[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ~~CHARLES A. TEBEDEF~~ MARILYN SHAFER J.S.C. PART 8

0600824/2001

FEINBERG, HERBERT

VS

SHAW, J. STANLEY

SEQ 4

SUMMARY JUDGMENT

NO. _____

DATE _____

SEQ. NO. _____

CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits -- Exhibits	
Replying Affidavits	

FILED
JAN 19 2006
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is

w/pgs + decided pursuant to attached Rem

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1/6/06

MARILYN SHAFER J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

HERBERT FEINBERG,

Plaintiff,

-against-

Index No.
600824/2001

J. STANLEY SHAW, JOHN DOE LAW PARTNERS 1-X, and SHAW, LICITRA, BOHNER, ESERNIO, SCHWARTZ & PFLUGER, P.C.,

Defendants.

SHAFER, J.:

Motion sequence numbers 004 and 005 are consolidated for disposition.

In motion sequence number 004, plaintiff Herbert Feinberg moves, pursuant to CPLR 3212, for summary judgment on his complaint, and the award of appropriate damages or, alternatively, to have this matter set down for an inquest as to damages.

In motion sequence number 005, defendants move for summary judgment dismissing plaintiff's complaint.

BACKGROUND

The instant action arose out of four investments and/or loans that were made, during 1986, by plaintiff Feinberg and other investors/lenders, to non-party William Levitt and business entities controlled by him. The four transactions are identified as (1) the Tropic Associates/La Colline transaction, (2) the Final 1999 Payment due Tropic Associates (formerly, the Donnelly Trust), (3) the Henderson & Bodwell Lien and Other Loans, and (4)

the Levitt Promissory Notes. These transactions allegedly were initiated to assist Levitt, a well known former real estate developer, who had fallen on hard times. Feinberg alleges that all four transactions were designed, promoted and handled through defendant J. Stanley Shaw, Feinberg's then close friend and attorney. At the time, Levitt also was a client of Shaw's law firm, a co-defendant in this action. It is also alleged that Shaw and Feinberg, a successful businessman and private investor, had been co-venturers on a number of business investments.

Feinberg alleges that he was defrauded by Shaw, who allegedly misrepresented the facts and terms of these four transactions in order to induce plaintiff to loan money to Levitt, and/or invest in certain Levitt-controlled entities. Plaintiff alleges that, when these loans/investments were repaid, Shaw diverted and/or withheld money due Feinberg for Shaw's own use, or the use of his law firm, and that the defendant law firm, and its partners, participated and benefitted from Shaw's wrongdoing. Plaintiff additionally alleges that Shaw has never fully or accurately accounted to plaintiff for any of these four transactions, and that despite his diligent efforts to find out the true circumstances of his investments, he did not learn of defendants' deception and fraud until March 2000.

In February 2001, plaintiff commenced the instant action asserting causes of action for fraud against Shaw, and causes of

action for breach of fiduciary duty and unjust enrichment against all of the defendants. The complaint also sought an accounting, injunctive relief, and a constructive trust.

Previously, in April 2001, defendants moved to dismiss the complaint against the John Doe Law Partners I X, pursuant to CPLR 3016 (b), and against all defendants on statute of limitations grounds, pursuant to CPLR 3211 (a) (5). By order dated December 19, 2001, this court (Lebedeff, J.) denied defendants' motion, finding that the circumstances constituting the wrong against the unnamed partners were set forth in sufficient detail, and that defendants had not met their burden of establishing that the time in which to sue had expired. That decision subsequently was affirmed by the First Department by decision dated October 24, 2002 (see Feinberg v Shaw, 298 AD2d 272 [1st Dept 2002]).

Meanwhile, in March 2002, plaintiff moved for an order to remove Shaw, and to appoint plaintiff, as the trustee of Tropic Associates (Tropic), a partnership that had been formed in 1986 for the purpose of investing or channeling loan money to Levitt. Plaintiff also sought an order enjoining Shaw from disposing of Tropic's assets, requiring an accounting, and requiring the production of all records and documents. Shaw cross-moved for summary judgment dismissing the complaint.

In an order dated July 12, 2002, this court (Lebedeff, J.) denied defendants' cross motion to dismiss the complaint in its

entirely, finding factual issues regarding whether defendants had properly accounted to plaintiff with respect to these four transactions. The court granted plaintiffs' motion to the extent that it sought discovery and inspection of defendants' books and records pertaining to these transactions. The court also directed defendants to prepare and serve a long accounting concerning the transactions raised in the complaint, and referred the issue of the long accounting to a Special Referee to hear and determine. The remainder of the action was held in abeyance pending the hearing and determination of the Special Referee.

Defendants served and filed their long accounting on September 23, 2002, and plaintiff served and filed his objections thereto on October 15, 2002. Following extensive discovery, the parties requested and were granted permission to file the instant summary judgment motions based on the evidence discerned subsequent to defendants' prior summary judgment motion. Plaintiff now moves for summary judgment against defendants for amounts, totaling $2,220,745.00, that he claims are still due on all four transactions. Defendants move for summary judgment dismissing the complaint, on the grounds that the evidentiary record establishes that plaintiff has received all sums due to him with respect to the transactions at issue and, in any event, plaintiff's claims are barred by the applicable statutes of limitation.

DISCUSSION

A motion for summary judgment will be granted only where the movant has made "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). Once the movant has made such a showing, the party opposing the motion has the burden of producing evidentiary facts sufficient to raise triable issues of fact (see Zuckerman v City of New York, 49 NY2d 557 [1980]). Because issue finding rather than issue determination is key, summary judgment will not be granted if there is any doubt as to the existence of a triable issue, or where such an issue is even arguable (Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]).

1. The Tropic Associates/La Colline Transaction

Feinberg alleges that, in June 1986, he was induced by Shaw to participate in what Shaw had represented was to be a $1 million loan to Levitt, with plaintiff and Shaw each to contribute $375,000.00, and another party to contribute $250,000.00. The loan allegedly was to be made through Tropic, and was to be secured by certain real property owned by Levitt, known as La Colline.

The record reflects that on June 12, 1986, Tropic executed an agreement with International Community Corporation (ICC), the

Levitt-controlled entity that allegedly was to receive the loan, setting forth the details of a $1 million transaction (Feinberg Aff., Exh. D). The agreement was signed by Feinberg, on behalf of Tropic (id.). However, although allegedly unbeknownst to Feinberg at the time, the amount of the loan that Tropic actually made to ICC was only $825,000.00, of which $375,000.00 was contributed by plaintiff and, at most, only $200,000.00 was contributed by Shaw.[1]

In 1987, Levitt found a buyer for La Colline. At the time, Tropic allegedly was due a total of $1,324,125.00 on the loan secured by that property. Apparently, however, the New York State Attorney General also had held judgments and liens against Levitt, and had commenced suit to recover the monies from Levitt and ICC in Nassau County Supreme Court. In a stipulation and settlement, allegedly entered on October 7, 1987, Tropic's claim against the proceeds of the La Colline sale was settled in that suit for a total of $1.2 million, payable pursuant to a $2.5 million purchase money mortgage to be received at the closing (see Shaw Affirm., Exh T:13).[2]

---

[1]It appears that an amended agreement evidencing this reduced amount was prepared by Shaw and signed by Levitt/ICC on June 12, 1986; however, no one signed this agreement on behalf of Tropic (Feinberg Aff., Exh. G).

[2]The stipulation and settlement provided that defendant law firm would receive a maximum of $1,150,000.00 from the purchase money mortgage, Tropic would receive a maximum of $1,200,000.00, and the Attorney General would receive the remaining $150,000.00

The record reflects that between January 1988 and March 1989, Feinberg received a total of $102,308.72 in interest on that purchase money mortgage, based on his alleged 45.45% share of Tropic's $825,000.00 loan (id., Exh. I:14). The purchase money mortgage allegedly was paid in full in June 1989. Thereafter, Feinberg received the return of his principal, in the amount of $375,000.00, plus additional interest in the amount of $12,831.16, in two sequentially numbered checks, dated January 4, 1990 (id., Exh. I:16). However, none of the profit derived from the $1.2 million in proceeds from the purchase money mortgage was distributed to Feinberg.

