

**Pure Power Boot Camp, Inc. v Fross Zelnick
Lehrman & Zissu, P.C.**

2017 NY Slip Op 30359(U)

February 27, 2017

Supreme Court, New York County

Docket Number: 112294/11

Judge: Joan M. Kenney

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 8

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PURE POWER BOOT CAMP, INC., PURE POWER
BOOT CAMP FRANCHISING CORPORATION, and
PURE POWER BOOT CAMP JERICHO INC.,

Plaintiffs,

Index No. 112294/11

Mot Seq. 009

- against -

FROSS ZELNICK LEHRMAN & ZISSU, P.C.,

Defendant.

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FROSS ZELNICK LEHRMAN & ZISSU, P.C.

Defendant and Interpleading
Plaintiff,

- against -

PURE POWER BOOT CAMP, INC., a Delaware
corporation,

Interpleaded Defendant.

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HON. JOAN M. KENNEY, J.S.C.:

Defendant, Fross Zelnick Lehrman & Zissu, P.C. ("Fross")
moves, pursuant to CPLR 3212 or 3126, to dismiss the amended
Complaint in this action sounding in legal malpractice.

BACKGROUND

Plaintiffs, Pure Power Boot Camp, Inc., Pure Power Boot Camp
Franchising Corporation, and Pure Power Boot Camp Jericho Inc.,
commenced this action seeking to recover damages from defendant
for legal malpractice and professional negligence. The
submissions of the parties document the extensive procedural
history in this action.

In November 2005, plaintiff Pure Power Boot Camp, Inc., a New York corporation ("PPBC-New York"), retained Fross to perform certain legal services, including preparing, among other things, (1) a non-disclosure and non-compete employment agreement ("NDA"), and (2) a trade dress application for the Service Mark identified in the United States Patent and Trademark Office ("USPTO") as Service Mark Reg. No. 3,580,542, to protect plaintiff from unfair competition (Engagement Letter, Not of Mot, Exh J).

Fross reportedly provided the legal services and submitted invoices totaling \$33,478.77 to PPBC-New York. A dispute arose as to the amount owed, and the parties reportedly agreed to settle the dispute by payment to Fross in the amount of \$5,000.00 and delivery of a general release. PPBC-New York paid the \$5,000.00, but Fross never delivered the general release.

In April 2008, PPBC-New York discovered that two of its former employees, each of whom had executed NDAs prepared by Fross, had opened a competing business using PPBC-New York's property, in violation of the NDAs. Plaintiffs also alleged that Fross was negligent in preparing, filing, and amending the trade dress application, including submitting the application under the name Pure Power Boot Camp, Inc., a Delaware corporation ("PPBC-Delaware"), which had reportedly been formed in December 2005 for tax purposes and was to cease operation at the end of 2005.

After gaining access to one of the employee's email accounts, PPBC-New York commenced an action for injunctive relief in New York State Supreme Court. The Court determined that the NDA was unenforceable as drafted, and allowed the former employees to operate their business. However, the Court directed the former employees to return certain materials that they had stolen from PPBC-New York and also instructed them to make alterations to distinguish the appearance of its business from PPBC-New York.

The former employees then removed the action to federal court and sought to preclude the use or disclosure of certain of the emails. The Court issued an order precluding the use of emails, finding that the emails were accessed without the employees' permission, in violation of the Stored Communications Act, 18 USC 2701 *et seq.* ("SCA") (*see Pure Power Boot Camp, Inc. v Warrior Fitness Boot Camp, LLC*, 587 F Supp 2d 548 [SD NY 2008]).

After discovery was complete in the federal action, the parties filed competing motions for summary judgment. The Court granted in part the defendants' motion for partial summary judgment, finding that the plaintiffs had accessed the employee's email in violation of the SCA (*see Pure Power Boot Camp, Inc. v Warrior Fitness Boot Camp, LLC*, 759 F Supp 2d 417 [SD NY 2010]). The Court also granted the plaintiffs' motion for partial summary

judgment, concluding that there had been no violation of the Electronic Communications Privacy Act ("ECPA") (*id.*).

Thereafter, PPBC-New York the sought damages and injunctive relief from the former employees on claims for breach of contract, breach of the common law duty of loyalty, unjust enrichment, common law unfair competition, violations of New York General Business Law §360, statutory trade dress infringement, conversion, defamation, tortious interference with prospective economic advantage, and tortious interference with contract. The Court determined that PPBC-New York established that the employees breached their duty of loyalty and were faithless servants, and that Pure Power-New York was entitled to forfeiture damages and punitive damages (*Pure Power Boot Camp, Inc. v Warrior Fitness Boot Camp, LLC*, 813 F Supp 2d 489 [SD NY 2011]).

In November 2009, the USPTO granted a trade dress to PPBC-Delaware (Service Mark, Not of Mot, Exh M).

In 2011, plaintiffs filed the Complaint in this action alleging legal malpractice and professional negligence concerning Fross's preparation of and advice concerning a non-disclosure and non-compete agreement (first cause of action), and Fross's failure to properly protect plaintiffs' rights regarding the trade dress application (second cause of action).

By order, entered on September 11, 2012, this Court (Kenney, J.) granted Fross's motion to dismiss the Complaint (Motion Sequence No. 001), essentially concluding that Pure Power Boot

Camp Franchising Corporation and Pure Power Boot Camp Jericho, Inc. had no standing to bring this action since they were not party to the retainer agreement, and that plaintiff acknowledged that it would provide a release in a series of emails regarding the legal fee dispute (Order, Not of Mot, Exh A).

The Appellate Division, First Department reversed, stating:

"Defendant failed to establish that plaintiff's legal malpractice action is barred by an agreement purportedly entered into in connection with the settlement of a legal fee dispute, to release the firm from all claims. The parties agreed to settle their legal fee dispute for \$5,000 and \$5,000 was paid to defendant. At issue is the scope of the settlement and whether the settlement was intended to include a general release of all claims against defendant. While the absence of an executed general release is not necessarily dispositive, defendant failed to establish that the parties agreed to execute the release and intended to be bound by it (see *Kowalchuk v Stroup*, 61 AD3d 118, 121 [1st Dept 2009]). Defendant also failed to establish that it was not negligent in preparing, filing, and amending a trade dress application, since the mere fact that the application was accepted by the U.S. Patent and Trademark Office is not evidence of a lack of negligence"

(*Pure Power Boot Camp, Inc. v Fross Zelnick Lehrman & Zissu*, P.C., 104 AD3d 566 [1st Dept 2013]).

Thereafter, Fross answered, generally denying the allegations in the amended Complaint and asserting several affirmative defenses. Fross also filed an interpleader complaint against PPBC-Delaware, alleging claims for breach of contract,

quantum meruit, and an account stated. PPBC-Delaware never filed an answer or appeared on the interpleader complaint.

In addition, plaintiffs filed an amended complaint adding a third cause of action for abuse of process, alleging that Fross's interpleader complaint is being prosecuted without just cause and with malicious intent (third cause of action).

Fross sought to dismiss the third cause of action (Motion Sequence No. 002), but it appears that motion was misplaced and a decision was not rendered until May 8, 2014. This Court denied the motion, as moot, under the misunderstanding that it sought to dismiss a third cause of action in the original complaint, rather than in the amended complaint, and the original complaint had been dismissed.

Fross moved to reargue/renew the Court's order denying the motion to dismiss as moot (Motion Sequence No. 003). Plaintiffs cross-moved for an order (1) dismissing the interpleader action, (2) granting plaintiffs a default judgment against Fross for failing to answer the amended complaint, and for sanctions against Fross. By order entered August 21, 2014, this Court dismissed the third cause of action in the amended complaint, denied the cross motion to dismiss the interpleader action, and denied the cross motion for a default judgment (Order, Not of Mot, Exh AA). The Court stated:

"It is undisputed that the entity addressed by the Appellate Division, First Department wherein it was determined that the attorneys' fee dispute was resolved was in fact between

plaintiff, PPBC New York and defendant, Fross Zelnick Lehman & Zissu, PC. The Appellate Division did not include PPBC Delaware in its findings that legal disputes were resolved between defendant and this other entity. As such, the Appellate Division decision and order cannot be a basis upon which to deny defendant's right to commence an interpleader action against an entity it believes benefitted and approved the legal services rendered to it

Plaintiff's attorneys have represented to this Court that they do not represent the interpleader defendant, PPBC Delaware and therefore have no standing to seek dismissal of the interpleader complaint asserted against an entity plaintiff's attorneys do not represent

The argument for a default judgment, as noticed in the cross motion, is without merit here. Plaintiff seeks an Order from this Court dismissing the interpleader because defendant did not seek a default judgment against PPBC Delaware in accordance with CPLR 3215^o. Again, plaintiff does not have standing to raise this defense, if at all applicable, on behalf of an entity not represented by counsel and/or that has failed to appear in this action"

(*id.*).

By order, dated March 30, 2015, this Court conditionally granted Fross's motion to dismiss (Motion Sequence No. 005) based on plaintiff's failure to provide discovery, unless plaintiff provided all of the documents demanded by Fross no later than May 1, 2015 (Order, Note of Mot, Exh Y).

By order dated June 3, 2015, this Court denied plaintiff's motion to compel disclosure (Motion Sequence No. 006) and marked the matter off the Court's calendar, without prejudice to

restore, based on plaintiff's failure to file a Note of Issue and Statement of readiness by the date previously directed by the Court (Order, Not of Mot, Exh DD).

The Court, among other things, granted plaintiff's motion to restore the case to the calendar (Motion Sequence No. 007) by order dated October 13, 2015 (Order, Not of Mot, Exh HH). The Court also referred the matter to a Special Referee to supervise discovery (*id.*). By order dated April 6, 2016, the Court again granted plaintiff's motion to restore (Motion Sequence No. 008), this time upon condition that plaintiff file a new note of issue and pay the appropriate fee (Order, Not of Mot, Exh II). Plaintiff filed the note of issue on April 11, 2016.

Defendant now seeks summary judgment dismissing the Complaint.

DISCUSSION

It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New*

York, supra). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

As stated, the amended Complaint alleges causes of action for legal malpractice and negligence concerning the trade dress.

In seeking summary judgment, defendants argue that the legal malpractice cause of action is time-barred.

The statute of limitations for legal malpractice is three years (CPLR 214[6]). The three-year limitations period applies regardless of whether the underlying theory is based in contract or tort (*see Melendez v Bernstein*, 29 AD2d 872 [2d Dept 2006]). An action for legal malpractice accrues when the malpractice is committed (*see Glamm v Allen*, 57 NY2d 87, 94 [1982]). Once a defendant makes a prima facie showing that the three-year statute of limitations has run, the burden shifts to the plaintiff to aver evidentiary facts establishing that the cause of action falls within an exception to the statute of limitations, or to raise an issue of fact as to whether such an exception applies (*Gravel v Cicola*, 297 AD2d 620, 622 [2d Dept 2002]).

An exception to the statute of limitations, the doctrine of continuous representation, tolls the limitations period for a legal malpractice claim "until the completion of the attorney's ongoing representation concerning the matter out of which the malpractice claim arises" (*Pellati v Lite & Lite*, 290 AD2d 544 [2d Dept 2002]). "The continuous representation doctrine tolls

the statute of limitations only where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim" (*McCoy v Feinman*, 99 NY2d 295, 307 [2002]), and where the continuous representation concerns a specific legal matter (*Shumsky v Eisenstein*, 96 NY2d 164, 168 [2001]).

Here, Fross asserts that the three-year statute of limitations expired on February 1, 2009, three years after Fross completed its services in connection with the NDA and trade dress application, and that plaintiffs did not commence this action until October 2011. As such, Fross satisfies its burden of making a prima facie showing that the three-year limitations period has run.

In opposition, however, plaintiffs argue that the legal malpractice action was timely since Fross continued to represent them as co-counsel, as transactional attorneys, and under two different retainer agreements, well into 2009. To support their position, plaintiffs primarily rely on a series of invoices for legal services provided by Fross between October 26, 2008 and December 29, 2010 (Aff in Opp, Exh 8). The invoices reference emails and telephone conversations regarding the NDA and trade dress application (*see id.*). In an email, dated October 14, 2009, Fross specifically discusses the validity of the trade dress application and the requests of PPBC-New York regarding the NDA (Email, Aff in Opp, Exh 9). Furthermore, the protracted

procedural history in this action evinces a mutual understanding of the need for further legal representation. Thus, at the very least, a question of fact exists as to whether the doctrine of continuous representation serves to toll the limitations period for the legal malpractice claim. As such, that the branch of the motion that seeks summary judgment dismissing the claim for legal malpractice is denied.

The request for summary judgment dismissing the claim for negligence concerning the trade dress application is also denied. Fross asserts that the Court in *Pure Power Boot Camp, Inc. v Warrior Fitness Boot Camp, LLC* (*supra*) did not find any defects with PPBC-Delaware's federal trade dress application. However, it is beyond dispute that PPBC-New York engaged Fross, among other things, to file the trade dress application, but that Fross submitted the application on behalf of PPBC-Delaware. In fact, as stated, the USPTO granted the trade dress to PPBC-Delaware. Fross offers nothing to counter the prior determination by the Appellate Division that it failed to establish that it was not negligent in preparing, filing, and amending a trade dress application on behalf of PPBC-Delaware (*see Pure Power Boot Camp, Inc. v Fross, supra*).

In an exercise of its broad discretion, and in light of a prior order referring the matter to a Special Referee to supervise discovery (Order, Not of Mot, Exh HH), the Court denies Fross's request for dismissal on the alternate ground that

plaintiffs violated discovery orders (*see Kihl v Pfeffer*, 94 NY2d 118 [1999]).

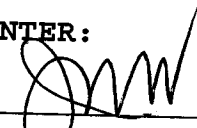
The request for sanctions is denied (22 NYCRR 130-1.1).

Accordingly, it is

ORDERED that the motion for summary judgment is denied.

Dated: 2/27/17

ENTER:



JOAN M. KENNEY
J.S.C.