

New York Law Journal

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Panel Says Singer's Legal Malpractice Suit Is Time-Barred

Andrew Keshner

New York Law Journal

01-11-2012

Singer Toni Basil's legal malpractice suit against the attorney and firm who, she argued, did not adequately protect her rights to her 1980s pop standard "Mickey," must be dismissed as time barred, a state appellate panel has ruled.

A unanimous panel of the Appellate Division, First Department, on Jan. 10 reversed a decision by Manhattan Supreme Court Justice Paul Wooten ([See Profile](#)) that had let the case proceed ([NYLJ, Aug. 22, 2011](#)). The court determined in [Basilotta v. Warshavsky](#), 115524-2009, that limitations period for her action had expired at least more than one year before she filed her claim.

Ms. Basil's 1982 song "Mickey" achieved pop culture fame, with its lyrics "Oh Mickey, you're so fine/You're so fine you blow my mind/Hey Mickey, hey Mickey."

Seeking compensation for an alleged unauthorized use of the song by the Subway sandwich chain, Ms. Basil—whose real name is Antonia Christina Basilotta—retained Oren J. Warshavsky, then of Gibbons, Del Deo, Dolan, Griffinger & Vecchione.

Mr. Warshavsky began two suits in 2004 and relayed a \$35,000 settlement offer to Ms. Basilotta, which she rejected; Mr. Warshavsky left the firm in late 2006 and is now with Baker Hostetler.

In 2009, Ms. Basilotta discovered she had lost the rights to the master recording of "Mickey" with the dissolution of Radialchoice, a record company where she had a recording contract.

In February 2010, Ms. Basilotta, a California resident, filed a legal malpractice action in Manhattan Supreme Court arguing that her interests had not been protected by Mr. Warshavsky and the Gibbons firm, which reorganized as Gibbons P.C. in 2007.

Due to the defendants' actions, Ms. Basilotta argued she lost millions of dollars when she was not able to invoke her rights to "Mickey" and other recordings between 2005 and 2010. During that time period, there was a "lucrative resurgence of the eighties," her complaint said.

The Gibbons firm responded that Ms. Basilotta terminated the firm as counsel by December 2006, with Mr. Warshavsky informing her, prior to settlement negotiations, that he could not prosecute the two cases in good faith.

But Ms. Basilotta said she never fired Gibbons and the firm never told her it intended to withdraw.

The defendants argued the case was controlled by California law, where Ms. Basilotta was allegedly injured. They contended that the one-year statute of limitations for a legal malpractice action under California law had begun to run in 2006, making the 2010 New York action untimely.

But Justice Wooten let Ms. Basilotta move ahead with her action, ruling the statute of limitations began to accrue from the October 2009 discovery of Radialchoice's dissolution.

The First Department disagreed. Applying California law, it held that the action accrued at the latest in November 2007. At that time, the panel said that Ms. Basilotta received a letter "unequivocally informing her that [the defendants] were no longer representing her or prosecuting her underlying actions."

"Contrary to the motion court's finding, plaintiff's assertion that it was not until October 2009 that she discovered that Radialchoice, the record company with whom she had held a recording contract, was involuntarily liquidated, did not raise an issue of fact as to whether this action is time-barred."

The panel noted that the discovery of the record company's dissolution was not mentioned in Ms. Basilotta's pleadings or affidavit, but was only cited in a memorandum of law in opposition to the defendants' dismissal motion.

The panel said Ms. Basilotta also could have surmised "alleged nonfeasance" more than a year before filing the 2010 action.

"Indeed, since January 2007, when plaintiff obtained her case files and observed that defendants had performed very little work on her underlying cases, she should have discovered, through the use of reasonable diligence, the facts supporting liability, including the fact that Radialchoice had been involuntary liquidated," the panel wrote.

Frederick B. Warder III of Patterson, Belknap Webb & Tyler represented the defendants.

F. Edie Mermelstein of the Law Office of F. Edie Mermelstein in Huntington Beach, Calif., represented Ms. Basilotta.

Neither attorney returned a request for comment.

The panel, which heard arguments on Dec. 13, included Justices David Friedman ([See Profile](#)), John W. Sweeny Jr. ([See Profile](#)), Rolando T. Acosta ([See Profile](#)), Dianne T. Renwick ([See Profile](#)) and Sheila Abdus-Salaam ([See Profile](#)).

@Andrew Keshner can be contacted at akeshner@alm.com.

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