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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

CARBON CAPITAL MANAGEMENT, LLC,	**TRIAL/IAS PART: 22** **NASSAU COUNTY**
Plaintiff,	**Index No: 006483-09** **Motion Seq. Nos: 2, 3, 4, 5, 6, & 7**
-against-	**Submission Date: 1/4/10**
AMERICAN EXPRESS COMPANY, CORPORATE SOLUTIONS GROUP, LLC and IRWIN SELINGER,	
Defendants.	

Papers Read on these Motions

Amended Notice of Motion.....x
American Express' Memorandum of Law.....x
Notice of Motion, Affirmation in Support and Exhibits.....x
Selinger Memorandum of Law.....x
Notice of Cross Motion, Affirmation in Opposition, Affidavit in Opposition and Exhibits.....x
Amended Notice of Cross Motion.....x
Notice of Cross Motion, Affirmation in Opposition, Affidavit in Opposition and Exhibits.....x
American Express' Reply in Further Support/Opposition...x
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Affirmation of J. Hillman in Further Support/Opposition...x
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Affirmation of J. Chavez, Jr.....x

This matter is before the court on the motions 1) filed by Defendant American Express Company ("American Express") on August 5, 2009, 2) filed by Defendant Irwin Selinger ("Selinger") on September 2, 2009, 3) filed by Plaintiff Carbon Capital Management, LLC

("Carbon Capital" or "Plaintiff") on October 5, 2009, 4) filed by Plaintiff on October 22, 2009, 5) filed by Selinger on November 2, 2009, and 6) filed by Plaintiff on November 5, 2009, all of which were submitted on January 4, 2010.

The Court 1) grants the motion by American Express to dismiss the complaint for failure to state a cause of action in part and denies it in part; 2) grants the motion by Selinger to dismiss the complaint for failure to state a cause of action in part and denies it in part; 3) grants Selinger's motion to dismiss based upon the statute of limitations in part and denies it in part; 4) grants Defendant Selinger's motion to dismiss for lack of personal jurisdiction to the extent that the motion shall be the subject of a traverse hearing; and 5) denies Plaintiffs motion for leave to serve an amended complaint.

BACKGROUND

A. Relief Sought

In Motion Sequence Number 2, Defendant American Express Company ("American Express") moves for an Order dismissing all claims against it, with prejudice.

In Motion Sequence Number 3, Defendant Irwin Selinger ("Selinger") moves for an Order, pursuant to CPLR §§ 3211(a)(7) and (8), dismissing the Complaint in its entirety.

In Motion Sequence Number 4, Plaintiff Carbon Capital Management, LLC ("Carbon Capital" or "Plaintiff") moves for an Order 1) permitting Plaintiff to replead in the event that the Court determines that the pleadings are insufficient; and 2) directing the holding of a Preliminary Conference to compel discovery.

In Motion Sequence Number 5, Plaintiff moves for an Order 1) permitting Plaintiff to replead in the event that the Court determines that the pleadings are insufficient; and 2) directing the holding of a Preliminary Conference to compel discovery. [1]

In Motion Sequence Number 6, Selinger moves for an Order, 1) pursuant to CPLR §§ 3211(a)(2), (7) and (8), dismissing the Complaint in its entirety; and 2) pursuant to NYCRR § 130-1.1, imposing sanctions and counsel fees.

In Motion Sequence Number 7, Plaintiff moves for an Order 1) permitting Plaintiff to

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[1] Plaintiff seeks similar relief in Motion Sequence Numbers 4 and 5.

replead in the event that the Court determines that the pleadings are insufficient; 2) pursuant to CPLR § 306-b, extending Plaintiff's time to serve the summons and complaint on Selinger; and 3) directing the holding of a Preliminary Conference to compel discovery.

B. The Parties' History

This is an action for fraud and breach of fiduciary duty. Plaintiff Dr. Jonathan S. Landow ("Dr. Landow") is the President of New York Medical, P.C. ("New York Medical") and the managing member of Plaintiff Carbon Capital Management, LLC ("Carbon Capital" or "Plaintiff"). Defendant Irwin Selinger ("Selinger") is a financial consultant with expertise in wealth management, mergers and acquisitions, and investment banking.

In July 2000, Dr. Landow consulted Selinger concerning a transaction that would allow Dr. Landow to liquidate his interest in the professional corporation without recognizing a capital gain. In essence, the transaction called for Landow to sell his stock in the P.C. to an employee stock ownership plan ("ESOP"). Pursuant to Internal Revenue Code § 1042, if a taxpayer sells "qualified securities" to an ESOP and purchases "qualified replacement property," long-term capital gain is recognized "only to the extent that the amount realized on such sale exceeds the cost to the taxpayer of such qualified replacement property."

On July 25, 2000, New York Medical entered into a consulting agreement ("Agreement") with Selinger's company, Defendant Corporate Solutions Group, LLC ("Corporate Solutions"). The Agreement provided that Corporate Solutions was to advise New York Medical with respect to compliance with § 1042 and assist the professional corporation in adopting the ESOP.[2] Additionally, Corporate Solutions was to assist New York Medical in obtaining a $10 million loan, so that New York Medical could in turn lend the money to the ESOP to finance its purchase of the stock of the professional corporation.[3] As compensation for these services, New York

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[2] Section 1042 has numerous requirements that must be satisfied in order for a capital gain not to be recognized. In particular, the securities sold to the ESOP must be "qualified securities," which are defined as "employer securities" issued by a "domestic C corporation" whose stock is not "readily tradable on an established securities market" (IRC § 1042(c)(1)). Thus, New York Medical, P.C. was presumably a C corporation, rather than an S corporation which elects to be taxed as a partnership.

[3] It is customary for an ESOP to borrow the purchase money, and it is not unusual for the ESOP to borrow from the employer. The ESOP will ordinarily service its debt with the "annual qualified plan contributions" paid by the employer corporation (Tax Planning for Corporations and Shareholders § 7.06).

Medical was to pay Corporate Solutions a "performance fee" of $325,000.

The Agreement is memorialized in the form of a letter from Corporate Solutions to New York Medical dated July 21, 2000. The Agreement was negotiated at American Express' office in Manhattan, and in the heading of the letter, Corporate Solutions is referred to as an "American Express Affiliate." In subsequent correspondence from Selinger to Landow concerning possible financing for the ESOP transaction, American Express Corporate Services' logo appears and Corporate Solutions is referred to again as an American Express Affiliate.

Dr. Landow sold his stock to the ESOP on November 30, 2000. The financing for the transaction was provided by Citibank, which lent New York Medical, P.C. $13.5 million. The Court notes that employees who are not licensed to practice medicine may not hold shares in a medical professional corporation (*See* Business Corporation Law §§ 1507, 1511). There is no indication that Dr. Landow or Selinger was concerned that the ESOP would hold stock on behalf of unlicensed employees. New York Medical was eventually formed, according to Dr. Landow, so that unlicensed employees could participate in the ESOP.

Although Plaintiff has submitted several proposal sheets from other lenders, including Fleet and Chase, it has not submitted a summary of the terms of the Citibank loan to the court. Nevertheless, the collateral for the loan was a portfolio of floating rate notes that were apparently held by Dr. Landow. Dr. Landow invested $1.5 million of his own funds in the transaction and was required to make repayments when the value of the portfolio did not meet the required loan to value ratio. Although the floating rate notes carried interest, New York Medical was required to pay the difference between the interest on its loan and the amount earned by the portfolio.

Due to Dr. Landow's dissatisfaction with having to make repayments and the interest cost, he became interested in refinancing the Citibank loan. On June 12, 2002, New York Medical engaged Corporate Solutions to negotiate a $14 million loan on its behalf. The agreement ("June Agreement") provided that the floating rate notes would again serve as collateral and Corporate Solutions would assist in "identifying a registered investment broker to handle" the portfolio. For these services, Corporate Solutions was to be paid $75,000. In the section of the June Agreement providing for compensation, the registered broker is identified as

"Morgan Stanley"[4]

The June Agreement was also in the form of a letter from Corporate Solutions to New York Medical. American Express' logo appears on the letterhead, and Corporate Solutions is referred to as an "American Express Marketing Partner." A legend on the bottom of the first page of the June Agreement, however, states that the "services described herein are offered and provided solely by Corporate Solutions Group, LLC (CSG) and not by American Express Financial Advisors Inc. or any other American Express Company."

On August 20, 2002, Selinger wrote to Dr. Landow concerning an anticipated proposal from Morgan Stanley. It appears from the letter that Landow was to receive $13.5 million in cash to repay the Citibank loan, and $5 million worth of securities for a total "account" at Morgan Stanley of $18.5 million. The floating rate notes were again to serve as the collateral for the loan. The term of the loan was to be between 27 and 39 years, apparently depending upon the maturity dates of the collateral.[5] The interest rate was to be "28 basis points above LIBOR."[6] The loan, however, was to have a "negative carrying cost" of $68,000 per year, apparently because the floating rate notes carried interest at a greater spread above LIBOR. The loan was to be non-recourse, so Dr. Landow would not be liable for any deficiency if there was a decline in value of the collateral. Morgan Stanley would not be participating alone, as it was to have certain undisclosed "partners on this transaction."[7]

Dr. Landow affirms that, on the same day, he met with Selinger and representatives of Morgan Stanley and learned that a company known as Derivium Capital, LLC was going to refinance the Citibank loan. The amount of the loan was to be 90% of the value of the floating rate notes. Plaintiff alleges that at the meeting Selinger represented that 1) the loan was not

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[4] Plaintiff's cross-motion for leave to replead, Ex. F., ¶ III.

[5] In the letter, Selinger stated that the term of the loan would depend upon the "CUSIP numbers." This acronym refers to the Committee on Uniform Security Identification Procedures and the 9-character alphanumeric security identifiers that the committee distributes. The first and second issue characters refer to the maturity date of the security (*See* www.wikipedia.org.)

[6] LIBOR, the London Interbank Offered Rate, is a guide that banks used to determine the interest rate to charge each other for loans.

[7] Plaintiff's cross-motion for leave to replead, ex. G.

subject to tax and allowed for a potential deferral of the tax until the floating rate notes were due; 2) Derivium was a legitimate company that would engage in hedging transactions to protect the value of the notes, and 3) at the end of the loan term, Landow would have the option to have the notes returned upon payment of the loan.

On April 11, 2003, Landow entered into a "master agreement to provide financing and custodial services" with Derivium.[8] The agreement provided that Derivium was appointed custodian of the collateral for the purpose of holding the securities on behalf of Landow and receiving interest on the collateral. The loan was non-recourse and was for a term of 28 years. The agreement provided that Derivium would return the collateral at the end of the loan term, upon Landow's paying the loan balance in full. As the loan called for an "annual net interest payment" of $921, it appears that the loan carried interest at a rate greater than the rate Selinger had discussed in the August 2002 proposal.

Dr. Landow alleges that in September 2005 he learned that Derivium was involved in a "Ponzi scheme" whereby it sold the collateral and used the proceeds to fund other loans, rather than holding the collateral as required by the loan agreement. Dr. Landow further alleges that the Internal Revenue Service has challenged the tax-free nature of the loan from Derivium and claims that a gain was realized when the collateral was sold. Dr. Landow alleges that he sustained damages in the amount of the $1.5 million that he invested in the ESOP transaction as well as interest and penalties on his tax deficiency.

On April 3, 2009, Dr. Landow assigned his claims against Corporate Solutions, Selinger, and American Express to Carbon Capital Management, Landow's limited liability company. Carbon Capital commenced this action on April 6, 2009. The verified complaint ("Complaint") contains two causes of action. The first, sounding in fraud, is based on allegations, *inter alia*, that 1) in March and April 2003 Defendants falsely represented that the loan was not subject to tax although they knew that the IRS had challenged similar transactions; and 2) Defendants falsely represented that Derivium was a "legitimate company," although they knew that it would

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[8] Plaintiff's cross-motion for leave to replead, ex. I. The negotiations leading up to the original loan reflect that Landow was reluctant to guarantee the debt of New York Medical (*See* Selinger letter of September 21, 2000 and the guarantor terms in the accompanying proposal (Plaintiff's ex. C)). It is unclear why, in the second loan, Landow borrowed the money from Derivium personally rather than guaranteeing the debt of New York Medical.

sell the collateral in the course of the Ponzi scheme. The second cause of action alleges that Defendants breached their fiduciary duties to Dr. Landow by failing to exercise due diligence in determining Derivium's "fitness" as a lender and failing to disclose that Derivium was involved in a lawsuit in California brought by the California Corporations Commissioner based upon the fraudulent loan scheme.

C. The Parties' Positions

Selinger moves to dismiss the Complaint for lack of personal jurisdiction pursuant to CPLR § 3211(a)(8) on the ground that service of process was improper. According to the affidavit of service, Selinger was served by delivering a copy of the summons and complaint to a person of suitable age and discretion -- the concierge -- at Selinger's usual place of abode in Atlanta, Georgia. The affidavit of service further recites that a copy of the papers marked "personal and confidential" was mailed to Selinger at his last known residence. Defendant asserts that the service was void because the papers were served on Sunday in violation of § 11 of the General Business Law and were not properly mailed to defendant.

Alternatively, Selinger moves to dismiss the complaint for failure to state a cause of action pursuant to CPLR § 3211(a)(7). Defendant argues that Landow did not reasonably rely upon Selinger's representations because Plaintiff was under an affirmative duty to investigate the details of the loan transaction. Defendant notes that in the June Agreement New York Medical acknowledged that Capital Solutions does not "perform legal or accounting or tax services or render legal or accounting or tax advice on any aspect of [the contemplated transaction]." The June Agreement further provides that New York Medical "will rely solely and exclusively on the advice and services of its legal and accounting counsels."

Additionally, Selinger argues that 1) Plaintiff has not pled his fraud claim in sufficient detail as required by CPLR § 3016(b); 2) Selinger was not under a fiduciary duty to Landow because the transaction was negotiated at arm's length; 3) Plaintiff's claims are void for champerty pursuant to Judiciary Law § 489; and 4) Plaintiff's fraud and breach of fiduciary duty claims are barred by the statute of limitations.

Defendant American Express moves pursuant to CPLR § 3211(a)(7) to dismiss the Complaint for failure to state a cause of action. American Express also argues that 1) Plaintiff

does not have standing to sue because the assignor, the party who transferred his claims to Plaintiff, is not disclosed in the Complaint; 2) American Express did not make any fraudulent representations to Landow and Selinger was not its agent; 3) American Express was not under a fiduciary duty to Landow; and 4) Plaintiff has not pled its fraud and breach of fiduciary duty claims in sufficient detail.

Although Plaintiff moves for leave to replead in the event the Court grants Defendants' motions to dismiss, Plaintiff does not submit a proposed amended pleading. Additionally, Plaintiff moves pursuant to CPLR § 306-b to extend the time for service upon Selinger, in the event that the Court concludes that service was improper.

RULING OF THE COURT

A. The Court Shall Conduct a Traverse Hearing to Determine Whether Service on Selinger was Proper

General Business Law § 11 provides that service of legal process "on the first day of the week" is "absolutely void," except in criminal proceedings or where specially authorized by statute. CPLR § 313 provides that a person subject to personal jurisdiction may be served outside New York "in the same manner as service is made within the state." Thus, personal delivery of the summons to defendant on Sunday outside New York is void, even if it is permissible in the state where service is effected. *Eisenberg v. Citation-Langley Corp.*, 99 A.D.2d 700 (1st Dept. 1984).

Plaintiff submits an affidavit of service reflecting that the Summons and Complaint were delivered on July 4, 2009, which was a Saturday, and were mailed to Defendant's last known residence. The affidavit gives rise to a presumption that service was not effected on a Sunday, and the papers were properly mailed to Defendant. *Washington Mutual Bank v. Fisette*, 66 A.D.3d 1287 (3d Dept. 2009). Defendant's denial of receipt of the summons and complaint is insufficient to rebut the presumption of mailing. *Kihl v. Pfeffer*, 94 N.Y.2d 118, 122 (1999). Defendant, however, has submitted an affidavit from the security officer of the building, stating that he observed the papers delivered to the concierge on Sunday, July 5, 2009. The security officer's affidavit raises a question of fact as to whether the papers were delivered to a person of suitable age and discretion on Sunday. Resolution of that question will require a traverse

hearing, which shall be scheduled by the Court at the next conference in this case on March 24, 2010. In light of the Court's conclusion that the question of service of process on Selinger requires a traverse hearing, the Court shall hear further argument from counsel, to the extent necessary, at the conclusion of the hearing as to the merits of Plaintiff's motion to extend the time for service.

B. The Court Dismisses the Fraud Cause of Action Against Selinger in Part

CPLR § 3211(a)(7) provides that a party may move for judgment dismissing one or more causes of action asserted against him on the grounds that the pleading fails to state a cause of action. It is well-settled that the Court must deny a motion pursuant to CPLR § 3211(a)(7) 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 construe the pleading, accept the facts alleged as true and accord to the Plaintiff every favorable inference which may be drawn from the pleadings. *Leon v Martinez*, 84 N.Y.2d 83 (1994).

To establish a *prima facie* case for fraud, plaintiff must allege that 1) defendant made a representation as to a material fact; 2) such representation was false; 3) defendant intended to deceive plaintiff; 4) plaintiff believed and justifiably relied upon the statement and was induced by it to engage in a certain course of conduct; and 5) as a result of such reliance plaintiff sustained pecuniary loss. *Ross v. Louise Wise Services, Inc.*, 8 N.Y.3d 478, 488 (2007).

CPLR § 3016(b) provides that where a cause of action is based upon misrepresentation, fraud, breach of trust, and certain other claims the circumstances constituting the wrong shall be stated in detail. The purpose of this pleading requirement is to inform a defendant of the incidents which form the basis of the action. *Pludeman v. Northern Leasing Systems*, 10 N.Y.3d 486, 491 (2008). Where it is impossible to state the circumstances constituting the fraud in detail, CPLR § 3016(b) should not be so strictly interpreted as to prevent plaintiff from asserting an otherwise valid cause of action. *Id.* There is no requirement of unassailable proof at the pleading stage. Rather, the complaint must allege the basic facts to establish the elements of the cause of action. *Id* at 492. CPLR § 3016(b) is satisfied when the facts suffice to permit a reasonable inference of the alleged misconduct. In certain cases, less than plainly observable

facts may be supplemented by the circumstances surrounding the alleged fraud. *Id.* at 493. *See also Eurycleia Partners v Seward & Kissel*, 12 N.Y.3d 553 (2009).

Based on a review of the Complaint and the other papers, it appears that Selinger's representations were related to the tax treatment of the Derivium loan, the integrity of Derivium as a lender, and the safety of the collateral.[9] Plaintiff alleges that Selinger knew that these representations were false in that Derivium intended to sell the floating rate notes, in order to obtain cash and make new loans, rather than holding the notes as it was obligated to do by the loan agreement. Plaintiff further alleges that Landow relied upon these representations by entering into the loan agreement and entrusting the collateral to Derivium. Thus, the court concludes that the complaint, as supplemented by plaintiff's exhibits, sets forth the basic facts to establish the elements of fraud and complies with the particularity requirement of CPLR § 3016(b).

The issue of justifiable reliance is generally one of fact. *Braddock v. Braddock*, 60 A.D.3d 84, 88 (1st Dept. 2009). A sophisticated investor who acquires a business, however, is under an affirmative duty to protect himself from misrepresentations by the seller by investigating the business he is acquiring and the details of the transaction. *Global Minerals & Metals Corp. v. Holme*, 35 A.D.3d 93, 100 (1st Dept. 2006), *app. den.*, 8 N.Y.3d 804 (2007). Similarly, a sophisticated borrower is under an affirmative duty to protect against misrepresentations by a lender or broker by investigating the details of the loan transaction.

Plaintiff had an affirmative duty to research the tax implications of the Derivium loan, with the assistance of an independent accountant or tax counsel. Moreover, in view of the disclaimer in the June Agreement that Capital Solutions was not rendering legal or tax advice, Plaintiff could not reasonably rely upon Selinger's representations concerning the tax treatment of the loan transaction. Accordingly, the Court grants Selinger's motion to dismiss Plaintiff's fraud claim for failure to state a cause of action as to representations concerning tax treatment.

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[9] While the statement that Derivium would engage in "hedging transactions" is somewhat imprecise, Selinger appears to have meant that the company would undertake some type of stabilizing operations to maintain the value of the collateral. If the form that these operations were to take, such as open market purchases or some type of arbitrage, is relevant to Plaintiff's claims, the issue may be pursued in discovery.

The court reaches a contrary conclusion as to Selinger's representations that Derivium was a "legitimate company" and his representation that at the end of the loan term the collateral would be returned. It is true that Landow might have learned the falsity of these representations by investigating Dirivium. Nevertheless, Plaintiff's reliance upon Selinger's representations may well have been justifiable in view of Selinger's expertise in financial matters and his involvement with American Express and Morgan Stanley, both of which are reputable financial services companies. Accordingly, the Court denies Selinger's motion to dismiss Plaintiff's fraud claim for failure to state a cause of action as to Selinger's representations concerning the legitimacy of Derivium and the safety of the collateral.[10]

C. The Breach of Fiduciary Duty Claims Against Selinger May Proceed

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. Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions. Generally, where parties have entered into a contract, courts look to that agreement to discover the nexus of the parties' relationship and the particular contractual expression establishing the parties' interdependency. If the parties do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them. However, it is fundamental that fiduciary liability is not dependent solely upon an agreement or contractual relationship between the fiduciary and the beneficiary but results from the relationship. *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19-20 (2005).

Although the June Agreement recites that Corporate Solutions was not providing legal or accounting "advice," the company was to provide "consulting services" and was to negotiate a loan "on behalf of" New York Medical. The term "consulting" suggests that Corporate Solutions was expected to give advice to New York Medical, if not with respect to tax treatment, with respect to the interest rate and other loan terms. Moreover, an agent, who acts on behalf of

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[10] The Court notes that while Landow did not justifiably rely upon Selinger's representation as to tax treatment, Plaintiff may recover tax penalties and interest if these damages were proximately caused by misrepresentations as to the integrity of Derivium or the safety of the collateral.

another, is ordinarily under at least a quasi-fiduciary duty to its principal. Thus, for the purpose of this motion to dismiss, the court must assume that a fiduciary relationship arose between Corporate Solutions and New York Medical. The Court, therefore, denies Selinger's motion to dismiss Plaintiff's breach of fiduciary claims for failure to state a cause of action.

D. Plaintiff's Claims are not Void under the Doctrine of Champerty

The doctrine of champerty developed to prevent or curtail the commercialization of or trading in litigation. *Merrill Lynch Mortgage Investors, Inc. v. Love Funding Corp.*, 13 N.Y.3d 190, 198 (2009). The doctrine is currently codified in Judiciary Law §§ 488-89. In pertinent part, Judiciary Law § 489(1) provides "No person or co-partnership, engaged directly or indirectly in the business of collection and adjustment of claims, ...shall solicit, buy, or take an assignment of,...any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon...." Judiciary Law § 488(1) applies a similar proscription to attorneys. The statutes are directed at preventing the strife, discord, and harassment that would be likely to ensue from permitting attorneys or corporations to purchase claims for the purpose of bringing litigation. The statutes, however, have been limited in scope to prevent attorneys from filing suit as a vehicle for obtaining costs. *Merrill Lynch,* 13 N.Y.3d at 199. In *Merrill Lynch*, the Court of Appeals distinguished between one who acquires a right in order to make money from litigating it and one who acquires a right in order to enforce it. *Id.* at 201. Accordingly, the champerty statute does not apply when the purpose of an assignment is the collection of a legitimate claim. *Id.* The *Merrill Lynch* court further concluded that where the assignee has a pre-existing proprietary interest in a loan, champerty does not apply because the assignee is seeking to enforce a legitimate claim.

In the present case, although Carbon Capital had no pre-existing proprietary interest in the loan, it did not acquire the cause of action for the purpose of making money. Rather, Landow assigned the cause of action to Carbon Capital for the purpose of enforcing his pre-existing claim. The Court, therefore, denies Selinger's motion to dismiss the Complaint on the ground that Plaintiff's claims are void for champerty.

In moving to dismiss on the grounds of champerty, however, Defendants put in issue the propriety of Landow's purpose in assigning his claim. As Defendants note, Landow's purpose in

failing to sue in the name of New York Medical has not been fully explained. The parties to a fraudulent or illegal transaction who are equally at fault may not invoke judicial aid lest they profit from their own illegal acts. *Abright v. Shapiro*, 214 A.D.2d 496 (1st Dept. 1995). While the principle of *in pari delicto* is most frequently invoked to bar an action for breach of the illegal agreement, it may also apply to bar a fraud or breach of fiduciary duty claim. *See Ross v. Bolton*, 904 F.2d 819 (2d Cir. 1999). In *Ross*, an investor who purchased stock through an illegal stock parking scheme was barred by *in pari delicto* from maintaining a fraud action against the securities firm which had acted as the seller's clearing agent in the stock parking scheme. The defense of *in pari delicto* may also be available where a party to an illegal transaction assigns his rights to a sham company in order to proceed upon a fraud claim.

At this juncture, the Court must assume that the original ESOP transaction fully complied with IRC § 1042 and there was no violation of BCL § 1507 by permitting non-physicians to participate in the plan. Nevertheless, because Landow's maintaining the action in the name of Carbon Capital gives reason to doubt the validity of these assumptions, Defendants may explore the purpose for the assignment in the course of discovery.

E. Certain Claims Against Selinger are Barred by the Statute of Limitations

1. Fraud

An action based upon fraud shall be commenced within the greater of six years from the date the cause of action accrued or two years from the time the plaintiff discovered the fraud or could with reasonable diligence have discovered it. CPLR § 213(8). A cause of action accrues, for the purpose of measuring the period of limitations, when all of the facts necessary to the cause of action have occurred so that the party would be entitled to relief in court. *Poughkeepsie v. Espie*, 41 A.D.3d 701, 704 (2d Dept. 2007), *app. dism.*, 9 N.Y.3d 1003 (2007), quoting *Matter of Motor Veh. Acc. Indem. Corp. v. Aetna Cas.*, 89 N.Y.2d 214, 221 (1996). A cause of action alleging fraud accrues at the time the plaintiff possesses knowledge of facts from which the fraud could have been discovered with reasonable diligence. *Poughkeepsie,* 41 A.D.3d at 705 (town's cause of action for fraud accrued when it executed more expensive lease agreement that defendant, allegedly falsely, represented was necessary for unexpected renovations costs).

Although the representations upon which plaintiff sues were made August 20, 2002, there

is no basis for this Court to conclude that Landow relied upon those representations before he entered the agreement with Derivium on April 11, 2003. Thus, the cause of action for fraud accrued on April 11, 2003. Because this action was commenced on April 6, 2009, Plaintiff's cause of action for fraud is within the six year statute of limitations and is thus timely.

2. Breach of Fiduciary Duty

New York law does not provide any single limitations period for breach of fiduciary duty claims. *Kaufman v. Cohen*, 307 A.D.2d 113, 118 (1st Dept. 2003). Generally, the applicable statute of limitations for such claims depends upon the substantive remedy sought. Where the relief sought is equitable in nature, the six year statute of limitations period of CPLR § 213(1) applies. *Id.* Where a suit for breach of fiduciary duty seeks only money damages, the action is viewed as alleging injury to property and the three year statute of limitations of § 214(4) applies. *Id.* A cause of action for breach of fiduciary duty based on actual fraud, however, is subject to a six year statute of limitations. *Id.* at 119. Generally, a cause of action for breach of fiduciary duty accrues at the time of the breach. *Id.* at 121, n.3. A cause of action for breach of fiduciary duty based on actual fraud, however, accrues when a claim for fraud would accrue, i.e when plaintiff relies upon the fiduciary's misrepresentation.

The complaint may be read as asserting causes of action for breach of fiduciary duty based upon actual fraud, with respect to the representations that Derivium was a legitimate company and the collateral would be returned. In light of the Court's conclusion that Plaintiff's cause of action for fraud was brought within the statute of limitations, the Court concludes that Plaintiff's cause of action for breach of fiduciary duty based upon those misrepresentations is also timely.

The causes of action for breach of fiduciary duty by failing to exercise due diligence in determining Derivium's fitness and failing to disclose its involvement in the California lawsuit, however, are not based upon actual fraud. Accordingly, the three year statute of limitations applies to the latter two breach of fiduciary duty claims. As those breach of fiduciary duty claims had accrued by the time Landow entered the Derivium agreement in April 2003, they are time-barred. Accordingly, the Court grants Selinger's motion to dismiss those aspects of the Complaint based upon the statute of limitations as to Plaintiff's breach of fiduciary duty claims

for failing to exercise due diligence and failing to disclose the California lawsuit. The Court denies Selinger's motion to dismiss those aspects of the Complaint based upon the statute of limitations as to Plaintiff's fraud and breach of fiduciary duty based upon actual fraud claims.

F. The Court Grants American Express' Motion to Dismiss in Part

The acts of a person assuming to be the representative of another are not competent to prove the agency in the absence of evidence tending to show the principal's knowledge of such acts or assent to them. *Lexow & Jenkins v. Hertz Commercial Leasing Corp.*, 122 A.D.2d 25 (2d Dept. 1986). Notwithstanding the appearance of the American Express logo on Selinger's stationery and its providing office space, which might otherwise suggest an agency relationship, the legend at the bottom of the June Agreement providing that the consulting services were not provided by an American Express Company was sufficient to dispel the belief that Selinger was American Express' agent. Plaintiff does not allege that any of the misrepresentations were made by American Express or any authorized official of the company. Accordingly, the Court grants American Express' motion to dismiss Plaintiff's fraud claim for failure to state a cause of action.

Although Plaintiff has not alleged facts from which it may be inferred that a fiduciary relationship existed between American Express and Landow, it has alleged sufficient facts to establish a cause of action for aiding and abetting a breach of fiduciary duty. A cause of action for aiding and abetting breach of fiduciary duty requires a *prima facie* showing of 1) a fiduciary duty owed to plaintiff by another, 2) a breach of that duty, 3) defendant's substantial assistance in effecting the breach, and 4) resulting damages. *Keystone Int'l v. Suzuki*, 57 A.D.3d 205, 208 (1st Dept 2008). Although American Express did not assent to Selinger's acting as its agent, it may have provided substantial assistance to Selinger in breaching his fiduciary duty to Landow by allowing him to act as its "marketing partner." The Court concludes that Plaintiff has stated a viable cause of action against American Express for aiding and abetting Selinger's breach of the fiduciary duty based upon actual fraud. Accordingly, the Court denies American Express' motion to dismiss the second cause of action for failure to state a cause of action.

G. The Court denies Plaintiff's Motion to Serve An Amended Complaint

Plaintiff has moved for leave to serve an amended complaint in the event that the Court grants Defendants' motions to dismiss. In light of the Court's conclusions that Plaintiff may

maintain fraud and breach of fiduciary duty claims against Selinger and Corporate Solutions and a claim for aiding and abetting a breach of fiduciary duty against American Express, the Court denies Plaintiff's motion for leave to serve an amended complaint.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds all counsel of their required appearance before the Court on March 24, 2010 at 9:30 a.m.

ENTER

DATED: Mineola, NY
February 25, 2010

HON. TIMOTHY S. DRISCOLL
J.S.C.