Sokolin LLC v Cozzi
2012 NY Slip Op 31410(U)
May 10, 2012
Supreme Court, Suffolk County
Docket Number: 09-41173
Judge: Ralph T. Gazzillo
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SHORT FORM ORDER

INDEX No. 09-41173

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 5-19-11
ADJ. DATE 1-5-12
Mot. Seq. # 001 - MD

SOKOLIN LLC,

Plaintiff,

- against -

CAROL COZZI, DENNIS TRAINA, SR., DENNIS TRAINA, JR., JOHN DOE #1 and JOHN DOE #2,

Defendants.

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Upon the following papers numbered 1 to 33 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 23; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 24 - 31; Replying Affidavits and supporting papers 32 - 33; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Dennis Traina, Sr., and Dennis Traina, Jr., for an order granting summary judgment dismissing the complaint against them is granted to the extent set forth herein, and is otherwise denied.

Plaintiff Sokolin, LLC, a retailer of fine wines, commenced this action to recover damages allegedly sustained as the result of a scheme involving a former employee, defendant Carol Cozzi, and defendants Dennis Traina, Sr., and Dennis Traina, Jr. (hereinafter the Traina defendants or defendants). In addition to retail sales, Sokolin, LLC (hereinafter Sokolin) offers various services, including the storage of wine collections. Cozzi allegedly used confidential information about Sokolin's clients and operating procedures obtained during her employment to devise a scheme whereby she transferred approximately two thousand bottles of wine from Sokolin's storage facility to the Traina defendants, particularly Dennis Traina, Sr. Hired by Sokolin in the 1990s to maintain the corporation's computer network, Cozzi allegedly concealed such transfers by using the accounts of existing clients and creating false records as to the retail price of such wines. It further is alleged that during the period of time such

transfers were made, Cozzi leased an apartment at a residence owned by Dennis Traina, Sr., and that she was not authorized by Sokolin to sell bottles of wine to defendants. The alleged scheme was discovered by Sokolin sometime in February or March 2008. It is noted that Cozzi has not appeared as a party in this action, and that no motion for a default judgment against her has been made by Sokolin.

As relevant to the instant motion, the first cause of action in the complaint seeks damages for conversion, alleging that defendants wrongfully took control of bottles of fine and rare wine for which Sokolin had the exclusive right of possession. The fourth and fifth causes of action allege that defendants aided and abetted Cozzi in breaching both the duty of loyalty and the fiduciary duty owed to Sokolin. The sixth cause of action alleges defendants misappropriated Sokolin's trade secrets, inventory and inventory lists, and the seventh cause of action alleges defendants tortiously interfered with Sokolin's business. The eighth and ninth causes of action seek damages for fraud and fraudulent concealment, and the tenth cause of action seeks the imposition of a constructive trust. The Traina defendants' answer denies the allegation that they participated in the alleged fraudulent scheme to obtain wine from Sokolin and asserts various affirmative defenses, including unclean hands, equitable estoppel and laches.

The Traina defendants now move for an order dismissing the complaint against them. Although admitting Dennis Traina, Sr. purchased wine from Sokolin through Cozzi during the period from 2002 through 2007, defendants assert that they were not involved in Cozzi's alleged scheme and that they paid in full for the bottles of wine they obtained from Sokolin during such time. They also assert that Dennis Traina, Sr. paid Cozzi approximately $60,000 for wine that was to be stored in Sokolin's facility, and that such wine has not been delivered to him. More particularly, defendants argue the first through seventh causes of action should be dismissed as time-barred. They further argue summary judgment should be granted in their favor on the first cause of action on the grounds Dennis Traina, Sr. was a good faith purchaser of the wine he received from Sokolin, that he reasonably relied on Cozzi's apparent authority to sell him wine, and that Sokolin failed to specifically identify the bottles of wine allegedly stolen from it. As to the causes of action alleging liability for aiding and abetting, they argue no fiduciary duty was owed by Cozzi to Sokolin, and that they did not know of or induce Cozzi to breach the fiduciary duty owed to her employer. Further, the Traina defendants argue the sixth, seventh, eighth and ninth causes of action should be dismissed, because plaintiffs failed to set forth in the complaint the factual bases for such claims against them. In addition, defendants seek dismissal of the tenth cause of action, alleging that Sokolin is unable to establish any of the elements necessary for the imposition of a constructive trust. Defendants' submissions in support of the motion include copies of the pleadings, their own affidavits, copies of Sokolin's responses to various demands for disclosure, a purported recording of a telephone conversation between Cozzi and Dennis Traina, Sr., and a written statement signed by Cozzi dated May 2, 2008.

Sokolin opposes the motion, arguing, among other things, that it is premature, as depositions of the parties have not been conducted. Plaintiff contends that documentary evidence annexed to counsel's affirmation in opposition to the motion raises triable issues as to whether the Traina defendants knew of and participated in the alleged fraudulent scheme to steal wine from Sokolin's storage facility. Sokolin also asserts that causes of action for fraud and fraudulent concealment meet the pleading requirements of CPLR 3106, and that a constructive trust may be imposed against defendants since they participated in

Cozzi's scheme. In opposition, Sokolin submits copies of an affidavit of David Geaney, Esq., Vice President and General Counsel of Sokolin, a written statement by Cozzi, packing slips for wine orders that allegedly were picked up by defendants or their representatives at Sokolin's storage facility, and a shipping manifest for bottles of wine allegedly delivered by Sokolin to Dennis Traina's business address. Also submitted with the opposition papers are copies of e-mail correspondence with defendants and inventory statements that Cozzi allegedly viewed on her computer screen in February 2008.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Initially, the Court notes that the alleged recording of a telephone conversation between Cozzi and Dennis Traina, Sr. was not considered in the determination of the motion, as no foundation was established for its admissibility (*see* ***People v Ely***, 68 NY2d 520, 510 NYS2d 532 [1986]). The unsworn statement by Cozzi submitted by defendants also was not considered by the Court (*see* ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790). Further, the written statement by Cozzi allegedly taken in Houston, Texas on February 17, 2011, which was submitted with the opposition papers, was not considered. Significantly, while the written statement contains a jurat below Cozzi's signature stating it was subscribed and sworn to before a notary on February 17, 2011, the top of the statement indicates that it was taken by David Katz at a Barnes and Noble store, and that no other persons were present. Absent language in the statement itself indicating that it was, in fact, sworn to by Cozzi before an officer authorized to take oaths, the failure to submit a certificate of conformity renders the February 2011 statement of Cozzi inadmissible (*see* CPLR 2309 [c]; *cf.* ***Hall v Elrac, Inc.***, 79 AD3d 427, 913 NYS2d 37 [1st Dept 2010]). In addition, legal arguments in support of the motion raised by defendants for the first time in the reply papers were not considered by the Court (*see* ***Sanz v Discount Auto***, 10 AD3d 395, 780 NYS2d 763 [2d Dept 2004]; ***Dannasch v BiFulco***, 184 AD2d 415, 585 NYS2d 360 [1st Dept 1992]; ***Ritt v Lenox Hill Hosp.***, 182 AD2d 560, 582 NYS2d 712 [1st Dept 1992]).

The branch of defendants' motion for summary judgment in their favor on the action for conversion is denied. To recover damages for conversion, a plaintiff must establish "legal ownership or an immediate superior right of possession to a specific identifiable thing" and that the defendant "exercised an unauthorized dominion over the thing in question, to the alteration of its condition or to the exclusion of plaintiff's rights" (***Independence Discount Corp. v Bressner***, 47 AD2d 756, 757, 365 NYS2d 44 [2d Dept 1975]; *see* ***Colavito v New York Organ Donor Network, Inc.***, 8 NY3d 43, 827 NYS2d 96 [2006]; ***Channel Marine Sales, Inc. v City of New York***, 75 AD3d 600, 903 NYS2d 922 [2d Dept 2010]; ***Whitman Realty Group, Inc. v Galano***, 41 AD3d 590, 838 NYS2d 585 [2d Dept 2007]).

The tort of conversion can occur even though there is no wrongful intent to possess the property of another (*see* ***Spodek v Liberty Mut. Ins. Co.***, 155 AD2d 439, 547 NYS2d 100 [2d Dept 1989]; ***Ahles v Aztec Enters.***, 120 AD2d 903, 502 NYS2d 821 [3d Dept], *lv denied* 68 NY2d 611, 510 NYS2d 1025 [1986]). However, "[w]here one is rightfully in possession of property, one's continued custody and refusal to deliver it on demand of the owner until the owner proves his right to it does not constitute conversion" (***Mehlman Mgt. Corp. v Fong May Fan***, 121 AD2d 609, 610, 503 NYS2d 642 [2d Dept 1986]; *see* ***Bradley v Roe***, 282 NY 525, 27 NE2d 35 [1940]; ***Trans World Trading, Ltd. v North Shore Univ. Hosp. at Plainview***, 64 AD3d 698, 882 NYS2d 685 [2d Dept 2009]). Here, the vague affidavits of the Traina defendants and the various sales orders, packing statements and other documents annexed to the moving papers are insufficient to establish a prima facie case that defendants were rightfully in possession of the bottles of wine received from Sokolin (*cf.* ***Trans World Trading, Ltd. v North Shore Univ. Hosp. at Plainview***, 64 AD3d 698, 882 NYS2d 685).

As to the branch of defendants' motion which seeks judgment in their favor on the fourth and fifth causes of action, it is well settled that an employee owes a duty of good faith and loyalty to his or her employer in the performance of his or her employment obligations (*see* ***Western Elec. Co. v Brenner***, 41 NY2d 291, 392 NYS2d 409 [1977]; ***Lamdin v Broadway Surface Adv. Corp.***, 272 NY 133, 5 NE2d 66 [1936]; ***30 FPS Prods., Inc. v Livolsi***, 68 AD3d 1101, 891 NYS2d 162 [2d Dept 2009]). An employee "is prohibited from acting in any manner inconsistent with his [or her] agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his [or her] duties" (***Lamdin v Broadway Surface Adv. Corp.***, 272 NY 133, 138, 5 NE2d 66). Further, "[a] fiduciary relationship arises 'between two persons when one of them is under a duty to act for or give advice for the benefit of another on matters within the scope of the relation'" (***Roni LLC v Arfa***, 18 NY3d 846, 848, 939 NYS2d 746 [2011], *quoting* ***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 19, 799 NYS2d 170 [2005] [internal quotation marks and citations omitted]). Such a duty does not depend on the existence of an agreement or contract between the parties; rather, it is created from the relationship between the fiduciary and the beneficiary (*see* ***Benfeld v Fleming Props., LLC***, 89 AD3d 654, 932 NYS2d 140 [2d Dept 2011]; ***Barrett v Freifeld***, 64 AD3d 736, 883 NYS2d 305 [2d Dept 2009]). A conventional business relationship is insufficient to create a fiduciary relationship (*see* ***AHA Sales, Inc. v Creative Bath Prods., Inc.***, 58 AD3d 6, 867 NYS2d 169 [2d Dept 2008]).

To establish a claim for aiding and abetting a breach of fiduciary duty or duty of loyalty, the plaintiff must present proof of a breach of the obligations owed to an employer, that the defendant knowingly induced or participated in the breach, and that the plaintiff suffered damages as a result of the breach (*see* ***Sanford/Kissena Owners Corp. v Daral Props., LLC***, 84 AD3d 1210, 923 NYS2d 692 [2d Dept 2011]; ***Kaufman v Cohen***, 307 AD2d 113, 760 NYS2d 157 [1st Dept 2007]). "One who aids and abets a breach of a fiduciary duty is liable for that breach, even if he or she had no independent fiduciary obligation to the alleged injured party, if the alleged aider and abettor rendered substantial assistance to the fiduciary in the course of effecting the alleged breach of duty" (***Sanford/Kissena Owners Corp. v Daral Props., LLC***, 84 AD3d 1210, 1212, 923 NYS2d 692; *see* ***Monaghan v Ford Motor Co.***, 71 AD3d 848, 897 NYS2d 482 [2d Dept 2010]; ***Velazquez v Decaudin***, 49 AD3d 712, 854 NYS2d 163 [2d Dept 2008]; *see also* ***Baron v Galasso***, 83 AD3d 626, 921 NYS2d 100 [2d Dept 2011]).

Here, it is undisputed that Cozzi was a faithless employee and transferred a substantial quantity of wine to the Traina defendants without her employer's knowledge and authorization, and the allegations in the complaint are sufficient to make out a claim for aiding and abetting Cozzi (*see* ***Shearson Lehman Bros. v Bagley***, 205 AD2d 467, 614 NYS2d 5 [1st Dept 1994]). Moreover, though asserting in their affidavits that Cozzi "appeared to have the authority to sell wine on [Sokolin's] behalf," and that every bottle of wine purchased was paid for "in full" and "at a fair market rate," defendants' submissions failed to show as a matter of law that they did not have actual knowledge of Cozzi's breach of the duties of good faith and loyalty, and that they did not assist in such breach. The Court notes that while the affidavit of Dennis Traina, Sr. states he paid Cozzi in cash for the "last several deliveries," the date of such alleged purchases and the amount paid is not indicated. The affidavit also does not explain why the limited number of sales receipts from 2002 and 2004 annexed to the moving papers indicate purchases were made through separate accounts maintained under the names of Dennis Traina, Carol Cozzi and D. Trager. In addition, while defendants' counsel's affirmation states wine purchases were made from Cozzi during the period from 2002 through 2007, there is no evidence in the moving papers as to the method of payment used for the other purchases and no evidence of payments made to Sokolin. Accordingly, summary judgment dismissing the causes of action against the Traina defendants for aiding and abetting is denied.

The branch of the motion seeking dismissal of the sixth cause of action as against the Traina defendant is denied. To establish a cause of action for the misappropriation of trade secrets, a plaintiff must show (1) that it possessed a trade secret, and (2) that the defendant used the trade secret in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means (***North At. Instruments, Inc. v Haber***, 188 F3d 38, 43-44 [2d Cir 1999]). A trade secret is "'any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it'" (***Ashland Mgt. v Janien***, 82 NY2d 395, 407, 604 NYS2d 912 [1993], *quoting* Restatement of Torts § 757, comment b; *see* ***Laro Maintenance Corp. v Culkin***, 267 AD2d 431, 700 NYS2d 490 [2d Dept 1999]). Stated differently, "[a] trade secret, like any other secret, is nothing more than private matter; something known to only one or a few and kept from the general public; and not susceptible to general knowledge" (***Leo Silfen, Inc. v Cream***, 29 NY2d 387, 394-395, 328 NYS2d 423 [1972]). Although a trade secret generally relates to the production of goods, it also may relate to the sale of goods or other business operations, such as bookkeeping methods, codes for determining discounts, and lists of specialized customers (Restatement of Torts § 757, comment b). Factors for a court to consider when determining whether information constitutes a trade secret include the extent to which the information is known outside of the plaintiff's particular business, the extent to which such information is known by the plaintiff's employees and others involved in its business, and the extent of the measures taken by the plaintiff to protect the secrecy of such information, the effort expended to develop the information, and the ease by which the information could be obtained by others (Restatement of Torts § 757, comment b). Moreover, the information at issue must, in the first instance, be secret (***Ashland Mgt. v Janien***, 82 NY2d 395, 407, 604 NYS2d 912).

Here, the allegations in the complaint that the Traina defendants, through improper means, obtained secret, confidential records and customer lists from Sokolin for their own use are sufficient to state a cause of action for misappropriation of trade secrets (*see* ***Bender Ins. Agency v Treiber Ins.***

Agency, 283 AD2d 448, 729 NYS2d 142 [2d Dept 2001]). Defendants' argument that "non-specific and conclusory information provided by plaintiff is not sufficient to support a cause of action for misappropriation of trade secrets" is insufficient to meet its burden for an order granting summary judgment in its favor on such action. "As a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense" (***George Larkin Trucking Co. v Lisbon Tire Mart***, 185 AD2d 614, 615, 585 NYS2d 894 [4th Dept 1992]).

The branch of the motion seeking dismissal of the seventh cause of action, however, is granted. To succeed on a cause of action for tortious interference with contractual relations, a plaintiff must show the existence of a valid contract between the plaintiff and a third party, the defendant's knowledge of such contract, the defendant's intentional and improper procurement of the breach of such contract by the third party, and damages (*see* ***White Plains Coat & Apron Co., Inc. v Cintas Corp.***, 8 NY3d 422, 835 NYS2d 530 [2007]; ***NBT Bancorp v Fleet/Norstar Fin. Group***, 87 NY2d 614, 641 NYS2d 581 [1996]; ***Lama Holding Co. v Smith Barney***, 88 NY2d 413, 646 NYS2d 76 [1996]; ***Miller v Theodore-Tassy***, 92 AD3d 650, 938 NYS2d 172 [2d Dept 2012]; ***Dune Deck Owners Corp. v Liggett***, 85 AD3d 1093, 927 NYS2d 125 [2d Dept 2011]). The tort of intentional interference with business relations requires a showing that the defendant intentionally and through wrongful acts prevented a third party from extending a contractual relationship to the plaintiff (*see* ***Smith v Meridian Tech., Inc.***, 86 AD3d 557, 927 NYS2d 141 [2d Dept 2011]; ***Adler v 20/20 Cos.***, 82 AD3d 915, 918 NYS2d 585 [2d Dept 2011]). The allegations set forth in the complaint are insufficient to state a cause of action for tortious interference with contract, as there is no allegation the Traina defendants procured Sokolin's clients to breach their contracts with it (*see* ***Dune Deck Owners Corp. v Liggett***, 85 AD3d 1093, 927 NYS2d 125; ***Ferrandino & Son, Inc. v Wheaton Bldrs., Inc., LLC***, 82 AD3d 1035, 920 NYS2d 123 [2d Dept 2011]). Similarly, the complaint fails to set forth sufficient allegations that the Traina defendants interfered with a prospective business relationship between Sokolin and a third party (*see* ***Adler v 20/20 Cos.***, 82 AD3d 915, 918 NYS2d 585; ***White v Ivy***, 63 AD3d 1236, 880 NYS2d 374 [3d Dept 2009]; ***Pacheco v United Med. Assoc.***, 305 AD2d 711, 759 NYS2d 556 [3d Dept 2003]; ***Korn v Princz***, 226 AD2d 278, 641 NYS2d 283 [1st Dept 1996]; *cf.* ***534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick***, 90 AD3d 541, 935 NYS2d 23 [1st Dept 2011]).

Further, summary judgment dismissing the fraud claims against the Traina defendants is denied as to the eighth cause of action, but granted as to the ninth cause of action. The essential elements of an action seeking damages for actual fraud are a representation or an omission as to a material fact made by the defendant that was false and known to be false, made for the purpose of inducing the plaintiff to rely upon it, justifiable reliance by the plaintiff on the misrepresentation or material omission, and injury suffered as a result of such reliance (*see* ***Lama Holding Co. v Smith Barney***, 88 NY2d 413, 646 NYS2d 76; ***Lunal Realty, LLC v DiSanto Realty, LLC***, 88 AD3d 661, 930 NYS2d 619 [2d Dept 2011]; ***Deutshe Bank Natl. Trust Co. v Sinclair***, 68 AD3d 914, 891 NYS2d 445 [2d Dept 2009]; ***Ozelkan v Tyree Bros. Envtl. Servs., Inc.***, 29 AD3d 877, 815 NYS2d 265 [2d Dept 2006]). A plaintiff claiming fraud based on misrepresentation must demonstrate that the misrepresentation was of an existing fact, that it actually relied on the misrepresentation, and that such reliance was reasonable (*see* ***Deutshe Bank Natl. Trust Co. v Sinclair***, 68 AD3d 914, 891 NYS2d 445; ***Regina v Marotta***, 67 AD3d 766, 887 NYS2d 861 [2d Dept 2009]; ***International Oil Field Supply Servs. Corp. v Fadeyi***, 35 AD3d 372, 825

NYS2d 730 [2d Dept 2006]; ***Fitch v TMF Sys.***, 272 AD2d 775, 707 NYS2d 539 [2d Dept 2000]). Alternatively, a fraud case may be predicated on acts of concealment where the defendant had a duty to disclose material information (***Kaufman v Cohen***, 307 AD2d 113, 119-120, 760 NYS2d 157 [1st Dept 2003]; *see* ***Mitschele v Schultz***, 36 AD3d 249, 826 NYS2d 14 [1st Dept 2006]). To recover damages for fraudulent concealment, in addition to the requirements of scienter, reliance and damages, a plaintiff must establish that the defendant, as a result of a confidential or fiduciary relationship with the plaintiff, had a duty to disclose material information and failed to do so (*see* ***High Tides, LLC v DeMichele***, 88 AD3d 954, 931 NYS2d 377 [2d Dept 2011]; ***Mandarin Trading Ltd. v Wildenstein***, 65 AD3d 448, 884 NYS2d 47 [1st Dept 2009], *affd* 16 NY3d 173, 919 NYS2d 465 [2011]; ***P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.***, 301 AD2d 373, 754 NYS2d 245 [1st Dept 2003]; ***Moser v Spizzirro***, 31 AD2d 537, 295 NYS2d 198 [2d Dept 1968], *affd* 25 NY2d 941, 305 NYS2d 153 [1969]). Furthermore, pursuant to CPLR 3016, "the circumstances constituting the wrong shall be stated in detail" in the complaint, including specific dates and factual allegations establishing the elements of fraud (*see* ***Eurycleia Partners, LP v Seward & Kissel, LLP***, 12 NY3d 553, 883 NYS2d 147 [2009]; ***Pludeman v Northern Leasing Sys., Inc.***, 10 NY3d 486, 860 NYS2d 422 [2008]; ***Morales v AMS Mtg. Servs., Inc.***, 69 AD3d 691, 897 NYS2d 103 [2d Dept 2010]).

It is undisputed that the Traina defendants obtained numerous bottles of wine from Sokolin through transactions with its employee, Cozzi. Contrary to the assertion by defense counsel, Sokolin's allegations in the complaint are sufficient to state a cause of action against the Traina defendants for liability based on participation in a scheme to defraud (*see* ***Danna v Malco Realty, Inc.***, 51 AD3d 621, 622, 857 NYS2d 688 [2d Dept 2008]). Liability for fraud may be premised on knowing participation in a scheme to defraud, even if such participation does not by itself suffice to constitute fraud (***Danna v Malco Realty, Inc.***, 51 AD3d 621, 622, 857 NYS2d 688; *see* ***CPC Intl. v McKesson Corp.***, 70 NY2d 268, 519 NYS2d 804 [1987]; ***Velazquez v Decaudin***, 49 AD3d 712, 854 NYS2d 163 [2d Dept 2008]; ***Kuo Feng Corp. v Ma***, 248 AD2d 168, 669 NYS2d 575 [1st Dept], *lv dismissed* 92 NY2d 845, 677 NYS2d 74, *lv denied* 92 NY2d 809, 678 NYS2d 594 [1998]). Furthermore, the vague affidavits of the Traina defendants submitted with the moving papers are insufficient to establish a prima facie case that they are entitled to judgment as a matter of law on the claim that they were involved in a scheme to defraud Sokolin (*see generally* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). However, as to the claim for fraudulent concealment, Sokolin has not alleged that a confidential or fiduciary relationship existed between it and the Traina defendants (*cf.* ***Mandarin Trading Ltd. v Wildenstein***, 16 NY3d 173, 919 NYS2d 465 [2011]).

Summary judgment dismissing the cause of action against the Traina defendants for a constructive trust is granted. To obtain the equitable remedy of a constructive trust, a plaintiff must establish the following elements: (1) a confidential or fiduciary relationship, (2) a promise, express or implied, (3) a transfer in reliance of such promise, and (4) unjust enrichment (*see* ***Sharp v Kosmalski***, 40 NY2d 119, 386 NYS2d 72 [1976]; ***Rowe v Kingston***, __ AD3d __, 2012 NY Slip Op. 02664 [2d Dept 2012]; ***Watson v Pascal***, 65 AD3d 1333, 886 NYS2d 440 [2d Dept 2009]). These elements, however, are not to be applied rigidly, as the purpose of a constructive trust is to prevent unjust enrichment (***Simonds v Simonds***, 45 NY2d 233, 241, 408 NYS2d 359 [1978]; *see* ***Rowe v Kingston***, __ AD3d __, 2012 NY Slip Op. 02664; ***Nastasi v Nastasi***, 26 AD3d 32, 805 NYS2d 585 [2d Dept 2005]). "A constructive trust is the formula through which the conscience of equity finds expression. When

property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest equity converts him to a trustee" (***Beatty v Guggenheim Exploration Co.***, 225 NY 380, 386, 122 NE 378 [1919]). As discussed above, the Traina defendants' submissions in support of the motion were sufficient to establish a prima facie case that they owed no fiduciary duty to Sokolin and that no transfers of wine were made to them by Sokolin in reliance of such relationship (*see* ***Guarino v North Country Mtge. Banking Corp.***, 79 AD3d 805, 915 NYS2d 84 [2d Dept 2010]). In opposition to this branch of the motion, plaintiff failed to submit admissible evidence showing a triable issue of fact as to the existence of a confidential or fiduciary relationship with defendants or any of the other elements for the imposition of a constructive trust (*see* ***Poupis v Brown***, 90 AD3d 881, 935 NYS2d 137 [2d Dept 2011]; *cf.* ***Parr v Ronkonkoma Realty Venture I, LLC***, 65 AD3d 1199, 885 NYS2d 522 [2d Dept 2009]).

Finally, as to defendants' claim that certain causes of action are time-barred, CPLR 3211 (e) provides that certain enumerated defenses, including statute of limitations, are waived if not raised either in a responsive pleading or by way of a motion to dismiss made under CPLR 3211 (a) (*see* ***Allen v Matthews***, 266 AD2d 782, 699 NYS2d 166 [3d Dept 1999]). Nevertheless, "an unpleaded defense may serve as the basis for granting summary judgment in the absence of surprise or prejudice to the opposing party" (***Sullivan v American Airlines, Inc.***, 80 AD3d 600, 602, 914 NYS2d 276 [2d Dept 2011]; *see* ***Rogoff v San Juan Racing Assn.***, 54 NY2d 883, 444 NYS2d 911 [1981]; ***Allen v Matthews***, 266 AD2d 782, 699 NYS2d 166). Thus, while the Traina defendants did not assert statute of limitations as an affirmative defense in their answer or move for dismissal under CPLR 3211, the merits of such a defense will be considered by the Court, as Sokolin had an opportunity to respond to the instant motion (*see* ***Allen v Matthews***, 266 AD2d 782, 699 NYS2d 166).

Here, the causes of action for conversion and misappropriation of trade secrets are governed by the three-year limitations period of CPLR 214 (3) (*see* ***IDT Corp. v Morgan Stanley Dean Witter & Co.***, 12 NY3d 132, 879 NYS2d 355 [2009]; ***Pursnani v Stylish Move Sportswear, Inc.***, 92 AD3d 663, 938 NYS2d 333 [2d Dept 2012]; ***Andrew Greenberg, Inc. v Svane, Inc.***, 36 AD3d 1094, 830 NYS2d 358 [3d Dept 2007]; *see also* ***Architectronics, Inc. v Control Sys., Inc.***, 935 F Supp 425 [SDNY 1996]). To the extent that such causes of action accrued more than three years prior to the November 12, 2009 commencement date of this action, they are time-barred (*see* CPLR214 [3]). Further, summary judgment on the cause of action for fraud having been denied, the fourth and fifth causes of action for aiding and abetting Cozzi's breach of her duties of good faith and loyalty to Sokolin are governed by the six-year limitations period (*see* CPLR 213 [1]; ***Klein v Gutman***, 12 AD3d 417, 784 NYS2d 581 [2d Dept 2004]; ***Kaufman v Cohen***, 307 AD2d 113, 760 NYS2d 157). The branch of defendants' motion seeking dismissal of causes of action against them as time-barred, therefore, is granted only as to any acts of conversion or use of trade secrets occurring more than three years before the instant action was brought, and is otherwise denied.

Dated: 5/14/12

A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**