

Gurvitz v Wank

2011 NY Slip Op 32511(U)

September 19, 2011

Supreme Court, Nassau County

Docket Number: 10468/06

Judge: Ute W. Lally

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 3

Present: HON. UTE WOLFF LALLY
Justice

Mol, Mol)

BARBARA GURVITZ,

Motion Sequence #2, #3
Submitted July 8, 2011

Plaintiff,

-against-

INDEX NO: 10468/06

JERALD L. WANK,

Defendant.

The following papers were read on this motion:

Notice of Motion and Affs.....	1-3
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Upon the foregoing, it is ordered that this motion by plaintiff, Barbara Gurvitz, for an Order, pursuant to CPLR 3025(b), granting her leave to serve an amended complaint and cross motion by defendant, Jerald L. Wank, for an Order, pursuant to CPLR 3211(a)5. dismissing the plaintiff's complaint on the grounds that it is time barred, are determined as set forth below.

Insofar as a motion made pursuant to CPLR 3211 requires this Court to accept as true all of the allegations contained in the complaint (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275), the underlying facts, as stated in plaintiff's proposed amended complaint, are as follows:

In December 1989, defendant Jerald Wank, an attorney and a certified public accountant, prepared the Last Will and Testament for non-party Marta Wisterich (the "Will"). The Will was executed on January 3, 1990 and named, both, the plaintiff, Barbara Gurvitz, and the defendant, Jerald Wank, as co-executors of her Estate. The Will also named the plaintiff as the sole beneficiary.

Apparently, at the time of the preparation and execution of the Will, Marta Wisterich asked Wank to change the beneficiary of her Teacher's Insurance and Annuity Association (TIAA) Equity Fund to Barbara Gurvitz. Plaintiff claims that the defendant failed to file the requisite paperwork with the TIAA reflecting the requested change. As a result, plaintiff filed the appropriate papers with TIAA herself on April 22, 1991.

Marta Wisterich died on May 28, 1991.

Following her death, the TIAA questioned the legality of the change of beneficiary forms because the paperwork was filed within the month preceding Wisterich's death. Also at this time, the decedent's aunt, by her counsel Mr. Kiernik, threatened to challenge the probate of the Will.

Thereafter, in March 1992, plaintiff claims that, upon defendant's advice that she would not be appointed co-executor of the Will because she was a non-resident alien, plaintiff executed a Waiver and Consent renouncing her appointment as co-executor.

Subsequently, on May 27, 1992, the Letters Testamentary were granted by the Surrogate's Court, New York County, to the Defendant, as sole executor of the Estate of Marta Wisterich.

Plaintiff claims that the defendant then negotiated an agreement to split the Estate of Marta Wisterich in half as between the decedent's aunt and the plaintiff. She claims that during the negotiations therein, defendant apparently represented the interests of the plaintiff as well as the interests of the Estate. Furthermore, plaintiff claims that the defendant failed to pay her the half of the estate to which she was entitled, instead retaining said share and telling her that he would first pay the outstanding taxes on her behalf. Plaintiff claims that the defendant deposited said monies into a new (escrow) account created under her name, from which defendant withdrew the money to give to the decedent's aunt.

Plaintiff claims that the escrow account created an appearance of income that the plaintiff did not in fact receive. She also claims that not only did the defendant fail to file or pay plaintiff's taxes, but he also refused to pay back the money he held in escrow and refused to represent her before the IRS and the New York State Department of Finance when plaintiff received a tax bill. Plaintiff claims that as the result of defendant's mistakes, her liability to the IRS totaled more than \$160,977.84 and the amount paid to the Department of Finance totaled more than \$23,361.11.

In addition, plaintiff claims that as the executor, defendant failed to sell Wisterich's cooperative apartment in New York for two years after her death, resulting in fines and penalties to the Estate and further diminishing the value of the residual Estate.

Ultimately, however, plaintiff concedes that in 2000, defendant forwarded the funds held for the plaintiff in his escrow account to plaintiff's then attorney, Mr. Caro.

Plaintiff also points out that in response to an investigation of the State of New York Grievance Committee for the Tenth Judicial District, defendant admitted to making several mistakes including that he "erroneously opened" several accounts in the Escrow Management Checking Account that held plaintiff's money. He also admitted therein that he continued to hold sums due and owing to the plaintiff in that escrow account.

In bringing this action, plaintiff claims that since May 27, 1992, defendant has abused his office as Executor of the Estate of Marta Wisterich and has failed to fully account for the funds he held as the Executor. Plaintiff claims that she, as defendant's client and as beneficiary of the Estate of Marta Wisterich, has received only a partial disbursement of the assets of the Estate, not including any proceeds of the sale of the decedent's cooperative apartment in New York City.

On December 14, 2005, plaintiff commenced this action against the defendant in his personal capacity in the Supreme Court, County of New York. On June 29, 2006, the Court ordered the venue to be changed to Supreme Court, County of Nassau. Thereafter, on September 21, 2006, plaintiff moved to amend the complaint by bringing the action against Jerald Wank as administrator of the Estate of Marta Wisterich. Said motion was apparently adjourned 29 times (because of plaintiff's poor health and her attorney's personal issues) until it was finally withdrawn, without prejudice, as stale on March 17, 2010. Gurvitz had retained present counsel in order to continue to prosecute this action.

Upon the instant motion, plaintiff seeks to amend her complaint so as to state her existing claims with greater detail (based upon specific acts committed by Wank as attorney and fiduciary) and to eliminate the clutter of other claims, namely, the cause of action for conversion and for fraud and deceit. The proposed amended complaint contains only four causes of action against Wank; to wit, breach of fiduciary duty against Gurvitz as attorney; negligence against Gurvitz as attorney; legal malpractice; and breach of fiduciary duty as Administrator of the Estate of Wisterich.

Defendant opposes the motion and in turn cross moves to dismiss the existing verified complaint as being time barred. Defendant argues that as identified in plaintiff's bill of particulars, her claims for breach of fiduciary duty and legal malpractice all pre-date 2002 which warrants the dismissal of plaintiff's claims.

It is noted at the outset that, generally, a motion to dismiss made pursuant to CPLR 3211 "abates," that is, that it must automatically be denied as moot since it refers to a pleading which has been superseded (*Lipary v Posner*, 96 Misc.2d 578 [Sup. Ct. Monroe 1978]). This approach, which only invites additional motion practice, should be restricted to those situations where the amendments make a significant change in the nature of the action. This is not the case herein. In fact, according to the holdings of the Appellate Division, Second Department, where an amended complaint does not render a motion to dismiss academic; the moving party has the discretion as to whether the motion should be applied to the new pleading (*Livadiotakis v Tzitzikalakis*, 302 AD2d 369, 370, citing *Matter of Sage Realty Corp. v Proskauer Rose Goetz & Mendelsohn*, 251 AD2d 35, 38; [1st Dept. 1998]; see also *Sholom & Zuckerbrot Realty Corp. v Coldwell*

Banker Commercial Group, 138 Misc.2d 799, 801 [Sup. Ct. Queens 1988]; *Matter of D'Addario v McNab*, 73 Misc.2d 59, 62 [Sup. Ct. Suffolk 1973]).

Accordingly, this Court holds that the "better rule" is one that most expeditiously advances the litigation (*Sholom & Zuckerbrot Realty Corp. v Coldwell Banker Commercial Group*, *supra*). Therefore, this Court herewith treats the defendant's cross motion to dismiss as directed to the amended complaint.

The determination of whether to deny or permit an amendment to the pleadings is one addressed to the sound discretion of the court (*Liendo v Long Island Jewish Med. Ctr.*, 273 AD2d 445; *Henderson v Gulati*, 270 AD2d 308). The party seeking leave to serve an amended pleading must make an evidentiary showing establishing merit to the proposed amendment (*Joyce v McKenna Assoc.*, 2 AD3d 592; *Morgan v Prospect Park Assocs. Holdings*, 251 AD2d 306). The Court will not consider the merits of the proposed amendment unless the proposed amendment is insufficient as a matter of law or totally devoid of merit (*Sunrise Plaza Assoc. v International Summit Equities Corp.*, 288 AD2d 300; *Norman v Ferrara*, 107 AD2d 739). For example, a party may not amend a complaint to assert a claim that is already barred by the statute of limitations (*Goldberg v Camp Mikan-Recro*, 42 NY2d 1029; *Truty v Federal Bakers Supply Corp.*, 217 AD2d 951).

It is beyond cavil that plaintiff's proposed amended complaint contains only four causes of action: (1) breach of fiduciary duty against Gurvitz as attorney; (2) negligence against Gurvitz as attorney; (3) legal malpractice; and (4) breach of fiduciary duty against Gurvitz as Administrator of the Estate of Wisterich.

In reference to the defendant's cross motion to dismiss plaintiff's claims on the grounds that said claims (also existing in the original complaint) are barred by the statute of limitations, this Court finds that plaintiff's proposed first, second and fourth causes of action are dismissed on the grounds that they are barred by the statute of limitations. As such, plaintiff's motion to amend her complaint to assert said causes of action is denied (*Goldberg v Camp Mikan-Recro, supra; Truty v Federal Bakers Supply Corp., supra*).

Plaintiff's proposed third cause of action for legal malpractice, however, withstands the scrutiny of CPLR 3025(b) requiring a showing of merit to the proposed amended claims (*Joyce v McKenna Assoc., supra; Morgan v Prospect Park Assocs. Holdings, supra*), and therefore survives the defendant's instant motion to dismiss.

Specifically, the statute of limitations for a breach of fiduciary duty cause of action depends on the substantive remedy which the plaintiff seeks (*Loengard v Santa Fe Indus., 70 NY2d 262*). Where the relief sought is equitable in nature, the statute of limitations is six years, and where the relief sought is purely monetary, the statute of limitations is three years (*Monaghan v Ford Motor Co., 71 AD3d 848*). Here, the causes of action against Wank alleging breach of fiduciary duty (both as attorney and as Administrator of the Estate) seek purely monetary damages, and, under the circumstances, a three-year statute of limitations applies.

The statute of limitations begins to run when the cause of action accrues (CPLR §203[a]), i.e., "when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court" (*Aetna Life & Cas. Co. v Nelson, 67 NY2d 169, 175*).

Plaintiff claims in her first cause of action (breach of fiduciary duty as attorney) that plaintiff was represented by the defendant from "March 1992 to now acting as her attorney with respect to the estate of Marta Wisterich". As alleged in her proposed amended complaint, the claimed breach, as attorney, occurred when the defendant misappropriated funds with respect to plaintiff's taxes. According to the plaintiff's own allegations said breach occurred some time after May 1992 and before 2000 when defendant forwarded the funds held for the plaintiff in his escrow account to the plaintiff's then attorney, Mr. Caro. Clearly, under these facts, and even assuming that the breach of fiduciary duty occurred at the very latest in 2000, the cause of action to recover damages for breach of fiduciary duty is time-barred insofar as asserted against Wank as attorney [CPLR 3211(a)5.]. Accordingly, plaintiff's proposed first cause of action for breach of fiduciary duty as attorney is dismissed. Plaintiff has failed to make the requisite evidentiary showing establishing merit to her proposed amended claim (*Joyce v McKenna Assoc., supra*; *Morgan v Prospect Park Assocs. Holdings, supra*).

Similarly, plaintiff's proposed fourth cause of action for breach of fiduciary duty against Gurvitz as Administrator of the Estate of Wisterich, claims that the breach occurred when the defendant refused to release all funds due to the plaintiff, relating to the Estate of Marta Wisterich and the sale of her New York cooperative apartment. The decedent's New York apartment was sold in 1993, two years after Marta Wisterich's death in 1991. While the plaintiff alleges in her proposed amended complaint that she has received only a partial disbursement of the assets of the Estate of Marta Wisterich, which assets did not include any proceeds of the sale of the decedent's cooperative apartment, plaintiff's own documentary evidence submitted in opposition to defendant's

cross motion, confirms that defendant turned over the final funds on February 7, 2005 “represent[ing] full and final payment to [the plaintiff] from both the Wank/Kreinik Attorney Escrow Management Account and the Estate of Marta Wisterich”. However, as stated above, the statute of limitations begins to run when the cause of action *accrues* [CPLR §203(a)]. Plaintiff’s proposed amended fourth cause of action accrued in this case when the defendant *first* refused to release the funds due to the plaintiff, a date no earlier than 1991 when the decedent died and no later than 2000 when the defendant forwarded the funds, albeit partial funds, held for the plaintiff in his escrow account to the plaintiff’s then attorney, Mr. Caro. Those were the dates when “all of the facts necessary to the cause of action. . . occurred.” That is, plaintiff was potentially entitled to obtain relief in court, if any, for her proposed cause of action for defendant’s breach of fiduciary duty as administrator of the Estate, as early as 1991, and certainly in 2000. Clearly, under these facts, and even assuming that the breach of fiduciary duty occurred at the very latest in 2000, the cause of action to recover damages for breach of fiduciary duty is time-barred insofar as asserted against Wank as administrator of the Estate of Wisterich [CPLR 3211(a)5.]. Accordingly, plaintiff’s proposed fourth cause of action for breach of fiduciary duty as administrator of the Estate of Marta Wisterich is also dismissed. Plaintiff has again failed to make the requisite evidentiary showing establishing merit to her proposed amended claim (*Joyce v McKenna Assoc., supra; Morgan v Prospect Park Assocs. Holdings, supra*).

Finally, plaintiff attempts to assert a legal malpractice in her proposed amended complaint. Plaintiff alleges that while the defendant represented to her, as her attorney, that he would ensure that all taxes due by her were paid, said taxes were never paid.

Plaintiff claims that as a result of defendant's material misrepresentation of a material existing facts, she was informed by the IRS and the Department of Finance that she personally owed back taxes. These allegations form the predicate for plaintiff's third cause of action for legal malpractice in her proposed amended complaint.

The statute of limitations for a legal malpractice claim is three years (CPLR 214[6]; *Tsafatinos v Lee David Auerbach, P.C.*, 80 AD3d 749). The limitations period begins to run from the time of the alleged malpractice, not from the time of discovery (*Shumsky v Eisenstein*, 96 NY2d 164, 166; *730 J & J, LLC v Polizzotto & Polizzotto, Esqs.*, 69 AD3d 704).

Again, the legal malpractice cause of action also accrued at the earliest date that the plaintiff possessed the facts to sustain said cause of action, i.e., May 27, 1992 when the Letters Testamentary were issued by the Surrogate's Court appointing defendant as the sole executor of the Estate of Marta Wisterich. That was the earliest possible date that the defendant would be under a duty to file or pay the requisite taxes on plaintiff's behalf. Clearly, under these facts, the claim of professional negligence, i.e., legal malpractice, is time-barred [CPLR 3211(a)5].

However, plaintiff's argument that the doctrine of continuous representation tolls the statute of limitations for her legal malpractice claim is persuasive.

For the purposes of defendant's pre answer motion to dismiss under CPLR 3211 and for the purposes of a liberal reading of CPLR 3025(b), the complaint adequately alleges and the evidence herein demonstrates that the relationship necessary to invoke the continuous representation doctrine survived past 2002 (three years before plaintiff was required to commence suit herein) (*Rupolo v Fish*, 2011 WL 3715294 [2nd Dept.

2011]; *cf. Marlett v Hennessy*, 32 AD3d 1293, 1294; *Piliro v Adler & Stavros*, 282 AD2d 511). Specifically, the documentary evidence, to wit, the defendant's letter to counsel for plaintiff, dated February 7, 2005, in which he returns the balance of the "Wank/Kreinik Attorney Escrow Management Account and the Estate of Marta Wisterich" presents an issue of fact as to whether the representation of plaintiff by the defendant continued beyond 2002, the earliest date plaintiff would have to meet to satisfy the timeliness of her legal malpractice claim.

Therefore, having made an evidentiary showing establishing merit to her proposed amended complaint for legal malpractice, this Court herewith denies so much of defendant's motion to dismiss plaintiff's legal malpractice claim on the grounds that it is time barred and grants plaintiff's motion to amend her complaint to assert a legal malpractice claim against the defendant (*cf. Sunrise Plaza Associates, L.P. v International Summit Equities Corp., supra; Norman v. Ferrara, supra*).

Inasmuch as the plaintiff's proposed second cause of action seeking to recover damages for defendant's alleged negligence is largely duplicative of her legal malpractice claim against Gurvitz, said cause of action is dismissed (*Turner v Irving Finkelstein & Meirowitz, LLP*, 61 AD3d 849, 850; *Sitar v Sitar*, 50 AD3d 667, 670; *Iannucci v Kucker & Bruh*, 42 AD3d 436, 437; *Town of Wallkill v Rosenstein*, 40 AD3d 972, 974).

The parties' remaining contentions have been considered and do not warrant discussion.

Finally, all applications not specifically addressed are denied.

Dated: **SEP 19 2011**



UTE WOLFF LALLY, J.S.C.

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ENTERED
SEP 21 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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