

**Tulino v Hiller, PC.**

2018 NY Slip Op 32553(U)

September 12, 2018

Supreme Court, Kings County

Docket Number: 502725/2016

Judge: Kathy J. King

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This opinion is uncorrected and not selected for official publication.

At an I.A.S. Part 64 of the Supreme Court of the State of New York, held in the County of Kings at the Courthouse, 360 Adams Street, Brooklyn, New York, on the 12<sup>th</sup> day of September 2018.

PRESENT: HON. KATHY J. KING,  
Justice.

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EVA TULINO, Individually, NICOLEETA TULINO as  
EXECUTRIX of the Estate of MICHELE TULINO,  
Deceased and TULINO REALTY, INC.,

**DECISION/ORDER**

Plaintiffs,

Index No. 502725/2016

-against-

HILLER, PC., HILLER P.C., f/k/a  
WEISS & HILLER, P.C., ARNOLD WEISS Esq.,  
and MICHAEL HILLER, Esq.,

Defendants.  
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The following papers numbered 1-4 read herein:  
Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_

Papers Numbered:  
\_\_\_\_\_ 1-2 \_\_\_\_\_  
\_\_\_\_\_ 3 \_\_\_\_\_  
\_\_\_\_\_ 4 \_\_\_\_\_

In this action for alleged legal malpractice, defendants Hiller, P.C., Hiller P.C., f/k/a Weiss & Hiller P.C., (“W&H”), Michael Hiller, Esq. and Arnold Weiss, Esq. (collectively referred to as “defendants”), move to dismiss plaintiffs’ complaint with prejudice pursuant to CPLR 3211(a)(1), (a)(5), (a)(7) and (a)(8). Michael Hiller Esq. (“Attorney Hiller”) and Arnold Weiss, Esq. (“Attorney Weiss”), also move individually, as part of the requested relief, to dismiss pursuant to CPLR 3211 (a)(8). Plaintiff Nicoletta Tulino, as Executrix of the Estate of Michele Tulino, opposes the requested relief. Plaintiff, Eva Tulino submits no opposition to the requested relief.

On April 14, 2009, Antonio Tulino, brother and business partner of Michele Tulino (“Michele”), commenced a lawsuit against Michele regarding an internal family dispute. The lawsuit

seeks to compel Michele to issue stock certificates to Antonio representing his ownership interest in Tulino Realty, Inc. W&H represented Michele in the lawsuit.<sup>1</sup> As part of Michele's defense, W&H asserted counterclaims against Antonio alleging, *inter alia*, that Antonio breached his fiduciary duty to the corporation. Thereafter, the parties settled the matter, however, the counterclaims asserted against Antonio remained. On November 6, 2012, a certification conference in the underlying action was held. Pursuant thereto, W&H was required to file a note of issue within 90 days which expired on February 14, 2013. On December 27, 2012, W&H moved by Order to Show Cause to be relieved as counsel based on the failure of Michele's agents-in-fact to cooperate with counsel. On March 18, 2013, the court denied W&H's motion to withdraw. A subsequent motion by W&H for leave to reargue its motion to withdraw as counsel was granted and the action was stayed for 30 days to enable Michele to retain new counsel.

On January 16, 2014, Michele's counterclaims were dismissed with prejudice since a note of issue was not filed prior to the order granting W&H's motion to withdraw as counsel. On February 26, 2016, Eva Tulino, Individually, Nicoletta Tulino as Executrix of the Estate of Michele Tulino, Deceased, and Tulino Realty, Inc. ("Plaintiffs") commenced an action against defendants W&H, Attorney Hiller and Attorney Weiss for alleged legal malpractice, breach of contract, fraud, and violation of Judiciary Law 487. An amended summons and complaint was filed on May 31, 2016.

Defendants' filed this motion to dismiss seeking dismissal of plaintiff's complaint pursuant to CPLR 3211(a)(1),(5), and (7) as barred by the statute of limitations. Attorneys Hiller and Attorney Weiss, individually, move to dismiss, pursuant to CPLR 3211(a)(1),(7) and (8).

### DISCUSSION

On a motion to dismiss, pursuant to CPLR 3211, the Court must accept as true the facts as alleged in the complaint and submissions, accord the plaintiff the benefit of every possible favorable

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<sup>1</sup> The retainer specifically indicated that W&H attorneys were to communicate with Michele through his daughters Nicole and Eva Tulino, agents-in-fact for Michele.

inference, and determine only whether the facts as alleged, fit within any cognizable legal theory (*see Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972, NE.2d 511 (1994)). The case law has consistently established that "the criterion is whether the proponent of the pleading has a cause of action not whether he has stated one" (*Id.* at 88).

Under CPLR 3211, a party may move for judgment dismissing one or more causes of actions asserted against him on certain enumerated grounds including that a defense is founded upon documentary evidence (CPLR 3211 (a)(1));...on the grounds that an action is barred by the statute of limitations (CPLR 3211 (a)(5); failure to state a cause of action (CPLR 3211(a)(7).... and lack of subject matter jurisdiction (CPLR 3211(a)(8)).

Upon review of the moving papers and opposition papers thereto, the Court finds as a matter of law that dismissal of the complaint is warranted under CPLR 3211(a)(5), (7), and (8).

"On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5), a defendant must establish, *prima facie*, that the time to commence a lawsuit has expired, and that the action is barred by the applicable statute of limitations. Once that showing has been made, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations has been tolled. (*King Tower Realty Corp. v G & G Funding Corp.*, 2018 NY Slip Op 05027 [2d Dept 2018] citing *Quinn v McCabe, Collins, McGeough & Fowler, LLP*, 138 AD3d 1085, 1085–86 [2d Dept 2016]). "An action to recover damages for legal malpractice must be commenced within three years of accrual (CPLR 214[6]; see *Farage v Ehrenberg*, 124 AD3d 159, 163 [2d Dept 2014]). However, "[c]auses of action alleging legal malpractice which would otherwise be barred by the statute of limitations are timely if the doctrine of continuous representation applies" (*Id.* at 164). "For the doctrine to apply, there must be clear indicia of an ongoing, continuous, developing, and dependent relationship between the client and attorney" (*Id.* at 159 citing *Aseel v Jonathan E. Kroll & Assoc., PLLC*, 106 AD3d 1037, 1038 [2d Dept 2013])

Here, defendants' established that the legal malpractice cause of action accrued on February 14, 2013, the date on which the note of issue should have been. Since the plaintiff did not commence this action until February 26, 2016 more than three years later, defendants demonstrated *prima facie* showing that the legal malpractice cause of action was time barred (King Tower Realty Corp. v G & G Funding Corp., 2018 NY Slip Op 05027 [2d Dept July 5, 2018]; see Quinn v McCabe, Collins, McGeough & Fowler, LLP, 138 AD3d 1085, 1086 [2d Dept 2016]).

The Court finds that plaintiff failed to raise a question of fact as to whether the continuous representation doctrine tolled the running of the statute of limitations. Further, there is no indication after W&H first moved to withdraw as counsel that W&H performed any substantive legal work on behalf of plaintiff giving rise to an ongoing, continuous, developing, and dependent relationship between defendants' and plaintiff ( Landow v Snow Becker Krauss, P.C., 111 AD3d 795, 796-97 [2d Dept. 2013]; see King Tower Realty Corp. v G & G Funding Corp., 2018 NY Slip Op 05027 [2d Dept. 2018]). Accordingly that branch of defendants' motion seeking dismissal under CPLR 3211(a)(5) is granted.

The Court also finds that defendants' motion is granted dismissing plaintiff's claims sounding in breach of contract, fraud, and violation of Judiciary Law 487 since they are duplicative in nature. These causes of action are based on the same set of facts as the claim arising from legal malpractice and do not allege distinct damages (Postiglione v Castro, 119 AD3d 920, 922 [2d Dept 2014]; Fin. Services Veh. Tr. v Saad, 72 AD3d 1019, 1020 [2d Dept 2010]). Accordingly, plaintiffs' second, third, and fourth causes of action are dismissed based on CPLR 3211(a)(7).

As to CPLR 3211(a)(8), both Attorneys Hiller and Weiss contend that the Court lacks personal jurisdiction because service is untimely as the action was commenced on February 26, 2016 and service was required to be completed by June 27, 2016 pursuant to CPLR 308(2). While the Court agrees with plaintiff that the affidavits of service annexed to her opposition papers constitutes *prima*

*facie* evidence of proof of service as to Attorneys Weiss and Hiller, the Court finds that plaintiff failed to file the affidavits of service for Attorneys Hiller and Weiss within 20 days of service of the complaint, pursuant to CPLR 308(2). In the case at bar, filing of the affidavits of services was required by June 27, 2016; instead they were not filed until June 30, 2016, thereby rendering service untimely. As a result, dismissal is warranted as to Attorneys Hiller and Weiss, individually, pursuant to CPLR 3211(a)(8).

The Court also notes that dismissal of the complaint is warranted against Hiller, P.C.<sup>2</sup> since it is not a proper party to the action.

Based on the foregoing, the motion to dismiss with prejudice of defendants' Hiller P.C., f/k/a Weiss & Hiller P.C., ("W&H") and Attorneys Hiller and Weiss, individually, is granted in its entirety, and defendants' remaining grounds for dismissal under CPLR 3211(a)(1) is denied as moot.

This constitutes the decision and order of the court.

ENTER,

  
HON. KATHY J. KING  
J.S.C

**HON. KATHY J. KING**

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<sup>2</sup> The Court notes defendants do not contest the service of Hiller P.C, however defendants argue that Hiller P.C. is not a proper party to the action as Hiller P.C. was formed in February 2014, did not begin operations until February 28, 2014 and none of the plaintiffs ever retained Hiller, P.C. on their behalf.