Knoll v Respler
2014 NY Slip Op 31599(U)
June 20, 2014
Sup Ct, New York County
Docket Number: 653609/13
Judge: Peter H. Moulton
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Supreme Court: New York County
Part 57

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CHARLES E. KNOLL,

Plaintiff,

-against-

Index No. 653609/13

MARK RESPLER, STEPHEN TEITELBAUM, AND ELM UROLOGY ASSOCIATES, P.C.

Defendants.

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Peter H. Moulton, Justice

Plaintiff brings this action against his former colleagues Mark Respler, MD, and Stephan Teitelbaum, MD, and the company they formed together, Elm Urology Associates, PC ("Elm Urology"). Plaintiff and the individual defendants were shareholders in Elm Urology from 1992 to 2005. According to plaintiff during the period 2001-04, Respler and Teitelbaum failed to pay the practice's payroll taxes, and diverted to themselves monies withheld for taxes from Elm Urology's employees' paychecks.

Defendants bring this pre-answer motion to dismiss the complaint on statute of limitations grounds.

BACKGROUND

Plaintiff is a urologist. In 1992 he was in practice with nonparty Eugene Wexler when the two were approached by defendants

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Respler and Teitelbaum to form a practice. The parties and Wexler formed Elm Urology. Each was a 25% shareholder. Wexler left the practice in 2001 and the remaining three doctors continued as equal shareholders.

According to the complaint Teitelbaum was responsible for preparing and filing Elm Urology's tax returns, and he dealt with the practice's accountant. Plaintiff avers that he did not get involved in the preparation and filing of Elm Urology's tax returns.

Plaintiff claims that from 1993 to 2001 Elm Urology withheld a portion of each employee's and each shareholder's salary for the payment of federal, state, and city payroll taxes. Teitelbaum allegedly saw to the filing of quarterly tax returns and the payment of these withholding fees.

The complaint avers that for the period July 1, 2001 through June 30, 2004, Teitelbaum failed to file quarterly tax returns, and failed to remit the withheld funds to the relevant taxing authorities. The complaint states that "upon information and belief" the withheld funds were instead diverted by Teitelbaum and Respler, to pay towards their own personal debts.

The complaint alleges that plaintiff learned about this failure to pay taxes in September 2004. Indeed, the complaint states that at that time both Teitelbaum and Respler "openly acknowledged" to plaintiff that they had distributed the withheld

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funds to themselves. The complaint also states that Teitelbaum and Respler assured plaintiff that "their" accountant (it is unclear from the complaint if this person was also Elm Urology's accountant) had "reached an agreement" with the IRS with respect to the outstanding payroll taxes. The complaint appears to assert that Teitelbaum and Respler were to be responsible for payment of these back taxes. The complaint asserts that in late 2004 and early 2005 both Teitelbaum and Respler told plaintiff that they were paying down the tax liability pursuant to their agreement with the taxing authorities. According to plaintiff the individual defendants in fact defaulted on their agreement and did not make the required payments.

The complaint alleges that at some point after becoming aware of these improprieties plaintiff notified Teitelbaum that he was leaving Elm Urology. He continued to provide care to Elm Urology's patients until June 30, 2005. Paragraph 46 of the complaint alleges:

> Respler and Teitelbaum agreed with plaintiff that upon his departure from the practice, all debts and other liabilities associated with Elm Urology would be the sole responsibility of the Defendants and not Plaintiff.

The complaint does not specify if this alleged agreement was written or oral.

In a letter dated January 25, 2006, the Internal Revenue Service informed plaintiff that it proposed to assess Trust Fund

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Recovery Penalties against him for the delinquent taxes owed by Elm Urology. According to the complaint, the IRS assessed the penalty on February 19, 2007. On March 20008, plaintiff made a payment of $15,241.90 to the IRS, and sought tax refunds for the period April 1, 2002 through June 30, 2004. The refund request was denied, apparently because the withholding funds for that period were never paid to the IRS and therefore constituted new untaxed income. Plaintiff appealed this determination, but the appeal was denied.

On January 31, 2011, the IRS levied several of plaintiff's bank accounts. In all, it seized $369,515. It also garnished funds from refunds allegedly owed plaintiff, in the amount of approximately $11,000.

In their pre-answer motion to dismiss defendants dispute the complaint's account of the transactions summarized above. However, the motion is directed solely to the legal questions of whether plaintiff's claims are time-barred or fail to state a claim.

DISCUSSION

Defendants argue that the underlying fraud that gives rise to plaintiff's four causes of action was known to plaintiff no later than September 2004, when the complaint avers that Teitelbaum and Respler admitted to plaintiff that they had failed to pay payroll taxes. Defendants go on to argue that the complaint provides other points where the alleged injury should have been known to plaintiff, i.e. 1) in January 2006, the IRS wrote to plaintiff telling him that it proposed to assess penalties against him, and 2) in February 2007, the IRS assessed a fine against plaintiff. Both of these dates fell more than six years prior to plaintiff's filing of the instant complaint. The six year limitations period governs fraud claims pursuant to CPLR 213(8).

Plaintiff argues that the fraud claim, his fourth cause of action, is not stale, because he did not suffer an injury until money was actually seized from his bank accounts. At the most, plaintiff argues, the first potential injury was when he paid $15,241.90 to the IRS in March 2008, allegedly to have standing to challenge the Trust Fund penalty levied by the IRS.

The elements of fraud are misrepresentation of a material fact, knowledge by the party making the misrepresentation that it was false when made, justifiable reliance on the statement, and damages. (E.g. Swersky v Dreyer & Traub, 219 AD2d 321, 326.) Plaintiff is correct that damages are an element of the claim, and that he must have suffered some damages in order for the claim to be ripe. (See House of Spices v SMJ Services, 103 AD3d 848.) Plaintiff asserts that it was not clear that he would have to actually pay anything when the IRS first notified him in January 2006 of the proposed penalty. Plaintiff argues that he did not suffer any damages until he was forced to pay money for the tax liability.

Plaintiff's argument is not persuasive. Damages from fraud do not require the actual loss of funds as a result of the fraud. (See Kottler v Deutsche Bank AG, 607 F Supp2d 447 [applying New York Law].) Once Elm Urology's tax delinquency was known to the IRS, the shareholders were potentially exposed to liability. Certainly, this was known to plaintiff no later than January 25, 2006, when the Internal Revenue Service informed plaintiff by letter that it proposed to assess Trust Fund Recovery Penalties against him for the delinquent taxes owed by Elm Urology. Had he attempted to sell his practice at this point, or seek financing or a letter of credit, this would be a fact he would have to disclose, and the fact that he was under an investigation could very likely have adverse economic consequences for him. It is not necessary for a potential tax liability to be quantifiable in order for it to cause damages. (Carbon Capital Management LLC v American Express Co. 88 AD3d 933, 939.) [injury occurred when plaintiff entered into a contract that resulted in adverse tax consequences, not upon the imposition of fines by IRS].) For these reasons, the fourth cause of action is dismissed as time-barred.

For similar reasons, the third cause of action, sounding in breach of fiduciary duty, is also dismissed as time-barred. The elements of a breach of fiduciary duty are: 1) the existence of a fiduciary relationship; 2) misconduct by defendant, and 3) damages. (Rut v Young Adult Institute, Inc., 74 AD3d 776.) New York does not have a single limitations period for fraud. The choice of the applicable limitations period depends on the remedy sought by plaintiff. Where the remedy is purely monetary in nature, courts construe the suit as alleging injury to property and the three-year limitations period of CPLR 214(4) applies. Where the relief sought is equitable in nature a six-year period applies. (IDT Corp. v Morgan Stanley Dean Witter & Co., 12 NY3d 132.)

Here again, plaintiff incurred damages, at the latest, on January 25, 2006. Accordingly, the breach of fiduciary duty claim is time-barred whether a six-year or a three-year limitations period applies. The third cause of action is dismissed.

Defendants contend in their motion papers that plaintiff's first two causes of action, for contribution and indemnification, are attempts to avoid the statute of limitations by re-casting fraud claims as some other cause of action.

In this case, plaintiff has articulated, barely, a cause of action for common law indemnification. Common law indemnity is an equitable concept that permits the shifting of loss in order to avoid unjust enrichment of one party at the expense of another. It is available where one person is held responsible "solely by operation of law because of his relation to the actual wrongdoer." (McCarthy v Turner Constr. Inc., 17 NY3d 369, 375.) "Since the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows

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that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine." (Trump Vil. Section 3 v New York State Housing Finance Agency, 307 AD2d 891, 895 [quoting Trustees of Columbia Univ. v Mitchell/Giurgola Assoc., 109 AD2d 449, 453], lv denied 1 NY3d 504.)

Here plaintiff has alleged an agreement or agreements with the defendants that would relieve him of responsibilities for Elm Urology's tax liabilities. Such agreements, it could be argued, might indemnify plaintiff concerning any liabilities to the federal and state taxing authorities. It seems certain that the IRS and the New York State Tax Department would not care about such an agreement, and would consider plaintiff per se liable for unpaid taxes irrespective of any agreement with his fellow shareholders. The parties have not briefed the applicable law on this question and it is unclear how the law concerning the tax liabilities of Professional Corporations might intersect with plaintiff's alleged agreements with Respler and Teitelbaum. However, on a motion to dismiss, it is sufficient that the complaint's allegations of the shareholders' internal agreements might give rise to a legally cognizable indemnification claim.

Unlike the fraud and breach of fiduciary duty claims, the indemnification claim is not time barred. The applicable limitations period is six years and accrues upon payment of the sum for which the party seeks indemnification. (See Walker v Trustees of the University of Pennsylvania, 275 AD2d 266.) The plaintiff's cause of action accrues each time a payment is made that is subject to common law indemnification. (See State of New York v Speonk Fuel, 307 AD2d 59, 62, aff'd 3 NY3d 720.) Accordingly, the complaint states a timely common law indemnification claim arising from the seizure of plaintiff's bank accounts and the garnishment of his refunds.

Plaintiff's first cause of action is for contribution. The claim does not state any underlying tort liability that could give rise to a claim for contribution. (CPLR 1401; see Genesee Valley Club v Walter Kidde & Company, Inc. 177 AD2d 1051.) Here, plaintiff's exposure, and resulting claim for contribution, appears to arise either from contract, i.e. from the defendants' alleged agreement to hold plaintiff harmless from the tax liabilities, or from statute, i.e. from tax laws that impose liabilities upon the shareholders of a professional corporation. Neither source of liability is a form of tort liability. Accordingly, the first cause of action is dismissed.

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CONCLUSION

For the reasons stated, defendants' motion to dismiss is granted with respect to the first, third and fourth causes of action. In all other respects the motion is denied. This constitutes the decision and order of the court.

DATED: June 20, 2014

J.S.C.

HON. PETER H. MOULTON
SUPREME COURT JUSTICE