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|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Mason v Brecher, Fishman, Pasternack, Walsh,<br/>Tilker &amp; Ziegler P.C.</b>                                                                                                                                                |
| 2011 NY Slip Op 33465(U)                                                                                                                                                                                                         |
| December 12, 2011                                                                                                                                                                                                                |
| Sup Ct, NY County                                                                                                                                                                                                                |
| Docket Number: 105881/11                                                                                                                                                                                                         |
| Judge: Donna M. Mills                                                                                                                                                                                                            |
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| This opinion is uncorrected and not selected for official<br>publication.                                                                                                                                                        |

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

GLORIA MASON,

Plaintiff,

-v-

BRECHER, FISHMAN, PASTERNAK, WALSH  
TILKER, & ZIEGLER P.C., et al.,  
Defendants.

INDEX No. 105881/11

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for \_\_\_\_\_.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits....

1 & 2

Answering Affidavits- Exhibits \_\_\_\_\_

3

Replying Affidavits \_\_\_\_\_

4

CROSS-MOTION: \_\_\_\_\_ YES ☒ NO

**FILED**

Upon the foregoing papers, it is ordered that this motion is:

DEC 20 2011

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 12/12/11

Donna M. Mills  
**DONNA M. MILLS, J.S.C.**

Check one: \_\_\_\_\_ FINAL DISPOSITION

☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 58

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GLORIA MASON,

Plaintiff,

- against -

BRECHER, FISHMAN, PASTERNAK, WALSH,  
TILKER & ZIEGLER P.C., BRECHER, FISHMAN,  
PASTERNAK, POPISH, HELLER, REIF &  
WALSH, P.C., BRECHER, FISHMAN,  
PASTERNAK, HELLER, REIF, WALSH &  
TILKER, P.C., AND BRECHER, FISHMAN,  
PASTERNAK HELLER, WALSH & TILKER, P.C.,  
Defendants.

INDEX NO.  
105881/11

**FILED**

DEC 20 2011

NEW YORK  
COUNTY CLERK'S OFFICE

DECISION/ORDER

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DONNA M. MILLS, J:

In this action Defendant, Brecher, Fishman Pasternack, Walsh, Tilker & Ziegler, P.C. ("Brecher Fishman" or "Defendant") moves for a motion for a judgment dismissing the Complaint of the Plaintiff, Gloria Mason ("Plaintiff"), pursuant to CPLR §§'s 3211(a)(1) and 3211(a)(7). Plaintiff opposes the motion on the grounds that the documentary evidence set forth by Brecher Fishman is insufficient to refute plaintiff's claim, and plaintiff maintains that she has set forth sufficient factual allegations to state a viable cause of action in legal malpractice.

**BACKGROUND**

On November 2, 2005, plaintiff while employed by the Department of Health and Mental Hygiene as a Clerical Aide at the premises located at 152 Lexington Avenue, New York, New York, was allegedly injured when she tripped and fell over construction debris and/or wires on the 2<sup>nd</sup> floor sustaining personal injuries. Due to her injuries, plaintiff subsequently sought representation for her Worker's Compensation case with Brecher Fishman. She signed a Retainer and Letter of Engagement with Defendant dated November 21, 2005. The Letter of Engagement signed by plaintiff directed her to bring any

and all inquiries as to the potential for bringing a personal injury action to the attorneys and/or personnel at Brecher Fishman, since they also handled these types of claims. Over the course of Brecher Fishman's representation, plaintiff contends that she made several requests for assistance and consultation from the attorneys and personnel at Brecher Fishman and/or referral to another attorney with respect to a potential third party claim against the construction company she believed responsible for her injuries. Plaintiff further contends that she was never given a consultation nor was she ever directed to seek outside counsel. Finally, plaintiff argues that as a result of Brecher Fishman's failure to advise and/or properly advise her, the statute of limitations on her personal injury action tolled, precluding plaintiff from recovery. Plaintiff now seeks to recover for attorney malpractice committed by Defendant.

#### LEGAL DISCUSSION

To sustain a cause of action alleging legal malpractice, a plaintiff must show that the defendant attorney "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession" and that "the attorney's breach of this professional duty caused the plaintiff's actual damages" (McCoy v Feinman, 99 NY2d 295, 301-302 [2<sup>nd</sup> Dept 2002]). To succeed on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (1), the documentary evidence relied upon by the defendant must "conclusively establish a defense to the asserted claims as a matter of law" (Leon v Martinez, 84 NY2d 83, 88 [1994]). When determining a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), "the standard is whether the pleading states a cause of action," and "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 within any cognizable legal theory' " (Sokol v Leader, 74 AD3d 1180, 1180-1181 [2010], quoting Nonnon v City of New York, 9 NY3d 825, 827 [2007], quoting Leon v Martinez, 84 NY2d at 87-88).

Here, the complaint alleged, inter alia, that but for the defendant's failure to provide her with a consultation or referral to outside counsel she would have been able to commence a personal injury action. It is undisputed that Brecher Fishman represented plaintiff in her Worker's Compensation case, however, language in the Retainer Agreement also made clear that defendant not only provided Workers' Compensation representation, but also provided their clients consultation and representation for personal injury actions.

The Letter of Engagement provides in relevant part:

Our firm does handle Personal Injury and Social Security Disability and Municipal Disability Pension claims, which may be related to the Workers' Compensation claim. You may be entitled to bring a personal injury action if your injury was due to the negligence of someone other than your employer or coworkers. . . . Our firm provides free consultations for these types of potential claims. Please contact us if you would like a consultation from our firm on either a Personal Injury, Social Security Disability, or Disability Pension claim.

Plaintiff maintains that she asked on several occasions if the defendant would bring a personal injury claim on her behalf, and was told that either she did not have a meritorious personal injury claim, or that they were only representing her with Workers' Compensation. Defendant contends that the documentary evidence is clear that they were not responsible for bringing a personal injury claim on behalf of plaintiff, and the failure to bring a personal injury claim against a third-party were entirely because of the actions of plaintiff.

This Court finds that the documentary evidence submitted by the Defendant does not conclusively dispose of the plaintiff's claim against them, as questions remain about the consultation that plaintiff requested, and the basis of defendant's determination that plaintiff did not have a viable personal injury claim against a third-party. Moreover, the

papers submitted by the defendant does not conclusively refute the material facts alleged in the complaint relating to claims of legal malpractice against them, nor does the documentary evidence conclusively establish that the plaintiff lacks a viable claim of legal malpractice (see CPLR 3211 [a] [1]). As such the, the factual allegations set forth in the Complaint, when viewed in the light most favorable to plaintiff establish each and every element of a cause of action sounding in legal malpractice.

Accordingly it is

ORDERED that defendant's motion to dismiss the complaint is denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 574, 111 Centre street, on 2/24, 2012, at 10<sup>15</sup> AM.

**FILED**

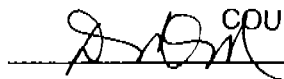
Dated:

12 / 12 / 11

DEC 20 2011

ENTER:

NEW YORK  
COUNTY CLERK'S OFFICE



J.S.C.

DOONA M. WILSON, J.S.C.