

Woods v Phin

2007 NY Slip Op 30769(U)

April 4, 2007

Supreme Court, Suffolk County

Docket Number: 0007831/2005

Judge: Jeffrey Arlen Spinner

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**SUPREME COURT OF THE STATE OF NEW YORK
IAS PART XXI - COUNTY OF SUFFOLK**

PRESENT:

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

<p>SANDRA M WOODS,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">- against -</p> <p>TERESA D PHIN and LERNER & PHIN,</p> <p style="text-align: right;">Defendants.</p>	
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INDEX NO.:	2005-7831
MOTION SEQ. NO.:	001 - MD
ORIG. MOTION DATE:	07/31/06
MOTION SEQ. NO.:	002 - MG
ORIG. MOTION DATE:	10/03/06
FINAL SUBMIT DATE:	11/01/06

UPON the following papers numbered 1 to 56 read on these Motions:

- Plaintiff's Motion (001) & Supporting Papers (Pages 1-12 Exhibits A-J);
- Defendants' Opposition (Pages 13-23 & Exhibits A-E);
- Plaintiff's Reply (Pages 24-27);
- Defendants' Motion (002) & Supporting Papers (Pages 28-47 & Exhibits A-E);
- Plaintiff's Opposition (Pages 48-51);
- Defendants' Reply (Pages 52-56);

it is,

ORDERED, that the application of Plaintiff (001) is hereby denied as moot, as set forth herein below, in light of the determination of Defendants' Motion herein; and the application of Defendants' (002) is hereby granted in all respects.

Plaintiff moves this Court (001) for an Order, pursuant to CPLR 3126, striking Defendants' Answer, imposing sanctions up to \$10,000.00 for Defendants' refusal to follow this Court's February 23, 2006 Order to respond to discovery, and for attorney's fees and costs in the amount of \$4,545.00.

Defendants move this Court (002) for an Order dismissing Plaintiff's action, pursuant to CPLR 3211.

Beginning with Motion by Defendants, the Court notes the following, regarding each of the Causes of Action of Plaintiff's Complaint, as adeptly and convincingly points out by Counsel for Defendants:

As to Plaintiff's First Cause of Action, alleging professional malpractice, an action for legal malpractice is governed by a three year statute of limitations, regardless of whether the underlying theory is based on contract or tort (*See*, CPLR 214(6)); and a legal malpractice claim accrues from the date the malpractice was committed, not when the client discovers the malpractice (*See, Shumsky v Eisenstein*, 96 NY2d 164 [2001]; *McCoy v Feinman*, 99 NY2d 295 [2002]). Furthermore, the continuous representation doctrine allows the statute of limitations for legal malpractice to toll until the attorney-client relationship terminates (*See*,

Shumsky v Eisenstein, supra), but a clear indicia of an on-going, continuous, developing and independent relationship between client and attorney must be demonstrated (*See, Kanter v Pieri*, 11 AD3d 912 [4 Dpt 2004] quoting, *Luk Lamellen U Kupplungbau GmbH v Lerner*, 166 AD2d 505 [2 Dpt 1990]).

In the instant situation, the attorney-client relationship between Plaintiff and Defendants, regarding Plaintiff's Divorce action, terminated in September, 1996. When Plaintiff contacted Defendants in February, 2003, it was not a continuous relationship, but rather to investigate whether Plaintiff's former husband had withheld information regarding a second pension plan, and whether Plaintiff could successfully make a claim against same. This was a separate legal retention, over six years later. When Plaintiff served a Summons and Complaint upon Defendants on April 19, 2005, nine years after the alleged malpractice, this was well beyond any measure of the Statute of Limitation applicable herein. Therefore, the First Cause of Action of Plaintiff's Complaint is dismissed.

As to Plaintiff's Second Cause of Action, alleging breach of fiduciary duty, the statute of limitations for such a claim is either 3 or 6 years, determined by the remedy sought by Plaintiff. Courts view claims solely for monetary damages as alleging 'injury to property, which has a three year statute of limitations, accruing upon the date of the alleged breach (*See, Kaufman v Cohen*, 307 AD2d 113 [1 Dpt 2003]).

When Plaintiff served a Summons and Complaint upon Defendants on April 19, 2005, nine years after the alleged breach of fiduciary duty, this was well beyond any measure of the Statute of Limitation applicable herein. Therefore, the Second Cause of Action of Plaintiff's Complaint is dismissed.

As to Plaintiff's Third Cause of Action, alleging breach of contract, including both express and implied promises regarding professional standards, it is generally accepted that Courts will not entertain both a legal malpractice claim and a claim for breach of contract, and will dismiss the breach of contract claim as duplicative if based on professional standards, instead of the promise of a particular result (*See, Peak v Burtlett Pontiff Stewart & Rhodes, PC*, 28 AD3d 1028 [3 Dpt 2006]; *Shivers v Siegel*, 11 AD3d 447 [2 Dpt 2004]).

In the matter at bar, Plaintiff raises both claims, but sets forth no additional promises or particular results, nor contracts entered into between the parties separate from legal services. Therefore, the Third Cause of Action of Plaintiff's Complaint is dismissed.

The Court notes that Plaintiff's Complaint contains no Fourth Cause of Action.

As to Plaintiff's Fifth Cause of Action, alleging constructive fraud, claiming Defendants made false representations regarding Plaintiff's husbands pension, in connection with the Property Settlement Agreement executed by Plaintiff in September, 1996, a cause of action for constructive fraud must be initiated within six years of the commission of the fraud claimed (*See, CPLR 213*). The two additional years allowed for discovery for fraud based claims, however, does not apply to actions based on constructive fraud (*See, Avalon, LLC v Coronet Properties*, 306 AD2d 62 [1 Dpt 2003]). Furthermore, it is well settled that the Courts will not apply the fraud statute of limitations if the fraud alleged is merely incidental to the claim asserted, lest fraud be used as a means to revive and litigate stale claims (*See, Kaufman v Cohen, supra; quoting Powers Mercantile Corp v Maurice Feinberg*, 109 AD2d 117 [1 Dpt 1985]; *Klein v Gutman*, 12 AD3d 417 [2 Dpt 2004]).

Herein, Plaintiff's allegation of constructive fraud merely sets forth the same claims as she alleges regarding legal malpractice, and fails to allege injuries resulting from said constructive fraud that is different than those allegedly suffered from her claim for malpractice (*See, Certain Underwriters at Lloyd's, London v William M Mercer, Inc*, 2005 NY SlipOp 50507(U) [SupCt, New York Co, 2005]).

Firstly, that fact that Plaintiff's claim for constructive fraud is indistinguishable from her claim for legal malpractice mandates dismissal of this Fifth Cause of Action. Secondly, even if the claim were to pass the requisite test, when Plaintiff served a Summons and Complaint upon Defendants on April 19, 2005, nine years after the alleged constructive fraud, this was well beyond any measure of the Statute of Limitation applicable herein. Therefore, the Fifth Cause of Action of Plaintiff's Complaint is dismissed.

As to Plaintiff's Sixth Cause of Action, it alleges the intentional tort of infliction of emotional distress, claiming Defendants were malicious, deceitful and indifferent during their representation of Plaintiff. As a matter of law, this claim has a statute of limitations of one year (*See, CPLR 215*).

In the matter before this Court, even considering Defendants' latter representation of Plaintiff, said services were terminated on January 5, 2004. When Plaintiff served a Summons and Complaint upon Defendants on April 19, 2005, this was well beyond any measure of the Statute of Limitation applicable herein. Therefore, the Sixth Cause of Action of Plaintiff's Complaint is dismissed.

As to Plaintiff's Seventh Cause of Action, alleging a claim of misconduct by attorneys pursuant to Judiciary Law § 487, contending that Defendants engaged in conduct to deceive Plaintiff, including taking \$1,500.00 and failing to use same for proper purposes, and further failing to communicate with Plaintiff after February, 2003, it is well settled that in order to establish a claim under this statute Plaintiff must allege deceit or a chronic, extreme pattern of legal delinquency by Defendants (*See, Izko Sportswear Co, Inc v Flaum*, 25 AD3d 534 [2 Dept 2006] quoting, *Knecht v Tusa*, 15 AD3d 626 [2 Dept 2005]), and further that only those acts that occur on or after commencement of a judicial proceeding are encompassed by Judiciary Law § 487(1) (*See, Werner v Katal Country Club*, 234 AD2d 659 [3 Dept 1996]; *Hansen v Caffry*, 280 AD2d 704 [3 Dept 2001]; *Schindler v Issler & Schrage, PC*, 262 AD2d 226 [1 Dept 1999]).

It is clear that, no action having been commenced by Defendants on behalf of Plaintiff, there can be no violation of Judiciary Law § 487(1). As to Judiciary Law § 487(2), which requires claims that Defendants either wilfully delayed the client's suit or received money improperly, Plaintiff's own Complaint sets forth allegations that demonstrate Defendants took significant actions (no delay set forth), expending the funds retained (no improper use of monies). Further, it is undisputed that Defendants return \$400.00 of unused funds held in escrow that were advanced for disbursements. Therefore, Plaintiff has failed to state a Cause of Action, pursuant to Judiciary Law § 487(2). In light thereof, the Seventh Cause of Action of Plaintiff's Complaint is dismissed.

There being no other Causes of Action, Plaintiff's Complaint is hereby dismissed and the within action is hereby terminated. Therefore, the Motion by Plaintiff to strike Defendants' Answer is moot, and therefore denied.

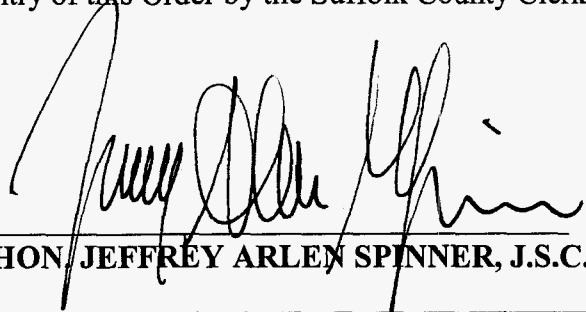
For all the reasons stated herein above and in the totality of the papers submitted herein, it is, therefore,

ORDERED, that the application of Plaintiff (001) for an Order, pursuant to CPLR 3126, striking Defendants' Answer, imposing sanctions up to \$10,000.00 for Defendants' refusal to follow this Court's February 23, 2006 Order to respond to discovery, and for attorney's fees and costs in the amount of \$4,545.00, is hereby denied in all respects, as moot in light of the determination of this Court set forth herein below; and it is further

ORDERED, that the application of Defendants (0020 for an Order dismissing Plaintiff's action, pursuant to CPLR 3211, is hereby granted in all respects, Plaintiff's Complaint is hereby dismissed and this action is hereby terminated; and it is further

ORDERED, that Counsel for Defendants is hereby directed to serve a copy of this Order, with Notice of Entry, upon Counsel for Plaintiff within 20 days of entry of this Order by the Suffolk County Clerk.

**Dated: Riverhead, New York
April 4, 2007**



HON. JEFFREY ARLEN SPINNER, J.S.C.

✓ FINAL DISPOSITION	NON-FINAL DISPOSITION
✓ SCAN	DO NOT SCAN

TO:

Law Offices of Susan Chana Lask
Attorney for Plaintiff
244 Fifth Avenue, Suite 2369
New York, New York 10001

Jerry Garguilo, Attorney at Law, PC
Attorneys for Defendants
542 North Country Road
St James, New York 11780