UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA,

Plaintiff,

v.

MARK ELLIOT ZUCKERBERG, Individually, and FACEBOOK, INC.

Defendants.

Civil Action No. : 1:10-cv-00569-RJA

DECLARATION OF PAUL ARGENTIERI IN RESPONSE TO DEFENDANTS' MOTION TO DISMISS FOR STATUTE OF LIMITATIONS VIOLATION, ETC.

DECLARANT, submits this declaration and hereby declares under penalty of perjury and pursuant to 28 U.S.C. 1746 and under the laws of the United States that the following is true and correct:

1. I make this declaration upon personal knowledge.

2. Defendants have made several claims within their now summary judgment motion regarding statute of limitations and laches. Each will be addressed in turn below.

STATUTE OF LIMITATIONS ARGUMENT

3. Defendants' motion, Doc. No. 321, argues their clients breached the FB agreement with Plaintiff in April 2004. Doc. No. 321 at 9. As the court noted in its October 17, 2012 Decision and Order however, "[t]he doctrine of judicial estoppel prevents a party from asserting a factual position in one legal proceeding that is contrary to a position that is successfully advanced in

another proceeding." Rodal v. Anesthesia Group of Onondaga, P.C., 369 F. 3d113, 118 (2d Cir. 2004) (citing Mitchell v. Washingtonville Central School District, 190F.3d1, 6 (2d Cir. 1999))." Doc. No. 572 at 9. Defendants are collaterally estopped from arguing that breach date as a result of contradictory claims made by Defendants in a prior lawsuit, Facebook,Inc.v. Saverin, No. 105CV039867, filed in California Superior Court, Clara County ("Saverin Case")." See Exhibit A, Third Amended Complaint in Saverin Case.

4. Defendants alleged in the Saverin Case that, "On April 13, 2004, Saverin formed the LLC, which was organized as a limited liability company under Florida law. Zuckerberg, Moskovitz and Saverin are each listed as members and managers of the LLC in the Articles of Organization. At no time were the intellectual property rights in the business ever assigned to the LLC. At no time did those rights ever belong to the LLC." Doc. No. 401 at 6.

5. The Court has effectively ruled on this issue in the May 30, 2012 Decision and order as it clearly restates in its October 17, 2012 Decision and Order, "In denying Defendants' Clarification Motion, the court found that 'Defendants, by claiming as plaintiffs in the Saverin case, that no intellectual property rights were transferred into the LLC formed by Saverin on April 13,2004 under Florida law, moots the issue in the instant case and, as Defendants admit,[ ] no further discovery on this issue is required.'" Doc. No. 572 at 5.

6. Following the court's decision to prohibit Defendants from arguing the April 2004 breach date, they failed to approach the court alleging any other breach

date. Therefore, defendants' motion to dismiss for statute of limitations violation is without a specified alleged breach date. In addition to their motion being converted by the court to a motion for summary judgment, it is now claiming a breach of the statute of limitations without alleging a breach date. As it is, Defendants' motion must fail because it claims a violation of the applicable statute of limitations while omitting their claimed breach date, an omission whose consequences for the logic of Defendants' argument are fatal. Even if this court were to entertain their motion, the only possible breach date alleged by either party is the July 2004 breach date alleged in the complaint. It is without doubt that a breach by Defendants of the FB agreement in July 2004 is within the applicable statute of limitations for a complaint filed in June 2010. N.Y. C.P.L.R. § 213(2).

LACHES DEFENSE

7. Defendants' arguments that the action should be dismissed because of laches even though the action was commenced within the statute of limitations period deserve little consideration. Courts of the Western District have held that reliance on the defense of laches is only available in the absence of an applicable statute of limitations. "There is no fixed statute of limitations for admiralty suits for damages arising out of the unseaworthiness of a vessel. The courts, in the absence of such a statute, apply the doctrine of laches in determining whether or not such an action is barred" *Ferner v. Bethlehem Steel Corp*, 179 F. Supp. 518, 519 (W.D.N.Y. 1960). Emphasis added.

8. "This Court has no quarrel with the view that laches might preclude enforcement of a claim before the expiration of a Statute of Limitations if it is not clear that a statutory limitations period applies to the action or if the limitations period is being applied to an equitable or legal remedy only by way of analogy. This Court has great difficulty, however, accepting the proposition that "'Laches and the Statute of Limitations are mutually exclusive, even when the statute has been made specifically applicable to the claim and the claim was brought within the statutory period.'" *In re Cardon Realty Corp*., 172 B.R. 182, 188-89 (Bankr. W.D.N.Y. 1994).

9. "Laches within the term of the statute of limitations is no defense at law." *Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784 - Supreme Court 2010 "Laches cannot be a defense to a legal action for damages if the action was commenced within the statute of limitations period." *Maxim Group LLC v. Life Partners Holdings, Inc*., 690 F. Supp. 2d 293, 310 (S.D.N.Y. 2010).

LACHES CANNOT BE RESOLVED ON THE PLEADINGS

10. Defendants acknowledge that the Court can only grant judgment on the pleadings, "where it is clear on the face of the Complaint that the plaintiff can prove no set of facts to avoid the insuperable bar." ("Although in some cases laches cannot be resolved on the pleadings where the reasonableness and prejudicial effect of a plaintiff's delay depend on facts outside the pleadings, courts do grant judgment on the pleadings "where it is clear on the face of the Complaint that the plaintiff can prove no set of facts to avoid the insuperable

bar." *LinkCo*, 615 F. Supp. 2d at 142 (internal quotation marks omitted, emphasis added). That is, if the complaint itself (or facts subject to judicial notice) forecloses any plausible explanation for the delay, and if the complaint and public records show that the delay will prejudice the defendant, courts have held that the plaintiff's claims are barred." Doc. No. 321 at 26.

11. "When a suit is brought within the time fixed by the analogous statute, the burden is on the defendant to show ... circumstances exist which require the application of the doctrine of laches." *Leonick v. Jones & Laughlin Steel Corp*., 258 F.2d 48, 50 (2d Cir.1958) (quoting *Reconstruction Fin. Corp. v. Harrisons & Crosfield, Ltd*., 204 F.2d 366, 370 (2d Cir.) cert. denied, 346 U.S. 854, 74 S.Ct. 69, 98 L.Ed. 368 (1953)); see *University of Pittsburgh v. Champion Prods. Inc*., 686 F.2d 1040, 1045 (3d Cir.), cert. denied, 459 U.S. 1087, 103 S.Ct. 571, 74 L.Ed.2d 933 (1982). *Conopco, Inc. v. Campbell Soup Co*., 95 F.3d 187, 191 (2d Cir. 1996).

12. Moreover, laches is "is an equitable defense that bars a[n]...equitable claim." *Ikelionwu v. United States*, 150 F.3d 233, 237 (2d Cir. 1998). Emphasis added. Plaintiff's claim are claims at law, a contract breach governed by a specific statute of limitations.

RELATION BACK ARGUMENT

13. Defendants argue that the amended complaint and its claims do not sufficiently relate back to those in the original complaint. Therefore, Defendants argue, the amended complaint being filed in April 2011 is outside

the six year statute of limitations which began to run, as alleged in the amended complaint in July 2004.

DEFENDANTS' ARGUMENTS

14. Defendants main argument is that the original complaint only had contract claims. Therefore, all the non-contract claims in the amended complaint do not relate back.

15. They argue that relation back means, "asserts a claim that arose out of the conduct, transaction, or occurrence set out or attempted to be set out in the original pleading." Doc. No. 321 at 22. "the basic claim must have arisen out of the conduct set forth in the original pleading." Id. "whether the original complaint gave the defendant fair notice of the newly alleged claims."

16. Defendants' cite to *Tho Dinh Tran v. Alphones Hotel Corp*, 281 F.3d 23 and note that it was "overruled on other grounds." The overruling court held the following:

17. "In our view, the relation back issue is more analogous to a dismissal on the pleadings than a balancing of factors involving the conduct of a lawsuit. If facts provable under the amended complaint **arose out of the conduct alleged in the original complaint, relation back is mandatory**. The proper standard of review of Rule 15(c)(2) decisions is therefore de novo and we so hold." *Slayton v. Am. Exp. Co.*, 460 F.3d 215, 227-28 (2d Cir. 2006). Emphasis added.

18. The emphasized quote from that case is the operative legal standard. The facts provable under Plaintiff's original complaint are a breach of contract.

There are no different facts underlying the claims in the amended complaint. It is obvious that an offshoot of the claims in the original complaint would be email and other communications confirming the parties' contract as alleged in the original complaint. The amended complaint, at its core, is still arguing a contract breach between the parties.

19. There is only one event at issue in this case, the alleged breach of the parties' contract. There may be varieties of entities and interests established by that contract, a business partnership, a joint ownership, etc. But, the key claim from the original complaint is not restated or reformed in the amended complaint. The parties had a contract and it was breached by Defendants. That is the key claim and has been so since the filing of the original complaint up until today.

20. "In our view, the relation back issue is more analogous to a dismissal on the pleadings than a balancing of factors involving the conduct of a lawsuit. If facts provable under the amended complaint arose out of the conduct alleged in the original complaint, relation back is mandatory. The proper standard of review of Rule 15(c)(2) decisions is therefore de novo and we so hold. Rule 15(c)(2) provides that "[a]n amendment of a pleading relates back to the date of the original pleading when ... the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." The purpose of "Rule 15 'is to provide maximum opportunity for each claim to be decided on its merits

rather than on procedural technicalities.' " *Siegel*, 714 F.2d at 216 (quoting 6 C. Wright & A. Miller, Federal Practice and Procedure, § 1471, at 359 (1971)). "For a newly added action to relate back, 'the basic claim must have arisen out of the conduct set forth in the original pleading....' " *Tho Dinh Tran*, 281 F.3d at 36 (quoting *Schiavone v. Fortune*, 477 U.S. 21, 29, 106 S.Ct. 2379, 91 L.Ed. 2d 18 (1986)). Under Rule 15, the "central inquiry is whether adequate notice of the matters raised in the amended pleading has been given to the opposing party within the statute of limitations by the general fact situation alleged in the original pleading." *Stevelman*, 174 F.3d at 86 (internal quotations and citation omitted). Where the amended complaint does not allege a new claim but renders prior allegations more definite and precise, relation back occurs. Id. at 87. *Slayton* at 227-28.

21. The original complaint contains allegations representing a "general fact situation" that clearly provides "adequate notice of the matters raised in the amended pleading." Id. The amended complaint also serves to further define and make more precise the claims in the original complaint. In the end, the liberal pleading standard applied to notice pleadings in the federal courts favors relation back in circumstances such as these.

DEFENDANTS ARE ENGAGED IN A CONTINUING BREACH

22. A continuing breach restarts the applicable statute of limitations upon the occurrence of every new breach. In New York, the Statute of Limitations on a claim for breach of contract is six years. N.Y. C.P.L.R. § 213(2). In general, the

limitations period begins to run when the cause of action accrues. N.Y. C.P.L.R. § 203(a). A cause of action for breach of contract ordinarily accrues and the limitations period begins to run upon breach. See *Ely-Cruikshank Co. v. Bank of Montreal*, 81 N.Y.2d 399, 599 N.Y.S.2d 501, 615 N.E.2d 985, 986 (1993). The plaintiff need not be aware of the breach or wrong to start the period running. See id. 599 N.Y.S.2d 501, 615 N.E.2d at 987. Where a contract does not specify a date or time for performance, New York law implies a reasonable time period. See *Schmidt v. McKay*, 555 F.2d 30, 35 (2d Cir.1977); *Lituchy v. Guinan Lithographic Co.*, 60 A.D.2d 622, 400 N.Y.S.2d 158, 159 (App.Div.1977).

23. If, however, a contract requires continuing performance over a period of time, each successive breach may begin the statute of limitations running anew. See *Bulova Watch Co. v. Celotex Corp.*, 46 N.Y.2d 606, 415 N.Y.S.2d 817, 389 N.E. 2d 130, 132 (1979); *Stalis v. Sugar Creek Stores, Inc.*, 295 A.D.2d 939, 744 N.Y.S.2d 586, 587-88 (App.Div.2002); *Orville v. Newski, Inc.*, 155 A.D.2d 799, 547 N.Y.S.2d 913, 914 (App.Div.1989); *Airco Alloys Div. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68, 430 N.Y.S.2d 179, 186 (App.Div.1980).

DEVELOPMENT OF CONTINUING BREACH ARGUMENT

24. The court has repeatedly reminded counsel that we are in limited expedited discovery as to two issues: the authenticity of the FB Contract and/or the emails. Plus, because general discovery has been stayed, any factual argument about continuing breach can only be developed after Defendants' motions to

dismiss are denied and general discovery begins.

I hereby declare under penalty of perjury and pursuant to 28 U.S.C. 1746 and under the laws of the United States that the following is true and correct:

DATED: November 25, 2012.

/s/ Paul Argentieri

Paul Argentieri