

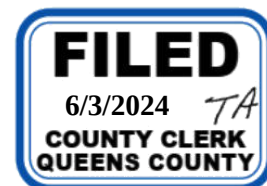
Delessio v Bragoli
2024 NY Slip Op 35393(U)
June 3, 2024
Supreme Court, Queens County
Docket Number: Index No. 714960/2023
Judge: Timothy J. Dufficy
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

-----X
VINCENT DELESSIO,

Index No.: 714960/23

Plaintiff,

Mot. Date: 4/9/24

-against-

Mot. Seq. 1

CHRISTOPHER BRAGOLI, BRAGOLI &
ASSOCIATES, P.C., DAVID BANGEL,
STEPHEN COHEN, CHISTOPHER
FALCONETTI, and BANGEL, COHEN, &
FALCONETTI, L.L.P.,Defendants.
-----X

The following papers were read on this motion by defendants Christopher Bragoli and Bragoli & Associates, P.C. (defendants) for an order dismissing the instant action as against them, pursuant to CPLR 3211(a)(1),(5), and (7); and, the plaintiff's cross-motion for an order imposing sanctions against the defendants.

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits..... EF 19-29
 Notice of Cross-Motion-Affidavits-Exhibits..... EF 34-42
 Defendant's Replying Papers..... EF 45

Upon the foregoing papers, it is ordered that the motion by the defendants is denied; and, the cross-motion by plaintiff is denied, as discussed below.

At the outset, the Court notes, that on November 22, 2023, the defendants filed a Notice of Partial Withdrawal of Motion, stating that they withdraw the branches of the instant motion seeking dismissal, pursuant to CPLR 3211(a)(1) and (7) (NYSCEF Doc. No. 33). As such, those branches seeking dismissal pursuant to CPLR 3211(a)(1) and (7) are denied, as moot, the Court will only consider the branch of the defendants' motion

seeking the alternative relief for dismissal of the complaint as against them, pursuant to CPLR 3211(a)(5).

By way of background information, the defendants had represented the plaintiff in a personal injury claim stemming from a motor vehicle accident, that occurred on April 2, 2014 (the 2014 MVA Claim). The claim was settled before any litigation commenced on March 28, 2017.

Plaintiff alleges that the settlement was done without the consent of the Workers' Compensation (WC) carrier or judicial approval, pursuant to Workers' Compensation Law § 29(5). Said consent or judicial approval was required on any settlement, as the plaintiff was receiving Workers' Compensation benefits at the time of the accident.

As a result of the failure to procure either the WC carrier's consent or judicial approval when he settled a separate action related to the WC claim, the WC Board suspended the plaintiff's benefits on April 12, 2019.

On November 5, 2019, the defendants, who were representing the plaintiff, filed a petition in Supreme Court, Richmond County, under Index No. 152557/2019, seeking an order of the Court approving the March 28, 2017 settlement of the 2014 MVA Claim, *nunc pro tunc*, so as to comply with Workers' Compensation Law § 29(5) (Richmond County action).

By Order of the Hon. Wayne M. Ozzi, dated February 28, 2020, the Court denied the petition in its entirety. Following an appeal, said Order was ultimately affirmed by the Appellate Division, Second Department, in a Decision and Order, dated March 15, 2023.

This instant action was commenced by Summons and Verified Complaint, filed on July 20, 2023, wherein the plaintiff alleges causes of action for legal malpractice and breach of contract.

Defendants now bring this instant motion seeking dismissal of the instant action as against them, on the grounds that plaintiff's claims are barred by the Statute of Limitations, pursuant to CPLR 3211(a)(5).

"On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, *prima facie*, that the time in which to sue has expired" (*Simmons v Jones Law Group, LLC*, 214 AD3d 835, 837 [2d Dept 2023][internal citations omitted]).

“The statute of limitations for a cause of action to recover damages for legal malpractice is three years (CPLR 214(b), which accrues at the time the malpractice is committed” (*Tulino v Hiller, P.C.*, 202 AD3d 1132, 1135 [2d Dept 2022][internal citations omitted]).

“However, pursuant to the doctrine of continuous representation, the time within which to sue on the claim is tolled until the attorney’s continuing representation of the client with regard to the particular matter terminates. For the continuous representation doctrine to apply, there must be clear indicia of an ongoing, continuous, developing, and dependent relationship between the client and the attorney which often includes an attempt by the attorney to rectify an alleged act of malpractice” (*Stein Indus., Inc. v Certilman Balin Adler & Hyman, LLP*, 149 AD3d 788, 789 [2d Dept 2017][internal citations omitted]).

Defendants contend that: the plaintiff’s legal representation by them terminated upon the settlement of the 2014 MVA Claim, on March 28, 2017; and, any alleged malpractice by the defendants could have only occurred on that date, not when the plaintiff’s WC benefits were terminated in 2019. Further, the defendants argue that the continuous representation doctrine does not apply where, *inter alia*, the defendants did not provide any services to the plaintiff in the two years between settling the 2014 MVA Claim and the filing of the petition in the Richmond County action, and that plaintiff’s own admissions state that he had no reason to contact the defendants after the receiving the proceeds from the settlement in the 2014 MVA Claim.

Plaintiff opposes, arguing that the continuous representation doctrine tolled the statute of limitations due to, *inter alia*, the defendants resuming their representation of the plaintiff by bringing the Richmond County action, and the subsequent appeal of the denial order to the Second Department. Additionally, the plaintiff argues that the instant motion is premature, due to outstanding discovery.

As to the relief sought with the cross-motion, the plaintiff seeks an order imposing sanctions upon the defendants, “due to the clearly frivolous nature of this motion and [the defendants] willful and bad faith conduct.”

The Court finds that the defendants have failed to establish, *prima facie*, that the time to sue for legal malpractice has expired, and, in any event, the plaintiff has raised an

issue of fact as to whether his claim is barred by the statute of limitations, due to the continuous representation doctrine.

Defendants' filing of the petition, in the Richmond County action, seeking to receive judicial approval of the settlement of plaintiff's 2014 MVA Claim, *nunc pro tunc*, plainly constitutes an attempt to rectify an alleged act on malpractice, where the defendants had failed to seek such approval previously.

Furthermore, their assertion that the 2014 MVA Claim and the Richmond County action are "two separate matters," because of the nature of the proceedings, is wholly unavailing. Defendants' representation of the plaintiff, in the Richmond County action, was not "merely a continuing relation" between the parties, nor was the representation for "distinct services related to a different subject matter," such that the continuous representation doctrine would not apply (*Goodman v Weiss, Zarett, Brofman, Sonnenklar & Levy, P.C.*, 199 AD3d 659, 661-662 [2d Dept 2021][internal citations omitted]).

Furthermore, the plaintiff should not have been expected to have brought an action against the defendants for legal malpractice, while the defendants were representing him, in the Richmond County action, during the same time period. Indeed, these specific scenarios are explicitly contemplated in applying the continuous representation doctrine (*see e.g. Tulino v Hiller, P.C.*, 202 AD3d 1132 [2d Dept 2022]).

Thus, the defendants' motion seeking dismissal of the instant action as them, pursuant to CPLR 3211(a)(5), is denied.

As to the plaintiff's cross-motion seeking sanctions against the defendants, pursuant to CPLR 3126, such is denied.

"The decision whether to impose costs or sanctions against a party for frivolous conduct, and the amount of any such costs or sanctions, is generally entrusted to the court's sound discretion" (*Strunk v New York State Bd. of Elections*, 126 AD3d 779, 782 [2d Dept 2015]).

The Court does not find that the defendants actions warrant sanctions at this stage of litigation, as their motion was "neither completely devoid of merit nor evidently advanced in bad faith" (*Flowers v 73rd Townhouse, LLC*, 2024 NY Slip Op 02868 *1 [1st Dept 2024]). Hence, it declines to levy any sanctions against them.

Accordingly, it is

ORDERED that the motion by defendants is denied; in that: it is

ORDERED that the branches of defendants's motion seeking an order dismissing the instant action as against them, pursuant to CPLR 3211(a)(1) and (7), are denied, as moot, pursuant to the Stipulation of Partial Withdraw filed by the defendants on November 22, 2023; and it is further

ORDERED that the branch of the defendants' motion for an order dismissing the instant action as against them, pursuant to CPLR 3211(a)(5), is denied, for the reasons set set forth above; and it is further

ORDERED that the plaintiff's cross-motion seeking an order imposing sanctions against the defendants, pursuant to CPLR 3126, is denied.

Dated: June 3, 2024



TIMOTHY J. DUFFICY, J.S.C.

