

STATE OF MICHIGAN
COURT OF APPEALS

ZACHARY SAVAS, DJS DEVELOPMENT
COMPANY, L.L.C., and INTERNET
EDUCATION FUND, L. L.C.,

UNPUBLISHED
April 20, 2010

Plaintiffs-Appellants,

v

No. 288991
Oakland Circuit Court
LC No. 08-088694-NM

BRADFORD T. YAKER, BRADFORD T.
YAKER, P.C., and NEDELMAN PAWLAK,
P.L.L.C.,

Defendants-Appellees,

and

HERTZ SCHRAM & SARETSKY, JAFFE &
BERLIN, and JAMES S. JACOBS,

Defendants.

Before: M.J. KELLY, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

This action for legal malpractice involves claims of professional negligence rooted in acts or omissions involving out-of-state plaintiffs seeking to pursue claims of fraud regarding an investment in an internet company under Illinois and Delaware law. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1999, Zachary Savas, DJS Investment Company, L.L.C. (hereinafter DJS) and twenty-four other investors¹ formed the Internet Education Fund (hereinafter IEF), a limited liability corporation, for the sole purpose of investing and purchasing membership in UNext.² IEF was

¹ Allegedly, the majority of these investors were attorneys from the Chicago area.

² In November 1999, IEF was a member of UNext, a limited liability corporation. Subsequently,
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formed under Delaware law as a limited liability corporation, but maintained its principal place of business in Illinois. Jeffrey Mowery served as IEF's managing agent. Between November 1999 and April 2000, IEF purchased approximately \$6.6 million in UNext securities.

While not a party to this appeal, information pertaining to UNext is pertinent to the issues underlying the claim of malpractice. UNext was formed in Illinois in the 1990's and initially structured as a limited liability corporation. UNext was developed and marketed to function as an on-line education company to provide "distance learning." Specifically, UNext was initiated to provide educational programs for professional development, offering business and management coursework for use by employees of large corporations. Andrew Rosenfield functioned as UNext's president. A substantial portion of the initial financing for UNext, comprising approximately 20 percent of the membership shares, was derived from Michael Milken's company, Knowledge Universe. As part of its solicitation of investors, UNext issued Private Placement Memorandums (PPM) in May 1999 and July 1999. It is the July 22, 1999 PPM that is pertinent to this appeal with regard to plaintiffs' allegations of fraud and subsequent claims of malpractice.

UNext, in the July 1999 PPM, reported that it had an agreement with IBM's Lotus Development Corporation, which would permit its courses to be distributed through Lotus LearningSpace systems. Through the 2000 calendar year, UNext indicated that it had obtained several significant customers for its services, but its revenues continued to remain below initial projections. In early 2001, UNext entered into an alliance with Thomson Corporation, a competitor. Thomson made a significant investment in UNext, and in return, received an equity stake in UNext, which served to dilute the value of the shares held by IEF.

Savas acknowledged that IEF was becoming frustrated and concerned by UNext's failure to generate revenues, to make an initial public offering of securities, the dilution of value of IEF's shares due to the investment by Thomson and the increasing involvement of Milken. Consequently, IEF requested a meeting with UNext director, Patrick Keating, which took place in Chicago on April 6, 2001. It was at this meeting that IEF learned of the reduction in sales staff for UNext and the loss of the alliance with Lotus for distribution and marketing of UNext's course offerings. It was evident by the fall of 2001 that UNext would fall short of its sales goals. On October 9, 2001, IEF forwarded a letter to UNext requesting a return of its investment and indicating concerns regarding the management of the company and utilization of resources. It was further noted that concerns were expressed at the April 6 meeting regarding the disparity in financial projections and the failure of UNext staff to respond to an earlier request for a listing of shareholders, which IEF asserted comprised "not appropriate corporate behavior." IEF opined, in the letter, that the value of UNext and its future profitability had been seriously impeded over a significant time period due to a "long period of inaction and poor decision-making." In response, Rosenfield informed IEF that UNext would not honor their request.

In 2002, defendant Bradford Yaker became involved in providing legal services to IEF. Initially, Yaker was retained simply to correspond with UNext's general counsel. At this time, Yaker was an attorney with the law firm of Hertz, Schram & Saretsky, P.C. The initial

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in October 2000, when UNext became a corporation, IEF became a shareholder.

correspondence sent by Yaker on August 27, 2002, on behalf of IEF, requested a list of shareholders and their percentage of interest and sought to procure assurances regarding the existence of agreements between UNext and other companies, such as IBM, General Motors and the relationship with Lotus Development. In that correspondence, Yaker specifically indicated a desire to open a dialogue with UNext to “establish a more positive relationship between UNEXT and IEF with a focus on resolving persistent concerns and beliefs that IEF has not been treated fairly and lawfully relative to its position in your company.” In this letter, Yaker also referenced correspondence from October 2001 from UNext to Mowery indicating that UNext was “in close proximity to the filing of a bankruptcy petition” and reiterated the previous request for a rescission and return of IEF’s investments. Plaintiffs had clearly been contemplating the initiation of legal action by IEF against UNext, based on the October 30, 2002, memorandum authored by Yaker indicating discussions with Mowery, Savas and other IEF members regarding various statutes of limitation and tolling periods. Yaker opined that he did not believe it necessary to file a complaint “before November 4-5, 2002” to avoid preclusion by the applicable statutes of limitation, despite acknowledging, “Savas indicated that he had suspicions about improprieties as early as late summer 2001.”

On November 15, 2002, several IEF investors, including Savas and Yaker, as counsel for IEF, met with Rosenfield. Plaintiffs contend that it is not until this meeting that they had sufficient information to support an allegation of fraud against UNext. Specifically, plaintiffs assert that they learned at this meeting of Milken’s active participation in UNext and that UNext “never possessed the marketing and commercial relationship with Lotus or . . . IBM to the extent and degree represented by Rosenfield in the offering materials.” In addition, plaintiffs suggest they first learned that UNext had failed to market to companies identified in the May 1999 PPM, misrepresented the number of customers obtained, and that UNext had not informed IEF “that they had not established the necessary relationship with Lotus prior to Plaintiff’s [sic] second funding on May 17, 2000.”

While Yaker was an attorney with Hertz, plaintiffs investigated the potential of initiating a lawsuit against UNext. Because Hertz indicated it would require a substantial retainer to pursue any such claim based on the potential difficulties of such an action, plaintiffs did not retain the Hertz firm. However, plaintiffs, along with other members of IEF, demanded that IEF initiate litigation against UNext. Approximately 26 members of IEF met, via a telephone conference, to discuss the proposed litigation. Mowery, as IEF’s managing agent, considered the demand and conducted a vote of the members. A majority of IEF’s members declined to initiate litigation based on the potential expense involved. Consequently, Mowery refused to pursue a lawsuit on IEF’s behalf. Subsequently, another vote was undertaken by the members of IEF to determine whether IEF should be dissolved. Purportedly, discussions were held among various IEF members regarding potential liabilities to members and risks associated with the dissolution. At the conclusion of this membership vote, it was determined that IEF would be dissolved and by January 2004, Mowery initiated correspondence to UNext’s general counsel seeking UNext to “substitute the proportionate interests of the individual members of IEF for the interest of IEF on the corporate registry of UNext.” UNext agreed and in August 2004, UNext completed the redistribution of shares to the individual IEF members. Reportedly, the dissolution of IEF was not finalized until June 1, 2007.

Yaker left the Hertz law firm on May 19, 2004. On June 29, 2004, Savas acknowledged that Yaker had left Hertz and wished for his file to accompany Yaker to his new position, of counsel, with defendant Nedelman Pawlak, P.L.L.C. On October 29, 2004, Savas signed a formal retainer agreement with Yaker, while of counsel with Nedelman, to pursue litigation against UNext.

On November 12, 2004, in the circuit court for Cook County, Illinois, Yaker filed a complaint on behalf of Savas and DJS against UNext, alleging four separate counts: (a) violation of Illinois securities law; (b) common law fraud; (c) violation of the Illinois Business Corporations Act (shareholder oppression); and (d) breach of fiduciary duty. UNext and Rosenfield were never served with a copy of this complaint. On September 9, 2005, Yaker filed an amended complaint to add a party not named in the original complaint. Following service of process, UNext and Rosenfield immediately sought dismissal. Reportedly, while these motions remained pending before the trial court, Yaker's of-counsel relationship with Nedelman ended. However, Yaker continued to represent plaintiffs against UNext.

On April 6, 2006, the Illinois trial court granted UNext's motion and dismissed plaintiffs' complaint with prejudice. Specifically, the trial court ruled that plaintiffs' claims were barred because they were "filed more than five years after the sale of the security/securities." In addition, the trial court ruled that plaintiffs, by failing to serve the original complaint, had violated Illinois Supreme Court Rule 103(b). Referencing the issue of standing, the trial court noted, "Plaintiffs cite no case law to support their argument that they are allowed, under Delaware law, to bring claims as members of a dissolved LLC on behalf of that LLC."

Yaker filed a motion seeking reconsideration of the trial court's ruling based on the failure of the trial court to consider claims related to post-investment improprieties supporting their claims for shareholder oppression and breach of fiduciary duty. The trial court denied the motion on August 22, 2006. Yaker then appealed to the Illinois Court of Appeals. On August 31, 2007, the appellate court upheld the trial court's ruling, finding that plaintiffs lacked standing to pursue their claims. In addition, the appellate court found that plaintiffs had waived any claim "that the trial court abused its discretion in denying them the opportunity to amend their complaint" because it was not argued in plaintiffs' appellate brief. The appellate court also found, as an alternative basis to affirm the trial court, the failure of plaintiffs to serve defendants with the original complaint.

Plaintiffs contend that Yaker did not inform them of the dismissal of their case or his subsequent actions in seeking reconsideration and the filing of an appeal. Reportedly, in May 2007, during the pendency of the appeal, Savas was informed by a third-party that their Illinois litigation had been dismissed and that the Michigan Attorney Discipline Board had suspended Yaker's law license for an 18-month period, effective December 31, 2006.

In January 2008, plaintiffs initiated their legal malpractice lawsuit against Yaker, Nedelman and several other law firms, which is ultimately the subject of this appeal.³ In general,

³ Plaintiffs' suit for malpractice against Hertz was dismissed by summary disposition based on
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plaintiffs alleged their Illinois litigation was unsuccessful because of Yaker's malpractice. Plaintiffs argued that Yaker committed malpractice by failing to keep them reasonably informed about the status of the action and by failing to pursue it in a competent manner. Plaintiffs further alleged that Yaker did not inform them of the allegations of misconduct and disciplinary action taken against him. Plaintiffs contended that Nedelman was vicariously liable for Yaker's malpractice based on their of-counsel relationship.

Nedelman sought summary disposition based on plaintiffs' lack of standing to assert claims against UNext because they did not own the stock at the time of purchase and based on plaintiffs' claims in the Illinois litigation having been time-barred before Yaker began his association with Nedelman, precluding a finding of proximate cause for plaintiffs' alleged loss. Nedelman contended plaintiffs' pre-investment claims of fraud were not viable because of the integration clause contained in the UNext subscription agreement limiting all representations to those contained in the July 1999 PPM. Yaker filed a separate motion for summary disposition, primarily contending that plaintiffs' lacked standing to bring a derivative action.

On October 30, 2008, the trial court issued an opinion and order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). Specifically, the trial court determined that plaintiffs lacked standing to pursue their claims because they were not purchasers of the securities at the time of the alleged injury and, therefore, could not demonstrate that Yaker's negligence was a proximate cause of their loss. The trial court also ruled that plaintiffs were incapable of bringing a shareholder derivative claim because, under the business judgment rule, there was no demonstration that Mowery, on behalf of IEF, "wrongfully refused" to bring suit against UNext. The trial court found that the language of the July 1999 PPM and subscription agreement precluded plaintiffs' pre-investment fraud claims. The trial court further noted that plaintiffs failed to demonstrate how statements contained in the July 1999 PPM were false.

The trial court found that plaintiffs were aware of alleged misrepresentations by UNext by the April 6, 2001 meeting and determined, "Plaintiffs' claims were already time-barred by June 2004, when Yaker became associated with Defendant Nedelman Pawlak." Similarly, plaintiffs' post investment claims were time-barred by Delaware's three-year statute of limitation. Further, citing the Illinois Court of Appeals, the trial court concurred that it was unnecessary "to determine whether the statute of repose barred Plaintiffs' amended complaint because of its conclusion as a matter of law that Plaintiffs lacked standing to sue." As a result, the trial court ruled, "that Yaker's alleged negligence in failing to serve and timely file the underlying action was not a proximate cause of Plaintiffs' damages because Plaintiffs lacked standing to sue." This appeal ensued.

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the statute of limitations. The allegations against the Illinois firm of Jaffe & Berlin were also dismissed based on lack of personal jurisdiction. Plaintiffs have not appealed the dismissal of these two firms.

II. STANDARD OF REVIEW

This Court reviews a trial court's grant or denial of summary disposition de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). Specifically:

Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. When the record leaves open an issue on which reasonable minds could differ, a genuine issue of material fact exists that precludes summary disposition. [*Fries v Mavrick Metal Stamping, Inc*, 285 Mich App 706, 712-713; 777 NW2d 205 (2009) (internal quotation marks and citations omitted).]

III. ANALYSIS

An action for legal malpractice is comprised of the following elements: “(1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was the proximate cause of an injury; and (4) the fact and extent of the injury alleged.” *Manzo v Petrella & Petrella & Assoc, PC*, 261 Mich App 705, 712; 683 NW2d 699 (2004). Proximate cause is comprised of two components: (1) cause-in-fact, and (2) proximate or legal cause. *Mettler Walloon LLC v Melrose Twp*, 281 Mich App 184, 218; 761 NW2d 293 (2008), citing *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). To demonstrate legal or proximate cause, typically requires an examination of the foreseeability of consequences. *Mettler Walloon*, 281 Mich App at 218 (citation omitted); see also *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994). In order to demonstrate cause-in-fact, a plaintiff must show that *but for* the actions of the defendant, the alleged injury or loss would not have occurred. *Mettler Walloon*, 281 Mich App at 218. However, the mere possibility of causation, or a conclusion reached solely on the basis of speculation or conjecture is insufficient to establish proximate cause. *Pontiac School District v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 615; 563 NW2d 693 (1997) (citation omitted). Thus, as explained by our Supreme Court:

Generally, an act or omission is a cause in fact of an injury only if the injury could not have occurred without (or “but for”) that act or omission. While a plaintiff need not prove that an act or omission was the *sole* catalyst for his injuries, he must introduce evidence permitting the jury to conclude that the act or omission was *a* cause.

It is important to bear in mind that a plaintiff cannot satisfy this burden by showing only that the defendant *may* have caused his injuries. Our case law requires more than a mere possibility or a plausible explanation. Rather, a plaintiff establishes that the defendant's conduct was a cause in fact of his injuries only if he “set[s] forth specific facts that would support a reasonable inference of a logical sequence of cause and effect.” A valid theory of causation, therefore, must be based on facts in evidence. And while “[t]he evidence need not negate

all other possible causes,” this Court has consistently required that the evidence “exclude other reasonable hypotheses with a fair amount of certainty.” [*Craig*, 471 Mich at 87-88 (footnote omitted).]

Under the circumstances of this case, the trial court did not err in ruling that plaintiffs failed to raise a triable issue of fact regarding causation.

Plaintiffs’ ability to demonstrate probable cause to support their malpractice claims is inextricably tied to the issue of standing. Plaintiffs contend that summary disposition was inappropriate based on Yaker’s incorrect filing of the fraud claims in the Illinois courts and the validity or sustainability of their claims had they been pursued in accordance with Delaware law.

In accordance with Illinois law, the courts all correctly ascertained that plaintiffs lacked standing. As discussed in *Delaney v Happel*, 185 Ill App 3d 951, 954; 542 NE2d 46 (1989):

The Securities Law regulates the conduct of dealers in, and issuers, underwriters, and sellers of, securities. The Securities Law seeks to protect *those who purchase* securities from such dealers and sellers by imposing on the dealers and sellers certain requirements that must be complied with prior to a sale of securities. The Securities Law provides that when a dealer or seller fails to comply with the statutory requirements, the “*purchaser*” may elect to rescind the sale. [(Emphasis added.)]

Based on the relevant statutory wording, the court determined that the *Delaney* defendants lacked standing to initiate an action under Illinois securities law based on the fact that they “were not the ‘purchasers’ of the securities in question.” *Id.* at 956. Consequently, because plaintiffs were not the “purchasers” of the stock, and did not even acquire “ownership” through redistribution of the shares by UNext until August 2004, their action was precluded both by the requirements of the statutory language and the expiration of the three-year limitation period by the time their complaint was filed in the Illinois courts. Because they lacked standing, plaintiffs are unable to demonstrate that Yaker’s alleged malpractice was attributable as a proximate cause of their injury.

Contrary to plaintiffs’ assertions, a different result is not found when applying Delaware law. As in Illinois, plaintiffs lacked the requisite standing to sue because they were not the purchasers of the stock at the time of the alleged malfeasance by UNext. *Omnicare, Inc v NCS Healthcare, Inc*, 809 A2d 1163 (Del, 2002). Specifically:

[A]s a general rule, only persons who were stockholders at the time of an alleged wrongdoing have standing to sue corporate directors for breach of fiduciary duty. Indeed, under established Delaware law, a breach of fiduciary duty claim must be based on an actual, existing fiduciary relationship between the plaintiff and the defendants at the time of the alleged breach.

* * *

The policy against purchasing lawsuits . . . was codified in the derivative suit context by 8 *Del C* § 327. The policy animating 8 *Del C* § 327 is not, however,

limited to derivative claims alone. Rather, that policy is derived from “general equitable principles” and has been applied to preclude stockholders who later acquire their shares from prosecuting direct claims as well. [*Id.* at 1169 (footnotes omitted, emphasis in original).]

Delaware statutory and case law recognize that an individual who purchases a claim by buying stock subsequent to the alleged wrongdoing having occurred lacks standing to challenge the wrongdoing in a derivative capacity. See, 8 Del C § 327; *Newkirk v W J Rainey, Inc*, 76 A2d 121, 123 (Del, 1950). Specifically, § 327 precludes an individual pursuing a derivative action challenging corporate mismanagement unless that individual was a stockholder at the time of the alleged wrongful transaction. Purportedly, the purpose underlying this statutory section is to prevent potential plaintiffs from purchasing stock in order to maintain a derivative action attacking a transaction that occurred before the stock was purchased. *Schreiber v Bryan*, 396 A2d 512, 516 (Del, 1978); *Jones v Taylor*, 348 A2d 188, 191 (Del, 1975); *Newkirk*, 76 A2d at 123. Since plaintiffs were not purchasers of the stock at the time of UNext’s alleged wrongdoing, they also lacked standing under Delaware law to pursue their claims.

The trial court also correctly recognized that plaintiffs’ right to pursue a derivative suit was precluded by the business judgment rule. “The elements, formulation and application of the Delaware business judgment rule follow from the premise that shareholders of a public corporation delegate to their board of directors responsibility for managing the business enterprise. The General Assembly has codified that delegation of authority and mandate of management generally in 8 *Del C* § 141(a).”⁴ *Cede & Co v Technicolor, Inc*, 634 A2d 345, 367 (Del, 1993), mod on other grounds 636 A2d 956 (Del, 1994). Further:

Applying the rule, a trial court will not find a board to have breached its duty of care unless the directors individually and the board collectively have failed to inform themselves fully and in a deliberate manner before voting as a board upon a transaction Only on such a judicial finding will a board lose the protection of the business judgment rule under the duty of care element and will a trial court be required to scrutinize the challenged transaction under an entire fairness standard of review. [*Id.* at 368 (internal citations omitted).]

As delineated by the trial court, IEF’s managing agent considered the initiation of a lawsuit against UNext. As part of this review, IEF polled the investors and determined that the cost of pursuing the action was prohibitive given the questionable potential for success. Based on the analysis conducted and the determination by a majority of the members of IEF not to pursue a cause of action against UNext, plaintiffs are unable to show that the decision not to initiate litigation constituted a wrongful refusal. *In re Citigroup Shareholder Derivative Litigation*, 964 A2d 106, 120 (Del, 2009). Hence, plaintiffs’ pursuit of a derivative claim was effectively precluded.

⁴ Similar requirements are imposed on limited liability companies in accordance with Delaware’s LLC Act, § 18-1001.

While not specifically alleged, plaintiffs imply that their malpractice claim is supported by Yaker's failure to correctly identify or advise his clients regarding the statute of limitation accrual or the impact of the dissolution of IEF. However, it is again worthwhile to note that plaintiffs were not unsophisticated investors and that the majority of people Yaker was advising were, themselves, attorneys. In addition, Savas acknowledged that, while Yaker did provide advice regarding the dissolution of IEF, that another attorney-investor, as a member of IEF, also provided input into that decision and the members of IEF determined the need to maintain that entity no longer existed. Hence, even though Yaker's advice, in hindsight was questionable and his failure to disclose his own problems with regard to sanctions imposed on his license to practice or keep his clients informed of the status of their case was not ethical, these factors were not the proximate cause of plaintiffs' failure to successfully pursue this litigation.

Plaintiffs also contend that the trial court erred in determining April 6, 2001, as the accrual date for the statute of limitation for their claims, asserting that it was not until November 2002 that they had sufficient information available to plead fraud with particularity. However, contrary to his assertions on appeal, Savas acknowledged that certain information was available to investors concerning UNext's failure to perform in accordance with expectations and general dissatisfaction with the investment. Further, Savas admitted that he learned of the end of the Lotus relationship at this meeting and that within six months of the April 2001 meeting IEF had formally requested a refund of the investment. Specifically, Savas acknowledged the reason for the October 2001 letter from IEF to UNext seeking a refund of the investment included "a lot of the misrepresentations that we felt were brought upon us."

As noted by the trial court, the statute of limitation is three years in accordance with Illinois Securities Law. 815 ILCS 5/13. In addition, pursuant to Illinois case law:

Under the common law discovery rule, the statute of limitations begins to run when a party knows or reasonably should know that an injury has occurred and that it was wrongfully caused, and at that point the party is under an obligation to inquire further to determine whether an actionable wrong was committed. "The accrual of the cause of action does not await the awareness by the plaintiff that he actually has a cause of action; the statute of limitations begins to run when a reasonable person possesses sufficient information to be put on inquiry to determine whether a cause of action exists." [*Smagala v Owen*, 307 Ill App 3d 213, 217-218; 717 NE2d 491 (1999) (internal citations omitted).]

Similarly, Delaware maintains a three-year statute of limitation. 10 Del C 8106. Further:

Statutes of limitation are calculated beginning from the date of accrual of a cause of action, "at the time of the wrongful act, even if the plaintiff is ignorant of the cause of action." In certain limited circumstances, however, the running of a statute of limitations may be tolled until some time after the cause of action accrued. Under the common law of our state, tolling is permitted, for example, when an injury is inherently unknowable to the plaintiff, or when a wrongful act is fraudulently concealed by the wrongdoer For a limitations period to be tolled under the doctrine of inherently unknowable injury, "there must have been no observable or objective factors to put a party on notice of injury." [*Delaware v*

Pettinaro Enterprises, 870 A2d 513, 531 (Del, 2005) (footnotes and citations omitted).]

Under Delaware case law, ignorance of the facts supporting a cause of action fails to toll the limitation period, absent some special circumstances such as “inherently unknowable” injuries or fraudulent concealment. *See, e.g., Mastellone v Argo Oil Corp*, 76 A2d 118 (Del, 1950); *Freedman v Beneficial Corp*, 406 F Supp 917 (1975); *Halpern v Barran*, 313 A2d 139 (Del, 1973). The burden of demonstrating the applicability of tolling rests with the party asserting the tolling. *Freedman*, 406 F Supp at 924-925.

Contrary to plaintiffs’ assertions, the trial court correctly determined the April 6, 2001, meeting between UNext and IEF investors as the date for accrual for the statute of limitation. By this meeting, plaintiffs had knowledge pertaining to the failure of UNext to meet sales goals and economic projections, the involvement of Thomson and concurrent diminution in value of their investment, the loss of important agreements with IBM and Lotus and their acknowledged dissatisfaction with UNext’s overall management and performance. Absolute certainty with regard to the existence of their claim of fraud was not necessary. Consequently, the trial court correctly concluded that plaintiffs’ claims of malpractice would not be sustained against Nedelman, because their representation of plaintiffs did not begin until October 29, 2004, fully four months after the expiration of the three-year statute of limitation.

In the Illinois trial court, plaintiffs alleged pre-investment fraud claims based on various alleged misrepresentations by UNext and its officers/agents. Addressing these claims in plaintiffs’ action for malpractice, the Michigan trial court determined that “even if Plaintiffs had standing to pursue [these claims], the language of the July 1999 Private Placement Memoranda (PPM) precludes those claims.” Plaintiffs’ original complaint contained several assertions pertaining to pre-investment fraud referencing statements contained in the May and July 1999 PPMs and various oral representations by agents of UNext.⁵

At the outset, it is important to again recognize that plaintiffs and the members of IEF were sophisticated investors. These individuals were cognizant and knowledgeable regarding the concerns and uncertainties involved in this type of investment and were provided with sufficient disclosures in contemplating participation in this venture. The initial three pages of the July 1999 PPM contained numerous provisos and warnings regarding the risk inherent in this investment, along with very specific disclaimers. The July 1999 PPM specifically included warnings regarding future expectations acknowledging, “forward-looking statements may not prove accurate.” In addition, members of IEF, including plaintiffs, were provided with a subscription agreement pertaining to IEF’s acquisition of UNext shares. In the subscription agreement the signor acknowledges, “receipt of a copy of the NEXT.com LLC Confidential Private Placement Memorandum dated July 22, 1999 (the ‘Memorandum’)” and agreed that he/she has “knowledge and experience in financial and business matters in general, and in

⁵ This Court notes that the fraud allegations contained in the amended complaint vary slightly from the original complaint. However, only the allegations in the original complaint are referenced because the Illinois trial dismissed plaintiffs’ amended complaint with prejudice.

investments of the type described in the Memorandum in particular” along with sufficient expertise to evaluate the “merits, risks and other facts of an investment in the Company.” Further, the subscription agreement provided, in relevant part:

The undersigned has relied solely upon the Memorandum, documents and materials submitted therewith and independent investigations made by the undersigned in making the decision to purchase the Units subscribed for herein, and acknowledges that no representations or agreements, other than those set forth in the Memorandum and the Operating Agreement, have been made to the undersigned with respect thereto.

As recognized by the trial court, the integration clauses of the subscription agreement and July 1999 PPM, specifically precludes several of plaintiffs’ claims in the original complaint because they reference statements that were either included in the May 1999 PPM, which was superseded, or oral statements outside the July 1999 PPM. Of the remaining assertions, a portion of each claim references UNext’s future expectations regarding its relationship with Lotus. These statements are similarly precluded from consideration as fraud by the language of the July 1999 PPM identifying such statements as “forward-looking.” As such, they are not factual assertions but merely comprise beliefs or goals and cannot be relied on for their accuracy as noted in the PPM and recognized by case law. “[A]n action for fraud must be predicated upon a false statement relating to a past or existing fact; promises regarding the future are contractual and will not support a claim of fraud.” *Cummins v Robinson Twp*, 283 Mich App 677, 696; 770 NW2d 421 (2009) (citation omitted).

The only remaining statements contained in the complaint, which serve as the basis for plaintiffs’ assertion of fraud, pertain to the existence of agreements with Lotus and IBM. Although plaintiffs allege they have reason to question the veracity of these statements, they fail to come forward with any evidence to show that such agreements did not exist when UNext made the assertions. “General allegations will not suffice to state a fraud claim,” and “mere speculations are not sufficient to overcome a motion for summary disposition.” *LaMothe v Auto Club Ins Ass’n*, 214 Mich App 577, 586; 543 NW2d 42 (1995). Because plaintiffs’ assertion of pre-investment fraud was based on mere speculation and conjecture and representations specifically precluded in accordance with the integration clause of the subscription agreement, the trial court properly granted summary disposition, as there existed no basis for a malpractice claim due to an absence of proximate causation.

IV. CONCLUSIONS

Plaintiffs lacked standing under both Illinois and Delaware law and were not able to initiate a derivative action. As such, their claims of malpractice must also fail because they cannot establish that Yaker’s performance deficits as their attorney, regarding the pleadings submitted and the choice of forum, are the proximate cause of their alleged injury since the action was doomed from its inception and before Yaker or Nedelman were specifically retained

to pursue litigation. While Yaker's deficient performance and deception is not excused, it does not constitute probable cause for the failure of plaintiffs' legal action against UNext.

Affirmed.

/s/ Michael J. Kelly
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder