

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU

PRESENT: HON. ANTHONY L. PARGA, J.S.C.

Part 17

SAMUEL PFEIFFER,

Plaintiff,

-against-

Index # 9726/04

X X X

Motion Date: 10/15/04

Sequence No. 001

**DAVID JACOBOWITZ a/k/a DUVID LEIB
JACOBOWITZ a/k/a LEO JACOBS a/k/a
LEO JACOBOWITZ a/k/a LEIBISH JACOBOWITZ,
BEREI JACOBOWITZ a/k/a BERNARD
JACOBOWITZ a/k/a AVRUM BER JACOBOWITZ,
MRS. YAKOV JACOBOWITZ, as Executrix with
Respect to the Estate of the Late YAKOV
JACOBOWITZ a/k/a JACOB JACOBOWITZ
a/k/a JACK JACOBOWITZ, WYTHE GARDENS,
LLC, and WATERVIEW GARDENS, LLC,**

Defendants.

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Upon the foregoing papers, the motion by the defendants for an order pursuant to CPLR 3211(a)(5) and (7), dismissing the Complaint on the grounds that (1) the Complaint is barred by the Statute of Limitations and (2) the Complaint fails to state a cause of action, is granted.

This is an action for legal and equitable relief wherein the plaintiff seeks an order imposing a constructive trust on three parcels of real property in Brooklyn, New York, and awarding him fifty million dollars in damages for depriving him of his purported interest in those properties. The plaintiff claims that he is a successful real estate professional for

many years and that sometime "in the summer of 1998" he offered the individual defendants "the right to join" with him in acquiring the subject properties (Complaint, par. 26). The defendants purportedly accepted the plaintiff's offer and allegedly agreed that they would (a) take over and complete, on behalf of the plaintiff, the negotiations that had been initiated by the plaintiff on March 4, 1998, (b) share ownership interest in these properties with the plaintiff on a fifty/fifty basis (Complaint, paragraphs 27-29) and (c) purchase the property on behalf of the plaintiff (Complaint, par. 31). The parties' purported agreement was never formalized in writing, and the Complaint does not specify when the alleged oral agreement was made. Nor does the Complaint identify when the defendants purchased the subject properties; it only recites the fact that deeds were issued for two of the parcels on January 9, 2002, and on the third parcel on May 25, 1999. After the plaintiff "heard rumors [on September 17, 1998] that the owner [of the subject properties] had entered into a contract with another party" (Complaint, par. 33), he "instructed his attorney to contact the owner of those properties to ascertain the facts" (Complaint, par. 35). Although the plaintiff never avers in his Complaint when he discovered that the properties were sold to the defendants, he recites in paragraph 46 that he "first learned in May 2003" that the defendants herein were also defendants in litigation over these properties. The action at bar was commenced on July 19, 2004; in addition to the equitable relief sought for the imposition of a constructive trust, the plaintiff alleges causes of action sounding in breach of fiduciary duty, misappropriation of a business opportunity, fraud and conspiracy to commit fraud.

The Complaint must be dismissed as the causes of action set forth therein are either barred by the Statute of Limitations or fail to state a cause of action.

To establish when a cause of action accrues and the Statute of Limitations begins to run, "a court must 'take the complaint as we find it' (*Nasaba Corp. v. Harfred Realty Corp.*, 287 NY2d 290, 296)" (*MRI Broadway Rental, Inc. v. US Mineral Prods. Co.*, 242 AD2d 440, 442). Here, the Complaint is vague as to key dates and times and consequently the

Court cannot ascertain whether the plaintiff claims are timely. Assuming *arguendo* that the third cause of action for the misappropriation of a business opportunity accrued in 1999 when the subject properties were possibly purchased by the individual defendants at that time, it is barred by the three-year Statute of Limitations (*Powers Mercantile Corp. v. Feinberg*, 109 AD2d 117, 121; *see also Kaufman v. Cohen*, 307 AD2d 113, 121[fn.3]). Furthermore, as to the plaintiff's allegation of fraud, it is not clear when the purported fraudulent act or acts took place. In addition, this Court does not accept the plaintiff's discovery of the fraud to be when he learned in 2003 of the litigation involving the subject properties since the facts alleged in the Verified Complaint reveal that the plaintiff could have discovered, with due diligence, the defendants' fraudulent acts within two years of their occurrence (*see, Ghandour v. Shearson Lehman Brothers, Inc.*, 213 AD2d 304, 305-306; *compare, Klein v. Gutman*, __ AD3d __, __ NYS2d __, 2004 N.Y. App.Div. LEXIS 13314 [2nd Dept. Nov. 8, 2004]; *Kaufman v. Cohen, supra*, at 122; *Liberty Co. v. Boyle*, 272 AD2d 380, 381).

Even according the Complaint every favorable inference to which it is entitled, and after accepting the facts as alleged in the Complaint as true, the Complaint fails to state causes of action for breach of fiduciary duty, the imposition of a constructive trust, fraud and civil conspiracy (*see, Noble v. Graham*, 8 AD3d 641, 642; *Hart v. Scott*, 8 AD3d 532; *Sokol v. Addison*, 293 AD2d 600, 601).

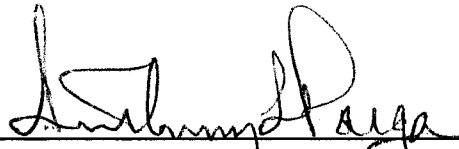
The Complaint does not allege facts which establish that any fiduciary duty existed between the parties (*Rattenni v. Cerreta*, 285 AD2d 636, 637). "A fiduciary relationship may exist where one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge (*see, Wiener v. Lazard Freres & Co.*, 241 AD2d 114; *Penato v. George*, 52 AD2d 939), but an arms-length business relationship does not give rise to a fiduciary obligation (*see, Wiener v. Lazarad Freres & Co., supra*) "(*Wit Holding Corp. v. Klein*, 282 AD2d 527, 529). Here the parties had, at best, an arms-length oral

contractual relationship, and there are no allegations that the defendants had superior knowledge to that of the plaintiff, "a successful real estate professional" or that the plaintiff reasonably relied upon the defendants' superior knowledge in negotiating and purchasing the subject properties (*see, Cuomo v. Mahapak Nat. Bank*, 5 AD3d 621, 622; *Sokol v. Addison, supra*). Nor can the parties' oral agreement be construed to be a partnership, which would create a fiduciary obligation, since (1) no partnership formed for the purpose of purchasing and conveying real property can be recognized without the existence of a written agreement to satisfy the Statute of Frauds, and (2) there was no agreement between the parties to share in the losses as well as the profits (*see, Chanler v. Roberts*, 200 AD2d 489, 490-491; General Obligations Law §5-703[1], [2], [3].). The lack of a fiduciary relationship between the parties at bar and the absence of a valid breach of fiduciary duty claim also requires the dismissal of plaintiff's cause of action for the imposition of a constructive trust since the plaintiff cannot prove the first element needed, i.e., a confidential or fiduciary relationship (*Sokol v. Addison, supra; see generally, Cerabono v. Price*, 7 AD3d 479, 480).

As to the plaintiff's claim for fraud, "a cause of action to recover damages for fraud does not lie where, as here, the only fraud claimed related to an alleged breach of contract", which has not been and could not be pleaded here (*Cavalry Invs., LLC v. Household Auto. Fin. Corp.*, 8 AD3d 317, 318; *Sokol v. Addison, supra; Wit Holding Corp. v. Klein*, 282 AD2d 527, 528; *compare, Klein v. Gutman, supra; Kaufman v. Cohen, supra*). To sustain a cause of action based on actual fraud, the plaintiff must allege that (1) the defendants made material misrepresentations that were false, (2) the defendants knew the representations were false and made them with intent to deceive the plaintiff, (3) the plaintiff justifiably relied on the defendants' representations, and (4) the plaintiff was injured as a result of the representations (*Cerabono v. Price*, 7 AD3d 479, 480). "The general rule is that fraud cannot be predicated upon statements that are promissory in nature at the time they are made and which relate to future actions or conduct" (*Cerabono v. Price, supra*;

Brown v. Lockwood, 76 AD2d 721, 731). The purported promises made by the defendants demonstrate, at most, misrepresentation of intentions to perform under a contract, which are insufficient to alleged fraud (*Calvary Invs., LLC v. Household Auto. Fin. Corp.*, *supra*; *WIT Holding Corp. v. Klein*, *supra*; *Brown v. Lockwood*, *supra*; cf. *M&A Oasis, Inc. v. MTM Assocs. L. P.*, 307 AD2d 872, 873). Finally, in light of the dismissal of the fraud cause of action, the (civil) conspiracy to commit fraud cause of action cannot stand alone since New York does not recognize civil conspiracy to commit fraud as an independent cause of action (*Sokol v. Addison*, *supra*).

Dated: December 13, 2004.



Anthony L. Parga, J.S.C.

ENTERED

DEC 20 2004

NASSAU COUNTY
COUNTY CLERK'S OFFICE