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<https://www.law.com/newyorklawjournal/2022/11/03/manhattan-law-firm-cant-dismiss-legal-malpractice-action-based-on-statute-of-limitations-argument-first-department-rules/>

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## Manhattan Law Firm Can't Dismiss Legal Malpractice Action Based on Statute of Limitations Argument, First Department Rules

The plaintiff argued the statute of limitations period for his \$750,000 legal malpractice case was tolled "based on alleged emails and telephone conversations" he'd had with the law firm for nine years about the status of the firm collecting of a 2010 money judgment.

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Legal Malpractice



**Jason Grant**

Staff reporter

A state appeals court on Tuesday rejected a Manhattan boutique's attempt to dismiss a malpractice action against it, finding that questions remain as to whether the statute of limitations for the claim was tolled and if the firm received sufficient notice about a bankruptcy that prevented its client from collecting a judgment.

Examining the plaintiff's argument that New York's three-year statute of limitation to bring a malpractice suit against The Law Offices of Neal Brickman was tolled under the continuous representation doctrine, a five-judge panel from the Appellate Division, First Department wrote that various "factual contentions" have to resolved during discovery—not at the pre-answer motion-to-dismiss stage.

Plaintiff Frank Basile argues that limitations period for his \$750,000 legal malpractice case had been tolled, under the common-law doctrine, "based on alleged emails and telephone conversations" he'd had with the Brickman firm for nine years regarding the collection of a 2010 judgment in his favor from a civil fraud suit in which the firm represented him, according to court documents.

But the Brickman firm argued that it had no contact with Basile about the unsatisfied judgment until August 2019 and that the limitations period on filing a malpractice suit against it passed during the previous year, the justices wrote.

"These factual contentions ... cannot be resolved in this pre-answer motion to dismiss," the unanimous panel wrote while citing *Boesky v. Levine* and *Johnson v. Law Off. of Kenneth B. Schwartz*.

The panel's opinion [affirmed a 2021 decision](#) by Manhattan Supreme Court Justice Shawn Kelly denying the Brickman firm's motion to dismiss the malpractice claim.

According to the lower court's ruling, in 2009, name attorney Neal Brickman filed a lawsuit on behalf of Celeste Holm, an actress who was married to Basile, who is an opera singer, against MODA Entertainment and its CEO Shannon Mulholland alleging that they had been duped into taking part in a project to archive her memorabilia and career highlights based on false pretenses.

MODA never finished the project even as it created fake licensing deals and forged signatures, according to [a news report on the case](#).

Brickman soon obtained a default judgment against MODA and Mulholland after they failed to answer the lawsuit, Kelly explained. In 2010, Basile and Holm were awarded \$343,606.

Basile, though, claims in his malpractice action that "he continually inquired" with the Brickman firm over the following nine years about when it "would commence efforts to collect against the Judgment."

The firm allegedly told Basile that “no efforts had been commenced but that enforcement could be pursued for 20 years,” according to Kelly’s decision.

Then in September 2019, at Basile’s request, the firm began to “explore” collection and learned that Mulholland had filed for bankruptcy in 2015, and that a Discharge of Debtor Order of Final Decree had already been issued apparently ending bankruptcy collection, Kelly said.

The Brickman firm countered Basile’s allegations of malpractice related to the firm missing the bankruptcy by saying it relocated its office in 2014 “because they had been notified that their former office building was scheduled for demolition,” and by saying it never received any notice of the bankruptcy, according to Kelly’s opinion.

Kelly noted in her ruling, though, that the firm provided no evidence that it filed for a change of address with the New York Secretary of State or that it notified Basile about the move.

The First Department panel Tuesday, after turning back the Brickman firm’s arguments contending that Basile’s claim should be dismissed because he missed New York state’s statute-of-limitations deadline for a malpractice actions, also addressed a separate Brickman firm argument that said Basile’s allegations weren’t sufficient to state a legal malpractice claim.

After turning back the Brickman firm’s arguments regarding New York state’s statute-of-limitations deadline for a malpractice actions, the First Department also knocked down the Brickman firm’s argument that Basile’s allegations weren’t sufficient to state a legal malpractice claim.

The panel noted that the firm had said “the bankruptcy petition, which, in naming plaintiff as a creditor, included an outdated address for defendants and omitted the name of defendants’ law firm or a suite number.”

Those facts, though, wrote the panel, were “not sufficient to find as a matter of law that defendants did not breach their duty to plaintiff,” and it noted that the “bankruptcy petition included the name of the attorney who had assisted in plaintiff’s underlying action against the judgment debtor.

“At the very least, a factual issue exists as to whether the notice of the bankruptcy proceeding to object on plaintiff’s behalf was forwarded to defendants, which cannot be resolved at this juncture,” Justices Judith Gische, Ellen Gesmer, Jeffrey Oing, Tanya Kennedy and Saliann Scarpulla said.

Benjamin Oxenburg, an attorney at Furman Kornfeld & Brennan, represented the Brickman firm in the appeal. He could not be reached for comment.

Diane Bradshaw of the Bradshaw Law Group was counsel to Basile. In an email Wednesday, she said “plaintiff and his counsel are grateful to have the opportunity to move the case forward toward resolution.”

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