

Two Cases On Malpractice and “Continuous Representation”

BY LAZAR EMANUEL

Defendant lawyer was retained to pursue plaintiffs’ contract claim. He failed to take any action and the statute of limitations on the contract claim expired. Plaintiffs made many calls to defendant after their claim was barred inquiring how the case was going, but defendant failed to return any of these calls. The calls continued beyond the end of the three-year tort malpractice limitation imposed by CPLR 214(6).

The Court of Appeals applied the “continuous representation” doctrine to extend the period of defendant’s malpractice liability beyond the three-year statutory limitation on legal malpractice claims. Representation would be deemed to continue until at least the first date upon which plaintiffs called to inquire about the progress of their claims -and, further, until the plaintiffs had “reasonable notice of defendant’s withdrawal.” *Shumsky v. Eisenstein*, ...N.Y.2d...(May 10, 2001).

In contrast, in *Elitzer v. Shlesinger, Arkwright & Garvey* (Sup. Ct., Third Dept), Justice Keegan recently declined to find the elements of continuous representation. Defendant law firm was engaged by plaintiff’s general counsel to provide advice on the federal registration of three trademarks.

After finding that a claim of legal malpractice could be based on principles of third-party-beneficiary liability and that the liability in this case would therefore be measured by the six- year contract limitations period instead of the three-year tort period, the court found that the services rendered by defendants with respect to one of plaintiffs’ claims had been intermittent rather than continuous. As to that claim, the continuous representation doctrine did not apply and the claim was time barred.