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

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MAGOMED MAGOMEDOV, AKHMED BILALOV,

Plaintiff,

- v -

LEONID LEBEDEV, LEONARD BLAVATNIK, VIKTOR VEKSELBERG

Defendants.

INDEX NO. 650643/2017

MOTION SEQ. NO. 002, 003, & 004

DECISION AND ORDER

----------X

HON. SALIANN SCARPULLA:

In this dispute over an alleged joint venture, plaintiffs Magomed Magomedov ("Magomedov") and Akhmed Bilalov ("Bilalov") are suing defendants Leonard Blavatnik ("Blavatnik") and Viktor Vekselberg ("Vekselberg") for more than one billion dollars in connection with the sale of a Russian oil company, OJSC Tyumenskaya Neftyanaya Kompaniya ("TNK"). Blavatnik and Vekselberg now move to dismiss the amended complaint against them on various grounds.

Background

The parties are long-time associates who did business together in Russia.[1] During the 1990s, when the Russian Federation started to privatize the oil and gas industry, plaintiffs and Lebedev owned shares in a Russian oil company, OJSC

[1] Plaintiffs and Vekselberg are Russian citizens. Lebedev is dual citizen of Russia and Cyprus. Blavatnik is a U.S. citizen, residing in New York.

Nizhnevartovskneftgaz ("NNG"). Specifically, plaintiffs owned a 5.37% interest in NNG, and Lebedev owned a 5.13% interest. Russia also owned a 38% interest in NNG through TNK.

In 1997, Russia placed 40% of TNK up for public auction. Blavatnik and Vekselberg purchased that interest, but the sale was allegedly conditioned on Blavatnik and Vekselberg later obtaining a controlling interest in NNG. Plaintiffs combined interest in NNG, together with Lebedev, allegedly provided Blavatnik and Vekselberg with the majority control they sought in NNG. Consequently, according to the complaint, plaintiffs and Lebedev agreed to act jointly in all matters related to their respective NNG shares ("1997 Joint Venture"). Pursuant to the 1997 Joint Venture, plaintiffs and Lebedev would share in profits and losses, and would not sell or take unilateral action regarding their respective shares in NNG without unanimous consent.

That same year, Vekselberg offered Magomedov $90 million for plaintiffs' 5.37% interest in NNG. Plaintiffs declined after consulting with Lebedev, who urged plaintiffs to act pursuant to their 1997 Joint Venture. Eventually, in 1999, plaintiffs sold their 5.37% interest in NNG to Oleg Kim ("Kim") in exchange for settlement of a judgment Kim obtained against plaintiffs' company. Although Lebedev allegedly participated in negotiating that deal, Lebedev did not sell his NNG interest to Kim.

Plaintiffs allege that, prior to selling their NNG shares to Kim, Vekselberg and Blavatnik approached Lebedev to sell his NNG shares to them. According to the complaint, in violation of the 1997 Joint Venture, Lebedev agreed to sell his 5.13%

interest in NNG and to secure plaintiffs' NNG shares on behalf of Vekselberg and Blavatnik. In exchange, Lebedev would receive a stake in a different joint venture with Vekselberg and Blavatnik ("Defendants' Joint Venture"). Plaintiffs further allege that, in violation of the 1997 Joint Venture, Lebedev never disclosed his sale of NNG shares to Vekselberg and Blavatnik, and he further failed to disclose his conflict of interest in negotiating the sale of plaintiffs' NNG shares to Kim. Blavatnik and Vekselberg eventually purchased the NNG shares plaintiffs sold from Kim.

Defendants' Joint Venture is the subject of another action before me, *Lebedev v. Blavatnik*, No. 650369/2014 (Sup. Ct. New York County 2014) ("Lebedev Action"). In the Lebedev Action, Lebedev alleges that he negotiated the terms of Defendants' Joint Venture in New York in 2001. Lebedev further alleges that in October 2012, TNK was sold to a Russian state-owned conglomerate. Blavatnik and Vekselberg allegedly received $13.8 billion from that sale, and Lebedev seeks $2.07 billion as part of his stake in Defendants' Joint Venture.

Plaintiffs allege that neither knew of defendants' misconduct until the Lebedev Action was filed in February 2014. According to plaintiffs, Lebedev met with Magomedov in 2014, at which time he disclosed his prior dealings with Blavatnik and Vekselberg. Lebedev allegedly reaffirmed the 1997 Joint Venture and discussed entering into a new agreement, whereby Lebedev would split any recovery from the Lebedev Action in exchange for Magomedov's assistance in the Lebedev Action ("2014 Agreement").

Magomedov subsequently memorialized the 2014 Agreement and started to assist in the Lebedev Action. However, throughout 2014, 2015, and January 2016, the parties were unable to finalize and execute a written agreement. According to the complaint, once plaintiffs realized that Lebedev had no intention of fulfilling the terms of the 2014 Agreement, plaintiffs diligently commenced this action in February 2017.

In the amended complaint plaintiffs assert the following causes of action: (1) breach of fiduciary duty against Lebedev based on the 1997 Joint Venture; (2) fraud against Lebedev; (3) anticipatory breach of the 1997 Joint Venture against Lebedev; (4) breach and anticipatory breach of the 2014 Agreement against Lebedev (5) unjust enrichment against Lebedev; (6) conversion against Lebedev; (7) aiding and abetting breach of fiduciary duty against Blavatnik and Vekselberg; (8) unjust enrichment against Blavatnik and Vekselberg; (9) conversion against Blavatnik and Vekselberg; and (10) declaratory judgment against all defendants.

Lebedev moves for dismissal of the amended complaint pursuant to CPLR 3211(a)(5) based on the statute of limitations, 3211(a)(7) for failure to state a claim, and 3211(a)(8) for lack of jurisdiction, among other grounds. Lebedev also separately moves for a stay of discovery. Blavatnik and Vekselberg move for dismissal pursuant to CPLR 3211(a)(5), 3211(a)(7), and 3016(e) for failure to specifically allege the applicable foreign law.

Discussion

I. Lebedev's Motion to Dismiss the Amended Complaint

Personal Jurisdiction

Lebedev first argues that this action should be dismissed against him because New York lacks jurisdiction over him. In opposition, plaintiffs do not dispute that Lebedev is not a domiciliary of New York and therefore, no general jurisdiction exists over him. Instead, plaintiffs argue that long arm jurisdiction exists over Lebedev, pursuant to CPLR 302(a)(1), *vis-à-vis* the 2014 Agreement. Plaintiffs further argue that Lebedev waived any objection to jurisdiction by selecting a New York state court to litigate the Lebedev Action.

Under CPLR 302(a)(1), jurisdiction may be exercised over an out-of-state defendant if that defendant "transact[ed] any business within the state or contract[ed] anywhere to supply goods or services in the state[.]" Although the 2014 Agreement does not support jurisdiction over Lebedev for all claims asserted against him, I find that it does support jurisdiction over him as to the fourth cause of action for breach and anticipatory breach of the 2014 Agreement.

Here, plaintiffs allege that they agreed to collaborate with Lebedev in litigating the Lebedev Action pursuant to the 2014 Agreement. To pursue that action, Lebedev transacted business here by hiring New York counsel, and allegedly contracted out-of-state for plaintiffs' assistance in the Lebedev Action in New York. Because plaintiffs allege that Lebedev breached the 2014 Agreement, a contract which is directly related to

the business Lebedev transacted in New York, the fourth cause of action for breach and anticipatory breach of contract arises sufficiently from Lebedev's activities in New York to confer jurisdiction.

