

Maddaloni v Del Col
2019 NY Slip Op 34501(U)
March 4, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 618469/2018
Judge: Joseph A. Santorelli
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ORIGINAL

SHORT FORM ORDER

INDEX No. 618469/2018
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 10-12-18
SUBMIT DATE 1-17-19
Mot. Seq. # 01 - Mot D

-----X
LUIGI MADDALONI,

Plaintiff,

- against -

ROBERT J. DEL COL, ESQ.,

Defendant.
-----X

ANDREW LAVOOTT BLUESTONE

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ROBERT J. DEL COL, ESQ.

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Upon the following papers numbered 1 to 36 read on this motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; ~~Notice of Cross Motion and supporting papers _____~~; Answering Affidavits and supporting papers 14 - 25; Replying Affidavits and supporting papers 26 - 36; ~~Other _____~~; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

In this action to recover damages, *inter alia*, for legal malpractice the defendant moves an order pursuant to CPLR 3211(a) 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.

On March 16, 2011 the plaintiff retained the defendant to represent him in a pending matrimonial action. In 2011 the plaintiff asked the defendant to draft an amendment to his 1988 post nuptial agreement. The defendant drafted the requested amendment and forwarded it to the plaintiff. The plaintiff claims that the defendant advised him to give the amendment to his wife, non-party Laura Maddaloni, who was represented at the time by Philip Castrovinci, Esq.. Laura Maddaloni signed the amendment and then subsequently moved to vacate it during the course of the matrimonial trial. The trial decision, dated February 6, 2014, (MacKenzie, J.), invalidated the amendment based upon overreaching on the part of the plaintiff and for lack of consideration, among other reasoning. The Judgment of Divorce was signed on May 19, 2014, (MacKenzie, J.). In March 2015 the plaintiff retained new counsel to file an appeal. The plaintiff indicates that the defendant continued to represent him on the matrimonial action until February 16, 2016 when he filed a reply affirmation on that action. This action was commenced for legal malpractice, breach of contract and breach of fiduciary duty on September 21, 2018.

Maddaloni v Del Col
Index # 618469/2018
Page 2

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 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

Maddaloni v Del Col
Index # 618469/2018
Page 3

action because it was duplicative of the legal malpractice cause of action.

The Court concludes that, the causes of action for breach of contract and breach of fiduciary duty are duplicative of the cause of action for legal malpractice. Therefore the defendant's motion to dismiss the 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 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 defendant has not

Maddaloni v Del Col
Index # 618469/2018
Page 4

established his prima facie entitlement to judgment as a matter of law dismissing the complaint by demonstrating that the legal malpractice cause of action accrued more than three years prior to the commencement of the action. Therefore the defendant's motion to dismiss the cause of action for legal malpractice is denied; and it is

ORDERED that a copy of this order shall be served by the plaintiff on the defendant by regular mail on or before March 18, 2019; and it is further

ORDERED that the defendant shall serve his answer within twenty (20) days from service of a copy of this order; and it is further.

ORDERED that a preliminary conference is hereby scheduled to be held on **Thursday, April 25, 2019 at 10:00 a.m.**, in the DCM courtroom 338 of the Hon. Alan D. Oshrin Supreme Court Building, 1 Court Street, Riverhead, New York. Counsel for the respective parties in this action are directed to appear at that time.

The foregoing constitutes the decision and Order of this Court.

Dated: March 4, 2019



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