Epiphany Community Nursery Sch. v Levey
2017 NY Slip Op 31668(U)
August 7, 2017
Supreme Court, New York County
Docket Number: 654655/2016
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54
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EPIPHANY COMMUNITY NURSERY SCHOOL,

Plaintiff,

-against-

HUGH W. LEVEY, CLAIRE GRUPPO, GRUPPO, LEVEY & CO., GRUPPO, LEVEY HOLDINGS INC., JANUARY MANAGEMENT, INC., FROG POND PARTNERS, L.P., and DAVIE KAPLAN CPA, P.C.,

Defendants.
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Index No.: 654655/2016

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 001 and 003 are consolidated for disposition.

Defendant Davie Kaplan CPA, P.C. (Davie Kaplan) moves, pursuant to CPLR 3211, to dismiss the complaint. Seq. 001. Defendants Hugh W. Levey (Hugh),[1] Claire Gruppo (Claire), Gruppo, Levey & Co. (GLC), Gruppo, Levey Holdings Inc. (GLH), January Management, Inc. (January Management), and Frog Pond Partners L.P. (Frog Pond) (collectively, the Gruppo Levey Defendants) separately move to dismiss the complaint. Seq. 003. Plaintiff Epiphany Community Nursery School (the School) opposes both motions. For the reasons that follow, defendants' motions are granted.

I. Factual Background & Procedural History

As this is a motion to dismiss, the facts recited are taken from the complaint (Dkt. 1)[2] and the documentary evidence submitted by the parties.

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[1] The individuals in this action are referred to by their first names to avoid confusion.

[2] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF).

The Gruppo Levey Defendants are currently before this court in an unrelated action, styled *Pensmore Investments, LLC v Gruppo, Levey & Co.*, Index No. 650002/2014 (the Pensmore Action), concerning their default on a settlement agreement. The underlying case and settlement resulted in protracted litigation over their alleged financial improprieties. *See* Pensmore Action, Dkt. 495 (granting summary judgment on claim to pierce corporate veils of GLC, GLH and another related entity).[3] An externality of the Pensmore Action was the public revelation that Hugh and Claire, longtime business partners, were having an affair. Predictably, the aftermath was an acrimonious divorce proceeding between Hugh and his now ex-wife, non-party Wendy Levey (Wendy),[4] which recently settled. Part of the fallout is the instant dispute over Hugh's involvement with the School, a New York not-for-profit corporation that operates a kindergarten and nursery school on Manhattan's Upper East Side.

The School's complaint contains well pleaded allegations of serious financial improprieties committed by Hugh. Nonetheless, while this case would have survived a motion to dismiss had it been commenced years ago, at this juncture, the claims in this action are dismissed because they are time-barred.[5]

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[3] The court assumes familiarity with the corporate structure of the Gruppo Levey Defendants. *See Pensmore Investments, LLC v Gruppo, Levey & Co.*, 2017 WL 1281815, at *6 n.13 (Sup Ct, NY County 2017). For the purposes of this decision, it is sufficient to note that Hugh "controlled [non-party Magic Management LLC [(Magic)] through his 100% ownership interest in January Management, which is the general partner of [non-party January Partners, L.P. (January Partners)]" and that "January Partners is the sole member of Magic." Complaint ¶ 36.

[4] Wendy intervened in the Pensmore Action. *See Pensmore Investments, LLC v Gruppo, Levey & Co.*, 137 AD3d 558 (1st Dept 2016).

[5] While not dispositive of the statute of limitations issue, defendants plausibly contend that Wendy benefited from many of her ex-husband's alleged defalcations by virtue of her ownership interest in some of the transferees (e.g., Wendy owns 48% of January Partners, the sole member of Magic, which is the beneficiary of some of the alleged fraud). *See also* Dkt. 43 at 9-10 (noting Wendy's $325,000 loan from the School, that "it appears that [the School] has not filed

Wendy founded the School in 1975 and "managed all educational aspects of [the School] since its inception."[6] Complaint ¶ 20. Wendy married Hugh two year earlier, in 1973. They have two children, Evan and Mariel (the former was a defendant in the Pensmore Action). Hugh has a B.A. from Yale and an M.B.A. from Harvard and is quite wealthy. In the 1990s, Hugh and Claire founded GLC, a financial advisory firm. In the early part of that decade, after enduring serous financial turmoil, including a personal bankruptcy, Hugh allegedly "started to insinuate himself in [Wendy's] personal financial matters, as well as the financial affairs of [the School], including its afterschool and summer programs." ¶ 30. "A few years later, Hugh … installed [himself] as a trustee of [Wendy's] personal trusts and [allegedly][7] arranged to become a member of [the School's] Board of Directors – a position that he retained until 2013, when he was removed by the newly formed Board." *Id.* "Ultimately, however, [Hugh allegedly] treated [the School] not as a charitable[8] organization, but as one of his numerous for-profit businesses." ¶ 32.

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its Form 990 or CHAR500 since its fiscal year ending June 30, 2013", and that "[p]ursuant to 26 U.S.C. § 6033(j), a non-profit that is required to but fails to file its Form 990 for three consecutive years automatically loses its tax-exempt status."); *accord* New York Not-For-Profit Corporation Law (N-PCL) § 719(a) (restrictions on transfers to directors, including loans). It should be noted that the current version of N-PCL § 719 was effective as of April 9, 2006, and that the current version of N-PCL § 716, which governs loans to directors that are not violative of N-PCL § 719(5), was effective as of July 1, 2014.

[6] The School contends that Wendy no longer controls it or its board. There is no need for the court to probe the veracity of that contention since it is not relevant to the court's statute of limitations analysis (because it is undisputed that Wendy controlled the School at the time of the underlying events). Moreover, the motive for this action is irrelevant (i.e., whether it is a "strife suit").

[7] As discussed herein, the School's contrary representations to the IRS in its tax returns preclude it from claiming that Hugh was actually a member of its Board.

[8] It should be noted that the School is not actually a charity; it is a not-for-profit that, as noted, operates a kindergarten and nursery school.

"In the late 1990s, [Hugh] retained [non-party] David Pitcher, of Davie Kaplan, to provide accounting services. Over time, [Pitcher] would grow to serve as [Hugh's] principal accountant for his and [Claire's] business interests, including [GLC] and GLH." ¶ 33.

"In or around December 2002, [Hugh] convinced [Wendy] that it would be beneficial [supposedly for tax purposes] for [the School] to sell its profitable afterschool and summer camp programs, then operating at … '74th St. Magic' and "Summer Days.'" ¶ 38. Pursuant to an Asset Purchase Agreement dated February 12, 2003 (the 'Purchase Agreement'),[9] [the School] sold its afterschool and summer programs to Magic for $300,000 — $30,000 of which was paid in cash, and the remaining $270,000 of which was to be paid pursuant to a promissory note payable over 10 years in installments of $27,000, plus interest." ¶ 40. "In addition, pursuant to a Premises and Services Agreement, certain monthly payments were to be made by Magic for the use of [the School's] facilities to operate its programs." *Id.*

The School alleges that "the $300,000 purchase price was based on a fraudulent valuation commissioned by Hugh." ¶ 42. Allegedly, "the valuation opinion was substantially inaccurate" because it was based on false information, provided by Hugh, regarding future rent owed by Magic. ¶¶ 43-44. "**For less than 10% of [the School's] space**, [Hugh] claimed Magic's rent would be $481,026 – **which was more than $100,000 above [the School's] total rent for the entire building**." ¶ 45 (emphasis added). "By supplying these false figures, [Hugh] was able to reduce the valuation for the programs, and ultimately the purchase price paid, by more than $1.5 million, providing [Hugh] with a windfall at [the School's] expense." *Id.* "If the valuation of the programs acquired by Magic had been appropriately calculated, the sale price would have exceeded $1.8 million." ¶ 46. In addition to this purportedly deflated purchase price, Magic,

[9] *See* Dkt. 101 at 5.

allegedly, never paid the amount owed on the note. The School, therefore, never received "$270,000 in principal and not less than $227,901 in interest." ¶ 48. "Adding insult to injury, in the years that followed, **Magic never paid any rent to [the School]** for the use of its facilities, thereby depriving the School of "over $484,000 in rent payments." ¶ 49 (emphasis added).

"[S]hortly after the 2003 sale to Magic was consummated, [Hugh] began regularly transferring money from [the School] to Magic." ¶ 50. The School's "financial records show that, in the period 2007 through December 31, 2013, [Hugh] transferred or caused to be transferred **over $5.9 million in school funds**." ¶ 52 (emphasis added). "Of the $5.9 million [Hugh] transferred or caused to be transferred to Magic, more than $4.4 million was received by January Management. At least $1.4 million in [School] funds were also transferred to [GLC] and/or GLH." ¶ 53. Additionally:

> [T]hrough his web of entities, [Hugh] transferred, or caused to be transferred, at least $535,000 of [School] funds to his personal bank accounts and at least $450,000 in [School] funds to Frog Pond, the limited partnership owned indirectly by [Hugh and Claire]. Once [Hugh] moved the [S]chool's funds into a Frog Pond account, the money was thereafter used to pay for [Claire's] personal expenses, as well as the expenses of the farmhouse in upstate New York used by [Hugh and Claire] … Frog Pond … also benefited from Hugh Levey's fraudulent transfers to Columbia Cabinets, a cabinet company owned, in part, by Frog Pond, as no less than $257,000 of [the School's] money was directed to Columbia Cabinets.

¶¶ 54-55.

"[I]n 2010, [Hugh] arranged for his long-time personal accountant, David Pitcher of Davie Kaplan, to serve as ECNS's outside auditor." ¶ 60. The School alleges, upon information and belief, that Hugh, "with the assistance of Davie Kaplan, manipulated and falsified the financial statements and books and records of both Magic and [the School] to further disguise the amounts siphoned from [the School] through Magic. ¶ 61. "This scheme had two main components: (1) initially record [Hugh's] fraudulent transfers as 'loans' on [the School's] books and records, and (2) then reduce the loan balances to zero at the end of each year by creating fictitious 'consulting fees' and 'lease commissions' that [the School] purportedly owed to [GLC] or GLH, which were then used to offset the fraudulent transfers and wipe them off [the School's] books." *Id.*[10] The School alleges that: "virtually no such services were provided to [the School] to justify any amount, let alone the millions of dollars fictitiously billed to [the School] to be used to offset the illicit transfers of [the School's] funds"; "[n]o documentation exists that such services were ever provided to [the School] or requested by [the School]"; "no agreement exists between [GLC]/GLH and [the School] setting forth the scope of services or their rates; and "no credible explanation exists as to why services purportedly provided by [GLC]/GLH to [the School] would be used to satisfy repayment of 'loans' made to a separate entity, namely Magic." ¶ 62.

The School further complains that Davie Kaplan ignored the "glaring red flag … that all of the purported 'consulting' fees were in whole dollar amounts and repeated each year", such as "(1) $75,000 for 'advertising and marketing' services for the years 2010 through 2013; (2) $100,000 for 'computer consulting' for the years 2009 through 2012; (3) $150,000 for 'strategic planning/consulting' for the years 2010 through 2013; (4) $50,000 for 'accounting' services for the years 2010 through 2013; and (5) $65,000 for 'human resources' for the years 2010 through 2013." ¶ 65. "Another glaring red flag were the accounting entries showing that GLH was owed (and ultimately paid) more than $1.2 million in purported 'lease commissions' in 2010 and 2012." ¶ 68. "A 'lease commission' — an amount paid to a real estate broker to bring a tenant

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[10] *But see* Dkt. 43 at 16 ("The Magic Loans were not written down to zero as of the end of [the School's] fiscal year 2010, i.e., June 30, 2010. Rather, as of then, the Magic Loans had a balance of $1,049,985. Further, as of the end of [the School's] fiscal year 2011, i.e., June 30, 2011, [the Schools] books and records reflected that the Magic Loans had a balance of $1,673,902.") (citations omitted).

and landlord together to form an agreement – has no application whatsoever to GLH or [the School]. GLH is not a real estate broker – it is a holding company for an investment firm." *Id.* The School also contends that "the amount in question – over $1.2 million – on its face is absurdly high, which itself should have triggered scrutiny" by Davie Kaplan. *Id.*

The School commenced this action on August 31, 2016. Its complaint asserts 13 causes of action: (1) fraud, asserted against Hugh and Davie Kaplan; (2) aiding and abetting fraud, asserted against Claire, GLC, GLH, January Management, Frog Pond, and Davie Kaplan; (3) breach of fiduciary duty, asserted against Hugh; (4) aiding and abetting breach of fiduciary duty, asserted against Claire, GLC, GLH, January Management, Frog Pond, and Davie Kaplan; (5) conversion, asserted against Hugh; (6) aiding and abetting conversion, asserted against Claire, GLC, GLH, January Management, Frog Pond, and Davie Kaplan; (7) unjust enrichment, asserted against Hugh, Claire, GLC, GLH, January Management, and Frog Pond; (8) an accounting, pursuant to N-PCL §§ 717 and 720(a)(1), asserted against Hugh; (9) aiding and abetting violations of N-PCL §§ 717 and 720(a)(1), asserted against Claire, GLC, GLH, January Management, Frog Pond, and Davie Kaplan; (10) a claim to set aside an unlawful conveyance under N-PCL § 720(a)(2), asserted against Hugh; (11) breach of contract, asserted against Davie Kaplan; (12) professional malpractice, asserted against Davie Kaplan; and (13) breach of fiduciary duty, asserted against Davie Kaplan.

On November 14, 2016, Davie Kaplan moved to dismiss the complaint, and the Gruppo Levey Defendants separately did so on December 14, 2016. The court reserved on the motions after oral argument. *See* Dkt. 102 (6/20/17 Tr.).

II. Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992); *see also Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

As an initial matter, the court rejects defendants' contention that the complaint lacks the specificity required by CPLR 3016(b); it is sufficiently detailed. *See Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009). Nonetheless, all of the claims in the complaint are dismissed as time-barred. While there are 13 causes of action, they all relate to one of two alleged schemes: (1) underpayment for the School's afterschool and summer camp programs; and (2) money stolen from the School, justified by the provision of alleged fictitious services.

The first scheme occurred in 2002 and 2003, more than a decade before this action was commenced in 2016. There is no applicable New York statute of limitations longer than 6 years. *See* CPLR 213 (claims with 6-year statute of limitations, including breach of contract, fraud, and accounting) & 214 (claims with 3-year statute of limitations, including conversion and malpractice).[11] The School recognizes this, but relies on CPLR 213(8), which provides that in "an action based upon fraud[,] the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued **or two years** from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could **with reasonable diligence have discovered it**" (emphasis added). It is well settled that "[t]he inquiry as to whether a plaintiff could, **with reasonable diligence**, have discovered the fraud turns on **whether the plaintiff was possessed of knowledge of facts from which [the fraud] could be reasonably inferred**." *Sargiss v Magarelli*, 12 NY3d 527, 532 (2009) (emphasis added; quotation marks omitted); *see Aozora Bank, Ltd. v Deutsche Bank Secs. Inc.*, 137 AD3d 685, 689 (1st Dept 2016) ("Where the circumstances are such as to suggest to **a person of ordinary intelligence** the probability that he has been defrauded, **a duty of inquiry arises**, and if he omits that inquiry when it would have developed the truth, **and shuts his eyes to the facts** which call

[11] It should be noted that the statute of limitations on a breach of fiduciary duty claim may be 3 or 6 years depending, for instance, if the claim is predicated on fraud. *See IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 (2009). It also should be noted that the statute of limitations on an aiding and abetting claim depends on the limitations period applicable to the underlying claim. *See D. Penguin Bros. v Nat'l Black United Fund, Inc.*, 137 AD3d 460, 461 (1st Dept 2016) ("The six-year limitations period applies to the aiding and abetting breach of fiduciary duty claims, since those claims are based on allegations of actual fraud.").

for investigation, knowledge of the fraud will be imputed to him.") (emphasis added), quoting *CIFG Assurance N. Am., Inc. v Credit Suisse Secs. (USA) LLC*, 128 AD3d 607, 608 (1st Dept 2015), and citing *Gutkin v Siegal*, 85 AD3d 687, 688 (1st Dept 2011) ("The test as to when fraud should with reasonable diligence have been discovered **is an objective one**.") (emphasis added).[12]

Defendants contend that the School has always been in possession of the facts from which Hugh's fraud could be reasonably inferred. They further aver that a reasonably prudent person, especially one that owes fiduciarily duties to a non-profit by virtue of being its director (i.e., Wendy), could have discovered with basic diligence that the School was being defrauded. Defendants are correct. The financial terms of the Purchase Agreement were not a secret,[13] nor was the fact that Magic never paid rent or the amounts due on the note. Magic's nonpayment could easily have been ascertained by performing a cursory review of the School's bank records.[14]

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[12] In *Kirschner v KPMG LLP*, 15 NY3d 446 (2010), the Court of Appeals explained that since "[c]orporations are not natural persons", necessarily, "[they] must act solely through the instrumentality of their officers or other duly authorized agents." *Id.* at 465. The Court further explained that "a fundamental principle that has informed the law of agency and corporations" is that "the acts of agents, and the knowledge they acquire while acting within the scope of their authority are presumptively imputed to their principals." *Id.* (citations omitted). "A corporation must, therefore, be responsible for the acts of its authorized agents even if particular acts were unauthorized." *Id.* Here, since the School is not a natural person, the requisite inquiry regarding knowledge and diligence must focus on Wendy, its director. It follows, thus, that Wendy's knowledge and the reasonableness of her diligence is imputed to the School.

[13] Wendy signed the Purchase Agreement on behalf of the School. *See* Dkt. 101 at 31.

[14] The degree to which Hugh may have linked the banks accounts of the School and his companies is irrelevant. Wendy had every right (as well as a duty) to access those records. She did not do so for more than a decade and now cannot complain. Notably, the School does not cite a single case where a director failed to review a company's bank records when such records would clearly have put her on notice of the fraud, but where the court nonetheless held that the

Moreover, nothing prevented Wendy from ensuring that the terms of the Purchase Agreement were fair (e.g., by obtaining her own appraisal). Indeed, she had a fiduciary duty of care to do so. N-PCL § 717(a); *see S.H. & Helen R. Scheuer Family Found., Inc. v 61 Assocs.*, 179 AD2d 65, 70 (1st Dept 1992); *People v Lower Esopus River Watch, Inc.*, 39 Misc3d 1241(A), at *24 (Sup Ct, Ulster County 2013) ("The N-PCL requires directors and officers of not-for-profit corporations to adhere to basic fiduciary duties that include[s] the duty of care."); *see also Levy v Young Adult Inst., Inc.*, 103 FSupp3d 426, 429 (SDNY 2015) (noting similarity between fiduciary duties of directors of for-profit corporations under BCL and not-for-profit corporations under N-PCL, such as duty of care); *cf. Consumers Union of U.S., Inc. v State*, 5 NY3d 327, 373-74 (2005) (Smith, J., dissenting) (disagreeing with majority, which held that business judgment rule applies to directors of not-for-profit corporations, but noting that business judgment rule does not apply where directors breached duty of care), accord *Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-38 (1990). Under New York law, a director breaches her duty of care when she causes there to be a "'sustained or systematic failure … to exercise oversight' over the corporation's activities." *Grika v McGraw*, 55 Misc3d 1207(A), at *19 (Sup Ct, NY County 2016) (Oing, J.) (applying New York law), quoting *In re Caremark Int'l Inc. Derivative Lit.*, 698 A2d 959, 970 (Del Ch 1996); *see also Marx v Akers*, 88 NY2d 189, 199 (1996) (noting that demand futility exists with respect to directors when "[t]heir performance of the duty of care would have 'put them on notice of the claimed self-dealing of the affiliated directors.'"), quoting *Barr v Wackman*, 36 NY2d 371, 380 (1975) ("No custom or practice can make a directorship a mere position of honor void of responsibility, or cause a name to become a substitute for care and attention.").

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company was permitted to avail itself of the two-year-from-discovery rule. This court will not create such terrible precedent notwithstanding Hugh's conduct.

To the extent the School complains that the Purchase Agreement's terms were obviously unfair, the court does not disagree. If anything, that fact demonstrates the complete abdication of Wendy's fiduciary duties. The most charitable reading of the complaint is that Wendy was asleep at the wheel and seemingly violated her duty of care.[15] No reasonable director can justify being ignorant of the level of malfeasance of which the School complains. That Wendy trusted her husband "implicitly" [*see* Dkt. 76 at 11] is irrelevant. Wendy, as the School's director, had the duty to ascertain the fairness of the Purchase Agreement's terms and to make sure the School was paid what it was owed. Her knowledge and access to information is imputed to the School. Hence, the School cannot contend that it was not always in a position to discover Hugh's fraud with reasonable diligence. Consequently, all of the School's claims predicated on the Purchase Agreement and Magic's failure to pay the School are dismissed as time-barred.

Turning now to the second category of claims – Hugh's theft of money from the School, which was allegedly aided and abetted by Davie Kaplan[16] – such claims also are time-barred.

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[15] Interestingly, Wendy, as noted, had an effective 48% interest in Magic's contractual arrangement with the School (i.e., thereby benefiting from a low purchase price and unpaid rent). It is one thing for a director to avail herself of her right under N-PCL § 717(b) to fulfill her duty of care by relying on an expert. However, when that expert is the director's husband, and the director permits the non-profit to contract with a company in which she has an ownership interest and which is controlled by her husband, that raises serious concerns. In such a situation, the director would likely be considered interested in the transaction, thereby triggering entire fairness (as opposed to business judgment) review. *See In re Kenneth Cole Prods., Inc.*, 27 NY3d 268, 275 (2016) ("when there is an inherent conflict of interest, the burden shifts to the interested directors or shareholders to prove good faith and the entire fairness.") That said, the court will not speculate about whether Wendy had actual knowledge of or aided and abetted her ex-husband's activities. Her duty of inquiry, which is imputed to the School, arises from her duty of care and exists regardless of her knowledge or scienter.

[16] It should be noted that the non-fraud claims asserted against Davie Kaplan must be construed as a single cause of action for malpractice, with has a three-year statute of limitations that began to run after the auditing work was completed. *Risk Control Assocs. Ins. Group v Lebowitz*, 151 AD3d 527 (1st Dept 2017) (there is a "three-year statute of limitations applicable to nonmedical malpractice actions, whether sounding in breach of contract or tort."), citing *In re R.M. Kliment*

Defendants correctly contend that "to the extent the Complaint alleges wrongdoing occurring before August 31, 2010—the vast majority of [the] Complaint —such allegations are barred by the statute of limitations." *See* Dkt. 54 at 13. As with the first category of claims, the School relies on CPLR 213(8) and contends that the discovery period should not begin to run until the School supposedly discovered the fraud within two years of its commencement of this action. In support of this contention, the School avers that Hugh's scheme was financially sophisticated and concealed with complex accounting shenanigans that made it impossible to detect by a layman such as Wendy. The court disagrees.

As defendants correctly respond, there is no financial alchemy afoot. A simple review of the School's bank statements would reveal that Hugh transferred nearly ***$6 million*** to himself and his companies. While the School complains that Wendy gave Hugh the power to manage its bank accounts, the School cannot credibly contend that Wendy lacked the ability and legal right to obtain and review such records, which would have revealed Hugh's defalcations.[17] Nor can the School credibly contend that it could not have determined the sham nature of the pretextual

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& Frances Halsband, Architects, 3 NY3d 538, 542 (2004); *see Johnson v Proskauer Rose LLP*, 129 AD3d 59, 68 (1st Dept 2015) (explain that current version of "CPLR 214(6) ... was enacted to prevent plaintiffs from circumventing the three-year statute of limitations for professional malpractice claims by characterizing a defendant's failure to meet professional standards as something else, such as a breach of contract (for which there is a six-year statute of limitations)."). Pursuant to CPLR 214(6), "[a]n action for professional malpractice must be commenced within three years of the date of accrual." *Williamson v PricewaterhouseCoopers LLP*, 9 NY3d 1, 7 (1st Dept 2007). The "claim accrues when the malpractice is committed, **not when the client discovers it**." *Id.* at 7-8 (emphasis added), citing *Glamm v Allen*, 57 NY2d 87, 93 (1982); *see Rodeo Family Enterprises, LLC v Matte*, 99 AD3d 781, 783 (2d Dept 2012) ("a cause of action alleging accountant malpractice '**accrues upon the client's receipt of the accountant's work product**'") (emphasis added), quoting *Ackerman v Price Waterhouse*, 84 NY2d 535, 541 (1994). Hence, the non-fraud claims asserted against Davie Kaplan are time-barred because its final audit was delivered on April 29, 2013, more than three years before this action was commenced.

[17] The School's IRS Form 990s provide that Wendy is the "person who possesses the books and records of the [School]." *See* Dkt. 85 at 6.

services Hugh proffered to justify the pilfering. A corporation and its board may not claim ignorance of its contractors' services (or lack thereof). The School and Wendy are charged with the knowledge of the millions taken by Hugh, which would have impelled a reasonable person to inquire of Hugh his justifications for taking such amounts. If the answer, presumably, was his supposed services, Wendy, who ran the School, would have been in a position to know if such services were proffered and if agreements to pay the amounts existed. Simply put, reasonable diligence easily would have revealed the fraud. Consequently, the School cannot avail itself of CPLR 213(8)'s two-year-from-discovery rule.

Finally, to the extent Hugh is alleged to have converted money between 2010 and 2013 (i.e., less than six years before this action was commenced), that claim amounts to a cause of action for conversion. *See Colavito v N.Y. Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 (2006) ("A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession."). Conversion has a three-year statute of limitations. CPLR 213(3); *see Komolov v Segal*, 96 AD3d 513 (1st Dept 2012). The complaint does not identify a single transfer after August 31, 2013.[18] The court rejects the notion that the scheme amounts to fraud, thereby triggering the longer six-year limitations period. As discussed, Hugh did nothing more than take money from the School that he was not entitled to. That is conversion. *See Johnson v Law Office of Schwartz*, 145 AD3d 608, 612 (1st Dept 2016) ("The gravamen of the sixth cause of action is that the attorney defendants converted the $45,000 that plaintiff was

[18] Moreover, the School's General Ledgers, submitted on this motion, only run through June 30, 2013. *See* Dkt. 72. While the complaint alleges that more than $400,000 was taken by Hugh in "the Fiscal Year 2012-13" [*see* Complaint ¶ 70], the School's audit reports indicate that its fiscal year ends on June 30. *See* Dkt. 34 at 2. The School does not allege any theft during the fiscal year 2013-14 or thereafter.

slated to receive from Builders Mutual. The three-year statute of limitations runs from the date that the conversion takes place."), citing *Vigilant Ins. Co. of Am. v Hous. Auth. of City of El Paso, Tex.*, 87 NY2d 36, 44 (1995) ("For Statute of Limitations purposes, an action for conversion [is] subject to a three-year limitation period[, and] accrual runs from the date the conversion takes place and not from discovery or the exercise of diligence to discover.") (internal citations omitted).[19]

The court also rejects the notion that Hugh engaged in complex accounting fraud to conceal his actions. That his proffered justifications may be pretextual is of no moment. No one was tricked by his accounting entries because, apparently, no one (including Wendy) bothered to monitor the School's bank records to verify why Hugh was taking millions of dollars. Had Wendy done so, the fraud, even according to her, would have been apparent. *See* Dkt. 76 at 16 ("the red flags and other indicia of fraud surrounding the purported 'consulting fees,' the 'lease commissions,' and the other bogus charges were so glaring and flagrant that 'even the most novice of accountants' would have recognized and 'objected to' them."). The fraud would have been obvious to anyone of ordinary intelligence, not only an accountant. No reasonably prudent director could miss the fact that her husband was siphoning millions of dollars from the School.[20] In hindsight, Hugh could have simply skipped the accounting shenanigans, and the result would

[19] Even if the claim was styled as breach of fiduciary duty, the statute of limitations is three years because the claim seeks monetary relief. *See IDT*, 12 NY3d at 139 ("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.").

[20] Aside from the inapplicability of tolling by virtue of fraud, the School cannot avail itself of equitable tolling because, as discussed, nothing prevented Wendy from discovering Hugh's theft and timely commencing suit. *See Zumpano v Quinn*, 6 NY3d 666, 674 (2006) (equitable tolling requires "the plaintiff [to] demonstrate reasonable reliance on the defendant's misrepresentations."); *see Duberstein v Nat'l Med. Health Card Sys., Inc.*, 37 AD3d 209, 210 (1st Dept 2007).

have been the same. Simply put, Hugh stole money. That is conversion. The School's complaint seeking redress for that conversion was filed more than three years after it occurred, rendering it untimely.[21] Nothing prevented Wendy from discovering this malfeasance other than her own inattention. Accordingly, it is

ORDERED that the motions by Davie Kaplan CPA, P.C., Hugh W. Levey, Claire Gruppo, Gruppo, Levey & Co., Gruppo, Levey Holdings Inc., January Management, Inc., and Frog Pond Partners L.P. to dismiss the complaint are granted, and the Clerk is directed to enter judgment dismissing the complaint with prejudice.

Dated: August 7, 2017

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.

[21] The School cannot contend that Hugh was a member of its board (the School contends that Hugh was a fiduciary in support of its breach of fiduciary duty cause of action, not in support of of fiduciary tolling). *See* Complaint ¶ 11. On the School's tax forms, which were signed by Wendy, there were only two listed "Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees" – Wendy and Evan. *See, e.g.,* Dkt. 85 at 7. The doctrine of tax estoppel precludes the School from now contending otherwise. *Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 (2009) ("A party to litigation may not take a position contrary to a position taken in an income tax return."); *Stevenson-Misischia v L'Isola D'Oro SRL*, 85 AD3d 551, 552 (1st Dept 2011); *see Livathinos v Vaughan*, 121 AD3d 485, 486 (1st Dept 2014) ("Having declared on the income tax returns filed for Trinity from 2001 through 2008 that she owned 100% of the company's stock, [plaintiff] may not assert in this litigation that [defendant] owned 50% of the company's stock."). One cannot lie to the government (under penalty of perjury) and then proffer a different story in a civil action. To the extent the School contends its tax returns' omission of Hugh as a director was a "mistake", that contention is "inherently incredible" – year after year Wendy and Evan were listed as the only directors. *See Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 (1st Dept 2016) ("It is true that in considering a motion to dismiss … the court must presume the facts pleaded to be true and must accord them every favorable inference. **However, factual allegations.... that consist of bare legal conclusions, or that are inherently incredible ..., are not entitled to such consideration**." (emphasis added; internal citations and quotation marks omitted).