

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DENNIS J. BOYLE, JR.

Plaintiff

vs.

**MEMORANDUM
DECISION**

Index No. 9675/06

ELFIN PROPERTIES, LLC,
PETER MULLETT, MARC VOGEL
AND CAROL VOGEL

Defendants

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **Law Office of Ralph C. Lorigo**
Attorneys for Plaintiff
Ralph C. Lorigo, Esq., of Counsel
Frank J. Jacobson, Esq., of Counsel

William C. Moran & Associates, P.C.
Attorneys for Defendants
William J. Hardy, Esq., of Counsel

CURRAN, J.

Defendants have moved for summary judgment. Plaintiff has cross-moved to amend his complaint.

Plaintiff is a minority member of the defendant limited liability company (“LLC”). The individual defendants also are members of the LLC and together comprise a majority of the LLC’s membership.

The LLC was formed to construct and own a building in which a childcare facility would be operated by the individual defendants. The LLC borrowed money from a bank to construct the building. The construction was performed by the plaintiff. The LLC entered into a lease agreement with the childcare company owned by the individual defendants.

Plaintiff's primary complaint is that the defendants unilaterally and without notice to him reduced the amount of rent charged by the LLC to the childcare facility. This in turn prohibited the LLC from distributing "available cash" to the members on an annual basis as required under Section 5.4 of the Operating Agreement. Plaintiff's complaint contains a cause of action for breach of fiduciary duty seeking damages and a cause of action for breach of contract also seeking damages.

Defendants have moved for summary judgment on the grounds that the breach of fiduciary duty claim is time-barred under the applicable statute of limitations. Defendants further assert that defendants were authorized by the Operating Agreement to modify the lease agreement and to reduce the amount of rental payable thereunder without notice to or the consent of the plaintiff. Plaintiff seeks to cure any purported deficiencies in the initial complaint by moving for permission to serve an amended complaint containing fraud causes of action.

Because the causes of action for breach of fiduciary duty in the initial complaint and the proposed amended complaint seek damages rather than equitable relief, a three-year statute of limitations applies (*Nathanson v Nathanson*, 20 AD3d 403, 404 [2d Dept 2005]; *Kaufman v Cohen*, 307 AD2d 113, 118 [1st Dept 2003]). Moreover, the cause of action for breach of fiduciary duty accrued at the time of the breach (*Kaufman, supra*). Here, the record

reflects that the breach of fiduciary duty as alleged by the plaintiff occurred at the time the lease was modified on or about August 1, 2002. Because this case was not commenced until 2006, any causes of action for a breach of fiduciary duties seeking damages are clearly time-barred. Therefore, the first cause of action in the Complaint for breach of fiduciary duty is dismissed as untimely and the proposed amendment seeking to assert breach of fiduciary duty causes of action will not be allowed as such causes of action lack merit.

As to the fraud causes of action in the proposed Amended Complaint, they too lack merit because they seek merely to re-state the breach of contract cause of action. When a plaintiff's claim is based upon the same facts and theories as the breach of contract claim, it is properly dismissed as duplicative (*Brooks v Key Trust Co. N.A.*, 26 AD3d 628 [3d Dept 2006]; *Williams v Coppola*, 23 AD3d 1012 [4th Dept 2005]). Moreover, this is not a situation where the plaintiff has alleged with particularity the details allegedly supporting the scheme to defraud thereby distinguishing the fraud causes of action from the contract cause of action (*see, e.g., Amherst Magnetic Imaging Assocs., P.C. v Community Blue, HMO and Blue Cross of Western New York, Inc.*, 239 AD2d 892 [4th Dept 1997]). Accordingly, leave to amend the Complaint to add fraud causes of action will likewise not be allowed.

Defendants do not claim that the second cause of action in the original Complaint is either time-barred or not well-plead. Rather, defendants assert that defendant Mullett is the Manager of the LLC and has unfettered discretion to effectuate an amendment or modification of the Lease Agreement. While the Manager under the Operating Agreement certainly has the right and duty to manage the business of the LLC, the manager also is required under Section 4.4 of the Operating Agreement to “perform his or her duties as a manager in

good faith and with that degree of care which an ordinary prudent person in a like position would use under special circumstances.” The alleged self-dealing of the individual defendants to advantage the defendant childcare operation at the expense of the LLC and its members presents a triable issue of fact warranting denial of the summary judgment motion as to the contract claim.

Based on the foregoing, defendants’ motion is granted to the extent of dismissing the first cause of action in the original Complaint but is denied as to the second cause of action alleging breach of contract. Plaintiff’s motion seeking leave to amend the Complaint is denied. Defendants’ counsel should settle the Order with plaintiff’s counsel.

DATED: June 18, 2007

HON. JOHN M. CURRAN, J.S.C.