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

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MICHAEL ROSENBERG,

Plaintiff,

- v -

R & B REALTY GROUP LLC, ARON ROSENBERG, BERNATH & ROSENBERG, P.C.

Defendants.

INDEX NO. 654296/2020

MOTION DATE 11/12/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 15, 17, 18, 19, 20

were read on this motion to DISMISS.

Plaintiff Michael Rosenberg ("Michael") alleges that since 2012, he has not received any income distributions from Rose & Berg Realty LLC ("Rose & Berg"), an entity whose managing member is his brother, Aron Rosenberg ("Aron").

Michael, individually and derivatively on behalf of Rose & Berg, asserts multiple claims against Aron for accounting (First Cause of Action), breach of fiduciary duty (Second Cause of Action), and stealing corporate entity opportunities (Third Cause of Action). Michael also asserts claims against Bernath & Rosenberg, P.C. ("B&R"), an accounting firm, for breach of fiduciary (Fifth Cause of Action), and aiding and abetting Aron's alleged breach of fiduciary duty (Sixth Cause of Action). B&R moves to dismiss those claims. For the reasons discussed below, B&R's motion to dismiss is granted.

Background

As alleged in the Complaint (and thus taken as true for purposes of this motion), B&R is a certified public accounting firm that has provided services to Michael, Aron, and Rose & Berg. (Complaint ("Compl.") ¶¶18, 31, 33, 64 [NYSCEF 1]).

Aron is the managing member of Rose & Berg. (*Id.* ¶29). For many years, Michael received income distributions and K-1 tax documents from Rose & Berg. (*Id.* ¶12). In or around 2014, Michael expressed concerns about not receiving K-1s for tax year 2013, and his wife contacted B&R to inquire about the missing tax documents. (*Id.* ¶18). Subsequently, Michael received a letter from B&R, dated September 15, 2014, which stated: "Based on information provided to us, Rose & Berg Realty LLC had no activity since 2012 and therefore there will be no tax returns filed in 2013 or in the future." (*Id.* ¶19; *see also* Compl. Ex. A [NYSCEF 2]).

Michael claims that he has not received any distributions from Rose & Berg since 2012, has not received K-1 tax statements relating to his interest in Rose & Berg since 2013, and has not had access to Rose & Berg's books and records. (*Id.* ¶¶26, 33). During this period, Rose & Berg was allegedly still operating and generating income, and all other members, except for Michael, continued to receive distributions. (*Id.* ¶¶20-22).

In the Complaint, Michael, individually and derivatively on behalf of Rose & Berg, brings various causes of action against Aron, Defendant R & B Realty Group LLC, and Defendant B&R. As relevant to this present motion, Michael asserts claims against B&R for breach of fiduciary duty (Fifth Cause of Action) and for aiding and abetting Aron's breach of fiduciary duty (Sixth Cause of Action). Specifically, Michael alleges that B&R had a fiduciary duty towards him because they were his personal accountants. (*Id.* ¶64).

According to the Complaint, B&R allegedly breached its fiduciary obligations by (1) deceiving Michael on behalf of Aron, (2) mispresenting that Rose & Berg had no activity since 2012, (3) "surreptitiously" supporting Aron during the brothers' various family disputes, and (4) abruptly terminating its relationship with Michael for "no legitimate reason." (*Id.* ¶¶65-67).

Separately, Michael asserts that B&R aided and abetted Aron's breach of fiduciary duty. Michael alleges that Aron breached his fiduciary obligations to him as a member of Rose & Berg by failing, since 2012, to make the proper income distributions and provide the relevant K-1 tax documents. (*Id.* ¶¶47, 76). According to the Complaint, Aron directed B&R to not provide Michael with tax documents and to deny Michael access to the books and records of Rose & Berg. (*Id.* ¶73). Furthermore, B&R was "aware" of Aron's fiduciary duty to provide members of Rose & Berg, including Michael, with proper income distributions and tax documents. (*Id.* ¶¶75-76). B&R allegedly aided and abetted Aron by (1) misleading Michael as to the continued operations of Rose & Berg subsequent to 2012, and (2) deliberately not sending Michael tax documents and records relating to Rose & Berg. (*Id.*¶¶77-78).

Michael seeks monetary relief in connection with his breach of fiduciary duty and aiding and abetting claims against B&R. (*Id.* ¶¶68, 79). B&R moves to dismiss both claims for failure to state a cause of action pursuant to CPLR 3211 [a] [7].

