Santana v Graubard
2011 NY Slip Op 34107(U)
August 10, 2011
Sup Ct, Bronx County
Docket Number: 4936/10
Judge: Mary Ann Brigantti-Hughes
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SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

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AUG 12 2011

PRESENT: Honorable Mary Ann Brigantti-Hughes

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DINORAH SANTANA,

Plaintiff,

-against-

PETER L. GRAUBARD, ESQ. and GRAUBARD & ASSOCIATES, P.C.,

Defendants.

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DECISION / ORDER
Index No. 4936/10

The following papers numbered 1 to read on the below motions noticed on **February 7, 2011** and duly submitted on the Part IA15 Motion calendar of :

Papers Submitted	Numbered
Defs. Notice of Motion, Exhibits, Memo of law	1,2
Pl.'s Affirmation in Opposition and support of Cross-Motion, Exhibits	3,4
Pl.'s Affirmation, Memo in Reply	5,6
Def.'s Affirmation, Memo in Reply.	7,8

In an action for damages arising out of alleged legal malpractice, defendants Peter Graubard ("Graubard") and Graubard & Associates (collectively referred to as "Defendants") move to dismiss the complaint of the plaintiff Dinorah Santana ("Plaintiff") pursuant to *CPLR* 3211, alleging that her claims are time-barred. Plaintiff cross-moves for summary judgment pursuant to *CPLR* 3212.

I. Factual History

On or around May 19, 1999, Plaintiff retained defendant Graubard to represent her in a medical malpractice action against St. Luke's Roosevelt Hospital and Calvin Thomas, M.D. The action was commenced in 2001, and Mr. Graubard handled the matter through discovery phases and prepared the matter for trial.

In November 2006, Mr. Graubard contacted Keith DeVries, Esq., and asked if he was interested in being retained as trial counsel for the matter. After reviewing the file, Mr. DeVries agreed, and the entire file was transferred to his office. Thereafter, Mr. Graubard arranged a

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meeting between Plaintiff and Mr. DeVries to discuss the future handling of the matter. Plaintiff allegedly agreed to have Mr. DeVries act as her trial counsel.

In July 2007, Mr. Graubard received correspondence from defense counsel in the matter, and sent a letter to Mr. DeVries, asking for a "consent to change attorney" as he no longer had the file and was "no longer involved" in what was happening. On July 17, 2007, Mr. Graubard, Mr. DeVries, and Plaintiff all executed a document entitled "Consent to Retain Trial Counsel" which stated that Mr. DeVries would act as "trial attorney of record...in place and stead" of Mr. Graubard.

Mr. DeVries continued to correspond with Mr. Graubard about the matter from 2007 through 2009. In June 2008, following a conference with the court, it was determined that one of the defendant health centers was a federal facility, and Calvin Thomas, M.D. was therefore a federal employee. Under those circumstances, it was necessary for Plaintiff to file a claim within two years under the Federal Tort Claim Act, which had not been done. Mr. DeVries notified Mr. Graubard of this fact and advised him to contact his professional liability carrier. In 2009, the matter was officially removed to the Southern District Court, where it was later dismissed for failure to comply with the Federal Tort Claim act on or about February 2009.

Plaintiff commenced the instant legal malpractice action against Defendants by filing a verified complaint on October 20, 2010. Defendants now argue that the complaint is time-barred pursuant *CPLR* 214(6), as the claim accrued when Mr. Graubard "was substituted" as counsel in July 2007, and the complaint was filed more than three years following accrual. Accordingly, they argue dismissal is warranted under *CPLR* 3211(a)(5). Plaintiff cross-moves for an order pursuant to *CPLR* 3212, (1) declaring that Mr. Graubard was never substituted as counsel for Plaintiff, and (2) the cause of action is timely under the continuous representation doctrine.

II. Standard of Review

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action. *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118 (1st Dept. 2002). In other words, the determination is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied

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from its statements, a cause of action can be sustained. *See Stendig, Inc. v. Thom Rock Realty Co.*, 163 A.D.2d 46 (1st Dept. 1990); *Leviton Manufacturing Co., Inc. v. Blumberg*, 242 A.D.2d 205 (1st Dept. 1997)(on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see, CPLR* §3026). The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory". *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). The motion should be denied if, from the pleading's four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law. *McGill v. Parker*, 179 A.D.2d 98 (1st Dept. 1992).

Factual allegations normally presumed to be true on a motion pursuant to *CPLR* 3211 (a)(7) may properly be negated by affidavits and documentary evidence. *Wilhemlina Models, Inc. v. Fleisher*, 19 A.D.3d 267 (1st Dept. 2005). Evidentiary material may be considered on a motion to dismiss for failure to state a cause of action to remedy defects in a complaint. *Beyer v. DaimlerChrysler Corp.*, 286 A.D.2d 103 (2nd Dept. 2001). On a motion to dismiss for failure to state a cause of action, any deficiency on the part of the complaint because of detailed pleadings of the facts and circumstances relied upon may be cured by details supplied in the affidavits submitted by plaintiff, resort to which is proper for the limited purpose of sustaining a pleading against a motion under *CPLR* 3211(a)(7). *Ackerman v. Vertical Club Corp.*, 94 A.D.2d 665 (1st Dept. 1983).

III. Analysis

Any action for legal malpractice must be commenced within three years of accrual of the cause of action. *CPLR* 214(6). As stated by Defendants, "a plaintiff's cause of action for legal malpractice, along with any damages alleged, accrues at the time the malpractice occurs and the injury party can obtain relief in court..." *Creditanstalt Investment Bank AG et al v. Chandbourne & Park LLP*. 14 A.D.3d 414 (1st Dept. 2005)(internal citations omitted). In other words, a legal malpractice claim accrues when all the facts necessary to the cause of action have occurred and an injured party can obtain redress. *McCoy v. Feinman*, 99 N.Y.2d 295 (2002). However, the

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continuous representation doctrine tolls the statute of limitations where the attorney who allegedly was responsible for the malpractice continues to represent the client on the matter which is the subject of the malpractice action. *Glamm v. Allen*, 57 N.Y.2d 87 (1982). The doctrine applies where there is evidence of an ongoing, continuous, developing, and dependent relationship between the plaintiff and the law firm. *See Marro v. Handwerker, Marchelos & Gayner*, 1 A.D.3d 488 (2nd Dept. 2003), citing *Piliero v. Adler & Stavros*, 282 A.D.2d 511 (2nd Dept. 2001). Thus, the statute of limitations on a claim for malpractice in the conduct of litigation begins to run when the attorney-client relationship terminates. *Greene v. Greene*, 56 N.Y.2d 86 (1982). Whether the attorney-client relationship has terminated depends on the facts and circumstances.

Courts have held that the attorney-client relationship has terminated where the client has retained new counsel and advised former counsel via letter to take no further action, rather than nine months later when a formal stipulation substituting counsel was filed. *Piliero v. Stavros*, 282 A.D.2d 511 (2nd Dept. 2001); Where an attorney serves as trial counsel, his responsibilities continue (and thus the continuous representation doctrine applies) until the action terminates in a final judgment. *Hirsch v. Weisman*, 189 A.D.2d 643 (1st Dept. 1993); An attorney-client relationship was deemed terminated, thus commencing the statute of limitations on a legal malpractice claim, from the date plaintiff-client executed a consent to change attorney. *Sommers v. Cohen*, 14 A.D.3d 691 (2nd Dept. 2005).

In this case, Defendants argue that the attorney-client relationship terminated on July 17, 2007, when Plaintiff executed a document that Defendants characterize as a "Consent to Change Counsel". Plaintiffs argue that this document was actually a consent to retain *trial* counsel, and did not effectively sever the attorney-client relationship. Thus, the continuous representation doctrine applies and they argue the action is timely.

In support of their motion, Defendants attach the "consent to change attorney" document. While the cover sheet is labeled "consent to change attorney", the stipulation itself is labeled "consent to retain trial attorney". The stipulation states that Plaintiff consents to have Mr. DeVries "be retained as trial attorney of record...in place and stead of the undersigned attorney..." The ambiguous nature of this agreement allows this Court to consider parol evidence to

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determine the intent of the parties. *See e.g. Schmitz v. MacDonald, 250 A.D.2d 533* (1st Dept. 1998). The affidavit of Mr. Graubard states that in 2006 "Plaintiff retained a new attorney..." to handle her lawsuit. Accordingly, Mr. Graubard transferred his entire file to Mr. DeVries. However, the affidavit of Mr. Devries, submitted by Plaintiff, states that Mr. Graubard, not Plaintiff, initiated contact with him in 2006 and inquired whether he'd like to be retained as trial counsel in the underlying medical malpractice action. Mr. Graubard thereafter transferred the file. Mr. Graubard then arranged a meeting between Plaintiff and Mr. DeVries, during which he emphasized that his role was limited to trial counsel, and Mr. Graubard remained the attorney of record. The affidavit of Plaintiff herself states that she was told that Mr. DeVries would work with Graubard to prosecute her case. Plaintiff was never informed that her relationship with Mr. Graubard was ending. After executing the stipulation, Mr. DeVires represented himself as "trial counsel to the law offices of Peter Graubard, Esq." in a Hold Harmless Agreement entered into in December 2007. The update letters sent to Mr. Graubard indicate that Mr. DeVries and Mr. Graubard discussed the matter regularly even after the stipulation was signed. Overall, the Court finds that the substance of the "consent to retain trial counsel" document coupled with the circumstances surrounding its execution fail to satisfy the requirements of *CPLR* 321(b)(1) and therefore did not effectively constitute a substitution of attorney.

Mr. Graubard never formally withdrew as counsel to Plaintiff under *CPLR* 321(b)(2) or sent any correspondence to Plaintiff confirming his discharge from the case. The single fax sent July 16, 2007, wherein Mr. Graubard inquired as to why he continued to receive correspondence on the matter, is not conclusory documentary evidence that the attorney-client relationship was severed.

While this Court finds that Mr. Graubard was never properly substituted as attorney of record for Plaintiff, I decline to rule as a matter of law that the action is timely under the continuous representation doctrine. There are issues of fact as to whether there was an ongoing, continuous, developing, and dependent relationship between Plaintiff and Defendants. This issue needs to be fleshed out through discovery and further investigation. When the existence of an issue of fact is even debatable, summary judgment should be denied. *Stone v. Goodson*, 8 N.Y.2d 8 (1960).

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IV. Conclusion

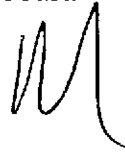
Accordingly, it is hereby

ORDERED, that defendants Peter L. Graubard, Esq. and Graubard & Associates, P.C.'s motion to dismiss pursuant to *CPLR* 3211 is hereby DENIED, and it is further,

ORDERED, that the plaintiff Dinorah Santana's cross-motion for summary judgment pursuant to *CPLR* 3212 is DENIED.

The above constitutes the Decision and Order of this Court.

Dated: August 10, 2011



Hon. Mary Ann Brigantti-Hughes, J.S.C.