SURROGATE'S COURT : NEW YORK COUNTY

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Motion by Loeb & Loeb LLP and Jerome Levine to Dismiss Third Party Claims of Ina Ebenstein and Jane Schuman in the Judicial Settlement of the First and Final Account of Proceedings of BEATRICE SCHUMAN, as Executor of the Will of

SEYMOUR SCHUMAN,

Deceased.

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File No. 4332-2002

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GLEN, S.

This is a motion to dismiss claims against third parties by objectants to the account of Beatrice Schuman, as executor of the will of Seymour Schuman. For the reasons detailed below, the motion is granted and the claims dismissed.

Background

Decedent died in October 2002 survived by his wife, Beatrice, and by their three daughters, Ina Ebenstein, Marian Schuman, and Jane Schuman. Decedent's will made pre-residuary bequests of tangible personal property to Beatrice and $1,000,000 to each of their three daughters, leaving his residuary estate in trust with income payable to Beatrice for life. Upon

her death the trust remainder was left to decedent's surviving issue, per stirpes. Beatrice was named the sole executor of the will, and she and the couple's three daughters were named co-trustees of the residuary trust. Beatrice died approximately six years later, in September 2008, survived by all three daughters. The residuary trust has therefore terminated and the remainder is payable outright in equal shares to Ina, Marian, and Jane.

Decedent's estate consisted largely of valuable closely held corporations, most of which own and manage parcels of commercial real estate. In December 2002, Beatrice retained attorneys Loeb & Loeb LLP and Jerome Levine (collectively, "the Attorney respondents" or the "Attorneys") and accountants Hays & Company LLP and David Lifson (collectively, "the Accountant respondents" or the "Accountants") to provide professional advice and services in connection with her administration of the estate. Disagreements arose among the daughters about the organization of the estate's various business entities. In July 2004, Jane petitioned the court for an order directing Beatrice to fund the residuary trust, and the court issued an order temporarily restraining Beatrice from converting one of the businesses from an "S" Corporation to one or more limited liability companies. In January 2005, citing mounting and unsubstantiated attorneys' and accountants' fees, Jane petitioned for an order compelling Beatrice to account. After settlement attempts failed, Surrogate Preminger ordered Beatrice to fund the residuary trust (*Matter of Schuman*, NYLJ, Oct. 28, 2005, at 35, col 5) and to file her account, now the subject of this proceeding (order, file No. 4322/2002, October 18, 2005).

Objections and Third Party Claims

Ina and Jane have objected to Beatrice's account,[1] alleging breach of fiduciary duty resulting in "millions of dollars of damages" to the estate and "millions of dollars of excessive expenses." They assert claims against the third party Attorneys and Accountants for aiding and abetting Beatrice in the alleged breach of her fiduciary duty and for professional malpractice. The Attorneys and Accountants move to dismiss all of the objectants' claims for failure to state a cause of action (CPLR 3211[a][7]) and as barred by the statute of limitations (CPLR 3211[a][5]). The Attorneys also seek sanctions against the objectants for frivolous conduct, pursuant to the Rules of the Chief Administrator (22 NYCRR) § 130-1.1.

Claims for Aiding and Abetting a Breach of Fiduciary Duty

A claim for aiding and abetting a breach of fiduciary duty requires allegations of fact that, if true, would add up to: (1) a breach of a fiduciary obligation, (2) knowing inducement or participation in the breach by giving "substantial assistance," and (3) damages to the claimant as a result of the breach (*Kaufman v Cohen*, 307 AD2d 113 [1st Dept 2003]). To satisfy the second element, an intent to harm need not be alleged, but the claimant must plead specific facts that would support a finding of the aider or abettor's actual knowledge of the breach (*id.* at 125; *Bullmore v Ernst & Young Cayman Islands*, 45 AD3d 461, 464 [1st Dept 2007]) ("Actual knowledge, as opposed to merely constructive knowledge, is required and a plaintiff may not merely rely on conclusory and sparse allegations that the aider or abettor knew or should have known about the primary breach of fiduciary duty" [citation omitted]).

[1] The account, as amended, covers the period from decedent's date of death to April 30, 2006. After Beatrice's death, Marian Schuman was substituted in the accounting proceeding as preliminary executor of Beatrice's estate.

Objectants allege in conclusory fashion that Beatrice mismanaged the estate's assets. Their only claim against Beatrice that implicates the Attorneys and Accountants, however, is that Beatrice and they engaged in a plan to divide the estate's assets for transfer into three separate trusts, rather than the single trust created by decedent's will. Objectants charge, for example, that "[a]cting under the guidance and at the direction of Mr. Levine and Mr. Lifson, Beatrice Schuman took significant actions as the sole executor of the Estate to reorganize the businesses in the Estate in pursuit of the plan to create three new trusts to receive the assets that Seymour Schuman's will directed in the single [residuary] Trust." They also state that "under the guidance and at the direction of Mr. Levine and Mr. Lifson, acting at the behest of Marian Schuman, Beatrice Schuman's position as sole executor of the Estate was used to appoint Beatrice as the sole or chief executive, sole managing member and/or sole director of the business entities in the Estate; and to arrange for Marian Schuman to be her sole successor in control of those business entities."

As objectants understood the alleged plan, Beatrice would become one of only two co-trustees of each of the resulting three trusts, rather than one of four co-trustees of the single trust, giving her disproportionate power over the estate properties. These actions, they claim, were an effort to thwart what they describe as the decedent's testamentary plan for joint control of the estate assets by Beatrice and all three daughters and would have allowed Beatrice to favor Marian over themselves.

Objectants do not complain that Beatrice actually implemented the plan or actually treated Marian in an impartial manner that favored her over themselves. They claim only that had Beatrice implemented the alleged plan, she would have been in a position to favor Marian.

Speculation as to what Beatrice may have done had the property been divided into three shares does not, however, state a cognizable claim for breach of fiduciary duty.

Objectants' claims for aiding and abetting are constructed entirely on their mischaracterization of Beatrice's *plan* to divide the trust into three shares as a breach of her duty as executor. Planning for separation of the residuary trust into three separate shares, however, does not constitute a breach of fiduciary duty per se. EPTL 7-1.13 expressly authorizes the division of trusts in many circumstances, "for any reason which is not directly contrary to the primary purpose of the trust," and division was not necessarily improper in this case. The decedent directed outright distribution of the trust property to his daughters *in separate shares* after the death of Beatrice, which belies objectants' broad contention that joint control of the assets was a critical aspect of decedent's testamentary plan.

The court also notes that any division of the residuary trust ultimately would have required either the objectants' consent (*see* EPTL 7-1.13 [a] [2]) or court approval (*see* EPTL 7-1.13 [a] [3]). In either case, the plan could not have been carried out in breach of any duty on Beatrice's part.

Further, objectants' allegation that Beatrice's position as executor "was used" to place her in control of estate assets (even apart from its failure to identify the alleged wrongdoer) does not state a cognizable claim for improper fiduciary conduct. So long as she was sole executor–in accordance with her appointment under her husband's will and therefore presumptively in accordance with his wishes–it was Beatrice's right and obligation to control businesses wholly owned by the estate.

Moreover, objectants' charge of "collusive activity" in relation to an unexecuted plan

does not state a claim for damages. As the Court of Appeals observed in *Alexander & Alexander, Inc. v Fritzen* (68 NY 2d 968, 969), "[A] mere conspiracy to commit a [tort] is never of itself a cause of action."

Objectants have failed to plead a cause of action for any breach of fiduciary duty in which the Accountants or Attorneys knowingly and substantially participated, much less that objectants sustained damages as a result.[2] Accordingly, the motions to dismiss the claims for aiding and abetting breach of fiduciary duty are granted as to both sets of respondents pursuant to CPLR 3211(a)(7).

As an alternate ground for dismissing the claims for aiding and abetting a breach of fiduciary duty, the court finds the claims barred by the statute of limitations. Where, as here, the claimant seeks only monetary damages and not equitable relief, the applicable period of limitations is three years (*Kaufman v Cohen*, 307 AD2d 113 [1st Dept 2003]). Objectants do not allege participation in a breach of fiduciary duty after the close of the accounting period, which was more than three years before they filed their third party claims.

2. Claim against Attorneys for Legal Malpractice

Objectants allege that the services performed by the Attorney respondents "were characterized by professional negligence, including the creation of inaccurate and ineffective documentation of transactions undertaken by the Executor of the Estate and deficient advice regarding taxes, the distribution of bequests made in the Will and proceedings in the Surrogate's Court" (Ina objections at 10). As stated above, the Attorneys move to dismiss this claim on the

[2] Objectants' claims for payment of excessive fees to the Attorneys and Accountants are appropriately addressed in their objections to Beatrice's account, not the subject of the instant motions.

ground that it fails to state a cause of action.

To support a cause of action for legal malpractice, the injured party must allege (1) the existence of an attorney-client relationship, (2) that the attorneys failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession which resulted in actual damages to the client, and (3) that the client would have accomplished a desired result "but for" the attorneys' negligence (*Plentino Realty, LTD. v Gitomer*, 216 AD2d 87 [1st Dept 1995]).

Objectants have failed to establish the first element of the cause of action for negligence, that is, the existence of an attorney-client relationship. The objectants appear in this controversy in many roles: as successor co-executors of decedent's will, as beneficiaries of pre-residuary bequests, and as co-trustees and remainder beneficiaries of the residuary trust. In none of these roles, however, can the objectants establish an attorney-client relationship with the Attorney respondents.

An attorney is not liable to third parties not in privity for harm caused by professional negligence (*Rovello v Klein*, 304 AD2d 628 [2d Dept 2003]). The Court of Appeals recently liberalized the rule somewhat in *Schneider v Finmann* (15 NY3d 306 [2010]). However, the Court extended privity only to the personal representative of a decedent, and only for claims of estate planning malpractice. The *Schneider v Finmann* holding is expressly limited to a narrow set of circumstances not present here, and provides no support for claimants' position that privity is no longer required in attorney malpractice suits.

The Attorneys also move to dismiss the third party claim for legal malpractice on the ground that it is time barred. The period of limitations for a claim of legal malpractice is three

years (*McCoy v Feinman*, 99 NY 2d 295 [2002]; CPLR 214[6]). The claim accrues at the time of the injury (*Ackerman v Price Waterhouse*, 84 NY2d 535 [1994]).

The period of the account ends in April 2006, more than three years before objectants filed their claim. The underlying acts, therefore, necessarily occurred outside the period of limitations. Objectants' argument that the continuous representation doctrine tolled the statute is unavailing, since the objectants and the Attorney respondents were never in an attorney-client relationship. The Court of Appeals explained in *Greene v Greene* (56 NY2d 86, 94 [1982]), and reaffirmed in *Shumsky v Eisenstein* (96 NY2d 164 [2001]), that the continuous representation doctrine "recognizes that a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered." It has no application here, where objectants were not the Attorneys' clients, did not seek their professional assistance, and were not the objects of any "continuous representation."

Accordingly, the claim for legal malpractice is dismissed both on the grounds of failure to state a cause of action and as barred by the statute of limitations.

3. Claim against the Accountants for Malpractice

Objectants claim that the Accounting respondents committed professional malpractice in rendering accounting services to the estate, alleging that the services "were characterized by professional negligence, including the creation of inaccurate records, deficient advice regarding taxes and business operations resulting in excessive tax liabilities and other unnecessary costs, the preparation of erroneous tax returns for businesses owned and operated by the Estate, and recommendations to the Executor of the Estate to pay excessive bills" (Ina objections at 10). The

Accounting respondents move to dismiss the claim for failure to state a cause of action.

Objectants have failed to allege facts to support an essential element of their claim, that the Accountants knew objectants would rely on their actions and that objectants did in fact rely on those actions to their detriment. Although strict privity between accountants and third parties is not required to state a claim for accounting malpractice, as in a claim for attorney malpractice, the claim requires "either actual privity of contract between the parties or a relationship so close as to approach that of privity" requiring "a clearly defined set of circumstances which bespeak a close relationship premised on knowing reliance" (*LaSalle Nat. Bank v Ernst & Young LLP*, 285 AD2d 101, 106 [1st Dept 2001]). As the Appellate Division further explained,

> "In order to impose negligence liability on an accountant for injury to a non-contracting third party resulting from the accountant's advice or services, the third party must establish each prong of the *Credit Alliance* test, that is: [1] the accountant's awareness that the financial reports were to be used for a particular purpose or purposes, [2] reliance on the reports by a known party or parties, and [3] some linking conduct on the part of the accountant which evinced the accountant's understanding regarding the third party's reliance (*Parrott v. Coopers & Lybrand, supra*, at 484, 718 N.Y.S.2d 709, 741 N.E.2d 506; *Securities Investor Protection Corp. v BDO Seidman LLP., supra*, at 711, 723 N.Y.S.2d 750, 746 N.E.2d 1042). Notwithstanding some degree of overlap among these requirements, they are distinct. They must be distinctly pleaded . . . ." *Id.* at 105.

Objectants fail to assert that they relied on the advice of the Accountant respondents. On the contrary, Ina suggests that the opposite is true. She acknowledges that she herself managed certain estate properties and that she considered Hays & Co. as exhibiting a "complete lack of knowledge and diligence" (Ina affidavit ¶ 21) "[t]hroughout this entire process" (*id.* ¶ 20). By her attorney's own account, Ina wrote letters in early 2006 that "highlighted David Lipson's 'inadequate' work" (Novick affirmation ¶ 16). Accordingly, the claim for accounting malpractice is dismissed for failure to assert an essential element of the cause of action, that of

objectants' reliance on the Accountants' work.

In light of this decision, the court need not determine the Accounting respondents' defense asserting the statute of limitations.

Sanctions

Lastly, the Attorney respondents request that sanctions be imposed against the objectants pursuant to Rules of the Chief Administrator (22 NYCRR) § 130-1.1. They argue that the claims were clearly without merit and apparently brought as a strategic ploy to hinder the attorneys from representing their client in the continuing underlying litigation.

The court finds no basis for determining that the claims were brought in bad faith and declines, in its discretion, to impose sanctions at this stage of the accounting proceedings.

This decision constitutes the order of the court.

SURROGATE

Dated: April 12, 2011