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

PRESENT: RICHARD B. LOWE III PART 56

Index Number : 601653/2003

VOLT VIEWTECH INC.

VS

D'APRICE, ANDREW

Sequence Number : 011

POOR PERSON/ASSIGN COUNSEL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1/9/2006

RICHARD B. LOWE III
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

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VOLT VIEWTECH, INC.,
Plaintiff,

- against -

ANDREW D'APRICE, HAROLD BLOCK, ELIAS BOCHNER a/k/a LEIB GOLD a/k/a ISAAC TRAUB, ALAN BOMZER, JOSEPH COLLINS, GEORGE HERBERT, YITZACK ITZKOWITZ a/k/a YITZCHOK ITZOWITZ a/k/a ISSAC ITZKOWITS, SIEGFRIED KOVACS, ELLEN MICHELE LEIBHARD, MIKE LEIBHARD, ABRAHAM MARKOWITZ a/k/a AVI MARKOWITZ a/k/a ABRAHAM LEBOVICE, CARMINE PAMPALONE, ALBERT PULLINI, AMERICO PULLINI, EDWARD PULLINI, MATTHEW ROMAINE, PAUL SIGNORELLI, JOSEF SLAMET a/k/a JOSEF SZAMET, MARVIN SONTAG a/k/a MENDY SONTAG, CARL TERMINE, CHRISTOS TSAMASIRO, THOMAS TSAMASIRO, GEORGE M. VANN, JR., MAX WEISZ a/k/a AVROM MEYER WEISZ, B&H PLUMBING & HEATING, INC., BAYIT PLUMBING AND HEATING, INC., BAY RIDGE MECHANICAL CORP., COPPERLINE PLUMBING AND HEATING, INC., EQUITY RESOURCES LLC., FIRST CHOICE PLUMBING, INC., FLUSH RITE SUPPLY, INC., GEORGE BOMZER & SON, INC., HUDSON FINANCIAL GROUP, M&S MECHANICAL CONTRACTORS, INC., METRO PLUMBING AND HEATING, PACE PLUMBING CORPORATION, PULLINI WATER MAIN & SEWER CONTRACTORS, INC., RIGID PLUMBING & HEATING, CORP., SUNSHINE GLOBAL CORP., T&M PLUMBING CORP., and TOTAL PLUMBING AND HEATING, INC.,
Defendants.

Index No. 601653/03

DECISION AND ORDER

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RICHARD B. LOWE, III, J.:

Defendant Abraham Markowitz, a/k/a Avi Markowitz, a/k/a Abraham Lebovice (Markowitz) brings this motion to dismiss, pursuant to CPLR 3013 and 3211(a), the Complaint for, inter alia, fraud, unjust enrichment, indemnification, breach of fiduciary obligations, commercial bribery, and injury to reputation. Markowitz asserts, pursuant to CPLR 3013, dismissal of the Complaint for

insufficiency of pleading. Markowitz also argues that, under CPLR 3211(a), dismissal is warranted for failure to state of cause of action based on documentary evidence and the statute of limitations. Defendant also moves, pursuant to CPLR 1101 and 1102, for an order declaring him a "poor person" and to assign counsel and other privileges to him for the duration of this litigation.

BACKGROUND

The general background surrounding this litigation is discussed at length in the court's decision dated July 14, 2005. Accordingly, only facts pertaining to Markowitz will be discussed here.

The City of New York, Department of Environmental Preservation (DEP), implemented a water conservation program called the Toilet Rebate Program ("TRP") from 1993 to 1997. The DEP, in order to induce participation in the program, offered financial incentives in the form of rebates to building owners who replaced existing plumbing fixtures such as toilets and showerheads. The predecessor to Volt Viewtech, Inc. (Volt) entered into an agreement with the DEP to administer the TRP. As DEP's contractor, the plaintiff was responsible for processing the rebate applications, conducting inspections, coordinating collection, and authorizing and arranging for payments of the rebates. Building owners would submit an application and hire a private company to remove and replace plumbing fixtures. The private companies would, once completed, submit forms to the plaintiff as proof of completion. Volt would inspect and would authorize payments.

Due to the improper issuance of rebates and kickbacks, Volt informed the City of New York of the thefts and an investigation ensued. Volt was required to reimburse the City of New York for the fraudulent payments. Eventual criminal charges were brought on behalf of the DEP against

individuals alleged to have conducted wrongdoing. One of the individuals concerned was Markowitz.

Markowitz, a partner in a plumbing company at the time the underlying litigation is premised upon, was one of the individuals convicted of such wrongdoing by voluntary plea. In his allocution in the United States District Court on December 2, 2002, he stated that he defrauded the TRP in 1996 and 1997 by falsely reporting that toilets were fully installed in buildings his company was working on. Further, he submitted the following statement:

> DEP through Volt Viewtech, would give me a check for the rebate amount which I would deposit the check in my company bank account and withdraw cash to use to pay kickbacks to the senior Volt Viewtech employee. To do this I used my ATM card and checks that were written to my name. These financial transactions were intended to disguise the source of the money and to promote the scheme....

(*See* Mait Aff., Ex. 13 at 16-21). Markowitz further stated that he:

> also assisted another person who had his own plumbing company by serving as a middleman between him and Volt Viewtech employee. When I was a middleman I received approximately $15 for each toilet that was falsely reported as having been installed. I did not report those cash payments on my 1997 tax return. As a result, I under reported my income for that year. I knew that the income should have been reported and failed to do so.

(*Id.*). The court accepted his plea and sentenced Markowitz to 33 months in prison for conspiracy to commit fraud, fraud, conspiracy to commit money laundering, and tax evasion, without downward departure (*id.*, Ex. 1, 14). Markowitz was also sentenced to pay restitution in the amount of $900,000 (*id.*). Markowitz has since paid $80,000 in restitution (*see* Markowitz Aff.), and continues to pay restitution through his current employment.

Volt was refused payment by the DEP due to the mal-administration of the program. Thus,

Volt, by Complaint on May 28, 2003, brings action against all the defendants, and Markowitz individually, for fraud (first cause of action), unjust enrichment (second cause of action), indemnification (third cause of action), inducement of breach of fiduciary obligation (fourth cause of action), commercial bribery (fifth cause of action), and injury to reputation, lost business, and loss of value to business (sixth cause of action).

DISCUSSION

Markowitz contends that the Complaint is deficient under CPLR 3013 because the plaintiff has failed to provide notice of the transactions and occurrences that Volt intends to prove. The defendant also moves to dismiss pursuant to CPLR 3211(a) all claims alleged against him for failure to state a cause of action based on documentary evidence and under the statute of limitations. He seeks to be declared a poor person and have the court by court order assign an attorney provided by New York to represent his interests in the pending litigation pursuant to CPLR 1101 and 1102.

I. *Poor Person Application*

The defendant moves under CPLR 1101 and 1102 for an order declaring him to be a poor person and ordering the City of New York to provide an attorney to represent him in this action. As well, the defendant requests stenographic notes and waiver of fees. The plaintiff opposes the request because defendant has either "legal acumen" or "is already represented by counsel," that Markowitz has financial capacity because he previously paid $80,000 in restitution, provided for his own counsel in the criminal action, and during oral argument, noted that counsel should not be provided by the City of New York at the expense of the taxpayers. In response, the defendant argues that he only makes $198.00 a week, has no other income or property, and used whatever

money he had for counsel in the criminal action. Markowitz also asserts that the $80,000 provided in restitution was given by his father, family, and people in the community. Finally, the defendant notes that he has no legal acumen and that his motion to dismiss was made through the aid of a former lawyer in prison and that the arguments articulated were made through his own ability.

Under CPLR 1101, a court may grant an application to any person to proceed as a poor person. "The moving party shall file an affidavit setting forth the amount and sources of his or her income and listing his or her property with its value; that he or she is unable to pay the costs, fees and expenses necessary to prosecute or defend the action . . . the nature of the action; [and] sufficient facts so that the merit of the contentions can be ascertained" (*id.*). Granting the poor person application enables the court to grant privileges under CPLR 1102, including the assignment of an attorney and free stenographic transcripts. In addition, the adjudged poor person "shall not be liable for the payment of any costs or fees unless a recovery by judgment or by settlement is had in his favor" (*id.*).

In determining whether to grant or deny a poor person application under CPLR 1101, which is discretionary (*see Smith v Smith*, 2 NY2d 120 [1956]), the court examines the party's overall financial situation. Here, the defendant argues that he does not have the funds and is unable to obtain the funds needed to pay for an attorney or for court fees. Markowitz alleges that he makes $198.00 weekly from his place of employment at Ketter Quality Judaica and owns no property other than personal wearing apparel. Even though he has paid over $80,000 in restitution, Markowitz argues that the moneys paid were given to him through friends and family, and that he no longer has any funds to hire an attorney. In addition, the defendant notes that he is

obligated to pay 25% of his earnings to a half-way house and 25% to the US Attorney to cover his sentence of restitution. Accordingly, of the estimated $200.00 Markowitz earns a week, the defendant only retains about $100.00 for personal use and does not have the wherewithal to retain an attorney.

Here, there is a lack of evidence to support the defendant's assertion of alleged indigency. While the court entertains the defendant's statement that the $80,000 paid in restitution is from friends and family, there is no evidence, documentary or otherwise, to further defendant's statement. In addition, the defendant has not specified how he currently makes use of the moneys received from his weekly earnings. First, he has not provided evidence as to the amount he makes at his place of employment. Secondly, the defendant has not provided collaborating support regarding the use of his income for restitution and the half-way house Even if the court were satisfied with Markowitz's statement regarding the use of 50% of his earnings, the defendant has not provided any information as to how the remaining amount is being utilized. Finally, Markowitz has failed to provide reasonable documentation as to his bank accounts (which he used to perpetuate the fraud) as well as tax returns to show indigence. As such, the court denies his poor person application.

Similarly, the court denies the defendant's application for appointment of counsel under CPLR 1102. As the Court of Appeals in *In Re Smiley* has noted in civil cases, "there is no absolute right to assigned counsel; whether in a particular case counsel shall be assigned lies instead in the discretion of the court" (36 NY2d 433, 438 [1975]). During oral argument, the defendant insisted that he had discussions with the Corporation Counsel of New York City and that he was told that the City would provide legal counsel to him as long as this court assigned

"poor person" status to Markowitz. However, when the court pressed defendant for an affidavit or other evidence to evidence these communications and even gave the defendant the opportunity to provide such documents, none were forthcoming. In addition, his application for poor person status is silent as to the alleged discourse between himself and the City. The court will not assign counsel here. The application for appointment of counsel pursuant to CPLR 1102 is denied.

II. *Acceptable Pleading Requirement under CPLR 3013*

The defendant strenuously argues that because Volt fails to provide statements "sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense" (CPLR 3013), Markowitz moves to dismiss the Complaint in its entirety as a deficient pleading. The court disagrees.

The primary function of pleadings is to *adequately* advise "the adverse party of the pleader's claim and its elements" (*Pope v Zeckendorf Hotels Corp.*, 22 AD2d 647, 647 [1st Dept 1964], citing *Foley v D'Agostino*, 21 AD2d 60 [1st Dept. 1964]). Generally speaking, "[p]leadings should not be dismissed . . . unless the allegations therein are not *sufficiently* particular to apprise the court and parties of the subject matter of the controversy" (*id.* [emphasis added], quoting 3 Weinstein-Korn-Miller, NY Civ Prac, par. 3013.03).

Here, the court finds that the pleadings are sufficient and adequate to apprise the court and the parties of the subject matter of the controversy. Volt has sufficiently articulated that it seeks to recover for the alleged fraud committed by the defendant as well as for loss of reputation and other injuries, based upon the alleged fact that the defendant filed false reports in order to receive rebate funds. Further, because this is a motion to dismiss, the court must look "to the substance rather than

to the form" of the Complaint (*Foley*, 21 AD2d at 64). The court "is solely directed to the inquiry of whether or not the pleading, considered as a whole, 'fails to state a cause of action'" (*id.*). Because the substance of plaintiff's complaint seeks to recover against the defendant for fraud and for the other causes of actions pursuant to the alleged fraud committed by him, as well as has provided adequate notice to Markowitz of the pleader's claims, there is no basis to dismiss the complaint for what Markowitz argues as inadequacies of pleading.

The court denies Markowitz's motion to dismiss pursuant to CPLR 3013 for failure to provide notice and insufficiency of the complaint.

III. *Causes of Action*

In a motion to dismiss pursuant to CPLR 3211(a), the court takes the facts as alleged in the Complaint as true and accords the benefit of every possible favorable inference to the non-movant (*see Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 634 [1976]). The court addresses each of the plaintiff's claims accordingly.[1]

1. Fraud

The defendant moves to dismiss the first cause of action for fraud under CPLR 3211(a) for failure to state a cause of action against Markowitz. The defendant argues that, under CPLR 3016, the plaintiff has failed to detail the wrongs against him to allege fraud. Furthermore, Markowitz argues that the documentary evidence supports his motion to dismiss and that it was Volt's own negligence that caused Volt's problems. Finally, the defendant argues that not only has the plaintiff

[1]The defendant argues in each cause of action that the plaintiff fails to give sufficient notice of the transactions underlying Volt's causes of action as required under CPLR 3013. Because the court has assessed the defendant's argument infra and has denied the motion to dismiss pursuant to CPLR 3013, the court will not review the same argument for each cause of action individually.

failed to state a cause of action, but that the statute of limitations bar the plaintiff from bringing a claim of fraud.

In order to assert a valid claim for common law fraud, the proponent must allege "representation of a material fact, falsity, knowledge, intent to deceive, reliance and damages, with the requisite particularity pursuant to CPLR 3016(b)" (*Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233, 234 [1st Dept 1994]; *Bank Leumi Trust Co. v D'Evori Intl.*, 163 AD2d 26, 31-32 [1st Dept 1990]). Conclusory allegations or mere suspicion of fraud are wholly insufficient (*Bank Leumi Trust Co.*, 163 AD2d at 32, citing *Glassman v Catli*, 111 AD2d 744 [2d Dept 1985]). However, a cause of action for common law fraud "requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a [defendant] with respect to the incidents complained of and is not to be interpreted so strictly as to prevent an otherwise valid cause of action" (*Bernstein v Kelso & Co.*, 231 AD2d 314, 320 [1st Dept 1997][internal quotations omitted]). Where the facts were "peculiarly within the knowledge of the party against whom the [fraud] is being asserted" (*id.*, quoting *Jered Contr. Corp. v New York City Tr. Auth.*, 22 NY2d 187, 194 [1968]), the misconduct complained of only needs to be set forth in sufficient detail to apprise defendants of the alleged wrongs.

Here, it is plainly obvious that the facts were "peculiarly within the knowledge of the party against whom the [fraud] is being asserted" (*id.*). There is no dispute that the defendant knew of the fraud; Markowitz himself perpetuated the fraud and voluntarily pled guilty to the underlying facts surrounding this litigation. While there may a question of the specific dates of the fraud, that does not change the fact that the defendant had knowledge of the fraud and himself was a party in the perpetuation thereof. Accordingly, the complaint alleges sufficient detail that clearly informed

Markowitz of the fraud complained of, and the motion to dismiss on this basis is denied.

The defendant next argues that documentary evidence refutes the allegation of fraud, arguing that it was plaintiff's own negligence that caused the fraud and not defendant's fraudulent actions. The defendant avers that the contractual agreements entered into for the rebate checks were between the building owners and Volt, not between Volt and the plumbers. Markowitz asserts that the building owners privately hired the defendant and, accordingly, could not have made misrepresentations to the plaintiff since it had no legal duty to Volt. The defendant argues that, if anything, he is only liable to the DEP since the DEP issued the rebate checks and not Volt. The court disagrees.

Here, the plaintiff alleges that the plumber, prior to Volt approving rebate payment, must submit forms to Volt, including an invoice for the work, proof that the old toilets had been properly disposed of, and a list of the specific toilets that were replaced. Though the contractual agreements entered into were between the building owners and Volt, nonetheless Volt relied upon documents submitted by the various plumbing companies and individuals, including Markowitz, in order to base its approval and payment of rebates. This alleged misrepresentation to Volt may constitute fraud, and, accordingly, the documentary evidence does not refute the allegation of fraud, but, instead, may actually further plaintiff's argument of fraud. Here, the documentary evidence Markowitz bases his defense on does not conclusively establish a defense to the asserted claims as a matter of law (*Leon v Martinez*, 84 NY2d 83, 88 [1994]), and, as such, the defendant's motion to dismiss on documentary evidence is denied.

