

**Sladowski v Charles John Casolaro & Assoc., P.C.**

2010 NY Slip Op 30345(U)

January 27, 2010

Supreme Court, Queens County

Docket Number: 20071/2007

Judge: James J. Golia

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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable JAMES J. GOLIA  
Justice

IAS TERM, PART 33

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MARIANNE SLADOWSKI,

Index No: 20071/07

Plaintiff(s),

Motion Date: 09/10/09

-- against --

Cal. No: 24

CHARLES JOHN CASOLARO & ASSOCIATES,  
P.C., PAUL A. STASKO, PATRICK S. MIELO,  
MIELO & STASKO, LLP, MIELO, CASOLARO,  
AND STASKO, LLP,

Sequence No. 2

Defendant(s).  
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The following papers numbered 1 to 17 read on this motion by defendants Charles John Casolaro and Associates, P.C. (C&A) pursuant to CPLR 3211 (a)(5) to dismiss the amended complaint against them with prejudice, or in the alternative, pursuant to CPLR 3212 for summary judgment dismissing the amended complaint against them with prejudice; and this cross motion by plaintiff pursuant to CPLR 3212 for partial summary judgment in her favor against defendant Charles John Casolaro on the issue of liability.

PAPERS  
NUMBERED

Notice of Motion, Affidavits, Exhibits....	1 - 6
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Answering Affidavits, Exhibits.....	15 - 17

Upon the foregoing papers it is ordered that this motion is decided as follows:

In this action for legal malpractice, negligence and breach of contract, plaintiff served an amended complaint alleging that on September 25, 2000, she suffered personal injuries during an incident which occurred while she attended, as a spectator, a professional wrestling event, sponsored by World Championship Wrestling, Inc. (WCW) at Nassau Veterans Memorial Coliseum (Nassau Coliseum). Plaintiff also alleged that defendants herein represented her from October 1, 2000 to November 2005 in connection

with her claim for damages arising out of the incident and in a personal injury action entitled *Sladowski-Casolaro v. World Championship Wrestling, Inc.*, originally brought in Supreme Court, Queens County, against WCW, Scott Steiner, Jumbo Elliott (a/k/a John Jumbo Elliott), Nassau Coliseum and County of Nassau. Plaintiff further alleged that in November 2005 she retained Taub & Marder, Esqs. as new counsel to represent her in the *Sladowski-Casolaro* action. In addition, she alleged that defendants committed legal malpractice by 1) failing to join Steiner and Elliott in the *Sladowski-Casolaro* action, or alternatively, failing to seek a default judgment against Steiner and Elliott therein, 2) improperly joining County of Nassau as a defendant in *Sladowski-Casolaro* action or alternatively, failing to serve a timely notice of claim, 3) failing to name SMG Facility Management Corp. as a party defendant in the *Sladowski-Casolaro* action, and 4) failing to oppose a motion in the *Sladowski-Casolaro* action by County of Nassau to change venue to Nassau County. Plaintiff also alleged that such malpractice caused the *Sladowski-Casolaro* action to be undermined.

Defendant Casolaro and C&A served a joint answer to the amended complaint admitting that defendants Charles John Casolaro, Paul A. Stasko and Patrick S. Mielo had been partners of Mielo, Casolaro and Stasko, LLP, a limited liability partnership, which operated as a law practice and which represented plaintiff in the *Sladowski-Casolaro* action, and denying other material allegations. Defendants Casolaro and C&A also asserted various affirmative defenses, including the expiration of the applicable statute of limitations.

Taub & Marder, Esqs. commenced this action on behalf of plaintiff on August 13, 2007, during the pendency of the *Sladowski-Casolaro* action. Plaintiff subsequently entered into an agreement dated June 23, 2008 with WCW to settle the *Sladowski-Casolaro* action against WCW for a cash payment of \$365,000.00, and a stipulation of discontinuance dated June 24, 2008.

That branch of the motion by defendant C&W to dismiss the amended complaint asserted against it is granted. Plaintiff concedes that defendant C&A had not relationship to the events alleged in the amended complaint, and did not represent her in the *Sladowski-Casolaro* action, and that dismissal is warranted with respect to defendant C&A.

With respect to that branch of the motion by defendant Casolaro denominated as one to dismiss the amended complaint asserted against him pursuant to CPLR 3211(a)(5), in view of the fact that issue has been joined, it is actually a motion for

summary judgment pursuant to CPLR 3212 (see *Tufail v Hionas*, 156 AD2d 670, 671 [1989]; *Connell v Hayden*, 83 AD2d 30, 32 [1981]).

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient *Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

The statute of limitations in a legal malpractice action is three years counting from the date the malpractice was committed (see *Glamm v Allen*, 57 NY2d 87, 93 [1982]; *Goicoechea v Law Offices of Stephen R. Kihl* 234 AD2d 507 [1996]; *Boyd v Gering, Gross & Gross*, 226 AD2d 489 [1996]). However, the limitations period is tolled by the doctrine of continuous representation and does not begin to run until the attorney ceases representing the client on the matter which is the subject of the malpractice action (see *Sommers v Cohen*, 14 AD3d 691 [2005]). A relationship may still exist if the client can present "evidence of an ongoing, continuous, developing and dependant relationship" with his or her attorney (*Marro v Handwerker, Marchelos & Gayner*, 1 AD3d 488 [2003]; see *Piliero v Adler & Stavros*, 282 AD2d 511 [2001]).

The amended complaint alleges that legal malpractice took place before September 24, 2003, the date of the commencement of the *Sladowski-Casolaro* action, insofar as it is alleged defendants failed to file a timely notice of claim on behalf of plaintiff with respect to her claims against the County of Nassau. With respect to the remaining allegations of legal malpractice, those acts took place during the period of defendants' alleged representation of plaintiff in the *Sladowski-Casolaro* action. Defendant Casolaro concedes that the statute of limitations for the cause of action for legal malpractice asserted against him was tolled during the period in which Mielo, Casolaro and Stasko, LLP represented plaintiff in the *Sladowski-Casolaro* action. He asserts, however, that the tolling of the statute of limitations ceased with respect to him in May 2004 when he withdrew as a partner from Mielo, Casolaro and Stasko, LLP, or at latest, on July 13, 2004, when plaintiff executed a consent to change attorney from substituting Mielo & Stasko, LLP as the law firm of record for Mielo, Casolaro and Stasko, LLP in the *Sladowski-Casolaro* action.

Defendant Casolaro testified that he and defendants Stasko and Mielo entered into an oral partnership agreement, and formed a limited liability partnership under the name "Mielo, Casolaro and Stasko, LLP" in late 1999. Defendant Casolaro states that in late 2000, at a time when he was still a partner in Mielo, Casolaro and Stasko, LLP, plaintiff approached him about engaging the law firm

to represent her in connection with her claims of personal injuries sustained at the wrestling event. Defendant Casolaro asserts that plaintiff formally retained Mielo, Casolaro and Stasko, LLP, by executing a retainer agreement, dated January 2, 2002, to prosecute her claim for damages arising from her personal injuries, and that Mielo, Casolaro and Stasko, LLP commenced the *Sladowski-Casolaro* action on her behalf. Defendant Casolaro claims that in May 2004, while the *Sladowski-Casolaro* action still was pending, he withdrew as a partner from Mielo, Casolaro and Stasko, LLP (to join another law firm), but did not take plaintiff's case with him. He asserts that upon his withdrawal as a partner in Mielo, Casolaro and Stasko, LLP, the partnership was dissolved by operation of law. Defendant Casolaro, therefore, contends that to the extent his former partners, defendant Mielo and Stasko, continued to provide legal representation to plaintiff, such representation was not provided by the dissolved partnership. Defendant Casolaro further contends that to the extent defendants Mielo and Stasko at some point formed a new limited liability partnership named "Mielo, & Stasko, LLP," he was neither a partner nor employee thereof.

Plaintiff counters that the statute of limitations remained tolled with respect to defendant Casolaro until the substitution of Taub & Marder, Esqs. as counsel in the *Sladowski-Casolaro* action in November 2005. Plaintiff testified that she attended the wrestling event with the brother of defendant Casolaro, John Casolaro, whom she was dating and later married on August 24, 2002. Plaintiff testified she knew defendant Casolaro on a social basis prior to her attending the wrestling event and knew that he was a lawyer. Plaintiff testified that after the incident, John Casolaro suggested she discuss her case with his brother, which she did, while at a family function in November or December 2000. Plaintiff stated that during their meeting, defendant Casolaro agreed to represent her regarding her claims arising out of the incident at the wrestling event. Plaintiff admits that she thereafter executed the January 2, 2002 retainer agreement.

Plaintiff testified that by December 2004, she and her husband were involved in separation proceedings, which culminated in their divorce in October 2006.<sup>1</sup> Plaintiff admitted, however, that as of May 2004, she and her husband had a "healthy" marital relationship. According to plaintiff, she became aware that defendant Casolaro had "physically" left the offices where he worked with defendants Mielo and Stasko. In her supplemental response dated March 12, 2008, to defendant Casolaro's first set of interrogatories,

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<sup>1</sup>Mielo & Stasko, LLP represented her in the matrimonial action.

plaintiff stated that she believed that her husband, another family member or defendant Casolaro orally informed her that Casolaro had left the premises where defendants Mielo and Stasko were practicing law. She testified that she believed this meant that although defendant Casolaro's office would be moved, he would still continue to handle her case. Plaintiff states that she relied upon defendant Casolaro's promise that he would continue to work on her case and "see it through" and be the attorney to try her case in court if it did settle and a trial was necessary. During her deposition, she admitted that she began dealing with other attorneys at the law offices, but stated it was not at her request. She testified that she believed the law firm had taken it upon itself to distance her from defendant Casolaro due to her separation from his brother. Plaintiff also testified that she continued to communicate with defendant Casolaro from May 2004 until the end of the year.

Defendant Casolaro offers no documentary evidence indicating that any of the defendants notified plaintiff by, or in, May 2004 of his alleged withdrawal as a partner from Mielo, Casolaro and Stasko, LLP or the purported dissolution of Mielo, Casolaro and Stasko, LLP. Furthermore, defendant Casolaro admitted during his examination before trial, that he did not "think" he notified, in writing, those clients, on whose matters he worked while at Mielo, Casolaro and Stasko, LLP, of his "intended" departure. When asked if he ever informed plaintiff at any time in May 2004 or prior thereto of his intention to leave the law firm of Mielo, Casolaro & Stasko, he testified he did not remember if he told her or his brother. To the extent defendant Casolaro testified that he told plaintiff he was leaving the law firm, he was unable to recall when the conversation took place. Yet, in his self-serving affidavit in support of the motion, he now states that "[a]round [April or May of 2004], I ... informed plaintiff that I was leaving and that her case would remain with my former partners." He offers no explanation for his sudden recall regarding the date he informed plaintiff he was leaving the practice.

Under these circumstances, issues of fact exist as to whether plaintiff was aware by May 2004, of the alleged withdrawal of defendant Casolaro as a partner from Mielo, Casolaro and Stasko, LLP.

To the extent defendant Casolaro asserts the tolling of the statute of limitations ceased with respect to him when plaintiff executed a consent to change form attorney dated July 13, 2004, defendant Stasko testified that in or around May 2004, Mielo, Casolaro and Stasko, LLP was dissolved, and at some point, the new firm named "Mielo and Stasko, LLP" was formed. He also testified

that plaintiff was "brought in" for a meeting at the law offices in Farmingdale, on the evening of July 13, 2004, called for the purpose of having her sign a consent to change attorney form. Defendant Stasko also testified that defendant Mielo did not attend the meeting, but nevertheless further testified, "[w]e told her that Charlie left the firm and that we would be taking over the file, the new firm was taking over the file, if she wanted us to represent her. If she wanted to then she would sign the consent. We told her she would be retaining us as her attorneys." Defendant Stasko further testified that he witnessed plaintiff sign the form. Defendant Mielo testified that he could not remember when he signed the form, but posited it might have been the following morning or afternoon.

Plaintiff does not deny signing the consent to change attorney form, but asserts that she must have done so unwittingly, insofar as she does not recall seeing it before. Plaintiff states that no one explained its meaning, significance or import to her. Plaintiff also states that she signed numerous forms presented to her by her then attorneys, and that she assumed they were for the purpose of furthering the litigation. She further states that she never received any written or oral explanation regarding the purported substitution of counsel, or the status of defendant Casolaro vis-a-vis the law firm of Mielo, Casolaro and Stasko, LLP. She claims that none of the individual defendants advised her that defendant Casolaro would no longer be involved in the prosecution of her case, or that he would not try her case in court if it did not result in a settlement. She also claims to have continued to rely upon the terms of the January 2, 2002 retainer agreement, and the reassurances of defendant Casolaro that he was responsible for her case and would try it in court if necessary.

To the extent plaintiff asserts she relied upon the January 2, 2002 retainer agreement, she retained the law firm of Mielo, Casolaro and Stasko, LLP as her counsel, not defendant Casolaro individually. That defendant Casolaro signed the retainer agreement on behalf of Mielo, Casolaro and Stasko, LLP does not alter that fact. It has been held that upon the execution of a consent to change attorney form, an attorney ceases to represent the client (*see Marro v Handwerker, Marchelos & Gayner*, 1 AD3d 488 [2003], *supra*; *Daniels v Lebit*, 299 AD2d 310 [2002]; *Wester v Sussman*, 287 AD2d 618 [2001]; *Elliott v. Jacobs*, 221 AD2d 889 [1995]). In this instance, the consent to change counsel form was executed on July 13, 2004, and by its terms, substituted defendant Mielo & Stasko, LLP for Mileo, Casolaro and Stasko, LLP as counsel in the *Sladowski-Casolaro* action (*see Sommers v Cohen*, 14 AD3d 691 [2005]).

A party who signs a document is conclusively bound by its terms absent a valid excuse for having failed to read it (see *Gillman v Chase Manhattan Bank* 73 NY2d 1 [1988]; *Pimpinello v Swift & Co.*, 253 NY 159 [1930]; *Metzger v Aetna Ins. Co.*, 227 NY 411 [1920]). Plaintiff does not dispute that she attended the meeting with defendant Stasko at the Farmingdale offices in July 2004, and offers no allegation as to any purported explanation or representation given by defendant Stasko, or any other defendant, regarding the need for her to execute the form (see *Bishop v Maurer*, 9 NY3d 910 [2007] [legal malpractice claim dismissed where plaintiff failed to read a document and offered no nonconclusory allegation that incorrect explanation of the contents of the document was given]; cf. *Arnav Industries, Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, LLP*, 96 NY2d 300 [2001] [legal malpractice claim reinstated where plaintiffs claimed to have misadvised by counsel about the contents of a revised settlement agreement they had signed without reading]). Nor does she claim that any defendant advised her to sign the consent to change form without reading it. Although she asserts she executed many documents regarding the authorization or release of medical records, she offers no evidence that she signed any such authorization or release simultaneously with the consent to change attorney form.

Under such circumstances, the execution of the consent to change counsel form relieved defendant Mielo, Casolaro and Stasko, LLP as counsel in the *Sladowski-Casolaro* action (see *Sommers v Cohen*, 14 AD3d 691 [2005]), and defendant Mielo, Casolaro and Stasko, LLP ceased to represent plaintiff in the *Sladowski-Casolaro* action (see *Marro v Handwerker, Mardchelos & Gayner*, 1 AD3d 488 [2003], *supra*; *Daniels v Lebit*, 299 AD2d 310 [2002], *supra*; *Wester v Sussman*, 287 AD2d 618 [2001], *supra*). Plaintiff offers no evidence that defendant Casolaro was ever a partner in, or an employee of, Mielo and Stasko, LLP, or that defendant Mielo, Casolaro and Stasko, LLP or defendant Casolaro otherwise continued to represent her with regard to the *Sladowski-Casolaro* action from which the alleged malpractice arose within the three years preceding the commencement of this action (see *Ainbinder v Jacobi*, 268 AD2d 494 [2000]). Nor has she shown that she was in a separate attorney-client relationship with defendant Casolaro after July 13, 2004 (see *Piliero v Adler & Stavros*, 282 AD2d 511, 512 [2001]; *Wester v Sussman*, 287 AD2d 618 [2001], *supra*). Therefore, because the instant action was not commenced until more than three years after July 13, 2004, the cause of action for legal malpractice against defendant Casolaro is time-barred under the statute of limitation.

Plaintiff's breach of contract claim against defendant

Casolaro is essentially that defendant Casolaro failed to perform services in a professional, non-negligent manner, and does not include any allegation of distinct damages. As a consequence, that claim is likewise governed by the three-year statute of limitations applicable to a cause of action for legal malpractice (CPLR 214[6]; see *Boslow Family Ltd. Partnership v Kaplan & Kaplan, PLLC*, 52 AD3d 417 [2008]). Furthermore, to the extent plaintiff's amended complaint alleges negligence and breach of contract as against defendant Casolaro, those claims arise from the same set of facts as the legal malpractice cause of action, and do not allege distinct damages, and thus, are duplicative of the legal malpractice cause of action (see *Turner v Irving Finkelstein & Meirowitz, LLP*, 61 AD3d 849 [2009]; *Kvetnaya v Tylo*, 49 AD3d 608 [2008]; *Shivers v Siegel*, 11 AD3d 447 [2004]; *Daniels v. Lebit*, 299 AD2d 310 [2002], *supra*).

That branch of the motion by defendant Casolaro for summary judgement dismissing the amended complaint asserted against him is granted. The cross motion by plaintiff for partial summary judgment on the issue of liability against defendant Casolaro is denied.

Dated: January 27, 2010

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JAMES J. GOLIA, J.S.C.