

Tantleff v Kestenbaum & Mark
2013 NY Slip Op 34017(U)
February 13, 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,

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MOTION DATE: Feb. 6, 2013
Motion Sequence # 005, 006

-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
Cross-Motion.....	X
Reply Affirmation.....	X
Memorandum of Law.....	XXXXX

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Motion by defendants Kestenbaum & Mark, Richard Kestenbaum, and Bernard Mark to compel non-party witnesses David Silverman, Stephen Breitstone, and Erez Tucner to answer questions at their depositions is denied. Cross-motion by plaintiffs Robert and Lenore Tantleff for a protective order based upon the attorney- client privilege is denied as academic.

This is an action for legal malpractice. Plaintiff Robert Tantleff is a physician who practiced as a professional corporation. 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 received information 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, Kestenbaum represented Dr. Tantleff and his wife, plaintiff Lenore Tantleff, at a meeting 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. Plaintiffs allege that Kestenbaum advised them that if plaintiffs did not consent to the income tax examination changes, 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. Although the Tantleffs were never prosecuted for any crime, they were subjects of the criminal investigation. Lenore Tantleff testified as a witness for the prosecution at Boykoff's criminal trial.

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.

On July 28, 2003, plaintiffs filed a power of attorney and declaration of

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representative, designating Stephen Breystone 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. However, they 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.

On August 25, 2003, plaintiffs 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, and that a forensic accountant 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 asserted the defense of 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.

Defendants deny that they committed malpractice and allege that plaintiffs knowingly participated with Boykoff in a fraudulent tax scheme. Defendants assert that plaintiffs paid management fees to dummy corporations which were supposedly managing the medical practice. Although the Tantleffs took deductions for the management fees, no tax returns were filed by the dummy corporations. Additionally, defendants claim that Lenore Tantleff admitted on the stand that she and her husband paid personal expenses from the corporate account and then fraudulently took tax deductions for these expenses.

Defendants moved for summary judgment dismissing the complaint based upon the statute of limitations. Plaintiffs opposed summary judgment arguing that the statute of limitations was tolled based upon the continuous representation doctrine. By order dated May 31, 2007, the court denied defendants' motion for summary judgment, determining that there was a triable issue as to when defendants' professional relationship with plaintiff terminated.

Defendants asserted a third party claim against third party defendants James Asch and Marcum & Kliegman, LLP. Asch and Marcum & Kliegman are the accountants whom plaintiffs engaged to replace Boykoff. Defendants allege that Asch prepared a fraudulent financial statement, understating the Tantleffs' assets and ability to pay, which was submitted with the offer in compromise. Third party defendants also prepared the forensic accounting which plaintiffs claim should have been prepared to challenge the original assessment.

Defendants move to compel non-party witnesses, Stephen Breitstone, David Silverman, and Erez Tucner, to appear for depositions. Silverman and Tucner are former Meltzer, Lippe attorneys, and Breitstone is still with the firm. Defendants argue that the witness' testimony as to legal services performed by Meltzer, Lippe is relevant to the accrual of plaintiffs' claim and the running of the statute of limitations. When defendants sought to depose these witnesses, plaintiffs asserted the attorney-client privilege. Defendants argue that plaintiffs waived the attorney-client privilege by bringing a malpractice action. However because of the limits of the continuous representation doctrine, there is no need for the privilege issue to be reached.

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. Once the offer in compromise based on the tax deficiency was withdrawn, defendants would have been 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, it seems unlikely that there was a mutual understanding, between the Tantleffs and Kestenbaum, of the need for further representation as to the tax deficiency.

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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. Nevertheless, after August 25, 2003, there appears to have been no continuous representation by defendants as to the tax deficiency. As the court noted in its order denying summary judgment, the depositions of Kestenbaum and Mark may provide probative evidence as to their understanding of the need for further representation as to the tax deficiency. However, any testimony by the nonparty witnesses, as to a mutual understanding between plaintiffs and defendants, would appear to be self-serving.

Defendants' motion to compel the nonparty witnesses to appear for a deposition is **denied**. Plaintiffs' cross-motion for a protective order based on the attorney-client privilege is **denied** as **academic**. The parties may move for summary judgment, and defendants may renew their motion for summary judgment based upon the statute of limitations, by March 14, 2013.

So ordered.

Dated FEB 13 2013

Stephen A. Bucaria

J.S.C.

ENTERED
FEB 15 2013
NASSAU COUNTY
COUNTY CLERK'S OFFICE