Bizounouya v Ciacci
2017 NY Slip Op 30403(U)
January 24, 2017
Supreme Court, Bronx County
Docket Number: 303243/2016
Judge: Lucindo Suarez

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART LPM

----------X

DAOUROU BIZOUNOUYA,

Plaintiff,

- against -

WALTER F. CIACCI,

Defendants.

----------X

DECISION AND ORDER

Index No. 303243/2016

PRESENT: Hon. Lucindo Suarez

Upon defendant's notice of motion dated December 2, 2016 and the affirmation and exhibits submitted in support thereof; plaintiff's affidavit in opposition dated December 27, 2016 and the "response" submitted therewith; defendant's affirmation in opposition dated January 19, 2017 and the two (2) affidavits submitted therewith; and due deliberation; the court finds:

This action alleges breach of fiduciary duty against plaintiff's former attorney, who represented him in two personal injury actions emanating from a June 5, 2007 motor vehicle accident. The court takes judicial notice of the records of the Bronx County Clerk relative to *Daourou Bizounouya v. Elieser L. Baum and Manhattan Bridge Car Wash Inc.*, Index No. 302619/2008 (Supreme Court, Bronx County) (the "*Baum* action") and *Daourou Bizounouya v. Manhattan Bridge CW Inc.*, Index No. 304441/2010 (Supreme Court, Bronx County) (the "MBCW II action") and all matters contained therein. *See e.g. Samuels v. Montefiore Med. Ctr.*, 49 A.D.3d 268, 852 N.Y.S.2d 121 (1st Dep't 2008); *Walker v. City of New York*, 46 A.D.3d 278, 847 N.Y.S.2d 173 (1st Dep't 2007); *American S&L Ass'n v. First American Title Ins. Co.*, 78 A.D.2d 624, 432 N.Y.S.2d 706 (1st Dep't 1980); *Tischler v. Key One Corp.*, 67 A.D.2d 886, 413 N.Y.S.2d 710 (1st Dep't 1979).

In *Bizounouya v. Baum*, it was alleged that plaintiff, an employee of Manhattan Bridge Car

Wash Inc. ("MBCW"), was struck by a vehicle owned by defendant Elieser L. Baum ("Baum") and driven by another car wash employee. MBCW claimed that the accident occurred during the course of plaintiff's employment, barring the action against it pursuant to the Workers Compensation Law. Plaintiff argued that the accident occurred on his day off, when he was at the car wash to visit another employee. On the basis of pay stubs dated shortly after the accident naming plaintiff's employer as Manhattan Bridge CW Inc. ("MBCW II"), defendant's firm commenced the MBCW II action against that entity.

In opposition to a motion for a default judgment against MBCW II, MBCW II's principal submitted an affidavit in which he averred that he was the principal of both MBCW and MBCW II and that while MBCW II had been newly formed shortly before plaintiff's accident, it had no role in operation of the car wash until after plaintiff's accident. He averred that MBCW operated the car wash during the relevant time. On the basis of such uncontroverted evidence, the action against MBCW II would have been without merit. *See e.g. Khedouri v Equinox*, 73 A.D.3d 532, 901 N.Y.S.2d 221 (1st Dep't 2010). Given the foregoing, defendant had legitimate reasons for both commencing and abandoning the action against MBCW II, and there was nothing wrongful in choosing to commence a separate action against MBCW II.

Plaintiff commenced this action by filing a summons with notice alleging that defendant's failure to pursue the personal injury action led to its dismissal. Plaintiff then filed a complaint changing his theory, in which he alleged that defendant settled the underlying action against MBCW by forging plaintiff's signature on settlement documents. Defendant moves pursuant to CPLR 3211(a)(1) (defense founded on documentary evidence), (5) (statute of limitations) and (7) (failure to state a cause of action) to dismiss the complaint. He submits several documents executed by plaintiff in furtherance of settlement of the *Baum* action, as well as June 22, 2012 correspondence from defendant to plaintiff explaining the terms of the settlement, including which

party was contributing and which was not, and calculation of the disbursement to him and enclosing a check disbursing the settlement proceeds to plaintiff. The context of plaintiff's complaint and opposition makes clear that plaintiff fails to appreciate the difference between MBCW and MBCW II and their respective roles, and thus the difference between the two actions. It is furthermore apparent that plaintiff fails to appreciate the relative merit of the action against the car wash and the individual vehicle, who apparently had a valid claim-over against the car wash pursuant to Vehicle and Traffic Law § 388, inasmuch as, among other reasons, the motor vehicle accident report indicates that the car wash employee operating Baum's vehicle fled the scene after the accident.

An action for breach of fiduciary duty must be commenced within three years, *see Harlem Capital Ctr., LLC v Rosen & Gordon, LLC*, 2016 NY Slip Op 08589 (1st Dep't Dec. 22, 2016), as must an action for legal malpractice, *see* CPLR 214(6). This period is measured from the date of the breach or malpractice, not the plaintiff's discovery of it. *See McCoy v. Feinman*, 99 N.Y.2d 295, 785 N.E.2d 714, 755 N.Y.S.2d 693 (2002); *Alizio v. Ruskin Moscou Faltischek, P.C.*, 126 A.D.3d 733, 5 N.Y.S.3d 252 (2d Dep't 2015). The statute of limitations applies regardless of whether the underlying theory is couched in terms of contract or tort. *See R.M. Kliment & Frances Halsband, Architects v. McKinsey & Co.*, 3 N.Y.3d 538, 821 N.E.2d 952, 788 N.Y.S.2d 648 (2004).

Accordingly, plaintiff's complaint, interposed more than three years after the accrual of the cause of action, is time-barred. Even presuming, on plaintiff's behalf, that the cause of action encompasses a fraud component, fraud duplicative of the negligence/malpractice cause of action, *see Mamoon v. Dot Net Inc.*, 135 A.D.3d 656, 25 N.Y.S.3d 85 (1st Dep't 2016); *Cusack v. Greenberg Traurig, LLP*, 109 A.D.3d 747, 972 N.Y.S.2d 11 (1st Dep't 2013), does not permit plaintiff to circumvent the statute of limitations imposed by CPLR 214(6), *see Johnson v. Proskauer Rose LLP*, 129 A.D.3d 59, 9 N.Y.S.3d 201 (1st Dep't 2015).

Interestingly, the complaint herein actually states the amount of the settlement and the share

attributable to plaintiff's portion as per the June 2012 correspondence. None of this information appears in the records of either underlying action, thus supporting defendant's contention that plaintiff was aware of, received the benefit of and ratified the settlement over four years ago and belying plaintiff's assertion that he discovered defendant's purported wrongdoing only upon examination of the court records. In opposition, plaintiff did not deny receiving and retaining the funds disbursed from the settlement without objection. He may therefore be found to have ratified the settlement in any event, despite his protestations. *See Allen v Riese Org., Inc.*, 106 A.D.3d 514, 965 N.Y.S.2d 437 (1st Dep't 2013).

Accordingly, it is

ORDERED, that defendant's motion to dismiss the complaint is granted; and it is further

ORDERED, that the complaint is dismissed; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in defendant's favor dismissing plaintiff's complaint.

This constitutes the decision and order of the court.

Dated: January 24, 2017

Lucindo Suarez, J.S.C.