At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of May, 2018.

PRESENT:

HON. CARL J. LANDICINO,

Justice.

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GEORGE H. LEICHT,

Plaintiff,

- against -

Index No. 505392/17

MEYER, SUOZZI, ENGLISH & KLEIN, P.C., DONNALYNN DARLING, ESQ., AND TED J. TANENBAUM, ESQ.,

DECISION & ORDER

Defendants.

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The following papers numbered 1 to 7 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3
Opposing Affidavits (Affirmations)	4
Reply Affidavits (Affirmations)	5
Affidavit (Affirmation)	
Other Papers Defendants' Memorandum of Law/Reply	
Memorandum of Law	6, 7

Upon the foregoing papers, defendants Meyer, Suozzi, English & Klein, P.C., Donnalynn Darling, Esq., and Ted J. Tanenbaum, Esq. (defendants) move, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the third amended verified complaint of plaintiff, George H. Leicht (plaintiff).

Plaintiff, a New York City sanitation worker, retained defendants to represent him in the underlying personal injury action involving an accident in which he drove his sanitation

truck into a steel girder that supported an elevated subway platform in order to avoid hitting a pedestrian (Defendants' Affirmation in Support of Motion, Exh. M, Decision and Order [Landicino, J], July 10, 2013, p. 1). Plaintiff's left leg was badly injured, requiring its amputation.

On or about January 11, 2007, defendants commenced the underlying action on behalf of plaintiff against the City of New York Department of Sanitation (the City), plaintiff's employer, and Mack Trucks, Inc. (Mack Trucks), the manufacturer of the truck. In particular, Mack Trucks had produced and designed the "low entry" truck model used by the Department of Sanitation, in which there is virtually no nose in the front of the vehicle, i.e. in the area housing the engine (*id.* at 2). As a result, the doors to the vehicle could be positioned lower and the driver's visibility was no longer obscured by a traditionally larger vehicle nose (*id.*). The bumper assembly used on the truck, which was designed and produced by Wausau Equipment Company, Inc. (Wausau), and which had been requested by the City, was located on the front of the subject vehicle in order to make the truck also function as a snow plow (*id.*)

On January 19, 2010, Mack Trucks filed a third-party complaint in the underlying action against Wausau and Truis, Inc. (the manufacturer and distributor of the truck's bumper assembly, respectively). In December, 2011, the City, Mack Trucks, Truis and Wausau moved for summary judgment dismissing the complaint. By order dated July 10, 2013, this court (Landicino, J.), granted the City's motion for summary judgment and denied the motions of Mack, Truis and Wausau (*id.*).

With respect to the City, the court held that it had made a *prima facie* showing that the subject "low entry sanitation vehicle was a product of a discretionary decision making process and that the product was reasonably safe for its intended use" (*id.* at 4) and that plaintiff had failed to raise a material question of fact in opposition (*id.* at 5). With respect to Mack Trucks, the issue was whether the truck, as designed, was reasonably safe for its intended use. Relying upon the testimony of the witnesses for the City, Truis, and Wausau, Mack Trucks argued that it was "'not liable because the vehicle it produced was designed [] in consultation with the City, was designed after testing the product, and was reasonably safe for its intended use'" (*id.* at 5-6). The court found that Mack Trucks had made a *prima facie* showing that the subject vehicle "was a product of a lengthy design process that sought to ensure that the vehicle was safe, and with the addition of the bumper assembly, capable of functioning as a sanitation vehicle and as a snow plow" (*id.* at 6). However, the court held that plaintiff had raised a material question of fact based, in part, upon the affidavit of his expert, engineer Russell E. Darnell, PhD. In particular, the court found:

> "Darnell states in his Affidavit that Mack Trucks applied the testing protocol of the Economic Commission of Europe in an effort to ensure that their design would increase visibility. However, Darnell argues that in doing so, Mack Trucks failed to adequately address the cab safety issues. Moreover, Darnell references studies conducted by the Federal government and Volvo to support his position that readily available and commonly used safety equipment could have mitigated the Plaintiff's injuries. This evidence, taken together, shows there is an issue of fact as to whether the subject vehicle was reasonably safe and whether the alleged incident at issue could have been avoided.

> "Where, as here, a qualified expert opines that a particular product is defective or dangerous, describes why it is dangerous, explains how it can be made safer, and concludes that it is feasible to do so, it is usually for the jury to make the required risk-utility analysis . . . Accordingly, the motion for summary judgment by Mack Trucks is denied" (*id.* [internal quotations marks and citations omitted]).

As to Truis and Wausau, the court held that they had failed to make a *prima facie* showing establishing "that they were unaware of how the bumper or bumper assembly were going to be used, or that the City or Mack Trucks substantially modified the bumper or bumper assembly as to make [them] defective" (*id.* at 7).

On or about October 18, 2013, Mack Trucks appealed, and Truis and Wausau subsequently cross-appealed the court's decision to the Appellate Division, Second Department. By order dated August 12, 2015, the Appellate Division reversed the court's decision with respect to these three defendants and granted them summary judgment dismissing the complaint (*Leicht v City of N.Y. Dep't of Sanitation*, 131 AD3d 515 [2d Dept. 2015]). In particular, with respect to Mack Trucks, the Appellate Division found that in response to Mack Truck's *prima facie* showing, plaintiff had failed to raise a triable issue of fact, namely:

> "Although the plaintiff submitted an expert affidavit from an engineer, the expert failed to establish that he was qualified to render an opinion as to the alleged defective design of the Class 8 heavy duty vehicle. An expert is qualified to proffer an opinion if he or she is possessed of the requisite skill, training, education, knowledge or experience from which it can be

> assumed that the information imparted or the opinion rendered is reliable. Here, the expert failed to present evidence that he had any practical experience with, or personal knowledge of, the vehicle at issue, and the expert also failed to demonstrate such personal knowledge or experience with the design or manufacture of Class 8 heavy duty vehicles in general. Moreover, the expert's affidavit, attributing the accident to the defective design of the vehicle, the lack of certain safety devices in the vehicle, and the failure to warn that injury could potentially occur as a result of a head-on collision, was speculative and conclusory and, therefore, insufficient to raise a triable issue of fact" (*id.* at 516 [internal citations and quotation marks omitted]).

Accordingly, the Appellate Division dismissed the complaint and cross claims asserted against Mack Trucks, and dismissed the third-party complaint and all cross claims asserted against Wausau and Truis (*id.* at 517).

On September 14, 2015, plaintiffs moved to reargue the Appellate Division's decision or, alternatively, for leave to appeal to the Court of Appeals, which was denied by the Appellate Division by order dated December 3, 2015.

By letter dated December 12, 2015, defendants memorialized their conversation with plaintiff that the Appellate Division had denied the motion to reargue, that they had advised plaintiff that his final remedy, which they could undertake on his behalf, would be to seek leave from the Court of Appeals to review the Appellate Division's decision, and that plaintiff had decided not to go forward, which would "effectively end your personal injury case and this law firm's representation of you." The letter was signed by defendant Donnalynn Darling and plaintiff ("I hereby consent and agree to the above").

On or about March 17, 2017, plaintiff commenced the within legal malpractice action against defendants by filing a summons and verified complaint. On May 23, 2017, plaintiff filed an amended verified complaint to correct certain factual inaccuracies of the original complaint. On May 31, 2017, plaintiff filed a second amended complaint to reflect the dismissal of defendant Ted J. Tanenbaum, P.C. from the action.

On or about June 20, 2017, defendants moved to dismiss the second amended verified complaint. In opposition, plaintiff cross-moved for leave to file a third amended complaint. By decision and order dated November 8, 2017, this court (Landicino, J.) granted plaintiff's cross motion and denied defendants' motion to dismiss as moot, without prejudice to renew the motion upon service of the third amended complaint. In particular, the court held:

> "After oral argument and review of the papers, [p]laintiff's motion to amend the Second Amended Complaint (Mot. Seq. 2) is granted and, therefore, Defendants' motion to dismiss the Second Amended Complaint (Mot. Seq. 1) is denied as moot, without prejudice to renew the motion upon service of the 3rd Amended Complaint. Plaintiff shall serve the Third Amended Complaint within 30 days. At this nascent stage of the proceedings, there is no prejudice to defendants by plaintiff's amendment of the complaint, which adds additional detail regarding plaintiff's claim."

On or about November 9, 2017, plaintiff filed the third amended verified complaint.

In January, 2018, defendants made the instant motion to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (a) (7), which is presently before the court for disposition.

Discussion

"On a motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Endless Ocean, LLC v Twomey, Latham, Shea, Kelley, Dubin & Quartararo,* 113 AD3d 587, 588-589 [2d Dept 2014]). However, "[a]lthough the facts pleaded are presumed to be true and are to be accorded every favorable inference, bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration" (*Vassar Coll. v Marshall & Sterling, Inc.*, 156 AD3d 936, 937-938 [2d Dept 2017]).

Nevertheless, "'[w]hether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss'" (*Endless Ocean, LLC,* 113 AD3d at 589, quoting *Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006]). Accordingly, disputed factual issues are not properly raised and resolved on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7) (*id.* at 589; *see also Von Maack v Wyckoff Heights Med. Ctr.*, 140 AD3d 1055, 1058 [2d Dept 2016]).

"Moreover, where, as here, evidentiary material is submitted and considered on a motion pursuant to CPLR 3211 (a) (7), and the motion is not converted into one for summary

judgment, 'the criterion is 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 pleader 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'" (*Wand, Powers & Goody, LLP v Yuliano,* 144 AD3d 1017, 1018 [2d Dept 2016], *quoting Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). "Further, a court may consider any factual submissions made in opposition to a motion to dismiss in order to remedy pleading defects" (*Barouh v Law Offices of Jason L. Abelove*, 131 AD3d 988, 990 [2d 2015] [internal citation and quotation marks omitted]).

"A motion pursuant to CPLR 3211 (a) (1) to dismiss based on documentary evidence may be appropriately granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law" (*Ralex Servs., Inc. v South West Mar. & Gen. Ins. Co.*, 155 AD3d 800, 801-802 [2d Dept 2017] [internal citations and quotation marks omitted]). In particular, "[t]he evidence submitted in support of such motion must be documentary or the motion must be denied" (*id.* at 801) [internal citations and quotations marks omitted]). Accordingly, "[i]n order for evidence submitted in support of a CPLR 3211 (a) (1) motion to qualify as documentary evidence, it must be unambiguous, authentic, and undeniable" (*id.* [internal citations and quotation marks omitted]). "[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which

are essentially undeniable, would qualify as documentary evidence in the proper case, as would insurance policies" (*id.* at 801-802 [internal citations 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'" (*Rhodes v Honigman*, 131 AD3d 1151, 1152-53 [2d Dept 2015], quoting *Randazzo v Nelson*, 128 AD3d 935, 937 [2d Dept 2015]). "To establish 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" (*Barouh,* 131 AD3d at 991 [internal citations and quotation marks omitted]; *see also Nestor v Putney Twombly Hall & Hirson, LLP*, 153 AD3d 840, 841 [2017]).

Further, "[a] plaintiff must plead actual, ascertainable damages resulting from the attorney's negligence," and "[c]onclusory or speculative allegations of damages are insufficient" (*Rhodes,* 131 AD3d at 1153). "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 defendant's malpractice might be reasonably inferred'" (*id.,* quoting *Rock City Sound, Inc. v Bashian & Farber, LLP*, 74 AD3d 1168, 1171 [2d Dept 2010], *lv dismissed* 16 NY3d 826 [2011]).

Finally, "[a]n attorney may be liable for ignorance of the rules of practice, for failure to comply with conditions precedent to suit, for neglect to prosecute or defend an action, or

for failure to conduct adequate legal research" (*Conklin v Owen*, 72 AD3d 1006, 1007 [2d Dept 2010]). However, "[u]nder the attorney judgment rule, an attorney's 'selection of one among several reasonable courses of action does not constitute malpractice'" (*Ackerman v Kesselman*, 100 AD3d 577, 579 [2d Dept 2012], quoting *Rosner v Paley*, 65 NY2d 736 [1985]; citing *Bua v Purcell & Ingrao, P.C.*, 99 AD3d 843 [2012]). In this regard, "strategic decision[s], which can be deemed an error in judgment only when illuminated by hindsight, cannot be the basis of a malpractice claim" (*Williams v Brentwood Farmers Mkt.*, 256 AD2d 613, 616 [2d 1998]). "Absent an express agreement, an attorney is not a guarantor of a particular result . . . and may not be held liable in negligence for . . . the exercise of appropriate judgment that leads to an unsuccessful result" (*Bua*, 99 AD3d at 846-47 [internal citations and quotation marks omitted]).

"To establish entitlement to the protection of the attorney judgment rule, an attorney must offer a reasonable strategic explanation for the alleged negligence" (*Ackerman,* 100 AD3d at 579 [internal citations and quotation marks omitted]; *see also Leon Petroleum, LLC v Carl S. Levine & Assoc., P.C.,* 122 AD3d 686, 686-87, 996 [2d Dept 2014]). "To establish 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 lawyer's negligence" (*Leon Petroleum, LLC,* 122 AD3d at 687).

Here, the third amended complaint sets forth the factual account of the plaintiff's accident, his retention of defendants to represent him in the underlying action, and the

procedural history of the underlying action, albeit in abbreviated form, including the reversal of the Supreme Court's order by the Appellate Division relating to Mack Trucks (although without detailing the basis for the decision). The complaint then alleges that:

> "Defendants' failure to proffer an expert qualified to render an opinion concerning [p]laintiff's claims in the underlying action or otherwise ascertain and/or properly present the necessary and/or appropriate evidence to support [p]laintiff's claims against Mack Trucks, Inc. and The City of New York, Department of Sanitation were departures from good and legal practice and a proximate cause of the dismissal of the underlying action and the [p]laintiff's damages herein.
>
> "But for, and/or as a result of, defendants' legal malpractice and/or violation of applicable laws or causes of action arising thereunder, the plaintiff would have recovered a sum not less than $10,000,000.00 plus interest and costs in the underlying action.
>
> "As a result of the foregoing, plaintiff, George H. Leicht, has been damaged in a sum not less than $10,000,000.00, plus interests and costs."

Contrary to defendants' argument, the complaint, as amplified by the record evidence, mostly notably the decision of the Appellate Division (*Leicht,* 131 AD3d 515), sufficiently states a claim for legal malpractice. As noted, the complaint alleges that the expert chosen by defendants was not qualified to render an opinion concerning plaintiff's claims in the underlying action, which was a departure from good legal practice, and that as a result of this negligence, plaintiff sustained damages. In this regard, with respect to the motion of Mack Trucks for summary judgment, the Appellate Division held that plaintiff's expert had "failed to present evidence that he had any practical experience with, or personal knowledge of, the

vehicle at issue" (*id.* at 516), had "failed to demonstrate such personal knowledge or experience with the design or manufacture of Class 8 heavy duty vehicles in general" (*id.*), and that his opinion, "attributing the accident to the defective design of the vehicle, the lack of certain safety devices in the vehicle, and the failure to warn that injury could potentially occur as a result of a head-on collision, was speculative and conclusory and, therefore, insufficient to raise a triable issue of fact" (*id.*).

In addition, as to damages, the complaint alleges that "but for, and/or as a result of, defendants' legal malpractice . . . the plaintiff would have recovered a sum not less than $10,000,000.00 . . ." from which damages attributable to defendants' alleged malpractice can clearly be inferred, contrary to defendants' claim.

Defendants also argue that plaintiff failed to allege conduct which would constitute a breach of the standard of care because plaintiff's claim regarding the expert "amounts to 'no more than the second-guessing of counsel's strategic judgment in the selection of trial tactics and do[es] not rise to the level of legal malpractice'" (Memorandum of Law at p. 10, quoting *Pacesetter Communs. Corp. v Solin & Breindel, P. C.*, 150 AD2d 232, 236 [1st Dept 1989]). In this regard, defendants contend that their "strategic decision to rely on certain evidence, including the affidavit of Mr. Darnell, was "'one among several reasonable courses of action'" (*id.* quoting *Rosner*, 65 NY2d at 738), on the grounds that: (1) this court, in its July 13, 2013 decision, found that Mr. Darnell was a qualified expert; (2) the Appellate Division's dismissal of plaintiff's claims against Mack Trucks was directly contrary to the

holding of *Caprara v Chrysler Corp.* (52 NY2d 114, 121-22 [1981]), namely that an expert may be qualified to offer an opinion regarding a particular product based on observation and experience, without any involvement in either the design or manufacture of that product; (3) that in spite of the holding of the Appellate Division, Mr. Darnell was in fact qualified to render an opinion regarding the safety of the subject sanitation truck because the Appellate Division ignored ample proof submitted regarding Mr. Darnell's qualifications; and (4) the Appellate Division overlooked or misapprehended the fact that Mr. Darnell's conclusions were well supported by facts and data in the record, and therefore were not "speculative and conclusory."

Plaintiff does not address this argument in his opposition. Rather, plaintiff contends, among other things, that the complaint sufficiently sets forth a cause of action for legal malpractice and that in the alternative, the motion should be denied, pursuant to CPLR 3211 (d), with leave to renew so he can review the prior attorney's file.[1]

As an initial matter, failing to call an appropriate expert, as the complaint alleges - where the sole reason the complaint was dismissed in the underlying action was a trial court's [here the Appellate Division's] finding that the plaintiff's expert was unqualified - sets forth a breach of the requisite standard of care (*Dimond v Salvan*, 78 AD3d 407, 408 [1st Dept

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[1]Plaintiff's argument that the court, in its November 8, 2017 order, "determined that [the third amended complaint] sufficiently stated a *prima facie* cause of action," misinterprets the order. The order merely granted plaintiff leave to amend his complaint and permitted defendants to move to dismiss the complaint thereafter (*supra*). Moreover, the motion is not one to renew pursuant to CPLR 2221 (e), as plaintiff also argues. Defendants have merely renewed their prior motion to dismiss.

2010] ["Defendant established that he reasonably decided to prosecute plaintiff's malpractice action against her former attorneys on the theory that they failed to call an appropriate expert in plaintiff's underlying personal injury action. Indeed, the sole reason that plaintiff's complaint in the underlying action was dismissed was the trial court's finding that plaintiff's expert was unqualified"]). However, in the context of this CPLR 3211 (a) (7) analysis, and where, as here, defendants have failed to supply the court with much of the evidence which they say would demonstrate that their selection of Mr. Darnell as plaintiff's expert was a "reasonable course of action," defendants have failed to satisfy their burden, as a matter of law, that they are entitled dismissal of plaintiff's complaint. Stated otherwise, whether defendants' selection of Mr. Darnell was reasonable presents a factual issue which should not be resolved in connection with that branch of the defendants' motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action (*Von Maack,* 140 AD3d at 1058; *3615-15 Realty I, LLC v Bedford Ave. Assocs. I, LLC*, 120 AD3d 487, 489-490 [2d Dept 2014]; *Urias v Daniel P. Buttafuoco & Assocs., PLLC*, 120 AD3d 1339, 1342 [2d Dept 2014]; *Endless Ocean, LLC,* 113 AD3d at 589).

Relying on *Grace v Law* (24 NY3d 203 [2014]), defendants also argue that plaintiff failed to sufficiently allege that their purported breach of duty proximately caused plaintiff to sustain actual damages because plaintiff declined to appeal the decision of the Appellate Division to the Court of Appeals, as memorialized in the December 12, 2015 letter signed by defendant Donnalynn Darling and plaintiff (*supra*).

In opposition, while plaintiff does not deny signing the letter and does not dispute its authenticity, he argues that it is inadmissible as a business record (CPLR 4518 [a]), that it does not constitute documentary evidence pursuant to CPLR 3211 (a) (1), and that in any event, is irrelevant to his claim of legal malpractice, which is based on defendants' failure to obtain sufficient evidence to withstand scrutiny on appeal.

As an initial matter, as defendants argue, the issue is whether the letter constitutes documentary evidence pursuant to CPLR 3211 (a) (1), not whether it qualifies as a business record. Further, the letter constitutes documentary evidence because it is an agreement between the parties and is "essentially undeniable" (*Sands Point Partners Private Client Grp. v Fid. Nat'l Title Ins. Co.*, 99 AD3d 982, 984 [2d Dept 2012]; *Adler v 20/20 Cos.*, 82 AD3d 915, 917-918 [2d Dept 2011] [agreement]). Moreover, the letter is admissible because defendants have submitted the affidavit of Donnalynn Darling, Esq. in support of their motion, in which she affirms, based upon personal knowledge, that the letter is genuine. Despite the foregoing, however, defendants' argument is rejected.

In *Grace,* the Court of Appeals addressed the question: "What does a client's failure to pursue an appeal in an underlying action have on his or her ability to maintain a legal malpractice lawsuit?" (*id.* at 206). The court adopted the "likely to succeed standard," namely:

> "prior to commencing a legal malpractice action, a party who is likely to succeed on appeal of the underlying action should be required to press an appeal. However, if the client is not likely to succeed, he or she may bring a legal malpractice action without first pursuing an appeal of the underlying action" (*id.* at 210).

Here, defendants argue that the Appellate Division's dismissal of plaintiff's claim against Mack Trucks was contrary to the law and the facts of this case, and therefore an appeal would likely have been successful. However, *Grace* addresses appeals to the Appellate Division, not the Court of Appeals, i.e. the "likely to succeed standard . . . will obviate premature legal malpractice actions by allowing the appellate courts to correct any trial court error and allow attorneys to avoid unnecessary malpractice lawsuits by being given the opportunity to rectify their clients' unfavorable result" (*id.* at 210-211).

In any event, defendants have failed to establish that their appeal lies as of right to the Court of Appeals (CPLR 5601) or that the Court of Appeals would have granted plaintiff leave to appeal under CPLR 5602. Even assuming the Court of Appeals would have granted plaintiff leave to appeal the decision and order of the Appellate Division, defendants have failed to demonstrate that the appeal would have been successful, and have therefore failed to show that plaintiff's decision to forego the appeal is fatal to his claims, as defendants argue.

Finally, the court agrees with defendants that the complaint fails to sufficiently state a claim against defendants with respect to their alleged breach of the standard of care as to the City. Defendants' correctly argue that their alleged failure to select an appropriate expert has no bearing upon this court's dismissal of plaintiff's claim against the City since the court dismissed the claims against the City on the entirely separate ground of governmental immunity. Further, the complaint fails to allege any facts in support of this allegation. Nor

does plaintiff allege any facts that defendants may have offered which would have shown, as the court held, that the purchase of the subject sanitation truck *was not* "a discretionary governmental act involving the exercise of reasoned judgment for which the City cannot be subject to liability" (Defendants' Affirmation in Support of Motion, Exh. M, Decision and Order [Landicino, J], July 10, 2013, p. 5).

Based upon the foregoing, defendants' claims that the complaint fails to allege facts which, if true, would constitute a breach of the standard of care, and fails to allege, beyond mere legal conclusions, that their conduct was a proximate cause of any actual damages suffered by plaintiff, are rejected as they relate to Mack Trucks only. Accordingly, defendants' motion to dismiss the complaint as it relates to Mack Trucks is denied and their motion to dismiss the complaint as it relates to the City is granted.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino
J.S.C.