SCANNED ON 2/17/2011

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARTIN SHULMAN J.S.C. PART 1

Index Number : 106347/2009

EHRENHALT, AMARANTH ROSLYN

vs.

KINDER, SCOTT

SEQUENCE NUMBER : 005

PARTIAL SUMMARY JUDGMENT

INDEX NO. 106347/09

MOTION DATE

MOTION SEQ. NO. 005

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ... 1-20 Notice of Cross-Motion	1, 2, 3
Answering Affidavits — Exhibits	4, 5
Replying Affidavits — Exh. 1	6, 7

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the attached decision and order.

FILED

FEB 17 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: February 15, 2011

MARTIN SHULMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

FILED

FEB 17 2011

NEW YORK
COUNTY CLERK'S OFFICE

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AMARANTH ROSLYN EHRENHALT,

Plaintiff,

-against-

Index No. 106347/09

SCOTT KINDER, MAXCINE HOLDER, MAX MANAGEMENT, LLC, FREDERICK MEHL and "JOHN DOE",

Defendants.

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MARTIN SHULMAN, J.:

Plaintiff Amaranth Roslyn Ehrenhalt ("Ehrenhalt" or "plaintiff") moves for partial summary judgment as to liability on her legal malpractice cause of action against defendant Frederick Mehl ("Mehl" or "defendant"). Mehl opposes the motion and cross-moves to strike the complaint pursuant to CPLR §3126 based upon plaintiff's alleged discovery defaults, or alternatively, for an order of preclusion or an order compelling plaintiff to provide outstanding discovery.

Ehrenhalt's legal malpractice claim arises from Mehl's representation of her in connection with her attempted purchase of condominium unit 1D located at 309 East 108th Street, New York, New York (the "unit"). The amended complaint alleges that in the spring of 2008, plaintiff, an artist, decided to relocate from Paris to New York (Exh. 1 to Motion at ¶16). To this end, she gave her friend Anita Shapolsky ("Shapolsky") power of attorney to purchase an apartment in New York on her behalf, to be used as both a studio and a residence. *Id.* With the assistance of a broker, Shapolsky ultimately found the unit and plaintiff authorized its purchase. *Id.* at ¶18.

Acting as Ehrenhalt's attorney-in-fact, Shapolsky entered into a contract of sale for the unit dated June 20, 2008 (the "contract", at Exh. 9 to Motion), with a closing date on or about September 20, 2008. The contract lists the unit's seller as defendant Scott Kinder ("Kinder") and provides for a purchase price of $850,000 (*id.*). At Kinder's recommendation, Shapolsky retained Mehl to represent plaintiff in connection with the purchase and the contract lists him as her attorney.

At the time she signed the contract, Shapolsky tendered the contract deposit of $85,000 directly to Kinder. Paragraph 3(i) of the contract confirms the foregoing and provides for plaintiff to pay an additional $20,000 on July 20, 2008, which she did, for a total contract deposit of $105,000. The unit required extensive renovation and/or repairs as reflected in a work rider attached to the contract. Kinder undertook to perform such work prior to closing. To finance this work, the contract provides for the immediate release of the contract deposit to defendant Max Management LLC ("Max LLC").[1] Thereafter, pursuant to a separate oral agreement of unspecified date, Ehrenhalt paid additional funds to Kinder and/or Max LLC in the total amount of

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[1] Kinder is a principal of co-defendant Max LLC, the entity through which the renovations were to be performed. Although Kinder physically appeared on several conference and motion dates in this action, he ultimately failed to interpose a written answer to the amended complaint and never retained counsel to represent Max LLC, prompting plaintiff's counsel to move for a default judgment, which was granted without opposition. This court conducted an inquest against Kinder and Max LLC on January 24, 2011 and a judgment in the amount of $133,597.45, excluding interest, costs and disbursements, was signed on January 31, 2011.

$28,597.45 for further renovations not indicated in the contract and not included in the purchase price (the "additional work").[2]

It appears Mehl ordered a title report pertaining to the unit on or about July 11, 2008 and received it on or about July 24, 2008 (see Exh. 8 to Motion). The title report revealed that co-defendant Maxcine Holder ("Holder") owned the unit, rather than Kinder, and further revealed the existence of two outstanding mortgages; an outstanding judgment of foreclosure; a lien for unpaid common charges; tax liens; and a certificate of occupancy designating the unit as a doctor's office (hereinafter collectively referred to as the "title defects" or "title issues"). The total amount of liens exceeded the balance of the purchase price due.

Understandably, the foregoing title defects delayed any possible closing. However, in the meantime, Ehrenhalt had sold her apartment in Paris and moved to New York in or about November 2008. According to plaintiff, Kinder permitted her to move into the unit prior to both the completion of renovations and closing. Disputes soon arose between Ehrenhalt and Kinder as to the quality and/or lack of the promised renovations as well as the terms of plaintiff's occupancy and her obligation, if any, to tender rent until closing. At this point, plaintiff also became aware of the many title defects.

In or about January 2009 Ehrenhalt terminated Mehl's services and retained her present counsel to replace Mehl as her transactional counsel for the still hoped for

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[2] Plaintiff paid for the additional work in three installments of $14,000, $7,000 and $7,597.45. It is unclear on this record when the first two installments were paid; however, the last installment was paid by check dated September 3, 2008 (Exh. 12 to Motion).

closing. Predictably, no closing ever took place and plaintiff ultimately commenced this action seeking, among other relief, specific performance. Plaintiff later amended the complaint and withdrew her request for specific performance. She subsequently purchased another unit in the same building and now seeks to recover damages in the amount of $133,597.45, representing the sums she paid to Kinder and/or Max LLC, plus attorney's fees.[3]

Plaintiff's Motion for Summary Judgment

An award of summary judgment is appropriate when no issues of fact exist. *See* CPLR 3212(b); *Sun Yau Ko v. Lincoln Sav. Bank*, 99 AD2d 943 (1st Dept.), *aff'd* 62 NY2d 938 (1984); *Andre v. Pomeroy*, 35 NY2d 361 (1974). In order to prevail on a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986). Indeed, the moving party has the burden to present evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law. *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 NY2d 1065 (1979).

To establish a cause of action for legal malpractice, Ehrenhalt must prove that Mehl failed to exercise that degree of care, skill and diligence commonly possessed by a member of the legal community and that his breach of this duty proximately caused

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[3] In her reply papers on this motion, plaintiff withdrew her claims for physical and emotional damages, thereby mooting defendant's argument that issues of fact exist as to these claims as well as the portion of the cross-motion seeking discovery sanctions for plaintiff's failure to provide proper medical authorizations.

her damages (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]). To establish causation, plaintiff must show that she would not have incurred any damages but for defendant's negligence. *Id.* To establish the foregoing elements, plaintiff's motion relies upon the following allegations which she contends, as a whole, constitute legal malpractice:

- Mehl negligently permitted her to enter into the contract and pay the contract deposit to Kinder without making any preliminary investigation into the unit's ownership and the existence of any potential liens[4] and without warning her of the inherent risks in advancing funds to a seller prior to closing;

- Mehl failed to add language to the contract specifying plaintiff's remedy in the event no closing occurred;

- Correspondence between Ehrenhalt and defendant indicates that Mehl failed to memorialize the terms of plaintiff's agreement with Kinder for the additional work in writing as plaintiff requested (see Exhs. 12 and 13 to Motion); and

- Ehrenhalt first learned of the title defects from a neighbor in or about November 2008. Had Mehl advised her of the title defects, she would not have paid the further sum of $28,597.45 to Kinder and/or Max LLC for the additional work.

While the moving party has the initial burden of proving entitlement to summary judgment, once such proof has been offered, in order to defend the summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980). Once the movant establishes *prima facie* entitlement to summary judgment, the burden of proof shifts to the opposing party to demonstrate by admissible evidence the existence

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[4] A simple internet search of New York City's property records would have revealed that Holder was the owner of the unit and the existence of the two mortgages.

of a factual issue requiring a trial. *Zuckerman, supra*. As set forth in *Spearmon v. Times Square Stores Corp.*, 96 AD2d 552, 553 (2nd Dept. 1983):

> It is incumbent upon a defendant who opposes a motion for summary judgment to assemble, lay bare and reveal his proofs, in order to show that the matters set up in his answer are real and are capable of being established upon a trial. Bare conclusory allegations are insufficient to defeat a motion for summary judgment [citations omitted]. *Id.*, 96 AD2d at 553.

If the opposing party fails to submit evidentiary facts to controvert the allegations set forth in the movant's papers, the movant's allegations may be deemed admitted. *Kuehne & Nagel, Inc. v. F.W. Baiden*, 36 NY2d 539, 544 (1975). Summary judgment may then be granted, as no triable issue of fact exists. *Id.*

At the outset, this court rejects defendant's claim that summary judgment is premature due to outstanding discovery. Specifically, Mehl contends that Ehrenhalt has had the benefit of obtaining written discovery from him while he has received none from her. "[A]lthough determination of a summary judgment motion may be withheld where discovery is incomplete (*see* CPLR 3212 [f]), there must be some evidentiary showing suggesting that completion of discovery will yield material and relevant evidence" (*Zinter Handling, Inc. v Britton*, 46 AD3d 998, 1001 [3rd Dept 2007]).

Here, Mehl merely states in a conclusory manner that the motion is premature and he requires further discovery in order to respond. However, defendant makes no evidentiary showing that further discovery will yield pertinent evidence. Indeed, in this case, correspondence between the parties is the main form of discovery and both Mehl and Ehrenhalt have equal access to communications between them. For the foregoing reasons, Mehl's attempt to forestall summary judgment by invoking CPLR 3212(f) is unpersuasive.

Mehl's opposing affidavit is hazy as to specific facts and details. He does not deny that he made no preliminary inquiries about the unit, nor does he dispute that this would have been a prudent course of action. Rather, defendant contends that plaintiff, through Shapolsky, had already agreed to the contract's terms before he was retained and he advised either plaintiff or Shapolsky "that the ordinary course was to place the down payment in escrow" and release it to the seller at closing. See Mehl Aff. at ¶2. Despite such advice, defendant claims plaintiff insisted on releasing funds to Kinder prior to closing to expedite renovations.

These allegations create an issue of fact as to the sufficiency of defendant's advice to plaintiff and whether plaintiff disregarded his advice. Moreover, notwithstanding the ease with which Mehl could have learned of the title issues, plaintiff does not establish that Mehl had a duty to investigate the unit's ownership and lien status prior to the contract signing. Whether defendant acted at that time with the degree of care, skill and diligence commonly possessed by a member of the legal community is a question for a jury. *Logalbo v Plishkin, Rubano & Baum*, 163 AD2d 511, 514 (2d Dept 1990), *lv dismissed* 77 NY2d 940 (1991).

As to the sufficiency of the contract's terms, Mehl also argues that paragraphs 13, 15 and 18 of the contract provide plaintiff's remedy in the event seller was unable to close (to wit, specific performance, a lien upon the unit and return of the contract deposit, respectively). Ehrenhalt argues in reply that these provisions could not protect plaintiff because any lien she might have acquired against the unit would be meaningless since: 1) Kinder, not being the unit owner, had no right to agree to such a lien; and 2) the foreclosure judgment would eliminate any such lien. Further, plaintiff notes that a return of the contract deposit would be unlikely since it was not held in escrow and was to be spent on renovations, and specific performance would also have been ineffectual given that Kinder was not the unit owner. However, these arguments presuppose that Mehl knew or should have known of the title defects at the contract signing. As stated above, this is a question for the fact finder.

Turning to defendant's conduct after he learned of the title defects, as stated in *Logalbo v Plishkin, Rubano & Baum*, *supra*:

> While the issue of whether certain conduct constitutes legal malpractice normally requires a factual determination to be made by a jury . . . , a plaintiff will be entitled to summary judgment in a case where there is no conflict at all in the evidence, the defendant's conduct fell below any permissible standard of due care, and the plaintiff's conduct was not really involved (citations omitted).

Here, once he learned of the title defects, Mehl alleges only that he spoke to Kinder's closing attorney about these issues and was assured they would be resolved prior to closing. He also vaguely alleges he spoke to plaintiff numerous times about the title defects and she repeatedly indicated her willingness to proceed to closing once title was clear. However, Mehl gives no indication when he spoke to plaintiff or what he claims to have told her, nor does he refute plaintiff's claim that the earliest correspondence documenting such discussions is dated December 2008 (Exh. 15 to Motion), months after plaintiff had already paid $133,597.45 to Kinder.

As to this claim, defendant does not meet his burden of refuting plaintiff's entitlement to summary judgment as to liability. This court finds that defendant's failure to advise plaintiff of the title defects immediately upon learning of same was a breach of his professional duty as a matter of law and that this negligence was a proximate cause of at least a portion of plaintiffs' damages, the amount of which will be determined at trial.

For the above reasons, plaintiff's motion for summary judgment as to liability on her legal malpractice cause of action against Mehl is granted in part and the amount of damages will be determined at the trial of this action. However, plaintiff does not establish any right to recover attorney's fees from defendant. As Mehl correctly notes, no statute or agreement authorizes such a recovery. See *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC,* 3 NY3d 592, 597 (2004)("It is well settled in New York that a prevailing party may not recover attorneys' fees from a losing party except where authorized by statute, [written] agreement or court rule [internal citations omitted]. . ." [bracketed matter added]). Plaintiff does not address this argument.

Cross-Motion to Strike Complaint

There is no dispute that plaintiff did not comply with the discovery deadlines set forth in the March 9, 2010 preliminary conference order ("PCO") (Exh. C to Cross-Motion). Plaintiff notes her intention to move for summary judgment as the reason for her failure to comply with the PCO. However, Ehrenhalt's responses to defendant's demand for a bill of particulars and document demands were due on May 15, 2010, and she was required to serve party statements and witness information on or before May 9, 2010. Depositions of all parties were to be completed on or before July 30, 2010. Plaintiff served her motion for summary judgment on August 5, 2010. Although service of the motion stayed discovery, Ehrenhalt was nonetheless already in default at the time she brought the motion.

Under these circumstances, Mehl's cross-motion is granted to the extent that plaintiff is directed to respond to defendant's outstanding discovery demands (Exh. D to Cross-Motion) on or before March 18, 2011. The parties will finalize deadlines for depositions at the compliance conference directed below. Accordingly, it is hereby

ORDERED that plaintiff's motion is granted in part and denied in part as set forth above and defendant Mehl's cross-motion is granted to the extent that the court grants an order compelling plaintiff's compliance with disclosure pursuant to the terms set forth above, and is otherwise denied.

Counsel for the parties are directed to appear for a compliance conference on March 22, 2011 at 9:30 a.m. at Part 1, Room 325, 60 Centre Street, New York, New York. Plaintiff's counsel is directed to notify all remaining parties of the conference date forthwith.

The foregoing is this court's decision and order. Courtesy copies of this decision and order have been sent to counsel for the plaintiff and Mehl.

Dated: New York, New York
February 15, 2011

Martin Shulman, J.S.C.

FILED

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