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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

BARNETT GUTHARTZ,

Plaintiff(s),

-against-

MOTION DATE: 4/18/08
INDEX No.:14567/07
MOTION SEQUENCE NO:4

CAL. NO.:

FIRST WALL STREET SECURITIES OF NEW YORK, INC.,

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	1-3
Answering Affidavits.....	4-7
Replying Affidavits.....	8,9

Upon the foregoing papers, it is ordered that this motion by plaintiff for an order pursuant to CPLR 3211(a)5,6,7 and 10 dismissing defendant's counterclaims is denied as to the first counterclaim with leave to renew as to the issue of statute of limitations. On the court's own motion, the second, third, and fourth counterclaims are transferred to Surrogate's Court, Nassau County.

This action for fraud, conversion, and breach of contract is part of a larger family dispute between plaintiff Barnett Guthartz and his adult son, Alan. Plaintiff's wife, Frieda Guthartz, died intestate in Florida on November 14, 1998. At the time of her death, Frieda was the owner of a home located at 16 Lake Road in Lake Success. Shortly after Frieda's death, Alan and his wife, Ona, moved into the house and made improvements to the property. Alan asserts that plaintiff promised to convey the house to him in settlement of various business disputes which Alan had with his father as well as Alan's interest in his mother's estate.

However, Alan and his father were unable to resolve their differences. In 2006, plaintiff filed a petition for letters of administration with the Nassau County Surrogate's Court and demanded that Alan and Ona vacate the premises. Alan cross-petitioned to be appointed as his mother's administrator. Because of extreme acrimony between Alan and his father, and questions as to their fitness to serve as fiduciaries, the Surrogate issued letters of temporary administration to the Public Administrator(*In re Frieda Guthartz*, Surrogate's Court, Nassau County, No. 343312 [Sept 20, 2007]).

Defendant First Wall Street Securities of New York, Inc. is wholly owned by Ona Guthartz and is under the control of Alan. In February 2004, plaintiff paid $16,455.07 to First Wall Street

based on Alan's representation that he would pay off an outstanding tax lien on the Lake Success property. Plaintiff alleges that instead of paying off the tax lien, First Wall Street purchased the lien in its own name. Plaintiff claims that in August 2006 he was required to pay $23,037.10 to the Nassau County Treasurer to satisfy the lien, and that he has been damaged in the amount of the additional funds expended.

In August and September of 2004, plaintiff paid $34,000 to First Wall Street. Plaintiff alleges that Alan represented that the funds would be used to install a "vertical lift" in the house and that any excess funds would be returned to plaintiff. Although the lift was installed, First Wall Street did not pay the contractor and has refused to return the $34,000 to plaintiff.

Finally, plaintiff alleges that over a period of several years, he advanced $10,000 to First Wall Street upon its representation that an investment account would be established for his benefit. Plaintiff alleges that First Wall Street has refused to account to him for the funds which were to be invested.

Plaintiff commenced this action, seeking to recover the funds advanced to First Wall Street, on August 17, 2007. By order dated February 4, 2008, the court directed plaintiff to accept defendant's answer as timely served as of November 15, 2007. Defendant's answer contains four counterclaims for breach of contract. Plaintiff moves to dismiss the counterclaims on a variety of grounds, including statute of limitations, failure to state a cause of action, and lack of standing on the part of First Wall Street to assert a claim in favor of Alan.[1] Plaintiff also moves to dismiss the counterclaims on the ground of failure to join certain necessary parties, including Frieda's estate. The court will discuss the substance of the counterclaims before proceeding to consider plaintiff's motion.

First counterclaim

Defendant alleges that on March 7, 2000 it entered into an agreement with plaintiff and/or 4685 Haverhill, Inc., a family-owned corporation controlled by plaintiff. The agreement provides that plaintiff or 4685 Haverhill "will deliver to the account of Owners, [First Wall Street Securities, Ona or Jason Guthartz] for the benefit of Owners, the sum of $162,069.93 verses [sic] the receipt

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[1]Plaintiff purports to rely upon CPLR 3211(a)(5)(6)(7) and (10). CPLR 3211(a)(6) provides that "with respect to a counterclaim, it may not properly be interposed in the action." While a motion to dismiss a counterclaim may be based upon any of the grounds of CPLR 3211(a), paragraph 6 applies uniquely to counterclaims(Practice commentary 3211:22). The court interprets plaintiff's objection to defendant's suing on claims in favor of Alan as a matter of standing rather than improper interposition of a counterclaim.

of 12,000 shares of State Bancorp Inc."[2] The agreement further provides that owners shall "retain all rights and all dividends" to the stock and "they [plaintiff or 4685 Haverhill] will not sell or in any way dispose of" the stock for ten years. The agreement provides that "owners may reclaim and will have said shares immediately returned by" plaintiff upon the payment of $162,069.93. Defendant alleges that plaintiff never "fulfilled the agreement," and defendant was damaged in the amount of $250,000.

Second counterclaim

The second counterclaim is based on an agreement between Alan and Frieda Guthartz.[3] The agreement recites that Alan desired to borrow $250,000 worth of bearer bonds and promised to pay interest to Frieda at the prime rate. The parties anticipated that the bonds would be "New York City General Obligation issue." Although the agreement is undated, it provided that the bonds were to be forwarded to Alan by February 15, 1992. The agreement is signed by Frieda and Alan. While the agreement purports to be "guaranteed" by plaintiff, it is unclear whether plaintiff was guaranteeing Frieda's obligation to provide the bonds or Alan's obligation to pay interest and return the securities. Since plaintiff's guarantee is located underneath Alan's signature, it could be argued that plaintiff was acting as guarantor for Alan. Nevertheless, defendant alleges that plaintiff never "fulfilled the agreement," and defendant was damaged in the amount of $250,000.

Third counterclaim

The third counterclaim is based on another undated agreement between Alan and Frieda Guthartz.[4] The agreement provides that Frieda agrees to "establish a $7 million line of credit" for U.S. Funding Corp., presumably another company controlled by Alan, or one of its subsidiaries. Frieda was to establish the line within 7 days of being requested by U.S. Finding or Alan. The agreement further provides that Frieda shall receive 1,000 non-voting shares of U.S. Funding stock "on each and every anniversary that the credit line is outstanding." It is unclear whether the stock was intended to compensate Frieda for "establishing" the line of credit or to penalize Alan for allowing the line to remain outstanding. The agreement is signed by Frieda and Alan and purports to be "guaranteed" by plaintiff. As with the bearer bond agreement, it is unclear whose performance

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[2]See Ex. B to affirmation of Robert Wilkie, Esq. in opposition to motion to dismiss. Although Jason Guthartz' relationship to the parties is unclear, plaintiff asserts that he is a necessary party to the present action.

[3]The agreement is annexed as Ex. B to defendant's answer. See Ex. B to plaintiff's motion to dismiss defendant's counterclaims.

[4]The agreement is annexed as Ex. C to defendant's answer. See Ex. B to plaintiff's motion to dismiss defendant's counterclaims.

was being guaranteed. Nevertheless, since plaintiff's guarantee appears underneath Frieda's signature, he was arguably guaranteeing her promise to establish the line. Defendant alleges that plaintiff never established the line of credit, and defendant was damaged in the amount of $7 million.

Fourth counterclaim

The fourth counterclaim is based on an undated agreement between Frieda Guthartz and U.S. Funding Corp.[5] The agreement provides that Frieda agrees to purchase 50,000 shares of U.S. Funding stock at a price of $9.25 per share. Payment for the stock was to be made in equal installments over a 12-month period, commencing February 25, 1992. Frieda was to pay interest on the outstanding balance of the purchase price at the prime rate. The agreement was signed by Frieda and by Alan on behalf of U.S. Funding. This agreement also purports to be "guaranteed" by plaintiff. Since plaintiff's guarantee appears underneath Frieda's signature, he was arguably guaranteeing her promise to pay for the shares. Defendant alleges that plaintiff never "fulfilled his obligation," and defendant was damaged in the amount of $462,500.

Discussion

Although Supreme Court has authority to hear and resolve all causes in law and equity, the Surrogate's Court is the primary forum for proceedings involving estates and intestacies (*Pollicina v. Misericordia Hospital*, 82 NY2d 332, 339). CPLR § 325(e) provides that where the administration of a decedent's estate is affected, Supreme Court, upon motion, may remove an action to Surrogate's Court, upon the Surrogate's Court's prior order. Although CPLR § 325(e) purports to require a prior order by Surrogate's Court, the State Constitution empowers the Supreme Court to transfer actions over which it has concurrent jurisdiction to the Surrogate's Court without the Surrogate's prior order(*Benjamin v. Morgan Trust Co.*, 173 AD2d 373). Despite the provision in CPLR § 325(e) that the transfer be "upon motion," Supreme Court has discretion to transfer an action to Surrogate's Court sua sponte(*Johnson v. Stafford*, 18 AD3d 324). Although CPLR § 325(e) does not mandate removal, the interests of judicial economy dictate a strong preference for removal to Surrogate's Court of all matters affecting the administration of a decedent's estate(*Lawrence v.Miller*, 48 AD3d 1, 6).

Although neither party has made a motion to transfer, defendant asserts that "these same matters are being tried concurrently in Surrogate's Court."[6] In the interests of judicial economy, the court will consider the extent to which adjudication of the counterclaims will affect the administration of Frieda's estate before reaching the merits of plaintiff's motion.

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[5]The agreement is annexed as Ex. D to defendant's answer. See Ex. B to plaintiff's motion to dismiss defendant's counterclaims.

[6]Affirmation of Robert Wilkie in opposition to plaintiff's motion to dismiss at ¶ 8.

The second, third, and fourth counterclaims are based upon guarantees issued by plaintiff and allegedly running in favor of Alan. Where a guarantee states that it is primary and unconditional and binds the guarantor to pay immediately upon the default of the debtor, it is considered to be a guarantee of payment(*Milliken & Co. v. Stewart*, 182 AD2d 385, 386). Upon default by the principal, a creditor may proceed directly against a guarantor of payment without attempting to proceed first against the principal(Id). On the other hand, a guarantor of collection binds himself only after attempts to obtain payment from the principal debtor have failed(*In re Ideal Mutual Ins. Co.*, 231 AD2d 59, 64).

If plaintiff issued a guarantee of payment, Alan may assert a claim on the guarantee without first attempting to obtain payment from Frieda's estate. However, if plaintiff issued a guarantee of collection, before proceeding on the guarantee, Alan must first attempt to collect from the estate. Because none of the guarantees state that they are primary or unconditional, it seems likely that they are guarantees of collection. If that be the case, Alan must proceed against Frieda's estate and the administration of the estate will be affected.

Plaintiff argues that First Wall Street lacks standing to assert a counterclaim based on any of the guaranties because it is not a party to the contracts. However, an undisclosed principal may sue on a contract made in its agent's name(*Aymes v. Gateway Demolition, Inc.*, 30 AD3d 196). Since First Wall Street was in the securities business, it may well have been the undisclosed principal for whom the bearer bonds and U.S. Funding stock contracts were made. Because of the size of the line of credit and because subsidiaries of U.S. Funding were to have access to the line, the court cannot conclude that First Wall Street had no legal or equitable interest in the line of credit agreement(*Sardanis v. Sumitomo Corp.*, 282 AD2d. 322). Thus, First Wall Street may have standing to enforce the guarantee agreements, and the administration of Frieda Guthartz' estate will be affected. Accordingly, pursuant to CPLR § 325(e), the second, third, and fourth counterclaims are transferred to the Surrogate's Court, Nassau County.

Frieda Guthartz is not a party to the agreement concerning the State Bancorp stock, which forms the basis of the first counterclaim. On the other hand, defendant asserts that its counterclaim based on the agreement is being tried in the Surrogate's Court. Moreover, the court has been informed that Alan submitted a claim against his mother's estate for $162,069, the exact amount that plaintiff was required to deliver to First Wall Street pursuant to the terms of the agreement. Nevertheless, it may be that Alan asserted a claim against Frieda's estate based on the mistaken belief that she was a party to the State Bancorp agreement. Accordingly, the court will not transfer the first counterclaim to Surrogate's Court without a prior order from that court. The court will proceed to consider the merits of plaintiff's motion to dismiss with respect to the first counterclaim.

The court notes that the unsigned memorandum evidencing the State Bancorp stock agreement was not annexed as an exhibit to defendant's answer. Instead, defendant annexed an "authorization to transfer," which was apparently intended to implement the agreement by authorizing First Wall Street to transfer the stock to 4685 Haverhill. Since the authorization to transfer makes no reference to Barnett Guthartz, plaintiff argues that he is not a party to the

agreement and defendant has not stated a cause of action for breach of contract. It would have been better practice for defendant to annex a copy of the State Bancorp agreement to its pleading(See *Int'l Oil Field Supply Services Corp. v. Fadeyi*, 35 AD3d 372, 375). The memorandum has nonetheless been submitted as Ex. B to defendant's affirmation in opposition to the dismissal motion. The memorandum clearly identifies plaintiff as a party to the contract.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction....[The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory"(*Arnav Industries, Inc. v. Brown*, 96 NY2d 300, 303 [2001]).

Where a parent and an adult child negotiate a contract at arm's length, it is legally enforceable(See *Chernow v. Chernow*, 39 AD3d 684). However, the contract may be voidable if the parent was subject to undue influence by the child(*Pacchiana v. Pacchiana*, 94 AD2d 721). In opposition to plaintiff's motion to dismiss, defendant asserts, "The court should pierce the corporate veil and not assume that these are arm's length transactions."[7] Nevertheless, the court understands defendant's position to be that while Alan and his father may not have followed corporate formalities with respect to the family-owned businesses, they intended their agreements to be legally enforceable. Giving defendant the benefit of every favorable inference, the court will assume that the State Bancorp agreement was negotiated at arm's length and Alan did not exercise any undue influence on his father.

Defendant does not allege the purpose in transferring the State Bancorp stock to 4685 Haverhill. Since First Wall Street was involved in the securities business, the agreement may have been a "stock parking" arrangement to conceal the beneficial ownership of the stock and avoid or delay the filing of required disclosure(See *SEC v. Bilzerian*, 29 F.3d 689, 693 [D.C. Cir. 1994]). On the other hand, the purpose of the agreement may simply have been to lend defendant $162,069.93 and to transfer the 12,000 shares of State Bancorp to plaintiff as collateral. Since the court is required to give defendant the benefit of every possible favorable inference, the court will assume that the agreement had a proper purpose rather than an illegal one. As defendant alleges that plaintiff never "fulfilled" the agreement, the court will further assume that plaintiff breached the agreement by failing to make the promised loan. Since the first counterclaim states a cause of action for breach of contract, plaintiff's motion to dismiss the first counterclaim for failure to state a cause of action is denied.

Plaintiff argues that the first counterclaim should be dismissed for failure to join 4685 Haverhill, which was one of the parties to the State Bancorp stock agreement. CPLR § 1001(a) provides that, "Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." Since 4685 Haverhill was a family-owned corporation under plaintiff's control, it may be considered plaintiff's alter ego for purposes of the

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[7]Affirmation of Robert Wilkie at ¶ 6.

present motion. The "authorization to transfer" suggests that 4685 Haverhill may have been the nominee in which First Wall Street had intended to park the stock. The court concludes that complete relief may be accorded between plaintiff and First Wall Street without joining 4685 Haverhill. The court also notes that pursuant to CPLR § 1501 it is not necessary to join all of the parties to the contract in an action based upon a joint contract or obligation. Thus, 4685 Haverhill is not a necessary party to the first counterclaim. Accordingly, plaintiff's motion to dismiss the first counterclaim for failure to join a necessary party is denied.

Alternatively, plaintiff moves to dismiss the first counterclaim based on the statute of limitations. CPLR § 213(2) provides that an action upon a contractual obligation must be commenced within six years. The statute of limitations begins to run when the cause of action accrues(CPLR § 203[a]). A cause of action for breach of contract accrues at the time of the breach(*Ely-Cruikshank Co. v. Bank*, 81 NY2d 399, 402 [1993]). When a contract is silent as to the time within which it is to be performed, performance is due within a reasonable time under the particular circumstances(*Boone Associates v. Leibovitz*, 13 AD3d 267). Thus, whatever the purpose in transferring the stock, plaintiff was required to deliver $162,069.93 to First Wall Street within a reasonable time after the contract was formed. Neither plaintiff nor defendant specifies a time when the funds were to be tendered or states whether a demand for the funds was made. Nevertheless, if a reasonable time for plaintiff to tender the funds was a year, defendant's counterclaim for breach of contract accrued by March 7, 2001 and would have been barred when defendant served its answer on November 15, 2007(CPLR § 203[d]). Thus, defendant's first counterclaim appears to be barred unless plaintiff is estopped from asserting the statute of limitations.

The doctrine of equitable estoppel applies where it would be unjust to allow a defendant to assert a statute of limitations defense(*Zumpano v. Quinn*, 6 NY3d 666, 673). Plaintiff must establish that subsequent and specific actions by defendant somehow kept plaintiff from timely bringing suit(Id at 674). Thus, defendant will be equitably estopped from asserting the statute of limitations if plaintiff was induced by fraud, misrepresentation, or deception to refrain from filing a timely action and plaintiff reasonably relied on defendant's misrepresentation(Id). Where concealment without actual misrepresentation is claimed to have prevented plaintiff from commencing a timely action, plaintiff must demonstrate a fiduciary relationship which gave defendant an obligation to inform him of facts underlying the claim(Id at 675). Plaintiff must also establish that defendant's failure to inform him of those facts contributed to his delay in bringing the action(Id at 676).

Defendant argues that an equitable estoppel arose by virtue of plaintiff's allowing Alan and his wife to possess the Lake Success home after Frieda's death and to make substantial improvements to the property. Had First Wall Street commenced an action on the agreement earlier, plaintiff might have responded by evicting Alan and Ona from the premises. Nevertheless, Alan knew that the funds were never tendered. While plaintiff's providing Alan and his wife with a residence may have encouraged Alan to refrain from suit, there was no specific action on plaintiff's part which prevented Alan from bringing a timely breach of contract action.

Alternatively, defendant argues that a fiduciary relationship arose by virtue of the parties' family relationship and plaintiff concealed facts underlying defendant's claim. A fiduciary relationship exists between two persons when one of them is under a duty to act for or give advice for the benefit of another upon matters within the scope of the relation(*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 19). While a fiduciary duty ordinarily arises from an agreement between the parties, it is not dependent solely upon an agreement but results from the relation(Id at 20). If an adult child looks to his parents for "advice and guidance" with respect to a particular matter, there may arise a corresponding fiduciary obligation(*Mendel v. Hewitt*, 161 AD2d 849). "In confidential family relationships, mutual understanding does not always depend upon words expressly uttered, and silence in the presence of conditional assertions may constitute tacit consent and a promise to comply with the conditions"(*Djamoos v. Djamoos*, 153 AD2d 871, 872).

Giving defendant the benefit of every favorable inference, the court must assume that Alan looked to his father for advice and guidance concerning their various business dealings and a fiduciary duty arose with respect to the agreement concerning the State Bancorp shares. Alan and Ona were already living in the Lake Success house when the State Bancorp agreement was formed. Plaintiff may have remained silent in the face of Alan's assertions that he should be permitted to remain in the house if he refrained from bringing suit. Thus, plaintiff's failure to inform Alan as to his intent to evict him may have contributed to Alan's delay in bringing a breach of contract action.

Plaintiff's motion to dismiss the first counterclaim based on the statute of limitations raises issues which cannot be decided upon the papers submitted to the court. Accordingly, the motion is denied without prejudice to renewal upon a showing as to the time of performance for the State Bancorp agreement and the absence of a fiduciary relationship between plaintiff and Alan. Pending a decision by Surrogate's Court as to transfer, this court declines to order an immediate trial of the issues raised on the dismissal motion(CPLR 3211[c]).

The clerk of the court is directed to forward a copy of this decision to the clerk of the Nassau County Surrogate's Court.

Dated: JUN 10 2008

J.S.C.

ENTERED

JUN 13 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE