

Brown-Jodoin v Pirrotti
2011 NY Slip Op 34223(U)
August 17, 2011
Supreme Court, Westchester County
Docket Number: 51283-11
Judge: Gerald E. Loehr
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NYSCEF DOC. NO. 21

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FILED
AND ENTERED

ON 8/17 2011

WESTCHESTER
COUNTY CLERK

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
SHARON BROWN-JODOIN, Individually, as Executor-
elect of the Estate of Selvyn D. Brown, and as Trustee
of the Selvyn D. Brown Revocable Living Trust,

Plaintiffs,

DECISION AND ORDER

Index No.: 51283-11

-against-

ANTHONY JOSEPH PIRROTTI, LAW OFFICES OF
ANTHONY J. PIRROTTI, P.C., and PIRROTTI &
PIRROTTI, LLP,

Defendant.

-----X

LOEHR, J.

The following papers numbered 1-6 were read on Defendants' motion to dismiss the Complaint pursuant to CPLR 3211(a)(1), (5) and (7).

Papers Numbered

Notice of Motion - Affidavits - Exhibits	1
Memorandum of Law in Support	2
Affidavits in Opposition - Exhibits	3
Memorandum of Law in Opposition	4
Reply Affidavit	5
Reply Memorandum of Law	6

Upon the foregoing papers, and as alleged in the Complaint filed on October 7, 2010, in 2003 Pirrotti & Pirrotti, LLP (“Pirrotti LLP”) was a New York professional limited liability partnership engaged in the practice of law of which Anthony Joseph Pirrotti (“Pirrotti”) was a member. Selwyn D. Brown (the Deceased”) died on May 12, 2003. Plaintiff, the daughter of the Deceased, was nominated executor in the wills the Deceased executed on December 23, 1999 (the “Prior Will”) and November 19, 2002 (the “Pour-Over Will”). On May 18, 2003, Plaintiff met with Pirrotti and retained Pirrotti LLP to represent her father’s affairs. In connection therewith, Plaintiff provided Pirrotti with the Prior Will while informing him that the Deceased had replaced the Prior Will with a Revocable Living Trust (the “Trust”), to which he had transferred all of his assets, and the Pour-Over Will, which documents she had not yet located. Plaintiff also advised Pirrotti that the Deceased’s estate plan was to avoid probate. That notwithstanding, Pirrotti advised Plaintiff that she should seek to probate the Prior Will immediately. To that end, Pirrotti that day prepared a petition seeking Letters Testamentary for Plaintiff and for the Prior Will to be admitted to probate. Pirrotti also prepared a Retainer Agreement (the “Retainer”) pursuant to which Plaintiff retained Pirrotti LLP to “probate the Last Will and Testament, and to perform any and all professional services required to finalize the Estate, except any matters which may require the use of an accountant, such as the preparation of New York State or Federal Estate Tax Returns and/or Fiduciary Returns, as required under the circumstances.” At that time, Plaintiff paid Pirrotti \$7,500 on account of the retention. In June 2003, Plaintiff located the Trust and Pour-Over Will and provided same to Pirrotti. At about the same time, Pirrotti LLP disbanded and Plaintiff’s representation was taken over and continued, with at least Plaintiff’s implied consent, by the Law Offices of Anthony J. Pirrotti P.C. (“Pirrotti P.C.”), a new law firm which Pirrotti has formed. Thereafter, as alleged in the Complaint, Defendants failed to have either the Prior Will or Pour-Over Will probated or to have Letters Testamentary issued to Plaintiff resulting in the loss of a \$9,000 settlement of a pre-death motor vehicle accident of the Decedent;¹ that Defendants were also retained to represent Plaintiff as Trustee under the Trust and, as part of that representation, mishandled the sale of certain Trust assets resulting in damage to the Trust; and that Defendants failed to file, or to advise Plaintiff to

¹ Plaintiff also appears to assert, presumably in the alternative, that the decision to seek to probate either will, considering the limited assets to be administered thereunder and the expense thereof, was malpractice in and of itself.

file, federal and New York State estate tax returns resulting in federal interest and penalties of \$41,495.98 and New York interest and penalties of \$31,638.09.² The Complaint, in one cause of actions, seeks damages for such alleged malpractice and restitution of fees and disbursements allegedly not earned under the agreements and/or not agreed to.

Defendants first move to dismiss the Complaint based on the statute of limitations as established by documentary evidence. Unless extended by the continuous representation doctrine, an action to recover damages for legal malpractice accrues when the malpractice is committed (*Shumsky v Eisenstein*, 96 NY2d 164, 166 [2001]). The statute of limitations is three years (CPLR 214[6]). Defendant Pirrotti LLP asserts, without contradiction, that it disbanded in 2003 and therefore could not have committed malpractice within three years of the commencement of this action in 2010. Defendants Pirrotti and Pirrotti P.C. rely on a “Consent to Change Attorney” form, executed in August 2006, pursuant to which attorney Nolfo was substituted for Pirrotti in the Decedent’s Surrogate Court proceeding at that time.

The continuous representation doctrine recognizes that a person seeking professional assistance has a right to repose confidence in the professional’s ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered. Neither is a person expected to jeopardize her pending case or her relationship to the attorney handling that case during the period that the attorney continues to represent the person (*id.* at 167). Application of the doctrine is nonetheless generally limited to the course of representation concerning a specific legal matter and not just a continuing relationship. Instead the doctrine tolls the statute of limitations only where the continuing representation pertains specifically to the matter in which the attorney committed the alleged malpractice (*id.* at 168). Where there is an understanding for continued representation, the failure to act may constitute both continued representation and malpractice (*id.* at 168-71).

Here, Defendants’ own documents show that Pirrotti and Pirrotti P.C. continued to represent Plaintiff in connection with the Decedent’s affairs after the substitution, monitoring the professionals, such as Nolfo, that the Defendants had brought in and advising Plaintiff. Moreover, Plaintiff has submitted evidence that she did not discharge the Defendants until April

² It is also alleged that eventually another attorney/accountant, Matthew Nolfo, was retained to prepare and file the taxes for a fee of \$21,092.09. It is unclear whether Plaintiff is seeking to recover this fee as damages, and if so, under what theory.

6, 2008, less than three years prior to the commencement of this action. Thus, the documentary evidence establishes that Pirrotti and Pirrotti PC. continued to represent Plaintiff until April 6, 2008 (*compare Shumsky v Eisenstein*, 96 NY2d 164 [2001] with *Martlett v Hennessy*, 32 AD3d 1293, 1294 [4th Dept 2006] and *Cerio v Koldin*, 289 AD2d 1080 [4th Dept 2001]). Moreover, as the same partner (Pirrotti) represented the Plaintiffs throughout the action, as a matter of law, the representation of Pirrotti LLC is deemed to have continued (*New Kayak Pool Corp. v Kavinoky Cook LLP*, 74 AD3d 1852 [4th Dept 2010]).

Defendants move to dismiss the Complaint as asserted by Plaintiff individually as failing to state a cause of action. Based on the Retainer, Defendants assert that it was the Plaintiff as Proposed Executor who retained the Defendants. In fact the Retainer was executed by Plaintiff individually and she paid the initial fee individually. Even more to the point, it was Defendants alleged malpractice that kept Plaintiff from becoming Executor. Thus, the submitted documentary evidence fails to resolve all factual issues as a matter of law (*Fontenetta v Doe*, 73 AD3d 78, 83-84 [2d Dept 2010]).

Defendants moved to dismiss the contract claims as being duplicative of the malpractice claims. They are not. The malpractice claims are based on the legal services provided and not provided and the damages proximately cause thereby. The contract claims seek a return of fees charged for services not rendered or in amounts not agreed to. They are therefore not duplicative.

Finally, Defendants move to dismiss the Complaint for Plaintiffs' asserted inability to establish proximate cause. Defendants appear to assert that some or all of the asserted damages for Defendants' alleged malpractice could have been avoided by Nolfo when he was retained. Defendants have failed to submit any documentary proof which establishes this.

Accordingly, the motion to dismiss is in all respects denied. This constitutes the decision and order of the Court.

Dated: White Plains, New York
August 17, 2011



HON. GERALD E. LOEHR
Acting J.S.C.

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