SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA PART 19
Justice

Index Number : 107935/2010
MASSEY, CRAIG B.
vs
BYRNE, CHRISTOPHER W.
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

motion and cross-motion are decided in accorda
with accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1/15/13

Saliann Scarpulla J.S.C.
SALIANN SCARPULLA

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----------X

CRAIG B. MASSEY,

Plaintiff,

- against-

Index No.: 107935/10
Submission Date:
08/08/2012

DECISION AND ORDER

CHRISTOPHER W. BYRNE and
BYRNE COMMUNICATIONS, INC.,

Defendants.

----------X

For Plaintiffs:
The Kurland Group
350 Broadway, Suite 701
New York, NY 10013

For Defendant:
The Law Offices of Tedd S. Levine, LLC
1305 Franklin Avenue, Suite 300
Garden City, NY 11530

Papers considered in review of this motion for partial summary judgment and cross motion for sanctions:

Noting of Motion 1
Aff in Support. 2
Mem of Law 3
Aff in Opp 4
Mem of Law 5
Notice of Cross Motion 6
Aff in Support 7
Memo of Law in Support 8
Reply Mem of Law. 9
Affs in Opp to Cross Motion 10
Reply Aff 11

HON. SALIANN SCARPULLA, J.:

In this action for breach of contract and constructive trust involving a romantic relationship, defendants Christopher W. Byrne ("Byrne") and Byrne Communications, Inc. ("Byrne Communications") (collectively the "defendants") move for summary

judgment dismissing the complaint against them. Plaintiff Craig B. Massey ("Massey") opposes the motion for summary judgment, and cross moves for costs and sanctions.

In the verified complaint, Massey asserts that he and Byrne had a "confidential and fiduciary relationship" and "lived together as life partners from 1997 until 2007." Massey also alleges that he and Byrne worked together at Byrne Communications during this period of time.

In his cause of action for constructive trust, Massey alleges that throughout the time they lived together and worked together, Byrne made promises to Massey regarding Byrne's intentions to share their assets, and that throughout their ten year relationship the parties agreed and Byrne represented and promised that the parties' assets would be jointly used to maintain their lifestyle together and "invest in their mutual benefit." Massey further alleges that he relied on these promises when making personal and financial decisions, such as "making personal and financial sacrifices for the benefit of Byrne Communications, Inc. and . . . Work[ing] at a reduced salary and . . . forego[ing] certain employment benefits in reliance on" Byrne's promise that it was for the mutual benefit of their partnership. Massey asserts that Byrne benefitted from Massey's efforts and support, and that Massey "must also be able to benefit."

As to unjust enrichment, Massey alleges that Byrne has been enriched by Massey's contributions to the couple's business, relationship and property. Massey also alleges a cause of action for fraudulent inducement, asserting that Byrne "knowingly and

fraudulently induced" Massey to move to New York, and to work at a reduced salary under false pretense of sharing benefits of the partnership with the intent of defrauding Massey of these assets and benefits of this investment. Massey alleges that but for Byrne's promises, Massey would not have moved to New York and worked for a reduced salary and "fail to contribute to his own individual savings and/or investments."

For the cause of action for breach of contract, Massey alleges that he and Byrne had an oral agreement to share equally in the assets and resources gained in their partnership and Byrne has breached this agreement. Lastly, for the cause of action for partition, Massey alleges that while the title to the condominium at 45 East 25th Street, Apt. 14 A (the "condo") was only in Byrne's name, Massey and Byrne jointly owned, lived in and maintained it. Massey is therefore asserting a claim for partition pursuant to RPAPL § 901(1), or in the alternative he is seeking a court ordered sale of the property rather than physical partition.

In their answer, defendants deny substantially all allegations of the complaint, and assert twenty-five affirmative defenses. In addition, defendants assert counterclaims for fraud in the inducement and unjust enrichment. In the answer and counterclaims defendants allege that upon learning in 1997 that Massey was dissatisfied with his job, occupation and compensation, and that he sought a change, Byrne Communications offered Massey a part time position as an at will employee as a writer for the company's website. It is further alleged that Massey was offered a compensation package with a

base salary of $25,000 annually, along with medical benefits and free rent, making his total compensation equal to $65,700.

Defendants allege that Massey moved to New York, accepted this part time position and "moved into Byrne's residence strictly as a boarder." At that time, defendants assert, Byrne rented his apartment and he was alone was responsible for making payments under the lease. Defendants asserts that Byrne subsequently moved "[w]ith Massey tagging along," to an apartment where Byrne was again the only tenant named on the lease. Defendants allege that Byrne purchased the condo "strictly out of his own funds" in November, 2002, and again Massey moved in with him.

Defendants assert that Massey worked for Byrne Communications from 1997 through 1999 as a part time writer for the website, and from 2000 to 2002 as a part time proofreader. On or about February 15, 2002, Massey was diagnosed with tuberculosis, and that from his diagnosis until August 2004 the defendants continued to pay Massey his full salary and a rent-free apartment even though he did not perform any service for the company during that time.

Defendants claim that as Massey failed to "carry his weight," he promised Byrne he would become a certified Apple Macintosh technician, which resulted in Byrne directing Byrne Communications to pay $1,900 for the Apple course, while continuing to pay Massey his full salary and allowing Massey to live with Byrne rent free. Defendants assert that Massey never completed the course. Defendant conclude that "[d]uring his

tenure at Byrne Communications and occupancy at Byrne's residence, Massey contributed no money to the company, supplied minimal services, paid no rent to Byrne, and barely paid for his own food."

In the counterclaim for fraud in the inducement, defendants allege that Massey accepted his position at Byrne Communication with no intention of performing the job he was hired to do. Byrne and Byrne Communication relied on Massey's misrepresentation and paid him the agreed salary and benefits, and permitted Massey to move into Byrne's apartment.

As for the counterclaim for unjust enrichment, defendants assert that they expended enormous effort, money and resources and "failed to pursue sublet opportunities" which directly benefitted Massey. Defendants also assert that Massey failed properly to compensate Byrne for occupying Byrne's residence and to provide Byrne Communications the bargained for services, therefore unjustly enriching Massey.

Defendants now move for summary judgment, arguing that Massey's causes of action for constructive trust, unjust enrichment, fraudulent inducement and breach of contract are barred by the applicable statute of limitations, and that all causes of action should be dismissed for failure to assert a prima facie cause of action. Massey opposes the motion, and cross-moves for sanctions, arguing that Defendants made misrepresentations in their verified pleadings, and submitted motion papers which contained false statements which defendants and their attorneys knew to be false. Massey

also asserts that defendants' counsel has a conflict of interest because he is a potential witness in this action.

Defendants oppose the cross-motion for sanctions, asserting that Massey's affidavit in support of the cross-motion contains "lies and misstatements." Defendants also argue that their counsel, Tedd S. Levine, has been close friend of Byrne's for approximately seventeen years, during which time Mr. Levine also served as Byrne's attorney. Mr. Levine acknowledges that Massey attended his wedding at Byrne's guest, but knows of no other social event which he attended at which Massey was present. Defendants claim that the pleadings and exhibits presented in this case "speak for themselves."

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgement as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party, who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

"Under CPLR 213(2), a claim for breach of contract is governed by a six-year statute of limitations. As a general principle, the statute of limitations begins to run when a cause of action accrues . . . . In contract actions, we have recognized that a claim

generally accrues at the time of the breach." *Hahn Automotive Warehouse, Inc. v. American Zurich Ins. Co.*, 189 N.Y.3d 765, 770 (2012) (citations omitted).

Defendants argue that Massey's cause of action for breach of contract is time barred, because Massey testified that the purported agreement between Massey and Byrne was entered into in 1997, and was never honored by Byrne. Byrne asserts, therefore, that the breach asserted by Massey occurred throughout the relationship or as early as 1999, soon after Byrne Communications was formed. Byrne also testified at his deposition, however, that he and Massey never entered into any oral agreement.

In opposition, Massey argues that the cause of action did not accrue until the end of the parties' ten (10) year relationship, because during their relationship the parties' assets were held constructively in trust for the benefit of both parties. Massey further argues that even if the statute of limitations did begin to run prior to the end of the parties' relationship, Byrne is estopped from raising the statute of limitations defense because his fraud and misrepresentation created a reasonable delay in the commencement of Massey's lawsuit.

Here, there is a question of fact as to when the parties reached the alleged oral agreement, if in fact it existed at all. Byrne testified that he and Massey, while living together as boyfriends, were not partners. Byrne also testified that there was no agreement to share assets and profits of Byrne Communications. Massey, on the other hand, testified at his deposition that the agreement to live as equal partners and to split all

assets was entered into from the start of their relationship, and that is how they lived until the end of their relationship. And while Massey acknowledges that the condo was only in Byrne's name, and that he and Byrne maintained some joint but mostly separate bank accounts, Massey also testified that he contributed in other ways to the partnership, that the decision to purchase the condo was made jointly by Massey and Byrne, and that they decided that Massey would not pay rent because of a tax advantage to Byrne. Finally, Massey alleges that the oral agreement was not breached by Byrne until the end of their relationship in 2007.

The parties have given conflicting accounts of whether an oral contract existed between them, and, if so, when in fact it was alleged to have been breached. Accordingly, there remains a question as to whether Massey's cause of action for breach of the alleged oral agreement is barred by the statute of limitations. *See Bayside Controls, Inc. v. Telyas*, 295 A.D.2d 343, 345 (2d Dep't 2002) ("[S]ince questions of fact exist with respect to when the cause of action accrued, the court properly denied that branch of the defendant's motion which was to dismiss it on the ground that it was barred by the statute of limitations").

Similarly, there is a question of fact as to whether an oral agreement between the parties existed thus summary judgment dismissing the breach of contract cause of action for insufficiency is denied. Where, as here, "there is an issue of fact with respect to the existence of an oral agreement, [it renders] summary judgment on the breach of contract

cause of action inappropriate." *Pyramid Brokerage Co., Inc. v. Zurich American Ins. Co.*, 71 A.D. 3d 1386, 1387 (4th Dep't 2010) (citations omitted).

Next, Byrne argues that the cause of action for constructive trust is barred by the statute of limitations. "Such a claim [for constructive trust] 'is governed by the six-year statute of limitations provided by CPLR 213 (1), which commences to run upon occurrence of the wrongful act giving rise to a duty of restitution, and not from the time when the facts constituting the fraud are discovered.'" *Knobel v. Shaw*, 90 A.D.3d 493, 496 (1st Dep't 2011) (quoting *Kaufman v. Cohen*, 307 A.D.2d 113, 127 (1st Dep't 2003)). *See also Quadrozzi v. Estate of Quadrozzi*, 952 N.Y.S.2d 74, 77 (2d Dep't 2012) (same). "A determination of when the wrongful act triggering the running of the Statute of Limitations occurs depends upon whether the constructive trustee acquired the property wrongfully, in which case the property would be held adversely from the date of acquisition or whether the constructive trustee wrongfully withholds property acquired lawfully from the beneficiary, in which case the property would be held adversely from the date the trustee breaches or repudiates the agreement to transfer the property." *Maric PipingInc. v. Maric*, 271 A.D.2d 507, 508 (2d Dep't 2000) (internal quotation marks and citations omitted)). *See also DeLaurentis v. DeLaurentis*, 47AD3d 750, 751-752) (2d Dep't 2008).

Defendants argue that Byrne solely purchased the condo and never concealed that fact or that the title was in his name only. Defendants assert that Massey was merely a

rent-free lodger who never had any right to or expectation of an ownership interest in the property. In opposition, Massey asserts that although Byrne purchased the condo in his name only, Byrne's and Massey's intent was that it was to be a shared asset. Massey therefore asserts that the cause of action accrued not when Byrne purchased the property but rather when the two ended their relationship and he failed to provide Massey with what Massey argues was his portion of the shared asset.

"Here, the gravamen of the plaintiff's complaint is not that the constructive trustee acquired the property wrongfully, but rather, that the defendant breached the trust relationship at some later date. Accordingly, questions of fact exists as to (1) when the defendant allegedly breached the agreement by an identifiable, wrongful act demonstrating his refusal to convey a one-half interest in the property to the plaintiff, and (2) whether the plaintiff's claim was therefore time-barred . . . ." *Sitkowski v. Petzing*, 175 A.D.2d 801, 802 (2d Dep't 1991). These question of fact prevent granting the motion for summary judgment dismissing the constructive trust cause of action as time barred.

