IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

PAUL H. BOERGER, APARTMENT MANAGERS, INC. and ALBAN PARK, INC.	)	C.A. No. 05C-01-020-CLS
Plaintiffs,	)	
v.	)	
HENRY A. HEIMAN, ESQUIRE, DARRELL J. BAKER, ESQUIRE, HEIMAN ABER & GOLDLUST, Including Its Successors, KEITH L. THOMPSON AND BALLARD, THOMPSON AND ASSOCIATES, P.A.	)	
Defendants.	)	
v.	)	
PATONE & PATONE, LLC.	)	
Third Party Defendants.	)	

Date Submitted: December 31, 2007
Date Decided: February 4, 2008

Upon Consideration of Defendants' Motion to Dismiss:
GRANTED.

Bruce W. McCullough, Esquire, McCullough & McKenty, P.A., Wilmington, Delaware, Stephen Skovron, Esquire, *pro hac vice*, Bochetto & Lentz, P.C., Philadelphia, Pennsylvania, Attorneys for Plaintiffs.

Colleen D. Shields, Esquire, Elzufon Austin Reardon, Tarlov & Mondell, P.A., Wilmington, Delaware, Attorneys for Defendants Darrell J. Baker, Esquire, Henry A. Heiman, Esquire and Heiman, Aber & Goldlust.

Paul Cottrell, Esquire, Tighe & Cottrell, P.A., Wilmington, Delaware, Attorney for Defendants Keith Thompson and Ballard, Thompson and Associates, P.A.

Gregory J. Weining, Esquire, Connolly Bove Lodge & Hutz LLP, Wilmington, Delaware, Attorney for Third-Party Defendant Patone & Patone, LLC.

SCOTT, J.

Introduction

On October 31, 2007, the Court granted defendants' motion to dismiss based upon the expiration of the statute of limitations. Plaintiff brought the remaining count of declaratory judgment to the Court's attention, as it had not been addressed. The parties submitted additional argument on the issue of whether the statute of limitations applies as a bar to the declaratory judgment action. The Court finds the three year limitations period applies and has not been tolled, as such, the action is barred as untimely.

Background

The facts of this case have been recited in detail elsewhere.[1] Generally, plaintiff utilized the services of defendants to create two limited liability companies, the first in 1997 and the second in 1998. He claims that, when he sells the companies, he will incur substantial tax liability as a result of defendants' failure to elect Subchapter-S status. The Court found plaintiff's legal claims barred by the three-year statute of limitations under 10 Del. C. § 8106. The present issue is whether the same statute of limitations and analysis applies to the declaratory judgment count.

[1] See *Boerger v. Heiman*, 2007 WL 3378667.

Discussion

Plaintiff asks the Court to hold defendants financially responsible, upon sale of the companies, for the failure to elect Subchapter-S status. In addressing this issue, the Court must look to the gravamen of the complaint.[2] The gravamen is the claim for negligence, malpractice, and breach of contract which are subject to a three-year statute of limitations.[3] Without those allegations, there is no basis for seeking declaratory relief upon the sale of the companies.

Plaintiff states that the "statute of limitations need not be applied" to bar a claim in equity. However, even the case plaintiff cites to for support states that the statute of limitations usually will be applied unless there are extraordinary circumstances.[4] "It is well established that a statute of limitations need not be *but usually is* applied so as to bar an equitable action where there is an analogy between such an action and its counterpart at

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[2] *Spano v. Morse*, 2003 WL 22389542 (Del. Ch. 2003).
[3] 10 Del. C. § 8106.
[4] *Elster v. American Airlines*, 128 A.2d 801 (Del. Ch. 1957).
See also *Verizon Delaware, Inc. v. Laramore*, 2007 WL 2230936 (Del. Super.) wherein the Court held that suit seeking declaratory judgment for reimbursement of worker's compensation benefits was untimely based upon the statute of limitations are provided by the Workers' Compensation Statute.

law."[5] "Absent some unusual circumstances, a court of equity will deny a plaintiff relief when suit is brought after the analogous statutory period."[6]

Plaintiff has not cited to any extraordinary circumstances which apply to the underlying allegations. The only argument plaintiff makes on this point is "Boerger never only had in mind" the legal documents that he signed.[7] According to plaintiff, he also had in mind the representations of defendants that the "tax affect on him would be neutral."[8] "Neutral" does not mean that defendants represented that the companies indeed had elected Subchapter-S status. Boerger was aware of the tax implications of incorporation and he signed numerous documents over a period of years detailing the corporate structure.

Most fatal to plaintiff's claim, accountant defendants affirmatively brought the issue of Subchapter-S status to Boerger's attention in a conversation (which he has acknowledged), but he still did nothing to investigate for several years. The issue is not whether defendants committed

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[5] *Id.* at 805 (emphasis added) (citing *Perkins v. Cartmell's Administrator*, 1845 WL 493 and *Bush v. Hillman Land Co*., 2 A.2d 133 (Del. Ch. 1938)).

[6] *U.S. Cellular Inv. Co. of Allentown v. Bell Atlantic Mobile Sys*., 677 A.2d 497 (Del. 1996) citing *Adams v. Jankouskas*, 452 A.2d 148, 157 (Del. 1982).

[7] See Supplement to Plaintiff's Opposition to all Defendants' Summary Judgment Motions, p. 4.
Those documents include the certificate of incorporation for both companies, the by-laws, the operating agreement, and both personal and corporate tax returns for several years—which revealed the ownership status.

[8] *Id.* at p. 4.

malpractice by overstating the tax benefits of plaintiff's corporate status—that issue goes to the merits. The threshold issue is whether and when plaintiff knew or should have known that he had a potential claim against defendants. There were sufficient facts to put him on notice, but he elected to linger until he had an offer to purchase the companies, he lingered too late for this Court to offer him relief.

Plaintiff next argues that "[t]he character and/or substance of the information which puts a plaintiff-in-equity on notice of his potential claim in equity must be more specific and/or concrete than the character and/or substance of the information which puts a plaintiff-at-law on notice of his potential claim at law." The legal support advanced by plaintiff is a comparison of this Court's decision to dismiss plaintiff's legal claims with *Church of Religious Science v. Fox*.[9] Plaintiff argues that *Church* stands for the proposition that "plaintiff's equitable claims for Declaratory Judgment require more precise information be conveyed to plaintiffs to put them on such inquiry notice and trigger laches."

In *Church*, a company's successor in interest brought suit against a former employee, charging that a device he invented was the intellectual property of the company. The employee invented the device while at home,

[9] 266 A.2d 881 (Del. 1970).

sick. Upon his return to work, he showed the device to two of his superiors and neither showed interest in developing it. One year later, the employee left the company and showed the same device to an individual named Offerman, who later purchased the company. Offerman also showed no interest. Nearly twenty years after invention, a suit for misappropriation was brought by the company against the former employee. Under those facts, the Supreme Court found that this information was "sufficient to impose upon [the employer] and its successor the duty of reasonable diligence in establishing the facts and prosecuting the claim that plaintiff now asserts."[10]

While the facts in *Church* were extreme, the Court was assessing the issue from the perspective of laches, not the statute of limitations. Nevertheless, the Court did not determine that such dramatic facts are necessary to establish inquiry notice. In fact *Church* held that there is a "duty of reasonable diligence" on the part of the plaintiff.[11]

There are no unusual circumstances which indicate that the statute of limitations should not apply to this count. As discussed at length in the previous decision of the Court, plaintiff Boerger admitted knowledge of potential tax liability associated with incorporation over twenty years prior to the organization of these companies. He was also directly warned about

[10] *Id.* at 883.
[11] *Id.* at 884.

the tax risks by accountant defendants. These factors are sufficient to indicate notice to Plaintiff such that reasonable diligence warranted inquiry into the corporate structure.

Conclusion

Defendant's Motion to Dismiss is **GRANTED**.

IT IS SO ORDERED.

/s/Calvin L. Scott, Jr.
Judge Calvin L. Scott, Jr.