

**Anda Mgt., LLC v Needleman & Schacter,
LLP**

2008 NY Slip Op 31534(U)

May 20, 2008

Supreme Court, Nassau County

Docket Number: 0505-07/

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

ANDA MANAGEMENT, LLC, WILLIAM T.
SCHLENGER and SHARYN SCHLENGER,

Plaintiffs,

INDEX NO.: 000505/2007
MOTION DATE: 04/21/2008
MOTION SEQUENCE: 002 and 003

-against-

NEEDLEMAN & SCHACTER, LLP,

Defendant.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed	1
Defendant’s Memorandum in Support of its Motion for Summary Judgment	2
Notice of Cross Motion, Affirmation, Affidavit & Exhibits Annexed	3
Reply affirmation of Matthew Tracy & Exhibit Annexed	4
Reply Affirmation of Joseph P. Tucker & Exhibits Annexed	5
Defendant’s Statement of Undisputed Facts	6
Plaintiff’s Response to Defendant’s Statement of Undisputed Facts	7
Proposed Amended Complaint	8

Motion pursuant to CPLR 3212 by the defendants Needleman and Schacter, LLP, for summary judgment dismissing the complaint.

Cross motion pursuant to CPLR 3025[b] by the plaintiffs Anda Management, LLC, William T. Schlenger and Sharyn Schlenger for leave to amend their complaint.

In 2003, the plaintiff Anda Management, LLC (“Anda”) and non-party Wilmington Papers Corp., Inc. [“Wilmington”] together formed a third entity known a World Wide Fibers,

LLC [World Wide"], a Delaware limited liability company (Def's Exh., "C") to further the venture's objective of selling paper products overseas and "to develop new accounts" (Schlenger Aff., ¶ 8).

The defendant accounting firm, Needleman and Schacter, LLP ["the Needleman firm" or the "defendant"], was retained as Worldwide's accountant – although no written agreement has been produced defining the precise scope of the defendant's representation.

In 2006, the relationship between the Schlengers and Wilmington's principals, Stuart and Harvey Lurie, soured, and in November of that year, Wilmington commenced a proceeding in the Delaware Chancery Court to dissolve Worldwide, in which both William Schlenger and Anda were named as defendants.

In substance, Wilmington's dissolution claims were founded on allegations that Anda and the Schlengers were, *inter alia*, impermissibly withdrawing funds from Worldwide for personal reasons and then falsely characterizing them as legitimate business expenses (S. Lurie Aff., ¶¶ 25-28[a] [Defs' Exh., "F"]). Notably, the Needleman firm provided assistance to Wilmington – with which it had a long-term professional relationship – in prosecuting the Delaware proceeding against the plaintiffs (A. Needleman Dep., 15; Cmplt., ¶¶ 13-14; Schlenger Aff., ¶ 13).

Thereafter, the Delaware litigation progressed and a related arbitration proceeding was also conducted, but both matters were ultimately resolved when Anda purchased Wilmington's interest in Worldwide (Def's Rule 19-A Statement, ¶ 15; Schlenger Dep., 134).

In January of 2007, the plaintiffs Schlenger and Anda commenced the within action against the Needleman firm, setting forth claims sounding in breach of fiduciary duty and professional malpractice, principally arising out of the defendant's conduct in the Delaware proceeding.

The plaintiffs allege that in the Delaware proceeding, the defendant consulted with and assisted Wilmington's trial counsel by, *inter alia*: reviewing a proposed complaint which Wilmington later served in the matter; participating in conference calls with Wilmington's Delaware trial counsel; and submitting affidavits supportive of Wilmington's claims against the plaintiffs – affidavits which the plaintiffs now claim were false, misleading, and which contradicted and arose out of accounting advice which the defendant itself had previously given

to the plaintiffs in 2005 (Schlenger Aff., ¶¶ 28-32; A. Needleman Dep., at 75-76, 93-96; 83-84; Pltffs' Exh., "5").

Additionally, the plaintiffs contend that the Needleman firm was aware that the expenses challenged by Wilmington were proper, and indeed, that the firm itself had affirmatively counseled the plaintiffs to take some of the disbursements described by Wilmington as improper, including a hotly disputed, \$69,000.00 disbursement reflected on Worldwide's books and taken by Anda in January of 2006 – which amount was allegedly taken with partner Allen Needleman's knowledge and at his express direction (Schlenger Aff., ¶ 15; Cmpl., ¶¶ 12, 22-23; Pltffs' Rule 19A Statement, ¶¶ 6-7).

The plaintiffs further contend that a Needleman "senior accountant" assigned to inquire into Worldwide's expenses, transmitted the Schlengers' personal social security numbers, which he obtained from file materials, to Wilmington's Delaware trial counsel, and then used that information – allegedly at the defendant's direction – to perform personal, on-line credit searches, which were also provided to opposing counsel in the Delaware matter. The same employee – who inquired about invoking a Fifth Amendment privilege at the outset of his deposition (David Dep., 6) – was apparently forwarding spreadsheet documents and e-mails he received from plaintiffs, to Wilmington's trial counsel and was also "blind copying" e-mails he originally sent to the plaintiffs, to Wilmington's Delaware attorneys (David Dep., 48-52; 78-90; A. Needleman Dep., 100-102, 103; Def's Brief at 7, fn 1; Pltff's Exh., "7").

The Needleman firm has answered, denied the material allegations of the complaint and interposed various affirmative defenses (Def's Mot., Exh., "B"). Depositions have been conducted and the Needleman firm now moves for summary judgment dismissing the complaint.

The plaintiffs cross move pursuant to CPLR 3025[b] for leave to serve an amended pleading which adds three new claims alleging fraud and violations of General Business Law § 380, as well as the so-called Federal, "Fair Credit Reporting Act" (15 USC § 1681, *et. seq.*). The plaintiffs' motion is granted. The defendant's motion is denied.

Viewed "in the light most favorable to * * * [the plaintiffs], as is appropriate in the context of * * * [a] motion for summary judgment" and affording plaintiffs "the benefit of every favorable inference" (*Fundamental Portfolio Advisors, Inc. v. Tocqueville*, 7 NY3d 96, 106

[2006]; *Franklin v. 2 Guys From Long Pond, Inc.*, ___ AD3d ___, 2008 WL 1748320 at 1 [2nd Dept. 2008]; *Mosheyev v. Pilevsky*, 283 AD2d 469), the court finds the evidence submitted has generated issues of fact with respect to plaintiffs allegations and claims against defendant.

Specifically, the plaintiffs have raised questions of fact with respect to their assertions that the defendant acted faithlessly, recklessly and unprofessionally by affirmatively assisting the plaintiffs' adversary in the Delaware-based dissolution proceeding through the submission of false and misleading affidavits allegedly arising out of, among other things, accounting advice the defendant itself had provided to the plaintiffs.

The contention that the defendant never entered into a formal retainer agreement with the plaintiffs and that, in any event, no fiduciary relationship generally exists between an accountant and his client, is not determinative (e.g., *Friedman v. Anderson*, 23 AD3d 163, 166; *DG Liquidation, Inc. v. Anchin, Block & Anchin, LLP*, 300 AD2d 70, 71).

Upon the inconclusive evidence presented, the precise nature of defendant's relationship with the plaintiffs and the scope of its retainer with Worldwide – which was apparently not memorialized in writing – is by no means clear and cannot be definitively assessed, thereby raising issues of fact as to whether the plaintiffs' "relationship with the defendant otherwise sufficiently approached privity to sustain * * * [the] accounting malpractice claim * * *" (*Dinerstein v. Anchin, Block & Anchin, LLP*, 41 AD3d 167; *L.H.P. Realty Co., Inc. v. Rich*, *supra see*, *SS&J Morris, Inc. v. Mahoney Cohen & Co.*, 264 AD2d 343, 344; *Always There Respiratory Home Care, Inc v. The Accounting Offices of L.K. Reisman*, ___ Misc3d ___, 2008 WL 1721521 at 3 [Supreme Court, Richmond County 2008] *see generally*, *Prudential Ins. Co. of America v. Dewey, Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377, 382 [1992]; *Credit Alliance Corp. v. Arthur Andersen & Co.*, 65 NY2d 536 [1985] *cf.*, *Kimmell v Schaefer*, 89 NY2d 257, 264 [1996]).

Indeed, and viewed in a favorable light (*Mosheyev v. Pilevsky, supra*), the record suggests that the defendant allegedly and affirmatively dispensed expert accounting advice to Anda and its closely held and joint venturers relating to corporate disbursements, tax issues and financial matters impacting upon the internal accounting practices of Worldwide as well as its two, constituent members (*cf.*, *White v. Guarente*, 43 NY2d 356, 363 [1977]; *Caprer v. Nussbaum*,

supra, at 198-199).

Moreover, courts have alternatively sustained analogous claims against accountants where, as here, the allegations made are grounded upon, *inter alia*, misrepresentation, grossly negligent or reckless conduct and/or “a failure to withdraw in the face of a conflict of interest” (*Nate B. & Frances Spingold Foundation v. Wallin, Simon, Black and Co.*, 184 AD2d 464, 465-466 *see, Lavin v Kaufman, Greenhut, Lebowitz & Forman*, 226 AD2d 107; *Kanev v. Turk*, 187 AD2d 395; *Amken Orthopedics, Inc. v. Chesin & Co.*, ___ Misc3d ___ 2008 WL 227022 [Supreme Court, New York County 2008]; *L.H.P. Realty Co., Inc. v. Rich*, ___ Misc3d ___, 2001 WL 1537744 [Supreme Court, New York County 2001] *see also, Mitschele v. Schultz*, 36 AD3d 249, 254).

The Court also disagrees with the defendant’s claim that the evidence submitted establishes the absence of causation as a matter of law. It is settled that where as here, “causation is disputed, summary judgment is not appropriate unless ‘only one conclusion may be drawn from the established facts’” which is “not the case here” (*Speller ex rel. Miller v. Sears, Roebuck and Co.*, 100 NY2d 38, 44 [2003], *quoting from, Kriz v. Schum*, 75 NY2d 25, 34 [1989]).

“Summary judgment is a drastic remedy “that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues’” (*Kolivas v. Kirchoff*, 14 AD3d 493, *quoting from, Andre v. Pomeroy*, 35 NY2d 361 [1974]). Indeed, “[e]ven the color of a triable issue forecloses the remedy” (*In re Cuttitto Family Trust*, 10 AD3d 656; *Rudnitsky v. Robbins*, 191 AD2d 488, 489).

Lastly, and upon a “circumspect, prudent and cautious” exercise of its discretion (*cf., Thomsen v. Suffolk County Police Dept.*, ___ AD3d ___, 2008 WL 1820814 [2nd Dept. 2008]), the Court grants the plaintiffs’ cross motion to amend its complaint so as to add claims based on fraud, General Business Law § 380, article 25, and the “Fair Credit Reporting Act”.

Here, although the matter was certified as trial-ready in December of 2007 – some three months prior to the instant application for leave – it is settled that “[i]n the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted,” and also that “[m]ere lateness is not a barrier to the amendment” (*Edenwald Contracting Co., Inc. v. City of New York*, 60 NY2d 957, 960 [1983]; *Spitzer v. Schussel*, 48 AD3d 233).

The defendant has not established prejudice, "which must be significant" (*Spitzer v. Schussel, supra*), *i.e.*, it has not shown that it has been "hindered in the preparation of its case or prevented from taking some measure to support its position" (*Spitzer v. Schussel, supra*). Nor are the proposed causes of action "patently devoid of merit" (*RCLA, LLC v. 50-09 Realty, LLC*, 48 AD3d 538) or, in the case of the fraud claim, pleaded in an unduly conclusory or inadequate fashion (CPLR 3016[b] *see, Pludeman v. Northern Leasing Systems, Inc.*, ___NY3d___, 2008 WL 1944567 [2008]; *Lanzi v. Brooks*, 43 NY2d 778, 780 [1977]; *Wiesenthal v. Wiesenthal*, 40 AD3d 1078, 1080; *Caprer v. Nussbaum, supra*, at 196, 202-203; *Auguston v. Spry*, 282 AD2d 489, 490).

The Court has considered the defendant's remaining contentions and concludes that they are lacking in merit.

Accordingly, it is,

ORDERED, that the motion pursuant to CPLR 3212 by the defendants Needleman and Schacter, LLP, for summary judgment dismissing the complaint, is denied, and it is further,

ORDERED that cross motion pursuant to CPLR 3025[b] by the plaintiffs Anda Management, LLC, William T. Schlenger and Sharyn Schlenger for leave to amend their complaint is granted, and it is further,

ORDERED the amended complaint which was attached to the notice of cross motion is deemed served and the defendant's time to serve an answer is enlarged until 20 days after service upon them of a copy of this decision and order. The foregoing constitutes the decision and order of the Court.

The previously scheduled conference for June 2, 2008 is being adjourned to June 25, 2008, at 9:30 A.M., to set a new discovery schedule.

Dated: May 20, 2008


J.S.C.

ENTERED

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