SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: IRA GAMMERMAN **PART** 27

Index Number : 603012/2009
FOWNES BROTHERS & COMPANY INC
vs
JP MORGAN CHASE & CO
Sequence Number : 002
DISMISS

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______
MOTION CAL. NO. ______

were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ **Yes** ☐ **No**

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memo decision.

It is so ordered.

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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/26/2010

IRA GAMMERMAN
~~J.S.C.~~ JHO

Check one: ☑ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 27

---X

FOWNES BROTHERS & COMPANY, INC.,
THOMAS GLUCKMAN, ROBY GLUCKMAN and
EVEN DUNLOP,

Plaintiffs,

- against -

Index No. 603012/09

Part Calendar No. 23269

JP MORGAN CHASE & CO., GRANT THORNTON LLP
and FICTITIOUS DEFENDANTS A, B, C, D & E,

Defendants.

---X

IRA GAMMERMAN, J.H.O.:

Motions bearing sequence numbers 001 and 002 are consolidated for disposition.

In motion sequence number 001, defendant Grant Thornton LLP ("GT") moves, pursuant to CPLR 3211 (a) (5) and (7), to dismiss the fifth, sixth and seventh causes of action against it for violation of General Business Law ("GBL") § 349, accounting malpractice, and professional negligence, respectively, as time-barred; and to dismiss the entire complaint for failure to state a claim. In motion sequence number 002, defendant JP Morgan Chase & Co. ("Chase") moves, pursuant to CPLR 3211 (a) (7), to dismiss the complaint for failure to state a claim.[1]

Background

In March of 2000, plaintiff Fownes Brothers & Company, Inc. ("Fownes"), with the assistance of Chase and GT, established an employee benefit plan, the Advantage Death Benefit

[1] While Chase does not formally move, under CPLR 3211 (a) (5), to dismiss the GBL § 349 claim and the professional negligence claim as time-barred, defendant argues for such relief in its brief and the parties have addressed the issues; therefore, I will consider it.

Plan, for its employees, including plaintiffs Thomas Glucksman, Roby Glucksman and Evan Dunlap. The Advantage Death Benefit Plan, known as the Bisys Plan, was represented to be in full compliance with Internal Revenue Code § 419A (f) 6. The Bisys Plan was to be funded with life insurance policies, the premiums of which were paid by Fownes.

From 2000 to 2002, Fownes made life insurance premium contributions to the Bisys Plan in excess of $2,179,500. Sometime in May of 2003, the managers of the Bisys Plan notified Fownes that its plan did not actually satisfy Internal Revenue Service ("IRS") regulations. The notice indicated that Fownes must terminate its participation in the Bisys Plan by December 31, 2003.

Upon receipt of the notice, Fownes consulted with defendants regarding its options. In October of 2003, Lance Rembar, vice president of Chase Insurance Brokerage & Advisory Services, provided Fownes with an Executive Summary, which advised Fownes to promptly send Bisys a notice of termination, and to transfer the policies to a welfare benefit trust. The Executive Summary further advised that such transfer should be a non-taxable event, and that premium deductibility should be available to Fownes. Rembar proposed that a transfer of the policies to the Millennium Plan should avoid the IRS 1099 problem. GT, plaintiff's accountant, endorsed and approved Rembar's plan and an unspecified individual, representing GT, communicated its approval to Fownes.

Plaintiffs allege that on or about October 24, 2003, in reliance upon the representations of Rembar, in his capacity as vice president of Chase, and upon GT's concurrence, Fownes formally withdrew its participation in the Bisys Plan and transferred the policies to the Millennium Plan. Plaintiffs allege that, in reliance upon defendants' representations, they did not include the amount of the policies in their gross income for 2003.

On March 28, 2007, the IRS notified plaintiffs that, for tax purposes, a distribution occurred when Fownes and the individual plaintiffs terminated their participation in the Bisys Plan, resulting in a taxable event for which plaintiffs incurred back taxes and penalties in an amount exceeding $900,000. The IRS position was directly contrary to the representations made by Rembar of Chase and by GT.

The Instant Action

Plaintiffs brought this action on or about September 30, 2009 to recover as damages the additional taxes assessed against them by the IRS as a consequence of their reliance on the representations made by defendants concerning the tax consequences of terminating the Bisys Plan and transferring the policies to the Millennium Plan. The complaint alleges seven causes of action. The seventh cause of action and causes of action one through five are alleged against both defendants; the sixth cause of action for accounting malpractice is alleged only against GT.

The first cause of action is for fraud, and seeks actual and punitive damages. The complaint alleges that defendants were under a duty to exercise the utmost good faith in their transactions with plaintiffs, that they intentionally misrepresented that the transfer from the Bisys Plan to the Millennium Plan was a non-taxable event in order to cover-up the earlier error as to the tax status of the Bisys Plan, and that plaintiffs relied on said misrepresentations to their detriment, resulting in the tax liability. The second cause of action is for negligent misrepresentation based upon the same transaction. The third cause of action is for unjust enrichment, in that, through the alleged misrepresentations and omissions, defendants obtained significant monetary remuneration to the detriment of plaintiffs. The fourth cause of action is for breach of fiduciary duty and it, too, seeks actual and punitive damages. The complaint alleges that defendants had a duty to exercise a degree of diligence, judgment, care and skill ordinarily used by persons engaged in the same business and, instead, they fraudulently induced plaintiffs to transfer the policies without informing them of the actual tax consequences of such action. The fifth cause of action is for violation of GBL § 349, and seeks damages and reasonable attorneys' fees. The complaint alleges that defendants' aforementioned actions constitute deceptive acts in violation of the statute. The sixth cause of action, for accounting malpractice, also seeks actual and punitive damages. It alleges that GT failed to exercise reasonable care and competence in performing accounting and tax-related services for plaintiffs when it advised plaintiffs on the transfer and when it filed plaintiffs' tax returns without accounting for the transfer as a taxable event. The seventh cause of action is for professional negligence, in that it alleges that defendants, as professionals in the financial services and accounting industry, owed plaintiffs a duty to exercise reasonable care with regard to the transfer of policies from the Bisys Plan to the Millennium Plan and to ensure that the transfer would provide plaintiffs with the benefits and tax advantages promised, and that defendants breached said duties, resulting in damages from the increased tax liability.

Discussion

<u>The Statute of Limitations Defense</u>:

Chase and GT argue that the fifth and seventh causes of action are time-barred under the applicable statutes of limitations. In addition, GT argues that the sixth cause of action, alleged against it only, is also untimely.

The fifth cause of action is for violation of GBL § 349. Such an action is governed by

CPLR 214 (2), the three year statute of limitations for statutory claims, *Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201 (2001). The cause of action accrues so as to trigger the commencement of the limitations period when all the necessary factual circumstances to establish a right of action have occurred, *Britt v Legal Aid Socy.*, 95 NY2d 443 (2000). Where an action is created by statute, the statutory language determines the elements of the claim, *Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214 (1996).

GBL § 349 (a) prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service" and GBL § 349 (h) affords a right of action to "any person who has been injured by any reason of any violation of this section." Thus, the cause of action does not necessarily accrue when the deceptive acts or practices occurred, but rather when a party is injured by said acts, *Gaidon v Guardian Life Ins. Co. of Am., supra.*

Defendants argue that the action accrued in 2003 upon the transfer to the Millennium Plan, when the taxable event occurred and plaintiffs incurred the tax liability. Plaintiffs argue that the injury occurred in 2007, when the IRS claimed the additional taxes.

Here, the injury took place at the time that the taxable event occurred as that is when the tax liability was incurred. In this case, the taxable event occurred in 2003, when plaintiffs made the transfer to the Millennium Plan, not when the IRS finally demanded payment, *cf. Ackerman v Price Waterhouse*, 84 NY2d 535 (1994). This action was not commenced until 2009, well after the limitations period had run. The fifth cause of action is, accordingly, untimely and is, thus, dismissed against both defendants.[2]

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[2] This cause of action also fails to a state a claim for relief under GBL § 349 in that the conduct alleged is not consumer oriented, as required, but, rather, is a private complex transaction unique to the parties, *New York Univ. v Continental Ins. Co.*, 87 NY2d 308 (1995);

The sixth cause of action, for accounting malpractice, is also governed by a three-year statute of limitations under CPLR 214 (6), *Williamson v Price Waterhouse Coopers LLP*, 9 NY3d 1 (2007). The action accrues "upon the client's receipt of the accountant's work product since this is the point that a client reasonably relies on the accountant's skill and advice and, as a consequence of such reliance, can become liable for tax deficiencies," *Ackerman v Price Waterhouse*, 84 NY2d 535 (1994).

Here, the advice on tax consequences of the transfer to the new plan occurred in October 2003 and the current action is, thus, untimely. Plaintiffs argue two that the statute of limitations should not apply. First, plaintiffs argue that GT concealed its wrongdoing and misrepresented that transfer of the policies to the Millennium Plan would be a non-taxable event, and is thus equitably estopped from asserting the statute of limitations as a defense. Second, plaintiffs argue that the statute of limitations should be tolled, because GT engaged in continuous representation of them. Plaintiffs allege that GT provided accounting services from 1987 to approximately 2008,[3] consisting of general accounting and tax-related services, arising from and relating to the transfer of the policies from the Bisys Plan to the Millennium Plan, citing GT bills for 2007 that reflect charges on this issue.

Under the doctrine of equitable estoppel, a defendant is estopped from pleading a statute of limitations defense "where the plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action," *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478 (2007)

Teller v Bill Hayes, Ltd., 213 AD2d 769 (2d Dept 1995).

[3] In 2007, the general accounting services were switched to another firm, but the tax-related services continued to be rendered by GT.

(citation and quotation omitted). However, equitable estoppel will not lie, if the allegations of concealment are the same as the conduct that forms the subject matter of the action, *Kaufman v Cohen*, 307 AD2d 113 (1st Dept 2003). Here, plaintiffs alleges the same wrongful conduct in their equitable estoppel argument as they allege as the basis for the malpractice cause of action. Thus, equitable estoppel does not preclude a statute of limitations defense.

Under the continuous representation exception, the statute of limitations period may be tolled where plaintiffs can establish a course of representation on a particular issue giving rise to the malpractice claim, and a mutual understanding that further representation is contemplated by the parties as to that issue, *Williamson v Price Waterhouse Coopers, LLP*, 9 NY3d 1, *supra*. Allegations of a continuing general relationship or discrete professional services unrelated to the alleged malpractice are insufficient to support the exception, *Weiss v Deloitte & Touche, LLP* 63 AD3d 1045 (2d Dept 2009). In *McCoy v Feinman,* 99 NY2d 295 (2002), the Court of Appeals noted that to invoke the exception, a plaintiff must plead evidentiary facts demonstrating a "mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim," and that language in the parties' engagement agreement may provide such evidence.

While plaintiffs have shown that services on the same issue occurred in 2007, they have failed to show that such services were previously contemplated in 2003, when the advice on the non-taxable nature of the transfer was originally given, or in the years between the original advice and the IRS notice of a taxable event four years later. Plaintiffs conclusory state in the complaint that the representation was continuous, but in their submissions on the motion, they only cite the 2007 GT bills for additional services provided as to the issue in dispute. Plaintiffs do not provide copies of engagement letters, or any other correspondence or other allegations that would indicate that additional representation was expressly contemplated by the parties. As the record stands, absent such evidentiary proof, there is no basis to assume that the subsequent services were contemplated by the parties, rather than constituting a new representation four years later, *Serino v Lipper,* 47 AD3d 70 (1st Dept 2007).[4] The continuous representation exception does not apply on the facts presented, and GT's statute of limitation defense bars the accounting malpractice action.

The seventh cause of action, for professional negligence, also carries a three year statute of limitations period under CPLR 214 (6). Like the accounting malpractice, this claim is also dismissed as untimely, based upon the above analysis.

<u>Failure to State a Cause of Action</u>:

Defendant Chase's Motion:

<u>Fraud</u>:

On a claim for fraud, plaintiffs must show a material misrepresentation of an existing fact, made with knowledge of its falsity, the intent to deceive, justifiable reliance on the misrepresentation, and resulting damages, *Kaufman v Cohen*, 307 AD2d 113, *supra.*

Chase contends that the first cause of action for fraud fails to state a claim for the following reasons: (1) Chase's alleged misrepresentations were non-actionable expressions of opinion and predictions, not statements of existing fact; (2) there are no factual allegations of

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[4] Plaintiffs citation to *Tayebi v KPMG LLP*, 18 Misc 3d 1139 [A], 2008 NY Slip Op 50374 (Sup Ct, NY County 2008) is distinguishable. There, the court concluded that an engagement letter lent some evidentiary support for the proposition that the subsequent representation was contemplated and that fact, taken with the invoice submitted, was sufficient to raise an issue of fact.

scienter; (3) plaintiffs' reliance on the representations was neither reasonable, nor justifiable; and (4) under the "out of pocket rule," plaintiffs sustained no damages as a consequence of any of Chase's statements.

Plaintiffs argue that there is a the fiduciary relationship with defendant Chase,[5] based upon the longstanding relationship of the parties and the trust and confidence reposed in Mr. Rembar's expertise and financial advice, and that a fiduciary's statements of opinion may form of the basis of a fraud claim, *Hutchins v United Mut. Ins. Co.*, 107 AD2d 871 (3d Dept 1985). Plaintiffs maintain that issues of opinion, scienter and justifiable reliance are usually fact specific and left to the trier of fact, or at the very least, may only be decided on a summary judgment motion after there has been an opportunity to conduct discovery, which has not yet occurred here. Plaintiffs also assert that damages are solely attributable to Chase's actions, and, therefore, represent an out-of-pocket loss.

Chase counters that, generally, courts have found that a relationship between a bank and its customer is an arm's length debtor-creditor relationship; and that plaintiffs have not alleged sufficient facts to establish a fiduciary relationship beyond the allegation that the parties had a longstanding relationship, which, in and of itself, is insufficient.

While, generally, the relationship of a bank to its customer is that of debtor and creditor and will not give rise to a fiduciary obligation, *Bank Leumi Trust Co. of NY v Block 3102 Corp.*, 180 AD2d 588 (1st Dept 1992), "a court will look to whether a party reposed confidence in another and reasonably relied on the other's superior expertise or knowledge [citations omitted],"

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[5] The plaintiffs also allege that a similar fiduciary relationship was established with GT, for the same reasons.

Wiener v Lazard Freres & Co., 241 AD2d 114 (1st Dept 1998), to make a determination as to whether a fiduciary relationship existed.

Here, it is alleged that Chase acted not in the usual debtor-creditor manner, but, rather, that Rembar, vice president in defendant's insurance brokerage and advisory services department, acted as an advisor with a certain expertise in these matters. As noted above, it is alleged that Rembar assisted in the formation of the Fownes' employee benefit program and its original placement with the Bisys Plan; that Rembar provided more advice regarding the tax problem with the Fownes employee benefit program resulting in the transfer of the life insurance for Fownes' employees from the Bisys and into the Millennium Plan, and the tax consequences thereof; and that plaintiffs' relied on Rembar's representations, as a financial advisor having superior knowledge and expertise. These allegations do not appear to fall within the conventional debtor-creditor boundaries of a bank-customer relationship, as they have nothing to do with either loans or deposits, either of which creates and forms the basis for the debtor-creditor relationship. Plaintiffs have, thus, alleged sufficient facts here to raise an issue as to a fiduciary relationship, but that alone does not set forth a cognizable legal theory of fraud.

Plaintiffs do not provide factual support for their conclusory allegation that Chase knew or should have known that the statements were false when made. In this instance, the critical information is what was the IRS position in 2003 as to whether a transfer to the Millennium Plan, or some other similarly situated plan, presented a taxable event. Such information is a matter of public record, equally available to both parties, so that plaintiffs do not need discovery thereon. Plaintiffs have failed to allege that, in 2003, IRS held a negative or contrary view from the position espoused by Chase. In the absence of any allegations as to the IRS position in 2003 on the issue, plaintiffs have not alleged that Chase's representations were made knowingly or that Chase should have known that IRS considered such a transfer a taxable event.

In addition, plaintiffs fail to allege recoverable damages. The complaint merely demands recovery of the taxes paid, as a consequence of the transfer. Under the holding in *Lama Holding Co. v Smith Barney,* 88 NY2d 413 (1996), "the out-of-pocket rule [does not] allow for the recovery of the payment of taxes, couched as consequential damages or otherwise." The Court of Appeals in *Lama* went on to state, citing *Alpert v Shea Gould Climenko & Casey*, 160 AD2d 67 (1st Dept 1990), that "[t]he recovery of consequential damages naturally flowing from a fraud is limited to that which is necessary to restore a party to the position occupied before the commission of the fraud."

Here, the damages flow not from the misrepresentation, but from the transfer of the funds from the Bisys Plan to the Millenium Plan, *Gaslow v KPMG LLP*, 19 AD3d 264 (1st Dept 2005). Plaintiffs, by making the transfer, obtained full access to the policies, and thereby, were put in a better position than had they not chosen to transfer the policies. Plaintiffs could take a cash distribution from the Millenium Plan without incurring taxes upon such distribution, since they could validly claim that the taxes had already been paid.

Plaintiffs have failed to state all the necessary elements of a fraud claim. Under these circumstances, the first cause of action must be dismissed.

<u>Negligent Misrepresentation and Breach of Fiduciary Duty</u>:

The second cause of action for negligent misrepresentation and the fourth cause of action for breach of fiduciary duty both seek the same damages as the fraud claim, namely recovery of the taxes paid on the transfer. For the reasons indicated above, recovery of the taxes is not a compensable damage in this case. These claims are dismissed.

Unjust Enrichment:

The elements of an unjust enrichment claim are: (1) enrichment by defendant; (2) at plaintiffs' expense; and (3) that equity and good conscience require restitution, *Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415 (1972), *cert denied* 414 US 829 (1973). There are no allegations in the complaint that plaintiffs paid Chase anything in connection with their transfer of the policies to the Millenium Plan, so there was no benefit bestowed upon Chase. Thus, there is no basis for an unjust enrichment claim, *Korff v Corbett*, 18 AD3d 248 (1st Dept 2005). This cause of action is dismissed.

GT's Motion to Dismiss For Failure to State a Cause of Action:

GT concurs in the argument that there is a lack of compensable damages. GT also asserts the following additional reasons for dismissal of the fraud based claims: (1) the first, second and fourth causes of action are duplicative of the time-barred malpractice action; and (2) the first through fourth causes of are not pled with sufficient specificity to satisfy CPLR 3016 (b).

GT joins in Chase's argument that recovery of the taxes paid is not a compensable damage on the fraud, negligent misrepresentation and breach of fiduciary duty causes of action. In light of the foregoing analysis on Chase's application, GT, is also entitled to dismissal of the claims against it.[6]

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[6] These claims are duplicative of the untimely malpractice action, as they are premised upon the same facts and conduct, and are, therefore, subject to dismissal on this basis as well, *Penner v Hoffberg Oberfest Burger & Berger*, 303 AD2d 249 (1st Dept 2003). Likewise, a review of the complaint indicates that plaintiffs have failed to plead basic facts regarding the misrepresentations integral to these claims. Missing are when and how the representations were made, and these items are something within the knowledge of plaintiff for which no discovery is necessary. Consequently, the complaint fails to plead the claim so as to provide notice and does

However, under an unjust enrichment claim, plaintiff may recover fees unjustly paid, and, here, these are different from payment of taxes, and, therefore, the unjust enrichment action against GT is not duplicative, *Tayebi v KPMG LLP*, 18 Misc 3d 1139 (A), 2008 NY Slip Op 50374, *supra*. The only objection GT asserts as to the unjust enrichment claim is that the allegations need further specification, under CPLR 3016 (b), ostensibly because the supporting allegations as to the misrepresentations are not pled with sufficient particularity. In addition, the complaint does not allege what benefits were obtained by GT at the expense of plaintiffs that it would be unjust for GT to retain. The documents submitted on the sur-reply indicate that GT was paid by Fownes for its services. Such payments may form the basis of a claim for unjust enrichment, and plaintiffs shall have leave to replead the third cause of action with greater specificity.

Accordingly, it is

ORDERED that the motion to dismiss by JP Morgan Chase & Co. is granted and the complaint as to JP Morgan Chase & Co. is dismissed in its entirety, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the motion to dismiss by Grant Thornton LLP is granted and the complaint is dismissed; and it is further

ORDERED that plaintiff is granted leave to serve an amended complaint so as to replead the third cause of action only, within 20 days after service on plaintiff's attorney of a copy of this order with notice of entry; and its further

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not meet the requirements for specificity in CPLR 3016 (b).

ORDERED that, in the event that plaintiff fails to serve and file an amended complaint in conformity herewith, within such time, leave to replead shall be deemed denied, and the Clerk upon service of a copy of this order with notice of entry and an affirmation/affidavit by defendant's counsel attesting to such non-compliance, is directed to enter judgment dismissing the action with prejudice, and with costs and disbursements to the defendant as taxed by the Clerk.

Dated: 10/26/10

ENTER:

W

J.H.O. IRA GAMMERMAN