

Leonard v Kweit, Mantell & DeLucia, LLP

2013 NY Slip Op 33118(U)

December 9, 2013

Supreme Court, New York County

Docket Number: 650629/2013

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK

NEW YORK COUNTY
HON. EILEEN A. RAKOWER

Index Number : 650629/2013
ESTATE OF ELEANOR LEONARD
vs
KWEIT, MANTELL & DELUCIA,
Sequence Number : 001
DISMISS

PART 15

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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). _____

ekw

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 12/9/13


_____, J.S.C.
HON. EILEEN A. RAKOWER

- 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

deductions that were found to either be not properly supported by records or not legitimate items for deduction.

The Complaint alleges that Defendants' preparation of tax returns for Eleonard Leonard for the tax years 2003, 2004, 2005, 2006, and 2007 "fell below the accepted standard of practice" in that preparing these returns Defendants "took as deductions, expense items which the IRS found were so egregiously improper and unsupported by valid documentation that the IRS assessed "accuracy penalties." The Complaint further alleges that after the IRS assessed these penalties, "Defendants undertook on behalf of Ms. Leonard and the Estate to handle the IRS audit and advise Ms. Leonard and the Estate and, as appropriate, negotiate with the relevant tax authorities to address the deficiencies and understatements of income and the interest and penalties assessed by the tax authorities."

Presently before the Court is Defendants' motion pursuant to CPLR §§3211(a)(1) and 214(6) to dismiss the Complaint in its entirety on the grounds that Plaintiff's claims for negligence/professional malpractice and breach of contract are both barred by the applicable statute of limitations as they both arise from allegations of alleged negligence on Defendants' part. Defendants submit the attorney affirmation of Ronald S. Herzog, which annexes a copy of the Complaint, a copy of the February 22, 2010 IRS correspondence, and a copy of correspondence dated May 21, 2010 from plaintiff Jay Leonard to the IRS making payment of \$169,204.41 to the IRS. Plaintiff opposes.

CPLR §3211(a)(1) provides, in relevant part, "a party may move for judgment dismissing one or more causes of action asserted against him on the grounds that" "a defense is founded upon documentary evidence."

On a motion to dismiss pursuant to CPLR §3211(a)(1), "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). "When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one" (*Guggenheimer v. Ginzburg*, 43 N.Y.2d

268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

A cause of action charging that a professional failed to perform services with due care and in accordance with the recognized and accepted practices of the profession is governed by the three-year statute of limitations applicable to negligence actions. (*See, CPLR §214[6]*).

As set forth in *ATC Healthcare Inc. v. Goldstein, Golub & Kessler LLP*, 28 Misc. 3d 1237(A), *3 (N.Y. Sup. July 26, 2010):

The continuous representation doctrine is an exception to the Statute of Limitations and applies only where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim. *Symbol Technologies, Inc. v. Deloitte & Touche, LLP, supra*, at p. 195 (citation omitted). That is, “the continuous representation must be in connection with the particular transaction which is the subject of the action and not merely during the continuation of a general professional relationship.” *Zaref v. Berk & Michaels, P.C.*, 192 A.D.2d 346, 347-48 (1st Dept. 1993) (citations omitted). “[T]he facts are required to demonstrate continued representation in the specific matter directly under dispute.” *Zaref v. Berk & Michaels, P.C., supra*, at p. 348.

ATC Healthcare Inc., 28 Misc. 3d 1237(A) at *3.

Here, the Complaint alleges that after the IRS assessed these penalties, “Defendants undertook on behalf of Ms. Leonard and the Estate to handle the IRS audit and advise Ms. Leonard and the Estate and, as appropriate, negotiate with the relevant tax authorities to address the deficiencies and understatements of income and the interest and penalties assessed by the tax authorities.” Plaintiff submits the attorney affirmation of Lee Squitieri, which avers that Defendants continued to represent Ms. Leonard until at least December 17, 2010 with full power of attorney. Attached as Exhibit 1 is a letter from Defendants to the IRS dated December 17, 2010 written on behalf of Plaintiff with “POA” which sets forth an explanation for “the substantial understatement of her taxes for all years audited.”

Defendants' evidentiary submissions do not flatly contradict the legal conclusions and factual allegations of the Complaint and do not establish that the statute of limitations has run on Plaintiff's claims as a matter of law to warrant dismissal at this juncture.

Wherefore, it is hereby,

ORDERED that defendants' motion to dismiss is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: December 9, 2013

A handwritten signature in black ink, appearing to read 'E. Rakower', is written over a horizontal line.

EILEEN A. RAKOWER, J.S.C.