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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

IGNACIO TORRES-SAGAZ and JUAN JOSE ROMERO AVILA as Bankruptcy Administrators for FEDEOLIVA-JAEN, S.C.A., IGNACIO TORRES-SAGAZ and JUAN JOSE ROMERO AVILA in their capacity as Bankruptcy Administrators for FEDEOLIVA-JAEN, S.C.A., Assignee of all Claims and Causes of Action of FEDEOLIVA U.S.A., LTD against LEE D. SCHLUSSEL & COMPANY, C.P.A., LEE D. SCHLUSSEL, C.P.A. and NEIL BYALICK, C.P.A. and all parties, officers, and directors, employees or agents of LEE D. SCHLUSSEL & COMPANY, C.P.A. and EXPAFE, A.I.E.,

Plaintiffs,

- against -

LEE D. SCHLUSSEL & COMPANY, C.P.A., LEE D. SCHLUSSEL C.P.A., and NEIL BYALICK C.P.A.,

Defendants.

INDEX NO. 102352/2007

MOTION DATE

MOTION SEQ. NO. 004

MOTION CAL. NO.

The following papers were read on this motion by defendants for summary judgment, pursuant to CPLR 3212 and cross-motion by plaintiffs for partial summary judgment and to dismiss affirmative defenses pursuant to CPLR 3211(b).

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

Cross-Motion: ■ Yes ☐ No

Defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiffs cross-move: (1) for partial summary judgment, pursuant to CPLR 3212(e), (2) to dismiss defendants' first and third affirmative defenses (failure to state a claim and the action barred by the statute of limitations), pursuant to CPLR 3211(b); and (3) to conform the pleadings to the evidence.

BACKGROUND

According to the complaint, plaintiff Fedeoliva-Jaen, S.C.A. (Fedeoliva) is a corporation

organized under the laws of Spain, with offices located in Jaen, Spain (Motion, exhibit 1). Fedeoliva was in the business of arranging for the sale of olive oil. On or about October 20, 2005, Fedeoliva filed for bankruptcy protection under Spanish law, and Ignacio Torres Sagaz and Juan Jose Avila were appointed bankruptcy administrators for the estate.

Plaintiff Expafe, A.I.E., is organized under the laws of Spain as a cooperative of olive oil producers formed for the purpose of exporting olive oil. Fedeoliva and Expafe worked together as a joint venture to promote and organize the exportation of Spanish olive oil under the trademark "Tosca." In 1999, Fedeoliva, working in concert with Robert Benedetti (Benedetti) as its agent, organized Fedeoliva U.S.A., Ltd. (Fedeoliva USA), an American corporation, to be run by Benedetti as the United States' sales agent for Fedeoliva.

Pursuant to arrangements made between Fedeoliva, Fedeoliva USA and Benedetti, Fedeoliva agreed to ship olive oil, on consignment, to Fedeoliva USA for sale in the United States. Fedeoliva USA agreed to render monthly statements to Fedeoliva, which reported sales, inventory and expenses, and to remit to Fedeoliva the proceeds of such sales after deducting reasonable business expenses, including agreed-upon compensation for Benedetti (Motion, exhibit 4).

Allegedly, Benedetti, on behalf of Fedeoliva and Fedeoliva USA, engaged defendant Lee D. Schlussel (Schlussel) to structure accounting procedures for making the above-referenced monthly reports to Fedeoliva, and otherwise to perform the usual and customary work of a certified public accountant. According to plaintiffs, this accounting work included setting up and monitoring the controls pursuant to which Fedeoliva USA was to carry out its reporting and remittance obligations to Fedeoliva. Allegedly, Schlussel assigned this accounting work to his firm, Lee Schlussel & Co. (the Firm), and Neil Byalick (Byalick), an accountant working for the Firm.

Around the middle of March, 2004, representatives from Fedeoliva came to the United

States to reconcile the monthly statements rendered by Fedeoliva USA for the period ending on December 31, 2003. The reconciliation signed by Fedeoliva and Fedeoliva USA contained the following statement:

> "I, Robert Benedetti, of Fedeoliva U.S.A., Ltd. to the best of my knowledge, acknowledge these figures as true, pending a review and approval of Fedeoliva U.S.A., Ltd.'s accountant" (Motion, exhibit 6).

According to this reconciliation, Fedeoliva USA owed Fedeoliva $4,594,613.32 (*id.*). By e-mail, dated June 3, 2004, Benedetti sent Fedeoliva a revised reconciliation, prepared by defendants, indicating that Fedeoliva owed Fedeoliva USA $685,118.07 (Motion, exhibit 7).

On or about August 2, 2006, Fedeoliva USA entered into a stipulation and order in the United States Bankruptcy Court for the Southern District of New York, which provided, among other things, that upon Court approval, Fedeoliva USA assigned to plaintiffs all the rights and claims that it might possess as against the Firm and Schlussel personally, as well as Schlussel's employees and agents. The Bankruptcy Court approved this stipulation on September 18, 2006.

In the herein action plaintiffs allege three causes of action as against defendants: (1) negligence in the preparation of the monthly accounting statements; (2) breach of contract; and (3) negligent misrepresentation in the preparation of the monthly accounting statements.

It is defendants' position that this action must be dismissed, with prejudice, because the complaint alleges what is primarily a professional malpractice action, which is governed by a three-year statute of limitations. Defendants say that the statutory period has expired, since the reporting at issue ending in 2003 and the present action was not commenced until 2007. Defendants also maintain that the breach of contract cause of action is merely duplicative of the malpractice cause of action and, as such, must fail. Moreover, defendants argue that even if the Court finds that the statute of limitations has not expired, plaintiffs' cause of action for

breach of contract fails because they cannot establish privity with defendants.

According to defendants, the Firm was engaged by Benedetti to provide various accounting services for Benedetti and his other companies in approximately 1995. Fedeoliva USA engaged the Firm to provide tax and consulting services from 1999 through 2005. These services included the preparation of Fedeoliva USA's domestic payroll, sales and income tax returns, and consulting services in connection with Fedeoliva USA's QuickBook records, which Fedeoliva USA used to prepare its monthly reports for Fedeoliva. Defendants assert that there was no engagement letter executed in connection with the Firm's services to Fedeoliva USA.

On December 15, 2010, a requirement to have a written engagement letter for accounting services came into legal effect, which was several years after the Firm stopped working for Fedeoliva USA. Further, defendants state that the work that it was engaged to perform for Fedeoliva USA did not encompass the preparation of any monthly financial statements that were to be sent to Spain.

Defendants proffer that Byalick visited Fedeoliva USA's offices once a month, spending one-to-two hours each visit, reviewing payroll records and the QuickBook records maintained by Fedeoliva USA's permanent staff, which included Karen Pallante (Pallante), Fedeoliva USA's full-time bookkeeper. According to defendants, Byalick only reviewed the items entered by Pallante and re-categorized such items, where necessary. Defendants contend that their services did not include reviewing the underlying documents or supporting documentation used by Pallante to make the entries. In addition, defendants claim that they were not responsible for verifying the underlying records, or for conforming the entries to a cash or accrual accounting method.

Plaintiffs claim that defendants failed to make appropriate accounting adjustments to the QuickBook entries, which resulted in inaccurate monthly reports which were sent to Spain. Basically, the discrepancies involve Quickbook using the accrual method of accounting, in

which Fedeoliva USA only entered sales when made, but neglected to enter returns, allowances and credits. In addition, the QuickBook entries did not include an expense for the key-man life insurance policy taken out by the company on Benedetti's life.

The business relationship between Fedeoliva and Fedeoliva USA ceased in 2003, which resulted in the necessity for the previously referenced reconciliation. Benedetti requested that the Firm assist him in reconciling the figures and in June of 2004, Benedetti transmitted the new reconciliation to Fedeoliva, which was based on the Firm's finding additional expenses recorded on the QuickBook account, indicating that Fedeoliva owed money to Fedeoliva USA. Defendants say that this reconciliation states that the Firm does not verify the accuracy of the items or their supporting documentation. However, the Court notes that neither side has provided a copy of the revised reconciliation containing such statement.

Lastly, defendants argue that the complaint alleges no claims on behalf of Fedeoliva USA against defendants, and as a result the complaint must be dismissed because plaintiffs are bringing suit as assignees of Fedeoliva USA. Further, defendants say that Fedeoliva USA and defendants, were in pari delicto, meaning in equal fault, to the extent of any alleged wrongdoing. Defendants maintain that Fedeoliva USA was more than equally at fault since the bulk of the accounting documents at issue were prepared by Fedeoliva USA, thus, any claims against the defendants on behalf of Fedeoliva USA should be dismissed.

In opposition to defendants' motion and in support of their cross-motion, plaintiffs assert that the three year statute of limitations for this action began to run at the earliest as of April 15, 2004, the date when the last monthly reports were transmitted from Fedeoliva USA to plaintiffs. Plaintiff states that the last work performed by defendants pertaining to the statements was on June 3, 2004, when the revised reconciliation report that indicated that Fedeoliva owed Fedeoliva USA over $600,000 was transmitted to the plaintiffs, which is within three years of the commencement of the instant litigation. Moreover, a stipulation extending the time to answer,

dated June 1, 2007, expressly provides that this action is deemed to have commenced on February 16, 2007 (Cross-motion, exhibit 2). In addition, plaintiffs argue that they do have privity with defendants because defendants were engaged to help prepare the monthly statements that Fedeoliva USA was required to submit to Fedeoliva. Further, plaintiffs maintain that questions of fact exist, including the scope of defendants' engagement, which preclude granting defendants' motion.

Specifically, plaintiffs contend that there is conflicting deposition testimony as to the scope of defendants' services. In his examination before trial (EBT), Benedetti testified that defendants were engaged to "reconcile certain accounts, everywhere from bank statements to reconciliations that we needed to present to Spain ..." and that it was his understanding that defendants were reviewing all of the invoices to make sure that they were accurate (Benedetti EBT, at 21-22). Pallante was also deposed in this matter and averred that she generated the reports for Spain after Byalick's monthly visits, and that Byalick was aware that the reports were being sent to Spain (Pallante EBT, at 14-15). At his deposition, Schlussel admitted that there was no engagement letter on file regarding the scope of the Firm's services for Fedeoliva USA (Cross-motion, exhibit 5). Byalick was also deposed in this matter and testified that he believed that Fedeoliva USA was wholly owned by Fedeoliva (Byalick EBT, at 60-61). Also, plaintiffs say that the assignment by Fedeoliva USA of its claims against defendants does not implicate any wrongdoing by Benedetti.

In reply, defendants contend that there is no privity between them and Fedeoliva, because all of the work that they performed was done exclusively for Fedeoliva USA's benefit, in a confidential relationship apart from the principal-agent relationship between Fedeoliva and Fedeoliva USA. Defendants also maintain that there is no material dispute as to the nature and scope of its engagement with Fedeoliva USA, since the testimony provided indicates that defendants never reviewed the monthly statements that were sent to Spain (Pallante EBT, at

55). However, the Court notes that the actual testimony of Pallante states that she either did not know or could not recall defendants' responsibilities with respect to the reports that she prepared for transmittal to Fedeoliva (*id.* at 18-19, 55, 64). Pallante did aver that Byalick never undertook an audit of Fedeoliva USA's business (*id.* at 81).

Defendants insist that the reports prepared for Spain were beyond the scope of their engagement, and there are no facts in the record that indicate that they ever prepared or reviewed those reports. In addition, defendants state that they cannot be held liable for any alleged negligence in connection with Fedeoliva USA's reporting to Fedeoliva, under the doctrine of in pari delicto, because Fedeoliva USA was responsible for such reports and, therefore, is necessarily at fault for any wrongdoing. Lastly, defendants argue that the action is time-barred since they did not prepare any of the monthly reports that form the basis of the instant action, and that the continuous representation doctrine is, therefore, inapplicable to extend the limitation period.

In reply to the opposition to their cross-motion, plaintiffs say that they consistently received inaccurate monthly reports from 1999 through April 15, 2004, and thus, their claims are not time-barred. Plaintiffs contend that the monthly reports were misleading because of the negligence of defendants in their review of Fedeoliva USA's records. Plaintiffs also argue that defendants were always aware that Fedeoliva USA was acting as Fedeoliva's agent and that monthly statements were being prepared to be sent to Fedeoliva. Consequently, plaintiffs maintain, there is privity between the parties. Further, plaintiffs insist that defendants' new arguments regarding privity, based on Fedeoliva USA's agency relationship with Fedeoliva, are inapposite to the instant situation. Moreover, plaintiffs point out that defendants admit that any reports to Spain would have been based on the QuickBook numbers (Defendants' Reply Memo, at 5).

STANDARDS

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Santiago v Filstein*, 35 AD3d 184,185-186 [1st Dept 2006]; CPLR 3212 [b]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied *(see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

CPLR 3211(b) states that "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." On a motion to dismiss affirmative defenses pursuant to CPLR 3211(b), "the plaintiff bears the burden of demonstrating that the defenses are without merit as a matter of law" (*534 E. 11th St. Hous. Dev. Fund Corp.*

v Hendrick, 90 AD3d 541, 541 [1st Dept 2011]). "A defense should not be stricken where there are questions of fact requiring trial" (*id.* at 542).

DISCUSSION

The portion of defendants' motion seeking summary judgment dismissing the first cause of action asserted as against them for professional malpractice is denied. The conflicting deposition testimony regarding the nature and extent of the services that defendants were to provide, and defendants' knowledge of the use of their work in the preparation of the monthly reports sent to Spain, raise "issue[s] of credibility inappropriate for resolution on a motion for summary judgment" (*Elamin v Roberts Express*, 290 AD2d 291, 291 [1st Dept 2002]; *Sanchez v Finke,* 288 AD2d 122 [1st Dept 2001]). Even though defendants argue that there is no evidence that they ever reviewed these monthly reports, a question still remains as to whether such review was intended under the terms of the oral agreement between the parties.

Since at this juncture the intended scope of defendants' services cannot be determined, it also cannot be determined whether plaintiffs instituted this action within the requisite statute of limitations. Pursuant to CPLR 214(6), an action for professional malpractice must be commenced within three years of the date of accrual. A claim for professional malpractice accrues when the malpractice is committed, not when it is discovered (*see Williamson v PricewaterhouseCoopers LLP,* 9 NY3d 1, 7-8 [2007]). Under the continuous representation doctrine, if the accountant whose professional work is being questioned engages in continuous work for the client with respect to the particular transaction that is the subject of the action, the statutory period is tolled (*see Mitschele v Schultz,* 36 AD3d 249, 253 [1st Dept 2006]). "The mere recurrence of professional services does not constitute continuous representation where the later services performed were not related to the original services" (*id.*).

In the case at bar, the evidence presented indicates that monthly reports were sent to Spain until March of 2004 and that between March and June of 2004, defendants assisted in

the preparation of a revised reconciliation statement to be sent to Fedeoliva. The scope of defendants' services is undetermined at this time, thus it cannot be stated with certainty when the statute of limitations began to run. Specifically, it is unclear whether the reports and revised reconciliation were part of continuous work for which defendants were engaged, which would make the continuous representation doctrine applicable and toll the statute of limitations.

Similarly, in order to establish privity between plaintiffs and defendants, it must be shown that: (1) defendants were aware that their reports were to be used for a particular purpose; (2) in the furtherance of which a known party was intended to rely; and (3) some conduct on the part of defendants evincing their understanding that plaintiffs were going to rely on their accounting work (*see Security Pac. Bus. Credit v Peat Marwick Main & Co.*, 79 NY2d 695, 702 [1992]; *Credit Alliance Corp. v Arthur Andersen & Co.*, 65 NY2d 536 [1985]). Since issues of material fact remain as to what services defendants agreed to provide and defendants' knowledge of the relationship between plaintiffs and Fedeoliva USA, defendants' privity argument cannot be resolved at the present time.

Moreover, the Court is not persuaded by defendants' in pari delicto argument because, at this time, there is no evidence of Fedeoliva USA's wrongdoing and, even if that doctrine were to apply, it does not exclude a cause of action for contribution among joint tortfeasors (*Rosenbach v The Diversified Group, Inc.*, 85 AD3d 569 [1st Dept 2011]).

The portion of defendants' motion for summary judgment dismissing plaintiffs' causes of action for breach of contract and negligent misrepresentation is granted. The claims for breach of contract and negligent misrepresentation are duplicative of plaintiffs' malpractice claim, and are properly dismissed (*see Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1 [1st Dept 2008] [breach of contract claim duplicative of professional malpractice claim]; *Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35 [1st Dept 1998]; Bellera *v Handler*, 284 AD2d 488 [2d Dept 2001] [negligent misrepresentation claim duplicative of professional

malpractice claim]).

Since questions remain precluding granting summary judgment, plaintiffs' cross-motion seeking to dismiss defendants' first and third affirmative defenses, based on an alleged failure to state a cause of action and the expiration of the statute of limitations, respectively, must be denied.

Lastly, the portion of plaintiffs' cross-motion seeking to conform the pleadings to the evidence is denied as plaintiffs have failed to provide any argument in support of this requested relief.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the branch of defendants' motion seeking summary judgment dismissing plaintiffs' first cause of action is denied; and it is further,

ORDERED that the branch of defendants' motion seeking summary judgment dismissing plaintiffs' second and third causes of action is granted and the second and third causes of action are dismissed; and it is further,

ORDERED that plaintiffs' cross-motion is denied; and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

Dated: 2-27-12

Paul Wooten J.S.C.

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

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