

**Osborne v Williamson Law Book Co.**

2016 NY Slip Op 32807(U)

July 20, 2016

Supreme Court, Nassau County

Docket Number: 601575-15

Judge: Jerome C. Murphy

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**SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. JEROME C. MURPHY,  
Justice.**

**THOMAS OSBORNE,**

**Plaintiff,**

**- against -**

**WILLIAMSON LAW BOOK COMPANY, J.  
GREGORY CHWIECKO, TERRY WOLFE and  
RAY SHORTINO,**

**Defendants.**

**TRIAL/IAS PART 19  
Index No.: 601575-15  
Motion Date: 6/6/16  
Sequence No.: 001**

**DECISION AND ORDER**

*MG*

The following papers were read on this motion:

Notice of Motion, Affirmation in Support.....	1
Attorney Affidavit in Opposition and Exhibits.....	2
Defendants' Memorandum of Law in Opposition.....	3
Reply Affirmation.....	4

**PRELIMINARY STATEMENT**

Plaintiff brings this application for an order pursuant to CPLR §3025, granting leave to serve an amended complaint; and for such other and further relief as to the Court deems just and proper. Opposition to this application has been submitted by defendants, Williamson Law Book Company, J. Gregory Chwiecko and Terry Wolfe.

**BACKGROUND**

Plaintiff commenced this action by filing a Summons and Complaint on March 10, 2015 (Exh. "A" to Affidavit in Opposition". Plaintiff claims to have been an employee of Williamson Law Book Company ("Williamson") since 1979, and alleges that he entered into a Shareholders Agreement dated August 15, 1989. The Agreement is stated to provide, at ¶ 14, ". . . for the employment of each of the Shareholders by the Corporation, at a compensation agreed upon by each of the respective Shareholders and the Corporation." Plaintiff claims to be a 40%

Shareholder.

The Complaint alleges that at a meeting held on December 17, 2014, defendants Chwiecko, Wolfe, and Shortino voted to reduce plaintiff's compensation from \$65,000 per year, plus an annual car allowance of \$10,000, to a salary of \$20,000 and a \$10,000 car allowance. Plaintiff claims that this reduction was in violation of his contractual rights under the Agreement. Plaintiff also claims that bonuses paid to defendant Chwiecko are actually disguised dividends, and that plaintiff, as a shareholder in an "S" corporation, is entitled to a pro rata distribution of payments to Chwiecko in excess of \$140,000 per year.

Plaintiff asserts Two Causes of Action. The First Cause of Action claims a Breach of Contract, and the Second Cause of Action alleges Tortious Interference With Contract on the part of defendants Wolfe and Shortino. Plaintiff claims that they were aware of the Agreement and the entitlement of Shareholders to lifetime employment, and that the salaries of Shareholders could not be changed without their express consent. Despite this knowledge, the Complaint asserts that they interfered with plaintiff's contract by reducing his salary, and voting to pay bonuses to defendant Chwiecko.

By this motion, plaintiff seeks leave to serve an Amended Complaint in the form annexed to the motion (Exh. "A" to Motion). The Proposed Amended Complaint substantially expands the factual basis for the action, and seeks to add an additional Cause of Action for Breach of Fiduciary Duty.

It adds a new dimension to the claims against defendants, and brings into play an organization known as SEI, which is solely owned by defendant Wolfe. Wolfe became a member of the Board of Directors of Williamson in 2010. SEI is a software creator which sells software to municipalities for the processing of parking tickets by courts. Allegedly, Wolfe offered to sell SEI to Williamson, but the offer was refused. Defendants Wolfe and Chwiecko each offered to purchase plaintiff's 40% share in Williamson, both of which plaintiff declined.

Chwiecko then allegedly entered into a rental agreement for a portion of Williamson's office space with SEI, which fact was not disclosed to plaintiff. Chwiecko then became an employee of SEI, and received salary payments from them, without disclosure to plaintiff. Chwiecko and Wolfe entered into a joint venture agreement between Williamson and SEI, at a time when Chwiecko and plaintiff were the only members of the Board of Williamson. After plaintiff demanded that Chwiecko deposit all proceeds from his work for SEI into Williamson's



bank account, plaintiff claims that Cwiecko cut him off from all his usual corporate activities, such as attending trade shows.

By letter dated July 12, 2010, Cwiecko proposed to take over the day-to-day operations of SEI and receive compensation from SEI, thereby diluting the amount of time available for him to devote to Williamson's business activities. The letter sought plaintiff's ratification of this working arrangement, which he declined to grant. Cwiecko subsequently delivered to plaintiff a proposed corporate resolution, embodying the provisions set forth in the July 12, 2010 letter, which plaintiff refused to sign. In response, Cwiecko allegedly increased the number of members of the board of directors of Williamson, including non-shareholders and his long-time friends, Wolfe and Shortino.

Plaintiff seeks to incorporate these allegations of breach of fiduciary duty into the Amended Complaint. Defendant opposes the motion, contending that the allegations of breach of fiduciary duty are simply duplicative of the breach of contract claim, are barred by the three-year statute of limitations, and plaintiff has not sufficiently alleged fraud, so as to invoke the six-year statute of limitations.

#### DISCUSSION

The amendment of pleadings is governed by Civil Practice Law and Rules § 3025, which provides as follows:

##### **Rule 3025. Amended and supplemental pleadings**

**(a) Amendments without leave.** A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.

**(b) Amendments and supplemental pleadings by leave.** A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.

**(c) Amendment to conform to the evidence.** The court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances.

**(d) Responses to amended or supplemental pleadings.** Except where otherwise prescribed by law or order of the court, there shall be an answer or reply to an amended or supplemental pleading if an answer or reply is required to the pleading being amended or supplemented. Service of such an answer or reply shall be made within twenty days after service of the amended or supplemental pleading to which it responds.

The language of the statute, and cases interpreting it, make it abundantly clear that amendment of pleadings is to be freely granted unless the proposed amendment is “palpably insufficient” to state a cause of action or defense, or it is patently devoid of merit. To the extent that prior decisions led to the conclusion that the movant was under a burden to establish the merit of the amendment, they erroneously stated the standard to be followed (*Lucido v. Mancuso*, 49 A.D.3d 420, 430 [2d Dept. 2008]).

The Proposed Amended Complaint is not palpably insufficient. Neither is it duplicative of the claim for Breach of Contract. The facts asserted as the basis for a breach of fiduciary duty are distinct from the breach of contract claims. The First Cause of Action in the original Complaint alleges that defendant Chwiecko unilaterally reduced plaintiff’s annual salary from \$65,000 to \$25,000; the Second Cause of Action alleges interference with plaintiff’s contract with Williamson by defendants Wolfe and Shortino.

The proposed Cause of Action for Breach of Fiduciary Duty involves a claim that defendant Chwiecko has undermined the viability of Williamson, by permitting what appears to be a competitor software company to occupy a portion of Williamson’s office, and Chwiecko’s diversion of his time to the operation of SEI, to the detriment of plaintiff’s 40% interest in Williamson.

New York law does not provide a single statute of limitations for breach of fiduciary duty claims. Rather, the choice of the applicable limitations period depends on the substantive remedy that the plaintiff seeks (*Loengard v. Santa Fe Indus.*, 70 N.Y.2d 262, 266, 519 N.Y.S.2d 801, 514 N.E.2d 113 [1987]). Where the remedy sought is purely monetary in nature, courts construe the suit as alleging “injury to property” within the meaning of CPLR 214(4), which has a three-year limitations period (*see e.g. Yatter v. Morris Agency*, 256 A.D.2d 260, 261, 682 N.Y.S.2d 198 [1st Dept.1998]). Where, however, the relief sought is equitable in nature, the six-year limitations period of CPLR 213(1) applies (*Loengard*, 70 N.Y.2d at 266-267). 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) ( *Kaufman v. Cohen*, 307 A.D.2d 113, 119 [1st Dept.2003] ).

Plaintiff’s Breach of Fiduciary Duty Cause of Action, for which he seeks monetary damages, is subject to a three-year statute of limitations. Plaintiff asserts that defendants created a joint venture, known as the Parking Management Team, in 2010, and annexes as Exh. “A”, promotional material sent by defendants to Babylon Village Court under cover of letter dated March 21, 2011.

Plaintiff claims that the wrongful conduct, constituting a breach of fiduciary duty, continues to the present time, annexing as Exh. “D” a schedule of updates of Parking Management Team software, as recently as May 23, 2016. The continuing tort doctrine permits the plaintiff to rely on wrongful conduct occurring more than three years prior to the commencement of the action , so long as the final actionable event occurred within the period of limitations (*Shannon v. MTA Metro-North R.R.*, 269 A.D.2d 218 [1<sup>st</sup> Dept. 2000]).

Consequently, plaintiff’s claims for breach of a fiduciary duty by defendants Cwiecko and Wolfe, fellow members of the Board of Directors of Williamson, is not barred by the statute of limitations. **Plaintiff’s motion for leave to serve an Amended Complaint including a Cause of Action for Breach of Fiduciary Duty is granted.** The Amended Complaint will be deemed served upon service upon defendants’ counsel with a copy of this Decision and Order with Notice of Entry. Defendants are directed to respond to the Amended Complaint within thirty days of service upon their counsel.


This matter is presently scheduled for a Certification Conference in this Part on September 14, 2016, at 9:30 A.M.

To the extent that requested relief has not been granted, it is denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York  
July 20, 2016

**ENTERED**  
AUG 08 2016  
NASSAU COUNTY  
COUNTY CLERK’S OFFICE

**ENTER :**  
  
**JEROME C. MURPHY**  
J.S.C.