

Nazzaro v Nazzaro

2011 NY Slip Op 30896(U)

April 7, 2011

Supreme Court, Suffolk County

Docket Number: 09-8081

Judge: John J.J. Jones Jr

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 6/24/10
ADJ. DATE 10/13/10
Mot. Seq. #001 - MotD

-----X
 CAROLYN NAZZARO, :
 :
 :
 Plaintiff, :
 :
 :
 - against - :
 :
 JAMES J. NAZZARO, J. NAZZARO :
 PARTNERSHIP, L.P., NAZZARO FAMILY :
 TRUST, and AUGUSTUS J. NAZZARO, :
 :
 Defendants. :
 -----X

PETER B. GIERER, ESQ.
 Attorney for Plaintiff
 400 Town Line Road, Suite 100
 P.O. Box 5296
 Hauppauge, New York 11788

 NEWMAN & CAHN, LLP
 Attorney for Defendants James J. Nazzaro &
 J. Nazzaro Partnership, L.P.
 1 Old Country Road, Suite 295
 Carle Place, New York 11514-1889

 FARRELL FRITZ, P.C.
 Attorney for Defendants Nazzaro Family
 Trust & Augustus J. Nazzaro
 1320 RXR Plaza
 Uniondale, New York 11556

Upon the following papers numbered 1 to 43 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-34; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 35-40; Replying Affidavits and supporting papers 41-43; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants James J. Nazzaro and J. Nazzaro Partnership, L.P. (collectively, "the defendants") for an order granting summary judgment (i) dismissing the complaint, or (ii) dismissing each cause of action which seeks an accounting from any of the defendants, or (iii) dismissing each cause of action which seeks to affect the title to any parcel of real estate owned by defendant J. Nazzaro Partnership, L.P.; and, upon the dismissal of all claims which would affect the title to or the possession, use or enjoyment of any parcel of real estate owned by defendant J. Nazzaro Partnership, L.P., canceling the notice of pendency filed on March 3, 2009, is granted to the extent of granting summary judgment dismissing the first, second, third, fourth, seventh, eighth, tenth, eleventh,

twelfth, fourteenth, fifteenth, and sixteenth causes of action pleaded in the second amended complaint, and is otherwise denied.

This action, which was commenced by Carolyn Nazzaro on March 3, 2009, is to recover damages and for declaratory and injunctive relief arising from the formation of J. Nazzaro Partnership, L.P. and from Carolyn's subsequent transfer of assets to the partnership. The partnership was ostensibly created in 1996 upon the execution of a limited partnership agreement ("the Agreement") naming Carolyn and James J. Nazzaro as general partners. Carolyn, who is currently prosecuting a divorce action against James, claims that James fraudulently induced her to enter into the Agreement and to transfer certain of her assets to the partnership, thereby removing the assets from the marital estate, to her detriment.

Carolyn and James were married on July 11, 1981. In or about 1987, James formed the Nazzaro Family Trust. It appears that the trust document was lost and that a restated trust agreement was prepared and executed by James and Augustus J. Nazzaro, as trustee of the Nazzaro Family Trust, on or about April 30, 2002.

According to Carolyn, James handled all financial matters, investments, and real estate transactions on their behalf, and hired all the attorneys, accountants, financial planners and other professionals which they used in those matters. She has no recollection of signing the Agreement; if she did sign it, she claims that she was never afforded an opportunity to read or review it and was never provided an explanation of its contents or purpose. At the inception of the partnership, there was one general partner unit and 99 limited partner units. James was designated as managing general partner in the agreement, giving him sole power to bind the partnership. Despite her lack of understanding as to why she was being asked to do so, she acceded to repeated demands by James that she transfer to the partnership various properties owned by her individually or jointly with her husband. Upon the transfer of those properties, and without Carolyn's knowledge or consent, James executed a separate joinder agreement in December 1996 pursuant to which he transferred all 99 limited partner units to the Nazzaro Family Trust, a trust controlled by James. In April 2002, Carolyn signed the Carolyn Nazzaro Residence Trust—as before, at James's insistence and without having an opportunity to read or review it and without having the contents explained to her—the effect of which was to transfer her interest in the marital residence into a trust.

In May 2006, Carolyn commenced the divorce action, during which she claims to have first learned that the assets of the partnership had been transferred into the Nazzaro Family Trust and that all of the property which she transferred to the partnership would not be considered marital property. This action followed.

The defendants, for their part, claim that it was always understood by Carolyn and James that the purpose of the 1996 transactions was to divest themselves of assets for estate planning purposes, *i.e.*, by conveying their respective properties to a limited partnership and then gifting the limited partner's interest to the Nazzaro Family Trust.

It appears that sometime after the commencement of this action, James produced a copy of the Agreement on which he had forged Carolyn's signature. As a result, Carolyn claims that there exist two copies of the Agreement, identical in content—one bearing what purports to be her signature, which was provided to her in December 2006, and the other with her signature having been placed on the document by James—and that there is no reason to believe that the forgery took place at any time other than at the time of the creation of the limited partnership. According to James, he believes that the forged copy was one which he prepared as a conformed copy for a bank; he now concedes that this was not a proper way to conform an agreement. Based on her discovery of the forged document, Carolyn served and filed an amended complaint pleading additional causes of action relating to the forgery.

The plaintiff alleges 16 causes of action in her amended complaint. The first, which sounds in fraud, is to recover damages in the amount of the value of her interest in the transferred properties if those properties were included in the marital estate, as well as punitive damages. The second is for constructive fraud based on an alleged breach of the obligation of trust and confidence owed by James to Carolyn. The third is for breach of fiduciary duty. The fourth is to impose a constructive trust on the property and income currently in the partnership and the Nazzaro Family Trust. The fifth is for an accounting to determine the current assets and value of the subject property. The sixth is for an injunction preventing the loss, waste, and dissipation of the subject property. The seventh is for rescission of the agreements and deed transfers based on forgery and fraud. The eighth is to reform the Agreement so as to make the property transferred part of the marital estate. The ninth is for an accounting of the Nazzaro Family Trust. The tenth is for revocation of the agreements and deed transfers based on forgery and fraud. The eleventh is to recover assets wrongfully converted by the defendants. The twelfth is for a declaration that the transfer of the limited partnership assets to the Nazzaro Family Trust is void for lack of consideration. The thirteenth is for a declaration that the Nazzaro Family Trust is a sham operated by James for the purpose of disenfranchising Carolyn and is, therefore, void. The fourteenth is for a declaration that the Agreement is void as a result of the forgery of Carolyn's signature thereon. The fifteenth is for damages resulting from the forgery. The sixteenth is for a declaration as to which of the two copies of the Agreement was executed by Carolyn in or about July 1996.

The defendants now move for summary judgment on the ground, *inter alia*, that this action, which was commenced in March 2009, is barred by the statute of limitations set forth in CPLR 213 (8). The defendants contend that Carolyn should have discovered the alleged fraud no later than February 6, 2007, when the preliminary conference order was filed in the divorce action. By that date, according to the defendants, she knew or should have known (i) that she and James had formed a limited partnership in 1996 and that 99% of the partnership assets had been gifted to the Nazzaro Family Trust in December of that year, as this information was set forth in the copies of the Agreement, the Carolyn Nazzaro Residence Trust instrument, and the Nazzaro Family Trust restatement which had been sent to her attorney in the divorce action in December 2006, (ii) that the owners of the partnership were herself, with a 0.5% interest, James, with a 0.5% interest, and the Nazzaro Family Trust, with a 99% interest, and of the partnership's various ownership interests, as all this information was set forth on the partnership's 2005 federal tax return which she had filed in conjunction with the commencement of the divorce action, (iii) the parties' respective ownership interests in their various assets and the

interrelationship of those assets, as this information was presented in a net worth statement filed by James in the divorce action on November 27, 2006, and (iv) that the properties held by the Trusts were excluded from the marital estate, as this matter had been a subject of discussion at the December 5, 2006 and February 6, 2007 conferences, where it had been specifically argued by James's attorney that those properties were not part of the marital estate because of the estate-planning actions taken as much as a decade earlier, but that the income stream which they generated and which were payable to James as net management fees would form the basis for Carolyn's support claim. The defendants further contend that she was required to commence this action within two years after that date, and that her failure to do so renders this action untimely. As to Carolyn's various requests for an accounting, the defendants contend that her right to an accounting of the partnership is limited by the Agreement and that her request is premature because of her failure to allege that she requested a meeting of the parties as required under paragraph 7.4 of the Agreement; also, that she has already been provided with every relevant financial record by way of discovery in the divorce action; and that insofar as her request extends to the Nazzaro Family Trust, she lacks standing to seek an accounting.

Carolyn, in opposition, contends that notwithstanding her receipt of the Agreement, tax returns, and other instruments on and before February 6, 2007, she did not understand their significance, *i.e.*, that a fraud had been perpetrated on her ten years before, until sometime later, after she had submitted the documentation to various experts. Since she promptly initiated an investigation upon learning that a fraud may have been perpetrated, the statute of limitations did not begin to run upon her receipt of those documents, but only after a reasonable opportunity for discovery of the fraud. Carolyn also contends that the defendants are barred by equitable estoppel from asserting the statute of limitations defense because they concealed the existence of the Agreement, tax returns, and other instruments until October 2006, because they concealed the forged copy of the Agreement until sometime after the commencement of this action, and because James failed to produce \$10,000.00 which he had agreed to pay (in the context of the divorce action) for Carolyn to retain an accounting expert until sometime after March 3, 2007.

The statute of limitations for a cause of action sounding in fraud is six years from the wrong, or two years from the date on which the fraud could reasonably have been discovered, whichever is later (CPLR 203 [g]; 213 [8]; *e.g.* *Lefkowitz v Appelbaum*, 258 AD2d 563, 685 NYS2d 460 [1999]). The burden of establishing that the fraud could not have been discovered before the two-year period prior to the commencement of the action is on the plaintiff, who seeks the benefit of the exception (*id.*).

The defendants established their *prima facie* entitlement to summary judgment dismissing, as untimely pleaded, each of the fraud-based causes of action, including not only the plaintiff's first and second causes of action but also the third cause of action for breach of fiduciary duty (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 879 NYS2d 355 [2009]), the seventh and tenth causes of action for rescission or revocation of the agreements and deed transfers (*Percoco v Lesnak*, 24 AD3d 427, 806 NYS2d 674 [2005]), the fourteenth cause of action, which is for a declaration that the Agreement is void (and which is duplicative of the seventh and tenth causes of action, which are themselves redundant), and the fifteenth cause of action to recover damages for forgery (*Piedra v Vanover*, 174 AD2d 191, 579 NYS2d 675 [1992]), by demonstrating that this action was not

commenced within six years after the last alleged fraudulent act was committed.

In opposition, Carolyn failed to establish that she commenced this action within two years after acquiring knowledge of facts from which she could have reasonably inferred that a fraud had taken place. Even crediting her assertion that nothing on the face of the various agreements, deeds, tax returns or other documents may be said to have reasonably alerted her to the possibility of fraud, it is undisputed that at the December 2006 and February 2007 conferences in the divorce action, James's attorney asserted that the property had been removed from the marital estate, thus putting her on notice and creating a duty of inquiry.

In order to start the limitations period regarding discovery, a plaintiff need only be aware of enough operative facts so that, with reasonable diligence, she could have discovered the fraud * * *. In other words, all that is necessary are sufficient facts to suggest to a person of ordinary intelligence the probability that [he or she] may have been defrauded.

(*Watts v Exxon Corp.*, 188 AD2d 74, 76, 594 NYS2d 443, 444 [1993] [internal quotation marks omitted]). By February 2007, irrespective of whether she failed to appreciate the legal significance of the attorney's assertion or whether she had not yet confirmed its accuracy, it is clear that she possessed knowledge of the facts necessary to commence the running of two-year limitations period (*see Oggioni v Oggioni*, 46 AD3d 646, 848 NYS2d 245 [2007]; *TMG-II v Price Waterhouse & Co.*, 175 AD2d 21, 572 NYS2d 6 [1991], *lv denied* 79 NY2d 752, 580 NYS2d 199 [1992]). Nor does Carolyn's subsequent discovery of the alleged forgery avail her. A forgery is defined, in relevant part, as "the fraudulent making of a writing to the prejudice of another's rights"; consequently, it is recognized as "but one species of fraud" and is governed by the same statute of limitations applicable to causes of action for fraud (*Piedra v Vanover, supra* at 194, 579 NYS2d at 677 [internal quotation marks omitted]). Even if she did not become aware of the alleged forgery until sometime after the commencement of this action, it is clear that, by February 2007, she was aware of the existence of a partnership agreement which, though it allegedly bore her signature, she did not recall signing. Her later discovery of the "forged" agreement does not state an independent basis for recovery and is without legal significance. Certainly, it does not serve to extend her time to commence this action or revive any untimely claims.

Nor has Carolyn demonstrated a basis to support invocation of the doctrine of equitable estoppel. Generally, a defendant may be estopped from pleading the statute of limitations where the plaintiff was induced by fraud, misrepresentation or deception to refrain from timely commencing an action (*Simcuski v Saeli*, 44 NY2d 442, 406 NYS2d 259 [1978]). Estoppel will not apply, however, if the plaintiff possesses timely knowledge sufficient to place him or her under a duty to make inquiry and ascertain all the relevant facts prior to the expiration of the applicable statute of limitations (*Gleason v Spota*, 194 AD2d 764, 599 NYS2d 297 [1993]). Thus, irrespective of whether the defendants may have concealed documents or withheld funds from Carolyn, they may not be estopped from raising a statute of limitations defense as it is evident that Carolyn was aware of the existence of a limited partnership agreement and the claimed effect of this agreement and the subsequent transfers on the marital estate more than two years prior to the commencement of this action. In any event, relative to the defendants' alleged concealment of the agreement and deed transfers, the Court notes that equitable estoppel "does

not apply where the misrepresentation or act of concealment underlying the estoppel claim is the same act which forms the basis of plaintiff's underlying substantive cause of action" (*Lucas-Plaza Hous. Dev. Corp. v Corey*, 23 AD3d 217, 218, 805 NYS2d 9, 10 [2005]).

The defendants also established their prima facie entitlement to summary judgment dismissing the fourth, eighth, eleventh, twelfth, and sixteenth causes of action, all of which are governed by the six-year statute of limitations set forth in CPLR 213 without the benefit of the two-year discovery rule. As to the fourth cause of action, the Court notes that an action to impose a constructive trust accrues upon the occurrence of the wrongful act giving rise to a duty of restitution, not from the time the facts constituting the fraud are discovered (*Coombs v Jervier*, 74 AD3d 724, 906 NYS2d 267 [2010]). Where the constructive trustee is alleged to have wrongfully acquired the property, the action is deemed to accrue on the date of the alleged wrongful transfer of the property (*Reiner v Jaeger*, 50 AD3d 761, 855 NYS2d 613 [2008]). Here, it is apparent that the cause of action accrued no later than December 1996. The eighth cause of action, which is for reformation of an instrument of the ground of mistake, is likewise governed by the six-year statute of limitations (CPLR 213 [6]), which begins to run on the date the mistake was made (*Taintor v Taintor*, 50 AD3d 887, 855 NYS2d 642 [2008]). Again, since the last alleged "mistake" took place more than six years prior to March 3, 2009, this cause of action is also untimely. Whether the gravamen of the eleventh cause of action is fraud or conversion, which is governed by a three-year statute of limitations (CPLR 214 [3]), it, too, is time-barred. The twelfth cause of action, which is for a declaration that the transfer of the limited partnership assets to the Nazzaro Family Trust is void for lack of consideration, is untimely as well, as this transfer is alleged to have taken place in December 1996 (CPLR 213 [1]). The sixteenth cause of action, which is essentially for a declaration that Carolyn's signature on the partnership agreement was forged, is time-barred irrespective of whether it is governed by limitations period provided in CPLR 213 (1) or 213 (8) (*see generally Martin Goldman, LLC v Yonkers Indus. Dev. Agency*, 12 AD3d 646, 785 NYS2d 517 [2004], *lv dismissed* 4 NY3d 861, 797 NYS2d 813 [2005]); in any event, since Carolyn is now foreclosed from pursuing any of her fraud-based claims (*see Piedra v Vanover, supra*), it would appear that her request for such a declaration no longer presents a genuine controversy and is not justiciable (*see e.g. Matter of Guild of Admin. Officers of Suffolk County Community Coll. v County of Suffolk*, 126 AD2d 725, 510 NYS2d 914, *lv denied* 69 NY2d 609, 516 NYS2d 1025 [1987]). In opposition, Carolyn failed to raise any triable issue of fact sufficient to defeat summary judgment as to these causes of action.


As to the remaining causes of action, *i.e.*, the fifth, sixth, ninth, and thirteenth, the defendants failed to demonstrate any basis to dismiss those causes of action on statute of limitations grounds. A claim against a trustee for an accounting, as pleaded in the fifth and ninth causes of action, does not accrue so long as the trust subsists (*Tydings v Greenfield, Stein & Senior*, 11 NY3d 195, 868 NYS2d 563 [2008]). Here, absent a showing that any trust has been renounced, it cannot be said that those causes of action have yet accrued. The sixth and thirteenth causes of action, which are for injunctive and declaratory relief, are based on acts of alleged trustee misconduct which are of a continuing nature. As such, those causes of action are deemed to have accrued on the date of the last wrongful act (*Selkirk v State of New York*, 249 AD2d 818, 671 NYS2d 824 [1998]). The defendants have made no showing to warrant a finding that the alleged course of misconduct has ended.

The defendants' substantive arguments directed at those causes of action are likewise deficient. To the extent the fifth cause of action is for an accounting of the affairs of the limited partnership, it is noted that a partner generally retains a continuing right to an accounting so long as the partnership is in existence (*see* Partnership Law §§ 43, 44). The Court does not read section 7.4 of the Agreement (which addresses how the partners may be convened for a meeting to discuss, *inter alia*, partnership investments and future operations) as a limitation on this right. Nor have the defendants provided any evidentiary support for their claim that Carolyn lacks standing, relative to the Nazzaro Family Trust, to seek the accounting and declaratory relief requested in the fifth, ninth, and thirteenth causes of action. As to the defendants' sole claim relative to the sixth cause of action, *i.e.*, that the request for injunctive relief is "duplicative," the Court finds their claim lacking support in the record and without merit.

Finally, since it does not appear that Carolyn has pleaded any cause of action which seeks to affect the title to any parcel of real estate owned by defendant J. Nazzaro Partnership, L.P., and the defendants' attorney has acknowledged in his reply affirmation that there are no issues concerning a notice of pendency, the defendants' remaining requests for relief are denied as academic.

The Court directs that the causes of action as to which summary judgment was granted are hereby severed and that the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]).

Dated: 7 April 2011



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION