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SHORT FORM ORDER

INDEX No. 11-17748

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 8-15-11 (#004)
MOTION DATE 9-13-11 (#005 & #006)
MOTION DATE 2-14-12 (#007)
ADJ. DATE 8-7-2012
Mot. Seq. # 004 - MG
005 - MotD
006 - MotD
007 - MG

AMENDED DECISION:

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BRINETT PALMER,

Plaintiff,

- against -

JOHN H. MULVEHILL, ESQ., RICHARD E. MILLER, ESQ., NICHOLAS PANZINI, ESQ. and NICHOLAS PANZINI, P.C.,

Defendants.

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Attorney for Defendant Miller
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Upon the following papers numbered 1 to 52 read on these motions to dismiss and to amend answers ; Notice of Motion/ Order to Show Cause (004) and supporting papers 1 - 10 ; Notice of Cross Motion (005)and supporting papers 11- 15 ; Notice of Cross Motion (006) and supporting papers 16 - 19 ; Answering Affidavits and supporting papers 20 - 30 ; Replying Affidavits and supporting papers 31 - 38 ; Notice of Motion/Order to Show Cause (007) and supporting papers 39 - 43 ; Answering Affidavits and supporting papers 44 - 52 ; Replying Affidavits and supporting papers 53 - 54 ; Other ___ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (005) by defendant John H. Mulvehill, Esq. for an order dismissing the complaint, and the motion (007) of plaintiff for an order substituting the bankruptcy trustee for plaintiff, are consolidated for the purposes of this determination and are decided together with the cross motions of defendants Richard E. Miller, Esq. and Nicholas Panzini, Esq. and Nicholas Panzini, P.C. for orders permitting them to amend their answers and dismiss plaintiff's complaint; and, it is further

ORDERED that the motion by the defendant John H. Mulvehill, Esq. for an order dismissing plaintiff's complaint in its entirety pursuant to CPLR 3211 (a) (1), (3), and (7) is granted, only as against defendant John H. Mulvehill, Esq.; and, it is further

ORDERED that the portion of the cross motion by the defendant Richard E. Miller, Esq. which seeks an order permitting him to amend his answer to change the date of the accident is granted, and the portion of the cross motion which seeks an order dismissing plaintiff's complaint against him in its entirety is denied; and, it is further

ORDERED that the portion of the cross motion by the defendants Nicholas Panzini, Esq. and Nicholas Panzini, P.C., which seeks an order permitting them to amend their answer is denied and the portion of the motion for an order dismissing plaintiff's complaint as asserted against them is denied; and, it is further

ORDERED that the motion by the plaintiff for an order substituting the trustee, R. Kenneth Barnard, as the successor in interest to the debtor plaintiff Brinett Palmer, and amending the caption accordingly is **granted**..

Plaintiff commenced this action on May 26, 2011 to recover damages she allegedly sustained as a result of the legal malpractice of each of the defendants. Plaintiff alleges that she sustained serious personal injuries when she was caused to fall through a fold away bed on a cruise ship on December 21, 2006 while employed to care for another cruise ship passenger. On March 2, 2007 plaintiff and defendant, Nicholas Panzini ("Panzini"), executed a contingent retainer agreement wherein plaintiff retained him to "prosecute or adjust all claims for personal injury/wrongful death and other damages resulting from injuries which [she] sustained on or about 12/21/06." In a letter dated April 12, 2007, defendant Panzini advised plaintiff that "for the continuity of the case, I will want to forward the bodily injury file to Mr. Miller." On December 5, 2008 plaintiff signed a retainer with defendant, John H. Mulvehill, Esq. ("Mulvehill"), whereby she retained him "to prosecute or adjust [her] claim for damages arising from personal injuries and, as well, pain and suffering sustained by [her] on or about the 21st day December, 2006 through the negligence of ... a cruise liner or other persons and the hereby [*sic*] give you the exclusive right to take all legal steps to enforce the said claim and further agree not to settle this claim in any manner without your written consent. This retainer does not include the cost of the prosecution or defense of any appeal." On December 8, 2008 an action was commenced on plaintiff's behalf against the cruise ship company in the United States District Court for the Eastern District of New York. In a fax transmittal sheet to defendant Richard E. Miller ("Miller"), dated July 31, 2009, defendant Mulvehill indicated that "this will confirm that there will be a 50/50 split of the attorneys fee in the above matter (the matter being "Palmer v [the cruise line]"). Thereafter, in a Memorandum of Decision and Order dated October 2, 2010, the Hon. Arthur D. Spatt, U.S.D.J. dismissed plaintiff's

claims in their entirety on the ground that the applicable one year statute of limitations had run prior to the commencement of the lawsuit.

Plaintiff, as debtor, filed a Chapter 7 bankruptcy petition in the US Bankruptcy Court for the Eastern District of New York on December 22, 2008. Plaintiff-debtor was discharged in bankruptcy on March 18, 2009, and the bankruptcy closed and a final decree was issued on or about October 12, 2010 (subsequent to the discharge in bankruptcy on January 29, 2010 the bankruptcy court issued an order granting an application to employ defendants Richard E. Miller and John H. Mullvehill as personal injury counsel to the trustee with regard to the action against the cruise ship). On October 25, 2011 the trustee in bankruptcy, R. Kenneth Barnard, advised the bankruptcy court in his petition to be re-appointed as the trustee and to re-open the bankruptcy proceeding, that the above captioned action had been commenced and that the bankruptcy estate could pursue a recovery upon a legal malpractice theory. By an order dated January 10, 2012, the Hon. Robert E. Grossman, US Bankruptcy Judge, stated in part that "R. Kenneth Barnard, as trustee [is authorized to retain, as Special Counsel, pursuant to 11 U.S.C. §§ 327 (e) and 328 of the Bankruptcy Code and F.R.B.P. Rule 2014 (a), to prosecute and conclude a legal malpractice action entitled 'Brinett Palmer v John Mulvehill, Esq., Richard E. Miller, Esq., Nicholas Panzini, P.C., Index No.: 17748/11' (the 'Malpractice Action') ... [and] that the issuance of the Discharge of the Debtor by the Bankruptcy Court shall not divest the Trustee and the Estate of the Debtor of any interest in the Malpractice Action or the proceeds derived therefrom."

Defendant Mulvehill now moves for an order dismissing plaintiff's complaint against him on the grounds that the documentary evidence shows that he was retained by plaintiff after the statute of limitations had run on her underlying lawsuit, thus his actions could not be the proximate cause of any injuries she may have suffered as a result of a late commencement of that suit; that an action against him for failing to commence a legal malpractice action against the co-defendants on plaintiff's behalf is improper because he was not retained to prosecute a legal malpractice action; that plaintiff was not damaged by an alleged failure on his part to commence a legal malpractice action on her behalf; and, that plaintiff has no standing to bring the within lawsuit since she did not disclose a claim against her counsel, based upon their representation of her in the underlying lawsuit, in a bankruptcy petition filed by her on or about December 22, 2008. In support of his motion, defendant Mulvehill includes a copy of the summons and complaint, defendant Panzini's answer with cross claims, the retainer agreement between plaintiff and him, Judge Spatt's October 2, 2010 memorandum decision and order, and plaintiff's voluntary bankruptcy petition.

Co-defendants, Miller and Panzini, cross-move for orders permitting each of them to amend their answers to include an additional affirmative defense that plaintiff failed to include her personal injury action against the cruise liner and her legal malpractice action against them in her bankruptcy petition, and dismissing plaintiff's complaint on the grounds that she lacks standing to bring the within action for failing to include her personal injury and legal malpractice actions as assets in her 2008 bankruptcy petition. Defendant Miller alleges that he first became aware of the plaintiff's voluntary bankruptcy petition "upon being served with a copy of the same which was included in co-defendant John H. Mulvehill, Esq.'s motion papers." Defendant Panzini states that he "first learned of [plaintiff's] bankruptcy action upon being served with co-defendants [*sic*] motion papers." He relies on co-defendant Miller's arguments concerning the bankruptcy laws and their application to this matter.

Defendant Miller includes a copy of his answer and proposed amended answer with his cross motion, while defendant Panzini submits his proposed amended answer with his cross motion.

A CPLR 3211 (a) (1) motion to dismiss a complaint on the ground that a defense is founded on documentary evidence may be appropriately granted where the documentary evidence utterly refutes the plaintiff's allegations, conclusively establishing a defense as a matter of law (*see* ***Peter Williams Enterprises, Inc. v New York State Urban Dev. Corp.***, 90 AD3d 1007, 935 NYS2d 624 [2d Dept 2011]; ***Turkat v Lalezarian Developers, Inc.***, 52 AD3d 595, 596, 860 NYS2d 153 [2d Dept 2008]). In order to sustain a claim for legal malpractice, the plaintiff must establish that the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession which results in actual damages to her (***McCoy v Feinman***, 99 NY2d 295, 301, 302, 755 NYS2d 693 [2002]). A cause of action sounding in legal malpractice accrues on the date the alleged malpractice was committed, not on the date it was discovered (***St. Stephens Baptist Church v Salzman***, 37 AD3d 589, 830 NYS2d 248 [2d Dept 2007]). Here, the time to file a complaint as a result of damages plaintiff allegedly sustained in the cruise ship accident expired on December 21, 2007, thus the plaintiff's claim for legal malpractice accrued on December 22, 2007.[1] Since the retainer agreement with defendant Mulvehill was not signed until December 5, 2008, after the statute of limitations had expired with regard to plaintiff's underlying claim against the cruise ship, he cannot be liable for malpractice in failing to file the claim in a timely manner. Consequently, defendant Mulvehill has established a defense to plaintiff's claim of legal malpractice as a matter of law in allegedly failing to bring a timely action against the cruise liner.

On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), the pleading is to be afforded a liberal construction and the court is to determine only whether the facts as alleged fit within any cognizable legal theory. The facts pleaded are presumed to be true and are to be accorded every favorable inference (*see*, ***Lucia v Goldman***, 68 AD3d 1064, 1065, 893 NYS2d 90, 92 [2d Dept 2009]). In addition, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*see*, *id.*). Also, where evidentiary material is adduced in support of the motion, the court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated one (*see*, *id.*). Defendant Mulvehill was retained by plaintiff to prosecute her claim against the cruise liner for the damages she allegedly sustained in a fall on the ship. Pursuant to the plain language of the retainer agreement he was not retained to commence an action against the co-defendants for their alleged legal malpractice. Thus, the plaintiff has failed to state a cognizable cause of action against defendant Mulvehill as to his failure to bring an action against the co-defendants (*see* ***AmBase Corp. v***

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[1]Despite the fact that a cause of action for legal malpractice accrued on the date the malpractice was committed, *i.e.* December 22, 2007, plaintiff was not obligated to commence her action against her attorneys during the period in which he/they continued to represent her in the action to recover damages from the cruise ship accident, as the rule of continuous representation tolled the running of the statute of limitations on the malpractice claim until the ongoing representation was completed, which appears to be on or after October 2, 2010 (*see* ***Shumsky v Eisenstein***, 96 NY2d 164, 726 NYS2d 365 [2001]; ***Glamm v Allen***,57 NY2d 87, 453 NYS2d 674 [1982]).

Davis Polk & Wardwell, 8 NY 3d 428, 834 NYS2d 705 [2007]). Accordingly, in light of the aforementioned, plaintiff's complaint as to defendant Mulvehill is dismissed.

On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (3), the defendant must show that the plaintiff does not have legal capacity to sue. Where a party fails to schedule an asset in a bankruptcy proceeding, she is thereafter deprived of standing to raise it in a subsequent legal proceeding as the asset becomes the property of the bankrupt plaintiff's estate, and, thus if her claim accrued while her bankruptcy proceeding was still pending, she would not be permitted to institute a proceeding involving the said asset (***Barranco v Cabrini Med. Ctr.***, 50 AD3d 281, 855 NYS2d 431 [1st Dept 2008]). A lawsuit that is initiated prior to the bankruptcy petition or that could have been initiated by the debtor prior to the bankruptcy petition, "become[s] part of the bankruptcy estate subject to the sole direction and control of the trustee, unless exempted or abandoned or otherwise revested in the debtor" (***Dennis v Bank United***, ___ B.R. ____ , 2011 U.S. Dist Lexis 102292 [Dist of MD 2011]). Thus, the question to be determined is whether the plaintiff's claims accrued before she filed her bankruptcy petition.

Plaintiff alleges in her opposition, and annexes portions of her bankruptcy petition (the original petition was filed on December 22, 2008) which indicate, that the underlying action against the cruise line was added to the bankruptcy petition, in or about October 2010. (Therefore, the issue with regard to standing as it relates the cruise line action must be denied as moot. It should be noted that the bankruptcy trustee was authorized to retain defendants Richard E. Miller, Esq. and John H. Mulvehill, Esq. as co-counsel to prosecute and conclude the cruise line lawsuit.) Insofar as defendants maintain that the within action for legal malpractice must have been alleged in the bankruptcy petition, plaintiff was not aware that she possessed that cause of action until on or after October 2, 2010, when her cruise ship action was dismissed by the Federal District Court as the result of a statute of limitations violation. The bankruptcy case was closed and a final decree issued on October 12, 2010. Thus, the legal malpractice action could not have been included in the bankruptcy petition as originally filed, or thereafter amended to include the cruise line action. Accordingly, as plaintiff's legal malpractice lawsuit was not initiated, nor could it have been initiated, prior to her bankruptcy filing in December 2008, the motions by the co-defendants Panzini and Miller to dismiss plaintiff's complaint on the grounds that she lacks standing to sue are denied.

Defendant Miller alleges that he was not aware of the plaintiff's prior bankruptcy petition until he was served with defendant's motion papers. This statement is at best, disingenuous, since defendant Miller submitted an affirmation dated December 7, 2009 to the United State Bankruptcy Court for the Eastern District of New York in connection with plaintiff's bankruptcy petition that he supported a Chapter 7 Trustee's application in connection therewith. Accordingly, because he did not just become aware of a possible defense regarding standing, in connection with plaintiff's failure to include this matter in the bankruptcy petition and his application to amend his answer to include same, and because the court has determined that plaintiff has standing to commence the within action, his request to amend his answer to include the lack of standing as a defense is denied. (His application to amend his answer to correct the date of the accident from December 26, 2006 to December 21, 2006 is granted, as same is not prejudicial to any party.) Although plaintiff has offered no evidence to show that defendant Panzini was aware of her bankruptcy petition, his request to amend his answer to include an affirmative defense with regard to plaintiff's lack of standing is denied as moot, the court having determined that plaintiff

has standing to commence the within action.

Finally, plaintiff's application to substitute the trustee, R. Kenneth Barnard, as the successor in interest to the debtor-plaintiff, and to amend the caption accordingly, is granted.

Dated: December 19, 2012

Daniel Martin
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION