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SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 9

NORMAN ANNEXSTEIN,

Plaintiff

INDEX NO.: 016049/2007
MOTION DATE: 02/03/2009
MOTION SEQUENCE: 001 and 002

- against -

ALLEN LEWINTER and TOPKAT ADVANTAGE GROUP, LLC,

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation, Affidavit & Exhibits Annexed 1
Notice of Cross-Motion, Affirmation & Exhibits Annexed 2
Affirmation in Opposition of Brian R. Feinstein, Esq., Affidavit in Opposition of Norman Annexstein & Exhibits Annexed 3

PRELIMINARY STATEMENT

The Plaintiff moves for summary judgment to compel an accounting by the Defendants. The Defendants cross-move for dismissal of the complaint on the basis of the statute of limitations and on the further ground that the Complaint fails to state a claim upon which relief can be granted.

BACKGROUND

The Plaintiff and another individual, Kenneth Weinstein, each contributed $50,000 for the purchase of a 2½ % membership interest in Topkat Advantage Group, LLC (Topkat).

According to the complaint, Topkat is in the business of supplying business development, brand recognition, marketing and promotional activities. Under cover letter of August 29, 2000 the parties forwarded two checks, each in the amount of $50,000. Eventually Weinstein received a refund of his $50,000, but Annexstein did not.

The complaint alleges seven causes of action. The First claims that on and after October 21, 2000 the Defendants have breached both a Membership Agreement, and Fiduciary obligations, in that they have failed to provide business disclosure, distribute profits, or other income, and have otherwise breached their obligations under the agreement. The Second Cause of Action alleges failure to account, misappropriation, and wrongful retention, beginning in August 2000. The Third claims entitlement to rescission and refund of $50,000, with interest from August 29, 2000.

The Plaintiff again alleges breach of the claimed 2000 Membership Agreement in the Fourth Cause of Action. The Fifth alleges an agreement to refund the investment on at least two occasions, the last being October 16, 2001. In the Sixth Cause of Action the Plaintiff claims that the Defendants committed fraud by misrepresenting their intention to perform and the prospect of substantial garment production business to be received by the Plaintiff as a result of his membership. The Seventh and last claim is that the Defendants have continued to secrete profits and revenue in an effort to deprive the Plaintiff of his partial membership rights.

DISCUSSION

The Plaintiff's motion is problematical in a number of respects. There are no copies of the pleadings annexed to the motion as required by Civil Practice Law and Rules § 3212 (b). But more importantly, the Plaintiff relies on an August 21, 2000 "Deal Memo" [1]among the parties. It is signed by the party to be charged, but is dated more than six years before the September 17, 2007 filing of the Summons and Complaint. The Defendant has annexed a copy of the complaint to the Cross-motion, so the Court will overlook the failure of the Plaintiff to comply with § 3212 (b).

The Plaintiff is a 2 ½ % member of Topkat by virtue of the August 21, 2000 memo and

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[1] Exh. "A" to Feinstein Affirmation in Opposition.

his payment of $50,000 to Topkat. As a member of the limited liability company, the Plaintiff is entitled to bring an action for an accounting. [2] The First Cause of Action claims breach of the Membership Agreement and the Fiduciary Relationship. To the extent that the Deal Memo may be termed an agreement, it does not impose any obligations upon Topkat or LeWinter to undertake any particular course of conduct. To the extent that the claim is for breach of contract, the September 17, 2007 filing is well beyond the six-year statute of limitations for contract actions. [3] Even if the breach occurred as late as August 23, 2001, when Defendants forwarded a sketchy statement of operations, the commencement of the action post-dated the expiration of the statute of limitations. To the extent the First Cause of Action is based upon breach of contract, it is barred by the Statute of Limitations.

The second aspect of the Cause of Action is premised on a breach of a Fiduciary Obligation. The application of the statute of limitations may limit the time within which to make a claim to three years, when the claim is for money damages, or six years if the relief sought is equitable in nature. [4] The manager of a limited liability company has a statutory duty to perform his duties "in good faith and with that degree of care that an ordinarily prudent person in like position would use under similar circumstances." [5] Because this cause of action seeks only equitable relief, the statute of limitations is six years.

The question, however, is when the six years began to run. In the Complaint, the Plaintiff alleges that:

> on and after October 21, 2001, LeWinter and Topkat, in breach of the Membership Agreement, the Fiduciary Relationship, and obligations imposed by law and agreement, have utterly failed to account to Annexstein, have failed to provide any financial and/or business disclosure to Annexstein concerning the financial and business affairs of Topkat, have failed to distribute any profits,

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[2] *East Quogue Jet, LLC v. East Quogue Members, LLC,* 50 A.D.3d 1089, 1091 (2d Dept. 2008).

[3] Civil Practice Law and Rules § 213.

[4] *Wiesenthal v. Wiesenthal,* 40 A.D.3d 1078, 1079 (2d Dept. 2005).

[5] *Nathanson v. Nathanson,* 20 A.D.3d 403, 404 (2d Dept. 2005).

> income or make other distribution, and have otherwise breached all obligations of the parties arising by agreement and imposed by law.

The claimed breach of the Fiduciary Relationship, therefore, occurred as of October 21, 2001, less than six years before the filing of the action. The evidence, however, may show that the fiduciary relationship was breached before September 17, 2001, which would make the action untimely; but there is presently no evidence in the record that would require a dismissal based upon the six-year statute of limitations. "A tort claim accrues as soon as 'the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in the complaint' ". [6] This, at the very least, produces a factual question so as to preclude dismissal as a matter of law. Consequently, the First Cause of Action insofar as it claims a breach of fiduciary duty, states a viable claim, and the Motion to dismiss it is denied.

The Second Cause of Action alleges failure to account, misappropriation, and wrongful or unlawful retention. The Plaintiff claims that this misconduct began in August 2000. The statute of limitations for fraud is six years from the commission or two years from the discovery, whichever is longer. [7] Certainly, six years have expired, since the Complaint alleges that the misconduct commenced on August 29, 2000. Any claim that the Plaintiff was not alerted to the reasonable likelihood that a misappropriation had taken place until not more than two years before the September 17, 2007 filing, is belied by the correspondence dated June 25, 2001, July 12, 2001, and July 19, 2001. [8] The tenor of that correspondence, and particularly the latter, was clearly to the effect that the Plaintiff and Mr. Weinstein, were, to say the least, "disappointed" in the lack of monetary distribution and financial reporting. The Plaintiff was copied on this correspondence, and apparently was also apprised by the Defendant LeWinter that he had agreed to return Mr. Weinstein's investment, which actually occurred.

An investor is not authorized to turn a blind eye to the circumstances surrounding his

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[6] *IDT v. Morgan Stanley,* 2009 WL 774351 (2009), quoting *Kronos, Inc. v. AVX Corp.,* 81 N.Y.2d 90, 94 (1993).

[7] Civil Practice Law and Rules § 213 (8).

[8] Exh. "C" to Exh. "A" to Cross-Motion.

investment, and claim unawareness of the potential of his having been defrauded for an indeterminate time. "The test as to when a plaintiff should have discovered an alleged fraud is an objective one." [9] The Court there quoted language from the Second Circuit as follows:

> " ' (W)here the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises and if he omits the inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him. ' *Higgins v. Crouse,* 147 N.Y. 411, 416".

The six-year statute of limitations is not tolled in this matter since the Plaintiff had a reasonable basis to suspect wrongdoing well in advance of the two years preceding the September 17, 2007 filing to commence the action. The Second Cause of Action is dismissed.

In the Third Cause of Action, the Plaintiff seeks refund of $50,000 with interest from August 29, 2000 and rescission of the Agreement. To the extent that one may consider the "Deal Memo" to be an Agreement, an action for rescission must be commenced within the statutory six-year period. [10] Again, if there is any agreement among the parties, it is the "Deal Memo" dated August 21, 2000, and the statute of limitations to rescind the contract would have to have been brought within six years of that date. The Third Cause of Action is Dismissed.

For the same reason the Fourth Cause of Action, alleging "utter breach and repudiation of the Membership Agreement, the Fiduciary Relationship and legal obligations imposed on the defendants by law and agreement" is dismissed. It simply reiterates the claim of breach of contract which the complaint otherwise alleges occurred on August 29, 2001, more than six years before the commencement of the action.

The Fifth Cause of Action alleges a promise on the part of the Defendant LeWinter in October 2001 to return the $50,000 investment to the Plaintiff. While there is documentation referable to the Defendant's promise to return Weinstein's investment, there is no such document indicating such a promise with respect to the Plaintiff. The lack of a writing does not bar an

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[9] *Prestandrea v. Stein,* 262 A.D.2d 621, 622 (2d Dept. 1999).

[10] Civil Practice Law and Rules § 213 (1).

action which can, by its terms, be completed within one year. [11] While the Plaintiff does not specify consideration for the promise to refund the money, this claim at least raises a factual issue as to whether or not such an agreement was reached, and whether or not it is enforceable. The alleged agreement, and its alleged October 16, 2001 reiteration, was within six years of the September 17, 2007 commencement of the action. The action was commenced by the filing of the Summons and Complaint, not the service thereof as claimed by the Defendants. [12] The motion to dismiss the Fifth Cause of Action is denied.

The Sixth Cause of Action claims that the Defendants fraudulently induced the Plaintiff to enter into a Membership Agreement. It fails for two reasons; the first of which is the Statute of Limitations, and the second of which is failure to adequately plead the elements of fraudulent inducement. The same reasoning for the dismissal of the claim for fraud applies to the claim of fraudulent inducement. The limitation period is six years, or two years from discovery, whichever is longer. [13] For the same reasons as previously stated, the Plaintiff has failed to preserve this action within the period of six years, or within two years from the time of reasonable discovery.

To state a claim for fraudulent inducement, the Plaintiff must allege and establish that the Defendant made a material factual misrepresentation, that the Defendant knew at the time of the falsity of the representation, that the misrepresentation was made with an intent to deceive, the Plaintiff justifiably relied upon the misrepresentation, and was damaged as a result of the reliance. [14] The complaint fails in this regard.

The Seventh Cause of Action, claiming fraud since the inception of the claimed Agreement, fails because of its failure to have been commenced within the six-year statute of limitations applicable to fraud. It also fails to plead the alleged fraud with the specific

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[11] General Obligations Law § 5-701.

[12] Civil Practice Law and Rules § 304.

[13] Civil Practice Law and Rules § 213 (8).

[14] *Leno v. DePasquale,* 18 A.D.3d 514 (2d Dept. 2005).

particularity required by statute. [15] They are essentially the same particularities to make a claim for fraudulent inducement. This Cause of Action is essentially a composite of the claims of breach of contract, failure to make distribution of profit, if any, and failure to produce business records. It does not adequately allege the specifics of the claimed fraud. For each of the foregoing reasons, the Seventh Cause of Action is Dismissed.

CONCLUSION

The Plaintiff's motion for summary judgment granting an accounting is denied since there is a factual issue as to when the breach of a fiduciary duty occurred, and, consequently, whether the claim is barred by the six-year statute of limitations.

Since there is no written Shareholders' or Operating Agreement before the Court, testimony is required as to the nature and extent of the obligations of the manager of the limited liability company to minority members.

The Defendants' motion for summary judgment dismissing the Complaint is granted as to the Second, Third, Fourth, Sixth and Seventh Causes of Action, and is denied as to the First and Fifth Cause of Action.

The Defendants' motion to dismiss the Complaint for failure to state a cause of action is granted as to the Sixth, and Seventh Causes of Action, and is in all other respects denied.

The matter is scheduled for a Certification Conference on April 29, 2009, at 9:30 A.M.

This constitutes the Decision and Order of the Court.

Dated: March 26, 2009

J.S.C.

[15] Civil Practice Law and Rules § 3016 (b).