2013 NY Slip Op 32666(U)

LUELLEN GOLDSTEIN, Plaintiff,

v.

STERN KEISER & PAN KEN, LLP f/n/a STERN KEISER PANKEN & WOHL LLP, JUDITH B. KUNREUTHER and JOAN MARLOW d/b/a JDM REAL ESTATE COMPANY, Defendants.

Docket No. 157177/12.

Supreme Court, New York County.

October 18, 2013.

JOAN A. MADDEN, Judge.

It is ordered that this motion is decided in accordance with the annexed memorandum Decision & Order.

In this action for both legal and real estate appraiser malpractice, the following two motions are here addressed: (1) the motion brought by defendants Stern Keiser & Panken, LLP f/n/a Stern Keiser Panken & Wohl LLP (SKP), and Judith B. Kunreuther (Kunreuther) (together, attorney defendants), for dismissal of the complaint as to them, pursuant to CPLR 3211 (a) (5) and (7), and for the disqualification of plaintiffs attorney; and (2) the motion brought by defendant Joan Marlow d/b/a JDM Real Estate Company (JDM), pursuant to CPLR 3211 (a) (5) and (7), to dismiss the complaint as to her.

I. Background

Plaintiff Luellen Goldstein retained SKP to prepare her will, and to provide other estate tax planning. Plaintiff wished to make a gift to her son outside the estate of $1 million. Plaintiff was advised by Kunreuther, an attorney associated with SKP, that, if the gift were $1 million or less, plaintiff could take advantage of the Internal Revenue Service's (IRS) unified tax credit, which would render the gift tax-free.

Because plaintiff did not have liquid assets sufficient to make a gift as high as $1 million to her son, she was advised by SKP to gift him with a number of non-voting shares in plaintiffs company, Lex Jay Realty Corp. (Lex), which company owned a mixed-use four-story building located at 154 East 79th Street, New York, New York (the building). The gift to plaintiffs son was made in January 2009.

SKP hired JDM in June 2009 to conduct an appraisal of the building. The value of the building would establish the value of the gift. JDM was a real estate appraisal firm which was alleged to have extensive experience in appraising real estate in New York.

JDM provided SKP with a written appraisal report (report), dated June 2009, which valued the building at approximately $2.3 million. Based on this number, plaintiffs gift was valued at $904,000, within the limits of the unified tax credit, so that the gift would be tax-free. JDM's fee was paid by plaintiff, although the report was sent to SKP.

In May 2011, the IRS challenged the appraisal of the building. In a letter dated May 27, 2011, IRS appraiser Elizabeth Principato approximated that the building had a value of $6.5 million, which would greatly increase the value of Lex's non-voting shares, and, subsequently, making the gift to plaintiffs son exceed $1 million, and thus be taxable.

Plaintiff, through her current attorney, Laurence Reinlab (Reinlab), negotiated with the IRS over the value of the building. Plaintiff eventually executed a "Waiver of Restriction on Assessment and Collection of Deficiency and Acceptance of Overassessment — Estate, Gift and Generation-skipping Transfer Tax" with the IRS (Waiver), which provided for adjustment to plaintiffs gift tax return.

As a result of the adjustment in the appraised value of the building, plaintiffs gift to her son was reevaluated at $1,462,016, and plaintiff was taxed $188,077, plus interest, a sum which she now claims as an injury caused by defendants' negligence. Plaintiff also claims that she sustained liability to the State of New York in the sum of $22,000. This liability has not been explained, as the State has no gift tax. Total damages claimed are $210,000.

In this action, plaintiff alleges that SKP committed legal malpractice when it promised to set up a $1 million tax-free gift to her son, and failed in that endeavor, by choosing an incompetent appraiser, and failing to inspect the report upon its receipt, to ensure that it was correct. Plaintiff sues SKP for legal malpractice, breach of contract and breach of fiduciary duty, and seeks damages of $210,000. Plaintiff brings causes of action for appraiser malpractice and breach of contract against JDM, seeking the same damages. The action was commenced by filing on October 16, 2012.

II. The Motions

The attorney defendants move to dismiss the complaint, pursuant to CPLR 3211 (a) (5), claiming that the malpractice, if it occurred at all, should be timed from the date of the report, July 21, 2009, rendering the entire action as against the attorney defendants time-barred, under the applicable three-year statute of limitations.

The attorney defendants also argue that the complaint fails to state a cause of action against them, pursuant to CPLR 3211 (a) (7), because the legal advice they gave plaintiff on how to structure the gift to her son was sound, and plaintiff does not challenge that. The attorney defendants argue that they never undertook a duty to value the property, had no experience in that field, and did not perform the appraisal, leaving that to JDM. As such, the attorney defendants claim that plaintiffs damages do not stem from any act committed by themselves.

The attorney defendants also claim that plaintiff cannot show any actual or ascertainable damages because, in short, she would have sustained some tax liability regarding her estate eventually whether or not she made a gift to her son before her demise, and it is speculation to say that she was damaged more by the imposition of gift taxes than by taxes that would eventually come out of the estate.

The attorney defendants argue that the claims for breach of contract and breach of fiduciary duty are duplicative of the claim for malpractice, and should be dismissed on that ground as well.

The attorney defendants request that Reinlieb should be disqualified because, allegedly, his representation of plaintiff during the auditing process makes it likely that he will become a necessary witness in the action, or that, at the least, his dual role as plaintiffs representative during the auditing process and his representation of her now creates a conflict of interest.

JDM also seeks to dismiss the complaint, pursuant to CPLR 3211 (a) (5) and (7). She also argues that the statute of limitations bars the action, and that the breach of contract claim is duplicative of the malpractice claim.

Plaintiff, in response, maintains that the statute of limitations began to run when she became aware that the appraisal was faulty, upon being audited, so that the action is not time-barred. She also argues that the doctrine of continuous representation tolls the statute of limitations, should the court conclude that the statute would normally run from the date of the appraisal. Plaintiff insists that she has separate causes of action for breach of contract and malpractice. She denies that Reinlieb's representation is in conflict with her interests, or that he will be a necessary witness during the trial of this matter.

III. Discussion

A. Attorney Defendants' Motion to Dismiss

i. Statute of Limitations

The statute of limitations for legal malpractice is three years from accrual of the claim. CPLR 214 (6); *McCoy v Feinman,* 99 NY2d 295 (2002). The cause of action accrues "when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court.'" *Id.* at 301, quoting *Ackerman v Price Waterhouse,* 84 NY2d 535, 541 (1994); *see also Shumsky v Eisenstein,* 96 NY2d 164, 166 (2001) ("[a]n action to recover damages for legal malpractice accrues when the malpractice is committed ... not when the client discovered it [internal quotation marks and citation omitted]"). It is irrelevant whether the injured party is aware of the wrong or injury. *Id.; Ackerman v Price Waterhouse,* 84 NY2d 535 (1994). A three-year statute also applies to claims for breach of contract or fiduciary duty arising from facts underlying the legal malpractice claim. CPLR 214 (6); *see Harris v Kahn, Hoffman, Nonenmacher & Hockman, LLP,* 59 AD3d 390 (2d Dept 2009).

The malpractice claimed herein is SKP's reliance on the report issued by JDM, which occurred in June 2009, which report verified that the gift to plaintiffs son would not exceed $1 million. The claim did not arise when plaintiff discovered the error in the report, upon the commencement of the audit. Therefore, without more, the action is time-barred.

The statute of limitations in a legal malpractice action may be tolled by the continuous representation doctrine. *Williamson v PricewaterhouseCoopers LLP,* 9 NY3d 1 (2007). The continuous representation doctrine "recogniz[es] that a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered [interior quotation marks and citation omitted]." *Id.* at 9; *see also Shumsky v Eisenstein,* 96 NY2d 164. However, the continuous representation doctrine does not apply unless there is a "mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim."' *Williamson v PricewaterhouseCoopers LLP,* 9 NY3d at 9-10, quoting *McCoy v Feinman,* 99 NY2d at 306; *see also Voutsas v Hochberg,* 103 AD3d 445 (1st Dept 2013) (legal services relied on must be related to specific legal matter which is ground for malpractice claim).

Plaintiff argues that the doctrine of continuous representation tolls the statute of limitations in this matter, because SKP continued to represent her through the auditing process with the IRS, in an attempt to get the best result relating to the gift to her son. Plaintiff is correct. Plaintiff had the right to rely on SKP's attempts to guide her through the audit process, as part of the goal of structuring a tax-free gift to her son, and she had the right to hold off suit against SKP until it was obvious that it could no longer help plaintiff to set up the gift which was, the purpose of SKP's representation. This action is not barred by the statute of limitations against the attorney defendants.

ii. Failure to State a Cause of Action

> On a motion to dismiss pursuant to CPLR 3211, we must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory.

Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 (2001); *see also Leon v Martinez,* 84 NY2d 83 (1994). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss.'" *Ginsburg Development Companies, LLC v Carbone,* 85 AD3d 1110, 1111 (2d Dept 2011), quoting *EBC I, Inc. v Goldman, Sachs &* Co., 5 NY3d 11, 19 (2005).

The attorney defendants claim that they were hired to set up the gift to plaintiffs son, and that they did so, and it is correct that plaintiff is not complaining about SKP's structuring of the gift. The attorney defendants hired JDM, a licensed appraiser, to conduct the appraisal of the building. Plaintiff paid JDM directly.

Plaintiff charges SKP with failing to verify the accuracy of the report after it was issued. The attorney defendants insist that they have no expertise in appraising real estate, and never held themselves out to plaintiff as having such expertise, and had no duty to corroborate the report. The attorney defendants maintain that it was not legal malpractice to rely on the report.

"[A]n action for legal malpractice requires proof of three elements: the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and proof of actual damages." *Schwartz v Olshan Grundman Frome & Rosenzweig,* 302 AD2d 193, 198 (1st Dept 2003); *see also Pellegrino v File,* 291 AD2d 60 (1st Dept 2002). Negligence is shown if a plaintiff can demonstrate that "the attorney failed to exercise that degree of care, skill and diligence commonly possessed by a member of the legal profession, and that this failure caused damages." *Cosmetics Plus Group, Ltd. v Traub,* 105 AD3d 134, 140 (1st Dept 2013).

In order to show proximate cause, the plaintiff must show that "but for" the attorneys misfeasance, it would have attained a "more favorable result" in the underlying action. *Pozefsky v Aulisi,* 79 AD3d 467, 467 (1st Dept 2010); *see also Keness v Feldman, Kramer & Monaco,* PC., 105 AD3d 812, 813 (2d Dept 2013) (to make a case for malpractice, there must be a showing that but for the attorneys negligence, "there would have been a more favorable outcome in the underlying proceeding or that the plaintiff would not have incurred any damages"). If proximate cause is not established, the action must be dismissed "regardless of whether it is demonstrated that the attorney was negligent." *Schwartz v Olshan Grundman Frome & Rosenzweig,* 302 AD2d at 198.

The allegations in the complaint establish that JDM was an independent contractor hired by SKP to produce a report in the area of JDM's expertise. The attorney defendants did not supervise or instruct JDM in the creation of the report in any way.

"The general rule is that a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractors negligent acts." *Kleeman v Rheingold,* 81 NY2d 270, 273 (1993). "[T]he most commonly accepted rational is based on the premise that one who employs an independent contractor has no right to control the manner in which the work is to be done and, thus, the risk of loss is more sensibly placed on the contractor." *Id.* at 274; *see also Calandrino v Town of Babylon,* 95 AD3d 1054, 1055 (2d Dept 2012) ("control of the method and means by which the work is to be done is the critical factor in determining whether one is an independent contractor or an employee for the purposes of tort liability").

This rule is subject to three exceptions, none of which applies here. A party hiring an independent contractor may be liable for the negligence of that contractor if the party is negligent in "selecting, instructing, or supervising the contractor; there are "'non-delegable duties ¯ of the party "arising out of some relation toward the public or the particular plaintiff"; and the contract involves ¯ [w]ork which is specially, particularly, or "inherently" dangerous.'" *Brothers v New York State Electric and Gas Corp.,* 11 NY3d 251, 258 (2008), quoting Restatement [Second] of Torts § 409, Comment b.

In the present matter, where there is no allegation that SKP was negligent in choosing JDM, where there is no non-delagable duty, or dangerous condition, the attorney defendants are not liable for JDM's alleged negligence in preparing the report. Plaintiff has made no allegations which would establish that SKP should be held vicariously liable for JDM's mistake. There is no showing that the attorney defendants' negligence was the proximate cause of plaintiffs injuries, or that "but for" their handling of any duty owed to plaintiff, plaintiff would not have been injured. Consequently, the attorney defendants' motion to dismiss the complaint is granted. There is no need to go into the question of disqualifying plaintiffs counsel.

The court also note's that plaintiffs causes of action for breach of contract and breach of fiduciary duty are completely duplicative of the legal malpractice claim, and so, should be dismissed on that account as well. *See Voutas v Hochberg,* 103 AD3d 445; *Bernard v Proskauer Rose, LLP,* 87 AD3d 412 (1st Dept 2011).

B. JDM's Motion to Dismiss

i. Statute of Limitations

Plaintiffs causes of action against JDM are time-barred. As previously discussed, the action for professional malpractice accrued at the time of the injury, here, when the report was issued. This action was brought more than three years after that date.

The doctrine of continuous representation does not apply to toll the claims against JDM. JDM did not continue to represent plaintiff after the report was issued. In 2011, after the IRS audit began, JDM wrote a letter to plaintiff defending the report, explaining, essentially, that the report was accurate, despite the IRS audit. [1] This letter did not revive plaintiffs case against JDM, and was, in fact, not representation at all.

In any event, the breach of contract cause of action against JDM is duplicative of the cause of action for malpractice, and would be dismissed on that ground as well.

III. Conclusion

The motions should be granted and the complaint dismissed in its entirety. The complaint fails to state a cause of action against the attorney defendants, and is time-bared against JDM.

Accordingly, it is

ORDERED that the motion brought by defendants Stern Keiser & Panken, LLP f/n/a Stern Keiser Panken & Wohl LLP, and Judith B. Kunreuther to dismiss the complaint is granted; and it is further

ORDERED that the complaint is dismissed as to these parties with costs and disbursements to these parties as taxed by the Clerk of the court on the presentation of an appropriate bill of costs; and it is further

ORDERED that the motion brought by defendant Joan Marlow d/b/a JDM Real Estate Company to dismiss the complaint is granted; and it is further

ORDERED that the complaint is dismissed as to Joan Marlow d/b/a JDM Real Estate Company with costs and disbursements to these parties as taxed by the Clerk of the court on the presentation of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

[1] JDM does admit to some fault, blaming an errant employee's work.