[* 1]

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

PRESENT: EMILY JANE GOODMAN PART 17

Justice

Index Number : 112072/2007

GAZES, IAN J., ESQ.

VS.

BENNETT, JOHN C.

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

in this motion to/for _____

	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 denied for the reasons stated on the record.

FILED
NOV 08 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 11/25/08

EMILY JANE GOODMAN 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: PART 17

----------x

Ian J. Gazes, Esq., as Trustee in Bankruptcy for the Bankruptcy Estate of John Horan, Debtor,

Plaintiff,

-against-

Index No.: 112072/2007

John C. Bennett,

Defendant.

----------x

EMILY JANE GOODMAN, J.S.C.:

The instant action involves a legal malpractice claim by plaintiff Ian J. Gazes, Esq. (Gazes), as the trustee for the bankruptcy estate of debtor John Horan (Horan), against defendant John C. Bennett (Bennett), former counsel who represented Horan in an employment discrimination action against his employer (the Employment Action). The complaint alleges that Bennett committed legal malpractice, by failing to timely commence the Employment Action, which resulted in the summary dismissal of that action.

In response to the instant malpractice action, defendant Bennett argues, among other things, that the malpractice claim is time-barred, and that this court does not have jurisdiction over him because plaintiff failed to properly serve the complaint in this action. For the reasons discussed herein, defendant's motion to dismiss the complaint is granted.

Background

Horan was an employee of the New York Telephone Company (NYT). On October 2, 1990, Horan was terminated by NYT based on conduct that previously caused NYT to send him to an alcoholism rehabilitation program. In 1991, Horan retained Bennett to prosecute the Employment Action against NYT. The Employment Action was filed on October 15, 1993, which was more than three years after the date of Horan's discharge from employment.

While the Employment Action was pending, Horan and his wife filed for chapter 7 bankruptcy relief, on February 29, 1996, with the United States Bankruptcy Court for the Southern District of New York (the Bankruptcy Court). Gazes was appointed as the bankruptcy trustee in the chapter 7 cases of Horan and his wife. Thereafter, Gazes obtained the approval of the Bankruptcy Court to retain Bennett, as special counsel to the trustee, to continue prosecute the Employment Action on behalf of Horan's bankruptcy estate. NYT moved to dismiss, arguing that the Employment Action was untimely and without merit. On May 17, 2002, the trial court granted NYT's motion, stating that the Employment Action was time- barred by the three year limitations period. On October 23, 2003, the trial court's ruling was affirmed on appeal. On November 17, 2003, Bennett wrote to Gazes, advising him of the final dismissal of the Employment Action. A legal malpractice action against Bennett soon followed.

The first legal malpractice action against Bennett was commenced and venued in the Supreme Court of Bronx County, on September 29, 2004, in Horan's own name (the Prior Action). After defense counsel advised plaintiff's counsel, Eisner & Associates, P.C. (Eisner), of Horan's bankruptcy case,[1] an amended complaint was served wherein Gazes was substituted as plaintiff, in his capacity as trustee of Horan's bankruptcy estate. Subsequent to motion practices, the Prior Action was calendared for pre-trial conference on December 5, 2005. On January 25, 2006, Bennett moved for summary judgment dismissing the Prior Action. The motion was denied by the trial court, on the basis that it was not made within six months of the filing of notice of readiness for trial. On March 13, 2007, the Appellate Division, First Department, reversed the trial court's ruling and dismissed the Prior Action, on the basis that Horan lacked the capacity to bring the action, and that the subsequent attempt to substitute Gazes, as bankruptcy trustee, did not cure the defect. *See Gazes v Bennett*, 38 AD3d 287, 288 (1st Dept 2007).[2]

---

[1] By order of the Bankruptcy Court dated December 30, 2004, Eisner was retained as special counsel to the bankruptcy trustee, in the prosecution of the legal malpractice action.

[2] Based on the court docket maintained in Horan's chapter 7 case, a request for entry of a final decree closing the chapter 7 case and discharging Gazes as trustee was cancelled on 1-22-2007. Docket No. 27. An order discharging debtor Horan was entered on 3-24-2007, and a certificate of mailing of same was entered on 3-25-2007. Docket Nos. 29 and 30. It is noteworthy that Horan passed away in May 2006. Charny Affirmation, p. 4, para. 22.

Thereafter, on September 5, 2007, plaintiff Gazes filed the instant complaint against defendant Bennett, based on the same facts contained in the Prior Action. On September 12, 2007, plaintiff's counsel caused the summons and complaint to be served on Bennett's receptionist/secretary in his office. On the same day, the summons and complaint was mailed to Bennett's office. On November 5, 2007, plaintiff's counsel was advised by defendant's counsel that there was a mailing defect, because the mailing envelope contained a name and address which indicated that it was from an attorney's office. Due to the defect, on November 6, 2007, plaintiff's counsel caused the summons and complaint to be again served upon another person in Bennett's office, and the same was mailed to his office on the same day. By motion dated November 30, 2007, defendant seeks an order, pursuant to CPLR 3211, dismissing this malpractice action.

Applicable Legal Standards

In considering a CPLR 3211 motion to dismiss, the court's task "is to determine whether plaintiffs' pleadings state a cause of action. The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law [internal quotation marks omitted]." *Richbell Info. Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 289 (1st Dept 2003), quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98

NY2d 144, 151-152 (2002). The pleadings are to be afforded a "liberal construction," and the court is to "accord plaintiffs the benefit of every possible favorable inference." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). On the other hand, while factual allegations contained in a complaint should be accorded "favorable inference," bare legal conclusions of law and inherently incredible facts are not entitled to preferential consideration. *Sud v Sud*, 211 AD2d 423, 424 (1st Dept 1995). Further, in order to prevail on a motion to dismiss based upon documentary evidence pursuant to CPLR 3211 (a) (1), the documents relied upon must resolve all factual issues as a matter of law. *Weiss v Cuddy & Feder*, 200 AD2d 665, 667 (2nd Dept 1994).

Discussions

In response to the instant malpractice action, defendant Bennett argues, among other things, that the applicable statute of limitations has already expired, and that the action should be dismissed as time-barred.

Pursuant to CPLR 214 (6), an action to recover damages for a legal malpractice claim must be commenced within three years from the date when the alleged malpractice is committed. However, the continuous legal representation doctrine extends the statute of limitations for commencing a legal malpractice action, if the continuing representation "pertains specifically to the matter in which the attorney committed the alleged malpractice." *Shumsky v*

Eisenstein, 96 NY2d 164, 168 (2001). In other words, the doctrine permits tolling of the statute of limitations "until the ongoing [legal] representation is completed." *Id.* at 167-168.

In this case, Bennett admits that his last communication with plaintiff (and thus the completion of his representation of plaintiff) was on November 17, 2003, when he advised plaintiff of the final dismissal of the Employment Action. Based on the continuous representation doctrine, the time to commence a legal malpractice action against Bennett ended on November 17, 2006. Because the Prior Action was brought on September 28, 2004, that action was timely commenced. The Prior Action ended on March 13, 2007, when the First Department entered a summary judgment dismissing that action. Pursuant to CPLR 205 (a), which applies to the termination of an action and the commencement of a new action, the statute provides, in relevant part:

> If an action is timely commenced and is terminated in any other manner than by ... a final judgment upon the merits, the plaintiff ... may commence a new action upon the same transaction ... within six months after termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.

CPLR 205 (a).

Defendant argues that since the Prior Action was ended by summary judgment, that action was terminated by a "final judgment upon the merits", and thus plaintiff would not be entitled to the

six-month extension under CPLR 205 (a) for commencing a new action. Plaintiff counters that because the Prior Action was dismissed solely because it was "brought in the name of the wrong plaintiff and not for any reason related to the merits of the underlying suit," there was no final judgment on the merits, and thus the six-month extension applied. Plaintiff's Opposition Brief, p. 7. Notably, the decision of the Appellate Division, First Department, states in relevant part that:

> [T]here is no dispute that the within ... malpractice action accrued during the pendency of debtor John Horan's bankruptcy proceedings and, as such, was an asset of the bankruptcy estate.[3] Horan, however, did not list the claim in the petition's schedule of assets and, therefore, lacked the capacity to commence this action.[4] Horan's subsequent attempt to

---

[3] Without citing any statutory or case law, the bankruptcy trustee takes the position that since the malpractice claim is "derivative" of the Employment Action, which was property of debtor Horan's bankruptcy estate, the malpractice claim is also property of the bankruptcy estate. Affirmation of Ian Gazes, dated March 10, 2006, paragraph 17. Applicable bankruptcy law appears to provide otherwise. *See e.g. In re Witko*, 374 F3d 1040 (11th Cir. 2004)(a legal malpractice claim that the debtor possessed only upon entry of an adverse judgment against him in an underlying divorce action, some months after the commencement of his bankruptcy filing, was not sufficiently rooted in his pre-bankruptcy past, and such malpractice claim should not included as property of the bankruptcy estate). The facts in the *Witko* case are similar to those in the instant case.

[4] Contrary to the First Department's determination, the bankruptcy trustee also takes the position that because the malpractice claim arose after the filing of the bankruptcy petition (i.e. the claim is a post-petition asset) neither the debtor nor the trustee was obligated to schedule such claim in the debtor's schedules of assets. Affirmation of Ian Gazes, dated March 10, 2006, paragraph 17. Such position is supported

> substitute Gazes, the bankruptcy trustee, as plaintiff, does not cure the defect ... Accordingly, summary judgment dismissing is the complaint is warranted.

Gazes v Bennett, *supra*, 38 AD3d at 288 (citation omitted).

In the instant case, because plaintiff Gazes, as bankruptcy trustee, did not appeal or move to reargue the summary judgment decision of the First Department, the federal bankruptcy law-related rulings in such decision constitute the "law of the case" and are binding upon this court. *Seaman v Wyckoff Heights Medical Center, Inc.* 51 AD3d 1002, 1003 (2nd Dept 2008). However, the issue as to whether the summary judgment was a "final judgment upon the merits," within the meaning of CPLR 205 (a), is governed by applicable state law, as discussed below.

In *George v Mt. Sinai Hospital* (47 NY2d 170 [1979]), the administratrix of a plaintiff's estate entered into a stipulation with the defendant dismissing, without prejudice, a personal injury action started by the plaintiff, who had died in the

---

by applicable bankruptcy law. *See e.g.*, *Thompson v Quarles*, 392 BR 517, 524 (SD Ga 2008) (property acquired by a chapter 13 debtor post-petition must be disclosed and included in the bankruptcy estate; but property acquired by a chapter 7 debtor post-petition would not be property of the bankruptcy estate); *In re Batten*, 351 BR 256, 259 (Bankr SD Ga 2006) (debtor's ongoing duty to disclose assets in his bankruptcy schedules does not extend to assets that are not property of the bankruptcy estate). Horan was a chapter 7 debtor. However, as noted above, the bankruptcy trustee never appealed or moved to reargue the decision.

interim. Within six months thereafter, the administratrix commenced an action against the defendant based on the same facts and claims asserted in the prior action. The defendant moved for summary judgment dismissing the new action as time-barred, and the appellate court granted the motion. Reversing the appellate court, the Court of Appeals stated that:

> Usually, of course, the fact that one party commenced an action which is subsequently dismissed, will not serve to justify application of [CPLR 205 (a)] so as to support a later action by a different claimant. Where, however, as here, the claim is the same, and the subsequent claimant is acting as the representative of the named plaintiff in the prior action, no such difficulty arises.

Id. at 179. *See also Reliance Insurance Co. v PolyVision Corp.*, 9 NY3d 52 (2007) (following the rationale stated in *George v Mt. Sinai Hospital*, the Court of Appeals declined to apply the six-month extension afforded under CPLR 205 (a), because plaintiff in the new action sought to enforce its own separate rights, rather than the rights of plaintiff in the original action).

In this case, it is undisputed that the instant action is based on the same facts and claims contained in the Prior Action. It is also undisputed that the Prior Action was dismissed because the First Department found Horan lacked the capacity to sue, and that the substitution of Gazes, as plaintiff, did not cure the defect. It is further undisputed that the summary judgment did not deal with the merits of the malpractice claim. Hence, under

applicable law, CPLR 205 (a) applies to this case because the summary judgment was not a "final judgment upon the merits." As such, the limitations period for plaintiff Gazes to commence a new malpractice action was extended to September 13, 2007, six months after the First Department's March 13, 2007 decision.[5]

Defendant Bennett next argues that, even if CPLR 205 (a) applies, he was not served with the complaint in the instant new action within the extended six-month period, and the instant action should thus be time-barred. As noted above, an individual in defendant's office was served with the summons and complaint in the instant action on September 12, 2007, and the same was mailed to Bennett's office on the same day. The affidavit reflecting such service was not filed until September 26, 2007. Under CPLR 308 (2), service of process is complete ten days after the proof of service is filed with the court. According to defendant, because the affidavit of service in this case was filed on September 26, 2007, service was not complete until October 6, 2007. As such, defendant argues that the instant action was time-barred even if CPLR 205 (a) applies, because the limitations period to commence this action had expired on

---

[5] This court notes that "the six-month period began to run when the [First Department] dismissed the [Prior Action,] and we reject plaintiff's contention that the six-month period should be calculated from the date of service of the judgment in the [Prior Action] with notice of entry." *Tang v St. Francis Hospital*, 37 AD3d 690, 691 (2nd Dept 2007).

September 13, 2007.

Such argument is without merit. There is ample caselaw which holds that a "[d]elay in filing proof of service under CPLR 308 is merely a procedural irregularity, not jurisdictional, and may be corrected *nunc pro tunc* by the court [citations omitted]". *Lancaster v Kindor*, 98 AD2d 300, 306 (1st Dept 1984), *affd* 65 NY2d 804 (1985). Also, it has been held that the purpose of requiring the filing of an affidavit of service, along with the ten-day grace period, "pertains solely to the time within which the defendant must answer, and does not relate to the jurisdiction acquired by service of the summons (citations omitted)" *Id.* *See also Paracha v County of Nassau*, 228 AD2d 422, 423 (2nd Dept 1996)(citing *Lancaster*); *Universal Bonding Insurance Company v All American Building and Development Corp.*, 2008 WL 1998675 (Sup Ct, NY County 2008)(same).[6] Thus, the fact that the affidavit of service was not filed until September 26, 2007 does not divest this court of jurisdiction over the defendant, when the summons and complaint was served and mailed on September 12, 2007, unless there was a defect in the service and/or mailing of the summons and complaint, as explained below.

In this case, the mailing envelope containing the summons and

---

[6] Defendant relies on *Roth v Syracuse Housing Authority* (2002 WL 31962630 [Sup Ct, Onondaga County 2002]) for a contrary proposition of law. Such reliance is misplaced because the *Roth* decision does not bind this court.

complaint indicated on the outside that it was from a law firm. CPLR 308 (2) states, in relevant part, that the mailing envelope must bear the legend "personal and confidential," but cannot indicate on the outside, "by return address or otherwise, that the communication is from an attorney ... ." The courts have held that a party seeking to assert jurisdiction over a defendant bears the burden of proof that service of process was properly made upon the defendant, and that strict compliance with all of the service requirements of CPLR 308 is required in order to obtain jurisdiction. *O'Brien v Hackensack University Medical Centre*, 305 AD2d 199 (1st Dept 2003); *Persaud v Teaneck Nursing Centre, Inc.*, 290 AD2d 350 (1st Dept 2002). In such regard, it has been held that where the mailing envelope did not bear the legend "personal and confidential," jurisdiction over the defendant was not obtained, and the complaint was dismissed. *Olsen v Haddad*, 187 AD2d 375 (1st Dept 1992); *Mastropierro v Bennett*, 233 AD2d 483, 484 (2nd Dept 1996); *see also Broomes-Simon v Klebanow*, 160 AD2d 973, 973 (2nd Dept 1990) (envelope which indicated that the sender was an attorney, and failed to include the legend "personal and confidential," was defective and jurisdiction was not acquired over the defendant); *Palais Partner v Vollenweider*, 173 Misc 2d 8, 12 (Civ Ct, NY County 1997) (envelope contained a return address disclosing its provenance was from a law firm was a jurisdictional defect). *Cf Ridgeway v St. John's Queens Hospital*, 199 AD2d 490,

491 (2nd Dept 1993) (envelope that bore the return address of plaintiff's attorney did not render mailing defective, as the mailing was sent to defendant's residence rather than his place of business).

The requirement that an envelope bear the legend "personal and confidential," as well as the requirement that it not indicate "by return address or otherwise, that the communication is from an attorney ..." relate to legislative confidentiality concerns. Thus, there is no reason to distinguish cases dismissing complaints where an envelope does not bear the legend "personal and confidential" from cases where the legend is included, but the envelope indicates that it is from an attorney. Because the September 12, 2007 mailing envelope indicated that it was from an attorney (albeit it also contained the legend "personal and confidential"), which fact is undisputed, plaintiff Gazes failed to obtain jurisdiction over defendant Bennett as of that date. Further, as noted above, because the limitations period under CPLR 205 (a) to commence the instant action against defendant expired on September 13, 2007, plaintiff's subsequent service and mailing upon defendant on November 6, 2007 was a nullity, as it was time-barred, albeit it was properly made.

In the opposition brief, plaintiff's counsel requests an extension of time under CPLR 3012 (d) to, again, effect service of process upon the defendant. CPLR 3012 (d) provides that the court

may grant a party an extension of time to compel the acceptance of an untimely served pleading, but the party must make a showing of "reasonable excuse for [the] delay or default."

In this case, the First Department's adverse summary judgment dismissing the Prior Action was issued on March 13, 2007. Yet, plaintiff's counsel waited until the eve of the six-month extension period under CPLR 205 (a) (i.e. on September 12, 2007) before attempting service upon the defendant. Plaintiff's counsel attributed such delay due to the moving of his family from New York City to Rhinebeck and that he needed to find new employment as a result of such move. Charny Affirmation, dated January 17, 2008, ¶ 19-20. However, counsel does not explain why another attorney his office did not assist with arranging for earlier service. Moreover, in using its discretion, the court also considers the fact that the debtor is deceased and has been discharged, that the bankruptcy has been pending for over 12 years, and that, due to the passage of time, it is unclear whether any creditors stand to benefit from a favorable judgment or whether a judgment would primarily inure to the benefit of the trustee and his attorney. It is also noteworthy that based on counsel's own failures to do certain acts within a specified time period, he seeks a discretionary extension of time to serve process, in order to keep alive what would otherwise be a time barred legal malpractice action, to pursue a claim against another

attorney who allegedly also failed to do certain acts within a specified time period.[7] For all of these reasons, counsel's request for an extension of time under CPLR 3012 (d) is denied. Accordingly, it is

ORDERED that the defendant's motion to dismiss the complaint is hereby granted, and that plaintiff's request for an extension of time under CPLR 3012 (d) is hereby denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly, without costs and disbursements.

This constitutes the Decision and Order of the Court.

Dated: November 25, 2008

ENTER:

J.S.C.

EMILY JANE GOODMAN

FILED

NOV 08 2008

COUNTY CLERK'S OFFICE
NEW YORK

[7]While the process server retained by counsel in September 2007 might have been negligent in failing to complete the service and mailing in accordance with the strict requirements of CPLR 308, it has been held that an attorney who hired the process server might be held vicariously liable for the negligence of the process server. *Kleeman v Rheingold*, 81 NY2d 270 (1993).