SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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PAUL MAZARIO, PPL CAPITAL GROUP, INC., and COLLISION CAPITAL GROUP, INC.,

Plaintiffs,

- v -

SNITOW KANFER HOLTZER & MILLUS, LLP, MEYER, SUOZZI, ENGLISH & KLEIN, PC, and PAUL F. MILLUS,

Defendants.

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INDEX NO. 152742/2017

MOTION DATE

MOTION SEQ. NO. 1, 2

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 9-69, 71-77, 79-81 were read on this motion to dismiss

This is an action for legal malpractice. By pre-answer motion to dismiss, defendant Snitow Kanfer moves pursuant to CPLR 3211(a)(1), (3), (5) and (7) for an order dismissing the complaint. (NYSCEF 9, 10). By pre-answer motion to dismiss, defendant Meyer, Suozzi moves for the same relief. (NYSCEF 26, 27). Plaintiffs oppose both motions, which are consolidated for disposition and considered as one.

As set forth in the complaint, plaintiff Mazario is the owner and sole shareholder of plaintiffs PPL Capital and Collison Capital, both of which operated an auto body workshop in Manhattan. In June 2011, they suffered losses due to construction work that made the street abutting the workshop impassible. In August 2011, PPL hired Snitow Kanfer to represent it in an action to recover for the losses, which was commenced by defendant Millus on or about August 11, 2011. In November 2012, Millus left Snitow Kanfer to work at Meyer Suozzi. With

Mazario's consent, Meyer Suozzi by Millus took over the case, "continuing his representation of PPL Capital." (NYSCEF 11).

In support of their defense based on the three-year statute of limitations for malpractice actions, Millus relies on an email dated March 6, 2014, whereby PPL requested its legal file from Millus (NYSCEF 19, 69), and on an email dated August 15, 2013, by which he advised Mazario that it was "impossible" to continue to represent him and that he intended to move to withdraw from the case, and recommended that Mazario obtain new counsel (NYSCEF 18). Defendants thus argue that the action is time-barred, as it was commenced on March 23, 2017, which is more than three years after the latest date on which the action accrued, March 6, 2014. (NYSCEF 23, 79).

Plaintiffs maintain that Millus continued to represent PPL until his motion to be relieved was granted on April 22, 2014 (NYSCEF 10). They rely on Millus's promises to provide guidance and assistance to any new counsel retained by PPL and his delay in seeking to withdraw from the action, and observe that they did not hire new counsel until after Millus was relieved as counsel. They also complain of being deprived of the discovery required to establish whether the relationship between PPL and Millus continued beyond March 6. Moreover, they argue, the purported documentary evidence offered by defendants fail absent an affidavit of one with personal knowledge of the pertinent events. (NYSCEF 62).

In reply, plaintiffs contend that an attorney affirmation may serve as the vehicle for evidence on a motion to dismiss (NYSCEF 79), and argue that no discovery is necessary, as plaintiffs have PPL's entire legal file.

Pursuant to CPLR 3211(a)(5), a defendant seeking dismissal of an action as time-barred bears the initial burden of proving, *prima facie*, by affidavit or other competent evidence, that the

time in which to sue has expired. (*Kuo v Wall St. Mortg. Bankers, Ltd.*, 65 AD3d 1089, 1090 [2d Dept 2009]). An attorney affirmation may serve as the vehicle for such evidence. (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]; *Furlender v Sichenzia Ross Friedman Ference LLP*, 79 AD3d 470, 470 [1st Dept 2010]).

If the defendant meets its burden, the burden then shifts to the plaintiff to establish that, accepting its complaint as true and affording it the benefit of every favorable inference (*In re 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 whether an exception applies (*Gravel v Cicola*, 297 AD2d 620, 621 [2d Dept 2002]).

One such exception is continuous representation, which tolls the three-year statute of limitations applicable to legal malpractice claims. (*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" (*In re Estate of Merker*, 18 AD3d 332, 333 [1st Dept 2005]). Continuous representation is marked by continuing trust and confidence between attorney and 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]).

Here, defendants meet their initial burden by offering undeniable evidentiary proof that the malpractice claim accrued, at the latest, on March 6, 2014, more than three years before this action commenced, when PPL requested its legal file, thereby demonstrating a lack of trust and

confidence in Millus. (*See Farage*, 124 AD3d at 168 [on motion for summary judgment, retrieval of litigation file marked end of representation, and consent to change attorney form executed later was "mere ministerial task" to inform others that representation ended]; *Aseel*, 106 AD3d at 1038 [on motion to dismiss claim as time-barred, trial court correctly concluded relationship necessary to invoke continuous representation ceased to exist when plaintiff surreptitiously removed his file from attorney's office]).

While the order relieving Millus as counsel formalized the end of the attorney-client relationship, it is not dispositive of when the representation ceased. (*See Aaron v Roemer, Wallens & Mineaux, LLP*, 272 AD2d 752, 755 [3d Dept 2000], *lv dismissed* 96 NY2d 730 [2001] [as plaintiff, in letter to court, did not contest attorney's withdrawal and described relationship as fractured, date of letter, as opposed to date on which withdrawal formalized, marked end of representation]). Moreover, Millus's offer to provide guidance to new counsel does not clearly indicate that the relationship continued beyond March 6, 2014 (*see id.* at 755 [plaintiff's letter to court stating he would not contest motion to withdraw and was seeking new counsel indicated he perceived relationship with counsel broken]), nor does Mazario's unilateral belief that representation continued (*see Davis v Cohen & Gresser, LLP*, 160 AD3d 484, 484 [1st Dept 2018] [statute of limitations not tolled as, *inter alia*, record reflected lack of mutual understanding that defendant would continue to represent plaintiff]). Likewise, in these circumstances, Millus's delay in moving to withdraw from representation does not prove continuous representation. (*See Riley v Segan, Nemerov & Singer, P.C.*, 82 AD3d 572, 572-573 [1st Dept 2011] [not dispositive that attorney never moved to withdraw, as he sent client letter stating he could not proceed with case, thereby severing relationship]).

Bass & Ullman v Chanes is distinguishable as, there, the defendant law firm encouraged the plaintiff to retain counsel in a separate criminal matter, and thereafter assisted counsel in that matter, whereas here, the offer to assist was contingent on plaintiff's retention of new counsel. (185 AD2d 750, 750 [1st Dept 1992]).

For all of these reasons, plaintiffs fail to raise a question of fact as to whether the statute of limitations was tolled, nor do they demonstrate a need for additional discovery under the circumstances. As plaintiffs' claim is barred by the statute of limitations, I need not address any other arguments.

Accordingly, it is hereby

ORDERED, that the motions of defendants Snitow Kanfer and Meyer Suozzi to dismiss the complaint are granted, the complaint is dismissed in its entirety, and the clerk is directed to enter judgment accordingly.

5/24/2018
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:	[x]	CASE DISPOSED		NON-FINAL DISPOSITION			
	[X]	GRANTED	[ ] DENIED	GRANTED IN PART		[ ] OTHER	
APPLICATION:	[ ]	SETTLE ORDER		SUBMIT ORDER			
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