

Brooks v Baker & Hostelter, LLP
2022 NY Slip Op 32871(U)
August 23, 2022
Supreme Court, New York County
Docket Number: Index No. 655754/2021
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

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JEFFREY BROOKS, as Personal Representative of the
ESTATE OF DAVID BROOKS,

Plaintiff,

INDEX NO. 655754/2021

MOTION DATE 08/17/2022

MOTION SEQ. NO. 002

- v -

BAKER & HOSTELTER, LLP., GEORGE STAMBOULIDIS,
ESQ.

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for DISMISS.

The motion by defendants to dismiss the complaint is granted.

Background

Plaintiff brings this legal malpractice case relating to defendants’ representation of David Brooks. He insists that defendants failed to challenge a jurisdictionally void federal indictment that purportedly illegally charged David Brooks with federal securities laws violations. Mr. Brooks was the CEO of DHB Industries (“DHB”), a publicly traded company that designed and sold body armor.

The complaint alleges that sometime in 2006, Mr. Brooks learned he was the target of a federal grand jury investigation run by the Securities and Exchange Commission. The federal grand jury returned a multi-count indictment in August 2006 against two DHB executives (not including Mr. Brooks). He was later indicted in October 2007.

Plaintiff contends that the indictment was issued 19 days after the expiration of the grand jury's 18-month term and so it should have been void. He insists that Mr. Brooks hired defendants to represent him in connection with this federal criminal case. Mr. Brooks was eventually convicted in September 2010 of multiple felonies and was sentenced to many years in prison. He later died in 2016 while in custody. Certain convictions were later abated due to Mr. Brooks' death.

In support of their motion, defendants contend that they briefly represented Mr. Brooks in the early stages of the criminal prosecution 15 years ago. They argue that the representation of Mr. Brooks only lasted eight months (from September 2008 through April 2009), that it ended well before the criminal trial began in January 2010, and that the alleged malpractice was not discovered until 2012.

Defendants insist that plaintiff's claims should be dismissed because he lacks the capacity to sue because his authority to bring a case on behalf of Mr. Brooks' estate expired nine months before the instant complaint was filed. They also argue that the case is time barred as the three-year statute of limitations expired long before this case was commenced. Defendants point out that the possible dates for when the statute of limitations began to run happened long ago. The indictment was issued on October 24, 2007, defendants purportedly stopped representing Mr. Brooks in April 2009 and the Second Circuit issued a related decision in September 2017.

Defendants point out that the federal district court handling the criminal case against Mr. Brooks severed three tax charges (at Mr. Brooks' request) and that he pled guilty to these offenses in August 2011 and received a sentence of 63 months. The Second Circuit granted a motion to abate Mr. Brooks' convictions for the non-tax charges (a jury found him guilty) in 2017, after Mr. Brooks died.

In opposition, plaintiff argues that defendants admit they had a duty to Mr. Brooks to verify that the grand jury returned a legally valid indictment. He points out that the Circuit Court for Palm Beach County in Florida re-opened his brother's estate in July 2022 and re-appointed him as personal representative of Mr. Brooks' estate. Plaintiff argues that defendant did nothing to prevent Mr. Brooks from suffering massive financial penalties and prison sentences.

He insists that but for defendants' failure to seek a dismissal of the first superseding indictment, a new grand jury would have been in a substantially different position and actually considered evidence presented by Mr. Brooks. Plaintiff argues that the application time for limitations period to run was in November 2018, when the federal district court enforced the Second Circuit's decision to vacate Mr. Brooks' conviction.

In reply, defendants insist that plaintiff's case is full of hypotheticals about what might have happened. They point out that Mr. Brooks was indicted by a properly empaneled grand jury, convicted after a jury trial and pled guilty to serious felony charges that resulted in a lengthy sentence. Defendants argue that plaintiff cannot show that but for defendants' alleged negligence, Mr. Brooks would not have been prosecuted and convicted.

Discussion

As an initial matter, the Court finds that plaintiff lacked capacity to bring this lawsuit at the time the complaint was filed. He admitted in opposition that he petitioned the probate court in Florida on July 12, 2022 to reopen the estate (it was previously closed) and for his re-appointment as personal representative. This case was filed in September 2021 and so he did not have capacity to sue on behalf of his brother's estate when this case was commenced.

Even if the Court were to overlook plaintiff's lack of capacity to sue, the fact is that plaintiff did not state a valid cause of action for legal malpractice. "In an action to recover

damages for legal malpractice, a plaintiff must demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence” (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442, 835 NYS2d 534 [2007] [internal quotations and citations omitted]).

“[A]n individual convicted of a criminal offense must be able to assert his innocence or a colorable claim of innocence before he can pursue a claim against his attorney for legal malpractice arising out of the criminal proceeding” (*Britt v Legal Aid Soc., Inc.*, 95 NY2d 443, 445, 718 NYS2d 264 [2000]).

Here, it is undisputed that Mr. Brooks pled guilty to various tax charges and was sentenced to years in prison. That the tax charges were severed does not change the fact that they were all part of the same purportedly insufficient indictment about which plaintiff complains. Moreover, it is undisputed that defendants were representing Mr. Brooks during a time period when all the charges (both tax and non-tax) were included in the same indictment.

Plaintiff's attempt to show that Mr. Brooks would not have been imprisoned if defendants had raised the issue about the defective indictment is mere speculation. This claim relies on the suggestion that, somehow, Mr. Brooks would have convinced a subsequent grand jury not to indict him. Of course, that argument fails because he pled guilty to the tax charges. It is also critical to point out that any jurisdictional defect was rendered moot when the government empaneled a new grand jury that returned a second superseding indictment containing the exact

same charges against Mr. Brooks. And the courts reviewing the issue noted that any prejudice was overcome.

And, as defendants point out, Mr. Brooks hired many attorneys throughout the course of the U.S. Attorney's investigation into his criminal conduct and defendants were long gone by the time the actual criminal trial started or when Mr. Brooks pled guilty. These other attorneys had ample opportunity to raise any number of issues on Mr. Brooks' behalf. And so even if there was some malpractice, successor counsel had a chance to address it (*Davis v Cohen & Gresser, LLP*, 160 AD3d 484, 487, 74 NYS3d 534 [1st Dept 2018] [dismissing a legal malpractice claim where a successor counsel had sufficient time to protect plaintiff's interests and failed to do so]).

Finally, the Court finds that the instant matter is time-barred. The Second Circuit's decision vacating his conviction was issued on September 20, 2017 (*see United States v Brooks*, 872 F3d 78, 96 [2d Cir 2017]) and this case was not commenced until September 2021.

Summary

The Court also stresses that the criminal convictions against Mr. Brooks were abated because he passed away while serving time. And the only convictions that were abated were the non-tax offenses. Therefore, plaintiff does not have a colorable claim of innocence to support the legal malpractice claims. It is also unclear that defendants' conduct (where they did not file a notice of appearance or file a single document during their representation of Mr. Brooks) was negligent in any way. At best, they should have pursued a dismissal of the indictment on the procedural grounds highlighted by plaintiff and then the government would have empaneled another grand jury (which it later did anyway).

Accordingly, it is hereby

ORDERED that the motion by defendants to dismiss this case with prejudice is granted, this complaint is dismissed and the Clerk is directed to enter judgment accordingly in favor of defendants and against plaintiff along with costs and disbursements upon presentation of proper papers therefor.

<u>8/23/2022</u> DATE		 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE