

Boslow Family L.P. v Kaplan & Kaplan, PLLC

2007 NY Slip Op 33554(U)

October 24, 2007

Supreme Court, New York County

Docket Number: 0110731/2003

Judge: Marcy S. Friedman

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: MARCY S. FRIEDMAN

PART 57

Index Number : 110731/2003

BOSLOW FAMILY

INDEX NO. _____

vs
KAPLAN & KAPLAN, PLLC

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

DISMISS ACTION

MOTION CAL. NO. _____

_____ were read on this motion to/for Sunny judgment

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

PAPERS NUMBERED

Answering Affidavits -- Exhibits Cross-Motion

1

Replying Affidavits

2

Memos of Law

M1, M2, M3, M4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion ~~is~~ and cross-motion are

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

FILED

NOV 01 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10-24-07

MARCY S. FRIEDMAN 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
NEW YORK COUNTY -- PART 57

BOSLOW FAMILY LIMITED
PARTNERSHIP and ALVIN BOSLOW,

Plaintiff(s),

against

KAPLAN & KAPLAN, PLLC, and
DAVID H. KAPLAN,

Defendant(s).

Index No.: 110731/2003

DECISION/ORDER

FILED
NOV 01 2007
NEW YORK
COUNTY CLERK'S OFFICE

Present: HON. MARCY FRIEDMAN
Justice, Supreme Court

In this action, plaintiffs sue to recover damages for defendants' alleged failure to perform legal services. Defendants move for summary judgment dismissing the complaint on the grounds that the plaintiffs' claims are time-barred under CPLR 214(6). Plaintiffs cross-move for summary judgment dismissing defendants' second affirmative defense based on the statute of limitations.

It is undisputed that plaintiffs retained defendant attorneys in June 1997 to form a limited partnership on behalf of Alvin Boslow and his family, to be known as the Boslow Family Limited Partnership. The complaint alleges that defendants failed to file the Certificate of Limited Partnership with the Department of State or publish a required notice of the formation of the limited partnership. Plaintiffs further allege that as a consequence of defendants' failures to perform these tasks, the partnership was not validly formed, a fact which plaintiffs discovered only when a lawsuit they commenced in 2002 was initially dismissed on the basis that it was not a legal entity entitled to sue.

The complaint asserts a single cause of action for breach of contract, based on defendants' failure to "properly form the Boslow Partnership." (Complaint, ¶¶ 27-29.) Defendants contend that, even accepting the allegations as true, the complaint sounds in malpractice and accordingly is barred by CPLR 214(6), the statute of limitations for legal malpractice claims, because defendants' representation of plaintiffs ended in June 1997, more than three years prior to commencement of the instant action in June 2003. Plaintiffs argue that their claim is timely because the six-year statute of limitations for breach of contract applies.

CPLR 214(6), as amended effective September 4, 1996, provides that an action to recover damages for legal malpractice must be commenced within three years "regardless of whether the underlying theory is based in contract or tort." "The Legislature specifically amended this statute in 1996 to counteract the effect of decisions by this Court 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)." (Matter of Kliment v McKinsey, 3 NY3d 538, 541 [2004].) The court in Kliment further noted that "[t]he legislative history makes clear that 'where the underlying complaint is one which essentially claims that there was a failure to utilize reasonable care or where acts of omission or negligence are alleged or claimed, the statute of limitations shall be three years if the case comes within the purview of CPLR Section 214 (6), regardless of whether the theory is based in tort or in a breach of contract' (Revised Assembly Mem in Support, Bill Jacket, L 1996, ch 623)." (Id.)

While there is authority that a breach of contract claim against an attorney may be based on a failure to achieve a particular, "bargained-for" result (see Matter of Kliment, 3 NY3d at 542-

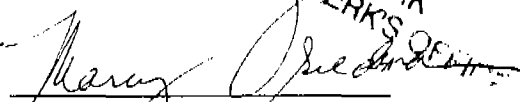
543; Sarasota, Inc. v Kurzman & Eisenberg, LLP, 28 AD3d 237 [1st Dept 2006]), plaintiffs submit nothing here to show that there was an express agreement to achieve a particular result. Notably, plaintiffs do not submit the retainer agreement, or any other evidence that their agreement with defendants concerned such a particular promise. (Compare Sarasota, Inc., 28 AD3d 237, affg Sarasota, Inc v Kurzman & Eisenberg, LLP, Sup. Ct., New York County, Dec. 30, 2004, Shafer, J., Index No. 116339/02 [promise to enter judgment might be sufficiently particular].) The allegations here are that defendants failed to take all the necessary steps to complete the process of forming a valid partnership. Thus, plaintiffs' claim is essentially that defendants "failed to perform services in a professional, non-negligent manner" by neglecting to file the certificate of partnership or publish the notice of formation of the partnership. (See Matter of Kliment, 3 NY3d at 543.) Plaintiffs submit no evidence to raise a triable issue of fact as to whether defendants "agree[d] to perform a service above or beyond that which [they] might be expected to accomplish using due care even in the absence of the specific term in the agreement." (Id.) The claim therefore is barred by CPLR 214(6).

It is accordingly ORDERED that the cross-motion is denied and the motion is granted to the extent that the complaint is dismissed, and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: New York, New York
October 24, 2007

FILED
NOV 01 2007
NEW YORK
COUNTY CLERK'S OFFICE


MARCY FRIEDMAN, J.S.C.