

<b>Helzen Assoc. LLC v Katz</b>
2020 NY Slip Op 33508(U)
October 22, 2020
Supreme Court, New York County
Docket Number: 655561/2019
Judge: Carol R. Edmead
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. CAROL R. EDMEAD **PART** **IAS MOTION 35EFM**

*Justice*

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HELZEN ASSOCIATES LLC,

Plaintiff,

- v -

STEVEN KATZ, STEVEN R. KATZ & COMPANY, CPA PC

Defendant.

-----X

**INDEX NO.** 655561/2019

**MOTION DATE** 9/24/2020

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

ORDERED that defendants' motion to dismiss the Complaint is granted, to the extent of dismissing the second cause of action, which is for breach of contract, and is otherwise denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that defendants shall serve and file an answer to the Complaint within twenty days of service of a copy of this order with notice of entry thereof.

## MEMORANDUM DECISION

In this accounting malpractice action, defendants move to dismiss the action as untimely, pursuant to CPLR 3211 (a) (5), and for failure to state a cause of action, pursuant to CPLR 3211 (a) (7) (motion seq. 001).

### BACKGROUND

The following facts are taken from the verified complaint (the Complaint), and assumed to be true for the purposes of CPLR 3211 (*see William Doyle Galleries, Inc. v. Stettner*, 167 AD3d 501, 502, [1<sup>st</sup> Dept 2018]).

Steven R. Katz, the principal of defendants Steven R. Katz & Co., CPA, P.C. (Katz & Co.) furnished tax and other business advice to Steven Helf (Helf), the principal of plaintiff Helzen Associates, LLC (Helzen), since 1994. Those services included advising Helf to incorporate his business as plaintiff Helzen Associates, LLC (Helzen) in 2002. Thereafter, defendants continued to furnish tax and business advice to Helzen, including the preparation of Helzen's tax returns pursuant to separate engagement letters (Katz aff, exhibits A - L) for each year. Helzen is a single purpose real estate holding company, which was created to hold its single asset, a commercial building located at 522 W. 22<sup>nd</sup> Street in Manhattan.

Plaintiff alleges that defendants erroneously advised plaintiff that it was liable for New York City unincorporated business tax (UBT), and plaintiff paid that tax in reliance upon defendants' advice, as reflected in the returns prepared by defendants, starting with Helzen's incorporation in 2002. Plaintiff received refunds for the amounts of UBT tax paid for the years 2015 – 2017, after the New York City Department of Finance (DOF) informed defendants that the UBT tax was not owed, and defendants filed Form 452, amending the returns for those three years. It is not clear on this record whether defendants filed amended returns for all of Helzen's

overpayments, or just the three years which were not barred by the applicable three-year statute of limitations of CPLR 241 (6) for professional malpractice actions, which accrues upon the delivery by the accountant of the erroneous tax returns for filing (*see Booth v Kriegel*, 36 AD3d 312, 313 [1st Dept 2006]).

The amounts of alleged overpayments for the tax years prior to 2015 (the Prior Years), in the principal amount of \$348,929, are the subject of this action, and are time-barred unless the statute of limitations is tolled under the continuous representation doctrine (*see Williamson v PricewaterhouseCoopers LLP*, 9 NY3d 1, 8, [2007]).

Helf alleges that he and defendants had a mutual understanding that defendants

“had a continuing obligation to remedy defects in all of the tax returns prepared by Defendants, and to recover any overpayments, going back to at least the time of Helzen's formation in 2002”

(Helf aff, Paragraph 8).

### DISCUSSION

Such a mutual understanding of the ongoing nature of the professional's undertaking is a requirement for application of the continuous representation doctrine, 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 Techs., Inc. v Deloitte & Touche, LLP*, 69 AD3d 191, 195 [2d Dept 2009][internal quotation marks omitted]). “[T]he nature and scope of the parties' retainer agreement (engagement) play a key role in determining whether ‘continuous representation’ was contemplated by the parties” (*Williamson*, 9 NY3d at 10).

The standard engagement letters prepared by Katz & Co. each year provided that, in the event of

“any governmental examination or inquiry, we will represent you if you so desire; however, these additional services are not included in our fee for preparation of the returns and we will bill you for any additional time and expenses for such representation”

(Katz aff, exhibits A – L).

The fact that defendants rendered services with respect to the refunds for the three years, without either requiring a new engagement letter or additional fees “suggests the continuation of the professional relationship,” at least for those three years (*Symbol Tech.*, at 196). Katz advised Helf

“to call the New York City Department of Finance (“NYC DOF”) and seek refunds of the overpayments for tax years 2008 to 2014, advising Mr. Helf that the NYC DOF would reject Defendants’ requests for refunds because Defendants ‘should have known better.’ Mr. Katz followed up this verbal advice with an email dated March 8, 2019 directing Mr. Helf “to write a letter to NYC for the other 6 (sic) years asking for special consideration”

(Complaint, paragraph 21).

Defendant’s advice to Katz to write a letter in furtherance of plaintiff’s claims for refunds for the Prior Years constitutes advice on how to proceed and is some evidence of continuing representation with respect to the Prior Years.

While each annual tax return involves a separate contractual engagement, defendants have not presented sufficient evidence to demonstrate that they did not engage in any corrective or remedial services in connection with the overpayments in the Prior Years (*see Lemle v Regen, Benz & MacKenzie, C.P.A.’s, P.C.*, 165 AD3d 414, 415 [1<sup>st</sup> Dept 2018]). The statute of limitations is tolled under the continuous representation doctrine only for “so long as the defendant continues to advise the client in connection with the particular transaction which is the subject of the action and not merely during the continuation of a general professional relationship” (*Booth v Kriegel*, 36 AD3d at 314).

Plaintiff is entitled to discovery on the underlying issues, including whether defendants made any application for refunds or performed continuing services with respect to the Prior Years.

Defendants' motion to dismiss the contract cause of action as duplicative of the malpractice action is granted. The contract cause of action makes the same allegations of wrongdoing as the professional malpractice cause of action and seeks the same damages. Therefore, it is duplicative (*see Board of Trustees of IBEW Local 43 Elec. Contractors Health & Welfare, Annuity & Pension Funds v. D'Arcangelo & Co., LLP*, 124 AD3d 1358, 1360 [ 4th Dept 2015]).

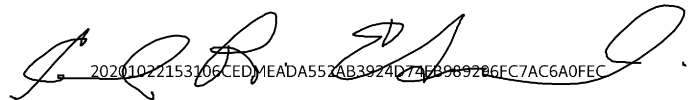
**CONCLUSION**

Accordingly, it is

ORDERED that defendants' motion to dismiss the Complaint is granted, to the extent of dismissing the second cause of action, which is for breach of contract, and is otherwise denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that defendants shall serve and file an answer to the Complaint within twenty days of service of a copy of this order with notice of entry thereof.



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10/22/2020  
DATE

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CAROL R. EDMEAD, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE