

TKJ Mgt. Corp. v Mark Mandel & Co. CPA's
2008 NY Slip Op 30482(U)
February 8, 2008
Supreme Court, Nassau County
Docket Number: 3392-07/
Judge: Ira B. Warshawsky
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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 10

TKJ MANAGEMENT CORP., REVERE SUPER SERVICE, INC., REVERE SUPER SERVICE TOO, INC., CAR CARE OF MANHASSET, INC., JERICHO SUPER SERVICE, INC., KISSENA BOULEVARD CONVENIENCE STORE, INC. and MIDDLENECK SUPER SERVICE, INC. k/k/a 595 CORP.,

Plaintiffs,

INDEX NO.: 013392/2007
MOTION DATE: 12/14/2007
MOTION SEQUENCE: 001 and
002

-against-

MARK MANDEL & CO. CPA's, FUOCO MANDEL, CPA's LLP, FUOCO, HENLE & ASSOCIATES, INC., FUOCO PEARE & HELLER CPA's, FUOCO GROUP LLP, MARK MANDEL, individually, JOSEPH MANZELLI, JR., individually, and LOU FUOCO, individually,

Defendants.

The following papers read on this motion:

Notice of Motion, Affidavit & Exhibit Annexed.....	1
Memorandum of Law in Support of Motion to Dismiss of Defendants Mark Mandel and Mark Mandel & Co. CPA's.....	2
Notice of Cross Motion & Affirmation.....	3
Affirmation in Opposition to Defendants' Motion to Dismiss of Steven R. Schlesinger, Affidavit & Exhibits Annexed.....	4
Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss.....	5
Affirmation in Opposition to Defendants' Cross Motion to Dismiss of Steven R. Schlesinger, Affidavit & Exhibits Annexed.....	6
Plaintiffs' Memorandum of Law in Opposition to Defendants' Cross Motion to Dismiss..	7
Reply Affirmation of Corey Stark & Exhibit Annexed.....	8

This motion by defendants Mark Mandell & Co. CPA's and Mark Mandel (the Mandel defendants) for an order pursuant to CPLR § 3211 (a) 5. & 7. dismissing the complaint, and the cross motion by defendants, Fuoco Mandel, CPA's LLP, Fuoco, Henle & Associates, Inc., Fuoco Peare & Heller CPA's, Fuoco Group LLP and Lou Fuoco (the Fuoco defendants), for an order dismissing the second and fourth causes of action are determined as follows.

The plaintiffs, owners and operators of several retail gas stations, commenced this action to recover damages from the accountants they engaged to calculate the taxes to be collected and paid on each gallon of gas and diesel fuel for each taxing jurisdiction in which plaintiff's gas stations are situate. Plaintiffs allege that the miscalculation of sales tax on retail sales of gasoline and diesel fuel resulted in losses of profit and subjected them to audits and assessments by the taxing authorities.

Plaintiffs plead four causes of action against all defendants.

The first sounds in professional malpractice. Defendants allegedly "failed to discharge their duties in a proper, skillful and diligent manner and, in fact, negligently, carelessly, unskillfully and improperly calculated taxes ...[so that] plaintiffs were unable to compute the proper retail selling price for their Gasoline [sic] and subjected them to sales tax audits and assessments by the New York State Department of Taxation and Finance." Cmplt. ¶¶ 27 and 28.

It is further alleged that they did not timely or properly handle the sales tax audit, and continued to improperly calculate the taxes even after learning of the audit and assessment.

The second cause of action alleges a breach of fiduciary duty based on the same conduct as supporting the malpractice claim set forth in the first cause of action.

The third cause of action alleges a breach of contract and a "return of all sums they paid to Defendants." Cmplt. ¶ 39.

The fourth cause of action is for damages in the nature of attorney fees spent in

resolving the sales tax audit and assessments by the New York State Department of Taxation and Finance which defendants had failed to properly resolve.

The facts as understood from the complaint are that in 1998 plaintiff engaged defendants Manzelli and Mandel, and Mandel's firm, to provide accounting services. The accountant was to advise plaintiff on the price to be charged at the station's gas or diesel pumps. The amount to be charged for product was based, inter alia, on the amount of taxes to be paid. Plaintiff contends that the prices charged were based on defendants' complex algorithm. An error in the basic premise would result in loss of profit at the pump and under collection of sales taxes.

In October of 2002, plaintiff's accountant, the Mandel defendants, were terminated in a dispute over fees. However, the firm to which Manzelli and Mandel belonged, Mark Mandel & Co. CPA's LLP, was soon to merge with the firm of Louis Fuoca, and became Fuoco Mandel CPA's LLP., and was reaccepted by plaintiff on October 25, 2002. Plaintiff claims that over the following four years the accountants reviewed his accounting systems, his inventory control, prepared profit and loss statements for the gas stations and convenience store, reconciled bank statements and also acted as business advisors or consultants.

Throughout reincarnations of the original accounting firm as set forth in the caption, defendants continued to provide accounting services using Mark Mandel's original formula for gasoline and diesel fuel pricing. Continuously, therefore, allegedly, they charged the wrong retail price and plaintiffs underpaid the sales tax.

The first audit was noticed in August of 2003. Defendants represented their client until November of 2006 when plaintiff terminated them. This action was commenced on August 15, 2007.

The Mandel defendants move for dismissal on the grounds that the entire action against them is time barred and that the complaint fails to state a cause of action. They claim that they were no longer the accountants for plaintiff as of October of 2002, and, therefore, cannot be sued five years later in negligence, which has a three year limitations period. The Mandel defendants argue that plaintiffs cannot avoid the three year Statute of Limitations by pleading the underlying negligence action as a breach of

contract, R.M. Kliment & Frances Galsband Architects v McKinsey & Co., 3 N.Y.2d 538 (2004), nor by pleading breach of fiduciary duty although the limitations period is still three years when only damages are sought. Loengard v Santa Fe Industries, 70 N.Y.2d 262 (1987).

Plaintiff counters that the continuous representation doctrine tolls the three year statute of limitations for accountant malpractice. CPLR § 214(6); Ackerman v Price Waterhouse & Co., 84 N.Y. 2d 535, 541 (1994). Plaintiff argues that it is applicable in this case insofar as Mandel and Mark Mandel & Co. CPA's continued to service his accounting needs, albeit under the name of the initially merged Fuoco Mandel CPA's LLP. company and then the others that followed of which Mandel and Manzelli continued to be members. Id.; Williamson v Price Waterhouse Coopers LLP, 9 N.Y.3d 1 (2007).

Further, the Mandel defendants argue that the second cause of action does not state a claim because as accountants they were not fiduciaries, the third cause of action is simply a negligence action masquerading as a breach of contract, and the fourth cause of action fails since attorney fees are only granted pursuant to statute or agreement.

The Fuoco defendants argue that the second cause of action for breach of fiduciary duty should be dismissed on the grounds that between accountant and a client no fiduciary relationship exists. Nate B. & Frances Spingold Foundation v Wallin, Simon Black and Co., 184 A.D.2d 464 (1st Dept 1992). Plaintiffs counter that they relied upon defendants as more than accountants and saw them as business managers instrumental in making important decisions for the profitability of the gas stations.

The first cause of action is the bellwether of this action. Only the Mandel defendants move for dismissal on the ground of the running of the three year limitations period. That relief should be granted as to defendant Mark Mandel & Co. CPA's who were terminated in October of 2002. There is nothing in the record on the exact date that plaintiff was first audited by the taxing authority. There is no evidence that the accountant and client were aware of any inaccuracies that needed addressing such as would toll the statute, see Id., and Mark Mandel & Co. ceased to exist then so could not

service plaintiffs' accounting needs. On the other hand, the individual Mark Mandel did continue his association with plaintiffs under the authority of his new firm, and he cannot benefit from the severance which separated any duty owed by Mark Mandel & Co. to plaintiffs.

For the reason that professional malpractice is the injury complained of, a duty imposed upon a fiduciary is not implicated in the facts alleged. As a basic proposition, in the State of New York an accountant is not a fiduciary of the client. Id. Plaintiff complains that defendants departed from accepted standards of practice and that the departure was the proximate cause of plaintiffs' injury. Herbert H. Post v Bitterman, 219 A.D.2d (1st Dept. 1996). Plaintiffs' allegations are based on lack of skill. Lacking is a claim that defendants had knowledge of and concealed illegal acts of diversion of funds. Id. Neither did anyone other than plaintiffs depend upon the calculations arrived at by defendants.

Telling on the point is the analysis of the Court of Appeals in Williamson v Price Waterhouse. In determining whether the continuous representation doctrine operated to toll the Statute of Limitations in that case, the analysis focused on whether the client and accountant had a "mutual understanding" of concern for prior audits. 9 N.Y.3d at 10-11. Each audit was viewed as a new one. See also Zorn v Gilbert, 8 N.Y. 3d 933, 934 (2007) (statute is tolled where there is a mutual understanding of the need for further representation on the specific subject underlying the malpractice claim).

Conversely, in this case, taking as true the facts alleged in the complaint, defendants undertook to represent plaintiffs in the ongoing audit with the New York State taxing authority based on an original error in the algorithm used for retail pricing. Plaintiffs reposed confidence and faith in their accountant as both "were acutely aware of the need for further representation against the [NYS taxing authority] (i.e. they had a mutual understanding to that effect), ... and plaintiffs were under the impression that defendant [accountants were] actively addressing their needs." Id.

Insofar as plaintiffs' continuous employment of defendants throughout the auditing process and corrective action to set the retail price was as their accountant, their business relationship was strictly professional and not as a fiduciary. Plaintiffs'

description of the accountants as opposed to factual claim, as being more than mere auditors or tax preparers, and as being an integral part of the profitability and business plan, does not take them beyond the realm of accountants. Plaintiffs have not shown in their pleadings that their duties were not well spelled out in their agreements; the accounting services they contracted for was to fix the retail price of gasoline so that plaintiffs would earn a profit, collected the right amount of sales tax and be awarded a bonus from Mobil for volume sales.

Accordingly, the second cause of action should be dismissed against all parties for failure to state a cause of action.

Remaining for consideration is the application to dismiss the fourth cause of action. It is plead as an element of damages for the first cause of action and is a sustainable cause of action. Rudolf v Shayne Dachs Stanisci Corker & Sauer, 8 N.Y.3d 438 (2007).

On the basis of the foregoing, it is

ORDERED that the first and fourth causes of action against defendant, Mark Mandel & co. CPA's, are dismissed as being time barred. The motion is denied without prejudice as to the third cause of action for breach of contract insofar as the movant has not presented argument on that issue. It is further

ORDERED that the second cause of action is dismissed against all defendants.

All other requests for relief not expressly addressed are denied.

A Preliminary Conference (see NYCRR 202.12) shall be held on March 6, 2008, at 9:30 A.M., before the undersigned in the Supreme Court of Nassau County.

Counsel for all parties are reminded that this matter has been assigned to the Commercial Division of the Supreme Court of Nassau County and the parties are directed to follow the Rules of this Division.

Dated: February 8, 2008

John S. Heenan
ENTERED
 J.S.C.
 FEB 15 2008
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE