

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Honorable Elizabeth H. Emerson

TED DOUKAS, ET AL, x

Plaintiffs,

-against-

CLAUDIO BALLARD, ET AL,

Defendants. x

MOTION DATE: 10-4-12; 11-7-12
SUBMITTED: 11-8-12
MOTION NO.: 007-MG
009-XMG

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Upon the following papers numbered 1-33 read on this motion to dismiss and cross-motion to modify ; Notice of Motion and supporting papers 1-14 ; Notice of Cross Motion and supporting papers 15-27 ; Answering Affidavits and supporting papers 28-32 ; Replying Affidavits and supporting papers 33 ; and after hearing oral argument in support of and in opposition to the motion; it is,

ORDERED that the motion by the defendants Claudio Ballard, Shepard Lane, Keith DeLucia, and Data Treasury Corp. for an order dismissing the complaint insofar as it is asserted against them is granted; and it is further

ORDERED that the cross motion by the plaintiffs for an order permitting their late opposition to the aforementioned motion is granted.

The defendant Claudio Ballard is the creator, inventor, and developer of biometric image recognition, capturing, and remote storage technology that is used in the banking and financial services industry (the “technology”). In 1994 or 1995, when he was developing the technology, Ballard purportedly entered into an oral joint-venture agreement with the plaintiff Ted Doukas, an experienced real-estate and mortgage entrepreneur. According to Doukas, he agreed to invest in the development of the technology in exchange for a 50% ownership interest therein. Doukas alleges that he provided Ballard with funds, capital contributions, and office space valued at approximately \$1 million. Doukas also alleges that, once the technology was developed, it was to be patented in his name and in Ballard’s name and assigned to his company, the plaintiff Syngen Data Services Corporation. Syngen Data Services Corporation was to merge with Ballard’s company, the defendant Syngen Corporation. Doukas alleges that development of the technology was to take only six or eight months. However, it took approximately two years. In August 1997 and May 1998, Ballard filed patent applications for the technology naming himself as the sole inventor thereof. Patents for the technology were issued to Ballard in June 1999 and February 2000, respectively. Ballard assigned the patents to CSP Holdings, Inc., a corporation of which he was an officer, director, and shareholder. CSP then transferred the patents to the defendant Data Treasury Corp. (“DTC”).

Doukas claims that he did not discover Ballard’s deception until April 29, 2009. On April 15, 2011, Doukas and Syngen Data Services Corporation commenced this action against Ballard, DTC, Keith DeLucia (DTC’s Chief Executive Officer), and Shepard Lane (DTC’s General Counsel), among others, and many of the banks and financial institutions that use the technology. The complaint contains 38 causes of action, inter alia, to recover damages for conversion, fraud, breach of contract, and breach of fiduciary duty; for the imposition of a constructive trust; and for declaratory relief. Ballard, DeLucia, Lane, and DTC move to dismiss the complaint on several grounds, among them that the plaintiffs’ claims are time-barred. The plaintiffs’ belated opposition to the motion is contained in a cross motion for leave to permit the late filing thereof.

Turning first to the cross motion, the court notes that the plaintiffs’ opposition to the motion was originally due on August 27, 2012, and that counsel for the moving defendants consented to two extensions of time for the plaintiffs’ counsel to submit his opposition. Those extensions gave the plaintiffs until October 1, 2012, to oppose the motion. On September 30, 2012, the plaintiffs’ counsel requested a third extension of time to which the moving defendants would not consent. Rather than contact the court to request a further extension of time to oppose the motion, the plaintiffs’ counsel took it upon himself to submit his opposition by way of a cross motion. The cross motion was served and filed on October 25, 2012, before the return date of the motion, but more than three weeks after the plaintiffs’ opposition was due. Counsel’s reason for proceeding via cross motion was “to avoid any shenanigans *via a vis* the papers being ‘rejected’ by opposing counsel and to preserve the record.” The plaintiffs’ counsel has appeared before this Justice on previous occasions and is aware of her practice regarding adjournments to which opposing counsel will not consent. Counsel should have followed that practice and

contacted the court to request a further adjournment of the time in which to submit his opposition. Instead, he simply submitted his opposition more than three weeks late without the consent of opposing counsel or leave of court. While the court does not condone counsel's conduct, it does not wish to penalize his clients. The court will, therefore, consider the plaintiffs' opposition in the interest of justice. Accordingly, the cross motion is granted.

Replevin

The moving defendants contend that the plaintiffs' eleventh cause of action for replevin is time-barred.

Replevin is governed by a three-year statute of limitations (*see*, CPLR 214 [3]; **Solomon R. Guggenheim Found. v Lubell**, 77 NY2d 311, 317). When the stolen object is in the possession of the thief, the statute of limitations runs from the time of the theft, even if the property owner was unaware of the theft at the time that it occurred (**Id.**). This action was commenced in 2011, more than three years after the purported theft of the technology by Ballard in the late 1990's and early 2000. Accordingly, the eleventh cause of action is time-barred.

Conversion

The moving defendants contend that the plaintiffs' twelfth and thirteenth causes of action for conversion and aiding and abetting conversion are time-barred.

Conversion is also governed by a three-year statute of limitations (*see*, CPLR 214 [3]), which accrues when the alleged conversion took place (*see*, **Grunfeld v Kasnett**, 18 Misc 3d 1143 [A], *3 [and cases cited therein]). This action was commenced in 2011, more than three years after the purported conversion of the technology by Ballard in the late 1990's and early 2000. Accordingly, the twelfth and thirteenth causes of action are time-barred.

Fraud

The plaintiffs' fraud claims are the first cause of action for actual fraud, the second cause of action for aiding and abetting a fraud, the fifth cause of action for fraud in the inducement, and the eighteenth cause of action for constructive fraud. The moving defendants contend, *inter alia*, that all of these claims are time-barred. The plaintiffs contend that they are timely because Doukas commenced this action within two years of discovering the fraud in April 2009.

A cause of action based upon fraud must be commenced within six years from the time of the fraud or within two years from the time the fraud was discovered or could have been discovered with reasonable diligence, whichever is longer (CPLR 213 [8]; CPLR 203 [g]; **Oggioni v Oggioni**, 46 AD3d 646, 648). For the purpose of the discovery rule, the cause of

action accrues at the time the plaintiff possesses knowledge of facts from which the fraud could have been discovered with reasonable diligence (**Marasa v Andrews**, 69 AD3d 584; **Lucas-Plaza Housing Dev. Corp. v Corey**, 23 AD3d 217, 218). The plaintiffs' fraud claims are based on events that occurred in the late 1990's and early 2000, more than six years before the commencement of this action in 2011. Moreover, the discovery rule does not apply to the cause of action for constructive fraud (**Gonik v Israel Discount Bank of N.Y.**, 80 AD3d 437, 438; **Fandy Corp. v Lung-Fong Chen**, 262 AD2d 352, 353), and the plaintiffs have failed to allege sufficient facts that they could not, with reasonable diligence, have discovered the purported fraud earlier than April 2009 (**Gonik**, *supra*).

The plaintiffs contend that, prior to the initial fraud in August 1997, Ballard told Doukas that their efforts had failed and that the technology had not been developed. Patents for the technology were issued to Ballard in June 1999 and February 2000, and an article about the technology appeared in *Newsday* as early as 2001. In June 2002, DTC commenced an action against J.P. Morgan Chase, among others, in the United States District Court for the Eastern District of Texas for infringement of the patents. Articles about the lawsuit appeared in *Newsday* in 2003 and in the *New York Times* and *Business Wire* in 2004. The *Newsday* and *New York Times* articles clearly identified Ballard as the founder of DTC and as the inventor of the technology.

The court finds that Doukas possessed knowledge of facts from which the fraud could have been discovered with reasonable diligence as early as 1997, approximately 14 years before the commencement of this action in April 2011. Prior to filing the first application for a patent in August 1997, Ballard told Doukas that their efforts had failed and that the technology had not been developed. It defies credulity that Doukas, an experienced entrepreneur who had invested approximately \$1 million in the development of the technology, took Ballard at his word and did nothing to verify his statements until April 2009, approximately 12 years later. The record reflects that, between 1997 and 2004, patents were issued, a patent-infringement lawsuit was commenced, and newspaper articles about the technology and the lawsuit were published.¹ Patents are publicly available, as are newspaper articles and information about lawsuits. Given that all of this information was in the public domain, the court finds that the plaintiffs were on inquiry notice of the alleged fraud and could have discovered it with reasonable diligence well before April 2009 (*see, Aldrich v March & McLennan Cos., Inc.*, 52 AD3d 435, 436; *see also*,

¹Also, between 1998 and 2001, after the patents were issued, Doukas was involved in a litigation in federal court with Ballard's father. The subject of the litigation was a mortgage note given by the elder Ballard to a corporation of which Doukas was the president and sole shareholder as security for funds loaned by Doukas to Ballard's Syngen Corporation. While Ballard was not a party to that action, he testified at the trial. The federal court noted in its memorandum opinion and order dated August 1, 2001, *inter alia*, that Syngen Corporation specialized in data-capture and image-processing technology, the same technology that is the subject of this action.

Shapiro v Hersch, 182 AD2d 403, 404). Accordingly, the first, second, fifth, and eighteenth causes of action are time-barred.

Breach of Fiduciary Duty

The moving defendants contend, inter alia, that the twentieth cause of action for breach of fiduciary duty and the twenty-first cause of action against for aiding and abetting a breach of fiduciary duty are time-barred.

The statute of limitations for a breach-of-fiduciary-duty cause of action depends on the substantive remedy that the plaintiff seeks (**Carbon Capital Mgt., LLC, v American Express Co.**, 88 AD3d 933, 939). When the relief sought is monetary, the statute of limitations is three years (**Id.**). However, when an allegation of fraud is essential to a breach-of-fiduciary-duty claim, courts will apply the six-year statute of limitations applicable to fraud (**Id.**) or the two-year discovery rule, which also applies to fraud-based breach-of-fiduciary-duty claims (**Kaufman v Cohen**, 307 AD2d 113, 122). Here, the alleged breach of fiduciary duty is based on Ballard's "fraudulent and nefarious actions." Thus, the timeliness of the plaintiffs' breach-of-fiduciary-duty claims turns on the viability of the plaintiffs' fraud causes of action (**Id.** at 119). Since the fraud claims have already been dismissed as untimely, the court finds that the breach-of-fiduciary-duty claims are also untimely. Accordingly, the twentieth and twenty-first causes of action are time-barred.

Constructive Trust

The third and eighth causes of action seek to impose a constructive trust on all past and future profits generated by the technology. The moving defendants contend that these causes of action are time-barred.

New York law provides a six-year statute of limitations for constructive-trust claims (*see*, CPLR 213 [1]), which commences upon the occurrence of the wrongful act giving rise to a duty of restitution (**Grunfeld v Kasnett**, 18 Misc 3d 1143[A], *5 [and cases cited therein]). When, as here, the constructive trustee allegedly acquired the property wrongfully, the statute of limitations begins to run from the date of the acquisition (**Id.**). The plaintiffs allege that Ballard wrongfully acquired the patents that are the subject of this action in the late 1990's and early 2000, more than six years before the commencement of this action in 2011. Accordingly, the third and eighth causes of action are time-barred.

Breach of Contract

The plaintiffs' contract claims are the fourth cause of action for breach of contract and unjust enrichment and the nineteenth cause of action for breach of the implied covenant of good faith and fair dealing. The moving defendants contend, inter alia, that these causes of

action are time-barred.

New York law provides a six-year statute of limitations for actions sounding in contract (*see*, CPLR 213 [2]), which accrues at the time of the contractual breach, although no damage occurs until later (*see*, **Ely-Kruishank Co. v Bank of Montreal**, 81 NY2d 399, 402). A claim for unjust enrichment is also governed by a six-year statute of limitations (*see*, CPLR 213 [1]), which accrues upon the occurrence of the alleged wrongful act giving rise to restitution (*see*, **Kaufman v Cohen**, 307 AD2d at 127). The alleged breach or wrongful act occurred when Ballard acquired the patents in his own name in the late 1990's and early 2000, more than six years before the commencement of this action in 2011. Accordingly, the fourth and nineteenth causes of action are time-barred.

The Continuing-Wrong Doctrine

The plaintiffs attempt to toll the statute of limitations for their breach-of-contract, breach-of-fiduciary-duty, constructive-trust, replevin, and conversion causes of action by application of the continuing-wrong doctrine to those claims.

The continuing-wrong or continuing-violation doctrine tolls the limitations period to the date of the commission of the last wrongful act when there is a series of continuing wrongs (**Shelton v Elite Model Mgt., Inc.**, 11 Misc 3d 345, 361). It may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct (**Id.**). The distinction is between a single wrong that has continuing effects and a series of independent, distinct wrongs (**Sanchez de Hernandez v Bank of Nova Scotia**, Sup Ct, NY County, August 4, 2009, Lowe, J., at 4 [2009 WL 7231229], *affd* 76 AD3d 929). Thus, the doctrine was applied when an insurance contract imposed a continuing duty on the defendants to consider factors comprising the cost of insurance before changing rates and to review of the cost-of-insurance rates at least once every five years to determine if a change should be made (*see*, **Beller v William Penn Life Ins. Co. of N.Y.**, 8 AD3d 310, 314; *see also*, **Orville v Newski, Inc.**, 155 AD2d 799 [the defendants had a contractual obligation to make a minimum payment each year]). In **Pike v New York Life Ins. Co.** (72 AD3d 1043), upon which the plaintiffs rely, the Second Department did not apply the continuing-wrong doctrine. In that case, the plaintiffs alleged that they were induced to purchase multiple insurance policies that were unsuitable for their needs and that they could not reasonably afford. They asserted causes of action, inter alia, for breach of contract, fraud, and breach of fiduciary duty against the defendants. The court declined to toll the statute of limitations, finding that any wrong accrued at the time of the purchase of the policies and not every time the plaintiffs paid a premium.

This case is on all fours with **Welwart v Dataware Elecs. Corp.** (277 AD2d 372). There, the plaintiff alleged breach of an agreement to issue shares of common stock in a closely held corporation and conversion of the dividends issued on those shares of stock. The Second Department affirmed dismissal of the complaint on the basis of the six-year statute of

limitations found in CPLR 213. The court found that the causes of action were, in essence, based on the alleged fraud of the defendants in depriving the plaintiff of shares of stock and diverting the profits of the corporation. The plaintiff argued that the causes of action accrued each time profits were diverted. The court rejected that argument, finding that the limitations period was measured from the date of the initial alleged breach in 1981, when the defendants purportedly deprived the plaintiff of his right to the shares and began diverting profits, regardless of when the damages began to accrue. In reaching its conclusion, the court relied on, *inter alia*, **Ely-Kruishank Co. v Bank of Montreal** (81 NY2d at 402), which holds that a breach-of-contract cause of action accrues at the time of the contractual breach, although no damage occurs until later.

This case is also similar to **Grunfeld v Kasnett** (18 Misc 3d 1143[A]), which followed **Welwart** and **Ely-Kruishank Co.** In **Grunfeld**, the plaintiff entered into an agreement with the defendant in which the defendant would run the plaintiff's business and both would share equally in the profits. The defendant allegedly violated the parties' profit-sharing agreement by failing to account for or turn over any profits to the plaintiff from August 2001 onward. The plaintiff commenced an action against the defendant in June 2007 alleging, *inter alia*, conversion, which is governed by a three-year statute of limitations. The plaintiff argued that his conversion claim was not time-barred because he sought the turnover of funds that continued to be converted. The court, rejecting the plaintiff's argument, held that there was no continuing wrong. Any retention of profits was simply a continuing effect of an earlier alleged wrongful act, and the fact that the plaintiff continued to suffer damages as a result of the defendant's earlier conduct was not relevant to the statute-of-limitations determination. The court, therefore, declined to extend the statute of limitations and dismissed the conversion claim as time-barred.

Like **Welwart** and **Grunfeld**, this case is not an example of continuing contractual breaches in which new and timely claims continue to arise. The acts of which the plaintiffs complain are alleged to have occurred during a discrete period of time in the late 1990's and early 2000. It is irrelevant for purposes of the statute of limitations that the plaintiffs may continue to be damaged as a result of those acts (*see*, **Rabouin v Metropolitan Life Ins. Co.**, 182 Misc 2d 632, 639, *aff'd* 282 AD2d 381). Accordingly, the court finds that the continuing-wrong doctrine does not toll the statutes of limitation and that the plaintiffs' causes of action for breach of contract, breach of fiduciary duty, constructive trust, replevin, and conversion are time-barred.

Tortious Interference with Contract

The moving defendants contend that the plaintiffs' seventeenth cause of action for tortious interference with contract is barred by the three-year statute of limitations applicable to actions to recover damages for injury to property (*see*, CPLR 214 [4]). The plaintiffs do not oppose dismissal of this cause of action as time-barred. Accordingly, it is dismissed insofar as it

is asserted against the moving defendants.

Accounting, Dissolution, & Corporate Waste

The moving defendants contend, inter alia, that the plaintiffs' sixth, seventh, ninth, and tenth causes of action for dissolution of DTC and the joint venture and for an accounting and the twenty-second cause of action for corporate waste are barred by the six-year statutes of limitations found in CPLR 213 (1) and (7). The plaintiffs do not oppose dismissal of these causes of action.

Since a joint venture is a partnership for a limited purpose, it is proper to look to the Partnership Law to resolve disputes involving joint ventures (**Eskenazi v Schapiro**, 27 AD3d 312, 314). The purported joint venture was dissolved by operation of law when Ballard acquired patents for the technology in his own name in the late 1990's and early 2000 (*see*, Partnership Law § 60; **Gardiner Intl., Inc. v J.W. Townsend & Assocs., Inc.**, 13 AD3d 246, 247 [a partnership dissolves when there is a change in the relationship between the partners caused by one partner who no longer associates with the purposes of the partnership]). Therefore, there is no longer a justiciable controversy for the court to determine regarding dissolution of the joint venture (*see*, **Matter of Ideal Mut. Ins. Co.**, 174 AD2d 420, 421). The plaintiffs' claim for an accounting of his interest in the joint venture is governed by the six-year statute of limitations found in CPLR 213 (1), which accrued upon the dissolution of the joint venture, more than six years before the commencement of this action in 2011 (*see*, Partnership Law § 74; **Brooks v Haidt**, 59 AD3d 233, 234).

The plaintiff is not an officer, director, or shareholder of DTC. He, therefore, has no standing to petition the court for dissolution of DTC (*see*, Business Corporation Law §§ 1102, 1103, 1104, 1104-a), to demand an accounting, or to assert a claim for corporate waste on behalf of DTC, which must be asserted in a shareholder derivative action (Business Corporation Law § 626 [a]; **Lewis v S.L.& E., Inc.**, 629 F2d 764 [2nd Cir] at 768, n 10).

Finally, the plaintiffs do not allege that they made a demand for an accounting prior to commencing this action. A court of equity will not intervene to vindicate a partner's right to an accounting in the absence of a showing that a demand for one was made and rejected by the partner in possession of the books, records, profits, or other assets of the partnership (**Kaufman v Cohen**, 307 AD2d at 124).

In view of the foregoing, the sixth, seventh, ninth, tenth, and twenty-second causes of action are dismissed insofar as they are asserted against the moving defendants.

Declaratory Judgment

The moving defendants contend that the statute of limitations for causes of action 35 through 38, which are for declaratory relief, has expired because the statute of limitations for the claims underlying those causes of action has also expired. The plaintiffs do not oppose dismissal of these causes of action.

The plaintiffs seek a judgment declaring that Doukas and Ballard had a joint venture, that Doukas and Ballard were fiduciaries, and that DTC and the defendant banks are constructive trustees of Doukas's interest in the technology and any payments made by the banks to DTC. As the moving defendants correctly contend, the time for asserting a claim cannot be extended through the simple expedient of denominating an action as one for declaratory relief (**New York City Health and Hospitals Corp. v McBarnette**, 84 NY2d 194, 201). Moreover, an action for a declaratory judgment is unnecessary when an action at law for damages will suffice (**Bartley v Walentas**, 78 AD2d 310, 312). The plaintiffs' claims for declaratory relief are clearly incidental to the substantial monetary relief requested in the plaintiffs' other causes of action (*see*, **Olsen v New York State Dept. of Env'tl. Conservation**, 307 AD2d 595, 596), which are time-barred. Accordingly, causes of action 35 through 38 are also time-barred.

Rescission

Causes of action 23 through 33 seek rescission of a settlement agreement executed by Doukas, Ballard, and DTC on February 9, 2010, *inter alia*, on the grounds of fraud and failure of consideration. Cause of action 34 seeks a judgment declaring that the settlement agreement is void for lack of mutual consent. The settlement agreement released Ballard and DTC from any claims by Doukas regarding the technology. The moving defendants contend that the settlement agreement is unenforceable because Doukas breached it by commencing this lawsuit to enforce claims that he released in that agreement.

The plaintiffs seek to rescind the settlement agreement, and the moving defendants contend that it is unenforceable. The court finds that, under these circumstances, there is no justiciable controversy for it to determine regarding the enforceability of the settlement agreement. Both sides seek to disregard or avoid the agreement. Courts are not empowered to render advisory opinions or to determine abstract, moot, hypothetical, remote, or academic questions (**Matter of Ideal Mut. Ins. Co.**, 174 AD2d 420, 421). Accordingly, causes of action 23 through 34 are dismissed as academic.

Receiver, Attachment & Preliminary Injunction

The moving defendants contend that the fourteenth, fifteenth, and sixteenth causes of action for the appointment of a receiver, for an order of attachment, and for a preliminary injunction, respectively, are time-barred because "the substantive causes of action upon which

they necessarily rely are barred by their respective limitations period.” The plaintiffs do not oppose dismissal of these causes of action.

Receivership, attachment, and preliminary injunction are provisional remedies and not causes of action (*see*, CPLR 6001). Therefore, their inclusion in the complaint is procedurally improper. Moreover, provisional remedies operate only as interim devices while the action is pending (Siegel, NY Prac § 306 at 510 [5th ed 2011]). Since there is no longer an action pending against the moving defendants, the plaintiffs may no longer obtain the appointment of a receiver, an order of attachment, or a preliminary injunction against them. Accordingly, the purported causes of action for such relief are dismissed insofar as they are asserted against the moving defendants.

Conclusion

The motion by the defendants Claudio Ballard, Shepard Lane, Keith DeLucia, and Data Treasury Corp. is granted, and the complaint is dismissed insofar as it is asserted against them.

Dated: May 1, 2013

J.S.C.