According to Shaw, there was no profit to be distributed because Levitt owed defendant law firm $800,000 in legal fees with respect to other matters, and the law firm allegedly had a security agreement that granted them priority over any profits arising out of Tropic's loan. Plaintiff disputes the validity of this security agreement, of which he claims he was never informed. In the decision denying defendants' prior summary judgment motion, this court found issues of fact in this regard, as the evidence showed that Tropic had not been a signatory to the security agreement, and there was no evidence that defendants had disclosed, or that plaintiff was aware, of the security agreement or any law firm priority to the profits due Tropic.

---

from that purchase money mortgage (id., ¶ 6).

Defendants argue that their instant motion for summary judgment dismissing this part of plaintiff's claim, as time-barred, should be granted because the documentary evidence now establishes that (1) plaintiff became aware, no later than 1989, that defendant law firm had a security interest in, and a priority to, any profits due Tropic from the La Colline sale; and (2) plaintiff's claims relating to the Tropic loan arose no later than January 1990, when Feinberg received the return of his principal, but no profits.

In his motion for summary judgment, plaintiff now seeks his share of the profits that he alleges defendants improperly diverted from Tropic to pay Levitt's legal fees, plus interest from January 1990. Plaintiff contends that the documentary evidence and sworn testimony establish an unbroken, documented pattern of misrepresentation, concealment, and misappropriation of these funds by Shaw that continues to this day, and sufficiently establishes his claims for fraud, breach of fiduciary duty, unjust enrichment, and for the imposition of a constructive trust.

Additionally, plaintiff now claims that he is actually entitled to a 51.72% share of all interest and proceeds of the purchase money mortgage, and not the 45.45% share calculated by defendants, as this was his true percentage ownership of the Tropic loan. Plaintiff contends that he only just learned,

during discovery, that $100,000 of Tropic's $825,000.00 loan had been disbursed to defendant law firm (see Feinberg Aff., Exh. E); therefore, plaintiff argues, the total amount of that loan, and Shaw's personal contribution thereto, should have been reduced by $100,000.00, and all interest payments and distributions should have been calculated based on Feinberg's $375,000.00 contribution to a loan of $725,000.00.

Insofar as defendants seek dismissal of this portion of plaintiff's complaint, based upon plaintiff's alleged prior knowledge of their priority lien in the proceeds of the La Colline sale, the motion is denied. Defendants contend that plaintiff knew, or should have known, of their purported security interest based on (1) the reference to a security interest that was contained in ¶ 10 (c) of the Tropic Agreement, which was read and signed by Feinberg on behalf of Tropic, on June 12, 1986 (Shaw Affirm., Exh. I: 6); (2) three UCC-1 financing statements filed with the Nassau County Clerk's office on March 4, 1987, pursuant to which defendants allege that they perfected their security interest in the proceeds of the La Colline sale (id., Exh. J: 11); and (3) a reference to a security interest contained in an exhibit that was attached to the complaint that Levitt had filed against Tropic, Shaw, and Shaw's law firm in Nassau County Supreme Court (the Tropic Suit), and that was served on Feinberg

in May 1989 (id., Exhs. L and M).[3]

However, contrary to defendants' contentions, this documentary evidence does not unequivocally establish that plaintiff was aware, by no later than May 1989, that defendant law firm possessed a security interest and priority lien in the proceeds of the Tropic loan, for payment of Levitt's past due attorneys' fees. The evidence shows that the purported security agreement between Levitt and defendant law firm, upon which defendants base their defense, was not signed until April 1987, after execution of the June 12, 1986 Tropic agreement, and after defendants allegedly filed their three UCC-1 financing statements (see id., Exh. I:10). Additionally, the three UCC-1 financing statements make reference only to an April 16, 1985 security agreement made in connection with a $2 million loan; that loan agreement makes no reference to attorneys' fees allegedly due defendant law firm (see id., Exh. I:1). The exhibit attached to Levitt's complaint in the Tropic Suit makes reference to the liens of several creditors, including one in favor of defendant law firm, but does not detail or indicate any priority among the competing liens (see id., Exh. N). Thus, none of these documents clearly establish that Feinberg had notice, by no later than 1989, of a particular security interest in favor of defendants,

---

[3]In the Tropic Suit, Levitt had claimed, inter alia, that the Tropic loan was usurious (id.).

or that defendants hold a priority lien on the profits of the Tropic loan.

Nevertheless, as issues of fact remain with respect to whether plaintiff's claims with respect to this transaction are time-barred, both plaintiff's and defendants' motions for summary judgment will be denied. A cause of action seeking to recover damages for unjust enrichment and to impose a constructive trust must be brought within six-years of the occurrence of the alleged wrongful act giving rise to a duty of restitution (see CPLR 213 [1]; Congregation Yetev Lev D'Satmar, Inc. v 26 Adar N.B. Corp., 192 AD2d 501 [2d Dept 1993]). Causes of action for fraud must be brought within six years of the commission of the alleged fraud, or within two years of the actual or imputed discovery of the facts supporting a cause of action, whichever is longer (CPLR 203 [g] and 213 [8]; Rostuca Holdings, Ltd. v Polo, 231 AD2d 402 [1st Dept 1996]; K&E Trading & Shipping, Inc. v Radmar Trading Corp., 174 AD2d 346 [1st Dept 1991]). Claims for breach of fiduciary duty fall under either a three-year or six-year limitation period (depending on the nature of the relief sought) (Yatter v Willian Morris Agency, Inc., 256 AD2d 260 [1st Dept 1998]), or within two years from date of discovery (Hammond v Reichbach, 232 AD2d 254 [1st Dept 1996]). Generally, an inquiry as to the time that a plaintiff could, with reasonable diligence, have discovered a fraud or breach of fiduciary duty is a mixed question of law and

fact and turns upon whether a person of ordinary intelligence possessed knowledge of facts from which the fraud could be reasonably inferred (Ghandour v Shearson Lehman Bros. Inc., 213 AD2d 304 [1st Dept], lv denied 86 NY2d 710 [1995]).

Defendants argue that plaintiff knew, or should have known, no later than January 1990, when the proceeds of the purchase money mortgage were disbursed, that the profit he now claims is due him was not distributed to Tropic investors. Specifically, defendants contend that (1) Feinberg knew by no later than May 1989, when he received Levitt's original complaint in the Tropic Suit, that only $825,000 in loan money had actually been remitted to Levitt, and not the $1 million initially proposed; and (2) Feinberg knew by no later than December 1989, when Levitt's amended complaint in the Tropic Suit was filed and served, that Shaw had received at least $1.2 million in proceeds from the purchase money mortgage, in repayment of the Tropic loan, evincing a profit of $375,000.00.

However, although plaintiff has acknowledged receiving and scanning the original complaint filed in the Tropic Suit, in May 1989, he now alleges that he was not served, or does not recall being served, the amended complaint in that action (Feinberg Reply Aff., ¶ 20). Plaintiff notes that the allegations as to both the fact and amount of the actual disbursement of proceeds were alleged only in the amended complaint. Although, during the

course of this litigation, plaintiff's position appears to have varied on whether he may have received the amended complaint (see Shaw Affirm., Exh. K, at 229), issues of credibility generally cannot be determined on a motion for summary judgment (Yazicivan v Blancato, 267 AD2d 152 [1st Dept 1999]; see also S.J. Capelin Assoc., Inc., v Globe Mfg. Corp., 34 NY2d 338 [1974]). As the evidentiary record does not conclusively resolve the issue of when plaintiff knew, or should have known, that there was a profit from this transaction that was never distributed, both motions for summary judgment must be denied.

However, to the extent that Feinberg now claims that he is entitled to a larger, 51.72% share of the interest and proceeds of the purchase money mortgage, and not the 45.45% share that was calculated by defendants, this portion of his claim cannot stand. The documentary evidence establishes that Levitt approved the disbursement of $100,000.00 to defendant law firm from the $825,000.00 he received pursuant to the Tropic loan (Shaw Affirm., Exh. N). In any event, Feinberg acknowledges that he was served with the original complaint filed by Levitt in the Tropic Suit in May 1989, and had, at the very least, scanned through and read parts of that complaint before, allegedly, sending it on to Shaw. In that original complaint, Levitt specifically alleged that he received only $825,000.00, and not $1 million in loan proceeds from Tropic, and that defendant law

firm had "converted" $100,000.00 of that amount for their own uses (see Feinberg Reply Aff., Exh. WW). Since a plaintiff may not shut his or her eyes to facts which call for investigation (Shannon v Gordon, 249 AD2d 291 [2d Dept 1998], lv denied 92 NY2d 819 [1999]), Feinberg's attempt to seek a larger share of the interest and proceeds of the purchase money mortgage based on his allegedly recent discovery of the $100,000.00 disbursement to defendant law firm, would be time-barred.

2. The Final 1999 Payment due Tropic (formerly, the Donnelly Trust)

Following the settlement of the Attorney General's action, Tropic still maintained a claim against Levitt/TCC for $124,125.00, the difference between its claim of $1,324,125.00 and the $1.2 million settlement. This remaining claim was later settled on March 31, 1992, as part of Levitt's Tropic Suit (see Shaw Affirm., Exh. 18). Specifically, pursuant to a Stipulation of Settlement in that action, Tropic's claim, in the approximate amount of $124,000,00, along with a separate claim by defendant law firm, in the amount of $170,000.00, were both settled for a maximum amount of $260,000.00 (id.). Under the terms of the settlement, this amount was to be paid out of any remains of a trust that had been created for the benefit of Edward Donnelly, another creditor of ICC.

It is undisputed that the monies due Tropic and defendant

law firm were received by Shaw on December 2, 1999. The parties also appear to agree that Tropic is entitled to approximately $109,665.00, comprising its share of these proceeds. These funds have yet to be disbursed.

Plaintiff now seeks summary judgment awarding him 51.72% of the amount due Tropic, along with interest from January 11, 1990 (see Feinberg Aff., Exh. SS). Although defendants acknowledge that plaintiff is entitled to his share of these funds, they suggest that these funds could not have been disbursed earlier because Donnelly had initiated litigation regarding Tropic's share of the Donnelly Trust, which was not dismissed until April 2001, by which time, plaintiff had commenced the instant suit.

The record indicates, however, that the Donnelly action was not commenced until seven months after defendants received the funds from the Donnelly Trust (see Shaw Affirm., Exh. I: 20), and defendants have failed to establish that they were otherwise prevented from promptly disbursing those funds. Accordingly, plaintiffs' motion for summary judgment will be granted to the extent of awarding plaintiff 45.45% of any amount due Tropic, plus interest from December 2, 1999, the date when the funds were received by defendants.

3. Henderson & Bodwell Liens and Other Loan Transactions

In July 1986, Shaw allegedly approached Feinberg about lending additional money to Levitt/ICC, and purchasing certain

mechanics liens, valued at $392,902.00, that had been placed on TCC's property in Florida by an engineering firm known as Henderson & Bodwell. The record establishes that on July 21, 1986, plaintiff sent defendant law firm a check for $105,000.00 (see Feinberg Aff., Exh. X). Plaintiff alleges that he understood that this money was to be used to purchase a half interest in a $210,000 loan to be made to TCC/Levitt. In fact, however, on July 23, 1986, Levitt/ICC and Feinberg signed an agreement whereby Feinberg loaned ICC the sum of $100,000.00, for which Levitt executed a Note on behalf of ICC, and exercised an option to purchase one percent of Levitt's limited partnership interest in certain property in Florida for $5,000.00 (id., Exhs. Y & Z). Shortly thereafter, by check dated July 24, 1986, Shaw purchased half of plaintiff's loan and limited partnership interest for $52,500.00,(id., Exhs. AA and BB).

The record shows that on October 10, 1986, Feinberg sent another $100,000.00 check to defendant law firm (id., Exh. CC), which he alleges he understood was to be used as a first payment to purchase the Henderson & Bodwell liens for $200,000. Plaintiff contends, however, that this money was not used for its intended purpose, but was also lent by Shaw to Levitt/TCC, for which Feinberg allegedly received an assignment of proceeds, dated July 28, 1986, referencing a promissory note worth $110,000.00 (see id. Exh. EE, FF and GG).

It appears that the Henderson & Bodwell Liens subsequently were purchased for a total consideration of $200,000.00 (Feinberg Aff., Exh. II). Although Feinberg admittedly did not advance the $200,000.00 used for that purpose, he nevertheless alleges that he became the sole owner of the liens, because the Assignment of Mechanics Liens, dated November 6, 1986, named Feinberg as the sole assignee (id.). Other documentary evidence connected with this transaction shows that, previous to this assignment, on October 28, 1986, Feinberg executed a release, in which he declared the Henderson & Bodwell Liens fully satisfied and released the property described therein (Feinberg Aff., Exh KK). On that same date, Feinberg also executed a satisfaction of both the $100,000 note that had been executed on July 23, 1986, and of the $110,000.00 assignment that had been executed on July 28, 1986 (id.). In exchange for these releases, on November 14, 1986, Shaw received two checks, totaling $607,407.00, which were made out to Feinberg and defendant law firm, in the amounts of $230,000.00 and $377,407.00, respectively (Exh. OO).[4] All parties agree that these checks were received as the satisfaction for the two loans and Henderson & Bodwell Liens.

The record shows that plaintiff received a total of

---

[4]Plaintiff contends that, originally, these two checks were to have been made out in his name alone, but that, and only at Shaw's insistence, these checks were made out to both Feinberg and defendant law firm.

$223,417.43 in return for his $150,000.00 investment.[5] Shaw contends that a total of $410,000.00 was advanced for the two loans and liens by three investors: $150,000.00 from Feinberg; $160,000.00 from Shaw, personally; and $100,000.00 from a third investor. Shaw now moves to dismiss this portion of plaintiff's complaint on the ground that Feinberg received his full percentage share of the total return on his investment.

Plaintiff disputes the existence of other investors, noting that there is no clear documentary evidence that establishes that anyone else participated in the loans or purchase of the Henderson & Bodwell liens. Plaintiff argues that, as all of the relevant documents have only his name on them, the funding for the purchase of the liens should be attributed solely to him, even though he was not the source of the $200,000.00. Thus, plaintiff contends, he should have received all of the $377,407.00 check paid in satisfaction of the liens, less the $200,000.00 that actually was used to pay for them, plus $172,500.00, or 75% of the $230,000.00 payment for the loans. Plaintiff now seeks this sum, totaling $349,907.00, minus the $223,417.43 he already received from defendants, plus interest from November 14, 1986.

---

[5]Defendants contend that, although Feinberg paid a total of $152,500.00 in making the two loans, $2,500.00 of this amount was used to purchase an option in a transaction, not at issue in this action; therefore, Feinberg's total loan/investment was only $150,000.00.

Both motions for summary judgment are denied. Although Feinberg's name was the sole name to appear on the assignment of liens, he admittedly advanced no additional money towards their purchase. The parties have presented conflicting accounts as to exactly who was involved in, and who contributed what amounts to, the transactions at issue. The documentary evidence submitted on this motion does not resolve the issues of fact in these respects. Accordingly, as this court is unable to determine who was entitled to share in the proceeds of these transactions, and to what degree, both motions for summary judgment must be denied.

4. The Levitt Promissory Notes

Feinberg alleges that on December 10 and December 17, 1986, he made, through Shaw, two $10,000.00 loans to Levitt. These loans are evidenced by two promissory notes payable to the order of Feinberg and signed by Levitt (Feinberg Aff., Exh. QQ).

Defendants argue that this part of plaintiff's complaint should be dismissed because both of these notes were payable to Feinberg individually, and there is no evidence that defendants executed, endorsed, or should be held legally liable for these notes.

Plaintiff avers, however, that he never forwarded any funds to Levitt, except through Shaw. Although in his complaint, plaintiff alleged that Shaw had advised him that these amounts would be repaid as part of the "Williamsburg transaction," and

that none of these amounts were repaid, plaintiff now alleges that Levitt's debts were to be paid as part of the La Colline closing, and that one of these notes was repaid on January 4, 1990, by a check drawn on defendant law firm (Feinberg Aff., Exh. RR). Plaintiff argues that this check is further proof that all of his investments and repayment were done through Shaw.

The sequence number on these checks, however, indicate that the January 4, 1990 check was, in fact, related to repayment of the Tropic loan, and not to the payment of either of the promissory notes. Other than this check, plaintiff has produced no documentary evidence to connect these notes to defendants, much less establish any obligation on their part to repay these notes. Unlike the case with respect to each of the prior transactions, plaintiff has produced no checks which might show that the funds for these notes were channeled through defendants. Accordingly, this portion of plaintiff's claim will be dismissed due to the lack of any documentary evidence which establishes any obligation on the part of defendants to repay promissory notes signed by Levitt.[6]

---

[6]Even if this court were to accept plaintiff's new allegations as true, plaintiff's claim with respect to the other promissory note would, arguably, be time barred. Plaintiff consistently has alleged that both notes were to be paid from the proceeds of the same transaction; however, plaintiff now alleges that he received payment for one, but not the other, promissory note upon the conclusion of the La Colline transaction on January 4, 1990. If, as plaintiff has alleged, these notes were to be paid from the same transaction, plaintiff's causes of action with

Miscellaneous Matters

To the extent that this court declines to dismiss plaintiff's entire complaint, defendants again move for summary judgment to dismiss the complaint as asserted against the John Doe law partners, on the ground that plaintiff has not identified any partner who allegedly participated in the alleged fraud or breach of trust. This portion of defendants' motion will be denied at this time, as there appears to be some evidence establishing a connection between at least one of the law partner and these transactions, which is sufficient to raise doubt as to the existence of a triable issue of fact.

Finally, in his reply affidavit, plaintiff requests that this court dismiss defendants' counterclaim for legal fees, on the ground that they failed to address this issue. Plaintiffs request, however, which was not contained in his original notice of motion or affidavit in support of the motion for summary judgment, is not properly made for the first time in a reply affidavit, and is denied.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted solely to the extent of severing and granting partial

---

respect to the second note would have accrued no later than January 4, 1990, more than eleven years prior to commencement of this action, when plaintiff became aware that only one of the notes was paid from the proceeds of the La Colline transaction.

summary judgment in favor of plaintiff, and against defendants, as to that portion of his claim identified as the Final 1999 Payment due Tropic Associates, and plaintiff is granted judgment in the amount of 45.45% of $109,665.00 (the amount due Tropic in the abovementioned transaction), together with interest at the statutory rate from December 2, 1999, plus costs and disbursements to be taxed by the Clerk of the Court upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's motion for summary judgment is otherwise denied; and it is further

ORDERED that defendants' motion for summary judgment is granted solely to the extent of severing and dismissing that portion of plaintiff's causes of action identified as the Levitt Promissory Notes, and defendants' motion for summary judgment is otherwise is denied; and it is further

ORDERED that the remainder of this action shall continue.

DATED: 1/6/06

ENTER:

J.S.C.

HON. MARILYN SHAFER, JSC

FILED