

Depamphilis v Karasyk & Moschello, LLP
2017 NY Slip Op 32846(U)
January 30, 2017
Supreme Court, New York County
Docket Number: 156289/2016
Judge: Joan M. Kenney
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

Williamson v PricewaterhouseCoopers LLP, 9 NY3d 1, 8 (2007). However, "[s]ince it is impossible to envision a situation where commencing a malpractice suit would not affect the professional relationship, the rule of continuous representation tolls the running of the Statute of Limitations on the malpractice claim until the ongoing representation is completed." *Glamm v Allen*, 57 NY2d at 94. Here, the doctrine of continuous representation is applicable and the action was timely commenced.

Defendants' application to dismiss, pursuant to CPLR 3211(a)(1) and 3211(a)(7) is a more compelling argument for dismissal. "[A]n action for legal malpractice requires proof of three elements: the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and proof of actual damages." *Schwartz v Olshan Grundman Frome & Rosenzweig*, 302 AD2d 193, 198 (1st Dept 2003); see also *Pellegrino v File*, 291 AD2d 60 (1st Dept 2002). Negligence is shown if a plaintiff can demonstrate that "the attorney failed to exercise that degree of care, skill and diligence commonly possessed by a member of the legal profession, and that this failure caused damages." *Cosmetics Plus Group, Ltd. v Traub*, 105 AD3d 134, 140 (1st Dept 2013).

In order to show proximate cause, the plaintiff must show that "but for" the attorney's misfeasance, it would have attained a "more favorable result" in the underlying action. *Pozefsky v Aulisi*, 79 AD3d 467, 467 (1st Dept 2010); see also *Keness v Feldman, Kramer & Monaco, P.C.*, 105 AD3d 812, 813 (2d Dept 2013) (to make a case for malpractice, there must be a showing that but for the attorney's negligence, "there would have been a more favorable outcome in the underlying proceeding or that the plaintiff would not have incurred any damages"). If proximate cause is not established, the action must be dismissed "regardless of whether it is demonstrated that the attorney was negligent." *Schwartz v Olshan Grundman Frome & Rosenzweig*, 302 AD2d at 198.

Simply stated, plaintiff asserts in his complaint that defendants "guaranteed" that if he pled guilty to the criminal charge, he would not lose his NYPD pension and would be allowed five years to pay restitution. Defendants vehemently deny that any "guarantee" was made to the plaintiff and that he well understood that the plea would have to be approved by the Commissioner of the NYPD and that said Commissioner could impose additional terms to the plea agreement, including, but not limited to dismissal from the NYPD and forfeiture of pension/benefits. Based on Commissioner Kelly's Memorandum dated November 29, 2010, plaintiff's ultimate demise would not have been changed due to an alleged "guarantee" of outcome made by defendants/counsel. (See also, *Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP*, 301 AD2d 63, 67 (1st Dept 2002) ("In order to survive dismissal, the complaint must show that but for counsel's alleged malpractice, the plaintiff would not have sustained some ascertainable damages"). Here, plaintiff failed to state a cause of action for malpractice against defendants. Accordingly, it is

ORDERED that the within application is granted and the Clerk of the Court shall enter judgment in favor of defendants and against plaintiff, dismissing this action against all named defendants.



JOAN M. KENNEY
J.S.C.

1/30/17

Ry. 2 of 2