Diraimondo v Calhoun
2013 NY Slip Op 34008(U)
April 22, 2013
Supreme Court, Nassau County
Docket Number: 9378/12
Judge: Jeffrey S. Brown
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X	**TRIAL/IAS PART 17**
MICHAEL P. DIRAIMONDO, WILLIAM CHILDS, ROBERT PETERS and CHARLENE VAUGHAN, individually and derivatively on behalf of AMERICAN VIRGIN ENTERPRISES, LTD.,	**INDEX # 9378/12**
	Motion Seq. 2,3
	Motion Date 11.26.12 & 1.25.13
Plaintiff(s),	**Submit Date 2.20.13**
-against-	
RORY CALHOUN, THEODORE E. STAIR, AMERICAN VIRGIN ENTERPRISES, LTD., SIRIUS DEVELOPMENT, LLC and T-REX ST. JOHN LLC.,	
Defendant(s).	
----------X	

The following papers were read on this motion:

Papers Numbered	MS2	MS 3
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed	1	4
Answering Affidavit	2	5
Reply Affidavit		6,7
Memoranda of Law	3	8

The plaintiffs, Michael P. DiRaimondo, William Childs, Robert Peters, and Charlene Vaughan, individually and on behalf of American Virgin Enterprises, Ltd., move for the following relief: an order pursuant to CPLR §3211(b), dismissing the defendants' second and tenth affirmative defenses and for an order pursuant to CPLR §3211(a)(5), dismissing the defendants' first and second counterclaims as being time barred (Sequence #002).

Defendants, Rory Calhoun, American Virgin Enterprises, Ltd., and Sirius Development, LLC, cross move for an order granting summary judgment dismissing the plaintiffs' causes of action denominated second through thirteenth (Sequence #003).

In 1987, the plaintiffs, together with defendants, Rory Calhoun and Theodore Stair, formed an entity known as American Virgin Enterprises, Ltd. (hereinafter AVE 1987), with the intention of developing a piece of property upon which would be situated a marina and related facilities (*see* Plaintiffs' Memorandum of Law at p.2). In addition to being Secretary of AVE 1987, plaintiff DiRaimondo purportedly served as corporate counsel between approximately 1987 through some point in 2001(*see* Calhoun Affidavit in Support at ¶¶ 8,10,11,15,17,18; Exhs. C-H).

In or about 1989, AVE 1987 entered into an agreement with the Virgin Islands Port Authority (hereinafter VIPA), to lease the property known as 7-10 and 10-E, Estate Emmaus, Coral Bay, St. John, Virgin Islands (hereinafter the subject property) (*see* Verified Complaint at ¶13). Several years later, in or about March of 1993, AVE 1987 was dissolved by proclamation of the New York Department of State for failure to pay franchise taxes (*id.* at ¶17). Thereafter, on or about November 24, 2001 defendants, Calhoun and Stair, together with John Hanrahan, a non-party, incorporated a second entity again utilizing the name American Virgin Enterprises (hereinafter AVE 2001) (*see* Calhoun Affidavit in Support at ¶19,20; Exh. I).

In the *interim*, on August 11, 1994, the Moravian Church, Virgin Islands Conference Center (hereinafter the Church) commenced an action in the U.S. Virgin Islands to quiet title wherein it specifically claimed to be the owner of the subject property (hereinafter the Virgin Islands litigation) (*id.* at ¶14). In that litigation, AVE 1987 was a named defendant and in said

capacity asserted a counterclaim against the Church, as well as a cross-claim against the VIPA (*see* Calhoun Affidavit in Support at ¶¶25,27). In June of 2006, the Church and AVE 1987 agreed to mutually withdraw any claims each had asserted against the other, and in September 2006, the cross claim asserted by AVE 1987 against the VIPA was settled for the amount of $412,000 (*id.* at ¶¶27,28,30; Exhs. M, N).

During the pendency of the Virgin Islands litigation, in or around early 2004, the court sitting in the Virgin Islands had determined the Church to be the rightful owner of the subject property, at which point the Church purportedly advised Calhoun that it had been in search of entities interested in developing the ten acres of land adjacent to the subject property into a "Condominium Resort" (*id.* at ¶¶36,38). After two years of discussions, Calhoun and his associates registered a Virgin Islands limited liability company known as Sirius Development, LLC (hereinafter Sirius), a named defendant herein, which entity ultimately executed a lease agreement with the Church in January of 2006 (hereinafter the 2006 lease agreement)(*see* Plaintiffs' Memorandum of Law at p.3,4; *see also* Verified Complaint at ¶¶41,47). Sirius thereafter assigned this lease to defendant, T-Rex St. John, LLC (hereinafter T-Rex) (*see* Verified Complaint at ¶49).

In a separate but relevant matter, on September 18, 2007, defendant Stair commenced an action in the federal district court both individually, as well as derivatively on behalf of AVE 2001 and Sirius, against Calhoun and other members of Sirius and T-Rex, in connection to the condominium project (*see* Calhoun Affidavit in Support at ¶¶45

The plaintiffs herein collectively allege that the formation of AVE 2001, as well as the settlements reached in the Virgin Islands litigation were done to deliberately and fraudulently

divert from AVE 1987 certain business opportunities, including the 2006 lease agreement (*see* Verified Complaint at ¶¶28-30). The plaintiffs further allege that they were deliberately and fraudulently informed by the defendants that any opportunity to develop the subject property could not be resurrected and were thereby deprived of their rights to take part in the 2006 lease agreement (*id.* at ¶¶51-161).

As a result, on July 24, 2012, the plaintiffs commenced the underlying action, which contains thirteen causes of action (*see* Verified Complaint at ¶¶51-161). In response thereto, the moving defendants interposed an answer containing ten affirmative defenses and two recoupment counterclaims (*see* Legum Affirmation at Exh. A). Of particular relevance herein, the defendants' second affirmative defense alleges that the plaintiffs' causes of action are time barred and the tenth affirmative defense alleges that plaintiff, Charlene Vaughan, as a non-resident, lacks capacity to sue in this jurisdiction. The applications respectively interposed by the moving parties herein thereafter ensued and are determined as set forth below.

The court initially addresses the cross motion interposed by the defendants, which prays for an order granting summary judgment dismissing the plaintiffs' causes of action denominated Second through Thirteenth.[1] In support thereof, counsel argues that as the actual fraud alleged by the plaintiffs is merely incidental to the underlying action, the true essence of which is misappropriation of a business opportunity, the two year discovery rule upon which the plaintiffs

---

[1] The Court notes that while the moving defendants' initial prayer for relief set forth in the Notice of Motion seeks dismissal of "the Plaintiff's [sic] causes of action numbered Second through Thirteenth", those causes of action denominated Eight and Ninth are not asserted against the moving defendants but rather against T-Rex St. John, LLC, which has not moved herein. Accordingly, counsel for the moving defendants did not addresses the susceptibility of either the Eight or Ninth causes of action to summary judgment treatment (*see* Defendants' Memorandum of Law at 4,9,12).

rely to resuscitate their otherwise untimely claims is inapplicable herein (*see* Defendants' Memorandum of Law at pp.1, 4-7).

Counsel further argues that as the plaintiffs failed to plead and prove they exercised reasonable diligence in uncovering the purported RICO violations alleged in the tenth and eleventh causes of action, said actions are time barred and must be dismissed (*id.* at pp. 9-11). As to the thirteenth cause of action, counsel posits that while same is labeled as one sounding in breach of fiduciary duty, the actual essence thereof is negligence, which is subject to a three year statute of limitations and is thus untimely (*id.* at pp 12-13).

The defendants' summary judgment application is opposed by the plaintiffs, who collectively move this court for an order dismissing the defendants' second and tenth affirmative defenses, as well as the first and second counterclaims asserted thereby. In both opposing the defendants' application and in support of the dismissal application, counsel for the plaintiffs argues that as the causes of action denominated second, third, fourth, fifth, sixth, seventh and eighth are predicted upon actual fraud and given that the plaintiffs only discovered the defendants wrongdoing in January of 2012, the commencement of the underlying action within two years thereof is timely warranting dismissal of the second affirmative defense (*see* Plaintiffs' Memorandum of Law at pp. 5-9). As to the plaintiffs' tenth and eleventh causes of action predicated upon the RICO statute, counsel asserts that as said causes of action only accrued upon the plaintiffs' discovery of their injury, the four year statute of limitations relevant thereto did not begin to run until January 2012 and as such said actions are not time barred (*id.* at p.10).

In support of the foregoing assertions, counsel provides a series of affidavits from the individual plaintiffs all of whom similarly, if not identically, assert that they first learned through

the allegations in the federal complaint filed by Stair, "that the defendants had formed the successor entities, had negotiated a lease with the Church, and were developing a marina resort project, to the exclusion of the plaintiffs" (*see* DiRaimondo Affidavit at 6; Peters Affidavit at ¶5; Childs Affidavit at ¶5;Vaughan Affidavit at ¶3)

With particular respect to that branch of the plaintiffs' application seeking dismissal of the defendants' tenth affirmative defense, counsel asserts that as the cause of action arose in New York, Ms. Vaughan may properly maintain an action in this jurisdiction pursuant to Business Corporation Law §1314[b][3] (hereinafter BCL)(*see* Plaintiffs' Memorandum of Law at pp.11,12). Finally, as to that branch of the plaintiffs' application seeking dismissal of the defendants' first and second counterclaims, counsel asserts that as said counterclaims, both of which sound in legal malpractice, do not arise out of the same transactions and occurrences as the causes of action against which recoupment is sought, dismissal thereof is warranted (*id.* at pp. 13-17).

"The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages" (*House of Spices (India), Inc. v SMJ Services, Inc.*, 103 AD3d 848 [2d Dept 2013] quoting *Introna v Huntington Learning Ctrs., Inc.*, 78 AD3d 896 [2d Dept 2010]). When a plaintiff commences a cause of action predicated upon fraud, "the circumstances constituting the wrong shall be stated in detail" (CPLR §3016[b]). The Court has held that "[c]ritical to a fraud claim is that a complaint allege the basic facts to establish the elements of the cause of action" and that the statutory requirements "may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct"

(*Pludeman v North Leasing Systems, Inc*, 10 NY3d 486 [2008]; *Sargiss v Magarelli*, 12 NY3d 527 [2009]).

A careful review of the within complaint reveals that the gravamen of the underlying action is that the defendants collectively engaged in a series of fraudulent activities deliberately undertaken to unlawfully usurp a business opportunity which rightfully belonged to AVE 1987, to wit: the 2006 lease agreement. Thus, as an initial matter, and in accordance with the foregoing legal precepts, contrary to defense counsel's assertion that the essence of the underlying action is one for misappropriation of a business opportunity, this court finds that the plaintiffs have sufficiently articulated a set of facts upon which a cause of action sounding in fraud may properly be based (*id.*).

As to the timeliness of the plaintiffs' claims, it is well settled that an action based upon fraud must be commenced within "the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it" (CPLR §213(8); *Dybowski v. Dybowska*, 146 AD2d 604 [2d Dept 1989]; *Quadrozzi Concrete Corp. v Mastroianni*, 56 AD2d 353 [2d Dept 1977]). "The inquiry as to whether a plaintiff could, with reasonable diligence, have discovered the fraud turns on whether the plaintiff was 'possessed of knowledge of facts from which [the fraud] could be reasonably inferred' " (*Sargiss v Margarelli*, *supra* quoting *Erbe v Lincoln Rochester Trust Co.*, 3 NY2d 321,326 [1957]). As a general proposition, "knowledge of the fraudulent act is required and mere suspicion will not constitute a sufficient substitute" (*Erbe v Lincoln Rochester Trust Co., supra* at 326). Further, where " 'it does not conclusively appear that a plaintiff had knowledge of facts from which the fraud could

reasonably be inferred, a complaint should not be dismissed on motion and the question should be left to the trier of the facts' " (*Gorelick v Vorhand,* 83 AD3d 893 [2d Dept 2011] quoting *Trepuk v Frank*, 44 NY2d 723,725 [1978]; *Pericon v Ruck*, 56 AD3d 635 [2d Dept 2008]).

In the matter *sub judice*, the record establishes that plaintiff DiRaimondo was unequivocally possessed of knowledge with respect to the existence of the 2006 lease agreement, as well as the settlements reached within the context of the Virgin Islands litigation such that he could have uncovered the defendants purported fraud years earlier than in 2012, as claimed (*Erbe v Lincoln Rochester Trust Co., supra; Sargiss v Margarelli, supra; Gorelick v Vorhand,* 83 AD3d 893 [2d Dept 2011]; *Vilsack v Meyer*, 96 AD3d 827 [2d Dept 2012]). With respect to the 2006 lease agreement, on October 30, 2006, plaintiff DiRaimondo received an email from Calhoun wherein the latter stated he had "to go back down to St. Thomas . . . to work on that condo project with the Church and to finalize the settlement with the Port Authority and the Court." The record also contains a copy of a fax dated, April 18, 2000, sent by DiRaimondo to Calhoun in reference to a pre-trial conference notice DiRaimondo had received in connection to the Virgin Islands litigation. In this fax, DiRaimondo specifically states the following: "I can not go [to the conference] and would not go at this point since AVE is no longer viable. The project is dead and has been for years." Thus, as DiRaimondo himself had already declared the original marina project "dead" as of April of 2000, the "condo project" to which Calhoun makes mention in his email of October 30, 2006, could only have been in reference to the 2006 lease agreement and not the earlier project, which had already been characterized by the plaintiff as defunct (*id.*)

With particular regard to the settlements reached in the Virgin Islands litigation, the record includes a copy of the "Minutes of Shareholders Meeting" dated December 19, 2006.

These minutes establish that on said date DiRaimondo met with Calhoun and specifically discussed the settlement reached between AVE 1987 and the VIPA, as well as the mutual dismissals of those claims asserted between AVE 1987 and the Church (*id.*).

Finally, with respect to plaintiff Childs, while said plaintiff avers that it was by way of the allegations in the federal complaint he first learned "the defendants had formed the successor entities, had negotiated a lease with the Church, and were developing a marina resort project", said averment is flatly contradicted by the record. Included in the parties' submissions is a letter to Childs from defendant Stair dated, June 12, 2006, which outlines in some detail the terms of the 2006 lease agreement (*id.*).

Thus, consonant with the governing statutory authority and controlling case law, given that DiRaimondo and Childs were clearly cognizant of the 2006 lease agreement in 2006, the within action should have been commenced either within two years of said discovery or no later than January 2012, which would have been within the six years of the execution of said lease (CPLR §213(8); *Dybowski v. Dybowska*, *supra*; *Quadrozzi Concrete Corp. v Mastroianni*, *supra*). However, as the within action was not commenced until July 24, 2012, it is untimely as to plaintiffs DiRaimondo and Childs (*id.*).

Accordingly, the defendants' application seeking summary judgment dismissing the plaintiffs' causes of action denominated second, third, fourth, fifth, sixth, seventh, tenth, eleventh, twelfth and thirteenth as untimely, is hereby **GRANTED** as to plaintiffs, Michael DiRaimondo and William Childs (*id.*). However, with respect to plaintiffs Robert Peters and Charlene Vaughan, the defendants have failed to establish what knowledge was possessed by said plaintiffs and at what point they acquired same (*Gorelick v Vorhand, supra*; *Pericon v Ruck*,

supra). Accordingly, summary judgment in favor of the defendants as against plaintiffs Peters and Vaughan, is not appropriate and that portion of the defendants' application is hereby **DENIED** (*id.*).

The court now addresses that branch of the plaintiffs' application, which seeks dismissal of the defendants' second affirmative defense, which alleges that the plaintiffs' causes of action are time barred and the tenth affirmative defense, which alleges that plaintiff Charlene Vaughan, as a non-resident, lacks capacity to sue in this jurisdiction (*id.*).

CPLR §3211[b] provides that "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." Accordingly, "when moving to dismiss or strike an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is 'without merit as a matter of law' " (*Greco v Christoffersen,* 70 AD3d 769 [2d Dept 2010] quoting *Vita v New York Waste Serviced, LLC.*, 34 AD3d 559 [2d Dept 2006]; *Galasso, Langione & Botter, LLP v Liotti*, 81 AD3d 880 [2d Dept 2011]). "In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference" (*Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721 [2d Dept 2008]). Further, "if there is any doubt as to the availability of a defense, it should not be dismissed" (*id.*).

Applying the foregoing to the defendants' second affirmative defense and based upon the record as thus far developed, this court finds that said defense is viable, and accordingly that branch of the plaintiffs' application seeking dismissal thereof is hereby **DENIED** (*id.*).

In moving for dismissal of the tenth affirmative defense, the plaintiffs rely with particularity upon BCL§1314(b)(3), which provides the following, in pertinent part: "[e]xcept as

otherwise provided in this article, an action . . . against a foreign corporation may be maintained . . . by a non-resident in the following cases only: [w]here the cause of action arose within this state . . ."

