

SHORT FORM ORDER

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable Leonard Livote
Acting Supreme Court Justice

IAS TERM, PART 33
COMMERCIAL DIVISION

_____ X

Efrat Gam & Slim's Bagles & Bialys,
Plaintiff,

Index
Number 701298 2017

- -against -

Motion
Date March 5, 2019

Joseph Dvir,
Defendant.

Motion Seq. No. 13

_____ X

The following numbered papers were read on this motion by defendant for summary judgment dismissing the complaint, and cross motion by plaintiffs for summary judgment, both pursuant to CPLR 3212.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Affidavit - Exhibits	E336-E355
Notice of Cross Motion - Affirmation - Exhibits	E367-E387
Reply and Answering Affirmations - Exhibits	E393-E398
Reply Affirmation	E403

Upon the foregoing papers, it is ordered that defendant's motion and plaintiffs' cross motion are determined as follows:

This action, containing causes of action for, among other things, breach of both individual and derivative fiduciary duties, unjust enrichment, injunctive relief, conversion, and an accounting, arises from 50% ownerships by Gam and Dvir in the corporation known as Slim's Bagles & Bialys, Inc. (Slim's), since 1999. In 2007, Gam moved to Australia, returning to the United States in 2009, living in Florida, and no longer active in the business. It is alleged that from 2007 to 2016, Dvir, alone, ran the business, making K-1 distributions, and paying himself a salary. Plaintiff contends, in the instant lawsuit, that Dvir improperly paid himself the amount of \$216,289.00 between 2010 and 2013; opened two unrelated businesses, billing expenses from those businesses to Slim's; failed to pay Gam her agreed distributions; and used Slim's funds to pay Dvir's personal credit card expenses. Defendant moves for summary judgment dismissing all causes of action in plaintiffs' complaint on the grounds that no issues of fact exist to support such claims, and that the applicable statute of

limitations bars such claims. Plaintiffs cross-move for summary judgment on all causes of action, pursuant to CPLR 3212.

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063, citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; see *Schmitt v Medford Kidney Center*, 121 AD3d 1088 [2014]; *Zapata v Buitriago*, 107 AD3d 977 [2013]). On one party's motion for summary judgment, the evidence should be liberally construed in a light most favorable to the nonmoving party (see *Boulos v Lerner-Harrington*, 124 AD3d 709 [2015]; *Farrell v Herzog*, 123 AD3d 655 [2014]). Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2002]; see *Parietti-Fogarty v Fogarty*, 141 AD3d 512 [2016]). Credibility issues regarding the circumstances of the subject incident require resolution by the trier of fact (see *Bravo v Vargas*, 113 AD3d 579 [2014]; *Martin v Cartledge*, 102 AD3d 841 [2013]), and the denial of summary judgment.

Initially, defendant claims entitlement to summary judgment dismissing plaintiffs' complaint, based upon the expiration of the statute of limitations prior to commencement of the action. Movant contends that plaintiff's breach of the fiduciary causes of action seek only monetary damages, and are, therefore, to be interpreted as causes of action for "injury to property," subject to a three-year statute of limitations, under CPLR 214 (4) (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 138 [2009]; *Monteleone v Monteleone*, 162 AD3d 761 [2d Dept 2018]; *Diraimondo v Calhoun*, 131 AD3d 1194 [2d Dept 2013]). Plaintiffs claim their breach of fiduciary causes of action are based on fraud, and entitled to a six-year statute of limitations (see CPLR 213 [7]; *In re Imperato*, 149 AD3d 1072 [2d Dept 2017]). However, a cause of action for breach of fiduciary duty requires only (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by defendant's misconduct (see for example *GMP Fur Trade Fin., LLC v Brenner*, 169 AD3d 649 [2d Dept 2019]).

In the case at bar, movant's evidence has demonstrated that plaintiffs have failed to include a cause of action for fraud, or particularize the elements of an action based on fraud, in either the complaint or supplemental complaint, and that the fraud allegations in the causes of action for breach of fiduciary duty, added only to the supplemental complaint, are merely incidental, and not essential, to the claims (*Id.*). Where an allegation of fraud is not essential to the cause of action pleaded, and "is added merely to avoid the Statute of Limitations ... this does not change the nature of the action, (and) ... in applying the Statute of Limitations, we look for the reality, and the essence of the action and not its mere name. ... If there were fraud extraneous to the contract, lulling the plaintiffs into the belief that the money had been paid or would be paid, a different situation might arise" (*Brick v Cohn-Hall-Marx Co.*, 276 NY

259, 264 [1937]; see *QK Healthcare, Inc. v InSource, Inc.*, 108 AD3d 56 [2d Dept 2013]). Plaintiffs' opposition has failed to rebut such argument. As such, the causes of action seeking monetary damages for breach of fiduciary duty are controlled by a three-year statute of limitations, are time-barred, and this branch of defendant's motion is granted.

Further, defendant has demonstrated, prima facie, that, in the instant action, the cause of action alleging conversion is time-barred (see CPLR 214 [3]; *Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36 [1995]; *Pentacon, LLC v 422 Knickerbocker, LLC*, 165 AD3d 829 [2d Dept 2018]). Plaintiffs have failed to raise a triable issue of fact in opposition, and this branch of the motion is granted.

With regard to the actions for declaratory relief and for injunctive relief, the branch of defendant's motion to dismiss them on statute of limitations grounds is denied. "Actions for declaratory judgments are not ascribed a certain limitations period. The nature of the relief sought in a declaratory judgment action dictates the applicable limitations period" (*Schulman v Schulman*, 166 AD3d 833, 834 [2d Dept 2018]). Here, the action for declaratory relief was essentially brought in the form of the cause of action alleging unjust enrichment, which cause of action carries a six-year statute of limitations (see CPLR 213 [1]), and survives this statute of limitations branch of the motion. Similarly, the equitable cause of action seeking injunctive relief is entitled to the six-year statute of limitations herein.

A cause of action for an accounting is, factually, a remedy pleaded as a cause of action. Such cause of action will be governed by the fate of the underlying causes of action. Here, the unjust enrichment and equitable branches of the action remain viable on statute of limitations grounds, thereby leaving the action for an accounting also surviving (see *Schulman v Schulman*, 166 AD3d 833; *Cambridge Capital Real Estate Invs., LLC v Archstone Enter., LP*, 137 AD3d 593 [1st Dept 2016]).

On the remaining First, Fourth, Sixth, Seventh and Eighth Causes of Action, defendant moves for summary judgment dismissing said causes of action, and plaintiffs cross-move for summary judgment granting said causes of action, both on the grounds that no question of material fact exists to deny such determination. Based on the arguments and collective evidence proffered, questions of material fact abound with regard to, among other things, any operating agreements between the parties; the division of work between the parties; the salaries paid, or to be paid, to the parties; and the distributions made, or to be made, to the parties. With such issues of fact extant, movant and cross-movants have failed to show prima facie entitlement to summary judgment, and their motions should be denied, regardless of the sufficiency of the opposing papers (see *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]). Consequently, both defendant's motion and plaintiffs' cross motion, for summary judgment on the First, Fourth, Sixth, Seventh and Eighth Causes of Action, are denied on the grounds that there are material issues of fact.

The parties remaining contentions and arguments are either without merit, or need not be addressed in light of the foregoing determinations.

Accordingly, defendant's motion for summary judgment dismissing the supplemental complaint, on the ground of failure to timely serve the pleadings within the applicable statute of limitations, is granted, solely to the extent that the Second, Third, and Fifth Causes of Action included therein, are dismissed. Said branch of the motion is denied with regard to the remaining causes of action included therein. The branch of defendant's motion seeking summary judgment dismissing plaintiff's remaining causes of action on the merits is denied. Plaintiffs' cross motion, seeking summary judgment in their favor, is denied.

Dated: May 16, 2019



A.J.S.C.

FILED
MAY 22 2019
COUNTY CLERK
QUEENS COUNTY