

Patton v Honig Mongioi Monahan & Sklavos, LLP

2007 NY Slip Op 33782(U)

November 15, 2007

Supreme Court, Nassau County

Docket Number: 4364-07/

Judge: Geoffrey J. O'Connell

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

SUSAN PATTON,

Plaintiff(s),

INDEX No. 4364/07

-against-

MOTION DATE: 10/5/07

HONIG MONGIOI MONAHAN & SKLAVOS, LLP
and MARY E. MONGIOI, Esq.,

Defendant(s).

MOTION SEQ. No. 1-MD
2-MG

The following papers read on this motion:

Notice of Motion/Affirmation/Exhibits

Notice of Cross Motion/Affirmation/Affidavit/Exhibits

The defendants seek an Order granting them summary judgment pursuant to CPLR § 3211. Statute of Limitations for a legal malpractice is three years. (CPLR § 214(6)). This action was commenced on March 12, 2007 with the filing of a Summons with Notice. Plaintiff subsequently served a verified complaint on June 14, 2007.

In the Complaint plaintiff alleges that she retained HONIG and MONGIOI on or about June 11, 2003 to represent her in her divorce action. She alleges that the defendants failed to seek the necessary discovery nor did they advise her that she would be waiving one half of the profit sharing funds earned by her husband, which was valued at \$125,000.00. In a second cause of action plaintiff alleges that the defendants failed to ensure that the plaintiff's husband provide a portion of his Social Security Benefits to the plaintiff for the support of their two children. She seeks \$28,500.00 on the second cause of action.

Defendant MARY MONGIOI argues that plaintiff's claim for legal malpractice accrued in 2003 as part of defendant's predecessor's representation of her in her divorce action. The defendant claims that she

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was hired by the plaintiff on June 11, 2003 to represent her in the divorce. The defendants claim that the cause of action occurred when the plaintiff entered a settlement agreement with her husband on September 22, 2003. MONGIOI claims that she did not provide any services to the plaintiff after December, 2003, and in fact, last billed the plaintiff in February, 2004.

The defendants further note that the named defendant law firm was dissolved in May/June 2003 . MONGIOI states that the Settlement Agreement was executed by the plaintiff against the defendant's advice and contains a clause stating that is in the agreement. Specifically, the agreement provides that "... parties hereby acknowledge that they both have waived their rights to financial discovery before entering this agreement, the wife having done so against the advice of her counsel" (Motion Exh. D) The agreement further states that the parties, including the plaintiff, acknowledged that it was a fair agreement, that the terms had been fully explained to them, and it was not the result of any fraud, duress or undue influence. (Motion Exh. D)

The defendants argue that even though the plaintiff alleges that services were rendered after that date through when the judgment of divorce was rendered, September 20, 2006, there is no evidence to support that claim. The defendants contend that the plaintiff's cause of actions are time barred as the plaintiff executed the Separation Agreement on September 22, 2003. The applicable three year statute of limitations governing legal malpractice claims required, then, that the action be commenced prior to September 22, 2006.

The plaintiff alleges that the cause of action did not accrue until the Judgment of Divorce was signed in 2006, thus arguing that the action is not time barred. She argues that MONGIOI continuously represented her up to that time.

A cause of action for legal malpractice accrues when the malpractice is committed no matter when the client discovers it. *Shumsky v Eisenstein*, 96 NY2d 164, 166 (2001). However, the cause of action does not come into existence until all the facts necessary to secure relief, including injury, are present. *McCoy v Feinman*, 99 NY2d 295, 301 (2002); *Ackerman v Price Waterhouse*, 84 NY2d 535, 541 (2001). In the context of certain professions like medicine the coincidence of the malpractice and the injury is usually obvious. With other professions there may be an issue as to what injury gave rise to the cause of action for malpractice. In *Ackerman v Price Waterhouse* (84 NY2d 535, 541 (1994)) the plaintiff claimed that the cause of action for accountant malpractice accrued when Internal Revenue Service assessed deficiencies for tax returns which the defendant had prepared. The Court of Appeals held, however, that the cause of action

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accrued when the client received the accountant's work product. It reasoned that all of the facts necessary to the cause of action existed at that date even if the client was unaware of the malpractice or that she had been injured. In *McCoy v. Feinman* (99 NY2d 295 (2002)) the wife's attorney failed to assert a claim for preretirement death benefits and no such provision was included in the stipulation settling the action for divorce. When the former husband died prior to retirement, the former wife was denied any share in the death benefit. The Court of Appeals found that the cause of action accrued on the day of the stipulation or, at the latest, the date on which the judgment incorporating the stipulation was filed saying, "we find no reason that plaintiff's damages were not then sufficiently calculable to permit plaintiff to obtain prompt judicial redress." (*Id.* at 305).

Here, there is a question of whether there was an ascertainable injury at the time the Agreement was executed, thus the Court cannot determine as a matter of law, pre-answer and pre-exchange of discovery that there was no cause of action prior to the expiration of the statute of limitations. *See, Shumsky v. Eisenstein*, 96 NY2d 164, 166 (2001).

Defendant contends that the representation of plaintiff ceased after some work was performed on the file in December, 2003. She states that after that time, and a bill sent in February 2004 there was no further contact with plaintiff. Plaintiff argues that defendant's representation continued until the Divorce was signed.

The question whether a formal substitution is required to end the attorney-client relationship also arises in the context of the "continuous representation" doctrine, the equivalent in the legal malpractice sphere to the "continuous treatment" doctrine in medical malpractice. The tolling of the Statute of Limitations for continuous representation does not turn on the formalities surrounding the relationship, but rather upon the existence of "clear indicia of an ongoing, continuous, developing, and dependent relationship between the client and the attorney often involving an attempt by the attorney to rectify an alleged act of malpractice" *Muller v. Sturman*, 79 AD2d 482, 485 (4th Dept, 1981). Continuous representation terminates when it becomes manifest that the client has ceased to repose trust and confidence in the attorney even if the attorney's withdrawal as counsel has not been formally sanctioned and no other attorney undertakes the representation. *Aaron v. Roemer, Wallens & Mineaux*, 272 AD2d 752 (3d Dept, 2000). The continuous representation doctrine is meant to toll the Statute of Limitations for a legal malpractice claim only for the time were there is clear indicia of a continuing trust and confidence in the relationship between the parties. *Luk Lamellen U. Kupplungbau GmbH v. Lerner*, 166 AD2d 505 (2nd Dept. 1990).

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Thus, based on the proof presented the defendants' motion to dismiss the matter pursuant to CPLR 3211(a)(5) as time barred, and for failing to state a claim pursuant to CPLR § 3211(a)(7) is Denied as premature. The motion for summary judgment pursuant to CPLR § 3212 is also Denied, with leave to renew only after completion of all discovery.

Plaintiff's motion permitting her to amend her pleadings to add proposed defendants Alexander E. Sklavos, Esq. and Monahan & Sklavos, P.C. as parties to this action and amend the complaint to add claims against them, and to amend the caption accordingly, is Granted.

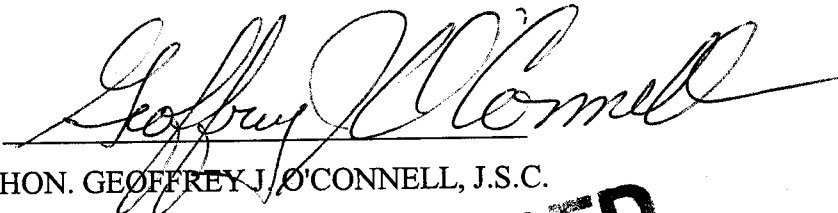
Plaintiff is directed to serve and file her proposed Amended Complaint within 20 days of the date of this Order.

A preliminary conference (22NYCRR 202.12) shall be held at the Preliminary Conference Desk, in the lower level of the Nassau County Supreme Court, on the 7th of February, 2008, at 9:30 a.m. This directive with respect to the date of the conference is subject to the right of the Clerk to fix an alternate date should scheduling require. Counsel for the movant shall serve a copy of this Order on all parties. A copy of the Order with affidavits of service shall be served on the DCM Clerk within seven (7) days after entry.

It is, SO ORDERED.

Dated:

Nov 15, 2007


HON. GEOFFREY J. O'CONNELL, J.S.C.

ENTERED

NOV 21 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE