

Menkes v Greenwald
2022 NY Slip Op 32882(U)
August 24, 2022
Supreme Court, New York County
Docket Number: Index No. 159685/2021
Judge: David B. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID B. COHEN PART 58

Justice

-----X

INDEX NO. 159685/2021

SHERYL MENKES,

MOTION SEQ. NO. 003

Plaintiff,

- v -

DECISION + ORDER ON MOTION

WAYNE GREENWALD and WAYNE GREENWALD, P.C.,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 39, 40, 41, 42, 43, 44, 45, 46, 47, 54, 55, 56, 57, 58, 59, 60

were read on this motion to/for DISMISSAL

In this legal malpractice action, defendants Wayne Greenwald and Wayne Greenwald, P.C. move, pursuant to CPLR 3211(a)(5), (a)(7), and (a)(8), for an order dismissing the amended complaint (Seq. 003). Plaintiff Sheryl Menkes opposes the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, defendants' motion is decided as follows.

Factual and Procedural Background

Plaintiff, a resident of the State of New York and owner of property in Mount Vernon, New York ("the property"), commenced this legal malpractice action against defendants after she allegedly suffered damages when the property was foreclosed by her mortgage servicer (Doc No. 1). In her original complaint, she asserted claims for legal malpractice, breach of contract and breach of fiduciary duty (Doc No. 1 at 7-11). Plaintiff alleged that she contacted defendant Wayne Greenwald P.C. ("Greenwald P.C."), a Manhattan-based law firm, and retained defendant Wayne Greenwald ("Greenwald"), an employee of Greenwald P.C., to represent her in a dispute with the property's mortgage servicer (Doc No. 1 at 2-5). She further alleged that Greenwald

never commenced an action against the mortgage servicer, and that he advised her to stop making full payments on her mortgage, which resulted in a foreclosure on the property (Doc No. 1 at 5-6).

Shortly after commencement of this action, defendants moved, pursuant to CPLR 3211(a), to dismiss the complaint (Doc No. 21). While that motion was pending, plaintiff amended her complaint as of right and reasserted her claims of legal malpractice, breach of contract, and breach of fiduciary duty as pleaded in her original complaint (Doc No. 31). By order entered January 27, 2022, this Court denied defendants' motion to dismiss without prejudice, concluding that plaintiff's amended complaint rendered defendants' motion moot (Doc No. 38).

Defendants now move, pursuant to CPLR 3211(a)(5), (a)(7), and (a)(8), to dismiss the amended complaint (Doc No. 39). They argue that plaintiff failed to properly serve Greenwald, that the statute of limitations has expired for all of plaintiff's claims, that plaintiff's legal malpractice claim fails to state a cause of action, and that plaintiff's breach of contract and breach of fiduciary duty claims are duplicative of her legal malpractice claim (Doc No. 46 at 3-17). Plaintiff opposes the motion, arguing that defendants' motion is moot because she filed a second amended complaint while the instant motion was pending with this Court (Doc Nos. 48, 54).

Legal Conclusions

Plaintiff's Mootness Contention

Contrary to plaintiff's contention, defendants' instant motion to dismiss (Seq. 003) is not moot. Pursuant to CPLR 3025, a party can only amend his or her pleading once without leave of court; any subsequent amendment requires a party to seek leave (*see* CPLR 3025 [a]; *Roam*

Capital, Inc. v Asia Alternatives Mgt. LLC, 194 AD3d 585, 585 [1st Dept 2021]; Siegel, NY Prac § 236 at 447-448 [6th ed. 2018]). Plaintiff previously amended her complaint while defendants' initial motion to dismiss (Seq. 002) was pending with this Court (Doc No. 31). Therefore, plaintiff required leave of this Court to amend her complaint a second time, which she did not seek. Thus, plaintiff's second amended complaint is a nullity, and defendants' instant motion is properly before this Court.

Defendants' Request for Dismissal Under CPLR 3211(a)(8)

Defendants contend that plaintiff failed to obtain personal jurisdiction over Greenwald because she failed to timely file an affidavit of service after serving the original complaint upon him (Doc No. 46 at 3-5). More specifically, they assert that plaintiff was required to file proof of service by November 22, 2021, because the affidavit of service indicated that service and mailing occurred on November 1, 2021 (Doc No. 46 at 5). Since plaintiff filed the affidavit of service on November 23, 2021, they argue service upon Greenwald was "defective" (Doc No. 46 at 5). However, "failure to file proof of service within the 20-day time period for answering the complaint is not a jurisdictional defect," it is a "mere irregularity" and "service is deemed complete . . . 10 days after the late filing" (*Reem Contr. v Altschul & Altschul*, 117 AD3d 583, 584 [1st Dept 2014]; see *Nardi v Hirsh*, 245 AD2d 205, 205 [1st Dept 1997]; Siegel, NY Prac § 72 at 141 [6th ed 2018]). Therefore, plaintiff's service upon Greenwald became complete on December 3, 2021, thereby allowing this Court to exercise personal jurisdiction over him (see *2110-2118 ACBP, LLC v Holland-Harden*, 118 AD3d 461, 461 [1st Dept 2014]; *Reem Contr.*, 117 AD3d at 584).

Defendants' Request for Dismissal Under CPLR 3211(a)(5) and (a)(7)

Generally, a cause of action for legal malpractice accrues on the date that the alleged malpractice was committed, and a plaintiff has three years to commence such action (*see* CPLR 214 [6]; *Glamm v Allen*, 57 NY2d 87, 93 [1982]). That three-year statute of limitations can also be tolled under the doctrine of continuous representation (*see Glamm*, 57 NY2d at 93-95). However, tolling resulting from continuous representation ends “once the client is informed or otherwise put on notice of the attorney’s withdrawal from representation” (*Shumsky v Eisenstein*, 96 NY2d 164, 170-171 [2001]; *accord RJR Mech. Inc. v Ruvoldt*, 170 AD3d 515, 515 [1st Dept 2019]), such as when an attorney provides a client with all of that client’s files (*see Marzario v Snitow Kanfer Holzer & Millus, LLP*, 178 AD3d 527, 528 [1st Dept 2019]).

In her complaint, plaintiff does not provide an exact date of defendants’ alleged malpractice (Doc No. 31 at 3-9). However, in support of their motion, defendants submit emails between themselves and plaintiff discussing the representation (Doc Nos. 44-45). In a May 2016 email, defendants stated that they were “preclude[d]” from further representing plaintiff because of her threats to sue defendants for legal malpractice; and in an email from August 23, 2016, defendants stated that they had provided plaintiff with all of her files (Doc Nos. 44-45). Even under the doctrine of continuous representation, and giving plaintiff the benefit of every possible inference, the relationship between the parties ended, and the limitations period began to run, on August 23, 2016 (*see Marzario*, 178 AD3d at 528; *Riley v Segan, Nemerov & Singer, P.C.*, 82 AD3d 572, 572-573 [1st Dept 2011]). Therefore, plaintiff was required to commence an action by August 23, 2019 (*see* CPLR 214 [6]). Since plaintiff did not commence the instant action until October 25, 2021 (Doc No. 1 at 13), her legal malpractice claim is barred by the statute of limitations and must be dismissed (*see Riley*, 82 AD3d at 573).

Plaintiff's claims of breach of contract and breach of fiduciary duty must also be dismissed because they are duplicative of the legal malpractice claim and time-barred. All of plaintiff's claims center around allegations that defendants did not perform any legal services for her related to her dispute with her mortgage servicer (Doc No. 31 at 3-13). She also seeks the same damages sought in her legal malpractice claim (Doc No. 31 at 8-11). Thus, since "all of plaintiff's claims are based on the same alleged conduct amounting to legal malpractice," and no allegation is "separate and distinct from the alleged legal malpractice," "all of plaintiff's claims against these defendants are barred by the three-year statute of limitations" (*6645 Owners Corp. v GMO Realty Corp.*, 306 AD2d 97, 98 [1st Dept 2003]; *cf. Akinrosotu v Kellman*, 289 AD2d 112, 112-113 [1st Dept 2001]). Therefore, as with plaintiff's legal malpractice claim, even assuming the limitations period for her breach of contract and breach of fiduciary duty claims began to run on the latest possible date of August 23, 2016, she failed to commence this action within the requisite three-year period (Doc No. 1 at 13) (*see Mitschele v Schultz*, 36 AD3d 249, 252 [1st Dept 2006]). Further, because her breach of contract and breach of fiduciary duty claims "arise out of the same facts and seek the same damages as the legal malpractice claim," they are duplicative (*Courtney v McDonald*, 176 AD3d 645, 645-646 [1st Dept 2019]; *see Petito v Law Offs. of Bart J. Eagle, PLLC*, 170 AD3d 555, 556 [1st Dept 2019]).

The parties' remaining contentions are either without merit or need not be addressed given the findings set forth above.

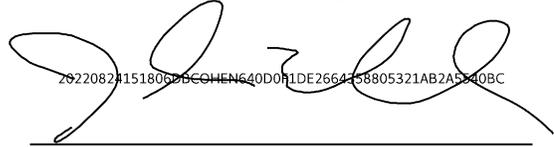
Accordingly, it is hereby:

ORDERED that defendants' motion to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).



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8/24/2022

DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE