Franklin v Hafftka
2014 NY Slip Op 33751(U)
May 15, 2014
Supreme Court, Nassau County
Docket Number: 601290/2013
Judge: Margaret C. Reilly

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

CYNTHIA FRANKLIN, in her capacity as a Special Guardian of and on behalf of **GEORGE S. FRANKLIN,** a person under guardianship,

Plaintiff,

-against-

MICHAEL HAFFTKA and **YONAT HAFFTKA,**

Defendants.

TRIAL/IAS PART 25
Index No.: 601290/2013
Motion Date: 2/27/14
Motion Seq No.: 001

DECISION AND ORDER

PRESENT: HON. MARGARET C. REILLY, J.S.C.

The following papers having been read on the defendants' motion:

Notice of Defendants' Partial Motion to Dismiss Complaint 1
Affirmation of Amelia K. Brankov in Support of Defendants' Partial Motion to Dismiss Complaint & Exhibits 2
Memorandum of Law in Support of Defendants' Partial Motion to Dismiss Complaint 3
Affirmation of Oleg Rivkin 4
Affidavit of Cynthia Franklin 5
Affidavit of Samuel C. Klagsbrun, M.D. 6
Plaintiff's Memorandum of Law in Opposition to Defendants' Partial Motion to Dismiss the Complaint and in Support of Cross-Motion for Leave to Amend the Complaint 7
Affidavit of Michael Hafftka 8
Reply Memorandum of Law in Further Support of Defendants' Partial Motion to Dismiss Complaint and in Opposition to Plaintiff's Cross-Motion to Amend the Complaint 9

Upon the foregoing papers, it is ordered that the defendants' motion is decided as follows:

Defendants' motion for judgment dismissing the first, third, fourth, fifth, ninth, eleventh and sixteenth causes of action in their entirety, and further dismissing the sixth,

seventh and eighth causes of action to the extent that they are time-barred, is **GRANTED**. Defendants' further request for an award of attorneys' fees and costs is **DENIED**.

George S. Franklin has suffered from severe anxiety and depression all of his life. According to the complaint, he is "emotionally unable to manage the daily activities of living"(complaint, par. 6). Plaintiff, Cynthia Franklin, is Mr. Franklin's sister. Mr. Franklin gave Ms. Franklin a durable general power of attorney in 2002. Ms. Franklin was appointed Mr. Franklin's guardian in 2013, for the purposes of bringing this action.

Defendant, Michael Hafftka, is an artist, who was a friend to Mr. Franklin for many years. Defendant, Yonat Hafftka, is Mr. Hafftka's wife. In 1999, Mr. Franklin and Mr. Hafftka purchased an apartment building in Brooklyn together. The Hafftkas and their children lived in one apartment. Mr. Franklin occupied three rooms, and had the use of common areas in the Hafftkas' apartment such as the kitchen, dining area, and living room space. The remainder of the apartments were rented. The Hafftkas supervised the building and took care of all financial matters. This action arises out of the falling out between Mr. Franklin and Mr. Hafftka.

At the time the apartment building was purchased in 1999, Mr. Franklin and the Hafftkas entered into an Agreement of Joint Ownership and Management ("the Agreement," annexed as Exhibit B to the complaint). In the Agreement, Mr. and Ms. Hafftka are referred to collectively as "Hafftka." Mr. Franklin and Hafftka's relationship is described as "50-50 split of ownership as tenants in common" (Agreement, p.1).The Agreement provides, at Section 12, that on six months notice Hafftka has the right to terminate the Agreement and purchase Mr. Franklin's interest in the property in accordance with the provisions therein, that is, at a price essentially equivalent to Mr. Franklin's cash contribution to the property. The Agreement was drafted by Mr. Franklin's attorney, a partner at a prestigious law firm in Manhattan.

According to Dr. Klagsbrun, Mr. Franklin's treating doctor from 1995 until 2012, Mr.

Franklin's condition " is characterized by vegetative depression, anxiety, hopelessness, inability to feel pleasure, disinterest in food, and extreme neglect of personal hygiene" (Klagsbrun affidavit, par. 4). Over the years, drug therapy and electroconvulsive therapy have not resulted in improvement. According to the complaint, Mr. Franklin became "increasingly unhappy" with his "disproportionately small share of the living space" (complaint, par 12), and "increasingly unhappy" about "escalating financial pressure" from the Hafftkas (Id). Mr. Franklin was hospitalized in 2003, 2007, and 2010. After his hospitalization in 2010, Mr. Franklin did not return to the Brooklyn apartment house. Instead he moved to his family's home in Oyster Bay.

Ms. Franklin states that she originally thought her brother's plan to buy a home with the Hafftkas and live with them was "a good solution that would allow George to live a relatively normal life in a warm and loving home" (Ms. Franklin affidavit, par. 3). She learned of Mr. Franklin's unhappiness with his living space, and pressure by the Hafftkas for more money in 2003. She spoke to Mr. Hafftka of these concerns, and alleges that Mr. Hafftka promised more space for Mr. Franklin if the Hafftkas received more money. She learned of the Hafftkas' unilateral right to buy out Mr. Franklin's interest in the apartment building when she obtained a copy of the Agreement later in 2003. She testified that Mr. Hafftka promised that he would dissolve Section 12 of the Agreement (Ms. Franklin affidavit, par. 6).

Ms. Franklin alleges that in the interest of avoiding conflict, Mr. Franklin refused to let her get involved with his living arrangement and financial issues with the Hafftkas. It was only after her brother moved to Oyster Bay that he allowed her to protect his financial interests.

In an email from Mr. Hafftka to Ms. Franklin, dated May 8, 2012 (Exhibit B to Rivkin affirmation), Mr. Hafftka describes the difficulties of living with Mr. Franklin, including infestations of mice, bed bugs, and lice, fecal messes, and hazards caused by Mr. Franklin leaving water running, the toilet overflowing, and stove burners on. Mr. Hafftka says he

finally had to ask Mr. Franklin to smoke only in the bathroom because Mr. Franklin's inability to put out cigarettes was a serious fire hazard. According to Mr. Hafftka, he and Mr. Franklin agreed that the apartment was not an investment for Mr. Franklin, but protection for Mr. Hafftka in case their unconventional living arrangement did not work out.

Ms. Franklin commenced this action, by filing the complaint herein, on May 20, 2013. The complaint contains eighteen causes of action. On this motion the Hafftkas seek judgment pursuant to CPLR §3211, dismissing seven of those causes of action, and portions of three of them.

§3211 Dismissal Standard

On a motion to dismiss pursuant to CLR §3211, the facts as alleged must be accepted as true, the pleader must be accorded the benefit of every favorable inference, and the Court must determine only whether the facts as alleged fit within any cognizable theory (*see ABN AMRO Bank, N.V. v. MBIA, Inc,* 17 NY3d 208 [2011] citing *Leon v. Martinez*, 84 N.Y.2d 83, 87 [1994]).

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Applicable Statutes of Limitations

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Stanley Dean Witter & Co., 12 NY3d 132 [2009]; *Monaghan v. Ford Motor Co.*, 71 AD3d 848 [2nd Dept. 2010]). Where the relief sought is monetary damages, or where an allegation of fraud is incidental to the claim, the limitations period is three years; where the relief sought is equitable in nature, or where an allegation of fraud is essential to the claim, the statute of limitations is six years (*see IDT Corp., supra; Scott v. Fields*, 85 AD3d 756 [2nd Dept. 2011]; *Monaghan, supra* at 850).The statute runs from the date of the alleged breach. The same limitations rules apply to a cause of action for aiding and abetting a breach of fiduciary duty (*see Kaufman v Cohen*, 307 AD2d 113 [1st Dept. 2003]).

A cause of action based upon unconscionability has a limitations period of six years that accrues upon execution of the alleged unconscionable agreement (*see 35 Park Ave. Corp v. Campagna*, 48 NY2d 813 [1979]).

The limitations period for a claim for declaratory relief is the six-year catch-all found in CPLR 213(1), unless the nature of the underlying action reveals that the dispute could have been resolved through an action for which there is a prescribed time period (*see Walter v. Starbird-Veltidi*, 78 AD3d 820 [2nd Dept. 2010]; *see generally Vigilant Ins. Co. of Am. v. Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36 [1995]). The statute of limitations for a rescission claim is six years, and the claim accrues when the agreement is executed (*Hosseiniyar v. Alimehri*, 48 AD3d 635 [2nd Dept. 2008], lv app dsmd 11 NY3d 744 [2008]; *see Prand Corp. v. County of Suffolk*, 62 AD3d 681 [2nd Dept. 2009]; *DeMille v. DeMille*, 5 AD3d 428 [2nd Dept. 2004]).

A claim for declaratory relief declaring the Hafftkas' right to terminate the Agreement void, based upon duress and undue influence, is an equitable claim with a six-year limitations period that accrues upon execution of the contract (*see Pacchiana v. Pacchiana*, 94 AD2d 721 [2nd Dept. 1983], app dsmd 60 NY2d 586 [1982]).

The statute of limitations for breach of contract is six years, and the claim accrues when the breach occurs (*see* CPLR §213(2); *Hahn Automotive Warehouse, Inc. v. American Zurich Ins. Co.*, 18 NY3d 765 [2012]).

A cause of action for promissory estoppel is subject to a six-year limitations period (*see Enzinna v. D'Youville College*, 34 Misc 3d 1223(A) [Sup. Ct., Erie Cty, 2010], affd 84 AD3d 1744 [4th Dept. 2011]; *Superior Tech. Resources, Inc. v. Lawson Software, Inc.*, 17 Misc.3d 1137(A) [Sup. Ct., Erie Cty, 2007]).

A cause of action for negligent infliction of emotional distress is governed by a three-year statute of limitation (*see* CPLR §214; *Goldstein v. Massachusetts Mut. Life Ins. Co.*, 32 AD3d 821 [2nd Dept. 2006]; *Yong Wen Mo v. Gee Ming Chan*, 17 AD3d 356 [2nd Dept. 2005]). A claim for intentional infliction of emotional distress is governed by the one-year statute of limitations for intentional conduct (*see* CPLR §215; *Wilson v. Erra*, 94 AD3d 756 [2nd Dept. 2012]; *Goldstein, supra*; *Yong Wen Mo, supra*). These causes of action accrue when all of the elements can be alleged, that is, when damages are sustained (*see Yong Wen Mo, supra*).

Analysis

The Hafftkas move for judgment dismissing as untimely six causes of action, namely the claims for declaratory relief based upon breach of fiduciary duty, unconscionability, incapacity and duress/undue influence, promissory estoppel, and negligent infliction of emotional distress. In addition, the Hafftkas seek judgment, dismissing so much of the causes of action for breach of contract, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty, as are untimely. They also seek dismissal of the claim for purchase money resulting trust for failure to state a cause of action.

Ms. Franklin rejects all charges of stale claims on the grounds that the limitations periods for the claims alleged on Mr. Franklin's behalf have been tolled, because of Mr. Franklin's severe mental illness pursuant to CPLR §208. The "insanity" toll available in CPLR §208 applies only to "those individuals who are unable to protect their legal rights because of an over-all inability to function in society" (*see McCarthy v. Volkswagen of Am.*, 55 NY2d 543, 548 [1982]). CPLR §208 is to be narrowly construed to reflect the legislative judgment that individuals should be protected from stale claims (*Id*). The application of the

McCarthy rule is a pragmatic one which involves consideration of all surrounding facts and circumstances relevant to the claimant's ability to safeguard his or her legal rights" (*see Matter of Cerami v. City of Rochester School Dist.*, 82 NY2d 809 [1993]).

Review of the complaint and the documentation submitted by plaintiff reveals that this is not a proper case for application of the insanity toll. Where the disability of insanity is available, the toll does not extend the limitations period "beyond ten years after the cause of action accrues" (*see Santo B. v. Roman Catholic Archdiocese of N.Y.*, 51 AD3d 956 [2nd Dept. 2008]). Most of Ms. Franklin's complaints arise out of the Agreement which was executed on April 23, 1999. If each limitations period was tolled for the maximum 10-year period until 2009, the claims would nevertheless be time-barred because this action was not commenced until 2013.

More specifically, Mr. Franklin's symptoms do not rise to the level of rendering him unable to protect his legal rights because of an over-all inability to function in society. Severe depression with suicidal ideation and the ingestion of methadone for opiate dependency did not suffice to make the insanity toll available in *Thompson v. Metropolitan Transp. Auth.* (*see*112 AD3d 912 [2nd Dept. 2013]; *see also Eisenbach v. Metropolitan Transp. Auth.*, 62 NY2d 973 [1984] [toll denied for hospital patient with extensive injuries, who was treated with strong pain-killing drugs, and "was generally confused, disoriented, and unable to effectively attend to his affairs"]). In general, severe depression is not equivalent to lack of contractual capacity by reason of mental illness (*see Blatt v. Manhattan Med. Group.*, 131 AD2d 48 [1st Dept. 1987]).

Most importantly, Mr. Franklin's ability to hire an attorney to draft the Agreement supports the Hafftkas' claim that Mr. Franklin was not mentally incapacitated at the time the Agreement was executed (*see Thompson, supra; Matter of Todd v New York City Hous. Auth.*, 262 AD2d 202 [1st Dept. 1999]; *see generally Matter of Cerami, supra* at 813), and he was not unable to protect his legal rights.

The Court has carefully considered Ms. Franklin's statement that she thought her

brother's decision to move in with the Hafftkas was "a good solution that would allow George to live a relatively normal life in a warm and loving home" (*see* Ms. Franklin affidavit, par. 3), as well as Dr. Klagsbrun's testimony that he "encouraged" Mr. Franklin's decision to move in with the Hafftkas (*see* Klagsbrun affidavit, par. 5). These admissions belie Dr. Klagsbrun's conclusion that "at all times since his joint purchase with the Hafftkas of the building in Brooklyn Mr. Franklin has not been competent to participate meaningfully in any litigation or negotiation with the Hafftkas" (*see* Klagsbrun, affidavit, par. 9).

On this record plaintiff has failed to raise a triable issue of fact regarding the availability of the insanity toll. Accordingly, the following causes of action in the complaint are dismissed as time-barred:

(i) the first cause of action for declaratory relief that Section 12 of the Agreement is void and unenforceable based on breach of fiduciary duty;

(ii) the third, fourth, and fifth causes of action for declaratory relief that Section 12 of the Agreement is void and unenforceable based on unconscionability, lack of mental capacity, and duress and undue influence, respectively;

(iii) the ninth cause of action for promissory estoppel, which accrued in 2003, based upon Mr. Hafftka's alleged promise to (a) dissolve Section 12 of the Agreement and (b) expand Mr. Franklin's living quarters;

(iv) the sixteenth cause of action, purportedly for negligent infliction of emotional distress, although based on intentional conduct described as defendants' "constant demands for more money" (complaint, par. 142) which allegedly resulted in Mr. Franklin's hospitalizations in 2003, 2007, and 2010.

In addition, the Hafftkas seek dismissal of so much of the sixth (breach of the Agreement), seventh (breach of fiduciary duty), and eighth (aiding and abetting breach of fiduciary duty) causes of action as are untimely. This Court agrees.

So much of the sixth cause of action that is based upon conduct occurring prior to

May 20, 2007, six years before this action was commenced, must be dismissed as untimely.

In both the seventh cause of action for breach of fiduciary duty and the eighth cause of action for aiding and abetting a breach of fiduciary duty, plaintiff seeks money damages. Consequently, so much of the seventh and eighth causes of action, that is based upon conduct by the Hafftkas that took place prior to May 20, 2010, three years before this action was commenced, must be dismissed as untimely.

Failure to State a Cause of Action

The Hafftkas seek dismissal of the eleventh cause of action for a purchase money resulting trust for failure to state a cause of action. A purchase money resulting trust is imposed to protect a payor when property purchased is placed in the name of another without the knowledge or consent of the payor, or where a transferee of property purchases the property with money belonging to another, in violation of some trust (*see Mendel v Hewitt*, 161 AD2d 849 [3rd Dept. 1990]; EPTL 7-1.3). The essence of the resulting trust is the purchase. Because there is no dispute that Mr. Franklin knew of, and participated in, the purchase of the apartment building in Brooklyn as evidenced by the Agreement, plaintiff has no claim for a purchase money resulting trust.

The substance of the eleventh cause of action is that after the purchase of the apartment building, the Hafftkas increased their percentage ownership of the property by pressuring George to give them money so they could be seen to make a financial contribution to the property. Such allegations may be relevant to other causes of action, but they do not state a claim for a purchase money resulting trust.

Plaintiff's Cross-Motion for Leave to Amend

The decision to grant or deny leave to amend is committed to the court's discretion, and mere lateness is not a barrier (*see Edenwald Contr. Co. v. City of New York*, 60 NY2d 957 [1983]). Leave to amend a complaint shall be freely given unless the proposed amendment would cause prejudice to the opposing party (CPLR §3025[b]; *Benyo v. Sikorjak*, 50 AD3d 1074 [2nd Dept. 2008]; *39 Coll. Point Corp v. Transpac Capital Corp.*, 27 AD3d

454 [2nd Dept. 2006]). No evidentiary showing of merit is required for leave to amend a pleading under CPLR §3025[b]; the Court need only determine whether the proposed amendment is palpably insufficient to state a cause of action or is patently devoid of merit (*Lucido v. Mancuso*, 49 AD3d 220, 229 [2nd Dept. 2008]; *see Dickinson v. Igoni*, 76 AD3d 943 [2nd Dept. 2010]; *DeMato v. Mallin*, 68 AD3d 711 [2nd Dept. 2009]).

However, the Court is not required to permit futile amendments (*see Meimeteas v. Carter Ledyard & Milburn LLP.*, 105 AD3d 643 [1st Dept. 2013]; *Sanders v. Grenadier Realty, Inc.*, 102 AD3d 460 [1st Dept. 2013]; *Castillo v. Starrett City*, 4 AD3d 320 [2nd Dept. 2004]; *Saferstein v. Mideast Sys.*, 143 AD2d 82 [2nd Dept. 1988]).

Ms. Franklin asks for leave to amend the complaint to add allegations to the fifth, sixth, and seventh causes of action. The fifth cause of action, for a declaration that Section 12 is void on the grounds of the Hafftkas' undue influence over Mr. Franklin, has already been dismissed as time-barred. Nothing in plaintiff's papers or the proposed first amended complaint cures the fatal untimeliness of this cause of action. Consequently, amendment of the fifth cause of action is denied as futile.

Ms. Franklin additionally requests leave to amend the sixth and seventh causes of action for breach of the Agreement and breach of fiduciary duty, respectively, to add allegations supporting equitable estoppel. Equitable estoppel is an extraordinary remedy that may be invoked to bar the affirmative defense of the statute of limitations only where it is the defendant's affirmative wrongdoing which produced the long delay between the accrual of the cause of action and commencement of the legal proceeding (*see Zumpano v. Quinn*, 6 NY3d 666 [2006], *citing General Stencils v. Chiappa*, 18 NY2d 125, 128 [1966]; *Bevinetto v. Steven Plotnick, MD PC*, 51 AD3d 612 [2nd Dept. 2008]). Equitable estoppel does not apply where the wrongdoing or act of concealment underlying the estoppel claim is the same conduct which forms the basis of the plaintiff's underlying substantive claim (*see Knobel v. Shaw*, 90 AD3d 493 [1st Dept. 2011]). The affirmative wrongdoing must be separate and apart from the underlying claim (*see Bobash, Inc. v. Festinger*, 57 AD3d 464 [2nd Dept.

2008], *citing Zumpano* at 674-675).

Ms. Franklin seeks to add allegations to the sixth and seventh causes of action that the Hafftkas have been submitting spreadsheets with false information regarding the expenses of the property since 1999, in order to conceal their alleged violations of the Agreement and their alleged breaches of fiduciary duty. According to the proposed amended complaint, the Hafftkas' misconduct "was not, and could not have been, discovered until 2012," when they finally allowed Mr. Franklin's accountants and attorneys to investigate banking records and expense receipts for the property (proposed amended complaint, par. 88 and 95).

In the sixth cause of action, Ms. Franklin has already claimed that the monthly spreadsheets prepared by defendants were "unsupported or fabricated or both," and that this was a breach of Section 2 of the Agreement (complaint, par. 71). In the seventh cause of action, Ms. Franklin has already identified the Hafftkas' "failing to pay for their share of the Property expenses under the Agreement" and "fabricating 'records' to indicate that they had complied with their obligations" as a breach of their fiduciary duty to Mr. Franklin (complaint, par. 91 [c]). In short, the conduct which forms the basis of plaintiff's estoppel argument is the same conduct underlying the substantive claims for breach of the Agreement and breach of fiduciary duty.

Accordingly, the request for leave to amend the sixth and seventh causes of action must be **DENIED**.

Finally, "under the general rule, attorneys' fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, or by statute or court rule" (*see Mount Vernon City School Dist. v. Nova Cas. Co.*, 19 NY3d 28 [2012], quoting *Matter of A.G. Ship Maintenance Corp. v. Lezak*, 69 NY2d 1 [1986]). The Hafftkas allege no agreement, statute or court rule authorizing an award of attorneys' fees and costs. For this reason, their request for an award of attorneys' fees and costs must be **DENIED**.

Any other relief requested not specifically addressed herein is **DENIED**.

This constitutes the Decision and Order of this Court.

Dated: May 15, 2014
Mineola, New York

ENTER:

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A cause of action based upon unconscionability has a limitations period of six years that accrues upon execution of the alleged unconscionable agreement (*see 35 Park Ave. Corp v. Campagna*, 48 NY2d 813 [1979]).

The limitations period for a claim for declaratory relief is the six-year catch-all found in CPLR 213(1), unless the nature of the underlying action reveals that the dispute could have been resolved through an action for which there is a prescribed time period (*see Walter v. Starbird-Veltidi*, 78 AD3d 820 [2nd Dept. 2010]; *see generally Vigilant Ins. Co. of Am. v. Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36 [1995]). The statute of limitations for a rescission claim is six years, and the claim accrues when the agreement is executed (*Hosseiniyar v. Alimehri*, 48 AD3d 635 [2nd Dept. 2008], lv app dsmd 11 NY3d 744 [2008]; *see Prand Corp. v. County of Suffolk*, 62 AD3d 681 [2nd Dept. 2009]; *DeMille v. DeMille*, 5 AD3d 428 [2nd Dept. 2004]).

