SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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AARON RICHARD GOLUB and DARROW GOLUB, AN INFANT BY HIS FATHER AND NATURAL GUARDIAN, AARON RICHARD GOLUB,

Plaintiffs,

- v -

SHALIK, MORRIS & COMPANY, LLP, WIENER FRUSHTICK & STRAUB, CERTIFIED PUBLIC ACCOUNTANTS, P.C.,

Defendants.

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INDEX NO. 158055/2017

MOTION DATE

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 74-91, 93-115, 117-133, 136, 140, 148

were read on this motion for summary judgment.

By notice of motion, ARG Aaron Richard Golub (ARG) moves pursuant to CPLR 3212 for an order granting him partial summary judgment with respect to liability only. Defendants cross move for an order granting them partial summary judgment.

I. PERTINENT UNDISPUTED BACKGROUND

Some time before August 2012, ARG's estate lawyer, Arlene Harris at Arnold & Porter Kaye Scholer LLP (Kaye Scholer) advised ARG to form a Qualified Personal Residence Trust (QPRT, or trust). ARG retained that firm to set up the recommended trust with his son as remainder beneficiary. On August 12, 2012, the firm completed the work in creating the trust. (NYSCEF 85).

On August 16, 2012, ARG transferred to the trust a gift of a 50 percent interest in a property in Southampton, New York. As of August 27, 2012, the entire property was appraised

at $9 million. (NYSCEF 86).

By email dated May 9, 2013, Harris sent copies of the deed to the property, the first and final pages of the trust agreement, and an appraisal of the property's fair market value to Steven Frushtick, ARG's accountant at defendant Wiener Frushtick & Straub (WFS), stating that "only 50% of the house" had been transferred to the trust. (NYSCEF 79). By email to Harris dated May 20, 2013, Frushtick advised of the need for a discounted appraisal, that without it, the nondiscounted appraisal would be used, and that his tax attorney had informed him that the Internal Revenue Service (IRS) does not countenance the use of residential discounts for QPRTs. In reply, Harris stated that it was ARG's decision as to whether he would pay for another appraisal to support a discount. ARG asked her how much a new appraisal would cost. Harris responded by asking if he wanted her to call about the cost. (NYSCEF 99).

Frushtick prepared a 2012 US Gift and Generation-Skipping Transfer (GST) Tax Return, Form 709 (2012 Form 709) on which he reported the value of the property as $4.5 million, one-half the appraised value and that the donee of the one-half interest in the property was ARG's son. (NYSCEF 85).

As of January 1, 2015, WFS merged into defendant Shalik, Morris & Company, LLP (SM). (NYSCEF 77). Frushtick continued to provide tax services to ARG until he died a month later, at which time SM accountant Stuart Shapiro took over. There was no written retainer agreement. (NYSCEF 75). SM's billing records for ARG's account reflect the following notation by Shapiro, dated April 19, 2016: "Steve - messed up gift tax/trust work," along with other entries, none of which relate to the trust except for an entry dated March 11, 2016 reflecting that a copy of the 2012 Form 709 had been sent to ARG. (NYSCEF 81). Defendants did not file a 2014 Form 709, nor did plaintiff ask them to file it. In or about the beginning of May 2016, ARG

terminated defendant's services.

On September 8, 2017, ARG commenced this action whereby he and his son advanced a joint cause of action for professional malpractice against both defendants, and ARG advanced a cause of action against WFS for professional malpractice arising from a matter unrelated to the trust. (NYSCEF 1). ARG filed an amended complaint in which he acknowledges that he was able to correct the errors in the 2012 Form 709 but that he incurred legal fees in doing so. (NYSCEF 82).

By decision and order dated September 21, 2018, defendants' motion pursuant to CPLR 3211(a)(4), (5), and (7) was granted to the extent of dismissing the first cause of action as advanced by ARG's son and the second cause of action in its entirety. (NYSCEF 83). Consequently, the sole cause of action remaining is ARG's claim against defendants for professional malpractice with respect to the preparation and filing of the 2012 Form 709 and the failure to file a 2014 Form 709.

II. ARG'S MOTION FOR SUMMARY JUDGMENT (NYSCEF 74-91)

ARG argues that defendants are liable for professional malpractice in failing to file a 2014 Form 709 in 2015, in overreporting the value of the property in the 2012 Form 709, and in falsely reporting that the gift had been made to his son instead of the trust. He also maintains that defendants' continuing representation of him as to the trust was within the scope of their professional relationship. (NYSCEF 91).

A. ARG's affidavit (NYSCEF 75)

In support of his legal arguments, ARG alleges that Frushtick had represented that he was familiar with QPRTs and had assured him that he knew about all of their aspects. ARG, who was 70 years old in 2012, was aware that should he not survive the two-year QPRT term, the tax

savings would be lost, and according to him, Frushtick "knew that there was a requirement to file a 2014 Form 709 gift tax return two years later—it is clearly stated in the IRS tax regulations—and that both Form 709 gift tax returns must be filed to make the 2012-2014 QPRT to achieve its purpose."

In reporting the gift as having been made to his son instead of the trust, ARG asserts, Frushtick "caused additional errors by overreporting and underreporting the gift," and that Frushtick had been clearly told that the gift was to the trust not only by the May 9, 2013 email, but by the August 2012 deed by which he transferred the gift to the trust. He maintains that Shapiro too had assured him of his full familiarity with the services rendered by Frushtick and WFS and admitted defendants' malpractice in his billing entry that Frushtick had "messed up" the gift tax and trust.

According to ARG, the 2012 and 2014 Forms 709 were "indelibly linked" and that as the QPRT was scheduled to expire in 2014, a 2014 Form 709 had to be filed thereafter.

B. Affidavit of Arlene Harris (NYSCEF 85)

As Harris had passed away after the filing of her February 3, 2018 affidavit in opposition to defendants' earlier motion to dismiss, ARG relies on that affidavit in support of his motion.

Harris stated in her affidavit that a QPRT is an irrevocable trust to which one's residence may be transferred at a reduced transfer tax cost. The donor retains the right to use and occupy the residence for a term of years and the value of the residence so transferred is reduced by an amount commensurate with the actuarial value of the donor's retained interest and may be further discounted. At the end of the trust's term, the remainder interest would vest and the donor's interest would terminate.

In 2016, lawyers at Kaye Scholer reviewed the 2012 Form 709 prepared by WFS and

discovered that the gift's value had been overreported due to WFS's failure to account for the non-controlling interest in the property, which resulted in a larger allocation to the gift of ARG's lifetime gift tax exemption and leaving less of a remaining exemption. WFS also incorrectly reported on the form that the gift had been made directly to ARG's son instead of to the trust, and thus overreported it as a gift of the entire 50 percent interest, and not the value of the 50 percent remaining after the expiration of the term of the trust. Additionally, WFS had applied the annual gift exclusion to reduce the gift's value, even though a gift to a trust does not qualify, thereby underreporting the gift by $13,000. In 2016, Kaye Scholer had the property reappraised and filed an amended 2012 Form 709 that corrected the errors.

According to Harris, the 2012 Form 709 is "inextricably interconnected" to the 2014 Form 709 because a Form 709 must be filed for the year the trust terminates if the donor wants to elect out of the automatic allocation of the generation-skipping transfer (GST) tax exemption with respect to the trust. Because defendants did not file the 2014 Form 709, ARG's GST tax exemption was permanently allocated to the trust. She explained that a taxable GST occurs when property is transferred by, *inter alia*, a gift to certain trusts, and that individual taxpayers are afforded set lifetime exemptions with some transfers being subject to an automatic allocation of a lifetime exemption, unless the taxpayer elects out of it by filing a gift tax return for the year in which the transfer occurs. With a QPRT, a deemed transfer for such purposes occurs in the year in which the term of the retained interest ends. When a GST from a trust is possible but remote, a taxpayer may elect out of any allocation of an exemption to a trust in order to preserve the exemption for future transfers. ARG had told her that he, Frushtick, and WFS had a mutual understanding of the need to prepare a 2014 Form 709 in 2015.

Harris added that the possibility of a GST from the trust here was remote and thus, it

would have been reasonable for ARG to allocate no GST tax exemption to the trust. Consequently, WFS's failure to file a 2014 Form 709 deprived ARG of a chance to preserve his exemption for future, more definite generation-skipping transfers. She opined that because a 2014 Form 709 was not timely filed, the entire gift became subject to the automatic allocation rules and the error was irreversible, notwithstanding the filing of the corrected 2012 Form 709, and estimated the amount of GST tax exemption automatically allocated to the gift and no longer available to ARG as equal to $1,425,623.20.

III. DEFENDANTS' OPPOSITION AND CROSS MOTION (NYSCEF 94-112)

Defendants oppose ARG's motion, arguing that it is premature absent discovery, and that in any event, he fails to demonstrate a *prima facie* case. They also seek partial summary judgment as to ARG's claim relating to the 2014 Form 709, claiming that ARG fails to raise a factual issue as to whether they had a duty to prepare and file the return and that he has sustained no loss as a proximate result of defendants' alleged failure. (NYSCEF 95).

A. Defendant's expert (NYSCEF 107)

1. 2012 Form 709

Defendants' expert opines that that a discounted valuation is not used by the IRS in valuing property and that the IRS "challenges the use of discounted appraisals when such use is believed to be inappropriate."

2. 2014 Form 709

As the property was transferred to the trust in 2012, defendants' expert maintains that a gift tax return reporting the value of the property transferred had to have been filed by April 15, 2013. He denies that a gift tax return must be filed for the tax year during which a QPRT terminates or that there is a two-step process associated with the Form 709. Rather, a gift tax

return for the tax year that a QPRT terminates is required only if the taxpayer wants to elect out of the automatic allocation to the GST exemption. He explains that pursuant to the Internal Revenue Code (IRC or Code), in certain situations all or a portion of a taxpayer's GST exemption will be automatically allocated to a transfer, and if a taxpayer does not want to allocate a GST exemption to a transfer, the taxpayer must affirmatively elect out of the automatic allocation on a timely filed gift tax return.

Here, according to the expert, had ARG intended in 2013 to elect out of the automatic allocation, he could have done so in the 2012 return and thereby eliminate having to do so on the 2014 return. He alleges that when ARG created the trust in 2012, his available GST exemption was $5,120,000, in 2014, when the trust terminated, the available exemption was $5,340,000, and now it is $11,400,000.

Defendants' expert also takes issue with ARG's assertion that the failure to file the 2014 Form 709 for the purpose of electing out of the automatic allocation was irreversible, relying on Treasury Regulation § 301.9100 that permits a late election, and a notice issued by the IRS which permits taxpayers to seek relief for missed elections. Such relief is granted, he states, if the taxpayer establishes that he or she acted reasonably and in good faith and that the relief will not prejudice governmental interests. As the papers show here that ARG acted reasonably and that the interests of government would not be prejudiced by granting him a chance to opt out of the automatic allocation to the transfer to the trust, and absent any indication that such a request was made and denied, the expert concludes that the alleged failure is not irreversible and that ARG's claim as to the 2014 Form 709 is premature. Moreover, even if ARG has unsuccessfully sought such relief, he asserts, there is still no actual loss absent any indication that he has given a gift or gifts in excess of the $11.4 million GST exemption with a resulting tax paid.

The expert denies that ARG's money damages exceed $1,400,000 and that he has any "current" damages arising from defendants' alleged failure to file the 2014 Form 709. Rather, he contends, ARG's alleged damages are speculative and premature because "[u]nless and until [ARG] makes [GSTs] in an amount in excess of the available GST Exemption (as noted above, it is presently in excess of $11 million), no GST Tax is due and no damages have been sustained." Thus, absent any indication that ARG has made such transfers in excess of his $11.4 million GST exemption, defendants' expert contends, ARG has no obligation to pay a GST tax.

In the event that ARG's son dies before receiving a distribution from the trust, the expert observes, a GST will have occurred which could warrant an allocation of the exemption to the transfer to the trust, and defendants' alleged failure to so allocate it in 2014 would result in a tax becoming due based on the trust's value at the time of the distribution to ARG's son's descendants. The elimination of the federal estate tax is another possibility which could entail the elimination of the GST tax. In such a case, the decision to allow the automatic allocation or elect out of it would be moot.

B. Affidavit of Stuart Shapiro (NYSCEF 109)

Shapiro prepared ARG's 2014 income tax return. He states that neither ARG nor his agents asked or directed him to prepare a 2014 Form 709 and in April 2016, ARG advised him that he believed that Frushtick had negligently failed to prepare and file one. Thus, on April 19, 2016, he entered that claim on the billing record without assessing its truth or accuracy, and denies that the entry constitutes "a direct admission of malpractice . . ."

C. Affidavit of Jonathan Shalik (NYSCEF 111)

Having reviewed the pertinent email correspondence among ARG, Harris, and Frushtick, Shalik, an SM partner, states that there is no indication therein of a need to prepare a 2014 Form

709, nor do the emails address ARG's alleged intention to opt out of the automatic GST exemption. He also searched the files maintained by WFS and SM relating to ARG's account, including those from Frushtick's personal AOL email account which include all and any work he performed as to the trust, and found nothing to support ARG's claim that Frushtick was to prepare and file a 2014 Form 709, that Frushtick knew of the two-year period of the trust or that Frushtick, WFS or SM had been engaged to prepare it, were asked to do so, were aware of the terms of the trust, were provided with a copy of it or were advised of ARG's wish to elect out of the automatic GST tax exemption. His search also revealed no evidence of defendants having performed any services related to the trust or the 2012 Form 709 after it was filed in 2013, nor was there any indication of a mutual understanding of a need for additional services related to the trust or the 2012 Form 709 after it was filed.

D. Defendants' Memorandum of Law (NYSCEF 112)

1. Opposition to ARG's motion

a. Discovery

In support of their claim that discovery is needed before a summary disposition may be obtained, defendants allege that they must explore whether there was a mutual understanding of the need for continued representation as to the trust, whether there were ongoing accounting services as to it, whether ARG decided not to obtain a discounted appraisal, whether there were communications with Harris about the appraisal and the Forms 709, whether ARG decided to opt out of the automatic GST exemption, and whether he had sought relief pursuant to the Code.

b. Continuous representation

In otherwise maintaining that ARG does not meet his *prima facie* burden as to continuous representation, defendants rely on a statement in the September 21, 2018 decision that ARG had

demonstrated an issue of fact as to whether defendants had continuously represented him with respect to the trust. They argue that the statement constitutes the law of the case and implies not only that ARG had not met his burden except to the extent of demonstrating a factual issue, but that factual issues exist as to the alleged continuous representation, which ARG cannot dispute, having failed to move for reargument. Moreover, they contend, ARG adds nothing to the insufficient argument he advanced in opposition to their motion to dismiss that defendants continuously represented him.

In any event, defendants assert, relying on Shalik's affidavit, there is no evidence of a mutual understanding that further services were required for the trust, as ARG's self-serving affidavit is insufficient for that purpose and the Dead Man's Statute precludes him from relying on Frushtick's statements.

Defendants also take issue with ARG's position that the need to file a 2014 Form 709 is implicit in the filing of the 2012 Form, per their expert's opinion. Thus, absent admissible evidence that defendants were aware of ARG's intention to elect out of the automatic GST exemption allocation at the termination of the trust, such as proof that ARG or Harris provided defendants with the complete QPRT or that they knew of the terms of the trust or its termination date, defendants maintain that ARG cannot demonstrate that their failure to file the 2014 Form 709 constitutes malpractice. Moreover, as ARG did not use the 2012 Form 709 to opt out of the allocation, defendants contend that he likely had not intended to do so at that time and thus, Frushtick could not have been expected to provide ongoing representation with respect to it, another issue they seek to explore in discovery.

c. 2012 Form 709

In arguing that there exist material issues of fact as to their alleged negligence in

reporting the value of the gift in the 2012 Form 709 as $4.5 million, defendants again seek discovery based on the emails referenced by Shalik indicating that ARG had chosen to not obtain a discounted appraisal of the property.

2. Cross motion

In support of their cross-motion for summary judgment, defendants rely on Shalik's and Shapiro's affidavits as proof that there was no duty to prepare the 2014 Form 709. They deny the existence of actual and ascertainable damages sustained as a result of that alleged failure absent proof that ARG has exhausted his available $11.4 million exemption. Thus, ARG's claim for damages is contingent on the occurrence of speculative and hypothetical future events, and moreover, given the availability of relief afforded by the IRS, there can be no damages or actual losses. They deny that Shapiro's notation in his billing records constitutes an admission of negligence.

