

**3130 Brighton 6th St. Owners, Inc. v Pesochinsky**

2021 NY Slip Op 30201(U)

January 22, 2021

Supreme Court, Kings County

Docket Number: 517804/2019

Judge: Loren Baily-Schiffman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 22<sup>nd</sup> day of January, 2021.

**PRESENT: HON. LOREN BAILY-SCHIFFMAN**

JUSTICE

3130 BRIGHTON 6<sup>TH</sup> STREET OWNERS, INC.,  
Plaintiff,

- against -

YAKOV PESOCHINSKY and BAY SHORE GARDENS  
OWNERS, INC.,  
Defendants.

Index No.:517804/2019

Motion Seq. # 3 & 4

DECISION & ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion:




	<u>PAPERS NUMBERED</u>
Pesochinsky's Notice of Motion, Affirmation & Exhibits (#3)	1
Pesochinsky's Memorandum of Law in Support	2
Bay Shore's Notice of Motion, Affirmation & Exhibits (#4)	3
Bay Shore's Memorandum of Law in Support	4
Plaintiff's Affirmation & Exhibits in Opposition	5
Plaintiff's Memorandum of Law in Opposition (#s 3 &4)	6
Pesochinsky's Reply Memorandum of Law	7

Upon the foregoing papers Defendant, YAKOV PESOCHINSKY (Pesochinsky), moves this Court for an Order pursuant to CPLR §3211(a)(7) dismissing the first and second causes of action in Plaintiff's Amended Complaint. (Motion Sequence #3). Defendant, BAY SHORE GARDENS OWNERS (Bay Shore), moves this Court for an Order pursuant to CPLR §3211(a)(1), CPLR § 3211(a)(5), § 3211(a)(7)and CPLR § 3016(b) dismissing the first, second, third and fourth causes of action in the Amended Complaint. (Motion Sequence # 4).

Background

Plaintiff, 3130 BRIGHTON 6<sup>TH</sup> STREET OWNERS, INC. (3130), a cooperative housing corporation located in Brooklyn, filed the Amended Complaint on or about May 27, 2020.

Defendant, Bay Shore is also a residential cooperative located in Brooklyn. According to Plaintiff, Pesochinsky served as a director and/or officer of the Board of Directors of both co-ops, simultaneously. Plaintiff further alleges that from approximately 2014 through 2017, Pesochinsky unlawfully made withdrawals from 3130's operating account and deposited those monies into accounts owned by Defendant Bay Shore. Prior motions were made by Defendants pursuant to CPLR § 3211 (a) (7) and in Orders dated and filed February 20, 2020 and February 26, 2020, respectively, this Court dismissed the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 8<sup>th</sup> causes of action and a portion of the 9<sup>th</sup> cause of action in the original complaint as against Defendant Pesochinsky. Bay Shore moved to dismiss the original complaint in its entirety and that relief was also granted in the prior Order of this Court.

Pesochinsky argues that Plaintiff's Amended Complaint must be dismissed because the action was commenced after the applicable statute of limitations expired. New York law does not provide a single statute of limitations for breach of fiduciary duty claims. Rather, the choice of the applicable limitations period depends on the substantive remedy that the plaintiff seeks. Where the remedy sought is purely monetary in nature, courts construe the suit as alleging 'injury to property' within the meaning of  CPLR § 214 (4) and the three-year limitations period applies. Where, the relief sought is equitable in nature, the six-year limitations period of  CPLR § 213 (1) applies. ***LMEG Wireless, LLC, et al., v Menachem Farro, 2021 NY Slip Op 00164 (2d Dept Jan. 13, 2021); DiRaimondo v Calhoun, 131 AD3d 1194, 1196 (2d Dept 2015), citing  IDT Corp. v Morgan Stanley Dean Witter & Co., 12 NY3d 132, 139 (2009).***

Plaintiff's 1<sup>st</sup> cause of action against Pesochinsky for Breach of Fiduciary Duty seeks only monetary damages, not equitable relief. The 3<sup>rd</sup> and 4<sup>th</sup> causes of action against Bay Shore for

Aiding and Abetting Breach of Fiduciary Duty and Money Had and Received, respectively, both seek only monetary damages. Accordingly, a three-year limitations period applies to the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> causes of action. However, in the instant action CPLR § 205 (a) applies because Plaintiff served an amended complaint within six months after this Court's Order dismissing certain causes of action against Pesochinsky and the entire action as against Bay Shore. CPLR § 205 (a) provides in relevant part:

If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.

Courts have consistently held that CPLR § 205 (a) is applicable to cases that have been dismissed for failure to state a cause of action. ***Sullivan v. Nimmagadda, 63 A.D.3d 908, (2d Dept 2009)***. The Court of Appeals set forth the rationale for permitting the filing of a new complaint in ***175 East 74th Corp. v. Hartford Accident & Indemnity Co. 51 N.Y.2d 585, 590 (1980)***. The Court stated therein that because the first motion attacked the sufficiency of the complaint, alleging that it failed to state a cause of action, such a dismissal would only have a preclusive effect on new complaint if it failed to correct the defect or supply the omission determined to exist in the earlier complaint. ***Id.*** Therefore, since the original action in the case at bar was commenced on or about August 13, 2019, any portion of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> causes of action accruing prior to August 13, 2016 are barred by the Statute of Limitations. The 2<sup>nd</sup> cause of action for an Accounting has a six-

year statute of limitations since the requested relief was equitable in nature. Therefore the 2<sup>nd</sup> cause of action against Defendant Pesochinsky is not time barred.

The law is well settled that conclusory allegations are insufficient to establish elements of a cause of action, as required by the statute, and are insufficient to defeat a motion for judgment as a matter of law. *Aur v Manhattan Greenpoint Ltd.*, 132 AD3d 595 (2015); *Anesthesia Assoc. of Mount Kisco, LLP v Northern Westchester Hosp. Ctr.*, 59 AD3d 473, 476-477 (2d Dept 2009). CPLR § 3016 (b) is satisfied when the facts suffice to permit a “reasonable inference” of the alleged misconduct. The strength of the requisite inference will vary based on the facts and context of each case. *Eurycleia Partners, LP v Seward & Kissel, LLP supra at 560-61.*

If from the four corners of the complaint “factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail.” *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). The law is well established that a court considering a motion to dismiss must both accept as true the allegations in the complaint and afford the plaintiff the benefit of every possible favorable inference. *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994); *Great Eagle Intl. Trade, Ltd. v. Corporate Funding Partners, LLC*, 104 AD3d 731 (2d Dept 2013).

Plaintiff’s Amended Complaint reiterates that each cause of action is brought pursuant to BCL§ 720. BCL § 720 (a) (1) states in relevant part that an action may be maintained against an officer or director of a corporation to compel the defendant to account for the neglect or failure to perform, or other violation of his duties in the management and disposition of corporate assets committed to his/her charge, whether by loss or waste, transfer to

him/herself or others. A fiduciary relationship is “necessarily fact-specific” and is grounded in a higher level of trust than normally present in the marketplace between those involved in arms-length business transactions. ***Oddo Asset Management v Barclays Bank PLC*, 19 NY3d 584, (2012)**. Courts have consistently held that the statutory language of BCL § 720 (a)(1)(B) includes corporate waste as a component of Breach of Fiduciary Duty. ***Yuan San Shih v Ji Yong Kim*, 54 Misc3d 1223 (A) (S. Ct., Queens County, 2017), citing 770 Owners Corp. v Spitzer, 25 Misc3d 1204(A), (S. Ct., Kings County, 2008)**.

"The elements of a cause of action to recover damages 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." ***Stortini v Pollis*, 138 AD3d 977, 978-979 (2d Dept 2016), citing *Deblinger v Sani-Pine Prods Co Inc*, 107 AD3d 659, 660 (2d Dept 2013)**. Members of a board of directors of a corporation “owe a fiduciary responsibility to the shareholders in general and to individual shareholders in particular to treat all shareholders fairly and evenly.” ***Schwartz v Marien*, 37 NY2d 487, 491 (1975); *Armentano v Paraco Gas Corp*, 90 AD3d 683, 684–685 (2d Dept 2011); *Deblinger v Sani-Pine Prods Co Inc*, *supra* at 659**.

In the instant action the Plaintiff has corrected the defects and omissions that existed in the 1<sup>st</sup> and 3<sup>rd</sup> causes of action as appeared in the original complaint. Plaintiff has sufficiently supported each element of the Breach of Fiduciary Duty, 1<sup>st</sup> cause of action, as against Defendant Pesochinsky and the Aiding and Abetting the Breach of Fiduciary Duty, 3<sup>rd</sup> cause of action, as against Defendant Bay Shore in the Amended Complaint. Plaintiff has set forth the factual allegations containing the details constituting the wrong as required

by CPLR § 3016(b). ***Cadet-Duval v Gursim Holding, Inc.*, 147 AD3d 718, 719–20 (2d Dept 2017), citing *Stortini v. Pollis*, 138 A.D.3d 977, 978 (2d Dept 2016); *Morgan Chase Bank, N.A. v. Hall*, 122 A.D.3d 576, 579, (2d Dept 2014).**

An accounting is an equitable remedy which a party may seek only where he or she can establish “the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest.” ***Gorunkati v. Baker Sanders, LLC*, 179 AD3d 904, 905–906 (2d Dept 2020), citing *Bonanni v. Horizons Invs. Corp.*, 179 AD3d 995, 997 (2d Dept 2020).** In order to obtain an accounting, a plaintiff must show that there was some wrongdoing on the part of a defendant with respect to the fiduciary relationship concerning property in which the plaintiff has an interest. ***Benedict v Whitman Breed Abbott & Morgan*, 110 AD3d 935, 938; (2d Dept 2013).** To state a viable cause of action for an accounting, a plaintiff must also allege that he or she demanded an accounting, which the defendant refused to provide. ***Mawere v. Landau*, 130 AD3d 986, 990 (2d Dept 2015).** Plaintiff has alleged that an accounting was demanded of Defendant Pesochinsky and therefore has properly plead all the elements required for an Accounting cause of action (2<sup>nd</sup>).

The essential elements of a cause of action for Money Had and Received are: (1) the defendant received money belonging to the plaintiff; (2) the defendant benefitted from receipt of the money; and (3) under principles of equity and good conscience, the defendant should not be permitted to keep the money. ***Goel v. Ramachandran*, 111 A.D.3d 783, 790, (2d Dept 2013).** In the Amended Complaint Plaintiff sufficiently set forth the necessary elements of a cause of action for Money Had and Received as against Defendant Bay Shore.

The parties' remaining contentions are without merit.

Accordingly, it is

ORDERED, that Defendant Pesochinsky's motion is denied in its entirety

ORDERED, that Defendant Bayshore's motion to dismiss the complaint is denied in its entirety.

This is the Decision and Order of the Court.

ENTER



---

LOREN BAILY-SCHIFFMAN  
JSC