A claim for declaratory relief declaring the Hafftkas' right to terminate the Agreement void, based upon duress and undue influence, is an equitable claim with a six-year limitations period that accrues upon execution of the contract (*see Pacchiana v. Pacchiana*, 94 AD2d 721 [2nd Dept. 1983], app dsmd 60 NY2d 586 [1982]).

The statute of limitations for breach of contract is six years, and the claim accrues when the breach occurs (*see* CPLR §213(2); *Hahn Automotive Warehouse, Inc. v. American Zurich Ins. Co.*, 18 NY3d 765 [2012]).

A cause of action for promissory estoppel is subject to a six-year limitations period (*see Enzinna v. D'Youville College*, 34 Misc 3d 1223(A) [Sup. Ct., Erie Cty, 2010], affd 84 AD3d 1744 [4th Dept. 2011]; *Superior Tech. Resources, Inc. v. Lawson Software, Inc.*, 17 Misc.3d 1137(A) [Sup. Ct., Erie Cty, 2007]).

A cause of action for negligent infliction of emotional distress is governed by a three-year statute of limitation (*see* CPLR §214; *Goldstein v. Massachusetts Mut. Life Ins. Co.*, 32 AD3d 821 [2nd Dept. 2006]; *Yong Wen Mo v. Gee Ming Chan*, 17 AD3d 356 [2nd Dept. 2005]). A claim for intentional infliction of emotional distress is governed by the one-year statute of limitations for intentional conduct (*see* CPLR §215; *Wilson v. Erra*, 94 AD3d 756 [2nd Dept. 2012]; *Goldstein, supra*; *Yong Wen Mo, supra*). These causes of action accrue when all of the elements can be alleged, that is, when damages are sustained (*see Yong Wen Mo, supra*).

Analysis

The Hafftkas move for judgment dismissing as untimely six causes of action, namely the claims for declaratory relief based upon breach of fiduciary duty, unconscionability, incapacity and duress/undue influence, promissory estoppel, and negligent infliction of emotional distress. In addition, the Hafftkas seek judgment, dismissing so much of the causes of action for breach of contract, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty, as are untimely. They also seek dismissal of the claim for purchase money resulting trust for failure to state a cause of action.

Ms. Franklin rejects all charges of stale claims on the grounds that the limitations periods for the claims alleged on Mr. Franklin's behalf have been tolled, because of Mr. Franklin's severe mental illness pursuant to CPLR §208. The "insanity" toll available in CPLR §208 applies only to "those individuals who are unable to protect their legal rights because of an over-all inability to function in society" (*see McCarthy v. Volkswagen of Am.*, 55 NY2d 543, 548 [1982]). CPLR §208 is to be narrowly construed to reflect the legislative judgment that individuals should be protected from stale claims (*Id*). The application of the

McCarthy rule is a pragmatic one which involves consideration of all surrounding facts and circumstances relevant to the claimant's ability to safeguard his or her legal rights" (*see Matter of Cerami v. City of Rochester School Dist.*, 82 NY2d 809 [1993]).

Review of the complaint and the documentation submitted by plaintiff reveals that this is not a proper case for application of the insanity toll. Where the disability of insanity is available, the toll does not extend the limitations period "beyond ten years after the cause of action accrues" (*see Santo B. v. Roman Catholic Archdiocese of N.Y.*, 51 AD3d 956 [2nd Dept. 2008]). Most of Ms. Franklin's complaints arise out of the Agreement which was executed on April 23, 1999. If each limitations period was tolled for the maximum 10-year period until 2009, the claims would nevertheless be time-barred because this action was not commenced until 2013.

More specifically, Mr. Franklin's symptoms do not rise to the level of rendering him unable to protect his legal rights because of an over-all inability to function in society. Severe depression with suicidal ideation and the ingestion of methadone for opiate dependency did not suffice to make the insanity toll available in *Thompson v. Metropolitan Transp. Auth.* (*see*112 AD3d 912 [2nd Dept. 2013]; *see also Eisenbach v. Metropolitan Transp. Auth.*, 62 NY2d 973 [1984] [toll denied for hospital patient with extensive injuries, who was treated with strong pain-killing drugs, and "was generally confused, disoriented, and unable to effectively attend to his affairs"]). In general, severe depression is not equivalent to lack of contractual capacity by reason of mental illness (*see Blatt v. Manhattan Med. Group.*, 131 AD2d 48 [1st Dept. 1987]).

