

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA PART 17
Justice

<u>ALICE FROMER etc.</u>	x	Index Number <u>6161</u> 2006
- against -		Motion Date <u>May 30,</u> 2007
<u>HERMAN FROMER, et al.</u>	x	Motion Cal. Number <u>35</u> Motion Seq. No. <u>1</u>

The following papers numbered 1 to 19 read on this motion by defendants Herman Fromer, Paul Fromer individually and d/b/a National Radio Service and National Sales for an order granting summary judgment dismissing the complaint with prejudice on the grounds of statute of limitations, and lack of capacity or standing to sue. Plaintiff Alice Fromer, as administratrix of the Estate of Rose Fromer cross-moves for an order (1) granting leave to amend the complaint and (2) granting partial summary judgment against defendants on the grounds of collateral estoppel.

	<u>Papers Numbered</u>
Notice of Motion -Affirmation-Exhibits(A-F)	1-4
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Upon the foregoing papers the motion and cross motion are determined as follows:

Plaintiff Alice Fromer as the Administratrix of the Estate of Rose Fromer commenced this action on March 17, 2006 by the filing of a summons with notice, stating that this is an action for monetary damages in the sum of \$5,000,000.00 for conversion, tortious interference with prospective advantage, accounting and breach of fiduciary duty. A demand for the service of a complaint

was made on May 30, 2003, and a verified complaint dated June 13, 2006 was served on the defendants. The first cause of action is for an accounting, the second cause of action seeks to recover damages for conversion, the third cause of action seeks to impose a constructive trust, and the fourth cause of action seeks to recover compensatory and punitive damages for tortious interference with economic advantage. Defendants have served an answer and interposed 14 affirmative defenses, including statute of limitations and lack of legal capacity and lack of standing to maintain this action.

This action is brought on behalf of the Estate of Rose Fromer. Rose Fromer was married to Harry Fromer, and Alice Fromer is their daughter. Harry Fromer died on December 5, 1997. Rose Fromer died on April 29, 2002. Defendant Herman Fromer is the brother of Harry Fromer, and defendant Paul Fromer is the nephew of both Harry and Herman and a cousin of Alice Fromer. The complaint alleges, in essence, that Harry Fromer owned a business known as National Sales Company, that he accumulated various assets during his lifetime, and that when Harry was hospitalized with terminal cancer in November 1997, and after his death, the defendants misappropriated and converted the profits, assets and accounts of National Sales Company, and Harry's other assets, including bank accounts and safe deposit boxes, for their own use and benefit.

Cal Fromer, Harry Fromer's son, made an application pursuant to a power of attorney, on behalf of Harry Fromer, in the Supreme Court, New York County, for pre-action discovery, including the taking of a deposition of Max Fromer, Hymie Fromer, Paul Fromer and Richard M. Cohlman, and for pre-action production of documents that Harry had signed while in the hospital. The petition, dated November 11, 1997, alleged that Harry and Herman were partners in National Sales Company, that they had amassed assets of \$3,500,000.00 which was invested in various joint checking accounts, certificates of deposits, brokerage houses and treasury bill, and that large amounts of cash remained in safety deposit boxes; that while hospitalized Harry executed certain documents presented to him by Herman Fromer, in the company of Paul Fromer and Mr. Cohlman, and that Cal Fromer sought to protect his father's interest in the assets of National Sales Company. The court therein, in an order dated November 26, 1997 denied the application, except as to Harry Fromer's deposition (Matter of Harry Fromer, Index No. 121309/97). Harry Fromer was not deposed prior to his death.

On July 10, 1998, Alice Fromer executed a petition for letters of administration of the Estate of Harry Fromer, which listed a right of action on behalf of the decedent against "Herman Fromer

a/k/a Hymie Fromer and Paul Fromer for the wrongful taking of assets of the deceased before and after his death." This paragraph was crossed-out at the time the petition was filed with the Surrogate's Court, Queens County. The petition requested that letters of administration be issued to Alice Fromer and that the authority of the representative of the estate be limited with respect to "bringing an discovery proceeding at a later date." In support of the petition, an affirmation by an attorney for the heirs at law of Harry Fromer, dated July 28, 1988, stated that Harry Fromer was the sole owner of a business known as National Sales Company; that Herman Fromer and Paul Fromer had taken over said business and refused Harry's wife and children access the business premises; that there were bank accounts in the names of Harry and Herman Fromer which were emptied after Harry's death, or while he was dying, and that these monies belonged to Harry; that the heirs at law, identified as Rose Fromer, Alice Fromer and her brother Cal Fromer, requested that an action at law be commenced to in connection with these bank accounts and said business; that it was necessary to appoint an administrator of the estate, so that discovery could be conducted to determine and locate the assets held in Harry's name at the time of his death; and that the heirs knew of no other assets held in Harry's name at the time of his death. Rose Fromer executed a Renunciation of Letters of Administration on July 10, 1998. Letters of Administration of the Estate of Harry Fromer were issued to Alice Fromer on August 14, 1998.

Sometime in 2000, Herman Fromer commenced an action in Supreme Court, New York County, against Banco Popular for conversion and breach of contract based upon the bank's restraint of funds in an account under the name of National Sales. The court, in an order dated August 11, 2000 determined that the Estate of Harry Fromer should be added as a party and directed the bank to serve a copy of the petition and pleadings on Harry Fromer's representative. Following a nonjury trial solely on the issue of the ownership of the funds in the Banco Popular account, the Supreme Court, New York County entered an order on October 21, 2004, which directed that \$44,397.99 on deposit in an account at Banco Popular be paid to the Administratrix of the Estate of Harry Fromer. The Appellate Division in an order dated May 10, 2005, unanimously affirmed, finding that "the court's decision to award the funds in the National Sales bank account to the estate of Harry Fromer was proper since the decedent's signature appeared on the business certificate for National Sales, on the only signature card for the National Sales bank account, and on the lease for the store premises" (Fromer v Banco Popular de Puerto Rico, 18 AD3d 260 [2005]).

On August 12, 2005, Cal Fromer executed a waiver of citation, renunciation and consent to appointment of administrator of the Estate of Rose Fromer. On September 22, 2005, Alice Fromer was issued Letters of Administration for the Estate of Rose Fromer.

It is well settled that the executor or administrator of a decedent's estate, not his heirs, has the duty to recover personal property of the estate (see McQuaide v Perot, 223 NY 75, 79 [1918]; Ponnambalam v Ponnambalam, 35 AD3d 571 [2006]; Gaentner v Benkovich, 18 AD3d 424, 426 [2005]; Jackson v Kessner, 206 AD2d 123, 126 [1994]). Alice Fromer, as the Administrator of the Estate of Rose Fromer, can only seek to recover assets that belonged to Rose Fromer. Plaintiff, however, is seeking to recover assets that allegedly belonged to Harry Fromer, and does not allege that said assets were ever the property of Rose Fromer. Rose Fromer explicitly renounced her right to be appointed administrator of Harry Fromer's Estate, and thus did not possess the right to commence an action to recover the assets of the Estate of Harry Fromer during her lifetime. Thus, Alice Fromer as the Administratrix of the Estate of Rose Fromer cannot exercise a right that did not belong to Rose Fromer. Thus, under the law of this State, Alice Fromer as the Administratrix of the Estate of Rose Fromer lacks the capacity to sue for the recovery of funds and to impose a constructive trust on assets that were allegedly taken from Harry Fromer's bank accounts, safety deposit boxes and other financial accounts. Therefore, that branch of defendants' motion which seeks to dismiss the complaint on the grounds of lack of capacity or standing to sue is granted.

That branch of plaintiff's cross motion which seeks leave to amend the complaint in order to assert a claim in her individual capacity, and as the administratrix of both her mother and father's estates, is denied.

Plaintiff's cross motion for leave to amend the complaint in order is denied, as she has failed to submit a copy of the proposed pleading for the court's review (see Bridges v 735 Riverside Drive, Inc., 119 AD2d 789 [1986]; Goldner Trucking Corp. v Stoll Packing Corp., 12 AD3d 639 [1960]). Furthermore, neither Alice Fromer nor Cal Fromer may maintain a claim in their individual capacities to recover assets that allegedly belong to the Estate of Harry Fromer, and Alice Fromer may not maintain a claim to recover such assets as the Administratrix of the Estate of Rose Fromer, for the reasons stated above.

That branch of the defendants' motion which seeks to dismiss the complaint on the grounds of statute of limitations is granted, and that branch of the plaintiff's cross motion which seeks leave

to amend the complaint in order to permit an action by Alice Fromer as the Administratrix of the Estate of Harry Fromer, is denied, as these claims are all time-barred.

The first cause alleges a breach of a fiduciary duty and seeks an accounting. An action for an accounting is governed by a six-years statute of limitations (CPLR 213), and accrues when the duty to pay arises. The evidence presented establishes that both prior to her father's death, and as of July 28, 1998, Alice Fromer, Cal Fromer and their mother Rose Fromer were aware of the purported acts by Herman Fromer and Paul Fromer, and sought to obtain possession of Harry's business records and bank accounts and other assets during his lifetime or shortly after he died. Plaintiff alleges that although Herman was permitted to run National Sales Company during Harry's illness, he improperly transferred Harry's funds into his own accounts either during Harry's lifetime or after his death. Plaintiff does not allege any fiduciary relationship between the individual defendants and herself. Therefore, the court finds that as the action for an accounting accrued no later than July 28, 2006, the first cause of action is time-barred.

The second cause of action for conversion is governed by a three-year statute of limitations (CPLR 214[3]) and generally accrues when the conversion takes place (see Sporn v MCA Records, 58 NY2d 482, 487 [1983]). "Where the original possession is lawful, a conversion does not occur until the defendant refuses to return the property after demand or until he sooner disposes of the property" (Johnson v Gumer, 94 AD2d 955 [1983]). However, "where [the] right [to demand] grows out of the receipt or detention of money or property by a trustee, agent ... or other person acting in a fiduciary capacity, the time within which the action must be commenced shall be computed from the time when the person having the right to make the demand discovered the facts upon which the right depends" (CPLR 206[a][1]; see Bernstein v La Rue, 120 AD2d 476, 477 [1986]). Here, although plaintiff alleges a fiduciary relationship between her father Harry, and his brother Herman, during her father's last illness and hospitalization, she does not allege that a fiduciary relationship existed after her father's death. In addition, the documentary evidence presented establishes that as of July 1998, Alice Fromer was aware of the alleged conversion by Herman Fromer and Paul Fromer, and that demand for access to the business premises, for the books and accounts and for the return of all business assets, including money, had been refused. Therefore, the statute of limitations accrued and began to run no later than July 28, 1998, and thus this cause of action is time-barred.

The third cause of action seeks to impose a constructive trust. A cause of action to impose a constructive trust or equitable lien is subject to a six-year limitations period (see CPLR 213[1]; Mazzone v Mazzone, 269 AD2d 574, 574-575 [2000]) that "commences to run upon the occurrence of the wrongful act giving rise to a duty of restitution" (Ponnambalam v Ponnambalam, 35 AD3d 571 [2006] [citation and internal quotation marks omitted]; see Boronow v Boronow, 111 AD2d 735, 737 [1985]; affd 71 NY2d 284 [1988]; Kitchner v Kitchner, 100 AD2d 954 [1984]). "A determination of when the wrongful act triggering the running of the Statute of Limitations occurs depends upon whether the constructive trustee acquired the property wrongfully, in which case the property would be held adversely from the date of acquisition (see Augustine v Szwed, 77 AD2d 298, 300-301 [1980]; Bey Constr. Co. v Yablonski, 76 AD2d 875 [1980]), or whether the constructive trustee wrongfully withholds property acquired lawfully from the beneficiary, in which case the property would be held adversely from the date the trustee breaches or repudiates the agreement to transfer the property (see Augustine v Szwed, supra at 301)" (Maric Piping v Maric, 271 AD2d 507, 508 [2000]; Morando v Morando, ___ AD3d ___, [June 12, 2007], 2007 NY Slip Op 5239; 2007 NY App Div LEXIS 7442; Sitkowski v Petzing, 175 AD2d 801, 802 [1991]). Here, it is asserted that the property was wrongfully acquired, either during Harry Fromer's lifetime, or after his death on December 5, 1997.

Plaintiff's assertion that she could not have acted prior to the commencement of a prior action by Herman Fromer against Banco Popular was resolved, is rejected. It is noted that Herman Fromer did not commence that action until sometime in 2000, and that the sole relief sought therein was the distribution of funds held in an account at Banco Popular by National Sales. That action did not involve any issues or claims as to any other bank accounts or funds held in the name of either Harry Fromer or National Sales at any other financial institution. Ms. Fromer's ability to commence an action regarding any other funds or accounts, thus was not dependent upon the outcome of the Banco Popular action. The court therefore finds that the cause of action for the imposition of a constructive trust accrued no later than July 28, 1998, as the defendants allegedly wrongfully acquired the property prior to that date, and therefore this claim is time-barred.

The fourth cause of action for tortious interference with economic advantage is governed by a three-year statute of limitations (see CPLR 214[4]; Legion of Christ, Inc. v Rita Cohen Realty Servs., 1 AD3d 572 [2003]; Besicorp Ltd v Kahn, 290 AD2d 147 [2002]). In view of the fact that Alice Fromer was aware of the alleged misappropriation of the business assets,

including the alleged change of a telephone listing, no later than July 28, 1998, this claim is time-barred.

Plaintiff's claim that the doctrine of equitable estoppel should be applied here in order to toll the statute of limitations is rejected. The doctrine of equitable estoppel will prohibit the defendant from raising a statute of limitations defense "'where [the] plaintiff was induced by [the defendant's] fraud, misrepresentations or deception to refrain from filing a timely action' [and] the plaintiff ... reasonabl[y] reli[ed] on the defendant's misrepresentations" (Zumpano v Quinn, 6 NY3d 666, 674 [2006], quoting Simcuski v Saeli, 44 NY2d 442, 449 [1978]; accord Doe v Holy See [State of Vatican City], 17 AD3d 793, 794 [2005], lv denied 6 NY3d 707 [2006]; see Putter v North Shore Univ. Hosp., 7 NY3d 548, 552 [2006]; Ponterio v Kaye, 25 AD3d 865, 868 [2006], lv denied 6 NY3d 714 [2006]). To invoke equitable estoppel, the plaintiff has "to establish that subsequent and specific actions by [the] defendant[] somehow kept [him or her] from timely bringing suit" (Zumpano v Quinn, supra at 674; accord Pahlad v Brustman, 8 NY3d 901 [2007]; Putter v North Shore Univ. Hosp., supra at 552; see Doe v Holy See [State of Vatican City], supra at 794). Notably, "equitable estoppel does not apply where the misrepresentation or act of concealment underlying the estoppel claim is the same act which forms the basis of [the] plaintiff's underlying substantive cause[s] of action" (Kaufman v Cohen, 307 AD2d 113, 122 [2003]; accord Lucas-Plaza Hous. Dev. Corp. v Corey, 23 AD3d 217, 218 [2005]; see Transport Workers Union of Am. Local 100 AFL-CIO v Schwartz, 32 AD3d 710, 714 [2006], lv dismissed 7 NY3d 922 [2006]; see also Rizk v Cohen, 73 NY2d 98, 105-106 [1989]; Robare v Fortune Brands, Inc., 39 AD3d 1045 [2007]). Significantly, the defendant's "mere denial of wrongdoing ... is not sufficient to create an estoppel" (Ponterio v Kaye, supra at 868; see Doe v Holy See [State of Vatican City], supra at 795) because the defendant "is not legally oblig[ated] to make a public confession, or to alert people who may have claims against it to get the benefit of a statute of limitations" (Zumpano v Quinn, supra at 675). However, "concealment without actual misrepresentation may form the basis for invocation of the doctrine if 'there was a fiduciary relationship which gave [the] defendant an obligation to inform [the] plaintiff of facts underlying the claim'" (Doe v Holy See [State of Vatican City], supra at 795, quoting Jordan v Ford Motor Co., 73 AD2d 422, 424 [1980]). A fiduciary relationship exists when "'one party reposes confidence in [another] and reasonably relies on the [other's] superior expertise or knowledge'" (Doe v Holy See [State of Vatican City], supra at 795, quoting WIT Holding Corp. v Klein, 282 AD2d 527, 529 [2001]; Robare v Fortune Brands Inc., supra). Here, the only fiduciary relationship alleged is

that Herman was to manage the business of National Sales Company during Harry's illness and hospitalization. Plaintiff does not allege that the fiduciary relationship continued after Harry's death. Moreover, rather than alleging that she placed confidence in Herman or Paul and relied upon their superior expertise or knowledge, plaintiff accuses these defendants of misappropriating her father's business and assets during his lifetime and after his death. Plaintiff thus cannot establish the existence of a fiduciary relationship between herself and the defendants. It is noted that both Herman Fromer and Paul Fromer, in their affidavits, deny the existence of any fiduciary relationship with either Harry Fromer, or the plaintiff. Finally, plaintiff does not allege any specific misrepresentation by Herman Fromer or Paul Fromer which would have prevented her from commencing suit in a timely fashion, and as she had "timely awareness of the facts requiring [her] to make further inquiry before the statute of limitations expired," an equitable estoppel defense to the statute of limitations is therefore "inappropriate as a matter of law" (see Pahlad v Brustman, supra; quoting Putter v North Shore Univ. Hosp., 7 NY3d 548, 553-554 [2006]).

Plaintiff in her reply papers, asserts for the first time that in addition to the doctrine of equitable estoppel, defendants' motion to dismiss should be denied alternatively under the "relation back doctrine", or on the grounds that the statute of limitations was tolled by Herman Fromer acting as a de facto trustee of the property. "The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion" (Matter of TIG Ins. Co. v Pellegrini, 258 AD2d 658, 685 NYS2d 777 [1999] [internal quotation marks omitted]; see Dannasch v Bifulco, 184 AD2d 415, 417, 585 NYS2d 360 [1992]). Since the defendants have submitted an affirmation opposing these newly raised claims, the court will consider these claims.

Plaintiff's assertion that the within claims necessarily relate back to the commencement of prior litigation between "Harry's Estate and Herman and Paul Fromer", is without merit. "[T]he relation back doctrine allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a co-defendant for Statute of Limitations purposes where the two defendants are 'united in interest'" (Buran v Coupal, 87 NY2d 173, 177 [1995]; Ramos v Cilluffo, 276 AD2d 475 [2000]; see CPLR 203[b]). The doctrine requires the plaintiff to establish that "(1) both claims arose out of the same conduct, transaction or occurrence, (2) the new party is united in interest with the original defendant, and by reason of that

relationship can be charged with such notice of the institution of the action that the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement, and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against that party as well" (Schiavone v Victory Mem. Hosp., 292 AD2d 365, 366 [2002] [internal quotation marks omitted]; Austin v Interfaith Med. Ctr., 264 AD2d 702, 703 [1999]; DeLuca v Baybridge at Bayside Condo. I, 5 AD3d 533, 534-535 [2004]).

As regards the Banco Popular action, the relation-back doctrine is inapplicable, as this doctrine applies to pending actions and not to actions that have long been concluded. The court further notes, that under the second prong of the test, unity of interest will be found only where there is some relationship between the defendants "giving rise to the vicarious liability of one for the conduct of the other" Vanderburg v Brodman, 231 AD2d 146 [1997]; Teer v Queens-Long Island Medical Group, P.C., 303 AD2d 488 [2003]). The notion of control underpins the doctrine of vicarious liability (Vanderburg v Brodman, supra), so that the person in a position to exercise authority or control over the wrongdoer must do so or bear the consequences. (Id.) For purposes of unity interest, the relevant inquiry is whether "the interest of the parties in the subject-matter is such that they [the parties] stand or fall together and that judgment against one will similarly affect the other" (id. at 148). Here, there can be no unity of interest, as Herman Fromer was the plaintiff, and not the defendant, in the prior Banco Popular action, Paul Fromer does not claim any right to the proceeds of the Banco Popular account, and Herman Fromer could not have been vicariously liable for the alleged actions of Paul Fromer, in either the Banco Popular action or the within action.

As regards the prior application for pre-action discovery that application was made by Cal Fromer on behalf of Harry Fromer, pursuant to a power of attorney. That application was determined during Harry's lifetime, and thus does not constitute prior litigation between the Estate of Harry Fromer and the defendants.

Finally, plaintiff's claim that Herman Fromer was acting as the de facto trustee of the property of the Estate of Harry Fromer is without merit. It is clear from the party's submissions that at all times Alice Fromer, her brother and her mother all claimed that Herman Fromer had misappropriated the property of the Estate of Harry Fromer, an act that is clearly inconsistent with that of a "de facto" trustee. Furthermore, Alice Fromer was appointed

as the Administratrix of the Estate of Harry Fromer on August 14, 1998, has represented the Estate in that capacity, and never acknowledged any right on the part of Herman Fromer to act on behalf of the Estate.

In view of the foregoing, defendant's motion to dismiss the complaint on the grounds of lack of standing or capacity to sue and statute of limitations is granted, and plaintiff's cross motion is denied in its entirety.

Dated: September 4, 2007

J.S.C.