

Johnson v Braverman CPA PC
2020 NY Slip Op 33149(U)
September 25, 2020
Supreme Court, New York County
Docket Number: 650894/2020
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

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MARVIS JOHNSON

Plaintiff,

- v -

BRAVERMAN CPA PC,

Defendant.

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INDEX NO. 650894/2020
MOTION DATE 09/24/2020
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 46, 47, 48, 49, 50, 51, 52, 53 were read on this motion to/for DISMISS.

The motion to dismiss is granted.

Background

This case arises out of defendant's work for plaintiff as an accountant. Plaintiff alleges that he hired defendant to handle his taxes in 2014. In 2016, he insists that he told defendant to file amended tax returns for 2013, 2014 and 2015. Later that year, plaintiff contends that defendant told him he had a tax liability of nearly \$100,000 from the 2013, 2014 and 2015 federal, New York and New Jersey tax returns. He alleges that defendant filed a petition with the IRS Appeals Office in May 2016 to correct errors of previously filed amended tax returns but missed an August 2016 deadline to respond.

Plaintiff alleges that he hired another accounting firm in December 2016 and it calculated plaintiff's tax liability to be only about \$13,000. He alleges a breach of contract claim against defendant for miscalculating plaintiff's tax liability and a fraud cause of action.

Defendant moves to dismiss on the ground that the statute of limitations expired no later than January 23, 2020. It claims that although plaintiff styles his claims as a breach of contract and fraud causes of action, this case is really an accounting malpractice lawsuit with a three-year statute of limitations. Defendant claims that plaintiff received copies of his 2014 and 2015 tax returns on October 17, 2016, which means the applicable limitations period ended in October 2019. Defendant argues in the alternative that the latest date upon which plaintiff could assert a claim is January 23, 2017, when an attorney representing plaintiff asked defendant to transfer plaintiff's file to a new accounting firm and to stop working for plaintiff.

Defendant claims that the fraud cause of action is duplicative of the breach of contract claim and should be dismissed. It points out that both causes of action seek the same amount of damages and the fraud claim does not contain the specificity required under the CPLR.

In opposition, plaintiff insists that this is a breach of contract case and so the six-year statute of limitations applies. He argues that "Defendant's conduct in performing accounting services for Plaintiff was grossly negligent, and through Defendant's fraudulent conduct and negligent misrepresentations, Defendant miscalculated Plaintiff's tax liability" (NYSCEF Doc. No. 46 at 10). Plaintiff contends his fraud claim should survive because he relied upon defendant's misrepresentations about the accuracy of the 2013-15 tax returns and there was a fiduciary relationship between the parties.

In reply, defendant claims that the cases relied upon by plaintiff were superseded by statute regarding the applicable statute of limitations for accounting malpractice. It argues that plaintiff made no effort to explain how his fraud claim differs from his breach of contract claim. Defendant maintains that it did not owe a fiduciary duty to plaintiff.

Discussion

“In moving to dismiss an action as barred by the statute of limitations, the defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the cause of action has expired. The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is inapplicable or whether the action was commenced within the statutory period, and the plaintiff must aver evidentiary facts establishing that the action was timely or [] raise an issue of fact as to whether the action was timely” (*MTGLQ Investors, LP v Wozencraft*, 2019 WL 2291865, 2019 NY Slip Op 04287 [1st Dept 2019] [internal quotations and citations omitted]).

The Court grants the motion. The allegations in the amended complaint clearly suggest a cause of action for accounting malpractice, which has a three-year statute of limitations (CPLR 214[6]). “The legislative history makes clear that where the underlying complaint is one which essentially claims that there was a failure to utilize reasonable care or where acts of omission or negligence are alleged or claimed, the statute of limitations shall be three years if the case comes within the purview of CPLR Section 214(6), regardless of whether the theory is based in tort or in a breach of contract” (*In re R.M. Kliment & Frances Halsband, Architects (McKinsey & Co., Inc.)*, 3 NY3d 538, 541-42, 788 NYS2d 648 [2004] [internal quotations and citation omitted]).

And plaintiff’s accounting malpractice claim is time-barred. “There are circumstances where the statute of limitations is tolled, precluding dismissal on timeliness grounds although the alleged acts of negligence occurred more than three years prior to commencement of the action. This may occur where the parties engaged in a continuous professional relationship, such as where [the] same accounting firm provided ongoing services in addition to the yearly preparation of tax returns; however, this tolling of the statute is only appropriate where the continuous

representation was in connection with the particular transaction which is the subject of the action” (*Mitschelle v Schultz*, 36 AD3d 249, 252-53, 826 NYS2d 14 [1st Dept 2006]).

Here, defendant attached emails from plaintiff’s law firm to one of defendant’s employees in January 2017 instructing defendant to return plaintiff’s file (NYSCEF Doc. No. 42). It also submitted an affidavit from Mr. Braverman claiming that his work for plaintiff terminated in response to those emails with plaintiff’s law firm and the files were shipped via FedEx on January 31, 2017 (NYSCEF Doc. No. 31, ¶¶16, 17).

The only logical conclusion is that the relationship with the parties ended in January 2017, at the latest, and this case was not commenced until February 7, 2020 more than three years later. The termination of plaintiff’s relationship with defendant—the demand for the return of his files—starts the applicable limitations period (*Mitschelle*, 36 AD3d at 253).

The Court also dismisses the fraud claim as duplicative. The allegations in the amended complaint do not establish a fraudulent act; rather, they simply reassert the claim that defendant made mistakes with plaintiff’s tax returns (*see* NYSCEF Doc. No. 23, ¶¶ 20-23). Moreover, the amount of damages sought is the same as the breach of contract claim and plaintiff does not assert sufficient reliance on these misrepresentations. In other words, plaintiff contends that defendant’s misrepresentation was that he filed returns that contained no errors when, in fact, the returns had mistakes. That is an accounting malpractice cause of action, not a fraud claim.

Unlike in *Mitschelle*, where a fraud claim survived because the accountant allegedly persuaded the client to pursue a particular strategy in order to benefit himself rather than the client (*id.* at 254), here the only allegation is that defendant did a poor job. In any event, as defendant points out, the amended complaint and plaintiff’s affidavit (NYSCEF Doc. No. 47) fails to allege fraud with the specificity required under CPLR 3016(b).

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendant is granted and the Clerk is directed to enter judgment when practicable in favor of defendant along with costs and disbursements after presentation of proper papers therefor.

9/25/2020

DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

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CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE