Grant v Corey
2016 NY Slip Op 33064(U)
March 31, 2016
Supreme Court, Bronx County
Docket Number: 304221/2015
Judge: Lucindo Suarez

NEW YORK SUPREME COURT – COUNTY OF BRONX

Mtn. Seq. # 01

FS 4/6/16

PART: LPM

Case Disposed	■
Settle Order	□
Schedule Appearance	□

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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GRANT, NICOLA, et al

Index №. **304221/2015**

- against -

Hon. **LUCINDO SUAREZ,**

COREY, PETER, et al

Justice.

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The following papers numbered 1 to **13** read on this motion, **DISMISSAL**,
noticed on **January 27, 2016** and duly submitted as No. **46** on the Motion Calendar of **March 29, 2016**

	PAPERS NUMBERED	
Notice of Motion – Exhibits and Affidavits Annexed	1, 2, 3, 4	
Notice of Cross-Motion – Exhibits and Affidavits Annexed	5, 6, 7, 8, 9, 10	
Replying Affidavit and Exhibits	11, 12, 13	
Affidavit and Exhibits		
Pleadings – Exhibit		
Stipulation(s) – Referee's Report – Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers, defendants' motion for an order dismissing the complaint is granted, and plaintiffs' cross-motion for an order amending the complaint is denied, in accordance with the annexed decision and order.

Dated: **03/31/2016**

Hon. **LUCINDO SUAREZ, J.S.C.**

FILED Apr 06 2016 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART LPM

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NICOLA GRANT, PAUL GRANT and ROY GRANT,

DECISION AND ORDER

Plaintiffs,

Index No. 304221/2015

- against -

PETER COREY, RICHARD L. STERN, MACCO & STERN LLP and RICHARD L. STERN, PC,

Defendants.

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PRESENT: Hon. Lucindo Suarez

Upon defendants' notice of motion dated December 28, 2015 and the affirmation, affidavit, exhibits and memorandum of law submitted in support thereof; plaintiffs' undated notice of cross-motion and the affidavits (3), exhibits and memorandum of law submitted in support thereof; defendants' affirmation in reply dated March 25, 2016 and the affidavit and exhibits submitted therewith; and due deliberation; the court finds:

In this action alleging legal malpractice for defendants' pursuit of Chapter 13 bankruptcy proceedings on plaintiffs' behalf, defendants move for dismissal on the ground that the action is time-barred. The complaint alleges that to avoid loss of property in foreclosure, brothers Paul Grant and Roy Grant consulted defendants, who filed Chapter 13 bankruptcy petitions for them in March and May 2012, and that the petitions were dismissed on August 2, 2012 and the proceedings closed upon discharge of the trustee.[1] The complaint alleges that defendants should have known that plaintiffs did not meet the statutory threshold for Chapter 13 bankruptcy.

> On a motion to dismiss pursuant to CPLR 3211(a)(5) based on the statute of limitations, our analysis of plaintiffs' claims is limited to the four corners of the pleading, the allegations of which we must give a liberal construction and accept as true (*see*

[1] Plaintiff Nicola Grant is the spouse of Paul Grant, and was joined in his bankruptcy proceeding.

> *Leon v Martinez*, 84 NY2d 83, 87-88, 638 NE2d 511, 614 NYS2d 972 [1994]). We must also accord plaintiffs the benefit of every possible favorable inference (*id.*) and bear in mind that "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 832 NE2d 26, 799 NYS2d 170 [2005]).

Johnson v. Proskauer Rose LLP, 129 A.D.3d 59, 67, 9 N.Y.S.3d 201, 207 (1st Dep't 2015).

The statute of limitations for a malpractice action is three years. *See* CPLR 214(6). This period is measured from the date of the malpractice, not the plaintiff's discovery of it. *See McCoy v. Feinman*, 99 N.Y.2d 295, 785 N.E.2d 714, 755 N.Y.S.2d 693 (2002); *Alizio v. Ruskin Moscou Faltischek, P.C.*, 126 A.D.3d 733, 5 N.Y.S.3d 252 (2d Dep't 2015). As the alleged malpractice consists of the filing and prosecution of the bankruptcy proceedings, and plaintiffs do not dispute that the bankruptcy proceedings were dismissed on August 2, 2012, the complaint is time-barred. *See 6645 Owners Corp. v. GMO Realty Corp.*, 306 A.D.2d 97, 762 N.Y.S.2d 60 (1st Dep't 2003).

In response to this *prima facie* showing, plaintiffs argue that they are entitled to the benefit of the continuous representation doctrine because the bankruptcy proceedings remained open after dismissal and because they never explicitly directed defendants to cease action. Neither is dispositive of the application of the doctrine, which requires "*mutual* understanding of the need for further representation on the specific subject matter underlying the malpractice claim." *McCoy*, 99 N.Y.2d at 306, 785 N.E.2d at 722, 755 N.Y.S.2d at 700 (emphasis added).

Plaintiffs' affidavits and memorandum of law do not point to any act performed by defendants after dismissal of the bankruptcy proceedings. The acts occurring after said date are alleged to have been performed solely by the trustee, and there is no indication that such acts were undertaken with the input of or at the direction of defendants. The bankruptcy trustee is required by law to make and file a final report, *see* 11 USCS § 1302(b)(1); 11 USCS § 704(a)(9),

without which the proceeding *cannot* be considered closed, *see* Federal Rule of Bankruptcy Procedure 5009(a), even where, as here, the petitions have been dismissed. Accordingly, the fact that the proceedings remained open, without more, is not evidence that defendants undertook any act on plaintiffs' behalf or should have been expected to do so.

Furthermore, plaintiffs' statements that upon learning of dismissal they assumed that defendants would take action because their proceedings should not have been dismissed is directly in conflict with their allegations herein that the proceedings were dismissable *ab initio*, a fact, it is alleged, that defendants should have known. Furthermore, such statements are belied by the email correspondence between defendants and plaintiff Paul Grant after the final appearance in Bankruptcy Court, wherein plaintiff lamented the futility of the proceedings and defendants' misguidedness in suggesting and pursuing same, and defendants' ensuing correspondence to plaintiffs.

Nothing in the emails or letter could be construed as a mutual understanding of the desire for continued pursuit of the Chapter 13 proceedings by defendants on behalf of plaintiffs. Given the obvious disagreement depicted in the correspondence, "plaintiffs could not have 'acutely' anticipated the need for further counsel from defendants that would trigger the continuous representation toll." *Johnson*, 129 A.D.3d at 68, 9 N.Y.S.3d at 208. Also, although not dispositive, representation on a motion to dismiss was not contemplated by the initial retainers signed by plaintiffs. *See Williamson v. PricewaterhouseCoopers LLP*, 9 N.Y.3d 1, 872 N.E.2d 842, 840 N.Y.S.2d 730 (2007).

Furthermore, the fact that plaintiff Roy Grant may have called defendants once in 2013 to inquire about bankruptcy and the purchase of an automobile does not refute defendants' averments that they took no action in furtherance of the bankruptcy proceedings after writing a letter to the court in July 2012. Plaintiff does not aver what defendants did or said in response to

his inquiry such that representation may be deemed continuous. Furthermore, if "intermittent telephone contact between [plaintiff] and defendants does not constitute 'clear indicia of an ongoing, developing and dependent relationship between the client and the attorney' or of 'a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim,'" *Hadda v. Lissner & Lissner LLP*, 99 A.D.3d 476, 477, 952 N.Y.S.2d 126, 127 (1st Dep't 2012), then the same may be said of a single telephone call. *See Mitschele v. Schultz*, 36 A.D.3d 249, 826 N.Y.S.2d 14 (1st Dep't 2006).

Accordingly, it is

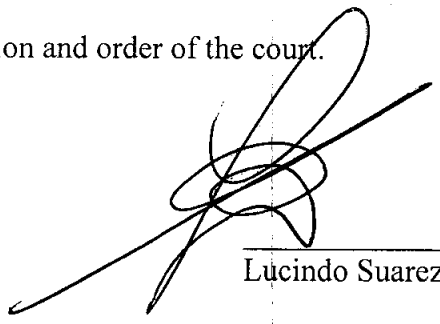
ORDERED, that defendants' motion for an order dismissing the complaint is granted; and it is further

ORDERED, that the Clerk of the Court shall enter judgment in favor of defendants dismissing plaintiffs' complaint; and it is further

ORDERED, that plaintiffs' cross-motion for an order amending the complaint is denied as moot.

This constitutes the decision and order of the court.

Dated: March 31, 2016



Lucindo Suarez, J.S.C.