IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

PAUL H. BOERGER, Apartment Managers, Inc. and ALBAN PARK, INC. Plaintiffs, v. **HENRY A. HEIMAN, ESQUIRE, DARRELL J. BAKER, ESQUIRE, HEIMAN ABER & GOLDLUST, Including Its Successors, KEITH L. THOMPSON AND BALLARD, THOMPSON AND ASSOCIATES, P.A.** Defendants. v. **PATONE & PATONE, LLC.** Third Party Defendants	)	**C.A. No**. 05C-01-020-CLS

Date Submitted: July 13, 2007
Date Decided: October 31, 2007

Upon Consideration of Defendants' Motion to Dismiss
GRANTED.

Bruce W. McCullough, Esquire, McCullough & McKenty, P.A., Wilmington, Delaware, Attorney for Plaintiffs.

Colleen D. Shields, Esquire, Elzufon Austin Reardon, Tarlov & Mondell, P.A., Wilmington, Delaware, Attorneys for Defendants Darrell J. Baker, Esquire, Henry A. Heiman, Esquire and Heiman, Aber & Goldlust.

Paul Cottrell, Esquire, Tighe & Cottrell, P.A., Wilmington, Delaware, Attorney for Defendants Keith Thompson and Ballard, Thompson and Associates, P.A.

Gregory J. Weining, Esquire, Connolly Cove Lodge & Hutz LLP, Wilmington, Delaware, Attorney for Third-Party Defendant Patone & Patone, LLC.

SCOTT, J.

INTRODUCTION

Plaintiffs utilized defendants' services to assist in the refinancing of properties; this ultimately led to the creation of two limited liability companies. The first created in December, 1997 and the second in January, 1998. Plaintiff's 2005 Complaint claims breach of contract, professional negligence, and negligent misrepresentation because of a failure to adopt Subchaper- S status. Presently before the Court is Defendant's Motion to Dismiss based upon the statute of limitations. Because the Court will grant the Motion to Dismiss, the Motion in Limine is moot.

FACTS

Plaintiff purchased parcels of real estate, and the multi-unit apartment buildings thereon in New Castle County, Delaware in 1982. These buildings consist of two apartment complexes, one known as Village of Windhover and the other entitled Canby Park.

After the purchase, Plaintiff employed lawyers, Defendants Henry Heiman, Esquire and Darrell J. Baker, Esquire of Heiman Aber & Goldlust (hereinafter referred to as "Lawyer Defendants") to "represent him individually, generally, and his business generally."[1] Lawyer Defendants

[1] See Pre-Trial Stipulation at 5 and Pl. Compl. ¶17.

advised Plaintiff about real estate, handled transactions for Plaintiff and all litigation on his behalf. This relationship continued until 1998.[2]

The Refinancing and Creation of the LLC

According to Plaintiff, his mortgage on the Village of Windhover and Canby Park was to expire "(i)n or around 1997."[3] Plaintiff states that he began to research the refinancing of his properties shortly beforehand and, in doing so, discussed it with GMAC Commercial Mortgage Corporation ("GMAC").

Plaintiff asked Lawyer Defendants to advise him and complete the transaction to protect Plaintiff's interests. Plaintiff states that Lawyer Defendants "eventually informed (Plaintiff) that, among other things, GMAC did not want (Plaintiff), alone, to own the refinanced properties because that might affect GMAC's ability to sell the refinancing package in a particular after-market."[4] However, Lawyer Defendants informed Plaintiff that they could "achieve the best financial result" for Plaintiff as follows:

> "They could create a limited liability company ("LLC") to own the properties so gains or losses would pass through the LLC, which also would be the borrower, create a corporate layer between the LLC and (Plaintiff) such that (Plaintiff) individually would own ninety-nine percent of the properties and his corporation(s) own one percent, so—if there ever were

[2] See Pre-Trial Stipulation at 5, ¶ 26.
[3] Pl. Compl. ¶20.
[4] Pl. Compl. ¶24.

> any gain—(Plaintiff)'s and his business' tax liability only could be increased, if at all, for a very small portion of it, but would remain as before for the rest."[5]

Plaintiff alleges that Lawyer Defendants also discussed this matter with Defendants Thompson and Ballard Thompson & Associates (hereinafter "Accountant Defendants"). Based on their combined assessment, Defendant Lawyers created the Village of Windhover, LLC on October 7, 1997 and Plaintiff transferred his real estate and apartment buildings to the LLC. Plaintiff claims that he was a layperson relying on the expertise of professionals.

An entire corporate restructuring occurred pursuant to this transfer. First, Apartment Managers, Inc. ("AMI"), which was organized on December 15, 1997, owned one percent of Village of Windhover LLC. Next, Alban Park, Inc. ("API"), organized on January 9, 1998, owned 90% of Village of Windhover, LLC. Finally, under the corporate restructuring, Plaintiff individually owned all the issued and outstanding stock of AMI and API.

Plaintiff alleges that the plan proposed to him by Defendant Lawyers greatly differed from the final result. According to Plaintiff, he was

[5] Pl. Compl. ¶26.

supposed to own 90% of the properties. Instead, API owned 90% of Village of Windhover, and "in turn, owned the properties."[6]

Plaintiff alleges that Lawyer and Accountant Defendants' simple failure to cause AMI and API to elect Subchapter-S status during the corporate restructuring of his property caused the greatest detriment. Subchapter-S status must be filed on the day of organization or 75 days thereafter. Because of this failure to elect Subchapter-S status, Plaintiff alleges that when he "sells the Village of Windhover and/or Canby Park apartment complex and/or their real estate parcels, or any portion, huge gains will pass to AMI and API, rendering AMI, API, and Boerger individually liable for materially more in federal and state income taxes than he and those businesses would have been if the Sub-S elections were made during the first seventy-five days the corporations existed (the "Absent Sub-S Tax Increment")."[7]

Plaintiff claims he first learned of this potential problem during the summer of 2004 when he received an offer from prospective buyers to purchase the apartment complex; the highest bid approximating $26,000,000.

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[6] Pl. Compl. ¶29.
[7] Pl. Compl. ¶38.

According to Plaintiffs, the Absent Sub-S Tax Increment will cost negative tax implications of $8,129,179. Plaintiffs bring this complaint on grounds of professional negligence, breach of contract, negligent misrepresentation, indemnity and declaratory judgment against Lawyer Defendants. Plaintiffs claims of breach of contract, professional negligence, indemnity and declaratory judgment against Accountant Defendants.

PROCEDURAL HISTORY

On March 15, 2005, Defendant Lawyers and Accountants filed a Motion to Dismiss. Defendants argued that Plaintiff failed to file the action within the statute of limitations pursuant to 10 *Del. C.* §8106. However, Judge Del Pesco denied this Motion, noting issues of fact. Following the denial of this Motion, Defendant Lawyers and Accountants filed answers to the Complaint and a series of crossclaims against one another.

Addition of Third Party Defendant, Patone & Patone, LLC

Thereafter, Defendant Lawyers and Accountants filed Motions to Add a Third Party Defendant on December 29, 2005. Defendant Lawyers generally deny all liability. However, Defendant Lawyers stated that, "if it is the case that the jury finds in favor of the plaintiffs and against the

defendants, then defendants contend that an entity, not yet a party, to wit: Patone & Patone, LLC, is also liable."[8]

On January 13, 2006, Judge Del Pesco granted the Motion to Add a Third Party, and Defendants subsequently filed the Third Party Complaint on January 19, 2006. The Complaint states that Patone is an accounting firm that prepared tax returns for Plaintiffs. As such, Defendants accuse Patone of failing to file Plaintiffs' tax returns as Subchapter "S" corporations. Defendants further allege that Patone had "numerous opportunities beginning in 1998, and perhaps earlier, to rectify the situation as it existed . . . "[9]

Patone filed an answer to the above Complaint on August 26, 2006. Patone admitted assisting plaintiffs in preparing tax returns. Patone denied the allegations of negligence, but stated that "at certain times relevant to this action, plaintiffs Apartment Managers, Inc. and Alban Park, Inc. and Alban Park, Inc. filed tax returns as 'C' corporations and had not elected 'S' corporation status."[10]

STANDARD OF REVIEW

The Court may grant summary judgment if it concludes that "the pleadings, depositions, answers to interrogatories, and admissions on file,

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[8] Def. Heiman, Baker, and Heiman Aber & Goldlust's Mot. to Add Third Party Def., ¶3.
[9] Third Party Compl., ¶3.
[10] Patone & Patone, LLC's Ans. to Compl., ¶3.

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law."[11] The moving party bears the initial burden of showing that no material issues of fact are present.[12] Once such a showing is made, the burden shifts to the nonmoving party to demonstrate that there are material issues of fact in dispute.[13] In considering a motion for summary judgment, the Court must view the record in a light most favorable to the nonmoving party.[14] The Court's decision must be based solely on the record presented and not on all evidence "potentially possible."[15]

PARTIES' CONTENTIONS

Presently, the three sets of defendants have separately filed five different motions for summary judgment. First, Lawyer Defendants filed a motion for summary judgment based upon the speculative nature of damages. Defendants argue that Plaintiffs fail to prove actual damages as they have not yet incurred the alleged tax liability by selling the real estate or liquidating assets.

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[11] Super. Ct. Civ. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).
[12] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).
[13] *Id*. at 681.
[14] *Burkhart*, 602 A.2d at 59.
[15] *Rochester v. Katalan*, 320 A.2d 704, 708 (Del. 1974) (citing *United States v. Article Consisting of 36 Boxes*, 284 F.Supp. 107 (D. Del. 1968), *aff'd*, 415 F.2d 369 (3d Cir. 1969)).

Lawyer Defendants also filed a motion for summary judgment based on the statute of limitations. Lawyer Defendants argue that the three year statute of limitations of 10 *Del. C.* §8106 bars the legal malpractice action here, and Plaintiffs cannot seek relief under the time of discovery rule.

Accountant Defendants filed a motion for joinder in the summary judgment of Lawyer Defendants by which they also rely on 10 *Del. C.* §8106. Accountant Defendants cite an engagement letter for additional support. Ballard, Thompson and Associates, P.A. argue they sent an engagement letter to Plaintiffs which included a clause that limited the time period for bringing a cause of action to 3 years.

Accountant Defendants filed a separate motion for summary judgment based on the issue of duty and the issue of damages. According to Defendants, they owed no duty to Plaintiffs because the engagement letter stated that Defendants would only perform the services with the information provided to them and would not conduct any further investigation. Defendants state, however, that if the matter at hand proceeds to trial, damages should be limited to "the lost benefit of loss carry forwards of C corporation status."[16]

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[16] Def. Thompson and Ballard Thompson Assoc. Joinder in Def. Heiman and Baker Mot. for Sum. J., ¶28.

Finally, Third Party Accountant Defendant Patone & Patone, LLC filed a motion for summary judgment. Third Party Defendant essentially relies on the aforementioned arguments by stating that, "[s]ince the Defendants' Third Party Complaints are premised on the contention that P&P bears some portion of responsibility for any liability that the Defendants are found to have to the Plaintiffs, then to the extent that the Plaintiffs' claims against one or more Defendants are dismissed, such Defendant's or Defendants' claims against P&P should also be dismissed."[17] Third Party Defendant also argues that, "In the alternative, to the extent that the Court grants Accountant Defendants' motion on its alternative ground seeking cap on damages, then any such cap on damages should also apply to Defendants' claims against P&P."[18]

Defendant's Statute of Limitations Arguments

The Court need not address the aforementioned arguments regarding damages or the engagement letter because the statute of limitations controls the matter at hand. All Defendants rely on the statute of limitations arguments.

In their motion for summary judgment, Lawyer Defendants argue that the statute of limitations expired on March 15, 2001. Lawyer Defendants

[17] Third Party Def. Patone Mot. for Summ. J., ¶6.
[18] *Id.*, ¶7.

arrived at this date by adding three years to the last potential date that a Subchapter-S election could have been timely filed under the measure derived by Plaintiff's accounting expert in this case.

Lawyer Defendants make three arguments as to why the time of discovery rule is not applicable here:

(1) Plaintiff was aware of the corporate restructuring because he "signed the deeds conveying title to the apartment complexes from himself, individually, into the Village of Windhover, LLC."[19] Defendants claim that Boerger "signed the certificates of incorporation for AMI and API, as well as, the By-laws and Operating Agreement for AMI, documents which, collectively, reveal that ownership for the complexes was not restructured so as to retain ninety-nine percent ownership in Boerger."[20] Accordingly, "this fact was evident on every federal income tax return that Boerger signed for himself and on behalf of Village of Windhover, LLC, AMI and API, each and every year beginning with the 1998 returns."[21]

(2) Lawyer Defendants argue that Plaintiff "was admittedly well versed in the potential tax consequences associated with corporate

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[19] Def. Heiman, Baker and Heiman Aber & Goldlust, P.A.'s Mot. for Summ. J. Based on Expiration of Statute of Limitations, ¶2.
[20] *Id.*
[21] *Id.*

ownership of real estate."[22] Defendants cite to the September 22, 2006 deposition of Boerger where he states that since the 1970s he knew of the possibility of double tax in connection with holding real estate as a corporate entity.[23] In fact, Plaintiff Boerger discussed the potential tax liability with Attorney Defendants who "told him that the creation of the LLC would cause profits and losses to pass straight through to him."[24] However, Defendants allege that Plaintiff "failed to investigate the discrepancy."[25]

(3) Furthermore, Defendant Lawyers claim that Third Party Defendant Patone placed Plaintiff Boerger on notice of the potential tax liability by the summer of 1999. Defendant Lawyers assert that Third Party Defendant Patone served as an independent tax consultant for Plaintiff starting in late 1998 or early 1999. They point to a deposition of Patone where he "recognized the potential for imposition of double taxation and inquired of Boerger as to why the corporations had not elected Subchapter-S status."[26] Patone testifies that he advised Plaintiff about the double tax on a corporate and personal level. Importantly, Boerger acknowledged this conversation with Patone in his September 22, 2006 deposition. Defendant Lawyers,

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[22] Def. Heiman, Baker and Heiman Aber & Goldlust, P.A.'s Mot. for Summ. J. Based on Expiration of Statute of Limitations, ¶3.
[23] *Id.* (citing Dep. of Boerger, p.25-27).
[24] *Id.* (citing Dep. of Boerger, p.174-179).
[25] *Id.*
[26] Def. Heiman, Baker and Heiman Aber & Goldlust, P.A.'s Mot. for Summ. J. Based on Expiration of Statute of Limitations, ¶7 (citing Dep. of Patone, p.48-57).

therefore, contend that "Boerger must be charged at the very least, with inquiry notice of his cause of action against Attorney Defendants as of the summer of 1999 . . ."[27]

Plaintiff's Response

Plaintiffs respond by stating that, "In full context, Boerger's testimony about his knowledge regarding corporate double tax in the 1970s was general and superficial and absolutely unrelated to the reorganization, he was promised would be tax neutral."[28] According to Plaintiffs:

> No lawyer Defendant (or Accountant Defendant) advised Boerger to elect S corporation status for Apartment Managers, Inc. or Alban Park, Inc., and advised Boerger about the repercussions of failing to elects corporation status for either of those entities, even mentioned the S corporation in any manner, advised Boerger to seek tax advice with respect to the reorganization or its tax affect on Boerger, or advised Boerger to seek any other lawyer's advice with respect to the reorganization or its tax affect on Boerger.[29]

Plaintiffs stand by the claim that Boerger first learned of a potential tax liability in 2004 when a prospective buyer offered $26,000,000 for the Village of Windhover Apartment Complex and a successor accountant pointed out the potential tax liability. In his September 22, 2006 deposition, Boerger testifies that he immediately sought the advice of a new lawyer

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[27] Def. Heiman, Baker and Heiman Aber & Goldlust, P.A.'s Mot. for Summ. J. Based on Expiration of Statute of Limitations, ¶7.
[28] Pl. Opp. to Def. Heiman, Baker, and Heiman Aber & Goldlust, P.A. Summ. J. Mot. Based on Expiration of Statute of Limitations, ¶12.
[29] *Id.*, ¶8.

upon learning of this predicament. Plaintiffs maintain that the Court cannot grant summary judgment based on the statute of limitations.

DISCUSSION

The Applicable Statute of Limitations is Three Years from Accrual

The Court finds that 10 Del. C. § 8106 applies because Plaintiff filed the Complaint for malpractice on grounds of negligence, breach of contract and negligent misrepresentation. This section provides that no action "shall be brought after the expiration of 3 years from the accruing of such cause of action." [30] Delaware courts have established that 10 *Del. C.* §8106 starts to run from the time of the alleged malpractice.[31] Accordingly, the statute begins to run for a contract claim at the time of the alleged breach and for a tort claim when the injury occurs to plaintiff.[32]

Tolling of the Statute of Limitations

Under Delaware law, "Ignorance of the facts does not act as an obstacle to the operation of the statute."[33] This rule, however, contains exceptions such as in the case of infancy, incapacity, fraud and "the absence of

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[30] 10 *Del. C.* §8106.
[31] *Healthtrio, Inc. v. Margules*, 2007 WL 544156, at *7 (Del. Super.).
[32] *Hood v. McConemy*, 1971 U.S. Dist. LEXIS 11108, at *21 (D. Del.) (citing *Nardo v. Guido De Ascanis & Sons, Inc.*, 254 A.2d 254, 256 (Del. Super. 1969).
[33] *Healthtrio, Inc.*, 2007 WL 544156, at *7 (citing *Oropeza v. Maurer*, 2004 WL 2154292, at *1 (Del. 2004).

observable factors that would place a layman on notice of a problem . . ."[34] This latter exception is known as the date of discovery exception.[35] If an exception applies then, "the statute begins to run when the defect is, or should have been, discovered."[36]

In *Healthtrio, Inc. v. Margules*,[37] the Delaware Superior Court granted a motion for summary in a legal malpractice action by relying on the well established precedent of *Began v. Dixon.*[38]

In *Began,* the Court held that plaintiff's claims did not meet the fraud or concealment exceptions to 10 *Del. C.* §8106.[39] The Court, therefore, addressed whether the date of discovery exception tolled the statute of limitations. Because the plaintiff in *Began* had consulted another attorney four years prior to the statute of limitations, the Court ruled that the statute was not tolled. The Court found that plaintiff's consultation with independent counsel indicated he was aware of the alleged malpractice.[40]

Similar to the plaintiff in *Began*, the plaintiff in *Healthtrio* consulted independent consultation prior to filing the complaint. The plaintiff retained

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[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] 2007 WL 544156, at *7.
[38] 547 A.2d 620 (Del. Super. 1988).
[39] *Id.* at 623.
[40] *Id.*

counsel on January 30, 2002, and later substituted “independent counsel.”[41] Despite the change in counsel, the Court held that plaintiff’s complaint fell outside the statute of limitations as plaintiff’s claim began to accrue on January 30, 2002. The Court found that plaintiff could not “prove any set of facts that would support its ‘blamelessly ignorant’ contention.”[42]

In defending against Defendants’ motion for summary judgment, Plaintiffs rely on the date of discovery exception which tolls the statute when there is an “absence of observable factors that would place a layman on notice . . .”[43] Plaintiffs contend that Boerger first learned of the potential tax liability from a “successor” accountant in 2004 and, thereafter, sought advice from a new lawyer. The Court finds that this argument surreptitiously evades the fact that Boerger himself had knowledge of the potential for tax liability dating back to the 1970s.

Moreover, the Court finds that not only was Boerger aware of the potential liability, but he was warned of it on several occasions. First, Lawyer Defendants discussed the creation of the LLC and the passing of profits and losses with Plaintiff Boerger in 1997. Second, Boerger later hired Third Party Defendant Patone who served as an independent

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[41] 2007 WL 544156, at *8.
[42] *Id.*
[43] *Id.* at *7 citing *Oropeza v. Maurer*, 2004 WL 2154292 (Del. 2004).

consultant for him in 1999. Patone testified that he recognized the tax liability at this time and even asked Plaintiff Boerger why he had not elected Subchapter-S status. Hence, on several occasions prior to filing the complaint here, Plaintiff Boerger was on notice of a potential tax problem, but did not take action.

The simple fact that Boerger hired a new accountant and lawyer in 2004 does not prove application of the date of discovery exception which tolls the statute of limitations. Though the facts of *Began* and *Healthtrio* involve the hiring of independent counsel to set the date on which the statute began to run for a legal malpractice claim, this does not mean that the statute of limitations in a legal malpractice claim only begins to run when independent counsel is retained. Where, as here, multiple factors and plaintiff's own statements indicate knowledge of the relevant facts which establish a potential claim, the statute is not tolled.

Defendants did not fraudulently conceal the potential tax liability in any manner here; the Court finds that Plaintiff Boerger should have discovered the potential tax liability by 1999 at the latest. The January 3, 2005 complaint falls well outside the three year statute of limitations.

CONCLUSION

There are no genuine issues of fact which show the statute of limitations was tolled. The statute of limitations expired prior to the filing of the complaint. Defendants' Motion to Dismiss is, hereby, **GRANTED.**

IT IS SO ORDERED.

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Judge Calvin L. Scott, Jr.