



Ofman v Bluestone

2018 NY Slip Op 32040(U) (2018) | Cited 0 times | New York Supreme Court | August 15, 2018

.. \... KINGS COUNTY 08/17/2018] NYSCEF poc. NO. NO. 506246/2014 NYSCEF: 08/21/2018

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Plaintiff,

BLUESTONE,

Third-Party Plaintiff,

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Third-Party 506246/2014 ORDER

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Introduction INDEX RECEIVED

Defendant/third-party plaintiff, Andrew L. Bluestone, Esq., moves by notice of motion, sequence number five, pursuant to 321 l(a)(l), (5) and (7) to dismiss plaintiffs verified second amended complaint dated December 17, 7, for failure to state a cause of action, based on documentary evidence and based on expiration of the statute of limitations. Plaintiff, Mendel E. 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). each of those three cases, Attorney Bluestone took over representation from multiple predecessor (Memorandum of Law in Support [LB] at p 1).

Ofman v. Campos and Campos (Action 1)

Plaintiff commenced the initial litigation man v. Campos (action 1), index number sounding in property damage. Plaintiff was represented by



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Ginsberg, Esq. The matter settled for before the Hon. Gerard H. Rosenberg on January 15, (see Notice of Motion [IA], Exhibit B).

Campos v. Ofman (Action 2) ...

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

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resulted in a jury verdict in favor of Campos (see Memorandum of Law in

[lB] at p 5). In retained Andrew Bluestone, Esq., defendant/third-

party plaintiff herein, to appeal the verdict (see Notice of Motion [IA], Exhibit D,

Campos v. Retainer). Pursuant to the retainer agreement dated January

Bluestone was to be paid a flat rate of to perfect the appeal. Plaintiff was

responsible to expenses for printing of the Record on Appeal and Brief, at the rate

of per page, along with all other expenses and court fees of an (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, Department, affirmed the trial court's judgment on March 4,

(Memorandum of Law in [lB] at p 5; see also (see Notice of Motion [IA],

Exhibit E, Campos v. dated March 4, According to defendant, his "sole

involvement [in this action] was perfecting the appeal of the trial court

(Memorandum of Law in [lB] at p 4).

Ofman v. Ginsberg (Action 3)



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Plaintiff commenced v. Ginsberg, (action 3) for legal malpractice, index

number against Ginsberg based upon his representation of plaintiff in

the v. Campos matter (action 1). Plaintiff initially retained Katz, Esq.

Katz was discharged, and defendant Bluestone was retained in November (see

Notice of Motion [IA], Exhibit G, v. Ginsberg retainer). Pursuant to the terms of

the retainer agreement dated November plaintiff was to pay Bluestone an

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hourly rate of 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, I (see id., Exhibit H, Ofman v. Ginsberg decision dated November 15, I). Thereafter, on March Bluestone was discharged and substituted by Jacques Catafago, Esq. (see id. at Exhibit I, Ofman v. Ginsberg 32I records demonstrate that successor counsel Catafago waived a jury trial, took the case to trial, and lost on August 8, (Memorandum of Law in Support [IB] at p 5; see also, Notice of Motion [IA], Exhibit J, Mendel v. Ginsberg E-Courts Printout).

Ofman v. Katz (Action 4)

Plaintiff commenced man v. Katz (action 4) for legal malpractice, index number I 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 plaintiff discharged Petitto, and retained Bluestone (see Notice of Motion [IA], Exhibit L, Ofman v. Katz retainer). Pursuant to the terms of the retainer agreement dated July 22, plaintiff was to pay Bluestone an hourly rate of per hour, as well as the litigation expenses including usual disbursements (see id.). The matter was dismissed in August and Bluestone appealed the decision.

The Appellate Division, Second Department, reversed the dismissal and restored the case



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on November 15, 2015 (see *id.*, Exhibit M, *man v. Katz* decision dated November 15,

I). Thereafter, on March Bluestone was discharged and substituted by

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Jacques Catafago, Esq. (see *id.*, at Exhibit N, *v. Katz* "CPLR 321 Consent").



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"Court records indicate that the case was settled during trial on June 16, .

(Memorandum of Law in [IB] at p 6; see also Notice of Motion [IA], Exhibit

v. Katz E-Courts printout).

man v. Bluestone (the Instant Action)

Plaintiff commenced the instant action, index number by-filing a

summons and complaint on July 9, (see Doc.# 1). Plaintiff served a

verified amended complaint on or about April (see Doc.# 24).

Defendant moved to dismiss plaintiff's complaint on May 29, The motion was

denied by the Hon. Ellen M. on March 16, who stated that "[t]here may

have been continuous representation of plaintiff by defendant, therefore the motion to

dismiss pursuant to CPLR § 321 I (a)(5) is denied" (see Affirmation in Opposition [2],

Exhibit C). A preliminary Conference was held on July 28, 7. 1

Thereafter, plaintiff e-filed a Verified Amended Complaint on December

17, 17 (see Notice of Motion [IA], Exhibit A; see also NYSCEF Doc. # 1). 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, 7", 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.

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operative complaint against Defendant Third-Party Plaintiff in this action" (Stipulation

December 12, 2017, Doc.#

Plaintiff alleges a first cause of action sounding in of Fiduciary Duty and

Faithless where he alleges the following,

(id. at 1-2). 5. Defendant represented to Plaintiff, orally and in writing, that Plaintiffs legal fees and costs in the man 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 Litigation.

17. Defendant induced Plaintiff to pay legal fees of in the course of Defendant's representation of Plaintiff by intentionally or negligently advising Plaintiff that legal fees and costs paid to Defendant



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could possibly be recovered.

Plaintiffs second cause of action sounds in negligence, wherein he seeks recovery

of the same in legal fees and costs. alleges that defendant's

purported negligence was both the cause in fact and proximate cause of plaintiffs

payment of legal fees and (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 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, amended complaint by January 26, rather than January 26, as stipulated, the instant motion to dismiss the verified second amended complaint was e-filed on February 6, 6

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plaintiffs legal fees were recoverable or when plaintiff made this payment for legal fees

and costs. He seeks statutory interest running from March (see id. at 22),

which is the date that defendant was discharged in actions 3 and 4.



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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 Defendant argues that plaintiff failed to properly plead for 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 not merely an incident of the litigation but instead, constituted consequential damages' of the (*id.* at 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 be recovered. did not plead that defendant guaranteed recoupment of fees in advising plaintiff (see *id.* at p 12-13). Defendant further contends that plaintiffs allegations that defendant induced him to pay legal fees is refuted by documentary (see *id.* at p 15). The documentary evidence shows that defendant did not induce plaintiff to litigate, inasmuch



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

Defendant argues that plaintiffs 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 plaintiffs 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 Defendant further argues that plaintiffs ciaims 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, plaintiffs claims related to action 2 are barred by the statute of limitations (see id. at 23).

Plaintiff Contends



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Plaintiff contends that 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 (see id. at 18-28). is well-settled that New York adheres to the 'American Rule' 'that the prevailing litigant ordinarily cannot

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collect ... attorneys' fees from its unsuccessful (id. citing Cange! v.

Malfitano, 31 N.Y.3d 272, 76 N.Y.S.3d 873 avers that defendant did

not provide documentary evidence which refutes any element of plaintiffs claim (see id.

24-28), including defendants claim that "voluntary payment doctrine" bars this

claim" (see id 38).

argues that defendant sets forth red herrings, including his argument that

successor counsel had sufficient time to protect plaintiffs rights (see id. 36).

maintains that the court has already ruled that the "continuous representation doctrine

applies in the decision of the Hon. Ellen Spodek dated March 16, and thus any

argument that the statute of limitations has expired is barred (see id. see also id at

Exhibit C, Decision dated March 16,

Discussion

Motion to Dismiss

Defendant moves herein pursuant to § 321 l(a)(l), (5) and (7). Section

321 l(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



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judicata, statute of limitations, or statute of frauds; or ...

7. the pleading fails to state a cause of action

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(CPLR § 321 l[a][l], [5], [7]).

CPLR § 321l(a)(5) - Statute of Limitations INDEX RECEIVED

"In resolving a motion to dismiss pursuant to CPLR 321 l(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 Bank Nat'l Ass'n v. Gordon, 158 A.D.3d 832,

72 156 [2 Dept., 2018], citing Faison v. Lewis, 25 220,



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185 [2015]). "[T]o dismiss a cause of action pursuant to CPLR 321 l(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 (Williams v. City of Yonkers, A.DJd -- -- [2 Dept., 2018], citing Amrusiv. Nwaukoni, 155 A.DJd 814, 65 62 [2 Dept., 2017]; see also Spitzer v. Newman, --A.D.3d --, Slip 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 (Williams v. City of Yonkers, A.DJd supra, citing Elia v. Perla, A.D.3d 962, 55 [2 Dept., 2017]).

Plaintiffs second cause of action is identified in the complaint as one for negligence (see Notice of Motion [IA], Exhibit A; see also 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 of 18 [* 10] KINGS COUNTY 08/17/2018] NYSCEF ,BOC. NO. NO. 506246/2014 NYSCEF: 08/21/2018

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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, N.Y.S.3d [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]). 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.,

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, 131A.D.3d955, 956, 15 N.Y.S.3d quoting McCoy v. Feinman, 99 N.Y.2d at 755 N.Y.S.2d 693, 785 N.E.2d 714). Continuous representation may toll the statute of limitations, but where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice (McCoy v. Feinman, 99 N.Y.2d at 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-file in November of 2014.

Defendant contends that plaintiffs 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



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action 2 on January The decision and order was affirmed on March 4, _

(see Notice of Motion [IA], Exhibit E, Campos v. Ofman dated March 4, .

3 Defendant sets forth no arguments, in support of his motion to dismiss, that plaintiffs claims based on the remaining actions, actions 3 and 4, are barred by the statute of limitations. 11

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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, the date of the Appellate

Division, 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



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judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are (Strujan v. Glencord Bldg. Corp., 137 A.D.3d 1252, 29398 [2 Dept., 2016], quoting Clark v. Clark, 117 A.D.3d 668, 985 276 [2 Dept., 2014]). Here, in deciding a prior motion to dismiss plaintiffs verified amended complaint, where defendant also alleged that plaintiffs claim based on Campos v. (Action 2), is barred by the statute of limitations, the Hon. Ellen M. denied the motion, stating that "[t]here may have been continuous representation of plaintiff by based on action 2. Plaintiff has offered no additional proof herein which would support changing Justice 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 plaintiffs 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

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pleading has a cause of action" (Bennett v. Farm Fire & Cas. Co., 161 A.D.3d 926,

-- N.Y.S.3d -- [2 Dept., 2018], quoting v Leader, 74 A.D.3d 1180, N.Y.S.2d

153 [2 Dept., "[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 (Trump Vil!. 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 Offices of Thomas F. Liotti v. Felix, 129 A.D.3d 783, 9 N.Y.S.3d 888 [2



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Dept., 2015], citing *Cohen v. Kings Point Corporation*, 126 A.D.3d 843, 6 N.Y.S.3d 93 [2 Dept., 2015]). "Whether a can ultimately establish its allegations is not part of the calculus" (*Trump Vil!. Section 4, Inc. v. Bezvoleva*, 161A.D.3d916, supra, quoting *EBC L Inc. v. Goldman, & Co.*, 5 N.Y.3d 11, 799 N.Y.S.2d opposition to such a motion, a may submit affidavits to remedy defects in the complaint and preserve inartfully pleaded, but potentially meritorious claims" (*Garcia v. Polsky, Shouldice & 161A.D.3d828*, 77 N.Y.S.3d 424 [2 Dept., 2018], quoting *Cron v. Hargro Fabrics*, 91N.Y.2d362, 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

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pleading, and does not reach the substantive merits of a party's cause of (Kaplan

v. New York City Dep't of Health & Mental Hygiene, 142 A.D.3d 38 N.Y.S.3d 563

[2 Dept., 2016]). the complaint will later survive a motion for summary

judgment, or whether the plaintiff will ultimately be able to prove its claims, of

plays no part in the determination of a prediscovery CPLR 3211 motion to

(Garcia v. Shouldice & Rosen, 161A.D.3d828, supra, quoting Shaya B.

LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, 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 operative complaint against

(Stipulation dated December 12, 2017, Doc.# 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



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costs were recoverable. As a result of this representation, plaintiff continued with his prior malpractice suits and as a result, paid defendant \$182, in legal fees. Plaintiff maintains that he would not have incurred these damages had he known legal fees were not recoverable. as here, the breach of fiduciary duty claims arose from the

4 As stated above, the complaint labels plaintiffs second cause of action as one sounding in 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. 14

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same facts and did not allege distinct damages, they should be dismissed, as a matter of law, as duplicative of the legal malpractice (Town ofN Hempstead v. Winston & Strawn, 28 A.D.3d 746, 814 237 [2 Dept., see also Maroulis v.



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Friedman, 153 A.D.3d 1250, 468 [2 Dept., 2017]).

At issue herein is plaintiffs 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 (Jngvarsdottir v. Gaines, Gruner, & Novick, 144 A.D.3d 1099, 43 68 [2 Dept., 2016], quoting Dempster v. Liotti, 86 A.D.3d 169, 924 484 [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 (Lieberman v. Green, 139 A.D.3d 815, 32 239 [2 Dept., 2016]).

Here, defendant's motion to dismiss plaintiffs cause of action for legal malpractice for failure to state a cause of action is denied. Construing plaintiffs 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.

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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 [lB]



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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. Shouldice & Rosen*, 161 A.D.3d 828, *supra*).

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

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 plaintiffs factual allegations, thereby conclusively establishing a defense as a matter of (Stone v. Bloomberg L.P., --A.D.3d--, 05515 [2 Dept., 2018], quoting *Feldshteyn v. Brighton Beach LLC*, 153 A.D.3d 670, 61 [2 Dept., see also *Goshen v. Mutual Life Ins. Co. of N. Y.*, 98 N.Y.2d 314, 746 858 [2002]). the evidence submitted in support of the motion is not 'documentary,' the motion must be (*Phillips v. Taco Bell Corp.*, 152 A.D.3d 806, 67 [2 Dept., 2017], citing *v. Lewin & Baglio*, A.D.3d 908, 55 98 [2 Dept., 2017]).

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"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., quoting Granada Condo. Ass'n v. Palomino, 78 A.D.3d 996, 913 N.Y.S.2d 668 [2 Dept., see also Phillips v. Taco Bell Corp., 152 A.D.3d supra).

Here, defendant argues that documentary evidence refutes plaintiffs 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 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 [LB] 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 plaintiffs claim that defendant induced plaintiff to pay legal fees. Here, plaintiff alleges that he relied on defendant's legal advice regarding



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possible recovery of legal fees. The documents provided offer no proof as to whether defendant gave such advice during his period representation. Accordingly, that portion of defendant's motion to dismiss plaintiffs verified second amended complaint based upon documentary evidence is denied.

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Conclusion RECEIVED

Accordingly, the defendant and third-party plaintiffs motion to dismiss plaintiffs second amended complaint is granted to the extent that plaintiffs 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.



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The foregoing constitutes the decision and order of this Court.

To: Daniel H. Richland, Esq. Richland & Falkowski, PLLC Attorney for Plaintiff 5 Fairlawn Drive, Washingtonville, New York Jordan A. Ehrlich, Esq. Lewis Brisbois Bisgaard & LLP Attorney for Defendant/ Third-Party Plaintiff 77 Water Floor New York, NY Jaques Catafago, Esq. Catafago P.C. Third-Party Defendants The Empire Building Fifth Avenue, New York, NY

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