

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH

PART 54

Justice

Index Number : 651760/2010
DAVIDSON, SANDRA CALDER
vs.
PERLS, KATHERINE
SEQUENCE NUMBER : 005
AMEND CAPTION/PARTIES

INDEX NO.

MOTION DATE 10/16/13

MOTION FOR NO.

The following papers, numbered 1 to were read on this motion to for

Notice of Motion/Order to Show Cause - Affidavits - Exhibits

Answering Affidavits - Exhibits

Replying Affidavits

No(s). 128-130, 114, 117-124, 131-138
No(s). 142-168
No(s). 173-211
212-215
217-222
226

Upon the foregoing papers, it is ordered that this motion is

and cross-motion
MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.

INDICATE IN THESE BOXES THE REASONS FOR THE FOLLOWING REASON(S):

Dated: 12/23/13

SHIRLEY WERNER KORNREICH J.S.C.

- 1. CHECK ONE: CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
SANDRA CALDER DAVIDSON, MARY CALDER
ROWER and SHAWN DAVIDSON, as Executors of
the Estate of Alexander Calder, Deceased,

Plaintiffs,

-against-

KATHERINE PERLS, individually, and as Executrix
of the Estates of Amelia B. Perls and Klaus G. Perls,
THE PERLS FOUNDATION, JANE DOE a/k/a
MADAME ANDRE and LENNART BRABERG,

Defendants.
-----X

KORNREICH, SHIRLEY WERNER, J.:

Index No.: 651760/2010

DECISION AND ORDER

This action arises from the relationship between Alexander Calder (Calder), an artist, and the Perls Galleries (the Gallery), his dealer. Calder and the owners of the Gallery are deceased. The action is brought by the executors of the Calder estate against the estates of Klaus Perls (Klaus) and his wife, Amelia (Dolly), and related entities and individuals. Plaintiffs move to amend their complaint. Defendants oppose and cross-move to dismiss. For the reasons stated below, the court denies plaintiffs' motion, grants defendants cross-motion, and dismisses the action with prejudice.

I. Background and Procedural History

Calder was a 20th century American artist of great renown. Prior to 1954, Calder used the Curt Valentin Gallery as his exclusive American dealer (complaint, ¶ 14). After Mr. Valentin's death, Calder replaced the Curt Valentin Gallery with the Gallery, a relationship that was maintained until Calder's death in 1976 (complaint, ¶ 14). The Gallery, a partnership owned

by Klaus and Dolly was operated by them with the assistance of, among others, their daughter Katherine and an individual named Douglas Mayhew. It was dissolved in 1997, and Dolly died in 2002 (*id.* at ¶¶ 11–12; amended compl.). Klaus died in 2008 (*supra* at ¶ 11). Katherine became the executrix of both their estates.

In the course of his life, Calder consigned hundreds of works to the Gallery. The relationship between Calder and the Perls was close, and there was a great deal of personal as well as business correspondence between them, some of which concerned the disposition or ownership of Calder’s works (the Correspondence) (*id.* at ¶¶ 14–18). After Calder’s death, the Calder Foundation,¹ not a party to this litigation, set out to prepare a complete catalogue of Calder’s work, known as a “catalogue raisonné” (*id.* at ¶ 37). In connection with this effort, between 1987 and 1997, the Gallery rendered to the Calder Foundation what it claimed was a complete inventory of Calder’s works (*id.*). However, in or around May 2010, the Calder Foundation was contacted by an art dealer seeking to obtain a “registration number” for a Calder work known as “Standing Constellation”, which the dealer had purchased from a New York gallery; the gallery had received it on consignment from the Perls Foundation (*id.* at ¶ 36). Neither the Perls Foundation nor any of the other defendants had disclosed to plaintiffs that they were in possession of this work; plaintiffs allege that the work was consigned to the Gallery by the artist during his lifetime (*id.* at ¶¶ 37, 40).

¹ The Calder Foundation was founded in 1987 by members of Calder’s family, including the plaintiffs-executors, who apparently continue to served as trustees (*see* affirmation of Steven Wolfe, March 9, 2013, exhibit F, 23-24; affirmation of Steven Wolfe, Feb. 22, 2013, exhibit J [letterheads]).

Some months later, in October 2010, plaintiffs² commenced this action against Katherine, the Perls Foundation, and Mayhew, as well as Roberto Caballero, Lennart Braberg (Katherine's companion), and "Madame Andre", an alleged citizen and resident of Switzerland (*id.* at ¶ 2). The complaint contends that defendants were in possession of certain property that was rightfully plaintiffs', namely the Correspondence (including correspondence between Calder and Valentin), certain instruments known as "signing wires" used by Calder to stamp his name on metal works of art, and other Calder works on paper related to mobiles and choreography (*id.* at ¶ 22). Plaintiffs also claim that Mayhew and Caballero were in possession of or had disposed of seventeen enumerated Calder works which were rightfully theirs, while the Perls Foundation, Katherine, Braberg and "Madame Andre" were in possession of or had disposed of fifteen enumerated Calder works which also rightfully belonged to plaintiffs (complaint, ¶¶ 27–34).³ The complaint posits causes of action for replevin, conversion and breach of bailment against the defendants and seeks to assert a cause of action for fraud against all defendants for concealment of their possession of "Standing Constellation". Katherine, the Perls Foundation and Braberg (defendants) answered on December 13, 2010, generally denying the allegations and asserting as affirmative defenses that: (1) plaintiffs fail to state causes of action; (2) the claims are barred by the statute of limitations, laches and the statute of frauds; (3) the fraud claim has not been pled

² According to the proposed amended complaint, one of the plaintiffs, Mary Calder Rower, passed away in 2011 and successor letters testamentary for Calder's estate were issued to Alexander S.C. Rower, one of Calder's grandchildren and the chairman and president of the Calder Foundation (proposed amended complaint, ¶ 3; Rower affidavit, December 24, 2012, ¶ 1, exhibit 11).

³ Plaintiffs are somewhat unclear on the nature of defendants' possession. The pleadings imply a mere bailment without authority to sell (*see* complaint, ¶¶ 32, 33 [accusing defendants of having "unlawfully disposed" of the works]). However, at his deposition, Mr. Rower described the arrangement as a consignment, and explained that the estate believed that it had not been paid its share of the proceeds from the works' sale (affirmation of Steven Wolfe, Feb. 22, 2013, exhibit K, 195—197).

with particularity; and (4) the court lacks personal jurisdiction over them. Pursuant to a settlement, Mayhew and Caballero delivered the signing wires (among other things) to the plaintiffs (transcript, Aug 22, 2013, 21:19–25), and the claims against them were discontinued with prejudice by stipulation dated April 29, 2011.

II. Proposed Amended Complaint

Plaintiffs now move to amend their complaint. In their proposed amended complaint (affidavit of Alexander S.C. Rower, sworn to December 24, 2012, exhibit 2 [proposed amended complaint]), plaintiffs seek to add allegations concerning a letter from Dolly received in 1996 by Alexander S.C. Rower, the artist's grandson and the president of the Calder Foundation (proposed amended complaint, exhibit 2). In the letter, Dolly wrote that she would "gather up whatall [sic] we have from [Calder] for your files. I feel like the Calder Foundation is the right home for all of our 'stuff'" (*id.*). Included in the items she mentioned were Calder's original letters and other objects that she thought might be of interest to Rower, such as "a handful of 'singing [sic] wires'" and "all kinds of things that we've been hanging onto since we took over after poor Curt [Valantin] died" (*id.*). Dolly noted that at the time Mayhew was "hording" [sic] the correspondence for the purpose of writing a book (*id.*).

Based on Dolly's letter, plaintiffs seek to add a cause of action for breach of contract due to defendants' failure or refusal to deliver the items mentioned therein. Also, plaintiffs claim that the letter can serve as the basis for a cause of action for fraud, asserting that the fact that defendants allowed Mayhew to take possession of the Correspondence shows that defendants never intended to relinquish the items to plaintiffs. Further, they contend that in 2008, Katherine told Rower that she would search Klaus's home for the Correspondence, when she allegedly knew that the letters had been put into escrow by Mayhew pursuant to a settlement agreement

discontinuing a separate action commenced by Mayhew in 2006 against the Perls (proposed amended complaint, ¶ 82 [ii]; Rower affidavit, December 24, 2012, exhibit 7). To amplify their fraud claim, plaintiffs also seek to allege that Klaus maintained a Swiss bank account which he called “Madame Andre”, that the Gallery’s business records are incomplete, obscure, or fraudulent, and that on various occasions, the defendants made misrepresentations to the United States tax authorities.

Aside from adding new factual allegations and a cause of action for breach of contract, the proposed amended complaint seeks to assert claims for breach of fiduciary duty, constructive trust and unjust enrichment, as well as an accounting, and discontinues the cause of action for conversion. Finally, the proposed amended complaint broadens its request for relief on the replevin and breach of bailment causes, to include the immediate repossession of “Standing Constellation” and any other Calder property in defendants’ custody.

III. Opposition and Cross-Motion

Defendants oppose the motion to amend and cross-move to dismiss the complaint. Defendants present evidence demonstrating that during Calder’s lifetime, the Gallery rendered accountings to him, which in many instances were acknowledged and signed by Calder or his wife (affirmation of Steven Wolfe, Feb. 22, 2013 [Wolfe opposition affirmation], exhibit B). After Calder’s death in 1976, the evidence indicates that the Gallery presented the estate with an inventory of the Calder works in its possession (*id.* at exhibit C). Another inventory was taken by the Calder estate’s agent in 1977 for a tax appraisal (*id.* at exhibit D). These inventories included the fifteen works of art enumerated in the complaint (Enumerated Works), albeit omitting “Standing Constellation”, which defendants claim was given to Dolly as a gift in 1970 (*see* Wolfe opposition affirmation, exhibit E [inventory record notation to that effect]). In 1978,

the Calder estate ended its relationship with the Perls Galleries in favor of the Knoedler Gallery (Knoedler) (*id.* at exhibit K, 197:1–11; affirmation of Steven Wolfe, May 29, 2013 [Wolfe reply affirmation], exhibit D).

Defendants admit that the Enumerated Works remained on consignment with the Gallery even after 1978, but maintain that the Gallery sold these works long ago (Wolfe opposition affirmation, ¶ 22 n 11, ¶ 54). Defendants present documents containing provenance statements for fourteen of the Enumerated Works⁴ which they received from the Calder Foundation during discovery, all of which indicate that the works in question had passed from the Gallery to a third party (*id.* at exhibit H). Moreover, they submit letters that the Calder Foundation received in 1989 from an establishment called the Greenberg Gallery, which acknowledged that it had once owned “Small Moths”, one of the Enumerated Works, and had sold it to the Marisa del Re Gallery in 1985 (*id.*). Similarly, defendants present a letter written to the Calder Foundation from a Japanese gallery named Galerie Tokoro, dated September 22, 1989, in which the Japanese gallery acknowledged that it had acquired the Enumerated Works “Crinkly Rudder,” “Red Fountain,” “Red Oval Counterweight,” “Red and Black Boomerangs,” “Black Tulip in the Air,” and “Flames and Moon Face” from the Perls Galleries in 1978 (*id.*).⁵

IV. *Standards*

A. *Dismissal*

On a motion to dismiss the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts (*Amaro v Gani Realty*

⁴ The exception is “The Bush and the Tree.”

⁵ These letters appear to have been sent in response to the Calder Foundation’s aforementioned efforts to compile a definitive catalogue raisonné, rather than any sort of investigation into the Gallery’s dealings (*id.*).

Corp., 60 NY3d 491 [2009]; *Skillgames, L.L.C. v Brody*, 1 AD3d 247, 250 [1st Dept 2003] [citing *McGill v Parker*, 179 AD2d 98, 105 (1992)]; *Mazzai v Kyriacou*, 98 AD3d 1088, 1090 [2d Dept 2012]; see also *Cron v Harago Fabrics*, 91 NY2d 362, 366 [1998]). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action (*Skillgames, id.* [citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)]). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff (*Amaro*, 60 NY3d at 491). “However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.” (*Skillgames*, 1 AD3d at 250 [citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994)]).

On a motion to dismiss an action as time-barred, the defendant must “establish, *prima facie*, ‘that the time in which to commence an action has expired. The burden then shifts to the plaintiff to aver evidentiary facts establishing that his or her cause of action falls within an exception to the statute of limitations, or raising an issue of fact as to whether such an exception applies’” (*Romanelli v Disilvio*, 76 AD3d 553, 554 [2d Dept 2010] quoting *Texeira v BAB Nuclear Radiology, P.C.*, 43 AD3d 403, 418–19 [2d Dept 2007]).

B. Leave to Amend

A party may move to amend or supplement his pleadings at any time (CPLR 3025 [b]). While leave to amend should be freely granted (*id.*), any such motion must be supported by an affidavit of merits or other evidence appropriate on a motion for summary judgment (*Nichols v Curtis*, 104 AD3d 526, 528 [1st Dept 2013] citing *Non-Linear Trading Co. v Braddis Assocs.*,

Inc., 243 AD2d 107, 116 [1st Dept 1998]; *see also JPMorgan Chase Bank, N.A. v Low Cost Bearings NY Inc.*, 107 AD3d 643, 644 [1st Dept 2013] [“Plaintiff made the requisite evidentiary showing of the viability of its proposed amendments . . .”]; *Am. Theatre for the Performing Arts, Inc. v Consol. Credit Corp.*, 45 AD3d 506, 506 [1st Dept 2007] *citing Nab-Tern Constructors v City of New York*, 123 AD2d 571, 572 [1st Dept 1986]). Leave may be denied when the proposed pleading “fails to state a cause of action, or is palpably insufficient as a matter of law” (*Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005] [citations omitted]; *see also Davis & Davis v Morso*, 286 AD2d 584, 585 [1st Dept 2001] [citations omitted]). Then too, specious amendments based on mere speculation should not be allowed (*Nab-Tern Constructors*, 123 AD2d at 572–73). Finally, denial is appropriate where the proposed cause of action would be time-barred (*Nall v Estate of Powell*, 99 AD3d 411, 412 [1st Dept 2012]; *Shefa Unlimited, Inc. v Amsterdam & Lewinter*, 49 AD3d 521 [2d Dept 2008]).

V. *Discussion*

A. *Proposed Breach of Contract*

In their proposed amended complaint, plaintiffs seek to allege that the letter Dolly wrote in 1996 constitutes a binding contract which entitles them to possession of the Correspondence and the other items mentioned therein. However, on its face, the letter does not indicate any consideration for the promises made, and neither plaintiffs’ proposed amendment nor Rower’s affidavits explain what Dolly gained or was to have gained. To the contrary, any fair reading of the letter reveals that it is at best an expression of an intent to give the Correspondence and the other items to the Calder Foundation as a gift, without consideration or compensation.⁶ Lacking

⁶ See proposed amended complaint, exhibit 2 (“I feel like the Calder Foundation is the right home for all of our ‘stuff’ . . . I want you to have his original letters . . . we have some other things that may be of interest to you”).

consideration, the letter is not an enforceable contract (*see Beitner v Becker*, 34 AD3d 406, 407 [2d Dept 2006] [“All contracts must be supported by consideration consisting of a benefit to the promisor or a detriment to the promisee.”]; *see also McRay v Citrin*, 270 AD2d 191 [1st Dept 2000] [natural affection insufficient consideration to render agreement enforceable]). Moreover, even if Dolly’s letter were a contract, it would have been a contract between her and the Calder Foundation, which is not a party to this action. Dolly’s alleged promise was made to the Calder Foundation, which Dolly described as a proper repository for the archival materials, not the Calder estate, which exists to distribute Calder’s assets to Calder’s beneficiaries. Plaintiffs therefore do not have standing to assert the Foundation’s purported claim. Having decided that plaintiffs cannot assert a breach of contract claim, the court declines to reach the question of whether any such claim would be time-barred under the statute of limitations.

Nor can the Correspondence serve as a basis for fraud. There is no allegation that plaintiffs suffered any injury separate from the non-delivery of the letters, which the court has ruled they were not entitled to (*see id.* [where there is no underlying claim, there is no recovery for fraud]; *see also Manas v VMS Assoc., LLC*, 53 AD3d 451, 454 [1st Dept 2008] [fraud based claim dismissed as duplicative of breach of contract action]).

B. The Correspondence, Standing Constellation and Other Items

In the alternative, plaintiffs claim that the Correspondence, “Standing Constellation,” the Enumerated Works, and the other items described in Dolly’s letter had merely been entrusted by Calder to the Gallery, and that Klaus, Dolly and their successors were bailees thereof. Plaintiffs, therefore, assert that they are entitled to immediate possession of all such property or to damages arising from the property’s unlawful withholding, and that, to the extent defendants have failed to

disclose their possession of any such objects, such an omission constituted fraud. Plaintiffs also seek an accounting.

The court first notes that the Correspondence cannot be regarded as property subject to a bailment, as the recipient of a letter becomes its owner (*see Salinger v Random House, Inc.*, 811 F2d 90, 94–95 [2d Cir 1987] *citing* 1 Nimmer on Copyright, § 5.04 at 5-32 [1986]). Plaintiffs' attempt to characterize these letters as the artist's business records is unpersuasive, as it is simply not remotely plausible that Calder, who lived in France, intended to depend on letters sent to New York in order to keep track of his own affairs. Therefore, insofar as plaintiffs' claims derive from an asserted property interest in the Correspondence, those claims are dismissed.

As for the other items, while it is true that the entrustment of one's property to another can create a bailment relationship (*see Martin v Briggs*, 235 AD2d 192, 197 [1st Dept 1997]), that does not mean that as long as such property is in the bailee's custody the bailment relationship persists. Like any other relationship, a bailment can be expressly terminated, and the former bailee's continued possession of the item does not mean that the bailment somehow survived the decision to end it (*see Leventritt v Sotheby's, Inc.*, 5 AD3d 225 [1st Dept 2004]). Once the bailment has ended, the bailor is "not free to treat the bailment as continuing, but [is] required to pursue her remedy" (*id.* at 226).

The relationship between Calder and the Gallery was one between an artist and his dealer. In 1978, after Calder's death, his estate terminated that relationship with the Perls Galleries by choosing a new dealer, Knoedler. Two inventories were conducted by the Calder estate. Except with respect to the Enumerated Works, there is no indication that, having moved the bulk of their material to Knoedler, the estate intended to leave any of its property with Klaus or Dolly. Thus, in contrast to *Martin*, the relationship between the estate and the Gallery did not merely become

dormant, but was actually, affirmatively terminated and an accounting rendered. Having taken affirmative steps to end the relationship in 1978, the estate cannot now, thirty-two years later, characterize the odds and ends left (or abandoned) in the Perls's possession as the subjects of a continuing bailment, however valuable or important those odds and ends now appear to be. Rather, any claim arising out of the prior bailment or the property alleged to have remained in defendants' possession, including the Correspondence or "Standing Constellation", which may or may not have been a gift from the artist to a friend, accrued upon the bailment's termination in 1978, and is long since time-barred.

Plaintiffs' fraud claim is similarly deficient. Even assuming that defendants, as bailees, owed plaintiffs, as successor-bailors, a duty to fully disclose the extent of Calder's property within their possession, the claim for fraudulent concealment must have accrued, at latest, when the bailment relationship was terminated in 1978 and the Perls's allegedly neglected to inform the estate of their continued possession of "Standing Constellation" and the other items. The limitations period for fraud being six years, any claim arising out of such failure to disclose must be time-barred.

In response, plaintiffs seek to toll the limitations period by invoking the fraud discovery rule (for claims based on fraud) or equitable estoppel (for the other claims).⁷ The accrual of a cause of action for fraud can be tolled until either the date of the fraud's discovery or the date that the plaintiff could have discovered the fraud through the exercise of due diligence (*Kaufman v Cohen*, 307 AD2d 113, 122-23 [1st Dept 2003]; CPLR 213 [8]). Furthermore, "a defendant may be estopped to plead the Statute of Limitations where the plaintiff was induced by fraud,

⁷ Plaintiffs also rely on the fiduciary tolling exception. The exception does not apply here, given their explicit termination of the relationship (*see Access Point Med., LLC v Mandell*, 106 AD3d 40, 44-46 [1st Dept 2013]).

misrepresentation or deception to refrain from filing a timely action” (*Simcuski v Saeii*, 44 NY2d 442, 448-49 [1978] [citations omitted]). However, it is the plaintiff’s burden to “demonstrate that any delay was caused by fraud, misrepresentation or deception and that his reliance on the asserted misrepresentations was justifiable” (*Ramirez v N.Y. City School Constr. Auth.*, 229 AD2d 313, 313 [1st Dept 1996] [internal quotations omitted]; *see also Mattewan on Main, Inc. v City of Beacon*, 109 AD3d 590, 590 [2d Dept 2013] [citations omitted] [once limitations defense established *prima facie*, it is plaintiff’s burden to raise a question of fact as to whether a tolling exception applies]). Similarly, to take advantage of the fraud discovery rule, it is plaintiff’s burden to demonstrate that he could not have discovered the fraud earlier through the exercise of reasonable diligence (*CSAM Capital, Inc. v Lauder*, 67 AD3d 149, 157 [1st Dept 2009] *citing Enderveit v Slade*, 214 AD2d 456, 457 [1st Dept 1995]; *see also Percoco v Lesnak*, 24 AD3d 427, 428 [2d Dept 2005] [“The burden of establishing that the fraud could not have been discovered during the two-year period before the commencement of the action rests on plaintiff”] *citing Siler v Lutheran Social Servs. of Metro. N.Y.*, 10 AD3d 646 [2d Dept 2004]).

The court first notes that defendants’ possession of the bulk of the items claimed by plaintiffs, aside from “Standing Constellation”, was revealed by Dolly in her 1996 letter, fourteen years before this action was filed. Defendants have also shown that after Calder’s death, the Gallery presented the estate with an inventory of Calder works in their possession, and in 1977, the estate itself commissioned an appraisal of all its property in the custody of the Gallery. The estate then took the affirmative step of moving most of its artwork to a different gallery. It would appear, then, that the question of what artworks the Perls’s possessed was one in which the estate took an active interest early on and which it took the time to investigate.

To successfully assert the tolling exceptions, then, plaintiffs must somehow explain the executors' supposed failure to carry out their *own* fiduciary duty to discover the totality of the estate assets the Gallery possessed. Plaintiffs must come forward with some evidence or specific factual allegations showing that despite their opportunity, and, indeed, their efforts, to do so, the estate's executors *could not* have discovered the full extent of the Perls's possession of Calder's property by the exercise of reasonable diligence until shortly before 2010, and that their prior efforts to do so were deliberately thwarted by the Perls's connivance. No such showing has been made, and the only evidence plaintiff has produced has been the various affidavits of Rower, who, as a child at the time of his grandfather's death (deposition of Douglas Mayhew, June 4, 2013, 39:6-7), has nothing useful to say about what the estate did or did not know in 1976 through 1978, how the appraisals were taken or how the move to Knoedler was executed. Rower, in fact, did not formally become an administrator of the estate until *after* this action was commenced (proposed amended complaint ¶ 3) and has admitted to having never investigated the estate's prior efforts to marshal its assets (Wolfe opposition affirmation, exhibit K, 204-05). Plaintiffs' claim that they could not have ascertained how much of their property the Gallery had is completely unsupported by contemporaneous records or the statement of anyone with personal knowledge of the facts. This conclusory, bare assertion is insufficient to invoke the fraud discovery rule or the doctrine of equitable estoppel. Accordingly, plaintiffs' claims arising out of the Correspondence, "Standing Constellation", and any other property left with the Gallery after Calder's death (other than the Enumerated Works), or defendants' alleged failure to disclose their possession of such property, are dismissed as time-barred.

C. *The Enumerated Works*

The analysis with respect to the Enumerated Works is somewhat different. Defendants here acknowledge that there was a continuing bailment with respect to these pieces, and maintain that they were sold. A claim for interference with this possessory interest, however formally styled, would accrue upon the performance of “some affirmative act [such as] asportation by the defendant or another person, denial of access to the rightful owner or assertion to the owner of a claim on the goods, [or] sale or other commercial exploitation of the goods by the defendant,” which has the effect of interfering with a plaintiff’s superior right to the property in question (*State v Seventh Regiment Fund, Inc.*, 98 NY2d 249, 260 [2002]).⁸ Thus, even where a defendant originally came into possession of the property lawfully, a claim against such a lawful custodian accrues upon the custodian’s performance of *any* affirmative act interfering with the true owner’s rights (*Heffernan v Marine Midland Bank, N.A.*, 283 AD2d 337, 338 [1st Dept 2001] *citing* *MacDonnell v Buffalo Loan, Trust & Safe Deposit Co.*, 193 NY 92, 101 [1908]; *Matter of Vogel*, 23 Misc2d 512, 514 [Sur Ct, Westchester County 2009]). Furthermore, even in those situations where it could be argued that there was no such clear, affirmative act, where the true owner has been given reason to believe that his rights are being usurped, he is not entitled to continue to rely on a custodian and may not unreasonably delay making a demand for the return of his property (*see SongByrd, Inc. v Estate of Grossman*, 206 F3d 172, 183 [2d Cir 2000] [holding that even if demand were required, plaintiffs’ unreasonable delay in making demand after learning that his ownership claims were being disregarded rendered action time-barred]; *Herrington v Verrilli*, 151 FSupp2d 449, 460—61 [SDNY 2001] [failure to make demand for return of church organ for five years after learning it had been moved by warehouseman unreasonable as a matter of law]).

⁸ An exception to this general rule is that a claim for replevin against a good-faith purchaser for value does not accrue until the true owner demands the return of the chattel and the purchaser refuses (*Solomon R. Guggenheim Found. v Lubell*, 77 NY2d 311 [1991]).

Here, defendants have presented documents, received from the Calder Foundation during discovery, which establish that the Gallery had disposed of fourteen out of the fifteen works of art at various points between 1976 and 1988 (Wolfe opposition affirmation, exhibit H). Any cause of action arising out of these allegedly unlawful dispositions would therefore have accrued at that time, and would be time-barred. Here, too, though, plaintiffs seek to toll the statute of limitations by claiming ignorance of these sales. However, defendants *also* have presented evidence showing that by 1989, the Calder Foundation had been explicitly informed that seven of these works had passed into the possession of other galleries. This undercut plaintiffs' invocation of equitable estoppel or the fraud discovery rule (*see Simcuski v Saeii*, 44 NY2d 442, 450 [1978] ["(T)he burden is on plaintiff to establish that the action was brought within a reasonable time after the facts giving rise to the estoppel have ceased to be operational"]; *Rite Aid Corp. v Grass*, 48 AD3d 363, 364 [1st Dept 2008]). Then too, it raises the serious question of why the Calder estate, having learned in 1989 that the Perls's had sold nearly half of the fifteen works that the estate had continued to entrust to them, decided to wait twenty-one years before making a demand for the works' return, under the false pretense that they still believed *all* of the works to be in defendants' possession. Plaintiffs have offered no explanation for this delay, and, in fact, have not responded to the evidence showing their knowledge of the works' fate. The estate's failure to act previously bars any action at this time.

D. The New Proposed Fraud Allegations

Finally, the court considers the remainder of plaintiffs' fraud claim. To state a claim for fraud, "the complaint must contain allegations of a representation of a material fact, falsity, scienter, reliance and injury" (*Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 [1999]). "[A] fraud cause of action may be predicated on acts of concealment where the defendant had a duty

to disclose material information” (*Kaufman*, 307 AD2d at 119-20, citing *Swersky v Dreyer & Traub*, 219 AD2d 321, 326 [1st Dept 1996] *app withdrawn* 89 NY2d 983 [1997]). A fraud claim may not be predicated upon a future promise and must be pled with particularity (CPLR 3016 [b]); *Lanzi v Brooks*, 43 NY2d 778 (1977).

The court has already discussed plaintiffs’ claim and proposed claim for fraud insofar as it relates to defendants’ failure to disclose their possession of items entrusted to them by the artist or alleged misrepresentations about the delivery of the Correspondence. The remaining fraud allegations are an incoherent stew of irrelevance and innuendo, which do not satisfy the elements of fraud outlined above. Briefly, allegations of tax fraud by defendants are the sole concern of the United States government and have nothing whatsoever to do with this case. Any curiosity in the Perls’s methods of keeping their own business records is immaterial, as there is no allegation that the estate ever relied on those records for any purpose. That Klaus Perls may have deposited some of his proceeds from the sale of Calder works into a Swiss bank account does not amount to fraud against plaintiffs, nor does it give plaintiffs the right to see the records of that account. That Klaus never disclosed to the estate that Calder also maintained a Swiss bank account is immaterial, as it was not his obligation to do so. In fact, all these allegations are so patently inadequate that the court can only conclude that they were brought solely for the purposes of harassment or embarrassment, without any consideration of their legal sufficiency.

VI. Conclusion

For the foregoing reasons, leave to amend is denied and the complaint is dismissed. In addition, the court notes that plaintiffs waited to commence this suit not only until after the deaths of Klaus, Dolly and the Gallery employees who would have known about the disposition of Calder’s works and the operation of the Gallery, but also after the passing of a number of the

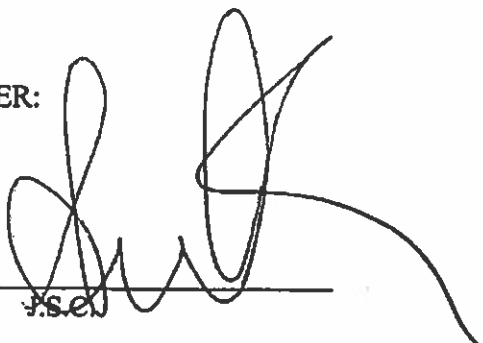
original executors (and their agents) who were first charged with administering the artist's estate (Wolfe opposition affirmation, exhibit K, 193; Mayhew deposition, June 4, 2013, 7, 250-51; proposed amended complaint ¶ 3). Though this case began more than two years prior to the filing of the instant motion, plaintiffs have presented no testimony from anyone with personal knowledge of the administration of the estate in the years immediately following Calder's death. Nor have they presented any of their own records in support of their contentions. In other words, plaintiffs are attempting to litigate issues that necessarily stretch back decades without any personal knowledge or contemporaneous records, where nearly all of the people who had personal knowledge of the facts are dead. Rarely has the court encountered a better justification for the statute of limitations. Accordingly, it is

ORDERED that the motion of plaintiffs Sandra Calder Davidson, Mary Calder Rower and Shawn Davidson, as executors of the estate of Alexander Calder, deceased, for leave to amend the complaint is denied; and it is further

ORDERED that the cross-motion of defendants Katherine Perls, individually, and as executrix for the estates of Amelia B. Perls and Klaus G. Perls, the Perls Foundation and Lennart Braberg is granted, and the Clerk is directed to enter judgment dismissing the complaint in its entirety, with prejudice, and with costs and disbursements.

Dated: December 23, 2013

ENTER:



J.S. CJ