

**Genesis Merchant Partners, LP v Gilbride, Tusa,  
Last & Spellane LLC**

2015 NY Slip Op 31080(U)

June 16, 2015

Supreme Court, New York County

Docket Number: 653145/2014

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 42

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GENESIS MERCHANT PARTNERS, LP and  
GENESIS MERCHANT PARTNERS II, LP,

Plaintiffs,

Index No. 653145/2014

-against-

GILBRIDE, TUSA, LAST & SPELLANE LLC,  
JONATHAN M. WELLS, KENNETH GAMMILL, JR.,  
and CHARLES S. TUSA,

Defendants.

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**NANCY M. BANNON, J.:**

In this action alleging, inter alia, attorney malpractice, defendants Gilbride, Tusa, Last & Spellane LLC, Jonathan M. Wells, Kenneth Gammill, Jr. and Charles S. Tusa (together, Gilbride) move, pre-answer, to dismiss certain claims in the complaint pursuant to CPLR 3211 (a) (1), (5), and (7). For the reasons set forth below, Gilbride's motion is granted in part.

**I. Background**

This action arises from four loans provided by Plaintiffs Genesis Merchant Partners, LP and Genesis Merchant Partners II, LP (together, Genesis) to non-party Progressive Capital Solutions, LLC (Progressive). At issue in this pre-answer motion to dismiss are the second and third loans (Loan 2 and Loan 3, respectively) (together, the Loans). Gilbride filed an answer regarding the fourth loan (Loan 4).

Gilbride represented Genesis in setting up the loans. Loan 2 closed on December 22, 2008, and Loan 3 closed on July 31, 2009. Loan 2 was to be secured by collateral in the form of a portfolio of five life insurance policies, having a value of approximately \$84 million. Loan 3 was to be secured with one life insurance policy, as well as by a mortgage, in the amount of \$1 million, on property located in Pennsylvania (Pennsylvania property). Seven months prior to the closing of Loan 3, a lien was placed on the Pennsylvania property by Farmer Boy Ag System, Inc. (Farmer Boy), in the sum of \$234,006.27.

Genesis commenced this action on October 15, 2014, asserting four causes of action, as follows: (1) legal malpractice, arising from Gilbride's alleged failure to perfect security interests in all three loans; (2) breach of contract; (3) negligence; and (4) disgorgement of fees. According to the complaint, Gilbride was retained to advise on all of the related loans between Progressive and Genesis through the maturity dates of the loans, including amending the loans and ensuring that Genesis' security interests in the collateral were perfected. Gilbride was to structure and draft the Loan documents so as to perfect security interests in the Loan collateral. However, when Progressive defaulted on the Loans, it was discovered that the security interests had not been perfected. Genesis contends that Gilbride failed to perfect the security interest in the life insurance policies because Gilbride only attempted to perfect the collateral by the filing of UCC financing statements listing the policies, which are insufficient to perfect security interests in life insurance policies.

Gilbride is also alleged to have failed to record the mortgage on the Pennsylvania property until one and one half years after the Loan 3 was made, allowing subsequent mortgages to "jump in line" before Genesis's mortgage was recorded. When the Pennsylvania property was sold at a tax foreclosure sale, Genesis recovered nothing, as all of the sale proceeds went to pay back taxes and to satisfy Farmer Boy's lien. However, neither of the two mortgages which "jumped in line" in front of Genesis received anything either.

In the instant motion, Gilbride seeks dismissal of so much of the legal malpractice claim as pertains to Loan 2 and Loan 3, on the grounds that the legal malpractice claim, as it relates to these Loans, is time-barred, pursuant to CPLR 3211(a)(5). Gilbride argues that documentary evidence rebuts Genesis' claim that Gilbride's failure to record the mortgage in a timely manner proximately caused its losses. Gilbride also seeks dismissal of the remaining causes of action as duplicative of the cause of action for legal malpractice.

In opposition, Genesis argues that its claims are not time-barred and that the instant action was timely commenced in October 2014 because Gilbride continued its representation regarding Loan 2 and Loan 3 and represented it regarding Loan 4, which it contends is related, through December 2011. The Court notes that the day after Genesis' opposition to the instant motion was submitted, Genesis filed an amended complaint, which, in addition to the existing four causes of action, asserted a fifth cause of action for breach of fiduciary duty against Gilbride. Gilbride's reply addresses both the original and amended complaint and the parties subsequently stipulated that the instant motion would be applied to both the original and amended complaint.

## II. Discussion

Initially, as Genesis filed an amended complaint with their opposition to Gilbride's motion to dismiss, Gilbride has the option to decide whether their motion should be applied to the new pleadings. See Sobel v Ansanelli, 98 AD3d 1020 (2<sup>nd</sup> Dept. 2012); Fownes Brothers & Company, Inc. v JP Morgan Chase & Co., 92 AD3d 582 (1<sup>st</sup> Dept. 2012); DiPasquale v Security Mutual Life Ins. Co. of New York, 293 AD2d 394 (1<sup>st</sup> Dept. 2002). Here, Gilbride has elected to proceed with the motion and apply it to the original complaint and the amended complaint.

On a pre-answer motion to dismiss pursuant to CPLR 3211, the court "must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory." Sokoloff v Harriman Estates Dev. Corp., 96 NY2d 409, 414 (2001); see also Leon v Martinez, 84 NY2d 83 (1994). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." Ginsburg Dev. Cos., LLC v Carbone, 85 AD3d 1110, 1111 (2<sup>nd</sup> Dept. 2011), quoting EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005) [internal quotation marks omitted].

### A. Statute of Limitations

"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." Island ADC, Inc. v Baldassano Architectural Group, P.C., 49 AD3d 815, 816 (2<sup>nd</sup> Dept. 2008); see Gravel v Cicola, 297 AD2d 620 (2<sup>nd</sup> Dept. 2002). The court takes the facts alleged in the complaint as true and resolves all inferences in favor of the plaintiff. See Island ADC, Inc. v Baldassano Architectural Group, P.C., supra.

An action for legal malpractice must be commenced within three years of its accrual. See CPLR 214(6); McCoy v Feinman, 99 NY2d 295, 301 (2002). The 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, supra at 301, quoting Ackerman v Price Waterhouse, 84 NY2d 535, 541 (1994). That is, a claim accrues when the malpractice is committed, not when it is discovered. See McCoy v Feinman, supra; West Vil. Assoc. Ltd. Partnership v Balber Pickard Battistoni Maldonado & Ver Dan Tuin, PC, 49 AD3d 270 (1<sup>st</sup> Dept 2008).

A cause of action for legal malpractice may be tolled by the continuous representation doctrine. See Glamm v Allen, 57 NY2d 87, 93 (1982).

“[T]he rule recognizes that a person seeking professional assistance has a right to repose confidence in the professional’s ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered . . . [a] person [is not] expected to jeopardize his pending case or his relationship with the attorney handling that case during the period that the attorney continues to represent the person [internal quotation marks and citation omitted].”

Id. at 93-94. The statute of limitations will be tolled by the continuous representation doctrine “only so long as the defendant continues to represent the plaintiff ‘in connection with the particular transaction which is the subject of the action and not merely during the continuation of a general professional relationship.’” Transport Workers Union of Am. Local 100 AFL-CIO v Schwartz, 32 AD3d 710, 713 (1<sup>st</sup> Dept. 2006) *quoting* Zaref v Berk & Michaels, 192 AD2d 346, 348 (1<sup>st</sup> Dept. 1993); see West Vil. Assoc. Ltd. Partnership v Balber Pickard Battistoni Maldonado & Ver Dan Tuin, PC, *supra*.

In the present matter, Gilbride fails to establish that the legal malpractice claim accrued more than three years prior to the commencement of this action and is, therefore, time-barred. Genesis alleges in the complaint, filed in 2014, that the parties always anticipated Gilbride’s continuing oversight of the Loans through their maturity dates in June 2012. Indeed, Gilbride performed legal work on behalf of Genesis relating to the Loans through, at least, 2011. Specifically, Gilbride completed amendments to the Loans in 2010 and 2011, “cross-collateralized” Loan 4 with the Loans, and consolidated the Loans with Loan 4 in August 2011. Gilbride was responsible for reviewing and revising the Loan documents to ensure the perfection of the collateral for the Loans and using the presumably perfected Loan collateral to “cross-collateralize” with Loan 4. In addition, Gilbride represented Genesis in a suit in Connecticut against Progressive with regard to the Loans. Genesis and Progressive entered into a conditional settlement, drafted by Gilbride, in which Progressive was to pay the aggregate outstanding value of the Loans by June 2012, plus interim monthly payments commencing in January 2012. Such work was done in connection with the Loans and was not merely the continuation of a general professional relationship between the parties. See Transport Workers Union of Am. Local 100 AFL-CIO v Schwartz, *supra*. Further, some of the work done during this period, including recording a \$1 million mortgage on property included as collateral on Loan 3 eighteen months after the closing, was performed to rectify the alleged act of malpractice, i.e.

failing to secure the Loans. See Red Zone LLC v Cadwalader, Wickersham & Taft LLP, 118 AD3d 581 (1<sup>st</sup> Dept. 2014).

In support of its motion, Gilbride fails to demonstrate that its representation terminated at some time earlier than the maturity dates of the Loans. Gilbride avers that the Loans were nothing more than a series of distinct, unrelated transactions. However, Gilbride does not dispute that it completed amendments to the Loans, “cross-collateralized” them with Loan 4, consolidated them, and represented Genesis in a suit regarding the Loans, all after the closing dates of the loans in 2008 and 2009. It is notable that Gilbride does not submit or cite to the retainer agreement in support of its contention that its representation ceased with the closings. See Shumsky v Eisenstein, 96 NY2d 164 (2001). The complaint, therefore, is sufficient to establish that there was mutual understanding that Gilbride’s representation would continue after the closings of the Loans and the continuous representation doctrine applies. See Lytell v Lorusso, 74 AD3d 905 (2<sup>nd</sup> Dept. 2010); West Vil. Assoc. Ltd. Partnership v Balber Pickard Battistoni Maldonado & Ver Dan Tuin, PC, *supra*; *cf.* Scott v Fields, 85 AD3d 756 (2<sup>nd</sup> Dept. 2011).

Contrary to Gilbride’s contention, its continuous representation of Genesis on the specific matter under dispute tolled the running of the statute of limitations on Genesis’ first cause of action for legal malpractice. See West Vil. Assoc. Ltd. Partnership v Balber Pickard Battistoni Maldonado & Ver Dan Tuin, PC, *supra*; Transport Workers Union of Am. Local 100 AFL-CIO v Schwartz, *supra*. Therefore, that branch of Gilbride’s motion to dismiss the first cause of action for legal malpractice pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations is denied.

### **B. Defense Founded upon Documentary Evidence.**

Dismissal under CPLR 3211(a)(1) is warranted only if the documentary evidence submitted “resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.” Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1<sup>st</sup> Dept. 2002); *see* Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431, 433 (1<sup>st</sup> Dept. 2014); Fontanetta v John Doe 1, 73 AD3d 78 (2<sup>nd</sup> Dept. 2010). Here, the documentary evidence submitted by Gilbride conclusively establishes a defense to Genesis’ cause of action for legal malpractice as it pertains to Genesis’ claim that failing to record the mortgage as collateral for Loan 3 was legal malpractice.

A claim of legal malpractice requires allegations “that the attorney was negligent; (2) that such negligence was a proximate cause of plaintiff’s losses; and (3) proof of actual damages.” Brooks v Lewin, 21 AD3d 731, 734 (1<sup>st</sup> Dept. 2005). To show proximate cause, it must be alleged that “‘but for’ the attorney’s negligence, the plaintiff would either have been successful in the underlying matter or would not have sustained any ascertainable damages.” Barbara King Family Trust v Voluto Ventures LLC, 46 AD3d 423, 424 (1<sup>st</sup> Dept. 2007).

Gilbride produces the order of the Court of Common Pleas of Lancaster County, Pennsylvania, entitled “Absolute Confirmation of Distribution of Surplus Sale Proceeds,” from the Pennsylvania tax sale of the Pennsylvania property, which indicates that, of the \$325,619.42 collected in the sale, \$2,345.00 went to the Pennsylvania Department of Revenue, and \$323,274.42 went to satisfy Farmer Boy’s lien placed on the property seven months before the closing of Loan 3. No other entity, including the mortgagees ahead of Genesis, obtained any sale proceeds. Although Genesis alleges that it received nothing as a result of the sale due to Gilbride’s failure to record the mortgage on the Pennsylvania property for a period of eighteen months, the documentation submitted by Gilbride establishes that Genesis did not suffer any losses due to Gilbride’s negligence. Rather, its losses were the result of the existence of a lienor with a greater claim to the sales proceeds than Genesis. Even if the mortgage had been recorded immediately after the closing of Loan 3, and even if Genesis’ lien sat directly after Farmer Boy as a lienor, Genesis would not have obtained any sale proceeds.

Because the documentary evidence establishes that there is no “but for” proximate cause, that portion of the first cause of action for legal malpractice seeking damages for Gilbride’s failure to record the mortgage is dismissed. See O’Callaghan v Brunelle, 84 AD3d 581 (1<sup>st</sup> Dept. 2011). However, since the complaint alleges that Loan 3 was also collateralized by a life insurance policy, Genesis’ claim as to Loan 3 insofar as it pertains to Gilbride’s actions regarding the life insurance policy collateral shall continue, as Gilbride failed to submit documentary evidence which conclusively establishes a defense as to its actions regarding the life insurance policy collateral. As Gilbride does not argue that the plaintiff’s legal malpractice claim regarding Loan 2 should be dismissed on the basis of documentary evidence, Genesis’ cause of action for legal malpractice as to Loan 2 shall also proceed.

### **C. Failure to State a Cause of Action.**

In considering a motion to dismiss for failing to state a cause of action under CPLR 3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as

true the facts alleged in the complaint, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994). Accepting the facts as alleged as true and according Genesis as the nonmoving party the benefit of every favorable inference, the complaint sufficiently states a cognizable legal theory for legal malpractice as to Loan 2 and that portion of Loan 3 as was collateralized by a life insurance policy, such that dismissal of Genesis' first cause of action for legal malpractice would not be warranted under CPLR 3211(a)(7). See Leon v Martinez, supra; Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP, 301 AD2d 63 (1<sup>st</sup> Dept. 2002).

Gilbride further contends that Genesis' second cause of action for breach of contract, third cause of action for negligence, fourth cause of action for disgorgement, and fifth cause of action for breach of fiduciary duty are merely duplicative of the cause of action for legal malpractice as to all three loans involved in this action. The court notes that, had the legal malpractice cause of action been dismissed as time-barred, these causes of action would have been dismissed as well pursuant to CPLR 214(6). See Johnson v Proskauer Rose LLP, –AD3d–, 2015 WL 1932165 (1<sup>st</sup> Dept. April 30, 2015). They are nonetheless subject to dismissal, as they are duplicative of that cause of action.

"The key to determining whether a claim is duplicative of one for malpractice is discerning the essence of the each claim." Johnson v Proskauer Rose LLP, supra at \*5. These causes of action are essentially identical to the malpractice claim in that they arose from the same facts and do not allege distinct damages. The claims are not "sufficiently distinct from one another" to withstand a motion to dismiss. Id.; see Matter of R.M. Kliment & Frances Halsband, Architects [McKinsey & Co., Inc.], 3 NY3d 538 (2004). Indeed, here, Genesis' causes of action for breach of contract, negligence, and breach of fiduciary duty are predicated on the same alleged conduct giving rise to its legal malpractice cause of action. Genesis does not allege any facts independent of those alleged in connection with the legal malpractice cause of action which would support these causes of action. See Schwartz v Leaf, Salzman, Manganelli, Pfiel, & Tandler, LLP, 123 AD3d 901 (2<sup>nd</sup> Dept. 2014); Inkine Pharmaceutical Company, Inc. v Coleman, 305 AD2d 151 (1<sup>st</sup> Dept. 2003); Mecca v Shang, 258 AD2d 569 (2<sup>nd</sup> Dept. 1999). Additionally, Genesis' cause of action for disgorgement is, essentially, a claim for monetary damages based on Gilbride's alleged malpractice and, thus, is duplicative of that cause of action. See Betz v Blatt, 116 AD3d 813 (2<sup>nd</sup> Dept. 2014); Access Point Medical, LLC v Mandell, 106 AD3d 40 (1<sup>st</sup> Dept. 2013); Thus, Genesis' second through fifth causes of action for breach of contract, negligence, disgorgement, and breach of fiduciary duty are dismissed. See

Schwartz v Leaf, Salzman, Manganelli, Pfiel, & Tandler, LLP, supra; Betz v Blatt, supra; Inkin  
Pharmaceutical Company, Inc. v Coleman, supra.

The parties' remaining contentions are without merit.

### III. Conclusion

Gilbride failed to establish that the first cause of action for legal malpractice is barred by the running of the statute of limitations. The cause of action for legal malpractice shall continue as to Loan 2 and Loan 3, based on damages sustained due to Gilbride's alleged failure to perfect a security interest in the insurance policies, but shall not continue as to any claim based on the failure to record the mortgage on the Pennsylvania property. The second cause of action for breach of contract, third cause of action for negligence, fourth cause of action for disgorgement, and fifth cause of action for breach of fiduciary duty are dismissed in their entirety.

Accordingly, it is

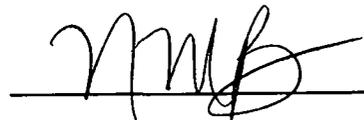
ORDERED that the branch of the defendants' motion to dismiss the first cause of action for legal malpractice is granted to the extent that so much of that cause of action which is predicated upon the defendants' failure to record a certain mortgage is dismissed, and that branch of the defendants' motion to dismiss the first cause of action for legal malpractice is otherwise denied; and it is further

ORDERED that the branch of the defendants' motion to dismiss the second cause of action for breach of contract, third cause of action for negligence, fourth cause of action for disgorgement, and fifth cause of action for breach of fiduciary duty is granted and those causes of action are dismissed; and it is further

ORDERED that the parties shall appear for a preliminary conference on July 30, 2015 at 9:30 a.m.

This constitutes the Decision and Order of the court.

Dated: June 16, 2015

 JSC

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