

**Rehberger v Garguilo & Orzechowski, LLP**

2007 NY Slip Op 31347(U)

May 10, 2007

Supreme Court, Suffolk County

Docket Number: 0030120/2005

Judge: Martin J. Kerins

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**COPY**

Ind No. 30120-2005

SHORT FORM ORDER

Supreme Court - State of New York  
IAS PART 12 - SUFFOLK COUNTY

MOTION DATE: 09-15-06  
ADJ. DATE: 02-01-07  
MOT. SEQ: 007 001-MG  
008 002-MG

**PRESENT:**

Hon. MARTIN J. KERINS  
J.S.C.

-----X  
**FREDERICK REHBERGER,** :  
:   
:   
Plaintiff(s), :   
:   
- against - :   
:   
**GARGUILO & ORZECZOWSKI, LLP,** :   
**JERRY GARGUILO and STANLEY E.** :   
**ORZECZOWSKI,** :   
Defendant(s). :   
-----X

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Upon the following papers numbered 1 to 27 read on this motion to dismiss \_\_\_\_\_; Notice of Motion/ Order to Show Cause and supporting papers 1-9; Notice of Cross Motion and supporting papers 10-16; Answering Affidavits and supporting papers 17-21; 22-24; Replying Affidavits and supporting papers 25-27; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion (001) by defendant, Jerry Garguilo, to dismiss the complaint on the grounds that plaintiff did not obtain personal jurisdiction over the defendant Garguilo and that the action is time barred, is granted solely to the extent that the action is dismissed as time barred by the statute of limitations; and it is further

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**ORDERED** that the cross-motion (002) by defendants, Garguilo & Orzechowski, LLP and Stanley E. Orzechowski, to dismiss on the ground that the action is time barred by the statute of limitations is granted; and it is further

**ORDERED** that counsel for defendant, Jerry Garguilo, shall serve a copy of this order with Notice of Entry upon the other parties within thirty (30) days of the date this order is entered.

This action sounding in legal malpractice arises from the alleged representation of plaintiff, Frederick Rehberger, by the defendant law firm.

Defendant Jerry Garguilo's assertion that he was never personally served with a summons and complaint is unavailing. Pursuant to CPLR 308(2), service was made by delivery to Garguilo's former partner and codefendant here, Stanley E. Orzechowski. On the date in question, Garguilo and Orzechowski shared office space located at 542 No. Country Rd., St. James, NY. They each had their own secretary. It is not disputed by Garguilo that he was served pursuant to CPLR 308(2), in that Orzechowski was in the shared common area of their offices located at the above address. The process server handed Orzechowski the documents in that area, i.e., where the secretaries for both attorneys maintained their desks. Clearly, such service was appropriate under the statute. While Mr. Orzechowski is no longer in partnership with Mr. Garguilo, he is certainly a "person of suitable age and discretion at the actual place of business", that the statute contemplates. Further, it does not appear that defendant's office was designated as an independent office in the property address or otherwise held out as a distinguishable unit. Accordingly, that branch of the motion to dismiss for lack of personal jurisdiction of defendant Garguilo is denied.

Defendants also claim that the action should be dismissed as time barred. They assert that the date the claim accrued is May 3, 2001, the date that defendant Garguilo allegedly failed to send notices of plaintiff's intention to sell his interests to the individual shareholders. Since the action here was not commenced until December 23, 2005, the action is time barred.

Plaintiff opposes on the ground of continuous representation. Plaintiff argues that this theory tolled the statute of limitations due to the ongoing representation by the defendants.

A brief description of the underlying claim is warranted here. In 1987, the Mills-Muller-Wood Corp. and Richtberg and Rehberger, Inc. entered into a merger agreement to form a new corporation, MRW Group, Inc. (hereafter MRW). Plaintiff here, Rehberger held 25.668% of the shares of common stock of MRW. Four other individuals held the remaining shares. When Rehberger decided to retire upon attaining sixty years of age, he elected to sell his shares of stock to MRW pursuant to Article IV of the Stock Redemption Agreement.

Notice was sent by Rehberger's then attorneys, Forchelli, Curto, Scwartz, Mineo, Carlino & Cohn, LLP to the MRW Group and to an individual shareholder, Richard Richtberg. However, the Forchelli law firm did not send a notice to the remaining individual shareholders. The Forchelli firm

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commenced an action against MRW and the individual shareholders of the Group seeking a declaratory judgment establishing the value of the outstanding shares of common stock of MRW at \$7,000,000.00. After a motion to disqualify the Forchelli firm was granted, the firm of Garguilo & Orzechowski was substituted on September 13, 2000.

On May 3, 2001, this Court (Emerson, J.) granted the motion by Rehberger for summary judgment against MRW Group. Partial summary judgment was also granted to the defendants there dismissing the complaint against the individual shareholders, after determining that the notice to sell only went to MRW.

Plaintiff here argues that defendants failed to correct the mistake of the Forchelli firm of only sending a notice to sell to MRW and Richtberg. Moreover, defendants failed to point out to Justice Emerson that the notice was in fact sent to Richtberg; defendants never filed a Notice of Appeal on plaintiff's behalf; and defendants did not move for leave to reargue or renew the cross-motion. As a result, plaintiff's rights against the individual shareholder Richtberg were extinguished.

Moreover, by order dated August 27, 2001, Justice Emerson modified her prior Order to the extent that any payments to the plaintiff from MRW would be limited to years in which a surplus was available for that purpose. Judgment was signed on November 8, 2001 and entered on November 20, 2001.

On June 17, 2002, the Appellate Division, Second Department affirmed the order of Justice Emerson and remitted the matter for the entry of Judgment declaring the value of the outstanding shares of common stock of MRW Group to be \$7,000,000.00. Proposed judgments were thereafter submitted but were unsigned.

On January 19, 2004, as part of an attempt to recover money from MRW, defendant law firm by Garguilo appeared at a deposition of the shareholder Richtberg. Pursuant to the order of Justice Emerson, this deposition was an effort by Rehberger to determine the financial viability of MRW, i.e., whether that company had surplus funds to pay Rehberger for his stock. Thereafter, defendants billed Rehberger for their legal services.

In light of the foregoing, plaintiffs here assert that defendants continued to represent plaintiff in the prior action until at least the calendar year 2004. Defendants counter that the representation in 2004 was unrelated to the underlying action.

A defendant who seeks dismissal of a complaint on the ground that it is barred by the statute of limitations bears the initial burden of proving, *prima facie*, that the time in which to sue has expired (see *Duran v Mendez*, 277 AD2d 348; *Savarese v Shatz*, 273 AD2d 219, 220; *Assad v City of New York*, 238 AD2d 456; *Siegel v Wank*, 183 AD2d 158, 159). Here, the defendants sustained their initial burden by offering evidentiary proof that the malpractice complained of occurred on May 3, 2001, and that this action was not commenced until on or about December 23, 2005, after the expiration of the


three-year limitations period (see CPLR 214[6]). The burden thus shifted to the plaintiff to aver evidentiary facts establishing that their cause of action falls within an exception to the statute of limitations, or to raise an issue of fact as to whether such an exception applies (see *Duran v Mendez*, 277 AD2d 348 *supra*; *Assad v City of New York*, 238 AD2d 456 *supra*; *Siegel v Wank*, 183 AD2d 158 *supra*).

The cause of action under the doctrine of continuous representation does "not accrue until the attorney's representation concerning a particular transaction is terminated" (*Boorman v. Bleakley, Platt, Schmidt, Hart & Fritz*), 88 AD2d 942). In determining the accrual of a of cause of action, the general rule is that a cause of action accrues when the act complained of occurs, not when the client discovers it, *Siegel v. Kranis*, 29 AD2d 477.

The continuous representation doctrine recognizes that a person seeking professional assistance has a right to 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 (*Shumsky v Eisenstein*, 96 N.Y.2d 164. This doctrine reflects both the unfairness of requiring the injured client to challenge its professional advisor while remedial efforts are under way (see *Borgia v City of New York*, 12 NY2d 151) and the potential abuse where the negligent advisor attempts to avoid liability by diverting the client from bringing a legal action until the limitations period expires (see *Siegel v Kranis*, 29 AD2d 477). To prevail under this theory requires that the continuous relationship be in connection with the particular matter from which the malpractice claim arose (see *McCoy v Feinman*, 99 NY2d 295; *Pellati v Lite & Lite*, 290 A.D.2d 544; *National Union Fire Ins. Co. of Pittsburgh v Davis, Wright, Todd, Reise & Jones*, 157 A.D.2d 571).

In light of the foregoing it is clear that the plaintiff has failed to demonstrate or provide evidentiary facts establishing that their cause of action falls within an exception to the statute of limitations, or to raise an issue of fact as to whether such an exception applies. Clearly, the deposition conducted in January 2004, was merely part of the attempt by Rehberger to determine whether MRW had surplus money and was not related to the underlying action.

Dated: May 10, 2007  
RIVERHEAD, NY

  
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Martin J. Kerins, J. S. C.

FINAL DISPOSITION

NON-FINAL DISPOSITION