STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DANIEL ZAZYNSKI and
THERESA ZAZYNSKI

Plaintiffs

MEMORANDUM DECISION

vs.

Index No. 520/08

EMPIRE STATE FINANCIAL GROUP, LLC,
EMPIRE STATE VIATICAL, LLC
THEO FALKOWITZ and W. JASON MITAN

Defendants

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **HOGAN WILLIG**
Attorneys for Plaintiffs
Amanda A. Gresens, Esq., of Counsel

JAECKLE FLEISCHMANN & MUGEL, LLP
Attorneys for Defendant Theo Falkowitz
Heath J. Szymczak, Esq., of Counsel
Bradley A. Hoppe, Esq., of Counsel

CURRAN, J.

This action was commenced on January 11, 2008. On April 25, 2008, defendant Theo Falkowitz ("Falkowitz") moved to dismiss the original complaint as against her. In opposition to that motion, plaintiffs sought leave to replead. On June 24, 2008, the Court granted an Order denying the motion to dismiss, without prejudice, and granting plaintiffs leave

to replead. On June 23, 2008, plaintiffs filed a Verified Amended Complaint ("Amended Complaint"). Presently before the Court is Falkowitz's motion to dismiss all causes of action directed against her in the Amended Complaint pursuant to CPLR 3211 (a) (1), (5) and (7).

Background

According to the Amended Complaint, Falkowitz is or was the president of defendants Empire State Financial Group, LLC and Empire State Viatical, LLC (hereinafter collectively referred to as "Empire"), as well as an investment advisor and broker of the transactions at issue in this action (Amended Complaint ¶ 7). Empire is or was engaged in the business of viatical settlements, which is a transaction whereby a "terminally ill" person, defined as a person whose illness will result in death within twenty-four (24) months (the "viator"), sells his or her life insurance policy to a viatical settlement company in order to obtain some value from the policy during his or her lifetime (see Amended Complaint ¶ 12). Thereafter, the viatical settlement company, in this case Empire, acts as an advisor and broker by locating investors who will acquire an interest in a qualifying viator's life insurance policy for which the investor invests an agreed upon sum, a substantial portion of which goes to the viatical settlement company to pay the continued premiums on the policy and as a commission (Amended Complaint ¶ 13).

Plaintiffs and Empire engaged in a series of viatical services transactions that took place in June and July of 1998 (Amended Complaint ¶ 17). Specifically, on or about July 14, 1998, plaintiffs, through the efforts of Falkowitz, entered into three (3) Viatical Loan Services Agreements ("Loan Agreements") with Empire (Amended Complaint ¶ 20). At that

time, plaintiffs invested the sum of $124,800 to obtain an interest in a life insurance policy owned by Jeffrey Fuller ("Fuller") (Amended Complaint ¶ 21). According to plaintiffs, Empire and/or Falkowitz "knew that the viator, Jeffrey Fuller, was not a terminally ill person whose illness would result in death within twenty four (24) months" and used false representations to induce plaintiffs to enter into the Loan Agreements (Amended Complaint ¶ 37). Further, plaintiffs allege that at the time the Loan Agreements were entered into, Empire and Falkowitz represented orally and in writing that Fuller was a terminally ill person whose illness would result in death within twenty four (24) months and that said representations were made for the purpose of inducing plaintiffs to enter into the Loan Agreements (Amended Complaint ¶¶ 65-67).

On or about March of 2000[1], plaintiffs, "in exchange for representations made by Empire and Falkowitz, agreed to substitute the Fuller policy for a policy of insurance owned by W. Jason Mitan" (Amended Complaint ¶ 22). Plaintiffs allege they were informed by Empire and/or Falkowitz that Fuller was a so-called "AIDS viator" who was living longer due to modern medication, and to protect their investment, they should substitute the Mitan policy. Empire and/or Falkowitz are alleged to have continued to encourage plaintiffs to maintain their investment in the Viatical Settlement Agreements (Amended Complaint ¶¶ 23; 68). Plaintiffs further allege that "Empire, Mitan and Falkowitz together obtained several 'Life Expectancy

[1] Although the Amended Complaint contains the date "March of 2002," plaintiffs' counsel, in a letter dated June 27, 2008, advised that the correct date is actually "March of 2000" (See Exhibit H to Falkowitz's motion papers).

Assessments' which represented to the plaintiffs that Mitan's health was such that his life expectancy would not exceed twenty four (24) months to five (5) years" and that based on this representation concerning Mitan's shortened life expectancy, plaintiffs invested $124,800.00 in the policy insuring Mitan (Amended Complaint ¶¶ 49-50; 69-70).

According to plaintiffs, "Falkowitz made these representations with the full knowledge that Mitan was not terminally ill, as defined herein, and with the intent to deceive and defraud the plaintiffs" and that "Empire and Falkowitz made continuing misrepresentations to plaintiffs, both orally and in writing, concerning the state of Mitan's health in the following years, from 2000 through 2003, in the form of 'updates' designed to lull plaintiffs into believing that Empire was tracking the state of Mitan's health and that said health was declining" (Amended Complaint ¶¶ 24-25).

Pursuant to the Loan Agreements, Empire agreed to "pay all premiums required to keep the policy in effect" (Amended Complaint ¶ 30; 42). It is undisputed that Empire stopped making premium payments in March 2003 and that plaintiffs have continued to pay the policy premiums since that date (Amended Complaint ¶¶ 31-34; 43). Plaintiffs assert that "Falkowitz's dominion and control of Empire . . . was used to, *inter alia*, effectuate the sale of viatical settlements for her own personal gain" and that "Falkowitz's control of Empire perpetrated wrongful and/or unjust acts towards the plaintiffs, resulting in loss of plaintiffs' initial investment monies and the obligation to pay the quarterly premium payments on the policy, thereby justifying piercing the corporate veil and holding Falkowitz personally responsible for the corporate obligation(s)" (Amended Complaint ¶¶ 44-45).

Plaintiffs further allege that investment advisors owe a fiduciary duty for which they are subject to tort liability for failure to exercise reasonable care irrespective of their contractual duties (Amended Complaint ¶ 82). Plaintiffs claim that Falkowitz, as president of Empire, acted in her capacity as plaintiffs' investment advisor at all times relevant and that as such, Falkowitz had discretion over which viator to choose and was obligated to provide viatical settlement investment advice and other related services to plaintiffs (Amended Complaint ¶¶ 83-84). Falkowitz also "owed a fiduciary duty of care to plaintiffs to ensure that the viators qualified for a viatical settlement by being terminally ill and that the plaintiffs' investment in the policy was safe" (Amended Complaint ¶ 85).

The Amended Complaint contains six causes of action: (1) scheme to defraud/fraudulent inducement (seeking rescission, restoration of the initial investment, reimbursement of premiums and punitive damages) against Empire and Falkowitz; (2) breach of contract for failure to pay the premiums against Empire and Falkowitz; (3) fraud and/or misrepresentation as to the state of his health against Mitan; (4) negligence against Empire and Mitan; (5) fraud and/or misrepresentation against all defendants; and (6) breach of fiduciary duty against Falkowitz (seeking compensatory damages).

In opposition to the present motion, plaintiffs submitted the Affidavit of plaintiff, Theresa Zazynski, dated August 13, 2008, which states plaintiffs understood that Falkowitz was under an obligation to assist them in purchasing a viatical settlement by locating an appropriate viator and offering them investment advice in connection with the transactions

and that plaintiffs regarded Falkowitz as a trusted advisor (T. Zazynski Aff. ¶ 6). Plaintiffs assert that due to her position with the company, plaintiffs considered Falkowitz to have superior knowledge and expertise concerning viatical settlements (T. Zazynski Aff. ¶ 7). It was plaintiffs' further belief, based on their understanding of how Empire operated on a corporate level, that Falkowitz, as President of Empire, "wielded significant dominion and control of Empire and operated the business in a personal rather than corporate capacity" (T. Zazynski Aff. ¶ 8).

Mrs. Zazynski further explains how plaintiffs came to invest in the Fuller policy (T. Zazynski Aff. ¶¶ 11-13) as well as the events leading up to the substitution of the Mitan policy on March 13, 2000 (T. Zazynski Aff. ¶¶ 14-15). According to Mrs. Zazynski, "from March of 2000 through and including March of 2003, we received continual updates, telephone calls, and correspondence from the Empire Defendants and/or prepared at Defendant Falkowitz's behest, informing us that the Defendants were monitoring the status of Defendant Mitan's health and that his health was declining" (T. Zazynski Aff. ¶ 17). Plaintiffs "believe that these updates constitute Empire and Falkowitz's attempts to perpetuate their fraud and to conceal their initial misrepresentation concerning the status of Mitan's health and life expectancy" (T. Zazynski Aff. ¶ 18).

Mrs. Zazynski details the contents of some of the "Life Expectancy Assessments" plaintiffs received from defendants (copies of which are attached to the August 14, 2008 Affidavit of Amanda A. Gresens, Esq.).[2]

The "Life Expectancy Assessments" for Mitan state as follows:

March 15, 1999	Certificate of Life Expectancy: Prognosis from the date of this report: 5 years; confidence level: 85% (Gresens Aff. Ex. E).
March 25, 1999	Medical Prognosis Certificate: Life expectancy prognosis: 4 to 5 years (Gresens Aff. Ex. E).
March 30, 1999	Mortality Prognosis Certificate: life expectancy of four to five years (Gresens Aff. Ex. E).
October 7, 1999	Life Expectancy Assessment: median life expectancy of less than five years (Gresens Aff. Ex. E).
August 29, 2000	Letter: No prognosis contained therein; simply advises of a recent laboratory result regarding the prostate (Gresens Aff. Ex. F).
June 1, 2001	Letter: No updated medical information at this time but a report is expected in August (Gresens Aff. Ex. G).
October 22, 2001	An email reporting the results of Mitan's renal, prostate and bladder ultrasound (Gresens Aff. Ex. H).
January 9, 2002	Letter: No apparent change in Mitan's condition that would significantly affect or alter the initial life expectancy report (Gresens Aff. Ex. I).

[2] The original Complaint had attached to it as exhibits copies of the Viatical Services Agreements and the Life Expectancy Assessments. None of these documents are attached to the Amended Complaint. However, the original complaint with exhibits is attached to Falkowitz's moving papers and plaintiffs' opposition papers. The Life Expectancy Assessments are also attached as separate exhibits to the Gresens Affidavit and referred to in the T. Zazynski Affidavit.

Mrs. Zazynski states that the "cumulative effects of these representations indicated that Empire was monitoring Mitan's health, receiving medical reports, and that Mitan continued to suffer ill-health" and that plaintiffs relied on those assertions and believed that their investment was secure (T. Zazynski Aff. ¶¶ 19-22). Following the January 2002 correspondence, plaintiffs "continued to receive intermittent oral representations, via telephone, from Empire and/or at Falkowitz's behest which represented that the company continued to monitor Defendant Mitan's health and that his health was, in fact, in decline up until the date of Empire's default under the terms of the Loan Agreements on March 25, 2003" (T. Zazynski Aff. ¶ 23).

On March 25, 2003, plaintiffs received a letter from Falkowitz advising that Empire would no longer pay the premiums associated with the Mitan policy (T. Zazynski Aff. ¶ 24; Gresens Aff. Ex. J). Mrs. Zazynski states that although plaintiffs were upset by Empire's default, they did not suspect fraud at that time (T. Zazynski Aff. ¶ 27). Plaintiffs did not suspect fraud even when Mitan's life expectancy expired in March of 2005, based on the defendants' representations that the viatical services industry was not an exact science (T. Zazynski Aff. ¶ 27).

"However, in the late summer of 2007 [plaintiffs] started to receive 'Google' updates concerning Defendant Mitan through the internet. [Plaintiffs] then learned that Defendant Mitan was employed in the viatical services industry, which may have lent him insider knowledge regarding 'gaming' the system and gaining income by misrepresenting

himself as a 'terminally ill' individual when, in fact, the Defendant is in good health" (T. Zazynski Aff. ¶ 29). Plaintiffs then decided to have their investments reviewed by a professional at Edward Jones (T. Zazynski Aff. ¶ 29). Through that review which took place in July 2007, plaintiffs learned that Mitan indicated on his February 1997 application for the underlying insurance policy that he has never been diagnosed with cancer, yet, the Life Expectancy Assessments prepared at Falkowitz's behest all document a history of a cancer diagnosis (T. Zazynski Aff. ¶ 31; Gresens Aff. Exs. K and E). The advisor at Edward Jones felt that these discrepancies demonstrated the presence of collusion and fraud among Empire, Falkowitz and Mitan and he recommended that plaintiffs seek the counsel of an attorney (T. Zazynski Aff. ¶ 32).

Finally, Mrs. Zazynski states that based upon plaintiffs' own investments in Empire, which exceeded $200,000.00, "it is unclear why Empire could not make continued premium payments. Upon information and belief, Theo Falkowitz, as the sole owner, must have been using that money for something other than its intended purpose" (T. Zazynski Aff. ¶ 37).

The First and Fifth Causes of Action:
Scheme to Defraud/Fraudulent Inducement and
Fraud and/or Misrepresentation

With regard to the first cause of action for fraud in the inducement, Falkowitz asserts that the claim is barred by the statute of limitations and is facially defective because there are no specific allegations as to the content or timing of any statements made to induce

plaintiffs to invest in the Fuller policy, nor do they explain how they were adversely affected by investing in the Fuller policy in the first instance. Further, to the extent that plaintiffs' first cause of action claims harm from having been induced into substituting the Mitan policy, Falkowitz asserts that this claim also is barred by the statute of limitations and is facially defective because there are no specific allegations as to the content or timing of any statements made to induce plaintiffs to substitute the Mitan policy, nor do plaintiffs explain how they were adversely affected by investing in the Fuller policy in the first place and then transferring that investment to the Mitan policy.

With regard to the fifth cause of action, Falkowitz asserts that the fraud cause of action is contradictory to plaintiffs' prior sworn statements, is barred by the statute of limitations and is facially defective because there are no specific allegations as to the content or timing of any statements made to induce plaintiffs to substitute the Mitan policy.

"The statute of limitations for a cause of action sounding in fraud is six years from the wrong, or two years from the date the fraud could reasonably have been discovered, whichever is later. The burden of establishing that the fraud could not have been discovered before the two-year period before the commencement of the action rests on the plaintiff, who seeks the benefit of the exception" (*Hillman v City of New York*, 263 AD2d 529, 529 [2d Dept 1999], *lv denied* 94 NY2d 759 [2000]; CPLR § 203 [g]; CPLR § 213 [8]). The test as to when a plaintiff should have discovered an alleged fraud is an objective one. "Where the circumstances are such as to suggest to a person of ordinary intelligence the probability that he

has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him" (*Prestandrea v Stein*, 262 AD2d 621, 622 [2d Dept 1999] [citations omitted]).

Here, the underlying transactions complained of took place in 1998 and 2000 - both outside the six (6) year statute of limitations for this action which was commenced in 2008. Accordingly, Falkowitz has met her burden on this motion of establishing that the first and fifth causes of action are barred by the statute of limitations. Therefore, in order to satisfy the statute and survive this motion, plaintiffs must establish their entitlement to the benefit of the "two-years after discovery" exception.

In both the Amended Verified Complaint and in the papers submitted in opposition to this motion, plaintiffs concede that the last policy premium payment made by defendants and the last medical "update" on Mitan made by defendants was in March 2003, i.e., almost five years prior to the time that plaintiffs commenced this action.

According to Mrs. Zazynski, since Mitan's life expectancy was supposed to expire in March 2005, and since the viatical services industry is not an exact science, they did not suspect fraud until 2007, apparently after they started to receive Google updates concerning Mitan (T. Zazynski Aff. ¶ 29). However, plaintiffs offer no explanation as to why they did not inquire of defendants further when the premium payments and medical updates stopped in 2003. They also do not explain how the "Google" information came to their attention or why

they did not "receive" it closer in time to the 2003 default. There also is nothing in this record to establish the actual content or age of the information plaintiffs received through Google. Without this information, plaintiffs have not established why the information could not have been discovered sooner.

Moreover, plaintiffs offer no explanation for their failure to sooner apprehend the "discrepancies" allegedly discovered during the review performed by Edward Jones in 2007. All of the information plaintiffs needed to ascertain this discrepancy was contained in Mitan's February 1997 insurance application and the Life Expectancy Assessments (specifically the October 7, 1999 report which states that Mitan had bladder cancer in 1981), documents that were undisputedly provided to plaintiffs *prior to* the time that plaintiffs agreed to substitute the Mitan policy for the Fuller policy. Plaintiffs fail to address in any way why they did not or could not sooner discover the "cancer discrepancy" between those documents.

"Having positive knowledge of fraud is not required to commence the running of the two-year statute of limitations. In order to start the limitations period regarding discovery, a plaintiff need only be aware of enough operative facts so that, with reasonable diligence, she could have discovered the fraud. In other words, all that is necessary are sufficient facts to suggest to a person of ordinary intelligence the probability that they may have been defrauded" (*Watts v Exxon Corp.*, 188 AD2d 74, 76 [3d Dept 1993] [citations omitted]; *see also TMG-II v Price Waterhouse & Co.*, 175 AD2d 21, 22 [1st Dept 1991], *lv denied* 79 NY2d 752 [1992]; *Stride Rite Children's Group, Inc. v Siegel*, 269 AD2d 875, 876 [4th Dept 2000]). "It is

knowledge of facts not legal theories that commences the running of the two-year limitations period" (*TMG-II,* 175 AD2d at 23).

Plaintiffs failed to conduct any inquiry or investigation until almost four and a half (4 1/2) years after their last communication with defendants. Thus, plaintiffs have failed to establish that the fraud could not have been discovered sooner and have not established their entitlement to the benefit of the exception (*see Sabbatini v Galati*, 43 AD3d 1136 [2d Dept 2007]). As a result, the first cause of action for fraudulent inducement and the fifth cause of action for fraud are barred by the statute of limitations.[3]

Breach of Contract for Failure to Pay Premiums

Pursuant to the Loan Agreements, Empire was to "pay all premium payments and other amounts required to be paid to keep the policies in effect after the depletion of the funds set aside with the Escrow Agent to make such payments" (Amended Complaint ¶30). It is undisputed that Empire stopped making premium payments in March 2003. Nowhere in the Agreements, the Amended Verified Complaint or the papers in opposition to this motion is there any allegation that Falkowitz had a personal contractual obligation to pay the premiums. As detailed above, although plaintiffs attempt to allege a basis for piercing the corporate veil in an effort to hold Falkowitz personally responsible for payment of the premiums, merely asserting that Falkowitz "wielded significant dominion and control" and "operated the business

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[3] Although plaintiffs argue a theory of "perpetuation of the fraud" in an effort to extend the accrual date for the fraud causes of action to March of 2003, the last date upon which plaintiffs allege they received any type of update on Mitan's health from defendants, plaintiffs fail to cite a single case in support of this theory, nor was the Court able to locate any.

in a personal rather than corporate capacity" (see Amended Complaint ¶¶ 44-45; T. Zazynski Aff. ¶¶8, 37), without making specific factual allegations demonstrating that she conducted business in a personal rather than corporate capacity, is insufficient *(see Walkovszky v Carlton,* 18 NY2d 414, 420 [1966]; *Feigen v Advance Capital Mgt. Corp.*, 150 AD2d 281, 282 [1st Dept 1989], *lv denied* 74 NY2d 874 [1989]; *Albstein v Elany Contr. Corp.*, 30 AD3d 210 [1st Dept 2006], *lv denied* 7 NY3d 712 [2006]).

Thus, although it is true that a plaintiff is not required to plead or prove actual fraud in order to pierce the corporate defendant's corporate veil, and must prove only that the individual defendant's control of the corporate defendant was used to perpetrate a wrongful or unjust act toward plaintiff, there must be sufficient allegations such as would tend to establish an undercapitalized corporation, a disregard of corporate formalities and/or personal use of corporate funds to justify piercing the corporate veil (*Rotella v Derner*, 283 AD2d 1026, 1027 [4th Dept 2001], appeal denied 96 NY2d 720 [2001]).

Accordingly, the second cause of action as against Falkowitz is dismissed, without prejudice. In the event that facts sufficient to allege a basis for piercing the corporate veil are uncovered during discovery, plaintiffs may seek to further amend their complaint at that time.

Breach of Fiduciary Duty

With regard to the sixth cause of action, Falkowitz asserts that plaintiffs' allegations are insufficient to establish a fiduciary duty and are barred by the statute of limitations.

"A breach of fiduciary duty claim is governed by either a three-year or a six-year limitation period, depending on the nature of the relief sought. The shorter time period applies where monetary relief is sought, the longer where the relief sought is equitable in nature" (*Carlingford Ctr. Point Assocs. v MR Realty Assocs., L.P.*, 4 AD3d 179 [1st Dept 2004]; CPLR §§ 213; 214 [4]). According to the Amended Complaint, plaintiffs seek compensatory damages for Falkowitz's alleged breach of fiduciary duty.

As discussed above, the transactions complained of took place in 1998 and 2000. Since plaintiffs are seeking monetary relief, the three-year statute of limitations applies (*see TVGA Eng'g, Surveying, P.C. v Gallick*, 45 AD3d 1252 [4th Dept 2007]). Plaintiffs' claims based on those transactions are clearly outside the statute of limitations. Further, even if the plaintiffs are correct in their assertion that the "two-year from discovery" exception could be applicable to this cause of action due to the fact that their claim for breach of fiduciary duty is premised on fraud (*see Elghanayan v Victory*, 192 AD2d 355 [1st Dept 1993]; CPLR § 203 [g]), as discussed above, plaintiffs have failed to establish that the fraud could not have been discovered sooner and have therefore not established their entitlement to the benefit of the exception.[4]

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[4] Although this issue was not raised or briefed by the parties, even if plaintiffs could arguably be entitled to a tolling of the statute based the doctrine of "equitable estoppel" (based upon plaintiffs' allegations of a fiduciary relationship and concealment), such toll would only extend the accrual date to the time at which the last alleged concealment took place (*see generally Niagara Mohawk Power Corp. v Freed*, 288 AD2d 818 [4th Dept 2001]; *Dionisio v George De Rue Contrs., Inc*., 38 AD3d 1172 [4th Dept 2007]). Based on the record before the Court, the last alleged concealment took place in March of 2003, which is more than three years prior to the date upon which this action was commenced.

Accordingly, the sixth cause of action as against Falkowitz also is dismissed.

Punitive Damages and Attorneys' Fees

Since all of the claims asserted against Falkowitz are being dismissed due to the expiration of the relevant statutes of limitations, there is no basis upon which punitive damages or attorneys' fees could be awarded against Falkowitz. Any such claims against Falkowitz are likewise dismissed.

Costs and Fees

Falkowitz's request for an award of costs and fees associated with this motion based upon alleged "frivolous conduct" is denied (Rules of the Chief Admin of Cts [22 NYCRR] § 130.1-1 [c]).

Falkowitz's counsel shall settle the Order with plaintiffs' counsel. A pretrial conference shall be held on April 6, 2009 at 10:00 a.m.

DATED: March 6, 2009

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HON. JOHN M. CURRAN, J.S.C.