

Hinrichsen v Augello Pezold Hirschmann, P.C.

2007 NY Slip Op 31571(U)

June 5, 2007

Supreme Court, Suffolk County

Docket Number: 0031246/2006

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:

Hon. Paul J. Baisley, Jr.

 RICHARD HINRICHSEN

Plaintiff(s),

-against-

AUGELLO PEZOLD HIRSCHMANN, P.C.
 WILLIAM AUGELLO, GEORGE PEZOLD,
 THOMAS HIRSCHMANN, RAYMOND
 SELVAGGIO and JOHN FLANAGAN

Defendant(s).

ORIG. RETURN DATE: April 18, 2007

FINAL RETURN DATE: May 30, 2007

MTN. SEQ. #: 001 - CASEDISP

PLTF'S ATTORNEY:

STEVEN R. BLYER, ESQ.

3000 MARCUS AVENUE

LAKE SUCCESS, N.Y. 11042

DEFT'S ATTORNEY:

MELITO & ADOLFSEN, P.C.

233 BROADWAY, 28TH FL

NEW YORK, NY 10279

Upon the following papers numbered 1 to 22 read on this motion to dismiss: Notice of Motion and supporting papers 1 - 12; Affirmation in Opposition and supporting papers 13; Reply Affirmation 14 - 22; it is,

ORDERED that this motion by the defendants for an order dismissing the complaint pursuant to CPLR 3211 is granted and the complaint is dismissed in its entirety; and it is further

ORDERED that counsel for the defendants is directed to serve a copy of this Order and Decision upon counsel for the plaintiff pursuant to CPLR 2103(b)(1), (2) or (3) within 20 days of the date hereof.

In general, in considering a motion to dismiss pursuant to CPLR 3211, the court's role is limited to "determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint [citations omitted]" (*Frank v Daimler Chrysler Corp.*, 292 AD2d 118, 121, 741 NYS2d 9, 12 [1st Dept 2002], *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]). In addition, the pleading "is to be afforded a liberal construction (CPLR 3026), and the court should accept as true the facts alleged in the complaint, accord the plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory [citations omitted]" (*Id.*, at 120-121, 12).

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This is an action sounding in legal malpractice against a then existing law firm and its partners.¹ The plaintiff alleges that he retained the law firm to represent him in a dispute with regard to the purchase of a boat and that the law firm failed to bring an action within the period allowed by the applicable statute of limitations and, moreover, misrepresented that it was actively working on the file.

The defendants are seeking the dismissal of the complaint pursuant to CPLR 3211 (a)(1)(documentary evidence), (5)(statute of limitations), (7)(failure to state a cause of action) and (8)(lack of personal jurisdiction as to the individual defendants).

In support of this application, the defendants submit, inter alia, an attorney's affirmation, affidavits from three of the individual defendants, a letter from an attorney on behalf of the plaintiff (dated October 21, 2003) and a memorandum of law.

One of the points raised on this application and supported by the defendants' affidavits is the proposition that the named partners did not actually handle the plaintiff's case, were not aware of the matter, did not supervise or control the associate who was allegedly charged with handling the case and, therefore, were not individually liable for any alleged malpractice on the part of said associate. This proposition is without merit. The Code of Professional Responsibility (22 NYCRR , Part 1200) requires a law firm to "adequately supervise" the work of its associates (22 NYCRR 1200.5[c]; DR 1-104[c]) and this responsibility expressly pertains to partners in the firm as well as the firm itself (22 NYCRR 1200.5[d][2]; DR 1-104[d][2]).

The defendants also claim that the applicable statute of limitations period (3 years; CPLR 214[6]) had run before the summons and complaint were filed. In support of this contention, they submit a letter from an attorney sent on behalf of the plaintiff, dated October 21, 2003, in which that attorney writes that her firm was retained by the plaintiff to investigate "potential claims for professional negligence and/or fraud" against the defendant law firm "during the period of time August 2000 through August 2003." The letter goes on to state an awareness of the failure of the defendant law firm to take "steps reasonably [*sic*] and necessary to protect the interests" of the plaintiff and that the defendant law firm "misrepresented the actions undertaken." The letter ends with the suggestion that the defendant law firm "notify your professional liability carrier" of the plaintiff's claim.

The defendants argue, based upon this letter, that it is clear that the period of representation ended at the end of August 2003 and that, in any event, such representation was clearly over by October 21, 2003 (the date of the letter) when it was apparent that the plaintiff was no longer engaging the defendant law firm in the underlying matter.

¹ According to the defendants, the defendant law firm has been succeeded by the law firm of Pezold, Smith, Hirschmann & Selvaggio, LLC; the individual defendant William Augello died between the time the underlying summons and complaint were filed and the time of the alleged service of said papers upon him; the individual defendant John Flanagan is not associated with the successor law firm.

The summons and complaint were filed on November 3, 2006 which is beyond the applicable three-year statute of limitations (*see* CPLR 214[6]) whether measured from the end of August 2003 or from October 21, 2003.

In opposition, the plaintiff states that he did not receive his file from the defendant law firm until late November of 2003 and this, he contends, is evidence that the defendant law firm was still working on the matter. Using this time frame, he argues, brings his filing within the three-year period.

The plaintiff's theory that the mere retaining of a file on a dead or dormant matter is the equivalent of continuous service is without support in law and without merit. It is an "untenable theory" that as long as a professional retains a file which is not or no longer being worked on that acts of malpractice continue as long as the file is retained (*see e.g., Goulding v Solomom*, 123 Misc 2d 954, 475 NYS2d 723 [Civil Court, Bronx County 1984]).

As the plaintiff's own counsel at the time stated, the period of representation by the defendants ended at the end of August 2003 and, in any event, that same letter made it clear that as of the date written (i.e., October 21, 2003), the defendant law firm was no longer being retained to represent the plaintiff.

In view of these circumstances, the attorney-client relationship between the plaintiff and the defendant law firm on the underlying matter came to an end at the end of August 2003 (or, in any event, on October 21, 2003 at the latest) and the summons and complaint were not filed until the three-year period (from either date) passed (*see Gilbert Properties, Inc. v Millstein*, 33 NY2d 857, 352 NYS2d 198 [1973]). Moreover, there was no showing by the plaintiff that after either of those dates there were any consultations or any contact with the defendant law firm related to pursuing the underlying matter, no billings to reflect continued work and no evidence of even a general relationship with the defendant law firm (*see Little Princess Truck Rentals, Inc. v Pergament Distributors, Inc.*, 143 AD2d 179, 531 NYS2d 812 [2d Dept 1988]; *Goulding v Solomom, supra*). In short, the plaintiff has offered no evidence to support an accrual date beyond October 21, 2003, at the latest, and to accept the plaintiff's unsupported theory regarding continuous representation would be an exercise in futile speculation (*see Barlow v Sun Chem. Co.*, ___ AD3d ___, ___ NYS2d ___, 2007 NY Slip Op [Sup Ct, Westchester County, April 5, 2007]).

Accordingly, based upon the applicable statute of limitation alone and the absence of any applicable tolling circumstances, this complaint must be dismissed in its entirety as being brought outside the three-year period allowed under CPLR 214(6).

The individual defendants (other than the deceased defendant and the defendant not associated with the successor firm) also contend that they were never served in accordance with law and, thus, there is no personal jurisdiction over them in this case. In support of this point, their affidavits state that none of them was served personally pursuant to CPLR 308(1), that the defendant law firm's receptionist was given just one copy of the summons and complaint, that there was no timely filing of proofs of service with the court and, in any event, none of them received a mailed copy of the summons and complaint as required under CPLR 308(2).

In opposition to this contention, the plaintiff attaches the affidavits of service upon the individual defendants (including the deceased defendant and the defendant not associated with the successor law firm) which swear that the receptionist (named in all but one of the affidavits²) was served on behalf of the individual defendants but does not state that any mailing was done³; and which show timely date stamps by the court.

Service pursuant to CPLR 308(2) not only requires service upon an individual to be by delivering the papers "to a person of suitable age and discretion" but also requires "mailing the summons" to the person's last known residence or actual place of business. The plaintiff concedes that such a mailing was not done and argues, without any authority or support in law, that such a mailing was not required. This contention is totally without merit. Accordingly, since the plaintiff failed to serve the individual defendants in a manner required by law (*see* CPLR 308[2]), no personal jurisdiction was obtained against the individual defendants.

In conclusion, the complaint must be dismissed as not being filed within the three-year period required by law and said period was not tolled on the basis of continuous work. Furthermore, and in any event, the complaint must be dismissed as against each of the individual defendants for failure to serve each of them as required by law as well as the fact that one of the named individual defendants was deceased at the time of purported service and another was not associated with the successor law firm where service was attempted.

In view of this dismissal on the grounds discussed above, the remaining contentions of the defendants for dismissal are rendered moot and need not be addressed.

This decision constitutes the order of the court.

Dated: June 5, 2007

HON. PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR., J.S.C.

The name of the person served on behalf of the individual defendant Selvaggio is left blank, although it was done at the same time as the others. Arguably, this alone makes this particular affidavit of service insufficient on its face.

Counsel for the plaintiff contends that a mailing was not required. This unsupported statement is in direct contravention of the provisions of CPLR 308(2).