State of New York

Court of Appeals

Remittitur

HON. JONATHAN LIPPMAN, *Chief Judge, presiding.*

COPY

No. 24
James L. Melcher,
Appellant,
v.
Greenberg Traurig, LLP, et al.,
Respondents.

Appellant in the above entitled appeal appeared by Jeffrey A. Jannuzzo, Esq.; respondents appeared by Simpson Thacher & Bartlett, LLP.

The Court, after due deliberation, orders and adjudges that the order is reversed, with costs, and defendants' motion to dismiss the complaint is denied. Opinion by Judge Read. Chief Judge Lippman and Judges Graffeo, Smith, Pigott and Rivera concur. Judge Abdus-Salaam took no part.

The Court further orders that this record of the proceedings in this Court be remitted to Supreme Court, New York County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

Andrew W. Klein, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, April 1, 2014

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Respondents.

OPINION

James T. Potter, for appellant.
Roy L. Reardon, for respondents.

READ, J.:

Judiciary Law § 487 exposes an attorney who "[i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party" to criminal (misdemeanor) liability and treble damages, to be recovered by the injured party in a civil action. After plaintiff James L. Melcher (Melcher) brought this action for attorney deceit against defendants Greenberg, Traurig, LLP and

Leslie Corwin (collectively, defendants), defendants moved to dismiss, arguing that the lawsuit was precluded by the three-year limitations period in CPLR 214 (2). This provision governs "an action to recover upon a liability, penalty or forfeiture created or imposed by statute," with exceptions not relevant here.

Melcher countered that his action was timely because the applicable statute of limitations was CPLR 213 (1). This so-called "catch-all" or residual provision requires "an action for which no limitation is specifically prescribed by law" to be brought within six years of a claim's accrual. Alternatively, Melcher contended that defendants were equitably estopped from asserting their statute-of-limitations defense; and that, in any event, his claim accrued within the three-year limitations period.

Supreme Court denied defendants' motion to dismiss. While the trial judge agreed with defendants that the applicable statute of limitations was the three-year period in CPLR 214 (2), she concluded that defendants were equitably estopped from asserting this defense. Upon defendants' appeal, the Appellate Division, with two Justices dissenting, reversed, granted defendants' motion and dismissed Melcher's amended complaint in its entirety (102 AD3d 497 [1st Dept 2013]).

The majority in the Appellate Division decided that the doctrine of equitable estoppel did not apply, and that Melcher's claim accrued outside the three-year limitations period. The

dissenting Justices expressed no opinion on equitable estoppel, but disagreed with the majority as to whether Melcher's claim was timely. Thus, all five appellate judges agreed with Supreme Court that CPLR 214 (2), rather than CPLR 213 (1), governs an action under Judiciary Law § 487 for attorney deceit; they simply differed over the legal question of when Melcher's claim accrued based on the pleaded facts. Melcher appealed as of right, based on the two-Justice dissent (see CPLR 5601 [a] [1]), and we denied defendants' subsequent motion to dismiss the appeal on the ground that the dissent was not on a question of law (21 NY3d 908 [2013]). We now reverse.

A few years ago, the United States Court of Appeals for the Second Circuit certified to us the question of whether "a successful lawsuit for treble damages brought under [Judiciary Law § 487 could] be based on an attempted but unsuccessful deceit[]" (Amalfitano v Rosenberg, 533 F3d 117, 126 [2d Cir 2008]). The attorney-defendant in Amalfitano argued that a section 487 claim was analogous to fraud, which requires an element of reliance, and therefore no recovery could be made for an attempted but unsuccessful deceit practiced on the court. In Amalfitano v Rosenberg (12 NY3d 8 [2009]), we disagreed, observing that section 487 "[was] not a codification of" and "[did] not derive from common-law fraud" (id. at 12, 14), but instead "descend[ed] from the first Statute of Westminster, . . . adopted by the Parliament summoned by King Edward I of England in

1275" (id. at 12).

Here, Supreme Court and the Appellate Division essentially (and understandably) interpreted the words "derive from" and "descend[] from" as used in Amalfitano in their narrowest possible sense to mean "originated in" the first Statute of Westminster; hence, they concluded, an action for attorney deceit is governed by the three-year period for recovery "upon a liability, penalty or forfeiture created or imposed by statute" (CPLR 214 [2]). This marked a change in the law because the Appellate Division had previously held that a claim for attorney deceit was governed by the six-year statute of limitations applicable to common-law fraud (CPLR 213 [8]), as opposed to the three-year period in CPLR 214 (2) (see Guardian Life Ins. Co. of Am. v Handel, 190 AD 57 [1st Dept 1993]; New York City Tr. Auth. v Morris J. Eisen, P.C., 276 AD2d 78 [1st Dept 2000]). As the courts below recognized, though, Amalfitano renders these decisions invalid. But an action for attorney deceit is not necessarily an action to recover under a statute just because it may be traced back to the first Statute of Westminster rather than common-law fraud.

Melcher points out that English statutory and common law became New York common law as part of the Colonial-era incorporation or "reception" of English law into New York law. As explained in Bogardus v Trinity Church (4 Paige Ch 178, 198 [1833]),

> "[t]he common law of the mother country as modified by positive enactments, together with the statute laws which are in force at the time of the emigration of the colonists, become in fact the common law rather than the common and statute law of the colony. The statute law of the mother country, therefore, when introduced into the colony of New-York, by common consent, because it was applicable to the colonists in their new situation, and not by legislative enactment, became a part of the common law of this province" (see also Beers v Hotchkiss, 256 NY 41, 54 [1931, Cardozo, C.J.] ["(T)he statutes of the mother country in existence at the settlement of a colony . . . are deemed to have entered into the fabric of the common law, and like the common law itself became law in the colony unless unsuited to the new conditions"] [emphasis added]).

A cause of action for attorney deceit therefore existed as part of New York's common law before the first New York statute governing attorney deceit was enacted in 1787 (see Amalfitano, 12 NY3d at 12 [discussing L 1787, ch 35, § 5). The 1787 statute enhanced the penalties for attorney deceit by adding an award for treble damages, but did not create the cause of action (see State of New York v Cortelle Corp., 38 NY2d 83, 85 [1975] ["Statutory provisions which provide only additional remedies or standing do not create or impose new obligations," within the meaning of CPLR 214 [2]]; see also Orr v Kinderhill Corp., 991 F2d 31, 34 [2d Cir 1993] ["That the statute merely enlarges the common-law scheme of liability or grants additional remedies is insufficient to bring it within CPLR 214 [2]").

Thus, even if a claim for attorney deceit originated in the first Statute of Westminster rather than preexisting English common law (a question unresolved by Amalfitano and disputed by the parties in this case), liability for attorney deceit existed

at New York common law prior to 1787. As a result, claims for attorney deceit are subject to the six-year statute of limitations in CPLR 213 (1). Because of our disposition of this appeal, we do not reach and need not resolve Melcher's other arguments.

Accordingly, the order of the Appellate Division should be reversed, with costs, and defendants' motion to dismiss the complaint denied.

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Order reversed, with costs, and defendants' motion to dismiss the complaint denied. Opinion by Judge Read. Chief Judge Lippman and Judges Graffeo, Smith, Pigott and Rivera concur. Judge Abdus-Salaam took no part.

Decided April 1, 2014

State of New York
Court of Appeals

Andrew W. Klein
Chief Clerk and
Legal Counsel to the Court

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