UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 06-21748-CIV-MARTINEZ/BANDSTRA

MARK J. GAINOR AND ELYSE GAINOR,

Plaintiffs,

v.

SIDLEY AUSTIN LLP, a Delaware limited liability partnership, f/k/a SIDLEY AUSTIN BROWN & WOOD, f/k/a, BROWN & WOOD, R.J. RUBLE, an individual, ARTHUR ANDERSON, LLP, an Illinois limited liability partnership, MICHAEL S. MARX, an individual, P. ANTHONY NISSLEY, an individual, MERRILL LYNCH & CO., INC., a Delaware corporation, and MARK C. KLOPFENSTEIN, an individual,

Defendants.
_____/

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on Defendant, Merrill Lynch & Co., Inc.'s Motion to Dismiss (D.E. 68) filed on May 29, 2007. On June 26, 2007, this motion was referred to Chief United States Magistrate Judge Ted E. Bandstra by the Honorable Jose E. Martinez for a Report and Recommendation pursuant to 28 U.S.C. § 636(b). Having carefully considered this motion, the response and reply thereto, the court file and applicable law, the undersigned respectfully recommends that Defendant, Merrill Lynch & Co., Inc.'s Motion to Dismiss be DENIED consistent with the below recommendation.

INTRODUCTION

On or about June 7, 2006, Mark J. Gainor and Elyse Gainor (plaintiffs), commenced this action in the Eleventh Judicial Circuit Court of the State of Florida, in and for Miami-

Dade County, seeking damages and other relief against the law firm of Sidley Austin Brown & Wood, LLP ("Sidley") arising out of plaintiffs' participation in a tax strategy allegedly offered to them by their accountants, Arthur Andersen, LLP. Plaintiffs' complaint, which named Sidley as the sole defendant, alleged nine causes of action: (1) professional malpractice; (2) breach of contract; (3) breach of contract implied in fact; (4) breach of contract implied in law; unjust enrichment; (5) negligent misrepresentation; (6) fraudulent misrepresentation; (7) breach of fiduciary duty; (8) tortious interference with an advantageous business relationship; and (9) violations of the Florida Remedies for Criminal Practices Act.[1]

On March 7, 2007, plaintiffs filed their amended complaint naming as additional defendants R.J. Ruble, Arthur Andersen, LLP ("Andersen"), Michael S. Marx, P. Anthony Nissley, Mark Klopfenstein, Merrill Lynch, Pierce, Fenner & Smith, Inc. ("MLPFS"), and Merrill Lynch Private Finance, LLC ("MLPF") (jointly referred herein as Merrill Lynch). The amended complaint also added civil conspiracy as a cause of action against all defendants.

The amended complaint alleges that in 1998, plaintiff Mark Gainor ("Gainor") maintained an 81.2% interest in Gainor Medical Management, LLC ("GMM") through direct ownership and through interest in two wholly-owned subchapter S corporations, Bryan Medical, Inc. and Gainor Medical U.S.A., Inc. Am.Cpt., ¶ 26. In December 1998, GMM agreed to sell substantially all of its assets and subsidiaries. Am.Cpt., ¶ 29. The sale

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[1]On July 12, 2006, Sidley removed this action to this Court on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1441(a).

closed in January 1999, realizing a total gain in excess of $130,000,000 representing potentially taxable income. Am.Cpt., ¶ 28 & 29.

In August 1999, Andersen offered Gainor a "strategy" designed by Sidley ("the Sidley Plan") which was created to effectuate a tax savings of approximately $17,000,000 on the asset sale. Anderson explained to Gainor that this tax shelter would be supported by an opinion letter from Sidley and that the losses and deductions to be claimed from the implementation of the strategy would likely be upheld if challenged by the Internal Revenue Service ("IRS"). Anderson also advised Gainor that Merrill Lynch would assist in effectuating the plan. Am.Cpt., ¶ 32.

On or about August 20, 1999, Andersen sent Gainor a schedule confirming the anticipated professional fees and transaction costs associated with the implementation of the Sidley Plan. Am.Cpt., ¶ 33. As of October 1999, the projected cost of the plan included approximately $2,100,000 in fees and costs payable to Andersen, Sidley, Merrill Lynch and to an entity controlled by Mark Klopfenstein. Am.Cpt., ¶ 34. On September 1, 1999, Gainor authorized Andersen to proceed with the tax shelter plan. Am.Cpt., ¶ 35. After implementation of the Sidley Plan, a series of financial transactions were conducted that were designed to generate over $70,000,000 in capital losses. Am.Cpt., ¶ 36. By this time, Gainor's ownership interests in GMUSA which had been merged into Lucor Special Investments, Inc. ("LSI") and Bryan Medical were transferred to MJG, a Georgia limited partnership in which Gainor held an 86.27 percent interest as a limited partner. Id.

On December 10, 1999, the IRS released Notice 99-59 entitled "Tax Avoidance Using Distributions of Encumbered Property" which described certain transactions similar to the Sidley Plan and warned that such transactions generated artificial losses lacking

economic substances which did not constitute the type of bona fide losses that are deductible under the Internal Revenue Code. Am.Cpt., ¶ 37.

On December 14, 1999, in accordance with the Sidley Plan, MJG sold its stock in Bryan Medical to one of the Klopfenstein entities for $297,115.00, a forty million dollar capital loss on paper. Similarly, on December 23, 1999, MJG sold its stock in LSI to the other Klopfenstein entity for $125,775.00, an additional thirty million, six hundred thousand dollar capital loss on paper. Am.Cpt., ¶ 39. Subsequent tax returns prepared by Anderson reported these transactions and claimed capital losses and deductions exceeding $70,000,000. Am.Cpt., ¶ 41.

On December 22, 2001, the IRS published Announcement 2002-2, 2002-1 C.B. 304, which encouraged taxpayers to disclose their participation in certain tax shelters in exchange for the IRS waiver of certain penalties. Am.Cpt., ¶ 42. Plaintiffs voluntarily disclosed to the IRS their involvement with the Sidley Plan. Am.Cpt., ¶ 44.

On January 20, 2006, pursuant to a settlement with the IRS, plaintiffs accepted the disallowance of claimed tax benefits associated with the Sidley Plan and the IRS agreed not to pursue any penalties against plaintiffs for their participation in the Plan. As a result, plaintiffs incurred additional taxes and interest in excess of $17,000,000.

On March 7, 2007, plaintiffs filed their amended complaint in this action naming Merrill Lynch and the other parties identified above as additional defendants to this action. The amended complaint added civil conspiracy as a cause of action against all defendants.

On May 29, 2007, MLPFS and MLPF filed the instant motion to dismiss seeking dismissal of plaintiffs' amended complaint for failure to state a cause of action under

Fed.R.Civ.P. 12 (b)(6).[2] Specifically, MLPS and MLPF argue that the amended complaint was filed after the expiration of the applicable statute of limitations and fails to allege the required elements of a civil conspiracy claim. The issues raised with respect to this motion are discussed more fully below.

STANDARD OF REVIEW

In ruling on a motion to dismiss, a federal court must view the complaint in the light most favorable to the plaintiff and take its allegations as true. Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229 (1984); Kirby v. Siegelman, 195 F.3d 1285, 1289 (11th Cir. 1999); Quinone v. Durkis, 638 F.Supp. 856 (S.D. Fla. 1986). When a federal court considers a motion to dismiss at the pleadings stage, it must apply the Federal Rules of Civil Procedure. Fed.R.Civ.P. 8(a) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Caster v. Hennessey, 781 F.2d 1569, 1570 (11th Cir. 1986). In order to satisfy the pleading requirements of Fed.R.Civ.P. 8, a complaint must be sufficient to give the defendant fair notice of what the claim is and the grounds upon which it rests. Swierkiewiez v. Sorema, N.A., 534 U.S. 506, 512, 122 S.Ct. 992 (2002).

Until the recent United States Supreme Court decision in Bell Atlantic Corp. v. Twombly, 550 U.S. ____, 127 S.Ct. 1955 (2007), courts routinely followed the rule that "a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that plaintiff could prove no set of facts in support of his claim which would entitle

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[2]On September 5, 2007, this Court entered an order dismissing all claims against Arthur Andersen, LLP, Michael S. Marx and P. Anthony Nissley with prejudice pursuant to a settlement agreement between plaintiffs and these defendants. Thus, plaintiff presently proceeds only against R.J. Ruble, Mark Klopfenstein, MLPFS and MLPF.

him to relief." Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99 (1957); Neizil v. Williams, 543 F.Supp. 899 (M.D. Fla. 1982). The Twombly decision essentially abrogated Conley's standard of review. Thus, to survive a Rule 12(b)(6) motion to dismiss, plaintiff's complaint must now include "enough facts to state a claim to relief that is plausible on its face." Twombly, 127 S.Ct. at 1964-65. As a result, "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" Id. Finally, the issue is not whether the plaintiff will ultimately prevail, but "whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 426 U.S. 232, 236 (1974); Hammer v. Armstrong World Industries, 679 F.Supp. 1096, 1098 (S.D. Fla. 1987).

FINDINGS AND CONCLUSIONS

I. Statute of Limitations

Merrill Lynch moves to dismiss plaintiffs' civil conspiracy claim on the ground that it is time barred by the applicable statute of limitations. Specifically, Merrill Lynch asserts that the four year statute of limitations applicable to a civil conspiracy action under both Florida and Georgia law bars plaintiffs' claim. The statute of limitations is ordinarily an affirmative defense, which must be pled and proven by the defendant. See City of Fort Lauderdale v. Ross, Saarinen, Bolton & Wilder, Inc., et al., 815 F.Supp. 444 (S.D. Fla. 1992). However, a statute of limitations defense may be properly raised in a Rule 12(b)(6) motion when a complaint shows on its face that the limitations period has run. Id., (citing Avco Corp. v. Prescision Air Parts, Inc., 676 F.2d 494, 495 (11th Cir. 1982). A Rule 12(b)(6) dismissal may also be appropriate "where it is evident from the plaintiff's pleadings that the action is barred and the pleadings fail to raise some basis for tolling or the like."

Jones v. Alcoa, Inc., 339 F.3d 359, 366 (5th Cir.2003), cert. denied, 540 U.S. 1161, 124 S.Ct. 1173, 157 L.Ed.2d 1206 (2004).

To address the statute of limitations issue, this Court must first discern which forum's laws apply and specifically where the parties' acts giving rise to this claim occurred. See Ellis v. Great Southwestern Corp., 646 F.2d 1099, 1102 (5th Cir. 1981) (a federal court in diversity cases is ordinarily bound to look to the choice of law rules of the state in which it sits to determine whether the state courts of that state would apply their own state's statute of limitations or the statute of limitations of some other state.) Florida courts apply the "significant relationship" test in determining which states' statute of limitations are applicable. See State Farm Mutual Automobile Insurance Co. v. Roach, *et al*, 945 So.2d 1160, 1163 (Fla. 2006).

Reviewing the amended complaint, it is difficult to determine where the most significant relationship to the alleged conspiracy claim occurred. Plaintiff's allege that "at all time material, [they] resid[ed] in the State of Georgia and then later in Dade County, Florida." Am.Cpt., ¶ 1. Yet, plaintiffs also allege that "[t]his action accrued in Miami-Dade County, Florida." Am.Cpt., ¶ 19. Plaintiffs do not allege the date they moved to Florida or whether it was before or after the implementation of the Sidley Plan. Resolution of this issue involves factual inquiries that are not apparent from the face of the amended complaint and, thus, cannot be resolved on this instant motion to dismiss.

Irrespective of whether Florida or Georgia's statute of limitations is applicable here, the undersigned finds plaintiff's conspiracy claim cannot be dismissed as a matter of law due to additional factual issues concerning the commencement date of the applicable statute of limitations period. Under both Florida and Georgia law, the statute of limitations

for a civil conspiracy claim is four years. See Fla. Stat. § 95.11(3)(o)(2006); Serv. Stages, Inc. v. Greyhound Corp. 170 F.Supp. 482, 484 (N.D. Ga. 1959). Under Florida law, "[a] cause of action accrues when the last element constituting the cause of action occurs." See Fla. Stat. § 93.031 (1). A conspiracy cause of action accrues when a plaintiff suffers damages as a result of the acts performed pursuant to the conspiracy. See Olsen v. Johnson, 2007 W.L. 1855687 (Fla. 2d DCA 2007). "The last of [the] elements [of conspiracy] will necessarily be the injury to the plaintiff." Id. (quoting Armbrister v. Roland Int'l Corp., 667 F.Supp. 802, 809 (M.D. Fla. 1987).

In order to state a cause of action for common law conspiracy under Florida law, a plaintiff must allege: (1) an agreement between two or more parties; (2) to commit an illegal act; (3) an overt act in furtherance of that conspiracy; and (4) injury as a result of the conspiratorial acts. In re Sahleen & Associates, Inc. Securities Litigation, 773 F.Supp. 342, 375 (S.D. Fla. 1991). Based on these pleading requirements, Merrill Lynch contends that the last element of plaintiff's civil conspiracy action occurred on or about September 1, 1999, when Gainor authorized Andersen to proceed with the implementation of the Sidney Plan and paid Merrill Lynch its fees. See Am.Cpt., ¶¶ 35, 96-97.[3] Thus, Merrill Lynch argues that plaintiff's conspiracy claim is untimely as the limitations period expired four years later on September 1, 2003 and plaintiffs failed to bring suit until March 7, 2007.

Plaintiffs respond by arguing that the statute of limitations began to run when they

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[3]Merrill Lynch further argues that plaintiffs knew and consented to all the transactions allegedly giving rise to the conspiracy in 1999 and then voluntarily disclosed their participation in the Sidney Plan to the IRS in March 2002. Am.Cpt. ¶¶ 44& 95. Thus, Merrill Lynch maintains that plaintiff's conspiracy claim accrued at the very latest in 2006, still well beyond the four year statute of limitations period.

suffered damages as a result of the conspiracy. Specifically, plaintiffs argue that they were not aware of the full extent of their damages until January 2006 when they settled the tax dispute with the IRS by payment of seventeen million dollars in additional taxes and interest. See Am.Cpt., ¶ 97. In support, plaintiffs primarily rely on Peat, Marwick, Mitchell & Co. v. Lane, 565 So.2d 1323 (Fla. 1990) (accounting malpractice) and Loftin v. KPMG LLP., 2003 WL 22225621 ((S.D. Fla. 2002) (fraud and negligent misrepresentation) for the proposition that where a person's damages depends upon a determination of liability to a third party, damages are not sustained and, thus, a cause of action does not accrue, until the related proceedings have been completed or a final settlement has been executed by the parties. Consequently, plaintiffs maintain that they did not suffer redressable harm until January 2006 so that their conspiracy claim falls well within the applicable four year statute of limitations.

Reviewing the amended complaint and applicable law, the undersigned finds that plaintiff's conspiracy claim cannot be dismissed as a matter of law due to factual issues concerning the commencement date of the four-year limitations period. Indeed, the parties do not agree on whether Florida or Georgia's statute of limitations is applicable here,[4] nor do they agree on applicable accrual dates of the respective limitations period to the alleged facts in this case. Accordingly, the undersigned recommends that Merrill Lynch motion to dismiss be denied with respect to the statute of limitations issue but with leave to revisit this issue at a later stage of these proceedings. Merrill Lynch may plead the applicable statute

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[4]As discussed *infra*, the applicability of New York law is also at issue here as the contracts governing the relationship between plaintiffs and Merrill Lynch purportedly call for the application of New York law.

of limitations as an affirmative defense in its answer.

II. Failure to State a Cause of Action

Merrill Lynch next moves to dismiss plaintiff's civil conspiracy claim on the ground that plaintiffs allegations are conclusory and fail to allege that Merrill Lynch had the requisite intent to achieve an unlawful purpose as required under Florida, Georgia and New York law. Specifically, Merrill Lynch claims that it could not have known the nature of the alleged illegal tax scheme because the Sidley Plan was implemented prior to the issuance of IRS-Notice 99-59 in December 1999.

As discussed above, in order to state a cause of action for conspiracy under Florida law, plaintiffs must allege (a) a conspiracy between two or more parties; (b) to do an unlawful act, (c) by means of some overt act in furtherance of the conspiracy, and (d) damage to the plaintiffs as a result of the acts performed pursuant to the conspiracy. Olsen v *Johnson, supra;* Sahlen, 773 F.Supp. at 375. Such a tort is actionable where the plaintiff can show some particular power of coercion possessed by conspirators that an individual acting alone would not have. See Buckner v. Lower Florida Keys Hosp. Dist., 403 So.2d 1025, 1029 (Fla.App.3d DCA 1981). An actionable conspiracy requires an actionable tort or wrong. Wright v. Yurko, 446 So.2d 1162, 1165 (Fla. 5th DCA 1984). Although Rule 9(b) does not list conspiracy as a cause of action which must be pled with particularity, a complaint will be dismissed where the allegations are conclusory and vague. Rindley v. Gallagher, 890 F.Supp. 1540, 1557 (S.D.Fla.1995) (denying motion for summary judgment on conspiracy claim). Plaintiffs may not simply aver that a conspiracy existed. Rather, defendants must be put on notice as to the nature of the conspiracy alleged. *Id.* Plaintiffs must provide some factual basis for the legal conclusion that a conspiracy

existed. Rindley, 890 F.Supp. at 1557.

Reviewing the amended complaint in light of the above pleading requirements, the undersigned finds that plaintiffs' allegations are sufficient to state a cause of action for conspiracy against Merrill Lynch under the Twombley standard. Plaintiffs allege that defendants agreed with each other to combine their activities in order to induce Gainor to believe that defendants had crafted a legal tax strategy which would yield Gainor over $17,000,000 in tax savings. See Am.Cpt, ¶ 85. Plaintiffs further allege that "[t]he purpose of this conspiracy was to cause Plaintiffs to pay Defendants over two million one hundred thousand dollars ($2,100,000) in fees to implement the Sidley Plan." Am.Cpt., ¶ 86. Merrill Lynch "agreed to join the conspiracy at some point in time between June and August of 1999." Am.Cpt., ¶ 88. Significantly, plaintiffs then allege "[a]t the time the Defendants agreed to combine together to induce Gainor to implement the Sidley Plan, they knew that the conspiracy had an improper purpose, as each knew that the Sidley Plan was not a legitimate tax avoidance strategy, but rather was an illegal tax evasion scheme." Am.Cpt., ¶ 90. Plaintiffs further allege that Merrill Lynch "took numerous acts in furtherance of the conspiracy, including . . . setting up accounts to handle the funds used the transactions . . . recommending the implementation of certain securities transactions in order to carry out the Sidley Plan; and then implementing those transactions." Am.Cpt., ¶ 93. Finally, plaintiff allege that they sustained millions of dollars in damages as a result of the conspiracy. Am.Cpt. ¶ 97.

The foregoing allegations are sufficient to apprise Merrill Lynch of their alleged role and activity in the alleged conspiracy. Plaintiffs have identified the alleged conspirators and have specifically alleged certain overt acts performed by Merrill Lynch and the alleged

co-conspirators in furtherance of the conspiracy. Plaintiff also have alleged that the intent of the conspiracy was an "illegal tax evasion scheme" which resulted in financial injury. Merrill Lynch's proposition that because IRS Notice 99-59 was not published until after its involvement in the alleged conspiracy had concluded and, thus, it could not have known that the scheme was illegal is contrary to the complaint's allegations and is a factual issue which cannot be resolved on a motion to dismiss. Accordingly, the undersigned finds that plaintiffs have sufficiently pled a cause of action for civil conspiracy against Merrill Lynch under Florida law.

However, to the extent that this case falls under Georgia or New York law, the undersigned finds that plaintiffs have failed to allege a claim for civil conspiracy against Merrill Lynch. It is well settled that New York does not recognize civil conspiracy to commit a tort as an independent cause of action. Rather, the cause of action rests upon an underlying tort. See Ferguson v. Meridian Distribution Services, Inc., 548 N.Y.S.2d 233 (N.Y.A.D. 2 Dept. 1989). Likewise, Georgia law also does not recognize civil conspiracy as an independent tort. See McCrary v. AA Music Service, Inc., 153 S.E.2d 643 (Ga.App. 1967) (one seeking to impose civil liability for conspiracy must allege all elements of cause of action for tort the same as would be required if there were no allegation of a conspiracy.) Here, plaintiffs' sole claim against Merrill Lynch is a cause of action for conspiracy. Consequently, Merrill Lynch contends that plaintiffs' conspiracy claim fails on its face due to plaintiffs' failure to allege an underlying tort.

Plaintiffs do not dispute the above substantive laws of New York and Georgia. Rather, plaintiffs contend that their conspiracy claim is sounding in fraud and that the elements of a cause of action for fraud are alleged in the amended complaint. To prove a

claim of fraud under New York law, it is necessary to show a knowing and intentional misrepresentation or omission of material fact with scienter, done for the purpose of inducing plaintiff's reliance, and which did induce plaintiff's reasonable reliance to his injury. See Mallia v. Bankers Trust Co., 615 F.2d 68, 80 (2d cir. 1980). Plaintiffs contend that these elements are alleged within the conspiracy claim and clearly depict a scheme to defraud. See Am.Cpt. ¶¶ 85-97.

Reviewing the complaint, the undersigned finds that plaintiffs failure to explicitly denominate his claim as one for fraud is not in and of itself fatal. As stated above, on a motion to dismiss the court must examine the complaint to determine whether the allegations state a claim for relief. The form of the pleadings should not defeat the substance of the claim. Plaintiffs have generally alleged misrepresentation of material fact, scienter, reasonable reliance and damages. The crux of these allegations allege a scheme to defraud. However, these allegations fail to satisfy the heightened pleading standard of Fed.R.Civ.P. 9(b) with respect to Merrill Lynch. Allegations of fraud "must be accompanied by some delineation of the underlying act and transactions which are asserted to constitute fraud." Merrill, Lynch, Pierce, Fenner & Smith v. Del Valle, 528 f.Supp. 147, 149 (S.D. Fla. 1981). Here, Merril Lynch's alleged material misrepresentations of fact are non-specific and can even be construed as mere opinion.

Accordingly, the undersigned finds that in the event Georgia or Florida law is found to be applicable to this case, plaintiffs' conspiracy claim against Merrill Lynch should be dismissed with leave to replead as a separate and distinct cause of action and with greater specificity.

RECOMMENDATION

For all the foregoing reasons, the undersigned recommends that Defendant, Merrill Lynch & Co., Inc.'s Motion to Dismiss be DENIED.

The parties may serve and file written objections to this Report and Recommendation with the Honorable Jose E. Martinez, United States District Judge, within ten (10) days of receipt. See 28 U.S.C. §636(b)1)c); United States v. Warren, 687 F.2d 347 (11th Cir. 1982); cert. denied, 460 U.S. 1087 (1983); Hardin v. Wainwright, 678 F.2d 589 (5th Cir. Unit B 1982); see also Thomas v. Arn, 474 U.S. 140 (1985).

RESPECTFULLY SUBMITTED this 2 day of October, 2007 in Miami, Florida.

Ted E. Bandstra
Chief United States Magistrate Judge

cc: Honorable Jose E. Martinez
Counsel of record