SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

DAVID J. GOLD, P.C. et al

-v-

LIPSKY, GOODKIN + CO. CPAs, P.C., et al

INDEX NO. 152519-2012

MOTION DATE

MOTION SEQ. NO. 001

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion by defendants to dismiss the Complaint is GRANTED

The cross motion by plaintiffs for leave to amend the Complaint is DENIED

all as per the attached Decision and Order.

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

Dated: November 21, 2012

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 45

DAVID J. GOLD, P.C., DAVID J. GOLD, IT IS TIME, INC. d/b/a HOWARD ADAMS & ROSE, and LISA R. GOLD,	
Plaintiffs,	
-against-	DECISION AND ORDER
LIPSKY, GOODKIN & CO., CERTIFIED PUBLIC ACCOUNTANTS, P.C., MARVIN KISLAK, MARVIN BROCKMAN, JOEL LIPSKY and HARRY BALFAN,	Index No. 152519-2012 Motion Sequence No. 001
Defendants.	

MELVIN L. SCHWEITZER, J.:

This case involves plaintiffs' claims of professional malpractice, negligence and breach of contract against defendants, an accounting firm and its individual partners. According to plaintiffs, defendants allegedly failed to file plaintiffs' 2010 corporate and individual tax returns, and failed to obtain an extension for filing on their behalf, causing plaintiffs to incur penalties and late fees.

Defendants have moved for an order, pursuant to CPLR 3211 (a) (7), dismissing the complaint against them based on legal insufficiency, and redundancy. Plaintiffs oppose the motion, and cross-move for an order, pursuant to CPLR 3025, granting leave to amend the complaint to amplify the factual allegations, as allegedly no prejudice against defendants can be shown.

For the reasons that follow, defendants' motion is granted, and the complaint is dismissed in its entirety. In addition, plaintiffs' cross motion for leave to amend the complaint is denied.

Background

Plaintiff David J. Gold (Gold) is the president of the plaintiff professional corporation, David J. Gold, P.C., which is licensed to practice law under the laws of the State of New York. Plaintiff It is Time, Inc., is a domestic corporation organized under the laws of the State of New York. Plaintiff Lisa R. Gold is a resident of the State of New York. The individual defendants are certified public accountants and principals in the accounting firm named as the corporate defendant (collectively referred to as LG & C).

Approximately 15 years ago, plaintiffs hired LG & C to prepare their individual and corporate income tax returns, and provide other accounting services. In order to effectively prepare plaintiffs' tax returns, defendants had a practice of sending the plaintiffs, in December of each year, a "Tax Organizer" worksheet for the calendar year. In addition, every year prior to the standard tax return due date, defendants would prepare and send to the United States Internal Revenue Service (IRS) "Extensions of Time to File" forms for plaintiffs' respective individual and business concerns. Prior to the extension due date, defendants would then prepare plaintiffs' tax returns.

The complaint alleges that the defendants, jointly and severally, failed to timely file their 2010 tax returns. Plaintiffs contend that, in December 2010, defendants sent out the tax organizer worksheets for 2010 (*see* Gold affidavit, exhibit 3, Tax Organizer Worksheet). The complaint further alleges that sometime in March 2011, Gold realized that defendants had not forwarded the extension forms for the filing of plaintiffs' 2010 returns. Subsequently, on

March 28, 2011, Gold sent an email to LG & C, requesting information on when the tax filing extensions were due (*id.*, exhibit 5). Gold also stated that he was concerned about the tax returns for his law firm, his collection agency corporation, a related Pennsylvania corporation and two Nevada corporations, as well as his individual returns.

By letter and email, dated March 31, 2011, Marvin Kislak (Kislak) of LG & C, responded to Gold's email (*id.*, exhibit 6). In his letter, Kislak reminded Gold of a conversation that allegedly took place in August 2010 with defendants Brockman, Lipsky and Balfan (*id.*). At that time, the accountants had allegedly discussed with Gold their concerns about tax information that was provided to the IRS in 2009, and other past years. LG & C was worried about "the consistent losses that the corporations generate and the issue of how [Gold was] able to provide income to support Gold's family and living expenses" (*id.*, exhibit 6). The letter stated that while Gold had provided a list of income and various deductions and expenses, there was "resistance" on Gold's part to provide verification for the tax loss information given to defendants. Kiskal was allegedly concerned because recently the IRS had placed the burden on tax preparers to verify their clients' tax information. The letter also highlighted the fact that plaintiffs were often late in providing the accounting firm with information relevant to the preparation of plaintiffs' tax returns prior to the extension due dates of September 15 for the corporations, and October 15 for the personal income taxes (*id.*). In short, the letter warned Gold that "unless we can obtain the written information necessary for us to prepare proper returns, we will no longer be able to retain you as a client (*id.*)." As part of his correspondence, Kiskal attached an invoice for monies due LG & C for past services, which amounted to $2,250.00.

On April 6, 2011, Gold sent another email to Kislak, requesting clarification as to whether LG & C was "planning on filing the extensions right away" or whether it was awaiting payment prior to filing the extensions (*see* affidavit of Gold, exhibit 7). Plaintiffs allegedly failed to respond to the email. Thereafter, plaintiffs allegedly hired another accounting firm to prepare their tax returns. On September 12, 2011, plaintiffs received a letter from the IRS advising them that they had been assessed a penalty and late fees under section 6699 (a) (1) of the IRS Code (Failure to File S Corporation Tax Return on a Timely Basis) in the amount of $2,340.00 (*id.*, exhibit 8, Letter from IRS) for late filing of their 2010 tax returns. On September 30, 2011, Gold appealed the assessments (*id.*, exhibit 9, Letter to IRS re 2010 Return). On October 27, 2011, however, the IRS denied the appeal, finding that the information submitted did not establish "reasonable cause or show due diligence" for the late filing of the 2010 tax returns (*id.*, exhibit 9, Letter from IRS).

In their complaint, plaintiffs claim that defendants, without warning, determined that they no longer wished to represent them, failed to file the proper extensions of time for filing their 2010 income tax forms, and caused plaintiffs to sustain various penalties assessed by the IRS for the late filing of their tax returns. Plaintiffs are seeking $500,000 in damages, plus interest, for the accounting malpractice claim, $25,000 in damages, plus interest, for the negligence claim, and $25,000 in damages, plus interest and attorneys' fees, for the breach of contract claim.

Discussion

A. Standard for Motion to Dismiss

> "On a motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit

> of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory"

(*Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703–704 [2d Dept 2008]; *see also AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *Leon v Martinez*, 84 NY2d 83, 87–88 [1994]).

Despite the court's deferential reading of the complaint, to survive a motion to dismiss, a complaint must provide more than conclusory allegations or a formulaic recitation of the elements of a cause of action (*see O'Donnell, Fox & Gartner v R–2000 Corp.*, 198 AD2d 154, 154 [1st Dept 1993]; *see also Melito v Interboro-Mutual Indem. Ins. Co.*, 73 AD2d 819, 820 [4th Dept 1979]). That is, to avoid dismissal, a complaint may not consist of factual claims either beyond belief or categorically contradicted by the documentary evidence (*see Caniglia v Chicago Tribune–N.Y. News Syndicate,* 204 AD2d 233, 233–234 [1st Dept 1994] ["bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence" are not presumed to be true, and are not accorded every favorable inference]; *Franklin v Winard*, 199 AD2d 220, 220 [1st Dept 1993]). Thus, a complaint must include sufficient factual matter to raise a right to relief above the level of speculation.

Defendants argue that the complaint should be dismissed because (1) the complaint fails to state a cause of action, and (2) plaintiffs' breach of contract and negligence claims are duplicative.

B. Defendants' Motion to Dismiss the Complaint

1. Accounting Malpractice

Plaintiffs contend that the complaint has the typical elements of an action for malpractice. In general, a plaintiff alleging a claim of accountant malpractice must show (1) a departure from accepted standards of professional practice, and (2) that the departure was the proximate cause of injury (*see Herbert H. Post & Co. v Sidney Bitterman, Inc.*, 219 AD2d 214, 223 [1st Dept 1996]). "Proof of proximate causation is an essential element of any malpractice claim, including accountant's malpractice" (*Herbert H. Post & Co. v Sidney Bitterman, Inc.*, 219 AD2d at 223). Thus, "a plaintiff must establish, beyond the point of speculation and conjecture, a causal connection between its losses and the [accountant's] actions" (*id.* at 224).

In this case, the complaint fails to allege that the defendants agreed to prepare and file plaintiffs' tax returns in the time required by law. As with attorney-client relationships, to recover damages for accounting malpractice, a plaintiff must prove, among other things, the existence of a professional relationship (*see Wei Cheng Chang v Pi*, 288 AD2d 378, 380 [2d Dept 2001]). A party's unilateral or unreasonable belief that there is an accountant-client relationship does not confer upon that party the status of a client (*see Volpe v Canfield*, 237 AD2d 282, 283 [2d Dept 1997]). That particular relationship is only established "where there is an explicit undertaking to perform a specific task" (*Wei Cheng Chang v Pi*, 288 AD2d at 380 [no attorney-client relationship was created between buyers and attorneys, and thus attorneys were not liable to buyers for legal malpractice]; *see also Volpe v Canfield*, 237 AD2d at 283 [same]).

In the present case, there are certainly factual allegations that plaintiffs sought to have defendants prepare their taxes, and to file for an extension of time. The record before the court,

however, is devoid of any written or oral agreement that the defendants would perform a specific task for plaintiffs with respect to their 2010 tax returns. It, therefore, follows that there was no specific, positive duty that the defendants assumed. While plaintiffs also contend that the defendants had a duty to act with reasonable care and perform tax-related services in accordance with Generally Accepted Accounting Principles (GAAP) and Generally Accepted Auditing Standards (GAAS), plaintiffs have failed to adequately plead any specific GAAP or GAAS violations in their complaint. In fact, the opposite is true.

The court has examined the letter, dated March 31, 2011, sent by Kislak of LG & C to Gold, which is part of plaintiffs' exhibits. Far from showing an extreme departure from proper professional behavior, defendants' actions in pressing for more complete information seem cautious and appropriate, and their response to Gold's inquiries fails to provide a compelling inference of accounting malpractice. Instead, this conduct appears fully consistent with the defendants' professional obligations.

In any event, the failure to demonstrate proximate cause mandates dismissal. In order to establish proximate cause, plaintiffs must demonstrate that "but for" the defendants' negligence, the IRS would not have penalized plaintiffs (*Herbert H. Post & Co. v Sidney Bitterman, Inc.*, 219 AD2d at 224, citing *Franklin v Winard*, 199 AD2d at 221; *see also Between the Bread Realty Corp. v Salans Hertzfeld Heilbronn Christy & Viener*, 290 AD2d 380, 381 [1st Dept 2002] [court found that client failed to allege acts to support its claim that "but for" attorney's improper handling of client's defense in lawsuit brought by landlord, client would not have incurred unnecessary legal fees]). It is disingenuous for plaintiffs to argue that their injuries were attributable to the defendants' actions or omissions. It is well settled that the taxpayer, not the

accounting firm, has a nondelegable duty to file timely tax returns (*Penner v Hoffberg Oberfest Burger & Berger*, 303 AD2d 249, 249 [1st Dept 2003]; *see also McMahan v Commissioner of Internal Revenue*, 114 F3d 366, 369 [2d Cir 1997] [court held that taxpayer had personal, nondelegable duty to timely file return or extension application]).

Lastly, with respect to the individual defendants, inasmuch as the complaint does not give the individual defendants notice of any acts personally committed by them, that branch of the defendants' motion seeking dismissal of the malpractice cause of action is granted.

In short, because the plaintiffs have failed to establish a prima facie case of accounting malpractice, the cause of action is dismissed.

2. Remaining Causes of Action (Negligence and Breach of Contract)

The negligence and breach of contract claims arise out of substantially the same set of facts, and seek the same damages (*see Clark–Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]).

> "It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract" (*id.*).

Here, plaintiffs have not alleged that any such independent duty has been violated. Accordingly, the two causes of action cannot be separately maintained, and they must be dismissed as duplicative (*see Wildenstein v 5H & Co., Inc.*, 97 AD3d 488, 491-492 [1st Dept 2012] [Court found that negligence claim was duplicative of breach of contract claim]; *OFSI Fund II, LLC v Canadian Imperial Bank of Commerce*, 82 AD3d 537, 539 [1st Dept 2011]).

Similarly, to the extent that plaintiffs assert these claims as separate from their accounting malpractice claim, the breach of contract and negligence claims must be dismissed as duplicative, for the same reason (*see e.g. Feldman v Finkelstein & Partners, LLP,* 76 AD3d 703, 705 [2d Dept 2010] [Clients' cause of action alleging breach of contract was duplicative of legal malpractice claim]; *see also Turner v Irving Finkelstein & Meirowitz, LLP*, 61 AD3d 849, 850 [2d Dept 2009]).

B. Plaintiffs' Cross Motion to Amend the Complaint

The remaining issue is whether the cross motion for leave to amend the complaint should be granted. Ordinarily, leave to amend a pleading should be "freely given" (CPLR 3025 [b]). It is within the court's discretion to deny or grant leave to amend in the absence of prejudice or surprise (*see Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 354-355 [1st Dept 2005]). Leave to amend also will be granted when the proponent submits sufficient support to show that the amendment is not "palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]). If an amendment is futile, or would serve no legitimate purpose, the court is not to needlessly prolong matters (*see Castillo v Starrett City,* 4 AD3d 320, 322 [2d Dept 2004] [motion to amend was properly denied when the amendment would have been futile]; *Saferstein v Mideast Sys.,* 143 AD2d 82, 83 [2d Dept 1988] ["Although leave to amend a pleading should be freely granted, the court is not required to permit futile amendments which may lead to needless litigation [internal citations omitted]."]).

Here, it is true that the defendants cannot argue that they will be surprised by the proposed amended complaint. Nevertheless, the court has determined that the proposed amended complaint, consisting of the same three causes of action asserted in the original complaint, is

similarly deficient, because of the unsuccessful attempt by plaintiffs to plead the necessary elements, and the duplicative nature of the amended claims. Permitting the submission of the amended complaint is therefore futile since the claims are based on the same legal and factual allegations as those in the original complaint, which failed to state any cause of action. Accordingly, because the claims are "palpably insufficient or clearly devoid of merit," plaintiffs' cross motion for leave to amend the complaint is denied (*see MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d at 500).

Conclusion

In view of the results reached by the court, it is hereby

ORDERED that the motion of defendants, Lipsky, Goodkin & Co., Certified Public Accountants, P.C., Marvin Kislak, Marvin Brockman, Joel Lipsky and Harry Balfan, to dismiss the complaint herein is granted, and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to the defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that the cross motion of plaintiffs, David J. Gold, P.C., David J. Gold, It Is Time, Inc. d/b/a Howard Adams & Rose, and Lisa R. Gold, for leave to amend the complaint, in the form annexed to the motion papers, is denied.

Dated: November 21, 2012

ENTER:

J.S.C.

MELVIN L. SCHWEITZER
J.S.C.