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

PRESENT: PART 11

Index Number : 102210/2002

GOTAY, BERNADETTE

VS

BREITBART, DAVID

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
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 is decided in accordance with the annexed Memorandum Decision + Order.

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

Dated: January 18, 2007

_____ J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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BERNADETTE GOTAY,

Plaintiff,

- against -

Index No. 102210/2002

DAVID BREITBART, MICHAEL HANDWERKER, STEVE MARCHELOS, HANDWERKER, HONSCHKE, AND MARCHELOS (a partnership), HANDWERKER, HONSCHKE, MARCHELOS & GAYNER, MARK HANKIN, ROSS, SUCHOFF, HANKIN, MAIDENBAUM, HANDWERKER & MAZEL (a professional corporation), NEIL HONSCHKE, BRIAN K. SUCHOFF, JEFFREY A. MAIDENBAUM, GEOFFREY R. MAZEL, CHARLES GAYNER,

Defendants.

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JOAN A. MADDEN, J.:

In this action alleging legal malpractice, three motions (sequence numbers 004, 005 and 006) are consolidated for disposition in accordance with the following decision and order. In these motions, the defendants who have not previously been dismissed from the action move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims as against them: defendant Handwerker, Honschke, and Marchelos (a partnership) and two of its partners, defendants Neil Honschke (Honschke) and Steve Marchelos (Marchelos), move in motion sequence number 004; defendant Michael Handwerker (Handwerker) moves in motion sequence number 005; and defendant David Breitbart (Breitbart) moves in motion sequence number 006. In motion sequence number 006, plaintiff also cross-moves, pursuant to CPLR 3212, for summary judgment deeming that, for purposes of this action, the medical malpractice which was alleged by plaintiff in a prior action -- the action in connection with which defendants are alleged to have committed legal malpractice -- be admitted.

BACKGROUND

Plaintiff Bernadette Gotay allegedly sustained permanent injury from Erb's Palsy as a result of medical malpractice committed during her birth, on August 31, 1977. In October 1977, plaintiff's

mother, Eva Rodriguez (Rodriguez), retained the law firm of Kaufman & Siegel, P.C. (Kaufman & Siegel) to pursue medical malpractice claims on behalf of plaintiff and herself. Kaufman & Siegel apparently commenced two medical malpractice actions on behalf of plaintiff and Rodriguez in the New York State Supreme Court, Bronx County: one, in or about April 1978, against New York City Health and Hospitals Corporation (HHC); and another, in or before March 1980, against the Albert Einstein Hospital and the Albert Einstein College of Medicine of Yeshiva University (either action individually, or both actions collectively, the Med Mal Action). Kaufman & Siegel allegedly commenced the Med Mal Action by service of the summons and complaint upon the defendants therein. However, by September 1993, plaintiff's father, Jesus Gotay, also known as Jesus Morales (Morales), did not believe that Kaufman & Siegel was adequately prosecuting the Med Mal Action. He asked Kaufman & Siegel to give their case file for the Med Mal Action to him, and they did.

On November 16, 1993, Rodriguez executed a "consent to change attorney" form, wherein she consented to Breitbart's substitution for Kaufman & Siegel as plaintiffs' attorney of record in the Med Mal Action. At that time, defendants Handwerker, Honschke and Marchelos allegedly worked out of the offices of Breitbart's firm as independent contractors, who performed legal services for the firm in lieu of paying rent for the office space they used, and received a share of the legal fees for the cases they brought into the firm. Handwerker referred the Med Mal Action to Breitbart's firm after he received a telephone call concerning the case. However, Handwerker asserts that he practices primarily criminal law rather than civil law, and that he performed no further work on the Med Mal Action after he referred it to Breitbart's firm. Honschke and Marchelos, as well, claim that they performed no services on the Med Mal Action while it was being handled by the Breitbart firm. In January 1994, a Breitbart firm attorney who is not a party to this action prepared, verified and served a bill of particulars on behalf of the plaintiffs in the Med Mal Action.

Handwerker, Honschke and Marchelos left Breitbart's firm in June or July 1994, and formed their own firm, Handwerker, Honschke, and Marchelos (a partnership) (hereinafter, HH&M). Breitbart executed a letter agreement prepared by Handwerker, dated June 3, 1994 (the Letter

Agreement), which provided that Handwerker would take certain of the cases that he had brought into the Breitbart firm, including the Med Mal Action, to HH&M. The Letter Agreement provided, in relevant part:

> I [Handwerker] am writing to confirm our agreement regarding my active cases that will no longer be handled by your [Breitbart's] office.
>
> It is my understanding that up to and including June 1st, 1994, The Law Office of David Breitbart has assisted Michael Handwerker Esq. with the prosecution of the following clients' personal injury claims:
>
> * * *
>
> [a list of 34 names including] Eva Rodriguez
>
> * * *
>
> As compensation for the services previously provided by the Law Office of David Breitbart, Michael Handwerker Esq. agrees to share equally [] the legal fees earned by Michael Handwerker Esq. on the aforementioned matters. Additionally, at the time this agreement is executed, Michael Handwerker Esq. agrees to reimburse David Breitbart for all monies paid by David Breitbart in the form of disbursements on the aforementioned matters.

(Cirone Affirm., Ex. T, Letter Agreement.) On July 13, 1994, Handwerker sent a letter to Rodriguez, on HH&M letterhead, which stated that, "[a]s you are already aware, I have terminated my relationship with the Law Office of David Breitbart" (*id.*, Ex. U). The letter asked Rodriguez to sign and return an enclosed form, which the letter described as "a mere formality in order to officially notify the court of the status of your representation" (*id.*). On the same date, Handwerker sent a letter to counsel for the defendants in the Med Mal Action, advising them that he was no longer associated with the Breitbart firm, and that HH&M was the attorney of record for the plaintiffs in that action.

HH&M subsequently changed its name to Handwerker, Honschke, Marchelos & Gayner (HHM&G; HH&M and/or HHM&G, hereinafter, the Handwerker Firm). In October 1995, Rodriguez executed three medical record request forms, which asked the hospitals where plaintiff had received treatment to furnish copies of their records concerning her to "my attorney Handwerker Honschke Marchelos & Gayner" (*id.*, Exs. W, X, Y). Marchelos concedes that he handled day-to-day matters relating to the Med Mal Action while the case was with the Handwerker Firm.

The Handwerker Firm was dissolved in November 1998. According to Mark Hankin (Hankin), a partner in the firm of Ross, Suchoff, Hankin, Maidenbaum, Handwerker & Mazel, P.C. (the Ross Suchoff Firm): Handwerker agreed, in December 1998, to join the Ross Suchoff Firm as a partner in January 1999; "[i]n early January 1999, [Hankin] reviewed certain files on behalf of [the Ross Suchoff Firm] that ... Handwerker proposed to bring from his prior firm"; among those files was the file for the Med Mal Action; in reviewing the file for the Med Mal Action, Hankin "observed that an index number had not been purchased" for that action; and, "[u]pon discovering this, the Ross Suchoff Firm decided not to undertake the representation of the plaintiff" in the Med Mal Action (*id.*, Ex. EE, Hankin Affid., ¶¶ 1, 4, 5).[1]

Hankin asserts that he "met with ... plaintiff and [Morales] on January 28, 1999 to advise of the situation, as well as [of the Ross Suchoff Firm's] decision not to undertake representation of the plaintiff in the [Med Mal Action]," and that Morales thereupon "requested the immediate return of the file" for the Med Mal Action (*id.*, ¶ 6). Hankin sent a letter to plaintiff and Morales, dated February 22, 1999, which stated:

> This letter will confirm my conversation with [Morales] relative to our review and consideration of [plaintiff's] claims for medical malpractice arising out of her birth ... .
>
> As we discussed at our meeting on January 28, 1999 and on the phone on[] February 9, 1999, a review of the file indicates that your initial counsel, Kaufman & Siegel ..., never purchased an index number subsequent to their service upon the defendants of a copy of the summons and complaint in this matter. When they initially accepted this case, there was no requirement in the State of New York that an index number be purchased. Our procedural rules required service of the papers only to commence an action. The filing and purchasing of an index number was only required when court intervention was necessary. In or about calendar year 1992, the statute in the State of New York was changed and our state became a "file and serve" state where you were required to purchase an index number before service of the papers upon the defendants. Under CPLR Section 306 (b) a window period of approximately one (1) year was granted to all attorneys for the purpose of purchasing index numbers on open and outstanding claims where none had been purchased before. Your attorneys Kaufman & Siegel ... should have obtained an index number at that time in order to preserve your case for further action. Unfortunately, my review of the court records relative to both actions filed in this matter indicate[s] that

[1]Hankin and the Ross Suchoff Firm were originally defendants in this action, but the action has previously been dismissed as against them.

> no index number was purchased by your former counsel. Since more than one (1) year has elapsed since the new file and serve statute was enacted, the claims previously instituted are now dismissed. Our review of the case law indicates that based upon the passage of time, any attempt to purchase an index number now would be futile.
>
> Accordingly, we will not be able to proceed with the claims previously instituted on behalf of [plaintiff] for ... medical malpractice. Your file remains in our possession. In the event you require the whole or any portion thereof, we are available to provide you with same.

(*id.*, Ex. FF, at 1-2.)

Plaintiff subsequently retained her present counsel, and commenced this action on January 31, 2002. The complaint herein alleges that the defendant attorneys and law firms acted negligently in failing to properly monitor and prosecute the Med Mal Action, and that defendants misled plaintiff and her parents into believing that there was a valid pending medical malpractice action when they knew, or should have known, that no index number had been purchased for the Med Mal Action, and that that action had been dismissed. The complaint further alleges that, as a result of defendants' negligence, "plaintiff has been prejudiced by the passage of time, in that the facts and circumstances surrounding the medical malpractice of 'The Hospital' have been obscured," and that she has been "placed ... in a position where [she] may not be able to fully explore and set forth [the] acts of negligence of 'The Hospital'" (Complaint, ¶¶ 15, 22).[2] The complaint, as originally pleaded, asserted eight causes of action for legal malpractice and a ninth cause of action seeking treble damages under Judiciary Law § 487.

Plaintiff's counsel commenced an action on behalf of plaintiff and Rodriguez against HHC in the Bronx County Supreme Court, in 2002, and moved in that action for an order "reactivating" the Med Mal Action. In April 2003, the court denied that motion, and granted a cross motion by

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[2]The complaint alleges that defendants acted negligently, additionally, in failing to advise plaintiff and her parents (1) that Kaufman & Siegel had committed legal malpractice by neglecting to purchase an index number for the Med Mal Action and (2) that they could bring a legal malpractice action against Kaufman & Siegel. However, plaintiff's memorandum of law in support of her cross motion, and in opposition to defendants' motions, indicates that she has abandoned claims based upon the complaint's allegations that "defendants were negligent in failing to sue, or to advise ... plaintiff to sue, ... Kaufman & Siegel" (Pl. Mem. of Law, at 1).

HHC to dismiss the action in which the motion was brought (*see Rodriguez v New York City Health and Hosps. Corp.*, Sup Ct, Bronx County, April 8, 2003, McKeon, J., Index No. 24266/2002) The court noted that it could not "condone 25 years of neglect in the prosecution of [the Med Mal Action]," and that plaintiff had "failed to offer any reasonable excuse for this neglect, or to explain how the restoration of her action after these many years would not prejudice the defendant" (*id.*).

By order entered September 25, 2003 (the Prior Order), this court dismissed the complaint in this action in its entirety by granting: a motion for summary judgment, pursuant to CPLR 3212, brought by the Ross Suchoff Firm, Handwerker and Hankin and defendants Brian Suchoff, Jeffrey Maidenbaum and Geoffrey Mazel; a cross motion to dismiss, pursuant to CPLR 3211 (a) (7), brought by HH&M, HHM&G and Marchelos; and a cross motion to dismiss, pursuant to CPLR 3211 (a) (7), brought by Breitbart. This court dismissed the causes of action for legal malpractice on the ground that plaintiff would be unable to establish that defendants' alleged negligence proximately caused her loss, inasmuch as plaintiff had neither alleged nor established that she was likely to prevail in the Med Mal Action. In light of that determination, this court expressly declined to "reach the additional grounds for dismissal raised by defendants," including defendants' arguments that plaintiff's claims were barred by the applicable statute of limitations.

The Appellate Division, First Department, subsequently modified the Prior Order, to the extent of denying dismissal of plaintiff's legal malpractice claims against Breitbart, Handwerker, Honschke, Marchelos and HH&M (*see Gotay v Breitbart*, 14 AD3d 452, 452 [1st Dept 2005]). The First Department determined that the complaint's allegations of legal malpractice, "at least as against" those defendants, were "sufficient to survive the CPLR 3211 (a) (7) motion" (*id.* at 454). The First Department also noted that, "if in further proceedings herein plaintiff should be unable to establish any element of the underlying medical malpractice action as a direct consequence of defendants' delay and inaction, such element shall be deemed admitted" (*id.* at 455).

DISCUSSION

For the reasons below, this court is constrained to grant defendants' motions for summary

judgment on the grounds that plaintiff's claims of legal malpractice as against those defendants are barred by the statute of limitations.

"An action to recover damages arising from an attorney's malpractice must be commenced within three years from accrual (*see* CPLR 214 [6])" (*McCoy v Feinman*, 99 NY2d 295, 301 [2002]). Such an action accrues "when the malpractice is committed" (*Shumsky v Eisenstein*, 96 NY2d 164, 166 [2001]). "What is important," for purposes of determining the time of accrual, "is when the malpractice was committed, not when the client discovered it" (*id.* [citation and internal quotation marks omitted]). Accordingly, a claim against an attorney for legal malpractice in connection with a matter must ordinarily have accrued no later than the date when the attorney's representation of the client in connection with that matter ended (*see e.g. Wells Fargo Home Mtge., Inc. v Zeichner, Ellman & Krause, LLP*, 5 AD3d 128, 128-129 [1st Dept 2004]; *Johnston v Raskin*, 193 AD2d 786, 787 [2d Dept 1993]). "The continuous representation doctrine tolls the statute of limitations until the completion of the attorney's ongoing representation concerning the matter out of which the malpractice claim arises" (*Griffin v Brewington*, 300 AD2d 283, 284 [2d Dept 2002] [citation and internal quotation marks omitted]). However, when the representation ends, "for whatever reason, the purpose for applying the continuous representation rule no longer exists," and the continuous representation doctrine ceases to toll the statute of limitations (*Glamm v Allen*, 57 NY2d 87, 94 [1982]).

Under the foregoing principles, plaintiff's legal malpractice claims against Handwerker, Honschke, Marchelos and HH&M (all, collectively, the HH&M Defendants) are time-barred : (1) plaintiff's legal malpractice claims against the HH&M Defendants accrued no later than January 28,1999, inasmuch as the representation of plaintiff by any of those defendants ended, at the latest, on that date; (2) insofar as plaintiff were entitled to the benefit of the continuous representation doctrine, that doctrine would, in any event, have ceased to toll the statute of limitations no later than January 28, 1999; (3) the three-year statute of limitations period therefore began to run no later than January 28, 1999 and expired no later than January 28, 2002; and (4) plaintiff did not file the

complaint in this action until January 31, 2002.

Under the circumstances of this case, it is difficult to determine precisely when the HH&M Defendants' alleged malpractice occurred. Where a legal malpractice claim is predicated upon an attorney's failure to commence an action within the applicable statute of limitations, the malpractice will generally be deemed to have been committed, and the legal malpractice claim to have accrued, when the underlying limitations period expired (*see e.g. Shumsky v Eisenstein*, 96 NY2d at 166). Here, the HH&M Defendants' alleged malpractice consists primarily of their failure to make a timely effort to preserve or revive the Med Mal Action, i.e., by making a timely application with the Bronx County Supreme Court for leave to file the summons and complaint in the Med Mal Action nunc pro tunc. As the First Department stated:

> ...in 1994 and 1995, when ... [HH&M] ... [was] representing plaintiff, the medical malpractice action apparently was still viable. Since the action was commenced before July 1, 1992, an application for an order of filing nunc pro tunc made two or three years later, in 1994 or 1995, likely would have been granted, pursuant to the 1991 version of CPLR 306-a. The same application made in 2002, however, likely would have been denied, as was plaintiff's motion to reactivate the action, on the ground of prejudice to the defendants.

(*Gotay v Breitbart*, 14 AD3d at 454 [citations omitted].) Given the number of years between the statutory change and the 2002 motion, the last date on which any of the HH&M Defendants could have successfully made the requisite application, such that plaintiff's legal malpractice claims against those defendants should be deemed to have accrued at that time, is not readily ascertainable.

However, it is clear that plaintiff and Morales knew or should have known, no later than January 28, 1999, that none of the HH&M Defendants continued to represent plaintiff and Rodriguez in connection with the Med Mal Action.[3] Hankin states in his affidavit that, when he met with

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[3]The Handwerker Firm dissolved in November 1998, and Marchelos asserts in his affidavit that, "[b]y that time, plaintiff and her father absolutely knew that the Handwerker Honschke and Marchelos firm could no longer represent them and could not help them" (Marchelos Affid., ¶ 9). Notwithstanding Marchelos's assertion, it is not entirely clear from the record what plaintiff or her parents knew, or could reasonably be expected to have known, between November 1998 and January 28, 1999 -- concerning the dissolution of the Handwerker Firm and whether or not any of the firm's individual partners might continue to represent plaintiff and Rodriguez after the firm dissolved -- and when they knew or should have known it.

plaintiff and Morales on January 28, 1999, he advised them that no index number had been purchased for the Med Mal Action and also of "[the Ross Suchoff Firm's] decision not to undertake representation of the plaintiff in the [Med Mal Action]" (Cirone Affirm., Ex. EE, ¶ 6). "At that point," according to Hankin, "[Morales] requested the immediate return of the [Med Mal Action] file" (*id.*). Morales concedes that the January 28, 1999 meeting with Hankin occurred, and that Hankin advised him at that meeting that Kaufman & Siegel had not purchased an index number for the Med Mal Action (*see* Morales EBT, at 73-74). Neither plaintiff nor Morales disputes Hankin's assertions that, at the January 28, 1999 meeting, he advised them that the Ross Suchoff Firm had decided not to undertake representation of plaintiff in the Med Mal Action, and Morales requested the return of the file for the Med Mal Action.[4]

When Morales asked Hankin to return the case file, he and plaintiff presumably knew: that it was the file which the Handwerker Firm had maintained for the Med Mal Action; that the file was in Hankin's possession because Handwerker had brought it with him to the Ross Suchoff Firm when he joined that firm as a partner; and that Morales' request that the case file be returned to him meant that neither the Ross Suchoff Firm, nor the Handwerker Firm, nor any of the Handwerker Firm's former partners, would thereafter continue to represent plaintiff, or perform any additional work, in connection with plaintiff's medical malpractice claims. Accordingly, plaintiff's legal malpractice claims against all of the HH&M Defendants necessarily accrued no later than January 28, 1999, because those defendants could be liable to plaintiff for malpractice only as regards acts or omissions they committed during their representation of plaintiff, and none of those defendants continued to represent plaintiff -- and she could not reasonably have believed that any of them did -- after that date.

Plaintiff argues that her legal malpractice claims against the HH&M Defendants did not

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[4]In its decision, the First Department noted that Hankin "discovered that no index number had been purchased in the [Med Mal Action]," that the Ross Suchoff Firm "decided not to undertake representation of plaintiff," and that "Hankin so advised [Morales] on January 28, 1999" (*Gotay v Breitbart*, 14 AD3d at 453).

accrue until April 2003, when the Bronx County Supreme Court issued its decision and order denying plaintiff's motion to reactivate the Med Mal Action, and dismissing the action in which plaintiff had brought that motion. Thus, according to plaintiff, her malpractice claims against the HH&M Defendants did not accrue until more than four years after January 28, 1999, a date by which it had become manifest that all of those defendants had ceased to represent her. However, as previously stated, a client's claim for legal malpractice accrues when the alleged malpractice is committed, and, at the latest, as of the date when the attorney's representation of the client ends. Consequently, plaintiff's commencement of an action to reactivate the Med Mal Action, in 2002, did not operate to delay accrual of her legal malpractice claims in connection with the Med Mal Action until the date when the action commenced in 2002 was dismissed.

Plaintiff argues, in the alternative, that the continuous representation doctrine should be applied to toll the statute of limitations with respect to her claims against the HH&M Defendants until February 22, 1999. That was the date when Hankin sent the letter to plaintiff and Morales stating that any attempt to purchase an index number for the Med Mal Action at that time would be futile, and that the Ross Suchoff Firm declined to represent plaintiff in connection with her medical malpractice claims.

However, plaintiff has failed to establish that the continuous representation doctrine should be applied to toll the statute of limitations with respect to her claims against the HH&M Defendants beyond January 28, 1999. As previously stated, neither plaintiff nor Morales disputes Hankin's assertions that, at the January 28, 1999 meeting, he advised them that the Ross Suchoff Firm had decided not to undertake to represent plaintiff in the Med Mal Action, and Morales requested that the case file be returned to him. Thus, Hankin's letter of February 22, 1999 was substantially a reiteration, and not a first communication to plaintiff and Morales, of the matters set forth therein. That fact is corroborated by the letter's statement that it was intended to "confirm" Hankin's earlier conversation with Morales, and by the letter's use of the prefatory language: "[a]s we discussed at our meeting on January 28, 1999 and on the phone on[] February 9, 1999 ..." (Cirone Affirm., Ex.

FF, at 1). Accordingly, plaintiff's argument that the continuous representation doctrine should be applied to toll the statute of limitations until February 22, 1999 fails, because plaintiff -- while she concedes that the letter was effective to end any tolling of the statute of limitations on account of the continuous representation doctrine (*see e.g.* Pl. Mem. of Law, at 12 [stating that "[t]he joint responsibility of the defendants ... continued up to the time that the letter of February [] 1999 declar[ed] that [defendants'] relationship with plaintiff's parents was over"]) -- does not identify any material difference between the information that was communicated by Hankin to plaintiff and Morales at the January 28, 1999 meeting, and the information that was undisputedly communicated by Hankin to them in the February 22, 1999 letter.

In order for the continuous representation doctrine to apply, there must be "clear indicia of an ongoing, continuous, developing and dependent relationship between the client and the attorney," and "a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim" (*Matter of Merker*, 18 AD3d 332, 332-333 [1st Dept 2005]). The client must have a "reasonable impression" that the attorney is "addressing [the client's] legal needs" (*Shumsky v Eisenstein*, 96 NY2d at 169). However, "even when further representation concerning the specific matter in which the attorney allegedly committed the complained of malpractice is needed and contemplated by the client, the continuous representation toll ... nonetheless end[s] once the client is informed or otherwise put on notice of the attorney's withdrawal from representation" (*id.* at 171). Notice of the attorney's withdrawal from representation need not be communicated by the attorney to the client in a writing, in order to be sufficient to end the continuous representation toll, and may even be communicated to the client by the attorney's inaction (*see e.g. id.* [stating that the attorney's extended failure to return the client's telephone inquiries, in that case, may have been sufficient to put the client on notice of the attorney's withdrawal from representation]).

On January 28, 1999 -- when Hankin told plaintiff and Morales that the Ross Suchoff Firm would not represent plaintiff in connection with her medical malpractice claims, and Morales asked Hankin to return the file for the Med Mal Action -- there was clearly no ongoing, developing and

dependent relationship between plaintiff and any of the HH&M Defendants, and no "mutual" understanding between plaintiff and any of the HH&M Defendants as to plaintiff's need for further representation in connection with her medical malpractice claims. Plaintiff could have had no reasonable impression that any of the HH&M Defendants would thereafter be addressing any legal needs she had relating to her medical malpractice claims and, even insofar as plaintiff needed or contemplated such further legal representation, Hankin's communications to plaintiff and Morales on January 28, 1999 were sufficient to put them on notice that none of the HH&M Defendants continued to represent plaintiff. Thus, plaintiff has failed to establish that the continuous representation doctrine should be applied to toll the statute of limitations on her malpractice claims against any of the HH&M Defendants beyond that date.

Accordingly, the three-year limitations period on plaintiff's legal malpractice claims against the HH&M Defendants accrued and began to run no later than January 28, 1999, and expired no later than January 28, 2002. Inasmuch as the complaint was not filed until January 31, 2002, plaintiff's legal malpractice claims against the HH&M Defendants are time-barred.

Plaintiff's legal malpractice claims against Breitbart are also time-barred.

The attorney-client relationship between Breitbart and his firm, on the one hand, and plaintiff and Rodriguez, on the other, ended no later than July 1994. The Letter Agreement between Breitbart and Handwerker, dated June 3, 1994, provided that the Med Mal Action was one of "[Handwerker's] active cases that [would] no longer be handled by [Breitbart's] office" (Cirone Affirm., Ex. T, Letter Agreement). Handwerker sent a letter to Rodriguez on HH&M letterhead, dated July 13, 1994, which stated that, "[a]s you are already aware, I have terminated my relationship with the Law Office of David Breitbart" (*id.*, Ex. U). The letter asked Rodriguez to sign and return an enclosed form, which the letter described as "a mere formality in order to officially notify the court of the status of your representation" (*id.*). Any claim by plaintiff against Breitbart for legal malpractice necessarily accrued no later than July 1994, because Breitbart's and his firm's representation of plaintiff and Rodriguez had ended by that time (*see e.g. Wells Fargo Home Mtge., Inc. v Zeichner, Ellman &*

Krause, LLP, 5 AD3d at 128-129; *Johnston v Raskin*, 193 AD2d at 787). However, because plaintiff was only 16 years old in July 1994, the statute of limitations was tolled with respect to plaintiff's claims against Breitbart until August 31, 1995, when plaintiff became 18 years old (*see* CPLR 208). Therefore, the three-year statute of limitations began to run on August 31, 1995 and expired on August 31, 1998. Accordingly, plaintiff's claims against Breitbart are time-barred, because plaintiff did not file the complaint in this action until January 31, 2002.

Plaintiff argues that Breitbart was not removed as her attorney in July 1994, and that he is liable for any legal malpractice committed by the Handwerker Firm in connection with the Med Mal Action after July 1994, because a "consent to change attorney" form, substituting Handwerker or the Handwerker Firm for Breitbart as plaintiffs' attorney of record in the Med Mal Action, was never executed.[5]

However, assuming, arguendo, that such a consent was never executed, that would not, alone, be a sufficient basis upon which to hold Breitbart liable for legal malpractice committed by the Handwerker Firm. The evidence contained in the record indicates that Rodriguez consented to the substitution of Handwerker or the Handwerker Firm for Breitbart as plaintiffs' attorney in the Med Mal Action. The language contained in Handwerker's July 13, 1994 letter to Rodriguez -- stating that, "***[a]s you are already aware***, I have terminated my relationship with the Law Office of David Breitbart"(Cirone Affirm., Ex. U [emphasis added]) -- suggests that Handwerker's departure from Breitbart's offices had already been discussed with Rodriguez by that time.

Rodriguez testified at her deposition to the effect that it was Morales who selected Breitbart to replace Kaufman & Siegel, and that, after Kaufman & Siegel was discharged, it was Morales rather than she who communicated with the attorneys who were handling the Med Mal Action (*see*

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[5]Although Handwerker's letter to Rodriguez, dated July 13, 1994, asked her to sign and return an enclosed form, which the letter described as "a mere formality in order to officially notify the court of the status of your representation" (Cirone Affirm., Ex. U), no copy of that form, either executed or unexecuted, has been submitted to the court. At her deposition, Rodriguez stated that she could not recall whether she received Handwerker's July 13, 1994 letter, or whether she signed a "consent to change attorney" form in July 1994 (*see* Rodriguez EBT, at 95).

Rodriguez EBT, at 89, 97-98). Morales testified at his deposition to the effect: that, at the time when Handwerker was leaving Breitbart's firm, Morales apprized Rodriguez of that fact, and told her that Handwerker was taking the file for the Med Mal Action with him to another firm; and that Rodriguez consented to the case being transferred from Breitbart's office to Handwerker's (*see* Morales EBT, at 59-60).[6] Inasmuch as Rodriguez consented to the substitution of the Handwerker Firm for Breitbart as plaintiffs' attorney in the Med Mal Action, in July 1994, the fact that a formal "consent to change attorney" may not have been executed is not a sufficient basis upon which to hold Breitbart liable to plaintiff for any legal malpractice that may have been committed by the Handwerker Firm after that time (*see e.g. MacArthur v Hall, McNicol, Hamilton and Clark*, 217 AD2d 429, 429-430 [1st Dept 1995]).

Plaintiff argues, additionally, that Breitbart should be held jointly liable for any malpractice committed by Handwerker and/or the Handwerker Firm after July 1994 because: (1) pursuant to the Letter Agreement between Handwerker and Breitbart, Breitbart was entitled to receive 50% of any fees earned by Handwerker, or the Handwerker Firm, in the Med Mal Action after July 1994; and (2) that fee-sharing agreement violated Code of Professional Responsibility DR 2-107 (a) (1) and (2) (22 NYCRR 1200.12 [a] [1] and [2]).[7]

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[6]Rodriguez concedes that she executed three medical record request forms, in October 1995, in which she identified the Handwerker Firm as her attorney (*see* Cirone Affirm., Exs. W, X, Y; Rodriguez EBT, at 96-98).

[7]DR 2-107 (a) (1) and (2) provide that:

> (a) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of the lawyer's law firm, unless:
>
> (1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.
>
> (2) The division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation.

Plaintiff, although she argues that Breitbart should bear joint responsibility for any malpractice committed after July 1994 because defendants did not comply with the quoted provisions, does not articulate the particular manner(s) in which defendants failed to comply. In any event, Handwerker and Breitbart entered an agreement regarding the fee in the context of Handwerker's separation from Breitbart's firm, where he worked out of Breitbart's offices for approximately ten years and "regularly participated in its work" -- such that Breitbart and Handwerker were associated attorneys for purposes of DR 2-107 (b) (*Gold v Katz*, 193 AD2d 566, 566 [1st Dept 1993] [citation and internal quotation marks omitted]).

Furthermore, even if the fee agreement were improper, plaintiff has failed to establish that such an agreement would be a sufficient ground upon which to subject Breitbart or his firm to joint liability for malpractice committed by Handwerker, or the Handwerker Firm, after July 1994. Finally, even assuming, arguendo, that the fee agreement were a sufficient basis upon which to subject Breitbart to such liability, Breitbart's liability could in that event, and at most, only be coextensive with, and not more expansive than, that of Handwerker or the Handwerker Firm. Accordingly, inasmuch as plaintiff's malpractice claims against Handwerker and the Handwerker Firm are being dismissed because they are barred by the statute of limitations, plaintiff's malpractice claims against Breitbart, as well, would necessarily be dismissed as time-barred.

Plaintiff argues that defendants' instant motions for summary judgment dismissing the complaint should be denied because the First Department has already decided, in its prior decision and order in this action, "that ... plaintiff's allegations of negligence on the part of all defendants [are] sufficient to survive a motion for summary judgment" (Pl. Mem. of Law, at 6 [emphasis in original]; *see also id.* at 7). Plaintiff appears to assert that the First Department's prior decision and order somehow encompassed a determination that her claims against the remaining defendants are not barred by the statute of limitations (*see* Pl. Affirm. in Opp., at 2-3).

However, plaintiff's argument that the First Department's prior decision and order requires denial of defendants' instant motions for summary judgment is without merit. The First Department,

in its decision, did not state that any of plaintiff's allegations were sufficient to survive a summary judgment motion, but merely that her allegations of malpractice "as against defendants Breitbart and Handwerker, Honschke & Marchelos and its partners, [were] sufficient to survive the CPLR 3211 (a) (7) motion" (*Gotay v Breitbart*, 14 AD3d at 454). Where a defendant first makes an unsuccessful motion to dismiss a cause of action for failure to state a claim, and thereafter makes a motion for summary judgment dismissing the same cause of action, denial of the earlier motion to dismiss does not mandate denial of the subsequent motion for summary judgment. Rather, "the scope of review on the two motions differs," and the motions are distinct from each other, in that "the motion to dismiss examines the sufficiency of the pleadings, whereas summary judgment examines the sufficiency of the evidence underlying the pleadings" (*Friedman v Connecticut Gen. Life Ins. Co.*, 30 AD3d 349, 349-350 [1st Dept 2006]; *see also Tenzer, Greenblatt, Fallon & Kaplan v Capri Jewelry, Inc.*, 128 AD2d 467, 469 [1st Dept 1987]).

Nor has any determination previously been made by either this court or the First Department, with respect to the issue of whether plaintiff's claims against the remaining defendants are barred by the statute of limitations, which would preclude this court from considering and determining that issue on the instant motions. This court granted defendants' prior motions to dismiss plaintiff's legal malpractice claims on the ground that plaintiff would be unable to establish that defendants' alleged negligence proximately caused her loss. In light of that determination, this court expressly declined, in the Prior Order, to "reach the additional grounds for dismissal raised by defendants," including defendants' arguments that plaintiff's claims are barred by the applicable statute of limitations. The First Department, on appeal, did not explicitly address the issue of whether any of plaintiff's malpractice claims are time-barred. Nor has plaintiff articulated any basis for a conclusion that the First Department, sub silentio, necessarily determined that plaintiff's claims were not time-barred. Thus, plaintiff has failed to establish that any prior decision or order in this action, whether by the First Department or this court, requires a determination that plaintiff's claims are timely under the applicable statute of limitations.

The cross claims against the HH&M Defendants and Breitbart are dismissed. Honschke, Marchelos and HH&M assert a cross claim against Breitbart for indemnification and/or contribution, and Breitbart asserts a cross claim against Handwerker, Honschke, Marchelos and HH&M for indemnification and/or contribution. However, each of the cross claims seeks recovery only contingently, in the event that plaintiff recovers a judgment on the claims alleged in her complaint. Inasmuch as all of plaintiff's claims are being dismissed, her recovery of such a judgment is precluded.

Finally, in view of the dismissal of the complaint as against all of the remaining defendants, plaintiff's cross motion -- which seeks summary judgment deeming the medical malpractice that was alleged in the Med Mal Action to be admitted -- is denied as moot.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion for summary judgment (sequence number 004) by defendants Handwerker, Honschke, and Marchelos (a partnership), Neil Honschke and Steve Marchelos, and the motion for summary judgment (sequence number 005) by defendant Michael Handwerker, and the motion for summary judgment (sequence number 006) by defendant David Breitbart are all granted, and the complaint and all cross claims are dismissed as against each of those defendants, and the Clerk is directed to enter judgment in favor of those defendants, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that plaintiff's cross motion is denied.

Dated: January ,2007

ENTER:

J.S.C.