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| Greenwald v Keren |
| 2021 NY Slip Op 32812(U) |
| December 22, 2021 |
| Supreme Court, New York County |
| Docket Number: Index No. 654820/2016 |
| Judge: Lucy Billings |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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MOSHE GREENWALD,

Index No. 654820/2016

Plaintiff

- against -

DECISION AND ORDER

ERAN KEREN, ARIK ESHEL, AROMA ON 42ND
STREET, LLC, and COFFEE ON CHURCH, LLC,

Defendants

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LUCY BILLINGS, J.S.C.:

Plaintiff and defendants Keren and Eshel each are members of defendants Aroma on 42nd Street, LLC, and Coffee on Church, LLC, two espresso coffee bars in New York County, and hold a one third interest in the limited liability companies (LLCs). Plaintiff moves to join a new defendant, Coffee at GSP (Garden State Plaza), LLC, an espresso coffee bar in New Jersey of which Keren and Eshel, but not plaintiff, are members. C.P.L.R. § 1002(b). He moves to amend his complaint to add a claim for conversion against the new defendant, a claim for civil conspiracy against Keren and Eshel as well as the new defendant, and a claim for access to the books and records and an audit under the operating agreement of Coffee on Church. C.P.L.R. § 3025(b). Plaintiff also moves to add allegations supporting the original complaint's claims for access to the books and records and an audit under the operating agreement of Aroma on 42nd Street, for breach of a

fiduciary duty against Keren, and for aiding and abetting breach of a fiduciary duty against Eshel. Id. Defendants do not oppose the additional claim for access to the books and records and an audit under the operating agreement of Coffee on Church or the additional allegations supporting the original complaint's claims for access to the books and records and an audit under the operating agreement of Aroma on 42nd Street. Plaintiff withdraws his motion to the extent it seeks to add claims for conversion against any defendants other than Coffee at GSP, for fraud, and for unjust enrichment.

I. THE NEW FACTUAL ALLEGATIONS

Plaintiff's proposed amended claims rest on his allegations that Keren and Eshel, when presented with the opportunity to acquire and operate the third coffee bar in New Jersey, owed plaintiff a fiduciary duty to disclose the opportunity to him, but deliberately concealed from him their acquisition and operation of the new LLC. He complains that Keren and Eshel used their experience owning and operating the two coffee bars in New York to qualify themselves as purchasers and operators of the third coffee bar. He further alleges, but only "upon information and belief," that Keren and Eshel secretly used the assets of Aroma on 42nd Street and Coffee on Church to fund the operation and otherwise for the benefit of Coffee at GSP, including its employees' salaries. Aff. of Joseph Tripodi Ex. 2 ¶ 39. The

only specific allegation supporting this use of the two New York LLCs' assets is that Coffee at GSP hired their former employees, who of course were free to accept employment from a new employer. As long as their former employer, one of the two New York LLCs, was not continuing to pay their salary, the New York LLCs and plaintiff's interest in them were not injured.

None of these new allegations indicates any unlawful conduct by defendants toward plaintiff except the allegation "upon information and belief" that Keren and Eshel used the assets of the LLCs of which plaintiff was a member for an LLC of which he was not a member without his knowledge. Although the original complaint sought access to the books and records and an audit of Aroma on 42nd Street, plaintiff has never moved for access to the books and records or an audit between September 12, 2016, when he commenced this action, and June 17, 2017, when he served this motion, or even now. Nor has he presented any disclosure conducted that reveals whether the assets of either Aroma on 42nd Street or Coffee on Church were diverted to Coffee on GSP or to any unauthorized purpose.

II. STANDARDS FOR AMENDING THE COMPLAINT

Leave to amend a complaint is freely granted unless the amendment would surprise or otherwise prejudice the opposing parties, Davis v. South Nassau Communities Hosp., 26 N.Y.3d 563, 580 (2015); Kimso Apts., LLC v. Gandhi, 24 N.Y.3d 403, 411

(2014); Machado v. Gulf Oil, L.P., 195 A.D.3d 26, 30 (1st Dep't 2021); Mashinsky v. Drescher, 188 A.D.3d 465, 466 (1st Dep't 2020), or the amendment lacks merit. C.P.L.R. § 3025(b); Mashinsky v. Drescher, 188 A.D.3d at 466; Avail 1 LLC v. Acquafredda Enters. LLC, 184 A.D.3d 476, 477 (1st Dep't 2020); Brook v. Peconic Bay Med. Ctr., 172 A.D.3d 468, 469 (1st Dep't 2019); Jean-Baptiste v. 153 Manhattan Ave. Hous. Dev. Fund Corp., 124 A.D.3d 476, 477 (1st Dep't 2015). Even if plaintiff's amended complaint would not amount to prejudice, his failure to support his motion with a proposed amended complaint verified on personal knowledge or other evidence, even inadmissible evidence, warrants denial of his motion. Avail 1 LLC v. Acquafredda Enters. LLC, 184 A.D.3d at 477; McBride v. KPMG Intl., 135 A.D.3d 576, 580-81 (1st Dep't 2016); Sullivan v. Harnisch, 100 A.D.3d 513, 514 (1st Dep't 2012). See Hickey v. Steven E. Kaufman, P.C., 156 A.D.3d 436, 436 (1st Dep't 2017). Although the standard for amending a pleading is less exacting than in moving for summary judgment, and plaintiff need not prove his proposed claims at this stage, he still must support them with a verified pleading or other evidence. Avail 1 LLC v. Acquafredda Enters. LLC, 184 A.D.3d at 477; Hickey v. Steven E. Kaufman, P.C., 156 A.D.3d at 436; McBride v. KPMG Intl., 135 A.D.3d at 580-81; MBIA Ins. Corp. v. Greystone & Co., Inc., 74 A.D.3d 499, 500 (1st Dep't 2010).

Plaintiff's proposed amended complaint is unverified. Plaintiff does not even swear that he believes the critical allegations made "upon information and belief" to be true. Tripodi Aff. Ex. 2 ¶ 39. See C.P.L.R. § 3020(a). He presents no affidavit or documents indicating that Keren and Eshel used the assets of Aroma on 42nd Street or Coffee on Church to fund the operation or otherwise for the benefit of Coffee at GSP. Even were the court to consider the unverified conclusory claim that Keren and Eshel used one or both of the two New York LLCs' assets for the New Jersey LLC, the claims for conversion and civil conspiracy that plaintiff seeks to add and the claims for breach of a fiduciary duty and aiding and abetting breach of a fiduciary duty to which plaintiff seeks to add further allegations lack merit.

III. BREACH OF A FIDUCIARY DUTY

Absent any alleged agreement between plaintiff and Keren or Eshel that Keren or Eshel would find or develop opportunities to operate coffee bars jointly with plaintiff, Keren and Eshel owed no fiduciary duty to inform plaintiff of their acquisition or operation of Coffee at GSP or to invite him to join in the business. Apogee Handcraft, Inc. v. Verragio, Ltd., 155 A.D.3d 494, 496 (1st Dep't 2017); Genger v. Genger, 123 A.D.3d 445, 447 (1st Dep't 2014); Burry v. Madison Park Owner LLC, 84 A.D.3d 699, 700 (1st Dep't 2011). See EBC I, Inc. v. Goldman, Sachs & Co., 5

N.Y.3d 11, 19-20 (2005). Their only fiduciary duty to each other was in the ownership and operation of the two LLCs of which they all were members. Therefore defendants would be liable only if they misappropriated either of those two LLCs' assets for a purpose outside those LLCs.

Not only does such a claim lack any supporting evidentiary facts, C.P.L.R. § 3016(b); RSSM CPA LLP v. Bell, 162 A.D.3d 554, 555 (1st Dep't 2018); Berardi v. Berardi, 108 A.D.3d 406, 406-407 (1st Dep't 2013); Peacock v. Herald Sq. Loft Corp., 67 A.D.3d 442, 443 (1st Dep't 2009), but the facts that plaintiff does allege demonstrate that the statute of limitations for such a claim had expired when plaintiff filed and served his original complaint in September 2016 or at least by the time he filed and served his proposed amended complaint in June 2017. Where as here plaintiff seeks damages for the breach, the limitations period for both breach of a fiduciary duty and aiding and abetting breach of a fiduciary duty is three years, C.P.L.R. § 214(4), unless the breach is fraudulent, in which event the limitations period is six years. C.P.L.R. § 213(8); IDT Corp. v. Morgan Stanley Dean Witter & Co., 12 N.Y.3d 132, 139 (2009); Wimbledon Fin. Master Fund, Ltd. v. Hallac, 192 A.D.3d 617, 618 (1st Dep't 2021); Romanoff v. Romanoff, 148 A.D.3d 614, 616 (1st Dep't 2017); Cusimano v. Schnurr, 137 A.D.3d 527, 529-30 (1st Dep't 2016).

Thus, if the breach was not fraudulent and relates back to the original complaint, the breach must have occurred in September 2013 or afterward to be timely. If the breach was not fraudulent, but does not relate back to the original complaint, the breach must have occurred in June 2014 or afterward to be timely.

Plaintiff alleges that the breach occurred in April 2013 when Kern and Eshel entered an agreement to own and operate Coffee at GSP without inviting plaintiff to join in the business. He does not allege that defendants misrepresented any facts to him regarding the use of their New York LLCs' assets, let alone that he justifiably relied on any such misrepresentation or omission of material facts. IDT Corp. v. Morgan Stanley Dean Witter & Co., 12 N.Y.3d at 140; Access Point Med., LLC v. Mandell, 106 A.D.3d 40, 44 (1st Dep't 2013). He simply alleges that defendants did not inform him of their new business, but not until March 2016 did they deny him access to the New York LLCs' books and records. Thus, from 2013 to 2016, he was provided full access to the books and records to uncover any misuse of assets or transactions that at least would raise questions about the use of assets. As of September 2016, this action's disclosure devices all were available to him. C.P.L.R. § 3102(a). If the misuse of assets did not begin until after March 2016, plaintiff provides no hint explaining how he learned of defendants' actions

or what he learned. C.P.L.R. § 3016(b); RSSM CPA LLP v. Bell, 162 A.D.3d at 555; Berardi v. Berardi, 108 A.D.3d at 406-407; Peacock v. Herald Sq. Loft Corp., 67 A.D.3d at 443.

The new claims for breach of a fiduciary duty and aiding and abetting that breach, moreover, are based on an entirely different transaction or occurrence than the original claims for breach of a fiduciary duty and aiding and abetting the breach. The original claims were based on the denial of access to the New York LLCs' books and records. The new claims are based on the misuse of the New York LLC's assets and thus do not relate back to the filing of the original complaint. Bossung v. Rebaco Realty Holding Co., N.V., 169 A.D.3d 538, 538 (1st Dep't 2019); Torati v. Hodak, 147 A.D.3d 502, 503 (1st Dep't 2017). See C.P.L.R. § 203(f); U.S. Bank N.A. v. DLJ Mtge. Capital, Inc., 33 N.Y.3d 84, 90 (2019); Buran v. Coupal, 87 N.Y.2d 173, 178 (1995). Therefore, the statute of limitations was tolled only when plaintiff filed his proposed amended complaint in June 2017, and this breach must have occurred in June 2014 or afterward to be timely.

The only timeframe plaintiff alleges is April 2013. He does not allege that anything occurred as late as June 2014. Therefore the new claims for breach of a fiduciary duty and aiding and abetting breach of a fiduciary duty lack merit because they are untimely.

IV. CONVERSION

The limitations period for plaintiff's conversion claim against Coffee at GSP is also three years from when it took funds from the New York LLCs. C.P.L.R. § 214(3); Vigilant Ins. Co. of Am. v. Housing Auth. of City of El Paso, Tex., 87 N.Y.2d 36, 44 (1995); Ndenenoh v. City Univ. of N.Y. (CUNY)-City Coll., 180 A.D.3d 576, 577 (1st Dep't 2020); Underground Utils., Inc. v. Comptroller of the City of N.Y., 170 A.D.3d 481, 481-82 (1st Dep't 2019); Swain v. Brown, 135 A.D.3d 629, 631 (1st Dep't 2016). Again, plaintiff does not allege that defendants misrepresented any facts to him regarding the alleged conversion of their New York LLCs' assets, that he justifiably relied on any such misrepresentation or omission of material facts, or that defendants concealed their conversion by denying him access to the New York LLCs' books and records, at least until March 2016. Therefore, at least until then, there was no alleged fraud involved in the conversion to extend the limitations period to six years. C.P.L.R. § 213(8). See D. Penguin Bros. Ltd. v. City Natl. Bank, 167 A.D.3d 467, 467 (1st Dep't 2018); Monteleone v. Monteleone, 162 A.D.3d 761, 762 (1st Dep't 2018); Loeuis v. Grushin, 126 A.D.3d 761, 765 (1st Dep't 2015).

Since this claim against a new defendant also is based on an entirely different transaction or occurrence than the original claims, it, too, must have occurred in June 2014 or afterward to

be timely. Bossung v. Rebaco Realty Holding Co., N.V., 169 A.D.3d at 538; Torati v. Hodak, 147 A.D.3d at 503. See C.P.L.R. § 203(f); U.S. Bank N.A. v. DLJ Mtge. Capital, Inc., 33 N.Y.3d at 90; Buran v. Coupal, 87 N.Y.2d at 178. Again, plaintiff alleges a timeframe of April 2013 only and nothing that occurred as late as June 2014. Nor does he allege specifically what funds Coffee at GSP took to which he was entitled, from where it took the funds, in what account they now are identifiable, or that he has demanded their return, as required to support a conversion claim. SH575 Holdings LLC v. Reliable Abstract Co., 195 A.D.3d 429, 430-31 (1st Dep't 2021); McBride v. KPMG Int'l, 135 A.D.3d at 580; Lemle v. Lemle, 92 A.D.3d 494, 487 (1st Dep't 2012). Therefore plaintiff's conversion claim against Coffee at GSP also lacks merit due to untimeliness and lack of substantiation.

V. CONSPIRACY

Absent viable claims against Keren and Eshel for breach of a fiduciary duty or aiding and abetting breach of a fiduciary duty, plaintiff may not sustain a claim of civil conspiracy among Kern, Eshel, and Coffee at GSP to commit breach of a fiduciary duty.

Kokov v. Law Firm of Dayrel Sewell, PLLC, 182 A.D.3d 418, 418 (1st Dep't 2020); Wilson v. Dantas, 128 A.D.3d 176, 188 (1st Dep't 2015); Oparaji v. Yablon, 126 A.D.3d 443, 443 (1st Dep't 2015); Hoeffner v. Orrick, Herrington & Sutcliffe LLP, 85 A.D.3d 457, 458 (1st Dep't 2011). Absent a viable claim against Coffee

at GSP for conversion, plaintiff may not sustain a claim of civil conspiracy among Kern, Eshel, and Coffee at GSP to commit conversion.

VI. CONCLUSION

The court grants plaintiff's motion to amend the complaint without opposition to the extent of adding a claim for access to the books and records and an audit of defendant Coffee on Church, LLC, and adding allegations supporting the original complaint's claims for access to the books and records and an audit of defendant Aroma on 42nd Street, LLC. C.P.L.R. § 3025(b). For the reasons explained above, the court denies plaintiff's motion both to join a defendant and to amend the complaint further. C.P.L.R. §§ 1002(b), 3025(b). In sum, the only unlawful conduct set forth in the opposed amendments is based on nothing but unverified speculation. The only timeframe alleged, April 2013, is beyond the statute of limitations even if the claims relate back to the original complaint. Although plaintiff alleges that defendants concealed conduct that was entirely lawful, he does not allege that they concealed the alleged unlawful conduct for three years, until March 2016, after it allegedly began in April 2013, to extend the statute of limitations based on fraud.

Within 10 days after entry of this order, plaintiff shall serve a copy of this order with notice of entry and an amended complaint in accordance with this order on defendants.

Defendants shall answer the amended complaint within 20 days after its service. C.P.L.R. § 3025(d). This decision constitutes the court's order.

DATED: December 22, 2021



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C