

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

OPTICAL DYNASTY, INC. d/b/a
STERLING OPTICAL, MICHAEL
RUBIN, STEVEN LINKER.

TRIAL/IAS, PART 31
NASSAU COUNTY

Plaintiffs.

Sequence No.: 001
Index No.: 000165/07

- against -

FORCHELLI, CURTO, SCHWARTZ, MINEO,
CARLINO & COHN, LLP, TERENCE E.
SMOLEV, ESQ., ANDREA TSOUKALAS, ESQ.
And ANDREW E. CURTO, ESQ.

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	X
Replying Affidavits	X

Defendants Forchelli, Curto, Schwartz, Mineo Carlino & Cohn, LLP's (hereinafter Forchelli, Curto), Terrence E. Smolev, Esq.'s, Andrea Tsoukalas, Esq. and Andrew E. Curto, Esq.'s motion for summary judgment dismissing the complaint herein is determined as set forth below.

The following facts are undisputed. Plaintiff Optical Dynasty, Inc. d/b/a Sterling Optical (hereinafter "Optical") are eye care retailers that provide eye examinations and sell eye care and wear services and products. Plaintiffs Michael Rubin and Stephen Linker are the shareholders of Optical which owned ten Sterling Optical Centers and franchises in the tri-state area. In 1996 Optical sold two of the Sterling Optical Centers and the remainder in 2000-2001. Between 2002 and 2004 Optical exercised its rights to retake four of the sold Sterling Optical Centers when the purchasers defaulted in satisfying their obligations to the seller. The seller was able to sell the assets to a new buyer for three of those stores with the exception of a Sterling Optical Center store in Commack, New York (hereinafter the "Commack store"). Defendant Terence E. Smolev, Esq. represented Rubin's, Linker's and their entities' interests in the attempted sale of

the four stores. Mr. Smolev later became a member of Forchelli, Curto. On or around February 20, 2001 Optical sold the Commack store to Carl Jacknowitz, who, in turn defaulted in payments to Optical. In July, 2004 plaintiffs were approached by Omawathi Debitat about the possible purchase of the store. Later that year Ms. Debitat and Optical reached an agreement pursuant to which the store would be sold to an entity designated by Debitat, Tristan Optical, Inc. (hereinafter "Tristan"). Said agreement was contingent upon Emerging Vision, Inc.'s (hereinafter "EVI"), a large holding company with interests in the franchising, specialty retail and the healthcare business, approval. EVI is a large optical retailer which does business under multiple retail brands including Sterling Optical and it was the franchisee of the Commack Store.

Forchelli, Curto represented Optical in the transaction. In January, 2005 a closing was scheduled for January 31, 2005. At the closing which was attended by Debitat and her husband, Smolev, plaintiff Rubin and EVI's attorney, EVI's attorney presented Mr. Smolev with a document known as the "recapture right" which provided that if Tristan defaulted, Optical would not have the right to take back and foreclose upon the assets of the Commack Store. As such were not part of the negotiations with EVI, Optical and its attorney, Mr. Smolev "walked out of the closing." On February 18, 2005 EVI's attorney faxed a letter to Smolev which stated that EVI was willing to proceed with the closing on the terms sought by Optical so long as Optical responded with notice that it would go forward with the closing on or before February 28, 2008 by February 22, 2008 (hereinafter the "drop dead letter").

By letter dated February 22, 2005 Mr. Smolev wrote back to EVI's counsel, Adam Stahl, Esq., inquiring if counsel would agree to extend the time in which to respond to the drop dead letter's demand for notice of intention to close to February 28, 2008. On February 23, 2005 Mr. Smolev e-mailed Mr. Stahl and requested until the following Friday in which to respond to the drop dead letter. Later on February 23, 2005 Mr. Smolev e-mailed Mr. Stahl in which he stated that he needed to reschedule the closing until March 18, 2005 based on his schedule and to which he requested a reply. On or about April 29, 2005 Tristan purchased a different Sterling Optical store in Bay Shore, New York and did not purchase the one in Commack, New York.

It is plaintiff's position that defendants failed to effectuate the deal with Tristan, over billed plaintiffs for the services provided and engaged in deceptive consumer practices. Plaintiffs commenced the instant action against Forchelli, Curto, Smolev, Tsoukalas and Curto asserting causes of action for 1) legal malpractice against defendant Forchelli, Curto in connection with the sale of the Commack store; 2) legal malpractice against defendant Smolev in connection with sale of the Commack store; 3) legal malpractice against defendant Tsoukalas in connection with the sale of the Commack store; 4) legal malpractice against defendant Curto in connection with the sale of the Commack store; 5) improper billing against all defendants; 6) legal malpractice on the part of all defendants for failing to advise plaintiffs of their right to seek damages against Tristan; and 7) a violation of General Business Law §349's prohibition against deceptive consumer practices. Defendants have answered and now move for summary judgment dismissing the complaint herein.

In moving for summary judgment defendants must demonstrate that there are no issues of fact which preclude summary judgment by the tender of evidence in admissible form. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). In order to oppose the motion plaintiffs must demonstrate that there are no triable issues of fact through admissible evidence. *Id.*

Defendants move for summary judgment dismissing all claims of malpractice in connection with the Commack transaction as asserted against Forchelli, Curto and Mr. Smolev on the grounds that plaintiffs under the facts herein are unable to demonstrate that but for any negligence on the part of Forchelli, Curto and Mr. Smolev, the Commack deal would have closed. Defendants point to Mr. Smolev's deposition testimony wherein he testified that after the initial closing fell through on January 31, 2005 he negotiated the recapture right in favor of plaintiffs and endeavored to set up a new closing date. (See, deposition transcript of Terrence Smolev, Esq., pp. 79-89, 93-99). When Mr. Rubin informed Mr. Smolev that Tristan had decided to purchase the Bay Shore store, he informed Mr. Smolev that setting up the closing for the Commack store would be futile. (*Id.*, pp. 95-97). Further, defendants point to the testimony of Mr. Rubin in which he admitted to knowing in February, 2005 that Mr. Smolev had negotiated the recapture right for plaintiffs. (See, Rubin transcript, p. 417).

In order to succeed on a claim for legal malpractice plaintiffs must demonstrate that 1) defendants failed to exercise the degree of care, skill and diligence commonly possessed by a member of the legal community; 2) the failure was a proximate cause of plaintiffs' injuries; 3) damages; and 4) that if defendant had exercised the proper level of care plaintiff would have prevailed in the underlying matter. See, Ippolito v. McCormack, Damiani, Lowe & Mellon, 265 A.D.2d 303 (2nd Dep't 1999). Defendants assert that plaintiffs are unable to demonstrate that the sale of the Commack store would have closed but for any malpractice on defendants' part.

Defendants fail to point to any evidence herein that plaintiff was informed by Forchelli, Curto or Mr. Smolev of the drop dead letter. It has been held that an attorney may be liable to his client for malpractice where the attorney negligently fails to meet a deadline on his client's behalf whether the deadline's nature is transactional or litigation. See, Logalbo v. Plishkin, Robano & Baum, 163 A.D.2d 511 (2nd Dep't 1990). In the instant matter defendants failed to demonstrate that there is no issue of fact as to whether Mr. Smolev negligently delayed the closing by seeking extensions of time to respond to the drop dead letter and by attempting to adjourn the closing until March despite EVI's demands relative to the scheduling of the closing. Nowhere do defendants point to evidence that plaintiffs were aware that Mr. Smolev was seeking an extension of time in which to provide notice of a closing date or an adjournment of the closing beyond the outside limit set forth in the drop dead letter.

Where, as here defendants fail to meet their prima facie burden of demonstrating entitlement to summary judgment, the court will deny this branch of the motion regardless of the sufficiency of the opposition papers. Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993). Thus, to the extent the motion seeks summary judgment dismissing the complaint as asserted against defendants Forchelli, Curto and Smolev in connection with the Commack transaction, the motion

is denied.

Defendants next move for summary judgment dismissing the complaint to the extent same is based upon the Commack transaction as asserted against defendants Tsoukalas and Curto as they did not represent plaintiffs in any way in the transactions in connection with the sale which underlie plaintiffs' claims. In support of this position defendants rely upon the deposition transcript of plaintiff Rubin in which he testified that he did not recall what services Ms. Tsoukalas provided in connection with the Commack transaction. (See, deposition transcript of Michael Rubin, pp. 378-379). Ms. Tsoukalas testified at her deposition that she was not involved in the representation of defendants in any contractual transaction, but drafted the complaint for an action against EVI. (See, deposition transcript of Andrea Tsoukalas, Esq., page 9, lines 3-11). Further, Mr. Rubin testified that he did not retain Mr. Curto to represent him in connection with the sale and Mr. Curto did not provide any services therewith. (See, Rubin transcript, page 378, lines 7-17).

An explicit undertaking to perform a specific task is required to establish an attorney-client relationship for purposes of maintaining a legal malpractice action. See, Chang v. Pi, 288 A.D.2d 378 (2nd Dep't 2001).

In opposition to this branch of the motion plaintiff Rubin avers that in discussing the potential for litigation with defendants Curto and Tsoukalas he learned that Mr. Smolev had failed to mail a letter to EVI informing EVI that it was Optical's intention to hold this entity liable if it caused the deal to fall through. Mr. Rubin further avers that he believed that Tsoukalas and Curto were "transactional attorneys" and knowledgeable about the underlying transaction. Also plaintiffs assert that an issue of fact exists as to whether Mr. Curto and Ms. Tsoukalas performed services on the sale transaction based upon Mr. Smolev's testimony that he had supervised other attorneys at Forchelli, Curto in the preparation of the contracts. Speculation is insufficient to defeat a motion for summary judgment. See, Klein v. Byalik, 1 A.D.3d 399 (2nd Dep't 2003). Thus, the court finds that plaintiffs have failed to raise a triable issue of fact on these branches of the motions and it is directed that defendants' motion is granted to the extent it seeks dismissal of the third and fourth causes of action.

Defendants next move for summary judgment dismissing plaintiffs' sixth cause of action as asserted against all defendants. In the sixth cause of action plaintiffs assert that defendants failed to advise plaintiffs of their right to seek damages against Tristan for its breach of contract. Defendants point to Mr. Rubin's deposition transcript wherein he testified that he was advised by Mr. Curto and Mr. Smolev that he had to sue Tristan for breach of contract and met with Ms. Tsoukalas to discuss the details of the alleged breach. Further, Mr. Rubin testified that he was shown a draft of a complaint against Tristan for breach of contract. (See, Rubin transcript, pp. 335-338).

As set forth above, in order to succeed on a claim for legal malpractice plaintiffs must demonstrate that 1) defendants failed to exercise the degree of care, skill and diligence

commonly possessed by a member of the legal community; 2) the failure was a proximate cause of plaintiffs' injuries; 3) damages; and 4) that if defendant had exercised the proper level of care plaintiff would have prevailed in the underlying matter. See, Ippolito v. McCormack, Damiani, Lowe & Mellon, supra. Defendants herein have demonstrated that they advised plaintiffs on the course of action of seeking damages against Tristan for breach of contract.

In opposition plaintiffs offer nothing to raise an issue of fact as to whether they were in fact advised on their rights against Tristan by defendants. Indeed, plaintiffs do not address this issue at all in their opposition papers. Thus, defendants' motion is granted to the extent that it seeks dismissal of the sixth cause of action.

Defendants next move for summary judgment dismissing the fifth cause of action for improper billing. In the complaint plaintiffs allege that defendants improperly billed plaintiffs for 1) \$30,000.00 in connection with the sale which plaintiffs assert did not take place due to defendants' negligence; and 2) \$10,000.00 in connection with the complaint prepared by defendants against EVI, Tristan and the Debidats based upon plaintiffs' position that it was erroneous to include EVI as a defendant. Defendants point out that \$5,000.00 was deducted from the bill for services rendered in the complaint drafting. Further, defendants take the position that plaintiffs' position vis-a-vis EVI appears to be inconsistent as first plaintiffs allege that defendants erroneously advised that litigation against EVI was necessary even though they should have known such a claim was erroneous but counsel for defendants posits that perhaps plaintiffs also claim "it was improper for defendants not to file a complaint against EVI even though they were no longer the attorneys for plaintiffs."

As defendants do not at all address the issue of the part of the fifth cause of action pertaining to the billing for the underlying transaction, the motion is denied. As plaintiff takes no position on the refund for \$5,000.00 by defendants in connection with the drafting of the complaint, the court grants defendants' motion to the extent it seeks dismissal of the fifth cause of action for the preparation of the complaint.

Defendants further move for summary judgment dismissing the seventh cause of action in which plaintiffs allege defendants violated General Business Law §349 which provides:

"(a) Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful."

That section also authorizes a plaintiff to maintain a cause of action for, inter alia, damages as a result of an alleged violation of the above referenced section. General Business Law §349(h).

Defendants assert that the cause of action should be dismissed because General Business Law applies to consumer transactions and not private contracts. In order for General Business Law §349 to apply, the conduct at issue must "have a broad impact on consumers at large." New

York University v. Continental Insurance Company, 87 N.Y.2d 308, 320 (1995). Private transactions between the plaintiffs and defendants and which only affect the plaintiffs and defendants lack ramifications for the public at large or other consumers. Canario v. Gunn, 300 A.D.2d 332 (2nd Dep't 2002); Choi v. Korea First Bank of New York, 244 A.D.2d 236 (2nd Dep't 1997). In such circumstances General Business Law §349 is inapplicable. Canario v. Gunn, supra.; Choi v. Korea First Bank of New York, supra.

Plaintiffs do not at all address this issue in their opposition papers. The court therefore grants that branch of defendants' motion which seeks summary judgment dismissing the seventh cause of action.

Defendants next seek summary judgment dismissing the claims of plaintiffs Rubin and Linker on the ground that any potential damages herein were suffered by plaintiff Optical, a corporate entity, and that the individual plaintiffs are therefore shareholders who lack standing to maintain this action. An individual shareholder has no cause of action for a wrong allegedly committed against a corporation. See, Abrams v. Donati, 66 N.Y.2d 951 (1985); Baker v. Latham Sparrowbush Associates, 129 A.D.2d 667 (2nd Dep't 19887); General Motors Acceptance Corp. v. Kalkstein, 101 A.D.2d 102 (1st Dep't 1984). In the instant matter it is undisputed that the underlying transaction upon which this matter is based involved the sale of Optical's interest in the Commack store to Tristan and the possible damages caused by Tristan to Optical. Further, a review of the contract upon which the transaction was facilitated does not reveal that plaintiffs Linker or Rubin were parties to the contract and could benefit thereby.

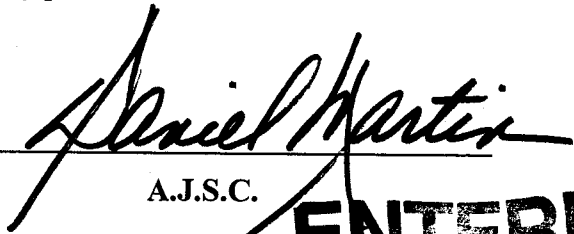
Plaintiffs again offer nothing in opposition to this branch of the motion. Defendants' motion seeking summary judgment dismissing the complaint to the extent it asserts causes of action on behalf of plaintiffs Linker and Rubin is therefore granted.

Accordingly, based upon the foregoing it is hereby directed that:

- 1) the third, fourth, sixth and seventh causes of action are dismissed in their entirety;
- 2) the fifth cause of action is dismissed to the extent same asserts improper billing by defendants in connection with the potential litigation on plaintiffs' behalf;
- 3) all claims asserted individually herein by plaintiffs Linker and Rubin are dismissed.

So Ordered.

Dated: November 24, 2008


A.J.S.C.

ENTERED

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NASSAU COUNTY
CLERK'S OFFICE