

Ursprung v Verkowitz
2011 NY Slip Op 31723(U)
June 14, 2011
Supreme Court, Nassau County
Docket Number: 1125/11
Judge: Anthony L. Parga
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU

PRESENT: HON. ANTHONY L. PARGA
JUSTICE

-----X
DONNA URSPRUNG,

Plaintiff,

-against-

CHARLENE K. VERKOWITZ, ESQ.,

Defendant.
-----X

PART 8

INDEX NO. 1125/11
XXX

MOTION DATE: 4/22/11
SEQUENCE NO. 001, 002

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Upon the foregoing papers, it is ordered that the motion by defendant (Seq. 001) for an order dismissing plaintiff's complaint, pursuant to CPLR §§3211(a)(5) and (7) and CPLR §214(6), is granted. Plaintiff's cross-motion (Seq. 002) for an order joining this action with the prior pending related action entitled *Verkowitz v. Ursprung*, bearing Nassau County index number 665/11, for the purposes of a joint trial, is denied as moot.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This is an action for legal malpractice. On July 19, 2002, attorney Verkowitz was retained by plaintiff Donna Ursprung (hereinafter "Ursprung") to represent her in a divorce proceeding against her now ex-husband, Christopher Ursprung. The matrimonial action was settled in late 2003, and a Judgment of Divorce was entered on February 27, 2004. Defendant Verkowitz contends that the Judgment of Divorce ended the matrimonial action and her representation of Ursprung in the matrimonial action.

On or about April 17, 2007, three years after the matrimonial action was concluded, and after Christopher Ursprung died in October 2006, Ursprung was named as a defendant in an insurance action venued in New York County Supreme Court, which was commenced by the Executor of Christopher Ursprung's estate, Robert Vermeylen, and Christopher Ursprung's second

wife, Diane Ursprung. The insurance action also named Genworth Life Insurance Company of New York as a co-defendant. Defendant contends that all causes of action asserted in the insurance action pertained to Christopher Ursprung's changes to the beneficiary designation of his life insurance policy.

On May 8, 2007, Ursprung retained attorney Verkowitz, by way of a new and separate retainer agreement, to defend her in the insurance action. The insurance action was to determine which beneficiary designation would apply to Christopher Ursprung's life insurance policy. Said action was eventually settled between the parties by dividing the insurance proceeds. Pursuant to the settlement, plaintiff Ursprung was to receive \$290,360.25.

Defendant Verkowitz contends that after the settlement of the insurance action, an issue arose regarding the outstanding legal fees allegedly owed by Ursprung to Verkowitz. Verkowitz argues that after she brought suit for payment of legal fees, the plaintiff instituted the within legal malpractice action. Plaintiff's complaint alleges that Verkowitz committed legal malpractice in the underlying matrimonial action, but defendant argues that plaintiff's legal malpractice action is barred by the three year statute of limitations which began to run upon the entry of the Judgment of Divorce on February 27, 2004. Since the complaint in the instant matter was not filed until January 24, 2011, defendant argues that the action is time barred by the expiration of the statute of limitations.

In addition, defendant argues that the plaintiff failed to properly plead a cause of action for legal malpractice, and as such, should be dismissed pursuant to CPRL 3211 (a)(7) for failure to state a cause of action. Defendant contends that the complaint does not set forth specific factual allegations which show that "but for" counsel's representation, there would have been a more favorable outcome in the underlying matter. Defendant lastly submits that plaintiff's action should be dismissed as there is a prior action pending in which plaintiff asserted a counterclaim for legal malpractice arising from the same set of circumstances.

Plaintiff opposes defendant's motion to dismiss on each of its grounds, arguing, *inter alia*, that Verkowitz failed to properly draft Ursprung's divorce agreement, failed to properly advise Ursprung as to the legal consequences of certain provisions of the divorce agreement, and failed to identify the legal consequences of the terms of the divorce agreement. Plaintiff contends that the insurance action was begun due to the legal malpractice of the defendant Verkowitz in the underlying divorce settlement wherein Verkowitz represented the Ursprung. Ursprung argues that in the underlying divorce settlement, she was supposed to be named as a beneficiary of her former husband's life insurance policy that would cover the spousal maintenance payments remaining in the event that her former husband died prior to the termination of his requirement to pay spousal maintenance. Ursprung claims that the clause, as written in the September 18, 2003 divorce settlement agreement, instead only required him to

maintain a life insurance policy that named her as a trustee for her two daughters. Ursprung also claims that the insurance litigation was a direct result of Verkowitz's negligence in drafting the subject divorce settlement agreement and then improperly advising Ursprung of its contents. As a result of this negligence, and on the advise of Verkowitz, Ursprung claims that she refused to execute the necessary documents required by Genworth Life Insurance Company to payout the beneficiaries of the policy and that she was ultimately sued because of it. Ursprung further contends that Verkowitz's defense of the insurance litigation entailed Verkowitz attempting to obtain a judicial construction of the divorce settlement agreement that would determine that the insurance provision contained therein was intended to cover the spousal maintenance owed to the plaintiff in the event that her ex-husband died.

