

Basilotta v Warshavsky

2011 NY Slip Op 32185(U)

August 2, 2011

Sup Ct, NY County

Docket Number: 115525/09

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

ANTONIA CHRISTINA BASILOTTA P/K/A TONI BASIL,

Plaintiff,

INDEX NO. 115524/09

- against -

MOTION DATE _____

OREN J. WARSHAVSKY, an Individual, and GIBBONS, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE,

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

Defendants.

The following papers were read on this pre-answer motion to dismiss.

Notice of Motion / Petition — Affidavits — Exhibits ...

PAPERS NUMBERED

1, 2

Answering Affidavits — Exhibits (Memo) / Cross Motion to Dismiss _____

3

Reply Affidavits — Exhibits (Memo) _____

4

FILED

AUG - 8 2011

COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

This is a pre-answer CPLR 3211(a) motion to dismiss the plaintiff's complaint, which seeks damages for legal malpractice and related causes of action. During the 1980's, plaintiff was a singer known for her popular 1982 song Hey Mickey ("Mickey"). At all relevant times, plaintiff has been a California resident. In or about 2003, non-party Fallon, Inc. ("Fallon") produced a television commercial for the non-party Subway restaurant franchise that featured Mickey without plaintiff's knowledge or consent. Subsequent to becoming aware of this commercial, plaintiff retained defendant Oren J. Warshavsky, who at the time worked at

defendant law firm Gibbons, Del Deo, Dolan, Griffinger & Vecchione ("Gibbons").¹ Plaintiff alleges that she retained Warshavsky and Gibbons 1) to seek compensation for the unauthorized use of Mickey in the commercial, and 2) to clarify her ownership rights to the Mickey master recordings. The retainer agreement between the parties was strictly contingency-fee based, and defines the scope of the retainer as "regarding all causes of action for CLIENT's recovery for CLIENT's performance as a musical artist on the recording entitled 'Mickey', as performed by CLIENT the [sic] exploitation of the recording, and the copyrights therein and thereto" (Retainer Agreement at ¶1)².

On or about December 30, 2004, Warshavsky commenced two lawsuits on plaintiff's behalf (collectively, the "Underlying Actions"). The first complaint, against Fallon (the "Fallon Complaint"), is attached as an exhibit to the motion herein. The Fallon Complaint asserts four causes of action: 1) for breach of contract, based upon a contract or contracts alleged by plaintiff to have been made between Fallon and the guilds AFTRA and SAG; 2) for violating plaintiff's rights of privacy and publicity; 3) for the tort of unfair competition; and 4) for unjust enrichment. Fallon filed an answer on March 23, 2005. This first Underlying Action was disposed by a stipulation of discontinuance with prejudice, dated February 17, 2008, executed by current counsel for plaintiff and counsel for Fallon.

The second action was commenced against Twist and Shout, Ltd., Odel Finance Corporation, Simon Lait, and six business entities related to record label Razor and Tie (collectively, the "Record Label Defendants"). This second action was commenced by a summons with notice, which was not attached to the motion papers herein.

Much of what happened after this time is in dispute. What is not disputed is that neither

¹Warshavsky is no longer associated with Gibbons, and Gibbons was reorganized in New Jersey, on or about October 11, 2007, as Gibbons P.C.

²Defendants note that the retainer agreement was only executed by plaintiff. This is irrelevant for purposes of this motion.

Gibbons nor Warshavsky filed a Request for Judicial Intervention ("RJI"), in either of the two Underlying Actions, until after this malpractice action commenced. Warshavsky at some point conveyed to plaintiff a settlement offer of \$35,000, which plaintiff rejected. Warshavsky left Gibbons in late 2006. On or about December 27, 2006, plaintiff requested her entire file from Gibbons. Plaintiff later returned the file, or a part thereof, unsolicited, in late October 2007. On or about November 7, 2007, Gibbons sent a letter to James Hudson, the attorney then representing plaintiff, advising him of their position that, among other things, plaintiff had terminated her relationship with Gibbons in December, 2006 and that they had not represented her since that time.

The essence of the relevant disputed facts is that plaintiff maintains that she never terminated her relationship with Gibbons, and Gibbons never advised her that they intended to withdraw as her counsel. Gibbons maintains that plaintiff did terminate Gibbons as counsel no later than December, 2006, and that Warshavsky clearly advised her, even before entering settlement negotiations, that he could not prosecute the Underlying Actions in good faith.

On or about February 14, 2010, plaintiff commenced the instant action, alleging causes of action for legal malpractice, breach of contract, and breach of fiduciary duty. She alleges that, upon retaining her current counsel, said counsel conducted research and discovered that plaintiff's former record label, Radialchoice Ltd. ("Radialchoice"), had been compelled to wind up and involuntarily dissolve. She further alleges that she had entered into a contract regarding her rights to the Mickey master recording with Radialchoice in August, 1982 (the "1982 Contract"), and that the 1982 Contract contains a reversion clause that her rights to the Mickey recording would revert to her in the event of an involuntary dissolution of Radialchoice. The evidence of dissolution was annexed to the complaint, but the 1982 Contract was not, and is not a part of the record of this motion.

The basis of plaintiff's complaint is that the 1982 Contract, combined with the evidence

of Radialchoice's dissolution, establish her rights to the Mickey master recordings, but the defendants failed to perform any research on her case, and therefore failed to discover the relevant evidence. Plaintiff maintains that she has sustained millions of dollars in damages, in that she had not been able to exploit her rights to the Mickey recording and other recordings between 2005 and 2010, during which time there was a "lucrative resurgence of the eighties" (Complaint at ¶ 48).

Defendants now make this pre-answer motion to dismiss, contending that an applicable statute of limitations had run before the action commenced. Defendants note that CPLR 202 requires that a cause of action accruing in a jurisdiction outside New York must be timely in both New York and that other jurisdiction. The injury allegedly suffered by plaintiff is economic in nature, and therefore her claim accrued in California.

In California, the relevant statute of limitations is California Code of Civil Procedure § 340.6(a), which provides that an action for legal malpractice must commence within one year after plaintiff "discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission." According to defendants, the "gravamen of the complaint is Gibbons's and Warshavsky's 'abandonment' of Basilotta and failure to pursue the Underlying Actions" (Defendants' Memorandum of Law in Support at 8). By this reasoning, plaintiff's cause of action accrued no later than November 7, 2007, the date that Gibbons sent a letter indicating that neither Gibbons nor Warshavsky was representing plaintiff. Defendants further assert that the tolling provision in California's legal malpractice statute of limitations, which tolls the statute while the "attorney continues to represent the plaintiff" (Cal. Civ. Proc. § 340.6[a][2]) does not render plaintiff's complaint timely.

In opposition, plaintiff asserts: 1) that plaintiff's damages are not economic in nature, as the Underlying Actions seek non-economic as well as economic damages, and therefore the injury accrued in New York and the California statute of limitations does not apply; 2) the statute

of limitations was tolled, pursuant to California Code of Civil Procedure § 340.6(a)(2), as the defendants continued to represent plaintiff in the Underlying Actions, and even filed requests for judicial intervention therein after the instant action commenced; 3) the statute of limitations was tolled until the defendants formally withdrew, as the parties' retainer agreement provides that "ATTORNEY shall be entitled to withdraw as counsel for CLIENT, without objection by CLIENT" (Retainer Agreement at ¶ 17)³; 4) the statute of limitations was tolled, pursuant to California Code of Civil Procedure § 340.6(a)(3), because defendants willfully concealed their own wrongdoing, which is evidenced by defendants remaining counsel of record where, if the Underlying Actions were meritless, defendants should have "dismissed the [Underlying Action defendants] as required to do in a meritless suit" (Plaintiff's Memorandum in Opposition at 8-9); and 5) the statute of limitations was tolled, pursuant to California Code of Civil Procedure § 340.6(a)(1), until plaintiff suffered actual injury, which did not occur until October 2009, when plaintiff discovered that Radialchoice was involuntarily dissolved.

The defendants reply that, in stating that plaintiff seeks non-economic damages, she is conflating her causes of action in the Underlying Actions with those at bar. Defendants note that the RJs filed by Gibbons in each of the underlying actions were actually filed by Gibbons's legal malpractice counsel in order to initiate a motion to be relieved as counsel of record, and also cite case law indicating that "simply remaining counsel of record does not toll the limitations period" (Reply Memorandum at 8, citing *Baltins v James*, 36 Cal App 4th 1193, n5 [1995]). Defendants also note that the complaint alleges injury on its face, which belies plaintiff's argument that the statute of limitations was tolled.

³Plaintiff also attempts to base this argument upon California Code of Civil Procedure § 340.6(b), contending that, pursuant to that subsection, the statute of limitations did not accrue until formal withdrawal as counsel of record. However, as that subsection only applies "[i]n an action based upon an instrument in writing, the effective date upon which depends upon some act or event of the future," that subsection is inapplicable.

Motion to Dismiss - Statute of Limitations

CPLR 3211(a) provides, in relevant part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the action may not be maintained because of . . . statute of limitations[.]" Upon a 3211(a)(5) motion to dismiss a complaint as time barred under the applicable statute of limitations, the initial burden is on the movant to make a prima facie showing that the time in which to bring the claim has run; "the burden then shifts to the plaintiff to aver establishing that his or her cause of action falls within an exception to the statute of limitations, or raising an issue of fact as to whether such an exception applies" (*Romanelli v Disilvio*, 76 AD3d 553, 554 [2nd Dept 2010]).

"To make a prima facie showing, the defendant must establish, inter alia, when the petitioner's causes of action accrued" (*In re Schwartz*, 44 AD3d 779, 779 [2d Dept 2007]). "In general, a cause of action accrues, triggering commencement of the limitations period, when all of the factual circumstances necessary to establish a right of action have occurred, so that the plaintiff would be entitled to relief" (*Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201, 210 [2001]).

When determining a CPLR 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 151-52 [2002]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, [2001]; *Wieder v Skala*, 80 NY2d 628, [1992]). "We also accord plaintiffs the benefit of every possible favorable inference" (*511 W. 232nd Owners Corp.*, 98 NY2d at 152; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d at 414).

Pursuant to CPLR 202, the "borrowing statute," a cause of action accruing in a jurisdiction outside New York must be timely in both New York and that other jurisdiction

(*Global Fin. Corp. v. Triarc Corp.*, 93 NY2d 525, 528 [1999]; *Kat House Prods. LLC v Paul, Hastings, Janofsky & Walker, LLP*, 71 AD3d 580 [1st Dept 2010]; *Proforma Partners v Skadden Arps Meagher & Flom*, 280 AD2d 303, 303 [1st Dept 2001]). For borrowing statute purposes, a claim accrues at the site of loss (*Proforma*, 280 AD2d at 304). In a case for legal malpractice, where the demanded relief is monetary damages, the site of loss is plaintiff's residence (*Kat House*, 71 AD3d at 580-81).

California's statute of limitations for legal malpractice actions, California Code of Civil Procedure § 340.6, provides in pertinent part:

(a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first . . . [I]n no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:

- (1) The plaintiff has not sustained actual injury.
- (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred.
- (3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation.

Discussion

The Court first notes that this motion presents the narrow question of whether the instant action was commenced after California's statute of limitations had run. All other questions are outside the scope of this motion.⁴ However, the question of whether plaintiff has

⁴The movants titled the memorandum of law in support of their pre-answer motion as "Memorandum of Law In Support of Defendants' Motion to Dismiss for Failure to State a Claim." They also included standards for CPLR 3211(a)(7), dismissal for failure to state a cause of action, and CPLR 3211(a)(1), dismissal upon a defense established by documentary evidence, but omitted the standards for CPLR 3211(a)(5), dismissal as the action cannot be maintained because of the statute of limitations. More importantly, however, the movants failed to posit any argument or theory as to how plaintiff had failed to plead a cause of action until their reply, in which the theory that no injury had occurred was presented. Movants' never posited any theory based upon CPLR 3211(a)(1). As the movants' memorandum in support of its motion only argued dismissal pursuant to CPLR 3211(a)(5), only that

sustained an actual injury is so intertwined with the question of whether the statute of limitations has run, that it must be addressed briefly here. For purposes of this motion, it is sufficient to note that, to the extent that plaintiff can allege injury based upon licensing fees and/or royalties lost during the period of purported eighties popularity, plaintiff's actual injury occurred more than a year before the commencement of the instant action.

The defendants here made a prima facie showing of entitlement to dismissal on statute of limitations grounds, as California's statute of limitations ostensibly accrued when Gibbons made clear that it was no longer representing plaintiff. This occurred no later than November 7, 2007, over a year prior to commencement of this action. However, neither party has addressed the issue of when the "wrongful act or omission" should be considered to have occurred (Cal. Civ. Proc. § 340.6[a]). California's applicable legal malpractice statute of limitations actually contains two limits, a one year limit accruing at the time that plaintiff discovers or reasonably should have discovered the defendants' wrongful acts or omissions, and a four year limit accruing at the time of the defendants' wrongful acts or omissions, with the statute of limitations running at the earlier of the two limits. As defendants only discussed the one year limit, and never even addressed the four year limit, their prima facie showing is limited to the one year limit.

The burden thus shifts to plaintiff to allege facts establishing or raising a triable issue as to whether the statute of limitations had run or whether the case falls within an exception to the statute. Plaintiff's first argument against defendants' prima facie showing is that plaintiff's damages are non-economic in nature, and therefore the place of injury is not plaintiff's residence in California, which means that the California statute of limitations is inapplicable. This is incorrect, as plaintiff here seeks money damages against the defendants. As noted by

argument is addressed here.

defendants, plaintiff's counsel is conflating the Underlying Actions with the action herein. That plaintiff sought equitable relief in one of the Underlying Actions is irrelevant to the determination of the site of injury in this malpractice action.

Plaintiff's remaining arguments attempt to establish that a tolling provision applies here. As to plaintiff's second argument, the Court is not persuaded by plaintiff's contention that the defendants continued to represent plaintiff by virtue of their remaining as counsel of record and recently filing an RJI. By letter dated November 7, 2009, Gibbons clearly notified the plaintiff, through her then-counsel Hudson, that Gibbons had withdrawn its representation of plaintiff. The RJIs later filed by Gibbons in each of the Underlying Actions are, on their face, for the express purpose of seeking to be removed as counsel of record. Remaining counsel of record is not dispositive as to when representation ends for purposes of tolling the legal malpractice statute of limitations (*see Shapero v Fliegel*, 191 Cal App 3d 842, 847-49 and fn6 ["We do not believe that the legislature intended the presence or absence of a formal withdrawal to be dispositive of the continued representation issue," although "formal withdrawal would certainly be helpful in determining at what point the attorney-client relationship ended"; also noting similarities to New York's continuous representation rule]). There is no reasonable argument that the defendants continued to represent plaintiff until after this action commenced. In the same vein, plaintiff's third argument, that the parties' retainer agreement required defendants to formally withdraw, is not persuasive because the plain reading of the language is that the defendants were permitted to withdraw over plaintiff's objection. There is no language within the cited paragraph of the retainer with the effect of restricting the defendants' rights or conduct.

The Court is also not persuaded by the plaintiff's fourth argument, that the statute of limitations was tolled because of defendants' willful concealment of its wrongdoing. To the extent that plaintiff had a valid claim based upon the involuntary dissolution of Radialchoice, no

facts alleged in the complaint, motion papers, or exhibits thereto indicate that defendants were aware of such valid claim. Rather, viewing the facts in a light most favorable to the plaintiff, it appears that the defendants negligently failed to perform certain research which would have led the defendants to conclude that plaintiff had a valid claim. Without going into detail on the requirements incumbent upon attorneys relative to frivolous actions, the Court notes that, prior to commencement of this action, defendants did not file an RJJ in either of the Underlying Actions. This means that the defendants were not actively prosecuting the Underlying Actions after they came to believe that those actions were meritless. It is therefore irrelevant that the defendants did not withdraw the complaints in the Underlying Actions.

As to plaintiff's fifth argument, the Court has already noted that the statute of limitations was not tolled for actual injury. However, defendants' motion must be denied because of an allegation of fact raised in this argument. Specifically, the legal malpractice cause of action did not accrue until plaintiff discovered, or reasonably should have discovered, the defendants' malpractice. Viewing the facts in a light most favorable to the plaintiff, plaintiff only actually discovered defendants' wrongdoing in October of 2009 (Affirmation in Opposition at 6). Plaintiff's allegation that the defendants' wrongdoing was only discovered at that time raises an issue of fact regarding the date of accrual of plaintiff's cause of action and whether the action commenced within one year of accrual. As proving the date of accrual is part of a prima facie showing of entitlement to dismissal on statute of limitations grounds (*see In re Schwartz*, 44 AD3d at 779), plaintiff has effectively rebutted defendant's prima facie showing, and the motion to dismiss must therefore be denied.

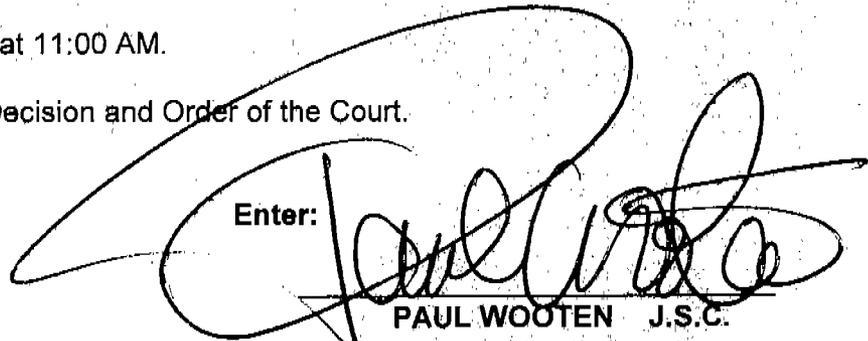
For this reason, the Court must deny this pre-answer motion to dismiss. The parties' remaining arguments have been considered and found unavailing. For the above reasons and upon the foregoing papers, it is hereby

ORDERED, that the defendants' motion to dismiss is denied; and it is further

ORDERED, that the parties shall appear for a preliminary conference in Part 7 (Room 341) on September 7, 2011, at 11:00 AM.

This constitutes the Decision and Order of the Court.

Dated: August 2, 2011

Enter: 

PAUL WOOTEN J.S.C.

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