

Byron Chem. Co., Inc. v Groman

2007 NY Slip Op 34035(U)

December 5, 2007

Supreme Court, Nassau County

Docket Number: 1302-06/

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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BYRON CHEMICAL COMPANY, INC.,
Plaintiff,

-against-

ROBERT H. GROMAN, ESQ., GROMAN, ROSS
& TISMAN, P.C., AND FORCHELLI, CURTO,
SCHWARTZ, MINEO, CARLINO & COHN, LLP
(as successor in interest to Groman, Ross & Tisman,
P.C.),

Defendants.

**MICHELE M. WOODARD,
J.S.C.**

TRIAL/IAS Part 18

Index No.: 21302/06

Motion Seq. Nos.:01,02 & 03

DECISION AND ORDER

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Plaintiff alleges that in 1993 it informed Groman that the corporation wished to have employment/shareholder agreements drawn up for two of its employees (the "1993 agreements"). Groman drafted the agreements in August and September of 1993. The agreements were signed in 1993. Plaintiff alleges Groman drafted the agreements incorrectly in that it directed that the employees were to get 100% each of the gross profits of plaintiff instead of 100% of the net or

post tax profits of plaintiff as a bonus. It is not refuted that the error was discovered by plaintiff in 1993 but never corrected despite plaintiff's admonition to Groman to take care of the problem. In 2006, in a court determination, one of the two employees was awarded 100% of the gross profits as per the uncorrected 1993 agreement. Plaintiff thus commenced this action against Groman and Forchelli as successor in interest to Groman in 2006. Groman and Forchelli state the statute of limitations for legal malpractice is three years from when the malpractice was committed, 1993. Plaintiff contends Groman was counsel to the plaintiff from 1970 until December, 2003 and that Groman provided legal analysis/input on the impact of the 1993 agreements in 2003. Plaintiff alleges continuous representation by Groman and Forchelli from 1993 until 2003. Plaintiff thus alleges its action is timely. The Court must disagree.

An action to recover damages for legal malpractice must be commenced within three (3) years from accrual (*Williams v Lindenberg*, 24 AD3d 434 [2d Dept 2005]). the action to recover for damages for legal malpractice accrues when the malpractice is committed (*Glamm v Allen*, 57 NY2d 87 [1982]) not when it is discovered (*Zorn v Gilbert*, 8 NY3d 933 [2007]). Here, the "clock" began to run in 1993.

As correctly noted by plaintiff, one of the predicates for tolling the statute of limitations for legal malpractice under the continuous representation doctrine is the client's continuing trust and confidence (*Piliero v Adler & Stavros*, 282 AD2d 511 [2d Dept 2001]). This is only one of the predicates.

However, for the exception of continuous representation doctrine to apply, for the purpose of tolling the limitations period for a legal malpractice action, its application is limited to instances in which the attorney's involvement in the case after the alleged malpractice is for

performance of the same or related services and not merely the continuation of the general professional relationship (*see Pellati v Lite & Lite*, 290 AD2d 544[2d Dept 2002]).

The continuous representation must be in connection with the same particular transaction which is the subject of the malpractice claim (*Parlato v Equitable Life Assurance Society*, 299 AD2d 108[1st Dept 2002]).

Thus, a legal malpractice claim may be tolled by a continuous representation doctrine only when the continuing representation pertains specifically to the matter in which the attorney committed the alleged malpractice (*Gravel v Cicola*, 297 AD2d 620[2d Dept 2002]).

The doctrine is not applicable to a client's continuing general relationship with a lawyer involving only routine contact for miscellaneous legal representation unrelated to the matter upon which the allegations of legal malpractice are predicated (*see Young v New York City Health & Hospitals Corp.*, 91 NY2d 291[1998]).

Thus, as noted, in the context of a legal malpractice action, the continuous representation doctrine tolls the Statute of Limitations only where the continuing representation pertains specifically to the matter in which the attorney committed the alleged malpractice (*Shumsky v Eisenstein*, 96 NY2d 164[2001]).

The continuous representation doctrine tolls the statute of limitations on legal malpractice claims where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim (*Town of Wallkill v Rosenstein*, 40 AD3d 972[2d Dept 2007]). Here, Robert Groman stated he did not review the 1993 agreements until 1993 (see Robert Groman's reply affidavit annexed to the Marian Rici affirmation dated September 6, 2007). There is no "mutuality" in this matter.

In order for the continuous representation doctrine to apply, it must be shown both that Groman continued to represent plaintiff within the limitations period and the representation was on the very matter that is the subject of the malpractice action (*Amendola v Kendzia*, 17 AD3d 1105[4th Dept 2005]), i.e., the 1993 agreements.

Here, the record shows a continuation of a general professional relationship and not an ongoing representation concerning the specific matters from which plaintiff's claim arose (*Lai v Gartlan*, 28 AD3d 263[1st Dept 2006]; *Dignelli v Berman*, 293 AD2d 565 [2d Dept 2002]; *Zaref v Berk & Michaels*, 192 AD2d 346[1st Dept 1993]).

Although the rule of continuous treatment was first applied in medical malpractice cases, its application has been held to be appropriate in actions relating to legal malpractice (*Glamm v Allen, supra*).

Continuous representation must be "continuous" and not intermittent (*see Davis v City of New York*, 38 NY2d 257[1975]). Thus, continuous representation was inapplicable in a legal malpractice action where the hiatus between the last representation and the plaintiff's final representation exceeded the Statute of Limitations (*see Curcio v Ippolito*, 97 AD2d 497[2d Dept 1983]). Here, the document in issue was prepared in 1993. The next time the document was discussed was in 2003. This far exceeds the three year Statute of Limitations. The 2003 general discussion at a board of directors meeting (see Exhibit F annexed to Lampert affirmation dated June 18, 2007) of the 1993 agreement does not revive the 1993 malpractice claim.

Hence, after the initial letter by plaintiff's president as to the net/gross problem, the issue died until 2003. The edict by the plaintiff's president to Groman to "fix the problem" allowed the clock to run. Groman continued to work as counsel to plaintiff, but the record is devoid of any

references to the problem until 2003. During that time, plaintiff and Groman had continued in a general professional (corporate?) counsel/client relationship (*Glamm v Allen, supra*).

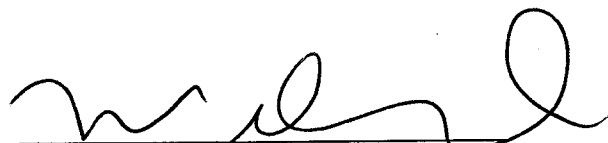
The burden of establishing continuous representation falls on the plaintiff (*Gravel v Cicola, supra*). Plaintiff must specifically aver facts in the complaint that support plaintiffs' allegation for the basis of the toll (*Zaref v Berk & Marshalls, P.C., supra*). Plaintiff has not met this burden.

As such, the motion by defendant Robert H. Groman, Esq., Groman, Ross & Tishman, P.C. (herein referred to as "Groman") to dismiss the complaint of Byron Chemical Company, Inc. (the "plaintiff"), pursuant to CPLR 3211(a)(5) on the grounds of the Statute of Limitations, is **Granted**. That branch of co-defendant Forchelli, Curto, Schwartz, Mineo, Carlino & Cohen (hereinafter referred to as Forchelli) that also seeks to dismiss the plaintiff's complaint pursuant to CPLR 3211(a)(5) is **Granted**. The other branches of the Forchelli's motion, as well as the plaintiff's cross motion for summary judgment, are **Denied** as moot.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: December 5, 2007
Mineola, N.Y.

ENTER:



HON. MICHELE M. WOODARD
J.S.C.
XXX

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