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

PRESENT: Hon Joan A. Madden PART 11

Index Number : 650767/2010
STURMAN, DONNA A.
vs
WAGNER DAVIS, P.C.
Sequence Number : 002
DISMISS ACTION

E 9/16/11 ac

INDEX NO.
MOTION DATE 5/19/11
MOTION SEQ. NO.
MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on 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 is decided in accordance with the annexed Memorandum Decision & Order.

NYS SUPREME COURT
Document has been E-Filed
SEP 16 2011
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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: September 13 2011

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

----------X

DONNA A. STURMAN, et ano,

Plaintiffs INDEX NO. 108665/11

-against-

WAGNER DAVIS, P.C. and STEVEN R. WAGNER,

Defendants

----------X

JOAN A. MADDEN, J.:

Defendants move for an order (i) dismissing the amended complaint as barred by the statute of limitations, (ii) striking certain paragraphs of the amended complaint as unnecessary, (iii) dismissing the amended complaint against defendant Steven R. Wagner, and (iv) sealing the file. Plaintiffs oppose the motion, which is granted to the extent of dismissing the amended complaint on statute of limitations grounds.

In this action, plaintiffs seek to recover damages for legal malpractice arising out of defendants' representation of plaintiffs in connection with various state court and bankruptcy actions. Defendants maintain that this action is time barred as it was filed after the expiration of the three year statute of limitations for legal malpractice claims provided under CPLR 214(6). Specifically, defendants maintain that their representation of plaintiffs terminated on June 26, 2007, and that this action was not filed until June 28, 2010 or two days after the statute of limitations expired. In support of their position, defendants submit photocopies of two emails exchanged between Donna Sturman ("Sturman") and defendant Steven Wagner ("Wagner") .

The first email dated June 25, 2007 from plaintiff states, in part:

> Today I have received a bill from you for $128,661.12, for work that was done when I walked into your office three years ago, and only had to be copied to include the false case against me. I am now asking for you to please return my money. I am willing to forget the potential damage you have done to my case but I can no longer wait for you to do something for three years it has just been promise after promise and nothing...This obviously was not something you could handle and you should have told me three years ago.

In his email response dated June 26, 2007, Wagner wrote, in part, that:

> I will not hold you up in any way. My office spent hundreds upon hundreds of hours working on your case, trying to satisfy you...I am sorry you are so dissatisfied. I accepted your termination of my firm in the best light possible, with hopes that you will find someone you feel is better able to assist you, and not with any remorse or recrimination. As far as the fees are concerned, the bill you received was for work performed in addition to the retainer you gave me. I was suppose to be paid for this work. I know how you desperately need money, but I cannot agree to return the fees that you paid my firm in light of the extensive amount of work that had been performed and the large amount of fees that are outstanding.

In response, plaintiffs argue that nothing in the email dated June 25, 2007 from Sturman states that the defendants were terminated, and Wagner's statement in his response email of June 26, 2007 accepting his termination as counsel was ineffective as there was no termination to accept. Plaintiffs also argue that defendants were required to withdraw as counsel, and by failing to do so violated their responsibilities under the Code of Professional Responsibility, thus tolling the limitations period. Plaintiffs further contained that the continuous representation doctrine applies based on billing records showing charges for copying, Lexis and telephone on June 28, 2007. Plaintiffs also point to an email exchanged between Sturman and defendants dated August 27, 2007 which, they argue, shows that defendants were still performing work for plaintiffs.

In reply, defendants submit an affidavit from a bookkeeper stating that the charges were in fact incurred on June 27. Furthermore, defendants argue that no work was performed on the matters after the attorney-client relationship was terminated, and that any charges related to providing plaintiffs with documents and other materials as required by defendants' ethical obligations. Defendants further argue that the work referred to in August 27, 2007 email did not relate to work that is the subject of the malpractice action and thus did not toll the three-year statute of limitations.

As this action seeks to recover damages arising from allegations of legal malpractice, it must be commenced within three years of accrual. McCoy v. Feinman, 99 NY2d 295, 301 (2002); CPLR 214(6). "A legal malpractice claim accrues 'when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court.'" Id., quoting Ackerman v. Price Waterhouse, 84 NY2d 535, 541 (1994). The accrual is measured from the date the injury occurs. Id. Thus, "'[w]hat is important is the when the malpractice was committed, not when the client discovered it'" Id., quoting Shumsky v. Eisenstein, 96 NY2d 164, 166 (2001)(internal citation omitted).

However, under the continuous representation doctrine, when the attorney continues to represent the client in a matter out of which the claim arises, the statute of limitations period is tolled until the attorney's representation ends. Shumsky v. Eisenstein, 96 NY2d 164. Thus, although the cause of action accrues on the date of the malpractice, a plaintiff is not required to commence an action against her attorney until the representation ends. Glamm v. Allen, 57 NY2d 87, 93 (1982). At the same time, however, "[t]he continuous representation doctrine tolls the statute of limitations only when there is a mutual understanding of the need for further

representation on the specific subject matter underlying the malpractice claim." McCoy v. Feinman, 99 NY2d at 306. Accordingly, when the attorney-client relationship is terminated, the continuous representation doctrine is no longer applicable and the toll of the statute of limitations ends. Riley v. Segan, Nemerov & Singer, P.C., 82 AD3d 572, 572-573 (1st Dept 2011).

Under these principles, the court finds that this action is untimely. The email exchange between Sturman and Wagner reveals that the attorney-client relationship ended, at the latest, on June 26, 2007, when Wagner responded to Sturman's email by confirming that attorney-client relationship was terminated. Notably, plaintiffs submit no evidence that Sturman sought to continue the relationship after receiving Wagner's email. Thus, on June 26, 2007, the continuous representation doctrine was no longer applicable and the toll ended. See Riley v. Segan, Nemerov & Singer, P.C., 82 AD3d at 572-573 (trial court erred in denying motion to dismiss legal malpractice claims as time barred finding that based on attorneys' letter unequivocally informing client that defendants could not proceed with plaintiff's case, the continuous representation doctrine ceased to apply and the toll ended). Furthermore, contrary to plaintiffs' position, a formal motion to withdraw was not necessary to end the toll. See Riley supra (reversing trial court which found that defendants failed to show that the attorney-client relationship had been terminated such that the continuous representation doctrine no longer applied where defendants did not move to withdraw as counsel and thus did not provide adequate notice to sever the attorney-client relationship).

In addition, evidence in the record that plaintiffs and defendants communicated after the email exchange in which Wager termination of the attorney-client relationship, including as required by the applicable rules of professional conduct, is insufficient to extend the toll in the

absence of evidence that defendants performed any work related to the subject matter of the alleged malpractice after the notice of termination. McCoy v. Feinman, 99 NY2d at 306. Moreover, plaintiffs cannot avoid the three-year limitations period by asserting a claim for breach of contract, as such claim would be duplicative of the malpractice cause of action. Amodeo v. Kolodny, P.C., 35 AD3d 773, 774 (2d Dept 2006)

As the motion to dismiss is being granted on statute of limitations grounds, the court need not reach whether the claims against Wagner individually have any merit or whether certain paragraphs of the complaint should be stricken.

Finally, there is no basis for sealing the file and the motion to do so is denied. See generally 22 NYCRR § 216.1(a); Liapakis v. Sullivan, 290 AD2d 393 (1st Dept 2002); In re Will of Hoffmann, 284 AD2d 92, 93 (1st Dept 2001).

In view of the above, it is

ORDERED that defendants' motion is granted to the extent of dismissing the complaint on statute of limitations grounds; and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the complaint in its entirety.

DATED: September 8, 2011

J.S.C.