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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present: HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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VICTOR J. DEFAZIO, JACK FINKELSTEIN, JAMES COLLINS AND HENRY GEBHARD, Individually and derivatively, on behalf of MERIDIAN GROUP HOLDINGS, LLC; MERIDIAN AMBULANCE GROUP, LLC; MERIDIAN BEHAVIORAL SCIENCES, LLP; MEDTRANSIT; MERIDIAN BEHAVIORAL HEALTH SCIENCES, LLP; MERIDIAN MSO, INC.; MERIDIAN MSO, LLC; UNIVERSITY CARE NETWORK, LLC,	NASSAU COUNTY
Plaintiffs,	Index No. 8715-08
-against-	Motion Seq. No. 1
KEVIN WALLIS; RYAN P. GREENBERG; THOMAS RYAN; ROBERT J. AQUINO; CAPITAL HEALTH MANAGEMENT, INC.; MERIDIAN GROUP HOLDINGS, LLC; MERIDIAN AMBULANCE GROUP, LLC; MERIDIAN AMBULANCE HOLDINGS, LLC; MERIDIAN BEHAVIORAL SCIENCES, LLP; MEDTRANSIT LLC; MERIDIAN BEHAVIORAL HEALTH SCIENCES, LLP; MERIDIAN MSO, INC.; MERIDIAN MSO, LLC; UNIVERSITY CARE NETWORK, LLC,	Submission Date: 5/8/09
Defendants.	
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The following papers having been read on this motion:

Notice of Motion, Affirmation in Support and Exhibits.....x
Affirmation in Opposition.....x
Reply Affirmation..... x

This matter is before the Court for decision on the motion filed by Defendants Kevin Wallis ("Wallis") and Ryan P. Greenberg ("Greenberg") on June 18, 2008 and submitted on May 8, 2009. [1] The Court heard oral argument on this motion on May 29, 2009. For the reasons set forth below, the Court grants Defendants' motion in part and denies it in part. Specifically, the Court 1) grants Defendants' motion to dismiss Plaintiffs' waste and conversion claims in the first and fourth counts of the Complaint as to acts committed on or before May 12, 2002, and otherwise denies Defendants' motion to dismiss those claims; 2) grants Defendants' motion to dismiss the third cause of action; and 3) denies Defendants' motion to dismiss the second and fifth causes of action.

BACKGROUND

A. Relief Sought

Defendants Wallis and Greenberg seek an Order: 1) dismissing Plaintiffs' first, third and fourth causes of action, pursuant to CPLR § 3211(a)(5), as time-barred under the applicable statute of limitations; 2) dismissing Plaintiffs' second and fifth causes of action, pursuant to CPLR § 3211(a)(7), for failure to state a cause of action; and 3) scheduling this matter for an evidentiary hearing, pursuant to CPLR § 3211(c), regarding the applicability of the statute of limitations defense.

B. The Parties' History

DeFazio, Finkelstein, Collins and Gebhard allege that they were fraudulently induced to invest in the business entities promoted by Defendants in that they relied upon Defendants'

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[1] This Court assumed responsibility for this case, and this motion, on May 8, 2009.

representations which Plaintiffs claim Defendants knew and or had reason to believe were false. They also assert that Defendants wasted Plaintiffs' money and assets and converted such money and assets to their own use, breached their fiduciary duty to the Plaintiffs and were unjustly enriched. These claims were the subject of a related federal lawsuit filed in the United States District Court for the Eastern District of New York on December 8, 2005, assigned Case Number CV-05-5712 ("Federal Complaint"). As it relates to Wallis and Greenberg, the Federal Complaint names Wallis and Greenberg as defendants, and contains eight (8) counts alleging that they 1) were employed by or associated with an enterprise(s) that engaged in racketeering activity in violation of 18 U.S.C.A. §§ 1962(a), (b) and (c) that caused injury to Plaintiffs; 2) breached their fiduciary obligation towards Plaintiffs; 3) committed a common law tort by making knowingly false representations regarding Plaintiffs in connection with an application for a line of credit; and 4) are liable for conversion and unjust enrichment by virtue of their improper retention of equipment and supplies on behalf of an entity in which Plaintiffs invested. Plaintiffs subsequently filed an amended complaint ("Amended Federal Complaint") dated December 14, 2006.

By Order dated July 14, 2007 ("2007 Order"), the Court (Spatt, J.) ruled on Defendants' motions to dismiss and for judgment on the pleadings. In the 2007 Order, the Court outlined the claims in the Federal Complaint and Amended Federal Complaint which included Plaintiff's allegations that: 1) Plaintiffs were induced to invest in Meridian Group Holdings ("MGH") and the affiliates through a series of misrepresentations by the individual defendants, during the period between April/May 2001 through December 2002, regarding a) Defendants' credentials, b) what Plaintiffs would receive in return for their investments, c) MGH's assets and d) other issues related to MGH's financial condition; and 2) Defendants forged Plaintiffs' signatures on an application for a line of credit with a particular bank, and misrepresented Plaintiffs' status in MGH, and ultimately defaulted on that loan, causing financial injury to Plaintiffs.

As it relates to Wallis and Greenberg, the 2007 Order: 1) granted Wallis and Greenberg's motion, pursuant to Federal Rules of Civil Procedure ("Fed. R. Civ. P.") 12(c) for judgment on the pleadings, in part and denied it in part; and 2) dismissed the federal Racketeer Influenced and Corrupt Organization ("RICO") claims. The Court declined to dismiss the state law claims

against Wallis and Greenberg (and other defendants) in light of the Court's retention of jurisdiction over the RICO causes of action against the non-moving defendants.

By Stipulation of Dismissal dated November 30, 2007, signed by counsel for Plaintiffs and Defendant Greenberg and so-ordered on December 19, 2007 (Spatt, J.), the Plaintiffs' Complaint was dismissed, without prejudice, as against Greenberg, except as to Counts I, II and III, which were dismissed with prejudice. Counts I, II and III allege violations of 18 U.S.C.A. §§ 1962(a), (b) and (c) (RICO counts). By Stipulation of Dismissal dated November 30, 2007, signed by counsel for Plaintiffs and Defendant Wallis and so-ordered on January 16, 2008 (Spatt, J.), the Plaintiffs' Complaint was dismissed, without prejudice, as against Wallis, except as to Counts I, II and III, which were dismissed with prejudice.

On May 12, 2008, Plaintiffs filed a Summons and Verified Complaint in Nassau County Supreme Court ("Complaint"), assigned Index Number 008715-08, that names numerous defendants, some of whom were named in the Federal Complaint, including Wallis and Greenberg. The Complaint contains five (5) causes of action alleging: 1) Waste by all Defendants, 2) Breach of Fiduciary Obligations by the four individual Defendants, including Wallis and Greenberg, 3) Common Law Tort against Wallis and Greenberg for allegedly false statements made about Plaintiffs in an application for a line of credit, 4) Conversion/Theft/ Embezzlement by the four individual Defendants, and 5) Unjust Enrichment by the four individual Defendants.

Plaintiffs DeFazio, Finkelstein, Collins and Gebhard, individually and on behalf of the named corporate Defendants, allege that they were fraudulently induced to invest in the business entities promoted by Defendants. They claim that they relied upon Defendants' representations which Plaintiffs claim Defendants knew and or had reason to believe were false. They also assert that Defendants wasted Plaintiffs' money and assets and converted such money and assets to their own use, breached their fiduciary duty to the Plaintiffs and were unjustly enriched.

With respect to Wallis, Plaintiffs allege that during the period of April or May 2001 through "at least" December 2002, Wallis, as either an owner or officer of MGH along with Aquino, Ryan and Greenberg and MGH and its affiliates, made certain misrepresentations to

Plaintiffs, including the following:

(1) that shares of stock would be issued to Defazio (July 10, 2001 and August 14, 2001), to Collins (July 10, 2001 and August 11, 2001) and to Finkelstein (July 16, 2001 and September 26, 2001) but were never issued;

(2) that Collins was promised 2% ownership of Capital, 3-5% ownership of Empress, a percentage of Approved Ambulance, a salary in excess of $100,000 per year, $1,500 a month in expenses and a company car;

(3) Plaintiff Finkelstein was promised 10-25% ownership in Meridian and affiliates, 15% of the ongoing ambulance operation, company car, expense account, profits, a salary and payment for work performed and expansion of the business;

(4) DeFazio was promised 10-15% return on his investement, a percentage of the ambulance company;

(5) in November/December 2001, Gebhard was falsely promised that in return for his loan, he would receive a job, medical benefits and return of his loan and, further, that Gebhard was induced to invest in a company that did not exist; and

(6) between July 2001 and April 2002, Wallis made numerous misrepresentations to certain Plaintiffs concerning the assets owned by the corporate Defendants as well as the status of contractual arrangements between the corporate Defendants and potential clients that bore on the financial stability of the corporate Defendants.

With respect to Greenberg, Plaintiffs allege that during the period of April or May 2001 through "at least" December 2002, Greenberg, as either an owner or officer of MGH along with Aquino, Ryan and Greenberg and MGH and its affiliates, made certain misrepresentations to Plaintiffs, including the following:

(1) between July 2001 and April 2002, Greenberg made numerous misrepresentations to certain Plaintiffs concerning the assets owned by the corporate Defendants as well as the status of contractual arrangements between the corporate Defendants and potential clients that bore on

the financial stability of the corporate Defendants;

(2) on July 8, 2001, Greenberg witnessed certain Plaintiffs providing a check to Wallis and participated in the false representation that the company in which Plaintiffs were investing in fact existed;

(3) on September 14, 2001, Greenberg, knowing or having reason to know that the statement was false, confirmed Wallis' allegedly false statement to Plaintiffs that the funds they were investing were being held in a particular escrow account;

(4) between April/May 2001 and December 2002, Greenberg wasted corporate funds by using those funds for excessive and non-existent personal expenses, including a) writing a check on November 18, 2001 for over $7,000 to American Express, and b) on December 31, 2001, writing a check on one corporate defendant's account, to another corporate defendant's account, in the sum of $92,000 for unexplained expenses; and

(5) between April/May 2001 and December 2002, Greenberg failed to advise Plaintiffs of the financial status of the corporate defendant companies in which Plaintiffs invested, which included misrepresentations regarding the number of investors in those companies.

C. The Parties' Positions

Wallis and Greenberg submit that the allegations in Plaintiffs' first cause of action in the Complaint are time-barred as beyond the six (6) year statute of limitations applicable to breach of contract pursuant to CPLR § 213. Wallis and Greenberg assert that none of the claims contained in the first cause of action were pled in the federal action and, therefore, Plaintiffs may not take advantage of the tolling provisions applicable to a dismissed federal court action. Plaintiffs oppose Wallis and Greenberg's application regarding the first cause of action, submitting that CPLR § 205 authorized the filing of the Complaint, within six (6) months of the termination of the federal action, because the Complaint is based upon the same transaction or occurrence, or series of transactions or occurrences, as the federal action.

Wallis and Greenberg also move to dismiss the second cause of action, alleging a breach of fiduciary duty, on the grounds that 1) no fiduciary duty existed between the Plaintiffs and

Defendants, based on the facts alleged in the Complaint; and 2) the claim is time-barred pursuant to the applicable statute of limitations provision of CPLR § 214(4). Plaintiffs oppose Wallis and Greenberg's application regarding the second cause of action, arguing that Defendants, as managers of limited liability companies, are required to perform their duties in good faith and with a standard of care that places them in a fiduciary relationship with Plaintiffs.

Wallis and Greenberg move to dismiss the third and fourth causes of action on the ground that they are time-barred by the applicable three year statute of limitations set forth in CPLR § 214. Plaintiffs oppose this application, submitting that the applicable statute of limitations is the six year statute provided in CPLR § 213 which applies to causes of action arising from breach of a fiduciary duty resulting in fraud, as alleged in the matter *sub judice*.

Finally, Wallis and Greenberg move to dismiss the fifth cause of action, submitting that none of the elements of unjust enrichment are pled. In addition, they argue that where a contract exists, as alleged by Plaintiffs, no cause of action for unjust enrichment lies. Finally, Wallis and Greenberg argue that the derivative claims are time-barred. Plaintiffs oppose the application, submitting that the fifth cause of action sufficiently pleads unjust enrichment and, further, that the derivative claims are not time-barred, in light of the provisions of CPLR § 205.

RULING OF THE COURT

A. Breach of Fiduciary Duty

Limited Liability Company Law § 409(a) provides that, "A manager shall perform his or her duties as a manager...in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances." This statutory obligation to act in good faith has been held to give rise to a fiduciary duty. *Tzolis v. Wolf*, 39 A.D.3d 138, 146 (1st Dept. 2007), *aff'd*, 10 N.Y.3d 100 (2008). To the extent that the manager's fiduciary duty runs to the limited liability company, a breach of that duty must be redressed by a derivative action on behalf of the company. *Tzolis*, 10 N.Y.3d at 109. However, the majority shareholder in a close corporation owes a fiduciary duty to the minority shareholders. *O'Neill v. Warburg, Pincus & Co.*, 39 A.D.3d 281 (1st Dept. 2007). Similarly, the manager of a limited liability company may owe a fiduciary duty directly to the other members of the LLC. *See Salm v.*

Feldstein, 20 A.D.3d 469 (2d Dept. 2005) (defendant, as managing member of limited liability company, owed co-member plaintiff fiduciary duty to make full disclosure of all material facts).

With respect to Defendants' motion to dismiss the Complaint under CPLR § 3211(a)(7), it is well-settled that the Court must deny such a motion if the factual allegations contained in the Complaint constitute a cause of action cognizable at law. *Guggenheimer v Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally accept the pleading, and accept the facts alleged as true and accord to the Plaintiff every favorable inference which may be drawn therefrom. *Leon v Martinez*, 84 N.Y.2d 83 (1994).

A fiduciary relationship exists between two people when one is under a duty to act for or give advice for the benefit of another regarding matters within the scope of the relation. Whether the parties are in a fiduciary relationship is ordinarily a fact-specific inquiry, and courts look to the parties' agreement to discover the nexus of the parties' relationship and the particular contractual expression establishing the parties' interdependency. *EBC I v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19-20 (2005). Providing Plaintiffs the benefit of every possible inference, the Court concludes that the Complaint adequately alleges that Defendants, the managers of the limited liability company, owed a fiduciary duty to the other members. Accordingly, the Court denies Defendants' motion to dismiss Plaintiffs' breach of fiduciary duty claim for failure to state a cause of action.

B. Unjust Enrichment

The essential inquiry in any action for unjust enrichment is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice. Generally, courts will determine whether 1) a benefit has been conferred on defendant under mistake of fact or law; 2) the benefit still remains with the defendant; and 3) the defendant's conduct was tortious or fraudulent. *Paramount Film Distributing Corp. v. New York*, 30 N.Y.2d 415, 421 (1972). Plaintiff may not maintain an action for unjust enrichment where the matter in dispute is governed by an express contract. *Scavenger, Inc. v. Interactive Software Corp.*, 289

A.D.2d 58 (1st Dept. 2001).

Defendants argue that Plaintiffs may not assert a claim for unjust enrichment because the parties entered into an express investment contract. However, the Complaint suggests that, although Plaintiffs entrusted funds under the mistaken belief that a contract had been formed, the parties never reached a formal agreement as to ownership and operation of the limited liability company.[2] Plaintiffs have alleged that they conferred a benefit on Defendants by investing their funds, that Defendants used the money for personal expenditures, and that Defendants fraudulently induced Plaintiffs to make the investment. The court concludes that Plaintiffs have stated a legally sufficient claim for unjust enrichment. Accordingly, the Court denies Defendants' motion to dismiss Plaintiffs' unjust enrichment claim for failure to state a cause of action.

C. Statute of Limitations

CPLR § 205 provides that, "If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment on the merits," plaintiff may commence a new action upon the same transaction within six months after termination of the prior action. The function of CPLR § 205(a) is to ameliorate the harsh effect of the statute of limitations, where defendant has been given timely notice of the claim, plaintiff is willing to prosecute, and the merits have not been reached. *George v. Mt. Sinai Hospital*, 47 N.Y.2d 170, 177-79 (1979). A stipulation dismissing a prior action "without prejudice" constitutes a voluntary discontinuance, which is not entitled to the six month extension. *Kourkoumelis v. Arnel*, 238 A.D.2d 313 (2d Dept. 1997). Thus, a plaintiff will not receive the six month extension where he stipulates to the dismissal of a federal action pursuant to Rule 41 of the Fed. R. Civ. P. *Id.* However, where a stipulation of dismissal expressly provides that it is "without prejudice to plaintiff's right to commence a new action pursuant to

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[2] For example, ¶ 23(aa) of the Complaint states, in pertinent part, "During the Wallis time frame, after no agreement on ownership and management was reached and the company known as Med Transit which was purported to be an invested in company was not operating, Wallis refused to return invested funds and loans to Plaintiffs."

CPLR § 205," the stipulation will be enforced and plaintiff will receive the six month extension. *Id.*

As the Rule 41 stipulations of dismissal in the matter before the Court did not specifically reserve Plaintiffs' rights to commence a new action pursuant to CPLR § 205, they constitute voluntary discontinuances that do not entitle Plaintiffs to the benefit of the six month extension. Accordingly, the Court will now determine whether Plaintiffs' filing of the Complaint on May 12, 2008 was timely.

Although derivative suits on behalf of limited liability companies are recognized by the courts, they are not expressly authorized by statute. *Tzolis v. Wolf, supra.* Thus, there is no statute of limitations expressly applicable to such derivative actions. In determining the applicable statue of limitations, the court must analyze the nature of Plaintiffs' claim. *See Chase Scientific Research, Inc. v. NIA Group*, 96 N.Y.2d 20, 27 (2001). The Court determines that Plaintiffs' derivative claims on behalf of Meridian Group are most analogous to an action on behalf of a corporation for fraud, waste, or an accounting. Such an action is governed by the six year statute of limitations provided by CPLR § 213(7). *See North Fork Preserve, Inc. v Kaplan*, 31 A.D.3d 403, 405 (2d Dept. 2006). In consideration of the fact that claims for waste and conversion must be asserted derivatively on behalf of the limited liability company, the court will apply the six year statute of limitations to Plaintiffs' first and fourth causes of action. A derivative cause of action for waste, conversion, or diversion of corporate assets accrues on the date of the transaction on which the claim is based. *Skorr v. Skorr Steel Co.*, 29 A.D.3d 594 (2d Dept. 2006).

It appears from the Complaint that Plaintiffs invested their funds with Defendants in 2001.[3] Nevertheless, Plaintiffs allege that Wallis and Greenberg continued to serve as managers of Meridian Group through at least December 2002.[4] Plaintiffs further allege that both

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[3] Paragraph 23(f) of the Complaint discusses Plaintiffs' investments and loans between July 10 and December 2001.

[4] Complaint ¶ 23 (Wallis), ¶ 24 (Greenberg).

Defendants continued to waste company assets during their periods of service.[5] Thus, Plaintiffs assert timely claims for waste and conversion based upon acts committed after May 12, 2002 (six years prior to the filing of the Complaint). Accordingly, the Court grants Defendants' motion to dismiss Plaintiffs' waste and conversion claims, based upon the statute of limitations, as to acts committed on or before May 12, 2002 and otherwise denies Defendants' motion.

Since all torts are, in a sense, creations of common law, Plaintiffs have not alleged a specific theory of liability in their third cause of action. Nevertheless, on a motion to dismiss pursuant to CPLR §3211, the court must determine whether the facts as alleged fit within any cognizable legal theory. *Arnav Industries, Inc. v. Brown*, 96 N.Y.2d 300, 303 (2001). The elements of a cause of action in *prima facie* tort are 1) intentional infliction of harm, 2) resulting in special damages, 3) without excuse or justification, and 4) by an act or series of acts that would otherwise be unlawful. *Burns, Jackson, Miller v. Lindner*, 59 N.Y.2d 314, 332 (1983). The Court concludes that the facts that Plaintiffs fit within the theory of *prima facie* tort, and, therefore, will now determine the timeliness of that cause of action.

A prima facie tort is an intentional tort for which the applicable statute of limitations is one year. *Angel v. Bank of Tokyo*, 39 A.D.3d 368, 370 (1st Dept 2007). *See also* CPLR § 215. The case law suggests that a cause of action for *prima facie* tort accrues when plaintiff's special damages are sustained. *See Dana v. Oak Park Marina*, 230 A.D.2d 204, 210 (4th Dept. 1997).

Plaintiffs allege that Defendants Wallis and Greenberg submitted the fraudulent line of credit application in July 2001.[6] Although it is unclear when North Fork Bank commenced an action with respect to this application, Plaintiffs included allegations regarding North Fork in the Federal Action, filed in 2005. Therefore, it is logical that Plaintiffs expended funds in defense of the North Fork action at or before that time, and therefore that Plaintiffs' claim for common law or *prima facie* tort accrued more than one year prior to May 12, 2008. Accordingly, the Court grants Defendants' motion to dismiss Plaintiffs' third cause of action based upon the statute of limitations.

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[5] Complaint ¶23(x)(Wallis), ¶ 25(g) (Greenberg).

[6] Complaint ¶ 28 .

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel to appear before the Court for a Preliminary Conference on August 19, 2009 at 9:30 a.m.

ENTER

DATED: Mineola, NY
July 8, 2009

HON. TIMOTHY S. DRISCOLL

J.S.C.