BLDG Christopher LLC v Herrick Feinstein LLP
2016 NY Slip Op 32237(U)
October 31, 2016
Supreme Court, New York County
Docket Number: 651795/12
Judge: Barry Ostrager
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

---X

BLDG CHRISTOPHER LLC, LKDG ASSOCIATES, IG SECOND GENERATION PARTNERS, L.P., NORMANDY MANAGEMENT COMPANY and MECOX PARTNERS, L.P.,

Index No. 651795/12

Mot. Seq. 001

Plaintiffs,

-against-

HERRICK FEINSTEIN LLP, DENNIS W. RUSSO and MICHAEL KESSEL,

Defendants.

---X

OSTRAGER, J.:

Before the Court is defendants' pre-answer motion to dismiss this action pursuant to CPLR §§ 3211(a)(1) and (a)(5) based on documentary evidence and on the ground the claims for legal malpractice and breach of fiduciary duty are time-barred. For the reasons stated below, the motion is granted in substantial part but denied as to certain claims asserted by one of the plaintiffs, LKDG Associates. The relevant facts are as follows.

Each one of the five plaintiffs named in this action is an owner of a different piece of improved real property in New York City that has been certified as an historic structure of significance in the historic district where it is located. On or about October 22, 2004, each plaintiff entered into a separate Retainer Letter with defendant law firm Herrick Feinstein LLP ("Herrick") to structure a donation of an historic preservation easement with respect to the facade of each respective property to a qualified charitable organization and to advise whether the conveyance would constitute a tax deductible "qualified conservation contribution" under § 170 of the Internal Revenue Code for the 2004 tax year. The individual defendants are the Herrick attorneys primarily responsible for the representation of plaintiffs in connection with this work.

Copies of the various Retainer Letters are attached to the Affirmation of moving counsel Jennifer Smith Finnegan as Exhibits C-G. Each is addressed to a separate plaintiff for that party's separate property, but all are sent to the attention of Scott Zechner at the management company common to all of the plaintiffs. Each Retainer states that the representation is "in connection with the granting of a Facade Conservation Easement ... to the National Architectural Trust ('NAT') with respect to the facade" of each client's property. Each Retainer further provides for a flat fee, in varying amounts, for the defined services, with final payment due by the "closing/delivery of the Easement to NAT." Each plaintiff was assigned a separate client number, and each plaintiff was at all times billed separately under its own billing number. But for the due date of the flat fee, the Retainer Letters are not limited in time; nor did Herrick ever terminate its representation of any plaintiff in writing.

In addition to the above general description of the legal representation, each Retainer Letter further describes the services to be rendered as follows:

> We anticipate that the bulk of our services will include tax analysis and structuring; interfacing with the accountants for the venture; review of your entity organizational documents; issuing a tax opinion; negotiating with NAT as to your general agreement with them, the form of the documentation as wall as the donation; review of recorded documents; and negotiations with your lender with regard to their consent and subordination or release of lien.

The Retainers also contain certain limitations and disclaimers regarding the tax implications of the Easements. For example, included in the same paragraph as the above-quoted description of services is the disclaimer that Herrick "cannot guarantee and makes no representation" as to the ability of plaintiffs' members "to obtain the maximum tax benefit available," and the Retainers expressly advise that plaintiffs' members "should consult with their personal accountants."

In the next two paragraphs of each Retainer, further limitations and disclaimers are stated:

> As you discussed with NAT's representative, in accordance with Internal Revenue Service ("IRS") regulations, the tax deduction that may be realized by an owner in connection with the Easement would be equal to the difference between the fair market value of the property prior to the granting of the Easement and its fair market value following the grant (the "Diminished Value"). The above described values are determined by an independent third-party appraiser that you will select in your sole and exclusive discretion. You acknowledge and agree that you will be solely responsible for the selection of the appraiser, and that we will neither participate in your selection of the appraisal nor be responsible for the appraisals you receive .... You acknowledge and agree that we offer no opinion, representation or guarantee as to the Diminished Value, or the amount of the permitted tax deduction. Such determination is solely made by the appraiser and the IRS.

