SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: PART 17

----------x

KENNETH FAATH,

Plaintiff,

- against -

MARK BRADLEY ROTH,

Defendant.

----------x

DECISION AND ORDER

Index No: 003912/11

Motion Sequence No: 001
Original Return Date: 06-27-11

P R E S E N T :
HON. JOEL K. ASARCH,
Justice of the Supreme Court.

The following named papers numbered 1 to 7 were submitted on this Notice of Motion on September 20, 2011:

	Papers numbered
Notice of Motion, Affirmation and Affidavit	1-3
Memorandum of Law in Support	4
Affirmation and Affidavit in Opposition	5-6
Reply Affirmation	7

This motion by the defendant, Mark Bradley Roth, for an order pursuant to CPLR 3211(a)(1) and (7), and CPLR 3013 dismissing the complaint in its entirety, and an order pursuant to 22 NYCRR 130-1.1 imposing sanctions on the plaintiff and his attorney requiring them to reimburse him for his legal fees and costs incurred as a result of this action, is determined as provided herein.

The plaintiff in this action seeks to recover damages for legal malpractice. As and for his first cause of action, he alleges that he retained the defendant to represent him "in connection with

a matrimonial matter" and that the defendant "failed to properly represent [him]." He alleges that as a result of the defendant's malpractice, he "is still married" and that he "was pressured by the defendant into executing an agreement with his wife which the defendant failed to explain to him and which is of doubtful enforceability." He seeks damages in the minimum amount of $100,000. As and for his second cause of action, he alleges that the defendant's charges were excessive and that he billed for work not performed. He seeks damages of a minimum of $40,000.

The defendant seeks dismissal of the complaint pursuant to CPLR 3211(a)(1) and (7).

"In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), a court should '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.' " T.V. v New York State Dept. of Health, 88 AD3d 290 (2nd Dept 2011), citing Leon V Martinez, 84 NY2d 83, 87-88 (1994); Sarva v Self Help Community Services, Inc., 73 AD3d 1155, 1155-1156 (2nd Dept 2010). "Such a motion should be granted only where, even viewing the allegations as true, the plaintiff still cannot establish a cause of action." T.V. v New York State Dept. of Health, supra; see Parsippany Const. Co., Inc. v Clark Patterson Associates, P.C., 41 AD3d 805, 806 (2nd Dept 2007). "A motion to dismiss pursuant to CPLR 3211(a)(1) will be granted only if the 'documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (quotations and citations omitted).' " Fontanetta v Doe, 73 AD3d 78, 83-84 (2nd Dept 2010).

"To state a cause of action to recover damages for legal malpractice, a plaintiff must allege: (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 (quotations and citations omitted)." Marino v Lipsitz, Green, Fahringer, Roll, Salibury & Cambria, LLP, 87 AD3d 566 (2nd Dept 2011). "To state a cause of action to recover damages for legal malpractice, a plaintiff must allege: (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 (citations omitted)." Marino v Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, LLP, supra, at p. 566. "To establish the element of causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages but for the attorney's negligence (citations omitted)." Marino v Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, LLP, supra, at p. 566.

"[I]t has been held that a client cannot premise a claim of malpractice on a claim that he was misadvised about the content of an agreement, or that his attorney 'missed something' in that agreement to the client's detriment, where the agreement itself recites that the client had been apprised of his rights and had been given the opportunity to weigh all the facts likely to influence his decision." Faden v Satterlee Stephens Burke & Burke, LLP, 24 Misc 3d 1205(A) (Supreme Court Nassau County 2007) aff'd, 52 AD3d 652 (2nd Dept 2008), citing Lunney & Crocco v Wolfe, 243 AD2d 348 (1st Dept 1997), lv den., 92 NY2d 802 (1998), rearg den., 92 NY2d 921 (1998); Wexler v Shea & Gould, 211 AD2d 450 (1st Dept 1995). "Therefore, submission of a writing that contains such provisions contradicts a claim of legal malpractice, and can lead to dismissal pursuant to CPLR 3211(a)(1) and (a)(7)." Faden v Satterlee Stephens Burke & Burke, LLP, supra, at 24 Misc 3d 1205(A), citing Malarkey v Piel, 7 AD3d 681 (2nd Dept. 2004) and Laruccia v Forcelli, Curto, Schwartz, Mineo, Carlino & Cohn, LLP, 295 AD2d 321 (2nd Dept 2002), lv dism. in part, den. in

part, 98 NY2d 753 (2002).

The only damages alleged by the plaintiff is that he is "still married." To baldly equate "remaining married" with damages is inappropriate and unacceptable. The plaintiff's failure to plead actual ascertainable damages which were proximately caused by the alleged malpractice requires dismissal of a legal malpractice claim under CPLR 3211(a)(7). Wald v Berwitz, 62 AD3d 786 (2nd Dept 2009), citing Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d 438, 442 (2007); Cummings v Donovan, 36 AD3d 648 (2nd Dept 2007).

In any event, the defendant lawyer cannot be faulted for the plaintiff's continued married status. The Settlement Agreement which was signed by the plaintiff precludes such a finding. It provides:

> "Each party has had a full opportunity and has consulted at length with his or her attorney regarding all of the circumstances hereof and acknowledge that this Agreement has not been the result of any fraud, duress or undue influence exercised by either party upon the other or by any other person or persons upon the other."

More importantly, the plaintiff signed a detailed letter by counsel dated June 19, 2008 which provides that the terms of the Separation Agreement were negotiated by him and he has required that they be included in it; that he realized he will continue to be married; that it is his desire that the divorce action be discontinued so that he could live under the terms of the Agreement; and that he had advised counsel that "it is not economically feasible for [him] to be divorced." It further notes that the Separation Agreement is very risky as it relies too much on the parties' good faith; that it may not be enforced in court; and, that it is a product of his and his wife's negotiations with little legal input. In sum, the letter by the defendant attorney states:

> I have attempted to do my best within the parameters and guidelines you have set. However, you have precluded me from attempting to fully protect you under the terms of this agreement. I have done all possible within those guidelines and parameters. You have limited the amount of negotiation and you are satisfied with the terms of the agreement as they are presently written.
>
> I have given you every opportunity to review this agreement in detail and to ask any questions you desire. You have had the opportunity to review this agreement and ask the questions and had sufficient time to digest the terms of this agreement, it is my understanding from speaking to you, that you have fully read the agreement.
>
> If you have any questions, now is the time to ask prior to executing this agreement, which will be binding upon you and your spouse.

The plaintiff acknowledged as follows:

> I have read the separation agreement and I am familiar with the terms. I am executing same voluntarily and under no duress and over the advice of my counsel as set forth in this letter.

In a follow-up letter by the defendant lawyer dated December 8, 2008 which was again signed by the plaintiff, counsel cautions that contract law, not the Domestic Relations Law, would apply to the agreement and warned that there was no telling what a court would do if called upon to enforce some of the provisions. In sum, the defendant lawyer warned:

> You have expressed your willingness to settle this matter under the terms of the agreement. Although, I disagree with many of the terms contained therein, you still wish to proceed under the terms of the settlement agreement as written. Settling this matter just to settle is not the right choice. However, based upon your desire to settle under the terms as written, I will permit you to execute the agreement over my objection.

In combination with the Settlement Agreement, the letters submitted by the defendant attorney which were signed by the plaintiff flatly refute any claim by him that he remained married or was otherwise damaged on account of the defendant's negligence. See, Malarkey v Piel, supra; Laruccia v Forcelli, Curto, Schwartz, Ineo, Carlino and Cohn, supra; Beattie v Brown & Wood, 243

AD2d 395 (1st Dept. 1997); Faden v Satterlee Stephens Burke & Burke, LLP, supra.

In any event, the Separation Agreement was entered into two and one-half years ago and it appears at no time has either party sought to challenge it in any way. Under these circumstances, the plaintiff has ratified the Separation Agreement. Vann & Home Ins. Co., 288 AD2d 60 (1st Dept 2001), lv den., 97 NY2d 611 (2002); Schwarz v Shapiro, 202 AD2d 187 (1st Dept 1994), lv den., 83 NY2d 760 (1994); see also, Jaffee & Asher LLP v Ross, 6 AD3d 357 (1st Dept 2004), lv dism., 3 NY3d 656 (2004).

The first cause of action by which the plaintiff seeks to recover for legal malpractice is **dismissed**.

The second cause of action seeks to recover damages for alleged overbilling and charges for work not performed. This claim has been adequately pled under CPLR 3013. Particulars can be obtained via a Bill of Particulars. Dismissal of the second cause of action is not warranted by this motion, nor is the awarding of sanctions pursuant to 22 NYCRR 130-1.1.

Accordingly, after due deliberation, it is

ORDERED, that the portion of the defendant's motion seeking dismissal of the first cause of action of action pursuant to CPLR 3211(a)(1) and (7) is **granted** and the first cause of action is dismissed; and it is further

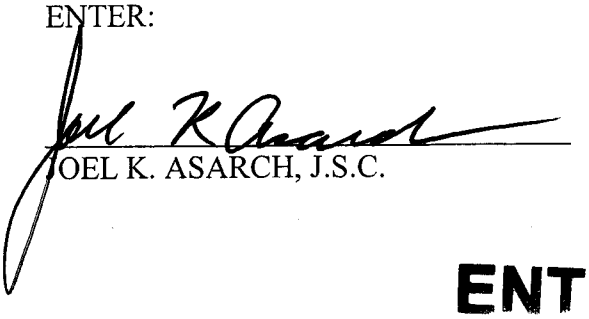
ORDERED, that in all other respects, the motion is **denied**; and it is further

ORDERED, that counsel for the plaintiff and for the defendant shall appear in the DCM Part of this Court at 100 Supreme Court Drive, Mineola, New York **on January 18. 2012** at 9:30 for a preliminary conference.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
December 12, 2011

ENTER:



JOEL K. ASARCH, J.S.C.

Copies mailed to:

Howard B. Arber, Esq.
Attorney for Plaintiff

Rivkin Radler, LLP
Attorneys for Defendant