UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re

MELVYN BENTLEY, Case No. 98-11908

Debtor.

MELVYN BENTLEY,

Plaintiff,

AND

MARK W. SWIMELAR, AS AND ONLY AS
CHAPTER 12 STANDING TRUSTEE,

Co-plaintiffs,

-against- Adversary No. 02-90374

THOMAS G. CLEMENTS
AND
THE CLEMENTS FIRM,

Defendants.

APPEARANCES:

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Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

Currently before the court are competing motions for summary judgment involving alleged legal malpractice. The court has jurisdiction over this core adversary proceeding pursuant to 28 U.S.C. §§ 157(a), 157(b)(1), 157(b)(2)(O), and 1334(b).

FACTS

Melyvn Bentley ("Plaintiff" or "Debtor") retained Thomas G. Clements ("Clements") and the Clements Firm ("Firm") (collectively the "Defendants") in May, 1997 to provide professional legal services. Defendants' representation included commencement of the Debtor's instant Chapter 12 case on or about March 20, 1998. The Defendants' representation of the Debtor continued for approximately 2 1/2 years. The exact date of the termination of the professional relationship is unclear. The following events, however, are pertinent:

1) On December 1, 1999, the Debtor objected in writing to a fee application by the Defendants (Ex. 15 to Bush Att'y Aff. in Supp.) with the assistance of other counsel (Bentley Tr. at 449).

2) On December 9, 1999, Clements and the Debtor both appeared in Bankruptcy Court in connection with Defendants' fee application. (Bentley Tr. at 441.) Irene Barret accompanied the Debtor, at his request, to help him in his discussions with Clements. (Bentley Tr. at 447.)

3) After December 9, 1999, the Debtor and Clements did not speak in person or over the telephone (Bentley Tr. at 448), except at a January 7, 2000 chamber's conference (Bentley Tr. at 458) in connection with Debtor's proposed sale of real estate and notice to Defendants as well as Defendants' request to withdraw (Docket No. 68).

4) On December 21, 1999, Clements sent the Debtor a status letter in which he told the Debtor, among other things:

> You have not returned my two phone calls since our meeting in the Bankruptcy Court. If you are not going to communicate with me, it will be impossible to work together, and you should attempt to find other counsel....
>
> ....
>
> We will have no hard feelings if you seek other counsel, and we would be glad to refer you to three or four attorneys, probably in Albany, who might be able to meet your needs.
>
> ....
>
> You should know that I am growing less sympathetic with your situation the longer this matter drags out and the longer you refuse to communicate with me. You should know that our fee dispute is a sideshow which is distracting your attention, energy and limited resources from the real culprits in this matter.

(Ex. F to Clements Aff. in Supp.)

5) On December 29, 1999, the Debtor wrote to Defendants to advise that he needed twenty days to consider the Defendants' letter of December 21, 1999, but he further directed, "I want you to cease all work on my case until further notice." (Ex. 16 to Bush Att'y Aff. in Supp.)

6) On December 31, 1999, the Defendants wrote to the Debtor that, "Because of your last correspondence ... you should seek other counsel immediately. In serving your best interests, we have not given the United States Attorney any indication that our attorney-client relationship has disintegrated ...With considerable reluctance and regret, we do not feel that we can continue to represent you in any of your legal affairs." (Ex. G to Clements Aff. in Supp.)

On December 30, 2002, the Debtor filed a complaint against the Defendants alleging certain acts of legal malpractice involving the Defendants' representation of the Debtor in his Chapter 12 proceeding. The Debtor filed a first amended complaint on January 16, 2003. The first amended complaint added Mark W. Swimelar, Chapter 12 Trustee ("Trustee" or "Co-Plaintiff"),[1] as a plaintiff. On April 10, 2003, the Debtor filed a second amended complaint, and Defendants filed an answer to the second amended complaint on April 17, 2003.

On March 8, 2004, the Defendants filed a motion for summary judgment, and on March

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[1] The Trustee states that he was joined as a party plaintiff "solely due to the concerns of the debtor that he may not have standing in his name only ... In the event it is found that the debtor has standing, I would have no objection to dismissal of the trustee as a party." (Letter from Trustee to court of 3/16/04).

11, 2004, the Plaintiffs filed their dueling motion for summary judgment. Opposition was filed to both motions. Following oral argument, the court provided the parties with an opportunity to file supplemental memoranda of law. The matter was then submitted for decision.

ARGUMENT

The Defendants essentially denied all allegations of the second amended complaint and pled affirmative defenses, including that the statute of limitations ("SL") applicable to the Plaintiffs' second amended complaint expired prior to the filing of the original complaint. The Defendants' motion for summary judgment again raises the specter of the possible untimeliness of the adversary proceeding and the more comprehensive proposition that the Plaintiffs would, in any event, be unable to prove malpractice as a matter of law. The Plaintiffs' motion for summary judgment requests a determination of malpractice in general and a violation of § 487 of the New York Judiciary Law [2] in particular.

In support of their SL defense, the Defendants argue that

> [T]he relationship between the parties broke down prior to the end of December of 1999 as indicated by the failure to pay the fees, the objections to the fees where plaintiff specifically states in his letter to the court that there was work that was not done or was unnecessary which Tom should not be compensated for. Plaintiff attends a meeting on December 9, 1999, orally enters a stipulation, then refuses to sign the document, calls the trustee and complains about the services being provided, and never returns Tom Clements' phone calls. Tom Clements writes a letter to plaintiff about the phone call to

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[2] Section 487 of the New York Judiciary Law provides that:

An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or
2. Wilfully delays his clients's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

> the trustee and that plaintiff never responds to or returns Tom's phone calls. This is unrefuted. This was an ongoing situation where the attorney-client relationship broke down. Plaintiff writes a letter dated December 29, 1999 saying stop work. Meanwhile, he has run to other counsel in November-December and that counsel has written a letter December 1, 1999 for the plaintiff raising issues about Tom's services. This obviously [sic] in not any indicia of an ongoing, continuing, developing, and dependent relationship between the client and attorney.

Defs.' Reply Mem. of Law filed April 28, 2004, at 4-5.

The Plaintiffs respond by stating that the professional relationship terminated on or after December 31, 1999 based upon the sequence and content of the letters discussed *supra*, and thus, the filing of a complaint on December 30, 2002 was timely.

DISCUSSION

The threshold, and possibly dispositive, issue that must be addressed is whether Plaintiffs' malpractice litigation is barred by the SL. Under New York law, an action for legal malpractice, regardless of whether the underlying theory is based in contract or tort, is governed by a three-year statute of limitations. CPLR § 214(6) (McKinney's 2003). An action for malpractice accrues when the malpractice complained of occurs. *Glamm v. Allen*, 57 N.Y.2d 87 (1982) (citations omitted). The continuous representation rule, however, serves to toll the SL on a legal malpractice claim while the attorney continues to represent the client in the same matter in which the malpractice allegedly occurred. Here it is undisputed that the acts or omissions of the Defendants constituting the alleged legal malpractice occurred more than three years prior to the commencement of the adversary proceeding. As a result, the adversary proceeding is time barred unless the SL was tolled by the continuous representation rule.

As discussed by the Appellate Division, Third Department, this judge-made doctrine is based on the premise that

> [T]he client " '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' ...[n]either is a person expected to jeopardize his pending case or his relationship with the attorney handling that case during the period that the attorney continues to represent the person." The rule also recognizes "that the professional 'not only is in a position to identify and correct his or her malpractice, but is best placed to do so'."

Aaron v. Roemer, Wallens & Mineaux, L.L.P., 272 A.D.2d 752, 754 (N.Y. App. Div. 3d Dep't. 2000) (citations omitted).

Because the rule ceases to operate when these considerations no longer prevail, courts have recognized the client's continuing trust and confidence as a prerequisite to the rule's application. *Id.* at 755 (citations omitted). To invoke the continuous representation rule, there must be "clear indicia of an ongoing continuous, developing, and dependent relationship between the client and the attorney." *Id*. at 754 (citation omitted).

The time line in this case is far from clear as to when the professional relationship between the parties terminated, or more specifically when the Debtor's trust and confidence in the Defendants eroded such that the three year SL began to run.

This court concludes that the irreparable deterioration of the attorney-client relationship between the parties occurred and, thus, the SL began to run, sometime between December 1, 1999 and a time prior to the issuance of the December 31, 1999 letter. For in that communication, the Defendants advised that the relationship had already deteriorated and, consequently, they could no longer represent the Debtor.

As indicated previously, the Plaintiffs commenced their malpractice action on December 30, 2002. The action is timely if the Defendants' representation of the Debtor did not end until

December 28, 1999 or later.[3]

The court finds a question of fact exists as to when the parties' attorney-client relationship terminated; thus, it would be inappropriate for the court to grant either motion for summary judgment. However, because the Defendants' SL defense may prove to be dispositive, the court will schedule a hearing on that limited issue.

Based upon the foregoing, it is

ORDERED, that an evidentiary hearing for the court to make appropriate findings regarding the Defendants' statute of limitations defense will be held on December 14, 2004, at 11:00 a.m., with pretrial submissions due by December 7, 2004; and it is further

ORDERED, that the motions for summary judgment are denied, without prejudice, subject to renewal pending the outcome of the December 14, 2004 hearing.

Dated:

Hon. Robert E. Littlefield, Jr.
U.S. Bankruptcy Judge

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[3] December 28, 2002 was a Saturday. Thus, any bar date occurring on Saturday, December 28, 2002, or Sunday, December 29, 2002 would have been tolled until Monday, December 30, 2002.