SUPREME COURT OF THE STATE OF NEW YORK - QUEENS COUNTY

Present: HONORABLE LOURDES M. VENTURA, J.S.C. IAS Part 37

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JAMES VACCARO,

Plaintiff,

Index Number: 703590/2019

-against-

Motion Date: September 9, 2019

BRET A. FERTIG, ADAM J. FERTIG, and FERTIG & FERTIG,

Defendants.

Motion Seq. No.: 1

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The following numbered papers read on this motion by defendants Bret A. Fertig, Adam J. Fertig and Fertig & Fertig (defendants) pursuant to CPLR 3211 (a) (1), (a) (5) and (a) (7) to dismiss all of plaintiff's claims alleged in the complaint.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits - Memorandum of Law	EF8-18
Answering Affidavits - Exhibits - Memorandum of Law	EF20-22
Reply Memorandum of Law.....	EF24

Upon the foregoing papers it is Ordered that the motion is determined as follows:

In this action by plaintiff asserting claims of legal malpractice against defendant law firm, Fertig and Fertig, and its partners, defendants Bret Fertig and Adam J. Fertig (defendants), arising out of their alleged negligent representation of plaintiff in a real estate investment deal with nonparty Blaise Corozzo, defendants move to dismiss plaintiff's complaint on the grounds that the causes of action for legal malpractice asserted therein are barred by the applicable statute of limitations. In the complaint, plaintiff alleges the following:

> In or about June of 2015, nonparty Corozzo offered to partner with plaintiff to renovate and sell a property located at 159-28 92nd Street, Howard Beach, New York (the property), which Corozzo claimed was owned by nonparty Atlantic ICS Corp. (Atlantic), a corporation Corozzo formed in 2014, of which Corozzo was the sole shareholder and the property its sole asset. Plaintiff told defendants, his attorneys, about Corozzo's offer. Defendants, who had who represented plaintiff on prior real property matters, recommended that the deal with Corozzo be structured so that plaintiff purchases a 50% ownership interest in Atlantic, the owner of the property, rather than purchasing a 50% interest in the property itself.

Defendants thereafter represented plaintiff in his purchase of a 50% ownership interest in Atlantic, which took place on or about July 7, 2015.

Prior to that purchase, Corozzo gave plaintiff the purported deed to the property showing Atlantic as the owner and that the ownership had been transferred to Atlantic from nonparties Wilbert and Mary Joy Cubillan for $350,000. Plaintiff gave the deed to defendants to determine its validity and to confirm Atlantic's ownership of the property before proceeding with the purchase of the interest in Atlantic. Defendants advised plaintiff that the deed was valid. Defendants also advised plaintiff that they could not confirm that the deed had been recorded since it was not showing up in their search of the New York City Department of Finance, Office of the Register's Automated City Register Information System (ACRIS), but that based on its recent date, the deed would likely be entered into ACRIS shortly. Defendants further advised plaintiff that Atlantic owned the property; and that the proposed shareholder's agreement pursuant to which plaintiff would become a 50% owner in Atlantic upon payment to Corozzo of $187,500, protected plaintiff's interests. Based on defendants' assurances, plaintiff signed the shareholder's agreement, and purchased the 50% interest (100 shares) in Atlantic. On or about July 7, 2015, plaintiff issued two checks to Corozzo totaling $140,000, and the remaining $47,500 was to be paid by plaintiff through renovations he agreed to make to the property.

Plaintiff began the renovations to the property and incurred at least $47,500 in expenses. In or about August 2015, the renovations to the property were almost done and plaintiff listed the property for sale. That same month, Corozzo offered to sell plaintiff his remaining 50% interest in Atlantic for $225,000. Plaintiff discussed this offer by Corozzo with defendants who advised plaintiff that there were no issues with going forward with this purchase of Corozzo's remaining shares in Atlantic. The purchase took place on or about August 25, 2015.

Thereafter, on or about September 14, 2015, a potential buyer signed a contract of sale to purchase the property from Atlantic for $700,000 and provided a contract deposit. Defendants, as the attorneys for plaintiff and Atlantic, held the deposit for this potential sale. Before plaintiff signed the contract of sale on behalf of Atlantic, he learned that the Atlantic deed to the property still had not been recorded. Plaintiff advised defendants who advised him to contact Corozzo. When plaintiff did, Corozzo informed him there was an error in the Atlantic deed that he was trying to correct. Plaintiff relayed this information to defendants who told plaintiff to wait for Corozzo to fix the problems with the deed. In or about October of 2015, plaintiff contacted Corozzo again because a new search on ACRIS revealed that the Atlantic deed still had not been recorded. Corozzo advised plaintiff that the Atlantic deed was being amended to change the grantee from Atlantic to 19-28 92nd Street Holdings Inc. (92nd Street Holdings), a New York corporation formed by Corozzo in October of 2015. Corozzo also advised

plaintiff that plaintiff was the sole owner of 92nd Street Holdings. Plaintiff told defendants about Corozzo amending the Atlantic deed to the property to reflect 92nd Street Holdings as grantee in place of Atlantic. Defendants advised plaintiff that as long as plaintiff was the sole stockholder of 92nd Street Holdings and the amended deed was recorded; plaintiff was protected and could then move forward with the sale of the property.

On or about October 20, 2015, plaintiff gave defendants the corporate filing receipts and tax identification number for 92nd Street Holdings. On or about October 31, 2015, Corozzo gave plaintiff the amended deed to the property (the 92nd Street Holdings deed) to sign. On or about November 2, 2015, plaintiff met with defendants to sign the 92nd Street Holdings deed which defendants notarized, and plaintiff returned the 92nd Street Holdings deed to Corozzo, for recording. On or about November 30, 2015, Corozzo returned the 92nd Street Holdings deed to plaintiff because notarization of plaintiff's signature thereon by defendants was unsigned. On or about December 1, 2015, plaintiff gave the 92nd Street Holdings deed back to defendants to sign the notarization, and once done, plaintiff gave the signed and notarized deed back to Corozzo on December 3, 2015, to record. By the end of December, the 92nd Street Holdings deed still had not been recorded and the potential buyer cancelled the contract of sale to purchase the property because of the uncertainty as to who owned it. Defendants returned the potential buyer's contract deposit and advised plaintiff to continue to have Corozzo record the 92nd Street Holdings deed to the property.

In or about January 2016, since the deed to the property still had not been recorded, Corozzo offered to enter into a promissory note with plaintiff to provide collateral until the problems with recording the deed were resolved. Plaintiff met with defendants in January and February 2016 to discuss the terms he should request Corozzo to put into the promissory note as well as Corozzo's responses thereto. On or about February 29, 2016, plaintiff and Corozzo met and executed the promissory note in favor of plaintiff in the amount of $425,000. Defendants were aware of this meeting to execute the note, the final terms of which provided that Corozzo was to pay plaintiff $425,000 in a balloon payment on or before February 17, 2017, and monthly interest payments of $1,770.83 per month for one year beginning March 15, 2016. On or about March 1, 2016, plaintiff met with defendants and provided them with a copy of the promissory note and discussed the adequacy of the note in protecting plaintiff. In or about March 2016, Corozzo began making the monthly interest payments to plaintiff which continued for approximately 14 months. Plaintiff met with defendants during this period to discuss Corozzo's payments and the status of the deed to the property. Corozzo failed to pay plaintiff the principal payment of $425,000 by February 17, 2017, as required under the terms of the note. Plaintiff thereafter reported his dealings with Corozzo to the police, and as a result of the police investigation, plaintiff learned

> that the Atlantic deed to the property was fraudulent and advised defendants of this fact.
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> In or about June of 2018, plaintiff advised defendants that Corozzo had filed a mechanic's lien against the property, which defendants confirmed after performing their own lien search on the property on behalf of plaintiff. In or about June of 2018, defendants advised plaintiff that he should file his own mechanic's lien against the property for the work he performed thereon. Plaintiff did not file a mechanic's lien against the property because the work he performed on the property was completed more than four months before June of 2018 and would not have complied with New York Lien Law. Plaintiff has not recovered any of the money he paid to purchase his initial 50% interest in Atlantic and Corozzo's remaining 50% interest in Atlantic, or the money plaintiff spent renovating the property.

On February 28, 2019, plaintiff commenced this legal malpractice action alleging that defendants were negligent in, among other things, failing to verify Atlantic's ownership of the property prior to plaintiff's purchase of his initial 50% interest in Atlantic from Corozzo in July of 2015, and his subsequent purchase of Corozzo's remaining 50% interest in Atlantic in August of 2015.

In support of their motion to dismiss plaintiff's complaint pursuant to CPLR 3211(a)(1), (5) and (7), defendants contend that the causes of action for legal malpractice asserted therein are barred by the applicable statute of limitations.

A defendant seeking dismissal on the ground that its defense is founded upon documentary evidence pursuant to CPLR 3211 (a) (1) bears the burden of submitting documentary evidence that resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim. (*See Botach Mgt. Group v Gurash*, 138 AD3d 771 [2d Dept 2016].) Further, in moving to dismiss a cause of action pursuant to CPLR 3211 (a) (5) as barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired. (*See Franklin v Hafftka*, 140 AD3d 922 [2d Dept 2016]; *see also Botach Mgt. Group v Gurash*, *supra*; *Geotech Enters., Inc. v 181 Edgewater, LLC*, 137 AD3d 1213 [2d Dept 2016].) Once this burden is satisfied, the burden shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether plaintiff actually commenced the action within the applicable limitations period. (*See Campone v Panos*, 142 AD3d 1126 [2d Dept 2016]; *see also Geotech Enters, Inc. v 181 Edgewater, LLC*, *supra*; *City of Yonkers v 58A JVD Indus., Ltd.*, 115 AD3d 635 [2d Dept 2014].) Finally, on a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, a court must accept as true the allegations of the complaint and give the plaintiff every favorable inference to determine if the allegations fit within a cognizable legal theory. (*See Nonnon v City of New York*, 9 NY3d 825 [2007]; *see also Leon v Martinez*, 84 NY2d 83 [1994]; *Konidaris v Aeneas Capital Mgt., LP*, 8 AD3d 244 [2d Dept 2004].)

The statute of limitations for a cause of action alleging legal malpractice is three years. (*See* CPLR 214 [6]; *see also Alizio v Ruskin Moscou Faltischek, P.C.*, 126 AD3d 733 [2d Dept 2015]; *Landow v Snow Becker Krauss, P.C.*, 111 AD3d 795 [2d Dept 2013].) A claim to recover damages for legal malpractice accrues when the malpractice is committed. (*See Shumsky v Eisenstein*, 96 NY2d 164 [2001]; *see also Roubeni v Dechert, LLP*, 159 AD3d 934 [2d Dept 2018]; *Aqua-Trol Corp. v Wilentz, Goldman & Spitzer, P.A.*, 144 AD3d 956 [2d Dept 2016].) "However, pursuant to the doctrine of continuous representation, the time within which to sue on the claim is tolled until the attorney's continuing representation of the client with regard to the particular matter terminates." (*Aqua-Trol Corp. v Wilentz, Goldman & Spitzer, P.A.*, *supra* at 957; *see Shumsky v Eisenstein*, *supra*; *Pellati v Lite & Lite*, 290 AD2d 544 [2d Dept 2002].) For the continuous representation doctrine to apply, "there must be clear indicia of an ongoing, continuous, developing, and dependant relationship between the client and the attorney which often includes an attempt by the attorney to rectify an alleged act of malpractice." (*Luk Lamellen U. Kupplungbau GmbH v Lerner*, 166 AD2d 505, 506-507 [2d Dept 1990]; *see Pellati v Lite & Lite*, *supra*.)

In this case, defendants satisfied their initial burden on their motion to dismiss based on the expiration of the applicable statute of limitations by demonstrating, prima facie, that plaintiff's legal malpractice claims accrued in July and August of 2015, when defendants allegedly failed to verify Atlantic's ownership of the property prior to plaintiff's purchasing the initial 50% interest in Atlantic, and Corozzo's remaining 50% interest in Atlantic, more than three years before this action was commenced in February of 2019. (*See* CPLR 214 [6]; *see also Stein Indus., Inc. v Certilman Balin Adler & Hyman, LLP*, 149 AD3d 788 [2d Dept 2017]; *Kennedy v H. Bruce Fischer, Esq., P.C.*, 78 AD3d 1016 [2d Dept 2010].) Thus, the burden shifts to plaintiff to aver evidentiary facts establishing that his legal malpractice claims fall within an exception to the statute of limitations, or to raise an issue of fact as to whether such an exception applies. (*See Gravel v Cicola*, 297 AD2d 620 [2d Dept 2002].)

Plaintiff, in opposition, has met this burden. The evidentiary facts averred by plaintiff in his affidavit are sufficient to raise triable issues of fact concerning whether defendants engaged in a course of continuous representation intended to rectify or mitigate the initial acts of alleged malpractice, that is, their failure to perform due diligence concerning ownership of the property prior to plaintiff's initial and subsequent investments in Atlantic, in July and August of 2015, which tolled the running of the statute of limitations until June of 2018. (*See Stein Indus., Inc. v Certilman Balin Adler & Hyman, LLP*, *supra*; *see also DeStaso v Condon Resnick, LLP*, 90 AD3d 809 [2d Dept 2011]; *Gravel v Cicola*, *supra*.) Plaintiff avers that after purchasing Corozzo's shares in Atlantic in July and August of 2015, plaintiff continued to meet with defendants in the Fall of 2015, for the sale of the property, during which time it was discovered that the Atlantic deed to the property still had not been recorded, and thereafter, during which additional meetings, defendants continued to advise plaintiff about having the Atlantic deed recorded; Corozzo's amendment to the Atlantic deed reflecting 92nd Street Holdings as the grantee of the property in place of Atlantic, which amended deed defendants notarized in December of 2015, to be recorded; the promissory note that plaintiff and Corozzo executed on February 29, 2016, when the deed to the property still had not been recorded; and filing a mechanic's lien against the property in June

of 2018, for the renovation work plaintiff previously performed thereon, when it was discovered that the Atlantic deed was fraudulent, and Atlantic was not the owner of the property. Such actions and counseling by defendants could be viewed as "attempt[s] by the attorney[s] to rectify [the] alleged act[s] of malpractice" (*Luk Lamellen U. Kupplungbau GmbH v Lerner*, *supra* at 506-507), and thus, raise triable issues as to whether the statute of limitations was tolled by the continuous representation doctrine.

Accordingly, defendants' motion to dismiss plaintiff's complaint, pursuant to CPLR 3211 (a) (1), (5) and (7), on the grounds that the claims are barred by the statute of limitations is denied.

This shall constitute the Decision and Order of the Court.

Date: April 27, 2020

LOURDES M. VENTURA, J.S.C.

FILED

5/11/2020
10:05 AM

COUNTY CLERK
QUEENS COUNTY