[* 1]

SHORT FORM ORDER ORIGINAL INDEX No. 2942-12

SUPREME COURT - STATE OF NEW YORK
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 9/14/12
ADJ. DATES 11/30/12
Mot. Seq. # 003 - MG
CDISP Y____ N x

BARBARA IRVIN individually and as General Partner of the Irvin Family Limited Partnership, Plaintiffs, -against- THOMAS JONES and JONES, LITTLE & CO., CPAS, LLP, Defendants.	VANDENBERG & FELIU, LLP Attys. For Plaintiffs 60 E. 42nd St. New York, NY 10165 LANDMAN, CORSI, *et. al.* Attys. For Defendants 120 Broadway New York, NY 10271

Upon the following papers numbered 1 to _____ read on this motion for partial dismissal of the plaintiff's complaint; Notice of Motion/Order to Show Cause and supporting papers 1 - 6; and 7-8 (Memo of Law in Support); Notice of Cross Motion and supporting papers _____; Answering papers 9-10 (Memo of Law in Opposition) _____; Replying Affidavits and supporting papers 11-12 Reply Memo of Law; Other _____; and after hearing counsel in support and opposed to the motion it is,

ORDERED that this motion (#003) by the defendants for an order dismissing the FIRST and THIRD causes of action and a portion of the SECOND cause of action set forth in the plaintiffs' amended complaint is considered under CPLR 3211(a) and is granted.

This action arises out of the purported misdeeds of the defendants who were retained as accountants in 2002 by the now deceased husband (George) of the plaintiff, Barbara Irvin, to perform personal financial accounting services *(see* Amended Complaint ¶ 8, attached as Exhibit A to affirmation of defense counsel Jacobs). The services included monthly personal bill payment, bookkeeping and tax reporting services for Mr. & Mrs. George Irvin. Sometime after such retention, the health of George Irvin deteriorated to such an extent that plaintiff Barbara Irwin took over the role of interfacing with the defendants with respect their performance of these accounting duties (*see* Amended Complaint ¶¶ 8-9 .

In June of 2005, the Irvins, together with their two adult daughters, Barnett and Di Lonardo, formed the plaintiff partnership, entitled the Irvin Family Limited Partnership [hereinafter "IFP"](*see* Amended Complaint ¶ 10). Under the terms of the partnership agreement, George and Barbara were named as general partners while the two daughters were named as limited partners. The purpose of

the partnership was to provide a vehicle by which the Irvins' personal finances were managed. Upon the death of George Irvin in February 2008, plaintiff Barbara Irwin allegedly assumed the role of sole general partner of the plaintiff IFP and allegedly "placed total responsibility for managing the IRF with the Defendants" (*see* Amended Complaint ¶ 11). Defendants are further alleged to have "controlled every aspect of Mrs. Irvin's finances" (*see* Amended Complaint ¶ 12).

In paragraphs 15- 30 and 46-56 of the amended complaint, the defendants are charged with self-dealing and breaches of fiduciary duties as they purportedly "utilized Mrs. Irvin's funds to benefit themselves at Mrs. Irvin's detriment"(*see* Amended Complaint ¶ 15). Such conduct began as early as August of 2003, when the defendants allegedly made loans and other payments totaling some $721,000 to various entities with "connections to the defendants" (*see* Amended Complaint ¶¶ 12 -19). In 2004, the defendants allegedly caused the Irvins to borrow money from Jones related entities the proceeds of which were used to fund loans to other of such entities (*see* Amended Complaint ¶ 21). Also in 2004, the defendants' used Irvin funds totaling $200,000.00 to invest in the development of a residential spec house in Watermill, New York, which investment was lost in 2009 when the house was sold without repayment of the $200,000.00 "loan" (*see* Amended Complaint ¶¶ 22-23). The defendants are further charged with self dealing in orchestrating the November of 2006 investment of some $3,312,000.00 of IFP plaintiff's assets in an office building in Cincinnati, Ohio (*see* Amended Complaint ¶ 24). This "TIC" investment was allegedly made without the defendants' engagement in due diligence and with knowledge that it was an ill-suited and imprudent investment for the IFP (*see* Amended Complaint ¶¶ 25-28). The defendants are further charged with other defalcations with respect to this investment, including the making of false and misleading statements regarding the availability an exit strategy two years prior to the end of IFP's receipt of positive returns on such investment that occurred in the second half of 2010 (*see* Amended Complaint ¶¶ 29-30).

The defendants are further charged with "defective services" in connection with the preparation of tax returns for the years 2006 and 2007 that culminated in the filing of at least one tax lien against the residential real property of plaintiff Barbara Irvin situated in Westhampton Beach, New York (see Amended Complaint ¶¶ 31- 40 and 59-67). Damages for all losses associated with alleged imprudent investments that are the subject of the FIRST cause of action and those attributable to faulty tax services that resulted in tax liabilities for the years 2006 and 2007 of not less than $134,795.11 are alleged to have been incurred by reason of the defendants' professional malpractice (*see* Amended Complaint ¶ 67)..

At some unidentified time, Di Lonardo allegedly learned that the defendants failed to timely pay her mother's monthly household bills (*see* Amended Complaint ¶ 42). On September 17, 2009, plaintiff Barbara Irvin allegedly discovered "some of the Defendants' mismanagement " and thus appointed her daughter Di Lonardo attorney-in-fact to act on the individual plaintiff's behalf with respect to matters of personal finance (*see* Amended Complaint ¶ 42). In such capacity, Di Lonardo immediately terminated the defendants' engagement as manager of the Mrs. Irvin's monthly expenses (*see* Amended Complaint ¶ 42). On October 21, 2011, Di Lonardo terminated the defendants as "accountants and financial advisors" to the estate of George Irvin and the trust plaintiff, IFP, except with respect to resolving the issue of the liability arising under the 2006 and 2007 tax returns filings of plaintiff, Barbara Irvin *(id.)*.

The amended complaint contains three causes counts or causes of action. In the FIRST, the defendants are charged with breaching fiduciary duties owing to the individual plaintiff. The conduct complained of includes advising, permitting, orchestrating and undertaking to invest the personal monies belonging to plaintiff Barbara Irvin in the unwise, unsuitable and imprudent investments identified in paragraphs 1-30 and 41-42 of the amended complaint. They are further charged with misleading plaintiff Barbara Irvin into making unfavorable loans and in investing in the TIC. Plaintiff Barbara Irvin demands recovery of damages in amounts equal to lost capital expenditures including the $200,000.00 invested in the Watermill spec house, the interest paid on funds borrowed from the Jones related entities together with all lost returns on loans made to such entities as well as the value of lost capital and lost opportunities by reason of her investment in the TIC building and punitive damages.

In the SECOND cause of action, the plaintiff Barbara Irvin charges the defendants with professional malpractice with respect the defalcations alleged in paragraphs 31-40 and 42 of the amended complaint. Money damages incurred by reason of the 2006 and 2007 tax filings in the amount of $134,795.11 and the recovery of all lost investments and some lost opportunities are demanded. In the THIRD and last cause of action advanced in the complaint, the plaintiffs charge the defendants with the duty to render an accounting of all investments, monies or holdings managed, invested, redeemed paid or otherwise disbursed by the defendants on behalf of or in the name of the plaintiffs since 2002.

By the instant motion, the defendants seek dismissal of all claims except those portions of the malpractice claims set forth in the SECOND cause of action that arise from the purportedly negligent preparation of the 2006 and 2007 personal income tax returns of plaintiff Barbara Irvin. For the reasons stated below the motion is granted.

The legal standard to be applied in evaluating a motion to dismiss pursuant to CPLR 3211(a)(7) is whether "the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" (***Marist College v Chazen Envtl. Serv.***, 84 AD3d 1181, 923 NYS2d 695 [2d Dept 2011], quoting ***Sokol v Leader***, 74 AD3d 1180, 1180–1181, 904 NYS2d 153 [2d Dept 2010]). On such a motion to dismiss, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see* ***Goshen v Mutual Life Ins. Co. of N.Y.,*** 98 NY2d at 314, 326, 746 NYS2d 858 [2002]; ***Leon v Martinez***, 84 NY2d 83, 87, 614 NYS2d 972 [1994]). However, bare legal conclusions and factual averments flatly contradicted by the record are not presumed to be true (*see* ***Simkin v Blank***, 19 NY3d 46, 945 NYS2d 222 [2012]); ***Khan v MMCA Lease, Ltd.***, ___ AD3d ____, 2012 WL 5870341 [2d Dept 2012]; ***U.S. Fire Ins. Co. v Raia***, 94 AD3d 749, 942 N.Y.S.2d 543 [2d Dept 2012]; ***Parola, Gross & Marino, P.C. v Susskind***, 43 AD3d 1020 [2d Dept 2007]).

