Millman v Blatt & Dauman, LLP
2018 NY Slip Op 30016(U)
January 3, 2018
Supreme Court, New York County
Docket Number: 652002/15
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

IRA MILLMAN

INDEX NO. 652002/15

MOT. DATE

- v -

MOT. SEQ. NO. 002 AND 003

BLATT & DAUMAN, LLP and MORTON E. MARVIN

The following papers were read on this motion to/for summary judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)._____

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)._____

Replying Affidavits NYSCEF DOC No(s)._____

This action arises from alleged negligent accounting and attorney malpractice. Defendants are Morton E. Marvin, who was plaintiff's attorney in an underlying divorce proceeding, and codefendant Blatt & Dauman, LLP ("B&D"), plaintiff's accountant since 1979. In motion sequence number 002, Marvin moves for summary judgment dismissing plaintiff's claims as well as the crossclaims asserted by B&D. In motion sequence number 003, defendant B&D moves for summary judgment dismissing plaintiff's complaint. Plaintiff opposes both motions. Issue has been joined and the motions were timely brought after note of issue was filed. Therefore, summary judgment relief is available. The motions are decided as follows.

The following facts are alleged in the verified complaint. During all relevant times, plaintiff was engaged in a divorce from his wife, non-party Gladys Millman. Plaintiff claims that B&D provided negligent tax advice insofar as it wrongly advised both plaintiff and his wife that their taxes would be less if they filed their taxes for the year 2013 jointly. Plaintiff admits that B&D later corrected this advice, acknowledging that "a separate tax filing would achieve greater savings to plaintiff."

Plaintiff claims that Marvin, his lawyer in the underlying divorce proceeding, knew but failed to inform him that B&D was giving tax advice to both him and his wife during the divorce proceedings, and the resultant conflict of interest. Further, plaintiff claims that Marvin negligently negotiated a provision into the separation agreement between plaintiff and his wife requiring the parties to file joint tax return, "without protecting plaintiff's interest by permitting the parties to revisit that issue depending on how their future estimated returns" (sic).

B&D maintains that its first tax projection analysis was preliminary and based upon limited information. Plaintiff admitted at his deposition that B&D did not have all information necessary to perform a full analysis of the tax return. B&D argues that its preliminary tax assessment was proper and not negligent. This preliminary tax assessment was advanced in an email from Joel Dauman to both plaintiff and

Dated: 1/3/18

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☒ GRANTED (002) ☒ DENIED (003) ☐ GRANTED IN PART ☐ OTHER

3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

his wife dated January 25, 2014, wherein he writes:

> Good morning Gladys and Ira,
>
> We completed our review of filing options for 2013 and here is what we found.
>
> The "combined" federal and state taxes would be $33,000 less if you filed jointly. If you file apart, Gladys would incur most of the extra tax burden and Ira would sustain a lower tax due to the separate maintenance deduction. The "math" clearly is in favor of filing jointly although your wishes may be otherwise. If you chose to file jointly, we can coordinate the date and filing for you as in the past. If you file apart, I can complete your return Gladys as soon as you are ready and I can place Ira's return on extension, pending receipt of his K-1s.

On May 12, 2014, Dauman wrote another email to plaintiff, stating as follows:

> Hi Ira,
>
> Here we go:
>
> If you and Gladys file jointly, your combined federal tax would be $721,000. Your withholdings of $747,000 would result in an overpayment of $26,000.
>
> If you filed as two single individuals, and reflected the alimony of $360,000 accordingly, Ira's federal tax would be $564,000 and Gladys' would be $125,000. Ira's refund of overpaid federal taxes would be $183,000 and Gladys would owe a balance of $125,000, for a net overpayment of $58,000. A combined savings of $32,000 ($58,000-$26,000) would be achieved by filing as single taxpayers.

B&D has also provided the affidavit of Andrew P. Ross, a certified public accountant. Based upon his review of relevant records, Ross opines that "plaintiff had provided B&D with limited information for a tax projection, and B&D amended its tax projection when B&D received the additional, necessary information from plaintiff." Ross further claims that plaintiff and his wife voluntarily agreed to file married filing joint tax returns, and that B&D did not otherwise bind or force plaintiff to agree to the settlement agreement.

Further, B&D points to the testimony of plaintiff's wife, who stated that she only ever intended to file her tax returns jointly. Therefore, B&D argues that plaintiff's damages were not proximately caused by B&D's alleged negligent acts.

Marvin argues that plaintiff cannot demonstrate either a breach of the standard of care or the "but for" causation requirement of a legal malpractice claim. Marvin explains, in an affirmation, that he was not the attorney of record in the underlying divorce proceeding, but "was retained as a consultant for plaintiff." Marvin claims that "[he] was not involved with the calculation of taxes, nor did [he] assist with any tax filings." Marvin further states that on January 22, 2014, at a conference between him, plaintiff, plaintiff's wife and her attorneys, he told plaintiff that it was his belief "that it was in his interest to file taxes separately from Gladys, due to the large alimony deduction available to him." Marvin claims that plaintiff and his wife then indicated that they would discuss the tax filing status with Dauman of B&D.

Marvin has also provided the affidavit of Harold W. Haldeman, an attorney of the firm which represented plaintiff's wife in the underlying divorce proceeding. Haldeman states that he participated in the aforementioned meeting on January 22, 2014, and specifically recalls hearing Marvin advise plaintiff not to execute a joint return with his wife and that despite Marvin's advice, plaintiff agreed to file jointly.

In opposing both motions, plaintiff argues that B&D has not met its burden on this motion that it did not depart from acceptable standards of accounting practice when it failed to disclose its conflict of interest, provided conflicted advice and provided incorrect advice. Otherwise, plaintiff contends that triable issues of fact preclude both motions.

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

To recover for professional malpractice against an accountant, plaintiff must establish: (1) the accountant's negligence; (2) that the negligence was the proximate cause of the loss sustained; and (3) proof of actual damages (*see i.e. Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1 [1st Dept 2008]).

B&D's motion must be denied. B&D has not met its burden on this motion by coming forward with evidence that it failed to exercise the ordinary reasonable skill and knowledge commonly possessed by an accountant when it rendered incorrect advice in the January 24, 2014 email. Indeed, Ross' affidavit is conclusory, insofar as it merely reiterates that the original incorrect advice was based upon incomplete information without explaining what that information was and demonstrating that an ordinary accountant would have rendered the same incorrect advice based upon said information using reasonable skills and knowledge. Therefore, B&D has failed to establish that it was not negligent as a matter of law.

Further, neither B&D nor Marvin have established that their alleged negligence was not a proximate cause of plaintiff's damages as a matter of law, to the extent they claim that plaintiff's wife would not have agreed to file separately. Plaintiff's wife's testimony on this point requires a credibility determination, which is not appropriate on a motion for summary judgment, since plaintiff vehemently disputes his wife's claims and maintains that he would have filed separately but for the January 24, 2014 email. This disputed issue of fact also remains for trial.

B&D further has failed to come forward with evidence that plaintiff waived any conflict of interest B&D had in jointly advising both plaintiff and his wife and/or whether said conflict was a proximate cause of plaintiff's damages.

As for Marvin's motion, however, that motion must be granted. On a claim for legal malpractice, plaintiff must establish that Marvin "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession" and that but for Marvin's negligence, plaintiff would have avoided damages" (*Ulico Cas. Co., supra* [internal citations and quotations omitted]).

Here, Marvin has demonstrated *prima facie* that he was not negligent and that even if he was negligent in failing to negotiate the separation agreement, this negligence was not a proximate cause of

plaintiff's economic damages. Indeed, plaintiff agreed to file his taxes jointly with his wife based upon B&D's advice that it would be financially advantageous to him. Otherwise, to the extent that plaintiff claims that Marvin failed to negotiate a provision in the settlement agreement allowing the parties to revisit the tax filing status, plaintiff has failed to raise a triable issue of fact on this point that such an act was negligent, albeit even legally enforceable. Accordingly, Marvin's motion is granted, and plaintiff's claims and B&D's crossclaims against him are hereby severed and dismissed.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that motion sequence number 002 by defendant Marvin for summary judgment is granted in its entirety; and it is further

ORDERED that plaintiff's claims and all crossclaims against Marvin are hereby severed and dismissed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that motion sequence number 003 by B&D for summary judgment is denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 1/3/18
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.