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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

JERRY HUTKA et al.,

Plaintiff and Appellant,

v.

EMILY BOLOGNA et al.,

Defendant and Respondent.

A141325

(Alameda County
Super. Ct. No. VG09455737)

Plaintiffs Jerry and Nancy Hutka and their sons Matt and Brian (Hutkas) appeal from a final judgment to contest a pretrial order granting summary adjudication of issues. The Hutkas contend that the trial court erred when it granted summary adjudication in favor of respondent and defendant Emily Bologna on four causes of action. The effect of the order was to cause entry of judgment in favor of Bologna in her personal capacity and against the Hutkas. Following a court trial, the Hutkas obtained a judgment against Moreland and Bologna Accountants and Consultants, Inc., in excess of \$2 million.

Based upon our independent review of the record, we agree with the trial court that all the causes of action against Emily Bologna alleged possible negligence or other breach of her professional responsibilities arising out of her role in preparation of the Hutkas' tax returns. The evidence showed that Bologna prepared the Hutkas' tax returns for 2006 through 2008, and that she learned the Hutkas' income was overstated on those returns due to the reporting of fictitious loans that represented moneys taken from the Hutkas by Bologna's employer and later business partner M. Weldon Moreland. Bologna prepared and filed amended tax returns for the Hutkas without charge to correct the

overstated income and they received refunds of overpaid taxes with interest. Since the Hutkas were unable to provide evidence that the tax refunds with interest did not fully compensate them for any negligence or breach of duty by Bologna, the trial court properly granted summary adjudication in Bologna's favor on causes of action 5, 6, 11 and 13 of their first amended complaint. Additional bases for liability of Bologna on the fifth and sixth causes of action fail because they are unsupported by evidence that her conduct breached the duty of care. We affirm.

FACTUAL BACKGROUND

Beginning in 1997, the Hutkas were clients of M. Weldon Moreland, CPA. In 2002, Moreland advised the Hutkas that if they invested their money with him, he would place it in a special account for their benefit and they would receive a guaranteed 8 percent annual rate of return. In reliance on Moreland's advice, the Hutka's gave him hundreds of thousands of dollars. Some of the Hutka's monies were memorialized in receipts from Moreland bearing a notation "eight (8) percent until fully paid." The money deposited with Moreland was referred to as the "Moreland Notes." In reality the Moreland Notes were nothing more than a scheme whereby Moreland stole hundreds of thousands of dollars from the Hutkas. Moreland ended up pleading no contest to 34 counts of grand theft, and none of the money was repaid to the Hutkas when they requested.

In 2006, defendant Emily Bologna began working for M. Weldon Moreland, CPA, and on January 1, 2007, Bologna merged her tax preparation practice with Moreland's as Moreland and Bologna Accountants and Consultants, Inc. They did business in this fashion for two years until Bologna bought out Moreland's interest in Moreland and Bologna on January 1, 2009. Beginning in April 2009, Bologna opened her new firm, Bologna Accountancy Corporation.

Bologna prepared the Hutkas' tax returns for 2006, 2007 and 2008, and first discovered the Moreland Notes in early 2007 while preparing their 2006 returns. Once Bologna realized the impropriety of the Moreland Notes, she concluded the Hutkas overpaid their taxes because they reported nonexistent interest income on the Moreland

Notes. Bologna filed amended returns for the Hutkas free of charge for tax years 2005 through 2008 in order to seek refunds of their overpayment of taxes due to the Moreland Notes. The Hutkas received full refunds with interest. The Hutkas did not state what they otherwise would have done with the money that they used to overpay their taxes.

PROCEDURAL BACKGROUND

The Hutkas' first amended complaint alleged 13 causes of action arising out of the money they lost on the Moreland Notes. Ms. Bologna moved for summary adjudication on the causes of action against her as an individual and doing business as Bologna Accountancy Corporation. The court granted summary adjudication in favor of Bologna and Bologna Accountancy Corporation on the first, second, fifth, sixth, eleventh and thirteenth causes of action in the first amended complaint. The Hutkas later voluntarily dismissed M. Weldon Moreland and Bologna Accountancy Corporation from the action.

The case was tried to the court, and a judgment was entered in favor of the Hutkas and against Moreland and Bologna Accountants and Consultants, Inc., for more than \$2 million. Judgment was entered in favor of Ms. Bologna and against the Hutkas based upon the ruling on the motion for summary adjudication of issues.

The Hutkas appeal, arguing the court erred in granting summary adjudication of issues in favor of Ms. Bologna on the fifth, sixth, eleventh and thirteenth causes of action of the first amended complaint.

DISCUSSION

1. The First Amended Complaint

The Hutkas' first amended complaint alleged various causes of action based on professional negligence, contract and common count theories against M. Weldon Moreland, Ms. Bologna, Moreland and Bologna Accountants and Consultants, Inc. and Bologna Accountancy Corporation. Some of the causes of action sought repayment of the money paid to Moreland for the Moreland Notes. Others sought compensation for the Hutkas' overpayment of taxes attributable to the non-existent interest income from the Moreland Notes.

The fifth cause of action alleges professional negligence because the Moreland Notes created a financial conflict of interest between defendants and the Hutkas that impaired the defendants' ability to provide independent and impartial accounting services in the preparation of the Hutkas tax returns. A fair and impartial accountant would not have included the interest from the Moreland Notes as income on the returns. As a result of this breach of duty, the Hutkas alleged they paid more taxes than they should have, were placed in a higher tax bracket, and lost the assets they entrusted to the defendants.

The sixth cause of action alleges professional negligence per se on account of defendants' control and mismanagement of the assets entrusted to them. As a result of this breach of duty, the Hutkas alleged they paid more taxes than they should have, were placed in a higher tax bracket, and lost the assets they entrusted to the defendants. But this cause of action is not directed at Ms. Bologna. The defendants charged in this cause of action are M. Weldon Moreland, Moreland and Bologna Accountants and Consultants, Inc. and Bologna Accountancy Corporation.

The 11th cause of action alleged professional negligence per se against Ms. Bologna for false information reported on the Hutkas tax returns for the years 2007 through 2009. As a result of this breach of duty, the Hutkas alleged they paid more taxes than they should have, were placed in a higher tax bracket, and lost use of the money they overpaid in taxes from the time the tax returns were originally filed until refunds were paid in late 2009.

The 13th cause of action alleged professional negligence per se against Ms. Bologna for her failure to timely disclose the Moreland Notes scheme to the Hutkas when she first became aware of it. The Hutkas allege that had she done so, their 2006, 2007 and 2008 tax returns would not have reported income interest earned from the Moreland Notes. As a result of this breach of duty, the Hutkas alleged they paid more taxes than they should have, were placed in a higher tax bracket, and lost use of the money they overpaid in taxes.

2. *The Standard of Review.*

“ ‘To secure summary judgment, a moving defendant may prove an affirmative defense, disprove at least one essential element of the plaintiff’s cause of action [citations] or show that an element of the cause of action cannot be established [citations]. [Citation.] The defendant “must show that under no possible hypothesis within the reasonable purview of the allegations of the complaint is there a material question of fact which requires examination by trial.” [Citation.] [¶] The moving defendant bears the burden of proving the absence of any triable issue of material fact, even though the burden of proof as to a particular issue may be on the plaintiff at trial. [Citation.] . . . Once the moving party has met its burden, the opposing party bears the burden of presenting evidence that there is any triable issue of fact as to any essential element of a cause of action.’ ” (*Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1485 (*Ochoa*), brackets and ellipses in original.)

“In reviewing the propriety of a summary judgment, the appellate court must resolve all doubts in favor of the party opposing the judgment. [Citation.] The reviewing court conducts a de novo examination to see whether there are any genuine issues of material fact or whether the moving party is entitled to summary judgment as a matter of law.” (*M.B. v. City of San Diego* (1991) 233 Cal.App.3d 699, 703–704.) “We accept as true the facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn from them. [Citation.] However, to defeat the motion for summary judgment, the plaintiff must show ‘ “specific facts,” ’ and cannot rely upon the allegations of the pleadings.” (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 805.) “While ‘[s]ummary judgment is a drastic procedure, should be used with caution [citation] and should be granted only if there is no issue of triable fact’ [citation], it is also true ‘[j]ustice requires that a defendant be as much entitled to be rid of an unmeritorious lawsuit as a plaintiff is entitled to maintain a good one.’ ” (*M.B. v. City of San Diego, supra*, at p. 704.)

3. *The Sixth Cause of Action.*

This cause of action seeks damages for the mismanagement of the Hutkas' assets entrusted to Moreland, Moreland & Bologna, and Bologna Accountancy Corporation. As we stated in the Background of this opinion, Bologna Accounting Corporation was dismissed from the action after the court's ruling on the summary adjudication motion. Summary adjudication in favor of Ms. Bologna was proper for two reasons. This cause of action is not alleged against Ms. Bologna, and there is no allegation or evidence that she had any role in managing the assets entrusted to Moreland.

4. *The 11th and 13th Causes of Action.*

The 11th and 13th causes of action seek damages for the overpayment of taxes attributable to the non-existent interest paid on the Moreland notes. But it is undisputed that Bologna filed amended tax returns for the Hutkas free of charge, and the overpaid taxes were refunded to the Hutkas with interest. The Hutkas argue these facts were irrelevant to their claim for loss of use of the money overpaid in taxes, and even though the money was repaid with interest they were damaged "economically."

The Hutkas support this argument of additional economic damage with *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739 (*Jordache*). In *Jordache* our Supreme Court considered when a client suffers actual injury under the tolling provision for the one-year statute of limitations for attorney malpractice. Relying on dicta in *Jordache*, the Hutkas argue the case supports their claim that they were damaged even though their overpaid taxes were refunded with interest. We have no quibble with the Hutkas' legal argument that a refund of money with interest may not adequately compensate a party for loss. But the deficiency in the Hutkas' argument is not due to legal theory, it is due to a lack of evidence.

The Hutkas' argue they were not adequately compensated by the refund of overpaid taxes with interest, but they provided no evidence to raise a material issue of fact that their refunds were insufficient compensation. The trial court correctly entered summary adjudication for Bologna on the 11th and 13th causes of action.

5. *The Fifth Cause of Action.*

For the reasons set forth in the preceding section addressing the 11th and 13th causes of action, summary adjudication was correctly granted on the fifth cause of action insofar as it sought damages caused by overpayment of taxes.

In addition to the damages caused by overpayment of taxes, the fifth cause of action sought return of the money paid by the Hutkas to Moreland under the Moreland note scheme. This negligence cause of action was premised upon a financial conflict of interest between the Hutkas and the defendants that compromised the preparation of the Hutkas' tax returns.

In order to recover against an accountant for professional negligence, a plaintiff must demonstrate: (1) the duty of the accountant to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the accountant's negligence. (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 833.)

Summary adjudication of this cause of action was proper for two reasons. The first is that there is no evidence in this record to show that Bologna breached her duty of care toward the plaintiffs. In their reply brief the Hutkas rely on general accounting regulations to argue that when Bologna learned of Moreland's scheme while she was preparing the Hutkas taxes, she failed in her ethical responsibilities because she did not timely confront Moreland or report him to the authorities. Had she done so, they say, they would not have lost all their money.

While the regulations they cite in support of these alleged duties circumscribe the general responsibilities of accountants to avoid financial interests that conflict with a client and to report perceived wrongdoing to superiors, those regulations alone do not clearly establish that Bologna breached her duty of care. "In negligence cases arising from the rendering of professional services, as a general rule the standard of care against which the professional's acts are measured remains a matter peculiarly within the knowledge of experts. Only their testimony can prove it, unless the lay person's common

knowledge includes the conduct required by the particular circumstances. [Citation.]” (*Unigard Ins. Group v. O’Flaherty & Belgum* (1995) 38 Cal.App.4th 1229, 1239.) The Hutkas presented no such expert testimony and thus failed to raise a triable issue as to whether Bologna’s conduct fell below the standard of care and breached the duty she owed to them in preparing their tax returns.

Another reason summary adjudication was proper on the fifth cause of action is that no reasonable causal nexus was shown between Bologna’s services in preparing the Hutkas’ tax returns and the loss of the money they entrusted to Moreland.

DISPOSITION

The judgment is affirmed.

Siggins, J.

We concur:

McGuinness, P.J.

Pollak, J.