SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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ANDREW TARGUM, an individual; ERIKA TARGUM, an individual; ANDREW S. TARGUM, P.C., a New York corporation; ANDREW SCOTT TARGUM, P.C., a New York corporation; TARGUM, BRITTON & TOLUD, LLP, a New York limited liability partnership; and IRWIN SEEMAN, an individual,

Plaintiffs,

Decision/Order
Index No. 650665/2014

-against-

CITRIN COOPERMAN & COMPANY, LLP, a New York limited liability partnership; MATTHEW G. WEBER, an individual, and LORRAINE WEBER, an individual,

Defendants.

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HON. SALIANN SCARPULLA, J.:

Before me is a summary judgment motion which was converted from defendant Citrin Cooperman & Company, LLP's ("Citrin") motion to dismiss, pursuant to CPLR 3211 (a) (1), (2), (5), and (7), the causes of action as against it and to strike the demands for attorneys' fees and punitive damages.

This action arises out of the conduct of defendant Matthew G. Weber, an accountant who misappropriated money from plaintiff attorney, Andrew Targum, Esq. ("Targum"), his wife Erika Targum (together, the "Targums"), Andrew S. Targum, P.C., Andrew Scott Targum, P.C., Targum, Britton & Tolud, LLP ("TBT"), Targum's law firm

(collectively, the "Targum plaintiffs"), and Irwin Seeman ("Seeman" and collectively with the Targum plaintiffs, "plaintiffs"). Seeman was a former Andrew S. Targum, P.C. employee.

Defendant Citrin is the accounting firm of which Weber was a partner when his misconduct was discovered. Also named as a defendant is Lorraine Weber, Weber's wife. After discovering Weber's misconduct, Citrin and the Targum plaintiffs have each alleged claims against the other, seeking to recover some of the losses each sustained as a result of Weber's unlawful conduct.

Targum and Weber were longstanding friends. In 1989, Weber became employed by the accounting firm Richard Friedman & Associates, C.P.A., P.C. ("Friedman"). In 1990, Weber began providing tax preparation and related services for the Targums, and Weber continued to prepare the Targums' taxes through 1999, while Weber was at Friedman. In 2000, Weber began working for Financial Appraisal Services, Ltd. ("FAS"). During his years at FAS, Weber continued to do accounting work for the Targums.

Weber left FAS, and in August 2004, became a partner at Citrin. At Citrin, Weber was under the direct supervision of Gary Karlitz ("Karlitz"), the leader of Citrin's Valuation Services, Forensic Services, and Forensic Accounting Group ("VSFSFA Group"). At Citrin, Weber signed Partnership and Admission Agreements. The Admission Agreement provided that "Weber shall provide professional services only on

behalf of [Citrin]." The Amended and Restated Partnership Agreement, dated as of January 1, 2007, states, "[t]he Partnership shall charge reasonably for all professional services rendered by it following generally the policies of the firm as to the fees charged from time to time. However, each Partner may serve professionally, without charge, any individual member of his own immediate family."[1]

In 2005, Weber and FAS were sued for accounting malpractice by Harry and Amy Cederbaum (the "Cederbaums"), in connection with tax returns Weber prepared for them at FAS. On January 3, 2007, Weber, represented by Gerard Britton of TBT, was deposed in that lawsuit and testified, among other things, that the Cederbaums were never FAS clients, but, rather, were his private clients. At his deposition, Weber claimed that FAS's owner and Weber split the cost of accounting software, and the owner permitted Weber to use it for his private clients. Because FAS's software was used, some of the

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[1] The versions of the Partnership Agreement submitted by Citrin on this motion are highly redacted. However, in its complaint against the Targum plaintiffs ("Citrin Action"), Citrin alleges as follows:

> Partnership Agreement § 2.8 provides: "There shall be paid over by a Partner to the Partnership all fees, executors and trustee fees, commissions, salaries and gratuities and any other compensation which any Partner may receive in any form which is attributable to his personal services unless such services are entirely unrelated to the practice of public accounting, the time devoted to such services are incidental in nature, and such services are not performed for or on behalf of a client of the firm."

Cederbaums' tax returns were imprinted with FAS's owner's name as the tax preparer, even though Weber allegedly prepared the tax returns himself.

After Weber was sued by the Cederbaums in 2005, Weber and Targum entered into an agreement (the "barter agreement"), whereby Targum agreed to represent Weber free of charge in the Cederbaum lawsuit in exchange for Weber providing the Targum plaintiffs with free accounting services. Targum claims that he first represented Weber in the Cederbaum action in May 2005.

As a result of the barter agreement, the Targum plaintiffs never incurred any accounting fees for the work performed by Weber during the time he was a Citrin partner through 2012, *i.e.*, a period of about seven years. Moreover, Cooperman avers that Targum never filled out a new client entry form and was never assigned a client number by Citrin.[2] *Id.* at 25-26.

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[2] When a new client was brought into the firm, Citrin created "a new client entry form," and the client was assigned a client number. Cooperman tr in Bardach case at 24; *see also* Karlitz aff of 10/03/14, ¶ 2. Clients received invoices which contained the assigned client number. Cooperman tr in Bardach case at 36-37. Payments were to be made out to Citrin, not to an individual, and were to be deposited in Citrin's bank account, not an individual account. *Id.* at 21-22. It is undisputed that the Targum plaintiffs never made any payments to Citrin.

During the time that Weber worked at Citrin, Targum saw Weber at Citrin's office in connection with the services Weber performed for the Targum plaintiffs, and Weber used Citrin's telephone, email, fax machine, and stationery for Targum matters. Targum also received some Citrin memos on tax matters from Weber.

In addition, Targum claims that Weber would allegedly, at chance meetings, introduce Targum to other Citrin employees as a Citrin client. At times, the tax returns which Weber prepared for the Targums were printed with Citrin as the firm, setting forth Citrin's address and employer identification number. At other times, the returns stated that Weber was the tax preparer, with a notation that Weber was self-employed, and listing M. Weber, C.P.A. as the firm, with Weber's Oceanside home address.

Targum alleges that on April 5, 2005, Weber advised Targum that his first quarterly tax payments to the city and state had to be sent, and that Targum should wire the payments to Weber's Citrin account. That account was not actually Citrin's, but was Weber's personal account in the name of Matthew Weber, c/o Citrin, setting forth Citrin's address.

Weber, thereafter ostensibly filed the Targums' tax returns, which they had reviewed and signed, for 2004 through 2010, and Targum wired numerous tax payments, to Weber's accounts. In fact, Weber did not file the Targums' tax returns which had been properly prepared, later filed falsified returns for some years, which showed

substantially lower earnings, and, hence, artificially lower tax obligations, and, for some years, never filed any returns at all.

In August 2008, Weber prepared a New York State Department of Taxation and Finance form giving him power of attorney over the Targums' 2004-2006 tax returns, forging the Targums' signatures, which signatures were purportedly witnessed by two Citrin employees, Elda Solla ("Solla"), who worked as an administrative assistant for Weber, as well as for many other Citrin partners, and Thomas Grohs ("Grohs"). That document gave Weber's address as c/o Citrin. Weber, in 2011, setting forth his address at Citrin, also prepared a forged IRS power of attorney allowing him to act for the Targums in connection with their 2007-2009 1040 tax returns.

As for Seeman, he alleges that he first retained Weber's services to prepare his personal and corporate tax returns in 2000, when Weber was employed at FAS, and that he continued to use Weber's services when he became a Citrin partner. Seeman claims that he regularly met with Weber in his Citrin office, called him at, and faxed his tax materials to, that office, and, on one amended tax return, Citrin's name, address, and employer identification number appear.

On February 15, 2012, Jordan Bardach ("Bardach") and Imagine Marketing Group, LLC served Citrin with a complaint naming it and Weber as defendants. Weber had long known Bardach, and some years later, Bardach engaged Weber to prepare his and his business's tax returns. Bardach alleges that Weber, while at Citrin, failed to file his and

the business's 2005-2010 tax returns and remit money to the taxing authorities, and, instead, misappropriated the money Bardach had given him.

Niles Citrin transcribed notes of a meeting, held on February 28, 2012, which was also attended by Weber, Karlitz, and "JAC," who, presumably, is Cooperman. The notes indicate that during the meeting, Weber stated that, aside from Bardach and his family members, he had never prepared tax returns for anyone else, except for Andy Targum. During the meeting, Weber was fired and cut off from all direct and remote access to the firm, but, offered assistance "if he came clean." Weber, after stating that Citrin "had nothing to do with any of this," admitted that he "owes some money to the IRS." "JAC" expressed that Citrin had to notify Weber's clients, particularly any who received tax notices. During the meeting, Weber admitted that he had stolen approximately $100,000 from Targum.

After that meeting, also on February 28, 2012, Cooperman sent a form letter to Targum and Seeman. In the letter, Targum and Seeman were advised that Citrin had recently learned that Weber, who was no longer affiliated with the firm, had been independently performing tax-related and perhaps other services, all in violation of his Partnership Agreement, without the firm's knowledge or authorization, and without each letter's recipient having been a firm client. Citrin advised Targum and Seeman that Weber had informed the firm that he may not have filed certain of their tax returns and

may not have made tax payments to the appropriate authorities and "suggest[ed] that [they] immediately consult with an independent accountant and/or attorney."

Weber pled guilty in February 2013 to an indictment in connection with his unlawful conduct toward the Targums, Bardach, and a receivership that benefitted two children, as well as for his own failure to file taxes. He agreed to pay restitution to those individuals for the sums taken, including $828,128 to Targum. Weber admitted that he had stolen the Targums' wired tax payments, used up much of it, and had transferred some to accounts in his or his wife's name. Weber also conceded, during his allocution, that he had misrepresented to Targum that the account was a Citrin account, and "created the impression that this [payment] process was both known to and accepted by Citrin Cooperman, and more efficient for the taxpayer." Weber also admitted some of his misdeeds as to the filing and failure to file, including the falsification of certain tax returns.

In August 2012, Citrin commenced an action in this court against the Targum plaintiffs for aiding and abetting Weber's breach of fiduciary duty and tortious interference with his contract. The next month, the plaintiffs in this action filed a complaint in the United States District Court, Southern District of New York ("federal court"), against the defendants, Solla, and Cooperman, asserting federal claims and pendent state causes of action. The federal court dismissed that action in November 2013, having found the federal causes of action lacking, but indicated that the state claims

should be determined in state court. In December 2013, Citrin was awarded more than $2,000,000, on default, in its arbitration against Weber.

On February 28, 2014, plaintiffs commenced this action. In the complaint plaintiffs allege that Weber was acting within the scope of his authority at Citrin and within the scope of Citrin's business, "and TARGUM and SEEMAN were not aware and had no reason to be aware of any limitation on WEBER's authority to act on CITRIN's behalf." Plaintiffs further allege that there was an accountant-client relationship between Citrin and the Targum plaintiffs and Citrin and Seeman. The complaint also alleges that plaintiffs had no reason to suspect that the accounts were not Citrin's or "that WEBER and CITRIN were, and had been, *inter alia*, altering and submitting under-reported tax returns for TARGUM, failing to file necessary tax returns for TARGUM, creating fraudulent documents, and/or converting TARGUM's funds."

As to Seeman, it is alleged that "SEEMAN had no idea at that time that WEBER and CITRIN were, and had been, altering and submitting under-reported tax returns for SEEMAN, failing to file necessary tax returns for SEEMAN, and failing to properly protect the interests he had entrusted to WEBER and CITRIN." It is also alleged that Weber and Citrin failed to file certain forms with the Social Security Administration to allow Seeman to get larger Social Security payments, and that Seeman received invoices and payment demands from Citrin.

Plaintiffs charge Weber and other Citrin employees with engaging in a fraudulent scheme against the Targum plaintiffs and Seeman. The other allegedly complicit Citrin employees include Solla, Grohs, Vera Fici, a Citrin administrative assistant, and Michael Lester ("Lester"), a former Citrin partner. Plaintiffs allege that people on Citrin's management team were aware that Weber had been filing tax returns using Citrin's resources, including its support staff. Plaintiffs note that Citrin, in its action against the Targum plaintiffs, asserted that Weber had been preparing and filing tax returns for as many as 150 people and businesses as allegedly private, and not Citrin, clients.

Plaintiffs allege that Citrin had the obligation to monitor "the usage of CITRIN computers and CITRIN's EIN to monitor and prevent fraud and other crimes of dishonesty from being perpetrated with its electronic systems." Plaintiffs further allege that the firm had knowledge "that WEBER and other CITRIN Partners and employees were utilizing CITRIN computers and EIN to review, prepare, and send false and altered documents that were fraudulently given to TARGUM and SEEMAN and governmental authorities; and CITRIN recklessly ignored that information and did nothing to halt or address that practice."

Plaintiffs contend that "CITRIN's computer system contains electronic data showing that WEBER -- or other CITRIN Partners, employees, or agents under his control and/or with his authorization -- accessed the CITRIN computer database to prepare tax documents for TARGUM under the client identifier 'WEBTARG - Targum, Andrew."

The complaint charges Citrin with vicarious liability for Weber's actions, and alleges that "CITRIN affirmed and ratified the actions undertaken in the course of the Tax Fraud Scheme, whether explicitly or by implication, each year WEBER was permitted to use CITRIN's resources in the manner described herein."

In their complaint, plaintiffs assert twelve causes of action, with the Targum plaintiffs and Seeman each bringing claims for breach of fiduciary duties against Citrin and Weber; professional negligence against Citrin and Weber; common law fraud against Weber; negligence against Citrin and Weber; and negligent supervision against Citrin. The Targum plaintiffs additionally bring claims for fraudulent conveyance against Weber and Lorraine Weber and conversion against Weber. Plaintiffs seek compensatory damages and attorneys' fees on all causes of action, and punitive damages on the breach of fiduciary duty, negligent supervision, and conversion causes of action.

Weber, in his answer, concedes that he had a professional relationship with the Targum plaintiffs, but denies that the Targum plaintiffs had any such relationship with Citrin, contending that "TARGUM was aware of the fact that WEBER was handling TARGUM'S tax and accounting matters on his own and not under the umbrella of CITRIN," and adding that the use of Citrin's resources was only for convenience. Weber admits that he breached his fiduciary duty toward the Targum plaintiffs, but as to this and every other cause of action alleged by the Targum plaintiffs against Citrin except the

negligent supervision cause of action, Weber asserts that Citrin had nothing to do with those claims.

Weber concedes that he committed the alleged acts of fraud which were the subject of his incarceration, and, to the same extent, admits the conversion claim. Regarding the fraudulent conveyance cause of action, Weber denies that his family members took funds knowing they were illegally obtained. As to the Targum plaintiffs' negligent supervision cause of action, "[Weber] assert[s] [his] fifth amendment privilege."

As for Seeman, Weber alleges that he never made any false statements to him about his returns and liabilities, and that his breach of fiduciary duty, professional negligence, negligence, and negligent supervision causes of action lack merit. In addition, Weber alleges that, if there was an under-reporting problem with Seeman's returns, it was a result of Seeman's own deficient record keeping.

Citrin now moves to dismiss the complaint pursuant to CPLR 3211(a)(1), (2), (5), and (7) and also moved to strike plaintiffs' request for punitive damages and attorneys' fees. In support of its motion, Citrin first argues that this Court lacks jurisdiction over Seeman's claims because his claims, seeking $50,000 in damages, do not meet the New York County Commercial Division monetary threshold. Second, Citrin argues that plaintiffs' claims are partially barred by the statute of limitations and that any claim accruing before September 12, 2009 is time-barred. Third, Citrin claims that plaintiffs' complaint fails to state claims against it and documentary evidence undermines plaintiffs'

allegations. Fourth, Citrin argues that the vicarious liability claims are subject to dismissal because Weber did not have Citrin's apparent authority, the documentary evidence demonstrates that his services were not provided "'in the usual way,'" and the complaint fails to allege that Weber provided services "'in the ordinary course'" of business. Citrin also asserts that plaintiffs' allegation that Citrin ratified Weber's actions is devoid of merit, because Citrin knew nothing about Weber's misconduct and received no benefits from it. Finally, Citrin seeks to dismiss the plaintiffs' claim for attorneys' fees, because there is no basis for an award of attorneys' fees, and to dismiss the claim for punitive damages, because plaintiffs allege in a conclusory fashion that Citrin acted in bad faith without any facts to support this claim.

During oral argument on Citrin's motion to dismiss, the Court gave notice to the parties that it was converting Citrin's motion to dismiss to a motion for summary judgment and invited the parties to make supplemental submissions.[3] In opposition to

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[3] Pursuant to CPLR 3211 (c), "the court, after adequate notice to the parties, may treat the motion [to dismiss] as a motion for summary judgment." "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The failure to meet that burden mandates the denial of the application, irrespective of the adequacy of the papers submitted in opposition. *Id.* Where the movant makes the requisite showing, the burden shifts to the non-moving party "'to produce evidentiary proof . . . sufficient to establish the existence of material issues of fact.'" *Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 320 (2009) (citation omitted).

Citrin's converted motion, plaintiffs initially argue that conversion of the motion to dismiss into one for summary judgment is improper. They also argue that neither an engagement letter nor a bill is required to establish an accountant-client relationship and support this assertion, in part, with the expert affidavit of CPA, Joseph Petrucelli ("Petrucelli"). Plaintiffs further claim that there are material questions of fact as to whether Citrin was negligent when it failed to detect Weber's fraud. Petrucelli opines that Citrin's lack of an appropriate quality control system directly caused plaintiffs' damages, relying, in part on 31 CFR, subtitle A, part 10, Treasury Department Circular No. 230 ("Circular 230"); 26 CFR 1.6695-1; and publications from the American Institute of Certified Public Accountants ("AICPA"). Plaintiffs also claim that Citrin is liable for Weber's actions under New York Partnership Law.

In opposition to Citrin's motion, plaintiffs also submit Seeman's affidavit. In this affidavit, Seeman denies the assertion that Citrin only provided limited forensic/valuation services, and claims that he retained Weber, as a Citrin partner, solely to do his personal and corporate tax returns, and believed that Citrin's invoices were overinflated for preparing tax returns. In reply, Citrin argues that the Targum plaintiffs have not shown an account-client relationship between themselves and Citrin. Moreover, Citrin argues that Targum knew of Weber's provision of on the side tax preparation services from his barter agreement with Weber whereby Targum provided legal representation to Weber during the Cederbaum lawsuit—a malpractice suit about Weber's on the side tax

preparation services—and Weber provided the Targum plaintiffs with tax preparation services. Without an accountant-client relationship, Citrin argues that the negligence claims are subject to dismissal, and the negligent supervision claim should also be dismissed because the harm was not foreseeable.

Citrin further argues that it should not be vicariously liable for Weber's actions because the theory of apparent authority is inapplicable here and liability cannot be found under the Partnership Law. Additionally, Citrin argues that discovery is not needed, Seeman's claims should be dismissed for failure to meet the Commercial Division's monetary threshold, and that claims that accrued prior to September 12, 2009 are not cognizable.

Finally, Citrin observes that the standards upon which Petrucelli relies apply only where there is an accountant-client relationship, and that, because that relationship is lacking between Citrin and plaintiffs, those standards are inapplicable. However, it argues that it nonetheless complied with the applicable responsibilities identified by the Targum plaintiffs.

As part of their reply submissions, Citrin submits the affidavit of Nicholas Florio ("Florio") and Lester. Florio, a Citrin partner, who was, during the relevant period, in charge of marketing, reviewed the three Citrin memos that the Targum plaintiffs submitted in opposition to this motion. He asserts that the memos would not have been part of Citrin's marketing department's "mass mailing," and "[i]nstead, such memos

would generally have been mailed by individual partners at their discretion after the partner directed an administrative assistant to handle the logistics of mailing." Florio conducted a review of Citrin's marketing database, and found that it did not contain the names of any of the Targum plaintiffs, but even if their names were there, he asserts that Citrin sends marketing materials to non-clients.

In his affidavit, Lester discusses the screenshots submitted by the Targum plaintiffs, which contain his user name—mlester—and show that this username accessed a Targum tax return for zero seconds on two occasions. Lester, "the tax administration partner," states that this appears to have occurred when the firm's computer system set up new tax return forms for the coming year for those whose returns from the prior year were in Citrin's computer system, that he does not recall reviewing Targums' returns, that "[p]rior to the discovery of Weber's wrongdoing, to the best of [his] recollection, [he] had never so much as heard the name Targum," and upon review of his time entries, he could not locate any entries for the Targum plaintiffs. Lester provides copies of similar returns with zero-second screen shots for other individuals to demonstrate that the shots were due to the creation of new tax return forms, and he further asserts that the time associated with the submitted screenshots had nothing to do with Citrin's billing records, but instead was automatically populated by the software.

Discussion

Monetary Threshold for Seeman's Claims

The plaintiffs argue that Citrin should be estopped from arguing that this Court lacks jurisdiction over Seeman's claims because Citrin requested that this case be assigned to the Commercial Division, and, in proceeding in this manner, it certified that it met the Commercial Division requirements. Further, they object to a severance of Seeman's claims and a transfer of his claims to a non-Commercial Division part. In reply, Citrin argues that it sought to have the case assigned to the Commercial Division, so that it would not forego the opportunity to do so on a timely basis, and that "[it] immediately sought judicial review of Seeman's claim by moving for a more definite statement." It further argues that "[t]o prevent jury confusion and to best serve the interests of judicial economy, it would be best to try Seeman's claims separately."

The branch of Citrin's motion, which seeks an order dismissing Seeman's claims on the ground that they do not meet the Commercial Division's monetary threshold is denied, inasmuch as there is a substantial overlap between the facts and issues concerning Seeman's claims and the other plaintiffs' claims. Further, trying the Seeman claims with the remaining claims fosters judicial economy.

The Targum Plaintiffs' Negligence, Professional Negligence, Breach of Fiduciary Duty, and Negligent Supervision Claims

"It is well established that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff. In the absence of duty, there is no breach and without a breach there is no liability." *See Pulka v Edelman*, 40 NY2d 781, 782 (1976) (internal citations omitted). An accountant owes a duty "to the party contracting for the accountant's services," *see William Iselin & Co., Inc. v Landau*, 71 NY2d 420, 425 (1988),[4] but "accountants do not have a duty to the public at large." *Parrot v Coopers & Lybrand, L.L.P.*, 263 AD2d 316, 319 (1st Dept 2000), *aff'd* 95 NY2d 479 (2000). Similarly, an accountant-client relationship is a necessary element to the Targum plaintiffs' fiduciary duty claim. *See Tal v Superior Vending, LLC*, 20 AD3d 520, 521 (2d Dept 2005). Thus, the Targum plaintiffs' negligence claims, as well as its claim for breach of fiduciary duty, depend entirely upon a finding that the Targum plaintiffs were Citrin clients.

Citrin has submitted substantial evidence to show that it did not have an accountant-client relationship with the Targum plaintiffs. Unlike other Citrin clients,

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[4] *See William Iselin*, 71 NY2d at 425 (". . . the accountant . . . has a duty to exercise due care in performance of its engagement. That duty runs primarily, of course, to the party contracting for the accountant's services. In the absence of a contractual relationship between the accountant and the party claiming injury, the potential for accountant liability is carefully circumscribed.").

Citrin did not have an engagement agreement with the Targum plaintiffs. No invoices were ever issued by Citrin to the Targum plaintiffs,[5] and Targum never paid Citrin for any of Weber's accounting services.[6] Further, it is undisputed that the Targum/Weber barter agreement was solely between Targum and Weber. Weber himself states that Citrin had nothing at all to do with his barter agreement with Targum, and that Targum knew that Weber was working individually for the Targum plaintiffs, not in his capacity as a partner of Citrin. Finally, the only person who worked on the Targum plaintiffs tax returns was Weber.

In opposition, the Targum plaintiffs submit the generic Citrin memos they allegedly received, which were addressed to "Our Clients."[7] The Targum plaintiffs also submit some of the tax returns Weber prepared for the Targum plaintiffs which contain Citrin's

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[5] While Petrucelli argues that an accountant-client relationship does not require bills, as Citrin notes, Weber's Partnership Agreement did require him to charge for the services provided.

[6] The bank account to which Targum wired the tax payments was in Weber's name and was not Citrin's. The addition of "c/o" "does not indicate that the 'care of' entity has an interest in the property." *See* federal court opinion at 5 n. 21, citing *Nanyuan Shipping Co., Ltd. v Marimed Agencies UK*, 595 F. Supp. 2d 314, 317 (S.D.N.Y. 2009) and *Jackson v United States*, 526 F.3d 394, 397 (8th Cir. 2008).

[7] While Florio avers that the memos were mailed by individual partners and were not part of Citrin's mass mailings, plaintiffs should have the opportunity to test this assertion and obtain additional discovery on materials distributed to Citrin clients.

name on them, as well as a screen shot showing that Lester reviewed the returns for a length of time of 0:00.[8] Finally, the Targum plaintiffs' note that their tax notices were mailed to Citrin. This evidence, though underwhelming, at best, is sufficient to warrant an exchange of discovery as to whether there was an accountant-client relationship between Citrin and the Targum plaintiffs.

Accordingly, although I originally determined to convert this motion to a summary judgment motion, I decline at this time to dismiss the Targum plaintiffs' negligence, breach of fiduciary duty, professional negligence, and negligent supervision claims. Instead, I direct the parties to exchange discovery related to whether or not the Targum plaintiffs were clients of Citrin, and invite the parties to remake their summary judgment motions at the close of discovery. Additionally, I decline to rule on the issue of the scope of the alleged duty and foreseeability until I determine that a duty actually

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[8] In light of the screen shot, Petrucelli states that it "is impossible" that Lester never looked at the returns. Lester's asserts in his affidavit that when Weber's misconduct came to light at the firm, "[he] reviewed [his] time entries to see if [he] had . . . ever billed any time to matters related to Targum or his various firms. [He] was unable to locate any entries of this nature[, and] [i]t was [his] practice to enter [his] time and bill clients if [he] provided them with any services." I note that that the federal court took the screen shot at face value for the assertion that Lester spent no time looking at the returns. *See* federal court opinion at 26 (footnote omitted) ("The FAC — but not the SAC — included a screen shot of those records, showing that Lester accessed two of Plaintiffs' records for exactly zero seconds.").

exists.[9] Finally, to the extent that the Targum plaintiffs oppose Citrin's motion on the ground that they have a negligence and accounting malpractice claim against Citrin because, after the plaintiffs learned of Weber's theft, Citrin failed adequately and promptly to respond to their document requests, I note that the Targum plaintiffs have not asserted that claim in their complaint.

Seeman's Negligence, Professional Negligence, Breach of Fiduciary Duty, and Negligent Supervision Claims

"New York law does not provide any single limitations period for breach of fiduciary duty claims. Generally, the applicable statute of limitations for breach of fiduciary claims depends upon the substantive remedy sought." *Kaufman v Cohen*, 307 AD2d 113, 118 (1st Dept 2003) (internal citation omitted). When a plaintiff seeks damages for breach of fiduciary duty, then a court will apply a three-year limitations period, and when a plaintiff seeks equitable relief, a court will apply a six-year limitations period. *Id.* Additionally, "a cause of action for breach of fiduciary duty based on allegations of actual fraud is subject to a six-year limitations period." *Id.* at 119.

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[9] *See Sheila C. v Povich*, 11 AD3d 120, 125 (1st Dept 2004) (internal citations omitted) ("The threshold question in any negligence action is whether the alleged tortfeasor owes a duty of care to the injured party, and the existence and scope of that duty is a legal question for the courts to determine. . . . Moreover, foreseeability, a point raised by plaintiff, generally presents a factual question and does not determine the existence of duty, but, rather, the scope of that duty once it is determined to exist.").

Seeman's allegations are insufficient to make out a timely fiduciary duty claim because Seeman seeks damages for his breach of fiduciary duty claim, and Seeman has not brought a cause of action for fraud against Citrin. Therefore, Seeman's fiduciary duty claims are barred because they relate to actions that took place before September 12, 2009. *See* CPLR 205(a); *Kaufman*, 307 AD2d at 118, 122 n.4 ("the discovery accrual rule does not apply in cases of constructive fraud").[10]

A three-year limitations period applies to Seeman's negligence-based claims. *See Williamson v PricewaterhouseCoopers LLP*, 9 NY3d 1, 7-8 (2007) (internal citation omitted) ("An action for professional malpractice must be commenced within three years of the date of accrual. A claim accrues when the malpractice is committed, not when the client discovers it."); *Ackerman v Price Waterhouse*, 84 NY2d 535, 541 (1994) ("A cause of action charging that a professional failed to perform services with due care and in accordance with the recognized and accepted practices of the profession is governed by the three-year Statute of Limitations applicable to negligence actions."); *Green v Emmanual African M.E. Church*, 278 AD2d 132, 132 (1st Dept 2000) (Where "allegations

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[10] In opposition to the converted motion, Seeman submits the bills he received from Citrin, and, in reply, Citrin also submits invoices along with its Client Ledger for Seeman. These documents indicate that the services performed for Seeman were completed in 2007.

. . . [were] that [defendant] negligently hired and supervised [co-defendant]," then "[t]he relevant Statute of Limitations is, accordingly, three years.").

Seeman's negligence claims are untimely because the invoices and Client Ledger reveal that Seeman was billed for services completed in 2007, but the complaint was not filed in federal court until September 12, 2012. *See* CPLR 205(a); *Williamson*, 9 NY3d at 7-8; *Ackerman*, 84 NY2d at 541; *Green*, 278 AD2d at 132. Seeman also argues for the timeliness of his claims by means of the discovery rule and Citrin's alleged continuous representation of him. As noted above, Seeman fails to allege a fraud claim directly against Citrin, and therefore the discovery rule is inapplicable. *Cf. Kaufman*, 307 AD2d at 121-123.

"The continuous representation doctrine, although originally derived from the continuous treatment concept in medical malpractice cases, has also been held applicable to professionals other than physicians." *Zaref v Berk & Michaels, P.C.*, 192 AD2d 346, 347 (1st Dept 1993); *Williamson*, 9 NY3d at 9. To apply the doctrine here, Seeman must show "a course of representation as to the particular problems (conditions) that gave rise to plaintiff's malpractice claims," rather than "defendant's failures within a continuing professional relationship." *See Williamson*, 9 NY3d at 11; *Zaref*, 192 AD2d at 347-348 (internal citations omitted) ("However, the continuous representation must be in connection with the particular transaction which is the subject of the action and not merely during the continuation of a general professional relationship.").

Citrin has shown that the alleged continuous representation cannot toll the limitations period here. *See Williamson*, 9 NY3d at 11; *Zaref*, 192 AD2d at 347-348. As indicated by the submitted invoices and Client Ledger, no work was completed after 2007, and accordingly Seeman has neither alleged nor shown "that defendant and [Seeman] explicitly contemplated further representation regarding the [services rendered for Seeman]." *See Williamson*, 9 NY3d at 11; *see id.* ("Specifically, the Funds never engaged defendant to provide corrective or remedial services . . .. Nor were the Funds aware of the need for further representation as to the audits."). In response to this showing, Seeman has not raised an issue of fact. Accordingly, Seeman's claims against Citrin are dismissed as untimely.[11]

The Targum Plaintiffs' Vicarious Liability Claims

a. Partnership Law § 20 (1)

Partnerships, by their nature, are "based on the law of principal and agent." *Ederer v Gursky*, 9 NY3d 514, 522 (2007). Each partner is the partnership's agent

> for the purpose of its business, and the act of every partner . . . for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

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[11] For the reasons described above, the Targum plaintiffs' fiduciary duty and negligence-based claims are time barred if they arose prior to September 12, 2009.

Partnership Law § 20 (1).[12]

As to the Targum plaintiffs, Citrin has shown that the barter agreement between Weber and the Targum plaintiffs – that Targum would represent Weber free of charge in the Cederbaum matter in exchange for Weber preparing the Targum plaintiffs' tax returns – did not constitute "carrying on in the usual way the business of the partnership." *See id.* However, as I am permitting the parties to exchange discovery on the issue of whether the Targum plaintiffs were Citrin clients, I also decline at this time to dismiss this cause of action.

b. Partnership Law § 24

> Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

Partnership Law § 24. "Pursuant to Partnership Law § 24, a tort by one partner committed in the scope of partnership business, renders the partnership liable." *Somer & Wand, P.C. v Rotondi*, 219 AD2d 340, 343 (2d Dept 1996); *see also Dupree v Voorhees*, 68 AD3d 807, 809 (2d Dept 2009) (quoting Partnership Law §§ 24 and 26(a)(1) and

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[12] However, "[a]n act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners." Partnership Law § 20 (2).

stating "[t]he pivotal test for liability in this regard is whether the wrong was committed on behalf of and within the reasonable scope of the partnership business, not whether the wrongful act was criminal in nature, or whether the other partners condoned the offending partner's actions."); *Swersky v Dreyer and Traub*, 219 AD2d 321, 329 (1st Dept 1996) (". . . the trial court properly found that because the alleged misconduct was conducted within the scope of the partnership's business, the firm may be held liable to the same extent as the individual defendant.").

As stated above, the Targum plaintiffs have raised an issue of fact as to whether they were clients of Citrin. I therefore decline to grant summary judgment dismissing this claim.

c. Partnership Law § 25 and Apparent Authority

Plaintiffs additionally argue that Citrin may be held liable because Weber acted with apparent authority. A partnership must "make good the loss: 1. Where the partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it." Partnership Law § 25.[13]

> Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the

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[13] Partnership Law § 25 (2) states that a partnership is responsible "[w]here the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership." However, this section is inapplicable to the Targum plaintiffs because, as Citrin notes, the Targum Plaintiffs made no payments to Citrin.

> agent possesses authority to enter into a transaction. The agent cannot by his own acts imbue himself with apparent authority. Rather, the existence of apparent authority depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal -- not the agent.

Hallock v State of New York, 64 NY2d 224, 231 (1984) (citation and internal quotation marks omitted). "The mere creation of an agency for some purpose does not automatically invest the agent with 'apparent authority' to bind the principal without limitation." *Ford v Unity Hosp.*, 32 NY2d 464, 472 (1973).

Accordingly, "[o]ne who deals with an agent does so at his peril, and must make the necessary effort to discover the actual scope of authority." *Id.* "When facts and circumstances serve to put the third party on notice that the agent may not be authorized to represent the principal, the third party has a duty to inquire as to the scope of the purported authority." *Arol Dev. Corp. v Whitman & Ransom,* 215 AD2d 145, 146 (1st Dept 1995); *150 Beach 120th St., Inc. v Washington Brooklyn Ltd. Partnership*, 39 AD3d 722, 723-724 (2d Dept 2007) (summary judgement granted to defendants dismissing the complaint as against them and declaring mortgages and notes issued in partnership's name to certain parties "null and void," where there was no evidence of agent's apparent authority to enter into relevant transactions and "respondents failed to conduct a reasonable inquiry into the scope of [agent]'s alleged authority.").

Further, "a third party with whom the agent deals may rely on an appearance of authority only to the extent that such reliance is reasonable." *Hallock*, 64 NY2d at 231.

The reasonableness of a third party's belief that an agent had authority to act for its principal will usually "be developed through discovery." *See Parlato v Equitable Life Assur. Socy. of U.S.*, 299 AD2d 108, 116 (1st Dept 2002).

Here, Citrin has made its *prima facie* case showing that the complaint lacks allegations that Citrin communicated to the Targum plaintiffs that Weber was apparently authorized to act as he did. However, here again the Targum plaintiffs have raised an issue of fact by showing that Weber used Citrin's facilities and personnel in preparing the tax returns.

d. Ratification

In the complaint, plaintiffs allege that "CITRIN affirmed and ratified the actions undertaken in the course of the Tax Fraud Scheme, whether explicitly or by implication, each year WEBER was permitted to use CITRIN's resources in the manner described herein." "[R]atification of an agent's acts requires knowledge of material facts concerning the allegedly binding transaction," *Matter of New York State Med. Transporters Assn. v Perales*, 77 NY2d 126, 131 (1990), and ratification of an agent's actions may be done expressly or impliedly. *See, e.g., Standard Funding Corp. v Lewitt*, 89 NY2d 546, 552 (1997). "[E]xpress ratification" occurs when a principal "adopt[s]" the conduct of the agent and chooses to become part of the agreement. *See id.* (citing Restatement [Second] of Agency § 82 and comment a) ("principal may become liable for its agent's unauthorized acts by adopting the agent's actions and electing to become a

party to the transaction"). "[R]atification may be implied where the principal retains the benefit of an unauthorized transaction with knowledge of the material facts . . .." *Id.*

As to the Targum plaintiffs, Citrin has made a *prima facie* case by showing that Citrin did not have knowledge regarding all material facts related to Weber's misconduct and there are no allegations supporting a finding that Citrin ever joined in the barter agreement or received payment thereunder. Accordingly, I dismiss the claims for express and implied ratification.

Plaintiffs' Attorney's Fees Request

"The rule is well settled in this State that the successful party in litigation may not recover attorneys' fees, except where authorized by the parties' agreement, statutory provision or court rule." *Chase Manhattan Bank v Each Individual Underwriter Bound to Lloyd's Policy No. 790/004A89005*, 258 AD2d 1, 4 (1st Dept 1999). Citrin has made out its *prima facie* case to strike the request for attorneys' fees, as plaintiffs do not allege any basis to recover their attorneys' fees for prosecuting this action. Accordingly, plaintiffs' request for attorneys' fees is stricken as against Citrin.

Plaintiffs' Punitive Damages Request

To recover punitive damages, plaintiffs must show that "defendant's conduct was . . . wantonly dishonest." *Apple Bank for Sav. v PricewaterhouseCoopers LLP*, 70 AD3d 438, 438 (1st Dept 2010). Plaintiffs have neither pled nor raised an issue of fact to show

that Citrin's actions were "wantonly dishonest." *Id.* Accordingly, I strike plaintiffs' request for punitive damages as against Citrin.

In accordance with the foregoing, it is hereby

ORDERED that Citrin Cooperman & Company, LLP's motion to dismiss the claims of plaintiff Irwin Seeman is granted on Statute of Limitations grounds, plaintiff Irwin Seeman's claims are severed and dismissed and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that Citrin Cooperman & Company, LLP's motion to dismiss the claims of Andrew Targum, Erika Targum, Andrew S. Targum, P.C., Andrew Scott Targum, P.C., and Targum, Britton & Tolud, LLP is granted as to the claims for ratification, and to the extent that these plaintiffs seek to recover for actions dating before September 12, 2009 and to recover punitive damages and attorneys' fees as against Citrin, and the motion is otherwise denied; and it is further

ORDERED that Citrin Cooperman & Company, LLP is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel for the movant shall serve a copy of this order upon Matthew G. Weber and Lorraine Weber; and it is further

ORDERED that Matthew G. Weber, Lorraine Weber, counsel for plaintiffs, and counsel for Citrin Cooperman & Company, LLP are directed to appear for a status conference in Room 208, 60 Centre Street, on September 28, 2016, at 2:15 PM.

This constitutes the decision and order of this Court.

Dated August 25, 2016

ENTER:

J.S.C. HON. SALIANN SCARPULLA