[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES J. GOLIA
Justice

IA Part 33

x

MARINA BONAPARTE, DENTAL WHEELS LLP, AND DENTAL WAGON, LLC,

Plaintiff(s)

– against --

MARVIN L. LIFSHUTZ, IAN R. LIFSHUTZ, AND LIFSHUTZ & LIFSHUTZ, PC,

x

Index Number 17440 2011

Motion Date March 29, 2012

Motion Cal. Number 4

Motion Seq. No. 1

The following papers numbered 1 to 11 read on this motion by defendants Marvin L. Lifshutz, Ian R. Lifshutz, and Lifshutz & Lifshutz for an order granting summary judgment, pursuant to CPLR 3212, dismissing the complaint on the grounds of statute of limitations and failure to state a cause of action and in the alternative leave to move for summary judgment following the completion of discovery.

	Papers Numbered
Notice of Motion-Affirmation-Affidavit-Exhibits (A-O).....	1-5
Opposing Affirmation.- Affidavit-Exhibits(A-H).....	6-9
Reply Affirmation-Affidavit.....	10-11

Upon the foregoing papers this motion is determined as follows:

Defendants move to dismiss the complaint on the grounds that the action is time barred and that plaintiffs fail to state a cause of action. In the alternative, defendants seek leave to move for summary judgment following the completion of discovery.

On July 21, 2011, plaintiffs Marina Bonaparte ("Bonaparte"), Dental Wheels LLP and Dental Wagon LLC commenced this action for legal malpractice against defendants Marvin L. Lifshutz, Ian R. Lifshutz and Lifshutz & Lifshutz, P.C. for legal malpractice. Plaintiffs assert a single cause of action for legal malpractice and seek damages in the sum of $15,677,556.61.

Plaintiffs allege that in 2002, Marvin L. Lifshutz represented to plaintiff Bonaparte and nonparty Lewis Brestin that he "specialized in the Medicare and Medicaid field for health providers and was completely familiar with all the rules and regulations required by such governmental agencies"; and that in 2002 Bonaparte and Brestin informed Marvin L. Lifshutz that they wanted to enter into a written agreement with Nations Management Group Inc. ("Nations") in connection with the operation of mobile dental buses in New York, which would provide dental services to patients, including Medicaid patients in New York City. Nations was operated by Osmin Ferran, Jr. The complaint further alleges that Bonaparte and Brestin engaged Marvin L. Lifshutz and Ian R. Lifshutz to negotiate a written agreement between Dental Wheels, and Nations, and subsequently between Dental Wagon and Nations. It is alleged that Marvin Lifshutz advised Osmin Ferran to have his father set up a marketing company which became known as Globe Management Group, Inc. ("Globe"). It is alleged that the purpose of dealing with Globe was to ensure that plaintiffs would be in compliance with the state Medicaid rules and regulations. Nations, and later Globe, were represented by Osmin Ferran, Jr. who was an officer and director of both entities. Plaintiffs allege that the negotiations continued for a two year period, and culminated in written agreements between Dental Wagon and Dental Wheels and Nations and Globe which were executed on September 24, 2004.

Plaintiffs allege that in 2003, during the negotiation period, Osmin Ferran Jr. was arrested and convicted of Medicaid fraud in Florida and was listed as an excluded person in the Federal Register on October 28, 2003. Plaintiffs allege that the defendants "failed to investigate, uncover and find" that Osman Ferran had been convicted in Florida for Medicaid fraud and was listed as an excluded person on the Federal Register on October 28, 2003. It is alleged that " due to negligence, poor legal advice rendered by the defendants to plaintiffs and the failure to represent plaintiffs in a legal standard as attorneys on behalf of the plaintiffs that would not cause the plaintiffs to violate the rules and regulations of Medicaid during the time that they were negotiating with 'Ferran' on behalf of Nations...and then on behalf of Globe...caused a judgment to be rendered against the plaintiffs. . . ."

Plaintiffs allege that they "relied upon the representations of the defendants that they were skilled, expert attorneys and specialized in Medicaid and Medicare field and were fully knowledgeable of the rules and regulations of Medicare and Medicaid," that the state Medicaid regulations provide that "Medicaid payments are barred for services where an excluded person is involved in any activity relating to the furnishing of medical care, services or supplies to Medicaid recipients and Medicaid providers may not submit any claim and cannot be reimbursed for services furnished in violation of said conditions (18 NYCRR Sec. 515[c][e]); that a regulation further provides a penalty not to part of any type of kickback scheme," that the state Medicaid regulations "provide that a person who is excluded nationally from Medicare is excluded by the New York Medicaid Agency (18 NYCRR Sec. 518.8[a][a]); and that "because of the negligence of defendants herein the

plaintiffs were not in compliance with the rules and regulations of the New York State Medicaid agency" and plaintiffs have sustained damages as set forth in the judgment of September 24, 2005 in favor of New York State, in the sum of $15,677,556.61 as to Marina Bonaparte, $9,348,902.47 as to Dental Wagon, and the sum of $6, 328,654.14 as to Dental Wheels, all with interest of 9% from September 25, 2005 to the present.

Plaintiffs' allege in their complaint that they engaged the defendant law firm Lifshutz & Lifshutz, PC. to defend them in an action commenced by the Attorney General and the State of New York to recover Medicaid funds as a result of plaintiffs' relationship with Mr. Ferran. The complaint alleges that defendant law firm was engaged in May 2005, and also alleges that said law firm was engaged in September 2005. Defendant law firm represented the plaintiffs through the filing of the notice of appeal on October 28, 2009.

Defendants served a verified answer and interposed ten affirmative defenses, including the failure to state a cause of action and statute of limitations, and now seek summary judgment dismissing the complaint on these grounds.

In support of the within motion, defendant Marvin Lifshutz has submitted an affidavit in which he states that Bonaparte and Ferran entered into an oral agreement in late 2001 which remained in effect through September 14, 2004. He further states that his law firm never represented the plaintiffs with respect to said oral agreement. Marvin Lifshutz states that in June 2002 his firm had an initial consultation, and was retained by Marina Bonaparte and Lewis Brestin to draft agreements between their companies Dental Wagon and Dental Wheels, and Nations. He states that he was specifically retained to draft management agreements, marketing agreements, and leasing agreements for a flat fee of $15,000.00. Marvin Lifshutz further states that in 2002 these agreements were drafted, but were not executed, and that the oral agreement that had been negotiated prior to the retention of counsel remained in effect through September 14, 2004. On September 14, 2004, Dental Wagon, Dental Wheels and Nations/Globe executed the managing agreement, the marketing agreement, and leasing agreement that had been drafted by defendant Marvin Lifshutz.[1]

In connection with the action by the State of New York, Bonaparte and Mr. Brestin entered into a voluntary execution of judgment with the Attorney General. They did not consult with the defendants prior to entering into said agreement. Thereafter, Ms. Bonaparte executed a retainer agreement, dated September 20, 2005, with the law firm of Lifshutz & Lifshutz, PC., on behalf of Dental Wheels, Dental Wagon, Richmond Hill Dental Health Associates, PC, Alternative Medicine Care of Queens, and Jamaica-Queens Dental Health

---

[1] It is undisputed that Globe and Dental Wagon executed a revised agreement on October 27, 2004.

Care. It does not appear that Ms. Bonaparte executed this retainer agreement in her individual capacity, although she was individually named as a defendant in the underlying action. Nonetheless, she was represented by defendants in that action.

An action for professional malpractice must be commenced within three years of the date of accrual (*see* CPLR 214 [6]). A claim accrues when the malpractice is committed, not when the client discovers it (*see Williamson v PricewaterhouseCoopers LLP*, 9 NY3d 1, 7-8 [2007]; *Glamm v Allen*, 57 NY2d 87 [1982], citing *McDermott v Torre,* 56 NY2d 39 [1982]). Here, it is undisputed that plaintiffs initially retained the defendants in 2002 to negotiate and draft the agreements which were ultimately executed on September 14, 2004 and amended on October 27, 2004. Plaintiffs' claim is based on the defendants alleged negligence in drafting the management and marketing agreements, and the alleged failure to investigate and discover, prior to the execution of said agreements, that Ferran had been excluded from participating in Medicaid. The alleged acts of malpractice are related to the written agreements prepared by defendant law firm for plaintiffs and occurred, at the latest, on October 27, 2004 , the date the September 14, 2004 agreements were amended. Therefore, this action was time-barred when it was commenced on July 21, 2011.

Defendants have further established, as a matter of law, that the statute of limitations has not been tolled here by the doctrine of continuous representation.

The rule of continuous representation applies to lawyers (*see Greene v Greene*, 56 NY2d 86, 94 [1982]; *Glamm*, 57 NY2d at 93) and "tolls the statute of limitations . . . where 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 295, 306 [2002]) and "where the continuing representation pertains specifically to [that] matter" (*International Electron Devices [USA] LLC v Menter, Rudin & Trivelpiece, P.C.*, 71 AD3d 1512, 1513 [2010], quoting *Shumsky v Eisenstein*, 96 NY2d 164, 168 [2001]; *see Chicago Tit. Ins. Co. v Mazula*, 47 AD3d 999, 1000 [2008]).

Here, the agreement between plaintiffs and Nations, and the agreement between plaintiffs and Globe were executed on September 14, 2004. Plaintiffs and Globe also executed an amendment to the agreements on October 27, 2004. Thereafter, there was no further contact between plaintiffs and defendants until September 20, 2005 when plaintiffs retained the defendants, solely for the purpose of providing a defense in the action by the State of New York.

Plaintiffs' claim is based on the defendants alleged negligence in drafting the management and marketing agreements, and the alleged failure to investigate and discover that Ferran had been excluded from participating in Medicaid. The complaint, does not allege that plaintiffs requested that the defendants investigate Osman Ferran, Jr., at any time

prior to their executing the agreements. Nor does Ms. Bonaparte, in her opposing affidavit, claim that she requested that the defendants conduct any investigation of Mr. Ferran.

The fact that defendant law firm was engaged, pursuant to a separate retainer, to defend the plaintiffs in the action by the State of New York, nearly a year after its representation ended with respect to the drafting of the contractual agreements, is insufficient to raise a triable issue of fact as to whether" (1) plaintiff[] and defendant . . . were acutely aware of the need for further representation [concerning the subject of the alleged malpractice,] i.e., they had a mutual understanding to that effect[ ], and (2) plaintiff [was] under the impression that defendant . . . was actively addressing [its] legal needs" with respect to the subject of the alleged malpractice (*Williamson*, 9 NY3d at 10). Consequently, the doctrine of continuous representation does not apply, and defendant's motion to dismiss the complaint is granted (*see generally Gotay v Brietbart,* 12 NY3d 894 [2009]).

The court further finds that even assuming that the statute of limitations had not expired, the complaint fails to state a claim for legal malpractice. In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession" and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages (*McCoy v Feinman*, 99 NY2d at 301-302 [internal quotation marks and citation omitted]). To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence (*see Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]; *Davis v Klein*, 88 NY2d 1008, 1009-1010[1996]; *Carmel v Lunney*, 70 NY2d 169, 173 [1987]).

Here, plaintiffs do not allege that an attorney practicing in the field of Medicaid and Medicare law who is hired to negotiate and draft a contractual agreement would normally investigate the other contracting party with whom a client is already doing business with, without receiving such instructions from the client.

Furthermore, the management agreements drafted by defendants and executed by Ms. Bonaparte as a member of Dental Wheels and Dental Wagon, state, in pertinent part that: "(ii) The Practice [Dental Wheels and Dental Wagon] acknowledges that it is aware of the Anti-Fraud and Abuse Amendments to the Social Security Act and that it cannot knowingly or willfully offer, pay, solicit or receive remuneration in order to induce business. Practice also agrees that it will abide by the Social Security Act, the Anti-Fraud and Abuse Amendments thereto, and all other laws, rules and regulations promulgated by any governmental authority having jurisdiction over the Practice."

In the action by the State of New York, Ms. Bonaparte, Dental Wheels and Dental Wagon, as well as the other named defendants therein, were found to have engaged in business with Mr. Ferran, a person who had been excluded from Medicare, *and* to have paid illegal kickbacks for referral services, either directly or indirectly to Mr. Ferran in violation of the Medicaid rules and regulations. The payment of kickbacks to *anyone* for referral services, constitutes a violation of Medicaid's rules and regulations, and is not dependent on whether such a payment was made to an excluded person. Plaintiffs' alleged damages in the underlying action thus was the result of their own conduct, as they paid kickbacks to Ferran, in violation of the agreements drafted by defendants , and the Medicaid rules and regulations. Plaintiffs' allegations thus fail to state a cause of action for breach of contract.

In view of the foregoing, defendants' motion for summary judgment dismissing the complaint as time barred and for failure to state a cause of action is granted; all other requests for relief are denied as moot.

This constitutes the order of the court.

Dated: June 18, 2012

J.S.C.