IV. ARG'S REPLY IN SUPPORT OF HIS MOTION AND IN OPPOSITION TO THE CROSS-MOTION (NYSCEF 117-133)

A. ARG's affidavit (NYSCEF 117)

1. Credibility

ARG asks that Shapiro's affidavit be disregarded due to his lack of credibility. He relies on depositions taken on June 26, 2018 relating to two Nassau County cases addressing defendants' fees wherein Shapiro denied a recollection of what he had meant by his April 19, 2016 billing entry. (NYSCEF 118). Shapiro now claims, however, that ARG was the source of the entry. Thus, ARG maintains, Shapiro's prior testimony is not only inconsistent with the position he advances now, but with it, Shapiro precluded him from extracting an admission that he was the source of the information that Frushtick had "messed up." ARG shores up his argument with the allegation that had he been the source of that information, Shapiro would have

noted it in a memorandum to the file and not in a billing entry. In any event, ARG alleges that from the time he took over for Frushtick in February 2015, Shapiro had repeatedly admitted to him that Frushtick had committed malpractice on his account and other accounts and that he had to correct Frushtick's many glaring errors. ARG additionally observes that even though defendants were aware that Frushtick had messed up the gift tax/trust work, defendants did not file a 2014 Form 709.

ARG also asks that defendants' general credibility be discredited given the finding by a special referee, made in the course of the Nassau County proceedings, that a lawyer for SM had "deliberate[ly] misstated" a fact in an email to ARG and his lawyer, although the referee had declined to impose sanctions.

2. Continuous representation

That SM billed him $75 in April 2016, moreover proves, ARG maintains, that defendants continuously represented him for the term of the trust, and otherwise contends that the time sheets are central as he was not "supposed to be" charged on an hourly basis by SM and that "no time sheets were to be kept." Nor had he been provided with time sheets until they were produced as part of discovery in the Nassau County actions.

ARG disputes Shalik's assertion of having searched and found nothing in his files evidencing defendants' services relating to the trust or 2012 Form 709 or the alleged mutual understanding of the need for further services relating to the trust or 2012 Form 709. He points to references to the trust in the documentation he had sent to Shapiro. (NYSCEF 126, 127).

Also relying on the September 21, 2018 decision and order, ARG alleges that it is a matter of found fact that the accounting mechanism for the trust requires two steps.

B. Affidavit of ARG's expert (NYSCEF 132)

In addition to the discussions of Harris and defendants' expert concerning the GST tax and exemptions, ARG's expert adds that a GST is an "indirect skip" that is subject to the automatic allocation rules, and that pursuant to IRC § 2632(c)(5)(B)(i), an election out of the automatic allocation must be made on the gift tax return "for the year in which the transfer which would otherwise be subject to such automatic allocation is made or deemed to have been made."

Thus, the expert opines, as WFS knew of ARG's transfer to the trust, and that it could have fallen within the category of an indirect skip that is subject to an "estate tax inclusion period," it also must have known that ARG could not have allocated an exemption on the 2012 Form 709. Having failed to demonstrate that it took steps to advise ARG of this issue, WFS failed "to adhere to basis accounting standards of care, and is a material deviation from recognized and accepted accounting professional standards." He also observes that relief under IRC § 9100 is not guaranteed.

The error in preparing the 2012 Form 709 with ARG's son as the done also reflects WFS's failure to adhere to "the most basic accounting standards of care and is a material deviation from recognized and accepted accounting professional standards."

C. ARG's Memorandum of Law in Reply (NYSCEF 133)

1. Damages

In addition to reiterating the arguments set forth in his memorandum of law in support of his motion (NYSCEF 91), ARG observes that as a malpractice claim against an accountant accrues upon receipt of the accountant's work product, he suffered an injury upon receipt of the negligently prepared 2012 Form 709 or on the due date for filing the 2014 Form 709, as the cause of action accrues on the date of the malpractice "as long as the damages were 'sufficiently

calculable to permit ARG to obtain prompt judicial redress,'" citing among other cases, *McCoy v Feinman*, 99 NY2d 295, 305 (2002). He argues that all of the facts necessary to both causes of action came into being on April 15, 2015, when the 2014 Form 709 was due and denies that his action is premature because the damages are presently unascertainable. To the extent that defendants rely on a discovery rule similar to that pertaining to certain medical malpractice actions, ARG denies such an exception for the accrual of other malpractice actions. Rather, he claims, damages may be estimated when the sole uncertainty relates to their amount. In any event, he points out, his claim for recovery of attorney and accounting fees is not uncertain.

2. Duty

ARG denies that it was his burden to advise defendants about the need to elect out of automatic allocations, rather, it was their duty to advise him. Thus, he claims, that he could have elected out of the automatic allocation in the 2012 Form 709 is irrelevant. Moreover, in failing to seek a late filing of the 2014 Form 709, defendants failed to mitigate their damages by following their own advice that the 2014 Form 709 may be filed late, which he asserts, constitutes another instance of malpractice.

V. DEFENDANTS' MEMORANDUM OF LAW IN REPLY (NYSCEF 140)

Defendants reiterate their arguments and observe that the future events on which ARG's damages depend are not only speculative and dependent on unknown future events, but some are within ARG's control and partly based on his decisions and actions which could ensure that he will incur no GST tax. Absent any factual issues on this point, defendants claim that ARG is precluded from being awarded summary judgment.

Defendants claim that ARG fails in his opposition to raise a factual issue as to whether their alleged failure to file the 2014 Form 709 proximately caused him ascertainable damages,

and that ARG otherwise misstates their arguments, as they neither addressed accrual nor articulated any argument based on a discovery rule. Rather, they claim, their argument is that ARG's damages are uncertain and based on speculation concerning future events and contingencies and are thus insufficient to show proximate causation. In any event, defendants assert and as both parties acknowledge, the alleged error is curable. Moreover, having been fired at or about the time the alleged error was discovered, they maintain that they could have not taken any action, whereas Harris could and did correct the 2012 Form 709.

VI. ORAL ARGUMENT (NYSCEF 141)

In addition to the arguments set forth in ARG's papers, ARG's counsel claimed that the tax code and IRS instructions for gift tax returns for a QPRT reference the two-step process and that allocations are made at the end of the term, when the trust becomes tax effective.

In addition to the arguments set forth in defendants' papers, counsel for defendants maintains that the evidence demonstrates that Harris had sent defendants only the cover and signature pages of the QPRT and an undiscounted appraisal, the latter of which resulted from ARG's decision not to obtain a discounted one. Thus, she argued, an issue of fact precludes summary judgment as to the alleged malpractice arising from the preparation and/or filing of the 2012 Form 709, and in light of defendants' expert's opinion.

VII. ANALYSIS

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of

hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

"A claim of malpractice requires proof that there was a departure from the accepted standards of practice and that the departure was a proximate cause of the injury." (*Kristina Denise Enterprises, Inc. v Arnold*, 41 AD3d 788, 788 [2d Dept 2007]). To establish entitlement to summary judgment on such a claim, the plaintiff bears the initial burden of presenting "competent, prima facie evidence that the accounting services that defendants rendered on his behalf were negligently performed and that, as a result, he incurred costs and expenses that would otherwise have not been sustained." (*Rockman v Bartlett*, 49 AD3d 1072, 1073 [3d Dept 2008]). A party may meet this burden by submitting expert testimony as to the accepted standards of accounting and how the defendant's conduct departed from such standard. (*See Millman v Blatt & Dauman, LLP*, 170 AD3d 429, 430 [1st Dept 2019] [defendant's expert's affidavit did not establish *prima facie* that it did not commit malpractice because expert did not set forth accepted standards of accounting practice]).

A. ARG's motion for summary judgment

Although ARG implicitly concedes that the claim arising from defendants' erroneous preparation and filing of the 2012 Form 709 accrued before September 8, 2014, when the limitations period for professional malpractice commenced (CPLR 214[6] [providing for three-year statute of limitation for malpractice other than medical, dental or podiatric malpractice]), he

argues that the statute was tolled by defendants' continuous representation of him which, he claims, was the subject of a mutual agreement.

Continuous representation may be found "only where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim" (*McCoy v Feinman*, 99 NY2d 295, 306 [2002]; *cf Lemle v Regen, Benz & MacKenzie, C.P.A's, P.C.*, 165 AD3d 414, 415 [1st Dept 2018] [statute of limitations tolled where defendants prepared plaintiff's tax returns, and three years later, "without any new engagement by plaintiff," responded to department of taxation and finance inquiry concerning plaintiff's tax returns]). The representation must also "be in connection with the specific matter directly in dispute, and not merely the continuation of a general professional relationship." (*Ackerman v Price Waterhouse*, 252 AD2d 179, 205 [1st Dept 1998]).

Here, although the entries and documentation that ARG sent to defendants contain references to the trust and/or the 2012 Form 709, none reflects a mutual understanding that defendants would prepare a 2014 Form 709, that they had undertaken to do so, that they were aware of a need to do so or that they were aware that ARG intended to elect out of the automatic exemption. And it is undisputed that Harris had sent Frushtick only the first and last pages of the trust agreement, neither of which reflects the term of the trust. Thus, ARG does not demonstrate that defendants represented him in connection with the trust after the filing of the 2012 Form 709, and consequently, he falls short of proving, *prima facie*, that defendants continuously represented him with respect to the trust. (*Cf Williamson ex rel. Lipper Convertibles, L.P. v PricewaterhouseCoopers LLP*, 9 NY3d 1, 10 [2007] [no continuous relationship where parties entered into annual engagements for separate and discrete audit services and plaintiff "never engaged defendant to provide corrective or remedial services"]). Defendants' alleged failure to

advise ARG of the need to file a 2014 Form 709, even if malpractice, does not toll the statute (*see Maya NY, LLC v Hagler*, 106 AD3d 583, 586 [1st Dept 2013] [as plaintiff's predecessor left "perpetually 'in the dark'" about everything concerning transactions in issue, that no written instruments involved, and that defendant handled the transactions independently, such "one-sided handling" did not support finding of continuous representation]).

Defendants also demonstrate *prima facie* that after the 2012 Form 709 was filed in 2013, their representation of ARG was not in connection with the trust but was a continuation of their provision of general tax services. Moreover, the September 21, 2018 decision did not establish the law of the case as to continuous representation as the finding of a two-step process was based solely on defendants' failure to dispute it, and thus, it does not preclude defendants from disputing it at this stage of the proceeding.

For these reasons, ARG fails to demonstrate, *prima facie*, that defendants continuously represented him during the period in issue. Even if ARG had demonstrated it, defendants raise a factual issue by disputing it and by offering the opinion of their expert as to the absence of a duty in these circumstances. That ARG moves solely for summary judgment as to liability does not change this result. There is no need to consider the other arguments of either party on ARG's motion.

B. Defendants' cross motion for summary judgment

To prevail on a claim based on professional malpractice, the plaintiff must establish that but for the alleged malpractice, the plaintiff "would not have sustained some actual ascertainable damages." (*Herbert H. Post & Co. v Sidney Bitterman, Inc.*, 219 AD2d 214, 224 [1st Dept 1996], quoting *Franklin v Winard*, 199 AD2d 220, 221 [1st Dept 1993]). Speculative assertions that the defendant's conduct caused the plaintiff's damages do not suffice. (*See e.g.*, *Leff v Fulbright &*

Jaworski, L.L.P., 78 AD3d 531, 533 [1st Dept 2010], *lv denied* 17 NY3d 705 [2011] [damages in malpractice case "grossly speculative" where plaintiff could not establish what would have occurred but for defendants' conduct]; *Phillips-Smith Specialty Retail Grp. II, L.P. v Parker Chapin Flattau & Klimpl, LLP*, 265 AD2d 208, 210 [1st Dept 1999], *lv denied* 94 NY2d 759 [2000] [allegations reliant on "hypothetical course of events on which any determination of damages would have to be based, involving the nature and timing of acts by plaintiffs themselves" too speculative to establish malpractice claim]; *Sherwood Grp., Inc. v Dornbush, Mensch, Mandelstam & Silverman*, 191 AD2d 292, 294 [1st Dept 1993] [allegations of damages "couched in terms of gross speculations on future events" insufficient]).

Here, while defendants maintain that ARG alleges no ascertainable damages arising from their alleged failure to file the 2014 Form 709, they do not address the ascertainable damages claimed by ARG in the form of fees expended for the preparation of an amended 2012 Form 709. Defendants' denial that they had a duty to prepare or file the 2014 Form 709, even if sufficient to establish, *prima facie*, that they had no such duty is disputed by ARG's expert who thereby raises an issue of fact. Additionally, nothing in the September 2018 decision constitutes the law of the case as to continuous representation.

VIII. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff Aaron Richard Golub's motion for partial summary judgment as to liability is denied; it is further

ORDERED, that defendants' cross motion for partial summary judgment is denied; and it is further

ORDERED, that the parties appear for the previously-scheduled compliance conference

on October 2, 2019 at 2:15 pm.

9/3/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE