Dispo

To commence the 30 day statutory time period 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

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF PUTNAM

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CHARLES MELCHNER and LILLIAN MELCHNER,

Plaintiffs,

-against -

THE QUINN LAW FIRM, PLLC and ANDREW C. QUINN, ESQ.,

Defendants.

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DECISION & ORDER

Index No. 382/15

Sequence No. 1 & 2
Motion Date 7/27/15

LUBELL, J.

The following papers were considered in connection with **Motion Sequence #1** by defendant for an Order granting motion to dismiss the complaint, pursuant to CPLR 3211(a)(1) and (7), in favor of such defendants; and **Motion Sequence #2** by plaintiff for partial summary judgment pursuant to CPLR 3212(a) with respect to plaintiffs' federal claims and for such other and further relief as this Court deems just and proper:

PAPERS	**NUMBERED**
NOTICE OF MOTION/AFFIRMATION/EXHIBITS A-E	1
MEMORANDUM OF LAW IN SUPPORT	2
NOTICE OF CROSS MOTION/AFFIRMATION/EXHIBITS A-3	3
MEMORANDUM OF LAW IN SUPPORT	4
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MEMORANDUM OF LAW IN REPLY	6
REPLY AFFIRMATION	7

Plaintiffs, Charles Melchner and Lillian Melchner, commenced this legal malpractice action on March 9, 2015 against their former attorney, Andrew C. Quinn, Esq., and his law firm, The Quinn Law Firm, PLLC (collectively "Quinn") alleging, among other things, that Quinn was negligent in his representation of Plaintiffs by permitting the applicable statute of limitations to expire with respect to federal and state law claims against the Town of Carmel and its elected officials (the "Town"). Plaintiffs further allege

that but for said negligence they would have recovered money damages against the Town in connection with multiple alleged frivolous criminal and civil actions initiated against them by the Town.

The complaint alleges that it all started in July of 1998 when the Town filed a criminal information in Justice Court of the Town of Carmel charging Plaintiffs with three zoning violations with respect to their ownership, operation and control of the Mahopac Marina (hereinafter the "Marina"), a commercial marina located in the hamlet of Mahopac. In connection therewith, Plaintiffs retained Quinn to defend them. Quinn's representation of the Plaintiffs would continue over the next fifteen years in connection with a series of criminal and civil actions filed against Plaintiffs by the Town in connection with the Marina and Plaintiffs' use of certain related docks. All tolled, criminal actions were filed in 1998, 2003 and 2008; civil actions in 2000, 2006 and 2009. Plaintiffs allege that the criminal and civil actions were initiated by the Town despite the Town's knowledge that it did not have jurisdiction over the docks.

The complaint further alleges that, throughout this time period, Quinn and Plaintiffs had numerous discussions about their intention to sue the Town for money damages during which Quinn repeatedly assured Plaintiffs that they would be able to sue the Town once the criminal and civil proceedings ended.

The complaint makes specific reference to Plaintiffs' appeal of the July 21, 2010 Decision & Order of the Supreme Court, Putnam County (Nicolai, J.), enjoining their use of certain docks in connection with the operation of the Marina. More specifically, by Decision & Order of February 27, 2013, the Appellate Division Second Department, modified, the July 21, 2010 Decision & Order

> (1) by deleting the provision thereof . . . granting the plaintiff's motion for a preliminary injunction, and substituting therefor a provision . . . vacating that determination and, thereupon, denying the plaintiff's motion for a preliminary injunction, and (2) by deleting the provision thereof denying that branch of the defendants' motion which was pursuant to CPLR 3211(a)(7) to dismiss the first cause of action, alleging a violation of the Town Code of the Town of Carmel, and substituting therefor a provision granting that branch of the defendants' motion; [and, to any further extent, affirming the order appealed] . . .

(Town of Carmel v. Melchner, 105 AD3d 82, 102 [2d Dept 2013]). Upon doing so, the Appellate Division concluded that the Town did not have

jurisdiction over the docks.

The complaint makes note that the 2008 criminal action and the 2009 civil action (that gave rise to the 2013 Appellate Division vacatur of the stay) are still pending.

Plaintiffs contend that, in reliance upon Quinn's alleged assurances that they would be able to commence an action against the Town, Plaintiffs commenced an action in November 2013 in the United States District Court for the Southern District of New York (the "Federal Action") wherein Plaintiffs alleged, among other things, a violation of their constitutional rights pursuant to 42 U.S.C. Section 1983 (the "1983 Action"). They also advanced several state law claims including tortious interference with business, abuse of process, selective enforcement of laws, breach of contract and intentional infliction of emotional distress.

It should be noted that Quinn did not represent Plaintiffs in the Federal action. By then, Plaintiffs had retained other counsel.

By Decision & Order of November 21, 2014, Judge Vincent L. Briccetti of the United States District Court for the Southern District of New York, granted the Town's motion to dismiss Plaintiffs' 1983 Action, as untimely, i.e., Plaintiffs' claims for deprivation of constitutional rights to freedom of speech and property under the First, Fifth and Fourteenth Amendments of the United States Constitution and selective enforcement of zoning laws under the Fourteenth Amendment.

Upon doing so, Judge Briccetti applied New York's three-year statute of limitations to the 1983 claims (see Pearl v. City of Long Beach, 296 F.3d 76, 79 [2d Cir. 2002]) and, upon application of federal law, determined that the 1983 claims accrued on June 30, 2009, the date on which the Appellate Division, Second Department, vacated the Supreme Court injunction against Plaintiffs regarding the use of the docks (Melchner v. Town of Carmel, 13 CV 8164 VB, 2014 WL 6665755 [SDNY Nov. 21, 2014] citing Van Wormer v. City of Rensselaer, 293 Fed App'x 783, 783 [2d Cir.2008][under federal law, a 1983 claim "accrues when the plaintiff knows or has reason to know of the harm"]). As such, Judge Briccetti ruled that the last possible date for Plaintiffs to have commenced a 1983 action was June 30, 2012.

Judge Briccetti expressly refused to rule on whether "the

continuing violation doctrine"[1] was applicable "because even if it were, the last discriminatory act in furtherance of defendants' alleged deprivations occurred on June 30, 2009, when the Town commenced the 2009 civil action" (Melchner v. Town of Carmel, 13 CV 8164 VB, 2014 WL 6665755, at 2 [SDNY Nov. 21, 2014]). Judge Briccetti noted:

> It matters not that the 2008 criminal action and 2009 civil action are allegedly still pending, because a federal claim accrues when the plaintiff knows or has reason to know of the harm. The latest the Melchners knew or had reason to know defendants allegedly retaliated against them for their protected speech, deprived them of the Marina's economically beneficial use, arbitrarily deprived them of their valid property interest, and selectively enforced the Zoning Code against them for impermissible reasons was when the Town commenced its last suit against them on June 30, 2009. Applying the applicable three-year statute of limitations, the last possible date on which any Section 1983 claim could have been brought was June 30, 2012. The instant action was commenced on November 15, 2013. As such, the Melchners' Section 1983 claims are time-barred.

(Melchner v. Town of Carmel, supra). Upon declining to exercise the Court's supplemental jurisdiction over Plaintiffs' state law claims, the entire action was dismissed without regard to the merits or lack of merits of any of the state claims.

Plaintiffs commenced this legal malpractice action against Quinn, their former attorney, wherein they allege that Quinn committed legal malpractice by failing to timely file a claim against the Town thereby depriving Plaintiffs of the opportunity to recover money damages for asserted injuries incurred.

Quinn now moves, pre-answer, to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7). Plaintiffs cross-move for partial summary

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[1] "The doctrine of continuing harm [or continuing violation] precludes a statute of limitations defense where the plaintiff suffers a continuing harm" (Allstate Ins. Co. v. Serio, 2000 WL 554221, at 14 [S.D.N.Y. May 5, 2000][internal quotation marks omitted]).

judgment pursuant to CPLR 3212(a) with respect to their federal claims.

Failure to State a Cause of Action

> "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" (Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, 8 N.Y.3d 438, 442, 835 N.Y.S.2d 534, 867 N.E.2d 385, quoting McCoy v. Feinman, 99 N.Y.2d 295, 301, 755 N.Y.S.2d 693, 785 N.E.2d 714; see Rehberger v. Garguilo & Orzechowski, LLP, 118 A.D.3d 767, 988 N.Y.S.2d 70). "To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action . . ., but for the lawyer's negligence" (Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, 8 N.Y.3d at 442, 835 N.Y.S.2d 534, 867 N.E.2d 385; see Quantum Corporate Funding, Ltd. v. Ellis, 126 A.D.3d 866; Kutner v. Catterson, 56 A.D.3d 437, 867 N.Y.S.2d 156).

(Antonelli v. Guastamacchia, 2015 NY Slip Op 06870 [2d Dept Sept. 23, 2015]). A plaintiff need only plead allegations from which one may reasonably infer damages which can be attributed to defendant's malpractice (Rhodes v. Honigman, ___ AD3d____, 16 NYS3d 324 [2d Dept 2015] citing Rock City Sound, Inc. v. Bashian & Farber, LLP, 74 A.D.3d 1168, 1171; Randazzo v. Nelson, 128 A.D.3d 935, 937).

> On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the facts pleaded are presumed to be true and are to be accorded every favorable inference, but "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration" (Silverman v. Nicholson, 110 A.D.3d 1054, 1055, 975 N.Y.S.2d 416 [internal quotation marks omitted] . . .

(Rhodes v. Honigman, supra).

It is noteworthy, that there is no allegation in the complaint that Quinn made any representations to Plaintiffs as to what specific "lawsuit" (Compl. ¶TWELFTH), "claim" (Compl. ¶THIRTEENTH) or "action" (Compl. ¶SIXTEENTH) they would be able to advance against the Town and whether that would be in state or federal court, once the criminal and civil proceedings initiated by the Town "had been resolved" (Compl. ¶TWELFTH) or concluded (Compl. ¶THIRTEENTH).

The complaint alleges, and is not otherwise disputed, that the third criminal action instituted by the Town on September 2, 2008 and the civil action commenced by the Town on June 30, 2009 that gave rise to the February 27, 2013 Appellate Division Decision and Order, are still pending" (Compl. ¶15 [parentheticals as in original]).

Therefore, contrary to Plaintiffs' position, Plaintiffs are not precluded from bringing a "lawsuit", a "claim" or an "action" against the Town. "The one-year statute of limitations applicable to a cause of action for malicious prosecution (see CPLR 215[3]) does not begin to run until favorable termination of the underlying criminal proceeding" (Roman v. Comp USA, Inc., 38 A.D.3d 751, 752 [2d Dept 2007][citations omitted]; see Williams v. CVS Pharm., Inc., 126 AD3d 890, 891 [2d Dept 2015]). Thus, additionally, a notice of claim is not yet due (Brownell v. LeClaire, 96 AD3d 1336, 1337 [3d Dept 2012]).

In addition, Quinn aptly notes that an action seeking damages for abuse of process, either civil or criminal (see Place v Ciccotelli, 121 AD3d 1378, 1380 [3d Dept 2014]), enjoys a one year statute of limitations (see CPLR 215) as measured from the last of the related proceedings (see Benyo v. Sikorjak, 50 AD3d 1074, 1077 [2d Dept 2008]; see also 10 Ellicott Sq. Ct. Corp. v Violet Realty, Inc., 81 AD3d 1366, 1368-69 [4th Dept 2011][causes of action for malicious prosecution, abuse of process and prima facie tort accrued upon dismissal of last of underlying lawsuits] lv to appeal denied 17 NY3d 704 [2011]). Here too, a notice of claim is not yet due (see Vil. of Val. Stream v. Zulli, 64 AD2d 609, 610 [2d Dept 1978]).

Here, again, there is no dispute that there is a pending 2008 criminal action and a pending 2009 civil action. As such, the period of limitations cannot be said to have expired.

It is noteworthy that the complaint conveniently fails to articulate the following facts as are expressly recited in Town of Carmel v. Melchner, supra, which is annexed to the complaint "as Exhibit '1' and made a part [thereof]":

> . . . [T]he charges in the first criminal action were tried before a jury in the Town Justice Court. Lillian Melchner was acquitted of all 18

> counts, and Charles Melchner was convicted of three violations of the Town Code for (1) nonresidential use of Lot 40, (2) failure to obtain site plan approval for the walkway on Lot 41, and (3) failure to obtain a building permit for the walkway on Lot 41. By judgment rendered January 27, 2003, the court imposed fines in the sums of $52,000, $51,000, and $51,000, respectively, for these counts (see People v. Melchner, 4 Misc.3d 132[A], 2004 N.Y. Slip Op. 50727 [U], 2004 WL 1563231 [App. Term, 9th & 10th Jud. Dists.]). On direct appeal, the Appellate Term vacated the conviction related to nonresidential use of Lot 40, affirmed the other two convictions, and reduced the fines on those convictions from the sums of $51,000 each to $250 each, on the ground that each of the two counts in the accusatory instrument charged a single violation, not a continuing violation (see id.).

(Town of Carmel v. Melchner, supra at 86). Additionally,

> [i]n late 2003, the Town initiated a second criminal action against the Melchners, charging them with nine violations of the Town Code related to their use of Lots 41 and 42. In January 2006, the Town commenced a third civil action to enjoin the Melchners' commercial use of Lots 41 and 42. On April 20, 2007, the parties entered into a stipulation of settlement on the record resolving both the second criminal action and the third civil action (hereinafter the April 2007 settlement). Charles Melchner agreed to plead guilty to a single violation of the Town Code alleging his failure to seek site plan approval for a wood walkway on Lot 40, for which he would pay a fine in the sum of $35,000 and receive a conditional discharge . . .

(Town of Carmel v. Melchner, supra at 86-87 [2d Dept 2013]). And, as earlier indicated, a third criminal action is still pending.

> [It] include[s] allegations of an unlawful expansion of the marina without site plan approval or a building permit in violation of sections 156-61 and 156-72 of the zoning ordinance in the Town Code, respectively, and unlawful expansion of dock structures or mooring

> facilities beyond those that existed on September 1, 1962, in violation of Town Code § 55-5 . . .

(Town of Carmel v. Melchner, supra at 87).

The Court is satisfied that upon consideration of the full and complete "record", including the attachments annexed to the complaint such as the Appellate Division decision of Town of Carmel v. Melchner, supra), that the factual claims advanced by Plaintiffs in the body of the compliant are patently tailored and/or edited by Plaintiffs to convey such a false impression and succession of facts that they should be deemed "contradicted" by the record as a matter of law.

Upon that contradicted record, the Court finds that Plaintiffs have failed to state a cause of action against Quinn

The Court is satisfied that the documentary evidence before it, be it by way of attachment to the complaint or otherwise, sufficiently refutes Plaintiffs' conveniently tailored allegations of fact such that a defense to the complaint has been established as a matter of law (see CPLR 3211[a][1]; Whitebox Concentrated Convertible Arbitrage Partners, L.P. v. Superior Well Servs., Inc., 20 N.Y.3d 59, 63 [2012]).

Moreover, even though Plaintiffs' Federal lawsuit was dismissed on statute of limitations grounds, the record establishes that Quinn's assurance that Plaintiffs' would be able to bring "a lawsuit" (Compl. ¶TWELFTH), "a claim" (Compl. ¶THIRTEENTH) or "an action" (Compl. ¶SIXTEENTH) against the Town once the criminal and civil proceedings initiated by the Town "had been resolved" does not, as a matter of law, constitute legal malpractice for the reasons hereinabove indicated and, in any event, it would be nothing more than conjecture to say that any damages sustainable in the federal action would have been any greater than that which Plaintiffs could have or would have been able to recover in a state action.

It is also noteworthy that Plaintiffs chose to bring a 1983 action in federal court and not state court where the courts of New York expressly recognize that,

> . . . [w]hile generally [1983] causes of action are governed by a three-year statute of limitations, one who experiences a continuous series of discriminatory acts may bring a claim [in Supreme Court] for violations that

> occur outside the limitations period if subsequent identifiable acts of discrimination occur within the period of limitations (see Abbott v. Town of Delaware, 238 AD2d 868, 869-870 [1997], lv denied 90 NY2d 805 [1997]; Corvetti v. Town of Lake Pleasant, supra at 824).

(Resnick v. Town of Canaan, 38 AD3d 949, 953 [3d Dept 2007]).

In any event, given the viability of several of the non-1983 claims dismissed in Federal Court, the Court finds that the allegations of damages in the complaint are "[c]onclusory allegations of damages or injuries predicated on speculation [which] cannot suffice for a malpractice action (Holschauer v. Fisher, 5 AD3d 553, 554 [2d Dept 2004] citing Pellegrino v File, 291 AD2d 60 [2002][1st Dept 2002] lv denied 98 NY2d 606 [2002]).

To any further extent, the Court finds no merit to Plaintiffs' opposition to Quinn's motion.

Cross-Motion

Plaintiff's motion for summary judgment is denied as academic and, in any event, would have been denied as premature since issue had yet to be joined (see CPLR 3212 [a]; Chakir v. Dime Sav. Bank of N.Y., 234 AD2d 577 [2d Dept 1996]; Milk v. 728 Gottschalk, 29 AD2d 698 [3d Dept 1968]; Union Turnpike Assoc., LLC v. Getty Realty Corp., 27 AD3d 725, 727-28 [2d Dept 2006]).

Based upon the foregoing, it is hereby

ORDERED, that the complaint is dismissed in all respects.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: Carmel, New York

October 3, 2015

S/ _____

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