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SHORT FORM ORDER

INDEX No. 09-4802
CAL. No. 11-00315CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

ADJ. DATE 10-3-12
Mot. Seq. # 009 - MD
010 - MD
011 - MD
012 - XMotD

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JOHN CRUZ,

Plaintiff,

- against -

CORY J. COVERT and LAW OFFICE OF CORY J. COVERT, P.C.

Defendants.

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Upon the following papers numbered 1 to 93 read on this motion and cross motion for summary judgment and motion to compel; Notice of Motion/ Order to Show Cause and supporting papers 1 - 44, 75 - 85 ; Notice of Cross Motion and supporting papers 62 - 69 ; Answering Affidavits and supporting papers 46 - 57, 70 - 71, 86 - 91, 92 - 93 ; Replying Affidavits and supporting papers 59 - 60, 72 - 73 ; Other memoranda of law 45, 58, 61, 74 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motions (#009 and # 010) are hereby treated as one motion, made by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment in his favor as to the defendants' liability, and that said motion is denied; and it is further

ORDERED that this cross motion (# 012)[1] by the defendants for an order pursuant to CPLR 2221 granting leave to reargue their prior motion for summary judgment (#001) is granted in accordance with the order of the Court (Baisley, J.) dated March 5, 2012, and upon reargument that branch of the defendants motion for an order pursuant to CPLR 3212, granting summary judgment dismissing the plaintiff's complaint is denied; and it is further

ORDERED that the motion (# 011) by the plaintiff for an order compelling the defendants and nonparty American Guarantee & Liability Insurance Company to disclose all claimants covered by the defendants' malpractice insurance policy, including said claimants' identifying information, staying the settlement and payment of any judgments against the defendants pending the determination of all such claims, and compelling the payment into court or escrow of all available insurance funds is denied.

This action for legal malpractice was commenced to recover damages allegedly sustained by the plaintiff as the result of the failure of the defendants to properly plead and prosecute an action on behalf of the plaintiff under the Fair Credit Reporting Act (FCRA), 15 USC §1681 et seq. The underlying action was eventually dismissed, and the defendants failed to perfect an appeal from that dismissal. The plaintiff alleges that his credit was adversely affected requiring him to pay additional costs and increased interest rates on mortgage loans he obtained to finance the purchase of residential properties that he sold for profit. He further alleges that he was denied further mortgages due to the failure of the defendants to correct the error on his credit reports, which prevented him from purchasing additional residential properties, resulting in lost business opportunities.

In 2002, the plaintiff was engaged in the purchase and sale of real estate. Previously, he had leased a Lexus motor vehicle financed by Toyota Motor Credit Corporation (TMC). The plaintiff alleges that he learned that TMC incorrectly reported that payments on the Lexus were in default, and that he wrote to TMC and the three credit reporting agencies (CRAs) regarding the error on April 10, 2002. In a letter dated May 7, 2002, TMC admitted the error and stated that it would correct his credit reports with the CRAs. By letters dated June 3, 2002, two of the three CRAs informed the plaintiff that the reported delinquencies had been deleted from his credit reports. Nevertheless published reports of delinquencies continued to appear on credit reports issued on December 30, 2002, January 16, 2003, March 25, 2003, March 26, 2003, and April 1, 2003, among other dates.

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[1] The Court will address the defendants' cross motion (# 012) before it reviews the plaintiff's motion to compel (# 011) as it directly opposes the relief sought in the plaintiff's motion for summary judgment (# 009 and # 010). The latter motions are treated as one because # 009 seeks to renew and reargue the order of the Court (Baisley, J.) dated November 18, 2011, denying both parties' motions for summary judgment. That relief, for renewal and reargument, was granted in the order of the Court (Baisley, J.) dated March 5, 2012, and the motion for summary judgment was referred to another Judge. For reasons not important here, the motion sequence of that branch of the motion seeking to renew and reargue was carried forward.

On or about April 9, 2003, the plaintiff retained the defendants Cory J. Covert and Law Office of Cory J. Covert, PC (collectively Covert) to prosecute an action against TMC to correct his credit reports and seeking damages for the false reporting concerning the plaintiff's credit. On or about May 14, 2003, Covert commenced the underlying action, *Cruz v Toyota Motor Credit Corporation and Lexus Financial Services*, Supreme Court, Suffolk County, Index No. 03-17730, alleging only state law causes of action. By order dated February 14, 2005, the Court (Baisley, J.) denied the motion to dismiss made by the defendants (TMC) in the underlying action, and granted the plaintiff's cross motion for leave to amend the complaint to include a cause of action under the FCRA. On or about September 26, 2006, TMC moved to renew and reargue its motion to dismiss the plaintiff's complaint on the grounds, among other things, that the plaintiff failed to allege that he notified the CRAs about his claims that TMC furnished false credit information, and to allege that the CRAs contacted TMC about the plaintiff's claims. By order dated April 9, 2007, the Court (Baisley, J.) granted TMC's reargued motion to dismiss indicating that all of the plaintiff's state law claims were preempted by the FCRA, and that the plaintiff had failed to allege a cause of action under said act. On or about May 30, 2007, Covert filed a notice of appeal in the underlying action. By decision and order dated February 19, 2008, the Appellate Division, Second Department dismissed the appeal due to Covert's "failure to timely perfect in accordance with the rules of this court ..."

On February 9, 2009, the plaintiff commenced this action for legal malpractice against Covert. Among the allegations set forth in the complaint are claims that the failure to perfect the appeal and the failure to include the letters from the two CRAs dated June 3, 2002 as exhibits in the plaintiff's opposition to TMC's motion to renew and reargue constituted malpractice.

The plaintiff now moves for summary judgment on the issue of Covert's liability. 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 issue of fact (*see* Avarez v Prospect Hospital, 68 NY2d 320; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (Roth v Barreto, 289 AD2d 557; Rebecchi v Whitmore, 172 AD2d 600; O'Neill v Fishkill, 134 AD2d 487). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co., 168 AD2d 610).

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 (Tortura v Sullivan Papain Block McGrath & Cannavo, P.C., 21 AD3d 1082; Ippolito v McCormack, Damiani, Lowe & Mellon, 265 AD2d 303; Iannarone v Gramer, 256 AD2d 443; Volpe v Canfield, 237 AD2d 282, *lv denied* 90 NY2d 802). A plaintiff must demonstrate that the breach of the attorney's duty proximately caused the plaintiff actual and ascertainable damages (*see* Leder v Spiegel, 9 NY3d 836; Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d 438; McCoy v Feinman, 99 NY2d 295; Darby & Darby, P.C. v VSI Intl Inc., 95 NY2d 308; Kluczka v Lecci, 63 AD3d 796). Moreover, the plaintiff is required to prove that, "but for" the attorney's negligence, the plaintiff would have prevailed

on the underlying cause of action (*see* AmBase Corp. v Davis Polk & Wardwell, 8 NY3d 428; Leder v Spiegel, *supra*; Snolis v Clare, 81 AD3d 923; Weil, Gotshalt & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267; Shopsin v Siben & Siben, 268 AD2d 578).

The FCRA governs the use and protection of information used to assess consumer credit, employment, and insurance eligibility (FCRA 1681 et seq.), and imposes a duty upon "furnishers" of information to a CRA to investigate disputed information once notified of the dispute by the credit reporting agency (FCRA 1681s–2[b]). Thus, in order to maintain a private cause of action against a furnisher, the plaintiff must: 1) notify any credit reporting agency that he or she is disputing the accuracy of information provided by said furnisher, and 2) plead and establish that a CRA notified the furnisher of said dispute (*Id.*, Dornhecker v Ameritech Corp., 99 F Supp2d 918, 928; *see also* Fryfogle v First Nat. Bank of Greencastle, 2009 WL 700161; Robinson v Equifax Info. Serv., LLC., 2005 WL 1712479; Ladino v Bank of Am., 52 AD3d 571).

