At an IAS Term, Part 27 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 19th day of September 2005

P R E S E N T:

HON. ARTHUR M. SCHACK HON. ARTHUR M. SCHACK J.S.C.

Justice.

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KARINA M. RIFTIN,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 35004/01

AVIVA KRISS STARK and KRISS STARK & ASSOCIATES,

Defendants.

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The following papers numbered 1 to 6 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ and Affidavits (Affirmations) Annexed	1
Opposing Affidavits (Affirmations)	2
Reply Affidavits (Affirmations)	3
Other Papers (Memoranda of Law)	4, 5, 6

This case is illustrative of the famous line, "Heaven has no rage like love to hatred turned, nor hell a fury like a woman scorned," from Act 3 of "The Mourning Bride," a 1697 play by the

English dramatist William Congreve. In this action, a very unhappy *pro se* divorce defendant commenced a separate action for legal malpractice and related causes of action for gross negligence and breach of contract against her former husband's divorce attorney. Defendant-attorney Stark moves, pursuant to CPLR 3212 and 3211, for summary judgment and dismissal of the action due to: plaintiff's failure to set forth a *prima facie* case; and, plaintiff's allegations being substantively deficient based upon documentary evidence. Plaintiff's verified complaint and opposition papers overflow with "fury and scorn," containing numerous irrelevant and inflammatory allegations, including claims about defendant Stark having a nefarious divorce practice, as well as plaintiff's former husband being accused of multiple transgressions, including fraud, adultery, and conversion of property. The papers read as if they were taken from a "tearjerker" soap opera or a Lifetime cable channel movie. However, while plaintiff's tale of woe might make for a good script, most of it has nothing to do with plaintiff's causes of action. As will be further explained, plaintiff fails to make a *prima facie* case for legal malpractice and her other causes of action. Therefore, defendants' motion for summary judgment is granted and the case is dismissed.

Background of case

At the core of this litigation is a November 16, 1998 encounter at defendants' law office, between defendant Stark, plaintiff [Karina] and Pavel "Paul" Riftin [Paul], her soon to be former husband. Karina and Paul executed documents for their uncontested matrimonial action, and Ms. Stark, as a notary, took the signatures of Karina and Paul. The issue, after putting aside all the extraneous fury, scorn, and venom in plaintiff's papers, is whether Ms. Stark represented Karina

in her divorce action against Paul? Then, if so, did Ms. Stark commit legal malpractice?

According to plaintiff's verified complaint [exhibit A of motion], and Karina's affidavit in opposition to the motion, Karina, a native of the former Soviet Union, immigrated to the United States in 1990, at the age of 17, and married Paul in May 1995. Getting past irrelevant allegations of how Paul secreted income from the sporting goods store he opened in Brighton Beach, had an adulterous affair with his future wife, used his marriage to Karina to secure his "green card," and, abused Karina, Karina and Paul agreed to separate and divorce in 1998. On November 5, 1998, Paul signed a retainer agreement with defendant's firm, Kriss Stark & Associates [exhibit C of motion], in which he agreed to pay an engagement fee of $570.00 for the "drafting of the summons and complaint and filing of an uncontested divorce in Kings County" plus the advance payment of costs and disbursements. Paul paid the engagement fee in two cash installments on November 5, 1998 and November 11, 1998 [exhibit D of motion - cash receipts issued by defendant].

Karina testified [EBT, pp. 115-118 - exhibit E of motion and exhibit 3 of affirmation in opposition] that through the efforts of Sam Jacobs, her distant relative, Paul hired Ms. Stark to represent both Paul and Karina in their divorce and that Karina had to pay her share of the divorce legal fee, between $250 and $300, to Paul. Karina claimed to have paid an unspecified amount in cash to Paul in late October 1998 or early November 1998 [Karina EBT, p. 116]. She testified that at the November 16, 1998 meeting with Ms. Stark she never told Ms. Stark that she paid half of the legal fee to Paul [Karina EBT, pp. 147-148]. Further, she testified that she never signed a retainer agreement with Ms. Stark [Karina EBT, p. 152].

Karina testified that the November 16, 1998 meeting was the only time she had any dealings with Ms. Stark, with the following testimony from her EBT, at p. 131, line 21 - p. 132, line 15:

Q. You earlier testified that the first time you met Ms. Stark was November 16, 1998, correct?

A. Yes.

Q. Did you have any telephone communication with her before you met her?

A. No.

Q. Did you have any telephone communication with anyone at her office before you met her?

A. No.

Q. Were there any letters exchanged between you and Ms. Stark before you met her?

A. No.

Q. Can you tell me in as much detail as you can what transpired when you attended at Ms. Stark's office on November 16, 1998.

A. Ms. Stark asked me to sign papers, which I did, and that's about it.

Karina testified that she was at Ms. Stark's office for about 15 or 20 minutes [Karina EBT, p. 141], most of which was spent in a waiting area, to execute her defendant's affidavit in the matrimonial action [Karina EBT, pp. 133, 137-138; exhibit H of motion - Karina's affidavit of defendant in divorce action]. At no time did Karina ask any questions of Ms. Stark [Karina EBT,

p. 143]. At p.144 of her EBT, Karina testified that Ms. Stark never asked Karina about her income, assets or liabilities, or any other questions with respect to her financial situation. Karina then testified, in somewhat contradictory language, as to why she believed that Ms. Stark was her attorney [Karina EBT, pp. 145, line 10 - p. 146, line 21]:

Q. Did Ms. Stark say anything to you which led you to believe that she was acting as your lawyer, as well?

A. No.

Q. Did she do anything which led you to believe that she was acting as your lawyer?

A. Yes.

Q. What was that?

A. She has prepared papers for me to be signed, exactly the same way as she prepared papers for my ex-husband.

She has spoken to me and treated me exactly the same way that she treated my ex-husband.

At no time did she tell me she was not representing me and at no time did she advise me I should go get my own counsel, so on this basis I believe that she was representing me then and I believe it today.

Q. When you say she spoke to you the same way she spoke to your husband, what did you mean by that?

A. In terms of giving me the paper and telling me to sign that, she spoke to me

just normal person, as a lawyer would speak to a client.

Q. Okay. But other than asking you to sign the document, I think you have testified you don't recall what else she said to you; is that correct.

A. Correct.

Q. At any point up to the point that you left Ms. Stark's office, did your husband say anything to you which led you to believe that Ms. Stark was acting as your attorney in the divorce?

A. No.

Ms. Stark testified [EBT, p. 114 - exhibit F or motion and exhibit 1 of affirmation in opposition] that her only contact with Karina on November 16, 1998, was taking her signature as a notary, which took from about 60 to 80 seconds. In answer to several questions, Ms. Stark denied, at p. 114, making any inquiry of Karina about her assets and the grounds for the divorce. At p. 115, lines 5 - 12 of her EBT, Ms. Stark testified, ". . . I did not ask her anything. Anything, in English, means nada, nothing, no talking, no asking, no questions. I just notarized her signature. I'm speaking in English. No Russian. And you speak English. So there is nothing to be talked about because I didn't ask her anything." The following exchange took place, at p. 124, line 24 - p. 125, line 5 of Ms. Stark's EBT:

Q. Did you ask Ms. Riftin if she agreed with the grounds of the divorce before she signed this affidavit of defendant?

A. I didn't ask Ms. Riftin anything. She is not my client. I didn't ask her a single thing.

Additionally, Ms. Stark testified that it was her usual practice to have her secretary provide a disclosure statement to an opposing *pro se* defendant in an uncontested divorce action. This was done on November 16, 1998, while Karina waited for Ms. Stark to take her signature on her divorce affidavit [Stark EBT, p. 108]. Ms. Stark testified that she would not have come out to the waiting area to notarize Karina's signature if her secretary had not provided Karina with the disclosure statement [Stark EBT, p. 110]. The disclosure statement [exhibit Q of motion], states in pertinent part:

> THIS OFFICE REPRESENTS THE PLAINTIFF IN THE FILING OF AN UNCONTESTED DIVORCE. PLEASE BE ADVISED THAT IF YOU HAVE ANY QUESTIONS ASSOCIATED WITH YOUR LEGAL RIGHTS IN THIS DIVORCE OR REGARDING THE DOCUMENTS THAT YOU WILL BE SIGNING, YOU MUST HIRE AN INDEPENDENT ATTORNEY OF YOUR CHOICE THAT WILL REPRESENT YOU.
>
> ***THIS LAW FIRM DOES NOT REPRESENT YOU IN THIS DIVORCE PROCEEDING [Emphasis added].***

In various court papers in the Riftin v Riftin divorce action, Ms. Stark and her firm is referred to only as attorney for Paul [exhibit J of motion - note of issue, uncontested divorce; exhibit K of motion - certification by attorney in a matrimonial action; exhibit M of motion - affirmation of regularity by attorney; exhibit O of motion - judgment of divorce].

Further, defendant served, on April 3, 2003, a notice to admit on plaintiff [exhibit P of motion], pursuant to CPLR 3123. Defendant's verified response is dated May 19, 2003, 26 days

late. Overlooking plaintiff's late response and the issue of whether the denied items are admitted due to plaintiff's response being more than 20 days after service of a notice to admit, plaintiff, in her verified response admitted that: plaintiff did not execute a retainer agreement with defendants in the Riftin v Riftin matrimonial action; plaintiff did not possess any documents to prove that she paid one-half of defendants' fee in the matrimonial action; plaintiff did not pay any money directly to defendants in satisfaction of defendants' fee in the matrimonial matter; the "agreement" allegedly breached by defendants in plaintiff's breach of action cause of action is not a written agreement; plaintiff visited Ms. Stark's office only one time for about 15 minutes; and, plaintiff never spoke to Ms. Stark on the telephone.

Summary Judgment Standard

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. *See* Zuckerman v City of New York, 49 NY2d 557, 562 (1980); Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 (1957). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. Matter of Redemption Church of Christ v Williams, 84 AD2d 648, 649 (3rd Dept 1981); Greenberg v Manlon Realty, 43 AD2d 968, 969 (2nd Dept 1974); Winegrad v New York University Medical Center, 64 NY2d 851 (1985).

CPLR § 3212 (b) requires that for a court to grant summary judgment the court must determine if the movant's papers justify holding as a matter of law, "that the cause of action or defense has no merit." The evidence submitted in support of the movant must be viewed in the

light most favorable to the non-movant. Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co., 168 AD2d 610 (2d Dept 1990). Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law. Friends of Animals, Inc., v Associated Fur Mfrs., 46 NY2d 1065 (1979).

Discussion

In the instant case, for plaintiff to refute defendant's motion for summary judgment, plaintiff has to make a *prima facie* showing that an attorney-client relationship existed. Then, plaintiff has to prove that: the defendant attorney owed a duty to the plaintiff client; there was a wrongful act or omission by defendant which was the proximate cause of damages to the client; and, the damages can be measured. McCoy v Feinman, 99 NY2d 295 (2002); Darby & Darby, P.C. v VSI Intern., Inc., 95 NY2d 308 (2000); Raphael v Clune, White & Nelson, 201 A.D.2d 549 (2d Dept 1994); Marshall v Nacht, 172 A.D.2d 727 (2 Dept 1991); Prudential Ins. Co. of America v Dewey Ballantine, Bushby, Palmer & Wood, 170 AD2d 108 (1st Dept 1991) *affd* 80 NY2d 377 (1992).

Upon defendant's prima facie demonstration that plaintiff cannot prove that an attorney-client relationship existed, and that defendant is unable to demonstrate the essential elements of a legal malpractice action, summary judgment must be granted for plaintiff's failure to raise any triable issues of fact which might support a malpractice claim as a matter of law. Pere v St. Onge, 15 AD3d 465 (2d Dept 2005); Epifano v Schwartz, 279 AD2d 501 (2d Dept 2001); Igen, Inc. v White, 250 AD2d 463 (1st Dept 1998); Lauer v Rapp, 190 AD2d 778 (2d Dept 1993);

Mendoza v Schlossman, 87 AD2d 606 (2d Dept 1982).

In C.K. Industries Corp. v C.M. Industries Corp., 213 AD3d 846 (3rd Dept 1995), the Court, at 847-848, instructed that:

> in the absence of fraud, collusion, malicious acts or other special circumstances, an attorney is not liable to third parties not in privity for harm caused by professional malpractice *(see,* Caiati v Kimel Funding Corp., 154 AD2d 639). Such a relationship arises when a contract is formed between an attorney and client for the performance of legal services or the rendition of legal advice *(see,* Matter of Priest v Hennessy, 51 NY2d 62, 68-69; Sucese v Kirsch, 199 AD2d 718). Since formality is not essential to the formation of the contract, it is necessary to look to the words and actions of the parties to ascertain if an attorney-client relationship was formed *(see,* Kubin v Miller, 801 F Supp 1101, 1115).

Applying C.K. Industries Corp., the Appellate Division, Second Department, in De Falco v Cutaia, 236 AD2d 358 (1997), stated that, "without evidence of the existence of an attorney-client relationship, the malpractice claim cannot be sustained . . ." An attorney-client relationship may arise by "the words and actions of the parties . . . however, one party's unilateral beliefs and actions do not confer upon him or her the status of client." Solondz v Barash, 225 AD2d 996, 998 (3d Dept 1996).

In the instant case, Ms. Stark gave a disclosure statement to plaintiff specifically stating

that she didn't represent Karina. Karina admitted that there was no retainer agreement and only a brief conversation when the affidavit was notarized by Ms. Stark. Karina's unilateral belief that Ms. Stark represented her is insufficient to establish that an attorney-client relationship existed. *See* Wei Cheng Chang v Pi, 288 AD2d 378 (2d Dept 2001); Volpe v Canfield, 237 A.D.2d 282 (2d Dept 1997); Jane Street Co. v Rosenberg & Estis, P.C., 192 A.D.2d 451 (lst Dept 1993). To establish an attorney-client relationship it "is fundamental that an explicit undertaking to perform a specific task is required." Sucese v Kirsch, 199 A.D.2d 718, 719 (3rd Dept 1993).

In First Hawaiian Bank v Russell & Volkening, Inc., 861 F. Supp. 233, 238 (US Dist Ct, SD NY1994), the Court enumerated six factors to be considered in determining whether an attorney-client relationship exists. The factors are:

> 1) whether a fee arrangement was entered into or a fee paid . . . 2) whether a written contract or retainer agreement exists indicating that the attorney accepted representation . . . 3) whether there was an informal relationship whereby the attorney performed legal services gratuitously . . . 4) whether the attorney actually represented the individual in one aspect of the matter (e.g., at a deposition) . . . 5) whether the attorney excluded the individual from some aspect of a litigation in order to protect another (or a) client's interest . . .6) whether the purported client believes that the attorney was representing him and whether this belief is reasonable . . .

In applying these factors to the instant case, it is clear that defendants have demonstrated that an

attorney-client relationship never existed between Ms. Stark and Karina, and that plaintiff has been unable to present any triable issues of fact that it existed.

No fee arrangement had ever been entered into between Karina and Ms. Stark and no fee was paid by Karina directly to Stark. The only fee that was paid to Ms. Stark was the $570.00 which Paul paid as per the retainer agreement, which was signed only by Paul. Karina admitted that she never directly paid any money to Ms. Stark. Karina testified that she was simply informed by her distant relative, Sam Jacobs, who was acting as an intermediary between Karina and Paul, that she owed her husband some money for the attorney in their divorce case. She did not speak directly to Paul about the money and what purpose it was for. Further, there is no evidence of any direct payments from Karina to Ms. Stark.

Karina admitted that she never executed a retainer agreement with Ms. Stark. It is uncontested that the only written retainer agreement in existence was between Paul and Ms. Stark and signed only by Paul. The retainer agreement makes no mention of Karina, and as Ms. Stark testified, Karina was not a party to this retainer agreement at any time.

Similarly, there was no informal agreement between Karina and Ms. Stark for Ms. Stark to gratuitously perform services for Karina. Karina never contacted Ms. Stark or vice-versa to discuss any informal or gratuitous arrangement. Prior to the November 16, 1998 meeting Ms. Stark did not know Karina and Karina did not know Ms. Stark. This was not a situation of a friend or acquaintance doing a favor and providing legal services without charge. In fact, Ms. Stark only met Karina on one occasion, November 16, 1998, for a matter of minutes. Furthermore, Karina admitted that she only visited Ms. Stark's office on one occasion,

November 16, 1998, for no more than fifteen minutes.

It is clear that Ms. Stark at no time represented Karina during the litigation of the divorce matter between Karina and Paul. It is uncontroverted that the only contact between Karina and Ms. Stark was the one office visit when Ms. Stark notarized Karina's signature. Ms. Stark had no other contract of any kind with Karina, and only knew of her as the defendant in the matrimonial action for which she had been retained by Paul. Ms. Stark did not ask about Karina nor act on her behalf at any point of the proceedings. Moreover, all Court filings clearly indicate that Ms. Stark only represented Paul.

Ms. Stark never excluded Karina from any aspect of the litigation so as to protect another client's interest. Ms. Stark never excluded or included Karina from any aspect of the litigation and never considered the impact of her decisions upon Karina because Ms. Stark was not Karina's attorney, and therefore had no obligation to act on Karina's behalf. Ms. Stark did not purposely partake in activities that would harm Karina, and was bound, as all attorneys are, by the appropriate disciplinary rules and codes of conduct. There simply was no independent obligation to make any inquiry as to Karina's interest or to protect those interests.

Any statements by Karina that she believed that Ms. Stark was representing her are merely speculative and not reasonable in light of the factual circumstances. However, one can examine the actions, or lack thereof, of Karina during the pendency of the divorce proceedings to deduce the beliefs of Karina. Karina's behavior must be examined in relation to that of a reasonable litigant. Surely, when someone retains an attorney to represent his or her interests in any type of legal proceeding, that person has contact with the attorney, which may

consist of office visits, telephone conversations, conferences, exchange of letters and other written correspondence. While every legal matter is unique and involves different levels of attorney-client interaction, it is reasonable to conclude that if a person met his or her alleged attorney on only one occasion for about one minute, during which no substantive conversation took place, never had any communications with the attorney before or since, and never paid any money directly to the attorney, that person could not possibly believe that he or she is represented by the attorney. Karina never sought advice from Ms. Stark and never requested Ms. Stark's assistance with respect to this matter.

It is only now, years after the uncontested divorce proceedings have been concluded, that Karina, upset about the results of the divorce proceedings, contends that Ms. Stark was her attorney, and that Ms. Stark misled her. Ms. Stark simply acted on behalf of her client, Paul.

Therefore, no privity existed between Karina and Ms. Stark. While Karina is upset, to put it mildly, about the ultimate outcome of her divorce proceedings, this was not as a result of any wrongdoing or malpractice by Ms. Stark, her former husband's attorney.

Karina's allegations are substantively deficient and must be dismissed, based upon documentary evidence and failure to state a cause of action, pursuant to CPLR 3211 (a) (1) and (7). In O'Riley v Unique Vacations, Inc., 204 AD2d 610 (2d Dept 1994), the Court instructed that "[a] complaint is subject to dismissal pursuant to CPLR 3211 (a) (7) when the pleading is comprised of little more than factual claims which are inherently incredible or flatly contradicted by documentary evidence . . ." and in Berardino v Ochlan, 2 AD3d 556 (2d Dept 2003), the Court held, at 557, that: " [w]here documentary evidence definitely contradicts the . . . factual

allegations and conclusively disposes of the . . . claim, dismissal pursuant to CPLR 3211 (a) (1) is warranted . . ." *See* Kaliva Food Corp. v Hunts Point Co-op. Market, Inc., 244 AD2d 460 (2d Dept 1997); Rao v Verde, 222 AD2d 569 (2d Dept 1995); Kaufman & Kaufman v Hoff, 213 AD2d 197 (1st Dept 1995); Gephardt v Morgan Guar. Trust Co. of New York, 191 AD2d 229 (1st Dept 1993); Roberts v Pollack, 92 AD2d 440 (1st Dept 1983).

Plaintiff's contention, that defendant was acting as her attorney and as such an attorney-client relationship existed, is clearly refuted by the documentary evidence in this matter. The retainer agreement, the basis for an attorney-client relationship, is solely between Paul and Ms. Stark for the purpose of obtaining an uncontested divorce between Paul and Karina. Paul's name alone is listed as a party to the retainer agreement and his signature alone appears at the bottom of the retainer agreement. The only mention of Karina in the document is listing her name as the party from whom Paul is getting divorced. Plaintiff has presented nothing but bare assertions to refute the documentary evidence.

Plaintiff's remaining causes of action for gross negligence and breach of contract are redundant of the legal malpractice claim and must be dismissed. Ferdinand v Crecca & Blair, 5 AD3d 538 (2d Dept 2004); Sage Realty Corp. v Proskauer Rose LLP, 251 AD2d 35 (1st Dept 1998); Schonfeld v Thompson, 243 AD2d 343 (1st Dept 1997); Senise v Mackasek, 227 AD2d 184 (1st Dept 1996); Winegrad v Jacobs, 171 AD2d 525 (1st Dept 1991), *lv dismissed* 78 NY2d 952 (1991). Plaintiff's allegations giving rise to her claims of gross negligence and breach of contract are redundant of legal malpractice. The premise of these claims, in Karina's verified complaint, is that Ms. Stark failed to properly advise her to obtain independent counsel, failed to

advise her of her legal rights to maintenance and equitable distribution, and allowed her to consent to a divorce on the grounds of constructive abandonment. Plaintiff fails to allege any facts specifically only to her gross negligence or breach of contract claims. Rather, plaintiff merely realleges her first cause of action for legal malpractice and then alleges that Ms. Stark's actions also constitute gross negligence and breach of contract. Redundant causes of action must be dismissed as a matter of law.

Conclusion

Defendant Stark's motion, pursuant to CPLR 3212 and 3211, for summary judgment and dismissal of the action due to plaintiff's failure to set forth a *prima facie* case, and plaintiff's allegations being substantively deficient based upon documentary evidence is granted in its entirety.

This case is dismissed.

This constitutes the decision and order of the court.

HON. ARTHUR M. SCHACK
J.S.C.

HON. ARTHUR M. SCHACK J.S.C.