

S

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

GERALD JEAN-BAPTISTE,

Plaintiff,

- against -

THE LAW FIRM OF KENNETH B. MOCK,

Defendant.

TRIAL / IAS PART 30
NASSAU COUNTY

Index No. 20409/10

Motion Sequence No. 001, 002

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1, 2</u>
Answering Affidavits	<u>3, 4</u>
Replying Affidavits	<u>5, 6</u>
Briefs: Plaintiff's / Petitioner's	<u>7, 8</u>
Defendant's / Respondent's	<u>7, 8</u>

The defendant law firm moves pursuant to CPLR 3211 (a) (1) and (7) to dismiss the complaint with prejudice. The *pro se* plaintiff moves to strike the defense reply affirmation, and opposes the defense motion to dismiss. The underlying action arises from a landlord tenant nonpayment proceeding, to wit Nassau County District Court index number 4473/08 with a breach of warranty of habitability defense.

The defense contends the plaintiff, who is the husband of their client landlord, lacks privity with the defendant because he was not a party to that landlord tenant litigation. The defense points to documentary evidence which shows a plenary action in

that litigation, where the defendant was no longer counsel, resulted in a court hearing where the Court concluded the landlord failed to make a *prima facie* showing of entitlement to rent arrears and utility payments.

The defense counsel states, in a January 28, 2011 affirmation, the plaintiff's cause of action for legal malpractice must be dismissed because the plaintiff cannot establish legal elements. The defense counsel points out the plaintiff was not privy with the defendant since the plaintiff was not the petitioner landlord in the District Court nonpayment proceeding involving 196 Long Beach Road, 1st floor, Hempstead, New York, rather it was Darlene Homere. The defense counsel notes the alleged legal malpractice was not the proximate cause and the plaintiff suffered no damages. The defense counsel adds the plaintiff's causes of action for breach of the duty of loyalty, misrepresentation, deceitful and circumvent behavior and unethical and fraudulent behavior are a duplication of the legal malpractice claim. The defense counsel avers the plaintiff's misrepresentation claim is conclusory and baseless, and that claim and the claims of deceitful and circumvent behavior amount to a defective fraud cause of action, but the plaintiff has not corrected his opposition papers. The defense counsel maintains the plaintiff cannot add his wife as a plaintiff here because there is no showing of Homere's consent to such an amendment. The defense counsel opposes the plaintiff's request for a default judgment in the absence of a CPLR 3215 motion for such relief.

The plaintiff asserts, in a February 9, 2011 affidavit, an undated affidavit and an

unsworn January 13, 2011 statement, the plaintiff opposes the defense motion, and the underlying matter consists of legal malpractice and fraud arising from the landlord tenant proceeding. The plaintiff states the subject property was owned by tenants in the entirety. The plaintiff points to his wife's February 28, 2008 power of attorney to the plaintiff. The plaintiff alleges lacking knowledge of a settlement of the District Court proceeding for months after entry of judgment in favor of the tenant. The plaintiff contends legal malpractice by the defendant.

The defense counsel states, in a February 28, 2011 affirmation, the plaintiff opposes the plaintiff's motion to strike the defense reply, and to add a sur-reply the defense motion. The defense counsel contends the plaintiff's motion is procedurally improper and devoid of legal substance. The defense counsel asserts the plaintiff lacks a right to file the motion, and the plaintiff's arguments in the unauthorized sur-reply should have been addressed in the plaintiff's opposition to the defense motion. The defense counsel avers there is no basis to strike the defense reply.

The plaintiff replies, in a March 14, 2011 affidavit, the defense motion should be denied. The plaintiff asserts he has standing to bring the complaint because the plaintiff retained the defendant and paid the law firm to perform a specific task. The plaintiff points out the defense fails to dispute that representation, and the plaintiff's submissions show there was privity between these parties. The plaintiff avers his papers are proper.

This Court carefully reviewed and considered all of the papers submitted by the

parties with respect to both motions. The Second Department holds, “[w]ith respect to the cause of action to recover damages for negligent misrepresentation, attorneys, like other professionals, may be held liable for economic injury arising from negligent misrepresentation (*Prudential Ins. Co. v Dewey, Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377)” (*Metral v. Horn*, 213 A.D.2d 524, 525-526, 624 N.Y.S.2d 177 [2nd Dept, 1995]) The Second Department stated the test:

In an action to recover damages for legal malpractice, the plaintiff must prove the following three essential elements: (1) the negligence of the attorney; (2) that such “negligence was the proximate cause of the loss sustained” (*Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 170 AD2d 108, 114, affd 80 NY2d 377 [1992] [emphasis added]), and (3) that the plaintiff sustained damages as a result of the attorney’s action or inaction (*id.*; see *Bauza v Livingston*, 40 AD3d 791 [2007]). Legal malpractice must be demonstrated by proof sufficient to show that the attorney failed to exercise that degree of care, skill, and diligence commonly possessed and exercised by a member of the legal community (see *Bauza v Livingston*, 40 AD3d 791 [2007]). To establish the elements of proximate cause and actual damages in a legal malpractice case, a plaintiff must prove that a favorable outcome would have been obtained but for the attorney’s negligence (see *Carmel v Lunney*, 70 NY2d 169 [1987]; *Zasso v Maher*, 226 AD2d 366 [1996]; *Hill v Fisher & Fisher*, 203 AD2d 328 [1994]). Failure to plead and prove the requisite allegation that “but for” the attorney’s alleged malpractice, the plaintiff would not have sustained some actual ascertainable damages is fatal to the viability of a legal malpractice action (see *Bauza v Livingston*, 40 AD3d 791 [2007]) *Barnett v. Schwartz*, 47 A.D.3d 197, 210-211, 848 N.Y.S.2d 663 [2nd Dept, 2007].

The Second Department as well holds:

“On a motion to dismiss pursuant to CPLR 3211 (a) (7), the pleading is to be afforded a liberal construction” (*Kempf v Magida*, 37 AD3d 763, 764 [2007]). The court must accept the facts as alleged in the complaint as true, accord the plaintiffs the benefit of every possible favorable inference, and determine whether the facts as alleged fit within any cognizable legal theory

(see *Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 303 [2001]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). To establish a cause of action alleging legal malpractice, a plaintiff must prove, inter alia, the existence of an attorney-client relationship (see *Terio v Spodek*, 63 AD3d 719, 721 [2009]; *Velasquez v Katz*, 42 AD3d 566, 567 [2007]). To prove an attorney-client relationship, there must be an explicit undertaking “to perform a specific task” (*Terio v Spodek*, 63 AD3d at 721). “ ‘It is well established that, with respect to attorney malpractice, absent fraud, collusion, malicious acts, or other special circumstances, an attorney is not liable to third parties, not in privity, for harm caused by professional negligence’ ” (*Moran v Hurst*, 32 AD3d 909, 911 [2006], quoting *Rovello v Klein*, 304 AD2d 638, 638 [2003])

Nelson v. Roth, 69 A.D.3d 912, 913, 893 N.Y.S.2d 605 [2nd Dept, 2010].

In addition, the Second Department holds: “[a] plaintiff is not obligated to show, on a motion to dismiss, that it actually sustained damages. It need only plead allegations from which damages attributable to the defendant’s malpractice might be reasonably inferred (see *Kempf v Magida*, 37 AD3d 763, 764 [2007]; see also *InKine Pharm. Co. v Coleman*, 305 AD2d 151 [2003]; *Fielding v Kupferman*, 65 AD3d 437, 442 [2009])” (*Rock City Sound, Inc. v Bashian & Farber, LLP*, 74 A.D.3d 1168, 1171, 903 N.Y.S.2d 517 [2nd Dept, 2010]). This Court viewed the complaint in the light most favorable to the plaintiff, yet this plaintiff fails to show the existence of an attorney-client relationship between him and the defendant, and the alleged legal malpractice was not a proximate cause of any damage to the plaintiff. The plaintiff here does not plead allegations from which damages attributable to the defendant’s malpractice might be reasonably inferred.

Homere, as petitioner landlord represented by the defendant, commenced a nonpayment proceeding in 2008 in the First District Court, Hempstead Part, County of

Nassau, Landlord and Tenant against Janice Henderson, as respondent tenant. District Court Judge Scott Fairgrieve found, the respondent having been duly served with the notice of petition and petition, the allegations in the petition were established. Judge Fairgrieve noted the parties entered into a settlement stipulation, and subsequently an affirmation of non-compliance was filed with the Clerk of that Court, so upon the motion of the defendant Judge Fairgrieve directed judgment entered for Homere. Judge Fairgrieve also determined no rent nor attorneys' fees was due and owing to Homere.

On December 2, 2008, the Clerk of First District Court entered a judgment of possession of leased premises, to wit 196 Long Beach Road, 1st floor, Hempstead, New York to Homere with a business address of 11 Oak Avenue, Hempstead, New York. That judgment directed the issuance of a warrant of eviction to remove the respondent tenant and all persons from the demised premises, and place Homere in full possession, and it severed the landlord tenant relationship (*see* RPAPL § 749).

In 2009, Homere commenced an action in the First District Court, Hempstead Part, County of Nassau under index number 1194/09. On September 16, 2009, District Court Judge Michael A. Ciaffa granted Homere counsel's motion, the defendant here, to withdraw there. Homere subsequently retained Chantel Jean Baptiste, Esq., as counsel in that civil action. On January 7, 2010, Judge Ciaffa granted a motion to amend the complaint adding the plaintiff husband here as a *pro se* plaintiff there while granting leave to Chantel Jean Baptiste, Esq., Homere's counsel to withdraw there. On April 14,

2010, Judge Ciaffa dismissed that District Court action, and found the plaintiff husband here was not a proper party there. Judge Ciaffa stated on the record, "it seems the parties had a full and fair opportunity in the landlord-tenant case to have all the issues in the case addressed." Judge Ciaffa concluded, "the claim for back rent was effectively lost at the time that the landlord-tenant court issued its judgment of eviction and your opportunity to pursue that claim was basically given up." Judge Ciaffa found the testimony of the former tenant, Janice Henderson who appeared *pro se*, credible, and determined the plaintiffs there failed to prove their claims regarding Henderson's responsibility for excessive gas and water charges. Judge Ciaffa added, while Henderson was not completely innocent in the situation, there was a significant fact issue whether the subject premises were sufficiently habitable and that Henderson had a substantial claim against the plaintiffs.

The plaintiff here fails to show an explicit undertaking by the defendant to perform a specific task as required by law. This plaintiff fails to sufficiently allege the existence of a relationship between himself and the defendant. The plaintiff was not in privity with the defendant and the resolution of the landlord tenant matter has *res judicata* effect upon the this instant litigation, so the plaintiff cannot maintain the underlying causes of action here against the wife's attorney nor add Homere as a plaintiff (*see Baker v. Levitin*, 211 A.D.2d 507, 622 N.Y.S.2d 8 [1st Dept, 1995]). The plaintiff here fails to show fraud, collusion, malicious acts, or other special circumstances for the alleged damages caused

by defendant's professional negligence.. The Second Department stated:

Those causes of action arose from the same facts as the legal malpractice cause of action, did not allege distinct damages, and were thus duplicative of the legal malpractice cause of action (*see Kvetnaya v Tylo*, 49 AD3d 608 [2008]; *Town of N. Hempstead v Winston & Strawn, LLP*, 28 AD3d 746, 749 [2006]; *Shivers v Siegel*, 11 AD3d 447 [2004]; *Daniels v Lebit*, 299 AD2d 310 [2002])

Rock City Sound, Inc. v. Bashian & Farber, LLP, 74 A.D.3d, supra, at 1171-1172.

In addition, the plaintiff's allegations rely upon the same facts, and these allegations do not plead distinct damages, hence there is duplication

The Second Department also holds:

[u]nlike a negligent misrepresentation cause of action, a cause of action sounding in fraud does not require the existence of a relationship of privity or something close to privity between the parties (*Credit Alliance Corp. v Andersen & Co., supra*, 65 NY2d, at 547; *Channel Master Corp. v Aluminium Ltd. Sales*, 4 NY2d 403, 408). However, "[w]here a cause of action or defense is based upon ... fraud ... the circumstances constituting the wrong shall be stated in detail" (CPLR 3016 [b]). The amended complaint submitted by the plaintiffs fails to state a cause of action sounding in fraud in the required detail

Metral v. Horn, 213 A.D.2d, supra, at 526.

The Second Department further holds:

"In order to state a cause of action for fraud, a plaintiff must allege, *inter alia*, a misrepresentation of fact" (*Karsanow v. Kuehlewein*, 232 A.D.2d 458, 648 N.Y.S.2d 465), and "a representation of opinion or a prediction of something which is hoped or expected to occur in the future will not sustain an action for fraud" (*Zanani v. Savad*, 217 A.D.2d 696, 697, 630 N.Y.S.2d 89)

Chase Investments, Ltd. v. Kent, 256 A.D.2d 298, 681 N.Y.S.2d 319 [2nd Dept, 1998].

The plaintiff here fails to show the circumstances constituting the wrong shall be stated in

detail, or in other words, the stipulation of the parties in the special proceeding and the local Court's April 14, 2010 determination appear to be the reasons for the release of rent arrears not the circumstances as speculatively asserted. The alleged representations of the defendant as asserted by the plaintiff do not constitute opinion nor prediction of anything to the plaintiff, so the alleged circumstances cannot sustain a fraud claim by the plaintiff (*see generally Chase Investments, Ltd. v. Kent*, 256 A.D.2d 298, 681 N.Y.S.2d 319 [2nd Dept, 1998]). Moreover, there are no damages alleged here by the plaintiff in view of the local Court's April 14, 2010 ruling. That Court found the plaintiff was not a proper party who could recover damages. The defense meets its burden under CPLR CPLR 3211 (a) (1) and (7) to dismiss the complaint with prejudice, and the plaintiff does not meet his burden to strike the defense reply affirmation, and deny the defense motion to dismiss.

Accordingly, the defense motion is granted, and the plaintiff's motion is denied.

So ordered.

Dated: **May 26, 2011**

ENTER:

J. S. C.

FINAL DISPOSITION

NON FINAL DISPOSITION

ENTERED

MAY 31 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**