

**Miller v Friedman**

2013 NY Slip Op 32030(U)

August 23, 2013

Sup Ct, New York County

Docket Number: 400833/12

Judge: Joan A. Madden

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

PRESENT: Hon Joan A. Miller

PART 11

Justice

Index Number : 400833/2012  
MILLER, STEVEN A.  
vs.  
FRIEDMAN, DANA B., ESQ.  
SEQUENCE NUMBER : 002  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the  
attached Memorandum Decision & Order.

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

## FILED

AUG 30 2013

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: August 23, 2013

[Signature], J.S.C.

- 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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

-----X  
STEVEN A. MILLER,

Plaintiff,

INDEX NO. 400833/12

-against-

DANA B. FRIEDMAN, ESQ. and THE LAW FIRM  
OF KLEINBERG & FRIEDMAN,

Defendant.

-----X  
JOAN A. MADDEN, J.:

**FILED**

**AUG 30 2013**

In this action for legal malpractice, defendants move for an order pursuant to CPLR 3211(a)(1) and (5) to dismiss the complaint on statute of limitations grounds<sup>1</sup> and to strike plaintiff's request for punitive damages. Plaintiff, who is pro se, opposes the motion.

NEW YORK  
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Plaintiff alleges that on May 1, 2008, he filed a workers' compensation claim with the New York State Worker's Compensation Board ("WCB"). He further alleges that he attended a hearing of the WCB on December 31, 2008, at which a determination was made that plaintiff was injured during the course of his employment with the City of New York, and that he was entitled to be compensated at a rate of \$100 per week from February 8, 2008, to August 25, 2008. It is alleged that after the hearing, the defendant law firm was notified that it should obtain a letter of consent before any settlement of plaintiff's claim. However, plaintiff alleges that the

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<sup>1</sup>The court notes that by decision and order dated January 29, 2013, the court denied defendants motion to dismiss for lack of service by giving plaintiff additional time to effectuate service, and permitted defendants to renew the motion to dismiss in the event plaintiff properly served them. Although the January 29, 2013 decision and order discussed the statute of limitations issue, defendants did not annex it to their motion or mention the decision in their papers.

defendant law firm settled the claim for \$8,500 without such letter of consent, and that plaintiff was therefore precluded from obtaining any workers' compensation benefits from February 8, 2008, through January 11, 2011, for a total amount of \$11,500.

Defendants argue that plaintiff's claim for legal malpractice accrued on February 13, 2009, when plaintiff accepted the settlement of his worker's compensation case for \$8,500. On that basis, the three-year statute of limitations for legal malpractice would have expired by the time plaintiff commenced this action on April 13, 2012.

Plaintiff, on the other hand, asserts that defendant Friedman "joined with" his worker's compensation attorney "in a campaign to obtain a letter of consent on plaintiff's behalf," and that "[o]n no less than three occasions, commencing with February 4, 2010, the defendant held himself out as plaintiff's attorney in an attempt to obtain the 'letter of consent' nunc pro tunc." In connection with his opposition to the prior motion to dismiss, plaintiff submitted an order to show cause filed on his behalf by defendant Dana Friedman as attorney for "Petitioner Steven Miller," in April 2011 in Queens County Supreme Court, which sought "nunc pro tunc relief directing that respondent City of New York issue the necessary consent letter in to order preserve petitioner Steven Miller's entitlement to any future Worker's Compensation benefits" (Steven Miller v. City of New York, Index No. 2991/11, Sup Ct, Queens Co). Plaintiff also submitted letters sent on his behalf by defendant Friedman to the New York City Law Department in February and March 2010, requesting "settlement consent."

An action for legal malpractice must be commenced within three years of accrual, regardless of whether the underlying theory is grounded in tort or contract law. See McCoy v. Feinman, 99 NY2d 295, 301 (2002); CPLR 214(6). Accrual is measured from the date when the

injury occurs. See Ackerman v. Price Waterhouse, 84 NY2d 535 (1994). However, under the continuous representation doctrine, when an attorney continues to represent a client in the matter from which the claim arises, the statute of limitations on the legal malpractice claim is tolled and the limitations period does not begin to run until the termination of the attorney-client relationship. See Shumsky v. Eisenstein, 96 NY2d 164 (2001); Riley v. Segan, Nemerov & Singer, P.C., 82 AD3d 572 (1<sup>st</sup> Dept 2011). For the doctrine to apply, “there must be clear indicia of an ongoing, continuous, developing and dependant relationship between the client and the attorney.” Elizabeth Arden, Inc v. Abelman, Frayne & Schwab, 29 Misc3d 1215(A) (Sup Ct, NY Co 2010) (citing Luk Lamellen U. Kupplungbau GmbH v. Lerner, 166 AD2d 505, 507 [2<sup>nd</sup> Dept 1990]); accord Henry v. Leeds & Morelli, 4 AD3d 229 (1<sup>st</sup> Dept 2004) (“relationship and bond of continuous trust necessary for the continuing representation doctrine to apply”).

At least at this juncture, it cannot be said that plaintiff’s claim is time-barred, in view of evidence submitted by plaintiff to support his allegations that defendants “continuously represented” him and that the “most recent representation” was in April 2011. Furthermore, contrary to defendants’ position, under these circumstances, plaintiff’s complaint to the Disciplinary Committee filed in 2010, does not establish as a matter of law that it no longer represented plaintiff in April 2011. Accordingly, the motion to dismiss on statute of limitations grounds is denied.

However, defendants’ motion is granted to the extent of striking plaintiff’s request for punitive damages. A punitive damage claim in a tort action must be based on evidence of conduct which exhibits “a wanton or reckless disregard of [a] plaintiff’s rights” and acts which are “grossly negligent and reckless.” Giblin v. Murphy, 73 NY2d 769, 772 (1998). “An act is

wanton and reckless when done under circumstances showing heedlessness and utter disregard for the rights and safety of others.” Gruber v. Craig, 208 AD2d 900, 901 (2d Dept 1994)(internal citations omitted; see 1B PJI 2:278 (2006 ed). Here, the conduct alleged in the complaint does not rise to the level of moral culpability that would warrant an award of punitive damages. See Financial Services Vehicle Trust v. Saad, 72 AD3d 1019, 1021 (2d Dept 2010).

Accordingly, it is hereby

ORDERED that defendants’ motion to dismiss the complaint on statute of limitations grounds is denied; and it is further

ORDERED that plaintiff’s request for punitive damages is stricken; and it is further

ORDERED that the defendants shall answer the complaint within 30 days of this decision and order; and it is further

ORDERED that the parties shall appear for a preliminary conference in Part 11, room 351, 60 Centre Street, on October 31, 2013 at 9:30 am.

DATED: August 23, 2013

ENTER:  
\_\_\_\_\_  
J.S.C.

**FILED**  
**AUG 30 2013**  
NEW YORK  
COUNTY CLERK'S OFFICE