SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

CARBON CAPITAL MANAGEMENT, LLC,

Plaintiff,

INDEX No. 006483/09

MOTION DATE: May 28, 2010
Motion Sequence # 002, 003, 004, 005, 006, 007

-against-

AMERICAN EXPRESS COMPANY, CORPORATE SOLUTIONS GROUP, LLC and IRWIN SELINGER,

Defendants.

The following papers read on this motion:

Amended Notice of Motion..... X
Notice of Motion..... XX
Cross-Motion..... XXX
Affidavit in Opposition..... X
Affirmation in Support..... X
Affirmation in further Support & Opposition..... X
Reply..... X
Memorandum of Law..... X

Motion (sequence # 2) by defendant American Express Company to dismiss the complaint for failure to state a cause of action is **granted** in part and **denied** in part. Motion (sequence # 3 and # 6) by defendant Irwin Selinger to dismiss the complaint for failure to state a cause of action is **granted** in part and **denied** in part. Defendant Selinger's motion

to dismiss based upon statute of limitations is **granted** in part and **denied** in part. Defendant Selinger's motion to dismiss for lack of personal jurisdiction is **denied**. Motion (sequence # 4 and # 5) by plaintiff for leave to serve an amended complaint is **denied**. Motion (sequence # 7) by plaintiff to extend the time for service of the summons and complaint on defendant Irwin Selinger is **denied** as **moot**.

This is an action for fraud and breach of fiduciary duty. Plaintiff Dr. Jonathan S. Landow is the President of New York Medical, P.C. and the managing member of plaintiff Carbon Capital Management, LLC. Defendant Irwin 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 whereby Landow could liquidate his interest in New York Medical without recognizing a capital gain. In essence, the transaction called for Landow to sell his stock in the professional corporation to an ESOP, or employee stock ownership plan.

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." Section 1042 defines "qualified securities" as "employer securities" issued by a "domestic C corporation" whose stock is not "readily tradeable on an established securities market" (IRC § 1042[c][1]). It is unclear whether a professional corporation qualifies as a domestic C corporation. In any event, New York Medical was presumably a C, as opposed to an S, corporation. The ESOP will ordinarily borrow the purchase money and may even borrow it from the employer. The ESOP usually services its debt with the "annual qualified plan contributions" paid by the employer corporation (Tax Planning for Corporations and Shareholders § 7.06).

On July 25, 2000, New York Medical entered into a consulting agreement with Selinger's company, defendant Corporate Solutions Group, LLC. 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 employee stock ownership plan. Additionally, Corporate Solutions was to assist New York Medical in obtaining a $10 million loan. New York Medical would in turn lend the money to the ESOP to finance its purchase of the stock of the professional corporation. As compensation for these services, New York Medical was to pay Corporate Solutions a "performance fee" of $325,000.

The consulting 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 who 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). It does not seem to have been an immediate concern to Dr. Landow or Selinger that the ESOP would hold stock on behalf of unlicensed employees. Nevertheless, an affiliated non-professional corporation, New York Medical, Inc. was eventually formed. According to Dr. Landow, New York Medical, Inc. was formed so that unlicensed employees could participate in the employee stock ownership plan.

Although plaintiff has submitted several proposal sheets from other lenders, a summary of the terms of the Citibank loan has not been submitted to the court. Nevertheless, the collateral for the loan was a portfolio of floating rate notes which were apparently held by Dr. Landow. Pursuant to IRC § 1042[c][3], qualified replacement property may be purchased anytime between three months before the sale of qualified securities and twelve months after the sale. Presumably, Dr. Landow acquired the floating rate notes to serve as the qualified replacement property. Landow invested $1.5 million of his own funds in the transaction and was required to make principal 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.

Because Landow was dissatisfied with having to make repayments and the interest cost, he became interested in refinancing the Citibank loan. On June 12, 2002, New York Medical, Inc. engaged Corporate Solutions to negotiate a $14 million loan on its behalf. The 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 agreement providing for compensation, the registered broker is identified as "Morgan

Stanley" (Plaintiff's cross-motion for leave to replead, ex. F).

The June 2002 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." However, a legend on the bottom of the first page of the letter states that the "services described herein are offered and provided solely by Corporate Solutions, LLC and not by American Express Financial Advisors Inc. or any other American Express Company."

On August 20, 2002, Selinger wrote to 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. 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 of these characters refer to the maturity date of the security (See www.wikipedia.org.).

The interest rate was to be "28 basis points above LIBOR." However, the loan 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 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."

On the same day, Landow 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 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" with Derivium

whereby it agreed to provide financing and custodial services. Why Landow borrowed the money from Derivium personally rather than guaranteeing the debt of New York Medical is unclear. In any event, the master 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.

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. 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. Landow alleges that he sustained damages in the amount of the $1.5 million which he invested in the ESOP transaction as well as interest and penalties on his tax deficiency.

On April 3, 2009, Landow assigned his claims against Corporate Solutions, Selinger, and American Express to Carbon Capital Management, Landow's limited liability company. The present action was commenced by Carbon Capital on April 6, 2009. Plaintiff alleges that in March and April 2003 defendants falsely represented that the loan was not subject to tax while they knew that the IRS had challenged similar transactions. Plaintiff further alleges that defendants falsely represented that Derivium was a "legitimate company," while they knew that it would sell the collateral in the course of the Ponzi scheme.

Plaintiff further alleges that defendants breached their fiduciary duties to 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.

Defendant 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 2002 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 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 plaintiff has not pled his fraud claim in sufficient detail as required by CPLR 3016(b).

Selinger argues that he was not under a fiduciary duty to Landow because the transaction was negotiated at arm's length. Selinger argues that plaintiff's claims are void for champerty pursuant to Judiciary Law § 489. Finally, Selinger argues that 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 argues that plaintiff does not have standing to sue because the assignor, the party who transferred his claims to plaintiff, is not disclosed in the complaint. American Express argues that it did not make any fraudulent representations to Landow and Selinger was not its agent. American Express further argues that it was not under a fiduciary duty to Landow and plaintiff's fraud and breach of fiduciary duty claims are not alleged 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 defendant Selinger, in the event that the court concludes that service was improper.

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 AD2d 700 [1st Dept 1984]).

Plaintiff submits an affidavit of service stating 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 AD3d 1287 [3d Dept 2009]). Defendant's denial of having received the summons and complaint is insufficient to rebut the presumption of mailing (***Kihl v Pfeffer***, 94 NY2d 118, 122 [1999]). However, defendant 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 is sufficient to raise a question of fact as to whether the papers were served on Sunday. However, the court determines that General Business Law § 11 does not render the service void in the circumstances of this case.

Section 11's prohibition of service of legal process on Sunday is part of Article 2 of the General Business Law, which establishes certain prohibitions designed to avoid "serious interruptions of the repose and religious liberty of the community" (General Business Law § 2). Among these restrictions was General Business Law § 9, which, with certain exceptions, prohibited "all manner of public selling or offering for sale of any property upon Sunday." In ***People v Abrams***, 40 NY2d 277, 284-85 (1976), the Court of Appeals declared § 9 to be unconstitutionally vague because its exceptions were "devoid of rhyme or reason" and the statute lacked "the requisite rationality in light of its avowed purpose."

The only exception contained in § 11 are criminal proceedings. Nevertheless, in ***Fine v Commissioner***, 168 AD2d 285 (1st Dept 1990), a Jewish process server who observed a Saturday Sabbath sought a declaratory judgment that § 11 was unconstitutional because it violated the equal protection and establishment of religion clauses. In dismissing the process server's complaint, the court held that the statute serves a legitimate state objective in providing a day of rest for its citizens. The court reasoned that the statute neither forced the process server to observe Sunday Sabbath nor hindered him from observing his own Sabbath day.

CPLR § 308(1) provides for personal service upon a natural person by delivering the summons to the person to be served. To the extent that § 11 prohibits personal delivery of the summons to defendant on his day of rest, it avoids a serious interruption of the repose and

religious liberty of the defendant and furthers the purpose of Article 2.

CPLR §308(2) provides for personal service by delivering the summons to a person of suitable age and discretion at the dwelling place or usual place of abode of the person to be served and by mailing the summons to the person to be served at his last known residence. To the extent that § 11 prohibits delivering the summons to a person of suitable age and discretion on their day of rest, it avoids a serious interruption of their repose and religious liberty and similarly furthers the purpose of Article 2.

Where the process server delivers the summons on Sunday to a person of suitable discretion in defendant's household, it may be assumed that their Sabbath day has been interrupted to the same extent as that of the defendant. However, where the person of suitable age and discretion is the concierge in a multiple dwelling, it is clear that the concierge's Sabbath is not being interrupted. Moreover, the acceptance of legal process by the concierge need not result in the interruption of the repose and religious liberty of the defendant. If defendant did not want to be disturbed with legal matters on Sunday, he had simply to instruct his concierge to hold any summonses or other documents which might be delivered. Indeed, since Selinger asserts that he actually received the summons and complaint "on or about" July 5, 2009, he does not specifically allege that he received the papers on Sunday, or that his Sabbath was otherwise effected.

Were this court to construe § 11 as prohibiting service of process on Sunday, regardless of whether the repose or religious liberty of defendant or anyone in his household was effected, the statute might well run afoul of the establishment clause. Finding a service void under such circumstances could be seen as declaring Sunday to be the official day of rest, regardless of whether it was so observed by the defendant. To avoid "constitutional doubts," the court must reject this construction of the statute (***Matter of Jacob***, 86 NY2d 651, 667 [1995]). Thus, the court concludes that plaintiff's delivering the summons and complaint to defendant's concierge on Sunday did not violate General Business Law § 11. Defendant Selinger's motion to dismiss the complaint for lack of personal jurisdiction is denied. Since the court has ruled that service of process on Selinger was proper, plaintiff's motion to extend the time for service is **denied** as **moot**.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction....[The court must] accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (***Arnav Industries, Inc. v. Brown***,

96 NY2d 300, 303 [2001]).

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 NY3d 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 NY3d 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 NY3d 553 (2009).

From the complaint and the other papers submitted to the court, it is clear that Selinger's representations related to the tax treatment of the Derivium loan, the integrity of Derivium as a lender, and the safety of the collateral. 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.

While the statement that Derivium would engage in "hedging transactions" is somewhat imprecise, it may reasonably have been understood as meaning 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 the issue of reliance, the issue may be pursued in discovery. 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 AD3d 84, 88 [1st Dept 2009]). However, a sophisticated investor who acquires a business 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 AD3d 93, 100 [1st Dept 2006]). 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 2002 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, defendant Selinger's motion to dismiss plaintiff's fraud claim for failure to state a cause of action is **granted** as to representations concerning tax treatment.

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. Landow might have learned the falsity of these representations by investigating Dirivium. However, in view of Selinger's expertise in financial matters, and his involvement of American Express and Morgan Stanley, two reputable financial services companies, plaintiff's reliance upon Selinger's representations may well have been justifiable. Defendant Selinger's motion to dismiss plaintiff's fraud claim for failure to state a cause of action is **denied** as to Selinger's representations concerning the legitimacy of Derivium and the safety of the collateral. 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.

"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 relation" (***EBC I, Inc. v. Goldman, Sachs & Co.***, 5 NY3d 11, 19-20 [2005]).

Although the June 2002 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 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. Defendant Selinger's motion to dismiss plaintiff's breach of fiduciary claims for failure to state a cause of action is **denied**.

"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 NY3d 190, 198 [2009]). The doctrine is currently codified in Judiciary Law §§ 488-89.[1] Section 489[1] in pertinent part 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 champerty 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. However, the statutes have been limited in scope to prevent attorneys from filing suit as a vehicle for obtaining costs (Id at 199). In ***Merrill Lynch Mortgage Investors***, the court of appeals distinguished between "one who acquires

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a right in order to make money from litigating it and one who acquires a right in order to enforce it" (Id at 201). Thus, "the champerty statute does not apply when the purpose of an assignment is the collection of a legitimate claim" (Id at 201).

In ***Merrill Lynch Mortgage Investors***, the court of appeals held 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. Defendant Selinger's motion to dismiss the complaint on the ground that plaintiff's claims are void for champerty is **denied**.

Nevertheless, in moving to dismiss for champerty, defendants put in issue the propriety of Landow's purpose in assigning his claim. Since Landow himself was party to the master financing agreement, his failure to sue in his own name 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 AD2d 496 [1st Dept 1995]). While the principle of *in pari delicto* is most frequently invoked to bar an action for breach of an 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 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 dummy company in order to proceed upon a fraud claim. At this point, 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.

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 (***Poughkeepsie v Espie***, 41 AD3d 701, 704 [2d Dept 2007]). Thus, a cause of action for fraud accrues when plaintiff relies upon the fraudulent representation (Id at 704-04).

Although the representations upon which plaintiff sues were made August 20, 2002, Landow did not rely upon those representations until he entered the agreement with Derivium on April 11, 2003. Since the cause of action for fraud accrued on April 11, 2003 and the action was commenced on April 6, 2009, plaintiff's cause of action for fraud is timely.

"New York law does not provide any single limitations period for breach of fiduciary duty claims" (Kaufman v Cohen, 307 AD2d 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). Nevertheless, a cause of action for breach of fiduciary duty based on actual fraud 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.) However, a cause of action for breach of fiduciary duty based on actual fraud 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. Since plaintiff's cause of action for fraud was brought within the statute of limitations, plaintiff's cause of action for breach of fiduciary duty based upon those misrepresentations is also timely.

However, 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 are not based upon actual fraud. Accordingly, the three year statute of limitations applies to the latter two breach of fiduciary duty claims. Since those breach of fiduciary duty claims had accrued by the time Landow entered the Derivium agreement in April 2003, they are time-barred. Accordingly, defendant Selinger's motion to dismiss the complaint based upon the statute of limitations is **granted** as to plaintiff's breach of fiduciary duty claims for failing to exercise due diligence and failing to disclose the California lawsuit.

Defendant Selinger's motion to dismiss the complaint based upon the statute of limitations is **denied** as to plaintiff's fraud and breach of fiduciary duty based upon actual fraud claims.

"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 AD2d 25 [2d Dept 1986]). The appearance of the American Express logo on Selinger's stationary and its providing of office space tends to show that American Express assented to Selinger's presenting himself as an agent of the company. However, the legend at the bottom of the June 2002 agreement to the effect 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, defendant American Express' motion to dismiss plaintiff's fraud claim for failure to state a cause of action is **granted**.

Plaintiff does not allege any facts from which it may be inferred that a fiduciary relationship existed between American Express and Landow. However, a cause of action for aiding and abetting a breach of fiduciary duty may be based upon a prima facie showing of a fiduciary duty owed to plaintiff by another, a breach of that duty, defendant's substantial assistance in effecting the breach, together with resulting damages (***Keystone Int'l v Suzuki***, 57 AD3d 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, defendant American Express' motion to dismiss the second cause of action for failure to state a cause of action is **denied**.

Plaintiff has moved for leave to serve an amended complaint only if defendants' motions to dismiss were granted. Since 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, plaintiff's motion for leave to serve an amended complaint is **denied**.

All counsel are directed to appear for a status conference before the undersigned on September 28, 2010 at 9:30 a.m. in Chambers of the undersigned.

Dated 29 July 2010

ENTERED
AUG 02 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Stephen A. Bucaria
J.S.C.