Patel v Scheurer
2014 NY Slip Op 30923(U)
April 4, 2014
Supreme Court, New York County
Docket Number: 650185/08
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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CHANDRAKANT PATEL, KIRIT S. PATEL, YAKOV SHIRYAK, and VOLCANO NIGHTCLUB RESTAURANT CORP., t/a VOLCANO NIGHTCLUB,

Plaintiffs,

-against-

TERENCE C. SCHEURER, ESQ., MICHAEL HARDY, ESQ., and SCHEURER & HARDY, P.C.,

Defendants.

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DECISION and ORDER
Index No. 650185/08
Motion Seq. No. 002

SALIANN SCARPULLA, J.:

This action for legal malpractice, breach of fiduciary duty, and breach of contract arises out of a litigation that took place in the United States District Court for the Eastern District of Pennsylvania (the "Federal Action"). Plaintiffs herein brought the Federal Action against the Pennsylvania Liquor Control Board ("PLCB") and associated individuals for violation of plaintiffs' constitutional and civil rights with regard to the ownership and management of the Volcano Nightclub Restaurant Corp., t/a Volcano Nightclub (the "Volcano"). Defendants now move pursuant to CPLR 3212(a) and (b) to dismiss the complaint.

Plaintiffs Chandrakant Patel ("Chandrakant"), Kirit S. Patel ("Kirit")[1], and Yakov Shiryak ("Shiryak" and, together, the "Owners") are the owners, officers and/or investors in

[1] The Court refers to Messrs. Patel by their first names to avoid confusion.

the Volcano, a now-defunct nightclub that was located in Allentown, Pennsylvania. After opening, Volcano was subject to several complaints regarding excessive noise. Several letters of violation were sent to Volcano in 2000, and all of the violations were upheld after hearings before an administrative law judge. Volcano did not appeal the decisions.

In April 2002, the PLCB notified Volcano that, due to the number of times Volcano had been cited for violating regulations, it might decline to renew the liquor license and amusement permit for the establishment. In a letter dated May 21, 2003, the PLCB gave final notice to Volcano that its amusement permit would not be renewed and, ultimately, Volcano went out of business.

Believing that it had been discriminatorily targeted by the PLCB, plaintiffs consulted with Terence C. Scheurer, Esq. ("Scheurer") and signed a retainer agreement with the law firm of Scheurer & Hardy, PC ("S&H") on January 30, 2002 (the "Retainer"). S&H, a New York firm whose lawyers were not admitted to practice in Pennsylvania, was retained to "represent[] [Volcano] in a *possible civil matter against the Pennsylvania State Police along with other possible individuals and/or entities*."[2] Notice of Motion, Ex. J, ¶ 1 (emphasis in original). The Retainer further provides that it "does not cover any additional work in connection with appeals from any court decisions, orders, or any other actions." *Id.*, ¶ 7.

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[2]While the PLCB is responsible for issuing liquour and amusement permits for businesses in Pennsylvania, the Pennsylvania State Police Bureau of Liquor Control Enforcement ("BLCE") is responsible for issuing citations to businesses that violate certain Pennsylvania codes, rules and regulations.

Finally, the Retainer states that "[a]ny and all changes to this retainer agreement must be made in writing and signed by both parties." *Id.*, ¶ 12.

Plaintiffs point out in their Counterstatement of Material Facts that even though defendants had no ability to file suit in Pennsylvania, they made no provision in the Retainer for the retention of local counsel and plaintiffs were not told that defendants could not undertake the representation without obtaining Pennsylvania counsel.

Ultimately, in November 2002, plaintiffs retained their long-standing counsel, non-party Eugene LaManna ("LaManna")[3], to prosecute plaintiffs' claims in district court in Pennsylvania. Defendants emphasize that they did not know LaManna prior to his retention by plaintiffs, did not suggest or recommend to plaintiff that they retain LaManna, and have never met him.

On November 5, 2002, Scheurer wrote a letter to plaintiffs notifying them of the terms of an amended retainer agreement which needed to be signed by all parties and LaManna (the "Amended Retainer"). The Amended Retainer was signed by LaManna, Chandrakant and Kirit, but not Scheurer, who claims there was no meeting of the minds despite the fact that he prepared the letter and it was on his firm's letterhead. The Amended Retainer provides in pertinent part that:

> 1. SCHEURER & HARDY P.C. ("SHPC") will remain on the case as "of counsel" and will assist local counsel in an advisory capacity; and
> 2. Local counsel, Eugene LaManna ("LaManna"), agrees to draft all

[3] LaManna had represented plaintiffs in the Pennsylvania proceedings related to the PLCB violations, discussed *supra*.

> pleadings, draft and respond to any necessary motions, handle depositions and attend any necessary Court appearances (including trial); and
> 3. SHPC will lend its expertise in an advisory role; will sign (along with local counsel) any pleadings or documents presented to the Court or to Defendants attorneys; will assist local counsel in settlement discussions (including attending any settlement conferences with the Court or the Defendants); and contribute monies towards any necessary expenses and disbursements in the case; and
> 4. The retainer shall be amended to reflect the fact that LaManna will receive 75% of the 100% (33 and 1/3rd%) of the legal fees collected from any settlement or award (SHPC will receive 25%)[...]

Scheurer allegedly shared his views with LaManna regarding plaintiffs' potential claims and LaManna agreed to draft and file plaintiffs' complaint (the "Federal Complaint"). LaManna filed the Federal Complaint in the District Court for the Eastern District of Pennsylvania on November 15, 2002. Consistent with the terms of the Amended Retainer, defendants were listed as counsel on the Federal Complaint, but they did not sign it. Nevertheless, S&H claims that it did not authorize or consent for LaManna to put their firm name and address on the Federal Complaint, did not sign any pleading filed in Federal Court on behalf of plaintiffs, and did not file a Notice of Appearance in the Federal Action.

By order dated January 31, 2005, the District Court entered summary judgment in favor of defendants and dismissed the complaint in its entirety. Plaintiffs filed a motion for reconsideration and, by order dated June 20, 2005, the Court granted that motion in part, but affirmed summary judgment dismissing the complaint.

Plaintiffs commenced the present action on June 17, 2008, asserting causes of action for legal malpractice, breach of fiduciary duty, and breach of contract based on defendants'

involvement in the Federal Action. Defendants assert several affirmative defenses in their answer, including failure by plaintiffs to timely file their complaint. Defendants now move pursuant to CPLR 3212(a) and (b) for summary judgment dismissing the action on the grounds that: (i) the claims of legal malpractice and breach of fiduciary duty are time-barred by Pennsylvania's two-year statute of limitations pursuant to CPLR 202, or New York's three-year statute of limitations for such claims; (ii) the claims for breach of fiduciary duty and breach of contract are barred as duplicative of the legal malpractice claims; (iii) all of the claims are barred because plaintiffs failed to name a necessary and indispensable party, pursuant to CPLR 1001 (a) and (b); and (iv) plaintiffs failed to sufficiently establish any of their causes of action as a matter of law.

Discussion

Choice of Law - Statute of Limitations

The Court first considers the threshold issue of the statute of limitations applicable to plaintiffs' claims for legal malpractice and breach of fiduciary duty. "When a nonresident sues in New York's courts on a cause of action accruing outside New York, CPLR 202, the so-called "borrowing statute", requires that the cause of action be timely under the limitation periods of both New York and the jurisdiction where the claim arose." *Proforma Partners, LP v. Skadden Arps Slate Meagher & Flom, LLP,* 280 A.D.2d 303, 303 (1st Dep't 2001)(citing *Global Fin. Corp. v. Triarc Corp.*, 93 N.Y.2d 525, 528 (1999)). Because Volcano was located in Pennsylvania, but plaintiffs live and the Volcano corporation was

allegedly domiciled in New Jersey,[4] the Court must determine whether plaintiffs' claims for legal malpractice and breach of fiduciary duty arose in New Jersey or Pennsylvania.

Under New York law, where the claimed injury is an economic one, the cause of action typically accrues where the plaintiff resides and sustains the economic impact of the loss. *Global Fin. Corp.*, 93 N.Y.2d at 529. Here, that would be New Jersey. However, New Jersey applies a "most significant relationship" test to resolve choice-of-law questions. *See Maniscalco v. Brother Intl. (USA) Corp.*, 709 F.3d 202, 206 (3d Cir. 2013)(*citing P.V. v. Camp Jaycee,* 197 N.J. 132 (2008)); *Watson v. Watson,* 2009 WL 901921, *2-3 (N.J. Super. Ct. App. Div. Apr. 6, 2009). That test "presumes that the law of the place of injury should govern, unless another state has a more significant relationship." *Id.* at *3. The first step in applying the "most significant relationship" test to the present facts is to determine whether a conflict exists between New Jersey and Pennsylvania's statutes of limitations for legal malpractice, which one does. New Jersey has a six-year statute of limitations for legal malpractice. *See N.J. Stat. Ann. § 2A:14-1*; *see also McHale v. Kelly*, 527 Fed.Appx. 149, 153 (3d Cir. 2013)(considering whether plaintiffs' legal malpractice claim falls within New Jersey or Pennsylvania's statutes of limitations). Pennsylvania has two separate statutes of limitations for legal malpractice, depending on whether the action is in contract or tort; a two-year limitations period applies to negligence claims and a four-year limitations period applies to breach

[4]It is apparently uncontroverted that, according to the records of the New Jersey Department of Treasury: Division of Revenue & Enterprise Services, the "Volcano Nightclub Restaurant Corp." was never registered with the New Jersey Secretary of State.

of contract claims. *See Wachovia Bank, N.A. v. Ferretti*, 935 A.2d 565, 570-71 (Pa. Super. 2007); 42 Pa. C.S.A. §§ 5524 (3), 5525.

Because there is a conflict between New Jersey and Pennsylvania's statutes of limitations, the Court must proceed to the second step of the test, which is to consider whether Pennsylvania has a more significant relationship to plaintiffs' legal malpractice claim than New Jersey. While plaintiffs are domiciled in New Jersey, Pennsylvania clearly is the center of the parties' relationship and is the location of the alleged conduct causing plaintiffs' injury. Considering these contacts qualitatively, (*Watson,* 2009 WL 901921 at *3), Pennsylvania has the most significant relationship to the parties' dispute and the Court will apply that state's two-year statute of limitations in its CPLR 202 analysis below.

Timeliness Under Pennsylvania Law

Plaintiffs' legal malpractice claim is based on defendants' representation of them in the Federal Action. Plaintiffs allege that during the course of the Federal Action, defendants, *inter alia*, failed to: name Volcano as a plaintiff, properly conduct discovery, timely file opposition to two motions to dismiss[5], file any memoranda at all in connection with certain other motions, and those memoranda that they did file were described by the district court as "woefully inadequate and provid[ing] only conclusory statements of law with no application of the law to the facts of [the] case."

Defendants argue that the statute of limitations in this case began to run on February 1, 2005 after the district court granted summary judgment in favor of the Federal Action

[5] The district court granted both motions on default.

defendants and dismissed plaintiffs' claims. They explain that LaManna wrote to plaintiffs two days later on February 3, 2005, stating that "[u]nfortunately, there is nothing more that can be done" with respect to their case. Defendants contend that this letter gave plaintiffs actual notice of the alleged malpractice, and plaintiffs acknowledged that the case was dismissed when Chandrakant wrote to LaManna on February 14, 2005. Defendants further contend that plaintiffs were required to commence this action by February 1, 2007 under Pennsylvania law.

Plaintiffs argue that their action was timely filed under New York law, but do not address the timeliness of their action under Pennsylvania law because they erroneously conclude that New Jersey law applies.

Under Pennsylvania law, "the statute of limitations in a legal malpractice claim begins to run when the attorney breaches his or her duty, and is tolled only when the client, despite the exercise of due diligence, cannot discover the injury or its cause." *Wachovia Bank, N.A. v. Ferretti*, 935 A.2d at 573; *see also Harsco Corp. v. Kerkam, Stowell, Kondracki & Clarke, P.C.*, 961 F.Supp. 104, 106 (M.D. Pa. 1997).[6] Because plaintiffs' claim for legal malpractice was not filed within two years of the alleged malpractice and plaintiffs do not allege, much less meet, this standard for tolling under Pennsylvania law, their claim is time-barred. *See Kat House Prods., LLC v. Paul, Hastings, Janofsky & Walker, LLP*, 2009 WL 1032719 (Sup.

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[6] When borrowing a foreign jurisdiction's statute of limitations under CPLR 202, its tolling statute is also borrowed. *GML, Inc. v. Cinque & Cinque, P.C.*, 9 N.Y.3d 949, 951 (2007).

Ct., NY Co. Apr. 6, 2009)(dismissing legal malpractice claims time-barred in California); *see also Portfolio Recovery Assoc., LLC v. King,* 14 N.Y.3d 410 (2010)(holding that because contract claims are time-barred in Delaware, under CPLR 202 they are time-barred in New York); *Metropolitan Life Ins. Co. v. Morgan Stanley,* 2013 WL 3724938, *8 (Sup. Ct., NY Co. June 8, 2013).

Plaintiffs' claim for breach of fiduciary duty is also subject to a two-year statute of limitations under Pennsylvania law. *See Zimmer v. Gruntal & Co., Inc.,* 732 F.Supp. 1330, 1336 (W.D. Pa. 1989)(*citing* 42 Pa. Cons. Stat. 5524(7)). While such claims may, under certain circumstances, be subject to equitable tolling, (*see Weis-Buy Services, Inc. v. Paglia,* 411 F.3d 415, 424 (3d Cir. 2005)), plaintiffs make no argument that tolling is appropriate here. Because plaintiffs did not assert this claim within two years of the alleged breach and the claim was not tolled, the Court finds plaintiffs' cause of action for breach of fiduciary duty also to be time-barred.

Breach of Contract

As noted above, Pennsylvania allows for a four-year limitations period for legal malpractice where the claim is based upon breach of contract. *Wachovia Bank, N.A. v. Ferretti,* 935 A.2d at 570-71; 42 Pa. C.S.A. §§ 5524 (3), 5525. Despite being timely asserted, plaintiffs' claim for breach of contract is dismissed because it arises from the same facts underpinning their legal malpractice claim and is duplicative. *See Shivers v. Siegel,* 11 A.D.3d 447, 447 (2d Dep't 2004)(finding legal malpractice claim time-barred and dismissing

breach of contract claim as duplicative of legal malpractice claim); *see also Weissman v. Kessler*, 78 A.D.3d 465, 466 (1st Dep't 2010).

In light of the foregoing holding, the Court need not reach defendants' arguments concerning plaintiffs' alleged failure to join a necessary party.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the complaint is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon submission of appropriate bills of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of this Court.

Dated: New York, New York
April 7, 2014

ENTER:

Saliann Scarpulla, J.S.C