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<b>F.W. Sims, Inc. v Simonelli</b>
2021 NY Slip Op 50410(U)
Decided on May 7, 2021
Supreme Court, Suffolk County
Emerson, J.
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Decided on May 7, 2021

Supreme Court, Suffolk County

**F.W. Sims, Inc., CAMILE SHEA, PATRICK SIMONELLI, LILLY  
ANN WISWALL AND ARTHUR SEEBERGER, Plaintiffs,**

**against**

**Deborah Simonelli AND DANA GRIMALDI, AS EXECUTORS OF  
THE ESTATE OF JOSEPH SIMONELLI, DEBORAH  
SIMONELLI, DANA GRIMALDI, AGOVINO & ASSELTA, LLP,  
JOSEPH ASSELTA, ESQ., ERIC BERKOWITZ, MTG  
DEVELOPMENT, THE NASSAU COUNTY PUBLIC  
ADMINISTRATOR AS ADMINISTRATOR OF THE ESTATE OF  
FRANK DANKO, DANKO CONTROL SYSTEMS, INC.,  
DOROTHY COVELLI A/K/A WILLIAMS, PROSPECTIVE, LLC,  
BRITISH BETTY RACING STABLES, LLC, AND SERENDIPITY  
FARMS, LLC, Defendants.**

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Elizabeth H. Emerson, J.

Upon the following papers read on this motion *to dismiss*; Notice of Motion [\*2] and supporting papers 397-403; Notice of Cross Motion and supporting papers; Answering Affidavits and supporting papers 405-410 ; Replying Affidavits and supporting papers 411 ; it is,

**ORDERED** that the branch of the motion by the defendants Dorothy Covelli, a/k/a Williams, and Prospective, LLC, which is for dismissal of the amended complaint, in part, insofar as it is asserted against them is granted to the extent of dismissing the second and third causes of action against the defendants Dorothy Covelli, a/k/a Williams, and Prospective, LLC, for claims that accrued before November 26, 2008; and it is further

**ORDERED** that the motion is otherwise denied.

The plaintiff F.W. Sims, Inc. ("F.W. Sims") is a family-owned business that installs heating, ventilation, and air-conditioning systems. Joseph Simonelli was F.W. Sims' Executive Vice President. Between 2002 and his termination in October in 2014, Simonelli embezzled approximately \$25 million from F.W. Sims by having contractors submit fraudulent invoices

to the company for work that was never performed. One such contractor was the defendant Prospective, LLC, whose principal was the defendant Dorothy Covelli. After the invoices were paid, the contractors retained a portion of the money and sent the balance to Simonelli, designated third parties, or the defendant Agovino & Asselta, LLP, which deposited the funds in an escrow account that it maintained for Simonelli. Simonelli used the embezzled funds to purchase, inter alia, a horse farm, a residence, luxury automobiles, and other luxury items. Simonelli was arrested by the FBI on November 12, 2014, and the government commenced an in-rem forfeiture action against his property in the United States District Court for the Eastern District of New York. That action was settled by a "Stipulation and Order of Settlement and Discontinuance" dated January 4, 2017 (the "Stipulation"), which provides, in pertinent part as follows:

"[F.W.] Sims, its officers and shareholders, [Deborah] Simonelli-Grimaldi, [Dana] Grimaldi, the Simonelli Estate, Serendipity [Farm LLC] and British Betty Racing Stables LLC agree to release each other for all claims made in or which could be made in or could arise from the State Court Action [this action] and agree to consent to the dismissal of the State Court Action by the filing, therein, of a Notice of a Stipulation of Discontinuance with Prejudice.

\* \* \*

"This Stipulation, and the validity, performance, construction and enforceability thereof shall be governed, and construed, in accordance with the laws of the State of New York, without regard to its choice-of-law rules. The United States District Court for the Eastern District of New York shall retain exclusive jurisdiction and shall be the exclusive venue for the resolution of any dispute arising under, and concerning the interpretation and enforcement of, this Stipulation."

The defendants Prospective, LLC ("Prospective"), and Dorothy Covelli ("Covelli") move for an order directing the plaintiff to file a stipulation of discontinuance, with prejudice, or for dismissal of this action as per the Stipulation. They also move for dismissal of the amended complaint, in part, as time-barred insofar as it is asserted against them.

Contrary to the plaintiff's contentions, the Stipulation is not a judgment that is entitled to full faith and credit. A stipulation is a contract between parties and, as such, is governed by general principles for its interpretation and effect (**Kraker v Roll**, 100 AD2d 424, 436). Prospective and Covelli are seeking to enforce the Stipulation by requiring the plaintiffs to discontinue this action with prejudice. However, they are not parties to the Stipulation. A

nonparty to a contract governed by New York law lacks standing to enforce the agreement in the absence of terms that clearly evidence an intent to permit enforcement by the third party in question (*see*, **Premium Mtge. Corp. v Equifax, Inc.**, 583 F3d 103, 108 [2nd Cir], *citing* **Fourth Ocean Putnam Corp. v Interstate Wrecking Co.**, 66 NY2d 38, 45; *see also*, **Dormitory Authority of the State of New York v Samson Construction Co.**, 30 NY3d 704, 710). Nothing in the Stipulation evinces an intent to permit enforcement by Prospective or Covelli or anyone else who is not a party thereto. Moreover, the parties to the Stipulation agreed that any dispute arising under and concerning the interpretation and enforcement of the Stipulation shall be resolved in the United States District Court for the Eastern District of New York. Such clauses are prima facie valid and enforceable (**Brooke Group v JCH Syndicate**, 87 NY2d 530, 534). Accordingly, the branch of the motion which is for an order directing the plaintiff to file a stipulation of discontinuance, with prejudice, or for dismissal of this action as per the Stipulation is denied.

The action was commenced on November 26, 2014, and the complaint was amended on July 14, 2016. The amended complaint contains five causes of action against Prospective and Covelli: the first cause of action for fraud, the second cause of action for money had and received, the third cause of action for unjust enrichment, the fourth cause of action for conversion, and the seventh cause of action for aiding and abetting Joseph Simonelli's breaches of fiduciary duty. Prospective and Covelli seek dismissal of the of the first and second causes of action for claims that accrued before November 26, 2008, more than six years before the action was commenced; dismissal of the third and fourth causes of action for claims that accrued before November 26, 2011, more than three years before the action was commenced; and dismissal of the seventh cause of action for claims that accrued before July 14, 2013, more than three years before the complaint was amended (alternatively, before November 26, 2011, more than three years before the action was commenced).

A cause of action based upon fraud must be commenced within six years from the time of the fraud or within two years from the time the fraud was discovered or could have been discovered with reasonable diligence, whichever is longer (**CPLR 213 [8]**; **Pericon v Ruck**, 56 AD3d 635, 636). The two-year period begins to run when the circumstances reasonably would suggest to the plaintiff that he or she may have been defrauded, triggering a duty to inquire on the plaintiff's part (**Id.**). An inquiry into when a plaintiff should have discovered an alleged fraud [\*3] presents a mixed question of law and fact (**House of Spices [India], Inc. v SMJ Services, Inc.**, 103 AD3d 848, 849). However, once a plaintiff demonstrates that an

action is timely, it is the defendant's burden to demonstrate, *prima facie*, that the fraud could have been discovered earlier with reasonable diligence (**Id.**).

Here, the alleged fraud was discovered on October 3, 2014, and this action was commenced on November 26, 2014. The first cause of action is, therefore, timely, and the burden shifted to Prospective and Covelli. The court finds that Prospective and Covelli have failed to meet their burden. Their conclusory assertions are insufficient to establish as a matter of law that the alleged fraud could have been discovered by the plaintiffs earlier (**Id.**). When, as here, it is unclear from the record when the plaintiffs should have been aware of the possible fraud, the fraud cause of action should not be dismissed as time-barred (*see, Pericon v Ruck, supra; see also, Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C213:8 at 32* [date of discovery is a jury question unless it conclusively appears that the plaintiff had knowledge of facts raising a reasonable inference of fraud]). Accordingly, the court declines to dismiss any part of the first cause of action against Prospective and Covelli.

Prospective and Covelli seek dismissal of the seventh cause of action for aiding and abetting Joseph Simonelli's breaches of fiduciary duty for claims that accrued before July 14, 2013 (alternatively, before November 26, 2011). A claim that a person aided and abetted a tort is governed by the same statute-of-limitations as the underlying tort (**Hudson v Delta Kew Holding Corp.**, 43 Misc 3d 1223[A] at \*4 [and cases cited therein]) and subject to the same statute-of-limitations analysis (**State of New York Workers' Compensation Bd. v Cody Mgt., Inc.**, 47 Misc 3d 1221 [A] at \*13). When, as here, an allegation of fraud is essential to a breach-of-fiduciary-duty claim, courts will apply the six-year statute of limitations applicable to fraud (**Id.**) or the two-year discovery rule, which also applies to fraud-based breach-of-fiduciary-duty claims (**Kaufman v Cohen**, 307 AD2d 113, 122). For the same reasons that the court declines to dismiss any part of the first cause of action, the court declines to dismiss any part of the seventh cause of action against Prospective and Covelli.

Prospective and Covelli seek dismissal of the fourth cause of action for conversion for claims that accrued before November 26, 2011. Like the previous cause of action, the conversion cause of action is based upon fraud and governed by the statute of limitations set forth in CPLR 213 (8) (**Loeuis v Grushin**, 126 AD3d 761, 765). Accordingly, the court declines to dismiss any part of the fourth cause of action against Prospective and Covelli.

The second cause of action for money had and received is governed by the six-year statute of limitations applicable to quasi-contracts or contracts implied-in-law (CPLR 213 [2]; **County of Suffolk v Suburban Housing Dev. & Research, Inc.**, 160 AD3d 607, 610; **Alexander, Practice Commentaries**, *supra*, CPLR C213:1 at 14, C213:2 at 18). CPLR 213 (8), therefore, does not apply. The plaintiffs contend that the statute of limitations was tolled by "fraudulent concealment." The plaintiffs are invoking the doctrine of equitable estoppel.

A defendant may be estopped from pleading the statute of limitations when it was induced by fraud, misrepresentations, or deception to refrain from filing a timely action (**Kaufman v Cohen**, *supra*). The doctrine requires proof that the defendant made an actual misrepresentation or, if a fiduciary, concealed facts that he was required to disclose; that the plaintiff relied on the misrepresentation; and that the reliance caused the plaintiff to delay bringing a timely action (*Id.*) Equitable estoppel does not apply when the misrepresentation or act of concealment underlying the estoppel claim is the same act that forms the basis of the plaintiff's underlying substantive cause of action (*Id.*). The plaintiffs rely on the same acts that underlie their fraud claim to support their "fraudulent concealment" argument. Accordingly, equitable estoppel does not apply.

The plaintiffs also contend that the statute of limitations is tolled by the continuing-wrong or continuing-violation doctrine, which tolls the limitations period to the date of the commission of the last wrongful act when there is a series of continuing wrongs (**Shelton v Elite Model Mgt., Inc.**, 11 Misc 3d 345, 360-361, *abrogated on other grounds* 84 AD3d 1). Where applicable, the doctrine will save all claims for recovery of damages, but only to the extent of wrongs committed within the applicable statute of limitations (**Hudson v Delta Kew Holding Corp.**, *supra* at \*7). Thus, it will not save any of the plaintiffs' claims for money had and received prior to November 26, 2008. Accordingly, the second cause of action is dismissed insofar as it alleges claims against Prospective and Covelli that accrued before that date.

Prospective and Covelli seek dismissal of the third cause of action for unjust enrichment for claims that accrued before November 26, 2011, applying the three-year statute of limitations. While two of the cases upon which Covelli and Prospective rely applied the three-year statute of limitations found in CPLR 214 (3) to unjust-enrichment claims (**Ingrami v Rovner**, 45 AD3d 806, 808; **Lambert v Sklar**, 30 AD3d 564, 566), the third case applied the six-year statute of limitations (**Maya NY, LLC v Hagler**, 106 AD3d 583, 585). Since this

case does not involve a claim for replevin or conversion of chattels under CPLR 214 (3), the court will apply the six-year statute of limitations (*see*, **Moskovits v Grigsby**, US Dist Ct, SDNY, June 9, 2020, Broderick, J. [2020 WL 3057754] at \*4; *see also*, **Haraden Motorcar Corp. v Bonarrigo**, US Dist Ct, NDNY, Apr. 20, 2020, Sannes, J. [2020 WL 1915125] at \*11 [and cases cited therein]; **Alexander, Practice Commentaries**, *supra*, CPLR C213:1 at 14, C213:2 at 18). Moreover, as previously discussed, the tolling provisions do not apply. Accordingly, the third cause of action is dismissed insofar as it alleges claims against Prospective and Covelli that accrued before November 26, 2008.

Dated: *May 7, 2021*

J.S.C.

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