

Backman v Israel Bio-Engineering Project, L.P.

2008 NY Slip Op 33020(U)

October 31, 2008

Supreme Court, New York County

Docket Number: 600043/08

Judge: Richard B. Lowe

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

HON. RICHARD B. LOWE, JR.

PRESENT: _____
Justice

PART 52

Index Number : 600043/2008

BACKMAN, IRVING A.

vs

ISREAL BIO-ENGINEERING

Sequence Number : 004

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is motion to/for _____

PAPERS NUMBERED

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

FILED


NOV 07 2008

COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 10/31/08



HON. RICHARD B. LOWE, JR.
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 56

-----X
IRVING A. BACKMAN,

Plaintiff,

-against-

Index No. 600043/08

ISRAEL BIO-ENGINEERING PROJECT, L.P. and
NEWTON BECKER, both personally and as he is
Liquidating Trustee of defendant Israel Bio-
Engineering Project, L.P.,

Defendants.

-----X
RICHARD B. LOWE III, J.:

This is a motion by the defendants Israel Bio-Engineering Project, L.P. (Israel Bio-Engineering) and Newton Becker (Becker), pursuant to CPLR 3211, for an order dismissing the amended complaint.

FILED
NOV 07 2008
COUNTY CLERK'S OFFICE
NEW YORK

Background

The defendant Israel Bio-Engineering was formed in 1982 for the purpose of funding, developing, and manufacturing human interferon, using recombinant DNA techniques. Upon the death of its sole general partner in 1990, by the terms of the partnership agreement, Israel Bio-Engineering dissolved. Since 1992, the defendant Becker, as liquidating trustee, has been in charge of distributing Israel Bio-Engineering's assets. The plaintiff Irving A. Backman (Backman) is an investor in Israel Bio-Engineering.

The amended complaint alleges that, despite the fact that Israel Bio-Engineering is receiving substantial royalties and licensing fees, insufficient distributions are being made to the limited partners. It is also alleged that the defendant Becker has refused to acknowledge

Backman's ownership of his full number of partnership units; refused to account for Israel Bio-Engineering's transfers of funds; and refused to distribute any money to the plaintiff Backman. The amended complaint sets forth causes of action for a declaratory judgment (first), an accounting (second), breach of fiduciary duty (third and fifth), breach of contract (fourth and seventh), and fraud (sixth).

The defendants make the following arguments in support of their motion to dismiss: (1) the claims for an accounting, breach of fiduciary duty, a declaratory judgment and breach of contract are all time barred; (2) the breach of fiduciary duty claim is duplicative of the contract claim; (3) the fraud claim fails to state a cause of action ; (4) the claim for breach of the implied covenant of good faith is duplicative of the breach of contract claim; and finally, (4) the continuing breach doctrine is inapposite here.

In opposition, the plaintiff Backman makes the following arguments: (1) none of the first four causes of action should be dismissed as untimely, both because Backman was not injured until less than two years prior to the filing of this action, and because Backman seeks an accounting from a partnership which, although dissolved in name, is still actively collecting royalties and distributing money; and (2) the final three causes of action are not duplicative, as they set forth different theories of recovery based on different wrongful actions, and are pled with specificity to inform the defendants of the substance of the claims.

Discussion

On a motion pursuant to CPLR 3211 (a) (7) to dismiss a complaint for legal insufficiency, the court accepts the facts alleged as true and determines simply whether the facts alleged fit within any cognizable legal theory (*Morone v Morone*, 50 NY2d 481 [1980]). The pleading is to be liberally construed, accepting all the facts alleged therein to be true, and

according to the allegations the benefit of every possible favorable inference (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 [2002]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The credibility of the parties is not under consideration (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]).

On a motion pursuant to CPLR 3211 (a) (5) to dismiss a cause of action on the ground that it is barred by the statute of limitations, the movant bears the initial burden of establishing prima facie that the time in which to sue has expired. Once this initial showing is made, the burden shifts to the proponent to allege evidentiary facts establishing an exception to the statute of limitations (*Swift v New York Medical College*, 25 AD3d 686 [2d Dept 2006]).

The first cause of action seeks a judgment declaring the number of limited partnership shares owned by Backman and Becker. CPLR 3001 authorizes a court to declare "the rights and other legal relations of the parties to a justiciable controversy," providing a procedure for parties to resolve disputes over existing rights and obligations (*Lang v Hanover Ins. Co.*, 3 NY3d 350 [2004]). In order to determine the statute of limitations applicable to a particular declaratory judgment action, the substance of the action must be examined to identify the relationship out of which the claim arises and the relief sought (*Solnick v Whalen*, 49 NY2d 224 [1980]).

A cause of action sounding in breach of fiduciary duty may be governed by either a three-year or six-year limitations period, depending on the nature of the substantive relief sought by the plaintiff (*Santulli v Englert, Reilly & McHugh, P.C.*, 78 NY2d 700 [1992]).

Here, examining the substance of the action, the nature of the relief sought, and identifying the relationship out of which the claim arises, the statute of limitations applicable to the first cause of action for a declaratory judgment, and the third and fifth causes of action for breach of fiduciary duty is the six-year statute of limitations which is applicable to accounting

claims (second cause of action) contract (fourth and seventh causes of action), and fraud (sixth cause of action) (CPLR 213 [1] and [2] and [8]).

Turning to question of when the causes of action accrued, the defendants argue that the action is time-barred pursuant to Partnership Law § 74 because the causes of action for an accounting, breach of contract, and fraud accrued in 1990, the date the partnership, by its terms, dissolved upon the death of its general partner, and this action was untimely commenced more than six years later in August 2007.

Partnership Law § 74 provides:

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.

Contrary to the defendants' assertion, the causes of action did not accrue in 1990. The accrual date with respect to the applicable statute of limitations in accounting cases is not, as the defendants contend, the date of the appointment of the winding-up partner. Rather, a cause of action against a liquidating trustee for an accounting accrues when the liquidation is complete (*Spallholz v Sheldon*, 216 NY 205 [1915]; *Bernstein v La Rue*, 120 AD2d 476 [2d Dept 1986]; *Bankers Trust Co. v Dennis*, 256 App Div 495 [1st Dept 1939] *affd* 282 NY 635 [1940]). Therefore, the burden never shifted to the plaintiff to allege evidentiary facts establishing that the case falls within an exception to the statute of limitations (*Reiner v Jaeger*, 50 AD3d 761 [2d Dept 2008]).

Although this lawsuit includes claims dating back as much as 18 years, the claims are timely, as the facts underlying the breach of contract, breach of fiduciary duty and fraud claims are intertwined with and directly related to the plaintiff Backman's demand for an accounting

under Partnership Law § 74 (*Fuchsberg & Fuchsberg v Fuchsberg*, 2 AD3d 158 [1st Dept 2003]).

The claims accrued, and the six-year statute of limitations began to run, at the earliest, upon the alleged breach on January 22, 2006, when Israel Bio-Engineering made its first distribution and failed to distribute a share to Backman. Clearly, this action was instituted within the required six-year statutory period. Therefore, the motion to dismiss as untimely the causes of action for a declaratory judgment, an accounting, breach of fiduciary duty, breach of contract, and fraud must be denied.

A cause of action sounding in fraud must be commenced either within six years from the date of the fraudulent act, or two years from the date the party discovered the fraud or could, with due diligence, have discovered it (CPLR 213 [8]). There is nothing to support a finding that the plaintiff Backman was on inquiry notice of the alleged fraud, and could have, with reasonable diligence, discovered the alleged fraud well before the beginning of the two-year period. The defendants' submission does not establish that the plaintiff Backman was aware of enough operative facts so that, with reasonable diligence, he could have discovered the fraud (*Aldrich v Marsh & McLennan Cos., Inc.*, 52 AD3d 435 [1st Dept 2008]). In fact, the plaintiff Backman alleges that the information was withheld from him, making it impossible to have discovered the fraud earlier than he actually did.

Finally, the amended complaint adequately pleads separate causes of action for breach of fiduciary duty, and fraud. Those in control of a business must deal fairly with the interests of the other investors and a managing partner of a limited partnership is bound in a fiduciary relationship with the limited partners (*Lichtyger v Franchard Corp.*, 18 NY2d 528 [1966]). Any fraud by a managing partner necessarily constitutes a violation of that duty (*Appleton*

Acquisition, LLC v National Hous. Partnership, 10 NY3d 250 [2008]).

In every contract there exists an implied covenant of good faith and fair dealing. A violation of such a duty is treated as a breach of contract (*Dalton v Educational Testing Serv.*, 87 NY2d 384 [1995]; *Kirke La Shelle Co. v Paul Armstrong Co.*, 263 NY 79 [1933]). Contrary to the defendants' assertion, the amended complaint does not set forth a separate cause of action for breach of the implied covenant of good faith. Therefore, since the references in the amended complaint to a breach of good faith are intrinsically tied to the damages allegedly resulting from a breach of the contract, they will not be stricken.

Enough is stated in the complaint to meet the pleading standard for a declaratory judgment, set forth in CPLR 3001 and 3017 (b). An action for a declaratory judgment is one that seeks to have the court establish and promulgate the rights of the parties on a particular subject matter (*James v Alderton Dock Yards*, 256 NY 298 [1931]). The declaratory judgment action requires a justiciable controversy between genuine disputants with a stake in the outcome (*Jacob Goodman & Co. v New York Tel. Co.*, 309 NY 258 [1955]; *Self-Insured's Assn. v State Indus. Commr.*, 224 NY 13 [1918]). Declaratory judgment actions are broadly used in contract actions.

Further, since the identity of the partners has yet to be determined, any failure to name all of the partners in this action may be corrected at a future time (*Miske v Berdon*, 189 AD2d 594 [1st Dept 1993]).

Conclusion

Accordingly, it is


ORDERED that the motion to dismiss is denied; and it is further

ORDERED that the defendants serve and file a responsive pleading within 10 days of

service of a copy of this order with notice of entry.

Dated: October 31, 2008

ENTER:



HON. RICHARD G. LANGE, Jr.
J.S.C.

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