

<b>First Natl. Group, LLC v Birbach</b>
2012 NY Slip Op 33243(U)
July 19, 2012
Supreme Court, New York County
Docket Number: 11147/11
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*

FIRST NATIONAL GROUP, LLC, COSCIA  
 REALTY CORP., LANDGROWTH  
 CORPORATION, AND ANDREW COSCIA  
 Plaintiff(s),

INDEX NO. 111471/11

MOTION DATE 5-16-2012

MOTION SEQ. NO. 001

STUART BIRBACH,  
 Defendant(s).

MOTION CAL. NO. \_\_\_\_\_

**FILED**

**JUL 23 2012**

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____ cross motion _____	<u>2</u>
Replying Affidavits _____	<u>3</u>

**Cross-Motion: Yes X No**

Upon a reading of the foregoing cited papers, it is Ordered that Defendant, Stuart Birbach's ("Birbach"), motion to dismiss allegations as time barred pursuant to CPLR 3211(a)(5) is denied.

According to Plaintiffs, Birbach represented Plaintiffs in numerous real estate and corporate transactions. Plaintiffs assert that Birbach was responsible for performing due diligence, negotiating favorable terms and drafting effective agreements for the transactions, which were loans from the Plaintiffs to various counter parties. Plaintiffs assert that Birbach negligently failed to perform due diligence and failed to meet the duty of care in negotiating, structuring and drafting documents for the transactions. Plaintiffs allege that none of the transactions would have been entered into if Birbach had preformed proper due diligence and informed Plaintiffs of the specifics of the transactions. Plaintiffs also allege that Birbach's failure to exercise due care in negotiating, structuring, and drafting transaction documents exposed Plaintiffs to additional harms and denied Plaintiffs adequate protections in the transactions.

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, Birbach

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

asserts that since the transactions in question all closed more than three years prior to the initiation of this case, that the statute of limitations has expired and Plaintiffs' claims are time barred. The transactions in question closed in July/August 2005, September 2005, August 2006, and September 2007. The Summons and Verified Complaint in the instant case was filed in October 2011. Birbach is seeking to dismiss all claims under CPLR 3211(a)(5).

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. 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 Plaintiffs' claims of legal malpractice against Birbach for failure to conduct due diligence and failure to exercise adequate care in negotiating, structuring, and drafting the transaction documents would therefore have expired, three years after the closing of each of the transactions, specifically July/August 2008, September 2008, August 2009, and September 2010 respectively.

The burden then shifts to the Plaintiffs 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 Plaintiffs assert the statute of limitations was tolled under the doctrine of continuous representation.

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. Elsentstein*, 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).

Plaintiffs assert that there was a mutual understanding that Birbach would represent Plaintiffs until each of the loans was repaid and that Birbach would take whatever actions necessary to have the loans repaid.

"The continuous representation doctrine tolls the statute of limitations only 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 N.Y.2d 295, 785 N.E.2d 714 (2002). Courts have repeatedly found that the mere continuation of an attorney-client relationship was not enough to invoke the doctrine of continuous representation.

“[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. *Shumsky v. Eisenstein, supra*. In the instant case neither party submitted or even mentioned any sort of retainer agreement. Plaintiffs assert that there was a mutual understanding that representation would continue until the loans were repaid, and Birbach is silent as to the scope or duration of representation agreed to by the parties.

Plaintiffs support the assertion of a mutual understanding of continued representation by submitting two Verified Complaints served on behalf of the Plaintiffs against defaulting counter parties from two of the transactions that are the subject of the instant suit. The Verified Complaints were dated December 31, 2008 and March 19, 2009. Both Verified Complaints were signed by Birbach.

Neither party in the instant action describes the circumstances under which Birbach drafted and signed the Verified Complaints on behalf of the Plaintiffs. Plaintiffs assert that Birbach and Plaintiffs were in continuous communication with each other regarding the status of the transactions and that Birbach represented to Plaintiffs that he was in continuous communication with the counter parties regarding the transactions and possible remedies following the default in each transaction.

In deciding this Motion to Dismiss, the Court assumes the factual allegations of the Complaint are true and accords every favorable inference to the non-moving party, in this case, the Plaintiffs. It seems reasonable to this Court that the parties could have foreseen the possibility that there would be a need for legal action if a counter party failed to meet its obligations under the loans. Given Plaintiffs’ factual allegations of a mutual understanding at the outset that representation would continue until the loans were fully repaid and the objective proof of the Verified Complaints signed by Birbach, this Court finds that Plaintiffs have met their “burden of demonstrating that the continuous representation doctrine [applies], or at least that there [is] an issue of fact with respect thereto.” *CLP Leasing Co., LP v. Nessen*, 12 A.D.3d 226, 784 N.Y.S.2d 535 (N.Y.A.D. 1<sup>st</sup> Dept. 2004).

Even though the objective proof supports continuous representation in only the two transactions in which the Verified Complaints were filed, the favorable inference that there was the same mutual understanding of continuous representation in all four transactions is accorded the Plaintiffs. The continuous representation would apply until the loans are re-paid, which according to the papers submitted still has not occurred.

Birbach argues that according to the holding in *Wei Cheng Chang v. PI*, 288 A.D.2d 378, 733 N.Y.S.2d 471 (N.Y.A.D. 2<sup>nd</sup> Dept. 2001), a client’s unilateral understanding as to the nature of the attorney client relationship does not create such a relationship. This argument fails to persuade this Court for two reasons.

First, the holding in *Chang v. PI* relates to the formation of an attorney client relationship, not the scope of such a relationship, and both parties to the instant action admit to the existence of an attorney client relationship. Second, Plaintiffs did not assert that it was their understanding as to the scope of the representation, but that it was a mutual understanding.

Birbach argues that because Plaintiffs failed to offer specifics as to the nature of the communications between Birbach and Plaintiffs following the closing of the transactions, Plaintiffs have not provided sufficient proof to establish more than a continued general relationship. Birbach relies on the holding in *Zaref v. Berk & Michaels, P.C.*, 192 A.D.2d 346 N.Y.S.2d 772 (N.Y.A.D. 1<sup>st</sup> Dept. 1993) to support his claim that this undermines Plaintiffs' assertion of a mutual understanding of continuous representation. Birbach's reliance on *Zaref* is misplaced. The Court in *Zaref* made it clear that an assertion of a general professional relationship supported by "papers [that] are almost devoid of factual statements [is] insufficient to support the application of the doctrine of continuous representation." *Id.* In the instant case, because the Court assumes facts alleged in the Complaint to be true and accords the Plaintiffs the benefit of every favorable inference, the very specific acts of drafting and signing the Verified Complaints, "are certainly sufficient to, at the very least, avoid dismissal pursuant to CPLR 3211." *Lavin v. Kaufman, Greenhut, Lebowitz & Forman*, 226 A.D.2d 107, 640 N.Y.S.2d 57 (N.Y.A.D. 1<sup>st</sup> Dept. 1996)

Accordingly, It is ORDERED that Defendant Birbach's motion to dismiss is denied.

This constitutes the decision and order of this court.

**FILED**

Dated: July 19, 2012

JUL 23 2012

ENTER:

NEW YORK  
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MANUEL J. MENDEZ  
J.S.C.

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

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