Etzion v Blank Rome LLP
2018 NY Slip Op 32302(U)
September 18, 2018
Supreme Court, New York County
Docket Number: 157904/17
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE, *Justice* — PART 12

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RAFAEL ETZION,

Plaintiff,

- v -

BLANK ROME LLP and JAY SILVERSTEIN, ESQ.,

Defendants.

---X

INDEX NO. 157904/17

MOTION DATE

MOTION SEQ. NO. 1

DECISION AND ORDER

By notice of motion, defendants move pre-answer for an order dismissing the complaint against them. Plaintiff opposes.

I. BACKGROUND

Defendant lawyers represented plaintiff in a divorce proceeding with regard to which plaintiff had executed a retainer agreement, dated July 8, 2002, for the provision of services "in connection with the prosecution or defense of a divorce action, including the attempt to negotiate a settlement; the negotiation, preparation, and/or review of a separate agreement or other marital settlement agreement; the prosecution or defense of a Supreme Court proceeding related to the matrimonial difficulties (if necessary)." The retainer does not cover services "which might be required following the entry of a final judgment, including, but not limited to, such matters as enforcement or modification of the judgment and possible future litigation to enforce or to modify a settlement or separation agreement." (NYSCEF 9).

The divorce action was settled in June 2005, and as part of it, the parties agreed that if either party had to hire an attorney to enforce any rights under the agreement, and if the party was successful in enforcing such rights, the other party was required reimburse him or her for reasonable attorney fees thereby incurred. (NYSCEF 1, 12, 15). As part of the settlement, plaintiff and his wife were allocuted in court as to their understanding of and consent to the settlement terms. (NYSCEF 13, 14).

By email dated September 22, 2005, defendant Silverstein advised a non-party that plaintiff "wants all further requests to go directly through him [ ] as he does not want to incur additional legal fees as there is no pending litigation." (NYSCEF 28).

Thereafter, in 2007, in a separate action, plaintiff's ex-wife sued him and his corporation for damages related to the valuation of a warehouse. Based on an alleged fraudulent concealment of the true value of the warehouse, she sought a determination as to whether the equitable distribution portion of the divorce judgment should be changed, asserted claims for fraud, rescission and/or reformation of the divorce judgment, and asked that the divorce settlement be set aside on the ground of mutual mistake of fact, unilateral mistake, or unfairness and unconscionability. She also sought to impose a constructive trust, claimed a *prima facie* tort and breach of fiduciary duty, and requested attorney fees. (NYSCEF 17). By second retainer agreement dated April 20, 2007, defendants agreed to represent plaintiff in connection with this second action. (NYSCEF 16).

Plaintiff asserted a counterclaim in the second action for attorney fees he would or could incur in defending against his ex-wife's claims, relying on the attorney fees provision in the divorce settlement. By decision and order dated August 3, 2010, the ex-wife's motion to dismiss the counterclaim for failure to state a claim was denied by the trial court, characterizing the

second action as a "post-judgment action seeking to rescind and/or reform certain provisions of the parties' [divorce settlement]." (NYSCEF 20).

On or about May 17, 2011, the trial court's decision was reversed and plaintiff's counterclaim was dismissed on a finding that the divorce settlement permitted the recovery of attorney fees only if a party sought to enforce rights under the agreement, and that plaintiff's defense to and/or counterclaim in his ex-wife's lawsuit did not constitute an action to enforce his rights under the settlement. (*Etzion v Etzion*, 84 AD3d 1015 [2d Dept 2011], *lv dismissed* 18 NY3d 854).

After years of litigation and appeals in the second action, in August 2016, the grant of summary judgment to plaintiff whereby all of his ex-wife's claims were dismissed was affirmed and all of his ex-wife's claims against him were dismissed. (138 AD3d 678 [2d Dept 2016]). The Court of Appeals later denied the ex-wife leave to appeal the decision, thereby ending the second action. (28 NY3d 1022).

Plaintiff contends that defendants represented him in both the divorce action and the second action, and that he expended approximately $2 million in defending himself in the second action. He asserts that defendants advised him before he signed the divorce settlement that the attorney fee provision would cover attorney fees incurred by the prevailing party in any litigation arising from or related to the settlement, and that their negligent drafting of the settlement agreement caused him to incur approximately $2 million in attorney fees for his defense in the meritless second action. (NYSCEF 1).

II. CONTENTIONS

Defendants contend that plaintiff's action is time-barred as the alleged malpractice occurred during the divorce action, which concluded in 2005, and that there was no representation between 2005 and 2007, when plaintiff's ex-wife commenced the second action and for which the parties signed a new and separate retainer agreement. They also argue that plaintiffs' claims are barred by statements he made during his allocution at the completion of the divorce action. (NYSCEF 24).

Plaintiff maintains that the divorce action consists of two parts, the divorce and the settlement, and the second action contesting the divorce settlement, and that defendants represented him for each and that the two are interrelated and concern the same subject matter. He also observes that the inclusion of the prevailing party attorney fee provision in the divorce settlement contemplates the possibility of future litigation concerning the settlement. Plaintiff denies that the settlement and/or allocution bars him from asserting a malpractice claim. (NYSCEF 30).

In reply, defendants observe that the divorce retainer agreement specifically excluded services related to post-judgment actions to modify or enforce the divorce settlement, that no legal services were provided to plaintiff related to the divorce after September 2005, as acknowledged by plaintiff's email dated September 22, 2005, and that the existence of the second retainer agreement proves that defendants' representation did not continue after the conclusion of the divorce action. Defendants characterize the second action as one arising from plaintiff's alleged fraud or concealment of the increased value of a marital asset, rather than an action by his ex-wife to contest the fairness of the divorce settlement, and thus maintain that the

fraud action is separate and distinct from the divorce action. Defendants for the first time argue that plaintiff also fails to plead sufficiently a legal malpractice claim. (NYSCEF 32).

III. ANALYSIS

Pursuant to CPLR 3211(a)(5), a defendant seeking dismissal of an action as time-barred bears the initial burden of proving, *prima facie*, that the time within which the action must be brought has expired. (*Kuo v Wall St. Mortg. Bankers, Ltd.*, 65 AD3d 1089, 1090 [2d Dept 2009]). An attorney affirmation may serve as the vehicle for such evidence. (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]; *Furlender v Sichenzia Ross Friedman Ference LLP*, 79 AD3d 470, 470 [1st Dept 2010]).

If the defendant meets its burden, the burden shifts to the plaintiff to establish that, accepting its complaint as true and affording it the benefit of every favorable inference (*Matter of Schwartz*, 44 AD3d 779, 779 [2d Dept 2007]), its cause of action falls within an exception to the statute of limitations, or to raise an issue of fact as to the applicability of an exception (*Gravel v Cicola*, 297 AD2d 620, 621 [2d Dept 2002]).

Where the plaintiff is continuously represented by the defendant, the three-year statute of limitations for malpractice is tolled. (*Shumsky v Eisenstein*, 96 NY2d 164, 167–68 [2001]). Representation is continuous when there is "clear indicia of an ongoing, continuous, developing, and dependent relationship between the client and the attorney" (*Farage v Ehrenberg*, 124 AD3d 159, 164 [2d Dept 2014], *lv denied* 25 NY3d 906 [2015]), or "a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim" (*Matter of Merker*, 18 AD3d 332, 333 [1st Dept 2005]).

Even if the representation is continuous, it must pertain to the subject matter of the alleged malpractice. (*Williamson v PricewaterhouseCoopers, LLP*, 9 NY3d 1, 11 [2007]). Thus,

"'[t]he mere recurrence of professional services does not constitute continuous representation where the later services performed were not related to the original services.'" (*Ackerman v PriceWaterhouse*, 252 AD2d 179, 205 [1st Dept 1998] internal quotes omitted).

In *Verkowitz v Ursprung*, the attorney had represented the defendant in a divorce action which had ended with the entry of a divorce judgment, and there was no evidence that the parties contemplated further representation thereafter. While there was subsequent litigation concerning the interpretation of the divorce settlement, "the fact that the defendant again retained the plaintiff . . . to represent her in subsequent litigation . . . did not render the representation continuous"]). The Court thus held that the defendant's counterclaim for legal malpractice was time-barred absent a continuous representation toll. (153 AD3d 1443, 1444 [2d Dept 2017]).

Here too, the settlement concluded the divorce action and there is no evidence of a need or expectation that defendants would continue to represent plaintiff in relation to that action, especially given the specific exclusion of representation in any post-judgment litigation in the first retainer agreement. (*See McCoy v Feinman*, 99 NY2d 295 [2002] [there was no continuous representation as alleged legal malpractice arose from defendant's alleged failures related to divorce stipulation and judgment, and no further representation of plaintiff was contemplated]).

Plaintiff also advised defendants that he did not want them to provide further legal services in 2005, and no further legal services were provided to him until his ex-wife commenced the second action in 2007 and the parties signed a new and separate agreement to represent him in that action. (*See Allmen v Fox Rothschild LLP*, 34 Misc 3d 1224[A], 2012 NY Slip Op 50220[U] [Sup Ct, New York County 2012][execution of new letter of engagement constituted objective proof that parties had not contemplated continuous representation after first engagement ended; duties set forth in second engagement letter differed and were distinct from

those in first engagement]; *see also Williamson v PricewaterhouseCoopers LLP*, 9 NY3d 1 [2007] [as party lacked "awareness of a condition or problem warranting further representation and the fact that no course of representation was alleged," no continuous representation established]).

Moreover, while the issues in the second action relate to the divorce, they were not interconnected with it, as plaintiff's ex-wife alleged in the second action that he had concealed an asset or income during the divorce and that the concealment warranted the modification or vacatur of the divorce settlement. (*See e.g., Nuzum v Field*, 106 AD3d 541 [1st Dept 2013] [legal malpractice claim time-barred as attorney's allegedly defective drafting of promissory notes occurred in 1999, and while attorney represented plaintiff in 2004 to draft documents related to notes, new representation insufficiently related to prior matter to render representation continuous]; *Pace v Raisman & Assocs., Esqs., LLP*, 95 AD3d 1185 [2d Dept 2012] [alleged negligent creation of trust for estate was separate and distinct from subsequent representation of estate related to legal advice on estate's tax liability]).

Plaintiff cites no authority for the proposition that the inclusion of a prevailing attorney fee provision in the first retainer constitutes an acknowledgment or concession that future or continuous representation was contemplated by the parties under the circumstances presented here.

In light of this result, I need not consider the parties' remaining contentions.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss is granted, and the complaint is dismissed in its entirety with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

9/18/2018

DATE

BARBARA JAFFE, J.S.C.

HON. BARBARA JAFFE

CHECK ONE:	[X] CASE DISPOSED		[ ] NON-FINAL DISPOSITION	
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APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
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