

Golub v Shalik, Morris & Co., LLP

2019 NY Slip Op 33258(U)

November 1, 2019

Supreme Court, New York County

Docket Number: 158055/2017

Judge: Barbara Jaffe

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE

PART IAS MOTION 12EFM

Justice

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AARON RICHARD GOLUB, DARROW GOLUB,

Plaintiffs,

- v -

SHALIK, MORRIS & COMPANY, LLP, WIENER
FRUSHTICK & STRAUB, CERTIFIED PUBLIC
ACCOUNTANTS, P.C.,

Defendants.

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SHALIK, MORRIS & COMPANY, LLP, WIENER
FRUSHTICK & STRAUB, CERTIFIED PUBLIC
ACCOUNTANTS, P.C.,

Third-Party Plaintiffs,

-against-

KAYE SCHOLER LLP, ARNOLD & PORTER KAYE
SCHOLER LLP

Third-Party Defendants.

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INDEX NO.	<u>158055/2017</u>
MOTION DATE	_____
MOTION SEQ. NO.	<u>004</u>
DECISION + ORDER ON MOTION	

Third-Party
Index No. 595337/2019

The following e-filed documents, listed by NYSCEF document number (Motion 004) 149-156, 158-162 were read on this motion to dismiss third-party action.

By third-party summons and complaint, defendant accounting firms Shalik Morris (SM) and Weiner Frushtick & Straub, Certified Public Accountants, PC (WFS) seek contribution from third-party defendant law firms Kaye Scholer (KS) and Arnold & Porter (together, movants).

By notice of motion, movants move pursuant to CPLR 3211(a)(1) and (7) an order dismissing the third-party complaint. Third-party plaintiffs oppose.

I. PERTINENT BACKGROUND

A. First amended complaint (NYSCEF 151)

In his first amended complaint, plaintiff advances two causes of action against defendants (third-party plaintiffs) for professional malpractice. In the first cause of action, plaintiff alleges that third-party defendants breached their duty to represent him with the reasonable skill, care, and diligence as members of the accounting profession commonly possess and exercise by overreporting the value of his residential property in a gift tax return for tax year 2012 it prepared and filed (2012 Form 709), falsely reporting in that return that the gift had been given to his son instead of the trust, and failing to file a Form 709 for tax year 2014, the year the trust had terminated. In the second cause of action, plaintiff alleges that WFS breached its duties to him by failing to create a second profit sharing plan for his law practice.

As a direct consequence of third-party plaintiffs' acts, omissions, professional malpractice and/or incompetence, plaintiff alleges, he incurred significant legal fees to correct the errors in the 2012 Form 709, although the corrections did not reverse the loss of his generation skipping tax exemption caused by third-party plaintiffs. Plaintiff thus seeks as against third-party plaintiffs more than \$14 million in monetary damages, the precise amount to be proven at trial, with appropriate legal interest plus all consequential and incidental damages proximately related thereto. As against WFS, he seeks \$150,000, the precise amount to be proven at trial, with appropriate legal interest plus all consequential and incidental damages proximately related thereto. (NYSCEF 151).

By decision and order dated September 21, 2018, third-party plaintiffs' motion to dismiss plaintiff's first amended complaint was granted to the extent of dismissing the first cause of action as it related to plaintiff's son, and the second cause of action against WFS. (NYSCEF 70).

B. Third-party complaint (NYSCEF 152)

In their third-party complaint, third-party plaintiffs allege, upon information and belief, as follows:

On KS's advice, plaintiff retained it to prepare a QPRT (trust), with plaintiff's son as a remainder beneficiary of the trust. On August 16, 2012, KS completed the legal work required to create the trust and facilitate the transfer to the trust of an undivided 50 percent interest in plaintiff's residential property.

On or about May 9, 2013, KS provided WFS with a copy of the deed for the property, "limited portions" of the trust instrument, and a property appraisal, all of which were required for the preparation of the 2012 Form 709. On the form, plaintiff's son is identified as the recipient of the gift, not the trust, and the value of the gift is its fair market value of \$4.5 million, based on the appraisal provided by KS to WFS. KS continued to provide legal services to plaintiff through at least September 2016, and movants represent plaintiff in his estate planning matters. KS never asked, instructed, or advised third-party plaintiffs to file a Form 709 for 2014, the year that the trust terminated.

At plaintiff's request in 2016, the KS attorney reviewed the 2012 Form 709 prepared and filed by WFS, and on May 10, 2016, she identified certain errors in it, including that the value of the property was reported as its fair market value and recommended that plaintiff obtain a discounted appraisal of the property, which she obtained on July 14, 2016. On October 26, 2016, KS prepared and filed an amended 2012 Form 709 which corrected the initial return by identifying the trust as the recipient of the gift and stating the discounted value of the gift.

Based on those allegations, third-party plaintiffs advance a cause of action for contribution, in support of which they state that given the attorney-client relationship between

KS and plaintiff, KS owed plaintiff a duty of care “in connection with the QPRT it created in 2012 and any and all Gift Tax Returns related thereto.” Thus, they continue, should it be found that WFS negligently prepared the 2012 return, then KS breached its duty to plaintiff and proximately caused him damages by failing to obtain a discounted appraisal of the property or to ensure that a discounted appraisal had been obtained before WFS filed the 2012 Form 709, by failing to provide WFS with a discounted appraisal before it filed the 2012 Form 709, and by failing to review the form before it was filed. And, if WFS and/or SM owed plaintiff a duty of care in connection with the 2014 Form 709 and that they were negligent in failing to file it, then KS again breached its duty to plaintiff and proximately caused him damages by failing to advise WFS and/or SM of the termination date of the trust and failing to ask or instruct that WFS and/or SM file a 2014 Form 709. (NYSCEF 152).

II. CONTENTIONS

A. Movants (NYSCEF 156)

Movants argue that third-party plaintiffs fail to state a cause of action for contribution as they do not allege that KS owed a duty to plaintiff with respect to the tax filings for the trust. Rather, they assert, KS was retained to perform the legal work required to create the trust, which work was completed on August 16, 2012, and that third-party plaintiffs were hired to perform the tax-related accounting work for the trust and were solely responsible for the preparation of the gift tax returns. They rely on an affidavit submitted by plaintiff in opposition to third-party plaintiffs’ motion to dismiss the complaint, wherein he describes his retention of WFS partner, accountant Steve Frushtick, who had assured him that he knew all about the accounting and tax treatment of QPRTs and performed all of the gift tax related accounting work for the trust. As the trust was to terminate in 2014, plaintiff alleges that Frushtick was obligated to prepare and file a

2014 Form 709, and that he had agreed to do so. Moreover, upon Frushtick's death, plaintiff swore, a partner at SM, with which WFS had merged in January 2015, had assured him that SM would continue the services provided by Frushtick, and it did so until plaintiff terminated SM in the middle of 2016 due to the errors and instances of professional malpractice. Moreover, he continues, WFS agreed to provide continuing accounting services in connection with the trust for tax years 2012 and 2014. (NYSCEF 153). Also submitted on the earlier motion, and on which movants also rely, is the affidavit of plaintiff's KS attorney, now deceased, who therein stated that plaintiff had advised KS that after the transfer of the property to the trust, WFS undertook the "exclusive responsibility" for preparing and filing the 2012 Form 709.

Based on the affidavits of plaintiff and his KS attorney and the first amended complaint, movants deny any role in preparing, filing, or reviewing the 2012 Form 709. Rather, they claim that KS provided third-party plaintiffs with a copy of the first property appraisal and information about the trust (NYSCEF 155), that third-party plaintiffs were retained for the purposes of the trust tax filings, that WFS had provided plaintiff with accounting services from 2005 through 2014, and that following the merger of WFS and SM in January 2015, SM was purportedly obligated to provide plaintiff with the same services. They observe that third-party plaintiffs incorrectly reported the value of the property by failing to discount it due to the non-controlling 50 percent interest that was not easily sold and use the value of the remainder interest in the property after the expiration of the trust, inaccurately reported that plaintiff's son was the recipient of the gift, erroneously applied the annual gift tax exclusion to the gift, and failed to file the 2014 Form 709 in a timely fashion. Absent any relationship or agreement with third-party plaintiffs, movants deny any duty to advise them on how to proceed or to instruct them on the need to file the returns in a timely manner or any liability to them for malpractice. Thus, they

maintain, there can be no breach and no cognizable claim for contribution.

Moreover, they argue, as plaintiff asks to be placed in the position he would have been in had third-party plaintiffs “lived up to their agreement and properly filed” his tax returns for the trust, he seeks economic damages. Thus, even had movants owed the alleged duty, third-party plaintiffs’ claim for contribution is not viable as plaintiff seeks economic damages only, even though the allegations sound in tort.

B. Third-party plaintiffs (NYSCEF 161)

Third-party plaintiffs argue that movants misrepresent their complaint, offer documents that neither constitute documentary evidence nor “utterly refute” the claim against them, and mischaracterize the law. Relying on the allegations set forth in their complaint that movants maintained an attorney-client relationship with plaintiff, third-party plaintiffs maintain that movants thus owed him a duty of care not only as to the trust it had created but also as to “any and all” related gift tax returns. They also observe that movants provided third-party plaintiffs with a copy of the deed for the property, “limited portions” of the trust instrument, and a property appraisal which were used by third-party plaintiffs to prepare and file the 2012 Form 709. If, third-party plaintiffs assert, the 2012 Form 709 is proven to have been negligently prepared, then movants breached their duty to plaintiff who failed to obtain a discounted appraisal of the property before the return was filed. They also allege that movants neglected to ensure that plaintiff had obtained a discounted appraisal and that they failed to review the 2012 return before it was filed.

Third-party plaintiffs object to movants’ reliance on the affirmations and affidavits as they do not constitute documentary evidence nor do they “utterly refute” their allegations. They otherwise observe that in her affirmation, plaintiff’s KS attorney did not deny any duty as to the

2012 Form 709, and they rely on plaintiff's affidavit in which he states that he had asked Frushtick to work with the KS attorney, which third-party plaintiffs construe as a direction that they together work on the 2012 Form 709, and on email communications between them and the KS attorney regarding the 2012 Form 709, wherein the lawyer stated that she would provide them with "all they need" to prepare the return, including an appraisal.

In opposition to movants' argument that plaintiff seeks damages that are contractual in nature and thus not recoverable through a claim for contribution, third-party plaintiffs maintain that as the sole cause of action brought by plaintiff is for malpractice, movants argument fails. Thus, according to third-party plaintiffs, where a plaintiff seeks to recover only economic damages, contribution may nonetheless be sought where the underlying claims arise solely from negligence. (NYSCEF 153).

C. Movants' reply (NYSCEF 162)

Movants observe that third-party plaintiffs do not deny responsibility for filing the tax returns for the trust. They argue that third-party plaintiffs conclusorily allege that KS had a duty to supervise and/or complete the tax work and that the assertion of such a duty is contradicted by plaintiff's and the KS attorney's affidavits which may be considered. Movants also assert that third-party plaintiffs misconstrue plaintiff's affidavit in claiming that it proves that KS worked with them in preparing the 2012 Form 709. On the contrary, movants contend, the affidavit reflects that KS only provided third-party plaintiffs with certain information so that they could prepare and file the returns, a conclusion supported by the email correspondence between the KS attorney and Frushtick which does not demonstrate that KS had a duty with respect to the preparation and filing of the returns. Moreover, movants argue, there is no evidence supporting the allegation that KS had a duty to obtain a discounted appraisal of the property or ensure that

plaintiff obtained before the return was filed. Nor is there evidence that it had a duty to review the 2012 Form 709 before it was filed as it was retained by plaintiff for the sole purpose of conducting legal work needed to create the trust.

Movants reiterate their argument that third-party plaintiffs' claim for contribution is not viable given plaintiff's prayer for economic damages.

III. ANALYSIS

A. CPLR 3211(a) (7)

On a motion to dismiss, a court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The determination of a motion pursuant to CPLR 3211 (a) (7) is limited to an examination of the pleadings to determine whether they state a cause of action. The facts alleged must be liberally construed, accepted as true, and interpreted in the light most favorable to the plaintiff.

While the facts alleged in the complaint must be accepted as true when deciding a CPLR 3211(a)(7) motion, the court may rely upon “affidavits submitted by the plaintiff to remedy any defects in the complaint.” (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). Affidavits submitted by a defendant are rarely sufficient on such a motion. (*See Lawrence v Miller*, 11 NY3d 588, 595 [2008], quoting *Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976] [“Affidavits submitted by a respondent will almost never warrant dismissal under CPLR 3211 *unless* they “establish conclusively that [petitioner] has no [claim or] cause of action” (emphasis in original)]).

“In determining whether a valid third-party claim for contribution exists, the critical issue is whether the third-party defendant owed a duty to the plaintiff which was breached and which

contributed to or aggravated plaintiff's damages." (*Rosner v Paley*, 65 NY2d 736, 738 [1985]; *Bivona v Danna & Assocs., PC*, 123 AD3d 956, 958-969 [2d Dept 2014]).

The allegations set forth in the third-party complaint are as follow:

KS was retained by plaintiff to create the trust, which it did on August 16, 2012;

KS maintained an attorney-client relationship with plaintiff and owed him a duty of care in connection with the trust and in connection with "all Gift Tax Returns" related to the trust;

on May 9, 2013, KS provided WFS with a copy of the deed to the property, limited portions of the trust instrument, and a property appraisal, all of which were used by WFS to prepare the 2012 Form 709;

the 2012 Form 709 reflects that the value of the gift was based on a fair market value appraisal that KS had obtained;

KS never requested, instructed or advised WFS or SM to file a 2014 Form 709;

after KS reviewed the 2012 Form 709 in May 2016 at plaintiff's request, it advised him that the value of the property should have been based on a discounted appraisal, which it obtained on July 14, 2016; and

on October 26, 2016, KS prepared and filed an amended 2012 Form 709 which corrected the return filed by WFS.

The allegations set forth in the KS attorney's affirmation and plaintiff's affidavit relating to KS's involvement in WFS's preparation of the 2012 Form 709 and movants' failure to prepare and file a 2014 Form 709 are as follow:

the KS attorney did not deny any duty as to the 2012 Form 709;

plaintiff asked Frushtick to work with the KS attorney on the 2012 return; and

the KS attorney stated that she would provide Frushtick with all that was needed to prepare the return, including an appraisal.

The allegations set forth in the complaint, liberally viewed in the light most favorable to third-party plaintiffs, demonstrate that KS was retained to create the trust. They do not demonstrate on their face that KS was retained to prepare or file tax returns for the trust.

Even if the KS attorney agreed to provide WFS all documents necessary for the preparation of the tax returns, and thereafter provided it with a fair market value appraisal of the property, whereas years later she recommended that plaintiff obtain a discounted appraisal of the property, which she obtained and used to prepare the corrected amended return, these allegations do not prove, on their face individually or collectively, that the scope of KS's duty extended beyond that for which she was retained by plaintiff, and third-party plaintiffs do not explain how they do. Likewise, that plaintiff asked Frushtick to work with the KS attorney does not demonstrate the alleged duty, nor does the absence of a denial of such a duty in her opposition to third-party plaintiffs' motion to dismiss, as the alleged duty was not then in issue. Moreover, third-party plaintiffs' allegation that, by virtue of its attorney-client relationship with plaintiff, KS owed him a duty of care in connection with "all Gift Tax Returns" related to the trust is fatally conclusory.

Consequently, these allegations, liberally viewed in the light most favorable to third-party plaintiffs, do not demonstrate, on their face, that KS owed plaintiff a duty of care in connection with all gift tax returns.

The allegations relating solely to third-party plaintiffs' failure to file a 2014 Form 709 are too sparse to state a cause of action against movants for contribution, even when liberally viewed in the light most favorable to third-party plaintiffs, as providing WFS with "limited portions" of the trust instrument, absent any other facts, proves nothing. That the KS attorney did not request, instruct, or advise WFS or SM to file a 2014 Form 709 begs the question.

Absent a duty of care owed by KS to plaintiff in the preparation and filing of the gift tax returns, to supervise third-party plaintiffs' preparation of the 2012 return, or with respect to the 2014 return, movants sufficiently demonstrate that the complaint states no cause of action against

them for contribution, without a need to address those portions of the affidavit and affirmation proffered by movants.

B. CPLR 3211(a)(1)

In light of this result, there is no need to consider the motion pursuant to CPLR 3211(a)(1).

IV. CONCLUSION

For all of the foregoing reasons, it is hereby

ORDERED, that third-party defendants' motion to dismiss the third-party complaint is granted in its entirety and the third-party complaint is hereby severed and dismissed, and the Clerk is directed to enter judgment accordingly.

11/1/2019

DATE

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BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE