

Sunyoung Jung v Reiner & Kaiser Assoc.
2020 NY Slip Op 32256(U)
May 11, 2020
Supreme Court, Queens County
Docket Number: 716240/2018
Judge: Joseph Risi
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FILED

**5/14/2020
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

**COUNTY CLERK
QUEENS COUNTY**

Present: HONORABLE JOSEPH RISI
A. J. S. C.

IA Part 3

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SUNYOUNG JUNG, AS ADMINISTRATOR OF THE
ESTATE OF RAYMOND KAISER a/k/a RAY
KAISER, and derivatively for REINER & KAISER
ASSOCIATES,

Index
Number 716240/2018

DECISION/ORDER

Plaintiffs,

-against-

Sequence Number 1

REINER & KAISER ASSOCIATES LAUREN
ROSEN, as Trustee of LAUREN ROSEN
REVOCABLE TRUST, CYNTHIA KNIGHT,
RACHEL SELIKOFF as Executor of the Estate of
MARTIN SELIKOFF, MARK FLEISCHMAN,
DENISE FLEISCHMAN, ARLENE PUTTERMAN,
DAVID MCGINNIS and RICHARD PUTTERMAN,

Defendants.

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The following numbered papers read on this motion by defendants Lauren Rosen as trustee of the Lauren Rosen Revocable Trust and as a partner of defendant Reiner & Kaiser Associates, Cynthia McKnight, Arlene Putterman, David McGinnis and Richard Putterman pursuant to CPLR §3211(a)(1), (3) and (7) and CPLR §3016(b) for an order dismissing the complaint in its entirety for failure to state a claim against Cynthia McKnight, Arlene Putterman and Richard Putterman; dismissing as premature all causes of action other than the seventh cause of action for a partnership accounting; dismissing the second, third and fourth causes of action as duplicative of the first cause of action; striking all the allegations in the every cause of action that fall outside the applicable statutory limitations period; dismissing any remaining allegations of plaintiff's breach of fiduciary duty and fraud causes of action for failing to plead with the particularity required by CPLR §3016(b); dismissing the fifth cause of action for unjust enrichment because there is a written partnership agreement; and dismissing as much of plaintiff's tenth cause of action as purports to assert a claim for punitive damages and is based upon a verbal agreement.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	EF 25-33
Answering Affidavits - Exhibits.....	EF 36-42
Reply Affidavits.....	EF 43-50

Upon the foregoing papers, it is ordered that this motion is determined as follows:

The plaintiff, Sunyoung Jung, as Administrator of the Estate of Raymond Kaiser, and derivatively for Reiner & Kaiser Associates, commenced this action on October 24, 2018. This case arises out of a partnership agreement. In or about 1967 Raymond Kaiser and Warren Reiner formed Reiner & Kaiser Associates for the primary purpose of cooperative conversion and development at 1 Station Square, Forest Hills, NY, each owning a 50% share. That after the death of Warren Reiner, his 50% was distributed pursuant to the Partnership Agreement and his Will as follows: 26.25% to Lauren Rosen Revocable Trust (Lauren Reiner Rosen, being the daughter of Warren Reiner); 12.50% to Cynthia McKnight; 5% to Martin Selikoff; 1.875% to Mark Fleischman; 1.875% to Denise Fleischman; 1.25% to Arlene Putterman; and 1.25% to Richard Putterman. On or about July 9, 2015, Raymond Kaiser passed way. On December 7, 2016, an estate was opened in Pasco County, Florida for Raymond Kaiser and plaintiff Sunyoung Jung was appointed administrator of the Estate of Raymond Kaiser.

The complaint alleges that Lauren Reiner Rosen did not wish to manage her interest in the Partnership and delegated her responsibility to her husband Lester Rosen. That in 2010 without the authorization of the plaintiff, the defendant David McGinnis began to manage the assets of the Partnership on behalf of the Lauren Rosen Trust. That without the knowledge or authority of plaintiff and in contravention of the Partnership Agreement, David McGinnis, Lester Rosen and Lauren Rosen directed the president and manager of Gabriel Management, the property manager, to draw \$1,500 directly to David McGinnis as a management fee. When plaintiff discovered this management fee in or about January 2011, plaintiff demanded the same \$1,500 draw, which was then authorized and paid each month from February 2011 until December 2012. As a result of a judgment against Raymond Kaiser, between January 2013 and November 30, 2017, the \$1,500 payment and 50% distribution was ordered retained in an escrow account controlled by Gabriel Management. The plaintiff alleges that the president of Gabriel Management had been embezzling money from the account of Raymond Kaiser.

The plaintiff further alleges that between June 2013 and January 2018, Lester Rosen and David McGinnis along with the president of Gabriel Management diverted the \$1,500 monthly distribution of plaintiff to defendant David McGinnis. In addition the defendants never reimbursed a November 15, 2003 income distribution of \$23,500 to plaintiff. The plaintiff further alleges that the defendant David McGinnis paid personal expenses, took trips and paid himself fees that totaled approximately \$217,038.

The plaintiff alleges that the defendant McGinnis is the manager of the Partnership on behalf of the Lauren Rosen Trust. The plaintiff further alleges that the defendant McGinnis was acting on behalf of the plaintiff and the partnership without the plaintiff's consent. That McGinnis held himself out as authorized to act on behalf of the partnership when he was not. That on or about 2016, Leslie Rosen and David McGinnis along with the president of Gabriel Management directed plaintiff's 2015/16 Partnership distribution of \$395,000 to the benefit of defendants. While this amount was repaid to plaintiff on or about November 2017, it was without interest to which the plaintiff is entitled. On or about April 24, 2018, demand was made on the defendants for all amounts claimed owed by the plaintiff and an accounting, but the plaintiff claims to date no adequate response has been received. The plaintiff then commenced this action.

The moving defendants have made this motion to dismiss the complaint against certain of the moving defendants and various causes of action on a variety of grounds. On a motion to dismiss pursuant to CPLR §3211(a)(7) for failure to state a cause of action, a court must accept as true the allegations of the complaint and give the plaintiff every favorable inference to determine if the allegations fit within a cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83 [1994]; *Konidaris v Aeneas Capital Mgt., LP*, 8 AD3d 244 [2d Dept 2004]). In order to be successful on a motion to dismiss pursuant to CPLR §3211(a)(1), the documentary evidence that forms the basis of the defense must resolve all factual issues and completely dispose of the claim (*see Held v Kaufman*, 91 NY2d 425 [1998]; *Teitler v Pollack & Sons*, 288 AD2d 302 [2d Dept 2001]).

First, the defendants have moved to dismiss the entire complaint against the defendants Cynthia McKnight, Arlene Putterman and Richard Putterman. The defendants argue that the complaint does not actually contain any factual allegations of wrongdoing against Cynthia McKnight, Arlene Putterman and Richard Putterman. The defendants are entitled to dismissal of all causes of action other than the causes of action seeking dissolution and accounting as the complaint failed to state a cause of action against Cynthia McKnight, Arlene Putterman and Richard Putterman. The complaint alleges that the defendants Cynthia McKnight, Arlene Putterman and Richard Putterman had ownership interest in the partnership, therefore, they cannot be dismissed from the causes of action seeking dissolution and accounting.

In opposition, plaintiff's states that the crux of its position is that the transfer of the any shares other than those to Lauren Rosen is without effect and void ab initio and therefore the alleged minority shareholders who received distributions are all named as defendants. This argument is without merit. First, the complaint does not actually plead this. There are no allegations that the transfer of the partnership interest by Warren Reiner to shareholders other than Lauren Rosen Trust was invalid. Even giving the plaintiff every benefit favorable inference, it cannot be said that the paragraphs in which plaintiff alleges that "the defendants had and continue to lack the legal right the to transfer any interest in the property" and "failed to obtain approval and consent of plaintiff to make any such transfer" even refer to the transfer of the property to those other than the Lauren Rosen Trust. The complaint gives no factual details of any of these transfers and in fact does not even make reference to them. The complaint only says that at the time of Warren Reiner's death these minority shareholders "then had" an interest in the partnership. There is no allegation of any

kind about the transfer, when it took place or how it was fraudulent. The plaintiff cannot make any argument based upon allegations that were not pled in the complaint. The plaintiff, in response, could have amended the complaint if it wanted to make these new allegations. In any event, the complaint alleges that these transfers had already taken place at the death of Warren Reiner in 1990. These transfer were thus long outside any statute of limitation period.

Furthermore, in reply, the moving defendants have submitted documentary evidence in which the plaintiff's predecessor in interest, Raymond Kaiser acknowledges the partnership transfer to partners other than the Lauren Rosen Trust. Additionally, these submissions appear to show that the transfers other than the 26.25% inherited by the Lauren Rosen Trust, took place during the life of Warren Reiner. While these were submitted in reply they will be considered as they address an issue raised by the plaintiff. Therefore, inasmuch as the complaint has not alleged any wrongdoing against the defendants Putterman and Knight, the individual causes of action must be dismissed against them. Inasmuch as they are alleged to have an interest in the partnership, the causes of action for dissolution and accounting are not dismissed against them.

The moving defendants next seek to dismiss as premature all causes of action other than the seventh cause of action for a partnership accounting. It is well established that an action at law may not be maintained by one partner against another for any claim arising out of the partnership until there has been a full accounting (*see Kriegsman v Kraus, Ostreicher & Co.*, 126 AD2d 489 [1st Dept 1987]). This prohibition, however, only exists where the claim for damages cannot be determined without a review of the partnership's books (*see Le Bel v Donovan*, 96 AD2d 415 [1st Dept 2010]). Here, much of the dispute at issue resolves around whether distributions and payments made were appropriate, made with authority and were proper under the partnership agreement rather than the amounts of those payments and distributions. Furthermore, the plaintiff's counsel in opposition has indicated that the plaintiff has access to the books and records of the partnership. Thus, it appears that most of the allegations do not require an accounting to resolve and, thus, the defendant failed to establish that the other causes of action should be dismissed at this juncture on a motion to dismiss.

The moving defendants seek to dismiss the first, second, third and fourth causes of action on the ground that they are duplicative of each other. While each of these causes of action are for dissolution, they all are based upon different grounds. While the plaintiff could have simply pled one cause of action for dissolution based upon multiple grounds, the plaintiff should not be punished for its failure to do so. Thus, inasmuch as the complaint purports to have multiple causes of action for dissolution, the first, second, third and fourth cause of action should be read to plead a single cause of action but the defendant is not entitled to dismissal of any of the ground pled by the plaintiff.

The defendants have moved to dismiss the cause of action for unjust enrichment. To recover on a cause of action for unjust enrichment, there must be a dispute as to the existence of the contract or the contract does not cover the dispute at issue (*see Clark-Fitzpatrick v Long Island Rail Road Co.*, 70 NY2d 382 [1987]; *Hochman v LaRea*, 14 AD3d 653 [2d Dept 2005]). The moving

defendants argue that this cause of action should be dismissed because it is based upon a breach of the Partnership Agreement. The causes of action cannot be maintained against any defendant with the exception of McGinnis as the complaint alleges they were all acting under the Partnership Agreement. However, the complaint does not allege that the defendant McGinnis was a party to this agreement. In fact, this cause of action is based upon acts outside the Partnership Agreement. Therefore, this cause of action will not be dismissed against the defendant McGinnis.

The defendants seek to dismiss the cause of action for breach of fiduciary duty. The elements of a cause of action for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant and (3) damages directly caused by the defendant's misconduct (*see Smallwood v Lupoli*, 107 AD3d 782 [2d Dept 2013]). Under New York law partners owe each other a fiduciary duty (*Birnbaum v Birnbaum*, 73 NY2d 461 [1989]). Here, the complaint adequately alleged that the defendant Lauren Rosen Trust owed a fiduciary duty to the plaintiff and breached this duty through acts of misconduct, whether by itself or through acts of McGinnis when he may have been acting as an agent of the Trust. Therefore, the complaint stated a cause of action for breach of fiduciary duty against the defendant Lauren Rosen Trust. This cause of action must be dismissed against the defendant McGinnis individually, however, as the complaint does not allege that McGinnis individually owed a fiduciary duty to the plaintiff.

The defendants seek to dismiss the cause of action for fraud. The fraud cause of action was not pled with the necessary level of detail to sustain a fraud claim and must be dismissed (CPLR §3016(b); *Wint v ABN Amro Mtge. Group, Inc.*, 19 AD3d 588 [2d Dept 2005]; *Hartford Cas. Ins. Co. v Vengroff Williams & Assoc.*, 306 AD2d 435 [2d Dept 2003]). In order to state a cause of action for fraud the plaintiff was required to allege (1) that the defendants made material representations that were false or concealed a material existing fact, (2) that the defendants knew the representations were false and made them with the intent to deceive the plaintiff, (3) that the plaintiff was deceived, (4) that the plaintiff justifiably relied on the defendants misrepresentations and (5) that the plaintiff was injured as a result of the representations (*Watson v Pascal*, 27 AD3d 459 [2d Dept 2006]). Here, while the plaintiffs allege in the complaint and its opposition papers that defendants Lauren Rosen Trust and McGinnis engaged in inappropriate conduct and that McGinnis held himself out to be representing the Partnership without authority, this did not state a cause of action for fraud. The plaintiff did not plead that she was deceived or that she relied on the misrepresentations and was injured as result of the reliance. Therefore, this cause of action must be dismissed.

While not expressly requested in the notice of motion, the defendant McGinnis seeks to separately dismiss all causes of action at law against him. To the extent the defendant McGinnis argues that it is a judicial admission that he was working as an agent this argument is without merit. While the complaint does state that the defendant McGinnis was hired by the defendant Lauren Rosen Trust, and acted at times in a role of an agent of the Lauren Rosen Trust, the allegations contained in the complaint in a reading of the complaint most favorable to the plaintiff, can be read to find that McGinnis could also have been acting outside of his scope as an agent and in fact diverted funds to himself in his own self-interest. Therefore, the defendant McGinnis is not entitled to dismissal of the complaint against him on the ground that he was an agent for the Lauren Rosen

Trust.

The portion of the tenth cause of action for breach of a verbal partnership agreement is dismissed. The tenth cause of action states that the plaintiff and defendant entered into a verbal partnership agreement and that the defendants breached this agreement. Here, there was a written partnership agreement. Thus the claimed existence of a verbal agreement is contradicted by the written partnership agreement. Additionally there are no factual allegations in the complaint regarding any such verbal agreement. Therefore, this cause of action will be dismissed.

The portion of the tenth cause of action which purportedly seeks punitive damages based upon a breach of contract is dismissed without opposition. The complaint does allege such gross, wanton or willful conduct or of such high moral culpability as to warrant an award of punitive damages (*see Connecticut N.Y. Light. Co. V Manos Bus. Mgt. Co., Inc.*, 171 AD3d 698 [2d Dept 2019]).

The moving defendants seek to limit the allegations in the complaint to the applicable statute of limitations periods for each of the remaining cause of action. The complaint alleges various allegations that cover a range of period since 1990. Much of the allegations used to support some causes of action fall outside the scope of the applicable statute of limitation period. The fifth cause of action for unjust enrichment seeks monetary damages, therefore there is a three-year statute of limitation under CPLR §214(3) (*see Ingrami v Rovner*, 45 AD3d 806 [2d Dept 2007]). Under CPLR §214(3) the statute of limitations for conversion is three years running from the date the conversion took place (*see Obstfeld v Thermo Niton Analyzers, LLC*, 168 AD3d 1080 [2d Dept 2019]). The cause of action for breach of fiduciary duty is also limited to a three year statute of limitation. Thus, any allegation prior to October 24, 2015 relating to the unjust enrichment, breach of fiduciary duty and conversion claims are barred. The argument by plaintiff that the statute of limitations for these causes of action should be no less than six years because they are based on fraud is without merit. While a fraud cause of action does have a six year statute of limitations, the other causes of action do not get an extension of the statute of limitations simply because some acts maybe fraudulent.

The cause of action for an accounting is six years under CPLR §213. The claim, however, does not begin to run until there is either an open repudiation of the fiduciary's obligation or a judicial settlement of the fiduciary's account (*see Evangelista v Mattone*, 44 AD3d 704 [2d Dept 2007]). Here, on a motion to dismiss the defendants did not establish that either an open repudiation or judicial settlement has occurred (*see Matter of Behr*, 191 AD2d 431 [2d Dept 1993]). Therefore, the statute of limitations does not bar or limit this cause of action at this time.

Accordingly, the branch of the motion to dismiss the complaint against Cynthia McKnight, Arlene Putterman and Richard Putterman in its entirety is granted to the extent that all causes of action except the causes of action for an accounting and dissolution are dismissed against them.

The branch of the motion to dismiss as premature all causes of action other than the seventh cause of action for a partnership accounting is denied.

The branch of the motion to dismiss the first, second, third and fourth causes of action as duplicative is denied.

The branch of the motion dismissing the fifth cause of action for unjust enrichment is granted against the defendants Lauren Rosen Revocable Trust, Cynthia McKnight, Arlene Putterman and Richard Putterman but denied against the defendant David McGinnis.

The branch of the motion dismissing the sixth cause of action for breach of fiduciary duty is granted as against the defendants David McGinnis, Cynthia McKnight, Arlene Putterman and Richard Putterman, but denied as against the defendant Lauren Rosen Revocable Trust.


The branch of the motion dismissing the eighth cause of action for fraud is granted and this cause of action is dismissed.

The branch of the motion to dismiss the tenth cause of action for breach of an oral agreement and punitive damages is granted and that cause of action is dismissed.

The branch of the motion to strike all allegations in every cause of action remaining that fall outside of the applicable statute of limitations period is granted to the extent that any allegation prior to October 24, 2015 relating to the unjust enrichment, breach of fiduciary duty and conversion claims are barred.

This is the decision and order of the Court.

Dated: May 11, 2020



Hon. Joseph Risi, A.J.S.C.

FILED

**5/14/2020
10:37 AM**

**COUNTY CLERK
QUEENS COUNTY**