

**Leonard Rosen & Co., P.C. v East Hudson Urology
Group, P.C.**

2007 NY Slip Op 34594(U)

January 5, 2007

Supreme Court, New York County

Docket Number: 107231/04

Judge: Herman Cahn

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

----- X
LEONARD ROSEN & CO., P.C.,

Plaintiff,

Index No. 107231/04
Action No. 1

- against -

EAST HUDSON UROLOGY GROUP, P.C.,

Defendant.
----- X

EAST HUDSON UROLOGY GROUP PENSION PLAN,

Plaintiff,

Index No. 402077/06
Action No. 2

- against -

LEONARD ROSEN & BENJAMIN J. GOLUB,

Defendants.
----- X

HERMAN CAHN, J.:

Plaintiff in Action Number 1, Leonard Rosen & Co., P.C. (Rosen PC), and defendant in Action No. 2, Leonard Rosen (Rosen), move for reargument of a prior motion for summary judgment, and, upon reargument, for an order dismissing all malpractice claims.

In Action Number 1, Rosen PC, an accounting firm, is seeking monetary damages allegedly due to it for services that it rendered to East Hudson Urology Group, P.C. (East Hudson PC), a professional corporation that provides medical services to members of the community. East Hudson PC claims that the accounting firm and its principal (Rosen) committed malpractice by arranging to have its pension plan, the East Hudson Urology Group Pension Plan (East Hudson Plan), loan Rosen money. The loan was evidenced by a promissory note (Note); a

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transaction that allegedly violated the federal Employee Retirement Income Securities Act (ERISA).

Prior to the commencement of Action Number 1, East Hudson Plan brought an action against Rosen and Benjamin J. Golub in the Supreme Court, Westchester County (Index Number 22165/02) (Westchester Action), seeking to recover on the Note. The Westchester Action, denominated herein as Action Number 2, was transferred to this court and the second amended complaint in that action constitutes the complaint in Action Number 2.

By decision dated May 4, 2004, the Judge in the Westchester Action (J. Emmett Murphy, J.) awarded summary judgment to East Hudson Plan on the issue of Rosen's liability as the maker of the Note. A hearing was directed on the issue of damages, including the amount of any offset that Rosen may be owed for accounting services provided to East Hudson Plan. The decision also held that Rosen was not entitled to an offset for accounting services provided to East Hudson PC because that entity was not a party to the Westchester Action and was a separate entity from East Hudson Plan.

Rosen PC then commenced Action Number 1 against East Hudson PC in this court. In the first cause of action, it alleges that during the period from 1997 through April 2001, it furnished accounting services to East Hudson PC for an agreed-upon amount of \$114,750. It alleges that East Hudson PC paid it \$60,000 in partial payment, that it made a demand for the remaining \$54,750, no part of which has been paid, and that this amount is presently owing to Rosen PC, with interest from April 30, 1997.

East Hudson PC's answer in Action Number 1 contains a counterclaim alleging that, beginning in 1997, East Hudson PC retained Rosen PC's services as an accountant and that

during that period, Rosen PC provided services to East Hudson PC in a negligent manner, causing damage.

Among its defenses to the malpractice claim by East Hudson Plan, based on the allegation that the Note violated ERISA, movants contend that such claim is time-barred because it was initiated subsequent to the expiration of the three-year statute of limitations applicable to malpractice claims. In a decision dated October 17, 2006 on the Prior Motion, this court held that the viability of the malpractice claim and the statute of limitations defense depends upon triable issues of fact regarding the “continuous representation” doctrine (*citing Gray v Wallman & Kramer*, 224 AD2d 275 [1st Dept 1996]; *Estate of David v Rashba & Pokart*, 254 AD2d 235 [1st Dept 1998]).

Movants now argue that even if the continuous treatment doctrine were applied, the statute of limitations period would nevertheless have expired in May 2004 or, at the latest, in June 2004. Since the first time East Hudson Plan asserted the malpractice claim was in September 2004 in the Westchester Action, movants argue the claim is time-barred.

In their reply papers, movants also argue for renewal. Movants state that the affidavit of Dr. Bernard Fagin, a member of East Hudson PC, was not available at the time of the original motion, that it is now apparent that Rosen’s services on nonmovants’ behalf ended in June 2001 and that the malpractice claim by East Hudson Plan was first asserted in the Westchester Action in September 2004 in the second amended complaint.

Granting reargument is warranted because the court misconstrued relevant facts (*Annibaffa v Annibaffa*, __AD2d __, 2006 WL 3365368 [1st Dept Nov 21, 2006]; *Jones v Budhwa*, 23 AD3d 154 [1st Dept 2005]). The continuous representation doctrine is irrelevant

here because the services ended in June 2001. On the Prior Motion, the record indicated the existence of an issue as to precisely when movants' services ended because Rosen prepared the tax return for East Hudson Plan in 2001. However, the fiscal year of that entity ended on April 30, 2001, and it is undisputed that Rosen's accounting work for that entity ended in June 2001. As previously stated, East Hudson Plan first asserted the malpractice claim in the Westchester Action in September 2004, more than three years after the running of the statute of limitations.

Movants also argue that, to the extent that the malpractice claim by East Hudson PC interposed in its counterclaim is timely, that claim must be dismissed because there is no basis upon which it can assert a malpractice claim based on a transaction with East Hudson Plan, since the two are separate entities.

East Hudson PC and East Hudson Plan dispute this assertion, contending that when Rosen billed for services provided by himself and his company, he did not render two separate invoices, one to East Hudson Plan and one to the corporation East Hudson PC. This contention is unpersuasive. It has already been established that these are two separate entities for purposes of asserting claims, as the court in the Westchester Action found in its decision of May 4, 2004 wherein it is stated:

Although defendant also seeks an offset for accounting services provided to East Hudson Urology Group, P.C., the latter is not a party to this action and is a separate entity from plaintiff. There is no legal authority for requiring the plaintiff to pay for accounting services provided to the medical group or individual members of the medical group.

Indeed, the East Hudson parties themselves argued as much in the Westchester Action, which determination is now the law of the case (*Leventritt v Eckstein*, 206 AD2d 313 [1st Dept], *lv dismissed in part, denied in part*, 84 NY2d 987 [1994]). Hence, movants are entitled to

dismissal of East Hudson PC's counterclaim for malpractice asserted in Action No. 1 because there was no claim of malpractice allegedly committed against this entity; it was East Hudson Plan that made the loan to Rosen, and the malpractice claim is based upon this loan and the Note.

Significantly, even if East Hudson PC were able to assert a malpractice claim based upon the Note given to it, there are no allegations in the pleadings *by East Hudson PC* as to such a claim. Contrary to the East Hudson Parties' assertion, this issue was raised in the Prior Motion. East Hudson PC's counterclaim merely alleges that "during the period that plaintiff provided services to the Group, it provided services in an improper and negligent manner as a result of which the Group sustained damages." As such, the claim is not viable (*see Rau v Borenkoff*, 262 AD2d 388 [2d Dept 1999]).

Further, there are no allegations in the pleadings, nor elsewhere in the record, indicating a basis upon which East Hudson PC can assert a malpractice claim (*see e.g. Fagin Aff*, July 28, 2006 [malpractice claim based upon the loan and the failure to advise that the loan was improper]). Dr. Fagin testified at his deposition that East Hudson PC was not dissatisfied with Rosen's services; rather, the problem it had was Rosen's failure to pay the amount due on the Note (*see Cmielewski Aff*, Exh H, Nov 8, 2006, at 26-27).

Accordingly, it is

ORDERED that the motion for reargument is granted, and, upon reargument, the prior decision is withdrawn; and it is further

ORDERED that the motion to dismiss the malpractice claims asserted by East Hudson, PC and East Hudson Plan is granted, and those claims are dismissed; and it is further

ORDERED that the clerk may enter judgment accordingly.

Dated: January 5, 2007

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J.S.C.

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