

Yakubov v Borukhov
2010 NY Slip Op 30323(U)
February 16, 2010
Supreme Court, Queens County
Docket Number: 14590/08
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

BORIS YAKUBOV

Plaintiff,

-against-

ARON B. BORUKHOV, ESQ. and
PENNISI, DANIELS & NORELLI, LLP

Defendants.

Index No: 14590/08

Motion Date: 12/23/09

Motion Cal. No.: 25

Motion Seq. No.: 1

The following papers numbered 1 to 10 read on this motion by defendant, Aron B. Borukhov, ESQ., for summary judgment dismissing the complaint as being barred by the applicable statute of limitations.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits	1 - 4
Answering Affidavits-Exhibits.....	5 - 7
Replying Affidavits.....	8 - 10

Upon the foregoing papers it is ordered that this motion is granted and the complaint, insofar as it is asserted against the defendant, Aron B. Borukhov, ESQ., is dismissed. The remainder of the action is severed.

In 2003, the plaintiff, as the purchaser, retained the defendant, Aron B. Borukhov, ESQ., to represent him in the negotiations and execution of a contract to purchase certain real property. A contract for the purchase of 85-82 Santiago St., Holliswood, N.Y., Block 10503, Lot 15 was executed on or about September, 22, 2003, and closing scheduled to take place on or about October 15, 2003. At the time of execution of the contract, the subject real property, 85-82 Santiago St., Holliswood, N.Y., consisted of a single tax Lot 13. The complaint alleges that Lot 15 was to be created by subdividing Lot 13 into the two tax lots, Lot 15 and Lot 13.

Sometime after execution of the contract, the seller refused to close and desired to cancel the contract. On December 29, 2003 the plaintiff retained Pennisi, Daniels & Norelli, LLP, the codefendant, to bring an action for breach of contract against the seller and seeking specific performance and damages. The codefendant commenced the action in 2004 and obtained summary judgment in favor of plaintiff in October, 2004. A closing took place on June 24, 2005 at which plaintiff was represented by the codefendant.

The plaintiff commenced this action on June 12, 2008 against the defendants for legal malpractice alleging that the defendants were negligent by allowing the plaintiff to sign a contract without a provision conditioning the purchase of the property on the creation of Lot 15 and allowing the plaintiff to close on the property when Lot 15 did not exist resulting in the plaintiff failing to obtain clear unencumbered title to Lot 15.

The defendant, Borukhov, now moves for summary judgment dismissing the complaint asserting that plaintiff's legal malpractice claim insofar as it is asserted against him is barred by the statute of limitations inasmuch as it is based solely upon the allegation that he allowed the plaintiff to enter into a contract on September 22, 2003 which did not make performance conditioned upon Lot 13 being subdivided.

A cause of action for 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" (McCoy v. Feinman, 99 NY2d 295, 301 [2002] quoting Ackerman v. Price Waterhouse, 84 NY2d 535, 541 [1994]). Generally, this occurs when the malpractice is committed even if the aggrieved party is then ignorant of the malpractice or injury (see Shumsky v. Eisenstein, 96 NY2d 164, 166 [2001]; Ackerman v. Price Waterhouse, supra; Glamm v. Allen, 57 NY2d 87, 95 [1982]). "What is important is when the malpractice was committed, not when the client discovered it" (Shumsky v. Eisenstein, supra, quoting Glamm v. Allen, supra at 95).

A defendant who seeks to dismiss a complaint on the grounds that the action is barred by the statute of limitations has the burden to establish, prima facie, that the action to recover damages for legal malpractice was filed more than three years after the cause of action accrued (see CPLR 214[6]; Rachlin v. LaRossa, Mitchell & Ross, 8 AD3d 461); Gravel v. Cicola, 297 AD2d 620 [2002]; Savarese v. Shatz, 273 AD2d 219, 220 [2000]).

The defendant's competent evidence, including the complaint, his affidavit, the real estate purchase contract and the plaintiff's retainer agreement with codefendant, established, prima facie, his entitlement to summary judgment demonstrating that this action accrued upon the execution of the contract on September 22, 2003 and, thus, this action filed on June 12, 2008 was commenced after the expiration of the applicable three year statute of limitations.

In opposition, plaintiff contends that no actionable injury occurred so as to trigger the accrual of the malpractice claim until the closing on June 24, 2005, thus, this action was timely commenced on June 12, 2008. The plaintiff's argument is without merit. The terms of the contract and the plaintiff's and the seller's obligations thereunder were fixed when it was executed regardless of when the actual closing took place. Under the circumstances, any actionable injury plaintiff incurred as a result of the defendant's alleged malpractice existed when the contract was signed and such damages could then have been sufficiently calculable (see McCoy v. Feinman, supra at 305; Ackerman v. Price Waterhouse, supra).

Where, as here, the defendant has established, prima facie, his entitlement to summary judgment upon statute of limitations grounds, the burden shifts to the plaintiff to "aver evidentiary facts establishing that the case falls within an exception" to the statute of limitations (see 6D Farm Corp. v. Carr, 63 AD3d 903, 905-906 [2009]; Savarese v. Shatz, supra at 220 [internal quotation marks and citations omitted]) or to raise a question of fact as to whether an exception applies.

The doctrine of "continuous representation," tolls the three-year statute of limitations for legal malpractice until the attorney's ongoing representation of the plaintiff in the matter in which the attorney committed the alleged malpractice is completed (see Shumsky v. Eisenstein, supra at 168; Weiss v. Manfredi, 83 NY2d 974 [1994]; Griffin v. Brewington, 300 AD2d 283, 284 [2002]; Luk Lamellen U. Kupplungbau GmbH v. Lerner, 166 AD2d 505, 506 [1990]). This doctrine is based upon the recognition that a client cannot be expected to sue his attorney for malpractice during the attorney's ongoing representation of the client on a specific legal matter (Shumsky v. Eisenstein, supra at 167-168). Additionally, for the doctrine to apply, there must be a clear indication that the relationship between the client and the attorney is an ongoing, continuing, developing, and dependent relationship (Kanter v. Pieri, 11 AD3d 912, 913 [2004], quoting Luk Lamellen U. Kupplungbau GmbH v. Lerner, 166 AD2d 505, 506 [1990]; Corless v. Mazza, 295 AD2d 848 [2002];

Piliiero v. Adler & Stavros, 282 AD2d 511, 512 [2001]).

The plaintiff has failed to demonstrate that the statute of limitations was extended beyond December 29, 2003 or to raise a triable issue of fact. The plaintiff has failed to submit any evidence of an ongoing, continuous, developing, and dependent relationship with the defendant after December 29, 2003. Contrary to counsel's conclusory claims in his affirmation, neither the complaint nor plaintiff in his affidavit allege that the defendant had any contact with the plaintiff or that the defendant was required to or that he did perform any legal services after plaintiff retained new counsel on December 29, 2003. The only evidence plaintiff submitted as to the "continuous representation" doctrine is his own affidavit asserting that he was "under the impression" that defendant continued to be involved in the transaction. The plaintiff does not to support his "impression" with any specific factual averments as to what continuing legal services defendant performed after December 29, 2003 (see Kanter v. Pieri, 11 AD3d 912 [2004]) or that he had any contact with defendant or even that he attempted to contact defendant, but was unsuccessful (see N & S Supply v. Simmons, 305 AD2d 648, 650 [2003]; Tal-Spons Corp. v. Nurnberg, 213 AD2d 395 [1995]; see also Jane St. Co. v. Rosenberg & Estis, 192 AD2d 451 [1993]). The plaintiff's unilateral, subjective belief without any evidentiary basis for such belief or evidence that the defendant committed any act to foster such belief is insufficient (see e.g. Volpe v. Canfield, 237 AD2d 282 [1997], lv denied 90 NY2d 802 [1997] ; see also Jane St. Co. v. Rosenberg & Estis, supra). Plaintiff has submitted no evidence to rebut defendant's averment that he had no contact with plaintiff and that he did not perform any legal services for the plaintiff after December 29, 2003. Moreover, any consultation defendant may have had with the codefendant during the specific performance litigation regarding the contract negotiations such conduct does not constitute ongoing representation (see Tal-Spons Corp. v. Nurnberg, supra).

Nor is plaintiff's claim, pursuant to CPLR 3212(f), that summary judgment is premature as there is significant discovery outstanding warrant denial of the motion. The plaintiff has not submitted a copy of his discovery demand nor offered any evidentiary basis to suggest that such discovery, might lead to relevant evidence with respect to the statute of limitations (see Dempaire v. City of New York, 61 AD3d 816 [2009]), which information is exclusively within the knowledge and control of the defendant (see Gasis v. City of New York, 35 AD3d 533, 534 [2006]; Noy v. Everest Equities, Inc., 27 AD3d 629 [2006]) and that plaintiff has made diligent efforts to obtain the

information (see CPLR 3124; Cruz v. Otis Elevator Company, 238 AD2d 540[1997]; Cruz v. Otis Elevator Company, 238 AD2d 540 [1997]).

Dated: February 16, 2010
D# 40

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J.S.C.