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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Kornreich PART 54

0117197/2002

SHAFI, JAMES
vs
GORAYEB & ASSOCIATES P.C.

INDEX NO. 0117197/02

MOTION DATE 2/13/03

MOTION SEQ. NO. 1

MOTION CAL. NO.

SEQ 1

DISMISS ACTION

The following papers, numbered 1 to 4 were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2, 3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the annexed decision and order.

SCANNED
APR 03 2003

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 3/25/03

SHIRLEY WERNER KORNREICH J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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JAMES SHAFI,

Plaintiff,

Index No.: 117197/02

-against-

DECISION AND ORDER

GORAYEB & ASSOCIATES, P.C., and ROY KURILOFF, ESQ., individually and as a member of GORAYEB & ASSOCIATES, P.C., and KATZ, BLEIFER & KERN, LLP.,

Defendants

..... X

KORNREICH, SHIRLEY WERNER, J.:

This is an action to recover for alleged legal malpractice in connection with an underlying personal injury action by plaintiff against the New York City Transit Authority ("NYCTA"). Plaintiff brought this action when he learned that his attorneys failed to appear at trial on his behalf, causing dismissal of his action.

Motion to Dismiss

Defendants Gorayeb and Kuriloff now move to dismiss all claims against them pursuant to CPLR 3211(a)(7), and submit their attorney's affirmation, the summons and complaint, and the affidavit of defendant Roy Kuriloff. Plaintiff submits in opposition his attorney's affirmation and copies of letters from Gorayeb addressed to plaintiff's son. Defendant Katz also opposes, and submits the affidavit of Chet W. Kern.

Facts

Plaintiff, a resident of Lahore City, Pakistan, alleges that on April 4, 1994 he was a passenger in a car which was rear-ended by a NYCTA bus, causing him to sustain injury including

a tear of the meniscus of the right knee and loss of hearing. It is undisputed that plaintiff retained defendant Katz, Bleifer & Kern, LLP ("Katz") and that Katz commenced an action on his behalf against NYCTA in Supreme Court, Kings County. Plaintiff alleges that Katz brought on as trial counsel defendant Gorayeb & Associates, P.C. ("Gorayeb"), a law firm where Kuriloff was an associate, Neither Gorayeb nor Kuriloff dispute this; however, Chet W. Kern avers on behalf of Katz that "on or about December 1996, the law firm of Katz, Bleifer and Kern, LLP ceased its practice" and "many matters including the Shafi matter were transferred to Gorayeb & Cuyler, P.C., now known as Gorayeb & Associates, P.C. for processing to conclusion and not as trial counsel." Affidavit of C. Kern, ¶ 2.

Plaintiff alleges that on or about September 29, 1999, Gorayeb and Kuriloff held themselves out as competent to represent him in his action against NYCTA. Plaintiff submits copies of letters dated May 13, 1999 and August 5, 1999 from Gorayeb addressed to plaintiffs son Shamsheer Shafi, in Brooklyn, New York. The first letter states "[t]he date is May 27, 1999 for a settlement conference your father is not needed at that time to be present but we would like to speak to him regarding his case before said date. Please call us as soon as you receive this letter and I will have more to tell you then." Affirmation of V. Aceste, Exhibit A. The August 5 letter states that "Robert Rubenstein appeared in court today regarding your father's case. The case has been adjourned to September 29, 1999. At that time we should obtain a trial date. With the looks of things it just might be towards the end of the year maybe the beginning." Both letters are signed "Jody Fisher, Legal Assistant." Id. Aside from these letters, plaintiff alleges that he "never received any further written communication from the Defendants." Affirmation of D. Wilck, Exhibit A, ¶ 21.

Plaintiff further alleges that, according to court records, his case was "marked dismissed on

September 29,1999 by Judge Michael Garson" due to the failure of Kuriloff and Gorayeb to appear in court; that Kuriloff and Gorayeb failed to move for an order restoring the action; that they concealed their failures from plaintiff; and that but for these negligent actions, plaintiff would have prevailed in the action. Wilck *Aff.* **Ex.** A. Plaintiffs attorney states "[u]pon information and belief...[Gorayeb] had executed a Consent to Change Attorney to become counsel of record in the matter of James Shafi **v.** NYCT and attempts are being made to locate the consent." Aceste *Aff.*, ¶ 6. Plaintiff commenced this action by filing a summons and complaint on August 2,2002. Id. at ¶ 4. Issue has not been joined and no discovery has taken place. Id. at ¶¶ 4-5.

Conclusions of Law

The Court's task in a CPLR 3211 motion to dismiss is "to determine whether plaintiff's pleadings state a cause of action." 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144 (2002). In making its determination, the Court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). Accord Campaign for Fiscal Equity, Inc. v. State of N.Y., 86 N.Y.2d 307, 318 (1995). Mindful of these guidelines, the Court turns to whether plaintiff's complaint states a cause of action.

"The elements of a legal malpractice claim in New York are the existence of an attorney-client relationship, negligence on the part of the attorney or some other conduct in breach of that relationship, proof that the attorney's conduct was the proximate cause of injury to the plaintiff, and proof that but for the alleged malpractice the plaintiff would have been successful in the underlying action." Hanlin v. Mitchelson, 794 F.2d 834 (2nd Cir. 1987) citing Fidler v. Sullivan, 93 A.D.2d 964 (3rd Dept. 1983). Defendants Gorayeb and Kuriloff argue that no

attorney-client relationship existed as between them and plaintiff because contractual privity was absent. The Court disagrees.

"It is well settled that an attorney may not be held liable for negligence in the provision of professional services adversely affecting one with whom the attorney is not in contractual privity." National Westminster Bank USA v. Weksel, 124 A.D.2d 144 (1st Dept. 1987) app den 70 N.Y.2d 604 (1987); see also Viscardi v. Lerner, 125 A.D.2d 66 (2nd Dept. 1986)("[w]e decline to depart from the firmly established privity requirement in order to create a specific exception for an attorney's negligence in will drafting"). The First Department has held that for the purposes of malpractice claims there is generally no privity between the client and an attorney "of counsel" to the client's retained counsel. See Hirsch v. Weisman, 189 A.D.2d 643 (1st Dept. 1993)(analogizing trial counsel to 'of counsel' role and finding no privity between client and assigned trial counsel). Moreover, when a client retains counsel, generally the relationship of privity exists only with the retained counsel, not with associates of the retained counsel. See Vogel v. Lyman, 246 A.D.2d 422 (1st Dept. 1998)(no contractual relationship existed between plaintiff client and associate of retained counsel).

Notwithstanding these general principles, courts have extended malpractice liability beyond cases of "actual privity," and recognized potential liability in cases where the relationship is "so close as to approach that of privity." See Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood, 80 N.Y.2d 377, (1992)(law firm that furnished to third party opinion letter containing false assurances could be liable to that third party for malpractice). Moreover, in determining whether an attorney-client relationship exists, "formality is not essential... it is necessary to look to the words and actions of the parties to ascertain if an attorney-client relationship was formed." C.K. Indus. *Corp.* v. C.M. Indus. Corp., 213 A.D.2d 846 (3rd Dept.

1995). Important to the determination is whether "there is an explicit undertaking to perform a specific task." See Wei Cheng Chang v. Katy Pi, 288 A.D.2d 378 (2nd Dept. 2001).

Accepting the facts as alleged and according plaintiff the benefit of every possible favorable inference, plaintiff meets the threshold requirement for alleging an attorney-client relationship. The letters from Gorayeb to plaintiffs son suggest a relationship existed to "perform a specific task," namely, to represent plaintiff at trial. See Gaddy v. Eisenpress, 1999 U.S. Dist. LEXIS 19710 (S.D.N.Y. Dec. 22, 1999) citing Hirsch, Vogel, Prudential, supra (question of fact raised as to attorney-client relationship where no formal agreement existed but 'of counsel' attorney agreed to represent plaintiff, appeared at meetings, and billed plaintiff for his services); Town Line Plaza Assocs. v. Contemporary Props., 223 A.D.2d 420 (1st Dept. 1996)(facts alleged, if proven, would "sufficiently approach privity to enable plaintiff to recover" in malpractice action). In addition, the affidavit submitted by Katz suggests plaintiffs case was not merely referred to Gorayeb as trial counsel but transferred to Gorayeb completely. See Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:43, at 60 ("the affidavit is of course the primary source of proof on a dismissal motion"); see also Rovello v. Orofino Realty Co., 40 N.Y.2d 633 (1976)(affidavits in CPLR 3211(a)(7) motion may be received to "remedy defects in the complaint"). Accord Held v. Kaufinan, 91 N.Y.2d 425 (1998)(court could consider additional dismissal grounds raised in defendant's reply affidavit). Under these circumstances, the Court concludes that plaintiff's complaint does not fail to state a cause of action against Gorayeb.'

However, under Vogel. supra, plaintiffs complaint alleges no cause of action against

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'The Court finds no support for plaintiff's argument that contractual privity is not required to maintain a legal malpractice action sounding in tort. Plaintiff cites no case which has so held, and the Court is aware of none.

Kuriloff, who avers he joined Gorayeb as an associate on or about November 1, 1998, and was not at that time, or at any time relevant to this action, a member of or a holder of any proprietary interest in Gorayeb. Wilck Aff., **Ex.** B. Plaintiff does not dispute Kuriloff s associate status, but argues that a cause of action is stated against him because he was "actively involved in the handling of [plaintiff's] matter." Aceste Aff., ¶ 6. Even if true, this allegation does not give rise to privity for the purposes of stating a malpractice claim. Accordingly, it is

ORDERED that the motion to dismiss of defendant Gorayeb & Associates, P.C. is denied; and it is further

ORDERED that the motion to dismiss of defendant Roy Kuriloff is granted and all plaintiff's claims against defendant Roy Kuriloff are dismissed.

The foregoing constitutes the decision and order of the Court.

Date: March 26,2003
New York, New York

SHIRLEY WERNER KORNREICH