At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 15th day of August 2018.

P R E S E N T:

HON. LARA J. GENOVESI,
J.S.C.

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MENDEL E. OFMAN,

Plaintiff,

-against-

ANDREW L. BLUESTONE, ESQ.,

Defendant.

Index No.: 506246/2014

DECISION & ORDER

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ANDREW L. BLUESTONE, ESQ.

Third-Party Plaintiff,

-against-

THE CATAFAGO LAW FIRM, P.C., and
JACQUES CATAFAGO, ESQ.,

Third-Party Defendants.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed	1A
Opposing Affidavits (Affirmations)	2
Reply Affidavits (Affirmations)	
Other Papers: Memoranda of Law in Support and Reply	1B, 3

Introduction

Defendant/third-party plaintiff, Andrew L. Bluestone, Esq., moves by notice of motion, sequence number five, pursuant to CPLR 3211(a)(1), (5) and (7) to dismiss plaintiff's verified second amended complaint dated December 17, 2017, for failure to state a cause of action, based on documentary evidence and based on expiration of the statute of limitations. Plaintiff, Mendel E. Ofman, opposes this application.

Background and Litigation History

The instant matter sounds in legal malpractice and breach of fiduciary duty. There are four prior actions related to the instant action, discussed more fully below. Defendant and third-party plaintiff herein Andrew Bluestone, Esq. represented plaintiff in three of the four prior actions: *Campos v. Ofman* (Action 2); *Ofman v. Ginsberg* (Action 3); and *Ofman v. Katz* (Action 4). "In each of those three cases, Attorney Bluestone took over representation from multiple predecessor counsels" (Memorandum of Law in Support [1B] at p 1).

Ofman v. Campos and Campos (Action 1)

Plaintiff commenced the initial litigation *Ofman v. Campos* (action 1), index number 14119/2000, sounding in property damage. Plaintiff was represented by Steven Ginsberg, Esq. The matter settled for $5,000.00 before the Hon. Gerard H. Rosenberg on January 15, 2002 (*see* Notice of Motion [1A], Exhibit B).

Campos v. Ofman (Action 2)

Thereafter, *Campos v. Ofman* (action 2) was commenced for breach of contract, index number 33007/2002. Plaintiff was represented by Stephen Katz. This litigation

resulted in a $55,000.00 jury verdict in favor of Campos (*see* Memorandum of Law in Support [1B] at p 5). In 2006, Ofman retained Andrew Bluestone, Esq., defendant/third-party plaintiff herein, to appeal the verdict (*see* Notice of Motion [1A], Exhibit D, *Campos v. Ofman* Retainer). Pursuant to the retainer agreement dated January 30, 2006, Bluestone was to be paid a flat rate of $3,750.00 to perfect the appeal. Plaintiff was responsible to "pay expenses for printing of the Record on Appeal and Brief, at the rate of $1.50 per page, along with all other expenses and court fees of an Appeal" (*id.*).

Defendant maintains that "the appeal was properly perfected; the briefs and record were considered by the Appellate Division; and oral argument was had. The Appellate Division, Second Department, affirmed the trial court's judgment on March 4, 2008" (Memorandum of Law in Support [1B] at p 5; *see also* (*see* Notice of Motion [1A], Exhibit E, *Campos v. Ofman* dated March 4, 2008). According to defendant, his "sole involvement [in this action] was perfecting the appeal of the trial court verdict" (Memorandum of Law in Support [1B] at p 4).

Ofman v. Ginsberg (Action 3)

Plaintiff commenced *Ofman v. Ginsberg,* (action 3) for legal malpractice, index number 1031/2005, against Steven Ginsberg based upon his representation of plaintiff in the *Ofman v. Campos* matter (action 1). Plaintiff initially retained Stephen Katz, Esq. Katz was discharged, and defendant Bluestone was retained in November 2005 (*see* Notice of Motion [1A], Exhibit G, *Ofman v. Ginsberg* retainer). Pursuant to the terms of the retainer agreement dated November 30, 2005, plaintiff was to pay Bluestone an

hourly rate of $325.00 per hour, as well as the litigation expenses including usual disbursements (*see id.*).

