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

**PRESENT:** Hon. Joan B. Madden **PART** 11
**Justice**

FILED
OCT 23 2013
COUNTY CLERK'S OFFICE
NEW YORK

Index Number : 112174/2010
ISAACSON, MARK
vs.
NORMAN L. HOROWITZ, LLC.
SEQUENCE NUMBER : 001
DISMISS

**INDEX NO.** _____
**MOTION DATE** _____
**MOTION SEQ. NO.** _____

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

**Notice of Motion/Order to Show Cause — Affidavits — Exhibits** _____ **No(s).** _____

**Answering Affidavits — Exhibits** _____ **No(s).** _____

**Replying Affidavits** _____ **No(s).** _____

**Upon the foregoing papers, it is ordered that this motion is** decided in accordance with the annexed Memorandum Decision + Order.

**MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):**

**Dated:** October 18, 2013

_____, **J.S.C.**

1. **CHECK ONE:** ..... ☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11
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MARK ISAACSON, IVAN BERKOWITZ, WILFRED KOPELOWITZ, GREAT COURT CAPITAL, LLC and STRATEGIC DEVELOPMENT PARTNERS, LLC,

Plaintiffs,

-against-

Index No. 112174/10



LAW OFFICE OF NORMAN L. HOROWITZ, LLC and NORMAN L. HOROWITZ, ESQ.,

Defendants.

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**Joan A. Madden, J.:**

In this action alleging legal malpractice, defendants Law office of Norman L. Horowitz and Norman L. Horowitz, Esq. move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the complaint. Plaintiffs oppose the motion, which is granted for the reasons below.

## I. Background

Plaintiffs Great Court Capital, LLC and Strategic Development Partners, LLC (tenants) leased premises located at 444 Madison Avenue, New York, New York from nonparty VII 444 Madison Lessee LLC (landlord). Plaintiffs Mark Isaacson, Ivan Berkowitz and Wilfred Kopelowitz (guarantors) signed a guaranty of payment under the lease (all plaintiffs together, plaintiffs). The guaranty was considered a "good guy" guaranty, in that the guarantors would be liable for rent only until the surrender of the premises by the tenants, in broom clean condition, and as otherwise required under the lease.

On June 4, 2008, a burglary occurred on the leased premises, where many items belonging to plaintiffs were stolen. Following the burglary, plaintiffs, believing that the landlord was responsible for failing to remedy deficiencies in security at the premises, suspended payment of the rent from June 2008 onward.

In July 2009, plaintiffs consulted defendants concerning plaintiffs' rights and obligations under the lease, in order to determine whether they could extinguish their obligations thereunder by surrendering the premises, despite the fact that the lease did not expire until 2015. Defendants advised plaintiffs that they could lawfully cut off their liability for further payment of rent by vacating the premises, upon notice to the landlord.

Upon instruction from defendants, plaintiffs sent the landlord written notice that they were vacating the premises as of July 31, 2009, with a line for the landlord to countersign. The landlord refused to do so, notifying plaintiffs of this fact in a letter to defendants, where the landlord also declined to accept surrender of the lease, and instructed defendants that the landlord would hold plaintiffs to their rent obligations.

Defendants apparently did not inform plaintiffs of this letter, and continued to advise plaintiffs to move forward with vacating the premises. Plaintiffs did so, as of July 31, 2009. As of this date, plaintiffs allegedly owed the landlord $512,229.92 in rent.

By letter dated August 7, 2009, sent to defendants, the landlord advised that it would not accept the surrender, nor cut off liability for the continued payment of rent. The landlord also informed defendants that the vacatur was insufficient to cut

off the obligations of the guarantors, as the premises was not delivered in the condition required by the lease. According to plaintiffs, defendants did not inform plaintiffs of this letter either.

On July 1, 2009 (before the vacatur of the premises), the landlord commenced a civil non-payment action against the tenants (Civil Court action). It also commenced an action, at around the same time, in Supreme Court, New York County, against the guarantors for non-payment under the guaranty (Supreme Court action). The parties discontinued the Civil Court action, and executed stipulations which, essentially, consolidated all the plaintiffs in the continuing Supreme Court action. The stipulation ending the Civil Court action served to sever the continued liability of the guarantors for payment of rent.

Based on defendants' advice, the plaintiffs answered the Supreme Court complaint, and asserted a counterclaim for damages resulting from the burglary. The landlord moved for summary judgment, and for dismissal of the counterclaim.

The motion was granted by Justice Debra James of this court, in a decision of the record dated April 13, 2010. The court adopted the landlord's arguments that the tenants had no right to terminate the lease, and that they had failed to vacate the premises in the condition required by the lease. The court also found the counterclaim to be without merit, in that the landlord had no duty to provide security services to plaintiffs, and that, in any event, the lease and the guaranty barred the bringing of a counterclaim.

Plaintiffs retained their present counsel after the decision was rendered. On June 25, 2010, the court entered an order and

judgment awarding the landlord $851,618.27 against the tenants, representing unpaid rent, interest and penalties. An award of $595,235.92 was rendered against the guarantors, under the guaranty. However, plaintiffs' new counsel eventually negotiated a settlement of the entire matter for $500,000.

In the present action, commenced on September 15, 2010, plaintiffs seek damages against defendants on the ground that, but for defendants' faulty advice, plaintiffs could have settled with the landlord before vacating the premises, and before the commencement of any lawsuits, at a much lower figure than the $500,000 settlement amount which was eventually reached.

In the present motion, defendants move to dismiss the complaint, on the ground that plaintiffs cannot prove that they would have fared better in settling the amount had they not heeded defendants' advice.

**II. Discussion**

> On a motion to dismiss pursuant to CPLR 3211, we must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory.

*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414 (2001); *see also Leon v Martinez*, 84 NY2d 83 (1994). "'Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss.'" *Ginsburg Development Companies, LLC v Carbone*, 85 AD3d 1110, 1111 (2d Dept 2011), quoting *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005).

"[A]n action for legal malpractice requires proof of three elements: the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and proof of actual damages." *Schwartz v Olshan Grundman Frome & Rosenzweig*, 302 AD2d 193, 198 (1st Dept 2003); *see also Pellegrino v File*, 291 AD2d 60, 63 (1st Dept 2002)(there must be a showing of "actual ascertainable," and not "speculative" damages"). Negligence is shown if a plaintiff can demonstrate that "the attorney failed to exercise that degree of care, skill and diligence commonly possessed by a member of the legal profession, and that this failure caused damages." *Cosmetics Plus Group, Ltd. v Traub*, 105 AD3d 134, 140 (1st Dept 2013).

In order to show proximate cause, the plaintiff must show that "but for" the attorney's malfeasance, it would have attained a "more favorable result" in the underlying action. *Pozefsky v Aulisi*, 79 AD3d 467, 467 (1st Dept 2010); *see also Keness v Feldman, Kramer & Monaco, P.C.*, 105 AD3d 812, 813 (2d Dept 2013)(to make a case for malpractice, there must be a showing that but for the attorney's negligence, "there would have been a more favorable outcome in the underlying proceeding or that the plaintiff would not have incurred any damages").

If proximate cause is not established, the action must be dismissed "regardless of whether it is demonstrated that the attorney was negligent." *Schwartz v Olshan Grundman Frome & Rosenzweig*, 302 AD2d at 198. Moreover, the damages claimed for legal malpractice must be "actual and ascertainable" resulting from the proximate cause of the attorney's negligence *Ressis v. Wojick*, 105 A.D.2d 565, 567 (3d Dept 1984), *lv. denied* 64 N.Y.2d

609 (1985), *rearg. denied* 65 N.Y.2d 785 (1985). Defendants maintain that plaintiffs cannot show actual ascertainable, non-speculative damages, as they actually settled with the landlord for less than the amount of rent which was due immediately prior to the vacatur of the premises in 2009, and cannot show that "but for" defendants' advice, they would have fared any better, or settled for less.

Plaintiffs argue that their damages are not speculative, because the settlement of the matter for $500,000, when the judgment against the plaintiffs for rent due was $851,618.27, shows that the landlord would have taken much less in settlement in 2009, prior to any litigation. Plaintiffs claim that settlement of the matter for $500,000, a "discount" of 41% on $851,618.27, shows that the landlord would have settled for at least $302,215 in 2009, for a savings on plaintiffs' part of, at minimum, $198,000. Plaintiffs suggest that this scenario is not speculative, as would be proven upon the deposition of the landlord, who will testify at that time as to what the landlord would have settled for in 2009, presumably affirmatively stating an amount less than $500,000.

Plaintiffs cannot prove that "but for" defendants' advice they would have settled for less than $500,000. Specifically, there is no proof available that would show that the landlord would have discounted the rent in any amount, much less a specific amount, such as 41%. Moreover, contrary to plaintiffs' position any testimony by the landlord's representative would be insufficient to establish actual and ascertainable damages as he would be speculating as to what the landlord might have done

years earlier.

As plaintiffs cannot show any actual or ascertainable damages, and so, cannot prove a case of legal malpractice against defendants, however faulty the advice plaintiffs received from defendants may have been. Under these circumstances, defendants' motion to dismiss must be granted. *See Zarin v. Reid & Priest*, 184 AD2d 385 (1st Dept 1992)(finding that legally malpractice action must be dismissed where damages claimed to have been a proximate cause of the defendant's alleged legal malpractice action were too speculative and incapable of being proven with reasonable certainty)(internal citation omitted).

**III. Conclusion**

Accordingly, it is

ORDERED that the motion brought by defendants Law Office of Norman L. Horowitz and Norman L. Horowitz, Esq. to dismiss the complaint is granted; and it is further

ORDERED that the complaint is dismissed, with costs and disbursements to these defendants as taxed by the Clerk of the Court, on the presentation of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: October 18, 2013

J.S.C.