Davoli v Dourdas
2015 NY Slip Op 30635(U)
April 20, 2015
Supreme Court, New York County
Docket Number: 654362/2013
Judge: Eileen Bransten
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

----------X

JOAN DAVOLI,

Plaintiff,

- against-

Index No. 654362/2013
Motion Seq. No. 001, 002 & 003
Motion Date: 10/10/2014

PETER NICHOLAS DOURDAS, KATHERINE DOURDAS, DOURDAS FINANCIAL, QUESTAR CAPITAL MANAGEMENT, INC., USALLIANZ SECURITIES, INC., MML INVESTORS SERVICES, INC., MASS MUTUAL LIFE INSURANCE COMPANY, and JOHN/JANE DOES 1-10,

Defendants.

----------X

BRANSTEN, J.

Motion sequence numbers 001, 002 and 003 are consolidated for disposition.

In this action, plaintiff Joan Davoli alleges fraud and other malfeasance by her financial advisors and others in connection with the management of approximately $7 million of her assets. In motion sequence 001, Peter Nicholas Dourdas, Katherine Dourdas and Dourdas Financial (collectively, the "Dourdas Defendants") seek dismissal on the grounds of failure to state a claim, statute of limitations, ratification and laches. In motion sequence number 002, defendants Massachusetts Mutual Life Insurance Company ("MassMutual") and MML Investors Services, LLC. (sued as MML Investors Services, Inc.) ("MML") (collectively, the "MML Defendants") move to dismiss on statute of

limitations grounds. In motion sequence number 003, defendants Questar Capital Corporation ("QCC"), Questar Asset Management, Inc. ("QAM"), and US Allianz Securities, Inc. ("USAS") (collectively, the "Questar Defendants") move to dismiss on the grounds of failure to state a claim and statute of limitations. For the reasons that follow, the Dourdas Defendants and the Questar Defendants' motions to dismiss are denied, while the MML Defendants' motion is granted.

I. Background / The Complaint[1]

Plaintiff Davoli is a widow who has not worked outside the home since the late 1960s. (Compl. ¶ 17.) Defendant Peter Dourdas is defendant Katherine Dourdas' husband, and Katherine Dourdas is Davoli's second cousin. (Compl. ¶ 6; Peter Dourdas Affidavit ¶ 2; Joan Davoli Affidavit ¶ 22.) Peter Dourdas was formerly a broker registered with FINRA, and with defendant Dourdas Financial, an unincorporated entity, he offered securities through defendant QCC, and investment advisory services through defendant QAM until September 2013. (Compl. ¶¶ 5, 7-9, 41.) Prior to working for QCC, from 2004, Peter Dourdas was a registered representative of USAS, a broker-dealer that was integrated into QCC in 2006 and formally merged into QCC in 2007. (Compl. ¶¶ 10, 40.) Before joining USAS, Peter Dourdas was a representative with MML, another

[1] The following facts are taken from the complaint and the affidavits submitted in connection with the various motions.

broker-dealer from 1999 to 2004, and worked for MassMutual from 1985 to 2004. (Compl. ¶¶ 11-12, 37-38.)

Plaintiff alleges that her husband of nearly thirty years handled her finances and made appropriate provisions for her future security. Upon her husband's death in 1995, however, Peter Dourdas used his family connections to plaintiff to secure her trust to allow him to manage approximately $7 million of her assets. At the time, plaintiff's fragile emotional required her to stay in a psychiatric facility and take both anti-depressants and anti-anxiety medication. (Compl. ¶ 17.) In August 1999, he persuaded her to execute a broad power of attorney in his favor, without explaining its significance to her. He also caused her to sign a trust agreement which allow him to name himself trustee, obtaining exclusive authority to determine what property was placed in the trust and how it was managed. (Compl. ¶¶ 19-20.) He then opened up accounts for plaintiff at the various corporate defendants for the purpose of buying insurance and annuity products, misrepresenting plaintiff's net worth, risk tolerance, investment objectives, and investment time horizons on the application forms. (Compl. ¶¶ 21-23.)

Plaintiff asserts that most of the life insurance policies Peter Dourdas bought were unnecessary and unsuitable investments in view of her income requirements. She also alleges that he took inappropriate loans from the policies, which incurred interest and decreased their cash value and the available death benefits. Based on information obtained regarding thirteen of the fourteen policies that were bought from MassMutual, nearly $800,000 of plaintiff's funds were spent on premiums. Additional premiums were

purchased with $1.7 million derived from loans taken out against the cash value of the policies, and another $164,000 in loans were taken out in cash. Peter Dourdas incurred $764,000 in interest charges on the loans, resulting in an outstanding loan balance which reached $1,616,695 by the end of August 2013. The cash value of the policies shrunk to under $75,000, with their death benefits reduced to under $2.5 million, or approximately 45% of their face value of $5.5 million. Two of the policies purchased for nearly $1 million in premiums lapsed due to failure to pay minimum charges, and became worthless. (Compl. ¶¶ 25-27; Compl. Appendix 1.)

Besides the life insurance policies, Peter Dourdas purchased at least twenty-three annuity contracts on behalf of plaintiff. In total, over $2.6 million in premiums were paid for those policies. However, by the end of 2009 through mid-2010, only approximately $1 million, associated with three contracts, was left to annuitize for guaranteed payment. Peter Dourdas allegedly mismanaged the annuities by rolling them over without cause and incurring penalties. He also took out loans totaling $250,000 against four of the policies, causing plaintiff to pay at least $85,000 in interest. Furthermore, Peter altered the length of the annuity contracts without authorization or disclosure, converting an USAS contract from a lifetime duration to 10 years. In September 2011, he withdrew approximately $26,000 from one of plaintiff's annuity policies, apparently without making a corresponding deposit of funds in her other accounts. Allegedly to conceal his conduct with respect to the annuities, Peter opened some of them in different names and at different addresses, and forged plaintiff's signature. (Compl. ¶¶ 30-35.)

Plaintiff additionally alleges that Peter paid himself excessive periodic fees under the pretense that he was acting as either a trustee or a bookkeeper. Some of those payments went to defendant Katherine Dourdas, who provided no services to plaintiff. (Compl. ¶¶ 44-45.) To do so, Peter Dourdas used a customized stamp with plaintiff's signature, even though the stamp was only supposed to be used to pay approved household bills. (Compl. ¶ 46.) The partial records plaintiff has examined indicate that Peter Dourdas withdrew approximately $700,000 between 1998-1999 and 2007-2013, and from these figures, plaintiff extrapolates that Peter took another $700,000 during the remaining periods. (Compl. ¶ 46.) Peter Dourdas did not have a contract to render services to plaintiff and did not generate any invoices for his alleged work. (Compl. ¶ 47.)

Peter Dourdas also incurred debt in plaintiff's name by opening up a line of credit at Bank of America in 2003. The outstanding balance reached $200,000 by 2006 and stood at about $100,000 at the time of the complaint. Available records show that plaintiff was compelled to pay over $58,000 in interest on the credit line. Over $15,000 in advances taken by Peter Dourdas are not accounted for.

Plaintiff claims that she did not discover Peter Dourdas' alleged misconduct until the spring of 2013, when she looked at one of her credit card statements and noticed that significant balances had accumulated because Peter had stopped paying her bills. (Compl. ¶ 50.) She contends that he concealed his activities from her in a variety of ways: by using the customized signature stamp to open the insurance and annuity accounts; by asking her to sign documents without explaining their significance; by having her sign

partially blank documents and filling the missing information out of her presence; and by forging her signature. (Compl. ¶ 52.) Although she received annuity and insurance accounts statements in the mail during the relevant time period, she would bring them, unopened, to Peter Dourdas for review. He also would pay plaintiff's bills from her banks accounts after she reconciled her credit card statements with her receipts. (Compl. ¶ 51.) Whenever she had any questions, he would falsely assure her that he was acting properly. (Compl. ¶ 53.)

Plaintiff estimates out of pocket losses totaling approximately $2.3 million due to Peter Dourdas' conduct as set forth above. (Compl. ¶ 56.) Additionally, she alleges an inability to account for over $300,000 taken from a Merrill Lynch retirement account between 1995 and 1999; almost $150,000 distributed to Provident Mutual in 1997; nearly $100,000 in checks made out to cash in 1997; and approximately $289,000 in funds received by Peter Dourdas from her father's estate upon his death. (Compl. ¶ 58.)

The complaint was filed on December 19, 2013. It sets forth ten causes of action: for (1) fraud as against Peter Dourdas and Dourdas Financial, (2) for negligence as against Peter Dourdas and Dourdas Financial, (3) violation of New York Business Law § 349 as against Peter Dourdas, (4) unjust enrichment as against Peter and Katherine Dourdas, (5) vicarious liability as against QCC, QAM, USAS, MML and MassMutual (the "Corporate Defendants"), (6) negligent supervisions as against the Corporate Defendants, (7) breach of fiduciary duty as against Peter Dourdas, (8) conversion as against Peter and Katherine Dourdas, (9) breach of fiduciary duty as against the

Corporate Defendants, and (10) money had and received as against Peter and Katherine Dourdas. Only nine of these claims are currently pending, as Plaintiff has withdrawn her claim under the General Business Law. (Pls. Mem. at 14.)

In connection with their statute of limitations defenses, defendants have submitted documentation relevant to the dates of various transactions. The Dourdas Defendants have attached evidence indicating that all of the insurance policies identified in Appendix 1 to the complaint were issued between December 20, 1995 and April 4, 2001. *See* Peter Dourdas Aff. ¶¶ 6-18, Exs. C-M, CC, DD). Similarly, they have submitted documents indicating that the annuities were all purchased between October 3, 1995 and December 12, 2008. *See* Peter Dourdas Aff. ¶¶ 19-33, Exs. N-Z, AA, BB. They have also submitted a copy of an email from plaintiff to Peter Dourdas dated August 7, 2012, which states in pertinent part:

> As we talked the other day we both spoke of the stress we are under concerning my financial situation. It has left me so anxious over the weekend after that letter from the IRS and the zero bank account that I am having a very difficult time. It's hard to go on with other things in life when this problem is weighing me down. I can't sleep, I am obsessing and basically not enjoying the time I have left. My children know that I am miserable and I hate to have them know that.
>
> Perhaps in the beginning when I was first starting out I over did it having two Mercedes convertibles, a Lexus, and buying jewelry and taking vacations. I thought there was more money than I apparently have. Several times you explained to me how my finances were set up but I guess I didn't pay attention knowing that you were taking care of it for me. Next to my friends I feel like an idiot because I don't pay my own bills, don't really have a clue other than the structured settlements exactly where things stand. And even those I am not overly knowledgeable about. My friends seem to manage their own money and pay their bills and are actually not worrying as much as I am and are able to do what they want to do. And basically they should have less money than I do. I am not blaming

> this on anyone but myself because you tried to tell me from the beginning where everything was and how it works but I just didn't listen Peter. I was too blase about the whole thing. Who needed to think when I had you to do it for me.
>
> Even though I have two children who are draining me of money I should still have the knowledge you were trying to give me and that I ignored because I thought it would all work out in the end. I don't know when I started going into a danger zone but it really has me anxious.
>
> * * *
>
> When we go out to lunch we talk about these matters but I am still not learning exactly where everything is and what is left and what is the long term outlook for me. I don't think I have the emotional strength to carry through on all of this. I need help.
>
> Please believe me when I say that in no way do I think this situation is because of anything you did. It was my responsibility to learn and I didn't do it. It's as simple as that. I hope over the next few weeks or month I can learn exactly where I stand.

(Ousley Affirm. Ex. B.)

The Questar Defendants have proffered documentation for three annuity and college savings accounts opened with QCC and USAS between January 27, 2006 and September 10, 2007. (Seale Aff. ¶ 5.) The affidavit submitted by QCC's Vice President for Regulatory Affairs, Barry L. Seale, avers that no accounts were opened with QAM (Seale Aff. ¶ 8.) Seale further states that Peter Dourdas was an independent registered representative of USAS, and then QCC, between 2004 and 2013, *id.* ¶ 4, and that Peter Dourdas executed a Registered Representative agreement which designated him as an independent contractor. *Id.* ¶ 4 & Ex. A. Additionally, he asserts that Peter Dourdas was an independent representative of QAM who signed an Investment Adviser Representative

Agreement which likewise identified him as an independent contractor. *Id.* ¶¶ 6-7 & Ex. B.

For her part, plaintiff has submitted an affidavit confirming, as alleged in the complaint, that she received regular statements regarding the various accounts in the mail. She also confirms that she did not read them, but brought them to Peter Dourdas unopened. (Davoli Aff. ¶ 4.) She asserts that he never told her anything about her finances other than that he had set up an irrevocable trust and that whenever she questioned him about her assets he assured her that her principal was safe. (Davoli Aff. ¶ 3.) She states that when she received the notice from the IRS, he told her it was a mistake and that he had already taken care of it. (Davoli Aff. ¶ 11.) Additionally, plaintiff asserts that Peter Dourdas' misconduct continued up until the time this action was commenced, insofar as he took out loans on six of the insurance policies between June and August 2013 and caused other other policies to lapse between November 2012 and February 2013. (Davoli Aff. ¶¶ 17-18.) She further claims that Peter Dourdas made monthly payments to himself from at least 2000 until July 2013.

II. Discussion

The motions to dismiss are granted in part and denied in part. Although some of the claims may be barred by the applicable statutes of limitations, plaintiff has pleaded facts sufficient to set forth that she may recover her losses, if any, as against Peter and Katherine Dourdas and Dourdas Financial, under the theories of negligence, conversion,

and money had and received, subject to the applicable three- and six-year limitations periods. She may also seek relief on her related claims against the Questar Defendants, to the extent they occurred within those periods. The claims against the MML Defendants, however, must be dismissed as they are completely time-barred.

A. *The Dourdas Defendants' Motion to Dismiss* (Motion Sequence 001)

1. Fraud

a. Failure to State a Claim

The motion to dismiss the claim for fraud against Peter Dourdas and Dourdas Financial is denied. To plead fraud, the plaintiff must allege "(1) a material misrepresentation of a fact, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance by the plaintiff, and (5) damages." *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009). Defendants argue that plaintiff has neither identified any specific misrepresentations nor demonstrated her reliance on any statements made by them.

The particularity requirement of CPLR 3016(b) requires, in general, that the complaint specify the language of the alleged misstatements and the time and place that were made. *Gregor v. Rossi*, 120 A.D.3d 447, 447 (1st Dep't 2014); *Riverbay Corp. v. Thyssenkrupp N. Elevator Corp.*, 116 A.D.3d 487, 488 (1st Dep't 2014). However, the rule is not absolute. Where the relationship between the parties creates on the part of the defendant a duty to disclose material information, a fraud claim may be based upon acts

of concealment rather than affirmative misrepresentation. *Kaufman v. Cohen*, 307 A.D.2d 113, 119-20 (1st Dep't 2003); *Am. Baptist Churches of Metro. N.Y. v. Galloway*, 271 A.D.2d 92, 100 (1st Dep't 2000). "Thus, where a fiduciary relationship exists, the mere failure to disclose facts which one is required to reveal may constitute actual fraud, provided the fiduciary possesses the requisite intent to deceive." *Kaufman,* 307 A.D.2d at 120 (internal quotations and citations omitted).

Defendants do not dispute that plaintiff has alleged a fiduciary relationship. Accordingly, the failure to allege specific misrepresentations is not fatal to the fraud claim. The complaint alleges sufficient facts, at least with respect to the concealment of certain accounts and withdrawal of funds, from which an inference of actual intent to deceive may be drawn. The fact that Peter was acting pursuant to a power of attorney which may have excused him from obtaining plaintiff's prior consent for every transaction did not negate his duty to disclose. In any event, the actual power of attorney has not been placed into the record, so its scope and limitations cannot be determined.

It may well be that not all of the allegations regarding the management of plaintiff's assets implicate fraud. Not all of the conduct respect to the insurance and annuity policies, even if imprudent, appears to have been made under circumstances involving misrepresentation or concealment. However, discovery is required to determine what conduct, if any, falls within a theory of fraud based upon nondisclosure.

Defendants further argue that plaintiff's failure to read or even open the account statements that were sent to her, and her email indicating that she ignored Peter Dourdas'

explanations of her finances, defeat the element of reliance. However, some of the statements may have been withheld from her, and the content of the statements she did receive is not in the record. Likewise, the record does not reflect what Peter Dourdas explained to plaintiff and whether his explanations were complete and accurate.

As noted, at a minimum, plaintiff has alleged that defendants concealed certain accounts and withdrawals and failed to disclose their existence. Where fraud claims are based upon an omission, to establish reliance "one need only prove that, had the omitted information been disclosed one would have been aware of it and behaved differently." *In re Bank of N.Y. Mellon Corp. Forex Transactions Litig.*, 91 F. Supp. 2d 479 (S.D.N.Y. 2014) (internal quotations and citations omitted). At the pleading stage, it may be reasonable inferred that plaintiff would have objected to defendants' alleged defalcations had she been aware of them.

b. Statute of Limitations

Plaintiff may recover for any fraud-related losses sustained after December 19, 2007. "An action based upon fraud must be commenced within the greater of 6 years from the date the cause of action accrued or 2 years from the time plaintiff discovered or, with reasonable diligence, could have discovered the fraud." *Gutkin v. Siegal*, 85 A.D.3d 687, 687 (1st Dep't 2011); CPLR § 213(8). The action is timely as to those claims for any concealed and undisclosed withdrawals or transfers of funds during the six-year period.

As to transactions prior to December 2007, there remains a question of fact as to whether any of them are saved by the fraud discovery accrual rule. "[T]he test as to when fraud should with reasonable diligence have been discovered 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." *Gutkin*, 85 A.D.3d at 688 (internal quotations and citations omitted). Furthermore, "[t]his inquiry involves a mixed question of law and fact, and, where it does not conclusively appear that a plaintiff had knowledge of facts from which the alleged fraud might be reasonably inferred, the cause of action should not be disposed of summarily on statute of limitations grounds. Instead, the question is one for the trier-of-fact." *Saphir Int'l, SA v. UBS PaineWebber Inc.*, 25 A.D.3d 315, 316 (1st Dep't 2006).

To the extent defendants may have engaged in hidden transactions prior to December 2007 that would not could have been discovered by plaintiff with the exercise of due diligence, plaintiff may recover for them so long as she was not aware of them more than two years prior to the filing of the complaint, *i.e.*, before December 19, 2011. Plaintiff's mere receipt of the insurance and annuity statements and other documentation would not have necessarily placed her on notice of other, concealed misconduct.

Nonetheless, plaintiff's further attempt to invoke the doctrine of equitable estoppel to toll the statute of limitations must be rejected. That theory "requires proof that the

defendant made an actual misrepresentation or, if a fiduciary, concealed facts which he was required to disclose, that the plaintiff relied on the misrepresentation and that the reliance caused plaintiff to delay bringing timely action." *Kaufman*, 307 A.D.2d at 122. However, it is inapplicable where, as here, "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." *Id.* Plaintiff's estoppel argument is founded solely on allegations relating to defendants' original concealment of the transactions, not any additional conduct which prevented plaintiff from bringing suit.

2. Negligence

Peter Dourdas and Dourdas Financial do not challenge the sufficiency of the negligence claim but instead raise a statute of limitations defense. The statute of limitations for negligence by a financial advisor is three years pursuant to CPLR § 214(4). *See Brooks v. AXA Advisors, LLC*, 104 A.D.3d 1178, 1180 (4th Dep't 2013). The motion therefore is granted as to all transactions occurring prior to December 19, 2010, which includes the purchase of all of the insurance and annuity policies. However, as defendants conceded at oral argument, there were various transactions that occurred after that date, such as taking out loans against the policies and collecting fees, which would not be time-barred. *See* 10/1/2014 Oral Arg. Tr. at 29-30.

3. Breach of Fiduciary Duty

Peter Dourdas seeks dismissal of the breach of duty claim against him, asserting that it is barred by a three-year statute of limitations. However, having found that the complaint states a viable, independent claim for fraud based upon some of the some the same transactions, plaintiff is entitled to the benefit of the six-year statute. *See Kaufman,* 307 A.D.2d at 119. It is only where the fraud claim is "incidental" to the breach of fiduciary claim, and is brought merely to revive stale claims, that the shorter period will be applied. *Id.* Moreover, even the three-year statute would not bar all of plaintiff's fiduciary-based claims, as she has alleged mismanagement and misappropriation in connection with her finances up through 2013.

Accordingly, the breach of fiduciary duty claims are time-barred only to the extent they involve transactions prior to December 19, 2007. However, should it turn out that no actual fraud has been committed since that date, the three-year statute of limitations shall be applied.

4. Money Had and Received /Unjust Enrichment/Conversion

a. Failure to State a Claim

Katherine Dourdas alone challenges legal sufficiency of the money had and received, unjust enrichment and conversion claims. Her motion is denied.

An action for money had and received is an obligation created by law, in the absence of a contact, when one party obtains money that belongs to another under such

circumstances that in equity and good conscience it ought not retain. *See Parsa v. State of N.Y.*, 64 N.Y.2d 143, 148 (1984); *Bd. of Educ. of Cold Spring Harbor Cent. Sch. Dist. v. Rettaliata*, 78 N.Y.2d 128, 138 (1991). The claim may be interposed if one "has obtained money from another through the medium of oppression, imposition, extortion or deceit or by the commission of a trespass," *Miller v. Schloss*, 218 N.Y. 400, 408 (1916), or where "money paid by mistake, or upon a consideration which happens to fail . . . or an undue advantage taken of the plaintiff's situation," *Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 88 n.2 (2d Dep't 1980).

The complaint alleges that Katherine Dourdas received payments from plaintiff's funds for which she performed no services, and to which she was not otherwise entitled, due to Peter Dourdas' taking advantage of plaintiff's situation. Katherine Dourdas' objections that she was not directly entrusted with any of plaintiff's money, that she committed no wrongful act to receive it, and that she was unaware of its source, are misguided. It is immaterial . . . whether the original possession of the money by the defendant was rightful or wrongful. *Roberts v. Ely*, 20 N.E. 606, 608 (1889); *Hoyt v. Wright*, 237 A.D. 124, 127 (1st Dep't 1932). It is sufficient that the money was received "erroneously," as "[t]here is no doubt . . . that, where a party receives from another moneys which do not belong to him, and which, in good conscience, belong to another, he may be compelled to repay said moneys in an action as for moneys had and received." *Hoyt*, 237 A.D. at 127. Plaintiff's failure to identify specific payments is not fatal to the complaint and can be remedied through discovery.

A claim for unjust enrichment is virtually identical to one for money had and received. The plaintiff must allege "that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered," *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011). Additionally, although neither privity nor a business relationship with plaintiff need be alleged, "the pleadings must assert a connection between the parties that [is] not too attenuated." *Philips Int'l Inv., LLC v. Pektor*, 117 A.D.3d 1, 1 (1st Dep't 2014) (internal quotations and citations omitted). The key is whether there was "a relationship between the parties that could have caused reliance or inducement." *Mandarin Trading Ltd.*, 16 N.Y.3d 173, 182; *Georgia Malone & Co., Inc. v. Rieder*, 19 N.Y.3d 511, 517 (2012).

The complaint alleges a familial relationship between plaintiff and Katherine Dourdas. Contrary to defendant's argument, that connection is sufficient insofar as plaintiff specifically asserts that she was induced to trust Peter Dourdas by virtue of it. Once again, the argument that Katherine Dourdas committed no misconduct is unavailing. "Unjust enrichment . . . does not require the performance of any wrongful act by the one enriched . . . innocent parties may frequently be unjustly enriched." *Simonds v. Simonds*, 45 N.Y.2d 233, 242 (1978) (citations omitted). Further, if, in fact, Katherine received fees without providing services it can be reasonably inferred that she was aware that misappropriation was involved.

The claim for conversion is also sufficiently pled. "[A]n action will lie for the conversion of money where there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question." *Lucker v. Bayside Cemetery,* 114 A.D.3d 162, 174 (1st Dep't 2013). Moreover, the receipt of funds converted by another may constitute conversion, whether or not there is a wrongful intent. *See Leve v. C. Itoh & Co., (America), Inc.*, 136 A.D.2d 477, 477 (1st Dep't 1988).

Liberally construed, the complaint alleges that Katherine accepted payments from accounts over which Peter Dourdas exercised control. Plaintiff was not required, as defendants suggest, to plead that Katherine Dourdas also exercised dominion over the accounts. "It is enough . . . that the rightful owner has been deprived of his property by some unauthorized act of another assuming dominion and control over it," *Passaic Falls Throwing Co. v. Villeneuve-Pohl Corp.*, 169 A.D. 727, 729 (1st Dep't 1915).

b. Statute of Limitations

A three-year limitation period governs an action for conversion, ordinarily accruing "on the date the conversion takes place and not the date of discovery or the exercise of diligence to discover." *See Maya NY, LLC v. Hagler*, 106 A.D.3d 583, 585 (1st Dep't 2013). The limitations period for money had and received and unjust enrichment is six years. *Knobel v Shaw*, 90 A.D.3d 493, 495 (1st Dep't 2011); *Ins. Co. of State of Pa. v HSBC Bank USA*, 37 A.D.3d 251, 254–255 (1st Dep't 2007), *rev'd on other grounds* 10 N.Y.3d 32 (2008). Accordingly, recovery is barred for claims accruing before

either December 19, 2010 or December 19, 2007, depending upon which theory ultimately prevails.

5. Ratification and Laches

The motion to dismiss the complaint on the grounds of ratification and laches is denied. "The essence of ratification is that the beneficiary unequivocally declares that he does not regard the act in question as a breach of trust but rather elects to treat it as a lawful transaction under the trust." *In re Levy*, 69 A.D.3d 630, 632 (2d Dep't 2010) (internal quotations and citations omitted); *Rosner v. Caplow*, 90 A.D.2d 44, 53 (1st Dep't 1982) ("Confirmation and ratification imply to legal minds, knowledge of a defect in the act to be confirmed, and of the right to reject or ratify it."), citing *Matter of Ryan*, 291 N.Y. 376, 417 (1943). However, "[r]atification requires full knowledge of the material facts relating to the transaction, and the assent must be clearly established and may not be inferred from doubtful or equivocal acts or language." *County of Monroe v. Raytheon Co.*, 48 A.D.3d 1237, 1239 (4th Dep't 2008) (internal quotations and citations omitted). As discussed above, plaintiff alleges that she was not aware of defendants' alleged misconduct and that there was a breach of the fiduciary duty of disclosure. Plaintiff's acknowledgement in her email that she relied upon Peter Dourdas, and that she was not paying attention to her finances, did not constitute consent to every transaction he effected with respect to the assets entrusted to him.

The defense of laches also fails. "A fiduciary is not entitled to rely upon the laches of his beneficiary as a defense, unless he repudiates the relation to the knowledge of the beneficiary." *In re Barabash's Estate*, 31 N.Y.2d 76, 82 (1972) (internal quotations and citations omitted). No allegation of repudiation has been made by defendants. Rather, Peter Dourdas continued to handle plaintiff's finances until the year this action was commenced.

B. *The MML Defendants' Motion to Dismiss* (Motion Sequence 002)

The MML defendants' motion to dismiss the complaint on statute of limitations grounds is granted. The complaint alleges that Peter left their employ in 2004, and it is undisputed that all of the MML policies were issued between 1995 and 2001. Accordingly, as the longest available statute of limitations for the claims alleged is six years, the action is time-barred.

C. *The Questar Defendants' Motion to Dismiss* (Motion Sequence 003)

The claims against the Questar Defendants are all derivative of the claims against Peter Dourdas, all based upon his conduct as an alleged employee. The motion is granted to the extent of limiting recovery to the claims accruing within the applicable statutes of limitation.

1. Vicarious Liability/Negligent Supervision/Breach of Fiduciary Duty

a. Failure to State a Claim

The Questar Defendants challenge the sufficiency of the allegations against them for a number of reasons. First, they assert that they cannot be held liable for the conduct of Peter Dourdas because he was an independent contractor, not an employee, and even if he was an employee, his alleged misconduct was outside the scope of his employment. Second, they claim that plaintiff was never their client. Third, they allege that Peter Dourdas sold only three securities through QCC and USAS, all of which remained in the custody of the sponsor, and that he purchased no products for plaintiff through QAM.

As a preliminary matter, defendants' contentions regarding Peter Dourdas' relationship with them relies upon extrinsic evidence that is contradicted by the complaint. Moreover, the supporting affidavit is from an individual who is employed by only one of the defendants, QCC, even though he purports to explain Peter's status with QAM, authenticate a QAM representative agreement, and make representations about QAM client and account records. "[A]ffidavits, which do no more than assert the inaccuracy of plaintiffs' allegations, may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint." *Tsimerman v. Janoff*, 40 A.D.3d 242, 242 (1st Dep't 2007) (internal quotations and citations omitted). Moreover, "affidavits submitted by the defendant will seldom if ever warrant the relief he seeks unless too the affidavits establish conclusively that plaintiff has no cause of action." *Rovello v. Orofino Realty Co., Inc.*, 40 N.Y.2d 633,

636 (1976); *see Lawrence v. Miller*, 11 N.Y.3d 588, 595 (2008). Plaintiff is not required to accept defendants' representations regarding its records and practices but is entitled to explore them through discovery.

Further, "[c]ontrol of the method and means by which work is to be performed . . . is a critical factor in determining whether a party is an independent contractor or an employee for the purposes of tort liability." *Goodwin v. Comcast Corp.*, 42 A.D.3d 322, 322 (1st Dep't 2007). The determination usually involves a question of fact, which cannot be resolved by the court as a matter of law unless the evidence on control presents no conflict. *Id.* Additionally, "the principle that an employer is not liable for the acts of independent contractors is subject to several categories of exceptions, which include an employer's negligence in selecting, instructing, or supervising the contractor." *Begley v. City of N.Y.*, 111 A.D.3d 5, 28 (2d Dept 2013); *see Brothers v. N.Y. State Elec. & Gas Corp.*, 11 N.Y.3d 251, 258 (2008).

Accordingly, the QCC and QAM representative agreements identifying Peter Dourdas as an independent contractor are not dispositive of the Questar Defendant's liability. Notably, the QAM agreement obligated QAM to provide Peter Dourdas with "certain training and supervision over sales practices"; obligated Peter Dourdas to provide information to QAM and attend training sessions and due diligence meetings; and required Peter Dourdas to "prepare and maintain all records required by QAM." *See* Seale Aff. Ex. B. The QCC agreement also contained various provisions requiring him to "strictly comply" with its policies and procedures, to obtain written approval for any

services rendered, and to maintain records for examination by the company. *See* Seale Aff. Ex. A. Although "the mere retention of general supervisory powers over an independent contractor cannot form a basis for the imposition of liability against the principal," *Goodwin v. Comcast Corp.*, 42 A.D.3d 322, 323, on the present record it cannot be determined whether QAM or the other defendants exercised a degree of control over Peter Dourdas which would give rise to liability for his conduct.

Defendants' argument that Peter Dourdas was acting outside the scope of his agency is similarly premature. An employer is liable to third parties harmed by its employees unless the employees have "totally abandon[ed] the employer's interests and act[ed] entirely for their own or others' purposes." *Prudential-Bache Sec., Inc. v. Citibank, N.A.*, 73 N.Y.2d 263, 276 (1989). Whether an employee is acting within the scope of the employment is generally a question for the jury. *Nicollette T. v. Hosp. for Joint Diseases/Orthopaedic Inst.*, 198 A.D.2d 54, 54 (1st Dep't 1993). Moreover, where the agent is cloaked with apparently authority, there is no need to demonstrate that the misconduct was committed in the furtherance of the employer's business. *Parlato v. Equitable Life Assur. Soc. of U.S.*, 299 A.D.2d 108, 114 (1st Dep't 2002).

Defendants' claim that plaintiff was not a client rests upon the contention that she never executed a QAM advisory agreement. However, the assertion that such an agreement is a "prerequisite" appears only in defendants' brief. Whether she was, in fact, considered a client creates a question of fact. As noted, the QCC/QAM representative agreements required Peter Dourdas to provide defendants with records of his activities,

and the QCC agreements obligated him to obtain written consent to provide any services. Discovery is needed to determine whether the Questar Defendants authorized Peter Dourdas to serve plaintiff on their behalf.

b. Statute of Limitations

The statute of limitations for negligent supervision is three years, *see Jarvis v. Nation of Islam*, 251 A.D.2d 116, 117 (1st Dep't 1998), so any claims pursued under that theory will be barred to the extent they accrued prior to December 19, 2010. Insofar as the vicarious liability and breach of fiduciary duty claims are premised upon Peter Dourdas' conduct as an agent of the Questar Defendants, limitations periods discussed above in connection with the claims against Peter Dourdas will apply.

III. Conclusion

Accordingly, it is hereby

ORDERED that the motion to dismiss filed by defendants MML Investors Services, Inc., and Mass Mutual Life Insurance Company is granted, and the claims of those defendants are severed and dismissed, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants, and it is further

ORDERED that the third cause of action as against Peter Dourdas is dismissed as withdrawn, and it is further

ORDERED that the Dourdas Defendants' and the Questar Defendants' motions to dismiss are denied as to all other claims, except to the extent that any claim or part of any claim is determined to be barred by the applicable statutes of limitations as discussed above; and it is further

ORDERED that Dourdas Defendants and the Questar Defendants shall serve an Answer to the Complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on Tuesday, June 23, 2015 at 10:00 am.

Dated: New York, New York
April 20, 2015

ENTER

Hon. Eileen Bransten, J.S.C.