SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

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HE CHI, BIAN YIDE, CAO YONGJIE, CHEN MINZHI, CHENG TAO, HU KUN, LIANG JINGQUAN, LUO PENG, MA QIHONG, MA WEIGUO, SONG YING, WANG JIAN, WANG LING, WANG XUEHAI, XIE QIN, YE XIAFEN, ZHANG YULONG

Plaintiff,

- v -

GONGZHAN WU, PAC RIM VENTURE LIMITED, PAC RIM CORPORATION,

Defendant.

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INDEX NO. 653488/2022

MOTION DATE 01/17/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 64, 65

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motion to dismiss filed by defendants GONGZHAN WU, PAC RIM VENTURE LIMITED, PAC RIM CORPORATION is granted in its entirety.

Facts

Plaintiffs are a group of investors that invested in an alleged EB-5 immigrant investment scheme designed and operated by a North Carolina businessman Charles Schoninger. *See* NYSCEF Doc. No. 40 page 1 ¶ 1. The corpus of the alleged scheme was an entity called Northern Riverfront Marina and Hotel LLLP ("NRMH") which developed marinas and restaurants. Schoninger is the managing member of NRMH and hired defendants in the present case as its agent to promote the alleged scheme in China. Defendants acted as a conduit between Schoninger and plaintiffs. The alleged scheme came across major setbacks and encountered several delays, causing plaintiffs to bring suit against Schoninger and various North Carolina entities (NC defendants), claiming they were defrauded. The current suit filed in this Court claims defendants

assisted with the alleged fraudulent conversion of plaintiffs' capital contribution and the compensation received by defendants should be recouped.

Discussion

Plaintiff commenced this action on September 22, 2022. The complaint pleads five causes of action: aiding and abetting fraud and conspiracy to defraud; aiding and abetting conversion; breach of fiduciary duties; conversion; and unjust enrichment. These claims roughly fall into two categories: those based on pre-investment misrepresentations and omissions and those tortious claims resulting from the purported fraudulent inducement. Defendants move to dismiss the compliant in its entirety as barred by the statute of limitations, for failure to state a cause of action and the case lacks necessary parties, and finally the court has no personal jurisdiction over defendants, pursuant to CPLR § 3211 (a)(5), (a)(7), (a)(8) and (a)(10).

Among the above grounds for motion to dismiss, the statute of limitations is a threshold issue, so that will be examined below.

CPLR § 3211(a)(5)

"On a motion to dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the statute of limitations, *a defendant bears the initial burden* of establishing, prima facie, that the time in which to sue has expired. In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff". Further, *plaintiff's submissions in response to the motion "must be given their most favorable intendment"*. *Benn v Benn*, 82 A.D.3d 548 (internal citations omitted, emphasis added).

Aiding and Abetting Fraud and Conspiracy to Defraud, Breach of Fiduciary Duty (The First and Third Cause of Action)

CPLR § 213(8) provides in pertinent part: "*an action based upon fraud*; 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 …discovered the fraud or *could with reasonable diligence have discovered it*."

Plaintiff's fraud-based claims, including aiding and abetting fraud, conspiracy to defraud, and breach of fiduciary duties for failing to convey accurate and complete information to plaintiffs, are based on the same allegations as to pre-investment representations, thus should be governed by § 213(8). See NYSCEF Doc. No. 18, ¶ 143,144. Also see *Aozora Bank, Ltd. v Deutsche Bank Sec. Inc.*, 137 A.D.3d 685, 685. [fraud-based claims including aiding and abetting fraud were dismissed by the trial court and affirmed by the First Department as time-barred by § 213(8)] *Kaufman v. Cohen*, 307 A.D.2d 113, 122. [The discovery accrual rule also applies to fraud-based breach of fiduciary duty claims—1st Dept. 2003]. *Cusimano v Schnurr*, 137 A.D.3d 527, 530. [although the fiduciary duty claims seek monetary relief, the six-year limitations period applies because the claims sound in fraud—1st Dept. 2016].

Plaintiffs allege that: 1) Absent Defendants PRV and Gongzhan's conduct and support, the NC Defendants' conspiracy and fraud could not have been successful; 2) Defendants PRV and Gongzhan assisted in the advancement of the NC Defendants' conspiracy and fraud; 3) Defendants PRV and Gongzhan knew the true facts or demonstrated reckless disregard for the true facts when communicating incomplete or inaccurate information to Plaintiffs, in order to induce their investment and their continued investment in the Project; 4) Defendants PRV and Gongzhan provided substantial assistance to the NC Defendants' scheme by creating, reviewing, and approving of Mandarin translations of the Marketing Materials distributed to the Plaintiffs for the purpose of *inducing their investments*; 5) Defendants PRV and Gongzhan had a special

relationship with Plaintiffs that gave rise to fiduciary duties, with respect to the ongoing affairs of the Project. See NYSCEF Doc. No. 40 page 42 ¶ 142-144; page 44 ¶ 153.

Therefore, pursuant to § 213(8), two pressing issues need to be addressed are: 1) when the cause of action for fraud accrued. 2) when plaintiffs discovered or should have discovered with reasonable diligence, the basis for fraud.

New York law controlling the first issue is clear about when does the clock start ticking. The First Department held that a claim for fraudulent inducement accrues at the time plaintiff "completed the act that the alleged fraudulent statements had induced". *Prichard v. 164 Ludlow Corp.*, 49 A.D.3d 408, 408. [1st Dept 2008]

Here, the act that plaintiffs were induced to complete is to invest in the North Carolina scheme NRMH. The first one among the 17 plaintiffs to sign the subscription agreement and invest in the scheme did so on August 31, 2011, and the last one on February 19, 2013. See NYSCEF Doc. No. 18, ¶ 92. Those two dates bookended the period when the individual claim for fraudulent inducement accrued. Therefore, the current suit should never be filed later than February 19, 2019, the deadline for the last signing investor. But the action was commenced on September 22, 2022, far greater than six years after the accrual of the fraudulent inducement claim. Neither party disputes the fact. Accordingly, these claims are time-barred unless plaintiffs can find a way out by using the so-called "two-year discovery rule" and prove they either cannot discover the alleged fraud before September 22, 2020, or could not have discovered the fraud at all even with due diligence, which brings us to the second issue.

The First Department has held that on "a motion to dismiss a fraud claim based on the two-year discovery rule, *a defendant must make a prima facie case* that a plaintiff was on inquiry notice of its fraud claims more than two years before it commenced the action, … *[t]he burden then shifts*

to the plaintiff to establish that even if it had exercised reasonable diligence, it could not have discovered the basis for its claims before that date." *Epiphany Community Nursery Sch. v Levey*, 171 A.D.3d 1, 7. (internal citations omitted, emphasis added). In the burden-shifting framework, the first step is for the defendant to prove that if put in a similar position, "the circumstances are such as to suggest to *a person of ordinary intelligence* the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, *knowledge of the fraud will be imputed to him*". *Aozora Bank* at 689. (internal citations omitted, emphasis added).

Here, numerous facts found in the complaint should have put plaintiffs on alert that possible fraud had happened, and an inquiry should have been triggered. For example, the marketing materials received by the plaintiffs stated that "*plaintiffs' funds would be used for the development of a marina and hotel complex*, including three restaurants, upon the Project Property" and "construction on the Marina would begin in January 2012 and take a total of 13 months to complete". See NYSCEF Doc. No. 18, ¶ 89 (f), (i). Plaintiffs alleged, however, that "the project almost *immediately* began to experience *severe and costly* delays in construction, … it was not until mid-spring 2014 that the marina was completed and *finally* opened for business". See NYSCEF Doc. No. 40, ¶ 95. The over-a-year construction delay and repetitive guarantees from defendants should have raised a red flag and insinuate that something devious was going on, given the main usage of the funds is to develop the marina. At the very least plaintiffs should have investigated the prolonged delay and asked for an acceptable excuse considering an investment of $500,000 per person was at stake here. Instead, plaintiffs just stayed put and did nothing.

Another ominous sign showed up when the promised annual return from the investment has never been realized since 2014. *Id.* at ¶ 89(j) ("Plaintiffs would receive a Preferred Return of

1% per annum on their investment capital during the Investment Term"); ¶ 99 ("For tax years 2014 through 2019, NRMH provided K-1 forms to each investor which… documented *a consistent annual loss* allocable to each investor of approximately $1,500"); ¶ 107("Despite the fact that the Marina had been operational for almost six years… Plaintiffs had received *numerous excuses but not a single penny* from the Project"). Simply put, the project has never realized a positive return for its investors and up until January 2020, plaintiffs had not generated any income from the scheme. If that is not enough, the request from defendants in January 2020 to extend the investment term again for another two years should function as a wake-up call and trigger a formal investigation into the scheme. By January 2020, the investment term had been extended twice and the scheme had existed for seven years, two more years than the initially agreed five-year lifetime. *Id*. at ¶ 103, ¶ 107. Any person with ordinary intelligence should have realized well before 2020 that this is a scam, and an investigation into defendants is long overdue. Accordingly, defendants have made a prima facie case that plaintiffs should have realized that they had been defrauded and could have discovered the fraud well before September 22, 2020. Now the burden shifts to plaintiffs to establish either that they could not discover the fraud before September 22, 2020, or that they couldn't have done so even if with reasonable care and diligence.

Plaintiffs failed on both fronts. The court does not credit plaintiffs' argument that "they did not have sufficient information to suspect fraud until after they sent the demand letter in April of 2020." See NYSCEF Doc. No. 59, page 15. True, "it is not unreasonable for a real estate development project to underperform or fail to meet stated completion deadlines" and "plaintiffs were in a disadvantaged position pertaining to access to information about the project". *Id*. But that disadvantage should have made plaintiffs be more cautious towards any foreboding sign. The

scheme should have been terminated in February 2018 and the extension beyond that has not been adequately explained.. See NYSCEF Doc. No. 65

The Court also disagrees with plaintiffs' suggestion that no objective standard exists to assess whether a person has a basis to inquire the potential fraud because the question "necessarily involves a dispute over state of mind and conflicting interpretations of perceived events." *Id*. True, here the plaintiffs quoted verbatim from the 1991 case heard by the First Department. See *K&E Trading & Shipping, Inc. v. Radmar Trading Corp.*, 174 A.D.2d 346, 347. But in the same opinion the appellate court also stresses that "(a)n objective test is applied to determine when fraud, with reasonable diligence, should have been discovered." *Id*. To elaborate on the objective test, the First Department went on and confirmed that "to start the limitations period regarding discovery, a plaintiff *need only be aware of enough operative facts* so that, with reasonable diligence, [it] could have discovered the fraud". *Lucas-Plaza Hous. Dev. Corp. v. Corey*, 23 A.D.3d 217, 218. (emphasis added) Therefore, contrary to plaintiffs' contention, the standard to evaluate is clear and objective, not ambiguous or stringent, and that standard has always been whether there is enough operative facts for a person of ordinary intelligence to be alert and inquire into the possible fraud. Waiting for the signs of possible deceit to develop into full-blown fraud is unnecessary.

Besides, a striking difference between the case at bar and *K&E Trading* lies in that plaintiff in the latter case did initiate a formal investigation within the six-year limitations period. The issue in dispute was whether that inquiry could have discovered the purported fraud. Plaintiffs in the present case had never inquired into the consistent loss from 2014 to 2019. Not until April 2020 was the demand letter sent and by which time, the statute of limitations had run. Therefore, *K&E Trading* is inapposite here because the dispositive facts are different.

Since plaintiffs cannot establish that before September 22, 2020, they could not have discovered the basis for their claims even with reasonable diligence, the fraud-based causes of action, including count I and III, are dismissed as time-barred.

Conversion and Aiding and Abetting Conversion (The Second and Fourth Cause of Action)

Generally, conversion is subject to a three-year statute of limitations, which runs from the date of the conversion and not its discovery. See *Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 44. However, *where there is an underlying fraud*, the six-year statute of limitations applies. *Dragons 516 Ltd. v. Knights Genesis Inv. Ltd.*, 2023 N.Y. Misc. LEXIS 38, *41(emphasis added). Also see *D. Penguin Bros. Ltd. v City Natl. Bank*, 158 A.D.3d 432, 433. [Because the complaint asserts causes of action for fraud and conversion, *the longer statute of limitations for fraud applies*—1st Dept. 2018]; *William Doyle Galleries, Inc. v Stettner*, 167 A.D.3d 501, 505. [The cause of action for aiding and abetting conversion, *which was based upon fraud*, was timely under the six-year statute of limitations governing fraud—1st Dept. 2018]

In the complaint, plaintiffs allege that: 1) Defendant PRV received $55,000 per investor recruited to the Project, along with other compensation; 2) the funds for this compensation were derived from Plaintiffs' investment into the Project, including the principal and administrative fees; 3) The actions of Defendants PRV and Gongzhan were crucial to, and substantially materially assisted, the conversion of Plaintiffs' investment capital by the NC Defendants; 4) Defendants PRV and Gongzhan's deceitful conduct substantially and materially assisted the NC Defendants in their conversion of Plaintiffs' $9,720,000 in investment capital. See NYSCEF Doc. No. 40 page 43 ¶ 147, 150; page 45 ¶ 160-161.

Here, both allegations sound in fraud, thus should be governed by CPLR § 213(8). The claim for conversion alleged that the compensation received by defendants came from plaintiffs' investment that were fraudulently obtained by the NC defendants. The claim for aiding and abetting conversion alleged that defendants assisted with the fraudulent conversion of plaintiffs' investment by the NC defendants. As analyzed in the above discussion, all fraud-based claims should be time-barred because they failed to satisfy either the six-year limitations period or the "two-year discovery rule". Therefore, count II and IV should be dismissed as untimely filed.

The First Department case *Swain* cited by plaintiffs is not controlling here because that case is about a replevin claim filed by plaintiff seeking return of a tangible property instead of monetary damages. The difference between a good faith and a bad faith possessor is inapposite because the present case is seeking actual damages resulting from the fraudulent conversion. See *Swain v Brown*, 135 A.D.3d 629, 631. [plaintiff alleges that Defendant is a wrongful possessor of the Artwork by virtue of her retention thereof in defiance of this Court's 1993 order.]

Unjust Enrichment (The Fifth Cause of Action)

"Under New York law, *there is no identified statute of limitations period within which to bring a claim for unjust enrichment*, but where, as here, the unjust enrichment and breach of contract claims are based upon the same facts and pleaded in the alternative, a six-year statute of limitations applies." *Maya NY, LLC v Hagler*, 106 A.D.3d 583, 585 (internal citations omitted, emphasis added) [1st Dept. 2013]. "Plaintiffs' claims of rescission, fraud, fraudulent conveyance, and *unjust enrichment*, are subject to a six-year statute of limitations." *Loreley Fin. (Jersey) No. 3, Ltd. v Morgan Stanley & Co. Inc.*, 2014 N.Y. Misc. LEXIS 4442, *1-2 (internal citations omitted, emphasis added); *Goldberg v Manufacturers Life Ins. Co.*, 242 AD2d 175, 180. [six-year statute governs all claims related to fraud—1st Dept. 1998].

In the complaint, plaintiffs allege that: 1) Defendants PRV and Gongzhan were unjustly enriched at the Plaintiffs' expense; 2) Defendants PRV and Gongzhan were compensated by the NC Defendants for *wrongful acts* that harmed Plaintiffs; 3) Plaintiffs are entitled to the recoupment of any *investment capital wrongfully paid* to the Defendants; 4) Defendants knew their conduct was wrongful and that such conduct would result in harm to the Plaintiffs. See NYSCEF Doc. No. 40 page 46 ¶ 166-169.

Here, the unjust enrichment claim simply flows from the alleged fraudulent conversion by the NC defendants and the compensation received by the defendants. In other words, the unjust enrichment and fraudulent conversion claims are based upon the same facts and pleaded in the alternative, as admitted by plaintiffs ["the same calculus used to ascertain the date of accrual for the conversion claims applies to the unjust enrichment claim." See NYSCEF Doc. No. 59 page 17, the second paragraph]. Therefore, CPLR § 213(8) controls and the claim should be dismissed as time-barred for reasons set forth above.

The Court finds that in the light most favorable to the plaintiff, and for the reasons stated above, none of the five causes of action can survive the statute of limitations provided in CPLR § 213(8). Thus, the Court does not each the remaining contentions of the parties. Accordingly, it is hereby

ORDERED that defendants' motion to dismiss pursuant to CPLR § 3211(a)(5) is granted in its entirety and the Clerk is directed to enter judgment of dismissal.

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4/4/2023
DATE

LYLE E. FRANK, J.S.C.

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

653488/2022 CHI, HE ET AL vs. WU, GONGZHAN ET AL
Motion No. 002