

Colucci v Rzepka

2022 NY Slip Op 34296(U)

October 31, 2022

Supreme Court, Albany County

Docket Number: Index No. 903586-20

Judge: Justin Corcoran

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

LORA COLUCCI and YAR-LO, INC.,
d/b/a MERLE NORMAN COSMETICS,

**DECISION, ORDER
AND JUDGMENT**

Plaintiffs,

Index # 903586-20

-against-

THOMAS J. RZEPKA, ESQ.; OSBORN REED &
BURKE, LLP.; BRESSLER & KUNZE; BURKE
ALBRIGHT HARTER & REDDY, LLP; MOYER
RUSSI & RANDALL, PC; AND LEOPOLD &
ASSOCIATES, PLLC,

Defendants.

(Albany County Supreme Court, Motion Term)

APPEARANCES: LEWIS B. OLIVER, JR., ESQ.
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Justin Corcoran, J.S.C.

Plaintiffs Lora Colucci (“Colucci”) and Yar-Lo, Inc., d/b/a Merle Norman
Cosmetics (collectively “plaintiffs”) bring this legal malpractice suit against defendant
Thomas J. Rzepka (“movant” or “Rzepka”), claiming that his negligent representation in
a litigation matter against plaintiffs’ former commercial landlord Stuyvesant Plaza led to
dismissal of plaintiffs’ case. Colucci, who was the owner of Yar-Lo, Inc., leased retail

space from Stuyvesant Plaza in 1990 to operate a cosmetics store. During the lease period, the premises experienced sewage backup and overflows that allegedly exposed the store to mold and sewage. In 2005, plaintiffs terminated the lease and submitted a business interruption claim to their commercial insurer Travelers Indemnity Company, which denied the claim. They retained Rzepka to litigate Travelers' wrongful denial of the insurance claim and to sue Stuyvesant Plaza for breach of the lease. Rzepka filed an action on behalf of Yar-Lo against Travelers in December 2006, which was dismissed upon summary judgement, which the Appellate Division affirmed. *Yar-Lo, Inc. v Travelers Indem. Co.*, 130 AD3d 1402, 1404 (3d Dept. 2015).

In 2007, Rzepka sued Stuyvesant Plaza on behalf of plaintiffs, seeking damages caused by Colucci's exposure to the toxins in the store, including for her personal injuries and the closure of her retail business. After prolonged discovery, Supreme Court (Kramer, J.) directed plaintiffs and Stuyvesant Plaza to serve expert disclosure by May 2015 and to file all dispositive motions by August 2015. By disclosing experts in May 2015, the parties would receive notice about potential opposing experts sufficiently before dispositive motions were filed to allow adequate time to retain appropriate experts. Stuyvesant Plaza timely served disclosure of medical and plumbing experts and filed a motion for summary judgment based on plaintiffs' failure to submit any expert proof that its actions injured Colucci. Rzepka missed the expert disclosure and motion deadlines but sought an extension of time to serve opposition to the landlord's dispositive motion. Stuyvesant Plaza consented to the extension to serve opposition papers if Rzepka agreed that the expert disclosure deadline would not be similarly extended. The court granted Rzepka's request to adjourn the motion return date to allow him to file responsive papers, conditioned upon Rzepka's consent that the expert disclosure deadline was not extended. Rzepka obtained another adjournment of the return date and, in the meantime, submitted a cross-motion with incomplete supporting papers (including an unexecuted, proposed affidavit which he apparently intended to ask the "affiant" to execute thereafter).

In a letter dated November 3, 2015, Rzepka advised Colucci that he no longer wished to represent her and asked her to find new counsel. On the new return date of

Stuyvesant Plaza's dispositive motion, with no new lawyer retained to represent plaintiffs, Rzepka moved to withdraw from his representation of them. On December 7, 2015, while the motion for leave to withdraw was pending, Colucci executed a form to substitute herself in the place of Rzepka, after which he no longer performed any services for plaintiffs. In January 2016, Supreme Court granted Rzepka's motion to be relieved as plaintiffs' counsel, placed Stuyvesant Plaza's dispositive motion on its February 26, 2016, motion calendar, and advised it would determine the new return date then. On February 25, 2016, plaintiffs' new counsel asked the Court to grant a six-month extension to serve papers opposing the landlord's motion and suggested that he would not formally appear unless his request was granted. At the February 26, 2016 appearance, the Court extended the deadline for plaintiffs' opposition papers to May 13, 2016 and adjourned the return date to May 27, 2016. The extension was confirmed in a March 1, 2016 letter order, which also noted that the Court declined the request for a longer motion extension and that no extension of the expert disclosure deadline had been granted.

New counsel appeared for plaintiffs on April 7, 2016, and later submitted papers opposing Stuyvesant Plaza's summary judgment motion, including expert affidavits addressing Colucci's injuries and liability for the plumbing problems, even though the Court had clarified that the expert disclosure deadline had not been extended. After oral arguments, Stuyvesant Plaza was awarded summary judgment dismissing the complaint. On appeal, the Appellate Division, Third Department affirmed in an order dated January 11, 2018, primarily because plaintiffs could not prove causation given their failure to timely serve expert disclosure and submit expert affidavits. *Colucci v Stuyvesant Plaza, Inc.*, 157 AD3d 1095, 1097-1101 (3d Dept. 2018), lv denied 31 NY3d 906 (2018).

Plaintiffs sued Rzepka and his former law firms for legal malpractice on May 27, 2020, more than three years after Rzepka was replaced and the complaint was dismissed by the trial court. Plaintiffs alleged Rzepka failed to make prudent strategic decisions and then neglected to hire and disclose experts needed to successfully defeat the landlord's summary judgment motion. Plaintiffs served an amended complaint and Rzepka joined issue via his answer to amended complaint dated June 17, 2021, which included various

affirmative defenses including the expiration of the statute of limitations. Plaintiffs alleged that the co-defendant law firms were vicariously liable for Rzepka's torts while he was affiliated with each firm under *respondeat superior*. Rzepka's former law firms moved to dismiss before answering under CPLR 3211 (a) (1), (5) and (7), arguing that plaintiffs' claims against them were time-barred by the three-year statute of limitations under CPLR 214 (6), that the complaint failed to state a cause of action, and that claims were barred by documentary evidence. Plaintiffs opposed on several grounds, primarily claiming that the suit was timely under *Grace v Law*, 24 NY3d 203 (2014). Specifically, plaintiffs argued that under *Grace v Law*, before an injured client may sue her lawyer for malpractice, she must first exhaust any appeal that is "likely to succeed" because an appellate court's reversal of a trial court's erroneous decision may (1) prevent the client from suffering any legal injury and (2) thus preclude the client from truthfully alleging the "but-for" causation element required to plead a cognizable legal malpractice claim. Plaintiffs claim that they were likely to succeed in appealing the order granting Stuyvesant Plaza summary judgment. This Court rejected plaintiffs' reasoning and held, as relevant here, that the claims against Rzepka's former law firms were time-barred. NYSCEF Doc. No. 67.

Plaintiffs appealed. Oral arguments were heard on September 12, 2022. In a decision dated October 27, 2022, the Appellate Division, Third Department affirmed. In relevant part, the Appellate Division found that "plaintiffs erroneously rely upon *Grace v Law* ...for the proposition that they were *not permitted* to commence this action until the appeal of the Stuyvesant Plaza action was resolved in January 2018." *Colucci v Rzepka*, 2022 N.Y.Slip.Op. 06043, 2022 WL 14931320 at *2 (3d Dept. 10/27/2022). The Court held that plaintiffs were not required to file an appeal before filing their legal malpractice action and that the limitations period was not tolled while they sought to reverse Judge Kramer's order dismissing their complaint. Therefore, the legal malpractice claims against the law firms were untimely and dismissal of the complaint was proper.

Unlike the law firms, defendant Rzepka did not move to dismiss under CPLR 3211. Rzepka first filed a motion for summary judgment on July 27, 2021. Plaintiffs

opposed the dispositive motion as premature on the ground that they had not conducted discovery and that the Court's discovery deadlines had not expired when Rzepka filed his initial summary judgment motion. Rzepka's dispositive motion was ordered held in abeyance under CPLR 3212 (f) for discovery to be completed. Though Rzepka argued that plaintiffs did not identify any material facts in his exclusive possession that could create a factual dispute about when the statute of limitations accrued and expired (because it was clear to all parties when and how Rzepka exited the underlying case), the Court allowed plaintiffs to conduct discovery to explore facts that might support their claims. Doc. No. 165. The parties conducted discovery, including depositions of the parties. Plaintiffs do not cite any new facts that alter the limitations analysis as applied to the law firms' motions to dismiss, such as concealment by Rzepka of his alleged negligence or unexpected proof of continuous representation by Rzepka after a consent to change counsel was filed.¹ See e.g., *Zumpano v Quinn*, 6 NY3d 666, 674-675 (2006); *Brean Murray, Carret & Co. v Morrison & Foerster LLP*, 165 AD3d 582, 582-583 (1st Dept. 2018). To the contrary, the additional facts adduced by depositions of the parties include Colucci's testimony that she was aware of Rzepka's alleged negligence before he withdrew from representing her, and that she consulted other lawyers about his errors even before she executed the consent to change counsel form. There is no basis to vary the Court's previous determinations of when the claims accrued or when the continuous representation toll expired based upon the evidentiary facts submitted on this dispositive motion, even granting the non-movants the benefit of every reasonable favorable inference.

¹ Colucci testified at her deposition that by November 2015, she had lost confidence in Rzepka and had consulted other lawyers about taking over the pending litigation matters at Rzepka's suggestion. She also concedes that Rzepka did not represent her after December 7, 2015. She was advised by her new counsel that Rzepka committed legal malpractice before Stuyvesant Plaza obtained summary judgment. See, plaintiffs' statement of material facts, Doc. No. 244 at ¶79-82, 103. In their memorandum of law, plaintiffs argue that the Court should revisit the grounds for dismissing the claims against the law firms based upon deposition testimony without citing any new facts that affect the date of accrual. Rather, plaintiffs concede that this motion involves the same statute of limitations issue as the Court considered before dismissing the untimely complaint against the law firms. See plaintiffs' memorandum of law at p.2 (Doc. No. 245).

On May 19, 2022, plaintiffs discontinued their claims alleging violation of Judiciary Law §487 and stipulated that their legal malpractice claims related solely to Rzepka's conduct in the Stuyvesant Plaza litigation, thus waiving any malpractice claims related to other legal matters where Rzepka represented them. Doc. No. 191. Pursuant to the parties' agreement, Rzepka filed a new motion for summary judgment solely on the ground that plaintiffs' suit is time-barred. More particularly, mindful that plaintiffs' appeal would impact this motion, the parties sought to limit this dispositive motion to address only the statute of limitations; if the complaint survived this motion, the parties would then brief other possible grounds for summary judgment (e.g., proximate cause or Rzepka's alleged violation of accepted legal standards) which would require the parties to incur additional expenses, such as expert fees. Rzepka's summary judgment motion was fully submitted on August 5, 2022. Because the related appeal was argued on September 12, 2022, this Court deferred a decision on Rzepka's motion until the appeal was decided. For reasons described below, movant is entitled to summary judgment dismissing the complaint as time-barred.

"An action to recover damages arising from legal malpractice must be commenced within three years after accrual." *Colucci v Rzepka*, 2022 N.Y.Slip.Op. 06043, 2022 WL 14931320, *2 (3d Dept. 10/27/2022) quoting *Zorn v Gilbert*, 8 NY3d 933, 933-934 (2007) (other citation omitted); CPLR 214 (6). "In the civil context, the claim accrues when the malpractice is committed (*Ruggiero v Powers*, 284 AD2d 593, 594 (3d. Dept. 2001), lv dismissed 97 NY2d 638 (2001), not at the time that the injury is discovered." *Id.* at *2 quoting *Lavelle-Tomko v Aswad & Ingraham*, 191 AD3d 1142, 1143 (3d Dept. 2021); see *McCoy v Feinman*, 99 NY2d 295, 301 (2002). As the party moving for summary judgment based on the statute of limitations, Rzepka "bore the initial burden of demonstrating that the time within which to commence the action had expired, including establishing the date that the cause of action accrued." *Lavelle-Tomko v Aswad & Ingraham*, *supra* at 1143 (internal citations omitted). If the movant met that initial burden, "the burden then shift[s] to...plaintiff[s] to raise a question of fact as to whether the statute of limitations has been tolled or was otherwise inapplicable. *Id.* quoting *Krog*

Corporation v Vanner Group, Inc., 158 AD3d 914, 915 (3d Dept. 2018) (internal quotation marks and other citations omitted). Rzepka established that this action was brought after the three-year statute of limitations accrued because he ceased representing plaintiffs in December 2015 and plaintiffs did not commence this legal malpractice action until May 2020. The burden shifted to plaintiffs “to raise a question of fact as to whether the statute of limitations has been tolled or was otherwise inapplicable, or whether the action was actually commenced within the period propounded by ... defendant[s].” *Colucci v Rzepka, supra, at *2, quoting State of N.Y. Workers’ Compensation Bd. v Wang*, 147 AD3d 104, 110 (3d Dept. 2017) (internal quotation marks and citations omitted); *see Bank of Am., N.A. v Gulnick*, 170 AD3d 1365, 1367 (3d Dept. 2019), lv denied 34 NY3d 908, 2020 WL 728411 (2020).

Plaintiffs do not contend that the statute of limitations was tolled after Rzepka ceased representing plaintiffs in December 2015, that it is otherwise inapplicable, nor that the action was “actually commenced within the period propounded” by Rzepka. Instead, they argue that this Court misapprehended the effect of *Grace v Law* when it dismissed the claims against the law firms and urge it to now adopt their theory of accrual. Once again, the Court finds plaintiffs’ rationale unavailing, this time with the guidance of the Appellate Division after it considered identical arguments raised by plaintiffs in appealing dismissal of their claims against the similarly situated law firms.²

Specifically, the Appellate Division expressly held that plaintiffs failed to meet their shifted burden and that they erroneously relied on *Grace v Law* for the proposition that they were not permitted to sue Rzepka until January 2018, when the Stuyvesant Plaza appeal was resolved in favor of the landlord. *Colucci v Rzepka, supra, at *2*. The Appellate Division further held that Judge Kramer had such broad discretion to control discovery and disclosure that plaintiffs’ appeal was not “likely to succeed” and that it was

² Plaintiffs alleged that the law firms were liable for Rzepka’s torts under *respondeat superior*, such that Rzepka and the firms are in privity for purposes of analyzing limitations defenses. The parties agree that the instant motion presents the identical legal issue about timeliness as the law firms’ earlier motion to dismiss. Rzepka relies on the same arguments as those advanced by the firms. Plaintiffs oppose Rzepka’s motion on the same grounds as those opposing the law firms’ motions to dismiss under 3211 (a) (5).

unnecessary for them to appeal before suing Rzepka under the *Grace v Law* standard. *Id. citing Grace v Law, supra* at 210; *see Florists' Mut. Ins. Co., Inc v Behman Hambelton, LLP*, 160 AD3d 502, 502 (1st Dept. 2018). The Third Department rejected plaintiffs' arguments that they were "forced" to file their appeal before commencing the legal malpractice action and that filing the appeal tolled the malpractice action. *Id.* Like this Court stated in dismissing the complaint against the law firm defendants, the Appellate Division found that the preferable course was to both timely sue the malpractice action and pursue the appeal and then request a stay of the legal malpractice action until the appeal was decided. *Id. citing Spitzer v Newman*, 163 AD3d 1026, 1027-1028 (2d Dept. 2018) (motion court providently exercised discretion in staying legal malpractice action pending determination of underlying action).

The Appellate Division held that plaintiffs misapprehended the import of *Grace v Law*, and that plaintiffs' appeal of Judge Kramer's decision was unlikely to succeed. The trial court (Kramer, J.) had wide discretion to control discovery and it was unlikely that an appellate court would find an abuse of that discretion where the case had been marked by extensive delays, the parties had stipulated that the expert disclosure deadline would not be extended, and the landlord had timely moved for summary judgment without the benefit of notice of plaintiffs' expert opinions. Indeed, plaintiffs contend Rzepka engaged in egregious, protracted discovery delays characterized by motions to compel, missed deadlines, and ignored discovery orders between 2007 and 2015. See Doc. No. 244, ¶63. Rzepka's failure to disclose experts could not be cured, as plaintiffs argue, by allowing time for cross-examination at trial where Stuyvesant Plaza was entitled to notice of plaintiffs' anticipated expert opinions before it moved for summary judgment. Because Rzepka had persistently flaunted court-ordered deadlines over the course of several years and had expressly waived the right to rely upon experts in opposing the dispositive motion, plaintiffs' appeal of Judge Kramer's order was unlikely to succeed.


Rzepka established that the legal malpractice claims against him accrued in 2015 when he missed deadlines and neglected to properly oppose Stuyvesant Plaza's motion for summary judgment, and that the continuous representation toll expired in December

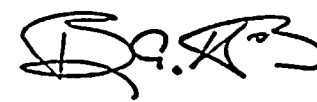
2015. In opposition, plaintiffs failed to create a material question of fact to defeat movant's *prima facie* showing that the legal malpractice complaint was not timely filed. Plaintiffs' sole basis for opposing Rzepka's summary judgment motion is that they were purportedly not permitted to bring suit until their appeal of the order granting summary judgment to Stuyvesant Plaza was decided. As explained above, this argument is unavailing and has been rejected by the Appellate Division.

Accordingly, for all the foregoing reasons, the motion for summary judgment by defendant Thomas J. Rzepka is **GRANTED** on the ground that plaintiffs' remaining legal malpractice claims are time-barred and the complaint is therefore **DISMISSED**.
SO ORDERED AND ADJUDGED.

ENTER.

Dated: Albany, New York
October 31, 2022


Justin Corcoran
Supreme Court Justice


10/31/2022

Papers Considered: NYSCEF Docket Nos. 67, 165, 191, 193-247, 251.

The Court has uploaded the original Decision and Order to the case record in this matter as maintained on the NYSCEF website whereupon it is to be filed and entered by the Office of the Albany County Clerk. Counsel for defendant shall comply with the applicable provisions of CPLR 2220 and 202.5b[h][2] of the Uniform Rules of Supreme and County Courts insofar as it relates to service and notice of entry of the filed document upon all other parties to the action, whether accomplished by mailing or electronic means, whichever may be appropriate dependent upon the filing status of the party.