SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____ **PART** 53
Justice

Index Number : 101697/2010
GOLD LEAF SECURITY INC
vs.
BEHANNA , DAVID R.
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause ... Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ **Yes** ☐ **No**

Upon the foregoing papers, it is ordered that this motion

accompanying Memorandum Decision.

Motion is decided in accordance with accompanying Memorandum Decision.

Dated: 7/29/11

HON. CHARLES E. RAMOS J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☑ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

☐ **SUBMIT ORDER/ JUDG.** ☐ **SETTLE ORDER/ JUDG.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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GOLD LEAF SECURITY INC., WATCHDOG PATROLS LLC AND WATCHDOG PATROLS, INC.,

Index No. 101697/10

Plaintiffs,

-against-

DAVID R. BEHANNA, DRB CONSULTING INC., AMPER, POLITZNER & MATTIA LLP and CAPITOL ONE BANK,

Defendants.

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Charles Edward Ramos, J.S.C.:

Defendant Amper, Politzner & Mattia, LLP (Amper) moves for an order, pursuant to CPLR 3211 (a) (1), 3211 (a) (5), and 3211 (a) (7), dismissing the first amended complaint dated October 13, 2010, as asserted against it.

Plaintiffs Gold Leaf Security Inc., Watchdog Patrols LLC, and Watchdog Patrols, Inc. cross-move for an order, pursuant to CPLR 3025, granting plaintiffs leave to amend the original complaint dated January 16, 2010.

Background[1]

From Spring 1999 through February 2009, defendants David R. Behanna and DRB Consulting, Inc. (DRB Consulting) provided plaintiffs with accounting services pursuant to a professional consulting agreement. Behanna also served as plaintiffs' chief

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[1] The allegations set forth herein are taken from the first amended complaint 9Complaint), and are generally assumed to be true for purposes of disposition.

financial officer.

Beginning in 2001, pursuant to yearly engagement letters, plaintiffs retained Amper, a professional accounting firm, to provide them with accounting services, consisting of a review of their financial records, performed in accordance with Statements on Standards for Accounting and Review Services issued by the American Institute of Certified Public Accountants (AICPA).

From 2005 through February 2009, Behanna and DRB Consulting purportedly misappropriated plaintiffs' funds through repeated unauthorized cash withdrawals from plaintiffs' business accounts maintained at local branch offices of defendant Capital One Bank, and its predecessors. Behanna allegedly made the withdrawals several times a week during that period.

According to plaintiffs, Capital One and Amper knew, or should have known, that the withdrawals were not authorized because they constituted a significant change in plaintiffs' financial dealings over the years. Plaintiffs further allege that Capital One and Amper failed to advise them of the withdrawals or otherwise act to prevent the embezzlement, in breach of their fiduciary duties.

On these allegations, plaintiffs assert causes of action for breach of contract and negligence against Behanna, DRB Consulting, and Capital One; commercial bad faith against Capital One; quantum meruit against Behanna and DRB Consulting;

accounting malpractice claim against Amper; and breach of fiduciary duty, aiding and abetting such breach, unjust enrichment, constructive trust, conversion, fraud, aiding and abetting fraud, and money had and received against all defendants, including Amper.

From Behanna and DRB Consulting, plaintiffs seek to recover the amount of $225,000, together with interest, and reasonable attorneys' fees and disbursements incurred in prosecuting this action. From all defendants, including Amper, plaintiffs seek an accounting and to recover the amount of $766,560, together with interest, and reasonable attorneys' fees and disbursements.

Behanna and DRB Consulting served and filed a verified answer (Answer) to the Complaint in which they deny all allegations of wrongdoing, and assert affirmative defenses based on the theory that the claims are barred by the applicable statutes of limitations, equitable estoppel, unclean hands, and an arbitration provision set forth in a three-year consulting agreement, effective September 1, 2004.

Behanna and DRB Consulting also served and filed counterclaims and a third-party complaint against plaintiffs and third-party defendant Irving H. Schwab, plaintiffs' shareholder, officer, director, and/or member, in which they assert claims for defamation, conspiracy to defame, indemnification, contribution, breach of the consulting agreement for professional services and

profit sharing, fraud, and filing a false police report, and seek compensatory, punitive, and exemplary damages.

Discussion

Amper moves to dismiss all causes of action asserted against it in the complaint. Amper contends primarily that, by the terms of the engagement letter, it was hired merely to review, rather than audit, plaintiffs' financial records for tax purposes. On this basis, Amper asserts that it could not have discovered the alleged fraudulent scheme, nor borne a fiduciary duty or contractual obligation to recognize, and report, the alleged embezzlement.

On a motion addressed to the sufficiency of the pleadings, the court must accept each and every allegation as true and liberally construe the allegations in the light most favorable to the pleading party (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Joel v Weber*, 166 AD2d 130, 135 [1st Dept 1991]; *see* CPLR 3211 [a] [7]). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Nonetheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not presumed to be true and are not accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]).

That branch of the motion to dismiss the third cause of action for accounting malpractice is denied. A claim for professional malpractice "requires proof that there was a departure from accepted standards of practice and that the departure was a proximate cause of the injury" (*Kristina Denise Enterprises, Inc. v Arnold*, 41 AD3d 788, 788 [2d Dept 2007], *citing D.D. Hamilton Textiles, Inc. v Estate of Mate*, 269 AD2d 214, 215 [1st Dept 2000]).

Here, plaintiffs allege that "Amper failed to properly perform its duties by, *inter alia*, failing to properly and competently review Plaintiffs' financial statements and returns; failing to timely prepare and file tax returns which caused Plaintiffs to incur significant tax penalties and liabilities; and failing to complete 'reviewed statements'" (Complaint, ¶ 14). Plaintiffs further allege that Behanna's misappropriation of plaintiffs' funds:

> was carried out over a number of years under the watchful eye, with the knowledge, assistance and complicity of Defendant Amper, which performed and prepared detailed reviews of [Plaintiffs'] financial statements during this time. The statements prepared, opinions issued and advice tendered by Amper at all times while the misappropriation occurred were false, misleading and otherwise deceptive, inaccurate and not in compliance with its duties as obligations as accountants, and the statements and omissions therein were both relied upon by Plaintiffs and a direct and proximate cause of the misappropriation (*id.*, ¶ 17).

Plaintiffs also allege that "Amper never inquired about the propriety of these transactions, attempted to reconcile cash withdrawals with previous years or informed Plaintiffs' principals. Amper's failure to act deviated from the reasonable standard of care required of accountants and substantially assisted and enabled the perpetration of the fraud" (*id.*, ¶ 18).

At this early stage of the litigation and prior to the taking of any discovery, these allegations are sufficient to state a legally viable cause of action for accounting malpractice against Amper.

Contrary to Amper's contention, it cannot be determined from the scant record now before the Court whether any part of the accounting malpractice claim is time-barred.

An accounting malpractice action must be commenced within three years of the accrual of the claim (*see* CPLR 214 [6]). A claim of professional malpractice "sounds in tort, and therefore, absent fraud, accrues when an injury occurs, even if the aggrieved party is then ignorant of the wrong or injury" (*Ackerman v Price Waterhouse*, 84 NY2d 535, 541 [1994]).

"In the context of a malpractice action against an accountant, the claim accrues upon the client's receipt of the accountant's work product, since this is the point that a client reasonably relies on the accountant's skill and advice" (*id.*). "A defendant who seeks dismissal of a complaint pursuant to CPLR

3211 (a) (5) on the ground that it is barred by the statute of limitations bears the initial burden of proving, prima facie, that the time in which to commence an action has expired" (*Texeria v BAB Nuclear Radiology, P.C.*, 43 AD3d 403, 405 [2d Dept 2007]).

Amper has not sustained its burden. The identification of the specific dates on which the alleged wrongful acts occurred present questions of fact for which discovery is necessary. Moreover, the misappropriations allegedly occurred beginning in 2005, and ended as late as February 2009. Therefore, much of the theft allegedly occurred within the three-year period preceding the commencement of this action on January 16, 2010.

The branch of the motion to dismiss the second cause of action for breach of fiduciary duty and aiding and abetting breach of fiduciary duty as asserted against Amper is also denied.

Generally, the accountant-client relationship is a conventional business relationship and does not give rise to a fiduciary relationship (*DG Liquidation, Inc. v Anchin, Block & Anchin, LLP*, 300 AD2d 70, 71 [1st Dept 2002]). However, in certain limited circumstances, as here, where the accountant is alleged to have committed an affirmative fraud against the client, a cause of action for breach of fiduciary duty against an accountant will survive a motion to dismiss (*see Block v*

Razorfish, Inc., 121 F Supp 2d 401, 403 [SD NY 2000], citing *Lavin v Kaufman, Greenhut, Lebowitz & Forman*, 226 AD2d 107, 109 [1st Dept 1996]).

Plaintiffs have adequately alleged that Amper knew of the embezzlement, and did not reveal the defalcation to plaintiffs when preparing the review statements. These allegations, if proven, may be held to give rise to a fiduciary duty by Amper to plaintiffs.

In addition, the branch of the cause of action for aiding and abetting co-defendants' breaches of fiduciary duty is also legally viable. Even assuming arguendo that Amper was not plaintiffs' fiduciary during the relevant time period, the absence of a direct fiduciary relationship does not immunize an accountant from a claim of aiding and abetting a breach of a fiduciary duty by the co-defendants (*see Caprer v Nussbaum*, 36 AD3d 176, 194 [2d Dept 2006]).

A plaintiff seeking to establish a cause of action for aiding and abetting a breach of fiduciary duty against an accountant must allege that the accountant had complete knowledge of the wrongful conduct by another, and rendered substantial assistance in concealing that conduct from the plaintiff (*id.*).

Here, plaintiffs have sufficiently alleged that, for a period of three or four years, Amper knew of the pattern of unauthorized withdrawals, that Amper's assistance or assent to

the misconduct was essential to conceal the scheme from plaintiffs, and that they trusted Amper, and relied on the accuracy of its review because it was an experienced accounting firm (*see* First Amended Complaint, ¶¶ 8-17; Irving Schwab Jun. 25, 2010 Aff., ¶¶ 3, 4).

That branch of the motion to dismiss the sixth cause of action for fraud as asserted against Amper is denied.

To state a legally viable claim of fraud, a plaintiff must allege a representation of a material existing fact, falsity, scienter, deception and injury (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]). "Where a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust, or undue influence, the circumstances constituting the wrong shall be stated in detail" (CPLR 3016 [b]). The section "is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be 'impossible to state in detail the circumstances constituting the fraud'" (*Lanzi v Brooks*, 43 NY2d 778, 780 [1977]; *see also Pludeman v Northern Leasing Sys., Inc.*, 10 NY3D 486 [2008]).

Significantly, "at the pleading stage of a fraud claim against an accountant, the plaintiff need not be able to make an evidentiary showing of exactly what the accountant knew as to falsehoods in the certified financial statements" (*Houbigant,*

Inc. v Deloitte & Touche, LLP, 303 AD2d 92, 97 [1st Dept 2003]). "Keeping in mind the difficulty of establishing in a pleading exactly what the accounting firm knew when certifying its client's financial statements, it should be sufficient that the complaint contains some rational basis for inferring that the alleged misrepresentation was knowingly made" (*id.*, at 98).

Here, plaintiffs have alleged that Amper "systematically withheld, doctored and/or crated [*sic*] certain fraudulent and misleading records and documents to hide [Behanna's] misappropriation from Plaintiffs," and that Amper "knew or should have known of this wrongdoing and assisted, aided and abetted in withholding this information from Plaintiffs" (First Amended Complaint, ¶ 16). Plaintiffs have also submitted an affidavit by their expert witness, Marc Ross, a certified public accountant, in which he attests that:

> the standard for conducting a review of financial statements, governed by [AICPA] Statements on Standards for Accounting and Review Services, are significantly greater than those required for a compiled financial statement . . . Preparing reviewed statements requires taking information provided by company management and then reviewing it in order to express limited assurance that the financial statements require no material modifications. A review involves not merely regurgitating numbers, but assuring that the numbers make sense and that there is nothing out of the ordinary. This would include identifying and questioning substantial changes from year to year, such as where a company begins making regular withdrawals of cash from a bank account which [were] not in

> line with previous patterns. An accountant performing a review is required to ask questions and the answers provided by the company must make sense. In short, they must satisfy themselves that the information provided by management is sound.

(Marc Ross Jun. 25, 2010 Aff. ¶ 4).

Plaintiffs' allegations, in conjunction with Ross's expert opinion, are sufficient to support a cause of action for fraud against Amper, at this early stage of the litigation.

Amper's contention that no duty can flow from its engagement for a review, rather than an audit, is unavailing at this juncture. Although the produced engagement letters , dated December 2, 2004 and January 10, 2006, drafted by Amper, include numerous disclaimer provisions and provide that Amper's engagement to review plaintiffs' financial records "cannot be relied upon to disclose errors, irregularities, or illegal acts, including fraud or defalcations, that may exist" (Engagement Letters at 2), given the allegations of willfulness, these provisions do not conclusively resolve all the factual issues, as a matter of law.

Amper may still be found to have borne a duty toward plaintiffs, if plaintiffs prove their factual allegations. "While the essential character of a Review Report . . . differs from that of the traditional audit, the accountant nevertheless has a duty to exercise due care in the performance of its engagement" (*William Iselin & Co., Inc. v Landau*, 71 NY2d 420,

425 [1988]). Moreover,

> [a] representation certified as true to the knowledge of the accountants when knowledge there is none, a reckless misstatement, or an opinion based on grounds so flimsy as to lead to the conclusion that there was no genuine belief in its truth, are all sufficient upon which to base liability. A refusal to see the obvious, a failure to investigate the doubtful, if sufficiently gross, may furnish evidence leading to an inference of fraud so as to impose liability for losses suffered by those who rely on the balance sheet. In other words, heedlessness and reckless disregard of consequence may take the place of deliberate intention.

(*State St. Trust Co. v Ernst*, 278 NY 104, 112 [1938]; *Joel v Weber*, 166 AD2d at 137).

The branch of the motion to dismiss the seventh cause of action for aiding and abetting fraud as asserted against Amper is also denied. A plaintiff asserting a cause of action for aiding and abetting fraud must allege that the defendant had actual knowledge of the fraud (*see Lenczycki v Shearson Lehman Hutton, Inc.*, 238 AD2d 248, 248 [1st Dept 1997], *lv dismissed in part, denied in part* 91 NY2d 918 [1998]). Here, plaintiffs have sufficiently alleged that Amper had actual knowledge of the embezzlement.

Contrary to Amper's contention, the pleadings and the record do not support a finding, at this early stage of the litigation, that plaintiffs had vested in Behanna actual and apparent authority to act on their behalf. Certainly, "[t]he risk of loss

from the unauthorized acts of a dishonest agent falls on the principal that selected the agent" (*Andre Romanelli, Inc. v Citibank, N.A.*, 60 AD3d 428, 429 [1st Dept], *lv denied* 13 NY3d 711 [2009]). Further, a corporation is responsible for the acts of its authorized agents, even where the particular act is unauthorized (*see Ruggles v American Cent. Ins. Co. of St. Louis*, 114 NY 415, 421 [1889]). Here, however, plaintiffs have adequately alleged that Amper knew that Behanna was withdrawing plaintiffs' funds without plaintiffs' knowledge or authorization.

The branches of the motion to dismiss the fifth cause of action for conversion, the ninth cause of action for money had and received, and the fourth cause of action for unjust enrichment and that seek the imposition of a constructive trust as asserted against Amper are granted. The existence of express contracts between plaintiffs and Amper preclude bar these causes of action.

In the conversion cause of action, plaintiffs limit the damages to those within the scope of the letters of engagement between them and Amper (*see* First Amended Complaint, ¶¶ 27, 34). To this extent, the cause of action is duplicative of the contract claim, and, thus, is fatally defective on its face (*see Richbell Info. Servs., Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 306 [1st Dept 2003]).

A cause of action for money had and received is one of

quasi-contract, and cannot lie where, as here, there exists an express contract between the parties (*see Board of Educ. of Cold Spring Harbor Cent. School Dist. v Rettaliata*, 78 NY2d 128, 138 [1991]; *Egnotovich v Katten Muchin Zavis & Rosenman LLP*, 55 AD3d 462, 464 [1st Dept 2008]).

For this same reason, the cause of action for unjust enrichment and to impose a constructive trust is not legally cognizable. "An action to recover on the theory of unjust enrichment is for restitution or on quasi contract and is based on the equitable principles that a person shall not be allowed to enrich himself unjustly at the expense of another" (*Waldman v Englishtown Sportswear, Ltd.*, 92 AD2d 833, 836 [1st Dept 1983]). Thus, "[w]here the express contract has been rescinded, is unenforceable or abrogated, a recovery may be had on an implied promise to pay for benefits conferred thereunder" (*id.*). Here, there is no dispute that the engagement letters are enforceable.

That branch of the motion to dismiss to dismiss the eleventh cause of action for an accounting is granted. Plaintiffs have wholly failed to allege that any of the funds allegedly embezzled by Behanna were accepted, or retained, by Amper.

Last, plaintiffs' cross-motion for leave to amend the original complaint is denied as moot, inasmuch as plaintiffs made the cross-motion approximately three months after they served the first amended complaint, and after Amper made the instant motion

to dismiss the first amended complaint.

Accordingly, it is

ORDERED that the motion is granted in part to the extent that the fourth cause of action for unjust enrichment and constructive trust, the fifth cause of action for conversion, the ninth cause of action for money had and received, and the 11th cause of action for an accounting as asserted against defendant Amper, Politziner & Mattia, LLP are severed and dismissed; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that defendant Amper, Politziner & Mattia, LLP is directed to serve an answer to the first amended complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the cross-motion is denied in its entirety.

Dated: July 26, 2011

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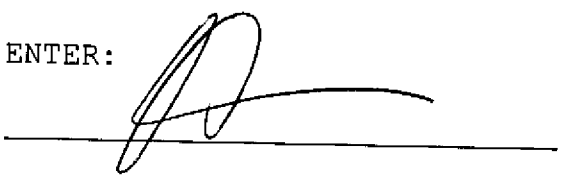

J.S.C.

HON. CHARLES E. RAMOS