the equitable relief plaintiff seeks, including an accounting,

> is incidental that relief (***IDT Corp. v Morgan Stanley Dean Witter & Co.***, 12 NY3d 132, 879 NYS2d 355 [2009]). However, a shareholder who seeks a corporate accounting, as here, must do so in the context of a derivative action (*see* NY BCL § 720 [b]; ***Romanoff v Superior Career Institute Inc.***, 69 AD2d 856, 415 NYS2d 457 [1979]). Inasmuch as this action was commenced on June 27, 2016, the allegations of defendants' breach of fiduciary duty and loyalty prior to June 27, 2013 are time barred, which include the first five[1] real estate purchases, as demonstrated by defendants' submission of the respective deeds to the parcels. The court notes that plaintiff has failed to identify an exception to the statute of limitations. Therefore, that branch of the motion seeking to dismiss the first cause of action is granted to the extent that all claims of breach of fiduciary duty and loyalty which occurred prior to June 27, 2013 are dismissed, as is the accounting claim in its entirety.

(Powell Aff., Ex. A, at 4). Jonathan makes two points in support of reargument, both meritless.

A. <u>The Court Correctly Ruled the First Cause of Action to be Monetary in Nature</u>

Jonathan argues that the Court incorrectly ruled the First Cause of Action to be primarily monetary in nature (*see* Memorandum of Law in Support of Motion for Leave to Reargue, dated February 15, 2017 ["Opening Bf."], at 1-2, 10-11). This argument is pure rehash. Jonathan "made no effort to demonstrate to the court in what manner it had either overlooked or misapprehended the relevant facts or law" (*V. Veeraswamy Realty v Yenom Corp.*, 71 AD3d at 874). Instead, he merely disagrees with the Court's conclusion. "A motion for reargument . . . is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (*Mangine v Keller*, 182 AD2d 476, 477 [1st Dept 1992] [internal quotations omitted]).

[1] As explained in Defendants' cross-motion, the Court misspoke when it stated that only the "first five real estate purchases were time barred. The sixth transaction, the so-called "Compost Yard" purchase, closed title on March 12, 2013. It too is time barred.

The parties thoroughly briefed the issue whether the fiduciary duty claim is primarily legal or equitable, and the Court carefully considered and rejected Jonathan's argument. In support of dismissal, Defendants argued:

> Jonathan's claim for breach of fiduciary duty seeks primarily monetary relief: he demands that the Defendants "return and pay back to the Corporation" damages in the form of "profits they derived, for which they were unjustly enriched to the Corporation's detriment, for wasting Corporation assets, and for self-dealing," to "disgorge" "excessive and unauthorized compensation" and "profits," and to pay "punitive damages" (Troffa Aff., Ex. A, ¶¶ 90-94). The claim is exclusively monetary in nature, so a three-year statute of limitations unquestionably applies.

(Powell Aff., Ex. D, Dismissal Opening Bf., at 6-7).

In opposition, Jonathan argued that his fiduciary duty claim was "equitable in nature" because, among other things, the "primary remedy sought" in the Second Cause of Action was "to determine title to [real] property and compel Joseph to convey it to the Corporation" (Powell Aff., Ex. E, Dismissal Opposition Bf., at 13).

In reply, Defendants argued:

> Here, it is shamelessly misleading to say that the "primary remedy" of the fiduciary duty claim is "to determine title to the property and compel Joseph to convey it to the Corporation" (Opposition Bf. at 13). The fiduciary duty claim seeks money damages. The *only* equitable component of the claim — the request for an accounting — is incidental to that relief (Joseph Aff., Ex. A, ¶ 90 and p. 18, "WHEREFORE" clause).

(Powell Aff., Ex. H, Dismissal Reply Bf. at 6-7).

After considering all these arguments, citing the relevant authorities, and "looking to the reality, rather than the form, of this action" (*IDT Corp. v Morgan Stanley Dean Witter & Co.* (12 NY3d 132, 139 [2009]), the Court correctly held that the "statute of limitations for breach of fiduciary duty and duty of loyalty" here "is three years since plaintiff seeks monetary damages"

and "the equitable relief plaintiff seeks, including an accounting, is incidental to that relief" (Powell Aff., Ex. A, at 4). Buttressing the holding's correctness, the Court dismissed the accounting part of the First Cause of Action, the only truly equitable aspect of the claim (*see* Powell Aff., Ex. A, at 5 ["defendants' motion . . . to dismiss the amended complaint is granted [as] to . . . an accounting in the first cause of action"]). The Court's holding was correct.

In his reargument brief, Jonathan argues for the first time that his fiduciary duty claim is really a faithless servant claim, which seeks disgorgement of compensation as an equitable forfeiture for disloyalty in the course of an employer-employee or master-servant relationship (*see* Opening Bf. at 10-11 [citing *W. Elec. Co. v Brenner*, 41 NY2d 291, 295 [1977]). For at least four reasons, this argument is insufficient to grant leave to reargue.

First, Jonathan never argued in his original motion that his First Cause of Action for breach of fiduciary duty is a faithless servant claim (*see* Powell Aff., Ex. E, Dismissal Opposition Bf., at 1-19). A "motion for leave to reargue does not offer an unsuccessful party, as here, successive opportunities to present arguments not previously advanced" (*Giovanniello v Carolina Wholesale Off. Mach. Co., Inc.*, 29 AD3d 737, 738 [2d Dept 2006] [internal quotations omitted]).

Second, the First Cause of Action fails to plead any of the elements of a faithless servant claim, namely, that Joseph was "faithless in his performance of services," that his "misconduct and unfaithfulness substantially violated the contract of service," that he "acted adversely to his employer in any part of the transaction," or that he "omitted to disclose any interest which would naturally influence his conduct in dealing with the subject of his employment" (*CARCO Group, Inc. v Maconachy*, 383 Fed Appx 73, 76 [2d Cir 2010]). The Amended Complaint has none of these essential elements (Powell Aff., Ex. B, ¶¶ 62-70).

Third, the First Cause of Action does not seek disgorgement of Joseph's compensation as an *employee* of the Corporation, which is the *sine qua non* of a faithless servant claim. Rather, it seeks "disgorgement of profits" from real property transactions (*see e.g.* Powell Aff., Ex. B, ¶ 14 and p. 15-16, "WHEREFORE" clause). The claim does seek recovery of "compensation" *paid to* Joseph and his wife, Laura, but only on grounds that the compensation was "excessive" and "a waste," which is garden-variety breach of fiduciary duty (*see id.*, ¶¶ 55-56, 67).

Fourth, even if the First Cause of Action could be considered as seeking, at least in part, disgorgement of compensation (which it does not), it would not alter or affect the overall nature of the claim — "the reality, rather than the form" of it — as being primarily to recover money damages not equitable relief (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d at 139). Based on the foregoing, Jonathan failed to demonstrate any "matters of law or fact allegedly overlooked or misapprehended by the court" in holding that the First Cause of Action was primarily legal, rather than equitable, in nature (*Vaughn v Veolia Transp., Inc.*, 117 AD3d 939, 940 [2d Dept 2014] [internal quotations omitted]).

B. <u>The Court Correctly Declined to Apply the Fraud-Based Statute of Limitations</u>

Jonathan argues that the Court incorrectly declined to apply the fraud-based statute of limitations to the First Cause of Action for breach of fiduciary duty (*see* Opening Bf. at 2-3, 9-10). The parties thoroughly briefed this argument, which the Court properly did not adopt (*see e.g.* Powell Aff., Ex. E, Dismissal Opposition Bf. at 4, 13-14; Powell Aff., Ex. H, Dismissal Reply Bf. at 1, 6-10; *compare* Powell Aff., Ex. A, at 1-5).

If "an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations" with a two-year fraud discovery rule (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d at 139; *see* CPLR § 213 [8]). However, "courts

will not apply the fraud statute of limitations if the fraud allegation is only incidental to the claim asserted; otherwise, fraud would be used as a means to litigate stale claims" (*DiRaimondo v Calhoun*, 131 AD3d 1194, 1196 [2d Dept 2015] [internal quotations omitted]). To determine whether fraud is "essential" or "incidental" to the claim, "courts look for the reality, and the essence of the action and not its mere name" (*Garber v Ravitch*, 186 AD2d 361, 362 [1st Dept 1992] [internal quotations omitted]).

Here, the Amended Complaint contains just two incidental allegations of fraud, consisting of three paragraphs in total. *First*, the "Background" section alleged that Joseph told Jonathan the six parcels of real property "were each acquired for the benefit of the Corporation and that the Corporation was to be the beneficial owner of said parcels, but that the deeds would be titled in the names of entities which would hold the properties and title for the Corporation" (Powell Aff., Ex. B, ¶ 27). Jonathan alleged: "The foregoing representations were false, were known to be false when they were made, and were made for the purpose of defrauding and misleading Jonathan" (*id.*, ¶ 32). *Second*, the Second Cause of Action for constructive trust alleged that Joseph and Laura's alleged acquisition of the six parcels "was fraudulent, and constituted a breach of Joseph's and Laura's fiduciary duties" (*id.*, ¶ 73). For at least two reasons, Jonathan's threadbare and conclusory fraud allegations are not "essential" to the fiduciary duty claim.

1. <u>The Alleged Fraud was Merely the Means of Accomplishing the Breach</u>

"Where the alleged fraud is merely the means of accomplishing the breach and adds nothing to the causes of action, the statute of limitations applicable to fraud claims will not control" (*Powers Mercantile Corp. v Feinberg*, 109 AD2d 117, 120 [1st Dept 1985], *affd* 67 NY2d 981 [1986]; *see also Gold Sun Shipping Ltd. v Ionian Transp. Inc.*, 245 AD2d 420, 421

[2d Dept 1997] [holding that fraud allegations were merely incidental to a cause of action for conversion, and therefore the three-year statute of limitations for conversion applied]).

Here, the substance of the fiduciary duty claim would not be altered by Jonathan's omission of the stray allegations of fraud. The Amended Complaint does not rely upon any fraudulent acts as the basis for an independent breach or tort. Rather, Jonathan's fraud allegation is entirely dependent upon the alleged existence and breach of a fiduciary duty, not vice versa. Jonathan admitted in his prior motion that he did not allege an "affirmative misrepresentation," just "failure to disclose facts which one is required to disclose" where "a fiduciary relationship exists" (Powell Aff., Ex. E, Dismissal Opposition Bf. at 12; *see also id*. at 11 ["Laura and Joseph owed Jonathan and the Corporation a fiduciary duty which also required them to fully disclose their plan. Failing to disclose that which they were duty bound to disclose constitutes fraud"]). Jonathan makes the same concession again here, admitting that his allegation of "fraud" could not exist but for the existence of a fiduciary duty imposing a duty to disclose in the first instance (Opposition Bf. at 7, 9 ["[A]s officers and directors of the Corporation . . . Joseph and Laura had a duty to disclose their conduct, and failure to do so constitutes actual fraud"]).

Based on the foregoing, the "fraud" allegation in the Amended Complaint is based on the identical allegations as the fiduciary duty claim — breach of a fiduciary duty imposing an obligation to disclose a corporate opportunity. Accordingly, if Jonathan had attempted to plead fraud as a separate claim, it would have been dismissed as duplicative (*see Stein v McDowell*, 74 AD3d 1323, 1326 [2d Dept 2010] ["the plaintiffs' purported cause of action sounding in fraud is duplicative of their cause of action to recover damages for breach of fiduciary duty. Therefore, their fraud cause of action must be dismissed"]). Therefore, the fraud allegation is not "essential" to the claim.

Finally, the most telling and obvious reason the fraud allegation is not "essential" is that the Amended Complaint does not allege a separate cause of action for fraud. If Jonathan had been capable of doing so, he would have alleged fraud, or at least tried. In sum, "the alleged fraud is merely the means of accomplishing the breach and adds nothing to the causes of action," so it is not "essential" to the fiduciary duty claim, and the Court did not overlook or misapprehend any matters of fact or law in declining to apply the longer, fraud-based statute of limitations to Jonathan's claim for breach of fiduciary duty (*Powers Mercantile Corp. v Feinberg*, 109 AD2d at 120).

2. <u>Jonathan Failed to Plead and Could Not Prove the Elements of Fraud</u>

Aside from being not "essential" to the fiduciary duty claim, Jonathan did not, and could not, plead a *prima facie* claim of fraud. "The elements of a cause of action to recover damages for fraud are [1] a material misrepresentation of fact, [2] knowledge of its falsity, [3] an intent to induce reliance, [4] justifiable reliance by the plaintiff, and [5] damages" (*Summit Dev. Corp. v Interstate Masonry Corp.*, 140 AD3d 1152, 1153 [2d Dept 2016]). The heightened-pleading requirement of CPLR 3016 (b) is only "satisfied when the facts suffice to permit a reasonable inference of the alleged misconduct" (*Simcuski v Saeli*, 44 NY2d 442, 453 [1978]).

Here, the Amended Complaint fails to plead sufficient facts about Joseph's alleged fraud (Powell Aff., Ex. B, ¶¶ 27, 32, 73). The Amended Complaint does not describe when the alleged statements occurred, what specifically was said, or the circumstances in which the statements were allegedly made (*id.*). The most detailed allegation was that Joseph told Jonathan the Corporation "was to be the beneficial owner of [the six] parcels," which was "false" and "known to be false" (*id.*, ¶¶ 26, 32). Under New York law, this sort of bare "conclusory allegation that

the . . . defendants knowingly made false representations" is wholly inadequate (*Pace v Raisman & Assoc., Esqs., LLP*, 95 AD3d 1185, 1189 [2d Dept 2012]).

Despite multiple, successive opportunities and attempts to do so, Jonathan is hopelessly incapable of articulating what Joseph allegedly promised him. Under New York law, Jonathan's allegation of fraud was woefully insufficient because he "fails to articulate any specific misrepresentation of a material present fact, made by [Joseph], and on which [Jonathan] justifiably relied" (*Intl. Oil Field Supply Servs. Corp. v Fadeyi*, 35 AD3d 372, 375 [2d Dept 2006]). At most, Jonathan alleged some elusive assurance about what *might* happen in the future. "Vague expressions of hope and future expectation provide an insufficient basis upon which to predicate a claim of fraud" (*id.*). "[O]ral representations regarding the future outcome of [events are] mere expressions of opinion of present or future expectations, upon which the plaintiff could not justifiably rely" (*Adrien v Estate of Zurita*, 29 AD3d 498, 499 [2d Dept 2006]).

In sum, Jonathan's stray fraud allegations do not add anything of substance to his fiduciary duty claim (*Cusimano v Schnurr*, 137 AD3d 527, 529 [1st Dept 2016]). Therefore, the Court did not overlook or misapprehend any matters of fact or law in applying the three-year statute of limitations under CPLR § 214 (4) to Jonathan's claim for breach of fiduciary duty, and dismissing the First Cause of Action as to events before June 27, 2013.

Point II

THE COURT DID NOT OVERLOOK OR MISAPPREHEND ANY MATTERS OF LAW OR FACT IN DISMISSING THE SECOND CAUSE OF ACTION FOR CONSTRUCTIVE TRUST

The Court dismissed the Second Cause of Action for constructive trust. The Court held that Jonathan failed to allege the essential elements of a claim. The Court ruled:

> That branch of defendants' motion to dismiss the second cause of action which seeks a constructive trust is granted. The elements of a constructive trust are as follows: a confidential or fiduciary relationship, a promise, a transfer in reliance on the promise and unjust enrichment (***Maiorino v Galindo***, 65 AD3d 525, 883 NYS2d 589 [2d Dept 2009]). The court agrees that all elements of constructive trust have not been met by plaintiff, in that plaintiff made no transfers in reliance on a promise.

(Powell Aff., Ex. A at 4). Jonathan makes three arguments in support of reargument. None has any merit.

A. <u>The Court Did Not Dismiss the Second Cause of Action as Untimely</u>

Jonathan claims that the Court "erred when it held that Jonathan's constructive trust claim was barred by the six-year statute of limitations" (Opening Bf. at 4). He is unable, however, to identify any matters of law or fact misapprehended or overlooked by the Court.

As an initial matter, Jonathan is incorrect when he asserts that the Court dismissed his constructive trust claim based upon the statute of limitations (*see* Powell Aff., Ex. A, at 1-5). Defendants moved for dismissal based upon the statute of limitations, and the parties thoroughly briefed the issue, but the Court did not rule on it, dismissing the claim on alternative grounds as insufficiently pled (*see* Powell Aff., Ex. D, Dismissal Opening Bf. at 2, 10-11; Ex. E, Dismissal Opposition Bf. at 15-17; Ex. H, Dismissal Reply Bf. at 12-13; Ex. A, at 4).

As a threshold matter, Jonathan argued in his prior motion that his constructive trust claim was confined to just one property – the Compost Yard (*see e.g.* Powell Aff., Dismissal Reply Bf. at 17 ["The Amended Complaint seeks the imposition of a constructive trust on the Compost Yard, which closing took place in 2013"]). Now, Jonathan argues for the first time that the constructive trust claim applied to multiple properties (*see e.g.* Opening Bf. at 7 ["The properties on which a constructive trust should be imposed" are "the Compost Yard" and "Parcels #3, 4, and 5"]). Based on Jonathan's prior submissions, the Court must limit the

constructive trust claim to the Compost Yard transaction and exclude any earlier transactions. It would be error to allow Jonathan "successive opportunities to present arguments not previously advanced" (*Giovanniello v Carolina Wholesale Off. Mach. Co., Inc.*, 29 AD3d at 738).

On the merits, as Defendants explained in their prior motion papers, the six-year statute of limitations for constructive trust "commences to run upon the occurrence of the wrongful act," "not from the time the facts constituting the fraud are discovered" (*Soscia v Soscia*, 35 AD3d 841, 843 [2d Dept 2006]; Powell Aff., Ex. H, Dismissal Reply Bf. at 12-13). In other words, "constructive trust" is "not subject to a discovery rule" (*Gerschel v Christensen*, 143 AD3d 555, 556 [1st Dept 2016]). Therefore, Jonathan's constructive trust claim accrued on "the date of the 'wrongful transfer' of the subject property" (*Loeuis v Grushin*, 126 AD3d 761, 765 [2d Dept 2015]). Therefore, as shown in Defendants' prior papers, the first five real property transfers are untimely as a matter of law because they occurred more than six years before Jonathan filed the Petition/Complaint (Powell Aff., Ex. E, Dismissal Opening Aff., ¶ 3 and Exs. A-K thereto).

B. <u>The Doctrine of Equitable Estoppel is Inapplicable as a Matter of Law</u>

Jonathan argues that the Court should have applied the doctrine of equitable estoppel to toll the statute of limitations on the Second Cause of Action for constructive trust (*see* Opening Bf. at 2-3, 4-5). The parties thoroughly briefed the doctrine of equitable estoppel (*see e.g.* Powell Aff., Ex. E, Dismissal Opposition Bf. at 15-17; Powell Aff., Ex. H, Dismissal Reply Bf. at 10-11; *compare* Powell Aff., Ex. A, at 1-5). The Court did not overlook or misapprehend any matters of law or fact in declining to apply the doctrine of equitable estoppel.

Under New York law, where a plaintiff "attempts to invoke the doctrine of equitable estoppel to revive its stale claims, that extraordinary remedy is only applicable in circumstances where there is evidence th[e] plaintiff was lulled into inaction by defendant in order to allow the

statute of limitations to lapse" (*E. Midtown Plaza Hous. Co., Inc. v City of New York*, 218 AD2d 628, 628 [1st Dept 1995]). Under New York law, an act of fraud or deception — meaning "subsequent and specific actions by defendants" totally "separate from the ones for which [plaintiffs] sue" — is "fundamental to the application of equitable estoppel" (*Zumpano v Quinn*, 6 NY3d 666, 674 [2006]; *Corsello v Verizon New York, Inc.*, 18 NY3d 777, 789 [2012]). "[E]quitable estoppel does not apply where the misrepresentation or act of concealment underlying the estoppel claim is the same act which forms the basis of plaintiff's underlying substantive cause of action" (*Kaufman v Cohen*, 307 AD2d 113, 122 [1st Dept 2003]).

To sufficiently plead equitable estoppel, the complaint must allege "both the tort that was the basis of the action and later acts of deception by which the defendants concealed their wrongdoing" (*Corsello v Verizon New York, Inc.*, 18 NY3d at 789). "By contrast, in cases where the alleged concealment consisted of nothing but defendants' failure to disclose the wrongs they had committed," the Court of Appeals has routinely "held that the defendants were not estopped from pleading a statute of limitations defense" (*id.*).

Here, the Amended Complaint fails to allege an act of deception or concealment separate or distinct from Joseph's alleged failure to disclose the nature of the ownership of the underlying six real properties, which forms the very essence of his tort claims (*see e.g.* Powell Aff., Ex. A, ¶¶ 26-32, 38-44, 64-65, 73-74). And, in his original motion papers, Jonathan merely argued that the alleged underlying torts — concealment and diversion of corporate opportunities — should also be the basis for equitable estoppel. According to Jonathan, an equitable estoppel should have arisen from Joseph's "misrepresentations . . . to Jonathan for the purpose of inducing him to acquiesce in and not assert his legal rights to object to, the misappropriation of the properties" (Powell Aff., Ex. E, Dismissal Opposition Bf. at 16). Thus, "the alleged concealment consisted

of nothing but defendants' failure to disclose the wrongs they had committed," not some "act of deception, separate from the ones for which [Jonathan] sue[s], on which an equitable estoppel could be based" (*Corsello v Verizon New York, Inc.*, 18 NY3d at 789).

Finally, as explained above in Point I.B.2, any alleged reliance by Jonathan upon representations about what *may* or *could* happen with the real properties at some indeterminate date in in the future is unreasonable as a matter of law. Therefore, the doctrine of equitable estoppel is unavailable to toll the statute of limitations (*see e.g. Benedict v Whitman Breed Abbott & Morgan*, 77 AD3d 867, 870 [2d Dept 2010] ["the parties are not equitably estopped from asserting a statute of limitations defense to the counterclaims" because "any reliance by [defendant] on alleged misrepresentations made by the plaintiffs . . . was not reasonable as a matter of law"]; *Shared Comms. Servs. of ESR, Inc. v Goldman, Sachs & Co.*, 38 AD3d 325, 326 [1st Dept 2007] ["there is no basis for tolling the statute of limitations under New York's doctrine of equitable estoppel, since plaintiff failed to show that it was prevented from timely filing an action due to reasonable reliance by it on deception, fraud or misrepresentation by defendant"] [internal quotations omitted]). Based on the foregoing, the Court did not overlook or misapprehend any matters of law or fact in declining to apply the doctrine of equitable estoppel.

C. <u>The Court Correctly Dismissed the Second Cause of Action as Insufficiently Pled</u>

Jonathan argues that the Court incorrectly held that he insufficiently pled the essential element of a transfer of an interest in the subject real property made in reliance on a promise (Opening Bf. at 4, 5-7). The Court did not overlook or misapprehend any matters of law or fact. The Court correctly considered and rejected Jonathan's argument, thoroughly briefed below, holding that "all elements of constructive trust have not been met by plaintiff, in that plaintiff

made no transfers in reliance on a promise" (Powell Aff., Ex. A, at 4; *compare* Powell Aff., Ex. D, Dismissal Opening Bf. at 7-8; Ex. E, Dismissal Opposition Bf. at 17-19).

For support, the Court correctly cited *Maiorino v Galindo* (65 AD3d 525, 526-27 [2d Dept 2009]; *see* Powell Aff., Ex. A, at 4). Like this case, *Maiorino* was a dispute among two 50% shareholders of a corporation. Like this case, one of the shareholders alleged that the other improperly acquired and improved real property that should have been held in constructive trust for the corporation. The Second Department reversed Supreme Court's denial of the defendant's motion to dismiss the cause of action for constructive trust. The Court held:

> Here, the complaint does not adequately plead a cause of action to impose a constructive trust on the Bethpage property. While there was a confidential relationship between the plaintiff and Galindo as 50% shareholders in Demo, and Galindo and Madia may have been unjustly enriched by the alleged diversion of Demo's assets, there was no promise to either the plaintiff or Demo with respect to the Bethpage property and no transfer of that property in reliance on any promise.

(*id*. at 527).

In *Maiorino*, the Second Department cited *Gargano v V.C. & J. Const. Corp.* (148 AD2d 417 [2d Dept 1989]), another case involving a dispute between two family member/shareholders seeking a constructive trust over real property allegedly misappropriated from the corporation. Like in *Maiorino*, the Court held:

> A constructive trust will be impressed upon property when, in the context of a fiduciary relationship, there has been a transfer of the property in reliance upon a promise, and an unjust enrichment as a result thereof. At bar, while the existence of a fiduciary relationship between the brothers is indisputable, all of the remaining elements were not established. . . . [T]he record fails to indicate that either Carmine or VC&J had any prior interest in the premises which was conveyed to Gaetano in reliance upon a promise to reconvey. Although a constructive trust may be imposed where property is parted with in reliance upon a promise to reconvey, none may be imposed by one who has no interest in

> the property prior to obtaining a promise that such an interest will be given to him.

(*Gargano v V.C. & J. Const. Corp.*, 148 AD2d at 418-19 [internal citation and quotations omitted]).

Recently, the Second Department reaffirmed that "a promise" and "a transfer in reliance thereon" are essential "elements of a cause of action to impose a constructive trust," and dismissed a complaint under CPLR 3211 for failure to allege that "the plaintiff transferred something in reliance upon any such promise" (*Swartz v Swartz*, 145 AD3d 818, 825 [2d Dept 2016]). Yet, Jonathan wholly failed to allege that he or the Corporation had an interest in real property which he or the Corporation was induced to convey in reliance upon a promise. Jonathan's request for the Court to jettison the well-established essential elements of constructive trust is an invitation to error. The Court did not overlook or misapprehend any matters of fact or law in dismissing the Second Cause of Action. The Court should deny leave to reargue.

Point III

THE COURT DID NOT OVERLOOK OR MISAPPREHEND ANY MATTERS OF LAW OR FACT IN DISMISSING THE THIRD CAUSE OF ACTION TO QUIET TITLE

The Court dismissed the Third Cause of Action to quiet title to the Compost Yard. The Court held that Jonathan failed to allege the type of claim encompassed by RPAPL § 1500 *et seq*. The Court ruled:

> That branch of defendants' motion to dismiss the third cause of action which seeks to quiet title is granted. An action seeking quiet title pursuant to Real Property [Actions] and Proceedings Law § 1500 et seq. is intended to clear title to real property (***Key Bank v Del Norte, Inc.***, 251 AD2d 740, 673 NYS2d 788 [3d Dept 1998]), where, *inter alia*, property lines, easements, property tax liens and mortgages are at issue, none of which exist here. Therefore, in viewing the allegations in the light most favorable to plaintiff, the court finds that plaintiff has failed to state a third cause of action.

(Powell Aff., Ex. A at 4). Jonathan argues that the Court incorrectly found his claim to quiet title to be outside the scope of RPAPL § 1500 *et seq*. (Opening Bf. at 11). The Court did not overlook or misapprehend any matter of law or fact in dismissing the Third Cause of Action to quiet title.

In *Key Bank v Del Norte, Inc.* (251 AD2d 740, 741 [3d Dept 1998]), upon which this Court correctly relied in its Order, the Third Department explained that "actions commenced pursuant to RPAPL 1501 [are] intended to clear title to real property." As this Court correctly held, the Third Cause of Action did not seek to *clear title* to property. Rather, it sought to *convey title* to a parcel in which Jonathan and the Corporation admittedly had no interest *from* Joseph *to* the Corporation (*see e.g.* Powell Aff., Ex. B., ¶¶ 77-82 ["Pursuant to one certain Bargain and Sale Deed . . . Joseph . . . obtained sole title to the premises referred to above as the Compost Yard," but the Court should nonetheless order that "the Corporation is the rightful owner in fee of the Compost Yard"]).

"Essential to the maintenance of an action to determine a claim to real property is that the complaint state a claim, by the defendant, of 'an estate or interest in the real property, *adverse* to that of the plaintiff" (*E. 41st St. Assoc. v 18 E. 42nd St., L.P.*, 248 AD2d 112, 114 [1st Dept 1998] [quoting RPAPL § 1515 [1][b] [emphasis in original]; *Pirrelli v OCWEN Loan Servicing, LLC*, 129 AD3d 689, 694 [2d Dept 2015] [same]). Here, at most, Jonathan alleged that the Corporation had a possessory interest in the Compost Yard pursuant to a "lease" of the premises (*see e.g.* Powell Aff., Ex. B., ¶¶ 38-40). Where a plaintiff seeks to quiet title based solely upon "an interest pursuant to a lease, no claim adverse to the [owner's] interest in the property is asserted, and the complaint fails to state a cause of action" (*E. 41st St. Assoc. v 18 E. 42nd St., L.P.*, 248 AD2d at 114). Based on the foregoing, Jonathan "has not sufficiently alleged [his or

the Corporation's] interest in the property" so the "complaint fails to state a claim for quiet title" (*O'Reilly v Keene*, 136 AD3d 482, 482 [1st Dept 2016]).

CONCLUSION

For all of the foregoing reasons, the Court should: (i) deny Jonathan's motion for leave to reargue, or in the alternative, grant reargument, and upon reargument, adhere to each and every determination challenged herein; and (ii) award such other and further relief as the Court deems just and proper.

Dated: March 8, 2017

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