

**Horvath v Budin, Reisman, Kupferberg & Bernstein
LLP**

2023 NY Slip Op 31124(U)

April 11, 2023

Supreme Court, New York County

Docket Number: Index No. 161339/2019

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN PART 58

Justice

-----X

LASZLO HORVATH

Plaintiff,

- v -

BUDIN, REISMAN, KUPFERBERG & BERNSTEIN LLP.,

Defendant.

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INDEX NO. 161339/2019

MOTION DATE 12/14/2022

MOTION SEQ. NO. 006

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 105, 111, 112, 113, 114, 115

were read on this motion to/for DISMISSAL.

In this action alleging legal malpractice, defendant moves pursuant to CPLR 3211 for an order dismissing the amended complaint.

As set forth in the factual and procedural background detailed in a prior decision and order dated January 13, 2021 (NYSCEF Doc. No. 36), plaintiff alleges that defendant committed malpractice by failing to amend the schedule of assets in his pending bankruptcy matter and, therefore, failed to competently pursue and prosecute his personal injury action.

CONTENTIONS

Defendant moves to dismiss plaintiff’s first cause of action for failure to state a claim and based on documentary evidence, and the second cause of action based on the statute of limitations. It asserts that plaintiff’s first cause of action arises from his claim that when he retained defendant, it failed to take all necessary steps to amend his schedule of assets in his already-pending bankruptcy matter to include his personal injury action. Defendant contends that plaintiff failed to plead the necessary elements for a legal malpractice claim, and also that documentary evidence establishes that plaintiff failed to identify the personal injury matter in his

bankruptcy filing before defendant was retained by plaintiff. Defendant maintains that plaintiff's second claim, that it failed to timely commence a legal malpractice action against plaintiff's prior attorney, had to be filed by March 8, 2018, and is thus time-barred.

Plaintiff opposes the motion, observing that defendant previously moved to dismiss the amended complaint pursuant to CPLR 3211(a)(1) and (a)(7) (NYSCEF Doc. Nos. 18-28, 30-35 [Motion #2]), and the motion was denied in all respects (NYSCEF Doc. No. 36). Plaintiff argues that defendant is barred from making a second motion to dismiss pursuant to CPLR 3211(e), and, in any event, the issues relevant to Motion #2 have already been determined and are now the law of the case. Plaintiff also contends that dismissal of his second claim based on the statute of limitations must be denied, as there was clear indicia of an ongoing, continuous, developing and dependent relationship between him and defendant, through at least November 13, 2017, and his complaint was filed within three years thereof.

In reply, defendant argues that dismissal of plaintiff's amended complaint is appropriate because the court may treat this second motion to dismiss as one for summary judgment pursuant to CPLR 3211(c). Defendant argues that plaintiff's law of the case argument lacks merit, and that its statute of limitations argument was neither raised nor determined on the merits, and therefore, may be raised for the first time here.

DISCUSSION

CPLR 3211(e) provides, in relevant part, that at any time before service of a responsive pleading is required, a party may move to dismiss a pleading on one or more of the grounds set forth in CPLR 3211(a), and that "no more than one such motion shall be permitted" (*see McLearn v Cowen & Co.*, 60 NY2d 686, 689 [1983]). "The single motion rule prohibits parties from making successive motions to dismiss a pleading pursuant to CPLR 3211(a)" (*Ramos v City*

of New York, 51 AD3d 753, 754 [2d Dept 2008]). “The rule bars both repetitive motions to dismiss a pleading pursuant to CPLR 3211(a), as well as subsequent motions to dismiss that pleading pursuant to CPLR 3211(a) that are based on alternative grounds” (*Bailey v Peerstate Equity Fund, L.P.*, 126 AD3d 738, 739 [2d Dept 2015]; see *Ross v Epstein*, 26 AD2d 658 [2d Dept 1966] [one-motion rule barred defendant’s belated attempt to invoke new defense of statute of limitations]).

As defendant previously moved pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the amended complaint, which was denied in all respects, and as defendant moves again here on the same grounds and on a new ground that could have been raised earlier, the instant motion is barred by the single-motion rule. While the one motion rule is not violated where substantial new material is introduced in an amended pleading (see *Matter of 8430985 Can., Inc. v Frydman*, 188 AD3d 401 [1st Dept 2020]), that is not the case here (see *Simon v FrancInvest, S.A.*, 192 AD3d 565 [1st Dept 2021], *app dismissed* 37 NY3d 1005 [2021] [motion barred by single-motion rule as defendants previously moved to dismiss exact same claims]; *Landes v Provident Realty Partners II, L.P.*, 137 AD3d 694 [1st Dept 2016] [second motion properly denied as defendants had full opportunity to raise current arguments in first motion to dismiss]).

Nor is it the case that “[defendant’s] first motion to dismiss was premature or where the two motions were aimed at different pleadings, thus permitting a second motion” (*Mariano v Krautman*, 28 Misc 3d 1233[A], 2010 NY Slip Op 51578[U], *2 [Nassau Dist Ct 2010] quoting Siegel, *New York Prac* § 273, at 454-455 [4th ed]).

While defendant moves to dismiss based on the statute of limitations for the first time, its argument is not based upon any new material interposed in an amended pleading. Moreover, “[w]hile a second motion to dismiss may be permitted where the movant takes its cue from [a]

court’s earlier decision to supply evidence that was found lacking on the first motion” (*Simon v FrancInvest*, 192 AD3d 565, 566 [1st Dept 2021]), defendant does not do so here.

Even assuming defendant could properly interpose a second dismissal motion, its arguments based on documentary evidence and the statute of limitations would be barred as “any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) of [CPLR 3211] is waived unless raised either by such motion or in the responsive pleading” (CPLR 3211[e]; *see e.g. Perine Intern. Inc. v Bedford Clothiers, Inc.*, 143 AD3d 491 [1st Dept 2016] [defense waived by defendants’ failure to assert it in answer or pre-answer motion to dismiss]).

While defendant argues that the court may treat the instant motion as one for summary judgment pursuant to CPLR 3211(c), its request to do so was already denied (NYSCEF 117).

CONCLUSION

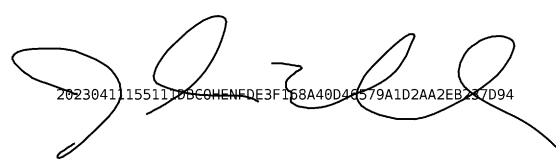
Accordingly, for the foregoing reasons, it is hereby

ORDERED, that defendants’ motion to dismiss is denied in all respects; and it is further

ORDERED, that the parties appear for a compliance conference on May 2, 2023 at 10 am, in person, unless a stipulation is submitted by May 1, 2023.

4/11/2023

DATE



DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE