

Breslin v Raich, Ende, Malter & Co., LLP
2016 NY Slip Op 32015(U)
July 25, 2016
Surrogate's Court, Nassau County
Docket Number: 290592J
Judge: Margaret C. Reilly
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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**Wilbur F. Breslin, individually, and as Executor
of the Estate of**

**ROBERT FRANKEL,
Deceased,
Plaintiff,
-against-**

**Raich, Ende, Malter & Co., LLP, James Tenzer, Esq.,
Larry Wilk, CPA, Patricia Evans, CPA,
Jingxia Zeng, CPA, and Louis G. Borodinsky, CPA,**

Defendants.

DECISION

**File No. 290592J
Dec. No. 31352**

PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Complaint by Plaintiff, Wilbur F. Breslin, individually and as the Executor of the Estate of Robert Frankel, filed July13, 2015	1
Motion by Defendants, Raich, Ende, Malter & Co., LLP, James Tenzer, Esq., Larry Wilk, CPA, Patricia Evans, CPA, Jingxia Zeng, CPA, and Louis G. Borodinsky, CPA, filed September 24, 2015	2
Memorandum of Law in Support of Defendants’ Motion to Dismiss the Second, Third and Fourth Causes of Action in the Complaint, filed September 24, 2015 . . .	3
Affirmation of Peter J. Larkin in Support of Defendants’ Motion to Dismiss the Complaint, filed September 24, 2015	4
Plaintiff’s Memorandum of Law in Opposition to Defendants’ Motion to Dismiss the Second, Third and Fourth Causes of Action, filed November 13, 2015	5
Affidavit of Wilbur F. Breslin in Opposition to the Motion to Dismiss, filed November 13, 2015	6
Reply Memorandum of Law in Support of Defendants’ Motion to Dismiss the Second, Third and Fourth Causes of Action in the Complaint, filed November 18, 2015	7

Before the court is a motion, filed on behalf of defendants Raich, Ende, Malter & Co.,
LLP, James Tenzer, Esq. (Tenzer), Larry Wilk, CPA, Patricia Evans, CPA, Jingxia Zeng,

CPA, and Louis G. Borodinsky, CPA (collectively, Raich Ende, or the defendants), for an order: (i) pursuant to CPLR 3211(a)(5) and (a)(7), dismissing the second, third and fourth causes of action in the complaint filed by Wilbur F. Breslin (Breslin, or the plaintiff), individually and as the executor of the estate of Robert Frankel (the Frankel estate); and (ii) granting fees, costs and disbursements.

An action was originally commenced by Wilbur F. Breslin, individually and as executor of the estate of Robert Frankel, in Supreme Court, County of Nassau, on February 20, 2015 by the filing of a summons with notice (Index #601101/2015; Motion Seq #001). On April 15, 2015, the plaintiff filed an unopposed motion for removal of the action to the Nassau County Surrogate's Court. The motion for removal was granted by the Supreme Court of Nassau County on May 19, 2015. A complaint was thereafter served on July 9, 2015.

Background

Robert Frankel (the decedent) died on April 21, 1995, survived by his wife, Adele Frankel-Loeb, and three adult children, Wendy Frankel, Richard Frankel and Lynn Frankel Fleetwood (Wendy, Richard and Lynn, collectively, the objectants). Under the terms of decedent's will, each of the objectants is a beneficiary under Article III of the will and a beneficiary of 1/3 of decedent's residuary estate.

Prior to his death, the decedent owned a chain of stores and was a real estate investor and manager. The decedent and Breslin jointly owned a number of real estate ventures, and had personally and jointly guaranteed related bank debt of approximately \$100,000,000.00.

At the time of the decedent's death, some of these ventures were in financial distress. Shortly after the death of the decedent, an arrangement was reached among the preliminary executors of the decedent's estate, Gerald Deutsch, Stephen Levy, Breslin, and the decedent's children, whereby Breslin's family purchased control over a portion of the decedent's assets, and reserved the right to acquire the remaining assets for \$2,500,000.00 (the Weary Option). Pursuant to this agreement, on December 11, 1995, Breslin was appointed as successor executor of the estate, taking over management of the real estate ventures that previously had been jointly owned by Breslin and the decedent, as well as the decedent's assets and properties.

On September 12, 2012, Breslin filed a judicial accounting in which he sought settlement of his account, approval of legal fees, and his release and discharge, individually and as successor executor. The account shows total principal charges of \$18,510,068.89 and income charges of \$6,813,228.50, with total income of \$5,478,074.46 on hand as of March 31, 2010.

Breslin hired Tenzer in 1995, when Tenzer was associated with a prior accounting firm, and continued to utilize Tenzer's services after Tenzer joined Raich Ende as a principal and accountant in 2002, pursuant to a retainer letter, dated November 7, 2002. The defendants, among other services, were to prepare a final accounting for the Frankel estate. On February 22, 2012, the defendants produced the accounting, which covered the period from April 21, 1995 through March 31, 2010.

In February of 2015, Breslin, individually and as Executor of the Estate of Robert Frankel, filed a summons with notice in the Nassau County Supreme Court to recover damages for professional malpractice against Raich, Ende, Malter & Co., LLP, James Tenzer, Esq., Larry Wilk, CPA, Patricia Evans, CPA, Jingxia Zeng, CPA and Louis G. Borordinsky, CPA. The complaint charges that the defendants committed professional malpractice by failing to render proper accounting advice, and in the case of Tenzer, accounting and legal advice, to Breslin in his dual capacities as a creditor and as the executor of the Frankel estate. The complaint lists four separate claims for relief (first cause of action - accounting malpractice; second cause of action, legal malpractice; third cause of action, breach of fiduciary duty; fourth cause of action, breach of contract). The complaint further asserts that, in connection with each claim, the plaintiff suffered damages, individually and as the executor of the Frankel estate, estimated at no less than \$5,000,000.00. In addition, plaintiff asks the court to direct that all professional fees paid or payable to the defendants should be forfeited, in amounts estimated to exceed \$500,000.00.

The Motion to Dismiss

The defendants' present motion seeks an order pursuant to CPLR 3211(a) (5) and (a) (7), dismissing the plaintiff's second, third and fourth causes of action and granting the defendants fees, costs and disbursements. A memorandum of law in support of the motion argues that the second, third and fourth causes of action mimic the principal claim, which is accounting malpractice. Counsel for the defendants argues that the second, third and fourth

causes of action fail to state a cause of action upon which the plaintiff can prevail because they are duplicative of the accounting malpractice claim or legally meritless and therefore must be dismissed. The defendant further raises the Statute of Limitations and a failure to allege a timely claim against Tenzer for legal malpractice and against Raich Ende under the doctrine of respondent superior. The defendant argued that, in order to prevail in an action for legal malpractice, the plaintiff must show that the attorney failed to exercise ordinary reasonable skill and knowledge possessed by a member of the legal profession, and that the breach of duty caused damages. However, first the plaintiff must establish the existence of an attorney-client relationship. The defendant further posited that the plaintiff only offers conclusory allegations, without factual support, that Tenzer rendered both accounting and legal advice, and that Raich Ende operates solely as an accounting firm, in which capacity it cannot offer legal services.

The plaintiff submitted an affidavit and a memorandum of law in opposition to the motion to dismiss. Breslin states that he retained Tenzer as both his attorney and his accountant and claims that Tenzer held himself out to the plaintiff as having expertise as both a lawyer and an accountant, in which capacities he continuously provided the plaintiff with legal and accounting services in connection with the estate, including tax law advice. According to the plaintiff, the professional relationship rose to a fiduciary level between the plaintiff and the various partners, accounting firms and professionals who worked with Tenzer.

Addressing the substance of his claims, the plaintiff charges the defendants with repeatedly and falsely advising him that they were actively working and progressing on estate matters. Further, the defendants had exclusive possession of many of the Frankel estate records and data, some of which they lost. The plaintiff notes that in June 2001, Tenzer was temporarily suspended from the practice of law for failure to file personal tax returns, and was reinstated in May 2008.

In opposition to the present motion, the plaintiff asserts that the defendants cannot satisfy the applicable legal standards for dismissal; that the plaintiff has more than sufficiently alleged an attorney-client relationship; that the legal malpractice claim is not time-barred by reason of continuous legal advice sought and received; that the defendants owed Breslin a fiduciary duty based upon a longstanding and trusting relationship, the provision of legal and accounting services, and the fact that estate property and accounts were entrusted to the defendants; that the breach of contract claim is not duplicative of the malpractice claim, because the defendants breached a specific agreement to timely prepare an accounting and tax returns, and the damages for the breach of contract are different from the damages for a malpractice claim.

In support of his opposition to the defendants' motion, Breslin submitted a memorandum of law in which he argues that Tenzer held himself out as both an accountant and an attorney and submitted bills that identified him as an attorney while providing continuous services in both capacities. Breslin states that Tenzer provided legal, accounting

and tax law services to Breslin, and “repeatedly induced Breslin to repose an extremely high degree of trust and confidence in Tenzer with respect to numerous legal, tax and accounting matters.”

Defendants, in their reply memorandum, argue that Breslin’s opposition to the motion raises new allegations that were not included in the original complaint. With respect to the second cause of action, defendants argue that the claim for legal malpractice must be dismissed because the underlying claims are insufficient and legally without merit, as the relationship between Tenzer and Breslin was never that of an attorney and client. In support of this argument, the defendants assert that none of the documents put forth by Breslin evidences an attorney-client relationship between Breslin and Tenzer during the 13-year period of Tenzer’s employment by Raich Ende. Further, Breslin retained an attorney to represent him during the same time period in which he claims to have relied upon Tenzer as his counsel. Finally, Breslin retained Raich Ende, an accounting firm, to provide accounting services only, as Raich Ende cannot, and does not, offer legal services.

Defendants further argue that Breslin has failed to establish a fiduciary relationship with the defendants, and that the damages sought by Breslin for breach of contract are the same as those sought under the malpractice claim. Although Breslin alleges that defendant’s failure to timely file tax returns creates a cause of action for breach of contract that is separate from the cause of action for professional malpractice, the defendants argue that this claim is also included in the malpractice claim if Breslin succeeds in proving that the

defendants failed to act and that damages resulted.

II. Legal Analysis

A) Motion to Dismiss - Failure to State a Cause of Action

On a motion to dismiss pursuant to CPLR 3211(a)(7), every favorable inference must be afforded to the challenged pleading (*see Held v Kaufman*, 91 NY2d 425 [1998]; *Matter of Schwartz*, 44 AD3d 779 [2d Dept 2007]). All of the allegations contained in the pleading must be assumed true, and the petition is accorded the benefit of every possible inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]). The court must then determine whether the alleged facts fit within any cognizable legal theory (*Morone v Morone*, 50 NY2d 481 [1980]).

In deciding whether the pleading is sufficient, the “sole criterion is whether the pleading states a cause of action, and if from the four corners factual allegations are discerned which together manifest any cause of action cognizable at law” (*Guggenheim v Ginzburg*, 43 NY2d 268, 276 [1977]; *also, Matter of Baugher*, 98 AD2d 1111, 1112 [2d Dept 2012]). The pleadings must be liberally construed and the question is whether there “can be fairly gathered from all the averments the requisite allegations of a valid cause of action Since this determination is made on pleadings alone, whether or not plaintiff will be able to establish his allegations by competent evidence is not a pertinent consideration” (*Cohn v Lionel*, 21 NY2d 559, 562 [1968]).

1. Motion to Dismiss Claim for Legal Malpractice

“[M]alpractice in the statutory sense describes the negligence of a professional toward the person for whom he rendered a service . . . an action for malpractice springs from the correlative rights and duties assumed by the parties through the relationship” (*Cubito v Kreisberg*, 69 AD2d 738, 742 [2d Dept 1979]). A plaintiff seeking to recover damages for legal malpractice must “show that the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession, and that the attorney's breach of this duty caused the plaintiff to suffer actual and ascertainable damages” (*Gaskin v Harris*, 98 AD3d 941, 942 [2d Dept 2012] [citations omitted]).

In Breslin's complaint, he states that the defendants were retained “to perform a variety of accounting, audit, tax, and consulting services with regard to Breslin's role as both a major creditor and Successor Executor of the Frankel Estate.” Breslin asserts that “for many years prior to December 1995, Tenzer had already provided substantial legal, accounting and tax services to Breslin . . .” and that “Tenzer repeatedly induced Breslin to repose an extremely high degree of trust and confidence in Tenzer with respect to numerous legal, tax and accounting matters . . .” In his claim for legal malpractice, Breslin asserts that Tenzer breached his “duty to exercise due professional care and to render reasonable and competent legal advice and legal services”

The court finds that the plaintiff's complaint states a cause of action. The defendants' motion to dismiss the cause of action for legal malpractice is **DENIED**.

2. Motion to Dismiss Claim for Breach of Fiduciary Duty

If the facts alleged by Breslin are assumed to be true and construed in the most favorable light, the question is whether Breslin can establish that the defendants breached a fiduciary relationship owed to Breslin, separate from the cause of action for accounting malpractice. In the original complaint filed by Breslin, the basis for the cause of action for breach of a fiduciary duty was that “[d]efendants stood in a special, confidential and fiduciary relationship with [Breslin], and upon which [Breslin] reasonably and foreseeably relied to his detriment.” Only in his opposition papers did Breslin assert, for the first time, that defendants had sole and exclusive possession of “estate and estate-related documents and records.”

While Breslin asserts that Tenzer had possession of records and papers necessary to prepare tax returns and the accounting, this would be expected in any accountant/client relationship. “As a basic proposition, in the State of New York an accountant is not a fiduciary of the client” (*TKJ Management Corp., v Mark Mandel & Co. CPA's*, 2008 NY Misc LEXIS 7803 [Sup Ct Nassau County 2008]). However, a fiduciary relationship may be created where an accountant becomes directly involved in the management of a client's

investments (*see Caprer v Nussbaum*, 36 AD3d 176, 194 [2d Dept 2006]). Breslin has not asserted that Tenzer managed or had control of assets and investments.

“The duty owed by an accountant to a client is generally not fiduciary in nature. Nor does a conventional business relationship, without more, create a fiduciary relationship” (*Bitter v Renzo*, 101 AD3d 465, 465 [1st Dept 2012] [citations omitted]). Breslin has not put forth any facts that could establish a cause of action for a breach of fiduciary duty that is separate from the cause of action for accounting malpractice. When a cause of action for malpractice and a second cause of action for breach of fiduciary duty are based upon the same allegations of wrongdoing and seek the same damages, the two causes of action are duplicative (*see Blumberg v Altman*, 15 Misc3d 1140[A] [Sup Ct New York County 2007]).

Accordingly, the defendants’ motion to dismiss the cause of action for breach of fiduciary duty is **GRANTED**.

C. Motion to Dismiss Claim for Breach of Contract

The defendants also seek dismissal of Breslin’s cause of action based upon breach of contract. The plaintiff argues that the defendants breached their contractual duty to professionally and competently perform accounting, tax, consulting and legal services in accordance with accepted standards and practices. In response, the defendants assert that this cause of action is duplicative of the claims based upon malpractice.

A complaint adequately states a cause of action for breach of contract when it alleges “the existence of a contract, the plaintiff’s performance under the contract, the defendant’s

breach of that contract, and resulting damages” (*JP Morgan Chase v. J.H. Elec. Of NY, Inc.*, 69 AD3d 802, 803 [2d Dept 2010]; see also *Elisa Dreier Reporting Corp. v Global Naps Networks, Inc.*, 84 AD3d 122, 127 [2d Dept 2011]). In considering a motion to dismiss a cause of action for breach of contract, “[t]he test of the sufficiency of a complaint is whether it gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments” (*Pace v Perk*, 81 AD2d 444, 449 [2d Dept 1949] [citations omitted]).

In addressing a cause of action for breach of contract that was filed in conjunction with a cause of action for professional malpractice, the First Department held that “a breach of contract claim premised on . . . failure to exercise due care or to abide by general professional standards is nothing but a redundant pleading of the malpractice claim” (*Sage Realty Corp. v Proskauer Rose L.L.P.*, 251 AD2d 35, 38-39 [1st Dept 1998]).

This court finds that Breslin’s cause of action for breach of contract is duplicative of the cause of action for accounting malpractice (*see Gold v Lipsky, Goodkin & Co.*, 2012 NY Misc 6387 [Sup Ct New York County 2012]). Defendants’ motion to dismiss the cause of action for breach of contract is **GRANTED**.

In view of the foregoing, the defendants’ motion for an order, pursuant to CPLR 3211(a)(7), dismissing the second cause of action for legal malpractice in the complaint filed by Breslin, individually and as the executor of the estate of Robert Frankel, is **DENIED**.

The defendants' motion for an order, pursuant to CPLR 3211(a)(7), dismissing the third and fourth causes of action in the complaint filed by Breslin, individually and as the executor of the estate of Robert Frankel, is **GRANTED**.

The remainder of the defendant's motion, including relief, pursuant to CPLR 3211(A)(5), fees, costs and disbursements is hereby **DENIED**.

Dated: July 25, 2016
Mineola, New York

E N T E R:

HON. MARGARET C. REILLY
Judge of the Surrogate's Court

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