As best can be adduced from the record, the 2006 lease agreement, which the plaintiffs allege was fraudulently diverted from AVE 1987, was executed in the Virgin Islands and not in New York. Accordingly, the exception upon which the plaintiffs rely is inapplicable herein and Ms. Vaughan, as a non-resident, may not maintain an action against Sirius, a foreign limited liability company (*id.*). Thus, that branch of the plaintiffs' application seeking dismissal of the tenth affirmative defense is hereby **GRANTED** to the limited extent that same is hereby dismissed insofar as it relates to defendants, Rory Calhoun and American Virgin Enterprises, Ltd. (*id.*).

Finally, the court turns to that branch of the plaintiffs' application seeking dismissal of the defendants' first and second counterclaims. Pursuant to CPLR §203(d), " 'claims and defenses that arise out of the same transaction as a claim asserted in the complaint are not barred by the Statute of Limitations, even though an independent action by defendant might have been time-barred at the time the action was commenced' " (*Carlson v Zimmerman*, 63 AD3d 772 [2d Dept 2009] quoting *Bloomfield v Bloomfield*, 97 NY2d 188 [2001]). "The provisions of CPLR 203(d) allow a defendant to assert an otherwise untimely claim which arose out of the same transactions alleged in the complaint, but only as a shield for recoupment purposes, and does not permit the defendant to obtain affirmative relief" (*Carlson v Zimmerman*, *supra* quoting *DeMille v DeMille*, 5 AD3d 428 [2d Dept 2004]).

In the instant matter, the defendants' counterclaims allege legal malpractice on the part of DiRaimondo in connection to his representation of AVE 1987 up through 2001 and hence are time barred, having been interposed in or about September 2012 (CPLR §214[6]). However, the plaintiffs' causes of action against which the counterclaims seek recoupment involve the formation of AVE 2001 and the negotiation of the 2006 lease agreement. Thus, inasmuch as the counterclaims do not arise out of the same transactions as those which underlie the plaintiffs' causes of action against which the counterclaims seek recoupment, the plaintiffs' application seeking an order dismissing the defendants' first and second counterclaims, is hereby **GRANTED** (*id.*).

In accordance with the foregoing it is

ORDERED, that the branch of the plaintiffs' application, which seeks an order dismissing the defendants' second affirmative defense, is hereby **DENIED** (Sequence #002); and it is further

ORDERED, that the branch of the plaintiffs' application, which seeks an order dismissing the defendants' tenth Affirmative defense, is hereby **GRANTED** to the extent that same is dismissed in relation to defendants, Rory Calhoun and American Virgin Enterprises, Ltd. (Sequence #002); and it is further

ORDERED, that the branch of the plaintiffs' application, which seeks an order dismissing the defendants' first and second counterclaims, is hereby **GRANTED** (Sequence #002); and it is further

ORDERED, that the application interposed by defendants, Rory Calhoun, American Virgin Enterprises, Ltd., and Sirius Development, LLC, which seeks an order granting summary judgment dismissing the plaintiffs' causes of action denominated second, third, fourth, fifth,

sixth, seventh, tenth, eleventh, twelfth and thirteenth, is hereby **GRANTED** as to plaintiffs Michael P. DiRaimondo and William Childs and **DENIED** as to plaintiffs, Robert Peters and Charlene Vaughan (Sequence #003); and it is further

ORDERED, that all parties shall appear at a preliminary conference at the supreme courthouse, 100 Supreme Court Drive, Mineola, N.Y., lower level, on May 22, 2013, at 9:30 a.m. No adjournments of this conference will be permitted absent the permission of or order of this court. All parties are forewarned that failure to attend the conference may result in judgment by default, the dismissal of pleadings (see 22 NYCRR 202.27) or monetary sanctions (22 NYCRR 130-2.1 et seq.).

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
April 22, 2013

ENTER:

HON. JEFFREY S. BROWN
J.S.C.

ENTERED
APR 23 2013
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Attorney for Plaintiff
Steven G. Legum, Esq.
170 Old Country Road
Mineola, NY 11501-4307

Attorney for Defendant
Parola & Gross, LLP
775 Wantagh Avenue
Wantagh, NY 11793