

Hershco v Gordon & Gordon
2015 NY Slip Op 30476(U)
March 18, 2015
Sup Ct, Queens County
Docket Number: 707935/2014
Judge: Robert J. McDonald
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defective and damaged homes represented as "newly renovated" by the defendants. The plaintiffs therein sued for discrimination, fraud, conspiracy, and violations of the New York General Business Law. The Barkley plaintiffs obtained a judgment after a jury trial in the amount of 3.5 million dollars. The District Court's decision denying a motion to set aside the verdict was affirmed by the Second Circuit Court of Appeals on February 19, 2014. Plaintiffs allege that trial counsel was negligent in failing to raise or preserve for appeal certain portions of the real estate contract which stated that the properties were being sold, "as is." In addition, plaintiffs contend that defendants herein failed to raise or preserve for appeal the contention that the evidence was insufficient as a matter of law to hold Mr. Hershco personally liable, and failed to raise or preserve for appeal the legal principals regarding piercing the corporate veil. Attorneys Peter S. Gordon and Peter S. Thomas were retained as trial counsel for Mr. Hershco and United Property Group, LLC, United Homes, LLC, and Galit Network, LLC. The verdict was rendered on June 1, 2011.

The instant action was commenced by the filing of a summons and complaint on October 27, 2014. The complaint contains causes of action for legal malpractice, breach of fiduciary duty, and breach of contract. The plaintiffs allege that the defendants were retained for trial and are still attorneys for the plaintiffs. The complaint alleges that the U.S. District Court Docket indicates that counsel remained on the case throughout the post-verdict period, including all post-trial motions and remained attorneys until after all judgments and amended judgments were entered.

Defendant, Peter S. Gordon, Peter S. Thomas, and the law firm of Gordon & Gordon now move, prior to filing an answer, to dismiss the complaint pursuant to CPLR 3211(5) on the ground that the allegations contained in the complaint accrued more than three years before the plaintiffs filed the complaint and as such the causes of action are barred by the three year statute of limitations. Defendant, Peter S. Gordon submits an affidavit in support of the motion stating that he and Peter S. Thomas were retained as trial counsel for plaintiffs pursuant to a retainer agreement dated June 23, 2010. According to the terms of the retainer, the attorneys were retained "in order to secure a jury verdict." The retainer agreement specifically states, "Please note that this agreement does not cover an appeal nor any post-trial motions, etc." He states that following the trial, he and Mr. Thomas were replaced as counsel by Jason Sultzer. Defendant states that after trial Mr. Hershco picked up 20 boxes from his office and transferred them to Mr. Sultzer. Mr Gordon states that

he took no further action in representing the plaintiffs after June 2011. Counsel also states that his representation ended when the matter was passed to Mr. Sultzter pursuant to an email dated June 7, 2011.

Counsel argues that because the instant action was not commenced until October 27, 2014, more than three years after his representation was concluded and more than three years after the date of the occurrence of the alleged malpractice, the action is time-barred by the statute of limitations. Counsel asserts that the malpractice claim accrues when the malpractice is committed not when the client discovers it (citing Williamson v. PricewaterhouseCoopers LLP, 9 NY3d 1 [2007]; Glamm v Allen, 57 NY2d 87 [1982]).

In opposition, plaintiffs' counsel, Andrew Lavoot Bluestone, Esq., asserts that the plaintiffs' claim that representation ended in June 2011 with the date of the verdict or on the date Mr. Sultzter directed him not to speak further on the issue of the trial are not supported by any documentary evidence. Mr. Bluestone claims the email does not discuss termination but is merely a direction for Mr. Gordon not to speak to the press. Counsel also claims that the verified complaint alleges that the District Court docket shows that Mr. Gordon and Mr. Thomas remained attorneys for the plaintiff throughout the post-verdict period. He states that on June 15, and June 22, 2011 motions to set aside the verdict were filed by the defendants. He also states that on March 29, 2012 additional motions were made by the defendants. Counsel also claims that Mr. Gordon was quoted in the New York Law Journal, in an article about the case dated October 14, 2011, which demonstrates that as of that date Gordon held himself out as counsel for the plaintiff. Counsel also claims that although Mr. Sultzter became the lead attorney after the trial, Mr. Gordon was never fired, terminated, told to quit, withdrew or was he substituted out. Counsel claims that the defendant has failed to make a prima facie showing that he was no longer the attorney of record on October 28, 2011 and thereafter. The plaintiffs have not submitted an affidavit of facts from Mr. Hershco.

In his memorandum of law, plaintiff contends that the statute of limitations sounding in legal malpractice is tolled until the completion of the attorneys ongoing representation concerning the matter out of which the malpractice arises (citing Leon Petroleum, LLC v Carl S. Levine & Assoc., P.C., 80 AD3d 573 [2d Dept. 2011]; Kennedy v H. Bruce Fischer, Esq., P.C., 78 AD3d 1016 [2d Dept. 2010]; Shipman v Mount Sinai Hosp., 290 AD2d 294 [1st Dept. 2002]). Counsel asserts that the continuous

representation doctrine applies because the defendants admit that they represented plaintiff until October 21, 2011 when an email was sent to the defendants containing instructions from the "lead attorney" to additional team attorneys on how to react to publicity and questions from the press. He states that the email does not indicate the defendants are no longer attorneys for the plaintiffs and there was no other documentary evidence submitted stating that counsel were ever terminated. Plaintiffs argue that no substitution of counsel form had been filed. Plaintiffs contend that the defendant remained as counsel for plaintiffs until the termination of the case through the First Clerk's Judgment on February 28, 2012.

Upon review and consideration of the defendants' motion, the plaintiffs' affirmation in opposition, and the defendants' reply thereto, this court finds that the defendants' motion to dismiss the complaint as untimely pursuant to the three year statute of limitations is granted.

The statute of limitations in a legal malpractice action is three years from the accrual of the claim (see CPLR § 214). Plaintiff commenced this action on October 27, 2014. The retainer agreement specifically states that defendants were retained as trial counsel on June 23, 2010. Defendants assert that pursuant to the terms of the retainer the representation ended on June 1, 2011 with the jury verdict. The retainer states that the agreement does not cover an appeal or post-trial motions. Mr. Gordon asserts that he did not file an appeal or a post-trial motion or do any other work for the plaintiffs following the verdict.

Plaintiffs assert in opposition that the rule of continuous representation tolls the running of the statute of limitations on the malpractice claim until the ongoing representation is completed (see Shumsky v Eisenstein, 96 NY2d 164 [2001], and here there is no proof that the ongoing representation by the defendants was ever terminated.

"On a motion pursuant to CPLR 3211(a)(5) to dismiss a complaint as barred by the applicable statute of limitations, the moving defendant must establish, prima facie, that the time in which to commence the action has expired" (Kitty Jie Yuan v 2368 W. 12th St., LLC, 119 AD3d 674 [2d Dept. 2014]; cited by Beroza v Sallah Law Firm, P.C., 2015 NY Slip Op 01913 [2d Dept. 2015]; also see Alizio v Ruskin Moscou Faltischek, P.C., 2015 NY Slip Op 01909 [2d Dept. 2015]). The three year limitations period applicable to causes of action to recover damages for legal malpractice "may be tolled by the continuous representation

doctrine where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim" Beroza v Sallah Law Firm, P.C., supra., Aseel v Jonathan E. Kroll & Assoc., PLLC, 106 AD3d 1037 [2d Dept. 2013]; Macaluso v DelCol, 95 AD3d 959 [2d Dept. 2011]). For the doctrine to apply, there must be clear indicia of "an ongoing, continuous, developing, and dependent relationship between the client and the attorney" (Aseel v Jonathan E. Kroll & Assoc., PLLC, 106 AD3d 1037 [2d Dept. 2013]).

This Court finds that the affidavit of Mr Gordon, stating that he was substituted by attorney Jason Sultzer on June 7, 2011, that he did not appear on or prepare any post-trial motions or appeals, that he took no acts on behalf of the plaintiff after the jury verdict, and that the plaintiff signed a retainer agreement stating that the retainer was for purposes of the trial only, are sufficient to make a prima facie demonstration that the defendants' representation ended more than three years prior to the commencement of this action.

In opposition, the plaintiffs failed to raise a question of fact as to the continuous representation doctrine or refute the claims set forth by the defendant. Although the verified complaint sets forth certain conclusions as to the defendants' participation in the case with respect to post-trial motions, Mr. Hershco failed to submit an affidavit in opposition to the motion and failed to present documentary evidence demonstrating that the parties had a mutual understanding of the need for further representation. To the extent that the affirmation of plaintiff's attorney contains factual assertions not based on personal knowledge and otherwise unsupported by evidence such affirmation, like any affirmation or affidavit of any person not based on personal knowledge, is without evidentiary value.

Further, plaintiff has failed to submit any copies of motions or documents filed by the moving defendants showing that they were still attorneys for the plaintiff once the trial ended. Further, the plaintiff has failed to provide any evidence to show that there was a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim or to show any indicia of an ongoing, continuous, developing, and dependent relationship between the client and the attorney (see Beroza v Sallah Law Firm, P.C., 2015 NY Slip Op 01913, supra., Farage v Ehrenberg, 124 AD3d 159 [2d Dept. 2014]). The essence of a continuous representation toll is the client's confidence in the attorney's ability and good faith, such that the client cannot be expected to question and assess the techniques employed or the manner in which the services are

rendered. Here, the plaintiff has failed to submit an affidavit or documentary evidence that after he lost the jury verdict in the amount of 3.5 million dollars he still had confidence in the attorneys' ability and confidence in the relationship (Farage v Ehrenberg, supra).

Accordingly, based on the foregoing, it is hereby,

ORDERED, that the motion by the defendants, GORDON & GORDON, PETER S. GORDON, Esq. and PETER S. THOMAS. Esq. is granted and the plaintiffs' complaint is dismissed against said defendants only and it is further,

ORDERED, that the Clerk of Court shall enter judgment accordingly.

Dated: March 18, 2015
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.