Moreover, I find that Lebedev waived his jurisdictional defense as to claims pre-dating the 2014 Agreement by selecting New York to litigate the Lebedev Action. The Appellate Division, First Department has recognized the inequity of a party objecting to jurisdiction when that same party seeks affirmative relief in a related action in the same forum. *See New Media Holding Co., LLC v Kagalovsky*, 118 A.D.3d 68, 77 (1st Dep't 2014) ("[Defendants] waived the right to challenge personal jurisdiction by freely using the protections of the New York courts when pursuing rights related to the partnership … [by] filing the first lawsuit against [plaintiff] in the Southern District of New York"). Although Lebedev is objecting to jurisdiction as to claims asserted by plaintiffs, who are not parties to the Lebedev Action, that distinction does not compel a contrary conclusion under the facts alleged here and the undisputed close relationship between the parties and the transactions at issue.

Plaintiffs' claims against Lebedev in this action, other than claims involving the 2014 Agreement, depend on Lebedev proving, in the Lebedev Action, that Defendants' Joint Venture exists. Absent such a determination in the Lebedev Action, plaintiffs' claims in this action pre-dating the 2014 Agreement fail. Thus, many of plaintiffs' claims in this action are entirely dependent on the claims asserted in the Lebedev Action. Because of the exceptionally close interdependent relationship between the parties,

transactions and causes of action alleged in this action and the Lebedev Action, I find that Lebedev has waived any jurisdictional defense to litigating both actions in New York.

Accordingly, I deny Lebedev's motion to dismiss this action against him based on lack of jurisdiction.

Statute of Limitations

Lebedev argues that, except for the fourth cause of action for breach and anticipatory breach of the 2014 Agreement, the complaint is untimely and barred by the statute of limitations. Specifically, Lebedev argues that regardless of whether a three-year or six-year statute of limitation period applies, the statute of limitations expired long ago as to each of the claims connected to the 1997 Joint Venture. Lebedev further maintains that neither the discovery rule nor principles of equitable estoppel apply to save plaintiffs' claims against him for breach of fiduciary duty, fraud, anticipatory breach of the 1997 Joint Venture, conversion, and unjust enrichment.

In moving to dismiss a claim as barred by the statute of limitations, a moving defendant bears the initial burden of demonstrating that the time within which to commence the cause of action has expired. *Norddeutsche Landesbank Girozentrale v. Tilton,* 149 A.D.3d 152 (1st Dep't 2017). The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is tolled or is otherwise inapplicable, or whether plaintiff commenced the action within the limitations period. *See Wilson v Southampton Urgent Med. Care, P.C.,* 112 A.D.3d 499 (1st Dep't 2013).

As the allegations of the amended complaint plainly show, the statute of limitations on plaintiffs' contract and tort-based claims connected to the alleged 1997 Joint Venture accrued decades ago, when plaintiffs sold their shares of NNG. These claims are therefore untimely, unless the discovery rule is applicable.

Initially, I dismiss plaintiffs' cause of action for anticipatory breach of the 1997 Joint Venture. Although plaintiffs frame the claim as an anticipatory breach, it is, at bottom, a disguised claim for breach of the 1997 Joint Venture that is subject to an expired six-year statute of limitations period. *See* CPLR 213(2).

Pursuant to CPLR 213 (8), causes of action based on fraud "must be commenced … [either] six years from the date the cause of action accrued or two years from the time the plaintiff … discovered the fraud, or could with reasonable diligence have discovered it." Lebedev argues that the two-year discovery rule should not apply here because the fraud and breach of fiduciary duty claims are merely "dressed up" breach of contract claims, *i.e.,* the claims arise from the same allegation that Lebedev agreed to act jointly with plaintiffs regarding their respective NNG shares.

Review of the amended complaint demonstrates, however, that plaintiffs plead other wrongs as the basis for independent fraud and breach of fiduciary duty claims against Lebedev. Plaintiffs' amended complaint, for example, alleges that Lebedev concealed his interest in having plaintiffs sell their NNG shares to Kim to advance the Defendants' Joint Venture. The complaint supports standalone fraud and breach of fiduciary duty claims and, pursuant to CPLR 213(8), the two-year discovery rule is applicable to both causes of action.

Nevertheless, Lebedev has met his initial burden of establishing that the additional two-year limitations period provided in CPLR 213(8) expired prior to the date of commencement of this action. Plaintiffs allege that they discovered Lebedev's fraud in February 2014, but plaintiffs commenced this action in February 2017. Consequently, the burden shifted to plaintiffs to state evidentiary facts raising a question of fact as to why Lebedev should be equitably estopped from asserting the statute of limitations.

Plaintiffs argue that Lebedev's deceptive conduct concerning the 2014 Agreement caused plaintiffs' delay in bringing this action and therefore, equitable estoppel applies to toll the statute of limitations. "Courts in New York have the power to apply the 'extraordinary remedy' of equitable estoppel [] where it would be unjust to permit a defendant to assert a statute of limitations defense[.]" *MBI Intern. Holdings Inc. v Barclays Bank PLC*, 151 A.D.3d 108, 116-17 (1st Dep't 2017). "In order for equitable estoppel to apply, plaintiffs bear the burden in showing: (1) plaintiffs were 'induced by fraud, misrepresentations or deception to refrain from filing a timely action'; and (2) plaintiffs reasonably relied on defendant's misrepresentations[.]" *MBI Intern. Holdings Inc.*, 151 A.D.3d at 117.

Plaintiffs admit that they discovered the essential elements of their claims against Lebedev in 2014 and could have commenced the action at that time. They voluntarily chose, instead, to try and collaborate with Lebedev in exchange for a part of any compensation Lebedev received in the Lebedev Action.

Even if the anticipated 2014 Agreement lulled them into inactivity, I find that plaintiffs failed to meet their burden of showing due diligence in bringing the action. *See Zumpano v Quinn*, 6 N.Y.3d 666, 683 (2006) (stating that "as soon as the plaintiff[s] learn[ed] of the misrepresentation, plaintiff must seek to bring an action against defendant"); *Brean Murray, Carret & Co. v Morrison & Foerster LLP*, 165 A.D.3d 582, 583 (1st Dep't 2018) ("Even if plaintiff's allegations of concealment were true, 'plaintiff [has] failed to demonstrate [its] due diligence[.]'").

Plaintiffs allege that (1) Magomedov's attorney memorialized and hand delivered the 2014 Agreement to Lebedev in September 2014; (2) despite Lebedev's assurances that he would execute the 2014 Agreement as memorialized, Lebedev delayed by nearly a year and half; and (3) plaintiffs proceeded with diligence to commence this action after their last meeting with Lebedev in January 2016.

At a minimum, Lebedev's protracted delay in executing the 2014 Agreement should have caused plaintiffs to proceed with diligence before January 2016.[2] While Lebedev vacillated for a year and half, plaintiffs, who are sophisticated business people and have been represented by counsel since 2014, should have, but did not, reasonably investigate their claims. Instead, for reasons not alleged in the complaint or on this motion, plaintiffs waited another year, until February 2017, before commencing this action.

[2] In January 2016, when plaintiffs last heard from Lebedev, plaintiffs' fraud-based claims were not yet time-barred, assuming the benefit of the two-year discovery rule of CPLR 213(8).

Based on the foregoing, I find that plaintiffs' conclusory allegation that "[p]laintiffs proceeded with diligence to commence this action" is insufficient to raise an issue of fact with respect to their fraud and breach of fiduciary duty claims, particularly because plaintiffs' claims are untimely even with the benefit of the two-year discovery rule. *See D. Penguin Bros. Ltd. v Natl. Black United Fund, Inc.*, 137 A.D.3d 460, 461 (1st Dep't 2016).

I also find that equitable estoppel is inapplicable to plaintiffs' unjust enrichment and conversion claims, which indisputably accrued long ago. Lebedev's alleged failure to disclose the wrongs he had committed prior to the 2014 Agreement is not a separate deception on which an equitable estoppel could be based. *See Cusimano v Schnurr*, 137 A.D.3d 527, 532 (1st Dep't 2016) ("Where the same alleged wrongdoing that underlines the plaintiffs' equitable estoppel argument is also the basis of their tort claims, equitable estoppel will not lie[.]"). Therefore, I dismiss plaintiffs' unjust enrichment and conversion causes of action as time-barred.

For the reasons set forth above, I dismiss plaintiffs' claims against Lebedev for fraud, breach of fiduciary duty, conversion, unjust enrichment, and "anticipatory" breach of the 1997 Joint Venture as time-barred.

Failure to State a Claim

Plaintiffs' remaining claims against Lebedev are the fourth cause of action for breach and anticipatory breach of the 2014 Agreement and the tenth cause of action for

declaratory judgment (to the extent based on the 2014 Agreement).[3] Lebedev argues that these causes of action fail to state a claim under either New York law or Russian law.[4] According to Lebedev, plaintiffs fail to allege that Lebedev breached the 2014 Agreement and that any claim for anticipatory breach is premature. Lebedev also argues that plaintiffs' claim for declaratory judgment is inappropriate because it depends on the occurrence of a future event, *i.e.*, the outcome of the Lebedev Action.

"Under [the doctrine of anticipatory breach], if one party to a contract repudiates his duties thereunder prior to the time designated for performance and before he has received all of the consideration due him thereunder, such repudiation entitles the nonrepudiating party to claim damages for total breach[.]" *Long Is. R. Co. v Northville Indus. Corp.*, 41 N.Y.2d 455, 463 (1977). Therefore, "[t]he question is whether, at the time of the repudiation, there existed some dependency of obligation[.] If the obligations are interdependent, a claim may lie to recover money payable in the future[.]" *Long Is. R. Co. v Northville Indus. Corp.*, 41 N.Y.2d at 466 (citations omitted).

Plaintiffs allege that they had agreed to assist Lebedev in pursuing his claims against Blavatnik and Vekselberg in the Lebedev Action and that, in exchange, Lebedev agreed to equally share in any recovery from the Lebedev Action. Plaintiffs further

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[3] To the extent that plaintiffs seek a declaration, in the declaratory judgment cause of action, as to rights and obligations arising from legal relations that form the basis of claims already dismissed herein, that portion of the declaratory judgment cause of action is also dismissed.

[4] Because neither party argues for the application of Russian law at the exclusion of New York law, I apply New York law as the law of the forum.

allege that Lebedev has unequivocally repudiated his obligation to share in any recovery from the Lebedev Action. In support of dismissal, Lebedev does not dispute his repudiation but instead argues that plaintiffs' claim is premature because plaintiffs have fully performed their obligations. Consequently, according to Lebedev, in the absence of any dependency of obligation, plaintiffs may not assert a claim for anticipatory breach.

Contrary to Lebedev's position, plaintiffs sufficiently allege obligations from which they need to be relieved to state a claim for anticipatory breach. Here, plaintiffs' obligations remain ongoing because, in order share in any recovery, plaintiffs may not breach their ongoing obligation to cooperate with Lebedev. Consequently, although plaintiffs' may have partly performed by, *inter alia*, helping Lebedev locate witnesses, plaintiffs must continue performing by assisting Lebedev. That Lebedev is no longer interested in plaintiffs' assistance is irrelevant. *See Long Is. R. Co. v Northville Indus. Corp.*, 41 N.Y.2d at 468 ("That the obligations of the [plaintiff] were less than those of [defendant] or, to some, may seem to be of a circumscribed nature, is not a basis for a restrictive, formalistic approach to the question of whether the doctrine of anticipatory breach applies.").

Accordingly, I deny Lebedev's request to dismiss the anticipatory breach cause of action for failure to state a claim. However, to the extent that plaintiffs allege breach of the 2014 Agreement in the fourth cause of action, I dismiss that part of the claim. Plaintiffs fail to allege an obligation that Lebedev has presently breached and therefore, plaintiffs fail to state a claim for breach of the 2014 Agreement.

I also dismiss the remaining portion of Lebedev's tenth cause of action for declaratory judgment as duplicative. The declaration plaintiffs seek in the tenth cause of action is the same dispute in the fourth cause of action for anticipatory breach of the 2014 Agreement, *i.e.*, the existence of the 2014 Agreement and the parties' respective rights and obligations thereunder. *See Stuckey v Lutheran Care Found. Network, Inc.*, 140 A.D.3d 734, 736 (2d Dept 2016) (dismissing a declaratory judgment claim where the plaintiff has an adequate remedy in the form of a cause of action alleging breach of contract). As there is no remaining basis to seek a declaration, the entirety of the claim is dismissed.

II. Lebedev's Motion for a Stay

Lebedev sought a protective order and a stay of discovery until the resolution of these motions. Pursuant to a letter dated March 14, 2018, the parties agreed to stay discovery pending the determination of these motions and, in exchange, will produce the discovery already produced in the Lebedev Action if this action survives these motions to dismiss. In accordance with the parties' agreement, I deny Lebedev's motion for a stay as moot.

III. Blavatnik's and Vekselberg's Motion to Dismiss

Blavatnik and Vekselberg argue that the causes of action for aiding and abetting breach of fiduciary duty, unjust enrichment, conversion, and declaratory judgment pled against them have three-year limitation periods, and that each claim expired fifteen years ago based on the alleged misconduct in the complaint. Blavatnik and Vekselberg further

maintain that neither the discovery rule nor the doctrine of equitable estoppel is applicable to toll plaintiffs' claims.

In response, plaintiffs argue that the cause of action for aiding and abetting breach of fiduciary duty is timely because it is a fraud-based claim and therefore, the discovery rule is applicable. Additionally, plaintiffs rely on principles of equitable estoppel to argue that any estoppel available against Lebedev is equally applicable against Blavatnik and Vekselberg.

As to equitable estoppel, plaintiffs fail to allege that either Blavatnik or Vekselberg made any misrepresentation that prevented plaintiffs from timely filing claims against them. Moreover, there is no reason to attribute Lebedev's conduct to Blavatnik and Vekselberg. In any event, as I found above, the equitable estoppel doctrine is inapplicable as to Lebedev. *See supra*.

As to the discovery rule, CPLR 213 (8) only provides an extension of two years from the date of discovery, and that limitations period expired in February 2016 -- one year before the commencement of this action. It is further undisputed that plaintiffs' causes of action for unjust enrichment and conversion expired long ago in the absence of equitable estoppel.

Accordingly, I dismiss the seventh cause of action for aiding and abetting breach of fiduciary duty, the eight cause of action for unjust enrichment, the ninth cause of

action for conversion, and tenth cause of action for declaratory judgment[5] as asserted against Blavatnik and Vekselberg.

In accordance with the foregoing, it is

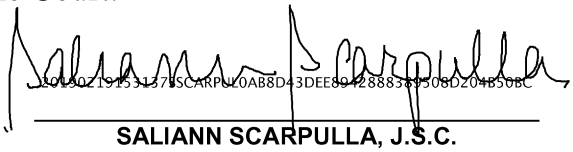
ORDERED that defendants Leonard Blavatnik's and Viktor Vekselberg's motion to dismiss the complaint is granted as to all causes of action asserted against them; it is further

ORDERED that defendant Leonid L. Lebedev's motion to dismiss the complaint is granted to the extent of dismissing the first, second, third, fifth, sixth, and tenth causes of action, and is otherwise denied; and it is further

ORDERED that defendant Leonid L. Lebedev's motion for a stay is denied as moot; and it is further

ORDERED that defendant Leonid L. Lebedev is directed to answer the remainder of the complaint asserted against him within thirty (30) days of this decision and order.

This constitutes the decision and order of the Court.



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SALIANN SCARPULLA, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

[5] Plaintiffs' claim for declaratory judgment against Blavatnik and Vekselberg fails because there is no legal basis on which to declare plaintiffs' and Blavatnik's and Vekselberg's respective rights and obligations.