

Oasis Sportswear, Inc. v Rego

2012 NY Slip Op 30218(U)

January 24, 2012

Sup Ct, NY County

Docket Number: 591092/07

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
J.S.C. Justice

PART 8

Index Number : 115500/2007
OASIS SPORTSWEAR INC
vs.
REGO, PATRICIA
SEQUENCE NUMBER : 014
SUMMARY JUDGMENT

INDEX NO. 115500/07
MOTION DATE 11/22/11
MOTION SEQ. NO. 014

The following papers, numbered 1 to 26, were read on this motion to for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits + Memo of Law | No(s) 1-12

Answering Affidavits — Exhibits X Motion + Memo of Law | No(s) 13-24

Replying Affidavits + Memo of Law | No(s) 25, 26

Upon the foregoing papers, it is ordered that this motion is

FILED

JAN 30 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: January 24, 2012

Joan M. Kenney, J.S.C.
JOAN M. KENNEY
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

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OASIS SPORTSWEAR, INC.,
Plaintiff,

DECISION & ORDER
Index No.: 115500/07

-against-

PATRICIA REGO, PATRICIA REGO
CONSULTING, INC. and PAT REGO, INC.,
Defendants.

-----x

PATRICIA REGO and PATRICIA REGO
CONSULTING, INC.,
Third-Party Plaintiffs,

TP Index No.: 591092/07

-against-

JOSEPH TRACHTMAN, CBIZ MAHONEY
COHEN, INC., Formerly known as
Mahoney Cohen & Company, and
GREGG SPIEGEL,
Third-Party Defendants.

FILED

JAN 30 2012

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JOAN M. KENNEY, J.:

NEW YORK
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Third-party defendants CBIZ Mahoney Cohen, Inc. and Gregg Siegel (Siegel) (together, third-party defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint as asserted against them. Defendants/third-party plaintiffs Patricia Rego Consulting (Consulting), Patricia Rego (Rego) and Pat Rego, Inc. (Pat Rego) (collectively, defendants) cross-move, pursuant to CPLR 3124, 3101 and 3120, to compel third-party defendants to produce additional tax documents.

FACTUAL BACKGROUND

This is the 14th motion, plus associated cross motions, filed in this action and the underlying facts have been previously discussed in the court's prior decisions; therefore, the underlying

facts will not be reiterated herein.

Third-party defendants were engaged as the accountants for plaintiff, whose services included the review of plaintiff's financial statements, the preparation of corporate tax returns, and the preparation of the individual tax returns for plaintiff's principal. Motion, Ex. I. Defendants never engaged third-party defendants in any capacity.

According to the third-party complaint,

"At various times and numerous times, from 2000 through 2007, Trachtman paid the following personal expenses from Oasis funds: mortgage payments on his Connecticut home, real property tax payments for his Connecticut home, rent owed on his New York City apartment, jet ski insurance payments, life insurance payments, monies owed by Trachtman as and for his personal income taxes, various payments in substantial amounts for the care and treatment of animals, and various payments for a private birthday party."

Third-party Complaint, ¶ 37.

According to third-party defendants, these payments were usually made by check prepared by plaintiff's internal bookkeeper and signed by plaintiff's principal, and the payments were entered into plaintiff's records by that bookkeeper. Third-party defendants maintain that it calculated plaintiff's yearly profits from the trial balances provided by the company from its records.

The third-party complaint alleges two causes of action as against third-party defendants: (1) negligence in that third-party defendants were negligent in the preparation of plaintiff's profit and loss statements, according to acceptable accounting standards

in the community (*id.* ¶ 51); and (2) breach of contract in that third-party defendants breached their contract with plaintiff in preparing these financial records, which significantly reduced plaintiff's profit by deducting the above-referenced items from plaintiff's income, and that defendants were third-party beneficiaries of that agreement who were injured thereby by receiving a smaller profit share.

In her examination before trial (EBT), Rego testified that she was aware of the alleged payment of personal expenses by plaintiff for its principal (Trachtman) since, at least, 2006. Rego EBT, at 147, 149. Rego's knowledge of these items of personal expense in 2006 was confirmed by the testimony of Spiegel. Spiegel EBT, at 50, 53-54.

Third-party defendants contend that the third-party complaint asserted as against them should be dismissed, based upon the claim that the action is time-barred and because defendants fail to evidence that third-party defendants' purported negligence proximately caused defendants any damage.

In opposition, defendants assert that their negligence claim is one for negligent misrepresentation, not professional malpractice, and, therefore, is governed by a six-year statute of limitations. Defendants do not challenge that more than three years elapsed from the time that they last received any financial documents from third-party defendants until the institution of the

present lawsuit.

In reply, third-party defendants maintain that the causes of action appearing in the third-party complaint all involve professional malpractice and that defendants are seeking to avoid dismissal on statute of limitation grounds by attempting to couch the claims as ones for negligence and breach of contract. Third-party defendants argue that the court should look at the essence of the claim and not the label that defendants attempt to attach to it.

In addition, third-party defendants point out that defendants do not dispute that they were aware of the items of account about which they now complain, and even assert, in defendants' opposition memo, that Rego was so suspicious that she relayed those suspicions to third-party defendants. Opp. at 14. Hence, state third-party defendants, since defendants admit that they were in possession of facts indicating an alleged misrepresentation, they cannot now claim negligent misrepresentation by third-party defendants.

Lastly, third-party defendants object to defendants' request to have the court compel them to produce the tax records for plaintiff and plaintiff's principal, since, if relevant, those records could be demanded of those parties directly.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law,

tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Third-party defendants' motion is granted and the third-party complaint is dismissed as to CBIZ Mahoney Cohen, Inc. and Siegel.

Pursuant to CPLR 214 (6), an action for professional malpractice must be commenced within three years of the date of accrual. A claim for professional malpractice accrues when the malpractice is committed, not when it is discovered. *Williamson v PricewaterhouseCoopers LLP*, 9 NY3d 1, 7-8 (2007).

The court is unpersuaded by defendants' argument that their claims are for negligent misrepresentation and breach of contract rather than for professional malpractice.

"[W]here the underlying complaint is one which essentially claims that there was a failure to utilize reasonable care or where the acts of omission or negligence are alleged or claimed, the statute of limitations shall be three years if the case comes within the purview of CPLR Section 214 (6), regardless of whether the theory is based in tort or in a breach of contract [internal quotation marks and

citation omitted]."

Matter of R.M. Kliment & Frances Halsband, Architects (McKinsey & Co., Inc.), 3 NY3d 538, 541-542 (2004); *Harris v Kahn, Hoffman, Nonenmacher & Hochman, LLP*, 59 AD3d 390 (2d Dept 2009).

Accounting malpractice is defined as an accountant failing to perform accounting services with due care and in accordance with recognized and accepted accounting practices. *Ackerman v Price Waterhouse*, 84 NY2d 535 (1994); *Herbert H. Post & Co. v Sidney Bitterman, Inc.*, 219 AD2d 214 (1st Dept 1996). This definition of accounting malpractice is almost identical to the allegations appearing in paragraph 51 of the third-party complaint. Defendants cannot now attempt to avoid the statute of limitations by arguing that they actually meant negligent misrepresentation. See *Rosenbach v Diversified Group, Inc.*, 12 Misc 3d 1152(A), 2006 NY Slip Op 503856 (U) (Sup Ct, NY County 2006).

Additionally, defendants have not challenged the argument that a cause of action asserted by them for professional malpractice would be time-barred.

Further, the court finds that defendants' claim for breach of contract is duplicative of their negligence (malpractice) claim and is properly dismissed. *Ulico Casualty Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1 (1st Dept 2008).

As a consequence of the foregoing, third-party defendants CBIZ Mahoney Cohen, Inc.'s and Gregg Siegel's motion for summary

judgment dismissing the third-party action asserted as against them is granted, and defendants' cross motion is denied as moot, since CBIZ Mahoney Cohen, Inc. and Siegel are no longer parties to this action. Accordingly, it is

ORDERED that third-party CBIZ Mahoney Cohen, Inc. and Gregg Siegel's motion for summary judgment is granted and the third-party complaint asserted as against said third-party defendants is dismissed, with costs and disbursements to said third-party defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that defendants/third-party plaintiffs' cross motion is denied as moot; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the parties are to file their Note of Issue no later than February 3, 2012. Failure to timely file the Note of Issue will result in this matter being marked off the Court's calendar.

Dated: January 24, 2012

ENTER: 

Joan M. Kenney, J.S.C.

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