

Allmen v Fox Rothschild LLP

2012 NY Slip Op 30244(U)

January 31, 2012

Sup Ct, NY County

Docket Number: 101964/11

Judge: Manuel J. Mendez

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

PRESENT: HON. MANUEL J. MENDEZ PART 13
Justice

DR. TARA ALLMEN, as Executor of the
Estate of Renee Allmen, and Trustee of
the Allmen Charitable Lead Trust,
Plaintiff(s),

INDEX NO. 101964/11

- v -

MOTION DATE 12-7-2011

MOTION SEQ. NO. 001

FOX ROTHSCHILD LLP,
Defendant(s).

MOTION CAL. NO. _____

FOX ROTHSCHILD LLP, Third-Party Plaintiff(s),

- v -

FRANKFURT KURNIT KLEIN & SELZ, P.C.,
Third-Party Defendant(s).

FILED

FFB 02 2012

The following papers, numbered 1 to 3 were read on this motion and cross-motion to for
Dismiss: NEW YORK COUNTY CLERK'S OFFICE

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1

Answering Affidavits — Exhibits _____ cross motion _____

2

Replying Affidavits _____

3

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, It Is Ordered that defendant, Fox Rothschild LLP's ("Fox"), motion to dismiss allegations that are time barred is granted. Pursuant to CPLR 3211(a)(5) all allegations based on conduct or omissions related to services provided by defendant to Renee Allmen ("Decedent") are dismissed. Plaintiff's other allegations related to services performed by defendant on behalf of plaintiff as executor of the estate of the Decedent (the "Estate") are unaffected by this ruling.

In or around 2005, defendant formulated Decedent's estate plan, and drafted Decedent's Last Will and Testament (the "Will"), which was executed on July 27, 2005. Plaintiff alleges that certain provisions of the Will, including certain tax allocation clauses drafted by defendant, needlessly and negligently exposed the Estate to a danger of a significantly increased tax burden upon Decedent's death. None of the parties allege that any additional services were provided to Decedent by defendant after the Will was executed.

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

Decedent died on June 15, 2006. On June 27, 2006, plaintiff retained defendant to represent her as executor of the Estate through the execution of a letter of engagement (the "Letter of Engagement"). The Letter of Engagement, which set forth the terms of the representation, was signed by both parties. On or about September 17, 2007, defendant prepared and filed on behalf of plaintiff, as executor, the Federal Estate tax return and the New York State tax return (collectively, the "Tax Returns") for Decedent's Estate.

On or about June of 2008, the IRS selected the Estate for a tax audit (the "Audit"). Defendant represented the Estate in connection with the Audit. Plaintiff alleges that defendant was negligent in their preparation of the Tax Returns which resulted in an increased tax burden, interest, and tax penalties for the Estate.

At the time of her death, Decedent maintained over twenty different brokerage and bank accounts at various financial institutions that listed both Decedent and plaintiff as account holders (the "Accounts"). Plaintiff alleges that the negligence of the tax allocation clauses drafted by defendant in the Will was compounded by defendant's negligence in the characterization of the Accounts when filing the Tax Returns. In preparing the Tax Returns, Defendant classified the Accounts as joint accounts which plaintiff assumed sole control over upon Decedent's death rather than as part of the Estate.

Since the Accounts were not included as part of the Estate, those funds could not be used to pay any of the debts, administrative expenses or taxes of the Estate. The debts, administrative expenses, and taxes of the Estate had to be paid out of funds that would have otherwise gone to the Charitable Lead Trust ("CLT") created in the Will. The reduction in funds given to the CLT meant a decrease in the charitable tax deduction available to the Estate. The decrease in charitable deduction further increased the tax liability for the Estate, which in turn reduced the funds given to CLT and the associated charitable deduction for the Estate. Plaintiff alleges that the increased tax burden, interest, and tax penalties are a direct result of the defendant's negligence in drafting the Will and preparing and filing the Tax Returns.

Plaintiff initiated an action for legal malpractice and excessive billing in connection with defendant's rendering of legal services to Decedent and in connection with defendant's rendering of legal services to the plaintiff directly. Plaintiff has standing to initiate the action on behalf of the Estate under EPTL Section 11-3.2(b) due to her designation as executor for the Estate. *Estate of Schneider v. Flinnann*, 15 N.Y.3d 306, 907 N.Y.S.2d 119, (2010).

A claim for attorney malpractice accrues when the malpractice is committed, and must be interposed within three years thereafter. *Shumsky v. Eisenstein*, 96 N.Y.2d 164, 750 N.E.2d 67, 726 N.Y.S.2d 365 (2001). The date at which the client discovers the malpractice is irrelevant. *Ackerman v. Price Waterhouse*, 84 N.Y.2d 535, 620 N.Y.S.2d 318, (1994). In this motion, defendant

is seeking to dismiss under CPLR 3211(a)(5) all allegations in plaintiff's amended complaint that are based on any conduct or omission alleged to have taken place in 2005, that is, defendant's representation of Decedent in the drafting of the Will. Defendant is asserting that the statute of limitations has expired.

On a motion to dismiss an action as time-barred, the moving party bears the initial burden of establishing prima facie that the time in which to sue has expired. The Will executed by defendant on behalf of Decedent is dated July 27, 2005. Neither party has claimed any additional services were provided to Decedent by defendant after the execution of the Will. According to the papers submitted by both parties, the Decedent died on June 15, 2006. On a motion to dismiss, a complaint's factual allegations are presumed to be true and are accorded every favorable inference. The statute of limitations on Decedent's claims of legal malpractice against defendant would therefore have expired no later than July of 2008, three years after the execution of the Will.

The burden then shifts to the plaintiff to establish that the statute of limitations was tolled. *Cox v. Kingsboro Medical Group*, 88 N.Y.2d 904, 646 N.Y.S.2d 659, (1996). The plaintiff asserts two basis under which the statute of limitations was tolled, the doctrine of continuous representation and the tolling agreement executed on or about October 2, 2009, between plaintiff and defendant (the "Tolling Agreement").

The doctrine of continuous representation "recognizes that a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered. The doctrine also appreciated the client's dilemma if required to sue the attorney while the latter's representation on the matter at issue is ongoing." *Shumsky v. Eisentstein*, 96 N.Y.2d 164, 726 N.Y.S.2d 365, (2001). The doctrine of continuous representation therefore tolls the statute of limitations for wrongful acts or omissions related to the specific subject matter underlying the malpractice claim until the ongoing representation is completed. *Williamson ex rel. Lipper Convertibles, L.P. v. Pricewaterhouse Coopers LLP*, 9 N.Y.3d 1, 872 N.E.2d 842, (2007).

Plaintiff asserts that defendant's representation of plaintiff as executor of the Estate tolled the statute of limitations on the Estate's malpractice claims. "[O]n a motion addressed to the sufficiency of a complaint, the facts pleaded are presumed to be true and accorded every favorable inference,...[however] allegations consisting of bare legal conclusions, are not entitled to such consideration" *Tectrade Int'l Ltd. v. Fertilizer Dev. & Inv., B.V.*, 258 A.D.2d 349, 685 N.Y.S.2d 235, (N.Y.A.D. 1st Dept., 1999). For the analysis of this motion to dismiss, the Court accords the plaintiff the favorable inference that the doctrine of continuous representation would toll the statute of limitations from the execution of the Will until Decedent's death in June of 2006, though neither side has asserted or offered proof substantiating this inference.

However, plaintiff's assertion that defendant's representation after Decedent's death constituted continuous representation is a bare legal conclusion unsupported by the facts. "In the context of a legal malpractice action, the continuous representation doctrine tolls the [s]tatue of [l]imitations only where the continuing representation pertains specifically to the matter in which the attorney committed the alleged malpractice." *Shumsky v. Eisensteln, supra*. Courts have repeatedly found that the mere continuation of an attorney-client relationship was not enough to invoke the doctrine of continuous representation. In the instant case, Decedent's death would have ended any assertion that there could have been an understanding that the defendant would be called upon to revise the Will or otherwise continue their representation of Decedent.

The execution of the Letter of Engagement is objective proof that none of the parties had an understanding of continuous representation. In the Engagement Letter, plaintiff retained defendant to represent her as executor of the Estate. The duties outlined in the Engagement Letter are distinct from the defendant's duties in drafting the Will. It was not until the Audit, two years after Decedent's death and the execution of the Engagement Letter, that there was any indication that there might be a problem with the Will. "Given [the Estate's] lack of awareness of a condition or problem warranting further representation and the fact that no course of representation was alleged, the purpose underlying the continuous representation doctrine would not be served by its application here." *Williamson ex rel. Lipper Convertibles, L.P. v. Pricewaterhouse Coopers LLP, supra*. "[T]he nature and scope of the parties' retainer agreement (engagement) play a key role in determining whether 'continuous representation' was contemplated by the parties. *Id.* The act of executing the Engagement Letter, and the terms of representation contained therein, contradict the bare legal assertion that the doctrine of continuous representation would toll the statute of limitations following Decedent's death.

Without the application of the doctrine of continuous representation to toll the statute of limitations beyond Decedent's death, the statute of limitations on malpractice claims on any conduct or omission alleged to have taken place in 2005, that is, defendant's representation of Decedent in the drafting of the Will would have expired in June of 2009, prior to the execution of the Tolling Agreement.

Accordingly, it is ORDERED that defendant Fox's motion to dismiss is granted as to allegations based on conduct or omissions alleged to have been committed in 2005 during defendant's representation of Decedent. Allegations based on defendant's conduct or omissions alleged to have been committed during defendant's representation of plaintiff, as executor of the Estate, are unaffected by this decision, and it is further

Ordered, that the parties are to appear for a prelliminary conference in Part 13 at the courthouse located at 80 Centre Street, Room 307, New York, New York on March 7, 2012, at 9:30 A.M.

This constitutes the decision and order of this court.

Dated: January 31, 2012



MANUEL J. MENDEZ

J.S.C. **MANUEL J. MENDEZ**
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION^{J.S.C.}

Check If appropriate: DO NOT POST REFERENCE

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