

Luxenberg v Estate of Richard D. Siegal

2012 NY Slip Op 31577(U)

May 25, 2012

Supreme Court, Nassau County

Docket Number: 013918-11

Judge: Timothy S. Driscoll

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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
ARTHUR LUXENBERG and PERRY WEITZ,

Plaintiffs,

-against-

TRIAL/TAS PART: 16
NASSAU COUNTY

Index No: 013918-11
Motion Seq. Nos. 1 and 2
Submission Date: 3/27/12

THE ESTATE OF RICHARD D. SIEGAL,
GAIL SIEGAL AS ADMINISTRATOR OF THE
ESTATE OF RICHARD D. SIEGAL,
GAIL SIEGAL, BIPPY SIEGAL, JEFFREY SIEGAL,
MICHAEL SIEGAL, PAUL HOWARD,
THE BISTATE OIL DISTRIBUTION CORP.,
BISTATE OIL MANAGEMENT CORP.,
PALACE EXPLORATION COMPANY,
OIL AND GAS TITLE HOLDING CORP.,
VAIL DRILLING COMPANY, INC., and
JOHN DOES I-X,

Defendants.

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Papers Read on these Motions:

- Notice of Motion, Affirmation in Support and Exhibits.....x
- Memorandum of Law in Support.....x
- Notice of Motion, Affirmation in Support and Exhibit.....x
- Memorandum of Law in Support.....x
- Affidavit in Opposition and Exhibit.....x
- Affirmation in Opposition and Exhibits.....x
- Memorandum of Law in Opposition.....x
- Reply Affirmation in Support and Exhibits.....x
- Reply Memorandum of Law in Support.....x
- Reply Affirmation and Exhibit.....x
- Reply Memorandum of Law in Further Support.....x
- Correspondence and Search Warrant Affidavit.....x

This matter is before the court on 1) the motion filed by Defendants Estate of Richard D. Siegal (“Estate”), Gail Siegal as Administrator of the Estate of Richard D. Siegal (“Administrator”), Gail Siegal (“Gail”), Vail Drilling Company, Inc. (“Vail Drilling”), Bistate Oil Distribution Corp. (“Bistate Dist.”), Bistate Oil Management Corp. (“Bistate Mgt.”), Palace Exploration Company (“Palace”), and Oil and Gas Title Holding Corp. (“Oil and Gas Title”) on January 23, 2012, and 2) the motion filed by Defendants Bippy Siegal (“Bippy”), Jeffrey Siegal (“Jeffrey”) and Paul Howard (“Howard”) on January 24, 2012, both of which were submitted on March 27, 2012.

For the reasons set forth below, the Court 1) grants the motions to dismiss all claims against Gail Siegal (individually), Bippy Siegal, Jeffrey Siegal, Michael Siegal, Paul Howard, Bistate Oil Distribution Corp., Bistate Oil Management Corp., Palace Exploration Company, Oil and Gas Title Holding Company; and 2) grants the motion to dismiss the second, fourth, fifth, seventh, ninth, tenth and fourteenth causes of action in the Complaint against Vail Drilling Company, Inc.; 3) dismisses the thirteenth cause of action in the Complaint, for a declaratory judgment, against all parties, except as it may apply to Vail Drilling Company, Inc., with regard to the two Subscription Notes to pay PW & F-04 Drilling Company, executed by Weitz, as Maker on June 21, 2004, and Luxenberg, as Maker on June 29, 2004; and 4) denies the motion to dismiss the Complaint against the Estate and Administrator, except that the Court dismisses the claim for a declaratory judgment, as set forth in the thirteenth cause of action, against the Estate and Administrator.

BACKGROUND

A. Relief Sought

Defendants Estate, Administrator, Gail, Vail Drilling, Bistate Dist., Bistate Mgt., Palace, and Oil and Gas Title move for an Order 1) dismissing the Plaintiffs’ Complaint in its entirety pursuant to CPLR § 3211(a)(7); 2) dismissing Counts 1-11 pursuant to CPLR § 3211(a)(1); and 3) dismissing the Complaint pursuant to CPLR § 3211(a)(5) to the extent that it purports to assert causes of action concerning investments predating 2005.

Defendants Bippy, Jeffrey, Michael and Howard move for an Order dismissing the Complaint in its entirety pursuant to CPLR §§ 3211(a)(1), (5) and (7).

Plaintiffs Arthur Luxenberg (“Luxenberg”) and Perry Weitz (“Weitz”) (“Plaintiffs”) oppose the motions.

B. The Parties’ History

This action was commenced on September 27, 2011. Plaintiffs allege that Defendants defrauded Plaintiffs into investing millions of dollars, through cash payments and the execution of promissory notes, in a series of partnerships that were engaged in financing oil and gas drilling ventures designed, promoted, sold and administered by deceased Defendant Richard Siegal (“Richard”). Plaintiffs assert that Richard was assisted by Howard, the Siegal family and the corporate defendants. Plaintiffs further allege that Richard conducted the Defendants’ fraud and other wrongdoing through Defendants Vail Drilling, Bistate Dist., Bistate Mgt., Palace, and Oil and Gas Title (“Corporate Defendants”), with the participation of the Siegal family and Howard. Plaintiffs assert that the Defendants induced them and other investors to form partnerships to obtain interests in drilling sites and hire drilling companies owned and controlled by the Defendants to drill for oil and gas.

Plaintiffs allege that Richard was the promoter of the investments. Plaintiffs further claim that, during relevant times, all of the Siegal family members and Howard were directors and/or officers of one or more of the Corporate Defendants and partners in certain of the partnerships (“Partnerships”) with the Plaintiffs. Plaintiffs allege that the Corporate Defendants were owned and controlled by Richard, the Siegal family and Howard, and continue to be controlled by the Siegal family and Howard.

The Complaint (Ex. 1 to Farinacci Aff. in Supp.) contains 14 causes of action: 1) fraud against the Estate and the Administrator, 2) fraud against the Corporate Defendants, Gail, Bippy, Jeffrey, Michael and Howard, 3) fraudulent concealment against the Estate and the Administrator, 4) fraudulent concealment against the Corporate Defendants, Gail, Bippy, Jeffrey, Michael and Howard, 5) aiding and abetting Richard’s fraud, against the Corporate Defendants, Gail, Bippy, Jeffrey, Michael and Howard, 6) breach of fiduciary duty against the Estate and the Administrator, 7) aiding and abetting Richard’s breach of fiduciary duty against the Corporate Defendants, Gail, Bippy, Jeffrey, Michael and Howard, 8) negligent misrepresentation against the

Estate and the Administrator, 9) negligent misrepresentation against the Corporate Defendants, Gail, Bippy, Jeffrey, Michael and Howard, 10) fraud against the Estate, the Administrator, Vail Drilling, and Howard, 11) aiding and abetting Richard's, Vail Drilling's and Howard's fraud against the other Corporate Defendants, Gail, Bippy, Jeffrey and Michael, 12) breach of Contract against Vail Drilling, 13) a request for a declaratory judgment against all Defendants that all promissory notes executed by Plaintiffs and their Partnerships payable to any of the Defendants are unenforceable, and are null and void, and that Defendants are liable to Plaintiffs for all damages caused by their wrongdoing, and 14) a request for an accounting against all Defendants.

Paragraph 1 of the Complaint alleges as follows:

This action arises from defendants' fraud, misrepresentation, breach of contract, and other wrongdoing in connection with their promotion and sale to plaintiffs, and their management of, oil and gas investments. From 1996 through 2005, defendants induced plaintiffs to invest tens of millions of dollars in partnerships purportedly formed to profit from oil and gas drilling and production, investments which defendants represented to plaintiffs were intangible drilling costs ("IDC"), which were validly deductible for federal and state tax purposes. In 2009, plaintiffs first learned that the U.S. Internal Revenue Service ("IRS") disallowed IDC deductions that plaintiffs had taken with respect to certain of their investments on the basis that defendants' oil and gas ventures were a fraud because, among other things, defendants failed to perform some or all of their material duties and obligations. In 2009, plaintiffs also learned for the first time that the U.S. Department of Justice had initiated a criminal investigation of defendants' oil and gas ventures and had executed a search warrant and seized approximately 300 boxes of documents from defendants' offices.

Paragraph 27 of the Complaint alleges that, with respect to the claims asserted in the Complaint:

[E]ach of the Defendants acted in concert with one another, acted with the consent of and benefit of one another, and acted as one another's agents and/or alter egos. Along with Siegal, the Siegal Family Defendants and Howard owned, managed, and/or exercised complete dominion and control over the Corporate Defendants. All Defendants knew of and actively participated in Defendants' Fraud, breaches of fiduciary duty, breaches of contract and other wrongdoing alleged herein. All Defendants also had access to the books and records of the Corporate Defendants and actively assisted one another in promoting and concealing Defendants' Fraud by holding positions in the Corporate Defendants, preparing false promotional materials and false drilling records, and preparing false financial books and records. Such Defendants concealed Defendants' Fraud and other wrongdoing alleged herein from

plaintiff, and assisted one another in continuing same all to the detriment of plaintiffs.

The Complaint further alleges, *inter alia*, as follows:

Richard, who is deceased, was a lawyer and accountant who claimed to be engaged in oil and gas exploration, drilling and development since the 1970's. Gail was Richard's wife until his death on February 9, 2010, and was appointed the administrator of his Estate on or about April 27, 2010. Gail, Bippy, Jeffrey, Michael,¹ and Howard were directors and/or officers of one or more of the named Corporate Defendants and partners in certain of the Partnerships with the Plaintiffs.

Bistate Dist. and Bistate Mgt. are New York corporations. Palace is a Oklahoma corporation, and Oil and Gas Title is a Texas Corporation. New York is the principal place of business of those four Corporations. Vail Drilling is a Colorado corporation.

Plaintiffs allege that, prior to their involvement with the Defendants, Plaintiffs had no experience in the oil and gas industry or the accounting and tax treatment of those investments. Based upon Richard's reputation as an attorney and accountant engaged in the oil and gas industry, Plaintiffs contacted Richard in 1996. Weitz and Richard met for several hours at the office of a good friend of Weitz who had enjoyed success investing in oil and gas ventures sponsored by Richard.

After that initial meeting, Plaintiffs and their financial advisor had a series of meetings both in person and by telephone with Richard, which typically lasted several hours. During those meetings, Richard described his extensive experience, the investment opportunity, how the investments worked, and the potential for substantial returns and tax benefits from the investments. Plaintiffs advised Richard of their lack of experience in these investments. Plaintiffs relied on Richard's representations, in light of his being a lawyer, accountant, and oil and gas professional. Richard represented to the Plaintiffs that the U.S. Government, to encourage oil and gas exploration, permitted expenses associated with these activities to be deducted from the investor's taxable income as an IDC. Richard also told Plaintiffs that past investments that Richard and the other Defendants sponsored and managed had been periodically audited by the IRS which, following those audits, had approved of similar investments and

¹ Bippy, Jeffrey and Michael are Richard's sons.

deductions.

In reliance on Defendants' representations, Plaintiffs entered into a series of investments with Defendants from 1996 through 2005 ("Investment Period"). The investments "followed a nearly identical investment structure established, controlled and administered by Defendants" (Compl. at ¶ 37). At Defendants' direction, Plaintiffs signed documents creating Partnerships including, in some instances, with Richard and other Siegal Defendants as members.

Plaintiffs allege that each investment was apparently used to pay Palace for interests in drilling sites believed to be assigned to each Partnership. Oil and Gas Title served as nominee and title holder for each drilling site, and Bistate Dist. and Bistate Mgt. handled the administration, bookkeeping and bond purchase for each investment. The vast majority of each investment went to Vail Drilling which was supposed to drill for oil and gas, or sublet the drilling at the sites acquired by the partnerships.

Plaintiffs invested tens of millions of dollars with the Defendants and claimed the IDC tax deductions, in reliance on Defendants' representations. Plaintiffs received cash distributions from their first investments accompanied by what was represented to be production and revenue reports for the wells purchased by the Plaintiffs' Partnerships. The IRS concluded that those reports were "false, fraudulent and misleading" (Compl. at ¶ 40).

During the Investment Period, Plaintiffs or their financial advisor met periodically with Richard and/or Howard to monitor the investments and discuss the production and revenue reports, and Richard and/or Howard represented that the drilling was being performed in accordance with the reports. They also repeatedly showed the Plaintiffs' financial advisor the Defendants' books, records and spreadsheets reflecting the bonds that Defendants claimed they had purchased to cover Plaintiffs' obligations under certain promissory notes.

In 1998, Plaintiffs' financial advisor visited drilling sites in Oklahoma and Texas with Richard and two purported geologists working for Defendants who, Richard claimed, had extensive experience in oil and gas exploration and drilling. Richard represented to the Plaintiffs' financial advisor that the wells were being used to drill for oil and gas for Plaintiffs' investments. The IRS concluded that those representations were also false.

In or about 2006, Plaintiffs received notice from the IRS that Plaintiffs' 2003 investment would be subject to an audit. Plaintiffs did not question the investments at that time in light of the fact that Defendants had previously told Plaintiffs that these audits were routine and to be expected. The Defendants allegedly assumed control of the audit, and supplied their own accountants and counsel to interact with the IRS on Plaintiffs' behalf. Defendants advised Plaintiffs that the IRS was mistaken, and assured them that the investments and deductions were legitimate.

In the spring of 2009, Plaintiffs received a "60 day letter" from the IRS informing them that the IRS proposed to disallow the IDC deductions for Plaintiffs' 2003 investment, and also proposed the imposition of interest and penalties. The IRS has since proposed the same disallowance and penalties for Plaintiffs' 2004 investment, and Plaintiffs anticipate the same result with respect to their 2005 investment. Plaintiffs allege that the IRS concluded, and other investors have alleged, that Defendants perpetrated a fraud on investors, including the Plaintiffs, with respect to the investments. Plaintiffs also allege that the IRS has concluded that "virtually every representation" that Defendants have made about the investments was false (Compl. at ¶ 47). The Department of Justice initiated a criminal investigation into whether the oil and gas ventures were part of a criminal fraud.

In opposition to Defendants' motions, Weitz 1) provides a chart (Ex. A to Weitz Aff. in Opp.) reflecting the name of each Partnership, the amounts that Plaintiffs invested in each Partnership, and the year of each investment referred to in the Complaint; 2) identifies the "friend" and "financial advisor" referred to in the Complaint; and 3) affirms that, for each investment after the 1996 investment year, Plaintiffs and/or their financial advisor met on a quarterly basis with Richard and/or Howard to review the financial performance of the outstanding investments and the status of the purchase of bonds that Defendants promised to make, or represented they had made, to cover the promissory notes executed by Plaintiffs as part of their investments.

C. The Parties' Positions

Defendants Estate, Administrator, Gail, Vail Drilling, Bistate Dist., Bistate Mgt., Palace, and Oil and Gas Title submit, *inter alia*, that 1) counts 1-11 of the Complaint, alleging fraud, misrepresentation and breach of fiduciary duty, do not satisfy the notice pleading standard set

forth in CPLR § 3013 or the heightened pleading standard of CPLR § 3016(b), in light of their failure to include relevant details including the amount of the investments, the identity of the financial advisor and friend upon whom Plaintiffs allegedly relied, and the dates on which Richard allegedly made the representations on which Plaintiffs claim they relied; 2) the Court should dismiss counts 1-11 of the Complaint to the extent that they are barred by the statute of limitations, because the fact that the Plaintiffs learned of an IRS audit in 2006 regarding their 2003 investments and deductions means that Plaintiffs were on notice at that time and should have discovered with reasonable diligence the alleged fraudulent acts; 3) the Court should dismiss counts 1-11, on the basis of documentary evidence, in light of the fact that a) the Subscription Agreements entered into by Plaintiffs contain Plaintiffs' acknowledgment that they were investing in the Partnerships solely in reliance on communications with the Managing Partner of the Partnerships; and b) it is not alleged in the Complaint that any of the named defendants were the Managing Partner or authorized representative, and the Subscription Agreements reflect that the Managing Partners were persons other than the named Defendants; 4) the Court should dismiss counts 6 and 7 because a) Plaintiffs have failed to plead the elements of a fiduciary relationship, and b) the facts alleged support the conclusion that there was no fiduciary relationship, particularly in light of Plaintiffs' allegation that it was the financial advisor, not Plaintiffs, who relied on Defendants' representations; 5) the Court should dismiss counts 3-5 and 8-9, alleging fraudulent concealment, in light of Plaintiffs' failure to plead a special relationship between Plaintiffs and Defendants; 6) the Court should dismiss all claims against all Defendants, except the Estate, given Plaintiffs' failure to allege that the other Defendants were involved in Plaintiffs' investments, participated in the alleged fraud, or rendered substantial assistance to the primary violator(s); 7) count 12 fails to plead a viable claim for breach of contract because the allegations do not identify the contract(s) allegedly breached and, as Plaintiffs concede, they were not parties to any contract with Vail Drilling; 8) the Complaint fails to meet the minimal standards of pleading with regard to the claim in the 13th cause of action for a declaratory judgment in that it fails to identify the promissory notes that Plaintiffs seek to have declared invalid; and 9) the 14th cause of action in the Complaint fails to assert a viable claim for an accounting in light of Plaintiffs' failure to assert a plausible claim of a fiduciary relationship with any of the Defendants.

Defendants Bippy, Jeffrey, Michael and Howard submit, *inter alia*, that 1) Plaintiffs have failed to plead the fraud claims with adequate particularity, in light of their failure to identify acts taken, or representations made, by the moving Defendants in furtherance of any alleged fraud; 2) the documentary evidence, including the Subscription Agreements, warrant the dismissal of the fraud claims in light of Plaintiffs' acknowledgment that they were relying on statements made by a managing partner other than the Defendants; 3) in light of Plaintiffs' status as sophisticated investors, any reliance by Plaintiffs was unreasonable, particularly because Plaintiffs had the opportunity to make additional inquiry of the managing partners prior to making any investment; 4) the claims for aiding and abetting a breach of fiduciary duty cannot be sustained in light of Plaintiffs' failure to allege facts sufficient to demonstrate moving Defendants' knowledge of any fraud by the primary mover, or their rendering of substantial assistance in any fraudulent acts; and 5) the Court must dismiss the negligent misrepresentation claims in light of Plaintiffs' failure to allege the existence of a special relationship between Plaintiffs and Defendants.

Plaintiffs oppose both motions asserting, *inter alia*, that 1) the Complaint properly pleads causes of action for fraud, fraudulent concealment, negligent misrepresentation and breach of fiduciary duty and aiding and abetting, and satisfies CPLR § 3016(b) by providing Defendants with notice of the facts that form the basis of the claims alleged in the Complaint; 2) Defendants have sufficient notice regarding the investments at issue, as demonstrated by the fact that Defendants, in their interrogatories to the Plaintiffs, list the partnerships and investments at issue;² 3) there is adequate specificity regarding the fraudulent conduct alleged, including the allegation that Richard and Howard falsely represented the extent of Richard's experience in oil and gas exploration and were the individuals with whom Plaintiffs and their financial advisors communicated, and who made the false representations on which the Plaintiffs relied; 4) the Complaint provides adequate specificity regarding the Siegal Defendants' and Howard's participation in the scheme to defraud by alleging that a) they were directors and/or officers of the Corporate Defendants, which they owned, managed and controlled; and b) Howard had direct

² Annexed to the Affirmation in Opposition of Plaintiffs' counsel are copies of Vail Drilling's first set of Interrogatories to Luxenberg and request for document production in this case (Exs. 1 and 4); Subscription Agreement, PW&F-04 Drilling Company (Ex. 2) and Val Drilling's motion for summary judgment in lieu of complaint in a related action (Nassau County Index No. 16732-11), which was withdrawn (Ex. 3).

contact with the Plaintiffs through their financial advisor and made false representations regarding the investments, their performance and the purchase of bonds to cover Plaintiffs' obligations on the notes; 5) the Complaint details the role and participation of each Corporate Defendant in the fraud and also alleges that Vail Drilling was supposed to drill for oil and gas or sublet the drilling for the leased parcels, but did not do; 6) the Complaint properly alleges aiding and abetting causes of action against Defendants by alleging that each of them had actual knowledge of the fraud and provided substantial assistance in that fraud by promoting and concealing the fraud through the preparation of false promotional materials, false drilling records, and false financial books and records, etc.; 7) Plaintiffs have properly pled the breach of fiduciary duty and fraudulent concealment claims by alleging that they relied on Richard's claimed expertise in an area about which they were unfamiliar; 8) the breach of contract claim against Vail Drilling is viable by virtue of the allegations in the Complaint that the Plaintiffs, through the Partnerships, entered into contracts directly with Vail Drilling which breached its duties and obligations under those contracts; 9) with respect to the declaratory judgment claim, the Complaint adequately informs the Defendants that Plaintiffs seek a declaration that all of the promissory notes entered into are void; and 10) with respect to the cause of action for an accounting, the Complaint establishes a basis for a fiduciary duty owed by Richard to the Plaintiffs, and by the other Defendants who aided and abetted Richard in breaching his fiduciary duty.

RULING OF THE COURT

A. Dismissal Standards

CPLR § 3211(a)(7) provides that a party may move for judgment dismissing one or more causes of action asserted against him on the grounds that the pleading fails to state a cause of action. It is well-settled that the Court must deny a motion pursuant to CPLR § 3211(a)(7) if the factual allegations contained in the Complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading, accept the facts alleged as true and accord to the Plaintiff every favorable inference which may be drawn from the pleadings. *Leon v. Martinez*, 84 N.Y.2d 83 (1994).

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

B. Relevant Causes of Action

The essential elements of a cause of action sounding in fraud are 1) a misrepresentation or a material omission of fact which was a) false and known to be false by defendant and b) made for the purpose of inducing the other party to rely upon it, 2) justifiable reliance of the other party on the misrepresentation or material omission, and 3) injury. *Colasacco v. Robert E. Lawrence Real Estate*, 68 A.D.3d 706 (2d Dept. 2009), quoting *Orlando v. Kukielka*, 40 A.D.3d 829, 831 (2d Dept., 2007). Where it is alleged that the defendant fraudulently concealed a material fact, the plaintiff must establish that the defendant had a duty to disclose the subject information. *Sitar v. Sitar*, 61 A.D.3d 739, 741 (2d Dept. 2009).

CPLR § 3016(b) provides that where a cause of action is based upon fraud or misrepresentation, the circumstances constituting the wrong shall be stated in detail. The purpose of this pleading requirement is to inform a defendant of the incidents which form the basis of the action. *Pludeman v. Northern Leasing Systems*, 10 N.Y.3d 486, 491 (2008). Moreover, a plaintiff seeking to recover for fraud and misrepresentation is required to set forth specific and detailed factual allegations that the defendant personally participated in, or had knowledge of the alleged fraud. *Friedman v. Anderson*, 23 A.D.3d 163, 166 (1st Dept. 2005), *rearg. den.*, 2006 N.Y. App. Div. LEXIS 592 (1st Dept. 2006). Nevertheless, where it is impossible to state the circumstances constituting the fraud in detail, CPLR § 3016(b) should not be so strictly interpreted as to prevent plaintiff from asserting an otherwise valid cause of action. *Id.* Thus, the CPLR does not require unassailable proof at the pleading stage. Rather, the complaint must allege the basic facts to establish the elements of the cause of action. *Id.* at 492.

The issue of justifiable reliance is generally one of fact. *Braddock v. Braddock*, 60 A.D.3d 84, 88 (1st Dept. 2009). A sophisticated investor who acquires a business is, however, under an affirmative duty to protect himself from misrepresentations by the seller by investigating the business he is acquiring and the details of the transaction. *Global Minerals & Metals Corp. v. Holme*, 35 A.D.3d 93, 100 (1st Dept. 2006), *app. den.*, 8 N.Y.3d 804 (2007).

To plead a cause of action to recover damages for aiding and abetting fraud, the complaint must allege the existence of an underlying fraud, knowledge of the fraud by the aider and abettor, and substantial assistance by the aider and abettor in the achievement of the fraud. *Winkler v. Battery Trading, Inc.*, 89 A.D.3d 1016, 1017 (2d Dept. 2011).

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986). *See also JP Morgan Chase v. J.H. Electric*, 69 A.D.3d 802 (2d Dept. 2010) (complaint sufficient where it adequately alleged existence of contract, plaintiff's performance under contract, defendant's breach of contract and resulting damages).

The elements of a claim for breach of fiduciary duty are: 1) existence of a fiduciary relationship, 2) misconduct, and 3) damages directly caused by the wrongdoer's misconduct. *Fitzpatrick House III, LLC v. Neighborhood Youth & Family Services*, 55 A.D.3d 664 (2d Dept. 2008); *Kurtzman v. Bergstol*, 40 A.D.3d 588, 590 (2d Dept. 2007).

A fiduciary relationship exists between two persons when one of them is under a duty to act for or give advice for the benefit of another upon matters within the scope of the relation. Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions. Generally, where parties have entered into a contract, courts look to that agreement to discover the nexus of the parties' relationship and the particular contractual expression establishing the parties' interdependency. If the parties do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them. It is fundamental, however, that fiduciary liability is not dependent solely upon an agreement or contractual relationship between the fiduciary and the beneficiary but results from the relationship. *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19-20 (2005).

A cause of action for aiding and abetting breach of fiduciary duty requires a *prima facie* showing of 1) a fiduciary duty owed to plaintiff by another, 2) a breach of that duty, 3) defendant's substantial assistance in effecting the breach, and 4) resulting damages. *Keystone Int'l v. Suzuki*, 57 A.D.3d 205, 208 (1st Dept 2008).

A claim for negligent misrepresentation requires the plaintiff to demonstrate 1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart

correct information to the plaintiff, 2) that the information was incorrect; and 3) reasonable reliance on the information. *J.A.O. Acquisition Corp. v. Stavitsky*, 8 N.Y.3d 144, 148 (2007), *rearg. den.*, 8 N.Y.3d 939 (2007).

CPLR § 3017(b) provides that, in an action for a declaratory judgment, the demand for relief in the complaint shall specify the rights or other legal relations on which a declaration is requested and state whether further or consequential relief is or could be claimed and the nature and extent of any such relief which is claimed.

The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest. *Center for Rehabilitation & Nursing at Birchwood, LLC, v. S & L Birchwood, LLC*, 92 A.D.3d 711, 713 (2d Dept. 2012).

C. Statute of Limitations

An action based upon fraud shall be commenced within the greater of six years from the date the cause of action accrued or two years from the time the plaintiff discovered the fraud or could with reasonable diligence have discovered it. CPLR § 213(8). A cause of action accrues, for the purpose of measuring the period of limitations, when all of the facts necessary to the cause of action have occurred so that the party would be entitled to relief in court. *Poughkeepsie v. Espie*, 41 A.D.3d 701, 704 (2d Dept. 2007), *app. dismiss.*, 9 N.Y.3d 1003 (2007), quoting *Matter of Motor Veh. Acc. Indem. Corp. v. Aetna Cas.*, 89 N.Y.2d 214, 221 (1996). A cause of action alleging fraud accrues at the time the plaintiff possesses knowledge of facts from which the fraud could have been discovered with reasonable diligence. *Poughkeepsie*, 41 A.D.3d at 705 (town's cause of action for fraud accrued when it executed more expensive lease agreement that defendant, allegedly falsely, represented was necessary for unexpected renovations costs).

D. Application of these Principles to the Instant Action

1. First Cause of Action-Fraud against the Estate and Administrator
Second Cause of Action-Fraud against all Defendants except Richard
Tenth Cause of Action-Fraud against the Estate, Administrator, Howard
and Drilling

The Complaint sufficiently alleges with particularity that Richard made false representations of material fact with the intent to defraud, and Plaintiffs were damaged upon their reasonable reliance on those representations. Accordingly, the Court denies Defendants' motion

to dismiss the causes of action for fraud by Richard, as alleged against the Estate and Administrator in the first and tenth causes of action.

The Complaint, however, is devoid of any specific allegations of representation, misrepresentation or omission by Gail, Bippy, Jeffrey, Michael, Howard, Bistate Dist., Bistate Mgt., Palace, Oil and Gas Title and Vail Drilling which induced Plaintiffs to invest or to continue investing in the oil and gas ventures, or any statement that could be attributable to them as to the investments or taxable deductions. Moreover, the allegations in the Complaint do not give rise to a reasonable inference that any Defendant except Richard participated in or had actual knowledge of any fraudulent acts as alleged in the Complaint. Plaintiffs have failed to particularize the allegations as to each Defendant, as required when fraud is claimed against multiple parties. Accordingly the Complaint does not adequately allege claims of fraud in the second or tenth causes of action as to Defendants Gail, Bippy, Jeffrey, Michael, Howard, Bistate Dist., Bistate Mgt., Palace, Oil and Gas Title and Vail Drilling and the Court dismisses the second and tenth causes of action as to those Defendants.

2. Third Cause of Action- Fraudulent Concealment against Estate and Administrator
Fourth Cause of Action-Fraudulent Concealment against Defendants except Richard

In light of the allegations of Plaintiffs' lack of knowledge regarding the investments at issue and their reliance on Richard's specialized expertise and superior knowledge regarding oil and gas drilling investments and tax deductions applicable to IDC, Richard had a duty to disclose material and correct information to them. Accordingly, the Court denies Defendants' motion to dismiss the third cause of action, alleging fraudulent concealment against the Estate and Administrator.

In light of the Court's conclusion that Plaintiffs have failed sufficiently to allege a claim of fraud against Defendants other than Richard, however, the Court dismisses the fourth cause of action alleging fraudulent concealment against Gail, Bippy, Jeffrey, Michael, Howard, Bistate Dist., Bistate Mgt., Palace, Oil and Gas Title and Vail Drilling.

3. Fifth Cause of Action - Aiding and Abetting Richard's fraud against all Defendants except Richard
Eleventh Cause of Action - Aiding and Abetting Richard's, Vail Drilling and Howard's fraud against Gail, Bippy, Jeffery, Michael, Bistate Dist., Bistate Mgt., Palace and Oil and Gas Title

The assertions in the Complaint that the Defendants, other than Richard, had actual knowledge of the fraud and provided substantial assistance in advancing the fraud are insufficient to satisfy the pleading requirements of CPLR §3016(b) where, as here, there are no allegations specific to any of the Defendants other than Richard. Accordingly, the Court dismisses the aiding and abetting fraud claims against Defendants Gail, Bippy, Jeffrey, Michael, Howard, Bistate Dist., Bistate Mgt., Palace, Oil and Gas Title and Vail Drilling contained in the fifth and eleventh causes of action.

4. Sixth Cause of Action-Breach of Fiduciary Duty against the Estate and Administrator
Seventh Cause of Action-Aiding and Abetting Breach of Fiduciary Duty against all Defendants except Richard

The allegations in the Complaint sufficiently assert a cognizable breach of fiduciary claim as to Richard. Given, however, that there are no allegations of any direct contact or relationship with any of the other Defendants, or any specific allegations as to their providing substantial assistance to effect the breach, the claims against them for aiding and abetting a breach of a fiduciary duty cannot stand. Accordingly, the Court dismisses the cause of action for aiding and abetting a breach of fiduciary duty as asserted against Defendants Gail, Bippy, Jeffrey, Michael, Howard, Bistate Dist., Bistate Mgt., Palace, Oil and Gas Title and Vail Drilling.

5. Eighth Cause of Action-Negligent Misrepresentation against the Estate and Administrator
Ninth Cause of Action-Negligent Misrepresentation against all Defendants except Richard

The allegations in the Complaint regarding Plaintiffs' lack of knowledge and Richard's specialized expertise and superior knowledge support the imposition of a duty on Richard to provide Plaintiffs with correct information, and further support the conclusion that Plaintiffs justifiably relied on that information and were injured due to the incorrect information. Thus, the cause of action for negligent misrepresentation against Richard is viable.

In light of the lack of specific allegations of any expertise of the remaining Defendants,

any representations made by the remaining Defendants, or any description of a relationship between the Plaintiffs and the remaining Defendants, the Court dismisses the negligent misrepresentation claim against Defendants Gail, Bippy, Jeffrey, Michael, Howard, Bistate Dist., Bistate Mgt., Palace, Oil and Gas Title and Vail Drilling.

6. Twelfth Cause of Action-Breach of Contract against Vail Drilling

Plaintiffs have alleged that Plaintiffs, through the Partnerships, entered into drilling contracts directly with Vail Drilling and executed notes to secure the Partnerships' obligation to pay Vail Drilling. Plaintiffs have also alleged that they are intended beneficiaries of the contracts between Vail Drilling and Plaintiff's Partnerships. The Court concludes that the allegations in the Complaint sufficiently assert a cognizable cause of action for breach of contract as against Vail Drilling.

7. Thirteenth Cause of Action-Declaratory Judgment against all Defendants

The Complaint does not identify the individual promissory notes and the parties to the notes, or allege that the Defendants have any interest, obligations or rights with respect to the notes. In their opposition to Defendants' motions, however, Plaintiffs provide an affidavit of Howard in a related action in which Howard makes reference to and provides copies of two notes executed in 2004 (*see* Ex. 3 to Schlesinger Aff. in Opp.). Accordingly, the Court dismisses the cause of action for declaratory relief against all parties, except as to the Plaintiffs' two Subscription Notes to pay PW & F-04 Drilling Company, executed by Weitz, as Maker on June 21, 2004, and by Luxenberg, as Maker on June 29, 2004.

8. Fourteenth Cause of Action-Accounting against all Defendants

As the Complaint only alleges with sufficient particularity a fiduciary relationship and breach of duty by Richard, the claim for an accounting is dismissed as against all Defendants except the Estate and the Administrator.

The Court also concludes that the documentary evidence relied on by the Defendants, in particular the Subscription Agreements the Plaintiffs entered into 2003, 2004 and 2005, do not conclusively establish or contradict the allegations of fraud, misrepresentation or fiduciary claims contained in the Complaint. While those agreements contain Plaintiffs' representations as to their reliance on communications with the Managing Partner in investing in the partnerships and state that Plaintiffs had the opportunity to verify the investments, the Court concludes that the

documentation submitted does not conclusively dispose of the Plaintiffs' fraud, misrepresentation and fiduciary duty claims alleged against Richard in light of the misrepresentations allegedly made by Richard to Plaintiffs.

The Court denies Defendants' motion to dismiss the Complaint to the extent that it asserts causes of action concerning investments predating 2005. The fraudulent acts that form the basis of the earliest claims in the Complaint occurred when the Plaintiffs initially invested and claimed the tax deductions in 1996. Accordingly, Plaintiffs were required to commence the claims based upon the fraudulent acts within six years of accrual or within two years of discovery of the fraud. The Court must, however, accept as true the allegations in the Complaint that Plaintiffs and Defendants agreed to toll the applicable statute of limitations periods from November 19, 2010 through May 31, 2011 (¶ 50), and Plaintiffs did not discover Defendants' wrongdoing until the spring of 2009 when they received a "60 day letter" from the IRS informing them their 2003 tax deductions were disallowed and all representations made about the investments by Richard and the other Defendants were false (¶¶ 45 and 46).

The Court has before it allegations which include that 1) Richard advised the Plaintiffs that an IRS audit on the IDC tax deductions was normal and expected but the deductions would eventually be approved; and 2) Defendants assumed control of the audit by supplying attorneys and accountants to interact with the IRS on behalf of the Plaintiffs. The Court cannot determine, at this juncture, when Plaintiffs should have discovered the alleged fraud and whether the 2006 IRS audit notice should have put Plaintiffs on notice of the alleged fraud. As the allegations raise factual issues as to the timeliness of the claims which cannot be determined on these motions, the Court denies Defendants' motions to dismiss the Complaint to the extent that the allegations pertain to investments predating 2005.

In light of the foregoing, the Court 1) grants the motions to dismiss all claims against Gail Siegal (individually), Bippy Siegal, Jeffrey Siegal, Michael Siegal, Paul Howard, Bistate Oil Distribution Corp., Bistate Oil Management Corp., Palace Exploration Company, Oil and Gas Title Holding Company; and 2) grants the motion to dismiss the second, fourth, fifth, seventh, ninth, tenth and fourteenth causes of action in the Complaint against Vail Drilling Company, Inc.; 3) dismisses the thirteenth cause of action in the Complaint for a declaratory judgment against all parties, except as it may apply to Vail Drilling Company, Inc., with regard to the two Subscription Notes to pay PW & F-04 Drilling Company, executed by Weitz, as Maker

on June 21, 2004, and Luxenberg, as Maker on June 29, 2004; and 4) denies the motion to dismiss the Complaint against the Estate and Administrator, except that the Court dismisses the claim for a declaratory judgment, as set forth in the thirteenth cause of action, against the Estate and Administrator.

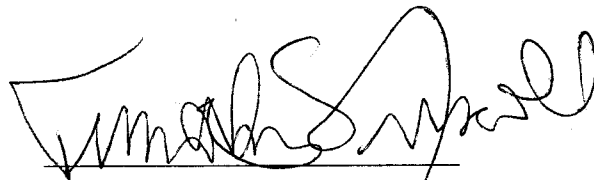
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for Plaintiffs and counsel for the remaining Defendants of their required appearance before the Court for a Preliminary Conference on June 19, 2012 at 9:30 a.m.

ENTER

DATED: Mineola, NY
May 25, 2012



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
JUN 07 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE