

**TufAmerica, Inc. v Warshavsky**

2013 NY Slip Op 32690(U)

October 24, 2013

Sup Ct, New York County

Docket Number: 157795/12

Judge: Anil C. Singh

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ANIL C. SINGH  
SUPREME COURT JUSTICE  
Justice

PART 61

Index Number : 157795/2012  
TUFAMERICA, INC.  
vs.  
WARSHAVSKY, OREN  
SEQUENCE NUMBER : 001  
DISMISS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001

The following papers, numbered 1 to 3, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2</u>
Replying Affidavits _____	No(s). <u>3</u>

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the annexed memorandum opinion.*

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

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

Dated: Oct 24, 2013

ANIL C. SINGH, J.S.C.  
HON. ANIL C. SINGH  
SUPREME COURT JUSTICE

- 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 61

-----X  
TUFAMERICA, INC.,

Plaintiff,

DECISION AND  
ORDER

-against-

OREN WARSHAVSKY, et al.,

Index No.  
157795/12

Defendant.  
-----X

HON. ANIL C. SINGH, J.:

Defendants Oren Warshavsky and Baker & Hostetler LLP move to dismiss the instant action for legal malpractice pursuant to CPLR 3211(a)(1), (5) and (7), contending that the claim is time-barred by the statute of limitations. Plaintiff opposes the motion.

The facts are as follows.

Plaintiff TufAmerica, Inc. ("TufAmerica") retained defendant Oren Warshavsky ("Warshavsky"), a New York attorney, to provide legal services beginning in August 1999 in connection with a lawsuit brought by Wardell Quezerque and Joseph Johnson against TufAmerica in federal district court in New Orleans, Louisiana. Warshavsky also represented TufAmerica in connection with a second suit brought against TufAmerica by the same two plaintiffs in 2002,

X

this one in state court in Louisiana. Warshavsky was admitted pro hac vice in connection with both lawsuits, and entered an appearance as counsel for TufAmerica in both lawsuits.

In the federal court suit, the court in a December 11, 2000, decision awarded summary judgment to TufAmerica against another defendant, Joe Jones, for copyright infringement, and awarded TufAmerica its attorneys' fees as to the claims against Joe Jones only.

Plaintiff commenced the instant action by filing a summons and verified complaint on November 7, 2012. The complaint alleges that Warshavsky and his law firm committed legal malpractice by failing to maintain records of TufAmerica's legal expenses incurred in connection with the federal court suit, knowing that TufAmerica would maintain that it had a right to deduct those fees from royalties that otherwise would have been owed to the plaintiff in the state court suit. Specifically, the complaint alleges that Warshavsky was contacted repeatedly by TufAmerica's local counsel in the state court suit for assistance in responding to a motion to compel brought by plaintiff in that case because TufAmerica had failed to produce copies of its billing statements issued by Warshavsky's law firm in connection with the federal court suit.

Discussion

A claim to recover damages for legal malpractice accrues when the malpractice is committed and must be interposed within three years thereafter (CPLR 214[6]). As a result, an action is time-barred unless the statute of limitations was tolled by the continuous representation rule.

“[F]or the continuous-representation doctrine to apply to toll the statute of limitations in an action sounding in legal malpractice, there must be clear indicia of an ongoing, continuous, developing, and dependent relationship between the client and the attorney, which often includes an attempt by the attorney to rectify the alleged act of malpractice” (75A N.Y.Jur.2d Limitations and Laches section 232). “The doctrine is generally limited to the course of representation concerning a specific legal matter, and thus is not applicable to a client’s ... continuing general relationship with a lawyer ... involving only routine contact for miscellaneous legal representation ... unrelated to the matter upon which the allegations of malpractice are predicated” (West Vil. Assoc. Ltd. Partnership v. Balber Pickard Battistoni Maldonado & Ver Dan Tuin, PC, 49 A.D.3d 270 [1<sup>st</sup> Dept., 2008] (internal quotation marks and citation omitted)). “The pleading must assert more than simply an extended general relationship between the professional and client, and the facts are required to demonstrate continued representation in the specific matter directly under dispute” (Id.).

On May 31, 2006, plaintiff's local counsel in Louisiana, Dino Gankendorff, sent the following e-mail to Warshavsky:

Oren:

I am still tring [sic.] to get in touch with you on the motion to compel. I have called you everyday for almost two weeks now and have not heard back. We have a hearing on this Friday, June 2, and face a serious problem. In reviewing the file, we have already agreed to produce certain documents, see your letter dated June 17, 2005. Donald Hyatt reports that he never received these docs. nor has our office. Frankly, I don't see how I can go to court on Friday and objection [sic.] to this production when we have already agreed to produce these documents. In short, I need you to overnight me these documents referenced in your letter dated June 17, 2006 today so we can produce them at the hearing on Friday or I feel certain that the Judge will cast us with attorney's fees and sanctions. Please let me hear from you immediately. Thanks dino

(Pergament Affirmation, exhibit A).

Later that day, Warshavsky replied:

I do not have any documents, and if Tuff City does not have the bills then there is not much that can be done – sometimes there are no documents found, and we can only give circumstantial evidence. Essentially, they want back up data – sorry, it is gone. And the company that generated the bills, Cobrin & Gittes, ceased operation in April 2002.

(Pergament Affirmation, exhibit A).

The Court finds that plaintiff's cause of action for legal malpractice accrued on May 31, 2006, when plaintiff received the above e-mail from Warshavsky.

[ 6 ]

The Court finds further that the statute of limitations was not tolled by the continuous representation doctrine. The complaint alleges that Warshavsky was admitted pro hac vice in connection with the Louisiana federal and state lawsuits, and there is nothing in the record reflecting that Warshavsky provided any legal representation or legal services in the underlying matters after May 31, 2006. Rather, it appears that plaintiff's local counsel in Louisiana handled the underlying matters exclusively from that date forward without any assistance from Warshavsky.

To summarize, the Court finds that legal representation by Warshavsky terminated on May 31, 2006. Plaintiff did not commence this action until November 7, 2012, more than six years later. The action is, therefore, time-barred by the three-year statute of limitations.

Accordingly, it is

ORDERED that the motion to dismiss is granted.

The foregoing constitutes the decision and order of the court.

Date: Oct 24, 2013  
New York, New York

  
\_\_\_\_\_  
Anil C. Singh