

This opinion is uncorrected and subject to revision in the Official Reports. This opinion is not available for publication in any official or unofficial reports, except the New York Law Journal, without approval of the State Reporter or the Committee on Opinions (22 NYCRR 7300.1)

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 4

A.F.C. ENTERPRISES, INC., et al. x
INDEX NO.: 7793/97
- against - BY: LaTORELLA, JR., J.
JACK MITNICK, et al. DATED: JANUARY 10, 2002

The defendants have moved for summary judgment dismissing the complaint against them. The plaintiffs have cross-moved for summary judgment dismissing the defendants' affirmative defense based on the Statute of Limitations.

In or about 1990, Frank Catapano decided to sell his interest in Catapano Enterprises, Inc. to the individual plaintiffs. Defendant Jack Mitnick, an attorney, a certified public accountant, and a partner in defendant Spahr, Lacher and Sperber, L.L.P., an accounting firm, advised the individual plaintiffs on the transaction. He advised them that the sale of Frank Catapano's interest should be accomplished first through the merger of Catapano Enterprises, Inc. into AFC Enterprises, Inc. and then through the purchase of Frank Catapano's interest in the surviving corporation. Mitnick allegedly also told the individual plaintiffs that Catapano Enterprises, Inc.'s assets included a tax refund owed by the federal government, which, together with accrued interest, totaled approximately \$1,000,000. The individual plaintiffs allegedly relied on this information, which subsequently proved erroneous, in negotiating the price for Frank Catapano's

interest. The individual plaintiffs executed the stock purchase agreement on January 15, 1991. After they purchased Frank Catapano's interest, the individual plaintiffs learned that the federal government did not owe Catapano Enterprises, Inc. a refund, but that the corporation owed \$2,689,688 in taxes. Mitnick alleges that he finished his work on the subject transaction in March, 1991 and that he performed no accounting work for the plaintiffs after 1993. On the other hand, the plaintiffs allege that Mitnick continued to render services related to the tax problem through July, 1994. The plaintiffs began this action for professional malpractice on March 31, 1997.

The opponent of a motion for summary judgment has the burden of making an evidentiary showing sufficient to show that there is an issue of fact which must be tried. (See, Alvarez v Prospect Hospital, 68 NY2d 320.) The plaintiffs successfully carried their burden. The complaint states a cause of action for professional malpractice. (See, Ackerman v Price Waterhouse, 84 NY2d 535.) A cause of action for accounting malpractice "requires proof that there was a departure from accepted standards of practice and that the departure was a proximate cause of the injury***." (D.D. Hamilton Textiles, Inc. v Estate of Theodore Mate, 269 AD2d 214; Estate of Burke v Repetti & Co., 255 AD2d 483.) "Proof of proximate causation is an essential element of any malpractice claim, including accountant's malpractice." (Herbert H. Post & Co. v Bitterman, Inc., 219 AD2d 214, 223.) The defendants contend that causation in the context of

an action for accounting malpractice has two elements: transaction causation and loss causation. (See, AUSA Life Ins. Co. v Ernst and Young, 206 F.3d 202.) "Loss causation is causation in the traditional 'proximate cause' sense--the allegedly unlawful conduct caused the economic harm. *** Transaction causation means that 'the violations in question caused the appellant to engage in the transaction in question.' *** Transaction causation has been analogized to reliance." (AUSA Life Ins. Co. v Ernst and Young, *supra*, 209, quoting Schlick v Penn-Dixie Cement Corp., 507 F2d 374, 380.) In the case at bar, there is sufficient evidence in the record to create issues of fact pertaining to both loss causation and transaction causation. Insofar as loss causation is concerned, the court cannot conclude here as a matter of law, as urged by the defendants, that the plaintiffs would have been liable for a tax debt whether or not they utilized the mechanism of a merger. The defendants cannot obtain summary judgment in their favor based on speculation that the IRS would have recovered the tax owed pursuant to 26 USC 6331 and CPLR 5227 or would have pierced the corporate veil of the Catapano corporations to recover the taxes owed from stockholders. Insofar as transaction causation is concerned, while the plaintiffs may have had several motives to consolidate the Catapano operating companies, nevertheless, there is evidence in the record that they entered into the merger in reliance on Mitnick's representation that there would be a substantial income tax refund and that a merger would allow the receipt of that refund. There is also evidence in the record that the plaintiffs

could have accomplished their goals without the device of a merger, such as by having AFC pay \$3,500,000 to Andrew Catapano Co., Inc. in partial discharge of AFC's debt, followed by the exchange of the remaining \$8,500,000 of debt for non-cumulative, non-convertible preferred stock of AFC with a stated interest rate of 8 per cent. The plaintiffs contend that if this mechanism had been utilized, they would have had no tax liability to the IRS beyond the amount of any declared dividend on the preferred stock and it would have been optional to declare such a dividend. The affidavit of the plaintiffs' expert, Robert A. Lass, a certified public accountant, an attorney, and the Director of Tax Services for the accounting firm of Marden, Harrison, and Kreuter is sufficient to create issues of fact pertaining to, inter alia, loss causation and transaction causation. Lass, whose career included a position with Price Waterhouse as its Managing Tax Partner, has expressed his professional opinion that "Mitnick and SLS committed numerous acts of professional malpractice in their performance of accounting services for plaintiffs" which his affidavit specifies. Although the defendants submitted an affidavit from one of their own experts, this court cannot resolve the issues in this complex case for accounting malpractice on the basis of the conflicting affidavits of experts. Among other things, the conflicting affidavits of the experts preclude summary judgment in this case. (See, Joseph v Brodman, 220 AD2d 331; Celentano v St. Luke's Roosevelt Hospital Medical Center, 170 AD2d 198.) Finally, the

court notes that the defendants are not entitled to summary judgment based on any of the other contentions made by them.

Accordingly, the motion by the defendants for summary judgment dismissing the complaint against them is denied.

Insofar as the plaintiffs' cross motion for summary judgment dismissing the affirmative defense of the Statute of Limitations is concerned, the court notes that CPLR 214(6), which provides for a three year period, controls this action. A cause of action for professional malpractice accrues when the malpractice is committed. (Glamm v Allen, 57 NY2d 87.) "In the context of a malpractice action against an accountant, the claim accrues upon the client's receipt of the accountant's work product ***." (Ackerman v Price Waterhouse, supra, 541; Kearney v Firley, Moran, Freer & Eassa, P.C., 234 AD2d 967.) However, the doctrine of continuous representation stays the running of the Statute of Limitations on a cause of action for professional malpractice until the ongoing representation is completed. (Glamm v Allen, supra; Kearney v Firley, Moran, Freer & Eassa, supra.) In order to invoke the doctrine of continuous representation against an accountant who has rendered tax services, there must be a "continuity of services with respect to the specific tax condition involved ***." (Kearney v Firley, Moran, Freer & Eassa, supra, 968.) In the case at bar there is conflicting evidence in the record concerning the date upon which defendant Mitnick last rendered services related to the tax aspects of the purchase of Catapano Enterprises, Inc. Thus, whether the plaintiffs may successfully invoke the doctrine

of continuous representation involves issues of fact which cannot be resolved on the present state of the record. (See, Fred Smith Plumbing and Heating Co, Inc. v. Christensen, 233 AD2d 207; Gray v Wallman & Kramer, 224 AD2d 275.) The conflicting allegations of the parties concerning whether the defendants were "part of the team" fighting the assessment of taxes by the IRS until their services were terminated in July, 1994 have raised issues of fact and credibility which are inappropriate for summary judgment treatment. (See, Dayan v Yurkowski, 238 AD2d 541; T&L Redemption Center Corp. v Phoenix Beverages, Inc., 238 AD2d 504; First New York Realty Co., Inc. v. DeSetto, 237 AD2d 219.)

Accordingly, the plaintiffs' cross motion for summary judgment dismissing the affirmative defense based on the Statute of Limitations is denied.

Settle order.

J.S.C.