

**Gitlin v Chirinkin**

2007 NY Slip Op 33860(U)

November 21, 2007

Supreme Court, Nassau County

Docket Number: 2131-07/

Judge: Stephen A. Bucaria

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

TRIAL/IAS, PART 6  
NASSAU COUNTY

\_\_\_\_\_  
EDUARD GITLIN, individually, and in the  
right and on behalf of KEW APARTMENT  
HOLDINGS, LLC,

INDEX No. 012131/07

MOTION DATE: Oct. 10, 2007  
Motion Sequence # 001

Plaintiffs,

-against-

ALEX CHIRINKIN, NELLIE CHIRINKIN,  
ARKADY PAVLOV, ALEX CHIRINKIN, LLC  
ALEXCHIRINKIN ENTERPRISES, LLC,

Defendants.  
\_\_\_\_\_

The following papers read on this motion:

- Notice of Motion..... X
- Affirmation in Opposition..... X
- Reply Affirmation ..... X

This motion, by defendants, for an order under Civil Practice Law and Rules Rule 3211(a)(5) and (a)(7), and Rule 3016(b) to dismiss the aforesaid complaint in their entirety, on the merits and with prejudice, is determined as hereinafter set forth.

The defendants move to dismiss six of the seven causes of action alleged by the plaintiffs under CPRL 3211(a)(5) and (a)(7), and CPLR 3016(b) because the causes of action are time barred and/or should be dismissed for failure to state a cause of action.

### FACTS

Kew Apartment Holdings LLC is a New York Limited Liability Company but the members of it never entered into an operating agreement. This dispute arises out of an alleged wrongful transfer of property without consideration from Kew Apartment Holdings LLC and Alex Chirinkin Enterprises, LLC to Alex Chirinkin, LLC and Dr. Arkady Pavlov. The plaintiffs allege: conversion; fraud; unjust enrichment; breach of fiduciary duty, self dealing and misappropriation of corporate assets; aiding and abetting a breach of fiduciary duty; violation of Debtor and Creditor law; and judicial dissolution.

The defendants argue that the statute of limitations bars the plaintiffs from alleging conversion; that the plaintiff is barred from alleging unjust enrichment because plaintiff did not have any ownership interest in the transferred property, the applicable statute of limitations, and because of the duplicative nature of the claim and failure to properly plead the claim for unjust enrichment; the plaintiff's claim of breach of fiduciary duty and fraud under the New York Debtor and Creditor Law as against Alex Chirinkin are untimely under NY LLC § 508 and/or CPRL 214(4); that the plaintiff's claim for fraud under NY DCL against the remaining defendants is time barred and should be dismissed because the plaintiff may not maintain an action under NY LLC § 601. The defendants contend that the plaintiffs fail to satisfy the pleading requirements under NY DCL; and the plaintiffs cannot assert a cause of action for aiding and abetting a breach of fiduciary duty because the underlying cause of action for breach of fiduciary duty is time barred and the plaintiff has failed to plead the defendants' actual knowledge of such breach.

The plaintiffs contest each allegation set forth by the defendants, asserting that the claims were not time barred and that they sufficiently pleaded each cause of action.

### DECISION

It is well settled that in considering a motion to dismiss, the allegations in the complaint must be deemed to be true and accorded every favorable inference (219 Broadway Corp. v. Alexander's, Inc., 49 NY2d 506). In a motion to dismiss under CPLR 3211(a)(5), the statute states, in pertinent part, that "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that... the cause of action may not be maintained because of...statute of limitations...". On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), "[t]he sole criterion is whether 'from [the complaint's] four corners factual allegations are

discerned which taken together manifest any cause of action cognizable at law’ ” (**Mayer v. Sanders**, 264 A.D.2d 827, 828, 695 N.Y.S.2d 593, 2<sup>nd</sup> Dept., 1999 quoting **Guggenheimer v. Ginzburg**, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 1977).

The causes of action for conversion, fraud, unjust enrichment, misappropriation of corporate assets, self-dealing, breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, and violation of Debtor and Creditor Law pleaded on behalf of the corporation Kew Gardens LLC must be dismissed because the plaintiffs brought such claims as a derivative action and an “owner/member of a limited liability company does not have the right to bring a derivative action on behalf of the company. (**Hoffman v. Unterberg**, 9 A.D.3d 386, 388-89, 2<sup>nd</sup> Dept., 2004).

“The LLCL doe not include a specific provision permitting a member to bring a derivative action on behalf of the LLC of which he is a member. Early drafts of the proposed LLCL had included an Article IX with provisions governing the institution of derivative actions on behalf of LLCs. Because some legislators had raised questions about the derivative rights provisions, to avoid jeopardizing passage of the balance of the entire law, Article IX was dropped. The absence of an Article IX from the LLCL was a conscious omission, not a typographical error, as the decision to omit derivative rights occurred late in the legislative session. See **Schindler v. Niche Media Holdings, LLC**, 1 Misc.3d 713, 772 NYS2d 781 (Sup. Ct. NY County 2003); cited in **Caprer v. Nussbaum**, 36 AD3d 176, 189, 2<sup>nd</sup> Dept., 2006).”

(Rich Practice Commentary, McKinney 6 Cons Law of NY, Book 32-32A, LLCL p.181).

In order for the plaintiff to timely commence the first cause of action sounding in conversion, the plaintiff must commence the suit within three years of the date the conversion took place “and not from the date of discovery or the exercise of diligence to discover” (**Vigilant Ins. Co. of Am. v. Housing Auth. Of the City of El Paso, Tex.**, 87 NY2d 36, 44, 637 NYS2d 342, 1995). Therefore, while the plaintiff did not become “aware of the transfer of the Property” until May 24, 2007, such does not serve to toll the statute of limitations. Additionally, in order to prove conversion, a plaintiff must have a “possessory right or interest in the property...and [show that] defendant [exerted] dominion over the property or interference with it, in derogation of plaintiff’s rights” (**Colavity v. NY Organ Donor**, 8 NY3d 43, 50, 827 NYS2d 96, 2006). Because the plaintiff has “no interest in [the] specific property of the limited liability company” under NY LLCL § 601, this cause of action is **dismissed**.

In order to succeed on plaintiff’s second cause of action of fraud, a party must show that 1) there was a misrepresentation of a material fact, 2) the person making such misrepresentation knew it was false, 3) other party relied on misrepresentation, 4) and injury (**Graubard Mollen Dannet & Horowitz v. Moskovitz**, 86 NY2d 112, 122, 629 NYS2d 1009, 1995).

The plaintiff has stated factual allegations in support of each element of fraud for defendant Alex Chirinkin only. The plaintiff alleges that the defendant Alex Chirinkin represented that he would manage the day-to-day activities of Kew to the benefit of Kew and its member and that this statement was false. Additionally, the defendant continued to counsel the plaintiff in connection with the investment property without divulging that the Property had been transferred and sold thereby omitting a material fact and deceiving the plaintiff. The plaintiff relied upon this misrepresentation by continuing to believe that the property had not been sold, and as a result, the plaintiff was allegedly damaged.

The allegations that the remaining defendants benefitted from the fraudulent actions of defendant Alex Chirinkin is insufficient to plead a cause of action of fraud against the remaining defendants because “the complaint must set forth all the elements of fraud...” (**Mazzone v. Mazzone**, 269 A.D.2d 574, 574, 703 NYS2d 282, 2<sup>nd</sup> Dept., 2000). This cause of action is therefore **dismissed** against defendants Nellie Chirinkin, Dr. Arkady Pavlov, ACE, LLC, and AC, LLC.

In order to prove the third cause of action for unjust enrichment, a party must commence the suit within six years of the alleged occurrence giving rise to the cause of action (**L&L Plumbing & Heating v. De Palo**, 253 AD2d 517, 2<sup>nd</sup> Dept., 1998) and a party must show that the other party was enriched, at that party's expense, and that "it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered." (**Paramount Film Distrib. Corp. v. State of New York**, 30 NY2d 415, 421, 1972). The plaintiffs have sufficiently pleaded this cause of action.

In reference to the fourth cause of action for breach of fiduciary duty, self-dealing, and misappropriation of corporate assets as to defendant Alex Chirinkin, this cause of action is permissible. "[W]hile suits alleging breach of fiduciary duty which seek only money damages have been viewed as alleging 'injury to property' to which a three-year statute of limitations applies, it has been held that where, as here, a cause of action alleging breach of fiduciary duty is based on allegations of actual fraud, it is subject to a six-year limitations period" (**Klein v. Gutman**, 12 AD3d 417, 419, 784 NYS2d 581, 2<sup>nd</sup> Dept., 2004) (citations omitted). Also, as manager of the company, "the defendant [Alex Chirinkin] had a statutory duty to perform his duties 'in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances'" (**Nathanson v. Nathanson**, 20 A.D.3d 403, 404, 799 NYS2d 83, 2<sup>nd</sup> Dept., 2005, quoting Limited Liability Company Law § 409 [a]). Under the circumstances of this case, the plaintiffs' allegations that defendant Alex Chirinkin engaged in self-dealing and misappropriation of corporate funds were sufficient to state a cause of action for breach of fiduciary duty.

As to the fifth cause of action for aiding and abetting a breach of fiduciary duty as against defendants Arkady Pavlov and Nellie Chirinkin, there is an issue of fact as to whether these defendants had actual knowledge of the breach of fiduciary duty. The plaintiff's fifth cause of action based on the theory that defendants Arkady Pavlov and Nellie Chirinkin aided and abetted a breach of fiduciary duty fails, as to defendant Arkady Pavlov only, because of "the absence of evidence that [he] acted with actual intent to aid in the fraud [defendant Alex Chirinkin] allegedly perpetrated" (**Greenfield v. Tassinari**, 8 A.D.3d 529, 531, 779 NYS2d 531, 2<sup>nd</sup> Dept., 2004).

The defendant's motion to dismiss the sixth cause of action for violations under NY DCL against all defendants is **denied**. The statute of limitations on actions under NY DCL is governed by the six-year limitation set out in CPLR 213(1) and CPLR 203 [g] (**Wall Street Associates v. Brodsky**, 257 A.D.2d 526, 530, 684 NYS2d 244, 1<sup>st</sup> Dept.,

1999). The essential elements of a claim pursuant to DCL §§ 273 and 274 are insolvency and lack of fair consideration. NY DCL § 270 defines “conveyance” broadly and in applying this definition to the instant matter, the complaint adequately alleges that a conveyance occurred (Id. at 528). The insolvency element can also “ be sufficiently made out from the complaint” also (Id.). Furthermore, the issue of fairness of the consideration is a question of fact and therefore is sufficiently plead in the complaint (Id.).

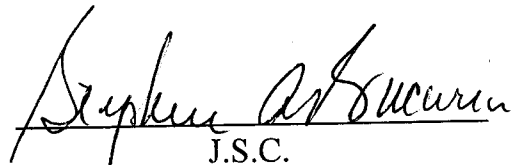
NY DCL §§ 276 and 276-a requires actual fraud with the intent to “hinder, delay, or defraud either present or future creditors...”. It does not require proof of unfair consideration or insolvency. “Due to the difficulty of proving actual intent to hinder, delay, or defraud creditors, the pleader is allowed to rely on ‘badges of fraud’ to support his cause, i.e., circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent” (Wall Street Associates, 257 A.D. at 529). Such circumstances include, but are not limited to, “a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration...” (Id.).

**CONCLUSION**

This court holds that defendant’s motion is **granted** in part and **denied** in part. All of the causes of actions pleaded on behalf of Kew Apartments Holdings, LLC are **dismissed**. Additionally, the **first** cause of action brought on by the individual plaintiff is **dismissed** as to all of the defendants, the **second** cause of action is dismissed as to defendants Nellie Chirinkin, Arkady Pavlov, Alex Chirinkin, LLC, and Alex Chirinkin Enterprises, LLC, and the **fifth** cause of action is dismissed as to defendant Arkady Pavlov. The action is **severed** and **continued** as to the remaining defendants as appropriate in the respective causes of action.

A Preliminary Conference has been scheduled for January 17, 2008 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client’s schedule for the purpose of setting **firm** deposition dates.

Dated NOV 21 2007

  
J.S.C.

**ENTERED**

NOV 28 2007

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**