SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

D. PENGUIN BROTHERS, LTD., et al., ACTION NO. 1

Plaintiffs

Index No. 158949/2014

v

CITY NATIONAL BANK, et al., MOT SEQ. 003

Defendants.

DECISION AND ORDER

D. PENGUIN BROTHERS, LTD., et al., ACTION NO. 2

Plaintiffs

Index No. 153494/2015

v

CITY NATIONAL BANK, et al., MOT SEQ. 003

Defendants.

NANCY M. BANNON, J.:

I. INTRODUCTION

In these two related actions, inter alia, to recover damages for fraud and conversion, the defendants NBUF Development, Ltd. (NBUF), Black United Fund of New York, Inc. (BUFNY), First Pro Group, Inc. (First Pro), James Robert Williams, a/k/a J. Robert Williams, a/k/a Bob Williams, d/b/a Inner City Strategies, and Inner-City Strategies, d/b/a Inner City Strategies (collectively the Williams defendants) move pursuant to CPLR 3211(a)(5) to dismiss the amended complaint in Action No. 1 insofar as asserted

against them. The defendant David Spiegelman moves pursuant to CPLR 3211(a)(5) to dismiss the amended complaint in Action No. 2 insofar as asserted against him. The plaintiffs oppose the motions. The motions are granted in part and denied in part in accordance herewith.

II. BACKGROUND

The plaintiffs commenced Action No. 1 on September 11, 2014, and Action No. 2 on April 9, 2015, respectively, by filing summonses with notice. They moved in both actions for leave to enter a default judgment the Williams defendants (Action No. 1, SEQ 001) and the defendant attorney David Spiegelman (Action No. 2, SEQ 001), but stipulated to withdraw the motions to permit those defendants to appear. The plaintiffs served the complaint in Action No. 1 on January 20, 2016, and the complaint in Action No. 2 on May 26, 2015, alleging that the defendants improperly diverted approximately $10 million rightfully belonging to the plaintiffs from numerous real estate investment accounts and escrow accounts maintained for the plaintiffs' benefit. The Williams defendants moved to dismiss the complaint as against them (Action No. 1, SEQ 002) and Spiegelman moved to dismiss the complaint against him (Action No. 2, SEQ 002) but, by orders dated July 26, 2016, and July 20, 2016, respectively, the defendants were permitted to withdraw the motions when the

plaintiffs filed amended complaints in both actions during the pendency of the motions.

The amended complaint in Action No. 1 asserts 52 causes of action and the amended complaint in Action No. 2 asserts 78 causes of action alleging, inter alia, conversion, fraud, forgery, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, gross negligence, professional malpractice, and breach of contract, and also seeking an accounting. The amended complaints allege that, in 2005 and 2008, the plaintiffs were induced to invest $4,500,000 with the defendants by false representations that the defendants were going to develop residential buildings for inclusion in federally subsidized housing programs, and that several of the defendants forged deeds and various approvals required from municipal agencies to falsely show the plaintiffs that closings on the sales of the buildings were effected in 2009, and that municipal approvals were acquired thereafter.

The amended complaints further alleged that the Williams defendants and Spiegelman misappropriated the invested and escrowed funds without ever entering into actual development agreements or obtaining necessary governmental approvals. The plaintiffs also assert that Spiegelman, on behalf of the Williams defendants and himself, obtained unauthorized loans in the plaintiffs' names in the sum of $2,200,000, and pocketed the loan

proceeds, leaving the plaintiffs responsible for repayment. The plaintiffs aver that the defendants provided them with forged and fraudulent memoranda, thus concealing their scheme from the plaintiffs, and that the plaintiffs did not discover the thefts until February 3, 2011.

