Transworld Trading, Ltd. v Bernard A. Nathan, P.C.
2013 NY Slip Op 32958(U)
February 6, 2013
Supreme Court, Suffolk County
Docket Number: 12-21608
Judge: Jerry Garguilo

[* 1]

COPY

SHORT FORM ORDER

INDEX No. 12-21608

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 8/22/12
ADJ. DATE 8/29/12
Mot. Seq. #001 - MotD

TRANSWORLD TRADING, LTD., ATLANTIC BALLOON, DENISE SIRIGO, Plaintiffs, - against - BERNARD A. NATHAN, P.C., Defendant.	ROBERT G. VENTURO, ESQ. Attorney for Plaintiffs 228 East Main Street Patchogue, New York 11772
	BERNARD A. NATHAN, ESQ. Attorney for Defendant P.O. Box 443 West Islip, New York 11795

Upon the following papers numbered 1 to 24 read on this motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1-12; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 13-19; Replying Affidavits and supporting papers 20-24; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant for an order dismissing the complaint pursuant to CPLR 3211 (a) (1), (5), and (7), is granted to the extent of dismissing the claims asserted by or on behalf of plaintiff Denise Sirigo, and is otherwise denied.

This action, which was commenced on July 18, 2012, is to recover damages arising from the defendant's alleged negligence in its legal representation of Transworld Trading, Ltd. d/b/a Atlantic Balloon ("Transworld") in an action to recover damages for conversion (*Trans-World Trading v North Shore Univ. Hosp. at Plainview*, Sup Ct, Nassau County, Index No. 02-1065; "the underlying action").

In and prior to 1999, Transworld was in the business of supplying balloons, novelties, and other gift items. Denise Sirigo was the president of Transworld. Pursuant to a series of consignment agreements, Transworld supplied Deluxe Food, Inc. and Anthony Saracco d/b/a Deluxe Food (collectively, "Deluxe") with merchandise for a gift shop operated on the premises of North Shore University Hospital in Plainview, New York ("North Shore"). In February 1999, North Shore closed the shop and subsequently refused to allow Transworld entry to the shop to retrieve its merchandise. It appears that North Shore removed some portion of the merchandise from the shop and placed it in the hospital basement. It also appears that, in the course of demanding the return of the merchandise, Sirigo

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wrote a March 8, 1999 letter to North Shore in which she made explicit reference to the storage of merchandise in the hospital basement.

The plaintiffs subsequently retained the defendant and, on January 22, 2002, filed the summons and complaint in the underlying action. The plaintiffs' first cause of action, against Deluxe, was for breach of contract; their second cause of action, against North Shore, sounded in conversion. Notwithstanding that some portion of the merchandise had been moved, the plaintiffs' cause of action for conversion referred only to merchandise allegedly housed in the gift shop. Thus, the March 8, 1999 letter is at the nexus of the parties' current dispute; the plaintiffs claim that it was faxed to the defendant on January 18, 2002, and the defendant counters that it did not receive the letter and was not aware of any merchandise stored in a basement storage area until May 1, 2007, when Sirigo faxed a copy of the letter to the defendant's office.

In May 2007, the plaintiffs moved, *inter alia*, for leave to amend their complaint to clarify that their conversion claim applied to their merchandise in the basement storage area as well as in the gift shop, and North Shore cross-moved for summary judgment. By order dated November 30, 2007, the court (Warshawsky, J.), noting the plaintiffs' unexplained delay and the consequent prejudice the proposed amendment would cause the defendants, denied their motion, granted North Shore's cross motion, and dismissed the complaint against North Shore. By decision and order (one paper) dated July 21, 2009, the Appellate Division, Second Department affirmed the November 30, 2007 order insofar as appealed from.[1]

In this action, the plaintiffs allege a single cause of action for legal malpractice, based on the defendant's failure both to refer to the basement storage area in the complaint and to discover the oversight for five years after the filing of the summons and complaint. The plaintiffs seek damages in the amount of $105,870.16, representing the value of their lost merchandise, plus reimbursement for their attorney's fees and costs in the underlying action.

The defendant now moves, pre-answer, to dismiss the complaint. The defendant contends that certain documentary evidence, to wit, a fax confirmation sheet, reveals that the March 8, 1999 letter was not faxed to the defendant's office on January 18, 2002 but rather on May 1, 2007. The defendant also contends, with reference to certain findings made by Justice Warshawsky and by the Appellate Division in the underlying action, that the plaintiffs' claim in this action is barred by "law of the case" and, further, that the plaintiffs' claim is barred by the applicable three-year statute of limitations (CPLR 214 [6]). Finally, the defendant contends that Sirigo lacks "capacity" to sue because she did not retain the defendant with respect to the matter in which the malpractice is claimed.

A motion to dismiss under CPLR 3211 (a) (1) 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, 746 NYS2d 858, 865 [2002]) and

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[1] According to the court's computer records, the underlying action was marked "purged no activity, pre-note" on September 11, 2009, with the calendar comment "disposed."

only if it is unambiguous, authentic, and undeniable (***Fontanetta v John Doe 1***, 73 AD3d 78, 898 NYS2d 569 [2010]).

When a defendant moves pursuant to CPLR 3211 (a) (5) to dismiss a claim on the ground that it is barred by the statute of limitations, it is the defendant's burden initially to establish the defense by prima facie proof that the statutory period has elapsed (***Hoosac Val. Farmers Exch. v AG Assets***, 168 AD2d 822, 563 NYS2d 954 [1990]). Once the defendant makes its prima facie showing, the burden shifts to the plaintiff to aver evidentiary facts establishing that the case falls within some exception to the statute, such as the continuous representation doctrine (*id.*). In an action to recover damages for legal malpractice–which generally accrues when the malpractice is committed–the doctrine of continuous representation will toll the statute of limitations for as long as the attorney continues to represent the client in the same matter in which the attorney committed the alleged malpractice (*e.g.* ***Shumsky v Eisenstein***, 96 NY2d 164, 726 NYS2d 365 [2001]).

On a motion to dismiss a complaint under CPLR 3211 (a) (7), the test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (***Sokol v Leader***, 74 AD3d 1180, 904 NYS2d 153 [2010]). A court must determine whether, accepting the facts as alleged in the complaint as true and according the plaintiff the benefit of every favorable inference, those facts fit within any cognizable legal theory (***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus" (***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 19, 799 NYS2d 170, 175 [2005]).

Here, as it is evident that Sirigo lacks standing to sue in her own name for injuries sustained solely by Transworld as a result of the alleged malpractice, the complaint fails to state a cause of action with respect to the claims of the individual plaintiff (*see* ***Schaeffer v Lipton***, 243 AD2d 969, 663 NYS2d 392 [1997]).

The complaint is otherwise sufficient to withstand the defendant's motion. As to the fax confirmation sheet, while it appears to confirm the defendant's theory that three other letters were faxed to the defendant's office on January 18, 2002, it does not disprove the plaintiffs' claim that the March 8, 1999 letter was also faxed to the defendant's office on that date. The defendant's attempts to attach precedential authority to certain findings made in the context of the underlying action are likewise unavailing. The defendant relies, in part, on Justice Warshawsky's finding in the November 30, 2007 order that "[u]pon verification of the Complaint, Plaintiff should have been aware that the term 'gift shop' did not encompass the alleged basement storage area too." But that finding–even assuming that the application of *stare decisis* to be appropriate to such a finding–does not negate the defendant's own negligence, if any. Nor, in any event, does it appear that this finding was adopted by the Appellate Division (*see* ***People v Rosano***, 69 AD2d 643, 419 NYS2d 543 [1979], *affd* 50 NY2d 1013, 431 NYS2d 683 [1980]). The defendant also relies on an affirmed finding that North Shore's retention of the merchandise did not constitute conversion because the competing claims to the ownership thereof had not yet been resolved. That finding, however, relates only to those items of merchandise retained in the gift shop and, as such, does not support the defendant's claim that its alleged negligence did not affect the outcome of the underlying action. As to the statute of limitations, while it seems clear that the

alleged malpractice took place more than three years prior to the commencement of this action, the court finds the evidentiary facts averred by the plaintiffs sufficient to raise an issue of fact whether the defendant continued to represent the Transworld as late as July 21, 2009, *i.e.*, through the conclusion of the appeal in an attempt to rectify the alleged malpractice, and, hence, whether the three-year limitations period was tolled by the continuous representation doctrine (*see* ***DeStaso v Condon Resnick, LLP***, 90 AD3d 809, 936 NYS2d 51 [2011]; ***Gravel v Cicola***, 297 AD2d 620, 747 NYS2d 33 [2002]).

The defendant shall serve its answer to the complaint within 10 days after service of a copy of this order with notice of its entry (*see* CPLR 3211 [f]).

Dated: February 6, 2013

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION