Landow v Snow Becker Krauss P.C.
2012 NY Slip Op 31971(U)
July 10, 2012
Supreme Court, Nassau County
Docket Number: 18038/11
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

JONATHAN S. LANDOW,

Plaintiff,

- against -

SNOW BECKER KRAUSS P.C., RICHARD REICHLER, ESQ. and MELTZER, LIPPE, GOLDSTEIN AND BREITSTONE, LLP,

Defendants.

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 18038/11
Motion Seq. Nos.: 01, 02
Motion Dates: 04/17/12
04/17/12
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The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 01), Affirmation and Exhibits	1
Affirmation in Opposition and Exhibits	2
Reply Affirmation	3
Notice of Motion (Seq. No. 02), Affidavit and Exhibits and Memorandum of Law	4
Affirmation in Opposition and Exhibits	5
Reply Affidavit and Memorandum of Law	6

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendant Snow Becker Krauss, P.C. ("Snow Becker"), moves (Seq. No. 01), pursuant to CPLR §§ 214 (6) and 3211 (a)(1), (a)(5),(a)(2), for an order dismissing the Verified Complaint. Plaintiff opposes the motion.

Defendants Richard Reichler, Esq. ("Reichler") and Meltzer, Lippe, Goldstein, and Breitstone, LLP ("Meltzer Lippe") move (Seq. No. 02), pursuant to CPLR §§ 3211(a)(1), (a)(7)

and 214(6), for an order dismissing the Verified Complaint. Plaintiff opposes the motion.

The instant motions arise from an underlying Verified Complaint sounding in legal malpractice and breach of contract, filed in or about December 2011. Therein, plaintiff alleges that defendants' failure to exercise due care in issuing an opinion letter regarding a business transaction resulted in indebtedness and penalties due and owing to the Internal Revenue Service.

By way of background, in 2000, plaintiff, as president and CEO of business entity, N.Y. Medical, Inc., ("NY Medical"), entered into an employee stock ownership plan ("ESOP") for the dual purposes of diversifying his personal business portfolio and rewarding the business' employees.

Plaintiff intended that the business entity would rollover the proceeds resulting from the sale of its stock holdings into "Qualified Replacement Property" ("QRP") and defer the capital gains tax until the subsequent sale of those replacement investments, pursuant to Section 1042 of the IRS Code. In furtherance of this end, plaintiff sold a portion of his shares to NY Medical, and NY Medical borrowed $15 million from Citibank to finance the purchase of the stock. Plaintiff used the proceeds from the purchase to lend the ESOP $15 million and the ESOP paid off the loan to Citibank.

As plaintiff did not retain any cash from the transaction, he borrowed $12 million from Citibank in the form of a line of credit for the purposes of purchasing certain QRP, floating rate notes, at a cost of $15 million. Plaintiff amended his agreement with Citibank and the credit was increased to $13.5 million. Citibank informed plaintiff that his use of the floating rate notes as QRP would achieve "zero-cost borrowing."

In 2002, plaintiff drew upon the line of credit and, with the use of his personal cash, purchased the floating rate notes. At the end of the tax year 2002, plaintiff was not required to

report any gain he acquired as result of the sale of certain stock to the NY Medical ESOP under IRC § 1042. However, Citibank failed to provide the "zero-cost" borrowing and plaintiff considered Drivium Capital, LLC ("DC") as a replacement for the Citibank line of credit.

In 2003, plaintiff retained defendant Snow Becker for, *inter alia*, the purpose of advising him of the possible tax implications of refinancing with DC. Defendant Reichler, an attorney, was assigned to his case. According to plaintiff, defendant Reichler represented that he could be located at either law firm - defendant Snow Becker or defendant Meltzer Lippe - as he identified defendant Meltzer Lippe as his "other" law firm. Plaintiff sent correspondence relative to his matter to defendant Reichler's attention at defendant Meltzer Lippe's address.

In March 2003, defendant Reichler rendered an opinion which ostensibly set forth that the DC transaction would not cause any adverse tax consequences under IRC §1042 in that the transaction would not be considered a sale of property by the IRS. In 2007, however, the IRS notified plaintiff that his transaction with DC was a sale of QRP property and therefore subject to past due income taxes, penalties and interest arising from his failure to report his gain from the sale.

In 2007, plaintiff retained defendants Reichler and Meltzer Lippe[1] to represent him in his dispute with the IRS. However, upon receiving the 2009 notice from the IRS that, as a result of the DC transaction, he owed about $4 million with additional penalties and interest equaling $860,000.00, he terminated his relationship with defendants and retained alternate counsel. The Tax Court in 2011, as a result of plaintiff's petition challenging the IRS' determination, upheld the IRS' findings and found plaintiff liable for the tax deficiency.

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[1]The correspondence evidence in the record indicates that plaintiff retained defendant Meltzer Lippe and that defendant Reichler was working on his case on its behalf as an employee of the firm.

Defendant Snow Becker contends that documentary evidence indicates that it last provided service to plaintiff in December 2003, and, as such, plaintiff is time barred from his claim of legal malpractice in that the statute of limitations is three years from the time of alleged complained of acts. Further, the statute of limitations for a legal malpractice claim under the theory of breach of contract is also three years and such time has expired.

In support of its motion (Seq. No. 01), defendant Snow Becker submits the pleadings; a letter dated August 7, 2002 to plaintiff from defendant Snow Becker confirming NY Medical's retention of the firm as its securities/corporate counsel; a letter dated September 18, 2007 to plaintiff and his wife, from defendant Reichler on defendant Meltzer Lippe letterhead confirming an agreement regarding its fees for representation regarding "tax planning"; a March 5, 2003 opinion letter addressed to "Ladies and Gentleman" from defendant Reichler to defendant Snow Becker regarding the proposed transaction with DC; a March 5, 2003 opinion letter to plaintiff from defendant Snow Becker which includes the legal findings and conclusions provided by defendant Reichler in his letter to the firm; Client/Matter Time/Slip Report by defendant Snow Becker indicating December 2003 as the time period of its last transaction between itself and plaintiff; invoices and corresponding transactions between defendant Snow Becker and NY Medical dated September 2002 through November 2003 and invoices and corresponding transactions between defendant Snow Becker and plaintiff dated September 2002 through November 2003.

Defendant Meltzer Lippe argues that defendant Snow Becker and its firm are separate and distinct entities and it had no part in the opinion letter in dispute. It submits the pleadings and the March 2003 and September 2007 letters and an invoice indicating retention by NY Medical[2]

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[2]It is noted that the invoice indicates that the retainer check in the amount of $10,000.00 was written by NY Medical and not the plaintiff as an individual. The retainer references the date of September 18, 2007, the date of defendant Reichler's letter confirming the agreement for

In opposition, plaintiff argues that defendant Snow Becker was "of counsel" to defendant Meltzer Lippe and, as that entity provided services in 2003 and up until 2009, the action is not time barred under the continuous representation theory. Plaintiff also contends that the instant motions cannot be granted since discovery will uncover the nature of the relationship between defendants Snow Becker, Reichler and Meltzer Lippe.

Plaintiff, in addition to the submission of the above referenced March 5, 2003 and September 18, 2007 letters, also submits as supporting evidence: a October 17, 2002 letter from plaintiff to defendant Reichler on behalf of defendant Snow Becker, referencing submitted documents in furtherance of evaluating his proposed DC transaction; a LAWYER.COM web page citing defendant Reichler as a member of the defendant Snow Becker firm; a defendant Meltzer Lippe web page indicating that defendant Reichler is counsel to its firm; a March 31, 2009 Notice of Deficiency from the IRS to plaintiff and his wife for tax years 2003 and 2004; an April 30, 2009 letter to defendant Reichler directing defendant Meltzer Lippe to not take any further action regarding the IRS dispute; plaintiff's petition challenging the IRS determination and the decision of the United States Tax Court, filed July 25, 2011, upholding the IRS determination.

In determining a motion to dismiss pursuant to CPLR § 3211(a)(7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail." *Heffez v. L & G General Const., Inc.*, 56 A.D.3d 526, 867 N.Y.S.2d 198 (2d Dept. 2008). Further, on a motion to dismiss for failure to state a cause of action, the complaint must be liberally construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true. *See Holly v. Pennysaver Corp.*, 98 A.D.2d 570, 471 N.Y.S.2d 611 (2d

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legal fees and a requirement of a $10,000.00 retainer.

Dept. 1984); *Wayne S. v. County of Nassau, Dept. of Social Servs.*, 83 A.D.2d 628, 441 N.Y.S.2d 536 (2d Dept. 1981).

