SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER Justice

PART 15

Index Number : 103044/2007
PESSIN, NEIL
vs.
BUDNER & ASSOCIATES, INC.
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

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). 1

Answering Affidavits — Exhibits _____ No(s). 2

Replying Affidavits _____ No(s). 3

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

MAR 21 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 3/14/13

HON. EILEEN A. RAKOWER, 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 15

----------X

NEIL PESSIN,

Plaintiff,

- against -

BUDNER & ASSOCIATES, INC., AND MORDECHAI BUDNER,

Defendants.

----------X

Index No.:103044/2007

Decision and Order

Motion Seq: 003

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

Neil Pessin ("Plaintiff") brings this action to recover from Budner & Associates, Inc. ("BAI"), and Mordechai Budner ("Budner")(collectively "Defendants") for alleged accounting malpractice. BAI is a public accounting firm and tax preparer. Budner is the Principal of BAI. Plaintiff claims that in 2003, Defendants negligently advised him concerning the tax liability for withdrawals from his retirement accounts for the purchase of a home; that he made the withdrawals in 2003 based upon Defendant' advice; that he was not compelled to make these withdrawals and that he would not have made these withdrawals had it not been for the alleged advice. Plaintiff also claims that Defendants negligently prepared Plaintiff's 2003 tax returns in April 2004, which failed to account for Plaintiff's withdrawals from his retirement accounts. Plaintiff alleges that as a result of Defendant's failures, Plaintiff has incurred additional tax liabilities for federal, state and local taxes including penalties and interest.

Defendants now move, pursuant to CPLR 3212, for summary judgment on the grounds that the complaint (1) is barred by the applicable statute of limitations; (2) Budner cannot be sued individually, but rather must be sued through the corporation BAI; and (3) Defendants did not commit professional malpractice. Plaintiff opposes.

Contrary to Plaintiff's contention, Defendants' summary judgment motion is

timely. Plaintiff filed a Note of Issue on July 25, 2012. CPLR §2211 provides,

> [a] motion is an application for an order. A motion on notice is made when a notice of the motion or an order to show cause is served.

CPLR §2103(b)(2) defines service of motion papers on an attorney,

> by mailing the paper to the attorney at the address designated by the attorney for that purpose, or, if none is designated, at the attorney's last known address; service by mail shall be complete upon mailing...

As indicated by the annexed affidavit of service, Defendants' motion was served by mail on Wednesday, November 21, 2012. Accordingly, Defendants complied with the requirements of CPLR §3212(a) as the motion was made "no later than one hundred twenty days after the filing of the note of issue..." (*People v. Price,* 56 AD3d 366, 868 NYS2d 631 [1st Dept 2008]).

In support of its motion, Defendants provide: the pleadings, Budner's Affidavit, the Affirmation of Defendants' Attorney Andrew Feldman, partial deposition testimony of both Plaintiff and Budner, Plaintiff's 2003 tax return, and an IRS notice indicating that Plaintiff's taxes were to be adjusted due to his withdrawal from his retirement account in 2003.

In opposition, Plaintiff attaches: the Affirmation of Anthony A. Lenza, attorney for Plaintiff, the notice of filing the Note of Issue on July 25, 2012, the New York Lawyers Diary and Manual, Plaintiff's Affidavit, authorizations for Merrill Lynch and Fidelity Services Company/National Financial Services/Fidelity Investments, this Court's prior compliance conference orders, Budner's deposition testimony, and Plaintiff's 2003 tax return.

In support of Defendants' motion for summary judgment, Budner asserts that he did not provide Plaintiff with any tax advice regarding withdrawing from his retirement account prior to Plaintiff's September 2003 withdrawal from his retirement account. He states in his deposition,

> Q. Do your recall having a conversation with Mr. Pessin in 2003 about the ramifications of taking withdrawals from any retirement accounts.

A. No.

He indicates that *after* plaintiff's September 2003 withdrawal, and after he filed Plaintiff's tax returns in April 2004,

> A. He came to me with the form that said he took out X amount of dollars and he said, "What can we do with it?" I said, "You know you're going to be subject to a ten percent penalty, but you're still going to have to pay the tax because no matter what you do, when you take out from an IRA, you still have to pay the tax.
>
> Q. What was his response?
>
> A. He said to me, "Well, I don't care because I've got to take the money out," or, "I took the money out."

Budner asserts that when they did discuss the withdrawal, he properly advised Plaintiff of all tax consequences. He urges, "at no time did I ever advise Plaintiff that his withdrawal from his retirement accounts did not result in tax liability by using the proceeds to purchase a home." Budner's affidavit indicates that Plaintiff knew of the tax consequences, but had no choice but to withdraw money from his retirement account, as the rent stabilized apartment he was living in was increased to market value, and he needed the money to purchase a new place to live.

In opposition, Plaintiff provides an affidavit which states in July and August 2003, he had multiple phone conversations with Budner, regarding, "whether withdrawals from his retirement accounts to fund approximately 10% of a home purchase to avoid PMI would be without tax consequences." He alleges at his deposition that Budner told him "for the first time homeowner, the first time buyer, that all penalties would be waived and that there would be no charges when I withdrew [from the retirement account]." Plaintiff contends that had he not been given such advice, he never would have taken out funds from his retirement accounts. His affidavit states,

> there was no urgency to avoid paying the PMI; we had other options for the down payment to avoid paying the PMI, or, if necessary, we could have just elected to put down 10% on the purchase and pay the PMI.

> Either alternative would not have resulted in the severe tax obligation, interest and penalties that the option the defendant recommended ultimately did.

Plaintiff asserts, "I did not need to withdraw these monies from my retirement accounts to close on my house and could have obtained these monies needed from other sources and/or personal loans." He alleges that it was not even essential that he bought a house at the time, since he had an alternate place to stay.

Plaintiff's affidavit states,

> [i]f Mr. Budner had informed me that withdrawing monies from my retirement accounts to purchase a home would have caused me to pay taxes on the withdrawal and a penalty due to my then age of 58, I would never have made those withdrawals and would have avoided the tax and penalty consequences.

In preparation of the tax filing for the 2003 tax year, Plaintiff claims he provided documents to Defendants and Defendants prepared the filings, which were presented to Plaintiff for signature in April 2004. The form filed reported an early distribution in the amount of $55,628 with a code "09" indicating an exception designation, and on the line providing for the additional tax of 10%, there is a zero entered in light of the exception. The IRS sent plaintiff a notification in September 2005 stating that additional income tax was due on the early distribution. The IRS advised Plaintiff that the 2003 tax return, which was prepared by Budner, had underreported his retirement account withdrawals and therefore failed to document $55,628 as income. Plaintiff states Budner advised him that he would contact the IRS to resolve the issue.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are

not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-52 [1st Dept. 1989]). "[I]f it is reasonable to disagree about the material facts or about what may be inferred from undisputed facts, summary judgment may not be granted. Moreover, in deciding whether there is a material triable issue of fact, 'the facts must be viewed in the light most favorable to the nonmoving party'" (*Ferluckaj v. Goldman Sachs & Co.*, 2009 NY Slip Op 2483 [2009]).

1. Statute of Limitations

Defendants contend that Plaintiff's cause of action based on Defendants' alleged negligent advice in 2003 is barred by the applicable statute of limitations.

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]*). For statute of limitations purposes, the claim against the accountant for the tax filing accrues upon the client's receipt of the accountant's work product, not when tax deficiency is assessed. (*Ackerman v. Price Waterhouse*, 84 NY2d 535, 620 NYS2d 318, 644 NE2d 1009 [1994]).

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, *quoting McCoy v. Feinman*, 99 N.Y. 2d 295, 306 (2002). 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, 347–348 (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.

Defendants allege that the portion of the Complaint which seeks damages based upon alleged misrepresentations in 2003 and the ultimate withdrawal in 2003 are barred by the applicable statute of limitations. Plaintiff opposes, and alleges either that the cause of action did not accrue until April 2004 when the tax return was filed and alternatively, that the continuous representation doctrine applies to toll the statute of limitations. Plaintiff states, "[n]ot only did defendants prepare plaintiff's tax return in April 2004 which incorporated their advice to plaintiff from 2003 (i.e. no tax or penalty implication from withdrawals), but defendants were also engaged to resolve the IRS notice in September [2005] that objected to defendants' preparation of the 2003 tax return." Defendants provide a conflicting account concerning the parties' relationship. Based upon a review of the record, as there is a question of fact as to the issue of continuous representation, Defendants' motion for summary judgment based on its statute of limitations defense is therefore denied.

B. Individual Liability

Budner asserts that he should not have been sued individually, as all services were provided by BAI, a corporation. "A corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of his official duties and regardless of whether the corporate veil is pierced." (*American Express Travel Related Services Company, Inc. v. North Atlantic Resources, Inc.*, 261 AD2d 310, 691 NYS3d 403 [1st Dept 1999]). As Plaintiff is claiming that Budner participated in the commission of a tort, providing negligent tax advice and preparing improper tax filings, he may be properly named as a party.

C. Professional Malpractice Claim

Defendants contend that Plaintiff's cause of action based upon Defendants' alleged negligent preparation of Plaintiff's 2003 tax returns is barred because Defendants prepared the tax returns "based on documents allegedly sent to Defendants in 2004 that were allegedly used to prepare the tax return."

With regard to the professional malpractice claim, Defendants owe Plaintiff a

duty of appropriate professional care as his accountant. *(Caprer v. Nussbaum,* 36 AD3d 176 [2nd Dept 2006]). In a claim for professional malpractice, the accountant must have committed a negligent act which was the proximate cause of the damage claimed. (*Craig v. Anyon*, 212 App. Div. 55, 208 NYS2 259 [1st Dept 1925]) The plaintiff must establish beyond the point of speculation and conjecture, a causal connection between its losses and the defendant's actions. (*Herbert H. Post & Co. V. Sidney Bitterman, Inc.* [1st Dept 1996]). Therefore, the plaintiff must show that "but for" the accountant's alleged malpractice, plaintiff would not have sustained some actual ascertainable damages. *Id.* Comparative negligence is a defense only when "it has contributed to the accountant's failure to perform his contract and to report the truth." *National Surety Corp. v. Lybrand*, 256 A,D, 226, 236 [1st Dept 1939]).

Defendants contend, "Plaintiff was cognizant of the tax ramifications of his actions and has attempted to shield his knowledge and liability by willfully failing to provide the requested documents for the action." Defendants further contend that "any and all tax returns prepared and signed by Plaintiff were made at the insistence of Plaintiff, with the knowledge of the potential exposure." However, Plaintiff testified and in his opposition to Defendants' motion, submits an affidavit, providing a conflicting account of the facts. Accordingly, as there are issues of fact concerning the preparation of the 2003 tax return, summary judgment is denied.

Moreover, Defendants "assume" that Plaintiff is seeking recovery of penalties assessed as against him. However, Defendants contend that *assuming arguendo* that they were "somehow negligent despite complying with Plaintiff's instructions any penalties for negligence were abated." Defendants attach a transcript provided by IRS, which "indicates a - $4,807 which is the cancellation of the penalty originally assessed against Plaintiff." Defendants also state that while New York State separately assessed Plaintiff for the income tax by Notice of Additional Tax Due dated January 7, 2008, NYS, by its original notice, never penalized Plaintiff. However, Defendants acknowledge that allegations in Plaintiff's cause of action concerning the 2003 tax return also concern liability for interest, which constitutes some actual ascertainable damages.

Wherefore, it is hereby,

ORDERED that Defendants' motion for summary judgment is denied.

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

DATED: 3/14/13

EILEEN A. RAKOWER, J.S.C.