Discussion

On a motion to dismiss pursuant to CPLR 3211 [a] [7], the Court must afford the Complaint a liberal construction, accepting as true the facts alleged, according the plaintiff the benefit of every favorable inference, and determining whether the facts, as alleged, fit within any cognizable legal theory. (*See Maddicks v Big City Props., LLC*, 34 NY3d 116, 123 [2019], *Leon v Martinez*, 84 NY2d 83,87-88 [1994], *C.H.A. Design Export (H.K.) Ltd. v Miller*, 191 AD3d

459, 459 [1st Dept 2021], citing *Kralic v Helmsley*, 294 AD2d 234, 235 [1st Dept 2002]). Allegations consisting of "bare legal conclusions, as well as factual claims flatly contradicted by documentary evidence" are insufficient to survive a motion to dismiss. (*See Myers v Schneiderman*, 30 NY3d 1, 11 [2017], *Simkin v Bank*, 19 NY3d 459, 462 [2012], *Bondi v Beekman Hill House Apt. Co.*, 257 AD2d 76, 81 [1st Dept 1999], *aff'd* 964 NY2d 659 [2000]).

Breach of Fiduciary Duty

Under New York Law, to state a claim for breach of fiduciary duty, a plaintiff must allege (1) the existence of a fiduciary relationship, (2) misconduct by the other party, and (3) damages directly caused by that party's misconduct. (*Castellotti v Free*, 138 AD3d 198, 209 [1st Dept 2016], citing *Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]). A cause of action sounding in breach of fiduciary duty must be pleaded with particularity. (*Bitter v Renzo*, 39 Misc3d 1208[A], 2012 NY Slip Op 52455[U], *10 [Sup Ct, NY County 2012], *aff'd* 101 AD3d 465 [1st Dept 2012], citing CPLR 3016 [b]).

As a general matter, accountants are not fiduciaries as to their clients. (*Bitter v Renzo*, 101 AD3d 465 [1st Dept 2012]; *Able Energy, Inc. v Marcum & Kliegman LLP*, 69 AD3d 443, 444 [1st Dept 2010]; *DG Liquidation v Anchin, Block & Anchin*, 300 AD2d 70, 71 [1st Dept 2002]). Accountants have a duty to perform within the scope of professional accounting standards, which "generally go beyond simple auditing and bookkeeping" and can involve "financial management and planning advice." (*Friedman v Anderson*, 23 Ad3d 163, 165 [1st Dept 2005]. However, a conventional business relationship between an accountant and her clients does not transform into a fiduciary relationship by mere allegation. (*Reville v Melvin Ginsberg & Assocs.*, 2017 NY Slip Op 30821[U], *9 [Sup Ct, NY County 2017], citing *Friedman*, 23 AD3d at 166).

In limited circumstances, New York courts have construed an accountant-client relationship as a fiduciary relationship where the accountant is directly involved in managing his or her client's investments. (*Caprer v Nussbaum*, 36 Ad3d 176, 194 [2d Dept 2006]; *see also Lavin v Kaufman, Greenhut, Lebowitz & Forman,* 226 AD2d 107, 108 [1st Dept 1996]; *Kanev v Turk*, 187 Ad2d 395, 395 [1st Dept 1992]). Additionally, courts have found the presence of a fiduciary relationship where there is a "higher level of trust than normally present . . . in arm's length business transactions" between the parties. (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *see also Lavin*, 226 AD2d at 108). For instance, in *Lavin*, the First Department sustained a cause of action for breach of fiduciary duty where the plaintiff's accountant "made all investment decisions for her from 1976 to 1992" and the plaintiff "always followed [the defendant's] advice and routinely signed whatever financial or tax documents [the defendant] suggested." (*Lavin*, 226 AD2d at 108). Moreover, in *Lavin*, the plaintiff's relationship with the defendant-accountant was one of "total trust and reliance" and the defendant, nonetheless, "concealed pertinent information about [the plaintiff's] investments." (*Id.*).

In addition, "where the allegations include knowledge and concealment of illegal acts and diversions of funds and failure to withdraw in the face of a conflict of interest, . . . a [breach of fiduciary duty] cause of action against an accountant will be permitted to stand." (*Gerzog v Goldfarb*, 2020 NY Slip Op 32059[U], *3 [Sup Ct, NY County 2020], citing *Nate B. & Frances Spingold Found. v Wallin, Simon, Black & Co.*, 184 AD2d 464, 465-66 [1st Dept 1992]).

Here, the factual allegations, taken as true, do not support the legal conclusion stated in the Complaint that Michael and B&R had a fiduciary relationship. Specifically, Michael alleges that "in or around 2014," B&R was his accountant. (Compl. ¶18). Moreover, Michael alleges

that between the years of 2012-2014, B&R had prepared tax documents for him in connection with his ownership interest in Rose & Berg. (*Id.* ¶¶17,19). In addition to serving as Michael's accountants, B&R has allegedly provided accounting services to Aron, Rose & Berg, and other Rosenberg family businesses. (*Id.* ¶¶18, 31, 33; *see also* Plaintiff's Reply Memorandum ("Plaintiff's Rep. Memo"), at 6 [NYSCEF 19] ["[B&R] is the accountant for Aron and various entities owned or controlled by various Rosenberg family members. . . ."].

B&R's alleged activities—serving as Michael's personal accountant and preparing his K-1 tax documents—establish only that B&R and Michael had a conventional professional relationship, not a fiduciary one. Nowhere in the Complaint does Michael allege that B&R was directly involved in managing his personal investments, as the defendant-accountant had in *Lavin* and *Kanev*.[1] Instead, Michael simply alleges, in conclusory fashion, that B&R "had a fiduciary duty towards [him] since they were his personal accountants." (Compl. ¶65).

Moreover, the parties' accountant-client relationship was intermittent and discontinuous. The Complaint alleges that B&R was Michael's accountant in 2014. (Compl. ¶18; *see also* Michael Rosenberg Affirmation ("Rosenberg Aff.") ¶9 [NYSCEF 17]). Separately, Michael states that he requested B&R to provide accounting services for him and his business entitles at the end of 2015, (Rosenberg Aff. ¶12), and that B&R provided these services from 2016-2018 after Michael re-hired them in 2016. (*Id.* ¶¶13,14). These allegations are insufficient to establish the existence of a fiduciary relationship between B&R and Michael. (*See Reville,* 2017 NY Slip Op 30821[U], *18 ["To trust one's accountant to provide reliable services typically

[1] At oral argument, Plaintiff's counsel confirmed that B&R were Michael's accountants, not his personal financial or trusts and estates advisors (NYSCEF 23 [oral argument transcript] at 20:14-22).

within the scope of accounting work does not transform a conventional professional relationship into a fiduciary one."]).

With a nod to *Lavin*, Michael argues in his reply brief that he placed "total trust and reliance upon [B&R] because of their long-standing relationship with his family and all the family-owned entities." (Plaintiff's Rep. Memo, at 5). However, as noted above, the *Lavin* case is distinguishable from the present case. In *Lavin*, the defendant-accountant "continuous[ly] represent[ed]" the plaintiff in her individual capacity for a period of 16 years. (*Lavin*, 226 Ad2d at 108). Because of the parties' longstanding relationship, and the discretionary authority the defendant-accountant had over the plaintiff's personal investments, it was reasonable to conclude that the plaintiff placed total trust and reliance upon the defendant's advice going beyond the traditional accountant-client relationship. (*Id.* at 108-09). Unlike in *Lavin*, here, the Complaint does not set forth allegations that Michael and B&R (independent of B&R's relationship with the Rosenberg family and its business entities) had a relationship analogous to that of the parties in *Lavin*. Furthermore, the Complaint does not set forth any allegations that B&R had discretionary authority to manage Michael's personal investments. As such, Michael's conclusory assertion that he placed "total trust and reliance" in B&R is insufficient to convert an otherwise typical accountant-client relationship into a fiduciary one.

Nate B. & Frances Spinghold Foundation v Wallin, Simon, Black & Co., 184 AD2d 464 [1st Dept 1992], is not to the contrary. In *Nate B.*, the plaintiff, a non-profit charitable organization, commenced an action against its director and CEO for allegedly misappropriating and diverting more than $6 million in company funds to his law firm over a 13-year period beginning in 1975. (*Id.* at 465). The plaintiff also asserted a breach of fiduciary duty claim against its accounting firm, which provided services to both the plaintiff and its CEO's law firm

during the same period. (*Id.*). The First Department sustained the plaintiff's breach of fiduciary cause of action against its accounting firm because the "allegations include[ed] knowledge and concealment of illegal acts and diversion of funds, and failure to withdraw in the face of a conflict of interest." (*Id.*).

Relying on *Nate B.*, this Court in *Gerzog v Goldfarb*, 2020 NY Slip Op 32059[U] [Sup Ct, NY County 2020], held that the plaintiff stated a viable breach of fiduciary duty against his law firm's accountant. (*Gerzog*, 2020 NY Slip Op 32059 [U], *2). In *Gerzog*, the plaintiff alleged in the Complaint that defendant Migden, a certified public accountant, "disguised hundreds of thousands of dollars per year of [defendant] Goldfarb's personal charges on the Firm credit cards . . . as 'case preparation' expenses'" and then erroneously wrote these expenses "off the Firm's income so that Plaintiff would believe the Firm's overall income—and thus Plaintiff's share—was substantially lower than it was." (*Id.* at *1). Accepting these allegations as true, this Court found that "Migden was aware that Goldfarb was diverting money from the partnership and that such diversion had a direct and adverse impact on Gerzog's income as reflected in his personal income tax returns prepared by Migden." (*Id.* at *2). Because Migden experienced the same conflict as the accountants in *Nate B.*, this Court held that he was subject to a claim for breach of fiduciary duty. (*Id.*).

Here, the allegations in the Complaint do not establish that B&R was burdened by the same conflict as the defendant-accountants in *Nate B.* and *Gerzog*. The Complaint alleges that B&R breached their fiduciary obligations to Michael by "deceiving him" on behalf of Aron, "mispresenting" that Rose & Berg had no activity since 2012, and terminating its relationship with him for "no legitimate reason." (Compl. ¶¶65-66). There are no allegations in the Complaint that B&R participated in any illegal acts, or assisted Aron in diverting funds away

from Michael, as the defendant-accountants allegedly did in *Nate B.* and *Gerzog*. Moreover, as previously discussed, B&R did not consistently provide accounting services to Michael during the period when Michael alleges he did not receive income distributions or tax documents from Rose & Berg. (*Id.* ¶26). When B&R was in fact providing accounting services to Michael in 2018, (Rosenberg Aff. ¶¶13,14), B&R withdrew from its engagement upon becoming aware of a conflict of interest with Aron and the other Rosenberg entities. (*See* Benjamin Burger Affirmation ("Burger Aff.") ¶6 [NYSCEF 6]; Ex. 3 to Burger Aff. [NYSCEF 8] (email from Mr. Burger to Michael, dated April 19, 2018, detailing B&R's withdrawal of representation)). As such, the present case is distinguishable from *Nate B.* and *Gerzog*.

In conclusion, the allegations in the Complaint do not establish a cause of action for breach of fiduciary duty. Accordingly, Michael's fifth cause of action against B&R for breach of fiduciary duty is dismissed.

Aiding and Abetting Aron's Breach of Fiduciary Duty

Under New York law, to state a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must allege: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach. (*Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]). When bringing a claim for aiding and abetting a breach of fiduciary duty, the allegations must be made with particularity. (*Foley v D'Agostino*, 21 AD2d 60, 64 [1st Dept 1964], citing CPLR 3016 [b]). The defendant must have actual knowledge of the other party's breach, and must have provided "substantial assistance" to the breacher. (*Kaufman*, 307 AD2d at 125-26). "Substantial assistance occurs when [the] defendant affirmatively assists, helps to conceal or fails to act when required to do so, thereby enabling the breach to occur." (*Id.*). The "mere inaction of an

alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff." (*Id.* at 126).

In this case, taking as true the allegations that Aron breached his fiduciary obligations to Michael, the allegations in the Complaint do not indicate that B&R had actual knowledge of Aron's breach. Michael argues that because B&R has provided accounting services to various Rosenberg owned entities over a twenty-year period, B&R "would know if Michael was being cut out of his share" of the profits from such entities—and subsequently, that Aron breached his fiduciary duties to Michael. (Plaintiff's Rep. Memo, at 6). Outside of these general claims, Michael does not plead with specificity that B&R had actual knowledge of Aron's conduct of "failing to make the proper distributions" to Michael. (Compl. ¶47).

In addition, the Complaint falls short of pleading with any specificity that B&R substantially assisted in Aron's alleged breach. Michael alleges that Aron "directed" B&R to "not provide [him] with K-1 statements related to [his] interest in Rose & Berg and to deny [him] access to the books and records of Rose & Berg." (*Id.* ¶73). Furthermore, Michael alleges that B&R was "aware" of Aron's fiduciary obligations to members of Rose & Berg, and thus to Michael, and "nevertheless aided and abetted Aron by misleading [him] as to the continued operations of Rose & Berg subsequent to 2012, and by deliberately not sending [him] the proper K-1 information." (Compl. ¶¶75-77). These allegations do not plead with requisite specificity that B&R affirmatively assisted, knowingly induced, or helped to conceal Aron's breach. (*Compare Gerzog*, 2020 NY Slip Op 32059[U], *2 [finding that the plaintiff's allegations of defendant-accountant's "knowing participation" in the breach were specific enough to survive a motion to dismiss]). Moreover, as previously discussed, the allegations in the Complaint do not establish that B&R and Michael had a fiduciary relationship. Therefore, B&R's alleged

"inaction" by not sending Michael tax documents is insufficient to establish that B&R substantially assisted Aron in his alleged breach of his fiduciary obligations. (*Kaufman*, 307 AD2d at 125-26).

As such, the allegations in the Complaint do not establish a cause of action for aiding and abetting breach of fiduciary duty. Accordingly, Michael's sixth cause of action against B&R for aiding and abetting Aron's breach of fiduciary duty is dismissed. If discovery yields information supporting a viable claim that B&R in fact aided and abetted improper conduct by Aron, Michael can seek leave to amend his Complaint.

Statute of Limitations

As an alternative ground for dismissal, B&R asserts that Michael's fifth and sixth causes of action are time barred by the applicable statute of limitations. Michael alleges that B&R, at the direction of Aron, mispresented the Rose & Berg's business activities since 2012, and failed to provide relevant tax documents since 2013. (*Id.*¶¶65, 67, 77). Michael's claims against B&R were triggered by a letter from B&R, dated September 15, 2014, stating that B&R would not be filing tax returns for Rose & Berg in 2013 or for any year thereafter because the company had no business activity since 2012. (*Id.* ¶19; *see also* Compl. Ex. A). Michael alleges at the time B&R sent him the letter, Rose & Berg was still operating and generating income, and other members were receiving distributions. (*Id.* ¶¶20-21). Giving Michael the benefit of every possible favorable inference, this Court agrees that both causes of action are time barred.

Fifth Cause of Action

Under New York law, there is no single statute of limitations period for breach of fiduciary duty claims. (*Kaufman*, 307 AD3d at 118). Generally, the applicable statute of limitations for breach of fiduciary claims depends on the substantive remedy sought. (*Id.*, citing

Loengard v Sante Fe Indust., Inc., 70 NY2d 262, 267 [1987]; *see also IDT Corp. v Morgan Stanley Dean Ritter & Co.*, 12 NY3d 132, 139 [2009]). When the remedy sought is purely monetary relief, New York courts have considered such actions as alleging "injury to property," to which the three-year statute of limitations of CPLR 214 [4] applies. (*Kaufman*, 307 AD3d at 118, citing *Yatter v William Morris Agency*, 256 AD2d 260, 261 [1998]; *see also Loengard*, 70 NY2d at 266-67). On the other hand, when the relief sought is equitable in nature, the six-year limitations period of CPLR 213 is applicable. (*Id.*).

Moreover, where an allegation of fraud is essential to a breach of fiduciary duty claim, New York courts have applied the six-year statute of limitations under CPLR 213 [8], regardless of the type of relief sought. (*Monaghan v Ford Motor Co.*, 71 AD3d 848, 850 [2d Dept 2010] [citation omitted]). However, "if the fraud allegation is only incidental to the allegation of breach of fiduciary duty, and not essential to it, then the three-year statute of limitations will apply." (*Id.* at 850 [internal citations omitted]). To state a claim for fraud, a plaintiff must allege "that the defendant knowingly misrepresented a material fact for the purpose of inducing reliance upon it, that there was, in fact, justifiable reliance thereon, and that damages resulted." (*New York State Workers' Comp. Bd. v. Consol. Risk Servs., Inc.*, 125 AD3d 1250, 1253-54 [3rd Dept 2015] [internal citations omitted]). Alternatively, New York courts have found that a cause of action for fraud "may be predicated on acts of concealment where the defendant had a duty to disclose material information." (*Kaufman*, 307 AD3d at 120 ["[W]here a fiduciary relationship exists, 'the mere failure to disclose facts which one is required to disclose may constitute actual fraud, provided the fiduciary possesses the requisite intent to deceive.'"]).

Here, Michael seeks monetary relief in connection with his breach of fiduciary duty claim against B&R. (Compl. ¶68). Therefore, the applicable statute of limitations period is three

years, unless an allegation of fraud is essential to the breach of fiduciary duty claim. (*Kaufman*, 307 AD3d at 199).[2] As alleged in the Complaint, Michael's breach of fiduciary duty claim against B&R is not rooted in an allegation of fraud. Although the pleadings allege that B&R "misrepresented . . . that Rose & Berg had no activity since 2012," (*Id.* ¶65), they fail to show that B&R "knowingly mispresented a material fact" for the purpose of inducing Michael's reliance on it. (*New York State Workers' Comp. Bd.*, 125 AD3d at 1250).

Moreover, in cases where New York courts have held that a breach of fiduciary duty is rooted in fraud and have applied the six-year statute of limitations, the defendant had clearly engaged in fraudulent activity. For instance, in *Cusimano v Schnurr*, 137 AD3d 527 [3rd Dept 2016], the defendants had "induced" the plaintiff to sell her stake in a business undertaking, "conspired" to falsify tax filings so that the plaintiff incurred phantom taxes, created fraudulent promissory notes, and engaged in tax fraud. (*Id.*). The allegations against B&R do not rise to that level.

Because Michael seeks monetary relief in connection with his breach of fiduciary claim against B&R, and an allegation of fraud is not essential to the claim, the three-year statute of limitations of CPLR 214 [4] applies. Again, Michael's claim against B&R was triggered in September 2014, and therefore is untimely under the three-year statute of limitations.

Sixth Cause of Action

Michael's cause of action claim against B&R for aiding and abetting Aron's breach of fiduciary duty is also time barred. Under New York law, a "claim that a person aided and abetted a tort is governed by the same statute of limitations that is applicable to the underlying

[2] Michael has not asserted a claim of fraud against B&R, nor against any of the other defendants in this case.

tort allegedly aided and abetted." (*Pomerance v McGrath*, 124 AD3d 481, 484 [1st Dept 2015], *lv dismissed* 25 NY3d 1038 [2015]). Here, the "underlying tort" is Aron's alleged breach of fiduciary duty. (*See* Compl. ¶¶45-48, *Second Cause of Action*). To determine the statute of limitations applicable to the aiding and abetting claim against B&R, the key question to consider is what statute of limitations is applicable to Michael's breach of fiduciary duty claim against Aron. (*See Pomerance*, 124 AD3d at 484).

Michael seeks monetary relief in connection with his breach of fiduciary duty claim against Aron. (Compl. ¶49). Therefore, the three-year statute of limitations, discussed above, governs the breach of fiduciary claim against Aron, absent a showing that an allegation of fraud is essential to the claim. (*Monaghan,* 71 AD3d at 850). In considering the allegations in the Complaint, Michael's breach of fiduciary duty claim against Aron is not sound in fraud. The Complaint alleges that Aron "is the manager of Rose & Berg and is acting as a fiduciary entrusted" to manage Rose & Berg and to make distributions of profits and income to all of Rose & Berg's members. (Compl. ¶46). The Complaint alleges that Aron "has been failing to make the proper distributions to Michael" and therefore "wholly and materially breached his fiduciary obligations" to Michael, a member of Rose & Berg. (Compl. ¶¶47-48). Nowhere in the Complaint has Michael made allegations that are remotely similar to those in *Cusimano v. Schnurr*, where the Third Department found the six-year statute of limitations to be applicable. (See *Cusimano*, 137 AD3d at 530 [finding that the defendants had "induced" the plaintiff to sell her stake in a business undertaking, "conspired" to falsify tax filings so that the plaintiff incurred phantom taxes, created fraudulent promissory notes, and engaged in tax fraud.]).

Because an allegation of fraud is not essential to Michael's breach of fiduciary duty claim against Aron, the three-year statute of limitations under CPLR 214 [4] is applicable. Therefore,

the governing statute of limitations for Michael's aiding and abetting claim against B&R is also three years. Because the cause of action against B&R for aiding and abetting Aron's breach of fiduciary duty accrued no later than in September 2014,[3] it is thus time barred under the three-year statute of limitations.

* * * *

Accordingly, for the foregoing reasons, it is

ORDERED that Defendant B&R's motion to dismiss is **granted**. The claims against B&R are severed and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

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4/9/2021
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

[3] At oral argument, Plaintiff's counsel confirmed that B&R's September 2014 letter, which purportedly stated that Rose & Berg "has wounded down," constitutes what Plaintiff claims to be B&R's "active participation" (NYSCEF 23 [oral argument transcript] at 22.)