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SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 8

TKJ MANAGEMENT CORP., REVERE SUPER SERVICE, INC., REVERE SUPER SERVICE TOO, INC., CAR CARE OF MANHASSET, INC., JERICHO SUPER SERVICE, INC., KISSENA BOULEVARD CONVENIENCE STORE, INC., and MIDDLENECK SUPER SERVICE, INC., k/k/a 595 CORP.,

Plaintiffs,

INDEX NO.: 013392/2007
MOTION DATE: 11/06/2009
MOTION SEQUENCE: 006 and 007

-against-

MARK MANDEL & CO., CPA's, FUOCO MANDEL CPA's, LLP, FUOCO, HENLE & ASSOCIATES, INC., FUOCO PEARE & HELLER CPA's, FUOCO GROUP, LLP, MARK MANDEL, Individually, JOSEPH MANZELLI, JR., Individually, and LOU FUOCO, Individually,

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibit Annexed	1
Affidavit of Ronald S. Herzog in Support & Exhibits Annexed	2
Memorandum of Law in Support of Defendant Mark Mandel's Motion for Summary Judgment	3
Affidavit in Opposition of John Demeo, Affirmation in Opposition of Steven R. Schlesinger & Exhibits Annexed	4
Memorandum of Law in Opposition to Motion for Summary Judgment	5
Notice of Cross-Motion & Affirmation in Support	6
Reply Affidavit of Ronald S. Herzog in Further Support & Exhibits Annexed	7

PRELIMINARY STATEMENT

Defendant Mark Mandel moves for summary judgment dismissing the complaint against him to the extent that it survived the original motion to dismiss. By Decision dated February 2, 2008, the First and Fourth Causes of Action against Mark Mandel & Co., CPA's, the Second Cause of Action was dismissed against all Defendants, while the motion to dismiss the Third Cause of Action was denied without prejudice to renewal. Defendant contends that neither Mark Mandel nor any entity with which he was related, provided accountancy services to Plaintiff after October 24, 2002, when Mark Mandel & Co., CPA's was discharged as their accountant by Mr. DeMeo. Consequently, the action commenced on August 1, 2007 was well beyond the 3-year statute of limitations.

Plaintiffs oppose the motion and cross-move for summary judgment. Their position is that the statute of limitations was tolled as to Mandel during the period of continuous accountancy services, and the tolling afforded the Fuoco entitites, preventing dismissal, so too should it be applicable to Fuoco Mandel CPA's, LLP, formed in August 2002 dissolved in July 2003. They further assert that subsequent entities, including Fuoco, Henle & Associates, Inc., Fuoco Peare & Heller CPA's and Fuoco Group, LLP were further iterations of Fuoco Mandel, in which Mandel participated, and that Mandel cannot escape liability simply by virtue of the dissolution of Fuoco Mandel CPA's more than three years prior to the filing of the complaint.

Mandel' response is that Fuoco Mandel CPA's, LLP was an organization formed to examine the possibility of a merger of the practices of Mark Mandel and Lou Fuoco, but that throughout the 1 year of its existence, Mandel and Fuoco maintained their independent practices and did not perform accounting work for the Plaintiffs. In addition, Mandel states that he has no relationship with any of the organizations in which Fuoco was involved and provided no professional services to the Plaintiffs through them.

BACKGROUND

John DeMeo is the operator of a substantial number of gasoline service stations in the New York metropolitan area. The guiding principal by which he operated his stations was volume sales which capitalized on incentive payments in the form of rebates from oil companies. There was a narrow profit margin, and this was sometimes even reduced in order to empty tanks

and receive another shipment from the supplier so as to qualify for additional rebates.

In order to effectuate this program, Plaintiffs, in the person of DeMeo, developed a formula for calculating the fluctuating sales price for gasoline and diesel fuel, which considered the base cost of fuel on an ongoing basis, added overhead, including sales tax, and added a net profit. Unfortunately, as the Complaint alleges, for the period 2001 — 2006, the calculation for the tax, performed by Defendants, was erroneous, resulting in a determination by the State of New York of an approximately $750,000 tax deficiency. DeMeo first hired Mark Mandel & Co., CPA's and Mark Mandel in or about 1998. According to DeMeo, they were charged with the responsibility of formulating and applying a complex algorithm to calculate the sales tax necessary to be paid on each gallon of gasoline or diesel fuel for each jurisdiction in which the Plaintiff gas stations were located. [1] He further claims that after Mark Mandel & Co. was terminated by him, Mandel continued to provide accounting services in the form of Fuoco Mandel, CPA's, LLC, and that services which were subsequently provided by Fuoco, Henle & Associates, Inc., Fuoco, Peare & Heller CPA's, and Fuoco Group, LLP, which were simply iterations of Fuoco, Mandel, and that Mark Mandel continued to be involved. [2] If DeMeo's understanding is not correct, then the last relationship he had with Mandel was more than three years prior to the commencement of the action and barred by the 3-year statute of limitations.

DISCUSSION

There is no substantial basis for Plaintiffs' contention that Mandel provided professional accounting services to them within three years of the filing of the complaint in this action. Even if Fuoco Mandel CPA's, P.C. provided accountancy services to Plaintiffs, which both Fuoco and Mandel deny, that organization was dissolved by agreement dated July 30, 2003. Previously, on July 14, 2003, Mandel assigned all his right, title and interest in Fuoco Mandel to Fuoco. [3] This documentary evidence establishes that Mandel had no role in whatever services Fuoco Mandel may have provided Plaintiffs within three years prior to the filing of the complaint.

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[1] DeMeo affidavit in opposition to motion, Exh. "D".

[2] *Id.* at ¶¶ 6 — 9.

[3] Exh. "A" to Motion for Summary Judgment.

Plaintiffs have failed to provide any evidence that Mandel had any role in the subsequent organizations known as Fuoco, Henle & Associates, Inc., Fuoco, Peare & Heller CPA's, or Fuoco Group, LLP. While Plaintiffs have speculated that these organizations were extensions, successors or alter egos for Fuoco Mandel CPA's, P.C., there is no evidence to that effect. To the contrary, all individuals with personal knowledge of the facts who have testified or provided affidavits, have denied any such affiliation of Mandel with these organizations.

The deposition testimony of John DeMeo [4] makes it clear that he presumed that Mr. Mandel had a continuing relationship with the three entities subsequent to Fuoco Mandel, CPA's on the basis that he was never advised that Mr. Mandel was no longer associated with Mr. Fuoco in the practice of accountancy. This is simply inadequate to rise to the level of a factual issue so as to preclude the grant of summary judgment.

When presented with a motion for summary judgment, the function of a court is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact." *(Quinn v. Krumland,* 179 A.D.2d 448, 449 — 450 [1st Dept. 1992]); See also, (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343, [1974]).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. *(Stillman v. Twentieth Century-Fox Corp.,* 3 N.Y.2d 395, 404 [1957]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. *(Moskowitz v. Garlock,* 23 A.D.2d 94 [3d Dept. 1965]); *(Crowley's Milk Co. v. Klein,* 24 A.D.2d 920 [3d Dept. 1965]).

The evidence will be considered in a light most favorable to the opposing party. (*Weill v. Garfield,* 21 A.D.2d 156 [3d Dept. 1964]). The proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party. *(Tortorello v. Carlin,* 260 A.D.2d 201, 206 [1st Dept. 2003]). On a motion to dismiss, the court must " ' accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'

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[4] Exh. "C" to Affidavit of Ronald S. Herzog.

". *(Braddock v. Braddock,* 2009 WL 23307 [N.Y.A.D. 1st Dept. 2009]), (*citing Leon v. Martinez,* 84 N.Y.2d 83, 87 — 88 [1994]). But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney's affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact. (*Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 [1980]).

Plaintiff, in opposing the motion, has provided an affidavit of John DeMeo, the principal of the Plaintiff Corporations. But his affidavit is not adequate to overcome the overwhelming evidence that Mandel provided no accounting services to Plaintiffs within three years of the filing of the complaint. DeMeo acknowledges in his deposition testimony to having no contact with Mandel after December 20, 2002. [5]

Defendant Mark Mandel's motion for summary judgment dismissing the remaining claims against him which survived the prior motion to dismiss is therefore granted. Defendants Fuoco, Mandel, CPA's, LLP, Fuoco, Henle& Associates, Inc., Fuoco Peare & Heller CPA's and Fuoco Group, LLP have also moved for summary judgment. For the above-cited reasons, the motion is granted as to Fuoco, Mandel, CPA's, LLP, but is denied as to each of the other moving Fuoco Defendants. The record has not been developed so as to establish that they did not perform accountancy services for Plaintiffs within the 3-year period preceding the filing of the Summons and Complaint.

In the accompanying memorandum of law, Defendant Mandel includes claims for costs and attorneys' fees in view of the bad faith responses by Plaintiffs to Defendant Mandel's Notices to Admit. They rely upon CPLR § 3123 (c) , which provides as follows:

> **(c) Penalty for unreasonable denial.** If a party, after being served with a request under subdivision (a) does not admit and if the party requesting the admission thereafter proves the genuineness of any such paper or document, or the correctness or fairness of representation of any such photograph, or the truth of any such matter of fact, he may move at or immediately following the trial for an order requiring the other party to pay him the

[5] Exh. "C" to Affidavit of Ronald S. Herzog, at page 296.

> reasonable expenses incurred in making such proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or the refusal otherwise to admit or that the admissions sought were of no substantial importance, the order shall be made irrespective of the result of the action. Upon a trial by jury, the motion for such an order shall be determined by the court outside the presence of the jury.

Mandel contends that there was no genuine basis for the failure of Plaintiffs to respond directly to the requests to admit that neither Fuoco, Henle & Associates, Fuoco Peare & Heller nor the Fuoco Group ever advised Plaintiff that Mark Mandel had any relationship with those entities; that any of the entities were a mere reiteration of the partnership between Mark Mandel and Lou Fuoco (Fuoco Mandel); or that any of the three entities were successors in interest of Mandel & Co. and/or Fuoco Mandel. The lack of any such communications to Plaintiff was acknowledged in the deposition testimony of Mr. DeMeo. Mandel seeks counsel fees and costs incurred to establish his lack of involvement with the three subsequent entities under circumstances that a straightforward answer to the notices to admit would have resolved the issue.

The purpose of a notice to admit under CPLR § 3123 (a) is to seek admissions as to "clear-cut" matters of fact as to which the party reasonably believes that there can be no dispute or controversy. (CPLR 3123, Practice Commentaries by David D. Siegel, C3123:1, p. 603). It is not intended as a substitute for other discovery devices, such as examination before trial, depositions upon written questions or interrogatories. (*Taylor v. Blair,* 116 A.D.2d 204, 206 [1st Dept. 1986])(internal citation omitted). As a practical matter, the typical use of a notice to admit is to determine the genuineness of papers or documents, correctness or fairntss of representations of any photograph, or the truth of a fact which the submitting party is not reasonably subject to dispute. *Id.* at 205.

In this case, the notices of which Defendant complains with respect to the answer are not such clear-cut factual issues. They go to the state of mind of Mr. DeMeo regarding his awareness, or lack thereof, of Mandel's involvement with the three entities insofar as it was communicated to him by those entities. The reality is that even if Plaintiffs stated that they had no such information transmitted to them by any of the entities, they may have had other reasons

to believe that such relationship existed. While this has proven to be inaccurate, the Court determines that the notice to admit would not necessarily have been determinative of the underlying issue; rather, it was the deposition of Mr. DeMeo which established that he had no basis for his belief as to Mandel's involvement.

Under these circumstances, the Court determines that the award of attorneys' fees and costs is unwarranted, and Defendant's application therefor is denied.

This constitutes the Decision and Order of the Court.

Dated: January 12, 2010

J.S.C.

ENTERED
JAN 19 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE