Baier v Baier
2019 NY Slip Op 32939(U)
October 4, 2019
Supreme Court, New York County
Docket Number: 655957/2016
Judge: Paul A. Goetz

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ **PART** IAS MOTION 47EFM

Justice

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DANNY CZARNINSKI BAIER,

Plaintiff,

- v -

JOHNY CZARNINSKI BAIER, VIVIAN CZARNINSKI BAIER DE ADLER

Defendant.

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INDEX NO. 655957/2016

MOTION DATE 10/25/2018

MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178

were read on this motion to/for DISMISS.

Plaintiff Danny David Czarninski Baier (Danny) brings this action against his siblings Johny Jacobo Czarninski Baier (Johny) and Vivian Czarninski Baier de Adler (Vivian). Danny alleges that his siblings engaged in a scheme to deprive him of his one-third share of their jointly owned assets, which is property inherited from their parents and other property owned jointly by the siblings that was not inherited.

Johny moves to dismiss Danny's second amended complaint (SAC) based upon documentary evidence, lack of subject matter jurisdiction, another action pending, failure to state a cause of action, lack of jurisdiction over Johny (respectively, CPLR 3211 [a] [1], [a] [2], [a] [4], [a] [7], and [a] [8], *res judicata*, and statute of limitations (CPLR 3211 [a] [5]). Alternatively, Johny moves for an order pursuant to CPLR 2201, staying the instant action. Danny cross-moves to take jurisdictional discovery from Johny.

The factual allegations are taken from the Second Amended Complaint. The parties are citizens of Ecuador and Germany. Danny and Johnny reside in Ecuador and Vivian resides in Israel. Their parents, Alfredo and Ruth, were domiciled in Ecuador and died there intestate in August 2003 and January 2013, respectively. Alfredo founded one of the largest commercial groups in Ecuador, El Rosado Group (El Rosado). El Rosado owns approximately 76 businesses, such as hardware stores, toy stores, movie theaters, shopping centers, and employs over 7,000 people. In 1997, Johny became the president of El Rosado and, in 1999, Danny became the executive vice- president.

While most of the parents' lives were spent in Ecuador, for a while in the 1970s they lived in Israel. The deaths of Alfredo and Ruth led to court proceedings in Israel and Ecuador. Courts in both nations "entered final and non-appealable judgments declaring that the siblings are the sole heirs of their deceased Parents and consequently, as a matter of law, each sibling owns an undivided one-third interest in their assets and holdings worldwide" (SAC, ¶ 2).

The siblings' jointly held interests consists of their shares in El Rosado, inherited and directly owned, and in bank accounts and safe deposit boxes in New York and elsewhere. There are more than $50 million in these accounts, which Alfredo and Ruth opened in banks around the world. The bank accounts were opened under one or both parents' names and, in some instances, one or more of the children were joined to those accounts. The siblings' ownership of El Rosado is mainly through direct non-inherited ownership. The Ecuadorean court determined that most of the El Rosado stock was not included in the parents' estates and thus was not inherited by the children.

The SAC alleges that Johny engaged in a five-part fraudulent scheme to take his siblings' interests in El Rosado. "Through a scheme of complex corporate transactions, Johny not only eliminated Danny's inherited interest in El Rosado, but also eliminated the value of El Rosado stock that Alfredo and Ruth provided to Danny during their lives" (SAC ¶ 8). Allegedly, Johny a) converted El Rosado Ltd. (the primary operating company of El Rosado) to a corporation; b) consolidated El Rosado Group through a series of mergers; c) increased capital to dilute the other shareholders; d) transferred a substantial majority of El Rosado shares to shell companies in the British Virgin Islands (BVI) for no consideration; and (e) re-domiciled the BVI companies to Delaware, where Delaware limited liability companies now hold the El Rosado shares.

Claims similar or identical to the ones in this case have been addressed before, in separate actions in Delaware, one commenced by Danny and the other by Vivian (*Baier v Upper New York Inv. Co. LLC,* 2018 WL 1791996, 2018 Del Ch LEXIS 122 [Del Ch April 16, 2018]; *de Adler v Upper New York Inv. Co. LLC*, 2013 WL 5874645, 2013 Del Ch LEXIS 267 [Del Ch Oct. 31, 2013]). Danny's and Vivian's Delaware actions alleged the same five-part scheme alleged here. In December 2016, Johny and Vivian settled her claims against Johny and she discontinued her case against both brothers. The Delaware court dismissed Danny's complaint in April 2018. Danny commenced this action in November 2016. He alleges that the settlement of Vivian's Delaware action constituted a harm to him.

The SAC states the following.

"Johny has harmed and continues to harm Danny by (i) concealing the funds in Jointly Owned bank accounts, including the New York Accounts; (ii) converting funds from New York Accounts, and, on information and belief, other Jointly

> Owned Assets; (iii) agreeing to divide and distribute Jointly Owned Assets under the [settlement with Vivian]; (iv) agreeing to distribute Alfredo's shares in [El Rosado] to Vivian without Danny's consent (which Vivian subsequently assigned back to Johny through the . . . settlement); and (iv) conspiring to divide or distribute Jointly Owned Assets with Vivian through the [settlement] without Danny's consent or consideration of his interest in the Jointly Owned Assets"

(SAC, ¶ 159).

Causes of Action in Second Amended Complaint

The first cause of action seeks an accounting of the jointly held interests. Danny alleges that Johny owes him a fiduciary duty because Johnny occupies a position of trust within the family, as oldest sibling and president of El Rosado, and that Danny trusted Johny to manage the company affairs and to look after Danny's interests.

The second cause of action seeks a declaratory judgment that the Israel Family Court succession orders holding that each child has one-third ownership in jointly held assets are valid and enforceable judgments and that Danny has an undivided one-third ownership in jointly held assets.

The third cause of action sounds in breach of fiduciary duty by Johny. It alleges that Johny breached his fiduciary duty to Danny by converting jointly held assets, including the New York bank accounts, bank accounts outside of New York, and Danny's El Rosado holdings, inherited and directly owned. Danny states that, under Israeli law, the children jointly own and administer the distribution of the assets in both parents' estates and are required to act with each other's consent. The siblings are thus fiduciaries to each other concerning the parents' estates.

In addition, Johny owes a separate fiduciary duty to Danny because Johny occupies a position of seniority within the family and the business.

The fourth cause of action sounds in fraud against Johny. Johny allegedly removed the total sum of $4.5 million from an account at the Israel Discount Bank (IDB) in New York, closed the account, and failed to disclose this to Danny. Johny never disclosed to Danny that he had stripped El Rosado of its value and that, in the settlement of Vivian's case, Johny and Vivian agreed that the bulk of their father's shares would be distributed to Vivian and that she would then give those shares to Johny. Johny's motive was to induce Danny to rely on Johny to manage El Rosado purportedly for Danny's benefit.

The fifth cause of action sounds in conversion against Johny based on the IDB account and other bank accounts from which Johny withdrew funds that belonged to Danny. In addition, Johny converted Danny's share in El Rosado.

The sixth cause of action is based on civil conspiracy to convert against Johny and Vivian. In the settlement agreement, they allegedly agreed to divide and distribute between themselves Danny's interest in the jointly held assets.

Discussion

A motion to dismiss pursuant to CPLR 3211 (a) (1) on the basis of a defense founded upon documentary evidence may be granted only where "the documentary evidence submitted conclusively establishe[s] a defense to the asserted claims as a matter of law." (*Spoleta Const., LLC v. Aspen Ins. UK Ltd.*, 27 N.Y.3d 933, 936 [2016] [internal citations and quotations omitted]). When considering a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, "a court must give the complaint a liberal construction, accept the

allegations as true and provide plaintiffs with the benefit of every favorable inference." (*Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 582 [2017] [internal citations and quotations omitted]).

Jurisdiction over Johny

Johny correctly argues that this court does not have jurisdiction to adjudicate the ownership of El Rosado, whether inherited or directly owned. Johny does not contest that this court has jurisdiction over him regarding claims involving the New York assets.

Under CPLR 301, a party who is not domiciled in New York but who is doing business in New York or is otherwise at home here is subject to general jurisdiction and may be sued here on causes of action wholly unrelated to acts done in New York (*Overseas Media, Inc. v Skvortsov*, 407 F Supp 2d 563, 567-568 [SD NY 2005], *affd* 277 Fed Appx 92 [2d Cir 2008]; *Lebron v Encarnacion*, 253 F Supp 3d 513, 520 [ED NY 2017]; *ABKCO Indus., Inc. v Lennon,* 52 AD2d 435, 439-440 [1st Dept 1976]). A person's affiliations with the state may be "so continuous and systematic as to render [the person] essentially at home in" New York (*Daimler AG v Bauman,* 571 US 117, 138 [2014]; *AlbaniaBEG Ambient Sh.p.k v Enel S.p.A.,* 160 AD3d 93, 102 [1st Dept 2018]). A party is doing business here when its activities in the state demonstrate "a fair measure of permanence and continuity" and is of a "quality and nature . . . to make it reasonable and just that it be required to defend the action here" (*Laufer v Ostrow*, 55 NY2d 305, 310 [1982] [internal citations and quotation marks omitted]; *see also RSM Prod. Corp. v Fridman,* 643 F Supp 2d 382, 400 [SD NY 2009]), *affd* 387 F Appx 72 [2d Cir 2010]).

The SAC alleges that this court has general jurisdiction over Johny because he owns bank accounts in New York and that therefore, the court can adjudicate on the ownership of El

Rosado, even if that issue has no relationship to New York. The maintenance of a bank account by itself in New York by a non-domiciliary does not subject that person to general jurisdiction in New York (*Krepps v Reiner,* 414 F Supp 2d 403, 407 [SD NY 2006]; *Fremay, Inc. v Modern Plastic Mach. Corp.,* 15 AD2d 235, 241 [1st Dept 1965]; *Donetto v S.A.R.L. De Gestion Pierre Cardin,* 3 Misc 3d 1106[A], 2004 NY Slip Op 50460[U] *2 [Sup Ct, New York County 2004]).

Johny's maintenance of bank accounts in New York does not subject him to New York's general jurisdiction. Danny does not allege anything else to show that Johny has a permanent affiliation or presence in New York, is at home here, or engages in continuous and systematic activity here.

Danny argues that this court has specific or long-arm jurisdiction over Johny and can adjudicate on matters related to El Rosado because Johny and Vivian settled her action in New York and the settlement concerned El Rosado. Under CPLR 302 (a) (1), a court may exercise long-arm jurisdiction over any non-domiciliary who transacts any business in New York, provided that the business or transaction has a substantial relationship to the claim asserted (*Wilson v Dantas,* 128 AD3d 176, 181 [1st Dept 2015]). The cause of action must arise out of the defendant's activities in New York (*McGowan v Smith,* 52 NY2d 268, 272 [1981]). The negotiation and execution of a settlement in New York qualifies as a transaction of business here as long as there is a "substantial nexus" between the settlement and the cause of action which the court is asked to decide (*Grand River v Pryor*, 425 F3d 158, 167 [2d Cir 2005]; *Ainbinder v Potter,* 282 F Supp 2d 180, 186-187 [SD NY 2003]; *Licci v Lebanese Can. Bank, SAL,* 20 NY3d 327, 334 [2012]).

Vivian and Johny came to New York to negotiate and execute the settlement of Vivian's Delaware action. Danny claims that the settlement provided that his siblings would divide El Rosado, including Danny's share, between them, and that they thus took away his holdings in the company. He argues that, since his claim to El Rosado arises out of the settlement agreement reached in New York, this court has long-arm jurisdiction over Johny. This is incorrect because Danny's claims do not arise out of the settlement. They arise out of actions that took place before the settlement. Vivian and Johny completed the settlement in New York in December 2016. Vivian commenced her Delaware action in September 2011 making the same allegations that Danny makes here, including that, in 2006-2008, Johny accomplished the five-part fraudulent scheme. Danny alleges that in 2006, Johny "purported to provide" Danny with "preferred shares" in El Rosado. Some months afterward in the same year, Danny discovered that the shares were non-voting shares that were not equivalent to Danny's interest in El Rosado (SAC, ¶ 100; February 2017 hearing in Israel Family Court, Danny's testimony, NYSCEF 146, at 5). Thus, Danny lost his El Rosado shares before the settlement was finalized. The settlement did not take El Rosado out of Danny's reach more than it was already out of his reach. For this reason, the link between the business transacted in New York and the causes of action related to El Rosado are not strong enough to create long-arm jurisdiction over Johny. There is no "substantial relationship" or "articulable nexus" between the settlement and Danny's loss of El Rosado (*McGowan,* 52 NY2d at 272).

This court lacks general jurisdiction over Johny and long-arm jurisdiction over him sufficiently related to Danny's El Rosado claims, whether based on inheritance or direct ownership. Thus, this court cannot adjudicate on matters relating to El Rosado.

Subject matter jurisdiction and preclusion regarding inherited non-New York assets

Johny correctly contends that the court lacks subject matter jurisdiction over the assets of a non-domiciliary's estate located outside New York (*see Matter of Obregon*, 230 AD2d 47 [1st Dept 1997], *affd* 91 NY2d 591 [1998]). The Surrogate's Court cannot exercise jurisdiction over the out-of-state assets of a non-domiciliary, and an ancillary probate proceeding is limited to assets in this state (4E N.Y. Prac., Com. Litig. in New York State Courts § 127:5 [Westlaw]). The New York Supreme Court, which has concurrent jurisdiction with the Surrogate's Court over matters relating to estates (which is almost never exercised), is limited in the same manner (D N.Y. Prac., Trusts and Estates Practice in New York § 3:15 [Westlaw]). Thus, this court cannot adjudicate on inherited assets in other jurisdictions.

Moreover, the Ecuadorean court has already made final determinations concerning the siblings' inherited interests. The doctrines of res judicata and collateral estoppel apply to foreign nations as well as domestic, and prevent the relitigation of issues (*Mashreqbank PSC v Ahmad Hamad Algosaibi & Bros. Co.*, 40 Misc. 3d 1214[A], 2013 NY Slip Op 51185[U], * 3[Sup Ct, NY County 2013]). Principles of comity also require that New York courts give full effect to a judgment rendered in a foreign nation (*Watts v Swiss Bank Corp.*, 33 AD2d 102, 1-3-104 [1st Dept 1969], *affd on other grounds*, 27 NY2d 270 [1970]). This court will not revisit the question of the children's inheritance of El Rosado.

However, this court can adjudicate on inherited assets in New York. The court can decide if the New York property belongs in the parents' estates and how it should be divided among the children. Unless it is shown that there is a reason under the law not to do so, this

court will adhere to the precept set down by the Ecuadorian and Israeli courts that each child takes one-third of the parents' estates.

Another action pending

Johny argues that the SAC should be dismissed, as Danny's Delaware action is pending. However, as Danny correctly argues, there is currently no action pending as the Delaware court dismissed Danny's complaint in April 2018, no appeal was filed and the time to appeal has expired. Accordingly, Johny's argument that this action should be dismissed or stayed pursuant to CPLR 3211(a)(4) based on another action pending between the same parties is without merit.

Cause of action for fraud

This case was commenced in November 2016. In New York, a cause of action based on fraud must be commenced within six years from the time of the fraud, or within two years from the time the fraud was discovered or with reasonable diligence could have been discovered, whichever is later (*DeLuca v DeLuca,* 48 AD3d 341, 341 [1st Dept 2008]).

The five-part scheme engineered by Johny concluded in 2008. Danny bases his fraud claims both on the scheme and on Johny's failure to inform Danny of the scheme. In either case, the statute of limitations for fraud lapsed in 2014, at the latest. Assuming that Danny did not know about the scheme until 2011 (when he learned about it from Vivian's Delaware complaint) and applying the discovery rule, the failure to inform claim also lapsed in 2014.

Danny alleges that when Vivian filed her case in Delaware in 2011, Johny told him that Vivian's allegations were false. Danny argues that Johny should be equitably estopped from raising the statute of limitation defenses because Johny's fraudulent misrepresentations caused Danny to delay bringing an action against Johny. Danny alleges that he "was effectively

unaware of Johny's actions" and that Johny told him he "was looking out for Danny's best interest" (SAC ¶ ¶ 85, 89). Danny alleges that Johny regularly failed to provide him with corporate notices and that Johny restricted Danny's access to El Rosado by limiting Danny's responsibility to managing the bakery business. Danny's trust in Johny was such that, for a time, in Israel and Ecuador, Danny permitted Johny's lawyer to represent both of them. The brothers had the same attorney during the negotiation of the settlement of Vivian's Delaware action. Danny maintains that the fraud claim did not accrue until December 2016, when Vivian and Johny settled Vivian's Delaware action, as Danny did not become aware of Johny's intention to defraud him until the settlement was made. At that time, Johny reversed course and explicitly told Danny that Danny would never receive his share of El Rosado.

Equitable estoppel is available where the defendant's wrongdoing produces the delay between the accrual of the cause of action and the untimely commencement of the legal proceeding (*Zumpano v Quinn*, 6 NY3d 666, 673 [2006]). A plaintiff seeking to apply the doctrine of equitable estoppel must "establish that subsequent and specific actions by defendants somehow kept [him or her] from timely bringing suit" (*id.* at 674). Where the parties deal at arm's length, the defendant will be equitably estopped from raising the statute of limitations if plaintiff was induced by fraud, misrepresentation, or deception to refrain from filing a timely action (*id.*). When a fiduciary relationship exists, concealment alone suffices to estop the fiduciary from asserting the statute of limitations as a defense (*id.* at 675; *General Stencils, Inc. v Chiappa*, 18 NY2d 125, 128 [1966]). Equitable estoppel defeats a valid limitations defense, only where the party invoking estoppel reasonably relied on the deceptive conduct that gave rise to the estoppel (*K-Bay Plaza, LLC v Kmart Corp.*, 132 AD3d 584, 589 [1st Dept 2015]). Due

diligence in ascertaining the facts and commencing the action are also essential elements of estoppel (*Pahlad v Brustman,* 33 AD3d 518, 519-520, [1st Dept 2006], *affd* 8 NY3d 901 [2007]).

Although Johny allegedly constantly reassured Danny that he was taking care of him, Johny limited Danny's access to El Rosado before 2011. This should have alerted Danny to the possibility of wrongdoing or made him realize the necessity of investigating Johny's actions more closely. Johny's subsequent representations that he would look after Danny's interests are not sufficient to make a case that Danny was induced to refrain filing a timely action. Moreover, Johny misrepresented his intention, he did not misrepresent facts. Since Danny had "timely awareness of the facts requiring [him] to make further inquiry before the statute of limitations expired," an equitable estoppel defense to the statute of limitations is therefore "inappropriate as a matter of law" (*see Putter v North Shore Univ. Hosp.,* 7 NY3d 548, 553–554 [2006]). Moreover, even where the issue of equitable estoppel is not raised, a duty of inquiry may arise and knowledge of the fraud may be imputed to the person claiming that he or she was defrauded (*see Aozora Bank, Ltd. v Deutsche Bank Sec. Inc.*, 137 AD3d 685, 689 [1st Dept 2016]). Here, a duty of inquiry devolved upon Danny.

Danny's allegation that the December 2016 settlement itself was an act of fraud does not add up to a claim. As stated, the settlement did not put assets more out of Danny's reach than the alleged five-part fraud scheme. He says that his siblings concealed information about the settlement from him, but as the SAC alleges, Danny knew that his siblings were negotiating and he refused to take part. Accordingly, the fourth cause of action for fraud must be dismissed.

Causes of action for an accounting and breach of fiduciary duty

The statute of limitations for an accounting is six years and it begins to run when the fiduciary openly repudiates its obligations (*Robinson v Day*, 103 AD3d 584, 586 [1st Dept 2013]; *see also Matter of De Sanchez*, 107 AD3d 409 [1st Dept 2013]). The statute of limitations for a breach of fiduciary duty is also six years if equitable relief is sought, and three years if money damages are sought (*Kaufman v Cohen,* 307 AD2d 113, 118 [1st Dept 2003]). Danny seeks both money damages and the equitable relief of an accounting. In this case, a six year statute of limitations period will be applied, because of the equitable relief and because "case law in New York clearly holds that a cause of action for breach of fiduciary duty based on allegations of actual fraud is subject to a six-year limitations period" (*id.* at 119; *see Epiphany Community Nursery Sch. v Levey,* 171 AD3d 1, 7 [1st Dept 2019]). The claim accrues upon the fiduciary's open repudiation of the relationship or duty (*Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016]).

Insofar as El Rosado is concerned, the statutes of limitations for breach of fiduciary duty and for an accounting have run. Johny's allegedly fraudulent maneuvers from 2006 to 2008 demonstrated an open repudiation of his fiduciary duty towards Danny. Even if Danny believed, as he alleges, that Johny would look after his interests, he had until 2014 within which to examine developments and sue Johny. For instance, Danny discovered that Johny had given him the wrong kind of El Rosado shares in 2006, a few months after the shares were transferred to Danny. This should have alerted Danny to the possibility that Johny was not acting like a faithful fiduciary. Accordingly, the first cause of action for an accounting and the third cause of action for breach of fiduciary duty are dismissed insofar as they concern foreign property and not dismissed insofar as they concern property in New York.

Cause of action for conversion

The three-year limitations period on a conversion claim begins to run on the date that the conversion occurs, not from the date of discovery (*Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, TX*, 87 NY2d 36, 44 [1995]; CPLR 214 [3]). A cause of action for conversion accrues "when all of the facts necessary to sustain the cause of action have occurred, so that a party could obtain relief in court" (*id.* at 43). However, where the wrongdoer conceals the tort, the statute of limitations can be equitably estopped (*General Stencils, Inc. v Chiappa,* 18 NY2d 125, 128 [1966]). Conversion is the "unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights" (*Employers' Fire Ins. Co. v Cotten,* 245 NY 102, 105 [1927]). Where the original possession is lawful, a conversion does not occur until the plaintiff demands the property and the defendant refuses to give it (*Johnson v Law Off. of Kenneth B. Schwartz,* 145 AD3d 608, 612 [1st Dept 2016]).

The claim that Johny converted New York bank accounts should not be dismissed, since there is no way to determine yet when the claim accrued, that is, when the conversion(s) took place. Assuming that Johny's original possession of the bank accounts was lawful, Danny does not allege that he asked Johny for Danny's money and was refused, or that Johny prevented him from taking out money. In regard to the IDB account that Johny closed in July 2013, the SAC alleges that Johny concealed information about the account from Danny. On that claim, estoppel could prevent Johny from using the statute of limitations.

Johny states that the IDB account was a joint account of his and his mother's and that, when she died, it did not pass by inheritance, it became his by the right of survivorship. Under the law, each joint tenant has a right to half of the funds in the account, and upon the death of the other tenant, the surviving tenant has the right to the entire account (see *New York State Commr.*

of Taxation and Fin. v Wachovia Bank, N.A., 2010 NY Slip Op 32122[U] [Sup Ct, NY County 2010], citing Banking Law § 675; *Jacks v D'Ambrosio,* 2008 NY Slip Op 31597[U] [Sup Ct, Nassau County 2008]). However, Johny does not prove that the IDB account was a joint account with his mother. He proffers a document showing that he and his mother opened a joint account at IDB (NSYCEF 153). It does not show that the account referenced there is the one that Johny closed or how much money was in the account. This document is not documentary evidence that could lead to the dismissal of the conversion allegation.

Any joint accounts owned by the parents and one or more of the children passed to the child or children upon the parents' deaths. Bank accounts in the names of the parents and none of the children are part of the parents' estates. An ancillary administration may be required regarding estate property within New York. Accordingly, the fifth cause of action for conversion will not be dismissed.

Cause of action for civil conspiracy

The SAC alleges civil conspiracy against Johny and Vivian, by way of the settlement agreement. New York does not recognize an independent cause of action for conspiracy to commit a civil tort (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010]). Allegations of civil conspiracy can be pled only to connect the actions of separate defendants with an otherwise actionable tort (*id.*; *Alexander & Alexander of New York, Inc. v Fritzen,* 68 NY2d 968, 969 [1986]). A person may be liable for conversion by conniving with another in an act of conversion (23 NY Jur 2d Conversion, Etc. § 45 [Westlaw]).

Danny alleges that Vivian and Johny entered into a conspiracy to convert his share in El Rosado. They agreed that Johny would settle Vivian's claims against him by giving Vivian Danny's share of El Rosado, and Johny gave Vivian the shares. To the extent that the shares

were directly owned by Danny, this amounts to a conspiracy based on conversion. However, as stated above, since 2006, Danny knew that Johny controlled the shares. Accordingly, the sixth cause of action for civil conspiracy must be dismissed as time barred.

Cause of action for declaratory judgment

The SAC seeks a declaratory judgment that the Israeli court succession orders are valid and enforceable and that "Danny has an undivided one-third ownership interest funds held in the New York Accounts at any time after Alfredo and Ruth's death that an Accounting determines to be Jointly Owned Assets" (SAC, ¶ 169). As stated above, this court cannot adjudicate on foreign property. The parents' foreign estates were probated in foreign courts. Moreover, this court lacks jurisdiction over Johny regarding any foreign property, inherited or not. The court can adjudicate upon the New York assets; however a declaratory judgment is not necessary. A cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as an accounting (*Spitzer v Schussel,* 48 AD3d 233, 234 [1st Dept 2008]; *Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50, 54 [1st Dept 1988]). Since Danny's claim for an accounting survives, the second cause of action for a declaratory judgment must be dismissed.

Danny's cross motion

Danny seeks leave to conduct jurisdictional discovery regarding Johny's contacts with New York. The SAC does not allege facts showing that this court may exercise general jurisdiction over Johny, and he does not contest specific jurisdiction. Accordingly, the cross-motion must be denied.

X. Conclusion

It is hereby

ORDERED that the motion by defendant Johny Jacobo Czarninski Baier to dismiss the second amended complaint is granted to the extent that the second cause of action for declaratory judgment, the fourth cause of action for fraud, and the sixth cause of action for civil conspiracy are dismissed in their entirety, and the first cause of action for accounting, the third cause of action for breach of fiduciary duty, and the fifth cause of action for conversion are dismissed insofar as they relate to foreign property and are not dismissed insofar as they relate to property in New York; and it is further

ORDERED that plaintiff's cross motion is denied; and it is further

ORDERED that defendants must serve and file an answer to the second amended complaint within thirty days after service of notice of entry of this order; and it is further

ORDERED that the parties shall appear for a preliminary conference on 11-21, 2019 at 9:30 a.m. at 80 Centre Street, Room 320, New York, New York.

10/4/19
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE