

**Fidelity Natl. Tit. Ins. Co. of N. Y.,
Inc. v Black United Fund of N. Y., Inc.**

2008 NY Slip Op 31315(U)

March 26, 2008

Supreme Court, Nassau County

Docket Number: 2274-07/

Judge: F. Dana Winslow

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SUAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

**FIDELITY NATIONAL TITLE INSURANCE
COMPANY OF NEW YORK, INC. As Subrogee/assignee
of 150 Beach 120th Street, inc. and The Levites
Organization**

**TRIAL/IAS, PART 9
NASSAU COUNTY**

Plaintiff,

-against-

**BLACK UNITED FUND OF NEW YORK, INC.,
HARVEST II, BUF DEVELOPMENT CORP.,
HARVEST INFORMATION TECHN. CENTER,
KERMIT EADY, BUFNY HOUSES, INC. and
RICHARD M. ROTH, ESQ.**

MOTION DATE: 11/16/2007

MOTION SEQ. NO.: 001

INDEX NO.: 12274/07

Defendant(s).

The following papers having been read on the motion (numbered 1-5):

Notice of Motion.....1
Affirmation in Reply.....2
**Memorandum of Law in Support of the Motion
of Defendant.....3**
Plaintiff's Memorandum of Law in Opposition.....4
Affirmation in Opposition.....5

Motion by the attorneys for the Defendant for an order pursuant to CPLR § 3211(a)(7) dismissing the Complaint against Richard M. Roth, Esq. for failing to state a cause of action in that plaintiff Fidelity National Title Insurance Company of New York, Inc. ("Plaintiff") failed to plead facts that establish an attorney-client relationship between Richard M. Roth, Esq. and Plaintiff; and CPLR 3211(a)(5) dismissing the complaint against Richard M. Roth, Esq. as untimely and barred by the statute of limitations is determined as hereinafter set forth. The

balance of relief requested is **denied**.

The complaint alleges that Richard M. Roth, Esq. (Roth) represented 150 Beach 120th Street and the Levites Organization (referred to hereinafter as the lenders) in connection with two mortgage loans extended by the lenders to Washington Brooklyn Limited Partnership (WBLP). The first loan, in the principal amount of \$225,000 closed on July 16, 2001. The second loan in the principal amount of \$100,000 closed on December 7, 2001. The complaint also alleges that at each of the closings the plaintiff issued a loan policy of title insurance to the lenders that insured the respective liens of the mortgages. The complaint also alleges that Roth failed to conduct reasonable due diligence with respect to the proper authorization of the note and mortgage. The Appellate Division, Second Department in *150 Beach St., Inc. v Washington Ltd. Partnership* (39 AD3d 722) determined that the loan documents prepared by the lenders in the within action were void and unenforceable. As a result of claims submitted to the plaintiff by the lenders under the mortgage title insurance policies and after the determination of the Appellate Division in *150 Beach St., Inc. v Washington Ltd. Partnership, supra*, the plaintiff made payment to the lenders. All sums due the lenders under the Notes and Mortgages have been paid in full. At the time of the aforesaid payment to the lenders, the plaintiff alleges it became subrogated to, and received a formal assignment of, all claims and actions of the lenders with regard to enforcement and collection of the notes and/or mortgages. (Complaint ¶¶ 24-27).

Plaintiff argues that because it reimbursed the lenders pursuant to a title insurance policy as a result of the legal malpractice of Roth, it automatically becomes subrogated to the rights of the lenders to proceed against attorney Roth. Plaintiff acknowledges in its opposition papers that it was not represented by Roth

and was not commencing the within action in its direct capacity. Plaintiff contends it is suing Roth in its representative capacity as both subrogee and assignee of the lenders who had a direct relationship with Roth, and consequently had standing to commence the within action for legal malpractice against Roth. In the area of attorneys' negligence, absent fraud, collusion, malicious acts or other special circumstances, an attorney is not liable to third parties not in privity for harm caused by professional negligence. *See Council Commerce Corporation v Schwartz, Sachs & Kamhi*, 144 AD2d 422. New York courts impose a strict privity requirement to claims of legal malpractice. The plaintiff can only recover against Roth for negligence in performing services on behalf of the lender in the preparation of the loan documents as a subrogee. *Federal Insurance Company v North American Specialty Insurance co.*, 2007 N.Y. Slip Op 8391, 847 NYS2d 7, 2007 NY App.Div. Lexis 11139.

Assuming *arguendo* that the court accepts as true the allegations in the complaint that the plaintiff "became subrogated" to all claims and actions of the lenders (complaint ¶ 25), the cause of action for legal malpractice accrued at the time the alleged malpractice occurred which would have occurred on the date of the closings of the first and second mortgages on July 16, 2001 and December 7, 2001, respectively and as such, the instant action is untimely. On a motion to dismiss pursuant to CPLR 3211(a)(7), the Court must accept as true, the facts "alleged in the complaint and submissions in opposition to the motion, and accord plaintiffs the benefit of every possible favorable inference," determining only "whether the facts as alleged fit within any cognizable legal theory." *Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414; *see Polonetsky v Better Homes Depot*, 97 NY2d 46, 54; *Leon v Martinez*, 84 NY2d 83, 87-88.

A defendant in a subrogation action has against the subrogee all defenses that he would have against the subrogor, including the same statute of limitations that could have been asserted against the subrogor. *Walker v Stein*, 305 AD2d 972. Since plaintiff's claim by subrogation is derivative from that of the lenders, it is subject to the same three (3) year statute of limitations as though the cause of action were sued upon by the lenders. Therefore, the plaintiff's action is barred if it sues after the period allowed the lenders to commence a cause of action sounding in legal malpractice. *Sixty Six Travel, Inc. v American Motorists Insurance Company*, 98 Misc2d 509, cited in 23 NY Jur.2d 132, Limitations and Laches. Pursuant to CPLR § 214(6), an action to recover damages for legal malpractice must be commenced within three (3) years of the accrual of the claim. CPLR 214(6). A claim to recover damages for legal malpractice accrues when the malpractice is committed, not when it is discovered. *Zorn v Gilbert*, 8 NY3d 933; see *Shumsky v Einstein*, 96 NY2d 164; *Glamm v Allen*, 57 NY2d 87. Absent evidence of a continuous representation of a client, a cause of action for legal malpractice against an attorney representing a client in a real estate closing accrued at the time of the closing. *Bergman v Fingerit*, 177 AD2d 448. The legal malpractice claim accrues when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court. See *Wallkill v Rosenstein*, 40 AD3d 972. The closings of the subject mortgages occurred on July 16, 2001 and December 7, 2001. The legal malpractice complained of against Roth accrued on July 16, 2001 and December 7, 2001 more than three (3) years before the commencement of the within action which was commenced on July 13, 2007. There is no allegation in the complaint, nor is there any evidence to suggest that the statute of limitations was tolled by the continuous representation doctrine, or

that the attorney-client relationship between Roth and the lenders would continue after the closings. *Miller v Miller*, 203 AD2d 338. The court has found no authority, nor has the plaintiff presented any citation to support its assertion that the time to commence the legal malpractice action against Roth was tolled until the plaintiff exhausted all efforts to appeal the adverse determination of the Supreme Court to the Appellate Division, Second Department. Plaintiff's cause of action sounding in legal malpractice against Roth is dismissed as time-barred.

Plaintiff's application for an award of costs, disbursements, sanctions, and reasonable attorney's fees is denied. The plaintiff's conduct in bringing this action cannot be categorized as frivolous. The plaintiff's remaining contentions are academic in light of the within determination.

Richard M. Roth, Esq. shall be deleted as a party defendant.

A Preliminary Conference (see 22 NYCRR 202.12) shall be held at the Preliminary Conference part, located at the Nassau County Supreme Court within 30 days of service after entry. The attorneys for the plaintiff shall serve a copy of this order on the Preliminary Conference Clerk and the attorneys for the plaintiffs.

This constitutes the order of the Court.

Dated: March 26, 2008

ENTER:

J. J. Ambrosino
J.S.C.

ENTERED

APR 28 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE