

Kelly v Richard Girasole, P.C.

2012 NY Slip Op 33058(U)

December 7, 2012

Supreme Court, New York County

Docket Number: 400937/2010

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

LUCY BILLINGS

PRESENT: _____ J.S.C. _____
Justice

PART 46

Index Number : 400937/2010
KELLY, PATRICK
vs.
RICHARD GIRASOLE, CPA
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to 4, were read on this motion to/for Dismiss the Complaint

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED	
1-2	_____
3	_____
4	_____

Cross-Motion: Yes No

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

The court denies defendant's motion to dismiss the complaint, pursuant to the accompanying decision. C.P.L.R. § 3211(a)(1).

FILED

DEC 26 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/7/12

Lucy Billings
LUCY BILLINGS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

-----X

PATRICK KELLY,

Index No. 400937/2010

Plaintiff

- against -

DECISION AND ORDER

RICHARD GIRASOLE, P.C.,

Defendant

-----X

LUCY BILLINGS, J.S.C.:

FILED
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COUNTY CLERK'S OFFICE

In this action for accounting malpractice and breach of contract, plaintiff retained defendant to negotiate plaintiff's income tax liabilities. Plaintiff claims that defendant's accounting services were negligent because defendant failed to show the United States Department of the Treasury Internal Revenue Service (IRS) that plaintiff's 1984-86 liabilities were discharged in his bankruptcy proceeding. As a result, plaintiff paid an amount in settlement that actually had been discharged. Defendant accountant moves to dismiss each of plaintiff's claims based on documentary evidence that defendant rendered the accounting services according to the parties' agreement and according to accepted professional standards. C.P.L.R. § 3211(a)(1).

I. FACTUAL ALLEGATIONS

In sum, the complaint alleges that, before plaintiff retained defendant to resolve plaintiff's tax liabilities, a bankruptcy proceeding discharged his debts, which defendant then

neglected to account for in negotiating plaintiff's tax liabilities with the IRS for the years before the discharge. Specifically, plaintiff filed his bankruptcy petition February 13, 1990. On August 16, 1995, the United States Bankruptcy Court of the District of Connecticut discharged plaintiff's debts.

Plaintiff first retained defendant to perform accounting services in 1998. After the IRS notified plaintiff of his federal income tax liabilities for 1984, 1985, and 1986, totalling \$201,098.90, he retained defendant to resolve those tax liabilities. Plaintiff alleges this notice and agreement with defendant occurred in 2002. Defendant alleges that the IRS issued an Official Assessment of Income Tax Liability in September 1999, but neither party presents any such document.

In February 2003, the IRS granted an application by defendant on behalf of plaintiff's former wife releasing her from that federal tax liability. In December 2004, defendant negotiated a settlement of plaintiff's federal income tax liabilities for 1984-86, reducing them to \$26,226.56, which plaintiff paid, along with \$6,000.00 to defendant for its services.

In May 2011, after plaintiff inquired about a refund from the IRS because he had paid debts that were discharged, the federal Taxpayer Advocate Service, an office independent of the IRS, notified him that:

After careful review and consultation with our technical staff, your bankruptcy was discharged prior to IRS additional assessment, September 1999. As a result, taxes would not have been discharged because they had not been

properly assessed before the bankruptcy.

Aff. of Richard Girasole Ex. A.

II. THE LACK OF ADMISSIBLE DOCUMENTARY EVIDENCE BEARING ON THE PARTIES' CLAIMS

While plaintiff does not dispute that he received this notice from the Taxpayer Advocate Service in 2011, the notice's contents are multi-layered hearsay. Therefore defendant may not rely on those contents as its documentary evidence that plaintiff's 1984-86 tax liabilities were not discharged and that, consequently, defendant did not fail to account for such a discharge in negotiating a settlement for plaintiff. C.P.L.R. § 3211(a)(1); Greenapple v. Capital One, N.A., 92 A.D.3d 548, 550 (1st Dep't 2012); Advanced Global Tech., LLC v. Sirius Satellite Radio, Inc., 44 A.D.3d 317, 318 (1st Dep't 2007); Wright v. C.H. Martin of White Plains Rd., Inc., 23 A.D.3d 295, 296 (1st Dep't 2005); Richbell Info. Servs. v. Jupiter Partners, 309 A.D.2d 288, 297 (1st Dep't 2003).. See 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152-53 (2002); Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994); Rivietz v. Wolohojian, 38 A.D.3d 301 (1st Dep't 2007); Hicksville Dry Cleaners, Inc. v. Stanley Fastening Sys., L.P., 37 A.D.3d 218 (1st Dep't 2007).

Even if the IRS in September 1999 did issue an Official Assessment of Income Tax Liability owed by plaintiff for 1984-86, no admissible evidence offered by defendant shows that this "additional assessment" was the IRS's first assessment for those years. Girasole Aff. Ex. A. Plaintiff presents correspondence dated November 30, 1993, from his attorney in the bankruptcy

proceeding to the IRS, albeit also inadmissible, referring to an IRS notice of November 23, 1993, that "continues to seek payment" of plaintiff's 1985 income tax indebtedness, and informing the IRS of this debt's dischargeability. Aff. of Patrick Kelly Ex. B. Plaintiff also presents the list of creditors whose claims were discharged in his bankruptcy proceeding, which includes the IRS, but does not specify what debts to that creditor were discharged.

Defendant, on the other hand, which bears the burden in the context of defendant's motion, presents no admissible evidence that plaintiff's 1984, 1985, or 1986 income tax indebtedness was not dischargeable. Defendant claims that plaintiff's federal income tax liability failed to meet the criteria for dischargeability: that, for example, his tax returns for 1984-86 were truthful and filed at least two years before his bankruptcy petition February 13, 1990, and the IRS issued an assessment of his tax liability at least 240 days before his bankruptcy petition. 11 U.S.C. §§ 507 and 523. Yet defendant presents no documentary evidence to this effect other than the inadmissible Taxpayer Advocate Service notice indicating that the IRS did not issue an assessment of plaintiff's tax liability until years after his bankruptcy petition.

Defendant claims that it successfully performed the services for which plaintiff retained it by reducing his federal tax liability to approximately 12.5% of the original amount and by securing the release of plaintiff's former wife from any

liability. Plaintiff maintains not only that his federal tax liability had been discharged, but also that he retained defendant to negotiate his New York State tax liability during the same period, a service defendant neglected entirely. As a result, plaintiff secured a cancellation of his 1986 \$23,674.41 income tax liability on his own: one of the tasks he had paid defendant to accomplish. In fact, defendant's further documentary evidence, a New York State Department of Taxation and Finance (NYSDTF) Tax Warrant issued to plaintiff dated January 25, 2003, and a NYSDTF Response to Taxpayer Inquiry dated December 6, 2010, reporting the cancellation of that 1986 income tax assessment, only corroborate plaintiff's claim in this regard.

III. CONCLUSION

Defendant's inadmissible documentary evidence thus fails to resolve the factual issues raised by plaintiff's allegations in his complaint and his affidavit opposing defendant's motion, to contradict his claims conclusively, Kram Knarf, LLC v. Djonovic, 74 A.D.3d 628 (1st Dep't 2010); Orbimed Advisors, LLC v. QVT Fund LP, 72 A.D.3d 521, 522-23 (1st Dep't 2010); Arfa v. Zamir, 55 A.D.3d 508, 509 (1st Dep't 2008); Sprung v. Command Sec. Corp., 38 A.D.3d 478, 479 (1st Dep't 2007), and to establish a defense as a matter of law. C.P.L.R. § 3211(a)(1); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); Correa v. Orient-Express Hotels, Inc., 84 A.D.3d 65 (1st Dep't 2011); McCully v. Jersey Partners, Inc., 60 A.D.3d 562 (1st Dep't 2009); Foster v.

v. Kovner, 44 A.D.3d 23, 28 (1st Dep't 2007). Therefore the court denies defendant's motion to dismiss this action. This decision constitutes the court's order. The court will mail copies to the parties' attorneys.

DATED: December 7, 2012

Lucy Billings

LUCY BILLINGS, J.S.C.

**LUCY BILLINGS
J.S.C.**

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