SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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MWW GROUP HOLDING COMPANY LLC,
MWW GROUP LLC and MWW GROUP 401(K) PLAN,

Plaintiffs,

-against-

MARCUM LLP, JEFFREY M. WEINER, AND
RICHARD COOKIE,

Defendants.

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DECISION AND ORDER
Index No.: 653412/2016

Motion Sequence No.: 004

O. PETER SHERWOOD, J.:

FACTS

As this is a motion to dismiss, the facts are taken from the First Amended Complaint ["FAC"] (NYSCEF Doc. No. 69 ["Doc. No. ___"]) and are assumed to be true (*see Monroe v Monroe*, 50 NY2d 481, 484 [1980]).

Plaintiff MWW Group Holding Company LLC ("MWW Holding") is a foreign Limited Liability Company. It has a subsidiary, MWW Group LLC, ("MWW Group") located in New York. Plaintiff MWW Group 401(k) Plan ("MWW Plan", and together with the other plaintiffs, "MWW") is an employee benefit plan maintained by MWW Group for its employees. MWW is a public relations agency. Defendant Jeffrey Weiner was Managing Partner of defendant Marcum LLP (Marcum), and defendant Richard Cooke was a Marcum Partner. Marcum provides independent accounting and advisory services.

In 2010, a group of investors, including MWW's CEO Michael Kempner, acquired MWW. Kempner owned 75% of MWW. Six investors owned the other 25%. Defendant "Weiner owned 2.5% of [ ] Class A equity interest" in MWW Holding (FAC, ¶ 24). Both Weiner and Cooke are certified public accountants and members of the American Institute of Certified Public Accountants (AICPA) and are subject to AICPA's bylaws and code of professional conduct.

In 2011, Weiner told Kempner that Weiner would like Marcum to be MWW's auditor (*id.* ¶ 26). Weiner said that his resignation from the MWW board of directors would eliminate any conflict of interest and allow Marcum to provide independent audit opinions. For fiscal year 2011, (and in fiscal years 2012, 2013 and 2014) MWW Group and MWW Holding hired

Marcum to provide independent audits. Marcum subsequently provided the MWW entities with audit opinions pursuant to yearly engagement agreements. Each audit was to be "conducted in accordance with auditing standards generally accepted in the United States of America" (*id.* ¶ 32). Independence of the auditor was required under the engagement agreements and by Generally Accepted Accounting Procedures ("GAAP") (*id.* ¶ 33-34). The agreements provided that, in the event of litigation, the prevailing party would receive reasonable attorneys' fees and costs (*id.* ¶ 36). MWW paid over $1 million for the audits.

In 2015, under a new CFO, MWW noticed that Marcum had made significant errors in preparing the 2014 audit, overstating revenue and making it appear MWW was doing significantly better than it was. The Marcum audit showed deferred revenue as having been earned. Marcum attempted to fix the audit, but its next draft also contained material errors. The plaintiffs also contend the 2014 audit, and all prior audits, were flawed because Marcum was not independent, based on Weiner's equity stake in MWW Holding. Marcum also failed to inform "anyone at MWW, other than MWW's former CFO, Seth Rosenstein, that checks were being dishonored and vendors were not being paid" (*id.* ¶ 48). Marcum's errors damaged MWW by the amount of money paid to Marcum, fees paid to identify the problems and fix the audits, MWW's default under a credit facility, legal fees from suits by unpaid vendors, operational decisions based on bad information in the audit, and the failure of a transaction to sell MWW, after the buyer learned of the audit problems (*id.* ¶ 50).

Marcum has acknowledged it was not independent when it issued the 2011, 2012, and 2013 audits (*id.* at 58). Marcum disclaimed those audit opinions and warned MWW not to rely on them.

MWW asserts causes of action for:

1) Declaratory Judgment- that the engagement agreements are illegal and void.

2) Rescission - Marcum's misrepresentation that it could perform under the agreements entitles MWW to rescind the contracts;

3) Fraudulent Inducement - Marcum and Weiner failed to inform MWW it had an unwaivable conflict of interest;

4) Professional Negligence/Accounting Malpractice – defendants failed to adhere to GAAP, purported to provide independent audit services when it could not, and made material errors;

5) Breach of Contract – Marcum failed to provide independent audits;

6) Breach of the Implied Covenant of Good Faith and Fair Dealing; and

7) Unjust Enrichment.

ARGUMENTS

I. Defendants' Arguments

Defendants contend plaintiffs were aware of the conflict, were equally at fault, that the claims are time-barred under the terms of the engagement agreements, and that the equitable causes of action should be denied as duplicative of the engagement agreements.

