

Ghiz v Schreck & Co.
2013 NY Slip Op 31869(U)
August 9, 2013
Sup Ct, New York County
Docket Number: 158805/2012
Judge: Eileen A. Rakower
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 158805/2012
GHIZ, DDS, RONALD
vs
SCHRECK AND COMPANY, CPA'S,
Sequence Number : 001
DISMISS ACTION

INDEX NO. 5
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) 1,2,3,4
Answering Affidavits — Exhibits No(s) 5,6
Replying Affidavits No(s) 7

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: 8/9/13

[Signature], 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
RONALD GHIZ, D.D.S. and R.S.G. DENTAL
HEALTHCARE, P.C.,

Index No.:158805/2012

Plaintiff,

- against -

Decision and Order

Motion Seq: ~~002~~
001

SCHRECK AND COMPANY, CPA'S, P.C.,
CAROLINA VALLARIO, ANTHONY VALLARIO
and ELVIRA SCARNATI,

Defendants.

-----X

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

Presently before the Court is defendant Schreck and Company, CPA's, P.C. ("Schreck") motion for an Order, pursuant to CPLR §§3211(a)(5) and (a)(7), to dismiss Plaintiffs' Complaint, and for summary judgment pursuant to CPLR §3211(c). In support, Schreck submits the affidavit of Marc E. Schreck, President of Schreck. Plaintiffs oppose.

The Complaint alleges that for many years prior to, and after 2007, Schreck was engaged by Plaintiffs as certified public accountants and auditors. Schreck "undertook to examine, verify and advise with respect to the accounting and bookkeeping methods and records of plaintiffs in accordance with generally accepted auditing and accounting standards" and had "full and unfettered discretion to perform whatever services it deemed necessary for plaintiffs."

The Complaint alleges that "[n]o written scope of work agreement or other written contract as to Schreck's services for plaintiffs was ever created or executed by plaintiffs or Schreck" and that Schreck "verbally represented to plaintiffs that they would do everything that plaintiffs needed accounting-wise and that plaintiff just

needed to trust them, to sit back and relax knowing Schreck would take care of everything.”

According to the Complaint, Schreck balanced Plaintiffs’ check registers, reconciled Plaintiffs’ bank statements, prepared and filed Plaintiffs’ tax returns, and represented Plaintiffs regarding tax issues, reviewed and filed Plaintiffs’ quarterly payroll returns, drafted Plaintiffs’ profit and loss statements, reviewed and verified Plaintiffs’ payroll expenses, and prepared and certified the accuracy and fairness of the Plaintiffs’ consolidated financial statements. Plaintiffs allege that they “wholly and completely relied upon Schreck’s professional judgment, acumen and integrity in the matters Schreck undertook” and that Schreck was “fully aware...that plaintiffs would wholly and exclusively rely upon Schreck’s services, professional acumen and experience...”

The Complaint alleges that between approximately March 2007 until August 2009, defendant Carolina Vallario (“Vallario”) was employed by Plaintiffs to run their dental offices. Vallario’s tasks included drafting but not signing checks, paying bills, balancing banking accounts and recording various financial transactions in Plaintiffs’ books. The Complaint alleges that Vallario began misappropriating Plaintiffs’ funds at some point after Plaintiffs retained Schreck as their accountant. The Complaint alleges that Vallario was convicted on June 9, 2011 of Grand Larceny of the Third Degree for the theft/embezzlement of over \$400,000 from Plaintiffs during the course of her employment.

The Complaint alleges that at some point in time Schreck employees discovered the embezzlement, “but failed to disclose the nature of said scheme to plaintiffs” and that this failure “increased the damages” that Plaintiffs suffered. The Complaint further alleges that, in connection with Schreck’s alleged discovery of the embezzlement and subsequent failure to notify Plaintiffs, Schreck prepared profit and loss statements, which were “false and/or knowingly based on false information to deceive plaintiffs and hide the fact that plaintiffs’ funds had been looted.”

In their Complaint, Plaintiffs further allege that Schreck has “continuously represented plaintiffs regarding claims by various government bodies as to said tax penalties and liabilities up and until September 2012 as well as rendered its usual and customary services to plaintiffs and attempted to restate and correct the mistakes made during the period of defendant Schreck’s malfeasance.”

As against Defendant Schreck, the Complaint asserts a cause of action for accounting malpractice (first cause of action), punitive damages (second cause of action), breach of fiduciary duty (third cause of action), breach of contract (fourth cause of action), and unjust enrichment (fifth cause of action).

Defendant Schreck now moves, pursuant to CPLR §3211(a)(5) and (a)(7), to dismiss all five causes of action on the grounds that the first, third, fourth and fifth causes of action are barred by the applicable statute of limitations, and that Plaintiffs have failed to state of cause of action for the second, third, fourth, and fifth causes of action. Schreck additionally moves pursuant to CPLR §3211© to treat its motion to dismiss as a motion for summary judgment.

CPLR §3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(5) the cause of action may not be maintained because of ... statute of limitations . . . ; [and]

(7) the pleading fails to state a cause of action.

On a CPLR §3211(a)(5) motion to dismiss based on the running of the statute of limitations, the defendant has the initial burden of proving that the time to commence the claim has expired and the plaintiff's response "must be given their most favorable intendment." (*Benn v. Benn*, 82 A.D.3d 548 [1st Dept 2011]).

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (see CPLR §3211[a][7]).

Schreck contends that Plaintiffs' first cause of action against Schreck based on accounting malpractice 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]*).

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.

Schreck contends that Plaintiffs’ accounting malpractice claim is time barred because Plaintiffs filed the Complaint in the present action on December 12, 2012, more than three years after the embezzlement was allegedly discovered on August 27, 2009 and argues that it did not continue to represent Plaintiffs specifically with respect to the embezzlement because it “could not have done anything in any ongoing capacity to ‘correct’ or ‘mitigate’ the embezzlement.” However, the Complaint alleges that “Defendant Schreck continuously represented plaintiffs regarding claims by various government bodies as to said tax penalties and liabilities up and until September 2012 as well as rendered its usual and customary services to plaintiffs and attempted to restate and correct the mistakes made during the period of defendant Schreck’s malfeasance.”

Schreck seeks to dismiss Plaintiffs’ second cause of action which seeks punitive damages on the basis that it is improperly plead as a separate cause of action rather than as the relief to Plaintiffs’ other causes of action and on the basis that Plaintiffs have failed “to set forth facts substantiating malice or moral culpability or evil motive on the part of Schreck CPA” with respect to each of the other four causes of action. Plaintiffs oppose and argue that in light of the allegations in the Complaint that Schreck knowingly hid the existence of the embezzlement from Plaintiffs,

dismissal is inappropriate at this stage in litigation and discovery is required to determine the issues of fact regarding whether Schreck's actions rose to the level necessary to obtain punitive damages. Here, accepting the allegations in the Complaint as true, Plaintiffs have plead facts sufficient to sustain a claim for punitive damages.

Schreck argues that Plaintiffs' third cause of action for breach of fiduciary duty should be dismissed pursuant to both CPLR §3211(a)(7) and (a)(5). Schreck argues that Plaintiffs failed to plead any facts from which it can be inferred that a fiduciary relationship existed, and therefore that Schreck breached any fiduciary duty owed to Plaintiffs. Schreck additionally argues that this claim is time-barred by the applicable three-year statute of limitations period under CPLR §214(6).

A fiduciary relationship "exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation" (*EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19, 832 N.E.2d 26, 31 (2005), quoting *Restatement [Second] of Torts* § 874, Comment a). "Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions." (*Id.*). "As a general rule, accountants are not fiduciaries to their clients, except where the accountants are directly involved in managing the client's investments. However, an action can be brought against an accountant for intentional misrepresentation, or for grossly negligent or reckless conduct which is the functional equivalent." *Amken Orthopedics, Inc. v Chesin & Company*, 2008 N.Y. Misc. LEXIS 7679, *9 (N.Y. Misc. 2008)

Schreck moves to dismiss Plaintiffs' fourth cause of action for breach of contract pursuant to both CPLR §§3211(a)(7) and (a)(5). Schreck contends that Plaintiffs' fourth cause of action for breach of contract, in which Plaintiffs allege that Schreck "did not deliver the services contracted for in a professional and proper manner," should be dismissed because it is duplicative of Plaintiffs' first cause of action against Schreck for accounting malpractice, in which Plaintiffs allege that Schreck "failed to fully and properly perform its duties as plaintiffs certified public accountants." Schreck additionally argues that Plaintiffs have failed to identify a contractual agreement between itself and Plaintiffs, and that even if a contractual agreement exists, that Plaintiffs have failed to specifically address which provision of the contract Schreck allegedly breached.

In their opposition, Plaintiffs appear to concede that their fourth cause of action is in fact duplicative of the accounting malpractice claim. In their memorandum of law in opposition to Schreck's motion to dismiss, Plaintiffs argue that "even though [the breach of contract claim] is deemed merged with plaintiffs' accounting malpractice claim sounding in tort," their breach of contract claim should not be dismissed because it serves as an alternative to Plaintiffs' fifth cause of action against Schreck for unjust enrichment.

Here, Schreck's fourth cause of action for breach of contract is duplicative of Plaintiffs' first cause of action against Schreck for accounting malpractice, in which Plaintiffs allege that Schreck "failed to fully and properly perform its duties as plaintiffs certified public accountants." Additionally, Plaintiffs have failed to identify a contractual agreement between itself and Plaintiffs, or any provision of any purported contract Schreck allegedly breached. Schreck's fourth claim for breach of contract against Schreck is therefore dismissed.

Defendant Schreck moves to dismiss Plaintiffs' fifth cause of action for unjust enrichment pursuant to CPLR §§3211(a)(5) and (a)(7).

"[T]o prevail on a claim of unjust enrichment, "a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered'" (*Cruz v. McAneney*, 31 A.D.3d 54, 59, 816 N.Y.S.2d 486 [2006]).

Here, the Complaint alleges that "Plaintiffs paid defendant Schreck a fair consideration for the promised services as alleged above but that defendant Schreck did not deliver said services or delivered them in such a manner that they did not earn the consideration paid by plaintiffs" and that as a result, Schreck was unjustly enriched. Here, accepting the allegations as true, the four corners of the Complaint state a cause of action for unjust enrichment. Furthermore, the cause of action is not time-barred under the continuous representation doctrine.

Schreck further argues that plaintiff Ronald Ghiz, D.D.S., lacks standing to bring any of the five causes of action against Schreck, and that only plaintiff R.S.G. Dental Healthcare, P.C. has standing. Schreck claims that the corporation, not Mr. Ghiz personally, was allegedly harmed by Schreck's actions, and therefore as a shareholder, Mr. Ghiz is only allowed to bring a derivative action against Schreck and not an individual suit. Ghiz is the sole member of R.S.G. Dental Healthcare, P.C.

In determining whether a claim is direct or derivative, “a court should consider “(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually).” *Yudell v. Gilbert*, 99 A.D.3d 108, 110, 949 N.Y.S.2d 380 (2012).

“Generally corporations have an existence separate and distinct from that of their shareholders and an individual shareholder cannot secure a personal recovery for an alleged wrong done to a corporation. The fact that an individual closely affiliated with a corporation (for example a principal shareholder, or even a sole shareholder), is incidentally injured by an injury to the corporation does not confer on the injured individual standing to sue on the basis of either that indirect injury or the direct injury to the corporation.” *New Castle Siding Co., Inc. v. Wolfson*, 97 A.D. 2d 501, 502 [2d Dept 1983], *aff'd* 63 N.Y.2d 782 [1984]. However, “a shareholder can pursue a direct claim against a third party where ‘it appears that the injury to the shareholder resulted from the violation of a duty owing to the shareholder from the wrongdoer, having its origin in circumstances independent of and extrinsic to the corporate entity.’” *MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 A.D.3d 836, 839 (1st Dep’t 2011). Here, based on the allegations of the Complaint, Ghiz lacks standing to sue personally for the alleged injury to defendant R.S.G. Dental as there are no allegations of any duty arising to Ghiz independent and extrinsic to R.S.G. Dental Healthcare, D.D.S., the corporate entity.

Wherefore, it is hereby,

ORDERED that defendant Schreck and Company, CPA’s, motion is granted only to the extent that the third cause of action for breach of fiduciary duty and fourth cause of action for breach of contract are dismissed and the claims asserted by Ronald Ghiz, D.D.S., in his individual capacity against said Defendant are dismissed.

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

DATED: 8/9/13


EILEEN A. RAKOWER, J.S.C.