In support of his motion, the plaintiff submits, among other things, the pleadings, his affidavit, an affidavit and report from a professional in the consumer credit industry, the deposition transcript of Covert and a nonparty witness, various papers in the underlying action, copies of a number of his credit reports and three credit denials, copies of relevant correspondence, and copies of deeds showing his purchase and sale of two parcels of residential property. Initially, the Court notes that the deposition of the nonparty witness is unsigned, and that the plaintiff has failed to submit proof that the transcript was forwarded to the witness for his review (*see*, CPLR 3116 [a]). Under the circumstances, the deposition testimony of the nonparty witness is not in admissible form (*see* Marmer v IF USA Express, Inc., 73 AD3d 868; Martinez v 123-16 Liberty Ave. Realty Corp., 47 AD3d 901; McDonald v Mauss, 38 AD3d 727).

In addition, the Court notes that the plaintiff's affidavit and the affidavit of plaintiff's expert in support of the plaintiff's motion are deficient on their face in that they were notarized in the State of Colorado and the State of Georgia respectively and were not accompanied by certificates verifying that the manner in which they were taken conforms with the law of those states (*see* CPLR 306 [d], 2309 [c]; Real Property Law § 299-a [1]). However, it has been held that the absence of a certificate of conformity is a mere irregularity, not a fatal defect, which can be ignored in the absence of a showing of actual prejudice (*see* Betz v Daniel Conti, Inc., 69 AD3d 545; Matapos Tech. Ltd. v Compania Andina de Comercio Ltd., 68 AD3d 672; Smith v Allstate Ins. Co., 38 AD3d 522). Here, the Court finds that Covert has not objected to the admissibility of said affidavits, and that there is an absence of actual prejudice to the defendants.

In his affidavit dated June 22, 2011, the plaintiff swears that he was developing a real estate investment business in 2002, that he was never late on his Lexus lease payments, and that he notified TMC and the three CRAs about the error in reporting that his payments were late by letters dated April 10, 2002. He states that, during this period, he was able to purchase two investment properties, which he sold at a profit. However, due to his diminished credit score he had to pay higher interest rates on the mortgages he obtained. He indicates that he was denied various mortgages "based solely on the false late payment reports made by [TMC] to the CRAs ..." The plaintiff further swears that he gave copies of the letters dated April 10, 2002 to Covert, along with many other documents, and that the responses by

two of the CRAs prove that those letters were sent. He states that his motion is based on his expert's report.

In his affidavit dated June 22, 2011, John R. Ulzheimer (Ulzheimer) swears that he is an "expert in consumer credit," that he incorporates his attached report in his affidavit, and that the plaintiff would have prevailed in his FCRA claim because, among other things, the plaintiff "sustained damages by virtue of [TMC's] violations of the FCRA because his credit worthiness was adversely affected, which resulted in his being declined for various mortgage applications." A review of the attached report reveals that Ulzheimer opines that the plaintiff notified the CRAs that TMC was misreporting late payments, that letters from two of the CRAs to the plaintiff prove that the CRAs contacted TMC, and that the plaintiff "would have likely prevailed in his [FCRA] lawsuit against [TMC]." He does not express an opinion regarding the plaintiff's claim that he had to pay higher interest rates on the mortgages obtained, nor does he explain the basis of his opinion that TMC's violations of the FCRA resulted in the denial of the plaintiff's various mortgage applications.

The Court notes its limited reliance on the expert opinion submitted by the plaintiff herein. An expert's opinion can have no greater probative value than the facts or data upon which it is based (*see* Hambsch v New York City Tr. Auth., 63 NY2d 723 *citing* Cassano v Hagstrom, 5 NY2d 643; Shi Pei Fang v Heng Sang Realty Corp., 38 AD3d 520; Santoni v Bertelsmann Property, Inc., 21 AD3d 712). An expert "may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion" (*see* Shi Pei Fang v Heng Sang Realty Corp., *supra*). "Speculation, grounded in theory rather than fact, is insufficient to defeat a motion for summary judgment" (*see* Zuckerman v City of New York, *supra*; Leggis v Gearhart, 294 AD2d 543; Levitt v County of Suffolk, 145 AD2d 414). Here, to the extent that Ulzheimer's affidavit attempts to render an expert opinion regarding the plaintiff's claim for damages, it primarily consists of theoretical allegations with no independent factual basis and it is therefore speculative, unsubstantiated, and conclusory (*see* Mestric v Martinez Cleaning Co., 306 AD2d 449).[2] Accordingly, said expert opinion has failed to establish the plaintiff's entitlement to summary judgment herein.

More importantly, a review of the record reveals that there are issues of fact requiring a trial in this action. These include, but are not limited to, whether Covert included the letters from the CRAs to the plaintiff dated June 3, 2002 in his opposition to TMC's motion to reargue in the underlying action, and whether the plaintiff suffered actual and ascertainable damages due to Covert's alleged breach of

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[2] Because Ulzheimer is not an attorney, his affidavit does not, and perhaps cannot, allege that Covert's actions fell below that standard of care required of Covert in the underlying action. However, expert testimony is not required in legal malpractice cases if "the ordinary experience of the fact-finder provides sufficient basis for judging the adequacy of the professional service ..., or the attorney's conduct falls below any standard of due care ..." Greene v Payne, Wood & Littlejohn, 197 AD2d 664; *see also* Northrop v Thorsen, 46 A.D.3d 780; Shapiro v Butler, 273 AD2d 657; Deitz v Kellcher & Flink, 232 AD2d 943; Zasso v Maher, 226 AD2d 366; S & D Petroleum Co. v Tamsett, 144 AD2d 849). The Court makes no findings regarding those allegations of legal malpractice that the plaintiff claims do not require an expert opinion.

duty (*see* Leder v Spiegel, *supra*). The motion papers submitted on behalf of the plaintiff in opposition to TMC's motion to reargue are incomplete and include a paragraph which purports to include the June 3, 2002 letters as an exhibit. In addition, the plaintiff has not submitted any evidence that he was required to pay increased costs and interest on the two mortgages he obtained due to Covert's actions. Neither has the plaintiff submitted any evidence, other than his own vague and self-serving statements, that he was denied further financing "based solely on the false late payment reports made by [TMC] to the CRAs ..." A review of the plaintiff's submission reveals that his credit reports during the relevant period contain a number of items which would be considered adverse to a successful loan application. In addition, the Court notes that Covert makes a very compelling argument that the plaintiff has failed to submit any evidence that he was in contract to purchase additional properties, and that he cannot establish that he lost any real estate transactions due to a lack of financing. However, all issues regarding the admissibility of evidence on that claim by the plaintiff are reserved for the Justice presiding at trial.

Here, the plaintiff has failed to establish his entitlement to judgment as a matter of law. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* Alvarez v Prospect Hosp., *supra*; Winegrad v New York Univ. Med. Ctr., *supra*; *see also* Martinez v 123-16 Liberty Ave. Realty Corp., 47 AD3d 901; Bozza v O'Neill, 43 AD3d 1094). Accordingly, the plaintiff's motion for summary judgment is denied.

Covert cross-moves for summary judgment on the sole ground that the plaintiff cannot establish that he suffered "actual and ascertainable damages" due to any alleged breach of duty in the underlying action. For a defendant in a legal malpractice case to succeed on a motion for summary judgment, evidence must be presented in admissible form establishing that the plaintiff is unable to prove at least one of the essential elements of a malpractice cause of action (Napolitano v Markotsis & Lieberman, 50 AD3d 657; Olaiya v Golden, 45 AD3d 823; Caires v Siben & Siben, 2 AD3d 383; Ippolito v McCormack, Damiani, Lowe & Mellon, *supra*).

Covert has failed to submit any evidence that TMC's error in reporting the plaintiff's purported late payments on his Lexus lease did not increase the plaintiff's costs, including the interest he was required to pay, on the two residential properties that the plaintiff purchased and sold during the period in question in this action. Rather than establishing that the plaintiff cannot prove damages herein, in essence Covert merely claims that the plaintiff has not established his entitlement to damages as a matter of law. A defendant moving for summary judgment cannot satisfy its initial burden of establishing his or her entitlement thereto merely by pointing to gaps in the plaintiff's case (Coastal Sheet Metal Corp. v Martin Assoc., Inc., 63 AD3d 617; *see also* Tsekhanovskaya v Starrett City, Inc., 90 AD3d 909; Blackwell v Mikevin Mgt. III, LLC, 88 AD3d 836; Shafi v Motta, 73 AD3d 729; Falah v Stop & Shop Cos., Inc., 41 AD3d 638). Accordingly, Covert's motion for summary judgment is denied.

The plaintiff now moves by order to show cause (# 011) for an order compelling the defendants and nonparty American Guarantee & Liability Insurance Company (American) to disclose all claimants covered by the defendants' malpractice insurance policy, including said claimants' identifying information, staying the settlement and payment of any judgments against the defendants pending the

determination of all such claims, and compelling the payment into court or escrow of all available insurance funds.

Initially, the Court notes that the plaintiff filed his note of issue in this action on February 18, 2011. This order to show cause was signed on April 5, 2012, almost seven months later. Pursuant to 22 NYCRR 202.21 (e) a motion to vacate the note of issue for lack of readiness must be filed within twenty days of the note being filed (Schroeder v IESI NY Corp., 24 AD3d 180). When a party fails to move within the requisite 20 day period, they are deemed to have waived their right to further discovery (Kirk v Blum, 79 AD2d 700; Bowen v Fiore, 42 AD2d 960; Williams v New York City Transit Auth., 23 AD2d 590). Nor has the plaintiff shown "unusual and unanticipated circumstances" as is generally required to obtain discovery after the filing of a note of issue (*see* 22 NYCRR 202.21 [d]; Arons v Jutkowitz, 37 AD3d 94; Francis v Board of Educ. of City of Mount Vernon, 278 AD2d 449, 717 NYS2d 660 [2d Dept 2000]). Therefore, that branch of the motion which seeks to compel Covert to disclose all claimants under his malpractice insurance policy is denied.

Turning to that branch of the motion that seeks relief from American, the Court finds that, regardless of any other possible infirmities, the motion should be denied. The plaintiff contends that he has learned that there are multiple claimants seeking damages due to the alleged legal malpractice of Covert. It is undisputed that American (incorrectly designated as "Zurich" in the subject motion papers) issued Policy No. LPL 5387704-05 (policy) to Covert effective September 30, 2008 to September 30, 2009. It is also undisputed that there are multiple claims against the policy either pending or previously settled. The plaintiff contends that it is not fair to force the competing claimants to "rush" to obtain a judgment in order to collect against the policy, and that American should be required to settle and pay all claims on a pro rata basis.

Generally, absent bad faith, an insurer is not obligated to pay out claims ratably and/or consolidate them (Allstate Ins. Co. v Russell, 13 AD3d 617). Instead, under the "first to settle rule," it is recognized that insurers are able to settle with any or several of multiple claimants, even though these settlements deplete or exhaust the policy limits (*see* STV Group v American Cont. Props., 234 AD2d 50; Duprey v Security Mut. Cas. Co., 22 AD2d 544; David v Bauman, 24 Misc 2d 67). Accordingly, the motion is denied in its entirety.

Dated: April 15, 2013

HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION