

Blados v Goggins & Palumbo
2019 NY Slip Op 34378(U)
January 16, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 618506/2017
Judge: Joseph A. Santorelli
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ORIGINAL

SHORT FORM ORDER

INDEX No. 618506/2017
CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 2-14-18
SUBMIT DATE 12-13-18
Mot. Seq. # 01 - MG

-----X
GEORGE H. BLADOS,

Plaintiff,

- against -

GOGGINS & PALUMBO, WILLIAM C.
GOGGINS, and ANTHONY H. PALUMBO,

Defendants.
-----X

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Upon the following papers numbered 1 to 28 read on this motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; ~~Notice of Cross Motion and supporting papers _____~~; Answering Affidavits and supporting papers 15 - 24; Replying Affidavits and supporting papers 25 - 28; Other ; (and after hearing counsel in support and opposed to the motion) it is,

The defendants seek an order pursuant to CPLR 3211(a)(1) and (5) dismissing the plaintiff's complaint for failure to state a cause of action and based upon the expiration of the statute of limitations. The plaintiff opposes this application.

The plaintiff commenced this action for legal malpractice in connection with his representation by counsel in a contract and foreclosure case. In May 2010 the plaintiff retained the defendant firm to commence an action for non-payment on a note and mortgage against Daniel Calabro in the amount of \$851,446.00. On September 1, 2011, Calabro made a settlement offer of \$775,000.00 with \$400,000.00 being paid as a lump sum payment upon signing a stipulation of settlement and the remaining balance being paid over time. The defendant attorneys felt that the offer was not in the best interests of the plaintiff and advised Blados to continue that litigation to obtain a judgment. Plaintiff Blados chose to accept the offer against his attorneys advice. On September 23, 2011 Blados signed a Client Acknowledgment and the Stipulation of Settlement. In the stipulation Blados agreed "to pay Goggins and Palumbo attorneys fees in the amount of 20% of the settlement amount, which is \$155,000.00" with the fees being "paid from the \$400,000.00 lump sum payment." Calabro paid the \$400,000.00 lump sum payment. The attorney fees were deducted and a check was sent to Blados for the remaining amount. On or about November 16, 2011 Blados was at the defendants' office for an unrelated legal matter and demanded the litigation file for the action against Calabro. The defendants turned over the file to Blados on that day. Blados claims

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that Calabro did not make any other payments as required under the stipulation of settlement. The plaintiff claims that by the defendants being paid 20% on the total settlement amount rather than the amount collected, they “impliedly entered into (therefore) an agreement to continue to represent them until such time as the entire principal balance was collected.” The plaintiff claims that “malpractice was committed on an ongoing day to day basis by this firm, as well as its successors” by their failure to represent Blados until the entire sum was collected under the settlement agreement.

To succeed on a motion to dismiss pursuant to CPLR 3211 for failure to state a cause of action, the court must determine whether, accepting as true the factual averments of the complaint and granting plaintiff every favorable inference which may be drawn from the pleading, plaintiff can succeed upon any reasonable view of the facts stated (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 754 NE2d 184, 729 NYS2d 425 [2001]; see also *Fowler, Rodriguez, Kingsmill, Flint, Gray & Chalos LLP v Island Prop., LLC*, 307 AD2d 953, 763 NYS2d 481 [2d Dept 2003], *Bartlett v Konner*, 228 AD2d 532, 644 NYS2d 550 [2d Dept 1996]). If the pleading states a cause of action and if, from its four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion for dismissal will fail (see *Wayne S. v County of Nassau Dept. of Social Services*, 83 AD2d 628, 441 NYS2d 536 [2d Dept 1981]). The documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (see *Estate of Menon v Menon*, 303 AD2d 622, 756 NYS2d 639 [2d Dept 2003], citing *Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511, *Roth v Goldman*, 254 AD2d 405, 406, 679 NYS2d 92).

In the context of a CPLR 3211 motion to dismiss, the Court must take the factual allegations of the complaint as true, consider the affidavits submitted on the motion only for the limited purpose of determining whether the plaintiff has stated a claim, and in the absence of proof that an alleged material fact is untrue or beyond significant dispute, the Court must not dismiss the complaint (*Wall Street Assocs. v Brodsky*, 257 AD2d 526, 684 NYS2d 244 [1st Dept 1999], citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634-636). In making a determination whether the complaint sets forth a cognizable claim, evidentiary material may be considered to “remedy defects in the complaint” (see *Dana v Shopping Time Corp.*, 76 AD3d 992, 908 NYS2d 114 [2d Dept 2010], quoting *Rovello v Orofino Realty Co.*, *supra* at 40 NY2d at 636).

In *Conklin v Owen*, 72 AD3d 1006, 1007 [2nd Dept 2010], the Court held that

the Supreme Court should have granted those branches of the defendants' motion which were for summary judgment dismissing the plaintiff's second cause of action to recover damages for breach of contract and third cause of action to recover damages for negligent representation, since these causes of action arise from the same facts as his legal malpractice cause of action and are duplicative of that cause of

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action (see *Sitar v Sitar*, 50 AD3d 667, 670, 854 NYS2d 536 [2008]; *Shivers v Siegel*, 11 AD3d 447, 782 NYS2d 752 [2004]; *Malarkey v Piel*, 7 AD3d 681, 776 NYS2d 845 [2004]; *Mecca v Shang*, 258 AD2d 569, 685 NYS2d 458 [1999]).

Similarly, in *Stuart v Robert L. Folks & Assoc., LLP*, 106 AD3d 808, 809 [2nd Dept 2013], the Court held that the Supreme Court properly directed the dismissal of the breach of contract cause of action because it was duplicative of the legal malpractice cause of action.

The Court concludes that, the fourth cause of action for breach of contract and the third and fifth causes of action for breach of fiduciary duty are duplicative of the first and second causes of action for legal malpractice. Therefore the defendant's motion to dismiss the third, fourth and fifth causes of action for breach of contract and breach of fiduciary duty is granted.

In *Schwartz v Leaf, Salzman, Manganelli, Pfiel & Tandler, LLP*, 155 AD3d 803, 803 [2d Dept 2017], the Court held that

Actions to recover damages for malpractice against nonmedical professionals are governed by the three-year statute of limitations set forth in CPLR 214 (6) (see *Matter of R.M. Kliment & Frances Halsband, Architects [McKinsey & Co., Inc.]*, 3 NY3d 538, 539, 821 NE2d 952, 788 NYS2d 648 [2004]; *730 J & J, LLC v Polizzotto & Polizzotto, Esqs.*, 69 AD3d 704, 705, 893 NYS2d 174 [2010]). A cause of action alleging professional malpractice against an accountant accrues upon the client's receipt of the accountant's work product (see *Williamson v PricewaterhouseCoopers LLP*, 9 NY3d 1, 8, 872 NE2d 842, 840 NYS2d 730 [2007]; *Ackerman v Price Waterhouse*, 84 NY2d 535, 541, 644 NE2d 1009, 620 NYS2d 318 [1994]; *CRC Litig. Trust v Marcum, LLP*, 132 AD3d 938, 939, 19 NYS3d 291 [2015]; *Rodeo Family Enters., LLC v Matte*, 99 AD3d 781, 783, 952 NYS2d 581 [2012])

The defendants established their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted by the plaintiff Madeleine E. Schwartz (hereinafter the plaintiff) by demonstrating that the professional malpractice causes of action accrued more than three years prior to the commencement of the action (see *Meredith v Siben & Siben, LLP*, 130 AD3d 791, 792, 13 NYS3d 520 [2015]; *Farage v Ehrenberg*, 124 AD3d 159, 164, 996 NYS2d 646 [2014]; *Napoli v Moisan Architects*, 77 AD3d 895, 895-896, 909 NYS2d 389 [2010]). In opposition, the plaintiff failed to raise a triable issue of fact as to whether the statute of limitations was tolled by the continuous representation

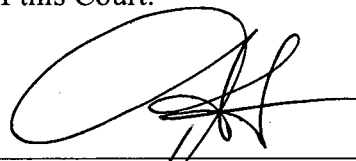
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doctrine (see *Rodeo Family Enters., LLC v Matte*, 99 AD3d at 784; *M.G. McLaren, P.C. v Massand Eng'g, L.S., P.C.*, 51 AD3d 878, 878, 858 NYS2d 340 [2008]; *Giarratano v Silver*, 46 AD3d 1053, 1055, 847 NYS2d 698 [2007]; *Booth v Kriegel*, 36 AD3d 312, 314, 825 NYS2d 193 [2006]; *Mitschele v Schultz*, 36 AD3d 249, 253, 826 NYS2d 14 [2006]).

The Court concludes that, accepting as true the factual averments of the complaint and granting plaintiff every favorable inference which may be drawn from the pleading on a CPLR 3211 (a) (5) motion to dismiss (see, *Guggenheimer v Ginzburg*, 43 NY2d 268), the defendants established their prima facie entitlement to judgment as a matter of law dismissing the complaint of the plaintiff by demonstrating that the professional malpractice causes of action accrued more than three years prior to the commencement of the action. In opposition, the plaintiff failed to raise a triable issue of fact as to whether the statute of limitations was tolled by the continuous representation doctrine. Therefore the defendants' motion to dismiss the first and second causes of action for legal malpractice is granted.

The foregoing constitutes the decision and Order of this Court.

Dated: January 16, 2019



HON. JOSEPH A. SANTORELLI
J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION