SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 11
NASSAU COUNTY

JOSEPH D'AMORE, Individually and as a partner of ALLERGY ASSOCIATES,

Plaintiff(s),

SUBMISSION DATE: 06/24/02
INDEX No.: 2609/02

-against-

ALLAN RICHHEIMER and IVY RICHHEIMER,

MOTION SEQUENCE #1, 2

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	X
Answering Papers.....	X
Reply.....	X
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Upon the foregoing papers, defendants' motion to dismiss the plaintiff's complaint pursuant to NY CPLR §3211(a)(5) on statute of limitations grounds and CPLR §3211(a)(7) for failure to state a cause of action upon which relief can be granted is granted in part and denied in part. Plaintiff's cross motion to amend and supplement the complaint pursuant to NY CPLR §3025 is granted.

The instant case arose from a contractual relationship for accounting and bookkeeping services between plaintiff Joseph D'Amore, individually and as a shareholder in Allergy Associates, P.C. and defendants Allan Richheimer and Ivy Richheimer. Defendants began providing accounting and bookkeeping services to Allergy Associates, Inc, a medical practice, in January 1993. In 1996, the Internal Revenue Service contacted plaintiff concerning the non-payment of certain taxes. Plaintiff alleges that defendant assured him that all taxes were paid. Thereafter, the Internal Revenue Service and the City and the State of New York

demanded payment of unpaid taxes, unemployment insurance, interest, and penalties. In 1997, defendant advised plaintiff that the taxes had not been paid and plaintiff terminated their relationship. Subsequently, plaintiff brought this action for breach of contract, fraud, conspiracy and conversion. Defendant made the instant motion pursuant to CPLR §3211 to dismiss the claims as time barred by the statute of limitations and for failure to state a claim. Further, defendant contends that plaintiff does not have standing to bring this suit as an individual because the alleged wrong was to the corporation. Nor, defendants allege, does plaintiff have standing to bring suit on behalf of the corporation because plaintiff has not met the requirements of NY BCL §626(c), which requires that a shareholder in a corporation make a demand on the board of directors to bring suit. Plaintiff made a cross motion for leave to amend and supplement the complaint pursuant to CPLR §3025.

Pursuant to CPLR §3025(b), "leave to amend shall be freely granted absent a showing of prejudice or surprise to the opposing party". Fisher v. Ken Carter Industries, 127 A.D.2d 817, 817-818, 512 N.Y.S.2d 408 (2d Dept. 1987). A motion for leave to amend or supplement a complaint is denied only if the pleading is "clearly and patently insufficient on its face". Id. at 818 (quoting DeForte v. Allstate Insurance Co., 66 A.D.2d 1028, 411 N.Y.S.2d 726 (4th Dept. 1978)). In the instant case, defendants will not be prejudiced by plaintiff's amendment to the complaint since the amended verified complaint contains substantially the same causes of action as the original pleading. Nor is the pleading insufficient on its face. Therefore, plaintiff's cross motion pursuant to CPLR §3025 is granted and plaintiff's amended complaint will be considered along with defendant's motion to dismiss.

First, defendants' contend that plaintiff does not have standing to bring this suit individually because the defendants' services were rendered to Allergy Associates, Inc., not to plaintiff individually and therefore, only the corporation has standing to complain about defendant's conduct. It is settled law that allegations which assert an injury to a corporation by a defendant "plead a wrong to the corporation only, for which a shareholder may sue derivatively, but not individually". Elenson v. Wax, 215 A.D.2d 429, 626 N.Y.S.2d 531 (2d Dept. 1995). "It is axiomatic that a shareholder has no individual cause of action to

recover damages for a wrong against a corporation, even if the shareholder loses the value of his investment . . .". Id. Also, incidental injuries to principal or sole shareholders that result from a wrong done to the corporation do not confer upon those shareholders the right to bring suit individually. New Castle Siding Company, Inc. v. Wolfson, 97 A.D.2d 501, 502, 468 N.Y.S.2d 20 (2d Dept. 1983), *aff'd*, 63 N.Y.2d 782, 481 N.Y.S.2d 70, 470 N.E.2d 868 (1984). However, where the injury to the individual shareholder stems from the violation of a duty owed to the individual by the wrongdoer that is independent of the relationship to the corporate entity, the shareholder may assert an individual cause of action. Id.

Here, plaintiff does not claim, nor is there any evidence in the pleadings, that defendants owed plaintiff a duty independent of and extrinsic to defendants' duty to the corporation to perform accounting and bookkeeping services. At the time that the contract for accounting and bookkeeping services to be rendered to the corporation was formed, the duty to advise plaintiff individually was not contemplated. Defendants did not owe plaintiff a separate duty independent of the contract and therefore, could not have violated any duty. As a result, plaintiff does not have standing to bring suit individually against the defendants because the alleged wrongs were against the corporation only. Accordingly, insofar as plaintiff's third cause of action states a claim for breach of contract resulting in individual loss to the plaintiff in that he was forced to sell the house he bought based on defendants' advice, that cause of action is dismissed.

Second, defendants contend that since plaintiff neither attempted to satisfy the demand requirement for bringing a shareholder derivative suit pursuant to NY BCL §626(c) nor pled with particularity why such a demand would be futile, plaintiff's case should be dismissed as a matter of law.

NY BCL §626(c) provides that before a shareholder's derivative suit is brought on behalf of a corporation, the shareholder must make a demand upon the corporation's board of directors to bring suit. Additionally, NY BCL §626(c) also provides that if such a demand on the directors would be futile, the requirement will be excused. Allegations of futility in attempting to secure the initiation of a suit by a board of directors should present detailed and specific assertions as to

why the board would refuse to initiate such an action. Health-Loom Corporation v. SoHo Plaza Corporation, 209 A.D.2d 197, 198, 618 N.Y.S.2d 287 (1st Dept. 1994). "The standard by which futility is assessed involves deciding what board members would have done had they been presented with a demand to investigate the alleged wrongdoing at the time the complaint was filed". Miller v. Schreyer, 257 A.D.2d 358, 360, 683 N.Y.S.2d 51 (1st Dept. 1999).

In the instant case, plaintiff alleges that he could not have secured the permission of the only other shareholder of Allergy Associates, Inc., Michael Richheimer, because the other shareholder is the defendant's brother and would have opposed the suit due to the fraternal relationship between the brothers. On its own, this allegation would not support use of the futility exception to the demand requirement of NY BCL §626(c). However, plaintiff's amended complaint avers that he and the other shareholder are currently embroiled in a dispute over the dissolution of the corporation through arbitration and are not speaking to each other. Therefore, plaintiff contends, he could not and cannot make a demand on Michael Richheimer to bring suit on behalf of Allergy Associates, Inc. It would have been futile for the plaintiff to make a demand on the corporation to bring suit because of the nature of the relationship between the two shareholders. Consequently, plaintiff is excused from failing to make a demand on the other shareholder to bring suit.

Additionally, this is not the typical derivative shareholder's suit where a member of the corporation itself has acted badly. Instead, plaintiff alleges that third parties wronged the corporation by failing to perform the services for which Allergy Associates, Inc. contracted. Consequently, the other shareholder will benefit from plaintiff's suit, as any recovery will inure to the corporation since "a shareholder's derivative suit seeks to vindicate a wrong done to the corporation through enforcement of a corporate cause of action [and] any recovery obtained is for the benefit of the injured corporation". Mirasola v. Gilman, 163 A.D.2d 371, 558 N.Y.S.2d 105 (2d Dept. 1990). As a shareholder in the corporation, Michael Richheimer was injured also. See Shapolsky v. Shapolsky, 53 Misc.2d 830, 830, 279 N.Y.S.2d 747 (1966), *aff'd*, 28 A.D.2d 513, 282 N.Y.S.2d 163 (1st Dept. 1967)("The wrong thus suffered by a stockholder is held to be the wrong suffered by the corporation and affects all stockholders alike"). Accordingly,

it is ordered that plaintiff has standing to bring this suit on behalf of Allergy Associates, Inc. because a demand on the corporation to bring suit would have been futile and the other shareholder will benefit from any recovery.

Third, pursuant to CPLR §3211(a)(5), the defendant contends that plaintiff's first, second and fourth causes of action are professional malpractice claims and, as a result, are barred by the three-year statute of limitations imposed pursuant to CPLR §214(6).

CPLR §3211(a)(5) provides, *inter alia*, that a motion to dismiss can be based on the theory that the action is time barred by the applicable statute of limitations. In a motion to dismiss an action as untimely, the defendant must meet the threshold requirement of establishing that the time in which to assert a claim has expired. Savarese v. Shatz, 273 A.D.2d 219, 708 N.Y.S.2d 642 (2d Dept. 2000). If the defendant meets this requirement, it is then up to a plaintiff to establish that the claim falls within an exception to the statute of limitations. Id.

CPLR §214(6) provides that an action to recover damages for malpractice, other than medical, dental or podiatric malpractice, must be commenced within three years regardless of whether the action is based in contract or tort. Prior to this statute's amendment in 1996, plaintiffs could choose their theory of recovery in tort or contract and take advantage of contract's six-year statute of limitations under CPLR §213(2) even though recovery was limited to contract damages. See Santulli v. Englert, Reilly & McHugh, P.C., 78 N.Y.2d 700, 579 N.Y.S.2d 324, 586 N.E.2d 1014 (1992)(". . . the choice of applicable statutes of limitations is properly related to the remedy rather than the theory of liability"). However, the statute was amended in 1996 to include non-medical malpractice claims when the underlying theory was based on contract to "restore a reasonable symmetry to the period in which all professionals would remain exposed to a malpractice suit". Chase Scientific Research, Inc. v. NIA Group, Inc., 96 N.Y.2d 20, 27, 725 N.Y.S.2d 592, 749 N.E.2d 161 (2001).

Although the term professional is not defined by CPLR 214(6), the qualities common to those groups are used as a guide in determining if the service provider is a professional within the ambit of CPLR 214(6) and therefore, whether the service

provider is part of the "discrete group of persons" intended to benefit from the shortened statute of limitations. Id. at 29. In attempting to formulate a bright line test, the Chase court held that qualities common to professionals include "extensive formal learning and training, licensure and regulation indicating a qualification to practice, a code of conduct imposing standards beyond those accepted in the marketplace and a system of discipline for violation of those standards". Id. In addition, professional relationships carry with them the "duty to counsel and advise clients" in a relationship of trust and confidence. Id.

Similarly, a profession has been defined as "an occupation generally associated with long-term educational requirements leading to an advanced degree, licensor evidencing qualifications met prior to engaging in the occupation, and control of the occupation by adherence to standards of conduct, ethics and malpractice liability". Santiago v. 1370 Broadway Associates, L.P., 264 A.D.2d 624, 624-625, 695 N.Y.S.2d 326 (1st Dept. 1999). For the purposes of CPLR §214(6), the field of professionals who may be liable for malpractice has been limited to such "learned professions" as law, accountancy, architecture, and engineering. Id. at 625.

In a parallel analogy, the Court of Appeals has also held that a psychologist was not considered a medical professional for the purposes of CPLR §214(a), which governs the statute of limitations for medical malpractice cases. Karasek v. LaJoie, 92 N.Y.2d 171, 677 N.Y.S.2d 265, 699 N.E.2d 889 (1998). Consequently, after Chase, where the Court of Appeals held that neither insurance agents nor brokers were professionals, it is clear that the legislature did not have a "vast, amorphous category of service providers in mind when it amended CPLR §214(6)" to require actions based in contract against professionals to be commenced within three years. Chase Scientific Research, Inc. v. NIA Group, Inc., 96 N.Y.2d at 28.

In the instant motion, defendants rely on Chase Scientific Research, Inc. v. NIA Group, Inc., 208 A.D.2d 115, 708 N.Y.S.2d 128 (2d Dept. 2000), where the court held that insurance brokers and agents were professionals, to support their contention that the accounting and bookkeeping services provided by defendants put them in the category of professionals meant to benefit from the shortened statute of limitations provided by CPLR §214(6).

However, the case cited by defendant was reversed by the Court of Appeals in Chase Scientific Research, Inc. v. NIA Group, Inc., 96 N.Y.2d 20, 725 N.Y.S.2d 592, 749 N.E.2d 161 (2001) where, as noted above, the court held that insurance brokers were not considered professionals as contemplated by CPLR §214(6). Defendant also relies on Early v. Rossbank, 262 A.D.2d 601, 692 N.Y.S.2d 465 (2d Dept. 1999), *appeal dismissed* 94 N.Y.2d 869, 705 N.Y.S.2d 1, 726 N.E.2d 478 (2000), where the court held that real estate appraisers were professionals for the purposes of CPLR §214(6). However, this case was decided prior to Chase and its holding is inconsistent with the guidelines for determining whether a service provider is a professional. Nor does IFD Construction Corp. v. Corddry Carpenter Dietz and Zack, 253 A.D.2d 89, 685 N.Y.S.2d 670 (1st Dept. 1999), also cited by the defendants, persuade this court that the defendants are professionals within the ambit of CPLR §214(6) as that case discusses applying the statute to architects and engineers who already pass the Chase court's test for a professional as both professions require formal advanced learning, licensure and regulation, and both professions are subject to a code of conduct and standards.

Consequently, performing accounting and bookkeeping services does not place the defendants within the core group of professionals subject to the shorter statute of limitations for professional malpractice. Defendants are not certified public accountants who have had extensive formal learning and training. They are not subject to a system of discipline for violating the code of conduct imposed on certified public accountants. Their job was to prepare tax returns and keep the books for Allergy Associates, P.C. They had no duty to advise and counsel the plaintiff and defendants themselves assert that they had no fiduciary obligation to plaintiff. To commit malpractice, one must be a professional because "malpractice is the negligence of a professional toward a person for whom a service is rendered". Santiago v. 1370 Broadway Associates, L.P., 264 A.D.2d at 624. Therefore, plaintiff's first, second and fourth causes of action are governed by the six-year statute of limitations for contractual obligations pursuant to CPLR §213(2) and not by CPLR §214(6). Actions for breach of contract accrue at the time of the breach regardless of whether any damages have or have not occurred at that time. Ely-Cruikshank Co., Inc. v. Bank of Montreal, 81 N.Y.2d 399, 402, 599 N.Y.S.2d 501, 615 N.E.2d 985 (1993). Here, the breach occurred sometime in 1996 when the

Internal Revenue Service first notified plaintiff that the taxes for Allergy Associates, P.C. had not been paid. As a result, plaintiff has filed this suit for breach of contract on behalf of the corporation in a timely manner. Accordingly, the first, second and fourth causes of action are not barred by the statute of limitations.

Fourth, defendants assert that the sixth and seventh causes of action are conversion claims that are barred by the statute of limitations pursuant to CPLR §214(4). CPLR §214(4) provides that actions for injury to property are to be commenced within three years.

Plaintiff's sixth and seventh causes of action state claims for wrongful retention of monies and conversion by the defendants of those monies for the defendants' own use. Conversion is the "unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights". Vigilant Insurance Company of America v. Housing Authority of the City of El Paso, Texas, 87 N.Y.2d 36, 44, 637 N.Y.S.2d 342, 660 N.E.2d 1121 (1995)(quoting Employers' Fire Ins. Co. v. Cotten, 245 N.Y. 102, 105, 156 N.E. 629 (1927)). Actions for conversion and actions for damages for the taking of a chattel are subject to the three-year statute of limitations period provided by CPLR §214(3). Id. Ordinarily, the three-year period provided for in CPLR §214(3) begins to run on the date the conversion takes place. Berman v. Goldsmith, 141 A.D.2d 487, 529 N.Y.S.2d 115 (2d Dept. 1988). However, "where the possession is originally lawful, a demand is necessary" for the return of the property. Id. Then, the time in which the conversion action must be commenced "is computed from the time when the right to make the demand is complete". Id.

Here, the plaintiff avers that the defendants were discharged from performing accounting and bookkeeping services in 1997. Since the monies were originally lawfully within defendant's possession, plaintiff was required to make a demand for the return of the monies. Any demand for the return of monies would have to have been completed by 1997 when the plaintiff discharged the defendants from their duties. The plaintiff's action for conversion was filed in 2002. Therefore, the three-year statute of limitations imposed pursuant to CPLR §214(3) bars plaintiff's conversion action. Accordingly, plaintiff's sixth and seventh causes of action are dismissed.

Last, the defendants contend that the plaintiff's fifth cause of action for fraud and conspiracy should be dismissed pursuant to CPLR §3211(7) for failure to state a cause of action because plaintiff has met neither the heightened pleading requirements pursuant to CPLR §3016(b) for pleading fraud nor the requirements for pleading conspiracy.

On a motion to dismiss pursuant to CPLR §3211(a)(7) for failure to state a claim, the court accepts as true the facts as alleged in the complaint and in the submission of opposition to the motion to dismiss. Sokoloff v. Harriman Estates Development Corp., 96 N.Y.2d 409, 414, 729 N.Y.S.2d 425, 754 N.E.2d 184 (2001). Plaintiffs are accorded the benefit of any favorable inference and there is only a determination made as to whether the facts as alleged fit within any cognizable legal theory. Id. Affidavits submitted by the plaintiff that attempt to remedy defects in the complaint are considered. Leon v. Martinez, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511(1994). "The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one". Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17 (1977). There is no determination made as to whether there is evidentiary support for the complaint, but rather whether the complaint states a cause of action. Bernstein v. Kelso & Company, 231 A.D.2d 314, 318, 659 N.Y.S.2d 276 (1st Dept. 1997).

CPLR §3016(b) requires, *inter alia*, that fraud be pled with particularity. "To establish a prima facie case of actual fraud, a plaintiff must present proof that (1) the defendant made material representations that were false, (2) the defendant knew the representations were false and made them with the intent to deceive the plaintiff, (3) the plaintiff justifiably relied on the defendant's representations, and (4) the plaintiff was injured as a result of the defendant's representations". Cohen v. Houseconnect Realty Corp., 289 A.D.2d 277, 278, 734 N.Y.S.2d 205 (2d Dept. 2001). CPLR §3016(b) requires that the "misconduct complained of be set forth in sufficient detail to clearly inform the defendant with respect to the incidents complained of . . .". Bernstein v. Kelso & Company, 231 A.D.2d at 320. Yet, in those cases where it would be impossible for the plaintiff to state in detail all the circumstances giving rise to the wrong because "the knowledge of those details is in the exclusive possession of the defendants", the provision is not construed as strictly.

Auguston v. Spry, 282 A.D.2d 489, 490, 723 N.Y.S.2d 103 (2d Dept. 2001).

Moreover, the independent tort of civil conspiracy is not recognized in New York. Hoag v. Chancellor, Inc., 246 A.D.2d 224, 230, 677 N.Y.S.2d 531 (1st Dept. 1998). An allegation of conspiracy on its own does not give rise to a cause of action. Id. Instead, "the actionable wrong lies in the commission of a tortuous act, or a legal one by wrongful means, but never upon the agreement to commit the prohibited act standing alone". Id. (quoting Cuker Inds. v. Crow Construction Company, 6 A.D. 415, 417, 178 N.Y.S.2d 777 (1st Dept. 1958)). Conspiracy can only be alleged when it connects the conduct of more than one defendant with a tort that is otherwise actionable. Gouldsbury v. Dan's Supreme Supermarket, Inc., 154 A.D.2d 509, 510, 546 N.Y.S.2d 279 (2d Dept. 1989), *appeal denied*, 75 N.Y.2d 701, 551 N.Y.S.2d 905, 551 N.E.2d 106 (1989).

Plaintiff's amended fifth cause of action states that the acts of defendants in appropriating plaintiff's property were fraudulent to the rights of the plaintiffs. However, plaintiff fails to identify exactly what defendants did that was fraudulent. Nor does plaintiff allege that the defendants acted with knowledge that their acts were fraudulent. Further, there is no allegation that plaintiff justifiably relied on any representations that defendants made. Also, there is no evidence that these facts were exclusively within the knowledge of the defendants. Here plaintiff hired accountants to organize their records and thus the knowledge to plead with particularity was not in the exclusive possession of the defendants. Even accepting what plaintiff alleges as true, the fifth cause of action does not fulfill the requirements of CPLR §3016(b) because merely pleading conclusory allegations of fraud does not transform negligent actions into ones for fraud. Dworman v. Lee, 83 A.D.2d 507, 441 N.Y.S.2d 90 (1st Dept. 1981), *aff'd*, 56 N.Y.2d 816, 452 N.Y.S.2d 570, 438 N.E.2d 103 (1982). Therefore, plaintiff's fifth cause of action alleging fraud is dismissed. It therefore follows that since plaintiff has failed to state an actionable tort, the claim for conspiracy cannot lie as there is no independent cause of action for conspiracy.

It is hereby ordered that plaintiff is granted leave to serve an amended complaint. It is further ordered that the

plaintiff's third, fifth, sixth and seventh causes of action are dismissed.

This decision constitutes the order of the court.

Dated: JUL 12 2002

J.S.C.
HON. KENNETH A. DAVIS

ENTERED

JUL 17 2002

NASSAU COUNTY
COUNTY CLERK'S OFFICE