

<b>Prisco v HRB Tax Group, Inc.</b>
2015 NY Slip Op 31265(U)
July 15, 2015
Supreme Court, New York County
Docket Number: 156384/12
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY - Part 42**

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**MICHAEL PRISCO and MAGDALENA PRISCO,**

**Plaintiffs,**

**-against-**

**DECISION AFTER INQUEST**

**Index No. 156384/12**

**HRB TAX GROUP, INC. and DEANA POLCARE,**

**Defendants.**

-----X

**NANCY M. BANNON, J.**

In this action to recover damages for conversion, fraud, and violation of General Business Law § 349(b), the plaintiffs allege that defendant Deana Polcare, as a former employee of defendant HRB Tax Group, Inc., stole the identity of plaintiff Magdalena Prisco, filed false State and Federal tax returns on her behalf and kept the refund monies. Defendant Polcare was criminally prosecuted, she pleaded guilty and was to be sentenced to a period of probation. She failed to answer or appear in the civil action. The action was discontinued against defendant HRB Tax Group, Inc., with prejudice.

By an order dated July 26, 2013, this court (Scarpulla, J.) granted the plaintiffs' motion for a default judgment against defendant Polcare on the issue of liability and directed an inquest on the issue of damages. In their complaint, the plaintiffs sought "\$25,000 in actual consequential and punitive damages" for the fraud and conversion causes of action, and another \$25,000 for actual and consequential damages" on the statutory claim, plus \$1,000 per violation.

**Findings of Fact**

An inquest was conducted by this Court on May 19, 2014, wherein the plaintiffs, Magdalena Prisco and Michael Prisco testified and presented three documents. However, much of their testimony concerned the issue of liability, which had already been determined, and they failed to establish the damages demanded, either by their testimony or documentary evidence.

Magdalena Prisco testified that she and her husband, plaintiff Michael Prisco, hired H&R Block to prepare their tax returns from 1999 through 2010 and Deana Polcare was the employee assigned. In 2010, Polcare informed Magdalena that they were not receiving a federal tax refund for 2009 and in 2011 she informed her that the 2010 refund was delayed or was lost in the mail. In April of May 2011, H&R Block discovered that Polcare had actually signed the returns herself, and redirected the two refunds to her own account a total of approximately \$10,000. The plaintiffs filed a criminal complaint but, according to Magdalena Prisco, the police questioned them and considered them "suspects" for some four months thereafter. In the meantime, the plaintiffs had fallen behind and their mortgage and applied for a loan modification. The lender requested further documentation due to the 2009 and 2010 tax returns, and then denied the application since IRS records showed no return had been filed for those years for Michael and the home for which they sought a mortgage was not the address listed on the return filed for Magdalena Prisco. According to Magdalena, the lender suspected her of conspiring with defendant Polcare to commit mortgage fraud. She claims to have lost work, lost sleep and suffered emotionally when accused of wrongdoing by the lender and the police. She also testified that her son was unable to attend college in 2010 because she was going to use the tax refund to pay the \$7,500 tuition and the \$50,000 income from the family piano store could not cover it. She also put her own education on hold. The piano store was closed soon afterward as business was slow.

Plaintiff Michael Prisco testified that he has several occupations - a piano rebuilder specializing in Steinway pianos, co-owner and CFO of Fidelity Dividend Capital, and an independent film and motion picture producer with his wife. He testified that Polcare's actions damaged the family by taking hours away from work and the children in dealing with the fraud. He claimed to have sold a screenplay concerning Norman Rockwell to the "estate" but lost out on producing the movie, a multi-million dollar project, due to being distracted by the fraud, the resulting paperwork, and the loss of the tax refunds. He testified that he and his wife eventually straightened things out with the IRS and re-applied for and received the mortgage loan modification eleven months after the first application. His son started college, albeit a semester late, and plaintiff Magdalena was able to finish her own degree. Michael Prisco testified that he and his wife chose not seek restitution from Polcare in the criminal action. He testified that he was given the choice to seek it the criminal action or in a civil action, and he chose the civil action. According to Prisco, there were eight other victims of Polcare's fraud and they all received restitution in the criminal action.

The only documents proffered by the plaintiffs at the hearing were (1) a mortgage loan modification package, (2) an IRS notice of overdue taxes in the sum of \$5,448.00 plus interest dated December 26, 2012, and (3) a "Request For Transcript of Tax Return" dated January 4, 2011, seeking a copy of the plaintiff's joint return for 2010. Nothing else was submitted.

In closing, counsel requested "not less than \$25,000 in actual, consequential and punitive damages" but then asked for \$50,000 for each of three years for the loss of the piano business and \$25,000 per year per plaintiff as damages for emotional stress" for a total of \$300,000, plus another \$300,000 in punitive damages. The court directed counsel's attention to the ad damnum clause of the complaint, and asked counsel to quantify the damages now sought and indicate how the amounts were supported by credible proof. This was not done.

#### Conclusions of Law

After hearing the testimony of the two witnesses and reviewing the three exhibits, and considering the relevant law, the court finds that the plaintiff's have failed to meet their burden of proving damages by a preponderance of the credible evidence. See generally 318 East 93, LLC v Ward, 276 AD2d 277 (1<sup>st</sup> Dept 2000). First, the plaintiff's were limited to the damages demanded in the complaint. See O'Reilly-Hyland v Liberty Mgmt. & Constr., Ltd., 32 AD3d 765 1<sup>st</sup> Dept. 2006); Reid v Weir-Metro Ambulance Svc, Inc., 191 AD2d 309 (1<sup>st</sup> Dept. 1993). Even crediting all of the testimony of both plaintiffs and the three exhibits, no damages were proven, much less the \$300,000 requested at the close of the hearing. While the plaintiffs may well have suffered some loss as a result of the defendant's conduct, they wholly failed to provide proof of that loss when they had the opportunity to do so. Notably, the three documents admitted into evidence do not bear on the issue of damages, but only possibly on liability, which was not the issue at the hearing.

Furthermore, while any admissions made by defendant Polcare in the criminal case would have collateral estoppel effect in this civil action (see D'Arata v New York Central Mutual Fire Insurance Co., 76 NY2d 659 [1990]; S.T. Grand, Inc. v City of New York, 32 NY2d 300 [1973]; Maielo v Kircher, 98 AD3d 480 [2<sup>nd</sup> Dept. 2012]; Grayes v DiStasio, 166 AD2d 261 [1<sup>st</sup> Dept. 1990]; National Bank of Pakistan v Basham, 148 AD2d 399 [1<sup>st</sup> Dept. 1989]), no such proof was presented. That the plaintiffs chose not to pursue restitution in the criminal action does not obviate the requirement to present sufficient proof of damages in the civil action.

Because no actual or consequential damages were proven, no punitive damages may be awarded. Indeed, "the standard for imposing punitive damages is a strict one and punitive damages will be awarded only in exceptional cases." Marinaccio v Town of Clarence, 20 NY3d 506, 511 (2013); see Gamiel v Curtis & Riess-Curtis, P.C., 16 AD3d 140 (1<sup>st</sup> Dept 2005). This case simply does not fall within the category of "exceptional cases" warranting punitive damages. Marinaccio v Town of Clarence, supra at 511.

The plaintiffs improperly rely upon General Business Law § 349(b) as a basis for punitive or any other damages since that section does not provide a private right of action but requires a finding of liability by the attorney general as to alleged unlawful conduct.

Accordingly, it is

ORDERED that judgment is granted in favor of the defendant and against the plaintiffs dismissing the complaint in its entirety, and it is further,

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: July 15, 2015

  
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NANCY M. BANNON, J.S.C.