

McCann v Manheimer
2011 NY Slip Op 30158(U)
January 10, 2011
Sup Ct, Nassau County
Docket Number: 19236/09
Judge: Karen V. Murphy
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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____x

DONNA ANNE MCCANN,

Plaintiff(s),

-against-

**JEFFREY A. MANHEIMER and MANHEIMER &
CHARNAS, LLP,**

Defendant(s).

_____x

Index No. 19236/09

**Motion Submitted: 11/5/10
Motion Sequence: 003**

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....X
- Reply.....XX
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

By Order of this Court dated September 30, 2010, this Court granted plaintiff's motion for renewal and re-argument, and then vacated its previous Order dated May 5, 2010 dismissing the complaint and denying as moot plaintiff's cross-motion for summary judgment. In its September 30, 2010 decision, the Court further determined to treat defendant's motion to dismiss as a motion for summary judgment, and provided the parties a further opportunity to submit any additional proof to buttress their respective positions.¹

¹The parties did not submit any further evidence in support of their respective positions, but they each submitted supplemental affirmations.

Accordingly, the Court will now consider defendant's summary judgment motion, which was made first in time, and then plaintiff's cross-motion for summary judgment.

The instant action involves plaintiff's allegations that the defendants committed legal malpractice by failing to commence a medical malpractice action in a timely fashion. The medical condition in question concerns injuries alleged to have been caused during plaintiff's thyroid surgery.

Plaintiff underwent thyroid surgery in March, 2004. It is during the surgery that plaintiff alleges the surgeon caused injury to her, resulting in the paralysis of one of plaintiff's vocal cords. In or about May 2004, it appears that plaintiff executed a retainer and/or engaged defendants with respect to prosecuting the alleged medical malpractice matter. It is apparently undisputed that the statute of limitations governing the medical malpractice action expired on September 12, 2006.

Defendant law firm dissolved on or about January 1, 2008. By November 14, 2008, defendant Manheim had executed a lease for a new law office in Nassau County, New York. The instant action for legal malpractice was commenced on or about March 5, 2009, when the action was filed in Supreme Court, New York County.²

Defendants allege that plaintiff's legal malpractice claims are time-barred because the attorney-client relationship terminated on or about October 28, 2005, approximately thirty days after the date of the letter sent to plaintiff terminating that relationship. Defendants assert that the letter, dated September 28, 2005, was sent to plaintiff on or about that same date. According to defendants, the statute of limitations to bring the legal malpractice action against them expired on October 28, 2008, three years after the termination of the attorney-client relationship.

Plaintiff contends that she never received the aforementioned letter, and that it was manufactured by defendants for the purpose of defending themselves against plaintiff's lawsuit. She further claims that she believed that defendants continued to represent her on the medical malpractice claim, thereby tolling the applicable statute of limitations for bringing the legal malpractice action. Specifically, plaintiff alleges that she first learned of the termination of the attorney-client relationship on or about March 7, 2007.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974). Summary judgment should only be

²The action was originally commenced in New York County, but venue was subsequently transferred to Nassau County.

granted where the court finds as a matter of law that there is no genuine issue as to any material fact. *Nassau Diag. Imag. & Radiation Oncology Assoc. v. Winthrop-University Hosp.*, 197 A.D.2d 563, 602 N.Y.S.2d 650 [2d Dept., 1993]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff. (*Makaj v. Metropolitan Transportation Authority*, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

A cause of action sounding in legal malpractice must be commenced with the three years following the accrual of the claim (*CPLR* § 214[6]). The accrual time for a legal malpractice action is measured from the date that the injury is claimed to have occurred "even if the aggrieved party is then ignorant of the wrong or injury" (*McCoy v. Feinman*, 99 N.Y.2d 295, 785 N.E.2d 714, 755 N.Y.S.2d 693 (2002) quoting *Ackerman v. Price Waterhouse*, 84 N.Y.2d 535, 644 N.E.2d 1009, 620 N.Y.S.2d 318 [1994]). "What is most important is when the malpractice was committed, not when the client discovered it" (*McCoy v. Feinman*, *supra*; quoting *Shumsky v. Eisenstein*, 96 N.Y.2d 164, 750 N.E.2d 67, 726 N.Y.S.2d 365 [2001]). At the latest however, the cause of action accrues upon termination of the attorney-client relationship (*Glamm v. Allen*, 57 N.Y.2d 87, 94, 439 N.E.2d 390, 453 N.Y.S.2d 674 (1982)).

The applicable statute of limitations can be tolled by operation of the doctrine of continuous representation, which will toll the running of the statute until such time that the ongoing representation is concluded (*Shumsky v. Eisenstein*, *supra*; *Piliero v. Adler & Stavros*, 282 A.D.2d 511, 723 N.Y.S.2d 91 [2d Dept., 2001]). The doctrine will apply where there exists "a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim" (*McCoy v. Feinman*, *supra*).

Moreover, there must be "clear indicia of an ongoing, continuous, developing and dependent relationship between the client and the attorney often involving an attempt by the attorney to rectify an alleged act of malpractice" (*Piliero v. Adler & Stavros*, *supra*, quoting *Luk Lamellen U. Kupplungbau GmbH v. Lerner*, 166 A.D.2d 505, 560 N.Y.S.2d 787 [2d Dept., 1990]).

Thus, and in order to prevail on their summary judgment motion, defendants must establish that the attorney-client relationship with plaintiff terminated on October 28, 2005, and that there was no continued representation of plaintiff from that point on. Defendants have met their burden.

In support of their motion, defendants have submitted, *inter alia*, the letter they claim was generated and mailed on September 28, 2005 terminating the attorney-client relationship. The letter is not on firm letterhead; however, defendants have submitted an affidavit from Chad M. Mayer, Esq., a customer service representative of TrialWorks, which

is a case management software program used by defendants. Mr. Mayer's affidavit attests to the fact that the September 28, 2005 letter was "created, modified and printed on September 28, 2005."

Defendants have also supplied the affidavit of Janet Dobroski, defendant law firm's former paralegal assigned to this matter. Ms. Dobroski's affidavit states that she mailed the September 28th letter to plaintiff at 35 Briarcliff Avenue, North Merrick, New York 11566,³ and that the mailing was never returned to the law firm by the United States Postal Service ("USPS").

It has long been held in New York, that a letter that has been mailed is presumed to have been received. Of course, this presumption is rebuttable upon submission of proper proof (*News Syndicate Company, Inc. v. Gatti Paper Stock Corp.*, 256 N.Y. 211, 176 N.E.2d 169 (1931); *Vita v. Heller*, 97 A.D.2d 464, 467 N.Y.S.2d 652 [2d Dept., 1983]). Thus, the Court finds that defendants terminated the attorney client relationship by mailing the September 28, 2005 letter to plaintiff, which was not returned by the USPS. Accordingly, defendants have established their *prima facie* entitlement to summary judgment as a matter of law.

The burden now shifts to plaintiff to establish a triable fact with respect to the termination of the attorney-client relationship. Plaintiff has met her burden.

In support of her motion, plaintiff submits, *inter alia*, her own affidavit stating that she never received the September 28, 2005 letter from defendants, and that the letter submitted by defendants is "fraudulent." Plaintiff states that, in 2004, she changed her mailing address to the Briarcliff Drive address to which defendants claim they mailed the termination letter. Plaintiff further states that she received other letters from defendants at that address, in 2004 and early 2005.

Plaintiff's mother submits her own affidavit attesting to the fact that she resides at the address to which the letter was mailed. Plaintiff's mother also states that she was involved in "each and every stage" of plaintiff's medical malpractice action, and that they discussed all correspondence, but never became aware of any correspondence closing plaintiff's file and terminating the representation.

Plaintiff also submits an affidavit from Adam Glass, an individual who maintains the computer systems for plaintiff's counsel. Mr. Glass claims to be a certified Microsoft Windows IT specialist. In his affidavit, he states that he has reviewed Chad M. Mayer's

³Plaintiff's affidavit submitted in connection with the instant motion and cross-motion acknowledges that her mailing address was 35 Briarcliff Drive, Merrick, New York 11566.

affidavit regarding the creation of the termination letter dated September 28, 2005. Mr. Glass states that the document's properties can be manipulated to appear as if the document was created on a particular date, even if it was not created on that date. Mr. Glass further states that the fact that many documents are shown to have been generated in a short period of time, indicates that Mr. Mayer's affidavit "appears irregular."

In view of the foregoing, the Court has determined that plaintiff has raised a triable issue of fact with respect to whether the attorney-client relationship was terminated in or about September or October 2005 by the letter relied upon by defendants.

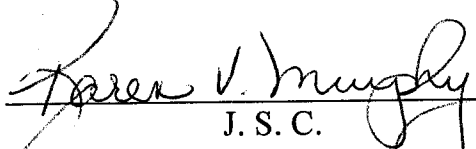
Defendants' motion for summary judgment is denied.

Based on the foregoing, plaintiff's cross-motion for summary judgment is likewise denied. The credibility of the parties is central to the determination of the issues in this case. Such issues of credibility generally require the denial of summary judgment and are to be resolved by the trier of fact. (*Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR §3212:6*, at 14; *Donato v. ELRAC, Inc.*, 18 A.D.3d 696, 794 N.Y.S.2d 348 (2d Dept., 2005); *Frame v. Markowitz*, 125 A.D.2d 442, 509 N.Y.S.2d 372 [2d Dept., 1986]).

Counsel for all parties are directed to appear before the Court on the previously scheduled conference date of January 25, 2011, at 9:30 a.m.

The foregoing constitutes the Order of this Court.

Dated: January 10, 2011
Mineola, N.Y.



J. S. C.

ENTERED
JAN 14 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE