

**Troy v Carolyn D. Slawski, C.P.A., P.C.**

2009 NY Slip Op 32690(U)

November 10, 2009

Supreme Court, New York County

Docket Number: 105968-2009

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE

PART 10

Index Number : 105968/2009  
TROY, EDWARD  
VS.  
SLAWSKI, CPA, P.C., CAROLYN D.  
SEQUENCE NUMBER : 001  
DISMISS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

1 this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
NOV 17 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION *and a*  
*preliminary conference is*  
*scheduled for Jan 14, 2010 @*  
*9:30 am in Part 10, Room 232 60C*

NOV 10 2009

Dated: \_\_\_\_\_

HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10**

-----X  
Edward Troy,  
Plaintiff (s),

-against-

Carolyn D. Slawski, C.P.A., P.C.,  
Toy & Troy, P.C., William J. Troy, III,  
Joseph B. Troy, and James J. Troy,  
Defendant (s).  
-----X

**DECISION/ORDER**  
Index No.: 105968-2009  
Seq. No.: 001

**PRESENT:**  
Hon. Judith J. Gische  
J.S.C.

**FILED**  
NOV 17 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

*Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):*

<b>Papers</b>	<b>Numbered</b>
Def Slawski n/m (dismiss) w/AFP affirm, CDS affid (sep back), exh . . . . .	1,2
Amended n/m (sep back) (as to where motion returnable) . . . . .	3
Pltf x/m (amend complaint) w/EJT affid, exhs . . . . .	4
Def Slawski reply w/AFP . . . . .	5
Proof of service (complaint) sep back . . . . .	6

*Upon the foregoing papers, the decision and order of the court is as follows:*

This is an action by Edward Troy ("plaintiff") against Troy & Troy, P.C. the law firm ("law firm") that he was a member and shareholder of, the other shareholders and members of the law firm ("individually named defendants"), and the accountant, Carolyn D. Slawski, C.P.A., P.C. ("accountant") that the law firm hired to prepared its tax returns. Presently before the court is the accountant's pre-answer motion to dismiss the complaint for failure to state a cause of action (CPLR 3211[a][7]) which is opposed by the plaintiff who has cross moved for permission to serve an amended complaint. The law firm and individually named defendants have answered the complaint, but take no position on either motion.

## Applicable Law

In the context of a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true, and provide the plaintiff with the benefit of every possible inference (Goshen v. Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; Leon v. Martinez, 84 NY2d 83 [1994]; Morone v. Morone, 50 NY2d 481 [1980]; Beattie v. Brown & Wood, 243 AD2d 395 [1<sup>st</sup> Dept. 1997]). In deciding defendants' motion to dismiss, the court must consider whether, accepting all the plaintiff's facts, they support the causes of action asserted (Rovello v. Orofino Realty Co., 40 NY2d 633, 634 [1976]) and whether they fit within any cognizable legal theory (Goldman v. Metropolitan Life Ins. Co., 5 NY3d 561 [2005]). Whether the plaintiff can ultimately establish his allegations is not part of the calculus in determining a motion to dismiss (Goshen v. Mutual Life Ins. Co. of N.Y., *supra* at 326).

The court's decision is as follows:

## Facts Alleged and Arguments Raised

Plaintiff is an attorney at law. He was a member and minority shareholder of the law firm which is a sub-chapter "S" corporation. Before he left the firm, plaintiff was a minority shareholder with a 25% interest of the outstanding shares. He retained these shares even after he left the firm.

The law firm's accountant prepared the year 2007 corporate tax return for the law firm and also prepared a K-1 in plaintiff's name. A cash disbursement of \$75,000 is reported on the K-1 and reported on the corporate tax return.

Plaintiff denies he ever received the \$75,000 attributed to him and as a result of this "distribution," plaintiff incurred tax liability of \$25,000 for the year 2007. Plaintiff

contends that K-1 and the tax return are untruthful, if not false statements, and that the money was allocated to him so that the other members of the firm could lower their own personal tax liabilities, at his expense.

Plaintiff claims that the firm has had a longstanding practice of making dividend distributions to its shareholders (him included) so they could pay their taxes and that each year each shareholder's compensation was a mixed bag of salary and dividends. According to plaintiff, this practice abruptly changed the same year he left the firm.

Based on these facts, plaintiff has asserted ten (10) causes of action. The 1<sup>st</sup> through 6<sup>th</sup> causes of action are asserted the law firm and individually named defendants. Those causes of action assert breach of fiduciary duty and related claims.

The 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> causes of action, which are the subject of these motions, are asserted against only the accountant and are all based upon her having breached her fiduciary duty to him as a minority shareholder of the firm. In the 7<sup>th</sup> and 8<sup>th</sup> causes of action plaintiff claims the accountant's preparation of an improper and untruthful tax return at plaintiff's expense was a breach of her fiduciary duty to him. In the 9<sup>th</sup> cause of action plaintiff claims that the accountant's failure to notify the shareholders of their quarterly tax liabilities exposed plaintiff to penalties and interest assessments for non-payment of taxes. In the 10<sup>th</sup> cause of action plaintiff seeks an order (injunctive relief) requiring defendants (including the accountant) to issue a corrected K-1, etc., showing plaintiff did not receive \$75,000 in income in 2007.

In support of her motion to dismiss and in a sworn affidavit, the accountant states that she is entitled to the dismissal of all claims against her that are based on breach of

fiduciary duty. She denies having any day to day involvement in the law firm's business operations and states that she did not prepare its payroll or perform bookkeeping services, nor did she provide any kind of investment counseling nor perform an audit of the firm. The accountant contends she is not a fiduciary of plaintiff or the law firm and owes no fiduciary duty to the plaintiff, as a matter of law. According to the accountant, all she did was prepare the K-1 and tax return solely based on the information provided to her by the law firm and in accordance with generally accepted accounting practices.

In opposition to the accountant's motion, plaintiff provides his sworn affidavit purporting to put additional facts before the court and in support of his cross motion to add two claims against the accountant. In his affidavit he states the law firm often consulted with the accountant regarding the manner in which certain tax and financial transactions were handled by the law firm and that the accountant was involved in deciding how the principals of the firm were compensated. He states further that before he left in 2007, compensation was done one way but after he left, the compensation scheme was changed to his detriment, saddling him with personal tax liability that he had not previously had.

The proposed 11<sup>th</sup> cause of action alleges that the accountant was directly involved in the management of the law firm's investments and assets management through meetings with and advice to the managing shareholders. The proposed 12<sup>th</sup> cause of action is based on negligence.

In opposition to the cross motion, the accountant argues that all plaintiff did was copy a paragraph from her sworn affidavit in which she denies day to day involvement in

the business operations of the law firm and he has not provided any new facts to support those claims.

### **Discussion and Decision**

It is well established law that permission to serve an amended complaint should be freely given upon such terms as may be just as a matter of discretion in the absence of prejudice or surprise (CPLR § 3025 (b); Stroock & Stroock & Lavan v. Beltrami, 157 A.D.2d 590 [1<sup>st</sup> Dept. 1990]). This is true particularly when the denial of the motion would create a greater prejudice than would be granting it. Murray v. City of New York, 43 NY2d 400 (1977). Leave, however, may not be granted where the amended pleading fails to state a cause of action. Stroock & Stroock & Lavan v. Beltrami, supra.

Affording the pleadings a liberal construction, taking the allegations of the complaint as true, and providing the plaintiff with the benefit of every possible inference, they support only the newly proposed 12<sup>th</sup> cause of action based upon negligence/accountant's malpractice, but not the proposed 11<sup>th</sup> cause of action or the 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> or 10<sup>th</sup> causes of action (as against the accountant) in the original complaint for the reasons that follow.

To establish a breach of fiduciary duty, the plaintiff must show the existence of a fiduciary relationship, misconduct that induced the plaintiff to engage in the transaction in question, and damages directly caused by that misconduct (Barrett v. Freifeld, 64 AD3d 736, 739 [2<sup>nd</sup> Dept 2009]). Although a fiduciary relationship may exist when one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge, it does not exist in an arm's-length business transaction involving

\* 7]  
sophisticated business people (Barrett v. Freifeld, *supra* at 739).

Generally, the duty owed by an accountant to a client is not fiduciary in nature (DG Liquidation, Inc. v. Anchin, Block & Anchin, LLP, 300 AD2d 70 [1<sup>st</sup> Dept. 2002]), even if the accountant provides financial advice. This is because it may be within the scope of his or her duties to provide such advice, and therefore, within the definition of a conventional business relationship (Friedman v. Anderson, *supra*).

Under certain limited and extreme circumstances a fiduciary duty may arise between an accountant and his client (Lavin v. Kaufman, Greenhut, Lebowitz & Forman, 226 AD2d 107 [1<sup>st</sup> Dept. 1996]; Kaney v. Turk, 187 AD2d 395 [1<sup>st</sup> Dept 1992]). Examples are where the plaintiff claims the accountant withheld some knowledge with the intent to deceive, there was resultant harm and fraud (Kaney v. Turk, *supra*; Lavin v. Kaufman, Greenhut, Lebowitz & Forman, *supra*). That standard has not been met here, even taking the plaintiff's sworn affidavit into account, as the court has the right to do (Leon v Martinez, 84 NY2d 83, 88 [1994]).

While plaintiff's facts support the breach of fiduciary duty based claims against the other defendants who are not the subject of this motion, the 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> claims against the account must be dismissed.

The proposed 12<sup>th</sup> cause of action for negligence/ accountant malpractice is based on facts that the accountant owed him a duty, that she breached that duty and that his injuries were proximately caused by the breach (Friedman v. Anderson, *supra*). The facts support this cause action and plaintiff may serve an amended complaint to add that cause of action (12<sup>th</sup>) against the accountant. The amended complaint shall be served on

all defendants who have appeared in the action and the defendants shall have the time provided under CPLR § 3025[d] to answer.

Since no preliminary conference has yet been held, it is hereby scheduled for **January 14, 2010 at 9:30 a.m.** in Part 10, Room 232 at 60 Centre Street. No further notices will be sent.

**Conclusion**

Defendant Slawski's motion to dismiss is granted as to the 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> causes of action in the original complaint. Plaintiff's cross motion to serve an amended complaint is granted only as to the 12<sup>th</sup> cause of action based on negligence but denied as to the 11<sup>th</sup> cause of action which is based upon a breach of fiduciary duty.

Plaintiff shall serve all defendants who have appeared in this action with the amended complaint and the defendants shall answer in the manner provided under CPLR § 3025[d].

A preliminary conference is hereby scheduled for **January 14, 2010 at 9:30 a.m.** in Part 10, Room 232 at 60 Centre Street. No further notices will be sent.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
November 10, 2009

So Ordered:

Hon. Judith J. Glische, J.S.C.

**FILED**  
NOV 17, 2009  
NEW YORK  
COUNTY CLERK'S OFFICE