

Sturman v Davis

2012 NY Slip Op 33531(U)

June 19, 2012

Supreme Court, New York County

Docket Number: 650767/10

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon Joan A. Widdow
Justice

PART 11

Index Number : 650767/2010
STURMAN, DONNA A.
vs
WAGNER DAVIS, P.C.
Sequence Number : 002
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE 3/15/12
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the
attached Memorandum Decision + Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

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NYS SUPREME COURT - CIVIL

Dated: June 19, 2012

[Signature], J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

-----x
DONNA A. STURMAN, f/k/a DONNA STURMAN
BUTLER, Individually, as a Beneficiary of the
ESTATES OF HENRY AND MURIEL STURMAN
and as a Partner and/or Shareholder in 6-8 PELHAM
PARKWAY CORP., CAULDWELL
MANAGEMENT CORP., ANTHONY J. GRIFFEN
CORP., HP HOWARD & CO., H.
DEVELOPMENT CORP., WAYNE-ADAM CORP.,
CORNWALL ESTATE, INC., YORKVILLE
ASSOCIATES, PELHAM ASSOCIATES,
PELHAM RAQUETBALL AND HEALTH CLUB,
A.B. YALE CORP., ASTORIA TERMINAL INC.,
AND SEA BRIDGE AND PIER TERMINAL
CORP.,

Index No. 650767/10

Plaintiffs,

-against-

WAGNER DAVIS, P.C. and STEVEN R.
WAGNER

Defendants.

-----x
Joan A. Madden, J.

In this action for legal malpractice, plaintiffs move for reargument of the court's decision and order dated September 13, 2011 (the "Original Decision"), which dismissed the complaint as barred by the applicable statute of limitations. Defendants oppose the motion. For the reasons below, the court grants reargument and, upon reargument, adheres to its Original Decision.

Background

Plaintiffs commenced this action on June 28, 2010, seeking to recover damages for legal malpractice arising out of defendant Wagner Davis, P.C.'s (the "Firm's") representation of plaintiffs in connection with certain state court and bankruptcy actions. Defendant Steven R.

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[* 3]

Wagner (“Wagner”) is a principal of Wagner Davis, P.C. and appears to have been the supervising partner with respect to the representation at issue here.

Defendants moved to dismiss the complaint on statute of limitations grounds, arguing that the action was untimely, as their attorney-client relationship with plaintiffs was terminated on June 25, 2007, more than three years before this action was commenced on June 28, 2010. Defendants also sought to have the record sealed and to have the court strike certain allegedly scurrilous paragraphs in the summons with notice and the amended complaint. Defendants also argued that dismissal was warranted as against Wagner for lack of personal and subject matter jurisdiction.

In support of their position, that the action was untimely, defendants submitted photocopies of two e-mails (the “E-mails”) exchanged between Donna Sturman (“Sturman”) and Wagner.

The first E-mail (“Sturman’s E-mail”) was sent from Sturman to Wagner on June 25, 2007. Sturman writes in part:

“Today I have received a bill from you for \$128,661.12... for work that was done... 3 years ago, and only had to be copied to include the false case against me. I am now asking for you to please return my money I am willing to forget the potential damage you have done to my case but I can no longer wait for you to do something for three years it has been promise after promise and nothing, the damage to my children and I...[has] become too much[.]I was all prepared to sign an affidavit last Thursday or Friday,[]only to have it sent to me with facts wrong[](such as I fired Milbank in 1989). This obviously was not something you could handle and you should have told me that three years ago.”

The second E-mail (the “Response E-mail”) was sent from Wagner to Sturman on June 26, 2007, in response to Sturman’s E-mail. In the Response E-mail, Wagner writes in part:

“I will not hold you up in any way. My office has spent hundreds...of hours working on your case, trying to satisfy you.... I’m sorry that you are so dissatisfied. I accept your termination of my firm in the best light possible, with hopes that you will find someone you feel is better able to assist you, and not with any remorse or recrimination.

[* 4]

As far as the fees are concerned, the bill you received was for work performed in addition to the retainer that you gave me.... I know how desperately you need money, but I cannot agree to return the fees that you paid my firm in light of the extensive amount of work that has been performed and the large amount of fees that are outstanding.”

In opposition, plaintiffs argued, inter alia, that the attorney-client relationship was not terminated by the E-mails and that defendants in fact continued to work on plaintiffs’ case after the Response E-mail, and, in support of this position, submitted invoices for photocopying, Lexis, and telephone charges that were billed to plaintiffs and were designated as having been incurred on June 28, 2007. Plaintiffs also submitted an e-mail from Wagner to Sturman, dated August 13, 2007 (the “August E-mail”), which they asserted showed that defendants were still performing work for plaintiffs. Plaintiffs further argued that as the E-mails did not terminate the attorney-client relationship, defendants were required by the Code of Professional Responsibility to seek to withdraw from representing plaintiffs.

In reply, defendants submitted the affidavit of an employee that of the Firm who stated that the Firm uses a billing system that characterizes disbursements, such as the photocopying, Lexis, and telephone charges cited by plaintiffs, as having been incurred on the last day of a billing period, even though the charges may have been incurred at various earlier dates during the billing period. Defendants also submitted an invoice showing that no work was performed by the firm for plaintiffs after June 22, 2007, except the June 26, 2007 letter indicating that the Firm reviewed and responded to “email from client terminating the firm.” Moreover, defendants asserted that any work done after the June 25, 2007 termination involved providing plaintiffs with case information and documents needed for plaintiffs to proceed *pro se* or to retain another attorney as required by defendants ethical obligations. In this connection, defendants argued that the August E-mail did not extend the limitations period as it reflects communications related to fulfilling such obligations and, in any event, did not relate to any claimed acts of malpractice.

[* 5]

In the Original Decision, the court found that under the continuous representation doctrine, which tolls the Statute of Limitations until an attorney's representation ends, the action was untimely as "[t]he e-mail exchange between Sturman and Wagner reveals that the attorney-client relationship ended, at the latest, on June 26, 2007, when Wagner responded to Sturman's e-mail by confirming that [the] attorney-client relationship was terminated." Original Decision, at 4. The court also held that evidence that Sturman and Wagner communicated in the August E-mail after the attorney-client relationship was terminated was insufficient to toll the limitations period past the date of the termination absent an allegation by plaintiffs that defendants were performing work relating to the same subject matter at issue in the legal malpractice action.

Plaintiffs now move for reargument of the Original Decision, asserting that the E-mails were insufficient to terminate the attorney-client relationship. Plaintiffs alternatively assert that if the attorney-client relationship ended on June 26, 2007, the court erred in finding that the three year statute of limitations had expired before this action was filed on June 28, 2010. In this connection, plaintiffs argue that as June 26, 2010, was a Saturday, the statute of limitations did not expire on that day but, rather, on the next business day, which was Monday, June 28, 2010, the date when this action was timely commenced.

Plaintiffs further assert that, upon reargument and upon reinstating the complaint, the court should deny the additional relief sought by defendants, including their request to exclude certain portions of the complaint since the allegations in question are relevant to plaintiffs' claims for legal malpractice.

In opposition, defendants argue that plaintiffs should be denied reargument as they have failed to annex their original moving papers to this motion, and as plaintiffs are impermissibly asserting new facts on this motion by arguing that the limitations period expired on June 28,

2010. Defendants alternatively contend that, even if reargument is granted, this court should sustain the dismissal of this action as the attorney-client relationship between plaintiffs and defendants was terminated by Sturman in Sturman's E-mail on June 25, 2007. Defendants argue that a client's termination of an attorney-client relationship is effective when made and does not require the acknowledgment of the attorney.

Defendants next assert that if reargument is granted, the court should dismiss the action against Wagner for lack of subject matter jurisdiction and lack of personal jurisdiction, strike the allegations regarding Wagner's conduct, and seal the record. Defendants also argue that this court erroneously found that it need not strike the allegedly scurrilous allegations in the complaint on the grounds that dismissal was granted, asserting that dismissal is not a bar to striking scurrilous material.

In reply, plaintiffs argue that the "plain meaning of [Sturman's E-mail]... was *if you return my money we will cease our relationship*" Reply Aff., ¶ 7 (emphasis in original). Thus, plaintiffs argue that there was no unconditional termination of the attorney-client relationship in Sturman's E-mail. Plaintiffs further argue that defendants cannot challenge the court's finding in the Original Decision that the attorney-client relationship was terminated on June 26, 2007, as this is the law of the case and as defendants argued in support of their motion to dismiss that the attorney-client relationship ended on that date.

Discussion

A motion for reargument is left to the discretion of the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. See Foley v. Roche, 68 A.D.2d 558, 567 (1st Dep't 1979). Applying this standard, leave to reargue is granted.

7]

As a preliminary matter, although plaintiffs failed to annex their original moving papers, this failure does not preclude the court from granting reargument, since the relevant documents were e-filed and plaintiffs did annex a document list of all the relevant e-filed papers. As for the merits of the motion, reargument is granted as the court failed to take into account in the Original Decision that June 26, 2010, was a Saturday and that, therefore, if the continuous representation doctrine toll ended on June 26, 2007, defendants would have until Monday, June 28, 2010 to file a timely action. See General Construction Law §25-a.

As the instant action seeks to recover damages arising from allegations of legal malpractice, it must be commenced within three years of accrual, regardless of whether the underlying theory is based in tort or contract law. McCoy v. Feinman, 99 N.Y.2d 295, 301 (2002); CPLR 214(6). The accrual is measured from the date when the injury occurs. Ackerman v. Price Waterhouse, 84 N.Y.2d 535 (1994). However, under the continuous representation doctrine, when an attorney continues to represent a client in the matter from which the claim arises, the statute of limitations on the legal malpractice claim is tolled and the limitations period does not begin to run until the termination of the attorney-client relationship. Shumsky v. Eisenstein, 96 N.Y.2d 164 (2001); Riley v. Segan, Nemerov & Singer, P.C., 82 A.D.3d 572 (1st Dep't 2011).

“[I]n order for the continuous representation doctrine to apply, there must be clear indicia of an ongoing, continuous, developing, and dependant relationship between the client and the attorney...” Elizabeth Arden, Inc. v. Abelman, Frayne & Schwab, 29 Misc3d 1215(A) (Sup Ct NY Co. 2010), citing, Luk Lamellen U. Kupplungbau GmbH v. Lerner, 166 A.D.2d 505, 507 (2nd Dep't 1990); see also, Henry v. Leeds & Morelli, 4 A.D.3d 229, 229 (1st Dep't 2004)(“[t]he relationship and bond of continuous trust [is] necessary for the continuing

representation doctrine to apply.) Such a predicate is consistent with the rationale behind the doctrine, which is based on the recognition that commencing a legal malpractice action would have a negative impact on the attorney-client relationship, and that a person seeking professional assistance “has a right to repose confidence in the professional's ability.” Glamm v. Allen, 57 N.Y.2d 87, 93-94 (1982)(internal citations and quotations omitted). Notably, the continuous representation doctrine only operates to toll the statute of limitations where “there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim.” McCoy v. Feinman, 99 N.Y.2d at 306.

Under this standard, the Sturman’s E-mail ended the attorney-client relationship as there is no evidence that after this e-mail there was any mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim such that the statute of limitations was no longer tolled by the continuous representation doctrine. McCoy v. Feinman, 99 N.Y.2d at 306. Notably, Sturman states in the email (i) that she “can no longer wait for [the Firm] to do something” as the Firm’s failure to draft satisfactory submissions has caused too much “damage to [her] children and [her],” and (ii) that the case “obviously was not something [the Firm] could handle and [the Firm] should have told [her] that three years ago.” These statements clearly convey the message that Sturman would not give the Firm the chance to do any more work in regard to the representation at issue, since she believed that the Firm was not competent to handle the matter and that allowing the Firm to continue as attorney would damage Sturman’s case. At this point, there was no continuing relationship between attorney and client that would be endangered by filing a malpractice action and the toll no longer applied. See generally, Glamm v. Allen, 57 N.Y.2d at 93-94.

[* 9]

The finding that Sturman terminated the attorney-client relationship in her e-mail is further supported by the Response E-mail, which shows that Wagner understood Sturman to have terminated the attorney-client relationship, and Sturman's failure to submit evidence that she sought to continue the attorney-client relationship. While it is undisputed that Sturman communicated with defendants after sending Sturman's E-mail, the doctrine of continuous representation is inapplicable since plaintiffs have failed to allege facts sufficient to show that the Firm was still serving as attorney for Sturman with respect to the specific subject matter that formed the basis of her malpractice claims. See McCoy v. Feinman, 99 N.Y.2d at 306; see also Williamson v. PricewaterhouseCoopers, 9 NY3d 1 (2007).

Plaintiffs' argument that Sturman was only offering to terminate the attorney-client relationship if the Firm returned her money is inconsistent with a plain reading of Sturman's E-mail, which indicates that Sturman was offering "to forget the potential damage [the Firm did] to [her] case but I can no longer wait for you to do something for three years it has been promise after promise and nothing, the damage to my children and I...[has] become too much.. ." The clear meaning of these words is that if her money were returned, Sturman would not take action against the Firm, but that she could not have the Firm represent her anymore. Thus, her termination of the attorney-client relationship was unconditional. See Stuart v. Trihas, 188 Misc. 116, 117 (App. Term, 1st Dep't 1946)(holding that a client's refusal to allow an attorney to complete his work is equivalent to a discharge, and terminates the attorney-client relationship); see also 6A N.Y. Jur. 2d Attorneys at Law § 69.

Plaintiffs' argument that the attorney-client relationship was not terminated until June 26, 2007, when the Response E-mail was sent, must also be rejected. The continuous representation doctrine operates to toll the statute of limitations while "there is a mutual understanding of the

10

need for further representation....” See McCoy v. Feinman, 99 N.Y.2d at 306. Thus, when one party unilaterally communicates its termination of the attorney-client relationship, the continuous representation doctrine is no longer applicable as there is no longer a mutual understanding of the need for further representation. Henry v. Leeds & Morelli, 4 A.D.3d at 229; Elizabeth Arden, Inc. v. Abelman, Frayne & Schwab, 29 Misc3d 1215(A). Thus, there was no need for defendants to accept the termination of the attorney-client relationship or to formally withdraw as counsel in order for the limitations period to begin.

The court also rejects plaintiffs’ argument that it is now the law of the case that the attorney-client relationship was terminated on June 26, 2007. “The ‘law of the case’ doctrine is a rule of practice which provides that once an issue is judicially determined, either directly or by implication, it is not to be reconsidered by Judges or courts of co-ordinate jurisdiction in the course of the same litigation.” Holloway v. Cha Cha Laundry, 97 A.D.2d 385, 386 (1st Dep’t 1983)(citations omitted); see also, Clark v. New York Telephone Co., 52 A.D.2d 1030 (4th Dep’t 1976) aff’d 41 N.Y.2d 1069 (1977). In the Original Decision, the court held that the attorney-client relationship terminated “at the latest on June 26, 2007” when Wagner sent the Response E-mail. Original Decision, at 4 (emphasis supplied). As such, the court did not determine that the attorney-client relationship terminated on June 26, 2007, and, therefore, the law of the case doctrine does not bar this court from finding that the attorney-client relationship ended on June 25, 2007. In addition, the court notes that an examination of defendants’ submissions indicates that defendants argued that the attorney-client relationship terminated on June 25, 2007, as a result of Sturman’s E-mail and therefore they are not precluded from making that same argument now.

11

Next, the court declines to strike those allegations in the complaint relating to certain conduct by Wagner, which defendants claim to be scurrilous. While CPLR 3024(b) provides that a party may move to strike any scandalous or prejudicial material unnecessarily inserted in a pleading, “[a] motion to strike scandalous or prejudicial material from a pleading will be denied if the allegations are relevant to a cause of action” (internal citations omitted). See New York City Health and Hospitals Corp. v. St. Barnabas Community Health Plan, 22 A.D.3d 391, 391 (1st Dep’t 2005). Here, since the allegations regarding Wagner’s conduct are relevant to the issue of whether defendants were providing competent representation to plaintiffs, the court declines to strike them from the complaint. Finally, there is no basis for sealing the file. See generally 22 NYCRR §216.1(a); Liapakis v. Sullivan, 290 A.D.2d 393 (1st Dep’t 2002); In re Will of Hoffmann, 284 A.D.2d 92, 93 (1st Dep’t 2001).

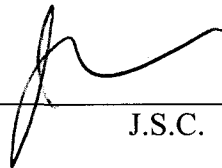
As this motion is being granted on statute of limitations grounds, the court need not reach the issues of whether it has subject matter and personal jurisdiction over defendant Wagner.

Conclusion

In view of the above, it is

ORDERED that plaintiffs’ motion to reargue is granted and, upon reargument, the court adheres to its Original Decision, dismissing the complaint upon statute of limitations grounds.

Dated: June 19 2012



J.S.C.