SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

JOSEPH RABASCO,

Plaintiff,

- against –

BUCKHEIT & WHELAN, PC, FRANK A. WHELAN ESQ., and JOHN L. BUCKHEIT ESQ.,

Defendants.

DECISION AND ORDER

Index No.: 2017-53283

FORMAN, J., Acting Supreme Court Justice

The following papers were read and considered in deciding the Defendants' motion to dismiss and Plaintiff's cross-motion for summary judgment:

	Papers Numbered
Notice of Motion	**1**
Affirmation of Mark Housman	**2**
Exhibits (A-H)	**3-10**
Affidavit of Frank A. Whelan	**11**
Exhibits (A-E)	**12-16**
Memorandum of Law	**17**
Notice of Cross-Motion	**18**
Affirmation of Thomas Cascione	**19**
Exhibits (1-9)	**20-28**
Affirmation of Mark Housman in Reply	**29**
Exhibits (A-D)	**30-33**
Reply Memorandum of Law	**34**
Affirmation of Thomas Cascione in Reply	**35**

In this action sounding in legal malpractice, Defendants Buckheit & Whelan, PC, Frank A. Whelan, Esq., and John L. Buckheit, Esq. (referred to hereinafter collectively as "the Defendants") move pursuant to CPLR 3211(a) (1) & (7) to dismiss Plaintiff's amended complaint. Plaintiff opposes the motion and cross-moves for summary judgment. For the reasons set forth herein, the Defendants' motion is granted and Plaintiff's motion is denied.

FACTS AND PROCEDURAL BACKGROUND

On or about December 24, 2011, Plaintiff sustained serious injuries to his jaw while breaking up a bar fight. He initially presented to St. Francis Hospital in Poughkeepsie and was ultimately transferred to Westchester Medical Center (WMC) where he subsequently underwent an open reduction and internal fixation surgery to repair bilateral mandibular fractures.

Over two years later, on or about May 22, 2014, Plaintiff sought the professional services of the Defendants in order to file and prosecute a claim for medical malpractice [*see* Plaintiff's Amended Complaint, NYSCEF Docket # 10, ¶15]. On May 23, 2014, the Defendants filed an action on Plaintiff's behalf in Westchester County Supreme Court entitled *Rabasco v. Westchester County Health Care Corporation, et. al.*, Index Number 58568/2014 (hereinafter "the Underlying Action") [*id.* at ¶16]. After the close of discovery, the defendants in the Underlying Action moved for summary judgment. In opposition, Plaintiff submitted affirmations from his two expert witnesses: Jack Levine, DDS and Burt Greenberg, M.D. The defendants in the Underlying Action objected to the use of the expert affirmations because the defendants had not been served with reports pursuant to 22 NYCRR 202.17 following the experts' physical examinations of Plaintiff. By Decision and Order dated December 23, 2016, Supreme Court, Westchester County denied the motion for summary judgment on the basis of, *inter alia*, conflicting expert submissions [*see* Decision and Order, Housman Aff, Exhibit B, NYSCEF Docket # 41].

The Underlying Action proceeded to trial. Prior to opening, on June 7, 2017, the defendants in the Underlying Action presented the trial court with motions in limine, one of which was to preclude expert testimony by Plaintiff's experts, Dr. Greenberg and Dr. Levine, due to Plaintiff's failure to serve a report following the physical examination of Plaintiff pursuant to 22 NYCRR 202.17. On June 7, 2017, after hearing oral argument on the motion in limine, the trial

court granted the motion to preclude and dismissed the Underlying Action [*see* Housman Aff, Exhibit C, NYSCEF Docket # 42].

The Defendants filed a notice of appeal[1] on July 20, 2017 [*see* Housman Aff, Exhibit E, NYSCEF Docket # 44]. Thereafter, the Defendants were able to secure an extension of time to perfect the appeal to May 7, 2018 [*see* Whelan Aff, Exhibit E, NYSCEF Docket # 53]. By correspondence dated February 28, 2018, Plaintiff instructed the Defendants to discontinue the appeal and take no further action on his behalf [*see* Whelan Aff, Exhibit D, NYSCEF Docket # 52]. Thereafter, Plaintiff did not timely perfect the appeal or move for an extension of time do so.

Plaintiff commenced this legal malpractice action by filing a summons and verified complaint on December 27, 2017. On February 27, 2018, the Defendants moved to dismiss the complaint pursuant to CPLR §3211 [*see* NYSCEF Docket #3] but withdrew that motion upon Plaintiff's filing of an amended complaint on February 28, 2018 [*see* NYSCEF Docket #s 10, 12]. The Defendants interposed an answer to the amended complaint on April 6, 2018.

By notice of motion dated June 17, 2019, the Defendants move for dismissal of the amended complaint pursuant to CPLR 3211(a) (1) & (7). In support of the motion, the Defendants argue that because an appeal from the trial court's order in the Underlying Action would likely have been successful, Plaintiff's failure to prosecute such an appeal precludes the instant legal malpractice action. The Defendants argue that such an appeal would have been likely to succeed because, *inter alia*: (1) the trial court's dismissal of the Underlying Action was not the appropriate remedy for a violation of 22 NYCRR 202.17; (2) the defendants in the Underlying Action were fully aware of the opinion and conclusions of the expert witnesses and could not claim surprise due to the failure to provide the reports; (3) the law of the case doctrine precluded the trial court's

[1] The Defendants filed a notice of appeal of the June 7, 2017 Order on July 20, 2017 and of the Judgment dated August 7, 2017 on or about September 7, 2017 [*see* Housman Aff, Exhibit E, NYSCEF Docket # 44].

ability to preclude the experts' testimony for failure to comply with 22 NYCRR 202.17; and (4) 22 NYCRR 202.17 was not applicable under the circumstances.

Plaintiff, in opposition to the Defendants' motion and in support of his cross-motion for summary judgment, argues: (1) the Defendants have not shown any merit to an appeal; (2) the Defendants failed to diligently prosecute the appeal; (3) the issues raised by the Defendants are not properly determined on a §3211(a) motion to dismiss; and (4) that the Defendants have made judicial admissions entitling Plaintiff to summary judgment on his claim for legal malpractice.

DISCUSSION

"On a motion pursuant to CPLR 3211(a)(7) to dismiss for failure to state a cause of action, the court must accept facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" [*Lopez v. Lozner & Mastropietro, P.C.*, 166 AD3d 871, 872 (2d Dept. 2018) (citations omitted)]. "Affidavits and other evidentiary material may also be considered to establish conclusively that plaintiff has no cause of action'" [*Simmons v. Edelstein*, 32 AD3d 464, 465 (2d Dept. 2006), quoting *Rovello v. Orofino Realty Co.*, 40 NY2d 633, 636 [1976]]. "Where evidentiary material is adduced in support of the motion, the court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated one" [*Feggins v. Marks*, 171 AD3d 1014, 1015 (2d Dept. 2019) (citations omitted)].

"In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages" [*Glenwayne Development Corp., v. James J. Corbett, P.C.*, 175 AD3d 473, 473-474 (2d Dept. 2019) (citations omitted)]. "Whether [a] pleading

[is] sufficient to state a cause of action for legal malpractice pose[s] a question of law which [can] be determined on a motion to dismiss" [*Rosner v. Paley*, 65 NY2d 736 (1985)].

A motion to dismiss for failure to state a cause of action may be filed at any time [*see* CPLR 3211(e); *see also Dermigny v. Siebert*, 79 AD3d 460 (1st Dept. 2010)]. However, because a motion to dismiss pursuant to CPLR 3211(a)(1) based upon documentary evidence must be brought before service of a responsive pleading [CPLR 3211(e); *McMahon v. Cobblestone Lofts Condominium*, 161 AD3d 536 (1st Dept. 2018)], the Defendants' motion to dismiss under CPLR 3211(a)(1) must be denied. The Court will now analyze whether Plaintiff has a viable cause of action for legal malpractice [*Feggins, supra*].

The failure to pursue an appeal in an underlying action bars a legal malpractice action where the client was likely to have succeeded on appeal in the underlying action [*Grace v. Law*, 24 NY3d 203 (2014); *see also Buczek v. Dell & Little, LLP*, 127 AD3d 1121 (2d Dept. 2015)]. "By establishing that an appeal would likely have been successful, a defendant in a legal malpractice action can establish that the alleged negligence did not proximately cause the plaintiff's damages" [*Buczek*, 127 AD3d at 1124].

In the Underlying Action, given the strong public policy of resolving cases on the merits [*see Gerdes v. Canales*, 74 AD3d 1017 (2d Dept. 2010)] it was error for the trial court to preclude Plaintiff's expert witnesses for a violation of 22 NYCCR 202.17. Contrary to the trial court's ruling, preclusion of Plaintiff's experts was not mandated; in fact, the language of 22 NYCRR 202.17(h) ["unless the judge presiding at the trial in the interests of justice and upon a showing of good cause shall hold otherwise …"] expressly provided for alternative, less severe, remedies. "The 'interests of justice and good cause' requirement [of 22 NYCRR 202.17(h)] is concerned less with the excuse offered for the failure timely to serve the report than it is with a party's need for

the medical proof, the availability of alternate sources and the adverse party's preparedness to cross-examine ..." [*McDougald v. Garber*, 135 AD2d 80, 94 (1st Dept. 1988), *mod. on other grounds* 73 NY2d 246 (1989)]. The testimony of Plaintiff's expert witnesses would not have engendered any claim of surprise or prejudice, as the defendants in the Underlying Action had already been provided with Plaintiff's medical records, a bill of particulars, and CPLR 3101(d) expert disclosures. Thus, rather than imposing the draconian remedy of preclusion, a more appropriate remedy would have been: (i) permitting the expert physicians to testify at trial about the consequences of Plaintiff's injuries as described in previously-served medical records and bill of particulars [*see Aquino v. Merha*, 168 AD3d 797, 799 (2d Dept. 2019); *Shichman v. Yasmer*, 74 AD3d 1316 (2d Dept. 2010) (trial court improvidently exercised its discretion in precluding the plaintiff's expert's opinions in the affidavit which were based on other evidence in the case); *Hughes v. Webb*, 40 AD3d 1035 (2d Dept. 2007); *Neils v. Darmochwal*, 6 AD3d 589 (2d Dept. 2004)]; (ii) imposing motion costs, attorney's fees and expenses upon counsel personally but permitting the case to go forward [*see Carullo v. Fishbach*, 2017 NY Slip Op. 32841(U), 2017 WL 9251258 (Sup Ct, Westchester Cty, 2017); *see also Heffney v. Brookdale Hosp. Ctr.*, 102 AD2d 609, 610-611 (2d Dept. 1984), *lv app dismissed* 63 NY2d 770 (1984)]; or (iii) granting a continuance to permit completion of disclosure along with the imposition of monetary sanctions [*Mazzurco v. Gordon*, 173 AD3d 1001 (2d Dept. 2019)].

Additionally, the trial court's order of preclusion violated the law of the case doctrine. "The doctrine of 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" [*Fishon v. Richmond University Medical Center*, 171 AD3d 873, 874 (2d Dept. 2019) (citations omitted)]. "The doctrine forecloses reexamination of

an issue previously determined by a court of coordinate jurisdiction 'absent a showing of newly discovered evidence or a change in the law'" [*id.*, quoting *Kaygreen Realty Co., LLC v. IG Second Generation Partners, L.P.*, 116 AD3d 667, 669 (2d Dept. 2014)].

The Court in the Underlying Action, over the objection of the underlying defendants, accepted Plaintiff's expert affirmations and relied upon them in denying the motion for summary judgment despite the Defendants' failure to comply with 22 NYCRR 202.17. The issue having been litigated and decided, the Court's acceptance and use of the expert affirmations constituted the law of the case. The defendants in the Underlying Action failed to present any newly discovered evidence or a change in the law when making the motion in limine. Thus, it was a violation of the law of the case doctrine for the trial court to preclude Plaintiff's experts [*see Fishon, supra; Noriega v. M. A. Angeliades, Inc.*, 129 AD3d 1043 (2d Dept. 2015); *Fudge v. N. Shore-Long Island Jewish Health Servs. Plainview and Manhasset Hosps.*, 117 AD3d 783 (2d Dept. 2014)].

Based upon the foregoing, the Defendants have established that the Plaintiff was likely to succeed on appeal in the Underlying Action and, therefore, the failure to prosecute the appeal bars the present legal malpractice action [*Grace, supra; Buczek, supra*].

Additionally, because Plaintiff's counsel had a sufficient opportunity to protect Plaintiff's rights by perfecting the appeal but failed to do so, any negligence by the Defendants in the Underlying Action could not, as a matter of law, be the proximate cause of Plaintiff's alleged damages [*see Davis v. Cohen & Gresser, LLP*, 160 AD3d 484, 487 (1st Dept. 2018) (Court dismissed malpractice claim because "the proximate cause of any damages … was not the alleged malpractice of defendant[], but rather the intervening and superseding failure of plaintiff's successor attorney"); *Ramcharan v. Pariser*, 20 AD3d 556 (2d Dept. 2005); *Perks v. Lauto &*

Garabedian, 306 AD2d 261 (2d Dept. 2003); *Kozmol v. Law Firm of Allen L. Rothenberg*, 241 AD2d 484 (2d Dept. 1997)].

Based upon the foregoing, accepting the facts in the amended complaint as true, and affording Plaintiff the benefit of every possible favorable inference [*Lopez*, 166 AD3d at 872], the Court finds that the amended complaint fails to state a viable cause of action for legal malpractice. The Defendants' motion to dismiss pursuant to CPLR §3211(a)(7) is therefore granted. In light of the Court's decision on the Defendants' motion to dismiss, Plaintiff's cross-motion for summary judgment is denied as academic. It is therefore

ORDERED, that the Defendants' motion to dismiss Plaintiff's amended complaint pursuant to CPLR 3211(a)(7) is granted; and it is further

ORDERED, that the Defendants' motion to dismiss Plaintiff's amended complaint pursuant to CPLR 3211(a)(1) is denied; and it is further

ORDERED, that Plaintiff's motion for summary judgment is denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: December 2, 2019
Poughkeepsie, New York

Hon. Peter M. Forman, A.J.S.C.

To: Thomas G. Cascione, Esq.
Cascione, Purcigliotti & Galluzzi, P.C.
Attorneys for Plaintiff
274 White Plains Road, Suite 6
Eastchester, New York 10709

Housman & Associates, P.C.
Attorneys for Defendants
150 White Plains Road
Tarrytown, New York 10591