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

PRESENT: WALTER B. TOLUB Justice PART 15

Index Number : 118036/2005
3 COTTAGE PLACE
VS
COHEN, TAUBER,SPIEVACK
Sequence Number : 002
STRIKE ANSWER

INDEX NO. _____
MOTION DATE 11/16/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

is 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 in accordance with the accompanying memorandum decision

FILED
FEB 28 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 2/21/08

WALTER B. TOLUB J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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3 COTTAGE PLACE LLC,

Index No.: 118036/05

Plaintiff,

-against-

COHEN, TAUBER, SPIEVACK & WAGNER, LLP,

Defendant.

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Tolub, J.:

This is an action for legal malpractice arising out of plaintiff's claim that it sustained damages due to defendant's failure to timely commence an action on plaintiff's behalf against plaintiff's property damage insurance carrier. By this motion, plaintiff moves for an order striking defendant's answer pursuant to CPLR 3211, and for summary judgment and an award of over $750,000.00 in damages as demanded in the verified complaint. Alternatively, plaintiff seeks partial summary judgment and the award of either $537,198.67 in damages based on the contention that the sum is the minimum amount owed as conceded in a letter from defendant to plaintiff dated March 8, 2005, or, an award of $526,017.67, based on the contention that the sum represents the minimum of damages sustained by plaintiff as initially investigated, analyzed and computed by defendant on plaintiff's behalf in connection with plaintiff's property damage claim. In addition, plaintiff seeks reasonable attorney's fees and expenses incurred in this legal malpractice action.

BACKGROUND

Plaintiff is the owner of a building located at 3 Cottage Place, New Rochelle, New York

(the premises). Barry J. Jacobson (Jacobson) serves as the managing member for Three Cottage Place. On or about August 10, 2001, plaintiff entered into a ten year written lease with the State of New York Division of Parole (the State) for use of the entire building. Although the lease stated that the lease term was to commence on March 1, 2002, the State was not obligated to pay any rent until the building, which was in the process of being renovated, was ready for occupancy. Non-party Celtic Constructions (Celtic) was the general contractor for the renovation project.

On or about August 28, 2002, an unknown person or persons broke into the building and opened a water valve, flooding the premises. The resulting water damage was extensive, and caused structural damage to the building. Plaintiff additionally claims that the water damage caused a mold condition to develop. As a result of the water damage, the State's occupancy of the premises was delayed until December 5, 2002.

At the time of the water damage, the property was insured by Federal Insurance Company (Federal Insurance). The policy issued for the property, which offered coverage from October 18, 2001 through October 18, 2003,[1] carried a property damage limit of $3,100,000.00, with a $10,000.00 deductible. The policy however stated that no legal action against Federal insurance could be commenced unless there was "full compliance with all of the terms of [the] insurance" policy and the action was "brought within two years after the date on which the direct physical loss or damage occurred" (Notice of Motion, Exhibits to Lindenberg Affirmation, Exhibit 5, Conditions to Federal Insurance Policy).

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[1]It should be noted that Federal Insurance Company was part of Chubb Group of Insurance Companies (Chubb), and as such, some of the insurance documents in this case were generated under the name Chubb.

Following the water damage, plaintiff submitted a claim to Federal Insurance, claiming $275,700.00 in damages arising from the flood. Several months later, plaintiff submitted a revised claim to Federal Insurance for $697,682.95, which included $285,000.00 in mold remediation costs which had not been previously reported. The additional claim for damages triggered an investigation into the mold claims (Defendant's Affirmation in Opposition, Exhibit C, International Investigation Report), and ultimately, Federal Insurance claimed that it was unable to resolve plaintiff's claim.

Following Federal Insurance's refusal to pay plaintiff's property damage claim, plaintiff, on October 1, 2003, retained defendant to handle their interests with respect to their property damage claim. Defendant, who had previously represented plaintiff on other legal matters, agreed to the representation:

> We are delighted that you have chosen Cohen Spievack & Wagner LLP ("CTSW") to represent the interests of the 3 Cottage Place LLC ("3 Cottage") with regard to the water damage to 3 Cottage Place, New Rochelle, New York (the "Building") and in connection with ongoing negotiations with Chubb Insurance Company with regard to the damage to the Building, and such other matters that may arise from time to time

(Plaintiff's Notice of Motion, Exhibits to Jacobson Affidavit, Exhibit E).[2]

The time records submitted by defendant indicate that defendant reviewed plaintiff's insurance policy with Federal Insurance, computed plaintiff's damages caused by the flood, and assisted plaintiff in fulfilling its obligations under the insurance policy. On November 29, 2004, more than two years after the flood, defendant commenced an action against Federal Insurance in

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[2]It should be noted that, although in its brief, plaintiff outlines various details regarding the specific scope of defendant's anticipated representation regarding plaintiff's property damage claim as against Federal, such alleged details are missing from the October 1, 2003 retainer letter (Exhibit E of the Jacobson Affidavit).

the United States District Court of the Southern District of New York (the Insurance action) for breach of contract due to Federal Insurance's rejection of plaintiff's property damage claim. The complaint in the Insurance Action was signed by Stephen Wagner (Wagner), a member of defendant's firm, who certified to the Federal Court that plaintiff suffered damages from the flood in the sum of approximately $750,000.00.

Federal Insurance rejected the complaint in the Insurance action on the grounds that it was untimely, a fact conceded by Mr. Wagner and conveyed to Mr. Jacobson (August 29, 2007 Affidavit of Barry J. Jacobson). In fact, by letter dated March 8, 2005, Simcha Herzog, an associate in defendant's firm, wrote to plaintiff to indicate that defendant had alerted its malpractice insurance carrier, Continental Casualty Insurance (CNA), of plaintiff's legal malpractice claim against the firm:

> We are prepared to submit 3 Cottage Place's claim to the insurance company. Please find attached to this letter a spreadsheet that list the companies that did work relating to the incident, their invoices and the actual amounts paid. We believe that these numbers provide an accurate estimation of the amounts you may possibly collect on behalf of 3 Cottage Place for the damage that occurred there on August 28, 2002.
>
> We have made numerous phone calls and sent letters to every company that did work at 3 Cottage Place after August 28, 2002. To date, we have spoken with nearly every company about the work they did at 3 Cottage Place. Many companies told us that their work at 3 Cottage Place did not relate to the incident and accordingly those companies were not included in the calculation of the possible recovery amount. However, we are reasonably confident that the companies included on the spreadsheet did work relating to the incident and accordingly those amounts are collectable

(Plaintiff's Reply Affidavit, Exhibit A, March 8, 2005 Herzog Letter).

The defendant's monetary exposure to plaintiff for defendant's negligence in not bringing a timely action against Federal Insurance was calculated by Mr. Herzog as being $537,198.67,

representing the sum total of plaintiff's actual out-of-pocket payments made to various vendors and contractors for remediation of the flood damaged premises.

On June 16, 2005, Mr. Wagner advised plaintiff of the potential conflict of interest with defendant taking a more active role against defendant's malpractice insurance carrier, CNA, concerning plaintiff's case, noting that defendant had "gone as far as possible with CNA advocating 3 Cottage Place's position and that any further efforts on our behalf will be detrimental to your interest, as it might jeopardize the coverage" (Plaintiff's Reply Affidavit, Exhibit B, June 16, 2005 Wagner Letter). The Wagner letter recommended that plaintiff retain an attorney to contact CNA and demand an immediate movement on the file, stating, in pertinent part:

> It has been with CNA for the better part of one year, and has already been reviewed by its outside counsel ... This lawyer should inform CNA that 3 Cottage Place has held off initiating an action against [defendant] based on CNA's commitment to expeditiously examine and resolve the claim without the need for litigation. The lawyer should demand immediate payment with interest

(id.). With defendant's assistance, plaintiff ultimately settled the claim with Federal for the sum of $80,000.00. On December 30, 2005, plaintiff commenced the instant legal malpractice action against defendant.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (Santiago v Filstein, 35 AD3d 184, 185-186 [1st Dept 2006], quoting Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form

sufficient to raise a genuine, triable issue of fact" (Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 [1st Dept 2006]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; DeRosa v City of New York, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 [1978]; Grossman v Amalgamated Housing Corporation, 298 AD2d 224, 226 [1st Dept 2002]).

Initially, it should be noted that, contrary to defendant's assertions, plaintiff's motion should not be denied as premature. In accordance with the Federal Insurance policy, plaintiff, through defendant, provided extensive documentation relating to the flood, including original books, records, canceled checks, building plans and photographs of the damage to the building. In addition, on May 20, 2004, Jacobson appeared for a lengthy deposition at Federal Insurance's request (compare Bradley v Ibex Construction LLC, 22 AD3d 380, 380-381 [1st Dept 2005] [plaintiffs' motions for partial summary judgment properly denied where motions were made before a preliminary conference and before defendants had any opportunity to obtain disclosure]).

"In order to state a cause of action for legal malpractice, the complaint must set forth three elements: the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and proof of actual damages" (Bishop v Maurer, 33 AD3d 497, 498 [1st Dept 2006] affd 9 NY3d 910 [2007]; Leder v Spiegel, 31 AD3d 266, 267 [1st Dept 2006]). In order to prove that the defendant attorney was negligent, "a plaintiff must prove that the defendant failed to exercise the care, skill, and diligence commonly possessed and exercised by a member of the legal profession" (Hartman v Morganstern, 28 AD3d 423, 425 [2d Dept 2006], quoting Pistilli v

Gandin, 10 AD3d 353, 354 [2d Dept 2004]; Tortura v Sullivan Papain Block McGrath & Cannavo, P.C., 21 AD3d 1082, 1083 [2d Dept 2005]).

"To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence" (Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d 438, 442 [2007]). "This burden of proving 'a case within a case' is a heavy one" (Aquino v Kuczinski, Vila & Associates, PC, 39 AD3d 216, 219 [1st Dept 2007]), quoting Lindenman v Kreitzer, 7 AD3d 30, 34 [1st Dept 2004]). "The failure to demonstrate proximate cause mandates the dismissal of a legal malpractice action regardless of whether the attorney was negligent" (Leder, 31 AD3d 266, 268 [1st Dept 2006]). "Where the record in a professional malpractice case demonstrates that an intervening cause was responsible for the injury, summary judgment will be granted to the defendant" (Brooks v Lewin, 21 AD3d 731, 734 [1st Dept 2005]). Thus, even in the event that a defendant attorney is negligent in failing to timely commenced an action, as in the instant case, the plaintiff still has the burden of proving that he would have prevailed in the underlying action "but for" the attorney's negligence (Aquino, 39 AD3d at 221).

"Damages in a legal malpractice case are designed 'to make the injured client whole'" (Rudolf, 8 NY3d at 443, quoting Campagnola v Mulholland, Minion & Roe, 76 NY2d 38, 42 [1990]). As such, plaintiff's claim for "'legal malpractice is viable, despite settlement of the underlying action,'" as the settlement of the action was '"effectively compelled by the mistakes of counsel'" (Tortura, 21 AD3d at 1083, quoting Bernstein v Oppenheim & Company, 160 AD2d 428, 430 [1990]).

Although a plaintiff may assert a legal malpractice action, notwithstanding the fact that

the underlying case settled, the plaintiff is required to "plead specific factual allegations demonstrating that, but for the defendant's alleged negligence, there would have been a more favorable outcome in the underlying action" (Tortura, 21 AD3d at 1083]).

Viewing the complaint in the light most favorable to the plaintiff (see Leon v Martinez, 84 NY2d 83, 87-88 [1994]), the court finds that, but for defendant's negligence, plaintiff would have likely prevailed at trial on the subject claim (see Tortura, 21 AD3d at 1083). However, whether plaintiff would have received more favorable outcome at trial than the $80,000.00 settlement sum must now be determined.

Citing Federal Rule of Civil Procedure (FRCP) 11 (b), plaintiff argues that, by certifying the underlying Federal complaint that plaintiff suffered "damages in an amount to be determined at trial, but in no event less than $750,000.00," defendant is now barred from asserting that its damages were less than that amount, as such a statement constitutes as judicial admission that is now binding upon defendant in this malpractice action.

"Formal judicial admissions take the place of evidence and are concessions, for the purposes of litigation, of the truth of a fact alleged by an adversary" (Wheeler v Citizens Telecommunications Company of New York, Inc., 18 AD3d 1002, 1005 [3d Dept 2005]). "Informal judicial admissions are facts incidentally admitted during a trial. These are not conclusive, being merely evidence of the fact or facts admitted" (id.).

In addition, "[i]n order to constitute a judicial admission, the statement must be one of fact" (Rahman v Smith, 40 AD3d 613, 614-615 [2d Dept 2007]). Only "deliberate, clear, and unequivocal" statements that are made with sufficient formality and conclusiveness can constitute a judicial admission (id. at 615 [attorney's argument or opinion did not constitute a

judicial admission]; see Wheeler, 18 AD3d at 1005).

Here, defendant's statement regarding the damage amount plaintiff might ultimately be entitled to at trial was intended to be a prayer for relief, and not a formal or informal concession of fact so as to constitute a judicial admission. In addition, the statement was not so deliberate, clear and unequivocal so as to constitute a judicial admission.

In addition, plaintiff's reliance on the doctrine of judicial estoppel is misplaced. Under the doctrine of judicial estoppel, "'where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position'" (Shapiro v Butler, 273 AD2d 657, 659 [3d Dept 2000], quoting Hinman, Straub, Pigors & Manning, P.C. v Broder, 124 AD2d 392, 393 [3d Dept 1986]).

However, an attorney who adopts a position in a prior action while representing a client is not barred from later asserting a contrary position in a subsequent action for legal malpractice, since a party's attorney is not a party to an action, as such a defendant was not afforded "'a full and fair opportunity to contest the [determination] now said to be controlling'" (see Lyons v Medical Malpractice Insurance Association, 275 AD2d 396, 397 [2d Dept 2000], quoting Schwartz v Public Administrator of Bronx County, 24 NY2d 65, 71 [1969]). As such, plaintiff has not established that it is entitled to damages in the amount of $750,000.000, and defendant is not barred from now asserting that plaintiff's damages were less than the amount of $750,000.00.

In the alternative, plaintiff argues that it is entitled to at least recover from defendant the sum of $537,198.67, which reflects plaintiff's out-of-pocket payments, conceded by defendant as recoverable from its malpractice insurance carrier.

Noting that the Herzog letter merely reflected the subjective opinion of an unreliable newly admitted associate, defendant argues that the Herzog letter was not intended as an admission of the actual monetary amount that plaintiff would have ultimately recovered from Federal had the action been timely commenced. Defendant also asserts that, even if the spreadsheet attached to the letter was related to plaintiff's flood damage expenditures, these damages would not necessarily be recoverable if they arose out of plaintiff's own failure to mitigate its damages.

A reading of the Herzog letter reveals that the letter was based upon defendant's extensive research as to the damages that plaintiff could expect to receive from defendant's malpractice insurance carrier as a result of defendant's negligence. Moreover, the Herzog letter was written at a time when defendant was aware of Federal Insurance's investigations and concerns regarding the mold problem. Accordingly, the Herzog letter noted that defendant was "reasonably confident that the companies included in the spreadsheet did work relating to the incident and accordingly those amounts are collectable." As such, it is clear that the Herzog letter is evidence of the amount of damages that plaintiff would have ultimately recovered from Federal had the action been timely commenced. Further, as the information set forth by Herzog was based upon his personal knowledge gained as a result of his research, it was not inadmissible hearsay, as defendant maintains.

Defendant also argues that the Herzog letter was drafted for the purpose of attempting to reach a settlement, and as such, the Herzog letter is inadmissible to prove liability or damages. CPLR 4547 provides, in pertinent part:

> Evidence of any conduct or statement made during a compromise negotiations shall ... be inadmissible.

(see Cigna Corporation v Lincoln National Corporation, 6 AD3d 298, 299 [1st Dept 2004] [documents prepared and exchanged for purposes of settlement are inadmissible to prove either liability or the value of the claim]).

Here, there is nothing within the four corners of the Herzog letter to indicate that it was drafted in anticipation of settlement with plaintiff. In fact, the letter focuses solely on the damage amount that defendant was "reasonably confident" that plaintiff would collect from defendant's malpractice insurance carrier. In addition, it was not until the June 16, 2005 Wagner letter, which made no reference to the Herzog letter, that defendant indicated that it deemed itself to be in an adversarial relationship with plaintiff.

Thus, the court finds that plaintiff is entitled to partial summary judgment in the amount of $447,198.67, reflecting plaintiff's actual out-of pocket expenses of $537,198.67, as conceded by defendant in the Herzog letter, minus the settlement sum of $80,000.00 and plaintiff's $10,000.00 deductible. However, in the absence of a statute, agreement or court rule, plaintiff is not entitled to attorney's fees and expenses incurred in defense of this action (see U.S. Underwriters Insurance Company v City Club Hotel, LLC, 3 NY3d 592, 597 [2004]).

The balance of plaintiff's motion which seeks an order striking defendant's answer is denied as moot. Accordingly, it is

ORDERED that the portion of plaintiff's motion seeking partial summary judgment and an award of damages in the amount of $447,198.67, is granted; and this amount is severed and the Clerk is directed to enter judgment, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the balance of plaintiff's motion is denied; and it is further

ORDERED that the remainder of the action shall continue.

Counsel for the parties shall appear for a Status Conference in IA Part 15, Room 335 at 11:00 a.m. on March 18, 2008.

This constitutes the decision and order of the court.

DATED: 2/21/08

ENTER:

Hon. Walter B. Tolub, J.S.C.