

**New York Bone & Joint Specialists, PLLC v
Goldstein, Rubinton, Goldstein & DiFazio, PC**

2019 NY Slip Op 30690(U)

March 20, 2019

Supreme Court, New York County

Docket Number: 158323/2016

Judge: Anthony Cannataro

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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 IAS MOTION 41EFM

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NEW YORK BONE & JOINT SPECIALISTS, PLLC,

INDEX NO. 158323/2016

Plaintiff,

MOTION DATE 12/09/2018

- v -

GOLDSTEIN, RUBINTON, GOLDSTEIN & DIFAZIO, PC,
RONALD GOLDSTEIN

MOTION SEQ. NO. 001

Defendant.

DECISION AND ORDER

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HON. ANTHONY CANNATARO:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

were read on this motion to/for DISMISSAL.

Defendants move to dismiss plaintiff's complaint, consisting of claims for legal malpractice and breach of fiduciary duty, in its entirety pursuant to CPLR 3211 (a)(5) as barred by the applicable statute of limitations. Defendants additionally move to dismiss the claim for breach of fiduciary duty pursuant to CPLR 3211 (a)(7) as being duplicative of the malpractice claim.

Defendants represented plaintiff in the negotiation, execution, and assignment of a lease agreement for commercial office space. The original lease was between landlord MB Real Estate LLC acting on behalf of landlord Milro Associates and tenant Tomorrow Enterprises LLC. The lease term ran from September 20, 2005 to September 30, 2015 but the obligation to pay rent did not to commence until after the first six months of the lease. The lease also

provided for regular rent increases based on a specific calculation involving the Consumer Price Index. In November 2006, the original tenant, Tomorrow Enterprises, assigned the lease to plaintiff, and plaintiff succeeded to all of Tomorrow Enterprise's rights and interests under the lease from July 14, 2006 to the end of the term. The parties agree that defendants represented plaintiffs from negotiation through assignment, however, there is no explanation of the relationship between the plaintiff and either Tomorrow Enterprises or the defendants prior to the assignment.

From 2005 through 2011, plaintiff contacted defendants several times a year concerning the issue of rent increases charged by its landlord. For example, plaintiff representative spoke with defendants in 2008 regarding retroactively charged rent increases. At that time, defendants advised plaintiff to take no action. The parties were also in contact throughout 2011 to address a perceived error in the landlord's rent calculations which ultimately resulted in a separate legal action; however, defendant's only advice to plaintiff at the time was to continue to monitor the situation. It bears noting that there are no records of these communications which are said to have taken place mostly over phone. Defendants sent no invoices for time spent or other work done on these calls.

More communication took place in November 2013, as evidenced by a letter from defendants to plaintiff responding to an inquiry about a rent increase and suggesting options as to how to proceed. In this letter, defendants offer plaintiff the option of consulting with another attorney or retaining defendants' firm.

Defendants now seek dismissal of the malpractice claims, arguing that they are barred by the expiration of the three-year statute of limitations, accrual for which is measured from the date of injury. Defendants argue that more than three years have elapsed since the date of any potential injury—and more than eleven years since the execution of the lease. Defendants also point to the fact that more than ten years have gone by since the assignment or assumption of the lease, and more than five years since the 2011 discussion about rent increases under the lease. Defendants also argue that plaintiff's cause of action for breach of fiduciary duty should likewise be dismissed because, not only is it barred by the three-year statute of limitations, but it is predicated on the same facts as the malpractice claim and seeks the same relief, thereby making it duplicative.

Plaintiff opposes, arguing that the accrual date of its malpractice cause of action is tolled during a period of continuous representation. Plaintiff claims the statute of limitations here was tolled by three periods of continuous representation: the first culminating in the lease signing in 2005; the second from 2005-2011; and the third between 2011-2013, during which time plaintiff asserts there was actual representation, a continuing relationship of trust and confidence, and a shared understanding of the necessity for further legal work.

In response to plaintiff's tolling argument, defendant argues that there was no continuous representation because there was no mutual understanding that defendants would undertake any action in response to plaintiff's queries. Defendants argue that even assuming a

period of continuing representation existed through 2011, there was no mutual understanding of a need for further legal services after that.

On a motion to dismiss pursuant to CPLR 3211, the pleadings are to be afforded a liberal construction, the facts alleged in the complaint are to be accepted as true, the non-movant is to be accorded the benefit of every possible favorable inference, and a determination is to be made only as to whether the facts alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). “These guidelines apply not only to a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), but also to dismiss based on the statute of limitations pursuant to CPLR 3211(a)(5)” (*Johnson v Proskauer Rose LLP*, 129 AD3d 59, 67 [1st Dept 2015]).

An action to recover damages arising from an attorney’s malpractice must be commenced within three years from accrual (CPLR § 214; *McCoy v Feinman*, 99 NY2d 295, 301 [2002]). Accrual time is usually measured from the day an actionable injury occurs, but the statute of limitations period may be tolled under the continuous representation doctrine (*id.*).

The continuous representation doctrine operates as a toll on the statute of limitations in recognition of the fact that a person seeking professional assistance cannot be expected to question and assess the services being rendered or sue the professional while representation is ongoing. The doctrine is not applicable to a client’s continuing general relationship with a lawyer involving only routine contact for miscellaneous legal representation, unrelated to the matter upon which the allegations of malpractice are predicated (*see Shumsky v Eisenstein*, 96

NY2d 164, 168 [2001]). Rather it applies “where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim” (*McCoy* at 306). The application also envisions a relationship between the parties that is marked with trust and confidence, is not sporadic but is developing and involves a continuity of professional services from which the alleged malpractice stems (*Frenchman v Queller, Fisher, Dienst, Serrins, Washor & Kool, LLP*, 24 Misc. 3d 486, 498 [Sup Ct 2009]).

Here, the alleged communications that plaintiff relies on to establish the existence of a continuous representation toll fall short for several reasons. First, there is no allegation or any indication in the papers that there was a mutual understanding of the need for further representation on matters involving the lease and/or any rent increases. Even accepting as true that the parties spoke intermittently between 2005 and 2011, plaintiff admits that defendants routinely took no action and simply told plaintiff to monitor the situation. While there is arguably some continuity of communication, there is no cognizable claim for a continuity of representation rendered by defendant. What is revealed from the pleadings and the papers on this motion is a series of sporadic conversations initiated by plaintiff with no apparent effort or even a promise from defendant to provide ongoing representation. Further, even if one were to assume a period of continuing representation based on these sporadic contacts between 2005 and 2011, there is no claim of any such “relationship” beyond this period. In fact, the evidence plaintiff relies on as proof of continuous communication in 2013 demonstrates exactly the opposite; showing that when consulted about an issue pertaining to rent increases on the lease,

defendants frankly suggested that plaintiff should consult another attorney or hire defendant to address this issue. For these reasons, the Court finds that no continuous representation existed that would toll the statute of limitations and, as such, the legal malpractice claim is time barred.

The Court has considered defendant's remaining arguments concerning the date upon which representation was terminated, specifically that an attorney must withdraw pursuant to CPLR 321 and that representation continues until the actual last act of the attorney, and finds them both unavailing. As to withdrawal pursuant to CPLR 321, this provision does not apply to representation for the purpose of discrete transactions such as those at issue here, but rather applies in the context of ongoing litigation. As for the argument that termination ends at the actual last act of an attorney, plaintiff offers no legal support for this theory which seems to apply only in the context of continuous representation. Even applying the actual last act theory to these facts, the Court has already determined that plaintiff was not representing defendant in 2013, when the actual last act was said to take place. so this action could not have been timely commenced.

Plaintiff's claim for breach of fiduciary duty based on unsatisfactory work and overbilling must be dismissed as it is both time-barred and duplicative. Where the remedy sought for a breach of fiduciary claim is purely monetary in nature, there is a three-year limitations period (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009]). Further, fiduciary duty claims have been dismissed as duplicative of malpractice claims where they arise from the same facts and do not allege distinct damages (*see Alphas v Smith*, 147 AD3d 557, 229 [1st Dept

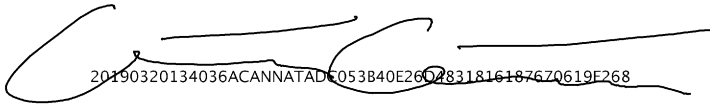
2017]; *see also Daniels v Lebit*, 299 AD2d 310 [2d Dept 2002]). Here, no additional facts or damages are alleged in the fiduciary duty claim and, as such, it must be dismissed. Plaintiff has not sufficiently alleged defendants' overbilling to support a separate cause of action for breach of fiduciary duty. Accordingly, it is

ORDERED that defendants' to dismiss the complaint is granted and the complaint is dismissed in its entirety, with costs and disbursements to defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendants; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

3/20/2019



ANTHONY CANNATARO, J.S.C.

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: