Brausch v Devery
2018 NY Slip Op 31929(U)
August 7, 2018
Supreme Court, Suffolk County
Docket Number: 11-28918
Judge: Denise F. Molia

[* 1]

SHORT FORM ORDER

COPY

INDEX No. 11-28918
CAL. No. 16-02052OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 4-21-17
ADJ. DATE 12-19-17
Mot. Seq. # 001 - MotD

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DANIEL A. BRAUSCH,

Plaintiff,

- against -

BRIAN S. DEVERY, STEPHANIE N. DEVERY, DEVERY & DEVERY, PLLC, THE DEVERY LAW GROUP, P.C., FRANK A. RACANO and FRANK A. RACANO, P.C.,

Defendants.

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Upon the following papers numbered 1 to 84 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 66 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 68 - 82 ; Replying Affidavits and supporting papers ____; Other memoranda of law 76, 83 - 84 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants Brian S. Devery, Stefanie N. Devery, Devery & Devery, PLLC, and The Devery Law Group, P.C. for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's complaint is granted to the extent that the complaint against the defendant Stefanie N. Devery is dismissed, and all claims of legal malpractice against said defendants, except those involving the entry of certain judgments in the underlying action indicated below, are dismissed, and is otherwise denied.

This action was commenced to recover damages sustained by the plaintiff due to the alleged legal malpractice of the defendants. It is undisputed that the plaintiff retained the defendant Devery & Devery,

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PLLC (the Devery firm) to defend him, and to prosecute certain causes of action against third-parties, in an underlying action entitled *Agnes DiChiara and JEM Technical Services, Inc., Plaintiffs, against A&A Auto Sales, Inc. and Daniel A. Brausch, Defendants/Third-Party Plaintiffs, against Ernest DiChiara, Fleet National Bank/Bank of America, North Fork Bank, Cycle Financial Services, Inc., Richard Bonner, and Christopher Marchese, Third-Party Defendants*, Supreme Court, Suffolk County, Index No. 04-16727 (the underlying action).

Immediately prior to the commencement of the underlying action, the plaintiff was the owner and sole shareholder of the defendant A&A Auto Sales, Inc. (A&A), a used car dealership located in Centereach, New York. At that time, the third-party defendant Ernest DiChiara (Ernest) was employed by A&A, A&A had two bank accounts with the third-party defendant Fleet National Bank/Bank of America (Fleet), A&A had three bank accounts with the third-party defendant North Fork Bank (NFB), and A&A had retained the third-party defendants Cycle Financial Services, Inc., Richard Bonner, and Christopher Marchese (CFS) to provide certain accounting services to the corporation. In approximately June 2004, the plaintiff discovered what he believed to be financial improprieties by Ernest, including alleged forgeries of A&A checks. The plaintiff filed affidavits with Fleet indicating that he did not authorize or consent to the making of the signatures on the subject checks. Thereafter, the plaintiff discovered what he believed were additional financial improprieties by Ernest, and he filed affidavits with NFB indicating that certain checks were forgeries made by Ernest. The plaintiff also discovered what he alleges is a fraudulent loan made to A&A by Ernest's mother, the plaintiff in the underlying action, Agnes DiChiara (Agnes), which allegedly allowed Ernest to misappropriate the loan proceeds.

Agnes commenced the underlying action in January 2005, alleging that the plaintiff and A&A had failed to repay the loan, and that the loan proceeds were to be used, in part, for the plaintiff's personal use. Initially, the plaintiff herein was represented by a different law firm, which served an amended answer to Agnes' complaint asserting two counterclaims against her, and served an amended third-party complaint asserting causes of action against Ernest, Fleet, NFB, and CFS. On or about November 3, 2006, Agnes served an amended complaint in the underlying action which added JEM Technical Services, Inc. (JEM), a corporation which she controlled, as a plaintiff, alleging that she had delivered a portion of the loan proceeds out of a JEM bank account (collectively Agnes/JEM). By order dated December 11, 2007, the plaintiff's prior counsel was permitted to withdraw. By order dated May 29, 2008, the Court (Pitts, J.) directed "new counsel for [A&A] and [the plaintiff] to serve and file a notice of appearance on counsel for all parties before 6/2/08," and said parties "to serve [a] reply to Fleet's counterclaim on or before 6/13/08." By letter dated June 2, 2008, the defendant Frank A. Racano (Racano), filed a notice of appearance, with service on all parties, which indicated that the Devery firm had been retained as counsel for the plaintiff and A&A in the underlying action, and that he appeared of counsel to the Devery firm.

At a conference held on September 4, 2008, the attorney for Fleet made an oral application for a default judgment based upon the alleged failure of A&A and the plaintiff to serve a reply to its counterclaim pursuant to the order of May 29, 2008. A so-ordered stipulation that date, executed by all parties, including Racano in his capacity as of counsel to the Devery firm, directed counsel for A&A and

the plaintiff to provide proof of service of said reply by September 9, 2008, and directed Agnes/JEM "to serve the amended complaint [in the underlying action] which was the subject of the court's 7/11/07 order on or before 9/11/08."

Thereafter, Agnes/JEM and Fleet moved for default judgments based upon the alleged failure of the Devery firm to serve responses to their respective pleadings. In opposing the motions, Racano submitted affidavits of service notarized by him and allegedly signed by a secretary employed by the Devery firm. By order dated May 8, 2009, the Court (Pitts, J.) scheduled a traverse hearing for June 11, 2009 to determine whether A&A and the plaintiff had timely served an answer to Agnes/JEM's amended complaint and a reply to the counterclaim contained in Fleet's verified answer. At the traverse hearing held before Justice Pitts on June 11, 2009, Michael A. D'Emidio, Esq. appeared on behalf of Racano. D'Emidio stated Racano was of counsel to the Devery firm, that Racano had a conflict and had asked him to appear on Racano's behalf, and that he did not have any witnesses to present. The Court stated that, in setting down the hearing, "it was the Court's expectation that the representatives from [A&A and the plaintiff] would be calling the legal secretary, who signed the affidavit of service so as to ... establish that service was made." After continuing the hearing, Justice Pitts verbally granted the respective motions for default judgment, and directed the parties to submit orders on notice.

By short form order dated October 29, 2009, the Court (Pitts, J.) granted the respective motions for default judgment, directed the clerk of the court to enter the judgments submitted by the parties, struck the answer of A&A and the plaintiff, and dismissed with prejudice all of the third-party actions and cross claims against the third-party defendants. The Devery firm and Racano did not take any action regarding the order of October 29, 2009 or the entry of the judgments against A&A and the plaintiff.

The plaintiff commenced this action for legal malpractice by the filing of a summons and complaint on September 13, 2011. In his complaint, the plaintiff alleges that the defendants failed to exercise reasonable care, skill and diligence on the plaintiff's behalf; failed to timely submit an answer to the amended complaint; failed to timely submit a reply to the counterclaim of Fleet; failed to properly defend the plaintiff in the underlying action; failed to properly prosecute the third-party action; failed to present testimony at the hearing before Justice Pitts held on June 11, 2009; failed to attempt to adjourn said hearing to properly prepare for it; failed to move to reargue or to appeal the decision rendered by Justice Pitts at the conclusion of said hearing; permitted the subject judgments to be entered against the plaintiff; allowed the respective default motions to be granted; permitted the third-party action to be dismissed in its entirety; and otherwise acted carelessly, unskillfully, negligently, and not in accordance with the accepted standards of care and the accepted standards of legal services ordinarily possessed by those holding themselves out to be attorneys licensed to practice law in the State of New York.

The defendants Brian S. Devery (Devery), Stefanie N. Devery, the Devery firm, and The Devery Law Group, P.C. (the Devery Group) (collectively, the Devery defendants) now move for summary judgment dismissing the complaint and all cross claims against them. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68

NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; ***Rebecchi v Whitmore***, *supra*).

In support of their motion, the Devery defendants submit, among other things, the relevant pleadings in this action and the underlying action, the transcripts of the deposition testimony of the plaintiff, Devery, Racano, and nonparty Richard Bonner,[1] numerous documents associated with A&A's bank accounts and banking transactions, a number of affidavits from experts and notices of expert disclosure, and copies of the relevant orders and judgments referenced herein.

At his deposition, the plaintiff testified that he was the sole owner of A&A, that Ernest was his brother-in-law and an employee of the corporation, and that he and Ernest would handle the books and records for A&A. He stated that Ernest paid the businesses' accounts payable by preparing checks for the plaintiff to sign, that Ernest did not have an official title, and that he never allowed Ernest to hold himself out as the general manager of A&A. He further stated that he was present at a court proceeding brought by the Town of Brookhaven against A&A, and that he did not object when Ernest identified himself as the general manager and operating officer of A&A. He indicated that in June of 2004 he learned that three checks were written on an A&A Fleet checking account with which he was not familiar, that he spoke with the branch manager at Fleet who apologized, told him that Ernest had opened the account, and suggested that he call the police.

The plaintiff further testified that it is not his signature on the certificate of authority for the Fleet checking account, that check number 93 drawn on the Fleet checking account and made out to cash in the amount of $17,250 contains Ernest's signature, and that, until June 2004, he was not aware of the subject checking account. He indicated that he had opened a line of credit account with Fleet in September 2002 (Fleet LOC), that he had personally guaranteed payment of the line of credit, and that he later learned that Ernest had obtained an ATM card for the Fleet LOC and had made ATM withdrawals from said account. He stated that he filed affidavits with Fleet indicating that certain checks drawn on the Fleet checking account and the Fleet LOC were forgeries, and that some A&A employees were paid with checks made out to cash. The plaintiff further testified that he opened three accounts at NFB; namely a checking account (NFB checking), an NFB eBay account, and a NFB reserve account. He stated that he visited

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[1] Bonner was a third-party defendant and a principal in the third-party defendant CFS in the underlying action.

NFB in June 2004 and spoke with a vice president who indicated something to the effect that the bank knew he was not signing all of the checks drawn on the NFB accounts, and that Ernest left A&A two or three days after that meeting taking all of the corporate paperwork and books when he left. He indicated that he filed affidavits with NFB indicating that certain checks drawn on the three NFB accounts were forgeries, and that some of the forgeries appear to reflect payment of legitimate A&A expenses.

The plaintiff further testified that, at some point, Agnes commenced an action against him and A&A claiming that she had loaned money to A&A, that the endorsements by A&A on the checks sent by Agnes are not in his handwriting, and that he did not know why the checks were deposited into A&A's NFB accounts. He stated that he did not know if the JEM checks to A&A, alleged to be loans in the amended complaint in the underlying action, were deposited into any A&A accounts. He indicated that, when confronted, Ernest confessed to misappropriating funds from the corporation, that Ernest's mother, Agnes, gave him a check for $15,000 to permit A&A to pay its New York State sales tax obligations, and that Agnes stopped payment on the check before it could be credited to A&A's account.

The plaintiff further testified that, after his prior attorney withdrew from representing him in the underlying action, he was referred to the Devery firm, that he spoke with Racano, and that he met with Devery and Racano two times at their offices. He stated that Devery and Racano told him that they were partners, that Devery "worked with banks and Mr. Racano was the negotiator," and that he signed a retainer agreement and gave them a retainer of $10,000. He indicated that he did not meet or speak with the defendant Stefanie N. Devery regarding the underlying action, that, at some point, Racano told him that he "had lost the [underlying action] because of my previous attorney that didn't do something," and that Racano would not give him his legal file. He asserts that he had a friend go to Riverhead to investigate, and that he learned that Racano's statement regarding his prior attorney was not true.

The plaintiff further testified that, beginning in 2002, CFS was on a monthly retainer to provide accounting services to A&A, that CFS was "supposed to come in every couple of months to go through everything and make sure everything was going smoothly," and that CFS did not write the checks to pay A&A's expenses. He indicated that Ernest had told him that A&A's bank statements were being mailed directly to CFS, that he requested copies of the bank statements in December 2003 or January 2004, approximately six months before he discovered that Ernest was misappropriating A&A's funds, and that he never received those bank statements. He stated that Ernest did not have a job afterwards, that he did not know if Ernest had any assets, that the judgments against him required him to file for bankruptcy, and that the subject judgments were discharged in bankruptcy.

Devery testified that he and his wife were partners in the Devery firm, that Racano was of counsel to the firm for two weeks, and that Racano's first work of counsel to the Devery firm was for the plaintiff. He stated that Racano was listed as of counsel on the Devery firm's letterhead, that he and Racano drove to pick up the file in the underlying action, and that he and Racano met with the plaintiff thereafter. He indicated that he introduced himself to the plaintiff at that initial meeting, that he told the plaintiff that he did not practice in the area of litigation and that Racano was the litigator, that he believes the parties entered into a written retainer, and that he told the plaintiff that Racano would transfer the retainer to Racano's office once Racano opened his practice. He indicated that he did nothing further regarding the

litigation after that initial meeting, that he first learned of the default judgments entered against the plaintiff when this action was commenced, and that he never saw Racano's affidavit in opposition to Agnes/JEM's motion for a default judgment, or the affidavit of service attached to A&A and the plaintiff's purported reply to Fleet's counterclaim. Devery further testified that the subject affidavit of service was signed by an employee of the Devery firm, that he never saw Racano's affidavit in opposition to the motion for a default judgment dated December 1, 2008, which was signed by Racano, of counsel, and that he never informed the plaintiff that Racano was no longer of counsel to the Devery firm.

At his deposition, Racano testified that he opened his solo practice in 2005, that he acted of counsel to the Devery firm, and that he first met the plaintiff when Devery called him into a conference at the firm's offices. He stated that the plaintiff signed a retainer agreement with the Devery firm, that he reviewed the plaintiff's file and reported to Devery that he believed the plaintiff's claims had merit, and that Devery asked him to assist in the handling of the plaintiff's case. He indicated that he did not recall whether a reply to Fleet's counterclaim was served on behalf of A&A and the plaintiff pursuant to the order of Justice Pitts dated May 29, 2008, that he did not personally provide proof of service of said reply as directed in the so-ordered stipulation created at the conference held on September 4, 2008, and that he cannot say whether the employee of the Devery firm he would have asked to serve said proof did so.

Racano further testified that he did not recall receiving a letter to his attention at the Devery firm which included a copy of the amended complaint in the underlying action and stated "kindly interpose an answer on or before the next scheduled conference on October 2, 2008." He stated that there was no written termination of his status as of counsel to the Devery firm, that he believes he was still of counsel at the time of the traverse hearing on June 11, 2009, and that he had spoken with Devery about the need for the secretary who signed certain affidavits of service to appear at the traverse hearing. He indicated that he met with the plaintiff after Justice Pitts granted the subject motions for default judgment on June 11, 2009, that he advised the plaintiff of the options available, including an appeal, a motion to reargue, or bankruptcy, and that he believed the plaintiff was not able to continue litigating the matter due to a lack of finances.

Racano also testified that the plaintiff eventually requested his file from the Devery firm, that he met the plaintiff on March 1, 2010 to deliver the file pursuant to Devery's direction to return the file, and that he had the plaintiff sign a file release form. He stated that a change of attorney from the Devery firm to his firm was never signed or filed, that he believes he was paid for his services in this matter by the Devery firm and not by the plaintiff, and that Devery was always kept informed about the plaintiff's matter, and may have reviewed some of the documents prepared by him.

In an affidavit dated April 30, 2007, Ernest swears that he received twenty per cent of the shares of stock in A&A as an inducement to manage the corporation, and that he eventually was responsible for running the operations of A&A, including purchasing new inventory, selling motor vehicles, paying the bills and payroll, and conducting its banking transactions. He states that, due to A&A's cash flow problems, he arranged for loans from his mother with the plaintiff's consent, that the proceeds of said loans were deposited into A&A bank accounts and used for its operations, and that the plaintiff would instruct him on occasion to cash corporate checks in order to wire funds to the plaintiff when he was on

extended stays outside the United States. He indicates that the plaintiff's signature on checks written by him were authorized by the plaintiff and used for legitimate business purposes.

At his deposition, Richard Bohner, incorrectly sued in the underlying action as Richard Bonner, testified that he is the president of CFS, and that CFS provided tax preparation services, performed bank reconciliations, and created summaries of banking transactions for A&A from August 2002 to August 2005. He stated that CFS received A&A's financial information from Ernest, that it did not conduct audits of A&A's finances or review who was signing checks for the corporation, and that no one at CFS was aware of any accounting irregularities regarding A&A.

In his affidavit, Leonard Fliegel swears that he is a certified public accountant licensed in the State of New York, that he has reviewed certain relevant documents regarding this action and the underlying action, and that it is his opinion with a reasonable degree of accounting practice certainty that the CFS defendants acted reasonably and within the standard of care regarding the services provided to A&A. He states that the standards set forth in the American Institute of Certified Public Accountants Statement on Standards for Tax Services No. 3, Certain Procedural Aspects of Preparing Returns provides that an accountant preparing a company's tax returns may rely in good faith, without verification, on the information provided by the client. He indicates that, under the circumstances herein, an accountant does not conduct a forensic analysis of signatures or endorsements on checks, and that only inconsistencies in the information provided by the client would require an accountant to conduct further inquiries.

In his affidavit, Richard Feinsilver swears that he is an attorney licensed to practice law in the State of New York, that he has successfully prosecuted more than 7,500 consumer and small business bankruptcy cases, and that he has reviewed certain documents and pleadings regarding the plaintiff's bankruptcy case and this action. He states that, as a result of the filing of a petition in bankruptcy, the subject judgments entered against the plaintiff are unenforceable, that the plaintiff has been discharged from any obligation to pay the judgments or the underlying debts, and that the plaintiff's homestead in no longer encumbered by said judgments. He indicates that it is his opinion with a reasonable degree of legal practice certainty that the plaintiff was insolvent prior to the entry of either judgment against him.

In her affidavit dated February 10, 2007, Agnes swears that she had at least three telephone conversations with the plaintiff regarding the delivery of loans to him and his corporation, that he agreed to repay the monies together with interest, and that he requested an additional loan of $15,000 on July 9, 2004. She states that the plaintiff's knowledge of the loans is established by an A&A check in repayment signed by the plaintiff.

In support of their motion, the Devery defendants also submit, among other things, copies of bank statements for the subject accounts, the "fraud affidavits" filed by the plaintiff with Fleet and NFB, copies of the refund checks issued by Fleet and NFB to A&A for certain alleged unauthorized withdrawals or transactions, the plaintiff's expert witness responses pursuant to CPLR 3101 (d) regarding forgery and damages, and the plaintiff's answers to the Devery defendants' interrogatories and first notice for discovery and inspection. The exhibits reveal that neither A&A nor the plaintiff notified the banks of the alleged forgeries until June 2004 or later, and that the testimony of the plaintiff's experts would not

establish if any of the checks signed by Ernest were used for other than corporate purposes. The exhibits also reveal that the plaintiff has admitted he did not have any contact with the defendant Stefanie N. Devery, and that he does not have any documentation regarding Ernest's assets or insurance.

For a defendant in a legal malpractice case to succeed on a motion for summary judgment, evidence must be presented in admissible form establishing that the plaintiff is unable to prove at least one of the essential elements of a malpractice cause of action (***Napolitano v Markotsis & Lieberman***, 50 AD3d 657, 855 NYS2d 593 [2d Dept 2008]; ***Olaiya v Golden***, 45 AD3d 823, 846 NYS2d 604 [2d Dept 2007]; ***Ippolito v McCormack, Damiani, Lowe & Mellon***, 265 AD2d 303, 696 NYS2d 203 [2d Dept1999]). To establish a cause of action to recover damages for legal malpractice, a plaintiff must prove (1) that the defendant attorney failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community, (2) proximate cause, (3) damages, and (4) that the plaintiff would have been successful in the underlying action had the attorney exercised due care (***Tortura v Sullivan Papain Block McGrath & Cannavo, P.C.***, 21 AD3d 1082, 803 NYS2d 571 [2d Dept 2005]; ***Ippolito v McCormack, Damiani, Lowe & Mellon***, *supra*; ***Volpe v Canfield***, 237 AD2d 282, 654 NYS2d 160 [2d Dept 1997], *lv denied* 90 NY2d 802, 660 NYS2d 712 [1997]).

Initially, the Devery defendants contend that the plaintiff lacks standing to bring this action, as the claims against the third-party defendants in the underlying action belonged solely to A&A, and that he does not have standing to assert claims of legal malpractice on behalf of A&A. With respect to standing, it is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria (*see* ***Society of Plastics Indus., Inc. v County of Suffolk***, 77 NY2d 761, 570 NYS2d 778 [1991]). "Standing . . . requires an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request . . . Without . . . standing, a party lacks authority to sue" (***Caprer v Nussbaum***, 36 AD3d 176, 825 NYS2d 55 [2d Dept 2006] [internal citations and quotation marks omitted]). It is well settled that, in addition to the elements discussed above, the elements of a cause of action for legal malpractice include the existence of an attorney-client relationship between the plaintiff and the defendant (***Lindsay v Pasternack Tilker Ziegler Walsh Stanton & Romano LLP***, 129 AD3d 790, 12 NYS3d 124 [2d Dept 2015; ***Terio v Spodek***, 63 AD3d 719, 880 NYS2d 679 [2d Dept 2009]), and that the relationship must exist at the time of the alleged malpractice (***Tabner v Drake***, 9 AD3d 606, 780 NYS2d 85 [3d Dept 2004]). Here, it is undisputed that the plaintiff retained the Devery firm to represent his corporation and him individually, and that said firm remained the attorney of record at all times relevant herein. The issue of the relative culpability of the defendants does not alter these basic fact that the plaintiff had an attorney-client relationship with Devery and the Devery firm.

However, is also well settled that, in general, "a corporation has a separate legal existence from its shareholders even where the corporation is wholly owned by a single individual" (***Matter of Queens W. Dev. Corp. [Nixbot Realty Assoc.]***, 121 AD3d 903, 905, 995 NYS2d 84, 87 [2d Dept 2014]; quoting ***Baccash v Sayegh***, 53 AD3d 636, 639, 862 NYS2d 564, 567 [2d Dept 2008]). With respect to a claim of attorney malpractice, an attorney is not liable to third parties, not in privity, for harm caused by professional negligence absent fraud, collusion, malicious acts, or other special circumstances (*see*

Ginsburg Dev. Cos., LLC v Carbone, 85 AD3d 1110, 926 NYS2d 156 [2d Dept 2011]; ***Breen v Law Office of Bruce A. Barket, P.C.***, 52 AD3d 635, 862 NYS2d 50 [2d Dept 2008]). It is determined that the Devery defendants have prima facie established that the causes of action in the underlying action against Ernest, NFB and CFS belonged solely to A&A. However, the Devery defendants have failed to establish that the plaintiff's counterclaim against Agnes/JEM and cause of action against Fleet, or the defenses he may have had relative to said adverse parties, are not claims which belong to him as an individual. Thus, to the extent the plaintiff had an individual causes of action or defenses in the underlying action he has standing in this action for legal malpractice.

It is undisputed that Racano, of counsel to the Devery defendants who remained the attorneys of record for A&A and the plaintiff, failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community, and permitted default judgments to be entered against the plaintiff based upon the bald assertion that he received proceeds of loans from Agnes and JEM when the record establishes that the checks from said parties are all made payable to A&A, and when his sole obligation to Fleet was based on his personal guarantee of the Fleet LOC account held by A&A. Where a defendant seeks summary judgment in an action for legal malpractice, the burden is on the movant to establish through expert opinion that he or she did not perform below the ordinary reasonable skill and care possessed by an average member of the legal community (*see* ***Cosmetics Plus Group, Ltd. v Traub***, 105 AD3d 134, 960 NYS2d 388 [2d Dept 2013]; ***Suppiah v Kalish***, 76 AD3d 829, 907 NYS2d 199 [1st Dept 2010]). The Devery defendants have not submitted the opinion of an expert to establish that their performance of legal services, if any, met the standard of care applicable herein.

However, an individual's mere membership in a limited liability company does not make that member liable for the tortious acts of another member (Limited Liability Company Law § 609 [a]). A member may be held individually liable if they participate in the commission of a tort in the furtherance of company business (***Board of Mgrs. of Beacon Tower Condominium v 85 Adams St., LLC***, 136 AD3d 680, 25 NYS3d 233, [2d Dept 2016]; ***Bynum v Keber***, 135 AD3d 1066, 23 NYS3d 654 [1st Dept 2016]). The adduced evidence establishes that Devery's wife and partner did not participate in representing the plaintiff or litigating the underlying action. Thus, the Devery defendants have established their prima facie entitlement to summary judgment dismissing the complaint against the defendant Stefanie N. Devery.[2]

The undersigned now turns to the Devery defendants' contentions that the plaintiff is unable to prove the remaining elements of his cause of action for legal malpractice. Initially, the Devery defendants contend that the plaintiff's cause of action fails as a matter of law because he has failed to establish that he has suffered any proximately caused damages. A defendant moving for summary judgment cannot satisfy its initial burden of establishing his or her entitlement thereto merely by pointing to gaps in the plaintiff's case (***Coastal Sheet Metal Corp. v Martin Assoc., Inc.***, 63 AD3d 617, 881 NYS2d 424 [1st

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[2] The Devery defendants do not submit any evidence, neither do the make any factual or legal arguments, regarding the possible liability of the Devery Group herein.

Dept 2009]; *see also* ***Tsekhanovskaya v Starrett City, Inc.***, 90 AD3d 909, 935 NYS2d 128 [2d Dept 2011]).

In order to establish a prima facie case of legal malpractice, a plaintiff must demonstrate that the breach of the attorney's duty proximately caused the plaintiff actual and ascertainable damages (*see* ***Leder v Spiegel***, 9 NY3d 836, 840 NYS2d 888 [2007]; ***Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer***, 8 NY3d 438, 835 NYS2d 534 [2007]). The Devery defendants contend that the affidavit of their expert Richard Feinsilver and the bankruptcy petition filed by the plaintiff confirm that the plaintiff was insolvent, and that the plaintiff "would have entered bankruptcy regardless of the entry of the judgments" in the underlying action. It is noteworthy that Feinsilver does not state that the plaintiff's insolvency would inevitably led him to file for bankruptcy if the subject judgments had not been filed against him. They further contend that, as a result of the discharge of those judgments in bankruptcy, the plaintiff has not suffered any ascertainable damages. However, the Devery defendants have submitted the plaintiff's expert witness disclosure, which indicates that said expert will testify that the plaintiff would not have had to declare bankruptcy absent the entry of the subject judgments, and that the filing of the petition required the plaintiff to surrender all of his non-exempt assets. Thus, there is an issue of fact whether the entry of the subject judgments required the plaintiff to declare bankruptcy. The Devery defendants have failed to prima facie establish that the plaintiff cannot prove he has suffered actual and ascertainable proximately caused damages.

Moreover, the plaintiff is required to prove that, "but for" the attorney's negligence, the plaintiff would have prevailed on the underlying cause of action (*see* ***AmBase Corp. v Davis Polk & Wardwell***, 8 NY3d 428, 834 NYS2d 705 [2007]; ***Leder v Spiegel***, *supra*; ***Snolis v Clare***, 81 AD3d 923, 917 NYS2d 299 [2d Dept 2011]). The Devery defendants contend that A&A is unable to prove its claims for fraud or aiding and abetting fraud asserted against Agnes in the underlying action, and that A&A's cause of action against Fleet is barred by A&A's failure to exercise reasonable care in examining its bank statements, discovering forgeries, and timely notifying Fleet of the issue (*see* UCC § 4-406 [1], [2], and [4]). Whether or not said contentions are correct, they are not dispositive herein. The question is whether the plaintiff could have successfully defended against any claims asserting personal liability on his part regarding the business operations of A&A, the alleged failure of A&A to exercise due care, or A&A's interactions with Agnes/JEM or the third-party defendants in the underlying action.

Here, the adduced evidence establishes that the Fleet LOC account was not paid by A&A, that Fleet had issued a credit for the reimbursable losses to said account due to improper payments or withdrawals, and that the plaintiff had personally guaranteed A&A's line of credit with Fleet. Thus, the Devery defendants have prima facie established that the plaintiff cannot prove that he would have prevailed on Fleet's counterclaim against him. However, as noted above, the Devery defendants have not established that the plaintiff cannot prove that he had a defense against, and would have prevailed regarding, Agnes/JEM's claims that he was the recipient of any loan proceeds individually. Because summary judgment deprives the litigant of his or her day in court, it is considered a "drastic remedy" which should be invoked only when there is no doubt as to the absence of triable issues (***Andre v Pomeroy***, 35 NY2d 361, 364, 362 NYS2d 131 [1974]; ***Elzer v Nassau County***, 111 AD2d 212, 489 NYS2d 246 [2d Dept 1985]). Indeed, where there is any doubt as to the existence of triable issues, or

where the issue is even arguable, the Court must deny the motion (***Chilberg v Chilberg***, 13 AD3d 1089, 788 NYS2d 533 [4th Dept 2004], *reargument denied* 16 AD3d 1181, 792 NYS2d 368 [4th Dept 2005]; ***Barclay v Denckla***, 182 AD2d 658, 582 NYS2d 252 [2d Dept 1992]; ***Cohen v Herbal Concepts, Inc.***, 100 AD2d 175, 473 NYS2d 426 [1st Dept 1984], *affd* 63 NY2d 379, 482 NYS2d 457 [1984]).

It is determined that the Devery defendants have established their prima facie entitlement to summary judgment dismissing the complaint against the defendant Stefanie N. Devery, and dismissing all claims of legal malpractice except those involving the entry of the judgments entered by Agnes and JEM. Having established their entitlement to summary judgment dismissing the complaint against them to the extent noted, it is incumbent upon the plaintiff to produce evidence in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, *supra*; ***Rebecchi v Whitmore***, *supra*; ***O'Neill v Town of Fishkill***, *supra*). In opposition to the motion, the plaintiff submits, among other things, his affidavit, and an affidavit from an expert witness. In his affidavit, the plaintiff swears that his damages herein include the loss of his equity in two residential properties that he owned, that all of the attorneys representing him in the underlying action and this action have told him that the claims against him were without merit, and that there is no merit to the claim that he did not sustain actual and ascertainable damages.

In his affidavit, Steven G. Pinks (Pinks), an attorney duly admitted to practice in the courts of New York State, swears that, in his opinion to a reasonable degree of professional certainty, the defendants herein "departed in multiple ways from the required standard of care." He states that his opinions are accurately set forth in the plaintiff's expert witness disclosure submitted by the plaintiff. In said disclosure, the plaintiff indicates that Pinks will testify that the defendants' failure to answer Agnes/JEM's amended complaint, to reply to the counterclaim in Fleet's answer, to present proof of service at the traverse hearing before Judge Pitts, and to oppose the respective motions for default judgment were departures from good and acceptable legal practice. In addition, the disclosure states that the entry of the subject judgments were the result of the negligence of the defendants, and that, absent said negligence and departures, the plaintiff would have prevailed on his counterclaim against Agnes and his third-party causes of action against Ernest, Fleet, NFB, and CFS.

It is well settled that the opinion testimony of an expert "must be based on facts in the record or personally known to the witness" (*see* ***Hambsch v New York City Tr. Auth.***, 63 NY2d 723, 480 NYS2d 195 [1984] *citing* ***Cassano v Hagstrom***, 5 NY2d 643, 646, 187 NYS2d 1 [1959]; ***Shi Pei Fang v Heng Sang Realty Corp.***, 38 AD3d 520, 835 NYS2d 194 [2d Dept 2007]; ***Santoni v Bertelsmann Property, Inc.***, 21 AD3d 712, 800 NYS2d 676 [1st Dept 2005]). An expert "may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion" (*see* ***Shi Pei Fang v Heng Sang Realty Corp.*** *supra*). The expert disclosure and Pinks, in setting forth the undisputed failures of the defendants to meet the required standard of care, have failed to address the other important issues raised by the Devery defendants and determined by the Court as set forth above. Here, to the extent that Pinks attempts to render an expert opinion that the plaintiff would have prevailed on his counterclaim and third-party causes of action, it primarily consists of theoretical allegations with no independent factual basis; therefore it is rejected as speculative, unsubstantiated, and conclusory (*see* ***Mestric v Martinez Cleaning Co.***, 306 AD2d 449, 761 NYS2d 504 [2d Dept 2003]).

In addition, the plaintiff has failed to address, among other things, the issue of his standing, whether any of the checks signed by Ernest were used for purposes other than A&A's business operations, and whether he could have succeeded in establishing that he would not have been held liable under his personal guaranty regarding the Fleet LOC account. In addition, the plaintiff does not dispute that certain causes of action in the underlying action belonged solely to A&A. New York Courts have held that the failure to address arguments proffered by a movant or appellant is equivalent to a concession of the issue (*see* ***McNamee Constr. Corp. v City of New Rochelle***, 29 AD3d 544, 817 NYS2d 295 [2d Dept 2006]; ***Welden v Rivera***, 301 AD2d 934, 754 NYS2d 698 (3d Dept 2003]; ***Hajderlli v Wiljohn 59 LLC***, 24 Misc3d 1242[A], 901 NYS2d 899 [Sup Ct, Ct, Ct, Bronx County 2009]).

Accordingly, the Devery defendants motion for summary judgment is granted to the extent that the complaint against the defendant Stefanie N. Devery is dismissed, all claims of legal malpractice except those involving the judgments entered by Agnes and JEM are dismissed, and is otherwise denied.

Dated: 8-7-18

[redacted]
A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION