35 W. 26th St. Realty, LLC v Norris, McLaughlin, & Marcus, P.C.
2023 NY Slip Op 31851(U)
June 2, 2023
Supreme Court, New York County
Docket Number: Index No. 155004/2022
Judge: Lori S. Sattler
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H SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02TR

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35 WEST 26TH STREET REALTY, LLC,

Plaintiff,

- v -

NORRIS, MCLAUGHLIN, & MARCUS, P.C.,GERARD PROEFRIEDT

Defendant.

INDEX NO. 155004/2022

MOTION DATE 10/03/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

were read on this motion to/for DISMISS.

In this action alleging legal malpractice, breach of fiduciary duty, and fraud, defendants Norris, McLaughlin & Marcus, P.C. ("Norris McLaughlin") and Gerard Proefriedt ("Proefriedt") (collectively, "Defendants") move for an order pursuant to CPLR 3211(a)(1), (5), and (7) dismissing the Complaint in its entirety. Plaintiff 35 West 26th Street Realty, LLC ("Plaintiff") opposes the motion.

Plaintiff 35 West 26th Street Realty, LLC ("Plaintiff") is a real estate company that owns a five-story building located at that address ("the building") with a sole owner and officer, Osman Bessa. It seeks to recover damages purportedly caused by Defendants' negligent representation in an administrative proceeding before the New York Loft Board. Nonparty Norris McLaughlin is a law firm and Proefriedt is an attorney there.

Plaintiff purchased the building in 2002. At the time, the building had been subject to the Loft Law and the Loft Board's jurisdiction for nearly 20 years. As set forth in the papers, the building was registered as an Interim Multiple Dwelling under the Loft Law in the early 1980s.

In 1985, a tenant harassment finding was issued against a previous owner of the building concerning, *inter alia*, conditions in the building's second and fifth floor units. The tenant harassment finding remained in effect at the time Plaintiff purchased the building, although Bessa contends he was unaware of it.

Plaintiff alleges that it retained Defendants in 2007 to remove the building from the Loft Board's jurisdiction and deregulate its units. It maintains that Proefriedt was held out by Norris McLaughlin as having "considerable experience in matters related to the Loft Board" and that Proefriedt had represented the building's previous owner (NYSCEF Doc. No. 8, Complaint ¶¶ 24-26). According to Plaintiff, at Proefriedt's recommendation, it bought out the tenants of the second floor and fifth floor units in 2007 and 2014 respectively. Plaintiff maintains these purchases were made so that the units could be deregulated and rented at the prevailing market rate pursuant to Section 286(12) of the Loft Law. To that end, Bessa allegedly executed sale of rights records under the Loft Law on behalf of Plaintiff at Proefriedt's instruction. Proefriedt then filed these forms with the Loft Board on June 15, 2016.

In a letter dated June 24, 2016 addressed to Plaintiff at Bessa's office address, the Loft Board informed Plaintiff that the sales of rights did not remove the second and fifth floor units from rent regulation because the tenant harassment finding against the building remained in effect. Plaintiff contends that neither it nor Bessa received this letter at the time and that they were therefore unaware that the units were still subject to the Loft Law. In his affidavit in opposition to the motion, Bessa attests that had he been aware of this letter, he would have immediately contacted Proefriedt, and that their contemporaneous emails reflect his lack of knowledge (NYSCEF Doc. No. 15, Bessa aff ¶¶ 17-18). He further avers that he had "no way of knowing if [the letter] was ever actually mailed to me by regular mail" and that "although the

Building is located at 35 West 26th Street, my office mailing address is 33 W 26th Street" (*id.* ¶ 18). The letter is addressed to "35 West 26th Street Realty, LLC c/o Osman Bessa 33 West 26th Street, Ground Floor" (NYSCEF Doc. No. 9).

Plaintiff maintains that Defendants knew that the sales of rights were ineffective. It claims that, at some point between June and December 2016, Defendants had either received the letter, been apprised of its contents, or otherwise realized that the sales of rights were ineffective. Plaintiff alleges that Defendants never informed it of this fact and took no steps to cure the issue. According to Plaintiff, Defendants could have applied to terminate the harassment finding at any time after June 2016.

Proefriedt continued to work on preparing the applications for removal from the Loft Board's jurisdiction and allegedly informed Bessa in July 2016 that the applications were to be filed before the end of that month. Plaintiff contends that this did not actually occur until December 2016, based upon Defendants' January 2017 invoice to Bessa (NYSCEF Doc. No. 10). After Defendants submitted the applications, Plaintiff contends it waited for nearly two years for the Loft Board to issue a decision. Plaintiff maintains that Bessa "did not believe that there was anything unusual about the delay" due to the slow pace of proceedings before the Loft Board and "continued to believe that [Plaintiff] was represented by [Defendants] before the Loft Board," since the application was still pending and because there had been no express communications or other actions indicating that the attorney-client relationship between Plaintiff and Defendants had terminated (Complaint ¶¶ 51-54).

Plaintiff contends that in January 2019, Bessa attempted to contact Proefriedt to inquire about the status of the application and received no response from Defendants. Plaintiff maintains that Bessa still believed Defendants continued to represent Plaintiff before the Loft Board

proceedings and that it did not seek new counsel for this purpose. That same month, Bessa allegedly "contacted the Loft board to see if anything else needed to be filled out or submitted to have his Building removed from the Loft Board's jurisdiction" (Complaint ¶ 58). On or about January 17, 2019, Bessa apparently "filled out paperwork for a removal application himself and filed it with the Loft Board" (*id*. ¶ 59).

On October 25, 2019, the Loft Board issued an order removing the building from its jurisdiction and setting its final rents (NYSCEF Doc. No. 11). However, the order found that the building's second and fifth floor units remained subject to rent regulation because an application to terminate the 1985 harassment finding had never been filed and thus the sales of rights for the second and fifth floor units could not be recognized. Plaintiff contends it did not receive notice of this order until August 2021, when it was sued by a second floor tenant for rent overcharge.

Plaintiff avers that the conditions underlying the harassment finding had been cured, as reflected by the issuance of a temporary certificate of occupancy in 2007 and a full certificate of occupancy in 2009. The non-termination of the harassment finding for the second and fifth floor units was, in Plaintiff's account, a "mere clerical failure" caused by Defendants' inaction that caused it to sustain significant damages, with the building's value being diminished by millions of dollars as the regulated rents in the second and fifth floor units have been set at a fraction of the going market rate (Complaint ¶¶ 80-81).

Plaintiff commenced this action on June 14, 2022. It asserts causes of action for legal malpractice, breach of fiduciary duty, and fraud and fraudulent concealment. Defendants then filed this pre-answer motion to dismiss. In it, they move to dismiss the legal malpractice cause of action as time-barred. They further move to dismiss the fiduciary duty and fraud causes of action as duplicative of the malpractice cause of action or, in the alternative, to dismiss the

breach of fiduciary duty claim as independently time-barred and the fraud claim for failure to state a cause of action.

"On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired" (*Benn v Benn*, 82 AD3d 548 [1st Dept 2011], quoting *Island ADC, Inc. v Baldassano Architectural Group, P.C.*, 49 AD3d 815, 816 [1st Dept 2008]). "The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is inapplicable or whether the action was commenced within the statutory period (*MTGLQ Invs., LP v Wozencraft*, 172 AD3d 644, 645 [1st Dept 2019]). To meet its burden, "the plaintiff must 'aver evidentiary facts establishing that the action was timely or . . . raise an issue of fact as to whether the action was timely'" (*id.*, quoting *Lessoff v 26 Ct. St. Assoc., LLC*, 58 AD3d 610, 611 [2d Dept 2009]). "In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff" (*Benn*, 82 AD3d 548). The statute of limitations for a legal malpractice cause of action is three years (CPLR 214[6]).

Defendants argue that the statute of limitations on the malpractice cause of action expired on August 8, 2019. They calculate this date based on the June 24, 2016 letter from the Loft Board informing Plaintiff that the 1985 harassment finding was still in effect and that its attempts to deregulate the second and fifth floor units were ineffective. Defendants contend that the malpractice claim, based on their alleged failure to lift the harassment finding, accrued on August 8, 2016 because that was when the window to challenge the Loft Board's determination closed.

In contrast, Plaintiff asserts that its malpractice cause of action only accrued when the Loft Board issued its final order on October 25, 2019. It argues that a malpractice claim only accrues when all its elements can be alleged in a complaint and that here, the damages element in the instant action became ascertainable once the Loft Board removed the building from its jurisdiction and set final regulated rent rates for the second and fifth floor units in its final order. In the alternative, Plaintiff argues that this action was still timely even if the cause of action accrued before 2019 because of Defendants' continuous representation of it through 2019, the 228-day toll on all statutes of limitations under Executive Order 202.8, and the doctrine of equitable estoppel based on Defendants' alleged fraudulent concealment of their malpractice.

"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 ignorant of the wrong or injury" (*id*. [citation omitted]). An actionable injury has been found to have occurred when a plaintiff's damages become "sufficiently calculable to permit [the] plaintiff to obtain prompt judicial redress" (*id*. at 306; *see also Flintlock Constr. Servs., LLC v Rubin, Fiorella & Friedman, LLP*, 188 AD3d 530, 531 [1st Dept 2020], quoting *McCoy*, 99 NY2d at 301, citing *King Tower Realty Corp. v G & G Funding Corp.*, 163 AD3d 541 [2d Dept 2018]).

Defendant meets its prima facie burden of showing that the statute of limitations for malpractice expired before Plaintiff commenced this action. It annexes to its moving papers a copy of the June 24, 2016 Loft Board letter to Plaintiff stating that the harassment finding remained in place and the second and fifth floor units were still subject to rent regulation under

the Loft Law (NYSCEF Doc. No. 9). It also submits a January 25, 2017 invoice sent to Bessa by Norris McLaughlin for Proefriedt's legal services containing an entry for November 16, 2016 that states "Finalize application" (NYSCEF Doc. No. 10). These documents establish, prima facie, that any purported malpractice in failing to apply for a termination of the harassment finding took place in 2016 when the applications were submitted and that any future attempts to raise the units' rents to fair market value would fail unless the harassment finding was removed.

Plaintiff fails to aver any evidentiary facts indicating that the statute of limitations had not expired at the time it commenced this action or that otherwise create a question of fact as to whether this action was timely (*see MTGLQ Invs., LP*, 172 AD3d at 644). It annexes to its opposition an affidavit from Bessa and copies of emails between Bessa and Proefriedt from June and July 2016 (NYSCEF Doc. Nos. 15, 17-18). The affidavit, which merely reiterates Plaintiff's argument that Bessa was unaware of the June 24, 2016 Loft Board letter, only asserts that Bessa believed Proefriedt "learned about the determination in the summer of 2016" and "likely delayed" the final application to the Loft Board by several months to cover up his failure to have the harassment finding terminated (Bessa aff ¶¶ 19, 25). Neither these speculatory assertions nor the 2016 emails between Bessa and Proefriedt create an issue of fact as to whether Plaintiff's alleged damages only became ascertainable in October 2019 or the malpractice cause of action otherwise accrued at a later date. The Court therefore finds that the statute of limitations accrued on August 8, 2019.

Plaintiff also fails to create an issue of fact as to whether the statute of limitations was tolled because it was continuously represented by Defendants between the 2016 removal application filings and the 2019 Loft Board final order. Under the continuous representation doctrine, the statute of limitations for legal malpractice is tolled "only where there is a mutual

understanding of the need for further representation on the specific subject matter underlying the malpractice claim" (*McCoy*, 99 NY2d at 306; *Shumsky v Eisenstein*, 96 NY2d 164, 168 [2001]). The continuous representation toll ends upon the conclusion of the matter or upon the attorney's withdrawal from representation (*see Shumsky*, 96 NY2d at 170-171; *Williamson ex rel. Lipper Convertibles, L.P. v PricewaterhouseCoopers LLP*, 9 NY3d 1, 9-10). An attorney's withdrawal can be inferred where, for instance, the attorney ceases to respond to the plaintiff's attempts at communication (*cf. Shumsky*, 96 NY2d at 170-171; *Champlin v Pellegrin*, 111 AD3d 411 [1st Dept 2013] [13-year gap in communication put plaintiff on notice that representation had terminated]).

Here, Plaintiff does not submit any proof of the scope of Defendants' representation of it before the Loft Board, such as a retainer agreement (*cf. Williamson*, 9 NY3d at 9-10 [2002]). It also does not submit proof of any attempts at communication it made with Proefriedt or any other Norris McLaughlin employees after July 2016; the latest email in Plaintiff's exhibits is one that Proefriedt sent to Bessa on July 22, 2016 (NYSCEF Doc. No. 17). It fails to support Bessa's purported belief that Proefriedt continued to represent him in the Loft Board matter through 2019 despite the apparently two-year lapse in communication after July 2016. The only proffered explanation for this lack of communication, that on occasion Proefriedt was slow to return Bessa's calls or emails or fail to return them, is insufficient to create an issue of fact about whether Plaintiff's purported belief in Defendants' continuous representation was reasonable under these circumstances. Even were the Court to assume that representation continued until the last documented communication between the parties, i.e., the bill sent to Plaintiff by Defendants on January 25, 2017, the action would still be untimely (NYSCEF Doc. No. 10). The Court also finds unavailing Plaintiff's equitable estoppel argument, as its allegations that

Defendants concealed or otherwise intentionally failed to disclose their knowledge of the tenant harassment finding are speculative and conclusory.

Defendant moves to dismiss Plaintiff's causes of action for breach of fiduciary duty and fraud/fraudulent concealment as duplicative of the malpractice cause of action. A cause of action is duplicative of where it "arise[s] out of the same facts and seek the same damages as" another claim (*Courtney v McDonald*, 176 AD3d 645, 645-646 [1st Dept 2019], citing *InKinePharm. Co. v Coleman*, 305 AD2d 151 [1st Dept 2003]). Here, the malpractice claim is premised on Defendants' alleged failure to provide legal services within a reasonable standard of care in their representation of Plaintiff in proceedings before the Loft Board.

This branch of the motion is granted. Both causes of action are duplicative of Plaintiff's malpractice claims, as they relate to Defendants' alleged conduct in connection with the preparation, finalization, and filing of the Loft Board applications for the building. The breach of fiduciary duty cause of action is based upon Defendants' purported discovery that they failed to terminate the tenant harassment finding, and then hid this fact from Plaintiff and intentionally delayed the Loft Board applications (Complaint ¶¶ 96-108). Plaintiff's fraud and fraudulent concealment cause of action arises from Defendants' purported delay in preparing and finalizing the Loft Board applications as part of their alleged attempt to cover up their failure to have the harassment finding terminated (Complaint ¶¶ 109-118). Moreover, as "there is no independent cause of action for concealing malpractice," Plaintiff's attempts to save these causes of action by claiming that they rest on Defendants' alleged acts to cover up their purported malpractice must fail (*Brean Murray, Carret & Co. v Morrison & Foerster, LLP*, 165 AD3d 582, 583 [1st Dept 2018], quoting *Zarin v Reid & Priest*, 184 AD2d 385, 387 [1st Dept 1992]).

Accordingly, it is hereby:

ORDERED that the motion is granted and the action is dismissed.

6/2/2023
DATE

LORI S. SATTLER, 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