

Theaprin Pharms., Inc. v Conway

2013 NY Slip Op 34048(U)

December 3, 2013

Supreme Court, Nassau County

Docket Number: 601039-13

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
**THE APRIN PHARMACEUTICALS, INC.,
PHILIP FELICE, M.D., MADHOOMATEE
FELICE and LINDA SISCO,**

**TRIAL/IAS PART: 16
NASSAU COUNTY**

Plaintiffs,

**Index No. 601039-13
Motion Seq. Nos. 1 and 2
Submission Date: 8/21/13**

-against-

**JOSEPH D. CONWAY, JOSEPH D. CONWAY
CERTIFIED PUBLIC ACCOUNTANT and any
affiliates, MICHAEL CONWAY, DIANA
CONWAY and DOES 1 through 100, inclusive,**

Defendants.

-----X

The following papers having been read on these motions:

- Notice of Motion, Affidavit in Support and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Notice of Motion, Affidavit in Support and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Taylor Affidavit in Opposition.....X**
- Taylor Affidavit in Support/Opposition.....X**
- Felice Affidavit in Opposition.....X**
- Plaintiffs' Memorandum of Law in Response.....X**
- Plaintiffs' Amended Memorandum of Law in Response.....X**
- Reply Affidavit in Support.....X**
- Reply Memorandum of Law.....X**
- Reply Memorandum of Law.....X**

This matter is before the Court for decision on 1) the motion filed by Defendants Joseph D. Conway and Joseph D. Conway Certified Public Accountant and unnamed affiliates ("Joseph Conway") on July 2, 2013, and 2) the motion filed by Defendants Michael Conway ("Michael") and Diana Conway ("Diana") on July 2, 2013, both of which were submitted on August 21,

2013. For the reasons set forth below, the Court grants the motions and dismisses the complaint against the Defendants.

BACKGROUND

A. Relief Sought

Joseph Conway moves for an Order 1) pursuant to CPLR §§ 3211(a)(7) and (3), dismissing with prejudice the First, Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth and Thirteenth causes of action in Plaintiff's Complaint (Ex. A to Kaley Aff. in Supp.) on the ground that those claims fail to state a cause of action; 2) pursuant to CPLR § 3211(a)(5), dismissing with prejudice the Second, Fourth, Fifth, Seventh, Twelfth and Thirteenth causes of action in the Complaint on the ground that those causes of action are barred by the applicable statutes of limitation and dismissing the First, Third, Sixth, Seventh (if a six-year statute were to apply), Eighth, Ninth, Tenth and Eleventh causes of action because they too are barred by the applicable statutes of limitations because the Complaint fails to allege sufficient facts of any acts within the past six years that might give rise to a cause of action; 3) pursuant to CPLR § 3211(a)(4), dismissing with prejudice the entire Complaint against Joseph Conway on the ground that there is another action pending between the parties for the same causes of action, specifically *Theaprin Pharmaceuticals et al. v. Joseph D. Conway et al.*, Nassau County Supreme Court Index Number 601040-13 ("Related Action") (*see* Ex. B to Kaley Aff. in Supp.); and 4) pursuant to CPLR § 3211(a)(3), dismissing with prejudice the entire Complaint insofar as the Individual Plaintiffs seek relief in their own individual rights because the wrong complained of is a purported wrong against Theaprin Pharmaceuticals, Inc., the corporate Plaintiff, and, as such, the Individual Plaintiffs lack legal capacity to sue.

Michael and Diana move for an Order 1) pursuant to CPLR §§ 3211(a)(7) and (3), dismissing with prejudice the entire Complaint against Michael and Diana and specifically the Ninth, Tenth, Eleventh, Twelfth and Thirteenth causes of action in the Complaint, which purport to name them, on the ground that the Complaint and the causes of action fail to state a cause of action; 2) pursuant to CPLR § 3211(a)(5), dismissing with prejudice the entire Complaint against Michael and Diana and specifically the Ninth, Tenth, Eleventh, Twelfth and Thirteenth causes of action in the Complaint, which purport to name them, on the ground that those causes of action are barred by the applicable statutes of limitation; 3) pursuant to CPLR § 3211(a)(1), dismissing with prejudice the entire Complaint against Michael and Diana and specifically the Ninth, Tenth, Eleventh, Twelfth and Thirteenth causes of action in the Complaint, which purport to name

them, because there exists a complete defense to the Complaint and the alleged causes of action based on documentary evidence; 4) pursuant to CPLR § 3211(a)(4), dismissing with prejudice the entire Complaint against Michael and Diana, and specifically the Ninth, Tenth, Eleventh, Twelfth and Thirteenth causes of action in the Complaint, which purport to name them, on the ground that there is another action pending between the parties for the same causes of action, specifically the Related Action; and 5) pursuant to CPLR § 3211(a)(3), dismissing with prejudice the entire Complaint against Michael and Diana, and specifically the aforesaid causes of action insofar as the Individual Plaintiffs seek relief in their own individual rights, because the wrong complained of is a purported wrong against Theaprin Pharmaceuticals, Inc. and, as such, the Individual Plaintiffs lack legal capacity to sue.

Plaintiffs Theaprin Pharmaceuticals, Inc. (“Theaprin” or “Company”), Philip Felice, M.D., Madhoomatee Felice, Linda Sisco, Robert Schoenfeld, M.D. and Arthur Lowy, M.D. (“Plaintiffs”) oppose the motions.

B. The Parties’ History

This is an action by Theaprin and certain of its stockholders against Joseph Conway and his accounting firm, and against his son and daughter-in-law, Michael and Diana. The Preliminary Statement of the Complaint (Compl. at ¶ 1) alleges that Plaintiffs are asserting numerous causes of action against Joseph Conway, including breach of “any alleged contract” between Theaprin and Joseph Conway. The Preliminary Statement also outlines the causes of action asserted against Michael and Diana, and alleges that each Individual Plaintiff is bringing this action on his or own behalf and as a representative of a class allegedly affected and injured by the Defendants.

The Complaint alleges that Joseph Conway acted as an officer of Theaprin, formerly known as Soluprin Pharmaceuticals, Inc. (“Soluprin”), and that Joseph Conway “claims to have acted and provided services” as an accountant for the Company (Compl. at ¶ 10). The Complaint further alleges that Joseph Conway worked in concert with individuals including the Company’s former President Robert Martin, Bilgen Ozfuruncu and Donald Milne,¹ “in a number of questionable schemes relating to the Company, including questionable transactions characterized as loans, securities transactions and improper conduct in connection with stock,

¹ These individuals have not been named as parties in this action. It appears that Bilgen Ozfuruncu is now deceased (Compl. at ¶ 12).

assets and shareholders of the Company” (*id.*).

The Complaint alleges that Joseph Conway was suspended from his positions as treasurer and secretary of Soluprin as a result of an investigation of improprieties in financial dealings. Plaintiffs allege that Joseph Conway did not turn over the Company’s records and data to Plaintiff Philip Felice (“Felice”), the new president of Theaprin, but instead delivered them to Bilgen Ozfuruncu, an alleged “collaborator” with Joseph Conway (Compl. at ¶ 12) who retained the records for years without delivering them to the Company. Plaintiffs allege that Bilgen Ozfuruncu’s family delivered the records to Philip Felice after Ozfuruncu’s death.

Plaintiffs allege a “bewildering web of dealings involving cash, payments, securities and purported ‘loans’” (Compl. at ¶ 14) that Conway has never adequately explained. Plaintiffs further allege that, since his termination from Theaprin, Joseph Conway has made “meritless claims” that he, Michael and Diana are entitled to hold stock in Theaprin (*id.* at ¶ 15). Plaintiffs also allege that Joseph Conway failed to file 2005, 2006 and 2007 tax returns for Theaprin, failed to maintain proper records and failed to provide information requested by the Company (Compl. at ¶ 16).

Plaintiffs allege that, by letter dated February 27, 2008, Felice instructed Joseph Conway to turn over the books and records of the Company to him. By email to Felice dated March 25, 2008, which included a resignation letter, Joseph Conway advised Felice that he would no longer be able to provide accounting services to Soluprin effective April 1, 2008 but would remain available to “aid in transitioning the work to a successor accounting firm”(Compl. at ¶ 18) and turn the Company’s records over to Felice or to a representative of his choosing.

The Complaint contains the following thirteen (13) causes of action: 1) against Joseph Conway for breach of contract based on the allegation that “[if] and to the extent that [Joseph Conway] at any time had any agreement or contract with any Plaintiff” (Compl. at ¶ 22), Joseph Conway breached that agreement, 2) against Joseph Conway for breach of fiduciary duty based on the allegation that, as an officer and accountant for Theaprin, Joseph Conway had a fiduciary duty to protect the Company’s interests and refrain from causing injury to the Company, which he breached, including a request for punitive damages in light of Joseph Conway’s allegedly oppressive and malicious conduct, 3) against Joseph Conway for breach of the duty of good faith and fair dealing, including a request for punitive damages, 4) against Joseph Conway for accounting malpractice, including a request for punitive damages, 5) against Joseph Conway for negligence in the performance of his accounting duties and “any contractual obligations” owed

to Theaprin (Compl. at ¶ 39), including a request for punitive damages, 6) against Joseph Conway for fraud and misrepresentation, including a request for punitive damages, 7) against Joseph Conway for “securities breaches related to brokers and commissions” based on the allegation that Joseph Conway “unlawfully took stock, options, payments and other commissions and remuneration from Theaprin in connection with securities transactions in violation of applicable law” (*id.* at ¶ 47), including a request for punitive damages, 8) against Joseph Conway for securities fraud based on the allegation that Joseph Conway “engaged in securities fraud in regard to securities issued to the individual Plaintiffs” (*id.* at ¶ 51), including a request for punitive damages, 9) against all Defendants for conspiracy to defraud Plaintiffs, including a request for punitive damages, 10) against all Defendants for an accounting, 11) against all Defendants under the theory of unjust enrichment, 12) against All Defendants for the imposition of a constructive trust with respect to Company assets, funds, compensation and securities held by Defendants, and 13) against all Defendants for conversion of Company property.

C. The Parties’ Positions

Joseph Conway submits *inter alia* that 1) the first cause of action fails to state a cause of action for breach of contract because it fails to set forth the elements of that cause of action, particularly because it fails to specify or describe the alleged contract breached; 2) the second cause of action is insufficient, both because it is duplicative of the cause of action for breach of contract and because it fails to allege the breach of fiduciary duty with the required specificity; 3) the third cause of action, alleging a breach of the duty of good faith and fair dealing, is duplicative of both the breach of fiduciary duty and breach of contract claims, and suffers from the same infirmities as those causes of action; 4) to the extent that the sixth cause of action for fraud and misrepresentation and ninth cause of action for conspiracy to defraud allege a conspiracy, a civil conspiracy cause of action is not cognizable under New York law and, therefore, those causes of action fail to state a cognizable claim; 5) to the extent that the sixth and ninth causes of action allege fraud, they fail to plead the essential elements of fraud with the required specificity; 6) the seventh and eighth causes of action, alleging securities violations, are not pled with particularity and fail to identify the statutes giving rise to those claims; 7) the tenth cause of action, which involves a request for an accounting, fails to allege specific misconduct and fails to allege that no adequate remedy at law exists; 8) the eleventh cause of action for unjust enrichment and twelfth cause of action seeking to impose a constructive trust both fail to set forth the necessary elements for those respective causes of action; and 9) the thirteenth cause

of action for conversion fails to allege what was converted and fails to plead facts which might give rise to a claim of tort liability distinct from a breach of contract claim.

Joseph Conway also contends that all of Plaintiffs' claims are time barred. Joseph Conway submits that the causes of action alleging breach of fiduciary duty, malpractice, negligence, securities breaches related to brokers and commissions and conversion are all barred by the applicable three year statute of limitations. Moreover, the remaining causes of action for breach of contract, breach of good faith and fair dealing, fraud and misrepresentation, securities fraud, conspiracy to defraud, accounting, unjust enrichment and imposition of a constructive trust are barred by the applicable six year statute of limitations because the Complaint fails to allege sufficient facts supporting the conclusion that acts were committed within the six years prior to the commencement of the action that might give rise to a cause of action.

Michael and Diana join in Joseph Conway's arguments in support of dismissal of the causes of action for conspiracy to defraud, accounting, unjust enrichment, imposition of a constructive trust and conversion for failure to state a cause of action. Michael and Diana also contend that the ninth through thirteenth causes of action are time barred by the applicable statutes of limitations because they have had nothing to do with Theaprin, or its predecessor Soluprin, since 2005.

Defendants submit further, that the claims of the individual Plaintiffs are barred because they lack the capacity to initiate suit in their own right. Moreover, this action is barred due to the pendency of the Related Action which involves the same parties and the same claims as the instant action. Michael and Diana also argue that they have a complete defense based on documentary evidence because the exhibits submitted demonstrate that Michael and Diana acquired shares of Theaprin's predecessor, Soluprin, for valid consideration.

In opposition, Plaintiffs submit *inter alia* that 1) they have adequately alleged their claims and, viewing the facts in a light most favorable to Plaintiffs, an agreement to engage in a fraudulent scheme can be inferred from the facts in the Complaint; 2) if Plaintiffs have failed to adequately plead all of the elements of their causes of action, the Court should permit Plaintiffs to amend the Complaint, although Plaintiffs have not affirmatively moved for that relief; 3) Plaintiffs' claims are not barred by the statute of limitations because there are factual questions as to when the claims accrued and when Plaintiffs discovered their claims; 4) Defendants should be precluded by principles of equitable estoppel from using the statute of limitations to bar Plaintiffs' claims because Defendants used deceit and concealment to prevent Plaintiffs from filing their action earlier; 5) the individual Plaintiffs have rights as stockholders

and investors who were defrauded when they invested or who suffered from the securities violations of Defendants, including the payment of illegal commissions to Joseph Conway and possibly Michael and Diana; 6) the pendency of the Related Action does not warrant dismissal of the instant action, but rather warrants consolidation of the two matters;² and 7) the documentary evidence submitted by Michael and Diana supports liability because it evinces their participation in questionable transactions to obtain the stock of Theaprin.

In reply, Joseph Conway submits that the evidence presented demonstrates that he turned over the Company's records in 2008, and Plaintiffs failed to exercise reasonable diligence if they wanted any additional records. Michael and Diana argue that Plaintiffs' reliance upon the discovery rule regarding fraud claims is misplaced because Plaintiffs have failed to plead any actionable fraud against them. Moreover, Plaintiffs have failed to refute Defendants' submissions regarding the manner in which Michael and Diana acquired their shares in the Company.

RULING OF THE COURT

A. Standards for Dismissal

On a motion to dismiss the complaint pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the court must afford the complaint a liberal construction, accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Nouveau Elevator Industries, Inc. v. Glendale Condominium Town and Tower Corp.*, 107 A.D.3d 965, 966 (2d Dept. 2013), quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

When moving for dismissal of a cause of action on the ground that it is barred by the statute of limitations, pursuant to CPLR §3211(a)(5), the defendant bears the initial burden of establishing prima facie that the time in which to sue has expired and the court must assume the allegations in the complaint to be true and resolve all inferences in favor of the plaintiff. *Island*

² Plaintiffs did not move for consolidation in opposition to Defendants' motions to dismiss, but made separate motions in each action, which motions were submitted on October 25, 2013.

ADC, Inc. v. Baldassano Architectural Group, P.C., 49 A.D.3d 815, 816 (2d Dept. 2008). Once the defendant has made a showing that the statute of limitations has expired, the burden shifts to the plaintiff to aver evidentiary facts establishing that the cause of action falls within an exception to the statute of limitations, or to raise an issue of fact as to whether such exception applies. *Gravel v. Cicola*, 297 A.D.2d 620, 621 (2d Dept. 2002).

An equitable estoppel defense to the statute of limitations is inappropriate where the plaintiffs had timely awareness of the facts requiring them to make further inquiry before the statute of limitations expired. *Pahlad v. Brustman*, 8 N.Y.3d 901, 902 (2007), quoting *Putter v. North Shore Univ. Hosp.*, 7 N.Y.3d 548, 553-554 (2006).

B. Relevant Causes of Action

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694, 695 (2d Dept. 1986). See also *JP Morgan Chase v. J.H. Electric*, 69 A.D.3d 802 (2d Dept. 2010) (complaint sufficient where it adequately alleged existence of contract, plaintiff's performance under contract, defendant's breach of contract and resulting damages citing, *inter alia*, *Furia v. Furia*, 116 A.D.3d at 695).

The elements of a cause of action to recover damages for breach of fiduciary duty are 1) the existence of a fiduciary relationship, 2) misconduct by the defendant, and (3) damage directly caused by the defendant's misconduct. A cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR §3016(b). *Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 A.D.3d 804, 808 (2d Dept. 2011). The duty owed by an accountant to a client is generally not fiduciary in nature. *Bitter v. Renzo*, 101 A.D.3d 465 (1st Dept. 2012).

A cause of action to recover damages for fraud requires allegations of 1) a false representation of fact, 2) knowledge of the falsity, 3) intent to induce reliance, 4) justifiable reliance, and 5) damages. CPLR § 3016(b) requires that the circumstances underlying a cause of action based on fraud be stated in detail. *Genovese v. State Farm Mut. Auto. Ins. Co.*, 106 A.D.3d 866, 867 (2d Dept. 2013).

The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest. *Lawrence v. Kennedy*, 95 A.D.3d 955, 958 (2d Dept. 2012), quoting *Palazzo v. Palazzo*, 121 A.D.2d 261, 265 (1st Dept. 1986).

To adequately plead a claim for unjust enrichment, a plaintiff must allege that 1) the defendant was enriched; 2) at plaintiff's expense; and 3) it is against equity and good conscience to permit defendant to retain what is sought to be recovered. *Georgia Malone & Co., Inc. v. Rieder*, 19 N.Y.3d 511, 516 (2012), quoting *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011) (brackets and internal quotation marks omitted). A plaintiff cannot succeed on an unjust enrichment claim unless there is a sufficiently close relationship with defendant that is not too attenuated. *Georgia Malone & Co., Inc. v. Rieder*, 19 N.Y.3d at 516, quoting *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 215-216 (2007).

New York law does not recognize an independent tort of civil conspiracy. *Sado v. Ellis*, 882 F. Supp. 1401, 1408 (S.D.N.Y. 1995), citing, *inter alia*, *Legion Lighting Co. v. Switzer Group, Inc.*, 171 A.D.2d 472 (1st Dept. 1991).

Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance. *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995). The implied covenant of good faith and fair dealing embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. *Moran v. Erik*, 11 N.Y.3d 452, 456 (2008), citing *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (2002), quoting *Dalton v. Educational Testing Serv.*, 87 N.Y.2d at 389 (additional citations omitted). Where a cause of action for breach of the covenant of good faith and fair dealing arises from the same facts and seeks identical damages as a breach of contract claim, then it should be dismissed as duplicative. *Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 70 A.D.3d 423, 426 (1st Dept. 2010), *lv. app. den.*, 15 N.Y.3d 704 (2010).

Conversion is the unauthorized exercise of dominion over or interference with a specific identifiable piece of property in defiance of the owner's rights. *Petty v. Barnes*, 70 A.D.3d 661, 662 (2d Dept. 2010). A claim to recover damages for conversion cannot be predicated on a mere breach of contract. *Wolf v. National Council of Young Israel*, 264 A.D.2d 416, 417 (2d Dept. 1999) (trial court properly dismissed conversion counterclaim that did not stem from wrong independent of alleged breach of contract). Where a party is merely seeking to enforce its bargain pursuant to the terms of a contract, a tort claim will not lie. *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 316 (1995).

The elements of a cause of action for a constructive trust are 1) a confidential or fiduciary relationship, 2) a promise, express or implied, 3) a transfer made in reliance on that promise, and 4) unjust enrichment. *Plumitallo v. Hudson Atl. Land Co., LLC*, 74 A.D.3d 1038, 1039-1040 (2d

Dept. 2010).

C. Relevant Statute of Limitations Principles

The applicable statute of limitations period for causes of action alleging a breach of fiduciary duty depends upon the substantive remedy sought by the plaintiff. Where the remedy sought is monetary in nature, the action is construed as alleging injury to property within the meaning of CPLR § 214(4) and the three-year limitations period applies. Where the relief sought is equitable in nature or where an allegation of fraud is essential to a breach of fiduciary duty claim, then the six-year limitations period in CPLR §§ 213(1) and (8) applies. *Monaghan v. Ford Motor Co.*, 71 A.D.3d 848, 849-850 (2d Dept. 2010).

The six-year statute of limitations of CPLR § 213(7) applies to actions for breach of fiduciary duty by or on behalf of a corporation against a present or former corporate officer, with no differentiation between legal and equitable claims. *Oxbow Calcining USA Inc. v. American Indus. Partners*, 96 A.D.3d 646, 651-652 (1st Dept. 2012), quoting *Roslyn Union Free School Dist. v. Barkan*, 16 N.Y.3d 643, 649 (2011).

If a complaint's allegations of breach of contract and breach of fiduciary duty arise out of the accounting services provided by the defendant pursuant to a contract between the parties and out of the accountant-client relationship which resulted therefrom, then the claims sound in accounting malpractice and the three-year statute of limitations of CPLR § 214(6) applies. *Harris v. Kahn, Hoffman, Nonenmacher & Hochman, LLP*, 59 A.D.3d 390, 391 (2d Dept. 2009). Otherwise, the statute of limitations for a cause of action based upon a contractual obligation is six years. See CPLR § 213(2).

Where unjust enrichment and breach of contract claims are based on the same facts and pled in the alternative, a six-year statute of limitations applies. *Maya NY, LLC v. Hagler*, 106 A.D.3d 583, 585 (1st Dept 2013).

Negligence claims are governed by a three-year statute of limitations. CPLR §214. The statute of limitations in an action to recover damages for accounting malpractice is three years, "regardless of whether the underlying theory is based in contract or tort." CPLR §214(6). A claim for accounting malpractice accrues upon the client's receipt of the accountant's work product as that is the point at which a client reasonably relies upon the accountant's skill and, as a consequence of such reliance, can become liable for tax deficiencies. This is the time when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court. *Ackerman v. Price Waterhouse*, 84 N.Y.2d 535, 541 (1994). The claim accrues when the malpractice is committed, not when the client discovers it. *Williamson v.*

PricewaterhouseCoopers LLP, 9 N.Y.3d 1, 7-8 (2007).

In an action based upon fraud, the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff discovered the fraud, or could with reasonable diligence have discovered it. CPLR § 213(8).

A cause of action for an accounting is governed by the “residual” six-year statute of limitations set forth in CPLR §213(1). *McDonald v. Edelman & Edelman, P.C.*, 2013 N.Y. App. Div. LEXIS 7393, * 2 (1st Dept. 2013).

For statute of limitation purposes, an action for conversion is subject to a three year limitation period. *Vigilant Ins. Co. of Am. v. Housing Auth. of City of El Paso, Tex.*, 87 N.Y.2d 36, 44 (1995), citing CPLR § 214(3). Accrual runs from the date the conversion takes place, not from discovery of, or the exercise of diligence to discover, the wrongful act. *Vigilant Ins. Co. of Am. v. Housing Auth. of City of El Paso, Tex.*, 87 N.Y.2d at 44.

A claim for the imposition of a constructive trust is governed by the six year statute of limitations found in CPLR § 213(1), and begins to run at the time of the wrongful conduct or event giving rise to a duty of restitution. *Vitarelle v. Vitarelle*, 65 A.D.3d 1034, 1035 (2d Dept. 2009), quoting *Maric Piping v. Maric*, 271 A.D.2d 507, 508 (2d Dept. 2000).

D. Shareholder Claims

A shareholder has no individual cause of action for a wrong against a corporation, even when he loses the value of his investment or incurs personal liability in an effort to maintain the solvency of the corporation, unless the wrongdoer has breached a duty owed to the shareholder independent of any duty owing to the corporation wronged. *Abrams v. Donati*, 66 N.Y.2d 951, 953 (1985).

E. Application of these Principles to the Instant Action

The Court grants the motions and dismisses the Complaint based on the Court’s conclusions that 1) the first cause of action, alleging breach of contract against Joseph Conway, fails to state a cause of action because it fails to allege that there was actually an agreement between Plaintiffs and Joseph Conway; 2) although the minimal specifics provided in the first cause of action make it difficult to determine when the statute of limitations would have accrued, if the purported contract related to Joseph Conway’s provision of accounting services, it is barred by the three-year statute of limitations in light of the fact that he resigned as accountant for Theaprin/ Soluprin in 2008 and this action was not commenced until 2013; 3) the second cause of action, alleging breach of fiduciary duty against Joseph Conway, fails to state a cause of

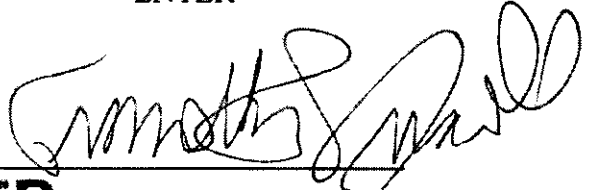
action because it fails to specify how he breached his fiduciary duty to the Company; 4) the third cause of action, asserted against Joseph Conway for breach of good faith and fair dealing, is similarly devoid of any specifics as to how he committed such a breach and therefore also fails to state a cause of action; 5) the fourth cause of action for accounting malpractice and fifth cause of action for negligence against Joseph Conway are both barred by the applicable three-year statute of limitations, which accrued at the time the accounting services were provided, which, at the latest, was 2008; 6) the sixth, seventh and eighth causes of action against Joseph Conway and ninth cause of action against all of the Defendants, all of which sound in fraud, lack the particularity required for fraud claims and therefore fail to state a cause of action; 7) the tenth cause of action against all of the Defendants for an accounting fails to state a cause of action a) against Michael and Diana because there is no allegation of any fiduciary relationship between them and any of the Plaintiffs, and b) against Joseph Conway because the Complaint fails to allege any breach of his duty to the Company; 8) the eleventh cause of action against all of the Defendants for unjust enrichment and twelfth cause of action for imposition of a constructive trust against all of the Defendants fail to state a cause of action because they fail to allege all of the requisite elements for such causes of action; 9) the thirteenth cause of action for conversion against all of the Defendants not only fails to state a cause of action, but is also barred by the applicable three-year statute of limitations; and 10) the individual Plaintiffs' claims must be dismissed because they lack capacity to sue on their own behalf for wrongs purportedly committed against the Company, and Plaintiffs fail to allege any independent duty owed to the individual shareholders by Defendants.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
December 3, 2013


ENTERED HON. TIMOTHY S. DRISCOLL
DEC 11 2013 J.S.C.
NASSAU COUNTY
COUNTY CLERK'S OFFICE 