Defendants maintain that contrary to the allegations in the amended complaint the engagement agreements are not void *ab initio*. Agreements are only void *ab initio* when they are inherently defective or consummated improperly, such as when a signature was forged (*see Kwang Hee Lee v ADJMI 936 Realty Assoc.*, 46 AD3d 629 [2d Dept 2007]). Here, there was no problem, including fraud, with the contracts themselves, only with performance of the contracts (Defendants' Memo at 10-11, Doc. No. 97).

Each contract provides for a one-year limitations period (*id.* at 12, quoting the various engagement agreements; Docs. No. 75-81 ["No action regardless of form, arising out of the services under this agreement may be brought by either party more than one year after the date of the last services are provided under this agreement"]). This suit was commenced in June 2016, and Marcum provided its last audit opinion on April 15, 2014. Delivery satisfied the 2013 Engagement Agreement, which, like all of the agreements, provided that the "engagement ends on delivery of our audit report" (Doc. No. 77, 2013 Engagement Agreement at 7). Accordingly, the claims of MWW Group and MWW Holding were all time-barred after April 15, 2015.

Marcum provided its last audit to MWW Plan on October 15, 2015 (Defendants' Memo at 13). A draft audit was circulated in December 2015, but it was never signed or completed, and cannot extend the time to sue (*id.* at 13-14). Additionally, as these constitute separate audit services, the doctrine of continuous representation does not apply (*id.* at 14- 15).

Defendants add that even if these claims were timely, plaintiffs are precluded from pursuing them against defendants because MWW's own agent was responsible for the

misstatements (*id.* at 15). In a Proposed First Amended Complaint (the "PFAC"), plaintiffs state that "MWW's former CFO Rosenstein . . . bore initial responsibility for the accounting errors" (Doc. No. 44, ¶ 42). Further, in the original complaint (Doc. No. 18), plaintiffs stated that "Rosenstein committed financial statement fraud . . . that included 'revenue misclassification, withholding of material information, and patently obvious operating account deficiencies and transactions'" (Memo at 16, quoting Original Complaint, ¶¶ 37-38, 40-41). Plaintiffs attempt to obscure the origin of these errors in the FAC (Memo at 16). Plaintiffs have also admitted Rosenstein "deceived" and "misled" MWW "by intentionally failing to record revenues and expenses properly under GAAP, thereby 'providing the company with false financial information'" (*id.*, quoting the Verified Complaint in *MWW Group LLC v Rosenstein*, Doc. No. 94, at ¶¶ 9-10). Because financial reporting was part of Rosenstein's job, his failures are imputed to the plaintiffs, as their agent (Memo at 17).

Defendants also argue Rosenstein's misrepresentations make the "hold harmless" clause of each agreement applicable. That clause provides the plaintiffs will hold the defendants harmless for "all claims . . . where there has been a known misrepresentation by a member of the Company's management" (Memo at 18). Rosenstein was a member of the company's management, and acted for the company when he signed each of the Management Representation letters, which included various known misrepresentations. Accordingly, this dispute is covered by the hold harmless provision and Marcum cannot be held liable for damages flowing from the misstatements (*id.*).

Defendants further argue that claims 3, 5, and 6 (fraudulent inducement, breach of contract, and breach of the covenant of good faith and fair dealing) are redundant of the professional negligence/malpractice claim (claim 4). They arise from the same facts, seek the same damages, and should be dismissed (*id.* at 19-21).

If not dismissed as redundant, the fraudulent concealment claim should be dismissed for failure to state a claim, as plaintiffs have failed to make the required allegation of knowing misrepresentation of a material fact, as the claim of independence was true when made (*id.* at 22). Weiner is only alleged to have held an interest in MWW Holding, not MWW Group or MWW Plan (*id.*). MWW Holding did not enter into the 2011 Engagement Agreement, MWW Group did (*id.*). Weiner had no interest in MWW Group. Only later did Marcum express an

opinion as to MWW Holding's 2011 financial statements (*id.* at 23, citing Independent Auditors' Report dated April 15, 2014, Doc. No. 84). Nor is an intent to deceive properly pled under the heightened standard for fraud (Defendants' Memo at 23). The only motive alleged is to get paid for services provided, which is insufficient (*id.*, citing *Stephenson v Citco Group Ltd.*, 700 F Supp 2d 599, 620 [SDNY 2010], *aff'd on other grounds sub nom. Stephenson v PricewaterhouseCoopers, LLP*, 482 Fed Appx 618 [2d Cir 2012], *as amended* [June 13, 2012]). Plaintiffs also fail to plead justifiable reliance, as MWW Holding had the ability to discover that Weiner held an interest in that company, and a fraud claim cannot survive where the plaintiff had notice or could have discovered the information at issue with reasonable investigation (*id.*, citing *Zamett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 496 [1st Dept 2006]).

As to the rescission claim and the quasi-contract claim for unjust enrichment (claims 2 and 7), these should be dismissed because they are equitable claims and the parties had enforceable contracts (Defendants' Memo at 24-25). These claims should also be dismissed for the separate reason that they are duplicative of the professional negligence claim. Finally, the rescission claim should be dismissed because such claims apply only where there is no adequate remedy at law and the parties may be returned to the status quo (*id.* at 25). Here, remedies at law were available for timely claims, and it is not practical to return to the status quo (*id.*).

II. Plaintiffs' Opposition

In opposition to the motion, plaintiffs note that Weiner was on the board of MWW and represented that Marcum could provide independent audit services, as long as Weiner stepped down (Plaintiffs' Opp at 3). Plaintiffs concede each engagement agreement contained a one year statute of limitations provision which starts to run after the last services are provided, and an indemnification provision which holds Marcum harmless from claims arising when there has been a known misrepresentation by MWW (*id.* at 4). Plaintiffs also agree that Marcum's errors, other than its lack of independence, arose from its failure to detect Rosenstein's misclassification of revenue payments to MWW, and failing to note they should have been deferred (*id.* at 5).

Plaintiffs argue the claims brought here are not time-barred because the engagement agreements are illegal contracts, and not enforceable (*id.* at 7). It is undisputed that Weiner owned an interest in MWW Holding (MWW Group's parent), and that, as a result, Marcum could not issue an independent opinion (*id.* at 8). Accordingly, the contract violated New York

law (8 NYCRR section 29.10[a][5] and AICPA Code of Professional Conduct section 1.210.010.02) and is an illegal contract (Plaintiffs' Opp at 8, citing *Lothar's of California, Inc. v Weintraub*, 158 Misc 2d 460, 463 [Sup Ct 1993]). While *Lothar's* also noted that "[t]he courts of this State have consistently held that even in the event of illegality, equity does not require defendant to return amounts already paid, and that the parties to an illegal contract should be left as they are" (158 Misc 2d at 463 [internal quotation omitted]), plaintiffs observe that the *Lothar's* court, which had a fully developed record, noted that the plaintiff had paid certain fees after it was satisfied with the services (Plaintiffs' Opp at 8). Plaintiffs distinguish the case on its facts and urge that leaving the parties here "as they are", and enforcing the shortened statute of limitations, "is inconsistent with the spirit of *Lothar's*" (*id.* at 8-9). Plaintiffs add that the illegal portion of the contract cannot be excised and the rest enforced, as the illegality goes to the heart of the contract (*id.* at 9).

Plaintiffs also claim to be entitled to rescission, rendering the limitations clauses unenforceable (*id.*). Plaintiffs argue they have alleged all four of the possible reasons to grant rescission: fraud in the inducement, failure of consideration, inability to perform, and a breach which frustrates the purpose of the contract (*id.* at 9-10). Due to Weiner's interest, Marcum was unable to perform, so plaintiffs received no consideration and the breach frustrated the purpose of the contract (*id.* at 10). Defendants should not be able to disclaim the audits, admit they are worthless, and retain the fees they received.

Defendants' fraud renders the agreements null and void (*id.* at 11). Because defendants were incapable of performing the work which they contracted to do, the fraud permeated the agreement, making it void and unenforceable (*id.*). Because the agreements should be rescinded, the limitations clause is a nullity and plaintiffs' malpractice claims are timely (*id.* at 12).

Plaintiffs also maintain that malpractice claims related to the Draft 2013/14 Financial Statement Audit and the 2014 Plan Audit are timely, regardless. The former was provided in December 2015, and stated Marcum audited the MWW Holding and MWW Group financials for 2014 and 2013. Thus, claims based on both years are actionable. Additionally, the 2014 MWW Plan Audit was provided on October 15, 2015, and so is within the contractual one year statute of limitations. As to the claims that the MWW Plan Audit was not raised in the original complaint,

the claim can be made in an amended complaint and is timely as it relates back to the original complaint (*id.* at 13).

A three-year statute of limitations applies to the malpractice claims regarding the 2012 and 2013 audits, making them timely (*id.*). While the 2012 Financial Statement Audit was provided to MWW on June 18, 2013 (three years and 12 days before the filing of the complaint here), the claim is timely because of the equitable tolling doctrine (*id.* at 14). Upon learning of the conflict of interest, MWW immediately confronted Marcum about its lack of independence. Plaintiffs pursued the issue properly, communicating with Marcum and starting this action in a timely fashion (*id.*).

Plaintiffs also claim the continuous representation doctrine tolled the statute of limitations until the representation ended, making all claims asserted here timely (*id.*). The doctrine applies because 1.) the contracts are null and void (as discussed above), 2.) there was continuing representation with regard to the same subject matter, Marcum's withdrawal of the audits constitutes a continuation of the professional relationship (*id.* at 15), and 3.) the withdrawal was related to the reason for this dispute, Marcum's conflict (*id.* at 16).

Plaintiffs also point to the continuing wrong doctrine to toll the statute of limitations, as Marcum continually violated the same law, so the statute of limitations should be tolled until the final violation, which, plaintiffs claim, should be the last services provided for MWW Group and MWW Holding in December 2015. The last services were provided for MWW Plan in October 2015 (*id.*).

As to the claims themselves, plaintiffs argue the fraud, breach of contract, breach of the covenant of good faith and fair dealing, and unjust enrichment claims are not duplicative of the malpractice claim. The fraud claim is distinct from the malpractice claim because the fraud is based on Weiner's intent to deceive MWW into believing Marcum could be independent despite his equity interest in MWW, while the malpractice claim is based on Marcum's inability to be independent (*id.* at 17). Further, even if the contractual statute of limitations provision applies, the fraud claim is not subject to that clause, and the six-year limitations period applies (*id.* at 18).

The breach of contract and unjust enrichment claims are not duplicative because there are distinct damages. The malpractice claim seeks "damages suffered as a result of Defendants' material misstatements, errors and omissions," while the contract claims seek a return of the fees

paid for services not properly performed (*id.* at 19). In the unjust enrichment claim, plaintiffs similarly seek to recover what they paid for worthless services (*id.*at 19, 22).

Plaintiffs claim the fraud and unjust enrichment claims have been properly pled. Marcum has admitted it was not, in fact, independent, and regardless of whether Weiner owned equity in MWW Holding or Group, each audit involved both entities, making the distinction irrelevant (*id.* at 20). Plaintiffs have pled defendants' intent to deceive, based on Weiner's false representations and Marcum's agreement to provide independent audits it could not perform (*id.* at 20-21). Plaintiffs argue that, by providing erroneous audits, which make MWW entities look better than they were, Weiner could obtain huge fees for Marcum while increasing the value of his equity stake in MWW (*id.* at 21). For justifiable reliance, plaintiffs are not relying on concealment of the fact that Weiner had an equity interest, but on defendants' representation that Marcum would be able to be independent if Weiner merely resigned from the board (*id.* at 21-22). Plaintiffs claim to be unsophisticated in this regard, and entitled to rely on defendants' representation.

Regarding the *in pari delicto* doctrine, it does not apply, and Rosenstein's actions do not eliminate defendants' liability (*id.* at 23). The doctrine only protects an auditor whose client commits willful fraud (*id.*). Further, the Delaware complaint against Rosenstein only alleges the "former CFO 'deceived' and 'misled' the company by intentionally failing to record revenues and expenses properly under GAAP thereby 'providing the company with false financial information'" (*id.*, quoting Delaware Complaint, ¶¶ 9-10). Rosenstein is not alleged to have provided Marcum with intentionally falsified information or to have attempted to intentionally defraud the company (Opp at 23). Further, allegations about Rosenstein in the Delaware Complaint were made upon information and belief, and are not deemed admissions for this purpose (*id.* at 24 citing *Sound Communications, Inc. v Rack and Roll, Inc.*, 88 AD3d 523, 524 [1st Dept 2011] ["assertions in the pleading were made "upon information and belief" and do not constitute formal or informal judicial admissions"]). And, as far as the Delaware Complaint contains informal judicial admissions, those do not provide a sufficient basis for dismissal (*id.* at 24-25, *Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 23 Misc 3d 1134(A) [Sup Ct 2009] ["While certain of the assertions and representations allegedly made by plaintiffs in the Federal Action and cited by Cadwalader may be informal judicial admissions and thus constitute evidence of facts allegedly admitted, such evidence is not sufficiently conclusive

under CPLR 3211 (a) (1) and/or (7) to preclude plaintiffs' claim that Cadwalader was negligent in the manner alleged"]).

Finally, plaintiffs claim the hold harmless provision of the engagement agreements does not bar these claims (Opp at 25). Such clauses usually are intended to apply to claims of third parties. As applied to parties to the contract, the provision is "strictly construed" and will not be interpreted to cover inter-party claims unless there is clear language to that effect, which is not present here (*id.* quoting *Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]).

III. Defendants' Reply

In reply, defendants argue the engagement agreements, including the limitations period clause, are enforceable and the cases relied upon by plaintiffs are distinguishable (Reply at 3). Here, no term of the engagement agreements violated a New York statute or policy. Rather, defendants' *conduct* failed to comply with New York law and the AICPA Code. Plaintiffs rely on *Lothar's of California, Inc.*, in which the contract itself was illegal, as it granted the defendant accountant a prohibited contingent fee (158 Misc 2d at 463). The parties' contract was not illegal, so *Lothar's* does not apply. The only case to cite *Lothar's*, *Pharmaceutical Sales Consulting Corp. v Accucorp Packaging, Inc.* (231 Fed Appx 110 [3d Cir 2007]), made the same distinction, noting that "[h]ere, however, it is [appellant's] chosen mode of performance rather than a term of the contract itself that is illegal," and the contract may be enforced against it (*id.* n6).

Even if fraud is alleged, the shortened limitations period was not obtained by fraud, so that clause survives (Defendants' Reply at 5, citing *Inc. Vil. of Saltaire v Zagata*, 280 AD2d 547, 548 [2d Dept 2001] ["Where the party against which an abbreviated Statute of Limitations is sought to be enforced does not demonstrate duress, fraud, or misrepresentation in regard to its agreement to the shortened period, it is assumed that the term was voluntarily agreed to"]). Regarding the draft 2014 audit report, it does not extend the limitations period to 2015, and plaintiffs cite no basis for a draft providing the basis for these claims (*id.* at 9).

Defendants argue that the *in pari delicto* doctrine also precludes the causes of action here (*id.* at 10). Defendants point to various representations plaintiffs made in court filings that Rosenstein intended to deceive when he falsified MWW's financial statements and committed improprieties (*id.*). Defendants also reiterate their arguments claiming protection of the hold

harmless provision in the engagement agreements (*id.* at 11, citing *Kimber MFG., Inc. v Marcum & Kliegman, LLP*, Sup Ct, Westchester County, September 26, 2007, Liebowitz, J., Index No 20559/04, 2007 WL 6711957) and that the contract and fraud based claims are duplicative of the malpractice claim (Reply at 12). Defendants note further that plaintiffs still have failed to plead an affirmative, intentional misrepresentation by Weiner, which would support a fraud claim (*id.*at 13). The FAC does not state which entity Weiner said Marcum could properly audit after he stepped down from the board, and that is an important distinction. The entity in which Weiner held an equity interest (MWW Holding) did not enter into the 2011 engagement agreement. Accordingly, defendants did not deceive plaintiffs when entering into the 2011 engagement agreement (*id.* at 14). Plaintiffs have also failed to plead justifiable reliance. They were aware of Weiner's equity interest in MWW Holding and knew of the underlying condition causing the lack of independence, or at least could have discovered it (*id.*). Finally, the equitable claims (rescission and quasi-contract) should be dismissed, as plaintiffs had adequate remedies at law, regardless that the remedies have expired (*id.* at 15, citing *Norris v Grosvenor Mktg. Ltd.*, 803 F2d 1281, 1287 [2d Cir 1986] ["An equitable claim cannot proceed where the plaintiff has had and let pass an adequate alternative remedy at law"]).

DISCUSSION

I. Standard for a Motion to Dismiss- Documentary Evidence

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn*, 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically, that means "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,'" (*id.* at 84-85). Here, the documentary evidence presented consists of the engagement agreements, the terms of which, defendants argue, bar plaintiffs' claims.

II. Standard for a Motion to Dismiss- Failure to State a Claim

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

III. Enforceability of Limitations Clause in Engagement Agreements

The one-year statute of limitations clause in the engagement agreement is enforceable. In New York, a reasonable contractual shortening of the period of limitations is statutorily authorized (*see* CPLR 201 *Rudin v Dianza*, 202 AD 2d 202 [1st Dept 1994]; and *Diana Jewelers of Liverpool, Inc. v A.D.T. Co.*, 167 AD2d 965, 966 [4th Dept 1990]). Such a provision is enforceable absent a showing of fraud, duress or misrepresentation with respect to the actual shortened limitation (*see Kozemko v Griffith Oil Co.*, 256 AD2d 1199, 1200 [1st Dept 1998]). A

one-year limitation period has been held to be reasonable (*see Fox-Knapp, Inc. v Emp'rs Mut. Ins. Co.*, 725 F Supp 706, 710 [SDNY 1989], aff'd 893 F2d 14 [2d Cir 1989]).

Marcum could not provide independent audits because of Weiner's equity interest in MWW Holding. 8 NYCRR § 29.10(a)(5) provides that "[u]nprofessional conduct in the practice of public accountancy shall include . . . expressing an independent opinion or knowingly permitting his or her firm to express an opinion on financial statements of an enterprise . . . , if the licensee or a partner or employee in the firm is not independent with respect to such enterprise.". Weiner was not independent with respect to MWW. MWW argues that "fraud permeates" the engagement agreements because Weiner affirmatively misrepresented that upon his withdrawal from the MWW board, Marcum could serve as an independent auditor, notwithstanding Weiner's continued equity interest in MWW. (Opp at 11). The representation was an opinion which was erroneous. It was not a statement of fact and even if it was, there was no justifiable reliance since the representation was reading verifiable. Further, even accepting this allegation as true, the contract clause shortening the statutory limitations period is enforceable because there are no allegations that the contract provision itself was procured by fraud (*see Henry Casper, Inc v Pines Assocs., L.P.*, 53 AD3d 764, 765 [3d Dept 2008]).

Plaintiffs claim, nevertheless, that the lack of independence makes the engagement agreements illegal contracts, and therefore unenforceable. Plaintiffs rely on *Lothar's*, where the defendant was hired to audit plaintiff's subtenant's books, as the subtenant's rent included a percentage of its sales (*Lothar's of California, Inc.*, 158 Misc 2d at 461). The agreement between those parties provided for an audit fee and a contingent fee. The latter was based on a percentage of money plaintiff recovered as a result of the audit. The defendant performed the audit. Plaintiff paid the defendant a portion of the fee, and then sued for the return of the amount paid, arguing correctly that contingent fee arrangements with auditors are improper and a violation of 8 NYCRR 29.10(a). Defendant counterclaimed for the outstanding balance of the fee. The court noted "[t]he courts of this state have consistently held that even in the event of illegality, equity does not require defendant to return amounts already paid, and that the parties to an illegal contract 'should be left as they are'" (*id.* at 463, quoting *Segrete v Zimmerman*, 67 AD2d 999, 1000 [2d Dept 1979]). The court also dismissed the counterclaim, because "[w]here an arrangement is illegal, the law will not extend its aid to either party or listen to their complaints against each other, but will leave them where their own acts have placed them" *(id.)*.

Pharmaceutical Sales Consulting Corp. (231 Fed Appx at 117), relied on by defendants, discusses the distinction New Jersey courts make between an illegal contract and an illegal mode of performance (Memo at 11). In that case, the plaintiff's commercial bribery in the course of its performance abrogated its entitlement to enforce the contract at issue (*id.* at 116 [applying New Jersey law]). The court noted that "[w]here a contract is tainted by illegality in its terms or in the mode of performance elected by one of the parties, New Jersey courts inquire into whether the illegality can be excised from the contract and the remainder enforced" (*id.* at 116). The Third Circuit allowed the opposing party, Delavau, to pursue a breach of contract claim for a portion of the contract which was severable from the tainted portion (*id.* at 117). Delavau was not permitted to recover through disgorgement of money it paid for the tainted portion of the contract, because Delavau "profited handsomely from this arrangement" (*id.* at 116).

The Third Circuit also cited and distinguished *Lothar's*, concluding that the case involved contractual arrangements that were themselves illegal, specifically, a contract for accounting services that contained an unlawful contingent fee clause. According to the Third Circuit, the case before it concerned a "chosen mode of performance rather than a term of the contract itself that is illegal, and there [was] no public policy reason to penalize [defendant] where there has been no showing that [defendant] was in any way at fault for [plaintiff's] illegal conduct" (*id.* at 117, n. 6). The cases cited by the parties do not support a conclusion that the contract is illegal and therefore void *ab initio* where the illegality is a result of defendants' conduct, not any contract term.

Nothing in the contract before this court is itself illegal. The engagements are unlawful because a principal in the accounting firm (Marcum) owned equity in MWW, thereby compromising the accounting firm's independence in the conduct of audits of any MWW company, not just the parent company. The resulting conflict of interest was known (or readily knowable) to MWW at the time of contract. The audit reports were received and used by MWW for a time. Although the complaint alleges that the audits were "irredeemably tainted by Marcum's conflict of interest" (Complaint ¶ 36, Doc. No. 18), the "blatant errors" found in the audits are alleged to have resulted from "financial impropriety within MWW's organization" that

Marcum failed to report to MWW's CEO (*id.*, ¶ 37).[1] What is disputed here is the mode of performance, not the terms of the contract. Accordingly, the first cause of action, for a declaratory judgment that the engagement agreements are illegal and void is dismissed.

The engagement agreements all contain shortened limitations periods of one year following delivery of each "individual audit report. Such shortened limitations periods have been found to be reasonable and upheld (*see, e.g. Diana Jewelers of Liverpool, Inc.*, 167 AD 2d at 695 and *Par Fait Originals v ADT Sec. Sys. Northeast, Inc.*, 164 AD 2d 472 [1st Dept 1992] [Contract containing shortened limitations period for all claims, including those involving gross negligence, upheld]). The shortened limitations clause cannot be invalidated based on allegations that fraud permeated the engagement agreement as there are no facts alleged to support such a fraud claim. Moreover, to invalidate a contractual limitations period based on fraud, plaintiff must allege the limitations provision itself was procured by fraud (*see Maxcess, Inc. v Lucent Techs. Inc.*, 433 F3d 1337, 1342 [11th Cir 2005] [applying New York law]; and *Diana Jewelers of Liverpool, Inc.*, 167 AD2d at 965).

Under the terms of the engagement agreements, the "engagement ends on the delivery of [the] audit report" (Doc. No. 75, 76 and 77). The last audit opinion relating to MWW was delivered on April 15, 2014 (*see* Doc. No. 84). The last audit opinion of MWW Plan was delivered on October 15, 2015. The MWW summons with notice was filed on June 28, 2016. The complaint was amended to include the audit of MWW Plan on December 22, 2016. Accordingly, plaintiff's claims are time barred except as to the 2014 MWW Plan Audit, as the complaint regarding the 2014 MWW Plan Audit relates back to the date the original complaint was filed (*see* CPLR 203[f] and *Fulgum v Town of Cortland Manor*, 19 AD3d 444, 446 [2d Dept 2005] [holding that amendment of complaint to add related party as a plaintiff related back to the original filing of the complaint since the substance of the added party's claim was virtually identical to that alleged in the original complaint]).

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[1] According to the verified complaint filed by MWW against its former CFO in the Delaware Chancery Court, *MWW Group LLC v Seth Rosenstein*, Rosenstein regularly provided false and misleading financial information to the company's CEO, and has admitted to doing so" (Doc. No. 94, 11), "falsely reported the amount of money available on MWW's credit lines" (*id.*, ¶ 12), "deliberately hid" overdue payables (*id.*, ¶ 13) and provided deliberately false financial statements to MWW's lender (*id.*, ¶ 16).

IV. Hold Harmless Clause Defense

Marcum also argues that the claims are barred under the hold harmless clause in the engagement agreements because the claims "arise[] in circumstances where there has been a known misrepresentation by the Company's management" (Doc. No. 77 at p. 9). Although MWW may have suffered damages as a result of flawed audits caused by misrepresentations of a former CFO of MWW, this case is distinguishable from *Kimber Mfg. Inc v Marcum & Kliegman, LLP*, No. 20559/04, 2007 WL 6711957 (Sup Ct Westchester Cty, September 26, 2007) aff'd 56 AD3d 618 (2d Dept 2008), because the FAC here alleges separate breaches resulting from Marcum's inability to render independent audits. The "strict" construction of inter-party indemnification clauses required under *Hooper Assoc. v AGS Computers, Inc.* (74 NY2d 487 [1989]), as applied to this case, renders the clause inapplicable, and this defense fails.

V. *In Pari Delicto* Defense

"The doctrine of *in pari delicto* denies judicial relief of rescission to parties to illegal contracts. According to the doctrine, one who comes into equity to seek relief from a contract that he or she has executed must come with clean hands, for equity will aid neither party to an illegal contract by decreeing cancellation if they are *in pari delicto*, but will leave them just where it finds them, to settle their dispute without the aid of the court" (16 N.Y. Jur. 2d Cancellation of Instruments § 36).

Marcum argues that, as Rosenstein, MWW's former CFO, caused the alleged accounting errors through financial fraud, including "revenue misclassification, withholding of material information and patently obvious operating account deficiencies" (Doc. No. 18, Complaint, ¶ 38), MWW should be precluded from raising claims related to those errors (Memo at 15-16). Even if Marcum's assertions are correct, this argument does not address MWW's claims based on Marcum's lack of independence and inability to provide the agreed-upon audits. This defense fails.

VI. Professional Negligence/Accounting Malpractice (Claim 4)

Marcum does not object to the malpractice claim, as far as it relates to Marcum's lack of independence. However, the three-year statute of limitations generally applicable to malpractice claims (CPLR § 214) does not apply here, as the parties agreed to the one-year limitations period

stated in the engagement agreements. Accordingly, as discussed above, only malpractice claims related to the 2014 MWW Plan audit are timely and survives. Otherwise this claim is dismissed.

VII. Contract and Fraud (Claims 3, 5, and 6)

Marcum argues that claims 3, 5 and 6 are duplicative of the malpractice claim and should be dismissed. The court agrees except the fifth cause of action alleging failure to provide accounting services pursuant to the engagement agreements survives. However, the three-year statute of limitations applicable to combined professional malpractice and breach of contract (*see* CPLR § 214 [6]) does not apply, as it is superseded by a contractual one-year limitations period.[2] The only portion of the claim which is timely is that related to the 2014 MWW Plan Audit. Accordingly, this claim is dismissed except as to the 2014 MWW Plan Audit.

The good faith and fair dealing claim (Claim 6) is duplicative of the breach of contract claim, as it is based on the same facts and seeks the same relief. It is also barred by the contractual limitations period and must be dismissed.

The fraudulent inducement claim (Claim 3) also fails. "In a fraudulent inducement claim, the alleged misrepresentation should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract . . . and not merely a misrepresented intent to perform" (*Hawthorne Group v RRE Ventures*, 7 AD3d 320, 323-24 [1st Dept 2004] [citations omitted]; *see also J.M. Bldrs. & Assoc., Inc. v Lindner*, 67 AD3d 738, 741 [2d Dept 2007] ["[a] present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud"]). Representations of opinion, even as to matters of fact, are not representations and are not actionable unless guaranteed (*see Lanzi v Brooks*, 54 AD2d 1057 [1976], *affd* 43 NY2d 778 [1977]; *Mun. Metallic Bed Mfg. Corp. v Dobbs*, 253 NY 313 [1930]). The alleged representations, regarding Marcum's ability to provide independent accounting services, were

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[2] *In re R.M. Klimen & Frances Halsband Architects (McKinsey & Co., Inc.)* 3 NY 3d 538, 543 (2004), cited by defendants is inapposite. That case concerned an interpretation of the 3-year statute of limitations fixed by the Legislature in nonmedical malpractice claims whether the complaint is cast in contract or tort (CPLR 214 [6]). *See also, N.Y. Workers' Comp. Bd v SG Risk, LLC*, 116 AD 3d 1148, 1150 (3d Dept 2014) (same). *Mary Imogene Bassett Hosp. v Cannon Design, Inc.*, 127 AD 3d 1377, 1379 (3d Dept 2015) is also inapposite because there the Third Department found that compliance with the 2000 International Building Code standard allegedly breached by defendant was not a requirement of the parties' contract and therefore the breach of contract claim was dismissed. To the extent *Leading Ins. Grp. Co. v Friedman LLP*, 2016 NY Misc 2389, *15 (Sup Ct NY Cty March 10, 2016) holds otherwise, this court respectfully declines to adopt it.

not "extraneous to the contract." Accordingly, this claim also shall be dismissed.

VIII. Rescission (Claim 2)

"Rescission is an equitable remedy through which one party seeks to disaffirm a written instrument and return to the status that existed before the transaction was executed. The effect of rescission is to declare a contract void from its inception and put or restore the parties to the status quo" (60A N.Y. Jur. 2d Fraud and Deceit § 221). Rescission is not available when there is an adequate remedy available at law (*Ellington v Sony/ATV Music Publ. LLC*, 85 AD3d 438, 439 [1st Dept 2011]). While most of the malpractice claim is barred by the contractual limitations period, plaintiffs may not circumvent this bar by invoking equity (*Colodney v New York Coffee & Sugar Exch., Inc.*, 4 AD2d 137, 140 [1st Dept 1957], *affd sub nom. Colodney v New York Coffee and Sugar Exch.*, 4 NY2d 698 [1958] ["it would appear that where a legal and equitable remedy exists as to the same subject matter, the latter is under control of the same [] bar as the former"]). Accordingly, this claim is dismissed as time-barred or otherwise duplicative.

IX. Unjust Enrichment (Claim 7)

"Unjust enrichment is a quasi contract theory of recovery, and 'is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned'" (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd.* 19 NY3d 511 [2012], quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). In order to plead a claim for unjust enrichment, the plaintiff must allege "that the other party was enriched, at plaintiff's expense, and that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered'" (*Georgia Malone & Co.*, 86 AD3d at 408, quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). Here plaintiffs may enforce the contract and seek damages for malpractice for the timely portion of that claim. Further, although plaintiffs' breach of contract claims are largely time barred, the fact that plaintiffs had viable breach of contract claims is an additional reason for dismissal of this claim (*see Norris*, 803 F 2d at 1287). There is no "absence of an actual agreement between the parties" to permit this claim. Accordingly, this claim is also dismissed

For the reasons discussed above, it is hereby

ORDERED that the motion to dismiss (Motion Sequence Number 004) of defendants Marcum LLP, Jeffrey Weiner & Richard Cooke is granted in part and otherwise denied; and it is further

ORDERED that the FIRST (declaratory judgment), SECOND (rescission), THIRD (fraudulent inducement), SIXTH (breach of the covenant of good faith and fair dealing) and SEVENTH (unjust enrichment) causes of action are DISMISSED; and it is further

ORDERED that the motion to dismiss is DENIED insofar as it seeks dismissal of the FOURTH (professional negligence) and FIFTH (breach of contract), causes of action, except that these claims are DISMISSED as time-barred as far as they relate matters other than the 2014 MWW Plan Audit; and it is further

ORDERED that defendants answer the First Amended Complaint within twenty (20) days of the date of service of this Decision and Order together with notice of entry; and it is further

ORDERED that counsel for the respective parties shall appear for a preliminary conference on Tuesday, September 18, 2018 at 9:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of this court.

DATED: August 10, 2018

E N T E R,

O. PETER SHERWOOD J.S.C.