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| Kaufman v A.F. Kaufman, Inc. |
| 2020 NY Slip Op 31444(U) |
| May 7, 2020 |
| Supreme Court, New York County |
| Docket Number: 654584/2018 |
| Judge: Andrea Masley |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREA MASLEY PART IAS MOTION 48EFM

Justice

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INDEX NO. 654584/2018

WILLIAM KAUFMAN,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 001

- v -

A.F. KAUFMAN, INC., A.F. SUPPLY CORP., HOWARD
FRIEDMAN, BENNETT FRIEDMAN, WARREN FRIEDMAN,
JACK FRIEDMAN,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 31, 32, 36, 38

were read on this motion to/for DISMISS

Masley, J.:

In motion sequence number 001, defendants A.F. Kaufman, Inc. (A.F. Kaufman), A.F. Supply Corp. (A.F. Supply), Howard Friedman, Bennett Friedman, Warren Friedman, and Jack Friedman (collectively, Friedman Defendants) move, pursuant to CPLR 3211 (a)(5) and (7), to dismiss the verified complaint.

Background

The following facts are alleged in the verified complaint unless otherwise noted, and for purposes of this motion, are accepted as true.

In August 1946, brothers Isadore Kaufman (Isadore) and Harry Kaufman (Harry) formed nonparty Kaufman Bro's. Plumbing Supplies, Inc. (Kaufman Bros.) (NYSCEF Doc. No. [NYSCEF] 12, ¶ 35). In November of 1974, plaintiff William Kaufman, the son of Isadore, started working full time at Kaufman Bros. (*id.* at ¶ 38). After the death of

Isadore, plaintiff and his mother purchased Harry's interest in the company (*id.* at ¶ 39). From that point on, plaintiff operated the business (*id.* at ¶ 40).

In 1922, nonparty Alex Friedman launched defendant A.F. Supply, a plumbing and supplies company incorporated in February 1934 (*id.* at ¶ 42). During the 1990s, A.F. Supply opened several new branch operations to expand and diversify (*id.* at ¶ 43). In September of 1995, plaintiff approached defendant Howard Friedman to discuss the possibility of structuring a business together, knowing that A.F. Supply had previously structured a business with another supply company (*id.* at ¶ 44-45). Plaintiff and Howard Friedman, who negotiated on behalf of himself and the other Friedman Defendants, agreed to create defendant A.F. Kaufman (*id.* at ¶ 45). A.F. Kaufman was officially created on November 21, 1995, whereupon 200 shares of stock were issued to plaintiff and the Friedman Defendants (*id.* at ¶ 47-48). Plaintiff and the Friedman Defendants agreed to an equal twenty percent (20%) share (*id.* at ¶ 49).

In 1996, A.F. Supply's CFO¹ and A.F. Kaufman's accountants, Mirsky, Furst & Associates (Mirsky), traveled to A.F. Kaufman's Long Island facilities to collect and calculate finance data in order to file A.F. Kaufman's 1995 Federal and New York State tax returns (*id.* at ¶ 54). Defendants provided Mirsky with all of this information (*id.* at ¶ 55). The 1995 federal tax return sets forth the percentage of corporate stock owned and that plaintiff and the Friedman Defendants each owned 20% equally (*id.* at ¶ 56).

Although the business grew, the Friedman Defendants convinced plaintiff to lower his compensation because of his ownership status in A.F. Kaufman (*id.* at ¶¶ 57, 58). In April 2018, when plaintiff's employment with A.F. Kaufman ended, "A.F.

¹ This CFO is unnamed in the complaint.

Kaufman provided Plaintiff with a Severance and Release of Claims Agreement, where in A.F. Kaufman promoted, for the first time, that Plaintiff's twenty percent equity (20%) ownership stake in A.F. Kaufman was a 'phantom interest'" (*id.* at ¶¶ 62, 63). Plaintiff alleges that the Friedman Defendants misappropriated plaintiff's equity stake and improperly increased the Friedman Defendants' equity ownership in A.F. Kaufman from 20% to 25% (*id.* at ¶ 66). Plaintiff also alleges that the Friedman Defendants improperly received dividend distributions from A.F. Kaufman between 1995 and 2018 but failed to provide plaintiff with the dividends he was owed as an equity owner (*id.* at ¶ 67). Moreover, plaintiff alleges that the neither the Friedman Defendants nor A.F. Kaufman ever approached plaintiff to purchase his 20% ownership stake (*id.* at ¶ 68). Plaintiff alleges he was never apprised of defendants' improper position prior to April 2018, and always believed he was an equal owner of A.F. Kaufman as was reported in the corporation's tax filings (*id.* at ¶ 64).

Plaintiff asserts that he is entitled to payment of any and all dividends and/or profit payments commensurate with his ownership interest from the date of incorporation (November 1995) until Plaintiff's ownership is terminated (Action Period) (*id.* at ¶ 72). Plaintiff calculates this amount at \$3,349,044 as of December 31, 2016 (*id.*)

Plaintiff filed this action on September 14, 2018 by filing a summons and complaint (NYSCEF 1, Summons and Complaint). Plaintiff alleges seven causes of action for (1) a declaratory judgment of ownership rights and payments of profit against the Friedman Defendants and A.F. Kaufman; (2) breach of contract against the Friedman Defendants and A.F. Kaufman; (3) fraud against the Friedman Defendants;

(4) fraudulent Inducement, against the Friedman Defendants; (5) misrepresentation against the Friedman Defendants and A.F. Kaufman; (6) unjust enrichment against the Friedman Defendants and A.F. Kaufman; and (7) breach of fiduciary duty against the Friedman Defendants.

Defendants move to dismiss the complaint on the grounds that the claims are barred by the applicable statute of limitations and the complaint fails to state a claim.

Discussion

Standard for Defendants' Motion to Dismiss

In considering a CPLR 3211 (a)(7) motion to dismiss, the court is to determine whether the pleadings state a cause of action. "The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Richbell Info. Servs., Inc. v Jupiter Partners*, 309 AD2d 288, 289 [1st Dept 2003], quoting *511 W 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 [2002]). The pleadings are afforded a liberal construction, and the court is to "accord plaintiffs the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). While factual allegations are given a favorable inference, "bare legal conclusions" and "inherently incredible facts" are not entitled to a preferential treatment (*Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]).

On the other hand, on a motion to dismiss based on the statute of limitations defense of CPLR 3211 (a)(5), the defendant must establish a prima facie case that the plaintiff's time to commence an action has expired; then the burden shifts to the plaintiff to raise a question of fact as to whether it commenced the action within

the applicable limitations period, or whether an exception or tolling applies (*Williams v City of Yonkers*, 160 AD3d 1017, 1019 [2d Dept 2018]).

Second Cause of Action - Breach of Contract

CPLR 213 (2) states, in relevant part, that “an action upon a contractual obligation or liability, express or implied . . . must be commenced within six years.” The statutory period of limitations begins to run from the time when liability for wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury (*ACE Sec. Corp., Home Equity Loan Trust, Series 2006-SL2 v. DB Structured Prods., Inc.*, 25 NY3d 581, 594 [2015] [internal quotation marks and citation omitted]). “New York does not apply the ‘discovery’ rule to statute of limitations in contract actions” (*id.* [citation omitted]). Thus, the breach of contract claim accrues at the time of the breach (*Yarbro v Wells Fargo Bank, N.A.*, 140 AD3d 668, 668 [1st Dept 2016] [citation omitted]).

However, there is an exception to the time of breach rule. The continuous wrong doctrine “is usually employed where there is a series of continuing wrongs and serves to toll the running of a period of limitations to the date of the commission of the last wrongful act. Where applicable, the doctrine will save all claims for recovery of damages but only to the extent of wrongs committed within the applicable statute of limitations” (*Henry v Bank of Am.*, 147 AD3d 599, 601 [1st Dept 2017] [internal quotation marks and citations omitted]). This doctrine is only predicated on continuing unlawful conduct, not the continuing effect of such conduct (*id.*). There must be a series of independent, distinct wrongs (*id.*).

Here, plaintiff alleges that defendants breached their agreement with plaintiff by failing to provide plaintiff with dividends from 1995 to 2018 (NYSCEF 12, complaint at ¶ 67) and failing to memorialize plaintiff's ownership with local, state and federal tax authorities (*id.* at ¶ 87). Here, any alleged breach occurred when defendants first excluded plaintiff from his ownership interest in 1995 as alleged in the complaint. The continued failure to not pay him dividends or include his ownership interest in tax filings is not an independent, distinct wrong. Thus, this claim is time barred.

First Cause of Action - Declaratory Judgment

As the CPLR does not specifically prescribe a period of limitations for a declaratory judgment claim, "courts must look to the underlying claim and nature of the relief sought to determine the applicable period of limitation" (*Vigilant Ins. Co. of Am. v Hous. Auth.*, 87 NY2d 36, 41 [1995] [internal quotation marks and citations omitted]). "[A] court's inquiry focuses on the 'substance of [the] action to identify the relationship out of which the claim arises and the relief sought'" (*id.* [citations omitted]). Here, the gravamen of plaintiff's claim for a declaratory judgment is that he has a 20% ownership in A.F. Kaufman in which he alleges was established by an agreement. Thus, the court will apply the six year statute of limitations that governs a breach of contract claim (CPLR 213 [2]) and is also the catch-all statute of limitations (CPLR 213 [1]). Thus, as the breach of contract claim is time barred, so is this claim premised on the same theory as the breach of contract claim.

Nevertheless, even if this claim was timely, courts have repeatedly held that "[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 breach of

contract" (*Apple Records v Capitol Records*, 137 AD2d 50, 53 [1st Dept. 1988]).

Plaintiff's remedy here is under a breach of contract theory which is time barred.

Third Cause of Action - Fraud

Pursuant to CPLR 213(8), "the time within which the action must be commenced shall be 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."

"The inquiry as to whether a plaintiff could, with reasonable diligence, have discovered the fraud turns on whether the plaintiff was possessed of knowledge of facts from which [the fraud] could be reasonably inferred. Generally, knowledge of the fraudulent act is required and mere suspicion will not constitute a sufficient substitute. Where it does not conclusively appear that a plaintiff had knowledge of facts from which the fraud could reasonably be inferred, a complaint should not be dismissed on motion and the question should be left to the trier of the facts"

(*Sargiss v Magarelli*, 12 NY3d 527, 532 [2009] [internal quotation marks and citations omitted]). An inquiry as to the time that a plaintiff could, with reasonable diligence, have discovered the fraud "turns upon whether a person of ordinary intelligence possessed knowledge of facts from which the fraud could be reasonably inferred (*Kaufman v Cohen*, 307 AD2d 113, 123 [1 Dept 2003] [internal quotation marks and citation omitted]).

Plaintiff alleges that the Friedman Defendants intentionally misrepresented their desire to be equal owners with plaintiff and fraudulently omitted material facts during the negotiations to form A.F. Kaufman. In the twenty-three years that plaintiff was allegedly an owner of A.F. Kaufman, he does not allege that he ever inquired why he was not receiving dividends or asked for copies of A.F. Kaufman's tax returns, a reasonable inquiry for a part owner to make. After not receiving dividends in 1996, plaintiff, with

reasonable diligence, could have discovered the alleged fraud. Further, when the Friedman Defendants asked plaintiff to reduce his salary because of his ownership status, as alleged in the complaint, plaintiff, with reasonable diligence, could have discovered the alleged fraud by making a simple inquiry as to proof such ownership before agreeing to lower his salary. Thus, this claim is time barred as the alleged fraud occurred in 1995 and plaintiff should have reasonable discovered such fraud.

Fourth and Fifth Causes of Action - Fraudulent Inducement and Misrepresentation

For the same reason the fraud claim is time barred, so are plaintiff's claims for fraudulent inducement and fraudulent misrepresentation.

Sixth Cause of Action - Unjust Enrichment

Plaintiff's unjust enrichment claim is governed by a six-year statute of limitations (*Gerschel v Christensen*, 143 AD3d 555, 556 [1st Dept 2016] [citation omitted]). An unjust enrichment claim accrues "upon the occurrence of the alleged wrongful act giving rise to restitution" (*Yarbro*, 140 AD3d at 669 [internal quotation marks and citation omitted]). Here, plaintiff alleges that defendants were unjustly enriched from 1995 through 2018 when plaintiff "agreed to accept discounted compensation by way of salary and bonus" (NYSCEF 12, Complaint at ¶ 116). Thus the alleged wrong act accrued when defendants allegedly asked plaintiff to accept a reduced salary in 1995. This claim is also time barred.

Seventh Cause of Action - Breach of Fiduciary Duty

"Where an allegation of fraud is essential to a breach of fiduciary duty claim the statute of limitations is six years and the discovery accrual rule . . . applies" (*Gerschel v Christensen*, 143 AD3d at 557 [internal quotation marks and citation omitted]). Plaintiff's

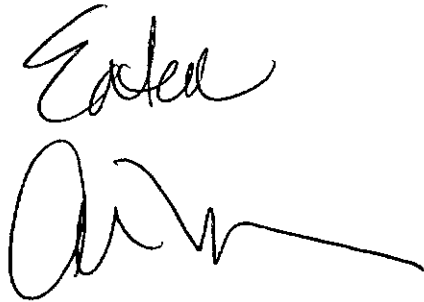
breach of fiduciary duty claim is based on the allegation that the Friedman Defendants overcompensated themselves by not paying plaintiff his dividends. Again, like the fraud claims, as the discovery rule applies, plaintiff's claim is time barred.

A.F. Supply

As the complaint fails to allege any causes of action against A.F. Supply, they are also dismissed from this action.

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted, and the complaint is dismissed in its entirety with costs and disbursements to defendants as taxed by the Clerk of the Court.



5/7/2020
DATE

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| CHECK ONE: | <input checked="" type="checkbox"/> | CASE DISPOSED | <input type="checkbox"/> | DENIED | <input type="checkbox"/> | NON-FINAL DISPOSITION | <input type="checkbox"/> | OTHER |
| APPLICATION: | <input checked="" type="checkbox"/> | GRANTED | <input type="checkbox"/> | | <input type="checkbox"/> | GRANTED IN PART | <input type="checkbox"/> | |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | | <input type="checkbox"/> | SUBMIT ORDER | <input type="checkbox"/> | |
| | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | | <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input type="checkbox"/> | REFERENCE |