

**Lazarus Resources, Inc. v Joseph & Terraccianok
LLP**

2017 NY Slip Op 30575(U)

February 3, 2017

Supreme Court, Nassau County

Docket Number: 4381/16

Judge: Stephen A. Bucaria

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

LAZARUS RESOURCES, INC.,

TRIAL/IAS, PART 1
NASSAU COUNTY

Plaintiff,

INDEX No. 4381/16

MOTION DATE: 1/6/17
Motion Sequence 001

-against-

JOSEPH & TERRACCIANOK LLP, JOSHEP,
GERRACCIANO & LYNAM LLP, PETER J.
TERRACCIANO, ESQ.,

Defendant.

The following papers read on this motion:

- Notice of Motion.....X
- Affirmation in Support.....X
- Memorandum of Law.....XX
- Reply Affirmation.....X
- Affidavit in Opposition.....X

Motion by defendants to dismiss the complaint for statute of limitations is **granted**.

This is an action for legal malpractice. Plaintiff Lazarus Resources is a lender. On July 8, 2010, Lazarus extended a \$200,000 loan to Carrie Graham. To evidence the loan, Graham issued a promissory note payable to the

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order of Lazarus which bore interest at the rate of 15.99%. The note was due July 8, 2011. The note contained a provision that the first year's interest would be deducted from the loan proceeds and held in escrow by the lender. Defendant Joseph & Terracciano, LLP represented Lazarus in connection with the transaction and prepared the note, as well as a mortgage on Graham's property located at 585 Quincy Street in Brooklyn.

On June 18, 2012, Lazarus and Graham executed a rider to the note, reducing the interest rate to 10.99% and extending the maturity date to July 8, 2013. Defendants did not represent Lazarus in connection with the note modification.

In January 2014, Lazarus, represented by other counsel, brought an action to foreclose the mortgage. In Graham's answer, she asserted the defense of usury. Graham argued that when the first year's interest of \$31,980 was deducted from the proceeds of the loan, the amount borrowed was only \$168,020, and the effective interest rate was over 16%. By order dated October 8, 2015, Justice Karen Rothenberg granted Graham summary judgment dismissing the foreclosure action and declared the note and mortgage void and unenforceable pursuant to General Obligations Law § 5-511(2), the usury statute.

This action was commenced on June 16, 2016. Plaintiff asserts that defendants committed legal malpractice by failing to advise plaintiff regarding the prevailing law of usury.

By notice of motion dated September 15, 2016, defendants move to dismiss the complaint for statute of limitations, a defense founded upon documentary evidence, and failure to state a cause of action. Defendants argue

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that the three-year statute of limitations began to run when the alleged malpractice was committed, i.e. when the note was executed. Defendants further argue that any malpractice on their part could not have been the proximate cause of plaintiff's loss because it is a sophisticated lender who understood the risk of the loan being declared void for usury. In opposition, plaintiff argues that the statute of limitations was tolled by the continuous representation doctrine.

The statute of limitations on a claim for legal malpractice is three years (CPLR § 214[6]). The claim accrues when the malpractice is committed (**Shumsky v Eisenstein, 96 NY2d 164, 166 [2001]**). The continuous representation doctrine tolls the statute of limitations where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim (**Zorn v Gilbert, 8 NY3d 933 [2007]**).

Plaintiff's claim for malpractice accrued on July 8, 2010 when the usurious note was executed. Defendants have not established a mutual understanding of the need for further representation on the subject of the promissory note. Thus, the statute of limitations was not tolled by the doctrine of continuous representation. Since this action was not commenced by July 8, 2013, it is untimely. Defendants' motion to dismiss the complaint for statute of limitations is granted.

So ordered.

ENTERED

FEB 03 2017

Date:

February 17

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Stephen D. Bucaria

J.S.C.
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