Defendants have also failed to make a prima facie showing of entitlement to dismissal on the merits as a matter of law on the constructive trust cause of action. "The elements necessary for the imposition of a constructive trust are [1] a confidential or fiduciary relationship, [2] a promise, [3] a transfer in reliance thereon, and [4] unjust enrichment." *Abacus Fed. Sav. Bank v. Lim*, 75 A.D.3d 472, 473 (1st Dep't 2010)

(citation omitted). While Defendants argue that there was not a confidential or fiduciary relationship between Byrne and Massey, there is a question of fact on this point. In the answer defendants claim that Byrne and Massey had a business relationship, and that Massey was merely a boarder in his home. Yet, in his deposition and the papers in support of this motion, Byrne acknowledged they he and Massey were in a romantic relationship, and that he and Massey shared certain bank accounts, purchased property in Georgia together, and that Byrne took care of Massey when he was sick with tuberculosis. Massey testified that they were in a life partnership, whereby they shared everything, and made joint decisions about financial, business and personal matters. Additionally, Byrne and Massey's depositions present conflicting testimony as to whether Byrne made promises to Massey about sharing the property. As there are plainly questions of fact as to all elements of this cause of action, summary judgment dismissing it is denied.

Defendants also move to dismiss the cause of action for unjust enrichment as untimely. Causes of action for unjust enrichment are governed by the six-year statute of limitations set forth in CPLR 213(1). *See EMD Constr. Corp. v. New York City Dept. of Hous. Preserv. & Dev.*, 70 A.D.3d 893, 894 (2d Dep't 2010); *37 Park Drive S., Inc. v. Duffy*, 63 A.D.3d 1040, 1041 (2d Dep't 2009). "[A] claim for unjust enrichment accrues upon the occurrence of the alleged wrongful act giving rise to restitution." *Kaufman v. Cohen*, 307 A.D.2d 113, 127 (1st Dep't 2003).

Defendants assert that the unjust enrichment cause of action accrued on the day that the deed for the condo was recorded, making this cause of action time barred. However, Massey asserts that Byrne only became unjustly enriched upon the dissolution of their relationship when Massey was denied his one-half interest in the property. For the same reasons as discussed above in reference to the cause of action for constructive trust, there are questions of fact as to if and when a cause of action for unjust enrichment accrued. Accordingly, summary judgment is also denied as to this cause of action.

Defendants also move to dismiss Massey's claim for fraudulent inducement as time barred. "The statute of limitations applicable to such claims [for fraudulent inducement] is six years." *Beesmer v. Besicorp Dev., Inc.*, 72 A.D.3d 1460, 1462 (3d Dep't 2010) (citing CPLR 213). "A cause of action based upon fraud must be commenced within six years from the time of the fraud or within two years from the time the fraud was discovered, or with reasonable diligence, could have been discovered, whichever is longer." *Oggioni v. Oggioni*, 46 A.D.3d 646, 648 (2d Dep't 2007). Byrne argues that, as with the cause of action for breach of contract, it is time barred as it accrued when he and Massey first would have first entered into the alleged oral agreement in 1999. As with the breach of contract cause of action, there is a question of fact as to if and when an oral agreement was reached. Accordingly, at this time the cause of action cannot be dismissed as time barred.

Similarly, there is a question of fact regarding the cause of action for fraudulent inducement. "The essential elements of an action for fraudulent inducement are the representation of a material existing fact, falsity, scienter, deception and injury. A person who fraudulently makes a misrepresentation of . . . intention . . . for the purpose of inducing another to act or refrain from action in reliance thereon in a business transaction is liable for the harm caused by the other's justifiable reliance upon the misrepresentation." *Century 21, Inc. v. F.W. Woolworth, Co.*, 181 A.D.2d 620, 625 (1st Dep't 1992) (internal quotations omitted).

As stated above, there is a question of fact as to whether the oral agreement alleged in the complaint was ever entered into between Byrne and Massey. Therefore, questions of fact also exist as to whether Massey was fraudulently induced into entering the alleged oral agreement, and summary judgment cannot be granted.

Defendants also move for summary judgment on the remaining cause of action for partition pursuant to RPAPL § 901(1), which provides that:

> By Whom Maintainable. (1) A person holding and in possession of real property as joint tenant or tenant in common, in which he has an estate of inheritance, or for life, or for years, may maintain an action for the partition of the property, and for a sale if it appears that a partition cannot be made without great prejudice to the owners.

Defendants argue that Massey does not posses the condo as a joint tenant, or a tenant in common, nor does he have "an estate of inheritance, or for life, or for years." Defendants further argue that there is no basis for this caus of action because (1) there is

no writing conveying the condo to Massey, *see* General Obligations Law §5-703; (2) there is no basis for Massey to assert a claim for constructive trust; and (3) a claim for constructive trust does not fall within the partition statute. In opposition, Massey does not argue that he falls into one of the categories of those who may maintain an action for partition, but merely asserts that partition is an equitable remedy in which the court may weigh many factors.

As Massey fails to establish that he has standing to maintain an action for partition, defendants' motion to dismiss this cause of action is granted. *See Watson v. Pascal*, 27 A.D.3d 459, 460 (2d Dep't 2006) ("Further, the Supreme Court properly granted that branch of [defendant's] motion which was for summary judgment dismissing the [] cause of action, which sought the partition of certain real property, inasmuch as the plaintiff was not '[a] person holding and in possession of real property as joint tenant or tenant in common' (RPAPL 901 (1)").

Lastly, Massey's cross motion for costs and sanctions is denied. Pursuant to 22 NYCRR §130-1.1, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct. *See also Llantin v. Doe*, 30 A.D.3d 292 (1st Dept. 2006). Sanctions are within the sound discretion of the trial court and are reserved for serious transgressions. Massey argues that sanctions are appropriate because defendants have failed to disclose relevant and necessary information in an effort to delay or prolong the resolution of the litigation and

to harass Massey. In support, Massey asserts that the factual allegations labeled "Uncontroverted Facts" in defendants' moving papers include mischaracterizations which defendants and their attorney know to be false, as well as defendants blanket denial of all allegations in the complaint, including that Massey and Byrne were in a romantic relationship.

A dispute over what constitutes "uncontroverted facts" lies at the heart of this and most other legal actions. In this matter, which deals with the end of a romantic relationship, the dispute over the facts and denial of certain allegations may be hurtful, but it does not rise to the level of frivolous conduct required for the imposition of sanctions.[1]

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[1] Although plaintiff does not formally cross-move for disqualification of defendant's counsel, there is a portion of the cross motion concerning Mr. Levine's representation of defendants, in which Massey asserts that he plans to call Mr. Levine as a witness at trial because of Mr. Levine's personal knowledge of the relationship between Massey and Byrne and his history as a close personal friend of both parties. Massey also asserts that he is "concerned more generally about Mr. Levine's ability to act as objective and disinterested counsel in this case." In this portion of the motion Massey "requests that the Court investigate Defendants' counsel's potential conflict of interest and grant such further relief as it deems just, necessary and proper."

"Disqualification [of counsel] may be required only when it is likely that the testimony to be given by the witness is necessary. Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence." *S & S Hotel Ventures Ltd. Partnership v. 777 S. H. Corp.*, 69 N.Y.2d 437, 445-446 (1987) (citation omitted). Here, Massey fails to assert, let alone establish, that Mr. Levine's testimony is necessary, nor does he further substantiate his allegations of conflict of interest. To the extent that Massey "informally" seeks disqualification of defendants' counsel, I deny that request. *See Lau v. S&M Enters.*, 72 A.D.3d 497, 498 (1st Dep't 2010) ("The court properly denied plaintiff's motion to disqualify defendants'

In accordance with the foregoing, it is hereby

ORDERED that the motion for summary judgment by defendants Christopher W. Byrne and Byrne Communications, Inc. is granted only to the extent that the cause of action for partition is dismissed, but is in all other respect denied; and it further

ORDERED that plaintiff Craig B. Massey's cross motion for costs and sanctions is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
January 15 2013

ENTER:

Saliann Scarpulla, J.S.C.

counsel . . . as plaintiff failed to show that counsel's testimony would be necessary or that his representation created a conflict of interest") (citations omitted).