

**Jay v Gallagher**

2011 NY Slip Op 32563(U)

September 20, 2011

Supreme Court, Nassau County

Docket Number: 323/11

Judge: Karen V. Murphy

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

Short Form Order

**SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 15 NASSAU COUNTY**

**PRESENT:**

**Honorable Karen V. Murphy**  
**Justice of the Supreme Court**

\_\_\_\_\_ x

Sandra M. Jay,

Plaintiff(s),

Index No. 323/11

-against-

Motion Submitted: 7/12/11  
Motion Sequence: 001, 002, 003

James M. Gallagher, Robert Nelson, Richard  
Leshnower,

Defendant(s).

\_\_\_\_\_ x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....XXX
- Answering Papers.....
- Reply.....
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....XX

Each of the defendants moves this Court unopposed for an Order dismissing the complaint on various grounds provided in CPLR § 3211, including the grounds that the action is barred by the doctrines of res judicata and collateral estoppel.<sup>1</sup>

Plaintiff, appearing *pro se*, commenced this action against the defendants, her former attorneys, for malpractice, fraud, negligence, misrepresentation, collusion, forgery, and conflict of interest in connection with an underlying real property matter. According to the

\_\_\_\_\_

<sup>1</sup>The Court declines to treat defendant Leshnower's motion as one for summary judgment pursuant to CPLR § 3211 (c).

complaint, the defendants failed to “adequately investigate” the restructuring of plaintiff’s original mortgage, as well as engaging in other alleged acts and omissions constituting negligence. The complaint refers primarily to defendant Gallagher, and to a lesser extent, defendant Leshnower. The complaint makes no specific allegations against defendant Nelson.

According to the documentary evidence provided by defendants upon their respective motions, plaintiff secured a first mortgage for \$374,000 against a property located in Queens County, New York, in 2000. Plaintiff thereafter defaulted on that mortgage and later refinanced the first mortgage by executing a new promissory note in the principal amount of \$500,000, and an agreement extending the terms of the original mortgage and forming a single lien on the subject property. The additional \$126,000 included in the restructured loan represented the sum of the unpaid balance, principal and interest on the original note, and expenses incurred by the lender on plaintiff’s behalf. The modification occurred in 2001. At the time plaintiff entered into the modification, she was represented by counsel, but not by any of the attorneys named as defendants in this action.

In August 2002, plaintiff defaulted under the terms of the modified mortgage, and the lenders resumed prosecution of the foreclosure action in or about 2003, in Queens County.

It was not until February 24, 2004 that plaintiff retained the legal services of defendants. The retainer agreement lists each of the defendants by name, and specifies that plaintiff retained them to represent her in “a real property matter and defense of a foreclosure action.” The retainer agreement does not refer to a particular firm, nor is the retainer agreement on firm letterhead. The retainer is, however, signed by all parties, including by plaintiff.

In late 2004, plaintiff filed for bankruptcy, which was subsequently dismissed in February 2005. Plaintiff was represented by defendants, specifically defendant Gallagher, in the bankruptcy action.

Defendants also represented plaintiff in the Queens County foreclosure action (Index No. 18599/2001), culminating in a motion for summary judgment made by the lender. In a detailed Decision and Order dated September 12, 2005, the Court determined, *inter alia*, that the lender was entitled to summary judgment on the issue of liability, and the Court directed the appointment of a Referee to compute the sum due and owing to the lender (Schulman, J.).

In that Order, the Court considered plaintiff’s contentions that the lender took advantage of her, and that the lender failed to disclose the computations justifying the increased principal amount of the modified mortgage, and rejected those contentions.

In or about April 2004, plaintiff sold the subject property privately, for an amount in excess of \$800,000. Plaintiff was represented by defendant Leshnower in the sale, and the proceeds were held in escrow by Ticor Title Insurance Company.

After the Referee filed his report in late 2006, the Court granted the lender's motion for a judgment of foreclosure and sale on July 25, 2007, and modified, in part, the Referee's report of computation (Schulman, J.).

In a handwritten letter dated January 9, 2008, plaintiff advised defendant Gallagher that his services were no longer needed. In a separate handwritten letter to defendant Leshnower dated January 5, 2009, plaintiff refers to the fact that she "fired" him in "Jan 08." None of the parties has submitted any letters, or other communications, addressed to defendant Nelson regarding his representation of plaintiff.

On January 16, 2008, plaintiff, defendant Gallagher, and new counsel executed a consent to change attorney form.

On or about January 24, 2008, defendant Gallagher filed an order to show cause seeking to withdraw as plaintiff's counsel, and for a charging lien in the amount of \$44,826.23.

On or about February 19, 2008, plaintiff, who was represented by new counsel at the time, executed a Settlement Agreement with the lender and others, thereby resolving all claims between them. Paragraph 2 of that Agreement specifies that, "[t]he sum of \$44,826.23, which represents the amount of a claim by James Gallagher, Esq. ("Gallagher"), shall continue to be held in escrow by TICOR in a non-interest bearing account subject to a final and *non-appealable order* of the Court or pursuant to a signed settlement agreement between GALLAGHER, JAY and TICOR" (emphasis added).

By Decision dated May 28, 2008 and Order dated July 25, 2008, defendant Gallagher was granted charging and retaining liens against plaintiff's file in the amount of \$44,826.23, "the amount being held in escrow by the title company" (Schulman, J., Order dated May 28, 2008).<sup>2</sup>

Three years later, plaintiff commenced the instant action, sounding primarily in legal malpractice, by filing a Summons with Notice on January 7, 2011, followed by the filing of the complaint on January 27, 2011.

Each of the defendants asserts that the complaint should be dismissed based on the

---

<sup>2</sup>Gallagher's motion to withdraw as plaintiff's counsel was denied as moot.

documentary evidence (*CPLR § 3211[a][1]*), on the grounds of res judicata and collateral estoppel (*CPLR § 3211[a][5]*), and for failure to state a cause of action for legal malpractice and fraud (*CPLR § 3211 [a][7]*). Defendant Leshnower additionally asserts that the Court does not have jurisdiction of his person (*CPLR § 3211[a][8]*), and the Leshnower and Nelson defendants each also assert that the action is barred by the statute of limitations for legal malpractice actions (*CPLR §§ 214(6), 3211[a][5]*).

Based on the affidavit of service submitted to the Court by defendant Leshnower, it appears that Mr. Leshnower was not served with the Summons with Notice. The Summons with Notice was served upon a secretary at a Baldwin, New York address where defendants Gallagher and Nelson maintain their offices, not where defendant Leshnower maintains his office. Moreover, defendant Leshnower's affidavit establishes that his office has been located at an address in Hewlett, New York since 2005, and that he has never been a member of the legal corporation listed in the affidavit of service. Accordingly, the Court does not have jurisdiction of Mr. Leshnower's person, and the complaint is dismissed as to defendant Leshnower pursuant to *CPLR § 3211(a)(8)*.

Notwithstanding the foregoing determination, the Court will address the remaining grounds of defendants' motions, including the alternate grounds asserted by defendant Leshnower.

Collateral estoppel bars relitigation of an issue that has already been decided in a prior action, and where the party against whom the estoppel is being asserted had a full and fair opportunity to contest the issue in the prior proceeding (*Tydings v. Greenfield, Stein & Senior, LLP*, 11 N.Y.3d 195, 199, 897 N.E.2d 1044, 868 N.Y.S.2d 563 (2008); *Jeffreys v. Griffin*, 1 N.Y.3d 34, 801 N.E.2d 404, 769 N.Y.S.2d 184 (2003); *Schwartz v. Public Administrator*, 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 [1969]).

"Pursuant to this doctrine, a legal malpractice action generally will be barred by the defendant's 'successful prosecution of a prior action to recover fees for the same legal services which the [plaintiff] presently allege[s] were negligently performed'" (*York v. Landa*, 57 A.D.3d 980, 981, 870 N.Y.S.2d 459 (2d Dept., 2008) *citing Pirog v. Ingber*, 203 A.D.2d 348, 348-349, 609 N.Y.S.2d 675 [2d Dept., 1994]). Specifically, a charging lien entered in an underlying action against plaintiff in a legal malpractice action bars plaintiff from asserting the malpractice claim. By fixing the value of the defendant attorney's services, the court necessarily concludes that there is no malpractice. (*see Lusk v. Weinstein*, 85 A.D.3d 445, 924 N.Y.S.2d 91 (1<sup>st</sup> Dept., 2011); *Wallach v. Unger & Stutman, LLP*, 48 A.D.3d 360, 853 N.Y.S.2d 295 (2d Dept., 2008); *Afsharimehr v. Barer*, 303 A.D.2d 432, 755 N.Y.S.2d 888 (2d Dept., 2003); *Lefkowitz v. Schulte, Roth & Zabel*, 279 A.D.2d 457, 718 N.Y.S.2d 859 [2d Dept., 2001]).

At the outset, this Court notes that defendants were signatories to the retainer agreement, and that they agreed to represent plaintiff, stating in relevant part that, “we will attempt to negotiate a fair and equitable settlement” (emphasis added). The fact of the matter is that the bill for legal fees incurred by plaintiff in the real property/foreclosure action emanated from defendant Gallagher. The specifics of any payment arrangement that defendant Gallagher may had with his co-defendants is not germane to the determination of this motion. The Court views the defendants as being collectively responsible for handling the plaintiff’s defense in the underlying real property action regardless of which of them may have done more work on the underlying matter than another, or from whom the final bill emanated.

In this case, not only did the Court (Schulman, J.) award defendant Gallagher counsel fees in the amount of \$44,826.23, but the Court determined that the granting of charging and retaining liens in that amount was appropriate.

Furthermore, plaintiff agreed in writing, as part of the Settlement Agreement between herself and the lenders in the underlying foreclosure action, that defendant Gallagher’s claim for counsel fees would continue to be held in escrow by the title company, “subject to a final and non-appealable order of the Court or pursuant to a signed settlement agreement between GALLAGHER, JAY and TICOR (title company).”

Apparently, defendant Gallagher, plaintiff and the title company did not sign a settlement agreement for the counsel fees, but the Court (Schulman, J.) ordered the fees awarded, and granted the charging and retaining liens against the file in the underlying action. As the Court’s order is not able to be appealed, by agreement, and there is no evidence that an appeal ensued nonetheless, the Court’s Decision and Order in this regard invokes the doctrine of collateral estoppel with respect to plaintiff’s malpractice claims against the defendants in this action.

Accordingly, the plaintiff’s malpractice claims against defendants are dismissed pursuant to CPLR § 3211(a)(5).

The Court also finds that plaintiff’s claims of “fraud, negligence, misrepresentation, collusion, forgery, and conflict of interest” to be duplicative of her malpractice claims, to the extent that they are articulated in the complaint, and those claims are likewise dismissed pursuant to CPLR § 3211(a)(5) (see *Daniels v. Lebit*, 299 A.D.2d 310, 749 N.Y.S.2d 149 [2d Dept., 2002]).

Furthermore, and to the extent that plaintiff attempts to assert a claim that the restructured mortgage is invalid, the issues with respect thereto are barred by the doctrine of res judicata, based on the Court’s (Schulman, J.) lengthy and detailed decisions in the

underlying foreclosure action in Queens County. In its September 12, 2005 Decision and Order, the Court (Schulman, J.) found that “[d]efendant Jay has failed to produce evidence sufficient to raise a triable issue of fact relative to her defenses of usury or lack of consideration, or to her defenses of unclean hands, oppressive or unconscionable actions, or bad faith on the part of plaintiffs,” as well as that “she has failed to show that she executed the restructured loan documents and the deed while under economic duress.” Plaintiff makes the selfsame accusations in the present complaint, including the allegation that she sold her property “to satisfy a fraudulent mortgage;” thus, plaintiff’s claims with respect to the restructured mortgage are also dismissed pursuant to CPLR § 3211(a)(5).

It is noteworthy that both the restructuring of the mortgage, and the settlement of the action between plaintiff and the lender were accomplished through legal representation of plaintiff by counsel *other than* the named defendants in this action. The fact that defendants did not represent plaintiff at these pivotal stages strikes at the heart of plaintiff’s ability to state a cause of action for legal malpractice.

To establish a cause of action for legal malpractice, plaintiff must prove (1) that the defendant attorney failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community, (2) proximate cause, (3) actual damages, and (4) that the plaintiff would have been successful in the underlying action had the attorney exercised due care. (*Selletti v. Liotti*, 22 A.D.3d 739, 740, 804 N.Y.S.2d 368 [2d Dept., 2005]).

A plaintiff is required to plead specific factual allegations demonstrating that, but for the attorney’s negligence, there would have been a more favorable outcome in the underlying action (*Tortura v. Sullivan Papain Block McGrath & Cannavo, P.C.*, 21 A.D.3d 1082, 803 N.Y.S.2d 571 [2d Dept., 2005]).

In this case, plaintiff makes a series of conclusory allegations against defendants Gallagher and Leshnower, and none at all against defendant Nelson. Additionally, nothing in plaintiff’s allegations demonstrates that the outcome of the underlying action would have been, or could have been, more favorable but for the conclusory allegations of “misrepresentations” and “misstatements” of Gallagher and Leshnower.

Furthermore, while the Court recognizes that a claim for legal malpractice is still viable although there was a settlement of the underlying action, if it is alleged that the settlement was “effectively compelled” by the errors of counsel (*Tortura, supra* at 1083), the settlement in the action underlying this matter was negotiated by other counsel not named in this complaint.

Thus, the Court determines that plaintiff has also failed to state a cause of action for

legal malpractice, and the complaint is dismissed on that ground as well (*CPLR § 3211 [a](7)*).

The Court finds the assertion that plaintiff's legal malpractice claims against defendants Leshnowar and Nelson are barred by the statute of limitations unpersuasive based on the evidence presented. Nelson claims to have last rendered legal services on plaintiff's behalf in 2006, but he is a signatory to the retainer agreement along with defendant Gallagher, who plaintiff discharged on January 9, 2008. Plaintiff's letter provided as an exhibit by defendant Leshnowar refers to Leshnowar's discharge in "Jan 08," without specifying a date. Were the Court to apply the January 9, 2008 discharge date to all defendants, as it is inclined to do, plaintiff timely commenced the action for legal malpractice by filing the Summons with Notice on January 7, 2008.

As to plaintiff's claim of fraud, the Court finds that plaintiff has failed to state the claim with any specificity. In order to allege a cause of action sounding in fraud the complaint must allege the following: the defendants made a material representation; the material representation was false; the defendants knew it was false and made it with the intention of deceiving the plaintiff; the plaintiff believed the representation to be true and justifiably acted in reliance thereon; and the plaintiff is damaged as a result thereof (*Small v. Lorillard Tobacco Co., Inc.*, 94 N.Y.2d 43, 720 N.E.2d 892, 698 N.Y.S.2d 615 [1999]). CPLR §3016(b) requires that a cause of action sounding in fraud be pled with factual specificity.

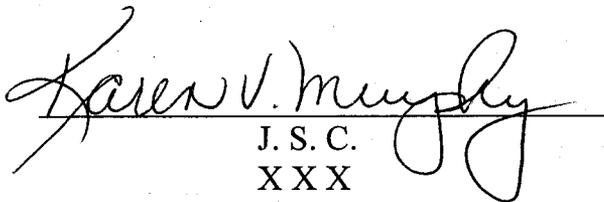
Plaintiff's repeated claims that defendant Gallagher misrepresented material facts and filed false documents that "concealed information of material facts to the court" and her insistence that the restructured mortgage is fraudulent are conclusory, general, and insufficient to state a cause of action for fraud. Thus any claim alleged in that regard is also dismissed pursuant to CPLR § 3211(a)(7).

Moreover, plaintiff's claim that defendant Gallagher knew that the \$126,000 in principal, which was added upon the restructuring of the mortgage, "couldn't be proven," and evidences the "fraud" allegedly committed by defendant Gallagher is belied by the undisputed documentary evidence presented upon the instant motions, including the Escrow Agreement executed on December 19, 2001 (Exhibit E and Exhibit H, Gallagher and Leshnowar Affirmations, respectively). The Escrow Agreement evidences the restructuring of the original mortgage to include "expenses paid by the lenders on behalf of the owner, including, but not limited to property taxes, insurance premiums, and legal fees," thereby warranting dismissal of the fraud claim pursuant to CPLR §3211(a)(1).

Defendants' motions to dismiss are granted, and the complaint is dismissed as to all defendants.

The foregoing constitutes the Order of this Court.

Dated: September 20, 2011  
Mineola, N.Y.

  
\_\_\_\_\_  
J. S. C.  
XXX

**ENTERED**  
SEP 27 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE