

**Fort Schuyler House, Inc. v Martin & Montanyne,
LLP**

2011 NY Slip Op 33962(U)

September 26, 2011

Supreme Court, Bronx County

Docket Number: 307885/10

Judge: Howard H. Sherman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

10/3/11
①

NEW YORK STATE SUPREME COURT - COUNTY OF BRONX
PART 4

-----X
FORT SCHUYLER HOUSE, INC.

Index No.: 307885/10

Plaintiff,

DECISION/ORDER

-against-

Present:

MARIN & MONTANYE, LLP,

Hon. Howard H. Sherman

Defendants.

Justice

-----X
The following papers read on this motion noticed on June 20, 2011 and duly submitted on the Motion Calendar of same date.

	<u>PAPERS NUMBERED</u>	
Notice of Motion - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	

Upon the forgoing papers this motion by defendant for an order dismissing the complaint as time-barred is decided in accordance with the accompanying decision/order of this court filed herewith.

Dated: September 26, 2011
Bronx, New York

Howard H. Sherman
J.S.C.

NEW YORK STATE SUPREME COURT - COUNTY OF BRONX
PART 4

-----X
Fort Schuyler House, Inc.

Plaintiff,

Index No. 307885/10

-against-

Decision/Order

Martin & Montanyne, LLP,

Present:

Defendant

Hon. Howard H. Sherman
J.S.C.

-----X
Defendant moves for an order pursuant to CPLR § 3211(a)(1) and (5) dismissing as time-barred pursuant to [CPLR § 214 (6)], the complaint in this action for accounting malpractice.

This action was commenced on September 23, 2010.

Complaint

It is alleged that plaintiff nursing home hired defendant limited liability company to perform all required accounting services and that defendant continued to provide these services in a continuing , ongoing relationship until November 2007. It is further alleged that defendant failed to follow generally accepted accounting/audit practices as a result of which plaintiff incurred damages in the amount of \$130,000 [Verified Complaint ¶¶ 1-14]. Plaintiff also interposes causes of action for breach of contract , and unjust enrichment .

Motion and Contentions of the Parties

Defendant now moves for relief pursuant to CPLR 3211(a)(1) and (5) contending that the undisputed documentary evidence establishes that plaintiff failed to commence this action within the applicable statute of limitations for claims of non-medical professional

malpractice [CPLR § 214(6)].

In support , defendant submits copies of correspondence indicating that the final services it rendered were performed in connection with plaintiff's 2006 federal tax returns and that these services were invoiced as of 01/05/07. In addition, defendant submits a copy of a 06/21/07 letter by which plaintiff advised Marin & Montanye that it would no longer be using the defendant firm's services. It is argued that any claims arising from defendant's accounting services accrued upon the receipt by defendant in January 2007, of the work product in connection with the 2006 tax return.

It is also argued that under the circumstances here, plaintiff cannot avail itself of any toll under the "continuous representation" doctrine as there was no relationship between the parties subsequent to the preparation of the 2006 tax returns.

Finally, defendant argues that the causes of action for breach of contract and for unjust enrichment should be dismissed as duplicative of the malpractice claim .

In **opposition** , plaintiff maintains it was not until its new accountants were in receipt of and had an opportunity to review defendant's work product in August 2007, that the cause of action accrued. In support of this argument, defendant submits the affidavit of the successor certified public accountant who attests that he received defendant's work product "between August of 2007 and September of 2007 [] " , and that it was in September "that [he] spoke with plaintiff and discussed my review of the previous work performed by [defendant]." [Affidavit of Gianfranco Ricciardella ¶¶ 4-5].

Plaintiff also argues that discovery is necessary to "determine what exact point in time plaintiffs were in receipt of the work product giving rise to the current litigation." [Affirmation in Opposition ¶ 11].

In **reply**, defendant argues that plaintiff failed to address the arguments seeking

dismissal of the non-malpractice claims, and as such, those claims should be dismissed as "unopposed and abandoned."

With respect to the malpractice claim, defendant argues that plaintiff fails to refute the evidence demonstrating either the final invoice in January 2007 , or the termination of the professional relationship between the parties in June 2007, and that the cause of action did not , as plaintiff maintains, accrue upon plaintiff's subsequent accountant's review of defendant's work in September 2007 , but "began on or before January 5, 2007 , when [defendant] issued its last billing for services rendered the previous year in connection with [plaintiff's] federal tax returns for the period ending March 30, 2006." Affirmation of Counsel in Reply ¶ 11. Alternatively, defendant argues that even were plaintiff's argument adopted, the record reveals that defendant's work product was acknowledged as having been received by the successor accountants on August 15, 2007, more than three years before this action was commenced.

Applicable Law

CPLR 3211(a)(5)

On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired, and in consideration of the motion, a court is required to take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff (see, Benn v. Benn, 82 A.D.3d 548 [1st Dept. 2011]; Island ADC, Inc. v. Baldassano Architectural Group, P.C., 49 AD3d 815, 816, [1st Dept. 2008]). In addition, plaintiffs' submissions in response to the motion "must be given their most favorable intendment" (Arrington v New York Times Co., 55 NY2d 433,

442, 434 N.E.2d 1319, 449 N.Y.S.2d 941 [1982], cert denied 459 U.S. 1146, 103 S. Ct. 787, 74 L. Ed. 2d 994 [1983]).

Limitations of Time

An action for non-medical professional malpractice must be commenced within three years of the date of accrual pursuant to CPLR 241 (6).

It is settled that " a claim accrues when the malpractice is committed, not when the client discovers it [internal citations omitted]." Williamson v. PricewaterhouseCoopers LLP, 9 N.Y.3d 1, 4 [2007].

As observed by the Court of Appeals in Ackerman v. Price Waterhouse, 84 NY2d 535, 541[1994],

[i]n the context of a malpractice action against an accountant, the claim accrues upon the client's receipt of the accountant's work product since this is the point that a client reasonably relies on the accountant's skill and advice and, as a consequence of such reliance, can become liable for tax deficiencies (see, *Carr v Lipshie*, 8 AD2d 330, affd on opn below 9 NY2d 983; *Sosnow v Paul*, 43 AD2d 978, affd on opn below 36 NY2d 780; *Chemical Bank v Sternbach & Co.*, 91 AD2d 518, appeal dismissed 58 NY2d 1086). This is the time when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court (see, *Snyder v Town Insulation*, 81 NY2d 429, 432).

The Court of Appeals has also observed that "[t]he legislative history of N.Y. C.P.L.R. 214(6) makes clear that 'where an underlying complaint is one which essentially claims that there was a failure to utilize reasonable care or where acts of omission or negligence are alleged or claimed, the statute of limitations shall be three years if the case comes within the purview of N.Y. C.P.L.R. 214(6), regardless of whether the theory is based in tort or in a breach of contract' (Revised Assembly Mem in Support, Bill Jacket,

L 1996, ch 623)" (Matter of R.M. Klimert & Frances Halsband, 3 N.Y.3d 538, 541-542 [2004]).

Discussion and Conclusions

Upon consideration of the submitted papers and the oral argument, as well as the applicable law, it is the finding of this court that the moving defendant has shouldered its burden to prove that the malpractice cause of action asserted is time-barred, having occurred as of receipt of the work product in connection with the 2006 tax filings. Moreover to the extent that the second cause of action for breach of contract is premised upon the allegation of defendant's negligent performance of its professional duties, that cause of action should also be dismissed as duplicative (see, Sage Rlty. Corp. v Proskauer Rose L.L.P., 251 A.D. 2d 35, 38-39 [1st Dept. 1998]).

In opposition, plaintiff fails to come forward with any probative evidence that it was not in receipt of defendant's 2006 tax preparation until copies of all permanent files were transmitted to the successor accounting firm's review on August 15, 2007, or, despite the termination letter of 6/21/07, that there was as alleged in the complaint, an "ongoing" professional relationship with defendant until November 2007.

Finally, defendant has not sustained its initial burden with respect to the third cause of action asserted. The cause of action for unjust enrichment, seeks damages to recoup the professional fees paid to defendant, arising out of the tax liability alleged to have resulted due to defendant's failure to provide adequate accounting services and as such, the cause of action is not duplicative of the malpractice claim and there is no showing that it was not timely brought (CPLR 213).

Accordingly, it is

ORDERED that defendant's motion be and hereby is granted to the extent of dismissing the first and second causes of action asserted in the complaint as time-barred.

This constitutes the decision/order of this court.

Dated: September 26, 2011
Bronx, New York



Howard H. Sherman
J.S.C.