

Colazzo v Hall & Hall LLP

2020 NY Slip Op 35571(U)

January 28, 2020

Supreme Court, New York County

Docket Number: Index No. 159785/2018

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

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DANIELLE COLAZZO,

Plaintiff,

- v -

INDEX NO. 159785/2018

MOTION DATE

MOTION SEQ. NO. 001, 002

HALL & HALL LLP, JOHN HALL, DANIEL REITER,

Defendants.

SUPPLEMENTAL DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7-11, 22-33, 52-53, 60

were read on this motion to/for dismiss

The following e-filed documents, listed by NYSCEF document number (Motion 002) 12-21, 34-51, 54-59 were read on this motion to/for dismiss

The previous decision and order on these motions dated September 20, 2019 (NYSCEF 62) is hereby vacated and the action is restored to active status.

By notice of motion, defendant Reiter moves pursuant to CPLR 3211(a)(5) and (7) for an order dismissing the complaint against him as barred by the statute of limitations and for failure to state a claim (mot. seq. one). Plaintiff opposes.

By notice of motion, defendants Hall & Hall, LLP and John Hall (collectively, Hall defendants) move pursuant to CPLR 3211(a)(5), (7), and (8) for an order dismissing the complaint against them (mot. seq. two). Plaintiff opposes and, by notice of cross motion, moves pursuant to CPLR 2215 for an order granting leave to extend the time to effect supplemental service of process on defendants, and if defendant Hall is deceased, substituting him with his estate and estate representative either by substitution or amendment of the complaint. Defendants

oppose the cross motion.

The motions are consolidated for decision.

I. PERTINENT BACKGROUND

A. Complaint (NYSCEF 1)

Plaintiff alleges that defendants law firm and attorneys engaged in a scheme to fraudulently conceal and dispossess plaintiff of valuable property interests in family-run companies and trusts inherited from her deceased mother, with the secret cooperation of others controlling the companies and trusts. Plaintiff retained the firm in or about March 2015 and learned of defendants' improper actions in August 2015. She asserts causes of action for malpractice, breach of fiduciary duty and aiding and abetting the breach, fraudulent concealment and aiding and abetting it, and unjust enrichment. As damages for defendants' actions, plaintiff claims that they are "not readily calculable outside of trial," but include the "facial damages resulting from the concealment and depravation (sic) of property as well as other injuries to plaintiff and the property . . . as well as any fees incurred and paid to [LLP] in connection with the representation of plaintiff."

2. Other

On or about May 15, 2018, plaintiff, along with certain family members, commenced a lawsuit in this court against other family members and various family-owned companies, alleging that that defendants conspired to disenfranchise her from her inherited interests in the family businesses, properties, and trusts. In the complaint in that action, plaintiff alleges that she learned of the Hall defendants' improper actions on August 20, 2015 and that "soon after learning [of the actions, she] . . . terminated services by Hall & Hall . . ." (NYSCEF 49).

On October 11, 2018, defendant Hall passed away. (NYSCEF 56).

On December 18, 2018, plaintiff's process server served the pleadings on defendants LLP and Hall by hand-delivering them to Margie "Doe," an attorney authorized to accept it, at 57 Beach Street in Staten Island; no additional mailing was sent to LLP. A separate mailing was sent to Hall at the same address. (NYSCEF 2).

II. REITER'S MOTION TO DISMISS

A. Statute of limitations

1. Contentions

Reiter contends that plaintiff's claim for malpractice is time-barred, as the last date alleged in the complaint is August 20, 2015, when plaintiff allegedly discovered defendants' improper actions and thereby terminated their relationship of trust and confidence. As plaintiff commenced the action on October 22, 2018, it is untimely. (NYSCEF 10).

Plaintiff alleges that defendants' representation continued beyond August 2015, and submits as proof thereof: (1) her affidavit wherein she denies terminating defendants' representation in August 2015 and asserts that the representation continued into the beginning of 2016 (NYSCEF 26); (2) an invoice addressed to her from LLP, with the heading "Preliminary investigation of the assets of the Estate of Marguerite Ponte Colazzo," reflecting that on October 22, 2015, Hall and Reitman corresponded with the defendants in the other action regarding settlement (NYSCEF 42); and (3) a February 8, 2016 email from plaintiff to her family members wherein she discusses working out issues with her father, and states that "I don't think it is a good idea to go forward with John Hall and everything again . . ." (NYSCEF 43). She also argues that defendants' motion to dismiss the claim is improperly premised on unfounded and refuted allegations, that it requires a legal determination which may not be decided on a motion to dismiss, and that it is unsupported by apposite authority. (NYSCEF 29).

In reply, Reiter observes that plaintiff does not deny in her affidavit having lost confidence and trust in defendants on August 20, 2015, and therefore, the October 2015 invoice did not revive such trust and confidence. Reiter also contends that the services reflected in the October 2015 bill are not communications with plaintiff and that they do not demonstrate an ongoing relationship of trust and confidence between them, and that the February 2016 email does not show that plaintiff continued to have trust and confidence in their relationship. (NYSCEF 53).

2. Analysis

Pursuant to CPLR 3211(a)(5), a defendant seeking dismissal of an action as time-barred bears the initial burden of proving, *prima facie*, that the time within which the action must be brought has expired. (*Kuo v Wall St. Mortg. Bankers, Ltd.*, 65 AD3d 1089, 1090 [2d Dept 2009]). If the defendant meets its burden, the burden shifts to the plaintiff to establish that, accepting its complaint as true and affording it the benefit of every favorable inference (*Matter of Schwartz*, 44 AD3d 779, 779 [2d Dept 2007]), its cause of action falls within an exception to the statute of limitations, or to raise an issue of fact as to the applicability of an exception (*Gravel v Cicola*, 297 AD2d 620, 621 [2d Dept 2002]).

Where the plaintiff is continuously represented by the defendant, the three-year statute of limitations for malpractice is tolled. (*Shumsky v Eisenstein*, 96 NY2d 164, 167–68 [2001]). Representation is continuous when there is “clear indicia of an ongoing, continuous, developing, and dependent relationship between the client and the attorney” (*Farage v Ehrenberg*, 124 AD3d 159, 164 [2d Dept 2014], *lv denied* 25 NY3d 906 [2015]), or “a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim” (*Matter of Merker*, 18 AD3d 332, 333 [1st Dept 2005]). Continuous representation is marked by

continuing trust and confidence between the attorney and her client (*Farage*, 124 AD3d at 168), such that once a client evinces a lack of trust or confidence in the relationship, it is deemed terminated (*Aseel v Jonathan E. Kroll & Assocs., PLLC*, 106 AD3d 1037, 1038 [2d Dept 2013]; *Deep v Boies*, 53 AD3d 948, 950 [3d Dept 2008]).

As the complaint provides that plaintiff learned of the defendants' alleged deception in August 2015, thereby implicitly causing her to lose trust and confidence in their representation of her, and no later dates are identified in the complaint, Reiter establishes, *prima facie*, that plaintiff's malpractice claim is untimely.

However, plaintiff's submissions in opposition sufficiently establish that an issue of fact exists as to whether defendants continuously represented her, which tolls the statute of limitations. Even if plaintiff learned of defendants' alleged deception in August 2015, Reiter does not establish that she lost trust and confidence in defendants' representation of her that month, as opposed to some other time in the future.

In the cases cited by Reiter, either documentary evidence established the plaintiff's loss of confidence or the plaintiff had taken some action demonstrating a loss of confidence in the attorneys' representation, neither of which is shown here. (*See e.g., Farage v Ehrenberg*, 124 AD3d 159 [2d Dept 2014], *lv denied* 25 NY3d 906 [2015] ["what constitutes a loss of client confidence is fact specific, varying from case to case, but may be demonstrated by relevant documentary evidence involving the parties, or by the client's actions"]; *cf Fleyshman v Suckle & Schlesinger, PLLC*, 91 AD3d 591 [2d Dept 2012], *lv denied* 19 NY3d 601 [2012] [documentary evidence showed that relationship terminated on specific date, and plaintiff's submissions did not indicate that her trust and confidence in defendants continued or was restored after that date]).

For the same reason, Reiter's motion to dismiss plaintiff's causes of action for breach of fiduciary duty and aiding and abetting a breach of fiduciary duty fails.

B. Failure to state a claim for malpractice

1. Contentions

Reiter argues that the complaint fails to state a claim for malpractice, as plaintiff does not allege which unidentified interests in the family companies were known to Reiter and which he failed to disclose to her. Nor is it alleged that but for Reiter's actions or inactions, plaintiff lost any interests, especially as plaintiff seeks information in her other action against the Ponte family as to whether she lost any interests. He also maintains that plaintiff's claim for damages is fatally conclusory and unsupported. (NYSCEF 10).

Plaintiff asserts that she sufficiently stated a claim for malpractice based on her allegations that: (1) plaintiff retained defendants to advise and protect her and her interests in the family companies against her family members' predatory actions; (2) defendants negligently represented her by failing to notify her of her family's actions and concealing the actions from her; and (3) defendants directly and proximately caused her damages by divesting her of the undisclosed assets and interests held by others on her behalf and preventing her from protecting herself and her interests from further misconduct by the Ponte fiduciaries. She also alleges that defendants directly damaged her relationships and reputation based on actions they had improperly taken against her immediate family. (NYSCEF 25).

In reply, Reiter observes that plaintiff fails to identify any damages arising from the alleged malpractice absent an allegation that she actually lost interests in the family companies and/or that but for defendants' conduct, she would not have lost such interests. Rather, plaintiff's allegation that she was injured by defendants' conduct and that she incurred ascertainable

damages is, Reiter claims, fatally conclusory and speculative. (NYSCEF 53).

2. Analysis

To state a cause of action for legal malpractice, plaintiff must allege attorney negligence, that the negligence was the proximate cause of the loss sustained, and actual damages. (*Reibman v Senie*, 302 AD2d 290, 290 [1st Dept 2003]). To be negligent, an attorney's conduct must be below the "ordinary and reasonable skill and knowledge commonly possessed by a member of the profession." (*Bernstein v Oppenheim & Co., P.C.*, 160 AD2d 428, 430 [1st Dept 1990]).

A claim for malpractice may not be based on an alleged conflict of interest or ethical violation, unless the conflict or violation directly results in malpractice. (*See Kaminsky v Herrick, Feinstein LLP*, 59 AD3d 1, 13 [1st Dept 2008], *lv denied* 12 NY3d 715 [2009] [cause of action for legal malpractice may not be based on conflict of interest absent allegation it resulted in actual damages]; *Ulico Cas. Co. v Wilson, Elser et al.*, 56 AD3d 1 [1st Dept 2008] [violation of attorney's ethical or disciplinary rules does not, without more, support malpractice claim]).

Plaintiff must also allege in the complaint that "but for" defendants' malpractice, plaintiff would not have suffered "actual ascertainable damages." (*Pellegrino v File*, 291 AD2d 60, 63 [1st Dept 2002], *lv denied* 98 NY2d 606 [2002]). Speculation as to damages does not constitute a basis for malpractice. (*Id.* at 63).

While plaintiff claims that defendants conspired with the Ponte family defendants by failing to notify her of her family members' actions against her and concealing that they were trying to deprive her of certain interests, there is no indication that she was deprived of those interests. Moreover, that issue remains to be decided in her other action against the family companies. Having failed to allege an injury, she also fails to allege that but for defendants' conduct, she would not have sustained the injury. By claiming without explanation in her

opposition papers that defendants “effectively” divested her of the family interests, plaintiff effectively acknowledges that she has not actually been injured. For the same reasons, plaintiff does not establish that she suffered actual ascertainable damages. (*See Ferguson v Hauser*, 156 AD3d 425 [1st Dept 2017] [plaintiff’s malpractice claim dismissed; claim required speculation about future evidence, and thus did not sufficiently establish that defendants proximately caused ascertainable damages]).

Nor may plaintiff recover non-pecuniary damages in a malpractice action for loss of reputation. (*See Dombrowski v Bulson*, 19 NY3d 347 [2012] [recovery in malpractice action limited to pecuniary damages]; *Kaufman v Med. Liability Mut. Ins. Co.*, 121 AD3d 1459 [3d Dept 2014] [no cognizable damages for malpractice based on claim that reputation tainted]).

C. Redundancy of other claims

As plaintiff’s claim for malpractice is dismissed, her other claims are not redundant. In any event, her fraud and other claims are based on intentional and not negligent conduct, and are thus not duplicative of the malpractice claim. (*Burke, Albright, Harter & Rzepka, LLP v Sills*, 83 AD3d 1413 [4th Dept 2011] [claims for fraud and breach of fiduciary duty not duplicative of malpractice claim as they were based on intention to deceive plaintiff, and not negligent conduct]).

D. Failure to state claim for fraud and aiding and abetting fraud

Absent a showing that plaintiff sustained actual damages based on defendant’s conduct, and as a fraud claim is limited to out-of-pocket damages, plaintiff fails to state a claim for fraud and aiding and abetting fraud. (*See Sapienza v Becker & Poliakoff*, 173 AD3d 640 [1st Dept 2019] [fraud claim properly dismissed as plaintiff did not allege actual pecuniary loss sustained as direct result of defendants’ alleged fraud]). Moreover, plaintiff does not claim to have

sustained additional damages from the alleged fraud, separate and distinct than those arising from the alleged malpractice. (*See Kaiser v Van Houten*, 12 AD3d 1012 [3d Dept 2004] [fraud claim asserted within context of legal malpractice requires showing alleged fraud caused additional damages than from malpractice]).

E. Failure to state claim for unjust enrichment

As plaintiff does not contest the existence or applicability of the parties' retainer agreement, her claim for unjust enrichment is dismissed. (*Compare Chowaiki & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600 [1st Dept 2014] [as dispute existed as to applicability of retainer agreement, plaintiff could maintain unjust enrichment claim as alternative claim]).

F. Punitive damages

The cases cited by Reiter in support of the dismissal of plaintiff's punitive damages claim are inapposite as plaintiff's allegations that defendants intentionally and willfully engaged in a scheme or conspiracy with her adversaries in order to benefit themselves and her adversaries to her detriment. Thus, she sufficiently states a claim for punitive damages. (*See e.g., Cohen v Kachroo*, 115 AD3d 512 [1st Dept 2014] [plaintiff stated claim for punitive damages against her attorneys by alleging that they made false representations to court about her having paid them and tried to coerce her into paying more money]). There is no requirement that the alleged harm be directed at the public generally in a case involving a breach of fiduciary duty. (*Mejia-Gonzalez v Storch*, 148 AD3d 467 [1st Dept 2017]).

G. Plaintiff's application for leave to replead

Absent evidence that plaintiff is able to state a claim as to her dismissed causes of action, and without a proposed amended complaint, there is no basis on which to grant her application for leave to replead. (*See Guzman v Kordonsky*, AD3d , 2019 NY Slip O 08176 [2d Dept

2019] [leave to replead should be granted unless proposed amendment is palpably insufficient or patently devoid of merit]; *Prosthetic Home Svces., Inc. v Fidelis Care of New York Western Region*, 154 AD3d 1283 [4th Dept 2017] [court properly denied leave to replead as plaintiff submitted no proposed amendment to correct defects]; *Cusack v Greenberg Traurig, LLP*, 109 AD3d 747 [1st Dept 2013] [plaintiff failed to show how pleadings defects would have been addressed if given leave to amend complaint]).

III. HALL DEFENDANTS' MOTION TO DISMISS

A. Improper service

Pursuant to CPLR 3211(a)(8), claims may be dismissed if the court has no personal jurisdiction over the defendant. The plaintiff bears the burden on a motion to dismiss on this ground of establishing that jurisdiction exists. (*Wang v LSUC*, 137 AD3d 520 [1st Dept 2016], *lv denied* 28 NY3d 914 [2017]).

1. Service on LLP

CPLR 310-a requires that service of pleadings on a limited partnership be made by delivering a copy personally to any managing or general agent or general partner of limited partnership, or to any other agent or employee of the partnership authorized by appointment to receive it, or to any other person designated by the partnership to receive process.

