Schwenger v Weitz, Kleinick & Weitz, LLP
2019 NY Slip Op 32605(U)
September 4, 2019
Supreme Court, New York County
Docket Number: 159856/2018
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH — *Justice* PART IAS MOTION 29EFM

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PAUL SCHWENGER,

Plaintiff,

- v -

WEITZ, KLEINICK & WEITZ, LLP, PAUL B. WEITZ & ASSOCIATES, P.C., PAUL WEITZ, ROBERTA DIGANGI, ANDREW WEITZ, BRIAN MITTMAN, MARKHOFF & MITTMAN P.C.,

Defendants.

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INDEX NO. 159856/2018

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for DISMISSAL.

Motion by Defendants Brian M. Mittman, Esq. ("Mittman") and Markhoff & Mittman, P.C., ("Mittman Firm") (collectively, "Mittman Defendants") to dismiss the complaint as against them, pursuant to CPLR 3211 (a) (5) and (7), is granted for the reasons stated herein.

BACKGROUND

Plaintiff Paul Schwenger brings the instant legal malpractice action against several individual attorneys and law firms who represented him in a prior personal injury and / or workers compensation action, *Schwenger v NYU*, No. 114525/2003 (Sup Ct, NY County), et al sub nom. (the "underlying action"). In that underlying action, Plaintiff alleged in sum and substance that he was exposed to a virus because of a lab accident at NYU.

Based upon the instant motion papers, there appears to be no dispute that the underlying action was initially brought in Supreme Court, New York County, in 2003. From early on it apparently became clear that a significant issue in the underlying action concerned whether Plaintiff was an employee of NYU such that his exclusive remedy would be pursuant to the Workers' Compensation Law (the "applicability issue"). According to Mittman Defendants, they were retained by Defendant Paul B. Weitz, Esq. and Defendant Weitz, Kleinick & Weitz, LLP ("Weitz Firm") (collectively, "Weitz Defendants"), sometime in 2004, to litigate the applicability issue.

There is no dispute that between 2004 and 2011, Mittman Defendants made multiple appearances before the Workers' Compensation Board to litigate the applicability issue. There also appears to be no dispute that on or about March 2013, the full panel of the Workers'

Compensation Board issued a decision (the "2013 Decision") determining that there was an employee-employer relationship between Plaintiff and NYU and, as such, Plaintiff's exclusive remedy was through the Workers' Compensation Law. There also appears to be no dispute that shortly after the 2013 Decision, Mittman and Plaintiff communicated via e-mail, wherein Mittman expressed to Plaintiff that Plaintiff's only recourse was to take an appeal before the Appellate Division, Third Department; and Mittman further communicated that he was "not in a position" to perfect such an appeal on Plaintiff's behalf. (*See* Mittman Aff. in Supp. ¶ 14-20; Schwenger Aff. in Opp. ¶¶ 13-20, Ex. F [March 2013 Email Exchange].) The parties further agree that Plaintiff filed a notice of appeal pro se before the Third Department and was eventually represented by separate counsel in said appeal. (Id.)

Mittman Defendants further assert that: Mittman last spoke to Plaintiff in March 2013, that the Mittman Firm's last file entry in the matter was dated July 15, 2013 relating to a request from Plaintiff for copies of certain portions of the case file; and that it sent a final bill for its hourly services to the Weitz Firm sometime in 2011 and was paid on December 8, 2011.

On January 12, 2015, the Third Department issued a decision affirming the 2013 Decision. In Plaintiff's affidavit in opposition, Plaintiff asserts that in or about August 2016, he contacted Mittman Defendants to "discuss the direction to take with regard to my worker's compensation case and I spoke to Mr. Mittman but he never got back to me." (Schwenger Aff. in Opp. ¶ 18.)

In the instant complaint, Plaintiff alleges the Defendants—apparently all the defendants named in the instant action—failed to adequately represent him by:

> "(a) failing to assert claims against parties other than defendant New York University in connection with the underlying laboratory incident, (b) missing filing deadline(s) in the NYU Action, (c) failing to assert alternative theories of recovery against defendant New York University encompassing employee status in the NYU Action, and (d) mishandling of Plaintiffs proceeding before the New York State Workers' Compensation Board."

(Affirm in Supp., Ex. A [Complaint] ¶ 16].) With specific regard to Mittman Defendants, Plaintiff alleges a host of mistakes made by them during the proceedings before the Workers' Compensation Board and alleges that "if the Mittman Defendants had not mishandled the proceedings before the Worker 's Compensation Board, Plaintiff would have prevailed in the underlying action as Plaintiff would not have been deemed an employee." (Affirm in Opp. ¶ 24; Schwenger Aff. in Opp. ¶ 12 [listing specific malpractice].) Furthermore, Plaintiff alleges that Mittman Defendants have "perpetuated their malpractice by allowing the Board action to remain dormant and by failing to respond to Plaintiff when an inquiry was made regarding the status of the Board action in 2016." (Id.)

On the instant motion, Mittman Defendants move, pursuant to CPLR 3211 (a) (5) and (7) to dismiss the complaint as against them arguing that it is barred by the statute of limitations given that any purported malpractice is alleged to have occurred no later than March 2013, and as such, pursuant to CPLR 214 (6), the three-year statute of limitations for a potential malpractice action expired in March of 2016. Mittman Defendants further argue that even if the

malpractice action against them were not barred by the statute of limitations, the complaint should still be dismissed because it is insufficiently specific.

In opposition, Plaintiff asserts that his complaint is timely because the statute of limitations is tolled pursuant to the continuous representation doctrine. Plaintiff further asserts "Mittman Defendants remain [as] counsel of record in the Board action," and that there was no severance of the attorney-client relationship. (Affirm in Opp. ¶ 17.) In support of this assertion, Plaintiff points to a "Notice of Appearance" filed before Workers' Compensation Board, dated March 22, 2004, which lists "Weitz, Kleinick & Weitz" as Plaintiff's "Attorney or Representative" at the top of the document, and lists "Markhoff & Mittman, P.C." in a portion that states "Attorney or Representative who is to appear if other than yourself." (Sur-Reply Letter in Opp., Ex. A [Notice of Appearance].) In addition, as mentioned, Plaintiff provides a list of purported mistakes made by Mittman Defendants in their handling of the applicability issue before the Workers' Compensation Board. (*See* Schwenger Aff. in Opp. ¶ 12.)

DISCUSSION

When considering a CPLR 3211 (a) (7) motion to dismiss for failure to state a cause of action, "'the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" (*Peery v United Capital Corp.*, 84 AD3d 1201, 1201-02 [2d Dept 2011], quoting *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2d Dept 2008].) Thus, "'a motion to dismiss made pursuant to CPLR 3211 (a) (7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law.'" (*E. Hampton Union Free Sch. Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122, 125 [2d Dept 2009], quoting *Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006].) "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005].) Furthermore, a court "may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint." (*Leon v Martinez*, 84 NY2d 83, 88 [1994].)

"On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired." (*Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011].) In considering such a motion, "a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff." (*Is. ADC, Inc. v Baldassano Architectural Group, P.C.*, 49 AD3d 815, 816 [2d Dept 2008].)

Pursuant to CPLR 214 (6), an action to recover for legal malpractice must be commenced within three-years of the date the cause of action accrues. "An action to recover damages for legal malpractice accrues when the malpractice is committed . . . not when the client discover[s] it." (*Shumsky v Eisenstein*, 96 NY2d 164, 166 [2001].)

However, "[t]he continuous representation doctrine, like the continuous treatment rule, its counterpart with respect to medical malpractice claims, recognizes that a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered." (*Shumsky v Eisenstein*, 96 NY2d 164, 167 [2001].) Accordingly, the continuous representation doctrine "tolls the running of the Statute of Limitations on the malpractice claim until the ongoing representation is completed." (Id. at 167-168.) "Application of the continuous representation or treatment doctrine is nonetheless generally limited to the course of representation concerning a specific legal matter or of treatment of a specific ailment or complaint; the concern, of course, is whether there has been continuous treatment, and not merely a continuing relation between physician and patient." (Id. at 168.)

On the instant motion, Mittman Defendants have established prima facie that the instant action against them is barred by the statute of limitations. The alleged malpractice by Mittman Defendants—purportedly mishandling the applicability issue before the Workers' Compensation Board—happened no later than March 2013.

The Court finds that Plaintiff's argument that the statute of limitations was tolled, pursuant to the continuous representation doctrine, is unavailing. Here, there is no dispute that from March 2013 to present, Mittman Defendants were not representing Plaintiff with respect to a specific legal matter. As such, that Plaintiff may have called Mittman Defendants in August 2016 or that Mittman Defendants may have arguably been listed as counsel of record before the Workers' Compensation Board is insufficient to raise an issue of continuous representation.

Further, there is no dispute that Mittman Defendants communicated to Plaintiff that they were not in a position to continue their representation of Plaintiff in the appeal of the 2013 Decision before the Third Department and that Plaintiff found new counsel to represent him thereafter. As such, there was no reasonable basis for Plaintiff to conclude that Mittman Defendants were still actively involved in Plaintiff's claim.

As such, the complaint must be dismissed as against Mittman Defendants.

Given that this Court finds that the instant action against Mittman Defendants is barred by the statute of limitations, this Court need not consider whether Plaintiff has otherwise sufficiently pleaded a cause of action for legal malpractice.

This Court has considered the parties' other arguments and finds them to be unavailing.

CONCLUSION

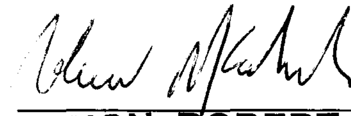
Accordingly, it is hereby

ORDERED that the motion by Defendants Brian M. Mittman, Esq. ("Mittman") and Markhoff & Mittman, P.C., ("Mittman Firm") (collectively, "Mittman Defendants") to dismiss the complaint as against them, pursuant to CPLR 3211 (a) (5) and (7), is granted, with costs and disbursements to said Mittman Defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said Mittman Defendants; and it is further

ORDERED that counsel for said Mittman Defendants is to serve upon all parties via NYSCEF a copy of the instant decision and order with notice entry within twenty (20) days; and it is further

ORDERED that the remaining parties shall appear before this Court for a preliminary conference on October 22, 2019 at 9:30 in Part 29 at 71 Thomas St., Room 104, New York, NY.

The foregoing constitutes the decision and order of this Court.



9/4/2019
DATE

HON. ROBERT D. KALISH
J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION	
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE