

Marte v Graber

2007 NY Slip Op 32506(U)

August 8, 2007

Supreme Court, New York County

Docket Number: 0402200/2005

Judge: Barbara Kapnick

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. **BARBARA R. KAPNICK**

PART 12

AMIN MARTE

Justice

INDEX NO. 402200/05

MOTION DATE _____

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

- v -

SANDRA GRABER

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

FILED

AUG 14 2007

NEW YORK COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED:

Dated: 8/8/07

Check one:

FINAL DISPOSITION

NON-FINAL DISPOSITION

BARBARA R. KAPNICK
J.S.C.

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 12

-----X
AMIN MARTE,

Plaintiff,

-against-

SANDRA GRABER, as Voluntary Administrator
of the Estate of HERMAN I. GRABER,
deceased,

Defendant.

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER

Index No. 402200/05
Motion Seq. No. 004

FILED
AUG 14 2007
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Amin Marte, appearing pro se, commenced this action against Herman I. Graber, Esq., an attorney who plaintiff retained to handle the appeal of his conviction after a jury trial for assault in the first degree and criminal use of a firearm in the second degree. Mr. Graber died on April 2, 2005.

Plaintiff's initial Complaint, which was filed on July 6, 2005 but never served, sought to recover compensatory and punitive damages against Mr. Graber in the sum of \$250,000 for 'breach of fiduciary contract' and the sum of \$8,200 for 'quantum meruit to recover for legal services not rendered'.

Plaintiff thereafter submitted an Order to Show Cause seeking a stay of the action pending his ascertaining the identity of a representative for the estate and the substitution of the estate in

the caption. In lieu of signing the Order to Show Cause, this Court issued an Ex-Parte Order on October 28, 2005 extending plaintiff's time to serve the Summons and Complaint for a period of 120 days commencing November 3, 2005.

This Court then issued a second Ex-Parte Order on March 9, 2006, again extending plaintiff's time to serve the Summons and Complaint through and including July 3, 2006.

Plaintiff thereafter obtained counsel who "filed" a Verified Amended Summons and Complaint as of right, pursuant to CPLR § 3025(a),¹ which seeks a judgment solely in the amount of \$8,500, together with interest from January 2, 2001, and costs and disbursements.

The Verified Amended Complaint alleges that Mr. Graber was paid a total of \$8,500 in fees "for and on behalf of the plaintiff" "[i]n consideration of the legal services to be rendered", but "failed and refused substantially to perform such contemplated legal services." The Verified Amended Complaint further alleges that plaintiff "has duly demanded the return of the said sum, and the same has been refused."

¹ The Verified Amended Summons and Complaint were annexed to plaintiff's prior motion but were apparently not filed separately with the County Clerk.

Defendant previously moved (under motion sequence number 002) for an order dismissing this action and awarding sanctions on the grounds that: (i) this action is barred by the three-year statute of limitations applicable to claims for legal malpractice; (ii) the Complaint does not state a claim for legal malpractice; (iii) this Court lacks jurisdiction because the summons filed by plaintiff pro se was defective; and (iv) plaintiff lacks standing to bring this lawsuit because there is no claim that any of the monies were paid out of his funds.

Plaintiff opposed the motion and moved (under motion sequence number 003) for an order: (a) pursuant to CPLR § 1021 substituting Sandra Graber, voluntary administrator, as defendant in place and stead of Herman I. Graber, deceased; and (b) pursuant to CPLR § 305(c) granting leave to amend the summons accordingly.

By Decision/Order dated March 28, 2007, this Court:

(a) granted the motion by plaintiff for permission to substitute Sandra Graber, voluntary administrator, as defendant in place and stead of Herman I. Graber, deceased and amended the caption accordingly;

(b) denied that portion of defendant's motion seeking to dismiss plaintiff's action based on the statute of limitations applicable to legal malpractice, based on this Court's finding that the Verified Amended Complaint states a claim for breach of

decedent's duty to provide services under a contract, which is governed by a six-year statute of limitations;

(c) denied that portion of defendant's motion seeking to dismiss the Complaint for failure to sufficiently plead a claim for legal malpractice, based on this Court's finding that plaintiff does not claim that the attorney was negligent in his representation, but rather that he retained monies that were paid pursuant to a contract for services that were never rendered;

(d) denied that portion of defendant's motion seeking to dismiss this action for lack of jurisdiction based on this Court's finding that none of the defects in the Summons identified by defendant were jurisdictional; and finally

(e) denied that portion of defendant's motion seeking to dismiss plaintiff's Complaint on the ground that he lacks standing, based on a finding that there was at least an issue of fact as to whether or not plaintiff paid a portion of the legal fees advanced to Mr. Graber from his own funds.

Defendant now moves for an order granting leave to reargue this Court's prior Decision/Order and, upon reargument, dismissing this action, on the grounds that this Court misapprehended that (i) the three year statute of limitations governs this case pursuant to CPLR § 214(6); and (ii) this Court lacks jurisdiction over the estate or the personal representative of the estate because the action was commenced against the decedent.

CPLR § 214(6) provides that "an action to recover damages for malpractice, other than medical, dental or podiatric malpractice, regardless of whether the underlying theory is based in contract or tort" is subject to a three-year statute of limitations.

The Legislature specifically amended this statute in 1996 to counteract the effect of decisions by the Court of Appeals (see, e.g., Sears, Roebuck & Co. v. Enco Assoc., Inc., 43 N.Y.2d 389 [1977]) that "'abrogat[ed] and circumvent[ed] the original legislative intent' by allowing actions that were technically malpractice actions to proceed under a six-year contract statute of limitations (Revised Assembly Mem. in Support, Bill Jacket, L. 1996, ch. 623)." R.M. Kliment & Frances Halsband, Architects v. McKinsey & Co., 3 N.Y.3d 538, 541 (2004).

Thus, in cases where "there is no allegation of any breach of contract separate and distinct from the alleged legal malpractice", the plaintiff's claims are barred by the three-year statute of limitations set forth in CPLR § 214(6), as amended. 6645 Owners Corp. v. GMO Realty Corp., 306 A.D.2d 97, 98 (1st Dep't 2003). See also, Amodeo v. Kolodny, P.C., 35 A.D.3d 773 (2nd Dep't 2006); Mitschele v. Schultz, 36 A.D.3d 249 (1st Dep't 2006).

Where, however, the claims for breach of contract and legal malpractice are not duplicative (see, e.g., Sarasota, Inc. v. Kurzman & Eisenberg, LLP, 28 A.D.3d 237 [1st Dep't 2006]), the

contractual claim may still be subject to the six-year statute of limitations.

Thus, in Akinrosotu v. Kellman, 289 A.D.2d 112, 113 (1st Dep't 2001), the Appellate Division, First Department found that the plaintiff was not "limited to a cause of action for legal malpractice and its concomitant three-year Statute of Limitations", finding that two of plaintiff's causes of action specifically alleged causes of action for money had and received (i.e., a retainer fee) and for breach of contract, "both of which are governed by a six-year Statute of Limitations."

As this Court noted in its prior Decision, plaintiff's Verified Amended Complaint does not allege that the decedent committed malpractice, but rather that Mr. Graber received a retainer fee in consideration of services he did not provide and then refused plaintiff's demand to return the fee.

Therefore, this Court adheres to its prior holding that the three-year Statute of Limitations set forth in CPLR § 214(6) does not apply to the instant action.


As to defendant's argument that this Court lacks jurisdiction over Sandra Graber, it appears that Mrs. Graber, as voluntary administrator of the estate, was served with a copy of the Amended Complaint by substituted service on or about June 20, 2006, and

that plaintiff simultaneously moved to substitute Mrs. Graber, as voluntary administrator, as the named defendant in this case in place and stead of Mr. Graber who was deceased, and to amend the caption of the Summons accordingly, as permitted under CPLR § 305(c). Therefore, it appears that jurisdiction was, in fact, obtained over Mrs. Graber as voluntary administrator of the estate.

Accordingly, upon reargument, this Court adheres to its prior Decision/Order.

This constitutes the decision and order of this Court.

Date: August 8, 2007



Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.

FILED
AUG 14 2007
NEW YORK
COUNTY CLERK'S OFFICE