

Horn's Inc. v Geller Marzano & Co. CPA's, P.C.

2010 NY Slip Op 31871(U)

July 9, 2010

Supreme Court, New York County

Docket Number: 113883/05

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Ling-Cohan
Justice

PART 36

Index Number : 113883/2005

HORNS

VS.

GELLER, MARZANO

SEQUENCE NUMBER : 007

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

in this motion to/for summary judgment

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
1, 2, 3	_____
4, 5	_____
6	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by plaintiff for partial summary judgment is decided in accordance with the attached memorandum decision 006.

FILED
JUL 15 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/9/10 _____


JUSTICE DORIS LING-COHAN .S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK- NEW YORK COUNTY
PRESENT: Hon. DORIS LING--COHAN, Justice PART 36

HORNS, INC. & FRANCINE HORN,

Plaintiffs,

-against-

GELLER MARZANO & CO. CPA'S, P.C.,
& DEAN HERNAN,

Defendants.

INDEX NO. : 113883/05
Motion Seq. No.: 006/007

FILED
JUL 15 2010
COUNTY CLERK'S OFFICE
NEW YORK

DORIS LING-COHAN, J.S.C.:

This is an action for accountant malpractice and related claims. Defendants have moved for summary judgment (motion sequence number 006). Plaintiffs have moved for partial summary judgment (motion sequence number 007). The motions are consolidated for disposition.

The complaint contains the following four (4) causes of action: (1) accountants' malpractice; (2) breach of contract; (3) breach of fiduciary duty; and (4) fraud.

Plaintiffs allege that defendant Geller Marzano and Company CPA's, P.C. (Geller Marzano) and the individual defendant Dean Hernan (Hernan) acted as plaintiffs' accountants, tax advisors, financial planners and investment advisors beginning in 1986, through and including the periods of time alleged in the complaint. Plaintiff Francine Horn (Horn), who was recently widowed, decided to sell Horns, Inc., shortly after her husband, and business partner, died. Plaintiffs claim that defendants exploited their long-standing fiduciary relationship with Horn when they obtained an ownership interest in Here & There, LLC (Here & There), the company that ultimately took control of Horns, Inc. (the business), while simultaneously representing Horn in the pricing and structuring of the sale of the business. Defendants are alleged to have gone to great lengths to disguise their role as purchasers of the business. Plaintiffs claim to have been damaged as a result of defendants' conflict of interest when the purchasers of the business defaulted on their contractual payout to Horn, and then attempted to coerce Horn into accepting an

even lower sale price or suffer the consequences of the business' insolvency. Defendants are alleged to have continued to represent plaintiffs as their accountants while the post-sale negotiations were ongoing.

Plaintiffs claim that defendants' conduct constituted a gross deviation from the minimum professional conduct that defendants, as accountants, were required to follow. Among the actions complained of are that defendants advised and recommended that Horn sell her business for reasons unrelated to plaintiffs' accounting requirements and in disregard of plaintiffs' best interests, that defendants structured the terms of the transaction to substantially benefit themselves, to plaintiffs' detriment, and that defendants failed to disclose their conflict of interest or to obtain plaintiffs' informed consent to their continued representation. Plaintiffs claim that their reliance upon defendants was justified and reasonable, and that their damage was the proximate result of defendants' misconduct.

In seeking summary judgment of dismissal of plaintiffs' accountant malpractice claim, defendants argue that plaintiffs cannot show that they suffered any actual ascertainable loss when Horns, Inc. was sold. Defendants also argue that plaintiff Horn's allegations that she was unaware of Frank Marzano's and Geller Marzano's role in the purchase and sale of Horns, Inc., is disingenuous at best, as she and her attorney, Robert Balsam, were both apprised of Marzano's involvement prior to the company's sale.

Defendants further argue that plaintiffs' breach of contract, breach of fiduciary duty and fraud claims should be dismissed because they are redundant of the accounting malpractice cause of action. Defendants further maintain that plaintiff's breach of contract claim should be dismissed since plaintiff failed to allege that defendants expressly guaranteed any result, or that any retainer agreement with plaintiffs made any such promise or guarantee. Defendants also argue that plaintiffs' fraud claim must fail since plaintiffs did not plead with the necessary specificity the alleged misrepresentations allegedly made by defendants.

In support of their motion for partial summary judgment, plaintiffs argue that defendants' committed accountant malpractice as a matter of law by grossly deviating from the accepted standards which proximately caused plaintiffs' damages.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. 1. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957). The movant must tender evidence, by proof in admissible form, to establish the cause of action "succinctly to warrant the court as a matter of law in directing judgment." (CPLR § 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Winegrad v NYU Medical Ctr.*, 64 NY2d 851, 853 [1985]). To grant summary judgment it must be clear that no material and triable issue of fact is presented (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The court should draw all reasonable inferences in favor of the non-moving party, and should not pass on issues of credibility (*Dauman Displays, Inc. v. Masturzo*, 168 AD2d 204 [1st Dept 1990]).

Applying the above principles herein, the motion by defendants for summary judgment is granted in part and denied in part, and plaintiffs' motion for summary judgment is denied, as detailed below.

Plaintiffs' claims for breach of contract and breach of fiduciary are dismissed in that they are merely redundant to plaintiffs' accounting malpractice claims, with no independent basis. *See Nevelson v. Carro, Spanbock, Kaster & CuiFFo*, 290 AD2d 399, 400 (1st Dept 2002); *Sage Rlty Corp. v. Proskauer Rose LLP*, 251 AD2d 35, 38 (1st Dept 1998).

“The elements of a fraudulent concealment claim - [are] concealment of a material fact which defendant was duty-bound to disclose, scienter, justifiable reliance, and injury”. *Mitschele v. Schultz* 36 AD3d 249 (1st Dept 2006). Here, the facts as alleged are sufficiently stated to establish a claim of fraud. Moreover, there are factual issues as to such claim which warrant a denial of the motions for summary judgment. While defendants contend that the plaintiffs’ fraud claim is duplicative of the claim for accountant malpractice claim and therefore must be dismissed, the court disagrees. *See Mitschele v. Schultz*, 36 AD3d 249 (1st Dept 2006) (fraud claim was not simply based upon errors in professional judgment but rather “predicated on proof of the commission of an intentional tort”). Plaintiffs allege that defendants intentionally failed to inform Horn of the defendants’ conflicts of interest through their continued representation throughout the sale of Horns, Inc. Based upon the submissions, there are material questions of fact exist as to whether defendants intentionally failed to disclose their interests and involvement in the sale of Horns, Inc., to warrant a denial of the motions for summary judgment on the fraud cause of action.

A cause of action for accounting malpractice requires “that a professional failed to perform services with due care and in accordance with the recognized and accepted practices of the profession”. *Ackerman v. Price Waterhouse*, 84 NY2d 535, 541 (1994). Here, the parties’ expert affidavits, raise factual issues as to whether defendants in fact exercised due care regarding the sale of Horns Inc. and did not materially deviate from the recognized and accepted professional standards for accountants. Further, there is a factual dispute as to whether plaintiff Horn in fact had knowledge of defendants’ purchasing of Horns, Inc, prior to its sale. Moreover, there are factual issues as to whether plaintiffs sustained damages as a direct result of defendants’ actions or failure to act. Thus, plaintiffs’ and defendants’ motion for summary judgment on plaintiffs’ accountant malpractice claim, is denied.

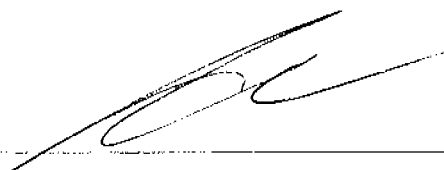
Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted to the extent that plaintiffs' causes of action for breach of contract, breach of fiduciary duty and fraud are severed and dismissed from this case; and it is further

ORDERED that plaintiffs' and defendants' motions for summary judgment on the accountant malpractice cause of action are denied; it is further

ORDERED that within 30 days of entry of this order, plaintiffs shall serve a copy upon defendants with notice of entry.

Dated: July 9, 2010



Hon. Doris Ling-Cohan, J.S.C.

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