

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY : CIVIL TERM : PART 48

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HARVEY BARRISON,

Plaintiff,

INDEX NO.  
653530/2011

-against-

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

Defendants.

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June 26, 2018  
60 Centre Street  
New York, New York

B E F O R E :

HON. ANDREA MASLEY, Supreme Court Justice.

A P P E A R A N C E S :

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Senior Court Reporter

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2 THE COURT: Good morning. In the matter of  
3 Barrison against D'Amato & Lynch.

4 Who is here for Barrison?

5 MR. RUSSOTTI: Your Honor, Philip Russotti,  
6 Wingate, Russotti & Shapiro for the Plaintiff.

7 THE COURT: Thank you. And for D'Amato & Lynch.

8 MR. SHAW: Ravindra Shaw from the law firm of  
9 Jackson Lewis, P.C. on behalf of D'Amato & Lynch, LLP.

10 THE COURT: And for the accounting firm Hecht &  
11 Company?

12 MS. REE: Sophia Ree from Landman Corsi, Your  
13 Honor.

14 THE COURT: So I have four motions before me. The  
15 first one is just a matter of housekeeping. There's motion  
16 to seal. It's a request and it's unopposed, but since  
17 you're new to my part you may not be aware that the law in  
18 here, in the First Department, is you don't get to just seal  
19 documents, and I follow that case law. So if you want to  
20 renew this motion, and I think I may have even told whoever  
21 came in with it when it came in, you can redact, but you  
22 cannot seal. And in this case you're seeking seal 11  
23 documents. And while I appreciate the chart that's given,  
24 which says what the nature of the document is, there's no  
25 legal basis for the -- there's no legal basis stated  
26 certainly not for sealing. If it were a redaction, I would

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still need a reason for something being sealed or redacted.

To say that it's a tax return is really not sufficient and it's -- you can redact numbers, but you cannot seal entire documents. So I'll adjourn this one and you can submit -- I'll continue the temporary seal until you can submit documents that are redacted.

Mr. Shaw, this is your motion. Do you have any questions?

MR. SHAW: No, Your Honor. I understand.

THE COURT: So before you leave, let's just pick a date to put that on. Of course, just the fact that it's not opposed, the days of sealing on consent are long over. So that's not possible. All right.

So let's get to the heart of the matter, motions for summary judgment. So we have a motion for -- Motion 13, 14 and 15. We have a motion by Mr. Barrison. We have a motion for summary judgment on his claims. The remaining claims, for the record, since some were dismissed and some were discontinued on consent, the remaining claims are number three for misrepresentation and fraud and number four for negligent misrepresentation. Number five, which is called an action for equitable estoppel, but everyone acknowledges in the papers that's not really a claim as much as a legal theory for dealing with the statute of limitations and other limitations.

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So I have 13 by -- Motion 13 by Hecht & Company. 14 is by the law firm and Mr. Lynch. And 15 by the Plaintiff. I think the best way to organize the argument is to start with the Plaintiff, and we'll go one by one through the three causes of action. And then I'll hear what the opposition or what the arguments are for the motions to dismiss those claims.

So let's start with number two, the -- sorry, number three, misrepresentation and fraud. So, Mr. Russotti, how can I grant summary judgment on misrepresentation and fraud?

MR. RUSSOTTI: Well, to make it quick, the first thing I'd like to do, Your Honor, is thank you for the courtesies you've given us with the scheduling of these motions, all counsel. I wanted to have the opportunity to say that.

With respect to fraud, quite honestly, I don't think you can grant summary judgement on a question of fraud. I think it's a question of fact that goes to the jury. There is -- we've cited cases, I'm sure Your Honor has seen, that you don't have to prove intentional conduct with fraud that you can prove through other evidence closing your eyes to the facts and ignoring facts, which is sufficient to get to the jury on fraud. And we've cited the State Street case. And quoting from State Street,

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2 "Accountants may be liable to third parties even when there  
3 is lack in deliberate or active fraud. A representation  
4 certified as true to the knowledge of the accountants when  
5 knowledge there is none a reckless misstatement or an  
6 opinion on grounds so flimsy that to lead to the conclusion  
7 that there was no genuine belief in its truth are all  
8 sufficient upon which to base liability. A refusal to see  
9 the obvious, a failure to investigate the doubtful, if  
10 sufficiently gross, may furnished evidence leads to an  
11 inference of fraud so as to impose liability for losses" --

12 THE COURT: So, Mr. Russotti, back at you. What  
13 about your client; did he have any obligations or anything?

14 MR. RUSSOTTI: To do what; to investigate?

15 THE COURT: Yeah.

16 MR. RUSSOTTI: We don't think so. If you look at  
17 the charge for misrepresentations --

18 THE COURT: Has to be reliance, reasonable  
19 reliance.

20 MR. RUSSOTTI: Right. Let me show you something,  
21 Judge. That if you look -- and this goes to one of their  
22 arguments -- that if you look to the PJI, which talks about  
23 negligent misrepresentation and the elements of negligent  
24 misrepresentation; one, something that was stated, was  
25 something stated that was set forth in a statement. The  
26 statement was incorrect. Three, the Defendant failed to use

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2 reasonable care to ensure that the statement was correct.

3 THE COURT: Can I just -- I just want to make sure  
4 that I'm clear and the record is clear. What was incorrect?

5 MR. RUSSOTTI: That he was -- well, they're  
6 claiming that he was an employee, not a partner. All of the  
7 tax returns and the K-1s said that he was --

8 THE COURT: They're not claiming he was an  
9 employee.

10 MR. RUSSOTTI: Sure they are. When Mr. Barrison  
11 left the firm, Mr. Lynch told us he was no longer -- he was  
12 never a partner. We sought to --

13 THE COURT: In your view, what is he?

14 MR. RUSSOTTI: In my view?

15 THE COURT: Yes.

16 MR. RUSSOTTI: Under the law, he's a partner. If  
17 you follow Mahoney against Bunson --

18 THE COURT: But your expert says that he's an  
19 employee.

20 MR. RUSSOTTI: Well, this is what's interesting,  
21 Judge. I agree that the facts of the case make him an  
22 employee. However, they have submitted documents to federal  
23 taxing parties by which they're bound. And the Court of  
24 Appeals has said in Mahoney against Bunson you cannot ignore  
25 and you cannot get away from or change statements made in  
26 tax returns. And that's exactly what they're trying to do

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2 here. For 20 years they filed these tax returns saying he  
3 was a general partner.

4 A general partner under the instructions of the IRS  
5 means that he was personally liable for the firm's debts.

6 THE COURT: Well, that goes to another question I  
7 had, which is so how did he share in the losses? Because it  
8 looks to me he only shared in profits, not losses.

9 MR. RUSSOTTI: Well, he didn't share either. He  
10 didn't share neither. To share in profits, as our  
11 accountant says, our expert says, you have to look at it  
12 going forward. You have to have a percentage of a profit  
13 going forward, not going backwards. All this really was was  
14 a distribution of money the firm had left over that they're  
15 conveniently calling a share of profits now, but it really  
16 isn't a share of profits. The point is --

17 THE COURT: My question is about losses. How did  
18 you share losses?

19 MR. RUSSOTTI: He didn't share losses.

20 THE COURT: Did he know that?

21 MR. RUSSOTTI: Yes. Nobody -- well, the firm never  
22 had any losses. They never came to him to ask to contribute  
23 to losses. And Mr. Lynch in his affidavit said Barrison was  
24 never asked to assume losses of the firm, yet they filed tax  
25 documents which said under the instructions of the IRS that  
26 he was personally liable for the firm's debts. If you're

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personally liable for the firm's debts, you're an owner.

So under Mahoney against Bunson they're bound by that, as a matter of law, according to the Court of Appeals and all the cases cited after that. And what's interesting and what I wanted to emphasize, because we had to wait for their replies, is that they did not contest this. They don't contest this rule of law or its application to this case. And I have cases, if you bear with me --

THE COURT: Well, let's move on to the damages. Let's move on to the damages, because I'm not going to have you read cases to me at this time on the record. So, thank you so much.

MR. RUSSOTTI: Can I hand them up to Your Honor?

THE COURT: No, no, no. I actually have an account with Lexis. I'm good. That's how I read the cases.

MR. RUSSOTTI: Can I tell you the cases that I want to tell you about?

THE COURT: No, they're in your papers.

MR. RUSSOTTI: Well, they're not, because we waited for their reply to see what they were going to say about Mahoney against Bunson, and they didn't say anything. What I wanted to point out to Your Honor is that there's First Department and Third Department cases that say when an argument is made and it's not responded to it's conceded. That case is Association of Secretaries of the Justices of



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2 the Supreme Court against the Office of Court  
3 Administration, 151 AD2d 420. And also Weldon against  
4 Rivera, 301 AD2d 934. That's a Third Department case. The  
5 first case I read to you, the Association of Secretaries of  
6 Justice is a First Department case where -- similarly to  
7 where you do not contest facts --

8 THE COURT: 301 AD2d what?

9 MR. RUSSOTTI: 301.

10 THE COURT: AD2d.

11 MR. RUSSOTTI: 934.

12 THE COURT: Thank you.

13 MR. RUSSOTTI: So the analogy --

14 THE COURT: I'll take a look.

15 MR. RUSSOTTI: If you don't contest --

16 THE COURT: I'm familiar with that rule.

17 MR. RUSSOTTI: Okay.

18 THE COURT: So moving on to damages.

19 MR. RUSSOTTI: Moving on to damages. Well, if you  
20 follow Mahoney against Bunson, he is a partner and he's a  
21 co-owner. And that's why we've asked to renew --

22 THE COURT: So then there are no damages.

23 MR. RUSSOTTI: Sure there are. As Justice Oing  
24 pointed out, he's entitled to an accounting. Justice Oing  
25 recognized this in his --

26 THE COURT: Except that he dismissed it.

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2 MR. RUSSOTTI: No. He said the case had to go  
3 forward to see if he was a partner or an employee under the  
4 fraudulent misrepresentations claim. And if he was  
5 determined to be a partner, then other damages would flow  
6 from that. And let me read Judge Oing's --

7 THE COURT: I actually read his decisions. I'm  
8 good.

9 MR. RUSSOTTI: Did you read the part where he said  
10 it's an alternative series of facts, alternative statement  
11 of facts?

12 THE COURT: Yes. And then he dismissed your  
13 accounting claim.

14 MR. RUSSOTTI: He did. But he also said that there  
15 would be ramifications to finding he was a partner. There  
16 would be the other obligations and liabilities and assets to  
17 be gone in to. And that's why we're seeking to reinstate  
18 the accounting cause of action. Not the dissolution cause  
19 of action, but the accounting cause of action. Because  
20 under the partnership law a partner is entitled to an  
21 accounting. Section 44 of the New York State Partnership  
22 Law.

23 THE COURT: Okay. So if he's a partner then he has  
24 no damages. If he's not a partner --

25 MR. RUSSOTTI: Well, he may have damages, because  
26 he's entitled to an accounting to go back the past 20 years

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2 as a partner to see if he got the correct share.

3 THE COURT: You can go back 20 years?

4 MR. RUSSOTTI: Yes. Because that's how long  
5 they've been saying he's a partner. To see how much he was  
6 given as compared to what he should have been given. So  
7 there may be very well substantial damages if he's found to  
8 be a partner, which is what was recognized by Judge Oing.

9 THE COURT: If he's an employee -- I don't  
10 understand your damage calculation. Because if he were an  
11 employee and the firm paid the taxes instead of  
12 Mr. Barrison, then they would have deducted it from what  
13 they were paying him instead of having him pay it.

14 MR. RUSSOTTI: No, no, no. With these taxes it's  
15 15 percent Social Security/Medicare. If he's an employee,  
16 the firm pays half -- the firm pays all of it, right?

17 THE COURT: Yes.

18 MR. RUSSOTTI: Firm pays half, he pays half.  
19 That's the way it works. By him being a partner he paid all  
20 of it. He should have only paid half of it. The damages  
21 are half of the taxes that he paid for FICA and Medicare.

22 THE COURT: If the firm paid him a thousand dollars  
23 as an employee -- let's just use a simple number for me --  
24 or 100,000, let's say, and he owed taxes on that, he  
25 wouldn't actually be paid \$100,000, he would be paid 100,000  
26 less the taxes that the firm paid on his behalf.

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2 MR. RUSSOTTI: Well, I don't know how the mechanics  
3 is, but on \$1,000 he owed 15 percent, say \$15, in Social  
4 Security and FICA tax.

5 THE COURT: Right.

6 MR. RUSSOTTI: The firm would have paid eight and  
7 he would have paid eight, okay. Instead, by calling him a  
8 partner, he paid 15 when he should only have paid eight.  
9 That's the damage. Half of the taxes that he was forced to  
10 pay because the firm labeled him a partner as opposed to an  
11 employee.

12 See what I'm saying?

13 THE COURT: Right.

14 MR. RUSSOTTI: The 15 percent that he had to pay  
15 all came out of his pocket as opposed to half of it being  
16 paid by the firm. Should have been paid by the firm.

17 THE COURT: But wouldn't that have been deducted  
18 from what they were paying him?

19 MR. RUSSOTTI: Deducted from what they were paying  
20 him? Whether it was deducted or not --

21 THE COURT: So you're saying he got paid 1,000 plus  
22 one half of 15 percent. Actually, that's what you're saying  
23 his income should have been. Because it would have been an  
24 added benefit if they were paying 15 percent or one half of  
25 15 percent. So his compensation would be 1,000 plus one  
26 half of 15 percent that they were paying on his behalf.

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MR. RUSSOTTI: I suppose you can look at it that way. I mean, our accountant calculated --

THE COURT: So his income was actually one half of 15 percent higher than he would have had to pay income tax on. So where is the damage?

MR. RUSSOTTI: I still don't follow you, Judge. I mean, our accountant looked at what -- the expert looked at how they did this, okay.

THE COURT: Yeah, I read his report.

MR. RUSSOTTI: Okay. And he set his tables and he established that this is the way you calculate the loss to him.

THE COURT: Okay. So moving on, that's my first question.

MR. RUSSOTTI: I mean, I don't know. It seems --

THE COURT: All right. So do you have anything else on negligent misrepresentation or fraud before I hear from the others, please?

MR. RUSSOTTI: Well, the question of reliance, as I said, the PJI, which sets forth the elements of negligence and misrepresentation, which nobody cited, neither myself, and I apologize for that, but they make an argument that negligence is not part of that cause of action. In fact, negligence is a part of that cause of action because what we have to prove is that the Defendant failed to use reasonable

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care to ensure that the statement, namely the tax returns, were correct. Failing to use reasonable care is negligence. And that's what the whole negligence cause of action is about, that they were aware that when they filled out that tax return that said general partner. That was supposed to mean that he was liable for the firm's debts. They never --

THE COURT: What would you prefer them to have said? Because under the expert that Hecht put in there are only four options. You can be a general partner or an LLC, member, manager or you can be a limited partner or other LLC member. So of those four choices, what would you like him to be?

MR. RUSSOTTI: Well, that's wrong, Judge. The choices are a partner, an employee or an independent contractor. The first is -- the first thing you have to determine is if he was a partner to be given K-1s. He doesn't talk about all the indicia of him being an employee. He should have been given a W-2 if Lynch is correct that e didn't have an equity ownership interest and he wasn't liable for the firm debts. And that's what they should realize.

They had twenty partners here that they closed their eyes to. They were giving K-1s and saying they're all general partners and representing they were all liable for the firm's debts. All of these people, and they never

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2 inquired is Barrison and are all of these people really on  
3 the book for the firm's debts. Because what they found out  
4 from Lynch in two seconds was that no, he's not liable for  
5 the firm debts. If he's not liable for the firm's debts  
6 then you don't call him a partner. You give him a W-2  
7 because he's an employee.

8 And with respect to negligent misrepresentation,  
9 one last thing, Your Honor, with respect to your question  
10 about did he have a duty to investigate or was his reliance  
11 on what they did reasonable --

12 THE COURT: Questioning his reliance.

13 MR. RUSSOTTI: His reliance. On the commentaries  
14 to the PJI they state that generally reliance is an issue of  
15 fact for the jury. So that's why this case should go to the  
16 jury.

17 THE COURT: But there are some cases where the  
18 reliance, and the defendants all state those cases, that  
19 it's completely unreasonable for an attorney with this  
20 amount of experience to actually believe that without  
21 putting in any equity that he's a partner? Did he know he  
22 didn't put in any equity?

23 MR. RUSSOTTI: He knew he didn't put in any equity,  
24 but he was contributing capital to the firm. When they  
25 took -- when they decided his --

26 THE COURT: How was he contributing capital but not

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equity?

MR. RUSSOTTI: Well, equity is an ownership interest. Capital is just money that's given to the firm to --

THE COURT: Right. But then he would have had a balance in his capital account and it was zero.

MR. RUSSOTTI: He had a balance in his capital account. That's what they reported on the tax returns on the K-1s.

THE COURT: But it was zero.

MR. RUSSOTTI: No, it wasn't sorry. No. If you look, it's more than zero. There were balances in that capital account.

THE COURT: The balance was the amount he was paid above the draw. That was the amount.

MR. RUSSOTTI: But it was withheld by the firm and paid out during the next year.

THE COURT: That's because they is agreed to give him a certain draw.

MR. RUSSOTTI: Right.

THE COURT: And then the amount paid after that was dependent on what income that the firm had.

MR. RUSSOTTI: No, no, no. It was retroactive. They looked on December 31st at the income for the past year. He had had draw for that year. Then they were going



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to give another \$150,000. So you're entitled to that money, which was in the bank. And the testimony was they had money in the bank, but they didn't give it to him then. They doled it out. So to the extent that they doled it out and they kept money in the firm, that was a capital contribution that he made to the firm.

THE COURT: Oh, okay. All right. Thanks.

I'm going to move on to -- since you started with the accounting firm, let's hear from Ms. Ree about the negligent misrepresentations and fraud.

MS. REE: Good morning, Your Honor.

Your Honor, they have to show some intent over fraud. And there's nothing in the facts, Your Honor, with the evidence that shows an intent for fraud. The evidence shows, Your Honor, and it's undisputed, that Hecht & Company, the accounting firm, used information and documents that were provided by D'Amato & Lynch. Your Honor, they were provided with schedules. And these schedules, Your Honor, included partner shares of profits in capital accounts and it included the names of the partners and the amount of guaranteed payments for each partner, Your Honor.

And contrary to what Plaintiff says, we did have a copy of the partnership agreement and that was part of the documents that were produced in our initial document production, Your Honor. I note that, because that was an

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2 argument that they made in their reply brief, and I did not  
3 have an opportunity to respond to that, Your Honor. So I  
4 just wanted to note it for the record, Your Honor.

5 THE COURT: So you had a partnership agreement that  
6 was signed by two people?

7 MS. REE: Yes, Your Honor.

8 THE COURT: And yet there you were issuing K-1s and  
9 calling other people partners?

10 MS. REE: Yes, Your Honor. Your Honor -- well, if  
11 I may, the agreement, Your Honor, does differentiate  
12 different types of partners. It's not just that they were  
13 all partners.

14 THE COURT: But those other people, that 37 other  
15 partners who were non-equity partners, didn't sign it. So  
16 we couldn't even know that they knew about it.

17 MS. REE: Your Honor, we had the agreement, which  
18 identified Mr. Barrison and others as income or profit  
19 partners. We received schedules, Your Honor, that showed  
20 that they were receiving profits. We received the schedule,  
21 Your Honor, showing that they had capital accounts. We  
22 received schedules, Your Honor, that showed that they were  
23 receiving guaranteed payments. And we received schedules,  
24 Your Honor, identifying who the partners were.

25 So based on that information, Your Honor, it was  
26 reasonable for Hecht & Company to conclude that Mr. Barrison

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2 was a partner. And based on the tax regulations and codes  
3 he was required to receive a, K-1, Your Honor. And as you  
4 mentioned before, Your Honor, if you look at the K-1 there  
5 really are only two boxes that he had checked off; general  
6 partner or limited partner. D'Amato & Lynch is a general  
7 partnership, so we could not have checked off limited  
8 partner, Your Honor. And so the only other option to have  
9 checked off was general partner. And based on --

10 THE COURT: Or employee or independent contractor.

11 MS. REE: There's nothing, Your Honor, that we  
12 received that identified Mr. Barrison as an employee. I  
13 know that Mr. Russotti makes reference to a conversation  
14 that he had with Luke Lynch, but that was after Barrison  
15 left. Hecht was not a part of that conversation. There's  
16 nothing that Hecht ever received which would have identified  
17 Mr. Barrison as an employee, Your Honor. For all intents  
18 and purposes, he was always a partner.

19 D'Amato & Lynch has taken that position. Hecht has  
20 taken that position. And, Your Honor, even his expert has  
21 taken that position. I know you said before that his expert  
22 has taken the position that he was an employee, but he  
23 submitted two affidavits, Your Honor, that are  
24 contradictory. In support of his motion against Hecht or  
25 D'Amato & Lynch, he submitted an affidavit from Mr. Schulman  
26 basically identifying Mr. Barrison as a partner and

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explaining why he was a partner. And then in his motion against my client, Your Honor, he submitted an affidavit, Your Honor, that says that he was an employee.

His expert, Your Honor, cannot create issues of fact, Your Honor. He was a partner. Everyone is identified Barrison as a partner. And even Barrison has identified himself as a partner, Your Honor.

THE COURT: Okay. Thank you.

MS. REE: Thank you.

THE COURT: Yes.

MR. SHAW: Good morning, Your Honor.

There are numerous elements of these misrepresentation claims that Plaintiff has failed to meet his burden on. Just to start with the damages element. One thing that I have not heard any discussion on so far is the propriety of seeking recovery of damages here in this court to recover half of the self-employment contribution and tax.

The tax codes and regulations specifically say that you must exhaust administrative remedies and pursue a tax refund if that's what you're seeking. And in holding that, state law claims for to seek recovery of taxes paid are preempted by the regulatory scheme. If you could just go to state court and file an action to recover taxes that you paid, then there would be no reason to ever go to the tax authorities. You could go straight to court. It interferes

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with that scheme.

And so Plaintiff has failed to exhaust administrative remedies. He was required to do so under the applicable tax regulations and law.

THE COURT: If he believes he's an employee and not a partner.

MR. SHAW: Regardless of what his status is, he's ultimately seeking recovery of taxes that he paid that he thinks should have been paid by D'Amato & Lynch. And he should go to tax authorities to make that argument and claim. So this claim, his state court claim, seeking this relief do not belong here in the first instance, they should have gone to a tax authority first.

And then staying with the damages here, the case law that we've cited under Lama Holding is quite clear that the only damages available for misrepresentation claims are the out-of-pocket losses. And the law is clear that taxes paid are not recoverable as damages on the misrepresentations claims, whether it counts as consequential damage or however you couch them. What we have here is a plaintiff who is basically calling taxes that he paid monies that he went out-of-pocket to pay, but that's not an out-of-pocket. Controlling case law makes that clear.

On the other elements here, Your Honor alluded to

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the problems with Plaintiff satisfying the reasonable reliance element here. The Plaintiff knew very well that he was a non-equity partner here. He had no partnership agreement with the firm. He never asked any questions about the status with the firm. He knew he was receiving K-1 forms that indicated he didn't have an ownership interest in the firm, that were blank in the line items for his capital contribution, that were blank in the line items for the percentage of his share of profits and losses. And he never asked any questions about the K-1 forms.

There is a duty to investigate that interpret under the case law for misrepresentation claims. He never asked any of those questions. As he testified, he got his check and he was happy to get it. He could have investigated the circumstances, but he didn't. And Your Honor alluded to he is an experienced attorney. And his own prior partnership arrangement with his current counsel indicated he knows what the elements of a partnership arrangement are. He discussed with his prior counsel a prior partnership, agreed to share profits and losses. But when it came to D'Amato & Lynch he didn't discuss those things. He never asked any questions about any of those things in 20 years of working at D'Amato & Lynch.

And this goes back to how this case arose. He never questioned his tax treatment until Mr. Lynch held him

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accountable for his lost productivity. The firm's primary client was dissatisfied with his work and his billable hours plummeted from roughly 1,200 in 2008 to 700 in 2009 and 2010. And Mr. Lynch then told him, hey, you need to bill at least 100 hours a month to earn your draw, and he told him that in October of 2010.

So Mr. Barrison found himself in a tough spot. And then he overreacted in July of 2011 by filing an action to dissolve the firm, which was improper. And Justice Oing found it to be improper, because he had no partnership agreement. An agreement that is actually in place says only two partners can dissolve the firm. And those two partners are George D'Amato and Luke Lynch.

THE COURT: How is he bound by that agreement between them if he didn't sign it? And, as far as I know, he never saw it.

MR. SHAW: You know, case law, certainly Mazer v. Greenberg and Esposito decision that we've cited find that the Plaintiff in those cases who was seeking an accounting were trying to claim he was an equity partner under New York law. He didn't sign those partnership agreements either and those were factors that were held against the Plaintiff even if he didn't know about it or see it. The fact is that there was a preexisting arrangement between the two named partners and there are only two general partners of the

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2 firm. And under those decisions the argument that he didn't  
3 sign the agreement is immaterial based on the decision --  
4 based on how those decisions came out.

5 There are elements here are that the alleged  
6 misrepresentation, the classification of the status as a  
7 general partner here isn't a legal opinion or conclusion.  
8 It's not a statement of existing fact. So he hasn't even  
9 shown that the misrepresentation is an appropriate,  
10 cognizable misrepresentation under the case law. And I  
11 heard Ms. Ree talk about how tax treatments are proper.  
12 This is not actually a misrepresentation. Our contention,  
13 as in Hecht's, that the tax classification and tax treatment  
14 here was proper. They may have a different opinion, but  
15 they should take that argument to the tax authorities as  
16 there're required to do under applicable tax law and  
17 regulations if they want to do that.

18 THE COURT: Okay. Anything else?

19 MR. RUSSOTTI: I'd just like to address two issues,  
20 Judge, and that's the failure to exhaust administrative  
21 remedies claim, which doesn't apply here at all, that  
22 doctrine. That has to do with employers who are collecting  
23 taxes, collecting withholding taxes. And the scheme that  
24 was devised by the Internal Revenue Service was to file a  
25 form if you're going to challenge -- the employee is going  
26 to challenge it, you file this SS-8 form, which we've



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2 attached, and if you look at the form it only applies to  
3 whether or not it's an employee or an independent  
4 contractor. And that's what specifically is stated on the  
5 form. And if you want, I can find it.

6 THE COURT: That's okay.

7 MR. RUSSOTTI: There is no administrative procedure  
8 to challenge whether you're a partner or employee. That was  
9 not preempted. There's no way to go to the Tax Court and  
10 say am I a partner as opposed to employee. The forms only  
11 deal with employee or independent contractor. So it's not  
12 preempted. And the case that we've cited, Childers, is  
13 really the one that controls. So there was no need to file  
14 anything with the Internal Revenue Service.

15 Also, with respect to our damages, this  
16 out-of-pocket rule in the case they cite Lama Holding is  
17 irrelevant. I mean, that has to do with -- when they say  
18 profits, they're using the word profits generally that they  
19 didn't get as much profit as they thought they were going to  
20 get because the tax law had been changed. That's not this  
21 situation. In that situation what the court says is we're  
22 not entitled to return of profits, that's fine, or taxes.  
23 Because they had to pay more taxes than they thought because  
24 the law changed. Here Barrison paid taxes he didn't have to  
25 pay. Very different situation. So he had suffered  
26 demonstrable loss, as pointed out by our expert.

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THE COURT: In one of his --

MR. RUSSOTTI: In the first affidavit.

THE COURT: In one affidavit.

MR. RUSSOTTI: Well, but I will concede that his opinion has evolved. But I want to point out that right from the beginning, Judge, in 2012 the first affidavit he submitted in connection with the motion to dismiss he said that he has the indicia of partner, being a, partner or he may be an employee if these things don't turn out to be true. He has been consistent throughout every one of his affidavits that it's an either/or. He always said there was indicia of being partnership, which is what he emphasized in the first affidavit submitted, but as things developed he looked at the indicia of being employee and said there was more indicia being an employee; and if so, he should have been given a W-2.

So he didn't change his opinion at any time during this. He's always been consistent in that regard.

THE COURT: Okay. And as to the equitable estoppel, what conduct are you relying on?

MR. RUSSOTTI: The same fraudulent conduct. The same misrepresentation.

THE COURT: Well, it has to be different. So what did they do?

MR. RUSSOTTI: They led him to believe that he was

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2 a partner, had him taxed as a partner, and then when they  
3 became disengaged and he sought to enforce his partnership  
4 rights, they said you're not a partner, you're an employee.

5 THE COURT: So they didn't try to hide it.

6 MR. RUSSOTTI: They didn't try to hide. They only  
7 said it when he went to them and tried to --

8 THE COURT: And asked a question? And asked a  
9 question?

10 MR. RUSSOTTI: Well, because they were forcing him  
11 out. They were cutting down his -- they were not paying him  
12 the same way they did before. They were requiring him to  
13 submit accountings for all his time. They became at  
14 loggerheads. Lynch didn't want him there, was forcing him  
15 out. This was clear. So, at that point, when he sought  
16 counsel, all right, you got all these tax returns, you're  
17 saying you're a partner for 20 years, you have rights under  
18 the partnership law to an accounting and/or dissolution.

19 So instead of waiting to get fired, he went to  
20 them, through counsel, and said we want to work something  
21 out. They said, what do you mean work something out; you're  
22 not a partner; you never were a partner; you're an employee.  
23 You have nothing to work out and you're getting nothing. So  
24 that's what happened at the end.

25 THE COURT: Right. But to rely on equitable  
26 estoppel, you need subsequent conduct by the Defendants.

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2 And if I understand you correctly, as far as you're  
3 concerned, the only conduct was the misrepresentation,  
4 alleged misrepresentation, that he was a partner not an  
5 employee.

6 MR. RUSSOTTI: Correct.

7 THE COURT: Okay. Thanks. Anyone want to say  
8 anything else before we finish up?

9 MS. REE: Your Honor, with respect to equitable  
10 estoppel, Your Honor, like you said, Your Honor, there has  
11 to be a separate conduct that's different from the basis of  
12 this claim. The only claim that he has against Hecht &  
13 Company relates to the preparation of the K-1s, Your Honor.  
14 Mr. Barrison never had any conversations with anyone at  
15 Hecht, and he has not set forth any basis, Your Honor, to  
16 establish equitable estoppel against Hecht & Company.

17 And, Your Honor, as I put forth in my papers, Your  
18 Honor, we do argue statute of limitations on negligent  
19 representation. I know Plaintiff argues continuous  
20 representation, but that's not applicable here, Your Honor.  
21 So the three-year should apply, Your Honor. And with  
22 respect to Mr. Russotti's comment that his expert is somehow  
23 making an alternative theory, Your Honor --

24 THE COURT: No, he evolved.

25 MS. REE: He evolved, Your Honor, but you know  
26 what, Your Honor, he evolved with the same set of documents,

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Your Honor, that form the basis of the three motions, Your Honor. It's not like he said something in 2011 and now he's saying something in 2018. He submitted two affidavits, Your Honor, with these three motions that are completely contradictory, Your Honor. One that he is a partner and one that he's an employee. And the Reilly case, Your Honor, say that contradictory affidavits, Your Honor, are insufficient to raise a triable issue of fact.

The one last thing that I wanted to say before, Your Honor, which I didn't say before, with respect to the reasonable reliance, Your Honor, it truly was unreasonable here because the Plaintiffs, Your Honor, deposed ten other partners that were similarly situated to Mr. Barrison and they all testified, Your Honor, they all received K-1s, just like Mr. Barrison. And they all testified, Your Honor, that they were partners with non-equity interest. So for Mr. Barrison to say that he was different is just unreasonable. And so he could not have relied on the K-1 to set his position that he was a partner with an equity interest, Your Honor.

Thank you very much.

THE COURT: Thank you. Anything else, Mr. Shaw?

MR. SHAW: Just two or three points. First, I heard Mr. Russotti say that under the partnership law you have the rights to an accounting. The partnership law --

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1  
2 New York Partnership Law the statute is a default set of  
3 rules when there is no written partnership agreement. There  
4 is a written partnership agreement here. It's in the  
5 record. It's attached to Luke Lynch's affidavit and it's  
6 clear that, you know, the two signatories were George  
7 D'Amato and Luke Lynch. And Mr. Barrison never signed that  
8 agreement.

9 So the partnership law reference in Plaintiff's  
10 papers do not apply.

11 THE COURT: Is there any -- would the partnership  
12 law preclude Mr. Barrison having a partnership with either  
13 of D'Amato or Lynch separate from that partnership? So, for  
14 example, they could have a partnership, not a law  
15 partnership, you know, some totally different partnership  
16 right for which there is no agreement; couldn't they?

17 MR. SHAW: Well, I mean, certainly the record  
18 indicates Plaintiff had such a partnership agreement with  
19 his current counsel. There was an unwritten agreement.  
20 They orally discussed sharing profits and losses. And  
21 presumably if there had ever been a dispute between  
22 Mr. Barrison and Mr. Russotti those set of rules would  
23 apply.

24 THE COURT: So once there is one partnership  
25 agreement there couldn't be an additional partnership  
26 separate and apart from the D'Amato & Lynch partnership?

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2 MR. SHAW: I think the governing agreement here  
3 is --

4 THE COURT: He's claiming to be -- I mean, the  
5 problem with my hypothetical is that he's claiming to be a  
6 partner of that partnership, but theoretically he could have  
7 said that there was another partnership.

8 MR. SHAW: Yeah. I don't think that works in this  
9 arrangement. He's a non-equity partner and this is --

10 THE COURT: Of that partnership.

11 MR. SHAW: That's correct. That's correct. And  
12 that's exactly what the Mazer decision that we cited in our  
13 cases has proved. The court in the First Department in that  
14 case said that the arrangement for that non-equity partner,  
15 Mazer v. Greenberg, a precursor to today's two-tiered  
16 partnership. So we've always consistently held that  
17 Barrison was a non-equity partner and that his tax treatment  
18 was proper in accordance with that.

19 Now, Mr. Russotti also says that we have at some  
20 point told him that he was an employee. There's no  
21 admissible evidence of that in the record. And at the end  
22 of the day, this equitable estoppel claim, you know, to the  
23 extent he's trying to seek damages on it or trying to  
24 theorize something, there's no claim for damages, as Your  
25 Honor, you know, indicated at the very start of this  
26 argument.

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2 THE COURT: Anything else before I mark this  
3 submitted.

4 MR. RUSSOTTI: Just one last thing, Your Honor.

5 I want to point out, to the extent that the statute  
6 of limitations has been raised in Hecht's reply, Judge Oing  
7 decided that issue already. Judge Oing decided that the  
8 case was commenced timely. At Page 42 of his decision,  
9 which became an order, he says, "So it goes back to the  
10 first time when you commenced it, which is 2011. So I find  
11 the statute of limitations to dismiss negligence claims  
12 against the accounting firm is denied based on the statute  
13 of limitations grounds. I find that this action has been  
14 timely commenced."

15 That's the law of the case.

16 THE COURT: I think what -- if I understand Hecht  
17 correctly, you're saying you can't go back further than the  
18 three years, right?

19 MS. REE: Correct, Your Honor.

20 THE COURT: So if you're successful, they're saying  
21 that your damages are limited to three years. That's the  
22 way I read it.

23 MS. REE: Yes, Your Honor.

24 THE COURT: Not that you're trying to reverse  
25 Judge Oing or ask --

26 MS. REE: No, no. That's correct, Your Honor. But



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1  
2 with respect to Judge Oing, his decision was based on the  
3 pleadings, Your Honor, and he had to have assumed the  
4 allegations in the complaint to be true. Now after seven  
5 years, Your Honor, with all of the facts, Your Honor, I  
6 don't Judge Oing's opinion, Your Honor, with respect to that  
7 wouldn't apply here, Your Honor, because we're basing it  
8 based on facts.

9 MR. RUSSOTTI: Well, the facts they're based on  
10 have changed. Those facts that he discharged, so to speak,  
11 in 2011 --

12 THE COURT: Just to be clear, they're not seeking  
13 to dismiss it on statute of limitations grounds. They're  
14 saying that if you're successful, your damages are limited  
15 to the three years.

16 MR. RUSSOTTI: Well, okay. Then we rely on the  
17 Akerman case, the First Department case, which is still good  
18 law and applies to accountants and allows you to go back  
19 when the subject of the case is the actual conduct that  
20 you're complaining about, which is what we're complaining  
21 about here. The tax returns that were not properly filled  
22 out.

23 MS. REE: Your Honor, if I may, there's plenty of  
24 case law out there, Your Honor, in the First Department that  
25 says that tax preparation of tax returns, Your Honor, are  
26 discrete actions and that the accrual of the claim starts

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2 when you receive the final product, Your Honor. There is no  
3 continuous representation for tax returns, Your Honor. And  
4 that's what they're trying to do.

5 We were engaged yearly to prepare the returns and  
6 they were prepared, given to D'Amato & Lynch and  
7 Mr. Barrison was given his K-1. So each of those K-1s that  
8 he received are separate and discrete, Your Honor. There is  
9 no continuous representation.

10 THE COURT: Anything else before I close the  
11 record?

12 MR. SHAW: No, Your Honor.

13 MS. REE: No, Your Honor. Thank you.

14 MR. RUSSOTTI: Thank you very much.

15 THE COURT: Okay. So, you know, you've given me  
16 two feet of paper, a lot to go through. I wish I could  
17 decide it off the bench, but I have a lot to think about.  
18 Thank you so much for your excellent papers. And we'll  
19 issue a written decision.

20 Okay. Thank you.

21 MR. RUSSOTTI: Thank you, Your Honor.

22 MS. REE: Thank you, Your Honor.

23 MR. SHAW: Your Honor, if I could ask one question?

24 THE COURT: You have to deal with your motion to  
25 seal. When did you want to submit the redactions?

26 MR. SHAW: Can we do that in two or three weeks.

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2 THE COURT: Whatever you want.

3 MR. SHAW: So three weeks from today.

4 THE COURT: So the seal will continue until when?

5 MR. SHAW: Three weeks from today.

6 THE COURT: Okay. So the 17th. July 17th. We'll  
7 put it on the calendar.

8 MR. SHAW: That's fine, Your Honor.

9 THE COURT: And for that date you'll submit the  
10 same thing, a chart, but add a column. And that third  
11 column or fourth column needs to say the reason for sealing,  
12 okay, which I will attach to a decision which allows  
13 redactions of certain information. So, for example, birth  
14 dates, Social Security numbers should have been redacted  
15 pursuant to court rule. But formulas or, you know, amounts  
16 on the tax returns, that can all be redacted.

17 So just look at the leading cases on sealing or  
18 redactions and you'll see what you can redact, okay. And  
19 you have to give me a reason for each redaction.

20 MR. SHAW: Your Honor, I thought I did that in the  
21 supporting affirmation. The fourth column with the reasons  
22 for sealing.

23 THE COURT: Well, it's not in the chart. Column  
24 one is numbered, column two is document, and column three is  
25 nature of document, 2010 and 2011 New Jersey partnership tax  
26 returns.

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2 MR. SHAW: Not in the order to show cause. My  
3 supporting affirmation, Your Honor.

4 THE COURT: Oh, okay. It's too general. As I  
5 said, you can't seal the entire document. You can just --  
6 and it's the same reason for each one. You can't do that.

7 MR. SHAW: Okay.

8 THE COURT: You know, so formula for Coca-Cola, you  
9 know, the most protected trade secret in the world, you  
10 know. And try to maintain the formula as a secret. But  
11 preserving the confidentiality of materials involving the  
12 internal finances of a party that are of minimal public  
13 interest is not sufficient.

14 MR. SHAW: One other issue, pretrial conference  
15 scheduled for August, is that going to stay on the calendar?

16 THE COURT: You know what, let's adjourn that for  
17 60 days and then just keep it on that date and if you don't  
18 have a decision just call or e-mail Brendan and adjourn it  
19 until you have a decision.

20 MR. RUSSOTTI: What's the date pretrial?

21 MS. REE: August 20th.

22 THE COURT: August 20th.

23 MS. REE: Yes, Your Honor.

24 THE COURT: At what time?

25 MS. REE: I don't have the time, Your Honor.

26 THE COURT: It doesn't matter. We'll check. So

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we'll keep it on the calendar, but if you don't have a decision by then we'll adjourn it.

MR. SHAW: Thank you, Your Honor.

THE COURT: Thank you very much. Before you go, Ms. Ree, we need to get the transcript and it's to be split among the three parties and submitted. We will put the three summary judgment motions back on the calendar and as soon as you get us the transcript we will mark it submitted. You'll see it in ECF as on the calendar again. Don't come in. We're just waiting for the transcript, okay.

MS. REE: Thank you, Your Honor.

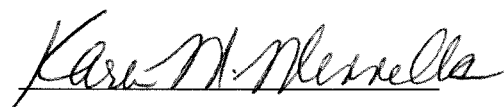
MR. RUSSOTTI: This transcript?

THE COURT: Yes.

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C E R T I F I C A T E

I, Karen M. Mennella, a Senior Court Reporter for the State of New York do hereby certify that the foregoing is a true and accurate transcription of my original stenographic notes.



Karen M. Mennella,  
Senior Court Reporter