

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D21514
X/prt

_____AD3d_____

Argued - November 20, 2008

WILLIAM F. MASTRO, J.P.
HOWARD MILLER
RUTH C. BALKIN
WILLIAM E. McCARTHY, JJ.

2007-08256
2008-00987

DECISION & ORDER

Hebrew Institute for the Deaf and Exceptional
Children, respondent, v Abraham M. Kahana,
et al., defendants, David Neiderman, appellant.

(Index No. 27823/06)

Meissner, Kleinberg & Finkel, LLP, New York, N.Y. (Ronald M. Kleinberg, Adam
Hurt, and Laurel J. Weinberg of counsel), for appellant.

Allen Lashley, Brooklyn, N.Y. (Roger Bennet Adler of counsel), for respondent.

In an action, inter alia, to recover damages for conversion, the defendant David
Neiderman appeals, as limited by his brief, from (1) so much of an amended order of the Supreme
Court, Kings County (F. Rivera, J.), dated July 13, 2007, as denied those branches of his motion
which were pursuant to CPLR 3211(a)(1), (2), (3), (5), and (7) to dismiss the complaint insofar as
asserted against him, and (2) so much of an order of the same court dated November 16, 2007, as
amended November 16, 2007, as, upon renewal and reargument, adhered to the prior determination.

ORDERED that the appeal from the amended order dated July 13, 2007, is dismissed,
as that order was superseded by the order dated November 16, 2007, as amended, made upon
renewal and reargument; and it is further,

ORDERED that the order dated November 16, 2007, as amended, is reversed insofar
as appealed from, on the law, upon renewal and reargument, so much of the amended order dated
July 13, 2007, as denied those branches of the appellant's motion which were pursuant to CPLR
3211(a)(1), (2), (3), (5), and (7) is vacated, those branches of the appellant's motion which were
pursuant to CPLR 3211(a)(5) and (7) to dismiss the complaint insofar as asserted against him are

December 16, 2008

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granted, and those branches of the appellant's motion which were pursuant to CPLR 3211(a)(1), (2), and (3) are denied as academic; and it is further,

ORDERED that one bill of costs is awarded to the appellant.

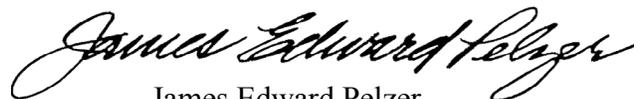
"To dismiss a cause of action pursuant to CPLR 3211(a)(5), on the ground that it is barred by the Statute of Limitations, a defendant bears the initial burden of establishing prima facie that the time in which to sue has expired" (*Sabadie v Burke*, 47 AD3d 913, 914 [citation and internal quotation marks omitted]). If the movant meets this burden, the burden then shifts to the plaintiff to "aver evidentiary facts establishing that the case falls within an exception to the Statute of Limitations" (*Savarese v Shatz*, 273 AD2d 219, 220 [citations and internal quotation marks omitted]; see *Texeria v BAB Nuclear Radiology, P.C.*, 43 AD3d 403, 405). Here, the defendant David Neiderman (hereinafter the appellant), established, prima facie, that the causes of action alleging conversion and aiding and abetting conversion were time-barred. The plaintiff failed to meet its burden in opposition. Its contention that the subject causes of action were timely interposed against the appellant pursuant to CPLR 205(a) is without merit (see *Gem Flooring v Kings Park Indus.*, 5 AD3d 542, 543-544; *Meneely v Hitachi Seiki USA*, 175 AD2d 111, 112-113; *Bishop v Uno Pizza*, 188 Misc 2d 142, 144-145). Accordingly, upon renewal and reargument, the Supreme Court should have granted that branch of the appellant's motion which was to dismiss the causes of action alleging conversion and aiding and abetting conversion insofar as asserted against him as time-barred pursuant to CPLR 3211(a)(5).

The only remaining cause of action asserted against the appellant alleged civil conspiracy to commit conversion. New York does not recognize civil conspiracy to commit a tort as an independent cause of action (see *Salvatore v Kumar*, 45 AD3d 560, 563); rather, such a claim stands or falls with the underlying tort (see *Salvatore v Kumar*, 45 AD3d at 563-564). Since its viability in this case was derivative of the underlying tort of conversion, and the latter claim must be dismissed, the civil conspiracy claim insofar as asserted against the appellant also should have been dismissed.

In light of our determination, we need not reach the parties' remaining contentions.

MASTRO, J.P., MILLER, BALKIN and McCARTHY, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court