Lewit v Fleishman
2016 NY Slip Op 32335(U)
November 28, 2016
Supreme Court, New York County
Docket Number: 152455/16
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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GUY M. LEWIT,

Plaintiff,

-against-

SHELDON J. FLEISHMAN,

Defendant.

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Index No. 152455/16

Motion seq. no. 001

DECISION AND ORDER

BARBARA JAFFE, J.

For plaintiff, self-represented:
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For defendant, self-represented:
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By notice of motion, defendant moves pursuant to CPLR 3211(a)(5) and (7) for an order dismissing a portion of plaintiff's first cause of action for attorney malpractice as time-barred and for failure to state a claim. Plaintiff opposes.

I. PERTINENT FACTS AS ALLEGED IN COMPLAINT

This action arises from a Surrogate Court proceeding involving the probate of the estate and assets of plaintiff's mother and father. In March 2006, plaintiff's father, Robert Lewit, hired attorney Frank Julie to handle his estate and tax issues. After Robert died in 2007, plaintiff was appointed executor of his estate. Plaintiff commenced a proceeding in Queens County Surrogate's Court, seeking to transfer all of the estate's non-exempt assets to Robert's surviving spouse, Mildred Lewit. In March 2007, soon after the decree issued authorizing the transfer to Mildred, she died intestate. Julie was retained to handle the probate of Mildred's estate. (NYCEF 2).

In November 2009, plaintiff and his siblings were appointed co-administrators of Mildred's estate. In December 2009, plaintiff filed federal estate tax returns prepared by Julie, which plaintiff alleges, was untimely, thereby resulting in penalties and interest of approximately $170,000. Plaintiff also alleges that Julie failed to disclose that in 2008, the IRS denied his request for an extension of time to file (*Id.*).

In the fall of 2010, Julie began work on an estate accounting for Mildred's estate. The accounting and stipulation settling the estate and distributing the assets were completed in early 2011. Plaintiff's siblings refused to agree to the stipulation and accounting, stopped communicating with him, retained counsel, and demanded copies of all relevant financial information. By then Julie had become unresponsive. (*Id.*).

On or about November 21, 2011, plaintiff, as executor of his father's estate, hired defendant to perform legal services on behalf of his father's and mother's estates; plaintiff signed solely in his capacity as the executor of his father's estate. (NYSCEF 6).

Although plaintiff wanted to commence a malpractice action against Julie, he was unable to do so as the co-administrators of the Mildred's estate refused to agree. Plaintiff asserts that he asked defendant to prepare a petition to either have the co-administrators removed or obtain permission from the Surrogate to proceed against Julie without the co-administrators' participation, and that defendant agreed to prepare a removal petition. (NYSCEF 2).

Defendant never filed a petition for removal nor commenced a malpractice action against Julie. After defendant allegedly committed other acts constituting negligence, malpractice, and breach of contract, plaintiff terminated his services in May 2013.

II. MOTION TO DISMISS

Defendant seeks dismissal of the portion of plaintiff's malpractice claim related to his alleged failure to remove plaintiff's siblings as co-administrators so that he might sue Julie for malpractice and/or for his failure to commence the lawsuit against Julie. According to defendant, he was retained to close out the estates, not to sue Julie or remove the siblings as co-administrators, and plaintiff failed to comply with his request for documentary evidence of Julie's alleged malpractice. He denies that he agreed to commence the lawsuit, and contends that he and plaintiff ultimately realized that a petition seeking to remove the siblings would not be successful. Defendant also claims that as Julie's alleged malpractice occurred in June 2008, when Julie failed to disclose that his request for an extension to file the estate's tax returns had been denied, and as defendant was retained in November 2011, the malpractice claim would have been time-barred. He also denies that plaintiff had standing to sue Julie, as the proper party was the estate, and thus plaintiff may not recover damages in his individual capacity for Julie's alleged malpractice. (NYSCEF 5).

In opposition, plaintiff disputes defendant's allegations, asserts that defendant was retained to remove the siblings as co-administrators so that a malpractice lawsuit could be brought against Julie, and denies that defendant asked him for documentation supporting a lawsuit against Julie. He submits correspondence reflecting defendant's assertions that he was filing or would file a petition for removal of the co-administrators, and his discussions with defendant about suing Julie. (NYSCEF 10).

Plaintiff takes issue with defendant's argument that he could not proceed with the lawsuit until he saw pertinent documentation, asserting that the malpractice is obvious and undeniable,

and contends that it occurred one day after the estate's tax return was due, which was on or about December 29, 2007, when Julie failed to file the tax return, request an extension of time to file, or pay the taxes. Plaintiff observes that the estate cannot sue defendant here, as it would require the approval of the co-administrators, which approval would not have been granted given the history. (*Id.*).

Plaintiff also denies that a malpractice claim against Julie was time-barred as of November 2011, when he retained defendant, as Julie represented the estate continuously until 2011, and argues that it would be unfair to grant defendant's motion to dismiss on the ground of standing as it was defendant's failure to file a petition seeking removal of the co-administrators that is at issue here. In that regard, he argues that defendant's motion to dismiss should be denied based on defendant's unclean hands and equitable estoppel. (NYSCEF 13).

In reply, defendant claims that plaintiff failed to submit evidence showing that Julie represented the estate in 2011, and asserts that if Julie's representation ended in 2011, then plaintiff could have commenced a malpractice lawsuit between 2011 and 2014. As plaintiff fired defendant in May 2013, there remained time for plaintiff or another attorney to file the malpractice action. Defendant also observes that plaintiff does not address his lack of standing to sue defendant as the estate is the aggrieved party, not plaintiff. (NYSCEF 17).

III. ANALYSIS

Pursuant to CPLR 3211(a)(7), a party may move at any time for an order dismissing a cause of action asserted against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference. (*Nonnon*

v City of New York, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court need only determine whether the alleged facts fit within any cognizable legal theory. (*Leon*, 84 NY2d at 87-88; *Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]).

However, a complaint may be dismissed if the defendant submits documentary evidence that "flatly contradicts" the allegations in the complaint. (*NRES Holdings, LLC v Almanac Realty Sec. VI, LP*, 140 AD3d 640 [1st Dept 2016]). The court may consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and the criterion then becomes whether the plaintiff has a cause of action, not whether it has stated one. (*High Definition MRI, P.C. v Travelers Companies, Inc.*, 137 AD3d 602 [1st Dept 2016]). If such affidavits are considered, the complaint should not be dismissed unless "'a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it.'" (*Id.* at 602, *quoting Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]).

A. Lack of capacity

An estate has standing to sue for malpractice an attorney hired to represent it. (*Estate of Schneider v Finmann*, 15 NY3d 306 [2010]; *see also Russo v Rozenholc*, 130 AD3d 492 [1st Dept 2015] [estate had standing to sue law firm for malpractice as estate authorized firm to represent its interests under retainer agreement]). However, there is no authority permitting an executor or administrator of an estate to sue in his or her individual capacity where the alleged malpractice harmed the estate or where the attorney was retained by the estate. (*See Estate of Schneider*, 15 NY3d 306, 308-310 [while personal representative of estate may commence malpractice claim against attorney who allegedly caused harm to estate, he does so as representative of estate and

not individually; "strict privity remains a bar against beneficiaries' and other third-party individuals' estate planning malpractice claims absent fraud or other circumstances."]; 21A Carmody-Wait 2d § 129:87 [2016] [personal representative of estate has standing to sue, on behalf of estate, attorney for malpractice]).

As the alleged malpractice was committed against the estate and not plaintiff in his individual capacity, and as the malpractice claim thus belonged to the estate and not plaintiff as an individual, he has no right or claim to damages resulting from the malpractice, and thus may not sue defendant here on his own behalf. (*Compare Brown-Jodoin v Pirrotti*, 138 AD3d 661 [2d Dept 2016] [plaintiff had standing to sue law firm for malpractice based on its alleged failure to properly probate her father's will and finalize estate; evidence reflected that plaintiff as individual signed retainer agreement and paid retainer individually and that attorney had not billed her in her representative capacity, and plaintiff alleged that she had been personally harmed by defendants' malpractice]; *Newbach v Giaimo & Vreeburg*, 209 AD2d 222 [1st Dept 1994] [plaintiffs had viable claim for legal malpractice in capacity as representatives of decedent's estate]).

B. Attorney malpractice

To establish a claim for legal malpractice, a party must show 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 the party to sustain actual and ascertainable damages. (*Rudolph v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438 [2007]). In other words, a plaintiff must show that the attorney was negligent, that the negligence was a proximate cause of the plaintiff's losses, and proof of actual damages. (*Nomura*

Asset Cap. Corp. v Cadwalader, Wickersham & Taft LLP, 115 AD3d 95 [1st Dept 2014], *affd as modified on other grounds* 26 NY3d 40 [2015]). To establish proximate cause, a plaintiff must demonstrate that but for the attorney's negligence, the plaintiff would have prevailed in the underlying matter or would not have sustained ascertainable damages. (*Id.*).

The statute of limitations for malpractice is three years (CPLR 214[6]), although the statute may be tolled while the attorney continues to represent the client in the same or a related matter (*Aaron v Roemer, Wallens & Mineaux, LLP*, 272 AD2d 752 [3d Dept 2000]). A legal malpractice claim accrues when the injury to the client occurs, regardless of the client's awareness of the malpractice. (*Johnson v Proskauer Rose LLP*, 129 AD3d 59 [1st Dept 2015]).

Here, accepting as true plaintiff's contention that Julie's representation of the estate continued until 2011, the estate had a viable claim for malpractice against Julie through and until sometime in 2014. As plaintiff terminated defendant's representation in 2013, plaintiff had sufficient time and opportunity to retain new counsel to prosecute the malpractice action before the statute of limitations had run on the claim. Therefore, defendant's alleged malpractice was not the proximate cause of any alleged damages, even assuming that plaintiff individually had standing to sue Julie or defendant. (*See Alden v Brindisi, Murad, et al.*, 91 AD3d 1311 [4th Dept 2012] [defendant's alleged malpractice not proximate cause of plaintiff's damages but rather failure of plaintiff to retain successor counsel in timely manner or failure of successor counsel to commence timely medical malpractice action; plaintiff and successor counsel had sufficient time and opportunity to protect plaintiff's rights]; *Golden v Cascione, Chechanover & Purcigliotti*, 286 AD2d 281 [1st Dept 2001] [as plaintiff's personal injury claim remained viable for almost two and half years after firm was relieved as counsel, firm's alleged negligence did not

proximately cause plaintiff injury]; *Greenwich v Markhoff*, 234 AD2d 112 [1st Dept 1996] [malpractice claim dismissed against law firm that had been substituted year after injury as firm not responsible for expiration of statute of limitations on underlying claim two years later]; *C & F Pollution Control v Fidelity & Cas. Co. of N.Y.*, 222 AD2d 828 [3d Dept 1995] [as statute of limitations had not run when plaintiff discharged defendant, plaintiff's second attorney could have timely commenced lawsuit and thus legal malpractice claim had no merit]; *Sherotov v Capoccia*, 161 AD2d 871 [3d Dept 1990] [claim dismissed as defendant's representation ended before statute of limitations on underlying claim expired]; *see also Pyne v Block & Assoc.*, 305 AD2d 213 [1st Dept 2003] [proximate cause of injuries was failure of plaintiff's successor attorneys to timely serve potentially liable parties, as they could have, within underlying action]).

However, plaintiff's claim that defendant failed to perform a task which he was hired to perform is more properly characterized as a breach of contract claim, which remains viable. (*See Reidy v Martin*, 77 AD3d 903 [2d Dept 2010] [client's breach of contract claim not duplicative of malpractice claim as client alleged he had hired and paid attorney to make certain motions and attorney failed to do so]).

Absent a showing of immoral and unconscionable conduct, plaintiff's claim that defendant's motion to dismiss should be denied based on defendant's alleged unclean hands has no merit. (*Filan v Dellaria*, 2016 WL 6885875, 2016 NY Slip Op 07922 [2d Dept 2016] [unclean hands applies when complaining party shows offending party is guilty of immoral, unconscionable conduct]). In any event, as a claim of unclean hands is equitable in nature (55 NY Jur 2d, Equity § 104 [2016]), it does not bar defendant's motion or require its denial.

Nor may plaintiff rely on equitable estoppel to prevent defendant from asserting a

defense based on the statute of limitations, as plaintiff knew that defendant had not filed the malpractice lawsuit before the statute of limitations had expired. (*See e.g. McDonald v Edelman & Edelman, P.C.*, 118 AD3d 562 [1st Dept 2014] [equitable estoppel unavailable to preclude assertion of statute of limitations defense on legal malpractice claim as plaintiff failed to exercise reasonable diligence to ascertain viability of appeal in underlying case despite having known that defendants ceased representing him]; *Rite Aid Corp. v Grass*, 48 AD3d 363 [1st Dept 2008] [equitable estoppel did not toll statute of limitations as to fraud claim as plaintiffs had knowledge sufficient to place them under duty to investigate prior to expiration of statute]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion for an order dismissing plaintiff's claim of malpractice premised on the allegation that defendant failed to sue Julie for malpractice and failed to seek the removal of plaintiff's co-administrators in order to sue Julie is granted, and that portion of the claim is dismissed.

ENTER:

Barbara Jaffe, JSC

HON. BARBARA JAFFE

DATED: November 28, 2016
New York, New York