SHORT FORM ORDER

INDEX NO. 20822/2011

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

JOHN DELOLLIS, TOM HOLSMAN, DOUGLAS MCCARRON and FRANK SPENCER in their capacity as TRUSTEES of the EMPIRE STATE CARPENTERS WELFARE FUND, EMPIRE STATE CARPENTERS ANNUITY FUND, and EMPIRE STATE CARPENTERS PENSION FUND,

Plaintiffs,

-against-

ROBERT M. ARCHER, ARCHER, BYINGTON, GLENNON & LEVINE, LLP,

Defendants.

ORIG. RETURN DATE: DECEMBER 21, 2011
FINAL SUBMISSION DATE: FEBRUARY 16, 2012
MTN. SEQ. #: 001
MOTION: MG

ORIG. RETURN DATE: FEBRUARY 16, 2012
FINAL SUBMISSION DATE: FEBRUARY 16, 2012
MTN. SEQ. #: 002
MOTION: MG

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Upon the following papers numbered 1 to 15 read on these motions TO DISMISS AND AMEND PLEADINGS.
Notice of Motion and supporting papers 1-3; Memorandum of Law in Support 4; Memorandum of Law in Opposition 5; Reply Affidavit and supporting papers 6, 7; Reply Memorandum of Law 8; Notice of Motion and supporting papers 9-11; Affidavit in Opposition and supporting papers 12, 13; Memorandum of Law in Opposition 14; Reply Affirmation 15; it is,

ORDERED that this motion by defendants, ROBERT M. ARCHER and ARCHER, BYINGTON, GLENNON & LEVINE, LLP (collectively "defendants"), for an Order, pursuant to CPLR 3211 (a) (5) and (a) (7), dismissing plaintiffs' complaint with prejudice, on the grounds that the complaint fails to state a valid cause of action; or, in the alternative, dismissing plaintiffs' complaint with prejudice on the grounds that the complaint is time-barred by the applicable

statute of limitations, is hereby **GRANTED** for the reasons set forth hereinafter; and it is further

ORDERED that this motion by plaintiffs, JOHN DELOLLIS, TOM HOLSMAN, DOUGLAS MCCARRON and FRANK SPENCER in their capacity as TRUSTEES of the EMPIRE STATE CARPENTERS WELFARE FUND, EMPIRE STATE CARPENTERS ANNUITY FUND and EMPIRE STATE CARPENTERS PENSION FUND (collectively "plaintiffs" or "Empire Funds"), for an Order, pursuant to CPLR 3025, granting plaintiffs leave to amend the complaint herein, is hereby **GRANTED**, and defendants' instant motion to dismiss shall be applied to the amended complaint without objection from the plaintiffs or defendants.

Defendants inform the Court that this matter arises out of legal representation defendants provided to plaintiffs, a conglomeration of individual local and regional carpenter union affiliated benefit funds located across New York State. Defendants allege that the Empire Funds are governed by the Employment Retirement Income Security Act ("ERISA"), which enforces the administration of retirement and benefit plans and imposes certain fiduciary obligations with regard to monetary investments made on behalf of the plans.

Defendant ROBERT M. ARCHER acted as attorney to the Empire Funds and/or its predecessor funds from 1986 through May 31, 2009. Defendants indicate that the defendant law firm was formed in 2008 and acted as Fund Counsel to the Empire Funds from February 1, 2008, through May 31, 2009. In connection therewith, defendants provided legal counsel to the Empire Funds' Trustees in order to secure compliance with the mandates and guidelines set forth in ERISA, as well as the Internal Revenue Code.

Plaintiffs commenced this action by summons with notice on or about June 30, 2011, sounding in legal malpractice. After a demand for a complaint was made by defendants, plaintiffs served a verified complaint on or about August 24, 2011. Plaintiffs seek to recover losses suffered by the Empire Funds as a result of defendants' alleged negligent performance of their professional obligations while serving as counsel to each of the Empire Funds.

Plaintiffs' claim herein is based upon losses they allege stem from plaintiffs' exposure to investment funds related to the Ponzi scheme orchestrated by Bernard L. Madoff ("Madoff") and Bernard L. Madoff Investment Securities.

Plaintiffs' complaint focuses on two transactions, to wit: (1) the June 30, 2008, merger between the Empire Pension Fund and the Upstate New York Carpenters Pension Fund ("Upstate Pension Fund"); and (2) a $6.4 million investment approved by the Trustees of the Empire Welfare Fund into a Madoff-related fund known as Limited Volatility Equity Strategy ("LVE"), which was made in December 2008. Plaintiffs contend that defendants failed to advise the Board of Trustees of their fiduciary responsibilities under ERISA to "further investigate these investments and conduct additional due diligence," and that the investment of $6.4 million violated the Funds' investment guidelines. Further, plaintiffs contend that defendants failed to properly advise plaintiffs regarding the fact that the Upstate Pension Fund had substantial Madoff investments (approximately 90% of its assets), which became assets of the Empire Pension Fund as a result of the merger (with an actual value of zero), or that the Empire Pension Fund would assume millions of dollars of pension benefit liabilities to the participants of the Upstate Pension Fund. Plaintiffs claim that defendants' professional negligence in failing to advise the Trustees as to their fiduciary obligations caused plaintiffs "substantial losses in an amount to be determined at trial." Plaintiffs allege that but for defendants' negligence, they would not have maintained and/or increased the amount of assets allocated to Madoff investments, and would not have entered into the merger with the Upstate Pension Fund.

The Empire Funds are governed by a Board of Trustees who are plan fiduciaries and have authority and discretion to manage and control the assets of the Funds, except to the extent delegated to an investment manager or consultant appointed pursuant to the terms of the Trust. The Trustees delegated the authority to manage and invest the assets of the Funds by retaining an investment consultant and several investment managers, including Investment Performance Services and J.P. Jeanneret Associates, Inc. In addition, the Trustees employed actuaries, accountants, and fund counsel to provide advice in their respective professional areas to assist the Trustees in administering the plan. Moreover, the Trustees formed an Investment Subcommittee that was responsible for overseeing the Funds' assets, as well as a Merger Subcommittee that was responsible for analyzing the merger with the Upstate Pension Fund and the issues attendant thereto. Notwithstanding the foregoing, the Trustees have ultimate responsibility to administer the Funds and to safeguard the assets of the Funds for the benefit of the participants.

With respect to the Fund's counsel, the defendants herein, the subject retainer agreement provided that defendants would perform certain legal services for the Funds, including:

> preparation of all contracts and other documents as directed by the Trustees; written and oral advice with respect to ERISA; attendance at all meetings of the Board of Trustees and any subcommittee thereof and the keeping of minutes at those meetings; and such other legal counsel as may be required by the Board of Trustees.

Defendants allege that they provided the Funds with legal services in accordance with the foregoing. However, defendants argue that they were not responsible for making decisions concerning the investment or disposal of Fund assets, or whether the allocation of investments met the Funds' guidelines. As discussed, the Funds employed financial experts such as an investment consultant and investment managers for this purpose.

Defendants have now moved to dismiss this action based upon the grounds that the complaint fails to state a cause of action, and that the action is barred by the applicable statute of limitations. As noted hereinabove, the motion to dismiss is now directed to plaintiffs' first amended complaint dated January 18, 2012, without objection from the parties. Defendants argue that defendants were not retained to serve as a "how to guide" for investments, and, notably, were not aware of the Trustees' final decision to make the LVE investment. Furthermore, defendants allege that they did in fact advise the Trustees with respect to the Upstate Pension Fund merger, and that the required due diligence was performed in connection therewith. In particular, defendants cite a memorandum dated April 21, 2008, from defendant ROBERT M. ARCHER to the Funds' Secretary-Treasurer and Administrator, wherein ARCHER expressed concerns about the Jeanneret investments, as well as a memorandum dated May 13, 2008, to the Funds' Administrator wherein ARCHER compiled a list of "legal/due diligence" issues. Moreover, defendants argue that even if defendants were retained to make investment decisions, any losses stemming from the Madoff investments were unforeseeable, as Madoff eluded financial experts for decades before his arrest. Thus, defendants argue that plaintiffs cannot establish that defendants breached the standard of care; cannot prove proximate cause; and

cannot demonstrate any damages resulting therefrom. As such, defendants seek dismissal of plaintiffs' complaint in its entirety.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true in determining whether the complaint states any legally cognizable cause of action (*see Grand Realty Co. v City of White Plains*, 125 AD2d 639 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]). When a party moves to dismiss a complaint pursuant to CPLR 3211 (a) (7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*see Vermont Mut. Ins. Co. v McCabe & Mack, LLP*, 2013 NY Slip Op 2392 [2d Dept]).

In order to sustain a claim for legal malpractice, a plaintiff must establish both that: (1) the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession; and (2) that the attorney's breach of the duty proximately caused the plaintiff actual and ascertainable damages (*see AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428 [2007]; *Keness v Feldman, Kramer & Monaco, P.C.*, 2013 NY Slip Op 2376 [2d Dept]). To establish causation, a plaintiff must show that he or she would not have incurred any damages but for the attorney's negligence (*see Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438 [2007]).

Here, the Court finds that defendants have met their burden for dismissal by demonstrating that plaintiffs have failed to allege that, but for their alleged negligence, they would not have sustained any damages (*see Davis v Klein*, 88 NY2d 1008 [1996]; *Ashton v Scotman*, 260 AD2d 332 [1999]). The Court finds that plaintiffs have failed to plead specific facts showing causation and damages; thus, their claims of legal malpractice fail to state a cause of action (*see Citidress II Corp. v Tokayer*, 2013 NY Slip Op 2369 [2d Dept]; *Kuzmin v Nevsky*, 74 AD3d 896 [2010]; *Tortura v Sullivan Papain Block McGrath & Cannavo, P.C.*, 21 AD3d 1082 [2005]). Furthermore, mere speculation about a loss resulting from an attorney's alleged omission is insufficient to sustain a *prima facie* case of legal malpractice (*see Siciliano v Forchelli & Forchelli*, 17 AD3d 343 [2005]; *Pellegrino v File*, 291 AD2d 60 [2002]; *Giambrone v Bank of N.Y.*, 253 AD2d 786 [1998]; *Luniewski v Zeitlin*, 188 AD2d 642 [1992]). Plaintiffs have failed to enunciate how "but for" defendants' alleged professional negligence, they would not have sustained losses related to Madoff's Ponzi scheme. The

Funds employed numerous financial experts to review and analyze the Funds' investment positions and to determine how to allocate assets. Defendants were not retained to perform these financial functions. Furthermore, plaintiffs have failed to allege how defendants' claimed omissions with respect to the Upstate Pension Fund merger caused plaintiffs any losses. Again, plaintiffs' claims relative to the merger stem from the fact that the Upstate Pension Fund also had substantial Madoff investments, which actually had no value. It was certainly unforeseeable that the Funds would suffer losses in connection with Madoff's Ponzi scheme, particularly in view of the fact that Madoff perpetrated his massive fraud for decades without detection before being arrested. Finally, plaintiffs have failed to allege that based upon defendants' purported negligence, the Trustees breached their fiduciary duties under ERISA, which proximately caused plaintiffs damages. The Court notes that the subject Trust Agreement vests the Trustees with the ultimate authority to determine how to invest and allocate Fund assets.

Therefore, upon favorably viewing the facts alleged (*Ossining Union Free School Dist. v Anderson LaRocca*, 73 NY2d 417 [1989]), and affording plaintiffs "the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582 [2005]), the Court finds that plaintiffs have failed to state a cause of action for legal malpractice against defendants.

Accordingly, defendants' motion is **GRANTED**, and this action is hereby dismissed pursuant to CPLR 3211 (a) (7).

The foregoing constitutes the decision and Order of the Court.

Dated: April 12, 2013

HON. JOSEPH FARNETI
Acting Justice Supreme Court

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**