UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA, Plaintiff, v. MARK ELLIOT ZUCKERBERG and FACEBOOK, INC., Defendants.	:	Civil Action No. 1:10-cv-00569-RJA

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

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PRELIMINARY STATEMENT

Paul Ceglia's lawsuit has now been exposed as a criminal fraud on Defendants, the Court, and the public. Defendants' motion to dismiss for fraud is now fully briefed and awaiting decision by this Court.

Defendants have also moved for judgment on the pleadings. In their opening brief (Doc. No. 321), Defendants demonstrated that, even taking Ceglia's fraudulent allegations as true, his Amended Complaint should be dismissed as barred by the statute of limitations and laches.

To ensure that Ceglia had a full opportunity to address those defenses, this Court converted Defendants' motion into a motion for partial summary judgment and granted Ceglia discovery. Doc. No. 366 at 5. But Ceglia thumbed his nose at that opportunity—first by declaring that much of the available discovery was "moot[]," Doc. No. 377 at 8, and then by serving discovery requests that the Court ruled were "completely irrelevant" and so improper as to warrant a protective order. Doc. No. 572 at 16, 23.

Ceglia has now filed his response to Defendants' motion. That response fails to rebut Defendants' showing that Ceglia's stale claims are time-barred. On the statute of limitations, Ceglia argues that Defendants are judicially estopped from relying on the formation of Thefacebook LLC ("LLC") in April 2004 because, in a prior case against Eduardo Saverin in California state court, Defendants purportedly took an inconsistent position regarding the rights that were assigned to the LLC. But Ceglia cannot establish that the court in the *Saverin* case adopted Defendants' position—an essential element of judicial estoppel—because the court dismissed that case without ever ruling on this issue. Nor can Ceglia establish that Defendants—by alleging that intellectual property rights were not assigned to the LLC—took a position that is inconsistent with the position they are asserting in this case.

On laches, Ceglia relies entirely on the patently erroneous legal argument that laches is unavailable when there is an applicable statute of limitations, and fails to introduce any evidence explaining his inexcusable and highly prejudicial six-year delay in bringing this fabricated lawsuit. That is undoubtedly because, as the evidence detailed in Defendants' Motion to Dismiss conclusively establishes, the true explanation for Ceglia's delay is that he recently forged the Work for Hire Document. The Court should therefore grant summary judgment for Defendants.[1]

ARGUMENT

I. ALL OF CEGLIA'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

In their motion, Defendants established that the six-year statute of limitations bars all of Ceglia's claims. Doc. No. 321 at 8-14. Those claims are based on the allegation that Zuckerberg unlawfully excluded Ceglia from ownership of Facebook, Inc. when it was incorporated in July 2004. But Zuckerberg formed Thefacebook LLC ("LLC") and excluded Ceglia from ownership in that entity in April 2004. Thus, to the extent that Ceglia's claims ever accrued, it was more than six years before Ceglia filed suit on June 30, 2010. Ceglia's responses are baseless.

First, Ceglia argues that Defendants are judicially estopped from relying on the formation of the LLC in April 2004 because they made "contradictory claims" in a "Third Amended Complaint" in the *Saverin* case. Doc. No. 609 at 2. But the document on which Ceglia relies—which is not even signed or dated (Doc. No. 609-1 at 17)—is merely an exhibit to

[1] Ceglia's response to Defendants' motion also violates this Court's rules. Ceglia failed to file an "answering memorandum," in violation of Local Rule 7(a)(2)(A), and instead filed only a declaration from his counsel, Paul Argentieri. That declaration also violates Local Rule 7(a)(3), which provides that "[a]n affidavit must not contain legal arguments." Each of these violations "may constitute grounds for resolving the motion against the non-complying party." Local Rule 7(a)(2)(A), (a)(3). Moreover, Ceglia filed his response on November 26, after the November 25 deadline (Doc. No. 607), and included a certificate of service, falsely sworn to by Mr. Argentieri, stating that the response was filed on November 25. *See* Doc. No. 609-2. In combination, these violations alone constitute grounds for dismissal.

Defendants' motion for leave to amend. Shortly after Defendants filed that motion, the parties in *Saverin* requested that the case be dismissed. The court granted that request, and therefore did not rule on Defendants' motion for leave to amend. *See* Southwell Decl., Exs. A-B.

Consequently, Ceglia cannot come close to establishing that Defendants are judicially estopped from relying on the formation of the LLC in April 2004. "A party invoking judicial estoppel must show that (1) the party against whom the estoppel is asserted took an inconsistent position in a prior proceeding and (2) that position was adopted by the first tribunal in some manner, such as by rendering a favorable judgment." *Mitchell v. Washingtonville Cent. Sch. Dist.*, 190 F.3d 1, 6 (2d Cir. 1999) (citation omitted). Ceglia does not even attempt to show that the California court adopted any position taken by Defendants in their "Third Amended Complaint" in the *Saverin* case. Nor could Ceglia conceivably make that showing—the court dismissed the case before even deciding whether to grant leave to file the document in question.

In any event, there is no contradiction between the "Third Amended Complaint" and Defendants' arguments in this case—much less a "direct and irreconcilable contradiction" that might give rise to judicial estoppel. *Rodal v. Anesthesia Grp. of Onondaga, P.C.*, 369 F.3d 113, 119 (2d Cir. 2004). Just as Defendants argue here (Doc. No. 321 at 8-9), the "Third Amended Complaint" explains that the LLC was the "effective predecessor" to Facebook, Inc., Doc. No. 609-1 ¶ 2, and that Facebook, Inc. "acquired all right, title and interest in the LLC and all membership interests therein," *id.* ¶ 16. Ceglia focuses on the allegation that intellectual property rights were not assigned to the LLC. Doc. No. 609 at 2. But Defendants have never argued here that intellectual property rights were assigned to the LLC, and Ceglia does not and cannot explain why the application of the statute of limitations should turn on such an assignment. Whether or not intellectual property rights were transferred, the formation of the

LLC was a public repudiation of Ceglia's supposed stake in the Facebook enterprise, and thus breached the fraudulent Work for Hire Document under Ceglia's own theory of the case.

Ceglia also argues that this Court has "effectively ruled on this issue." Doc. No. 609 at 2. That is false. After this Court granted Ceglia discovery relating to the statute of limitations, Ceglia took the position that much of this discovery was "moot[]" based on the "Third Amended Complaint." Doc. No. 377 at 8. The Court accepted that position—but only for purposes of determining the scope of discovery, and not for purposes of deciding the merits of the limitations issue. *See* Doc. No. 401 at 7-8. Indeed, Defendants made clear at the time that they "disagree[d] with Ceglia's characterization of the allegations in the purported pleading that he cites and his arguments regarding the legal significance of those allegations," but that this "disagreement . . . need be addressed only in subsequent briefing on the merits." Doc. No. 380 at 4.

Second, Ceglia erroneously argues that his claims may be timely under the theory of "continuing breach," and that he can only determine whether this theory applies when "general discovery begins." Doc. No. 609 at 9-10. But the Court granted Ceglia discovery on the statute of limitations, and he has thus already had the opportunity to develop a factual record on this question. He effectively waived that opportunity—both by taking the position that much of the discovery authorized by the Court was moot, and by serving "completely irrelevant" discovery requests that warranted a protective order. Doc. No. 572 at 16, 23. Ceglia cannot now escape the entry of summary judgment by requesting a second bite at the apple.

In any event, as Ceglia himself concedes, the "continuing breach" decisions on which he relies addressed far different circumstances in which "a contract require[d] continuing performance over a period of time." Doc. No. 609 at 9. For example, in *Bulova Watch Co. v. Celotex Corp.*, 389 N.E.2d 130 (N.Y. 1979), the defendant agreed to make repairs to the

plaintiff's roof for a twenty-year period. That agreement created "separate" obligations to perform repairs each time they were needed, and the statute of limitations therefore ran "separately" each time the defendant breached one of those obligations. *Id.* at 132; *see also Orville v. Newski, Inc.*, 547 N.Y.S.2d 913, 914 (App. Div. 1989) (defendant agreed to make "annual payment[s]"); *Stalis v. Sugar Creek Stores, Inc.*, 744 N.Y.S.2d 586, 587 (App. Div. 2002) (defendant agreed to "'continue'" to comply with sewage laws over time).

Here, in contrast, Ceglia does not allege that Zuckerberg agreed to perform "separate" obligations over a period of time. Ceglia alleges that Zuckerberg had a single obligation under the fraudulent Work for Hire Document that he breached at a single point in time—when he incorporated Facebook, Inc. and failed to provide Ceglia a 50% interest. Doc. No. 39 ¶¶ 23, 97, 102. Thus, the "continuing breach" cases do not help Ceglia, and his claims are untimely under the well-established rule that "the limitations period is measured from the date of the initial alleged breach"—here, when Zuckerberg deprived Ceglia of a 50% interest in the LLC in April 2004—and under the numerous decisions holding that contract claims are time-barred when a plaintiff seeks partial ownership of a company, but files suit more than six years after he was denied that ownership. *Welwart v. Dataware Elecs. Corp.*, 717 N.Y.S.2d 220, 221 (App. Div. 2000) (emphasis added); *see also* Doc. No. 321 at 9-10.

II. CEGLIA'S NEW CLAIMS DO NOT RELATE BACK TO HIS ORIGINAL COMPLAINT.

Defendants also established in their motion that the new claims in Ceglia's Amended Complaint—for fraud, breach of fiduciary duty, and declaratory relief based on an alleged partnership—are untimely for an additional reason: They were filed in April 2011, more than six years after Ceglia himself alleges those claims accrued. Doc. No. 321 at 14. Ceglia does not dispute that, as a result, these new claims can be salvaged only if they "relate[] back" to his

original Complaint. Fed. R. Civ. P. 15(c)(1). Because the entirely new factual allegations and legal theories in the Amended Complaint do not relate back to the bare-bones breach of contract claim that Ceglia originally advanced, his new claims should be rejected.

Ceglia does not contest the applicable legal standard: an amendment relates back if it "asserts a claim . . . that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). Ceglia nevertheless appears to argue (Doc. No. 609 at 6) that Defendants should not have relied on the analysis of this standard in *Tho Dinh Tran v. Alphonse Hotel Corp.*, 281 F.3d 23 (2d Cir. 2002) because *Slayton v. American Express Co.*, 460 F.3d 215 (2d Cir. 2006), overruled *Tho Dinh Tran* on this issue. But *Slayton* overruled *Tho Dinh Tran* only on the issue of the appellate standard of review. *See* 460 F.3d at 226-28. It did not alter the standard that district courts must apply, and in fact quoted *Tho Dinh Tran*'s discussion of that standard with approval. *Id.* at 228. Thus, both cases agree that a pleading does not relate back when it goes beyond "merely adding a new legal theory based on the same facts as those presented in the original complaint," and instead adds "a significant new factual allegation that fundamentally change[s] the nature of the allegations, both factual and legal." *Tho Dinh Tran*, 281 F.3d at 36; *see also Slayton*, 460 F.3d at 228.

That is precisely what Ceglia seeks to do here. Indeed, he makes only a feeble attempt to argue that his claims relate back, contending that Zuckerberg's alleged breach of contract is the only relevant event in this case, that this "key claim" was "not restated or reformed in the amended complaint," and that the new facts alleged in the Amended Complaint are an "obvious . . . offshoot of the claims in the original complaint." Doc. No. 609 at 7. But those arguments fail to come to grips with the radical alteration of Ceglia's factual allegations and legal theories in his Amended Complaint. The original Complaint says nothing, for example,

about the alleged extended period of creative collaboration—devolving into a highly charged email exchange—that Ceglia now asserts gave rise to a partnership between Ceglia and Zuckerberg. Based on those new allegations, which seek to morph the Work for Hire Document into a partnership agreement, Ceglia adds new claims for breach of his partnership rights and breach of fiduciary duty. The Amended Complaint also alleges, for the first time, that Zuckerberg deliberately concealed the extent of his work on Facebook and scope of the website's success. Based on these newly alleged misrepresentations, Ceglia raises new claims for fraud.

Far from merely "amplif[ying], or stat[ing] in a slightly different way" his prior allegations by making them "more definite and precise," *Slayton*, 460 F.3d at 228-29, Ceglia's Amended Complaint (filed by new lawyers from DLA Piper LLP and Lippes Mathias Wexler Friedman LLP) fundamentally transforms the case. Rule 15(c)(1)(B) applies when an amended pleading fills in missing pieces in the factual and legal scenario previously pled. It does not apply when, as here, the original complaint contains no reference whatsoever to conduct necessary to support a new legal theory. *See, e.g.*, *Tho Dinh Tran*, 281 F.3d at 36 (relation back was inappropriate because the original complaint did not reference bribery, the only conduct that could support a new civil RICO claim); *Asset Value Fund Ltd. P'ship v. Care Grp., Inc.*, 179 F.R.D. 117, 121 n.3 (S.D.N.Y. 1998) (rejecting a new securities fraud claim where the original complaint said nothing about the specific conduct necessary to prove that claim).

Ultimately, Ceglia seeks a staggering expansion of the relation back standard—an expansion that would subvert the guarantees of fair notice to the defendant and respect for statutory time limits that stand at Rule 15(c)(1)(B)'s core. *See, e.g.*, *Stevelman v. Alias Research Inc.*, 174 F.3d 79, 86 (2d Cir. 1999) ("[T]he [rule's] 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 . . . ."). Ceglia cannot be permitted to use the relation back exception as a tool to circumvent the statute of limitations and reinvent his case midstream. At a minimum, therefore, the new claims in the Amended Complaint (Counts 1-5) should be dismissed.

III. BECAUSE CEGLIA HAS FAILED TO INTRODUCE ANY EVIDENCE RELATING TO LACHES, DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT.

Defendants also established in their motion that all of Ceglia's claims were barred by laches because he has no reasonable excuse for his six-year delay in bringing this suit, and because that delay would cause immense prejudice to Defendants and Facebook's employees, investors, and users. Doc. No. 321 at 17-25. Even after this Court converted Defendants' motion to one for summary judgment, Ceglia's response fails to offer any factual explanation whatsoever for his delay in filing suit. Although Ceglia previously stated to the press that he simply "forgot" about his purported contract with Zuckerberg,[2] he does not provide any sort of affidavit making that claim here. In fact, Ceglia has not submitted an affidavit of any kind with his response attempting to explain why he waited six years to assert his alleged stake in a extensively publicized, multibillion-dollar company. That failure is not surprising: Defendants have overwhelmingly established in their Motion to Dismiss that the only reason for Ceglia's delay is that he recently fabricated the Work for Hire Document.

It is black-letter law that a party opposing summary judgment "must come forward with specific evidence demonstrating the existence of a genuine dispute of material fact." *FDIC v. Great Am. Ins. Co.*, 607 F.3d 288, 292 (2d Cir. 2010) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). Thus, courts routinely grant summary judgment on laches grounds when, as here, the plaintiff fails to introduce any evidence to explain his delay in bringing suit.

[2] *See* Bob Van Voris, *Facebook Would-Be Owner Says He Owes His Claim To Arrest*, Bloomberg.com, Aug. 2, 2010, http://www.bloomberg.com/news/2010-08-02/facebook-would-be-owner-says-he-owes-claim-to-arrest-andrew-cuomo-lawsuit.html.

For example, in *RBC Nice Bearings, Inc. v. Peer Bearing Co.*, 676 F. Supp. 2d 9 (D. Conn. 2009), the court granted summary judgment on laches because the plaintiffs "failed to present any justification for the delay" in bringing their trademark claim. *Id.* at 26. Similarly, in *Gossen Corp. v. Marley Mouldings, Inc.*, 977 F. Supp. 1346 (E.D. Wis. 1997), the court granted summary judgment on laches because the plaintiff "failed to meet its burden of producing any evidence excusing delay or any affirmative evidence negating prejudice" in a patent-infringement case. *Id.* at 1352; *see also, e.g.*, *Raitport v. United States*, 1996 WL 15909, at *2 (Fed. Cir. Jan. 16, 1996) (per curiam) (affirming grant of summary judgment because the plaintiff "did not produce . . . evidence" on laches). So too here. Ceglia has submitted no evidence in support of his response to Defendants' motion that could create a genuine issue of material fact about the reasonableness of his delay or the prejudice it has caused. Thus, the Court should grant summary judgment for Defendants.

Rather than introduce any evidence, Ceglia relies entirely on the argument that laches is legally unavailable as a defense in this case. According to Ceglia, "the defense of laches is only available in the absence of an applicable statute of limitations." Doc. No. 609 at 3. That is wrong. The New York Court of Appeals has expressly held that laches is available "where the defendant shows prejudicial delay even though the limitations period was met." *Saratoga Cnty. Chamber of Commerce v. Pataki*, 798 N.E.2d 1047, 1055 (N.Y. 2003) (emphasis added). And it is well-settled that laches can bar claims for breach of contract under New York law. *See, e.g.*, *Morris v. Monit Mgmt., Ltd.*, 635 N.Y.S.2d 845, 847 (App. Div. 1995) (holding that "laches bar[red] an award of damages to defendants on their breach of contract counterclaim").

Ceglia relies on an entirely different line of cases holding that, when a party asserts a claim under a federal statute with a built-in limitations period, laches is unavailable. For

example, in *Ivani Contracting Corp. v. City of New York*, 103 F.3d 257 (2d Cir. 1997), the Second Circuit explained that "[t]he prevailing rule . . . is that when a plaintiff brings a federal statutory claim seeking legal relief, laches cannot bar that claim, at least where the statute contains an express limitations period within which the action is timely." *Id.* at 260 (emphasis added). Similarly, *Merck & Co. v. Reynolds*, 130 S. Ct. 1784 (2010), on which Ceglia relies (Doc. No. 609 at 4), involved federal securities-fraud claims governed by the two-year statute of limitations in 28 U.S.C. § 1658(b)(1). *See* 130 S. Ct. at 1789. Here, in contrast, Ceglia is pursuing claims under state common law, not a federal statute.[3]

Finally, Ceglia argues that laches bars only equitable claims, not claims for damages. *See* Doc. No. 609 at 5. But the New York courts have expressly held that, "even if no statute of limitations bars a claim for damages, such relief may still be barred by the doctrine of laches." *Town of Huntington v. Cnty. of Suffolk*, 910 N.Y.S.2d 454, 461 (App. Div. 2010) (emphasis added). Indeed, Ceglia's argument cannot be reconciled with *Morris*'s holding that laches barred a counterclaim for damages from an alleged breach of contract. *See* 635 N.Y.S.2d at 847.

CONCLUSION

This Court should grant summary judgment for Defendants and dismiss Ceglia's complaint with prejudice.

[3] Ceglia also errs in relying (Doc. No. 609 at 3) on *Ferner v. Bethlehem Steel Corp.*, 179 F. Supp. 518 (W.D.N.Y. 1960), which merely assessed the timeliness of a federal admiralty claim under laches because no statute of limitations applied, without remotely suggesting that the absence of a statute of limitations is a necessary condition for the application of laches. Similarly, nothing in *Maxim Group LLC v. Life Partners Holdings, Inc.*, 690 F. Supp. 2d 293 (S.D.N.Y. 2010), purported to overrule the well-settled authority in the Second Circuit and the New York courts making clear that laches is available here. Indeed, the complaint in *Maxim Group* was filed only "three days after the alleged breach," so any discussion regarding the general availability of the laches defense was unnecessary. *Id.* at 310 (emphasis added).

Dated: New York, New York
December 3, 2012

Respectfully submitted,

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