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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN J.S.C. PART 11
Justice

Index Number : 102210/2002
GOTAY, BERNADETTE
VS
BREITBART, DAVID
Sequence Number : 007
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the annexed decision and order.

FILED
JUL 30 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: July 16, 2007

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11
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BERNADETTE GOTAY,

Plaintiff,

- against - Index No. 102210/2002

DAVID BREITBART, MICHAEL HANDWERKER, STEVE MARCHELOS, HANDWERKER, HONSCHKE, AND MARCHELOS (a partnership), HANDWERKER, HONSCHKE, MARCHELOS & GAYNER, MARK HANKIN, ROSS, SUCHOFF, HANKIN, MAIDENBAUM, HANDWERKER & MAZEL (a professional corporation), NEIL HONSCHKE, BRIAN K. SUCHOFF, JEFFREY A. MAIDENBAUM, GEOFFREY R. MAZEL, CHARLES GAYNER,

Defendants.
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JOAN A. MADDEN, J.:

In this action alleging legal malpractice, plaintiff moves: (1) pursuant to CPLR 2221, for leave to reargue three motions (sequence numbers 004, 005 and 006) in which (a) the defendants who had not previously been dismissed from the action moved for summary judgment dismissing the complaint and all cross claims as against them, and (b) plaintiff cross-moved for summary judgment deeming that, for purposes of this action, the medical malpractice which was alleged by plaintiff in a prior action -- the action in connection with which defendants are alleged to have committed legal malpractice -- be admitted; and (2) upon reargument, for an order denying the defendants' motions for summary judgment and granting plaintiff's cross motion for summary judgment.

BACKGROUND

By prior decision and order dated January 18, 2007, and entered on January 25, 2007 (the Prior Decision), this court granted the then-remaining defendants' three motions for summary judgment dismissing the complaint -- on the ground that plaintiff's claims for legal malpractice as against those defendants were barred by the three-year statute of limitations applicable to those claims -- and denied plaintiff's cross motion for summary judgment. The facts from which this

action arose are set forth in the Prior Decision and will not be repeated here, familiarity with that decision being assumed. Defined terms used herein, and not otherwise defined herein, have the meanings ascribed to them in the Prior Decision.

DISCUSSION

Plaintiff's motion for reargument is denied with respect to the summary judgment motion brought by Breitbart (sequence number 006), inasmuch as plaintiff has failed to establish that the court, in determining that motion, overlooked or misapprehended any matter of fact or law. However, plaintiff's motion for reargument is granted with respect to the summary judgment motions brought by HH&M, Honschke and Marchelos (sequence number 004) and Handwerker (sequence number 005), and plaintiff's cross motion for summary judgment (sequence number 006), and, upon reargument, all of those motions are denied.

Upon reargument, the court finds that HH&M, Honschke and Marchelos, in their motion, and Handwerker (collectively, with HH&M, Honschke and Marchelos, the HH&M Defendants), in his motion, failed to establish that plaintiff's legal malpractice claims as against any of them should be dismissed on the ground that the claims are time-barred.

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Once this showing has been made, ... the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*id.*). However, the movant's failure to make the requisite prima facie showing of entitlement to judgment "requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*).

"An action to recover damages for legal malpractice accrues when the malpractice is committed" (*Shumsky v Eisenstein*, 96 NY2d 164, 166 [2001]). "The continuous representation doctrine tolls the statute of limitations until the completion of the attorney's ongoing representation

concerning the matter out of which the malpractice claim arises" (*Griffin v Brewington*, 300 AD2d 283, 284 [2d Dept 2002] [citation and internal quotation marks omitted]). However, when the representation and the attorney-client relationship with respect to that matter end, "the purpose for applying the continuous representation rule no longer exists," and the rule ceases to toll the statute of limitations (*Glamm v Allen*, 57 NY2d 87, 94 [1982]; *see also Schlanger v Flaton*, 218 AD2d 597, 603 [1st Dept 1995]).

In their motions, the HH&M Defendants argued that plaintiff's claims against them are time-barred because plaintiff's filing of the complaint in this action, on January 31, 2002, occurred more than three years after the Handwerker Firm's and its partners' representation of plaintiff and her parents -- and the attorney-client relationship between those parties -- had been ended by: (1) Marchelos's statements to plaintiff and her father at a meeting in early 1998; (2) the dissolution of the Handwerker Firm in November 1998; and/or (3) Hankin's statement to plaintiff and her father, at a meeting on January 28, 1999, that the Ross Suchoff Firm had decided not to undertake the representation of plaintiff in the Med Mal Action. Accordingly, the burden rested upon the HH&M Defendants, as the proponents of their respective motions for summary judgment, to make a prima facie showing that the representation and the attorney-client relationship did, in fact, end more than three years before January 31, 2002.[1] However, the HH&M Defendants failed to make such a prima facie showing, and that failure required denial of the HH&M Defendants' motions -- insofar as the motions were predicated upon statute of limitations grounds -- regardless of the sufficiency of plaintiff's opposing papers with regard to the statute of limitations issue.

"Ordinarily, an attorney's representation is not completed until the agreed tasks or events

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[1]By contrast, where a defendant moves for dismissal of a legal malpractice claim on statute of limitations grounds, and makes a prima facie showing that the plaintiff did not commence the action in which the claim is asserted until more than three years after the date when the claim accrued, the burden rests upon the plaintiff to raise a triable issue of fact with respect to whether the continuous representation doctrine applied to toll the statute of limitations (*see e.g. Williams v Lindenberg*, 24 AD3d 434, 434-435 [2d Dept 2005]; *860 Fifth Ave. Corp. v Superstructures--Engrs. & Architects*, 15 AD3d 213, 213 [1st Dept 2005]; *Loft Corp. v Porco*, 283 AD2d 556, 556-557 [2d Dept 2001]).

have occurred, the client consents to termination or a court grants an application by counsel to withdraw" (Mallen and Smith, Legal Malpractice § 22.13, at 415 [2007]). "An attorney who is retained generally to conduct a legal proceeding enters into an entire contract to conduct the proceeding to its termination, and he cannot abandon the service of his client without good and sufficient cause and reasonable notice" (7 NY Jur 2d, Attorneys § 71). "A purported withdrawal" by an attorney from the representation of a client "without proof that reasonable notice was given [to the client] is ineffective" (*Williams v Lewis*, 258 AD2d 974, 974 [4th Dept 1999]).[2] Accordingly, the continuous representation toll of the statute of limitations on a client's claim for legal malpractice will generally be deemed to have ended as the result of the attorney's withdrawal from the representation of the client only when the client received "reasonable notice" of the withdrawal (*Shumsky v Eisenstein*, 96 NY2d at 171).

The HH&M Defendants, in their respective motions, failed to establish that Marchelos, at his meeting with plaintiff and her father which allegedly occurred in early 1998, gave them reasonable notice of the Handwerker Firm's withdrawal from its representation of plaintiff, such that the meeting may be deemed to have ended the representation. In their memorandum of law, HH&M, Honschke and Marchelos asserted that, at the meeting, Marchelos "confirm[ed] that [the Handwerker Firm] could no longer represent [plaintiff and her father] in connection with [the Med Mal Action]" (HH&M, Honschke and Marchelos Mem. of Law, at 3). Handwerker stated, in an affidavit in support of his motion, that Marchelos advised plaintiff and her father, at the meeting, "that the law firm of Kaufman & Siegel had failed to timely purchase a[n] index number for the [Med Mal Action] and that the action was 'probably dismissed'" (Handwerker Affid., ¶ 7). Handwerker further asserted

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[2]*See also* 22 NYCRR 604.1 (d) (6) (providing that "[o]nce a client has employed an attorney who has entered an appearance, the attorney shall not withdraw or abandon the case without [i] justifiable cause, [ii] reasonable notice to the client, and [iii] permission of the court); *Matter of Dunn (Brackett)*, 205 NY 398, 403 (1912); *Hanlin v Mitchelson*, 794 F2d 834, 842 (2d Cir 1986) (applying New York law and stating that "[o]rdinarily ... a withdrawing attorney must give a client 'clear and unambiguous' notice of the attorney's intent to withdraw from representation"), quoting *Bucaro v Keegan, Keegan, Hecker & Tully, P.C.*, 126 Misc 2d 590, 592 (Sup Ct, NY County 1984).

that "[u]pon information and belief no further services were to be provided by ... [the Handwerker Firm] in connection with [the Med Mal Action]" (*id.*, ¶ 8). However, the HH&M Defendants' assertions concerning Marchelos's meeting with plaintiff and her father were not supported by Marchelos's own affidavit and deposition testimony.

Handwerker brought the Med Mal Action from the Breitbart firm to the Handwerker Firm in 1994, and Marchelos's affidavit states that he became involved in representing plaintiff in 1995. In the course of his investigation of the Med Mal Action, Marchelos was allegedly informed by the Bronx County Clerk's office that it was unable to locate a court file for the action. Marchelos then allegedly contacted Janice Kabel, an attorney who was at that time the head of the Corporation Counsel's medical malpractice division. Kabel allegedly advised Marchelos that the law firm of Bower & Gardner, which had been assigned by the City of New York as defense counsel for the Med Mal Action, had archived their file for the action in 1988, while Kaufman & Siegel was still representing plaintiff. Marchelos allegedly presumed that Bower & Gardner's archiving of the file most probably meant that the Med Mal Action had been either dismissed or abandoned.

As regards the substance of his meeting with plaintiff and her father, Marchelos's affidavit states:

> I telephoned plaintiff's father and asked him to come with his daughter to my ... firm for a conference to discuss [the Med Mal Action]. We did eventually meet in early 1998. I explained everything that I had learned from my investigation, including my discussions with ... Kabel, even though it was not good news. I then went on to advise the plaintiff and her father that they might have a claim for legal malpractice against ... Kaufman & Siegel for their handling of the [Med Mal Action].

(Marchelos Affid., ¶ 8.) Marchelos's testimony at his deposition included the following excerpts:

> A. ... . I remember telling [plaintiff and her father] what I had discovered regarding the [Med Mal Action], and that it was not good news. Essentially what I told them was I had been searching for the index number on the file, and I had called someone that I knew ... at the City of New York, and they told me that this file had been archived by Bower & Gardner in [1988]. ... . And ... I told them and I thought that that probably meant that the case had been dismissed.
>
> ... . I said they may have a claim against Kaufman & Siegel, and they ... asked me if I was interested in taking that claim. I told them I wouldn't be interested in taking that claim.

That's the sum and substance of that conversation, that I can recall.

Q. And that's the last time you had ever spoken to him?

A. Yes, that's correct.

Q. Did you take any steps, any further steps to determine whether, in fact, the case had been dismissed?

A. I remember asking [Kabel] to see if she could pull the archived file so I [could] verify some of [this] information, as ***I was going to continue in trying to follow through, maybe, with a resurrection of the file***.

And at that point, I think it was the early '90s, Bower & Gardner [had] dissolved as well, which is pretty commonly known, so it was a lot more difficult, ***and before anything more could come of it, [the Handwerker Firm] went into dissolution***.

(Marchelos EBT, at 17-19 [emphasis added].)

Q. Did you write a letter to the Gotays indicating you thought that the case was dead?

A. No.

(*id.* at 20.)

Q. Did you advise either Bernadette or her father that you would be performing any additional services on that file?

A. At that time, I don't recall.

Q. Again, all this occurred prior to the November 1998 dissolution of the firm?

A. ***I may have been waiting because I had that conversation with [Kabel] ... to see what she [could] come up with in terms of the file that was archived, so I could have been waiting on that as well, too, in terms of the time. I wasn't sure.*** As I am sitting here today, I can't be sure.

(*id.* at 39-40 [emphasis added].)

Q. ... can you tell us what was the basis of your opinion when you advised [plaintiff's father] what you had learned about the [Med Mal Action]? ... .

A. ... .

Q. ... .

A. I knew from ... looking at the file that the case was very, very old. ... .

After I spoke to [Kabel] and she looked at her computer records and

indicated to me over the phone that Bower & Gardner had the case, and they had an indication that it was archived, I assumed that that was bad news; that they had made a motion to dismiss the case, God knows for what reason, perhaps a failure to prosecute or something else; and that the case was over, and there was probably nothing to be done to resurrect it. I felt I had an obligation to tell the client that there may be a malpractice suit at that point in time with Kaufman & Siegel, so I let them know that, so that's what I did.

So the basis was, when a firm like Bower & Gardner has a file archived and it was a big firm -- it is the biggest medical malpractice defense firm -- I made the assumption there was a motion to dismiss, which is why they archived it, and that [the] motion ... was granted. That's the basis of my conversation.

Q. Do you know whether that motion to dismiss was ever made?

A. I don't even know it was a motion to dismiss. I made that assumption based upon the fact that I was told the file was archived.

Q. What was your understanding of what it meant to have a file archived?

A. I can tell you from my own personal practice that when I archive a file, there is absolutely nothing more to be done on it, nothing else, and I assume that most lawyers have the same understanding of archiving a file.

Q. Why did you think there was nothing more to be done on the Gotay case?

A. ***No, no. I was assuming that that's what Bower & Gardner would have thought, not what I said. In fact, I asked [Kabel] if she could get the file. She made the offer to get the file. I said "If you could do that, it would be helpful." This way, I can see if there is anything I can do to resurrect the file.***

So I didn't assume for my own purposes that there was nothing more for me to do, but I assumed if Bower & Gardner, in fact, archived it, then they believed that they had nothing more to do on the file, which would leave me the conclusion that this file may have been dismissed, and I felt at that point in time I had an obligation to tell them that, and I did.

Q. Did you get that file from [Kabel]?

A. I never did. ... .

Q. ***Did you take any steps to determine whether indeed it had been dismissed?***

A. ***No. It's the juxtaposition of time. I would approximate that it was in 1998; then the dissolution came***, so it may have been in or about that time, within a month of that time.

(*id.* at 42-45 [emphasis added].)

Thus, Marchelos's affidavit and deposition testimony contains no indication that, at his

meeting with plaintiff and her father, he advised them either that the Handwerker Firm would no longer represent plaintiff, or that the firm would perform no further services for plaintiff, in connection with the Med Mal Action. Rather, Marchelos conceded that, at the time when the meeting occurred -- which was apparently the last time when Marchelos spoke to plaintiff or her father -- he did not assume that there was nothing more for him to do in connection with the Med Mal Action, but planned to take further action to ascertain whether the action had, in fact, been dismissed or abandoned, as Bower & Gardner's archiving of the file seemed to him to suggest, and whether the action could be "resurrected." Marchelos's testimony appears to indicate that he still planned to take such further action, and had not finished taking such action, as of the time when the Handwerker Firm was dissolved in November 1998.

The record on the HH&M Defendants' motions contained no evidence that, after Marchelos met with plaintiff and her father, either of them understood that the Handwerker Firm's representation of plaintiff had ended. There was no allegation, for example, that plaintiff or her father, as a result of Marchelos's statements to them at the meeting, asked that the Med Mal Action case file be returned to them, or sought to obtain new counsel to represent plaintiff. The apparent absence of any such reaction by plaintiff and her father following their meeting with Marchelos -- in contrast with their request for the return of the case file and obtaining of new counsel following their communications with Hankin in 1999 -- suggests that, as of the time of the meeting, plaintiff and her father, like Marchelos, understood that the Handwerker Firm would be taking further action on plaintiff's behalf in connection with the Med Mal Action. Where there is "a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim," as appears to have been the case here, "[t]he continuous representation doctrine tolls the statute of limitations" (*Zorn v Gilbert*, 8 NY3d 933, 934 [2007] [citation and internal quotation marks omitted]).

The policy underlying the continuous representation doctrine also militates in favor of applying the doctrine to toll the statute of limitations on plaintiff's claims as against the HH&M

Defendants beyond the date of Marchelos's meeting with plaintiff and her father. That policy generally seeks to maintain the attorney-client relationship so long as an attorney is attempting to correct his or her own alleged malpractice, based upon the principles that the most efficacious legal representation will ordinarily be obtained when the same attorney represents a client from the beginning until the conclusion of a legal matter, and that an attorney who allegedly committed malpractice "not only is in a position to identify and correct his or her malpractice, but is best placed to do so" (*Aaron v Roemer, Wallens & Mineaux, LLP*, 272 AD2d 752, 754 [3d Dept 2000] [citation and internal quotation marks omitted]; *cf. McDermott v Torre*, 56 NY2d 399, 408 [1982]).

After the conclusion of Marchelos's meeting with plaintiff and her father, and even as of the time when the Handwerker Firm partnership was dissolved, Marchelos had still not taken the further action, which he had planned to take, in order to ascertain what the actual status of the Med Mal Action was and whether he could revive or resurrect that action. Such a resurrection was presumably required in 1998, in part, because of the Handwerker Firm's own failure, in 1994 or 1995, to: (1) ascertain that no index number had previously been purchased for the Med Mal Action; and (2) make a prompt application for an order of filing of the summons and complaint in the Med Mal Action nunc pro tunc which -- as the Appellate Division, First Department, has previously observed in considering the history of this action -- "likely would have been granted, pursuant to the 1991 version of CPLR 306-a," if such application had been "made ... in 1994 or 1995" (*Gotay v Breitbart*, 14 AD3d 452, 454 [1st Dept 2005]). Thus, here, the Handwerker Firm should be deemed to have continued to represent plaintiff so long as Marchelos intended to take, and had not yet taken, further action in an attempt to verify the actual status of, and to revive, the Med Mal Action (*cf. Griffin v Brewington*, 300 AD2d at 284).

For the foregoing reasons, the HH&M Defendants failed to establish, in their respective motions, that Marchelos, at his meeting with plaintiff and her father, gave them reasonable notice of the Handwerker Firm's withdrawal from its representation of plaintiff, such that the meeting should be deemed to have ended the representation, and commenced the running of, or ended the

continuous representation tolling of, the statute of limitations on plaintiff's claims as against the HH&M Defendants. The HH&M Defendants also failed to establish that the Handwerker Firm's representation of plaintiff should be deemed to have ended as the result of the dissolution of the Handwerker Firm partnership in November 1998, such that the dissolution commenced the running of the statute of limitations on plaintiff's claims.

Notwithstanding a partnership's dissolution, the partnership continues to exist until the winding up of partnership affairs is completed (*see* Partnership Law, § 61; *Matter of Silverberg [Schwartz]*, 81 AD2d 640, 641 [2d Dept 1981]). The dissolution does not render the partnership unamenable to suit in connection with an obligation which the partnership had already undertaken, but not yet completely performed, as of the time when the dissolution occurred (*see 111-115 Broadway Ltd. Partnership v Minter & Gay*, 255 AD2d 192, 192 [1st Dept 1998]; *Scholastic, Inc. v Harris*, 259 F3d 73, 88 [2d Cir 2001] [applying New York law]; 15A NY Jur 2d, Business Relationships § 1698 [stating that "(a) recently dissolved partnership is not immune from an action against it on obligations which survive its expiration or termination"]).

Moreover, "a partnership continues, notwithstanding [its] formal dissolution, as to a third person acting in good faith who has had no actual or constructive notice that the [partnership] has been dissolved" (*Kaydee Sales Corp. v Feldman*, 14 Misc 2d 793, 795 [Sup Ct, Monroe County 1958]; *see also Bank of Monongahela Valley v Weston*, 159 NY 201, 211 [1899]; 15A NY Jur 2d, Business Relationships § 1644). It has been held, further, that the mere dissolution of a law partnership was ineffective to terminate its partners' obligations as attorneys toward clients of the partnership, so as to preclude their liability for legal malpractice occurring after the dissolution, where there was no indication that the clients were notified of the partnership's dissolution or that the dissolved partnership was no longer able to represent the clients (*see Vollgraff v Block*, 117 Misc 2d 489, 493 [Sup Ct, Suffolk County 1982]; *cf. RLS Assoc., LLC v United Bank of Kuwait PLC*, 417 F Supp 2d 417, 419 [SD NY 2006] [applying New York law]; *see also* Mallen and Smith, Legal Malpractice § 5:3, at 550-552).

The Handwerker Firm and its partners undertook their obligations as plaintiff's attorneys long before the firm's dissolution. The HH&M Defendants submitted no evidence, apart from conclusory assertions, which would indicate that plaintiff or her parents had actual or constructive notice of the dissolution of the Handwerker Firm partnership, or that the dissolved partnership, or any of its partners, was no longer able to represent plaintiff following the dissolution. Accordingly, in view of the previously-cited legal principles, the HH&M Defendants failed to establish that the November 1998 dissolution of the Handwerker Firm partnership should be deemed to have ended the Handwerker Firm's representation of plaintiff in connection with the Med Mal Action, or to have commenced the running of the statute of limitations on plaintiff's claims against the HH&M Defendants for legal malpractice.

Handwerker asserted that plaintiff could not establish that the continuous representation doctrine should be applied to toll the statute of limitations after November 1998, when the Handwerker Firm partnership was dissolved, because plaintiff and her father had no contact with any partner of the Handwerker Firm after that time. However, in order for the burden to have shifted to plaintiff to raise a triable issue of fact with respect to any continuous representation toll, Handwerker had the initial burden, as the party moving for summary judgment, of making a prima facie showing that plaintiff's claims were untimely. Handwerker purported to do that based upon the theory that the Handwerker Firm's representation of plaintiff ended more than three years before plaintiff commenced this action rather than upon the theory that plaintiff's claims accrued more than three years before plaintiff commenced this action. Inasmuch as Handwerker did not satisfy his initial burden of making a prima facie showing that the Handwerker Firm's representation of plaintiff ended more than three years before plaintiff commenced this action -- whether at the time of Marchelos's meeting with plaintiff and her father in early 1998, or at the time of the Handwerker Firm partnership's dissolution in November 1998, or at the time of Hankin's meeting with plaintiff and her father on January 28, 1999 -- the burden never shifted to plaintiff to raise a triable issue of fact, in opposition to Handwerker's motion, with respect to the applicability of the continuous

representation toll.[3]

Neither Handwerker, in his motion, nor HH&M, Honschke and Marchelos, in their motion, established that it would have been unreasonable for plaintiff and her father to think that the Handwerker Firm continued to represent plaintiff for some period of time beyond November 1998 in view of, inter alia: (1) Marchelos's previously quoted deposition testimony, which indicates that, as of the time when the Handwerker Firm was dissolved, Marchelos had still not finished taking the further action which he had planned to take to ascertain the actual status of the Med Mal Action, and whether the action might be revived; (2) the HH&M Defendants' failure to submit any evidence that any partner of the Handwerker Firm ever adequately advised plaintiff or her father that the firm's representation of plaintiff was, or had, ended; (3) the HH&M Defendants' failure to submit any evidence that any partner of the Handwerker Firm ever advised plaintiff or her father, or that plaintiff or her father was otherwise aware, that the Handwerker Firm had been, or would be, dissolved; (4) the fact that the Handwerker Firm's representation of plaintiff had progressed slowly over a substantial period of time; and (5) plaintiff's father's deposition testimony that he thought it was unusual that the prosecution of the Med Mal Action was taking so long, but that, when he had once asked Marchelos why it was taking so long, Marchelos had told him that the Med Mal Action was "a difficult case" (Morales EBT, at 62-63). Accordingly, the HH&M Defendants failed to establish, to the preclusion of any triable issue of fact, that the Handwerker Firm's representation of plaintiff should be deemed to have ended at the time when the partnership was dissolved.

In their arguments that plaintiff's legal malpractice claims are time-barred, both HH&M, Honschke and Marchelos, in their motion, and Handwerker, in his motion, referred to Hankin's meeting with plaintiff and her father on January 28, 1999. HH&M, Honschke and Marchelos

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[3]The record does, in any event, contain evidence which contradicts Handwerker's assertion that there was no contact between plaintiff or her father and any partner of the Handwerker Firm after the dissolution of the Handwerker Firm in November 1998. Plaintiff's father testified, at his deposition, to the effect that he had a telephone conversation with Handwerker sometime after February 22, 1999 (*see* Morales EBT, at 79).

submitted a statement by Marchelos, in his affidavit, that, "[b]y [the time of the Handwerker Firm's dissolution, in November 1998], plaintiff and her father absolutely knew that [the Handwerker Firm] could no longer represent them and could not help them. They even started looking for new representation and met with ... Handwerker's new firm of Ross Suchoff on January 28, 1999 but the managing partner ... Hankin apparently refused to accept [plaintiff's] case" (Marchelos Affid., ¶ 9; *see also* HH&M, Honschke and Marchelos Mem. of Law, at 6). Marchelos asserts that, "[e]ven if the statute of limitations was somehow tolled until the meeting with ... Hankin, the claims are still time barred" (Marchelos Affid., ¶ 9).

Marchelos's statement that, by November 1998, "plaintiff and her father absolutely knew that [the Handwerker Firm] could no longer represent them and could not help them" was wholly conclusory, and unsupported by any allegation of fact. Marchelos's assertions concerning Hankin's meeting with plaintiff and her father were presumably intended to argue that the Handwerker Firm's representation of plaintiff should be deemed to have ended no later than the time of the meeting either because: (1) plaintiff's and her father's presence at the meeting established that they were looking for new legal representation, which, in turn, evidenced their knowledge that the Handwerker Firm was no longer representing them; or (2) the Ross Suchoff Firm's non-acceptance of plaintiff's Med Mal Action constituted sufficient notice to plaintiff and her father that the Handwerker Firm would not perform any further legal services on plaintiff's behalf, or continue to represent plaintiff, in connection with the Med Mal Action. However, HH&M, Honschke and Marchelos failed to establish that either of those arguments had merit.

First, HH&M, Honschke and Marchelos failed to establish that plaintiff's and her father's presence at the meeting with Hankin meant that that they were looking for new legal representation. Hankin indicated in his affidavit: that Handwerker agreed in December 1998 that he would join the Ross Suchoff Firm in January 1999; that Hankin, as a partner of the Ross Suchoff Firm, reviewed various files, including the file for the Med Mal Action, which Handwerker proposed to bring with him from the Handwerker Firm to the Ross Suchoff Firm; that, upon reviewing the file for the Med

Mal Action, Hankin observed that no index number had been purchased for the action; and that the Ross Suchoff Firm thereupon decided not to undertake to represent plaintiff in the Med Mal Action. Hankin states in his affidavit, further, that:

> [a]lthough the Ross Suchoff Firm was never retained by ... plaintiff and did not have an attorney-client relationship with her or her parents, I met with ... plaintiff and her father on January 28, 1999 to advise of the situation, as well as ... [the Ross Suchoff] Firm's decision not to undertake representation of the plaintiff in the [Med Mal Action].

(Hankin Affid., ¶ 6.) Thus, it appears to have been Hankin, rather than plaintiff and her father, who initiated the January 28, 1999 meeting.

Moreover, the record on the HH&M Defendants' motions contained no indication as to what, if anything, plaintiff and her father were told, either before or at the January 28, 1999 meeting, concerning the purpose of the meeting, or the circumstances surrounding the Ross Suchoff Firm's review of the Med Mal Action case file. The HH&M Defendants submitted no evidence which would indicate that any of the partners of the Handwerker Firm, or Hankin, informed plaintiff or her father: that the Handwerker Firm had been dissolved, such that plaintiff would need new representation; that Handwerker was joining the Ross Suchoff Firm, such that that firm's refusal to accept the Med Mal Action might bear some relation to whether the Handwerker Firm continued to represent plaintiff[4]; or that the Ross Suchoff Firm's possession of the case file for the Med Mal Action meant that Handwerker or the Handwerker Firm disclaimed any further obligation to act on plaintiff's behalf. Accordingly, it would be speculative to conclude that plaintiff and her father attended the meeting with Hankin in order to obtain new legal representation to replace the Handwerker Firm, rather than, for example, that they attended the meeting believing that the Ross Suchoff Firm might potentially be representing plaintiff in some sort of cooperative or coordinated manner with the Handwerker Firm.

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[4]Hankin's letter to plaintiff and her father, dated February 22, 1999, was printed on stationery which had a letterhead listing Handwerker as a partner in the Ross Suchoff Firm. However, there was no evidence that plaintiff and her father knew, when they met with Hankin on January 28, 1999, that Handwerker was joining the Ross Suchoff Firm.

The HH&M Defendants also failed to establish that Hankin's statement to plaintiff and her father at the January 28, 1999 meeting -- i.e., that the Ross Suchoff Firm had decided not to undertake the representation of plaintiff in the Med Mal Action -- should be deemed to have sufficiently apprised plaintiff and her father that the Handwerker Firm would not be performing any further legal services on plaintiff's behalf, and would not continue to represent plaintiff, in the Med Mal Action. Hankin, for his part, did not claim that any statement he made to plaintiff and her father was made on behalf of, or authorized by, or in any way representative of the position of, the Handwerker Firm, or that he ever purported to advise plaintiff and her father concerning the nature or status of the Handwerker Firm's preexisting representation of plaintiff.

As previously stated, the record on the HH&M Defendants' motions contained no indication as to what, if anything, plaintiff and her father were told concerning the purpose of their meeting with Hankin, or the circumstances surrounding the Ross Suchoff Firm's review of the Med Mal Action case file. Nor did the record set forth any basis for imputing to plaintiff or her father, as of the time of the meeting, actual or constructive knowledge of any particular relation or association between Handwerker, or the Handwerker Firm, on the one hand, and Hankin, or the Ross Suchoff Firm, on the other. Accordingly, it cannot be concluded that plaintiff and her father knew, or should have known, that any statement made by Hankin at the January 28, 1999 meeting, with regard to whether the Ross Suchoff Firm would undertake a new representation of plaintiff, was in any manner indicative of whether the Handwerker Firm would continue its previously existing representation of plaintiff, or perform any further services on her behalf, in the Med Mal Action.

Handwerker's memorandum of law first asserted, with respect to Hankin's meeting with plaintiff and her father on January 28, 1999, that the meeting was "irrelevant" to this action, and that "plaintiff clearly cannot" "rely on the ... meeting ... to extend the three-year statute of limitations period," because: (1) Hankin "is not a party to the within action"; (2) "Hankin and his firm were never attorneys for ... plaintiff and were simply reviewing the file to determine whether the [Ross Suchoff Firm] would accept plaintiff's claim"; and (3) "prior to the January 28, [1999] meeting ...

plaintiff had already been advised," presumably meaning by Marchelos in his meeting with plaintiff and her father in early 1998, "of the failure by Kaufman & Siegel ... to purchase an index number on plaintiff's behalf" (Handwerker Mem. of Law, at 11-12). Thus, Handwerker appeared to argue, as an initial matter, that Hankin's interactions with plaintiff and her father at the January 28, 1999 meeting were not relevant to the question of whether plaintiff's claims as against the HH&M Defendants are or are not timely.

However, Handwerker then argued, in the alternative, that plaintiff's father's alleged request for the return of the Med Mal Action case file, at the meeting, clearly indicates that plaintiff's claims are time-barred. According to Handwerker, plaintiff's father's purported request for the return of the file from Hankin was "an unequivocal indication that plaintiff did not have the requisite 'trust or confidence' in the attorney," presumably meaning the Handwerker Firm and/or its partners, "in order to support the theory that the representation [by those attorneys] continued on plaintiff's behalf" (*id.* at 12).

However, assuming, arguendo, that plaintiff's father did ask Hankin to return the Med Mal Action case file at the January 28, 1999 meeting[5], Handwerker failed to establish that that request may be deemed to conclusively indicate that plaintiff or her father had no "trust or confidence" in the Handwerker Firm or any of its partners. As previously stated, there was no evidence in the record as to what, if anything, plaintiff and her father were told as regards the circumstances surrounding the Ross Suchoff Firm's review of the Med Mal Action case file, and no basis in the record for imputing to plaintiff or her father, as of the time of their meeting with Hankin, any actual

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[5]Hankin's letter to plaintiff and her father, dated February 22, 1999, stated: "Your file remains in our possession. ***In the event you require the whole or any portion thereof***, we are available to provide you with same" (Mondora Affirm., Ex. A, at 2 [emphasis added]). That language appears to indicate that Hankin was uncertain -- as of the date of the letter, which was less than one month after the date of his meeting with plaintiff and her father -- as to whether plaintiff or her father wished the Med Mal Action case file to be returned to either of them. Thus, the language in the letter is arguably ostensibly inconsistent with Hankin's assertion in his affidavit that, at the January 28, 1999 meeting, "plaintiff's father requested the immediate return of the file" (Hankin Affid., ¶ 6).

or constructive knowledge of any particular relation or association between Handwerker, or the Handwerker Firm, on the one hand, and Hankin, or the Ross Suchoff Firm, on the other.

For the foregoing reasons, neither HH&M, Honschke and Marchelos, in their motion, nor Handwerker, in his motion, made a prima facie showing that the Handwerker Firm's or its partners' representation of plaintiff in the Med Mal Action ended more than three years prior to the time when plaintiff commenced this action -- whether by reason of Marchelos's statements to plaintiff and her father at their meeting in early 1998, the dissolution of the Handwerker Firm in November 1998 or Hankin's meeting with plaintiff and her father on January 28, 1999 -- such that plaintiff's legal malpractice claims as against any of those defendants should be dismissed as time-barred.

The HH&M Defendants also argued that plaintiff's claims should be dismissed as against them on grounds other than the statute of limitations. HH&M, Honschke and Marchelos, in their motion, and Handwerker, in his motion, argued that plaintiff's claims against them should be dismissed because: (1) in order to prevail on her claims against them for legal malpractice, plaintiff would be required to establish that she would have been successful in the Med Mal Action "but for" the HH&M Defendants' negligence; and (2) plaintiff cannot establish that she would have been successful in the Med Mal Action "but for" the HH&M Defendants' negligence, because there is no evidence that plaintiff's Erb's Palsy was the result of any medical malpractice. In support of their motions, the HH&M Defendants submitted an affirmation by a Dr. James Howard. Dr. Howard stated that he was board certified as an obstetrician and gynecologist in 1966, that he was an attending obstetrician/gynecologist at the time of plaintiff's birth in 1977, and that he was, accordingly, qualified to render an opinion regarding the accepted standard of obstetrical care rendered in 1977. Dr. Howard further stated that he had reviewed the medical records from Bronx Municipal Hospital pertaining to the prenatal care of plaintiff and her mother and to plaintiff's delivery. He opined that the medical records appeared to be the complete birth records, and that the medical care rendered to plaintiff and her mother, and the delivery procedures employed, did not deviate from the accepted standard of care that existed in 1977.

However, in opposition to the HH&M Defendants' motions, and in support of her cross motion, plaintiff submitted an affidavit by a Dr. Richard Levine. Dr. Levine stated that he is board certified in obstetrics and gynecology, that he is currently engaged in the practice of obstetrics and gynecology, that he was completing an internship and residency in obstetrics and gynecology during the years 1976 through 1980, and that he was, therefore, familiar with the accepted standard of obstetrical care rendered in 1977. Dr. Levine noted that the medical records which he reviewed as a basis for his medical opinion -- presumably the same records which were reviewed by Dr. Howard, since defendants obtained the records from plaintiff -- were not certified, and appeared to be incomplete. He stated: that the medical records pertaining to prenatal care were "scant"; that the records contained no prenatal blood tests; and that such tests "would be important because they may have indicated that [plaintiff's] mother had gestational diabetes, which is often ... followed by the birth of a large baby," and which, accordingly, might alert medical providers to the risk of an Erb's Palsy birth (Levine Affid., at 5). Plaintiff's mother indicated at her deposition that she had had some blood tests as part of her prenatal care (*see* Rodriguez EBT, at 17). Although plaintiff's mother also stated that she had never suffered from diabetes (*see id.* at 12), the apparent absence of any prenatal blood test records from the medical records reviewed by Dr. Howard raises an issue of fact as to whether the records upon which he based his opinion -- which were not certified or authenticated -- were complete.

Dr. Levine also opined to the effect: that it appeared that plaintiff was delivered while her mother was in a regular hospital bed; that, under normal circumstances, a mother was placed in stirrups in preparation for delivery; and that the hospital employees deviated from good and accepted obstetrical care by delivering plaintiff while her mother was in a regular hospital bed rather than in a birthing bed (*see* Levine Affid., at 4). Dr. Levine asserted that plaintiff's delivery in a regular bed rather than a birthing bed made it impossible for the hospital's employees to effect a "controlled vaginal delivery," and to utilize then-standard procedures, "such as the McRoberts and Woods Maneuvers," to relieve the impacted shoulder condition, or dystocia, which caused plaintiff's Erb's

Palsy (*see id.*).

Dr. Howard opined in his affirmation that, while plaintiff's mother was in a "standard bed" at the time when plaintiff was delivered, this was "standard for a laboring patient and was not a departure [from] the [accepted] standard of care" (Howard Affirm., ¶ 4). However, the conflicting medical opinions of Drs. Howard and Levine raise issues of fact, precluding summary judgment in the HH&M Defendants' favor, as to the completeness of the uncertified and unauthenticated medical records which were the basis of Dr. Howard's opinion, as to what the accepted standard of obstetrical care was in 1977, and as to whether the hospital's employees deviated from that standard of care, and caused plaintiff's Erb's Palsy by, inter alia, placing plaintiff's mother in a standard hospital bed rather than a birthing bed for plaintiff's delivery (*see e.g. Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623, 624 [2d Dept 2003]).

In their motion, HH&M, Honschke and Marchelos argued, additionally, that plaintiff's legal malpractice claims should be dismissed: (1) as against Marchelos, in his individual capacity, because he did not become involved in working on the Med Mal Action until late 1995, by which time the Med Mal Action was already nonviable, or dead, and nothing could have been done to resurrect or revive that action; and (2) as against both Marchelos, individually, and the Handwerker Firm, because Marchelos's actions in representing plaintiff were entirely reasonable -- inasmuch as he took reasonable steps to investigate the Med Mal Action, and to attempt to prosecute the action, and it was reasonable for him to believe that there was nothing further he could do to pursue prosecution of the action -- and such reasonable attorney conduct is not actionable as malpractice.

However, HH&M, Honschke and Marchelos did not establish their entitlement to dismissal of plaintiff's claims as against Marchelos or the Handwerker Firm on either of the foregoing grounds. First, they failed to establish that the Med Mal Action was, in fact, already nonviable in 1995, such that nothing could have been done by Marchelos to revive it. As previously noted, the Appellate Division observed, upon considering the facts and procedural history of this action, that:

> in 1994 and 1995, when ... defendant [HH&M] ... [was] representing plaintiff, the medical malpractice action apparently was still viable. Since the action was

> commenced before July 1, 1992, an application for an order of filing nunc pro tunc made two or three years later, in 1994 or 1995, likely would have been granted, pursuant to the 1991 version of CPLR 306-a.

(*Gotay v Breitbart*, 14 AD3d at 454.) HH&M, Honschke and Marchelos, in their motion, failed to establish to the preclusion of any triable issue of fact, that an application for an order of filing nunc pro tunc of the summons and complaint in the Med Mal Action, made in 1995, would have been denied, or that the Med Mal Action was, in fact, already irrevocably and irretrievably nonviable at that time.

Secondly, HH&M, Honschke and Marchelos failed to establish that Marchelos's actions in investigating and attempting to prosecute the Med Mal Action were entirely reasonable, or that it was reasonable for him to believe that there was nothing further that he could do to pursue prosecution of that action, beyond what he had done, such that his conduct is not actionable as malpractice. HH&M, Honschke and Marchelos did not establish that Marchelos acted reasonably insofar as he: (1) made assumptions as to the status, and viability or nonviability, of the Med Mal Action based upon Bower & Gardner's archiving of their file for the action, without taking independent steps to confirm the actual status of the action; and (2) did not act more quickly to confirm the actual status of the action, and to take the necessary action to attempt to revive it, at the time when such efforts would have been most likely to succeed.

Indeed, as previously set forth, Marchelos testified at his deposition to the effect: that he did not assume, from Bower & Gardner's archiving of their file for the Med Mal Action, that there was nothing more for him to do in connection with that action; that he asked Kabel to see if she could obtain the file, so that he could better determine the actual status of the action and whether the action might be revived; and that he never obtained the file from Kabel, or took other further steps to ascertain the actual status of the Med Mal Action because, before he got around to doing so, the Handwerker Firm partnership was dissolved. Thus, Marchelos himself concededly did not believe that there was nothing further that he could have done, beyond what he had done, to attempt to prosecute the Med Mal Action. Rather, Marchelos planned to take further actions to ascertain the

actual status of the Med Mal Action, and he had still not taken those actions as of November 1998, when the Handwerker Firm partnership was dissolved. Given those circumstances, HH&M, Honschke and Marchelos failed to establish that Marchelos's or the Handwerker Firm's conduct did not, as a matter of law, constitute malpractice.

HH&M, Honschke and Marchelos also argued, in their motion, that plaintiff's legal malpractice claims should be dismissed as against Honschke, in his individual capacity, because he was merely an "innocent partner" who personally rendered no services to plaintiff or her parents, and, therefore, could not have rendered any services which constituted legal malpractice. HH&M, Honschke and Marchelos asserted that an "innocent partner" can only be held liable for the acts of a partnership, or of the partnership's other partners, if the partnership does not have sufficient assets to satisfy the liability incurred as a result of those acts. They asserted, further, that more than enough assets were available to cover any liability of the Handwerker Firm and its partners other than Honschke, because the partnership maintained adequate insurance to cover any such liability.

However, it is only when a plaintiff names the individual partners of a partnership as defendants on a claim -- and does not, in addition, name the partnership as a defendant -- that the plaintiff is required to show that pursuing the claim against the partnership would be futile, due to the partnership's insolvency or inability to pay, before the plaintiff is permitted to reach the assets of an individual partner (*see National Union Fire Ins. Co. of Pittsburgh, Pa. v Robert Christopher Assoc.*, 257 AD2d 1, 13 [1st Dept 1999]). Here, because plaintiff "joined the partnership as a defendant, plaintiff was not required to allege insufficiency of partnership assets to hold the individual partners jointly and severally liable" (*Sylvan Lawrence Co. v 180 Realty Co.*, 268 AD2d 238, 239 [1st Dept 2000]).

Plaintiff's cross motion for summary judgment -- deeming that, for purposes of this action, the medical malpractice which was alleged in the Med Mal Action be admitted -- was untimely, and must, therefore, be denied. CPLR 3212 (a) provides that "the court may set a deadline after which no [motion for summary judgment] may be made, such date being no earlier than thirty days after

the filing of the note of issue." The note of issue in this action was filed on October 31, 2005, and this court, by order dated December 1, 2005, directed that any motion for summary judgment be made not later than 60 days following completion of the last independent medical examination (*see* Furman Reply Affirm., Ex. 5). It appears that the last independent medical examination of plaintiff occurred on December 23, 2005, such that a summary judgment motion, in order to be timely, had to be made not later than 60 days thereafter, i.e., by February 21, 2006. Inasmuch as plaintiff failed to cross-move until after that date, and offered no reasonable excuse for her delay, her cross motion is denied (*see e.g. Cabibel v XYZ Assoc., L.P.*, 36 AD3d 498, 498 [1st Dept 2007]; *Berjarano v City of New York*, 18 AD3d 681, 682 [2d Dept 2005]).

However, denial of plaintiff's cross motion would be required even assuming, arguendo, that the cross motion had been timely made. Upon its review of this court's Prior Order, the Appellate Division directed that, "if in further proceedings herein plaintiff should be unable to establish any element of the underlying medical malpractice action as a direct consequence of defendants' delay and inaction, such element shall be deemed admitted" (*Gotay v Breitbart*, 14 AD3d at 455). Plaintiff's cross motion asserted that she was entitled to summary judgment deeming the medical malpractice which was alleged in the Med Mal Action to be admitted, in accordance with the Appellate Division's directive, inasmuch as she would be unable to establish the medical malpractice because of the HH&M Defendants' negligence in failing to assemble medical records which were complete, and certified or authenticated, in a form admissible at trial.

However, the Appellate Division directed that any element of the underlying medical malpractice action should be deemed admitted only "if in further proceedings herein plaintiff should be unable to establish [such] element ... as a direct consequence of defendants' delay and inaction" (*id.*). Thus, the Appellate Division clearly contemplated that, in order to avail herself of the benefit of its directive, plaintiff would first be required to expend some degree of effort to develop evidence establishing that the underlying medical malpractice could not be proven, and that her inability to prove the medical malpractice was caused by defendants' delay and inaction. Plaintiff failed to

demonstrate that she had expended any such effort. Plaintiff did not claim, for example, to have made any attempt: to authenticate the medical records which were in her possession; to discover whether any additional medical records pertaining to her delivery did, in fact, ever exist; to adduce any evidence proving that the medical records in her possession were incomplete; to discover what prenatal tests the hospital performed and procedures the hospital followed at the time of plaintiff's birth; or to obtain information concerning, or depose, any of the hospital employees who were involved in her delivery. Accordingly, inasmuch as plaintiff did not demonstrate "in further proceedings" that she was unable to establish any element of the underlying medical malpractice as a direct consequence of the HH&M Defendants' delay and inaction, she failed to establish that she was entitled to avail herself of the benefit of the Appellate Division's directive.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff's motion for reargument is granted, but only to the extent that so much of this court's decision and order dated January 18, 2007 as granted the motions for summary judgment by defendants Handwerker, Honschke, and Marchelos (a partnership), Neil Honschke and Steve Marchelos (sequence number 004) and defendant Michael Handwerker (sequence number 005), and denied plaintiff's cross motion for summary judgment (sequence number 006), is recalled and vacated, and this decision and order is substituted therefore; and it is further

ORDERED that, upon reargument, the motions for summary judgment by defendants Handwerker, Honschke, and Marchelos (a partnership), Neil Honschke and Steve Marchelos (sequence number 004) and by defendant Michael Handwerker (sequence number 005), and plaintiff's cross motion for summary judgment (sequence number 006), are all denied in their entirety.

Dated: July 16, 2007

ENTER:

J.S.C.