

Ling Lin Yau v Yaw

2005 NY Slip Op 30627(U)

September 19, 2005

Supreme Court, New York County

Docket Number: 113572/04

Judge: Richard B. Lowe, III

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : LAS PART 56

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LING LIN YAU, Individually and as Administratrix of
the estate of WAY MANE YAU,

Plaintiff,

- against -

ALAIN YAW, YAW BROTHERS REALTY CORP.,
and LEONARD BRENNER,

Defendants.
-----X

Index No. 113572/04

DECISION
AND ORDER

FILED
SEP 21 2005
NEW YORK
COUNTY CLERK'S OFFICE

RICHARD B. LOWE, III, J.:

Defendants Alain Yaw ("Yaw"), Yaw Brothers Realty Corp. ("YBR"), and Leonard Brenner ("Brenner") move, pursuant to CPLR 3016, 3211(a)(5) and (7), to dismiss the Complaint in this action for, *inter alia*, breach of contract.

BACKGROUND

Plaintiff Ling Lin Yau, individually and as Administratrix of the Estate of Way Mane Yau, brings this action to recover funds allegedly due to the estate of her deceased husband, Way Mane Yau ("Yau").

In 1981, Yau and his brother, Yaw, formed YBR to buy and sell real property. Each brother reportedly contributed \$50,000 in start-up money to YBR. Both verbally agreed to share in the profits and losses of the corporation. Brenner, an attorney, represented the brothers in the formation of the company. Brenner also represented YBR and Yaw in the purchase of rental properties located at 77 Eldridge Street, New York, New York, and at 189 East Broadway, New York, New York.

Yau died on February 13, 1993. Brenner represented the plaintiff in matters involving Yau's estate.

Prior to her husband's death, the plaintiff claims that Yau and Yaw had shared equally in the profits and losses of YBR. However, since Yau's death, plaintiff alleges that Yaw retained all of the rental profits from the two properties, and has failed to provide an accounting despite her repeated requests.

Plaintiff further claims that on April 17, 1998, Yaw received net proceeds of \$385,261 from the sale of the property located at 77 Eldridge Street, but failed to turn over 50% of the net proceeds to Yau's estate. Plaintiff also asserts that on June 22, 2004, Brenner represented the parties in the sale of 189 East Broadway, but failed to properly distribute the proceeds from that sale.

Plaintiff commenced this action by filing a Summons and Complaint, dated July 28, 2004. The Complaint seeks damages from Yaw and YBR for breach of the alleged verbal agreement to share equally in the profits of YBR (first cause of action); damages from defendants for fraudulent misrepresentation regarding the sharing of profits of YBR (second cause of action); and punitive damages (third cause of action).

DISCUSSION

Defendants move to dismiss the Complaint and the claims therein as time-barred by the statute of limitations and for failure to state a valid claim. The court takes each allegation as true and addresses each of the plaintiff's claims in turn.

A. Breach of Contract

Defendants seek to dismiss the first cause of action for breach of an alleged oral agreement to share in the rental income and profits from the April 17, 1998 sale of the rental property located at 77 Eldridge Street. Defendants also seek to dismiss Plaintiff's claim to a share in the rental

income realized before July 28, 1998 from the property located at 189 East Broadway. Defendants argue that the plaintiff is barred by the statute of limitations from bringing this cause of action.

A cause of action for breach of contract must be brought within six years of the alleged breach or will be barred by the Statute of Limitations (*see* CPLR 213[2]). The applicable period is calculated from the day the Summons and Complaint is first filed (*see* CPLR 203[b]).

Here, the plaintiff's cause of action for breach of contract to share rental income and profits from the sale of 77 Eldridge Street must be dismissed as outside the statute of limitations period. Assuming that there was a binding oral agreement between Yau and Yaw to a share of the rental income and any proceeds from the April 17, 1998 sale of 77 Eldridge Street, the plaintiff had six years from the date of sale to demand her share of such proceeds. Instead, the plaintiff filed this claim on July 28, 2004, more than six years after the actual sale date. This claim is outside the statute of limitations period and, accordingly, the plaintiff is barred from recovering any portion of the rental income or the profits from the disposal of 77 Eldridge Street.

Similarly, any claim for a share of rental income for the property located at 189 East Broadway must also be dismissed as time-barred for income realized before July 28, 1998. Again, plaintiff had more than enough time to take her share of this income. Plaintiff tries to save her claim by arguing that there was an oral agreement to postpone the estate's share of the profits from the rental income until the sale of the property on June 22, 2004. Plaintiff argues that this agreement served as a toll to the statute of limitations. This court disagrees.

An agreement to postpone payment beyond the six-year statute of limitations period must be made in writing (*see* General Obligations Law § 17-101). Here, even if there was an agreement between the two parties, the agreement does not toll the running of the statute of limitations because there is no evidence of a writing. While the rental income from July 28, 1998 to the sale of the

property on June 22, 2004, and the profits from that sale are within the applicable statute of limitations period, any amount the plaintiff claims entitlement to prior to July 28, 1998 is barred.

Therefore, the motion to dismiss Plaintiff's claim for breach of contract for failure to share the rental income and profits from the April 17, 1998 sale of the rental property located at 77 Eldridge Street is granted. Defendants' motion to dismiss Plaintiff's claim for breach of contract to a share in the rental income from the property located at 189 East Broadway is also granted as to income realized before July 28, 1998, but is denied as to rental income realized after July 28, 1998 and as to the proceeds from the June 22, 2004 sale of the property.

B. Fraudulent Misrepresentation and Legal Malpractice

Defendants also move to dismiss Plaintiff's second cause of action alleging fraudulent misrepresentation as it simply recasts the breach of contract cause of action and, as against Brenner, a legal malpractice claim.

In order to state a valid cause of action for fraudulent misrepresentation, the plaintiff must allege specific facts and detailed allegations to support a *prima facie* case of fraud (see CPLR 3016[b]). A cause of action for fraud, however, does not arise when the only fraud charged relates to the breach of contract (*Krantz v Chateau Stores of Canada, Ltd.*, 256 AD2d 186, 187 [1st Dept 1998]).

As against Yaw and YBR, Plaintiff has failed to plead with detailed factual instances a valid cause of action for fraudulent misrepresentation. Even concluding that there was a valid oral contractual agreement between Yau and Yaw, as well as between Yau and YBR, plaintiff fails to provide specific dates or occurrences of these statements, nor does the plaintiff explain the damages resulting from her reliance on these statements.

Furthermore, this fraudulent misrepresentation cause of action is related to plaintiff's contract action. Plaintiff argues that the defendants made misrepresentations of fact to her in the splitting of proceeds from the rental properties. This misrepresentation is related to the breach of contract cause of action; the splitting of the proceeds was part and parcel of the oral contract between the parties. Whatever misrepresentation was made to the plaintiff by the defendants was based on the oral agreement. As such, there is no cause of action for fraudulent misrepresentation.

Plaintiff attempts to salvage her fraudulent misrepresentation claim as against Brenner by recasting it as one for legal malpractice. Plaintiff charges Brenner with failing to secure the estate's share of the proceeds from the sale of the rental properties. Defendants assert that the statute of limitations bars plaintiff from bringing this cause of action.

It is well settled that an action to recover for legal malpractice must be commenced within three years of the accrual of the claim (*see* CPLR 214[6]). Furthermore, the claim accrues when the malpractice is committed (*Ruggiero v Powers*, 284 AD2d 593, 594 [3d Dept 2001]).

Here, assuming that there is a cause of action for legal malpractice, plaintiff failed to bring a valid cause of action within the applicable statute of limitations. As to the holding located at 77 Eldridge Street, Plaintiff asserts that Brenner represented her during her application for letters of administration in her husband's estate, and in connection with the disposal of the property. However, plaintiff does not allege that Brenner performed any further service after its sale. Thus, any claim against Brenner for legal malpractice accrued, at the latest, when 77 Eldridge Street was sold in April 17 1998. As such, Plaintiff was required to commence a legal malpractice action related to this sale no later than April 17, 2001 in order to comply with the applicable statute of limitations.

However, as to the 189 East Broadway property, Plaintiff argues that since Brenner represented both Yaw and YBR in its sale, and because Brenner knew that her husband's estate was a shareholder of YBR, his representation of the estate continued until 2004. Essentially, plaintiff reasons that the "continuous representation doctrine" effectively tolled the statute of limitations regarding the legal malpractice claim against Brenner.

Pursuant to the "continuous representation doctrine," the statute of limitations for legal malpractice is tolled until the attorney's ongoing representation of the plaintiff in connection with the matter in question is completed (*see Weiss v Manfredi*, 83 NY2d 974 [1994]). The doctrine is strictly limited to instances where the continuing representation pertains specifically to a matter in dispute, and is not applicable where an attorney provides ongoing general representation (*see Tal-Spons Corp. v Nurnberg*, 213 AD2d 395 [2d Dept 1995]). Plaintiff must affirmatively demonstrate ongoing representation in connection with the specific matter from which the malpractice claim arose (*see Zaref v Berk & Michaels*, 192 AD2d 346 [1st Dept 1993]).

Here, plaintiff's attempt to invoke the continuous misrepresentation doctrine is unavailing. First, as articulated above, the matter of 77 Eldridge Street and Brenner's representation thereof effectively ended in April 1998 with the sale of the property. As well, there is no indication that Brenner represented the estate in the sale of 189 East Broadway in 2004. Though plaintiff argues that she never relieved Brenner as her attorney in matters involving Yau's estate, there is no indication that Brenner represented the estate in this particular sale as Brenner was representing YBR in the transaction.

Because the plaintiff has failed to state a valid cause of action for fraudulent misrepresentation against the defendants, defendants' motion to dismiss the claim is granted.

C. *Punitive Damages*

Plaintiff concedes that the third cause of action seeking punitive damages is invalid (*see Rocanova v Equitable Life Assur. Socy.*, 83 NY2d 603 [1994]). As such, defendants' motion to dismiss plaintiff's claim for punitive damages is granted.

CONCLUSION

Accordingly, it is hereby


ORDERED that the motion to dismiss is granted to the extent that so much of the first cause of action as seeks damages from Yaw and YBR for breach of the alleged verbal agreement to share equally in the profits of YBR with respect to the rental property located at 77 Eldridge Street, New York, New York, and the rental income from the property located at 189 East Broadway, New York, New York realized before July 28, 1998, and it is otherwise denied; it is further

ORDERED that the motion to dismiss the second and third causes of action is granted; it is further

ORDERED that the remainder of the action is severed and continued; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry.

Dated: 9/19/2005

FILED
SEP 21 2005
NEW YORK
COUNTY CLERK'S OFFICE
ENTER:

RICHARD B. LOWE III
RICHARD B. LOWE, III, J.S.C.