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

PRESENT: HON JOAN A. Madden PART 11

Index Number : 100005/2009

PECKAR & ABRAMSON, P.C.

VS.

LYFORD HOLDINGS, LTD.

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this 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 is decided in accordance with annexed Memorandum Decision and Order.

FILED
DEC 24 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: December 15, 2009

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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PECKAR & ABRAMSON, P.C.,

Plaintiff,

-against-

Index No. 100005/09

LYFORD HOLDINGS, LTD., MITCHELL STERN, SAVOY MANAGEMENT CORPORATION, SAVOY SENIOR HOUSING CORP., JACOB FRYDMAN, WHITE ACRE EQUITIES, LLC, TUSCANY BUILDERS, LLC, TIVOLI PARTNERS, LLC, and SAVOY LITTLE NECK ASSOCIATES, L.P.,

Defendants.

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MADDEN, J.:

In 2006, plaintiff Peckar & Abramson, P.C. (P&A) obtained a default judgment against defendant Savoy Little Neck Associates, L.P. (Savoy Little Neck) for legal services rendered, which judgment remains unsatisfied. In this action, P&A alleges that Savoy Little Neck "wrongfully" distributed and/or transferred the money to various entities, including its general and limited partners, prior to fulfilling its obligation to pay P&A the money that it was owed, and asserts several causes of action seeking the recovery of such funds, in order to collect on the judgment.

Defendants Savoy Little Neck, Lyford Holdings, Ltd. (Lyford), Savoy Management Corporation (Savoy Management), Savoy Senior Housing Corp. (SSHC), Jacob Frydman, White Acre Equities, LLC (White Acre), Tuscany Builders, LLC (Tuscany) and Tivoli Partners LLC (Tivoli)[1] now move, pursuant to CPLR 3211 (a) (3), (5) and (7), for an order

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[1] Defendant Mitchell Stern is the only defendant who does not move to dismiss the complaint.

dismissing the complaint on the grounds that P&A has no legal capacity to sue, the statute of limitations has expired, and the pleading fails to state a cause of action.

BACKGROUND

Accepting the allegations of the complaint as true (*Leon v Martinez*, 84 NY2d 83 [1994]), the following facts emerge: defendant Savoy Little Neck and non-party Savoy Boro Park Associates, L.P. (Savoy Boro Park), a related entity, were each in the business of running assisted living facilities (Complaint, ¶ 19). Savoy Little Neck operated pursuant to an Agreement of Limited Partnership dated December 23, 1998, and amendments thereto (*id.*, ¶ 12). At a certain point, Savoy Little Neck purchased property located at 55-15 Little Neck Parkway, Little Neck, New York (the Property), which it converted into an assisted living facility (*id.*, ¶ 13).

Savoy Little Neck is one of more than a dozen entities operated by defendant Frydman, an attorney, who is also an owner and/or indirect beneficiary of each related entity (*id.*). All defendants other than Savoy Little Neck either owned limited partnership interests in Savoy Little Neck, or were controlled by Frydman (either directly or via entities Frydman controlled) (*id.*, ¶ 20). Frydman was a limited partner of Savoy Little Neck (*id.*, ¶ 21). Defendant SSHC was the managing member of non-party Alata Knoll, LLC, the corporate general partner of Savoy Little Neck and Savoy Boro Park (*id.*, ¶¶ 15, 22).

In 2003, P&A, a law firm, was engaged by Savoy Little Neck and Savoy Boro Park for legal services (*id.*, ¶ 19). Although Savoy Little Neck and Savoy Boro Park entered into an agreement to pay P&A's outstanding legal fees over a period of time, Savoy Little Neck failed to make payments required under that agreement. On April 5, 2004, P&A commenced an action entitled *Peckar & Abramson P.C. v Savoy Little Neck Assocs., L.P. and Savoy Boro Park*

Assocs., L.P. (Sup Ct, NY County, Index No. 105621/04) for breach of contract (*id.*, ¶ 14). On February 22, 2006, judgment was entered against Savoy Little Neck in the amount of $237,731.75, which judgment remains unsatisfied (*id.*, ¶¶ 16-17). P&A asserts that, as a result, it is a creditor of Savoy Little Neck pursuant to Article 10 of the New York Debtor and Creditor Law (*id.*, ¶ 18).

P&A contends that, after commencement of the underlying action, Savoy Little Neck sold the assisted living facility, and made other payments and transfers to or for the benefit of defendants. According to P&A, these transfers, which occurred over a period of six months, were designed to avoid the P&A judgment, and/or controvert the express terms of the Savoy Little Neck partnership agreement.

Specifically, P&A alleges that, in June 2004, Savoy Little Neck conveyed the Property to an unrelated entity, CRP Little Neck, L.P. (*id.*, ¶ 24). As of the day the Property was sold, Savoy Little Neck was insolvent, and its major remaining asset was a claim for a property tax refund (*id.*, ¶ 25). According to P&A, the sale of the facility is a "liquidating event" under the Savoy Little Neck partnership agreement (*id.*, ¶ 47). Savoy Little Neck then made numerous payments to defendants (Complaint, ¶ 28; *see id.*, Exh A).

Prior to the commencement of the underlying action, Savoy Little Neck maintained three checking accounts at North Fork Bank (NFB): an operating account, a payroll account and a checking account (*id.*, ¶ 26). Frydman was a signatory on all NFB checking accounts (*id.*, ¶ 27). In the 10 days before the sale of the Property, Savoy Little Neck depleted several hundred thousand dollars from its NFB checking account, and transferred the cash therein to defendants White Acre, Tivoli, Tuscany, and non-party Frydman & Co. (*id.*, ¶ 29; *see id.*, Exh

A). On September 2, 2004, Savoy Little Neck depleted the NFB payroll account by transferring the remaining balance of $3,008.97 to White Acre, after which the account was closed (*id.*, ¶ 30).

On September 24, 2004, the Department of Finance of the City of New York issued a property tax refund check payable to Savoy Little Neck in the amount of $722,365.43 (the Property Tax Refund) (*id.*, ¶ 32). On September 30, 2004, the Property Tax Refund check, which was endorsed "Savoy," was deposited into the "Operating" account of Savoy Management, an entity related to Savoy Little Neck (*id.*, ¶¶ 33, 37). Within 15 days after deposit, all proceeds of the Property Tax Refund were depleted, leaving the Savoy Management operating account with a negative balance (*id.*, ¶ 38).

From the Property Tax Refund proceeds, Savoy Management transferred $425,000 to defendant Mitchell Stern, $154,299.14 to defendant Lyford, the majority (49.5%) limited partner of Savoy Little Neck, and $65,000 to defendant White Acre (*id.*, ¶ 39). According to Schedule A attached to the complaint, (which indicates that $722,265.43 as opposed to $722,365.43 was deposited in the account), the transfer to White Acre was made on October 1, 2004, the transfer to Lyford was made on October 12, 2004, and the transfer to Mitchell Stern was made on October 15, 2004 and another $85,000 was transferred to non-party Armstrong Management Corporation on October 15, 2004. P&A asserts that, in addition to the $65,000 paid from the Property Tax Refund, Savoy Little Neck also transferred additional funds to White Acre, allegedly making the total transfers to White Acre in excess of the amount of the unsatisfied judgment (*id.*, ¶ 44).

The complaint contains six causes of action. The first cause of action alleges a violation of Savoy Little Neck's limited partnership agreement. The second cause of action

alleges a violation of New York Revised Limited Partnership Act (RLPA) § 121-607. The remaining four causes of action allege violations of the New York Debtor and Creditor Law (DCL). The third, fourth and fifth causes of action claim violations of DCL §§ 273, 273-a, 274, 275, 276, 277, 278 and/or 279. The sixth cause of action alleges a violation of DCL § 276-a.

ANALYSIS

The first cause of action alleges a breach of contract claim against defendants based on Savoy Little Neck's limited partnership agreement (the LP Agreement). P&A maintains that, under the terms of the LP Agreement, Savoy Little Neck's June 2004 sale of the Property constituted a "Liquidating Event," and P&A was an "unaffiliated creditor" entitled to be paid before defendants from the proceeds of the Property Tax Refund. Defendants seek dismissal of this cause of action on the ground that P&A lacks legal capacity to bring this claim, because it was not a party to the LP Agreement, and the complaint does not claim that P&A was a third-party beneficiary of the LP Agreement. During oral argument, P&A consented to the withdrawal of the first cause of action, and as such, it is dismissed.