In or about the first week of January 2013, several of the plaintiffs commenced an action against the Williams defendants in the United States District Court for the Southern District of New York, alleging that those defendants violated the Racketeer Influenced and Corrupt Organizations Act (18 USC § 1961, et seq.) (RICO), and were liable to the plaintiffs pursuant to several state-law causes of action. On January 31, 2013, The remaining plaintiffs commenced a virtually identical action against the Williams defendants. The District Court consolidated the two federal actions, and granted the motion of the Williams defendants to dismiss the complaints, which were based on the same transactions alleged here, upon concluding that the complaints failed to state a claim under RICO. The District Court also declined to exercise supplemental jurisdiction over the related state-law claims. See D. Penguin Bros., Ltd. v City Natl. Bank, 2014 US Dist LEXIS 32819, 2014 WL 982859 (SD NY, Mar. 11, 2014), affd 587 Fed Appx 663 (2nd Cir. 2014).

On May 6, 2013, while the federal actions were pending, the plaintiffs commenced an action solely against NBUF in the Supreme

Court, New York County, alleging causes of action sounding in unjust enrichment, common-law fraud, and aiding and abetting Spiegelman's breach of the fiduciary duty he allegedly owed to the plaintiffs in his capacity as escrowee. The court (Oing, J.) granted NBUF's motion to dismiss the complaint as time-barred, and the Appellate Division affirmed. See D. Penguin Bros., Ltd. v National Black United Fund, Inc., 137 AD3d 460 (1st Dept. 2016). The Appellate Division concluded that the causes of action alleging fraud and aiding and abetting breach of fiduciary duty were barred by the six-year statute of limitations of CPLR 213(8), which began to run when the plaintiffs first tendered money in 2005. The Court held that the claims were not saved by the two-year discovery rule of CPLR 203(g), since the plaintiffs "failed to demonstrate that further acts of concealment prevented them from commencing the action within the two-year period. In any event, the fraud claims fail to allege facts sufficient to permit a reasonable inference that defendant was involved in the scheme." Id. at 461. The Court also ruled that there was no basis for applying the discovery rule to extend the limitations period applicable to an unjust enrichment claim, and that the "allegations that [NBUF] participated in and benefited from the fraud scheme are conclusory." Id.

The plaintiffs commenced the instant actions on September 11, 2014, and April 9, 2015, respectively, reasserting the

state-law claims against the Williams defendants and Spiegelman, and adding additional state-law claims, including causes of action for an accounting. The Williams defendants and Spiegelman now separately move to dismiss the amended complaints as against them, arguing, among other things, that the conversion, fraud, and breach of fiduciary duty causes of action are time-barred, and that the actions are barred by the doctrine of res judicata.

III. DISCUSSION

A. Res Judicata

Inasmuch as the prior state-court action was dismissed against NBUF as time-barred, the causes of action asserted against NBUF here are barred by the doctrine of res judicata. See Cangro Reitano, 92 AD3d 483 (1st Dept. 2012). "Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action." Parker v Blauvelt Volunteer Fire Co., 93 NY2d 343, 347 (1999); see Matter of Reilly v Reid, 45 NY2d 24 (1978). As a general rule, New York applies a "transactional approach" to analyzing the doctrine of res judicata, so that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." O'Brien v Syracuse, 54 NY2d 353, 357 (1981).

> "The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation. The rationale underlying this principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again."

Matter of Hunter, 4 NY3d 260, 269 (2005).

Since the prior federal court actions were dismissed for failure to state a claim under federal law, and the federal court declined to exercise supplemental jurisdiction over the pendent state-law causes of action, and thus not on the merits, the causes of action asserted here against the Williams defendants, save NBUF, as well as the causes of action asserted against Spiegelman, are not barred by res judicata. See Bielby v Middaugh, 120 AD3d 896 (4th Dept. 2014).

The plaintiffs correctly contend that the dismissal of the state-court action against NBUF on the ground that it was time-barred does not have a res judicata effect upon the causes of action asserted against the remaining Williams defendants or Spiegelman because the statute of limitations defense was personal to NBUF and there was no privity between NBUF and the other Williams defendants. See Israel v Wood Dolson Co., 1 NY2d 116 (1956); see also John J. Kassner & Co., Inc. v City of New York, 46 NY2d 544 (1979).

B. Statute of Limitations

1. Conversion

The conversion causes of action are nonetheless time-barred.

"A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession." Colavito v New York Organ Donor Network, Inc., 8 NY3d 43, 49-50 (2006). A cause of action sounding in conversion accrues when the conversion occurred. See Sporn v McA Records, 58 NY2d 482 (1983); Geotech Enters., Inc. v 181 Edgewater, LLC, 137 AD3d 1213 (2nd Dept. 2016). "The cause of action normally accrues on the date the conversion takes place and not the date of discovery or the exercise of diligence to discover." Maya NY, LLC v Hagler, 106 AD3d 583, 585 (1st Dept. 2013). Since the amended complaints assert that the defendants never intended to develop real property, and engaged in a years-long charade meant to convince the plaintiffs that they did intend to do so, the conversions occurred here in 2005 and 2008, when the plaintiffs tendered their money to the Williams defendants.

CPLR 205(a) provides that, where, as here, a prior action has been dismissed on grounds other than a voluntary discontinuance, failure to obtain personal jurisdiction over a defendant, neglect to prosecute, or a final judgment on the merits, a plaintiff may commence a new action for the same relief within six months after the dismissal. However, such a new action may only be commenced "if the new action would have been timely commenced at the time of commencement of the prior action"

CPLR 205(a). Although the plaintiffs commenced this action within six months after its appeal as of right in the federal actions was exhausted (see Malay v City of Syracuse, 25 NY3d 323 [2015]), the conversion causes of action that were asserted therein were time-barred at the time those actions were commenced in January 2013, and the plaintiffs thus cannot avail themselves of CPLR 205(a) with respect to those causes of action. See Matter of Sanders v New York City Dept. of Hous. Preserv. & Dev., 127 AD3d 453 (1st Dept. 2015).

2. Fraud, Breach of Fiduciary Duty, and Aiding and Abetting Breach of Fiduciary Duty

Additionally, the causes of action asserted in both actions against the defendants BUFNY and First Pro which are to recover for fraud, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty, are barred by the six-year statute of limitations articulated in CPLR 213(8), since the allegations in those causes of action are virtually identical to those in the fraud and aiding and abetting causes of action asserted against NBUF, which the Appellate Division concluded were time-barred in Penguin Bros., Ltd. v National Black United Fund, Inc., (supra).

Conversely, the statute of limitations does not bar the fraud causes of action against Williams, Inner-City Strategies, and Spiegelman, since the allegations supporting those causes of action are far more than conclusory, and are sufficient to permit reasonable inferences that these defendants were directly

involved in the alleged fraudulent scheme, and that the plaintiffs were unable to discover the wrongdoing committed by these defendants until February 3, 2011. Moreover, these defendants were allegedly directly responsible for furnishing the plaintiffs with fraudulent and forged contracts of sale, deeds, closing documents, and written approvals by municipal agencies, with the signatures of various public officials forged thereon, all to convince the plaintiffs that the development of 29 buildings had been approved and was proceeding. These allegations are sufficient to support the plaintiffs' contention that they were induced to refrain from timely commencing an action against these defendants, and that they could not, with due diligence, have discovered the fraud within six years of its commission. See generally MBI Intl. Holdings Inc. v Barclays Bank PLC, 151 AD3d 108 (1st Dept. 2017).

Consequently, the two-year date-of-discovery rule of CPLR 203(g) is applicable to the fraud causes of action asserted against Williams, Inner-City Strategies, and Spiegelman. As such, the commencement of the federal actions against these defendants in January 2013 was timely, and the exhaustion of the federal appeals process on October 16, 2014, gave the plaintiffs until April 16, 2015, to interpose the instant state-law fraud causes of action against them. See CPLR 205(a). Since the plaintiffs commenced the instant actions prior to that date, the

fraud causes of action against Williams, Inner-City Strategies, and Spiegelman were timely interposed.

For the same reasons as apply to the causes of action alleging fraud against Williams, Inner-City Strategies, and Spiegelman, the causes of action alleging breach of fiduciary duty against these defendants were timely interposed.

> "New York law does not provide a single statute of limitations for breach of fiduciary duty claims. Rather, the choice of the applicable limitations period depends on the substantive remedy that the plaintiff seeks. Where the remedy sought is purely monetary in nature, courts construe the suit as alleging 'injury to property' within the meaning of CPLR 214(4), which has a three-year limitations period. Where, however, the relief sought is equitable in nature, the six-year limitations period of CPLR 213(1) applies. Moreover, where an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR 213(8)."

IDT Corp. v Morgan Stanley Dean Witter & Co., 12 NY3d 132, 139 (2009). In addition, courts apply the two-year date-of-discovery rule to causes of action alleging a breach of fiduciary duty founded on fraud. See Elghanayan v Victory, 192 AD2d 355 (1st Dept. 1993); Walsh v Walsh, 91 AD2d 1198 (4th Dept. 1983).

3. Accounting

Although the conversion causes of action are time-barred as to all of the defendants, as are the breach of fiduciary duty and aiding and abetting causes of action asserted against BUFNY and First Pro, "[t]he statute of limitations with respect to the cause of action . . . seeking an accounting by reason of

defendants' alleged conversion and breach of fiduciary duty has not expired, as it did not begin to run on the date of the alleged wrongdoing, but rather on the date of discovery." Elghanayan v Victory, supra, at 355.

4. Specific Performance and Breach of Contract

The causes of action seeking specific performance and to recover for breach of the contracts for the sale of real property is not time-barred, since the instant actions were commenced within six years of the defendants' alleged failure to perform under the contracts as of 2009. See CPLR 213(2).

5. Legal Malpractice

The causes of action against Spiegelman alleging legal malpractice are not time-barred, since the continuing representation doctrine tolled the applicable three-year limitations period for a sufficient period of time. See Shumsky v Eisenstein, 96 NY2d 164 (2001).

C. Issues To Be Determined Are Limited By Notices of Motion

The court notes that the Williams defendants did not move to dismiss the amended complaint in Action No. 2 as against them, and that Spiegelman did not move to dismiss the amended complaint in Action No. 1 as against him. Although the two actions appear to seek relief arising from the same series of transactions, and involve all of the same parties, the court here is constrained to

address only the specific relief requested by the various defendants in their notices of motion. See Bonnie Leasing Co. v New York, 85 AD2d 509 (1st Dept. 1981). Hence, the court does not address the issues of whether the causes of action asserted against the Williams defendants in Action No. 2 were timely, or the applicability of the doctrine of res judicata to the causes of action asserted against them in that action, nor does it address the timeliness of the causes of action asserted against Spiegelman in Action No. 1.

Any other request for relief not otherwise granted is denied.

IV. CONCLUSION

Accordingly, it is

ORDERED that the motion of the defendants NBUF Development, Ltd., Black United Fund of New York, Inc., First Pro Group, Inc., James Robert Williams, a/k/a J. Robert Williams, a/k/a Bob Williams, d/b/a Inner City Strategies, and Inner-City Strategies, d/b/a Inner City Strategies to dismiss the amended complaint in Action No. 1 against them (SEQ 003) is granted to the extent that the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth causes of action are dismissed insofar as asserted against them,

are dismissed insofar as asserted against the defendants NBUF Development, Ltd., and First Pro Group, Inc., and the motion is otherwise denied; and it is further,

ORDERED that the motion of the defendant David Spiegelman to dismiss the amended complaint in Action No. 2 against him (SEQ 003), is granted to the extent that the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth and fourteenth causes of action are dismissed insofar as asserted against him, and the motion is otherwise denied.

This constitutes the Decision and Order of the Court.

Dated: 9/8/17

ENTER: _____
J.S.C.

HON. NANCY M. BANNON