SHORT FORM ORDER

INDEX No. 11-25516

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 9-30-11
ADJ. DATE 11-29-11
Mot. Seq. # 001 - MG; CASEDISP

NORI MIZUNO, Plaintiff, - against - SHARI BARAK, Esq., and SHAPIRO, DiCARO & BARAK, LLP, Defendants.	ANDREW LAVOOTT BLUESTONE, ESQ. Attorney for Plaintiff Woolworth Building, 233 Broadway, 27th Floor New York, New York 10279 SHAPIRO, DICARO & BARAK, LLC Attorney for Defendants 250 Mile Crossing Boulevard, Suite 1 Rochester, New York 14624

Upon the following papers numbered 1 to 26 read on this motion for dismissal ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 20 - 22 ; Replying Affidavits and supporting papers 23 - 26 ; Other memorandum of law - 23 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants pursuant to CPLR 3211 for an order dismissing the complaint is granted.

Plaintiff and his wife are the previous owners, as tenants by the entirety, of a single family residence known as 5 Gerry Lane, Lloyd Neck, New York. A foreclosure proceeding was commenced against plaintiff and his wife in 1994 by First National Bank of Chicago, as Trustee, for a default of the obligation to make monthly mortgage payments, and a bankruptcy petition aimed at staying the foreclosure was filed by plaintiff in 1995. Following a dismissal of the proceeding for failure to pay the Bankruptcy Trustee, plaintiff filed a second bankruptcy petition in an effort to halt the foreclosure action. The second petition was dismissed, and plaintiff retained the law firm of Fischoff & Associates to file a new bankruptcy petition on his behalf. Upon an application by the foreclosing bank to lift the automatic stay imposed by 11 USC § 362 (a), United States Bankruptcy Judge Melanie L. Cyganowski issued a conditional order on May 1, 2000 directing, in part, that plaintiff make monthly mortgage payments by the 15th day of each month to the foreclosing bank's attorneys, the law firm of Shapiro & DiCaro, LLP. The conditional order further provided that plaintiff had a two-month default period before a notice to

4-5-12

cure could be sent by the bank, and that, in the event plaintiff defaulted in his obligations to make payments and failed to comply with a 10-day notice to cure, "upon the filing of an Affidavit of Non-Compliance, the automatic stay shall be immediately vacated with respect to First National Bank of Chicago, as Trustee . . . to the extent necessary to allow First National Bank of Chicago, as Trustee . . . to foreclose the mortgage secured by the property located at 5 Gerry Lane . . . without further application to this Court." In addition, the conditional order provided that in the event plaintiff failed to comply with any of the terms of such order, "said stay shall be lifted with prejudice as to the debtor . . . for a period of 180 days."

Subsequently, plaintiff fell behind in his mortgage payments, and a notice to cure, dated December 28, 2001, was sent to plaintiff stating that he was in default of mortgage payments due on November 1 and December 1, 2001. In January 2002, defendant Shari Barak, Esq., at that time an associate of Shapiro & DiCaro, refused to accept a check delivered by plaintiff for the November 2001 mortgage payment, mailed the check back to plaintiff, and filed an affidavit of noncompliance with the Bankruptcy Court. Plaintiff was advised by an attorney with Fischoff & Associates to file yet another bankruptcy petition to stop the foreclosure. Such advice, however, was contrary to the provision in the conditional order precluding plaintiff from seeking a new bankruptcy stay for 180 days after the stay in such bankruptcy proceeding was lifted. On April 4, 2002, plaintiff's home was sold at a foreclosure sale for the sum of $629,000. An application to set aside the foreclosure sale was denied by the Bankruptcy Court, and an appeal of the conditional order issued by Judge Cyganowski was denied by the United States District Court, Eastern District.

In 2003, plaintiff brought a legal malpractice action against Gary Fischoff, Esq. and Fischoff & Associates to recover the value of the lost equity in the Lloyd Neck property. After conducting a nonjury trial, this Court (Whelan, J.) determined that the December 2001 notice to cure was premature under the terms of the conditional order and that defendants, by failing to raise a defense to such notice, were liable for malpractice. During the trial of the malpractice action, Barak testified pursuant to a subpoena duces tecum and ad testificandum issued by plaintiff's attorney directing her to appear at the trial to give testimony and to produce documents related to the underlying loan, the mortgage foreclosure action, and the bankruptcy proceedings. By decision dated January 14, 2010, Justice Whelan, in addition to determining defendants' liability for malpractice, determined plaintiff was entitled to recover all of the lost equity in the subject property, as well as consequential damages. By order dated March 8, 2011, the Appellate Division, Second Department, granted plaintiff's appeal of the judgment in the legal malpractice action to the extent that it directed prejudgment interest on the damages awarded be calculated from April 4, 2002, rather than from May 3, 2003.

Thereafter, in August 2011, plaintiff brought the instant action against Barak and the law firm of Shapiro, DiCaro & Barak, LLP. The complaint alleges, in part, that "[e]ven though the law firm and defendant [Barak] knew of the payment [made by plaintiff in January 2002], it nevertheless wrote, prepared, signed and filed misleading and untruthful documents in which the law firm and Ms. Barak willfully misrepresented receipt of only one payment"; that "[e]ven knowing of this wrongfully refused payment, wrongful testimony and wrongful legal action against plaintiff, and the resulting legal malpractice action against the Fischoff defendants, defendant Barak agreed to appear as an expert witness and offer exculpatory yet discredited and ultimately rejected testimony , and . . . deceitfully

testified in Supreme Court"; and that Barak "did not testify credibly at the underlying trial . . . especially on the claim that the 60 day period set forth in paragraph C of the conditional order started to run on the first of the month."

The first cause of action in the complaint seeks to recover for violations of Judiciary Law § 487, and alleges that Barak "aligned herself with Mr. Fischoff and offered testimony on his behalf that the Court found incredible," namely that plaintiff was late on his mortgage payments, that she "deceitfully" filed the notice of noncompliance in the bankruptcy case, and that she "deceitfully" testified before the Supreme Court in 2009. The second cause of action sounds in fraud and is supported by allegations that Barak knowingly made false and misleading statements in the foreclosure action, that such statements benefitted her client and "ultimately permitted defendant to get hired and compensated as an expert," and that such statements injured plaintiff and "were a fraud upon the Court." The third cause of action alleges Barak "committed a malicious act and committed legal malpractice when she gave testimony that was not true," and that her "fraud, collusion, malicious acts and special circumstances permit a claim of legal malpractice against her, as an attorney, even in the absence of privity." It also asserts that "'[b]ut for' the fraud, collusion, malicious acts and special circumstances . . . plaintiff would have had a better, different and more satisfactory outcome to the foreclosure action and the legal malpractice action."

Defendants now move for an order dismissing the complaint on the grounds that it fails to state a cause of action, that the causes of action asserted are time-barred, and that complete defenses can be established through documentary evidence (*see* CPLR 3211 [a] [1], [5], [7]). Defendants' submissions in support of the motion include copies of the summons and complaint, the judgment of foreclosure and sale, the May 2001 conditional order issued by the Bankruptcy Court, and the subpoena duces tecum and ad testificandum issued to Barak by plaintiff's former attorney, Charles Holster III. Plaintiff opposes the motion, arguing that defendants made misleading, untruthful and deceitful statements in court documents during the period leading up to the foreclosure sale. Plaintiff asserts that Barak "was selected as an expert to testify on behalf of Fischoff at the trial of the legal malpractice action, that she "colluded with Gary C. Fischoff and his attorney when she appeared as an expert on his behalf," and that her testimony "was deceitful within the meaning of Judiciary Law § 487, was fraudulent and was a departure from good and accepted practice . . . and was accomplished by fraud, collusion or malice." Plaintiff also asserts that the claims in this action are timely, as evidence of the alleged fraud, namely an e-mail string between defendant law firm and employees of the foreclosing bank, first was revealed in 2009 during the trial of the malpractice action. Submitted in opposition to defendants' motion is a copy of the alleged e-mail string between attorneys from Shapiro & DiCaro and employees of First National Bank of Chicago.

As to the branch of defendants' motion seeking dismissal of the complaint under CPLR 3211 (a)(7), when a party moves for dismissal based on the failure to state a cause of action, the test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (***Sokol v Leader***, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). A court must determine whether, accepting the facts as alleged in the pleading as true and according the plaintiff the benefit of every favorable inference, those facts fit within any cognizable legal theory (***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]). Affidavits may be used to remedy pleading defects, thereby preserving "inartfully pleaded, but potentially meritorious, claims" (***Rovello v Orofino Realty Co.***, 40 NY2d 633, 635-636, 389 NYS2d 314 [1976]). "Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus

in determining a motion to dismiss" (***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 19, 799 NYS2d 170 [2005]). However, "factual allegations which are flatly contradicted by the record are not presumed to be true, and '[i]f the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211 (a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action'" (***Deutshe Bank Natl. Trust Co. v Sinclair***, 68 AD3d 914, 915, 891 NYS2d 445 [2d Dept 2009], *quoting* ***Peter F. Gaito Architecture, LLC v Simone Dev. Corp.***, 46 AD3d 530, 530, 846 NYS2d 368 [2d Dept 2007]).

As to the first cause of action, 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. To recover under this provision, however, the attorney's deceit or collusion must have caused the plaintiff damages (*see* ***Manna v Ades***, 237 AD2d 264, 655 NYS2d 412 [2d Dept], *lv denied* 90 NY2d 806, 663 NUS2d 511 [1997]; ***Di Prima v Di Prima***, 111 AD2d 901, 490 NYS2d 607 [2d Dept 1985]). Plaintiff's claim under Judiciary Law § 487 is dismissed, as there is no allegation that he or the Court were deceived by Barak during the malpractice action against the Fischoff defendants (*see* ***O'Connor v Dime Sav. Bank of N.Y.***, 265 AD2d 313, 696 NYS2d 477 [1st Dept 1999]; ***Manna v Ades***, 237 AD2d 264, 665 NYS2d 412), and, despite allegations in the complaint that Barak colluded with Gary Fischoff, the uncontroverted evidence in the record shows Barak was subpoenaed as a trial witness by plaintiff's attorney (*see* ***Curry v Dollard***, 52 AD3d 642, 862 NYS2d 54 [2d Dept], *lv denied* 11 NY3d 709, 868 NYS2d 602 [2008]). The Court notes the claim raised in plaintiff's opposition papers that defendants deceived the Bankruptcy Court is barred by the three-year Statute of Limitations (*see* ***Lefkowitz v Appelbaum***, 258 AD2d 563, 685 NYS2d 460 [2d Dept 1999]).

To plead a cause of action for actual fraud, a plaintiff must allege (1) that the defendant made a representation or an omission as to a material fact that was false and known to be false, (2) that the misrepresentation or omission was made for the purpose of inducing the plaintiff to rely upon it, (3) that the plaintiff justifiably relied on the misrepresentation or material omission, and (5) that the plaintiff suffered an injury as a result of such reliance (*see* ***Lama Holding Co. v Smith Barney Inc.***, 88 NY2d 413, 646 NYS2d 76 [1996]; ***Levin v Kitsis***, 82 AD3d 1051, 920 NYS2d 131 [2d Dept 2011]; ***Selechnik v Law Off. of Howard R. Birnbach***, 82 AD3d 1077, 920 NYS2d 128 [2d Dept 2011]; ***Deutshe Bank Natl. Trust Co. v Sinclair***, 68 AD3d 914, 891 NYS2d 445). CPLR 3016 also requires that "the circumstances constituting the wrong shall be stated in detail." Further, a cause of action seeking damages for fraudulent concealment must include, in addition to allegations of scienter, reliance and damages, an allegation that the defendant, as a result of a confidential or fiduciary relationship with the plaintiff, had a duty to disclose material information and that it failed to do so (*see* ***High Tides, LLC v DeMichele***, 88 AD3d 954, 931 NYS2d 377 [2d Dept 2011]; ***Mandarin Trading Ltd. v Wildenstein***, 65 AD3d 448, 884 NYS2d 47 [1st Dept 2009]). In addition, the amount of damages that may be recovered on a fraud claim is limited to the actual loss sustained by the plaintiff (*see* ***Lama Holding Co. v Smith Barney Inc.***, 88 NY2d 413, 646 NYS2d 76; ***Hense v Baxter***, 79 AD3d 814, 914 NYS2d 200 [2d Dept 2010]).

Here, the complaint does not allege that defendants made a misrepresentation or concealed a material fact for the purpose of inducing plaintiff to act or to refrain from acting with respect to either the foreclosure action or the malpractice action, or that defendants had a duty to disclose information to

plaintiff (*see* ***Ozelkan v Tyree Bros. Envtl. Servs., Inc.***, 29 AD3d 877, 815 NYS2d 265 [2d Dept 2006]; ***Singer v Thuilot***, 140 AD2d 235, 528 NYS2d 382 [1st Dept 1988]). The complaint also fails to allege that plaintiff, who was represented by counsel in the foreclosure and malpractice actions, as well as in the bankruptcy proceedings, justifiably relied on a misrepresentation made by a defendant and that he suffered actual damages as a result of such reliance (*see* ***Regina v Marotta***, 67 AD3d 766, 887 NYS2d 861 [2d Dept 2009]; ***Ideal Steel Supply Corp. v Anza***, 63 AD3d 884, 882 NYS2d 190 [2d Dept 2009]; ***O'Connor v Dime Sav. Bank of N.Y.***, 265 AD2d 313, 696 NYS2d 477). Thus, dismissal of the second cause of action, is granted.

Finally, a plaintiff seeking to establish a claim for legal malpractice generally must show that the defendant attorney failed to exercise that degree of care, skill and diligence commonly exercised by an ordinary member of the legal community, and that the attorney's failure to exercise due care caused the plaintiff to sustain actual and ascertainable damages (*see* ***Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer***, 8 NY3d 438, 835 NYS2d 534 [2007]; ***McCoy v Feinman***, 99 NY2d 295, 755 NYS2d 693 [2002]). An attorney, however, will not be liable to third parties not in privity for harm due to professional negligence absent fraud, collusion, malicious acts or other special circumstances (*see* ***Ginsburg Dev. Cos., LLC v Carbone***, 85 AD3d 1110, 926 NYS2d 126 [2d Dept 2011]; ***Fredriksen v Fredriksen***, 30 AD3d 370, 817 NYS2d 320 [2d Dept 2006]; ***Berkowitz v Fischbein, Badillo, Wagner & Harding***, 7 AD3d 385, 777 NYS2d 99 [1st Dept], *lv dismissed* 3 NY3d 767, 788 NYS2d 669 [2004]; ***Rovello v Klein***, 304 AD2d 638, 757 NYS2d 496 [2d Dept], *lv denied* 100 NY2d 509, 766 NYS2d 163 [2003]). Plaintiff, who does not allege an attorney-client relationship with defendants, fails to set forth in the complaint specific allegations against Barak that would constitute fraud, collusion or any of the other acts that would place his legal malpractice claim within the ambit of the exception to the privity requirement (*see* ***Fredriksen v Fredriksen***, 30 AD3d 370, 817 NYS2d 320; ***Griffith v Medical Quadrangle, Inc.***, 5 AD3d 151, 772 NYS2d 513 [1st Dept 2004]). Additionally, the complaint fails to allege actual damages suffered by plaintiff as a result of the alleged malpractice (*see* ***Igen, Inc. v White***, 250 AD2d 463, 672 NYS2d 867 [1st Dept 1987]; *see also* ***Giambrone v Bank of N.Y.***, 253 AD2d 756, 677 NYS2d 608 [2d Dept 1998]). Instead, plaintiff, having obtained a judgment in the action against the Fischoff defendants for the full amount of lost equity in the Lloyd Neck property, plus consequential damages, alleges only that, if not for Barak's conduct, he would have had "a better, different and more satisfactory outcome to the foreclosure action and the legal malpractice action." Dismissal of the cause of action for legal malpractice, therefore, is granted.

Accordingly, defendants' motion pursuant to CPLR 3211 for an order dismissing the complaint is granted.

Dated: April 5, 2012

W. Gerard Asher
J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION