NOT INTENDED FOR PUBLICATION AND/OR CITATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN RE: CASE NO. 08-14268	)	
STEPHEN R. MYRON	)	
Debtor	)	
STEPHEN R. MYRON	)	
Plaintiff	)	
vs.	)	PROC. NO. 10-1105
PHILIP+COMPANY, INC., et. al.	)	
Defendants	)	

DECISION

At Fort Wayne, Indiana, on June 20, 2012.

The plaintiff, Stephen R. Myron, is a debtor under Chapter 11 of the United States Bankruptcy Code. He is also a doctor and the owner of a number of medical providers collectively referred to as Preferred or Preferred Medical. At various times during 2006 and 2007, Preferred failed to pay withholding taxes amounting to approximately $397,000. For this and other reasons, in July 2007, Preferred's lender required it to engage the services of a turnaround firm in order to review the situation and make recommendations. From a list of groups acceptable to the bank, the defendant, Philip+Company was selected to make this report, which it completed in October. By a contract entered into on November 17, 2007, Preferred engaged the services of Philip+Company to implement the recommendations contained in its October report. The individual defendants, William Neitzke and Ken Philip, were the two individuals primarily responsible for

Philip+Company's onsite performance of this contract. Beginning in November 2007 through the end of March 2008, or perhaps the first week of April, Mr. Neitzke was the individual onsite. After that time it was Mr. Philip.

Unfortunately, Preferred's tax problems continued. During the first, second and third quarters of 2008, it failed to remit approximately $217,000 in payroll taxes. Preferred's operations were subsequently liquidated by the bank to satisfy its liens and Dr. Myron filed Chapter 11. He is the assignee of Preferred's rights against the defendants and contends that they are responsible for the failure to remit the required withholdings. By this adversary proceeding he seeks to recover not only the unremitted 2008 taxes, but also those from 2006 and 2007.[1] To do so he is proceeding under a number of theories which include breach of contract, gross negligence, willful misconduct, breach of fiduciary duty[2] and contribution. Additionally, because Philip+Company was paid during the period of time when tax withholdings were not, he contends this constitutes conversion and seeks to recover that amount, which he then asks to be trebled pursuant to Ohio Revised Code 2307.61. Since the engagement, Philip+Company has gone out of business and so most of the plaintiff's attentions are focused on recovering from the individual defendants.

The matter is before the court following trial of the issues raised by the plaintiff's complaint. The court has subject matter jurisdiction over it through 28 U.S.C. § 1334(b) and the district court's order of reference, see, N.D. Ind. L.R. 200.1, and all parties have consented to the bankruptcy judge

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[1]The court sees no reason why the defendants should be liable for withholding taxes that went unpaid months before their association with Preferred.

[2]The contract between Preferred and Philip+Company contains an exculpatory clause limiting the claims that can be brought against it, its agents and employees to gross negligence and willful misconduct.

determining this matter and entering final judgment.[3]

Despite the labels given to the plaintiff's various theories of recovery – breach of contract, gross negligence, breach of fiduciary duty, willful misconduct and conversion – at its core this action is about professional malpractice. To the extent the individuals Philip+Company used to fulfill its obligations under the engagement with Preferred failed to do so properly, it would be liable for breach of contract, as well as for any torts those individuals would have committed. While the individual defendants cannot be held liable to the plaintiff in contract – they were not parties to the agreement – if their own actions are tortious they can be held personally liable for their own misdeeds, even absent a contractual relationship. This potential allocation of liability is little different from a medical malpractice claim against physicians in a large medical group. Although the patient's contract may be with the group, that contract will not insulate the individual physicians who treat the patient from liability if the treatment they provide falls below the standard of care required.

Plaintiff has the burden of proving that in performing their duties the defendants' actions fell below the required standard of care. See e.g., State v. Robinson, 351 N.E.2d 88, 107 (Ohio 1976) (plaintiff bears the burden of proof in civil cases). In this there has been a failure of proof. No evidence was presented concerning the appropriate standard of care in this particular profession – turnaround management. Consequently, we have nothing to measure the defendants' actions against. While the plaintiff contends that under Ohio law, which all parties appear to agree governs this

[3]Following trial, the court dismissed the claims against William Neitzke. Plaintiff has filed a motion asking the court to reconsider that decision. Because of the court's decision on the merits, it is not necessary to address that motion. With or without the dismissal of Mr. Neitzke, the ultimate result remains the same.

dispute,[4] it was not required to introduce any such evidence, this case does not qualify for that exception. Expert testimony is required in malpractice cases "unless the breach . . . is so obvious that it may be determined by the court as a matter of law, or is within the ordinary knowledge and experience of laymen." Bloom v. Dieckmann, 464 N.E.2d 187, 203 (Ohio Ct. App. 1983). Neither of these conditions have been satisfied here. The field of turnaround management – what turnaround managers do and how they are supposed to do it – is beyond the scope of the ordinary factfinder's knowledge and experience. Furthermore, we do not know why the required taxes went unpaid, and that is critical. Did they go unpaid in spite of or because of the defendant's actions? We do not know. Unless we are to hold turnaround managers strictly liable for withholding taxes that go unpaid during the term of their engagement – a proposition which the plaintiff does not advance – we must have evidence from which to conclude that taxes went unpaid because of something the defendants did or did not do. The fact that they went unpaid is not enough. Consequently, the court cannot find that the defendants were grossly negligent or guilty of some type of willful misconduct in the performance of their duties.

There is a similar failure of proof regarding the plaintiff's breach of fiduciary duty claims. Even assuming that the defendants qualify as fiduciaries – a doubtful proposition – there is no proof that they breached some type of fiduciary duty with regard to the payment of employment taxes. Again, we do not know why those taxes went unpaid: Whether because of or in spite of the defendants' actions. We cannot conclude that a fiduciary (assuming the defendants are fiduciaries)

[4]Although the parties do not debate plaintiff's claim that Ohio law applies, it would seem that, despite the choice of law provisions in the contract, Indiana law would govern the tort claims. Cerabio LLC v. Wright Medical Technology, Inc., 410 F.3d 981, 987 (7th Cir. 2005) ("A choice of law provision will not be construed to govern tort as well as contract disputes unless it is clear that this is what the parties intended").

is liable just because something untoward happens during its engagement.

Plaintiff also complains that the defendants did not provide him with the necessary reports and that had they done so he would have realized that the taxes were going unpaid and would have been able to prevent this situation. On this issue, there is a great deal of conflict in the evidence. Plaintiff testified that he constantly complained he was not receiving the regular reports he expected. Defendants, on the other hand, testified that they regularly provided the necessary reports and kept nothing from him. On this point, the court finds that the defendants' testimony is the more credible. The contract between Preferred and Philip+Company was terminable at will. It is difficult to believe that Dr. Myron would have continued the defendants' services throughout the entire time in question if their reporting to him did not satisfy his expectations.

Plaintiff's conversion claim is based upon the theory that, during the time in question, Philip+Company was overpaid or paid when it should not have been. Plaintiff contends that the defendants obtained rubber stamps with his signature which they then used to stamp his name on checks he had not authorized, and/or that they obtained passwords to Preferred's accounts and surreptitiously made electronic funds transfers to Philip+Company. There is no evidence to support this claim beyond the plaintiff's speculations. There is no credible evidence that Philip+Company was overpaid or that any of the payments to it were not authorized by Dr. Myron.

The plaintiff's final claim is for contribution pursuant to 26 U.S.C. § 6672(d). If more than one person is liable for the penalty assessed because of the failure to remit withholding taxes, this portion of the tax code authorizes each person who paid the penalty to recover from the others the amount paid in excess of their proportionate share.[5] Liability under § 6672(d) is dependant upon whether the person is a "responsible party" and whether he willfully failed to withhold and pay those taxes. Bowlen v. U.S., 956 F.2d 723, 727 (7th Cir. 1992) Neither of these requirements is satisfied here. The key to being a responsible person is the power to control the decision of making the payment to other creditors in preference of the company's tax obligations. Bowlen, 956 F.2d at 728; Haffa v. U.S., 516 F.2d 931 (7th Cir. 1975). See also, U.S. v. Jones, 33 F.3d 1137 (9th Cir. 1994) (no authority to make payroll); McMillan v. U.S., 1992 WL 281405 (W.D. Mich. 1992) ("inclusion of an outside financial consultant in the realm of statutorily responsible persons would certainly have a deleterious effect upon the willingness of financial experts to provide the expertise needed to salvage a company in financial distress."). The defendants had no such control here. Although the engagement letter provided that Philip+Company would have final approval of cash expenditures, this was clearly designed to prevent Preferred from incurring unnecessary debt which would hinder the company's reorganization efforts. Ultimately, it was the plaintiff who retained the authority to

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[5]The parties do not address any particular elements of § 6672(d) and largely confine themselves to arguing about whether the defendants were or were not responsible persons under § 6672(a). Because of this there are some gaps in the analysis. In one sense, the claim for contribution seems to be a bit premature. The statute refers to "each person who paid such penalty" as being entitled to contribution. Here, there is no evidence concerning the amount of penalty Dr. Myron has paid, only what has been assessed against him and what he expects to pay. If payment is a prerequisite for contribution, this action is premature. Secondly, one may only seek contribution from others "who are [also] liable for the penalty." One of the requirements for that liability is a notice to the taxpayer that they are subject to the assessment. 26 U.S.C. § 6672(b)(1). There is no evidence that the individual defendants were given such a notice. Consequently, it does not appear that the I.R.S. contends they are responsible persons; it is only the plaintiff who takes that position. In light of the notice provision of § 6672(b)(1), at least arguably, the I.R.S. must have assessed the penalty against the one from whom contribution is being sought, rather than, as here, a responsible person asserting that others should also be considered responsible, thereby justifying contribution. Nonetheless, because the parties have not focused their attention on these arguments, the court does not consider them further.

determine which creditors were paid, when and to issue the necessary checks. Furthermore, there is no evidence that the failure to pay the withholding taxes was willful. Once again, we do not know why the taxes were unpaid, just that they were. That is not enough.

A judgment of dismissal will be entered.

/s/ Robert E. Grant
Chief Judge, United States Bankruptcy Court