

**Skyline Duplication & Document Mgt. Corp. v David  
Gronsbell & Co. Certified Pub. Accountants, P.C.**

2010 NY Slip Op 33680(U)

December 23, 2010

Sup Ct, New York County

Docket Number: 604201/2005

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN

PART 57

Justice

Keyline Duplicate of Documents Mgt Corp  
-v-  
David Grossbelle & Co

INDEX NO.

604201/05

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for summary judgment

PAPERS NUMBERED

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

1

Cross-Motion  
Answering Affidavits — Exhibits \_\_\_\_\_

2, 3

Replying Affidavits \_\_\_\_\_

4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion and cross-motion are

determined as per accompanying decision order dated 12-23-10.

**FILED**

DEC 23 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 12-23-10

Marcy S. Friedman  
MARCY S. FRIEDMAN J.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  
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

\_\_\_\_\_ x  
SKYLINE DUPLICATION AND DOCUMENT  
MANAGEMENT CORP.,

Index No.: 604201/2005

*Plaintiff(s)*,

- against -

DECISION/ORDER

DAVID GRONSBELL & CO. CERTIFIED  
PUBLIC ACCOUNTANTS, P.C. and LARRY  
JACOBS,

**FILED**

*Defendant(s)*.

**DEC 23 2010**

\_\_\_\_\_ x

NEW YORK  
COUNTY CLERK'S OFFICE

In this accounting malpractice action, plaintiff Skyline Duplication and Document Management Corp. (Skyline) sues for damages arising out of the alleged failure of defendants David Gronsbell & Co. Certified Public Accountants, P.C. and Larry Jacobs (collectively Gronsbell) to advise Skyline of Work Opportunity Tax Credits (WOTC) that Skyline claims it was entitled to receive. Gronsbell moves for summary judgment dismissing the complaint against it. Plaintiff cross-moves for summary judgment on its complaint against Gronsbell.

As a threshold matter, plaintiff contends that the court should deny Gronsbell's motion for summary judgment as untimely. While the note of issue was filed on April 10, 2008, by order dated September 18, 2008, this court extended the deadline to serve summary judgment motions to October 31, 2008. (See Ds.' Reply Ex. A.) By order dated October 21, 2008, this court (Silbermann, J.S.C.) marked the case off the trial calendar, with leave to restore the matter by stipulation. (See Ds.' Motion Ex. N.) Plaintiff received a signed stipulation from defendant restoring the matter on or about November 2009 (see Laub Aff. In Support Of Cross-Motion ¶ 7), and the instant motion was served on plaintiff on November 24, 2009. Accordingly, the court

finds that the motion and cross-motion were timely. (See Williams v Peralta, 37 AD3d 712 [2d Dept 2007].)

It is undisputed that Skyline employed Gronsbell to prepare Skyline's tax returns from 1994 until 2004. Skyline, a document duplication company, alleges that during the period from 1997 to 2006, it hired approximately 114 employees through non-party employment agency Binding Together. It further argues that these employees were members of "targeted groups," thus entitling Skyline to claim the WOTC as a result of their hiring. It is also undisputed that Skyline neither claimed nor received the WOTC during the period that Gronsbell prepared Skyline's tax returns.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently 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 showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

In moving for summary judgment, Gronsbell contends that Skyline's claims for accounting malpractice based on its failure to advise Skyline of the availability of the WOTC are barred by the statute of limitations for all but 12 employees.<sup>1</sup> Gronsbell further contends that there is no evidence that the employees would have qualified for the WOTC. (See Cannon Aff. In

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<sup>1</sup> Plaintiff has withdrawn its claims as to employees hired by Skyline after Gronsbell was terminated in 2004. (See Laub Aff. In Support of Cross-Motion ¶ 29.)

Support of Motion ¶¶ 24-26.)

As a threshold matter, the court rejects Skyline's assertion that Larry Jacobs, Gronsbell's accountant who worked with Skyline, admitted Gronsbell's liability. On the contrary, Mr. Jacobs denied that he was aware of the qualifications of employees hired by Skyline through Binding Together. He testified that all he was told by Mary Alva, Skyline's Chief Administrative Officer, was that Binding Together "was an employment agency." (Jacobs Dep. at 86.) Indeed, Jacobs testified that he had no recollection of Alva inquiring about the applicability of the WOTC, and no recollection of being shown a document of any kind about the WOTC. (*Id.* at 69-70.)

Skyline correctly contends that Jacobs acknowledged that it would be good and accepted practice to have knowledge of the tax credits that apply to a specific business, and that if a client is able to use a particular tax credit, it would be good and accepted practice to recommend that credit to the client. (Jacobs Dep. at 77-78.) However, this testimony was elicited in response to a hypothetical question and did not refer to the particular facts of this case. Jacobs did not testify that he knew that Skyline was hiring workers whose qualifications would entitle Skyline to claim the WOTC. Accordingly, Jacobs did not admit that he breached a duty to Skyline by failing to advise it about the WOTC.

The testimony of Skyline's employee, Alva, was ambiguous as to the extent of her communications with Jacobs regarding the WOTC. Alva testified that in 1999 or early 2000, she had received a document from Binding Together that indicated that Skyline might be entitled to the WOTC, and that "I asked [Larry Jacobs] if he was familiar with it, because I was not familiar with it at all. I asked him if he knew anything about it. If he was familiar with it or if it is anything we should be applying for, getting any credit for, because I did not know anything about it. And he did not really give me an answer on that." (Alva Dep. at 70, 78-79.) She also

testified, however, that she was “just asking Larry [Jacobs] as a general question” about the WOTC. (*Id.* at 80.) She further stated that she did “not really” understand that Skyline had hired certain categories of individuals who may have rendered Skyline eligible for the WOTC, and she acknowledged that she did not tell Jacobs that Skyline had hired or was in the process of hiring categories of people who might be eligible for the WOTC. (*Id.* at 79-80.)

On the instant cross-motion, Skyline also submits the affidavit of Michael McGowan, Skyline’s president, in which he asserts that he inquired repeatedly of Jacobs about ways to limit tax liability. However his affidavit wholly fails to make any detailed showing that Skyline specifically inquired of Jacobs as to whether the hiring of employees from Binding Together might entitle Skyline to the WOTC. (McGowan Aff. In Support of Cross-Motion ¶¶ 4-6.)

Notwithstanding the vagueness of the testimony of Skyline’s witnesses, the court assumes, for purposes of these motions, that Skyline has raised a triable issue of fact as to whether defendant Gronsbell had a duty, as Skyline’s accountant, to advise Skyline of Skyline’s possible eligibility for the WOTC. The court accordingly turns to defendant’s statute of limitations defense.

Accounting malpractice is “[a] cause of action charging 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]. *Accord Herbert H. Post & Co. v Sidney Bitterman, Inc.*, 219 AD2d 214 [1<sup>st</sup> Dept 1996].) The statute of limitations for accounting malpractice is three years. (CPLR 214[6].) Generally, “[i]n the context of a malpractice action against an accountant, the 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 and, as a consequence of such reliance, can become liable for tax

deficiencies.” (Ackerman, 84 NY2d at 541.)

Defendant contends that the statute of limitations bars claims as to each employee which accrued more than three years prior to filing of the action on November 29, 2005. Plaintiff contends that the statute of limitations is not a bar because the “continuing representation” doctrine applies to Gronsbell’s services for Skyline.<sup>2</sup>

This case presents complicated issues as to the precise accrual date, for statute of limitations purposes, of Skyline’s claims arising out of Gronsbell’s alleged failure to advise Skyline of the availability of the WOTC. Skyline does not establish on this record that the “continuing representation” doctrine applies. As noted above, there is a sharp dispute in the deposition testimony of Alva and Jacobs as to the nature of the parties’ discussions regarding the WOTC. Moreover, according to Alva’s own testimony, there were gaps of years between the times she allegedly inquired of Jacobs about the WOTC. (See Alva Dep. at 85-88.) Skyline therefore has not met its burden of showing that there was a “mutual understanding” that advice about the availability of the WOTC was contemplated by the parties as part of the ongoing or future services rendered to Skyline by Gronsbell. (See Williamson v Pricewaterhousecoopers LLP, 9 NY3d 1, 11 [2007]; Apple Bank for Savings v Pricewaterhousecoopers LLP, 70 AD3d 438 [1<sup>st</sup> Dept 2010].)

Conversely, Gronsbell does not establish the date from which the statute of limitations should be found to run on each claim for a WOTC based on the hiring of each employee. The

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<sup>2</sup> More particularly, defendant contends that the WOTC requires that the employer request a certification from the designated local agency, within 28 days of the hire date, that the employee is a member of a targeted group (see USC §51[d][13] [A][ii][II]), and that Skyline’s malpractice claims accrued 28 days after each of the claimed employees was hired and Skyline failed to request the certifications. As a result, Gronsbell argues that Skyline’s claims are timely as to only 12 employees. Skyline claims that under the continuing representation doctrine all of its claims are timely for those employees hired prior to Gronsbell’s termination in August 2004.

accrual date is a fact-specific inquiry in which the limitations period is “measured from the date the taxpayer receives and, as a consequence, relies on the accountant's advice and/or work product.” (Ackerman, 84 NY2d at 543.) Gronsbell fails to submit authority in support of its contention that each claim accrued 28 days after the hire of a employee, when Skyline failed to file a request for a certification that was a pre-condition of its receipt of the WOTC. Gronsbell also fails to address case law holding that, on appropriate facts, a claim for accounting malpractice accrues when the plaintiff receives a negligently prepared tax return from the accountant. (See generally Ackerman, 84 NY2d at 543 [“[P]laintiffs suffered no injury until they received the tax forms and schedules prepared by defendant; only upon receipt of the alleged negligently prepared tax documents could plaintiffs . . . rely upon defendant’s professional skill and advice to their detriment.”].) Nor is there any evidence in the record as to the dates on which Gronsbell prepared the tax returns for each year.

The accrual date for Skyline’s claims thus cannot be determined on this inadequately developed record. However, the court need not finally resolve the accrual date because Gronsbell demonstrates that it is entitled to dismissal of the complaint based on its further defense that even if Gronsbell breached a duty to Skyline by virtue of a failure to advise Skyline of the availability of the WOTC, Skyline does not and cannot demonstrate any damages as result of the breach.

The WOTC is available to employers hiring individuals from one or more of eight targeted groups, including veterans, ex-felons, and food stamp recipients. (See 26 USC §51 et seq.) The WOTC for a taxable year is equal to “40 percent of the qualified first-year wages” (26 USC §51[a]), on the first \$6,000 (or \$12,000 for qualified veterans) of wages. (26 USC §51[b][3].) In addition, to be eligible for the WOTC, employees must work a minimum of 120

hours (26 USC §51[i][3][B]), and the WOTC is reduced to 25% of wages for employees working between 120 and 400 hours. (26 USC §51[i][3][A].)

Employers do not qualify for the credit unless the employee's eligibility for the program has been certified by a designated local employment agency and other specified administrative requirements have been satisfied. (See 26 USC §51[d][13].)<sup>3</sup> The statute also sets forth criteria for an employee's membership in a targeted group. Thus, for example, a "qualified veteran" is any veteran who is a member of a family receiving assistance under a supplemental nutrition assistance program for a specified period, or who is entitled to compensation for a service-connected disability. (26 USC §51[d][3][A][i], [ii].)

In support of its motion, Gronsbell submits the employment records produced by Skyline. (See Ds.' Motion Ex. S.) None of these records shows that Skyline obtained a certification of eligibility for any employee from a designated local employment agency. Nor does any of the records show that Skyline submitted a request for certification within 28 days of any employee's hire date. (See 26 USC §51[d][13][A][ii][III].)

More important, Skyline does not make any showing that any of the employees qualified as a targeted group member for purposes of the WOTC. Thus, for example, although Skyline produced a Veteran's Administration card showing that it hired a veteran (F. Atanasio) (see Ds.'

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<sup>3</sup> 26 USC §51[d][13][A] provides in pertinent part: "In general.--An individual shall not be treated as a member of a targeted group unless-- (i) on or before the day on which such individual begins work for the employer, the employer has received a certification from a designated local agency that such individual is a member of a targeted group, or (ii)(I) on or before the day the individual is offered employment with the employer, a pre-screening notice is completed by the employer with respect to such individual, and (II) not later than the 28th day after the individual begins work for the employer, the employer submits such notice, signed by the employer and the individual under penalties of perjury, to the designated local agency as part of a written request for such a certification from such agency."

Motion Ex. S), Skyline fails to submit any evidence to show that this employee was a member of a family receiving assistance under a supplemental nutrition assistance program or entitled to compensation for a service-connected disability. (26 USC §51[d][3][A][i], [ii].) Similarly, although Skyline produced an employment application showing that it hired a parolee (J. Stanley) (Ds.' Motion Ex. S), it does not submit any records showing that this employee met the additional eligibility requirement of having been hired "not more than 1 year after the last date on which such individual was so convicted or was released from prison." (26 USC §51[d][4][B].) Finally, although Skyline produced New York State Benefit cards showing that at least some of the employees it hired were public assistance recipients, it does not submit any evidence to show that these employees met the requirement that they have received assistance for "any 9 months during the 18-month period ending on the hiring date." (26 USC §51[d][2][A].)

In opposition, Skyline contends that it did not obtain or retain any of this information because it was not informed by Gronsbell of the requirements that an employer must meet to obtain the WOTC. (See McGowan Aff. In Support of Cross-Motion at ¶ 11.) This contention ignores that Skyline had independent information which put it on notice that its hiring of employees from Binding Together might entitle it to the WOTC. In particular, McGowan acknowledged that he had been told by Binding Together that Skyline might be eligible for a tax credit. (Id. ¶ 6.) Alva also testified that she "had received [a] document in the mail from Binding Together with information [for] a tax credit that our company would be eligible for or potentially be eligible for." (Alva Dep. at 70-71.)

Finally, the court notes that among the requirements for obtaining the WOTC is that the employee work a minimum of 120 hours, and that only the first \$6,000 of wages are eligible to

be considered for the credit. (26 USC §51[b][3]; §51[i][3][B].) Yet, Skyline does not submit even its own payroll records to show that the employees it claims made it eligible for the WOTC worked the requisite number of hours.

In short, given that Skyline does not contend that additional records exist for any of the claimed employees, the court finds that Skyline will be unable to show that it suffered any damages as a result Gronsbell's alleged failure to obtain the WOTC on behalf of Skyline. Accordingly, Skyline's claims against Gronsbell for accounting malpractice should be dismissed.

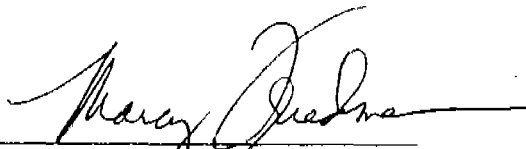
Gronsbell further demonstrates that Skyline's third cause of action for breach of contract is duplicative of plaintiff's accounting malpractice claim, as it does not allege any facts other than those relied upon in the accounting malpractice claim. (See RGH Liquidating Trust v Deloitte & Touche LLP, 47 AD3d 516 [1<sup>st</sup> Dept 2008], lv dismissed 11 NY3d 804.)

It is accordingly hereby ORDERED that Gronsbell's motion for summary judgment is granted to the extent that the complaint is dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's cross-motion is denied in its entirety.

This constitutes the decision and order of the court.

Dated: New York, New York  
December 23, 2010

  
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MARCY FRIEDMAN, J.S.C.

**FILED**

**DEC 23 2010**

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