[* 1]

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Kanner

INDEX NO. 113737/04

MOTION DATE 3/7/08

- v -

MOTION SEQ. NO. 001

Palmiotto

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant to amend his answer and for summary judgment is denied; and it is further

ORDERED that the cross-motion by plaintiff for summary judgment is denied; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon defendant within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 3/19/08

HON. CAROL EDMEAD J.S.C.

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

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 35

----------x

ANGELA KANNER,

Plaintiff,

-against-

JOSEPH M. PALMIOTTO,

Defendant.

----------x

Index No. 113737/2004

DECISION/ORDER
Motion Sequence #001

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

MEMORANDUM DECISION

In this action for legal malpractice, defendant Joseph M. Palmiotto ("defendant") moves pursuant to CPLR 3025(b) for leave to serve an amended answer, and pursuant to CPLR 3212 for summary judgment dismissing the complaint of the plaintiff, Angela Kanner ("plaintiff"). Defendant represented the plaintiff in a legal malpractice action against Richard H. Rubin, Esq. and Jerald Segal, Esq. arising from their representation of plaintiff in a commercial real estate transaction (the "Underlying Action").

In response, plaintiff cross moves pursuant to CPLR 3212 for summary judgment on her complaint.

The Underlying Action[1]

In 1988, plaintiff sold her gas station in Brooklyn, New York to Flatgut Corporation ("Flatgut") "c/o Isak Gutman" ("Gutman") for $875,000 (the "Contract"). According to plaintiff, Gutman was to secure a new first mortgage of $575,000, and since Flatgut was anticipated to be "short" $150,000 of the purchase price at the closing, she agreed to take back a second mortgage in the sum of $150,000, to be paid within five years or earlier if the gas station

[1] The facts are taken in large part from the complaint in the Underlying Action, entitled *Angela Kanner v Richard H. Rubin and Jerald Segal*, Index 8645/1994.

was sold. The mortgage to plaintiff was signed by Flatgut, and Gutman signed as a personal guarantor. The note contained a "due on sale" clause; however, no such clause existed in the body of the mortgage. According to plaintiff, her husband, Robert Kanner ("Mr. Kanner") (collectively, "the Kanners") handled the transaction. Richard H. Rubin, Esq., however, prepared the instruments necessary to consummate the sale, including the note and mortgage, on plaintiff's behalf.[2]

In January 1990, plaintiff began receiving payments from Gaseteria Oil Corporation ("Gaseteria"). Rubin advised plaintiff that Gaseteria was only a tenant (Plaintiff accepted such payments for the next two years). Rubin also advised plaintiff that the premises could not be sold without her knowledge in light of the "due on sale" clause in the note.

Thereafter in June 1990, Rubin requested that plaintiff sign an estoppel certificate as "a routine manner" required by the mortgagor.

In January 1992, Gaseteria stopped making payments and, upon Rubin's advice, plaintiff commenced a foreclosure action for non-payment. Rubin indicated that Segal would be assisting him in the foreclosure.

In March 1992, Segal advised plaintiff that Gaseteria *owned* the gas station. Although Rubin and Segal told plaintiff that she had signed an assumption of mortgage agreement back on June 12, 1990, plaintiff denied ever signing such an agreement. Rubin and Segal then had plaintiff sign an assumption of mortgage on June 11, 1992, which was now, two years after the sale to Gaseteria. On June 18, 1992, upon Rubin's advice, plaintiff also signed a "modification agreement" with Gaseteria, which modified the note and mortgage. Plaintiff also discontinued

[2]According to defendant, Flatgut and Gutman ran into financial difficulties, and plaintiff granted them a forbearance for 10 months.

the foreclosure action in exchange for $6,250 from Gaseteria for interest payments due on the mortgage from January 1, 1992 through May 31, 2002. When plaintiff indicated that she wanted Gutman to remain personally liable for the note and mortgage, Rubin and Segal advised her that Gutman would remain liable since no satisfaction of mortgage was issued. Although Segal had previously informed plaintiff that there was a multimillion tax lien against Gaseteria, Rubin advised plaintiff that Gaseteria was a solid company and that the lien had been satisfied. Prior to signing the modification agreement, plaintiff hired another attorney, Geraldine Santangelo, to allegedly supervise Rubin's work, but this other attorney offered no advice on the transaction.

In January 1993, Gaseteria filed for bankruptcy. When plaintiff was unable to recover the debt, she hired defendant to commence an action against Rubin and Segal to recover her losses.

On August 13, 1999, Gutman filed for bankruptcy and listed plaintiff's debt.

Underlying Action Against Rubin[3]

In her first cause of action, plaintiff alleged that Rubin was negligent in failing to include the "due on sale" clause in the mortgage.

In her second cause of action, plaintiff alleged that the estoppel certificate Rubin requested she sign in June 1990 was not a routine manner, but was used in connection with Gaseteria's purchase of the gas station. Rubin's failure to properly recognize the potential sale of the gas station to Gaseteria, and thus, failed to properly represent her interests in such sale.

In her third cause of action, plaintiff claims that if she signed an assumption of mortgage agreement on June 12, 1990 as Rubin stated, then Rubin knew or should have known that the

[3] The Underlying Action was also brought against Segal; however, at the request of plaintiff, said Action against Mr. Segal was discontinued.

sale to Gaseteria was occurring and Rubin failed to advise her of the steps she could have taken to protect her interests. Further, the June 11, 2002 assumption of mortgage Rubin had plaintiff sign, was improperly drawn and failed to protect plaintiff's interests.

In her fourth cause of action, plaintiff alleges that Rubin's advice that Gutman would remain liable on the basis that no satisfaction of mortgage was issued was erroneous. Rubin failed to realize that Gutman would not be liable on either the mortgage or the note because (1) he did not sign the mortgage and (2) he would no longer be liable on the note once the modification agreement was signed. Rubin and Segal failed to provide for Gutman's continued liability for the sums due on the note and modification agreement.

Further, Rubin's representation that Gaseteria was a solid company and that the million dollar lien had been satisfied was made without due diligence and constituted gross negligence. Had plaintiff known about Gaseteria's true financial condition, she would not have agreed to enter into the agreements without additional security or guarantees.

When plaintiff's case came up for trial on June 19, 2000, it was marked off the trial calendar. The action was later automatically dismissed pursuant ot CPLR 3404 on June 19, 2001.

Defendant thereafter moved to have the case restored. However, the motion was denied. The Court reasoned:

> Plaintiffs [sic] affidavit with respect to the merits of her malpractice claim is conclusory and unsupported by the affidavit/affirmation of an expert. Further, plaintiff conceded that her husband, not she, dealt with [Rubin], and plaintiff's husband, not she, had "intimate knowledge" of the facts involved in this case. Plaintiff failed to establish that the lawsuit has merit. . . .
>
> Plaintiff also failed to provide a reasonable excuse for the delay in moving to restore the case. The case was marked off the calendar at plaintiff's request on June 19, 2000, in order for plaintiff and her husband to take a trip to Alaska. . . . It was not until January 18, 2002, some 19 months after it was marked off, that plaintiff moved to restore

> the case to the trial calendar. The husband's purported back injury is not supported by medical proof in evidentiary form. Instead, plaintiff submitted unsworn, and conclusory statements by his treating doctors. Further, there is no evidence to establish that plaintiff's husband's duties in Florida required him to be present there at all times, thereby preventing him from coming to New York, if needed, in this lawsuit. Furthermore, defendant's purported consent to marking the case off the court's calendar, did not give plaintiff unfettered discretion as to when to move to restore the case
>
> . . . .as to the element of prejudice, the length of delay in bringing this 1994 case to trial has prejudiced defendant. Apparently, defendant was ready for trial when plaintiff decided to take a vacation. . . .

This action ensued.

Instant Action

Plaintiff alleges that defendant departed from accepted legal standards by discontinuing the Underlying Action against Segal, a liable attorney, either without her consent or upon providing plaintiff with negligent information; failing to adequately pursue the claim against Rubin; permitting the action to be marked off the calendar; improperly and untimely seeking to restore the matter to the calendar; abandoning representation of the plaintiff; permitting the action to be dismissed without the court reaching the merits; unsuccessfully appealing the dismissal; and failing to act promptly to seek recovery from Gutman and/or any other responsible individual.

Instant Motion

In support of amending his answer, defendant argues that since Gutman filed for bankruptcy, and had a defense that the material terms changed in the modification of the mortgage and that there was a new obligor who he did not intend to guaranty, defendant can now raise the affirmative defense that any judgment against Gutman could not be collected.

Defendant also seeks summary dismissal of the complaint, on the ground that plaintiff cannot establish one of the three elements of an legal malpractice action, *to wit*: that "but for" the

attorney's negligence, plaintiff would have prevailed in the Underlying Action. Moreover, the lack of merit of the Underlying Action warrants dismissal of the complaint.

Although plaintiff denied knowledge that Gascteria had purchased the gas station, she admitted that she accepted checks from Gaseteria for two years and had received correspondence from Gaseteria on September 30, 1990 regarding insurance for the premises. The Kanners were thus aware at that time that they could foreclose on the loan and enforce Gutman's guaranty. They were also aware that Flatgut and Gutman were not in a position to pay their obligations. Further, Mr. Kanner testified that he knew, prior to the period he started receiving Gaseteria's checks, that Gaseteria was indicted by the Federal government.

Additionally, during the foreclosure proceeding in 1992, plaintiff wrote Santangelo about her concerns that the first mortgage holder would foreclose, that Gaseteria would buy back the premises at auction for the amount of the first mortgage, and that she would be "dead in the water."

As part of the settlement of the foreclosure proceeding, plaintiff recognized Gaseteria's purchase of the premises and assumption of Flatgut's mortgage. Prior to settling, plaintiff intended for her Florida corporation to assume the mortgage at the conclusion of the foreclosure, but instead, made a deal with Gaseteria. There was an additional understanding as part of the settlement that the interest rate from June 1, 1992 through May 1, 1993 would be 9% and that the modification agreement also contained a "due on sale" clause. Further, Santangelo also advised plaintiff to proceed with the foreclosure settlement and to ensure that the modification agreement was recorded with the Court.

In January 1993, plaintiff wrote Gutman, listing the options she considered taking, including foreclosing against Gaseteria, and seeking a default judgment against him personally.

Defendant argues that plaintiff understood and agreed to the terms of the foreclosure settlement, and had every opportunity to exercise the "due on sale" clause and/or foreclosure, but chose not to do so. Plaintiff, who also had an opportunity to recover against Gutman on the guaranty and chose not to, did not sue Gutman until Rubin raised the guaranty issue as an affirmative defense. When Gutman defaulted in that lawsuit, Mr. Kanner advised defendant that he did not want to pursue a judgment against Gutman. After Segal threatened to sue the Kanners for malicious prosecution, plaintiff instructed defendant to discontinue her action against Segal. When defendant discussed with plaintiff the possibility of naming Santangelo as a defendant, Mr. Kanner expressed the beneficial and harmful effects of such action.

Also, Rubin's legal expert in the Underlying Action, Marvin Natiss, Esq., attested that plaintiff and Mr. Kanner, an astute business man, had the benefit of three separate counsel on the underlying transactions, and that Rubin did not commit legal malpractice. Defendant maintains that plaintiff knew what was going on in entering into these transactions and made business decisions that had a certain degree of risk.

Opposition and Cross-Motion

Plaintiff opposes dismissal, and seeks summary judgment for $150,000 with interest from June 13, 1990, the date of sale of the premises to Gaseteria.

Plaintiff argues that defendant failed to meet his burden to come forward with *prima facie* proof in admissible form of lack of negligence, either his own, or that of Rubin. Further, defendant should not be permitted to present an "expert" affidavit prepared for Rubin, which defendant criticized when used, which does not address the critical issues and is not presented as to a degree of reasonable legal certainty and, inadmissible in this action.

The facts in the complaint in this action, and those in the Underlying Action are uncontested, and demonstrate that both defendant and Rubin were negligent, that the negligence was the proximate cause of the damage to the plaintiff, and there are ascertainable damages which constitute the loss of the principle amount of the second mortgage, plus interest.

With respect to defendant's negligence in mishandling the trial date of the Underlying Action, defendant assured the Kanners that there was no need to select an adjournment, that he could merely mark the case "off the calendar" and put it back on after the cruise was over. Defendant never explained the ramifications of marking the case off the calendar, as opposed to an adjournment. When the Kanners returned from their trip, Mr. Kanner repeatedly asked defendant to put the matter back on the calendar. Not only did defendant fail to do so, defendant then became difficult to contact. On the few times that defendant could be reached, his response was "don't worry" and that "it would be taken care of." But for defendant's negligence in not restoring the Underlying Action, plaintiff would have successfully established that the negligence of Rubin and Segal proximately caused damages to the plaintiff in the amount of $150,000. Plaintiff also notes that although she and Mr. Kanner were deposed in the Underlying Action, defendant never took Rubin's deposition.

Plaintiff argues that there is also a difference between making an application to restore a case within one year of it being marked off the calendar and doing so after the case is marked off the calendar, beyond the one-year period. Defendant presented no excusable neglect that was acceptable to the Court and could not do so. The claim about the client being injured appeared feigned and defendant also presented no proof of the merits of the case. The determination of the Appellate Division cannot be changed and the failure to provide what would be necessary in

order to restore the case to the calendar was negligence. No such proof would have been needed if the application were made within one year.

Nor did defendant keep a dairy or calendar to keep track of the one year time period, and his failure to do so would be negligence.

Furthermore, the Underlying Action had merit. Rubin failed to place the "due on sale" clause in the mortgage document so as to put the subsequent purchaser, Gaseteria, on notice.

Plaintiff argues that when the sale of the gas station had come to Rubin's attention, he concealed this from the Kanners by trying to convince them that plaintiff had signed a document in which Gaseteria would take over the mortgage and the mortgage would not be called in based upon a sale of the premises to Gaseteria.

When payments ceased, the Kanners instructed Rubin to commence a foreclosure action against Flatgut. Rubin assured the Kanners that there was no defense to the foreclosure and that they would receive their monies.

Mr. Kanner denies instructing Rubin not to sue Gutman, which makes no difference, as Gutman ended up having no personal liability and later went bankrupt after he was eventually sued.

The Underlying Action would have been won either by summary judgment, which was never made by defendant, or at trial. Rubin had at least $1 million of insurance coverage and was being defended by the insurance carrier, so that the limited damage claim would have been paid. Rubin was part of a larger firm, but defendant did not sue the firm, only Rubin.

Additionally, plaintiff's legal expert opines that to a reasonable degree of legal certainty, there were numerous acts of negligence committed, the primary act of negligence being Rubin's failure to include in the mortgage held by plaintiff a "due on sale" clause. If the Kanners

required such language, the provision for "due on sale" contained within the unrecorded note is negligence to the extent that it would not give constructive notice of the provision to a purchaser of the property. Rubin should have been familiar with the requirement of the Recording Act, Real Property Law §291 which requires that "Every such conveyance not so recorded is void as against any person who subsequently purchases or acquires.... the same real property,... in good faith and for a valuable consideration..." Once Flatgut sold the premises to Gaseteria, Rubin's negligence proximately caused damage to plaintiff. "But for" that negligence, plaintiff would have been paid under the terms of the mortgage. The documents indicate that the $150,000 second mortgage would have been paid in full.

When plaintiff received documents showing Gaseteria's name on the insurance policy, Rubin was negligent in representing that Gaseteria was a tenant without reviewing the issue of ownership.

Even if the Kanners decided to investigate and found that a transfer had taken place, it was too late. The initial negligence of Rubin proximately caused the damage. If Rubin had reviewed the title and found that transfer had taken place, he would have been able to commence litigation against Flatgut for breach of the note, and Flatgut would have had the proceeds of sale in order to pay Plaintiff. To that extent, Rubin was negligent in not suing Flatgut or commencing a foreclosure action claiming that Gaseteria was aware of the mortgage. Rubin having believed that there was already an assumption agreement of the mortgage prepared in 1990 demonstrates that Gaseteria was aware of the "due on sale" clause and was willing to make such assumption of the mortgage so long as the mortgage was not accelerated based on the breach. With evidence that Gaseteria had actual knowledge of the "due on sale" clause, Rubin, who later recommended a foreclosure based on non-payment, could have sought foreclosure

based on the breach of mortgage note and the knowledge of Gaseteria or, suc Flatgut, which would have the purchase money from the sale. The agreement that Rubin claimed was signed by plaintiff was contemporaneous with the sale to Gasceria; thus, Rubin was aware of the transfer in time to take immediate action to recover monies owed to plaintiff.

When the attorney finally commenced a foreclosure action and was at the point of making a motion for summary judgment for a judgment of foreclosure and sale, it was negligent for the attorney to recommend that plaintiff withdraw the foreclosure action. Rubin recommended discontinuance of the foreclosure action, which was at a point of success, and would have given the Plaintiff either her money or possession of the premises by which Mr. Kramer asserts that he would have been able to be back into the business and resell the property for at least $150,000. Instead, Rubin recommended that plaintiff have Gaseteria sign what is, essentially, an assumption of the mortgage. When Gaseteria filed for bankruptcy, it would no longer be bound by that assumption of that mortgage as a contractual obligation. To do this was negligent of the part of Rubin.

Even more negligent, was permitting the discontinuance of the foreclosure and assumption of mortgage without any review for creditors of Gaseteria. Plaintiff contends that even though Segal advised the Plaintiff of the multi-million dollar judgment against Gaseteria and discouraged the deal that Rubin was recommending, Rubin, persisted in forcing the resolution. By representing that the judgment had been paid and that Gaseteria was credit-worthy, without verifying its accuracy, is negligence. Having the client accept, in *lieu* of completion of foreclosure, an assumption of the mortgage by another party, similar to a guarantee, without knowing whether or not there are existing liens against that party, is

negligence. Any litigation against Gaseteria to collect on the contractual assumption of mortgage would have been worthless, with a $19 million judgment already against it.

It was also negligent to modify the agreement as to the second mortgage since, to the extent of any modification, a guarantor of that mortgage is relieved from responsibility. This all compounded Rubin's initial negligence because the plaintiff, having a successful foreclosure, discontinued the foreclosure, and no longer had a guarantee from Gutman; Flatgut was no longer in title and Gaseteria only had a contractual obligation subject to a $19 million dollar judgment.

Defendant's Opposition to Cross-Motion and Reply

The Kanners' allegations against Rubin and defendant go beyond the allegations contained in the bills of particulars against these two lawyers. The bill of particulars against defendant herein fails to lay out a legal malpractice claim, since it does not allege the nexus of defendant's negligence and how it affected the ultimate outcome of plaintiff's action against Rubin and how, "but for" defendant's negligence, the Kanners would have succeeded against Rubin.

Further, the Kanners are entirely responsible for the dismissal of plaintiff's case from the trial calendar. The Kanners' own excuses explain why defendant was reluctant to restore the case to the calendar. Defendant did not hire an expert, or take the deposition of Rubin because the Kanners were unwilling to bear the costs related to such discovery. Defendant wanted to proceed with both important items of discovery, and even discussed using another one of Mr. Kanner's lawyers to act as an expert.

Moreover, any decision not to pursue Segal was made by the Kanners, not defendant. Rubin also denied that he represented the Kanners on the foreclosure matter. Additionally, Segal and Santangelo, and not the defendant, advised the Kanners during the foreclosure proceedings.

Notwithstanding all the claims by the Kanners, the legal documents that Rubin prepared in the initial sale to Gutman allowed the Kanners to place themselves favorably in position to bring a lawsuit against both Gutman and Gasetcria in light of the wrongful sale of the business from Gutman to Gaseteria. Moreover, it gave them the leverage they needed to negotiate a favorable settlement. The documents prepared by Rubin allowed the Kanners to make a business decision to exchange obligors on their second mortgage, to continue to receive interest payments and to be made whole by compelling the new owner of the station to correct the original obligor's default. It was Gutman's financial instability which lead to the improper sale in the first place. This is evidenced by the fact that for ten (10) months the Kanners excused Gutman's obligation to pay interest on their second mortgage note. Though the improper sale occurred without the Kanners' knowledge, they accepted checks from Gaseteria after they became aware of the sale. Rubin did not prepare the new mortgages, note or any document after the mortgage was modified by the Kanners which reflected the new owners of the property and new obligor(s) on the note and mortgage.

Additionally, the Kanners were counseled by competent attorneys and entered into a settlement agreement with all parties for what was then a beneficial agreement. The Kanners were able to preserve all rights to their second mortgage even after the wrongful transfer by Gutman. That Gutman and Gaseteria filed for bankruptcy after the modification of the mortgage and note is simply fortuitous circumstances. That is a risk in every transaction. Rubin's actions did not cause these events.

Further, although Mr. Kanner claims that Rubin concealed his knowledge of the sale, the Kanners provided a copy of the June 12, 1990 document to Rubin after the sale had occurred, which Gasetcria had drafted and later sent on to the Kanners to have them accept Gaseteria as

the new owner. The document is dated June 12, 1990, two years after the transaction had closed and when Rubin was no longer involved with the deal. In looking at the document, it contains Gascteria's name and that of Angela Kanner. The transaction where Rubin was involved was between the Kanners and Gutman. Santangelo was hired directly by the Kanners' to oversee the foreclosure proceedings, where Rubin was not involved. Moreover, the stroke suffered by Ms. Santangelo did not occur until "years later, after the foreclosure settled. In fact, the Kanners hired Santangelo to oversee the activities of Segal, who was hired to handle the foreclosure actions.

The affidavit of Mr. Levitt is nothing more than that of an advocate putting his best foot forward for his clients. Mr. Levitt lacks personal knowledge, as does the expert.

Additionally, the absence of the "due on sale" clause in the mortgage filed had no bearing on the outcome of the Kanners' ability to exercise their rights under the second mortgage, evidenced by their ability bring an action against the parties to the wrongful transfer.

While the dismissal for failure to restore, on its face, seemingly establishes a potential cause of action, such allegation alone is insufficient.

Plaintiff's Reply

In reply, plaintiff points out that even defendant's counsel acknowledges the defendant's negligence in failing to restore the Underlying Action. Defendant does not contest the deposition testimony of plaintiff, Mr. Kanner, or the expert, and offers no expert affidavit. Thus, there are no questions of fact for trial. Whether plaintiff did not want to pay for a deposition, that there was no trial, that defendant could have still won the case without the deposition, and not having an expert for trial is immaterial. Rubin's improper draft of the mortgage did not warrant an expert.

Some "facts," such as defendant not knowing how to reach the Kanners, what plaintiff knew or did not know, what was told to Rubin, or suggesting that a modification document provided by Rubin for signature were created to oppose the motion and do not come from a witness with knowledge, but from defendant's attorney.

It is also uncontested that judgment against Gaseteria rendered the new agreement worthless. Defendant's suggestion that plaintiff could have brought an action for wrongful transfer is something raised in reply as an afterthought; if plaintiff could have recovered by such an action, defendant is then conceding liability for not bringing the action. Based on the facts of the case, such action would have been futile unless brought by Rubin when he learned of the transfer of the property without paying the mortgage. It is undisputed that Rubin could have done so when the transfer money was still available and have payment made to Plaintiff.

Once Rubin failed to draft the mortgage properly and the transfer of the property took place, damages were fixed. Plaintiff would have recovered against Rubin, and there is no dispute that Rubin was insured sufficiently to pay such judgment.

Further, the bill of particulars prepared against Rubin by defendant is complete and presents a theory of the case which defendant cannot contest, and which would have been based on his investigation of the case and the facts that he was ready to present at trial. The affidavit prepared on Rubin's behalf in the Underlying Action, was improperly submitted in reply.

The bill of particulars annexed to defendant's reply confirms every single statement in this case made on behalf of the plaintiff.

Further, the bill of particulars in this case is consistent with plaintiff's claim. If defendant's counsel now wants to blame Segal, the bill of particulars against defendant claims that he improperly discontinued the action against Segal.

Plaintiff respectfully contends that she and her husband not be forced to return from Florida for immediate trial, or undergo the expense of the testimony of an expert, or the legal expenses of a trial, as defendant has not presented evidence upon which, if not contradicted, would compel a directed verdict to defendant, as that is the test of the summary judgment motion. It is defendant who cannot dispute plaintiff's *prima facie* showing, and, as such, summary judgment should be granted to plaintiff.

Analysis

Leave to Amend Complaint

It is well settled that leave to amend an answer pursuant to CPLR §3025(b) should be freely granted provided there is no prejudice to the nonmoving party (*Crimmins Contr. Co. v City of New York*, 74 NY2d 166 [1989]; *McCaskey, Davies & Assocs. v New York City Health & Hosps. Corp.*, 59 NY2d 755 [1983]; *Lambert v Williams*, 218 AD2d 618, 631 NYS2d 31 [1st Dept 1995]). Although leave to amend should be freely granted, the movant must make some evidentiary showing that the proposed amendment has merit, and a proposed pleading that fails to state a cause of action or is plainly lacking in merit will not be permitted (*Hynes v Start Elevator, Inc.*, 2 AD3d 178, 769 NYS2d 504 [1st Dept 2003]; *Tishman Constr. Corp. v City of New York*, 280 AD2d 374 [1st Dept 2001]; *Bencivenga & Co. v Phyfe*, 210 AD2d 22 [1st Dept 1994]; *Bankers Trust Co. v Cusumano*, 177 AD2d 450 [1st Dept 1991], *lv dismissed* 81 NY2d 1067 [1993]; *Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590 [1st Dept 1990]).

Gutman filed for bankruptcy in 1999, long after the sale of the gas station to Gaseteria in June 1990, and the settlement of plaintiff's foreclosure action in 1992. Defendant failed to demonstrate the merit of the defense that due to Gutman's financial difficulties during an

unspecified period after Flatgut purchased the gas station in 1988, and Gutman's bankruptcy in 1999, any judgment by plaintiff in the Underlying Action could not be collected against Gutman.

Accordingly, defendant's application to amend his answer to include such a defense is denied.

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] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). 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). The 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]).

Legal Malpractice

In order to prevail on their cause of action for legal malpractice, plaintiff must allege and demonstrate that (1) defendant owed her a duty to exercise the degree of care, skill and diligence commonly possessed by a member of the legal profession, (2) defendant breached that duty, and (3) that actual damages were proximately caused by the breach (*Gonzalez v Ellenberg*, 5 Misc.3d 1023 [Sup. Ct. New York County 2004] citing *Hatfield v Herz*, 109 F. Supp. 2d 174, 179 [S.D.N.Y. 2000]). To establish the third element of proximate cause and actual damages,

plaintiff "must meet the 'case within a case' requirement, demonstrating that 'but for' the attorney's conduct the client would have prevailed in the underlying matter or *would not have sustained any ascertainable damages had defendants exercised due care* (emphasis added) (*see Levine v Lacher & Lovell-Taylor*, 256 AD2d 147 [1st Dept 1998]; *Rubinberg v Walker*, 252 AD2d 466 [1st Dept 1998]; *Perks v Lauto & Garabedian*, 306 AD2d 261 [2d Dept 2003]; *see also*, *Bazinet v Kluge*, 14 AD3d 324 [1st Dept 2005]; *Gonzalez v Ellenberg*, 5 Misc 3d 1023 [Supreme Court, New York County 2004]).

In order for plaintiff to prevail in her legal malpractice against defendant, she must establish that "but for" the defendant's malpractice, she would have prevailed in her legal malpractice claim against Rubin. Necessarily, plaintiff must establish that Rubin's negligence was a proximate cause of her damages, *i.e.*, her loss of $150,000.

At the outset, an issue of fact remains as to whether defendant exercised the degree of care, skill and diligence commonly possessed by a member of the legal profession when plaintiff's Underlying Action was "marked off" the calendar.

When a case is "marked off" the calendar, such case may be restored within one year thereof as of right (*Okun v Tanners*, 47 AD3d 475 1 Dept 2008] ["Once a case is struck from the trial calendar, the plaintiff has one year from the date it was struck to restore it as a matter of right"] *citing Basetti v Nour*, 287 AD2d 126, 134-135, 731 NYS2d 35 [2001] [when a case is "marked off" the calendar, plaintiff need only request to restore the action within one year, and there is no obligation to demonstrate a reasonable excuse, meritorious action, lack of intent to abandon, and lack of prejudice to the defendants, or some lesser burden]]). However, in order to restore the action to the calendar, the party must meet the stricter standard imposed pursuant to CPLR 3404, by showing (1) a meritorious cause action and (2) reasonable excuse for delay

(*Okun v Tanners*, 47 AD3d 475, *supra*). Defendant failed to demonstrate that the filing of the motion to restore the Underlying Action to the calendar after one year it was "marked off" was conduct representing the degree of care, skill and diligence commonly possessed by member of the legal profession (*see e,g., Butler v Brown*, 180 AD2d 406, 579 NYS2d 79 [1st Dept 1992] [holding that expert testimony was not necessary with respect to whether the case had been "marked off" and defendant's malpractice for failure to restore it within one year thereof]). The level of proof necessary to restore an action to the calendar after it has been deemed abandoned is nonexistent when such action is taken within one year of the case being marked off the calendar. In any event, an issue of fact exists as to whether the Kanners were entirely responsible for the dismissal of plaintiff's case from the trial calendar. It is uncontested that instead of appearing for trial in the Underlying Action as scheduled, plaintiff went on vacation with her husband. According to defendant, plaintiff was unable to proceed to trial thereafter due to Mr. Kanner's injury and work schedule. However, the Kanners claim that defendant advised them that the case would be restored notwithstanding their decision to go on vacation. Thus, an issue of fact exists as to whether defendant's failure to restore the action within one year it was "marked off" the calendar was negligent, as a matter of law.

Furthermore, an issue of fact exists as to whether plaintiff would have prevailed in her Underlying Action against Rubin, as a matter of law. The "due on sale" clause contained in the note, but not in the mortgage, states that "The entire principal sum together with any prepayment fees shall be due and payable on the sale or transfer of title" of the gas station. When such an unambiguous provision appears in a mortgage, it affords the mortgagee the "unrestricted right to declare the whole of the unpaid principal sum to be due in the event of a sale" or transfer of the subject premises and such provision may be enforced in accordance with its terms (*Newburgh*

Savings Bank v Grossman, 118 Misc 2d 1036 [Supreme Court, Orange County 1982]). And, once the subject premises are sold or transferred to a subsequent purchaser, the mortgagee has the right to commence an equitable action to foreclose on the premises against the mortgagor and the subsequent purchaser (*id.*).

It is uncontested that Rubin prepared the note and the mortgage held by the plaintiff and that the mortgage did not contain a "due on sale" clause, as did the note. It cannot be contested that plaintiff intended to protect her interest in the gas station by including a "due on sale" clause in the necessary documents. The purpose of the "due on sale" clause was to put subsequent purchasers of the gas station on notice of plaintiff's interest in gas station. In the event of a sale of the gas station, plaintiff would have been paid the balance due on the mortgage, in this case, $150,000 from Flatgut or the guarantor, Gutman. It is also uncontested that Real Property Law 291 provides that a conveyance not recorded is void as against subsequent purchasers who acquire said property in good faith and valuable consideration.

According to the complaint in the Underlying Action, in January 1990, Rubin advised plaintiff that Gasceria was a mere tenant of Flatgut and that the gas station could not be sold in light of the purported "due on sale" clause in the mortgage. According to plaintiff, Rubin believed that she signed an assumption of mortgage agreement with Gaseteria in June 1990. When Gaseteria purchased the gas station later in June 1990, such transfer of title would have triggered any "due on sale" clause in the mortgage. Although defendant claims that Rubin was no longer involved in the representation of the plaintiff by this time, according to plaintiff, Rubin believed that plaintiff signed the June 1990 assumption agreement permitting Gasetcria to assume Flatgut's mortgage. An issue of fact thus exists as to whether Rubin was aware of the

June 1990 sale to Gaseteria, and if so, whether his failure to pursue a foreclosure action at such time was negligent, as a matter of law.

Furthermore, Rubin advised plaintiff that Gaseteria was financially sound, and to settle her action against Gaseteria by having Gaseteria assume the mortgage, without having first investigated the accuracy of such statement. The record indicates that Gaseteria was subject to a multi-million dollar tax lien in 1991, and later filed for bankruptcy in 1993. Although plaintiff's husband, who handled the original transaction to Flatgut, may have been a sophisticated client, there is a question regarding the extent of the Kanners' reliance upon Rubin's advice to settle the foreclosure action against Gaseteria. A question of fact exists as to whether the settlement of the foreclosure action was due to the negligent advice of Rubin, or a result of plaintiff's business decision to forego an assumption of the mortgage by her Florida corporation.

Finally, with respect to the modification agreement and Gutman's guaranty of the original mortgage, defendant failed to demonstrate that Gutman's guaranty was continuing, and applicable to Gaseteria's after-acquired obligation.

According to the affidavit of plaintiff's legal expert of the purchase price paid by Gaseteria for the gas station, it appears that "but for" Rubin's omission, plaintiff would have had been paid in full under the terms of the mortgage. And, in the event of Flatgut's failure to comply with the "due on sale" clause, plaintiff would have had been able to maintain an action against the guarantor, Gutman.

In essence, issues of fact exists as to whether the negligence of defendant was the proximate cause of plaintiff's damages, and whether plaintiff would have prevailed in the Underlying Action against Rubin.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant to amend his answer and for summary judgment is denied; and it is further

ORDERED that the cross-motion by plaintiff for summary judgment is denied; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon defendant within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: March 19, 2008

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