Mortley v Tucker

2019 NY Slip Op 32577(U)

July 15, 2019

Supreme Court, Queens County

Docket Number: 711376/18

Judge: Robert I. Caloras

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ROBERT I. CALORAS **PART 36**
Justice

---X

GEORGE MORTLEY,

Plaintiff,

-against-

CHARLES TUCKER, JR. ESQ. and
TUCKER LAW GROUP, LL,

Defendants

---X

Index No. 711376/18
Motion Date: 5/16/19
Motion Cal. No. 30
Seq. No. 1

FILED
JUL 25 2019
COUNTY CLERK
QUEENS COUNTY

The following papers numbered E5-E25, E27-E31, E33-E38 read on this motion by defendants for an order dismissing this action with prejudice against defendants as failing to state a cause of action pursuant to CPLR § 3211(7), or in the alternative, for an order dismissing this action with prejudice as time barred by the statute of limitations pursuant to CPLR 3211(5) and 214(6)

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits......................	E5-E9
Affirmation in Opposition-Affirmation-Exhibits.........	E10-E25
Reply Affirmation-Exhibits..	E27-E30
Letter, March 26, 2019...	E31
Sur Reply-Exhibits...	E33-E38

Upon the foregoing papers, it is ordered that defendants', Charles Tucker, Jr., Esq. and Tucker Law Group, LLP, ("defendants" or "Tucker") motion is determined as follows:

This is a legal malpractice action that stems from an underlying motor vehicle case that was filed in Supreme Court, Bronx County under *Mortley v Stanislas et al.*, Index No. 302297/11 ("Action No.1"). It is undisputed that on January 30, 2015, Hon. Laura Douglas issued an order granting defendants' motion to strike the complaint in Action No. 1. In this decision, Hon. Douglas stated that "the motion to strike plaintiff's complaint for failure to prosecute is granted. Plaintiff failed to oppose the motion after being granted an adjournment for that purpose".

In the Complaint, plaintiff alleges, among other things, the following: that on or about October 15, 2013, plaintiff retained the defendants to represent him in Action No. 1. On or

about October 15, 2013, defendants filed a Notice of Appearance in Action No. 1. In or about June 2014, defendants were served with a 90 Day Notice in Action No. 1, and that defendants failed to respond to said Notice. In or about November 2014, defendants in Action No. 1 filed a motion to dismiss the complaint, pursuant to CPLR 3216, which was served upon the defendants. Thereafter, defendants requested and received an adjournment of the motion to dismiss plaintiff's complaint from December 19, 2014 to January 30, 2015. On January 30, 2015, defendants were still plaintiff's attorney of record in Action No. 1, and failed to respond to the motion to dismiss. Since January 30, 2015, defendants failed to advise plaintiff that Action No. 1 was dismissed.

Defendants now move for an order dismissing this action for failing to state a cause of action pursuant to CPLR 3211(7), or in the alternative, for an order dismissing this action as time barred by the statute of limitations pursuant to CPLR 3211(5) and 214(6). Defendants assert that the alleged malpractice did not occur on their part, nor were they the proximate cause of the plaintiff's injury. In the alternative, defendants argue that plaintiff's claims should be dismissed as time barred by the statute of limitations because Action No. 1 was dismissed on January 30, 2015, and plaintiff's Complaint alleging legal malpractice against the defendants was filed on July 24, 2018. Defendants further argue that plaintiff did not plead sufficient facts to support a claim under the continuous representation doctrine to toll the statute of limitations. As such, defendants argue that the Complaint should be dismissed pursuant to CPLR 3211(a)(5).

In opposition, plaintiff has submitted, amongst other things, the following: retainer agreement with defendants; plaintiff and Dominick Lavelle, Esq. ("Lavelle") deposition transcript; attorney fee agreement with defendants; defendant's Notice of Appearance in Action No. 1; request for an adjournment in Action No. 1; 90 Day Notice; motion to dismiss filed in Action No. 1, Hon. Douglas' order, issued on January 30, 2015; and a consent to change attorney. Plaintiff argues that the motion should be denied as procedurally defective, because defendants failed to attach the pleadings to the instant motion. Notwithstanding defendants' failure to attach the pleadings, plaintiff argues that the Complaint states a cause of action, and claims that due to defendants' malpractice and failure to prosecute plaintiff's claim, Action No. 1 was dismissed.

In addition, plaintiff argues that his cause of action for malpractice did not accrue until, at the earliest, September 14, 2015 when Action No. 1 was ultimately dismissed and plaintiff had all information necessary to bring forth the malpractice action. Plaintiff claims that on September 9, 2010, he retained Dominick Lavelle, Esq. ("Lavelle") to commence suit in Action No. 1. Lavelle commenced Action No. 1 on or about February 9, 2011. Plaintiff

claims that due to a lack of responsiveness from the Lavelle's office, he contacted defendants to review his case. On or about October 15, 2013, Tucker had plaintiff sign a retainer agreement. On October 23, 2013, Tucker filed a Notice of Appearance, noting that he was retained by plaintiff. Thereafter, Tucker filed a "Motion Requesting Adjournment," on October 24, 2013. In this request, Tucker stated that he had been retained by plaintiff as of October 18, 2013, and requested that the Court adjourn the pending motion in Action No. 1 to November 14, 2013. Plaintiff argues that despite having filed a Notice of Appearance, Tucker failed to submit opposition papers in response to the motion to dismiss in Action No. 1. As a result, the motion to dismiss was granted and Action No. 1 was dismissed. Plaintiff claims that Tucker failed to advise him that Action No. 1 was dismissed. On February 26, 2015, plaintiff and Lavelle signed a consent to change attorney. Thereafter, Lavelle filed a motion to renew and reargue. In a stipulation, "so ordered" by Hon. Douglas on November 25, 2015, the parties agreed to withdraw the motion to renew and reargue. Accordingly, Hon. Douglas issued an order, dated November 25, 2015, stating that the motion was resolved pursuant to the stipulation. Since defendants did not sign the consent to change attorney, dated February 26, 2015, plaintiff argues that they were still his attorney of record at the time the motion to renew and reargue was resolved. Therefore, plaintiff argues that the time to commence the instant action for legal malpractice against the defendants was tolled under the continuous representation doctrine, and that the Complaint is not barred by the statute of limitations.

In reply, defendants argue that plaintiff is seeking, in the affirmation in opposition, to allege new facts not pled in the complaint. Specifically, defendants argue that the plaintiff is now alleging that the motion to renew and reargue was withdrawn on or about September 2015. Based upon this newly alleged fact, defendants argue that the plaintiff is seeking to cure his failure to timely file his Complaint.

In the sur reply, plaintiff asserts that after his affirmation in opposition was filed, defendant Charles Tucker, Esq. was deposed on March 19, 2019. Plaintiff claims that Mr. Tucker's testimony and corresponding discovery documents confirm that Mr. Tucker does not have the correct date of injury and thus, the proper time line for the statute of limitations. Plaintiff claims that his cause of action for malpractice did not accrue until at the earliest, September 14, 2015 when Action No. 1 was ultimately dismissed, and he had all information necessary to bring forth the malpractice action.

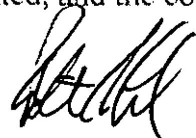
The branch of the motion seeking to dismiss the Complaint pursuant to CPLR 3211(a)(7) is determined as follows: On a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), "[t]he sole criterion is whether the pleading

states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]). "The complaint must be liberally construed in the light most favorable to the plaintiff and all allegations must be accepted as true" (Podesta v Assumable Homes Dev. II Corp., 137 AD3d 767, 769 [2d Dept. 2016]). Here, the Court finds that the plaintiff's allegations state a viable cause of action against the defendants. Under these circumstances, the branch of the motion seeking to dismiss the action pursuant to CPLR 3211(a)(7) is denied.

The branch of the motion seeking to dismiss Complaint pursuant to CPLR 3211(a)(5) is determined as follows: "In moving to dismiss a cause of action pursuant to CPLR 3211(a)(5) as barred by the applicable statute of limitations, the moving defendant bears the initial burden of demonstrating, *prima facie*, that the time within which to commence the cause of action has expired. The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is tolled or is otherwise inapplicable" (Stein Indus., Inc. v Certilman Balin Adler & Hyman, LLP, 149 AD3d 788, 789 [2d Dept. 2017]; see Stewart v GDC Tower at Greystone, 138 AD3d 729, 729-730 [2d Dept. 2016]). "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 NY2d 295, 301 [2002], quoting Ackerman v Price Waterhouse, 84 NY2d 535, 541 [1994]). "In most cases, this accrual time is measured from the day an actionable injury occurs, 'even if the aggrieved party is then ignorant of the wrong or injury' " (McCoy v Feinman, supra at 301, quoting Ackerman v Price Waterhouse, supra at 541). "A cause of action to recover damages for legal malpractice accrues when the malpractice is committed, not when it is discovered" (Alizio v Ruskin Moscou Faltischek, P.C., 126 AD3d 733, 735 [2d Dept. 2015]; see McCoy v Feinman, supra at 301; Quinn v McCabe, Collins, McGeough & Fowler, LLP, 138 AD3d 1085, 1086 [2d Dept. 2016]). "For the continuous representation doctrine to apply, there must be clear indicia of an ongoing, continuous, developing, and dependant relationship between the client and the attorney'" (Stein Indus., Inc. v Certilman Balin Adler & Hyman, LLP, supra at 789, quoting Luk Lamellen U. Kupplungbau GmbH v Lerner, 166 AD2d 505, 506 [2d Dept. 1990]).

Here, the Court finds that the defendants satisfied their initial burden by demonstrating that the plaintiff's legal malpractice cause of action accrued on January 30, 2015, when Hon. Douglas issued the order dismissing Action No. 1. Since the plaintiff did not commence this action until July 24, 2018, more than three years later, defendants demonstrated, *prima facie*, that the legal malpractice cause of action was time-barred (King

Tower Realty Corp. v G & G Funding Corp., 163 AD3d 541 [2d Dept. 2018]). In opposing the defendants' motion, plaintiff failed to raise a question of fact as to whether the continuous representation doctrine tolled the running of the statute of limitations until September 30, 2015. Initially, the Court notes that the order resolving the motion to renew and reargue in Action No. 1 was issued by Hon. Douglas on November 25, 2015, not September 30, 2015, as alleged in the Complaint and the affirmation in opposition. Plaintiff annexed, as Exhibit "L", to his affirmation in opposition, an order issued by Hon. Douglas on November 25, 2015, stating that the motion to renew and reargue. Notwithstanding this, the Court finds that the plaintiff was unaware of any need for further legal services after Hon. Douglas issued the January 30, 2015 dismissal order, and there was no mutual understanding with the defendants that further services were needed in connection with the specific subject matter out of which the malpractice arose (Shumsky v Eisenstein, 96 NY2d 164 [2001]). Moreover, the record does not establish that the plaintiff was left with the reasonable impression that the defendants were actively addressing plaintiff's legal needs (Shumsky v Eisenstein, supra [2001]). Therefore, the plaintiff failed to raise a question of fact as to whether any continued representation by the defendants served to toll the statute of limitations (see King Tower Realty Corp. v G & G Funding Corp., supra]). Accordingly, the branch of the motion seeking to dismiss pursuant to CPLR 3211(a)(5) is granted, and the complaint is dismissed.



Dated: July 15, 2019

ROBERT I. CALORAS, J.S.C.

FILED
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COUNTY CLERK
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