Chapter 1

Agency or Fiduciary Causes of Action

1-A INTRODUCTION TO AGENCY OR FIDUCIARY CAUSES OF ACTION

This chapter details causes of action based on agency and fiduciary relationships. In particular, this chapter focuses on situations where a principal may bring an action for breach of its agent's fiduciary duty when the agent acts against the interests of the principal, conducts itself in bad faith, or omits to disclose relevant to employment information. Further, principals may also bring claims against an agent for damages based on negligent collection of debt as well as for claims brought against an escrow agent for improperly distributing escrow funds. The chapter also focuses on claims for breach of fiduciary duties, for example, when an employer may bring a claim for breach of fiduciary duty based on the faithless servant doctrine where an employee acts adversely to its employer, becomes involved in self-dealing, personal interest conflicts, or fraudulently conceals to defraud or mislead. Additionally, claims may also be raised against an obligor, who aided and abetted a disloyal agent.

Third-party claims are also a part of this discussion. A third party may bring an action against an agent when the agent fails to disclose its agency relationship, acts beyond its powers, or breaches a contract. A third party may also bring a claim for personal injury where an agent's negligent acts cause harm to others. Further, a third party may also bring an action against a principal for damages caused by an agent's nonfeasance. Moreover, charitable organizations are not immune from tort liability.

Bailment issues are discussed focusing primarily on their creation and the necessary elements for caring for collateral or security. The chapter discusses an action arising against a consignee for damaged art.

NYCOA01.indd 1 4/11/2022 12:27:30 AM

Additionally, there is a discussion of two possible scenarios of appointing a receiver in New York either by necessity or under the "receiver clause." Finally, the elements for creating a warehouseman or carrier lien on goods and establishing liability claims against a warehouseman or carrier are contained herein.

1-1 AGENT BREACHING FIDUCIARY DUTY TO PRINCIPAL

The elements of an agent breaching a fiduciary duty to a principal cause of action are:

1) an agent-principal relationship has been established;
2) the agent has breached his, her or its fiduciary duty to principal when he, she or it acts:
    a. adversely toward the principal's interests, and
    b. in bad faith, or
    c. in any manner inconsistent with his, her or its agency to the principal in any part of the transaction, or
    d. when the agent omits to disclose any interest which would naturally influence his, her or its conduct in dealing with the subject of the employment.

See Lamdin v. Broadway Surface Adver. Corp., 272 N.Y. 133, 139 (N.Y. 1936) [1, 2].

Notes

Not only must the agent account to his, her or its principal for secret profits, but he, she or it also forfeits any right to compensation for services rendered by him, her or it if he, she or it proves disloyal. *See Lamdin v. Broadway Surface Adver. Corp.*, 272 N.Y. 133, 139 (N.Y. 1936).

Statute of Limitations

Under New York law, a claim for this breach of fiduciary duty would be governed by a three-year limitations period if the action sought monetary relief, but by a six-year period if the action sought equitable relief. *See* New York Civil Practice Law and Rules § 213(2).

1-2 AGENT NEGLIGENT IN COLLECTING DEBT

An agent is required to exercise:

1) good faith in that the agent must disclose when the debt has been collected and the amount collected;
2) with reasonable diligence; and

NYCOA01.indd 2 4/11/2022 12:27:31 AM

3) such skill as is ordinarily possessed by persons of common capacity in collecting debt.

Blonsky v. Allstate Ins. Co., 128 Misc. 2d 981, 491 N.Y.S.2d 895, 897 (N.Y. Sup. Ct., N.Y. Co. 1985) [1, 3]; *Jetter v. Little Falls Dairy Co.*, 101 N.Y.S.2d 980, 982 (N.Y. Sup. Ct., Herkimer Co. 1951) [2].

Notes

The cause of action is for damages, and is not for the debt or its equivalent. Where there is a reasonable probability that collection was possible if the agent had not been negligent, the principal may still collect more than the value of the original debt if the loss proven is greater than the value of the debt. *See Joseph Mogul, Inc. v. C. Lewis Lavine, Inc.*, 247 N.Y. 20, 23, 159 N.E. 708 (N.Y. 1928).

Statute of Limitations

The statute of limitations on this form of a negligence and gross negligence cause of action is three years from the date of the alleged negligence. *See Witherwax v. Transcare, Inc.*, 8 Misc. 3d 1005(A), 801 N.Y.S.2d 782, 782 (N.Y. Sup. Ct., N.Y. Co. 2005).

1-3 AGENT'S LIABILITY FOR PRINCIPAL'S OBLIGATION

An agent will be liable for the principal's obligation if:

1) the agency relationship was never disclosed;

2) the agency relationship was known by the principal, but was never disclosed; and

3) there is a disclosed principal, but there is clear and explicit evidence that the agent intended to assume such liability personally.

Rothschild Sunsystems, Inc. v. Pawlus, 129 A.D.2d 933, 514 N.Y.S.2d 572, 572 (N.Y. App. Div., 3d Dep't 1987) [2]; *Weidman v. Klot*, 11 A.D.2d 641, 201 N.Y.S.2d 476, 476 (N.Y. App. Div., 1st Dep't 1960) [1-3].

1-4 AGENT'S NEGLIGENCE CAUSING HARM TO OTHERS

An agent is liable for harm caused to others when:

1) the act was an affirmative act;

2) of negligence or misfeasance; and

3) where the claimed negligence is nonfeasance, the person injured has a cause of action only against the principal.

NYCOA01.indd 3 4/11/2022 12:27:31 AM

See Lennon v. Oakhurst Gardens Corp., 229 A.D.2d 897, 645 N.Y.S.2d 652, 653 (N.Y. App. Div., 3d Dep't 1996) [1-3]; *Mathis v. Yondata Corp.*, 125 Misc. 2d 383, 480 N.Y.S.2d 173, 175 (N.Y. Sup. Ct., Monroe Co. 1984) [1-3].

Statute of Limitations

An action to recover damages for a personal injury must be commenced within three years after the cause of action has accrued. This statute of limitations commonly arises in actions based on the defendant's negligence. *See* New York Civil Practice Law and Rules § 214(5).

1-5 AGENT'S PERSONAL LIABILITY ON CONTRACT

An agent will be personally liable on a contract if:

1) the agency is disclosed and there is clear and explicit evidence of the agent's intention to substitute or supersede his personal liability for, or to, that of his principal; and
2) the agency was not disclosed at the time of the contracting.

See Star Video Entm't, LP v. J & I Video Dist., Inc., 268 A.D.2d 423, 702 N.Y.S.2d 91, 91 (N.Y. App. Div., 2d Dep't 2000) [1-2]; *Rothschild Sunsystems, Inc. v. Pawlus*, 129 A.D.2d 933, 514 N.Y.S.2d 572, 572 (N.Y. App. Div., 3d Dep't 1987) [1-2].

Statute of Limitations

The statute of limitations for most breach of contract causes of action is six years from the date the contract is breached, that is, usually the date when performance is due. *See* New York Civil Practice Law and Rules § 213(2).

1-6 BAILMENTS

A bailment is created by:

1) lawful possession, consisting of an actual delivery creating an actual bailment or a constructive delivery creating a constructive bailment; and
2) a duty to account for the thing as the property of another, however, the type of duty created depends upon the type of bailment created so that
    a. Bailment for mutual benefit: bailor benefits by having the property cared for, and compensation of some type is provided for the bailee, thus, imposing a duty upon the bailee to exercise ordinary care in relation to the article bailed, or

NYCOA01.indd 4 4/11/2022 12:27:31 AM

b. Gratuitous bailment: the transfer of possession or use of property without compensation, and, therefore, the bailor owes a duty to warn the bailee of any known defects that were not readily discernible.

See generally Osborn v. Cline, 263 N.Y. 434, 189 N.E. 483, 483 (N.Y. 1934) [1]; *Martin v. Briggs*, 235 A.D.2d 192, 663 N.Y.S.2d 184, 197 (N.Y. App. Div., 1st Dep't 1997) [2]; *Castner v. Ins. Co. of N. Am.*, 40 A.D.2d 1, 337 N.Y.S.2d 52, 54 (N.Y. App. Div., 3d Dep't 1972) [1-2]; and *Mays v. N.Y., N.H. & H.R. Co.*, 197 Misc. 1062, 1063, 97 N.Y.S.2d 909, 911 (N.Y. App. Div., 1st Dep't 1950) [1].

Notes

For Bailment for Mutual Benefit:

Castner v. Ins. Co. of N. Am., 40 A.D.2d 1, 3, 337 N.Y.S.2d 52, 54 (N.Y. App. Div., 3d Dep't 1972).

For Constructive Bailment:

Mays v. N.Y., N.H. & H.R. Co., 197 Misc. 1062, 1063, 97 N.Y.S.2d 909, 912 (N.Y. App. Div., 1st Dep't 1950).

For Gratuitous Bailment:

Acampora v. Acampora, 194 A.D.2d 757, 599 N.Y.S.2d 614, 614 (N.Y. App. Div., 2d Dep't 1993).

Statute of Limitations

In a chattel bailment of indefinite duration, the statute of limitations does not begin to run against a bailee in lawful possession until the bailor makes a demand for the chattel's return and the demand is refused. In such a case, the conversion does not accrue until there is a "denial or violation of the plaintiff's dominion, rights or possession." *See Martin v. Briggs*, 235 A.D.2d 192, 198, 663 N.Y.S.2d 184, 188 (N.Y. App. Div., 1st Dep't 1997).

1-7 CARING FOR COLLATERAL OR SECURITY

A secured party must act toward the collateral or security that they have possession of with:

1) due diligence for the preservation of the collateral or security;
2) with reasonableness, and, if a secured party has possession of collateral, it may
    a. hold as additional security any proceeds received from the collateral;

NYCOA01.indd 5 4/11/2022 12:27:31 AM

b. apply money received from the collateral to reduce the secured obligation;

c. create a security interest in the collateral; and

3) with reasonable care where:

4) in the case of chattel paper or an instrument, care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed;

5) while standards by which performance of such obligations may be set by the parties, this duty of care may not be disclaimed by agreement; and

6) reasonable expenses incurred in the custody, preservation, use or operation of the collateral are chargeable to the debtor.

See New York Uniform Commercial Code § 9-207 [1-6]; *Federal Deposit Ins. Corp. v. Frank L. Marino Corp.*, 74 A.D.2d 620, 621, 425 N.Y.S.2d 34, 35 (N.Y. App. Div., 2d Dep't 1980) [1-6].

1-8 CHARITABLE ORGANIZATION LIABLE FOR WRONGDOING

A charitable organization's status does not make it immune from tort liability. In fact, all theories of negligence and respondeat superior are still applicable to a charitable organization as if it were a for-profit organization.

See Restatement (Second) of Torts § 895E (1979); *Bing v. Thunig*, 2 N.Y.2d 656, 666, 143 N.E.2d 3 (N.Y. 1957).

1-9 CONSIGNEE LIABILITY FOR DAMAGED ART

Consignments are covered under § 9 of the Uniform Commercial Code, Secured Transactions. Pursuant to Uniform Commercial Code § 9, a consignee would be liable for damage caused by the lack of reasonable care of the consignee.

1-10 CO-SURETIES CONTRIBUTING ON DEBT DEFAULT

The elements of this claim are:

1) a guarantor;

2) who has paid more than his or her proportionate share of a common liability;

3) is entitled to contribution from any guarantors.

NYCOA01.indd 6 4/11/2022 12:27:31 AM

See Leo v. Levi, 304 A.D.2d 621, 623, 759 N.Y.S.2d 94 (N.Y. App. Div., 2d Dep't 2003) [1-3].

1-11 ESCROW AGENT IMPROPERLY DISBURSING FUNDS

An escrow agent will be liable for conversion when:

1) there is an escrow agreement, and
2) there is a delivery of the property inconsistent with the terms of the agreement.

See Miller v. J.A. Keeffe, P.C., 276 A.D.2d 757, 757, 715 N.Y.S.2d 423, 423 (N.Y. App. Div., 2d Dep't 2000) [1-2].

1-12 FAITHLESS SERVANT DOCTRINE

To state a faithless servant/fiduciary claim, a party must allege:

1) an employee's act;
2) adversely to his or her employer's interest;
3) where the employee's disloyal activity was related to "the performance of his duties,"
4) the disloyalty "permeated the employee's service in its most material and substantial part"; and
5) for forfeiture to be warranted, or, in the alternative, an employee must be guilty of misconduct and unfaithfulness that substantially violated the contract of service.

See Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC, 813 F. Supp. 2d 489 (S.D.N.Y. 2011) [1-2, 5]; *Murray v. Beard*, 102 N.Y. 505, 7 N.E. 553 (N.Y. 1886) [1-2, 5]; *Turner v. Kouwenhoven*, 100 N.Y. 115, 2 N.E. 637 (N.Y. 1885) [1-2, 5]; *Phansalkar v. Andersen Weinroth & Co., L.P.*, 344 F.3d 184, 200, 203 (2d Cir. 2003) [3-4]; *Abramson v. Dry Goods Refolding Co.*, 166 N.Y.S. 771, 773 (N.Y. App. Div., 1st Dep't 1917) [3]; *Feiger v. Iral Jewelry, Ltd.*, 41 N.Y.2d 928, 363 N.E.2d 350 (N.Y. 1977) [3]; Restatement (Second) of Agency § 469 (1958) ("One who owes a duty of fidelity to a principal and who is faithless in the performance of his services is generally disentitled to recover his compensation, whether commissions or salary.") [3]; *Pictorial Films v. Salzburg*, 106 N.Y.S.2d 626, 630-31 (N.Y. Sup. Ct., N.Y. Co. 1951) [3]; *Turner v. Kouwenhoven*, 100 N.Y. 115, 120, 2 N.E. 637 (N.Y. 1885) (holding that, for an employee to forfeit all compensation, "the dishonesty must be of such a character as would justify the conclusion that the contract of employment was violated 'in a most material and substantial

NYCOA01.indd 7 4/11/2022 12:27:31 AM

part'") [3]; *Maritime Fish Prods. Inc. v. World-Wide Fish Prods., Inc.*, 100 A.D.2d 81, 88, 474 N.Y.S.2d 281, 285 (N.Y. App. Div., 1st Dep't 1984) (duty of loyalty breached where employee "surreptitiously organized a competing corporation, corrupted a fellow employee, and secretly pursued and profited from one or more opportunities properly belonging to his employer") [3].

Notes

The faithless servant doctrine provides that an agent is obligated "to be loyal to his employer and is 'prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of the employee's duties.'" *Western Elec. Co. v. Brenner*, 41 N.Y.2d 291, 295, 360 N.E.2d 1091 (N.Y. 1977) (quoting *Lamdin v. Broadway Surface Adver. Corp.*, 272 N.Y. 133, 138 (N.Y. 1936)). As a result, several faithless fiduciary claims have been held to be insufficient. *See Ross v. FSG PrivatAir, Inc.*, 2004 WL 1837366, at *6 (S.D.N.Y. Aug. 17, 2004) (finding that a fiduciary duty claim "is barred as redundant" where it is "merely a restatement, albeit in slightly different language," of the parties' contractual obligations); *Midamerica Prods., Inc. v. Derke*, 2010 WL 7765577, at *2-3 (N.Y. App. Div., 1st Dep't Dec. 27, 2010) (plaintiffs failed to allege a cause of action for breach of the duty of loyalty under the faithless servant doctrine since focus was on conduct after resignation and no allegations when employed or that the facilities or proprietary secrets of the employer where used to build a competing business while still employed).

Additionally, there are lower standards for a plaintiff's pleading of this cause of action than for a traditional fiduciary breach cause of action. The faithless servant doctrine, like the traditional fiduciary duty standard, is "limited to matters relevant to affairs entrusted" to the employee. *Ross v. FSG PrivatAir, Inc.*, 2004 WL 1837366, at *7 (S.D.N.Y. Aug. 17, 2004) (citing *Rush v. Oppenheimer & Co.*, 681 F. Supp. 1045, 1055 (S.D.N.Y. 1988)); *see also BNY Capital Mkts., Inc. v. Moltech Corp.*, 2001 WL 262675, at *8 (S.D.N.Y. Mar. 14, 2011) ("A fiduciary is only responsible to undertake reasonable diligence [or act for the] benefit of another upon matters within the scope of the relation.") (emphasis in original). However, unlike a traditional breach of fiduciary duty claim, requiring a showing of actual damages to prove a violation of the faithless servant doctrine, an employer is not required to show that it "suffered . . . provable damage as a result of the breach of fidelity by the agent." *Feiger v. Iral Jewelry, Ltd.*, 41 N.Y.2d 928, 929, 363 N.E.2d 350 (N.Y. 1977); *see also Webb v. Robert Lewis Rosen Assoc., Ltd.*, 2003 WL 23018792, at *5-6 (S.D.N.Y. Dec. 23, 2003) ("[While] proving a breach of fiduciary duty claim requires a showing of damages . . .

NYCOA01.indd 8 4/11/2022 12:27:31 AM

the faithless servant doctrine [ ] provides an additional mechanism for relief, notwithstanding that [the employer] suffered no damage.").

Consequently, an interesting aspect of the faithless servant doctrine is the amount of time that employer may obtain forfeiture of the amount of compensation that a disloyal employee must forfeit. *See* Geoffrey A. Mort, *Against Tide, New York Claims to 'Faithless Servant' Doctrine*, New York Law Journal, Feb. 10, 2012, at 4, 7. Further, as discussed above, another issue that commonly arises is if there is no harm to the employer. If there is no harm to the employer, case law seems to suggest that an employer need not prove that it actually suffered any harm as a result of the breach by the servant, but only that the breach actually occurred. *See Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC*, 813 F. Supp. 2d 489 (S.D.N.Y. 2011).

Thus, New York law indicates that the question of remedies is somewhat flexible. New York courts have deprived a faithless servant of his or her right to compensation, but only for the period of his or her faithlessness. *Herman v. Branch Motor Express Co., Inc.*, 67 Misc. 2d 444, 323 N.Y.S.2d 794 (N.Y. City Civ. Ct. 1971). A faithless servant forfeits all compensation earned during the period of his disloyalty even if his services benefited the principal in some part. *Tyco Int'l, Ltd. v. Kozlowski*, 756 F. Supp. 2d 553, 562 (S.D.N.Y. 2010). The faithless servant doctrine requires disgorgement of all compensation received after the date that agent's disloyalty began. *In re Food Mgmt. Grp., LLC*, 380 B.R. 677, 714 (Bankr. S.D.N.Y. 2008).

The extent and composition of compensation that may be recovered has been an issue of dispute for the New York courts. Commissions have been a point of contention for the courts. Some courts have interpreted commissions to be fully recoverable, but others have limited that only those commissions directly related to the disloyal activity are recoverable. Certain cases have permitted the recovery of commissions. *Phansalkar v. Andersen Weinroth & Co., L.P.*, 344 F.3d 184, 200 (2d Cir. 2003) ("One who owes a duty of fidelity to a principal and who is faithless in the performance of his services is generally disentitled to recover his compensation, whether commissions or salary.") (quoting *Feiger v. Iral Jewelry, Ltd.*, 41 N.Y.2d 928, 363 N.E.2d 350 (N.Y. 1977)); *see also Kenneth D. Laub & Co. v. Bear Stearns Cos., Inc.*, 278 A.D.2d 121, 718 N.Y.S.2d 45 (N.Y. App. Div., 1st Dep't 2000) (hired agent not entitled to commissions for breach of duty of good faith); *GRG Grp., Inc. v. Ravenal*, 247 A.D.2d 201, 668 N.Y.S.2d 353, 352 (N.Y. App. Div., 1st Dep't 1998) (finding that "[t]he motion court properly granted an interim award of $500,000 in management fees and brokerage commissions for the years 1991 to 1993, where the evidence demonstrated disloyalty during those years and there is no basis in the record for apportionment").

NYCOA01.indd 9 4/11/2022 12:27:31 AM

Some New York courts have held that commissions and/or fees could be apportioned for work performed. New York law required the apportionment of compensation forfeited by agents of decedent's estate for breach of fiduciary duty/faithless fiduciary where the parties had apportioned various agency tasks under a number of separate agreements, agents engaged in no misconduct at all in carrying out specific tasks set out in two of the agreements, and where the agents' misdealing regarding one task had neither tainted nor interfered with completion of the other tasks. *Musico v. Champion Credit Corp.*, 764 F.2d 102, 112 (2d Cir. 1985). The court in *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136 (2d Cir. 1998), expressed the view that, under the faithless servant doctrine, a rule of apportionment could apply where only the fees related to the "specified items of work" as to the agent's faithless actions would be forfeited rather than a forfeiture of all of a faithless servant's compensation during the entire agency relationship.

Similarly, the court in *Ability Search, Inc. v. Lawson*, 556 F. Supp. 9 (S.D.N.Y. 1981), *aff'd without reported opinion*, 697 F.2d 287 (2d Cir. 1982), expressed the view that an employee's forfeiture of compensation may be limited or apportioned to fees for particular tasks that were performed disloyally. The *Ability Search* court pointed out that this would mean former employees were entitled to commissions earned by working for their employer during the time period when they were not engaged in a disloyal scheme to divert business from the employer and to their own company. *Ability Search, Inc. v. Lawson*, 556 F. Supp. 9 (S.D.N.Y. 1981), *aff'd without reported opinion*, 697 F.2d 287 (2d Cir. 1982).

Another court, *Design Strategies, Inc. v. Davis*, 384 F. Supp. 2d 649, 668 (S.D.N.Y. 2005), denied a commission forfeiture claim where the defendant had received a hybrid compensation of both salary and commissions, or for specific amounts paid for individual tasks completed such as sales of staffing services to the plaintiff's clients. The *Design Strategies* court found the disloyalty did not arise in connection with any employer transaction where the employee would receive a commission, and the subsequent sales were not tainted so as to effect any lawful commission. *Design Strategies, Inc. v. Davis*, 384 F. Supp. 2d 649, 668 (S.D.N.Y. 2005).

Additionally, in *G.K. Alan Assoc., Inc., v. Lazzari*, 44 A.D.3d 95, 840 N.Y.S.2d 378, 386 (N.Y. App. Div., 2d Dep't 2007), the court found that a faithless servant forfeits only the compensation due concerning the transaction where the disloyalty occurred, provided that: (1) the parties had agreed that the agent would be paid on a task-by-task basis (e.g., a commission on each sale arranged by the agent); (2) the agent engaged in no misconduct at all regarding certain tasks; and (3) the agent's disloyalty as to other tasks

NYCOA01.indd 10 4/11/2022 12:27:31 AM

neither tainted nor interfered with the completion of the tasks as to which the agent was loyal. The *G.K. Alan Assoc.* court ultimately denied the recovery of compensation under a consulting agreement, but permitted it under a brokerage agreement between the parties since that is where the disloyalty tainted the work product. *G.K. Alan Assoc., Inc., v. Lazzari*, 44 A.D.3d 95, 104, 840 N.Y.S.2d 378, 386 (N.Y. App. Div., 2d Dep't 2007).

Compensation could also include life, health and dental insurance benefits and premiums during the disloyal period. *William Floyd Union Free Sch. Dist. v. Wright*, 61 A.D.3d 856, 877 N.Y.S.2d 395 (N.Y. App. Div., 2d Dep't 2009).

Courts have also found that a guilty party may be liable for disgorgement of profits from a subsequent business venture as a result of a breach. *Samba Enters., LLC v. iMesh, Inc.*, 2009 WL 705537, at *9 (S.D.N.Y. Mar. 19, 2009), *aff'd*, 390 Fed. App'x 55 (2d Cir. 2010) (court ordered disgorgement of subsequent companies' profits resulting from disloyal actions of employee under his employment with prior fiduciary); *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 416, 754 N.E.2d 184, 729 N.Y.S.2d 425 (N.Y. 2001) ("If 'an agent receives anything as a result of his violation of a duty of loyalty to the principal, he is subject to a liability to deliver it, its value, or its proceeds, to the principal.'"); *United States v. Miller*, 997 F.2d 1010, 1018 (2d Cir. 1993) ("It is settled law that an agent owes his principal a duty of loyalty, and must account for any profits realized in connection with his representation of the principal."); *212 Inv. Corp. v. Kaplan*, 16 Misc. 3d 1125A, 847 N.Y.S.2d 905 (N.Y. App. Div., 1st Dep't 2007) ("The law is clear that disloyal fiduciaries must disgorge all wrongful benefits obtained by their disloyalty, including compensation and interest.").

Further, punitive damages are permissible in faithless servant doctrine cases so long as the very high threshold of moral culpability is satisfied. *See Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC*, 813 F. Supp. 2d 489, 526 (S.D.N.Y. 2011); *South Pierre Assocs. v. Meyers*, 12 Misc. 3d 955, 820 N.Y.S.2d 485 (N.Y. City Civ. Ct. 2006). "New York courts allow punitive damages against disloyal employees," specifically in faithless servant suits. *Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC*, 813 F. Supp. 2d 489, 526 (S.D.N.Y. 2011). However, in *In re Blumenthal*, 32 A.D.3d 767, 822 N.Y.S.2d 27 (N.Y. App. Div., 1st Dep't 2006), the court expressed the view that the disgorgement of compensation received by a faithless servant under the faithless servant doctrine is proper and is not tantamount to the imposition of punitive damages. Similarly, the court in *Soam Corp. v. Trane Co.*, 202 A.D.2d 162, 608 N.Y.S.2d 177 (N.Y. App. Div., 1st Dep't 1994), expressed the view that the forfeiture of a commission by a faithless servant is not an unconscionable penalty, given the strict application of the doctrine mandating the forfeiture of all

NYCOA01.indd 11 4/11/2022 12:27:31 AM

compensation, regardless if commissions or salary, where one who owes the duty of fidelity to a principal is faithless in the performance of his or her services. *See also South Pierre Assocs. v. Meyers*, 12 Misc. 3d 955, 820 N.Y.S.2d 485 (N.Y. City Civ. Ct. 2006).

It would also appear that a faithless servant claim would survive despite valid and accepted corporate liability. In *Dachowitz v. Bergman*, faithless fiduciary claims were asserted by plaintiffs despite their guilty plea along with defendants in state and federal court to various crimes in connection with fraudulent activities. *Dachowitz v. Bergman*, 113 Misc. 2d 236, 238, 448 N.Y.S.2d 381, 383 (N.Y. App. Div., 1st Dep't 1982). The concerted activity to produce the breach of trust was sufficient to support the conspiracy, and once the fraud was disclosed, the corporation may recover the secret and guilty profit even if the transaction itself was fully known and approved, regardless of the principal's status serving as a bar to the ability to re-coup the profit made through the acts of its faithless servant and its co-operator. *Penn-Texas Corp. v. Sarlie*, 15 Misc. 2d 626, 628, 181 N.Y.S.2d 750, 753 (N.Y. App. Div., 1st Dep't 1958).

An employer may also proceed under a theory of indemnity for this form of restitution. *See Mas v. Two Bridges Assocs.*, 75 N.Y.2d 680, 690 (N.Y. 1990); *McDermott v. City of N.Y.*, 50 N.Y.2d 211, 216-17, 406 N.E.2d 460, *rearg. denied*, 50 N.Y.2d 1059 (N.Y. 1980).

Statute of Limitations

Causes of action for breach of fiduciary duty/faithless servant liability are governed by a three-year statute of limitations when only monetary damages are requested, and a six-year statute of limitations applies when equitable relief is sought. The statute of limitations is tolled until the fiduciary has only repudiated his or her obligation or the relationship has been otherwise terminated. "The reason for such a tolling rule is that the beneficiary should be entitled to rely upon a fiduciary's skill without the necessity of interrupting a continuous relationship of trust and confidence by instituting suit." *Spitzer v. Ben*, 55 A.D.3d 1306, 1308, 866 N.Y.S.2d 464, 465-66 (N.Y. App. Div., 4th Dep't 2008).

1-13 FIDUCIARY BREACHING DUTY

To establish a breach of fiduciary duty, a plaintiff must prove the existence of:

1) a fiduciary relationship;
2) misconduct, including
3) situations of self dealing or personal interest conflicts;

NYCOA01.indd 12 4/11/2022 12:27:31 AM

4) the fiduciary injuring or acting contrary to the interests of the person to whom a duty of loyalty is owed; and

5) damages that were directly caused by the defendant's misconduct.

See Birnbaum v. Birnbaum, 73 N.Y.2d 461, 466, 539 N.E.2d 574 (N.Y. 1989) [1-3]; *Doe v. Roman Catholic Diocese of Rochester*, 51 A.D.3d 1392, 1393, 857 N.Y.S.2d 866, 867 (N.Y. App. Div., 4th Dep't 2008), *rev'd on other grounds*, 12 N.Y.3d 764, 907 N.E.2d 683, 879 N.Y.S.2d 805 (N.Y. 2009), *rearg. denied*, 12 N.Y.3d 879, 910 N.E.2d 1003, 883 N.Y.S.2d 173 (N.Y. 2009) [1-5]; *Kurtzman v. Bergstol*, 40 A.D.3d 588, 590, 835 N.Y.S.2d 644 (N.Y. App. Div., 2d Dep't 2007) [1-5].

Statute of Limitations

The statute of limitations for breach of fiduciary duty is governed by New York Civil Practice Law and Rules §§ 213(1) and 214(2); *see also IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y. 3d 132, 907 N.E.2d 268 (N.Y. 2009) (explaining that New York law does not provide a single statute of limitations for a breach of fiduciary duty cause of action. The appropriate standard depends on the type of relief sought and whether fraud is pleaded.). Causes of action for breaches of fiduciary duty are governed by a three-year statute of limitations when only monetary damages are requested, and a six-year statute of limitations when equitable relief is sought. The statute of limitations is tolled until the fiduciary has openly repudiated his or her obligation or the relationship has been otherwise terminated. *See Bouley v. Bouley*, 19 A.D.3d 1049, 1050, 797 N.Y.S.2d 221, 223 (N.Y. App. Div., 4th Dep't 2005).

1-14 FIDUCIARY RELATIONSHIP

A fiduciary relationship exists between two persons when:

1) one of them is under a duty for or gives advice for the benefit of another; and

2) upon matters within the scope of the relation.

See EBC I, Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170, 175 (N.Y. 2005) [1-2].

1-15 FRAUDULENT CONCEALMENT BY FIDUCIARY

Plaintiff must allege that:

1) defendant owed a fiduciary duty to the plaintiff;

2) defendant concealed a fact;

NYCOA01.indd 13 4/11/2022 12:27:31 AM

3) the concealment was intentional in order to defraud or mislead the plaintiff;

4) the plaintiff reasonably relied on the misrepresentation; and

5) the plaintiff suffered damage as a result of its reliance on the defendant.

See P.T. Bank Cent. Asia v. ABN AMRO Bank N.V., 301 A.D.2d 373, 376, 754 N.Y.S.2d 245, 250 (N.Y. App. Div., 1st Dep't 2003) [1-5].

1-16 OBLIGOR AIDING AGENT DISLOYALTY TO PRINCIPAL

A claim for aiding and abetting a breach of fiduciary duty requires:

1) a breach by a fiduciary of obligations to another;

2) that the defendant knowingly induced or participated in the breach, and

   a. a person knowingly participates in a breach of fiduciary duty only when he or she provides "substantial assistance" to the primary violator, that consists of when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur—inaction is insufficient; and

   b. constructive knowledge of the breach of fiduciary duty by another is legally insufficient to impose aiding and abetting liability; and

3) that plaintiff suffered damage as a result of the breach.

See Kaufman v. Cohen, 307 A.D.2d 113, 126, 760 N.Y.S.2d 157 (N.Y. App. Div., 1st Dep't 2003) [1-4].

Statute of Limitations

This aiding and abetting claim is barred by the six-year statute of limitations. *See* New York Civil Practice Law and Rules § 213(1).

1-17 WAREHOUSEMAN OR CARRIER LIABILITY FOR GOODS

Carriers and warehousemen are treated as different causes of action. Carrier liability may become warehouseman liability if the delivery is not made, and the carrier retains the item or items.

Carrier Liability Elements

A common carrier, is, as a matter of law, the insurer of the merchandise, and is responsible for any loss or damage while the goods are in the

NYCOA01.indd 14 4/11/2022 12:27:31 AM

common carrier's custody. However, a private or contract carrier is not liable for the loss of, or damage to, goods transported, in the absence of negligence by it.

See Ups N'Downs, Inc., v. Albina Enters., Inc., 61 A.D.2d 763, 763, 402 N.Y.S.2d 194, 195 (N.Y. App. Div., 1st Dep't 1978); *Reliable Textile Co. v. Deptula Trucking Co.*, 37 A.D.2d 952, 953, 326 N.Y.S.2d 217, 218 (N.Y. App. Div., 1st Dep't 1971); New York Uniform Commercial Code § 7-307 [1-5].

Warehouseman Liability Elements

A warehouseman is liable for damages for loss of or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful man would exercise under like circumstances but unless otherwise agreed he is not liable for damages that could not have been avoided by the exercise of such care.

See New York Uniform Commercial Code § 7-204 [1-4].

1-18 WAREHOUSEMAN OR CARRIER LIEN ON GOODS

Carrier Elements

A carrier has a lien on

1) the goods covered by a bill of lading;
2) for charges;
3) subsequent to the date of its receipt of the goods for storage or transportation (including demurrage and terminal charges);
4) for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law;
5) but against a purchaser for value of a negotiable bill of lading a carrier's lien is limited to charges stated in the bill or the applicable tariffs, or if no charges are stated then to a reasonable charge.

See New York Uniform Commercial Code § 7-307 [1-5].

1-19 WAREHOUSEMAN ELEMENTS

A warehouseman has a lien:

1) against the bailor;
2) on the goods;
3) covered by a warehouse receipt or on the proceeds thereof in his possession for charges for storage or transportation

NYCOA01.indd 15 4/11/2022 12:27:31 AM

(including demurrage and terminal charges), insurance, labor, or charges present or future in relation to the goods; and

4) for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law.

See New York Uniform Commercial Code § 7-209 [1-4].

Statute of Limitations

The right of a holder of warehouse receipt to demand goods stored is a continuing right, and, as a result, no statute of limitations runs. *See Williams v. Flagg Storage Warehouse Co.*, 128 Misc. 566, 571, 220 N.Y.S. 124, 129 (N.Y. Sup. Ct., Onondaga Co. 1927).

NYCOA01.indd 16 4/11/2022 12:27:31 AM