

<b>Copeny v George T. Peters, PLLC</b>
2016 NY Slip Op 32501(U)
December 16, 2016
Supreme Court, Kings County
Docket Number: 501818/14
Judge: Larry D. Martin
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At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 16<sup>th</sup> day of December, 2016.

**PRESENT:**

Hon. LARRY D. MARTIN, J.S.C.

**TARSHEEMA M. COPENY,**  
**PLAINTIFF,**

**Decision & Order**

-VS-

INDEX No. 501818/14

**GEORGE T. PETERS, PLLC and GEORGE T. PETERS,**  
**DEFENDANTS.**

The following papers numbered 1 to 4 read on this motion	Papers Numbered
Notice of Motion - Order to Show Cause and Affidavits (Affirmations) Annexed _____	1-2 _____
Answering Affidavit (Affirmation) _____	3 _____
Reply Affidavit (Affirmation) _____	4 _____

Upon the foregoing papers, defendants George T. Peters, PLLC (the "PLLCC") and George T. Peters ("Peters"; collectively, "defendants") for an order, pursuant to CPLR 3211 (a) (1) and (a) (7), dismissing the complaint herein.

This action arises from defendants' representation of plaintiff Tarsheema M. Copeny ("plaintiff") in an underlying personal injury action. On or about July 17, 2012, plaintiff was in an automobile accident involving a vehicle operated by plaintiff and a vehicle owned by New York Office of Children and Family Services ("OCFS") and operated by Michael Jackson ("Jackson"), an OCFS employee. Plaintiff then retained defendants to represent her. On or about May 7, 2013, defendants filed a summons and complaint, on behalf of plaintiff, against OCFS and Jackson under Index No. 502376 in the Kings County Supreme Court (the "underlying personal injury action"). Subsequently, defendants learned that claims against OCFS had to be made in the Court of Claims. Thereafter, on or about, June 6, 2013, defendants filed a stipulation of discontinuance dated May 31, 2013 with the Kings County Supreme Court for the discontinuance of the underlying personal injury

action. On or about August 12, 2013, defendants, on behalf of plaintiff, filed a motion for permission to file a late claim against OCFS in the Court of Claims. By letter dated August 20, 2013, plaintiff, among other things, terminated defendants' services on her behalf and advised that she had retained the law firm Sinel & Associates, PLLC to represent her. By decision and order (Soto, J.) dated October 7, 2013, the motion for permission to file a late claim against OCFS was denied in the Court of Claims. By letter dated February 27, 2015, Sinel & Associates, PLLC advised defendants that they would not be substituting in as counsel in the underlying personal injury action. On or about March 3, 2014, plaintiff commenced the instant action against defendants asserting causes of action sounding in legal malpractice. Defendants now move for the relief requested herein.

“A motion pursuant to CPLR 3211 (a)(1) to dismiss the complaint on the ground that the action is barred by documentary evidence may be granted only where the documentary evidence utterly refutes plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law” (*Vertical Progression, Inc. v Canyon-Johnson Urban Funds*, 126 AD3d 784, 786 [2d Dept 2015], quoting *Mendelovitz v Cohen*, 37 AD3d 670, 670 [2d Dept 2007]).

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*see*, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*F & M General Contracting v Oncel*, 132 AD3d 946, 947 [2d Dept 2015], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). “However, when evidentiary material is adduced in support of a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), and the motion has not been converted to one for summary judgment, the court must determine whether the proponent of the pleading has a cause of action, not whether he or she has stated one and, unless it has been shown that a material fact as claimed by the [plaintiff] to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, ... dismissal should not eventuate” (*F & M General Contracting*, 132 AD3d at 947-48, internal citation and quotation marks omitted).

“To state a cause of action to recover damages for legal malpractice, a plaintiff must allege (1) that the attorney failed to exercise the care, skill, and diligence commonly possessed and exercised by a member of the legal profession, and (2) that such negligence was a proximate cause of the actual damages sustained. A plaintiff must plead actual, ascertainable damages resulting from the attorney’s negligence. Conclusory or speculative allegations of damages are insufficient. However, a plaintiff is not obligated to show, on a motion to dismiss, that it actually sustained damages. It need only plead allegations from which damages attributable to the defendants’ malpractice might be reasonably inferred” (*Randazzo v Nelson*, 128 AD3d 935, 936 [2d Dept 2015], internal citations and quotations omitted).

The Court notes that plaintiff’s current counsel, Sinel & Associates, PLLC, treats the instant motion as one for dismissal pursuant to CPLR 3212 rather than dismissal pursuant to CPLR 3211. Plaintiff also requests that the instant motion be converted into one for summary judgment and, upon conversion, she be granted judgment as a matter of law on her claims in the complaint. Pursuant to CPLR 3211, the Court, upon adequate notice to the parties, may treat a CPLR 3211 (a) motion to dismiss as a motion for summary judgment where the parties deliberately chart a summary judgment course (*see* CPLR 3211 [c]; *see Mihlovan v Grozavu*, 72 NY2d 506, 508 [1988]; *compare Kaplan v Roberts*, 91 AD3d 827, 828 [2d Dept 2012]). The Court declines to grant plaintiff’s request to convert the instant motion to one for summary judgment and, upon conversion, granting judgment as a matter of law in her favor.

Nevertheless, based upon a review of the record submitted by the parties and the relevant law, the Court denies defendants’ motion to dismiss. Here, plaintiff alleges in the complaint that defendants breached the duty of care by, among other things, (1) failing to file a notice of intention to file a claim with the Court of Claims within the statutory 90-day time period, (2) failing to timely move for permission to file a late notice of claim pursuant to Court of Claims Act Article II, Section 10 (6) and (3) failing to submit an affidavit from plaintiff establishing that she has a valid cause of action or to submit any medical records regarding her claims pursuant to Insurance Law § 5102 (d)

[\*4]  
(Complaint, ¶ 27). As a result, plaintiff claims that she would have been able to “prove[] a case of liability” against OCFS and Jackson and also that her claims in the Court of Claims would not have been dismissed leaving her “no remedy at law for her personal injuries” (Complaint, ¶ 28). The Court finds that these claims are sufficient to state a cause of action for legal malpractice (*see* CPLR 3211 [a][7]). As such, that branch of defendants’ motion to dismiss the complaint for failure to state a cause of action is denied.

Moreover, the documents submitted by defendants did not conclusively establish a defense as a matter of law. Defendants’ submissions fail to utterly refute plaintiff’s allegations so as to warrant dismissal of the complaint herein (*see* CPLR 3211 [a][1]; *see also* *Randazzo*, 128 AD3d at 937). Plaintiff correctly points out that Jackson was never served with the summons and complaint in the underlying personal injury action. In addition, a review of the Court’s record indicates that a request for judicial intervention was never filed in the underlying personal injury action. In this regard, that branch of defendants’ motion to dismiss the complaint on the grounds of documentary evidence is denied.

Accordingly, defendants’ motion is denied.

The foregoing constitutes the decision and order of the Court.

**For Clerks use only**

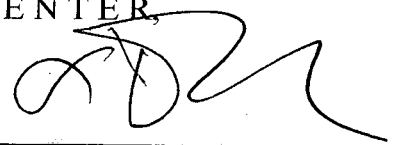
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**Motion Seq. #**

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ENTER,



HON. LARRY D. MARTIN  
J.S.C.