Estate of Smulewicz v Meltzer, Lippe, Goldstein & Breitstone, LLP
2017 NY Slip Op 30483(U)
March 15, 2017
Supreme Court, New York County
Docket Number: 152264/16
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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ESTATE OF RENATE SMULEWICZ and HEDDA SMULEWICZ in her capacity as Executrix of the ESTATE OF RENATE SMULEWICZ,

Index no. 152264/16

Motion seq. no. 001

Plaintiffs,

DECISION AND ORDER

-against-

MELTZER, LIPPE, GOLDSTEIN & BREITSTONE, LLP,

Defendant.

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BARBARA JAFFE, J.:

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By notice of motion, defendant moves pursuant to CPLR 3211(a)(5) for an order dismissing the complaint as time-barred. Plaintiffs oppose. During oral argument on the motion, plaintiffs consented to dismissal of the second and third causes of action. (NYSCEF 30, at 2).

I. PERTINENT FACTS

Sometime in early 2008, Renate Smulewicz engaged defendant law firm to devise an "estate planning and tax reduction plan." By letter dated February 6, 2008, defendant provided Smulewicz with a summary of the plan, whereby it created an LLC to which Smulewicz deeded her apartment, and created a trust to which she both gifted and sold her interest in the LLC in exchange for a $2,340,000 promissory note. (NYSCEF 12).

By invoice addressed to Smulewicz on the same day, defendant lists the following pertinent services rendered: "Gift by [Smulewicz] of ten (10%) percent interest in [the LLC] to THE SMULEWICZ FAMILY TRUST by Assignment Agreement; . . . [Smulewicz] selling ninety (90%) interest in [the LLC] to THE SMULEWICZ FAMILY TRUST." (NYSCEF 13).

A September 17, 2009 invoice addressed to Smulewicz reflects that defendant rendered the following pertinent services in August 2009:

> Attention to planning/LLC/deed etc. . . . Analysis and attention to planning necessary documents. . . . Revise Will of [Smulewicz] and review Trust Agreement. . . . Telephone conference with [Smulewicz] regarding formation of LLC. . . . Telephone conference wish [sic] Seaport Title regarding transfer of deed with life estate to LLC. . . . Prepared operating agreement for 44 West 70th Street LLC. . . .; discuss the transfer of the property into the LLC; . . . .

(NYSCEF 21).

On September 29, 2009, Smulewicz executed a power of attorney in favor of her daughter, and on September 2011, executed her last will and testament. Both instruments were prepared by defendant. (NYSCEF 22-23).

On June 26, 2012, defendant invoiced Smulewicz for services rendered in connection with an unrelated action in which the estate of one Daniel P. Smulewicz was a party. (NYSCEF 15). On July 16, 2012, defendant sent an email to Smulewicz's daughter, attaching Smulewicz's "power of attorney, health care proxy and living will." (NYSCEF 24).

A Department of Health and Human Services form entitled "Home Health Certificate and Plan of Treatment," dated December 22, 2012, reflects that Smulewicz was diagnosed on October 25, 2012 with "dementia unspec[ified] w/o behav[ior] disturbance." (NYSCEF 25). In April 2014, Smulewicz died. (NYSCEF 1).

By letter dated September 30, 2015, plaintiffs demanded from defendant $830,000 which allegedly represents the estate's alleged tax liability incurred as a result of defendant's alleged failure to form or reference the LLC properly, "and as such, the transfers contemplated pursuant to the estate planning and tax reduction plan were ineffective . . . ." They annexed a copy of the February 6, 2008 letter. (NYSCEF 11).

On or about March 16, 2016, plaintiffs commenced this action, advancing a claim of legal malpractice based on defendant's negligent preparation of Smulewicz's estate plan as evidenced by the February 6, 2008 letter. (NYSCEF 1).

II. CONTENTIONS

Defendant contends that the event on which plaintiffs' malpractice claim is based occurred on February 6, 2008, when it presented Smulewicz with a tax reduction plan reflecting that she had transferred her interest in an allegedly nonexistent LLC. As defendant was retained specifically for the purpose of planning Smulewicz's estate, and had completed all transactions thereto and finalized the plan when it sent her the February 2008 letter, defendant argues that plaintiff's cause of action for malpractice accrued on that date. Thus, it asserts, as the action was commenced in March 2016, well over three years after the cause of action accrued, it is time-barred. Defendant also maintains that plaintiffs fail to allege that its post-2008 representation of Smulewicz was sufficiently related to the plan so as to toll the statute of limitations. Even assuming, it claims, that its last invoice dated June 26, 2012, reflects services that are related to the February 2008 plan, plaintiffs were required to commence the action no later than June 25, 2015. (NYSCEF 9, 16).

In opposition, plaintiffs deny that defendant's representation of Smulewicz after February 2008 was unrelated to estate planning and tax counseling, relying on defendant's invoices and emails from August 2009 to July 2012 which reference various estate-related work. They also note that defendant provides no evidence that the attorney-client relationship terminated, and that additional documents reflecting the extent and duration of defendant's representation have not been exchanged in discovery. Moreover, as Smulewicz was suffering from dementia as early as December 2012, the statute of limitations tolled until her death in 2014. (NYSCEF 18, 21-24).

In reply, defendant asserts that plaintiffs fail to demonstrate that Smulewicz's alleged mental condition existed when the cause of action accrued in February 2008 or offer admissible proof that she suffered from dementia, and if she did, show that it resulted in "an overall inability to function in society." Even if Smulewicz began suffering from dementia in December 2012, it argues, plaintiffs may not simultaneously contend that Smulewicz had "consciously relied" on defendant's counsel thereafter, and thus, the attorney-client relationship terminated at the time of her diagnosis. (NYSCEF 26-27).

Defendant also observes that plaintiffs' continuous representation theory is advanced by counsel alone, and that the invoices and emails on which they rely reflect the provision of unrelated services rendered after the transaction in issue. In any event, were the statute to have been tolled until the date of the last email on July 16, 2012, it argues, the action had to have been commenced by July 15, 2015. It reiterates that the 2015 demand letter constitutes an admission that the claim accrued in February 2008, the effect of which plaintiffs may not now avoid. (*Id.*).

III. ANALYSIS

A cause of action may be subject to a pre-answer dismissal as time-barred. (CPLR 3211[a][5]). The defendant has the initial burden of establishing that the statute has run on the plaintiff's cause of action, and all favorable inferences are afforded the allegations raised in the complaint and the plaintiff's responding papers. (*Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011], quoting *Island ADC, Inc. v Baldassano Architectural Grp., P.C.*, 49 AD3d 815, 816 [2d Dept 2008]; *see also Leon v Martinez*, 84 NY2d 83 [1994]).

An action for legal malpractice, "regardless of whether the underlying theory is based in contract or tort," must be commenced within three years of its accrual. (CPLR 214[6]). A claim of legal malpractice accrues "when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court." The date of accrual depends on when the defendant committed the malpractice, not when his or her client discovered it. (*McCoy v Feinman*, 99 NY2d 295, 301 [2002]; *Hahn v Dewey & LeBoeuf Liquidation Trust*, 143 AD3d 547, 547 [1st Dept 2016]; *Landow v Snow Becker Krauss, P.C.*, 111 AD3d 795, 767 [2d Dept 2013]).

However, the three-year statute may be tolled when the representation is continuous, and a plaintiff may avoid dismissal by showing that there exists an issue of fact as to whether the representation was continuous. (*Sendar Dev. Co., LLC v CMA Design Studio P.C.*, 68 AD3d 500, 503 [1st Dept 2009]; *860 Fifth Ave. Corp. v Superstructures–Engrs. & Architects*, 15 AD3d 213, 213 [1st Dept 2005]). The continuing representation must "pertain[] to the matter in which the attorney committed the alleged malpractice," and the attorney and client must have reasonably intended for the professional relationship to continue past the time that the cause of action

accrued. (*Shumsky v Eisenstein*, 96 NY2d 164, 167 [2001]; *see Williams v Pricewaterhouse Coopers LLP*, 9 NY3d 1, 10 [2007]). The provision of subsequent legal services pertaining to "discrete and severable transactions," however, does not toll the statute. (*Parlato v Equitable Life Assur. Socy. of U.S.*, 299 AD2d 108, 114-115 [1st Dept 2002], *lv denied* 99 NY2d 508 [2003]; *see Gristede v Morris & McVeigh*, 192 AD2d 424, 425 [1st Dept 1993]).

The statute of limitations may also be tolled if, at the time the cause of action accrues, the plaintiff is "under a disability because of infancy or insanity . . . [and] the time within which the action must be commenced shall be extended to three years after the disability ceases or the person under the disability dies." (CPLR 208). The toll applies only to those "who are unable to protect their legal rights because of an over-all inability to function in society." (*McCarthy v Volkswagen of Am., Inc.*, 55 NY2d 543, 548 [1982]; *Rodriguez v Mount Sinai Hosp.*, 96 AD3d 534, 535 [1st Dept 2012]).

Relying on the February 2008 estate and tax reduction plan and the September 2015 letter, defendant satisfies its initial burden of demonstrating that the event giving rise to plaintiffs' claim of malpractice accrued on February 6, 2008, when it sent the plan to plaintiffs, and having demonstrated that plaintiffs commenced this action over eight years later, defendant also satisfies its initial burden of showing that the action is untimely. To the extent that the invoices and emails reflect the provision of estate-related services that are neither discrete nor severable, and sufficiently related to the 2008 matter to toll the statute, the statute was tolled until July 16, 2012, the date of defendant's last email to plaintiffs. Thus, plaintiffs had until July 15, 2015 to commence the action.

Moreover, absent any indication that Smulewicz was suffering from dementia on February 6, 2008, when the action accrued, or that her alleged condition rendered her incapable of protecting her own legal rights, CPLR 208 is inapplicable. (*Cf. Skamagas v Bd. of Educ. of W. Hempstead Union Free School Dist.*, 280 AD2d 596, 597-598 [2d Dept 2001] [affidavit of plaintiff's treating physician established that "since the time of the incident the plaintiff (had) been unable to manage his affairs or comprehend and protect his legal rights because of an overall inability to function in society"]; *Stackrow v New York Prop. Ins. Underwriter's Assn.*, 115 AD2d 883, 884-885 [3d Dept 1985] [affidavit of plaintiff's son raised issue of fact as to "plaintiff's sanity on the date of the fire" thereby tolling statute]).

Plaintiffs also articulate no basis for claiming that additional discovery could lead to evidence demonstrating a continuing relationship between defendant and Smulewicz past July 16, 2012, or evidence that Smulewicz's mental condition predated December 2012, and in any event, any pertinent documents or records would be in plaintiffs' custody. (*See Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 370-371 [1st Dept 2007] [issues plaintiff sought to elucidate through discovery were "either irrelevant or depend(ed) on circumstances within her own knowledge"]; *cf. Cantor v Levine*, 115 AD2d 453, 453 [2d Dept 1985] [dates defamatory letters were mailed and/or made solely within knowledge of moving party and thus further discovery warranted]).

While not raised by plaintiffs, the September 2015 letter supports an inference that Smulewicz's estate was not assessed the $830,000 tax until sometime after her death in April 2014, and thus, while the underlying malpractice occurred in February 2008, the damages were not discernable until the tax was assessed. Even if the estate was assessed immediately, in April

2014, having commenced the action within three years thereof, plaintiffs would have been timely in commencing it. (*See generally Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993] ["The Statute of Limitations does not run until there is a legal right to relief. Stated another way, accrual occurs when the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint."]; *see also LaBello v Albany Med. Ctr. Hosp.*, 85 NY2d 701, *706* [1995] [same]; *Bonded Waterproofing Serv., Inc. v Anderson-Bernard Agency, Inc.*, 86 AD3d 527, 530 [2d Dept 2011] [negligence claim against insurer did not accrue until plaintiff sustained damages, i.e., where plaintiff's request for coverage was rejected]; *McCoy v Feinman*, 291 AD2d 799, 803 [4th Dept 2002] [Hayes, J. & Scudder, J., dissenting], *affd* 99 NY2d 295 ["Plaintiff does not contend that the cause of action accrued on the date on which she discovered the malpractice, as suggested by the majority; rather, she contends only that it accrued when she was able to plead the elements of the cause of action."]). Nevertheless, as plaintiffs do not raise this issue, and in light of contrary authority (*see Ackerman v Price Waterhouse*, 84 NY2d 535, 541-542 [1994] [consistent with policy promoting "fairness to defendant and society's interest in adjudication of viable claims not subject to the vagaries of time and memory," malpractice claim accrued when plaintiff received and relied on tax advice, not when IRS assessed deficiency]), I adhere to the finding that the cause of action for malpractice accrued on February 6, 2008, and is thus, untimely.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion to dismiss the complaint as time-barred is granted, the complaint is dismissed in its entirety, and the clerk is directed to enter judgment in favor of

defendant.

ENTER:

Barbara Jaffe, JSC

DATED: March 15, 2017
New York, New York

HON. BARBARA JAFFE