SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

JUNIOR LARRY HILLBROOM, *et al.*,	:	
	:	
Plaintiffs,	:	**2009 CA 004610 M**
	:	**Judge Judith Retchin**
v.	:	**Calendar 14**
	:	
PRICEWATERHOUSECOOPERS, LLP, *et al.*,	:	
	:	
Defendants.	:	

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND DENYING AS MOOT CONSENT MOTIONS TO APPEAR *PRO HAC VICE*

(December 22, 2009)

Before the Court is defendants' motion to dismiss, plaintiffs' opposition thereto and defendants' reply.[1] For the reasons stated below, the Court concludes that plaintiffs' claims are barred by the statute of limitations. Accordingly, defendants' motion to dismiss is **granted**, and the consent motions to appear *pro hac vice* are **denied as moot.**

BACKGROUND

Plaintiffs assert claims of professional malpractice, breach of contract and breach of fiduciary duty in connection with defendants' management of tax filings for the estate of Larry Hillblom, who died on May 21, 1995, after being involved in an air crash. Amended Complaint ("Am. Compl.") ¶¶ 17-18. On July 17, 1995, Mr. Hillblom's will was admitted to probate in the Superior Court of the Commonwealth of the Mariana Islands.[2] *Id.* ¶ 19. The will designated the Bank of Saipan as Executor ("Executor"), distributed assets among his family and established a charitable trust with the residue of

[1] The Court grants defendants' motion for leave to file a reply.

[2] The will, drafted in 1982, provided that "all inheritance, estate or other death taxes . . . shall be paid by my Executor and shall be charged against the residue of my Estate." *Id.*

the estate. *Id.* Shortly after the will was admitted to probate, several plaintiffs—over the Executor's opposition—filed claims to be recognized as Qualified Heir Claimants ("QHC") and obtain shares of the Estate. *Id.* ¶¶ 21-22. Thereafter, the Executor and plaintiffs disputed plaintiffs' status as QHCs for the following two years. *Id.*

While plaintiffs' and the Executor were litigating their status as QHCs, the Executor also was attempting to resolve the Estate's tax status with the Internal Revenue Service ("IRS"). *Id.* ¶ 32. On February 26, 1996, the Executor filed a Form 4768, requesting an extension of time to file a return to pay estate taxes. *Id.* Several subsequent filings to the IRS ensued and on July 12, 1999, the Executor paid the IRS $43,348,728.00, representing what the Executor believed were the Estate's tax liabilities. *Id.* ¶ 34-35. On December 7, 1999, the Executor made a subsequent filing to the IRS reporting a correction to prior filings and indicating that the Estate overpaid taxes by $5,729,113.00, in its July 12, 1999, filing. *Id.* ¶ 36.

On April 6, 2000, the Executor and plaintiffs executed a settlement agreement that recognized plaintiffs as QHCs. *Id.* ¶ 24. The settlement further provided that plaintiffs received the rights to pending applications for tax refunds, the right to apply for additional refunds not yet filed and other tax payment adjustments form the Estate's previous filings with the IRS. *Id.* ¶ 24; *see also* Pl.'s Ex. A.

Having executed the settlement and obtained rights to the Estate's tax payments, plaintiffs promptly entered into a Tax Refund and Escrow Agreement ("Escrow Agreement") with Charles Cervantes ("Agent"). Am. Compl. ¶ 24. The Escrow Agreement provided, *inter alia*, that the Agent would be responsible for investigating and

prosecuting all claims that plaintiffs may have for overpayment of taxes. In relevant part, the Escrow Agreement provides as follows:

> 3. Filing Claims For Refund
> 3.1. … Agent shall prosecute all of the Estate's tax refund applications which are pending . . . and shall file claims for additional refunds of taxes paid by the Estate in every U.S. Jurisdiction where estate taxes were paid
> …
> 4. Prosecution of Claims for Refund
> 4.1. . . . Agent shall fully prosecute each claim for refund filed.

Pl.'s Ex. B at 3-4.

The Escrow Agreement also provided that the Escrow Agent obtain a Tax Advisor to "prosecute, on behalf of Agent, as legal successor in interest to the Estate, any and all claims for refund to which the Estate was entitled." *Id.* at 7; *see also* Am. Compl. ¶ 31. As a result, defendants were retained as Tax Advisor to aid the Escrow Agent's prosecution of the overpaid tax claims. Am. Compl. ¶ 31.

On May 9, 2000, defendants met with the Executor's tax counsel to help defendants prepare the tax overpayment claims that the Executor was overseeing. *Id.* ¶¶ 42-43. Plaintiffs' claims for overpaid taxes were classified into two categories: taxes overpaid on federal estate taxes and unclaimed state and foreign death tax credits. *Id.* ¶ 52. Plaintiffs allege that defendants were advised—both at the meeting and by a written memorandum—of additional refunds that the Escrow Agent could solicit. *Id.* ¶¶ 43-46. Additionally, plaintiffs indicate that the memorandum allegedly provided to defendants explicitly instructed defendants to "research the applicable time limitations and calendar those dates to ensure timely filing of any additional claims for refund." *Id.* ¶ 47.

Thereafter—for unspecified reasons—it appears defendants took no action to prosecute plaintiffs' tax claims. ¶¶ 48-49. On August 20, 2000, the statute of limitations under the Internal Revenue Code tolled for plaintiffs' refund claims of overpayment on foreign and state death tax credits. *Id.* ¶ 51. On July 12, 2001, the statute of limitations tolled for plaintiffs' refund claims of overpayment of estate taxes. *Id.* ¶ 50.

On December 10, 2002, the Escrow Agent hired new counsel to replace defendants and prosecute plaintiffs' untimely claims of overpaid taxes. *Id.* ¶ 52. At the time plaintiffs' retained new counsel, plaintiffs were aware that defendants had allowed the deadlines to lapse without taking action. *Id.* ¶ 53; see also Pl.'s opp'n at 13 ("plaintiffs do not allege in their [amended complaint] that they only recently learned of defendants' malpractice or that defendants somehow acted to conceal it from them"). Indeed, the complaint indicates that plaintiffs were aware that they "faced the real possibility of not receiving a refund at all if the refund claims were litigated" after the limitations period had lapsed. *Id.* ¶ 54. Thereafter, new counsel filed claims in an effort to recover for plaintiffs' overpaid taxes before the IRS even though it was understood the time had run to pursue the overpayment of taxes. *Id.* ¶ 55-56.

In December of 2007, plaintiffs and the IRS reached a settlement, and plaintiffs agreed to accept $4,502,851.00, plus accrued interest, to resolve the claim before the IRS. *Id.* ¶ 56-57. Plaintiffs claim that "had the Estate filed a timely refund claim, the Estate would have been entitled to $10,872,524.84, plus accrued interest, instead of $4,502,851.00, plus accrued interest, actually refunded by the IRS." *Id.* ¶ 57. Thus, plaintiffs allege that when they settled their untimely claims with the IRS in December of

2007, they lost $6,369,673.86, plus accrued interest that they would have been entitled to receive if their claims had been filed timely. *Id.*

On June 22, 2009, plaintiffs filed a complaint for professional malpractice, breach of contract and breach of fiduciary duty.[3] Plaintiffs are interested parties who obtained the legal rights to prosecute tax claims from the settlement executed with the Executor. Specifically, plaintiffs include:

1. Junior Larry Hillbroom, the sole beneficiary of the J.H.L. Trust.
2. Keith Waibel, Trustee of the J.H.L. Trust
3. David Moncrieff, representative of the J.C. Trust and legal guardian to J.C., a minor.
4. J. Steven Grist, representative of the Be Lory Trust and legal guardian to N.B.L., a minor.
5. Ma Mercedes Feliciano, representative of the MF Trust and legal guardian of M.F.
6. Peter Scardello, the legal successor in interest as the Escrow Agent for the Hilblom Estate.

Am. Comp. ¶¶ 1-8. Defendants are PricewaterhouseCoopers, the firm retained by plaintiffs to prosecute the tax claims; defendant Jenner is an employee of the accounting firm; and defendant Crable is defendant Jenner's wife.[4]

On October 13, 2009, defendants filed a motion to dismiss arguing that (1) plaintiffs' claims are bared by the statute of limitations; (2) plaintiffs lack standing to bring this action; and (3) the complaint fails to state a claim upon which relief may be granted. On November 30, 2009, plaintiffs filed an opposition to defendants' motion, and on December 11, 2009, defendants filed a reply.

[3] On August 4, 2009, plaintiffs filed an amended complaint.
[4] On December 1, 2009, the parties filed a consent motion to dismiss defendant Crable which the Court grants.

ANALYSIS

A. Standard of Review

When reviewing a motion to dismiss under Rule 12(b)(6), the Court must accept all of the allegations in the complaint as true and must construe all facts and inferences in favor of the plaintiff. *Murray v. Wells Fargo Home Mort.*, 953 A.2d 308, 316 (D.C. 2008). In opposing a motion to dismiss, plaintiff is not required to offer his proof, but plaintiff must provide "sufficient information to outline the legal elements of a viable claim for relief or to permit inferences to be drawn from the complaint that indicate that these elements exist." *Manago v. District of Columbia*, 934 A.2d 925, 926 (D.C. 2007) (internal citations omitted).

Dismissal under Rule 12(b)(6) is warranted when it appears beyond doubt that plaintiff can prove no set of facts which would entitle him to relief. *Atkins v. Indus. Telecomm'ns Ass'n*, 660 A.2d 885, 887 (D.C. 1995) (citations omitted). A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a complaint. *Luna v. A.E. Eng'g Servs., LLC*, 938 A.2d 744, 748 (D.C. 2007). Dismissal of a claim is proper whenever a claim falls outside the statute of limitations. *See, e.g., D.C. Water & Sewer Auth. v. Delon Hampton & Assocs.*, 851 A.2d 410, 418 (D.C. 2004).

B. Discussion

A claim for breach of contract, professional malpractice and breach of fiduciary duty may not be brought more than three years after the cause of action accrues. D.C. Code §12-301(7-8) (2001). A claim does not accrue until a plaintiff knows—or by the exercise of reasonable diligence should know—of (1) an injury, (2) its cause, and (3)

some evidence of wrongdoing. *Wagner v. Sellinger*, 847 A.2d 1151, 1154 (D.C. 2004) (citations omitted).

In the instant matter, the parties dispute when the injury occurred. Plaintiffs contend that although they discovered defendants' failure to pursue their tax refunds by 2002, they were not injured—and hence their cause of action did not accrue—until December of 2007, when they settled with the IRS on less than favorable terms due to defendants' negligence. Relying primarily on *Wagner v. Sellinger*, 847 A.2d 1151 (D.C. 2004), plaintiffs contend they suffered no injury until they resolved their matter with the IRS in 2007. On the other hand, defendants maintain that plaintiffs' injury occurred by 2002 when plaintiffs knew defendants missed the deadline for filing to recover overpaid estate taxes before the IRS.

Wagner instructs that an "inchoate" or "uncertain" injury does not give rise to a cause of action, and that where an injury is "speculative and remote," a claim for professional negligence is premature. *Id*. at 1156 – 1157. On the other hand, *Wagner* also instructs that a "plaintiff need not be fully informed about the injury for the statute [of limitations] to begin running; [plaintiff] need only have *some* knowledge of *some* injury…In short, knowledge is deemed sufficient if the plaintiff has reason to suspect that the defendant did something wrong, even if the full extent of the wrongdoing is not yet known." *Id.* at 1154.

In *Wagner*, the plaintiffs fired their lawyer after he negligently conducted depositions when preparing for a medical malpractice trial. *Id.* at 1153. At trial with replacement counsel, testimony confirmed that their first lawyer failed to elicit key facts from a witness during deposition, and a jury ultimately returned a verdict against

plaintiffs. *Id.* Thereafter, plaintiffs filed a legal malpractice action against their first attorney. The Court of Appeals concluded that their claims were not time barred, because their injury did not occur at the time the lawyer conducted inadequate discovery; rather their injury arose when the jury found against them at trial. *Id.* at 1156. The Court of Appeals reasoned that when the lawyer conducted poor discovery, plaintiffs had not yet been injured because "[plaintiffs] still had hope, however faint, that matters could be turned around, especially if successor counsel could reopen discovery." *Id.* Indeed, the Court indicated that "an attorney's negligent error in the prosecution of a lawsuit may create only the potential for injury." *Id.* (citations omitted). As a result, the Court of Appeals held that an injury could not be "contingent on a future event," and that an injury had to be certain and ascertainable. *Id.*

Unlike the plaintiffs in *Wagner* who were not certain of the fact of injury, plaintiffs here knew defendants missed the deadline to recover overpaid taxes. *See Bleck v. Power*, 955 A.2d 712 (D.C. 2008) (injury occurred when plaintiff learned attorney missed filing deadline); *Weisberg v. Williams, Connolly & Califano*, 390 A.2d 992, 996 (D.C. 1978) (malpractice cause of action accrued when plaintiff was aware prior counsel missed statute of limitations). Plaintiffs knew their claims were untimely and that they "faced the real possibility of not receiving a refund at all…" because of defendants' failure to file the claims before time expired. Am. Compl. ¶ 54. Plaintiffs also had to retain new counsel and incur additional litigation expenses, although the amount they would be able to recover from the IRS was uncertain. As noted, "a claim for legal malpractice accrues when the plaintiff has sustained some injury, even if the injury occurs prior to the time at which the precise amount of damages can be ascertained."

Burtoff v. Faris, 935 A.2d 1086, 1089 (D.C. 2007); *see also Ideal Elec. Sec Company v. Brown*, 817 A.2d 806, 811 (D.C. 2003) and *Cantu v. St. Paul Cos.*, 401 Mass 53, 514 N.E. 2d 666 (1987) (injury occurred when plaintiff had to pay additional attorneys' fees to address defendant's malpractice not after appeal was exhausted). Based on the foregoing, the court concludes plaintiffs' claims are barred by the statute of limitations.

Plaintiffs allege their claims are not time barred because certain of the plaintiffs are minors for whom the statute of limitations does not toll until they reach majority. The Court rejects this argument. *See First-Citizens Bank & Trust Co. v. Willis*, 125 S.E.2d 359, 361 (N.C. 1962); *U.S. Fidelity & Guaranty Co. v. Nelson*, 809 So.2d 647, 654 (Miss. 2002) (where a guardian is appointed, "there is no logical reason to prevent the running of the statue of limitations inasmuch as that guardian or conservator is fully authorized to employ attorneys and bring actions on their behalf"). Here plaintiffs designated the Escrow Agent as the sole entity who could bring claims for overpaid taxes. Moreover, to the extent plaintiffs seek to assert claims as third party beneficiaries of the contract between the Escrow agent and the defendants, "(t)he general rule is that a beneficiary cannot bring an action directly against a third-party wrongdoer." *Rearden v. Riggs Nat'l Bank*, 677 A.2d 1032, 1037 (D.C. 1996) (citing Restatement (Second) of Trusts § 281)). Indeed, a beneficiary's right is an action in equity against the trustee—the person with whom the beneficiary shares a fiduciary relationship—to compel the trustee to proceed against the third party. *Rearden, supra*, 677 at 1037; *see also Robinson v. Samuel C. Boyd & Son, Inc.*, 822 A.2d 1093, 1103 (D.C. 2003) (heir lacks standing to sue as a third-party beneficiary).

CONCLUSION

Wherefore, it is this 22nd day of December, 2009, hereby

ORDERED that defendants' motion to dismiss is **GRANTED**; it is further

ORDERED that the case is **DISMISSED WITH PREJUDICE**; it is further

ORDERED that the consent motion to admit Shannon Clark *pro hac vice* is **DENIED AS MOOT**; it is further

ORDERED that the consent motion to admit Patrick McGroder *pro hac vice* is **DENIED AS MOOT**; it is further

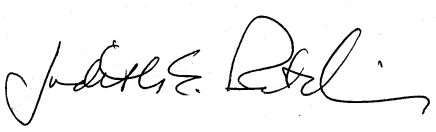
ORDERED that the consent motion to admit Lincoln Combs *pro hac vice* is **DENIED AS MOOT**; and it is further

ORDERED that the consent motion to dismiss Beth Crable is **GRANTED**; it is further

ORDERED that Defendant PricewaterhouseCoopers motion for leave to file reply is **GRANTED**; and it is further

ORDERED that the scheduling conference hearing scheduled for January 29, 2010, is **CANCELLED**.

CASE CLOSED.



Judith E. Retchin
Associate Judge

Copies sent to:

Diana Parton, Esq.
D.C. Bar No. 475932

Preston Burton, Esq.
D.C. Bar No. 426378

Diana Weiss, Esq.
D.C. Bar No. 475932

Patrick Regan, Esq.
D.C. Bar No. 336107

Christopher M. O'Connell, Esq.
D.C. Bar No. 495495

Kenneth von Schaumburg, Esq.
D.C. Bar No. 987204

Gregory F. Jenner, Esq.
D.C. Bar No. 436012

Beth A. Crable
100 2nd Street NE, Unit 630
Minneapolis, MN 55413