SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C. PART 8

NOREEN ROTH INDEX NO. 154855/16

MOT. DATE

- v -

RUBINSTEIN & RUBINSTEIN LLP et al. MOT. SEQ. NO. 001

The following papers were read on this motion to/for _____

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s). _____
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s). _____
Replying Affidavits NYSCEF DOC No(s). _____

In this action for legal malpractice and a breach of fiduciary duty, defendants move, pursuant to CLPR 3211 (a) (5), to dismiss the complaint. Plaintiff opposes the motion. The court's decision follows.

Defendant Rubinstein & Rubinstein, L.L.P. is a law firm (the "law firm") located in Manhattan. Defendants Kenneth Rubinstein and Asher Rubinstein are attorneys, duly licensed to practice law in the State of New York, who practice law at the law firm. All three defendants are together referred to as defendants.

The following facts are based upon the complaint. Plaintiff Noreen Roth alleges that, in 1996, she married nonparty Peter Thomas Roth, and they have two children together. In the course of their marriage, plaintiff and Mr. Roth accumulated assets worth tens of millions of dollars due to the success of nonparty Peter Thomas Roth Labs ("PTR Labs"), "a global prestige skincare company founded by Mr. Roth in 1993". PTR Labs employed plaintiff as a consultant and, since January 2008, as a managing director.

Plaintiff alleges that the significant wealth that she and her husband accumulated during marriage was marital property, subject to equitable distribution, in the event of divorce, pursuant to the Domestic Relations Law. In 2012, Mr. Roth allegedly decided "that he would ultimately leave the marriage," and "sought out ways to effectively deprive [plaintiff] of . . . her share in their fortune" so that he could claim "in a divorce proceeding that there were virtually no assets subjects to [e]quitable [d]istribution".

Towards this end, Mr. Roth engaged the services of defendants "as counsel to him and [plaintiff]". Mr. Roth allegedly did not consult with plaintiff about the retention of defendants, and plaintiff was not aware of defendants' "loyalty to Mr. Roth at her expense". "In December 2012, Mr. Roth told [plaintiff] that they needed to very quickly create a new estates tax plan because there was likely going to be a change in the law concerning estate taxes commencing in 2013".

Plaintiff avers that, pursuant to the Tax Relief, Unemployment Insurance Reauthorization and Job

Dated: 1/8/18

HON. LYNN R. KOTLER, 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

Creation Act of 2010 (the 2010 Act), she and Mr. Roth could shelter from federal estate tax up to $5 million per child, by giving this amount to each child as a lifetime gift. The 2010 Act was set to expire at the end of 2012, after which estates over $1 million would be subject to estate tax. According to plaintiff, prior to the anticipated expiration of the 2010 Act, Mr. Roth and plaintiff were able to shelter $8 million more for their two children, than after its expiration. This goal, she claims, could have been accomplished by creation of an irrevocable trust for each child and contribution by the Roths of $5 million in cash or assets to each trust. Plaintiff claims that, in 2012, "there was no reason to gift any more than that amount".

Instead, plaintiff claims that she was told by defendants and Mr. Roth that the couple "urgently needed to place *all* of their assets in[to] family limited partnerships and [t]rusts before the end of 2012". In light of the aforementioned possible tax consequences and the fact that the Roths were in their early 50s and in relatively good health, an "irrevocable transfer of all assets to their children in 2012 was not remotely in [plaintiff's] best interests". "[R]elying upon [d]efendants and her husband as fiduciaries," plaintiff "agreed to a . . . series of transfers of essentially all marital property subject to [e]quitable [d]istribution, as well as all of [plaintiff's] separate property, into her children's trusts".

The series of simultaneous transactions, implemented by defendants, involved: (1) creation of revocable trusts for plaintiff and Mr. Roth; (2) creation of irrevocable trusts for each of their two children; (3) transfer of all of the marital assets and all of plaintiff's separate property into five family limited partnerships, in which plaintiff and Mr. Roth each had a 1% general partner interest and a 47% limited partner interest, and each of their children's trusts held a 2% limited partner interest; (4) transfer by plaintiff and Mr. Roth of their respective 47% limited partner interests into their respective revocable trusts; and (5) transfer by plaintiff and Mr. Roth of "their revocable trusts' respective 47% limited partnership interests in each [family limited partnership] to the two children's trusts in equal shares". As a result, 98% of all marital property and 98% of plaintiff's separate property were allegedly transferred "to the children's trusts as interests in the [family limited partnerships], as opposed to interests in the underlying assets owned by the [family limited partnerships]".[1]

Unbeknownst to plaintiff, Mr. Roth did not subject his separate property to any of the aforementioned transfers, which deprived plaintiff of her rights to equitable distribution of marital property in the event of divorce.

Plaintiff further alleges that defendants: (1) "falsely presented themselves to [plaintiff] as jointly representing her and her husband even though . . . they were acting solely for the benefit of Mr. Roth," and had "private communications and . . . meetings with Mr. Roth"; (2) never informed plaintiff "that there was at least a potential conflict of interest in their representing both her and her husband," and "never advised her to seek the advice of independent counsel"; (3) did not withdraw from representing both plaintiff and Mr. Roth, nor obtained an informed waiver of the conflict, once defendants learned that Mr. Roth was not transferring his separate property and an actual conflict of joint representation allegedly arose; (4) did not advise plaintiff that "only she was surrendering ownership of her separate property"; (5) never explained to plaintiff "the consequences of her agreeing to create the [family limited partnerships] and [t]rusts while she was young and in good health"; (6) never informed plaintiff that "the [t]rusts could have contained provisions protecting her right to live in the family's homes during her life time, or provide for her to receive income generated by the trusts," as plaintiff "was effectively rendered completely dependent upon her marriage surviving, and/or the beneficence of her children, in order to benefit from her own assets"; and (7) although their plan was conceived well before December 2012, de-

[1] The transfer of the 47% limited partnership interests in each family limited partnership "to the children's irrevocable trusts was a transfer subject to gift tax" (*see id.*, ¶ 29). The fair market value of the assets, that were gifted to the irrevocable trusts, was allegedly tens of millions of dollars (*id.*, ¶ 30). However, Mr. Roth and defendants allegedly "concocted fraudulent valuations of the assets gifted so that the Roths' tax returns would show less than $10 million in gifts in 2012" (*see id.*, ¶¶ 31-36 [plaintiff describes specific assets, including real estate, that were allegedly undervalued]).

fendants and Mr. Roth deliberately waited until then in order to "create[] a scenario where it was impossible for [plaintiff] to secure independent legal advice because . . . [plaintiff was] falsely told that the new estate plan must be put into place before the last day of 2012, [and plaintiff] had no choice but to sign [the transaction documents] without consulting counsel".

In February 2016, Mr. Roth filed for divorce, "claiming that [plaintiff] has no right to any [e]quitable [d]istribution because the Roths no longer own anything other than their 1% [g]eneral [p]artnership interests" in the family limited partnerships.

Plaintiff filed a summons with notice on June 9, 2016, and a complaint on November 8, 2016. Plaintiff asserts two causes of action: (1) for legal malpractice, claiming that as a result of defendants' negligence, she suffered damages of no less than $25 million; and (2) for breach of fiduciary duty, seeking damages of no less than $25 million, as well as punitive damages of no less than $150 million. Defendants interposed an answer, asserting as an affirmative defense that the causes of action are time barred. Defendants now move to dismiss the complaint.

DISCUSSION

Defendants contend that both of plaintiff's causes of action are barred by a statute of limitations. CPLR 3211 (a) (5) provides, in relevant part, that a cause of action may be dismissed if it is barred by the statute of limitations.

Legal Malpractice

Under CPLR 214, "an action to recover damages for malpractice . . . regardless of whether the underlying theory is based in contract or tort" "must be commenced within three years" (CPLR 214 [6]). However, the statute of limitations may be tolled in situations where a doctrine of continuous representation applies (*see e.g. Red Zone LLC v Cadwalader, Wickersham & Taft LLP*, 118 AD3d 581, 582 [1st Dept 2014], *affd as mod* 27 NY2d 1048 [2016]).

> For the continuous representation doctrine to apply to an action sounding in legal malpractice or breach of contract by an attorney, there must be clear indicia of an ongoing, continuous, developing, and dependant relationship between the client and the attorney which often includes an attempt by the attorney to rectify an alleged act of malpractice. One of the predicates for the application of the doctrine is continuing trust and confidence in the relationship between the parties. However, its application is limited to instances in which the attorney's involvement in the case after the alleged malpractice is for the performance of the same or related services and is not merely the continuity of a general professional relationship" (*Luk Lamellen U. Kupplungbau GmbH v Lerner*, 166 AD2d 505, 506-507 [2nd Dept 1990] [internal citations omitted]).

In support, defendants provide a retainer agreement, dated December 7, 2012, that outlines the scope of work of the law firm for the purposes of plaintiff's and Mr. Roth's estate planning and asset protection. Kenneth Rubinstein states in his affirmation[2] that "[a]ll services covered by the retainer agreement were . . . substantially completed on December 21, 2012," and the "Memoranda of Gift were presented to [p]laintiff and Mr. Roth several days later" and were signed by them on December 31, 2012. Defendants contend that the statute of limitations expired no later than December 31, 2015, whereas plaintiff commenced this action on June 9, 2016.

[2] Plaintiff contends that Mr. Rubinstein, as a party to his action, should have submitted an affidavit, not an affirmation. The court agrees (*see* CPLR 2106 [a]). However, the court is willing to overlook this irregularity because Mr. Rubinstein's affirmation is primarily a vehicle to offer exhibits and to make legal arguments, and, as defendants' argue, this defect does not prejudice plaintiff's substantial rights (*see* CPLR 2101 [f]).

In opposition, plaintiff argues that defendants, as part of work that they undertook to complete, were to prepare and record deeds transferring plaintiff's and Mr. Roth's ownership in various real estate properties to the family limited partnerships. Plaintiff points out that: (1) the deed transferring her interest in a property located in Water Mill, New York was not provided to her until March 6, 2013 and that it was not recorded until April 17, 2014; and (2) the deed transferring a townhouse in Manhattan was not executed until August 13, 2013.

In reply, defendants contend that the conveyance of the townhouse was implemented by a different law firm, Romer Debbas LLP. Defendants concede that they provided services in order to convey the Water Mill property, which was conveyed on March 6, 2013 when plaintiff and Mr. Roth signed a deed. Defendants argue that that the date when the Water Mill deed was recorded, which was April 17, 2014, is irrelevant for the purposes of tolling of the statute of limitations, since conveyance of property takes effect once a deed is delivered by a grantor and accepted by a grantee, and not when a deed is recorded. Hence, they argue that the statute of limitations expired on March 6, 2016 at the latest.

A deed for the conveyance of property in Water Mill, dated March 6, 2013, was prepared by the law firm (*see id.*, exhibit 5), and it was recorded on April 17, 2014 by the Suffolk County Clerk (*see* 01/16/17 Kenneth Rubinstein affirmation, exhibit 4). Defendants' contention, that the recording of the deed did not affect the conveyance of the Water Mill property, is unavailing. The relevant inquiry, for the purposes of application of the doctrine of continuous representation, is whether defendants continued to perform the same or related services as those that are at the heart of this action (*see Luk Lamellen U. Kupplungbau GmbH v Lerner*, 166 AD2d at 506-507). Clearly, the recording of a deed for the transfer of the Water Mill property was at least a related service to the underlying task of plaintiff's estate planning that defendants undoubtedly undertook (*see* December 7, 2012 retainer agreement at 3 (stating that defendants will prepare conveyance documents including deeds)]; *cf. Voutsas v Hochberg*, 103 AD3d 445, 446 [1st Dept 2013] ["(t)he continuous representation doctrine did not apply to the malpractice claim, as the legal services relied upon were unrelated to the specific legal matter as to which malpractice was alleged"]). Therefore, the court finds that the doctrine of continuous representation applies, and plaintiff's cause of action for legal malpractice is not time barred.

Breach of Fiduciary Duty

Although defendants contend that this cause of action is duplicative of that for legal malpractice, they have moved for dismissal only on the ground of the statute of limitations, and not on a ground of failure to state a cause of action.

"[A]n attorney stands in a fiduciary relation to the client" (*Graubard Mollen Dannett & Horowitz v Moskovitz*, 86 NY2d 112, 118 [1995]; *see also Greene v Greene*, 80 AD2d 55, 57 [1st Dept 1981], *affd* 56 NY2d 86 [1982]). "So long as the relationship of trust and confidence exists, the client cannot be expected to bring suit. Indeed, it would be absurd to resort to litigation since there is then no reason to believe that a breach of the fiduciary relationship has occurred. Only when the client is made aware that she has been imposed upon and some violation of the faith inherent in the attorney-client relationship has been brought home to her is there cause for judicial intervention. It is then that the right of action accrues" (*Greene*, 80 AD2d at 58 [stating that a doctrine that is analogous to continuous treatment is applicable, and that the statute of limitations begins to run when the attorney-client relationship terminates]).

Here, as previously discussed, defendants continued to provide services to plaintiffs as late as 2014. Even if a three-year statute of limitations applies, this cause of action is timely as well, based upon the court's reasoning with respect to the legal malpractice claim.

CONCLUSION

Accordingly, it is hereby

ORDERED that the Clerk is directed to restore this action to the active calendar, as it appears to have been marked disposed in error; and it is further

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

ORDERED that the parties are directed to appear for a preliminary conference in Part 8, 80 Centre Street, Room 278, on February 6, 2018 at 9:30am.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order and Judgment of the court.

Dated: 1/8/18
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.