UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

RODERICK WEBBER, Plaintiff v. EDWARD DECK, ET AL., Defendants	Case No. 1:18-cv-00931-LM

REPLY OF XMARK LLC TO PLAINTIFF'S OBJECTION TO XMARK'S MOTION TO DISMISS

Defendant XMark LLC ("XMark") submits this reply to the plaintiff's objection[1] to its motion to dismiss the second amended complaint.

I. Introduction

On its face, plaintiff's second amended complaint is time-barred as against XMark because it seeks to recover for alleged tortious conduct that occurred more than three years before plaintiff named XMark as a defendant. Plaintiff's reliance on Fed. R. Civ. P. 15(c) is misplaced because his original complaint did not mistakenly name the wrong party. Nor does the discovery rule save plaintiff's claims against XMark because failure to discover the identity of a defendant is not a factor to which the discovery rule applies and because the alleged connection between XMark and the Trump Campaign on which plaintiff relies was discoverable

[1] After many admonitions from the court to comply with Local Rule 7.1(a) regarding page limits, plaintiff has resorted to incorporating entire sections of other papers by reference so as to circumvent the page limits and escape the requirements of the Local Rules. *See, e.g.*, Doc. 135 (07/12/2019) at 1, 17; *see also* 5.1(a)(2) (discouraging incorporation by reference in context of exhibits and appendices).

online before he filed his original complaint. Likewise, plaintiff's assertions of fraudulent concealment and equitable tolling and estoppel are misplaced because the alleged concealment occurred after the statute of limitations had expired and there was no concealment as a matter of law. Accordingly, plaintiff's claims against XMark must be dismissed.

II. Statement of Facts

The plaintiff seeks to recover damages from XMark related to his removal from a political event known as the No Labels "Problem Solvers" convention. The convention took place in Manchester, New Hampshire, on October 12, 2015. Doc. 75 (05/22/2019) at ¶33. Plaintiff did not name XMark as a defendant until he filed his first amended complaint on April 17, 2019, well outside the applicable three-year statute of limitations. The plaintiff again named XMark in the second amended complaint on May 22, 2019. XMark filed a motion to dismiss the plaintiff's second amended complaint as time-barred by RSA 508:4. Plaintiff has not contested that the first amended complaint was filed more than three years after his alleged injury.

Throughout his objection plaintiff maintains that he could not have known about XMark's relationship with Mr. Deck until he attempted service upon him. This is demonstrably and objectively untrue. If plaintiff – a self-described documentarian and journalist who is obviously conversant with internet search conventions – had simply searched Google using the basic terms "Edward Jon Deck Jr. Security Trump" he would have found Mr. Deck's LinkedIn profile, which states that he is the President of XMark, as well as multiple media stories from 2016 and 2017 reporting on Mr. Deck as a principal of XMark. Google, https://www.google.com (search "Edward Jon Deck Jr. Security Trump"; then follow "Edward Jon Deck Jr – President – XMARK LLC LinkedIn" hyperlink).

III. Argument

Plaintiff does not contest that he failed to commence an action against XMark within the three years after he allegedly suffered his injury. Instead, he seeks refuge in Fed. R. Civ. P. 15(c), the "discovery rule," equitable tolling, and allegations of fraudulent concealment. None of these contentions avoids the bar of the statute of limitations.

A. Rule 15(c) Does Not Apply Because Plaintiff's Amended Complaints Added XMark as a New Party, Not as a Substitute for a Mistakenly Named Party.

Plaintiff contends that his amended complaints relate back to the date on which he filed his original complaint under Rule 15(c). Under the law of this circuit, however, plaintiff has failed to satisfy the requirements of the rule.

Plaintiff does not dispute that he failed to name XMark as a defendant in his original complaint; nor does he contest that his first amended complaint was filed more than three years after he was removed from the No Labels event. "The claims in the amended complaint are thus time-barred unless the amended complaint 'relates back' to the original complaint under" Rule 15(c). *Donlon v. Hillsborough County*, 2019 DNH 081 at 9-10.

"Where, as here, a plaintiff seeks to add a new defendant, she may rely upon either Rule 15(c)(1)(A) or Rule 15(c)(1)(C)." *Graham v. Church*, 2015 DNH 013 at 8 (citing authorities). Rule 15(c)(1)(A) states that an amendment relates back where "the law that provides the applicable statute of limitations allows relation back." Fed. R. Civ. P. 15(c)(1)(A). New Hampshire's statute governing amendments, RSA 514:9, "is silent on the matter of relation back [and therefore] provides no express basis" for the application of Rule 15(c)(1)(A), however. *Graham*, 2015 DNH 013 at 11.

Rule 15(c)(1)(C) prescribes three conditions "each of which must be satisfied in order to permit relation back of an amended complaint seeking to substitute a newly-designated

defendant." *Morel v. Daimler-Chrysler AG*, 565 F.3d 20, 26 (1st Cir. 2009). The third of these conditions is that, within the time provided for service of the original complaint, the new defendant either "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." *Id.*, *citing* Fed. R. Civ. P. 15(c)(1)(C)(ii).

As a matter of law, however, a lack of knowledge about a potential defendant is not a cognizable "mistake" under the rule. *Graham*, 2015 DNH 013 at 14-16 (citing authorities). Put another way, ignorance of the existence of a defendant is not a mistaken misidentification on which relation back can be predicated. *Id.*

Here, plaintiff has argued merely that he was unaware of XMark's alleged role in his removal from the event. He does not claim that he mistakenly named the wrong defendant. Accordingly, Rule 12(c)(1)(C) provides no basis for his amended complaints to relate back to his original complaint.

B. New Hampshire's "Discovery Rule" Does Not Apply to a Failure to Investigate and Identify a Defendant.

Plaintiff contends that the "discovery rule" embodied in RSA 508:4,I, saves his claims from dismissal. Doc. 135 (07/12/2019) at 14. While he cites the controlling New Hampshire case, *Perez v. Pike Industries, Inc.*, 153 N.H. 158 (2005), he ignores the case's holding.

In *Perez*, the plaintiff was injured by allegedly negligent road paving. *Id.* at 159. The plaintiff sued the State of New Hampshire within the limitations period of RSA 508:4 and sought to add the state's contractor as a defendant after the statute had run. *Id.* He argued that he had no knowledge of the subcontractor until he received discovery from the state. *Id.*

The supreme court held that the discovery rule applies only when the plaintiff is unaware of either the alleged injury or its causal connection to the negligent act. *Id.* at 160. The

discovery rule does not apply where the plaintiff knows of the injury and the act that caused it but does not know the identity of the defendant. *Id.*

In this case, plaintiff was aware of his alleged injury and the conduct that allegedly caused it on the day he was removed from the No Labels event. The fact that he failed to "investigate and identify" XMark as a potential defendant does not toll the statute of limitations. *Id.; see also Isaacs v. Trustees of Dartmouth College*, 2017 DNH 136 at 38.

C. The Plaintiff Has Not Demonstrated that XMark Concealed Facts Essential to His Causes of Action.

Plaintiff invokes the fraudulent concealment rule to attempt to sidestep the bar of the statute of limitations. Doc. 135 at 12-13. He relies upon allegations that XMark and Mr. Deck have multiple addresses and that XMark "appear[ed]" to have "scrubbed" its website after plaintiff attempted to serve Mr. Deck with process. *Id.* Even if true, these allegations do not amount to fraudulent concealment.

The state and federal standards for fraudulent concealment are virtually identical. *Galvin v. Metrocities Mtg.*, No. 1:16-cv-00268-JDL, slip op. at 25 (D.N.H. Nov. 17, 2017).[2] For there to be a fraudulent concealment that will toll the limitations period, the defendant must have intentionally concealed "facts essential to the cause of action." *Id., citing Beane v. Dana S. Beane & Co.*, 160 N.H. 708, 712 (2010) and *Rakes v. U.S.*, 442 F.3d 7, 26 (1st Cir. 2006).

Plaintiff neither acknowledges nor satisfies this standard. He offers no explanation of how multiple addresses or "scrubbing" a website amounts to a deliberate concealment of facts essential to his causes of action. Even if the identity of Mr. Deck's employer were essential to

[2] XMark was unable to find this opinion on the court's website and therefore could not provide the citation in the form required by LR 5.3(b). It has therefore provided the citation in accordance with LR 5.3(c).

plaintiff's causes of action, a simple Google search would have revealed that XMark provided security for the Trump campaign and that Mr. Deck was a principal of XMark.

Likewise, plaintiff's pro forma equitable tolling argument also fails. "Equitable tolling is the exception, not the rule, and is applied only in exceptional circumstances." *Meza v. Schaaf*, No. 11-cv-483-JD, slip op. at 2-3 (D.N.H. June 11, 2012), report and recommendation approved, No. 11-cv-483-JD, slip op. (D.N.H. July 5, 2012).[3] The First Circuit has not decided whether state or federal law governs equitable tolling for claims brought under 42 U.S.C. § 1983. *Id.* Under federal law, equitable tolling applies only when a plaintiff demonstrates "excusable ignorance of the statute of limitations caused by some misconduct of the defendant. *Id.* (internal quotation marks omitted). Equitable tolling will apply under state law only when the prospective plaintiff "did not have, and could not have had with due diligence, the information essential to bringing the suit." *Id.* (internal quotation marks omitted). The plaintiff bears the responsibility of performing the necessary due diligence before the statute of limitations expires to discover all potential defendants. *See id.*

Plaintiff has not pled that he was unaware of the statute of limitations because of some misconduct of XMark or that he could not have, with due diligence, discovered the information necessary to name XMark within the applicable timeframe. There is therefore no basis on which to apply equitable tolling here.

D. Plaintiff Misunderstands and Misapplies the Alter Ego Doctrine.

Plaintiff contends that Mr. Deck formed XMark to shield himself from liability and protect his financial assets and therefore XMark is a "shell company" and Mr. Deck's alter ego. Doc. 135 (07/12/2019) at 15. Plaintiff claims that this alleged impropriety should toll the statute

[3] These opinions are also not available on the court's website.

of limitations. *Id.* Plantiff cites no authority establishing that the statute of limitations is tolled when one of two alter egos is timely sued, misconstrues the purpose of the alter ego doctrine, and fails to cite any allegations in the second amended complaint that would support a claim that Mr. Deck and XMark are alter egos.

The plaintiff alleged in his second amended complaint that XMark was vicariously liable for the actions of Mr. Deck under an agency theory of liability. *See e.g.* Doc. 75 (05/22/2019) at ¶111. The plaintiff now argues in his objection, however, that XMark is liable for the actions of Mr. Deck under the alter ego doctrine, a mechanism for piercing the corporate veil. Doc. 135 (07/12/2019) at 15. Liability as an alter ego is not vicarious. It is premised on a determination that the owners are legally indistinguishable from the corporation and are therefore directly liable for the corporation's obligations. Even aside from its procedural defects, plaintiff's "alter ego" theory is substantively defective.

The New Hampshire Supreme Court has recognized that "one of the desirable and legitimate attributes of the corporate form of doing business is the limitation of the liability of the owners to the extent of their investment." *Michnovez v. Blair, LLC*, 795 F. Supp. 2d 177, 186 (D.N.H. 2011) (citing authorities). A corporation is not considered the "alter ego" of an owner simply because the owner maintains control of the corporation. *Id.* (citing authorities). Under New Hampshire law, the doctrine of piercing the corporate veil permits a "person with a claim against a corporation to recover from the principal of that corporation when the principal abuses the corporate form." *Martinez v. Petrenko*, 792 F.3d 173, 181 (1st Cir. 2015) (citing *Terren v. Butler*, 134 N.H. 635, 638-40 (1991)). It is not a cognizable basis on which to toll the statute of limitations.

To state a claim based on a veil-piercing theory, moreover, "plaintiffs must allege facts that show the defendant suppressed the fact of incorporation, misled his creditors as to the corporate assets, or otherwise used the corporate entity to promote injustice or fraud." *McCarthy v. Waxy's Keene, LLC*, 2016 DNH 133 at 11 (internal quotation marks omitted) (citing authorities). The fraud or injustice must be *caused* by the misuse of the corporate form. *Bates v. Private Jet Commercial Grp., Inc.*, 2013 DNH 030 at 2-3 ("It is only when the shareholders disregard the separateness of the corporate identity and when that act of disregard causes the injustice or inequity or constitutes the fraud that the corporate veil may be pierced." (*quoting NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047, 1053 (10th Cir. 1993))). A similar factor New Hampshire courts have considered to determine whether to disregard the corporate form is whether shareholders failed to observe corporate formalities. *GE Mobile Water, Inc. v. Red Desert Reclamation, LLC*, 6 F. Supp. 3d 195, 203 (D.N.H. 2014) (citing *Mbahaba v. Morgan*, 163 N.H. 561, 569 (2012)); *see also Terren v. Butler*, 134 N.H. at 640 and *Druding v. Allen*, 122 N.H. 823, 828 (1982).

Plaintiff has not alleged or argued that Mr. Deck suppressed XMark's status as a limited liability company, misled creditors as to XMark's assets, caused his alleged injuries by disregarding the corporate form, or disregarded corporate formalities. Hence, even if the alter ego doctrine were a recognized means to toll the statute of limitations, plaintiff has failed to allege any facts on which the court could plausibly conclude that XMark is Mr. Deck's alter ego.

IV. Conclusion

Plaintiff has not alleged facts that would enable the court to conclude that Rule 15(c), the discovery rule, the fraudulent concealment doctrine, or the alter ego doctrine tolled the three-year

statute of limitations on his claims against XMark. Those claims must therefore be dismissed as time-barred.

Respectfully submitted,

XMark LLC,
By Its Attorneys,

Date: July 26, 2019

/s/ Bryan K. Gould

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CERTIFICATE OF SERVICE

I hereby certify that the within pleading is being served electronically upon the persons listed below through the court's ECF system.

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