

Gregg v Weiss

2012 NY Slip Op 33235(U)

April 3, 2012

Sup Ct, Westchester County

Docket Number: 51387/2011

Judge: William J. Giacomo

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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**FILED
AND
ENTERED**
ON 4-3-2012
WESTCHESTER
COUNTY CLERK

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

-----X
KATHERINE GREGG, as Administratrix of the
Estate of MARY LYNN DAVIS,

Plaintiff,

Index No. 51387/2011
DECISION & ORDER

-against-

RICHARD WEISS, ESQ.,

Defendants.
-----X

The following papers numbered 1 to 20 were read on defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(1), (5) and (7):

PAPERS NUMBERED

Notice of Motion/Affidavits/Exhibits A-D	1-6
Memorandum of Law	7
Affirmation in Opposition/Affidavits/Exhibits A-H	8-18
Memorandum of Law in Opposition	19
Reply Affirmation	20

Factual and Procedural Background

Defendant represented plaintiff's decedent Mary Lynn Davis in a 2001 personal injury action. By order dated June 23, 2003, (Donovan, J.) the action was conditionally dismissed for failure to complete discovery. The order directed that the parties were to

complete discovery within 90 days. If discovery was completed within 90 days, the dismissal could be vacated by a stipulation of the parties. The order also stated "in the event that no stipulation is obtained, counsel for plaintiff must move for restoration within one year of the date of this order." Discovery was not completed within 90 days and defendant did not move to restore the case to the calendar within one year of June 23, 2003. In fact, the case was never restored to the calendar.

Mary Lynn Davis died on October 23, 2006 and on May 2, 2011, plaintiff was appointed the Administratrix of Davis's estate.

Plaintiff commenced this legal malpractice action in June 2011, alleging that defendant committed malpractice in the personal injury action by failing to comply with the Court's June 23, 2003 order. Plaintiff also claims that defendant failed to petition the Surrogate's Court to have an Administratrix appointed for the Estate of Mary Lynn Davis. Plaintiff also asserts several breach of contract claims with respect to defendant's legal representation of Davis.

Defendant makes a pre-answer motion to dismiss, pursuant to CPLR 3211(a)(1), (5) and (7). In support of his motion, defendant argues that the statute of limitations for a legal malpractice action is three years. Defendant notes that the alleged malpractice occurred on June 23, 2004 when the time expired within which to restore Davis's personal injury claim to the Court calendar, therefore, the statute of limitations expired on June 23, 2007. Defendant also argues that Davis's death severed any attorney client relationship. Further, any work he performed beginning in 2006 to have a fiduciary appointed for the estate are distinctly different than the alleged malpractice committed in the personal injury action. Defendant also notes that in a letter dated January 11, 2008, he expressly informed

decedent's family "I have decided NOT to proceed" with the personal injury matter. Therefore, according to defendant even if he represented Davis's estate in the personal injury matter that representation ended on January 11, 2008 and since plaintiff commenced this action in June 2011, the three-year statute of limitations expired.

With respect to plaintiff's breach of contract claims, defendant argues that regardless of whether plaintiff entitles an action as a breach of contract, it is a legal malpractice action governed by the three-year statute of limitations.

In opposition, plaintiff argues that defendant's motion pursuant to CPLR 3211(a)(1) and (7) must be denied because defendant has not submitted documentary evidence to support his claims and further because they have properly plead a legal malpractice cause of action against defendant.

With respect to defendant's motion pursuant to CPLR 3211(a)(5), plaintiff argues the 3-year legal malpractice statute of limitations has been tolled by defendant's continues representation of both Mary Lynn Davis and the estate with respect to the personal injury action. Plaintiff notes that defendant has conceded that he represented Davis up to the time of her death. Further, through letters he sent to plaintiff's new counsel, he acknowledged that he represented the estate in the Surrogate's Court proceeding. Notably, in a December 3, 2010, letter to Bailly & McMillan defendant requested the payment of attorney's fees for his work in the estate matter.¹ Plaintiff also argues that the sole purpose of the estate action was to have a fiduciary appointed to pursue Davis's personal injury

¹Apparently, before an Administratrix could be appointed for Mary Lynn Davis, a guardian had to be appointed for Davis' two minor sons so that they could receive service of the Petition for Letters of Administration.

claim. Finally, plaintiff argues that as late as May 16, 2011, when Bailly & McMillan sent a letter to defendant requesting that he turn over Davis's personal injury file, defendant required a notice of substitution before he would turn over the file. Plaintiff argues that these actions by defendant create an issue of fact as to whether plaintiff and/or plaintiff's decedent reasonably believed that defendant was representing the estate from 2001 until plaintiff changed attorneys in 2011.

In reply, defendant argues that the death of a client automatically terminates the attorney client privilege. Therefore, his representation of Davis ended at her death on October 23, 2006. Further, defendant argues that there was no need for him to withdraw as attorney for the estate in the personal injury action because "logic and CPLR dictate that a motion to withdraw is not required where there is no pending case to withdraw from."

Discussion

As an initial matter the Court finds that to the extent defendant seeks to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7) the motion is denied as defendant has not submitted documentary evidence which conclusively forecloses plaintiff's claims and plaintiff has properly alleged fact to support a legal malpractice cause of action. To the extent plaintiff asserts breach of contract claims, these claims essentially allege that the defendant failed to perform services in a professional, non-negligent manner. Therefore, they are governed by the three-year statute of limitations for legal malpractice. (See CPLR 214[6]; *Matter of R.M. Kliment & Frances Halsband, Architects [McKinsey & Co., Inc.]*, 3 NY3d 538 [2004]); *Kinberg v Garr*, 60 AD3d 597 [1st Dept. 2009]; *Harris v Kahn, Hoffman, Nonenmacher, & Hochman, LLP*, 59 AD3d 390 [2nd Dept 2009]).

On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. (See *Sabadie v. Burke*, 47 A.D.3d 913 [2nd Dept 2008]; *Matter of Schwartz*, 44 A.D.3d 779 [2nd Dept 2007]). In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff. (See *Sabadie v. Burke, supra*; *Matter of Schwartz, supra*).


While defendant has satisfied his initial burden of establishing that the statute of limitations in this case has expired, viewing plaintiff's allegations as true and resolving all inferences in her favor, there is a question regarding the applicability of the continuous representation doctrine in this case.

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 (see *Williamson ex rel. Lipper Convertibles, L.P. v. Pricewaterhouse Coopers LLP*, 9 NY3d 1, 872 N.E.2d 842, [2007]).

The Court notes that while defendant contends that his attorney/client relationship with Davis ended upon death, he did not act in a manner to support this argument. Notably, as late as May 2011, defendant clearly believed that he still represented either Davis or her estate with respect to her personal injury claims since he required plaintiff's new counsel to submit a signed substitution of attorney form before he would turn over Davis's personal injury file. Further, plaintiff alleges that at all times, defendant reassured her that he was representing the estate and was continuing to pursue the personal injury law suit for the benefit of Mary Lynn Davis's two minor children.

Based upon the foregoing, plaintiff sufficiently alleges, for the purposes of surviving a motion to dismiss, a legal malpractice claim against defendant and raises issues of fact with respect to whether the continuous representation doctrine tolled the 3-year statute of limitations for legal malpractice. Accordingly, defendant failed to establish his entitlement to dismissal as a matter of law (*see Sabadie v Burke*, 47 A.D.3d 913, 849 N.Y.S.2d 440 [2nd Dept 2008]; *Petracca v Petracca*, 305 AD2d 566, 567 [2003]).

Dated: White Plains, New York
April 3, 2012


HON. WILLIAM J. GIACOMO
SUPREME COURT JUSTICE

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H:\Motions to DISMISS\Gregg v. Weiss (motion to dismiss on 3211 a1, a5 SOL, a7).wpd