In December 2004, plaintiffs conveyed their respective Easements to NAT by deeds prepared by Herrick. In or about May 2005, Herrick provided each plaintiff with an opinion letter that the conveyance of the Easement would constitute a "qualified conservation contribution" deductible for federal income tax purposes in the year of the donation. Based on this legal advice, and based on the alleged mistaken belief that Herrick had filed the deeds in 2004, plaintiffs included a deduction in their federal tax returns for the tax year ending December 31, 2004. Each plaintiff paid the flat fee due pursuant to the Retainer no later than February 2005 (see Exhs E-G of Finnegan Aff).

In an Affirmation from Donald Olenick, Senior Vice President and General Counsel for the management company for the various plaintiffs, plaintiffs assert (at ¶ 6) that the representation by Herrick was ongoing thereafter, "continuously between 2004 and July 2009." However, neither party's papers contain any documentation of any type of legal services rendered by the firm until about two years later, in 2007, when the IRS began questioning the deductions and notified plaintiffs that it intended to audit plaintiffs' 2004 returns. The IRS challenged the deductions on various grounds relating to Herrick's work, including that the deductions could not be taken for the 2004 tax year because the deeds had not been recorded until 2005 and that the deeds appeared non-compliant in that they failed to protect the conservation purposes of the Easements in perpetuity.

In response to the IRS inquiry, Stephen S. Ziegler, independent counsel for plaintiffs, sent Herrick a letter dated April 30, 2007 advising the firm that it had received an IRS form requesting documents in regard to the BLDG Christopher property (Exh M to Soloway Aff in Opp). While three properties are referenced in the subject line of the letter and Ziegler emphatically requests a copy of Herrick's "entire file on the above contributions," the body of the letter suggests that Ziegler was forwarding an IRS form only related to the Christopher property. Herrick thereafter, and continuing through September 2007, rendered significant legal services to plaintiff BLDG Christopher LLC in connection with the IRS inquiry in a total amount of about $7,250 (Exh L to Finnegan Aff). Although the original billing number was used, the charges were on an hourly, rather than a flat fee, basis, but no new Retainer Letter was signed.

There appears another gap in services rendered and billings until March 14, 2008, when Olenick, in his capacity as General Counsel for plaintiffs' management company, sent to Herrick a memorandum drafted by plaintiffs' tax counsel Stephen S.

Ziegler requesting "specified documents and information necessary to respond to the IDR [Information Document Requests] forms" sent by the IRS regarding all of the Facade Easements (Exh O to Soloway Aff). While Olenick indicates (at ¶ 11) that he sent the Ziegler memorandum to Herrick, the signature line is "Lloyd Goldman, President of Managing General Partners" for four of the plaintiffs. As evidence of Herrick's work, Olenick cites to the above-referenced BLDG Christopher bills from 2007, as well as bills for 25.4 hours of services provided to PJMX/Normandy from May 7, 2007 through March 31, 2008 (Exh N to Finnegan Aff). Olenick also cites bills for very significant legal services, discussed more fully below, rendered to plaintiff LKDG Associates in 2009, continuing through August of 2009 to confirm the Easement for that property (Exh R to Finnegan Aff).

Beginning in 2011 for plaintiff Mecox and continuing thereafter over time, the IRS issued each plaintiff a Notice disallowing plaintiffs' claimed tax deductions for 2004 on the ground, *inter alia*, that Herrick had not filed the Easement deeds until 2005 (Olenick Aff ¶¶ 19-21). Plaintiffs retained Cooley LLP, a tax litigation firm, to commence suit in federal court on behalf of Mecox in November 2011 challenging the IRS determination. Soon after, plaintiffs commenced this action by filing a Summons with Notice on May 24, 2012 asserting claims of legal malpractice and breach of fiduciary duty, but counsel stipulated to stay this action pending the determination of the federal litigation (NYSCEF Doc. Nos. 5 and 6).

By Decision and Order dated February 1, 2016, United States District Judge Edgardo Ramos of the Southern District of New York determined that the IRS had correctly determined to disallow the deduction valued in excess of two million dollars

[*Mecox Partners LP v United States of America,* 11 Civ. 8157 (SDNY), attached to Finnegan Aff as Exh Z]. Defendants then filed this motion to dismiss this state litigation as time-barred.

Pursuant to CPLR § 214(6), the statute of limitations for legal malpractice is three years, "regardless of whether the underlying theory is based in contract or tort." Similarly, the statute of limitations for the breach of fiduciary duty claim is three years, as it is based on some of the same facts as the malpractice claim and, like the malpractice claim, seeks monetary damages rather than equitable relief. *See Nichols v Curtis,* 104 AD3d 526, 527 (1st Dep't 2013). According to Herrick, the law firm's representation of plaintiffs in connection with the matters at issue ended in May of 2005 when it issued Opinion Letters regarding the tax status of the Easement donations, and the commencement of this action seven years later in May of 2012 is untimely.

Plaintiffs first argue in opposition that the action is timely because the malpractice cause of action did not accrue until in or about 2011 at the earliest, when the IRS determined to disallow the tax deductions plaintiffs had claimed on their 2004 returns and plaintiffs discovered Herrick's alleged malpractice for the first time. As recently as this month, in *Hahn v The Dewey & LeBoeuf Liquidation Trust,* 2016 WL 6078932, a case directly on point, the Appellate Division, First Department, rejected such a "discovery" argument, stating that: "Although plaintiffs claim not to have discovered that this advice was incorrect until years later, '[w]hat is important is when the malpractice was committed, not when the client discovered it'." *Hahn, citing McCoy v Feinman*, 99 NY2d 295, 301 (2002), *quoting Ackerman v Price Waterhouse*, 84 NY NY2d 535, 541 (1994). The Appellate Division affirmed the trial court's dismissal of the legal malpractice claim in connection with the defendant law firm's erroneous tax advice rendered more than three years earlier, even though plaintiffs had not discovered the error until the IRS raised it two years before the action was commenced.

Plaintiffs latch on to certain language by the Court of Appeals in *McCoy* and *Ackerman, supra*, also quoted in *Hahn*, that a legal malpractice claim accrues "when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court." They argue that since they could not prove Herrick's error until the IRS disallowed the Easement tax deduction in or about 2011, they could not prove injury and obtain relief in court. Such a reading is inconsistent with the facts and holding in *Hahn* discussed above. It is also contrary to other clarifying language in *McCoy,* where the Court of Appeals expressly found that: "Because the [defendant lawyer] was negligent in failing to assert plaintiff's claim to preretirement death benefits in the settlement stipulation or judgment, we conclude that plaintiff ***suffered actionable injury*** on the day of the stipulation ..., or at the latest, on the day the judgment incorporating the stipulation was filed in the county clerk's office" even though plaintiff did not discover the negligence until she sought to access the death benefits years later. 99 NY2d at 301 (emphasis added).

Similarly, the Court of Appeals in *Ackerman* found that the cause of action for accountant malpractice accrued upon the accountant's issuance of an erroneous tax return and not years later when the IRS assessed the deficiency. 84 NY2d at 541-42. In so holding, the court explained that "the claim accrues upon the client's receipt of the accountant's work product since this is the point that a client reasonably relies on the accountant's skill and advice and, as a consequence of such reliance, can become liable for tax deficiencies .... This is the time when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court ...." *Id.* at 541 (citations omitted); *see also, Landow v Snow Becker Krauss, P.C.*, 111 AD3d 795 (2d Dep't 2013) (cause of action for legal malpractice accrued when attorney issued erroneous tax opinion letter and not when the error was raised by the IRS and discovered by client years later).

As defendants have demonstrated, *prima facie*, that plaintiffs' claims are time-barred based on the 2005 accrual date, the burden shifts to plaintiffs to raise a question of fact as to whether the statute of limitations was tolled. *Landow, supra,* 111 AD3d at 796-97. In a further attempt to shield their claims from Herrick's statute of limitations defense, plaintiffs seek to rely on the toll available under the "continuous representation" doctrine. Specifically, plaintiffs assert that the Herrick firm continuously represented them in connection with the original engagement inasmuch as Herrick was asked for assistance with regard to the IRS audit and rendered statements for services rendered through August of 2009. Plaintiffs argue that because of the continuous representation by Herrick, the statute of limitations did not expire until three years later, *after* this action was commenced in May 2012.

The Court of Appeals explained the continuous representation doctrine in detail in *Shumsky v Eisenstein,* 96 NY2d 164, 167-68 (2001) (internal quotation marks and citations omitted):

> The continuous representation doctrine, like the continuous treatment rule, its counterpart with respect to medical malpractice claims, 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.

> The doctrine also appreciates the client's dilemma if required to sue the attorney while the latter's representation on the matter at issue is ongoing ... Since it is impossible to envision a situation where commencing a malpractice suit would not affect the professional relationship, the rule of continuous representation tolls the running of the Statute of Limitations on the malpractice claim until the ongoing representation is completed .... Application of the continuous representation or treatment doctrine is nonetheless generally limited to the course of representation concerning a specific legal matter or of treatment of a specific ailment or complaint; "[t]he concern, of course, is whether there has been continuous treatment, and not merely a continuing relation between physician and patient" ... Thus, the doctrine is not applicable to a client's or patient's continuing general relationship with a lawyer or physician involving only routine contact for miscellaneous legal representation or medical care, unrelated to the matter upon which the allegations of malpractice are predicated ... Instead, in the context of a legal malpractice action, the continuous representation doctrine tolls the Statute of Limitations only where the continuing representation pertains specifically to the matter in which the attorney committed the alleged malpractice ...

As summarized more recently by the First Department, a finding of continuous representation must be based on "clear indicia of an ongoing, continuous, developing and dependent relationship between the client and the attorney" or of "a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim." *Hadda v Lissner & Lissner LLP*, 99 AD3d 476, 477 (1st Dep't 2012), *quoting Matter of Merker,* 18 AD3d 332, 332-33 (1st Dep't 2005).

Plaintiffs here allege, and Herrick does not dispute, that the law firm provided various legal services to plaintiffs on an hourly basis, without a new written Retainer Letter, after the Facade Easement conveyance was completed and the Opinion Letter was issued in May 2005 pursuant to the initial flat fee Retainer Letter. To qualify for the toll under the continuous representation doctrine, plaintiffs would need to demonstrate, among other things, that the legal services rendered after 2005 related to the specific subject matter underlying the malpractice claim (the Facade Easement representation) and continued through May 24, 2009, the date three years before this action was commenced.

Plaintiffs have failed to make the required showing with respect to four of the parties, but have alleged sufficient facts to survive dismissal with respect to the fifth plaintiff, LKDG Associates. Specifically, while counsel in the opposition papers attempts to lump all the plaintiffs together, the undisputed facts detailed above demonstrate each plaintiff had a separate Retainer Letter for a separate Easement relating to a separate property for which each plaintiff received a separate bill. While some work was done sporadically from 2005-2008 for one plaintiff or another, that work for the most part consisted of providing information and documentation to plaintiffs' separate counsel Stephen S. Ziegler in response to the IRS inquiries. Consistent with the limitations in the retainer agreement, the legal representation in connection with the tax matters was provided by Ziegler and later Cooley LLP, rather than Herrick.

The documentation shows that the only legal work performed by Herrick in 2009 related to plaintiff LKDG Associates. Herrick insists the work was in response to a new inquiry brought to Herrick's attention in late 2008 by the donee NAT (not the donor plaintiff LKDG) relating to an error in a 1994 Deed relating to LKDG's property that had been recorded for the first time in June 2006, about a year after the Easement. The deed reflected a transfer of a 49% interest in the property to a third-party, and that ownership interest had not been reflected in the Easement that LKDG had granted to NAT in 2004. Herrick then worked on behalf of LKDG in 2008 and through at least June of 2009 to arrange for a Confirmation of the 2004 Easement to reflect the ownership interest (Finnegan Aff at ¶ 20-23, Exhs Q-S).

The parties disagree as to whether this work related back to the Facade Easement and was part of an ongoing relationship so as to qualify for a toll under the continuous representation doctrine. On a motion to dismiss based on the statute of limitations pursuant to CPLR 3211(a)(5), the Court must give the pleadings a liberal construction, accept the allegations as true, and accord plaintiffs the benefit of every possible inference. *Johnson v Proskauer Rose LLP,* 129 AD3d 59, 67 (1st Dep't 2015).

Applying this standard, the Court finds that plaintiff LKDG, but only plaintiff LKDG, has set forth sufficient allegations relating to the continuous representation doctrine to allow its claim against Herrick to survive dismissal. The 2009 work appears related to the 2004 Easement work, and the intervening communications between the parties, although sporadic, may suffice to establish the required continuity; while a gap in representation is some evidence of a break in continuous representation, it is not dispositive, particularly where the ongoing contact suggests a mutual understanding of Herrick's continued legal representation in connection with issues relating to the Easement. *See Red Zone LLC v Cadwalader, Wickersham & Taft LLP,* 27 NY3d 1048, 1050 (2016) (triable issues of fact existed regarding whether the statute of limitations was tolled by the continuous representation doctrine in light of, among other things, the gap in time between the alleged malpractice and the later communications between the parties).[1]

---

[1] The Court takes no position on the continued viability of the claims against the individual partners, as that issue was not addressed in the moving papers.

The Court, however, rejects as to all the plaintiffs the argument that the statute of limitations has been tolled based on a "continuing wrong" relating to a purported conflict of interest arising from Herrick's dual representation of plaintiffs and NAT. Not only was any alleged conflict discussed and waived when Herrick was initially retained, but plaintiffs have not alleged any injury caused by the dual representation. Absent injury, no claim for legal malpractice or breach of fiduciary duty in connection with the legal representation can stand. *See, e.g., Rudolf v Shayne, Cachs, Stanisci, Corker & Sauer,* 8 NY3d 438 (2007).

Finally, whether or not the claims are considered timely, all plaintiffs' claims for punitive damages must be dismissed. Plaintiffs have failed to allege any facts demonstrating that Herrick's conduct "was so outrageous as to evince a high degree of moral turpitude and showing such wanton dishonesty as to imply a criminal indifference to civil obligations." *Rosenkrantz v Harriet M. Steinberg, P.C.,* 13 AD3d 88 (1st Dep't 2004), *quoting Zarin v Reid & Priest,* 184 AD2d 385, 388 (1st Dep't 1992) (law firm's erroneous legal advice with respect to tax-related issues did not warrant punitive damages). The claim stands in sharp contrast, for example, to a case in which a punitive damages claim survived dismissal where the legal malpractice claim involved a tax avoidance scheme directed at a wide swath of clients. *Johnson v Proskauer Rose LLP,* 129 AD3d 59 (1st Dep't 2015).

While the dismissal of all the claims asserted by four of the five plaintiffs may appear harsh at the pleading stage in light of the significant value of the claims, plaintiffs are all sophisticated, long-term real estate owners and investors in the City of New York. Had plaintiffs acted in 2007 or 2008 to enter into a tolling agreement or commenced suit against Herrick when the IRS first notified plaintiffs of questions relating to the tax deductions, plaintiffs' suit would have been timely. But plaintiffs did not act then, and this Court cannot correct that omission. "While courts have discretion to waive other time limits for good cause (*see* CPLR 2004), the Legislature has specifically enjoined that '[n]o court shall extend the time limited by law for the commencement of an action' ..." *McCoy, supra,* 99 NY2d at 300 (citations omitted). And the law discussed above does not permit a toll of the statute of limitations; even assuming an ongoing *relationship* between Herrick and the four plaintiffs, the allegations and evidence fail to demonstrate the required "mutual understanding of the need for further *representation* on the specific subject matter underlying the malpractice claim" so as to entitle plaintiffs to the continuing representation toll. *Id.* at 306.

Accordingly, it is hereby

ORDERED that the motion by defendants to dismiss the action as time-barred is granted in part and denied in part, and the Clerk is directed to sever and enter judgment dismissing all claims asserted by BLDG Christopher LLC, IG Second Generation Partners, L.P., Normandy Management Company and Mecox Partners, L.P. against defendants, as well as the claim by all plaintiffs for punitive damages; and it is further

ORDERED that the motion is denied and the claim by LKDG Associates shall continue, expect as limited in this decision; and it is further

ORDERED that LKDG Associates shall serve its Answer by November 21, 2016, and counsel shall appear in Room 341 for a preliminary conference on December 6, 2016 at 9:30 a.m.

Dated: October 31, 2016

J.S.C.

BARRY R. OSTRAGER
JSC