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SHORT FORM ORDER

SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 7

NORMAN ANNEXSTEIN,

Plaintiff,

- against -

ALLEN LEWINTER and TOPKAT ADVANTAGE GROUP, LLC,

Defendants.

INDEX NO.:016049/07
MOTION DATE: 11/5/10
SEQUENCE NO .: 09

The following documents were read on this motion:

Motion for Leave to Reargue Decision and Order dated February 17, 2010 1
Affirmation in Opposition to Second Motion to Reargue 2
Reply Affirmation in Further Support of Motion to Reargue 3

PRELIMINARY STATEMENT

Plaintiff and a non-party each contributed $50,000 on August 29, 2000 to acquire a 2 ½% interest in Topkat Advantage Group, LLC. Plaintiff commenced this action by filing on September 17, 2007. The complaint alleged seven causes of action:

FIRST: Defendants LeWinter and Topkat Advantage breached Membership Agreement and Fiduciary Obligations on and after October 1, 2000;

SECOND: Failure to account, misappropriation, and wrongful retention beginning in August 2000;

THIRD: Claim for Rescission with Interest from August 29, 2000;

FOURTH: Breach of 2000 Membership Agreement;

FIFTH: Agreement to refund investment, the latest being October 16, 2001;

SIXTH: Fraud by misrepresenting intentions to perform and the prospect for substantial garment production by plaintiff as a result of membership;

SEVENTH: Deprivation of plaintiff's partial membership rights by secreting profits and revenues.

By Decision and Order dated March 26, 2009, entered on April 1, 2009 the Court granted defendants' motion to dismiss the Complaint as to the Second, Third, Fourth, Sixth and Seventh Causes of Action, leaving remaining only the First and Fifth Causes of Action.

Plaintiff thereafter moved for leave to amend the complaint to include Michael Steinberg and Topkat, LLC. It is the denial of that motion which is the subject of this motion.

The proposed Amended Verified Complaint included Steinberg and Topkat, LLC, and also included seven Causes of Action as follows:

FIRST: LeWinter, Steinberg and Topkat Advantage failed to account for or distribute plaintiff's share of the profits, surplus or income of Topkat Advantage;

SECOND: Defendants LeWinter and Steinberg breached their fiduciary duties to plaintiff, including failure to provide an accounting, self-dealing, supplying plaintiff with false financial information, and improperly withholding from and failure to distribute to plaintiff his pro rata share of income, property, distribution and other property and assets of Topkat Advantage;

THIRD: Plaintiff has recently discovered that, in November 2009, LeWinter and Steinberg secreted plaintiff's property, $50,000, by secreting the funds for their own personal use;

FOURTH: Fraud on the part of Lewinter and Topkat Advantage in wrongfully inducing plaintiff to invest $50,000, several of which misrepresentations were not discovered by plaintiff until November 2009, during the course of discovery;

FIFTH: In November 2001 and February 2002 defendants LeWinter and Steinberg made additional misrepresentations to plaintiff, including that Topkat Advantage was solvent, when they knew it was insolvent;

SIXTH: LeWinter and Steinberg have distributed assets of Topkat Advantage to themselves to the extent of $121,310, including $30,000 to LeWinter and $30,000 to Topkat, LLC, which plaintiff describes as an alter ego of LeWinter; and that plaintiff only discovered these diversions of funds within weeks of the December 2009 proposed Amended Complaint;

SEVENTH: Defendants LeWinter and Steinberg were members of Topkat Advantage when plaintiff purchased his membership interest, and in December 2001 they made a fraudulent conveyance of the assets of Topkat Advantage to Topkat, LLC; that Topkat, LLC so controlled the operation of Topkat Advantage, that it was an alter ego of Topkat Advantage, and that the transfer of assets from Topkat Advantage to Topkat, LLC rendered the former insolvent.

Plaintiff's motion to amend the complaint was denied by Order dated February 17, 2010 and counsel for defendants contends, unsurprisingly, that it is far too late to move for reargument. In similar circumstances, where the motion to reargue was at the request of the Court, and the party seeking reargument had filed, but not perfected, a notice of appeal, the granting of the reargument beyond the term provided by statute was within the discretion of the trial court. (*Leist v. Goldstein,* 305 A.D.2d 468 [2d Dept. 2003]).

DISCUSSION

Plaintiff's motion to reargue the decision of February 17, 2010 is granted, and upon reargument, the Court adheres to its original decision. The motion to amend the complaint is denied.

Proposed Causes of Action

The proposed first cause of action for accounting and proposed second cause of action for fiduciary duty, will not be addressed to the extent that those claims survived in the original Complaint after this court's decision dated March 26, 2009. However, to the extent that the proposed second cause of action alleges that the defendants and proposed additional defendants failed to issue distributions of profits to plaintiff, the court notes that the Statute of Limitations for such claims is three years pursuant to Limited Liability Company Law § 508 (c).

The proposed Amended Complaint apparently abandons plaintiff's fifth cause of action as stated in the original Complaint, which alleged breach of an agreement to return plaintiff's investment, and which was the only other claim that survived after this court's decision dated

March 26, 2009. Instead, plaintiff alleges entirely new facts in a proposed fifth cause of action, to the effect that plaintiff was fraudulently induced to keep his investment in Topkat Advantage Group, LLC. This proposed fifth cause of action is now barred by the Statue of Limitations for fraud, as it is now more than nine years since the alleged inducement occurred and more than two years since the plaintiff "could with reasonable diligence have discovered [the fraud]" pursuant to CPLR § 213(8). This court adheres to its earlier decision that various correspondence dated June 25, 2001, July 12, 2001, and July 19, 2001 should have alerted the plaintiff of possible fraud, and therefore knowledge of *any* possible fraud related to plaintiff's investment is imputed as of those dates. (*See Prestandrea v. Stein*, 262 AD2d 621 [2d Dept. 1999], *Higgins v. Crouse*, 147 NY 411, 416 [1895], *Erbe v. Lincoln Rochester Trust Co.*, 165 NY2d 107 [1957]). Plaintiff may well have allowed himself to be lulled into a sense of confidence in his investment by further misrepresentations, but the time when the Statute of Limitations began to run remains unchanged.

In the proposed sixth cause of action, plaintiff alleges distribution of Topkat Advantage's assets to LeWinter and Topkat, LLC, and that these diversions of funds were only discovered within weeks of the December 2009 proposed Amended Complaint. These distributions are alleged to have occurred within the first few months of plaintiff's involvement with Topkat Advantage, LLC. They are barred by the statute of limitations. As these allegations fall within plaintiff's investment relation with Topkat Advantage, LLC, knowledge of these diversions is also imputed as of the various correspondence dated June 25, 2001, July 12, 2001, and July 19, 2001. (*See Prestandrea v. Stein*, 262 AD2d 621 [2d Dept. 1999], *Higgins v. Crouse*, 147 NY 411, 416 [1895], *Erbe v. Lincoln Rochester Trust Co.*, 165 NY2d 107 [1957]). The fact that it took plaintiff nine years to conclude that funds were expended does nothing to change the fact that the time within which to bring such a claim expired in July 2007.

Plaintiff also alleges a breach of the Debtor and Creditor Law in a proposed seventh cause of action. He claims that in December 2001, LeWinter and Steinberg improperly transferred the assets of Topkat Advantage, LLC to Topkat, LLC, thereby rendering it insolvent. However, plaintiff has no right of action under DCL § 273, and, in any case, the Statute of Limitations to bring such a claim has run, nine years after the alleged fraud and diversion of funds had occurred.

Plaintiff relies on Section 273 of the Debtor and Creditor Law, to claim a right of action for constructive fraudulent conveyance. A constructive fraudulent conveyance was a presumption in the early common law, and it is adopted as a *sui generis* equitable claim in the Uniform Fraudulent Conveyance Act, or sections 270 through 281 of the Debtor and Creditor Law, to prevent debtors from disposing of assets in order to defraud creditors. (*See* 30 N.Y. Jur.2d Creditors' Rights §§ 313, 414). A right of action for constructive fraudulent conveyance is therefore strictly a legal construct created by courts of equity to afford *creditors* certain limited remedies, and it differs from actual fraud or actual fraudulent conveyance in that fraudulent intent need not be proven. (*See* 30 N.Y. Jur.2d Creditors' Rights §§ 312, 360).

A right of action under DCL § 273 is therefore only available to creditors. Sections 278[1] and 279[2] of the Debtor and Creditor Law, both titled with language beginning "Rights of creditors," fully set out creditors' remedies and standing to claim a constructive fraudulent conveyance under any of the sections of the Uniform Fraudulent Conveyance Act, or sections 270 through 281 of the Debtor and Creditor Law. Plaintiff is not a creditor to the defendants, and the defendants and proposed additional defendants were not debtors to the plaintiff. Plaintiff therefore has no right of action under DCL § 273 in this case.

Plaintiff's remaining proposed causes of action merely restate the dismissed causes of

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[1] DCL § 278 (Rights of creditors whose claims have matured) provides:
1. Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser,
a. Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or
b. Disregard the conveyance and attach or levy execution upon the property conveyed.
2. A purchaser who without actual fraudulent intent has given less than a fair consideration for the conveyance or obligation, may retain the property or obligation as security for repayment.

[2] DCL § 279 (Rights of creditors whose claims have not matured) provides:
Where a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured he may proceed in a court of competent jurisdiction against any person against whom he could have proceeded had his claim matured, and the court may,
a. Restrain the defendant from disposing of his property,
b. Appoint a receiver to take charge of the property,
c. Set aside the conveyance or annul the obligation, or
d. Make any order which the circumstances of the case may require.

action alleging fraud in the inducement, breach of the membership agreement, and misappropriation. This court's decision dismissing several causes of actions stands. Even though plaintiff asserts that he discovered details of the "secreting" of funds and fraudulent inducement in November 2009, the Court has previously determined that plaintiff was under an obligation to investigate the circumstances of the transaction, and was chargeable with notice as of 2001, long before the claimed discovery in 2009. The referenced correspondence, and his co-investor's withdrawal, placed plaintiff on notice of the strong possibility of fraud and obligated the plaintiff to undertake action to protect his investment.

Additional parties

This court adheres to its multiple decisions denying plaintiff's request to add Steinberg and Topkat, LLC as defendants.

Plaintiff does not claim "discovery" of Mr. Steinberg in 2009, and plaintiff could have added Steinberg as a defendant when he brought this suit. Plaintiff chose not to do so. Plaintiff is not entitled to add Steinberg now that it is more than nine years since the membership agreement was signed and the alleged misappropriations and breaches of fiduciary duty took place. As the Court has previously ruled, the doctrine of relation back is inapplicable to save the plaintiff from his earlier choice not to sue Mr. Steinberg. The doctrine of relation back through unity of interest is applied sparingly and only when, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against them as well. (*See* CPLR 203[b], *Buran v. Coupal*, 87 NY2d 173, 178 [1995]). Such is not the case here, since the plaintiff was not mistaken as to whom he has been dealing with in his investment, that is, Mr. LeWinter, whom he chose to sue in his original Complaint.

Despite plaintiff's contentions, the court did not misapprehend the difference between Topkat Advantage, LLC and Topkat, LLC. Whether or not Topkat, LLC was an alter ego of LeWinter is not important, as it is Topkat Advantage, LLC in whom plaintiff invested, and against whom plaintiff chose to make its claims. Under the alleged facts, plaintiff could have sued Topkat, LLC directly for conversion of plaintiff's investment funds. Again, however, the plaintiff chose not to do so in a timely fashion. The Statute of Limitations now bars his claims against Topkat, LLC. Although plaintiff claims recent "discovery" of Topkat, LLC, this court

still imputes knowledge of any alleged fraud, misappropriations, or conversion related to his investment in Topkat Advantage, LLC, because various correspondence in 2001 and his co-investor's withdrawal raised a duty to inquire about any possible fraud, misappropriations, or conversion. Indeed, the plaintiff also cannot claim "discovery" of Topkat Advantage's failure to issue any distributions from profits or to provide the plaintiff his expected $500,000 return on his $50,000 investment (his claimed expectation damages). Further, this court adheres to its earlier decision that the relation back doctrine cannot save the plaintiff from his choice not to sue Topkat, LLC. There is no *relevant* "unity of interest" between Topkat, LLC and Mr. LeWnter, or between Topkat, LLC and Topkat Advantage, LLC, as to any claim that is not time-barred. Indeed, the only supportable claim against Topkat, LLC would be conversion based on actions that occurred in 2001, and those claims, either in their conversion or misappropriation incarnations, have been dismissed in this court's decision dated March 26, 2009.

More generally, neither could this court impute notice of suit as to Topkat, LLC, when the plaintiff sued Topkat Advantage, LLC on claims of breach of contract, breach of fiduciary duty, and misappropriation, as none of the allegations implicated Topkat, LLC, as a responsible party. (*See* CPLR 203[b], *Buran v. Coupal*, 87 NY2d 173, 178 [1995]). The plaintiff strenuously argues and confounds himself in the fog of the alter-ego and piercing-the-veil doctrines. These doctrines only apply, as the name suggests, to pierce the limited liability of a corporation or LLC, in order to reach the assets of individual members or investors. That is not plaintiff's objective. Rather, he seeks to reach a limited liability company, Topkat, LLC, by way of one of its members or investors, Mr. LeWinter. The doctrines are thus entirely irrelevant to the issue of relation back.

Simply stated, if Topkat, LLC was brought into this lawsuit under the relation back doctrine, the plaintiff would not have any claim against Topkat, LLC which is not barred, since only a claim for conversion would lie against Topkat, LLC, and that claim was already time-barred by the time that plaintiff brought the original Complaint.

The court adheres to its earlier decision denying plaintiff's request to amend the Complaint.

This constitutes the decision and order of the court.

Dated: January 28, 2011

J.S.C.