

Malta v Meltzer, Lippe, Goldstein & Breitstone, LLP
2016 NY Slip Op 31016(U)
June 2, 2016
Supreme Court, New York County
Docket Number: 150771/15
Judge: Kathryn E. Freed
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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 2

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ROBERT MALTA and GMD 444 LLC and
GMD REALTY LLC,

Plaintiffs,

-against-

DECISION/ORDER

Index No.: 150771/15

Mot. Seq. No.: 001

PRESENT:

Hon. Kathryn E. Freed

MELTZER, LIPPE, GOLDSTEIN & BREITSTONE, LLP,

Defendants.

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HON. KATHRYN E. FREED, J.S.C.:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS MOTION.

PAPERS

NUMBERED

NOTICE OF MOT. AND AFF. IN SUPPORT

1-2 (Exs. A-E)

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this claim sounding in legal malpractice, defendant Meltzer, Lippe, Goldstein & Breitstone, LLP moves, pursuant to CPLR 3012(b), to dismiss the action due to plaintiff's failure to serve a complaint. Defendant also moves, pursuant to CPLR 3211(a)(5), to dismiss based on the expiration of the statute of limitations.

Factual and Procedural Background:

On January 26, 2015, plaintiffs Robert Malta, GMD 444 LLC, and GMD Realty LLC commenced the captioned action against defendant Meltzer, Lippe, Goldstein & Breitstone, LLP,

a law firm, by filing a summons with notice. Exs. A, D. The summons with notice alleged that plaintiffs sought \$10 million due to defendant's legal malpractice. Ex. A. Specifically, plaintiffs claimed that they had hired defendant to provide tax advice "regarding their purchase of a minority ownership interest in corporations holding shares in a commercial cooperative at 121 Varick Street, New York, New York in January 2012." Id. The summons with notice, which was verified by Malta on behalf of all three plaintiffs, was served on defendant via the Secretary of State on May 14, 2015 and was filed with the court the following day. Exs. A, B, C.

On June 11, 2015, defendant filed a notice of appearance and a demand for a complaint pursuant to CPLR 3012(b). Ex. C. However, plaintiff has not served a complaint.

Defendants maintain that "[p]laintiffs' admissions and defendant's records confirm that the last time defendants provided any legal advice to the plaintiffs was no later than February 16, 2012." Defendants' Aff. In Supp., at par. 8; Ex. E.

Position of the Defendant:

Defendant asserts that the action must be dismissed pursuant to CPLR 3012(b) because plaintiff failed to serve a complaint in response to its demand. It further asserts that the plaintiffs' claim must be dismissed pursuant to CPLR 3211(a)(5) since it is barred by the 3-year statute of limitations for legal malpractice.

Legal Conclusions:

Failure To Serve Complaint

Pursuant to CPLR 3012(b), a plaintiff who commences an action by service of a summons

with notice and who has been served with a demand for the service of a complaint has 20 days in which to comply with that demand. *See Wess v Olympia and New York Realty Corp.*, 201 AD2d 365 (1st Dept 1994). A plaintiff seeking to serve a complaint after the expiration of the 20-day period must demonstrate the merits of the cause of action and a reasonable excuse for the delay. *See Barasch v Micucci*, 49 NY2d 594, 599 (1980).

Here, defendant's notice of appearance and demand for a complaint was filed on June 11, 2015. Ex. C. However, nearly one year later, plaintiff has neither served a complaint nor even opposed this motion with any proffered reason why no complaint was served. Thus, the action is dismissed in the discretion of this Court pursuant to CPLR 3012(b). *See Alvarado v New York City Hous. Auth.*, 192 AD2d 461 (1st Dept 1993).

Statute Of Limitations

"On a motion to dismiss a complaint pursuant to CPLR 3211(a)(5) on statute of limitations grounds, the moving defendant must establish, prima facie, that the time in which to commence the action has expired." *Ross v Jamiaca Hosp. Med. Ctr.*, 122 AD3d 607 (2d Dept 2014) quoting *Baptiste v Harding-Marin*, 88 AD3d 752, 753 (2d Dept 2011). Here, there is no need to address the statute of limitations issue since the action is dismissed pursuant to CPLR 3012(b). In any event, however, defendants have not established their prima facie entitlement to dismissal on this ground. As noted above, defendant concedes that the latest it could have provided plaintiffs with legal services was in February of 2012. Defendants' Aff. In Supp., at par. 8. Since the captioned action was commenced in January of 2015 (Exs. A, D), prior to the expiration of the statute of limitations in February of 2015, it is thus unclear whether some or all of the services provided by defendant are

barred by the statute of limitations and dismissal is not warranted on this ground.

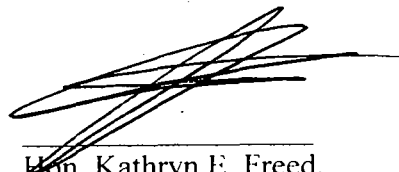
Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the branch of defendant Meltzer, Lippe, Goldstein & Breitstone, LLP's motion seeking to dismiss the action pursuant to CPLR 3012(b) is granted; and it is further,

ORDERED that this constitutes the order and decision of the court.

DATED: June 2, 2016

ENTER:

A handwritten signature in black ink, appearing to read 'Kathryn E. Freed', is written over a horizontal line.

Hon. Kathryn E. Freed,
J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**