

<b>Gaydos v Grossman</b>
2006 NY Slip Op 30755(U)
March 14, 2006
Supreme Court, New York County
Docket Number: 104660/05
Judge: Marilyn Shafer
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 36

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ANN M. GAYDOS and ELIZABETH O'CONNELL,

Plaintiffs,

-against-

Index No.  
104660/05

STEPHEN A. GROSSMAN, ESQ. and STEPHEN A.  
GROSSMAN & ASSOCIATES (formerly known as  
Grossman & Birnbaum),

Defendants.

DECISION

**FILED**  
JUN 06 2006  
COUNTY CLERK'S OFFICE  
NEW YORK

-----X  
SHAFFER, J.:

This motion seeks dismissal of the plaintiffs' cause of action against the defendant for negligence and legal malpractice, pursuant to the provisions of CPLR 3211 (a) (1), (3) and (7); i.e, respectively, on grounds of documentary evidence, statute of limitation and failure to state a cause of action.

According to the complaint, verified April 4, 2005, and annexed to the moving papers as Exhibit "A", defendant Grossman was engaged by the plaintiffs to commence an action for defective workmanship and personal injuries against various defendants for negligence in the construction of a residence purchased by plaintiffs. Grossman did indeed commence suit against these various construction defendants, including Fred Muhl- bauer d/b/a/Brookside Construction, New York Board of Fire Underwriters, Thomas

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Horn, Glenn S. Ayasse, and Advantage Electric Contractors, Inc. (hereafter referred to as “construction defendants”) by service of summonses and complaints upon them at various times, which is not disputed. Issue was joined by service of an answer on April 3, 1998.

As is further alleged in the complaint, a preliminary conference was held on October 19, 1998, and a stipulation and order was entered into between the parties, pursuant to which plaintiffs were to provide the construction defendants’ respective counsel with bills of particulars within thirty days thereof. Grossman failed to comply, which occasioned motions by counsel for all construction defendants under CPLR 3126 (3), demanding preclusion of any bills of particulars by plaintiffs. This motion was disposed of by stipulation between the parties providing for a new discovery schedule wherein the penalty for the plaintiffs’ non-compliance could be dismissal without further notice to plaintiffs.

On or about March 25, 1999, according to the complaint, as aforesaid, a bill of particulars was served on the construction defendants. Thereafter, on various occasions between December 5, 2001 and December 17, 2001, Grossman was served with a ninety-day notice, pursuant to CPLR 3216 (b) (3), by each of the construction defendants, pursuant to which the plaintiffs’ case was made vulnerable to a motion to dismiss for want of prosecution in the absence of the timely filing of a note of issue. Although a conference was held on February 7, 2002, at which a stipulation and order was concluded

establishing another discovery schedule, such discovery was never completed. Grossman neither filed a note of issue nor moved to vacate the ninety-day notices under CPLR 3216. The construction defendants made their anticipated motions to dismiss the plaintiffs' underlying cause of action for want of prosecution on August 27, 2002, and an order granting this relief was signed on November 26, 2002.

Clearly, it is the plaintiffs' contention that Grossman's negligent delays in completing discovery and responding to construction defendants' notices and applications caused the dismissal of the case and the loss of any possible monetary recovery. It is well-settled that a legal malpractice claim must be supported by "specific factual allegations establishing that but for counsel's deficient representation there would have been a more favorable outcome to the underlying matter (citation omitted)." (*Dweck Law Firm, LLP v Mann*, 283 AD2d 292, 293 [1<sup>st</sup> Dept 2001].)

It appears, however, in the case at bar, that the documentary evidence submitted by the defendant Grossman is dispositive in demonstrating that the latter's acts of negligence—however culpable—were not the proximate cause of the unfavorable outcome in the underlying matter, at least with regard to the construction defendants.

Defendant Grossman has submitted documentary evidence in support of the instant motion in the form of the decision of the Supreme Court of the State of New York, Appellate Division, Second Department, in the case of *Gaydos v Muhlbauer*, the underlying cause of action herein, 10 AD3rd 408, wherein the court specifically holds in

affirming the dismissal of the case as follows:

....the burden is upon the plaintiff to establish both a reasonable excuse for the delay in responding to the 90 day demand as well as the existence of a meritorious action....In the instant case, the plaintiffs failed to sustain that burden by showing...that the action was meritorious.(*id* at 409).

Specifically, the plaintiffs' attorney, who prepared the answering papers to the motion to dismiss in the underlying action, failed to submit an affidavit of merit by an expert witness to establish the proximate cause between the plaintiff Gaydos' alleged injury and the defective electrical work on the plaintiffs' house or an affidavit of merit by an expert to establish defective construction in the first place (*id*). The attorney who prepared these papers was not defendant Grossman, who had long since been discharged. Thus, the documentary evidence submitted demonstrates that an intervening act, independent of Grossman's neglect, caused the unfavorable outcome to plaintiffs' underlying case, and this evidence is sufficient to be dispositive on the issue as required by law (CPLR 3211 [a] [1]; *Heaney v Purdy*, 29 NY2d 157, 158-9 [1971]).

Accordingly, the motion is granted to the extent that it seeks dismissal of the complaint on a defense based upon documentary evidence against Grossman for malpractice with respect to the construction defendants in the underlying cause of action.

The remainder of the complaint in the underlying cause of action seeks damages against Grossman for legal malpractice in that Grossman never filed or served a complaint in a legal malpractice action against William H. Duggan Jr. Esq. and Edwards and

Duggan P. C., which, as alleged in the complaint, he had been retained by plaintiffs to do. Duggan had represented plaintiffs in the transaction in which they had purchased the house, which is the subject of their claims in the underlying action. Amongst other things, Duggan had advised plaintiffs to execute releases from liability against the construction defendants they subsequently sought to hold responsible for their damages.

The remaining branch of Grossman's instant motion seeks dismissal under CPLR 3211 (a) (1) (3) and (7) on the grounds that the documentary evidence demonstrates that Grossman was never retained to represent plaintiffs in an action against Mr. Duggan, and, in any event, a suit against Grossman on the facts alleged by plaintiffs is barred by the statute of limitations.

As alleged by Grossman's counsel, Peter R. Chatzinoff, in his affirmation of May 23, 2005, Grossman filed and served a summons against Duggan in plaintiffs' names *pro se* (at p.11, paragraph 40). Duggan's counsel demanded a complaint of the plaintiffs in their *pro se* capacity, which was ignored.*(id.)* Duggan's counsel responded with a motion to dismiss for failure to serve a complaint, pursuant to CPLR 3012 (b)*(id.)*. This motion was granted by order of the Supreme Court of Suffolk County on May 5, 1998 (Chatzinoff affirmation, Exhibit "L").

The affidavit of Elizabeth O'Connell of August 5, 2005, submitted in opposition, raises sufficient disputed issues of fact, however, as to whether or not the plaintiffs, as laypersons, nonetheless had a right to rely on Grossman taking all necessary steps to represent them in a claim against Duggan. Moreover, Exhibit "A", a letter by Grossman

to Marian C. Rice, Esq., annexed to the affirmation in opposition of Mary Elizabeth Burns of August 12, 2005, demonstrates that Grossman himself considered the plaintiffs' claims against Duggan and the construction defendants to be very much intertwined.

Therefore, according the plaintiffs the benefit of every possible favorable inference and accepting the facts as alleged in the complaint as true, a cause of action is sufficiently stated to survive Grossman's motion under CPLR 3211(a) (7) (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Moreover, the documentary evidence as to this branch of Grossman's motion is insufficient to resolve all of the factual issues as a matter of law, and "definitively dispose of the claim", as would be required for dismissal under CPLR 3211 (a) (1) (*Demas v 325 West End Avenue Corporation*, 127 AD2d 476, 477 [1st Dept 1987]).

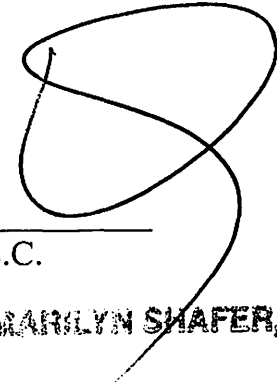
Finally, Grossman contends that any cause of action the plaintiffs might have had against him arose on the day that the underlying cause of action against Duggan was dismissed on May 5, 1998, and the period of limitation ended on May 5, 2001, pursuant to CPLR 214 (b). That the complaint in the instant matter was not served until April 2005 means, according to Grossman, that the plaintiffs' claim against Dagan is four years barred. However, Grossman continued to represent the plaintiffs in their underlying cause of action against the construction defendants until his discharge in June, 2002. The aforesaid affidavit of Elizabeth O'Connell, and the said letter from Grossman to Marian C. Rice, are sufficient to demonstrate that the plaintiff had reason to consider their claims against Mr. Duggan to be legally and strategically combined with their claims against the con-

struction defendants and reason to believe that Mr. Grossman continued to represent them in that those combined matters until his discharge. Thus the doctrine of continuous representation would toll the statute of limitations against the plaintiffs in the instant matter as to their malpractice claim against Grossman in the underlying cause of action against Duggan (Shumsky v Eisenstein, 96 NY2d 164, 167-8 [2001]).

Accordingly, this motion to dismiss the complaint is granted as to so much of the complaint as sets forth a claim of legal malpractice against the defendants for the underlying cause of action against the construction defendants and is denied as to so much of the complaint as sets forth a claim of legal malpractice against defendants for the underlying cause of action against William Duggan.

Settle order.

Dated: 3/14/06

Enter:   
J. S.C.

HON. MARILYN SHAFER, JSC

**FILED**  
JUN 06 2006  
COUNTY CLERK'S OFFICE  
NEW YORK