

**Booth v Kriegel**

2005 NY Slip Op 30397(U)

January 14, 2005

Supreme Court, New York County

Docket Number: 602841/03

Judge: Shirley Werner Kornreich

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

PRESENT: Kornreich  
Justice

PART 54

0602841/2003

INDEX NO. 602841/03

BOOTH, CONSTANCE  
VS  
KRIEGEL, I. STANLEY

MOTION DATE 6/23/05

MOTION SEQ. NO. 2

MOTION CAL. NO. \_\_\_\_\_

SEQ # 2

SUMMARY JUDGMENT

this motion to/for SJ

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

1

Replying Affidavits \_\_\_\_\_

2,3

4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is decided in accordance with  
The annexed decision and order.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**

NOV 28 2005

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 11/14/05

Shirley Werner Kornreich  
SHIRLEY WERNER KORNREICH  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X

CONSTANCE BOOTH,

Plaintiff,

Index No.: 602841/03

-against-

I. STANLEY KRIEGEL and J. MANNING  
WINIKUS & CO., LLP.,

Defendants.

-----X  
KORNREICH, SHIRLEY WERNER, J.:

DECISION AND  
ORDER

**FILED**

NOV 28 2005

NEW YORK  
COUNTY CLERK'S OFFICE

This is an action for alleged breach of contract, breach of fiduciary duty, negligence and professional malpractice arising out of the provision of accounting services. Plaintiff's complaint alleges that defendants negligently caused her to over-pay taxes to the Internal Revenue Service ("IRS") from 1969 to 2001 due to defendants' failure to recognize an exemption applicable to plaintiff under the 1985 US/UK Totalization Agreement (the "Totalization Agreement").

***I. Summary Judgment***

Defendants now move for summary judgment dismissing the complaint on the ground that it is time-barred under CPLR 214(b). Defendants submit the affirmation of their attorney, the affidavit of defendant Kriegel, copies of pleadings and the affidavit of plaintiff, and other documentary evidence. In opposition, plaintiff submits her affidavit, with supporting documents, and a memorandum of law. Defendants have replied.

## **II. Background**

Plaintiff, a citizen of the United States, has been “for decades ... self-employed and residing in the United Kingdom.” Affidavit of C. Booth, para. 4. In 1969, Ms. Booth retained Mr. Kriegel as her accountant to prepare her annual state and federal tax returns in the United States. *Id.* at 5. Mr. Kriegel prepared plaintiff’s annual income tax returns for the years 1969 through, and including, 2001. *Id.* at 7. Mr. Kriegel had power of attorney to sign the returns, and did so. Affidavit of S. Kriegel, para. 7.

In 2002, plaintiff retained “new accountants,” Loerner Silberberg & Weiner LLP, (“LSW”) to prepare and file her 2002 income tax returns. Booth Aff. at 9. The new accountants advised her that, under the Totalization Agreement she was “exempt from U.S. self-employment taxes,” and thus, had paid “double taxes” from 1985 to 2001. *Id.* at 10-12. Plaintiff previously had not known about the Totalization Agreement; Mr. Booth never mentioned it to her. *Id.* at 13. After discovering the exemption, plaintiff filed amended income tax returns with the IRS for the years 1999-2001, the maximum number of years (3) for which taxpayers are allowed by the IRS to amend their returns. *Id.* at 21.

By letter dated April 21, 2003, LSW wrote to Mr. Kriegel requesting reimbursement for plaintiff’s alleged tax over-payment for the years 1969 to 1998. *Id.*, Ex. 6. The letter stated:

We understand that for every year that you rendered ... accounting services for Ms. Booth, and especially since 1985, you consistently and continuously caused Ms. Both to pay a U.S. self-employment tax which you knew or should have known she was exempt from paying under the 1985 US/UK Totalization Agreement.

*Id.*, Ex. 6.

As of May 8, 2002, plaintiff had not yet filed her 2001 return. A copy of the return indicates that it was prepared on July 22, 2003, by Mr. Kriegel. Booth Aff., Ex. 5. Plaintiff commenced this action on September 9, 2003.

## **II. Conclusions of Law**

### **A. Summary Judgment**

In order to prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). If the movant makes out a prima facie case, the opponent must come forward and “lay bare his proofs” of any alleged triable issues of fact. *See In re Dissolution of Rencor Controls, Inc.*, 263 A.D.2d 845 (3<sup>rd</sup> Dept. 1999) citing *Hanson v. Ontario Milk Producers Coop., Inc.*, 58 Misc.2d 138 (Sup. Ct. Oswego Co. 1968).

It is undisputed that plaintiff's causes of action are governed by the three-year statute of limitations applicable to negligence actions, under CPLR 214(6). *See Ackerman v. Price Waterhouse*, 84 N.Y.2d 535, 541 (1994). Nor do the parties dispute that plaintiff's causes of action accrued on “the date the accountant's work product [was] received by the client... .” *Id.* at 538. The parties part ways, however, as to the accrual date. Defendants argue that plaintiff's causes of action accrued on April 13, 1999, the day plaintiff's 1998 return was mailed to her. Plaintiffs counter that the cause of action accrued at the earliest, on July 22, 2003, the preparation date of her 2001 tax return. Moreover, plaintiffs argue that the doctrine of continuous representation should apply to toll the statute of limitations for all the years during which Mr. Kriegel was engaged as plaintiff's accountant. As set forth below, the Court concludes that the

continuous representation doctrine does apply, and that none of plaintiff's causes of action are time-barred.

*B. Continuous Representation*

The First Department summarized the continuous representation doctrine, in the context of accounting malpractice, as follows:

The continuous representation doctrine, although originally derived from the continuous treatment concept in medical malpractice cases, has also been held applicable to professionals other than physicians. As the Court of Appeals explained in *Greene v. Greene* [56 N.Y.2d 86 (1982)], a client cannot reasonably be expected to assess the quality of the professional service while it is still in progress. However, the continuous representation must be in connection with the particular transaction which is the subject of the action and not merely during the continuation of a general professional relationship. Therefore, the pleading must assert more than simply an extended general relationship between the professional and client in that the facts are required to demonstrate continued representation in the specific matter directly under dispute.

*Zaref v. Berk & Michaels, P.C.*, 192 A.D.2d 346, 348 (1st Dept. 1993) (citations omitted).

In essence, defendants argue that each tax return that Mr. Kriegel prepared for plaintiff was a separate transaction, with nothing binding them together but a "general professional relationship," insufficient to raise the continuous representation exception to the statute of limitations. According to defendants, plaintiff can only seek redress, if at all, for malpractice occurring in the three years prior to the accrual date, which they assert is April 13, 1999. Plaintiff counters that Mr. Kriegel continuously represented plaintiff in the "specific matter directly under dispute," i.e., in the preparation of her tax returns, and more specifically, the consistent failure to apply the Totalization Agreement from 1969 to 2001. Plaintiff urges that her

cause of action accrued, at the earliest, on July 22, 2003.

The Court finds plaintiff's argument the more compelling. The First Department has applied the continuous representation doctrine where the plaintiff alleged a "repeated use of an improper accounting method and the repeated failure to disclose the risks associated with the same [*Zwecker v. Kulberg*, 209 A.D.2d 514, 515 (continuous treatment applicable where limited partners alleged that defendant accountant continued to utilize deductions in preparing their tax returns despite knowledge that IRS would likely invalidate the deduction)]." See *Ackerman v. Price Waterhouse*, 252 A.D.2d 179, 205 (1st Dept. 1998) citing *Zwecker*, 209 A.D.2d at 515. Although there is no indication here that Mr. Kriegel knew of, and disregarded, the Totalization Agreement, plaintiff here has alleged that beginning in 1969, Mr. Kriegel repeatedly used the same "improper accounting method," i.e., failing to seek an exemption plaintiff was entitled to under the Totalization Agreement.

The continuous representation doctrine "recognizes that a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered." *Greene v. Greene*, 56 N.Y.2d 86, 94 (1982). Plaintiff could not realistically have been expected to know about the applicability of the Totalization Agreement, except by professional advice, for which she engaged Mr. Kriegel. Under the circumstances, the Court concludes that plaintiff has sufficiently alleged that Mr. Kriegel's annual preparation of her tax returns, and repeated failure to apply the Totalization Agreement, was a "continued representation in the specific matter directly under dispute," and thus, the

statute of limitations is tolled for all the years during which Mr. Kricgel was engaged.<sup>1</sup>

Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissing the complaint is denied, and the action shall continue.

Date: November 14, 2005  
New York, New York

  
SHIRLEY WERNER KORNREICH

**FILED**  
NOV 28 2005  
NEW YORK  
COUNTY CLERK'S OFFICE

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<sup>1</sup>The Court notes that plaintiff's cause of action may have accrued prior to July 22, 2003, the date of the last return Mr. Kriegel prepared for her. At the time plaintiff hired LSW, in 2002, it appears that she had ceased to "repose" her confidence in Mr. Kriegel. Even if the Court were to find, and it does not, that her cause of action against Mr. Kriegel accrued when she hired new tax advisers, plaintiff's action would not be time-barred, because she commenced it less than three years later.