Benjamin v Yeroushalmi
2018 NY Slip Op 33655(U)
April 25, 2018
Supreme Court, Nassau County
Docket Number: 003563-14
Judge: Vito M. DeStefano

SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 11
NASSAU COUNTY

JIM BENJAMIN and BEHROUZ BENYAMINPOUR,

Plaintiffs,

-against-

MOTION SEQUENCE: 04
INDEX NO.:003563-14

MOUSSA YEROUSHALMI, FARZANEH YEROUSHALMI, DAVID POUR and DAVID POUR & ASSOCIATES, LLP,

Defendants.

The following papers and the attachments and exhibits thereto have been read on this motion:

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The Plaintiffs, Jim Benjamin ("Jim") and his brother Behrouz Benyaminpour ("Bruce") (Bruce and Jim are collectively referred to as the "Benjamins") move for: an order pursuant to CPLR 2221(d) granting them leave to reargue a prior motion which resulted in an order dated May 3, 2016 (the "prior order"); and an order pursuant to CPLR 3025(b) granting them leave to amend the amended complaint to assert a fraud-based breach of fiduciary duty claim and a claim for unjust enrichment/constructive trust.

Factual Background

Jim Benjamin is a real estate developer/investor who, on April 18, 2007, entered into a joint venture agreement with real estate developer and investor Moussa Yeroushalmi ("Moussa") in connection with property located at 242 and 250 Old Country Road in Mineola, New York (the "Mineola Property"). The Mineola Property was to be offered for sale by the Metropolitan Transportation Authority ("MTA") through a closed bidding procedure. Pursuant to the joint venture agreement, the parties agreed that profits earned in connection with the Mineola Property would be divided as follows: 30% to Jim Benjamin; 65% to Moussa Yeroushalmi; and 5% to non-party Morad Yeroushalmi.

Following the formation of the Mineola joint venture, the Mineola joint venturers submitted a bid at auction to purchase the Mineola Property for $12,222,000. After winning the bid, they subsequently agreed to assign their purchase rights to Robert Kahen ("Kahen") for $13,500,000 with the $1,278,000 difference between the purchase price ($12,222,000) and the price of the assignment to Kahen ($13,500,000) to be distributed as profits to the three joint venturers in accordance with their joint venture agreement. According to the amended complaint, Moussa "repeatedly represented to [Jim] that the [profits] payment [Jim's 30% share of the $1,278,000] would be made when the transaction with the MTA closed" (Amended Complaint at ¶ 19).

On May 18, 2007, and allegedly unbeknownst to Jim, Kahen and Moussa entered into a separate agreement with respect to the Mineola Property which contained the following relevant provisions (the "May 2007 Agreement"):[1]

> WHEREAS, the Parties are interested in entering into a contract of sale with the Metropolitan Transportation Authority ("MTA"), covering the premises located at

[1] This agreement between Kahen and Moussa was annexed as exhibit "2" to the underlying motion to dismiss by Defendants David Pour and David Pour & Associates, LLP (the "Pour Defendants").

242 and 250 Old Country Road, Mineola New York (collectively the "Properties"); and

WHEREAS, the Parties estimate that the purchase price, inclusive of closing expenses, for the Property shall be approximately $17,000,000 (the "Acquisition Price"). The estimated closing date is within seventy-five (75) days from the date hereof;

* * *

At the execution of this Agreement, Kahen will deliver a check in amount of $550,000.00 to [Moussa] against the Acquisition Price. [Moussa] hereby personally and unconditionally guarantees the full return of this amount in the event that the Parties do not enter into the said contract with the MTA. If, and when, an official contract is executed, this guarantee shall be cancelled.

* * *

At the closing, Kahen and [Moussa] shall take title, under their respective newly formed entities, as tenants in common, with each having a fifty (50%) percent undivided interest. Each Party may structure its entity with additional members (Ex. "4" to Motion at exhibit "2").

The following year, on July 2, 2008, the parties to the Mineola joint venture (Jim Benjamin, Moussa Yeroushalmi, and Morad Yeroushalmi) entered into a subsequent agreement with respect to the Mineola Property whereby the parties agreed, in pertinent part, as follows:

This agreement, made on July 2, 2008, *supersedes the previous agreement* made and signed on April 18, 2007, between Mr. Jim Benjamin . . . , Mr. Morad Yeroushalmi . . . and Mr. Moussa Yeroushalmi . . . , collectively were Partners for the purchase of the above referenced property.

The Partners had a meeting at the above premises and following a discussion, the following decision has been made and agreed upon:

1. Mr. Jim Benjamin has decided not to continue with the Partnership. This decision is completely of Mr. Jim Benjamin's free will.

2. Mr. Jim Benjamin would receive the money he invested into this deal, if Moussa Yeroushalmi assumes control. The funds Mr. Jim Benjamin has invested to date, check #250 in the amount of $750.00, paid on April 24, 2008, should be returned to him.

3. The Partnership would continue as follows:
   a. Morad Yeroushalmi - 5%
   b. Moussa Yeroushalmi - 95%

Moussa, Jim and Morad Yeroushalmi "agreed and accepted" and signed the above agreement (the "July 2008 Agreement") (emphasis added).

Five years later, on July 26, 2013, Kahen, who had previously been assigned the purchase rights to the Mineola Property, closed on the sale of the Mineola Property with the MTA and "paid or otherwise credited the Yeroushalmis with the $1,278,000." According to the Benjamins, however, the Yeroushalmis failed to distribute the Benjamins' share of profits pursuant to the April 2007 Mineola joint venture agreement (Amended Complaint at ¶¶ 13-21).

Procedural History

Thereafter, the Benjamins commenced the instant action against David Pour[2], David Pour & Associates, LLP (the "Pour Defendants"), Moussa Yeroushalmi, and Farzaneh Yeroushalmi (the "Yeroushalmi Defendants"). The Pour Defendants and the Yeroushalmi Defendants separately moved to dismiss the amended complaint. The court denied the Pours' motion and granted, in part, the Yeroushalmis' motion to the extent that it dismissed the first and seventh causes of action for breach of contract and breach of fiduciary duty, respectively. Specifically, in its prior order dated May 3, 2016, the court stated:

[2] David Pour, the brother in law of Kahen, is an attorney who was allegedly involved in various transactions with the Benjamins and the Yeroushalmis.

> Notably, the Benjamins do not deny the existence or authenticity of the July 2008 Agreement. Because the July 2008 Agreement, by its express terms, superseded the original April 17, 2007 Mineola joint venture agreement, the law treats the former agreement as if it never existed and states that the only recourse the parties would have arise under the superseding contract (*Northville Industries Corp. v Ft. Neck Oil Terminals Corp.*, 100 AD2d 865, 867 [2d Dept 1984]). Accordingly, by entering into the July 2008 Agreement, a novation occurred by which the prior April 17, 2007 joint venture agreement, and any interests Jim may have had pursuant to that agreement, were extinguished (*see Citigifts, Inc. v Pechnik*, 67 NY2d 774 [1986] [because there was a novation, which extinguished the old agreement, plaintiffs were relegated to an action for breach of the new agreement]).
>
> * * *
>
> Given the July 2008 Agreement, the branch of the Yeroushalmi Defendants' motion to dismiss the first cause of action for breach of the Mineola joint venture agreement is granted inasmuch as the documentary evidence herein, the authenticity of which is not disputed, utterly refutes the Benjamins' factual allegations that the Yeroushalmis owe them profits with respect to the Mineola Property (*see Goshen v Mutual Life Insurance Co. of N.Y.*, 98 NY2d at 326-27, *supra*; *Fontanetta v John Doe 1*, 73 AD3d at 86, *supra*) (Ex. "1" at pp 10-11).

With respect to the seventh cause of action for breach of fiduciary duty, the court dismissed that claim as it was not pleaded with the requisite particularity (CPLR 3016[b]).

By the instant motion, the Benjamins seek leave to reargue the Yeroushalmis' underlying motion which resulted in, *inter alia*, dismissal of the first and seventh causes of action; and, in addition, seek leave to amend the amended complaint to assert a fraud-based breach of fiduciary duty claim and a claim for unjust enrichment/constructive trust.

For the reasons that follow: the branch of the motion seeking leave to reargue is granted, in part, and, upon reargument, the court adheres to its original determination; and the branch of the motion seeking leave to amend the amended complaint is granted.

Motion to Reargue

In their first cause of action, the Benjamins allege that the Yeroushalmis breached the terms of the Mineola joint venture agreement by failing to pay the Benjamins the $383,400 due them as their share of profits when the Yeroushalmis assigned the right to purchase the Mineola Property to Kahen (Amended Complaint at ¶¶ 76-78). [3]

With respect to this claim, the Benjamins argue that the court:

> [M]isapprehended the law and facts in determining that the July 2, 2008 agreement constituted a novation of the prior partnership agreement between Jim and the Yeroushalmis to purchase and redevelop the [Mineola Property] such that Jim was precluded from suing to recover his share of profits previously earned by the partnership. Relying exclusively on the use of the word 'superseded' in the preamble to the July 2, 2008 Agreement, the Court erroneously determined that the agreement constituted a novation of the original partnership agreement (Memorandum of Law in Support at p 6).

Further, according to the Benjamins, notwithstanding the well settled principal that the use of the word "superseded" is sufficient to evidence the intention to create a novation, the Benjamins contend that under the particular factual circumstances at bar, the word "superseded" was insufficient in this regard inasmuch as the July 2008 Agreement "exclusively focuses on Jim's rights going forward and did not purport to address entitlement to profits already realized and the parties expressed intent that Jim was not giving up his entitlement to profits" (Memorandum of Law in Support at p 8).[4]

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[3] $383,400 constitutes Jim's 30% share of the profits of $1,278,000 by virtue of the "flip" of the contract to Kahen (*see* discussion *supra* at p 2).

[4] In opposition to the underlying motion, the Benjamins asserted that they did "not seek any portion of profits from the joint venture going forward, only the profit that was already realized by the joint venture by virtue of the 'flip'" to Kahen (Memorandum of Law in Opposition at p 3 [Motion Seq. No. 3]).

Contrary to the Benjamins' contention, the July 2008 Agreement did not evince an "expressed intent that Jim was not giving up his entitlement to profits" contemplated under the April 2007 Mineola joint venture agreement. The language of the July Agreement provides: "This agreement, made on July 2, 2008, *supersedes the previous agreement* made and signed on April 18, 2007" between the Mineola Property joint venturers; the "Partners had a meeting at the above premises" and agreed Jim would not remain with the Partnership; Jim was to receive "*the money he invested* into this deal"; and that "decision is completely of Mr. Jim Benjamin's free will" (emphasis added). Such language constitutes a novation of the April 2007 Mineola joint venture agreement (*see Leeward Isles Resorts, Ltd. v Hickox*, 49 AD3d 277 [1st Dept 2008] [new loan agreement, which increased the amounts extended under a prior loan agreement and expressly superseded and replaced the prior loan agreement constituted a novation of the prior loan agreement]; *Northville Indus. Corp. v Fort Neck Oil Terms Corp.*, 100 AD2d 865 [2d Dept 1984] *aff'd* 64 NY2d 930 [1985] ["It is well settled that 'where the parties have clearly expressed or manifested their intention that a subsequent agreement supersede or substitute for an old agreement, the subsequent agreement extinguishes the old one and the remedy for any breach thereof is to sue on the superseding agreement'"]; *Flaum v Birnbaum*, 120 AD2d 183, 192 [4th Dept 1986] citing 22 NY Jur 2d Contracts § 401 [the elements of novation are a valid previous obligation, the parties' agreement to a new contract, the formation of a valid new contract, and the parties' indication of their intention to extinguish the old contract]).

The Benjamins' second contention is that the court erred in finding a novation inasmuch as it failed to "recognize that the original partnership agreement had already been breached by Moussa's failure to disclose and pay over to Jim his share of the payment Moussa received from Kahen for the assignment of the contract of sale on May 18, 2007" (*see* discussion *supra* at pp 2-3) and that this "breach was revealed to Jim for the first time" when the May 2007 Agreement between Moussa and Kahen was annexed to the underlying motion papers (*see* discussion *supra* at pp 2-3).

Although it is true that a novation cannot take place when the original contract has

already been breached (*see Wasserstrom v Interstate Litho Corp.*, 114 AD2d 952 [2d Dept 1985]), there is no merit to the Benjamins' argument inasmuch as the Benjamins' amended complaint asserts that Jim's share of the profits from the Mineola Property was to be paid *when the transaction with the MTA closed, which did not occur until 2013*, approximately six years *after* the May 2007 Agreement between Kahen and Moussa. Second, the May 2007 Agreement between Kahen and Moussa dealt, in effect, with the parties' rights and obligations concomitant with the acquisition of the Mineola Property from the MTA. Importantly, the $550,000 paid by Kahen to Moussa upon execution of the May 2007 Agreement was to be applied toward the acquisition of the Mineola Property and apparently did not relate to the Mineola joint venturers' (Jim, Moussa and Morad) initial assignment of their purchase rights of the Mineola Property to Kahen (*see* discussion *supra* at p 2).[5]

The Benjamins further argue that the court erred in dismissing their claim for breach of fiduciary duty on the basis that it was not pleaded with sufficient particularity under CPLR 3016(b).[6]

In their seventh cause of action in the amended complaint, the Benjamins allege: that as co-joint venturers, the Yeroushalmis owed the Benjamins a fiduciary duty and that in reliance on the Yeroushalmis' promises to share the profits of the various ventures, the Benjamins transferred funds and performed services for the benefit of the joint ventures, but that the Yeroushalmis retained the profits, unjustly enriching themselves in breach of their duty to the Benjamins (Amended Complaint at ¶¶ 100-104).

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[5] While the Benjamins repeatedly note that they first became aware of the May 2007 Agreement between Kahen and Moussa during motion practice in the instant action (when the agreement was annexed to the Pours' underlying motion to dismiss), the court notes that the Benjamins never raised the argument in their opposition to the underlying motions. Therefore, this argument, never raised in the underlying motion, cannot be considered on a motion to reargue.

[6] In a footnote in its prior order, the court also noted that the breach of fiduciary claim, to the extent that it can be read as alleging that the Yeroushalmis breached their fiduciary duty with respect to the Mineola Property by not paying Jim his profits, was duplicative of the first cause of action in the amended complaint asserting a claim for breach of contract concerning the Mineola Property.

Contrary to the Benjamins' contention, the breach of fiduciary claim, as pleaded in the amended complaint, fails to set forth facts in sufficient detail the substance of the claims asserted against the Yeroushalmis (see CPLR 3016[b]). In this regard, the Benjamins' bare allegations that the parties were co-joint venturers; that the Yeroushalmis promised to "share in the profits of the various ventures"; that the Benjamins "performed services for the benefit of the joint ventures"; and that the "Yeroushalmis kept the profits for themselves" are insufficient (*see Parekh v Cain*, 96 AD3d 812 [2d Dept 2012]).

Accordingly, the branch of the Benjamins' motion seeking leave to reargue the Yeroushalmis' underlying motion to dismiss is granted, to the extent indicated, and, upon reargument, the court adheres to its original determination.

Motion to Amend the Amended Complaint

The Benjamins seek leave to amend the amended complaint and assert two additional causes of action for fraud-based breach of fiduciary duty and unjust enrichment/constructive trust.

It is well settled that unless a proposed amendment is palpably insufficient to state a cause of action or is patently devoid of merit, leave to amend a complaint should be freely given (*Lucido v Mancuso*, 49 AD3d 220 [2d Dept 2008]).

The Benjamins' Proposed Complaint

In the proposed second amended complaint ("proposed complaint"), the Benjamins allege the following against the Pour Defendants and the Yeroushalmis:

> Pursuant to the [Mineola Property] Partnership Agreement, [Jim], [Moussa] and [Moussa's] brother Morad Yeroushalmi entered into a joint venture agreement to purchase and develop the [Mineola] Premises as partners.

As co-joint venturers and partners the Yeroushalmis owed [Jim] a fiduciary duty.

Pour, as the attorney and agent for the partnership between [Jim] and the Yersoushalmis, owed [Jim] a fiduciary duty.

On or about May 17, 2007, [Moussa] secretly and without disclosing it to [Jim], entered into a written agreement with Kahen and received at least $550,000 from Kahen as compensation for assigning the [Mineola Property] Partnership's interest in the [Mineola] Premises.

The May 17, 2007 written agreement provided that entities formed by [Moussa] and Kahen would each have a 50% interest in the [Mineola] Premises.

The written agreement was drafted by Pour who was acting simultaneously as attorney for [Moussa] and Kahen and acted as agent for the [Mineola Property] Partnership in bringing Kahen into the transaction for a fee.

Neither [Moussa] nor Pour disclosed to [Jim] the fact that [Moussa] had entered into the written agreement or the fact that he had received $550,000 from Kahen.

Upon information and belief, [Moussa] received additional direct or indirect compensation from Kahen prior to July 2, 2008, which funds together with the $550,000.00 totaled or exceeded approximately $1,278,000.00 and failed to disclose the receipt of any compensation to [Jim] even though he had a duty to do so.

[Moussa] concealed the receipt of the funds from [Jim] and kept all of the funds he received from Kahen for himself except $250,00 which was to be paid to Pour on behalf of the joint venture, unjustly enriching themselves in breach of their fiduciary duty to [Jim].

[Moussa] not only failed to disclose the receipt of funds to [Jim] but actually misrepresented to [Jim] that he had not yet received the funds.

Pour owed [Jim] a fiduciary duty as attorney for the [Mineola Property] Partnership and actively aided and abetted [Moussa's] fraud and breach of fiduciary duty to [Jim] by concealing from [Jim] that [Moussa] had entered into a written joint venture agreement with Kahen and had paid the [Mineola Property] Partnership for the assignment of an interest in the [Mineola] Premises.

> [Jim] did not discover that [Moussa] with the assistance of Pour, received funds from Kahen until Pour's attorney filed the May 17, 2007 written agreement between [Moussa] and Kahen in support of his motion to dismiss the amended complaint in this action on or about April 30, 2015.
>
> Had [Jim] known that [Moussa] had received funds from Kahen, he would have insisted upon immediate payment of his share of the funds at the time [Moussa] received the funds and would not have conveyed his interests in the [Mineola Property] Partnership to [Moussa].
>
> That by reason of the foregoing, Defendants are liable to the Benjamins in an amount to be determined at trial but believed to be no less than $1,000,000.00, with interest thereon (Proposed Complaint at ¶¶ 97-110).

The Yeroushalmis' Opposition to the Amendment

Contrary to the Yeroushalmis' contention, the proposed sixth cause of action is not duplicative of the first cause of action for breach of fiduciary duty inasmuch as the breach alleged in the proposed sixth cause of action, in addition to being predicated upon Moussa's failure to pay Jim his share of profits associated with the Mineola Property, also concerns Pour and Moussa's failure to disclose the May 2017 Agreement between Moussa and Kahen. Parties to a joint venture owe each other a duty of "undivided and undiluted loyalty," which includes the duty to disclose material information (*see Mawere v Landau*, 130 AD3d 986 [2d Dept 2015]; *A.G. Homes, LLC v Gerstein*, 52 AD3d 546, 548 [2d Dept 2008]; *Farber v Breslin*, 47 AD3d 873 [2d Dept 2008]; *Salm v Feldstein*, 20 AD3d 469 [2d Dept 2005] [as co-member of company with the plaintiff, the defendant owed the plaintiff a fiduciary duty to make full disclosure of all material facts]; *PebbleCove Homeowners' Ass'n, Inc. v Shoratlantic Development Co., Inc.*, 191 AD2d 544 [2d Dept 1993]; *Meinhard v Salmon*, 249 NY 458 [1928]).

Moreover, the following allegations set forth in the proposed eleventh cause of action plead a cause of action for unjust enrichment/constructive trust (*see Mei Yun Chen v Mei Wan*

Kao, 97 AD3d 730 [2d Dept 2012])[7]:

> [Moussa] represented to [Jim] that the [Mineola] Partnership would not receive compensation for the sale of an interest in the purchase contract with the MTA to Kahen until the closing with the MTA.
>
> In fact, [Moussa] had already been paid by Kahen in an amount no less than $550,000.
>
> In order to continue with the joint venture with Kahen's revised plan to build a new apartment building, [Moussa] required [Jim] to fund his share of the architect's fees.
>
> [Jim] was unwilling to invest additional funds in the [Mineola Property], however, had [Moussa] distributed [Jim's] share of the funds [Moussa] received from Kahen, [Jim] would have had a source of funds with which to pay for his share of the architects' fees and would have continued in the [Mineola] Partnership.
>
> [Jim's] transfer of his interest in the [Mineola] Partnership was made in reliance on [Moussa's] representation that no monies had been paid to the [Mineola] Partnership and thus no monies were currently available to [Jim], which representation was untrue.
>
> [Jim's] transfer of his interest in the [Mineola Property] to [Moussa] unjustly enriched [Moussa].
>
> Based on the foregoing, [Jim] is entitled to the imposition of a constructive trust on [Moussa's] interests in the [Mineola Property] or any entity having an ownership interest in the [Mineola Property] or on any proceeds that [Moussa] received by reason of his interest in the [Mineola Property] or any entity having an ownership interest in the [Mineola Property] (Ex. "11" to Motion at ¶¶ 137-142).

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[7] A constructive trust is an equitable remedy, the purpose of which is to prevent unjust enrichment (*Simonds v Simonds*, 45 NY2d 233 [1978]). In general, to impose a constructive trust, four factors must be established: 1) a confidential or fiduciary relationship between the parties, 2) a promise, 3) a transfer in reliance thereon, and 4) unjust enrichment flowing from a breach of that promise. However, as these elements serve only as a guideline, a constructive trust may still be imposed even if all of the elements are not established (*Mei Yun Chen v Mei Wan Kao*, 97 AD3d at 730, *supra*; *Marini v Lombardo*, 79 AD3d 932 [2d Dept 2010]).

Furthermore, the proposed eleventh cause of action is not duplicative of the first cause of action alleging breach of the Mineola joint venture agreement.

The Pour Defendants' Opposition to the Amendment

The Pour Defendants oppose amendment of the amended complaint on two grounds. First, the Pour Defendants argue that the Benjamins are judicially estopped to add the causes of action for breach of fiduciary duty and constructive trust because they originally took a position that they did not have any claims against Pour arising out of the Mineola Property and are now taking a contrary position (Pour Memorandum of Law in Opposition at pp 4-5).

The doctrine of judicial estoppel "precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed" (*Ford Motor Credit Co. v Colonial Funding Corp.*, 215 AD2d 435 [2d Dept 1995]; *Tedesco v Tedesco*, 64 AD3d 583 [2d Dept 2009]; *see also Kilcer v Niagara Mohawk Power Corp.*, 86 AD3d 682 [3d Dept 2011] [pursuant to the doctrine of judicial estoppel, "if a party assumes a position in one legal proceeding and prevails in maintaining that position, that party will not be permitted to assume a contrary position in another proceeding simply because the party's interests have changed"]). The doctrine can also preclude a party from inequitably assuming inconsistent positions within the same proceeding and, thus, does not require the entry of judgment (*Hartsdale Fire Dist. v Eastland Const., Inc.*, 65 AD3d 1345, 1346 [2d Dept 2009]).

Here, the Benjamins' proposed amendment, i.e., to add causes of action for breach of fiduciary duty and constructive trust against the Pours, is not contrary or inconsistent with a position taken in prior pleadings or the underlying motion papers. According to the Benjamins, at the time the complaint and amended complaint were filed, they had no knowledge that Pour was involved in the Mineola Property, including the drafting of the May 2007 Agreement between Moussa and Kahen. Thus, the doctrine of judicial estoppel is inapplicable to the case at

bar.

The Pour Defendants' second argument in opposition to the amendment is that any legal malpractice claim arising out of the Mineola Property is time-barred. According to the Pour Defendants: "the gravamen of Plaintiffs' allegations against Pour is that Pour owed Plaintiffs a duty as counsel for the [Mineola joint venture partnership] and breached that duty by failing to protect Plaintiffs' interests"; these allegations purportedly form the basis for a legal malpractice claim; and any claim for legal malpractice would have to have been brought no later than July 2, 2011 (which is three years from the date in which the Pours' representation of the Mineola joint venture terminated).

The Pours argue that the court should deny the amendment because; "[w]hile Plaintiffs purport to assert a claim against Pour arising out of fraud" (which is subject to a two-year discovery limitations period[8]), the characterization of Plaintiffs' claim "is a transparent attempt to revive a time-barred professional malpractice claim."

Given the factual allegations asserted in the proposed sixth cause of action, there is no merit to the Pour Defendants' argument that the fraud-based breach of fiduciary duty claim is a recast legal malpractice claim. Rather, the Benjamins' claim is predicated upon Pour's breach of fiduciary duty in assisting the alleged fraud committed by Moussa in concealing from Jim the May 2007 Agreement between Moussa and Kahen.

Moreover, the cases cited by the Pour Defendants are inapposite inasmuch as the courts therein dismissed the fraud claims as either duplicative of the untimely legal malpractice claims

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[8] The Benjamins purportedly rely upon the two-year discovery limitations period starting from when the Benjamins first learned of the claimed fraud with respect to the May 2007 Agreement between Moussa and Kahen (which is when the Benjamins were served with the Pour's motion papers in the underlying motion to dismiss) (CPLR 213[8] [A claim for fraud must be brought either six years from the commission of the fraud, *or two years from the time the fraud was discovered* or, with reasonable diligence, could have been discovered] [emphasis added]).

or because fraud was alleged only as a means to circumvent the three-year limitations period applicable to malpractice (*see e.g. Scott v Fields*, 85 AD3d 756 [2d Dept 2011] [fraud cause of action was "merely incidental to the negligence cause of action" and did not adequately allege any act of deception committed by defendant attorney, who was counsel to plaintiff for the real estate transaction at issue therein]; *Hsu v Liu & Shields LLP*, 127 AD3d 522 [1st Dept 2015] [fraud allegations in complaint were duplicative of plaintiffs' untimely legal malpractice claims]; *Nickel v Goldsmith & Tortora, Attorneys at Law, P.C.*, 57 AD3d 496 [2d Dept 2008] [where cause of action to recover damages for legal malpractice was time-barred, plaintiff's remaining cause of action alleging fraud "was merely incidental to the cause of action to recover damages for legal malpractice and was asserted only to avoid the three-year statute of limitations with respect to a cause of action to recover damages for legal malpractice"]; *Murray Hill Invs. v Parker Chapin Flattau & Klimpl*, 305 AD2d 228 [1st Dept 2003] ["the fraud and fiduciary breach causes of action were properly dismissed as duplicative of the untimely and insufficient malpractice claim"]; *Mohan v Hollander*, 303 AD2d 473 [2d Dept 2003] [causes of action alleging conversion and legal malpractice were barred by the applicable three-year statute of limitations; since the causes of action alleging fraud are "merely incidental to the conversion and legal malpractice claims, the only purpose they serve is to circumvent the three-year statute of limitations"]).

Unlike the cases cited by the Pour Defendants, here, the fraud-based breach of fiduciary duty claim is not a recast legal malpractice claim but, rather, is predicated upon Pour's breach of fiduciary duty in assisting Moussa's fraud by concealing from Jim the May 2007 Agreement between Moussa and Kahen.

Accordingly, Plaintiff's proposed amendments to the amended complaint are not palpably improper.

Conclusion

Based on the foregoing, it is hereby

Ordered that the branch of the Plaintiffs' motion seeking leave to reargue a prior motion made by Moussa Yeroushalmi and Farzaneh Yeroushalmi is granted, and, upon reargument, the court adheres to its original determination; and it is further

Ordered that the branch of the motion seeking leave to amend the amended complaint in the form annexed as exhibit "11" to the motion papers is granted; and it is further

Ordered that the second amended complaint annexed as exhibit "11" to the motion will be deemed served as of the date of service of a copy of the within order with notice of entry, upon the Defendants.

DATE: April 25, 2018

Hon. Vito M. DeStefano, J.S.C.