

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 11  
NASSAU COUNTY

LINDA LIPSHUTZ, JACK SHAPIRO and  
JACK M. SHAPIRO, M.D.P.C.,

Plaintiff(s),

SUBMISSION DATE: 05/10/02  
INDEX Nos.: 24459-97  
08381-98

-against-

BOYKOFF & BELL, P.C., ROSANNA BELL,  
individually and as a principal of  
BOYKOFF & BELL, P.C. and  
FRANKLIN M. BOYKOFF, individually  
and as a principal of BOYKOFF & BELL, P.C.

MOTION SEQUENCE #6, 7, 8

Defendant(s).

-against-

GROSSBACH & BOYKOFF, ESQS.,  
MARTIN GROSSBACH, individually and as a  
principal of GROSSBACH & BOYKOFF, ESQS.,  
and MARTIN GROSSBACH, P.C.

Third-Party Defendants.

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	X
Answering Papers.....	X
Reply.....	X
Briefs: Plaintiff's/Petitioner's.....	X
Defendant's/Respondent's.....	X

Upon the foregoing papers, plaintiffs motion to amend their complaint to add a claim for punitive damages pursuant to CPLR §3025(b) is granted. Plaintiffs motion to compel deposition testimony pursuant to CPLR §3124 is granted. Defendant's cross-motion to compel deposition testimony pursuant to CPLR §3124 is

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denied.

The instant action involves seven causes of action all relating to plaintiff and defendants business relations commencing in 1987. Plaintiff employed defendant Mr. Boykoff who at the time was an employee of Grossbach & Boykoff to perform accounting and legal services. Plaintiff continued to employ Mr. Boykoff in 1992 when the latter became affiliated with the firm Boykoff & Bell, P.C. Plaintiffs were later informed by the Internal Revenue Service that their tax returns for the years 1989 - 1993 were being audited. The IRS issued the audit because plaintiffs' tax returns were overstated and contained undocumented deductions. Plaintiff paid \$1,500,000 in back taxes, interest and penalties.

Plaintiffs have moved to add a claim for punitive damages. Plaintiffs claim that defendants did not meet their professional obligations to properly calculate plaintiffs' personal and business finances by failing to properly report his taxable income, failing to maintain accounting records and failing to advise him how to minimize his tax liabilities. Plaintiffs also claim Mr. Boykoff committed fraud when he intentionally signed forms he knew contained false information about plaintiffs' finances and breached the contract with plaintiffs as he failed to fulfill promises.

Defendant claims that plaintiffs' motion to add punitive damages is late and is extremely prejudicial to him. Defendant asserts that had plaintiff sought punitive damages in their original complaint, defendant might have selected different theories of the case.

Leave to amend shall be liberally granted. CPLR §3025. In cases where the plaintiff moves to amend his complaint to include punitive damages, leave to amend shall also be granted freely so long as there is no surprise or prejudice to the defendant. Kaplan v Sparks, 192 A.D.2d 1119, 596 N.Y.S.2d 279 (4<sup>th</sup> Dep't, 1993). Prejudice has been found where plaintiff seeks to amend nine years after the alleged injury and eight years after the commencement of the action. Scott v General Motors Corp., 202 A.D.2d 570, 609 N.Y.S.2d 552 (2d Dep't, 1994). The instant motion was brought in a timely manner and will not prejudice the defendant. The defendant has not presented sufficient evidence to prove that he will need to rely on different evidence if leave to amend is granted. Rather, defendant will rely on the same factual circumstances. Kaplan v Sparks, supra. Although the defendant has

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raised a valid argument that plaintiff seeks to amend at the "eleventh hour", this defense is not sufficient. Where leave to amend was denied on grounds that it was too late, the motion was made on the eve of trial and severely prejudiced the defendant. Gonzalez v Texaco, 71 A.D.2d 666, 419 N.Y.S.2d 879 (2d Dep't, 1979), see Brophy v County of Putnam, 156 A.D.2d 413, 548 N.Y.S.2d 695 (2d Dep't, 1989). Punitive damages are appropriate where the defendant manifests a conscious disregard of the rights of another, and where defendant's conduct was "gross, wanton and willful". Milliken v Town of Cornwall, 740 N.Y.S.2d 229 (2d Dep't, 2002). Here, plaintiffs have presented sufficient evidence to establish that defendants did not adhere to professional standards when preparing plaintiff's tax returns nor inform plaintiffs about tax benefits available to them. In cases where plaintiffs claim fraud, punitive damages are appropriate when there is a public wrong or defendant failed to follow professional standards leaving plaintiff's financial statements inaccurate. Simon v Ernst & Young, 223 A.D.2d 506, 637 N.Y.S.2d 375 (1<sup>st</sup> Dep't, 1996) (defendant accountant was also not directly involved in the preparation of plaintiff's financial reports), see Abrahami v UPC Construction, 224 A.D.2d 231, 638 N.Y.S.2d 11 (1<sup>st</sup> Dep't, 1996). Here, defendant was the accountant personally responsible for plaintiffs' financial reports and is alleged to have signed the tax returns knowing they were inaccurate.

Plaintiffs also move to compel Mr. Boykoff to answer questions regarding matters to which he refused to testify to at his deposition on March 15, 2002. Plaintiffs claim that a line of questioning concerning Mr. Boykoff's February 8, 2002 criminal conviction for defrauding the IRS, aiding and assisting in the preparation of false tax returns for a client, attempting to obstruct an IRS audit of another client's returns and various charges relation to Boykoff's own tax returns and those of his business is material to the instant action.

Defendant argues that his criminal conviction is not sufficiently related to plaintiffs claims of fraud, negligence and breach of contract.

In order to compel a party to answer questions during a deposition not directly related to the instant action, the information that plaintiff seeks to obtain must be material and necessary to the prosecution of the case. Harvey v Monteforte, 738 N.Y.S.2d 394 (2d Dep't, 2002). Here, defendant's conviction is not

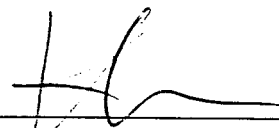
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only public record but is a similar claim as the instant action. Although plaintiffs were not parties to the criminal proceeding, the conviction is related to plaintiffs' claim for punitive damages.

Defendant has cross moved for an order compelling plaintiffs to authorize the IRS to furnish defendant's counsel with certain records relating to plaintiffs income taxes, to compel a deposition about a civil action relating to plaintiff being disciplined by the New York State Board of Health resulting in a restriction of his medical license, to compel a deposition regarding plaintiff's criminal conviction in Alaska and to compel testimony regarding plaintiffs connection with a car accident injury. The portion of the motion relating to plaintiffs car accident and income taxes was resolved pursuant to a conference with this court and a letter dated June 5<sup>th</sup>, 2002 confirming the resolution. Defendant's motions to compel a deposition regarding plaintiffs criminal conviction in Alaska and license restriction are not related to the instant action. Both are outside the scope of the instant causes of action, and therefore they are not material or necessary to the instant action. Id.

This decision constitutes the order of the court.

Dated: JUN 28 2002

  
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HON. KENNETH A. DAVIS J.S.C.

**ENTERED**

**JUL 02 2002**

**NASSAU COUNTY  
COUNTY CLERKS OFFICE**