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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU**

**PRESENT: HON. ANTHONY L. PARGA**
**JUSTICE**

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**CHARLENE K. VERKOWITZ, ESQ.,**

**Plaintiff,**

**-against-**

**DONNA URSPRUNG,**

**Defendant.**

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**PART 6**

**INDEX NO. 665/11**
**Action # 1**

**MOTION DATE: 12/06/11**
**SEQUENCE NO. 004, 005**

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**DONNA URSPRUNG,**

**Plaintiff,**

**-against-**

**CHARLENE K. VERKOWITZ, ESQ.**

**Defendant.**

**INDEX NO. 14742/11**
**Action # 2**
**XXX**

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**DONNA URSPRUNG,**

**Plaintiff,**

**-against-**

**CHARLENE K. VERKOWITZ, ESQ.**

**Defendant.**

**INDEX NO. 14743/11**
**Action # 3**
**XXX**

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Upon the foregoing papers, it is ordered that the motion by plaintiff Charlene K.

Verkowitz, Esq. for summary judgment on the issue of legal fees, pursuant to CPLR §3212, is denied. Defendant Donna Ursprung's motion seeking leave to amend her answer and for an order joining the above actions is denied.

The first action captioned above was brought by plaintiff Charlene K. Verkowitz, Esq. (hereinafter "Verkowitz") to recover counsel fees from the defendant relating to the plaintiff's legal representation of the defendant in an action entitled *Vermylen v. Genworth Life Insurance Company*, bearing New York County Index Number 601254/07, and related appellate work stemming therefrom. Defendant, Donna Ursprung, was named as a defendant in the *Vermylen* action, and retained plaintiff to represent her.

To begin, plaintiff Verkowitz moves for summary judgment on her legal fees action. Plaintiff Verkowitz contends that defendant, Donna Ursprung, owes her $71,165.12, representing $47,927.50 for appellate work in connection with the *Vermylen* action and $23,237.62 for the remainder of the work on the *Vermylen* action, together with interest on unpaid sums since June 2010. Plaintiff submits eleven volumes of exhibits in an attempt to demonstrate the amount of legal work which was performed by the plaintiff on behalf of defendant Ursprung in the *Vermylen* action. Despite her submission of same, there are several material questions of fact which prevent the granting of summary judgment to plaintiff in Action No. 1. Most significantly, there is a question as to whether the portion of the legal fees that plaintiff seeks to recover for her appellate work was covered by the retainer agreement, which is silent regarding same, and whether defendant Ursprung consented to said charges prior to the appellate work being undertaken. There is also a question of fact as to whether the plaintiff agreed to undertake the appellate work on a pro bono basis. There is a further question of fact as to whether the October 14, 2009 email from the defendant constituted an acceptance of a modification of the original May 8, 2007 retainer agreement, as there is no evidence that defendant Ursprung ever signed the "Payment Plan," dated October 14, 2009, and as defendant Ursprung attests that she "never agreed upon any terms of a revised or new retainer agreement." Additionally, the submissions before the Court reveal that defendant Ursprung previously challenged the accuracy of the legal bills, in writing, and that there were, in fact, errors in same. While the plaintiff contends that she fixed three clerical errors contained in the bills, defendant Ursprung attests that "numerous errors" were not

addressed. As such, there are questions of fact which warrant the denial of plaintiff's summary judgment. If there is any doubt as to the existence of a triable issue of fact, or if a material issue of fact is arguable, summary judgment should be denied. With respect to summary judgment, issue finding, rather than issue determination, is the court's function. (*Celardo v. Bell*, 222 A.D.2d 547, 635 N.Y.S.2d 85 (2d Dept. 1995); *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D.2d 572, 536 N.Y.S.2d 177 (2d Dept. 1989)). Accordingly, plaintiff Verkowitz's motion for summary judgment is denied in its entirety.

With respect to defendant Ursprung's motion to amend her answer and to join one of her newly filed actions, captioned above as Action #2 and Action #3, with the instant action, same is denied, and Action #2 (bearing index number14742/11) and Action #3 (bearing index number 14743/11) are hereby dismissed.

After the instant action (Action #1) was commenced, Donna Ursprung filed an answer which asserted a legal malpractice counterclaim and also initiated a separate action for legal malpractice, entitled *Ursprung v. Verkowitz*, bearing Nassau County Index Number 1125/11. Defendant Ursprung's counterclaim made allegations of legal malpractice pertaining to the legal representation that Verkowitz provided to Ursprung in the underlying matrimonial action. Defendant Ursprung asserted nearly identical allegations within her complaint in the *Ursprung v. Verkowitz* matter, bearing index number 1125/11. As the result of motions filed by all parties, the Court issued two decisions, dated June 14, 2011, which dismissed both the legal malpractice counterclaim and the *Ursprung v. Verkowitz* (1125/11) action. The Court Orders specifically stated that both the counterclaim asserted in Ursprung's answer and her legal malpractice cause of action in the *Ursprung v. Verkowitz* (1125/11) matter were time barred by the applicable three year statute of limitations and that both failed to state a cause of action for legal malpractice. Despite Ursprung's counsel's purported "confusion" about the meaning of the decision, the Court very clearly held:

> Contrary to Ursprung's contentions, the doctrine of continuous representation is inapplicable to toll the statute of limitations in the instant action as the matrimonial action during which attorney Verkowitz allegedly committed the malpractice was concluded on February 27, 2004, and Verkowitz's representation of the plaintiff for the matrimonial action ceased at that time. The particular transaction which is the subject of this malpractice action had ended in 2004, even

> if one accepts that a general professional relationship continued. (*See, Zaref v. Berk & Michaels*, P.C., 192 A.D.2d 346, 595 N.Y.S.2d 772 (1st Dept. 1993)). Further, as the plaintiff was no longer "acutely aware of such need for further representation on the specific subject matter underlying the malpractice claim," the defendant's representation on the matter had ceased at that time. (*Shumsky v Eisenstein,* 96 N.Y.2d 164, 750 N.E.2d 67 (2001); *Carnevali v. Herman*, 293 A.D.2d 698, 742 N.Y.S.2d 85 (2d Dept. 2002)). Attorney Verkowitz's representation of Ursprung in the subsequent insurance matter was pursuant to a separate and subsequent retainer agreement, which was entered three years after the matrimonial action was concluded on February 27, 2004. **As such, the within action for legal malpractice is barred by the expiration of the statute of limitations.**

Further, within the decision of the same date concerning the dismissal of Ursprung's legal malpractice counterclaim, the Court stated, **"the legal malpractice counterclaim asserted by the defendant on January 24, 2011 is barred by the statute of limitations**."

Subsequent to the Court's decisions dated June 14, 2011, defendant Ursprung filed two new, virtually identical actions, captioned above, bearing index numbers 14742/11 and 14743/11. Ursprung submits same here for the Court's review, as well as two proposed amended answers to plaintiff's complaint. In the complaint bearing index number 14742/11, Ursprung sets forth two causes of action: the first cause of action is for legal malpractice pertaining to Verkowitz's representation of her in the *Vermylen* insurance matter, and the second cause of action repleads Ursprung's time-barred and previously dismissed cause of action for legal malpractice pertaining to Verkowitz's representation of her in the underlying matrimonial action. The second newly filed action, bearing index number 14743/11, asserts only the cause of action for legal malpractice pertaining to Verkowitz's representation of Ursprung in the *Vermylen* insurance action. Ursprung incredulously contends that she filed both new actions as she was "unsure how the Court will view the impact, if any, of its prior orders." For the same reason, defendant Ursprung also submits two proposed amended answers, requesting, first, that the Court allow her to amend her answer to replead a counterclaim sounding in legal malpractice relating to the matrimonial action and, second, to assert a new counterclaim sounding in legal malpractice relating to the *Vermylen* insurance action. In the "alternative," Ursprung requests that if the Court interprets its order "as a binding 'factual determination' that there was no continuous

course of representation," she submits a second proposed amended answer which only asserts a counterclaim for legal malpractice relating to the *Vermylen* insurance action.

To begin, the Court notes that defendant Ursprung did not seek appellate review of this Court's prior June 14, 2011 orders, and cannot seek to reargue or renew the same issues herein. As the Court Orders of June 14, 2011 specifically held, after all parties had a full and fair opportunity to be heard, that Ursprung is time barred from asserting any claims for legal malpractice against Verkowitz relating to her representation of Ursprung in the matrimonial action, and that the doctrine of continuous representation is inapplicable to toll the statute of limitations, same is the law of the case. Accordingly, defendant Ursprung is barred from asserting all claims against Verkowitz related to her representation of Ursprung in the matrimonial action. As such, defendant Ursprung shall not be granted leave to amend her complaint to include a counterclaim for legal malpractice relating to the matrimonial action (as submitted in her first proposed amended answer, annexed to her motion as Exhibit "C"), nor may she sustain a cause of action for same, as she has attempted to do in the Second Cause of Action of her newly filed complaint, bearing index number 14742/11. Said Second Cause of Action is hereby dismissed.

The Court further notes that defendant Ursprung's filing of two separate, new complaints containing causes of action which were previously barred, and proposing two separate amended answers, containing counterclaims which were previously barred, in blatant disregard of the Court's prior orders, borders on frivolity warranting the imposition of sanctions.

Additionally, Ursprung's request to amend her answer to assert a counterclaim sounding in legal malpractice arising from Verkowitz's representation of Ursprung in the *Vermylen* insurance action is also denied. Ursprung has failed to state a cause of action within her counterclaims upon which relief may be granted. In considering a motion to dismiss for failure to state a cause of action, a trial court must determine, accepting as true the factual averments of the complaint and according the plaintiff every benefit of all favorable inferences, whether the plaintiff can succeed upon any reasonable view of the facts stated. (*Wald v. Berwitz*, 62 A.D.3d 786, 880 N.Y.S.2d 293 (2d Dept. 2009)). The first causes of action asserted in Ursprung's proposed counterclaims, which allege legal malpractice arising from Verkowitz's representation

of Ursprung in the *Vermylen* insurance action, as well as the nearly identical causes of action contained within her two newly filed complaints (the First Causes of Action in both the 14742/11 and 14743/11 actions) fail to state a legally cognizable cause of action. Even accepting all of the Ursprung's allegations as true, her proposed counterclaims and the nearly identically pled First Causes of Action in her new complaints, fail to state a cause of action for legal malpractice against Verkowitz. In addition, despite Ursprung's contentions otherwise, said counterclaims and causes of action also contain legal malpractice allegations related to the legal representation that Verkowitz provided Ursprung in the matrimonial action, which have been barred by the June 14, 2011 Orders of this Court.

To state a cause of action to recover damages for legal malpractice, it must be alleged: (1) that the attorney "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession," and (2) that the attorney's breach of the duty proximately caused the plaintiff actual and ascertainable damages (*Leder v. Spiegel*, 9 NY3d 836, 837, cert denied sub nom. *Spiegel v. Rowland*, 552 US 1257; *See, Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442). The sufficiency or insufficiency of a pleading that alleges claims for legal malpractice is a question of law and may be determined by the Court on a motion to dismiss. (*See, Rosner v. Paley*, 65 N.Y.2d 736, 481 N.E.2d 553 (1985)). "[M]ere speculation about a loss resulting from an attorney's alleged omission is insufficient to sustain a prima facie case of legal malpractice" (*Siciliano v. Forchelli & Forchelli*, 17 AD3d 343, 345; *see Dupree v. Voorhees*, 68 AD3d 810, 812-813; *Plymouth Org., Inc. v. Silverman, Collura & Chernis*, P.C., 21 AD3d 464; *Giambrone v. Bank of N.Y.*, 253 AD2d 786).

In order to prevail in an action for legal malpractice, the plaintiff must plead factual allegations which, if proven at trial, would demonstrate that counsel had breached a duty owed to the client, that the breach was the proximate cause of the injuries, and that actual damages were sustained. (*Dweck Law Firm, LLP v. Mann*, 283 A.D.2d 292, 727 N.Y.S.2d 58 (1st Dept. 2001)). To establish causation, a necessary element of a legal malpractice claim, a party must plead specific factual allegations tending to show that "but for" counsel's deficient representation, he or she would have prevailed in the underlying matter or would have achieved a more favorable result. (*See, Kuzmin v. Nevsky*,74 A.D.3d 896 (2d Dept. 2010)). Unsupported

factual allegations, conclusory legal arguments or allegations contradicted by documentation, do not suffice. (*Dweck Law Firm, LLP v. Mann*, 283 A.D.2d 292, 727 N.Y.S.2d 58 (1st Dept. 2001)).

Ursprung's allegations in the first causes of action asserted in her proposed counterclaims, as well as the first causes of action contained in her newly filed complaints, are that Verkowitz was negligent in her representation of Ursprung in the *Vermylen* insurance action by: failing to disclose an unidentified conflict of interest in representing Ursprung in the insurance action; failing to disclose her malpractice; failing to advise Ursprung of her legal position in the insurance matter, failing to recognize that Ursprung was not in a weak position in the insurance matter; failing to properly advise Ursprung regarding the settlement of the insurance action; improperly and fraudulently billing Ursprung and improperly advising her in order to increase the legal fees; willfully or negligently failing to disclose to Ursprung that her rights as a trustee were not those of a beneficiary of the insurance policy, and failing to disclose that she did not know the difference between a beneficiary and trustee from the time she "draft[ed] the divorce settlement"in the matrimonial action through the settlement of the insurance action.

With respect to Ursprung's allegations that Verkowitz failed to disclose a conflict of interest, Ursprung fails to set forth allegations, which if accepted as true, would tend to show that "but for" the conflict of interest, Ursprung would have had a more favorable result in the insurance action. An attorney's failure to disclose a conflict of interest and advise her clients to consult with an independent attorney as a result of a purported conflict of interest, does not by itself state a legal malpractice cause of action. (*See, Lavant v. General Acc. Ins. Co. of Am.*, 212 A.D.2d 450, 622 N.Y.S.2d 726 (1st Dept. 1995); *Sumo Container Station, Inc. v. Evans*, 278 A.D.2d 169 719 N.Y.S.2d 223 (1st Dept. 2000)). A complaint must sufficiently set forth factual allegations, which if proven true, would set forth the manner in which the conflict caused the client to sustain damages, and Ursprung's complaint has failed to do so. (*Coleman v. Fox, Horan & Camerini*, 274 A.D.2d 308, 711 N.Y.S.2d 723 (1st Dept. 2000)). Additionally, if the unidentified conflict of interest alleged relates to Verkowitz's purported malpractice in the underlying matrimonial action, such claims are barred by the June 14, 2011 orders. Further,

Ursprung's allegation that Verkowitz's failed to disclose her malpractice to Ursprung is also barred by the prior court orders as it pertains to the purported malpractice arising out of the legal representation Verkowitz provided to Ursprung in the matrimonial action.

Ursprung's allegations pertaining to Verkowitz's failure to properly advise her of her legal position in the insurance action and Verkowitz's improperly advise to settle the insurance action also fail to state a cause of action for legal malpractice, as Ursprung fails to set forth what her legal position was and fails to set forth allegations which, if true, would tend to show that "but for" Verkowitz's failure to advise Ursprung of her position or recognize that she was not in a weak position, Ursprung would have had a more favorable result or would not have sustained damages.

Further, Ursprung's allegations that Verkowitz fraudulently billed her and that Verkowitz improperly advised her in order to increase her legal fees also fail to state a legally cognizable cause of action. Ursprung fails to set forth factual allegations regarding what improper advise Verkowitz gave Ursprung or what advise was given for the purpose of increasing her legal fees. She also fails to properly allege fraud in Verkowitz's billing. Ursprung fails to set forth any facts tending to show that Verkowitz made false representations of a material fact, with knowledge, regarding Verkowitz's billing or practices, or that Ursprung relied upon the misrepresentation, resulting in damages. CPLR §3016 states that where an action is based upon misrepresentation or fraud, "the circumstances constituting the wrong shall be stated in detail." In order to properly plead a cause of action for fraud, a plaintiff must allege facts specifically setting forth the misrepresentation of a material fact, falsity, scienter by the wrongdoer, justifiable reliance, and injury. (*Barclay v. Barclay Arms Assoc.*, 74 N.Y.2d 644, 542 N.Y.S.2d 512 (1989)).

Lastly, Ursprung's allegations that Verkowitz failed to understand the difference between a trustee and a beneficiary, as it pertained to the life insurance policy at issue in the Vermylen insurance action, that she wilfully or negligently failed to disclose to Ursprung that her rights as a trustee were not those of a beneficiary, that Verkowitz failed to disclose that she did not know the difference between a beneficiary and a trustee "from the time that she represented Ursprung with respect to drafting the divorce settlement" in the matrimonial action through the settlement of the *Vermylen* insurance action, and that she negligently advised Ursprung that her rights to

claim proceeds under the insurance policy were not protected under the divorce agreement, all relate to Verkowitz's representation of Ursprung in the matrimonial action and are barred by the June 14, 2011 Orders.

Accordingly, defendant Ursprung's motion to amend her answer and to join Action #2 or Action #3 with the instant action is denied, and Actions #2 and #3, bearing index numbers 14742/11 and 14743/11, are dismissed for the reasons set forth above.

It is further ordered that the plaintiff CHARLENE K. VERKOWITZ, ESQ. shall serve a copy of this Order upon the Differentiated Case Management Part ("DCM") Case Coordinator of the Nassau County Supreme Court within twenty (20) days of the date of this Order. The parties shall appear for a **Preliminary Conference on March 20, 2012, at 9:30 A.M.** in the DCM Part, Nassau County Supreme Court, to schedule all discovery proceedings.

The parties are forewarned that any further filing of motions requesting nearly identical relief to that which has previously been denied shall result in the issuance of sanctions.

This constitutes the decision and Order of this Court.

Dated: February 2, 2012

Anthony L. Parga, J.S.C.

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