SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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HARVEY BARRISON,

Plaintiff,

- against -

D'AMATO AND LYNCH, LLP, LUKE D. LYNCH, JR., and HECHT AND COMPANY, CERTIFIED PUBLIC ACCOUNTANTS, P.C.,

Defendants.

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Index No. 653530/2011

Motion Sequence Nos. 013, 014 & 015

MASLEY, J:

Motion sequence numbers 013, 014 and 015 are consolidated for disposition.

Plaintiff Harvey Barrison brings this action against his former law firm, D'Amato and Lynch, LLP (the Firm), its managing partner, Luke D. Lynch, Jr. (Lynch Jr., together with the Firm, Firm Defendants), and its accountants, Hecht and Company, Certified Public Accountants, P.C. (Hecht), alleging that he was either an equity partner with the right to seek dissolution of the Firm or, alternatively, that he was merely an employee of the Firm and that defendants misclassified him as a partner on his tax returns, causing him to incur tax liabilities that should have been paid by his employer. Of the eight causes of action asserted in the amended complaint, three remain: fraudulent misrepresentation, negligent misrepresentation, and equitable estoppel (third, fourth and fifth causes of action, respectively).

In motion sequence numbers 013 and 014, respectively, Hecht and the Firm Defendants move for summary judgment dismissing the amended complaint. In motion sequence number 015, Barrison moves "for an Order granting Plaintiff Summary Judgement [sic] that he was a partner with an ownership interest in [the Firm] and for an

Order permitting renewal of the Defendant's Motion to Dismiss which resulted in dismissal of the" claims for dissolution of the Firm and an accounting (NYSCEF Doc. No. 391). In the alternative, "if the Court finds as a matter of law that plaintiff was not a partner with an ownership interest," plaintiff seeks summary judgment against all defendants for fraud and misrepresentation (*id.*).

I. Background and Procedural History

George D'Amato and Luke D. Lynch, Sr. (Lynch Sr.) established the Firm in 1977. Plaintiff joined the Firm as of counsel in 1990. Sometime in 1995 or 1996, D'Amato informed plaintiff that he was now a partner at the Firm (NYSCEF Doc. No. 416 at 107:3-9). Plaintiff did not enter into a written partnership agreement (*id.* at 115:4-7). Plaintiff admitted that he never inquired and was never told by anyone at the Firm whether he had an equity interest and that he was never asked to make a capital contribution to the Firm (NYSCEF Doc. No. 369 at 113:4-114:5; 149:18-150:8; 307:17-308:4; NYSCEF Doc. No. 443 at 307:17-24). The Firm provided him with K-1 forms that indicated that he was a general partner with a capital account (*id.* at 115:25; 116:2-4). Plaintiff also stated that he received K-1s from the time he joined the firm as of counsel (NYSCEF Doc. No. 416 at 91:12-19; NYSCEF Doc. No. 369 at 352:16-23).

Lynch Sr. passed away in 1999. On April 18, 2002, D'Amato and Lynch Jr. entered into a "Memorandum of Partnership Agreement" (Partnership Agreement) (NYSCEF Doc. No. 377). The Partnership Agreement provides that D'Amato and Lynch Jr. are the only "General Partners" of the Firm (*id.* at ¶ 4) and that the remaining partners, including plaintiff, are "Limited Partners," who are not parties to the Partnership Agreement and who "have no right or interest in the assets, capital, goodwill, income, losses, receivables, unbilled time and furniture and fixtures of The Firm" (*id.* at ¶ 5). It

also states that "[t]he Firm shall be continued until terminated or dissolved by [D'Amato or Lynch Jr.]" (*id.* at ¶ 1) and that, in the event one of the general partners dies or withdraws, "the remaining General Partner shall have the right to use in the firm name the name of the withdrawing or deceased General Partner" (*id.* at ¶ 9) and that "the surviving partner who shall continue to [sic] business of The Firm shall have the right to make payments to the withdrawing partner or the deceased partner's legal representative ..." (*id.* at ¶ 10).

According to Lynch Jr., since D'Amato's death in 2007, he has been the Firm's sole equity partner and as such he is: "the only signatory on the Firm's lease of office space" (NYSCEF Doc. No. 376 at ¶¶ 15, 16); "the only living individual in the Firm who has made capital investments in the Firm and contributed monies to the Firm to keep it in operation in economically difficult times" (*id.* at ¶ 17); and the only one with the "final say on all of the Firm's hiring and firing decisions and [the] sole authority to initiate and implement Firm policies and procedures" (*id.* at ¶ 19). With respect to plaintiff, Lynch Jr. affirms that he "was a non-equity partner", who never "share[d] in the profits or losses of the Firm" or made "any capital contributions to the Firm." (*id.* at ¶¶ 6, 21, 22). In addition, Lynch affirms that plaintiff did not: have "authority to bind or assume financial obligations on behalf of the Firm", set Firm policies, participate in the Firm's management or its hiring decisions, and have access to the Firm's financial records (*id.* at ¶¶ 23, 24, 25).

In addition, Lynch Jr. affirms that he "decide[s] the amounts of the draws and/or salaries of, and discretionary payments to, all non-equity partners, including Plaintiff" (*id.* at ¶ 15). He explains that these "[d]iscretionary payments are determined annually and allocated on a quarterly basis and reduced to a zero balance for each individual in the

Firm's financial records" (*id.*). During his deposition, Lynch Jr. further explained that these discretionary payments are allocated from the Firm's net profits, after salaries and bonuses are paid, but that the non-equity partners have no entitlement to any set percentage of the profits (*see* NYSCEF Doc. No. 476 at 33:19-36:25; NYSCEF Doc. No. 511 at 37:2-38:5). The amount allocated to each non-equity partner is entirely within Lynch's discretion and he makes the determination at the end of each year based on the partners' productivity, among other factors (*see* NYSCEF Doc. No. 476 at 34:3-35:9).

Hecht has been preparing the Firm's tax returns, including Schedule K-Is for the Firm's partners, since 1992 (*see* NYSCEF Doc. No. 351 at 10:5-18; 13:2-6; 40:17-20; NYSCEF Doc. No. 354 at ¶ 5). Based on information provided by the Firm, Hecht prepared plaintiff's K-1s, indicating that he was a general partner and reflecting items, such as his share of profits (i.e. discretionary payments) and monthly draws (i.e. guaranteed payments), as self-employment income, subject to Social Security and Medicare taxes under the Federal Insurance Contributions Act (FICA) (*see* NYSCEF Doc. No. 351 at 13:9-12, 17:11-18, 51:8-14; NYSCEF Doc. No. 348 at 147-14, 44:12-45:14, 86:3-24; NYSCEF Doc. No. 354 at ¶¶ 7-9, 12-13; NYSCEF Doc. No. 455 at 14:8-16:17, 121:4-122:18; NYSCEF Doc. No. 458 at 25:1-12, 28:3-15). The K-1s are the only documents Hecht ever prepared for, and the only form of communication Hecht ever had with, plaintiff (*see* NYSCEF Doc. No. 443 at 402:4-403:19, 423:5-14; NYSCEF Doc. No. 457 at 81:2-18).

According to James F. Mahon Jr., a Certified Public Accountant and Hecht's Director of Tax, the discretionary payments were placed in plaintiff's capital account at the end of each year and paid out in their entirety over the course of the following year, "meaning that none of such profits were contributed to the [Firm] as a 'capital

contribution'" (NYSCEF Doc. No. 354 at ¶ 21). Accordingly, Mahon explains, plaintiff's federal Schedule K-1s (more specifically, Part II, Section L) show a beginning capital account balance based on the allocation of net profits made at the end of the preceding year (e.g. plaintiff's 2008 K-1 shows a beginning balance of $156,000, which was allocated at the end of 2007), withdrawals and distributions in the same amount (in 2008, this was $156,000), and a new ending balance (in 2008, this was $120,000), reflecting the new allocation of net profits to be paid out over the course of the following year (*id.* at ¶ 21 and exhibit 2). Mahon also states that, based on the Firm's representations that "[p]laintiff did not make any capital contributions to the [the Firm] and was not allocated any partnership capital", and based on "such records as the [Firm's] schedules of its partners' share of profits," Hecht treated plaintiff as a "profits (or income) interest" partner for purposes of U.S. income tax reporting (*id.* at ¶ 19). As such, Mahon states, plaintiff was classified as a "general partner" on the K-1s, but the "line items in Part II for partner's 'share of capital' and 'capital contributed during the year'" were left blank. (*id.* at ¶ 22 and exhibit 2, Part II, J and L).

Between 2008 and 2011, plaintiff's billable hours declined drastically (*see* NYSCEF Doc. No. 376 at ¶¶ 27-30; NYSCEF Doc Nos. 380-383). Plaintiff claims Lynch Jr. refused to assign him work to force him out of the Firm (*see* NYSCEF Doc. No. 15 at ¶ 8). Lynch Jr. contends that he was unable to assign plaintiff work because of clients' dissatisfaction (NYSCEF Doc. No. 376 at ¶¶ 32-33). On July 26, 2011, plaintiff commenced an action against Lynch Jr. and the Firm, entitled *Barrison v D 'Amato & Lynch LLP, et al.*, Index No. 108580/2011 (Prior Action), seeking dissolution of the Firm and an accounting. Plaintiff alleges in the prior action that plaintiff was a partner, as evidenced by various tax documents (*see* NYSCEF Doc. No. 360, ¶ 4) (Prior

Complaint). The Firm Defendants moved to dismiss the Prior Complaint. The court (Oing, J.) granted the motion, finding that plaintiff failed to sufficiently plead any indicia of partnership under New York law (*see* NYSCEF Doc. No. 361 at 12:19-13:15, 24:16-26:25).

On December 20, 2011, plaintiff then commenced this action by summons and complaint (NYSCEF Doc. No. 1). On April 20, 2012, plaintiff filed an amended complaint, asserting eight causes of actions: dissolution of the Firm and accounting (first cause of action); misappropriation of funds against the Firm Defendants (second cause of action); fraudulent misrepresentation against the Firm Defendants and Hecht (third cause of action); negligent misrepresentation against the Firm Defendants and Hecht (fourth cause of action); equitable estoppel to prevent the Firm Defendants and Hecht from asserting statute of limitations as a defense (fifth cause of action); state and city age discrimination claims against the Firm Defendants (sixth and seventh causes of action, respectively); and violation of 26 USC § 7434 for fraudulent filing of information return against the Firm Defendants and Hecht (eighth cause of action) (NYSCEF Doc. 15).

Hecht and the Firm Defendants moved to dismiss the amended complaint (in motion sequence numbers 003 and 004, respectively). During oral argument held on May 31, 2013, Justice Oing dismissed the first, second and eighth causes of action. Justice Oing rejected plaintiff's argument that the Partnership Agreement terminated upon D'Amato's death and that a new implied partnership was formed, stating that:

> "[t]he Partnership Agreement is very clear; it doesn't say that. Mr. D'Amato passed away, and it said that the surviving named partner, Mr. Lynch [Jr.] can now pay out whatever it is to his estate but it never said that it terminates the partnership when he dies"

(NYSCEF Doc. No. 100 at 6:8-13). In addition, Justice Oing found that the Partnership Agreement unambiguously provides that only D'Amato and Lynch Jr. may dissolve the Firm. In pertinent part, Justice Oing held as follows:

> ". . . I find that documentary evidence here, the documentary evidence here, is very clear. The Partnership Agreement clearly indicates only two people can dissolve the firm and they are Mr. D'Amato and Mr. Lynch [Jr.]. There is nothing in there that provides otherwise, and that's plain and simple, it can't be any more clear.
>
> "With respect to the issue of him being a partner or him being a general partner, now, that all comes into play in the sense that if he prevails, if the plaintiff prevails on that issue he may be entitled to certain benefits and so forth, and that's for later on down the road, but with respect to simply dissolving the partnership so as to get to an accounting, that's not available for him at all under the circumstances of this Partnership Agreement"

(*id.* at 14:17-15:7).

Hecht and the Firm Defendants joined issue by service of their answers and the parties engaged in discovery. During the course of discovery, plaintiff procured additional tax documents that Hecht had prepared for the Firm, including, among other things, the K-1s the Firm had filed with the IRS for the years 2003 through 2010, identifying plaintiff as a "[g]eneral partner" and indicting that he had a "capital account" (NYSCEF Doc. No. 418), and New Jersey Partnership returns (NYSCEF Doc. No. 426), which included Partnership Directories, showing that in 2010, under a column labeled "Percent Owned," the Firm reported "2.035590" for plaintiff (NYSCEF Doc No. 427 at HC002968). 2010 is the only year that a percentage value is provided for plaintiff on the Partnership Directories.

On December 15, 2017, plaintiff filed the note of issue. On February 13, 2018, the parties filed a stipulation discontinuing the sixth and seventh causes of action (NYSCEF Doc. No. 303). Subsequently, the parties made these motions for summary judgment.

II. Analysis

A. Motions for Summary Judgment

This action is based on two alternative theories of liability: plaintiff was a partner with an ownership interest in the Firm and, therefore, is entitled to seek dissolution of the Firm and an accounting, or alternatively, plaintiff was actually an employee, but that the Firm Defendants and Hecht agreed to treat plaintiff as a partner for tax purposes, causing "plaintiff [to pay] to the Internal Revenue Service, New York State and City government taxes properly payable by the [Firm Defendants] namely FICA, Medicare, a portion of [the Firm's] New York City Unincorporated Business Tax and taxes on medical insurance premiums, which were all properly payable by defendant" (NYSCEF Doc. No. 15 at ¶ 49). Plaintiff argues that he is entitled to summary judgment finding that he is a partner with an ownership interest in the Firm, because, under the doctrine of quasi-judicial estoppel, defendants may not assert a position contrary to one taken on their tax returns. In the alternative, plaintiff contends that he is entitled to summary judgment on his fraudulent and negligent misrepresentation claims, because should the court find that plaintiff was not a partner with an ownership interest, then Hecht failed in its obligation to correctly determine that plaintiff was merely an employee.

Hecht and the Firm Defendants, who adopt each other's arguments, contend that they are entitled to summary judgment dismissing the fraud and negligent misrepresentation causes of action, because: (1) plaintiff is judicially estopped from

claiming he is an employee, having argued he was a partner in the Prior Action; (2) as a non-equity, income-interest partner, plaintiff had to be treated as a general partner for tax purposes and, therefore, the K-1s did not contain any misrepresentations; (3) the K-1s' statement that plaintiff was a "general partner" is a non-actionable opinion; (4) plaintiff's reliance on the alleged misrepresentations was unreasonable as a matter of law; (5) plaintiff did not suffer any cognizable loss because the out-of-pocket rule does not allow recovery of taxes; and (6) plaintiff's claims are disguised tax refund claims, which are barred by controlling tax laws. In addition, Hecht contends that it was entitled to rely on the representations and schedules provided by the Firm, indicating that plaintiff was a non-equity, income-interest partner, and that it never had any knowledge to the contrary. Lastly, Hecht and the Firm Defendants argue that the equitable estoppel claim must be dismissed as it is not an independent cause of action and, in any event, plaintiff cannot demonstrate the necessary elements.

Pursuant to CPLR 3212 (b), "[t]o obtain summary judgment, the movant 'must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.'" (*Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 607 [1st Dept 2012], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez,* 68 NY2d at 324). Once the movant satisfies its burden, the opposing party must "'produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action'" (*Madeline D'Anthony Enters., Inc.*, 101 AD3d at 607, quoting *Alvarez*, 68 NY2d at 324).

The elements of fraudulent misrepresentation are: "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011] [internal quotation marks and citation omitted]). The elements of negligent misrepresentation are: "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*id.* at 180 [internal quotation marks and citation omitted]).

As a preliminary matter, plaintiff is not judicially estopped from arguing that he was an employee, rather than a partner, of the Firm because of his position in the Prior Action. The doctrine "prevent[s] abuses of the judicial system by which a party obtains relief by maintaining one position, and later, in a different action, maintains a contrary position" (*D & L Holdings, LLC v RCG Goldman Co.*, 287 AD2d 65, 71 [1st Dept 2001]). Here, the doctrine of judicial estoppel does not apply. Dismissal of the Prior Action for failure to plead a claim "cannot be considered a ruling in [plaintiff's] favor ..." (*Olszewski v Park Terrace Gardens, Inc.*, 18 AD3d 349, 350 [1st Dept 2005]). In addition, plaintiff is permitted to propose alternative theories of liability (*see* CPLR 3014).

Nonetheless, plaintiff's motion for summary judgment must be denied. "While a party is permitted to plead inconsistent theories of recovery (CPLR 3014), it must elect among inconsistent positions upon seeking expedited disposition" (*On the Level Enters., Inc. v 49 E. Houston LLC*, 104 AD3d 500, 501 [1st Dept 2013]). Here, plaintiff fails to do so. Instead, plaintiff seeks summary judgment on two alternative theories: one asserts

that he was an equity partner; the other, that he was merely an employee.[1] What is more concerning to the court is that plaintiff's expert provides affidavits supporting both theories (*see* NYSCEF Doc. No. 421 at ¶¶ 10-13, 16 [plaintiff's expert opines that plaintiff was a partner with an ownership interest in the Firm, because the discretionary payments, allocated to plaintiff at the end of each year and held in his capital account: were at risk of the Firm's creditors, meaning that, in effect, plaintiff was responsible for the Firm's debts and obligations; and were distributed in quarterly installments over the course of the following year, allowing the Firm to retained the benefit of those funds, which, in effect, amounted to a capital contribution by plaintiff; NYSCEF Doc. No. at ¶ 8 [plaintiff's expert opines that "(plaintiff) had indicia of being an employee more than that of a General Partner" and that "Hecht should have advised the law firm that (plaintiff) be given a W-2"]). These contradictory positions fail to meet plaintiff's burden of "'tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Madeline D'Anthony Enters., Inc*, 101 AD3d at 607, quoting *Alvarez*, 68 NY2d at 324).

Moreover, plaintiff fails to establish that he was an equity partner as a matter of law. Plaintiff points to various tax documents–specifically, the K-1s that the Firm filed with the IRS, identifying plaintiff as a "[g]eneral partner" and indicting that he had a "capital account" (NYSCEF Doc. No. 418), as well as the New Jersey Partnership Directories, showing that in 2010, under a column labeled "Percent Owned," the Firm reported "2.035590" for plaintiff (NYSCEF Doc. No. 427 at HC002968)–and relies on *Mahoney-Buntzman v Buntzman* (12 NY3d 415, 422 [2009]) to argue that the Firm

[1] Notably, plaintiff's argument, that he was an equity partner, does not relate to the remaining causes of action for fraud and negligent misrepresentation, both of which hinge on plaintiff's assertion that he was an employee of the Firm.

Defendants are now estopped from asserting a position in this proceeding that is "contrary to declarations made under the penalty of perjury on income tax returns." However, "[w]hether partnership status is enjoyed turns on various factors, including sharing in profits and losses, exercising joint control over the business, and making capital investment and possessing an ownership interest in the partnership" (*Mazur v Greenberg, Cantor & Reiss*, 110 AD2d 605, 605 [1st Dept 1985], *affd* 66 NY2d 927 [1985] [internal quotation marks and citation omitted]). Tax returns, without any other indicia of partnership, are insufficient (*Matter of Bhanji v Baluch*, 99 AD3d 587, 587-588 [1st Dept 2012]) [internal quotation marks and citation omitted] ["corporate and personal tax returns, even when filed with government agencies, are not in and of (themselves) determinative"]; *see also Dundes v Fuersich*, 13 Misc 3d 1223(A), 2006 NY Slip Op 51962[U], *11 [Sup Ct, NY County 2006] [noting that "tax documents and documentary evidence of compensation as an employee were merely some proof, and not conclusive, on the issue of whether a person is an employee or a partner"]).

Here, aside from the tax documents, plaintiff does not provide any evidence that he actually contributed capital to, possessed an ownership interest in or shared in the losses of the Firm. Nor does plaintiff offer any evidence of control over the Firm's policies or hiring decisions. Therefore, plaintiff has failed to establish that he was an equity partner with the Firm (*see D'Esposito v Gusrae, Kaplan & Bruno PLLC*, 44 AD3d 512, 512-513 [1st Dept 2007] [finding that plaintiff "was never a true equity member of the firm," where, "notwithstanding that plaintiff was called a partner and listed as such in Martindale-Hubble, on the firm's letterhead and tax return, and he received distributions of net profits from the firm at a fixed rate, he was not responsible for the firm's rent or losses, was not a signatory of the partnership and/or operating agreement, made no

capital investment and had no ownership interest in the firm" or control over its policies]; *see also Mazur*, 110 AD2d at 605-606 [finding an absence of customary indicia of partnership, where plaintiff was listed as a partner on the firm's tax returns, received net profits from the firm as at a fixed rate and "exercise some control in the firm," but was not responsible for the firm's losses, had no capital investment and no ownership interest in the firm]).

In addition, plaintiff's moving papers do not address his fraud claim or make any showing with respect to the Firm Defendants. As for the negligent misrepresentation claim, plaintiff devotes the entirety of his argument to demonstrating that Hecht had a duty to provide plaintiff with accurate tax documents and fails to address the remaining elements of the claim (*see* NYSCEF Doc. No. at 17-23). Plaintiff's failure to establish his entitlement to summary judgment, "requires a denial of [plaintiff's] motion, regardless of the sufficiency of the opposing papers" (*Alvarez,* 68 NY2d at 324).

For the foregoing reasons, plaintiff's motion for summary judgment is denied.

Hecht and the Firm Defendants, on the other hand, are entitled to summary judgment dismissing the amended complaint. First, plaintiff's fraud and negligent misrepresentation claims are barred by pertinent tax laws.

Pursuant to the Internal Revenue Code (IRC),

> "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof"

(26 USCA § 7422 [a]).

Here, plaintiff seeks to recover taxes that he alleges were properly payable by his employer, the Firm. Plaintiff's contention, that the statute is inapplicable because the Firm never withheld any taxes from plaintiff and the statute is limited to situations where the employer acts as a tax collector for the government, is unpersuasive. As the Supreme Court observed, with regard to this statute, "[f]ive 'any's' in one sentence and it begins to seem that Congress meant the statute to have expansive reach" (*United States v Clintwood Elkhorn Min. Co.*, 553 US 1, 7 [2008]).

Ferro v Metro. Ctr. for Mental Health (2014 WL 1265919, 2014 US Dist LEXIS 41477 [SDNY 2014]) is particularly instructive. As in this case, the employer in *Ferro* did not withhold taxes from the plaintiffs' wages. Rather, the plaintiffs claimed that they "were classified as 'independent contractors' in [their employer's] filings with the [IRS]" and that, "[a]s a consequence of this classification, plaintiffs were responsible for [, among other things,] paying their own Social Security tax payments ..." (*Ferro*, 2014 WL 1265919 at *2, 2014 US Dist LEXIS 41477 at *5). After the court dismissed most of the plaintiffs' claims, including a claim under FICA, the plaintiffs moved for reconsideration of the decision (*see Ferro v Metro. Ctr. for Mental Health*, 2014 WL 2039132, 2014 US Dist LEXIS 67969 [SDNY 2014]).

On the motion to reconsider, plaintiffs attempted to reframe their FICA claim as one for fraud, arguing that "[b]ecause plaintiffs were misclassified and were reported falsely to tax authorities, plaintiffs had to pay the full Social Security tax on their earnings, and [the defendant] did not pay the employer's share, required under [FICA]" (*Ferro*, 2014 WL 2039132 at *4, 2014 US Dist LEXIS 67969 at *9-10). The Court rejected the argument, finding that it had correctly "construed these allegations as an attempt to recover money that [the employer] should have paid to the government under

its FICA obligations" and that, in any event, "the exclusive remedy to recover excess tax payments is by filing suit against the government, and not through an action against a private party" (*Ferro*, 2014 WL 2039132 at *4, 2014 US Dist LEXIS 67969 at *10-11, citing 26 USC § 7422 [f] [1]).

Much like in *Ferro*, here plaintiff claims that he paid his employer's share under FICA. As in *Ferro*, such a claim is barred under section 7422 of the IRC, which "require[s] [plaintiff] to seek a refund from the IRS, which would in turn seek to collect the employer FICA tax due from [plaintiff's employer]" (*Umland v PLANCO Fin. Services, Inc.*, 542 F3d 59, 69 [3d Cir 2008] [finding that the plaintiff's unjust enrichment claim, seeking to recover the employer's portion of FICA tax that the employer improperly withheld from her salary, was preempted by 26 USCA § 7422]).

Plaintiff relies on *Childers v New York and Presbyt. Hosp.* (36 F Supp 3d 292, 304 [SDNY 2014] [internal quotation marks and citations omitted]) for the proposition that "[t]he mere fact that the plaintiffs' damages are calculated in terms of overpaid income taxes does not necessitate the conclusion that the plaintiffs' claim[s] must actually be . . . for a federal income tax refund." His reliance is misplaced. In *Childers*, the court held that section 7422 of the IRC did not apply, because "[t]he [defendant] Hospital's alleged liability . . . stem[med] not from its collection of FICA taxes but from later, independent actions and omissions ..." (*id.* at 303). The court reasoned that the "[p]laintiffs [did] not seek to hold the Hospital liable for any action that the IRS required the Hospital to take, or that the Hospital reasonably could have believed it was required to take," but "for completely distinct allegedly unlawful conduct" (*id.* at 303-304). Here, unlike in *Childers*, plaintiff seeks to hold defendants liable for incorrectly reporting information required by the IRS. As such, this is an action for a federal tax refund

brought against plaintiff's employer in state court, which is not permitted (*see* 26 § USC 7422 [a]).

To the extent plaintiff seeks to recover state and city taxes, his claims are similarly barred for failure to first exhaust administrative remedies (*see* NY Tax Law § 690 [b] ["The review of a decision of the tax commission provided by this section shall be the exclusive remedy available to any taxpayer for the judicial determination of the liability of the taxpayer for the taxes imposed by this article"]; City Unincorporated Business Income Tax [Administrative Code of City of NY] § 11-530 [b] ["The review of a decision of the tax appeals tribunal provided by this section shall be the exclusive remedy available to any taxpayer for the judicial determination of the liability of the taxpayer for the taxes imposed by this chapter"]; *see also Kallenberg Meat Prods. v O'Cleireacain*, 209 AD2d 381, 382 [2d Dept 1994) ["It is well settled that a party seeking review of tax assessments must exhaust statutory or administrative remedies before requesting judicial intervention for declaratory relief"] [internal quotation marks and citations omitted]).

Alternatively, defendants are still entitled to summary judgment dismissing the fraud and negligence misrepresentation claims for failure to establish justifiable reliance. "Where a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance on defendant's misrepresentations" (*Stuart Silver Assoc. v Baco Dev. Corp.*, 245 AD2d 96, 98-99 [1st Dept 1997]; *see also HSH Nordbank AG v UBS AG*, 95 AD3d 185, 194-195 [1st Dept 2012]) ["As matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on

alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it]" [internal quotation marks and citations omitted]).

Despite being a seasoned attorney, plaintiff admitted that he never made any inquiries regarding the terms of his partnership. Plaintiff knew that D'Amato and Lynch Jr. ran the firm and that he: had no control over the Firm's policies, was not involved in hiring decisions and was never asked to make an out-of-pocket capital contribution to the Firm or share in its losses (*see* NYSCEF Doc. No. 369 at 113:4-114:12; 117:7-118:21; 123:2-12; 166:9-18); yet, plaintiff never asked what sort of partner he was and whether he had any equity interest in the firm (*see id.* at 149:18-150:8, 307:17-308:4). The K-1s were plaintiff's sole basis for believing he was a partner with ownership interest (*see id.* at 307:10-21). However, plaintiff's reliance on the K-1s is particularly unreasonable because he states that, "[he] was taxed as a partner" and "was given a K-1" starting in 1990, when he joined the Firm as of counsel (*id.* at 157:19-158:2; 352:16-23). Having failed to make any inquiries, despite indications that he was not an equity partner, plaintiff's reliance on the K-1s was unreasonable as a matter of law (s*ee Epic Sec. Corp. v AMCC Corp.*, 103 AD3d 493, 493-494 [1st Dept 2013] [finding that "[t]he record establishe[d] that any reliance by plaintiff on the alleged misrepresentations, concerning the taxable nature of the provision of plaintiff's services to defendant (a matter not peculiarly within defendant's knowledge), would have been unreasonable as a matter of law," where, among other things, the "[p]laintiff itself could readily have investigated the accuracy of the alleged representations, but failed to do so"]; *see also Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 100 [1st Dept 2006] ["when the party to whom a misrepresentation is made has hints of its falsity, a heightened degree of diligence is required of it. It cannot reasonably rely on such representations without

making additional inquiry to determine their accuracy"] [citation omitted]; *see also D'Esposito*, 44 AD3d at 513 [finding that, on summary judgment, "the cause of action for fraud fail[ed] for lack of any justifiable reliance on defendants' purported misrepresentation"]).

For the foregoing reasons, plaintiff's third and fourth causes of action for fraud and negligent misrepresentation are dismissed.

Turning to plaintiff's fifth cause of action, "equitable estoppel is not a basis to recover damages" (*Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793, 798 [2d Dept 2011]). Rather, the doctrine "bar[s] the assertion of the affirmative defense of the Statute of Limitations where it is the defendant's affirmative wrongdoing . . . which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding" (*Powers Mercantile Corp. v Feinberg*, 109 AD2d 117, 121 [1st Dept 1985], *affd* 67 NY2d 981 [1986]). Therefore, the fifth cause of action is dismissed.

Accordingly, Hecht and the Firm Defendants' motions for summary judgment are granted.

B. Plaintiff's Motion to Renew

Plaintiff argues that the Firm's tax returns, indicating that plaintiff was a "[g]eneral partner," with a "capital account" and had an ownership percentage in the Firm, constitute new evidence requiring the reinstatement of his claims for dissolution and accounting (NYSCEF Doc. No. 418; NYSCEF Doc. No. 427 at HC002968). The Firm Defendants respond that the motion should be denied, because plaintiff fails to demonstrate how the new evidence would have altered the prior determination or to justify the delay in bringing this evidence to the court's attention.

CPLR 2221 (e) provides that a motion to renew "shall be based upon new facts not offered on the prior motion . . . or . . . a change in the law that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion." Here, plaintiff argues that newly discovered tax documents demonstrate, as a matter of law, that plaintiff was a partner with an ownership interest in the Firm. However, plaintiff fails to demonstrate how this new evidence would have changed the prior determination. In dismissing plaintiff's claims for dissolution and accounting, the court relied on the Partnership Agreement, finding that it expressly provides that D'Amato and Lynch Jr. are the only partners with the right to dissolve the firm. Plaintiff does not argue that new evidence of his purported partnership status overrides the express provisions of the Partnership Agreement. Instead, he argues that Justice Oing incorrectly determined that the Partnership Agreement endured beyond D'Amato's death.

However, if that was the case and the court "misapprehended" the facts or the law, the proper remedy was a timely motion to reargue (*see* CPLR 2221 [d]). Plaintiff's failure to demonstrate how proof of his purported partnership status alters the prior determination requires denial of the motion (*see Vyrtle Trucking Corp. v Browne*, 157 AD3d 842, 843 [2d Dept 2018] [denying motion to renew, where, among other things, "the new facts would not have changed the prior determination"]; *see also Gassab v R.T.R.L.L.C.*, 69 AD3d 511, 512 [1st Dept 2010] [holding that "[p]laintiff's second motion for renewal was . . . properly denied since a complete affidavit from his expert would have made no difference to the outcome of the first motion for renewal"]).

Moreover, plaintiff fails to explain the delay in bringing the motion. According to the Firm Defendants, they provided the tax documents to plaintiff more than two years

ago, a fact plaintiff does not dispute. Therefore, plaintiff's failure to justify the delay requires denial of the motion (s*ee Rivera v Ayala*, 95 AD3d 622, 623 [1st Dept 2012] [affirming denial to renew, where "counsel failed to provide a reasonable justification . . . for the more than two-year delay in moving to renew that motion"]; *Levy v New York City Health and Hosps. Corp.*, 40 AD3d 359, 360 [1st Dept 2007] [affirming denial of motion to renew, where movant failed, among other things, "to show a reasonable justification . . . for the subsequent five-year delay in moving to renew"]). For the foregoing reasons, plaintiff's motion to renew is denied.

Accordingly, it is hereby

ORDERED that defendant Hecht and Company, Certified Public Accountants, P.C.'s motion for summary judgment is granted and the amended complaint is dismissed with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that defendants D'Amato and Lynch, LLP and Luke D. Lynch, Jr.'s motion for summary judgment is granted and the amended complaint is dismissed with costs and disbursements to said defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the motion of plaintiff Harvey Barrison is denied in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 4/2/19

ENTER:

J.S.C.

HON. ANDREA MASLEY