SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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

----------X	**TRIAL/IAS PART 15**
MICHAEL P. DIRAIMONDO, WILLIAM CHILDS, ROBERT PETERS and CHARLENE VAUGHAN, individually and derivatively on behalf of AMERICAN VIRGIN ENTERPRISES, LTD.,	**INDEX # 9378/12**
	Motion Seq. 6 - 6.16.14
	Motion Seq. 7 - 8.25.14
	Motion Seq. 8 - 9.2.14
Plaintiff(s),	**Submit Date 10.28.14**

-against-

RORY CALHOUN, THEODORE E. STAIR, AMERICAN VIRGIN ENTERPRISES, LTD., SIRIUS DEVELOPMENT, LLC and T-REX ST. JOHN LLC.,

Defendant(s).

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The following papers were read on this motion:	Papers Numbered		
	MS 6	MS7	MS 8
Notice of Motion & Memoranda of Law	1	4	8
Answering Affidavit	2	5	9
Reply Affidavit & Supplemental Affidavits	3	6,7	10

Upon the foregoing papers, it is hereby ordered that the application interposed by defendants, Rory Calhoun, American Virgin Enterprises, Ltd., and Sirius Development, LLC (the moving defendants), which seeks orders of preclusion against plaintiff, Michael DiRaimondo, and defendant, Theodore Stair,[1] as well as an order striking the note of issue and certificate of Readiness, is hereby DENIED (Sequence #006); and it is further ordered that the application

[1] By short form order dated, April 22, 2013, this court dismissed those causes of action denominated second through seventh and tenth through thirteenth as asserted by plaintiffs, Michael DiRaimondo and William Childs (*see* Calhoun affidavit in support at Exh. F). Additionally, by short form order dated, July 23, 2013, this court found defendant, Theodore Stair, to be in default (*see* Legum affirmation in opposition dated, June 6, 2014, at Exh. A).

interposed by the moving defendants for renewal of the previously interposed application which sought summary judgment dismissing the claims asserted by plaintiffs, Robert Peters and Charlene Vaughan, as being time barred, as well as for an order dismissing those causes of action denominated second through seventh and tenth through thirteenth as being devoid of merit and due to the plaintiffs' failure to provide expert witness disclosure, is hereby **DENIED** (Sequence #007); and it is further ordered that the application interposed by plaintiffs, Robert Peters and Charlene Vaughan, individually and on behalf of American Virgin Enterprises, Ltd., for an order granting summary judgment as to the first, second, third, twelfth and thirteenth causes of action, is hereby **DENIED** (Sequence #008).

In 1987, the plaintiffs, together with defendants, Rory Calhoun and Theodore Stair, formed an entity known as American Virgin Enterprises, Ltd. (AVE 1987) with the intention of developing a piece of property upon which a marina and related facilities would be situated (the marina project) (*see* plaintiffs' memorandum of law at p.2). In addition to being secretary of AVE 1987, DiRaimondo purportedly served as corporate counsel between approximately 1987 through some point in 2001, after which Calhoun appeared as counsel for AVE 1987 (*see* Legum affirmation in support at Exh. D at ¶¶ 8,10,11,15,17,18,22).

In or about 1989, AVE 1987 entered into an agreement with the Virgin Islands Port Authority (VIPA) to lease the property known as 7-10 and 10-E, Estate Emmaus, Coral Bay, St. John, Virgin Islands (the subject property) (*see* verified complaint at ¶13). Several years later, in or about March of 1993, AVE 1987 was dissolved by proclamation of the New York Department of State for failure to pay franchise taxes (*id.* at ¶17). Thereafter, on or about November 24, 2001 defendants, Calhoun and Stair, together with John Hanrahan, a non-party, incorporated a second entity again utilizing the name American Virgin Enterprises (AVE 2001) (*see* Legum affirmation in support at Exh. D at ¶¶19,20,21).

In the interim, on August 11, 1994, the Moravian Church, Virgin Islands Conference Center (the Church) commenced an action in the U.S. Virgin Islands to quiet title wherein it specifically claimed to be the owner of the subject property (the Virgin Islands litigation) (*id.* at ¶¶12,13,14). In that litigation, AVE 1987 was a named defendant and in said capacity asserted a counterclaim against the Church, as well as a cross-claim against VIPA (*id.* at ¶¶25,27). In June of 2006, the Church and AVE 1987 agreed to mutually withdraw any claims each had asserted against the other, and in September 2006, the cross-claim asserted by AVE 1987 against VIPA was settled for the amount of $412,000 (the settlement) (*id.* at ¶¶27,28,30).

During the pendency of the Virgin Islands litigation, in or around early 2004, the court sitting in the Virgin Islands had determined the Church to be the rightful owner of the subject property, at which point the Church purportedly advised Calhoun that it had been in search of entities interested in developing the 10 acres of land adjacent to the subject property into a "Condominium Resort" (*id.* at ¶¶36,38). After two years of discussions, Calhoun and his associates registered a Virgin Islands limited liability company known as Sirius Development, LLC (Sirius), a named defendant herein, which entity ultimately executed a lease agreement with

the Church in January of 2006 (2006 lease agreement) (*see* plaintiffs' memorandum of law at p.3,4; *see also* verified complaint at ¶¶41,47). Sirius thereafter assigned this lease to defendant, T-Rex St. John, LLC (T-Rex) (*see* verified complaint at ¶49).

In a separate but relevant matter, defendant Stair commenced an action in the federal district court both individually, as well as derivatively on behalf of AVE 2001 and Sirius, against Calhoun and other members of Sirius and T-Rex, in connection to the condominium project (*see* Legum affirmation in support at Ex. D at ¶45).

The plaintiffs allege that the formation of AVE 2001, as well as the settlement in the Virgin Islands litigation were done to deliberately and fraudulently divert from AVE 1987 certain business opportunities, including the 2006 lease agreement (*see* verified complaint at ¶¶28-30). The plaintiffs further allege that they were deliberately and fraudulently informed by the defendants that any opportunity to develop the subject property could not be resurrected and were thereby deprived of their rights to take part in the 2006 lease agreement (*id.* at ¶¶51-161).

In or about January 2013, the moving defendants cross moved for an order dismissing those causes of action denominated second through seventh and tenth through thirteenth as being time barred. On April 22, 2013, this court granted the defendants' application and dismissed those claims asserted by plaintiffs, Michael P. DiRaimondo and William Childs, and denied the application as to plaintiffs, Robert Peters and Charlene Vaughan (*see* Calhoun affidavit in support dated, August 7, 2014, at Exh. F). In so deciding, this court found that as to Peters and Vaughan, the defendants had "failed to establish what knowledge was possessed by said plaintiffs and at what point they acquired same" regarding the fraud allegedly perpetrated by the defendants (*id.* at p. 9).

The plaintiffs and defendants now respectively move for the various forms of relief recited above.

Motion Sequence #006

The court initially addresses the defendants' application seeking orders of preclusion against DiRaimondo and Stair and striking the note of issue and certificate of readiness. In support thereof, counsel asserts that during his depositions taken on March 28 and April 30, 2014, DiRaimondo failed to produce certain previously demanded documents thereby warranting an order of preclusion (*see* Gross affirmation in support at ¶¶9,10,27; Exhs. C,D). As to Stair, counsel asserts that "Mr. Legum [plaintiffs' counsel] has failed to provide any documents or information stating to his discussion with defendant Stair, prior to the commencement of this action" (*id.* at ¶19). Counsel adds that "[s]ince it appears that there is, at best, curious interaction between plaintiff, defendant Stair and Mr. Legum, it is essential that we receive this information as it bears on the lack of bona fides of plaintiffs['] claim" (*id.* at ¶20). Counsel stresses that as

Stair has "totally refused to participate in discovery" an order of preclusion is appropriate (*id.* at ¶¶21, 27, 28; Exhs. M,N). Finally, counsel asserts that as there is clearly outstanding discovery, the note of issue and certificate of readiness must be stricken (*id.* at ¶¶24-26).

In opposing the application, plaintiffs' counsel contends DiRaimondo answered all questions posed during the course of his depositions and that all documents properly requested have been produced (*see* Legum affirmation in opposition at ¶3). Counsel further states that he "*never* consulted with Mr. Stair, . . . *never* discussed representation of Mr. Stair, and . . . *never* even spoke to Mr. Stair prior to the commencement of this action" (*id.* at ¶2).

"Pursuant to CPLR 3126, a court may impose discovery sanctions, including the preclusion of evidence, where a party refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed." (*Mikhailov v Katan*, 116 AD3d 744,745 [2d Dept 2014][internal quotation marks omitted]). "The nature and degree of a penalty to be imposed under CPLR 3126 for discovery violations is addressed to the court's discretion" (*Zakhidov v Boulevard Tenants Corp.*, 96 AD3d 737,738 [2d Dept 2012]), and "[p]reclusion may 'be appropriate where the offending party's lack of cooperation with disclosure was willful, deliberate, and contumacious' " (*Mikhailov* at 745 *quoting Arpino v F.J.F. & Sons Elec. Co., Inc.,* 102 AD3d 201, 210 [2d Dept 2012][internal quotation marks omitted]).

In the instant matter, counsel for the defendants annexes a page from DiRaimondo's April 30, 2014 deposition whereon Mr. Gross is quoted as saying he was "going to have to discontinue for the moment my examination until Mr. DiRaimondo produces the voluminous documents about which he's been speaking"[2] While the existence of these documents was apparently revealed during the deposition held on April 30, 2014, no post-deposition notice for discovery and inspection was served. Accordingly, there is no basis to find that any failure on the part of DiRaimondo to disclose these documents was wilful or contumacious (*Mikhailov,* 116 AD3d 744).

However, the court notes that even if it were to find a discovery sanction was warranted, other than generically requesting "preclusion" against DiRaimondo and Stair, defendants' counsel does not articulate which of the panoply of sanctions set forth in CPLR §3126 he is demanding. Relatedly, as this court has previously dismissed all of DiRaimondo's claims asserted against the moving defendants, with the exception of that for an accounting, it is unclear precisely what counsel seeks to preclude DiRaimondo from producing.[3] As to Stair, said defendant has already been held to be in default, and as such it remains equally ambiguous what defendants' counsel seeks to prevent Stair from proffering. Finally, the court finds counsel's remaining contentions argued in support of the instant application, to be without merit.

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[2] *see* Gross affirmation in support at ¶14 ; Exh. H.

[3] *id.* at ¶5; Exh. A

Motion Sequence #007

The court now addresses the defendants' application which seeks, among other things, an order granting renewal. The defendants' application is opposed in its entirety by counsel for the plaintiffs (*see* Legum affirmation dated, August 19, 2014, at ¶¶2-9).

In moving for renewal, counsel asserts that during the deposition of plaintiff Peters taken on October 21, 2013, it was irrefutably established that DiRaimondo was Peters' agent, and as a result Peters is charged with the knowledge possessed by DiRaimondo (*see* Gross affirmation in support at ¶¶18-23). More specifically, counsel contends that in its prior decision this court held that DiRaimondo was cognizant of the alleged fraud in 2006, and given the agency between DiRaimondo and Peters, the latter was possessed of the same knowledge, and therefore the causes of action asserted thereby are time barred and must be dismissed (*id.*). As to plaintiff, Charlene Vaughan, counsel asserts that during the course of her deposition she clearly testified she had traveled to the Virgin Islands but never inquired as to the status of the marina project, and accordingly such testimony clearly establishes she failed to exercise due diligence in uncovering the fraud claims in general and those premised upon the RICO statute in particular (*id.* at ¶¶26-28).

"A motion for leave to renew must (1) be based upon new facts not offered on a prior motion that would change the prior determination, and (2) set forth a reasonable justification for the failure to present such facts on the prior motion [citations omitted]" (*Ellner v Schwed*, 48 AD3d 739,740 [2d Dept 2008]; *Bardes v Pintado*, 115 AD3d 894,895 [2d Dept 2014]).

Of particular relevance to Peters, " '[a]gency is a legal relationship between a principal and an agent. It is a fiduciary relationship which results from the manifestation of consent of one person to allow another to act on his or her behalf . . . . The agent is a party who acts on behalf of the principal with the latter's express, implied, or apparent authority' " (*Faith Assembly v Titledge of N.Y. Abstract, LLC,* 106 AD3d 47,58 [2d Dept 2013] quoting *Maurillo v Park Slope U–Haul,* 194 AD2d 142,146 [2d Dept 1993]). As a general proposition, "knowledge acquired by an agent acting within the scope of his agency is imputed to his principal and the latter is bound by such knowledge although the information is never actually communicated to it" (*Center v Hampton Affiliates,* 66 NY2d 782, 784 [1985]).

In arguing an agency relationship existed between DiRaimondo and Peters, counsel posits the latter testified it was DiRaimondo who personally told him about the settlement, provided him with the release executed in connection therewith, and forwarded the settlement funds when same were issued. Here, the court has reviewed the deposition testimony upon which defendants' counsel relies, and while Peters did testify to the foregoing, this court finds that such actions do not constitute a sufficient basis to establish a legally cognizable agency (*Faith Assembly v Titledge of N.Y. Abstract, LLC*, *supra*).

As to plaintiff Vaughan, the record contains two sworn affidavits wherein Ms. Vaughan avers she was unaware of the series of events alleged in the complaint until March 2012 and such averments are not contradicted by the testimony upon which defendants' counsel relies. Thus, Ms. Vaughan's deposition does not alter this court's prior determination (*Ellner,* 48 AD3d 739).

The court now addresses those branches of the defendants' application seeking dismissal of those causes of action denominated second through seventh and tenth through thirteenth. While these portions of the application are not cast as motions for re-argument, in support thereof, counsel reasserts many of those arguments previously posited and considered by this court in its decision dated, April, 22, 2013, to wit: the two year discovery rule is inapplicable to the fraud claims; the claims predicated upon the RICO statute are time barred, and the thirteenth cause of action is untimely (*see* defendants' memorandum of law at pp. 6-31). However, as there is no properly interposed motion for reargument currently pending, this court will not reconsider these arguments (CPLR §2221[d]). Additionally, counsel posits that as AVE 1987 was dissolved in 1994 it did not have a tangible expectancy in the 2006 lease agreement, and as such the plaintiffs' claims should be dismissed (*see* defendants' memorandum of law at pp. 32-36). However, this court will not entertain what is in effect a successive motion for summary judgment premised upon grounds which could have been raised on the defendants' prior motion for summary judgment noticed in January of 2013 (*Manning v Turtel*, 135 AD2d 511 [2d Dept 1987]).

Finally, the court addresses that branch of the defendants' application seeking "summary judgment" due to the plaintiffs' failure to provide expert disclosure as required by CPLR §3101(d), which provides, in part, that "[u]pon request, each party shall identify each person whom the party expects to call as an expert witness at trial . . . ." However, the statute "does not require a party to respond to a demand for expert witness information 'at any specific time nor does it mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute', unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party" (*Aversa v Taubes*, 194 AD2d 580, 582 [2d Dept 1993] quoting *Lillis v. D'Souza*, 174 AD2d 976, 976 [4th Dept 1991]; *Rivers v. Birnbaum*, 102 AD3d 26, 35 [2d Dept 2012]). "Thus, 'the fact that the disclosure of an expert pursuant to CPLR 3101(d)(1)(i) takes place after the filing of the note of issue and certificate of readiness does not, by itself, render the disclosure untimely' " (*Begley v City of New York*, 111 AD3d 5, 36 [2d Dept 2013] quoting *Rivers* at 41). Guided by the foregoing controlling appellate authority, that branch of the defendants' application which is characterized as one for "summary judgment" but is in essence one seeking to preclude the plaintiffs from offering expert testimony at trial for failing to disclose the identity of the expert, is hereby **denied** (*id.*).

Finally, the court now addresses the application interposed by plaintiffs, Robert Peters and Charlene Vaughan, for an order granting summary judgment against defendant, Rory Calhoun, as to the first, second, third and thirteenth causes of action, and an order granting summary judgment as to the twelfth cause of action asserted against all the named defendants.

In support of the application, counsel asserts that Calhoun usurped and misappropriated a business opportunity rightfully belonging to AVE 1987, and in which the plaintiffs had both an interest and tangible expectancy, and accordingly summary judgment should be awarded to the plaintiffs on the second and twelfth causes of action respectively, predicated upon breach of fiduciary duty and for the imposition of a constructive trust (*see* plaintiffs' memorandum of law at pp. 5-9). More specifically, counsel asserts that Calhoun, who was an officer of AVE 1987, learned of the possibility of the 2006 lease agreement while acting as counsel for AVE 1987 within the context of the Virgin Islands litigation and as such owed the plaintiffs a fiduciary duty to fully disclose the existence of that opportunity (*id.*). Counsel further contends that as Calhoun actively concealed the 2006 lease agreement, the existence of which he was duty bound to disclose to the plaintiffs as shareholders of AVE 1987, summary judgment should be granted on the third cause of action sounding in fraud and the thirteenth cause of action, which specifically seeks treble damages against Calhoun (*id.* at pp. 10-16).

Counsel provides the affidavit of plaintiff, Robert Peters, who states that in or about 1994 he learned of the Virgin Islands litigation and that AVE 1987 had been dissolved (*see* Peters' affidavit at ¶3). He states he was informed by Calhoun in 2004 that the Church had been adjudicated the rightful owner of the subject property upon which the marina project was to be situated and that "the project was abandoned and any settlement arising out of [AVE 1987's] cross-claim against VIPA was [AVE 1987's] only opportunity to reimburse its investors" (*id.* at ¶4). Mr. Peters maintains "at no time . . . did Mr. Calhoun advise your deponent that he had formed another corporation" or "that the Church had sought to develop a marina project on the land which it owned" (*id.* at ¶5). Mr. Peters adds that "[i]t was not until May 2012 that your deponent learned, from Michael DiRaimondo, that an entity formed by Rory Calhoun had executed a lease from the Church to develop a marina project" (*id.* at ¶5).

Counsel additionally proffers the affidavit of plaintiff, Charlene Vaughan, who states, among other things, that "[i]n or about 1987, your deponent was offered the opportunity to become a shareholder in . . . [AVE 1987]" but that "[a]fter such time, your deponent had little to no contact with her fellow shareholders and was not kept apprised as to the status of the project"

(*see* Vaughan affidavit at ¶2). Ms. Vaughan maintains she "had all but forgotten about [AVE 1987] and the marina project until March, 2012" when she was alerted to the existence of the federal action commenced by Stair (*id.* at ¶4).

In opposition, counsel for the defendants reiterates many, if not all, of those arguments posited in support of the defendants' within application seeking dismissal of those causes of action denominated second through seventh and tenth through thirteenth (*see* defendants' memorandum of law in opposition at pp. 1-23). Counsel additionally contends that as AVE 1987 was dissolved in 1994, it did not have a tangible expectancy in the 2006 lease agreement ultimately resulting in the condominium resort, the scope of which was different from and more expensive that the marina project originally intended by AVE 1987 (*id.* at pp. 26-30).

As noted above, the plaintiffs allege that Calhoun engaged in a series of fraudulent actions to deliberately deprive AVE 1987 of a business opportunity in which it had an interest and tangible expectancy. In a case cited to and relied upon by all parties herein, the Appellate Division, First Department, noted that "[a]n interest or tangible expectancy has been explained as something much less tenable than ownership but, on the other hand, more certain than a desire or hope" (*Alexander & Alexander of N.Y. v Fritzen*, 147 AD2d 241, 247 [1st Dept 1989] [internal quotation marks omitted]; *Blaustein v Pan Am. Petroleum & Transp. Co.*, 293 NY 281,300 [1944]). In the matter *sub judice*, this court finds that the plaintiffs have failed to establish AVE 1987 possessed something beyond "a desire or hope" *vis-a-vis* the 2006 lease agreement (*id.*) Here, in the Peters' affidavit it is conceded thereby that he was fully cognizant that AVE 1987 was dissolved in 1994, a full twelve years prior to the execution of the 2006 lease agreement in which AVE 1987 purportedly possessed a tangible interest. Moreover, Ms. Vaughan readily admits she "had all but forgotten about AVE 1987" and it was not until 2012, 25 years after AVE 1987's formation, that she first learned of the existence of the 2006 lease agreement. In this court's view, neither of the foregoing affidavits constitutes a sufficient basis upon which to find the plaintiffs had a tangible expectancy in the 2006 lease agreement and the condominium project which followed (*id.*).

Based upon the foregoing, it is hereby

ORDERED, that the applications interposed by defendants, Rory Calhoun, American Virgin Enterprises, Ltd., and Sirius Development, LLC, are hereby **DENIED** (Sequences #006, #007); and it is further

ORDERED, that the application interposed by the plaintiffs, Robert Peters and Charlene Vaughan, is hereby **DENIED** in its entirety (Sequence #008).

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

Dated: Mineola, New York
January 7, 2015

ENTER:

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