At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 23rd day of December 2021.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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WILLIAM D. ROSS,

Plaintiff(s),

-against-

MASHKANTA, LLC, SIMCHA DIAMONT a/k/a SAM DIAMANT a/k/a SAM DIAMOND, TED T. MOZES, JAMES GIARRAPUTO, ROGER A. LEVY, ESQ., ENEALIA S. NAU, ESQ., ANTHONY P. MASCOLO, as Administrator of the Estate of ANTHONY L. MASCOLO, ESQ., deceased, JOE SOFER, PETER VON NESSI, REED RITZ ASSET TRUST, JOHN DOE#1 a/k/a WALL STREET BANKER, JOHN DOE #2-12, the last twelve names being fictitious and unknown to the Plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any having or claiming an interest in or lien upon the premises described in the complaint,

Defendant(s),

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DECISION AND ORDER
Index No.: 508310/2019

Motion Sequence # 2

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

	Papers Numbered
Notice of Motion and Affidavits (Affirmations) Annexed	13, 25-27
Opposing Affidavits (Affirmations)	38
Affidavits in Reply (Affirmations)	43-46
Memoranda of Law	29, 47

After a review of the papers and oral argument the Court finds as follows:

The instant proceeding concerns, *inter alia*, claims by the Plaintiff, William D. Ross (hereinafter referred to as the "Plaintiff"), of improper legal representation in relation to the execution of a mortgage and ancillary documents, and the foreclosure litigation that ensued. Defendant Anthony P. Mascolo, as Administrator of the Estate of Anthony L. Mascolo, deceased

(hereinafter referred to as "Mascolo"), now moves for an order, pursuant to CPLR 3211(a)(5) and (7), (i) dismissing the ninth cause of action for malpractice, (ii) dismissing the tenth cause of action for breach of contract, and (iii) dismissing the eleventh cause of action for *prima facie* tort, as contained in the First Amended Complaint. Mascolo alleges that the Plaintiff commenced this proceeding after the statutory limitation period expired. Mascolo also alleges that the Plaintiff concedes that the Plaintiff dismissed Mascolo and retained other counsel to represent him during the related litigation. Mascolo argues that this subsequent retention of counsel terminated his attorney-client relationship with the Plaintiff. In addition, Mascolo contends that the Plaintiff's causes of action are duplicative.

The Plaintiff opposes the motion, arguing that the causes of action alleged against Mascolo were timely made. The Plaintiff contends that Mascolo was the Plaintiff's attorney throughout the entirety of the related foreclosure litigation and that it was Mascolo's initial failure to appear, that resulted in a summary judgment being granted and entered against the Plaintiff on default. The Plaintiff further alleges that Mascolo continued to neglect the related action and failed to appear in relation to other applications, resulting in a judgment of foreclosure.

Mascolo replies, arguing that the Plaintiff has conceded that the attorney-client relationship between him and Mascolo ended in 2012, when new counsel was retained to represent the Plaintiff in the mortgage litigation. Mascolo also highlighted what he contends are supporting admissions in affidavits by the Plaintiff dated November 26, 2012 and January 26, 2018.

Action in Contract – Tenth Cause of Action

Generally, causes of action which arise from the same facts as the cause of action alleging legal malpractice, and do not allege distinct damages are duplicative of the legal malpractice cause of action and should be dismissed (*see Vermont Mut. Ins. Co. v. McCabe & Mack LLP*, 105 AD3d 837, 964 N.Y.S.2d 160 [2d Dept 2013], *see also Tsafatinos v. Lee David Auerbach P.C.*, 80 AD3d 749, 915 N.Y.S.2d 500 [2d Dept 2011]; *Sitar v. Sitar*, 50 AD3d 667, 854 N.Y.S.2d 536 [2d Dept 2008]; *Shivers v. Siegel*, 11 AD3d 447, 782 N.Y.S.2d 752 [2d Dept 2004]; *Malarkey v. Piel*, 7 AD3d 681, 776 N.Y.S.2d 845 [2d Dept 2004]; *Mecca v. Shang*, 258 AD2d 569, 685 N.Y.S.2d 458 [2d Dept 1999]). Here, the cause of action for breach of contract repeats the allegations supporting the legal malpractice cause of action and seeks the same damages. The action is duplicative of the malpractice claim and, therefore, the tenth cause of action for breach of contract is dismissed. See

Dempster v. Liotti, 86 AD3d 169, 924 N.Y.S.2d 484 [2d Dept 2011] and *Kliger-Weiss Infosystems, Inc. v. Ruskin Moscou Faltischek, P.C.*, 159 AD3d 683, 73 N.Y.S.3d 205 [2d Dept 2018].

Action in Malpractice – Ninth Cause of Action

> In moving to dismiss a cause of action pursuant to CPLR 3211(a)(5) as barred by the applicable statute of limitations, the moving defendant bears the initial burden of demonstrating, *prima facie*, that the time within which to commence the cause of action has expired (*see Stewart v. GDC Tower at Greystone*, 138 AD3d 729, 729, 30 N.Y.S.3d 638; *J.A. Lee Elec., Inc, v. City of New York*, 119 AD3d 652, 653, 990 N.Y.S.2d 223). The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is tolled or is otherwise inapplicable (*see Beroza v. Salla Law Firm, P.C.*, 126 AD3d 742, 742-743, 5 N.Y.S.3d 297; *Kitty Jie Yuan v. 2368 W. 12th St., LLC*, 119 AD3d 674, 674, 988 N.Y.S.2d 898).

Stein Industries, Inc. v. Certilman Balin Adler & Hyman, LLP, 149 AD3d 788, 789, 51 N.Y.S.3d 183, 185 [2d Dept 2017].

> Under the statute of limitations, the time within which a plaintiff must commence an action "shall be computed from the time the cause of action accrued to the time the claim is interposed" (CPLR 203(a)). While courts have discretion to waive other time limits for good cause (see CPLR 2004), the Legislature has specifically enjoined that "[n]o court shall extend the time limited by law for the commencement of an action" (CPLR 201; see *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.*, 66 NY2d 38, 43 [1985]; see generally Siegel, NY Prac §33, at 40 [3d ed 1999]).
>
> An action to recover damages arising from an attorney's malpractice must be commenced within three years from accrual (see CPLR 214(6)). 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" (*Ackerman v. Price Waterhouse*, 84 NY2d 535, 541, 620 N.Y.S.2d 318, 644 N.E.2d 1009 [1994]). 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" (*id.*). "What is important is when the malpractice was committed, not when the client discovered it" (*Shumsky*, 96 NY2d at 166, 726 N.Y.S.2d 365, 750 N.E.2d 67; *Glamm v. Allen*, 57 NY2d 87, 95, 453 N.Y.S.2d 674, 439 N.E.2d 390 [1982]). Though we have recognized tolls on this three-year limitation period under the continuous representation doctrine (*see Shumsky* at 167-168, 726 N.Y.S.2d 365, 750 N.E.2d 67), we have recognized no exception to measuring the accrual date from the date of injury caused by an attorney's malpractice…
>
> In a legal malpractice action, a plaintiff must show that an attorney "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession" (*Darby & Darby v. VSI Intl.*,

> 95 NY2d 308, 313, 716 N.Y.S.2d 378, 739 N.E.2d 744 [2000] [citations and internal quotation marks omitted]). In addition, the plaintiff must show that the attorney's breach of this professional duty caused the plaintiff's actual damages (*see Prudential Ins. Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood*, 170 AD2d 108, 114, 573 N.Y.S.2d 981 [1st Dept 1991], *affd.* 80 NY2d 377, 590 N.Y.S.2d 831, 605 N.E.2d 318 [1992], *rearg. denied* 81 NY2d 955, 597 N.Y.S.2d 940, 613 N.E.2d 972 [1993]; see also 2 Dobbs, Torts §485, at 1387 [2001].

McCoy v. Feinman, 99 NY2d 295, 301-302, 755 N.Y.S.2d 693, 697-698 [2002].

In relation to the related foreclosure action, the Plaintiff claims that Mascolo failed to appear on a summary judgment motion which was granted on Plaintiff's default. Summary judgment, in the related litigation, was granted on default against the Plaintiff on July 14, 2010. The Plaintiff also claims that these failures subjected the Plaintiff to a judgment of foreclosure in relation to his property. The Plaintiff contends that Mascolo failed to appear or oppose a motion/application for judgment of foreclosure. The Plaintiff contends that, as a consequence, a judgment of foreclosure and sale was issued on June 20, 2012. The instant proceeding was commenced against Mascolo on April 12 2019, more than six years after judgment was entered in the foreclosure litigation. The Plaintiff alleges that the interval between the award of the judgment and commencement of this proceeding is irrelevant because the continuous representation doctrine applies.

The doctrine of continuous representation applies when there is "clear indicia of an ongoing, continuous, developing, and dependent relationship between the client and the attorney which often includes an attempt by the attorney to rectify an alleged act of malpractice" (*Stein Industries, Inc. v. Certilman Balin Adler & Hyman, LLP*, 149 AD3d 788, 789, 51 N.Y.S.3d 183, 185 [2d Dept 2017] *quoting Luk Lamellen U. Kupplungbau GmbH v. Lerner*, 166 AD2d 505, 506-507, 560 N.Y.S.2d 787 [2d Dept 1990]). However, the Plaintiff has repeatedly represented that his relationship with Mascolo terminated in November of 2012, when he retained new counsel to represent him in the foreclosure litigation. The Plaintiff alleged that,

> … subsequent to defendant Mascolo allowing the action in foreclosure to go to default judgment and ultimately to a judgment of foreclosure and sale which was filed July 3, 2012, defendants Levy and Nau substituted in for third-party defendant Mascolo.
>
> As a consequence of Defendant Mascolo's failure to represent his interests, in or about November 2012, Plaintiff retained Defendants Levy and Nau,

> doing business as Levy and Nau PC, to represent him in the action brought against him by Mashkanta, and in that capacity, to move in that action to stay the foreclosure and sale. Plaintiff was unaware of any prior history of relationships and/or transactions among Mashkanta, Mascolo, Levy and Nau at the time he retained Levy and Nau to represent him.

(See First Amended Verified Complaint at paragraph 61-62, NYSCEF Doc. No. 12, 13[1]).

Accordingly, the doctrine of continuous representation is inapplicable here. This proceeding was commenced after the statutory limitation period expired. Therefore, the ninth cause of action for malpractice is dismissed.

Action in *Prima Facie* Tort – Eleventh Cause of Action

> "*Prima facie* tort was designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy, and not to provide a 'catch all' alternative for every cause of action which cannot stand on its legs" (*Bassim v. Hassett,* 184 A.D.2d 908, 910, 585 N.Y.S.2d 566).

Lancaster v. Town of E. Hampton, 54 A.D.3d 906, 908, 864 N.Y.S.2d 537, 539 [2d Dept 2008].

> The requisite elements for a cause of action sounding in *prima facie* tort include (1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, (4) by an act or series of acts which are otherwise legal (*see Del Vecchio v. Nelson,* 300 A.D.2d 277, 278, 751 N.Y.S.2d 290; *see also Curiano v. Suozzi,* 63 N.Y.2d 113, 480 N.Y.S.2d 466, 469 N.E.2d 1324; *Drago v. Buonagurio,* 46 N.Y.2d 778, 413 N.Y.S.2d 910, 386 N.E.2d 821). An element of a *prima facie* tort cause of action is that the complaining party suffered specific and measurable loss, which requires an allegation of special damages (*see Del Vecchio v. Nelson,* 300 A.D.2d at 278, 751 N.Y.S.2d 290). Additionally, central to a cause of action alleging *prima facie* tort is that the plaintiff's intent was motivated solely by malice or "disinterested malevolence" (*Simaee v. Levi,* 22 A.D.3d 559, 563, 802 N.Y.S.2d 493 [internal quotation marks omitted]; *see Lancaster v. Town of E. Hampton,* 54 A.D.3d 906, 908, 864 N.Y.S.2d 537).

Diorio v. Ossining Union Free Sch. Dist., 96 A.D.3d 710, 712, 946 N.Y.S.2d 195, 198 [2d Dept 2012].

The First Amended Verified Complaint states, in relevant part, as follows:

> 159. Defendant Mascolo at all times beginning on or about October 18, 2018, has not responded to Plaintiff's efforts to contact him regarding his

[1] The movant annexes an unverified 1st Amended Verified Complaint (NYSCEF Doc. No. 27). However, the signed document is contained in NYSCEF Doc. 13

> obligations under the two above-mentioned retainers for legal services executed between them.
>
> 160. At all relevant times. Defendant Mascolo has declined and refused to convey the client file of Plaintiff to Defendants Levy and Nau or to otherwise comply with the Court's directives contained in the order of the Hon. Johnny L. Baynes of June 13, 2013 date.

(see paragraphs 159-160, First Verified Complaint, NYSCEF Doc. No. 13).

The Plaintiff fails to state a cause of action for *prima facie* tort. This claim sounds in legal malpractice and is duplicative of the legal malpractice claim. At paragraph 159, it is alleged that as late as October 18, 2018, Mascolo failed to respond to the Plaintiff regarding Mascolo's obligations in relation to prior retainers. The Plaintiff attempts to revive an otherwise time barred legal malpractice claim. The Plaintiff asserts a continuing failure to comply with a 2013 court order. This does not serve to sustsain a continuing obligation which would constitute a new event of legal malpractice every day until it is complied with. The Plaintiff attempts to assert the same legal theory of continuing failure to provide competent legal services in relation to Mascolo's alleged failure to contact the Plaintiff in relation to prior retainers notwithstanding the fact that Mascolo's representation ended in November of 2012. The Plaintiff also alleges a vague "intentional tort" claim.

These allegations reflect and relate to the underlying claim for malpractice. As such, the claim would carry a three-year statute of limitation from the accrual date. See *Scott v. Fields*, 85 AD3d 756, 925 N.Y.S.2d 135 [2d Dept 2011], *Stein Indus., Inc., v. Certilman Balin Adler & Hyman, LLP*, 149 AD3d 788, 51 N.Y.S.3d 183 [2d Dept 2017]. See also *Klein v. Gutman*, 12 AD3d 417, 784 N.Y.S.2d 581 [2d Dept 2004]. The accrual date ocurred when Mascolo ceased representation of the Plaintiff, by the Plaintiff's own admission, in November of 2012. Even assuming that the accrual date occurred when, as the Plaintiff contends, Mascolo refused to turn over his file in contravention of a June 13, 2013 court order, the action for malpractice would still be time barred. The applicable statute of limitations for a *prima facie* tort cause of action is determined by, "... the reality, and the essence of the action and not its mere name." *Mishkin v. Dormer*, 57 AD2d 795, 795-796, 395 N.Y.S.2d 452, 452 [1st Dept 1977] *quoting Brick v. Cohn-*

Hall-Marx Co., 276 NY 259 [1937]. See also *Milone v. Jacobson*, 78 AD2d 548, 432 N.Y.S.2d 30 [2d Dept 1980]. [2]

> Moreover, as the Appellate Division majority aptly noted, the limitations period could become incalculable were we to adopt plaintiff's argument that Feinman's continuing failure to file the QDRO tolled the malpractice action under the continuous representation doctrine. Except where a date of discovery rule applies, our law cannot permit a limitations period to depend on a continuing omission that can go on for decades. "The policies underlying a Statute of Limitations – fairness to defendant and society's interest in adjudication of viable claims not subject to the vagaries of time and memory – demand a precise accrual date" (Ackerman, 84 NY2d at 542).
>
> Finally, Feinman's representation of plaintiff in the Family Court action did not sufficiently toll the limitations period to save the plaintiff's cause of action. That action was unrelated to the QDRO. Even were we to deem the limitations period tolled until the support action concluded in 1991, another five years elapsed before plaintiff filed suit in 1996. Thus, even under this hypothesis, the three-year limitation of CPLR 224(6) still renders this action untimely.

MCCoy v. Feinman, 99 NY2d 295, 306, 99 N.Y.S.2d 693, 755 N.Y.S.2d 693, 701 [2002]. See also *3rd & 6rh LLC v. Berg*, 149 AD3d 794, 53 N.Y.S.3d 78 [2d Dept 2017]. Accordingly, the eleventh cause of action entitled *prima facie* tort is dismissed.

It is hereby ordered that:

Mascolo's motion (motion sequence #2) is granted. The ninth cause of action for legal malpractice, the tenth cause of action for breach of contract, and the eleventh cause of action for *prima facie* tort are dismissed.

This constitutes the Decision and Order of this Court.

ENTER:

Carl J. Landicino, J.S.C.

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[2] Even assuming that the Plaintiff solely stated an action for *prima facie* tort, the statute of limitations would be one year. Therefore, the *prima facie* tort claim would be time barred. See *Angel v. Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 835 N.Y.S.2d 57 [2d Dept 2007].