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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 3

Present: HON. UTE WOLFF LALLY  
Justice

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J. LEONARD SPODEK a/k/a LEONARD  
SPODEK, ROSALIND SPODEK and  
IRVING SPODEK,

Motion Sequence #26  
Submitted January 26, 2011

Plaintiffs,

-against-

INDEX NO: 32644/96

CHARLES NEISS, individually and as executor  
of the Estate of BENCION NEISS, FAY NEISS  
a/k/a FAY PODRABINEK, DEVORAH RUBIN,  
MICHAEL RUBIN, JACOB NEISS, BRENDA GARCIA,  
MOSES FRIED, BERNICE FRIED, NEISS  
MANAGEMENT CORP., BERTA MANAGEMENT  
CORP., 80 CLARKSON REALTY CORP., PREMIUM  
600 REALTY CORP., ROBINSON 1601 REALTY  
CORP., 789 ST. MARKS REALTY CORP., NORTH  
751 REALTY CORP., 751 ST. MARKS, LLC, 985  
OCEAN AVENUE, LLC, THE NEISS FAMILY TRUST  
and JOHN DOE "1" through JOHN DOE "10",

Defendants.

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The following papers were read on this motion to dismiss cross claims:

|                                |      |
|--------------------------------|------|
| Notice of Motion and Affs..... | 1-3  |
| Affs in Opposition.....        | 4&5  |
| Affs in Reply.....             | 6&7  |
| Memorandum of Law.....         | 8&8a |

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Memorandum of Law.....8&8a

This motion by defendants Charles Neiss, individually and as executor of the Estate of Bencion Neiss, Fay Neiss a/k/a Fay Podrabinek, Devorah Rubin, Jacob Neiss, Brenda Garcia, Neiss Management Corp, Berta Management Corp., Brenda Management Corp., 80 Clarkson Realty Corp., Premium 600 Realty Corp, Robinson 1601 Realty Corp., 789 St. Marks Realty Corp., North 751 Realty Corp., 751 St. Marks, LLC., 985 Ocean Avenue, LLC., and The Neiss Family Trust for an order pursuant to CPLR 3211(a) 1., 3., 5., and 7. Dismissing the cross-claims of defendants Moses Fried and Bernice Fried as asserted in their Second Amended Verified Answer to Amended Complaint, dated May 5, 2010 is disposed of as follows:

Plaintiffs J. Leonard Spodek a/k/a Leonard Spodek, Rosalind Spodek and Irving Spodek (the "Plaintiffs") commenced this action in 1996. During this fifteen year litigation, Plaintiffs and defendants Moses Fried and Bernice Fried (the "Fried Defendants") have been represented by various counsel. In addition, Defendants Charles Neiss, individually and as executor of the estate of Bencion Neiss, Fay Neiss a/k/a Fay Podrabinek, Devorah Rubin, Michael Rubin, Jacob Neiss, Brenda Garcia, Neiss Management Corp., Berta Management, Corp., Brenda Management Corp., 80 Clarkson Realty Corp., Premium 600 Realty Corp., Robinson 1601 Realty Corp., 789 St. Marks Realty Corp., North 751 Realty Corp., 985 Ocean Ave, LLC, The Neiss Family Trust (the "Neiss Defendants") have been represented by a number of law firms. There have been two referees appointed by this Court (one of whom has passed away) and two main witnesses in this litigation that have passed away. To say that this litigation has been pending for some time would be an understatement. With the assistance of the Court appointed Discovery Referee, Michael

Cardello III, the matter has finally been certified, ready for trial, and the Note of Issue is scheduled to be filed by May 31, 2011.

On May 5, 2010, the Fried Defendants moved, pursuant to CPLR §3025(b), for leave to amend the Amended Verified Answer dated November 25, 2002 and to assert two cross-claims against the Neiss Defendants arising from claims that apparently accrued in 1997. Pursuant to a stipulation entered into by the Fried Defendants and the Neiss Defendants dated May 7, 2010, the Neiss Defendants did not oppose the CPLR §3025(b) motion but did expressly reserve their right to move to dismiss any claims of the Fried Defendants now asserted in the second amended answer ("Second Amended Answer"). In an Order dated June 11, 2010, the Court granted the Fried Defendants' motion without opposition.

On July 12, 2010, the Neiss Defendants moved to dismiss the cross-claims contained in the Second Amended Answer, based upon a statute of limitations defense pursuant to CPLR 3211(a)5; the equitable doctrine of laches; documentary evidence pursuant CPLR 3211(a)1; and the failure to state a cause of action pursuant to CPLR 3211(a)7 ("Motion to Dismiss"). On November 19, 2010, the Fried Defendants filed an affirmation in opposition to the Neiss Defendants' Motion to Dismiss. Then, on January 25, 2011, the Neiss Defendants filed a reply affirmation in further support of their Motion to Dismiss ("Reply"). A recitation of the background facts is necessary to understand the context of this Motion to Dismiss before the Court.

In 1990, 789 St. Marks Realty Corp. ("789 St. Marks") was incorporated. Leonard Spodek ("Spodek") Moses Fried ("Fried") and Bencion Neiss agreed that they would each individually own 33.33% of 789 St. Marks. The primary asset owned by 789 St. Marks was

the premises located at 789 St. Marks Avenue, Brooklyn, New York, which was an apartment building comprised of 135 units (the "Property").

In or about October, 1993, the City of New York brought a proceeding against 789 St. Marks, based upon its failure to pay real estate taxes in which title to the Property would go to the City of New York. Accordingly, that same month (October 1993), Spodek, Bencion Neiss and Fried entered into an agreement, whereby Bencion Neiss agreed to pay the City of New York for the unpaid taxes that had accrued on the Property. In consideration, Spodek and Fried each assigned their respective 33.33% ownership interest in 789 St. Marks to Bencion Neiss. Spodek and Fried each agreed to pay back Bencion Neiss their share of the taxes, plus 10% interest, that Bencion Neiss paid to the City of New York to stop the tax sale from occurring. Further, Spodek, Bencion Neiss and Fried agreed that if Spodek or Fried failed to pay back Bencion Neiss their respective proportionate share of the unpaid real estate taxes on the Property, plus 10% interest, by December 31, 1994, then that individual would forfeit his respective interest (*i.e.*, his share of 789 St. Marks) to Bencion Neiss.

Spodek and Fried purportedly failed to make the required payment to Bencion Neiss by December 31, 1994. Consequently, Plaintiffs commenced this action by filing a Summons and Verified Complaint (the "Original Complaint") on or about November 26, 1996, alleging twenty causes of action against all of the defendants in this action concerning a variety of properties, including the Property owned by 789 St. Marks, for fraud, breach of contract, negligence and breach of fiduciary duty. Initially, the Neiss Defendants and Fried Defendants were represented by the same counsel, Segal,

Goodman & Goodman ("SG&G"). On or about January 8, 1997, the Neiss Defendants and Fried Defendants filed their Amended Verified Answer (the "Amended Answer").

Fried stated that between 1990 and 1997, he provided management and construction services to 789 St. Marks. In 1997, Fried alleged that he was removed from the management of 789 St. Marks by Charles Neiss, the son of Bencion Neiss. Additionally, Fried contends that Charles Neiss allegedly took possession, to the exclusion of Fried, of all of 789 St. Marks' books, records, documents and computer materials.

On or about September 13, 2002, Plaintiffs filed their Amended Complaint. The Neiss Defendants and Fried Defendants -- who terminated SG&G and retained Katlowitz & Associates as their counsel ("Katlowitz") -- filed an Amended Verified Answer (the "First Amended Answer") on or about November 25, 2002.<sup>1</sup>

On December 11, 2002, Katlowitz advised the Fried Defendants, via letter, that it would no longer be able to represent them because of a potential conflict of interest. Additionally, Katlowitz, in that letter, advised the Fried Defendants to retain new counsel. However, less than a month later, Katlowitz retracted its withdrawal of representation of the Fried Defendants in a second letter dated January 9, 2003, which stated:

[d]uring the past several weeks, we have researched the issue of whether representing you as well as Charles Neiss and the other Neiss Defendants would create a potential conflict of interest. We are pleased to advise you that, at this juncture, we believe that no conflict of interest exists. We will, in fact, be able to continue representing both you and Mr. Neiss.

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<sup>1</sup> The Neiss Defendants and Fried Defendants have submitted two documents to this Court titled the "Amended Verified Answer." For the purposes of this decision the Amended Verified Answer filed on or about January 8, 1997 will be referred to as the "Amended Answer" and the Amended Verified Answer filed on or about November 25, 2002 will be referred to as the "First Amended Answer".

Then, on July 15, 2004, Katlowitz transmitted a letter to the Fried Defendants confirming that Katlowitz was terminated as the Fried Defendants' attorney and that the Court had directed the Fried Defendants to retain new counsel and appear at the Court Conference scheduled for August 17, 2004.

On January 10, 2005, a letter was sent by Katlowitz to Plaintiffs' counsel confirming that at the Court Conference that transpired that same day, Harry Brown, Esq., new counsel for the Fried Defendants, notified the Court that the Fried Defendants intend to assert cross-claims against the Neiss Defendants. Notwithstanding the comments contained in this letter dated January 10, 2005, the Fried Defendants never asserted any cross-claims against the Neiss Defendants until they filed their Second Amended Verified Answer more than five years later. The Second Amended Verified Answer states two cross-claims against the Neiss Defendants which appear to assert causes of action for breach of contract, breach of fiduciary duty, fraud, and unjust enrichment.

Throughout the past fifteen years, the parties have exchanged voluminous documents and information and taken numerous depositions of parties and non-party witnesses. As stated earlier, the matter has been certified, trial ready, and a Note of Issue is required to be filed by May 31, 2011. Notwithstanding, on May 5, 2010, the Fried Defendants sought leave to file their Second Amended Answer in which they asserted, for the very first time, cross-claims against the Neiss Defendants which was granted as unopposed. The filing of the Second Amended Answer by the Fried Defendants precipitated the Neiss Defendants' instant Motion to Dismiss.

On or about July 12, 2010, the Neiss Defendants filed the Motion to Dismiss the cross-claims contained in the Second Amended Answer. In their motion, the Neiss

Defendants allege that the Fried Defendants' cross-claims are time-barred under the statute of limitations pursuant to CPLR 3211(a)5; violate the equitable doctrine of laches; and fail to state a cause of action pursuant to CPLR 3211(a)7. In addition, the Neiss Defendants have moved to dismiss the Fried Defendants' cross-claims based upon documentary evidence under CPLR 3211(a)(7). Lastly, the Motion to Dismiss submitted by the Neiss Defendants seeks dismissal of Bernice Fried's cross-claims because allegedly she does not have standing.

On November 19, 2010, the Fried Defendants filed opposition papers in which they argue that their cross-claims were timely brought, and therefore, do not violate the statute of limitations and, further, that the equitable doctrine of laches is an equitable defense, which cannot defeat the Fried Defendants' cross-claims for legal redress. Additionally, the Fried Defendants argue that the Neiss Defendants would not be prejudiced by the assertion of the cross-claims contained in the Second Amended Answer and that the documentary evidence submitted by the Neiss Defendants is not dispositive of the Fried Defendants' cross-claims.

**A. The Neiss Defendants' Arguments in Support of Dismissal Based Upon the Failure by the Fried Defendants' to Timely Bring Their Cross-Claims**

The Neiss Defendants argue that all of the Fried Defendants' cross-claims are derived from a breach of contract, which occurred in or about 1997, based upon the wrongful termination of Fried by Charles Neiss from the Property. Therefore, according to the Neiss Defendants, the potential claims by the Fried Defendants accrued in 1997, carry a six year statute of limitations, and were required to have been brought by 2003. The



Neiss Defendants argue that since the cross-claims were first brought in 2010, seven years after the statute of limitations expired in 2003, they are untimely and, accordingly, should be dismissed.

Anticipating the Fried Defendants' contention that the cross-claims were timely brought because they "relate back" to a prior pleading, the Neiss Defendants argue that the relation back doctrine, enumerated in CPLR 203, is inapplicable. According to the Neiss Defendants, neither the Amended Answer nor the First Amended Answer provide any notice of the alleged breach by Charles Neiss in 1997 of the 1990 agreement between Spodek, Bencion Neiss and Fried which resulted in damages to Fried. Moreover, the Neiss Defendants argue that the relation back doctrine cannot apply to an amended pleading, as CPLR 203(f) only applies to an "original pleading".

**B. The Fried Defendants' Arguments Claiming That Their Cross-Claims Were Timely Brought and Therefore Do Not Violate the Statute of Limitations**

The Fried Defendants agree with the Neiss Defendants that their cross-claims contained in the Second Amended Answer are based upon the 1990 agreement between Spodek, Bencion Neiss and Fried. However, the Fried Defendants argue that 789 St. Marks has not been dissolved and, therefore, the statute of limitations period has not yet commenced. As such, according to the Fried Defendants, their cross-claims contained in the Second Amended Answer are not time-barred.

Alternatively, the Fried Defendants further argue that their cross-claims accrued in 1997, when Charles Neiss terminated Fried from 789 St. Marks and the Property, and took possession of 789 St. Mark's books and records to the exclusion of Fried. While the

statute of limitations may ordinarily have run by 2003, the Fried Defendants contend, in this case, the statute of limitations was tolled from 1997 until July 15, 2004, based upon the joint representation by Katlowitz of the Neiss Defendants and Fried Defendants. Therefore, the Fried Defendants argue that their cross-claims have been timely brought since they were commenced on May 5, 2010, within the applicable six year statute of limitations period.

The Fried Defendants submit a third argument as to why their cross-claims do not violate the statute of limitations. According to the Fried Defendants, the allegations contained in Paragraphs 101 and 102 of the Amended Complaint, when read in conjunction with Paragraphs 20 and 21 of the First Amended Answer, provide the requisite notice sufficient to alert the Neiss Defendants that the Fried Defendants have possible cross-claims against them. Therefore, according to the Fried Defendants, the cross-claims asserted in the Second Amended Answer, in 2010, should relate back to the Amended Complaint and First Amended Answer, which were both filed in 2002. As such, the Fried Defendants argue that the cross-claims are not time-barred because they relate back to 2002, when the Amended Complaint and First Amended Answer were filed.

CPLR 213(2) provides that an action based upon a contractual obligation or liability, express or implied, must be commenced within six years from the date the breach occurs. CPLR 213(8) provides that the statute of limitations for a fraud claim is the greater of six years from the commission of the fraud or two years from the date the fraud was discovered or could have been discovered with reasonable diligence. (CPLR 213). An action for unjust enrichment is analyzed under CPLR 213(1) and is subject to a six year statute of limitations. (*Natimir Rest. Supply Ltd. v London 62 Co.*, 140 AD2d 261). The

statute of limitations period for a breach of fiduciary duty claim depends upon the substantive remedy sought. (*Kaufman v Cohen*, 307 AD2d 113, 118). When the relief sought is equitable in nature, the statute of limitations period is six years pursuant to CPLR 213(1). (*Id.*) However, when only money damages are sought, New York courts apply the three year statute of limitations of CPLR 214(4) for injury to property. (*Id.*) However, a party to an action will be allowed to amend a pleading to interpose a claim that had previously not been asserted in the original pleading, which would otherwise be time-barred under the statute of limitations, if the original pleading provides notice of the transactions, occurrences, or events which give rise to that claim. (CPLR 203). This is commonly referred to as the relation-back doctrine.

"The 'linchpin' of the relation-back doctrine is whether the new defendant had notice within the applicable limitations period." (*Lopez v Wyckoff Heights Med. Ctr.*, 78 AD3d 664, 665 citing *Alvarado v Beth Israel Med. Ctr.*, 60 AD3d 981, 982; see also *Hellman v Hoenig & Co., Inc.*, 244 AD2d 529). Notwithstanding, "[m]ere notice alone, independent of the original pleading, is inadequate; the pleadings themselves must give the requisite notice." (*Shapiro v Schoninger*, 122 AD2d 38, 40; see also *Alvarado*, *supra* at 983). Accordingly, the relation-back doctrine will only be applied when the asserted cause of action arose out of the same facts and circumstances which gave rise to the causes of action asserted in the party's original pleading. (*Schutz v Finkelstein, Bruckman, Wohl, Most & Rothman*, 247 AD2d 460). By contrast, the relation-back doctrine will not save an otherwise untimely claim where the events that give rise to that claim occur after service of the original pleading. [*Maxon v Franklin Traffic Serv., Inc.*, 261 AD2d 830, 831 (first and

third causes of action in second amended complaint arose from conduct occurring after service of amended complaint and therefore it was impossible to relate back to the amended complaint].

While not explicitly stated in CPLR 203(f), a cross-claim has been held to relate back to the original answer, if there is notice in the original answer that such cross-claims exist. [*Long v Sowande*, 27 AD3d 247, 249, applying CPLR 203(f) to determine whether cross-claim related back to original answer, but nevertheless holding that requisite notice was not provided sufficient to relate back]. Moreover, it is well-settled that general denials and affirmative defenses asserted in an answer do not provide sufficient notice to the plaintiff of the defendant's existing claims under CPLR 203(f). [*U.S. Fid. & Guar. Co. v Delmar Dev. Partners, LLC*, 22 AD3d 1017, 1021; *Hager v Hager*, 177 AD2d 401, 402].

In contrast to CPLR 203(f), CPLR 203(d) provides, in pertinent part, that:

"[a] defense or counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed, except that if the defense or counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed."

Although not specifically referred to in the statute, CPLR 203(d) applies to cross-claims as well. (*Colichio v Bailey*, 77 AD2d 694). However, in *Coleman, Grasso & Zasada Appraisals Inc. v Coleman*, 246 AD2d 893, 894, the Appellate Division Third Department concluded that CPLR 203(d) does not apply to claims first asserted in an amended answer. [See *Jones v Gelles*, 125 AD2d 794; see also *Am. Stock Exch., LLC v. Mopex, Inc.*, 230 F. Supp. 2d 333, 336 (S.D.N.Y. 2002); 75A N.Y. Jur. 2d) Limitations and Laches §312

("[203(d)] does not apply to a counterclaim asserted for the first time in an amended pleading").

In a situation where a party seeks to invoke the relation-back doctrine, the burden is first on the party seeking dismissal under the statute of limitations. Once that party has shown that the claim would otherwise be time-barred, the burden then shifts to the party seeking to have its claim relate back to a previous pleading to demonstrate that the relation-back doctrine is applicable. (*Lopez v Wyckoff Heights Med. Ctr.*, 78 AD3d at 665; *Alvarado*, *supra* at 982; *Cardamone v Ricotta*, 47 AD3d 659, 660). However, the application of this doctrine is ultimately within the "sound judicial discretion" of the court to apply if the relaxation of the statute of limitations will not prejudice the adversary. (*Buran v Coupal*, 87 N.Y.2d 173, 177-78).

**THE CROSS-CLAIMS ASSERTED BY THE FRIED DEFENDANTS  
AGAINST THE NEISS DEFENDANTS ARE TIME-BARRED,  
PURSUANT TO THE STATUTE OF LIMITATIONS, AND THEREFORE  
ARE DISMISSED UNDER CPLR §3211(A)(5)**

The Fried Defendants first contend that because 789 St. Marks was never dissolved, the statute of limitations period has yet to accrue. This argument is completely devoid of merit. There is no basis in law to support the legal proposition that the statute of limitations period does not commence in a shareholder dispute based on breach of contract, fraud, breach of fiduciary duty or unjust enrichment until the corporation has been dissolved.

Nor is there any support for the Fried Defendants' legal theory that the statute of limitations was tolled during the seven year period that Katlowitz jointly represented the Neiss Defendants and Fried Defendants. While the Court finds the joint representation by

Katlowitz of both the Neiss Defendants and Fried Defendants until 2004 to be unsettling, there is no legal support for the conclusion that such representation would toll the statute of limitations. Accordingly, this Court cannot agree with the Fried Defendants' contention that the statute of limitations was tolled until the Fried Defendants retained independent counsel in 2004.

Finally, the Court cannot agree with the Fried Defendants' contention that their cross-claims relate back to the Amended Complaint and First Amended Answer. The statute of limitations on any of the asserted claims is at most six years. The Neiss Defendants have satisfied their burden for their Motion to Dismiss that the cross-claims accrued in 1997 and, accordingly, were required to have been brought by 2003. As such, the burden shifts to the Fried Defendants to prove that the relation back doctrine is applicable here to salvage what would otherwise have been untimely cross-claims.

Under CPLR 203(d), a cross-claim asserted for the first time in an amended answer cannot relate back to the original complaint. (*Coleman, supra* at 894; see also *Am. Stock Exch.*, 230 F. Supp. 2d 333 at 336; 75A N.Y. Jur. 2d Limitations and Laches §312). Therefore, the cross-claims contained in the Second Amended Answer cannot relate back to the allegations contained in the Amended Complaint pursuant to CPLR 203(d). Moreover, under CPLR 203(f), a cross-claim in an amended answer has been held to relate back to the original answer, only if there is notice to the third party in the original answer that such cross-claims exist. (See *Long, supra* at 249). Here, there could be no notice plead in the original answer since it was filed prior to the date on which the Fried Defendants' cross-claims accrued.

Notwithstanding, even if the cross-claims asserted in the Second Amended Answer could relate back to the First Amended Answer, though CPLR 203(f) clearly states otherwise, there is not sufficient notice in the First Amended Answer to put the Neiss Defendants on notice that the Fried Defendants may assert a cross-claim against the Neiss Defendants. This is exemplified by the fact that the Neiss Defendants and Fried Defendants were represented by the same counsel until 2004. Further, there are no facts in the allegations contained in the First Amended Answer that concern the alleged breach by Charles Neiss of the 1990 Agreement entered into by Spodek, Bencion Neiss and Fried that purportedly caused damages to Fried in 1997.

Lastly, the application of the relation back doctrine is ultimately within the sound judicial discretion of the Court. (*Buran, supra* at 177-78). This litigation has ensued for almost fifteen years. This action has been certified as ready for trial and the Note of Issue is required to be filed by May 31, 2011. Even if this Court found that the relation-back legal theory technically saved the cross-claims (*i.e.*, that the cross-claims relate back to the original pleadings and therefore, the cross-claims are timely, which they are not), this Court is extremely troubled by the late filing of the cross-claims. The Fried Defendants had many years, with independent counsel, to assert their cross-claims in this action. However, the Fried Defendants chose to assert them in the fourteenth year of this litigation when they were made aware of their potential to bring their cross-claims many years ago.

Counsel for the parties have been working diligently, with the oversight of Mr. Cardello, the Discovery Referee, to move this very old case forward and get it ready for trial. In furtherance of the Court's ruling above, the Court finds that allowing the cross-

claims to go forward this late in the process would be prejudicial to the Neiss Defendants and possibly the Plaintiffs as well. The defense of the cross-claims would certainly delay the adjudication of the matter, namely, delay the trial of this case. Naturally, additional discovery would be necessary to prosecute and defend the cross-claims, and thus, this extremely old case would, in fact, age further. This is unacceptable. At some point, the case needs to end, either by settlement, motion practice, or trial. The parties have waited many years for the discovery process to end. It is now coming to the end. While a few depositions remain, the number is extremely limited. To allow the cross-claims to go forward would further delay the end of discovery and the trial in this case. The Fried Defendants waited many years to assert their cross-claims, which was done at their own peril. This Court will not continue to further delay the process as any further delay would be prejudicial to the Neiss Defendants and Plaintiffs, and thus, justice would not be served by permitting the cross-claims to move forward.

Based upon the foregoing, the Fried Defendants' cross-claims are time-barred under the statute of limitations and are dismissed. Accordingly, this Court finds that the other arguments set forth by the Neiss Defendants to be moot. This motion to dismiss the cross-claims is granted.

Dated: March 31, 2011

  
UTE WOLFF LALLY, J.S.C.

**ENTERED**

APR 05 2011

**HAWAII COUNTY  
COUNTY CLERK'S OFFICE**



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