At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 1st day of May 2024.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS

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JOSEF ZAVULUNOV

Plaintiff(s)

-against-

LAW OFFICES OF YURIY PRAKHIN, P.C. AND YURIY PRAKHIN, ESQ

Defendant(s)

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Index No: 529217/2022
Motion Seq. 2-3

ORDER

The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Affirmation in Support/Affidavits Annexed Exhibits Annexed.....	19-26;
Affirmation in Opposition/Affidavits Annexed/Exhibits Annexed.....	41-42
Notice of Motion/Affirmation in Support/Affidavits Annexed Exhibits Annexed/Reply.....	34-35; 60-61
Affirmation in Opposition/Affidavits Annexed/Exhibits Annexed.....	52-58

In this action, Josef Zavulunov ("Plaintiff") moves ("Motion Seq. 2) for default judgment against The Law Offices of Yuriy Prakhin, P.C., ("Defendant Firm") and Yuriy Prakhin, Esq., ("Individual Defendant") (Collectively "Defendants") pursuant to CPLR 3215(a)(b) or in the alternative to have this matter set down for an inquest, assessing damages and attorney's fees for Plaintiff's counsel. Defendants have opposed the motion. Additionally, Defendants move (Motion Seq. 3) for an order dismissing Plaintiff's complaint pursuant to CPLR 3211(a)(1) and (7) or in the alternative to disqualify Plaintiff's counsel. Plaintiff has opposed the motion.

Plaintiff filed this instant action against Defendants on October 7, 2022, asserting causes of action for legal malpractice, lack of informed consent, and breach of Judiciary Law 487. Defendants were served the summons and complaint on October 21, 2022, by delivery of copies of the documents upon an employee at the Defendant Firm who was of suitable age and discretion and a copy was mailed to Defendants' place of business. On November 29, 2022, Plaintiff also served Defendants via the Secretary of the State of New York. On December 9, 2022, the parties stipulated to extend Defendants' time to respond to the complaint up to and including December 31, 2022. On December 31, 2022, Defendants filed a motion to dismiss, that was returnable on May 10, 2023. On the return date, Defendants' motion was marked off for failure to appear. On July 21, 2023, Plaintiff filed his motion for default judgment and Defendants refiled their motion to dismiss.

In support of his motion, Plaintiff argues that Defendants have willfully and deliberately failed to defend against claims asserted against them and thus have defaulted in this action. Plaintiff states that the motion was marked off the calendar, Defendants have not interposed an answer or sought an additional extension of time to respond and that their default has been intentional and willful to prejudice or hinder Plaintiff's ability to litigate his case. Additionally, Plaintiff argues that Defendants second motion to dismiss is improper pursuant to CPLR 3211(e), which prohibits duplicative and repetitive filings of dismissal motions.

In opposition, Defendants argue that they have not abandoned this action and that they have a reasonable excuse and meritorious defense for their default. Defendants state that they misunderstood the NYSCEF Court Notice that was posted prior to the return date for the motion, believing that the return date would serve as the date in which the matter would be fully submitted and that oral arguments would be scheduled for a future date. Defendants' counsel states that after she realized her error, she immediately refiled the motion to dismiss and made multiple attempts to contact Plaintiff's counsel to resolve the matter. Defendants' counsel asserts that there has not been any willful or deliberate failure on their part to make an appearance and that as soon as their firm was retained, they prepared and filed their motion to dismiss, and that they always had the intention of fully litigating this matter. Additionally, Defendants' counsel contends that they have a meritorious defense because based on their submitted documentary evidence, their firm was retained before the Pager firm; however, the firm was never informed that Pager was retained to take over the case. Defendants' counsel states that during their retention, rather than commence a lawsuit, they contacted the insurance company that denied Plaintiff's claim and entered into settlement negotiations. In the interim, however, the Pager Firm commenced an action in Kings County Supreme Court on October 29, 2018, under Index: 521783/2018.[1] Defendants contend that they had Plaintiff's permission and ultimately settled the matter with Plaintiff's consent, and that Plaintiff signed a Settlement Agreement and Release form on May 4, 2020.

Defendants also argue that Plaintiff's complaint fails to allege necessary facts that would establish that Plaintiff was deceived and/or did not give informed consent nor did he establish that "but for" Defendants' alleged negligence, that he would have received a more favorable outcome. Defendants assert that Plaintiff will not be prejudiced by restoring their motion to the calendar because the action is still in the very early stages of litigation, that discovery has not begun nor has there been a preliminary conference. Defendants claim that they have tried multiple times to contact Plaintiff's attorney, but he is unwilling to return their phone calls, or respond to letters.

[1] In his complaint, Plaintiff alleges in part that Defendants did not serve the Pager Firm with "consent to change attorney" forms, nor did they serve a notification that the Pager Firm had been retained to prosecute the underlying action under the index: 521783/2018, on behalf of the Plaintiff.

CPLR 3211(e) provides, in relevant part, that at any time before service of a responsive pleading is required, a party may move to dismiss a pleading on one or more grounds set forth in CPLR 3211(a), and that no more than one such motion shall be permitted (*Bailey v Peerstate Equity Fund, L.P.*, 126 AD3d 738 [2d Dept 2015]). Accordingly, this "single motion rule," generally prohibits parties from making successive motions to dismiss a pleading" pursuant to CPLR 3211(a) as well as subsequent motions to dismiss that pleading on alternate grounds (*Id.*; *see* CPLR 3211 [e]; *Ramos v. City of New York,* 51 AD3d 753 [2d Dept. 2008]; *see* also *McLearn v. Cowen & Co.,* 60 NY2d 686 [1983]; *Reilly v. Prentice,* 141 AD2d 520 [2d Dept. 1988]; *Ultramar Energy v. Chase Manhattan Bank,* 191 AD2d 86 [1st Dept. 1993]). However, the failure of counsel to appear in support of an initial motion which resulted in its being marked off the calendar does not bar a second motion because marking a matter off the calendar does not operate to establish the law of the case or dismiss it on its merits (*Lewis v New York City Tr. Auth.*, 100 AD2d 896, 869 [2d Dept 1984]; citing *Aridas v Caserta*, 41 NY2d 1059 [1977]; *Bernard-Moses v Chick-Fil-A, Inc.*, 81 Misc. 3d 1241(A) [Sup Ct. Kings County 2024; *Pallotta v Saltru Assoc. Joint Venture, N.Y.*, 32 Misc 3d 1208(A) [Sup Ct Kings County 2011]).

To successfully oppose a motion for leave to enter a default judgment based on failure to appear or timely serve an answer, the defendants are required to demonstrate a reasonable excuse for their delay and the existence of a potentially meritorious defense to the action (*Cartessa Aesthetics, LLC v Demko*, 217 AD3d 821 [2d Dept. 2023]; *Sharestates Investment, LLC v Hercules*, 166 AD3d 700 [2d Dept. 2018]). In determining whether a reasonable excuse was demonstrated, a court should consider all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits (*Id.*; *Nowakowski v. Stages,* 179 AD3d 822 [2d Dept. 2020]; *Fried v Jacob Holding, Inc.*, 110 AD3d 56 [2d Dept. 2013] quoting *Harcztark v Drive Variety, Inc.*, 21 AD3d 876 [2d Dept. 2005]). The determination of what constitutes a reasonable excuse lies within the discretions of the court (*Jing Shan Chen v R & K 51 Realty, Inc.,* 148 A.D.3d 689 [2d Dept. 2017]; *New York Hosp. Medical Center of Queens v Nationwide Mut. Ins. Co.,* 120 A.D.3d 1322 [2d Dept. 2014]).

Law office failure may qualify as a reasonable excuse for a party's default if the claim of such failure is supported by a credible and detailed explanation of the default (*Columbus v Kourtei*, 218 AD3d 531 [2d Dept. 2023]; *Sauteanu v BJ's Wholesale Club, Inc.*, 210 AD3d 922 [2d Dept. 2022]; quoting *Al Maruf v E.B. Management Properties, LLC*, 181 AD3d 670 [2d Dept. 2020]). Where law office failure is the excuse, it must be explained by the attorney in detail (*Diamond v Leone*, 173 AD3d 686, [2nd Dept. 2019]; *Cornwall Warehousing, Inc. v Lerner*, 171 AD3d 540 [1st Dept. 2019]). The law office failure defense underpinning vacatur motions must be supported by evidence that is direct and proffered by a person with actual knowledge of the circumstances (*Deutsche Bank Natl. Trust Co. v Fishbein*, 179 AD3d

768 [2nd Dept. 2020]; *Becker v Babylon Transit Inc.*, 90 AD2d 815 [2d Dept. 1982]; *Tandy Computer Leasing v Video X Home Lib.*, 124 AD2d 530 [1st Dept. 1986]). Conclusory and unsubstantiated allegations, with no affidavit from any person with actual knowledge of the failure, are inadequate (*Fishbein* at 770; see also *Fekete v Camp Skwere,* 16 AD3d 544 [2d Dept. 2005]; see also *Kamil El–Deiry & Assoc. CPA, PLLC v. Excellent Home Care Services, LLC*, 208 AD3d [2d Dept. 2022]; *Peacock v Kalikow,* 239 AD2d 188 [1st Dept. 1997]). Similarly, general allegations of neglect will not suffice (*Sauteanu* at 924). In contrast, a motion supported by an affirmation of former counsel, with direct knowledge of the failure, may be adequate where the claim is supported by a "detailed and credible" explanation of the default at issue (see *210 East 60 St., LLC v Rahman*, 178 AD3d 888 [2d Dept. 2019]).

Here, Defendants initial motion to dismiss was marked off the calendar for failing to appear, it was not dismissed on the merits nor was a default order entered. While Defendants did not move to restore the action to the trial calendar, in opposing Plaintiff's motion for leave to enter a default judgment, Defendants have proffered affirmations by counselors at Defendant Firm, who state they are familiar with the facts herein and have sufficiently provided a reasonable excuse and meritorious defense for its default. Additionally, service of a notice of motion to dismiss a complaint pursuant to CPLR 3211(a) extends a defendant's time to answer the complaint (CPLR 3211[f]). Plaintiff has not established prejudice by having this matter restored, and public policy would favor resolving this case on the merits.

Accordingly, Plaintiff's motion for default judgment is denied and this issue of Defendants' motion to dismiss pursuant to CPLR 3211 will be decided on the merits.

Upon a motion to dismiss pursuant to CPLR 3211 (a)(1), dismissal is warranted where documentary evidence refutes plaintiff's factual allegations and establishes a defense as a matter of law (*Leon v Martinez,* 84 N.Y.2d 83 88 [1994]; *Goshum v Mutual Life Ins. Co. of New York,* 98 NY2d 314 [2002]; *Brio v Roth,* 121 A.D.3d 733 [2d Dept. 2014]). To constitute documentary evidence, the evidence must be "unambiguous, authentic, and undeniable," such as judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable (*Granada Condominium III Assn. v. Palomino*, 78 A.D.3d 996 [2d Dept. 2010]; *Prott v. Lewin & Baglio, LLP*, 150 AD3d 908 [2d Dept 2017]). An affidavit is not documentary evidence because its contents can be controverted by other evidence, such as another affidavit (*Xu v Van Zqienen,* 212 A.D.3d 872 [2d Dept. 2023]; *Phillips v Taco Bell Corp.,* 152 A.D.3d 806 [2d Dept. 2017]; *Fontanetta v John Doe 1,* 73 A.D.3d 78 [2d Dept. 2010]). Similarly, neither deposition testimony nor letters are considered documentary evidence within the intended meaning of CPLR 3211 (a)(1) (*Cives Corp. v George A. Fuller Co., Inc.,* 97 A.D.3d 713 [2d Dept. 2012]; *Integrated Const. Services, Inc., v Scottsdale Ins. Co.,* 82 A.D.3d 1160 [2d Dept. 2011]).

Where documentary evidence contradicts the allegations of the complaint, the court need not assume the truthfulness of the pleaded allegations (*West Branch Conservation Assn, Inc., v County of Rockland,* 227 A.D.2d 547 [2d Dept. 1996]; *Greene v Doral Conference Center Associates,* 18 A.D.3d 429 [2d Dept. 2005]); *Penato v. George*, 52 A.D.2d 939, 941 [2d Dept 1976]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*Connaughton v Chipotle Mexican Grill, Inc.,* 29 N.Y.3d 137 [2017]; *Duncan v Emeral Expositions LLC,* 186 A.D.3d 1321 [2d Dept. 2020]; *Dinerman v Jewish Bd. of Family & Children's Services Inc.,* 55 A.D.3d 530 [2d Dept. 2008]; *Nisari v. Ramjohn*, 85 A.D.3d 987, 989 [2d Dept 2011]). The defendant bears the burden of demonstrating that the proffered evidence conclusively refutes plaintiff's factual allegations (*Guggenheimer v Ginzburg,* 43 NY2d 268 [1977]; *Kolchins v Evolution Mkts. Inc.,* 31 NY3d 100 [2018]; *Goshen v Mutual Life Ins. Co. of NY,* 98 NY2D 314 [2002]).

A legal malpractice defendant seeking dismissal pursuant to CPLR 3211 (a)(1) must tender documentary evidence conclusively establishing that the scope of its representation did not include matters relating to the alleged malpractice (Id. at 39; Zhang v Lau, 210 A.D3d 829 [2d Dept. 2022]; see also *Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman, & Dicker, LLC*, 38 A.D.3d 34 [2d Dept. 2006]).

In his complaint, Plaintiff alleges that he initially retained the Pager Firm for the purposes of commencing an action against the nonparty defendants AK1 Group Inc. and Walansky, which the Pager firm commenced on October 30, 2018. Plaintiff claims that while he did not discharge the Pager Firm at any point in the litigation, at some point he also retained The Prakhin Firm to take over the matter. Plaintiff states that as the de facto attorney, the Prakhin Firm knew or should have known that the Plaintiff was also represented by the Pager Firm in the underlying action under the index: 521783/2018. However, in his moving papers, Plaintiff has failed to proffer admissible evidence establishing that the Prakhin Firm was aware of the Pager Firm's representation or that he involuntarily entered into the settlement agreement. The record demonstrates contradictory contentions as to when the parties were retained, and Plaintiff has not provided his retainer agreement or documentation regarding the Pager Firm's representation. Additionally, while Defendants have submitted documentary evidence including the July 24, 2017, Retainer Agreement and the May 4, 2020, Settlement and Release Agreement signed by Plaintiff, to refute the factual claims regarding the scope of their representation and when their firm was retained, the documentary evidence does not utterly refute the Plaintiff's allegations that Defendants were negligent in settling the underlying matter.

Accordingly, that branch of Defendants motion to dismiss pursuant to CPLR 3211(a)(1) is denied.

When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*Leon* at 88; *Skefalidis v China Pagoda NY, Inc.,* 210 A.D. 3d 925 [2d Dept. 2022]); *Oluwo v Sutton,* 206 A.D.3d

750 [2d Dept. 2022]; *Sokol v Leader,* 74 A.D.3d 1180 [2d Dept. 2010]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (*Eskridge v Diocese of Brooklyn,* 210 A.D.3d 1056 [2d Dept. 2022]; *Zurich American Insurance Company v City of New York,* 176 A.D.3d 1145 [2d Dept. 2019]; *EBC I Inc. v Goldman, Sachs & Co.,* 5 NY3d [2005]).

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the burden never shifts to the non-moving party to rebut a defense asserted by the moving party (*Sokol* at 1181; *Rovello v Orofino Realty Co. Inc.,* 40 NY2d 970 [1976]). CPLR 3211 allows a plaintiff to submit affidavits, but it does not oblige him or her to do so on penalty of dismissal (*Id.; Sokol* at 1181). Affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint and such affidavits are not to be examined for the purpose of determining whether there is evidentiary support for the pleading (*Id.; Rovello* at 635; *Nonon* at 827). Thus, a plaintiff will not be penalized because he has not made an evidentiary showing in support of its complaint.

Unlike on a motion for summary judgment, where the court searches the record and assesses the sufficiency of evidence, on a motion to dismiss, the court merely examines the adequacy of the pleadings (*Davis v. Boeheim,* 24 NY3d 262, 268 [2014]). The appropriate test of the sufficiency of a pleading is whether such pleading gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments (*V. Groppa Pools, Inc. v. Massello*, 106 AD3d 722, 723 [2d Dept 2013]; *Moore v Johnson*, 147 AD2d 621 [2d Dept 1989]).

To state a cause of action alleging legal malpractice, a plaintiff must allege 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 the plaintiff to sustain actual and ascertainable damages (*Rudolf v Shayne, Dachs, Stanisci, Corker, & Sauer*, 8 N.Y.3d 438 [2007]; *Philip S. Schwartzman, Inc. v Pliskin, Rubano, Baum, & Vitulli*, 215 A.D.3d 699 [2d Dept. 2023]; *Parklex Associates v Flemming Zulack Williamson Zauderer, LLP*, 118 A.D.3d 698 [2d Dept. 2014]). A cause of action for legal malpractice cannot be stated in the absence of an attorney-client relationship (*Windsor Metal Fabrications, Ltd. v Scott & Schechtman,* 286 A.D.2d 732 [2d Dept. 2001]). Generally, to plead causation, the plaintiff must allege that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the attorney's negligence (*Rudolf* at 442; *Philip S. Schwartzman, Inc.* at 703; *Parklex Associates* at 970). Furthermore, the claimed "actual and ascertainable damages" have to be clearly calculable (see *Rudolph; Gallet, Dreyer & Berkey, LLP v Basile,* 141 A.D.3d 405 [1st Dept. 2016]). Conclusory allegations of damages or injuries predicated on speculation cannot suffice for a malpractice action (*Philip S. Schwartzman, Inc.* at 704; *Katsoris v Bodnar & Milone, LLP*, 186 A.D.3d 1504 [2d Dept. 2020*]; Gall v Colon-Sylvain*, 151 A.D.3d 698 [2d Dept. 2017]).

Here, Plaintiff has failed to plead a viable cause of action for legal malpractice in that Plaintiff has not sufficiently pled that Defendants failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the breach of this duty proximately caused the Plaintiffs to sustain actual and ascertainable damages. In his complaint, Plaintiff states in a conclusory fashion that but for the Defendant Firm's negligent advice, that he would not have agreed to the settlement and would have proceeded with litigation and that he ultimately "gave up what should have been reasonable compensation, and which should have been substantially in excess of the agreed upon $4,000.00." However, such allegations are insufficient to establish actual and ascertainable damages necessary to plead a cause of action for legal malpractice.

Accordingly, that branch of Defendants' motion to dismiss Plaintiff's cause of action for legal malpractice is granted.

A claim based on lack of informed consent, is governed by Public Health Law 2805-d. A cause of action alleging lack of informed consent requires an affirmative violation of physical integrity in the absence of informed consent (*see* Public Health Law 2805-d[1][3]; *S.W. v Catskill Regional Med. Ctr.*, 211 AD3d 890, 891 [2d Dept 2022]; *Pedone v. Thippeswamy,* 309 AD2d 792 [2d Dept. 2003]; see also *Foote v Rajadhyax*, 268 AD2d 745, 745 [3d Dept 2000]). For a cause of action therefor it must ... be established that a reasonably prudent person in the patient's position would not have undergone the treatment or diagnosis if he had been fully informed (*Hecht v Kaplan*, 221 Add 100 [2d Dept. 1996]). A claim for lack of informed consent does not apply where, as here, Plaintiff alleges that counsel negligently advised him into accepting a settlement agreement, and parties have not proffered case law to support a common law cause of action for lack of informed consent in instances of legal malpractice.

Accordingly, that branch of Defendants' motion to dismiss Plaintiff's cause of action for lack of informed consent is granted.

Under Judiciary Law 487(1), an attorney who is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party is liable to the injured party for treble damages (*Izmirligil v Steven J. Baum, P.C.*, 180 AD3d 767, (2d Dept. 2020). A violation of Judiciary Law 487 requires an intent to deceive, whereas a legal malpractice claim is based on negligent conduct (*Moormann v. Perini & Hoerger,* 65 AD3d 1106 [2d Dept 2009]). To plead a viable cause of action, plaintiff must sufficiently allege that he or she suffered an injury proximately caused by any alleged deceit or collusion on the part of the defendants.

Here, accepting the Plaintiff's allegations as true and giving the Plaintiff the benefit of every possible favorable inference, the complaint adequately states a cause of action to recover damages for violation of Judiciary Law 487.

Accordingly, that branch of Defendants' motion to dismiss Plaintiff's cause of action for violation of Judiciary Law 487(1) is denied.

Accordingly, it is hereby,

ORDERED, that Plaintiff's motion (Motion Seq. 2) for default judgment is denied, and it is further,

ORDERED, that Defendants' motion (Motion Seq. 3) is granted to the extent that Plaintiff's causes of action for legal malpractice and lack of informed consent are dismissed.

This constitutes the decision and order of the court.

Hon. Ingrid Joseph J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice