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

PRESENT: EDMEAD Justice PART 35

GABRIELLI, FRANK, ET AL.

-v-

DOBSON AND PIRCI, ET AL.

INDEX NO. 107333/03

MOTION DATE 2.26.07

MOTION SEQ. NO. 11

MOTION CAL. NO. _____

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 is decided under Motion Sequence #10

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 4.20.07

CAROL EDMEAD J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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FRANK GABRIELLI and UNION TURNPIKE MGT.,

Plaintiffs,

-against-

DOBSON & PINCI, its heirs, as successors and assigns, hereinafter referred to as law firms, doing business as "a-x" and FRANK FERRANTE, individually and on behalf of DOBSON & PINCI, MARC ANTONIO PINCI, ESQ., PINCI and ASSOCIATES, and JERRY LEFKOWITZ,

Defendants.

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Index No. 107333-2003

Sequences 010 & 011
DECISION/ORDER

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION[1]

Frank Gabrielli ("Gabrielli"), an individual, and Union Turnpike Mgt. ("Union") (together, the "Plaintiffs") commenced this action against defendants Dobson & Pinci, it heirs, successors and assigns, and Frank Ferrante ("Ferrante"), individually and on behalf of Dobson & Pinci, Marc Antonio Pinci, individually, and Pinci and Associates (together, the "Dobson Defendants"), and Jerry Lefkowitz ("Lefkowitz") (together, the "Defendants"), for legal malpractice.

Before this Court are the motions of defendants Ferrante and Lefkowitz for an order dismissing the instant action. Ferrante moves for summary judgment pursuant to CPLR 3212 dismissing both malpractice causes of action against him. Lefkowitz moves for (1) dismissal of the first, second, and fourth causes of action pursuant to CPLR 3211(a)(7) and the third cause of action pursuant to CPLR 3211(a)(1); (2) dismissal of all causes of action pursuant to CPLR

[1] Motion sequences 010 and 011 have been consolidated for the purpose of this decision.

3211(a)(5); (3) summary judgment and dismissal of the Lefkowitz Amended Complaint in its entirety together with all cross-claims; and (4) dismissal of Gabrielli's claims.

FACTUAL BACKGROUND

In 1998, Plaintiffs were under a construction contract (the "Contract") with Thomas and Aglaia Anagnostopoulos (the "Owner") to build a home. By notice dated April 27, 1999, Plaintiffs were fired before the work was fully completed.[2] As a result of negotiations between the Plaintiffs and the Owner, the Contract was amended on May 13, 1999.

Events during the Retention of Ferrante/Dobson and Pinci

According to Plaintiffs, on May 21, 1999, Plaintiffs retained Ferrante *via* the law firm of Dobson and Pinci to recover the sum of over $200,000 in connection with the Contract.[3]

Thereafter, on June 3, 1999, the Owner terminated Plaintiffs' services again "for cause" based on alleged breaches of the Contract.

According to Ferrante, Plaintiffs "first came to see [him] some point in June of 1999 to request assistance . . . in ongoing negotiations between" Plaintiffs' attorney at the time, Masone, White, Penkava & Cristofari, and the Owner in order "to revive or reinstate a settlement agreement or amendment" of the Contract.

On July 8, 1999, Plaintiffs (themselves) sent the Owner and Owner's architect (the "Architect") a letter serving as "formal notice" pursuant to Article 4.3 that the Owner was in

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[2] Plaintiffs were terminated by the Owner on a previous occasion on January 9, 1999.

[3] In their Complaint, Plaintiffs allege that they hired Dobson and Pinci to obtain advice, guidance, and legal counsel concerning a contractual controversy, that Ferrante was assigned to represent Plaintiffs, and that the representation continued until January 16, 2001 (Amended Complaint at ¶¶ 22-24, 26). However, Plaintiffs offer no documentary evidence to support this assertion.

breach of the Contract, and advising them of Plaintiffs' intent to "proceed with dispute resolution provisions in Article 4 of the Contract" if Plaintiffs' claims were not resolved within seven (7) days (the "Plaintiffs' July 8, 1999 Letter").

Thereafter, on October 4, 1999, the Dobson Defendants filed a demand for arbitration (the "1999 Demand for Arbitration"), seeking $400,000 in damages. In response, the Owner's counsel objected to arbitration and requested that the 1999 Demand for Arbitration be withdrawn, on the grounds that (1) the 1999 Demand for Arbitration was untimely, and (2) Plaintiffs failed to first make such claim upon the Architect in violation of Article 4.4.1 of the Contract, constituting a jurisdictional defect to commencing arbitration.

The Owner then filed an order to show cause in Supreme Court, Nassau County to stay the arbitration on the two grounds noted above (the "Supreme Court Stay Proceeding"). The Court issued an order, dated January 21, 2000, finding that a condition precedent to arbitration was not satisfied, and permanently staying the arbitration without prejudice to Plaintiffs' right to arbitrate the claims pursuant to Article 14.2 of the Contract. According the Court, the Plaintiffs "failed to timely serve the petitioners and the architect with notice of the claims the respondent seeks to arbitrate. As service of timely notice is a condition precedent to arbitration, the petition is granted."

On June 20, 2000, Plaintiffs notified Ferrante that the Certificate of Occupancy, dated May 2, 2000, had been issued.

On the same date, Ferrante sent a letter to the Architect, expressly requesting the Architect's opinion pursuant to the Contract regarding Plaintiffs' dispute ("Ferrante's June 2000 Letter"). On July 29, 2000, the Architect issued a preliminary determination that Plaintiffs'

claim did not comply with the terms of the Contract, and opined that "Article 14.2 of the Agreement would be applicable in this circumstance for the resolution of any claim made."

Events During Retention of Lefkowitz

By retainer agreement dated December 13, 2000, Plaintiffs hired defendant Lefkowitz "to complete" the arbitration commenced by Plaintiffs' "former attorney," and a formal Consent to Change Attorney, dated January 16, 2001, was executed. Approximately five months later, Ferrante sent Dobson and Pinci's entire file in this matter to Lefkowitz.

Lefkowitz maintains that he was unable to locate Ferrante's June 2000 Letter in the files provided by Dobson and Pinci. Lefkowitz claims that he was informed by either Plaintiffs or Dobson & Pinci of the July 2000 Letter to the Architect, and that by letter dated January 2, 2001, Lefkowitz contacted the Architect to inquire about the status of the Architect's decision regarding the Letter. In a letter response the following day, the Architect informed Lefkowitz that his opinion was previously provided to Ferrante on July 29, 2000, and that Ferrante acknowledged same in a subsequent correspondence.

In order to compel the Owner to proceed in the 1999 Arbitration, Lefkowitz filed a motion to compel arbitration under the same index number assigned to the Owner's previous order to show cause to stay the arbitration (the "Supreme Court Compel Arbitration Proceeding"). In opposition to this motion, the Owner again argued that there was no precatory notice properly filed for arbitration. Lefkowitz (in his affirmation of July 23, 2001) and on behalf of the Plaintiffs, did not object to this issue but opposed the motion on other grounds; yet, the motion court compelled arbitration. The Owner then appealed, insisting that the failure to serve the precatory notice upon the Architect was fatal to the arbitration. Lefkowitz, on behalf of

the Plaintiff, again failed to object to this issue, arguing instead that the 21-day period was inapplicable where the construction was completed. The Second Department agreed that the condition precedent to Arbitration was not satisfied and stayed the arbitration.

THE COMPLAINTS

Amended Complaint Against the Dobson Defendants

Plaintiffs allege that after they hired the Dobson Defendants on May 21, 1999, the Dobson Defendants received a copy of the Contract and the Owner's June 3, 1999 termination notice.

Plaintiffs allege that on October 4, 1999[4] the Dobson Defendants filed a demand for arbitration with the American Arbitration Association, without first referring the claim to the Architect for decision, which was a condition precedent to arbitration under 4.4.1 of the Contract. By a letter dated October 8, 1999 from the Owner's contract attorney, the Dobson Defendants were on notice of the defect in their arbitration demand, yet failed to heed the language in the Contract (4.4.1) requiring that the claim be submitted to the Architect for an initial opinion. Thus, as stated by the Second Department, since the precatory notice was not sent to the Architect, the Plaintiffs were precluded from pursuing arbitration and recovering the value of the services Plaintiffs performed.[5]

It is alleged that on October 19, 1999, the Dobson Defendants also had notice that "the project will be complete within four months [when] either party can make a claim at such time

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[4] Although the Complaint alleges that the demand was served on October 19, "2000," the record reflects that the demand was served on October 19, 1999. (See Motion by the Dobson Defendants, Exh. M).

[5] Such allegations form Plaintiffs' second cause of action for malpractice.

for payment (or damages) . . . ."[6] Plaintiffs claim that "despite receipt" of such information, "between October 19, 1999 and May 2, 2000, the [Dobson] Defendants failed to serve a precatory demand as required by 4.4.1" of the Contract, and failed to assert a proper claim within 21 days after the claim arose pursuant to 4.3.2 of the Contract. Further, due to the negligence of the Dobson Defendants, Plaintiffs were unable to recover monies and the value of Plaintiffs' services performed based on *quantum meruit*.[7]

Amended Complaint Against Lefkowitz

As against Lefkowitz, Plaintiffs' first cause of action for legal malpractice alleges that after Lefkowitz substituted the Dobson Defendants on January 16, 2001, Lefkowitz negligently represented Plaintiffs during the Supreme Court Compel Arbitration Proceeding, by arguing that Plaintiffs' July 8, 1999 letter served as a requisite precatory notice to the Architect. It is also alleged that Lefkowitz was either "in possession of another document or had reason to believe that another document existed" which would have sufficiently demonstrated the existence of a valid precatory notice, "and failed to submit it to the Court, advise [Plaintiffs] of its existence, or provide a copy of same to [Plaintiffs] when Lefkowitz turned over the file" upon his termination.

In their second cause of action, Plaintiffs allege that in addition to the above conduct, Lefkowitz' actions and inactions after the Second Department declared that the no precatory notice was properly served upon the Architect, constitute a breach of their retainer agreement. Plaintiffs allege that Lefkowitz "failed to prepare or maintain a proper and thorough file of and

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[6] Such notice came in the form of the Owner's Petition to stay Ferrante/Dobson and Pinci's attempt at arbitration.

[7] Such allegations form plaintiff's first cause of action for malpractice.

for his representation of Plaintiffs," failed to turn over to the Plaintiffs his complete and proper legal file upon their request, "improperly withheld" from the Plaintiffs evidence that a valid precatory notice existed at the time Lefkowitz represented them, "improperly removed evidence of same from the copy of the Plaintiffs' legal file" that Lefkowitz turned over to the Plaintiffs, "improperly concealed" evidence of his own or Ferrante/Dobson and Pinci's malpractice, "failed or refused to disclose to the Plaintiffs the existence of pertinent evidence of the Plaintiffs' legal remedy in this matter."

As to the third cause of action, Plaintiffs allege that Lefkowitz failed to extend the Mechanics Lien filed by prior counsel (Ferrante/Dobson and Pinci) which was in effect at the time of Lefkowitz's substitution of counsel. But for Lefkowitz's negligence in allowing the Mechanic's Lien to expire and lapse, "Plaintiffs could have recovered their damage by foreclosing on the Mechanics Lien."

As to the fourth cause of action, Plaintiffs allege that Lefkowitz "failed to commence a separate lawsuit" in State Supreme Court on behalf of the Plaintiffs pursuant to the Contract, failed to advise Plaintiffs that they had the statutory right to commence a state court action against the owner pursuant to General Business Law ("GBL") § 399-c, and that but for Lefkowitz's failures, "Plaintiffs would otherwise have commenced an action in the Supreme Court for the recovery of the damages" against the Owner.

Ferrante's Motion

Ferrante's Contentions

Ferrante contends that the cause of action arising from his alleged failure to submit Plaintiffs' claim to the Architect in 1999 before commencing arbitration is not only time-barred,

but lacks merit for the following reasons. By the time Plaintiffs first met with him at Dobson & Pinci in June 1999, it was after he returned from his documented trip to Italy, and the 21-day deadline to submit Plaintiffs' claim to the Architect had already expired. Thus, the failure to submit the claim to the Architect was not the proximate cause of any damage to the Plaintiffs, and any submission would have been untimely and ineffective, nonetheless. Also, when Plaintiffs first requested his assistance in their dispute with the Owner, Plaintiffs did not want to pursue claims or file an arbitration. Instead, Plaintiffs simply wanted Ferrante to intercede in and assist in the negotiations between Plaintiffs and the Owner to revive a prior settlement with respect to a prior termination of the Contract or to reach a new settlement agreement. It was only much later when settlement was not forthcoming that Plaintiffs instructed Ferrante to pursue arbitration, and by such time, the 21-day deadline had expired. Further, by the time Plaintiffs sought his assistance in 1999, Plaintiffs had already retained and were continuing to use their contract counsel, Masone, White, Penkava & Cristofari, who was expressly identified in the Contract as Plaintiffs' representatives. Thus, Masone, White, Penkava & Cristofari was responsible for sending out the precatory notices. Moreover, since the Supreme Court stayed the 1999 demand of Arbitration "without prejudice" to file a second arbitration after the construction on Owner's house was complete, no damages resulted from the alleged failure to submit the claim to the Architect in 1999.

Alternatively, summary judgment dismissing such cause of action is warranted because as Plaintiffs were terminated "for cause," Plaintiffs could only recover the total contract sum due, and since the cost of completion was greater than the unpaid portion of the contract, Plaintiffs could never establish that they were owed any damages in arbitration.

Ferrante further argues that Plaintiffs' malpractice cause of action based on the purported failure to submit plaintiff's claim to the Architect in 2000 following completion of the work should be dismissed because the documents establish that he in fact submitted Plaintiffs' claim to the Architect in his June 20, 2000 letter to the Architect, which was followed by additional information at the Architect's request. Thus, Ferrante complied with any condition precedent to arbitration. In fact, the Architect issued his initial determination by letter dated July 29, 2000, duly acknowledging Ferrante's June 20, 2000 letter.

Plaintiffs' Opposition[8]

In opposition, Plaintiffs note that their letter of July 8, 1999 was deemed insufficient by the Second Department. Additionally, Plaintiffs contend that Ferrante has failed to explain why the "other" letters he allegedly wrote were not submitted to the Court and not in the file forwarded to Lefkowitz (Plaintiffs' Opp. at ¶ 24).[9] Plaintiffs also point out that Lefkowitz alleges that the "other" letters allegedly written by Ferrante were not in the file and he never received them." In fact, in August 2004, Lefkowitz submitted an affidavit stating that he did not receive a copy of those letters with the files turned over from Ferrante/Dobson and Pinci. These divergent accounts raise an issue of fact as to whether Ferrante wrote the appropriate letters in the first instance, and if so, which of two lawyer defendants were responsible for failing to submit those letters to the Court. Neither of the two lawyer defendants presented evidence of a proper notice to any Court in the underlying proceeding. But for the failures of Ferrante to submit and/or

[8] Plaintiffs submitted a combined response to Ferrante's and Lefkowitz's motions to dismiss in which Plaintiffs' concede that Ferrante and Lefkowitz committed independent acts of malpractice. For the purpose of this decision, the court addresses Plaintiffs' arguments in opposition separately.

[9] It is unclear from Plaintiffs' submission which "letters" and which "court" Plaintiffs are referring to.

write an appropriate notice to the Architect, Plaintiffs would have successfully recovered the damages in the underlying action.

Additionally, Plaintiffs contend that Ferrante permitted the Mechanics Lien he filed on Plaintiffs' behalf to lapse, thereby, preventing Plaintiffs from successfully "recovering the money due him" (Plaintiffs' Opp. at ¶¶ 15, 28, 29).

Lastly, given that GBL § 399-c renders the arbitration provisions in the Contract void, Plaintiffs contend that Ferrante failed to advise them of their right to commence an action in Supreme Court.

Lefkowitz's Opposition

Lefkowitz opposes Ferrante's motion, arguing that under the continuous representation doctrine the instant action is not time-barred because Ferrante's 1999 demand for arbitration and 2000 letter to the Architect demonstrates an ongoing attempt to obtain payment from the Owner for work performed by Union. Lefkowitz relies on correspondence from Ferrante to the Architect dated August 16, 2000 in which Ferrante refers to the Plaintiffs as his "client" who has been "waiting for a resolution for over one year."

Lefkowitz further argues that it cannot be said that Plaintiffs did not suffer any damages as a result of Ferrante's failure to notify the Architect prior to commencing the 1999 Arbitration. Lefkowitz maintains that under section 4.3 of the Contract "when either the contractor or the homeowner has a dispute with the other party…the contractor is required to proceed with performance of the contract and that the owner [is required to] make payments in accordance with the contract." Accordingly, if Ferrante had properly filed the 1999 demand for arbitration, Plaintiffs could have continued to receive payments from Owner for the work already performed.

However, upon completion of the work, section 14.2 of the Contract provides that "the contractor only recovers for work performed if the amount of money the homeowner expended to complete the construction did not exceed the amount demanded by the contractor." Thus, in the second instance, Plaintiffs would only be paid if the amount paid by Owner to the new contractor to complete the construction did not exceed the amount of money owned to Plaintiffs.

Lefkowitz also contends that in light of Gabrielli's deposition testimony that he met with Ferrante "a few days after receiving the notice of termination" from the Owner, Ferrante was retained in time to serve the predicate notice to the Architect before filing the 1999 demand. Thus, Ferrante's failure to do so or advise Plaintiffs to serve same is the proximate cause of Plaintiffs' damages.

Additionally, that Christofari was designated in the Contract as Plaintiffs' representative does not obviate Ferrante's responsibility to notify the Architect, since Ferrante's liability stems from his retention concerning the Contract dispute and from that point forward Cristofari did no further work for Plaintiffs since he felt that he was a potential witness should the matter go to trial.

Lastly, concerning the second failed attempt at Arbitration after the work was completed, Lefkowitz contends that Ferrante did not provide Lefkowitz a copy of the Letter when he turned over the file (Lefkowitz's Opp. at ¶¶ 32-34). Moreover, Ferrante's 2000 Letter, which was dated June 20, 2000, was sent beyond 21 days after the Certificate of Occupancy was issued on May 2, 2000. Additionally, even if Lefkowitz submitted the motion with Ferrante's 2000 Letter, the outcome of the underlying action would have been the same given that the 2000 Letter would have been untimely. Accordingly, Ferrante is not entitled to summary judgment on this issue.

Ferrante's Reply

In reply, Ferrante argues that, Plaintiffs do not deny, dispute, or even address any of his arguments as to the first cause of action, and do not dispute that the only claim they had against the Owner for the unpaid balance was based on Article 14.2 of the Contract (Ferrante Reply Aff. at ¶ 9).

As to the second cause of action, Ferrante contends that Plaintiffs do not deny or dispute that his June 20, 2000 Letter was duly submitted to the Architect prior to the second arbitration attempt. Furthermore, the Architect confirmed that the June 20, 2000 Letter was duly submitted to him. In reference to Plaintiffs' contention that Ferrante did not submit "other" letters to the court, Ferrante states that he did not submit the June 20, 2000 Letter to the court in connection with the 1999 Arbitration because the Letter did not exist at that time. Similarly, Ferrante had ceased representing Plaintiffs prior to the second arbitration and therefore, unlike Lefkowitz, was in no position to submit the June 20, 2000 Letter to the Court. Also, even if the file turned over to Lefkowitz did not contain the June 20, 2000 Letter, Lefkowitz admits that he "understood" from either "Union or Dobson & Pinci" when he was retained, or through correspondence from the Architect, that the Letter existed.

Ferrante also argues that Plaintiffs' two new causes of action for malpractice against him, *i.e.* (1) failing to renew a mechanic's lien and (2) failing to advise Plaintiffs that the arbitration clause in the Contract was purportedly unenforceable, were never asserted in the original or Amended Verified Complaint, or either the two separate Bills of Particulars. Nor were these claims brought to light during discovery. Such claims have only been asserted against Lefkowitz. As such claims were raised for the first time in their opposition, Plaintiffs may not

now rely upon them in an effort to defeat the instant motion.

As to Lefkowitz's opposition, Ferrante states that neither Lefkowitz nor his attorney have any personal knowledge of the events that transpired during the Dobson Defendants' representation of Plaintiffs.

Additionally, Lefkowitz's attempt to draw a distinction between Articles 4.3 and 14.2 of the Contract in order to prove that the first arbitration could have resulted in damages incurred by Plaintiffs lacks merit. Since the Owner terminated Plaintiffs for cause, Plaintiffs' only claim under the Contract arose under Article 14 of the Contract.

Lastly, Lefkowitz does not deny that he was aware of Ferrante's June 20, 2000 Letter to the Architect or that he failed to submit it in opposition to the Owner's allegations. Further, the outcome of both attempts at Arbitration would not have been the same since the "timeliness" of Ferrante's June 20, 2000 Letter was never an issue in the underlying action nor a basis for the Second Department's decision. And, Plaintiffs never made Ferrante aware of the Certificate of Occupancy until June 20, 2000, and did not ask him to resume pursuing Plaintiffs' claims until that date, he cannot be held liable for Lefkowitz's negligence in failing to make the courts in the underlying proceedings aware of the June 20, 2000 Letter. Accordingly, there is no ground to hold Ferrante liable for malpractice

Analysis

Summary Judgment

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor

(*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212[b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that

material triable issues of fact exist (*Zuckerman, supra* at 562). Opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

To establish a cause of action to recover damages for legal malpractice, a 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) damages, and (4) that the plaintiff would have been successful in the underlying action had the attorney exercised due care (*Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 170 AD2d 108 [1st Dept 1991], *affd* 80 NY2d 377 [1992], *rearg denied* 81 NY2d 955 [1993]). To sustain a cause of action for legal malpractice, a party must show that an attorney failed to exercise "the ordinary reasonable skill and knowledge" commonly possessed by a member of the legal profession (*Darby & Darby, P.C. v VSI International, Inc.*, 95 NY2d 308 [2000]). To establish the elements of proximate cause and actual damages it must be shown that the plaintiff would have had a favorable outcome but for the attorney's negligence (*Davis v Klein*, 88 NY2d 1008 [1996]; *Carmel v Lunney*, 70 NY2d 169 [1987]). An attorney may be liable for his or her ignorance of the rules of practice; failure to comply with conditions precedent to suit; neglect to prosecute or defend an action; and the failure to conduct adequate legal research *(Shopsin v Siben & Siben*, 268 AD2d 578 [2d Dept 2000]).

Given that the second cause of action is based on events that occurred earlier in time, the court addresses the merits of the second cause of action first. Here, Ferrante has established that

he was not negligent as to the alleged act of malpractice stated in Plaintiffs' second cause of action. The decision of January 21, 2000 in the Supreme Court Stay Proceeding held that the 1999 Demand for Arbitration was permanently stayed without prejudice to Plaintiffs' right to arbitrate their claims, pursuant to Article 14.2 of the Contract, upon completion of the construction of the Owner's house. Accordingly, Ferrante's failure to satisfy a condition precedent to arbitration was a harmless error which resulted in no loss to Plaintiffs because the court preserved Plaintiffs' right to pursue a claim for damages after the completion of the work.

Lefkowitz's contention that Ferrante's failure to serve precatory notice precluded Plaintiffs from continuing to receive payment under Article 4.3 overlooks the fact that the Owner terminated the Contract "for cause." Although Subparagraph 4.3.3 states that

> [p]ending final resolution of a Claim except as otherwise agreed in writing or as provided in Subparagraph 9.7.1 and Article 14, the Contractor shall proceed diligently with performance of the Contract unless the nature of the occurrence which is the subject of the claim physically bars performance, and the Owner shall continue to make payments in accordance with the Contract documents

Plaintiffs were foreclosed from receiving further payment under this Article once they were terminated for cause. Thus, Article 14 became the controlling section of the Contract on the issue of whether Plaintiffs would be able to obtain payment.

Subparagraph 14.2.3 states that "[w]hen the Owner terminates the Contract for [cause], the Contract shall not be entitled to receive further payment until the Work is finished." Although Subparagraph 4.3.2 requires "[c]laims by either party [to] be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later" and for written notice to the Architect, a claim for payment under Subparagraph 14.2.3 does not mature until the work is

finished. Thus, Ferrante's failure to serve the precatory notice in connection with the 1999 Demand for Arbitration was inconsequential.

Accordingly, Ferrante's motion for summary judgment dismissing the second cause of action is granted.

In light of the above, the Court does not reach the merits of Ferrante's remaining arguments for summary judgment concerning the second cause of action.

Plaintiffs' first cause of action alleges that Ferrante was on [constructive] notice of the approximate date that construction was to be completed and despite this knowledge did not timely serve the Architect with notice of Plaintiffs' claim. Ferrante disputes this assertion alleging that he obtained [actual] notice that construction was complete when Gabrielli informed him of such on June 20, 2000. Based on Plaintiffs' allegations concerning the notice, the court has concluded that the approximate date of completion would have been on or about February 19, 2000. The court also notes that construction was not completed until May 2, 2000 when the Certificate of Occupancy was issued. Thus, as to the issue of timeliness the question is whether notice of the approximate date of completion meant that Ferrante was obligated to be prepared to serve the Architect with notice of Plaintiffs' claim at any point in time from when construction would actually be complete or whether Ferrante's obligation was limited to a reasonable period of time before and after the approximate date of completion. Despite this issue, Ferrante has established that he is entitled to summary judgment.

During the course of the second arbitration attempt it was never argued that Ferrante's June 2000 Letter was untimely; rather, it was argued that Plaintiffs did not serve the Architect with notice of their claim. Lefkowitz alleges that he never disputed this assertion because the

letter was allegedly not included in the Plaintiffs' file that Ferrante sent to Lefkowitz. However, the submissions include sufficient findings from which a fact finder may infer that Lefkowitz was aware of the disposition of Ferrante's June 2000 Letter, its contents, and the Architect's determination.

It has been held that in an action by a client against his or her first attorney, the negligence of a successor attorney may be proven to show that the successor attorney caused the loss in whole or in part (*Titsworth v Mondo*, 73 AD2d 1049 [4th Dept 1980]). Since the existence of Ferrante's June 2000 Letter was never made known, none of the courts in the underlying action had the opportunity to evaluate the letter's timeliness. Accordingly, Plaintiffs cannot maintain a malpractice action against Ferrante on this issue because they cannot establish that but for the alleged untimeliness of the letter the outcome would have been different.

Lastly, Plaintiffs opposition to the instant motions alleges for the first time that Ferrante was negligent for permitting a mechanic's lien to lapse and for not advising Plaintiffs' of their alleged right to commence an action pursuant to GBL § 399-c.[10] Plaintiffs cannot assert new and separate acts of malpractice as a defense against a summary judgment motion. Although the court must be necessarily cautious when exercising its power to bludgeon defenses and to grant summary judgment, in the instance where the court is convinced that the defense advanced false,

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[10] The court does not reach the merits of these issues because the claims do not appear in the Amended Complaint against the Dobson Defendants and Plaintiffs request to conform the pleadings to the proof is addressed solely as to Lefkowitz (Schiff Aff. at p. 19). Further, Plaintiffs have permitted almost four years to elapse during which discovery proceeded based on the claims alleged in the Amended Complaint and have not sought to serve a second amended complaint. Moreover, Plaintiffs have failed to provide any excuse for their delay in alleging these claims. To allow these claims to be interposed at this late date would be highly prejudicial to the Dobson Defendants (*c.f. Haughton v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 305 AD2d 214, 215, 761 NYS2d 13, 15 [1st Dept 2003]; *Holliday v. Hudson Armored Car & Courier Service, Inc.*, 301 AD2d 392, 399, 753 NYS2d 470, 476 [1st Dept 2003]).

dishonest, devoid of substance, or interposed for time-gaining purposes only, it should not hesitate to pronounce judgment accordingly (*see Manhattan Paper Co. v. Bayer*, 147 Misc. 227, 229, 263 NYS 720, 722 [Sup Ct New York County, 1931]).

Accordingly, Ferrante's motion for summary judgment dismissing the first cause of action is granted.

II. Lefkowitz's Motion

Lefkowitz's Contentions

Lefkowitz contends that Plaintiffs' amended complaint should be dismissed pursuant to CPLR 3211(a)(7) because it fails to state a cause of action and/or is barred by documentary evidence. As to the first cause of action for malpractice, Lefkowitz contends that Plaintiffs failed to allege that "but for" Lefkowitz's failure to submit to the court the "other" document to show that precatory notice was served, they would have been able to arbitrate and prevail on their claims. Lefkowitz contends that aside from being an insufficient pleading, no document was in fact provided to him that would have complied with the contract provisions. And, as Lefkowitz was retained some seven months after the Certificate of Occupancy was filed, there was nothing he could have done to comply with a condition precedent arbitration.

As to the second cause of action for breach of contract, Lefkowitz contends that this claim does not allege that Plaintiffs sustained any damages, and should also be dismissed as duplicative of Plaintiffs' first cause of action.

Plaintiffs' third cause of action for negligence in failing to extend a mechanic's lien should also be dismissed based upon CPLR 3211(a)(1). The notice of mechanic's lien attached to Plaintiffs' amended complaint indicates that it was filed by Dobson & Pinci on August 26,

1999. Thus, the mechanic's lien expired by operation of law one year later, before Plaintiffs retained Lefkowitz.

The fourth cause of action alleging that Lefkowitz failed to advise Plaintiffs that they had a right to assert a state court action pursuant to GBL § 399-c fails to state a cause. Plaintiffs failed to alleged that they would have prevailed in such an action. Further, such statute was not designed to protect non-consumers such as Plaintiffs, from the inclusion of mandatory arbitration clauses in contracts for the sale or purchase of consumer goods.

Further, Lefkowitz contends that, pursuant to CPLR 3211(a)(5), Plaintiffs' amended complaint is barred by the doctrine of collateral estoppel. The Second Department denied Plaintiffs' motion to compel arbitration in the underlying action, holding that Plaintiffs failed to fulfill a condition precedent prior in a timely manner. Accordingly, Plaintiffs should be collaterally estopped from maintaining the instant matter against Lefkowitz because Plaintiffs' failure occurred prior to Lefkowitz's retention.

Lefkowitz also contends that summary judgment is warranted in his favor because the evidence demonstrates that he was not negligent. However, assuming, *arguendo*, that he was, Plaintiffs cannot establish that "but for" Lefkowitz's negligence they would have been able to arbitrate their claims, let alone prevail on those claims. Lefkowitz asserts that he was never in possession of nor did he have knowledge of the June 20, 2000 letter from Ferrante to the Architect that would have satisfied the condition precedent of notifying the Architect before filing the claim for arbitration. Accordingly, there is no basis for Plaintiffs' claims and summary judgment dismissing Plaintiffs' amended complaint and all cross-claims should be granted.

Lastly, Lefkowitz contends that dismissal of Gabrielli's claims is warranted because

Lefkowitz was retained to represent Union, not Gabrielli, and that the retainer agreement supports same. Accordingly, without the existence of an attorney-client relationship, Gabrielli lacks standing to assert a claim for malpractice against Lefkowitz.

Plaintiffs' Opposition

Plaintiffs' oppose dismissal, arguing that but for the failure of Lefkowitz to commence a Supreme Court action, or advise Plaintiffs of alternative relief to arbitration, Plaintiffs would have successfully recovered the balance of the damages in the underlying dispute.

Further, both Ferrante and Lefkowitz appeared in the underlying proceedings. Either one or both of them were responsible for not serving precatory notice and/or failing to submit it to the court. Accordingly, there is a question of fact as to whether Lefkowitz was negligent on this issue.

Plaintiffs also request that this Court deem the pleadings to conform to the proof as there is conclusive evidence that Lefkowitz failed to consider or advise Plaintiffs of their right to recover the balance of the monies due under the contract by filing a lawsuit for damages.

Ferrante's Opposition

In limited opposition to Lefkowitz's motion, Ferrante contends that the Amended Complaint against Lefkowitz is sufficient to state a claim for legal malpractice and that dismissal pursuant to CPLR 3211(a)(7) should be denied (Ferrante Opp. at ¶ 8).

Ferrante contends that he in fact turned over his June Letter and that although Lefkowitz admits that he knew about the Letter when he was retained in December 2000, Lefkowitz never asked any of the Dobson Defendants for the Letter (Ferrante Opp. at ¶ 24, fn. 2). Additionally, Lefkowitz was aware that the letter constituted notice of Plaintiffs' claims. He acknowledged

such in his January 2, 2001 letter to the Architect and was provided with proof that Ferrante's June 2000 Letter constituted notice by the Architect's response of January 3, 2001 (Ferrante Opp. at ¶¶ 24-26). Yet, Lefkowitz never made the court aware of Ferrante's June 2000 Letter.

Further, collateral estoppel is inapplicable to the instant matter. In connection with Plaintiffs' first attempt at arbitration, Plaintiffs' notice of claim was held to be untimely; however, the decision does not affect Lefkowitz because there is no allegation that he committed malpractice concerning the untimeliness of Plaintiffs' notice of claim. Regarding the second attempt at arbitration, it is of no moment that the Second Department held that Plaintiffs' did not satisfy a condition precedent for arbitration subsequent to the issuance of the Certificate of Occupancy. The issue in the instant matter is whether Lefkowitz was negligent in failing to disclose and argue to the courts that Ferrante served a letter to the Architect on June 20, 2000. Furthermore, neither Ferrante nor the Dobson Defendants have had an opportunity to litigate this issue (Ferrante Memo of Law In Opp. at pg. 8). Therefore, dismissal pursuant to CPLR 3211(a)(5) should be denied (Ferrante Opp. at ¶ 10).

Lastly, there are multiple issues of fact that preclude summary judgment in Lefkowitz's favor; namely, whether Lefkowitz should have further investigated the facts surrounding Ferrante's submission to the Architect, whether Lefkowitz should have evidence of Ferrante's submission to the Architect, and whether the result of the underlying action would have been different had Lefkowitz made such submissions (Ferrante Opp. at ¶ 11).

Lefkowitz's Reply

Lefkowitz contends that Plaintiffs failed to dispute any of the material allegations contained in Lefkowitz's motion. Plaintiffs also failed to include an affidavit from a legal expert

attesting that Lefkowitz deviated from the appropriate standard of care in representing Plaintiff. Additionally, Plaintiffs' counsel's affidavit is devoid of evidentiary facts and consists of mere conclusions and the affidavit from Gabrielli does not support the majority of the inadmissable hearsay stated by Plaintiffs' counsel (Lefkowitz Reply at ¶ 5).

Lefkowitz contends that Plaintiffs failed to dispute his entitlement to summary judgment as to the breach of contract cause of action, the basis of which is Lefkowitz's alleged failure to provide Plaintiffs with a complete copy of their file.

With respect to the third cause of action, Plaintiffs' do not dispute that the mechanic's lien was filed by Ferrante and lapsed during his representation of Plaintiffs.

As to the fourth cause of action, Lefkowitz reiterates that GBL § 399-c would have been inapplicable in the underlying action because the Owner was the consumer and Plaintiffs were the contractor who drafted the arbitration clause. Plaintiffs' reliance on *Ragucci v. Professional Construction Services*, 25 AD3d 43, 803 NYS2d 139 [2d Dept 2005] is misplaced, in that it was decided in 2005, after the Defendants had represented Plaintiffs, and the court stated that there were no reported cases analyzing GBL § 399-c, the actions taken by the Defendants was proper (Lefkowitz Reply at ¶¶ 13-14). Lefkowitz further contends that New York public policy strongly favors the use of arbitration clauses (Lefkowitz Reply at ¶ 16). And, even assuming that GBL § 399-c was applicable, Plaintiffs have not asserted or established that they would have been successful in a lawsuit against the Owner.

Further, GBL § 399-c does not give a contractor the right to commence a lawsuit in court after an attempt to compel arbitration fails. GBL § 399-c merely states a cause of action to declare a mandatory arbitration clause in a consumer contract null and void (Lefkowitz Reply at ¶

19). Since Plaintiffs elected, while represented by Ferrante, to pursue arbitration pursuant to the contract that Plaintiffs prepared and signed. Accordingly, Plaintiffs cannot now argue that Lefkowitz was negligent in failing to bring a lawsuit pursuant to GBL § 399-c (Lefkowitz Reply at ¶ 18).

Concerning Plaintiffs' claim for legal malpractice, Ferrante's failure to comply with the Contract by failing to timely notify the Architect prior to filing the claim for arbitration and by failing to timely pursue a claim after the Contract was terminated precluded Plaintiffs from being able to arbitrate its claim against the Owner. These failures are admitted by Plaintiffs and should not result in denial of Lefkowitz's motion for summary judgment (Lefkowitz Reply at ¶¶ 20-22).

Lastly, both Lefkowitz and Ferrante have argued that Plaintiffs could not have recovered against the Owner because the Owner had to pay more money to complete the house than Plaintiffs sought. Plaintiffs' unsubstantiated hearsay argument that the Owner completed the work himself is insufficient to overcome Lefkowitz's motion for summary judgment.

Lefkowitz also contends that he is correct in asserting the doctrine of collateral estoppel. Lefkowitz states that Plaintiffs' admission that the Second Department found the July 8, 1999 letter to be inadequate to invoke arbitration is sufficient to establish the applicability of collateral estoppel. Accordingly, Plaintiffs cannot now argue otherwise (Lefkowitz Reply at ¶¶ 26-27).

In response to Ferrante's opposition, Lefkowitz contends that Ferrante fails to raise an issue of fact sufficient to deny Lefkowitz's motion. Lefkowitz disputes Ferrante's contention that he provided Lefkowitz with a copy of the June 20, 2000 letter. Lefkowitz states that during two separate depositions Ferrante admitted that he did not make a copy of Plaintiffs' file before transferring it to Lefkowitz and that he did not remember whether he provided Lefkowitz with

any part of Plaintiffs' file prior Plaintiffs first meeting with Lefkowitz on December 13, 2000 (Lefkowitz Reply at ¶¶ 30-31). Further, Ferrante also testified that he did not know when the file was sent and that he did not review it before it was sent (Lefkowitz Reply at ¶ 32). Accordingly, Ferrante cannot now argue that the letter was in the file if he has previously admitted that he did not review the file before sending it to Lefkowitz (Lefkowitz Reply at ¶ 36).

Analysis

Motion to Dismiss - CPLR 3211(a)(7)

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.,* 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR §3026). On a motion to dismiss made pursuant to CPLR § 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). However, in those circumstances where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence," they

are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996], and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993] [CPLR 3211 motion granted where defendant submitted letter from plaintiff's counsel which flatly contradicted plaintiff's current allegations of prima facie tort]).

The first, third, and fourth causes of action in the Lefkowitz Amended Complaint allege claims for legal malpractice. To establish a cause of action to recover damages for legal malpractice, a 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) damages, and (4) that the plaintiff would have been successful in the underlying action had the attorney exercised due care (*Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 170 AD2d 108 [1st Dept 1991], *affd* 80 NY2d 377 [1992], *rearg denied* 81 NY2d 955 [1993]). To sustain a cause of action for legal malpractice, a party must show that an attorney failed to exercise "the ordinary reasonable skill and knowledge" commonly possessed by a member of the legal profession (*Darby & Darby, P.C. v VSI*

International, Inc., 95 NY2d 308 [2000]). To establish the elements of proximate cause and actual damages it must be shown that the plaintiff would have had a favorable outcome but for the attorney's negligence (*Davis v Klein*, 88 NY2d 1008 [1996]; *Carmel v Lunney*, 70 NY2d 169 [1987]). An attorney may be liable for his or her ignorance of the rules of practice; failure to comply with conditions precedent to suit; neglect to prosecute or defend an action; and the failure to conduct adequate legal research *(Shopsin v Siben & Siben*, 268 AD2d 578 [2d Dept 2000]).

Concerning the first cause of action, the Lefkowitz Amended Complaint alleges that Lefkowitz had possession or knowledge of a document that would sufficiently demonstrate the existence of a valid precatory notice and that he failed to act on such information or to share same with Plaintiffs upon his termination. Although Plaintiffs pleading lacks a statement containing the words "but for," it is nonetheless apparent that Plaintiffs have pled an action for malpractice. Based on the allegations, the court can infer that "but for" Lefkowitz's failure to act with the degree of care, skill, and diligence commonly possessed by a member of the legal community the ultimate outcome would have been different. Dismissal of the first cause of action pursuant to CPLR 3211(a)(7) is unwarranted.

The second cause of action in the Lefkowitz Amended Complaint alleges a breach of contract. To state a cause of action for breach of contract, the proponent of the pleading must specify the making of an agreement, the performance by that party, breach by the other party, and resulting damages (*Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071, 816 NYS2d 702 [Supreme Court New York County 2006], *citing Furia v Furia,* 116 AD2d 694, 695 [2d Dept 1986]). The essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated, must be alleged either by

reference to or by or attaching a copy of the contract to the complaint (*Atlantic Veal & Lamb, Inc. v. Silliker, Inc.*, 11 Misc 3d 1072, 816 NYS2d 693 (Supreme Court New York County 2006] *citing Chrysler Capital Corp. v Hilltop Egg Farms, Inc.*, 129 AD2d 927, 928 [1987]; *Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071 citing *Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]; *Caniglia v Chicago Tribune-New York News Syndicate Inc.*, 204 AD2d 233, 234 [1st Dept 1994]).

Here, the Complaint alleges that a series of Lefkowitz's actions and inactions constituted a breach of the parties' retainer agreement. Lefkowitz's only objection on this issue relates to whether Plaintiffs have alleged damages. Again, construing the pleading liberally, the court can infer the existence of damages based on Lefkowitz's actions and inactions contributing to Plaintiffs' delay prosecuting the instant matter as it relates to the Dobson Defendants.

Therefore, the branch of Lefkowitz's motion to dismiss the second cause of action against him pursuant to CPLR 3211(a)(7) is denied.

As to the third cause of action, Plaintiffs have failed to allege that Lefkowitz was negligent in allowing the mechanic's lien to lapse.

Pursuant to CPLR 3211(a)(l), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." Thus, where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law," dismissal is warranted (*Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 N.E.2d 511 [1994]). The test on a CPLR 3211(a)(1) motion is whether the documentary evidence submitted "conclusively establishes a defense to the asserted claims as a matter of law" *(Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1st Dept 2001]

citing Leon v Martinez, 84 NY2d 83, 88, *supra*; *IMO Indus., Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1st Dept 1999]).

Where documentary evidence and undisputed facts negate or dispose of the claims in the complaint or conclusively establish a defense, dismissal may be granted pursuant to CPLR 3211(a)(1) (*Biondi v Beekman Hill Housing Apt. Corp.*, 257 AD2d 76, 692 NYS2d 304 [1st Dept 1999]; *Kliebert v McKoan*, 228 AD2d 232, 43 NYS2d 114 [1st Dept 1996]; *Gephardt v Morgan Guaranty Trust Co. of N.Y.*, 191 AD2d 229, 594 NYS2d 248 [1st Dept 1993]; *Juliano v McEntee*, 150 AD2d 524, 541 NYS2d 232 [1st Dept 1989]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 N.E.2d 511 [1994]; *Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]).

The aforementioned documentary evidence establishes that Dobson & Pinci filed the mechanic's lien and that it expired by operation of law prior to Plaintiffs retention of Lefkowitz. Therefore, it is impossible to allege a cause of action against Lefkowitz on this issue.

With regard to the fourth cause of action, Plaintiffs have failed to allege that Lefkowitz was negligent in his inactions relating to GBL § 399-c. In opposition to Lefkowitz's motion, Plaintiffs cite to *Ragucci v. Professional Const. Services*, 25 AD3d 43, 803 NYS2d 139 [2d Dept 2005]), which was the first reported decision to address GBL § 399-c. The petitioners in *Ragucci* were consumers who brought an action in Supreme Court against their architect and general contractor for malpractice, breach of contract, and deceptive trade practices. The respondents moved to stay the proceeding and compel arbitration. Plaintiffs opposed the motion on the ground that GBL § 399-c prohibits mandatory arbitration clauses in contracts for the sale or

purchase of consumer goods. The court denied the respondents' motion and stated that GBL § 399-c was"designed to prevent sales contracts [for consumer goods] from including clauses pre-committing consumers to arbitrate disputes rather than resort to Small Claims suits, refusal to pay for defective goods, or other remedies" (Ragucci, 25 AD3d at 46, 803 NYS2d at 143).

Since the statute was not designed to protect non-consumers from their own inclusion of mandatory arbitration clauses Plaintiffs cannot now allege that the clause they inserted into the Contract is void. Thus, dismissal of the fourth cause of action pursuant to CPLR 3211(a)(7) is warranted.

Motion to Dismiss - CPLR 3211(a)(5)

Lefkowitz also maintains that he is entitled to dismissal of the complaint on the ground of collateral estoppel.

Collateral estoppel, or issue preclusion, is invoked when the cause of action in the second proceeding is different from that in the first and applies to a prior determination of an issue which was actually and necessarily decided in the earlier case (*DaimlerChrysler Corp. v Spitzer, supra)*. It is confined to the point actually determined and applies only to issues which were actually litigated, not to those which could have been litigated (*id.*). In order for the doctrine of collateral estoppel to apply, two requirements must be satisfied: the party seeking the benefit of the doctrine must prove that the identical issue was decided in the prior action and is decisive in the current action, and that the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior determination (*DaimlerChrysler Corp. v Spitzer*). The doctrine of collateral estoppel precludes a party from relitigating an issue which has been previously,

actually and necessarily decided against him or her in a prior proceeding in which there was a full and fair opportunity to litigate the point (*Kaufman v Eli Lilly & Co.*, 65 N.Y.2d 449, 455). The doctrine is applicable not only to court decisions, but to prior determinations made in administrative forums that are "quasi-judicial" in nature and governed by "procedures substantially similar to those used in a court of law" (*Ryan v New York Telephone Co.*, 62 NY2d 494, 499; *see also Johnson v Penn Mutual Life Insurance Co.*, 184 AD2d 230, 231, lv. app. den., 80 N.Y.2d 757). "[T]he burden rests upon the proponent of collateral estoppel to demonstrate the identicality and decisiveness of the issue" (*Ryan, supra* 62 NY2d at 501; *Capital Telephone Co., Inc. v Pattersonville Telephone Co., Inc.*, 56 NY2d 11, 18; *Schwartz v Public Admin.*, 24 NY2d 65, 73). The opponent, on the other hand, has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the administrative hearing (*Ryan*, *supra* 62 NY2d at 501; *Capital Telephone*, *supra* 56 N.Y.2d at 18).

As to the first cause of action, a determination of whether Lefkowitz was negligent in failing to disclose Ferrante's June 2000 Letter has not been made. Similarly, no prior determination has made concerning the allegations supporting Plaintiffs' cause of action for breach of contract. Therefore, dismissal of the first and second causes of action on the ground of collateral estoppel is denied.

Summary Judgment

Lefkowitz also maintains that he is entitled to summary judgment on all causes of action asserted against him.

Here, Lefkowitz has not satisfied his burden to establish that the cause of action for

malpractice has no merit sufficient to warrant the court as a matter of law to direct judgment in his favor. As already noted, the submissions include sufficient findings from which a fact finder may infer that Lefkowitz was aware of the disposition of Ferrante's June 2000 Letter and that he failed to advise the courts and Plaintiffs of its existence. Issues of fact exist as to whether the Letter was timely and as to whether Lefkowitz was negligent for failing to dispute the Owner's allegation that the Letter did not exist as well as for not disclosing the Letter's existence to the courts. Issues also exist as to whether Plaintiffs would have been able to recover through arbitration and, whether Lefkowitz's actions/inactions were inconsequential.

Additionally, an issue of fact exists as to whether Lefkowitz breached the Retainer Agreement, and if so, whether such breach resulted in further damages to Plaintiffs.

Dismissal of Gabrielli's Claims

It is uncontested and documents substantiate that Lefkowitz's representation was only of Union. Accordingly, the claims by Gabrielli against Lefkowitz are dismissed.

Dismissal of Cross-Claims

In light of the court's determination dismissing Plaintiffs' action against Ferrante, Ferrante' s cross claims against Lefkowitz are moot.

CONCLUSION

In accordance with the foregoing, motion seq. 10 and 11 are consolidated for disposition as follows:

ORDERED that the Order to Show Cause (seq. 10) by defendant Frank Ferrante for summary judgment pursuant to CPLR 3212 dismissing the claims asserted in the Plaintiffs'

Amended Verified Complaint as against defendant Ferrante is granted in its entirety; and it is further

ORDERED that the Order to Show Cause (seq. 11) by defendant Jerry Lefkowitz for dismissal of the Amended Complaint of the Plaintiffs pursuant to CPLR 3211(a)(7), 3211 (a)(1), 3211(a)(5), summary judgment dismissing the Amended Complaint and the cross-claims pursuant to CPLR 3212, and dismissal of the claims of Frank Gabrielli pursuant to CPLR 3211 (a) (7), is granted to the extent that (1) dismissal of the first cause of action for legal malpractice is denied; (2) dismissal of the second cause of action for breach of contract is denied; (3) dismissal of the third cause of action is granted; (4) dismissal of the fourth cause of action is granted; and (5) dismissal of the cross-claims asserted against him is granted as moot; and it is further

ORDERED that defendant Frank Ferrante shall serve a copy of this order upon all parties within 3 days.

This constitutes the decision and order of the Court.

Dated: April 20, 2007

Hon. Carol Robinson Edmead, J.S.C.

CAROL EDMEAD
J.S.C.

FILED
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