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| Renk v Renk |
| 2020 NY Slip Op 31526(U) |
| May 21, 2020 |
| Supreme Court, New York County |
| Docket Number: 652439/2018 |
| Judge: Barry Ostrager |
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

Table with case details: Plaintiff (KIMBERLY RENK), Defendants (RICHARD RENK, SR., LINDA RENK, RICHARD JOHN RENK, JR., SEQUIN, LLC, and JOHN DOE CORPORATIONS 1 through 5), INDEX NO. 652439/2018, MOTION DATE, MOTION SEQ. NO. 009, and DECISION + ORDER ON MOTION.

HON. BARRY R. OSTRAGER

Before the Court is a motion by defendants Richard Renk, Sr., Linda Renk, Richard John Renk, Jr., and Sequin, LLC ("Defendants") to dismiss the Second Amended Complaint ("the Complaint") (NYSCEF Doc. No. 168) filed by plaintiff Kimberly Renk ("Kimberly" or "Plaintiff") pursuant to CPLR § 3211(a) (5), (1) and (7) as barred by the Statute of Limitations and based on documentary evidence and failure to state a cause of action. For the reasons stated below, the motion is granted in part and denied in part.

Background Facts

The following "facts" are based on allegations in the unverified Complaint and arguments by counsel in their memoranda of law citing various documents and deposition excerpts submitted with this motion. No party has submitted an affidavit on personal knowledge, except for defendant Richard J. Renk, Jr., who limits his comments to the authentication of Sequin meeting minutes from September 2011 and a letter from his sister Kimberly Renk to their parents forwarded to Richard by his father Richard Renk, Sr.

The case involves a dispute related to a financially successful family-owned and family-operated jewelry business known as Sequin, LLC. This litigation, involving each individual

family member's ownership interest in Sequin, has been ongoing for two years now with no real progress having been made toward a resolution. All discovery is to be completed by August 31, 2020, and a trial is presently scheduled for January 4, 2021. But the parties are still arguing about the pleadings.

The parties appear to agree that Sequin was formed in or about 1999 by Kimberly and Linda when the two sisters were on good terms. It also appears undisputed that Linda was given a 50% membership interest in the company at that time. The ownership of the remaining 50% interest is hotly contested.

Kimberly claims the second 50% interest was put in the name of her father Richard Renk, Sr. to hold for Kimberly until she completed her work with a competing company known as Swank, Inc., after which time the interest was to be transferred to Kimberly. Although Kimberly did end her relationship with Swank soon after Sequin was formed, and although she has served in a well-compensated managerial position at Sequin since that time, Kimberly's father never formally transferred the 50% interest to her or placed it in her name. Kimberly claims the transfer was always contemplated as a mere formality, and it was frequently discussed and even acknowledged by her father, but never implemented.

In contrast, Linda (presumably with the other Defendants who jointly made this motion) claims the second 50% interest was in the name of their father Richard and that any promise Richard may have made to transfer his interest to Kimberly is unenforceable. Kimberly commenced this suit after a break down in her relationship with Linda to formalize what she insists is her absolute right to a 50% ownership interest in Sequin as part of an internal family power struggle related to the running of the company. She also seeks damages based on distributions she allegedly should have received over the years as a part owner of Sequin.

Discussion

In the twenty-eight page Second Amended Complaint, filed on December 11, 2019, Kimberly asserts eleven causes of action: (1) breach of contract against Richard Renk, Sr.; (2) breach of fiduciary duty against Richard Renk, Sr.; (3) aiding and abetting breach of fiduciary duty against Richard Renk, Jr. and Linda Renk; (4) declaratory judgment against Richard Renk, Sr., Richard Renk, Jr., and Sequin; (5) unjust enrichment against all defendants; (6) accounting against all defendants; (7) constructive trust against all defendants; (8) fraud against Richard Renk, Sr.; (9) fraud against Richard Renk, Sr. and Linda Renk; (10) conspiracy to commit fraud against Richard Renk, Sr., Richard Renk, Jr., and Linda Renk; and (11) negligent misrepresentation against all defendants. Kimberly seeks declaratory relief, specific performance of her father's alleged promise, and/or damages in an unspecified amount.

The first prong of defendants' motion seeks to dismiss plaintiff's claims as time-barred pursuant to CPLR § 3211(a)(5). As defendants correctly note, CPLR § 213(2) expressly imposes a six-year statute of limitations to claims for breach of contract, which accrue on the date of breach. *Demian v Calmenson*, 156 AD3d 422, 423 (1st Dep't 2017). Since the request for a declaratory judgment is based on the alleged breach of contract, that claim is subject to the same six-year limitations period. *Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex*, 87 NY2d 36, 40 (1995). A six-year statute of limitations also applies to the breach of fiduciary duty claim here because equitable relief is sought; i.e., specific performance of Richard Sr.'s alleged promise to transfer his membership interest to Kimberly. *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 (2009). Claims for unjust enrichment, an accounting, and constructive trust are subject to a six-year statute of limitations pursuant to CPLR § 213(1), which covers claims for which no specific statute of limitations is directed. *See also*

Underground Utils., Inc. v Comptroller of the City of N.Y., 170 AD3d 481, 482 (1st Dep't 2019).

Fraud and negligent misrepresentation are subject either to a six-year statute of limitations from the date of accrual or the two-year discovery rule, whichever is later, pursuant to CPLR § 213(8).

The First Department clearly articulated the standard of review for a CPLR § 3211(a)(5) motion in *MTGLQ Invs., LP v Wozencraft*, 172 AD3d 644, 644–45, *lv to appeal dismissed*, 34 NY3d 1010 (2019) (citations omitted):

In moving to dismiss an action as barred by the statute of limitations . . . , the defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the cause of action has expired The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is inapplicable or whether the action was commenced within the statutory period . . . , and the plaintiff must “aver evidentiary facts establishing that the action was timely or . . . raise an issue of fact as to whether the action was timely”

The movants here have met their initial burden. As defendants correctly note, all of plaintiff’s claims relate to the failure of Richard Renk, Sr. to fulfill a promise he purportedly made in 1999 to transfer his membership interest to Kimberly. Although no date for performance was specified, one must assume the oral contract required performance within a year to avoid running afoul of the writing requirement in General Obligations Law (GOL) § 5-701(a)(1). Thus, defendants assert that, at best, the claims accrued in the year 2000, and the applicable statute of limitations required the commencement of this suit in 2006, twelve years before it was actually commenced on May 16, 2018. To the extent Kimberly relies on Richard’s alleged restatement of his promise in later years, defendants claim the restatement cannot extend the statute of limitations due to the lack of a writing. *See Dillon v Peretti*, 176 AD2d 497, 497-98 (1st Dep’t 1991) (“While plaintiff attempts to extend the statute of limitations by asserting that restatements or reconfirmations of the alleged oral agreement occurred after September 1983, none of the alleged restatements or reconfirmations are in writing or signed by the party to be charged”).

Kimberly asserts in opposition that (1) the claims never accrued because Richard never repudiated his promise, (2) if the claims did accrue, the limitations period was extended each time Richard reconfirmed his promise, and (3) in any event, defendants should be equitably estopped from asserting a limitations defense because Kimberly relied on her father's repeated promises to her detriment. As to the first point, Kimberly asserts that, at a minimum, her allegations, which must be construed liberally in her favor, create an issue of fact as to when her claims accrued. Richard was effectively in the position of a trustee, acting as a "placeholder" for Kimberly's membership interest until its transfer. Where a constructive trustee wrongfully withholds property belonging to the beneficiary, as alleged here, the cause of action does not accrue until "the date the trustee breaches or repudiates the agreement to transfer the property." *Maric Piping v Maric*, 271 AD2d 507, 508 (2nd Dep't 2007). Richard never repudiated, she claims.

What is more, Kimberly asserts Richard repeatedly reconfirmed his promise, which started any statute of limitations running anew. The reconfirmation included the November 15, 2013 Codicil to Richard's February 1993 Will, signed by Richard and his wife before two witnesses well within the six-year limitations period (NYSCEF Doc. No. 189). There, Richard states he is "holding an ownership interest in the jewelry company Sequin, LLC for [his] daughter Kimberly C. Renk, (Dryer) which [he] intend[s] to transfer to her as soon as possible." Richard testified about this Codicil at his deposition on April 15, 2019 (NYSCEF Doc. No. 193, at 300:19, 302:14).¹ Kimberly also cites Linda's deposition testimony purportedly acknowledging Richard's ongoing intent to transfer an interest to Kimberly (Memo, pp 14-15).

¹ Kimberly asserts the Statute of Frauds is not applicable because repeated promises were made that could be completed within a year, but the Codicil would in any event qualify as a writing to satisfy the GOL.

Lastly, Kimberly argues her equitable estoppel defense raises issues of fact based on her allegations that she relied to her detriment on representations by Richard of his intent to transfer his interest to her by not filing suit sooner. See *Simcuski v Saeli*, 44 NY2d 442, 448–49 (1978) (“It is the rule that a defendant may be estopped to plead the Statute of Limitations where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action.”)

Defendants reply to each point, arguing, for example, that the Codicil is ambiguous, does not satisfy the GOL, and was revoked, and that the equitable estoppel claim fails as a matter of law. However, this Court finds, after giving Kimberly’s allegations every favorable inference, that plaintiff has succeeded in raising issues of fact that bar the dismissal of her claims as time-barred at this stage of the litigation pursuant to CPLR § 3211(a) (5).

The Court now turns to the request for dismissal pursuant to CPLR § 3211(a) (1) and (7) based on documentary evidence and failure to state a claim. Under CPLR 3211(a)(7), this Court is tasked with determining whether, after affording the pleadings a liberal construction and accepting the allegations in the Amended Complaint as true, “the facts as alleged fit within any cognizable legal theory ... Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” *Leon v Martinez*, 84 NY2d 83, 87-88 (1994) (citations omitted).

Defendants claim the first cause of action for breach of contract against Richard Renk, Sr. fails because Kimberly has not alleged the necessary elements for an enforceable contract and because the claim is belied by the documentary evidence; that is, the 2006 Sequin Meeting Minutes (NYSCEF Doc. No. 180). To establish the existence of an enforceable agreement, “a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an

intent to be bound ...” *Kowalchuk v Stroup*, 61 AD3d 118, 121 (1st Dep’t 2009) (citation omitted). Defendants argue the Complaint falls short on all these point, as the allegations merely state that Richard made a vague promise at some unspecified time to transfer his membership interest to Kimberly in some unspecified manner, with no indication of any consideration being provided by Kimberly. Further, any claim of an enforceable contract is belied by the agenda item in the 2006 Sequin Meeting Minutes which states: “Considerations for gifting and/or sale of membership units by Richard Sr. to R.J. and Kim” and lists related items such as tax consequences and valuation methodology.

Construing the pleadings liberally, the Court finds Kimberly has adequately stated a claim for breach of an oral contract. The oral agreement was reached in 1999 when Sequin was formed, at which time Kimberly, Linda and Richard all allegedly agreed that Richard would hold Kimberly’s 50% interest for her temporarily because her work for a competing company at that time prevented her from then taking the interest (Complaint, ¶¶27-28). Kimberly provided ample consideration by contributing her skills, expertise in costume jewelry, and business relationships and knowledge, all of which were critical to Sequin’s success (¶¶30, 34), and she fully performed her obligations, even allegedly working with no salary for two years. The Complaint alleges repeated breaches by Richard over the years (¶¶38-61) and damages in the loss of the benefits of an ownership interest, including distributions (¶51). There appears to be no definitive bar based on the Minnesota law requiring the consent of other members, as Kimberly alleges the understanding in 1999 was that she owned 50% of Sequin, with Linda’s consent. As for the Meeting Minutes, Kimberly correctly asserts that the Minutes are too vague to constitute documentary evidence defeating her claim as a matter of law. Therefore, dismissal of the breach of contract claim is denied without prejudice to renewal on summary judgment or at trial.

The fourth cause of action seeks a declaration that Kimberly and Linda are equal owners of Sequin and that Kimberly is the owner of a corresponding percentage of the Sequin membership interest. Although the claim is alleged against Richard Jr. and Linda, in addition to Richard Sr., and although it alleges that Richard Sr. wrongfully transferred a 5% interest to Richard Jr., the claim is otherwise duplicative of the breach of contract claim and is dismissed.

Turning to the second and third causes of action, the Court rejects defendants' claim that no fiduciary duty relationship exists. "Family members stand in a fiduciary relationship toward one another in a co-owned business venture." *Braddock . Braddock*, 60 AD3d 84, 88 (1st Dep't 2009), citing *Venizelos v Oceania Mar. Agency*, 268 AD2d 291 (2000); *Birnbaum v Birnbaum*, 73 NY2d 461 (1989). However, as pleaded the fiduciary duty claim is duplicative of the breach of contract claim as it fails to allege conduct by Richard Sr. in breach of a duty other than, and independent of, that allegedly established between the parties in their agreement. *Kaminsky v FSP Inc.*, 5 AD3d 251, 252 (1st Dep't 2004). Thus, both the second cause of action for breach of fiduciary duty by Richard Sr. and the third cause of action against Richard Jr. and Linda for aiding and abetting breach of fiduciary duty are dismissed, as an aiding and abetting claim cannot stand without a breach of fiduciary duty claim.

The fiduciary duty alleged provides sufficient support for the accounting claim in the sixth cause of action and for the seventh cause of action for a constructive trust over plaintiff's membership interest as an alternative to the contract claim. The unjust enrichment claim in the fifth cause of action also stands as an alternative to the breach of contract claim on the theory that all three individual defendants benefitted by receiving distributions that were due to Kimberly. The negligent misrepresentation claim against the three individual defendants in the eleventh cause of action is dismissed as too barebones, despite the parties' special relationship.

The remaining three claims are all fraud-related: the eighth cause of action for fraud against Richard Sr., the ninth for fraud against Richard Jr. and Linda, and the tenth against all the individual defendants for conspiracy to commit fraud. The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff, and damages.” *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009). Defendants assert these elements have not been alleged with sufficient specificity.

The Court finds the fraud claims fail to state a claim. Kimberly points to allegations in her Complaint (¶¶ 114-119) relating to the Codicil her father prepared in 2013, in which he stated that he was “holding an ownership interest in the jewelry company Sequin, LLC for [his] daughter Kimberly C. Renk (Dryer) which [he] intend[ed] to transfer to her as soon as possible.” However, this statement is more of a future promise of performance than a misrepresentation of fact. To the extent it can be viewed as a misrepresentation that Richard Sr. was holding an interest for Kimberly that he always intended to transfer, it is duplicative of Kimberly’s contract claim against her father. *See Smart Egg Pictures v New Line Cinema Corp.*, 213 AD2d 302, 303 (1st Dep’t 1995) (“A contract claim cannot be converted into a fraud claim merely by the expedient of alleging that a contracting party never intended to perform its promise.”)

With respect to the fraud-related claims against Linda and Richard Jr., including conspiracy to commit fraud, Kimberly asserts the Complaint alleges numerous misrepresentations by defendants (¶¶ 2-3, 114, 129-131), most particularly that Linda and Kimberly were earning the same amount of money from Sequin, and that Linda and Richard were not receiving any other benefits when in fact they were each receiving yearly distributions (¶¶ 121-134) and Richard Jr. had received a 5% membership interest in Sequin. Because of the

family relationship, Kimberly claims she justifiably relied on the misrepresentations in delaying legal action and has suffered damages in that she was unable to assert her ownership rights and receive distributions.

These allegations fail to state a fraud claim. Whereas justifiable reliance is oftentimes a question of fact, the First Department has held the question can also be determined on a pre-Answer motion to dismiss, stating in *UST Private Equity Invs. Fund, Inc. v Salomon Smith Barney*, 288 AD2d 87, 88 (2001) that: “As a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it, such as reviewing the files of the other parties.” Here, as a sophisticated business person who played an active role in the management of Sequin for decades, attending company minutes and presumably having access to at least some books and records, the Court finds Kimberly has not pleaded justifiable reliance on any alleged misrepresentations regarding distributions sufficient to state a claim for fraud.

Accordingly, it is hereby

ORDERED that defendants’ pre-Answer motion to dismiss is granted as to the second cause of action for breach of fiduciary duty against Richard Renk, Sr., the third cause of action for aiding and abetting breach of fiduciary duty against Richard Renk, Jr. and Linda Renk, the fourth cause of action for declaratory relief, the eighth cause of action for fraud against Richard Renk, Sr., the ninth cause of action for fraud against Richard Renk, Sr. and Linda Renk, the tenth cause of action for conspiracy to commit fraud against Richard Renk, Sr., Richard Renk, Jr., and Linda Renk, and the eleventh cause of action for negligent misrepresentation against all the defendants, and those claims shall be severed and dismissed; and it is further

ORDERED that the motion is denied as to the first cause of action for breach of contract against Richard Renk, Sr., the fifth cause of action for unjust enrichment against all defendants, the sixth cause of action for an accounting against all defendants, and the seventh cause of action for a constructive trust against all defendants; and it is further

ORDERED that defendants shall efile their Answer by June 22, 2020, and counsel shall thereafter confer and efile a proposed Stipulation and Compliance Conference Order for the completion of all discovery for approval by the Court. A status conference is set for September 11, 2020 at 11:00 a.m. Plaintiff shall file the Note of Issue by September 17, 2020, and the January 4, 2021 trial date stands.

Dated: May 21, 2020

Barry R. Ostrager
BARRY R. OSTRAGER, J.S.C.

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| APPLICATION: | <input type="checkbox"/> GRANTED | | <input checked="" type="checkbox"/> GRANTED IN PART | |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> SETTLE ORDER | | <input type="checkbox"/> SUBMIT ORDER | |
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