Hahn v Dewey & Leboeuf Liquidation Trust
2015 NY Slip Op 31481(U)
August 3, 2015
Supreme Court, New York County
Docket Number: 650817/2014
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.

[* 1]

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

---X

ROY E. HAHN, LARRY J. AUSTIN, CHENERY ASSOCIATES, INCORPORATED, and SUSSEX FINANCIAL ENTERPRISES, INC., f/k/a CHENERY MANAGEMENT, INCORPORATED,

Plaintiffs,

-against-

Index No. 650817/2014
Motion Seq. No: 010, 011 & 012
Motion Date: 4/22/2015

THE DEWEY & LEBOEUF LIQUIDATION TRUST, PROSKAUER ROSE, LLP, and SIDLEY AUSTIN, LLP,

Defendants.

---X

BRANSTEN, J.

In this action, plaintiffs assert legal malpractice, fraud, and negligent representation claims against their former legal counsel, defendants Dewey & LeBoeuf Liquidation Trust[1] ("Liquidation Trust"), Sidley Austin LLP ("Sidley"), and Proskauer Rose LLP ("Proskauer"). All defendants now seek dismissal of plaintiffs' Corrected Amended Complaint ("Complaint") in its entirety, pursuant to CPLR 3211(a)(5) and (a)(7). In addition, defendants Liquidation Trust and Sidley also contend that the fraud claim asserted against them fails under CPLR 3016(b). Plaintiffs oppose and request leave to file a second amended complaint, omitting the negligent representation claim and adding a Judiciary Law § 487 attorney misconduct claim, based upon newly discovered

[1] The Liquidation Trust is the successor-in-interest to Dewey & LeBoeuf LLP, which is the successor-in-interest to LeBoeuf, Lamb, Greene & MaCrae ("LeBoeuf").

evidence. For the reasons that follow, defendants' motions are granted, plaintiffs' cross-motion is denied, and plaintiffs' action is dismissed.

I. **Background**[2]

A. *The NPL Program*

In late 2000, plaintiffs Roy E. Hahn and Larry J. Austin, tax-advantaged investment strategists working in the United States and Asian financial markets, created and developed an investment strategy involving Asian distressed debt that became known as the "Non-Performing Loan Investment Program" ("NPL Program"). The NPL Program involved the purchase of the distressed debt of fundamentally sound companies from the Federal Deposit Insurance Corporation and the Resolution Trust Corporation that could be used to offset tax liabilities. Hahn and Austin sold the debt to investors through plaintiff Chenery Associates, Incorporated ("Chenery").

Plaintiffs retained Graham R. Taylor, a LeBoeuf tax attorney, to render tax advice to them regarding the NPL Program. Taylor advised plaintiffs that he believed that plaintiffs' investment strategy was legally viable and "worked" from a tax perspective. Plaintiffs engaged LeBoeuf as their legal advisor with regard to the NPL Program.

---

[2] The allegations described herein are drawn from the Corrected Amended Complaint.

Plaintiffs also contacted Sidley, which was their then-general legal counsel. Sidley advised plaintiffs that it also believed the NPL Program would work and agreed to render United States federal income tax benefit opinions to plaintiffs' investors, if the NPL Program were appropriately structured.

Both LeBoeuf and Sidley became involved in structuring the NPL Program to ensure that Chenery would be in compliance with the laws and regulations of the United States and foreign countries. One legal issue that they specifically addressed was whether the NPL Program would be classified as a tax shelter by the Internal Revenue Service ("IRS") and whether Chenery would be considered a tax shelter organizer, such that it would be required by sections 6111 and 6112 of the Internal Revenue Code ("IRC") to file a disclosure statement with the IRS and to maintain a list of actual investors.

Plaintiffs introduced the NPL Program to non-party myCFO LLC ("myCFO"), a company in the business of providing financial services to high net worth individuals. During the summer of 2001, a group including myCFO, LeBoeuf, and Sidley discussed Asian distressed asset portfolios that might be available for purchase, and LeBoeuf and Sidley made trips to Asia to meet with potential sellers. In August 2001, Chenery, myCFO, LeBoeuf and Sidley arranged the initial distressed debt portfolio acquisition by clients of myCFO. "In September 2001, [Sidley] advised Chenery that it was not able to render tax benefit opinions to third party investors in respect of China-based distressed

assets arranged by Chenery" because "it was unable to determine how the IRS would determine the basis of the China-based distressed assets." (Complaint ¶¶ 52-53.)

B. *Opinion Letters*

On December 31, 2000, Sidley issued a tax opinion letter, at plaintiffs' request, regarding a transaction known as the "Whitechapel transaction," which was unrelated to the NPL Program ("Whitechapel transaction opinion letter").

Later, in October 2001, plaintiffs retained Proskauer to write letters to NPL Program investors, advising them of the tax issues presented by the program. Between October and December 2001, plaintiffs regularly consulted Proskauer regarding structuring issues relating to the China assets, and Proskauer repeatedly advised that it did not believe that registration of the NPL Program with the IRS as a tax shelter was required. In late December 2001, Proskauer advised plaintiffs that it was prepared to write opinion letters to investors in the NPL Program based on oral representations by myCFO and Chenery regarding the final acquisition structure.

On December 3, 2001, LeBoeuf issued a formal opinion ("LeBoeuf opinion letter"), written by Taylor, confirming that Chenery was not required to register the NPL Program as a tax shelter. That same month, plaintiffs consummated a series of investments as part of the NPL Program.

Meanwhile, in 2001, Hahn and Austin each individually retained Proskauer to advise them regarding the tax issues presented by their own personal investments in the NPL Program involving an entity known as Peking Investment Fund LLC ("Peking transaction"). By letters dated November 21, 2002 ("Proskauer 2002 Peking opinion letters"), Proskauer confirmed its earlier verbal advice to Hahn and Austin and advised each of them again that, in the event that the IRS disallowed the tax position that they adopted in their personal investments in the NPL Program, they probably would be able to avoid the tax penalties imposed by IRC § 6707(a) because their reliance on Proskauer's tax advice would be considered reasonable by the IRS.

On September 18, 2003, Proskauer issued an opinion letter ("Proskauer 2003 opinion letter"), advising NPL Program investors that Chenery was not required to register the NPL Program as a tax shelter. In that letter, Proskauer warned, "as you know, the IRS or a court may disagree with the conclusions reached herein." (Proskauer 2003 opinion letter at 1.)

Allegedly in reliance on legal advice received from LeBoeuf, Sidley, and Proskauer, plaintiffs did not register the NPL Program as a tax shelter with the IRS.

C. *IRS Investigation and Penalties*

Between 2003 and 2010, plaintiffs were sued in four separate actions by investors in the NPL Program. *See* Compl. ¶ 123. On October 21, 2003, the IRS conducted a Promoter Penalty Interview with Hahn, as part of an IRS investigation into the NPL Program. The IRS interviewed Hahn a second time in September 2008, as part of the same investigation.

On December 30, 2008, the IRS advised that it would impose tax penalties of approximately $1 million against both Hahn and Austin individually, in connection with the Peking transaction. Plaintiffs are contesting the imposition of such tax penalties.

On January 19, 2012, the IRS assessed $7,719,594 in penalties against plaintiffs, pursuant to IRC § 6707(a), for failure to register the NPL Program as a tax shelter. The IRS found that plaintiffs' reliance on the advice of LeBoeuf and Proskauer was unreasonable, since they did not accurately state the facts of the transaction in their respective opinion letters and had a financial interest in providing opinions approving of the transaction. *See* Compl. Ex. D at 26 (IRS Jan. 19, 2012 Report, Form 886A).

D. *The Instant Action*

On March 13, 2014, plaintiffs commenced this action, asserting that they reasonably relied on the verbal and written opinions issued by LeBoeuf, Proskauer, and

Sidley in deciding not to register the NPL Program as a tax shelter. Moreover, if those firms had advised plaintiffs to register, plaintiffs assert that they would have registered the program. Plaintiffs further contend that, had Chenery registered by late 2003, the IRS would not have assessed any promoter penalties. Plaintiffs maintain that they incurred substantial financial losses, as a result of their reasonable reliance on the legal advice rendered by LeBoeuf, Proskauer, and Sidley. Plaintiffs also assert that Sidley committed legal malpractice in rendering the advice in the Whitechapel transaction opinion letter.

In response to these alleged causes of action, plaintiffs seek to recover $50 million in damages on the legal malpractice claim, and $1 million each on the fraud and negligent misrepresentation claims.

II. Discussion

A. *Motion to Dismiss Standard*

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in a light most favorable to the plaintiffs, and the plaintiffs must be given the benefit of all reasonable inferences. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994). This Court

must deny a motion to dismiss, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted).

CPLR 3211(a)(5) provides for dismissal where the cause of action may not be maintained because of, *inter alia*, statute of limitations. CPLR 3211(a)(5).

B. *Legal Malpractice Claims*

LeBoeuf, Sidley, and Proskauer each contend that the first cause of action for legal malpractice, which pertains to the NPL Program, is time-barred. Sidley also argues that the second cause of action for legal malpractice in connection with the Whitechapel transaction is similarly time-barred.

In opposition, plaintiffs maintain that LeBoeuf, Sidley, and Proskauer must be equitably estopped from raising the statute of limitations as a defense. Plaintiffs further seek discovery regarding defendants' knowledge of the impropriety of their tax advice and whether defendants' believed they could act with impunity since plaintiffs were not likely to learn of their malpractice until after the statute of limitations expired.

1. Equitable Estoppel

The doctrine of equitable estoppel is inapplicable in the circumstances presented here. Pursuant to the doctrine, a defendant will be estopped from pleading a statute of limitations defense where the "plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action. For the doctrine to apply, a plaintiff may not rely on the same act that forms the basis for the claim – the later fraudulent misrepresentation must be for the purpose of concealing the former tort." *Ross v. Louise Wise Servs., Inc.*, 8 N.Y.3d 478, 491 (2007). "Our courts have long had the power, both at law and equity, to bar the assertion of the affirmative defense of the Statute of Limitations where it is the defendant's affirmative wrongdoing . . . which produced the long delay between the accrual of the cause of action and the institution of the legal proceedings." *Zumpano v. Quinn*, 6 N.Y.3d 666, 673 (2006). Thus, equitable estoppel "is only applicable in circumstances where there is evidence that plaintiff was lulled into inaction by defendant in order to allow the statute of limitations to lapse." *East Midtown Plaza Hous. Co. v. City of N.Y.*, 218 A.D.2d 628, 628 (1st Dep't 1995).

Plaintiffs do not allege that LeBoeuf, Sidley, or Proskauer ever affirmatively attempted to dissuade plaintiffs from commencing a legal action or lulled plaintiffs into inaction. Instead, plaintiffs argue that their continued legal representation by the movants deceived them into believing that these law firms were qualified to give the tax advice at

[* 10]

issue. In addition, as will be addressed in detail below, there is no real dispute that the three movants ceased representing plaintiffs more than eight years before plaintiffs commenced the instant action in March 2014.

Significantly, "equitable estoppel does not apply where the misrepresentation or act of concealment underlying the estoppel claim is the same act which forms the basis of plaintiff's underlying substantive cause of action." *Kaufman v. Cohen*, 307 A.D.2d 113, 122 (1st Dep't 2003); *Ross v. Louise Wise Servs., Inc.*, 8 N.Y.3d at 491. In this case, plaintiffs' estoppel arguments mimic the allegations underlying the alleged malpractice.

Contrary to plaintiffs' contention, no factual issue exists regarding whether the doctrine of equitable estoppel should apply. Although application of the doctrine often presents a question of fact, where plaintiffs were timely aware of the facts requiring them to make further inquiry before the statute of limitations expired, no such factual issue exists. *See Putter v. North Shore Univ. Hosp.*, 7 N.Y.3d 548, 553-554 (2006). "[D]ue diligence on the part of the plaintiff in bringing his action is an essential element for the applicability of the doctrine of equitable estoppel." *Simcuski v. Saeli*, 44 N.Y.2d 442, 450 (1978); *Pahlad v. Brustman*, 8 N.Y.3d 901, 902 (2007).

Plaintiffs' duty to inquire arose as early as October 2003, and certainly no later than December 2008. *See TMG-II v. Price Waterhouse & Co.*, 175 A.D.2d 21, 22-23 (1st Dep't 1991) (holding that duty of inquiry arises for related fraud claim upon knowledge

that IRS is questioning the legitimacy of transaction). By October 2003, plaintiffs had to have known that issues regarding the tax advice rendered by LeBoeuf, Sidley, and Proskauer with regard to the NPL Program had been raised by the IRS. On October 21, 2003, the IRS conducted a Promoter Penalty Interview with Hahn, as part of an IRS investigation into the tax strategy employed in the NPL Program. On September 18, 2008, the IRS interviewed Hahn a second time, as part of that investigation.

In addition, between 2003 and 2010, plaintiffs were sued in four separate actions by investors in the NPL Program. Further, on December 30, 2008, the IRS advised Hahn and Austin that it would impose tax penalties of approximately $1 million against each of them in connection with the Peking transaction, which was part of the NPL Program.

For these reasons, no additional discovery is necessary, and plaintiffs' request to equitably estop movants from raising a statute of limitations defense against the legal malpractice and fraud claims is denied.

2. Statute of Limitations

Section 3211(a)(5) of the CPLR permits dismissal of a claim that is barred by the applicable statute limitations. "On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears

the initial burden of establishing, prima facie, that the time in which to sue has expired." *Benn v. Benn*, 82 A.D.3d 548, 548 (1st Dep't 2011). Defendants have met that burden.

The legal malpractice claims are untimely asserted. An action to recover for attorney malpractice is governed by a three-year statute of limitations, regardless of whether the underlying theory is based on contract or tort. *McCoy v. Feinman*, 99 N.Y.2d 295, 301 (2002); *see* CPLR 214(6). The three-year limitations period accrues when the malpractice is committed, not when the client discovers it, even if the plaintiff is unaware of any malpractice, damages, or injury. *McCoy v. Feinman*, 99 N.Y.2d at 300-301; *Williamson v. PricewaterhouseCoopers LLP*, 9 N.Y.3d 1, 7-8 (2007).

Contrary to plaintiffs' suggestion, a legal malpractice claim does not accrue when the IRS assesses a deficiency. Instead, a tax-related legal malpractice claim accrues on the date that the defendants issued their tax opinion letter, even where the plaintiffs discover years later that their attorney's tax advice was incorrect. *See Landow v. Snow Becker Krauss, P.C.*, 111 A.D.3d 795, 795-796 (2d Dep't 2013) (citing *Ackerman v. Price Waterhouse*, 84 N.Y.2d 535, 541 (1994)). "[W]hat is important is when the malpractice was committed, not when the client discovered it." *Landow*, 111 A.D.3d at 796; *Arnold v. KPMG LLP*, 334 Fed. App'x 349, 352 (2d Cir. 2009) (holding that, pursuant to New York law, plaintiffs' legal malpractice claim was subject to three-year statute of limitations, and accrued when defendant law firm issued legal opinion letter at issue).

As the Court of Appeals explained in *Ackerman v Price Waterhouse*:

> [w]e reject plaintiffs' proposition on this appeal that a Statute of Limitations can only accrue in a malpractice action against an accountant when the IRS assesses a deficiency, a date that necessarily varies depending on the type of deficiency notice received by the taxpayer. The policies underlying a Statute of Limitations – fairness to defendant and society's interest in adjudication of viable claims not subject to the vagaries of time and memory – demand a precise accrual date that can be uniformly applied, not one subject to debate or negotiation. . . . Indeed, to base a limitations period on the potentiality of IRS action defies the essential premise of temporal finality embodied in Statutes of Limitations.

Ackerman v. Price Waterhouse, 84 N.Y.2d 535, 541-542 (1994).

a. **LeBoeuf**

Plaintiffs' legal malpractice claim against LeBoeuf arises out of a December 3, 2001 tax opinion letter. Plaintiffs contend that LeBoeuf failed to exercise the ordinary, reasonable skills possessed by a lawyer in rendering the advice in the letter. Plaintiffs do not allege that LeBoeuf rendered any legal advice to them after issuing the LeBoeuf opinion letter. Plaintiffs also do not allege that there was any further involvement between plaintiffs and LeBoeuf after the two attorneys that worked on the letter left LeBoeuf in summer 2002. Therefore, the latest point in time at which LeBoeuf could have committed the alleged legal malpractice was summer 2002.

Plaintiffs filed the original complaint against LeBoeuf on October 23, 2013, more than eleven years after the last possible time that the alleged legal malpractice could have occurred, and more than seven years after the limitations period expired. Therefore, the branch of the legal malpractice claim asserted against LeBoeuf is untimely asserted.

b. **Sidley**

With regard to Sidley, plaintiffs allege that Sidley committed legal malpractice with respect to the NPL Program when it represented that it was uniquely qualified to assist plaintiffs in the program's design and implementation and when it attended a single meeting at which the NPL Program was discussed. The alleged misrepresentation was made in late 2000 or early 2001, and the meeting was held on March 22, 2001, approximately thirteen years prior to the commencement of this action against Sidley.

Plaintiffs also allege that Sidley committed legal malpractice when it issued the Whitechapel transaction opinion letter on December 31, 2000. Therefore, the limitations period for that instance of alleged malpractice ran no later than December 31, 2003, more than a decade prior to the commencement of this action against Sidley on March 13, 2014. For those reasons, both legal malpractice claims asserted against Sidley are time-barred.

c. **Proskauer**

The legal malpractice claim is also time-barred as to Proskauer. Plaintiffs' claim is based on factual allegations that Proskauer gave plaintiffs defective legal advice, culminating in opinion letters dated November 21, 2002 and September 18, 2003. Therefore, the three-year limitations period expired no later than 2006, some seven years prior to the commencement of this action against Proskauer on March 13, 2014. Thus, the branch of the legal malpractice claim asserted against Proskauer is untimely asserted.

***

For the foregoing reasons, defendants' motions to dismiss the first cause of action for legal malpractice are granted, as is Sidley's motion to dismiss the second claim.

C. *Fraud*

LeBoeuf, Sidley, and Proskauer next contend that plaintiffs' fraud claim both fails as duplicative of the legal malpractice claim and is untimely asserted. In opposition, plaintiffs contend that newly-discovered evidence, consisting of a book entitled *Confidence Games, Lawyers, Accountants and the Tax Shelter Industry* (*Confidence Games*) (MIT Press 2014), co-authored by Tanina Rostain and Milton C. Regan, Jr., constitutes evidence that LeBoeuf, Sidley, and Proskauer committed actual fraud with

regard to its tax shelter advice rendered in the early 2000's. Moreover, plaintiffs contend that this book will lead to evidence that each fraudulently advised plaintiffs during that same time period. Plaintiffs further allege that, until they read *Confidence Games*, they did not know, nor could they have known, of the fraud.

1. Duplicativeness

"Where . . . a fraud claim is asserted in connection with charges of professional malpractice, it is sustainable only to the extent that it is premised upon one or more affirmative, intentional misrepresentations – that is, something more egregious than mere concealment or failure to disclose one's own malpractice – which have caused additional damages, separate and distinct from those generated by the alleged malpractice." *White of Lake George v. Bell*, 251 A.D.2d 777, 778 (3d Dep't 1998) (internal quotations and citations omitted); *see also Carl v Cohen*, 55 A.D.3d 478, 478-479 (1st Dep't 2008) (deeming fraud claim duplicative of legal malpractice claim where it "was not based on an allegation of independent, intentionally tortious conduct and failed to allege separate and distinct damages").

Moreover, a fraud claim will be dismissed as duplicative where it appears that it was asserted to take advantage of the longer six-year limitations period for fraud claims. *See, e.g., Johnson v. Proskauer Rose LLP*, 129 A.D.3d 59, 68 (1st Dep't 2015) (stating

that CPLR 214(6) was enacted to prevent plaintiffs from circumventing the three-year statute of limitations for professional malpractice claims by characterizing a defendant's failure to meet professional standards as another claim for which the CPLR provides a longer statute of limitations); *see also Powers Mercantile Corp. v. Feinberg*, 109 A.D.2d 117, 120 (1st Dep't 1985), *aff'd* 67 N.Y.2d 981 (1986).

Plaintiffs' fraud claim is duplicative of the legal malpractice claim. In the legal malpractice claim, plaintiffs allege that, at the time that they retained LeBoeuf, Sidley, and Proskauer, each of those defendants represented to plaintiffs that it was, in all respects, licensed and otherwise qualified to render the legal services that plaintiffs sought. Plaintiffs further contend that each of those defendants represented that plaintiffs could reasonably rely upon their legal advice. Plaintiffs allege that LeBoeuf, Sidley, and Proskauer were each reckless in not knowing that they were unqualified to give the advice that they gave and that plaintiffs could not reasonably rely on that advice.

In the fraud claim, plaintiffs allege that LeBoeuf, Sidley, and Proskauer each lacked the proper qualifications to render the tax-related legal advice at issue in this litigation. Plaintiffs' factual allegations in the fraud claim relate to the legal advice that LeBoeuf, Sidley, and Proskauer each provided to plaintiffs.

Moreover, the damages allegedly sustained by plaintiffs as a result of the alleged fraud flow from the same facts as does the legal malpractice claim and therefore are not

separate and distinct from the legal malpractice damages. Where the "plaintiffs have not shown that their reliance upon these alleged misrepresentations subjected them to any damages beyond those resulting from the purported malpractice alone, their fraud claim is not maintainable." *White of Lake George v. Bell*, 251 A.D.2d at 778.

To the extent that plaintiffs allege that LeBoeuf, Sidley, or Proskauer concealed any aspect of its legal advice, such allegations are insufficient to state a legally viable fraud claim, independent from the legal malpractice claim. "[A]n attorney's failure to disclose malpractice does not give rise to a fraud claim separate from the customary malpractice action." *Weiss v. Manfredi*, 83 N.Y.2d 974, 977 (1994) (citing *Simcuski v. Saeli*, 44 N.Y.2d at 451-452).

Contrary to plaintiffs' contention, Hahn's reading of *Confidence Games* in August 2014 does not render the fraud claim legally viable. *Confidence Games* does not constitute newly discovered evidence that changes the fraud claim in any material way. Further, "[a] new cause of action for fraud does not accrue each time a plaintiff discovers new elements of fraud in a transaction or new evidence to prove such fraud." *Sielcken-Schwarz v. Am. Factors, Ltd.*, 265 N.Y. 239, 245 (1934).

For the foregoing reasons, the fraud claim asserted against LeBoeuf, Sidley, and Proskauer is duplicative of the legal malpractice claim.

2. Statute of Limitations

Even if the fraud claim asserted against those law firms were not duplicative of the legal malpractice claim, the fraud claim would be dismissed as time-barred.

The limitations period for fraud claims is the later of (1) six years from the commission of the fraud; or (2) two years from the time that the fraud was discovered, or, with reasonable due diligence, could have been discovered. *St. Clement v. Londa*, 8 A.D.3d 89, 90 (1st Dep't 2004); CPLR 213(8). "'The test as to when fraud should with reasonable diligence have been discovered is an objective one,' and the duty of inquiry arises '[w]here the circumstances are such as to suggest to a person of ordinary intelligence the probability that he [or she] had been defrauded.'" *Apt v. Morgan Stanley DW, Inc.*, 115 A.D.3d 466, 467 (1st Dep't 2014) (quoting *Gutkin v. Siegal*, 85 A.D.3d 687, 688 (1st Dep't 2011)).

Plaintiffs allege that the fraudulent acts or omission by LeBoeuf, Sidley, and Proskauer consist of each firm's misrepresentations that it was qualified to render the tax-related legal advice that it provided to plaintiffs, when each knew, or were reckless in not knowing, that it was unqualified to render such advice. Plaintiffs allege that LeBoeuf made the representations, and provided the advice, between 2000 and 2002, and that Sidley did the same in late 2000 or early 2001. Plaintiffs allege that Proskauer rendered the cited legal advice between 2001 and 2003.

Taking the underlying facts alleged by plaintiffs as true, as we must on a motion addressed to the pleadings, *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994), LeBoeuf's alleged fraud could not have been committed later than summer 2002 when the attorneys who worked on plaintiffs' matter left LeBoeuf. Therefore, the latest that the limitations period could have run was 2008, six years after the last date that the fraud could have been committed, and some five years prior to the filing of the complaint against LeBoeuf.

Similarly, pursuant to plaintiffs' factual allegations, Sidley's alleged fraud could not have occurred later than early 2001. Therefore, the limitations period could not have run later than 2007, some six years prior to the filing of the complaint against Sidley.

With regard to branch of the fraud claim asserted against Proskauer, plaintiffs fail to allege that any fraud occurred after 2003, more than 10 years prior to the filing of the action against Proskauer in March 2014.

Moreover, the fraud claim asserted against LeBoeuf, Sidley, and Proskauer is untimely, even under the discovery-of-the-fraud two-year limitations period. The undisputed record demonstrates that plaintiffs knew, or could have reasonably discovered, the fraudulent acts allegedly committed by movants no later than October 21, 2003, when the IRS conducted its first Promoter Penalty Interview with Hahn. By that date, plaintiffs had to have been well-aware that the IRS was investigating the tax strategy used by plaintiffs, the same tax strategy about which LeBoeuf, Sidley, and Proskauer allegedly

each had given legal advice. *See Lucas-Plaza Hous. Dev. Corp. v. Corey*, 23 A.D.3d 217, 218 (1st Dep't 2005); *TMG-II v. Price Waterhouse & Co.*, 175 A.D.2d at 22-23 (knowledge that IRS is questioning legitimacy of transaction creates duty of inquiry for related fraud claim).

In addition, the IRS assessed the Promoter Penalties against plaintiffs on January 19, 2012, and plaintiffs filed a supplementary protest with the IRS challenging the penalties on February 28, 2012, both more than two years prior to the filing of the original complaint. The receipt of an IRS audit bill, and knowledge that one was subject to an audit, were sufficient to create actual notice to start the running of the statute of limitations for fraud. *Kottler v. Deutsche Bank AG*, 607 F. Supp. 2d 447, 460-461 (S.D.N.Y. 2009) (applying New York law).

Further, beginning in 2003, plaintiffs were sued in at least four separate actions by investors in the NPL Program. Therefore, at the latest, the limitations period began to run in 2003, when a duty of inquiry arose as a result of Hahn's interview with the IRS and the actions commenced against plaintiffs by investors.

Plaintiffs' fraud claims arise out of allegations that, when rendering legal advice regarding the applicability of IRC § 6707, LeBoeuf, Sidley, and Proskauer each knew, or should have known, that such advice was incorrect, and that plaintiffs could not, or should not, reasonably rely upon it. Plaintiffs repeat those same allegations with respect

to the fraud claims asserted in the corrected amended complaint and the proposed second amended complaint.

Contrary to plaintiffs' contentions, the facts set forth in the *Confidence Games* book cited by plaintiffs do not constitute "new" information directly relating to the misrepresentations and omissions alleged here that was unknown to plaintiffs. The authors of *Confidence Games* do not rely on secret sources or insider information, but, instead, cite to publicly-available documents. Further, the contents of the book do not indicate that the fraud claim may be timely asserted. The alleged dates of movants' last acts or omissions cited by plaintiffs have not changed. In addition, regarding plaintiffs' discovery of the fraud, the date of publication of the book and the date that Hahn allegedly read the book are irrelevant. As discussed at length above, plaintiffs' duty to inquire further into movants' alleged fraud arose when plaintiffs learned of the IRS's investigation into the NPL Program, and when NPL Program investors commenced legal actions against plaintiffs.

For the foregoing reasons, the fraud claim asserted against LeBoeuf, Sidley, and Proskauer is dismissed as time-barred.

3. Particularity Requirement

The fraud claim is also fatally deficient on the ground that plaintiffs have failed to satisfy the statutory pleading requirements. To state a legally viable claim of fraud, a plaintiff must allege a "representation of a material existing fact, falsity, scienter, deception and injury." *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 318 (1995); *Nicosia v. Board of Mgrs. of the Weber House Condo.*, 77 A.D.3d 455, 456 (1st Dep't 2010). "Where a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust, or undue influence, the circumstances constituting the wrong shall be stated in detail." (CPLR 3016(b).) The allegations must be sufficiently particularized to give adequate notice to the court and to the parties of the transactions and occurrences intended to be proved. *See Accurate Copy Serv. of Am., Inc. v. Fisk Bldg. Assoc. L.L.C.*, 72 A.D.3d 456, 456 (1st Dep't 2010); *Foley v. D'Agostino*, 21 A.D.2d 60, 63-64 (1st Dep't 1964).

Plaintiffs have failed to plead the specific remarks, how, or when LeBoeuf, Sidley, or Proskauer represented to them that each was qualified to render tax-related legal advice, or that plaintiffs could reasonably rely upon that advice. In addition, plaintiffs' broad allegations are not sufficient to support a claim of fraud against LeBoeuf, Sidley, or Proskauer. A fraud claim asserted against multiple defendants collectively must include specific and separate allegations for each defendant, or it will be dismissed. *See Aetna*

Cas. & Sur. Co. v Merchants Mut. Ins. Co., 84 A.D.2d 736, 736 (1st Dep't 1981). Plaintiffs have alleged the same improper conduct against the three remaining defendant law firms, without providing any factual details about the alleged fraudulent acts.

D. *Negligent Representation*

Next, LeBoeuf, Sidley, and Proskauer contend that the fourth cause of action for negligent representation is duplicative and time-barred.

The motion is granted without opposition. Failure to oppose arguments raised by motion to dismiss results in waiver of the right to oppose. *Patel v. Am. Univ. of Antigua*, 104 A.D.3d 568, 569 (1st Dep't 2013). The court also notes that plaintiffs do not assert a negligent representation claim in the proposed second amended complaint.

E. *Damages*

Proskauer contends that plaintiffs' damages demands for interest on back taxes and lost business opportunities must be stricken. In partial opposition, plaintiffs contend that their demand for recovery of their lost business opportunities is not speculative.

That branch of Proskauer's motion to dismiss the demand for recovery of interest on back taxes is granted without opposition. Pursuant to New York Law, back taxes and interest paid to a taxing authority are not recoverable as damages. "[T]he out-of-pocket

rule [does not allow] for recovery of the payment of taxes, couched as consequential damages or otherwise." *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 422 (1996). Interest on back taxes "[i]s not damages suffered by plaintiff but rather was a payment to the IRS for his use of the money during the period of time when he was not entitled to it." *Alpert v. Shea Gould Climenko & Casey*, 160 A.D.2d 67, 72 (1st Dep't 1990). Thus, to permit recovery would be to place plaintiffs in a better position than they would have been in, had they not participated in the transaction. Therefore, that branch of Proskauer's motion to dismiss the claim for damages based on interest paid is granted.

Plaintiffs' alleged damages for loss of income and loss of profits from unspecified "highly lucrative business opportunities" are similarly unrecoverable. According to plaintiffs, this potential income was lost when their prospective clients learned of their legal troubles. *See* Complaint ¶ 125. "[D]amages claimed in a legal malpractice action must be 'actual and ascertainable' resulting from the proximate cause of the attorney's negligence." *Zarin v. Reid & Priest*, 184 A.D.2d 385, 387-388 (1st Dep't 1992). Where the lost business claimed emanates from a new business venture, the court applies a stricter standard than a reasonable certainty "for the obvious reason that there does not exist a reasonable basis of experience upon which to estimate lost profits with the requisite degree of reasonable certainty." *Kenford Co. v. County of Erie*, 67 N.Y.2d 257, 261 (1986). The lost business damages claimed by plaintiffs in this case are far too

speculative and are incapable of being proven with any reasonable certainty. Therefore, that branch of Proskauer's motion to dismiss the lost business damages demand is granted.

F. *Plaintiffs' Cross-Motion for Leave to File a Second Amended Complaint*

Plaintiffs' cross-motion for leave to file and serve a second amended complaint is denied. Although motions for leave to amend pleadings are "liberally granted in the absence of prejudice or surprise," the court should consider "the sufficiency of the merits of the proposed amendment when considering such motions ..." *Heller v. Provenzano, Inc.*, 303 A.D.2d 20, 25 (1st Dep't 2003) (denying a motion to amend, noting that the motion was "totally devoid of merit" and "legally insufficient"); *see also* CPLR 3025(b).

1. Proposed Legal Malpractice and Fraud Claims

The legal malpractice and fraud claims asserted in the proposed second amended complaint are, in all material respects, identical to the legal malpractice and fraud claims asserted in the corrected amended complaint. Those claims, as held above, are not legally cognizable for a variety of reasons, primarily because they are not timely asserted.

2. Proposed Judiciary Law § 487

In addition, the proposed attorney misconduct claim is not legally cognizable. Pursuant to Judiciary Law § 487, an attorney who "[i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . [i]s guilty of a misdemeanor, and . . . forfeits to the party injured treble damages, to be recovered in a civil action." "[S]ection 487 is not a codification of a common-law cause of action for fraud. Rather, section 487 is a unique statute of ancient origin in the criminal law of England. The operative language at issue – 'guilty of any deceit' – focuses on the attorney's intent to deceive, not the deceit's success." *Amalfitano v. Rosenberg*, 12 N.Y.3d 8, 14 (2009).

In the proposed attorney misconduct claim, plaintiffs allege that they did not discover, nor could they have discovered, the alleged fraud until they read *Confidence Games* in 2014. Plaintiffs contend that the information in the book leads them to believe that evidence exists regarding LeBoeuf, Sidley, and Proskauer's commission of actual fraud with regard to the tax shelter advice each rendered to plaintiffs in the early 2000's.

Plaintiffs further maintain that the defendant law firms knowingly and fraudulently concealed the existence of a conflict of interest between their interests and plaintiffs' interests, in breach of their respective fiduciary duties owed plaintiffs, in order to receive additional exorbitant legal fees from plaintiffs. Plaintiffs contend that these defendants

rendered improper legal advice regarding the plaintiffs' eligibility for the safe harbor protection afforded by IRC § 6707, because they knew that, by the time that their legal malpractice and fraud were discovered, the relevant statute of limitations would have passed and that, therefore, they would be safe from legal action.

As discussed at length above, in *Confidence Games*, the authors analyze the tax shelters of the late 1990s and early 2000s and do not specifically reference the NPL Program or any tax advice rendered by LeBoeuf, Sidley, or Proskauer with respect to that tax strategy. The information in *Confidence Games* does not constitute new evidence. Plaintiffs' duty to inquire further was triggered by the IRS investigation into the NPL Program, and the lawsuits filed against plaintiffs NPL Program investors.

The claim is also without merit because it is not properly brought in this action. Section 487 of the Judiciary Law applies only where the alleged deceit forming the basis of the claim occurs during the course of a pending judicial proceeding. *See, e.g., Meimeteas v. Carter Ledyard & Milburn LLP*, 105 A.D.3d 643, 643 (1st Dep't 2013); *Costalas v. Amalfitano*, 305 A.D.2d 202, 203-204 (1st Dep't 2003). Here, the alleged misconduct occurred well before commencement of this litigation.

Finally, the attorney misconduct claim is time-barred. An attorney misconduct claim is subject to a six-year limitations period. *See Melcher v. Greenberg Traurig, LLP*, 23 N.Y.3d 10, 15 (2014); CPLR § 213(1). The last act or omission of attorney

misconduct by any of the movants alleged by plaintiffs occurred in 2003, more than ten years prior to commencement of this action.

III. Conclusion

Accordingly, it is

ORDERED that motion sequence number 010 by defendant The Dewey & LeBoeuf Liquidation Trust to dismiss the corrected amended complaint is granted, and that complaint is dismissed in its entirety as against that defendant, with costs and disbursements to that defendant, as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of that defendant; and it is further

ORDERED that motion sequence number 011 by defendant Sidley Austin LLP to dismiss the corrected amended complaint is granted, and that complaint is dismissed in its entirety as against that defendant, with costs and disbursements to that defendant, as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of that defendant; and it is further

ORDERED that motion sequence number 012 by defendant Proskauer Rose LLP to dismiss the corrected amended complaint is granted, and that complaint is dismissed in its entirety as against that defendant, with costs and disbursements to that defendant, as

[* 30]

taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of that defendant; and it is further

ORDERED that plaintiffs' cross-motion to serve and file the proposed second amended complaint is denied in its entirety.

Dated: New York, New York
August 3, 2015

ENTER:

Hon. Eileen Bransten