Ingvarsdottir v Gaines, Gruner, Ponzini & Novick, LLP
2015 NY Slip Op 32642(U)
April 3, 2015
Supreme Court, Westchester County
Docket Number: 57331/14
Judge: Linda S. Jamieson

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

Disp ____ Dec _x___ Seq. Nos. __2, 3___ Type _dismiss, renew_

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

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HELGA INGVARSDOTTIR,

Plaintiff,

-against- Index No. 57331/14

GAINES, GRUNER, PONZINI & NOVICK, LLP, STEVEN H. GAINES, DENISE M. COSSU, and DOES 1-20,

DECISION AND ORDER

Defendants.

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The following papers numbered 1 to 6[1] were read on these motions:

Paper	Number
Notice of Motion, Affirmation and Exhibits	1
Memorandum of Law	2
Notice of Cross-Motion, Affirmation and Exhibits[2]	3
Memorandum of Law	4
Reply Affirmation	5
Reply Affirmation	6

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[1]Plaintiff's counsel submitted to the Court an "Affirmation in Further Support" which is, in actuality, a sur-reply. The Court does not accept unauthorized sur-replies, as set forth in the Part Rules. In any event, this Court does not find anything untoward in the fact that Justice Bellantoni recused himself many months after deciding a motion in August 2014; this Court does not assume, as plaintiff does, that the reason for the recusal already existed prior to August 2014.

[2]Exhibits must be tabbed. Counsel is directed to review the Part Rules.

The Court has before it two motions in this legal malpractice action. The first motion, brought by defendants, seeks to dismiss the complaint for failure to state a cause of action. The second motion, brought by plaintiff, seeks to renew her motion for a default judgment against defendants.

It is well-settled that "On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Elie v. City of New York*, 92 A.D.3d 716, 938 N.Y.S.2d 595 (2d Dept. 2012).

Both motions turn on one issue: whether or not the statute of limitations for plaintiff's claim in the underlying action, *Davidson v. Wachovia*, Index No. 50786/2011, had expired by the time that plaintiff retained defendants to represent her in that action. If, as plaintiff alleges, the statute of limitations had not expired, then defendants have no defense to the malpractice action - and hence no meritorious defense to plaintiff's motion for a default judgment. If defendants are correct, and the statute of limitations had already expired, then plaintiff cannot prove that defendants committed malpractice.

There are two statutes at issue here. The first, under

which plaintiff's claim in the *Davidson* case arose, is Business Corporation Law § 630(a). That statute provides that a worker may obtain from the ten largest shareholders of certain corporations payments for "all debts, wages or salaries due and owing to any of its laborers, servants or employees . . . for services performed by them for such corporation." The worker must give notice of such claim to the employer "within one hundred and eighty days after termination of such services." Bus. Corp. Law § 630.

There is no dispute that here, plaintiff stopped actually working for her employer before the end of 2010. Indeed, in the Decision and Order of the Administrative Law Judge dated August 4, 2014 (the "Administrative Decision"), the Court states that plaintiff "averred that she did not work in 2011" and that "she did not return to work for Datalink after her incarceration ended in December 2010." Thus, if the only law that applied was BCL § 630, defendants would be correct that the claims were time-barred before plaintiff ever retained them in May 2011.

Plaintiff argues, however, that another statute applies to determine the dates of her employment, 8 U.S.C. § 1101(a)(15)(H)(i)(B), the Immigration and Nationality Act H-1B visa program ("H-1B"). She claims that pursuant to H-1B, the Administrative Decision "has already determined the end date of Plaintiff's employment with Datalink to be May 15, 2011 - four

(4) days before Plaintiff retained Defendants." A review of the Administrative Decision shows that under H-1B, employers "are required to pay H-1B workers beginning on the date" when the worker first is admitted to the United States, through a "bona fide termination" of the employment relationship **or** the end of the visa period. Here, plaintiff's employment was not formally terminated. The Administrative Decision thus found that - although plaintiff had actually not worked any days at all in 2011 - her employment status ended in May 2011, when her H-1B visa ended. Plaintiff naturally argues that the claim was not time-barred at the time of the retention of defendants, since both occurred in May 2011.

What the parties do not address is the interaction between the New York Business Corporation Law and the H-1B Administrative Decision. This Court is particularly interested in how the language of Section 630(a), which specifically states that workers are entitled to wages for "**services performed by them**[3] for such corporation," (emphasis added) might be affected by the H-1B determination that plaintiff was still working (when she plainly was not actually working). This is a matter that the parties should address in detail, with references to legislative history and relevant treatises if necessary, in any future

[3]This appears to require actual work, not the legal status of "working" under the H-1B program.

motions for summary judgment.

The Court thus finds that neither party is entitled to the relief that it seeks, and both motions are denied. The parties are directed to appear for a Preliminary Conference in the Preliminary Conference Part, Courtroom 800, on May 11, 2015 at 9:30 a.m.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
April 3, 2015

HON. LINDA S. JAMIESON
Justice of the Supreme Court

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