

**Flintlock Constr. Servs., LLC v Rubin, Fiorella &
Friedman LLP**

2019 NY Slip Op 32414(U)

August 9, 2019

Supreme Court, New York County

Docket Number: 158633/2018

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

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INDEX NO. 158633/2018

FLINTLOCK CONSTRUCTION SERVICES, LLC

MOTION DATE 12/03/2018

Plaintiff,

MOTION SEQ. NO. 001

- v -

RUBIN, FIORELLA & FRIEDMAN LLP,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for DISMISSAL.

In this legal malpractice action, the defendant attorney, Rubin, Fiorella & Friedman, LLP (RFF), moves pursuant to CPLR 3211(a) to dismiss the complaint as time-barred (CPLR 3211[a][5]), as barred by collateral estoppel (*id.*), for failure to state a cause of action (CPLR 3211[a][7]), and based on documentary evidence (CPLR 3211[a][1]). The plaintiff, contractor Flintlock Construction Services, LLC (Flintlock), opposes the motion. Although the complaint states a cause of action, documentary evidence does not provide a complete defense, and the action is not barred by collateral estoppel, the motion must be granted because the action is time-barred. Specifically, the three-year limitations period applicable to a cause of action to recover for legal malpractice accrued on July 29, 2013, when the jury in an underlying property damage action rendered its verdict and any damages purportedly arising from RFF's malpractice were sufficiently calculable. The instant action, commenced on September 17, 2018, is thus untimely.

In 2004, property owner Oversea Chinese Mission (OCM) commenced an action under the strict liability provisions of New York City Administrative Code § 27-1031 to recover for injury to property (the property damages action) against Flintlock, adjacent property owner Well-Come Holdings, Inc. (Well-Come), and another contractor. OCM alleged that Flintlock, while undertaking construction and excavation activities on the adjacent property, caused significant damage to OCM's property.

Shortly after the property damage action was commenced, Flintlock and Well-Come conceded liability pursuant to a stipulation dated January 1, 2005, and agreed to proceed to trial on the issue of damages only. Flintlock's insurer assigned RFF as its attorney. RFF, on behalf of Flintlock, thereupon entered into an indemnification and settlement agreement with Well-Come, agreeing to indemnify Well-Come, without limitation, for any damages awarded against Well-Come in the property damage action and to absorb all defense costs. This agreement disposed of the cross claims that Flintlock and Well-Come asserted against each other. The court thereafter granted Guideone Insurance Company, as OCM's insurer and subrogee, leave to intervene as a plaintiff, inasmuch as, between March 29, 2007, and December 30, 2008, it had tendered seven checks to OCM totaling \$3,000,000 to pay OCM's casualty loss claims. On April 15, 2010, Flintlock substituted Traub Lieberman Straus & Shrewsbury, LLP, as its attorney in place of RFF.

In 2011, and thus prior to the trial on the issue of damages in the property damage action, Flintlock commenced an action against RFF, alleging that it committed malpractice by entering into the indemnification agreement because, among other things, it was void against public policy insofar as it purported to indemnify Well-Come against its own negligence. Flintlock further alleged that the indemnification agreement was entered into without its knowledge or consent, and that the construction contract between Flintlock and Well-Come placed all responsibility for excavation-related property damage upon Well-Come; hence, Flintlock alleged that RFF waived its protection from liability under the construction contract and

received nothing of value in return, leaving it liable to indemnify Well-Come out of its own pocket to the extent that any award against Well-Come exceeded the limits of its own insurance policy.

The Appellate Division dismissed the complaint in that action because

"[a]t th[at] juncture, plaintiff's allegations of proximate cause and damages are premature or speculative, as it is unable to prove that any such damages are directly traceable to defendant's conduct. Accordingly, we dismiss without prejudice to raising the malpractice claims upon resolution of the underlying action"

(*Flintlock Constr. Servs., LLC v Rubin, Fiorella & Friedman, LLP*, 110 AD3d 426, 427 [1st Dept 2013]).

The 2005 stipulation conceding liability was entered into the record in the property damage action on July 15, 2013, at the commencement of the trial on the issue of damages. On July 29, 2013, the jury in the property damage action rendered a verdict on the issue of damages, awarding damages jointly and severally against Flintlock, Well-Come, and their co-defendant, and in favor of OCM and Guideone in the principal sum of \$1,152,000.00. After a collateral source hearing was conducted pursuant to CPLR 4545, OCM and Guideone agreed to divide the award by allocating \$87,726.00 to OCM and \$1,064,274.00 to Guideone. Several of Flintlock's post-trial motions were denied during the course of 2014, and the verdict extract was filed on January 29, 2015. Even though a jury had awarded OCM and Guideone damages, the Supreme Court (James, J.) entertained a post-verdict motion, incorrectly denominated as one for "summary judgment," but which was, in reality, a motion to fix the amount of prejudgment interest. In an order dated August 10, 2018, the court explained:

"In this case, there is no dispute with respect to OCM's entitlement to prejudgment and post-judgment interest on the verdict. In fact, by agreement of the parties, the starting date for calculating prejudgment interest is January 1, 2005 and the ending date is July 29, 2013. Thus, it is unnecessary to discuss the computation of OCM's prejudgment and post judgment interest."

With respect to the award in favor of Guideone, the court determined that February 13, 2008, was a reasonable intermediate date from which to calculate pre-verdict interest on the principal award of \$1,064,274.

The judgment itself was not entered until September 7, 2018. Flintlock commenced the instant action on September 17, 2018.

Contrary to RFF's contention, the complaint states a cause of action to recover for legal malpractice.

"In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages. To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence"

(*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007] [internal quotation marks and citations omitted]; see *McCoy v Feinman*, 99 NY2d 295, 301-302 [2002]). Here, Flintlock alleged that its attorney entered into a full-indemnification stipulation with Well-Come despite the favorable terms of the underlying construction contract between them, thus waiving its own likely successful cross claims against Well-Come and its likely successful defenses to Well-Come's cross claims. It further asserts that it had no knowledge of and did not consent to the indemnification agreement. It asserts that the failure to notify it or obtain its consent was a departure from good legal practice, as were the contents of the indemnification agreement itself. Although a mere error in professional judgment concerning several valid courses of action will not rise to legal malpractice (see *Kleinser v Astarita*, 92 AD3d 518, 519 [1st Dept 2012]; *Geller v Harris*, 258 AD2d 421 [1st Dept 1999]), Flintlock asserts more than that here.

The indemnification agreement is not facially violative of public policy, inasmuch as it does not purport to indemnify Well-Come solely for its own negligence (*cf.* General Obligations Law § 5-322.1), but for its strict statutory liability under the New York City Administrative Code (see generally *Brown v Two Exch. Plaza Partners*, 76 NY2d 172 [1990]). Flintlock nonetheless states a cause of action to recover for legal malpractice by asserting that the indemnification agreement was entered into without its knowledge or consent, that the insurance company lawyer assigned to it entered into the agreement to protect the insurer but not Flintlock, and that

the agreement was objectively adverse to its interests by vitiating the protections from liability afforded under its construction contract with Well-Come.

Moreover, contrary to RFF's suggestion, a determination made in a Georgia declaratory judgment action commenced by Flintlock against its insurer does not collaterally estop Flintlock from arguing that it had no knowledge of the indemnification agreement and that it was entered into without its consent. Although the judge in the Georgia action suggested that Flintlock never complained about its lack of knowledge or consent, a close reading of the decision suggests that the Georgia court did not make a factual finding that Flintlock actually had knowledge of or consented to the agreement. Even if such a finding had been made, it was not necessary to the disposition of the declaratory judgment action.

Nor does documentary evidence provide a complete defense to the legal malpractice cause of action.

Nonetheless, the complaint must be dismissed as time-barred. A cause of action for legal malpractice is subject to a three-year limitations period, "whether the underlying theory is based in contract or tort" (CPLR 214[6]). The cause of action accrues when damages arising from the alleged malpractice are "sufficiently calculable to permit plaintiff to obtain prompt judicial redress of that injury" (*McCoy v Feinman*, 99 NY2d at 305; see *Gerschel v Christensen*, 143 AD3d 555, 556 [1st Dept 2016]; *Elstein v Phillips Lytle, LLP*, 108 AD3d 1073 [4th Dept 2013]; see also *Ackerman v Price Waterhouse*, 84 NY2d 535, 541 [1994]). The Appellate Division has already determined in this action that any damages that Flintlock sustained by reason of RFF's alleged malpractice in negotiating the indemnification agreement were not sufficiently calculable prior to the disposition of the underlying property damage action, inasmuch as Flintlock could not then have known whether Well-Come would be held liable for any damages whatsoever and, hence, whether Flintlock would be held liable for indemnifying Well-Come (see *Flintlock Constr. Servs., LLC v Rubin, Fiorella & Friedman LLP*, 110 AD3d 426 [1st Dept 2013]). On July 29, 2013, when the jury in the property damage action rendered its

verdict on the issue of damages, Flintlock's damages became sufficiently calculable. Hence, the three-year limitations period began to run on that date.

The court rejects Flintlock's contention that it could not have ascertained the extent of its damages because it did not know how much prejudgment interest it might owe, and that it was only when the court disposed of its many post-trial motions that the amount could be ascertained. Accrual "is not delayed until the damages develop or become quantifiable or certain" (*Woodson v American Tr. Ins. Co.*, 9 Misc 3d 1117[A], 2005 NY Slip Op 51627[U], *2 [Sup Ct, N.Y. County, Oct. 11, 2005], citing *Gilbert Props. v Millstein*, 40 AD2d 100 [1st Dept 1972], *affd* 33 NY2d 857 [1973]; see *Billiard Balls Mgt., LLC v Mintzer Sarowitz Zeris Ledva & Meyers, LLP*, 54 Misc 3d 936, 943 [Sup Ct, N.Y. County 2016]).

In any event, "[t]he language of CPLR 5002 measures interest from 'verdict ... report or decision' to the date of the entry of a final judgment. The terms 'verdict,' 'report' or 'decision' generally refer to the date that liability is established, even though the damages verdict is reached at a later time" (*Van Nostrand v Froehlich*, 44 AD3d 54, 57 [2d Dept 2007]; see *Rohring v City of Niagara Falls*, 84 NY2d 60, 68 [1994]; *Love v State of New York*, 78 NY2d 540, 542 [1991]; *Gyabaah v Rivlab Transp. Corp.*, 170 AD3d 616, 617 [1st Dept 2019]; *Gibbs v State Farm Fire & Cas. Co.*, 169 AD3d 1483, 1484-1485 [1st Dept 2019]). "[P]rejudgment interest must be calculated from the date that liability is established regardless of which party is responsible for the delay" (*Love v State of New York*, 78 NY2d at 544) in bringing the dispute to final resolution. Once the jury rendered its verdict in the property damage action on July 29, 2013, Flintlock knew precisely the amount of principal and prejudgment interest it would owe as a consequence of any verdict in favor of OCM against Well-Come, and hence the amount of principal and interest that might have been proximately caused by any malpractice on the part of RFF. Flintlock had already conceded liability on January 1, 2005, and thus knew that its liability was established, and prejudgment interest would accrue, as of that date.

When the jury rendered its verdict, Flintlock also knew how much it would owe as a consequence of the verdict in favor of OCM's subrogee, Guideone (see CPLR 5001; 5002). "It is the very essence of subrogation that a subrogee stands in the shoes of the subrogor and is entitled to all of the latter's rights, benefits and remedies" (*United States Fidelity & Guar. Co. v E.W. Smith Co.*, 46 NY2d 498, 504 [1979]). Hence, Guideone had the same right to prejudgment interest as OCM. Flintlock knew that the earliest date that prejudgment interest would begin to run on the award to Guideone was January 1, 2005, when liability against OCM was established by concession. It also could have been reasonably anticipated that the date might have been fixed as of March 29, 2007, when Guideone began to pay out on the policy and thus incurred a monetary obligation, that the date could have been December 30, 2008, at the latest, when Guideone made its last payment to OCM on the policy, or that the date could have been fixed at any reasonable intermediate date, which is what actually occurred.

Hence, the three-year limitations period expired on July 29, 2016, and this action, commenced on September 17, 2018, is time-barred. There is no basis for Flintlock's contention that damages arising from any malpractice on the part of RFF would only be "sufficiently calculable" when the final judgment was entered on September 7, 2018 (see *Aaron v Roemer, Wallens & Mineaux*, 272 AD2d 752 [3d Dept 2000]) or that Flintlock's filing of post-trial motions tolled or extended the accrual date of the legal malpractice cause of action.

Accordingly, it is

ORDERED that the defendant's motion to dismiss the complaint is granted, and the complaint is dismissed; and it is further,

ORDERED that the Clerk of the court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the court.

8/9/2019
DATE


JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE