

**BLS Holdco, LLC v Kushner Cos., LLC**

2024 NY Slip Op 32929(U)

August 13, 2024

Supreme Court, New York County

Docket Number: Index No. 652944/2023

Judge: Lyle E. Frank

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

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

*Justice*

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BLS HOLDCO, LLC,

Plaintiff,

- v -

KUSHNER COMPANIES, LLC, LAURENT MORALI

Defendant.

-----X

**INDEX NO.** 652944/2023

**MOTION DATE** 03/01/2024

**MOTION SEQ. NO.** 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 31, 32, 33, 34, 35, 37, 38

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, plaintiff’s motion to reargue is granted in part.

This action arises out of a dispute involving a 2014 real estate investment transaction.

Plaintiff BLS HOLDCO, LLC (“Plaintiff”) is a Delaware limited liability company, and a member of nonparty BLS ASSOCIATES LLC, also a Delaware limited liability company.

Defendant Kushner (“Defendant Kushner”) is a real estate investment firm, incorporated in Delaware, with its principal place of business at 767 Fifth Avenue New York, NY. Defendant Laurent Morali (“Defendant Morali”) is an individual and senior management of Kushner. By decision and order dated February 1, 2024, this Court granted defendants’ motion to dismiss in part and denied the motion to dismiss in part.

Before the Court is Plaintiff’s motion to reargue and renew this Court’s February 1, 2024, decision and order.

Background

The Court stated the background relevant to this motion in its February 1, 2024, decision and order.

## Discussion

The Court acknowledges that it erred in its February 1, 2024, decision. The Court previously declined to dismiss plaintiff's claims on statute of limitations grounds, finding that although plaintiff's claims are subject to Delaware's three-year statute of limitations, some of plaintiff's claims were timely pursuant to the tolling doctrine of fraudulent concealment. Furthermore, the Court declined to dismiss plaintiff's unjust enrichment claim, aiding and abetting fraudulent concealment, and accounting claims.

i. Breach of Fiduciary Duty

a. Fraudulent Concealment

Under Delaware Law, the statute of limitations for breach of fiduciary duty is three years from the moment of the alleged harmful act. (10 Del. C. § 8106; *See Am. Int'l Grp., Inc. v. Greenberg*, 965 A2d 763, 811-12 [Del. Ch. 2009]). This is true even if the plaintiff is unaware of the cause of action or the harm. (*See In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 584 [Del. Ch. 2007]; *Isaacson, Stolper & Co. v. Artisans' Sav. Bank*, 330 A2d 130 [Del. 1974]). However, under the doctrine of fraudulent concealment, the statute of limitations may be tolled if there was an affirmative act of concealment or some misrepresentation that was intended to 'put a plaintiff off the trail of inquiry' until such time as the plaintiff is put on inquiry notice. (*In re Nine Sys. Corp. S'holders Litig., No. CV 3940-VCN*, 2013 WL 4013306 [Del. Ch. July 31, 2013]).

The Court previously found that as to plaintiff's claims that the defendants' breached their fiduciary duty to plaintiff by failing to properly register the multi-family properties as rent stabilized, the statute of limitations on such claims were tolled due to defendant's alleged fraudulent concealment of said breach. However, upon second look, any allegations that may

constitute fraudulent concealment thus tolling the statute of limitations occurred *after* the statute of limitations already expired.

Even assuming plaintiff's cause of action accrued in April of 2014, when the parties formally entered into the venture, or sometime later in 2014 when plaintiff alleges the properties should have been re-registered, the three-year statute of limitations to bring such claims expired in 2017, at the latest.

In the complaint, plaintiff alleges it did not find out that the units were not in compliance until the tenants of those units filed suit in August of 2017. That plaintiff was unaware of the noncompliance alone does not toll the statute of limitations. (*See In re Tyson Foods*). Thus, regardless of how or when plaintiff discovered the alleged breach, plaintiff needed to bring suit in 2017. The Court previously relied on plaintiff's allegation that on May 7, 2018, occurred after the statute of limitations already expired. To toll the statute of limitations due to defendants alleged fraudulent concealment, plaintiff would have had to allege defendant committed an affirmative act to conceal its action or misrepresentation *prior* to 2017. (*In re Nine Sys. Corp. S'holders Litig*). While plaintiff alleges it relied on defendants' statements and representations "throughout the eight years," there is no specific allegation after the alleged breach and before 2017 that defendants fraudulently concealed the noncompliance.

Therefore, plaintiffs have failed to allege an affirmative act before the expiration of the statute of limitations which would warrant tolling under the doctrine of fraudulent concealment. (*Winklevoss Capital Fund, LLC v. Shaw*, 2019 Del. Ch. LEXIS 75.) (*IMO Estate of Lambeth v. Kendall, C.A. No. 2017-0918- MTZ*, 2018 WL 3239902, at \*4 (Del. Ch. July 2, 2018).)

b. Continuing Wrong Doctrine

Plaintiff argues in its opposition that in any event, the tolling doctrine of continuing wrong is also applicable to plaintiff's breach of fiduciary duty cause of action. In opposition, defendants contend that not only is the continuing wrong doctrine not factually applicable here, but plaintiffs are raising it as a new issue in opposition to a motion to reargue is improper.

Preliminarily, the Court will consider plaintiff's argument. Defendants have cited no specific authority which precludes the Court from considering plaintiff's argument. The cases offered by defendants are distinguishable, and thus without clear prohibition, the Court will consider all relevant arguments in order to come to a just determination.

The continuing wrong doctrine is another tolling doctrine which Delaware courts apply when a series of related wrongful acts are "so inexorably intertwined that there is ... one continuing wrong." (*In re Thomas Lawrence Reeves Irrevocable Trust Under Agreement Dated February 26, 1997*, 2015 Del. Ch. LEXIS 130). It is settled, however, that "the failure to remedy a wrong does not mean that the wrong is continuing. *Id.* Although uncorrected wrongs remain wrongful until remedied, they do not fit within the narrow category of acts which are considered continuing wrongs. *Id.*

Plaintiff has failed to allege sufficient acts which would constitute a continuing wrong with respect to defendants alleged failure to register the multifamily properties. That defendant did not correct the error and the properties remained uncorrected, is one wrong which remains wrongful, rather than a series of related wrongful acts. For the same reason that any alleged acts which occurred after the statute of limitations expired which may have constituted a related wrongful act does not toll the statute of limitations under the doctrine of fraudulent concealment, it is outside of the window where it could toll under the continuing wrong doctrine either.

However, with respect to plaintiff's allegations that defendant Kushner breached its duty of loyalty by misrepresenting an outstanding loan balance on financial documents from July 2017 to July 2021, the Court finds plaintiff have sufficiently alleged a series of related wrongful acts. Under both Delaware and New York law, in order to state a claim for breach of fiduciary duty, plaintiffs must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct" (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-700, 924 NYS2d 77 [1st Dept 2011]; *People v. Grasso*, 50 A.D.3d 535 [2008]).

Here, plaintiff alleges defendants' misrepresentation resulted in defendants being overpaid by more than \$650,000, resulting in additional interest accruals of \$32,231. Therefore, plaintiff's first cause of action for breach of fiduciary duty is sustained solely with respect to plaintiff's allegation that defendants breached their duty of loyalty to plaintiff by failing to report their loans accurately. In the light most favorable to plaintiff, plaintiff has plead the elements of a claim for breach of fiduciary duty.

**ii. Aiding and abetting breach of fiduciary duty**

As discussed in the Court's prior decision, plaintiff's claim for aiding and abetting breach of fiduciary duty is sustained. However, as the Court has dismissed plaintiff's breach of fiduciary duty claims with respect to the multi family properties, plaintiff's aiding and abetting breach of fiduciary duty claims are limited accordingly.

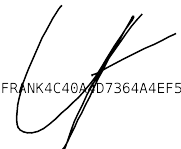
Accordingly, it is hereby

ADJUDGED that the motion for re-argument is granted; and it is further

ORDERED that the first cause of action for breach of fiduciary duty is dismissed; and it is further

ADJUDGED that the motion is otherwise denied.

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8/13/2024  
DATE

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LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: