

**Friedman and Mahdavian, P.C. v Kumar**

2007 NY Slip Op 33429(U)

October 16, 2007

Supreme Court, New York County

Docket Number: 0100362/2007

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
HON. JUDITH J. GISCHE

PRESENT: \_\_\_\_\_

PART 10

Index Number : 100362/2007  
FRIEDMAN & MAHDAVIAN

vs  
KUMAR, SUDARSHAN

Sequence Number : 001

DISMISS

X NO. \_\_\_\_\_  
ON DATE \_\_\_\_\_  
N SEQ. NO. \_\_\_\_\_  
V CAL. NO. \_\_\_\_\_

The following numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
OCT 23 2007

NEW YORK  
COUNTY CLERK'S OFFICE

~~MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION~~

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION and appearance scheduled for 11/29/07 @ 9:30 am Part 10, 80 Centre, Rm 122

Dated: OCT 16 2007

HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10**

-----X

Friedman and Mahdavian, P.C.,

Plaintiff

-against-

Sudarshan Kumar, M.D.,

Defendant.

**DECISION/ORDER**

Index No.: 100362/07

Seq. No.: 001

Present:

Hon. Judith J. Gische

JSC

-----X

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

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**Papers**

**Numbered**

F&M n/m to dismiss cc's WTF affid, exhs .....	1
SK affid in opp w/exhs .....	2
F&M reply w/AMF affirm, exhs .....	3

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*Upon the foregoing papers the court's decision is as follows:*

*GISCHE, J.;*

This is an action by plaintiff Friedman and Mahdavian, P.C. ("law firm") to enforce payment of its legal fees under its retainer agreement dated March 7, 2003 ("retainer agreement") with its former client, defendant Sudarshan Kumar, M.D. ("Dr. Kumar"). Issue has been joined and Dr. Kumar has asserted counterclaims for malpractice which plaintiff now moves to dismiss on the basis that they are time barred and they fail to state a cause of action. CPLR §§ 3211 (a) (5) and (7). The motion is

opposed by Dr. Kumar who is self represented.

Although issue has been joined, plaintiff raised in reply the affirmative defense that the counterclaims fail to state a cause of action. Since this motion attacks the sufficiency of the pleadings by Dr. Kumar, his answer with counterclaims is to be liberally construed. The facts, as he alleges them to be, will be accepted as true and afforded the benefit of every possible favorable inference (EBC I, Inc v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]; Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 [2001]; P.T. Bank Central Asia v ABN AMRO Bank NV, 301 AD2d 373, 375-6 [1<sup>st</sup> Dept 2003]), unless clearly contradicted by evidence submitted by the moving party in connection with the motion (see Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1<sup>st</sup> Dept 2006]).

Since, in the alternative, plaintiff claims that Dr. Kumar's counterclaims are time barred, the court will first consider whether defendant's alleged facts support a timely action for legal malpractice. The statute of limitations applicable to a legal malpractice cause of action is three years, accruing when the malpractice is committed. Shumsky v. Eisenstein, 96 N.Y.2d 164 (2001). Under certain circumstances, however, where there is a "mutual understanding of the need for further representation on the specific subject matter," the "doctrine of continuous representation" tolls the running of the statute of limitations until the ongoing representation is completed, Shumsky v. Eisenstein, 96 NY2d at 167. There is no "date of discovery rule" with respect to a claim for legal malpractice. Thus, the claim of professional malpractice accrues, for limitations purposes, when malpractice is committed, not when client discovers it. McCoy v.

Feinman, 99 N.Y.2d 295 (2002); Shumsky v. Eisenstein, *supra* at 166.

**Facts alleged**

Defendant alleges the following facts in support of his legal malpractice counterclaims:

Dr. Kumar hired plaintiff to represent him before the State Board for Professional Medical Conduct ("OPMC") on charges related to his admitted alcohol dependency and related charges. Dr. Kumar contends he was "forced" to retain this particular firm by Mr. Nielsen, the case manager assigned to monitor his performance by the OPMC". Dr. Kumar contends he did not want an attorney at all, but admits he signed the retainer with this lawyer and that it provided plaintiff would "act as your counsel in connection with the anticipated investigation being conducted by the Office of Professional Medical Conduct ("OPMC") . . ." The retainer also provides that if no settlement is reached, then "[w]e shall represent you at any hearing actually convened."

The hearing before took place over the course of several days, during which William T. Friedman, Esq. ("Mr. Friedman"), a named partner of the plaintiff law firm, represented Dr. Kumar. With some exceptions, most of the "specifications" or charges against him were sustained and the penalty imposed was a 3-year suspension which was stayed, provided he comply with the terms of his 3-year probation. The decision of the Hearing Committee, Order No. 04-27, is dated February 5, 2004 ("order"). It was sent to his attorney and to Dr. Kumar by certified mail, return receipt requested, on February 9, 2004, making it effective 7 days thereafter, as per the Public Health Law, PHL §230 (10) (I). Enclosed was a form he could use to file an appeal with the

Administrative Review Board. It had to be filed "within fourteen (14) days of service and receipt" of the Order.

In support of his counterclaims, and in his answer, Dr. Kumar contends that plaintiff committed legal malpractice because he was misrepresented "in 2003," he lost invaluable time and opportunity "in 2003," he was caused to suffer "pain and suffering," and he could have done a better job of defending himself at the hearing "in 2003."

In his supporting affidavit, Dr. Kumar offers these additional facts: that the attorney only conferred with him for one hour when he was retained, he was not completely apprised of his rights and responsibilities as a client, his attorney regularly communicated with his case manager - something Dr. Kumar found suspicious - and his attorney manipulated him so that he felt like a "puppet." All these events, according to Dr. Kumar, took place in 2003. Dr. Kumar also states he was misrepresented at the hearing, he lost time and opportunity, he is still "undergoing pain and suffering because of the plaintiffs' actions," he could have done a better job defending himself, and he was overcharged.

In support of its motion to dismiss, plaintiff argues that Dr. Kumar's counterclaims are time barred because the hearing and other events alleged took place in 2003. Mr. Friedman states that December 2003, the attorney/ client relationship had disintegrated, prompting him to write a letter to his client on December 16, 2003 stating that he was not cooperating with his case manager or following the committee's instructions, and this would be reported to OPMC. In the letter, Mr. Friedman also wrote:

"[w]hile you fail to respond to correspondence from me, I have the responsibility of seeing this matter through to the end. I will continue as counsel through receipt of the decision in your case which should be forthcoming during the month of January 2004, following which I will take such action as is necessary to recover the fees due to me."

In a separate letter, also dated December 16, 2003, Mr. Friedman wrote:

"[a]fter reviewing your absolute refusal to respond to any communication from my office, as well as your absolute refusal to reduce your outstanding balance, I must consider whether you remain my client in your mind. . . . obviously I have [not] communicated your disregard to my communications to your case manager at CPH, but he does know that I have requested that you communicate with CPH [directly] and you have failed to do that as well. Please advise whether you remain my client within the next five business days."

By the time these letters were sent, the hearing had been completed. The last day of the hearing was September 12, 2003. Consequently, the plaintiff claims that because the attorney/ client relationship had been ended by plaintiff by December 2003, and it was irretrievably broken due to their client's refusal to communicate with them, this action for legal malpractice is time barred because defendant did not assert his claim by December 2006.

Alternatively, plaintiff argues the counterclaims are without merit, failing to state a cause of action, because defendant does not present facts that "but for" the firm's negligence, he would have obtained a more favorable result at the conclusion of the hearing.

### **Discussion**

At the outset, the court must deny plaintiff's motion to dismiss the counterclaims on the basis that they are time barred. Although the counterclaims are not artfully

crafted, and Dr. Kumar does refer primarily to events that transpired in 2003, his overall contention is that he was poorly represented in connection with the hearing which resulted in the Order dated February 5, 2007. Affording his pleading every favorable inference, as the court must, it does not appear, at this stage, that his claim is timely because the date when the firm no longer represented Dr. Kumar has not yet been decided. The firm's letter in December 2003 is followed by another letter in February 2004 from the firm stating "I want to make sure you understand that my firm does not represent you with regard to the appeal by the Department of Health in the result of the hearing. . ." There is also a February 2004 letter from the Department of Health to Dr. Kumar stating that "it is our understanding that you are currently unrepresented. . ." Therefore, the issues of when representation actually ended is factually disputed.

Turning to the sufficiency of the pleadings, and even accepting the defendant's facts as true, it does not appear that defendant has stated a cause of action for legal malpractice/ negligent misrepresentation. In an action to recover damages for legal malpractice, the client "must demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages." Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, 8 N.Y.3d 438 (2007) [internal citations and quotations omitted]. To establish causation, the client must show that s/he would have prevailed in the underlying action or would not have incurred any damages, "but for" the lawyer's negligence. Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, supra.

Although Dr. Kumar states he could have done a better job than the law firm, or

that he paid too much for the result achieved, Dr. Kumar does not state any facts about what he believes the law firm did wrong, or what kind of a better result he expected, than ultimately was achieved. Dr. Kumar fails to address even how the results achieved by the law firm are unfavorable or unsatisfactory, particularly in light of his own admission, that he struggled for years with alcohol abuse. This dependency ultimately led to his doctor privileges being revoked while enlisted in the United States Air Force. Dr. Kumar concedes he did not report this on an employment application. Thus, regardless of his motive for not doing so, and though he claims it was an innocent mistake, this was a specification or "charge" against him. The omission or concealment of this information formed the basis, in part, for his discipline which resulted in a 3 year stayed suspension, conditioned on his complying with certain probation requirements. The Department of Health had sought an outright suspension of his license which would have prevented Dr. Kumar from working. It appealed the stayed suspension, but the review board affirmed the decision to stay Dr. Kumar's suspension, although it increased the period to 5 years. Notably, the appeal was by the Commissioner of Health, not by Dr. Kumar, and his submission to the review board, which he did *pro se* makes no mention of any of his present claim, that he was poorly represented in connection with the underlying hearing.

Other statements by Dr. Kumar, about Mr. Friedman's lack of "enthusiasm" or that he felt manipulated, or even that his attorney was too friendly with his adversaries, are mere expressions of dissatisfaction. They do not set forth a cause of action for legal malpractice in the absence of facts by plaintiff supporting any departure from the skill and knowledge of other similarly situated attorneys in the community.

For all the reasons, plaintiff's motion to dismiss the defendant's counterclaim must be, and hereby is, granted on the basis that defendant has failed to state a cause of action, even though his counterclaim would not otherwise be untimely. The counterclaim is, therefore, severed and dismissed.

### **Conclusion**

Plaintiff's motion for an order dismissing defendant's counterclaims against it for legal malpractice is granted pursuant to CPLR § 3211 (a) (7) as it fails to state a cause of action, even though the counterclaim is not time barred.


**A status conference is already scheduled in this case for November 29, 2007 at 9:30 a.m.**

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This shall constitute the decision and order of the court.

Dated:           New York, New York  
                  October 16, 2007

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC

**FILED**  
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