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

PRESENT: SHIRLEY WERNER KORNREICH J.S.C. PART 64
Justice

PRYOR CASHMAN

INDEX NO. 603515/05

MOTION DATE 1/11/07

-v-

MOTION SEQ. NO. 004

TRACT MANAGER, INC

MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on this motion to/for dismiss
9 papers submitted in 003 & this motion
in connection with Interim Order dated 3/9/07

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1-2 |
| Answering Affidavits — Exhibits | 3-5 |
| Replying Affidavits | |

Cross-Motion: ☒ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED
MAY 24 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER order dated 3/9/07

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

Dated: 5/18/07

SHIRLEY WERNER KORNREICH J.S.C.
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: PART 54

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PRYOR CASHMAN SHERMAN & FLYNN, LLP,

**DECISION & ORDER**

Plaintiff,

-against-

Index No.: 603515/05

TRACTMANAGER, INC., THOMAS RIZK, CLAY HAMLIN, BEN ALLEN HORNSBY, SCOTT JEFFREY, KELLY E. MCBRYDE, JAMES PERSON, BRUCE SCHONBRAUN and ROBERT WILSON

Defendants.

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TRACTMANAGER, INC.,

Counterclaim-Plaintiff,

-against-

PRYOR CASHMAN SHERMAN & FLYNN, LLP, and JONATHAN BERNSTEIN,

Counterclaim-Defendants.

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KORNREICH, SHIRLEY WERNER, J.:

Motion sequence numbers 003 and 004 were previously consolidated for disposition by Interim Decision and Order of the court, dated March 9, 2007 ("Prior Order"). Familiarity with the Prior Order is assumed and facts and defined terms will be repeated only as necessary.

This action was originally commenced by Pryor Cashman Sherman & Flynn, LLP (the "Firm"), a law firm, to recover a legal fee from the defendant Corporation. The Corporation is a Delaware Corporation whose predecessor entities were Meditract, LLC, and TractManager, LLC. For the sake of simplicity, all three entities will be referred to in this opinion as the "Corporation,"

or, when necessary for clarity, by the relevant predecessor entity name. Bernstein moved in motion sequence 004 to dismiss the amended counterclaims against him by the Corporation on various grounds, including the statute of limitations, C.P.L.R. §3211(a)(5). Jonathon Bernstein ("Bernstein") is of counsel to the Firm and also a founder, shareholder, vice-chairman and a director of the Corporation. Thomas Rizk ("Rizk") is a founder, shareholder, CEO and director of the Corporation, as well as a lawyer.

The parties were asked to submit supplemental briefs addressing the statute of limitations issues with regard to the amended counterclaims of the Corporation against Bernstein. The statute of limitations issues identified in the Prior Order were the effect of CPLR §202, the borrowing statute, including the applicable relation back and tolling provisions, as well as the principal place of business of the Corporation.

*I. Procedural History*

*A. Original Pleadings*

The summons with notice by which the Firm commenced this action against the Corporation was filed on September 30, 2005. Included in the Corporation's new submissions is a complaint filed in the Superior Court in Bergen County, New Jersey, on October 14, 2005 ("NJ Action"), Docket No. L7096-05, naming the Firm as defendant. It contains Four Counts: declaratory judgment declaring unenforceable a 2004 agreement pursuant to which the Corporation was to pay the Firm's fee ("Conditional Agreement"); a declaratory judgment that the Firm was estopped from claiming that the Corporation owed it more than $7,791.09; damages for breach of fiduciary duty predicated on Bernstein's alleged attempt to induce Lowenbaum, another investor in the Corporation, to commence legal proceedings against it; and forfeiture of the Firm's legal fee for

breaches of fiduciary duty and conflicts of interest. Bernstein was not named as a defendant in the NJ Action. According to the Corporation's latest submissions, the Firm successfully moved to dismiss the NJ Action on the ground that this action was filed first.

The Firm served a verified complaint in this action on November 17, 2005. On January 6, 2006, the Corporation served its answer containing four counterclaims against the Firm. The counterclaims in the Corporation's original answer in this action were the same as the counts in the NJ Action. The Corporation's original answer in this action, like the NJ Action, interposed no counterclaims against Bernstein personally.

On June 23, 2006, the Corporation served a supplemental summons and first amended verified answer and counterclaims on Bernstein, which were filed on June 28, 2006 ("amended counterclaims"). Although the amended counterclaims were denominated "counterclaims," prior to that point in time Bernstein was not a party to the action and had not asserted any claims against the Corporation to which it could counterclaim.

The Firm filed a supplemental summons and verified amended complaint, naming the individual defendants on June 30, 2006. The individually named defendants were persons beneficially interested in the Corporation.

In response to the amended complaint, the Corporation served an amended verified answer and counterclaims to amended complaint, verified on July 20, 2006. The "amended counterclaims" against Bernstein remained the same.

On November 20, 2006, pursuant to a stipulation, the Firm purported to discontinue all claims in the amended complaint and the Corporation purported to discontinue all amended

counterclaims against the Firm. The stipulation expressly reserved all claims against Bernstein. In violation of C.P.L.R. §3217, the stipulation was neither approved by Bernstein or the court.

*B. Remaining Causes of Action*

The Prior Order left intact the following amended counterclaims of the Corporation against Bernstein:

1. the portion of the first counterclaim for constructive trust, alleging that Bernstein's acquisition of an increased equity interest in Meditract, LLC, pursuant to the First Amendment to its Operating Agreement effective in March 2000 ("First Amendment") was a breach of fiduciary duty;

2. the third counterclaim for legal malpractice, alleging that Bernstein forfeited his fee by breaching his fiduciary duty and omitted obligations he promised to perform in the Medtiract, LLC Operating Agreement effective as of December 31, 1999; and

3. the seventh counterclaim seeking damages for unjust enrichment based on legal fees Bernstein received from the Corporation and the increased equity interest he received under the First Amendment.

The Prior Order made the following ruling with respect to the statute of limitations issues raised by the parties:

> In an action brought in New York by a non-resident, C.P.L.R. §202 requires a New York court to borrow the statute of limitations of the state where the cause of action accrued if it is shorter than New York's. *Global Financial Corp. v. Triarc Corp.*, 93 N.Y.2d 525 (1999). The policy behind the rule is the prevention of forum shopping in New York for a longer period of limitation. *Id.* A cause of action based on an economic injury accrues where the plaintiff resides and suffers the loss. *Id.*; *Smith Barney, Harris Upham & Co., Inc. v. Luckie*, 85 N.Y.2d 193 (1995)(in securities fraud case, injury occurred where investor resided and suffered economic loss). In applying the borrowing statute, the foreign state's tolling provisions and other rules relating to the application of the statute of limitation are borrowed in determining the shortest applicable statute. *Id.; see also, Ledwith v. Sears Roebuck & Co.*, 231 A.D.2d 17, 23-24 (1st Dept. 1997).
>
> However, at the present juncture, the court is unable to determine where the Corporation resided when it suffered its injury. The parties have raised issues regarding relation back and tolling of the statute of limitations due to continuous representation. The record discloses that the Corporation has offices in Tennessee and New Jersey, but is incorporated

in Delaware. The parties' original briefs assumed that the New York statute of limitations applied.

*II. Statutes of Limitation*

*A. Applicability of the Borrowing Statute*

The Corporation contends that the borrowing statute does not apply to counterclaims because they are not actions. Additionally, it claims that the policy underlying C.P.L.R. §202, which is to prevent forum shopping, is not implicated by allowing interposition of a counterclaim. C.P.L.R. §202 provides that "[a]n action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued...." However, a counterclaim should be treated as if it were in a complaint. C.P.L.R. §3019(d) provides that "a cause of action contained in a counterclaim or a cross-claim shall be treated, as far as practicable, as if it were contained in a complaint." In addition, forum shopping considerations apply to the assertion of a counterclaim. The policy is to prevent assertion of claims that are stale under the law of the state where they accrued, even if they would be timely in New York. *Global Financial Corp. v. Triarc Corp.*, 93 N.Y.2d 525 (1999). Therefore, the policy is implicated whether the claim is asserted by way of a counterclaim or a main claim.

*B. Relation Back under New York Law*

The Corporation claims that the amended counterclaims are timely because they relate back, pursuant to C.P.L.R. §203(d), to the Firm's claims against the Corporation, which were interposed when the summons with notice by the Firm against the Corporation was filed on September 30, 2005. Bernstein contends that relation back does not apply to the amended

counterclaims because they did not arise from the same conduct as the Firm's claims and the Corporation knew Bernstein's identity when it filed its original answer, but chose not to name him.

Section 203(d) provides that:

> 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 the defense or counterclaim arose from the transactions, 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 demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed.

C.P.L.R.§203(f) provides that:

> 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.

Moreover, C.P.L.R. §3019(a) provides that a counterclaim may be interposed against "a plaintiff or other persons alleged to be liable." A counterclaim, however, is improper if it is brought against a new party and the claim does not embrace the original plaintiff. *New York Industrial Center Corp. v. National Biscuit Co.*, 14 A.D.2d 761 (1st Dept. 1961); *Michelman-Caancelliere Iron Works, Inc.*, v. *Kiska Construction Corp.*, 18 A.D.3d 722 (2d Dept. 2005)(claim and counterclaim must be by and against same party in same capacity). The Corporation's amended counterclaims for unjust enrichment and constructive trust relating to the increased equity Bernstein received under the First Amendment were not properly a counterclaim with respect to the Firm's action to collect its bill. The Firm could not be liable for these claims as they did not receive an interest in the Corporation and, therefore, they were not counterclaims, but rather independent claims.

The amended counterclaims based on the First Amendment were interposed when they were served, which was in June of 2006. C.P.L.R. §203(d). They could relate back to the service of the original counterclaims in January 2006 if the original counterclaims gave notice of "the transactions or occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." C.P.L.R. 203(f); *Darby & Darby, P.C. v. VSI Int'l., Inc.*, 268 A.D.2d 270, 273 (1st Dept. 2000), *affirmed* 95 N.Y.2d 308 (2000).

Where a new party is added, as Bernstein was here, a three part test determines whether relation back to an earlier pleading is appropriate. *Buran v. Coupal*, 87 N.Y.2d 173, 178 (1995). The pleader must show that:

> (1) both claims arose out of the same conduct, transaction or occurrence, (2) the new party is 'united in interest' with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well.

*Id.* Where the pleader knows the identity of the party within the limitations period, but chooses not to name him, relation back is inappropriate. *Buran v. Coupal*, 87 N.Y.2d 173 (1995)(when party intentionally decides not to assert claim against party known to be potentially liable, there has been no mistake and statute of limitations should not be extended). *See also, Leylegian v. Federal Paper Bd. Co.*, 251 A.D.2d 60, 61 (1st Dept. 1998).

There can be no relation back for the amended counterclaim for forfeiture of Bernstein's legal fee based on breach of fiduciary duty. The Corporation's original counterclaims against the Firm alleged that it forfeited its fee because Bernstein had conflicting interests and breached his fiduciary duty, but stopped short of naming Bernstein as a party. Therefore, the Corporation knew

of Bernstein's identity, but failed to assert the claim for disgorgement of his fees due to breach of fiduciary duty within the statute of limitations. In a like manner, the claim for unjust enrichment seeking disgorgement of fees received by Bernstein does not relate back because the original counterclaims stated that the Firm was not entitled to fees based upon alleged conflicts of interest by Bernstein, but did not name Bernstein as a party.

Further, with respect to the amended counterclaims for constructive trust based on the First Amendment there is no relation back under section 203(f) because the original counterclaims did not give notice to Bernstein of the transaction that is the subject of this amended counterclaim. *See Darby & Darby, P.C. v. VSI Int'l., Inc., supra.* The original counterclaims contained no mention of the First Amendment. Similarly, the claim for unjust enrichment seeking return of the equity interest Bernstein received under the First Amendment cannot relate back because the original counterclaims did not give notice of that transaction. With respect to the amended counterclaim for malpractice based on omissions of promises made by Bernstein in the Operating Agreement, there also is no relation back because the original counterclaims contained no mention of omissions in the Operating Agreement.

The Corporation is incorrect in arguing that the amended counterclaims relate back to the filing of the Firm's summons with notice under C.P.L.R. §203(d), rather than the service of the Corporation's amended counterclaims in June 2006. As noted previously, the amended counterclaims for constructive trust and unjust enrichment relating to the First Amendment, and omission of terms in the Operating Agreement, were not properly interposed as counterclaims. Only the original counterclaims seeking forfeiture of fees based upon breach of fiduciary duty were properly asserted as counterclaims to the Firm's suit to recover its fee because Bernstein was a person alleged to be liable and the claim "embraced" the Firm. C.P.L.R. §3019; *New York*

*Industrial Center Corp. v. National Biscuit Co.*, 14 A.D.2d 761 (1st Dept. 1961); *Michelman-Caancelliere Iron Works, Inc.*, v. *Kiska Construction Corp.*, 18 A.D.3d 722 (2d Dept. 2005). But the addition of Bernstein as a party brought into play the third prong of *Buran v. Coupal*, *supra*, -- whether the failure to name Bernstein was a mistake. The Corporation cannot meet that test. Accordingly, this claim does not relate back to the Firm's service of the summons with notice. Nor can the Corporation avail itself of a set-off under §203(d), which provides that a counterclaim is "not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed." As the Corporation signed a release of its claims against the Firm and Bernstein has no claim against the Corporation, set-off is unavailable under this provision. In sum, under New York Law, all of the amended counterclaims were interposed in June 2006, when they were served.

*C. Application of the Borrowing Statute*

A cause of action based on an economic injury accrues at the time and the place where the plaintiff resides and suffers the loss. *Global Financial Corp. v. Triarc Corp.*, 93 N.Y.2d 525 (1999); *Smith Barney, Harris Upham & Co., Inc. v. Luckie* 85 N.Y.2d 193 (1995); *Ledwith v. Sears Roebuck & Co.*, 231 A.D.2d 17, 23-24 (1st Dept. 1997). A corporation suffers its injury where its principal place of business is located because that is where its damages are felt. *Brinckerhoff v. JAC Holding Corp.*, 263 A.D.2d 352, 353 (1st Dept.1999)(claims against corporate directors for breach of fiduciary duty and waste); *Prefabco, Inc. v. Olin Corp.*, 71 A.D.2d 587 (1st Dept. 1979).

The parties dispute whether the Corporation's principal place of business is Tennessee or New Jersey. The Operating Agreement states that the principal executive office of the Corporation is in Tennessee. The Operating Agreement also provides that meetings of the

Corporation would be at the offices of the Firm in New York, unless the meeting notice provided otherwise. The First Amendment did not change these provisions. In the Second Operating Agreement, effective in 2001, the Corporation again stated that its principal executive office was in Tennessee. In January 2003, when the Stockholders' Agreement was adopted, the Corporation changed its principal executive office to New Jersey.

The Corporation has submitted affidavits by Rizk and Scott Jeffrey ("Jeffrey"), another principal, who state that the Corporation's principal office has always been in New Jersey. Essentially, they contend that the Corporation's residence has always been in New Jersey because that is where executive management is centered. Jeffrey admits that there was a larger "headcount" in Tennessee and that most board meetings were held telephonically, with several participants physically in New Jersey. He also states that the Corporation's income is derived from charging customers fees for access to a New Jersey data hosting facility.

However, the Operating Agreement and First Amendment, which were executed by all members and managers of the Corporation, including Rizk and Jeffrey, state otherwise. The record also demonstrates that computerized records of the Delaware Secretary of State list the principal office of Tractmanager, Inc., as 408 Broad St., Chattanooga Tennessee. The Delaware Secretary of State also lists the same principal office for Meditract, LLC and Tractmanager, LLC, until a change, which is not in the record, was made on April 19, 2001.

Cases defining "resident" for purposes of venue under CPLR 503 are useful precedents for determining residence under the borrowing statute. *Antone v. General Motors Corp., Buick Motor Div.*, 64 N.Y.2d 20, 30 (1984). For venue purposes, a foreign corporation's designation of its residence will be enforced. *Shetty v. Volvo Cars of N. Am., LLC*, 2007 NY Slip Op 1769 (1st Dept. 2007); *Hamilton v. Corona Ready Mix, Inc.*, 21 A.D.3d 448, 449 (1st Dept. 2005) (sole residence

of domestic corporation for venue purposes is county designated in certificate of incorporation, despite maintenance of office or facility in another county). As a result, Tennessee's statute of limitations, if it is shorter than New York's, must be applied to the Corporation's claims relating to the interests Bernstein acquired under the First Amendment and the alleged omissions in the Operating Agreement, as at the time those agreements were executed the Corporation's principal place of business was in Tennessee.

Moreover, the Corporation's claims do not relate back to an earlier pleading under Tennessee law. Tennessee has the same rules for relation back of amended pleadings as New York, including that the original pleading must give notice of the transactions or occurrences in the amended pleaded, and that if a party is added by the amendment, he must know that he wasn't named because of a mistake as to the identity of the correct party. Tenn. R. Civ. P. 15.03. Therefore, under Tennessee law, the amended counterclaims were interposed in June 2006.

The Corporation's claims accrued at the time that the damage was suffered. *Ledwith v. Sears Roebuck & Co., supra.* With respect to the constructive trust and unjust enrichment claims relating to the First Amendment, accrual was in March 2000. With respect to the omission of terms from the Operating Agreement, accrual was in December 1999. As will be explained later, it is a question of fact as to when Bernstein received the legal fees that are the subject of the Corporation's malpractice and unjust enrichment claims involving disgorgement Bernstein's legal fees.

*D. New York's Statutes of Limitation*

*1. Constructive Trust*

In New York, the applicable statute of limitations in an action to impose a constructive trust is six years, pursuant to C.P.L.R. §213(1); *Maric Piping, Inc. v. Maric*, 271 A.D.2d 507, 508 (2d

Dept. 2000); *In re Estate of Alpert,* 234 A.D.2d 150 (1st Dept. 1996). The statute begins to run at the time of the wrongful conduct giving rise to a duty of restitution, which in a case involving wrongful acquisition is the date the constructive trustee acquired the property. *Maric Piping, Inc. v. Maric*, *supra.*

Bernstein acquired his increased interest in the Corporation pursuant to the First Amendment in March of 2000, more than six years before the amended counterclaims were served in June 2006. Therefore, the Corporation's constructive trust claim is time-barred under New York law unless it was tolled due to continuous representation.

*2. Unjust Enrichment*

The New York six year statute of limitations for unjust enrichment is found in CPLR 213 (1) and starts to run upon the occurrence of the wrongful act giving rise to a duty of restitution. *Kaufman v. Cohen*, 307 A.D.2d 113 (1st Dept. 2003); *Congregation Yetev Lev D'Satmar v. 26 Adar N.B. Corp.*, 192 A.D.2d 501, 503 (2d Dept. 1993).

With respect to the claim that Bernstein was unjustly enriched by receipt of his increased equity interest under the First Amendment, the statute began to run when he received it in March 2000. Consequently, this claim too is time-barred unless the statute was tolled by continuous representation. However, it is unclear when the statute of limitations accrued for purposes of the claim that Bernstein was unjustly enriched by the receipt of legal fees, as neither party states when he received them. Therefore, it cannot be determined on this record whether the statute of limitations has run on this claim.

*3. Legal Malpractice*

The New York statute of limitations for attorney malpractice is three years, pursuant to C.P.L.R. §214, and begins to run when the malpractice is committed, whether or not the client is

aware of the wrong. *McCoy v. Feinman*, 99 N.Y.2d 295, 301 (2002); *Ackerman v Price Waterhouse*, 84 N.Y.2d 535, 541 (1994) ( legal malpractice claim accrues "when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court"). Accordingly, the malpractice claim for omission of terms in the Operating Agreement effective in December of 1999 is time-barred unless it is saved by continuous representation.

*4. Breach of Fiduciary Duty*

The New York statute of limitations for breach of fiduciary duty not involving fraud is three years as well. *Kaufman v. Cohen*, 307 A.D.2d 113 (1st Dept. 2003). The breach of fiduciary claim relating to forfeiture of the fee accrued either on October 8, 2004, the date of the Firm's last billing and the date when the Corporation alleges that Bernstein ceased to represent the Corporation, or December 2002, the date Bernstein alleges that his representation ended. Under the Corporation's contention, the claim would be timely without resort to tolling. Under Bernstein's contention, it would not. This presents a factual issue that cannot be determined at this juncture.

*5. Continuous Representation Toll under New York Law*

Continuous representation by an attorney tolls the statute of limitations for claims involving malpractice until the end of the representation from which the malpractice claim arises. *Shumsky v. Eisenstein*, 96 N.Y.2d 164, 168 (2001); *Greene v. Greene,* 56 N.Y.2d 86, 93-95 (1982). The toll is based on the theory that the client cannot be expected to sue the attorney while the professional relationship based on trust is ongoing with respect to a particular transaction. *Id.; see also, Schlanger v. Flaton*, 218 A.D.2d 597 (1st Dept. 1995). Nonetheless, the statute of limitations will not be tolled where there is a general continuing professional relationship, but the discrete and severable transactions allegedly tainted by malpractice from which the claim arose are completed. *Parlato v. Equitable Life Assurance Society,* 299 A.D.2d 108 (1st Dept. 2002); *Booth v. I. Stanley*

*Kriegel*, 2006 N.Y. Slip Op. 8352, 825 N.Y.S.2d 193 (1st Dept. 2006)(n.o.r.); *CLP Leasing Co. v. Nessen*, 12 A.D.3d 226 (1st Dept. 2004).

The Corporation's memorandum of law argues that the amended counterclaims allege that Bernstein's involvement in the periodic updating of the Corporation's operating agreements, as capital was raised, constituted a continuing representation, which continued until the last billing date in October 2004, rendering all of its claims timely. Bernstein's position is that the First Amendment and the Operating Agreement were discrete transactions that were completed no later than March of 2000. He states that his representation of the Corporation ended when the Stockholders' Agreement was completed at the end of 2002.

Continuous representation was found in *Schlanger v. Flaton, supra*, where the attorney purchased an ownership interest in a client's real property, he became actively involved in the client's automobile dealership on a daily basis and it was impossible to separate his legal services from those rendered to the client's business. In *Schlanger,* the transactions by which the attorney acquired his interests in his client's business were discrete transactions, as were the First Amendment and the Operating Agreement, but the Court held that the lawyer's involvement in the client's business, legally and generally, were a continuous course of representation which extended the statute of limitations for rescission of the transactions. In *Greene v. Greene, supra,* continuous representation was based on the drawing of a trust instrument and the attorney's management of the trust. In *Greene,* the Court stated that the attorney's administration of the trust was part of the same representation because it was "an integrated plan proposed by [the attorneys] as a solution to [the client's] concern over the proper investment of her funds." *Greene v. Greene, supra* at 95. Finally, in *Shumsky v. Eisenstein, supra* at 170, the court held that the doctrine applies where

"pursuant to a retainer agreement, an attorney and client both explicitly anticipate continued representation."

Here, however, the amended counterclaims allege that there was no retainer agreement. Moreover, this case is complicated by the fact that the Corporation's amended counterclaims allege that part of the malpractice was Bernstein's failure to include in the Operating Agreement his promise to devote substantial time to the Corporation's business. One of the underpinnings of the Corporation's claim is that Bernstein's equity interest was undeserved because he continued his law practice at the Firm rather than put his efforts into the Corporation's business. That claim is inconsistent with the Corporation's statute of limitations argument that Bernstein was so involved with the Corporation's business that continuous representation applies under *Schlanger v. Flaton*, where the attorney was involved with the client's business on a daily basis. Consequently, an issue of fact exists as to whether Bernstein was so involved in the Corporation's day to day business as extend Bernstein's representation.

*6. Conclusion under New York Statutes of Limitation*

In sum, there is an issue of fact which cannot be resolved as a matter of law as to when Bernstein's representation of the Corporation ended that bears on whether continuous representation would toll the statute of limitations under New York law with respect to the Corporation's amended counterclaims. In addition, there is an issue of fact as to when Bernstein received legal fees, which relates to the accrual of the amended counterclaims for forfeiture of the fees based upon breach of fiduciary duty or on the theory of unjust enrichment. Accordingly, under New York law, the statute of limitations issues cannot be resolved as a matter of law.

*E. Statutes of Limitation under Tennessee Law*

*1. Constructive Trust*

Tennessee has no specific statute of limitation for constructive trust, but looks to the gravamen of the action, the damages suffered and the remedy sought. Where, as here, the gravamen of the action is an equitable claim for property, a three year statute of limitations applies. *See, Prescott v. Adams*, 627 S.W.2d 134, 137 (Tenn. Ct. App. 1981) (three year statute of limitations for injury to property applies to claim for rescission), citing Tenn. Code Ann. §28-3-105 (three year statute of limitations for injury to personal property). This statute of limitations is shorter than New York's and, therefore, is applicable. Since the claim seeking to impose a constructive trust on the equity Bernstein received under the First Amendment accrued in March 2000, it expired in March 2003, prior to the interposition of the amended counterclaims in June 2006.

*2. Unjust Enrichment*

With respect to unjust enrichment, Tennessee also has no specific statute of limitation, but looks to the gravamen of the action, the damages suffered and the remedy sought. *Middle Tennessee Occupational and Environmental Medicine, Inc. v. First Health Group Corp.*, 2005 WL 3216282 (M.D. Tenn) (three year statute of limitations wrongful retention of money applied to unjust enrichment claim), citing Tenn. Code Ann. §28-3-105 (three year statute of limitations for injury to personal property). The claim that Bernstein unjustly received the equity interest under the First Amendment in March 2000, thus, is time-barred under Tennessee's three-year statute of limitation, which is shorter than New York's.

*3. Legal Malpractice*

The Tennessee statute of limitations for legal malpractice is one year whether the action is based on contract or tort. Tenn. Code Ann. § 28-3-104(a)(2); *Wilson v. Pickens*, 196 S.W.3d 138, 142 (Tenn. Ct. App. 2005). As a result, the claim that Bernstein committed malpractice by

omitting terms from the Operating Agreement in 1999 is time-barred under Tennessee law, which has a shorter statute of limitations than New York.

*4. Breach of Fiduciary Duty*

With respect to breach of fiduciary duty, Tennessee again has no specific statute of limitation, but looks to the gravamen of the action, the damages suffered and the remedy sought. *Keller v. Colgems-Emi Music, Inc.*, 924 S.W.2d 357, (Ct. of App. Tenn. 1996) (breach of fiduciary duty causing economic damages subject to three year statute of limitations for injury to personal property), citing Tenn. Code Ann. §28-3-105 (three year statute of limitations for injury to personal property). Thus, Tennessee's period of limitation is the same as New York's. The claim that Bernstein forfeited his legal fee based on breach of fiduciary duty is time-barred as the breaches consisted of receiving equity under the First Amendment in March 2000 and not including terms in the Operating Agreement in 1999, more than three years before the amended counterclaims were served in June 2006.

*5. Continuous Representation under Tennessee Law*

Tennessee courts apply the discovery rule and reject the continuous representation doctrine. *Tenn-Fla Partners v. Shelton*, 2007 Tenn. App. LEXIS 101 (Tenn. Ct. App. 2007) (n.o.r.)(continuing representation rule inconsistent with discovery rule); *Cherry v. Williams*, 36 S.W.3d 78 (Tenn. Ct. App. 2000)(n.o.r.)(continuing treatment exception subsumed into the discovery rule);*Wilson v. Pickens*, 196 S.W.3d 138, 142 (Tenn. Ct. App. 2005)(malpractice statute begins to run from the date when client has actual or constructive notice of facts that reasonably give notice of injury caused by defendant). Its case law holds that it is not necessary for the client to know that the defendant's conduct was below the standard of care, *Wilson v. Pickens, supra.*, or the specific type of legal claim he has in order for the statute to commence running, *John Kohl &*

*Co. P.C. v. Dearborn & Ewing*, 977 S.W.2d 528 (Sup. Ct. Tenn. 1998) (discovery rule composed of two elements: plaintiff must suffer actual injury as a result of defendant's wrongful or negligent conduct, and plaintiff must have known, or in exercise of reasonable diligence should have known, injury was caused by said conduct).

In this case, the Corporation had notice in 1999 that the Operating Agreement did not include Bernstein's alleged promises when it was signed by Rizk, to whom the promises allegedly were made. Moreover, Rizk was aware that Bernstein was acting as the Corporation's lawyer. Therefore, all the facts were known at the latest in 1999. The rule regarding conflicted representation is a legal theory, not a fact.

In addition, the claims based on the First Amendment, which was executed by all members and managers in March 2000, put the Corporation on inquiry notice when it was signed that Bernstein was receiving increased equity for a specific price. Accordingly, the unjust enrichment and constructive trust claims based on the First Amendment cannot be extended under the Tennessee statute of limitations.

The unjust enrichment and breach of fiduciary duty claims seeking to recover legal fees received by Bernstein also must be dismissed under the shorter Tennessee statutes of limitation because they stem from the same alleged conflicts of interest: the omission of terms in the Operating Agreement and Bernstein's increased equity interest under the First Amendment. As a result, the Corporation was on inquiry notice of the alleged conflicts at the latest in March 2000, more than three years after the amended counterclaims were interposed. In conclusion, under Tennessee law, all of the Corporation's claims are time-barred, and there is no applicable tolling provision because all of the alleged conflicts of interest are referable to events in 1999 or March 2000 of which the Corporation was on inquiry notice. Accordingly, it is

ORDERED that the motion by Jonathan Bernstein to dismiss the first, third and seventh causes of action in the counterclaims of Tractmanager, Inc., to the amended complaint, dated July 20, 2006, is granted in all respects and said amended counterclaims hereby are dismissed with prejudice, with costs to the movant; and it is further

ORDERED that Jonathan Bernstein's first cross-claim against Thomas Rizk for indemnity and/or contribution is dismissed as moot in light of the dismissal of the counterclaims against Bernstein; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: May 18, 2007

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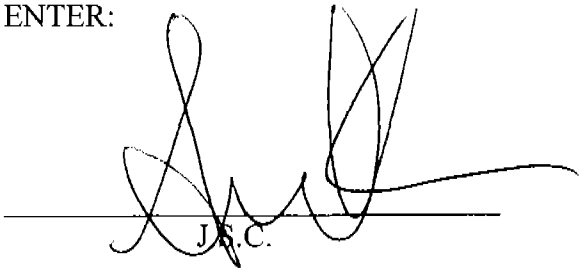

J.S.C.