

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 9-27-11
SUBMITTED: 11-10-11
MOTION NO.: 003-MOT D

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ROBERT GARDNER, CARMELA GARDNER,
and CJEFA PIZZA, INC.,

Plaintiffs,

THE LAW OFFICES OF DAVID J. SUTTON, P.C.
Attorneys for Plaintiffs
1205 Franklin Avenue, Suite 320
Garden City, New York 11530

-against-

LEITGEB & VITELLI, LLP, SEBASTIANO
VITELLI, and JAMES GARDNER,

Defendants.

TRAUB LIEBERMAN STRAUS &
SHREWSBERRY LLP
Attorneys for Defendants Leitgeb & Vitelli, LLP,
and Sebastiano Vitelli
Seven Skyline Drive
Hawthorne, New York 10532

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Upon the following papers numbered 1-73 read on this motion for summary judgment ; Notice of Motion and supporting papers 1-49 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 50-70 ; Replying Affidavits and supporting papers 71-73 ; it is,

ORDERED that this motion by the defendants Leitgeb & Vitelli, LLP, and Sebastiano Vitelli for summary judgment dismissing the complaint insofar as it is asserted against them is granted to the extent of dismissing the first, second, and fourth causes of action; and it is further

ORDERED that the motion is otherwise denied.

This matter involves a dispute between the plaintiffs, Robert and Carmela Gardner, and their son, the defendant James Gardner, over the ownership of the corporate plaintiff, CJEFA Pizza, Inc. ("CJEFA"), which operated an Italian restaurant and pizzeria in Fort Salonga, New York. The plaintiffs claim that they were the sole shareholders and officers of CJEFA from 1984 until its dissolution in 2009. The defendant James Gardner claims that he became the sole shareholder and president of CJEFA in 1997 and that he managed the restaurant until the last quarter of 2001, when his parents took over the business illegally. The plaintiffs

agree that James was the manager of the business at one time until that relationship was terminated in November 2001 and he no longer had any authority to conduct CJEFA's affairs.

In August 2001, James retained the defendant accounting firm, Lietgeb & Vitelli, LLP, and a partner in that firm, the defendant Sebastiano Vitelli (collectively "the Vitelli defendants"), to provide accounting services to CJEFA. James held himself out to the Vitelli defendants as the president and sole shareholder of CJEFA. The retainer agreements executed by him required the Vitelli defendants, inter alia, to represent CJEFA in connection with an ongoing sales-and-use tax audit by the New York State Department of Taxation, to prepare New York State sales tax returns for CJEFA, and to prepare federal and state income tax returns for CJEFA for the fiscal year that ended on December 31, 2001. It is undisputed that the Vitelli defendants performed those tasks.

In February 2002, James and CJEFA commenced an action in this court against Robert and Carmela (Index No. 3736-02), alleging that James was the president and only shareholder of CJEFA and that his parents had engaged in a systematic scheme to convert CJEFA's assets to them. Specifically, James and CJEFA alleged that Robert was holding himself out as CJEFA's president, that he and Carmela had locked James out of the restaurant, and that they were looting the business by drawing down CJEFA's line of credit and diverting revenue from the restaurant to them, among other things. Although the Vitelli defendants knew of this dispute between James and his parents, they continued to work with Robert to prepare sales tax returns for CJEFA. In mid-2003, Robert terminated CJEFA's relationship with the Vitelli defendants and demanded that they return all original CJEFA documents to him. The Vitelli defendants advised Robert that all original documents in their possession had been given to James. Subsequent requests by Robert for copies of CJEFA's corporate documents were ignored or refused.

Robert and Carmela commenced this action against James and the Vitelli defendants on or about September 30, 2004. The gravamen of the complaint is that the plaintiffs were damaged by the Vitelli defendants' failure to prepare and file CJEFA's federal and state income tax returns for the years 2001 and 2002 and by the Vitelli defendants' returning CJEFA's corporate documents to James. The plaintiffs allege that, as a result, they incurred fines and penalties because they were unable to prepare and file CJEFA's tax returns in subsequent years and because they were unable to properly defend against and cooperate with the sales-tax audit by the New York State Department of Taxation. The complaint contains causes of action for malpractice, breach of contract, and breach of fiduciary duty against the Vitelli defendants and for conversion against both James and the Vitelli defendants. Discovery is now complete, and the Vitelli defendants move for summary judgment dismissing the complaint.

The plaintiffs contend that the Vitelli defendants' motion should be denied because it is supported only by an attorney's affirmation and not by an affidavit from an individual with personal knowledge of the facts. An attorney's affirmation, however, is accorded probative value when, as here, it is accompanied by documentary evidence (*see, Lupinsky v*

Windham Constr. Corp., 293 AD2d 317, *citing Zuckerman v City of New York*, 49 NY2d 557, 563). The Vitelli defendants have established, prima facie, their entitlement to judgment as a matter of law through the affirmation of their attorney, which is based upon documentary evidence (*see, Prudential Securities, Inc. v Rovello*, 262 AD2d 172; **Eldon Group America, Inc. v Equiptex Indus. Prods. Corp.**, 236 AD2d 329). Accordingly, the motion cannot be defeated simply because the Vitelli defendants have submitted an attorney's affirmation in support thereof.

The plaintiffs do not oppose the branch of the motion which is for summary judgment dismissing the fourth cause of action for breach of fiduciary duty. Generally, there is no fiduciary relationship between an accountant and his client (*see, Friedman v Anderson*, 23 AD3d 163, 166; **DG Liquidation v Anchin, Block & Anchin**, 300 AD2d 70, 71), and the plaintiffs have made no showing of the limited circumstances in which such a duty might arise (*Id.*, *citing Lavin v Kaufman, Greenhut, Lebowitz & Forman*, 226 AD2d 107). Accordingly, the fourth cause of action is dismissed.

The first and second causes of action for malpractice and breach of contract, respectively, are based on the Vitelli defendants' purported failure to prepare and file CJEFA's federal and state income tax returns for the years 2001 and 2002. The unambiguous written engagement letters between CJEFA and the Vitelli defendants required the Vitelli defendants to prepare federal and state income tax returns for CJEFA for the year 2001. There was no agreement to prepare CJEFA's federal or state income tax return for the year 2002, nor was there an agreement to file any tax returns. The plaintiffs contend that the Vitelli defendants continued to perform accounting work on the sales-and-use tax returns through mid-2003 and that there was an oral agreement between Robert and the Vitelli defendants to file the income tax returns for the year 2001. The clear engagement letters govern the terms of the parties' relationship and, as a matter of law, cannot be altered by alleged parol or extrinsic evidence (*see, Italia Imports, Inc. v Weisberg & Lesk*, 220 AD2d 226, 227). It is undisputed that the Vitelli defendants prepared CJEFA's federal and state income tax returns for the year 2001. They were under no obligation to file those returns or to prepare income tax returns for any other year. Unlike their obligation to prepare CJEFA's sales-and-use tax returns, their obligation to prepare income tax returns was limited to one year and was not open-ended. Moreover, it is the taxpayer's nondelegable duty to file timely tax returns (*see, Penner v Hoffberg Oberfest Burger & Burger*, 303 AD2d 249). Accordingly, the first and second causes of action are dismissed.

The third cause of action for conversion is based on the Vitelli defendants' failure to return CJEFA's corporate documents to the plaintiffs. To recover damages for conversion, the plaintiff must show legal ownership or an immediate, superior right of possession to a specific, identifiable thing and that the defendant exercised unauthorized dominion over the thing in question to the exclusion of the plaintiff's rights (*see, Eight In One Pet Prods. v Janco Press, Inc.*, 37 AD3d 402). While it is undisputed that the corporate documents in question were owned by CJEFA, there is a triable issue of fact as to who had an immediate, superior right of possession to those documents, i.e., James or Robert and Carmella. That issue is sharply

disputed and inextricably intertwined with the question of the ownership of CJEFA, which was not resolved in the prior action between James and his parents. In fact, the court (Molia, J.) denied summary judgment in that action based on the following findings:

Each of the parties has produced copies of documents, including stock certificates, that purports to prove that party as the lawful owner of the corporation. However, the parties have disputed the authenticity of the produced documents, and the proceedings are rife with allegations of fraud, forgery and associations with organized crime. It is impossible for the Court at this time to determine the authenticity of the documents and the veracity of the various affidavits submitted, which are wildly divergent in their recitation of the facts.

The prior action was subsequently marked disposed without resolution of the ownership issue. The parties to this action rely on much of the same proof, which suffers from the same deficiencies. Accordingly, the court declines to dismiss the third cause of action.

The Vitelli defendants correctly contend that this action should have been brought as a shareholder derivative action pursuant to Business Corporation Law § 626 since the plaintiffs seek to recover damages for a wrong to CJEFA (*see*, Haig, Commercial Litigation in NY State Courts, Shareholder Derivative Actions § 82.1 [3rd ed]). The Vitelli defendants also correctly contend that shareholder derivative actions are equitable in nature and that latches is a proper defense thereto (*see*, **Sakow v 633 Seafood Restaurant, Inc.**, 25 AD3d 418, 419). Latches is an equitable defense, which the Vitelli defendants have waived because they failed to assert it in their answer (*see*, CPLR 3018[b]; **Fade v Pugliani/Fade**, 8 AD3d 612, 614-615).

However, the failure to plead an affirmative defense such as latches, when required, does not always preclude consideration of such a defense in support of or in opposition to a motion for summary judgment. When a defendant fails to plead an affirmative defense, but asserts it in connection with a motion for summary judgment, the waiver is said to have been retracted, and the court can grant or deny summary judgment based on the never-pleaded affirmative defense (*see*, **Strauss v BMW Financial Services Vehicle Leasing**, 29 Misc 3d 362, 364). The relevant inquiry for the court is the prejudice or surprise associated with the assertion thereof (**Id.**). Prejudice and surprise are ameliorated when it is shown that the plaintiff has had a full and fair opportunity to respond to and oppose the defense (**Id.**). Further, when required, the court may consider the defense when it is shown that it has been explored through the course of discovery (**Id.** at 364-365).

The plaintiffs contend that the Vitelli defendants' invocation of the affirmative defense of latches is procedurally improper at this juncture. They make no real claim of surprise or prejudice. Thus, the court will consider the merits of the Vitelli defendants' claim of latches.

Latches is an equitable bar based on a lengthy neglect or omission to assert a right, which results in prejudice to an adverse party (*see, White v Priester*, 78 AD3d 1169, 1171). The doctrine may be applied in an equitable action when the defendant shows prejudicial delay, regardless of whether the statutory limitations period has expired (*Id.*). Prejudice may be demonstrated by a showing of injury, change of position, loss of evidence, or some other disadvantage resulting from the delay (*Id.*; *O'Dette v Guzzardi*, 204 AD2d 291, 292).

The Vitelli defendants have failed to establish that they were prejudiced or otherwise disadvantaged by the commencement of this action only one year after the plaintiffs' first request for CJEFA's corporate documents was denied in September 2003. They contend that this litigation could have been avoided if the plaintiffs had commenced an action pursuant to CPLR article 71 (recovery of chattel) and followed through on their threat to subpoena the CJEFA documents. The Vitelli defendants do not contend that they would have complied with a subpoena and not moved to quash it. They merely contend that the plaintiffs should have pursued an alternative remedy, which would have been quicker. The court finds that these assertions are insufficient to establish the affirmative defense of latches as a matter of law. Accordingly, the motion is denied as to the third cause of action for conversion.

Given that this action should have been brought as a shareholder derivative action, the court directs the parties to be prepared to address that issue at their next conference with the court, which shall be held on March 21, 2012, at 9:45 a.m., Supreme Court, Courtroom 7, Arthur M. Cromarty Criminal Court Building, 210 Center Drive, Riverhead, New York 11901.

Dated: February 17, 2012

HON. ELIZABETH HAZLITT EMERSON
J.S.C.