In the second cause of action, P&A claims that defendants violated RLPA § 121-607 by knowingly accepting wrongful distributions from the partnership. However, RLPA § 121-607 (c) specifically states:

> Unless otherwise agreed, a limited partner who receives a wrongful distribution from a limited partnership shall have no liability under this article or other applicable law for the amount of the distribution after the expiration of three years from the date of the distribution

Here, the complaint alleges that the complained-of distributions occurred between May and October 2004. The complaint was not filed until December 2008, more than four years

after the date of the alleged wrongful distributions, and at oral argument P&A conceded that this claim was untimely.

The third, fourth, fifth and sixth causes of action are all brought pursuant to the DCL, and are based upon the allegation that "all defendants, other than Savoy Little Neck, either owned limited partnership interests in Savoy Little Neck or were controlled by Frydman (directly or via entities Frydman controlled) (Complaint, ¶ 20). Defendants argue that P&A's claims against Savoy Little Neck's limited partners brought pursuant to the DCL are time-barred by section 121-607 (c), asserting that the three year statute of limitations contained in RLPA § 121-607 (c) applies to all of P&A's claims arising from asserted "wrongful distributions."

In opposition to the motion, P&A argues that the longer six-year statute of limitations governing fraudulent conveyances under the DCL applies to the third, fourth, fifth and sixth causes of action, and not the three year time limit under RLPA § 12-607 (c). P&A alternatively contends that the three-year limitations period in RLPA § 12-607 (c) applies only where the limited partnership is the plaintiff, and does not apply to "innocent creditors" like P&A[2]. who step into the shoes of the limited partnership.

At issue here is the interpretation of RLPA § 12-607 and, in particular, whether the three-year statute of limitations provided under subsection (c) relates to claims, like those at issue here, which are brought by a creditor to recover under the DCL. RLPA § 121-607 provides:

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[2]In reply, P&A asserts that in the second cause of action, P&A seeks recovery for payments of wrongful distributions by "stepping into the shoes of" Savoy Little Neck whereas in the fraudulent conveyance claims (i.e. the third, fourth, and fifth causes of action) P&A seeks to recover "in its own right." Whatever the legal significance of this distinction, the court need not address it since as explained herein the three-year statute of limitations under RLPA § 121-607(c) applies to any claim against a limited partner who receives a wrongful distribution.

> (a) A limited partnership shall not make a distribution to a partner to the extent that, at the time of the distribution, after giving effect to the distribution, all liabilities of the limited partnership, other than liabilities to partners on account of their partnership interests and liabilities for which recourse of creditors is limited to specified property of the limited partnership, exceed the fair market value of the assets of the limited partnership, except that the fair market value of property that is subject to a liability for which the recourse of creditors is limited shall be included in the assets of the limited partnership only to the extent that the fair value of that property exceeds that liability.
>
> (b) A limited partner who receives a distribution in violation of subdivision (a) of this section, and who knew at the time of the distribution that the distribution violated subdivision (a) of this section, shall be liable to the limited partnership for the amount of the distribution. A limited partner who receives a distribution in violation of subdivision (a) of this section, and who did not know at the time of the distribution that the distribution violated subdivision (a) of this section, shall not be liable for the amount of the distribution. *Subject to subdivision (c) of this section, this subdivision shall not affect any obligation or liability of a limited partner under a partnership agreement or other applicable law for the amount of a distribution.*
>
> (c) Unless otherwise agreed, a limited partner who receives a wrongful distribution from a limited partnership shall have no liability under this article or other applicable law for the amount of the distribution after the expiration of three years from the date of the distribution.
>
> (emphasis supplied).

In *Williamson v Culbro Corp. Pension Fund*, 41 AD3d 229 [1st Dept 2007], lv denied, 10 NY3d 702 [2008], the Appellate Division, First Department considered whether claims for unjust enrichment and money had and received asserted by a successor liquidating trustee on behalf of a partnership to recover distributions allegedly wrongful paid to defendants were governed by the three-year statute of limitations provided by RLPA § 121-607(c). The trial

court decision found that subdivision (c) did not apply because section 121-607 limits the three-year period to wrongful distributions described in subdivisions (a) and (b), that is those distributions which would render the partnership insolvent and were received by a partner knowingly that such distribution would lead to insolvency.

The First Department rejected the trial court analysis writing that it was "contrary to [the statute's] plain language" and that "the limitation period applies when a limited partner receives a 'wrongful distribution.' The term 'wrongful' is plain and refers not only to distributions that render a partnership insolvent, but any improper distribution. Moreover, the subdivision states that the limited partner receiving a 'wrongful distribution' shall have no liability after three years 'under this article or *other applicable law.*'" 41 AD3d at 331. The First Department explained that "while subdivision (b) makes a limited partner liable for a violation of subdivision (a) only to the extent that the limited partner knew the distribution rendered the partnership insolvent, it expressly states that this does not affect 'liability of a limited partner under a partnership agreement or other applicable law for the amount of a distribution' but such liability is 'subject to subdivision(c).'" The court then wrote "[i]t is hard to imagine how this sentence can mean anything other than that the limited partner's liability for distributions 'under the partnership agreement or other applicable law' is subject to the three-year statute of limitations." *Id.* at 232.

Moreover, while *Williamson* did not involve claims under the DCL, the First Department cited with approval the decision in *Matter of Die Fliedermaus LLC*, 323 BR 101, 108 [SD NY 2005], in which the Bankruptcy Court interpreted the almost identical language in § 508 of the Limited Liability Company Law, a sister statute based upon the RLPA, and found that

"[w]rongful is a broad term and the common understanding of the term would include distributions that could be recovered as either constructive or intentional fraudulent conveyances under the DCL, or as distributions based on an alleged breach of an LLC operating agreement." Accordingly, based on *Williamson,* the court finds that the causes of action based on violation of the DCL are governed by the three-year statute of limitations contained in RLPA § 12-607 (c).

In addition, contrary to P&A's assertion, *Williamson* is not "factually dissimilar" because it involved claims by the partnership itself against former partners, and not claims by "innocent creditors" of the partnership. The plaintiff in *Williamson* was not the partnership, but a liquidating trustee. Such a liquidating trustee may assert claims on behalf of the partnership, but the true beneficiaries of such claims are creditors, who are first in line for any resulting distributions (*see* RLPA § 121-804); *see also Mostel v Petrycki*, ___ Misc 3d ___, 885 NYS2d 397 [Sup Ct, NY County 2009] [claims of plaintiff, a former employee who was essentially a creditor of defendant, for fraudulent conveyance under the DCL, were barred by three-year limitation set forth in LLCL § 508 (c)]; *see also* Walker, Limited Liability Companies & Partnerships § 7:11 [1 West's NY Prac Series 2002 and Supp 2008] ["A member who knowingly receives a wrongful distribution is not liable to the LLC *or to creditors* after three years from the date of distribution"] [interpreting identical language in Limited Liability Company Law § 508 (c)] [emphasis added]).

Plaintiff further contends that the three-year statute of limitations only applies to claims asserted by the partnership itself, on the ground that the phrase "liable to the limited partnership" in subdivision (b) of 121-607 should be grafted onto subdivision (c). However, a plain reading of the statute reveals that there is no limitation in subdivision (c) to the application

of the three-year statute of limitation, as to either to the type of claim or the claimant. As the First Department noted in *Williamson*, the Legislature's use of qualification in one section of the statute, and its failure to use such qualifications in another section, represents a deliberate choice that should not be disregarded (*see Williamson v Culbro Corp. Pension Fund,* 41 AD3d 229, *supra* [reversing trial courts's determination that subdivision (c) did not apply because section 121-607, when read as a whole, limits the three-year period to wrongful distributions made to withdrawing partners that rendered the partnership insolvent]).

P&A next argues that allegedly fraudulent transfers of the proceeds of the Property Tax Refund do not constitute "distributions" within the meaning of RLPA, and therefore the three-year statute of limitations does not apply. At issue here are the transfers which are the subject of the third and fourth causes of action of the complaint which allege that the proceeds of Property Tax Refund were transferred on September 24, 2004, into an operating account of Savoy Management, an entity related to Savoy Little Neck, without consideration, and that in October 2004 in what the complaint labels as "the Little Neck Final Distribution," another transfer was made to defendants which was also allegedly made without consideration. The moving defendants identified in Schedule A of the complaint as receiving this Final Distribution are White Acre and Lyford.[3]

The term "distribution" is defined under RLPA § 121-101 to mean "the transfer of property by a limited partnership to one or more of its partners." P& A argues that since the proceeds of Property Tax Refund were transferred to White Acre and Lyford by Savoy

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[3]Defendant Mitchell Stern, who is not moving to dismiss, is also alleged to have received part of the final distribution.

Management and not by the limited partnership, i.e. Savoy Little Neck, that the transfers do not qualify as distributions. This argument is unavailing as the mere fact that a limited partnership uses a related entity as a conduit to transfer property is insufficient to take it out of the definition of distribution. Significantly, the facts, as pleaded, make clear that the proceeds were in Savoy Management's operating account for approximately 15 days, and that the proceeds remained in the account until they were distributed to the limited partners.

P.A. next argues that certain transfers in the complaint were not distributions but were returns on capital subject to Partnership Law § 106(4). This argument is also unavailing. Although a limited partner receiving a return on capital is liable to the partnership for any sum necessary to discharge the partnership's liability to its creditors, the return of capital from a partnership is nonetheless considered a distribution. *Whitley v. Klauber*, 51 NY2d 555, 563 [1980]; *see also*, *Rand LLC v. Young*, 384 BR 94 [D NJ 2008][noting that "the typical nature of a distribution is the distribution of profits or the return of capital]; *Mostel v Petrycki*, ___ Misc 3d ___, 2009 NY Slip OP 29363 [Sup Ct, NY County 2009] [return to defendant managing manager of limited company of $300,000 of his invested capital was "distribution" under LLCL § 508].

P&A also argues that the transfers were not distribution as they were made to Savoy Management to pay business expenses and debts, and asserts that Savoy Management received $360,650 for payment of a business debt and $361,715.43 without consideration. Notably, this argument is contrary to the facts as alleged in support of the third and fourth causes of action under the DCL. These causes of action are not based on an allegation that Savoy Capital received money for a business debt or otherwise retained the proceeds from the Property Tax

Refund, but instead, that Savoy Management transferred such proceeds to White Acre, Lyford, Mitchell Stern and a nonparty. Thus, based on the allegations in the complaint, the transfers of the proceeds of Property Tax Refund constitute distributions within the meaning of RLPA.[4]

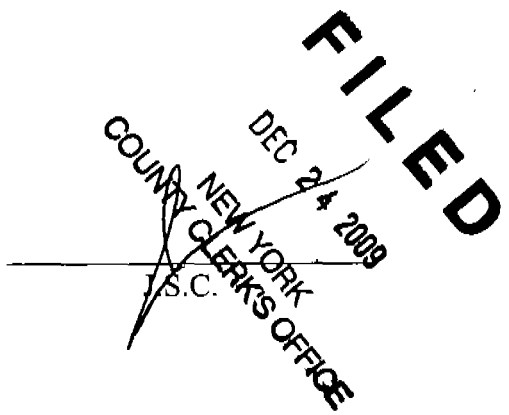
Accordingly, as P&A's claims for relief based on violations of DCL are outside the applicable three-year period provided under RLPA § 12-607 (c), these claims must be dismissed as time-barred.

In view of the above, it is hereby

ORDERED that the motion to dismiss is granted and the complaint is hereby severed and dismissed as against moving defendants Lyford Holdings, Ltd., Savoy Management Corporation, Savoy Senior Housing Corp., Jacob Frydman, White Acre Equities, LLC, Tuscany Builders, LLC, Tivoli Partners LLC and Savoy Little Neck Associates, L.P., and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that the action shall continue as against defendant Mitchell Stern and the remaining parties shall appear for a preliminary conference on January 7, 2010 at 9:30 am.

Dated: December 7, 2009



[4]While the complaint alleges that Savoy Little Neck and Frydman provided Lyford with a spreadsheet entitled "Little Neck Distribution" indicating that $360,650 of the Property Tax Refund was used to pay a Construction Management fee (Complaint, ¶ 41), this allegation is not used as a basis for the DCL claims, and there is no allegation that Savoy Management was paid this fee or that it retained any part of Property Tax Refund.