SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19

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STUART P. FELD,

Plaintiff,

- against -

WILLKIE, FARR & GALLAGHER and JACK H. NUSBAUM,

Defendants.

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INDEX NO. 122887/02

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EDWARD H. LEHNER, J.:

Before me is a motion by defendants to dismiss the complaint pursuant to CPLR 3211(a) 5 and 7.

According to the complaint, plaintiff is an art dealer and collector of fine art (¶¶ 5 & 6). In 1971 he wrote a letter to his parents requesting the return of 16 specific pieces of art which he had left in their home (¶ 7). In 1972 plaintiffs parents (the "Parents") made claim against him over ownership of other works of art, and plaintiff hired defendant Willkie, Farr & Gallagher (WF & G) to represent him against the Parents' claims and in connection with his attempts to recover the aforesaid 16 pieces of art (¶ 10).

On April 8, 1974, plaintiffs father wrote to plaintiff declining to discuss his claim until the claim of the Parents was resolved (¶ 12). Defendant Nusbaum, a

partner of WF & G, advised plaintiff that he would ultimately be successful in obtaining the art works after the death of his parents "by means of informal negotiation with Feld's brother, who, it was presumed, would become the executor of his parents' estates" (¶ 17). Plaintiff relied on this advice and thus did not commence litigation against his parents to recover the items (¶ 18). In 1977, the Parents commenced an action against plaintiff to recover certain items allegedly belonging to them ("the 1977 Action"), in which action plaintiff was represented by WF & G. In connection with that action, which was not resolved until 1990 (¶¶ 20-22), plaintiff was counseled by Nusbaum not to assert a counterclaim or commence a separate action in order to maintain "family peace" and thus "enhance Feld's chances of reclaiming his paintings and antiques at a later date" (¶ 24).

Both parents passed away in 1995. In 1998, plaintiff, represented by WF & G, filed objections to the probate of his mother's will based on an alleged lack of mental capacity. In March 1998, WF & G advised the Surrogate's Court that the objections were withdrawn and that it would no longer be representing plaintiff (¶ 36). In his opposing affidavit, plaintiff states that the probate challenge was recommended by Chester Straub, a partner of WF & G (now a judge of the Second Circuit Court of Appeals) "as a means of obtaining additional leverage in the negotiations with my brother, as executor of my parents' estates" (p. 5). In April 1998, Lester Corwin of

Greenberg, Traurig was retained to commence an action (the "1998 Action") against the estates of the Parents to recover the artwork that plaintiff had demanded in 1971 (¶ 47), with WF & G to serve as "backup or shadow counsel" (¶ **46).** WF & G submitted factual affidavits in that action on plaintiffs behalf in opposition to a motion for summary judgment. In January 2001, the Appellate Division dismissed the action as time barred (¶ 59). Plaintiff then sought leave to appeal to the Court of Appeals and, in what is a most serious charge, he alleges that he was informed by Nusbaum that former Governor Cuomo, a partner of WR & G, "would reach out to and discuss the matter of Feld's application for leave to appeal with various members of the Court of Appeals, several of whom had been appointed to their respective position on said Court by Governor Cuomo" (¶ 65). Leave was denied in July 2001.

In his first cause **of** action, plaintiff alleges that defendants committed malpractice in failing "to timely assert Feld's causes of action to recover and reclaim the paintings which were rightfully his and wrongfully withheld from him, first by his parents and then by his brother'' (¶ 82), and as a result he has been damaged in the amount of $20,000,000. The second and third causes of action are for breach of contract, for "failure to provide the quality of legal representation which WF & G had promised and committed itself to provide to Feld" (¶ 92). Among the claims asserted is the breach of representation that Mario Cuomo "would review certain appellate

papers and would undertake certain steps on Feld's behalf' (¶ 94), which "steps" apparently refer to the alleged representation that Governor Cuomo would make ex parte contacts with certain judges of the Court of Appeals in connection with plaintiffs application for leave to appeal. The fourth cause of action is for the return of legal fees and the fifth is for a breach of the disciplinary rules for failure to provide a detailed itemization of the legal services provided.

Since defendants' motion is pursuant to CPLR 3211(a), the court must read the allegation of the plaintiffs pleading as true and give them every favorable inference [Leon v. Martinez, 84 NY2d 83 (1994), "unless the facts sworn to by plaintiff are patently untrue" [Leo v. Mt. St. Michael Academy, 272 AD2d 145, 146 (1st Dept. 2000)].

A limitation period runs "from the time the cause of action accrued to the time the claim is interposed" [CPLR 203(a)]. An action to recover damages for legal malpractice accrues when the malpractice is committed, not when the client discovers it [Shumsky v. Eisenstein 96 NY2d 164, 166 (2001); McCoy v. Feinman, 99 NY2d 295 (2002)].

Since the Statute of Limitations on claims for replevin and conversion is three years [(CPLR 214(3)], the alleged malpractice occurred in 1977, which was three years after plaintiffs father refused to turn over the artwork demanded by plaintiff.

This was, in fact, the holding of the Appellate Division in 2001 in dismissing the 1998 Action (279 AD2d 393).

Plaintiff initiated this action by filing a summons with notice on October 18, 2002, far beyond the three-year Statute of Limitations for legal malpractice claims [CPLR 214(6)]. To sustain his claim, plaintiff contends that he was continually represented by defendants from 1977 until the present, and the continuous representation doctrine should thus apply to toll the period of limitations.

In Glamm v. Allen, 57 NY2d 87 (1982), the court enunciated the theory behind applying the concept of the continuous treatment rule in medical malpractice cases to continuous representation in legal malpractice suits as follows (pp. 93-94):

> **"As** this court recently stated, the 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 .... Neither is a person expected to jeopardize his pending case or his relationship with the attorney handing that case during the period that the attorney continues to represent the person. 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."

While the Glamm court stated that the toll continues until "the ongoing representation is completed", subsequent decisions have limited the concept "to the

course of representation concerning a specific legal matter ... (and) [t]hus the doctrine is not applicable to a client's continuing general relationship with a lawyer ... involving only routine contact for miscellaneous legal representation ... unrelated to the matter upon which the allegations of malpractice are predicated" (Shumsky v. Eisenstein, supra, at p. 168). In Shumsky the court concluded that "in the context of a legal malpractice action, the continuous legal 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'' (p. 168).

In Zaref v. Berk & Michaels, P.C., 192 AD2d 346, 347-348 (1st Dept. 1993), the court reiterated that "the continuous representation must be in connection with the particular transaction which is the subject of the action", and declined to apply the doctrine even through the defendant attorneys subsequently provided services to the plaintiffs by preparing tax returns, making investment decisions, and obtaining mortgages and insurance. **See** also, National Union Fire Insurance Company of Pittsburgh, Pa. v. Davis, Wright, Todd, Reise and Jones, 157 AD2d 571 (1st Dept. 1990)(statute tolled "until the attorney's representation concerning a particular case is terminated"); Degnelli v. Berman, **293** AD2d 565 (2d Dept. 2002); Tiffany General Holding Corp. v. Speno, Goldberg, Steingart & Penn, P.C., 278 AD2d 306 (2d Dept. 2000)("rule is limited to situations in which the attorney who allegedly was

responsible for the malpractice continues to represent the client in that case").

Coming to the case at bar, the malpractice alleged is the failure to timely commence an action against the Parents. There is no allegation in the complaint that defendants stated that future litigation against the Parents would be undertaken, the only relevant allegation being that defendants advised that bringing peace in the family might induce plaintiffs brother to negotiate a resolution of the matter regarding the subject 16pieces after the death of the Parents. Since the legal viability of plaintiffs claim expired three years after the Parents refused to turn over the artwork in 1974, plaintiffs claim of malpractice accrued in 1977, and the cause of action against defendants for malpractice expired three years later.

The 1997 Action, in which WF & G represented plaintiff, in no way involved the pieces plaintiff sought from his parents. While the theory of the toll, as quoted above, is that a client should not have to be put in the position of having to sue a lawyer who is then representing him or her until the representation is terminated, case law has, as noted above, limited the doctrine to continuous representation on the matter which resulted in the claim of malpractice. Since, other than involving some of the same parties and also involving **artwork,** it cannot be said that the claims of the Parents in the 1977 Action are related to the claim of the plaintiff involved herein. Hence, defendants' representation of plaintiff therein did not result in a toll of the

Statute of Limitations.

However, even if defendants' representation of plaintiff in the 1977 Action could be deemed to result in a tolling until the termination of that action in 1990, no steps were taken thereafter in connection with plaintiffs claim until the death of the Parents in 1995. Hence, any argument that representation of plaintiff in connection with the probate challenge thereafter instituted revived plaintiff's claim lacks merit as more than three years expired between the two events. See, Grellet v. City of New **York,** 118 AD2d 141, 149 (2d Dept. 1986)("the continuous treatment doctrine is inapplicable where the interval of time between visits or treatments exceeds the applicable period of limitations"); Swartz v. Karlan, 107 AD2d 801, 803 (2d Dept. 1985)("where the interval between treatments exceeds the limitation period, the treatment cannot be considered continuous"); Ruggiero v. Powers, 284 AD2d 593, 595 (3rd Dept. 2001)("this subsequent representation fails to toll the limitations period because it occurred after an interval of more than two years and ... it was a separate legal proceeding"); Highland Sand & Gravel, Inc. v. Rust Environment & Infrastructure of New York, Inc., 281 AD2d 516, 517 (2d Dept. 2001)("The services rendered ... were discrete and complete in 1985, and the subsequent reports prepared in 1991 and 1994 constituted a renewal, rather than a continuation, of the relationship").

Moreover, the challenge in 1998 to the probate of the will of plaintiffs mother cannot be said to be related to plaintiff's claim and thus it also would not result in a toll. But, even if the challenge could revive the toll and was instituted, as alleged by plaintiff, as a means of causing his brother to negotiate a resolution of plaintiffs claim to the subject artwork, it would not save plaintiffs claim from being untimely as Straub, on behalf of WF & G, advised the Surrogate's Court in March 1998 that the firm would no longer be representing plaintiff. Thereafter, all efforts to recover the artwork were undertaken by Corwin, a partner of Greenberg, Traurig, which firm in April 1998 instituted the action that was dismissed by the Appellate Division in 2001 as time barred. Upon the retention of new counsel, any claim of ongoing representation would then cease even if a formal substitution of counsel did not occur until later. See, Piliero v. Adler & Stavros, 282 AD2d 511 (2d Dept. 2001); National Union Fire Insurance Company of Pittsburgh, Pa. v. Davis, Wright, Todd, Riese and Jones, supra; Cerio v. Koldin, 289 AD2d 1080 (4th Dept. 2001).

The assistance provided by defendants to Greenberg, Traurig in handling the litigation instituted by it on behalf of plaintiff does not constitute providing continuous representation. See, Tal-Spons Corp. v. Nurnberg, 213 AD2d 395, 397 (2d Dept. 1995)("Nurnberg's consultations with the plaintiffs and their attorneys regarding pending litigation over the meaning of the contract drafted by him cannot

be equated with ongoing representation". Loft Corp. v. Porco, 283 AD2d 556 (2d Dept. 2001)(the subsequent representation "was intermittent, not continuous"); Dignelli v. Berman, supra.

In view of the foregoing, the first cause of action for malpractice is dismissed as barred by reason of the period of limitations.

The second, third and fourth causes of action for breach of contract and unjust enrichment are also dismissed as duplicative of the untimely malpractice claim. ***See,*** Murray Hill Investments, Inc. v. Parker Chapin Flattau & Klimpl, LLP, 305 AD2d 228 (1st Dept. 2003); Daniels v. Lebit, 299 AD2d 310 (2d Dept. 2002).

It is noted that while the complaint alleges a breach of contract in that Nusbaum allegedly represented that former Governor Cuomo would aid plaintiffs application for leave to appeal to the Court of Appeals by having ex parte communications with the judges of that court whom he appointed, plaintiff does not argue in support of that tenuous claim in his memorandum of law. Disciplinary Rule 7-110 (22 NYCRR § 1200.41) provides that in "an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending", with exceptions not relevant here. Thus, in his complaint plaintiff is, in essence, seeking damages for defendants' breach of an alleged agreement for a prominent member of the firm to

patently violate the disciplinary rules, which rules represent the public policy of this state.' Such purported agreement is clearly unenforceable. See, City of New York v. 17 Vista Associates, 84 NY2d 299, 306 (1994); Szerdahelyi v. Harris, 67 NY2d 42, 48 (1986).

Lastly, the fifth cause of action based on an alleged violation of the disciplinary rules in failing to provide an itemized bill is also dismissed as a violation of such a rule does not create a private right of action [Schwartz v. Olsham Grundman Frome & Rosenzweig, 302 AD2d 193, 199 (1st Dept. 2003); The William Kaufman Organization v. Graham & James LLP, 269 AD2d 171, 173 (1st Dept. 2002); Kantor v. Bernstein, 225 AD2d 500, 501 (1st Dept. 1996)].

In conclusion, defendants' motion to dismiss the complaint is granted and the Clerk shall enter judgment accordingly.

Dated: March 1, 2004

J.S.C.

[1] Counsel should note that the rule not only prohibits a lawyer from having ex parte communications with a judge, it also prohibits a lawyer from causing another lawyer to violate this rule.