| **Doral Fabrics, Inc. v Gold** |
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| 2016 NY Slip Op 31772(U) |
| September 27, 2016 |
| Supreme Court, New York County |
| Docket Number: 161939/2015 |
| Judge: Marcy Friedman |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

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DORAL FABRICS, INCORPORATED and BARKER-DORAL FABRICS, INC.,

*Plaintiffs*,

– against –

CHERYL GOLD, individually and as Preliminary Executrix of the Estate of Eugene P. Gold, AMY KAUFMAN GOLD, JEAN-PIERRE STEUDLER, DR. THOMAS M. RINDERKNECHT, BADERTSCHER RECHTSANWÄLTE AG, GIAN R. GISLER, UBS AG and AGQUILA ASSOCIATES AG,

*Defendants.*

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Index No.: 161939/2015

DECISION/ORDER

Defendants Cheryl Gold, individually and as Preliminary Executrix of the Estate of Eugene P. Gold, and Amy Kaufman Gold (collectively Gold defendants) move to dismiss this action brought by plaintiffs Doral Fabrics, Inc. (hereinafter Doral) and Barker-Doral Fabrics, Inc. at the direction of Kenneth Gold, the sole officer and minority shareholder of these companies, and the brother of the Gold defendants. The complaint asserts a single cause of action for fraud based on the allegation that Eugene Gold, who is the deceased father of Kenneth, Cheryl and Amy Gold, diverted commissions or "sample allowances" due the plaintiff corporations and deposited them in Swiss bank accounts, thus embezzling money from plaintiff corporations. (Compl., ¶¶ 52-53.) Eugene Gold then allegedly retained defendant Jean-Pierre Steudler to loan plaintiff Doral's own money back to it (id., ¶ 67), and Doral paid interest to Steudler. (Id., ¶ 68.) Plaintiffs seek damages of 5 million dollars, plus punitive damages, for this alleged fraud by Eugene Gold.

The Gold defendants move to dismiss the complaint pursuant to CPLR 3211 (a) (1), (4), (5) and (7) on the grounds, among others, that the action is barred by the statute of limitations. By separate motion, defendant UBS AG also moves to dismiss the complaint pursuant to CPLR (a) (5), (7), and (8).

The Gold Defendants' Motion to Dismiss

CPLR 213 (8) provides that for an action based on 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."

In moving to dismiss, the Gold defendants contend that the action is untimely because the alleged fraud occurred more than six years before the commencement of the action. The Gold defendants further contend that the action is untimely because Kenneth Gold could with reasonable diligence have discovered the alleged fraud more than two years before the commencement of the action.

In opposing the motion on behalf of the plaintiff corporations, Kenneth Gold does not appear to contend that the cause of action is timely under the accrual prong of CPLR 213 (8). He does not deny that the alleged diversion of funds by Eugene Gold ceased in or around 1983. Indeed, although Kenneth Gold annexes a billing summary as evidence of Eugene Gold's alleged diversion of corporate funds, the latest of the invoices referenced in the summary are dated 1982. (Compl., Exhs. at Plaintiff's 040-047.) The complaint also fails to identify with specificity any loan made by Steudler or Eugene Gold to the plaintiff corporations after 1986. (Compl., ¶ 74 & Exhs. at Plaintiff's 001-002.)[1] The cause of action is therefore untimely unless the plaintiff

[1] Plaintiffs' failure to allege diversion or loans subsequent to 1986 is significant. Kenneth Gold claims to be the sole officer of Doral, and this court has previously found him to be the custodian of its books and records. (See Decision

corporations could not with reasonable diligence have discovered the fraud prior to November 18, 2013, the date two years before the commencement of this action.

The ultimate burden of establishing that the fraud could not have been discovered prior to the two-year period before the commencement of the action rests on the plaintiff who seeks the benefit of the exception. (See Aozora Bank Ltd. v Deutsche Bank Secs. Inc., 137 AD3d 685, 689 [1st Dept 2016]; Derfner Mgt., Inc. v Lenhill Realty Corp., 90 AD3d 434, 435 [1st Dept 2011]; CSAM Capital , Inc. v Lauder, 67 AD3d 149, 157 [1st Dept 2009]; Sargiss v Magarelli, 50 AD3d 1117, 1118 [2nd Dept 2008].)

It is undisputed that Kenneth Gold has been responsible for the day-to-day operation of Doral, has been an officer of the company since at least 2010, and has been a 49% shareholder since 1988. (Cheryl Aff., Exhs. H, I; Tr. of Oral Arg., at 31.) The Gold defendants contend that Kenneth Gold was put on inquiry notice of the alleged fraud in 2010, when Doral's accountant reclassified the Steudler loan on Doral's federal tax return from a third-party loan to a shareholder loan — in effect disclosing that the source of the funds was Eugene Gold. The Gold defendants annex to their moving papers Doral's income tax returns from 2009 and 2010. (Cheryl Gold Aff., Exhs. F, G.) These returns show that "Loans of shareholders" increased from $1,611,094 in 2009 to $5,467,670 in 2010. Simultaneously, the category of "Mortgages, notes, bonds payable in 1 year or more," which it is undisputed encompassed third-party loans, decreased in a roughly equivalent amount, from $3,619,194 in 2009 to zero in 2010. It is further undisputed that, in 2011, Kenneth Gold executed an IRS Form 8879-S in which he swore, under

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on the record on Dec. 17, 2015, the transcript of which was so-ordered on Jan. 25, 2016, Index No. 158996/2015.) Kenneth Gold has also had substantial document discovery of the Estate of Eugene Gold in a related action before this court, in which he has asserted an affirmative defense based on substantially the same allegations as those alleged in this action. (Cheryl Gold v Doral Fabrics, Inc., Sup Ct, NY County, Index No. 152660/2014.)

penalties of perjury, that he was the President of Doral and that "I have examined a copy of the corporation's 2010 electronic income tax return and accompanying schedules and statements and to the best of my knowledge and belief, it is true, correct, and complete." (Id., Exh. H.)

In opposing the Gold defendants' claim that plaintiffs were on inquiry notice of the alleged fraud as of 2010, plaintiffs merely restate the allegations of the complaint that Kenneth Gold first became aware, from documents found in Eugene Gold's home following his death in 2013 and from 2009 documents allegedly received from Cheryl Gold in 2015, "that JEAN-PIERRE STEUDLER was a straw man." (Pls.' Memo. In Opp., at 15.) The 2009 documents include a letter to the IRS by Eugene Gold and his wife, dated December 2, 2009, disclosing that they were the beneficial owners of accounts into which Steudler allegedly deposited loan repayments from Doral. (Compl., Exhs. at Plaintiff's 048-055.)

Plaintiffs fail to meet their burden of establishing that they could not have discovered the fraud prior to the two-year period before the commencement of the action. It is well settled that "[i]n order to start the limitations period regarding discovery, a plaintiff need only be aware of enough operative facts so that, with reasonable diligence, it could have discovered the fraud." (Lucas-Plaza Hous. Dev. Corp. v Corey, 23 AD3d 217, 218 [1st Dept 2005] [internal quotation marks, brackets, and citation omitted].) Here, the significant change in the classification of Doral's debts in 2010 (an increase in shareholder loans of approximately $3,856,576), when compared to the amount of the company's total assets at that time ($3,618,293), should have alerted Kenneth Gold, as the officer who certified Doral's tax returns, to a possible earlier fraud with respect to the loans to the corporation. (Cheryl Gold Aff., Exh. F.) This change in the classification of Doral's debts also put Kenneth Gold on notice that his father was the source of the Steudler loan, as the loan was re-characterized on the 2010 tax return as a shareholder loan,

and Eugene Gold was at that time the only other shareholder of Doral. The court accordingly holds that plaintiffs were put on inquiry notice of the alleged fraud by 2010, and that the claim is therefore time-barred.

In the alternative, the Gold defendants argue that the complaint fails to state a cause of action. In particular, defendants argue that Eugene Gold cannot have embezzled money from his own wholly-owned corporations. (Gold Defs.' Memo. In Supp., at 14-18.)

The fraud claim is premised on the allegation that the funds that Eugene Gold allegedly took and then loaned back to plaintiffs rightfully belonged to plaintiffs. Thus, plaintiffs argue in opposition that the complaint pleads a corporate injury because Kenneth Gold did not know "that he was paying off a loan with interest made using the corporations [sic] own funds," and "[n]o reasonable person would agree to pay interest on a loan of funds belonging to them." (Pls.' Memo. In Opp., at 12-13.) As noted above, however, the complaint fails to allege any diversion of funds or loans by Eugene Gold after 1986. It is further undisputed that Kenneth Gold did not become a shareholder of Doral until 1988, when he acquired 49% of the company's shares from his father. (Cheryl Gold Aff., Exh. I.) Plaintiffs cite no authority that the alleged wrongful acts of Eugene Gold, undertaken at a time when he was the sole shareholder of Doral, and which have not been alleged to have affected the rights of creditors, were wrongs to the corporations.[2] (See e.g. Aglow Studios, Inc. v Karlsson, 83 AD3d 747, 748 [2d Dept 2011]; Masek v Wichelman, 67 AD3d 444, 446 [1st Dept 2009]; 546-552 W. 146th St. LLC v Arfa, 54 AD3d 543 [1st Dept 2008], lv dismissed in part & denied in part 12 NY3d 840 [2009].) The court accordingly holds that the complaint fails to state a cause of action for fraud.

[2] In so holding, the court makes no finding that the acts of Eugene Gold were lawful, and finds only that the complaint does not plead a cause of action maintainable by the plaintiff corporations.

Finally, the court holds that the complaint fails to plead a cause of action, with the particularity required by CPLR 3016 (b), against Cheryl Gold and Amy Kaufman Gold in their individual capacities. The complaint alleges that Cheryl and Amy "willfully and knowingly did combine, conspire, confederate, and agree together with each other to defraud the plaintiff corporations" (Compl., ¶ 98), and that each "fraudulently concealed her receipt of money decedent EUGENE GOLD embezzled from and belonging to the DORAL COMPANIES." (Id., ¶¶ 104-110.) The complaint alleges no facts in support of those conclusions. (See Doukas v Ballard, 135 AD3d 896 [2d Dept 2016] [dismissing complaint for containing "only bare and conclusory allegations, without any supporting detail"]; Honua Fifth Ave. LLC v 400 Fifth Realty LLC, 111 AD3d 579, 579-580 [1st Dept 2013].)

For all of the above reasons, the complaint will be dismissed in its entirety, with prejudice, as against Cheryl Gold, individually and as Preliminary Executrix of the Estate of Eugene P. Gold, and Amy Kaufman Gold.

UBS AG's Motion to Dismiss

By separate motion, defendant UBS AG moves to dismiss the complaint pursuant to CPLR (a) (5), (7), and (8). The complaint pleads that UBS AG "facilitated and joined in" the efforts of Eugene Gold in embezzling money from the plaintiff corporations. (Compl., ¶ 30.)

In moving to dismiss the complaint, UBS AG adopts the arguments of the Gold defendants on their separate motion to dismiss. (UBS AG Memo. In Supp., at 8-9 & n 9.) UBS AG also asserts a personal jurisdiction defense. (Id., at 9-13.) At oral argument, UBS AG did not take the position that the court must decide the personal jurisdiction issue before reaching the other grounds for dismissal. The complaint will therefore be dismissed in its entirety, with prejudice, as against UBS AG, for the reasons stated on the Gold defendants' motion to dismiss.

It is accordingly hereby ORDERED that the motion to dismiss of defendants Cheryl Gold, individually and as Preliminary Executrix of the Estate of Eugene P. Gold, and Amy Kaufman Gold, is granted to the extent that the complaint is dismissed in its entirety, with prejudice, as against those defendants; and it is further

ORDERED that the motion to dismiss of defendant UBS AG is granted to the extent that the complaint is dismissed in its entirety, with prejudice, as against UBS AG.

This constitutes the decision and order of the court.

Dated: New York, New York
September 27, 2016

MARCY FRIEDMAN, J.S.C.