[* 1]

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

PRESENT: HON. JOAN A. MADDEN J.S.C. Justice PART 11

BERNADETTE GOTAY

- v -

DAVID BREITBART.

INDEX NO. 102210/02

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO. 001

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

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

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: Sept 10, 2003

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

----------X

BERNADETTE GOTAY, INDEX NO. 102210/02

Plaintiff,

-against-

DAVID BREITBART, MICHAEL HANDWERKER, STEVE MARCHELOS, HANDWERKER, HONSCHKE, and MARCHELOS (A Partnership), HANDWERKER, HONSCHKE, MARCHELOS & GAYNER, MARK HANKIN, ROSS, SUCHOFF, HANKIN, MAIDENBAUM, HANDWERKER & MAZEL (A Professional Corporation), NEIL HONSCHKE, BRIAN K. SUCHOFF, JEFFREY A. MAIDENBAUM, GEOFFREY R. MAZEL and CHARLES GAYNER,

Defendants.

----------X

JOAN A. MADDEN, J.:

In this legal malpractice action, defendants Ross, Suchoff, Hankin, Maidenbaum, Handwerker & Mazel (the "Ross Suchoff firm"), Michael Handwerker, Mark Hankin, Brian **K.** Suchoff, Jeffrey A. Maidenbaum and Geoffrey R. Mazel (collectively, "the Ross Suchoff defendants") move for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint as against them on the grounds of failure to state a cause of action and the statute of limitations.

Defendants Steve Marchelos, Handwerker, Honschke and Marchelos, and Handwerker, Honschke, Marchelos and Gayner (collectively, "the Handwerker Honschke law firm defendants") cross-move for an order pursuant to CPLR 3211(a)(7) dismissing the legal malpractice claims as barred by the statute of limitation and for failure to state a cause of action, and dismissing the Judiciary Law §487 claim for failure to state a cause of action.

Defendant David Breitbart cross-moves for an order pursuant to CPLR 3211(a)(7) dismissing the complaint as against him on the ground that the complaint fails to state a cause of action; he also adopts and incorporates the grounds for dismissal presented in the co-defendants' motion and cross-motion.

I. Background

This legal malpractice action is based upon an underlying medical malpractice action in which plaintiff alleged that during the course of her delivery and birth on August 31, 1977, defendant Bronx Municipal Hospital Center deviated from good and accepted medical practice, causing plaintiff to suffer Erb's Palsy. In October 1977, plaintiff's parents retained the law firm of Kaufman & Siegel, P.C. to represent them in the medical malpractice action.[1] Plaintiff asserts that a Notice of Claim was filed with New York City Health and Hospital Corporation ("HHC"), but has not submitted a copy of the notice of claim, nor proof of its service.

In or about April 1978, Kaufman & Siegel, P.C. commenced the medical malpractice action in Supreme Court, Bronx County, on behalf of plaintiff, then known as Bernadette Rodriguez, and her mother Eva Rodriguez, by serving the summons and complaint on defendant HHC.[2] HHC served an answer on or about June 7, 1978. Sometime in 1980, Kaufman & Siegel, P.C. commenced a separate action against the Albert Einstein Hospital and the Albert Einstein College of Medicine of Yeshiva University; these defendants served their answer on or about

---

[1] The law firm of Kaufman & Siegel, P.C. is allegedly now defunct.

[2] Although plaintiff has not submitted copies of the affidavits of service, she submits a copy of the Answer and Demand for Bill of Particulars that was served by defendant HHC; the answer was verified on June 7, 1978. Plaintiff also submits a copy of the answer served by defendants Albert Einstein Hospital and Albert Einstein College of Medicine of Yeshiva University, which was verified on March 17, 1980.

March 17, 1980.[3]

On September 18, 1981, Mark J. Aaronson of the law firm of Bower & Gardner, wrote to plaintiff's counsel, advising that they would be representing defendants HHC and the Hospital of the Albert Einstein College of Medicine. The letter stated that the action against the Hospital of the Albert Einstein College of Medicine "has no basis in fact" and requested that "[i]n an effort to move this case off dead center," plaintiff should provide a bill of particulars so that depositions could go then forward.

It is unclear, what if anything occurred next, as the record contains no documents or explanation as to the progress of the case following that September 1981 letter from defendants' counsel, up through November 16, 1993, when plaintiff's mother signed a Consent to Change Attorney form substituting defendant David Breitbart as the attorney representing them in the medical malpractice action. The Breitbart firm subsequently prepared and served a Bill of Particulars on plaintiffs' behalf, which is dated January 21, 1994. Defendant Michael Handwerker, Esq. was apparently an associate of the Breitbart law firm at that time and worked on plaintiff's case.

In or about June 1994, Michael Handwerker left the Breitbart firm, and together with two other Brietbart associates formed their own firm, defendant Handwerker, Honschke and Marchelos. On July 13, 1994, Michael Handwerker wrote to defendants' counsel (on the

[3]It appears that plaintiff commenced the separate action against Albert Einstein Hospital and Albert Einstein College of Medicine of Yeshiva University, in response to the Rider that HHC annexed to its answer. The Rider stated as follows: "That the defendant, The City of New York, owns, and the defendant Health and Hospital Corporation maintains and controls Bronx Municipal and Albert Einstein Medical Coll. affiliated hospital operates aforesaid hospital pursuant to an affiliation agreement with the defendant, New York City Health and Hospitals Corporation."

letterhead of Handwerker Honschke & Marchelos), advising that he was no longer associated with the Brietbart firm and that the Handwerker Honschke firm was now the attorney of record for plaintiffs. On July 13, 1994, Mr. Handwerker also wrote to plaintiff , stating "[a]s you are already aware, I have terminated my relationship with the Law Office of David Brietbart. The enclosed form is a mere formality in order to officially notify the court of the status of your representation. Please sign the enclosed form where indicated by the "X" and return is [sic] to me in the self-address [sic] envelope provided, as soon as possible."

On October 20, 1995, the Handwerker Honschke firm (by defendant Steve Marchelos)[4] wrote to Bronx Municipal Hospital Center, and explained that they were representing plaintiff in the medical malpractice action and requested all of her medical records, and included authorizations executed by plaintiff's mother, dated October 20, 1995. On November 28, 1995, the Handwerker Honschke firm wrote to the Hospital for Joint Diseases Orthopaedic Institute, enclosing payment for the duplication of plaintiff's x-ray films.

In or about November 1998, the Handwerker Honschke firm was apparently dissolved. Defendant Mark Hankin, a partner in the Ross Suchoff firm, submits an affidavit stating that in December 1998, defendant Michael Handwerker agreed to join his firm as a partner, commencing in January 1999. Mi. Hankin explains that "[i]n early January 1999, I reviewed certain files on behalf of my Firm that co-defendant Michael Handwerker proposed to bring from his prior firm," and among those files was plaintiff's medical malpractice action. Mr. Hankin states that when he discovered that an index number had not been purchased in plaintiff's medical malpractice action,

[4]At this time, the Handwerker firm was now known as Handwerker, Honschke, Marchelos & Gayner.

"the Ross Suchoff Firm decided not to undertake the representation of the plaintiff."

According to **Mr.** Hankin, he met with plaintiff and her father on January 28, 1999, "to advise of the situation" and his firm's decision not to undertake her representation. On February **22,** 1999, Hankin followed-up with a letter to plaintiff and her father, stating that "[a]s we discussed at our meeting on January 28, 1999 and on the phone on February 9, 1999, a review of the file indicates that your initial counsel, Kaufman & Siegel, P.C., never purchased a index number." Hankin explained that in 1992, the procedural rules were changed and New York "became a 'file and serve' state where you were required to purchase an index number before service of the papers upon defendants." **Mr.** Hankin states that plaintiff's initial attorneys "should have obtained an index number" during the one-year "window period." He also advised that since an index number had not been purchased and more than a year had passed since the statute was enacted, "the claims previously instituted are now dismissed. Our review of the case law indicates that based upon the passage of time, any attempt to purchase an index number now would be futile."

On January 31, 2002, plaintiff commenced the instant action seeking $2 million in compensatory damages and treble damages. The complaint asserts eight causes of action for legal malpractice against the various law firms and individual attorneys, and a ninth cause of action for treble damages due to defendants' "professional misconduct" based on an unspecified provision of the Judiciary Law. Specifically, plaintiff alleges that the defendant attorneys and law firms were negligent in failing to monitor the status of her medical malpractice action; misleading her and her parents into believing that there was a valid pending action when defendants knew or should have known that no index number had been purchased and that the case had been

dismissed; failing to advise plaintiff and her parents that their initial attorney, Kaufman & Siegel, P.C., had committed legal malpractice by neglecting to purchase an index number for the medical malpractice action; and failing to advise plaintiff and her parents of their right to bring a legal malpractice action against Kaufman & Siegel, P.C. The complaint further alleges that as result of defendants' negligence, "plaintiff has been prejudiced by the passage of time, in that the facts and circumstances surrounding the medical malpractice of 'The Hospital' have been obscured. . . .and have placed the plaintiff in a position where the plaintiff may not be able to fully explore and set forth acts of negligence of 'The Hospital.'"

Defendants are now moving and cross-moving to dismiss the instant action, asserting that plaintiff's claims for legal malpractice are barred by the statute of limitations, and that plaintiff has failed to state a cause of action for legal malpractice and a cause of action for violation of Judiciary Law §487.

At oral argument on the motions, the Court agreed to hold defendants' motion and cross-motions in abeyance, to await a determination by the Hon. Douglas E. McKeon, Supreme Court, Bronx County, as to plaintiff's motion for an order "reactivating" the underlying medical malpractice action. In a Memorandum Decision filed April 10, 2003, Justice McKeon denied plaintiff's motion and granted defendant HHC's cross-motion to dismiss. Justice McKeon concluded: "While this court may have broad discretion with respect to restoring a matter which may have been dismissed, or apparently otherwise abandoned, it cannot condone 25 years of neglect in the prosecution of this action. Plaintiff has failed to offer any reasonable excuse for this neglect, or to explain how the restoration of her action after these many years would not prejudice the defendant."

II. Legal Malpractice

It is well settled that an action for legal malpractice requires proof of the attorney's negligence, a showing that the attorney's negligence was the proximate cause of the plaintiff's loss or injury, and evidence that plaintiff suffered actual damages as a direct result of the attorney's actions. Russo v. Feder Kaszowitz, Isaacson, Weber, Skala & Bass, LLP, 301 AD2d 63, 67 (1st Dept 2002); Pellegrino v File, 291 AD2d 60, 63 (1st Dept), lv app den, 98 NY2d 606 (2002); Between The Bread Realty Corp. v. Salans Hertzfeld Heilbronn Christy & Viener, 290 AD2d 380 (1st Dept), lv app den 98 NY2d 603 (2002); Franklin v. Winard, 199 AD2d 220 (1st Dept 1993); Prudential Insurance Co. v. Dewey Ballantine, Bushby, Palmer & Wood, 170 AD2d 108, 114 (1st Dept 1991), aff'd, 80 NY2d 377 (1992). "In order to survive dismissal, the complaint must show that but for counsel's alleged malpractice, the plaintiff would not have sustained some actual ascertainable damages, so that a failure to establish proximate cause requires dismissal regardless whether negligence is established" (citations omitted). Pellegrino v File, supra at 63. "Notwithstanding counsel's purported negligence, the client must demonstrate his or her own likelihood of success; absent such a showing, counsel's conduct is not the proximate cause of the injury." Russo v. Feder Kaszowitz, Isaacson, Weber, Skala & Bass, LLP, supra at 67.

Noticeable absent from plaintiff's complaint are any factual allegations that "but for" the alleged negligence of the defendant attorneys, she would have prevailed in the underlying medical malpractice action. The only allegations in the complaint which make any reference at all to plaintiff's likelihood of success in the medical malpractice action are the allegations that as result of defendants' negligence, plaintiff has been prejudiced "by the passage of time, in that the facts

and circumstances surrounding the medical malpractice of 'The Hospital' have been obscured" and plaintiff "may not be able to fully explore and set forth [the Hospital's] acts of negligence." These allegations do not suffice to satisfy the "but for" standard required for the proximate cause element of legal malpractice, as plaintiff does not allege that she would have prevailed in the medical malpractice action.

Additionally, in opposing the summary judgment motion by the Ross Suchoff defendants, plaintiff has failed to lay bare any proof, in admissible form, showing or tending to show a prima facie claim of medical malpractice. See Deleon v. Sonin & Genis, 303 AD2d 291,293 (1st Dept 2003); Tanel v Kreitzer & Vogelman, 293 AD2d 420 (1st Dept 2002). Although plaintiff submitted a physician's affidavit of merit in support of her motion before Justice McKeon, for an order "reactivating" the medical malpractice action, plaintiff has not submitted that or any other affidavit in response to the instant motion and cross-motions. In any event, in his decision, Justice McKeon notes that "[p]laintiff has also offered an affidavit by a physician dated July 31,2002, who claims to have viewed, without further specification, the 'prenatal and birth records' concerning Ms. Gotay, and concludes therefrom the Erbs Palsy she suffers from was a result of the medical malpractice which occurred at the time of her birth." Thus, it appears that the affidavit lacked specificity and facts regarding the nature of the alleged negligence, which are required to establish the merit of the medical malpractice claim.

While this Court does not condone the conduct of plaintiff's attorneys in neglecting the prosecution of her medical malpractice case, and is not unsympathetic to plaintiff's claims, under circumstances herein, where plaintiff has neither alleged nor established the likelihood of her success in that case, plaintiff cannot establish that any negligence on the part of the defendants

was a proximate cause of her loss, and her claims for legal malpractice must be dismissed.' Reibman v. Senie, 302 AD2d 290, 291 (1st Dept 2003); Pellegrino v File, supra at 63.

111. Judiciary Law § 487

In the Ninth Cause of Action, plaintiff seeks treble damages "due to the professional misconduct of all defendants,'' presumably pursuant to section 487 of the Judiciary Law. Judiciary Law §§ 487(1) and (2) provide, in relevant part, that treble damages can be sought against an attorney who: 1)"[i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party"; or 2) "[w]illfully delays his client's suit with a view to his own gain."

Although it can be argued that some of the defendant attorneys may have breached ethical obligations established by the Code of Professional Responsibility, see DR 6-101(A)(3), 22 NYCRR 1200.30(a)(3)["A lawyer shall not . . . [n]eglect a legal matter entrusted to the lawyer"], Kleeman v Rheingold, 81 NY2d 270,276 (1993), In re Lebow, 285 AD2d 28 (1st Dept) 2001, plaintiff has neither alleged nor presented evidence showing or tending to show that any of the defendants engaged in the requisite pattern of wrongdoing or deceit, by engaging in "a chronic, extreme pattern of legal delinquency," which is necessary to sustain a cause of action under Judiciary Law § 487(1). Schlinder v. Issler & Schrage, P.C., 262 AD2d 226 (1st Dept), lv app dism 94 NY2d 791 (1999); see also Gonzalez v Gordon, 233 AD2d 191 (1st Dept 1996), lv app den 90 NY2d 802 (1997); Pellegrino v File, supra; Donaldson v Bottar, 275 AD2d 897 (4th Dept), lv app dism 95 NY2d 959 (2000); Frank v Pepe, 186 Misc2d 377 (Sup Ct, Nassau Co, 2000).

---

[5]In light of this determination, the Court need reach the additional grounds for dismissal raised by defendants.

Plaintiff likewise fails to allege or present evidence establishing that any of the defendants violated Judiciary Law § 487(2), by wilfully delaying the prosecution of the underlying action for their own gain. There is no merit to plaintiff's conclusory assertion that the Handwerker Honschke firm defendants purposely neglected the underlying medical malpractice action in order to protect themselves from a legal malpractice action. See Northern Trust Bank of Florida/Sarasota, N.A. v Coleman, 632 FSupp 648 (SDNY 1986)(no cause of action under Judiciary Law § 487(2) against an attorney who served as co-executor of an estate for wilfully delaying a legal malpractice suit against himself).

Thus, as plaintiff has neither alleged nor established the elements necessary to maintain a claim for treble damages under Judiciary Law $487, that claim must be dismissed.

Accordingly, it is hereby

ORDERED that the motion and cross-motions are granted, and the complaint is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly.

DATED: September 16 2003

ENTER:

J.S.C.