~~SHORT FORM ORDER~~ **INDEX NO. 033959/2013**

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr.

GREGORY A. BEROZA,

Plaintiff,

-against-

THE SALLAH LAW FIRM, P.C., DONALD R. SALLAH, ESQ., DEAN J. SALLAH, ESQ., and PATRICK M. KERR, ESQ.,

Defendants.

ORIG. RETURN DATE: February 3, 2014
FINAL RETURN DATE: February 18, 2014
MOT. SEQ. #: 001 - MD

PLTF'S ATTORNEY:
AMY S. NORD, ESQ.
71 SOUTH CENTRAL AVENUE, STE 307
VALLEY STREAM, NY 11580

DEFT'S ATTORNEY:
SALLAH LAW FIRM, P.C.
110 WASHINGTON AVENUE
HOLTSVILLE, NY 11742

Upon the following papers numbered 1 to 28 read on these motions to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 10 - 20; Replying Affidavits and supporting papers 21 - 28; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the defendants for an order dismissing the plaintiff's complaint pursuant to CPLR 3211(a)(5) is denied; and it is further

ORDERED that the parties are directed to appear for a preliminary conference pursuant to 22 NYCRR 202.8 (f) on May 5, 2014 at the Supreme Court, DCM Part, One Court Street, Riverhead, New York at 10:00 a.m.

The plaintiff commenced this action on August 21, 2013 to recover damages allegedly sustained as a result of the defendants' legal malpractice. The defendants were retained by the plaintiff in November 2006 to represent him in an action for divorce that had been pending in the Nassau County Supreme Court since 2001. The action was scheduled for trial in February 2007, and the trial was conducted on various dates between February 2007 and April 2007. On February 5, 2008, the Court (Warshawsky, J.) rendered its decision after trial which became part of the judgment of divorce entered on August 19, 2008. Thereafter, the defendants were retained to represent the plaintiff in an appeal of the trial court's decision and judgment. In it decision and order dated March 2, 2010, the Appellate Division, Second Department modified the judgment by deleting the decretal paragraph regarding the plaintiff's obligation to pay child support, increasing the credit due the plaintiff regarding two items of marital property subject to equitable distribution, and remitting the action to the trial court for further proceedings in accordance with its decision.

The following facts are undisputed: In March or April 2010, the plaintiff retained different counsel to file an application for reargument of, or leave to appeal from, the Appellate Division decision. In June 2010, the defendants submitted a memorandum to the trial court regarding the recalculation of the plaintiff's child support obligation. By memorandum decision dated August 24, 2010, the Court (Warshawsky, J.), among other things, reduced the amount of the plaintiff's child support obligation and the percentage of his share of expenses. By letter dated August 26, 2010, the defendants forwarded a copy of the memorandum decision to the plaintiff. On August 31, 2010, the plaintiff instructed the defendants by fax and e-mail to serve a copy of the memorandum decision with notice of entry on his wife's attorney. On September 2, 2010, the defendants served the aforementioned notice as directed.

In his complaint, the plaintiff alleges that the defendants committed malpractice and were negligent, among other things, in failing to present necessary and relevant documentary evidence at trial to adequately and proficiently defeat his then wife's claim of expenses incurred for the benefit of their children, to adequately present at trial the correct extent of the plaintiff and his wife's income and assets, and to adequately present at trial a full presentation of the facts regarding the claims of the plaintiff and his wife for their respective contributions to the enhancement of the value of the other's separate property.

The defendants now move for an order dismissing the complaint against him pursuant to CPLR 3211(a)(5). A movant seeking to dismiss a complaint insofar as asserted against it as time-barred pursuant to CPLR 3211(a)(5) has the initial burden of proving through documentary evidence that the action was untimely commenced after its accrual date (*see Tsafatinos v Wilson Elser Moskowitz Edelman & Dicker, LLP*, 75 AD3d 546, 903 NYS2d 907 [2d Dept 2010]; *Morris v Gianelli*, 71 AD3d 965, 897 NYS2d 210 [2d Dept 2010]; *Lessoff v 26 Ct. St. Assoc., LLC*, 58 AD3d 610, 872 NYS2d 144 [2d Dept 2009]; *Sabadie v Burke*, 47 AD3d 913, 849 NYS2d 913 [2d Dept 2008]). Thereafter, the burden shifts to the plaintiff to aver evidentiary facts establishing that the action was timely or to raise an issue of fact as to whether the action was timely (*Symbol Technologies, Inc. v Deloitte & Touche, LLP*, 69 AD3d 191, 888 NYS2d 538 [2d Dept 2009]; *Lessoff v 26 Ct. St. Assoc., LLC*, *supra*; *Gravel v Cicola*, 297 AD2d 620, 747 NYS2d 33 [2d Dept 2002]).

An action to recover damages for legal malpractice must be commenced within three years from accrual (CPLR 214(6); *see McCoy v Feinman*, 99 NY2d 295, 755 NYS2d 693 [2002]; *Rupolo v Fish*, 87 AD3d 684, 928 NYS2d 596 [2d Dept 2011]; *Williams v Lindenberg*, 24 AD3d 434, 805 NYS2d 132 [2d Dept 2005]). A legal malpractice claim accrues when the malpractice is committed, not when it is discovered (*McCoy v Feinman*, *supra*; *Shumsky v Eisenstein*, 96 NY2d 164, 726 NYS2d 365 [2001]; *St. Stephens Baptist Church, Inc. v Salzman*, 37 AD3d 589, 830 NYS2d 248 [2d Dept 2007]; *Shivers v Siegel*, 11 AD3d 447, 782 NYS2d 752 [2d Dept 2004]; *Venturella-Ferretti v Kinzler*, 306 AD2d 465, 762 NYS2d 254 [2d Dept 2003]). Generally, in a matrimonial action the plaintiff's cause of action accrues at the latest when a judgment of divorce is entered in the action (*Zorn v Gilbert*, 8 NY3d 933, 834 NYS2d 702 [2007]; *McCoy v Feinman*, *supra*; *Kvetnaya v Tylo*, 49 AD3d 608, 854 NYS2d 425 [2d Dept 2008]).

In support of the motion, the defendants submit the pleadings, the judgment of divorce, the decision after trial, the Appellate Division's decision and order, the memorandum decision dated August

24, 2010, and the denial of the plaintiff's application for reargument or leave to appeal. A review of the judgment of divorce reveals that it was entered in the Nassau County Clerk's Office on August 19, 2008, and recorded therein on September 8, 2008. Here, the defendants have established prima facie that this action was commenced on August 21, 2013, more than three years after the cause of action accrued on August 19, 2008.

In opposition to the defendant's motion, the plaintiff submits, among other things, the affirmation of his attorney, the Appellate Division's decision and order, the memorandum decision dated August 24, 2010, and correspondence between him and the defendants. In her affirmation, counsel for the plaintiff contends, among other things, that the plaintiff's cause of action did not accrue until September 2, 2010 at the earliest based on the doctrine of "continuous representation."[1]

The period in which to commence a legal malpractice action may be tolled by the continuous representation doctrine (*Singh v Edelstein*, 103 AD3d 873, 962 NYS2d 225 [2d Dept 2013]; *DeStaso v Condon Resnick. LLP*, 90 AD3d 809, 936 NYS2d 51 [2d Dept 2011]). Pursuant to this doctrine, the statute of limitations is tolled where there is a mutual understanding by the attorney and the client of the need for further representation on the specific subject matter of the underlying lawsuit, and, in a matrimonial action the representation generally ends, at the earliest, on the date the judgment of divorce is signed (*Kvetnaya v Tylo*, *supra*; *Gaslow v Phillips Nizer Benjamin Krim & Ballon*, 286 Ad2d 703, 730 NYS2d 146 [2d Dept 2001]; *see also Mc Coy v Feinman*, *supra*). "For the doctrine to apply, there must be clear indicia of an ongoing, continuous, developing and dependent relationship between the client and the attorney" (*Piliero v Adler & Stavros*, 282 AD2d 511, 512 [2d Dept 2001] quoting *Luk Lamellen U. Kupplungbau GmbH v Lerner*, 166 AD2d 505, 506 [2d Dept 1990]; *see Aseel v Jonathan E. Kroll & Assoc.*, 106 AD3d 1037, 966 NYS2d 202 [2d Dept 2013]). "One of the predicates for the application of the doctrine is continuing trust and confidence in the relationship between the parties" (*Aseel v Jonathan E. Kroll & Assoc.*, *supra* at 1038, quoting *Luk Lamellen U. Kupplungbau GmbH v Lerner*, *supra* at 507; *see Coyne v Bersani*, 61 NY2d 939, 474 NYS2d 970 [1984]; *Piliero v Adler & Stavros*, *supra*).

The correspondence between the plaintiff and the defendants submitted by the plaintiff raises issues of fact as to whether the action is timely. In a letter dated August 26, 2010, the defendant Donald R. Sallah forwarded the memorandum decision dated August 24, 2010 to the plaintiff, and indicated that "you and I have not had a good relationship in the last year of my representation of you. You have stated that you do not trust this firm ... I would suggest that you consider hiring new counsel to continue ..." On August 31, 2010, the plaintiff directed the defendants to serve said decision on his wife's attorney via fax and e-mail, and the defendants did so on September 2, 2010.

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[1] Counsel further contends that the motion should be denied because the defendants' submitted an affirmation by a party attorney in support of their motion in contravention of CPLR 2106. However, the defect is not fatal, the plaintiff does not indicate that he has been prejudiced thereby, and the defect has been cured by submission of the same contentions in affidavit form in the defendants' reply papers (*Warshaw Burstein Cohen Schlesinger & Kuh, LLP v Longmire*, 82 AD3d 586, 920 NYS2d 23 [1st Dept 2011]).

Thus, there are issues of fact, including but not limited to, whether there was a mutual understanding by the attorney and the client that the defendants needed to continue to represent him regarding their actions at the trial of the divorce action after the filing of the memorandum by the defendants in June 2010, and whether there was clear indicia of an ongoing, continuous, developing and dependent relationship between the client and the attorney at all times prior to August 21, 2010, three years prior to the filing of this action.

The issues of fact raised by the plaintiff's submission are highlighted, but not resolved, by the defendant's reply papers which establish that there was significant "stress" on the attorney-client relationship as early as January 2010. In addition, the defendants' remaining contentions, including their contention that the hiring of separate counsel to seek reargument or leave to appeal the decision of the Appellate Division indicates conclusively that their representation of the plaintiff terminated at that time, are without merit.

The plaintiff has submitted evidentiary facts establishing that there are issues of fact as to whether the action was timely (*Symbol Technologies, Inc. v Deloitte & Touche, LLP*, 69 AD3d 191, 888 NYS2d 538 [2d Dept 2009]; *Lessoff v 26 Ct. St. Assoc., LLC, supra).* Accordingly, the motion by the defendants for an order pursuant to CPLR 3211(a)(5) dismissing the complaint is denied.

Dated: 4/1/14

HON. PAUL J. BAISLEY, JR., J.S.C.