SHORT FORM ORDER

INDEX No. 11-37345

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 5-18-12 (#001)
MOTION DATE 6-22-12 (#002)
ADJ. DATE 3-21-13
Mot. Seq. # 001 - MG
002 - MotD

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MARIE ELISE BENJAMIN,

Plaintiff,

- against -

ALLSTATE INSURANCE COMPANY, THE ODIERNO LAW FIRM, P.C., and JOSEPH J. ODIERNO,

Defendants.

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Upon the following papers numbered 1 to 36 read on these motions to dismiss ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15, 28 - 36 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 16 - 25 ; Replying Affidavits and supporting papers 26 - 27 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by the defendants The Odierno Law Firm, PC and Joseph J. Odierno for an order pursuant to CPLR 3211 (a) (5) dismissing the complaint as time-barred is granted; and it is further

ORDERED that the unopposed motion by the defendant Allstate Insurance Company for an order pursuant to CPLR 3211 (a) (7) and CPLR 3211 (c) dismissing the complaint is denied with leave to renew its motion upon proper proof.

This action was commenced to recover damages allegedly sustained by the plaintiff as the result of the actions of the defendants The Odierno Law Firm, PC and Joseph J. Odierno (Odierno) in failing to timely pay her the proceeds of the settlement of a personal injury action commenced on her behalf, failing to timely notify her of its failure to timely notify her insurance carrier of the potential of her potential "SUM" claim, and for their violation of Judiciary Law 487. The amended complaint in this action sets forth three causes of action. The first cause of action against the defendant Allstate Insurance Company (Allstate) seeks a declaration that she is entitled to supplementary uninsured/underinsured motorist (SUM) benefits pursuant to her policy of insurance with Allstate. The second and third causes of action against Odierno sound in legal malpractice and violations of Judiciary Law § 487.

Odierno now moves for an order dismissing the complaint against him pursuant to CPLR 3211 (a) (5). A movant seeking to dismiss a complaint insofar as asserted against it as time-barred pursuant to CPLR 3211 (a) (5) has the initial burden of proving through documentary evidence that the action was untimely commenced after its accrual date (*see* ***Tsafatinos v Wilson Elser Moskowitz Edelman & Dicker, LLP***, 75 AD3d 546, 903 NYS2d 907 [2d Dept 2010]; ***Morris v Gianelli***, 71 AD3d 965, 897 NYS2d 210 [2d Dept 2010]; ***Lessoff v 26 Ct. St. Assoc., LLC***, 58 AD3d 610, 872 NYS2d 144 [2nd Dept 2009]; ***Sabadie v Burke***, 47 AD3d 913, 849 NYS2d 913 [2d Dept 2008]). Thereafter, the burden shifts to the plaintiff to aver evidentiary facts establishing that the action was timely or to raise an issue of fact as to whether the action was timely (***Symbol Technologies, Inc. v Deloitte & Touche, LLP***, 69 AD3d 191, 888 NYS2d 538 [2d Dept 2009]; ***Lessoff v 26 Ct. St. Assoc., LLC***, *supra*; ***Gravel v Cicola***, 297 AD2d 620, 747 NYS2d 33 [2d Dept 2002]).

In support of the motion, Odierno submits, among other things, the amended complaint, the general release executed by the plaintiff in favor of the defendants in the underlying action and their insurance carrier, correspondence regarding the underlying action, and a copy of the check received in settlement of the underlying action. In her complaint, the plaintiff alleges in her second cause of action that she requested "payment of her settlement long after the release was executed, and one payment was made on or about March of 2008. Further, another payment was made on October 18, 2008." The plaintiff alleges in her third cause of action that Odierno "failed to notify plaintiff of its failure to timely notify defendant Allstate of the potential of a "SUM" claim; and that the willful and intentional failure deceived the plaintiff and was in violation of New York Judiciary Law § 487."

It is undisputed that plaintiff was involved in a motor vehicle accident on May 7, 2004, and that Odierno was retained by the plaintiff to prosecute an action against both the owner and the operator of the other vehicle (the underlying action). It is also undisputed that Odierno settled the underlying action on or about May 17, 2007. A review of the documentary evidence reveals that Odierno received the settlement check from the defendants' insurance carrier on or about June 26, 2007, and that he filed a closing statement pursuant to 22 NYCRR 691.20 on or about September 14, 2007. However, Odierno did not disburse the amount due to his client immediately. Instead, he paid out $6,000 to the plaintiff on March 11, 2008, and the balance due her on October 18, 2008.

To the extent that the plaintiff's second cause of action can be read to assert that Odierno's delay in paying out the subject settlement proceeds to the plaintiff constituted legal malpractice, the action accrued no later than October 18, 2008. In a letter that date, Odierno transmitted the balance of the settlement proceeds to the plaintiff stating "Thank you for the privilege of selecting my office to represent you in this matter. If I can be of service to you in the future, do not hesitate to contact me." An action to recover damages for legal malpractice must be commenced within three years from accrual (CPLR 214 (6); *see* ***McCoy v Feinman***, 99 NY2d 295, 755 N.Y.S.2d 693 [2002]; ***Rupolo v Fish***, 87 AD3d 684, 928 NYS2d 596 [2d Dept 2011]; ***Williams v Lindenberg***, 24 AD3d 434, 805 NYS2d 132 [2d Dept 2005]). A legal malpractice claim accrues when the malpractice is committed, not when it is discovered (***McCoy v Feinman***, *supra*; ***Shumsky v Eisenstein***, 96 NY2d 164, 726 NYS2d 365 [2001]; ***St. Stephens Baptist Church, Inc. v Salzman***, 37 AD3d 589, 830 NYS2d 248 [2d Dept 2007]; ***Shivers v Siegel***, 11 AD3d 447, 782 NYS2d 752 [2d Dept 2004]; ***Venturella-Ferretti v Kinzler***, 306 AD2d 465, 762 NYS2d 254 [2d Dept 2003]). In addition, a client's ignorance of the alleged wrong or injury has no impact upon when the cause of action accrues (*see* ***McCoy v Feinman***, *supra*; ***Alicanti v Bianco***, 2 AD3d 373, 767 NYS2d 815 [2d Dept 2003]; ***King v Albany County Pub. Defender's Off.***, 255 AD2d 770, 680 NYS2d 289 [3d Dept 1998]). Here, Odierno has established that this action was commenced on December 7, 2011, more than three years after the second cause of action accrued on September 14, 2007 or, in any event, no later than October 18, 2008.[1]

To the extent that the plaintiff's third cause of action can be read to assert a cause of action for legal malpractice, Odierno has established prima facie that the action was not timely commenced. The remaining allegations in the plaintiff's third cause of action allege that Odierno has violated Judiciary Law 487 in that "Ordierno failed to notify plaintiff of its failure to timely notify defendant Allstate of the potential of a "SUM" claim." Judiciary Law 487 provides that an attorney who, during a pending judicial proceeding, "is guilty of any deceit or collusion . . . with intent to deceive the court or a party" may be liable for treble damages. However, to recover under this provision, the attorney's deceit or collusion must have caused the plaintiff damages (*see* (***Izko Sportswear Co., Inc. v Flaum***, 25 AD3d 534,536, 809 NYS2d 119 [2d Dept 2006]; ***Knecht v Tusa***, 15 AD3d 626, 627, 789 NYS2d 904 [2d Dept 2005]; ***Manna v Ades***, 237 AD2d 264, 655 NYS2d 412 [2d Dept 1997]). A cause of action pursuant to Judiciary Law 487 is subject to the three-year statute of limitations (***Melcher v Greenberg Traurig, LLP***, 102 AD3d 497, 958 NYS2d 362 [1st Dept 2013]; ***Kuske v Gellert & Cutler, P.C.***, 247 AD2d 448, 667 NYS2d 955 [2d Dept 1998]; ***Lefkowitz v Appelbaum***, 258 AD2d 563, 685 NYS2d 460 [2d Dept 1999]; *but see* ***New York City Tr. Auth. v Morris J. Eisen, P.C.***, 203 AD2d 146, 610 NYS2d 236 [1st Dept 1994]).

Here, the Court finds that the plaintiff's action pursuant to Judiciary Law 487 accrued on May 17, 2007, when Odierno settled the underlying action without exhausting the bodily injury limits of the defendants in that action, the plaintiff lost her opportunity to seek underinsured coverage, and Odierno,

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[1] The Court notes that, to the extent that the second cause of action can be read to assert that Odierno's violation of court rules gives her a private cause of action, it fails to state a cause of action (***Shapiro v McNeill***, 92 NY2d 91, 677 NYS2d 48 [1998]; ***Art Capital Group, LLC v Neuhaus***, 70 AD3d 605, 896 NYS2d 35 [1st Dept 2010]; ***Guiles v Simser***, 35 AD3d 1054, 826 NYS2d 484 [3d Dept 2006]; ***Schwartz v Olshan Grundman Frome & Rosenzweig***, 302 AD2d 193, 753 NYS 2d 482 [1st Dept 2003]).

at least in theory, "improperly" failed to notify the plaintiff of that result. It is undisputed that the defendants in the underlying action had bodily injury coverage in the amount of $25,000, and that Odierno settled the plaintiff's action in the amount of $21,500. Insurance Law 3420 (f) (2) (A) provides that "[a]s a condition precedent to the obligation of the insurer to pay under the supplementary uninsured/underinsured motorists insurance coverage, the limits of liability of all bodily injury liability bonds or insurance policies applicable at the time of the accident shall be exhausted by payment of judgments or settlements." The statute was intended to allow for excess liability insurance coverage after exhaustion of the insurance policies covering an underinsured vehicle (***Passaro v Metropolitan Prop. & Liab. Ins. Co.***, 128 Misc 2d 21, 487 NYS2d 1009 [Sup Ct, Queens County 1985] *affd* 124 AD2d 647, 507 NYS2d 836 [2d Dept 1986]; *see also* ***Prudential Property & Cas. Ins. Co. v. Carleton***, 145 AD2d 492, 535 NYS2d 738 [2d Dept 1988]; *cf.* ***S'Dao v National Grange Mut. Ins. Co.***, 87 NY2d 853, 638 NYS2d 597 [1995] (in two car accident, exhaustion of both policies not required); ***Matter of Liberty Mut. Ins. Co. v Doherty***, 13 AD3d 629, 789 NYS2d 55 [2d Dept 2004] (policy of owner of vehicle exhausted; exhaustion of separate policy of operator not required); ***Matter of General Acc. Ins. Co. v Gobetz***, 234 AD2d 599, 651 NYS2d 623 [2d Dept 1996] (policy of second vehicle exhausted, exhaustion of host vehicle policy not required).

Here, Odierno has established prima facie that the cause of action alleging a violation of Judiciary Law 487 was not timely commenced. This is true even if the plaintiff could establish that the continuous representation doctrine tolls the statute of limitations until October 18, 2008, when Odierno mailed the balance of the settlement proceeds to the plaintiff, as this action was not commenced until December 7, 2011.[2]

In opposition to Odierno's motion, the plaintiff submits, among other things, her affidavit, the affirmation of her attorney, correspondence between her attorney and Odierno, the closing statement filed by Odierno, and correspondence between her attorney and Allstate. Initially, the Court notes that the plaintiff's affidavit is deficient on its face in that it was notarized in the State of Florida and was not accompanied by a certificate verifying that the manner in which it was taken conforms with Florida law (*see* CPLR 306 [d], 2309 [c]; Real Property Law § 299-a [1]). However, it has been held that the absence of a certificate of conformity is a mere irregularity, not a fatal defect, which can be ignored in the absence of a showing of actual prejudice (*see* ***Betz v Daniel Conti, Inc.***, 69 AD3d 545, 892 NYS2d 477 [2d Dept 2010]; ***Matapos Tech. Ltd. v Compania Andina de Comercio Ltd.***, 68 AD3d 672, 891 NYS2d 394 [1st Dept 2009]; ***Smith v Allstate Ins. Co.***, 38 AD3d 522, 832 NYS2d 587 [2d Dept 2007]). Here, the Court finds that Odierno has not raised any objection to said affidavit, and that it has suffered no actual prejudice herein.

In her affidavit, the plaintiff swears that the closing statement filed by Odierno in September 2007 stating that he had released the settlement proceeds to her was false, and that she did not receive any money from the settlement of her lawsuit until March of 2008 and October 2008. She states that she consulted with her current attorney in September 2010, that she learned at that time of the status of her

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[2] The parties have not raised the issue of continuous representation, and the Court makes no finding regarding that issue herein.

case including "the claim against my own insurance company, Allstate, for supplementary uninsured coverage," and that she advised Odierno to "stop any further work on my behalf" in a letter written on September 30, 2010. The plaintiff further swears that Odierno falsely told her that he was holding her settlement proceeds because workers compensation "may have a lien in connection with my settlement," that there was no workers compensation lien, and that her current attorneys advised her that they would contact Odierno. She states that she was told by her current attorneys that they would need to find out what the insurance limits of her 2004 insurance policy were before they could determine if she had a SUM claim.

In his affirmation in opposition to Odierno's motion, the attorney for the plaintiff contends that the motion is "procedurally improper" pursuant to CPLR 3211 (d), that Odierno's failure to deliver its file to him tolls the statute of limitations, and that he needed Odierno's file to determine whether a SUM claim on the plaintiff's behalf was viable. CPLR 3211 (d) provides, in pertinent part: "Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion ..." A review of the plaintiff's submission reveals that it does not set forth any facts which may exist but are not in her knowledge regarding the date of accrual of her action or the applicable statutes of limitation. In addition, the plaintiff does not suggest how additional discovery would assist her in opposing Odierno's motion. Therefore, the Court finds that the plaintiff's contention that the instant motion is "procedurally improper" is without merit.

Counsel for the plaintiff further contends that Odierno's failure to deliver the plaintiff's file to him constitutes equitable estoppel which serves to toll the running of the statute of limitations. The doctrine of equitable estoppel is "an extraordinary remedy which applies where a party is prevented from filing an action within the applicable statute of limitations due to his or her reasonable reliance on deception, fraud or misrepresentations by the other" (***Pulver v Dougherty***, 58 AD3d 978, 979, 871 NYS2d 495 [3d Dept 2009]; *see also* ***McCormick v Favreau***, 82 AD3d 1537, 919 NYS2d 572 [3d Dept 2011]). It is well settled that the doctrine does not apply unless the plaintiff demonstrates "that subsequent and specific actions by defendants somehow kept them from timely bringing suit " (***Zumpano v Quinn***, 6 NY3d 666, 674, 816 NYS2d 703 [2006]; ***Giannetto v Knee***, 82 AD3d 1043, 919 NYS2d 176 [2d Dept 2011]; ***Philip F. v Roman Catholic Diocese of Las Vegas***, 70 AD3d 765, 894 NYS2d 125 [2d Dept 2010]). The application of the doctrine of equitable estoppel is triggered by some conduct on the part of the defendant after the initial wrongdoing; mere silence or failure to disclose the wrongdoing is insufficient (*see* ***Ross v Louise Wise Servs., Inc.***, 8 NY3d 478, 836 NYS2d 509 [2007]; ***Zoe G. v Frederick F.G.***, 208 AD2d 675, 617 NYS2d 370 [2d Dept 1994]; ***Glover v National Bank of Commerce***, 156 AD 247, 141 NYS 409 [1st Dept 1913]; *see generally* ***Baratta v ABF Real Estate Co***, 215 AD2d 518, 627 NYS2d 52 [2d Dept 1995]).

The plaintiff's submission includes a copy of her attorney's letter to Odierno dated October 6, 2010 wherein he requests Odierno's "complete file" regarding the underlying action, and a copy of Odierno's response dated October 16, 2010. In his letter, Odierno states that the underlying action was settled for $21,500 and that the "coverage on the offending vehicle" was $25,000, and he attaches copies of certain relevant documents. In addition, the Court notes that the plaintiff swears in her affidavit that she learned of the status of her case including "the claim against my own insurance company, Allstate,

for supplementary uninsured coverage," in September 2010. Here, plaintiff has failed to set forth any acts committed by Odierno which induced her to refrain from proceeding in a timely manner. This is not a situation where the doctrine of equitable estoppel should be invoked because the plaintiff has not established that Odierno in any way kept her from timely commencing this action (*see* ***Zumpano v Quinn***, 6 NY3d 666, 816 NYS2d 703 [2006]; ***Clarke v Mikail***, 238 AD2d 538, 657 NYS2d 940 [2d Dept 1997]; ***Manno v Levi***, 94 AD2d 556, 465 NYS2d 219 [2d Dept 1983]).

The plaintiff has failed to aver evidentiary facts establishing that the action was timely or to raise an issue of fact as to whether the action was timely (***Symbol Technologies, Inc. v Deloitte & Touche, LLP***, *supra*; ***Lessoff v 26 Ct. St. Assoc., LLC***, *supra*; Accordingly, the motion by the defendants The Odierno Law Firm, PC and Joseph J. Odierno for an order pursuant to CPLR 3211 (a) (5) dismissing the complaint against them is granted.

Allstate now moves pursuant to CPLR 3211 (c) for summary judgment dismissing the complaint against it on the ground that the complaint fails to state a cause of action. Said statute provides, in pertinent part: "Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment." Whenever a court elects to treat such a motion as one for summary judgment, it must provide "adequate notice" to the parties unless it appears from the parties' papers that they deliberately are charting a summary judgment course by laying bare their proof (*see* ***Rich v Lefkovits***, 56 NY2d 276, 452 NYS2d 1 [1982]; ***Hopper v McCollum***, 65 AD3d 669, 885 NYS2d 304 [2d Dept 2009]; ***Myers v BMR Bldg. Inspections, Inc.***, 29 AD3d 546, 814 NYS2d 686 [2d Dept 2006]; ***Schultz v Estate of Sloan***, 20 AD3d 520, 799 NYS2d 246 [2d Dept 2005]; ***Singer v Boychuk***, 194 AD2d 1049, 599 NYS2d 680 [3d Dept], *lv denied* 82 NY2d 657, 604 NYS2d 556 [1993]). Here, upon review of the papers, the Court finds that Allstate has clearly charted a summary judgment course, and the motion is unopposed. In addition, Allstate's notice of motion specifically demanded said relief and it has submitted extensive documentary evidence and affidavits in support of its position (*see generally* ***Harris v Hallberg***, 36 AD3d 857, 828 NYS2d 579 [2007]). Under these circumstances, the court, in determining this motion, is free to apply the standard applicable to summary judgment motions without affording the parties notice of its intention to do so (*see* ***Mihlovan v Grozavu***, 72 NY2d 506, 534 NYS2d 656 [1988]; ***Doukas v Doukas***, 47 AD3d 753, 849 NYS2d 656 [2008]); ***Fuentes v Aluskewicz***, 25 AD3d 727, 808 NYS2d 739 [2006]).

In support of its motion, Allstate submits, among other things, the complaint, the second amended complaint, the affidavit of one of its employees, and a copy of an insurance policy. It is also well settled that a court addressing an insurance coverage dispute must initially look to the language of the subject policy (***Raymond Corp. v National Union Fire Ins. Co.***, 5 NY3d 157, 162, 800 NYS2d 89 [2005]; ***State of New York v Home Indem. Co.***, 66 NY2d 669, 671, 495 NYS2d 969 [1985]). In the affidavit submitted herein, Nannette Quinn swears that she is a litigation examiner for Allstate, and that the policy referenced in the complaint, policy number 78 025087 05/20 was in effect at the time of the motor vehicle accident on May 7, 2004. She states that said policy contains "certain conditions" which must be met in order for an insured to qualify for SUM benefits, and she references an attached copy of the "subject policy of insurance." It appears from a review of the record that Allstate would be entitled

to summary judgment herein. However, the Court notes that the insurance policy attached to the papers does not indicate that it the policy issued to the plaintiff, or its effective date. In addition, said exhibit has not been properly authenticated. It is a prerequisite to the admission of a private document offered in evidence by a party to an action that the authenticity and genuineness of the document be established (*see* ***Horowitz v Kevah Konner, Inc.***, 67 AD2d 38, 414 NYS2d 540 [1st Dept 1979]; ***Prestige Fabrics v Novik & Co.***, 60 AD2d 517, 399 NYS2d 680 [1st Dept 1977]; ***Material Men's Mercantile Assn., Ltd. v Material Men's Credit Agency, Inc.***, 191 AD 73, 180 NYS 801 [1st Dept 1920]; *see eg.* ***People v Boswell***, 167 AD2d 928, 562 NYS2d 289 [4th Dept 1990]; ***Greenberg v Manlon Realty***, 43 AD2d 968, 352 NYS2d 494 [2d Dept 1974]).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form sufficient to eliminate any material issues of fact from the case (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]). The proponent has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

Here, Allstate has failed to establish its entitlement to summary judgment herein. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see*, ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). However, the Court's interest in judicial economy would be served by allowing Allstate the opportunity to authenticate the critical document herein. Accordingly, the motion is denied with leave to renew upon proper proof of the controlling insurance agreement between the parties.

Dated: June 10, 2013

W. Gerard Asher
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**