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SHORT FORM ORDER

INDEX No. 11-25374

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 46 - SUFFOLK COUNTY

PRESENT:

Hon. EMILY PINES
Justice of the Supreme Court

MOTION DATE 12-29-11
ADJ. DATE 3-27-12
Mot. Seq. # 001 - MG; CASEDISP

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ROBERT S. LEVY, SMITH, CARROAD, LEVY & FINKEL, LLP,

Plaintiffs,

- against -

LEE FINKEL OP DIGITAL LLC,

Defendants.

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Upon the following papers numbered 1 to 16 read on this motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 7; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 8 -13; Replying Affidavits and supporting papers 14 - 16; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Lee Finkel and OP Digital LLC seeking to dismiss plaintiffs' complaint is granted.

On August 9, 2011, plaintiffs Robert Levy and Smith, Carroad, Levy & Finkel commenced this action against defendants Lee Finkel and OP Digital LLC to recover damages for breach of contract, fraud, unjust enrichment, conversion, and tortious interference with their right to contract. Plaintiffs also seek an order directing Finkel to return the ownership, operation, registration and control of the URL "sclf.com" to plaintiffs.

Initially, the Court notes that on a motion to dismiss a complaint pursuant to CPLR 3211(a)(5), the court's function is to determine whether the causes of action alleged in the complaint have expired based upon their accrual dates. In addition, a CPLR 3211 motion to dismiss a complaint requires that a court take all the allegations in the complaint as true and resolve all inferences in favor of the plaintiff (*see* ***Sabadie v Burke***, 47 AD3d 913, 849 NYS2d 440 [2d Dept 2008]). In order to perform such a task, the complaint must be before the court (*see generally* ***Soule v Lozada***, 232 AD2d 825, 648 NYS2d 790 [3d Dept 1996]). Here, defendants have failed to include a copy of the complaint with their motion papers. However, since the complaint is contained in the record before this Court, defendants' motion shall be considered on the merits in the interest of judicial economy (*see* CPLR 2001; ***O'Brien v Vassar Bros. Hosp.***, 207 AD2d 169,

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622 NYS2d 284 [2d Dept 1995]; *cf.* ***Aleksandrowicz v Cantella & Co., Inc.***, 72 AD3d 1580, 898 NYS2d 913 [4th Dept 2010]).

Plaintiffs, by their complaint, allege that Robert Levy owned all of the assets of Smith, Carroad, Levy & Finkel, LLP, including the URL "sclf.com," and that on September 15, 1998, Louis Squeo of Squeo Graphics, Inc. (hereinafter referred to as "Squeo") was retained to create and manage the content of plaintiff's URL "sclf.com." Plaintiffs allege that Squeo designed the firm's web page, and, with Levy's approval, published the website, utilizing the services of Timothy Sailer of Coastal Internet, Inc., as the domain's host. Plaintiffs allege that Squeo ensured that the registrant of the URL "sclf.com" was Smith, Carroad, Levy & Finkel, LLP. Plaintiffs allege that in August 2005, Finkel offered to redesign plaintiffs' web page, and that during such time, Finkel discovered that the registration for "sclf.com" was set to expire on or about September 15, 2005. Plaintiffs allege that Finkel misrepresented his authority to Squeo and obtained all of the information for the subject URL, without advising plaintiffs that he would be registering the URL in his name. Plaintiffs allege that on or about September 15, 2005, Finkel registered the URL in his name, through his company OP Digital LLC, and then published the redesigned web page without plaintiffs' knowledge or consent. Plaintiffs allege that upon their discovery of Finkel's publication of the redesigned web page, Levy demanded that Finkel remove said page, which Finkel did, restoring Squeo's designed page. Plaintiffs allege that during this time they continued to make payments to Coastal Internet, Inc. for hosting the domain with Squeo's design and that they were unaware that Finkel had registered the site in his name.

Plaintiffs further allege that in September 2008 they engaged a new company, Top Ten Marketing, to redesign the web page, but when Top Ten Marketing attempted to access the website it was discovered that Finkel had registered the URL in his name. Thereafter, plaintiffs allege that they requested that Finkel provide Top Ten Marketing access to the web page, but that said request was refused. Plaintiffs allege that they never consented or agreed to permit Finkel to host, manage, or have any ownership or control over the URL "sclf.com," and that Finkel refused plaintiffs' request to return the URL. Plaintiffs further allege that Finkel continues to renew the URL in his name and currently is the registrant.

Defendants now move for dismissal of the complaint on the basis that plaintiffs failed to commence their action within the applicable statute of limitations period. More specifically, defendants contend that they obtained ownership to the "sclf.com" domain name on August 3, 2005 after being given permission to do so, and, therefore, plaintiffs' causes of action, which are grounded in contract law, expired on August 3, 2011. In support of the motion, defendants submit Lee Finkel's affidavit, and copies of the "GoDaddy.com" receipt transferring ownership of the URL "sclf.com" to Lee Finkel and OP Digital LLC, dated August 3, 2005, and copies of the domain's "Whois" ownership history. Plaintiffs oppose the motion on the ground that the date of the breach is September 12, 2008, which is the date that Finkel refused a request to return ownership of the website to plaintiffs. Plaintiffs further assert that the statute of limitations has not run on their causes of action for fraud, unjust enrichment, conversion, and tortious interference with their contractual right.

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(5) on statute of limitations grounds, the moving defendant must establish, prima facie, that the time in which to commence the action has expired (*see* ***Vilsack v Meyer***, __AD3d __, 2012 NY Slip Op 04736 [2d Dept 2012]; ***East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.***, 90 AD3d 821, 935 NYS2d 616 [2d Dept 2011]). If the

movant meets the initial burden of establishing prima facie that the time in which to sue has expired, the burden then shifts to the plaintiff to raise a triable issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable (*see* ***Zaborowski v Local 74, Serv. Empls. Intl. Union, AFL-CIO***, 91 AD3d 768, 936 NYS2d 575 [2d Dept 2012]; ***Baptiste v Harding-Marin***, 88 AD3d 752, 930 NYS2d 670 [2d Dept 2011]; ***Williams v New York City Health & Hosps. Corp.***, 84 AD3d 1358, 923 NYS2d 908 [2d Dept 2011]).

Plaintiffs' first cause of action is for breach of contract. A breach of contract cause of action is governed by a six-year statute of limitations (*see* CPLR 213 (2); ***Gibraltar Mgt. Co., Inc. v Grand Entrance Gates, Ltd.***, 46 AD3d 747, 848 NYS2d 684 [2d Dept 2007]). In particular, a breach of contract cause of action accrues at the time of the breach (*see* ***Ely-Cruikshank Co. v Bank of Montreal***, 81 NY2d 399, 599 NYS2d 501 [1993]; *see also* CPLR 203[a]). In general, accrual occurs when all of the factual elements necessary to maintain the lawsuit and obtain relief come into existence (*see* ***HP Capital, LLC v Village of Sleepy Hollow***, 68 AD3d 928, 891 NYS2d 443 [2d Dept 2009]). Here, the six-year statute of limitations on the breach of contract cause of action began to run when Finkel registered the URL in his name. Finkel has submitted evidence demonstrating that to make updates to a domain one has to be the owner of the domain, that his last update to the domain occurred on August 5, 2005, and that the transfer of the domain into his name occurred on August 3, 2005. Thus, the statute of limitations had already expired by the time plaintiffs instituted their cause of action on August 9, 2011 (*see* ***HP Capital, LLC v Village of Sleepy Hollow***, *supra*; ***Brandenberg v Waters Place Assocs.***, 17 AD3d 615, 794 NYS2d 80 [2d Dept 2005]; *cf.* ***Fleetwood Agency, Inc. v Verde Elec. Corp.***, 85 AD3d 850, 925 NYS2d 576 [2d Dept 2011]). In opposition, plaintiffs failed to present any evidence establishing that the action was commenced within the applicable limitations period, or to raise a triable issue of fact as to whether the six-year statute of limitations was tolled or was otherwise inapplicable (*see* ***Rakusin v Miano***, 84 AD3d 1051, 923 NYS2d 334 [2d Dept 2011]; ***Kirchmar v Scher***, 82 AD3d 1164, 919 NYS2d 378 [2d Dept 2011]; *see also* ***Sears, Roebuck & Co. v Patchogue Assoc.,LLC.***, 87 AD3d 629, 928 NYS2d 476 [2d Dept 20011]). Specifically, plaintiffs failed to rebut defendants' contention that Finkel became owner of the domain on August 3, 2005.

Plaintiffs' second cause of action sounding in fraud also must be dismissed, because plaintiffs have failed to allege with the particularity necessary to survive the heightened pleading requirements of CPLR 3016 any specific misrepresentations by Finkel upon which they justifiably relied (*see* ***Introna v Huntington Learning Ctrs., Inc.***, 78 AD3d 896, 911 NYS2d 442 [2d Dept 2010]). CPLR 3016 (b) requires that a party seeking to assert a cause of action for fraud must set forth the circumstances constituting the wrong with particularity (*see* ***Eurycleia Partners, LP v Seward & Kissel, LLP***, 12 NY2d 553, 883 NYS2d 147 [2009]; ***National Union Fire Ins. Co. of Pittsburgh, Pa v Christopher Assoc.***, 257 AD2d 1, 691 NYS2d 35 [1st Dept 1999]; ***Bank Leumi Trust Co. of N.Y. v D'Evori Intl.***, 163 AD2d 26, 558 NYS2d 909 [1st Dept 1990]). To plead a cause of action for fraudulent misrepresentation, a plaintiff must show misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance by that party, and injury as a result of such reliance (*see* ***Lama Holding Co. v Smith Barney***, 88 NY2d 413, 646 NYS2d 76 [1996]; ***Chanel Master Corp. v Aluminum Ltd. Sales***, 4 NY2d 403, 176 NYS2d 259 [1958]; ***Introna v Huntington Learning Ctrs., Inc.***, *supra*; ***Deutsche Bank Natl. Trust Co. v Sinclair***, 68 AD3d 914, 891 NYS2d 445 [2d Dept 2009]).

Moreover, plaintiffs' claim for fraud is time-barred. An action alleging fraud must be commenced within six years of the fraud or within two years from the time the plaintiff discovered the fraud or could with reasonable diligence have discovered it, whichever is later (*see* CPLR 213 (8); ***Carbon Capital Mgt., LLC v American Express Co.***, 88 AD3d 933, 932 NYS2d 488 [2d Dept 2011]; ***New York City Tr. Auth. v Morris J. Eisen, P.C.***, 276 AD2d 78, 715 NYS2d 232 [2d Dept 2000]). A plaintiff will be held to have discovered the fraud when it is established that he or she was possessed with knowledge of facts from which the fraud could be reasonably inferred (*see* ***Trepuk v Frank***, 44 NY2d 723, 405 NYS2d [1978]; ***Erbe v Lincoln Rochester Trust Co.***, 3 NY2d 321, 165 NYS2d 107 [1957]). Plaintiffs state that in September 2008 they became aware of the fact that Finkel was the registered owner of the URL "sclf.com;"; that plaintiffs requested that Top Ten Marketing be given the website's access information in order to redesign the web page, which Finkel refused to do; and that Finkel refused their request that he return the URL to their ownership. Thus, plaintiffs had two years from the discovery of the alleged fraud in 2008 to commence their action. However, plaintiffs' action was not commenced until August 2011, well outside the statute of limitations for fraud. Additionally, the alleged fraudulent act that Finkel allegedly committed was the registration of the URL in his name, through his corporation, OP Digital, LLC, on September 15, 2005. However, defendants have submitted evidence establishing that the URL was registered in Finkel's name on August 3, 2005 and, therefore, the action is barred by the statute of limitations, since it was commenced more than six years after the alleged fraudulent act occurred (*see* ***Robertson v Wells***, 94 AD3d 951, 942 NYS2d 194 [2012]; *cf.* ***Sargiss v Magarelli***, 12 NY3d 527, 881 NYS2d 651 [2009]).

Regarding plaintiffs' third cause of action, the theory of unjust enrichment is a quasi-contract claim, which rests upon the principle in equity that a person should not be permitted to enrich himself or herself unjustly at the expense of another person (***State of New York v Barclays Bank of N.Y.***, 76 NY2d 533, 540, 561 NYS2d 697 [1990]; *see* ***IDT Corp. v Morgan Stanley Dean Witter & Co.***, 12 NY3d 132, 879 NYS2d 355 [2009], *lv denied* 12 NY3d 889, 883 NYS2d 793 [2009], *quoting* ***Miller v Schloss***, 218 NY 400, 407, 113 NE 337 [1916]; *see also* Restatement [First] of Restitution § 1). It creates an obligation imposed by equity to prevent injustice in the absence of an actual agreement between the parties concerned (*see* ***Goldman v Metropolitan Life Ins. Co.***, 5 NY3d 561, 807 NYS2d 583 [2005]). Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded (*see* ***IDT Corp. v Morgan Stanley Dean Witter & Co.***, *supra*; ***Clark-Fitzpatrick v Long Is. R. R. Co.***, 70 NY2d 382, 521 NYS2d 653 [1987]). A claim for unjust enrichment has a statute of limitations of six years (*see* CPLR 213).

Plaintiffs allege that defendants were unjustly enriched, because plaintiffs have been unable to utilize the URL "sclf.com," and seek pecuniary damages in the amount of $250,000.00. Under the instant circumstances, plaintiffs' allegation that defendants have been unjustly enriched at their expense, because Finkel is the registered owner of the URL "sclf.com," cannot stand. Notwithstanding the fact that the URL is registered in Finkel's name and plaintiffs continued to pay Coastal Internet, Inc. to host the domain, using the Squeo web design, plaintiffs have derived all the benefits from the existence of the web page. Plaintiffs allege that it was not until they "engaged" Top Ten Marketing to redesign the website in September 2008 that they discovered Finkel was the registered owner of the URL. However, plaintiffs' website had been active and continues to be active despite the fact that Finkel remains listed as the registered owner. In fact, plaintiffs state that Finkel continues to renew the URL. Furthermore, nowhere in plaintiffs' complaint do they allege that they have paid any fees to Finkel or OP Digital LLC to maintain the website, despite the website remaining operable.

Turning to plaintiffs' fourth cause of action, a claim for conversion has a three-year statute of limitations (*see* ***Davidson v Fasanella***, 269 AD2d 351, 702 NYS2d 384 [2d Dept 2000]; ***Erdheim v Matkins***, 259 AD2d 515, 686 NYS2d 108 [2d Dept 1999]), and accrues on the date that the conversion occurs (*see* CPLR 214 (3); ***Vigilant Ins. Co. v Housing Auth.***, 87 NY2d 36, 637 NYS2d 342 [1995]). The actions by Finkel that plaintiffs allege resulted in the conversion of their property all occurred in 2005, and the instant action was not commenced until 2011. Consequently, plaintiffs' claim that Finkel converted the URL "sclf.com" for his own use and benefit is time-barred.

Finally, plaintiffs allege in the fifth cause of action that defendants tortiously interfered with their right to contract. To establish a claim for tortious interference with contractual relations, a plaintiff must plead and prove four elements: (1) the existence of a contract between the plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party breach or otherwise render performance impossible; and (4) damages to the plaintiff (*see* ***Kronos, Inc. v AVX Corp.***, 81 NY2d 90, 595 NYS2d 931 [1993]). Since damage is an essential element of the tort, the claim is not enforceable until damages are sustained (*see* ***Kronos, Inc. v AVX Corp.***, *supra*). A claim for tortious interference with contractual relations has a three-year statute of limitations (*see* CPLR 214; ***Pursnani v Stylish Move Sportswear, Inc.***, 92 AD3d 663, 938 NYS2d 333 [2d Dept 2012]; ***Chung v Wang***, 79 AD3d 693, 912 NYS2d 647 [2d Dept 2010]).

Here, the damages would be those resulting from defendants' interference with plaintiffs' contracts with Squeo and Coastal Internet, Inc. Plaintiffs allege that Finkel, through misrepresentations of his authority, induced Squeo and Coastal Internet, Inc. to provide him with all of the necessary information to access the website page and register the URL under his name through his company OP Digital LLC. However, it must be concluded that plaintiffs first suffered a loss as a result of Finkel's alleged interference with their contractual relations when the information was provided to Finkel to access the website. Although the exact date of the injury is not alleged in plaintiffs' complaint, it must have occurred before September 15, 2005, which is the date that plaintiffs allege that Finkel registered the URL in his name, through his corporation OP Digital LLC. Therefore, the claim for tortious interference is time-barred. In any event, even if the claim was timely brought, plaintiffs' allegations fail to demonstrate that Finkel tortiously interfered with their right to contract with either Squeo or Coastal Internet, Inc., because plaintiffs state that they continued to pay Coastal Internet, Inc. for hosting the site and that Squeo's web design remained in place.

Accordingly, defendants' motion for an order dismissing plaintiffs' complaint on the grounds that all the causes of action set forth therein are time-barred is granted.

Dated: July 13, 2012

Emily Pines
Emily Pines
J. S. C.