Finally, the defendant argues that the statute of limitations has run and, as such, the cause of action for fraud should be dismissed, arguing that because the plaintiff discovered the wrongdoing

of its employees in June 1997 and brought this Complaint on May 28, 2003, the statute of limitations has run. The plaintiff argues that the statute of limitations did not run because under CPLR 213-b, the statute of limitations period was extended to victims of a crime. The court agrees with Volt.

While an action for fraud generally has a statute of limitations period of six years or two years from the time that the plaintiff discovered the fraud, or could with reasonable diligence have discovered it (*see* CPLR 213[8]), CPLR 213-b allows the victim of a crime to pursue otherwise time-barred claims by adjusting the statute of limitations period to seven years against one "convicted of a crime which is the subject of such action, for an injury or loss resulting therefrom . . . of the date of the crime" or ten years if "convicted of a specified crime" (*id.*). "Specified crimes" include "an offense in any jurisdiction which includes all the essential elements of" crimes such as grand larceny, criminal possession of stolen property, and a class B felony offense (*see* Executive Law § 632-a[1]). Because the purpose of extending the period is to provide a meaningful remedy to the victim, the statute is generally read expansively (*see Elkin v Cassarino*, 248 AD2d 35 [2d Dept 1998]).

Whether the time limitations is extended to seven years or ten years, Volt has brought the complaint against defendant Markowitz within the requisite time period. Here, the original complaint was brought on June 23, 2003. Because the defendant, in his plea in federal court, stated that he began the wrongdoing beginning in 1996 and into 1997, the time period in which Markowitz defrauded Volt is within the applicable time limitations period pursuant to CPLR 213-b (*see id.* at 40 [providing that for the same federal crime committed by the defendant in that action, the court granted a seven-year statute of limitations to the victim]). Accordingly, the defendant's motion to dismiss pursuant to the statute of limitations is denied.

2.. Unjust Enrichment

The defendant moves to dismiss the plaintiff's second cause of action for unjust enrichment arguing that Volt failed to show that there was unjust enrichment on the part of the defendant. Further, Markowitz argues that there was negligence on the part of the plaintiff under the doctrine of unclean hands, arguing that because plaintiff's own employees perpetuated the fraud, Volt cannot argue unjust enrichment as against this defendant. Finally, the defendant avers that the statute of limitations has run. The court need not deal with the statute of limitations argument for the reasons set forth above (see CPLR 213-b), only reviewing the remaining arguments proffered by the defendant.

A claim for unjust enrichment "rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another" (*Sloame v Madison Square Garden Center, Inc.*, 56 AD2d 92, 95 [1st Dept 1977], quoting *Miller v Schloss*, 218 NY 400, 407 [1916]). "It is an obligation which the law creates, in the absence of any agreement, when and because the acts of the parties or others have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it, and which ex acquo et bono belongs to another" (*id.*). To recover from a particular defendant, "a plaintiff must demonstrate that services were performed for the defendant resulting in its unjust enrichment" (*Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 108 [1st Dept 2002], citing *Kapral's Tire Serv. v Aztek Tread Corp.*, 124 AD2d 1011, 1013 [4th Dept 1986]).

Here, the plaintiff has made out a viable cause of action for unjust enrichment. It is undisputed that Markowitz received payment for work not done, received by the City based on Volt's approval. These fraudulent actions eventually caused the DEP not to pay Volt for its work under the

contractual agreement, and even forced Volt to reimburse the City of New York for the fraudulently-made payments. In the case at bar, the "equitable principal that a person shall not be allowed to enrich himself unjustly at the expense of another" controls (*Miller*, 218 NY at 407), and because the plaintiff has sufficiently alleged that Markowitz was unjustly enriched by the scheme he perpetrated, there is a viable claim for unjust enrichment. Accordingly, the defendant's motion to dismiss this cause of action for failure to state a cause of action is denied.

In the alternative, the defendant argues that the plaintiff, because of unclean hands, is barred from bringing a claim of unjust enrichment. "The doctrine of unclean hands is only available where [a] plaintiff is guilty of immoral or unconscionable conduct directly related to the subject matter, and *the party seeking to invoke the doctrine is injured by such conduct*" (*Frymer v Bell*, 99 AD2d 91, 96 [1st Dept 1984] [emphasis added], citing *Weiss v Mayflower Doughnut Corp.*, 1 NY2d 310, 316 [1956]). Here, the court disagrees with the defendant. It undisputed that the company's conduct, through its employees, is directly related to the subject matter at hand and that the plaintiff's employees helped to perpetuate the fraud. Nor is it controverted that Volt controlled these employees. Nonetheless, there is a question of fact of whether Volt is liable for its employees actions. Further, the party seeking to invoke this doctrine here is himself part and parcel of the fraud committed. Indeed, Markowitz was not injured by the conduct of Volt or its employees; he perpetuated the same fraud. The court will not allow the defendant to use this doctrine as both a shield and a sword.

The defendant's motion to dismiss the second cause of action for unjust enrichment is denied.

3. Indemnification

The next cause of action the defendant seeks to dismiss is that of indemnification.

Markowitz argues that because he did not have an independent duty to the DEP, the plaintiff has no claim or basis for indemnification as against him. In the alternative, Markowitz argues that the statute of limitations bars recovery. The court disagrees with both arguments.

The court turns first to the statute of limitations argument. A "cause of action for indemnification . . . is independent of the underlying wrong and for the purpose of the Statute of Limitations [the action] accrues when the loss is suffered by the party seeking indemnity" (*City of New York v Lead Indus. Ass'n*, 222 AD2d 119, 124 [1st Dept 1996], quoting *McDermott v City of New York*, 50 NY2d 211, 215 [1980]). Here, the plaintiff seeks indemnification for its injury after it was required to make reimbursements for the sums the plaintiff had caused the City of New York to pay. Because the plaintiff alleges that payment was made in October 1997, and because the Complaint was filed on May 23, 2003, the statute of limitations time frame of six years has not run. Accordingly, the defendant's motion to dismiss based on the statute of limitations is denied.

In turning to the issue of duty, the court notes that indemnification is available to a party who is free of actual wrongdoing and whose liability is vicarious (*see Lim v 147 East 44th Street Corp.*, 186 AD2d 353, 353-354 [1st Dept 1992]). That party may turn to the actual wrongdoer for indemnification (*id.*). "In the classic indemnification case, the one entitled to indemnity from another had committed no wrong, but by virtue of some relationship with the tort-feasor or obligation imposed by law, was nevertheless held liable to the third party" *(D'Ambrosio v City of New York*, 55 NY2d 454, 460-61 [1982]).

Here, the plaintiff has made out a viable claim for indemnification from Markowitz. While it is disputed as to what extent there was a relationship between Markowitz and Volt, Volt alleges that it required these individuals and companies to submit forms to the plaintiff as proof of

completion. Contrary to defendant's assertion, one could perceive a relationship between the two parties as well as an independent duty on the part of the defendant to provide correct and precise information to the plaintiff. Indeed, the alleged fraud committed upon the plaintiff and the duty of Markowitz not to defraud the plaintiff are enough for the plaintiff to seek indemnification from Markowitz for reimbursements made to the City of New York due to defendant's actions. The court again notes that this argument, sounding in unclean hands, cannot be used as both a shield and sword to escape liability where the defendant is an alleged cohort to the fraud.

The defendant's motion to dismiss the third cause of action for indemnification is denied.

4. Inducement of Breach of Fiduciary Obligation

Markowitz seeks to dismiss the fourth cause of action for inducement of breach of fiduciary obligation, arguing that the plaintiff fails to state a cause of action because he claims that there was no fiduciary duty on the part of Volt's employees to the plaintiff and, as such, no inducement to breach fiduciary obligations. Markowitz also argues that the statute of limitations bars recovery as to this cause of action. The court disagrees.

"A claim for aiding and abetting a breach of fiduciary duty requires: (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][citations omitted]).

Here, the plaintiff has sufficiently plead that Markowitz may have induced the plaintiff's employees to breach their fiduciary obligations to Volt. Employees of a company are "prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties" (*Maritime Fish Products, Inc.*

v World-Wide Fish Products, Inc., 100 AD2d 81, 88 [1st Dept 1984]; *see also Gassman & Gassman, Certified Public Accountants v Salzman*, 112 AD2d 82, 83-84 [1st Dept 1985]). The fraud perpetuated by the plaintiff's employees constitute a breach of that fiduciary obligation. Furthermore, as indicated by the defendant's allocution, Markowitz states that he knowingly participated in the breach. Finally, Volt sufficiently alleges that Volt suffered damages as a result, namely loss of income, loss of business and reputation, and forfeiture of the contract between the DEP and Volt. Based upon the above reasoning, Volt has made a viable claim against Markowitz for inducement to breach fiduciary obligations.

In the alternative, the defendant suggests that the statute of limitations bars recovery. Generally, while there is no single limitations period for breach of fiduciary claims (*see* CPLR 213[1]; CPLR 214[4]), a cause of action for breach of fiduciary duty based on allegations of actual fraud is subject to a six-year limitations period (*Kaufman*, 307 AD2d at 119, citing *Goldberg v Schuman*, 289 AD2d 8 [1st Dept 2001]). Furthermore, as articulated above, because CPLR 213-b applies in matters of this nature, a victim of a crime may pursue an otherwise barred claim by adjusting the statute of limitations period to a seven or ten year period. Based upon the reasoning set forth above, the plaintiff has brought this cognizable claim against the defendant within the requisite time period.

Thus, the defendant's motion to dismiss the fourth cause of action for inducement of breach of fiduciary obligation is denied.

5. Commercial Bribery

Markowitz next argues that the plaintiff fails to state a cause of action as to commercial bribery, arguing that there is no private cause of action for commercial bribery in this Department.

In the alternative, the defendant argues that the statute of limitations period has run. The court agrees.

Commercial bribery is "when [one] confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence [one's] conduct in relation to [one's] employer's or principal's affairs, and when the value of the benefit conferred or offered or agreed to be conferred exceeds one thousand dollars and causes economic harm to the employer or principal in an amount exceeding two hundred fifty dollars" (Penal Law § 180.03). As the First Department in *Sardanis v. Sumitomo Corp.* articulates, "the creation of such a right of action under the statute would be inconsistent with the existing legislative and remedial scheme, which gives the power of enforcement to the District Attorney" (279 AD2d 225, 230 [1st Dept 2001]). Accordingly, there is no private cause of action for commercial bribery (*id.*).

Because the First Department has decided that no private right of action exists for commercial bribery, the defendant's motion to dismiss the fifth cause of action is granted. The court need not deal with the statute of limitations argument.

6. Injury to Reputation, Lost Business, and Loss of Value to Business

Finally, the defendant moves to dismiss the sixth cause of action pursuant to the statute of limitations. Insofar as this claim sounds in defamation, the statute of limitations is one year, and it accrues upon publication of the offending statement (*see* CPLR 215[3]; *Firth v State of New York*, 98 NY2d 365, 369 [2002]; *Entertainment Partners Group, Inc. v Davis*, 198 AD2d 63, 64 [1st Dept 1993]). CPLR 213-b does not apply in this cause of action as the crime involved was for fraud, and victims may not utilize CPLR 213-b to toll claims for defamation. Accordingly, the requisite statute

of limitations applies. Here, because the complaint was brought years after the alleged defamation, the defendant's motion to dismiss the sixth cause of action for injury to reputation, lost business, and loss of value to business is granted.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant Markowitz's motion to declare him as a poor person pursuant to CPLR 1101 and to provide privileges allocated under CPLR 1102 is denied; it is further

ORDERED that the defendant's motion to dismiss pursuant to CPLR 3013 for insufficiency of the Complaint is denied; and it is further

ORDERED that the defendant Markowitz's motion to dismiss pursuant to CPLR 3211 (a) is granted as to the fifth cause of action for commercial bribery and the sixth cause of action for injury to reputation, lost business, and loss of value to business, and is otherwise denied as to the remaining causes of action.

Dated: January 9, 2006

ENTER:

RICHARD B. LOWE III

RICHARD B. LOWE, III, J.S.C.

FILED

JAN 17 2006

COUNTY