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

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JONATHAN S. AARON and ERIC L. GARBER, as the personal representatives of the ESTATE OF WILLIAM M. DAVIDSON, and as the trustees of the WILLIAM M. DAVIDSON TRUST, DATED SEPTEMBER 24, 2008, AS AMENDED,

Plaintiffs,

-against-

Index No. 653203/2015
Motion Date: 4/6/2016
Motion Seq. No. 003

DELOITTE TAX LLP,

Defendant.

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BRANSTEN, J.

Plaintiffs Jonathan Aaron and Eric Garber bring this action as the personal representatives of the Estate of William Davidson. Through this suit, Plaintiffs seek to recover approximately $500 million paid by the Estate to the IRS as a result of Defendant Deloitte Tax LLP ("Deloitte") allegedly reckless and negligent estate planning. Plaintiffs assert claims for fraud, malpractice, negligent misrepresentation, and violations of Section 349 of New York General Business Law. Deloitte now moves to dismiss the complaint in its entirety.

For the reasons that follow, Deloitte's motion to dismiss is granted.

I. Background[1]

William Davidson was an entrepreneur, sports team owner, and philanthropist. During his life, Davidson amassed a substantial personal fortune, valued by Forbes magazine at approximately $3 billion. (Compl. ¶ 20.)

By the spring of 2008, in a state of deteriorating health, Davidson contemplated changing his will and estate plan, to include bequests to his grandchildren. (Compl. ¶ 49.) At the time, Davidson's estate plan provided for the distribution of $109 million to specific individuals and trusts, $717 million to his wife, Karen Davidson, and the remainder, approximately $2.2 billion, to charity. *Id.* at ¶ 46. Since charitable contributions were deductible, the plan was tax efficient, reducing the overall amount owed upon Davidson's death. *Id.* at ¶ 47. Based on the plan, the total estate taxes due upon his death were estimated to be approximately $88 million. *Id.*

a. *Retention of Deloitte*

In furtherance of his desired changes to his estate, Davidson had several meetings with representatives from Deloitte, specifically John Silverman and Eric Johnson – national principal and partner, respectively, in Deloitte's Family Wealth Planning Group. *Id.* at ¶ 52. Deloitte held itself out as a firm with expertise in estate planning for high net

[1] The allegations cited in this section are drawn from the Complaint, unless otherwise noted.

worth individuals, with a diverse staff that could deal with any issues that may arise. *Id.* at ¶ 53. Deloitte assured Davidson that it was not a "one-man show," and Silverman, in particular, said his group was highly specialized in handling high net worth individuals. *Id.* at ¶ 53. Silverman further assured Davidson that as an attorney, he brought legal capabilities to his estate planning practice. *Id.* at ¶ 54. Based on these representations by Deloitte and Silverman, Davidson and his personal representatives, Jonathan Aaron and Eric Garber, decided to engage Deloitte to revise Davidson's estate plan. *Id.* at ¶ 55.

b. *Deloitte's 2008 Engagement Letter*

On May 28, 2008, Davidson signed an engagement letter (the "2008 Engagement Letter"), retaining Deloitte as Davidson's "strategic tax partner." The 2008 Engagement Letter also included Davidson's descendants, his wife and her descendants, in addition to Davidson's holdings, within the "strategic tax partnership." *Id.* at ¶¶ 57-58.

The Letter stated the scope of Deloitte's professional services under the engagement, which included "render[ing] specific advice on various tax and estate planning issues and strategies." *See* Affirmation of Andrew Genser Ex. 1 at 1. In addition, the Letter set forth the "key team members" from Deloitte who would work on the engagement, as well as the fees due for their "strategic tax consulting." *See* Genser Affirm. Ex. 1 at 2-3. Notably, for the purpose of the instant matter, the 2008 Engagement Letter also specified that "[n]o action, regardless of form, relating to this engagement, may

be brought by either party more than one year after the cause of action has accrued…" *See* Genser Affirm. Ex. 1 at Appendix B ¶ 9.

c. *Estate Planning & Execution of Deloitte's Estate Plan*

Beginning with its engagement in May 2008, Deloitte conducted several meetings with Davidson and his representatives to discuss his estate plan. (Compl. ¶ 70.) During these meetings, Deloitte was informed of Davidson's intent to transfer a greater amount of wealth to his family members and other non-charitable beneficiaries. *Id.* ¶ 73. Nonetheless, Davidson wished to structure his estate to accomplish these transfers in a tax efficient matter. *Id.* ¶ 74. Davidson executed a new will and trust, making the desired bequests to his children and grandchildren, in September 2008. *Id.* ¶ 75.

After three presentations by Deloitte in July, October, and December 2008, Davidson elected to proceed with Deloitte's estate plan, under which it was estimated that Davidson's Estate would owe $158 million in taxes. *Id.* ¶ 100. To execute this plan, Davidson executed a series of transactions on December 22, 2008, January 2, 2009, and January 21, 2009 (collectively, the "Estate Plan transactions"). *Id.* ¶ 101. The Estate Plan transactions involved the transfer of hundreds of millions of dollars in stock and other assets to trusts set up for the benefit of Davidson's children and grandchildren. *Id.* ¶¶ 102-117.

d. *Davidson's Death and Deloitte's Continued Work on the Estate*

Davidson died on March 13, 2009, approximately seven weeks after completion of the Estate Plan transactions. *Id.* ¶ 133. Following Davidson's death, Deloitte continued work on behalf of the Estate, entering into a new engagement letter on April 2, 2009. This 2009 Engagement Letter was backdated to the day after Davidson's death. *Id.* ¶ 167. As Plaintiffs explain, the letter "was intended to facilitate Deloitte Tax's continued assistance in the administration and implementation of the Estate Plan." *Id.* ¶ 168.

e. *IRS Examination of the Estate Plan*

In an April 2009 meeting, Silverman met with Plaintiffs, as well as Davidson's beneficiaries, and discussed potential IRS challenges to the estate plan. *Id.* ¶ 178. This is allegedly the first time that Deloitte mentioned any potential IRS scrutiny regarding the nearly $3 billion estate. *Id.* ¶ 180.

On March 30, 2010, the Estate and the IRS entered into a Memorandum of Mutual Commitments ("MOU"), which established "a framework for resolving the transfer tax liability of the estate, including any generation-skipping tax and any gift taxes for which the Estate may be liable." *Id.* ¶ 221. Following the execution of the MOU, the Estate – together with its tax advisor, Deloitte, and its legal advisors at non-party Skadden, Arps, Slate, Meagher & Flom – engaged in several years of discussions with the IRS regarding the Estate's tax liability. *Id.* ¶ 226. Finally, on May 2, 2013, the IRS served the Estate

with a Notice of Deficiency demanding over $2.7 billion in taxes and penalties. *Id.* ¶ 230.

After receiving the Notice of Deficiency, the Estate pursued an administrative appeal and ultimately negotiated a settlement with the IRS, pursuant to which the Estate agreed to pay over $457 million. *Id.* ¶ 284. The Tax Court approved the settlement on July 6, 2015. *Id.* ¶ 296. Until the Tax Court approved the settlement, Deloitte continued its work in administering the Estate Plan, filing tax returns, and advising the Estate regarding management issues. *Id.* ¶ 293.

f. *The Instant Litigation*

Plaintiffs filed the instant litigation on September 24, 2015. In their four-count Complaint, Plaintiffs assert claims against Deloitte for: (1) fraud; (2) malpractice; (3) negligent misrepresentation; and, (4) violation of Section 349 of the New York General Business Law.

II. **Discussion**

Deloitte now seeks dismissal of the Complaint in its entirety, arguing that the claims are barred by the statute of limitations provided in the 2008 Engagement Letter and that, in any event, the claims fail to state a cause of action.

A. *Statute of Limitations*

The 2008 Engagement Letter is clear. The Letter provides that:

> *No action*, regardless of form, relating to this engagement, may be brought by either party *more than one year after the cause of action has accrued*, except that an action for nonpayment may be brought by a party not later than one year following the date of the last payment due to the party bringing such action.

(Genser Affirm. Ex. 1, Appx. B ¶ 9) (emphasis added). Plaintiffs do not dispute the applicability of this agreed-upon statute of limitations. In fact, "[i]t is well settled that parties may contractually agree to shorten the applicable period of limitations." *Rudin v. Disanza*, 202 A.D.2d 202, 203 (1st Dep't 1994). Instead, Plaintiffs argue that continuous representation and equitable estoppel doctrines deferred accrual of the causes of action in the complaint until Deloitte's representation of the Estate ceased. Since Plaintiffs contend that the claims accrued "at the earliest in September 2015" when Deloitte stopped providing services to the Estate, they assert that the instant action – also filed in September 2015 – falls within the contractual limitations period.

1. Contractual Statute of Limitations and Accrual of Plaintiffs' Claims

Nonetheless, the gravamen of Plaintiffs' complaint sounds in malpractice, and New York law is clear – such claims stemming from the provision of tax advice accrue at the time the advice is given. *See, e.g., Ackerman v. Price Waterhouse,* 84 N.Y.2d 535, 541 (1994) (stating that a claim for malpractice pertaining to tax advice "accrues upon the

client's receipt of the accountant's work product since this is the point that a client reasonably relies on the accountant's skill and advice and, as a consequence of such reliance, can become liable for tax deficiencies.").

In the instant case, Plaintiffs' malpractice claim alleges injury resulting from the execution of the Estate Plan transactions – the last of which occurred on January 21, 2009 – and Deloitte's advice leading to those transactions. *See, e.g.*, Compl. ¶ 350 ("Deloitte Tax committed multiple acts of wrongdoing, including failing to disclose multiple risks, and by proposing an Estate Plan with multiple defects."). According to these allegations, Plaintiffs' claim accrued on January 21, 2009, and under the 2008 Engagement Letter, Plaintiffs had until January 21, 2010 to file their malpractice claim against Deloitte.

The same is true for Plaintiffs' additional claims – negligent misrepresentation, fraud, and violation of General Business Law Section 349.[2] Negligent misrepresentation claims accrue "on the date of the alleged misrepresentation [that] is relied upon by the plaintiff," which again is January 21, 2009 at the latest. *Fandy Corp. v. Lung-Fong Chen*, 262 A.D.2d 352, 353 (2d Dep't 1999) (citing *IFD Constr. Corp. v. Corddry Carpenter Dietz & Zack*, 253 A.D.2d 89, 92 (1st Dep't 1999)). Likewise, the fraud claim accrued at the time Plaintiffs possessed knowledge of facts from which the fraud could have been discovered with reasonable diligence. *See, e.g., Town of Poughkeepsie v.*

[2] In their opposition brief, Plaintiff state that they "no longer pursue their claims under the Michigan Consumer Protection Act." (Pls.' Opp. Br. at 5 n.2.)

Espie, 41 A.D.3d 701, 705 (2d Dep't 2007). Plaintiffs allege that Deloitte informed them of the likelihood that the IRS would challenge the estate plan and the Estate Plan transactions in April 2009. *See* Compl. ¶¶ 179-80. Thus, Plaintiffs' fraud claim would have expired a year later. Finally, the General Business Law § 349 claim accrued at the time of the alleged injury, i.e. the execution of the Estate Plan transactions. *See Gaidon v. Guardian Life Ins. Co. of Am.*, 96 N.Y.2d 201, 210 (2001). Therefore, this deceptive practice claim, like the remainder of Plaintiffs' claims, accrued in 2010, rendering the filing of the claim in 2015 untimely.

2. Continuous Representation Doctrine

The continuous representation doctrine does not salvage Plaintiffs' claims. First and foremost, this toll – and all tolls – are expressly barred by the language of the 2008 Engagement Letter, which states that "***[n]o action***, regardless of form, relating to this engagement, may be brought by either party ***more than one year after the cause of action has accrued***" (emphasis added).

However, even if application of the continuous representation toll were not foreclosed by the agreement, Plaintiffs cannot use the toll to defer accrual of their claims. The continuous representation doctrine serves to toll the statute of limitations for a claim, not accrual of the claim itself. *Glamm v. Allen*, 57 N.Y.2d 87, 94 (1982) ("[W]e interpret the continuous representation rule to toll the Statute of Limitations rather than to delay

the point at which the cause of action accrues."). This is a nuanced distinction but one that is fatal to Plaintiffs' claim under the agreed-upon language of the 2008 Engagement Letter.

Moreover, Deloitte's representation of Davidson lasted only through the pendency of the 2008 Engagement Letter. By its terms, the 2008 Engagement Letter was "applicable for the remainder of calendar year 2008" and "[a] new engagement letter [was to be] issued for each subsequent year." *See* Genser Affirm. Ex. 1 at 4. Indeed, a new engagement letter was signed in 2009 – backdated to the day after Davidson's death – which expressly stated that Deloitte's clients were now "Jonathan S. Aaron and Eric L. Garber, as the personal representatives of the Estate of William M. Davidson (the 'Client') and the related individuals and entities (collectively referred to as the 'Covered Members') listed in Exhibit A of the letter." (Compl. ¶ 168.). As Plaintiffs concede, through the 2009 Engagement Letter, Deloitte's "client" was no longer Davidson; instead, Deloitte assumed representation of the Estate – "essentially the same" but not the same client. *See id.* ("The Deloitte Tax 2009 Engagement Letter was for essentially the same clients as the May 2008 Letter."). Thus, the representation of Davidson ended the day after his death when the 2009 Engagement Letter took effect, commencing a new engagement by Plaintiffs on behalf of the Estate. Therefore, in addition to the reasons stated above, Deloitte's representation of Davidson was not "continuous," and even if the

language of the 2008 Engagement Letter would permit its consideration, the continuous representation toll would not apply.

3. Equitable Estoppel

Plaintiffs' equitable estoppel argument fares no better. "[A] defendant may be estopped to plead the Statute of Limitations where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action." *Simcuski v. Saeli*, 44 N.Y.2d 442, 448-49 (1978). However, Plaintiffs have not alleged that Deloitte fraudulently concealed the estate plan or its supposed problems. To the contrary, Plaintiffs state that Deloitte met with Plaintiffs in April 2009 and June 2009 to discuss potential "serious challenges forthcoming with respect to Deloitte Tax's Estate Plan." (Compl. ¶ 178.) As alleged, on April 2, 2009, Deloitte purportedly informed Plaintiffs that: "(i) an estate of the size of Mr. Davidson's Estate would be closely examined and likely challenged by the IRS; (ii) the Estate Plan could be challenged in light of its use of SCINs;[3] and (iii) the Estate Plan could be challenged in light of Mr. Davidson's untimely death." *Id.* ¶ 179. Deloitte's alleged announcement of these issues belies Plaintiffs'

[3] A SCIN or self-cancelling installment note "resembles a traditional promissory note in that it provides for a stated principal amount and a fixed rate of interest accruing and paid on that principal. Unlike a traditional note, however, the outstanding debt balance of a SCIN will cancel if the lender dies prior to the maturity date of the SCIN." (Compl. ¶ 4 n.1.)

assertion that Deloitte concealed its conduct so to induce Plaintiffs to refrain from bringing suit.

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Accordingly, Plaintiffs' claims are barred by the one-year limitations period contained in the 2008 Engagement Letter.

B. *Failure to State a Claim*

1. General Business Law Section 349

Even if not dismissed on statute of limitations grounds, Plaintiffs' GBL Section 349 claim nevertheless would merit dismissal for failure to state a claim. Section 349 prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state..." As used in the statute, "deceptive acts" contemplates "a recurring, consumer type of transaction affecting the public interest, rather than a solitary private commercial transaction." *Schimenti v. Whitman & Ransom*, 208 A.D.2d 470, 470 (1st Dep't 1994). The instant facts clearly fall outside the scope of "deceptive acts" under Section 349. This case involves the provision of professional services surrounding the design and implementation of a tax-driven, private estate plan involving billions of dollars. "Therefore, this transaction was not the 'modest' type of transaction the statute was primarily intended to reach." *Denenberg v. Rosen*, 71 A.D.3d 187, 195 (1st Dep't 2010). Accordingly, this claim is dismissed.

2. Negligent Misrepresentation and Fraud

The negligent misrepresentation and fraud claims likewise would be dismissed for failure to state a claim. Notwithstanding Plaintiffs protestations to the contrary, the fraud and negligent misrepresentation claims are premised on the same allegations of nondisclosure and misrepresentation as the malpractice claim, rendering them duplicative. *See, e.g., Sage Realty Corp. v. Proskauer Rose LLP*, 251 A.D.2d 35, 38-39 (1st Dep't 1999) (affirming dismissal of fraud claim as duplicative of malpractice cause of action where based on the same allegations). For example, in support of the fraud and negligent misrepresentation claims, Plaintiffs make nearly identical allegations regarding Deloitte's purported numerous misrepresentations of fact to Davidson and Plaintiffs regarding the estate plan. *See* Compl. ¶¶ 338-41, 345 (fraud claim); *id.* ¶¶ 360-61 (negligent misrepresentation). The malpractice claim is premised on the same allegations. *See* Compl. ¶¶ 350, 352 ("Deloitte Tax committed multiple acts of wrongdoing, including failing to disclose multiple risks, and by proposing an Estate Plan with multiple defects. … Deloitte Tax also fraudulently concealed the risks and defects of [the] Estate Plan from Mr. Davidson, the Personal Representatives, and the Estate and Trust.").

There is no "allegation of independent, intentionally tortious conduct" to sustain the fraud claim. *See Carl v. Cohen*, 55 A.D.3d 478, 478 (1st Dep't 2008). Likewise, these redundant allegations doom Plaintiffs' negligent misrepresentation claim. *See, e.g.,*

Sun Graphics Corp. v. Levy, Davis & Maher, LLP, 94 A.D.3d 669, 669 (1st Dep't 2012) (affirming dismissal of negligent misrepresentation claim as "redundant" of the malpractice clam since they arise from the same allegations).

Moreover, an allegation of concealing malpractice does not render a fraud claim distinct. Concealing malpractice is deemed to be part of the underlying malpractice claim, not a separate fraud cause of action. *See, e.g., Zarin v. Reid & Priest*, 184 A.D.2d 385, 387 (1st Dep't 1992) (noting that allegations of "concealing malpractice" are part of underlying malpractice claim and do not constitute an "independent intentional tort").

Moreover, the fraud and negligent misrepresentation claims seek the same damages sought in the malpractice cause of action, *see* Compl. ¶¶ 344, 355, 366, further compelling the conclusion that the claims are duplicative. *See Carl v. Cohen*, 55 A.D.3d at 478-79 (affirming dismissal of fraud claim as duplicative since claim failed to allege damages "separate and distinct" from malpractice claim); *see also Voutsas v. Hochberg*, 103 A.D.3d 445, 445 (1st Dep't 2013) (same); *Sun Graphics Corp.*, 94 A.D.3d at 669 (dismissing negligent misrepresentation claim as duplicative of malpractice where both claims sought identical relief).

Therefore, even if not time-barred, the fraud and negligent misrepresentation claims would be dismissed for failure to state a claim.

III. **Conclusion**

Accordingly, it is

ORDERED that Defendant Deloitte Tax LLP's motion to dismiss is granted in its entirety and the complaint is dismissed with costs and disbursements to Defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: New York, New York
August 11, 2016

ENTER

Hon. Eileen Bransten, J.S.C.