

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU**

Present:

**Hon. Thomas Feinman**  
Justice

\_\_\_\_\_  
AUDREY ZIEGLER, BERNADETTE GRILLO,  
MARY JANE LONG, FRANCES PICONE, JO ANN  
GAJ, FLORENCE C. POLICASTRO & RITA IANNONE,

Plaintiffs,

- against -

SEYMOUR TRAGER, MICHAEL TRAGER, and  
LAWRENCE W. KEVY, and TRAGER, KEVY  
TRAGER, LLP,

Defendants.

TRIAL/IAS PART 18  
NASSAU COUNTY

INDEX NO. 763/09

MOTION SUBMISSION  
DATE: 5/11/09

MOTION SEQUENCE  
NO. 1

The following papers read on this motion:

Notice of Motion and Affidavits.....	<u>  X  </u>
Memorandum of Law in Support of Motion.....	<u>  X  </u>
Affirmation in Opposition.....	<u>  X  </u>
Reply Affirmation.....	<u>  X  </u>

The defendants move for an order pursuant to §3211(a)(7) dismissing, in part, plaintiff's complaint against the defendants. The defendants submit a Memorandum of Law in support of their motion. The plaintiffs submit opposition. The defendants submit a reply affirmation.

The defendants, Seymour Trager, Michael Trager and Lawrence W. Kevy, are partners of the accounting firm Trager, Kevy, Trager, LLP. The plaintiffs are beneficiaries of the Joseph Picone, Sr. Revocable Family Trust dated January 21, 1986, (the 'Trust'), and an insurance Trust entitled the Joseph Picone Irrevocable Family Trust dated August 5, 1985, (the "Insurance Trust"). The defendant, Seymour Trager, was named as a Trustee of the aforementioned Trusts. The plaintiff alleges that the defendants knowingly and intentionally, and/or negligently, prepared and filed wrongful Federal and State fiduciary income tax returns for the Trust for the years 2004 - 2007 by declaring the "Trust" to be a "Complex Trust" as opposed to a 'Simple Trust' and as so, overpaying Federal and State fiduciary income taxes, and took improper deductions for personal fiduciary liability insurance, and declared incorrect amounts of accounting income, thereby duplicating tax deductions for professional fees by intentionally and wrongfully not preparing and issuing K-1 to the plaintiffs jeopardizing plaintiffs' personal income tax positions. The plaintiffs also allege that the

defendants breached their fiduciary obligation to the plaintiffs, that the defendant, Seymour Trager, as Executor and Trustee and financial advisor, along with the LLP, as tax preparers for the Estate and Trust, and further as financial advisor the plaintiffs, had a conflict of interest. The plaintiffs also seek punitive damages.

The plaintiffs claim that the defendants' actions were deliberate when the defendants misclassified the Trusts as "Complex Trusts" instead of "Simple Trusts", whereby the defendants, in preparing a trust return for a 'Simple Trust' should have prepared a Schedule K-1 for each beneficiary's share of the accounting income so that each beneficiary can properly file their respective Form, 1040. As the defendants misclassified the Trust, the Schedule K-1 forms were not filed. As so, plaintiffs claim that they, as beneficiaries, have not declared income they should have, thereby, allegedly, placing each beneficiary in jeopardy with the Internal Revenue Service and New York State for substantial income tax liabilities, interest and penalties.

Here, while the defendants contend that the first cause of action should be dismissed for lack of privity as plaintiffs are beneficiaries of the Trusts, and not in privity with the defendants or the defendants' firm, hired by the Trustees, the plaintiffs are arguably members of a settled or particular group whose reliance on their tax audits and returns was, at best, or should have been, foreseen. (*White v. Guarente*, 43 NY2d 356). The plaintiffs argue that Trust at bar provided that income would be distributed to the beneficiaries, the plaintiffs herein, members of a class to whom the defendants owed a duty to who would rely on the Trust returns in preparing their personal returns. The plaintiffs point out that the defendant, Seymour Trager, a Trustee and trust tax advisor, and defendant Michael Trager, prepared the personal income tax returns for some of the plaintiffs. With respect to the defendants' claim that the instant action is time-barred, the plaintiff have demonstrated that their claim herein is timely.

This being a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211(a)(7), the Court starts with the presumption that the allegations contained in the plaintiff's pleadings are true. (*Becker v. Schwartz*, 46 NY2d 401). A motion for failure to state a cause of action will fail if from its four corners, the factual allegations are discerned which taken together maintain any cause of action cognizable of law, regardless of whether the plaintiff will ultimately prevail on the merits. (*Gruen v. County of Suffolk*, 187 AD2d 564).

In view of the foregoing, this Court being only concerned with the sufficiency of the plaintiff's pleadings, and not evidentiary matters, is of the opinion that the plaintiff has stated causes of action against the defendants. Accordingly, the defendants' motion to dismiss for failing to state a cause of action is denied.

The parties are hereby directed to appear for a Preliminary Conference which shall be held at the Preliminary Conference part located at the Nassau County Supreme Court on the 6th day of August, 2009, at 9:30 A.M. This directive, with respect to the date of the Conference, is subject to the right of the Clerk to fix an alternate date should scheduling require. The attorneys for the plaintiff shall serve a copy of this order on the Preliminary Conference Clerk and the attorneys for the defendants.

**ENTERED**

ENTER:  
JUL 09 2009

NASSAU COUNTY  
COUNTY CLERK'S OFFICE J.S.C.

Dated: July 6, 2009  
cc: Franklin C. Hyman, P.C.  
Babchik & Young, LLP