Red Zone LLC v Cadwalader, Wickersham & Taft LLP
2018 NY Slip Op 31532(U)
February 6, 2018
Supreme Court, New York County
Docket Number: 650318/2011
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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RED ZONE LLC,

Plaintiff,

-against-

CADWALADER, WICKERSHAM & TAFT LLP,

Defendant.

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DECISION AND ORDER
Index No.: 650318/2011

Motion Sequence No.: 015

O. PETER SHERWOOD, J.:

I. BACKGROUND

This action for legal malpractice arises out of representation of plaintiff Red Zone LLC (Red Zone) by defendant Cadwalader, Wickersham & Taft LP (CWT) in connection with Red Zone's potential acquisition of amusement park company Six Flags and the replacement of Six Flags' directors in 2004-2005. In August 2005, a dispute arose between Red Zone and UBS Securities, LLC (UBS), its financial advisor, about UBS's fee in connection with the initiative. The dispute resulted in a compromise which CWT was asked to document (the "Supplement"). This lawsuit concerns whether CWT erred in drafting the Supplement. Red Zone has asserted claims for breach of contract (based on CWT's failure to provide the agreement as requested) and malpractice. In a Decision and Order dated August 27, 2013, Justice Schweitzer granted Red Zone's motion for summary judgment. The decision was affirmed by the First Department, and then modified by the Court of Appeals, which reinstated CWT's statute of limitations defense.

On this motion for summary judgment, CWT argues that the claims are barred by the applicable three-year statute of limitations. Red Zone responds that the continuous representation doctrine tolls the statute of limitations thereby making its claims timely.

II. FACTS

As this is a motion for summary judgment, the facts are taken from the parties' 19-a statements (Defendant's 19-a Statement [NYSCEF Doc. No. 474] ("DSUF"), Plaintiff's Response [NYSCEF Doc. No. 643] ("RDSUF") [together, the "19a Statements"], Plaintiff's Counter Statement [NYSCEF Doc. No. 644] ("PSUF") and Defendant's Response to Plaintiff's Counter Statement [NYSCEF Doc. No. 650] ("RPSUF") [together, the "Counter 19a Statements"]), except where noted.

CWT is a law firm, with its principal office in New York City. Red Zone is a Delaware LLC managed by Daniel Snyder, who is also the principal owner of the Washington Redskins football franchise. David Donovan, formerly of the law firm Wilmer Cutler Pickering Hale and Dorr LLP, was general counsel for both the Washington Redskins and Red Zone between October 2005 and July 2011. CWT represented Red Zone with respect to the Six Flags acquisition (the "Acquisition") and the solicitation of Six Flags shareholders to replace three of six Six Flags board members (the "Solicitation"), as well as other matters. UBS was Red Zone's financial advisor regarding the Acquisition and the Solicitation, and received a $500,000 retainer fee. In August 2005, a dispute arose between UBS and Red Zone regarding the fee UBS would receive upon completion of the Solicitation (the "Fee Dispute"). The Fee Dispute was resolved in an agreement which the parties sought to memorialize in the Supplement. CWT worked on the Supplement, although the extent of CWT's involvement appears to be disputed (19-a Statements, ¶6). The parties dispute whether CWT made an error with respect to the Supplement. Red Zone and UBS signed the Supplement on August 17, 2005. The Solicitation then proceeded successfully, and Red Zone's designees joined the Six Flags board of directors.

On December 5, 2005, Red Zone and UBS executed a second amendment to their engagement letter. CWT was involved with the amendment. The parties also dispute whether the second amendment was related to the Supplement (*id.*, ¶ 11). The parties dispute whether CWT considered its representation of Red Zone complete after the execution of the second amendment.

Red Zone then paid UBS an additional $1.5 million. There was then a period of inactivity between Red Zone and UBS, during which time CWT represented Six Flags. The parties dispute whether CWT still represented Red Zone.

In approximately May 2007, UBS sent Red Zone a written demand, seeking additional fees. The dispute led to litigation ("UBS Litigation"). The parties dispute whether CWT was approached and agreed to act as counsel to Red Zone in the UBS Litigation, and how much assistance CWT provided (*id.*, ¶¶ 17-18). It is undisputed that CWT never appeared as counsel of record in the case or billed for any work related to that litigation. CWT did provide information, and was subpoenaed and deposed in that litigation. Red Zone asked CWT to contribute toward a possible settlement of the UBS Litigation, but CWT declined. On October 28, 2010, the First Department entered summary judgment for UBS, in that case.

On January 14, 2011, Red Zone filed this suit against CWT, alleging legal malpractice and seeking to hold CWT liable for the amount of the judgment in the UBS action. Summary judgment was granted to Red Zone in 2013, with the First Department affirming, noting that the continuous representation doctrine applied to toll the statute of limitations. The Court of Appeals modified, denying summary judgment and reinstating CWT's statute of limitations defense, as Red Zone had not demonstrated that the defense failed as a matter of law.

III. ARGUMENTS

A. CWT's Motion for Summary Judgment

CWT now moves for summary judgment on the ground that Red Zone's claims are barred as untimely. It seeks to show that the continuous representation doctrine does not toll the statute of limitations. CWT argues that Red Zone won the Solicitation in November 2005 and CWT sent its final bill, which included work on the Supplement, in April 2006. Subsequently, CWT represented Six Flags in unrelated matters (Memo at 2). While CWT disputes Red Zone's claim that CWT represented Red Zone the UBS Litigation, CWT assumes it represented Red Zone in that dispute, for the purposes of this motion (*id.*). CWT argues that, even if it did represent Red Zone in the UBS Litigation, that was not part of a continuous representation.

First, continuous representation requires a mutual understanding between client and counsel that further representation on a matter is required (*seeMcCoy v Feinman*, 99 NY2d 295, 306 [2002] ["The continuous representation doctrine tolls the statute of limitations only where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim."]). There was no discussion of such representation, and no mutual understanding that CWT would represent Red Zone in a litigation against UBS. CWT actually had a policy against suing big banks, which it viewed as potential clients (*id.* at 3, 6-7; citing *Shumsky v Eisenstein*, 96 NY2d 164, 170 [2001] ["plaintiffs and the defendant reasonably intended that their professional relationship of trust and confidence—focused entirely upon the very matter in which the alleged malpractice was committed—would continue"]). CWT did not have any understanding that future representation was planned, and such an understanding is required (*see Johnson v Proskauer Rose LLP*, 129 AD3d 59, 68 [1st Dept 2015] ["while there was certainly the *possibility* that the need for future legal work would be required with respect to the [original representation], plaintiffs could not have "acutely" anticipated the need for further counsel from defendants that would trigger the continuous representation toll"]).

Second, the representations alleged by Red Zone were not continuous (Memo at 9-14). A general relationship between client and counsel is insufficient. Continuous representation requires that the attorney responsible for the malpractice continues to represent the client in the same case. Representation in connection with a lawsuit is not continuous with representation for a transaction, even if the transaction is the basis for the lawsuit, especially given the two year lag between them (*id.* at 4, 9, 11-12; citing *Goldman v Akin, Gump, Strauss, Hauer & Feld, LLP*, 11 Misc 3d 1077(A) [Sup Ct New York County, 2006], *affd,* 46 AD3d 481 [1st Dept 2007] [not a continuing representation where there was a "clear break in the two representations. Moreover, they were distinct—one retention was for papering the deal while the other was for representation in litigation"]). Additionally, courts have held that "[u]nder New York law, a transactional matter and litigation related to that transaction are not considered the same specific matter for continuing representation purposes" (*Rich Products Corp. v Kenyon & Kenyon, LLP*, 43 Misc 3d 1236(A) [NY Sup 2014], *affd as mod,* 128 AD3d 1532 [4th Dept 2015]).

Third, the statute of limitations is intended to protect parties from prejudice due to the loss of evidence over time, and the continuing representation doctrine is intended to allow an unsophisticated or unrepresented client to place confidence in its counsel, and not be adverse to its counsel while the representation is ongoing (Memo at 4, 14-15; *Glamm v Allen*, 57 NY2d 87, 94 [1982] ["Neither is a person expected to jeopardize his pending case or his relationship with the attorney handling that case during the period that the attorney continues to represent the person"]). CWT argues that there is prejudice, as at least three witnesses are no longer available to testify, either because of death (Matt Fenster, an associate who worked on the UBS litigation), disability (Red Zone's former general counsel, who has had a stroke), or disappearance (Bin Tan, a CWT associate who worked on the transaction, who has not been located). Additionally, CWT's representation regarding the Supplement ended in August 2005, and Red Zone was neither unsophisticated or unrepresented, as Red Zone's owner is a billionaire entrepreneur, and Red Zone was highly sophisticated and had three other high-quality firms representing it on the UBS dispute (Memo at 4, 15). Red Zone was not dependent on CWT, and CWT argues that the hiring of other counsel cuts against the litigation being part of a continuing representation (*id.* at 17, citing *Piliero v Adler & Stavros*, 282 AD2d 511, 512 [2d Dept 2001]). CWT argues that Red Zone's use of the continuing representation doctrine would stretch the doctrine beyond any prior use.

B. Red Zone's Opposition

Preliminarily, Red Zone contends that CWT's motion is improper. Red Zone previously moved for summary judgment in this action. In opposition, CWT made the same arguments it makes here. Red Zone's motion was granted. The First Department affirmed, noting that CWT had provided legal advice throughout the UBS litigation, into late 2010, and rejecting the CWT's argument about Red Zone's having additional counsel (Opp at 3). A further appeal to the Court of Appeals resulted in remand for trial (Opp at 1, citing *Red Zone v Cadwalader, Wickersham & Taft LP*, 27 NY3d 1048 [2016] ["triable questions of fact exist regarding whether the statute of limitations was tolled by the continuous representation doctrine in light of: the significant gap in time between the alleged malpractice and the later communications between the parties; the changed nature of the alleged legal representation of plaintiff by defendant; the absence of any clear delineation of the period of such representation; and defendant's submission of affidavits disclaiming any mutual understanding of legal representation after 2005"]). Additionally, Red Zone notes that, in its opposition to Red Zone's motion, CWT requested summary judgment pursuant to CPLR 3212(b), making this motion barred by the rule against successive summary judgment motions (Opp at 1, 6-7, citing *Amill v Lawrence Ruben Co.,* 117 AD3d 433, 434 [1st Dept 2014], *Fleming & Assocs., CPA P.C. v Murray & Josephson, CPAs, LLC*, 127 AD3d 428, 428 [1st Dept 2015] ["parties are not permitted to make successive fragmentary attacks on upon a cause of action but just assert all available grounds when moving for summary judgment"]). While Red Zone has not found a case on the prohibition against successive motions for summary judgment after a request pursuant to CPLR 3212 (b), Red Zone contends the same considerations apply as to a cross-motion (Opp at 7). At oral argument, Red Zone's counsel candidly conceded that whether a second motion should be allowed, is a matter within the sound discretion of the court.

Considering the merits, CWT has admitted, for the purpose of this motion, that it represented Red Zone in the UBS Litigation. That litigation started in September 2007, within the three year statute of limitations after the alleged August 2005 malpractice (Opp at 1). Therefore, the doctrine of "timely return" allows tolling of the statute of limitations (*id.* at 10-12). In *Shumsky*, the Court of Appeals vacated the dismissal of a malpractice case where the client had timely returned to the attorney, applying the same logic as courts do for a medical malpractice case in which the patient returns to the doctor within the limitations period regarding the same condition

(Opp at 10, quoting *Shumsky*, 96 NY2d 164 [2001]). The phrase "timely return" merely means a return for related services within the statute of limitations (Opp at 11). Further, the First Department has ruled that CWT's representation in the UBS Litigation was an attempt to rectify the malpractice, and the representation related to the UBS Litigation is related to the transactional litigation (Opp at 12).

Red Zone notes that CWT did not provide an engagement letter, which violates Rules 1215.1 (requiring counsel to provide an engagement letter to clients to define the scope of the services to be provided) and 1215.2 (creating an inapplicable exception for fees under $3,000), and requiring all inferences about whether the representation was continuous to be made in Red Zone's favor (Opp at 7-9, citing *Gary Friedman, P.C. v O'Neill,* 115 AD3d 792, 793 [2nd Dept 2014] ["an attorney who fails to comply with rule 1215.1 bears the burden of proving the terms of the retainer and establishing that the terms of the alleged fee arrangement were fair, fully understood, and agreed to by the client"]). Accordingly, CWT bears the burden of showing that the engagement had ended. Red Zone has provided affidavits showing that it believed CWT represented the company from 2004 through 2010 (Opp at 9). Further, CWT wrote, but never sent, a letter to Red Zone in October 2007 to tell Red Zone the representation had ended in 2005 (*id.*). Red Zone argues that CWT's subjective understanding about the representation is irrelevant, as the law considers what was done and the client's expectations (Opp at 2, 12-13, citing *Shumsky,* 96 NY2d at 95 [plaintiffs had the "reasonable impression" that defendant was taking care of plaintiffs' needs]). Red Zone also claims that CWT continuously counseled Red Zone on all matters related to Six Flags from the start of the project in 2004 through the end of the UBS Litigation in 2010 (Opp at 2). Red Zone further contends that there are issues of fact as to a mutual understanding, and facts which constitute evidence that CWT represented Red Zone with respect to all Six Flags matters (Opp at 13-18).

Red Zone argues that CWT is incorrect in its arguments about the relationship between the malpractice and the subsequent work not being sufficiently related (Opp at 18- 23). It distinguishes cases involving serial engagement letters (*Williamson ex rel. Lipper Convertibles, L.P. v PricewaterhouseCoopers LLP*, 32 AD3d 179, 183 [1st Dept 2006] *rev'd,* 9 NY3d 1, 10-11 [2007]), or work which was limited to that specified in the engagement letter (*Johnson v Proskauer Rose LLP,* 129 AD3d 59, 63 [1st Dept 2015]). Additionally, as far as CWT relies on the distinction between working on a transaction and a subsequent related litigation, neither the Court of Appeals

nor the Appellate Division has recognized such a distinction, and, contrary to CWT's position, there are cases finding counsel's work on a litigation related to the malpractice constituted continuous representation (Opp at 20, citing *N&S Supply v Simmons*, 305 AD2d 648, 650 [2nd Dept 2003]; *Kuritzky v Sirlin & Sirlin*, 231 AD2d 607, 608 [2nd Dept 1996]). Additionally, the First Department has held in this case that CWT's work during the litigation was an attempt to remedy the malpractice (Opp at 21, citing 11 AD3d at 582), and that portion of the decision was not touched by the subsequent Court of Appeals decision.

Finally, as far as CWT relies upon the rationale for the continuous representation doctrine, CWT's arguments that Red Zone was too sophisticated hold no water. Red Zone did not have expertise in "change of control" and relied on CWT's assistance (Opp at 23).

Red Zone asks the court to deny CWT's motion for summary judgment and to grant summary judgment to Red Zone, dismissing CWT's statute of limitations defense (Opp at 2).

C. CWT's Reply

CWT points out that Red Zone does not dispute it must show "continuous representation" to avoid its claims being time barred. Red Zone is required to show that the representation in the lawsuit was continuous to the alleged malpractice on the agreement (Reply at 1).

CWT argues that this motion is consistent with, and is not foreclosed by, the law of the case, since the Court of Appeals held there to be a triable issue of fact regarding the applicability of the continuous representation doctrine (Reply at 2). Discovery had not been completed, and the current record was not available. Nor did the Court of Appeals address the legal issues raised by this motion. Finally, if this motion is prohibited, so is Red Zone's request for the court to search the record and grant it summary judgment, instead of CWT. CWT notes Red Zone has not cited, and CWT has not seen, any cases where a request for summary judgment pursuant to CPLR 3212(b) precluded a subsequent motion. Considering the motion on the merits would also be more efficient, as it could eliminate the need for a trial.

Substantively, in order to show "continuous representation" and toll the statute of limitations, there must be a mutual understanding of the need for further representation on the underlying subject matter (Reply at 4). CWT argues that Red Zone misinterprets the cases it cites to support its position that only the client's beliefs were relevant (*id.* at 4-5). Further, the evidence provided by Red Zone does not create a material issue of fact about the existence of a mutual understanding. Dennis Block's 2013 affidavit, in which he stated he had advised Red Zone not to

sign the Supplement because it could entitle USB to $10 million in fees, is not the same as agreeing to future representation (Reply at 5-6). The unsent termination letter also does not show the representation had continued; it explicitly stated that CWT believed the representation had ended in 2005 (*id.* at 6). Finally, Red Zone's argument that CWT continued to represent Red Zone with respect to all matters related to Six Flags is inconsistent with events as illustrated by the bills showing various client-matter numbers. Additionally, the representations cannot be continuous, as the litigation over an agreement is not continuous with the drafting of the agreement, and CWT distinguishes the cases cited by Red Zone (*id.* at 7-10).

Red Zone's "timely return" argument fails because Red Zone misinterprets the cases as stating that the only requirement is for the client to return to the attorney within the limitations period (*id.* at 11-12). The representation was not continuous because there was a clear break between the two distinct representations (*id.* at 12). Finally, CWT argues this is not an intended use of the continuous representation doctrine, given the rationale for the doctrine of avoiding prejudice from the passage of time and loss of evidence (*id.* at 13).

As far as Red Zone argues that CWT's failure to provide an engagement letter requires tolling the statute of limitations, CWT argues that, while there may not have been a letter, there is no evidence that CWT willfully failed to comply with the rule requiring engagement letters (*id.* at 14). CWT had been representing Red Zone in connection with the Six Flags acquisition for over a year, Red Zone paid its bills, and no engagement letter is required when the "services are of the same general kind as previously rendered to and paid for" (*id.* at 15, quoting 22 NYCRR § 1215.2). Further, that rule was created to avoid fee disputes, not to avoid attorney misconduct, and weighs against finding a continuing representation (*id.* citing *Bergman v Fingerit*, 177 AD2d 448, 449 [1st Dept 1991]).

IV. DISCUSSION

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez v Prospect Hosp.*,

supra; *Olan v Farrell Lines, Inc.*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the *prima facie* showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver*, 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion, give that party the benefit of every favorable inference (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]), and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "[a] shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *see Zuckerman v City of New York*, *supra*; *Ehrlich v Am. Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 259 [1970]).

Lastly, "[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin*, 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

Although, successive motions for summary judgment are not allowed (*see Amill v Lawrence Ruben Co.*, 117 AD3d 433, 434 [1st Dept 2014], *Fleming & Assocs., CPA P.C. v Murray & Josephson, CPAs, LLC*, 127 AD3d 428, 428 [1st Dept 2015] ["parties are not permitted to make successive fragmentary attacks on upon a cause of action but just assert all available grounds when moving for summary judgment"]), this motion is the product of a decision of the Court of Appeals for further fact development which is now complete. In this unusual circumstance, the court will allow the motion to proceed in the exercise of its discretion.

Upon review of the prior motion for summary judgment, the Court of Appeals reinstated the statute of limitations defense, holding that

> plaintiff did not meet its burden of demonstrating that defendant's statute of limitations defense fails as a matter of law. Specifically, triable questions of fact exist regarding whether the statute of limitations was tolled by the continuous representation doctrine in light of: the significant gap in time between the alleged malpractice and the later communications between the parties; the changed nature of the alleged legal representation of plaintiff by defendant; the absence of any clear delineation of the period of such

representation: and defendant's submission of affidavits disclaiming any mutual understanding of legal representation after 2005.

On this motion CWT repeats the arguments made previously in opposition to Red Zone's motions for summary judgment, specifically that 1) there was no mutual understanding as to the need for continued representation and 2) its representation of Red Zone was not continuous (*see* NYSCEF Doc. No. 151 pp. 1215). As to both of these, CWT repeats a number of legal arguments but except for the deposition testimony and self-interested affidavit of Dennis Block, it fails to show new evidence sufficient to justify entry of judgment for CWT as a matter of law in face of the finding of the Court of Appeals that there are "triable questions of fact." Moreover, in his Decision and Order dated August 27, 2013, Justice Schweitzer set forth facts that, although insufficient to require a grant of summary judgment in favor of Red Zone, are adequate at least to create doubt as to the existence of triable issues of fact (*see Rotuba Extruders, Inc.*, 46 NY 2d at 231). Here, the facts are in dispute and conflicting inferences may be drawn from the evidence, thereby requiring denial of the motion (*see Ruiz*, 71 AD 3d at 1112).

Accordingly, CWT's motion for summary judgment is DENIED. Counsel shall appear for an initial pre-trial conference in Part 49, Room 252, 60 Centre Street, New York on March 7, 2018 at 9:30 a.m.

This constitutes the decision and order of the court.

DATED: February 6, 2018

E N T E R,

O. PETER SHERWOOD J.S.C.