[* 1]

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

PRESENT: WALTER B. TOLUB Justice PART 15

Index Number : 104990/2005
CARNEGIE HILL ORTHOPEDIC
VS
WEISS & WEXLER
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

NYS SUPREME COURT REVIEWED FEB 2 8 (W) E-FILING DEPT.

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED,

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

RECEIVED FEB 2 8 2007 MOTION SUPPORT OFFICE

FILED FEB 27 2007 NEW YORK COUNTY CLERK'S OFFICE

CASE DISP

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

Dated: 2/21/07

WALTER B. TOLUB

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

----------X

CARNEGIE HILL ORTHOPEDIC SERVICES, P.C. and DR. ALLEN CHAMBERLIN,

Plaintiffs,

-against-

WEISS and WEXLER, P.C.

Defendant.

----------X

Index No. 104990/05
Seq: 002

WALTER TOLUB, J.S.C.:

Defendant Weiss, Wexler & Wornow, P.C., sued herein as Weiss and Wexler, P.C., (hereinafter "Weiss") moves for an order granting it summary judgment dismissing this action on the ground that it is barred by the statute of limitations and on the ground that the alleged negligence of the defendant was not a proximate cause of plaintiffs' damages.

The plaintiff Carnegie Hill Orthopedic Services, P.C. ("Carnegie Hill") and its president, Dr. Allen Chamberlin (hereinafter collectively referred to as "plaintiffs") retained the services of Weiss in connection with a Workers' Compensation claim filed by Naomi Friedman, a former employee of Carnegie Hill, who was allegedly injured in a slip and fall, while in the course of her employment, on November 22, 1993. The parties entered into a retainer agreement, dated May 19, 1995, which provided as follows:

> As compensation for this representation, Weiss & Wexler, P.C. shall be paid $1,500.00

> upon execution of this agreement for Weiss & Wexler's attendance at three (3) hearings in this matter. Thereafter, Weiss & Wexler, P.C. shall be paid on an hourly rate of $150.00 per hour.

Weiss appeared before the Workers' Compensation Board ("WCB") on September 17, 1996, wherein the Board was to determine whether Ms. Friedman suffered a compensable injury, the extent of her resulting disability, and whether the workers' compensation insurance policy issued to plaintiffs by the State Insurance Fund ("SIF') was in effect on the date of the accident.

On March 18, 1997, the Workers' Compensation Law Judge issued a decision finding that the claimant was an employee; the accident occurred during the course of the claimant's employment; the claimant suffered a compensable injury; and SIF should be held to be the insurer of the plaintiffs on the date of the accident. Although the subject policy was issued for the period from November 11, 1992 to November 11, 1993, the Law Judge, nevertheless found that the policy was in effect on November 22, 1993, the date of the accident.

On May 9, 1997, SIF filed an application for a review of that branch of the Law Judge's decision, which found that the policy of insurance it issued to plaintiffs was still in effect on the date of the accident. While Weiss opposed this application asserting that SIF should be estopped from denying coverage based upon its acceptance of a premium after

cancellation of the policy, SIF successfully argued that estoppel was not applicable as the canceled policy had, in any event, expired prior to the employee/claimant's accident. The Board, on September 10, 1997, rescinded the finding that SIF was liable. Weiss filed a timely notice of appeal, on October 10, 1997.

There is a dispute between the parties about what occurred next. Solomon Basch, the attorney at Weiss, primarily responsible for handling this matter, alleged he telephoned Dr. Chamberlin and informed him that there was no legal basis for appealing the determination to the appellate division; that Weiss would not perfect the appeal and that if he wanted to appeal, he should seek other counsel. There is nothing in the attorneys' file memorializing this alleged conversation. Basch further alleged that the last conversation the firm had with Chamberlin was a telephone conversation, sometime in December 1999.

Dr. Chamberlin's deposition testimony indicated that he did not recall having any contact whatsoever with anyone from Weiss from the time he retained them and that he had no recollection of an individual named Solomon Basch. The affidavit he submitted, in opposition to this motion, however, now alleges no conversation took placed between him and Basch regarding his legal options.

There is no dispute that Weiss subsequently appeared on behalf of the plaintiffs before the WCB at a hearing held to

determine the claimant's disability, the casual relation between the accident and her disability and the benefit rates. The last appearance by Weiss on behalf of the plaintiffs was on August 2, 2000. The WCB issued a decision, dated August 24, 2000, and a final decision, dated December 6, 2001, which assessed penalties against Carnegie Hill. The decision indicated that there would be no further action by the Board.

The parties agree there was never any written or verbal communication between Weiss and the plaintiffs, after the December 1999 telephone call, until Weiss received a letter from Chamberlin, dated April 6, 2005, which stated that he had recently discovered judgments entered against him and his company and that he was evaluating the merits of a legal malpractice action against the Weiss firm.

Dr. Chamberlin does not recall receiving any invoices for the work performed by Weiss, after December 2001 and Weiss' file indicates that it did not send any invoices beyond August 2000.

The complaint in this action is for legal malpractice and alleges that Weiss failed to perfect the appeal of the WCB's decision, dated September 10, 1997, and failed to file notices of appeal with respect to the subsequent WCB's decisions, dated August 11, 2000 and August 6, 2001.

Weiss previously moved, pursuant to CPLR §3211, to dismiss based upon the statute of limitations and insufficiency. This

motion was denied, without prejudice to Weiss moving for summary judgment after completion of discovery (order, Richter, J., dated February 7, 2006).

Weiss argues that the claims are time barred, pursuant to CPLR §214(6), which provides a three-year period of limitations. Even assuming the allegations contained in the complaint, the claim, concerning Weiss' failure to perfect the notice of appeal, accrued on July 10, 1998, the last date to perfect the appeal. With respect to the other claims, Weiss asserts that the WCB's decisions of August 24, 2000 and December 6, 2001, were not appealable and if appealable, these claims of malpractice accrued on September 23, 2000 and on January 5, 2002. Therefore, this action commenced on April 6, 2005, must be dismissed, as barred by the statute of limitations.

Additionally, Weiss seeks summary judgment on the ground that plaintiffs cannot establish that Weiss' alleged malpractice was the proximate cause of plaintiffs' injuries as there was no possibility of success on appeal.

Statute of Limitations

Plaintiffs apparently do not dispute the fact that this action was commenced in excess of three-years from the accrual of the malpractice complained of in the complaint. Plaintiffs, however, contend that they have raised an issue of fact concerning the tolling of the statute based upon the doctrine of

continuous representation. The issue of fact concerns whether there ever was a conversation between Chamberlin and Basch that Weiss would not perfect the appeal of the WCB's determination, which found plaintiffs was uninsured at the time of claimant's injury.

Plaintiffs rely upon two cases in particular to support its position that the statute of limitations was tolled by the doctrine of continuous representation. The first is the seminal case of *Shumsky v Eisenstein*, 96 NY2d 164 (2001). In that case the clients retained an attorney for the specific purpose of commencing an action against a home inspector for breach of contract. The attorney failed to commence the breach of contract action before the expiration of the statute of limitations. The clients contacted the attorney approximately two-years later but the attorney was too embarrassed to discuss the matter. The Court of Appeals found that the period of limitations was tolled by the continuous representation doctrine as the "record indisputably established [clients] were left with the reasonable impression that [the attorney] was, in fact, actively addressing their legal needs."

Plaintiffs argue that the facts in this particular case are similar to the facts in *Shumsky* in that the attorneys failed to communicate with the clients regarding the status of their cases and that it was approximately two-years before the clients were

on notice that their attorneys had unilaterally terminated the representation without any communication to the client.

The second case relied upon is *Montes v Rosenzweig*, 21 AD3d 460 (2nd Dept 2005), where decedent retained an attorney to prosecute a claim against the New York City Housing Authority ("NYCHA") and subsequently died as the result of complications from her injuries. The attorney brought an action against NYCHA on behalf of two of decedent's relatives, which was dismissed for lack of letters administration. The attorney advised one of the decedent's relatives that the action had been dismissed and that he was closing the file, however, for the next seven years, he attempted to help the decedents in obtaining letters administration for the purpose of prosecuting the claim against NYCHA.

The Appellate Division, Second Department, found that the statute of limitations was tolled by operation of the continuous representation doctrine as the actions of the attorney lulled the decedents into believing that an action could still be commenced against the NYCHA.

This court finds that the facts, herein, differ significantly from the facts in *Shumsky*. *Shumsky* requires that there must be a mutual understanding between the client and the professional that further services were needed. The subject retainer agreement mentions nothing about representation through

appeal. While the plaintiffs may have believed that representation included appeals, there is nothing to demonstrate that they along with Weiss explicitly anticipated continued representation.

There is no dispute that there was no contact between the plaintiffs and Weiss, after December 1999, therefore, plaintiffs' claim that they were left with the reasonable impression that Weiss was, in fact, actively addressing their legal needs, rings hollow. The subject retainer provided for hourly billing, beyond counsel's attendance at three hearings before the WCB, and plaintiffs conceded that they never received an invoice indicating that legal work was ongoing after December 2001.

The facts also differ from the fact found in *Montes*. In *Montes*, the attorney continued with his attempt to obtain letters administration even after the statute of limitations in the wrongful death action had expired. The court found that the actions of the attorney lulled the decedents into a reasonable belief that the action could still be commenced. In this case, the attorney performed no work after the WCB's final determination and there was no further contact between the attorney and the client. A professional's failure to take action or provide services necessary to protect a client's interest cannot itself constitute representation (*Ashmead v Groper*, 251 AD2d 716 [3d Dept 1998]).

For the continuous representation doctrine to apply "there must be a clear indicia of an ongoing, continuous, developing and dependent relationship between the client and attorney" (*Kanter v Pieri*, 11 AD3d 912, 913, quoting *Luk Lammellen V. Kupplungbau GmbH v Lerner*, 166 AD2d 505, 506 [2d Dept 1990]). There is no evidence of said relationship between these parties after the final determination by the WCB, when Weiss performed the final legal duties for which their services were retained.

Therefore, plaintiffs, even assuming that Basch had never advised Dr. Chamberlin that Weiss would not perfect the appeal, have failed to meet their burden of demonstrating evidentiary facts sufficient to raise an issue as to whether the statute of limitations was tolled by the doctrine of continuous representation (*Gravel v Cicola*, 297 AD2d 620 [2d Dept 2002]).

Accordingly, this action must be dismissed as barred by the applicable statute of limitations.

Proximate Cause

Weiss states that plaintiffs cannot establish that its alleged negligence was the proximate cause of plaintiffs' damages, the judgments obtained by the WCB as against the plaintiffs.

The evidence shows that plaintiffs obtained a workers' compensation insurance policy with SIF, which was effective from November 11, 1992 through November 11, 1993. The plaintiffs were

sent a notice of cancellation, on March 16, 1993, that if they failed to remit payment of an outstanding premium of $25.20, the policy would be canceled effective April 9, 1993. Plaintiffs sent a check in the sum of $25.20, dated July 13, 1993, which was endorsed by SIF on August 13, 1993. The claimant's accident occurred on November 22, 1993.

The cases relied upon by plaintiffs in support of their claim that SIF was estopped from denying coverage, after retaining the premium payment, involved cases in which the accident occurred within the year that the subject policies would have been in effect absent cancellation.

The facts, herein, establish that the employer's payments were made on account of past due premiums and not for workers' compensation coverage subsequent to the policy's expiration date (*Moorehead v Union Press Co.*, 259 AD2d 906 [3d Dept 1999]; *Frazer v Additional Personnel, Inc.*, 108 AD2d 948 [3d Dept 1985]).

The other issues plaintiffs attempt to raise are irrelevant. Even if the subject policy was subject to automatic renewal, the coverage had lapsed due to plaintiffs' late payment of past due premiums and even if the WCB's finding of fact, that an invoice premium was sent prior to the notice of cancellation, was not supported by the record, plaintiffs, nevertheless, failed to remit payment within the period between the notice of cancellation and the effective date of cancellation, which was

approximately three weeks in duration. Additionally, the standard of review is only whether there exists substantial evidence to support the WCB's findings.

Accordingly, this action must be dismissed as Weiss' failure to perfect the appeal was not a proximate cause of plaintiffs' damages.

ORDERED that the motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 2/24/07

ENTER:

WALTER B. TOLUB J.S.C.