

[Alarmex Holdings, LLC v JP Morgan Chase Bank, N.A.](#)

Supreme Court of New York, Appellate Division, First Department

February 7, 2017, Decided ; February 7, 2017, Entered

3011, 152706/15

Reporter

147 A.D.3d 451 *; 48 N.Y.S.3d 19 **; 2017 N.Y. App. Div. LEXIS 930 ***; 2017 NY Slip Op 00930 ****; 2017 WL 484729

[****1] Alarmex Holdings, LLC, Appellant, v JP Morgan Chase Bank, N.A., Respondent.

Prior History: [Dreier v Dreier \(In re Dreier LLP\), 421 BR 60, 2009 Bankr. LEXIS 4018 \(Bankr. S.D.N.Y., 2009\)](#)

Core Terms

funds, fiduciary, aiding and abetting, actual knowledge, escrow account, statute of limitations, cause of action, alleged facts, misappropriated, beneficiary, contractual, time-barred, transferred, amend, fails

Headnotes/Summary

Headnotes

Limitation of Actions—Fraud—Equitable Estoppel—Misappropriation of Funds—No Fiduciary Relationship Existed

Contracts—Agreement for Benefit of Third Persons—Failure to Allege Third-Party Beneficiary of Agreement

Pleading—Sufficiency of Pleading—Fraud—Failure to Allege Actual Knowledge of Fraud

Counsel: [***1] Feder Kaszovitz, LLP, New York (David Sack of counsel), for appellant.

Emmet, Marvin & Martin, LLP, New York (Tyler J. Kandel of counsel), for respondent.

Judges: Concur—Tom, J.P., Renwick, Saxe, Feinman, Gesmer, JJ.

Opinion

[**19] [*451] Order, Supreme Court, New York County (Robert Reed, J.), entered October 23, 2015, which granted defendant's motion to dismiss the complaint as time-barred, unanimously affirmed, without costs.

Plaintiff seeks to recover certain funds that allegedly were wrongfully transferred from an escrow account maintained at a branch of defendant by Marc Dreier, the principal of Dreier LLP, before Dreier LLP filed for bankruptcy. Plaintiff does not dispute that its causes of action are time-barred under the applicable statutes of limitations; it argues that defendant's active concealment of the illicit [**20] transfers equitably estops it from asserting a statute of limitations defense. However, the complaint fails to allege facts showing either that defendant had actual knowledge of the diversion of funds or reason to suspect that the funds were being misappropriated or that a fiduciary relationship existed between the parties that would give rise to a duty to disclose (see [Gonik v Israel Discount Bank of N.Y.](#), 80 AD3d 437, 438, 914 NYS2d 63 [1st Dept 2011]; [Home Sav. of Am. v Amoros](#), 233 AD2d 35, 38-39, 661 NYS2d 635 [1st Dept 1997]). Indeed, the allegations show [***2] that Dreier LLP, as the escrow agent, was the fiduciary, and that defendant was merely the depository bank at which Dreier LLP maintained the escrow account. Thus, defendant had no duty to monitor the subject escrow account "to [*452] safeguard the funds [therein] from fiduciary misappropriation" ([Amoros](#), 233 AD2d at 38).

Plaintiff also failed to allege adequately that it was a third-party beneficiary of the agreement between defendant and Dreier LLP that gave rise to a contractual duty on defendant's part to notify it of the transfer (see

[LaSalle Natl. Bank v Ernst & Young, 285 AD2d 101, 108, 729 NYS2d 671 \[1st Dept 2001\]](#)). Its allegation that it was an intended beneficiary is conclusory. Its contention that the motion court should have permitted the matter to proceed to discovery for defendant to produce the agreement seeks nothing more than a fishing expedition (see [Orix Credit Alliance v Hable Co., 256 AD2d 114, 116, 682 NYS2d 160 \[1st Dept 1998\]](#)).

Plaintiff's argument that the statutes of limitations were tolled by the continuing breach doctrine falls with the failure of its argument that defendant owed it contractual and fiduciary duties.

Plaintiff waived any contention that its third cause of action states a timely claim for aiding and abetting fraud (see [CPLR 213 \[8\]](#)). It denominated the claim as one for "aiding and abetting" without specifying the underlying theory, and never disputed [***3] defendant's characterization of the claim as a claim for aiding and abetting conversion. In any event, the complaint fails to allege facts showing that defendant had actual knowledge of Dreier's fraud (see [Oster v Kirschner, 77 AD3d 51, 55, 905 NYS2d 69 \[1st Dept 2010\]](#)). Without actual knowledge, defendant's allowing of the transfer of funds was routine business service, and does not amount to substantial assistance of the fraud ([McBride v KPMG Intl., 135 AD3d 576, 579, 24 NYS3d 257 \[1st Dept 2016\]](#)).

The court properly denied leave to amend, since the proposed amendments would not have cured the deficiencies (see [CLP Leasing Co., LP v Nessen, 27 AD3d 291, 812 NYS2d 471 \[1st Dept 2006\]](#)). Concur—Tom, J.P., Renwick, Saxe, Feinman and Gesmer, JJ.