

**Waldorf v Waldorf**

2024 NY Slip Op 35150(U)

October 4, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 607959/2020

Judge: Jerry Garguilo

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.

SHORT FORM ORDER

INDEX No. 607959/2020

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 48 - SUFFOLK COUNTY

**PRESENT:**

Hon. JERRY GARGUILO  
Justice of the Supreme Court

MOTION DATE 8/7/24  
ADJ. DATE 8/22/24  
Mot. Seq. # 005 MotD

-----X

PAMELA J. WALDORF and ECIRAVA INC.,

Plaintiffs,

- against -

WILLIAM J. WALDORF, STEPHEN M.  
WALDORF, WALDORF SERVICING, LLC,  
WALDORF SPECIAL RISK, LLC and  
WALDORF RISK SOLUTIONS, LLC,

Defendants.

-----X

LAW OFFICE OF GABRIELE BURNER  
Attorney for Plaintiffs  
516 Route 25A  
Mt. Sinai, NY 11766

MINTZ & GOLD LLP  
Attorney for Plaintiffs  
600 Third Avenue, 25<sup>th</sup> Floor  
New York, NY 10016

SPIZZ & COOPER, LLP  
Attorney for Defendants  
114 Old Country Road, Suite 644  
Mineola, NY 11501

Upon the following papers read on the motion to amend the summons and complaint: (1) Notice of Motion and supporting papers by plaintiffs, filed July 16, 2024; (2) Answering Affidavits and supporting papers by defendants, filed July 31, 2024; and (3) Replying Affidavits and supporting papers by plaintiffs, filed August 6, 2024, it is

**ORDERED** that plaintiffs’ motion, essentially to amend the summons and complaint, is granted to the extent set forth herein, and is otherwise denied; and it is further

**ORDERED** that service of an amended summons and complaint that are consistent with this order shall be made upon Mitchell Cooper in compliance with the CPLR.

This commercial action arises from the business relationship among plaintiff Pamela Waldorf and defendants William Waldorf and Stephen Waldorf. Pamela, William, and Stephen are siblings. William and Stephen were, along with plaintiff Ecirava Inc., of which Pamela was the sole shareholder, members of defendants Waldorf Servicing, LLC, Waldorf Special Risk, LLC, and Waldorf Risk Solutions, LLC (collectively, the Waldorf Entities). Disputes arose among the parties, and they began negotiating a buyout of Ecirava’s shares in the Waldorf Entities in 2011. In a 2014 settlement and

Waldorf v Waldorf  
Index No. 607959/2020  
Page 2

purchase agreement (SPA), Ecirava sold its shares of the Waldorf Entities to Stephen and William. In 2020, plaintiffs commenced this action for fraud and breach of contract, alleging that defendants failed to comply with the SPA and defrauded them by misrepresenting their compliance with the SPA.

Defendants moved to dismiss the complaint, and this Court (Emerson, J.), in an order dated February 17, 2021, granted the motion to the extent of dismissing the fraud claim and so much of the breach of contract claim as sought to recover salary. Defendants moved to reargue their motion to dismiss, and plaintiffs moved to reargue their opposition to the motion. This Court (Emerson, J.), in an order dated June 2, 2021, (1) denied plaintiffs' motion; (2) granted defendants' motion; and (3) upon reargument, adhered to its original determination. Defendants then moved, in effect, for summary judgment dismissing so much of the breach of contract claim as predicated upon a failure to transfer a life insurance policy to plaintiffs, and this Court (Emerson, J.), in an order dated October 20, 2021, granted the motion. Plaintiffs appealed the October 2021 order. The Appellate Division, Second Department, reversed and denied the motion (*Waldorf v Waldorf*, 222 AD3d 807, 201 NYS3d 241 [2d Dept 2023]).

Plaintiffs now seek, essentially, to amend the summons and complaint to (1) add Mitchell Cooper, an attorney for the Waldorf Entities, as a defendant; and (2) add claims for breach of fiduciary duty (against William, Stephen, and Cooper), aiding and abetting breach of fiduciary duty (against Cooper), fraud (against William, Stephen, and Cooper), aiding and abetting fraud (against Cooper), unjust enrichment (against William, Stephen, and the Waldorf Entities), and unjust enrichment (against Cooper). The proposed first amended complaint (PFAC) pleads that William and Stephen induced plaintiffs to sell their shares in the Waldorf Entities by (1) failing to disclose that (a) two of the Waldorf Entities were about to commence a lawsuit worth \$13 million (the Subsequent Lawsuit) and (b) their parents gave \$1 million (the Parental Cash Infusion) to the Waldorf Entities in 2011; and (2) asserting, in 2011, nonexistent debts of the Waldorf Entities (the Nonexistent Debts), a portion of which Pamela was responsible for. The PFAC also alleges that "Cooper openly threatened litigation against Pamela to bully her into selling" after negotiations stalled and "threatened Pamela with a capital call for Prospect State Administrators, Inc., another entity jointly[-]owned by Pamela and her brothers, if Pamela refused to accept her brothers' proposed buyout." Plaintiffs further allege that because the Waldorf Entities paid Cooper's legal fees, "[p]laintiffs effectively paid one-third of Cooper's legal fees and costs, despite Cooper working directly against [p]laintiffs' interests." Plaintiffs allege that Cooper never disclosed the existence of the Subsequent Lawsuit or the Parental Cash Infusion, that he misrepresented the amount of the Waldorf Entities' liabilities, and that he made the above-mentioned threats to Pamela.

As the Court of Appeals has explained, "absent prejudice, courts are free to permit amendment" of pleadings (*Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411, 998 NYS2d 740, 745 [2014]; see CPLR 3025). Indeed, leave to amend a pleading "should be freely given, provided that the proposed amendment does not prejudice or surprise the opposing party and is not palpably insufficient or patently devoid of merit" (*Vidal v Claremont 99 Wall, LLC*, 124 AD3d 767, 767-768, 2 NYS3d 186, 188 [2d Dept 2015]; see *Richer v JQ II Assoc., LLC*, 166 AD3d 692, 88 NYS3d 190 [2d Dept 2018]). "No evidentiary showing of merit is required under CPLR 3025 (b), and a court shall not examine the legal sufficiency or merits of a pleading unless the insufficiency or lack of merit is clear and free from doubt"

Waldorf v Waldorf  
Index No. 607959/2020  
Page 3

(*Krakovski v Starvos Assoc., LLC*, 173 AD3d 1146, 1148, 103 NYS3d 553, 556 [2d Dept 2019] [quotation marks and citations omitted]). Nonetheless, if a proposed amended pleading asserts a claim that is time-barred, then that proposed claim is patently devoid of merit, and amendment will be disallowed (*Sage v Neil H. Greenberg & Assoc., P.C.*, 219 AD3d 1544, 196 NYS3d 775 [2d Dept 2023]; *Deutsche Bank Natl. Trust Co. v McAvoy*, 188 AD3d 808, 136 NYS3d 134 [2d Dept 2020]; *Schwartz v Walter*, 171 AD3d 969, 95 NYS3d 879 [2d Dept 2019]; *Roco G.C. Corp. v Bridge View Tower, LLC*, 166 AD3d 1031, 89 NYS3d 201 [2d Dept 2018]).

Contrary to defendants' argument, the fact that plaintiffs' original fraud claim was dismissed does not, under res judicata or law of the case, prevent amendment of the complaint to add new fraud claims (see *Wilder v Fresenius Med. Care Holdings, Inc.*, 215 AD3d 511, 187 NYS3d 610 [1st Dept 2023]).

The statute of limitations for unjust enrichment is six years, without a discovery rule (CPLR 213 [1]; *Mahabir v Snyder Realty Group, Inc.*, 217 AD3d 850, 192 NYS3d 144 [2d Dept 2023]). All of plaintiffs' claims arose more than six years ago, so the claims for unjust enrichment are untimely on their face (*D. Penguin Bros. Ltd. v National Black United Fund, Inc.*, 137 AD3d 460, 26 NYS3d 524 [1st Dept 2016]). Thus, this claim is only timely if the relation back doctrine applies (see *Bisono v Mist Enters., Inc.*, \_\_ AD3d \_\_, 216 NYS3d 23, 2024 NY Slip Op 03873 [2d Dept 2024]).

"[T]he relation back doctrine allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a codefendant for [s]tatute of [I]mitations purposes" (*Buran v Coupal*, 87 NY2d 173, 177, 638 NYS2d 405, 408 [1995]; see CPLR 203). There are three prongs that must be met for the relation back doctrine to apply:

The first prong is that the new claims arise out of the same conduct, transaction, or occurrence as that alleged in the original complaint. Second, if a new party is to be added, it must be united in interest with one or more of the original defendants, and by reason of that relationship can be charged with such notice of the institution of the action that he or she will not be prejudiced in defending the action on the merits. Third, if a new party is to be added, the newly-added defendant must have known, or should have known, that the action would have been timely commenced against him or her but for a mistake by the plaintiff as to the identity of the proper parties

(*Bisono v Mist Enters., Inc.*, 2024 NY Slip Op 03873 at \*2, 216 NYS3d at 31; see *Wilson v Rye Family Realty, LLC*, 218 AD3d 836, 193 NYS3d 274 [2d Dept 2023]). In determining whether a pleading gave notice of the transactions or occurrences underlying an amended claim, a court cannot look beyond the four corners of the original pleading (*34-06 73, LLC v Seneca Ins. Co.*, 39 NY3d 44, 178 NYS3d 1 [2022]). Plaintiff has the burden of showing that the relation back doctrine applies (*Patterson v Nassau County Social Servs. Dept.*, \_\_ AD3d \_\_, \_\_ NYS3d \_\_, 2024 NY Slip Op 04777 [2d Dept 2024]).

Here, the original complaint is devoid of allegations relating to the conduct, transaction(s), or occurrence(s) that form the basis of the proposed new claims for unjust enrichment (see *Carlino v*

Waldorf v Waldorf  
Index No. 607959/2020  
Page 4

*Shapiro*, 180 AD3d 989, 119 NYS3d 234 [2d Dept 2020]; *Cady v Springbrook NY, Inc.*, 145 AD3d 846, 44 NYS3d 107 [2d Dept 2016]). Thus, the relation back doctrine does not apply, and so much of the motion as seeks to amend the complaint to assert unjust enrichment claims is denied.

The statute of limitations for fraud and aiding and abetting fraud is the later of six years from the fraud or two years from the time that plaintiff discovered the fraud or could have discovered it with reasonable diligence (CPLR 213 [8]). “Where the circumstances are such as to suggest to a person of ordinary intelligence the probability that he or she has been defrauded, a duty of inquiry arises, and if he or she shuts his or her eyes to the facts [that] call for investigation, knowledge of the fraud will be imputed to him or her” (*MBI Intl. Holdings Inc. v Barclays Bank PLC*, 151 AD3d 108, 110, 57 NYS3d 119, 121 [1st Dept 2017] [quotation marks, citations, and alterations omitted], *lv denied* 29 NY3d 919, 64 NYS3d 670 [2017]; see *Seidenfeld v Zaltz*, 162 AD3d 929, 80 NYS3d 311 [2d Dept 2018]). Although application of the discovery rule typically presents a factual question for the jury, resolution of this issue may be determined as a matter of law “where it conclusively appears that the plaintiff has knowledge of facts [that] should have caused him or her to inquire and discover the alleged fraud” (*Pare v Pare*, 222 AD3d 765, 769, 202 NYS3d 363, 368 [2d Dept 2023] [quotation marks and citations omitted], *lv denied* 41 NY3d 909, 213 NYS3d 255 [2024]; see *Cannariato v Cannariato*, 136 AD3d 627, 24 NYS3d 214 [2d Dept 2016], *lv denied* 27 NY3d 903, 36 NYS3d 616 [2016]).

Here, the portions of the fraud and aiding and abetting fraud claims that are based on the Nonexistent Debts are time-barred. According to the PFC, Pamela challenged defendants’ statements about the Nonexistent Debts, triggering her duty to inquire (see *Boesky v Levine*, 193 AD3d 403, 147 NYS3d 2 [1st Dept 2021]; *Epiphany Community Nursery Sch. v Levey*, 171 AD3d 1, 94 NYS3d 1 [1st Dept 2019], *appeal withdrawn* 34 NY3d 927, 109 NYS3d 758 [2019]). Moreover, the relation back doctrine does not apply because the original complaint did not include anything about the Nonexistent Debts (see *Carlino v Shapiro*, 180 AD3d 989, 119 NYS3d 234; *Cady v Springbrook NY, Inc.*, 145 AD3d 846, 44 NYS3d 107). Thus, plaintiffs may not amend the complaint to assert so much of the fraud and aiding and abetting fraud claims as premised on the failure to disclose the Nonexistent Debts (see *Roco G.C. Corp. v Bridge View Tower, LLC*, 166 AD3d 1031, 89 NYS3d 201).

The claims for fraud and aiding and abetting fraud are also based on the failure to disclose the Parental Cash Infusion and the Subsequent Lawsuit. Because William, Stephen, and Ecirava were members of the Waldorf Entities, they owed each other fiduciary duties (see *Willoughby Rehabilitation & Health Care Ctr., LLC v Webster*, 13 Misc 3d 1230[A], 831 NYS2d 357 [Sup Ct, Nassau County 2006], *affd* 46 AD3d 801, 849 NYS2d 887 [2d Dept 2007]; *Weidberg v Barnett*, 752 F Supp 2d 301 [ED NY 2010]), so the failure to disclose a material fact can support a fraud claim (see *Cantor v Villucci*, 212 AD3d 765, 181 NYS3d 644 [2d Dept 2023]; *Castle at Bluehill, Inc. v Town of Orangetown*, 189 AD3d 980, 137 NYS3d 499 [2d Dept 2020]). Cooper, who allegedly served as counsel for the Waldorf Entities, also owed a fiduciary duty to Ecirava (see *Kurtzman v Bergstol*, 40 AD3d 588, 835 NYS2d 644 [2d Dept 2007]). Moreover, the discovery rule applies to fraudulent concealment (see *Bender v Gilberg Agency*, 276 AD2d 311, 716 NYS2d 40 [1st Dept 2000]; see also *NYAHS Servs., Inc., Self-Ins. Trust v Recco Home Care Servs., Inc.*, 141 AD3d 792, 36 NYS3d 270 [3d Dept 2016]). Whether plaintiffs should have known that defendants were concealing this

Waldorf v Waldorf  
Index No. 607959/2020  
Page 5

information, and if so, when they should have known, cannot be determined at this procedural juncture. Thus, the Court cannot say, as a matter of law, that these claims are totally devoid of merit, and plaintiffs may amend the complaint to assert so much of the fraud and aiding and abetting fraud claims as based on the failure to disclose the Parental Cash Infusion and the Subsequent Lawsuit.

When based on underlying fraud, the statute of limitations for breach of fiduciary duty and aiding and abetting breach of fiduciary duty is the same as for fraud (*Monteleone v Monteleone*, 162 AD3d 761, 78 NYS3d 247 [2d Dept 2018]; *DiRaimondo v Calhoun*, 131 AD3d 1194, 17 NYS3d 722 [2d Dept 2015]; *Kaufman v Cohen*, 307 AD2d 113, 760 NYS2d 157 [1st Dept 2003]). Accordingly, for the reasons explained above, plaintiffs may amend their complaint to assert these claims insofar as they are based on the failure to disclose the Parental Cash Infusion and the Subsequent Lawsuit, but not to the extent they are premised upon the Nonexistent Debts.

The Court notes that this determination has no preclusive effect on any subsequent motion made under CPLR 3211 or 3212 (see *Benjamin v Yeroushalmi*, 212 AD3d 758, 183 NYS3d 134 [2d Dept 2023]; *Katz v Hampton Hills Assoc. Gen. Partnership*, 186 AD3d 688, 130 NYS3d 542 [2d Dept 2020]).

Dated: October 4, 2024

  
J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION