SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

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CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Plaintiff,

- v -

ARMIENTI, DEBELLIS & WHITEN, LLP, ARMIENTI, DEBELLIS, GUGLIELMO & RHODEN, LLP

Defendant.

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INDEX NO. 152730/2018

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

were read on this motion to/for DISMISS.

In this legal malpractice action, defendant Armienti, Debellis, Guglielmo & Rhoden, LLP, a/s/h/a Armienti, Debellis & Whiten, LLP (together, "Armienti"), moves to dismiss the complaint, filed March 27, 2018, by plaintiff Consolidated Edison Company of New York, Inc. ("Con Edison"), pursuant to CPLR 3211(a)(1), (5), and (7), based on documentary evidence, the statute of limitations, and for failure to state a cause of action. Con Edison opposes the motion.

BACKGROUND

I. The Casas Action.

This legal malpractice action arises out of Armienti's representation of Con Edison in an underlying personal injury action entitled *Luis Casas v. Consolidated Edison of New York, Inc.*, which was filed in the Supreme Court, New York County, under Index No. 115106/2004 (the "Casas Action"), and commenced on October 25, 2004. In the Casas Action, Mr. Casas, a janitor employed by non-party Nelson Cleaning Services, Inc. ("Nelson"), alleged that, on August 6, 2003, he was sweeping the floor in the basement of Con Edison's Waterside facility located at

700 First Avenue, New York, New York, when a piece of cement dislodged from the ceiling and struck him. The complaint asserted causes of action for Labor Law violations and negligence against Con Edison, although Mr. Casas later withdrew his Labor Law claims.

Initially, Con Edison was represented by its in-house counsel. On November 19, 2004, Con Edison's in-house counsel served an answer to the complaint. On February 18, 2005, Mr. Casas served Con Edison with discovery demands seeking, *inter alia*, accident reports, maintenance/inspection information, photographs, safety meeting minutes, and other relevant documents. On February 28, 2005, Con Edison's in-house counsel filed a third-party complaint against Nelson for indemnification, negligence, and breach of its contract to procure sufficient liability insurance naming Con Edison as an additional insured. Thereafter, in or around May of 2005, pursuant to an insurance policy issued by non-party Everest Indemnity Insurance Company ("Everest") to Nelson, which policy named Con Edison as an additional insured, Everest assigned Armienti to defend Con Edison in the Casas Action (Reid Aff., NYSCEF Doc. No. 34, ¶¶ 4-5). Armienti became the attorney of record for Con Edison, and Con Edison's in-house attorneys continued to monitor the matter.

On June 8, 2005, Armienti forwarded an initial status report regarding the Casas Action to Everest (Ex. I, NYSCEF Doc. No. 15, p.1). In the report, Armienti noted that, although it had received a Substitution of Counsel from Con Edison, it still had not received Con Edison's file. After receiving the file, on or about July 6, 2005, Armienti forwarded a supplemental status report to Everest. Significantly, regarding the third-party complaint against Nelson, the supplemental status reported stated that "[p]ursuant to your [Everest's] directions, we have filed a Notice of Discontinuance with regard to [the] third-party action." (Ex. I, NYSCEF Doc. No. 15, p.17).

Although Armienti received a "file" from Con Edison, between June 2005 and April 2006, Armienti sent numerous additional letter requests and communications to Con Edison seeking to obtain other documents related to the Casas Action including discovery in be exchange in that action (Armienti Aff., NYSCEF Doc. No. 5, ¶ 11). When Con Edison failed to provide Armienti with the requested documents, and in turn, Armienti failed to produce documents in response to Mr. Casas' discovery requests, on June 26, 2006, Mr. Casas moved to strike Con Edison's answer.

After Mr. Casas' motion to strike was filed, between July 2006 and September 2006, Armienti sent numerous additional letters and communications to Con Edison requesting copies of documents responsive to Mr. Casas' requests (Armienti Aff., NYSCEF Doc. No. 5, ¶ 12). Finally, in September of 2006, Con Edison provided Armienti with a copy of an accident report regarding Mr. Casas' accident, which Armienti produced. However, Con Edison failed to provide the other requested documents or explain to its attorney why the requested documents could not be located.

II. The Stipulation.

On October 19, 2006, the parties appeared on Mr. Casas' motion to strike, which was resolved by a so-ordered stipulation and conditional order (the "Stipulation") that required Con Edison to either provide responsive discovery or an affidavit from a person with knowledge as to a search for the discoverable materials within thirty (30) days, or Con Edison's answer would be stricken. Thereafter, Armienti sent more letters to Con Edison's investigator requesting documents responsive to Mr. Casas' requests (Armienti Aff., NYSCEF Doc. No. 5, ¶ 17). When Con Edison failed to produce either responsive documents or an affidavit, Con Edison's answer was automatically stricken pursuant to the conditional language of the Stipulation.

After Con Edison's answer was stricken, Armienti made efforts to obtain relief from the Stipulation and to obtain responsive documents and an affidavit from Con Edison to support a motion to vacate the Stipulation On or about February 5, 2010, Con Edison finally produced blueprints, a floor plan, and several work orders regarding the Waterside facility (Armienti Aff., NYSCEF Doc. No. 5, ¶¶ 18-19). In addition, Con Edison's Section Manager executed an affidavit averring that "diligent efforts" were made to obtain the documents following Con Edison's decommissioning and sale of its Waterside facility in 2005. Armienti produced the discovery and affidavit to Mr. Casas on February 8, 2010, but Mr. Casas' counsel rejected them pursuant to the Stipulation, entered on October 19, 2006, which required compliance within thirty days, *i.e.*, on or before November 19, 2006.

On February 16, 2010, Armienti moved to vacate the Stipulation. By order dated July 29, 2010, the court denied Armienti's motion, holding the Stipulation was "self-executing" and that Con Edison had failed to act with reasonable promptness or demonstrate sufficient cause to justify vacating the Stipulation (Ex. P, NYSCEF Doc. No 23). Thereafter, Armienti sought to circumvent the Stipulation via a cross-motion to enlarge the time to provide discovery. Again, the court denied Armienti's motion, holding that Con Edison's failure to comply with discovery orders warranted striking Con Edison's answer (Ex. R, NYSCEF Doc. No 25). On April 29, 2014, the Appellate Division affirmed the September 27, 2011 order denying Armienti's cross-motion, holding that the self-executing conditional Stipulation and order became absolute when no supplemental response or explanatory affidavit was produced by Con Edison within the stated time frame (*Casas v Consol. Edison Co. of New York*, 116 AD3d 648 [1st Dept 2014]).

III. Con Edison Discharges Armienti.

In the fall of 2014, the Casas Action was scheduled for trial to commence on February 2, 2015 (Reid Aff., NYSCEF Doc. No. 34, ¶ 7). On December 16, 2014, Con Edison's in-house counsel sent a letter to Armienti requesting, *inter alia*, that Armienti immediately recommence the third-party action against Nelson, provide copies of all correspondence, e-mails, legal documents and communications regarding the Stipulation, Con Edison's answer being stricken, and Armienti's attempts to obtain the documents requested in discovery (NYSCEF Doc. No. 27, p. 1). After Armienti's first production of documents to Con Edison, Con Edison sent a second letter to Armienti seeking to confirm that Armienti executed the Stipulation conditionally striking their answer, questioning Armienti's discontinuance of the third-party complaint against Nelson, reiterating its demand that Armienti immediately recommence the third-party action, and requesting copies of Con Edison's responses to Armienti's prior demands for documents (NYSCEF Doc. No. 27, p. 1-2). In accordance with Con Edison's letters, Armienti recommenced the third-party action against Nelson in January of 2015 (Armienti Aff., NYSCEF Doc. No. 5, ¶ 22). As a result, when counsel for the parties, as well as one of Con Edison's staff attorneys, appeared on February 2, 2015, rather than being sent out for trial the matter was adjourned for six-months to allow for further discovery related to the renewed third-party action (*see* NYSCEF Doc. No. 37, p. 4).

On March 24, 2015, Everest contacted Armienti and advised that Con Edison had requested that Armienti transfer the Casas file to Heidell, Pittoni, Murphy & Bach, LLP ("Heidell"). Silvana DeBellis of Armienti immediately contacted Con Edison's in-house attorneys to inquire about the request to transfer the file:

> Hi Tom –
> Hope you are well. Bob Junio of Everest just told me that you requested that the Cases file be transferred to the firm of Heidell, Pittoni, et al. I just want to confirm this, so I can draw up the consents to change attorneys, pack up the file and arrange

> for a smooth transfer. Please confirm so that we may inform the Court that they will be taking over Con Ed's defense in this matter.
> Thanks. Silvana.

(NYSCEF Doc. No. 37, p. 5). Con Edison confirmed that Con Edison wanted Armienti to transfer the file as soon as possible:

> Hi Silvana, David Santoro has requested the transfer of the Casas file. Please effectuate the transfer as soon as possible, I am available if you need any additional information in this regard. We should speak in the next few days to discuss any issues to insure a smooth transition. Thank you.

(NYSCEF Doc. No. 37, p. 5). Accordingly, on April 15, 2015, Armienti filed a copy of a Consent to Change Attorney, dated April 8, 2015 and executed April 13, 2015, and delivered the Casas file to Heidell (NYSCEF Doc. No. 32).

IV. Con Edison Sues Armienti For Legal Malpractice.

On March 27, 2018, Con Edison commenced this action for legal malpractice against Armienti alleging that Armienti's execution of a stipulation of discontinuance regarding the third-party action against Nielson in 2005, their execution of the conditional Stipulation in 2006, which resulted in the court striking Con Edison's answer in the Casas Action, and their failure to successfully vacate the Stipulation, *inter alia*, increased the amount that Con Edison was required to pay to settle the Casas Action.

DISCUSSION

Armienti moves to dismiss the Complaint, pursuant to CPLR 3211(a)(1), (5), and (7), on the grounds that (1) it is barred by the three-year statute of limitations for legal malpractice, (2) Con Edison's alleged damages are the result of its own failure to provide Armienti with requested documents, and (3) Con Edison's inability to plead the proximate causation element of its legal malpractice claim because it lacked a meritorious defense to the Casas Action.

On a motion to dismiss under CPLR 3211(a), the complaint is to be liberally construed (*Harrison v Golden Tree Homes Inc.*, 199 AD2d 205, 205 [1st Dept 1993]). The court must "accept the facts as alleged in the complaint as true, accord [the] plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Sokol v Leader*, 74 AD3d 1180, 1181 [2010], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). Moreover, the plaintiffs are to be accorded the benefit of "every possible favorable inference" (*Hsu v Liu & Shields LLP*, 127 AD3d 522, 523 [1st Dept 2015] [citation omitted]), although "bare legal conclusions, or that are inherently incredible or unequivocally contradicted by documentary evidence, are not entitled" to any such presumption or inference (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *aff'd*, 9 NY3d 836 [2007] [citation omitted]).

Pursuant to CPLR 3211(a)(1), in order to prevail on a motion to dismiss based on documentary evidence, "the documents relied upon must definitively dispose of plaintiff's claim" (*Bronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248, 248 [1st Dept 1995]; *Demas v 325 W. End Ave. Corp.*, 127 AD2d 476 [1st Dept 1986]). Dismissal pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence submitted "utterly refutes plaintiff's factual allegations" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see also Greenapple v Capital One, N.A.*, 92 AD3d 548, 550 [1st Dept 2012]), and "conclusively establishes a defense to the asserted claims as a matter of law" (*Weil, Gotshal & Manges, LLP, v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004] [internal quotation marks omitted]). Armienti argues that the documentary evidence submitted conclusively establishes that Con Edison's claims are time barred.

Under CPLR 214(6), a plaintiff must commence an action to recover damages for legal malpractice within three years from the date of the alleged malpractice. "The period of limitations in a legal malpractice action begins to run when the malpractice is committed ..., not when the client discovers the injury." (*Wells Fargo Home Mortgage, Inc. v Zeichner, Ellman & Krause, LLP,* 5 AD3d 128, 128-29 [1st Dept 2004] [internal citation omitted]). "A legal malpractice claim accrues 'when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court' " (*McCoy v. Feinman*, 99 N.Y.2d 295, 301 [2002], quoting *Ackerman v. Price Waterhouse*, 84 NY2d 535, 541 [1994]). "[W]hat is important is when the malpractice was committed, not when the client discovered it" (*Hahn v Dewey & LeBoeuf Liquidation Tr.*, 143 AD3d 547, 547 [1st Dept 2016] [internal quotation marks and citations omitted]).

Here, the actions giving rise to Con Edison's claims for legal malpractice occurred in 2005 and 2006. Accordingly, to survive dismissal, Con Edison must establish that the statute of limitations was tolled pursuant to the continuous representation doctrine until at least March 27, 2015, which date is three years prior to Con Edison's commencement of this action.

The "continuous representation doctrine tolls the statute of limitations . . . where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim" (*Zorn v Gilbert*, 8 NY3d 933, 934 [2007], quoting *McCoy v Feinman*, 99 NY2d 295, 306 [2002]; *see also Shumsky v Eisenstein*, 96 NY2d 164, 167-168 [2001]). The purpose of the continuous representation doctrine is to avoid forcing a client to jeopardize the relationship with the attorney handling his or her case during the period that the attorney continues to represent them (*Waggoner v Caruso*, 68 AD3d 1, 7 [1st Dept 2009], *affd,* 14 NY3d 874 [2010]). "An attorney-client relationship would certainly be

jeopardized by a client's allegation that his or her attorney committed malpractice while representing the client" (*id.* [citation omitted]).

The application of the continuous representation doctrine in an action for attorney malpractice "envisions a relationship between the parties that is marked with trust and confidence. It is a relationship which is not sporadic but developing and involves a continuity of the professional services from which the alleged malpractice stems" (*Frenchman v Queller, Fisher, Dienst, Serrins, Washor & Kool, LLP*, 24 Misc 3d 486, 498 [Sup Ct New York Cnty 2009], quoting *Muller v Sturman*, 79 AD2d 482, 486 [4th Dept 1981]; *see Henry v Leeds & Morelli*, 4 AD3d 229 [1st Dept 2004]). For the continuous representation doctrine to apply, "there must be clear indicia of an ongoing, continuous, developing, and dependent relationship between the client and the attorney which often includes an attempt by the attorney to rectify an alleged act of malpractice" (*Luk Lamellen U. Kupplungbau GmbH v Lerner*, 166 AD2d 505, 507 [2d Dept 1990]).

Here, Armienti argues that Con Edison's claims accrued, at the latest, on March 24, 2015, three years after Everest and Con Edison directed Armienti to transfer the Casas file to Heidell and notified Armienti that Heidell would be taking over the defense of Con Edison in the Casas Action. Armienti further argues that a breakdown in the relationship of trust and confidence between Con Edison and Armienti is demonstrated by the two letters from Con Edison's in-house counsel to Armienti in December of 2014, which letters requested all documents regarding the alleged acts constituting legal malpractice in this action, and challenged the propriety of Armienti's discontinuance of the third-party action against Nelson in 2005. In opposition, Con Edison argues that Armienti's representation of Con Edison for purposes of the continuous

representation doctrine continued until the execution of their Consent to Change Attorneys on April 13, 2015 (Complaint,

In a given case, the Consent to Change Attorney may reflect the end date of an attorney-client relationship, in the absence of other evidence that establishes an earlier date (*see Louzoun v. Kroll Moss & Kroll, LLP*, 113 A.D.3d at 602, 979 N.Y.S.2d 94 [2d Dept 2014]). While, "from the standpoint of adverse parties, counsel's authority as an attorney of record in a civil action continues unabated until the [attorney's] withdrawal, substitution, or discharge is formalized" in accordance with CPLR 321, "[a]n affirmative discharge of an attorney by the client is immediate" (*Farage v Ehrenberg*, 124 AD3d 159, 165 [2d Dept 2014] [citations omitted]). Thus, where evidence establishes that a client affirmatively discharged their attorneys prior to the execution of a Consent to Change Attorney, the Consent to Change Attorney does not, in and of itself, serve as a basis to toll the statute of limitations (*see Frenchman v Queller, Fisher, Dienst, Serrins, Washor & Kool, LLP*, 24 Misc 3d 486, 504-05 [Sup Ct New York Cnty 2009] [holding notice of substitution, signed by defendant on December 17, 2004, did not, in and of itself, serve as a basis to toll the statute of limitations under the continuous representation doctrine, where plaintiff's own letter to defendant in August of 2004 made clear that defendant was being replaced by other counsel]).

Here, contrary to the allegation in the complaint (Complaint, ¶ 53), the documentary evidence establishes that Con Edison affirmatively discharged Armienti on March 24, 2015, when Con Edison directed Armienti to transfer the Casas file and informed them that Heidell would be taking over Con Edison's defense, "well prior to the execution and filing of the Consent to Change Attorney [on April 13, 2015], rendering the consent form a mere memorialization of what had already occurred" (*Farage*,124 AD3d at 168). There is no indicia of

an ongoing, continuous, developing and dependent relationship between Con Edison and Armienti after March 24, 2015. In addition, the purpose of tolling to facilitate a cooperative relationship between Con Edison and Armienti to rectify the alleged acts of malpractice, is not served as Armienti had already exhausted all avenues to vacate or otherwise circumvent the Stipulation (*see Luk Lamellen U. Kupplungbau GmbH*, 166 AD2d at 507). Con Edison fails to present any documentary evidence of a mutual understanding of the need for further representation by Armienti after March 24, 2015, other than in facilitating the transfer of the Casas file to Heidell (*see* NYSCEF Doc. No. 37, p. 5).

To the extent Armienti communicated with the court, the client and subsequent counsel after March 24, 2015, to facilitate a smooth transition of the Casas file to Con Edison's new attorneys, such communications did not toll the statute of limitations (*see Knobel v Wei Group, LLP*, 160 AD3d 409, 410 [1st Dept 2018], citing *Rupolo v Fish*, 87 AD3d 684, 685 [2d Dept 2011]; *see also Docster v Levene*, 3:03CV1193(FJS/DEP), 2005 WL 1388899, at *5 [NDNY 2005] ["once a client consults with another attorney with respect to the matter in which his initial attorney represented him, continuous representation clearly ends because, at that point, the client is able to question the attorney's actions and pursue remedies for perceived wrongs"]). Accordingly, Con Edison's claims for legal malpractice against Armienti are time barred.

In light of the court's finding that the action is barred by the statute of limitations, the court need not address the additional arguments advanced by Armienti in support of the motion to dismiss. However, if the court were to rule on the merits of Con Edison's claims, it would still dismiss the Complaint.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of defendant Armienti, Debellis, Guglielmo & Rhoden, LLP, a/s/h/a Armienti, Debellis & Whiten, LLP, to dismiss the complaint of plaintiff Consolidated Edison Company of New York, Inc., is granted and the complaint is dismissed in its entirety; and it is further

ORDERED that the clerk enter judgment accordingly dismissing the complaint, with prejudice, with costs and disbursements to Armienti as taxed by the clerk upon submission by Armienti of an appropriate bill of costs.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

4/17/19
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE