

**Always There Respiratory Home Care, Inc. v  
Accounting Off. of L.K. Reisman**

2008 NY Slip Op 31008(U)

March 21, 2008

Supreme Court, Richmond County

Docket Number: 0101410/2005

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND PART DCM 3**

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**Index No.: 101410/05  
Motion No.: 2**

**ALWAYS THERE RESPIRATORY HOME CARE, INC,**

*Plaintiff*

*against*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

**THE ACCOUNTING OFFICES OF L.K. REISMAN and  
FREDERICK P. SCHECK,**

*Defendants.*

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The following items were considered in the review of this motion for summary judgment:

<u>Papers</u>	<u>Numbered</u>
<b>Notice of Petition and Affidavits Annexed</b>	<b>1</b>
<b>Answering Affidavits</b>	<b>2</b>
<b>Replying Papers</b>	<b>3</b>
<b>Exhibits</b>	<b>Attached to Papers</b>

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Defendants make a motion for an order granting summary judgment and dismissing the action in its entirety pursuant to CPLR §§3013, 3211(a)(1), (5), (7), (8), (1), and 3212.

Plaintiff, Always There Respiratory Home Care, Inc., seeks damages from the alleged mismanagement of its company's taxes for the years 2001, 2002, and 2003. Plaintiff claims that defendants were hired to perform accounting services for his company and were negligent in preparing his company's taxes. As a result of the alleged malpractice, plaintiff claims the IRS placed liens and fines on his business.

Defendants claim that plaintiff's action fails to allege the elements of a viable cause of action of accounting malpractice against either of the named defendants. Furthermore, defendants argue that the claims are beyond the three year statute of limitation applicable to an accounting malpractice claim.

## Discussion

An action for professional malpractice, other than medical, dental or podiatric malpractice, must be commenced within three years of the date of accrual.<sup>1</sup> A claim accrues when the malpractice is committed, not when the client discovers it.<sup>2</sup> The Court of Appeals, in *Ackerman v Price Waterhouse*,<sup>3</sup> held that an accounting malpractice claim “accrues upon the client’s receipt of the accountant’s work product since this is the point that a client reasonably relies on the accountant’s skill and advice.”<sup>4</sup> Here, plaintiff’s malpractice claims for years 2001 and 2002 is untimely as this action was brought on May 5, 2005. However, as to the claim for year 2003, that claim appears timely.

However, as the defendants argue, there is an issue of whether plaintiff asserted a claim against the proper party. Plaintiff claims that the defendants performed the accounting services for his company under various names besides “Reisman and Associates” located in Staten Island. In support of his argument, plaintiff attaches various faxes and correspondence addressed to and from defendants. However, as to year 2003, which is the only claim that is not barred by the statute of limitations, the only exhibit given is plaintiff’s letters dated February 16, 2003 and February 16, 2004. In reviewing these exhibits, the sticker label on the document reads “Bratinelle, Inc.” Plaintiff claims that this sticker label was placed over the printing “L.K. Reisman” because defendants were his actual accountants and not “Bratinelle, Inc.”

Defendants argue that the proper party that actually had a contractual relationship with the plaintiff is a New Jersey Corporation by the name of Brantinelle, Inc. and thus, there is no privity of contract between the plaintiff and the named defendants. In support of their argument that plaintiff

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<sup>1</sup>See, CPLR §214[6].

<sup>2</sup>*Glamm v Allen*, 57 NY2d 87, 93 [1982], citing *McDermott v Torre*, 56 NY2d 399 [1982].

<sup>3</sup>84 NY2d 535 [1994].

<sup>4</sup>*Id.* at 541.

cannot maintain a malpractice claim against the defendants in the absence of privity, defendants' cite to the First Department case of *Dinerstein v Anchin, Block & Anchin, LLP*.<sup>5</sup> Although the court in *Dinerstein* requires privity between parties, the court found that despite the fact that plaintiff, a stockholder and director of Medi-Bill, was not a party to the engagement letters by which Medi-Bill retained defendant to audit its financial statements, its relationship with defendant sufficiently approached privity to sustain an accounting malpractice claim, despite defendant's contention that the claim must fail for lack of contractual privity.<sup>6</sup> Likewise here, there are issues of fact as to whether defendants were the intended beneficiary of the contract between plaintiff and Brantinelle, Inc precluding summary judgment dismissing plaintiff's cause of action for accounting malpractice that allegedly occurred in 2003.

Accordingly, it is hereby:

ORDERED, that the defendants The Accounting Offices of L.K. Reisman and Frederick P. Scheck's motion for an order granting summary judgment dismissing the action in its entirety pursuant to CPLR §§3013, 3211(a)(1), (5), (7), (8), (1), and 3212, is granted in part and denied in part; and it is further

ORDERED, that the claims concerning the taxes for 2001 and 2002 are dismissed, and it is further

ORDERED, that all parties appear at DCM Part 3 at 9:30AM on **Wednesday, April 16, 2008** for a compliance conference.

ENTER,

DATED: March 21, 2008

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<sup>5</sup>41 AD3d 167 [2007].

<sup>6</sup>*Id.* at 167, citing *Credit Alliance Corp. v Arthur Andersen & Co.*, 65 NY2d 536 [1985].

Joseph J. Maltese  
Justice of the Supreme Court