Cordero v Koval Rejtig & Dean PLLC
2013 NY Slip Op 31893(U)
August 8, 2013
Supreme Court, New York County
Docket Number: 113450/11
Judge: Debra A. James
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[* 1] SCANNED ON 8/14/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **DEBRA A. JAMES**
Justice

PART 59

ROLANDO CORDERO,

Plaintiff,

- v -

KOVAL REJTIG & DEAN PLLC and CHRISTOPHER RICHARD DEAN,

Defendant.

Index No.: 113450/11

Motion Date: 01/18/13

Motion Seq. No.: 01

FILED
AUG 14 2013
COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered 1 to 3 were read on this motion to dismiss

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No(s). 1
Answering Affidavits - Exhibits	No(s). 2
Replying Affidavits - Exhibits	No(s). 3

Cross-Motion: ☐ **Yes** ☒ **No**

Upon the foregoing papers, it is ordered that this motion is

Plaintiff Rolando Cordero alleges legal malpractice. Defendants, plaintiff's previous attorneys, make a CPLR 3211 motion to dismiss, on the grounds of the statute of limitations, documentary evidence, and failure to state a cause of action.

Defendants are the law firm of Koval Rejtig & Dean PLLC (the law firm) and Christopher Richard Dean (Dean), a member of the firm. On August 17, 2004, plaintiff was hurt when the motorcycle he was riding struck a construction plate in the road. Prior to November 15, 2004, plaintiff retained the law firm to represent him in a personal injury action. It appears from plaintiff's

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

allegations that he dealt mostly with Dean. On September 19, 2006, defendants commenced a personal injury action on plaintiff's behalf against Consolidated Edison of New York, Verizon New York, Brooklyn Union Gas Company, and two other companies.

Subsequently, plaintiff alleges, Dean told him that the law firm was closing and that plaintiff's file was being transferred to another firm. On October 30, 2007, plaintiff, defendants, and plaintiff's new counsel entered into a consent to change attorney form substituting the new counsel for defendants. The new counsel was Kaston Aberle & Levine, Esqs. (Kaston), not a party in this case. The consent to change attorney form was filed with the court on November 28, 2007.

Nonparty Mark Koval was an attorney at defendant law firm. According to his affidavit in support of defendants' motion, he began working at Kaston after the consent to change attorney form was filed. Koval states that he did not take plaintiff's case with him when he left Kaston. He says that he left Kaston on November 12, 2008 and that he returned to the law firm, where he is presently a member.

Plaintiff's personal injury action continued. After discovery ended, the defendants in the personal injury action moved for summary judgment. Their motions were granted on December 5, 2008 "based upon the fact that none of [them] had any

responsibility for the defectively placed construction plates as it was the City of New York that bore said responsibility, dismissing my case with prejudice".

Plaintiff claims that defendants negligently failed to name as a defendant in his personal injury action the City of New York or the Department of Transportation of the City of New York or both (collectively, the City). The complaint in this action alleges that defendants engaged in malpractice by failing to properly ascertain the identity of the party responsible for plaintiff's accident, by suing parties that were not responsible for the accident, and by failing to name and serve the proper parties.

In determining a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), the court's role is limited to determining whether the complaint states a cause of action (Frank v DaimlerChrysler Corp., 292 AD2d 118, 120-121 [1st Dept 2002]). The pleadings are liberally construed and accepted as true, and the court decides only if "the facts as alleged fit into a cognizable legal theory" (Nonnon v City of New York, 9 NY3d 825, 827 [2007]). The court does not inquire whether there is evidence to support plaintiff's allegations (Frank, 292 AD2d at 121), or weigh the plaintiff's chances of ultimate success (EBC I, Inc. v Goldman Sachs & Co., 5 NY3d 11, 19 [2005]). When evidence is submitted pursuant to a CPLR 3211 (a) (1) motion,

[* 4]

dismissal will be "granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]). On a CPLR 3211 (a) (5) motion to dismiss based on the running of the statute of limitations, the defendant has the initial burden of proving that the time to commence the action has expired (Benn v Benn, 82 AD3d 548, 548 [1st Dept 2011]).

A plaintiff wanting to sue the City must serve a notice of claim upon it within 90 days of the occurrence or incident sued upon and must commence an action against the City within 90 days and one year of the occurrence (General Municipal Law § 50-e [1] [a]; Pierson v City of New York, 56 NY2d 950, 954-955 [1982]; Singleton v City of New York, 55 AD3d 447, 447 [1st Dept 2008]). Plaintiff's accident occurred on August 17, 2004. November 15, 2005 was the last day on which plaintiff could commence an action against the City. Defendants commenced plaintiff's personal injury action in September 2006.

The statute of limitations for attorney malpractice is three years (CPLR 214 [6]). A claim for legal malpractice accrues when the attorney commits the malpractice, not when the client discovers it (Shumsky v Eisenstein, 96 NY2d 164, 166 [1st Dept 2001]). A client's ignorance of his or her attorney's misconduct has no effect on when a claim for malpractice accrues (Lincoln

Place, LLC v RVP Consulting, 70 AD3d 594, 594-595 [1st Dept 2010]). The accrual of the limitations period may be tolled according to the continuous representation doctrine. Pursuant to the doctrine, the statute of limitations does not begin to run when the malpractice occurs, where, after the malpractice, the attorney continues to represent the client in the matter in which the attorney committed the malpractice (Shumsky, 96 NY2d at 168). The limitations period starts running when the attorney's representation in the matter is completed (Glamm v Allen, 57 NY2d 87, 94 [1982]).

Plaintiff commenced this legal malpractice action on November 30, 2011. Defendants contend that the malpractice claim accrued on the last day that they represented plaintiff, November 28, 2007, when the change of attorney form was filed with the court, and the limitations period expired on November 29, 2010. Defendants also argue that, even if the limitations period started running on November 12, 2008, when Koval left Kaston and stopped representing plaintiff, plaintiff's action would still be untimely. On that basis, defendants state that November 12, 2011 was the last day on which plaintiff could commence the action.

Plaintiff contends that the action accrued on December 5, 2008, when his personal injury case was dismissed, and that he had until December 5, 2011 to sue defendants. Plaintiff relies

on case law stating that a legal malpractice claim accrues "'when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court'" (McCoy v Feinman, 99 NY2d 295, 301 [2002], quoting Ackerman v Price Waterhouse, 84 NY2d 535, 541 [1994]). He argues that, until his case was dismissed, he did not have an action against defendants. Plaintiff misstates the applicable law. Plaintiff had a claim against defendants before his case was dismissed, even if he was ignorant of that fact. Where it is alleged that an attorney negligently let pass the statute of limitations for the client's action, the claim for legal malpractice accrues upon the expiration of that statute of limitations (Cohen v Wallace & Minchenberg, 39 AD3d 691, 692 [2d Dept 2007]; Baker v Levitin, 211 AD2d 507, 507 [1st Dept 1995]).

Malpractice occurs and the statute of limitations begins to run when the wrong is done, which is when the injury to the client is final or cannot be undone, at least not without a legal struggle (McCoy, 99 NY2d at 305 [at the latest, the plaintiff's claim accrued on the day that the faulty divorce judgment was filed in the county clerk's office]; Lincoln Place, 70 AD3d at 594 [the malpractice claim accrued at the time that the attorney assigned a lease, rather than designating a lessee, not three or four years afterward when the client suffered the consequences of the assignment]; Kerbein v Hutchison, 30 AD3d 730, 732 [3d Dept

2006] [the time to sue for malpractice accrued when the client's option to unilaterally withdraw from the settlement agreement ended]; Schleidt v Stamler, 106 AD2d 264, 264-265 [1st Dept 1984] [the client's cause of action accrued when the attorney failed to file a notice of bulk sale as required by tax law]).

Plaintiff's injury was final when he could no longer sue the City. Plaintiff's claim would have begun to run on the last day that he could sue the City, if not for the fact that defendants continued to represent him. After defendants' representation ended, Koval represented him. As defendants implicitly point out, Koval's continuous representation of plaintiff can be imputed to defendants.

In Antoniu v Ahearn (134 AD2d 151 [1st Dept 1987]), the plaintiff hired the first attorney and her law firm in 1978. In 1981 or 1982, the first attorney left that firm and joined another firm, where she continued to represent plaintiff. Upon hiring a new attorney, plaintiff fired the first attorney in July 1983. On October 10, 1985, plaintiff began an action against the firm retained in 1978. The court determined that the action against the firm that plaintiff retained in 1978 was within the statute of limitations. The limitations period against that firm was tolled until the first attorney stopped representing the plaintiff. The first attorney's continuing representation, which stopped in 1983, was imputed to the firm. The malpractice action

was timely as against the attorney and, thus, was timely as against the firm.

In Waggoner v Caruso (68 AD3d 1 [1st Dept 2009], *affd* 14 NY3d 874 [2010]), the plaintiff hired attorney Caruso and his firm Pillsbury in October 1998. In November 2001, Caruso left Pillsbury and began practicing at a second firm. In January 2002, the second firm replaced Pillsbury as plaintiff's counsel. In May 2005, Caruso left the second firm and joined a third firm. The third firm became plaintiff's counsel and continued to represent plaintiff until discharged in May 2006. The malpractice action against Caruso, Pillsbury, and the second and third firms was commenced in July 2007. The complaint alleged malpractice committed before 2001.

The Waggoner court dismissed the malpractice claims against all of the law firms, but emphasized that the claims against Pillsbury (the only defendant to raise a statute of limitations defense) were not dismissed on statute of limitation grounds, although the claims against Pillsbury accrued six years before the action was commenced. The court held that the continuous representation doctrine tolled the statute of limitations against Pillsbury during the time that Caruso represented the plaintiff, although Caruso left Pillsbury after the malpractice was committed (*id.* at 6-7; see also New Kayak Pool Corp. v Kavinoky Cook LLP, 74 AD3d 1852, 1853 [4th Dept 2010]; HNH Intl., Ltd. v

Pryor Cashman Sherman & Flynn LLP, 63 AD3d 534, 535 [1st Dept 2009]).

These cases demonstrate that the associate's continuing representation of the client will be imputed to the firm, where the associate left the firm taking the client's case and continued to represent the client. The date that the statute of limitations starts running against the associate is the same date that it starts running against the firm. Conversely, in Pollicino v Roemer & Featherstonhaugh (260 AD2d 52, 53 [3d Dept 1999]), the firm's representation was imputed to the associate. The plaintiff hired the defendant law firm and a firm associate handled plaintiff's case. The associate committed the alleged malpractice in 1989, and left the firm in 1990. Plaintiff sued the firm and the associate in 1997. Given the continuing representation, the case was timely as against the law firm, and the court decided that it was timely as against the associate, as well. The statute of limitations was tolled in regards to both the law firm and the associate, although the associate was no longer at the firm when plaintiff commenced his action.

Following the lead of these cases, Koval's representation is attributed to defendants. If, as Koval alleges, he stopped acting as plaintiff's lawyer on November 12, 2008, which was when he left Kaston, plaintiff's action is untimely. But there is a question as to when Koval's representation ended. The evidence

consists of Koval's affidavit and the copy of a document entitled "Earnings Record." The record states that the "period covered" is from October 25, 2008 to November 21, 2008. The "check date" is identified as November 12, 2008. Another "check date" is May 8, 2012. This record does not establish when Koval stopped working at Kaston.

Nor is Koval's affidavit sufficient for the purpose. On a CPLR 3211 motion, a plaintiff's affidavit may remedy an inartfully pleaded complaint and preserve a claim from dismissal, but a defendant's affidavit will seldom defeat a claim (Rovello v Orofino Realty Co., 40 NY2d 633, 636 [1976]). While Koval's affidavit raises an issue of fact, it does not establish when Koval ceased to act as representative for plaintiff. In addition, affidavits do not qualify as "documentary evidence" so as to support a dismissal based on (a) (1) of CPLR 3211 (David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C3211:10; see Johnson v Spence, 286 AD2d 481, 483 [2d Dept 2001]).

Defendants argue that the complaint fails to state a cause of action as it is insufficient and conclusory regarding plaintiff's ability to recover against the City. The complaint alleges that the City was responsible for his injuries in owning, supervising and/or maintaining the place where his accident occurred, that plaintiff would have obtained a judgment against

the City, if it had been sued, and that it was not sued because of defendants' negligence. Plaintiff's affidavit states that defendants' malpractice was the reason that his case was dismissed on summary judgment, and that the construction plates were defectively placed.

To state a cause of action to recover damages for legal malpractice, a plaintiff must allege that the attorney failed to apply the skill and knowledge commonly possessed by those in the profession and that this breach of duty proximately caused the plaintiff to suffer actual damages (Leder v Spiegel, 9 NY3d 836, 837 [2007]). As defendants point out, plaintiff bears a heavy burden of proof, and must conduct a trial within a trial. First, he must show that he would have succeeded in the case against the City that the attorneys did not bring. Then, he must show that the City was responsible for the road, that it acted negligently, and that his injuries arose from such negligence and call for compensation. Then, he must prove that defendants were negligent and that, if not for their negligence, he would have been compensated for his injury (see Lindenman v Kreitzer, 7 AD3d 30, 34 [1st Dept 2004]). The court finds that the complaint, along with plaintiff's affidavit, is adequate to survive a motion to dismiss.

Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint is denied; and it is further

ORDERED that defendants shall serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties are directed to attend a preliminary conference on September 24, 2013 in IAS Part 59, Room 103, 71 Thomas Street, at 10:00 A.M.

This is the decision and order of the court.

Dated: August 8, 2013 ENTER:

[signature] J.S.C.
DEBRA A. JAMES

FILED
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COUNTY CLERK'S OFFICE
NEW YORK