

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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ADAMS BOOK COMPANY.

Plaintiff,

-against-

MEMORANDUM AND ORDER
97-CV-4418 (ILG)

NORMAN NEY, CARLOS E. RAYMOND
and CARMEN L. RAYMOND,

Defendants.

-----X

GLASSER, United States District Judge:

Plaintiff Adams Book Company, Inc. ("Adams") brought this diversity action for, *inter alia*, fraud and conversion, against two former employees and a spouse of one of these employees. Defendants now move to dismiss, pursuant to Fed. R. Civ. Proc. 12(b), 12(c)¹ and 9(b) for failure to (1) state a claim upon which relief can be granted, (2) comply with the

¹ Because no answer has been filed in this action, this motion, insofar as it is predicated upon Fed. R. Civ. P. 12(c), is premature. See Fed. R. Civ. P. 12(c) ("After the pleadings are closed . . . any party may move for judgment on the pleadings."); Wright & Miller, 5A Federal Practice and Procedure § 1367 ("defendant may not move under Rule 12(c) until after he has answered"). In any event, the Second Circuit has held that an identical standard is applied to motions under Fed. R. Civ. P. 12(b)(6) — which is considered below — and 12(c). Sheppard v. Beerman, 18 F.3d 147, 150 (2d Cir. 1994).

appropriate limitations periods and (3) plead the fraud claim with sufficient particularity. For the reasons set forth below, defendants' motion is granted in part and denied in part.

FACTS

For purposes of this motion, the following factual allegations set forth in the Amended Complaint are accepted as true:

Defendants Norman Ney ("Ney") and Carlos Raymond were employed by Adams, as, respectively, a corporate accountant, director and treasurer from 1945 through 1985 and as an office manager from 1955 through 1986. Amended Complaint, ¶¶ 10-11. During Ney's long employment with Adams, he was a "trusted employee . . . who had been on terms of an intimate friendship" with one of its principals, Albert Shattner, its "founder and presiding President and Chairman of the Board." Id., ¶ 28. For this reason, Adams relied on Ney's "honesty, judgment, professional competence and expertise," id., ¶ 31, and gave him "full and unfettered control of" and made him "responsible for maintaining the special and payroll accounts as well as the books and records pertaining to same." Id., ¶ 31. Ney, in turn, "was presumed and expected to act and held himself out to act in a

Fiduciary capacity" to Adams. Id., ¶ 29.

Between "no later than January 1984 and December 1986" Ney "issued to and or caused and/or allowed to be issued to and/or to the benefit of" Carlos Raymond and his wife, Carmen - who was employed by the Chemical Bank branch at which Adams maintained a special account - checks totaling \$164,039.56. Id., ¶ 14. These checks were drawn on this special account "without the approval of and/or knowledge of and/or acquiescence of" Adams. Id., ¶ 15. Carlos and Carmen Raymond - with one minor exception² - endorsed each of these checks. Id., ¶¶ 13,16.

At some time prior to January 1984, the defendants in this action - Ney and Carmen and Carlos Raymond - "conspired together in order to deceive and mislead the plaintiff concerning the funds," it being "secretly understood and agreed that defendants were not entitled to the proceeds of the checks and that such fact was to be kept from the plaintiff and that the plaintiff was to remain in ignorance of the fact." Id., ¶ 32. Defendants "well knew that the checks and the proceeds therefrom

² Two checks were made out to and endorsed by the Trustee of the University of Pennsylvania. These monies were used to pay tuition for the Raymonds' daughter. Amended Complaint, ¶ 13.

were not due them, nor were they due any such sum" and "acted in conjunction and aid concert and connive together, each with fraudulent intent, to mislead and deceive" Adams. Id.

Accordingly, none of these transactions were "reflected in or carried on the ADP account" or "attributed as bonus or reimbursement of business expenses or otherwise on the books and records of the corporation." Id., ¶¶ 17-18. Furthermore, "[a]t the behest and direction of and in full cooperation with defendant, Norman Ney, defendant, Carlos Raymond would on a monthly basis personally bring books, records and statements pertaining to the special account to the garbage carter so that plaintiff was unable to review documents pertaining to the conspiracy and underlying fraud and/or to obtain vital information pertaining thereto." Id., ¶ 20. When Carlos Raymond was unavailable, Ney would deliver these documents to the garbage carter himself. Id. In addition, "[d]efendant, Norman Ney and/or defendant, Carlos Raymond at the behest and direction of an[d] in full cooperation with defendant, Norman Ney did hide and secrete all bank statements and checks from the special account during the time period January 1984 to December 1986 as they became available in a crawl space underneath a stairway in the basement of the corporate headquarters." Id., ¶ 21. "This was

done specifically so that plaintiff would be unable to review documents pertaining to the conspiracy and underlying fraud and/or to obtain vital information pertaining thereto." Id.

"At no time up to the giving of said money by the said defendant to the said co-defendants or for a long time afterward, did or could plaintiff have any knowledge that a conspiracy existed to defraud it of money." Id., ¶ 33. In fact, Adams' first knowledge of these actions occurred only in March 1997 "when in the course of cleaning the basement area where the bank statements were hidden plaintiff found the bank statements pertaining to the time period January 1984 to December 1986 in a crawl space underneath the basement staircase in an area which had not been utilized for any other purpose . . . for a number of years." Id., ¶ 34.

In addition, Adams alleges that certain monies were advanced to Carlos and Carmen Raymond as a loan between January 1984 and December 1986 and that these monies have not been repaid. Amended Complaint, ¶¶ 90-97.

On July 29, 1997 Adams brought this action. The Amended Complaint - which lists eleven causes of action, many of them untitled and difficult to identify - alleges conspiracy to defraud (first cause of action, against all defendants), breach

of fiduciary duty³ (second cause of action, against Ney, Carlos Raymond and Carmen Raymond), fraud (third, fourth and fifth causes of action, against all defendants), conversion (sixth, seventh and eighth causes of action, against all defendants), money loaned (ninth and tenth causes of action, against Carlos and Carmen Raymond) and unjust enrichment (eleventh cause of action, against Carlos and Carmen Raymond).

STANDARD

When deciding a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a court must accept all allegations in the complaint as true and draw all

³ The second cause of action also alleges a conspiracy to defraud that appears to be duplicative of the first cause of action and that "it is impossible to ascertain without an accounting" whether the checks attached as Exhibit A represent the full extent of defendants' fraudulent conduct. See Amended Complaint, ¶¶ 46, 48.

The Amended Complaint does not allege that Carmen Raymond was a fiduciary, but simply states that "[d]efendants acted in concert and in secret in conspiring to defraud plaintiff for monies that they were not entitled to." Based on other allegations of the Amended Complaint, see ¶¶ 12-14, 19, 32, it appears that this statement is meant to also encompass her activities.

reasonable inferences in favor of the plaintiff. Ortiz v. Cornetta, 367 F.2d 146, 44-2d Cir. 1989. A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

DISCUSSION

Defendants move to dismiss this Amended Complaint on three grounds, failure to comply with the applicable statutes of limitations, failure to properly plead the elements of particular causes of action and failure to plead the fraud claim with the requisite particularity. These are addressed in that order in the following sections.

I. Statute of Limitations

A. Conversion, Breach of Fiduciary Duty, Unjust Enrichment and Money Loaned

The limitations period for an action for conversion is three years. C.P.L.R. § 214[3] (actions that must be commenced within three years includes "an action to recover a chattel or damages for the taking or detaining of a chattel"); Vigilant Ins. Co. of America v. Housing Authority of the City of El Paso,

Texas, 87 N.Y.2d 36, 44, 637 N.Y.S.2d 342, 347 (Ct. App. 1995) (holding three year period applicable to conversion claims). The limitations period for an action for unjust enrichment is six years. C.P.L.R. § 213(1) (limitations period for action for which no limitations period is specifically prescribed by law is six years); Congregation Yetev Lev D'Satmar, Inc. v. 26 Adar N.B. Corp., 192 A.D.2d 501, 503, 596 N.Y.S.2d 435, 437 (App. Div. 1993) (limitations period for unjust enrichment claim is six years); Natimar Restaurant Supply Ltd. v. London 62 Co., 140 A.D.2d 261, 261, 528 N.Y.S.2d 564, 565 (App. Div. 1988) (same). Similarly, the limitations period for a cause of action for money loaned is six years. See C.P.L.R. § 213(2) (an action upon an express or implied contractual liability is six years); Donovan v. Burkowski, 51 A.D.2d 878, 380 N.Y.S.2d 134 (App. Div. 1976) (same). Finally, the limitations period for an action for breach of fiduciary duty is either three or six years depending upon the gravamen of the claim. See Cooper v. Parsky, ___ F.3d ___, 1998 WL 151731, * 8 (2d Cir. April 2, 1998). In each of these instances, defendants contend that the limitations period has expired and that the claims must be dismissed as untimely.⁴

⁴ The limitations issues surrounding the fraud claims are discussed separately below.

Plaintiff contends, however, that the doctrine of equitable estoppel is applicable and that defendants are estopped from asserting a defense based upon the statute of limitations. Pl. Mem. (Ney)⁵ at 7-8. In support of this contention, it cites to General Stencils, Inc. v. Chiappa, 18 N.Y.2d 125, 272 N.Y.S.2d 337 (Ct. App. 1966). In General Stencils, the plaintiff corporation brought a conversion action against its former head bookkeeper, alleging that he had converted monies from the petty cash funds and that because of his fraudulent concealment of his conversion, the majority of the missing funds did not come to the attention of the plaintiff until after the statute of limitations had run. 18 N.Y.2d at 126; 272 N.Y.S.2d 337, 338. After the trial court reduced the amount awarded by the jury to reflect that much of the recovery was barred by the statute of limitations and the intermediate appellate court affirmed that determination, appeal was taken to the New York Court of Appeals. That Court noted that

[p]laintiff does not argue that the statute has been tolled, or that the cause of action did not accrue until discovery, but rather

⁵ Plaintiff has submitted two memoranda in opposition to defendants' motion, one in response to Ney's motion and one in response to the Raymonds' motion.

that the doctrine of equitable estoppel should be applied – because of defendant's affirmative wrongdoing and concealment – to prevent defendant from asserting the statute of limitations. The principle that the wrongdoer should not be able to take refuge behind the shield of his own wrong is a truism. The United States Supreme Court has espoused the doctrine in these terms: "To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence[,] this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance of statutes of limitations." (Glus v. Brooklyn East. Term., 359 U.S. 231, 232-233, 79 S.Ct. 760, 762, 3 L.Ed.2d 770 (1959)).

18 N.Y.2d at 127-28; 272 N.Y.S.2d at 339. Here, plaintiff has alleged that defendants Ney and Carlos Raymond secreted and/or destroyed the records pertinent to the special account and that it did not discover the conversion because of these actions. Amended Complaint, ¶¶ 20-21, 33-34.

In response, defendants argue that plaintiff cannot invoke equitable estoppel because it has not (1) alleged that it exercised reasonable care and diligence in seeking to learn the facts that would disclose the fraud (2) alleged that the Raymonds owed plaintiff a fiduciary duty and (3) complied with the heightened pleading requirements of Fed. R. Civ. P. 9(b).

The "essence of the doctrine [of equitable estoppel]

'is that a statute of limitations does not run against a plaintiff who is unaware of his cause of action.'" Dillman v. Combustion Engineering, Inc., 784 F.2d 57, 60 (2d Cir. 1986) (quoting Carbone v. Int'l Ladies Garment Workers' Union, 768 F.2d 45, 48 (2d Cir. 1985)). A prerequisite to successful invocation of the doctrine of equitable estoppel is that the plaintiff demonstrate that it was diligent in bringing the action when it became aware or should have become aware of the wrongdoing. Dory v. Ryan, 999 F.2d 679, 681 (1993), *modified on other grounds*, 25 F.3d 81 (2d Cir. 1994); Parkview Associates v. City of New York, 71 N.Y.2d 274, 282, 525 N.Y.S.2d 176, 179 (Ct. App. 1988); Matter of Allstate Ins. Co. (Michel), 167 A.D.2d 208, 211, 561 N.Y.S.2d 914, 916 (App. Div. 1990).

In Golden Budha Corp. v. Canadian Land Company of America, 931 F.2d 196 (2d Cir. 1991), after defendant moved to dismiss a conversion claim because of untimeliness, the court noted the possible application of equitable estoppel and reasoned that

"[w]hether in any particular instance the plaintiff will have discharged his responsibility of due diligence in this regard must necessarily depend on all the relevant circumstances." Simcuski v. Saeli, 44 N.Y. 2d 442, 450, 406 N.Y.S.2d 259, 263.

In the case at bar, as in Simcuski, "[i]t is not possible or appropriate . . . on the present motion addressed to the pleading, presenting us as it must with only a skeletal record, to determine whether this plaintiff met [its] obligation of due diligence when [it] instituted the present action" (citation omitted). Indeed, it is questionable whether an equitable estoppel defense to a statute of limitations claim under circumstances such as those revealed here even can be resolved on a summary judgment motion." (citation omitted).

Id. at 200. In both Simcuski and Golden Budha the courts refused to dismiss a claim for failure to comply with the applicable statute of limitations where the plaintiff had invoked the doctrine of equitable estoppel. See Golden Budha, 931 F.2d at 200; Simcuski, 44 N.Y.2d at 449-50; 406 N.Y.S.2d at 262-63. See also Ortiz v. Cornetta, 867 F.2d 146, 148 ("[w]hile a statute-of-limitations defense may be raised in a motion to dismiss under Fed. R. Civ. P. 12(b)(6), such a motion should not be granted unless it appears *beyond doubt* that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief") (quoting Abdul-Alim Amin v. Universal Life Ins. Co., 706 F.2d 638, 640 (5th Cir. 1983)).

Here, plaintiff has alleged that defendant Ney "had full and unfettered control of and was responsible for maintaining the special and payroll accounts as well as the books

and records pertaining to same." Amended Complaint, ¶ 30. In addition, plaintiff has alleged that the defendants concealed their wrongdoing and that, as a consequence, it was unable to learn of the wrongdoing until certain papers which had been secreted had been recovered. Amended Complaint, ¶¶ 20-21, 34. That is sufficient to invoke the doctrine of equitable estoppel and withstand a motion to dismiss on statute of limitations grounds insofar as Ney and Carlos Raymond are concerned. However, because the defendant must have owed the plaintiff a fiduciary duty for successful invocation of the doctrine of equitable estoppel, see Rockwell v. Ortho Pharmaceutical Co., 510 F. Supp. 266, 270 (N.D.N.Y. 1981), the claims asserted against Carmen Raymond⁶ for which plaintiff seeks to invoke equitable estoppel – the eighth and tenth causes of action and the second and eleventh causes of action, to the extent that they are asserted against her – should be dismissed.

Fed. R. Civ. P. 9(b) requires nothing more. In Moll v. U.S. Life Insurance Company of New York, 700 F. Supp. 1284, 1289 (S.D.N.Y. 1988), the principal case relied upon by defendants,

⁶ The fiduciary relationship owed by Carlos Raymond to his employer is discussed below. See, *infra*, at 18.

the court held that equitable estoppel may not be invoked to prevent application of the statute of limitations to a federal claim unless the more rigorous pleading requirements set forth by Fed. R. Civ. P. 9(b) are met. Because Moll concerned a self-concealing act, the court required the plaintiffs to show "some misleading, deceptive or otherwise contrived action or scheme, in the course of committing the wrong, that is designed to mask the existence of a cause of action."³ 700 F. Supp. at 1291.

Defendants nevertheless assert that plaintiff must provide the bases for its allegations of concealment: "who discovered the information, when the information was discovered, how the information was discovered." Def. Ney Mem. at 17. Although these allegations properly concern not the concealment itself but the discovery of the wrongdoing, plaintiff appears to have

⁷ Defendants do not address whether Fed. R. Civ. P. 9(b) applies to equitable estoppel of the statute of limitations applicable to a state cause of action.

⁸ Courts have distinguished between "affirmative acts of concealment and wrongs which are inherently self-concealing." Moll, 700 F. Supp. at 1290. An example of the former could involve a thief who replaces a stolen antique vase with a fake; an example of the latter could involve the knowing sale of a worthless vase as a valuable antique. Id.

provided virtually all of the information requested. Thus, plaintiff alleges that in March 1997 it discovered bank statements hidden "in a crawl space underneath the basement staircase in an area which had not been utilized for any other purpose by the corporation for a number of years" and that "[a]n immediate review of the contents and the follow up conversations with employees disclosed the nature of the fraud and conspiracy." Amended Complaint, ¶ 34. The only information not provided is the identity of the person who found these bank statements.

B. Fraud

Defendants also claim that the causes of action sounding in fraud are untimely because plaintiff did not bring the action within six years from the date the cause of action accrued or two years from the time that plaintiff discovered or could, with the exercise of reasonable diligence, have discovered the alleged wrongdoing. See C.P.L.R. ¶ 213(8). For the reasons discussed in the preceding section, plaintiff has adequately pleaded that it could not have earlier discovered the alleged wrongdoing.

II. Failure to State a Claim

A. Fraud

Defendants argue that plaintiff has not stated a fraud

claim because there is no allegation that defendants committed any material misrepresentation.⁹ Def. Ney Mem. at 6; Def. Raymond at 9. In addition, Ney contends that plaintiff has also failed to allege the omission of any fact. Def. Ney. Mem. at 6. To state a cause of action for fraudulent concealment, the following elements must be alleged: "(1) nondisclosure of (2) material facts, in the face of (3) a duty to disclose, (4) scienter, (5) reliance, and (6) damages." Lone Star Indus., Inc. v. Compania Naviera Perez Companc, S.A.C.F.I.M.F.A. (In re New York Trap Rock Corp.), 42 F.3d 747, 754 (2d Cir. 1994).

Thus, where fraudulent concealment is alleged there need be no allegation of misrepresentation. In addition, although Ney contends that plaintiff has not alleged that there has been any "omission of fact," it is clear that plaintiff has clearly alleged that defendants failed to disclose their wrongdoing to their employer. See, e.g., Amended Complaint,

⁹ Both Ney and the Raymond defendants cite to cases discussing fraudulent misrepresentation. However, the third, fourth and fifth causes of action are more properly considered as sounding in fraudulent concealment. See, e.g., Amended Complaint, ¶¶ 55,66 (alleging concealment of the wrongdoing), ¶ 57 (alleging special relationship existing between Ney and plaintiff).

“ 55, 66 (alleging concealment of the wrongdoing).”

However, since as Carmen Raymond was not an employee of Adams Book and was therefore under no obligation to disclose any wrongdoing, see, supra, at 13, the fraud claim asserted against her – the fifth cause of action – is dismissed.

B. Breach of Fiduciary Duty

The Raymond defendants argue that this cause of action must be dismissed because neither of them was involved in a fiduciary relationship with plaintiff.” Raym. Mem. at 7. In

¹⁰ Although not directly on point, employee theft followed by continued employment and nondisclosure may constitute mail or wire fraud for purposes of RICO. See Horn's Inc. v. IM Int'l Publishing, Inc., 1986 WL 11450 (S.D.N.Y. 1986). See also Carpenter v. United States, 484 U.S. 19, 27 (“[t]he concept of ‘fraud’ includes the act of embezzlement, which is ‘the fraudulent appropriation to one’s own use of the money or goods entrusted to one’s care by another.’”) (citation omitted).

¹¹ Because of the ambiguity of the allegations set forth in the second cause of action, that for breach of fiduciary duty, the Raymond defendants have taken it to be directed toward securing an accounting. In either event, a fiduciary relationship must be present to state a cause of action. See Adam v. Cutner & Rathkopf, 238 A.D.2d 234, 242, 656 N.Y.S.2d 753, 759 (App. Div. 1997) (“The right to an accounting is premised upon the existence of a confidential or fiduciary

particular, they note that an ordinary debtor-creditor relationship is not of a fiduciary nature. See Orix Credit Alliance, Inc. v. Swinbank, No. 96 Civ. 5717, 1997 WL 570517, *3 (S.D.N.Y. 1997); Phillips Credit Corp. v. Regent Health Group, Inc., 953 F. Supp. 482, 523 (S.D.N.Y. 1997). In addition, they contend that an employee does not owe a fiduciary duty to his employer. However, a panoply of decisions in this state hold to the contrary. See, e.g., Gruntal Corp. v. San Diego Bancorp., 901 F. Supp. 607, 615 (S.D.N.Y. 1995) ("While it is well settled New York law that an employer owes no fiduciary duty to an at-will employee, it has also long been true that an employee is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties."); Mineola Ford Sales Ltd. v. Rapp, 661 N.Y.S.2d 281 (App. Div. 1997) (plaintiff employer had shown likelihood of success on the merits of, *inter alia*, claim for breach of fiduciary duty against defendant employee who had stolen money and falsified records).

C. Conversion

relationship").

This cause of action is addressed only insofar as it is asserted against Carlos Raymond.

The Raymond defendants also contend that plaintiff has not stated a cause of action for conversion because it has not alleged that there was any "obligation to return the money or treat the check or the funds they represent in any particular way" and that "no such obligation can even be inferred from the checks themselves, from the employment by Plaintiff of defendant, Carlos Raymond, from the status of Mrs. Raymond nor from any other allegation in the complaint." Raym. Mem. at 18-19. This contention is without merit. The Amended Complaint clearly alleges that defendants were not entitled to the monies at issue; that an obligation exists to return these monies is apparent from the Amended Complaint.

D. Money Loaned

The Raymond defendants contend that plaintiff has failed to state a claim for money loaned because the notation "loan" does not appear on all of the checks annexed to the complaint that correspond to the money loaned causes of action. In support of this contention, they cite to Skiadas v. Terovalas, 219 A.D.2d 635, 631 N.Y.S.2d 729 (App. Div. 1995), which held that the notation "temp. loan" was insufficient to unequivocally establish a promise of repayment. 219 A.D.2d at 636; 631 N.Y.S.2d at 730. See also Farca v. Farca, 216 A.D.2d 520, 521,

628 N.Y.S.2d 782, 783 (App. Div. 1995) same. The relevance of these cases to this motion to dismiss, where the court must accept all allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff, Ortiz, 867 F.2d at 149, is unclear. Here, plaintiff has clearly alleged that loans were made to Carlos and Carmen Raymond and that promises of repayment were made by them. Amended Complaint, ¶¶ 91,95.

III. Failure to State Fraud Claim with Specificity

Finally, defendants contend that plaintiff has failed to state its fraud claim with the specificity required by Fed. R. Civ. P. 9(b). In the case of fraudulent concealment, "a plaintiff must make 'distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see, whether by the exercise of ordinary diligence, the discovery might not have been before made.'" Armstrong v. McAlpin, 699 F.2d 79, 89 (2d Cir. 1983). As described above, plaintiff has satisfactorily alleged these elements. See *supra* at 14-15.

CONCLUSION

For the foregoing reasons, defendants' motion is granted as to the fifth, eighth and tenth causes of action and the second and eleventh causes of action insofar as they are asserted against Carmen Raymond. In all other respects, it is denied.

SO ORDERED.

Dated: Brooklyn, New York
June 2nd, 1998



I. Leo Glasser, U.S.D.J.

Copies of the foregoing Memorandum and Order were this day sent to:

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