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At an IAS Term, Part 71 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of August, 2015.

PRESENT:

HON. SYLVIA G. ASH,

Justice.

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ELYSE JOSEPHS /ADVANCED ACUPUNCTURE HEALTH, P.C.,

Plaintiff,

- against -

AACT FAST COLLECTIONS SERVICES INC. AND LUBARSKY & TARNOVSKY ATTORNEYS AND COUNSELORS AT LAW P.C.,

Defendant,

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DECISION / ORDER

Index # 502491/2012

The following papers numbered 1 to 4 read herein: Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1
Opposing Affidavits (Affirmations)	2
Reply Affidavits (Affirmations)	3

Plaintiff Elyse Josephs moves for an order to amend her complaint and add the following additional non-party defendants: Karina Mistselmakher, Leon Lubarsky, Esq., and Rada Tarnovsky, Esq. Lubarsky and Tarnovsky oppose. For the reasons set forth below, Plaintiff's motion is granted.

Background

Plaintiff's underlying action, based in negligence and legal malpractice, seeks to recover damages which allegedly arose from services and representation provided by Defendants, AACT Fast Collections Services Inc. ("AACT") and Lubarsky & Tarnovsky Attorneys and Counselors at Law P.C. ("L&T"). Plaintiff, a licensed acupuncturist, alleges that she retained AACT in or about January 2008 to collect unpaid medical bills that she was owed. Plaintiff further allege that AACT breached its contractual obligations by failing to take appropriate actions to recover the unpaid funds and by not keeping her abreast of the proceedings of the case. Subsequently, Plaintiff entered into an agreement with L&T in January 2009, to recover the unpaid funds. Plaintiff maintains that L&T similarly failed to follow through on its commitments. As a result, Plaintiff filed a complaint against L&T with the Grievance Committee for the Second, Eleventh and Thirteenth Judicial Districts. In support of her motion, Plaintiff submits the Grievance Committee's report, which found that L&T breached the Rules of Professional Conduct in its representation of Plaintiff.

In August 23, 2014, Plaintiff commenced an action against AACT and L&T in Kings County Supreme Court. According to Plaintiff, the defendants failed to respond in a timely manner, prompting Plaintiff to move for a default judgment. Plaintiff's motion was denied by the Hon. Wavny Toussaint on October 18, 2014. Plaintiff now seeks to amend her complaint in order to add the following non-party defendants: Leon Lubarsky, Esq., Rada Tarnovsky, Esq., and Karina Mistselmakher. Plaintiff claims that Mistselmakher is the owner of AACT and that Lubarsky and Tarnovsky are individual partners of L&T.

Mistselmakher does not oppose Plaintiff's motion to amend. However, Lubarsky and Tarnovsky argue that Plaintiff should not be permitted to amend her complaint due to the expiration of the three year statute of limitation for a legal malpractice claim. Lubarsky and Tarnovsky maintain that Plaintiff's proposed amendment does not relate back to Plaintiff's initial claim for the following reasons: the amended claim does not arise out of the same conduct, transaction or occurrence as the prior claim; they, Lubarsky and Tarnovsky, are not united in interest with L&T because each individual attorney of a firm is responsible for his or her own acts and not the acts of the firm; and the prior action did not provide them with sufficient

notice that they would be parties in the case but for a mistake by Plaintiff.

In response, Plaintiff argues that the amended complaint relates back to the prior complaint. Plaintiff maintains that both claims arose out of the same events, namely L&T's representation. Further, Plaintiff argue that Lubarsky and Tarnovsky are united in interest with L&T because pursuant to New York Business Corporations Law §1505 (BCL §1505), employees of a professional corporation are personably liable for their own negligence. To that end, Plaintiff maintains that even though he was represented by L&T, Lubarsky and Tarnovsky are personally liable for their negligence in prosecuting her case. Lastly, Plaintiff argues that Lubarsky and Tarnovsky were sufficiently on notice to be added to the current action.

Discussion

An action to recover damages for legal malpractice must be commenced within three years from the accrual of the claim (see CPLR 214[6]; *Zorn v Gilbert*, 8 NY3d 933, 934 [2007]). Accrual is measured from the commission of the alleged malpractice, when all facts necessary to the cause of action have occurred and the aggrieved party can obtain relief in court (see *Landow v Snow Becker Krauss, P.C.*, 111 AD3d 795, 796 [2013]). When a party seeks to amend a complaint and add a defendant after the limitations period has expired, that party bears the burden of establishing the applicability of the relation-back doctrine of CPLR §203(b) (see *Hoosac Val. Farmers Exch. v AG Assets*, 168 AD2d 822 [3rd Dept 1990]).

In order for a claim asserted against a new defendant to relate back to the date a claim was asserted against another defendant, the plaintiff must establish that (1) both claims arose out of the same conduct, transaction, or occurrence, (2) the new party is united in interest with the original defendant, and by reason of that relationship, can be charged with notice of the institution of the action and will not be prejudiced in maintaining his or her defense on the merits by virtue of the delayed, and otherwise stale, assertion of those claims against him or her, and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been timely commenced against him or her as well (see *Buran v Coupal*, 87 NY2d 173, 178 [1995]; *Schiavone v Victory Mem. Hosp.*, 292 AD2d 365, 365-366 [2d Dept 2002]). The "linchpin" of the relation-back doctrine is whether the new defendant

had notice within the applicable limitations period (see *Buran v Coupal*, 87 NY2d at 180).

With respect to the second prong of the relation back doctrine, parties are considered united in interest where "the interest of the parties in the subject-matter is such that they stand or fall together and that judgment against one will similarly affect the other" (*Desiderio v Rubin*, 234 AD2d 581 [2d Dept 1996]). Further, "interests are united, only where one is vicariously liable for the acts of the other" *(Connell v Hayden*, 83 AD2d 30, 45 [2d Dept 1981]). The fact that one of the parties is vicariously liable for the conduct of the other, permits the new party to be charged with timely notice (see, *Austin v. Interfaith Med. Ctr.*, 264 A.D.2d 702, 704 [2d Dept 1999]).

Here, Plaintiff's motion to amend falls outside of the limitations period and would normally be denied. However, an application of the relation back doctrine of CPRL §203(b), demonstrates that the claim against Lubarsky and Tarnovsky relates back to the original complaint. Both claims arose from the same transaction or occurrence because both claims involve allegations of malpractice in connection with L&T's representation of Plaintiff. Further, Lubarsky and Tarnovsky are united in interest with L&T because not only are they individually liable for their own negligence pursuant to BCL §1505, L&T is vicariously liable as their employer. Additionally, Lubarsky and Tarnovsky were sufficiently on notice due to their shared interest with L&T.

Accordingly, Plaintiff's motion to amend the complaint is GRANTED.

ORDERED that Plaintiff shall serve the amended complaint containing the new caption upon all parties within 20 days of this order.

This constitutes the Decision and Order of the Court.

E N T E R,

Sylvia G. Ash, J.S.C.

HON. SYLVIA G. ASH, JSC