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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHIRLEY WERNER KORNREICH PART 54

Index Number : 100328/2008
DOUCET, SUZANNE
VS.
FISCHBARG, GABRIEL
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 7/3/08
MOTION SEQ. NO. 1
MOTION CAL. NO. _____

this motion to/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2,3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED
JUL 16 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/10/08

HON. SHIRLEY WERNER KORNREICH J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

---------- X

GABRIEL FISCHBARG,

Plaintiff,

-against-

SUZANNE DOUCET a/k/a SUZANNE BELL-DOUCET and ONLY NEW AGE MUSIC, INC.,

Defendants.

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SUZANNE DOUCET a/k/a SUZANNE BELL-DOUCET and ONLY NEW AGE MUSIC, INC.,

Plaintiffs,

-against-

GABRIEL FISCHBARG,

Defendant.

---------- X

Index No.: 101427/05

DECISION
and ORDER

Index No.: 100328/08

KORNREICH, SHIRLEY WERNER, J.:

These actions are consolidated for decision only.

The actions arise out of a legal fee dispute for services pro-se plaintiff/defendant Gabriel Fischbarg, Esq. provided Only New Age Music Corp. (ONAM) and Suzanne Doucet in an action before the United States District Court for the District of Oregon entitled *Allegro Corp v. Only New Age Music Corp. and Suzanne Doucet* (the Oregon Action). In action No. 101427/05 (the Fischbarg Action), Mr. Fischbarg now moves for summary judgment pursuant to CPLR § 3212, asking the court to award him $57,906.38 in legal fees, plus interest, on the ground that this amounts to the *quantum merit* value of his services rendered in the Oregon Action. Defendants

oppose and cross-move: for summary judgment dismissing the complaint on the ground that, *inter alia*, plaintiff's alleged violation of DR 2-106 D (22 NYCRR § 1200.11) make it impossible for him to recover in *quantum merit*.; or in the event the complaint is not dismissed, for an order pursuant to CPLR § 3025 allowing defendants to amend their answer to add a cross-claim for negligent misrepresentation against plaintiff.

In action No. 100328/08 (the Doucet Action), Mr. Fischbarg moves to dismiss the complaint filed against him on the ground that it is time barred pursuant to the three year statute of limitations period applicable to a claim for legal malpractice. Ms. Doucet and ONAM oppose, arguing that continuous representation tolled the time limitation.

I. Background

A. Affirmation of Gabriel Fischbarg (the Fischbarg Action)

Plaintiff avers that in January 2001, defendants contacted him "out of the blue" via telephone and requested his representation. Mr. Fischbarg states defendants sent him a letter (the February 23, 2001 Letter) to further solicit his services. This letter stated, *inter alia*:

> Thank you for offering to help us with our legal efforts concerning Allegro Corporation. Our understanding is that you offered to take this case on a contingency.
>
> Our understanding is also, that we only have to pay a deposit of $2,000 against expenses, if you go forward with this case after reviewing our material. After settlement in or outside of court, the moneys received from Allegro will be split 1/3 (you) 2/3 us, after the deduction of expenses incurred by both parties. Expenses will be reimbursed before split.
>
> Please find the enclosed information...
>
> I hope this letter and the enclosures will give you a clear picture of the situation and answer all of your questions. Please fell free to contact me or Chuck for any further explanations or backup information.
>
> Thank you again for your time and consideration to look at this complex issue.

Affirmation of Gabriel Fischbarg, Exhibit C. Plaintiff avers that following the February 23, 2001 Letter, he entered into an oral retainer agreement with defendants to represent them in the Oregon Action. Affirmation of Gabriel Fischbarg, p. 3. He claims that the terms of this "hybrid retainer agreement" were that plaintiff would receive a one-third contingency fee deducted from any recovery and a $2,000 advancement in legal fees that would be deducted from any recovery and that defendants would be responsible for any incurred expenses. *Id.* at 4. Plaintiff then states that in 2002, he withdrew from representing defendants in the Oregon Action due to a dispute over the $2,000 advance. *Id.* at 3. Mr. Fischbarg argues that he is entitled to the *quantum merit* value of his legal services due to a decision rendered by United States Magistrate Judge Dennis James Hubel in the Oregon Action on July 30, 2002, in which Judge Hubel held that the parties entered into a new fee agreement on January 15, 2002. *Id.* at 4.

B. Suzanne Doucet Affidavit

Defendant Suzanne Doucet (Ms. Doucet) avers the following. She is the president of defendant ONAM, a California corporation in the music production, publication and distribution business. Prior to 2001, ONAM entered into several agreements with non-party Allegro Corp. (Allegro), an Oregon corporation, for the purpose of licensing some of ONAM's recorded music. In or around February 23, 2001, ONAM discovered Allegro was in breach of its contractual obligations and thereby liable to ONAM for, *inter alia*, copyright infringement. Defendants subsequently sought counsel in California who would file an action for it against Allegro. Due to ONAM's strained financial status, it needed an attorney who would take its case on a contingency basis. Not finding counsel to undertake its case on such terms, the husband of a California music producer recommended plaintiff to Ms. Doucet, as someone who would agree

to represent ONAM for a contingency fee.

In or around February 2001, Ms. Doucet avers she had a telephone conversation with Mr. Fischbarg and non-party Chuck Plaisance to discuss the specifics of her case. During this conversation, plaintiff allegedly stated that he was an experienced trial attorney for the Topani Law Firm with knowledge in the field of copyright law. Ms. Doucet further avers she made it clear that Mr. Fischbarg would be required to work on her case for a contingency fee. Plaintiff allegedly understood this requirement and asked Ms. Doucet to forward him some documentation so he could review her case. According to Ms. Doucet, plaintiff proposed that ONAM pay him $2,000 up front to cover his expenses and that he would represent ONAM for a one-third contingency fee.

Ms. Doucet then forwarded Mr. Fischbarg the documents he requested along with the February 23 Letter confirming their agreement. Affidavit of Suzanne Doucet, pp. 7-8, para. 16. Plaintiff never sent defendants any document confirming this contingency arrangement or outlining the terms of his representation.

Nonetheless, Mr. Fischbarg subsequently began to represent defendants in the Oregon Action. Ms. Doucet avers that plaintiff's representation was negligent and did not adequately meet the standards of the legal profession. She first asserts Mr. Fischbarg's advice caused Allegro to file suit against her. Ms. Doucet claims plaintiff advised her to write a letter to non-party Ciram Corp. (Ciram). The purpose of this letter was to alert Ciram that its continued production of compact discs for Allegro was in violation of ONAM's agreement with Allegro. Acting on plaintiff's advice, Ms. Doucet wrote this letter on May 10, 2001. According to Ms. Doucet, Allegro found out about this letter and, therefore, commenced the Oregon Action. Thus,

as opposed to being able to file suit against Allegro in California, she was forced to defend herself against Allegro in Oregon. In addition, she claims the answer filed by Mr. Fischbarg in the Oregon Action was deficient since he failed to allege the existence of willful copyright infringement claims for over fifty master recordings owned by ONAM. Ms. Doucet avers that properly pleading each counterclaim for willful copyright infringement would have subject Allegro to statutory damages of up to $150,000 per violation.

Ms. Doucet also claims Mr. Fischbarg filed declarations and signed her name in the Oregon Action without her permission. For example, Mr. Fischbarg submitted final opposition to Allegro's motion for summary judgement on October 29, 2001, bearing Ms. Doucet's signature. Ms. Doucet avers she did not sign the document, never had the opportunity to review it and never gave Mr. Fischbarg the authority to sign her name without permission. She additionally avers plaintiff instructed her to lie at her deposition. Ms. Doucet asserts that approximately five minutes before her deposition was set to begin, Mr. Fischbarg told her that in the event she is asked a question regarding the May 10, 2001 letter to Ciram, she "should deny that it was prepared by him and sent at his suggestion." Affidavit of Suzanne Doucet, p. 15.

Moreover, Ms. Doucet also alleges that Mr. Fischbarg failed to communicate with her regarding expenses, improperly asserted a lien against her file, and improperly withdrew from the case. In early 2002, a dispute arose over the parties interpretation of the $2,000 Ms. Doucet advanced plaintiff. Attached to her affidavit, Ms. Doucet offers a series of emails between the parties detailing the discussion surrounding this disagreement. On January 6, 2002, plaintiff sent Ms. Doucet an email asking her to forward him $80 to cover a subpoena service fee, $1,600 for deposition transcripts, $275 for a court reporter, and $2,000 for a Portland attorney. Affidavit

Suzanne Doucet at Exhibit P. Ms. Doucet responded in two separate emails on January 7 and January 8, 2002, expressing confusion over this request since, pursuant to their agreement, she had already forwarded him $2,000 for expenses, and any further expenses exceeding this amount she believed should be deducted at the end of the case. *Id.* at Exhibits Q and T. Plaintiff responded as follows:

> The $2,000 you sent me was for my legal fees, not for expenses. *My legal fees are 1/3rd of any money collected.* The $2,000 was an advance on my legal fees for which you will get a credit if you get money in the litigation (emphasis added).

Id. at Exhibit U. Ms. Doucet responded on January 8, 2002, stating that it was her recollection that all expenses incurred after her $2,000 advance were to be deducted from any payout received at the end of the case. *Id.* at Exhibit R. She further recommended the parties compile a list to keep track of all incurred expenses to date and also so they could predict who would be responsible for any future costs that might arise. *Id.*

On January 10, 2002, plaintiff sent Ms. Doucet an email reiterating his position regarding the parties fee and expense arrangement. This email stated, *inter alia*:

> The arrangement was that my legal fee is 1/3 of the recovery and expenses come out of 2/3 your part. If you want to change the arrangement by having expenses come out first, and then splitting the rest 1/3 and 2/3, that is fine, BUT ONLY FOR EXPENSES INCURRED [FROM] NOW ON AND ONLY FOR LITIGATION EXPENSES THAT I APPROVE...
>
> My 1/3 legal fee will be reduced by the $2,000 you already paid me.

Id. Mr. Fischbarg sent Ms. Doucet a follow up email on January 13, 2002, telling her that she needed to pay the Portland attorney $2,000 as well as $275 for the court reporter. *Id.* Ms. Doucet responded that same day accusing Mr. Fischbarg of altering their agreement. *Id.* She also expressed concern over not receiving any invoices regarding the Portland attorney and court

reporter. *Id.* Ms. Doucet sent plaintiff an email on January 14, 2002, in which she stated her intention to fax him a copy of the February 23 Letter which "states clearly that the $2,000 are an advance against expenses. This letter confirms our agreement, you have never sent me anything to the contrary. Your demands and requests are not in accord with this agreement." *Id.* at Exhibit V. Plaintiff responded that same day by stating that Ms. Doucet was "wrong. The $2,000 is not an advance against expenses. The $2,000 is for my legal fees." *Id.* at Exhibit W. Ms. Doucet responded on January 14, 2002, by reaffirming her position that the $2,000 was for expenses, not legal fees. *See Id.* at Exhibit X.

> Mr. Fischbarg responded in two separate emails on January 15, 2002, as follows:
>
> I am not wrong. I know we spoke after that letter in February and corrected the language in it. Since we have [a] dispute, *I can not represent you anymore*. Please hire another lawyer to continue this case.
>
> As I previously emailed you, I have spent $100.00 as the fee to admit me as your lawyer in Oregon, approximately $80.00 for Federal Express charges and approximately $120.00 for buying various Allegro CDs. Since you are hiring another lawyer to replace me, *I will get my expenses back at the end of the case together with a fair legal fee for the work I have done so far*. Please let me know when you have found a new lawyer (emphasis added).

Id. at Exhibit Y. Ms. Doucet accepted plaintiff's resignation via email that same day and asked him to forward all of his materials to an attorney named Mike Cohen of Schwabe, Williamson & Wyatt in Portland, Oregon who would be taking over the case. *Id.* at Exhibit Z. She also asked plaintiff to deduct any out of pocket expenses he incurred from the $2,000 advancement he received back in 2001. *Id.* Mr. Fischbarg, responded:

> You don't understand. *I have placed a lien on the files* and am entitled to get paid for my reasonable attorneys fees for the work I have performed to date plus my expenses before you can substitute another attorney for me. I will not wait until the end of the case. You can get the files in the case and substitute another attorney only when you pay me my legal fees and expenses (emphasis added).

Id. at Exhibit AA. On February 18, 2002, Mr. Fischbarg sent the following email to Ms. Doucet and her new counsel in which he noted, *inter alia*:

> After talking to you, Chuck and Michael Cohen on Friday, I wanted to make sure you understood what will happen in the future if you don't want me continue working on the case.
>
> First, I will immediately get a judgement issued by the Portland judge against you and [ONAM] for the value of my legal fees to date which are at least $60,000. Then, if you do not pay me the judgment, I will enter that judgment in California and proceed with seizing your assets and the assets of [ONAM]. In addition, any proceeds from this lawsuit will be used to pay me first.
>
> My judgment against you will show up on your credit report and you will be unable to finance the purchase of many things including a car, a house, a refrigerator, etc. You will also not be able to get a new credit card or a cell phone...
>
> I believe that the smart thing for us to do is to set aside the $2,000 dispute and allow me to continue representing you and [ONAM]. If we get money from Allegro at the end of the case, the $2,000 dispute can be resolved at that stage.

Id. at Exhibit BB.

C. Decision by United States Magistrate Judge Dennis James Hubel

On March 18, 2002, defendants filed a motion in the Oregon Action to compel plaintiff to turn over the case file to their new counsel. Mr. Fischbarg cross-moved for the immediate payment of his legal fees arguing that he had placed a lien on defendants file and was thus entitled to a payment of $57, 906 for his services. In a decision dated July 30, 2002, Hon. Dennis James Hubel granted defendants motion to compel and denied Mr. Fischbarg's motion for legal fees. Fischbarg Affidavit, Exhibit D at p. 12. In making this decision, Judge Hubel held:

> There is no written fee agreement entered into in this case...The terms Ms. Bell-Doucet recited in [the February 23, 2001 Letter] are consistent with those of a standard contingent fee agreement. There is no evidence that Mr. Fischbarg disagreed with anything in this letter verbally or in writing.
>
> The January 15 e-mails constituted an offer by Mr. Fischbarg to which Ms. Doucet

> accepted, instructing him to deduct his current expenses from the $2,000 advance. Mr. Fischbarg's subsequent response was a unilateral attempt to change the terms of the offer he had previously made Ms. Bell-Doucet and which she had accepted. Mr. Fischbarg's statement that he was placing a lien on the files contradicted the agreement he and Ms. Bell-Doucet had just made.
>
> Because Mr. Fischbarg made an offer in writing, which Ms. Bell-Doucet accepted, to be paid his expenses and a fair legal fee at the conclusion of the case, he should be held to that agreement. The agreement was made before Mr. Fischbarg asserted a lien and before he demanded the sum of $57,906. Mr. Fischbarg's attempts to assert a lien and demand a liquidated amount were in breach of the agreement he and Ms. Bell-Doucet had made...
>
> Even without the January 15, 2002 written agreement, Mr. Fischbarg's entitlement to $250 an hour times the number of hours expanded on this case is problematic. Under New York law, an attorney discharged without cause is only entitled to recover on a quantum merit basis...
>
> The fact that Mr. Fischbarg has been accused of misconduct imposes an additional obstacle to his demand of an immediate payment of a liquidated amount. Under New York law, when an attorney is discharged with sufficient cause, the attorney has no right to recovery of fees...
>
> Mr. Fischbarg cannot demonstrate that he is entitled to the immediate payment of $57,906.05 in attorney fees.

Id. at pp 5, 7-8, 10-11.

D. Affidavit of Neville Johnson

Following Mr. Fischbarg's departure, the law firm of Johnson and Rishwan LLP (JR) took over as counsel for defendants in the Oregon Action. Neville Johnson, Esq. who was JR's lead trial counsel in the Oregon Action, submits an affidavit in support of defendants motion. Mr. Johnson states that his firm had to conduct entirely new depositions of Allegro employees Vincent and Joe Micaleff due to Mr. Fischbarg's failure to adequately question them. He further asserts that plaintiff did not do his due diligence in discovery by not: hiring any experts, conducting any research regarding damages, obtaining Allegro's sales records (which Mr. Johnson claims are vital in a case for copyright infringement), or identifying any witnesses on

defendants' behalf.

In addition, Mr. Johnson claims plaintiff's refusal to cooperate with JR after his resignation hampered their ability to adequately represent defendants in the Oregon Action. He states that Mr. Fischbarg failed to identify a clear conflict of interest that existed because the firm representing Allegro had drafted the contract which was the subject of the Oregon Action. JR's identification of this conflict resulted in Allegro having to change counsel. Allegro's predecessor law firm ended up contributing money towards the eventual settlement of the case. According to Mr. Johnson, had Mr. Fischbarg identified this conflict right away, it is possible that an early settlement of the case could have been reached at a substantial savings in legal fees to defendants.

According to Mr. Johnson, plaintiff's most egregious error was his failure to adequately plead claims for willful copyright infringement in the Oregon Action. This failure deprived defendants of their ability to recover the substantial amount of attorneys fees to which they were entitled under the Copyright Act.

E. Reply Affirmation of Gabriel Fischbarg

Mr. Fischbarg contends that he could not file a lawsuit when defendants first contacted him in 2001 because ONAM had not applied for all of the copyright registrations it needed to file such a lawsuit. Specifically, as of February 2001, Mr. Fischbarg states defendants did not have copyright registration for all of the musical works subject to its dispute with Allegro. Defendants filed some of these registrations in March 2001, but did not have enough money to file all of them. Allegro thus filed suit before all of these registrations were complete. Defendants continued to file copyright registrations after the commencement of the Oregon Action. In fact,

Allegro pled ONAM's failure to register all copyrights as its sixth affirmative defense in response to defendants' counter claims. Reply Affidavit of Gabriel Fischbarg Exhibit P.

Plaintiff asserts that he adequately pled the copyright infringement claims in defendants answer. Mr. Fischbarg states that based upon fundamental principles of copyright law, a determination of whether an infringement is willful or non-willful is a question of fact and the amount of damages to be assessed is within the court's discretion. He further avers that since the allowable statutory range for damages in a claim for copyright infringement ranges from $0 up to $150,000, defendants did not want to risk the court making a finding of non-willful infringement and awarding them minimal damages. Therefore, he decided to pursue defendants claims under a theory of breach of contract.

Mr. Fischbarg also avers that he had authority to sign court documents on Ms. Doucet's behalf. He argues that Oregon law permits an attorney to sign on behalf of a client without the clients permission. Regarding the opposition to Allegro's motion for summary judgement on October 29, 2001, bearing Ms. Doucet's signature, Mr. Fischbarg avers he went over the document with her for two hours on October 28, 2001. He argues Ms. Doucet consented to his signing the document on her behalf so the papers could be timely submitted the next day. Mr. Fischbarg also asserts he never instructed Ms. Doucet to lie during her deposition.

Regarding Mr. Johnson's affidavit, plaintiff asserts that he conducted a great deal of discovery prior to his withdrawal. Plaintiff claims he accumulated approximately 2,000 pages of sales records from Allegro and notes that since discovery was still ongoing when he withdrew, any criticism by Mr. Johnson is without merit. In addition, Mr. Fischbarg notes that Mr. Johnson's claims regarding his failure to identify the conflict of interest that existed is based

upon pure speculation.

II. Conclusions of Law

A. Summary Judgment Motions in The Fischbarg Action

It is well established that summary judgment may be granted only when it is clear that no triable issues of fact exist. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *Friends of Animals, Inc. v. Associated Fur Mfts., Inc.*, 46 N.Y.2d 1065, 1067 (1979). A failure to make a *prima facie* showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez, supra*, 68 N.Y.2d at 324; *Zuckerman, supra*, 49 N.Y.2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in a light most favorable to the party opposing the motion. *Martin v. Briggs*, 235 A.D.2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgement motion. *Zuckerman, supra*, 49 N.Y.2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978).

In his July 20, 2002 decision, Judge Hubel held that the parties entered into a new contract on January 15, 2002, replacing their previous contingent fee agreement. Judge Hubel

found that Ms. Doucet had accepted Fishbarg's January 15 offer of a new agreement. Both offer and acceptance were in writing. This court is bound by Judge Hubel's findings. *Ryan v. New York Telephone Co.*, 62 NY2d 494, 500 (collateral estoppel allows determination of issue of fact or law raised in subsequent action by reference to previous judgment on which different cause of action where same issue was raised and decided).

Indeed, New York permits a client to ratify a new fee agreement in the course of representation. *King v. Fox*, 7 NY3d 181, 190-193 (2006). Such ratification "may occur at any time, so long as the client has full knowledge of the relevant facts (including the terms of the agreement and the choice to disavow it) and has acquiesced." *Id.* at 191. Thus, "[w]here a fully informed client with equal bargaining power knowingly and voluntarily affirms an existing fee arrangement that might otherwise be considered voidable as unconscionable, ratification can occur so long as the client has both a full understanding of the facts that made the agreement voidable and knowledge of his or her rights as a client." *Id.* at 193. At the time Ms. Doucet ratified the new agreement, she was represented by other counsel.

Further, a client in New York may terminate a contingency fee agreement at any time, leaving the lawyer with a cause of action for *quantum meruit*. *Id.* at 192. Finally, the fact that the fee agreement was not a formal written retainer created by Mr. Fischbarg does not preclude him from attempting to collect his fee. *Mintz & Gold, LLP v. Hart*, 48 AD3d 526 (2d Dept 2008) (absence of written letter of engagement or retainer agreement does not preclude plaintiff law firm from collecting legal fees); *Chase v. Bowen*, 49 AD3d 1350 (4th Dept 2008) (plaintiff entitled to trial to establish *quantum merit* value of services despite failure to provide defendant with letter of engagement or written retainer); *Nicoll & Davis LLP v. Ainetchi*, 2008 NY Slip Op 5763 (1st Dept 2008) (plaintiff law firm's failure to comply with retainer agreement rules does not preclude it from suing to recover legal fees for services provided).

Judge Hubel, however, left open the question of whether Fishbarg was guilty of misconduct, thereby vitiating his right to any fees. Defendants raise allegations of both misconduct and ineffective representation. Mr. Fischbarg contests these allegations. The allegations of malpractice are hereafter dealt with by the court. In addition, Mr. Fishbarg's effectiveness are part and parcel of any assessment of his quantum meruit fee.[1] But issues of misconduct remain. Consequently, Mr. Fishbarg's motion for summary judgment is denied.

B. Malpractice: Motion to Amend in the Fischbarg Action and Motion for Summary Judgment in The Doucet Action

Defendants both in their motion to amend their verified answer in the Fischbarg Action and in the Doucet Action raise a cause of action for attorney malpractice. Mr. Fishbarg argues that this cause of action is barred by the statute of limitations.

Mr. Fischbarg commenced his action for legal fees on or around January 31, 2005. Thereafter, defendants made a motion to dismiss for lack of personal jurisdiction. The motion was denied on October 24, 2005. Defendants subsequently timely served their verified answer on December 15, 2005, and asserted as their second affirmative defense that Mr. Fischbarg's representation in the Oregon Action was negligent. In their verified answer, defendants asked the court "for the right to assert a Counterclaim against plaintiff upon the facts alleged in the Second Affirmative Defense...for damages...in the event that it is ultimately concluded that the Court has jurisdiction over the persons of defendants."[2] The Doucet Action alleging legal malpractice

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[1] *Quantum merit* is measured by the fair and reasonable value of the services rendered. *Matter of Cooperman*, 83 NY2d 865 (1994). Factors to be considered in assessing the reasonable value of services rendered include the: time spent; difficulties involved; nature of the services rendered; amount of money involved; professional standing of the attorney; results obtained and the amount customarily charged for similar services in the same locality. *Inger v. Sabato*, 229 AD2d 884, 887 (3rd Dept 1996).

[2] Defendants appealed the denial of their motion to dismiss, and on March 13, 2007, the Appellate Division affirmed the denial. During the appeal, an interim stay was granted. The

against Mr. Fischbarg was commenced on January 9, 2008.

A defendant entitled to dismissal based upon a statute of limitations defense must make a prima facie showing that the alleged legal malpractice was filed more than three years after accrual of the cause of action. *Hasty Hills Stables, Inc. v. Dorfman, Lynch, Knoebel & Conway, LLP*, 2008 NY Slip Op 5479, *3 (2d Dept 2008) citing CPLR 214(6); *Rachlin v. LaRossa, Michell & Ross*, 8 A.D.3d 461 (2d Dept 2004). A legal malpractice cause of action accrues on the date the alleged malpractice was committed, not when it was discovered. *Hasty Hills*, 2008 NY Slip op at *3 citing *Shumsky v. Eisenstein*, 96 NY2d 164, 166 (2001); *McCoy v. Feinman*, 99 NY2d 295 (2002) (what is important is when malpractice was committed, not when client discovers it. Though courts recognize toll on three-year limitations period under continuous representation doctrine, courts have recognized no exception to measuring accrual date from date of injury caused by attorneys malpractice. Key issue is when plaintiff's actionable injury occurred). The three-years, however, are tolled while the attorney continues to represent the client on the same matter after the alleged malpractice has taken place. *Hasty Hills*, 2008 NY Slip op at *3 citing *Shumsky*, 96 NY2d at 168. The toll occurs because "a person seeking professional assistance has 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 services are rendered." *Greene v. Greene*, 56 NY2d 86, 94 (1982). *Accord Shumsky*, 96 NY2d at 70; *West Vill. Assocs. Ltd. P'ship v. Balber Pickard Battistoni Maldonado & Ver Dan Tuin, PC*, 49 AD3d 270 (1st Dept 2008).

Here, Mr. Fischbarg ceased representing Ms. Doucet and ONAM in the Oregon Action on

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instant motion and cross-motion were both filed in November 2007. On December 20, 2007, the Court of Appeals affirmed the Appellate Division decision.

January 15, 2002. All of the alleged malpractice against Mr. Fischbarg, thus, took place prior to January 15, 2002. At the earliest, allegation of malpractice were raised in defendants' answer on December 15, 2005, well beyond the three year bar. The fact that the case continued with other counsel does not change this result. *See TVGA Eng'g, Surveying, P.C. v. Gallick*, 45 AD3d 1252, 1257 (4th Dept 2007) quoting *Glamm v. Allen*, 57 NY2d 87, 94 (1982) (application of continuos representation doctrine "limited to situations in which the attorney who allegedly was responsible for the malpractice continues to represent the client [asserting the malpractice claim] in that case. When the relationship ends, for whatever reason, the purpose for applying the continuos representation rule no longer exists."). Neither the amendment of the answer nor the malpractice action, therefore, are timely. Accordingly, it is

ORDERED that plaintiff Gabriel Fischbarg's motion for summary judgment in action No. 101427/05 is denied; and it is further

ORDERED that defendants cross-motion for summary judgment in action No. 101427/05 is denied; and it is further

ORDERED that defendants motion in action No. 101427/05 for leave to amend their verified answer is denied, and the second affirmative defense contained in defendants verified answer alleging negligent representation is dismissed; and it is further

ORDERED that Gabriel Fischbarg's motion to dismiss action No. 100328/08 is granted with prejudice and the Clerk is directed to enter judgment for Mr. Fishbarg and against Suzanne Doucet and Only New Age Music, Inc. in action No. 100328/08, with costs upon submission of a bill of costs.

ENTER:

Date: July 10, 2008
New York, New York

J.S.C.