Hamrick v Schain Leifer Guralnick
2015 NY Slip Op 31696(U)
August 27, 2015
Supreme Court, New York County
Docket Number: 650802-2014
Judge: Marcy S. Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

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MOLLY HAMRICK, BEVERLY HOUSE-MYERS, R&M HAMRICK FAMILY TRUST,

Plaintiffs,

– against –

SCHAIN LEIFER GURALNICK, MATTHEW BARNES and MONTCALM CO., LLC,

Defendants.

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Index No.: 650802-2014

DECISION/ORDER

Plaintiffs Molly Hamrick, Beverly House-Myers, and R&M Hamrick Family Trust (R&M) allege that defendants Matthew Barnes, Montcalm Co., LLC (Montcalm), and Schain Leifer Guralnick (SLG) fraudulently promoted and subsequently mismanaged three partnerships in which plaintiffs are principals. The purpose of the partnerships was to acquire and manage working interests in oil and gas properties, and to derive tax deductions for their investors. (Compl. ¶ 32 [a], [e].) The Internal Revenue Service (IRS) audited the partnerships, and in 2010 disallowed a substantial portion of the tax deductions flowing to plaintiffs individually. (Id. ¶ 42.) This action followed. Defendants Montcalm and Barnes now move, and SLG separately moves, to dismiss the Complaint in its entirety pursuant to CPLR 3211 (a) (1), (5) and (7).

Background

The relevant facts as alleged in the Complaint are as follows. Plaintiffs are two individuals and a Family Trust (Compl. ¶¶ 13-15), each of whom is a "principal" in Colt Drilling Partners (Colt) and Falcon Drilling Partners (Falcon). (Id. ¶¶ 21, 32.) Hamrick and R&M are

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also principals in Lion Drilling Partners (Lion) (collectively, the Partnerships).[1] (Id. ¶ 32.) Defendant Montcalm is the General Partner of the Partnerships, and defendant Barnes is Montcalm's Managing Member. (Id. ¶ 21.) Defendant SLG is an accounting firm that provided tax and accounting services related to plaintiffs' investments. (Id. ¶¶ 47-49.)

Defendants Barnes and Montcalm, along with non-parties Jonathan Feldman, Millennium Drilling Co, Inc. (Millenium), Patriot Exploration Co., LLC (Patriot), and Carter Henson, are "promoters of oil and gas investments" through partnerships like Colt, Falcon, and Lion (collectively, the Promoters).[2] (Id. ¶¶ 1, 21.) The Complaint alleges that plaintiffs were induced to invest in the Partnerships based on promises of "significant returns" on oil and gas interests acquired by the Partnerships, and "substantial federal tax deductions." (Id. ¶¶ 2, 21.) Plaintiffs were told that "this investment was a 'safe investment' that was routinely approved by the IRS." (Id. ¶ 3.)

The Complaint sets forth various representations allegedly made by non-party Feldman, including the following: Feldman allegedly promised Hamrick and House-Myers that they "would receive a return of approximately 4-to-1 on the amount they invested," "could expect a 'success rate' of between 50%-60% on the oil and gas wells drilled with their money," and "would be entitled to take a lawful, federal tax deduction of nearly $2 for every $1 in cash that was invested," based on a promissory note structure designed by Feldman that matched, or nearly matched, the cash investment. (Id. ¶¶ 23-24.) Feldman represented that this structure and the tax deductions it supported "were both lawful, that similar programs involving even greater

[1] The Complaint refers to the entities in which plaintiffs invested as Partnerships. Documentary evidence for the Colt Partnership indicates that it began as a New York general partnership, but may subsequently have been converted into a limited partnership or limited liability company. (Colt PPM [Plotz Aff. Ex. K] at 1, 3.)

[2] A prior lawsuit between plaintiffs and the non-party Promoters is pending in the United States District Court for Nevada. (No. 2:12-cv-00462-MMD-CWH [D Nev].) This action was commenced after defendants were dismissed from that litigation for lack of personal jurisdiction.

deductions had been audited several times and never disallowed, and that Feldman had a '100% success' rate" with the structure. (Id. ¶ 24.) He allegedly provided written materials and personal references to support these claims, including a tax opinion describing a similar transaction structure (id. ¶ 27) and an independent accountant's report prepared by defendant SLG (id. ¶ 49).

Feldman "indicated that [] Hamrick and House-Myers would need to sign subscription notes to guarantee the costs associated with drilling." (Id. ¶ 25.) He represented, however, that "the tax advantages of his proposed tax structure and the investment returns would more than offset the costs associated with servicing the notes, so that despite the costs associated with the notes structure, the investment would be highly profitable . . . ." (Id. ¶ 26.) He subsequently also represented that record title to properties acquired for the Partnerships would be held in the name of Millennium, but that Millennium would transfer record title to the Partnerships upon the Partnerships' request. (Id. ¶ 30.)

The Complaint alleges that in May 2004, "in reliance upon the various representations made by Feldman," plaintiffs invested in and became principals of the Partnerships. (Id. ¶ 32.) Plaintiffs also relied on "various misrepresentations" by defendants in making their investments. (Id. ¶ 33.) The Complaint does not, however, set forth the particular misrepresentations made by the party defendants, or specify the circumstances under which they were made. Rather, the Complaint alleges an oral agreement under which Feldman and defendant Barnes promised to "act as Colt, Falcon and Lion's fiduciaries, with broad discretion to make investment decisions, receive distributions, and maintain all necessary and customary records, for the benefit of Colt, Falcon and Lion." (Compl. ¶ 32 [c].) The agreement allegedly required Feldman and Barnes to hold working interests in trust for the Partnerships; transfer record title to the Partnerships upon

request (id. ¶ 32 [b]); maintain and "provide access to all books and records regarding the working interests . . . [and] moneys received" from the Partnerships and from well proceeds (id. ¶ 32 [c]); and "collect and distribute to [the Partnerships] the revenues to which [they] were entitled based on their ownership interest" (id. ¶ 32 [d]). The agreement also reiterated that principals would be allowed to take a 2-for-1 tax deduction. (Id. ¶ 32 [e].)

According to the Complaint, Feldman and Barnes "used Plaintiffs' money to pay each other fees or expenses that were not earned and were not ordinary and necessary business expenses." (Id. ¶ 36.) They "grossly overstated" drilling costs, "pocketing the excess money invested by Plaintiffs." (Id. ¶ 9.) SLG knew that defendants and the non-party Promoters were taking "exorbitant fees" and that these fees were "not reportable as intangible drilling costs" on the Partnerships' federal tax returns. (Id. ¶ 48.) SLG allegedly assisted the Promoters in concealing such fees from plaintiffs by inappropriately reporting them as a single line item on plaintiffs' Form 1065 K-1s. (Id. ¶ 51.) SLG engaged in other wrongful acts, including preparation of an audited return on investment that contained inaccurate information and that SLG knew or should have known would be used in marketing materials. (Id. ¶ 49.) SLG allegedly had an "inherent conflict of interest" because of its "relationship with Montcalm and Millennium." (Id. ¶ 54.)

In 2007, the IRS audited the Partnerships. In 2010, plaintiffs learned that "a substantial portion" of the intangible drilling cost deductions that flowed to them individually would be disallowed, "including the entirety of the deductions associated with the promissory note structure." (Id. ¶ 42.)

Plaintiffs were required to pay a share of the administrative judgment assessed against the Partnerships, including interest. (Id. ¶ 42.) Feldman and Barnes also allegedly began to sell off

the Partnerships' drilling assets to pay legal bills incurred due to the audits of the Partnerships and related entities. (Id. ¶ 53.) As a result, insufficient revenues were being generated to satisfy payments due on plaintiffs' notes. (Id.) Plaintiffs have been subjected to capital calls, a risk allegedly not disclosed to them during the promotion of the Partnerships. (Id. ¶ 34.)

Plaintiffs further allege that the Promoters have refused to provide them with requested information, or to transfer record title to any of the working interests in which the Partnerships have invested. (Id. ¶ 44.)

Discussion

Plaintiffs commenced this action on March 12, 2014. The Complaint pleads eight causes of action: breach of fiduciary duty (first cause of action); fraud and fraudulent inducement (second cause of action); "fraudulent nondisclosure" (third cause of action); negligent misrepresentation (fourth cause of action); breach of contract (fifth cause of action); constructive trust (sixth cause of action); unjust enrichment (seventh cause of action); and aiding and abetting (eighth cause of action). The fifth and sixth causes of action are pleaded solely against Barnes and Montcalm. These claims fall into two categories: those based on pre-investment misrepresentations and omissions, including the representations that Feldman's tax strategy was legal and that plaintiffs would receive a substantial return on investment (Compl. ¶¶ 63, 78); and those based on post-investment misconduct, including self-dealing and improper preparation of tax returns (id. ¶ 57). Defendants move to dismiss the Complaint in its entirety, as barred by the statute of limitations and for failure to state a cause of action.

It is well settled that on a motion to dismiss pursuant to CPLR 3211 (a) (7), "the pleading is to be afforded a liberal construction (see, CPLR 3026). [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable

inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts." (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]; see also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], lv denied 6 NY3d 706 [2006].)

Fraud, Fraudulent Nondisclosure, and Negligent Misrepresentation

Plaintiffs' claims for fraud and negligent misrepresentation are based on the same allegations as to pre-investment representations. (Compl. ¶¶ 63, 78.) Plaintiffs allege that these representations were made with the knowledge that they were false or, with respect to negligent misrepresentation, without a reasonable basis for believing that they were true. (Id. ¶¶ 64, 79.) They further allege that the misrepresentations were intended to and did in fact induce plaintiffs to invest with the Promoters. (Id. ¶¶ 64, 81.) The "fraudulent nondisclosure" claim alleges that defendants failed to disclose the falsity of the misrepresentations underlying plaintiffs' fraud and negligent misrepresentation claims – e.g., failure to disclose "that the investment program and transaction structure proposed by Feldman, whereby partners of [the Partnerships] would take a nearly 2-for-1 deduction on their tax returns, would not, in fact, support such deductions;" and failure to disclose the extent or propriety of expenses that subsequently would be charged by the Promoters. (Id. ¶ 70.) These omissions are likewise alleged to have induced plaintiffs' investment. (Id. ¶ 71.)

As a threshold matter, the court holds that these claims are barred by the New York

statute of limitations.[3] Under New York law, a cause of action based on fraud must be brought within the greater of 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. (CPLR 213 [8]; Gutkin v Siegal, 85 AD3d 687, 687 [1st Dept 2011] [applying CPLR 213 [8] discovery rule to fraud claim based on nondisclosure of material information]; Baratta v ABF Real Estate Co., Inc., 215 AD2d 518, 519 [2d Dept 1995] [same].) As the negligent misrepresentation claim is premised on the same allegations as the fraud claims, it is also governed by a six-year limitations period. (See County of Ulster v Highland Fire Dist., 29 AD3d 1112, 1115 [3d Dept 2006], lv denied 7 NY3d 710; see also 14 Bruckner LLC v 14 Bruckner Blvd. Realty Corp., 78 AD3d 431, 431 [1st Dept 2010]; Colon v Banco Popular N. Am., 59 AD3d 300, 300 [1st Dept 2009].)

Plaintiffs argue that the claims did not accrue until at least 2010, "when after years of Defendants fighting with the IRS to uphold their hopeless scheme it became clear that Plaintiffs' deductions would not be allowed." (Pls.' Memo. In Opp. at 10.) They further contend that their Complaint "raises issues of equitable tolling." (Id.)

These contentions are without merit. New York law is clear that a claim for fraud in the promotion of a financial investment accrues at the time the plaintiff invests – i.e., on the date the plaintiff "complete[s] the act that the allegedly fraudulent statements [] induced." (Prichard v 164 Ludlow Corp., 49 AD3d 408, 408 [1st Dept 2008].) While plaintiffs correctly argue that "a tort cause of action cannot accrue until an injury is sustained" (Kronos, Inc. v AVX Corp., 81 NY2d 90, 94 [1993]), the court finds that plaintiffs first suffered injury at the time of their

[3] Defendants argue that New York's borrowing statute (CPLR 202) applies to this case, and that Nevada law also applies based on the plaintiffs' residence in Nevada. The Court need not determine where the plaintiffs' causes of action accrued – a matter of dispute between the parties – in light of the court's holding that plaintiffs' claims are barred by the New York statute of limitations.

investment in 2004.[4] (Carbon Capital Mgt., LLC v American Express Co., 88 AD3d 933, 939 [2d Dept 2011] [holding that plaintiffs' claim for fraud in promotion of financial transaction accrued at time of transaction, "at which point his reliance on [defendant's] representations would have given rise to his alleged injuries"]; Chlsea, LLC v Gramercy Fin. Servs., LLC, 2013 WL 6095110, *6, 10 [Sup Ct, NY County, No. 652682-2011, Nov. 19, 2013] [this court's decision holding that claim for fraud in marketing of tax investment strategy accrued at the time that the plaintiff entered into the transaction with defendants, and that plaintiffs were injured at that time, not at the time the IRS subsequently disallowed the claimed losses].) As this action was brought more than six years after accrual of the fraud and negligent misrepresentation causes of action, these claims are barred unless plaintiffs meet their burden of pleading and proving that they commenced this lawsuit within two years of the time they could, with reasonable diligence, have discovered the alleged fraud. (See CIFG Assur. N. Am., Inc. v Credit Suisse Sec. (USA) LLC, 128 AD3d 607, 608 [1st Dept 2015].)

"In order to start the limitations period regarding discovery, a plaintiff need only be aware of enough operative facts so that, with reasonable diligence, it could have discovered the fraud." (Lucas-Plaza Hous. Dev. Corp. v Corey, 23 AD3d 217, 218 [1st Dept 2005] [internal quotation marks, citation, and brackets omitted].) "Where the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his

[4] Assuming the truth of plaintiffs' allegation that the pre-investment misrepresentations were false when made, they first suffered injury when they invested in Partnerships that were worth less than represented. (See Continental Cas. Co. v PricewaterhouseCoopers, LLP, 15 NY3d 264, 271 [2010] [Under the general rule, "the actual loss sustained as a direct result of fraud that induces an investment is the difference between the value of the bargain which a plaintiff was induced by fraud to make and the amount or value of the consideration exacted as the price of the bargain" (internal quotation marks and citation omitted)].) That plaintiffs may not have discovered the truth until later is fairly accounted for by the discovery prong of the fraud statute of limitations; it does not affect the general accrual date of the claim. (See Kronos, Inc., 81 NY2d at 94.)

eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him." (Gutkin, 85 AD3d at 688 [internal quotation marks, citation, and brackets omitted].)

Accepting the truth of the facts alleged in the Complaint, as the court must do on this motion to dismiss, the court holds that plaintiffs were put on notice of possible fraud more than two years before the commencement of this action. At least one of the Private Placement Memorandums (PPMs) that plaintiffs signed when entering into the Partnerships (see Compl. ¶ 39) contains disclosures that contradict key pre-investment representations regarding the tax deductions to be taken by the Partnerships.[5] The Complaint also alleges that plaintiffs have never received anything close to the returns allegedly promised by the Promoters. (See Compl. ¶¶ 8, 33, 35 [describing minimal returns]. See Gutkin, 85 AD3d at 688 [holding, in substantially similar case, that plaintiff was put on notice of possible fraud concerning representations as to revenue to be derived from oil and gas partnerships, where plaintiff received reports reflecting lower revenues and plaintiff "recognized that his investment returns were significantly less than expected"].)

As this court has held, relying on numerous appellate authorities, an IRS audit of an investment vehicle marketed as a tax shelter may be sufficient to put an investor on notice of fraud in the marketing of the investment. (See Chlsea, LLC, 2013 WL 6095110, at *7 [collecting cases].) Hopkinson v Estate of Siegal (2011 WL 1458633, *6 [SD NY, No. 10 Civ 1743, Apr. 11, 2011], rearg denied 2011 WL 2935876 [July 12, 2011], affd 470 Fed Appx 35 [2d

[5] The Colt PPM represents that "uncertainty exists concerning some of the federal income tax aspects of the transactions being undertaken by the Partnership" (Colt PPM [Plotz. Aff. Ex. K] at 30), and that "THERE CAN BE NO ASSURANCE THAT THE [IRS] WILL NOT SUCCESSFULLY ASSERT POSITIONS WHICH ARE INCONSISTENT WITH . . . THE TAX REPORTING POSITIONS TAKEN BY THE PARTNERS OR THE PARTNERSHIP." (Id. at 33 [emphasis in original].) The PPM disclosed the possibility that "the IRS will audit [the Partnership's returns]," that "tax adjustments might be made that would increase the amount of taxes due by [the plaintiffs]," and that "[the Partnership] may incur costs and expenses in contesting such adjustments." (Id. at 10-11.) The PPM also disclosed potential conflicts of interest. (Id. at 8.) The Colt PPM is the only PPM in the record.

Cir 2012]) involved substantially similar allegations of fraud.[6] The federal district court dismissed Hopkinson's claim as time barred under New York's fraud discovery rule, citing plaintiff's notice of an IRS audit evidencing that the deductions might be disallowed.[7] (Id. at *6.) The Second Circuit affirmed "[f]or substantially the same reasons," noting that "[a]s early as 2005, Hopkinson knew that she was not receiving the return on investment she had been promised by [the defendant]. Moreover, she knew by December 2006 that the [IRS] was investigating the tax deductions offered by the [] vehicles in which she had invested." (470 Fed Appx at 36.)

Here, similarly, the audit, along with plaintiffs' notice that their returns were inadequate, triggered their duty of inquiry. Indeed, in a February 2009 email from plaintiff House-Myers to Feldman (Plotz Aff. Ex. G), House-Myers noted that she had received notice of the IRS audits of Colt and Falcon, and requested an evaluation of "the risk [] that they [the IRS] will determine that the deductions taken by the partnership are not valid." She also expressed her concern that "if this audit goes with the trend it will [be] a catastrophic issue for us." Plaintiffs' counsel's apparent assertion at the oral argument that plaintiffs could not have learned of the possible disallowance of the deductions until the IRS assessed damages (Oral Argument Transcript at 24-26) is unsupported by the pleadings and by any documentary evidence in the record. In any event, this action was not brought until 2014, approximately four years after the assessment. The court accordingly concludes that plaintiffs fail to plead facts sufficient to show that they

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[6] The plaintiff alleged that she was fraudulently induced to invest millions in tax shelter partnerships, purportedly for the development of oil and gas properties (including a partnership identified as "Colt Driling Co" – of unclear affiliation). (2011 WL 1458633, at *1.) The defendants' alleged misrepresentations included that "the investments were tax deductible on a '1.95 to 1 basis' as intangible drilling costs," and that "the tax deductions had been approved by the [IRS]." (Id.)

[7] The plaintiff's duty of inquiry was also triggered by her notice of another federal litigation involving similar facts. (2011 WL 1458633, at *6.)

commenced this lawsuit within two years of the time they could, with reasonable diligence, have discovered the alleged fraud.

Plaintiffs' claim of equitable tolling of the limitations period is also unpersuasive. Plaintiffs appear to base this claim on defendants' concealment of the falsity of Feldman's or their own misrepresentations. (See Pls.' Memo. In Opp. at 5-6.) "[E]quitable estoppel does not apply where the misrepresentation or act of concealment underlying the estoppel claim is the same act which forms the basis of plaintiff's underlying substantive cause of action." (Kaufman v Cohen, 307 AD2d 113, 122 [1st Dept 2003].) Plaintiffs also assert equitable tolling based on defendants' failure to provide plaintiffs with information regarding the properties owned by the Partnerships and the proceeds generated by those properties. (See Pls.' Memo. In Opp. at 8; Compl. ¶¶ 43-44.) Plaintiffs' vague allegations do not support the extraordinary remedy of estoppel, which is only applicable where a plaintiff "'establish[es] that subsequent and specific actions by defendants somehow kept [him or her] from timely bringing suit.'" (Putter v North Shore Univ. Hosp., 7 NY3d 548, 552 [2006], quoting Zumpano v Quinn, 6 NY3d 666, 674 [2006].) Far from "lull[ing]" plaintiffs into a false sense of security (East Midtown Plaza Hous. Co. v City of New York, 218 AD2d 628, 628 [1st Dept 1995]), defendants' alleged failure to respond to plaintiffs' requests for information should have strengthened their suspicion of fraud or mismanagement and confirmed the need to seek judicial recourse.

Finally, to the extent that plaintiffs' fraud claim is construed as encompassing post-investment self-dealing – e.g., the alleged overstatement of drilling costs and charging of inappropriate management fees by Montcalm and Barnes (Compl. ¶ 70 [d]) – the Complaint fails to state a cause of action. The allegations of post-investment misconduct in support of the fraud claim overlap with the allegations in support of the breach of fiduciary duty claim. As discussed

in connection with the latter claim, these allegations are not pleaded with the requisite particularity. The second, third, and fourth causes of action will therefore be dismissed in their entirety.

Breach of Fiduciary Duty

Plaintiffs' first cause of action for breach of fiduciary duty is based on twenty-three categories of alleged misconduct. (Compl. ¶ 57.) Several of these categories simply restate the pre-investment misrepresentations and omissions which form the basis of plaintiffs' fraud and negligent misrepresentation claims – e.g., "[m]isrepresenting to Plaintiffs that the tax-advantaged investment program . . . was lawful and appropriate" (id. ¶ 57 [a]); "[f]ailing to accurately report the return on investments in the independent accountant's report" (id. ¶ 57 [f]); "[r]epresenting to Plaintiffs that Defendant SLG had previously vetted the tax structure of Colt, Falcon and Lion with the IRS . . . ." (id. ¶ 57 [p]); and "[f]ailing to inform Plaintiffs that [] Defendants Barnes and Montcalm would make inappropriate capital calls from the partners in the partnerships" (id. ¶ 57 [s]). Other categories allege post-investment mismanagement or self-dealing – e.g., "[o]verstating the costs of drilling to Plaintiffs and contracting for drilling services at a substantially lower cost than represented and failing to disclose the same to Plaintiffs" (id. ¶ 57 [b]); "taking substantial sums of money (effectively as pure profit off the top), including 'interest' payments" (id. ¶ 57 [c]); "[f]ailing to properly prepare Colt, Falcon, and Lion's tax returns" (id. ¶ 57 [g]); "failing to keep and maintain adequate business information and records" or to "transfer title to the oil and gas properties to Colt, Falcon and Lion upon request" (id. ¶ 57 [i]); and "[s]elling properties that were owned by Colt, Falcon, and Lion to parties related to Defendants Barnes and Montcalm without disclosing the sale of such properties and for substantially less than the fair value of such properties" (id. ¶ 57 [k]).

To the extent based on pre-investment conduct, the claim fails because plaintiffs do not plead facts sufficient to show that defendants owed them pre-investment fiduciary duties. While the existence of a fiduciary relationship is a question of fact, it is well-settled that such a relationship "is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions." (EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005], citing Northeast Gen. Corp. v Willington Adv., Inc., 82 NY2d 158, 162 [1993]; Van Valkenburgh, Nooger & Neville, Inc. v Hayden Publ. Co., Inc., 33 AD2d 766, 766 [1st Dept 1969], affd 30 NY2d 34 [1972], rearg denied 30 NY2d 880 [1972], cert denied 409 US 875 [1972]; see also J.P. Morgan Sec. Inc. v Ader, 127 AD3d 506, 507 [1st Dept 2015] [applying this standard to negligent misrepresentation claim].) The relationship exists where a "person reposes a high level of confidence and reliance in another, who thereby exercises control and dominance over him." (People v Coventry First LLC, 13 NY3d 108, 115 [2009], rearg denied 13 NY3d 758; RNK Capital LLC v Natsource LLC, 76 AD3d 840, 842 [1st Dept 2010], lv denied 16 NY3d 709 [2011].) That a defendant had "superior knowledge of the particular type of investment products involved does not, without more, create a fiduciary relationship," especially where the plaintiff is a sophisticated party. (See RNK Capital LLC, 76 AD3d at 842.) In contrast, a fiduciary relationship may be found where the defendant acts in an advisory role. (See EBC I, Inc., 5 NY3d at 21 [finding fiduciary relationship between underwriter and issuer of IPO, the court "stress[ing]" the underwriter's "role as advisor"].)

Plaintiffs allege that "they had no prior experience with oil and gas properties or with the investment/tax structure" of the Partnerships, and "impressed" this fact upon non-party Feldman. (Compl. ¶ 27.) Under the above authority, this allegation is plainly insufficient to plead a fiduciary relationship with Feldman, let alone with the party defendants. The documentary

evidence also does not support a claim that a fiduciary relationship existed. The Subscription Agreements for at least two of the Partnerships state that the investors were advised to consult their own attorneys and tax advisors regarding legal matters concerning the Partnerships and the tax consequences of the investment. (See Colt Subscription Agreement § 6 [Plotz Aff. Ex. D]; Lion Subscription Agreement § 9 [Plotz Aff. Ex. E].)[8] On this record, the court cannot find that plaintiffs have pleaded anything other than an arm's length business transaction.

To the extent that plaintiffs' claim is based on conduct that occurred post-investment, the claim fails for lack of particularity. Under CPLR 3016 (b), when a cause of action is based on "breach of trust . . . the circumstances constituting the wrong shall be stated in detail." Allegations of management wrongdoing that are "vague and conclusory, made without any specific instances of the alleged misconduct" lack the particularity required of fiduciary claims under CPLR 3016 (b). (Berardi v Berardi, 108 AD3d 406, 406-07 [1st Dept 2013], lv denied 22 NY3d 861 [2014]; see also Burry v Madison Park Owner LLC, 84 AD3d 699, 700 [1st Dept 2011]; Peacock v Herald Sq. Loft Corp., 67 AD3d 442, 443 [1st Dept 2009].)

Although the Complaint pleads numerous categories of wrongdoing, plaintiffs provide virtually no detail as to the specific acts perpetrated by the defendants or the dates on which the acts occurred. Plaintiffs plead, for example, that Barnes and non-party Feldman paid each other "fees or expenses that were not earned and were not ordinary and necessary business expenses." (Compl. ¶ 36.) They do not allege any factual support for these contentions. For example, they do not identify any excessive fees or any respect in which the fees deviated from the compensation to which they allegedly agreed (id. ¶ 32 [c]), or from usual and customary rates in

[8] Although defendants represented that the Falcon Subscription Agreement was attached (see Plotz Aff. ¶ 5), this agreement was not in fact included.

the industry. The Complaint's lack of specificity extends to the other asserted instances of wrongdoing, such as SLG's alleged reporting of excessive fees as "intangible drilling costs" on Partnership tax returns (id. ¶¶ 50-51), and the alleged sale by Montcalm and Barnes of Partnership assets to affiliated entities for insufficient value (id. ¶ 53).

As to the claim that Montcalm and Barnes have refused to transfer record title to Partnership properties, plaintiffs do not identify any oil or gas property as to which defendants have failed to transfer title. In contrast, Montcalm and Barnes submit three exhibits showing numerous assignments of oil and gas property interests from Patriot to the Partnerships. (Plotz Aff. Exs. L-N.) Plaintiffs do not contest the authenticity of these documents or address them at all in their opposition papers.

For all of these reasons, the first cause of action for breach of fiduciary duty will be dismissed.[9]

Breach of Contract

For their fifth cause of action, plaintiffs recast the alleged post-investment misconduct of Barnes and Montcalm, including their purported failure to transfer record title to working interests and to maintain books and records, as breaches of an oral agreement. (Compl. ¶¶ 84-85.) Although the Complaint alleges that plaintiffs are parties to this agreement, it lacks any factual detail as to the parties' entry into the agreement. It does not set forth the circumstances under which, or even the date on which, the agreement was made. Finally, the terms of the agreement and plaintiffs' allegations of breach are too vague to form the basis of a breach of contract claim. (See Charles Hyman, Inc. v Olsen Indus., Inc., 227 AD2d 270, 275 [1st Dept

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[9] In light of this holding, the court need not address the argument that plaintiffs' fiduciary duty claim is derivative in nature and that plaintiffs therefore lack standing. (Barnes & Montcalm Memo. In Supp. at 21.)

1996] ["Before a court will impose contractual obligation, it must ascertain that a contract was made and that its terms are definite"]; see also Agricultural Ins. Co. v Matthews, 301 AD2d 257, 259 [1st Dept 2002] ["[I]t is particularly important that the proponent cite with some specificity . . . agreement or assent by the other party"]; Cottone v Selective Surfaces, Inc., 68 AD3d 1038, 1039 [2d Dept 2009] [pleading of complaint upheld where it described "the formation, terms and alleged breach of the oral agreement"].)

As the Appellate Division has observed, "the primary purpose of a contract is not to serve as a vehicle for litigation but to document the respective rights and obligations of the parties to a particular transaction." (Charles Hyman, Inc., 227 AD2d at 275.) Even under the relaxed notice pleading standards applicable to breach of contract claims, the Complaint falls far short of alleging the elements of an enforceable agreement. The fifth cause of action therefore will be dismissed.

Plaintiffs' Remaining Claims

Plaintiffs' sixth cause of action for constructive trust and their seventh cause of action for unjust enrichment are duplicative of plaintiffs' breach of fiduciary duty and fraud claims, and are dismissed for the same reasons. Their eighth and final cause of action alleges that defendants aided and abetted acts of fraud and breaches of fiduciary duty on the part of Feldman, Millennium, Patriot, and Henson. (Compl. ¶ 101.) On the authority discussed above, no viable underlying tort against these non-parties has been stated. The eighth cause of action will therefore also be dismissed. (See Kagan v HMC-New York, Inc., 94 AD3d 67, 73 [1st Dept 2012], appeal dismissed 19 NY3d 918; Aldoro, Inc. v Gold Force Intl. Ltd., 52 AD3d 223, 224 [1st Dept 2008].)

The Court has considered plaintiffs' remaining contentions and finds them to be without

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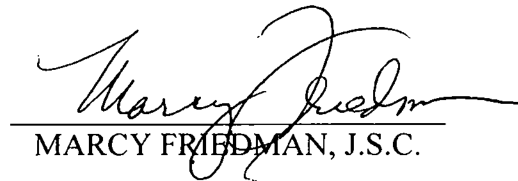
merit.

Plaintiffs request leave to replead in the event that the motions to dismiss are granted in any respect. (See Pls.' Memo. In Opp. at 21.) Plaintiffs do not, however, make any evidentiary showing of facts that would support leave to replead any of the causes of action in the Complaint. (See AJW Partners, LLC v Admiralty Holding Co., 93 AD3d 486, 486 [1st Dept 2012]; Fletcher v Boies, Schiller & Flexner, LLP, 75 AD3d 469, 470 [1st Dept 2010].) Leave to replead will therefore be denied.

It is accordingly hereby ORDERED that the motions to dismiss of Schain Leifer Guralnick and of Matthew Barnes and Montcalm Co., LLC are granted to the extent of dismissing the Complaint in its entirety with prejudice.

This constitutes the decision and order of the court.

Dated: New York, New York
August 27, 2015



MARCY FRIEDMAN, J.S.C.