Most importantly, Mr. Franklin's ability to hire an attorney to draft the Agreement supports the Hafftkas' claim that Mr. Franklin was not mentally incapacitated at the time the Agreement was executed (*see Thompson, supra; Matter of Todd v New York City Hous. Auth.*, 262 AD2d 202 [1st Dept. 1999]; *see generally Matter of Cerami, supra* at 813), and he was not unable to protect his legal rights.

The Court has carefully considered Ms. Franklin's statement that she thought her

brother's decision to move in with the Hafftkas was "a good solution that would allow George to live a relatively normal life in a warm and loving home" (*see* Ms. Franklin affidavit, par. 3), as well as Dr. Klagsbrun's testimony that he "encouraged" Mr. Franklin's decision to move in with the Hafftkas (*see* Klagsbrun affidavit, par. 5). These admissions belie Dr. Klagsbrun's conclusion that "at all times since his joint purchase with the Hafftkas of the building in Brooklyn Mr. Franklin has not been competent to participate meaningfully in any litigation or negotiation with the Hafftkas" (*see* Klagsbrun, affidavit, par. 9).

On this record plaintiff has failed to raise a triable issue of fact regarding the availability of the insanity toll. Accordingly, the following causes of action in the complaint are dismissed as time-barred:

(i) the first cause of action for declaratory relief that Section 12 of the Agreement is void and unenforceable based on breach of fiduciary duty;

(ii) the third, fourth, and fifth causes of action for declaratory relief that Section 12 of the Agreement is void and unenforceable based on unconscionability, lack of mental capacity, and duress and undue influence, respectively;

(iii) the ninth cause of action for promissory estoppel, which accrued in 2003, based upon Mr. Hafftka's alleged promise to (a) dissolve Section 12 of the Agreement and (b) expand Mr. Franklin's living quarters;

(iv) the sixteenth cause of action, purportedly for negligent infliction of emotional distress, although based on intentional conduct described as defendants' "constant demands for more money" (complaint, par. 142) which allegedly resulted in Mr. Franklin's hospitalizations in 2003, 2007, and 2010.

In addition, the Hafftkas seek dismissal of so much of the sixth (breach of the Agreement), seventh (breach of fiduciary duty), and eighth (aiding and abetting breach of fiduciary duty) causes of action as are untimely. This Court agrees.

So much of the sixth cause of action that is based upon conduct occurring prior to

May 20, 2007, six years before this action was commenced, must be dismissed as untimely.

In both the seventh cause of action for breach of fiduciary duty and the eighth cause of action for aiding and abetting a breach of fiduciary duty, plaintiff seeks money damages. Consequently, so much of the seventh and eighth causes of action, that is based upon conduct by the Hafftkas that took place prior to May 20, 2010, three years before this action was commenced, must be dismissed as untimely.

Failure to State a Cause of Action

The Hafftkas seek dismissal of the eleventh cause of action for a purchase money resulting trust for failure to state a cause of action. A purchase money resulting trust is imposed to protect a payor when property purchased is placed in the name of another without the knowledge or consent of the payor, or where a transferee of property purchases the property with money belonging to another, in violation of some trust (*see Mendel v Hewitt*, 161 AD2d 849 [3rd Dept. 1990]; EPTL 7-1.3). The essence of the resulting trust is the purchase. Because there is no dispute that Mr. Franklin knew of, and participated in, the purchase of the apartment building in Brooklyn as evidenced by the Agreement, plaintiff has no claim for a purchase money resulting trust.

The substance of the eleventh cause of action is that after the purchase of the apartment building, the Hafftkas increased their percentage ownership of the property by pressuring George to give them money so they could be seen to make a financial contribution to the property. Such allegations may be relevant to other causes of action, but they do not state a claim for a purchase money resulting trust.

Plaintiff's Cross-Motion for Leave to Amend

The decision to grant or deny leave to amend is committed to the court's discretion, and mere lateness is not a barrier (*see Edenwald Contr. Co. v. City of New York*, 60 NY2d 957 [1983]). Leave to amend a complaint shall be freely given unless the proposed amendment would cause prejudice to the opposing party (CPLR §3025[b]; *Benyo v. Sikorjak*, 50 AD3d 1074 [2nd Dept. 2008]; *39 Coll. Point Corp v. Transpac Capital Corp.*, 27 AD3d

454 [2nd Dept. 2006]). No evidentiary showing of merit is required for leave to amend a pleading under CPLR §3025[b]; the Court need only determine whether the proposed amendment is palpably insufficient to state a cause of action or is patently devoid of merit (*Lucido v. Mancuso*, 49 AD3d 220, 229 [2nd Dept. 2008]; *see Dickinson v. Igoni*, 76 AD3d 943 [2nd Dept. 2010]; *DeMato v. Mallin*, 68 AD3d 711 [2nd Dept. 2009]).

However, the Court is not required to permit futile amendments (*see Meimeteas v. Carter Ledyard & Milburn LLP.*, 105 AD3d 643 [1st Dept. 2013]; *Sanders v. Grenadier Realty, Inc.*, 102 AD3d 460 [1st Dept. 2013]; *Castillo v. Starrett City*, 4 AD3d 320 [2nd Dept. 2004]; *Saferstein v. Mideast Sys.*, 143 AD2d 82 [2nd Dept. 1988]).

Ms. Franklin asks for leave to amend the complaint to add allegations to the fifth, sixth, and seventh causes of action. The fifth cause of action, for a declaration that Section 12 is void on the grounds of the Hafftkas' undue influence over Mr. Franklin, has already been dismissed as time-barred. Nothing in plaintiff's papers or the proposed first amended complaint cures the fatal untimeliness of this cause of action. Consequently, amendment of the fifth cause of action is denied as futile.

Ms. Franklin additionally requests leave to amend the sixth and seventh causes of action for breach of the Agreement and breach of fiduciary duty, respectively, to add allegations supporting equitable estoppel. Equitable estoppel is an extraordinary remedy that may be invoked to bar the affirmative defense of the statute of limitations only where it is the defendant's affirmative wrongdoing which produced the long delay between the accrual of the cause of action and commencement of the legal proceeding (*see Zumpano v. Quinn*, 6 NY3d 666 [2006], *citing General Stencils v. Chiappa*, 18 NY2d 125, 128 [1966]; *Bevinetto v. Steven Plotnick, MD PC*, 51 AD3d 612 [2nd Dept. 2008]). Equitable estoppel does not apply where the wrongdoing or act of concealment underlying the estoppel claim is the same conduct which forms the basis of the plaintiff's underlying substantive claim (*see Knobel v. Shaw*, 90 AD3d 493 [1st Dept. 2011]). The affirmative wrongdoing must be separate and apart from the underlying claim (*see Bobash, Inc. v. Festinger*, 57 AD3d 464 [2nd Dept.

2008], *citing Zumpano* at 674-675).

Ms. Franklin seeks to add allegations to the sixth and seventh causes of action that the Hafftkas have been submitting spreadsheets with false information regarding the expenses of the property since 1999, in order to conceal their alleged violations of the Agreement and their alleged breaches of fiduciary duty. According to the proposed amended complaint, the Hafftkas' misconduct "was not, and could not have been, discovered until 2012," when they finally allowed Mr. Franklin's accountants and attorneys to investigate banking records and expense receipts for the property (proposed amended complaint, par. 88 and 95).

In the sixth cause of action, Ms. Franklin has already claimed that the monthly spreadsheets prepared by defendants were "unsupported or fabricated or both," and that this was a breach of Section 2 of the Agreement (complaint, par. 71). In the seventh cause of action, Ms. Franklin has already identified the Hafftkas' "failing to pay for their share of the Property expenses under the Agreement" and "fabricating 'records' to indicate that they had complied with their obligations" as a breach of their fiduciary duty to Mr. Franklin (complaint, par. 91 [c]). In short, the conduct which forms the basis of plaintiff's estoppel argument is the same conduct underlying the substantive claims for breach of the Agreement and breach of fiduciary duty.

Accordingly, the request for leave to amend the sixth and seventh causes of action must be **DENIED**.

Finally, "under the general rule, attorneys' fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, or by statute or court rule" (*see Mount Vernon City School Dist. v. Nova Cas. Co.*, 19 NY3d 28 [2012], quoting *Matter of A.G. Ship Maintenance Corp. v. Lezak*, 69 NY2d 1 [1986]). The Hafftkas allege no agreement, statute or court rule authorizing an award of attorneys' fees and costs. For this reason, their request for an award of attorneys' fees and costs must be **DENIED**.

Any other relief requested not specifically addressed herein is **DENIED**.

This constitutes the Decision and Order of this Court.

Dated: May 15, 2014
Mineola, New York

ENTER:

HON. MARGARET C. REILLY, J.S.C.