

Mathus v Bouton's Bus. Machs.

2007 NY Slip Op 31585(U)

June 4, 2007

Supreme Court, New York County

Docket Number: 0603790/2006

Judge: Shirley W. Kornreich

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

PRESENT: **SHIRLEY WERNER KORNREICH**
Justice J.S.C.

PART 54

Index Number : 603790/2006

INDEX NO. 603790/2006

MATHUS, KEITH

MOTION DATE 4/19/07

vs
BOUTON'S BUSINESS MACHINES

MOTION SEQ. NO. 001

Sequence Number : 001

MOTION CAL. NO. _____

SUMMARY JUDGMENT

his motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1	2
3	3
4	

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED
JUN 12 2007
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

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

Dated: 6/4/07

SHIRLEY WERNER KORNREICH
J.S.C.

[Handwritten Signature]
J.S.C.

Check one: FINAL DISPOSITION
Check if appropriate: DO NOT POST

NON-FINAL DISPOSITION
 REFERENCE

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

-----X
KEITH MATHUS, individually and as a shareholder of
BOUTON'S BUSINESS MACHINES, INC. pursuant to
Sections 626 and 720 of the Business Corporations Law,

Index No.: 603790/06

Plaintiff,

**DECISION
and
ORDER**

-against-

BOUTON'S BUSINESS MACHINES, INC.,
PATRICK DESPIRITO, CHRISTOPHER DESPIRITO,
KAL ROTHMAN, ESQ., FACSIMILE COMMUNICATIONS, INC.
d/b/a ATLANTIC BUSINESS PRODUCTS,
GOLDSTEIN, KARLEWICZ & GOLDSTEIN, LLP,
BOB GOLDMAN and JOHN DOE, said name being fictitious,
this individual's real name is currently unknown to plaintiff,

Defendants.

FILED
JUN 12 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

This action arises out of accounting services rendered by defendant Goldstein, Karlewicz & Goldstein, LLP ("GKG") on behalf of defendant Bouton's Business Machines, Inc. ("Bouton's"). Plaintiff, an individual and shareholder of Bouton's, brings action against several parties including the company's president Patrick Despirito ("P. Despirito"), one of its employees Christopher Despirito ("C. Despirito"), its attorney Kal Rothman ("Rothman"), its sales manager Bob Goldman ("Goldman"), the assignee of its assets/debts Fascimile Communications, Inc. d/b/a Atlantic Business Products ("Facsimile"), and its accounting firm GKG. Plaintiff alleges that GKG issued financial statements that falsely portrayed Bouton's financial status, which plaintiff relied on when deciding to buy stock in the company. Here, defendant GKG moves for summary judgment claiming that plaintiff's action against it is time-barred by the Statute of Limitations.

I. Facts

Scott Goldstein, a partner of GKG, avers the following. Bouton's is an office equipment company and retailer of copy machines, which retained GKG in 1996 to provide the company with specific, limited accounting services. From 1996 to 2000 GKG provided such services pursuant to a written Letter of Engagement. The Letter of Engagement, executed by GKG and P. Despirito on behalf of Bouton's, defined the scope of GKG's services as: (i) preparing review reports based on Bouton's financial statements for each year; (ii) preparing quarterly compilation reports on the financial statement for the company; and (iii) preparing Federal and New York State Income Tax returns for Bouton's as well as individual returns for P. Despirito. GKG's annual written review reports covered each year ending on December 31 and were typically completed and delivered to Bouton's in March of the following year. GKG's last report-- covering the year ending December 31, 2000-- was delivered to Bouton's on March 9, 2001.

When GKG issued its last annual review report on March 9, 2001, plaintiff was neither in privity with GKG nor did he own any stock in Bouton's. He was the holder of a \$400,000 promissory note ("the Note") executed on June 13, 1997, by Bouton's president, P. Despirito. The Note provided for a 4.5% interest rate and was to be repaid in equal installments over a two-and-a-half year period. It further gave plaintiff the option of exchanging the Note for a 50% share of Bouton's stock. In a June 5, 2001 letter, plaintiff attempted to exchange the Note for the stock and accept a lesser sum of \$151,000 payable over a two year period, but Mr. Despirito declined to honor the option and instead issued plaintiff 25% of Bouton's stock. Plaintiff commenced an action for the remaining stock in Rockland County Supreme Court against Mr. Despirito and Bouton's, which was discontinued on December 16, 2002. On October 31, 2006, plaintiff filed this complaint alleging that he relied on false statements contained in GKG's 2000

review report (issued on March 9, 2001) when deciding to exercise the stock option pursuant to the Note.

II. Conclusions of Law

Accounting malpractice is governed by the three-year limitation period applicable to all professional malpractice. CPLR 214(6); *Levin v. Pricewaterhousecoopers, LLP*, 302 A.D.2d 287, 288 (1st Dept. 2003); *Fred Smith Plumbing & Heating, Inc. v. Christensen*, 233 A.D.2d 207, 208 (1st Dept. 1996). The action accrues upon receipt of the accountant's work product. *Ackerman v. Pricewaterhouse*, 84 N.Y.2d 535, 541 (1994) (when work product is delivered, "all the facts necessary to the cause of action have occurred," client has relied on accountant's advice and due to its reliance, client may be injured). *Accord Levin*, 302 A.D.2d at 288 (limitations period begins to run when accountant delivers work product to client); *Kearney v. Firley, Moran, Freer & Eassa*, 234 A.D.2d 967 (4th Dept. 1996) (malpractice for limitation period accrues when accountant's work product is received by client); *Fred Smith Plumbing*, 233 A.D.2d at 208.

Here, GKG's annual review reports were its "final" work products for each year. The report issued on March 9, 2001, therefore, was GKG's complete work product for the year 2000. This was the last report on which plaintiff could have relied since he attempted to exercise the stock option on June 5, 2001. Plaintiff apparently does not dispute this fact, nor does he make any attempt to show that the report was a work in progress or that the Statute of Limitations should be tolled under the doctrine of continuous representation. Defendant's submission being uncontested, the Court is bound to accept the conclusion that plaintiff's cause of action accrued on March 9, 2001, when GKG's last annual review report was completed and delivered to the

plaintiff. Plaintiff's claim thus became time-barred on March 9, 2004. Plaintiff did not bring this action until October 31, 2006, more than two-and-a-half years after his claim was barred.

Even were this action not time-barred, summary judgment still would have to be granted because plaintiff was not a GKG client and was never entitled to rely on its services. "Before a party may recover in tort for pecuniary loss sustained as a result of another's negligent misrepresentations there must be a showing that there was either actual privity of contract between the parties or a relationship so close as to approach that of privity." *Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood*, 80 N.Y.2d 377, 382 (1992), *rearg. denied* 81 N.Y.2d 955 (1993) (citing *Ossining Union Free School Dist. v. Anderson LaRocca Anderson*, 73 N.Y.2d 417, 424 (1989); *Credit Alliance Corp. v. Andersen & Co.*, 65 N.Y.2d 536 (1985)). GKG could only be held liable to plaintiff if it: (i) knew that the financial reports were to be used for a particular purpose; (ii) intended that plaintiff rely on the reports in furtherance of that purpose; and (iii) exhibited some conduct linking them to plaintiff, which evinced GKG's understanding of plaintiff's reliance. *Credit Alliance Corp.*, *id.* at 551; *LaSalle Nat. Bank v. Ernst & Young LLP*, 285 A.D.2d 101, 105 (1st Dept. 2001).

Here, plaintiff and GKG were never in privity; GKG never undertook to perform services directly for plaintiff, nor did plaintiff own any stock in Bouton's when GKG issued its final review report on March 9, 2001. Further, the Letter of Engagement expressly provided that GKG was not performing an audit and that its reports could not be relied upon to disclose errors contained in Bouton's financial statements. Finally, GKG neither met with plaintiff personally nor made any representations to plaintiff regarding the nature of its engagement with Bouton's. Consequently, GKG's conduct does not establish a linkage between the parties sufficient to justify plaintiff's reliance in the absence of privity.

Finally, plaintiff's assertion that discovery is needed to "reveal the true nature of the business relationship among GKG, Bouton's, and Patrick Despirito" is without merit. His vague and conclusory statement that "serious and significant issues exist that would determine GKG's involvement with Bouton and Patrick Despirito," is not supported by evidence of how such involvement may have been wrongful. It is well-settled that the "mere chance that somehow, somewhere... [a party] will uncover something which might add to [its] case but obviously of which now they have no knowledge, is mere speculation and conjecture and is not sufficient[.]" *Meath v. Mishrik*, 120 A.D.2d 327, 329-30 (1st Dept. 1986) *aff'd* 68 N.Y.2d 992 (1986) (recitation of "bare allegations and speculation" as to what discovery may yield is insufficient to warrant denial of summary judgment)). If plaintiff has knowledge of facts pointing in the way of GKG's negligence, he has not produced them here. As a result, Statute of Limitations notwithstanding, plaintiff has not submitted evidence sufficient to defeat defendant's motion for summary judgment.

Accordingly, it is

ORDERED that defendant GKG's motion for summary judgment is granted and the complaint is dismissed as against GKG with costs and disbursements to defendant GKG as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the remainder of the action is severed and shall continue; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Date: June 4, 2007
New York, New York

FILED
JUN 12 2007
NEW YORK
COUNTY CLERK'S OFFICE


SHIRLEY WERNER KORNREICH