

**Marjay N10, LLC v Yashar**

2020 NY Slip Op 31279(U)

April 28, 2020

Supreme Court, New York County

Docket Number: 650489/2019

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

-----X  
MARJAY N10, LLC, LESLIE WESTREICH,

Plaintiffs,

- v -

MORTY J. YASHAR, MARJAY REALTY LLC, GAYLE  
YASHAR, SUSAN ROZNER, BRIAN GLICKMAN,  
MARJAY MANAGER, LLC

Defendants.  
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INDEX NO.	650489/2019
MOTION DATE	06/06/2019
MOTION SEQ. NO.	002
<b>DECISION + ORDER ON MOTION</b>	

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 55, 56, 57, 58, 59, 60, 61, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 79, 80, 95 were read on this motion to DISMISS.

In motion sequence number 002, defendants Morty J. Yashar (“Yashar”), Gayle Yashar, Suzan Rozner (“Rozner”), Brian Glicksman (“Glicksman”), Marjay Manager, LLC (“Marjay Manager”), and Marjay Realty, LLC (“Marjay”) (collectively, the “Defendants”) move to dismiss Plaintiffs’ First Amended Complaint pursuant to CPLR §§ 3211(a)(3), (5), and (7). Plaintiffs Marjay N10, LLC (“N10”), Leslie Westreich (“Westreich”), and The Jonathan Company ST, L.P. (“JCST”) (collectively, the “Plaintiffs”) opposed the motion and cross-moved to file a Second Amended Complaint (“SAC”).

Defendants have elected to apply their motion to dismiss to the proposed SAC (*see* Oral Arg. Tr. at 2-5), as permitted by *Sage Realty Corp. v. Proskauer Rose LLP*, 251 AD2d 35, 38 [1st Dept 1998]. Accordingly, the Court will deem this to be a motion to dismiss the SAC. (*See 49 West 12 Tenants Corp. v. Seidenberg*, 6 AD3d 243, 243 [1st Dept 2004] [“The motion court

properly considered defendant's motion to dismiss as against the proffered amended complaint."]).<sup>1</sup>

For the reasons set forth below, Defendants' motion to dismiss is granted in part and denied in part.

### **FACTUAL BACKGROUND**

According to the factual allegations of the SAC, Westreich and Yashar are longtime business partners. Along with his wife, Gayle, Yashar co-owned three companies, each of which owned a property in Brooklyn, New York: Marjay, Greenpoint Industrial Center, Inc. ("Greenpoint"), and Berry Wythe Realty Corp. ("Berry Wythe"). In 2005, Yashar approached Westreich, asking him to purchase an interest in each of the three companies formerly owned by Yashar's relatives, the Morgensterns. Westreich agreed to purchase the Morgensterns' one-third interest in all three companies.

#### ***The Greenpoint Dispute***

Yashar allegedly told Westreich that the Morgensterns' interests in two of the companies (Greenpoint and Berry Wythe) could not be conveyed to Westreich immediately without triggering a tax consequence to the Yashars and the other interest holder, Rozner. Yashar allegedly represented that he would instead hold Westreich's one-third interests in Greenpoint and Berry Wythe nominally in trust, for the benefit of Westreich until Westreich's interests were formally recorded.

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<sup>1</sup> In the SAC, Plaintiffs add JCST as a Plaintiff, and reformat the claims as brought on behalf of Westreich and/or JCST, not N10. Plaintiffs no longer allege that N10 was a member of Marjay. (See NYSCEF Entry No. 68, Redline of Proposed Second Amended Complaint).

Westreich alleges that he paid \$4.8 million for the Morgensterns' one-third interest in Berry Wythe, and Yashar held the money in trust for Westreich. In 2008, Berry Wythe was sold, and the net proceeds were allegedly distributed to Westreich, the Yashars, and Rozner in equal one-third portions.

As for Greenpoint, Westreich alleges that he purchased his interest in the company, but Yashar never held Westreich's interest in trust. Westreich believed that Yashar was holding his Greenpoint interest in trust from 2006 to 2014. Westreich claims that Yashar transitioned Greenpoint into an LLC, recorded that the Yashars and Rozner were each one-half owners, and omitted any recording of Westreich's one-third interest. Yashar claims that none of Westreich's allegations are true, and in any event, Westreich's claims should be dismissed because, *inter alia*, they barred by the statute of limitations.

### ***The Marjay Dispute***

When the Morgensterns withdrew as members of Marjay, their membership interests were bought back by the other members of Marjay. Between 2005 and 2006, JCST allegedly paid \$5.7 million to acquire a one-third membership interest in Marjay, effectively becoming a member. Westreich claims that JCST transferred its Marjay membership and interest to him. Westreich alleges that Yashar, and fellow member Glicksman, planned to defraud Westreich and steal his membership interest in Marjay. In an effort to close on a \$35 million refinancing on the Marjay property, Yashar and Glicksman allegedly submitted documents to Santander Bank, N.A. that did not reflect Westreich's one-third membership. Yashar also filed an alleged inaccurate tax return for Marjay, omitting Westreich's one-third membership interest.

Westreich claims that Yashar knowingly continues to breach his fiduciary duties to Westreich, by not filing correct tax return information reflecting Westreich's one-third

membership interest. Westreich brings individual and derivative claims against Defendants. Defendants argue that Westreich is not a member of Marjay and that Plaintiffs' claims fail due to pleading defects. Plaintiffs seek compensation for damages suffered as a result of Yashar's alleged misconduct, injunctive relief ordering Yashar to fulfill his fiduciary duty to Westreich and Marjay, declaratory relief resolving the membership rights and interests of the parties, indemnity, and a judgment of judicial dissolution of Marjay.

### LEGAL ANALYSIS

#### *Plaintiffs' (Greenpoint) Claims (Causes of Action 1 – 3, 17 –18, 20) are Time Barred*

Under CPLR § 3211(a)(5), Defendants bear the initial burden of establishing, *prima facie*, that the time in which to sue has expired. To determine whether the applicable statute of limitations has expired, Defendants must establish, *inter alia*, when Plaintiffs' cause of actions accrued. (*Lebedev v. Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016] [internal citation omitted]). If Defendants meet that burden, then the burden shifts to Plaintiffs to “aver evidentiary facts establishing that the cause of action was timely or to raise a question of fact as to whether the cause of action was timely.” (*Lessoff v. 26 Ct. St. Assoc., LLC*, 58 AD3d 610, 6100 [2d Dept 2009]).

At the outset, the parties dispute whether Plaintiffs' claims sound in contract or fraud, which are governed by different statutes of limitation. Because Westreich's core allegation is that Yashar failed to honor his agreement to hold the Morgensterns' Greenpoint interest in trust for Westreich, the claims are for breach of contract. A claim of fraud arising out of those same facts, and seeking the same damages, would be duplicative. (*See, e.g., Financial Structures Ltd. v. UBS AG*, 77 AD3d 417, 419 [1st Dept 2010]; *ESBE Holdings, Inc. v. Vanquish Acquisition Partners, LLC*, 50 AD3d 397, 398 [1st Dept 2008]).

Plaintiffs' claims are governed by the six-year statute of limitations set forth in CPLR § 213(2). "A breach of contract clause of action accrues at the time of breach, even if no damage occurs until later." (*Chelsea Piers L.P. v. Hudson Riv. Park Trust*, 106 AD3d 410, 412 [1st Dept 2013]). Here, Plaintiffs allege that Yashar broke his promise with respect to Westreich's Greenpoint interest in 2008. It does not matter, for statute of limitations purposes, when Plaintiffs discovered Yashar's alleged breach of the agreement. Any knowledge "of the occurrence of the wrong on the part of the plaintiff is not necessary to start the Statute of Limitations running in [a] contract action." (*Ely-Cruikshank Co. v. Bank of Montreal*, 81 NY2d 399, 403 [1993]). Plaintiffs' claims were not brought within six years of the alleged breach and thus are precluded by CPLR § 213(2).

The claims would be time-barred even if, as Plaintiffs allege, they are deemed to be fraud claims. The statute of limitations for claims sounding in fraud is "the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it." (CPLR § 213(8)). A plaintiff will be held to have discovered the fraud, when the plaintiff has knowledge of the facts for which the fraud could be reasonably inferred. (*See Saphir Intl., SA v. UBS PaineWebber Inc.*, 25 AD3d 315, 316 [1st Dept 2006]). Yashar allegedly represented to Westreich that he was holding Westreich's interests in trust beginning in 2008. The applicable statute of limitations thus began to run and expired in 2014, at the earliest. Taking the Plaintiffs' factual allegations as true, Westreich discovered Yashar's fraud in 2015. Thus, even after applying the discovery rule of CPLR § 213(8), Westreich had two years from his discovery of Yashar's fraud to bring these claims. Westreich failed to file this suit by 2017, and thus Plaintiffs' Greenpoint claims are time-barred.

Plaintiffs' reliance on the "continuing wrong doctrine" to toll the statute of limitations is misplaced. That doctrine is "predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct. The distinction is between a single wrong that has continuing effects and a series of independent, distinct wrongs." (*Henry v. Bank of Am.*, 147 AD3d 599, 602 [1st Dept. 2017]). Here, Plaintiffs' alleged damages flow from Yashar's failure in 2008 to hold Westreich's shares in trust. Yashar's actions in 2014 were merely consequences of Yashar's alleged original wrong. Any alleged damages sustained by Plaintiffs reflect "only the continuing effects of earlier conduct alleged to have been wrongful." (*Carey v. Trustees of Columbia University*, 113 NYS3d 32, 34 [1st Dept 2019]).

Accordingly, Plaintiffs' Greenpoint claims are time-barred and must be dismissed.<sup>2</sup>

***Plaintiffs Do Not Have Standing to Assert Their Derivative (Marjay) Claims (Causes of Action 5, 7, 9, 19, 21)***

Under CPLR § 3211(a)(3) a cause of action may be dismissed when the plaintiff lacks standing to sue. The critical question, in determining whether a party has standing, is whether the party suffered an injury giving it "an actual legal stake in the matter being adjudicated," ensuring that the "party seeking review has some concrete interest in prosecuting the action." (*Society of Plastics Indus. v. County of Suffolk*, 77 NY2d 761, 722 [1991]).

Plaintiffs lack standing to bring derivative claims on behalf of Marjay, because they do not allege facts to show that Westreich and JCST are Marjay members. Only a member of a limited liability company can bring suit derivatively on behalf of the company. (*See, e.g., MFB Realty LLC v. Eichner*, No. 653549/2014, 2016 WL 3541398, at \*3 [Sup Ct NY Co June 24,

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<sup>2</sup> Given the Court's determination that Plaintiffs' claims are untimely, the Court need not reach Yashar's alternative argument that the claims – which Plaintiffs assert are not based on breach of contract – are barred by the statute of frauds.

2015] [“Only a member of an LLC at the time of the alleged wrong to the LLC has standing to bring a derivative claim on behalf of that company.”], *aff’d* 161 AD3d 661 [1st Dept 2018]). “An assignee of a membership interest may not become a member without the vote or written consent of at least a majority in interest of the members, other than the member who assigned or proposes to assign such membership interest.” (Limited Liability Law § 604(a)). Further, in a section titled, “Admission of Additional Members,” the 2002 Marjay Operating Agreement states that “additional members of the Company may be admitted to the Company only with the unanimous consent of the Members.” (See NYSCEF Entry No. 53, 2002 Marjay Operating Agreement § 15). Here, Plaintiffs claim that JCST transferred its interests in Marjay to Westreich in 2015, but Plaintiffs do not allege that they effected a transfer in accordance with the Marjay Operating Agreement or the applicable Limited Liability Law.<sup>3</sup>

For these reasons, Plaintiffs’ derivative Marjay claims are dismissed for lack of standing.

***Plaintiffs’ Direct and Derivative (Marjay) Claims are Impermissibly Intermingled (Causes of Action 4, 6, 8, 16, 17, 18)***

Plaintiffs impermissibly intermingle both direct and derivative claims against Defendants.

When a claimed individual harm is “confused with or embedded in the harm to the corporation, it cannot separately stand.” (*Serino v. Lipper*, 123 AD3d 34, 40 [1st Dept 2014]).<sup>4</sup> In

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<sup>3</sup> As part of their SAC, Plaintiffs submit Marjay’s 2015 tax form 1065, also known as a Schedule K-1 form, naming Westreich as a “limited partner or other LLC member” of Marjay. (See NYSCEF Entry No. 72). Plaintiffs maintain that this K-1, allegedly received by Westreich in 2015, demonstrates that Plaintiffs were members of Marjay. However, a K-1, while used to report an individual’s income from a limited liability company, is insufficient to show that a party is or ever became a member of the subject limited liability company. (See *e.g.*, *Pappas v. The 38-40 LLC*, No. 650251/2017, 2018 WL 1030312, at \*5 [NY Sup Ct Feb 22, 2018], *aff’d* 172 AD3d 409 [1st Dept 2018]).

<sup>4</sup> The analysis applicable to derivative actions against corporations has been held to apply to limited liability companies. (See *Solutia Inc. v. FMC Corp.*, 385 F Supp 2d 324, 331 n.1 [SDNY

determining whether a claim is direct or derivative, a court must “look to the nature of the wrong and to whom the relief should go,” considering “(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders individually).” (*Yudell v. Gilbert*, 99 AD3d 108, 114 [1st Dept 2012]). Substantively, Plaintiffs’ fourth, sixth, eighth, sixteenth, seventeenth, and eighteenth claims are identical to Plaintiffs’ derivative claims: all of the claims are based on the same set of facts, allege the same conduct, and seek the same relief. Plaintiffs’ aforementioned claims are inextricably entangled with derivative claims and require dismissal.

***Plaintiffs Improperly Seek Relief Available Only to Marjay Members  
(Causes of Action 10 – 15, 22, 23)***

Under CPLR § 3211(a)(7), the Court may “determine only whether the facts as alleged fit within any cognizable legal theory.” (*Leon v. Martinez*, 84 NY2d 83, 87 [1994]). In doing so, the Court must give the SAC a liberal construction, accept its factual allegations as true, and provide Plaintiffs with the benefit of every favorable inference. (*See, e.g., Nomura Home Equity Loan Inc. Series 2006-FM2 v. Nomura Credit & Capital, Inc.*, 30 NY3d 572, 582 [2017]). Allegations consisting of “bare legal conclusions” are not entitled to such consideration. (*See, e.g., Connaughton v. Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141-42 [2017]).

In Causes of Action 10-15, 22, and 23 Plaintiffs seek to obtain relief that is only available to members of Marjay. (*See e.g., Estate of Calderwood v. ACE Grp. Intl. LLC*, 157 AD3d 190, 199 [1st Dept 2017] [dismissing financial accounting and records claims because LLC did not

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2004] [holding that “New York corporate law applies in full force to limited liability companies,” in relation to derivative suit matters.]

owe non-member plaintiffs fiduciary duties]; *see also Cordts-Auth v. Crunk, LLC*, 479 F App'x 375, 381 [2d Cir 2012] [holding that accounting claims and rights to declaratory judgments can only be asserted by members of the LLC]; Limited Liability Law § 702 [stating that a decree of dissolution of an LLC can be sought by an application submitted by or for a member]). The allegation that Westreich is an assignee of Marjay interests is not sufficient to state a claim. (*See MFB Realty LLC*, 161 AD3d at 662). Accordingly, those Causes of Action must be dismissed.

***Plaintiffs' (Marjay) Unjust Enrichment Claim Is Not Duplicative  
(Cause of Action 20)***

In order to state a claim for unjust enrichment, a plaintiff must allege that: “(1) the [defendant] was enriched, (2) at [plaintiff’s] expense, and (3) that it is against equity and good conscience to permit the [defendant] to retain what is sought to be recovered.” (*Schroeder v. Pinterest Inc.*, 133 AD3d 12, 26 [1st Dept 2015]). Unjust enrichment is appropriate in situations when, “defendant has not breached a contract nor committed a recognized tort, [but] circumstances create an equitable obligation running from the defendant to the plaintiff. Typical cases are those in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled.” (*Corsello v. Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012]). “An unjust enrichment claim is not available where it simply duplicates, or replaces a conventional contract or tort claim.” (*Id.*). However, it is premature to dismiss an unjust enrichment claim when there is a “bona fide dispute as to the existence of a contract.” (*See Moshan v. PMB, LLC*, 141 AD3d 496, 497 [1st Dept 2016] [citing *Sabre Intl. Sec., Ltd. v. Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 438-49 [1st Dept 2012]]).

Applying a liberal construction of the SAC, this Court finds that Plaintiffs sufficiently allege that Defendants benefited at the expense of Westreich and/or JCST. At this time, the Court finds it inappropriate to dismiss Plaintiffs’ twentieth claim based on the facts alleged.

**CONCLUSION**

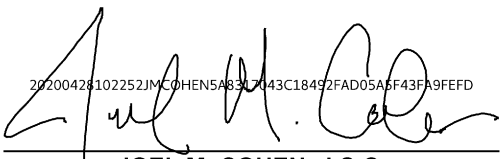
In accordance with the foregoing, it is

**ORDERED** that Defendants' Motion to Dismiss is **granted** as to Claims 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, and 23 in Plaintiffs' Second Amended Complaint and **denied** as to Claim 20; and it is further

**ORDERED** that, subject to the foregoing, Plaintiffs' cross-motion for leave to file the proposed Second Amended Complaint is **granted**.

This constitutes the Decision and Order of the Court.

4/28/2020  
DATE

  
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JOEL M. COHEN, J.S.C.

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