Ursprung argues that the statute of limitations has not expired to bring the within legal malpractice action, and that the within action is timely commenced, because the continuous representation doctrine applies to this matter and tolls the applicable statute of limitations. Ursprung argues that Verkowitz represented Ursprung continuously from 2002, when she was retained to act as her divorce attorney, to the present date. Ursprung argues that the attorney client relationship has not ceased as Verkowitz is still holding a portion of the settlement proceeds from the insurance action. Ursprung also argues that the continued representation was not a continuing general relationship, but rather, it was specific to the divorce settlement and the litigation that allegedly arose from it, which gives rise to the malpractice claim herein. Ursprung argues that an ongoing and continuous professional relationship from 2002 to the present is demonstrated by the billing invoices sent from Verkowitz to Ursprung, the letters containing inquiries about Ursprung's ex-husband's Qualified Domestic Relations Order ("QDRO") sent between Ursprung and Verkowitz, the letters sent by Verkowitz to the County Clerk in connection with the filing of the QDRO in connection with the divorce, and the letters sent between Ursprung and Verkowitz regarding Ursprung's questions about the divorce settlement agreement and the Genworth Life Insurance policy. Ursprung contends that said communications are sufficient to demonstrate that the continuous representation doctrine applies and that the within legal malpractice action is not time barred. Plaintiff further argues that her complaint sufficiently sets forth a cause of action for legal malpractice and should not be dismissed upon said grounds.

CPLR §214 provides that an action for legal malpractice, whether sounding in tort or breach of contract, must be commenced within three years from the date that the malpractice occurs. It is well settled that the period of limitations in a legal malpractice action begins to run when the malpractice is committed. (*See, Boyd v. Gering, Gross & Gross*, 226 A.D.2d 489, 641 N.Y.S.2d 108 (2d Dept. 1996); *Glamm v. Allen*, 453 N.Y.2d 674, 439 N.E.2d 390 (1982)). Pursuant to the doctrine of continuous representation, however, the statute of limitations period

does not begin to run until the attorney ceases representing the client on the matter which is the subject of the malpractice action. (*See, Shumsky v. Eisenstein*, 96 N.Y.2d 164, 750 N.E.2d 67 (2001); *Piliero v. Adler & Stavros*, 282 A.D.2d 511, 723 N.Y.S.2d 91 (2d Dept. 2001) (holding that pursuant to the continuous representation doctrine, the statute of limitations for causes of action sounding in legal malpractice is tolled until the attorney's ongoing representation concerning the matter out of which the claim arises is completed). The continuous representation must be in connection with the particular transaction which is the subject of the action and not merely during the continuation of a general professional relationship. (*Zaref v. Berk & Michaels, P.C.*, 192 A.D.2d 346, 595 N.Y.S.2d 772 (1st Dept. 1993)). For the continuous representation doctrine to apply to an action sounding in legal malpractice by an attorney, there must be clear indicia of an ongoing, continuous, developing, and dependant 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 A.D.2d 505, 560 N.Y.S.2d 787 (2d Dept. 1990)).

Contrary to Ursprung's contentions, the doctrine of continuous representation is inapplicable to toll the statute of limitations in the instant action as the matrimonial action during which attorney Verkowitz allegedly committed the malpractice was concluded on February 27, 2004, and Verkowitz's representation of the plaintiff for the matrimonial action ceased at that time. The particular transaction which is the subject of this malpractice action had ended in 2004, even if one accepts that a general professional relationship continued. (*See, Zaref v. Berk & Michaels, P.C.*, 192 A.D.2d 346, 595 N.Y.S.2d 772 (1st Dept. 1993)). Further, as the plaintiff was no longer "acutely aware of such need for further representation on the specific subject matter underlying the malpractice claim," the defendant's representation on the matter had ceased at that time. (*Shumsky v Eisenstein*, 96 N.Y.2d 164, 750 N.E.2d 67 (2001); *Carnevali v. Herman*, 293 A.D.2d 698, 742 N.Y.S.2d 85 (2d Dept. 2002)). Attorney Verkowitz's representation of Ursprung in the subsequent insurance matter was pursuant to a separate and subsequent retainer agreement, which was entered three years after the matrimonial action which was concluded on February 27, 2004. As such, the within action for legal malpractice is barred by the expiration of the statute of limitations.

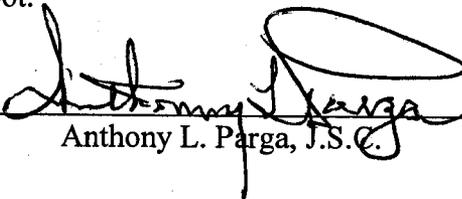
Even accepting plaintiff's arguments that attorney Verkowitz's inquiries regarding Christopher Ursprung's QDRO filings on behalf of Ursprung are evidence of a continuation of the matrimonial matter, the administrative tasks related to the QDRO were completed on September 12, 2006, when Verkowitz forwarded a copy of the August 18, 2006 QDRO order to Ursprung. Accordingly, even accepting the later date of September 12, 2006 as the conclusion of Verkowitz's representation of Ursprung for the matrimonial action, the within legal malpractice action, filed on January 24, 2011, is barred by the statute of limitations.

Furthermore, plaintiff's complaint fails to state a cause of action. To state a cause of action to recover damages for legal malpractice, a plaintiff must allege: (1) that the attorney "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession," and (2) that the attorney's breach of the duty proximately caused the plaintiff actual and ascertainable damages (*Leder v. Spiegel*, 9 NY3d 836, 837, cert denied sub nom. *Spiegel v. Rowland*, 552 US 1257; *See, Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442). Even if a plaintiff establishes the first prong, however, the plaintiff must still demonstrate that he or she would have succeeded on the merits of the action but for the attorney's negligence. (*See, Hamoudeh v. Mandel*, 62 AD3d 948, 949; *McCluskey v. Gabor & Gabor*, 61 AD3d 646, 648; *Peak v. Bartlett, Pontiff, Stewart & Rhodes, P.C.*, 28 AD3d 1028, 1030-31; *see also, Brodeur v. Hayes*, 18 AD3d 979; *Raphael v. Clune, White & Nelson*, 201 AD2d 549, 550). "[M]ere speculation about a loss resulting from an attorney's alleged omission is insufficient to sustain a prima facie case of legal malpractice" (*Siciliano v. Forchelli & Forchelli*, 17 AD3d 343, 345; *see Dupree v. Voorhees*, 68 AD3d 810, 812-813; *Plymouth Org., Inc. v. Silverman, Collura & Chernis, P.C.*, 21 AD3d 464; *Giambrone v. Bank of N.Y.*, 253 AD2d 786).

On a motion to dismiss for failure to state a cause of action, a trial court must determine, accepting as true the factual averments of the complaint and according the plaintiff every benefit of all favorable inferences, whether the plaintiff can succeed upon any reasonable view of the facts stated. (*Wald v. Berwitz*, 62 A.D.3d 786, 880 N.Y.S.2d 293 (2d Dept. 2009)). Plaintiff's complaint herein fails to allege that her attorney's negligence proximately caused her to sustain actual and ascertainable damages, as required to state a cause of action for legal malpractice. (*Id.*). Even accepting all of the plaintiff's allegations as true, Ursprung's complaint fails to state a cognizable cause of action for legal malpractice.

Accordingly, defendant Verkowitz's motion is granted and plaintiff's complaint is hereby dismissed in its entirety. As such, plaintiff's cross-motion for an order joining this action with the prior pending action entitled *Verkowitz v. Ursprung*, bearing Nassau County index number 665/11, for the purposes of a joint trial, is denied as moot.

Dated: June 14, 2011


Anthony L. Parga, J.S.C.

Cc: Michael R. Walker, Esq.
Gallagher, Walker, Bianco & Plastaras, LLP
98 Willis Avenue
Mineola, NY 11501

ENTERED

JUN 16 2011

COUNTY CLERK'S OFFICE

Lewis Brisbois Bisgaard & Smith, LLP
77 Water Street, Suite 2100
New York, NY 10005

Charlene K. Verkowitz, Esq.
561 Lakeville Road
New Hyde Park, NY 11040