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SCANNED ON 4/13/2009

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

PRESENT: LOUIS B. YORK J.S.C. Justice PART 2

Index Number : 106781/2008
KAT HOUSE PRODUCTIONS, LLC
vs
PAUL, HASTINGS, JANOFSKY
Sequence Number : 001
DISMISS ACTION

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

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
APR 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 4/6/09

LOUIS B. YORK 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 2

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KAT HOUSE PRODUCTIONS, LLC. et al,

Plaintiffs, Index No. 106781/2008

- against - DECISION AND ORDER

PAUL, HASTINGS, JANOFSKY &
WALKER, LLP

Defendant.

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LOUIS B. YORK, J.:

Background

In this action Kat House Productions and its owners Kathleen Merrick, Patricia J. Wagner, and Aurora Contreras (herein "plaintiffs") seek to recover damages against Paul, Hastings, Janofsky and Walker, LLP (herein "defendant") based on its alleged legal malpractice resulting from the failure to secure trademark protection for Plaintiffs' Surf Chick mark. In their complaint, Plaintiffs allege that Defendant violated its professional duties in the handling and application for the trademark. Plaintiffs claim that this malpractice resulted in dilution of the trademark and contributed to millions of dollars of lost profits to Plaintiffs' business.

For the sake of this motion to dismiss, all facts alleged by Plaintiff are assumed true. Brewster v. Lacy, 24 A.D.3d 136, 136, 805 N.Y.S.2d 56, 56 (1st Dept. 2005). Kat House business sells clothing, surfboards, and accessories that have a reputation in the United States and worldwide. Kat House sought protection of the Surf Chick mark under which it allegedly has a well-established reputation for quality with both consumers and the surfer community. On or about March 1999, Plaintiffs retained Defendant to obtain and fulfill the applicable requirements

and procedures to maintain the Surf Chick trademark both in the United States and a number of foreign countries. Allegedly, Defendants failed to procure the trademark. Plaintiffs state that they discovered Defendant's malpractice by email correspondence in February 2005. On March 9, 2006 it sent a letter of disengagement, in which it severed representation as a result of non-payment of fees.

Initially, Plaintiffs commenced an action on November 7, 2007 in the United States District Court for the Southern District of New York, but this action was dismissed on May 12, 2008 solely on the basis of subject matter jurisdiction. Subsequently on May 16, 2008, Defendant commenced an action in California, for legal fees arising from Defendant's representation of Plaintiffs. The action was dismissed without explanation. The current action was filed in New York State Supreme Court on May 15, 2008. Plaintiffs assert causes of action for a breach of professional responsibility, breach of contract, legal fees arising from the present action, and breach of duty to supervise the foreign law firms which assisted in trademark applications in other countries. These four causes of action arise from the time period between when Defendant was retained until representation was disengaged on March 9, 2006.

Defendant now moves, pursuant to CPLR §202 and 3211(a)(5), to dismiss the complaint on the ground that the cause of action is barred by the statute of limitations. Defendant alleges that according to the New York borrower statute, CPLR §202, the California statute of limitations should govern. Under the California statute of limitations, CCP § 340.6, malpractice suits must be commenced within one year after the plaintiff discovers or has reason to discover the wrongful acts of the defendant. Defendant asserts that Plaintiffs did not commence the initial action until November 1, 2007, more than one year after both the date of knowledge (discovery

of the alleged malpractice) and the date Defendants severed representation. For the reasons stated, Defendant's motion to dismiss is granted.

Discussion

In order to address the appropriate procedure under which the claim is made, the Court must first set forth the pertinent statute of limitations. Here, the parties argue that either New York's or California's statute of limitations could apply. New York CPLR §214(6) states that "an action to recover damages for malpractice...regardless of whether the underlying theory is based on contract or tort" must be commenced in three years (emphasis added). The California statute section 340.6 states that "[a]n action against an attorney for a wrongful act or omission,... arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered the facts constituting the wrongful act or omission (emphasis added)." If the New York statute is applicable, then Plaintiff had three years to bring the current action, but if the California statute applies, then Plaintiff had only one year to bring a timely suit.

It is necessary to look to the New York borrower's statute to determine whether the cause of action requires the California statute of limitations to enumerate the appropriate time in which to bring the action, or whether the New York rule is binding on this action. The New York borrower statute, CPLR §202 provides:

> An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply (emphasis supplied).

The purpose of CPLR §202 is to prevent forum shopping by plaintiffs and to adhere to the generally accepted definition (Global Fin. Corp. v. Triarc Corp., 93 N.Y.2d 525, 693

N.Y.S.2d 479). Accrual is defined as "the time when, and the place where, the plaintiffs first had the right to bring the cause of action." Id. at 528, N.Y.S.2d at 481. In particular, "when an alleged injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss." Id. at 529, N.Y.S.2d at 482. Furthermore, CPLR §202 was not intended to confound plaintiffs attempting to determine where the cause of action accrued.

> CPLR §202 is designed to add clarity to the law and provide the certainty of uniform application to litigants.' This goal is better served by a rule requiring the single determination of a plaintiff's residence than by a rule dependant on a litany of events relevant to the "center of gravity" of a contract dispute.

Global, 93 N.Y.2d at 530, 693 N.Y.S.2d at 485-86. Only under unusual circumstances will a cause of action arise from a place other than Plaintiffs' residence or the site of economic loss.

Under the governing case law, a cause of action accrues at "the place where the investors resided and sustained the economic impact of the loss (Smith Barney, Harris Upham & Co., Inc v. Luckie, 85 N.Y.2d 193, 207, 623 N.Y.S.2d 800, 808 (1995) (herein "Luckie"))." In Luckie, the case involved an arbitration agreement and the court determined that the statute of limitations to be applied for a cause of action is the same as the one to be used for arbitration proceedings. The Court of Appeals distinguished between the site of the plaintiff's economic loss and the location of the defendant's securities brokerage company, finding that a cause of action for fraud accrues in the State in which the loss occurred. See id. at 207, N.Y.S.2d at 808. It has also been established that the site of the harm suffered is where the cause of action arises, and that site is primarily the location of the business. See Proforma Partners, LP v. Skadden Arps Slate Meagher and Flom LLP, 280 A.D.2d 303, 304, 720 N.Y.S.2d 140, 140 (1st Dept. 2001).

Here, the parties take differing positions as to where the harm was ultimately caused. Plaintiffs contend that the harm was caused in New York at the site of Defendant's offices and thus New York is the appropriate site for the cause of action to accrue. Plaintiffs argue that because Defendant is a law firm licensed to practice in New York, all acts of malpractice occurred in New York. Defendant argues instead that Plaintiffs suffered the harm at the site of the business in California. Based on the site of economic loss rule, Defendant asserts that the cause of action accrued in the state of California and thus the California statute of limitations should apply. Defendant argues that because Plaintiffs and their business are in California, the economic suffering occurred in California. Therefore, the cause of action accrued in California and the relevant statute of limitations should apply.

After reviewing the parties' arguments, the Court determines that the cause of action accrued in California. "[W]hen an alleged injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss (Global, 93 N.Y.2d at 529, 693 N.Y.S.2d at 482)." As stated, Plaintiffs' business and residences are in California. In addition, that is where they sustained their economic loss and lost profits. Therefore, the cause of action accrued in California at the site of the economic loss.

Plaintiffs raise several arguments to the contrary, none of which are persuasive. First, Plaintiffs argue that under Global, the site of economic loss is not the mandatory place of accrual. Instead, Plaintiffs assert that in unusual circumstances accrual could occur in a location other than where loss of profits were suffered. Defendant's place of business and site of malpractice occurred in New York, and therefore Plaintiffs cite New York as where the cause of action accrued. However, Plaintiffs do not explain why this case should be deemed unusual, such that it is an exception to the rule in Global. Without a strong reason to apply an exception, the

court determines that the Global rule applies. Additionally, it is site of the harm suffered that is relevant See Proforma Partners, LP v. Skadden, 280 A.D.2d 303, N.Y.S.2d 140 (1st Dept. 2001). This excludes New York, because the harm was not caused at the site of Defendant's business, but rather at Plaintiffs' business location. Therefore, the Court finds that the cause of action accrued in California.

Plaintiffs argue that the Court still should apply the New York statute of limitations using the "operative facts" analysis. In an operative facts test, the place "where all the operative facts" occurred is determined as the site of the cause of action (Insurance Co. v. ABB Power Generation, 91 N.Y.2d 180, 183, 668 N.Y.S.2d 143, 144 (1997)). However, courts appear to apply the operative facts test only in cases where the arbitration agreement stipulates a location in which none of the relevant facts occurred. In that instance the court will use the operative facts test to determine which statute of limitations should be applied. The facts of the current case are clearly distinguishable from Insurance Co., and the issues in Global are more analogous. In Insurance Co. the parties contracted to arbitrate in New York even though all the relevant facts and actions occurred in California. The court used the California statute of limitations because all the actions of both parties occurred in California but the arbitration was commenced in New York. The case here, however, does not involve an arbitration agreement, and there is no contract between them specifying the choice of law or the site of loss. Therefore, Plaintiffs' reliance upon the operative facts language is unpersuasive and thus, California's CCP § 340.6 applies.

Both Defendant and Plaintiff argue about the controlling date on which the statute of limitations begins to run. Defendant states that the February 2005 emails demonstrate that Plaintiffs had knowledge of the alleged malpractice of the attorneys in February. Conversely,

Plaintiffs argue that the accrual occurred in March 2006 at the time the disengagement letter was mailed by Defendants. This dispute is only relevant, however, if the Court adopted Plaintiffs' position applying the New York statute of limitations. Under the California statute of limitations, the case is untimely under the analysis of either date because both the February 2005 emails and the March 2006 disengagement letter occurred over a year before the initial action was filed in November 2007. Either date would have the same result, causing the action to be dismissed, because it was outside the one-year California statute of limitations parameters.

Plaintiffs also raise several other arguments to voice dissent on issues such as the continuous representation doctrine and the date on which the accrual would commence. However, as the Court has determined that the California statute of limitations is the applicable law according the New York borrower statute, then it need not address these arguments.

Conclusion

Based on the above, therefore, it is

ORDERED that Defendant's motion to dismiss is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of Defendant, dismissing the complaint in its entirety.

Dated: April 6, 2009

ENTER:

Louis B. York, J.S.C