



Alerts

Plaintiff's Legal Malpractice Action—First Filed Too Early, Then Refiled Too Late—Results in Dismissal With Prejudice

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Flintlock Constr. Servs, LLC v. Rubin, Fiorella & Friedman, LLP, 2020 NY Slip Op 06711 (App. Div.).

Brief Summary

After plaintiff's initial legal malpractice action was dismissed as premature because the underlying litigation was still pending, a New York appellate court affirmed the trial court's dismissal of plaintiff's subsequently filed legal malpractice claim. It affirmed because plaintiff failed to (1) refile the action within the three-year statute of limitations, (2) show the statute was tolled and (3) show that it was actively misled or prevented from commencing the action earlier.

Complete Summary

Sometime prior to 2004, Flintlock Construction Services (plaintiff) and Well-Come (non-party) entered into a construction agreement for excavation work at a property. In 2004, an adjacent property owner brought a claim against Well-Come and plaintiff alleging damage to its property resulting from the excavation work. Subsequently, Well-Come brought a declaratory judgment against plaintiff and its insurer for defense and indemnity in the property damage claim.

Plaintiff's counsel—the defendant in this legal malpractice action—allegedly entered into two stipulations without plaintiff's consent. The first stipulation made in 2006 was that plaintiff and its insurer would jointly defend and indemnify Well-Come for the excavation damages including any damages for Well-Come's own negligence. In 2007, the second stipulation discontinued the declaratory judgment action brought by Well-Come against plaintiff, and stipulated that plaintiff alone would defend and indemnify Well-Come against the claim from the property owner.

The alleged malpractice occurred in 2006 and 2007 when plaintiff's counsel agreed to the stipulations that plaintiff would be solely responsible for all damages in the property damage litigation. Because plaintiff feared future liability in the yet unresolved property damage case—and before the property damage trial—plaintiff filed a legal malpractice action against the defendant in

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2011. However, the court dismissed the case as premature in 2013, finding: "[a]t this juncture, plaintiff's allegations of proximate cause and damages are premature or speculative, as it is unable to prove that any such damages are directly traceable to defendant's conduct." The court in the first malpractice action thus dismissed the case "without prejudice to raising the malpractice claims upon resolution of the underlying [property damage] case." See *Flintlock Construction Services v. Rubin, Fiorella & Friedman, LLP*, 110 A.D.3d 426 (1st Dept. 2013).

On July 29, 2013, in the property damage litigation filed by the adjacent property owner, a jury issued a verdict of damages against Well-Come and Flintlock. After five years of post-trial motions and proceedings, a judgment was finally entered against plaintiff and Well-Come on September 5, 2018.

Less than two weeks after that judgment was entered, plaintiff filed a second legal malpractice claim against the defendant alleging the firm was negligent by entering into the stipulations. Plaintiff alleged that entering into the stipulations without plaintiff's consent, which shifted the responsibility for Well-Come's defense and liability from plaintiff's insurer to plaintiff alone, was professional negligence. In December 2018, the trial court granted defendant's motion to dismiss. The court ruled that the complaint was time-barred because the statute of limitations commenced on July 29, 2013, the date the jury rendered its verdict, because the plaintiff's damages were reasonably calculable on that date.

Plaintiff appealed, but the appellate court affirmed. The court noted that in New York:

"An action to recover damages for an attorney's malpractice must be commenced within three years from accrual (see CPLR § 214[6]). A legal malpractice claim accrues when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court. In most cases, this accrual time is measured from the day an actionable injury occurs [or when the damages are sufficiently calculable], even if the aggrieved party is then ignorant of the wrong or injury." (*McCoy v. Feinman*, 99 NY2d 295, 301 (2002) (emphasis in original; internal quotation and citation omitted)).

According to the court, the action commenced on September 17, 2018 was time-barred because any damages arising from defendant's alleged malpractice were sufficiently calculable for pleading purposes when the jury rendered its verdict on July 29, 2013. The court further held that plaintiff failed to show that the statute was tolled or that plaintiff was actively misled or prevented in some extraordinary way from timely commencing a malpractice action.

Significance of Decision

This was a very harsh result for the plaintiff in this case. Plaintiff initially filed its malpractice case in 2013, but the court dismissed it, without prejudice, as premature because the underlying property damage case was not yet resolved or tried. However, when plaintiff refiled after the underlying case was resolved, the case was dismissed with prejudice and affirmed on appeal as untimely because following the adverse verdict in July 2013, there were five years of post-trial proceedings.

There are a couple of options available to a party faced with similar circumstances. One is to seek a tolling agreement from the potential defendant—with extensions, if necessary. Another option is to file the malpractice action and seek a stay until the underlying litigation is fully resolved.