

Idi v Sela

2024 NY Slip Op 31679(U)

May 10, 2024

Supreme Court, New York County

Docket Number: Index No. 651527/2022

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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ELI IDI		INDEX NO.	<u>651527/2022</u>
	Plaintiff,	MOTION DATE	<u>10/22/2022</u>
	- v -	MOTION SEQ. NO.	<u>001</u>
GAL SELA,			
	Defendant.		
		DECISION + ORDER ON MOTION	
-----X			

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 73, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, Gal Sela's cross-motion for summary judgment is granted and Eli Idi's motion for summary judgment is denied because there are no issues of fact warranting further proceeding (*see generally Wilson v Southampton Urgent Med. Care, P.C.*, 112 AD3d 499, 499-500 [1st Dept 2013]).

Relevant Facts and Circumstances

Messrs. Idi and Sela were business partners in, among other things, L Hostels Café LLC and L-Hostels, Inc. (collectively, **L-Hostels**), and 1961 7th Avenue Inc. (**1961**) (NYSCEF Doc. No. 1, ¶¶ 7, 12). In July 2005, 1961 acquired certain real property (the **Property**) located in the City of New York (the **City**) for the purpose of developing a mixed-used condominium building (*id.*, ¶ 16). Construction on the building was complete on or about April 2008 (*id.*).

When 1961's newly developed condominiums failed to sell, the parties formed L-Hostels to operate a hostel at the Property (*id.*, ¶¶ 19-20). The hostel opened in August 2008 and operated for approximately two years until the City deemed the Property not properly zoned for a hostel (*id.*, ¶¶ 21-23).

Approximately three years later (on February 22, 2011), 1961 sold the Property for \$19.5 million (*id.* ¶ 31; NYSCEF Doc. No. 53). According to Mr. Idi, he never received his 50% share of the proceeds (*id.*). He further alleges that Mr. Sela failed to file appropriate tax returns and failed to pay the partnership's outstanding tax liability from the sale with the net proceeds, resulting in an IRS audit (*id.*).

Mr. Idi further alleges that Mr. Sela also diverted business opportunities away from their partnership, siphoned funds from the profits generated by the hostel, paid himself a salary without Mr. Idi's consent, diverted proceeds from construction loans, and took out loans on the Property in order to fund his own business endeavors (*id.*, ¶¶ 17-30). Indeed, according to Mr. Idi, Mr. Sela has refused to account for how funds were being spent both before and after the sale of the Property and has concealed the same in order to fund his own ventures and to pay his own bills (*id.*).

For his part, Mr. Sela denies any financial wrongdoing and asserts that Mr. Idi is making these accusations up in an effort to avoid paying his share of the company's obligations to the IRS (NYSCEF Doc. No. 59, at 1). To wit, Mr. Sela alleges, among other things, that during the course of the IRS audit of 1961's final tax return for 2011 (the year the Property was sold), Mr.

Idi misrepresented to the IRS that he was no longer a shareholder of 1961 in 2011 and that Mr. Sela purchased plaintiff's interest in or about 2009 (*id.*, at 16). Mr. Sela further asserts that Mr. Idi's failure to pay his proportionate share of income taxes due on the sale of the Property, as well as his misrepresentation to the IRS, have resulted in the IRS improperly assessing additional income taxes, interest and penalties on Mr. Sela (NYSCEF Doc. No. 48, ¶¶ 63-66).

Significantly, **more than five years after the alleged conduct allegedly accrued**, the parties agreed to arbitrate their dispute pursuant to an Agreement to Arbitrate dated February 8, 2016 (NYSCEF Doc. No. 9; the **Agreement to Arbitrate**) and an Agreement to Arbitrate Modification Agreement (NYSCEF Doc. No. 11; the **Modification Agreement**) dated July 20, 2016 (the Agreement to Arbitrate together with the Modification Agreement, hereinafter, collectively, the **Arbitration Agreement**). On July 1, 2016, plaintiff filed a Statement of Claim (NYSCEF Doc. No. 2), and the parties thereafter completed discovery, including depositions and the exchange of expert reports.

However, and due to a potential conflict between one of the parties and one of the arbitrators, the parties entered into a stipulation (which was so ordered by the arbitrators; NYSCEF Doc. No. 5; the **Stipulation**), pursuant to which they agreed that (i) Mr. Idi could file an action in this court, limited in scope by the arbitration agreement, the Statement of Claim, and any prior rulings or stipulations reached in the arbitration and (ii) Mr. Idi's claims filed in this court would be deemed filed as of the date they were filed in the arbitration—*i.e.*, July 1, 2016 (*id.*, ¶¶ 1-2, 4).¹

¹ Even were the Court to deem the claims filed as of February 2016, they would still be time barred.
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Motion No. 001

Pursuant to the Stipulation, Mr. Idi then filed this lawsuit asserting causes of action for an accounting, breach of fiduciary duty, unjust enrichment, fraud, and constructive trust. Mr. Sela filed an answer and asserted counterclaims for breach of an implied contract, unjust enrichment, and fraud. As discussed above, both parties have moved for summary judgment.

Discussion

On a motion for summary judgment the movant must make a prima facie showing of entitlement to judgment as a matter of law sufficient to demonstrate the absence of any question of material fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). As discussed below, Mr. Sela has met this burden, and Mr. Idi fails to demonstrate the existence of any material fact preventing the award of summary judgment.

I. Mr. Sela May Raise the Statute of Limitations as a Defense

Mr. Idi's argument that Mr. Sela is barred from asserting that Mr. Idi's claims are barred by the statute of limitations fails. Mr. Sela never filed and never had the opportunity to file an answer in the arbitration. Had he done so, Mr. Sela indicated that he intended to raise the statute of limitations as a defense (NYSCEF Doc. No. 57, at 1; NYSEF Doc. No. 58, at 2). The Stipulation itself provides that notwithstanding the date on which Mr. Idi files a summons and complaint in this action, the claims and counterclaims interposed

“shall be deemed filed as of the date they were filed in the arbitration, except to the extent any particular claim or counterclaim exceeds the scope of the claims, counterclaims, and/or defenses as determined by the Arbitration Agreement, the Parties' Statement of Claim, and any prior rulings or stipulations in the arbitration”

(*id.*, at ¶ 4). By agreeing to a date on which claims would be deemed filed, both parties contemplated the preservation of the statute of limitations as a defense.

II. *First Cause of Action (Accounting) is Untimely*

Although an accounting claim is generally subject to a six-year statute of limitations (CPLR 213[1]), where a plaintiff primarily seeks monetary damages for breach of fiduciary duty and pursues an accounting merely to determine the amount of such damages, a three-year limitations period applies (*see Carlingford Ctr. Point Assoc. v MR Realty Assoc.*, 4 AD3d 179, 180 [1st Dept 2004]; *Webster v Forest Hills Care Ctr., LLC*, 164 AD3d 1499, 1501 [2d Dept 2018]). The accounting claim is in favor of 1961 and L-Hostels which are corporations not partnerships, and these claims sounding in breach of fiduciary duty arose when then the breach first occurred. Thus, the appropriate statute of limitations period is three years, not six. The limitations period begins to run when the “fiduciary has openly repudiated his or her obligation or the relationship has been otherwise terminated” (*Knobel v Shaw*, 90 AD3d 493, 496 [1st Dept 2011] [internal quotation marks and citation omitted]). The gravamen of Mr. Idi’s claim is that Mr. Sela breached his fiduciary duties by late 2011. Under the open repudiation rule, “the statute of limitations on claims against a fiduciary for breach of its duty is tolled until such time as the fiduciary openly repudiates the role” (*Access Point Med., LLC v Mandell*, 106 AD3d 40, 45 [1st Dept 2013]). Mr. Idi asserts Mr. Sela “openly repudiated his fiduciary obligation” with regard to 1961 and L-Hostels in late 2011 “when he made clear to [plaintiff] on the phone that [plaintiff] should stop calling him” (NYSCEF Doc. No. 88, at 2), thus by Mr. Idi’s own claims, Mr. Sela had openly repudiated his role as a fiduciary. The claim was not asserted until Mr. Idi filed his Statement of Claim in the arbitration on July 1, 2016. Taking the allegations as true as the Court must at this stage of the litigation and giving Mr. Idi every favorable inference, the latest such

claims accrued was in late 2011, *i.e.*, five years before the claims were asserted. As such, it is untimely and dismissed.

III. Second Cause of Action (Breach of Fiduciary Duty) is Untimely

“A breach of fiduciary duty claim is governed by either a three-year or six-year limitation period, depending on the nature of the relief sought. The shorter time period applies where monetary relief is sought, the longer where the relief sought is equitable in nature” (*Carlingford Ctr. Point Assoc. v MR Realty Assoc.*, 4 AD3d at 179-180 [internal citations omitted]). “Moreover, where an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR 213 (8)” (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009]). “An exception to this rule exists if the fraud allegation is only incidental to the claim asserted. Thus, where an allegation of fraud is not essential to the cause of action pleaded except as an answer to an anticipated defense of Statute of Limitations, courts look for the reality, and the essence of the action and not its mere name” (*Cusimano v Schmurr*, 137 AD3d 527, 529 [1st Dept 2016] [internal quotation marks and citations omitted]).

In this case, the claim is governed by the three-year statute of limitations because Mr. Idi seeks monetary relief and allegations of fraud are not essential to his claim. The purported breach of fiduciary duty claim does not arise from, or depend upon, a misrepresentation made by Mr. Sela for the purpose of inducing Mr. Idi’s reliance. Rather, the claim arises from the alleged improper diversion of corporate opportunities and assets for which Mr. Idi seeks monetary relief – his share.

A claim for breach of fiduciary duty accrues when all the elements of the tort can be truthfully alleged in a complaint (see *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d at 140; *Ganzi v Ganzi*, 183 AD3d 433, 433-434 [1st Dept 2020]). “Where there is one tortious act complained of, the cause of action accrues at the time that the wrongful act first injured the plaintiff; ‘the continuous wrong’ doctrine tolls the running of the statute of limitations where there is a series of independent, distinct wrongs rather than a single wrong that has continuing effects” (*Ganzi v Ganzi*, 183 AD3d at 434). Here, Mr. Idi alleges that he was injured as a result of Mr. Sela’s failing to distribute to him his share of the proceeds from the sale of the Property, which occurred in February 2011. The other misdeeds alleged in the complaint all occurred prior to that date. Thus, as alleged, Mr. Idi suffered such damages more than three years before he interposed this claim. As such, this claim too is dismissed as time-barred.

IV. The Unjust Enrichment (third) and Constructive Trust (fifth) causes of action are also dismissed as untimely

A three-year statute of limitations applies to unjust enrichment claims seeking monetary relief, which begins to run on the occurrence of the wrongful act giving rise to the duty of restitution (*Siegler v Lippe*, 189 AD3d 903, 906 [2d Dept 2020]). Thus, as discussed above, Mr. Idi must have brought his unjust enrichment claim by February 2014, three years after the sale of the Property. This he did not do. As such, Mr. Idi’s unjust enrichment claim is dismissed as time barred.

Claims sounding in constructive trust that are in essence claims for conversion are also subject to a three-year statute of limitations. In this case, Mr. Idi alleges that Mr. Sela unlawfully retained Mr. Idi’s 50% share of the proceeds from the sale of the Property. A conversion is the

intentional assumption or exercise of control over property belonging to another, interfering with that person's right of possession (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49 [2006]). The latest this claim accrued was February 2011, when the Property was sold and Mr. Sela allegedly retained the proceeds. Mr. Idi did not assert this claim until July 2016 in his Statement of Claim. Thus, Mr. Idi's constructive trust (fifth) cause of action is similarly time-barred (*Hellman v Hoenig & Co., Inc.*, 244 AD2d 529, 530 [2d Dept 1997]).²

V. Fourth Cause of Action (Fraud) Is Untimely

Mr. Idi's fraud claim is incidental to the breach of fiduciary duty claim and is therefore subject to the same three year statute of limitations period. The latest this claim could have accrued is February 2011. It was not asserted until July 2016. Thus, the cause of action for fraud is also time-barred (*see Car Park Sys. of N.Y. Inc. v Ull*, 154 AD3d 444, 444 [1st Dept 2017]; *Powers Mercantile Corp. v Feinberg*, 109 AD2d 117, 120-121 [1st Dept 1985], *aff'd* 67 NY2d 981 [1986]).

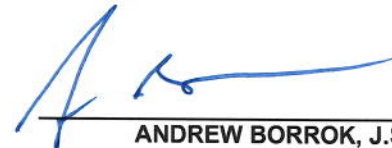
The Court has considered the parties' remaining arguments and found them unavailing.

Accordingly, it is hereby

ORDERED that Mr. Idi's motion is denied; and it is further

² The claims of unjust enrichment and a constructive trust must also be dismissed as duplicative of the breach of fiduciary duty claim as they arise from the same facts and seek identical damages (*see Hahn v Stone House Props. LLC*, 206 AD3d 408, 409 [1st Dept 2022]).

ORDERED that Mr. Sela's cross-motion is granted, and the complaint is dismissed.

<u>5/10/2024</u> DATE	 ANDREW BORROK, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE