

Lally v Winkler & Co. (MB)

2010 NY Slip Op 33757(U)

December 23, 2010

Supreme Court, Nassau County

Docket Number: 4478/11

Judge: F. Dana Winslow

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SUN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

REGAN LALLY,

**TRIAL/IAS, PART 3
NASSAU COUNTY**

Plaintiff,

-against-

**MOTION SEQ. NO.: 001
MOTION DATE: 9/9/11**

**WINKLER & COMPANY (MB), and
RONALD M. WINKLER, CPA,**

INDEX NO.: 4478/11

Defendants.

The following papers having been read on the motion (numbered 1-3):

Notice of Motion.....	1
Affidavit in Opposition.....	2
Memorandum of Law.....	3

Motion pursuant to CPLR §3212(a)(5) and (a)(7) to dismiss the complaint is determined as follows.

In this action, plaintiff seeks to recover damages arising from defendants' alleged professional malpractice *vis-a-vis* accounting services rendered between 1996-2008, including tax advice, tax preparation and filing of joint personal tax returns during the period of plaintiff's marriage to Richard Aebly, the brother-in-law of defendant Ronald M. Winkler.¹

The complaint asserts seven separate causes of action each under the heading of professional malpractice. They include:

- breach of fiduciary duty/confidentiality;
- collusion in hostile litigation against plaintiff;
- providing false counsel; information and direction to plaintiff's detriment;
- destruction of client records;

¹In or about 2008 divorce proceedings were initiated between plaintiff and her husband Richard Aebly.

refusal to release client records;
failure to warn client of pending litigation; and
fraud – preparation of incorrect/false tax return for the year 2007.

Defendants seek dismissal of the complaint pursuant to CPLR 3211(a)(5) and (a)(7) predicated on the grounds that the action is time barred inasmuch as the last joint tax return filed on behalf of plaintiff and Richard Aebly was for tax year 2006, more than three years before defendant Ronald M. Winkler received a copy of the complaint in this action. Defendant further maintains that defendants received no compensation for his services; no contract was ever executed by the parties defining their relationship and defendants never provided any financial or other type of professional advice to plaintiff. As such, defendants contend the complaint is unsustainable.

ANALYSIS

A claim of professional negligence requires proof that there was a departure from accepted standards of practice and that the departure was a proximate cause of the injury. *Kung v Zheng*, 73 AD3d 862, 863 [2nd Dept 2010]. In the context of a malpractice action against an accountant, the claim accrues upon the client's receipt of the accountant's work product since this is the point that a client reasonably relies on the accountant's skill and advice. *Weiss v Deloitte & Touche, LLP*, 63 AD3d 1045, 1047 [2nd Dept 2009] (citation and internal quotation marks omitted). Absent fraud, a claim of negligently given incorrect accounting information or advice normally accrues upon receipt of the negligently prepared tax return. *Mitschele v Schultz*, 36 AD3d 249, 252 [1st Dept 2006].

Although defendants aver that the last tax return filed by defendants on behalf of plaintiff was for the year 2006, the filing of which occurred in April, 2007, plaintiff has submitted a copy of a 2007 federal joint income tax return prepared and filed on her behalf for the 2007 tax year, and a letter to her from defendants dated April 4, 2008, advising her of a balance due of \$113,948.

The claim for accounting malpractice is governed by a three year statute of limitations. CPLR 214(6). The statute of limitations in a malpractice case may be tolled "where the parties engaged in a continuous professional relationship" but only "where the continuous representation was in connection with the particular transaction which, is the subject of the action. *Mitschele v Schultz*, *supra*, at p. 253. A recurring use of a professional's services does not constitute continuous

representation if the later services are not related to the original service which gave rise to the action. *Giarratano v Silver*, 46 AD3d 1053, 1055 [3rd Dept 2007].

Since the record reflects that a summons with notice was filed on March 24, 2011, and served on defendant Ronald M. Winkler, CPA individually on April 2, 2011, the action was timely commenced. A claim of professional malpractice *vis-a-vis* the preparation and filing of the 2007 joint tax return is timely asserted and, for the reasons which follow, the only sustainable claim asserted in the complaint.

The existence of a negligence claim does not create a fiduciary relationship between a client and her accountant. Generally, there is no fiduciary relationship between an accountant and his client. *Friedman v Anderson*, 23 AD3d 163, 166 [1st Dept 2005]. A conventional business relationship, without more, does not become a fiduciary relationship by mere allegation. *DG Liquidation v Anchin, Block & Anchin, LLP*, 300 AD2d 70, 71 [1st Dept 2002]. As a general rule, accountants are not fiduciaries as to their clients (*Friedman v Anderson*, *supra*), except where the accountant is directly involved in managing the client's investments. *Caprer v Nussbaum*, 36 AD3d 176, 194 [2nd Dept 2006]. Since there is no allegation that defendants played such a role, defendants are not subject to breach of fiduciary claims as alleged in the first cause of action.

The bare allegations asserted in the second, third, fourth, fifth and sixth causes of action fail to state cognizable causes of action upon which relief might be granted. The purported causes of action are devoid of factual support. Bare conclusory allegations of collusion with unspecified third parties, revelation of confidential information to said unspecified parties; provision of false information/professional advice; destruction of client's records; failure to return client records and failure to warn client of pending litigation are not entitled to the presumption of truth in the absence of any factual data to support such a finding. The purported claims must, therefore, be dismissed.

The essential elements of a cause of action for fraud are a representation of a material existing fact, falsity, scienter, deception and injury. *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]. A plaintiff seeking to recover for fraud and misrepresentation is required to set forth specific and detailed factual allegations not subject to breach of fiduciary claims as alleged in the first cause of action that the defendant participated in or had actual knowledge of any fraud. *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]. A fraud claim is not actionable without evidence that the misrepresentations were made with intent to deceive. *Guberman v*

Rudder, 85 AD3d 683, 684 [1st Dept 2011]. A claim rooted in fraud must be pled with the requisite particularity required under CPLR §3016(b). CPLR §3016(b) provides that an action for fraud must be pled “with particularity, including specific dates and items, if necessary and insofar as practicable.” Conclusory allegations of fraud will not be sufficient. *Dumas v Fiorito*, 13 AD3d 332 [2nd Dept 2004]; and *Sargiss v Magarelli*, 50 AD3d 117 [2nd Dept 2008], *aff’d as modified*, 12 NY3d 527 [2009]. A mere recitation of the elements of fraud is insufficient to state a cause of action. *National Union Fire Ins. Co. of Pittsburgh, PA. v Robert Christopher Associates*, 257 AD2d 1, 9 [1st Dept 1999]. The complaint must allege the basic facts to establish elements of the cause of action and the circumstances constituting the wrong must be stated in detail. *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011].

Plaintiff has failed to articulate a cause of action for fraud with the requisite particularity. The complaint is devoid of any factual support for any of the elements of fraud.

Accordingly, even affording the complaint a liberal construction, and according the plaintiff the benefit of every possible favorable inference (*Marone v Marone*, 50 NY 2d 485, 484 [1980]), defendants’ motion to dismiss the complaint is **granted** as to the first, second, fourth, fifth, sixth and seventh causes of action of the complaint and **denied** as to the third cause of action for malpractice *vis-a-vis* preparation of plaintiff’s 2007 joint tax return which continues.

This constitutes the Order of the Court.

Dated: 1

ec 23, 2010

J.S.C.

ENTERED

JAN 18 2012

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**