The only other applicable subsection of CPLR § 3211 under which the defendants can seek relief is CPLR § 3211(a)(1). Generally, a motion to dismiss pursuant to this section of the statute will be granted only if the documentary evidence resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim. *See Fontanetta v. Doe,* 73 A.D.3d 78, 898 N.Y.S.2d 569 (2d Dept. 2010) *quoting* Siegel, PRACTICE COMMENTARIES, MCKINNEY'S CONS. LAWS OF N.Y., BOOK 7B, CPLR C3211:10 at 22. In sum, the analysis is two-pronged; the evidence must be documentary and it must resolve all the outstanding factual issues at bar.

For evidence to be considered as documentary, it must be unambiguous, authentic, and undeniable. The term "documentary evidence" as referred to in CPLR § 3211(a)(1) typically means judicial records, such as judgments, and orders or out-of-court documents, such as contracts, deeds, wills, and/or mortgages, and includes "[a] paper whose content is essentially undeniable and which, assuming the verity of its contents and the validity of its execution, will itself support the ground on which the motion is based." Siegel, PRACTICE COMMENTARIES, MCKINNEY'S CONS LAWS OF NY, BOOK 7B, CPLR C3211:10 at 20. *See also Teitler v. Max J. Pollack & Sons,* 288 A.D.2d 302, 733 N.Y.S.2d 122 (2d Dept. 2001).

On such a motion, if the documentary evidence submitted by the defendant refutes the plaintiff's factual allegations and conclusively establishes a defense to the asserted claims as a matter of law, the motion may be granted. *See Logatto v. City of New York*, 51 A.D.3d 984, 859 N.Y.S.2d 469 (2d Dept. 2008).

To recover damages for legal malpractice, a plaintiff must prove, *inter alia*, the existence of an attorney-client relationship. *See Berry v. Utica Nat. Ins. Group*, 66 A.D.3d 1376, 886 N.Y.S.2d 784 (4th Dept. 2009). Since an attorney-client relationship does not depend on the

existence of a formal retainer agreement or upon payment of a fee, the court must look to the words and actions of the parties to ascertain the existence of such a relationship. *See Moran v. Hurst*, 32 A.D.3d 909, 822 N.Y.S.2d 564 (2d Dept. 2006).

Although no formal retainer is provided in the record regarding the specific purposes of evaluating the tax consequences of plaintiff's proposed DC transaction, the evidence is clear that defendant Snow Becker and plaintiff entered into an attorney/client relationship regarding this issue. According to its own invoice and/or ledger for the specific time period of March 3, 2003 through March 3, 2005, the description of the services are set forth in relevant part:"...T/c w/ Reichler re: QRP tax opinion and fax to him revised draft...Confs. w/[Snow Becker Attorney] review revised drafts...Finalize opinion and distribute; t/c w/Landow...Proofed Reichler opinion..." *See* Defendant Snow Becker's Affirmation in Support Exhibit H.

As to whether plaintiff's claim that defendant Reichler was also acting as an "of counsel" to defendant Meltzer Lippe at the time of his drafting and preparation of the subject opinion letter, the Court is guided by the rationale set forth in *Jones v. Lopez,* 12 Misc.3d 1184(A), 824 N.Y.S.2d 763 (Sup Ct. Bronx County 2006). There, the court noted that plaintiff failed to establish that the defendant law firm explicitly undertook to perform a service for her, either orally or in writing. The court further noted that plaintiff failed to show any representations or other actions by the defendant law firm that granted individual and/or of counsel attorney apparent authority to contract for and bind the firm. Nor did plaintiff establish fraud, collusion or malicious acts by the defendant law firm or other special circumstances for which it could be held liable *despite the absence of contractual privity* (emphasis added). *See Jones v. Lopez, supra.*

The *Jones* court considered the evidence as provided by the plaintiff in her attempt to bind the attorney to the law firm and determined that the evidence of attorney's use of the firm's

logo may have furnished a basis for suspecting an affiliation and that plaintiff's reliance on the attorney's hearsay representation that he and the law firm would handle her case, in and of itself, did not constitute an admission binding the firm. Here, the instant plaintiff also relies on the hearsay statements that defendant Reichler could be located at his "other law firm" and that he mailed case documents to defendant Reichler, via overnight mail, to defendant Meltzer Lippe. Said statements are similarly insufficient.

As in *Jones*, the instant plaintiff presents no evidence that defendant Meltzer Lippe vested defendant Reichler with any authority regarding his actions on the tax opinion matter. Further, while the web page entries in evidence may indicate an affiliation between defendant Reichler and defendant Meltzer Lippe, the evidence is not conclusive that such relationship existed at the time of the complained of acts.

Noteworthy in the opinion letter drafted and prepared by defendant Reichler is the following statement: "I have been retained to represent Dr. Landow *individually* in connection with the proposed transaction with DC." *See* Defendant Snow Becker's Affirmation in Support Exhibit E. This statement further undermines the existence of a client/attorney relationship between plaintiff and defendant Meltzer Lippe regarding the underlying dispute giving rise to plaintiff's malpractice claim.

Notwithstanding the foregoing, there remains the issue regarding the statute of limitations as to all three defendants. CPLR § 3211 (a)(5) provides in relevant part: ".... the cause of action may not be maintained because of... statute of limitations..." CPLR § 214(6) also provides in relevant part; "...[t]he following actions must be commenced within three years:...an action to recover damages for malpractice, other than medical, dental or podiatric malpractice, regardless of whether the underlying theory is based in contract or tort...." Based on the foregoing, the alleged acts of malpractice regarding the opinion letter occurred in March 2003. As plaintiff

filed the underlying cause of action in December 2011, clearly more than three years after the alleged malpractice, he relies on the continuous representation theory to toll the statute.

For continuous representation doctrine to apply, for purposes of tolling limitations period for legal malpractice action, there must be clear indicia of an ongoing, continuous, developing and dependent relationship between client and attorney which often includes an attempt by attorney to rectify an alleged act of malpractice; *its application is limited to instances in which attorney's involvement in case after alleged malpractice is for performance of the same or related services and is not merely continuation of general professional relationship* (emphasis added). *See Pellati v. Lite & Lite,* 290 A.D.2d 544, 736 N.Y.S.2d 419 (2d Dept. 2002).

Also, referencing the language of the case cited by plaintiff, *Shumsky v. Eisenstein,* 96 N.Y.2d 164, 726 N.Y.S.2d 365 (2001), under the doctrine of continuous representation, the three-year statute of limitations for legal malpractice is tolled while the attorney *continues* to represent the client in the same matter, after the alleged malpractice is committed (emphasis added). Further, the parties must have a "mutual understanding" that further representation is needed with respect to the matter underlying the malpractice claim. *See Hasty Hills Stables, Inc. v. Dorfman, Lynch, Knoebel & Conway, LLP*, 52 A.D.3d 566, 860 N.Y.S.2d 182 (2d Dept. 2008).

Since the Verified Complaint in the instant matter lacks any allegation of a "mutual understanding" between plaintiff and defendants of the need for further representation regarding the tax opinion and/or DC transaction, the continuous representation doctrine does not apply to the instant matter. In fact, the Verified Complaint and supporting affidavit are devoid of any facts that occurred between any defendant and plaintiff regarding the DC transaction and/or the tax treatment thereof between the time period of 2003 (when the alleged malpractice act was committed) and 2007 when defendant Meltzer Lippe was retained.

Additionally, a legal malpractice cause of action accrues on the date the malpractice was

committed, not when it was discovered. *See Byron Chemical Co., Inc. v. Groman*, 61 A.D.3d 909, 877 N.Y.S.2d 457 (2d Dept. 2009). In other words, the statute does not run from the time plaintiff received notice from the IRS in 2007. Accordingly, the malpractice claims of all defendants are dismissed as time-barred. *See Serino v. Lipper,* 47 A.D.3d 70, 846 N.Y.S.2d 138 (1st Dept. 2007).

The Court has reviewed plaintiff's remaining arguments and has determined that they are unavailing.

Accordingly, defendant Snow Becker's motion (Seq. No. 01), pursuant to CPLR §§ 214 (6) and 3211 (a)(1), (a)(5),(a)(2), for an order dismissing the Verified Complaint is hereby **GRANTED**.

Defendants Reichler and Meltzer Lippe's motion (Seq. No. 02), pursuant to CPLR §§ 3211(a)(1), (a)(7) and 214(6), for an order dismissing the Verified Complaint is also hereby **GRANTED**.

This constitutes the Decision and Order of the Court.

ENTER:

DENISE L. SHER, A.J.S.C.

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ENTERED

JUL 12 2012

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated: Mineola, New York
July 10, 2012