Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT Justice

IAS Part 14

NANDAN AMBEEKA,
Plaintiff(s),

- against -

LAW OFFICES OF FRANK H. GUZMAN, PC, et ano.,
Defendant(s).

Index No. 701885 2020

Motion Date December 1, 2020

Motion Cal. No. 1

Motion Seq. No. 1

The following papers read on this motion by defendants for an order dismissing this action pursuant to CPLR 3211 (a) (1), (5), and (7)[1]; and on this cross motion by plaintiff for an order assessing sanctions and costs against defendants pursuant to 22 NYCRR § 130-1.1.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	EF5-17
Notice of Cross Motion - Affirmation - Exhibits.....	EF20-23
Answering Affirmation - Exhibits.....	EF25
Reply.....	EF28-31[2]

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

1. Though defendants enumerate dismissal pursuant to CPLR 3211 (a) (5) in their Notice of Motion, the reasons therefor are not articulated in the supporting papers and, as such, will not be discussed herein.

2. The papers considered on this motion include a surreply. Though defendants objected to the submission of the surreply, defense counsel substantively responded to same and, in any event, consideration of the surreply does not change the court's determination herein.

Plaintiff was involved in a motor vehicle accident on March 6, 2014. According to the instant complaint, subsequent thereto, plaintiff engaged and retained the services of defendants to render legal services, advise, represent, and commence a lawsuit against what would have been the defendants in that action – Mohammed Islam and Nasima Rahman – with respect to injuries plaintiff sustained in that accident. Though plaintiff alleges that he had a meritorious cause of action against those individuals, defendants failed to file a summons and complaint on his behalf within the three-year statute of limitations for commencing a personal injury action, to wit: by March 6, 2017.

In his first cause of action for legal malpractice, plaintiff alleges: that defendants owed plaintiff a duty to prosecute the underlying matter; that defendants deviated from good and accepted legal practice by failing to do so; that such deviation prevented plaintiff from his right to a trial for damages sustained in the motor vehicle accident; and that, but for defendants' malpractice, plaintiff would have recovered damages against the would-be defendants. Plaintiff alleges in his second cause of action that defendants' conduct also constituted a breach of contract/breach of the parties' retainer agreement.

Finally, in his third cause of action, plaintiff alleges: that defendants intentionally withheld the malpractice from him; and that it was not until the statute of limitations had passed that he was advised that "he had no cause and [defendants] would no longer represent him, in order to hide the malpractice from him." Plaintiff asserts that such conduct constitutes "a violation of Section 478 of the Judiciary Law," thereby entitling him to treble damages.

Defendants now make this pre-answer motion to dismiss the complaint in its entirety. Plaintiff cross-moves for sanctions.

I. Legal Standard on Motion to Dismiss

On a motion to dismiss based on documentary evidence pursuant to CPLR 3211 (a) (1), the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*see Cali v Maio*, __AD3d__, 2020 NY Slip Op 07853 [2d Dept]; *Bianco v Law Offices of Yuri Prakhin*, __AD3d__, 2020 NY Slip Op 07849 [2d Dept]; *Dedaj v Berisha*, 185 AD3d 782 [2d Dept 2020]; *Gorunkati v Baker Sanders, LLC*, 179 AD3d 904 [2d Dept 2020]). To be considered documentary evidence, it must be "unambiguous and of undisputed authenticity" (*Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010]; *see Flushing Sav. Bank, FSB v Siunykalimi*, 94 AD3d 807 [2d Dept 2012]; *Torah v Dell Equity, LLC*, 90 AD3d 746 [2d Dept 2011]).

Further, on a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the court must liberally construe the complaint, accept all the facts as alleged therein to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Katsoris v Bodnar & Milone, LLP*, 186 AD3d 1504 [2d Dept 2020]; *Kahlon v DeSantis*, 182 AD3d 588 [2d Dept 2020]; *Izmirligil v Steven J. Baum, P.C.*, 180 AD3d 767 [2d Dept 2020]). If evidentiary material is considered on a motion to dismiss pursuant to CPLR 3211 (a) (7), unless it has been demonstrated that a material fact is not a fact at all and, unless no significant dispute exists regarding it, the action should not be dismissed (*see Dedaj*, 185 AD3d at 783; *Gobindram v Ruskin Moscou Faltischek, P.C.*, 175 AD3d 586 [2d Dept 2019]).

II. First Cause of Action for Legal Malpractice

"A cause of action to recover damages for legal malpractice requires proof of three elements: (1) that the defendant failed to exercise that degree of care, skill, and diligence commonly possessed and exercised by an ordinary member of the legal community, (2) that such negligence was the proximate cause of the actual damages sustained by the plaintiff, and (3) that, but for the defendant's negligence, the plaintiff would have been successful in the underlying action" (*Cummings v Donovan*, 36 AD3d 648 [2d Dept 2007]; *see 4777 Food Servs. Corp. v Anthony P. Gallo, P.C.*, 150 AD3d 1054 [2d Dept 2017]; *Vogel v American Guar. & Liab. Ins. Co.*, 148 AD3d 1206 [2d Dept 2016]; *Simmons v Edelstein*, 32 AD3d 464 [2d Dept 2006]).

Defendants set forth three arguments in support of dismissal of this claim: (1) there was no attorney-client relationship at the time of the alleged malpractice; (2) defendants' conduct did not deviate from the standard of care; and (3) plaintiff cannot establish that defendants' malpractice, if any, proximately caused his injury.

A. Existence of Attorney-Client Relationship

To support the first ground, defendants assert that they sufficiently withdrew from representing plaintiff and advised plaintiff of the remaining statute of limitations period both in a Termination Letter and Closing Statement sent to plaintiff on May 12, 2016 (approximately 10 months prior to the deadline for commencing plaintiff's personal injury action). Per the Termination Letter, annexed to the motion as Exhibit C, defendants, inter alia, advised plaintiff of their declination to represent plaintiff in his personal injury matter, urged plaintiff to seek another legal opinion, and warned plaintiff of the time limitations on commencing a case. Defendants also annex as Exhibit C a correspondence and enclosed Closing Statement addressed to the Office of Court Administration (OCA), both dated May

12, 2016. Defendant Frank Guzman also submits an affidavit in which he states that his office sent the Termination Letter and Closing Statement to plaintiff via regular mail on that date; that he understood at that point that the attorney-client relationship to have ended; and that he received no further communication from plaintiff after transmitting the aforementioned correspondence to him.

In opposition, plaintiff states in his affidavit that he never received the purported correspondence dated May 12, 2016; that he was never otherwise notified prior to the expiration of the statute of limitations that defendants would no longer represent him; that he called defendants several times but his calls were ignored; and that it was not until April 2017 that he was called into defendants' office, at which point he was advised that he "ha[s] no case" and that he should "just let it go." Plaintiff also points out that defendants fail to establish proof of mailing of the Termination Letter and Closing Statement. Further, plaintiff points out that defendants fail to attach any proof of filing the Closing Statement with OCA. Indeed, plaintiff's counsel received written confirmation from OCA that defendants did not file the Closing Statement until February 6, 2018, suggesting that defendants backdated the one presented to the court on this motion.

In reply, defendants argue that the filing of the Closing Statement with OCA is not determinative as to the issue of whether representation has been terminated; and that plaintiff's denial of receipt of the May 12, 2016 Termination Letter is insufficient to rebut the presumption that it was sent.

Here, accepting the facts alleged in the complaint as true, plaintiff has sufficiently alleged the existence of an attorney-client relationship between himself and defendants: to wit, that plaintiff engaged and retained the services of defendants in connection with the motor vehicle accident of March 6, 2014 (*see Lindsay v Pasternack Tilker Ziegler Walsh Stanton & Romano LLP*, 129 AD3d 790 [2d Dept 2015]). The evidentiary material submitted by defendants – the Termination Letter and Closing Statement – failed to establish that plaintiff had no cause of action. The case of *Lindsay* (*id.*) is squarely on point. Much like the attorney in *Lindsay*, defendants' assertion that the May 12, 2016 correspondence to plaintiff was mailed by regular mail by his office on that date does not give rise to the presumption of receipt, since there was neither an affidavit of service nor proof of defendants' office practices with respect to mailing such correspondences (*id.* at 793). It should also be noted that letters do not qualify as documentary evidence under CPLR 3211 (a) (1) (*see Magee-Boyle v Reliastar Life Ins. Co. of N.Y.*, 173 AD3d 1157 [2d Dept 2019]; *Fontanetta*, 73 AD3d at 87), particularly letters which speak to the existence of an attorney-client relationship (*see First Choice Plumbing Corp. v Miller Law Offs., PLLC*, 164 AD3d 756 [2d Dept 2018]).

B. Departure from the Standard of Care

Since it has been determined, *supra*, that defendants cannot conclusively establish that they terminated the attorney-client relationship prior to the expiration of the statute of limitations by virtue of the Termination Letter and Closing Statement, it cannot be said, as a matter of law, that the content within this correspondence was an appropriate exercise of defendants' duty to plaintiff.

Further, to the extent defendants argue that the letter of engagement limited the scope of their representation in that they did not specifically promise to commence an action on plaintiff's behalf but only that they would "work on [plaintiff's] case [and take] all the steps necessary to protect [plaintiff's] interests," the factual allegations contained in the complaint – which this court must accept as true on a motion to dismiss – sufficiently allege that plaintiff retained defendants to "commence a lawsuit" concerning the personal injuries he sustained in the underlying motor vehicle accident. Further, and in any event, notwithstanding the issues which exist regarding (1) proof of service of the letter of engagement; and (2) the consideration of said letter as documentary evidence, both discussed in detail, *supra*, it can certainly be argued that the failure to timely commence plaintiff's lawsuit constitutes a failure to "[take] all the steps necessary to protect [plaintiff's] interests."

C. Proximate Cause

It bears repeating for purposes of considering defendants' arguments that the legal standard on this motion is governed by CPLR 3211 (compare legal standard on a CPLR 3212 motion for summary judgment). The court's function on this motion is not to determine whether plaintiff has a cause of action, but whether he has stated one. Here, the allegations in the complaint are sufficient to establish causation: plaintiff states that but for defendants' malpractice, plaintiff would have recovered damages sought in his meritorious action against the would-be defendants for personal injuries sustained in the motor vehicle accident.

Moreover, the evidence submitted on the motion – an uncertified police report and certain medical reports – do not "utterly refute" plaintiff's factual allegations (see CPLR 3211 [a] [1]; *Cali*, 2020 NY Slip Op 07853; *Bianco*, 2020 NY Slip Op 07849).

III. Second Cause of Action for Breach of Contract/Retainer Agreement

Defendants have established, without opposition from plaintiff, their entitlement to dismissal of this claim as duplicative, since it is based upon the same set of operative facts as the legal malpractice claim and it does not seek distinct and different damages (CPLR

3211 [a] [7]; *see Kliger-Weiss Infosystems, Inc. v Ruskin Moscou Faltischek, P.C.*, 159 AD3d 683 [2d Dept 2018]; *Palmieri v Biggiani*, 108 AD3d 604 [2d Dept 2013]; *Soni v Pryor*, 102 AD3d 856 [2d Dept 2013]; *Ofman v Katz*, 89 AD3d 909 [2d Dept 2011]; *Thompsen v Baier*, 84 AD3d 1062 [2d Dept 2011]).

IV. Third Cause of Action for a Violation of the Judiciary Law

Judiciary Law § 478 makes it unlawful for a person to practice or appear as an attorney-at-law without being admitted and registered. To the extent plaintiff intended to plead a cause of action based on this section of the Judiciary Law, defendants are entitled to dismissal of same since the facts alleged do not support a violation of Judiciary Law § 478.

To the extent plaintiff intended instead to assert a cause of action based upon a violation of Judiciary Law § 487, governing misconduct by attorneys, defendants have established, without opposition from plaintiff, their entitlement to dismissal of this claim, since the allegations of which plaintiff complaints of defendants did not occur during the pendency of litigation (CPLR 3211 [a] [7]; *see Bill Birds, Inc. v Stein Law Firm, P.C.*, 35 NY3d 173 [2020]; *Mahler v Campagna*, 60 AD3d 1009 [2d Dept 2009]; *Tawil v Wasser*, 21 AD3d 948 [2d Dept 2005]; *Henry v Brenner*, 271 AD2d 647 [2d Dept 2000]).

V. Cross Motion for Sanctions

Plaintiff has failed to articulate in support of his cross motion any specific arguments that would warrant an award of sanctions against defendants pursuant to 22 NYCRR 130-1.1. As such, the cross motion is denied.

VI. Conclusion

Accordingly, defendants' motion is granted only to the extent that plaintiff's second and third causes of action for breach of contract/retainer agreement and violation of te Judiciary Law, respectively, are dismissed. The motion is otherwise denied. Plaintiff's cross motion for sanctions is denied.

Dated: January 15, 2021

J.S.C.

FILED

1/15/2021
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COUNTY CLERK
QUEENS COUNTY