SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE TRIAL/IAS PART 20

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MICHELE FORTUNA,

Plaintiff,

-against-

Index No. 005164/10
Motion Sequence...01
Motion Date...10/13/10

STERN & DeROSSI, LLP and
MARIO DeROSSI,

Defendants.

_____X

Papers Submitted:
Notice of Motion.....x
Affirmation in Opposition.....x
Memorandum of Law.....x
Affidavit.....x
Memorandum of Law.....x

Upon the foregoing papers, the Defendants' motion, pursuant to CPLR § 3212, seeking an order granting summary judgment dismissing the Plaintiff's complaint and granting summary judgment on their counterclaim for an account stated, is determined as hereinafter provided.

On April 22, 2009[1], the Plaintiff retained the legal services of the Defendants and in connection therewith, the Plaintiff and Mario De Rossi executed a retainer agreement (*see* DeRossi Affidavit at ¶ 3).[2] In July of 2009, the Plaintiff and her husband apparently reached a settlement agreement of their own volition and the Defendants thereafter prepared a Stipulation of Settlement reflecting the principal terms thereof (*id.* at ¶ 13; *see also* Exhibits. H, I, J). On August 24, 2009, a Separation Agreement was executed by and between the Plaintiff and her then husband, John Fortuna (*id.* at ¶ 13; *see also* Exhibit J). On the very same day, the Plaintiff signed a letter which stated that "I have spent a great deal of time reviewing the proposed Separation Agreement" and "although my attorney has strongly urged me not to sign the Separation Agreement based upon the terms contained therein, I have nevertheless decided that I am satisfied with the terms and I wish to sign the Separation Agreement as currently drafted" (*id.* at Exhibit I). Said letter further stated that "Fundamental to Mr. DeRossi's advice not to sign the settlement agreement is my unwillingness to have my husband's business evaluated" and that without such an evaluation, "it is impossible to evaluate whether or not the stipulation of settlement is a fair offer or not to me" (*id.*). The letter concluded with the language that "Mr. DeRossi has made it clear that I will be compromising the financial security of my children and myself if I execute the

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[1] Prior thereto, on or about September 10, 2006, the plaintiff initially retained Mr. DeRossi to obtain a divorce from her husband (*see* De Rossi Affidavit in Support at ¶2). However, the plaintiff thereafter attempted a reconciliation with her husband and as a result the matrimonial action was accordingly discontinued (*id.*).

[2] The Court notes that said retainer agreement was executed by and between the plaintiff and Mr. DeRossi, at a time when Mr. DeRossi was affiliated with the firm "Stern, Adler & DeRossi, LLP" (*see* De Rossi Affidavit at Exh. A).

Separation Agreement as it is currently constituted. Notwithstanding this strong advice, I have decided to ignore my attorney's advice and execute the Separation Agreement as proposed. I understand that in so doing, I waive any claim against my attorney or his law firm for ineffectual counsel as a result of the stipulation of settlement being contrary to my or my children's best interests."

The within action was commenced by the Plaintiff in March 2010, and contains a cause of action sounding in legal malpractice and a cause of action alleging breach by the Defendants of their agreement with the Plaintiff (*id.* at Exhibit C at ¶¶ 16, 18). The complaint specifically alleges that "the Defendants negligently, carelessly and wrongfully failed and/or neglected to protect the interests of the Plaintiff" and that "upon the advice and recommendation of the Defendants, the Plaintiff ill-advisedly executed a Separation Agreement upon the belief of the statements made by the Defendants that Plaintiff was receiving her reasonable and fair share of the marital property between her husband and herself" (*id.* at ¶¶ 13, 14). The Plaintiff further alleges that as the Defendants failed to properly represent the Plaintiff they have "breached their agreement and contract with the Plaintiff to render legal services in a proper, expert, skillful and diligent manner" (*id.* at ¶ 18). The Defendants' instant application for an order granting, *inter alia*, summary judgment dismissing the Plaintiff's complaint thereafter ensued.

In support of that branch of the instant application which seeks an order granting summary judgment dismissing the Plaintiff's complaint, the moving Defendants

initially assert that the Plaintiff herein was fully cognizant with respect to the importance of procuring accountants and appraisers to properly evaluate the marital property and notwithstanding said advice, the Plaintiff refused to retain said experts and elected to pursue a course, the goal of which was to obtain an expeditious dissolution of her marriage (*see* DeRossi Affidavit in Support at ¶¶ 4, 6, 9, 11-19; *see also* Exhibits B, E, K, H).

The Defendants provide copies of a series of email exchanges by and between the Plaintiff and Mr. DeRossi (*id.* at ¶ 18; *see also* Exhibit E). The moving Defendants rely, with particularity, upon email communications dated August 7, 2009, August 12, 2009 and August 18, 2009, as evidence that the Plaintiff had access to banking documents and knowledge as to the substance thereof, as well as that the Plaintiff fully agreed to the terms as were contained in the Separation Agreement (*id.*). Specifically, in the email dated August 7, 2009, the Plaintiff communicated to Mr. DeRossi that "she was going over bank statements and saw that John was transferring large amounts of money to an investment company. Linsco was the name. We have to look into it. THX Michele" (*id.* at Exhibit E). The email communication dated August 12, 2009 and sent by Mr. DeRossi to the Plaintiff was entitled "Remaining Issues" and contained seven separate matters, the last of which related to the evaluation of the Mr. Fortuna's law practice and stated "Business evaluation (we will never know the true value of the [sic] John's interest in the business without an evaluation. The accountant cannot tell without a full investigation) (*id.*). Finally, the email dated August 18, 2009, sent by the Plaintiff to Mr. DeRossi, said "Ok. I have all the answers

to your questions. I'm ready to seal the deal." (*id.*).

In addition to the foregoing emails, the moving Defendants also provide a series of letters by and between Mr. DeRossi and Mr. Hirsch, the attorney who represented the Plaintiff's former husband in the divorce action, the substance of which included the following issues: maintenance in lieu of equitable distribution, and; the Plaintiff's waiver of her interest in her husband's law firm in exchange for a certain amount of maintenance (*id.* at Exhibit K).

As to that branch of the Defendants application, which seeks summary judgment on their counterclaim sounding in an account stated, the Defendants aver that "the plaintiff was sent invoices for the months of May, June, August, October, November and December of 2009 and she has failed to object to any invoices sent to her" (*see* Stern Affidavit in Support at ¶ 11; *see also* Exhibit F).

The Plaintiff opposes the Defendants' application and asserts that the moving Defendants were negligent in relation to numerous aspects of their legal representation, which included the following: failure to obtain an evaluation of the law firm, in which the Plaintiff's husband was purportedly a partner; failure to obtain an appraisal of the marital residence; the failure to verify the financial data provided by the Plaintiff's former husband on his statement of net worth; the failure to obtain the necessary documentation in relation to the assets comprising the marital estate and the attendant duty to properly advise the Plaintiff as to her rights in relation thereto; the failure to obtain proof as to the existence of

her husband's life insurance policy and the premium payments made in connection therewith (*see* Plaintiff's Memorandum of Law at pp. 6-19; *see also* Fortuna Affidavit at ¶¶ 6-8, 11, 13, 16, 19, 20-23, 25, 26, 29). The Plaintiff asserts that in failing to obtain an accurate valuation of the marital estate, the Defendants acted negligently and that said negligence proximately caused her to sustain actual and ascertainable damages (*see* Plaintiff's Memorandum of Law at pp. 19-22, 26, 27, 29). With particular respect to the "waiver letter", the Plaintiff avers that "I read the letter and signed it, but I was unsure as to its meaning, as DeRossi never emphatically advised me not to sign the Separation Agreement" (*see* Rooney Affirmation in Opposition at Exhibit 4 at ¶ 27).

Counsel for the Plaintiff further asserts that there remains outstanding document discovery *vis a vis* the matrimonial action and accordingly the Defendants' within application is premature (*id.* at pp. 30-33). More specifically, the Plaintiff's counsel argues that on the record as thus far developed, the Defendants cannot establish their *prima facie* entitlement to judgment inasmuch as the affidavit of Mr. DeRossi, "relies upon broad conclusions and not specific facts and details" (*id.* at pp. 32-33). Finally, and with respect to the Defendants' counterclaim for an account stated in the sum of $6,144.91, while the Plaintiff concedes that she received an invoice for the amount sought by the Defendants, she avers that Mr. DeRossi "told [her] to just ignore the invoices" and that "those charges were from before the agreement was finalized and were already paid" (*see* Rooney Affirmation in Support at Exhibit 4 at ¶¶ 31, 32).

In order to successfully assert an action sounding in 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 [the] plaintiff to sustain actual and ascertainable damages" (*Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer,* 8 N.Y.3d 438 [2007] quoting *McCoy v. Feinman*, 99 N.Y.2d 295 [2002]at 301-302; *Rosenstrauss v. Jacobs & Jacobs*, 56 A.D.3d 453 [2d Dept. 2008]). "[T]o establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyers negligence" (*Boone v. Bender*, 74 A.D.3d 1111 [2d Dept. 2010]).

When moving for summary judgment dismissing an action alleging legal malpractice, the moving defendants bear the burden of coming forth with admissible evidence which establishes that the plaintiff is unable to prove at least one of the essential elements which comprise the cause of action (*Ippolito v. McCormack, Damiani, Lowe & Mellon,* 265 A.D.2d 303 [2d Dept. 1999]; *Boone v. Bender*, 74 A.D.3d 1111 [2d Dept. 2010], *supra*).

Initially addressing that branch of the Defendants' application seeking dismissal of the within complaint, the Court finds that the Ddefendants' have met their *prima facie* burden of demonstrating that they exercised the ordinary skill and care under the circumstances and that the actions undertaken by the Defendants were not the proximate

cause of any monetary damages the Plaintiff may have sustained (*id.*). In the instant matter, the above referenced emails indicate that the Plaintiff herein was made fully aware of the financial issues surrounding the dissolution of her marriage and that the proximate cause of any financial damages she sustained was her own intent to expeditiously enter into a settlement agreement ending her marriage. Additionally, the letters exchanged by and between Mr. DeRossi and Mr. Hirsch also demonstrate that the significant financial issues as to the Plaintiff's maintenance and her interest in her former husband's practice were clearly contemplated by the Defendants and that efforts were expended thereby to protect the Plaintiff's interest relative thereto (*id.*).

In opposition to the Defendants' *prima facie* showing, the Plaintiff has failed to raise a triable issue of fact (*Zuckerman v. City of New York,* 49 N.Y.2d 557 [1980]). Here, the Plaintiff avers that while she read and signed the waiver letter, she was unsure as to its meaning. However, "a party who signs a document is conclusively bound by its terms absent a valid excuse for having failed to read it" *(Arnav Industries Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, LLP.*, 96 N.Y.2d 300 [2001] at 304). In the instant matter, the Plaintiff admittedly read the waiver letter, the language of which was both clear and unambiguous. Moreover, if the Plaintiff was uncertain as to the import thereof, there was nothing which precluded her from asking Mr. DeRossi for a more definitive explanation (*id.; Bishop v. Maurer*, 33 A.D.3d 497 [1st Dept. 2006] *aff'd* 9 N.Y.3d 910 [2007]). "The fact that the Plaintiff was subsequently unhappy with the settlement obtained by the

Defendant does not rise to the level of legal malpractice" (*Holschauer v. Fisher,* 5 A.D.3d 553 [2d Dept. 2004]).

Based upon the foregoing, that branch of the Defendants' application which seeks an order dismissing the Plaintiff's complaint, including the first cause of action sounding in legal malpractice and the second cause of action sounding in breach of contract, is hereby **GRANTED.**[3]

The Court now addresses that branch of the Defendants' application which seeks summary judgment on their counterclaim for an account stated. Within the particular context of a motion which seeks summary judgment on an action for an account stated, it is incumbent upon the moving party to proffer the relevant invoices, which clearly detail the services provided, the hourly rate charged, and the billable hours expended (*Landa v. Dratch,* 45 A.D.3d 646 [2d Dept. 2007]). In addition, the moving party must demonstrate that the defendant duly approved such invoices and made partial payments thereon (*id; see also Landa v. Sullivan,* 255 A.D.2d 295 [2d Dept. 1998]).

In the instant matter, the Court finds that questions of fact which exist which precludes the granting of summary judgment (*Zuckerman v. City of New York,* 49 N.Y.2d 557 [1980], *supra*). As noted above, while the Plaintiff acknowledged receipt of the subject invoices, she avers in her sworn affidavit that she objected thereto and that upon said

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[3] The Court notes that as the Plaintiff's breach of contract action was predicated upon the identical facts which formed the basis of the legal malpractice action, dismissal thereof is warranted (*Shivers v. Siegel,* 11 A.D.3d 447 [2d Dept. 2004]).

objection, Mr. DeRossi instructed her to ignore same as they "were already paid" (*Landa v. Sullivan*, 255 A.D.2d 295 [2d Dept. 1998], *supra*).

Based upon the foregoing, that branch of the Defendants' application, which seeks an order granting summary judgment on their counterclaim alleging an account stated is hereby **DENIED**.

This constitutes the Decision and Order of the Court.

All applications not specifically addressed are **DENIED**.

DATED: Mineola, New York
December 20, 2010

Hon. Randy Sue Marber, J.S.C.