Where a party offers evidentiary proof on a motion pursuant to CPLR 3211(a)(7) and such proof is considered but the motion has not been converted to one for summary judgment, "the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it ... dismissal should not eventuate" (***Guggenheimer v Ginzburg***, 43 NY2d 268, 275, 401 NYS2d 182 [1997]; *see* ***Bua v Purcell & Ingrao, P.C.,*** 99 AD3d 843, 952 NYS2d 592 [2d Dept 2012]; ***Jannetti v Whelan***, 97 AD3d 797,

949 NYS2d 129 [2d Dept 2012]); ***Bokhour v GTI Retail Holdings, Inc***., 94 AD3d 682, 941 NYS2d 675 [2d Dept 2012]). Upon a court's consideration of evidentiary material, a motion to dismiss pursuant to CPLR 3211(a)(7) should be granted only when: (1) it has been shown that a material fact alleged in the complaint is not a fact at all; and (2) there is no significant dispute regarding it (*see* ***Cucco v Chabau Cafe Corp***., 99 AD3d 965, 952 NYS2d 463 [2d Dept 2012]; ***Norment v Interfaith Ctr. of New York***, 98 AD3d 955, 951 NYS2d 531 [2d Dept 2012]; ***Basile v Wiggs***, 98 AD3d 640, 950 NYS2d 148 [2d Dept 2012]). However, the burden never shifts to the nonmoving party to rebut a *defense* asserted by the moving party *(see* ***Quiroz v Zottola,*** 96 AD3d 1035, 948 NYS2d 87 [2d Dept 2012]; ***Sokol v Leader***, 74 AD3d 1180, *supra*). "Thus, a plaintiff 'will not be penalized because he [or she] has not made an evidentiary showing in support of his [or her] complaint' " (*id.* at 1181, 904 NYS2d.2d 153, quoting ***Rovello v Orofino Realty Co.***, 40 NY2d 633, 635, 389 NYS2d 314 [1976]).

In contrast, motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted only if the documentary evidence that forms the basis of the defense resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim (*see* ***AG Capital Funding Partners, L.P. v State St. Bank and Trust Co.***, 5 NY3d 582, 590–591, 808 NYS2d 573 [2005]; ***Bua v Purcell & Ingrao, P.C.*** 99 AD3d 843, 952 NYS2d 592 [2d Dept 2012]; ***Fontanetta v Doe,*** 73 AD3d 78, 898 NYS2d 569 [2d Dept 2010]). To qualify as "documentary," the evidence relied upon must be unambiguous and undeniable in a manner like judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, and contracts. Documents compiled the parties such as affidavits, notes, accounts, depositions, correspondence and the like generally do not constitute documentary evidence within the ambit of CPLR 3211(a)(1) (*see* ***Granada Condominium III Assn. v Palomino***, 78 AD3d 996, 913 NYS2d 668 [2d Dept 2010]; ***Fontanetta v. Doe,*** 73 AD3d 78, *supra*). If the documentary evidence disproves an essential allegation of the complaint, dismissal is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (*see* ***Peter F. Gaito Architecture, LLC v. Simone Dev. Corp***., 46 AD3d 530 846 N.Y.S.2d 368 [2d Dept 2007]).

"On a motion to dismiss a complaint pursuant to CPLR 3211(a)(5) on statute of limitations grounds, the moving defendant must establish, prima facie, that the time in which to commence the action has expired" (***Vilsack v Meyer***, 96 AD3d 827, 946 NYS2d 595 [2d Dept 2012], quoting ***Zaborowski v Local 74, Serv. Empls. Intl. Union, AFL–CIO***, 91 AD3d 768, 768–769, 936 NYS2d 575 [2d Dept 2012], quoting ***Baptiste v Harding-Marin***, 88 AD3d 752, 930 NYS2d 670 [2d Dept 2011]). Where such a showing is made, the burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable (*see* ***Vilsack v Meyer,*** 96 AD3d 827, *supra*; ***Baptiste v Harding-Marin,*** 88 AD3d 752, *supra*).

The statute of limitations applicable to claims for nonmedical professional malpractice is the three year time limitation period imposed by CPLR 214 which mandates that all such claims "regardless of whether the underlying theory is based in contract or tort" be interposed within three years of the date of accrual (CPLR 214[6]; *see* ***Symbol Technologies, Inc. v Deloitte & Touche***, 69 AD3d 191, 888 NYS2d 538 [2d Dept ,2009]). The limitations period begins to run from the time of the alleged malpractice, not from the time of discovery (*see* ***Shumsky v Eisenstein***, 96 NY2d 164, 166, 726 N.Y.S.2d 365 [2001]; ***Tsafatinos v Lee David Auerbach, P.C.***, 80 AD3d 749, 915 NYS2d 500 [2d Dept 2011]). In the context of a malpractice action against an accountant, the claim "accrues upon the client's receipt of the accountant's work product since this is the point that a client reasonably relies

on the accountant's skill and advice" (***Rodeo Family Enterprises, LLC v Matte***, 99 AD3d 781, *supra*; ***Weiss v Deloitte & Touche, LLP.***, 63 AD3d 1045, 882 NYS2d 229 [2d Dept 2009], quoting ***Ackerman v Price Waterhouse,*** 84 NY2d 535, 541, 620 NYS2d 318 [1994]).

The continuous representation doctrine, where applicable, will operate to toll the running of the statute of limitations for professional malpractice claims until the completion of the professional's ongoing services concerning the matter out of which the malpractice claim arises (***Williamson v PricewaterhouseCoopers LLP***, 9 NY3d 1 at 9–10, 840 N.Y.S.2d 730 [2007]; ***Rodeo Family Enterprises, LLC v Matte***, 99 AD3d 781, 952 NYS2d 581 [2d Dept 2012]). The doctrine, where applicable, does not alter the accrual date of the claim , but instead operates solely to toll an applicable limitations period *(see* ***McCoy v. Feinman,*** 99 N.Y.2d 295, *supra*; ***Tsafatinos v Lee David Auerbach, P.C.***, 80 AD3d 749, *supra*; ***Levin v PricewaterhouseCoopers***, 302 AD2d 287, *supra*). Moreover, the continuous representation doctrine applies only where there has been continuous representation as to the specific matter at issue rather than a continuing general relationship (*see* ***Weiss v Deloitte & Touche, LLP***, 63 AD3d 1045, *supra*), and "a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim" (***McCoy v Feinman***, 99 NY2d 295, 306, 755 NYS2d 693 [2002]; ***Rodeo Family Enterprises, LLC v Matte***, 99 AD3d 781, *supra*).

The statute of limitations applicable to breach of fiduciary duty claims is variable as it depends on the substantive remedy that the plaintiff seeks (*see* ***IDT Corp. v Morgan Stanley Dean Witter & Co.***, 12 NY3d 132, 879 NYS2d 355 [2009]; ***Loengard v Santa Fe Indus.***, 70 NY2d 262, 266, 519 NYS2d 801 [1987]; ***Scott v Fields***, 85 AD3d 756, 759, 925 NYS2d 135 [2d Dept 2011]). Where the remedy sought is monetary in nature, courts construe the claim as alleging "injury to property" within the meaning of CPLR 214(4), which has a three-year limitations period (*see* ***IDT Corp. v Morgan Stanley Dean Witter & Co.***,12 NY3d 132, *supra*, at 139; ***Monaghan v Ford Motor Co.,*** 71 AD3d 848, 897 NYS2d 482 [2d Dept 2010]; ***Yatter v Morris Agency***, 256 AD2d 260, 261, 682 NYS2d 198 [1st Dept.1998]). Where, however, the relief sought is equitable in nature, or an allegation of fraud is essential to a breach of fiduciary duty claim, a six year limitations period of CPLR 213(1) or 213(8) apply, respectively (*see* ***IDT Corp. v Morgan Stanley Dean Witter & Co.***,12 NY3d 132, *supra*, at 139; ***Loengard v Santa Fe Indus***, 70 NY2d 262, *supra* at 266–267, *supra*). Equitable or fraud claims that are merely incidental to the monetary claim will not get the benefit of the longer six year period of limitations (*see* ***IDT Corp. v Morgan Stanley Dean Witter & Co.***,12 NY3d 132, *supra;* ***Pursani v Stylish Move Sportswear, Inc.***, 92 AD3d 663, 938 NYS2d 333 [2d Dept 2012]; ***Carbon Capital Management, LLC v American Exp. Co.***, 88 AD3d 933, 932 NYS2d 488 [2d Dept 2011]; ***Monaghan v Ford Motor Co.,*** 71 AD3d 848, *supra*).

First considered by the court are those portions of the defendants' motion for summary judgment dismissing so much of the plaintiffs' SECOND cause of action in which they seek damages under theories of professional malpractice of all claimed losses associated with the loans and investments that are the subject of the plaintiffs' FIRST cause of action. Specifically, the defendants claim, among other things, that the malpractice claims resting upon the 2003-2005 loans, the 2004 investment in the Watermill spec house and the 2006 TIC investment in the Cincinnati office building are time barred when measured by the three year statute of limitations applicable to professional malpractice claims under the provisions of CPLR 214(6). Defendants contend that these claims

accrued more than three years prior to the commencement of this action in 2012. Continuing, the defendants contend that unlike the faulty tax services claims that comprise the remainder of the SECOND cause of action, no toll or extension of the three year limitations period is applicable to the plaintiff's demands for recovery of losses associated with the loans and investments for which damages are demanded in the SECOND cause of action sounding in malpractice. With these contentions the court agrees and finds that the defendants have met their prima facie burden of establishing that these targeted malpractice claims are time barred (*see* CPLR 214; ***Rodeo Family Enterprises, LLC v Matte***, 99 AD3d 781, *supra*; ***Weiss v Deloitte & Touche, LLP.***, 63 AD3d 1045, *supra*; ***Symbol Technologies, Inc. v Deloitte & Touche***, 69 AD3d 191, *supra*).

It was thus incumbent upon the plaintiffs to demonstrate that an issue of fact exists as to whether the statute of limitations is tolled or is otherwise inapplicable (*see* ***Vilsack v Meyer***, 96 AD3d 827, *supra*; ***Baptiste v Harding-Marin***, 88 AD3d 752, *supra*). The plaintiffs' claim that a six year statute of limitations is applicable to the SECOND cause of action is rejected as unmeritorious (*see* CPLR 214). The true nature of the plaintiffs' claims sound in tort (see ***Ackerman v Price Waterhouse***, 84 NY2d 535, *supra*). They are thus not contractual or equitable in nature nor are they sufficiently predicated upon allegations of fraud to warrant application of the six year limitations period or two year period from discovery that is may be applied to claims of fraud (*see* ***IDT Corp. v Morgan Stanley Dean Witter & Co.***, 12 NY3d 132, *supra*; ***Pursani v Stylish Move Sportswear, Inc.***, 92 AD3d 663, *supra*; ***Carbon Capital Management, LLC v American Exp. Co.***, 88 AD3d 933, *supra*; ***Monaghan v Ford Motor Co.,*** 71 AD3d 848, *supra*). Moreover, any claim that the continuous representation doctrine tolls the targeted investment portions of the plaintiffs' SECOND cause of action has been abandoned by the plaintiffs (*see* Section A on page 9 of the Plaintiffs' Memorandum of Law in Opposition to defendants' motion). Those portions of this motion by the defendants wherein they seek dismissal pursuant to CPLR 3211 (a)(5) of all claims are advanced in the plaintiffs' SECOND cause of action, except those relating to the "faulty tax services", are thus granted.

Next considered are those portions of the defendants' motion wherein they seek dismissal of the FIRST cause of action set forth in the plaintiffs' complaint. Therein, the defendants are charged with breaching fiduciary duties that were owing to the plaintiffs by virtue of the individual plaintiff's transfer of responsibility over her personal finances and partnership assets to the defendants for purposes of management and investment. These claims rest on allegations of self-dealing and conflicts with respect to the loans to Jones related entities; the $200,000.00 investment in the Watermill spec house which was being developed by a Jones related entity; improvidence and negligence on the part of the defendants in recommending and undertaking the $3,300,000.00 investment in the TIC office building in Cincinnati and in misrepresenting material facts with respect thereto as well as engagement in wanton and malicious acts of deception. The defendants' demands for dismissal of this FIRST cause of action are premised on various grounds, including, legal insufficiency, legal defenses based on documentary evidence and untimeliness under applicable statutes of limitations.

First considered is the defendants' claim that no fiduciary duties were owing from the defendants to the plaintiffs. While it is generally recognized that there is no fiduciary relationship between an accountant and his or her client (*see* ***Caprer v Nussbaum***, 36 AD3d 176, 825 NYS2d 55 [2d Dept 2006]; ***Friedman v Anderson,*** 23 AD3d 163, 166, 803 NYS2d 514 [1st Dept 2005]; ***Atkins Nutritionals, Inc. v Ernst & Young***, LLP 301 AD2d 547, 754 NYS2d 320 [2d Dept 2003]; ***DG***

Liquidation v Anchin, Block & Anchin, 300 AD2d 70, 750 NYS2d 753 [1st Dept 2002]), the existence of special and/or additional circumstances may transform that conventional, arms length, business relationship into one of trust and confidence. Where one party is possessed of superior skill or knowledge in the subject matter of the relationship so as to induce reasonable reliance by the other party to the transaction, the law will impose fiduciary duties on the part of the non-reliant party (*see* ***Staffenberg v Fairfield Pagma Associates, L.P.***, 95 AD3d 873, 944 NYS2d 568 [2d Dept 2012]; ***Bullmore v Ernst & Young Cayman Islands***, 45 AD3d 461, 846 NYS2d 145 [1st Dept 2007]; ***Caprer v Nussbaum***, 36 AD3d 176, *supra*; ***Lavin v Kaufman, Greenhut, Lebowitz & Forman***, 226 AD2d 107, 640 NYS2d 57 [1st Dept 1996]). In the discipline of accounting, the special circumstances that may transform the customary relationship into one of trust and confidence include the rendering of financial investment advice and/or the entrustment of funds to the accountant for such purposes (*see* ***Palmetto Partners, L.P. v. AJW Qualified Partners***, 83 AD3d 804, 921 NYS2d 260 [2d Dept 2011]; ***Bullmore v Ernst & Young Cayman Islands***, 45 AD3d 461, *supra*; ***Brooks v Key Trust Co. N.A.***, 26 AD3d 628, 630, 809 NYS2d 270 [3d Dept 2006]; ***Caprer v Nussbaum***, 36 AD3d 176, *supra*; ***Rasmussen v A.C.T. Environmental Services Inc***., 292 AD2d 710, 739 N.Y.S.2d 220 [3d Dept 2002]; ***Lavin v Kaufman, Greenhut, Lebowitz & Forman***, 226 AD2d 107, *supra*; ***Davis v CCF Capital Corp.***, 277 AD2d 342, 717 NYS2d 207 [2d Dept 2000]).

Here, the defendants' moving papers failed to establish any legal insufficiency in the pleading of the existence of a fiduciary relationship in the FIRST cause of action that would warrant dismissal of such cause of action under CPLR 3211(a)(7). Nor did the moving papers establish that the defendants possess a legal defense to the plaintiffs' pleaded claims of a fiduciary relationship that is based upon documentary evidence of the type contemplated by CPLR 3211(a)(1) (*see generally* ***EBC I, Inc. v Goldman Sachs & Co.*** 5 NY3d 11, 799 NYS2d 170 [2005]; ***Carbon Capital Management, LLC v. American Exp. Co.*** , 88 AD3d 933, *supra*). The defendants' demands for dismissal of the plaintiffs' FIRST cause of action, to the extent premised upon the absence fiduciary duties owing from the defendants to the one or more of the plaintiffs, are thus rejected as unmeritorious.

The defendants' claims that the plaintiffs' FIRST cause of action is time barred under applicable statutes of limitations does, however, have merit. Whether measured by the six year limitations period set forth in CPLR 213 (1) or the three year period set forth in CPLR 214(3), all purported breaches of fiduciary duties, with the exception of the TIC Cincinnati building investment made in November of 2006, occurred more than six years prior to the commencement of this action. All of the plaintiffs' claims for breach of fiduciary duties except for the TIC investment, have thus been shown, prima facie, to be time barred.

The TIC Cincinnati building investment is untimely only if the three year statute of limitations is applicable thereto. This court finds that such three year period is applicable because: the true nature of the plaintiffs' claim is sounds in tort as it is principally a claim for money damages arising from the alleged loss of the $3,300,000,00 capital investment and the lost opportunity attendant therewith. The claim is thus not dependent upon allegations of fraud or the elements of claim for equity.

The existence of the plaintiffs' demand for the equitable remedy of an accounting does not effect a transformation of the plaintiffs breach of fiduciary duty claim into a one that is equitable in nature. As indicated above, the principal remedy sought by the plaintiffs is monetary in nature. The

plaintiffs' pursuit of the equitable remedy of an accounting is incidental to their money damages claim since an accounting would serve merely as a vehicle for the ascertainment of the amount of the money damages sought on the breach of fiduciary duties claim (*see* ***Carlingford Center Point Assocsv MR Realty Associates, L.P.***, 4 AD3d 179, 772 NYS2d 273 [1st Dept 2004]). Nor does the existence of allegations of purportedly misleading, fraudulent and/or conflicted conduct on the part of the defendants transform the plaintiffs' breach of fiduciary claim into a fraud based claim. These allegations lack the specificity required for the pleading of fraud claims that are imposed by CPLR 3016(b) *(see* ***Rotterdam Ventures, Inc. v Ernst & Young LLP***, 300 AD2d 963, 752 NYS2d 746 [3d Dept 2002]; ***LaSalle Nat. Bank v Ernst & Young LLP***, 285 AD2d 101, 729 NYS2d 671 [1st Dept 2001]). In addition, these allegations are not the focus of, nor are they essential to, the plaintiffs' claim for recovery of money damages by reason of the defendants' purported breaches of fiduciary duties (*see* ***IDT Corp. v Morgan Stanley Dean Witter & Co.***,12 NY3d 132, *supra*, at 139; ***Pursani v Stylish Move Sprotswear, Inc.***, 92 AD3d 663, *supra*). Rather, the plaintiffs claims rest principally on the defendants' negligence in the rendering of investment advice; their lack of engagement in due diligence and other research failures with respect to the suitability of the loans and the other investments into which they pledged the Irvins' funds; failures to disclose the defendants' interests in the Jones related entities; the failure to sufficiently diversify among liquid and non-liquid investments; the payment of inadequate returns on investments and lost opportunities with respect to the funds loaned and invested; and failures on the part of the defendants to observe, heed and transmit warnings about the risks associated with the capital investments made in the Watermill spec house and the TIC office building.

Upon its review of the complaint, the court finds that the allegations of fact advanced in the plaintiffs' complaint that may fairly be construed as sounding in demands for equitable relief or in claims of fraud are merely incidental to the monetary claim and that the inclusion of such allegations do not entitle the plaintiffs to the benefit of the longer six year period of limitations (*see* ***IDT Corp. v Morgan Stanley Dean Witter & Co.***,12 NY3d 132, *supra;* ***Pursani v Stylish Move Sportswear, Inc.***, 92 AD3d 663, *supra*; ***Carbon Capital Management, LLC v American Exp. Co.***, 88 AD3d 933, *supra*; ***Monaghan v Ford Motor Co.,*** 71 AD3d 848, *supra*). The defendants have thus made a prima facie showing that the plaintiff's FIRST cause of action is time barred with respect to all claims including the TIC investment in the Cincinnati office building.

It was thus incumbent upon the plaintiffs to demonstrate that an issue of fact exists as to whether the statute of limitations is tolled or is otherwise inapplicable (*see* ***Vilsack v Meyer,*** 96 AD3d 827, *supra*; ***Baptiste v Harding-Marin,*** 88 AD3d 752, *supra*). In an effort to satisfy this burden, the plaintiffs resort to the continuous representation doctrine so as to reap the benefits of the toll that operates upon application of the doctrine. Unfortunately, the plaintiffs failed to demonstrate that the continuous representation doctrine is applicable to their breach of fiduciary duty claims which purportedly arise out defalcations different from those which are the subject of the plaintiffs' professional malpractice claims.

Admittedly, the continuous representation doctrine is rooted in cases of medical and other professional malpractice (*see* pp. 11-12 of the plaintiffs' Memorandum of law in Opposition, citing ***Williamson ex rel Lipper Convertibles v PricewaterhouseCoopers., L.P.***, 9 NY3d 1, 840 NYS2d 730 [2007]). However, various case authorities have considered it applicable in determining whether the toll arising therefrom may be save otherwise untimely claims to recover damages for breaches of

fiduciary duties against professionals (*see* ***Girarratano v Silver***, 26 AD3d 1053, 847 NYS2d 698 [3rd Dept 2007]; ***Lavin v Kaufman, Greenhut, Lebowitz & Forman***, 226 AD2d 107, 640 NYS2d 57 [1st Dept 1996]; ***Zaref vBerk & Michaels, P.C.***, 192 AD2d 346, 595 NYS2d 772 [1st Dept 1993]; *cf.*, ***Rodeo Family Enterprises, LLC v Matte***, *99 AD3d 781, supra* [*"The continuous representation doctrine tolls the running of the statute of limitations for professional malpractice until the completion of the professional's ongoing services....."*]; ***Serino v Lipper***, 47 AD3d 70, 846 NYS2d 138 [1st Dept 2007]). Where the period of limitations applied to claims for breach of fiduciary duties is the the three year period under CPLR 214(6) that is applicable to claims to recover damages for professional malpractice due to the nature of the fiduciary duties claims, application of the continuous treatment doctrine is not precluded as a matter of law (*see* ***Girarratano v Silver***, 26 AD3d 1053, *supra*).

The defendants nevertheless argue that the continuous representation doctrine is not available to the plaintiffs because such a doctrine is available only to claims of professional malpractice or claims of fiduciary duty that are based on professional malpractice. The defendants emphasize that the plaintiffs' breach of fiduciary claims are not based on the plaintiffs' professional malpractice claims, as such fiduciary duty claims have been carefully edited out of the plaintiffs' professional malpractice claims on this motion. According to the defendants, the result of such editing, the breach of fiduciary duty claims are tort based claims to recover damages for injury to property which are governed by the three year statute of limitations set forth in CPLR 214(4), to which the continuous representation doctrine should not be applied. The court, finds however, that the distinction relied upon by the defendants is one having no effect upon the applicability of the continuous representation doctrine in cases such as the instant one where the breach of fiduciary claim is lodged at defendants engaged in a professional relationship with the plaintiff and the claim arises therefrom.

Nevertheless, the continuous representation doctrine applies only where there has been continuous representation in the subject matter at issue by the defendant professional rather than a continuing general relationship (*see* ***Weiss v Deloitte & Touche, LLP***, 63 AD3d 1045, *supra*), and there was "a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim" (***McCoy v Feinman***, 99 NY2d 295, 306, 755 NYS2d 693 [2002]; *see* ***Rodeo Family Enterprises, LLC v Matte***, 99 AD3d 781, *supra*; ***Fownes Brothers & Company, Inc. v JPMorgan Chase & Co.***, 92 AD3d 582, 939 NYS2d 367 [1st Dept 2012]). A review of the record adduced on this motion reveals that the plaintiffs failed to demonstrate the existence of pleaded facts sufficient to warrant a finding that the continuous representation doctrine is or might be applicable to their claims of fiduciary breaches with respect to any of the investments at issue including the TIC Cincinnati building investment (*see* ***Williamson v PricewaterhouseCoopers LLP,*** 9 NY3d 1, 10–11, *supra*; ***Rodeo Family Enterprises, LLC v Matte***, 99 AD3d 781, *supra;* ***Fownes Brothers & Company, Inc. v JPMorgan Chase & Co.***, 92 AD3d 582, *supra;* ***Zaref v Berk & Michaels, P.C.***, 192 AD2d 346, *supra*). There are no pleaded allegations that there was any "mutual understanding of the need for further representation" after the initial investments were made, Instead, only the nuanced allegations set forth in¶ 45 of the amended complaint that "the parties contemplated the Defendants' representation would continue with respect to the investments" are before the court, all of which are premised solely upon bare legal conclusions drawn from surmise and conjecture on the part of the plaintiffs alone. These allegations are legally insufficient as they are devoid of allegations of a mutual understanding of continuing representation and they were not further elaborated upon in the plaintiffs' opposing papers. The court thus finds that the defendants' prima facie of showing of the untimeliness

of the plaintiffs' FIRST cause of action was not rebutted (*see* ***Zaref v Berk & Michaels, P.C.***, 192 AD2d 346, *supra*). Accordingly, such cause of action wherein the plaintiffs seek damages, including punitive damages, by reason of the defendants' purported breaches of fiduciary duties, are dismissed as time-barred pursuant to CPLR 3211(a)(5).

Also granted are the remaining portions of the defendants' motion wherein they seek dismissal of the plaintiffs' FIRST cause of action on an alternate ground of legal insufficiency and dismissal of the THIRD cause of action for an accounting also on the grounds of legal insufficiency. With respect to the FIRST cause of action, the court finds that to the extent that such cause of action may be read as asserting "holder" claims, *i.e.*, that the plaintiffs' were wrongfully induced by the defendants to hold rather than sell the TIC and other investments, such claims are not actionable under New York law. The "out-of-pocket rule" limits the recovery of damages for fraud to the actual pecuniary loss sustained as a direct result of the wrong and precludes recovery of profits which might have been realized but for the wrongful conduct (*see* ***Tradex Global Master Fund SPC LTD v Titan Capital***, 95 AD3d 586, 944 NYS2d 527 [1st Dept 2012]; ***Starr Foundation v American Intern. Group, Inc.***, 76 AD3d 25, 901 NYS2d 246 [1st Dept 2010]). The plaintiffs' demands for recovery of punitive damages that are advanced into the FIRST cause of action are also legally insufficient in as much as the plaintiffs failed to allege facts sufficient to demonstrate that the conduct of the defendants rose to the level of moral culpability which must be reached to support a claim for punitive damages *(see* ***Atkins Nutritionals, Inc. v Ernst & Young, LLP.***, 301 AD2d 547, 754 NYS2d 320 [2d Dept 2003]).

With respect to the plaintiffs' THIRD cause of action for an accounting, the court finds that it too is legally insufficient in as much as the plaintiffs failed to demonstrate that the money damages potentially available to them on their sole surviving malpractice claim that is premised upon allegedly faulty tax services provides an inadequate remedy at law or that the defendants owed a fiduciary duty to the individual plaintiff with respect to the tax return services at issue (*see* ***Weinstein v Natalie Weinstein Design Associates***, 86 AD3d 641, 928 NYS2d 305 [2d Dept 2011]; ***Friedman v Anderson***, 23 AD3d 163, 803 NYS2d 514 [1st Dept 2005]).

In view of the foregoing, the instant motion is granted. Counsel are reminded that a status conference is scheduled for March 8, 2013, at which time the court shall inquire into the schedule of discovery with respect to the claims remaining and other related matters.

Dated: December 13, 2012

THOMAS P. WHELAN, J.S.C.