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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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STAN STUART,

Plaintiff,

-against-

ROBERT L. FOLKS & ASSOCIATES, LLP, and CYNTHIA A. KOURIL, ESQ.,

Defendants.

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MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 11
Index No.: 26713/09
Motion Seq. No.: 01

DECISION AND ORDER

Papers Read on this Motion:

Defendants' Notice of Motion	01
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Plaintiff's Affirmation	xx
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The defendants move for an order pursuant to CPLR §3211(a) (1), (5) and (7) to dismiss the plaintiff's complaint. The plaintiff opposes the application.

Plaintiff, the former owner and chief executive officer of Popeye's Inc. and Popeye's Fishing Station, Inc., commenced this action against defendants Robert L. Folks & Associates, LLP and Cynthia A. Kouril, Esq. (collectively Folks & Kouril), to recover damages for legal malpractice. Plaintiff alleges that said defendants, despite expiration of the Statute of Limitations, improperly brought suit[1] against his prior attorney (Kirschenbaum & Kirschenbaum, P.C.), whom plaintiff had retained to represent Popeye's Inc.'s business interests in a bankruptcy proceeding for the specific purpose of converting a Chapter 7 proceeding to a Chapter 11 reorganization proceeding and renegotiating the

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[1]Although defendants commenced a time barred legal malpractice action against Kirschenbaum & Kirschenbaum, P.C., plaintiff alleges said attorneys failed to assert a cause of action for fraud which was not time barred.

terms of a mortgage.

According to the complaint in the legal malpractice against Kirschenbaum & Kirschenbaum, said defendants failed, *inter alia*, to oppose the foreclosure action regarding real property known as 2740 Ocean Avenue; failed to oppose the sale of the subject premises at auction and failed to recast the terms of the mortgage. It is further alleged that the Kirschenbaum & Kirschenbaum employee, Richard A. Koren, assigned to represent Popeye's Inc.'s interest in the bankruptcy proceeding, was not a licensed attorney.[2] Plaintiff alleges that, due to the failures of Kirschenbaum & Kirschenbaum, he lost his business, his property and incurred legal fees he could not afford to pay.

Defendants move to dismiss the complaint pursuant to CPLR §3211(a)(1), (5), (7) on the grounds, respectively, that plaintiff's claims are barred by documentary evidence, the doctrine of collateral estoppel applies and that the complaint fails to state a viable cause of action. They argue that the complaint is contradictory in that plaintiff alleges both that the legal malpractice claim was untimely commenced, defendants failed to prosecute the claim and, at the same time, were negligent in prosecuting the claim.

Plaintiff's opposition to defendants' dismissal motion is predicated on allegations that defendants:

> 1) negligently advised him that he had a viable cause of action against the Kirschenbaum & Kirschenbaum law firm;
>
> 2) commenced an action on behalf of a dissolved corporation, i.e., Popeye's Inc. and Popeye's Fishing Station, Inc., and
>
> 3) failed to timely commence an action alleging fraud.

In short, plaintiff contends that if defendants had timely filed the summons and complaint in the

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[2]Mr. Koren was subsequently charged with practicing law without a license and, on September 14, 2004, pled guilty to the lesser charge of disorderly conduct. He was fined and sentenced to a conditional discharge for a period of one year.

underlying action, after allegedly being retained on April 7, 2006, the action would not have been time barred.

ANALYSIS

On a motion to dismiss pursuant to CPLR §3211, the pleading is to be afforded a liberal construction; the facts alleged must be accepted as true, and the plaintiff is to be accorded the benefit of every favorable inference. *Thomas v Thomas*, 70 AD3d 588, 589 [1st Dept 2010]. Under CPLR §3211(a)(1), dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. *Alvarez v Amicucci,* 82 AD3d 687 [2d Dept 2011]. Where an issue cannot be resolved as a matter of law, and a factual question is presented, the motion to dismiss must be denied. *Mandarin Trading Ltd. v Wildenstein*, 65 AD3d 448 [1st Dept 2009] *aff'd* 16 NY3d 173 [2011]. In assessing a CPLR §3211(a)(7) motion, the criterion is whether the plaintiff has a cause of action, not whether he has stated one. *Wilner v Allstate Ins. Co.*, 71 AD3d 155, 159 [2d Dept 2010].

In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession; that the attorney's breach of this duty caused plaintiff to sustain actual and ascertainable damages; and that but for the negligence of the attorney the plaintiff client would have prevailed in the underlying action or would not have incurred damages. *Barnett v Schwartz* 47 AD3d 197, 201 [2d Dept 2007]. An attorney may be liable for ignorance of the rules of practice, for failure to comply with conditions precedent to suit, for neglect to prosecute or defend an action or for failure to conduct adequate legal research. *Conklin v Owen*, 72 AD3d 1006, 1007 [2d Dept 2010]. An attorney is free, however, to select among reasonable courses of action in prosecuting a client's case without exposing him or herself to liability for malpractice. *Healy v Finz & Finz, P.C.*, 82 AD3d 704,

706 [2d Dept 2011]; *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]; *Carrasco v Pena & Kahn*, 48 AD3d 395, 396 [2d Dept 2008].

A cause of action for legal malpractice accrues when the malpractice is committed no matter when the client discovers it. *Shumsky v Eisenstein*, 96 NY2d 164, 166 [2001]. However, the cause of action does not come into existence until all of the facts necessary to secure relief, including injury, are present. *McCoy v Feinman*, 99 NY2d 295, 301 [2002].

Notwithstanding plaintiff's assertion to the contrary, Folkes & Kouril, defendants herein were retained to represent plaintiff in connection with the malpractice claim against Kirschenbaum & Kirschenbaum by written agreement dated September 26, 2006. The letter dated April 7, 2006, wherein defendant Cynthia Kouril, Esq. acknowledges receipt of plaintiff's check in the amount of $900, does not constitute a retainer agreement as it specifically states as follows:

> "Please be advised that we are not retained by you at this point and any representation by us will only be commenced upon the execution of a written retainer agreement."

While plaintiff alleges that defendants herein did "negligently advise and negligently misrepresent and guarantee [him] that [he] had a viable cause of action," despite the fact that the statute of limitations to commence an action against Kirschenbaum & Kirschenbaum had expired, he does not deny receipt of a letter dated February 1, 2007 from the Folks & Kouril defendants referencing a conversation regarding the statue of limitations problems inherent in plaintiff's lawsuit and outlining a number of dates that might possibly be utilized by the Court to determine when his claim accrued. According to defendants, they advised plaintiff that commencement of the underlying action was a "Hail Mary Pass" although they believed they could maintain a good faith argument regarding an extension of law as to the accrual date of plaintiff's claim. As pointed out in their letter, by relying on September 14, 2004, the date of

Koren's guilty plea, as the accrual date, the Folks defendants would be arguing for an extension of law.

In short, the malpractice claims asserted against defendants Folks & Kouril fly in the face of the record which establishes that, pursuant to the order of the Hon. John M. Galasso, entered September 19, 2007, the motion by defendants Folks & Kouril to be relieved as counsel to plaintiff in the action against Kirschenbaum & Kirschenbaum was granted notwithstanding his opposition to the motion which included many of the same claims he purports to assert in the complaint in this action. Plaintiff was directed to retain new counsel within thirty days of October 10, 2007.

The facts as alleged in this action, even viewed in the light most favorable to plaintiff, do not constitute a meritorious cause of action for legal malpractice. The record is devoid of facts to support the contention that defendants' alleged mishandling of the underlying legal malpractice action against Kirschenbaum & Kirschenbaum was the "but for" cause of plaintiff's alleged damages.

Given that the Bankruptcy Court granted the first mortgagee's motion and lifted the stay on the sale of the corporate property based, *inter alia*, on plaintiff's acknowledgment, in a sworn affidavit dated January 14, 1999, that "the corporate property is worth less than the mortgage balance on it, any claim that Kirschenbaum & Kirschenbaum's acts of legal malpractice were the "but for" cause of the foreclosure[3] and failure to convert a Chapter 7 to a Chapter 11 bankruptcy proceeding is untenable. The transcript of the hearing before the Bankruptcy Court on February 16, 1999, as quoted below, reflects the Judge's serious reservations about the likelihood that he might grant a request to convert the Chapter 7 proceeding to one under Chapter 11. At p. 12-13, lines 19-25; 1-13 of the transcript in the

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[3]Plaintiff failed to inform defendants Folks & Kouril of the existence of the Bankruptcy affidavit or of the statement made by his attorney before the Bankruptcy Court on February 23, 1999, which plaintiff did not refute, that the subject property was underwater, i.e., the property was valued at approximately $300,000 and the outstanding mortgage debt owed on the property was approximately $375,000.

matter *In Re: Popeye's Inc.* on February 16, 1999, the Hon. Stan Bernstein states:

> "if the principal of the corporation doesn't cooperate with the trustee, that hardly suggests that we're going to have an orderly administrated Chapter 11 and compliance with the terms of the U.S. Trustee guidelines. Um, it means they've got a debtor out of control, a debtor basically running its own business as it sees fit with no accountability. And I'm not going to do that.
>
> The most I would do, if it was for the benefit of the creditors, would be to permit a Chapter 11 and appoint an operating trustee, or appoint an examiner, with a very limited period of time to report back to me whether the case should be converted or dismissed."

Moreover, the record establishes that the action against Kirschenbaum & Kirschenbaum was dismissed by order of the Hon. John M. Galasso entered November 21, 2007, based on plaintiff's failure to obtain substitute counsel as directed and not on the expiration of statute of limitations grounds.

Based on the foregoing, the defendant's application is **granted**. It is hereby

ORDERED, that the plaintiff's Complaint is **dismissed**.

This constitutes the Decision and Order of the Court.

DATED: May 16, 2011
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.
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