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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

FBEM

SAID HAKIM, SAID HAKIM on behalf of RANELL FREEZE COMPANY and SAID HAKIM on behalf of RANELL FREEZE CORPORATION,

Plaintiffs,

-against-

KARAM HAKIM, MASUD HAKIM, RANELL FREEZE COMPANY and RANELL FREEZE CORPORATION,

Defendants.

INDEX NO. 603000/2005 E

MOTION DATE

MOTION SEQ. NO. 004

MOTION CAL. NO.

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying Decision and Order.

Dated: April 13, 2007

KARLA MOSKOWITZ J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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SAID HAKIM, SAID HAKIM on behalf of RANELL FREEZE COMPANY and SAID HAKIM on behalf of RANELL FREEZE CORPORATION,

Plaintiffs,

Index No. 603000/05

-against-

KARAM HAKIM, MASUD HAKIM, RANELL FREEZE COMPANY and RANELL FREEZE CORPORATION,

Decision and Order

Defendants.

----------x

KARLA MOSKOWITZ, J.:

This lawsuit involves a dispute over the percentage interest plaintiff Said Hakim ("Said") holds in buildings that he owns or owned with his brother, defendant Karam Hakim ("Karam"), and the money to which Said is entitled from this ownership. By this motion (sequence number 004), plaintiff moves, pursuant to CPLR 2221, to reargue and renew two decisions of this court that addressed prior motions: 1) this court's order of March 1, 2006 in response defendants' motion to dismiss the first through tenth causes of action in the amended complaint based on CPLR 3211 and 3212 (sequence number 002); and 2) the court's decision and order at oral argument on April 11, 2006 in response to defendants' motion to dismiss the tenth and eleventh causes of action in the second amended complaint based on CPLR 3211 and 3212 (sequence number 003). This is plaintiff's second motion to renew and reargue, and plaintiff also requests leave to file and serve a fourth amended complaint. For the reasons below, the court denies plaintiff's motion.

BACKGROUND

The following facts are primarily from the third amended complaint and other papers the

parties submitted on this motion.

Defendant Ranell Freeze Company ("RF Company") is a New York partnership comprised of plaintiff Said and defendant Kamran as partners. (Third Amended Complaint ¶¶ 6-8). Pursuant to the court's direction, plaintiff added a third brother Masud Hakim ("Masud") to his complaint. Defendant Masud also alleges to be a partner. (*Id.* ¶ 9; Masud Hakim's First Amended Answer to Plaintiffs' Third Amended Complaint with Counterclaims ¶ 9). Said claims to own a 50% interest in RF Company (Third Amended Complaint ¶ 17), but Masud characterizes the interest as an equal one-third interest for each of the brothers (Masud Hakim's First Amended Answer to Plaintiffs' Third Amended Complaint with Counterclaims, p 7, ¶ 5).

RF Company owns property at 536 East 89th Street, New York, New York ("89th Street property"), but Said relinquished management and operational control to Kamran. (Third Amended Complaint ¶¶ 19-20). Said claims that, because of his control over the 89th Street property, Kamran withdrew partnership funds, paid himself excessive management fees, and failed to provide Said with schedule K-1's and other documents for RF Company. (*Id.* ¶¶ 24-26). To these allegations, Kamran responds that he operated the 89th Street property for the "benefit of the brothers Kamran, Masud and Said." (Answer to Third Amended Complaint with Counterclaims ¶ 12).

Said maintains that he owns four additional properties, either individually or with Kamran, at the following addresses in New York City: 456 West 57th Street, 328 East 61st Street, 121 Lexington Avenue and 728 Tenth Avenue. (Second Amended Complaint ¶¶ 21-22). According to Said, defendant Ranell Freeze Corporation ("RF Corporation"), in which Said and Kamran were allegedly shareholders, owned certain of these additional properties, and Kamran controlled them. (*Id.* ¶¶ 17, 23-24). Kamran states that all of these additional properties, except

121 Lexington Avenue, "were sold at least some twenty five years ago, and 121 Lexington Avenue was sold some seventeen years ago in April of 1988 . . . ." (Reply Affidavit of Kamran Hakim, dated December 14, 2005, ¶ 2, attached to Affirmation of Leo Fox in Opposition to Plaintiff's Second Motion to Renew and Reargue, dated June 22, 2006, Exh. E). Kamran also asserts that he and Said shared an interest in only three properties and had an agreement for only these three properties: 536 East 89th Street, 456 West 57th Street and 121 Lexington Avenue. (Reply Affidavit of Kamran Hakim, dated December 14, 2005, ¶¶ 3, 15). Said, however, claims that Kamran "fraudulently transferred [the four additional properties] by forging Said's signature and drafting a false Power of Attorney, which gave a gentleman know as Bernard Parsoff the power to act on Said's behalf for real estate transactions." (Plaintiffs' Memorandum of Law in Support of its Motion for Renewal and Reargument, p 3).

In addition to whether the brothers ever owned certain properties and, if so, who owned them, Said and Kamran dispute two written agreements they purportedly executed. The parties can produce only one of these agreements, an agreement of February 20, 1991. Pursuant to rules of the Declaration of Algeria and the Iran-United States Claims Tribunal, Kamran signed a document that stated the percentage each brother would receive from any money they could recover. (Second Amended Complaint ¶ 72 and Exh. A). Said claims Kamran breached this agreement by not paying him his percentage. (Second Amended Complaint ¶ 75).

Said also claims that Kamran breached a second agreement to invest jointly in properties by not including Said in his New York purchases. (Second Amended Complaint ¶¶ 86, 88). Plaintiff alleges that "pursuant to the agreement Plaintiff was to furnish income and support from Iran, Defendant Kamran Hakim would purchase properties in New York and any properties which were purchased would be through a partnership of the Hakim brothers including Plaintiff."

(Second Amended Complaint ¶ 87). Plaintiff asserts, but Kamran denies, that the parties did memorialize their agreement in writing, but Said "left [the written agreement] and all [his] business records in Iran when [he] was forced to flee in 1979 at the time of the Iranian Revolution." (Reply Affidavit of Said Hakim, dated December 7, 2005, ¶ 16, attached to Affirmation of Leo Fox in Opposition to Plaintiff's Second Motion to Renew and Reargue, dated June 22, 2006, Exh. E). Said believes that Kamran has retained a copy of this agreement. (Plaintiffs' Memorandum of Law in Support of Motion for Renewal and Reargument, p 3).

Said lists these properties as ones the brothers acquired pursuant to their written agreement: (1) 536 East 89th Street; (2) 456 West 57th Street; (3) 328 East 61st Street; and (4) 728 Tenth Avenue. (Reply Affidavit of Said Hakim, dated December 7, 2005, ¶ 17). Initially, all three brothers held a one-third interest, but Said claims they modified the agreement in or about 1980 so that Kamran and Said each held a 50% interest and Masud withdrew from the partnership. (*Id.* ¶ 21). Masud contests this change in percentage interest. (Affidavit of Masud Hakim, dated December 12, 2005, ¶ 5, attached to Affirmation of Leo Fox in Opposition to Plaintiff's Second Motion to Renew and Reargue, dated June 22, 2006, Exh. E).

Masud offers a different perspective on the alleged agreements. He states that all three brothers had an agreement to "jointly purchase, for investment, real properties in the State of New York, and they each having equal interests therein, as partners, and ultimately, purchased three properties located at 536 East 89th Street . . .; 456 West 57th Street . . .; and 121 Lexington Avenue." (Masud Hakim's First Amended Answer to Plaintiffs' Third Amended Complaint with Counterclaims, p 7, ¶ 6). As for Said's interest in any other properties, Masud claims, "I am not aware of any partnership interest held by Said Hakim in any other properties in which Kamran Hakim has an interest." (Affidavit of Masud Hakim, dated December 12, 2005, ¶ 3). Masud

alleges that Said received more than his percentage interest in the properties and that he "forged [Masud's] signature on deeds to transfer at least two of the three New York Properties, thereby receiving [Masud's] percentage interest in said properties." (Masud Hakim's First Amended Answer to Plaintiffs' Third Amended Complaint with Counterclaims, p 8, ¶ 11). Said, however, asserts that in 2003 Kamran reduced Said's interest in RF Company, so he could then make payments to Masud instead. (Reply Affidavit of Said Hakim, dated December 7, 2005, ¶ 24).

In this dispute over property ownership, other documents, besides the alleged written agreements, provide additional information. Although Said contends that "[Kamran] never advised [him] that any of these properties had been sold. At all times between the 1970's and 2005, he led me to believe that we still owned them and that they were part of our RF Company partnership" (Reply Affidavit of Said Hakim, dated December 7, 2005, ¶ 34), Kamran provides two documents, namely letters from 1999, that suggest otherwise. On April, 11, 1999, Said wrote to Kamran about the state of their partnership: "But instead of expansion for our partnership – you knowingly or unknowingly betrayed me and now you also want to take 57th, half of 536 East 89th, and also take all of $1,800,000 that came from Iran." (Letter from Said to Kamran, dated April 11, 1999, p 2). Said further asserts that Kamran was "taking more than half of Lexington and [he] insist[ed] on claiming all of 57th Avenue [*sic*], and [he] also want[ed] to have 50% of 536 East 89th Street." (*Id.*).

Thus, Said, as early as 1999, acknowledged problems with his interest in the properties and knew that Kamran had indicated trouble with some of the buildings and the distribution of income from them. For example, Kamran had written to Said that he "proceeded to vacate these properties [536 East 89th Street and 121 Lexington Avenue,]" that he had sold "the property near Tenth Avenue" and also 121 Lexington Avenue, and that because "Masud is not doing as well

and he was our partner – he will be getting the income starting January 2000." (Letter from Kamran to Said, dated February 25, 1999). Finally, regarding the Iran Tribunal award money, that Said alleges Kamran fraudulently concealed from him, Said also acknowledges this interest in his 1999 letter by stating that Kamran had received $1,800,000 and "[i]t is at least fair that I have a good portion of the settlement." (Letter from Said to Kamran, dated April 11, 1999, p 3).

Recently, however, Said has denied any knowledge of the status of the properties. He claims that "[i]n or about early 2005, [he] learned for the first time that some of the properties may have been sold. [H]e wrote to Defendant about this." (Reply Affidavit of Said Hakim, dated December 7, 2005, ¶ 35). Tax returns and schedule K-1's from the years 1997, 1998, 2000, 2001, 2002, 2003, and 2004, however, that the parties include with their moving papers, reflect income only from the 89th Street property. (Reply Affirmation of Leo Fox in Opposition to Motion to Supplement Record, dated September 7, 2006, Exh. A). Said claims that the absence of income from the other properties did not surprise him because "[Kamran] indicated that the property was undergoing renovation or being kept empty to enhance its value and as a result not earning income." (Reply Affidavit of Said Hakim, dated December 7, 2005, ¶ 34).

Letters in 2005 and Kamran's accountant also suggest that Said knew that RF Company owned only the 89th Street property. In his affidavit, the accountant states, "Over the years, Said Hakim would come to the offices and inquire about the operations of 536 East 89th Street, New York City, on a fairly frequent basis at least several times of year. I would provide him with whatever information he requested, including giving him copies of tax returns and statement [*sic*] of operations of the property at 536 East 89th Street. He never requested any information regarding 456 West 57th Street, 328 East 61st Street, 728 Tenth Avenue or 121 Lexington Avenue." (Affidavit of Bertram Weiss, dated December 14, 2005, ¶ 3, attached to Plaintiff's

Notice of Motion, dated May 23, 2006, Exh. D). Said himself confirmed receipt of tax returns for RF Company when he wrote in his July 13, 2005 letter to Kamran, "until recently, each year you have sent tax returns and related documents (including K-1's) for this property [536 East 89th Street, together with my portion of the earnings." (Letter from Said to Kamran, dated July 13, 2005). In this letter, Said also claims to have recently learned about the sale of 456 West 57th and of "unauthorized transfers involving 328 East 61st Street." (*Id.*). In response, Karam wrote that 456 West 57th Street had been sold more than thirty years ago and that he had notified Said at the time of the sale. (Letter from Kamran to Said, dated August 16, 2005, p 1). Kamran also told Said that Said never had any interest in the proeprty at 328 East 61st Street. (*Id.* at 2).

In August 2005, Said commenced this action against his brother Kamran and sought dissolution of RF Company (first cause of action), an accounting (second cause of action), waste (third cause of action), an injunction (fourth cause of action), conversion (fifth cause of action), fraud (sixth cause of action), declaratory judgment (seventh cause of action), appointment of a receiver (eighth cause of action), breach of contract (ninth cause of action) and punitive damages (tenth cause of action).

In response, both Kamran and Masud assert counterclaims. Kamran counterclaims for: (1) payment of loans he made to Said to cover Said's one-third share of renovations at the 89th Street property and to enable Said to purchase his equity interest in the property; (2) an accounting and judgment for monies Kamran advanced for a property at 6122 Wilshire Boulevard, Los Angeles, California; (3) declaratory relief to establish the one-third interest of Kamran, Said and Massud in the 89th Street property; and (4) a declaration of sums due Kamran from promissory notes he executed with Said. Masud counterclaims for (1) an accounting for all assets at the 89th Street property and monies Said received from this property; (2) an accounting

of all monies Said received from any of the properties in New York; (3) conversion for retaining Masud's interest in the cash flow and sales of the properties in New York and then using the proceeds to invest in other properties without including Masud; (4) fraud for concealing the material fact of forging Masud's name on deeds for the sale of at least two New York properties; (5) declaratory judgment setting forth Masud's interest in each of the New York properties, awarding him all proceeds Said received in connection with the New York properties and declaring Masud an equitable partner in any properties Said purchased with assets he converted; (6) breach of contract for failing to repay Masud for monies received pursuant to their agreement; and (7) unjust enrichment for receiving monies that belong to Masud.

At oral argument on December 15, 2005 and in an order of March 1, 2006 for motion sequence 002, the court dismissed the following causes of action as barred by the statute of limitations pursuant to CPLR 3212 but did allow them to survive and continue for the property at 536 East 89th Street, New York, New York: the first cause of action (dissolution of a partnership), the second cause of action (an accounting), the third cause of action (waste), the fourth cause of action (an injunction), the seventh cause of action (declaratory judgment) and the eighth cause of action (receiver). The court explicitly stated that "plaintiff has no interest in any 'additional properties.'" Also pursuant to CPLR 3212 and on the basis of the statute of limitations, the court dismissed the fifth cause of action (conversion) and the sixth cause of action (fraud). As for the ninth cause of action (breach of contract), the court dismissed it pursuant to CPLR 3211 as barred by the statute of limitations. The court dismissed the tenth cause of action for punitive damages but permitted plaintiff to incorporate it in the prayer for relief in an amended complaint. The court denied plaintiff's order to show cause for the appointment of a temporary receiver for the 89th Street property. (Order, dated March 1, 2006,

at 1).

On April 11, 2006, at the end of oral argument, the court granted defendants' motion to dismiss the second amended complaint's eleventh cause of action (breach of contract) pursuant to CPLR 3211 and 3212, specifically on the basis of the statute of limitations. (Transcript of Oral Argument, dated April 11, 2006, at 39). Defendant had also moved to dismiss plaintiff's tenth cause of action (conversion, breach of fiduciary duty and accounting for Pars Machine Manufacturing Company in which Said and Kamran were partners), but plaintiff withdrew the tenth cause of action. (Plaintiffs' Rule 19-A Statement ¶¶ 1-5). The court denied plaintiff's cross-motion for renewal and reargument of the prior dismissal of plaintiff's first through tenth causes of action but gave plaintiff leave to renew that motion. However, the court allowed plaintiff's action to continue for the 89th Street property and deemed the complaint amended accordingly. (Order, dated April 11, 2006).

DISCUSSION

I. Plaintiff's Motion for Reargument

CPLR 2221(d) states a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." (CPLR 2221[d][2]). A motion for reargument "is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law." (*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]). But, "[i]t is not designed to provide the unsuccessful party with successive opportunities to argue once again the very issues previously decided. (*North Am. Van Lines, Inc. v Am. Intl. Cos.*, 11 Misc. 3d 1076A, 3 [Sup Ct, NY County 2006, Fried, J.] [citations omitted]). Nor can a party use a motion for reargument as a means to

advance arguments or positions different from the original motion. (*Id.* at 4).

Plaintiff claims that the court misapprehended the law in dismissing plaintiff's claims against Kamran and that the court engaged in improper factual finding. Specifically, "Because Plaintiffs' causes of action were predicated upon the actual fraud of Defendant Kamran, it was improper for the Court to dismiss those counts because this action was commenced within two years from the time Plaintiff Said discovered the fraud." (Plaintiffs' Memorandum of Law in Support of its Motion for Renewal and Reargument, pp 7-8). In addition, plaintiff asserts that, because he discovered Kamran's fraud in early 2005, when an accountant for the partnership told him all properties, except the 89th Street property, had been sold in the 1970s (*Id.* at 3), the current action, that he filed in August 2005, is timely under the two-year discovery rule. Plaintiff, however, believes that the court improperly made a factually finding at the pleading stage by stating "that Plaintiff should have discovered any wrongdoing [by Kamran] earlier." (*Id.* at 5). The court disagrees with plaintiff because plaintiff has misinterpreted the application of the statute of limitations.

First, plaintiff incorrectly applies the two-year discovery rule. Plaintiff characterizes his claims in the amended complaint and the second amended complaint for breach of contract, waste, conversion, declaratory judgment and an accounting as "intertwined in [a] fraud claim" that arises from plaintiff's factual allegations of Kamran's false representations of joint property ownership with Said, Kamran's false representations that the K-1's covered all RF Company properties, Kamran's failure to reveal unauthorized sales of RF Company properties, Kamran's knowledge of these false representations and plaintiff's reliance and damages. (Plaintiffs' Memorandum of Law in Support of its Motion for Renewal and Reargument, pp 11-12). As plaintiff explains it, "[t]hese factual allegations clearly support a fraud claim to which the

discovery rule applies. The discovery rule likewise applies to the remaining claims because they are intertwined in the fraud claim." (*Id.* at 12).

"A cause of action sounding in fraud must be commenced within 6 years from the date of the fraudulent act or 2 years from the date the party discovered the fraud or could, with due diligence, have discovered it (CPLR 213[8], 203[g])." (*Ghandour v Shearson Lehman Brothers, Inc.*, 213 AD2d 304, 305 [1st Dept 1995] [citations omitted]). The moment at which a plaintiff who has used reasonable diligence should have discovered the fraud is usually 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*, 213 AD2d at 305 [citations omitted]; *see also Kaufman v Cohen*, 307 AD2d 113, 123 [1st Dept 2003] [To toll the statute of limitations, a plaintiff must show that a person of ordinary intelligence did not know of facts "from which the fraud could be reasonably inferred."] [internal quotations omitted]). Any plaintiff who seeks to use the two-year exception to the six-year statute of limitations for fraud has the burden of establishing that plaintiff could not have discovered the fraud prior to two years before filing the action. (*Lefkowitz v Appelbaum*, 258 AD2d 563, 563 [2d Dept 1999]; *see also Hillman v City of New York*, 263 AD2d 529, 529 [2d Dept 1999]).

Plaintiff here raises no factual issues to support his contention that he may rely on the two-year discovery rule. As the exchange of letters in 1999 indicates (*see supra* pp 5-6), Said had his suspicions about Kamran more than two years before commencing this action in August 2005. Further, because Said possessed K-1's (*see supra* pp 6-7), that clearly list only the 89th Street property, Said ignored his suspicions for over six years, when "a person of ordinary intelligence possessed knowledge of facts from which the fraud could be reasonably inferred." (*Ghandour*, 213 AD2d at 305). Surely, Said, as a sophisticated business man, should have

discovered Kamran's alleged fraud in 1999, or even earlier, had he used reasonable diligence to ask specific questions about the other properties. Said has not responded with a factual argument that dates his discovery to a later time. Accordingly, Said may not rely on the two years from discovery extension of the statute of limitations, and his claims related to fraud are time-barred because the court finds discovery of Kamran's alleged fraud should date to 1999 or earlier.

In addition to statute of limitations problems that bar plaintiff's claims, plaintiff's case law on fraud does not convince the court that he may maintain the causes of action for properties other than the 89th Street property. For example, plaintiff argues that *Fuchsberg & Fuchsberg v Fuchsberg* entitles him to pursue his claims, but that case very clearly addresses arbitration: "Where several discrete theories are asserted, any one of which is still timely, all related claims should be considered timely, at least to the extent of allowing the arbitrator to determine the timeliness question on each such theory." (*Fuchsberg & Fuchsberg v Fuchsberg*, 2 AD3d 158, 159 [1st Dept 2003]). By citing to *Sachs v Adeli*, plaintiff hopes to avoid the statute of limitations problem by arguing that reasonable reliance on claims of fraud is an issue of fact and therefore not appropriate for summary judgment. (Plaintiff's Memorandum of Law in Reply to Defendant's Supplemental Opposition, p 13). *Sachs*, however, is not a statute of limitations case, and its interpretation of reasonable reliance supports, rather than bars, as plaintiff suggests, the court's dismissal of plaintiff's claims.

The court stated that "hints of possible falsity" do not trigger the duty to inquire in establishing reasonable reliance in a fraud claim. (*Sachs v Adeli*, 2006 NY Misc LEXIS 2615, *50 [Sup Ct, NY County, Aug. 21, 2006, Moskowitz, J.]). However, "the duty to inquire further is triggered where the plaintiff may be said to have been placed on guard or practically faced with the facts of the complained of fraud." (*Id.* [internal quotations omitted]). As discussed above,

the letters from 1999 and the K-1's indicate that Said should have discovered the fraud much sooner than the time of filing this lawsuit in 2005. Because in his April 11, 1999 letter to Kamran Said expressed his questions and doubts concerning properties in the partnership, as of 1999, Said was "placed on guard" and "faced with the facts" of Kamran's alleged fraud. Thus, the court can determine on summary judgment that Said's reliance on Kamran's alleged misrepresentations is not reasonable and therefore cannot support a claim of fraud on those properties.

Second, plaintiff incorrectly argues for "equitable tolling of the statute of limitations on the other claims [in addition to the claims relating to fraud]." (Plaintiffs' Memorandum of Law in Support of its Motion for Renewal and Reargument, p 5). The court rejects plaintiff's equitable estoppel argument because plaintiff has not indicated how defendant's alleged misrepresentations contributed to his delay in bringing suit.

A plaintiff cannot equitably estop a defendant from a statute of limitations defense when "[t]here is no evidence that defendant took any action which would have caused plaintiff to forebear from filing a timely action." (*Kenny v RBC Royal Bank*, 22 AD3d 385, 386) [1st Dept 2005] [citations omitted]). In addition, "equitable estoppel does not apply where the misrepresentation or act of concealment underlying the estoppel claim is the same act which forms the basis of plaintiff's underlying substantive cause of action." (*Kaufman*, 307 AD2d at 122).

Said misapplies the doctrine of equitable estoppel as it relates to the statute of limitations. For example, Said asserts, "Kamran committed a number of wrongful acts over the years that resulted in Kamran receiving partnership funds that Kamran was not entitled to possess. He has alleged that Kamran had almost total control over the company's records, continued for a number

of years to provide K-1's that failed to disclose the improper sale of properties or overpayment of management fees, and that he hid the improper transactions by failing to provide accurate information or by making affirmative misrepresentations as to the business of the partnership." (Plaintiffs' Memorandum of Law in Support of its Motion for Renewal and Reargument, p 17). Because Said bases his causes of action in fraud on similar claims, Said cannot also use these very same allegations to justify an equitable estoppel argument by simply saying this conduct by defendants prevented him from bringing suit.

Third, plaintiff states, "the controlling New York law holds that an accounting relating to a partnership at the time of dissolution shall include all transactions from the inception of the partnership through dissolution." (Plaintiffs' Memorandum of Law in Support of its Motion for Renewal and Reargument, p 6). Plaintiff points out that the brothers never dissolved their partnership, so the court should honor Said's request to include all transactions, including those for the other properties, because the statute of limitations does not start to run until the date of dissolution. (Plaintiffs' Memorandum of Law in Support of its Motion for Renewal and Reargument, p 15). Thus, plaintiff seeks to have all properties included in the accounting and not just the 89th Street property as the court previously ordered. Defendants counter that "the Court did not limit the time period for an accounting as to the partnership," but merely limited the accounting to the 89th Street property. (Affirmation of Leo Fox in Opposition to Plaintiff's Second Motion to Renew and Reargue, dated June 22, 2006, ¶ 37).

New York law permits an accounting for transactions that arise from a partnership. A partner may ask for an accounting at the time of dissolution. "The right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of

dissolution, in the absence of agreement to the contrary." (Partnership Law § 74). The statute of limitations for an accounting is six years from the time of dissolution. (*Sagus Marine Corp. v Donald G. Rynne & Co.*, 207 AD2d 701, 702 [1st Dept 1994]). In addition, "[a]ny partner shall have the right to a formal account as to partnership affairs: 1. If he is wrongfully excluded from the partnership business or possession of its property by his copartners, 2. If the right exists under the terms of any agreement, 3. As provided by section forty-three ["Partner accountable as fiduciary"], 4. Whenever other circumstances render it just and reasonable." (Partnership Law § 44). "[S]o long as a partnership remains in existence, any partner has a right to a formal accounting . . . . [T]here is a continuing right to an accounting by a partner during the life of the partnership." (*Elghanayan v Elghanayan*, 190 AD2d 449, 453-54 [1st Dept 1993]). "If a partnership relationship is established, plaintiff need only show the transaction of business by the partnership producing profits and losses to be accounted for." (*Missan v Schoenfeld*, 95 AD2d 198, 209 [1st Dept 1983]).

Although a partner has a right to an accounting, a partner can only make this request in response to certain circumstances, such as the "wrongful[] exclu[sion] [of a partner] from the partnership business or possession of its property by his copartners" (Partnership Law § 44) that Said alleges about the real estate properties in this dispute. Because, as explained above, the statute of limitations has run for Kamran's alleged exclusion of Said from the other properties (*see supra* pp 11-12), only the alleged exclusion for the 89th Street property remains timely. Thus, Said has a cause of action for an accounting solely for the 89th Street property. Accordingly, the court denies plaintiff's motion for reargument because he has not demonstrated how the court misapprehended the facts or the law in either of its two previous decisions and the causes of action in the amended complaint and the second amended complaint that these

decisions dismissed.

II. Plaintiff's Motion for Renewal

CPLR 2221(e) states a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination." (CPLR 2221[e][2]). "An application for leave to renew must be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and therefore, not made known to the court." (*Foley*, 68 AD2d at 568). A court denies renewal if the moving party only produces material facts that are "merely cumulative or additional evidence of the same kind as originally submitted." (*Ecco High Frequency Corp. v Amtorg Trading Corp.*, 81 NYS 2d 897, 899 [Sup Ct, NY County 1948], *affd* 274 AD 982 [1st Dept 1948]).

The court does not find any new material facts that justify renewal. Plaintiff offers Masud's First Amended Answer to Plaintiffs' Third Amended Complaint with Counter Claims, dated June 22, 2006, as evidence of new material facts. However, Masud's First Amended Answer merely repeats, in slightly different form, the contents of Masud's affidavit, dated December 14, 2005. In the First Amended Answer, Masud states the brothers had an agreement to "jointly purchase, for investment, real properties in the State of New York, and they each having equal interests therein, as partners, and ultimately, purchased three properties located at 536 East 89th Street . . .; 456 West 57th Street . . .; and 121 Lexington Avenue." (Masud Hakim's First Amended Answer to Plaintiffs' Third Amended Complaint with Counterclaims, p 7, ¶ 6). This statement is no different from the one in Masud's earlier affidavit that describes the one-third interest of each brother in the same three properties and then states Masud is "not

aware of any partnership interest held by Said Hakim in any other properties in which Kamran Hakim has an interest." (Affidavit of Masud Hakim, dated December 14, 2005, ¶ 3). The statement in the First Amended Answer is therefore cumulative of the statement in the affidavit because the two statements both indicate that any agreement between the brothers only gave Said an interest in those three named properties.

Plaintiff points out that Masud's First Amended Answer is really his third pleading and that Masud's previous answer, dated May 6, 2006, indicated "at least" three properties were part of the partnership, so the partnership, plaintiff suggests, could own more properties. (Plaintiff's Reply Memorandum, p 6). Plaintiff claims that this third pleading, dated June 22, 2006, is procedurally improper and without leave of court. Plaintiff's concern is irrelevant because, unverified pleadings, such as Masud's First Amended Answer, cannot serve as evidence. As the court stated at oral argument, "But evidence has to be evidence. This is an allegation in a pleading. It's not even certified. . . . [I]t isn't any basis for renewal because it's not under oath." (Transcript of Oral Argument, dated November 30, 2006, at 26). In addition, the court fails to see how the word "at least" would alter the court's determination that Masud's affidavit and his answer are cumulative. Both documents (the answer of May 6, 2006 and that of June 22, 2006) allege an interest in three specifically named properties and no more or no less. Also at oral argument, plaintiff asserted another ground for renewal – the existence of deeds that bear both Said's and Masud's names – but this is not new information either because plaintiff has asserted all along an ownership interest in additional properties. (*Id.* at 29). Moreover, as the court has explained, any causes of actions for these additional properties are time-barred. (*See supra* pp 11-12). Accordingly, the court denies plaintiff's motion for renewal.

III. Leave to File and Serve a Fourth Amended Complaint

Plaintiff seeks leave to replead his complaint. "A party may amend his pleading, or supplement it 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]). "Although leave to amend a pleading should be freely given (CPLR 3025[b]), an amendment which is devoid of merit should not be permitted." (*Goldstein v Barco of California, Inc.*, 109 AD2d 817, 818 [2d Dept 1985]). In spite of this freedom to amend as long as the additional claims have merit, "[t]he purpose of this procedural device [CPLR 3025] is to permit the plaintiff to amend his theory of recovery to comply with the facts as they unfold, not to permit the plaintiff to alter his representation of material facts to best suit his theory of recovery and thereby overcome defenses raised in opposition." (*Bogoni v. Friedlander*, 197 AD2d 281, 291 [1st Dept 1994]).

In his fourth amended complaint, plaintiff proposes to "includ[e] all of [his] causes of action against Defendants, including those [he] contend[s] that the Court had erroneously dismissed in the Court's earlier decisions . . . . but includes additional factual support, developed in response to Defendant's motion for summary judgment, demonstrating that these claims also involved separate fraud because of defendants' concealment and misrepresentation of material facts related to these other wrongful acts." (Plaintiffs' Memorandum of Law in Support of its Motion for Renewal and Reargument, p 24). Given that the court has dismissed all the previous causes of action, except as they relate to the 89th Street property, and has denied reargument and renewal of the decisions that dismissed those causes of action, the court denies leave to amend because these claims would simply be "devoid of merit."

CONCLUSION

Accordingly, it is

ORDERED that that part of plaintiff's motion seeking reargument is denied; and it is further

ORDERED that that part of plaintiff's motion seeking renewal is denied; and it is further

ORDERED that plaintiff's request for leave to replead the complaint is denied.

Dated: April 13, 2007

ENTER

J.S.C.