



Statute of Limitations in Legal Malpractice Claims – Continuous Relationship versus Continuous Representation

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One of the most effective defenses to professional malpractice cases is the expiration of the statute of limitations. Plaintiffs often try to get around this defense by claiming continuous representation. The recent Second Department case *Goodman v. Weiss, Zarett, Brofman, Sonnenklar & Levy, P.C.*, 2021 N.Y. Slip Op. 05957 (November 3, 2021) demonstrates that simply having a continuous relationship with an attorney does not toll the statute of limitations, the continuous representation doctrine is “limited to the course of representation concerning a specific legal matter.”

Background

In New York, an action to recover damages for legal malpractice must be commenced within three years from the accrual of the claim, which is measured from the commission of the alleged malpractice, not from when the malpractice is discovered. See *Shumsky v. Eisenstein*, 96 N.Y.2d 164 (2001); see also, e.g., *Ackerman v. Price Waterhouse*, 84 N.Y.2d 535, 541 (1994); *Glamm v. Allen*, 57 N.Y.2d 87, 95 (1982). To invoke tolling of the statute of limitations pursuant to the “continuous representation” doctrine, a plaintiff is required to establish, by sufficient evidentiary facts, “an ongoing, continuous, developing and dependent relationship between the attorney” or a “mutual understanding of the need for further representation on the specific subject matter underlying the malpractice

claim.” See *Matter of Merker*, 18 A.D.332, 332-333 (1st Dept 2005); *Hasty Hills Stables, Inc. v. Dorfman, Lynch, Knoebel & Conway*, 52 A.D.3d 566 (2d Dept. 2008). The concern is whether there has been continuous representation concerning a specific legal matter, not merely a continuing relationship between the client and lawyer. See *Shumsky, supra*.

Goodman v. Weiss, Zarett, Brofman, Sonnenklar & Levy, P.C.

The recent Second Department case *Goodman* stands for the proposition that continuous representation tolls the running of the statute of limitations only so long as the professional defendant continues to represent the plaintiffs in connection with the particular transaction which is the subject of the action, not merely during the continuation of a general professional relationship.

In *Goodman*, the plaintiff entered into a retainer agreement in December 2010 with defendant to represent plaintiff in negotiating an employment contract for services to be performed at St. Luke’s Roosevelt Hospital Center and Beth Israel Medical Center. In January 2011, plaintiff entered into a five-year employment contract with the hospitals, which included a termination clause. The termination clause provided for termination “for cause”, defined as the failure to satisfactorily perform any material obligations, unless remedied within 30 days of written notice.

Generally, absent unique circumstances, if a law firm represents a client on an initial transaction and then later represents the client in litigation related to that transaction, these are considered two wholly separate matters for the purposes of continuous representation.

Therefore, courts take a narrow view of the subject matter of the representation for the purposes of establishing continuous representation.

On November 15, 2013, the hospitals served plaintiff with written notice advising employment would be terminated in three days unless he cured various alleged breaches of his employment contract. Plaintiff contacted defendant regarding the notice of potential termination and defendant drafted a response to the notice. Plaintiff was terminated December 19, 2013.

In June 2014, plaintiff, represented by defendant law firm, commenced an action against the hospitals for damages for breach of the employment contract. In August 2014, plaintiff substituted other counsel for defendant. The plaintiff settled his action in 2016, and then commenced an action against defendant in July 2017. Of import, the malpractice alleged that defendant failed to properly negotiate plaintiff's employment contract by permitting the overbroad "failure to satisfactorily perform" language to be included without modification and plaintiff was therefore forced to accept a de minimis settlement.

Defendant moved for dismissal for, among others, statute of limitations grounds, which was granted. Plaintiff moved to reargue the dismissal which was granted, but upon reargument, adhered to the prior determination. On appeal, the Second Department agreed the legal malpractice cause of action was time barred under CPLR 214(6) and

continuous representation did not toll the statute of limitations. The Appellate Division noted there was no evidence that the defendant provided legal services to plaintiff between January 2011 and November 2013. Additionally, when plaintiff did engage defendant again, it was for a distinct service related to a different subject matter. Therefore, continuous representation was inapplicable.

Analysis

The *Goodman* holding is helpful because it supports the argument that even if subsequent representation is tangentially related to the initial retainer, the courts will parse out the terms of the relationship and are able to differentiate between related, but independent, subject matter.

We note that a party cannot create a relationship based on its own beliefs or actions and the continuation of a general professional relationship is insufficient to toll the statute of limitations. In *Davis v. Cohen & Gresser, LLP*, 160 AD3d 484 (1st Dept. 2018), the court concluded that the attorney-client relationship was severed upon the death of the decedent. See *id.* Thereafter, defendant did not represent the estate with regard to the action wherein the claimed malpractice occurred, but in other litigation. Thus,

the Court held, "the record evidence demonstrates the lack of a mutual understanding that defendant would continue to represent the estate in the Devine action, even if there was a continuation of a general professional relationship." *Id.* Generally, absent unique circumstances, if a law firm represents a client on an initial transaction and then later represents the client in litigation related to that transaction, these are considered two wholly separate matters for the purposes of continuous representation. See *Pandozy v. Robert J. Gumenick, P.C.*, 2008 U.S. Dist. LEXIS 41440 (S.D.N.Y. May 23, 2008) (finding no continuous representation where defendant represented plaintiff for the sale of his apartment and then subsequently regarding litigation related to specific performance of the contract). Therefore, courts take a narrow view of the subject matter of the representation for the purposes of establishing continuous representation.

Comparison with Other Jurisdictions

New York is not the only state to have considered the merits and limitations of the continuous representation rule. For example, courts in both Pennsylvania and Michigan have also recently examined the doctrine and have come to much different conclusions.

On the one hand, the Pennsylvania Supreme Court completely rejected the doctrine a little over a year ago in *Clark v. Stover*, 242 A.3d 1253 (Pa. 2020). Although the court noted that the doctrine had been adopted by many other states, it held that adopting it in Pennsylvania was the prerogative of the legislature, not the courts, and also hinted that the rule was anyway unnecessary due to other tolling doctrines for unknown injuries (i.e., the discovery rule) or fraud (i.e., fraudulent concealment). The court also held

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that it could discern no reason to treat attorneys differently than other professionals who are not subject to a similar rule, which can allow claims to be brought years after the standard limitations period has passed.

Michigan law, on the other hand, functions similarly to the Second Department’s interpretation in *Goodman*. Michigan’s statute of limitations, MCL 600.5838, imposes a two-year statute of limitations for legal-malpractice claims. The Michigan Supreme Court interpreted MCL 600.5838 in *Gebhardt v. O’Rourke*, 444 Mich. 535, 510 N.W.2d 900 (S. Ct. Mich. 1994) to begin running the statute of limitations “from the time the attorney stops representing [the plaintiff] regarding the matter in question...” 510 N.W.2d 900 (emphasis added). And in *Maddox v. Burlingame*, 205 Mich. App. 416, 517 N.W.2d 816 (Mich. Ct. App. 1994), the Michigan Court of Appeals held that, because the attorney-client relationship is contractual in nature, the relationship ends “upon completion of a specific legal service that the lawyer was retained to perform.” 205

Mich. App. 450, 517 N.W.2d 818. See also *Chapman v. Sullivan*, 161 Mich. App. 558, 562, 411 N.W.2d 754 (holding that the statute of limitations begins running when the attorney stops representing the client for the matter from which the alleged malpractice arose).

The Michigan Court of Appeals has differentiated between continuing representation and remedial representation related to prior representation. For example, in *Braspenick v. Johnson Law PLC*, unpublished per curiam opinion of the Court of Appeals, issued April 19, 2018 (Docket No. 338556), the plaintiff hired the defendant law firm to represent her in a medical-malpractice action. After the jury returned a verdict of no cause, the law firm sent the plaintiff a letter stating that it would take no further action with regard to an appeal for her case. But the court granted case evaluation sanctions (a Michigan-specific ADR process) and taxable costs against the plaintiff, and the law firm filed a motion for relief from judgment. The court ultimately held that the legal-malpractice claim accrued

when the law firm sent the letter to the plaintiff, stating that it would take no further action. The court held that the filing of the motion for relief from judgment did not extend the accrual date, as it was a remedial effort concerning past representation, rather than a continuation of the representation. In sum, Michigan’s caselaw is generally consistent with the analysis in *Goodman*.

Conclusion

Thus, to successfully invoke the continuous representation toll of the statute of limitations in New York, a plaintiff is required to establish “an ongoing, continuous, developing and dependent relationship between the attorney” or a “mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim.” If the facts indicate that the attorney-client relationship was related one specific subject, a subsequent representation tangentially related to the initial representation will generally break continuity. ■

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This article was prepared by **Mehreen Hayat** and **Andrew Jones** of the New York City-based law firm of *Furman Kornfeld & Brennan LLP*. Mehreen and Andrew are part of a team of 36 lawyers and paralegals devoted to the defense of attorneys and other professionals in malpractice and disciplinary matters, as well as the defense of construction and personal-injury accidents. For more information about the above topic or authors, please visit: www.fkblaw.com. We trust that the article was useful and thought-provoking; however, please note that it is intended as a general guide and opinion only, not a complete analysis of the issues addressed, and readers should always seek specific legal guidance on particular matters.

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