Chlsea, LLC v Gramercy Fin. Servs., LLC
2013 NY Slip Op 32946(U)
November 19, 2013
Supreme Court, New York County
Docket Number: 652682/2011
Judge: Marcy S. Friedman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN, *Justice* PART 60

CHLSEA, LLC, et al.,

Plaintiffs,

-against-

GRAMERCY FINANCIAL SERVICES, LLC, et al.,

Defendants.

INDEX NO. 652682/2011

MOTION DATE ______

MOTION SEQ. NO. 003

The following papers, numbered 1 to ____ were read on this motion to dismiss.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... No (s). ______

Answering Affidavits — Exhibits ______ No (s). ______

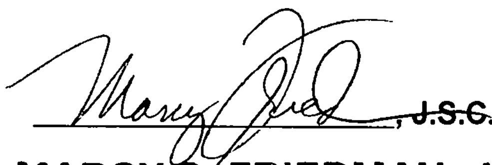
Replying Affidavits ______ No (s). ______

Cross-Motion: ☐ Yes ☒ No

This motion is decided in accordance with the accompanying decision/order.

SO ORDERED.

Dated: 11-19-13



, J.S.C.

MARCY S. FRIEDMAN, J.S.C.

1. Check one: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check as appropriate:.....Motion is: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 60
--X
CHLSEA, LLC, BROMLI, LLC, UNION STREET HOLDINGS, LLC, BRIAN KELLY and JOELLE KELLY, husband and wife,

Plaintiffs,

-against-

Index No. 652682/11

GRAMERCY FINANCIAL SERVICES, LLC, GRAMERCY ADVISORS, LLC, GRAMERCY INVESTMENT ADVISORS, LLC, GRAMERCY FINANCIAL GROUP, LLC, GRAMERCY INVESTMENT MANAGEMENT, LLC, TALL SHIPS CAPITAL MANAGEMENT, LLC and STEAMBOAT CAPITAL MANAGEMENT, LLC,

Defendants.
--X
MARCY FRIEDMAN, J.:

Plaintiffs allege that defendants (collectively Gramercy) fraudulently, or with gross negligence or recklessness, marketed a tax investment strategy to plaintiffs, known as a distressed asset debt or DAD transaction, involving defendants' acquisition of foreign distressed debt on plaintiffs' behalf. The transaction was a tax shelter which "use[d] a limited liability company taxed as a partnership to shift losses among partners entering and exiting the partnership," for the purpose of enabling the investor to benefit from the built-in losses in foreign distressed debt. (Complaint, ¶ 2.) The Internal Revenue Service (IRS) audited the DAD transaction, and disallowed plaintiffs' claimed losses from the transaction. This action ultimately followed.

Gramercy moves, pursuant to CPLR 3211 (a) (1), (5), and (7) and CPLR 3016 (b), to dismiss the complaint, on the grounds that it barred by the statute of limitations, that defendants

did not cause plaintiffs' damages, and that the complaint is not pleaded with sufficient particularity.

BACKGROUND

According to the complaint, starting in the mid-1990s, many banks, accounting firms and law firms designed and promoted tax investment strategies to individuals with substantial income or capital gains. These strategies involved the creation of a high tax basis in a partnership or limited liability company by executing a series of offsetting transactions. (Complaint, ¶ 24.) The Gramercy defendants are investment advisors who buy foreign distressed debt, and represented to plaintiffs that they had "unique" expertise in such debt. (Id., ¶¶ 25, ¶ 31.)

Plaintiffs allege that defendants and non-party BDO Seidman (BDO) developed and marketed the DAD transaction to taxpayers, with law firms providing "formal legal opinions attesting to the propriety of the deals under the applicable tax laws." (Id., ¶ 26.) Plaintiffs claim that BDO is a co-conspirator in a fraud committed with an unidentified law firm that provided an opinion letter to plaintiffs as to the propriety of the DAD transaction at issue. (Id., ¶¶ 26, 35.)

In 2002, Brian Kelly (Kelly), an executive at software maker Activision, sought to limit his tax liability on $26,000,000 he earned from the exercise of stock options. (See IRS Form 886-A "Explanation of Items" prepared in connection with Kelly audit, at 8 [Aff of Michael E. Petrella, exhibit 2].) In August 2002, Lawrence Cohen of BDO sent information to Kelly regarding a potential DAD transaction, and recommended that Kelly meet with defendants. (Complaint, ¶ 30.) At the initial meeting, BDO and defendants solicited Kelly to invest in a DAD transaction, which they indicated would be arranged and managed by defendants. (Id., ¶ 31.)

In determining whether to invest in the DAD transaction, Kelly had his own advisors. (Id., ¶ 33.) In November 2002, Kelly entered into an Investment Management Agreement with Gramercy (the IMA [Petrella Aff, exhibit 3]), which set forth the terms and conditions upon which Gramercy would provide services to him. (Id., ¶ 38.) As plaintiffs acknowledge, Gramercy "would not have a fiduciary duty in the areas of financial, tax and legal advice with respect to the DAD transaction. . . ." (Id.) Plaintiffs further allege, however, that Gramercy "would have a high fiduciary duty with respect to investments in foreign distressed debt for which they had discretionary control as attorneys-in-fact for plaintiffs – their unique area of expertise that the DAD transaction was based upon." (Id., ¶ 38.)

Section 7 (b) of the IMA provided in pertinent part:

> "To the fullest extent permitted by law, the Investment Manager [Gramercy] . . . shall not be liable to the Client [Kelly] or anyone for any reason whatsoever (including but not limited to (i) any act or omission by the Investment Manager in connection with the conduct of the business of the Client, that is determined by the Investment Manager in good faith to be in or not opposed to the best interests of the Client, [and] (ii) any act or omission by the Investment Manager based on the suggestions of any professional advisor of the Client whom the Investment Manager believes is authorized to make such suggestions on behalf of the Client . . . unless any act or omission by the Investment Manager constitutes willful misconduct, gross negligence, a violation of applicable securities laws or criminal wrongdoing by the Investment Manager."

Section 7 (c) of the IMA provided that to the fullest extent permitted by law, Gramercy shall not "be liable in any manner to the Client [Kelly] with respect to the effect of any U.S. federal, state, local or any other taxes" in connection with the management of the account or the IMA. Schedule A of the IMA expressly disclosed that "[d]ebt securities typically will not be investment grade and will be most likely subject to periods of illiquidity." (Id. at 14.) Kelly also executed a letter (the Belief Letter), in which he acknowledged that "he has consulted with [his]

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own financial, tax and legal advisors with respect to the Transactions and, in particular, the effect of the tax laws," and that he "shall not have any claim against [Gramercy] . . . in the event that any tax liability, problem or issue should arise in connection with the Transactions other than as a direct result of any gross negligence, willful misconduct, violation of applicable securities laws or wrongdoing of [Gramercy] . . . in effecting the investments pursuant to the Agreement." (Kelly Letter, dated Nov. 1, 2002 [Petrella Aff, exhibit 6].) Section 2 (a) of the IMA authorized Gramercy, as Investment Manager, to manage securities and other investments belonging to Kelly and "to enter into such investments as are in accordance with the IM's best judgment and Investment Approach."

The DAD transaction into which Kelly entered was a complex transaction that began in June and July 2002, when various Brazilian companies transferred distressed Brazilian consumer receivables and notes to Brazilian entities MPATRN, LLC and TROPE, LLC. (Complaint, ¶¶ 46 [a]-[b].) In August 2002, Kelly met with defendants about investing in the transaction. (Id., ¶ 46[c].) In early November 2002, defendants organized CHLSEA, LLC (CHLSEA) in Delaware on plaintiffs' behalf to execute the DAD transaction, and the Brazilian entities contributed the distressed receivables to CHLSEA. (Id., ¶ 46 [d].) In December 2002, pursuant to a Contribution Agreement, Kelly purchased a 98% interest in CHLSEA. (Id., ¶ 46 [g].) In December 2002, CHLSEA and Tall Ships Capital Management, LLC (Tall Ships) formed BROMLI, LLC (BROMLI). (Id., ¶ 46 [g].) CHLSEA contributed the consumer receivables to BROMLI, and Tall Ships was made the managing member. (Id.) In late December 2002, BROMLI sold the consumer receivables to defendants for $324,911, but claimed a basis loss of $29,208,601. (Id., ¶ 46 [h].) Plaintiffs allege that in reliance on the advice given by the law firm

that issued the tax opinion in connection with the DAD transaction, Kelly claimed an approximately $26 million loss attributable to the DAD transaction on his tax returns for 2002. (Id., ¶ 47.)

Defendants assert that widespread media coverage of the federal crackdown on the promotion of tax shelters for wealthy clients, like the DAD transaction that Kelly entered into, should have placed plaintiffs on notice of their claims. Defendants submit evidence that in 1999 and 2000, the IRS issued IRS Public Notices concerning the allegedly abusive nature of certain transactions making use of an artificially inflated basis in partnership interests. (See Petrella Aff, exhibits 17 [Notice 1999-59, "Tax Avoidance Using Distributions of Encumbered Property"] and 18 [Notice 2000-44, "Tax Avoidance Using Artificially High Basis"].) In December 2001, the IRS publicly offered amnesty to taxpayers who had engaged in abusive tax shelters. (See id., exhibit 19.) In July 2002, months before Kelly consummated the DAD transaction, the IRS commenced litigation against BDO, alleging that BDO was "promoting potentially abusive tax shelters substantially similar to those described in Notice 2000-44" which involved high basis partnership interests. (See U.S. v BDO Seidman, LLP, Civ Action No. 02 C 4822 [ND Ill 2002] [Petition, ¶ 11] [Petrella Aff, exhibit 20].) This litigation sought to enforce subpoenas directing BDO to provide it with a list of investors employing potentially abusive tax shelters.

Defendants also submit evidence that these developments received prominent media coverage in the summer and fall of 2002. (See Petrella Aff, exhibits 21-30.) Moreover, between 2004 and 2006, at least seven federal court actions were brought against BDO, based on allegations that it acted in concert with law firms and other defendants in promoting tax shelters involving high basis partnerships that lacked economic substance. (See Miron v BDO Seidman,

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LLP, 2006 WL 3742772 [ED PA 2006]; Matter of Watson v BDO Seidman LLP, 2006 WL 1566968 [ND GA 2006]; RA Invs. I LLC v Deutsche Bank AG, 2005 WL 1356446 [ND Tex 2005]; Heller v Deutsche Bank AG, 2005 WL 525401 [ED PA 2005]; Acker v AIG Intl., Inc., 398 F Supp 2d 1239 [SD FL 2005]; Blythe v Deutsche Bank AG, 399 F Supp 2d 274 [SD NY 2005]; Denney v Jenkens & Gilchrist, 340 F Supp 2d 338 [SD NY 2004], revd in part 412 F3d 58 [2d Cir 2005].)

Significantly, in September 2005, the IRS served Notices of Beginning of Administrative Proceeding (IRS Notices) and associated Information Document Requests (IDR), commencing audits of CHELSEA and BROMLI in connection with their treatment of DAD losses for the 2002 tax year. (See Petrella Aff, exhibits 4 and 5; Complaint, ¶ 51.) The IRS requested, among other items, information about the valuation of the distressed debt in the portfolios held by the partnerships. (Complaint, ¶ 58.) Although the IRS Notices were addressed to Tall Ships, a letter dated October 31, 2005 to Tall Ships from Robert Chadwick, CPA, on which Kelly was copied, acknowledged: "Mr. Kelly has received the attached Information Document Request (IDR) from the Internal Revenue Service related to the 2002 Chlsea LLC Form 1065 audit." The letter further requested Tall Ships' assistance in complying with the IDRs. (Petrella Aff, exhibit 5.)

In response to the IDR, Gramercy furnished spreadsheets listing information about specific consumer receivables in the portfolios held by CHLSEA. However, the IRS found that it was not provided with "information explaining how the purported fair market values of the consumer receivables contributed to CHLSEA were determined." (See IRS Explanation of Items, at 28-29.) Kelly alleges that when his advisors requested information from Gramercy that was "needed for tax and audit purposes," Gramercy failed to produce evidence of "bona fide due

diligence" and the value of the assets. (Complaint, ¶ 58.) After the audit was complete, in early 2008, the IRS declared that the DAD transaction was not a valid transaction, and subsequently disallowed plaintiffs' claimed losses from the transaction, and assessed penalties. (Complaint, ¶¶ 51-52.) The IRS found that the transaction "lacked economic substance," and was motivated solely to achieve a tax deduction. (See IRS Explanation of Items, at 54-57.)

In January 2009, plaintiffs Brian and Joelle Kelly initiated a FINRA arbitration against defendant Gramercy Financial Services LLC. (See Statement of Claim [Petrella Aff, exhibit 45].) The parties (including all parties to this action) thereafter agreed to toll the statute of limitations as of January 9, 2009 (the Tolling Period). (Ds.' Memo. In Support at 10.) The parties subsequently extended the time to file the complaint to September 30, 2011.

Plaintiffs filed the complaint on September 30, 2011. The complaint contains five causes of action: fraud (first cause of action); conspiracy to commit fraud (second cause of action); fraudulent inducement (third cause of action); gross negligence/recklessness (fourth cause of action); and deceptive trade practices under General Business Law (GBL) § 349 (fifth cause of action). Plaintiffs admit that they disclaimed any liability of Gramercy for the tax treatment of the transactions, and further admit that Gramercy cannot be held liable for the failure of the financial, tax or investment advice given by others. Plaintiffs thus state: "This action is not based upon the failure to give proper financial, tax or investment advice, but [is based upon] the actual and constructive fraud, fraudulent inducement to contract, gross negligence/recklessness and deceptive trade practices engaged in by the Defendants in effecting investments." (Complaint, ¶ 6.) In this regard, Kelly makes five basic allegations against defendants: (1) Gramercy falsely represented that it had performed bona fide pre-acquisition due diligence on the

Brazilian consumer receivables (Complaint, ¶ 6 [a]); (2) Gramercy acquired worthless debt, and then falsely represented that the receivables had value (id., ¶¶ 6 [b]-[d]); (3) Gramercy subsequently collected management fees on the basis of an inflated value of the receivables (id., ¶ 6 [e]); (4) Gramercy failed to provide evidence of due diligence when requested during Kelly's IRS audit (id., ¶ 6 [f]); and (5) Gramercy failed to disclose ongoing relationships with BDO and with the law firm that issued the tax opinion letter, and that these relationships vitiated the penalty protection that otherwise would have been afforded by the opinion letter. (Id., ¶¶ 7, 34-37.)

DISCUSSION

Defendants contend that plaintiffs' fraud, fraudulent inducement, and conspiracy claims are time-barred, because this action was commenced more than six years after the transactions at issue, and more than two years after plaintiffs had notice of the alleged fraud. Defendants also contend that the limitations periods for the gross negligence/recklessness and GBL § 349 claims have also expired. Defendants further contend that their alleged misconduct did not proximately cause plaintiffs' injuries; that plaintiffs fail to state a claim for fraud, fraudulent inducement, or conspiracy; that the gross negligence/recklessness claim is barred by the economic loss rule; and that the deceptive trade practices act is inapplicable.

The dispositive issue in this case is the timeliness of the action. A cause of action based on fraud, including fraudulent inducement, must be brought within the greater of six years from the date the cause of action accrued, or two years from the time the fraud was discovered or could, with "reasonable diligence," have been discovered. (CPLR 213 [8]; Gutkin v Siegal, 85 AD3d 687, 687-688 [1st Dept 2011]; see Sargiss v Magarelli, 12 NY3d 527, 532 [2009]; Yatter v

William Morris Agency, Inc., 268 AD2d 335, 335-336 [1st Dept 2000].) A cause of action for fraud accrues at the time that the plaintiff entered into the allegedly fraudulent transaction. (See Tayebi v KPMG LLP, 18 Misc 3d 1139[A], 2008 NY Slip Op 50374[U] [Sup Ct, NY County 2008] [table; text at 2008 WL 518149, *7] [alleged tax shelter fraud accrued at the time the plaintiff entered into transaction].) While New York does not recognize an independent tort of conspiracy, allegations of conspiracy are permitted to connect non-actors, who might otherwise escape liability, with the acts of their co-conspirators. (Burns Jackson Miller Summit & Spitzer v Lindner, 88 AD2d 50, 72 [2d Dept 1982], affd 59 NY2d 315 [1983].) Thus, a claim regarding conspiracy to commit fraud also accrues at the time of the fraud. (Tayebi, 2008 WL 518149, *7.)

The IMA between Kelly and Gramercy was entered into on November 1, 2002, and the transactions at issue were executed in November and December 2002. (Complaint, ¶ 46.) The transactions were completed, and thus the statue of limitations began to run, by the end of December 2002, over six years prior to the January 9, 2009 Tolling Period. Accordingly, it is plaintiffs' ultimate burden in this action to prove that they commenced this lawsuit within two years of when they could have, with reasonable diligence, discovered the alleged fraud. (See Endervelt v Slade, 214 AD2d 456, 457 [1st Dept 1995].)

"'The test as to when fraud should with reasonable diligence have been discovered is an objective one.'" (Gutkin, 85 AD3d at 688 [internal citation omitted].) Inquiry notice "turns on whether the plaintiff was 'possessed of knowledge of facts from which [the fraud] could be reasonably inferred.'" (Sargiss, 12 NY3d at 532 [internal citation omitted, brackets in original].) "Where it does not conclusively appear that a plaintiff had knowledge of facts from which the fraud could reasonably be inferred, a complaint should not be dismissed on motion. . . ." (Id.)

However, "[i]n order to start the limitations period regarding discovery, a plaintiff need only be aware of enough operative facts 'so that, with reasonable diligence, [it] could have discovered the fraud.'" (Lucas-Plaza Hous. Dev. Corp. v Corey, 23 AD3d 217, 218 [1st Dept 2005], quoting Watts v Exxon Corp., 188 AD2d 74, 76 [3d Dept 1993].) "'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.'" (Gutkin, 85 AD3d at 688 [internal citation and brackets omitted].)

Here, the IRS's commencement of the 2005 audit regarding the CHLSEA and BROMLI partnerships, and its specific inquiries regarding Gramercy's pre-acquisition valuation of the distressed debt, were sufficient to give Kelly actual notice of potential problems with the DAD transaction and to trigger Kelly's duty of inquiry as to the validity of the debt. TMG-II v Price Waterhouse & Co., (175 AD2d 21 [1st Dept 1991], lv denied 79 NY2d 752 [1992]) is directly on point. In that case, plaintiffs were limited partnerships that were designed primarily for tax shelter investments consisting of fraudulent tax losses derived from pre-arranged fictitious trades. Plaintiffs brought a fraud action against Price Waterhouse, their accounting firm, alleging that the firm participated in the fraudulent activities of the general partner. The court dismissed the action as untimely under the two year discovery rule for fraud, holding that plaintiffs' duty of inquiry arose when the IRS questioned the validity of the trades underlying the claimed losses:

> "[W]hen the IRS investigation became known . . . , a series of facts became public that, in our view, were sufficient to have put the plaintiffs on notice and created a duty of inquiry."

(Id. at 22-23; see also Shapiro v Hersch, 182 AD2d 403, 404 [1st Dept 1992] [holding that duty to

inquire as to whether tax shelter was sham arose even before IRS audited tax return because "underlying facts of the fraud" were known before the audit and could have been discovered with due diligence]; Mirman v Berk & Michaels P.C., 91 Civ 8606, 1992 WL 332238 [SD NY 1992] [applying New York fraud statute of limitations, and holding that "[a]n IRS inquiry into an investment partnership intended as a tax shelter would raise the suspicion of a person of ordinary intelligence and thus give rise to his duty to inquire further"]; Cuccolo v Lipsky, Goodkin & Co., 826 F Supp 763 [SD NY 1993] [IRS investigation notice triggers inquiry duty]; Tayebi, 2008 WL 518149, *7 ["As for the two-year discovery rule, even without more, the IRS announcement [about questionable tax shelters] should have been sufficient to put plaintiffs on inquiry notice of the existence of problems with the [challenged] transaction"].)

In the instant case, similarly, the documentary evidence conclusively shows that Kelly was aware of and participated in the IRS 2005 audit of the CHLSEA and BROMLI partnerships and, as found above, thus acquired notice of the IRS's specific concerns about the DAD transaction. The court accordingly holds that this audit, without more, was sufficient to trigger Kelly's inquiry notice.[1] As the fraud claims should have been brought more than two years before the Tolling Period, they are barred by the statute of limitations.

In so holding, the court rejects plaintiffs' argument that the earliest they could have been on notice of defendants' alleged fraud was mid-2008, just after the IRS issued its final determination regarding the distressed debt. (Ps.' Memo. Of Law at 5.) As discussed above, the

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[1]As noted above (supra at 4-6), defendants contend that media coverage of IRS crackdowns on abusive tax shelters, and a profusion of lawsuits against BDO, also triggered plaintiffs' duty of inquiry. The court need not and does not determine the sufficiency of such evidence to trigger the duty, in view of its holding that the duty arose upon commencement of the audit itself.

duty of inquiry is triggered by notice of sufficient operative facts to warrant further investigation as to whether a fraud has been committed, and is not deferred until the fraud is confirmed. The court also rejects plaintiffs' claim that the audit did not trigger the duty of inquiry because they had general knowledge at the time they entered into the tax shelter that an audit was possible. This claim ignores that the audit, and the IRS's associated document requests, gave plaintiffs notice of the IRS's specific concerns about the valuation of the debt, and thus of the need to undertake further investigation of that issue.

The court is also unpersuaded by plaintiffs' argument that the complaint is not barred by the statute of limitations because defendants continued to perpetrate the fraud though 2008 by email correspondence which misrepresented the true (worthless) nature of the distressed debt, and because Gramercy continued to charge management fees based on the allegedly inflated value of the receivables. (Ps.' Memo. Of Law at 6-7.) Even if these allegations are true, the fact that defendants continued the fraud into 2008 does not mean that it could not have been discovered earlier.

Plaintiffs' further argument that their claims are tolled by the continuous representation doctrine is without merit. "The continuous representation doctrine tolls the running of the statute of limitations on a claim arising from the rendition of professional services only so long as the defendant continues to advise the client 'in connection with the particular transaction which is the subject of the action and not merely during the continuation of a general professional relationship.'" (Booth v Kriegel, 36 AD3d 312, 314 [1st Dept 2006] [citation omitted].) However, the continuous representation doctrine applies only to malpractice claims, not to fraud claims. (See e.g. Endervelt v Slade, 162 Misc 2d 975, 982 [Sup Ct, NY County 1994], affd 214

AD2d 456 [1st Dept 1995].) Plaintiffs allege that they retained Gramercy to "effect[] investments." (Complaint, ¶ 6.) They do not assert a malpractice claim, and have made an explicit judicial admission that "[t]his action is not based upon the failure to give proper financial, tax or investment advice." (Id.)[2]

Finally, the court rejects plaintiffs' argument that defendants are equitably estopped from claiming the defense of statute of limitations, because defendants' own deception, fraud or misrepresentations caused plaintiffs to miss the applicable periods of plaintiffs' claims. The doctrine of equitable estoppel, an "extraordinary remedy" (East Midtown Plaza Hous. Co. v City of New York, 218 AD2d 628, 628 [1st Dept 1995]), provides that a defendant may be estopped from pleading the statute of limitations where the plaintiff was induced by fraud, misrepresentation, or deception to refrain from filing a timely action. (Ross v Louise Wise Servs., Inc., 8 NY3d 478, 491 [2007]; Simcuski v Saeli, 44 NY2d 442, 448-449 [1978].) This "remedy is only applicable in circumstances where there is evidence that plaintiff was lulled into inaction by defendant in order to allow the statute of limitations to lapse." (East Midtown Plaza Hous. Co., 218 AD2d at 628.)

Plaintiffs fail to present any evidence of an effort by defendants to dissuade them from bringing suit. Rather, plaintiffs assert, in conclusory terms, that defendants "continued to misrepresent the true (worthless) nature of the distressed debt receivables up through at least 2008" and that they "reasonably relied upon Defendants' misrepresentations." (Ps.' Memo. Of Law at 11). However, estoppel cannot arise from the same conduct as that underlying the

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[2]In view of this holding, the court does not reach the further issue, which is the subject of dispute between the parties, as to whether an investment advisor is a professional for purposes of the continuous representation doctrine.

original fraud. (Kaufman v Cohen, 307 AD2d 113, 122 [1st Dept 2003] ["equitable estoppel does not apply where the misrepresentation or act of concealment underlying the estoppel claim is the same act which forms the basis of plaintiff's underlying substantive cause of action"]; Melcher v Greenberg Traurig, LLP, 102 AD3d 497, 501 [1st Dept 2013], lv to dismiss appeal denied 21 NY3d 908 [doctrine of equitable estoppel is inapplicable where the plaintiff "does not allege an act of deception separate and apart from the ones upon which he sues"].)

For the above reasons, the court holds that the first, second and third causes of action for fraud, fraudulent inducement, and conspiracy must be dismissed as barred by the statute of limitations.

Plaintiffs' causes of action for gross negligence/recklessness (fourth cause of action) and deceptive business practices (fifth cause of action) are also barred by the statute of limitations. Plaintiffs do not dispute that a cause of action for gross negligence or recklessness is subject to a three-year limitations period (CPLR 214; Community Network Serv., Inc. v Verizon NY, Inc., 39 AD3d 300 [1st Dept 2007]), and that the cause of action accrues when the injury first occurs, rather than on the date of the discovery of the injury by the plaintiff. (See generally Ackerman v Price Waterhouse, 84 NY2d 535, 541-542 [1994]; Kronos, Inc. v AVX Corp., 81 NY2d 90, 94 [1993].) Likewise, claims brought pursuant to GBL § 349 must be brought within three years from the time injury occurs. (CPLR 214 [2]; see Gaidon v Guardian Life Ins. Co. of Am., 96 NY2d 201, 210 [2001] [section 349 claim accrues "when plaintiff has been injured by a deceptive act or practice violating section 349"].)

The court holds that plaintiffs were injured, and their remaining claims accrued, in 2002 when plaintiffs entered into the transaction with Gramercy, not at the time the IRS subsequently

disallowed Kelly's claimed losses. The gross negligence/recklessness and GBL § 349 claims thus accrued over three years before the January 9, 2009 Tolling Period. This court has rejected plaintiffs' general defenses to the application of the statute of limitations to these claims. They must therefore also be dismissed.

As the court has concluded that the entire complaint is barred by the statute of limitations, it does not reach the remaining grounds for dismissal advanced by defendants. (See TMG-II, 175 AD2d at 22.)

It is accordingly hereby ORDERED that defendants' motion to dismiss is granted, to the extent of dismissing the complaint in its entirety with prejudice, and with costs and disbursements to defendants as taxed by the Clerk of the Court; and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: New York, New York
November 19, 2013

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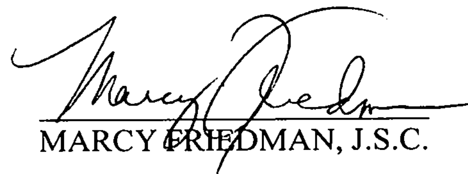

MARCY FRIEDMAN, J.S.C.