LLP denies that plaintiff delivered the pleadings to a person identified in CPLR 310-a, contending that the woman served is a secretary employed by it with no authority to accept service of process. (NYSCEF 17, 20). Plaintiff argues that the woman she served had represented that she was authorized to accept the pleadings on LLP's behalf. In the alternative, plaintiff asks for leave to re-serve LLP. (NYSCEF 40).

While plaintiff's affidavit of service constitutes *prima facie* proof of proper service, LLP

rebutts it by its sworn affidavit. Therefore, a traverse hearing is required. (*See Purzak v Long Is. Hous. Svces., Inc.*, 149 AD3d 989 [2d Dept 2017] [defendants' affidavits in which they denied that person served was authorized to accept service on their behalf necessitated traverse hearing as to proper service]; *Bevilacqua v Bloomberg, L.P.*, 70 AD3d 411 [1st Dept 2010] [affidavits of persons who accepted service denying authority to do so sufficient to warrant traverse hearing as to proper service]; *see also Finnegan v Trimarco*, 173 AD3d 691 [2d Dept 2019] [defendant rebutted presumption of proper service by principal's sworn denial of relationship with any person at service address or that any person there had authority to accept service on defendant's behalf]).

2. Service on Hall

Defendant submits proof that Hall was deceased when plaintiff commenced this action. Thus, the action against Hall was a nullity from its inception. (*US Bank Nat. Assn. v Cadeumag*, 147 AD3d 881 [2d Dept 2017]; *Krysa v Estate of Qyra*, 136 AD3d 760 [2d Dept 2016] [party may not commence legal action against dead person]).

Having failed to commence the action properly against Hall, there is no party for whom substitute service may be effected, nor may the pleadings be amended to add Hall's estate and/or estate representative as a party. (*See Marte v Graber*, 58 AD3d 1 [1st Dept 2008] [as pleadings filed and served after defendant's death, no party could be substituted for him, nor could pleadings be amended]).

B. Failure to state a claim

In support of their argument that plaintiff's malpractice claim is time-barred, the Hall defendants offer an email from Reiter dated September 15, 2015 to an unknown person in which he writes that he had called and emailed plaintiff on three or four occasions recently but received

no response (NYSCEF 19). The email does not reflect that plaintiff had terminated defendants' services by then. Rather, in response to it, the addressee states that he had spoken to plaintiff's uncle who had indicated that he was "going to have [plaintiff] call [Reiter]." There is no indication or evidence that she did not do so. The Hall defendants thus fail to establish that plaintiff's malpractice claim is time-barred.

However, for the reasons set forth above (*supra*, II.), plaintiff's claims for malpractice, fraud and aiding and abetting fraud, and unjust enrichment are not viable.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Reiter's motion to dismiss (mot. seq. one) is granted to the extent of dismissing plaintiff's claims against him for malpractice, fraud and aiding and abetting fraud, and unjust enrichment, and is otherwise denied; it is further

ORDERED, that the motion to dismiss by defendants Hall & Hall, LLP and John Hall (mot. seq. two) is decided as follows:

(1) as to Hall & Hall, LLP, its motion to dismiss is granted as to dismissal of plaintiff's claims for malpractice, fraud and aiding and abetting fraud, and unjust enrichment against it, and the remainder of the motion is held in abeyance pending a traverse hearing on whether it was properly served with the summons and complaint, and the traverse hearing is referred to a special referee to hear and determine, and counsel for plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,¹ upon the Special Referee Clerk in the Motion Support Office in

¹ Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website at <http://www.courts.state.ny.us/supctmanh>.

Room 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee’s Part (Part 50 R) for the earliest convenient date; it is further

(2) as to Hall, the complaint is severed and dismissed as against him, and the clerk is directed to enter judgment accordingly; it is further

ORDERED, that plaintiff’s cross motion to amend her complaint as to Hall is denied, and the remainder is held in abeyance pending the traverse hearing; and it is further

ORDERED, that the parties appear for a status conference on April 1, 2020 at 2:15 pm to update the court on the status of the traverse hearing.


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BARBARA JAFFE, J.S.C.

<u>1/28/2020</u> DATE					
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/>	REFERENCE