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ENDORSED  
FILED  
San Francisco County Superior Court

FEB 24 2006

GORDON PARK-LI, Clerk  
BY: RENE A. PASQUAL  
Deputy Clerk

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 FOR THE CITY AND COUNTY OF SAN FRANCISCO

12 Case No. 05-440240

13 **[PROPOSED] ORDER GRANTING  
14 DEFENDANT'S MOTION FOR  
15 SUMMARY JUDGMENT**

Hearing Date: Fri., February 3, 2006  
Time: 9:30 a.m.  
Dept.: 302  
Judge: Hon. Ron Quidachay

Trial Date: March 6, 2006

16 Plaintiffs,

17 v.

18 Defendants.

19 On February 3, 2006, the motion for summary judgment brought by Defendants

20 \_\_\_\_\_, came on regularly for hearing in Department 302 of  
21 the above-entitled superior court. After hearing all of the evidence, both oral and documentary,  
22 the Court rules as follows:

23 **I. COMPLAINT IS BARRED BY STATUTE OF LIMITATIONS**

24 The complaint filed by

25 \_\_\_\_\_ is barred by the statute of limitations

26 because Smith suffered both actual injury and discovered Hatter's allegedly improper conduct  
27 over two years before filing suit on April 7, 2005. A complaint for professional negligence  
28 against an accountant is governed by the two-year statute of limitations contained in Code of

1 Civil Procedure § 339(1). *Apple Valley Unified School District v. Vavrinek, Trine, Day and Co.*  
2 (2002) 98 Cal. App. 4<sup>th</sup> 934, 942. “The statute begins to run when (1) the aggrieved party  
3 discovers the negligent conduct causing the loss or damage and (2) the aggrieved party has  
4 suffered actual injury as a result of the negligent conduct.” *Id.*

5 **A. All of Plaintiffs’ Causes of Action are Barred by the Two-Year Statute**

6 Smith alleges four causes of action for breach of fiduciary duty, professional negligence,  
7 breach of oral contract, and constructive fraud. Breach of an oral contract has a two year statute,  
8 Cal. Civ. Proc. Code § 339, as does a claim for professional negligence. *See id.* § 335.1; *Hydro-*  
9 *Mill Co., Inc. v. Hayward, Tilton and Rolapp Ins. Associates, Inc.*, 115 Cal. App. 4<sup>th</sup> 1145,  
10 1153, 1159 (2004) (stating that “the negligence claim is one for professional negligence and is  
11 governed by the two-year statute of limitations set forth in section 339 , subdivision 1 of the  
Code of Civil Procedure”).

12 Furthermore, since the gravamen of the actions pleaded herein is professional negligence,  
13 Smith’s remaining claims for breach of fiduciary duty and constructive fraud are also barred by  
14 the two-year statute. *Curtis v. Kellogg and Andelson*, 73 Cal. App. 4<sup>th</sup> 492, 503 (1999) (“The  
15 same analysis renders appellants’ claims against K&A for breach of fiduciary duty, fraud, and  
16 breach of contract untimely. Since the gravamen of the breach of contract and breach of  
17 fiduciary duty claims are the purported malpractice, the two-year statute of limitations applies.”);  
18 *see also Barton v. New United Motor Manufacturing, Inc.*, 43 Cal. App. 4<sup>th</sup> 1200, 1207 (1996)  
19 (“The statute of limitations to be applied in a particular case is determined by the nature of the  
20 right sued upon or the principal purpose of the action, not by the form of the action or the relief  
21 requested.”); *Hydro-Mill Co.*, 115 Cal. App. 4<sup>th</sup> at 1159-60 (“In sum, because the gravamen of  
22 this lawsuit is Hayward’s failure to execute its obligations as an insurance broker, the two-year  
23 limitations period for professional negligence applies to the cause of action denominated ‘breach  
24 of fiduciary duty,’ rendering it untimely.”); *Stoll v. Superior Court*, 9 Cal. App. 4<sup>th</sup> 1362, 1368  
25 (1992).

26 Here the complaint establishes that the gravamen of Smith’s complaint is Hatter’s alleged  
27 professional negligence. Smith’s cause of action for Breach of Fiduciary Duty states that the  
28 breach occurred insofar as Hatter, allegedly, “acted below the standard of care in providing tax

1 advice [and] . . . tax planning” and failed in his professional duties to “render and provide tax  
2 services,” among other services. (Complaint ¶ 11.) These are, at heart, claims for professional  
3 negligence. Moreover, this allegation is identical to Smith’s own claim for Professional  
4 Negligence which complains of Hatter’s alleged failure to provide “professional, accountancy,  
5 and trustee services for the plaintiffs,” (*id.* ¶ 18), which are “described above,” (*id.* ¶ 17), in  
6 Smith’s first cause of action for Breach of Fiduciary Duty.

7 Similar allegations based on a claim of professional negligence appear directly and by  
8 incorporation in every cause of action of the complaint. Because the gravamen of each cause of  
9 action is professional negligence, all causes of action are barred by the two-year statute  
10 contained in Cal. Civ. Proc. Code § 339.

11 **B. *Seeking to Dismiss Claims Without Prejudice By Way of Avoiding a***  
12 ***Motion for Summary Judgment is Improper and any Such Attempted***  
13 ***Dismissal is Denied***

14 Smith’s recent attempt to change the gravamen of her causes of action by seeking  
15 dismissal of three of four claims without prejudice is improper gamesmanship under law. *See*  
16 *Groth Bros. Oldsmobile, Inc. v. Gallagher*, 97 Cal. App. 4th 60, 70 (2002); *Hartbrodt v. Burke*,  
17 42 Cal. App. 4th 168, 175 (1996). Smith is “not entitled to dismiss [her] action without  
18 prejudice and reassert the same allegations that it could not, or would not, defend when  
19 challenged by respondents’ summary judgment motions.” *Mary Morgan, Inc. v. Melzark*, 49  
20 Cal. App. 4th 765, 772 (1996). Smith’s attempt to avoid summary judgment on all four causes  
21 of action is improper and her request to dismiss certain claims without prejudice is hereby  
22 denied. The court hereby orders summary judgment entered in Hatter’s favor as to all causes of  
23 action contained in the complaint.

24 **C. *Plaintiffs Suffered Actual Injury and Discovered the Injury Over Two***  
25 ***Years Prior to Filing the Four Causes of Action***

26 Smith suffered actual alleged injury, at the earliest, May 2001 and at the latest December  
27 2002 when Smith sold her shares in Continental Parks. It was during this time period time that  
28 Smith allegedly sold her shares below market value and suffered other harms related to the sale  
of this stock. (Separate Statement of Undisputed Material Facts in Support of Motion for  
Summary Judgment ¶¶ 4, 5, 7, 11, 13, 14 [hereinafter SSUMF].)

Smith was aware of the fact that she had suffered actual injury related to the sale of her

1 interest in Continental Parks, on March 15, 2002, due to the fact that she believed, even at the  
2 time, that the transaction was a bad deal. (SSUMF ¶¶ 41.) Smith conceded again,  
3 approximately one month after this transaction that she felt “taken advantage of.” (SSUMF ¶  
4 42.) Thus the latest date that Smith can be said to have discovered her injury was on or around  
5 April 2002, making April 2004 the absolute latest date by when Smith would have been  
6 permitted to file the instant action under the statute of limitations. Smith filed her action  
7 approximately a year after the statute had run (filing on April 7, 2005). (SSUMF ¶ 34.) All four  
8 causes of action (including the three that Smith unsuccessfully sought to dismiss without  
9 prejudice) are barred as a matter of law under the statute and are dismissed with prejudice.

10 **II. AS A MATTER OF LAW, HATTER BREACHED NO FIDUCIARY DUTY TO SMITH**

11 Where a motion for summary judgment, such as this one, is brought by a defendant, the  
12 “defendant bears the burden of persuasion that one or more elements of the cause of action in  
13 question cannot be established, or that there is a complete defense thereto.” *Aguilar v. Atlantic*  
14 *Richfield Co.*, 25 Cal. 4th 826, 850 (2001) (quotation marks omitted); *see* Cal. Civ. Proc. Code §  
15 437c(o)(2). A defendant need not conclusively negate an element of the plaintiff’s cause of  
16 action. Rather,

17 All that the defendant need do is to show that one or more elements of the cause  
18 of action cannot be established by the plaintiff. In other words, all that the  
19 defendant need do is to show that the plaintiff cannot establish at least one  
20 element of the cause of action—for example, that the plaintiff cannot prove  
21 element X. Although he remains free to do so, the defendant need not himself  
22 conclusively negate any such element—for example, himself prove *not* X.

23 *Aguilar*, 25 Cal. 4th at. 853-54 (citations, alterations, ellipsis, and quotation marks omitted).

24 **A. No Issue of Disputed Material Fact Exists Regarding Hatter’s Advice  
25 Regarding the Continental Parks Transactions**

26 Hatter presented sufficient evidence establishing no issue of disputed material fact  
27 existed regarding any bad advice relayed to Smith concerning the Continental Parks transaction.  
28 Hatter declared that he did not recommend that Smith engage in any of the transactions that  
Smith now complains about. (SSUMF ¶¶ 6, 24, 32, 50.)

Now “the burden shifts to the plaintiff . . . to show that a triable issue of one or more  
material facts exists as to that cause of action or a defense thereto.” Cal. Civ. Proc. Code §  
437c(p)(2). But Smith has failed to bear that burden. Smith is unable to say that Hatter

1 provided her with bad advice inducing her to engage in the Contiental Parks transactions, but  
2 merely that Hatter never *sought to stop her* from engaging in said transactions. (Declaration of  
3 in Support of Her Opposition to Defendants' Motion for Summary Judgment  
4 or, in the Alternative, Summary Adjudication ¶¶ 9, 11, 14, 17 (filed Jan. 20, 2006) [hereinafter  
5 Smith Decl.].) Smith acknowledges in her opposition that "it may be true that *did not*  
6 advise Ms. Smith to sell her shares." (Plaintiff's Memorandum of Points and Authorities in  
7 Opposition to Motion for Summary Judgment at 8:3-4 (filed Jan. 20, 2006) (emphasis added).)

8 Smith's failure to even allege that Hatter advised that she engage in this transaction is  
9 fatal to her claim for breach of fiduciary duty and is grounds under summary judgment analysis  
10 to find that no issue of material fact exists on this point. *See Ahrens v. Superior Court*, 197 Cal.  
11 App. 3d 1134, 1152 (1988) (indicating that for purposes of summary judgment, equivocal  
12 evidence will not suffice to create a disputed issue of material fact). Smith has failed to create  
13 an issue of material fact indicating that Hatter breached any fiduciary duty.

14 **B. Plaintiffs Are Unable to Establish Damages as a Matter of Law**

15 Smith has also failed to establish the existence of material fact regarding damages. *See*  
16 *Mattco Forge v. Arthur Young*, 52 Cal. App. 4<sup>th</sup> 820, 837 (1997). The plaintiff has the burden to  
17 establish that had the alleged malpractice not occurred, the harms complained of would not have  
18 occurred. *Id.* at 837; *see also Marshak v. Ballesteros*, 72 Cal. App. 4<sup>th</sup> 1514, 1518 (1999);  
19 *Herrington v. Superior Court* 107 Cal. App. 4<sup>th</sup> 1052, 1058 (2003).

20 Smith claims that damages have accrued during the May 21, 2001 Continental Parks  
21 transaction because she should have been able to generate cash through dividends and other  
22 means without resorting to the sale of shares. But these arguments are unsupported by citation  
23 to the Separate Statement, to any declaration, or any record whatsoever. In carrying its burden  
24 in responding to a motion for summary judgment a plaintiff "may not rely upon the mere  
25 allegations or denials of its pleadings to show that a triable issue of material fact exists but,  
26 instead, shall set forth the specific facts showing that a triable issue of material fact exists as to  
27 that cause of action or a defense thereto." Cal. Civ. Proc. Code § 437c(p)(2). Smith's mere  
28 allegations of damages absent proof will not establish an issue of material fact.

1 provided her with bad advice inducing her to engage in the Contientental Parks transactions, but  
2 merely that Hatter never *sought to stop her* from engaging in said transactions. (Declaration of  
3 Virginia P. Smith in Support of Her Opposition to Defendants' Motion for Summary Judgment  
4 or, in the Alternative, Summary Adjudication ¶¶ 9, 11, 14, 17 (filed Jan. 20, 2006) [hereinafter  
5 Smith Decl.]) Smith acknowledges in her opposition that "it may be true that Mr. Hatter *did not*  
6 advise Ms. Smith to sell her shares." (Plaintiff's Memorandum of Points and Authorities in  
7 Opposition to Motion for Summary Judgment at 8:3-4 (filed Jan. 20, 2006) (emphasis added).)

8 Smith's failure to even allege that Hatter advised that she engage in this transaction is  
9 fatal to her claim for breach of fiduciary duty and is grounds under summary judgment analysis  
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12 evidence will not suffice to create a disputed issue of material fact). Smith has failed to create  
13 an issue of material fact indicating that Hatter breached any fiduciary duty.

14 **B. *Plaintiffs Are Unable to Establish Damages as a Matter of Law***

15 Smith has also failed to establish the existence of material fact regarding damages. *See*  
16 *Mattco Forge v. Arthur Young*, 52 Cal. App. 4<sup>th</sup> 820, 837 (1997). The plaintiff has the burden to  
17 establish that had the alleged malpractice not occurred, the harms complained of would not have  
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19 *Herrington v. Superior Court* 107 Cal. App.4<sup>th</sup> 1052, 1058 (2003).

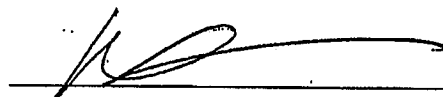
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25 allegations or denials of its pleadings to show that a triable issue of material fact exists but,  
26 instead, shall set forth the specific facts showing that a triable issue of material fact exists as to  
27 that cause of action or a defense thereto." Cal. Civ. Proc. Code § 437c(p)(2). Smith's mere  
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CONCLUSION

For the foregoing reasons, summary judgment on all four of Plaintiff's causes of action for breach of fiduciary duty, professional negligence, breach of contract, and constructive fraud are entered in favor and, as such, are dismissed with prejudice.

DATED: February 23 2006

  
\_\_\_\_\_  
JUDGE OF THE SUPERIOR COURT  
HON. RONALD QUIDACHAY

DATED: February \_\_, 2006

Approved as to Form

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