

Tantleff v Kestenbaum & Mark
2013 NY Slip Op 34016(U)
June 27, 2013
Supreme Court, Nassau County
Docket Number: 15023/06
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

ORIGINAL

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

A. ROBERT TANTLEFF, M.D. and
LENORE TANTLEFF,

Plaintiffs,

INDEX No. 15023/06

MOTION DATE: May 23, 2013
Motion Sequence # 007

-against-

KESTENBAUM & MARK, RICHARD S.
KESTENBAUM and BERNARD S. MARK,

Defendants.

KESTENBAUM & MARK, RICHARD S.
KESTENBAUM and BERNARD S. MARK,

Third-Party Plaintiffs,

-against-

JAMES T. ASHE and MARCUM & KLIEGMAN,
LLP,

Third-Party Defendants.

The following papers read on this motion:

- Notice of Motion..... X
- Affirmation in Opposition..... X
- Affirmation/Affidavits..... XXXXX

Reply Affidavit.....	XX
Memorandum of Law.....	XX
Reply Memorandum of Law.....	X
Rule 19-a Statement.....	X
Response to Rule 19-a Statement.....	X

Motion by defendants Kestenbaum & Mark, Richard Kestenbaum, and Bernard Mark for summary judgment dismissing the complaint is **granted**.

This is an action for legal malpractice. Plaintiff Dr. Robert Tantleff is a radiologist. Plaintiff Lenore Tantleff, Dr. Tantleff's wife, was employed as the office manager and bookkeeper for her husband's professional corporation. In 1988, the Tantleffs retained Franklin Boykoff to prepare their personal and business tax returns. Defendants assert that Boykoff set up four dummy corporations, which received management fees for supposedly managing the medical practice. The corporations were paid \$489,993 in management fees in 1993, \$626,500 in 1994, \$936,395 in 1995, and \$943,629 in 1996. Defendants assert that the dummy corporations actually performed no management services but were simply vehicles to pay the Tantleffs' personal expenses. Although the Tantleffs took deductions for the management fees, no tax returns were filed by the dummy corporations.

In July 1997, the Internal Revenue Service commenced an audit of Dr. Tantleff's personal and corporate tax returns for the years 1993-1998. In October 1998, Dr. Tantleff was notified that he was under investigation for criminal tax fraud. On November 12, 1998, Dr. Tantleff retained defendant Kestenbaum & Mark, a law firm, to represent him in connection with the criminal investigation.

On December 16, 1998, Dr. Tantleff, represented by Kestenbaum, met with the US Attorney and the Criminal Investigation Division of the IRS in White Plains. At that meeting, the Tantleffs discussed their tax returns for the years in question pursuant to a proffer agreement, providing use immunity as to statements made during the interrogation.

The IRS concluded its audit of the Tantleffs' tax returns in October, 2001. On October 3, 2001, the Tantleffs consented to an assessment of \$1,508,013 in total taxes for years 1993 through 1995. Additionally, the Tantleffs consented to penalties of \$1,141,877, as well as interest on the taxes and penalties. According to defendants, a fraud penalty was applied only to the management fee deductions, while only the lower negligence penalty was applied to the improper deduction of personal expenses. Nevertheless, plaintiffs allege that

Kestenbaum advised them that if plaintiffs did not consent to the assessment, interest, and penalties, the criminal investigation would continue against Dr. Tantleff and would be extended to include Lenore Tantleff.

On February 8, 2002, the Tantleffs' tax preparer, Franklin Boykoff, was convicted of tax fraud. Lenore Tantleff testified as a witness for the prosecution at Boykoff's criminal trial. Although the Tantleffs were never prosecuted for any crime, they were subjects of the criminal investigation.

Meanwhile, Kestenbaum continued to represent plaintiffs by settling their tax liability for tax year 1996. On October 28, 2002, defendants submitted to the IRS an offer in compromise in an attempt to reduce plaintiffs' tax liability for the previous years based upon inability to pay.

On July 28, 2003, plaintiffs filed a power of attorney and declaration of representative, designating Stephen Breitstone and David Silverman, attorneys with the law firm of Meltzer, Lippe, to represent them before the IRS. The declaration indicates that the Tantleffs did not intend to revoke their prior power of attorney. Plaintiffs apparently did not attach a copy of the power of attorney in favor of Kestenbaum, which was required for that power of attorney to remain in effect. Nevertheless, plaintiffs assert that it was originally understood that the attorneys were a "team" and Kestenbaum would continue with the representation. Defendants continued to bill for their services through August 20, 2003.

On August 25, 2003, plaintiffs, through Meltzer, Lippe, withdrew the offer in compromise which defendants had filed. In Meltzer, Lippe's letter to the IRS, counsel stated that the Tantleffs were challenging the underlying deficiency because they believed it was "not properly challenged initially." On September 19, 2003, defendants formally withdrew from the Tantleffs' representation.

Plaintiffs, represented by Meltzer, Lippe, commenced the present action on September 15, 2006. Plaintiffs allege that defendants committed malpractice by failing to retain a forensic accountant, who would have established that the amount of taxes due was less than the amount plaintiffs agreed to in the consent. The assessment was subsequently reduced after plaintiffs brought a proceeding in the Tax Court. Nevertheless, plaintiffs allege that but for defendant's failure to engage a forensic accountant, plaintiffs would not have occurred legal fees in the Tax Court proceeding. Additionally, plaintiffs claim that defendants were

negligent in failing to challenge the IRS' treatment of the PC as a "pass through," whereby plaintiffs were individually assessed on income not distributed by the professional corporation.

In their answer, defendants deny that they committed malpractice, arguing that their advice that plaintiffs consent to the assessment was a reasonable strategic choice, which may have been a mistake in judgment but was not malpractice. Additionally, defendants assert that the action is barred by the three year malpractice statute of limitations. Defendants argue that plaintiffs' claim accrued on July 15, 2003 when defendants were allegedly directed not to take any further action on Dr. Tantleff's behalf, or at the latest when the offer in compromise was withdrawn on August 25, 2003.

By order dated May 31, 2007, the court denied defendants' motion for summary judgment, finding that there was a factual issue as to whether the statute of limitations was tolled by the continuous representation doctrine. However, on February 13, 2013, the court granted defendants leave to renew their summary judgment motion based upon subsequently conducted discovery. By notice of motion dated March 13, 2013, defendants renew their motion for summary judgment arguing both that they did not commit malpractice and the action is barred by the statute of limitations.

The continuous representation doctrine tolls the statute of limitations for attorney malpractice where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim (*Zorn v Gilbert*, 8 NY3d 933 [2007]). The subject matter underlying plaintiffs' malpractice claim is the tax deficiency which plaintiffs claim was not challenged properly. Plaintiffs, and indeed Meltzer, Lippe, may subjectively have believed that defendants were still "part of the team," in that they would continue to represent the Tantleffs in the criminal case, even though the offer in compromise of the tax deficiency had been withdrawn. However, once the offer in compromise was withdrawn on August 25, 2003, defendants were justified in concluding that plaintiffs no longer reposed confidence in their professional ability and good faith (*Shumsky v Eisenstein*, 96 NY2d 164, 167 [2001]). Thus, there was no mutual understanding, between the Tantleffs and Kestenbaum, of the need for further representation as to the tax deficiency. Kestenbaum's resignation letter of September 19, 2003 does not suggest mutual understanding of the need for further representation as to the tax deficiency and may be interpreted as resigning as plaintiff's counsel with regard to the criminal case. The court concludes that the toll of the statute of limitations ended on August 25, 2003, when the offer

in compromise was withdrawn. Since plaintiffs failed to commence their action within three years of that date, it is untimely. Defendants' motion for summary judgment dismissing the complaint based upon the statute of limitations is granted.

Moreover, even if the action were timely, defendants' motion for summary judgment should be granted. An attorney's selection of one among several reasonable courses of action does not constitute malpractice (**Bua v Purcell & Ingrao**, 99 AD3d 843, 847 [2d Dept 2012]). Defendants assert that they advised plaintiffs to compromise the civil fraud penalty in order to avoid criminal liability for tax fraud. Thus, defendants have established prima facie that they selected a reasonable course of action.

The burden shifts to plaintiffs to show a triable issue as to whether defendants committed malpractice because the decision to avoid criminal liability was not reasonable (**Alvarez v. Prospect Hospital**, 68 NY2d 320, 324 [1986]). In order to carry this burden, plaintiffs must raise a triable issue as to whether they were guilty of criminal tax fraud. In his affidavit, Dr Tantleff states, "We were unaware that the Investment Corporations did not file required tax returns." By "investment corporations," Dr Tantleff apparently refers to the dummy corporations or "managment companies" set up by Boykoff. However, plaintiffs must have known that they did not sign, or file, tax returns for the management companies. Moreover, Dr Tantleff does not allege that he was unaware that the management companies were created for the purpose of avoiding the payment of income tax which was payable by plaintiffs for tax years 1993 through 1996. Thus, plaintiffs have not raised a triable issue as to whether they were guilty of tax fraud. Because plaintiffs have not raised a triable issue as to whether defendants committed malpractice, defendants' motion for summary judgment should be granted.

This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

So ordered.

Dated JUN 27 2013

Stephen A. Bucaria
XXX J.S.C.

ENTERED

JUL 02 2013

NASSAU COUNTY
COUNTY CLERK'S OFFICE