

Yongman Kim v Sim

2016 NY Slip Op 31911(U)

October 11, 2016

Supreme Court, New York County

Docket Number: 157276/2015

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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YONGMAN KIM,

Index No.
157276/2015

Plaintiff,

**DECISION
and ORDER**

- v -

Mot. Seq. 2

SANG J. (PETER) SIM,
Defendant.

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HON. EILEEN A. RAKOWER, J.S.C.

This action was commenced by Plaintiff’s filing of the Summons and Complaint on July 17, 2015. This is an action brought by Plaintiff against defendant, Sang J. (Peter) Sim (“Defendant”), arising out of a membership agreement dated January 9, 2012 wherein Plaintiff and Defendant agreed to form KS Funding, LLC (“KS Funding” or “LLC”), and became its two members. KS Funding is “principally involved in the business of providing financing to parties engaged in litigation.” The Complaint, filed by Plaintiff on July 14, 2016, alleges that Defendant, as KS Funding’s manager, “failed to perform duties imposed upon him as a manager of the LLC in that he: refused to make the LLC’s books and records available to plaintiff; failed to provide back-up documentation to support distributions to plaintiff; failed to provide any information relating to distributions defendant made to himself; told plaintiff that defendant had dissolved the LLC, when the Membership Agreement requires plaintiff’s consent to dissolution; and falsely advised plaintiff that he did not have any interest in the LLC.” The Complaint further alleges, “Upon information and belief defendant diverted funds due the LLC and paid himself more in distributions than due him as a result of his 25% membership interest.” The Complaint asserts the following claims against Plaintiff: breach of fiduciary duty against Defendant; conversion of Plaintiff’s interest in KS Funding; and accounting.

Defendant interposed a Verified Answer with one Counterclaim on August 6, 2015. The Counterclaim alleges, “Plaintiff and Defendant came into a settlement for legal fees due and payable to Defendant. Plaintiff agreed to pay Defendant legal fees

in settlement in the amount of \$30,000. To date, Plaintiff owes Defendant an amount equal to \$12,500.”

Presently before the Court is Defendant’s motion pursuant to CPLR § 3025(b) granting Defendant leave to amend his answer with counterclaim. Defendant submits an affidavit, which attaches, *inter alia*, a copy of the Proposed Amended Verified Answer and Counterclaims. The motion was filed on July 14, 2016. The Proposed Amended Verified Answer seeks to add the following Counterclaims: breach of fiduciary duty (second proposed counterclaim) and conversion (third proposed counterclaim). Plaintiff opposes. Plaintiff cross moves for an Order compelling discovery. Defendant opposes Plaintiff’s cross motion.

The second proposed counterclaim for breach of fiduciary duty:

Since Plaintiff stated in his Bill of Particulars that he never withdrew from KS Funding, LLC, the Plaintiff has breached his fiduciary duty to KS Funding, LLC and Defendant by commencing a business J&K Funding LLC that was created on November 6, 2012, by which Yongman Kim ceased working on behalf of KS Funding LLC and worked on behalf of J&K Funding LLC in direct breach of his fiduciary duty. By reason of the above, Defendant has sustained damages in an amount that exceeds the jurisdictional limits of all lower courts, which would otherwise have jurisdiction.

The third proposed counterclaim for conversion alleges:

After Yongman Kim left KS Funding LLC, he took with him potential customer lists belonging to KS Funding LLC in which he used to start his business at J&K Funding LLC in providing loan services by which J&K Funding LLC obtained commissions and income from procuring loans on behalf of these customers that belonged to KS Funding, LLC. Further, prior to November 2012, Yongman Kim failed to reimburse KS Funding for certain employee that he undertook to compensate from his own personal funds but used KS Funding monies to pay that certain employee. In addition, Yongman Kim wrote checks to himself prior to his withdrawal from KS Funding without the consent of the defendant, which must be returned to KS Funding to cover the debts that KS Funding presently owes. By reason of the above, Defendant has sustained damages in an amount that exceeds the jurisdictional limits of all lower courts, which would otherwise have jurisdiction.

CPLR § 3025 permits a party to amend or supplement its pleading “by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties.” (CPLR § 3025[b]). Pursuant to CPLR § 3025(b), such “leave shall be freely given upon such terms as may be just including the granting of costs and continuances.” (CPLR § 3025[b]; *Konrad v. 136 East 64th Street Corp.*, 246 A.D.2d 324, 325[1st Dep’t 1998]).

Plaintiff opposes Defendant’s motion. Plaintiff states that Defendant’s new claims for breach of fiduciary duty and conversion are based upon allegations that plaintiff “commenc[ed] a business J&K Funding LLC that was created on *November 6, 2012*” and that “*prior to November 2012* [plaintiff] Yongman Kim failed to reimburse KS Funding for certain employee that he undertook to compensate from his own personal funds.” (emphasis added). Plaintiff argues that since Defendant’s proposed claims accrued no later than November 2012 and Defendant did not assert them until July 2016, these claims are barred by the three-year statute of limitations that applies. Defendant argues that its proposed claims are timely under CPLR §203(d) because they “arose from the same transaction, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends.”

“A breach of fiduciary duty claim falls under either a three-year or six-year limitation period, depending on the nature of the relief sought.” (*Yatter v. William Morris Agency, Inc.*, 256 A.D.2d 260, 261 [1st Dep’t 1998]). Where a plaintiff’s “breach of fiduciary duty claim seeks only money damages, the applicable limitations period is three years.” (*Id.* at 199). Where the nature of the relief sought in a breach of fiduciary claim is equitable, a six year statute of limitations applies to the claim. (*Loengard v. Santa Fe Indus., Inc.*, 70 N.Y.2d 262, 266 [N.Y. 1987]). A cause of action for breach of fiduciary duty based on allegations of actual fraud is subject to a six-year limitations period. (*Kaufman v Cohen*, 307 A.D. 2d 113, 119 [1st Dep’t 2003]); *AQ Asset Mgmt., LLC v. Levine*, 119 A.D.3d 457, 458 [1st Dep’t 2014]).

The statute of limitations for a conversion claim is three years (CPLR §214(3)). “While ‘accrual [normally] runs from the date the conversion takes place and not from discovery or the exercise of diligence to discover’ it is well settled that, where the original possession is lawful, a conversion does not occur until after a demand and refusal to return the property.” (*D’Amico v First Union Nat. Bank*, 285 A.D. 2d 166, 172 [1st Dept 2001]).

CPLR § 203(d) provides as follows:

(d) Defense or counterclaim. A defense or counterclaim is interposed when a pleading containing it is served. A defense or counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed, except that if a defense or counterclaim arose from the same transaction, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the damages in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed.

CPLR § 3215(f) provides:

(f) Claim in amended pleading. A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

“Under New York law, counterclaims are deemed timely if they were timely when the complaint was initially brought (CPLR 203 [d]), and are said to ‘relate back’ to the original claim.” (*Gary v. GMAC Mortg.*, No. 0111954/2006, 2008 WL 206958, January 11, 2008) [citations omitted]. However, where a counterclaim is raised for the first time in an amended answer, the relation back doctrine does not apply and the statute of limitations is not tolled, unless the claim arises from the same transaction on which the plaintiff’s claim is based (*Id.*) (citing *Coleman, Grasso and Zasada Appraisals, Inc. v. Colema*, 246 A.D.2d 893, 667 N.Y.S.2d 828 [3d Dept. 1998], *lv denied* 96 NY2d 715 [2001]; *Joseph Barsuk, Inc. v. Niagara Mohawk Power Corp.*, 281 A.D.2d 876 [4th Dept.], *lv denied* 97 N.Y.2d 638 [2001]; *Shays, Kemper v Nachman*, NYLJ, Sept. 20, 2002, p. 18, col. 3 [Sup. Ct. NY County 2002]).

Here, Defendant’s proposed counterclaims for breach of fiduciary and conversion, which accrued no later than November 2012, are raised for the first time on July 14, 2016. Defendant’s proposed counterclaims do not “relate back” to when he served his original answer on August 6, 2015, because his original answer contains only counterclaim alleging that the parties “came into a settlement for legal fees due and payable to Defendant” and Plaintiff has failed to make payment in accordance with that settlement. Defendant’s original answer and counterclaim do not “give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved” for his proposed counterclaims for breach of fiduciary

and conversion. Nor do the proposed counterclaims arise from the “same transaction, occurrences, or series of transactions or occurrences” on which Plaintiff’s claims are based. Plaintiff’s claims are based on the allegations that Sim breached his fiduciary duties as managing member of the LLC in failing, inter alia, to make the LLC’s books and records available to Plaintiff upon his request, to provide back-up documentation to show any distributions to the LLC’s members, to ensure that distributions were made in accordance with their capital contributions, to keep accurate records, and to prevent assets of the LLC from being wasted. Plaintiff’s claims are also based on the allegations that “Defendant converted plaintiff’s interest in the LLC for defendant’s own use.” Defendant’s proposed counterclaims are based upon distinct set of occurrences- that Plaintiff breached his fiduciary duty in commencing the business J&K Funding LLC in November 2012 and that prior to November 2012, Plaintiff “failed to reimburse KS Funding for certain employee that he undertook to compensate from his own personal funds.”

Turning to Plaintiff’s cross motion, Plaintiff seeks an Order pursuant to CPLR § 3126 scheduling a firm date for Defendant’s deposition, upon the ground that Defendant has failed to proffer dates prior to the July 29, 2016 deadline for depositions in the April 5, 2016 Preliminary Conference Order. Defendant opposes, stating that “there is additional discovery that needs to be obtained before depositions can go forward” and that depositions cannot go forward without resolution of Defendant’s motion to amend the answer and counterclaims. The parties are directed to appear at a compliance conference on November 15, 2016 to address outstanding discovery and to set a schedule for depositions.

Wherefore, it is hereby

ORDERED that Defendant’s motion to amend his Answer and Counterclaims is denied; and it is further

ORDERED that Plaintiff’s cross motion is granted only to the extent that the parties are directed to appear at a compliance conference on November 15, 2016 to address outstanding discovery and to set a schedule for depositions.

This constitutes the decision and order of the court. All other relief is denied.

DATED: OCTOBER 11, 2016

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HON. EILEEN A. RAKOWER