[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. JUDITH J. GISCHE J.S.C.

Index Number : 105968/2009

TROY, EDWARD

vs

SLAWSKI, CAROLYN D., CPA, P.C.

Sequence Number : 003

SUMMARY JUDGMENT

PART 10

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 003

The following papers, numbered 1 to ____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

FILED

APR - 5 2012

COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING DECISION.

FOR THE FOLLOWING REASON(S):

Dated: Apr. 14, 2012

HON. JUDITH J. GISCHE J.S.C.

J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: ..... MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

----------x

Edward Troy,

Plaintiff (s),

-against-

Carolyn D. Slawski, C.P.A., P.C., Toy & Troy, P.C., William J. Troy, III, Joseph B. Troy, and James J. Troy,

Defendant (s).

----------x

DECISION/ORDER
Index No.: 105968-2009
Seq. No.: 003

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Troy Defs' n/m (3212) w/JJT affid, exhs	1
Pltf's opp w/EJT affid, exhs	2
Def JJT reply affid, exhs	3
Pltf's sur reply w/EJT affid	4
Various stipulations	5
Stipulation of Settlement w/ SLawski	6

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by Edward Troy ("plaintiff") against Troy & Troy, P.C. the law firm ("law firm" sometimes "Troy & Troy") that he was a member and shareholder of, the other shareholders and members of the law firm ("individual defendants"), and the accountant, Carolyn D. Slawski, C.P.A., P.C. ("accountant") who the law firm hired to prepared its corporate tax returns. Plaintiff has since settled his claims with against the accountant.

The law firm and individual defendants (collectively "Troy defendants") have answered and now move for summary judgment dismissing the amended complaint against them. Since this motion was timely brought after plaintiff filed his note of issue,

summary judgment relief is available (CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]). The reader is presumed to be familiar the court's prior orders in this action.

Facts Alleged and Arguments Raised

In 2007, Troy & Troy, P.C., a subchapter S corporation, had four shareholders, all brothers. In April 1, 2007 plaintiff left the firm but retained his 25% interest therein. In May 2007, he brought a dissolution action as a minority shareholder of "25 percent of all outstanding shares" (Supreme Court, Suffolk County, In re Troy, Index No. 14816/07) ("dissolution action"). The dissolution of Troy & Troy was resolved pursuant to an undated so-ordered stipulation of settlement ("settlement agreement") made sometime in October 2008.

Pursuant to that settlement agreement, plaintiff agreed to surrender his 25% ownership in the law firm and a realty company. In exchange, Troy & Troy would pay him the aggregate sum of $150,000 in 22 quarterly payments of $6,818.18 each. Plaintiff and Troy & Troy each reserved certain rights in the settlement agreement.

In the action at bar, plaintiff contends the Troy defendants issued him a K-1 in 2007, showing he had taxable income of $75,000 that year when, in fact, he was never paid that money. He has incurred taxes as a result. Plaintiff claims further that the remaining shareholders (the individual defendants) divided corporate profits three (3) ways but then divided the corporate tax liability four (4) ways, treating him differently because he was a minority shareholder. Plaintiff claims that before 2007 the firm had issued "cash disbursements" to the members of the firm so they could pay their tax liability and that these disbursements were not considered salary to them. He claims further that the Troy defendants' refusal to follow that practice in 2007 together with the

issuance of the K-1 showing "income" paid to him in 2007 is a breach of the Troy defendants' fiduciary duty to him (1st and 2nd causes of action) ("__COA"). Plaintiff contends that the individual members have lowered their tax exposure at his expense (3rd, 4th , 5th and 6th COA). These actions have, according to plaintiff, caused him to incur improper and unnecessary tax liabilities and penalties (10th COA).

The Troy defendants maintain they are entitled to summary judgment because this court has already decided that there is no agreement among the parties for payment of plaintiff's personal taxes. The Troy defendants argue further that plaintiff does not have standing to maintain this action because he is alleging a wrong to the corporation and, therefore, this action can only be maintained derivatively, not in plaintiff's individual capacity. A related argument is that plaintiff was no longer a shareholder when he brought this action in April 2009 and, therefore, it was brought in contravention of BCL 626 [b], requiring its dismissal on that basis alone.

James J. Troy ("James") provides his sworn affidavit in support of this motion. James states that plaintiff was the managing partner of the firm when he decided to leave the firm and start his own business. At the time Troy & Troy had a large debt and at or about 2007 - 2008, when plaintiff brought the dissolution action, the remaining members of the law firm decided to retire as much of that debt as possible. James contends that some of the debt was personally guaranteed by plaintiff and that this decision benefitted plaintiff as much, if not more, than the firm.

James states that "[to] achieve this goal [of debt reduction]...the firm put their employees, including the shareholders still working at the firm, on payroll such that all

necessary taxes were being withheld each paycheck." This resulted in K-1s being issued for tax year 2007 to each shareholder, including plaintiff. James contends that plaintiff regularly received money from the firm's credit line, but did not pay taxes on that money and, therefore, had taxable income. James contends these issues were already resolved in the underlying dissolution action and that plaintiff is attempting to re-litigate those issues.

The Troy defendants point out that plaintiff has asserted contradictory claims because he testified at his EBT that he stopped being a shareholder of the corporate defendant as of April 1, 2007 but argues in opposition to this motion that he was "a shareholder until at least October 2008 and maybe later..."

Plaintiff denies that this is a derivative action. He denies that he is seeking any redress for any wrong committed to the corporate defendant and, therefore, denies there is any need for him to comply with the requirements of BCL § 626. He claims further that there is a real question concerning the status of his shares in the corporation because no canceled certificates or affidavits of surrender were issued to him and the settlement agreement is not self-effectuating in that regard.

Relying on older tax returns of the law firm, plaintiff contends that the Troy defendants recharacterized income and structured transactions so as to increase his personal tax liability, thereby acting improperly towards a minority shareholder. He points out that income rose after he left the firm, compensation to the remaining shareholders rose by 80%.

Discussion

Since Troy defendants contend that plaintiff does not have standing to bring this action in his individual capacity, and they move for summary judgment on that basis, the first issue for the court to decide is whether plaintiff's claims are derivative.

A shareholder, even a sole shareholder or one in a closely held corporation, typically does not have standing to sue directly for a wrong committed against the corporation but must instead commence a derivative action on behalf of the corporation (see, Abrams v. Donati, 66 N.Y.2d 951, 953 [1985]). Allegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually (Abrams v. Donate, 66 NY2d at 953). If, however, the plaintiff/stockholder has suffered an injury that is either separate and distinct from the injury suffered by the corporation or if the injury arises out of a violation of a special duty running from the alleged wrongdoer directly to the stockholder and that special duty is independent and extrinsic to the corporation, an individual action may be maintained (Id.).

The Troy defendants have not proved their defense, that plaintiff's claims are derivative. To the contrary, plaintiff's claims are, in fact, individual because he is challenging the issuance of a K-1 to him for salary or income although he did not actually receive the money, compounded by the fact that he now has to pay taxes on this "income." Thus, plaintiff is not seeking to assert a claim for some wrong committed to the corporation, such as the misappropriation or waste of corporate assets. Consequently,

BCL § 626 [b] – the so-called "contemporaneous ownership rule" applying to derivative actions on behalf of a corporation – does not apply and he does not have to show he was a shareholder when the challenged transaction occurred and when he brought this action (Independent Protective League v. Time Inc., 50 NY2d 259 [1980]; Pessin v. Chris-Craft Industries, 181 AD2d 66 [1st Dept 1992]). Therefore, the requirements of BCL § 626 [b] is not a reason to grant the moving defendants summary judgment, dismissing the complaint for lack of standing (Schorr v Steiner, 46 AD3d 435 [1st Dept 2007]).

In its decision/order dated February 28, 2011 ("prior order"), the court denied plaintiff's motion for partial summary judgment stating that:

> The parties' settlement agreement, that the Troy defendants would "hold Edward Troy harmless for any liability for the payment of taxes or other debts of the respondent and 3783 Realty Corp," does not support plaintiff's interpretation, that the defendants agreed to pay his personal income taxes. The settlement agreement was made within the context of a corporate dissolution proceeding and the "taxes" clearly refer to corporate, not personal, taxes.

The parties disagree whether the court's prior order resolves the claims in the amended complaint in the Troy defendants' favor. Plaintiff argues the prior order does not resolve of his claims because he only moved for partial summary judgment on the "hold harmless" clause of the settlement agreement (paragraph 11) but there is an addendum to the settlement agreement which contain language supporting his claims. The "hold harmless" clause provides as follows:

> Upon surrender by Edward Troy of his shares of stock in the respondent and 3783 Realty Corp . . . the respondent will hold Edward Troy harmless for any liability for the

payment of taxes or other debts of the respondent and 3783 Realty Corp which exist December 31, 2007.

The addendum to the settlement agreement, however, differently provides that "[the] parties agree that this stipulation shall not bar Edward Troy from asserting a claim against Troy & Troy, P.C. for personal tax liability he incurred by reason of the 2007 K-1 he received from Troy & Troy, P.C." Thus, plaintiff contends the court's prior order does not justify the grant of summary judgment in favor of the moving defendants.

Although not articulated as such, the parties' dispute is over the prior order is "the law of the case." The doctrine of the law of the case applies only to legal determinations that were necessarily resolved on the merits in the prior decision (Baldasano v. Bank of New York, 199 A.D.2d 184 [1st Dept 1993]). In his prior motion plaintiff only sought partial summary judgment against the Troy defendants based solely on the strength of the hold harmless clause. Neither side addressed, nor did the court decide, whether the addendum barred this action. The court's prior order does not bar this action and the Troy defendants are not entitled to summary judgment on that basis.

The Troy defendants maintain that plaintiff's claims are contrary to what the legal requirements of a subchapter S corporation are. In support of their motion, the Troy defendants rely on the sworn affidavit of Andrew P. Ross, a certified public accountant ("Ross"). Plaintiff objects to the Ross affidavit on procedural grounds and on the merits. He claims Ross was not previously disclosed, though he served CPLR 3101 [d] demand. He also objects to Ross's affidavit because it is submitted for the first time in reply. Plaintiff contends, in any event, that Ross's opinion is "nonsensical" because he was

retained by Slawski on the issue of whether she committed malpractice, having nothing to do with plaintiff's claims against the moving defendants.

CPLR § 3101 [d] does not set a deadline by which expert disclosure must be provided. It only requires that upon being served with a demand for such disclosure, the party in receipt of the demand shall "disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion." Here, plaintiff has established he served a demand, but no information about this expert was provided.

Even were the court inclined to allow the affidavit, Ross states his opinion is "in support of [Slawski's] motion for summary judgment dismissing plaintiff's negligence and professional malpractice claims against [her and her practice]." Consequently, Ross's affidavit has no bearing on plaintiff's claims against the Troy defendants and does not support their motion for summary judgment or eliminate any issues of fact.

The parties disagree whether plaintiff continued to be a shareholder after April 2007. This issue is raised by the Troy defendants, however, to show that plaintiff did not comply with the requirements of BCL 626 [b] and, therefore, he did not have standing to commence this action. Having decided the issue of standing in favor of plaintiff (see discussion, *supra*; BCL 626 [b]), the court does not have to decide whether plaintiff was a shareholder (i.e his status) beyond April 2007. Plaintiff also raised the issue of his post April 2007 status, arguing that the necessary documents were never issued cancelling his shares. This point, however, goes to the issue of whether the issuance of a K-1 in 2007

was an aberration and evidence of Troy defendants' breach of fiduciary duty. Consequently, this issue is collateral to the Troy defendants' motion and does not present an issue of law that has to be decided at this time.

Having decided the issue of standing, the moving defendants must now make a *prima facie* showing they are entitled to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 [1985]). If the movant fails to make out their *prima facie* case for summary judgment the motion must be denied, regardless of the sufficiency of the opposing papers (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [1986]; Ayotte v. Gervasio, 81 N.Y.2d 1062 [1993]).

Although the Troy defendants broadly contend that plaintiff's claims are without merit and his rendition of facts is "misleading," defendants have not met their burden of establishing their *prima facie* case. Defendants' argument, that plaintiff's causes of action are duplicative of one another, are offered by way of commentary and without any kind of legal analysis. Having failed to show they are entitled to summary judgment on any of plaintiff's claims, the motion by the Troy defendants is denied.

Since the note of issue was filed, this case is ready to be tried. Plaintiff shall serve a copy of this decision/order on the Office of Trial Support so the trial can be scheduled.

Conclusion

In accordance with the foregoing,

It is hereby,

ORDERED that the motion by defendants Troy & Troy, P.C., William J. Troy, III,

Joseph B. Troy and James J. Troy for summary judgment is denied for the reasons stated; and it is further

ORDERED that plaintiff shall serve a copy of this decision/order on the Office of Trial Support so the trial can be scheduled; and it is further

ORDERED that any relief requested but not specifically addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
April 4, 2012

So Ordered:

Hon. Judith J. Gische, J.S.C.