SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

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RJR MECHANICAL INC.,

Plaintiff,

HAROLD J. RUVOLDT and HODGSON RUSS LLP,

Defendants.

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Index No.: 158764/2015

Mtn Seq. No. 001

DECISION AND ORDER

JEFFREY K. OING, J.:

Relief Sought

Defendants, Harold K. Ruvoldt ("Ruvoldt") and Hodgson Russ LLP ("Hodgson Russ") move, pursuant to CPLR 3211, to dismiss the complaint with prejudice based on the following: documentary evidence, statute of limitations, and failure to state a cause of action.

Background & Procedural History

The First Action

On March 14, 2014, plaintiff, RJR Mechanical Inc. ("RJR"), commenced an action against Ruvoldt and Hodgson Russ, Ruvoldt's law firm employer, asserting claims for 1) breach of fiduciary duty, 2) fraud, 3) professional malpractice, 4) breach of contract, and 5) unjust enrichment (RJR Mechanical Inc., v Harold J. Ruvoldt and Hodgson Russ LLP, Index No. 152320/2014 [Sup Ct, New York County] [the "first action"]). There, plaintiff alleged that Ruvoldt and Hodgson Russ represented it in a real property action involving property located at 59-15 55th Street, Maspeth,

NY (the "Maspeth Property") and that they failed to disclose an alleged favorable settlement offer having to do with that action. Plaintiff claimed that defendants' failure to advise of this alleged proposed settlement offer fell below professional standards of legal representation, and resulted in damages to plaintiff.

Defendants moved to dismiss the legal malpractice claim as time-barred, and the other asserted claims as duplicative of the legal malpractice claim. In a decision and order, rendered from the bench on February 26, 2015, this Court granted defendants' motion, finding that the three year statute of limitations for legal malpractice barred the claims, and that the other causes of action were duplicative of the legal malpractice claim (NYSCEF Doc. No. 29, pp. 38-39). This Court also held that plaintiff failed to set forth facts sufficient to toll the limitations period (Id.).

The Instant Action

On or about August 25, 2016, plaintiff filed a new complaint, which is the subject of this motion, wherein it alleges, again, claims for 1) legal malpractice, and 2) unjust enrichment stemming from defendants' failure to inform it of the alleged proposed settlement offer as well as failure to prepare for trials and hearings (the "second action"). As with the

allegations in the first action, in this action, plaintiff alleges that in 2002 it retained Ruvoldt to represent it, as the plaintiff, in a mortgage foreclosure action, which was originally commenced by the lender, but assumed by plaintiff after it had acquired the lender's interest in the mortgage for the Maspeth Property (Norwest Bank Minnesota, N.A. v E.M.V. Realty Corp., Index No. 20159/2002 [Sup Ct, Queens County] [the "Norwest Bank action"]) (Verified Complaint, ¶¶ 10-12). During the time he was plaintiff's counsel, Ruvoldt worked at various firms which, by virtue of Ruvoldt's employment, also became plaintiff's counsel of record. Ruvoldt remained counsel of record for plaintiff until 2011 when he ultimately withdrew from the case. At that time, Ruvoldt was employed by Hodgson Russ.

As in the first action, the complaint in the second action alleges that the Norwest Bank action resulted in a private auction in which the Maspeth Property was sold, with the proceeds distributed pursuant to a court order: $424,790.42 to plaintiff and $1,450,992.89 to EMV, the prior owner of the Maspeth Property (Verified Complaint, ¶¶ 18-20). The balance of the purchase price, $300,000, was held in escrow pending further order of the court (Id.). In the meantime, defendants filed a notice of appeal on plaintiff's behalf.

As before, plaintiff alleges that defendants failed to disclose to it a settlement offer, and that, had they made such disclosure, it would have accepted the settlement offer:

> 41. Prior to the Appellate Division's Order of April 10, 2012, counsel for EMV and Baron, Joseph Dineen, and counsel for the Plaintiff, Loanzon Sheikh LLC, attempted to engage in settlement discussions.
>
> 42. During those attempted settlement discussions, Mr. Dineen questioned why [plaintiff] did not agree to a prior settlement offer conveyed by Mr. Dineen on behalf of EMV and Baron through which EMV offered to transfer the [Maspeth Property] to [plaintiff] in full satisfaction of the mortgage lien and judgment that [plaintiff] then owned and that were existing as liens upon the [Maspeth Property].
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> 43. [Plaintiff] had no knowledge of any settlement offer from Mr. Dineen that included a transfer of the [Maspeth Property].
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> 47. Mr. Dineen advised that Defendant Ruvoldt declined the settlement offer and thereafter the Action continued.
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> 53. [Plaintiff's] ultimate goal in the Action was to acquire the [Maspeth Property]. This goal was known to Defendant Ruvoldt. [Plaintiff], had it known of the settlement offer that included a transfer of the [Maspeth Property] to it, would have accepted the same.

(Verified Complaint, ¶¶ 41-53).

Plaintiff's new allegations are as follows. Plaintiff alleges that not only did Ruvoldt represent it in the Norwest Bank action, but he also represented it in another action

commenced in 2004 against it and related to the Maspeth Property: EMV Realty Corp. v RJR Mechanical, Inc., Index No. 14778/2004 (Sup Ct, Queens County) (the "EMV Realty action"). Plaintiff alleges it retained Ruvoldt to represent it and one of its principals, Roy Leibowitz ("Leibowitz") in the EMV Realty action (Verified Complaint, ¶¶ 14-15). The EMV Realty action has laid dormant since 2005, save for a single 2011 substitution of counsel (Elman Affirm., Ex. C).

On February 11, 2011, Kevin J. Espinosa ("Espinosa"), an attorney at Hodgson Russ, sent an email to plaintiff's representative, Randy Karpman ("Karpman"), notifying plaintiff that an appeal for the Norwest Bank action needed to be perfected by March 23, 2011 (Verified Complaint, ¶ 22; Espinosa Affirm., Ex. A). In the email, Espinosa advised Karpman that if he did not hear from plaintiff by February 25, 2011 defendants would no longer be able to represent it on the appeal (Id.). In this email, Espinosa did not mention anything about withdrawing from the EMV Realty action or from other aspects of the Norwest Bank action (Verified Complaint, ¶ 22; Espinosa Affirm., Ex. A).

In a February 14, 2011 email, Espinosa again reiterated that Hodgson Russ would be unable to represent plaintiff in the appeal of the Norwest Bank action (Verified Complaint, ¶¶ 24-25; Espinosa Affirm., Ex. B). In a February 28, 2011 email, Espinosa

advised plaintiff that defendants planned on filing a motion to withdraw as counsel of record for the Norwest Bank appeal, and that plaintiff look for new counsel for its appeal (Verified Complaint, ¶ 26; Espinosa Affirm., Ex. C). On March 4, 2011, defendants filed their motion to withdraw as counsel of record and the motion was given a return date of March 16, 2011 (Espinosa Affirm., Ex. D).

Notwithstanding the motion to withdraw, plaintiff further alleges that defendants continued representing it and that on March 8, 2011 Espinosa informed Karpman of his continuing discussion with counsel concerning an extension of the time to appeal and settle the Norwest Bank action (Verified Complaint, ¶ 28). Plaintiff contends that this allegation is also supported by a March 7, 2011 letter sent from Espinosa to Karpman and Leibowitz stating that defendants would take steps to "protect" plaintiff's rights (Pl. Memo of Law in Opp., p. 6; Espinosa Affirm., Ex. E).

On March 9, 2011, Karpman informed Espinosa that it had retained new counsel, the law firm of Loanzon Sheikh LLC ("Loanzon Sheikh"), to handle the Norwest Bank action appeal (Id., ¶¶ 29-30; Espinosa Affirm., Ex. F). Plaintiff then alleges:

> [a]t this time, on or about March 9, 2011, RJR had no intention of replacing the defendants as their counsel

> in the balance of [the Norwest Bank action] or in [the EMV Realty action] and communicated the same to the defendants, that Loanzon Sheikh LLC would be handling the appeal in [the Norwest Bank action] only.

(Verified Complaint, ¶ 31).

Plaintiff next alleges that after it retained Loanzon Sheikh to represent it on its appeal in the Norwest Bank action it requested files from defendants so that it could give these files to its new counsel (Verified Complaint, ¶ 32). According to plaintiff, defendants demanded payment and sought to withhold the files necessary to prosecute the appeal. Plaintiff alleges that defendants did not communicate to it that they were not willing to represent plaintiff concerning the balance of the Norwest Bank action and the EMV Realty action (Id., ¶¶ 33-34). Plaintiff alleges that it never communicated to defendants that it was seeking to terminate its relationship with defendants, and that based on defendants' communications with counsel in the Norwest Bank action regarding settlement, plaintiff "continued in the good faith belief that defendants continued to represent [plaintiff]" (Id., ¶ 34).

Plaintiff alleges that on March, 15, 2011, due to defendants' allegedly uncooperative conduct and demand for payment, it formally substituted Loanzon Sheikh as new counsel to take over the entirety of the Norwest Bank action and the EMV Realty action, and communicated this decision to defendants (Id.,

¶ 35, 39). Plaintiff alleges that defendants remained counsel of record and continued to represent it in both the Norwest Bank action and the EMV Realty action through March 15, 2011 (Id., ¶ 38). Defendants seek to have this second action dismissed as time-barred.

Discussion

On a motion to dismiss pursuant to CPLR 3211(a)(7), the Court must liberally construe the complaint, accepting the facts alleged as true (Leon v Martinez, 84 NY2d 83, 87 [1994]). For a CPLR 3211(a)(1) dismissal based on documentary evidence, the Court is not required to accept factual allegations, or accord favorable inferences, where factual assertions are clearly contradicted by documentary evidence (Bishop v Maurer, 33 AD3d 497, 497 [1st Dept 2006]). As for a motion pursuant to CPLR 3211(a)(5), dismissal is warranted when the applicable statute of limitations has expired.

Statute of Limitations

Pursuant to CPLR 214(6), an action for legal malpractice must be commenced within three years from the date of accrual (Shumsky v Eisenstein, 96 NY2d 164, 166 [2001]). A legal malpractice claim accrues when relief can be obtained in court (McCoy v Feinman, 99 NY2d 295, 301 [2002]) and from the time the

actual injury stemming from the malpractice occurs, not when it is discovered (Id.).

Here, defendants argue that any alleged failure to prepare for trial would have had to occur before July 30, 2010, which is when the Supreme Court, Queens County, issued its distribution decision. Defendants argue that because more than three years elapsed between July 2010 and the filing of RJR's first action on March 14, 2014, the failure to prepare allegation is time-barred by the statute of limitations.

Similarly, defendants argue that their alleged failure to inform plaintiff of EMV's settlement offer to transfer the Maspeth Property is similarly time-barred, as the offer to sell must have occurred before the property was auctioned off to a buyer in July 2009. As a result, defendants contend that the failure to inform claim is also time-barred as more than four years elapsed between July 2009 and the filing of plaintiff's first action on March 14, 2014.

In response, plaintiff argues that the continuous representation doctrine tolls the limitations period and, as such, its claims are not time-barred.

Continuous Representation Doctrine

The continuous representation doctrine, which is the offspring of the continuous treatment doctrine, recognizes that a

layperson seeking legal assistance "[h]as 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" (Greene v Greene, 56 NY2d 86, 94 [1982]; Matter of Lawrence, 24 NY3d 320, 342-343 [2014]). "The continuous-representation doctrine tolls a statute of limitations where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim" (Zorn v Gilbert, 8 NY3d 933, 934 [2007] [internal quotations and citations omitted]). The two prerequisites needed to invoke a continuous representation toll are 1) a claim of misconduct regarding the manner in which the professional services were performed, and 2) the ongoing provision of professional services with respect to the contested matter or transaction (Matter of Lawrence, 24 NY3d at 342). The ongoing representation must be specifically related to the matter in which the attorney committed the alleged malpractice (Id.; Johnson v Proskauer Rose LLP, 129 AD3d 59, 68 [1st Dept 2015]). The continuous representation doctrine is inapplicable where "plaintiff's allegations establish defendant[s'] failures within a continuing professional relationship, not a course of representation as to the particular problems (conditions) that

gave rise to plaintiff's malpractice claims" (Id. at 341-342 [internal quotations and citations omitted]).

Here, plaintiff contends that prior to its decision to substitute defendants as counsel it was unaware that defendants no longer intended to represent it and that defendants' letters were not indicative of such. Rather, plaintiff asserts that defendants' letters established that they would continue to represent it in the settlement of the Norwest Bank action and the EMV Realty action.

In the alternative, plaintiff argues that the letters indicating withdrawal, as well as the motion to withdraw are of no consequence. It argues that because the earliest time that the motion could have been granted was March 16, 2011, if it were granted at all, plaintiff did not expect the settlement offer to expire until then. Plaintiff argues that based on defendants' communications, most notably Espinosa's March 7, 2011 letter to Karpman and Leibowitz, it was led to believe that defendants would continue representing it in the balance of the Norwest Bank action, namely the settlement of the case. The pertinent parts of the letter which plaintiff relies upon read:

> In addition, in speaking with Mr. Dineen, he intimated that the settlement offer of $100,000 above the trial court award is still on the table. [Hodgson Russ's] motion to withdraw has been served on all parties, as we were required to do. Opposing counsel has informed me that once [Hodgson Russ] is no longer involved in

> this case, the settlement offer is revoked and is no longer available to [plaintiff]. If you wish to accept the settlement offer, please notify me immediately.

(Espinosa Affirm., Ex. E).

Defendants, in turn, contend that there was no continuous representation as their intention to withdraw from the entirety of the Norwest Bank action was made clear, well in advance of March 15, 2011, the date that plaintiff's decided to officially substitute counsel of record. In addition, defendants assert that they only agreed to continue in settlement negotiations for the Norwest Bank action in order to protect the rights of a former client. Defendants argue that as of February 2011, the attorney-client relationship between Ruvoldt/Hudgson Russ and plaintiff had deteriorated irreparably, due to plaintiff's failure to communicate with or to pay Hodgson Russ. Defendants also argue that they had made their intentions clear that they wanted to withdraw, and that the very latest the parties' relationship could have existed was March 9, 2011, when plaintiff affirmatively terminated Hodgson Russ and retained new counsel to "handl[e] the appeal" (Espinosa Affirm., Ex. F.)

Here, plaintiff's arguments are unpersuasive, as defendants made their intention to withdraw as counsel clear. In February 2011, Hodgson Russ wrote to plaintiff twice and informed plaintiff that if it failed to respond by February 25, 2011,

Hodgson Russ would be forced to withdraw (Espinosa Affirm., Exs. A & B). On February 28, 2014, Hodgson Russ informed plaintiff in writing that: plaintiff's "[l]ack of cooperation ... has made it unreasonably difficult to effectively continue [...] representation"; that Hodgson Russ "strongly recommend[s] that [plaintiff] immediately seek new counsel to timely perfect [the] appeal"; and that Hodgson Russ would move "to withdraw as counsel of record in this matter" on March 4, 2011 (Id. Ex. C). Accordingly, on March 4, 2011, defendants moved to withdraw as counsel of record (Id., Ex. D).

As a result, by February 2011, and certainly by March 4, 2011, there was no longer any "mutual understanding" of the need for further representation between lawyer and client, and plaintiff could not have reasonably believed that any representation continued. Contrary to plaintiff's assertions, the documentary evidence of these letters indicates that defendants had no intention of continuing on as plaintiff's counsel.

Even if this Court were to accept that plaintiff intended for defendants to remain as counsel in the remainder of the Norwest Bank action and the EMV Realty Action, it is of no legal consequence. Defendants have submitted substantial documentary evidence, most importantly their motion to withdraw as counsel of

record, to indicate that they did not intend to represent plaintiff and that this was clearly conveyed to plaintiff.

To the extent plaintiff relies on the EMV Realty action to toll the statute of limitations, plaintiff's arguments are unavailing. Since 2011, when Loanzan Sheikh was substituted as counsel, there has been no activity in the EMV Realty action and, prior to that, since 2005, there had been no activity before the substitution. Contrary to plaintiff's assertion, it would not have been under the reasonable belief that defendants were actively representing it in the EMV Realty action.

Further, and more importantly, in order for a legal malpractice claim to be subject to the continuous representation toll, the ongoing representation must be directly linked to the alleged malpractice. Given that plaintiff has failed to plead with sufficiency that the EMV Realty action is related to the underlying allegations of legal malpractice, the continuous representation doctrine cannot be transferred to the second action based on the EMV Realty action.

Based on the foregoing, plaintiff's legal malpractice claim is time-barred.

Unjust Enrichment

Here, defendants argue that plaintiff's second cause of action for unjust enrichment is based on the same factual

allegations and seeks identical damages as plaintiff's allegations for legal malpractice. "CPLR 214(6) was enacted to prevent plaintiffs from circumventing the three-year statute of limitations for professional malpractice claims by characterizing a defendant's failure to meet professional standards as something else ... The key to determining whether a claim is duplicative of one for malpractice is discerning the essence of each claim" (Johnson, 129 AD3d at 69). In the context of professional relationships, when the claim essentially states that there was a failure to utilize reasonable care or where acts of omission or negligence are alleged, the statute of limitations shall be three years (Matter of R.M. Kliment & Frances Halsband, Architects (McKinsey & Co., Inc., 3 NY3d 538, 541-542 [2004]).

In opposition, plaintiff contends that its pleaded unjust enrichment cause of action is an independent claim as it alleges that: 1) defendants were enriched by plaintiff's payment of legal fees to them; 2) such payments of fees were at plaintiff's expense due to the subpar value of legal services rendered, and 3) defendant's were able to retain plaintiff's benefit in the form of legal fees which is against equity and good conscience.

Plaintiff's specific unjust enrichment claims are as follows:

76. Plaintiff repeats the allegations contained within Paragraphs 1-73 of the Complaint as fully set forth herein.

77. As a result of the Defendants actions and omissions, the Defendants were enriched through the continued payment of fees.

78. The Defendants enrichment occurred through circumstances that were unjust, namely, Defendants failure to advise the Plaintiff of a settlement offer and failure to adequately prepare for trial.

79. As a direct and proximate result of the Defendants unjust conduct, the Plaintiff has suffered damages.

80. As a result of the Defendants' unjust conduct, the Plaintiff has suffered damages equal to the fair market value of the Premises, a sum no less than $2.5 million dollars, together with all legal fees paid to the Defendants and/or incurred as a result of services provided by the Defendants, all together with interest, and the reasonable attorneys' fees, costs and disbursements of this action.

(Verified Complaint, ¶¶ 76-80).

Ultimately, all of these allegations are duplicative of the legal malpractice cause of action in that plaintiff seeks damages stemming from defendants' allegedly below standard professional representation. Given that the unjust enrichment claim is based on the same factual allegations and seeks the same damages, it must be dismissed as duplicative. In any event, plaintiff's payment of legal fees to defendants is not sufficient to make out a claim for unjust enrichment.

Accordingly, it is

ORDERED that defendants' motion to dismiss plaintiff's complaint is hereby granted, and it is hereby dismissed with prejudice; and it is further

ORDERED that the complaint is dismissed in its entirety, with costs and disbursements to defendants as taxed by the Clerk of the Court, and the Clerk is respectfully directed to enter judgment accordingly in favor of said defendants.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 6/8/17

HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING
J.S.C.