

**Lipper Holdings, LLC v Pricewaterhousecoopers
LLP**

2007 NY Slip Op 32445(U)

July 27, 2007

Supreme Court, New York County

Docket Number: 0600150/2005

Judge: Karla Moskowitz

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

LIPPER HOLDINGS, LLC, LIPPER & COMPANY,
L.P., JEROME SERVICES CORP. LDC and
KENNETH LIPPER,
Plaintiffs,

- against -

PRICewaterhouseCOOPERS LLP, and
PRICewaterhouseCOOPERS (NETHERLANDS
ANTILLES),
Defendants.

INDEX NO. 600150/2005
MOTION DATE _____
MOTION SEQ. NO. 004
MOTION CAL. NO. _____

FILED
AUG 08 2007
COUNTY CLERK'S OFFICE

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 _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying
Decision and Order.

Dated: July 27, 2007

KARLA MOSKOWITZ J.S.C.

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 3

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L.P., JEROME SERVICES CORP. LDC and
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Index No. 600150/2005

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-----X
MOSKOWITZ, J.:

This action is one of several lawsuits resulting from the demise of Lipper Offshore Convertibles, L.P. ("Lipper Offshore") and Lipper Convertibles, L.P. (together, "Funds"). Plaintiffs seek damages for, among other things, the defendant accounting firms' allegedly improper audits of the Funds' financial statements and the firm's failure to discover that the Funds had overstated their earnings.

In motion sequence number 002, defendant Pricewaterhousecoopers (Netherlands Antilles) ("PWC-NA") moved to dismiss the complaint for failure to allege wrongdoing with sufficient particularity, pursuant to CPLR 3013. By decision dated September 28, 2006, this court granted the motion and dismissed the action as to PWC-NA with leave to replead ("9/28/06 Decision"). Plaintiffs served an amended complaint, dated November 30, 2006. The six-count amended complaint asserts three causes of action against PWC-NA, including fraud (first cause of action), negligence/malpractice (second cause of action) and negligent misrepresentation (fifth cause of action).

PWC-NA now moves to dismiss the amended complaint for lack of standing, as time-

barred, for failure to state a cause of action, on the basis of documentary evidence and for failure to plead with particularity.

The court discussed the facts underlying this action in detail in the 9/28/06 Decision and in its decisions in the related actions *Jones v PriceWaterhouseCoopers LLP* (6 Misc 3d 1014[A] [Sup Ct, NY County 2004]) and *Morgado Family Partners, LP v Lipper* (6 Misc 3d 1014[A] [Sup Ct, NY County 2004], *affd* 19 AD3d 262 [1st Dept 2005]). The recent Court of Appeals decision, *Williamson ex rel. Lipper Convertibles, L.P. v PricewaterhouseCoopers LLP* (2007 WL 1624759 [June 7, 2007]), also states the facts. Therefore, the court presumes familiarity with the facts and refers the parties to these decisions. To the extent the amended complaint alleges new facts that are relevant to this decision, the court states those facts in the discussion below.

Discussion

Standing

PWC-NA argues that Jerome Services Corp. LDC (“Jerome Services”) is the only plaintiff with privity to assert claims against PWC-NA and that, therefore, the court should dismiss the amended complaint for lack of standing as to plaintiffs Lipper Holdings, LLC (“Lipper Holdings”), Lipper & Company, L.P. (“Lipper, LP”) and Kenneth Lipper (“Lipper”).

“When accountants conduct a traditional financial audit, they undertake a duty of due care in the performance of their engagement to the party which has contracted for their services.” (*Security Pacific Bus. Credit, Inc. v Peat Marwick Main & Co.*, 79 NY2d 695, 702 [1992]). However, in certain circumstances, “accountants may also incur liability to injured third parties who rely on their work, even in the absence of a direct contractual relationship between the accountants and the third party.” (*Id.*). These circumstances are as follows:

(1) the accountants must have been aware that the financial reports were to be used for a particular purpose or purposes; (2) in the furtherance of which a known party or parties was intended to rely; and (3) there must have been some conduct on the part of the accountants linking them to that party or parties, which evinces the accountants' understanding of that party or parties' reliance. The indicia, while distinct, are interrelated and collectively require a third party claiming harm to demonstrate a relationship or bond with the once-removed accountants sufficiently approaching privity based on some conduct on the part of the accountants.

(*Id.* at 702-03 [citations and internal quotation marks omitted]; *see also Securities Inv. Protection Corp. v BDO Seidman, L.L.P.*, 95 NY2d 702, 711 [2001] [same]).

Here, plaintiffs submit a letter from PWC-NA to Lipper, LP, dated March 31, 1999, concerning the "1998 audited financial statements of the offshore partnerships," that indicates PWC-NA is providing original signed financial statements of the offshore funds, including Lipper Offshore. (Temkin Aff., Ex. N). This reveals a relationship with PWC-NA sufficiently approaching privity with respect to Lipper, LP. (*Caprer v Nussbaum*, 36 AD3d 176, 198 [2d Dept 2006] [permitting unit owner to bring malpractice action against condominium's accountant in connection with accounting services provided to the condominium when accountants allegedly "communicated, on at least one occasion reflected in the record, with unit owners regarding the financial circumstances of the condominium"]; *Credit Alliance Corp. v Arthur Andersen & Co.*, 65 NY2d 536 [1985]).

With respect to Lipper and Lipper Holdings, the amended complaint alleges that PWC-NA knew that these plaintiffs would use and rely upon the financial reports. However, the pleading does not claim that Lipper Holdings or Lipper engaged PWC-NA and concedes that PWC, not PWC-NA, would audit Lipper Offshore. (Amended Complaint, ¶¶ 17, 98). Moreover, PWC-NA's reports were directed "To the Partners of" Lipper Offshore (Temkin Aff., Exs. B, C

and D), and the amended complaint alleges that only Jerome Services was a partner of Lipper Offshore (Amended Complaint, ¶ 60). While the pleading alleges that PWC-NA's audit opinions were disseminated annually to Lipper, LP and Lipper, plaintiffs do not allege that Lipper Holdings received those reports. Nor do plaintiffs allege that the reports were disseminated by PWC-NA; rather, plaintiffs merely allege that the reports were disseminated.

In short, the pleading fails to allege any "conduct on the part of the accountants linking them to [Lipper or Lipper Holdings], which evinces the accountants' understanding of [their] reliance." (*Security Pacific Bus. Credit, Inc.*, 79 NY2d at 702). Plaintiffs fail to show "that a primary, if not the exclusive, *end and aim* of" PWC-NA's audit "was to provide [Lipper or Lipper Holdings] with the financial information it required." (*Credit Alliance Corp.*, 65 NY2d at 554 [emphasis in original]). Therefore, Lipper and Lipper Holdings lack privity with PWC-NA. Lipper also lacks privity with PWC-NA for the same reasons discussed in the 9/28/06 Decision.

"Lack of privity is not a bar to an action against an accountant for intentional misrepresentation." (*Caprer*, 36 AD3d at 195 [citations omitted]). Accordingly, Lipper Holdings and Lipper lack standing only with respect to their negligence claims. For the foregoing reasons, the court grants PWC-NA's motion to the extent that the court dismisses the negligence claims of Lipper Holdings and Lipper against PWC-NA in the second and fifth causes of action.

Statute of Limitations

PWC-NA argues that the three-year statute of limitations bars the negligence claims because PWC-NA did not do any work concerning Lipper Offshore after PWC-NA completed its December 31, 2000 audit and plaintiffs did not commence this action until January 13, 2005.

Plaintiffs counter that their claims are timely because of the continuous representation doctrine and because PWC was PWC-NA's agent.

Under CPLR section 214 (6), a party must commence "an action to recover damages for malpractice" within three years. "A claim accrues when the malpractice is committed, not when the client discovers it." (*Williamson ex rel. Lipper Convertibles, L.P.*, 2007 WL 1624759, *supra*).

Here, the amended complaint alleges that PWC-NA issued its last audit opinion for Lipper Offshore for the year ending December 31, 2000. As the Court of Appeals recently concluded in the related action, *Williamson ex rel. Lipper Convertibles, L.P.* (2007 WL 1624759, *supra*), the allegations of the amended complaint make clear that the parties entered into mutual consent letters defining PWC-NA's engagement "for the provision of separate and discrete audit services for the Funds' year-end financial statements, and once defendant performed the services for a particular year, no further work as to that year was undertaken." The amended complaint does not allege that PWC-NA did any work after issuing its report in February 2001. Plaintiffs commenced this action in January 2005, more than three years after PWC-NA's final report for Lipper Offshore.

Plaintiffs argue that PWC's continued provision of audit advice through the second quarter of 2002 constitutes continuous representation attributable to PWC-NA. (Amended Complaint, ¶ 99). The amended complaint claims that, in December 2001, PWC executed an engagement letter to conduct audits of the Funds for 2001. According to plaintiffs, "PWC and PWC-NA had entered into, or had planned to enter into, a separate mutual consent arrangement whereby PWC would perform the substantial audit work related to the 2001 audit of [Lipper

Offshore] and PWC-NA would have the ultimate responsibility to issue the final audit opinion for [Lipper Offshore].” (*Id.*, ¶ 98). Plaintiffs claim that PWC was acting on behalf of PWC-NA during this time and that PWC representatives informed plaintiffs that PWC performed work on behalf of PWC-NA concerning audit advice for Lipper Offshore through the second quarter of 2002. (*Id.*, ¶¶ 99, 101).

However, plaintiffs do not allege that PWC-NA was a party to PWC’s engagement agreement. Nor do plaintiffs dispute PWC-NA’s assertion that the 2001 audit was never completed. Thus, plaintiffs’ speculation about an agreement that the parties “had planned to enter into” and the responsibilities that PWC-NA “would have” had with respect to Lipper Offshore’s final audit opinion for 2001 (*id.*, ¶ 98) is insufficient to plead malpractice. (*Brooks v Lewin*, 21 AD3d 731, 734-735 [1st Dept 2005] [“speculation on future events is insufficient to establish ... malpractice”]).

Moreover, at oral argument on the parties’ previous motions, plaintiffs’ attorney represented to the court that PWC-NA did no work after the 2000 audit. (7/6/06 Tr., at 13-14). Similarly, when the court heard arguments on this motion on April 26, 2007, plaintiffs’ attorney acknowledged that there is no documentary evidence that PWC-NA participated in 2002 audit work. (4/26/07 Tr., at 5). For the foregoing reasons, PWC-NA’s audits did not continue in 2002. (*Williamson ex rel. Lipper Convertibles, L.P.*, 2007 WL 1624759, *supra*).

Plaintiffs’ attempt to impute to PWC-NA work that PWC allegedly performed in 2002 is also unpersuasive. Plaintiffs base their argument on the mutual consent letters discussed above and in the 9/28/06 Decision and on allegations that PWC-NA “retained sole authority to issue the audited financial statements for [Lipper Offshore] from 1998 on, it retained control, oversight

and authority of PWC's audit work relating to [Lipper Offshore], and was free to either accept or reject that work." (*Id.*, ¶ 20).

Agency ... is a fiduciary relationship which results from the manifestation of consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other so to act. The agent is a party who acts on behalf of the principal with the latter's express, implied, or apparent authority.

(*Maurillo v Park Slope U-Haul*, 194 AD2d 142, 146 [2d Dept 1993]).

Here, the amended complaint fails to explain how PWC-NA controlled PWC or how PWC acted at PWC-NA's request or for PWC-NA's benefit. The amended complaint does not allege that plaintiffs engaged PWC-NA to audit Lipper Offshore. Instead, it alleges that plaintiffs engaged PWC to audit Lipper Offshore through 2002 and that plaintiffs paid fees to PWC to audit Lipper Offshore. (Amended Complaint, ¶¶ 17, 51, 98, 118).¹ PWC-NA submits invoices that PWC-NA billed PWC (not Lipper Offshore or plaintiffs) for audit services. (Greilsheimer Aff., Ex. D). Plaintiffs also admit that, while they retained PWC, PWC, in turn, subcontracted a portion of the work to PWC-NA. (4/26/07 Tr., at 16). Although the mutual consent letters explain the division of labor and responsibility between PWC-NA and PWC, plaintiffs do not explain how these letters establish a principal-agent relationship.

Thus, the amended complaint and the documentary evidence refute PWC's assertion that it acted on behalf of PWC-NA or subject to PWC-NA's control. Rather, PWC agreed to perform audit work for plaintiffs, and, in turn, PWC-NA agreed to perform portions of that work for

¹ The court also notes that, in opposition to defendants' motions to dismiss the original complaint, plaintiffs conceded that "[a]lthough PWC NA issued audit opinions for [Lipper Offshore's] financial statements ..., Plaintiffs never specifically retained PWC NA." (Plaintiffs' Opp. Mem. of Law, at 3).

PWC. Therefore, if anything, PWC-NA was acting at the direction of PWC. Accordingly, PWC was not the agent of PWC-NA. (*Melbourne v New York Life Ins. Co.*, 271 AD2d 296, 297 [1st Dept 2000] [“where the evidence on the issue of control presents no conflict, the matter may properly be determined by the court as a matter of law”]). For the foregoing reasons, the court grants PWC-NA’s motion to dismiss plaintiffs’ second and fifth causes of action for negligence/malpractice and negligent misrepresentation on statute of limitations grounds.

Negligent Misrepresentation

PWC-NA seeks dismissal of the fifth cause of action for negligent misrepresentation on the additional ground that it duplicates the negligence/malpractice cause of action. Plaintiffs do not oppose this portion of PWC-NA’s motion. (Plaintiffs’ Opp. Mem. of Law, at 10 n 7). Therefore, the court dismisses the fifth cause of action for negligent misrepresentation on this ground as well.

Fraud

In order to state a cause of action for fraud, “a plaintiff must allege misrepresentation of material fact, falsity, scienter, deception and injury.” (*LaSalle Natl. Bank v Ernst & Young LLP*, 285 AD2d 101, 109 [1st Dept 2001] [citation omitted]). In addition, under CPLR 3016 (b), “the circumstances constituting the wrong [must] be stated in detail.” With respect to scienter, “[a] complaint alleging fraud by an accountant is expected to identify the particular manner in which an item included in the financial statement relied upon has been intentionally or recklessly misrepresented.” (*LaSalle*, 285 AD2d at 109 [citation and internal quotation marks omitted]).

Here, the amended complaint alleges that the Funds’ portfolio manager, Edward Strafacci (“Strafacci”), overvalued the Funds’ securities and that PWC, “through its independent

confirmations ... discovered mounting discrepancies between Strafaci's valuations and the values that PWC obtained from independent, third-party sources." (Amended Complaint, ¶¶ 3, 56, 71, 77-97). The pleading avers that PWC "performed most, if not all, of the audit work on [Lipper Offshore's] behalf," that PWC-NA then relied upon in issuing its audit opinions. (*Id.*, ¶ 83). Plaintiffs allege that it is through "PWC's work papers generated in connection with its audits of Convertibles' financial statements" that PWC-NA knew that Strafaci overvalued Lipper Offshore's securities. (*Id.*, ¶ 122).

However, the amended complaint does not contain any details concerning how PWC-NA learned about the alleged overvaluation from PWC, whether PWC alerted PWC-NA about any audit issues, or that PWC-NA had access to PWC's work papers. In short, plaintiffs fail to explain how PWC's alleged knowledge of the overvaluation of Lipper Offshore establishes scienter attributable to PWC-NA.

Plaintiffs' alternative argument is that PWC's knowledge should be imputed to PWC-NA, because PWC was PWC-NA's agent. However, as discussed above, PWC was not PWC-NA's agent. Therefore, this argument is unpersuasive. For the foregoing reasons, the amended complaint fails to plead PWC-NA's scienter and, therefore, fails to state a cause of action for fraud.

Moreover, although a fraud claim is not vitiated just because a plaintiff alleges some of the same acts and misrepresentations in connection with its malpractice claim (*Serio v PricewaterhouseCoopers LLP*, 9 AD3d 330, 331 [1st Dept 2004]), when the plaintiff asserts claims for both malpractice and fraud,

[i]t is only when the alleged fraud occurs separately from and subsequent to the malpractice that a plaintiff is entitled to allege

and prove a cause of action for intentional tort ..., and then only where the fraud claim gives rise to damages separate and distinct from those flowing from the malpractice.

(*Abbondandolo v Hitzig*, 282 AD2d 224, 225 [1st Dept 2001] [quotation marks and citation omitted]).

Here, without any allegations of scienter, plaintiffs' fraud claim relies solely upon the same acts that form the basis of the malpractice claim. Therefore, the fraud claim duplicates the malpractice claim. (*Rizk v Cohen*, 73 NY2d 98, 105-106 [1989] [fraud claim dismissed because it relied on same act that formed the basis of negligence claim; thus, defendant did not make "subsequent misrepresentations in an attempt to conceal his earlier negligence" by acting with knowledge of that negligence]; *Penner v Hoffberg Oberfest Burger & Berger*, 303 AD2d 249, 249 [1st Dept 2003] [fraud claim dismissed as "duplicative of plaintiff's claims for accounting malpractice"]). For the foregoing reasons, the court grants PWC-12's motion to dismiss plaintiffs' first cause of action for fraud.

Accordingly, it is hereby


ORDERED that the motion to dismiss is granted and the amended complaint is dismissed as to defendant PricewaterhouseCoopers LLP (Netherlands Antilles) with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remainder of the action is severed and shall continue.

Dated: July 27 2007

ENTER:



J.S.C.

FILED
AUG 08 2007
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