

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IAS PART 22
Justice

-----	Index No. 2936/08
ELVIRA A. FOLDES,	Motion
Plaintiff,	Date September 10, 2008
-against-	Motion
EDMUND M. DANE, ESQ., et al.,	Cal. No. 37
Defendants.	Motion
-----	Sequence No. 1

	<u>PAPERS</u>
	<u>NUMBERED</u>
Notice of Motion-Affidavits-Exhibits.....	1-4
Cross Motion.....	5-9
Opposition.....	10-18
Reply.....	19-21

Upon the foregoing papers it is ordered that this action is determined as follows:

Plaintiff, Elvira A. Foldes commenced this action against defendants, Edmund M. Dane, Esq. (hereinafter "Dane"), Dane & Dane, Attorneys at Law and Philip S. Milone, Esq. (hereinafter "Milone), to recover damages for legal malpractice by defendants. Plaintiff alleges that she retained the legal services of defendants Dane and Milone to represent her in a matrimonial action to obtain a divorce, and that defendants Dane and Milone undertook the representation and subsequently failed to notify the New York City Taxi & Limousine Commission (hereinafter "TLC") of an order issued by the Supreme Court, Queens County restraining and prohibiting plaintiff's then husband from selling a taxi medallion. Plaintiff alleges in the complaint, *inter alia*, that she sustained monetary damages when the plaintiff's husband allegedly sold the taxi medallion, retained all of the proceeds from the sale and left the United States. Plaintiff further alleges that upon substitution of Dane for Milone as counsel, Milone also failed to protect plaintiff's interests by failing to notify the TLC of the restraining order. Defendant Dane moves and defendant Milone separately cross-moves to dismiss the verified complaint pursuant to CPLR 3211(a)(1) and (7) for

failure to state a cause of action. Both defendants' motion and cross motion to dismiss pursuant to CPLR 3211 are hereby joined for purposes of disposition.

Defendant Dane contends that the complaint against him must be dismissed because as a matter of law he could not have been the proximate cause of any damages sustained by plaintiff. Defendant Dane maintains that it is undisputed that his representation of plaintiff terminated and defendant Milone commenced his representation of plaintiff in January 2007, and that the alleged sale of the taxi medallion which allegedly caused plaintiff damages occurred in May 2007. Defendant Dane contends that this period of four to five months demonstrates that plaintiff cannot establish that any alleged negligence on the part of Dane was the proximate cause of any alleged damages. Specifically, defendant Dane asserts that plaintiff's complaint alleges plaintiff retained defendant Milone in or about January 2007, and that thereafter, defendant Milone failed to notify the TLC of a restraining order prohibiting the sale of the taxi medallion. Dane further maintains that during the time of his representation of plaintiff, which representation terminated in late December 2006 or early January 2007, plaintiff had not sustained any damages. Dane argues that any act or omission by new counsel, who was given sufficient time to protect plaintiff's interests, would serve to break the causal connection of any of his alleged negligence to the incident which allegedly caused plaintiff damage. Additionally, defendant Dane asserts that no statutory language cited by plaintiff would have obligated the TLC to prohibit the medallion sale even if Dane had provided notice of the court order to the TLC.

Defendant Milone also cross-moves to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7). Defendant Milone argues, like defendant Dane, that there can be no negligence in failing to notify the TLC as New York City Administrative Code § 19-512, the statute upon which plaintiff relies in part, specifically refers to notification of a "judgment", and the restraining order here does not constitute a judgment.

Plaintiff opposes both defendants' motions. Plaintiff argues that due to the failure of defendants Dane and Milone to notify the TLC of the restraining order, plaintiff sustained damages as a result of the subsequent sale, by her then husband of the taxi medallion, which was the subject of the restraining order. Plaintiff argues that defendant Dane has not submitted an affidavit with his motion. Plaintiff further contends that the TLC has a policy in effect which would flag a medallion which a court order was issued affecting an interest in that medallion,

and no transfer of the medallion would have been authorized without notice to all parties named in the court order. Plaintiff further argues that any alleged failure on behalf of defendant Dane to notify the TLC was the proximate cause of the alleged damage sustained by plaintiff. As to defendant Milone, plaintiff contends that as plaintiff's successor attorney, defendant Milone should have protected plaintiff's interest in the medallion by also notifying the TLC of the restraining order.

Defendant Milone also opposes defendant Dane's motion contending that defendant Dane did not turn over all of plaintiff's file to defendant Milone; that it was defendant Dane who should have notified the TLC of the order, and that defendant Milone was merely retained by plaintiff to be a "scrivener".

A. Defendants' motion and cross motion pursuant to CPLR 3211(a)(1).

The branches of defendant Dane's motion and defendant Milone's cross motion for an order pursuant to CPLR 3211(a)(1) dismissing the complaint against defendant plaintiff Elvira A. Foldes based on documentary evidence are denied.

Neither defendant Dane nor defendant Milone have submitted any evidence to support a dismissal under this ground.

Accordingly, defendant Dane's motion and defendant Milone's cross motion to dismiss pursuant to CPLR 3211(a)(1) are denied.

B. Defendants' motion and cross motion pursuant to CPLR 3211(a)(7)

The branches of defendant Dane's motion and defendant Milone's cross motion for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against plaintiff Elvira A. Foldes for failure to state a cause of action are decided as follows:

It is well settled to dismiss a complaint for failure to state a cause of action the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true, and according the plaintiff the benefit of every possible favorable inference (see, CPLR 3211[a][7]; *Tougher Indus. v. N. Westchester Joint Water Works*, 304 AD2d 822 [2d Dept 2003];

1455 Washington Ave. Assocs. v. Rose & Kiernan, 260 AD2d 770 [3d Dept 1999]).

In an action to recover damages for 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 plaintiff to sustain actual and ascertainable damages" (*Rudolph v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007], quoting *McCoy v. Feinman*, 99 NY2d 295, 301-302 [2002]). To 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 lawyer's negligence" (*Rudolph v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d at 442). Moreover, if subsequent counsel had a sufficient opportunity to protect plaintiff's interests, then generally any negligence by prior counsel cannot be the proximate cause of plaintiff's alleged damages (*Perks v. Lauto & Garabedian*, 306 AD2d 261 [2d Dept 2003]; *Somma v. Dansker & Aspromonte Assoc.*, 843 NYS2d 577 [1st Dept 2007]; *Golden v. Cascione, Chechanover & Purcigliotti*, 286 AD2d 281 [1st Dept 2001]; *Albin v. Pearson*, 289 AD2d 272 [2d Dept 2001]; *Kozmol v. Rothenberg*, 241 AD2d 272 [2d Dept 2001]).

Here, accepting all the facts alleged in plaintiff's complaint to be true and according plaintiff the benefit of every possible favorable inference, plaintiff has failed to state a cause of action against defendant Dane, as a matter of law. Plaintiff alleges in her complaint that defendant Dane represented her in the underlying matrimonial proceeding from the beginning of the divorce proceeding until December 2006 and that in January 2007 defendant Milone substituted for defendant Dane and commenced representation of plaintiff. Plaintiff also alleges that in December 2006 while being represented by defendant Dane, plaintiff obtained an order from the Supreme Court restraining and enjoining her then husband from selling his taxi cab medallion. Plaintiff alleges that defendant Dane during his remaining time representing plaintiff in the month of December 2006 failed to notify the TLC of the restraining order. Plaintiff further alleges that in May 2007, while represented by successor counsel defendant Milone, plaintiff's husband sold his taxi cab medallion, allegedly causing plaintiff monetary damages. Plaintiff additionally alleges that defendant Milone also failed to notify the TLC of the restraining order. Assuming the failure to notify the TLC constituted negligence on behalf of defendant Dane for failure to protect the interest of plaintiff, subsequent counsel defendant Milone had five months from January 2007 to May 2007 in which to notify the TLC and possibly prevent the sale of the medallion. In the instant case, assuming notification to the TLC of the restraining order could have prevented the sale, the five months from the beginning of defendant Milone's representation of plaintiff in January 2007 until the sale of the

medallion in May 2007 was sufficient time to protect plaintiff's rights (see, *Perks v. Lauto & Garabedian*, 306 AD2d 261 [2d Dept 2003] [held two months to be a sufficient time for successor counsel to have protected plaintiff's interests]). Therefore, even if Dane had been negligent, as a matter of law, any alleged damage to plaintiff was not proximately caused by Dane's negligence, and as such dismissal of plaintiff's complaint pursuant CPLR 3211(a)(7) is warranted.

On the other hand, at this preliminary stage of litigation, plaintiff's verified complaint does state a cause of action for legal malpractice against defendant Milone, to wit: that as a result of his failing to exercise the care, skill and diligence possessed by a member of the legal profession that damage was proximately caused to plaintiff by his negligence.

Plaintiff in her verified complaint alleges the existence, during the relevant time period, of a policy at the TLC whereby if the TLC "was served with a Court Order affecting an interest in a taxi medallion, said Order was placed in the file maintained under the medallion number, and said file was 'flagged'. That thereafter, no transfer of the medallion could take place without notice being given to the parties and/or the attorneys named in said Court Order, or another subsequent Order". (§46 of the Verified Complaint). The complaint further alleges that in January 2007, defendant Milone commenced representation of plaintiff, and while representing plaintiff, Milone negligently caused damage to plaintiff when Milone failed to notify the TLC of the court order, which notification would have prevented the May 2007 sale of plaintiff's then husband's taxi cab medallion.

Plaintiff's allegation that the failure of defendant Milone to notify the TLC of the court order restraining her then husband from selling his medallion may serve as some evidence of failure to exercise the care, skill, and diligence possessed by a legal professional. Therefore, plaintiff has sufficiently alleged facts that establish a *prima facie* case of legal malpractice.

Accordingly, defendant Dane's motion pursuant to CPLR 3211(a)(7) to dismiss is hereby granted, and defendant Milone's cross motion pursuant to CPLR 3211(a)(7) is hereby denied.

This constitutes the decision and order of the court.

Dated: January 16, 2009

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Howard G. Lane, J.S.C.