Action 3 was dismissed. Bluestone appealed; the Appellate Division reversed and restored the case on November 15, 2011 (*see id.,* Exhibit H, *Ofman v. Ginsberg* decision dated November 15, 2011). Thereafter, on March 20, 2012, Bluestone was discharged and substituted by Jacques Catafago, Esq. (*see id.* at Exhibit I, *Ofman v. Ginsberg* "CPLR 321 Consent"). "Court records demonstrate that successor counsel Catafago waived a jury trial, took the case to trial, and lost on August 8, 2012" (Memorandum of Law in Support [1B] at p 5; *see also,* Notice of Motion [1A], Exhibit J, Mendel v. Ginsberg E-Courts Printout).

Ofman v. Katz (Action 4)

Plaintiff commenced *Ofman v. Katz* (action 4) for legal malpractice, index number 17579/2007, against Stephen Katz, based upon his representation of plaintiff in *Campos v. Ofman* (action 2), and *Ofman v. Ginsberg* (action 3). Plaintiff initially retained Charles Petitto, Esq. In July 2008, plaintiff discharged Petitto, and retained Bluestone (*see* Notice of Motion [1A], Exhibit L, *Ofman v. Katz* retainer). Pursuant to the terms of the retainer agreement dated July 22, 2008, plaintiff was to pay Bluestone an hourly rate of $325.00 per hour, as well as the litigation expenses including usual disbursements (*see id.*).

The matter was dismissed in August 2009 and Bluestone appealed the decision. The Appellate Division, Second Department, reversed the dismissal and restored the case on November 15, 2011 (*see id.,* Exhibit M, *Ofman v. Katz* decision dated November 15, 2011). Thereafter, on March 20, 2012, Bluestone was discharged and substituted by

Jacques Catafago, Esq. (*see id.,* at Exhibit N, *Ofman v. Katz* "CPLR 321 Consent"). "Court records indicate that the case was settled during trial on June 16, 2014" (Memorandum of Law in Support [1B] at p 6; *see also* Notice of Motion [1A], Exhibit O, *Ofman v. Katz* E-Courts printout).

Ofman v. Bluestone (the Instant Action)

Plaintiff commenced the instant action, index number 506246/2014, by e-filing a summons and complaint on July 9, 2014 (*see* NYSCEF Doc. # 1). Plaintiff served a verified amended complaint on or about April 10, 2015 (*see* NYSCEF Doc. # 24). Defendant moved to dismiss plaintiff's complaint on May 29, 2015. The motion was denied by the Hon. Ellen M. Spodek on March 16, 2016, who stated that "[t]here may have been continuous representation of plaintiff by defendant, therefore the motion to dismiss pursuant to CPLR § 3211 (a)(5) is denied" (*see* Affirmation in Opposition [2], Exhibit C). A preliminary Conference was held on July 28, 2017.[1]

Thereafter, plaintiff e-filed a Verified Second Amended Complaint on December 17, 2017 (*see* Notice of Motion [1A], Exhibit A; *see also* NYSCEF Doc. # 104). A search of the court record reveals that the parties stipulated that plaintiff shall file a Verified Second Amended Complaint, Bluestone shall respond to "on or before January 26, 2017", and "such Verified Second Amended Complaint shall serve as Plaintiff's

[1] A review of the court file reveals that no compliance conferences have been held.

operative complaint against Defendant / Third-Party Plaintiff in this action" (Stipulation dated December 12, 2017, NYSCEF Doc. # 103).[2]

Plaintiff alleges a first cause of action sounding in "Breach of Fiduciary Duty and Faithless Servant", where he alleges the following,

> 5. Defendant represented to Plaintiff, orally and in writing, that Plaintiff's legal fees and costs in the Ofman Litigation were recoverable.
>
> 6. Defendant knew, or should have known, that as a matter of law, the recovery of legal fees is controlled by the "American Rule," to wit, that each person pays its own legal fees and costs, unless there is a contractual or statutory basis for the recovery of said legal fees.
>
> . . .
>
> 11. Further, Defendant engaged in duplicative and unnecessary billing in the Ofman Litigation.
>
> . . .
>
> 17. Defendant induced Plaintiff to pay legal fees of $182,190.00 in the course of Defendant's representation of Plaintiff by intentionally or negligently advising Plaintiff that legal fees and costs paid to Defendant could possibly be recovered.

(*id.* at 1-2).

Plaintiff's second cause of action sounds in negligence, wherein he seeks recovery of the same $182,190.00 in legal fees and costs. Plaintiff alleges that defendant's purported negligence was both the cause in fact and proximate cause of plaintiff's payment of legal fees and costs (*see id.* at ¶¶ 19-20). It is unclear from the second amended verified complaint when defendant purportedly made representations that

[2] This Court notes that defendant did not e-file an amended answer in response to the verified second amended complaint. Even assuming the parties meant for defendant to respond to the December 17, 2017 amended complaint by January 26, 2018, rather than January 26, 2017, as stipulated, the instant motion to dismiss the verified second amended complaint was e-filed on February 6, 2018.

plaintiff's legal fees were recoverable or when plaintiff made this payment for legal fees and costs. He seeks statutory interest running from March 20, 2012 (*see id.* at ¶ 22), which is the date that defendant was discharged in actions 3 and 4.

Defendant Contends

Defendant contends that plaintiff fails to state a cause of action for legal malpractice. Defendant maintains that plaintiff failed to plead sufficient factual allegations that but for defendant's alleged negligence, plaintiff would have had a more favorable outcome and that this failure caused actual damages (*see* Memorandum of Law in Support [1B] at p 9-10). Defendant argues that plaintiff failed to properly plead "but for causation" for a claim of legal malpractice (*see id.* at p 14). Defendant avers that plaintiff merely asserts that defendant negligently advised plaintiff that attorney's fees could not be recovered, however defendant maintains that fees can be recovered in a malpractice action, when they "'were not merely an incident of the litigation but instead, constituted consequential damages' of the malpractice" (*id.* at 10 quoting *Affiliated Credit Adjustors, Inc., v. Carlucci & Legum*, 139 A.D.2d 611 [2 Dept., 1988]). Defendant maintains that plaintiff failed to state a cause of action by pleading that defendant was negligent in advising that fees "could possibly" be recovered. Plaintiff did not plead that defendant guaranteed recoupment of fees in advising plaintiff (*see id.* at p 12-13).

Defendant further contends that plaintiff's allegations that defendant induced him to pay legal fees is "squarely refuted by documentary evidence" (*see id.* at p 15). The documentary evidence shows that defendant did not induce plaintiff to litigate, inasmuch

as plaintiff initiated the underlying malpractice litigation prior to retaining Bluestone and continued the litigation after Bluestone was substituted by Catafago.

Defendant argues that plaintiff's legal malpractice claim is barred as a matter of law because there is no malpractice liability when a successor attorney has an adequate opportunity to protect a plaintiff's rights (*see id.* at p 16). Defendant further maintains that plaintiff fails to state a cause of action for breach of fiduciary duty, as this cause of action is duplicative of his claim for legal malpractice (*see id* at 18). Even assuming the breach of fiduciary duty claim is not duplicative, it fails to state a valid cause of action (*see id.* at 19). The duplicative and unnecessary billing claim also fails to state valid cause of action (*see id.* at 20). Defendant further argues that plaintiff's claims for legal malpractice with respect to action 3 is barred as a matter of law because plaintiff failed to appeal the dismissal of the lawsuit (*see id.* at 22). Further, plaintiff's claims related to action 2 are barred by the statute of limitations (*see id.* at 23).

Plaintiff Contends

Plaintiff contends that "[n]owhere in Defendant's papers does Defendant address whether the Complaint states a cause of action under legal malpractice or breach of fiduciary duty based upon Defendant's misrepresentation or omission as to the recoverability of legal fees *paid* to Defendant by Plaintiff" (Affirmation in Opposition [2] at ¶ 4). Plaintiff maintains that he stated a cause of action for breach of fiduciary duty (*see id.* at ¶¶ 13-17). Plaintiff further argues that he stated a cause of action for "negligence/legal malpractice" (*see id.* at ¶ 18-28). "It is well-settled that New York adheres to the 'American Rule' 'that the prevailing litigant ordinarily cannot

collect...attorneys' fees from its unsuccessful opponents'" (*id.* at ¶ 20, citing *Congel v. Malfitano,* 31 N.Y.3d 272, 76 N.Y.S.3d 873 [2018]). Plaintiff avers that defendant did not provide documentary evidence which refutes any element of plaintiff's claim (*see id.* at ¶¶ 24-28), including defendants claim that "voluntary payment doctrine" bars this claim" (*see id* at ¶ 38).

Plaintiff argues that defendant sets forth red herrings, including his argument that successor counsel had sufficient time to protect plaintiffs rights (*see id.* at ¶ 36). Plaintiff maintains that the court has already ruled that the "continuous representation doctrine applies in the decision of the Hon. Ellen Spodek dated March 16, 2016, and thus any argument that the statute of limitations has expired is barred (*see id.* at ¶ 40; *see also id* at Exhibit C, Decision dated March 16, 2016).

Discussion

Motion to Dismiss

Defendant moves herein pursuant to CPLR § 3211(a)(1), (5) and (7). Section 3211(a) states, in relevant part, that

> A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> 1. a defense is founded upon documentary evidence; or...
>
> 5. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or...
>
> 7. the pleading fails to state a cause of action

(CPLR § 3211[a][1], [5], [7]).

CPLR § 3211(a)(5) - Statute of Limitations

"In resolving a motion to dismiss pursuant to CPLR 3211(a)(5), the court must accept the facts as alleged in the complaint as true, and accord the plaintiff the benefit of every possible favorable inference" (*U.S. Bank Nat'l Ass'n v. Gordon*, 158 A.D.3d 832, 72 N.Y.S.3d 156 [2 Dept., 2018], citing *Faison v. Lewis,* 25 N.Y.3d 220, 10 N.Y.S.3d 185 [2015]). "[T]o dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired" (*Williams v. City of Yonkers*, 160 A.D.3d 1017, -- N.Y.S.3d -- [2 Dept., 2018], citing *Amrusi v. Nwaukoni,* 155 A.D.3d 814, 65 N.Y.S.3d 62 [2 Dept., 2017]; *see also Spitzer v. Newman,* -- A.D.3d --, 2018 N.Y. Slip Op. 05514 [2 Dept., 2018]). "If the defendant meets this initial burden, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations has been tolled, show that an exception to the limitations period is applicable, or demonstrate that the plaintiff actually commenced the action within the applicable limitations period" (*Williams v. City of Yonkers*, 160 A.D.3d 1017, *supra,* citing *Elia v. Perla,* 150 A.D.3d 962, 55 N.Y.S.3d 305 [2 Dept., 2017]).

Plaintiff's second cause of action is identified in the complaint as one for negligence (*see* Notice of Motion [1A], Exhibit A; see also NYSCEF Doc. # 104). However, this purported negligence is based upon defendant's legal representation of plaintiff. Both parties characterize this as a cause of action for legal malpractice. "An action to recover damages arising from legal malpractice must be commenced within

three years, computed from the time the cause of action accrued to the time the claim is interposed" (*Roubeni v. Dechert, LLP*, 159 A.D.3d 934, 70 N.Y.S.3d 60 [2 Dept., 2018], quoting *3rd & 6th, LLC v. Berg*, 149 A.D.3d 794, 53 N.Y.S.3d 78 [2 Dept., 2017]; *see also* CPLR 214[6]). "Moreover, any negligence claim would be barred by the three-year statute of limitations" (*Tenenbaum v. Gibbs*, 27 A.D.3d 722, 813 N.Y.S.2d 155 [2 Dept., 2006], citing CPLR 214[4]).

> " 'A legal malpractice claim accrues when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court. In most cases, this accrual time is measured from the day an actionable injury occurs, even if the aggrieved party is then ignorant of the wrong or injury. What is important is when the malpractice was committed, not when the client discovered it' " (*Tantleff v. Kestenbaum & Mark,* 131 A.D.3d 955, 956, 15 N.Y.S.3d 840, quoting *McCoy v. Feinman,* 99 N.Y.2d at 301, 755 N.Y.S.2d 693, 785 N.E.2d 714). Continuous representation may toll the statute of limitations, but "only where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim" (*McCoy v. Feinman,* 99 N.Y.2d at 306, 755 N.Y.S.2d 693, 785 N.E.2d 714;

(*3rd & 6th, LLC v. Berg*, 149 A.D.3d 794, *supra*).

In the instant case, the action was commenced by e-file in November of 2014. Defendant contends that plaintiff's claim as related to action 2, the Campos Appeal, is barred by the statute of limitations.[3] Defendant was retained to perfect the appeal in action 2 on January 30, 2006. The decision and order was affirmed on March 4, 2008 (*see* Notice of Motion [1A], Exhibit E, *Campos v. Ofman* dated March 4, 2008).

[3] Defendant sets forth no arguments, in support of his motion to dismiss, that plaintiff's claims based on the remaining actions, actions 3 and 4, are barred by the statute of limitations.

Defendant met his burden and established that any cause of action based on action 2 would be time-barred. Even assuming, arguendo, that the cause of action for legal malpractice based on this appeal accrued on March 4, 2008, the date of the Appellate Division, Second Department, decision, the instant action was brought six years later in 2014.

In opposition, plaintiff raised a question of fact. "The doctrine of the 'law of the case' is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned" (*Strujan v. Glencord Bldg. Corp.*, 137 A.D.3d 1252, 29 N.Y.S.3d 398 [2 Dept., 2016], quoting *Clark v. Clark,* 117 A.D.3d 668, 985 N.Y.S.2d 276 [2 Dept., 2014]). Here, in deciding a prior motion to dismiss plaintiff's verified amended complaint, where defendant also alleged that plaintiff's claim based on *Campos v. Ofman* (Action 2), is barred by the statute of limitations, the Hon. Ellen M. Spodek denied the motion, stating that "[t]here may have been continuous representation of plaintiff by defendant" based on action 2. Plaintiff has offered no additional proof herein which would support changing Justice Spodek's determination. Inasmuch as this issue was judicially determined by a judge of co-ordinate jurisdiction, this is law of the case. Accordingly, that portion of defendant's motion to dismiss plaintiff's verified second amended complaint based upon expiration of the statute of limitations is denied.

CPLR § 3211(a)(7) – Failure to State a Cause of Action

"When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the

pleading has a cause of action" (*Bennett v. State Farm Fire & Cas. Co.*, 161 A.D.3d 926, -- N.Y.S.3d -- [2 Dept., 2018], quoting *Sokol v Leader*, 74 A.D.3d 1180, 904 N.Y.S.2d 153 [2 Dept., 2010]). "[T]he pleading must be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory" (*Trump Vill. Section 4, Inc. v. Bezvoleva*, 161 A.D.3d 916, 78 N.Y.S.3d 129 [2 Dept., 2018], citing *Leon v Martinez,* 84 N.Y.2d 83, 614 N.Y.S.2d 972 [1994]; *see also Mirro v. City of New York,* 159 A.D.3d 964, 74 N.Y.S.3d 356 [2 Dept., 2018]). "[T]he sole criterion is whether factual allegations are discerned from the four corners of the complaint which, taken together, manifest any cause of action cognizable at law" (*Law Offices of Thomas F. Liotti v. Felix,* 129 A.D.3d 783, 9 N.Y.S.3d 888 [2 Dept., 2015], citing *Cohen v. Kings Point Tenant Corporation,* 126 A.D.3d 843, 6 N.Y.S.3d 93 [2 Dept., 2015]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus" (*Trump Vill. Section 4, Inc. v. Bezvoleva*, 161 A.D.3d 916, *supra,* quoting *EBC I, Inc. v. Goldman, Sachs & Co.,* 5 N.Y.3d 11, 799 N.Y.S.2d 170 [2005]).

"In opposition to such a motion, a plaintiff may submit affidavits to remedy defects in the complaint and preserve inartfully pleaded, but potentially meritorious claims" (*Garcia v. Polsky, Shouldice & Rosen, P.C.,* 161 A.D.3d 828, 77 N.Y.S.3d 424 [2 Dept., 2018], quoting *Cron v. Hargro Fabrics,* 91 N.Y.2d 362, 670 N.Y.S.2d 973 [1998]; *see also Rad & D'Aprile, Inc. v. Arnell Constr. Corp.*, 159 A.D.3d 971, -- N.Y.S.3d – [2 Dept., 2018]). "A motion to dismiss merely addresses the adequacy of the

pleading, and does not reach the substantive merits of a party's cause of action" (*Kaplan v. New York City Dep't of Health & Mental Hygiene*, 142 A.D.3d 1050, 38 N.Y.S.3d 563 [2 Dept., 2016]). "Whether 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" (*Garcia v. Polsky, Shouldice & Rosen, P.C.,* 161 A.D.3d 828, *supra,* quoting *Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 A.D.3d 34, 827 N.Y.S.2d 231 [2 Dept., 2006]).

As an initial matter, defendant's motion to dismiss plaintiff's claim for breach of fiduciary duty as duplicative is granted. Plaintiff's verified second amended complaint, which the parties stipulated serves as "plaintiff's operative complaint against defendant" (Stipulation dated December 12, 2017, NYSCEF Doc. # 103) seeks recovery of $182,190.00 plus interest, costs, fees and disbursements, on his first cause of action for breach of fiduciary duty and his second cause of action for negligence.[4] Both causes of action allege the same facts; that defendant represented to plaintiff that his legal fees and costs were recoverable. As a result of this representation, plaintiff continued with his prior malpractice suits and as a result, paid defendant $182,190.00 in legal fees. Plaintiff maintains that he would not have incurred these damages had he known legal fees were not recoverable. "[W]here, as here, the breach of ....fiduciary duty claims arose from the

[4] As stated above, the complaint labels plaintiff's second cause of action as one sounding in "negligence", however both parties understand this cause of action to be one for legal malpractice and set forth arguments in their moving papers based on legal malpractice.

same facts and did not allege distinct damages, they should be dismissed, as a matter of law, as duplicative of the legal malpractice claim" (*Town of N. Hempstead v. Winston & Strawn, LLP*, 28 A.D.3d 746, 814 N.Y.S.2d 237 [2 Dept., 2006]; *see also Maroulis v. Friedman,* 153 A.D.3d 1250, 60 N.Y.S.3d 468 [2 Dept., 2017]).

At issue herein is plaintiff's remaining cause of action for negligence/legal malpractice. "To state a cause of action to recover damages for legal malpractice, a [party] must allege: (1) that the attorney 'failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession'; and (2) that the attorney's breach of the duty proximately caused the [party] actual and ascertainable damages" (*Ingvarsdottir v. Gaines, Gruner, Ponzini & Novick, LLP*, 144 A.D.3d 1099, 43 N.Y.S.3d 68 [2 Dept., 2016], quoting *Dempster v. Liotti,* 86 A.D.3d 169, 924 N.Y.S.2d 484 [2 Dept., 2011]). "However, a party is not obligated to show, on a motion to dismiss, that he or she actually sustained damages. He or she only has to plead allegations from which damages attributable to the attorney's malpractice might be reasonably inferred" (*Lieberman v. Green*, 139 A.D.3d 815, 32 N.Y.S.3d 239 [2 Dept., 2016]).

Here, defendant's motion to dismiss plaintiff's cause of action for legal malpractice for failure to state a cause of action is denied. Construing plaintiff's complaint liberally and affording plaintiff the benefit of every favorable inference, plaintiff has stated a cause of action for legal malpractice. It is clear that plaintiff retained the defendant to represent him in three prior cases. Although defendant was later substituted out of actions 3 and 4, an attorney-client relationship existed. Plaintiff

alleges that defendant failed to exercise reasonable skill and failed to possess the commonly possessed knowledge that legal fees would not be recoverable, in the underlying actions. Plaintiff further alleges that this breach, caused him damages in the amount of $182,190.00, paid in legal fees. Defendant does not dispute having given such advice to plaintiff. Rather, counsel argues that no guarantees were made to plaintiff, and that fees are in fact recoverable under the law (*see* Memorandum of Law in Support [1B] at pp 10-14). Whether the complaint will survive a motion for summary judgment, or whether plaintiff will be able to prove his cause of action for legal malpractice is not part of the determination on a motion to dismiss (*see Garcia v. Polsky, Shouldice & Rosen, P.C.,* 161 A.D.3d 828, *supra*).

CPLR § 3211(a)(1) – Documentary Evidence

"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" (*Stone v. Bloomberg L.P.*, -- A.D.3d --, N.Y. Slip Op. 05515 [2 Dept., 2018], quoting *Feldshteyn v. Brighton Beach 2012, LLC,* 153 A.D.3d 670, 61 N.Y.S.3d 60 [2 Dept., 2017]; *see also Goshen v. Mutual Life Ins. Co. of N.Y.,* 98 N.Y.2d 314, 746 N.Y.S.2d 858 [2002]). "If the evidence submitted in support of the motion is not 'documentary,' the motion must be denied" (*Phillips v. Taco Bell Corp.*, 152 A.D.3d 806, 60 N.Y.S.3d 67 [2 Dept., 2017], citing *Prott v. Lewin & Baglio, LLP,* 150 A.D.3d 908, 55 N.Y.S.3d 98 [2 Dept., 2017]).

"To constitute 'documentary' evidence, the evidence must be 'unambiguous, authentic, and undeniable' such as judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable [internal citations and quotations marks omitted]" (*Karpovich v. City of New York*, 162 A.D.3d 996 – N.Y.S.3d – [2 Dept., 2018], quoting *Granada Condo. III Ass'n v. Palomino*, 78 A.D.3d 996, 913 N.Y.S.2d 668 [2 Dept., 2010]; *see also Phillips v. Taco Bell Corp.*, 152 A.D.3d 806, *supra*).

Here, defendant argues that documentary evidence refutes plaintiff's allegation that defendant induced him to pay legal fees. In support of this contention, defendant provided pleadings and consents to change attorney in the underlying actions to demonstrate that "plaintiff was pursuing the underlying litigations before he retained Bluestone, and continued to pursue his claims after he terminated Bluestone and retained successor counsel Catafago" (Memorandum of Law in Support [1B] at p 15). Although defendant is correct that plaintiff commenced the underlying actions with prior counsel, and continued the actions with predecessor counsel, defendant failed to provide documentary evidence to refute plaintiff's claim that defendant induced plaintiff to pay legal fees. Here, plaintiff alleges that he relied on defendant's legal advice regarding possible recovery of legal fees. The documents provided offer no proof as to whether defendant gave such advice during his period of representation. Accordingly, that portion of defendant's motion to dismiss plaintiff's verified second amended complaint based upon documentary evidence is denied.

Conclusion

Accordingly, the defendant and third-party plaintiff's motion to dismiss plaintiff's second amended complaint is granted to the extent that plaintiff's cause of action for breach of fiduciary duty is denied as duplicative of the legal malpractice claim. The remainder of defendant's motion to dismiss is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:

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