SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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REGEN CAPITAL I, LLC,

Index No. 652794/2012

Plaintiff,

Motion Seq. No. 003

-against-

ALIXPARTNERS, LLP,

Defendant.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendant Alixpartners, LLP ("defendant") moves for summary judgment dismissing the complaint of the plaintiff Regen Capital I, LLC ("plaintiff") on the ground that the complaint is time-barred by the statute of limitations.

In response, plaintiff cross moves to amend its complaint to add claims for unjust enrichment, constructive trust, an accounting and punitive damages.

Factual Background[1]

Plaintiff's President, Elliot H. Herskowitz ("Herskowitz"), claims that plaintiff was a creditor of Key3Media Group, Inc. (the "Debtor" or "Key3Media") and holder of claims in a bankruptcy case. As such, plaintiff received notice that it was entitled to purchase shares of the reorganized debtor, MediaLive International, Inc. (the "Reorganized Debtor"), with a direction that all questions be directed to Meade Monger, an employee of defendant. On January 19, 2004, defendant, through Henry R. Colvin ("Colvin") directed plaintiff to wire the funds to

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[1] The Factual Background is taken in large part from the complaint and opposition papers of plaintiff.

"Texas Capital Bank," located at "6060 North Central, Suite 800, Dallas, TX 75206" with an account address of "c/o MediaLive International, Inc., Legal Department, 795 Folsom Street, 6th Floor, San Francisco, CA 94107-1243" and to "Account # 111 301 0217" (the "Account") for the purpose of purchasing the shares pursuant to the First Amended Joint Plan of Reorganization. Based on plaintiff's "trust and confidence" in defendant, plaintiff wired the funds accordingly. However, over time, plaintiff realized that the funds were never used to purchase the shares.

In its complaint, plaintiff alleges that defendant "owes plaintiff $50,164.20 for money that was wired on or about January 20, 2004 to an account designated by defendant, to wit, Texas Capital Bank Account No. 1113010217" (¶3). It is also alleged that on an unspecified date after such wire, defendant converted the monies for an unauthorized use" and therefore, "breached a duty owed to plaintiff." (¶¶4,5).[2]

In support of dismissal, defendant alleges that the breach of fiduciary duty and conversion claims are time-barred under the three-year statute of limitations applicable to such claims. Both claims accrue when the alleged breach and conversion occurred, respectively, which was when defendant received payment from plaintiff (*i.e.*, January 2004) and failed to make plaintiff a shareholder in the Reorganized Debtor. Plaintiff's claim accrued at the earliest, January 2004 or at the latest in January 2005, a year after the funds were wired. Even if the conversion claim accrued when the demand by plaintiff was made, discovery shows that at the latest, plaintiff sought return of the money on May 3, 2007. Plaintiff also acknowledged that the claims accrued more than eight years ago by insisting that it receive interest from the date plaintiff's funds were

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[2] Upon a previous motion (seq. 002) to dismiss the complaint for failure to state a cause of action, the Court held that plaintiff stated a cause of action for conversion, but not for breach of contract. (See order, dated August 19, 2013).

wired to the subject account. Plaintiff's President, Herskowitz, even stated that after 10 years "of being run around I decided enough." And, even if the claims are deemed as one for monies had and received, which has a six-year statute of limitations, such claim runs from the remittance by plaintiff of the funds at issue; and, the latest this claim could have accrued was a year after the funds were wired, *to wit*: January 2005. Therefore, the Complaint, which was filed in August 2012, is time-barred.

Further, even if the conversion claim is timely, the funds transferred by plaintiff were wired into an account which, at that time, contained other funds as well, and plaintiff's funds were commingled with others. Since plaintiff cannot prove that the money is "specifically identifiable and segregated," the conversion claim fails. Likewise, even if the fiduciary claim is timely, there is no basis for plaintiff's claim that defendant was its fiduciary. Plaintiff does not allege that defendant is a debtor in possession. And, plaintiff was not even defendant's client; the Debtor Key3Media was. Further, nothing about the subject arms-length stock purchase transaction created a fiduciary relationship between defendant and plaintiff.

In response, plaintiff opposes defendant's motion, cross moves for leave to amend its complaint, and argues that upon a search of the record, summary judgment should be granted in favor of plaintiff, with plaintiff's punitive damages claim severed for trial.

Plaintiff initially argues that defendant fails to specify the applicable CPLR section upon which it relies for its statute of limitations defense. Although the statute of limitations for conversion claims is generally three years pursuant to CPLR 214(3), to the extent the claim may be read as an equitable claim for unjust enrichment, the imposition of a constructive trust and an accounting, a six-year statute of limitations applies. And, as to the conversion claim, defendant

does not admit that it converted the funds, or, submits sufficient, admissible evidence showing what happened to the funds and when. Instead, documents produced by defendant show that, as late as February 2012, accounts relating to the Key3Media bankruptcy continued to remain open.

Since defendant cannot establish when its conversion of plaintiff's property occurred, the statute of limitations must be measured from the time defendant refused to return plaintiff's funds upon demand. Alternatively, the conversion action is timely pursuant CPLR 206(a), the additional, one-year statute of limitations applicable to fiduciary relationships, since plaintiff reposed confidence and trust in defendant who provided directions with respect to plaintiff's funds and, as an intermediary and agent who obtained such funds, was under a duty to act for the benefit of plaintiff with respect to those funds. Defendant is deemed to be an escrow agent, owing a fiduciary duty to plaintiff upon defendant's receipt plaintiff's funds for the purpose of delivery to the Reorganized Debtor to purchase stock. Defendant was also a fiduciary by virtue of its role in the Key3Media bankruptcy. And, defendant is estopped from pleading the statute of limitations defense based on its misrepresentations that it did not possess plaintiff's funds.

Plaintiff claims that after wiring its funds to defendant on January 20, 2004 time passed, and it never received its shares. After "time went by," and "over the ensuing years" plaintiff inquired of Colvin as to the whereabouts of its shares, and Colvin advised that he would contact the Reorganized Debtor, and that plaintiff did not need to pursue the Reorganized Debtor itself. Plaintiff claims that it would have demanded the return of the money had it known that defendant had the funds. Over the course of time as plaintiff tried to retrieve the funds, David Bauman, CEO of the successor to the venture capital firm which funded the reorganization and Julian Viadro (the Liquidating Trustee) advised plaintiff in June 2011 that the Account did not belong

to the Reorganized Debtor, and the funds never reached the Reorganized Debtor and may have been used for other purposes. Plaintiff contacted Colvin, who advised, on June 30, 2011 that an internal report would be prepared to trace the funds. Plaintiff's messages left with Colvin remained unreturned throughout June and August 2011. Thus, on August 16, 2011, plaintiff demanded, in writing, that unless defendant "in its role as fiduciary" provided plaintiff with an explanation as to the whereabouts and use of the funds, plaintiff would pursue other remedies.

Plaintiff also contends that defendant has avoided disclosure of relevant documents, and the documents produced show that at least by August 4, 2011, defendant was still in possession of the funds, in an account defendant chose to keep open due to defendant's claim of right to such funds. Documentation also shows that defendant used the funds to pay itself on invoices which include charges relating to defendant's misappropriation of plaintiff's funds. Also, the June 2011 destruction of documents referenced in an invoice was implemented pursuant to Item III(B) of a report of August 4, 2011 (the "Specific Trust Status Report"). Nor may defendant rely upon the so-called "ledger" as it was improperly withheld from production, and only produced less than 24 hours before the summary judgment motion was e-filed and in violation of the stay of discovery issued by the Court. And, defendant may not use reply papers to correct these deficiencies.

Plaintiff's motion to compel Colvin to appear for a deposition was denied by this Court, and discovery was stayed pending the disposition of plaintiff's summary judgment motion. Plaintiff argues that based on the above facts the Court should search the record and grant summary judgment in its favor. As this Court has previously ruled, plaintiff's funds are properly the subject of a conversion claim since they were provided for the specific purpose of the

purchase of stock and were to be treated in a particular manner. This Court has also previously found that it cannot be said as a matter of law that defendant did not owe plaintiff a fiduciary duty. And, since the evidence shows that defendant received and retained plaintiff's funds and diverted them to itself, plaintiff's proposed claims for unjust enrichment, constructive trust and an accounting are appropriate.

In opposition to plaintiff's cross-motion, defendant argues that plaintiff's conversion claim is time-barred and even if the funds were initially lawfully held by defendant, plaintiff's claim is still time-barred. Plaintiff concedes that the funds were wired to a Key3Media account "that belonged to and was controlled by [defendant] Alix" and thus, the conversion claim occurred on the date of the wire, as the funds were, controlled by defendant "without authority."

And, since CPLR 5001 permits the computation of interest from the earliest ascertainable date the cause of action existed, plaintiff's demand for interest from the date of the wire shows that the conversion claim is time-barred.

CPLR 206(a)(1) applicable to fiduciary claims does not toll the statute of limitations, and is not applicable because no fiduciary-type relationship ever existed between plaintiff and defendant, and a demand was not necessary for plaintiff to commence this action, as required to implicate this statute. And, since plaintiff claims that defendant's initial possession of the funds was unlawful, the demand rule does not apply to toll the statute of limitations. In any event, the documentation shows that plaintiff sought the return of the funds on May 3, 2007. And, since, under Second Department caselaw, the conversion claim would afford plaintiff complete relief, the three-year statute of limitations would still apply to the matter despite the purported new equitable claims.

And, defendant will suffer prejudice if leave to amend is granted. First, the amendment lacks merit. There exists no fiduciary duty relationship to support either a claim for constructive trust or an accounting claim. Further, the constructive trust claim accrued when defendant allegedly wrongly acquired plaintiff's funds on January 20, 2004, and thus, this claim is time-barred. And plaintiff cannot demand an accounting to circumvent the time-barred conversion claim. Similarly, the proposed unjust enrichment claim is time-barred, since defendant's alleged wrongful conduct occurred on either January or February 2004 when the funds were wired or received, respectively, or at the latest, on May 3, 2007 when plaintiff inquired as to the return of the funds. There is no claim of egregious conduct or moral turpitude to support a punitive damage claim. Further, to allow plaintiff to amend its complaint at this late stage, after two years of filing its two-page complaint, would prejudice defendant in that all prior motion practice aimed at dismissing the conversion claim would have been a waste of the Court's and defendant's time. Plaintiff also failed to offer a reasonable excuse for its delay in moving to amend its complaint.

Discussion

It is well established that the "proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]). However, the moving party must demonstrate entitlement to judgment as a matter of law (*see Zuckerman*, *supra*), and the failure

to make such a showing will result in the denial of the motion, regardless of the sufficiency of the opposing papers (*Johnson v. CAC Business Ventures, Inc.*, 52 A.D.3d 327, 859 N.Y.S.2d 646 [1st Dept 2008]; *Murray v. City of New York*, 74 A.D.3d 550, 903 N.Y.S.2d 34 [1st Dept 2010]).

"On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff. Further, plaintiff's submissions in response to the motion must be given their most favorable intendment" (*Pasternack v. New York Ciy Dept. of Housing Preservation & Dev.*, 44 Misc.3d 1216(A), Slip Copy, 2014 WL 3739581 (Table) [Supreme Court, New York County 2014] *citing Benn v. Benn*, 82 A.D.3d 548, 548 [1st Dept 2011]).

Contrary to defendant's contentions the Court did not previously determine that this action was solely one for conversion. Instead, the Court, in response to defendant's motion to dismiss the claim for conversion and breach of contract, held that plaintiff stated a claim for conversion and that plaintiff did not pursue a claim for breach of contract.

While defendant fails to cite the CPLR section governing the statute of limitations applicable to conversion claims, the conversion claim herein is subject to a three-year limitation period *(Maya NY, LLC v. Hagler*, 106 A.D.3d 583, 965 N.Y.S.2d 475 [1st Dept 2013] *citing* CPLR 214[3]). The cause of action normally accrues on the date the conversion takes place and not the date of discovery or the exercise of diligence to discover (*Maya NY, LLC v. Hagler, supra, citing Vigilant Ins. Co. of Am. v. Housing Auth. of City of El Paso, Tex.*, 87 N.Y.2d 36, 44–45, 637 N.Y.S.2d 342, 660 N.E.2d 1121 [1995]). However, while "accrual [normally] runs

from the date the conversion takes place . . . and not from discovery or the exercise of diligence to discover" . . . it is well settled that, where the original possession is lawful, a conversion does not occur until after a demand and refusal to return the property (*D'Amico v. First Union Nat. Bank*, 285 A.D.2d 166, 728 N.Y.S.2d 146 [1st Dept 2001] *citing MacDonnell v. Buffalo Loan, Trust & Safe Deposit Co.*, 193 N.Y. 92, 101, 85 N.E. 801 (internal citations omitted)). Thus, a claim for conversion accrues from the earlier of the time when a defendant refuses to return the property after a demand, or the time when the defendant disposes of the property (*Malanga v. Chamberlain*, 71 A.D.3d 644 [2d Dept 2010]).

While defendant alleges that it received plaintiff's funds in January 2004, or at the latest, in February 2004, defendant, as the movant, offers nothing as to when or if: (a) plaintiff "demanded" the funds in question; or (b) defendant disposed of the property. Indeed, defendant has not acknowledged that any conversion took place, let alone on February 11, 2004, when defendant received the funds at issue. And, the handwritten notation of "5/3/07 -Henry Colvin - spoke; will look into & be in touch" is insufficient to show that plaintiff demanded the return of its funds as of this date (*see Marden, Harrison & Kreuter, Certified Public Accountants, P.C. v. CCS Intern., Ltd.*, Not Reported in N.Y.S.2d, 2000 WL 33416864 [defendant's letter merely warning of consequences unless it received the "promise[d] documents," suggested that plaintiff previously had communicated its intent to return the records, and any refusal was not so unequivocal as to preclude defendant's reasonable expectation as of January 19, 1997, that the records would be delivered]).

It is also noted that a November 19, 2007 email to Colvin from "D Valentine" of MediaLive International, Inc. concerning "Wire Instructions for Option Exercise" advised Colvin

of the name and account numbers of the receiving bank, was followed by another email minutes thereafter on that same day from Valentine to Colvin to "Please hold off on wiring us these funds until, we get back to you and confirm." Therefore, it is unclear as to when the alleged conversion occurred. That plaintiff insists on interest from the date does show that plaintiff demanded the return of its funds on that date, or that defendant disposed of the funds on that date. Thus, defendant has failed to show *prima facie* when the three-year statute of limitations began to run as to the conversion claim.

In any event, the record indicates that plaintiff was under the impression that the funds were used to purchase the shares in the Reorganized Debtor, arguably at least until Colvin advised plaintiff on June 30, 2011 that an internal report would be prepared to trace plaintiff funds. Until that time, plaintiff was given no reason to believe that defendant's possession or control of plaintiff's funds was hostile. By email dated August 16, 2011, plaintiff's President Herskowitz advised Colvin that all of his messages "over the last 6 weeks" have "gone unanswered" and that Colvin previously indicated that he was "hoping to be in receipt of a report which would trace the funds which we wired for the exercise of the rights we received in the aforementioned bankruptcy case. . . .If you continue to ignore our inquiries, I will be left with little choice but to pursue any and all legal remedies . . . ." Therefore, plaintiff's conversion claim filed on August 20, 2012, is timely under such circumstances (*see D'Amico v. First Union Nat. Bank*, 285 A.D.2d 166, 728 N.Y.S.2d 146 [1st Dept 2001] (finding that conversion claim was timely, where "Although plaintiff could apparently have demanded the funds in question after the agreement was approved by the Surrogate in August 1994, she had no reason to believe that First Union's possession was hostile until it refused to accede to her 1997

demand unless she released it from all liability and because of certain attorneys' fees claimed by Miller in connection with the unsuccessful tax refund claim)).

As to the merits of plaintiff's conversion claim, contrary to defendant's contention, that plaintiff's funds were commingled with other funds in the subject Account does not defeat plaintiff's conversion claim, under the circumstances alleged herein (*see Manufacturers Hanover Trust Co. v. Chemical Bank*, 160 A.D.2d 113, 559 N.Y.S.2d 704 [1st Dept 1990] (plaintiff effected a wire transfer to Chemical Bank "of a specific sum, $223,280.74, to be credited to a specific account and, by doing so, created an obligation on Chemical's part either to treat the transfer in the specified manner or return the funds" and "Chemical did neither," and "the funds at issue remain in Chemical's hands and it has refused [plaintiff's] demand for their return, it may be sued by [plaintiff] in conversion")).

A "conversion occurs when 'someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession'" (*Colavito v. New York Organ Donor Network*, 8 N.Y.3d 43, 50, 827 N.Y.S.2d 96, 860 N.E.2d 713 [2006]). A necessary element of conversion is "defendant's dominion over the property or interference with it, in derogation of plaintiff's rights." Here, the record indicates that plaintiff caused a wire transfer to be made to an account controlled by defendant, for the purpose of purchasing shares in the Reorganized Debtor and that the whereabouts of such funds remain unknown. Thus, dismissal of plaintiff's conversion claim is unwarranted.

However, dismissal of the breach of fiduciary claim is warranted. For breach of fiduciary duty claims, "the choice of the applicable limitations period depends on the substantive remedy

that the plaintiff seeks" (*Access Point Medical, LLC v. Mandell*, 106 A.D.3d 40, 963 N.Y.S.2d 44 [1st Dept 2013] *citing IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 139, 879 N.Y.S.2d 355, 907 N.E.2d 268 [2009]). Here, plaintiff's original complaint seeks monetary damages solely. Therefore, the breach of fiduciary duty claim is governed by the three-year statute of limitations.[3] Assuming a fiduciary duty exists, such a claim has been held to accrue when a defendant failed to issue stock certificates within a required period of time (*see e.g., Kopel v. Bandwidth Technology Corp.*, 56 A.D.3d 320, 868 N.Y.S.2d 16 [1st Dept 2008]), and here, the record is unclear as to when such stocks were required to be delivered to plaintiff.

In any event, the Court finds that the record fails to establish the existence of a fiduciary relationship between plaintiff and defendant. "Generally, a fiduciary relationship is a situation where one person reposes special trust in another or where a special duty exists on the part of one person to protect the interests of another'" (*In re Bear Stearns Litigation*, 23 Misc. 3d 447, 870 N.Y.S.2d 709 [Supreme Court, New York County 2008] *citing Wal–Mart Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 113 [Del. 2006]). "In determining whether a fiduciary relationship exists, 'a court will look to whether a party reposed confidence in another and reasonably relied on the other's superior expertise or knowledge'" (*Sergeants Benev. Ass'n Annuity Fund v. Renck,* 19 A.D.3d 107, 796 N.Y.S.2d 77 [1st Dept 2005] *citing Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 122, 672 N.Y.S.2d 8 [1998]).

There are no allegations indicating that confidential conversations or communications were had between plaintiff and defendant to give rise to a confidential relationship. Nor did

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[3] Although plaintiff's proposed amended complaint seeks equitable relief in the form a constructive trust and an accounting, the Court declines to permit plaintiff to add such claims (*see infra*, page 16).

plaintiff allege facts supporting its conclusory claim that it "reposed confidence and trust in defendant." The "Notice Pursuant to First Amended Joint Plan of Reorganization for Key3Media Group, Inc. Et Al." which gave rise to plaintiff's transfer of funds at issue demonstrates that the wire transfer was made pursuant to an arms-length business transaction (*see V. Ponte and Sons, Inc. v. American Fibers Intern.*, 222 A.D.2d 271, 635 N.Y.S.2d 193 [1st Dept 1995] (dismissing breach of fiduciary duty counterclaim, as defendants pleaded only an arm's length business transaction without special circumstances which might give rise to a fiduciary relationship); *Chester Color Separations, Inc. v. Trefoil Capital Corp.*, 222 A.D.2d 276, 636 N.Y.S.2d 613 [1st Dept 1995] (debtor-creditor relationship was based upon arms-length transactions; defendants "never occupied the kind of position of trust with plaintiffs that would create a fiduciary relationship between them")). Plaintiff alleged no facts indicating that defendant had any special duty toward plaintiff or special knowledge or expertise on which plaintiff relied concerning the option to purchase the subject stock. Nor did plaintiff allege circumstances indicating that plaintiff's funds were delivered to defendant as escrow agent, *i.e.*, that the delivery of the funds was irrevocable until the occurrence or non-occurrence of a condition and pursuant to a contract containing language indicating the escrow nature of the funds (*see National Union Fire Ins. Co. Pittsburgh, Pa. v. Proskauer Rose Goetz & Mendelsohn*, 165 Misc. 2d 539, 634 N.Y.S.2d 609 [Supreme Court, New York County 1994] (absent such a contract the mere delivery of the instrument or property to an escrowee does not constitute a transaction in escrow; delivery of property must be made with the intent that the condition required to release the same take effect in the future, and the delivery must be intended by the promisor as relinquishment of any right of possession and control of the property; the delivery of

the property must be irrevocable until the occurrence or non-occurrence of the condition)). And, the caselaw cited by plaintiff is inapplicable.

As to plaintiff's cross-motion for leave to amend its complaint, "[m]otions for leave to amend pleadings should be freely granted ... absent prejudice or surprise resulting therefrom ..., unless the proposed amendment is palpably insufficient or patently devoid of merit.... [P]laintiff[] need not establish the merit of [their] proposed new allegations ..., but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*Schron v. Grunstein*, 39 Misc.3d 1213(A), 975 N.Y.S.2d 369 (Table) [Supreme Court, New York County 2013] *citing MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 499–500 [1st Dept 2010]; CPLR 3025[b]). "Prejudice in this context is shown where the nonmoving party is "hindered in the preparation of his case or has been prevented from taking some measure in support of his position" (*Schron v. Grunstein, supra, citing Loomis v. Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 23 [1981]). "A delay in seeking leave to amend is not grounds for denial of the motion except where the delay would cause prejudice or surprise" (*Schron v. Grunstein, supra, citing Lucido v. Mancuso*, 49 A.D.3d 220, 229 [2d Dept 2008]). Although leave to amend should be freely granted, an examination of the underlying merits of the proposed causes of action is warranted in order to conserve judicial resources (*Schron v. Grunstein, supra, citing Eighth Ave. Garage Corp. v. H.K.L. Rlty, Corp.*, 60 A.D.3d 404, 405 [1st Dept 2009]). Whether to permit amendment is within the sound discretion of the court (*Schron v. Grunstein, supra, citing Pellegrino v. NYC Transit Auth.*, 177 A.D.2d 554, 557 [2d Dept 1991]).

In light of the two previous motions filed for discovery and dismissal, and court appearances concerning same, there was no undue delay in bringing the instant motion, and the

claims sought to be added arise out of the same facts as those underlying the original complaint (*see Fellner v. Morimoto,* 52 A.D.3d 352, 862 N.Y.S.2d 349 [1st Dept 2008]).

As to plaintiff's claim for unjust enrichment, "there is no identified statute of limitations period within which to bring a claim for unjust enrichment," (*Maya NY, LLC v. Hagler*, 106 A.D.3d 583, 965 N.Y.S.2d 475 [1st Dept 2013]) but where, as here, the unjust enrichment is based on tortious conduct (as opposed to a breach of contract), the three-year limitations period applies (*Board of Managers of Chelsea 19 Condominium v. Chelsea 19 Associates*, 73 A.D.3d 581, 905 N.Y.S.2d 8 [1st Dept 2010]; *Dimatteo v. Cosentino,* 71 A.D.3d 1430, 896 N.Y.S.2d 778 [4th Dept 2010]; *Enzinna v. D'Youville College*, 34 Misc.3d 1223(A), fn.1, 946 N.Y.S.2d 66 (Table) [Supreme Court, Erie County 2010] ("a claim seeking monetary relief for unjust enrichment is governed by a statute of limitations, usually deemed to be the six-year period prescribed by CPLR 213(1) or (2) . . . but sometimes deemed to be the three-year period of CPLR 214(3)). Under either statutory of limitations period, a claim for unjust enrichment accrues upon the occurrence of the alleged wrongful act giving rise to restitution *(Maya NY, LLC v. Hagler, supra*; *Kaufman v. Cohen,* 307 A.D.2d 113, 760 N.Y.S.2d 157 [1st Dept 2003]; *cf.*, *Elliott v. Qwest Communications Corp.*, 25 A.D.3d 897, 808 N.Y.S.2d 443 [3d Dept 2006] (applying a six-year statute of limitations, and finding that unjust enrichment claim accrued in 1995 (when plaintiff wired the money) or, at the latest, in 1996 (when defendant Phoenix requested additional information and failed to timely issue a stock certificate)).

Here, although plaintiff wired the funds in 2004, additional information concerning the stocks and funds was sought in June 2011, and no stocks were issued to plaintiff. Given that defendant's alleged failure to return plaintiff's funds upon demand occurred in June 2011, it

cannot be said that this cause of action is untimely.

To state a cause of action for unjust enrichment, a plaintiff must demonstrate "that (1) defendant was enriched, (2) at plaintiff's expense, and (3) that 'it is against equity and good conscience to permit [ ] defendant to retain what is sought to be recovered" (*Farina ve Bastianich*, 116 A.D.3d 546, 984 N.Y.S.2d 46 [1st Dept 2014]). Here, plaintiff alleged facts indicating that defendant was enriched by the funds plaintiff's wired in that defendant allegedly "diverted funds to pay itself on invoices [dated July 7, 2011] which include charges relating to Alix' misappropriation of [plaintiff's] funds . . ." Although there is no indication, at this juncture, that defendant was in fact paid upon these invoices, assuming that the above allegations are true, leave to assert an unjust enrichment claim is warranted.

However, to impose a constructive trust, the following factors must be shown: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, (4) a breach of the promise and (5) unjust enrichment (*Zuch v. Zuch,* 117 A.D.2d 397, 503 N.Y.S.2d 343 [1st Dept 1986] *citing Sharp v. Kosmalski*, 40 N.Y.2d 119, 121, 386 N.Y.S.2d 72, 351 N.E.2d 721). In light of the finding above that plaintiff failed to assert a fiduciary relationship between the parties, leave to amend to add a claim to impose a constructive trust is unwarranted.[4]

And, even assuming the accounting claim is governed by the six-year statute of limitations,[5] in the absence of a confidential or fiduciary relationship, the proposed accounting

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[4] Like the unjust enrichment claim, a claim to impose a constructive trust accrues upon the occurrence of the alleged wrongful act giving rise to restitution (*Knobel v. Shaw*, 90 A.D.3d 493, 936 N.Y.S.2d 2 [1st Dept 2011]), and as such, the constructive trust claim is timely.

[5] *(McDonald v. Edelman & Edelman, P.C.*, 111 A.D.3d 457, 974 N.Y.S.2d 427 [1st Dept 2013] (a fiduciary duty claim to account for money or property allegedly belonging to plaintiff is governed by the "residual" six-year statute of limitations set forth in CPLR 213(1)).

claim lacks merit (*see Abacus Federal Savings Bank v. Lim,* 75 A.D.3d 472, 905 N.Y.S.2d 585 [1st Dept 2010] ("The failure to establish the existence of such a fiduciary relationship [for the imposition of a constructive trust] also precludes summary judgment for an accounting); *Waldman v. Englishtown Sportswear, Ltd.*, 92 A.D.2d 833, 460 N.Y.S.2d 552 [1st Dept 1983] ("The existence of a fiduciary relationship is essential for a cause of action in equity for an accounting arising out of the contract between the parties")).

And, leave to seek punitive damages is unwarranted. Although punitive damages may be obtained on a conversion claim or upon allegations of malicious conduct . . . the record establishes that no wrong to the general public is involved (*Parkway Windows, Inc. v. River Tower Associates*, 108 A.D.2d 660, 485 N.Y.S.2d 755 [1st Dept 1985] (internal citations omitted)). The dispute in the case at bar involves solely private wrongs and plaintiff failed to allege any intentional or deliberate wrongdoing, aggravating or outrageous circumstances, a fraudulent or evil motive, or a conscious act that willfully and wantonly disregards the rights of another so as render punitive damages appropriate (*see Parkway Windows, Inc. v. River Tower Associates, supra; Wildenstein v. 5H & Co, Inc.*, 97 A.D.3d 488, 950 N.Y.S.2d 3 [1st Dept 2012]; *see also Gamiel v. Curtis & Riess-Curtis, P.C.*, 16 A.D.3d 140, 791 N.Y.S.2d 78 [1st Dept 2005] (sufficiently stated conversion of escrow funds failed to support a punitive damage claim where there was no showing of "intentional or deliberate wrongdoing, aggravating or outrageous circumstances, a fraudulent or evil motive, or a conscious act that willfully and wantonly disregards the rights of another")). Consequently, plaintiff's request for severance of the punitive damage claim is also denied.

Upon a search of the record, summary judgment on the issue of liability is granted in

favor of plaintiff. It is uncontested that plaintiff wired its funds to the Account on January 20, 2004, based on defendant's instructions. The record establishes that in June 2012, plaintiff demanded an explanation of the whereabouts of the funds and the threat of legal action if defendant failed to respond. Notably, by email dated February 17, 2012, Colvin advised that in relation to the subject Account, "We are shutting the accounts down because all funds have been applied to invoices," thereby indicating defendant's control over the Account. This action was commenced, and the record indicates, that the funds were not returned to plaintiff and that plaintiff did not receive the stock at issue. Having failed to provide plaintiff with the shares, or a return of plaintiff's funds, which were wired to an account over which defendant had control, defendant is liable to plaintiff for conversion.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant for summary judgment dismissing the complaint of the plaintiff on the ground that the claims in the original complaint are time-barred by the statute of limitations is denied; and it is further

ORDERED that plaintiff's cross-motion to amend its complaint to add claims for unjust enrichment, constructive trust, an accounting and punitive damages is granted solely as to the unjust enrichment claim, and plaintiff shall serve an amended complaint upon defendant within 20 days of service of this order; and it is further

ORDERED that the branch of plaintiff's cross-motion for summary judgment on its claims is granted as to its conversion claim on the issue of liability, and the conversion claim is hereby severed and the issue of the amount of damages is hereby referred to Hon. Ira

Gammerman to hear and determine; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendant within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: September 2, 2014

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD