SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

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EMIL LLC and 10839 ASSOCIATES,

Plaintiffs,

- v -

BARRY JACOBSON, LARRY WOHL, JOSEPH P DAY REALTY CORP, 10839 ASSOCIATES, 108 WEST 39TH STREET ASSOCIATES, ROSENBERG & CHESNOV CPAS LLP

Defendants.

INDEX NO. 651281/2017

MOTION DATE N/A

MOTION SEQ. NO. 005

DECISION AND ORDER

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HON. BARRY R. OSTRAGER:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 164, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 199, 200, 201, 202
were read on this motion to/for DISMISS.

HON. BARRY R. OSTRAGER:

Plaintiff Emil LLC ("Emil") is the successor-in-interest to the late Arthur Emil with respect to Arthur Emil's ownership interest in derivative plaintiff/nominal defendant 10839 Associates (the "Partnership"). Defendants Jacobson and Wohl each control minority interests in the Partnership. Defendant Joseph P. Day Realty Corp. ("Realty")—allegedly controlled by Jacobson and Wohl—is the managing agent for the property owned by the Partnership. Plaintiff's complaint alleges derivative and direct claims sounding in, *inter alia*, breach of fiduciary duty and breach of contract. Defendants Jacobson, Wohl, Realty, and Nominal Defendants 10839 Associates and 108 West 39th Street Associates (together, "Defendants") move to dismiss various causes of action pursuant to CPLR 3211(a)(1), (a)(5), and (a)(7). For the reasons stated herein, the motion to dismiss is denied.

The crux of this dispute arises out of the accounting treatment accorded to funds provided by Emil to the Partnership. The Partnership is a general partnership which owns and operates real estate located at 108 West 39th Street. Emil advanced funds to the Partnership in 1991 and 2007 in the amount of $250,000 each. Emil claims that these advances were loans, long-treated as such on the Partnership's books, and were improperly reclassified as capital contributions in 2012.

Plaintiff seeks these advances be reclassified as loans on the Partnership's books, tax returns, and financial statements, as well as have the Partnership's profits and losses adjusted as a result. Plaintiff thus seeks damages from the individual Defendants who allegedly breached their fiduciary duties by reclassifying the loans as capital contributions. Plaintiff also asserts a faithless servant claim against Realty—the management company—for mismanaging the property and its records. Finally, plaintiff asserts two derivative claims based on the allegedly improper allocation of certain Partnership funds to the capital accounts of Jacobson and Wohl.

Defendants argue, primarily, that Plaintiff's claims regarding accounting treatment of the advances must be dismissed as time-barred under the applicable six-year statute of limitations. Defendants assert that the breach of fiduciary duty claims should be dismissed for failure to plead with the required particularity the acts of mismanagement complained of during the twenty-six years at issue. Finally, Defendants argue that the first and second causes of action alleging improper treatment of certain other Partnership funds should also be dismissed as time-barred conversion claims.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction .... Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). Dismissal pursuant to CPLR 3211(a)(5) is

warranted when "the cause of action may not be maintained because of … [the] statute of limitations."

Loans which have no stated maturity date are payable on demand. *See Farhadi Inc. v. Anavian*, 58 A.D.2d 546, 546 (1st Dep't 1977) ("The fact that the notes in issue were undated does not invalidate them but, rather, makes them payable on demand."). The statute of limitations for a demand loan is six years from the date the loan was made. *Moore v. Candlewood Holdings Inc.*, 714 F. Supp. 2d 406 (E.D.N.Y. 2010) ("It is well-settled that, under the New York Civil Practice Law and Rules, the time to commence an action on a promissory note is six years from the date of its accrual."). To extend the limitations period, an acknowledgement must meet the requirements of New York General Obligations Law §17-101, which provides: "An acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations…."

"[T]he rule is well settled that where a creditor has several claims, against which the statute has run, then the acknowledgment or promise in the writing must indicate the particular claim to which it refers; that a general acknowledgment of an indebtedness, there being several claims, is insufficient." *Zinn v. Stamm*, 152 A.D. 76, 79 (1st Dep't 1912). However, "[i]n determining the effectiveness of an acknowledgment, the critical determination is whether the acknowledgment imports an intention to pay." *Knoll v. Datek Sec. Corp.*, 2 A.D.3d 594, 594 (2d Dep't 2003).

Defendants rely principally on *Moore v. Candlewood Holdings, Inc.*. There, plaintiff commenced suit in 2007 to collect on a demand loan made in 1997 evidenced by a promissory note. The Court held plaintiff's claim barred by the six-year statute of limitations despite

plaintiff's assertion that the limitations period was extended by defendant's 2000, 2002, and 2004 tax returns, each of which contained a line stating outstanding "loans from shareholders" and providing a general amount that purportedly *included* the amount owing on the promissory note at issue. *Moore*, 714 F. Supp. 2d at 410. However, the Court determined that the reason the tax returns were insufficient to restart the statute of limitations period was because the total amount listed for "loans from shareholders" on the 2004 tax return was *less* than what defendant owed to plaintiff under the promissory note at that time. *Id.* at 411. This was inconsistent with "plaintiff's position that the relevant tax returns acknowledged the Promissory Note." *Id.*

Here, Emil made two $250,000 demand loans to the Partnership in 1991 and 2007, respectively. After the 2007 loan was made, the Partnership's books and records reflected that the total amount of "Loans Payable Partners" was in the principal amount of $2,319,297.75. This principal amount appears in unsigned Partnership financial statements at least as recently as 2010. (*See* Samson Aff. Ex. F [NYSCEF Doc. 129]). The Partnership's 2011 tax return contains a single line entry for "loans payable – partners" which states the same principal amount of $2,319,298. (*See* Second Amended Complaint Ex. I [NYSCEF Doc. 169]). Notably, the 2011 tax return was prepared by the Partnership's accountant, Defendant Rosenberg & Chesnov CPAs LLP ("Rosenberg"), and is dated April 12, 2012—within six years of the commencement of this action. The Partnership's accounting statements from this period, also prepared by Rosenberg, indicate that the $2,319,298 principal in outstanding loans contains the two $250,000 loans Emil made in 1991 and 2007. (*See* Second Amended Complaint Ex. D [NYSCEF Doc. 169]).

Unlike in *Moore*, which dismissed plaintiff's claims on summary judgment following discovery, Plaintiff here has submitted evidence tending to show recognition of a consistent amount owed to Emil and the other partners. The Partnership's accountant prepared accounting

statements and tax returns over a period of years—some prepared within six years of commencement of this action—showing that Emil made two $250,000 loans to the Partnership in 1991 and 2007. The principal amount of all outstanding loans payable to partners remained consistent for many years and may, for purposes of this pre-answer motion to dismiss, evince the Partnership's intent to repay the debt.

"At this juncture, it cannot be determined whether the entries in the tax returns and financial statements [] describing the loan constituted an acknowledgment of the debt sufficient to revive or toll the statute of limitations, or evince an intent [] to pay it." *Cognetta v. Valencia Devs., Inc.*, 8 A.D.3d 318, 320 (2d Dep't 2004) (holding that "[w]hether a purported acknowledgment is sufficient to restart the running of a period of limitations depends on the circumstances of the individual case"). The near yearly recognition of Emil's loans in financial statements and tax returns—at least some of which were dated within the limitations period—is sufficient, for now, to permit discovery into the issue of the Partnership's intent to repay the purported loans. Therefore, the Court denies the motion to dismiss the third, fourth, and fifth causes of action, without prejudice to renew the statute of limitations issue upon the conclusion of discovery.

Defendants' motion to dismiss Plaintiff's first and second causes of action for declaratory judgment and breach of fiduciary duty, respectively, is denied. Both claims concern the improper classification of $62,543 that was allocated to Jacobson and Wohl's capital accounts instead of to the Partnership. Plaintiff seeks correction in the Partnership books, recalculation of the Partnership's profits and losses, reallocation of partners' capital accounts, amendment to the Partnership's financial statements and tax returns, the removal of Jacobson and Wohl as managing partners, and the appointment of a receiver. Defendants argue that these claims are

really one for conversion of $62,543 and are thus time-barred under a three-year statute of limitations. However, the relief sought by Emil is equitable in nature and thus the six-year statute of limitations applies. *See IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 139 (2009) (finding that six-year statute of limitations applies where relief sought is equitable in nature). Therefore, Defendants' motion to dismiss the first and second causes of action is denied.

Finally, Defendants' motion to dismiss Plaintiff's seventh cause of action against Realty, the management company, is denied. "The faithless agent rule [] is founded upon the agent's duty of loyalty to the principal, is concerned with faithfulness in connection with the transaction, and the conduct that implicates it constitutes a fraud upon the principal." *G.K. Alan Assoc., Inc. v. Lazzari*, 44 A.D.3d 95, 101 (2d Dep't 2007) (internal quotations and citations omitted). Here, Plaintiff alleges that Realty, which is controlled by Jacobson and Wohl, falsified the books and records of the Partnership, participated in Defendants' improper reclassifications of certain funds, and allowed the property at issue to fall into a state of disrepair. Plaintiff has adequately alleged that Realty acted as a faithless agent and that disgorgement of Realty's compensation may be the proper remedy. *See In re Blumenthal*, 32 A.D.3d 767 (1st Dep't 2006) (holding that disgorgement of compensation received by a faithless agent is proper remedy). Therefore, Defendants' motion to dismiss the seventh cause of action is denied.

Accordingly, it is hereby

ORDERED that Defendants' motion to dismiss is denied.

10/3/2018
DATE

BARRY R. OSTRAGER, J.S.C.

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION

APPLICATION: [ ] GRANTED [X] DENIED [ ] GRANTED IN PART [ ] OTHER
[ ] SETTLE ORDER [ ] SUBMIT ORDER

CHECK IF APPROPRIATE: [ ] INCLUDES TRANSFER/REASSIGN [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

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