SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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DALY REVILLE,

Plaintiff,

-against- Index No. 152167/2015

MELVIN GINSBERG & ASSOCIATES, **DECISION/ORDER**

Defendant,
----------X

HON. JOAN M. KENNEY, J.:

In this action sounding in professional negligence, breach of contract, breach of fiduciary duty, and aiding and abetting fraud, plaintiff Daly Reville (Reville) seeks damages for purported unlawful conduct by her accounting firm, Melvin Ginsberg & Associates (the firm; or MGA). Defendant moves for summary judgment, pursuant to CPLR 3212, to dismiss the complaint on the basis that it is barred by the statute of limitations, lacks merit and is subject to the judicial policy against double recovery.

I. Factual Background and Contentions

It is undisputed that during much of the period at issue, Reville was married to Edward A. Glenn (Glenn). Reville and Glenn became clients of MGA in or around the year 2000. The couple divorced in 2010, pursuant to a stipulation of settlement dated August 27, 2010 (Vergari affirmation, exhibit T). Plaintiff remained a client of the firm on an individual basis through 2013.

In her pleadings plaintiff claims that defendant provided Reville, as well as her businesses, a wide variety of services, including tax accounting, tax preparation and filing, bookkeeping, advice on real estate transactions and monitoring of all brokerage and bank accounts from approximately 2000 through 2013.

According to plaintiff, Alicia Ginsberg was her main contact at the firm. During the period in consideration, Glenn was employed by Morgan Stanley Smith Barney (Morgan

Stanley; or the corporation) and oversaw Reville's accounts held at the corporation. Plaintiff affirms that defendant was granted full access to plaintiff's financial information, and set up a structure or system with Glenn under which MGA and Glenn both had complete access to account information concerning her accounts held at Morgan Stanley, as well as banking accounts she individually or jointly held with Glenn. In addition, Reville claims Glenn changed her account authorizations, and took over her daly.reville@verizon.net account and impersonated her in communications with defendant relating to her finances.

Defendant argues that the scope of services MGA provided to Reville, Glenn and their businesses, was limited to tax planning, projected tax liability and income tax preparation (Alicia Ginsberg aff, ¶ 4). Furthermore, there is no formal written agreement between MGA and Reville and/or Glenn (*id.*). Defendant further alleges that, contrary to plaintiff's claims, MGA never represented itself as a personal financial manager, financial planner or investment advisor to Reville, Glenn or their businesses (*id.* at ¶ 7). Neither was MGA bookkeeping, monitoring the accounts, or scrutinizing business decisions (*id.*) Defendant alleges that MGA did not have general check-writing authority other than a temporary access to plaintiff's accounts, pursuant to a Power of Attorney to pay vendors/contractors, in connection with the renovation of her apartment during plaintiff's vacation in June 2007 (Ginsberg reply aff, ¶ 7; Vergari reply affirmation, exhibit KK; Galbraith affirmation, exhibit D).

Plaintiff also claims that it is only after ceasing to be a client of defendant, and during the discovery phase of a Financial Industry Regulatory Authority (FINRA) arbitration against Glenn and his employer, Morgan Stanley, and discovery in this action, that she learned the details of defendant's unlawful conduct. Plaintiff therefore asserts that her action commenced on April 14, 2015 is timely pursuant to the continuous representation and discovery rule doctrines.

Plaintiff states that written discovery requests and responses were exchanged and documentary evidence and audio files were produced in 2015. Upon review of the foregoing, plaintiff contacted defendant in October 2016 to schedule the examinations of Alicia Ginsberg and Melvin Ginsberg. However, defendant proceeded to move for summary judgment in November 2016.

In her complaint, plaintiff alleges specifically that MGA is liable in connection with the following five unlawful transactions: 1) the wrongful diversion of over $240,000 in real estate proceeds; 2) unauthorized transfers from personal and joint accounts to foreign accounts held and/or controlled solely by Glenn; 3) the hiding of assets from the Matrimonial Part of the New York State Supreme Court in New York County (the Matrimonial Part); 4) the diversion of tax refunds for the 2008 tax year; and, 5) the premature withdrawal of money from her retirement accounts.

A. Prior Litigation

On March 19, 2013, plaintiff brought an arbitration claim with FINRA against Glenn, his employer, Morgan Stanley, and his former supervisor, Edward J. Mulcahy, Jr., (Mulcahy) at Morgan Stanley (Galbraith affirmation, exhibits L and M; Vergari affirmation, exhibits V, CC and DD). In the FINRA arbitration, Reville asserted the following causes of action: failure to supervise, theft, forgery, making false statements, unauthorized wire transfers, and falsifying documents (Vergari affirmation, exhibit CC).

The following three claims were the focus of the arbitration: 1) the misappropriation of an escrow payment for $15,985.55 in connection with a real estate transaction in 2005; 2) a claim that Reville did not receive her alleged share of the couple's 2008 tax refunds from the IRS and the State of New York, which had been deposited in the couple's joint account at

Morgan Stanley; 3) and a claim that, in April 2008, Glenn transferred funds from Reville's account to repay the loans he had taken out and payments he had made to renovate the couple's apartment, which Reville believed were excessive.

On June 25, 2014, FINRA awarded Reville, in relevant part, $16,233 plus interest from June 1, 2009 to March 19, 2013 against Glenn, and $96,975 plus interest jointly and severally against Mulcahy and Morgan Stanley from April 8, 2008 to March 19, 2013.

B. Alleged Unlawful Conduct

1. The Wrongful Diversion of Over $240,000 in Real Estate Proceeds

First, plaintiff alleges that in May 2007 she was led by defendant to incorrectly believe that she lacked the funds to complete the renovation of an apartment that she owned at 45 West 54th Street, New York, New York (Reville aff, ¶¶ 24-28; Galbraith affirmation, exhibits G and H). This mistaken belief caused plaintiff to take out an unnecessary $240,000 loan from Glenn. Defendant tracked the loan amount and the expenditures made from the loaned funds at plaintiff's request. Reville claims that defendant failed to take action when Glenn wrongfully transferred over $240,000 that she earned from the sale of an investment apartment, from her account to a joint account on April 7, 2008, purportedly to satisfy, among other items, the loan.

Defendant claims, however, that said transfer occurred at plaintiff's direction, pursuant to an email directing same (Vergari affirmation, exhibits F, G, H and I). Reville states that Glenn fraudulently induced her to transfer $240,043 in the immediate aftermath of her cancer surgery and that she did not recall sending this email which had been deleted from the sent items in her mailbox. Defendant highlights, however, that plaintiff admits knowledge of the transfer, at the latest in August 2008, as revealed in her response to interrogatories in connection with her divorce action with Glenn (Vergari affirmation, exhibit R, p. 4).

Defendant states that this is the identical claim previously asserted in the FINRA arbitration, for which plaintiff was awarded damages in the amount of $96,975. Plaintiff claims that the FINRA arbitration panel awarded her only the portion of the loss presumably attributable to the negligence and supervisory failures of Morgan Stanley. Furthermore, defendant underscores that plaintiff makes no allegation that MGA had any control over the accounts or any role effectuating any transfer, and that its involvement was limited to being forwarded an email indicating that the transfer was to pay down three loans.

2. Unauthorized Transfers from Personal and Joint Accounts to Foreign Accounts

According to plaintiff, MGA had knowledge and provided assistance to Glenn in making unauthorized transfers from accounts Reville held individually and jointly with Glenn, to overseas accounts held and/or controlled solely by Glenn (Reville aff at ¶¶ 30 and 31). To defeat this contention, defendant points to plaintiff's own Exhibit B, a print-out of an email chain initiated by Alicia Ginsberg, who contacted Reville on October 24, 2005 to alert her about a suspicious transfer of €185,000, and email exchanges that day and the following day between Reville, Glenn and MGA discussing the transfer (*id.*). Defendant highlights again that it is undisputed that MGA had no control over these accounts and that plaintiff stated that she realized in April or May 2008 that Glenn had been stealing from her.

3. The Hiding of Assets from the Matrimonial Part

Third, plaintiff claims MGA provided materials to Glenn in connection with the preparation of a schedule of assets, and that defendant participated in making misrepresentations to the Matrimonial Part regarding certain assets that would have otherwise been part of the marital estate to which Reville would have had a claim. Plaintiff alleges that MGA advised Glenn about how he could hide portions of his income, such as bonuses in the form of forgivable

loans, which are assets that were not addressed during the divorce, and that MGA aided Glenn's fraud by granting him access to discovery meant for her and her attorney (Reville aff at ¶¶ 37 and 38).

In support of the foregoing, plaintiff points to a chain of emails, starting on December 21, 2009, where Alicia Ginsberg informs Reville and Glenn that MGA is in receipt of two large envelopes from Citibank containing checkbooks addressed respectively to Glenn/M. Ginsberg and Reville/Glenn. The exchange continues on December 22, 2009 where MGA clarifies that the envelopes actually include bank statements from Citibank, dating back to 2003. Ms. Ginsberg follows up with an email to Glenn and Reville in which she relates that she was informed by her secretary that Glenn would be stopping by the office to pick up the copies and where she asks Glenn whether he would be picking up one or both accounts. Whereupon Glenn emails MGA back separately stating that these documents were sent pursuant to "DR's att'ys request for dox" and that he would be picking up "everything" (Galbraith affirmation, exhibit C).

Defendant alleges that plaintiff proffered conclusory accusations that MGA participated in hiding assets from the Matrimonial Part and states that the cause of action would have accrued at the latest on August 27, 2010, the date of the stipulation of settlement in the divorce action.

4. The Diversion of Tax Refunds for the 2008 Tax Year

The court will not address this allegation, which plaintiff has withdrawn in her affidavit, as she appears to concede she has recovered damages arising from this transaction in the FINRA arbitration (Reville aff at ¶ 35).

5. The Premature Withdrawal of Money from Plaintiff's Retirement Accounts

Finally, plaintiff alleges that defendant recommended, during several years, that plaintiff make substantial early withdrawals from her retirement savings, in order to fund certain real estate investments as well as living expenses, resulting in penalties, and the permanent depletion of retirement savings (Reville complaint at ¶¶ 46-53). In support of this unlawful transaction, plaintiff refers the Court to plaintiff's Exhibit I, a print-out of an email chain, dated June 24, 2008, initiated by MGA inviting Reville and Glenn to come in "to do more retirement planning/number crunching." (Reville aff at ¶ 50; Galbraith affirmation, exhibit I).

Defendant counters by stating that Reville and Glenn informed Alicia Ginsberg, at some point prior to 2006, about their plan to take an early withdrawal from Reville's retirement savings "for the purposes of confirming their understanding for her eligibility for a ten (10) year payout under applicable tax laws."(Ginsberg aff at ¶ 17). Ms. Ginsberg further contends that she

> "made absolutely no recommendation in favor of the financial soundness of such withdrawal; indeed I never would have advised someone to take out an early withdrawal against retirement savings. MGA is not in the business of giving financial/business advice to our clients except with respect to tax consequence. In any event, the business decision to make such an early withdrawal had already been made by Plaintiff Reville and Mr. Glenn at the time they asked us to confirm their understanding of the tax consequence. MGA had no involvement thereafter." (*id.*)

Defendant also contends that Morgan Stanley was the entity which provided relevant financial services to the couple (Vergari affirmation, exhibit V), and that accrual of this alleged unlawful transaction would have been in May 2007, when MGA rendered tax advice regarding the consequences of such a withdrawal.

II. Discussion

The principle is well settled that 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 (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion shall be granted if neither party has shown "facts sufficient to require a trial of any issue of fact." (CPLR 3212[b]).

In a motion to dismiss a cause of action as barred by the applicable statute of limitations, the moving defendant bears the initial burden to demonstrate that the time within which to commence the action has elapsed (*see Baptiste v Harding-Marin,* 88 AD3d 752, 753 [2d Dept 2011]; *Savarese v Shatz*, 273 AD2d 219, 220 [2d Dept 2000]; *Doyon v Bascom*, 38 AD2d 645, 645-646 [3d Dept 1971]). In order to make a prima facie showing, the defendant must establish, *inter alia*, when the cause of action accrued (*see Swift v New York Med. Coll.*, 25 AD3d 686, 687 [2d Dept 2006]). The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is tolled or is otherwise inapplicable (*Baptiste,* 88 AD3d at 753).

A. Cause of Action for Professional Negligence

CPLR 214 (6) imposes a three-year time limitation period in all professional malpractice actions, except those involving medical malpractice. In an accounting malpractice action, the limitations period is measured from the date the client receives the accountant's advice and/or work product (*Ackerman v Price Waterhouse,* 84 NY2d 535, 541-543 [1994]). The statute may be tolled in accounting malpractice cases pursuant to the continuous representation doctrine

(*Zaref v Berk & Michaels,* 192 AD2d 346 [1st Dept 1993]; *Hall & Co. v Steiner & Mondore,* 147 AD2d 225 [3d Dept 1989]). Facts supporting the application of the continuous representation doctrine must be proffered in connection with the "specific matter directly under dispute" and must assert more than merely "the continuation of a general professional relationship" (*Zaref,* 192 AD2d at 347-348).

A negligence-based claim, absent fraud, accrues when the malpractice is committed, even though the injured party may be ignorant of the wrong or injury (*Ackerman*, 84 NY2d at 541).

Plaintiff's action was not commenced until March 4, 2015, well past the three year limitations period. Consequently, plaintiff's malpractice claim is untimely unless the continuous representation doctrine serves to toll the three-year limitations period.

1. The Wrongful Diversion of Over $240,000 in Real Estate Proceeds

Here, defendant alleges that the latest possible accrual date for this alleged unlawful transaction is August 31, 2008, when Reville was re-notified about that transaction. Defendant points out that the funds were transferred pursuant to an April 7, 2008 email from plaintiff (Vergari affirmation, exhibit F), and that plaintiff sent a series of emails discussing said transfer (Vergari affirmation, exhibits G, H and I). Reville realized that Glenn was stealing from her in April/May 2008 (Vergari affirmation, exhibit BB at p. 5), and conceded that she recovered her memory of the transfer in August 2008 (Vergari affirmation, exhibit R at p. 4). Reville and Glenn also exchanged emails in January 2009 about the transfer (Vergari affirmation, exhibit J). Reville had access to her own bank accounts at all relevant times (Ginsberg aff at ¶ 6, n. 2; Vergari affirmation, exhibit FF). Furthermore, defendant claims that there is no allegation,

much less any documentary evidence, that MGA continued to render advice on this particular transaction so as to extend the statute.

In opposition, plaintiff relies on *Alpert v Shafer* (1991 WL 222130, 1991 US Dist LEXIS 15228 [SD NY, Oct. 24, 1991, No. 89 Civ. 0839 (CSH)]), to claim that summary judgment is not the appropriate stage to resolve the question of whether the continuous representation doctrine applies to toll the statute of limitations. In support of the continuous relationship claim, plaintiff states that the parties maintained a relationship through approximately October 2013 (Complaint at ¶ 11; Reville aff at ¶¶ 6-16; Vergari affirmation, exhibits B, C, and D).

Plaintiff's reliance on the *Alpert* case is misplaced. In *Alpert*, plaintiffs, Joan and Paul Alpert, commenced an action against defendant, a certified public accountant, for negligence and breach of fiduciary duty. Plaintiffs claimed defendant played a role in plaintiffs' decisions to invest in eight tax shelters, and in plaintiffs' responses to tax deficiency notices received from the Internal Revenue Service (IRS). Defendant denied recommending any investments, denied preparing tax returns that included the alleged tax benefits, and denied advising against settling their dispute with the IRS. Defendant asserted that he had been purely plaintiffs' accountant, not their financial advisor. The *Alpert* court found that there was a triable issue on a material question of fact where Paul Alpert's deposition revealed that, although he had retained tax counsel, he would regularly send defendant the mail from the IRS first, and only relay copies to his tax lawyer if defendant so advised. The court concluded, "[t]here is at least some evidence that he continued to advise the Alperts on the tax shelter problems." (*Id.* at *5).

In contrast, and directly applicable here, the Court of Appeals, stressed that a "mutual understanding" between the parties regarding further representation and the "nature and scope of the parties' retainer agreement (engagement) play a key role in determining whether continuous

representation was contemplated by the parties." (*Williamson v PricewaterhouseCoopers LLP*, 9 NY3d 1, 10 [2007], quoting *Shumsky v Eisenstein*, 96 NY2d 164, 170 [2001] [internal quotation marks omitted]).

Here, plaintiff's allegations do not establish a course of representation as to the particular problems relating to this transaction that gave rise to the malpractice claim. Furthermore, there is no written agreement between the parties. The invoices submitted by defendant appear to contemplate separate and discrete accounting services for each fiscal year, and once the defendant had performed the services for a particular year, no further work was undertaken (Vergari reply affirmation, exhibit GG). No corrective or remedial services were offered.

As a result, there was no mutual understanding between the parties that MGA would provide Reville with any further representation in connection with this alleged unlawful transaction (*see also*, *Apple Bank for Sav. v PricewaterhouseCoopers, LLP*, 23 Misc 3d 1126 [A], 2009 NY Slip Op 50948 [U] [Sup Ct, NY County 2009], *revd* 70 AD3d 438 [1st Dept 2010]). In *Apple Bank*, the Appellate Division, First Department, reversed the Supreme Court, which had found a question of fact about whether certain claims based on tax advice and the resulting tax returns are timely under the continuous representation doctrine. In its decision, the lower court had relied on *Cuccolo v Lipsky, Goodkin & Co.* (826 F Supp 763 [SD NY 1993]) for the proposition that determining whether a toll applies to a particular cause of action is generally a question of fact. However, the First Department, citing *Williamson, supra*, held that the continuous representation doctrine did not apply to toll the statute of limitations on a malpractice claim brought by a client against its accounting firm, where the accountant never had an express, mutual agreement to advise the client on the effect of a stock buy back after the original advice.

Defendant has shown that the alleged continuous representation cannot toll the limitations period here. As indicated by the invoices (Vergari reply affirmation, exhibit GG), plaintiff has not shown that defendant and Reville explicitly contemplated further representation regarding the services rendered (*see Williamson*, 9 NY3d at 11). In response to this showing, plaintiff has not raised an issue of fact. Accordingly, plaintiff's negligence claim with respect to this transaction is dismissed as untimely.

Here, the court agrees with defendant's argument that the statute of limitations with respect to the diversion of $240,000 accrued, at the latest, at the end of August 2008. Plaintiff fails to adduce any evidence of a later accrual date, or of the tolling of the statute, thus rendering her claim untimely.

2. Unauthorized Transfers from Personal and Joint Accounts to Foreign Accounts

Defendant surmises from the record that plaintiff is referring to monies transferred to France when Reville and Glenn traveled to Paris (Ginsberg aff at ¶ 11). According to Ginsberg and plaintiff's narrative in connection with the FINRA arbitration (Vergari affirmation, exhibit BB), the couple never traveled to Paris together after 2007. Based on the foregoing, defendant alleges that the unauthorized transfer of funds to overseas accounts by Glenn occurred at the very latest in 2007, and that MGA did not continue to render services in connection with any such transfer(s) after the calendar year 2007 tax filings in April 2008. Therefore, defendant claims that the latest accrual date in connection with this transaction is April 2008. Defendant states that the discovery rule is inapplicable to toll the statute of limitations, given that plaintiff had access to her account information at all relevant times. Defendant also reiterates it had no control over plaintiff's accounts and had no role in effectuating such transfers.

In opposition, Reville submits that she found out through FINRA discovery and testimony (presumably in 2014) that MGA and Glenn had "separate conversations" with regards to an October 2005 transfer of €185,000 out of a French account (Reville aff at ¶ 21). Plaintiff also states "I have also learned from these sources of numerous unauthorized and fraudulent transfers from my personal and joint accounts with Mr. Glenn into foreign accounts controlled solely by Mr. Glenn" (Reville aff at ¶ 30), but plaintiff fails to identify any dates, or point to any documentary evidence in connection with such transfers. Plaintiff appears to refer to the €185,000 transfer to highlight that Alicia Ginsberg alerted the couple to "an odd transaction" (Reville aff at ¶¶ 30 and 31, exhibit B), presumably in support of her claim that MGA was monitoring her accounts and acting as a fiduciary.

Plaintiff's complaint and affidavit are devoid of information pertaining to the dates of the purported unlawful transfers, or any agreement of continuous representation with regards to these transfers. Taking into account defendant's proposed latest accrual date of April 2008, a cause of action for professional negligence in connection with this transaction is time-barred.

3. The Hiding of Assets from the Matrimonial Part

Defendant claims that MGA's involvement in the preparation of the schedule of assets for the divorce action lasted no further than August 27, 2010, when plaintiff and Glenn entered into a stipulation of settlement before the Matrimonial Part.

Plaintiff states that "MGA advised Mr. Glenn regarding how he could hide portions of his income, such as the bonuses he received from his employer in the form of forgivable loans. I was unaware of these assets during our relationship and as a result, they were not addressed during our divorce." (Reville aff at ¶ 37). In support of this claim, plaintiff refers to an email chain from December 2009 in which she was included and, which, she suggests, shows that

MGA granted Glenn access to discovery relating to Citibank bank statements dating back to 2003, which were meant for her and her attorney (*id.* at ¶¶ 38 and 39, exhibit C). However, plaintiff does not state when she discovered this alleged unlawful transaction, other than vague allegations that the facts recited in her affidavit are derived from her personal recollection, document discovery obtained as part of the FINRA arbitration, document discovery obtained in this matter throughout 2015, and document discovery obtained in her divorce from Glenn (Reville aff at ¶ 3).

Taking defendant's August 27, 2010 accrual date into account, the cause of action is time-barred, and based on the foregoing, plaintiff fails to raise a question of fact as to a later accrual date in connection with this alleged unlawful transaction, which would render this cause of action timely.

4. The Premature Withdrawal of Money from Plaintiff's Retirement Accounts

Defendant claims that plaintiff's early withdrawal of money from her retirement savings occurred prior to 2006 (Ginsberg aff at ¶ 17), and that MGA's scope of services in connection with this transaction was to opine on plaintiff's eligibility to make the early withdrawal under prevailing tax laws. Defendant states that MGA did not continue to render services in connection with that transaction after May 2007.

In opposition, plaintiff points solely to a June 2008 email chain initiated by MGA, in which the firm invites Reville and Glenn to come in "to do more retirement planning/number crunching." (Reville aff, exhibit I).

The foregoing is insufficient to render the cause of action timely. Plaintiff does not adduce any allegations or documentary evidence to raise a question of fact as to the tolling of the statute.

B. Cause of Action for Breach of Contract

Generally, breach of contract actions are subject to a six-year statute of limitations. Applying the pertinent statute of limitations for this cause of action turns on a determination of whether plaintiff's claim is essentially a malpractice claim. The court notes at the outset, that in this case, there is no written contract or engagement letter between the parties.

The Legislature amended CPLR 214 (6) in 1996 to apply a three-year limitations period to all nonmedical malpractice claims, whether based on tort or contract, thus overturning a line of cases, which had determined the appropriate statute of limitations based upon the proposed remedy instead of the theory of liability (*Matter of R. M. Kliment & Frances Halsband, Architects (McKinsey & Co., Inc.)*, 3 NY3d 538, 541 [2004]). Following that amendment, the Court of Appeals addressed CPLR 214 (6), not only to remediate that line of cases, "but also to reduce potential liability of insurers and corresponding malpractice premiums, and to restore a reasonable symmetry to the period in which all professionals would remain exposed to a malpractice suit." (*Chase Scientific Research v NIA Group*, 96 NY2d 20, 27 [2001]).

However, while a malpractice action may be grounded in negligence, it can theoretically rest on a breach of contract, when a particular result is guaranteed, or when the professional agreed to perform a service above and beyond that which it might be expected to accomplish using due care, even in the absence of a specific term in the agreement (*Matter of R. M. Kliment,* 3 NY3d at 543; *Chase Scientific*, 96 NY2d at 25). Here, plaintiff does not point to an express, rather than an implied agreement, that would be construed as inconsistent with an accountant's ordinary professional obligations and remove the issue from the realm of negligence (*see Matter of R. M. Kliment,* 3 NY3d at 542-543; *Chase Scientific*, 96 NY2d at 25). Neither does plaintiff

allege a "particular bargained-for result," which would convert the malpractice action into a breach of contract action (*id.*).

Based on the foregoing, plaintiff's claim against defendant is governed by the three-year statute of limitations applicable to nonmedical, professional malpractice actions, rather than the six-year statute of limitations for breach of contract, as the claims are fundamentally that her accounting firm failed to perform services in a professional, nonnegligent manner *(Matter of R. M. Kliment,* 3 NY3d 538). It follows that plaintiff's claim is time-barred.

In addition, the breach of contract cause of action arises from the same facts and alleges the same damages as the malpractice claim, and is, therefore, dismissed as duplicative (*Voutsas v Hochberg*, 103 AD3d 445 [1st Dept 2013]; *Fross, Zelnick, Lehrman & Zissu, P.C. v Geer*, 120 AD3d 1157 [1st Dept 2014]). Therefore, the court dismisses this cause of action as duplicative of the first cause of action for professional negligence.

C. Cause of Action for Breach of Fiduciary Duty

The statute of limitations for a breach of fiduciary claim varies depending on the nature of the relief sought (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009]; *Kaufman v Cohen*, 307 AD2d 113, 118 [1st Dept 2003]). A three-year limitations period according to CPLR 214 (4) applies "[w]here the remedy sought is purely monetary in nature" (*IDT Corp.*, 12 NY3d at 139, citing *Yatter v Morris Agency*, 256 AD2d 260, 261 [1st Dept 1998]). The six-year limitations period of CPLR 213 (1) is applicable where the relief sought is equitable in nature (*Loengard v Santa Fe Indus.*, 70 NY2d 262, 266 [1987]). Additionally, "a cause of action for breach of fiduciary duty based on allegations of fraud is subject to a six-year limitations period." *(Kaufman*, 307 AD2d at 119). However, "where an allegation of fraud is not essential to the cause of action pleaded except as an answer to an anticipated defense of Statute

of Limitations, courts 'look for the reality and the essence of the action and not its mere name'" (*id.*)

Here, plaintiff only seeks money damages, therefore the applicable limitations period is three years. Plaintiff alleges that the statute of limitations for the cause of action for a breach of fiduciary duty begins to run according to the "open repudiation doctrine," which provides that the applicable statutory period "does not begin to run until the fiduciary has openly repudiated his or her obligation or the relationship has been otherwise terminated" (*Golden Pacific Bancorp v Federal Deposit Ins. Corp.*, 273 F3d 509, 518 [2d Cir 2001], quoting *Westchester Religious Institute v Kamerman*, 262 AD2d 131 [1st Dept 1999]). However, plaintiff's reliance on the foregoing case law and doctrine is misplaced as they only apply to claims for accounting or equitable relief (*Cusimano v Schnurr*, 137 AD3d 527, 530-531 [1st Dept 2016]).

Even if plaintiff's claims were timely, plaintiff fails to state a cause of action.

Courts do not generally view the duty of an accountant to a client as fiduciary in nature (*Able Energy, Inc. v Marcum & Kliegman LLP*, 69 AD3d 443, 444 [1st Dept 2010]; *DG Liquidation v Anchin, Block & Anchin*, 300 AD2d 70, 71 [1st Dept 2002]). It is widely recognized throughout the accounting profession that accounting services "generally go beyond simple auditing and bookkeeping" and typically include "financial management and planning advice" (*Friedman v Anderson,* 23 AD3d 163, 165 [1st Dept 2005]). MGA's services, as alleged by plaintiff, fall within the aforementioned perspective. They are typical, rather than of a heightened nature. "'A conventional business relationship, without more, does not become a fiduciary relationship by mere allegation'" *(Friedman,* 23 AD3d at 166, quoting *Oursler v Women's Interart Ctr.*, 170 AD2d 407, 408 [1st Dept 1991] [The *Friedman* court held that the

accountant's recommendation of a money manager to a client did not establish a fiduciary relationship]).

However, an accountant-client relationship may be construed as a fiduciary relationship in limited circumstances. The First Department concluded that plaintiff sustained a cause of action for breach of fiduciary duty where her accountant engaged in a series of acts, representations and omissions relating to 16 investments; made all investment decisions and recommended specific investments while concealing pertinent information about same *(Lavin v Kaufman, Greenhut, Lebowitz & Forman*, 226 AD2d 107 [1st Dept 1996]). In *Kanev v Turk*, 187 AD2d 395 [1st Dept 1992], the court held that plaintiff adequately set forth a cause of action for breach of fiduciary duty and fraud by alleging that her accountant advised her to loan $25,000 to another one of his clients, advised her there was no need to secure the loan, knew of the borrower's insolvency and intentionally deceived her, and she relied on his advice and was damaged as a result, since the loan was not fully repaid.

Here, plaintiff's allegations are insufficient to meet the standard to sustain a fiduciary duty cause of action. Plaintiff did not provide any legal basis for concluding that MGA had discretionary investment authority, as in *Lavin, supra,* or that MGA gave her advice regarding the making of an unsecured loan, as in *Kanev, supra*. To trust one's accountant to provide reliable services typically within the scope of accounting work does not transform a conventional professional relationship into a fiduciary one (*see Bitter v Renzo*, 39 Misc 3d 1208 [A], 2012 NY Slip Op 52455 [U] [Sup Ct, NY County 2012], *affd* 101 AD3d 465 [1st Dept 2012]). Accordingly, the cause of action for breach of fiduciary duty is dismissed.

D. Aiding and Abetting Fraud

According to CPLR 213 (8), a cause of action based on fraud must be brought within six years from the date the cause of action accrued, or two years from the time the fraud was discovered or could, with "reasonable diligence" have been discovered (*Gutkin v Segal*, 85 AD3d 687 [1st Dept 2011]). The discovery rule for the accrual of the statute of limitations states, in pertinent part, that time is computed from the actual or imputed discovery of facts (CPLR 203 [g]).

Defendant states that the latest accrual date in connection with the aiding and abetting fraud cause of action is August 27, 2010, and, thus, concedes that this claim is within the limitations period "if solely premised on MGA's alleged participation in Plaintiff's Matrimonial Action" (Vergari reply affirmation, p. 17).

A plaintiff claiming aiding and abetting fraud must allege the existence of the underlying fraud, actual knowledge, and substantial assistance (*Oster v Kirschner*, 77 AD3d 51, 55 [1st Dept 2010]; *Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009]). Moreover, the allegations of such claims must be pled with particularity *(Foley v D'Agostino*, 21 AD2d 60, 64 [1st Dept 1964], citing CPLR 3016 [b]).

Plaintiff's cause of action is dismissed for failure to plead with particularity pursuant to CPLR 3016 [b]. Plaintiff does not provide facts to explain how the alleged scheme set up by MGA and Glenn was effectuated. To the extent that plaintiff's allegations that defendant's aiding and abetting of the fraud are predicated on its failure to alert her about unauthorized transfers, the cause of action fails for lack of a duty to disclose, as there is no fiduciary relationship *(see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 562 [2009]).

Additionally, plaintiff's allegations are vague and conclusory as to the preparation of a schedule of assets and the hiding of assets. Plaintiff merely alleges that she discovered an email from Glenn to MGA in which he states he would pick up discovery meant for her and her attorney, and, thus, MGA must have aided and abetted Glenn's fraud/hiding of assets from the Matrimonial Part. It is unclear how MGA knew of Glenn's fraud and how MGA helped in the deception. Not only is plaintiff copied on the emails sent by MGA notifying plaintiff about the receipt of the Citibank statements (Galbraith affirmation, exhibit C), but, in contrast to plaintiff's allegations, defendant adduces evidence of a December 22, 2009 email from plaintiff to MGA stating "Hey, not mine!" thus advising MGA not to give her envelope to Glenn (Vergari reply affirmation, exhibit MM).

Based on the foregoing, plaintiff's cause of action for aiding and abetting fraud is dismissed.

III. Conclusion

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: April 20, 2017

Joan M. Kenney, J. S. C.