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Sabourin v Chodos
2020 NY Slip Op 20186
Decided on July 30, 2020
Supreme Court, New York County
Borrok, J.
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Supreme Court, New York County

**Isabelle Sabourin, SHERIFF ISHAK, I.T. GLOBAL MEDIA
LLC, ZINK MEDIA GROUP, KASHI INTERNATIONAL
LLC, Plaintiff,**

against

Adam Chodos, Defendant.

650591/2015

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Andrew Borrok, J.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198 were read on this motion to/for SUMMARY [*2]JUDGMENT(AFTER JOINDER

Upon the foregoing documents, and for the reasons set forth below, Adam Chodos' motion for summary judgment dismissing the complaint pursuant to CPLR § 3212 following the completion of discovery is denied in its entirety.

I. The Relevant Facts and Circumstances

This is a case about a lawyer's involvement in a complex fraud perpetrated by William Jack Frost (aka Bill Frost), an investor in a fashion and lifestyle magazine known as Z!NK (founded in 2002), on its founders, Isabelle Sabourin and Sheriff Ishak (collectively, **Z!NK's Founders**). Although the fraud dates back to 2008, the facts surrounding the lawyer's involvement are alleged to have been unknown until discovery in the 2013-14 Arbitration (hereinafter defined).

More specifically, in 2007, Mr. Frost agreed to invest a total of \$8 million in Z!NK Magazine in exchange for a 25% equity stake in a new joint venture known as I.T. Global Media, LLC (**ITGM**), which took ownership over Z!NK Magazine and its intellectual property rights. Up until the 2013-14 Arbitration, Z!NK's Founders understood Mr. Chodos' role to be that of merely representing Mr. Frost in the negotiations leading up to the deal and later representing ITGM (Chodos Aff., ¶ 6).

The relationship between Mr. Frost and Z!NK's Founders got off to a rocky start. After Mr. Frost defaulted on his initial funding obligations within the first 30 days, Mr. Ishak told Mr. Frost the deal was off and removed him as a manager. But when Mr. Frost was able to come up with the first \$2 million, Mr. Ishak agreed to revive the deal. One of Mr. Frost's companies, F4 Capital Management, LLC (**F4**), provided an additional \$2 million between late 2007 and early 2008, including \$1 million obtained by Mr. Chodos from an undisclosed source and transferred into F4's accounts from an account controlled by Mr. Chodos. The source of the funds and Mr. Chodos' involvement in the transfer were not disclosed to Z!NK's Founders.

In June 2008, Mr. Frost provided Z!NK's Founders with a \$6 million check drawn on an account in Mr. Frost's father's name. Mr. Frost claimed that his father was a majority equity holder and Chairman of the Board of Synovus Bank in Florida, and that ITGM could earn 1.5% more in interest with Synovus Bank than at any other bank. Z!NK's Founders agreed to deposit the \$6 million check into an account at Synovus Bank. Mr. Frost indicated that he would take care of opening the account and depositing the check, and he subsequently presented Mr. Ishak with forged account statements showing a balance of \$6 million. In August 2008, when Ms. Sabourin sought to transfer funds from the Synovus Bank account to ITGM's Commerce Bank account to cover operating expenses, Mr. Frost intervened, stating that he would take care of it instead. The next day, Mr. Frost transferred \$230,000 to ITGM's Commerce Bank account.

What Z!NK's Founders did not know, however, was that Mr. Frost had not transferred the money out of the account at Synovus Bank that was supposed to have been created for ITGM. Instead, he had transferred the money out of his then wife Jennifer R. Frost's account. In September 2008, when Mr. Ishak attempted to withdraw money from the Commerce Bank [*3] account for payroll, he learned that there were insufficient funds in the account and that he had been removed as an authorized person on the account. Next,

he tried to access ITGM's account at Synovus Bank only to learn that the Synovus Bank account did not exist. This was all part of what Z!NK's Founders allege to be a scheme by Messrs. Frost and Chodos to wrest control of the Z!NK business and loot its assets. They allege that, between 2008 and 2010, Mr. Frost, with substantial assistance from Mr. Chodos, engaged in a campaign of misrepresentations and forgeries in an attempt to take over Z!NK Magazine.

For example, Mr. Frost, with the assistance of Mr. Chodos, created a document that purported to reflect Sheriff Ishak's resignation as a manager of ITGM (NYSCEF Doc. No. 145). Mr. Frost demanded that his employee, Amy Walko, notarize the document even though Mr. Ishak had not signed it, and then Mr. Frost forged Mr. Ishak's signature (Walko Tr at 64:4-22).

In September 2008, using the fraudulent resignation letter of Mr. Ishak, Messrs. Frost and Chodos took full control over ITGM, terminated its employees, stopped payment to all vendors, and closed all of its bank accounts.

On October 8, 2008, Mr. Chodos sent an email (the **October 8th Email**) to Mr. Ishak informing him that Mr. Frost had been hospitalized due to metal poisoning from his time in Macedonia, and he was taking over the reins of ITGM in Mr. Frost's absence. In addition, in the October 8th Email, Mr. Chodos acknowledged that Mr. Frost and Mr. Ishak were partners, indicated that based on his experience as a former auditor the books had significant inconsistencies, and dissuaded Mr. Ishak from retaining an accountant to examine the inconsistencies and file the tax returns:

The partnership between you and Bill regarding Zink cannot continue as it has. For the immediate term Bill has been advised by his physicians to have no travel and minimize workload. It is unfair to both Bill and Zink to put business affairs on hold for weeks or perhaps months. Secondly, as you may recall, I am a former auditor, and after speaking with Amanda and reviewing some of the accounting documents there are significant inconsistencies and accounting problems with Zink. Frost did not cause them and cannot be associated with them. *I understand that you have been requesting documents so an accountant you know can file the returns before they are due next week. Given the complexity of the returns, and the host of accounting issues, it is not practical nor advisable to bring in an accountant we do not know.* As Bill is the manager

and the tax matters partner per the operating agreement, this is his function. (NYSCEF Doc. No. 176 at 4 [emphasis added]).

On October 20, 2008, Mr. Chodos sent an email to Mr. Ishak firing him:

[I]t has come to my attention that Jormic has been announcing to ITGM/Zink employees, vendors, etc. that Frost is "on medical leave". Again, you have no authority per the operating agreement to remove the manager or put anyone on leave. The Commerce bank accounts have been abused by Jormic/you and no documentation has been provided despite multiple requests and will be closed as soon as possible. As you are actively damaging the business, F4 Capital Management LLC is the sole manager of ITGM, you are hereby notified that you are relieved of duty, effective immediately, as an officer or management of ITGM and are to relinquish all company information to me as counsel for [*4] the manager. As you have now reneged on your investor suggestions, F4 will actively market and sell the business. Any further misdeeds by Jormic or you will be prosecuted to the fullest extent. I have discussed with Frost that the manager has a duty to review all compliance and it appears there are department of labor, new york state sales tax, and internal revenue service issues

(NYSCEF Doc. No. 176 at 2).

Later that day, Mr. Frost sent Mr. Ishak a letter referring to the email sent from Mr. Chodos earlier in the day indicating that since Mr. Ishak's "resignation" on March 29, 2007, he was an employee, and purporting to terminate his employment at Z!NK Magazine and accusing him of certain financial improprieties (NYSCEF Doc. No. 146). On November 6, 2008, Mr. Ishak purported to assign the trademark associated with Z!NK Magazine from ITGM back to Jormic Publishing Company, Ms. Sabourin's company, which had originally owned the mark (NYSCEF Doc. No. 148).

In December 2008, Mr. Chodos filed papers with the U.S. Patent and Trademark Office purporting to assign all of the rights, title and interest in the Z!NK trademark and U.S. Trademark registration number 3,057,318 from ITGM to Cavolino 430, LLC (**Cavolino**), a company owned by Mr. Frost, and prepared and submitted an agreement signed by Mr. Frost on behalf of ITGM ostensibly effectuating the transfer. Mr. Chodos also filed papers with the New York and Delaware Secretaries of State purporting to

dissolve ITGM without so much as informing Z!NK's Founders. As further discussed below, this was not known to Mr. Ishak or Ms. Sabourin until the 2013-14 Arbitration.

Inasmuch as Mr. Ishak needed an account to continue Z!NK Magazine's operations, he opened a new account at Commerce Bank. However, Mr. Chodos sent a letter, dated December 3, 2008, to Robert Jacobs at Commerce Bank, demanding that the new account be frozen. He followed up with an email the next day claiming that Mr. Ishak was a defendant in related litigation and threatened to inform the bank's corporate headquarters and contact the state banking authority if the account was not closed (NYSCEF Doc. No. 186). On January 21, 2009, Mr. Chodos forwarded the forged resignation letter and other documents and asserted that Sheriff Ishak had no authority to act on ITGM's behalf. As discussed more fully below, he sent additional emails threatening legal action against TD Bank on February 24, 2009, March 5, 2009, and March 23, 2009 (NYSCEF Doc. No. 187). On March 9, 2009, Mr. Chodos sent an email to Alexa Internet Customer service claiming that Cavolino was the owner of the domain www.zinkmag.com (NYSCEF Doc. No. 189).

Mr. Chodos also drafted and notarized several promissory notes and security agreements purporting to evidence debts due in 2008 totaling approximately \$4 million, and he caused ITGM's accountants to file false tax returns on behalf of ITGM in February 2009 acknowledging the fraudulent debts and a Schedule K-1 Form showing that one of Z!NK's Founders' companies, Kashi International, LLC, had received \$4 million in distributions in 2008 (Compl., ¶¶ 69, 70). The problem is that the distributions never happened and the K-1 was completely fabricated.

Subsequently, on May 15, 2009, Mr. Chodos prepared and notarized certain additional Secured Promissory Notes and Pledge Security Agreements in favor of companies owned by Mr. Frost evidencing fictitious debts that were falsely backdated, including: (i) a Secured Promissory Note and Pledge Security Agreement, dated June 23, 2008, in the principal amount of \$11,400, from ITGM in favor of Air One Connections, LLC, (ii) a Secured Promissory Note and Pledge Security Agreement, dated November 10, 2008, in the principal amount of \$719,857.79 from ITGM in favor of Capitalla, LLC, (iii) a Secured Promissory Note and Pledge Security Agreement, dated October 1, 2008, in the principal amount of \$20,000, from ITGM to Capitalla, LLC, Series A, (iv) a Secured Promissory Note and Pledge Agreement, dated August 22, 2008, in the principal amount

of \$17,363.78, from ITGM in favor of F4, and (v) a Secured Promissory Note and Pledge Security Agreement, dated August 29, 2008, from ITGM in favor of F4 Group, LP (NYSCEF Doc. No. 152). Each debt was purportedly secured by a security interest in 100% of ITGM's intellectual property, and each loan was fabricated to reflect that the loans were already mature and more than six months in default as of the date the documents were executed. Notably, Mr. Chodos had already dissolved ITGM and transferred its assets, including its intellectual properties, to Cavolino.

Additionally, Mr. Chodos wrote a detailed letter to the Office of the Comptroller of Currency complaining that TD Bank had been complicit in irregular activities by permitting Sheriff Ishak to open a new account for ITGM after Mr. Chodos had closed an existing one (Compl., ¶ 112), and made false statements to the Federal Bureau of Investigations, the New York County District Attorney's Office, the Internal Revenue Service, and other authorities (*id.*, ¶ 113). As a result, ITGM's bank accounts were frozen, Mr. Ishak was prevented from accessing the company's funds or bank records, and in 2009, Mr. Ishak became the subject of an investigation by the FBI and the target of Grand Jury Proceedings (*id.*). These investigations were allegedly abandoned when the various authorities learned that several of the key documents were not authentic and that Mr. Ishak's signature had been forged, information the authorities learned because Ms. Walko admitted that she had notarized the documents without seeing them signed by Mr. Ishak (whom she had never met) and witnessed Bill Frost practicing Mr. Ishak's signature (*id.*, ¶ 115).

Z!NK's Founders allege that the underlying facts surrounding Mr. Chodos' involvement were unknown to Z!NK's Founders because at some point in 2008, Mr. Frost travelled from Florida to New York and pilfered all of the documents and any evidence of the fraudulent scheme from Z!NK's offices and scanned them into his personal computer. As Ms. Walko testified:

Q All right. So what happened with ZINK?

A Billy went in. Well, he took a suitcase of mine. I had a really big suitcase, huge, black suitcase. And I think he was at my house dropping off — like he and his wife were dropping off like a Christmas bonus thing, like shop list or whatever, and just saying Hi. I think they did that to Amanda too.

So, anyway, he saw my suitcase there because I was going to Pennsylvania. He said, [*5]That's huge, I may need to borrow that. I was like, Okay, whatever. I thought he was, like, traveling.

So he asked to borrow it in 2008. And he would come back from ZINK Magazine literally with suitcases in the middle of his living room because our office was in his condominium. And we all sat around a table like this and worked. That was the office in his home.

So the suitcase, open it up, file after file, document after document, everything. Old magazines of ZINK, personal files of Sheriff's. Just everything. I'm like, What are you doing, what is all this?

And he said, We need to scan it all in the computer to have it.

And I said, Well, what are they going to do.

He's like, Well, they don't need it, we're taking them over. And he did that, gosh, ten times, maybe, with that suitcase. I had to beg to get it back.

But — so he took every document, Verizon Wireless, Verizon, everything. Every piece of paper. Basically every piece of paper. But — and we had to put everything in the computer.

That's why I hired Amanda, because it was a big job. So his wife scanned all the documents in and then had to organize it.

(Walko Tr. at 38:12-39:20).

Ms. Walko further explained:

So it was basically all the files of running the company. Of course, he didn't strip down taking desks or anything like that. But it was the everyday things that you needed, all the office stuff, files.

(*id.* at 40:2-5).

Mr. Chodos was aware of Mr. Frost's plan and they discussed it together (*id.* at 41:12-20). Indeed, according to Ms. Walko's testimony at the 2013-14 Arbitration, Mr. Chodos may have advised Mr. Frost to do it. In any event, by taking everything out of the office, Mr. Frost effectively shuttered the company and prevented it from operating.

On January 27, 2010, Z!NK's Founders commenced a lawsuit against Mr. Frost and certain others (Compl., ¶ 116). The complaint in that action was amended on March 18, 2011. ***Before the commencement of discovery*** on August 19, 2011, the complaint was dismissed as to [*6] certain individuals (*id.*). On September 13, 2012, the matter was referred to arbitration (the **2013-14 Arbitration**). During the 2013-14 Arbitration, Mr. Frost frustrated discovery so much so that the arbitrator noted in his April 1, 2014 award:

Frost continued to stonewall the process and produced nothing in response to Claimants' document requests. In addition to ignoring orders and literally every other deadline he faced, Frost has made every conceivable effort to impede the timely and orderly disposition of this arbitration. While adverse inferences against Respondents would certainly be appropriate in the circumstances, such inferences are not necessary since the facts as to Frost's conduct were clearly established at the hearing

(NYSCEF Doc. No. 13 at 14).

In fact, document production in the 2013-14 Arbitration occurred in August 2013 and testimony occurred in September, 2013 (Compl., ¶ 32). Mr. Chodos participated in the 2013-14 Arbitration. According to Z!NK's Founders, Mr. Chodos participated both as Mr. Frost's attorney and as a fact witness (*id.*, ¶ 120). According to Mr. Chodos, however, he did not represent Mr. Frost in the proceeding (NYSCEF Doc. No. 154 at 1, fn 1).

At the 2013-14 Arbitration both Mr. Chodos and Ms. Walko testified on September 18, 2013 — i.e., less than 2 years before the initial Summons with Notice was filed in this case on February 26, 2015. Through the evidence and testimony adduced in the 2013-14 Arbitration, Z!NK's Founder's allege that they learned, for the first time, the facts underlying what had transpired.

At the 2013-14 Arbitration, Ms. Walko, as Mr. Frost's former executive assistant and office manager, testified that Messrs. Frost and Chodos had a history of working together prior to their involvement with Z!NK's Founders. They were good friends and Mr. Chodos had helped Mr. Frost incorporate 12-15 companies (Walko Tr. at 14:15-16, 26:11). In this particular case, Mr. Chodos assisted Mr. Frost achieve his "main goal," which was to "screw Sheriff over and take the company over," by "filing the documents" and "**giving him advice on how to do it**" (*id.* at 26:20-25 [emphasis added]). From Ms. Walko and Mr. Frost's other assistant, Amanda Ward's perspective, Mr. Chodos was more than just Mr. Frost's lawyer, but was also his business advisor, and Mr. Frost did not do anything without consulting with Mr. Chodos (*id.* at 30:10-19).

Ms. Walko explained that it was Mr. Frost's intention from the beginning to take over Z!NK Magazine and that he "undermined Sheriff [Ishak] to take over the company" (*id.* at 15:21-22, 21:4-9). She stated that Mr. Frost "saw how disorganized [Sheriff Ishak] was" and thought he could take advantage of him (*id.* at 22:20-25).

At the conclusion of the 2013-14 Arbitration, the arbitrator, John Wilkinson, signed the final award of arbitration on April 1, 2014 (NYSCEF Doc. No. 13) awarding Z!NK's Founders \$56,400,000.00 against Mr. Frost. On February 23, 2015, Z!NK's Founders entered judgment against Mr. Frost in the amount of \$62,380,605.50. But by the time the judgment was entered, Mr. Frost had disappeared.

The documents and testimony adduced in the course of the 2013-14 Arbitration revealed Mr. Chodos' previously undisclosed and unknown involvement in the fraud. In other words, and for the avoidance of doubt, Z!NK's Founders allege that the documentary evidence described above, including Mr. Chodos' letters and emails, the fabricated promissory notes, bank records, and other evidence showing Mr. Chodos' involvement, was not known or otherwise available to Z!NK's Founders, and Ms. Walko had not yet testified as to Mr. Chodos' participation in the fraud.

With this information newly discovered during the course of the 2013-14 Arbitration either during document discovery in August 2013 or when Mr. Chodos and Ms. Walko testified on September 18, 2013, Z!NK's Founders brought this action against Mr. Chodos by filing a summons with notice on February 26, 2015 and a complaint on March 30, 2015, asserting causes of action for fraud, aiding and abetting fraud, unjust enrichment,

aiding and abetting breach of fiduciary duty, civil conspiracy to commit conversion, and tortious interference with economic advantage, and seeking damages of not less than \$5 million.

II. Discussion

Summary judgment will be granted only when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit (CPLR § 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The proponent of a summary judgment motion carries the initial burden to make a *prima facie* showing of entitlement to judgment as a matter of law (*Alvarez*, 68 NY2d at 324). Failure to make such a showing requires denial of the motion (*id.*, citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing is made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a triable issue of fact (*Alvarez*, 68 NY2d at 324).

Mr. Chodos argues that summary judgment should be granted dismissing the complaint because (i) the statute of limitations has run, (ii) he should not be held liable for his clients' actions, and (iii) the damages not ascertainable.

A. Statute of Limitations

i. The Motion to Dismiss the First (Fraud) and Second (Aiding and Abetting Fraud) Causes of Action is Denied

CPLR § 3106(b) requires that to bring an action based on fraud, it must be pled with particularity:

Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.

To prevail on a fraud cause of action, a plaintiff must establish: "a misrepresentation or a material omission of fact which was false and known to be false by [the] defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Mandarin Trading Ltd. v Wildenstein*, 16 [*7]NY3d 173, 178 [2011] [internal quotation marks and citation omitted]). An action based on fraud must be commenced within six years from the commission of the fraud or within two years from the time that the fraud was discovered or, with reasonable diligence, could have been discovered (CPLR § 213 [8]; [*Saphir Intl., SA v UBS PaineWebber Inc.*, 25 AD3d 315](#), 315 [1st Dept 2006]).

Mr. Chodos, relying on *Harty v Lenci* (294 AD2d 296 [1st Dept 2002]) for the proposition that a proponent is bound by their prior testimony and cannot create an issue of fact based solely on a subsequent contrary affidavit, argues based on the testimony of Mr. Ishak, where he indicated that he believed that Mr. Chodos was "complicit" in the fraud back in 2008, that the fraud cause of action must be dismissed because it is barred by the statute of limitations. To wit, Mr. Ishak testified:

Q: So at that point when Mr. Chodos sent you the letter [dated October 20, 2008] and spoke to you, did you come to the conclusion that Mr. Chodos was complicit in Frost's fraud?

A: Yes, I believe so.

* * *

Q: Did this [October 20, 2008 letter] contribute to your belief that Mr. Chodos was part of the Frost fraud of you?

A: Absolutely

* * *

Q: at that point in September 2008 you also believed that Adam Chodos was complicit in Mr. Frost's fraud, correct?

Mr. Mohamadi: Objection.

As far as the word "complicit" in a legal fashion, you can answer as far as you understand it in general terms.

A: I believe he was involved.

(Ishak Tr. at 146:8-16, 159:25-160:1-8,184:6-13).

Mr. Chodos' arguments fail. As discussed above, a cause of action grounded in fraud must satisfy CPLR § 3016(b). Nothing in the testimony cited by Mr. Chodos establishes *the facts* known by Z!NK's Founders or that they knew or had reason to know of his involvement prior to the 2013-14 Arbitration. Put another way, and in the oft-quoted words of Howard Baker, Mr. Chodos fails to meet his burden of coming forward with evidence establishing 'what the Z!NK Founders knew' and 'when they knew it,' or that they could have, with reasonable [*8]diligence, discovered any such facts necessary to satisfy CPLR § 3016(b) to have brought an action against him previously.

In fact, the evidence adduced in this case establishes that Z!NK's Founders were cut-off from records that may have revealed Mr. Chodos' involvement in the fraud because Mr. Frost literally purloined Z!NK's business records which theft, based on Ms. Walko's testimony, was perhaps at the direction and upon advice from Mr. Chodos himself, making it impossible for them to have known the nature and extent of Mr. Chodos' active participation in the scheme.

To wit, Z!NK's Founders did not know, because they could not have known, about the following conduct by Mr. Chodos until it was disclosed either at the earliest during the document production in August 2013 or when Mr. Chodos and Ms. Walko testified on September 18, 2013 during the 2013-14 Arbitration (i.e., in either case, well within the 2 year discovery rule as this action was commenced on February 26, 2015): (a) that Mr. Chodos created the document purporting to reflect Mr. Ishak's resignation as a manager of ITGM, thereby giving full control of the company to Mr. Frost, in March 2008 (b) that Mr. Chodos created falsified promissory notes in favor of companies owned and controlled by Mr. Frost in June 2008, (c) that Mr. Chodos filed papers with the U.S. Patent and Trademark Office purporting to assign all of the rights, title, and interest in Z!NK Magazine's intellectual property to a company owned and controlled by Bill Frost in December 2008, (d) that Mr. Chodos filed papers with the New York and Delaware Secretaries of State purporting to dissolve ITGM without informing Z!NKs; Founders in December 2008, (e) that Mr. Chodos sent numerous emails and letters to Commerce Bank

(and later TD Bank) starting in December 2008 and continuing through March 2009 demanding that the bank deny Z!NK's Founders access to ITGM's account and that the account be frozen, (f) that Mr. Chodos sent an email to Alexa Internet Customer Service in March 2009 claiming that a third-party company owned and controlled by Mr. Frost was the true owner of ITGM's intellectual property, and (g) that Mr. Chodos created the fabricated Secured Promissory Notes and Pledge Security Agreements in favor of various companies controlled by Mr. Frost-controlled companies in May 2009.

According to Z!NK's Founders, Mr. Chodos threatened Mr. Ishak with deportation as part of his role in helping Mr. Frost carry out his fraudulent scheme — based on incorrect information he only had based on the purloined records, which included Mr. Ishak's former immigration papers. As the arbitrator observed in the 2013-14 Arbitration, "[w]hile Chodos' statement about Ishak's illegal presence in the U.S. was false, Ishak was understandably intimidated by Chodos' threat because Ishak believed Frost had high connections and could make a deportation proceeding a nightmare, even if the case had no merit" (NYSCEF Doc. No. 163 at 8). The impact of the threat may have been amplified by Mr. Frost's representations that Mr. Chodos had "ties with the Russian mob" (*id.*).

In addition, as discussed above, Mr. Frost's former employee, Ms. Walko, testified that she worked for Mr. Frost as his executive assistant and office manager in 2007 and 2008, during which time she communicated with Mr. Chodos on a weekly and sometimes daily basis and that Mr. Frost took all of his direction from Mr. Chodos and never made any decisions without consulting with him (Walko Tr. at 12:1-18, 13:9, 30:10-19). As Ms. Walko explained, Mr. Frost [*9] "didn't do anything without calling Adam [Chodos]" and, Mr. Chodos "was the right-hand man with everything. Whether it was money, business advice, anything, he was his guy" (*id.* at 30:18-19, 121:22-25). Significantly, as discussed above, at some point in Mr. Frost's absence, Mr. Chodos even took over the company. But without any of this information learned during the 2013-14 Arbitration, the Z!NK Founders could not have known the detailed facts about Mr. Chodos' involvement in Mr. Frost's scheme.

For the avoidance of doubt, to the extent that Mr. Ishak argues that he misunderstood the questions at this deposition and was trying to explain that he *now* believes that Mr. Chodos was involved in the fraud as early as September 2008, this is consistent with Z!

NK's Founders not even referring to Mr. Chodos in their 2011 complaint and in any event is, at most, potential impeachment evidence for trial.

Finally, it also appears that Mr. Chodos has unclean hands. His alleged participation in the preparation of fraudulent instruments and notarized documents raises issues including whether there was an obligation to reveal his role in the fraud or resign from the matter and not continue to assist Mr. Frost (*see* Rules of Professional Conduct [22 NYCRR § 1200.0], Rule 1.2 [d] ["A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client"]). Having failed to do so, he cannot complain of Z!NK's Founders' alleged delay and was not harmed or prejudiced by any such "delay" in any event.

Accordingly, there are issues of fact precluding summary judgment relating, among other things, to (i) the relationship of Messrs. Chodos and Frost; (ii) the likelihood that Mr. Chodos knew, should have known, or maybe played a role in assisting Mr. Frost in forging the documents or stealing all the business records; (iii) the reasons for the delay in the 2013-14 Arbitration and whether it really took Z!NK's Founders until the 2013-14 Arbitration to have the facts to satisfy CPLR § 3016(b); and (iv) how Mr. Chodos' alleged ethical breaches may have further altered Z!NK's Founders' ability to learn the facts. Accordingly, the motion for summary judgment must be denied.

ii. The Motion to Dismiss the Fourth Cause of Action (Aiding and Abetting Breach of Fiduciary Duty) is Denied

The elements of a cause of action for aiding and abetting breach of fiduciary duty are: "(1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach" ([Schroeder v Pinterest Inc.](#), 133 AD3d 12, 24-25 [1st Dept 2015]). Where allegations of fraud are essential to the claim, a breach of fiduciary duty claim (including an action for aiding and abetting breach of fiduciary duty) is subject to a statute of limitations of six-years or two years from the time the plaintiff discovered, or with reasonable diligence could have discovered, the fraud (CPLR § 213 [8]; [IDT Corp. v Morgan Stanley Dean Witter & Co.](#), 12 NY3d 132, 139 [1st Dept 2009]).

Mr. Chodos argues that the claim must be dismissed as untimely because the claim [*10] accrued in September 2008, when Z!NK's Founders allege that Mr. Frost made over \$1 million in fraudulent transfers from ITGM's accounts to accounts controlled by his father and his various corporate entities and tendered the \$6 million fraudulent check and this lawsuit was not filed until 2015 after the statute of limitations expired in September 2014. In their opposition papers, Z!NK's Founders argue that the claim is not untimely because they did not learn the facts concerning Mr. Chodos' actions until the 2013-14 Arbitration and, in any event, to the extent that the conduct complained of occurred after February 26, 2009, a claim based on such conduct would be timely.

Here, as discussed above, the allegations of Mr. Chodos' involvement in Mr. Frost's fraudulent scheme that form the basis of the aiding and abetting breach of fiduciary duty claim occurred in 2008 and 2009. There are disputed issues of material fact as to when Z!NK's Founders knew or should have known about Mr. Chodos' alleged role in assisting Mr. Frost in his breach of his fiduciary duty as a managing member of ITGM. However, the alleged conduct that occurred after February 26, 2009, including, without limitation, (1) sending threatening emails to Commerce Bank demanding that it freeze ITGM's account in February and March 2009, (2) preparing and filing false tax returns for ITGM in February 2009, (3) sending an e-mail to Alexa Internet Customer Service claiming that a third party was the owner of ITGM's intellectual property in March 2009, and (4) drafting fraudulent Secured Promissory Notes and Pledge Security Agreements to Bill Frost's companies May 2009, is within the six-year statute of limitations, irrespective of the question of the discovery rule's applicability. In addition, to the extent that Mr. Chodos argues that the fiduciary duty claim is untimely, the First Department's decision in [*Cusimano v Schnurr* \(137 AD3d 527 \[1st Dept 2016\]\)](#) is instructive.

In *Cusimano*, the plaintiffs were engaged in a series of disputes with certain family members concerning family-owned commercial real estate businesses (137 AD3d at 528). The defendants were CPAs who allegedly provided accounting and tax services to the plaintiffs and the various family-owned entities (*id.*). The plaintiffs sued the defendants in the Supreme Court in September 2011 alleging breach of fiduciary duty, accounting malpractice, and aiding and abetting fraud, among other claims (*id.*). In September 2012, the plaintiffs filed a demand for arbitration containing nearly identical claims and moved to dismiss the action that they previously filed in the Supreme Court or, in the alternative,

for a stay pending arbitration (*id.*). The defendants cross-moved to dismiss the action with prejudice or to permanently stay the arbitration claims as time-barred (*id.* at 528-529). The Supreme Court held that many of the plaintiffs' claims were time-barred and granted a permanent stay of the arbitration of those claims (*id.* at 529). The First Department determined that the question of whether the claims were barred by the applicable statutes of limitations was for the arbitrator to decide, but the Court of Appeals subsequently held that the issue of timeliness should be determined by the court and remitted the case to the First Department (*id.*).

On remittitur, the First Department determined that although the fiduciary duty claims sought monetary relief, they were nevertheless subject to a six-year limitations period because the claims were based on allegations of fraud (*id.* at 530). As the Court explained, the plaintiffs alleged that certain defendants created fraudulent promissory notes, prepared falsified tax returns and a Schedule K-1 form, and forged one of the plaintiff's signatures on checks and bank [*11] documents, and such allegations of fraud were integral to the claims rather than merely incidental (*id.*). Accordingly, the Court held that the six-year limitations period applied (*id.* at 530).

In addition, the First Department held, *inter alia*, that the fraud claims were barred under the six-year statute of limitations and the two-year discovery rule was inapplicable because the plaintiffs were on inquiry notice or had actual knowledge of the alleged fraud more than two years prior to the commencement of the arbitration (*id.* at 531). Specifically, the First Department found that the plaintiffs were aware of the promissory note, knew of the need to seek additional information but failed to do so, and accepted explanations as to income reported on tax filings but never received without questioning what happened to the company's earnings (*id.*).

Here, as in *Cusimano*, Z!NK's Founders' fiduciary duty claims are based on allegations of fraud, including, among other things, that Mr. Chodos created fabricated promissory notes and other financial instruments and caused the preparation of fraudulent tax filings including a fraudulent Schedule K-1 form. Therefore, as in *Cusimano*, the allegations of fraud in this case are integral to the fiduciary duty claims, and the six-year statute of limitations and two-year discovery rule for fraud apply. Significantly, and unlike in *Cusimano*, however, Z!NK's Founders were not on inquiry notice of Mr. Chodos' involvement in the fraud. As discussed above, any documents or other evidence that might

have put them on inquiry notice were stolen by Mr. Frost in 2008, and even as Mr. Frost's scheme played out and Z!NK's Founders became aware of the fraud, they did not have the facts to know about Mr. Chodos' alleged involvement until at the earliest in August 2013 when documents were produced during the 2013-14 Arbitration — i.e., well within the two year discovery rule.

Aside from arguing that the claim is untimely, Mr. Chodos offers no evidence in support of his motion and fails to make a *prima facie* showing of entitlement to judgment as a matter of law, specifically with respect to the post-February 26, 2009 conduct. Accordingly, the motion for summary judgment is denied as it relates to the fourth cause of action for aiding and abetting breach of fiduciary duty.

iii. The Remaining Claims are Timely

The Third Cause of Action (unjust enrichment) is subject to a six-year statute of limitations ([Whittemore v Yeo, 112 AD3d 475](#), 476 [1st Dept 2013]). A cause of action for unjust enrichment "accrues upon the occurrence of the alleged wrongful act giving rise to restitution (*Kaufman v Cohen*, 307 AD2d 113, 127 [1st Dept 2003]). Here Mr. Chodos argues that the only benefit that he received was a \$25,000 legal fee, which fee was paid on or before September 16, 2008 (NYSCEF Doc. No. 177). The statute of limitations for the fifth cause of action (civil conspiracy to commit conversion) is three years from the when the alleged conversion or taking occurred ([Harlem Cap. Ctr., LLC v Rosen & Gordon, LLC, 145 AD3d 579](#), 580 [1st Dept 2016]). Mr. Chodos argues that, as alleged in the complaint, any acts in furtherance of Mr. Frost's conversion of funds or property were complete by 2009 at the latest and are therefore also untimely as they would have lapsed in 2012. Finally, the sixth cause of action (tortious interference with prospective economic advantage) is subject to a three-year statute of [*12]limitations ([Susman v Commerzbank Capital Mkts. Corp., 95 AD3d 589](#), 590 [1st Dept 2012]). Here, again, Mr. Chodos argues that any acts in furtherance of Mr. Frost's conversion of funds or property were complete by 2009 at the latest and therefore lapsed in 2012.

These arguments all fail. Initially, the court notes that Z!NK's Founders allege that Mr. Chodos was unjustly enriched through 2009 and into 2010, and any evidence of unjust enrichment from that time period is well within the six year statute of limitations

including, without limitation, any evidence that Mr. Chodos made anything from either the IP rights that were allegedly stolen or any other salary, tax benefits, expenses, or other remuneration during the time he evicted Z!NK's Founders including any equity that he received to the extent that he took over the business.

The statute of limitations as it relates to the otherwise time-barred conduct is tolled under the doctrine of equitable estoppel due to Mr. Chodos' conduct. Equitable estoppel applies "where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action" ([Zumpano v Quinn](#), 6 NY3d 666, 674 [2006], quoting *Simcuski v Saeli*, 44 NY2d 442, 449 [1978]). The alleged deception underlying the plaintiff's equitable estoppel argument must be distinct from the wrongdoing alleged as the basis for the plaintiff's tort claims for tolling to apply (*Cusimano*, 137 AD3d at 532). It is "fundamental to the application of equitable estoppel for plaintiffs to establish that **subsequent** and **specific** actions by defendants somehow kept them from timely bringing suit" (*Zumpano*, 6 NY3d at 674 [emphasis added]).

Although Mr. Chodos argues that equitable tolling should not apply because the conduct is not separate from the alleged fraud, the argument is unavailing. A properly instructed jury could well find that every day that Mr. Chodos concealed what he did in 2008-2010, he was committing a new breach of duty separate from the fraud that constituted the wrong against Z!NK's Founders by Mr. Frost. In addition, Mr. Chodos may well have actively frustrated the 2013-14 Arbitration by not revealing Mr. Frost's theft of the records and his own fraud — i.e., he had a duty to disclose and he ignored it which further damaged Z!NK's Founders. By frustrating the process, he tolled the statute of limitations he now wants to claim. For the avoidance of doubt, it is of no moment that the arbitrator did not make a finding against him personally. Third, Mr. Chodos took over the company. When he did that, he either became a principal of the company or was at least acting as its attorney-in-fact with respect to Z!NK's Founders because he was acting as the 'merged' company's counsel, or both. ^[FN1] He was providing legal advice to Z!NK's business as it then existed within Mr. Frost's entity. He also owed Z!NK's Founders a continuing duty of honest legal services. He did not provide that every day that he concealed things from them — even after the active fraud was complete. In other words, the complaint is replete with facts separate from the active fraud to support equitable tolling of the statute of limitations. Accordingly, none of the claims are time barred.

B. The Claims are Based on Adam Chodos' Conduct, Not Bill Frost's Conduct

Mr. Chodos also argues that he cannot be held liable for his client's fraud. According to [*13]Mr. Chodos, he merely performed his services in an appropriate manner as outside counsel for ITGM and cannot be held liable Mr. Frost's fraud. The argument fails. Z!NK's Founders are not suing Mr. Chodos for Mr. Frost's conduct. They are suing him for his own alleged involvement in the fraud. As discussed above, the documentary evidence and testimony adduced in the 2013-14 Arbitration revealed that Mr. Chodos played an instrumental role in the alleged fraud sufficient to, at a minimum, raise a triable issue of fact concerning the nature and extent of his involvement. Accordingly, to the extent that Mr. Chodos argues that the complaint should be dismissed on the ground that this is merely a case of "guilt by association" and there is no evidence that he was complicit in the fraud, the argument fails.

C. Damages are Ascertainable

Finally, Mr. Chodos argues that the complaint must be dismissed because the damages are speculative and are not cognizable as a matter of law because he disagrees with the basis for the award in the 2013-14 Arbitration. This argument also fails. As reflected by the Deal Points, which were negotiated at arm's length by counsel (including Mr. Chodos himself), Mr. Frost acquired a 25% interest in ITGM for an investment of \$8 million (NYSCEF Doc. No. 139). Based on this investment, in the 2013-14 Arbitration, the arbitrator found that the valuation of the company would be \$32 million. Z!NK's Founders' valuation expert, Jorge Amador, JD, CPA, CFF, testified in his deposition that this is a reasonable basis for a valuation of the company (Amador Tr. at 36:22-38-25). Mr. Chodos' valuation expert, Mandeep Trivedi, CFA, ASA estimates the value of ITGM to be "nil" based on its income and cash flow analysis (NYSCEF Doc. No. 153). The competing expert opinions raise an issue of material fact for trial. At trial, among other things, the jury could certainly consider whether Mr. Chodos' conduct contributed to any destruction in value which he now asserts. Therefore, to the extent that the motion to dismiss is based on the argument that the damages are unascertainable, the motion is denied.

Accordingly, it is

ORDERED that the motion to dismiss is denied in its entirety.

DATE 7/30/2020

ANDREW BORROK, J.S.C.

Footnotes

Footnote 1: If a finding were to be made that he in fact became a principal, he would be bound by the 2013-14 Arbitration.

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