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

PRESENT: HON. PAUL WOOTEN **PART** 7
Justice

BRIAN COHEN,
Plaintiff,

-against-

MICHAIL Z. HACK, EVAN SCHWARTZ, SCOTT HARRIGAN, individually and as a member of QUADRINO & SCHWARTZ, P.C., and QUADRINO & SCHWARTZ, P.C.,
Defendants.

INDEX NO. 159052/12

MOTION SEQ. NO. 002

The following papers were read on this motion by the defendants for dismissal.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ☒ No

Brian Cohen (plaintiff) commenced the herein action against Michail Z. Hack, Evan Schwartz, Scott Harrigan, individually and as members of Quadrino & Schwartz, P.C., and Quadrino & Schwartz, P.C. (the law firm) (collectively, defendants) for legal malpractice, fraudulent misrepresentations, and breach of contract for improper and excessive billing. Plaintiff seeks damages in excess of $250,000.00 as well as costs and disbursements, attorneys fees and punitive damages. Before the Court is a motion by the defendants for an order dismissing the causes of action in the complaint for legal malpractice and fraud pursuant to CPLR 3211(a)(1) and (7) and 3016(b), and to compel arbitration of the cause of action for breach of contract pursuant to CPLR 7503(a). Plaintiff is in opposition to the motion. Discovery in this matter is not complete and the Note of Issue has not yet been filed.

Plaintiff commenced the herein action by the filing of a summons and complaint on or

about December 20, 2012. This case arises from plaintiff's retention of the law firm to represent him in applying for long-term disability benefits from Guardian Life Insurance Company (Guardian) and New York Life Insurance Company (Complaint at ¶ 8). Plaintiff maintains that he retained the law firm in April of 2008, pursuant to a written retainer agreement, which was signed on April 28, 2008, and the scope of such retention did not include "a lawsuit or other legal proceeding" (Complaint at ¶ 22). Plaintiff then maintains that on July 24, 2009, the law firm advised him that it would not continue to represent plaintiff if he did not pay $19,000.00, his outstanding legal fees and as a result the law firm had plaintiff enter into a new retainer agreement that provided for a one-third contingency fee (Complaint at ¶ 23-24). Plaintiff avers that he was not advised by the law firm to have the second retainer agreement reviewed by independent counsel, pursuant to Rule 1.8 of the New York Rules of Professional Conduct (id. at ¶ 25).

Plaintiff maintains that the law firm filed a law suit against Guardian in August of 2009, and recommended that plaintiff settle the suit with Guardian approximately four months after switching to a contingency fee agreement thus leading to a $428,296.00 fee for the law firm, which was a large increase from the approximately $19,000.00 fee that plaintiff owed before signing the second retainer agreement (id. at ¶ 34). He further alleges that the law firm was negligent in its representation of plaintiff because it: (1) failed to apply for disability benefits with complete medical records and tax returns which miscalculated plaintiff's income; (2) failed to appeal from the denial of disability benefits by Guardian, and instead recommended a lawsuit; and (3) advised plaintiff to settle his disability suit against Guardian (*see* Complaint at ¶ 10-17). Plaintiff also maintains that the law firm and individual defendants improperly and excessively billed plaintiff for the legal work that was performed on his behalf when he was unable to work to support his family and his home was allegedly in foreclosure (id. at ¶ 36, 37) as well as failed

to tell plaintiff about the option of appealing Guardian's denial before commencing suit. Specifically, plaintiff avers that the law firm collected in excess of $100,000.00 in legal fees when he was paid only approximately $178,000.00 in benefits, and the law firm continued to bill plaintiff for both the Guardian and New York Life Insurance Company matters after they had settled (id. at ¶ 41, 42). Due to the alleged misconduct by the law firm and individual defendants plaintiff avers that he was awarded benefits $2,000.00-$4,819.00 less than he should have received beginning with the first payment until the last payment has been or will be sent to him (id. at ¶ 46).

Now before the Court is a motion by the defendants for an order dismissing the causes of action in the complaint for legal malpractice and fraud pursuant to CPLR 3211(a)(1) and (7) and 3016(b), and to compel arbitration of the cause of action for breach of contract pursuant to CPLR 7503(a). Defendants maintain that plaintiff instituted this action to avoid his contingency fee obligations to the defendants arising out of their representation of plaintiff. Additionally, defendants proffer that plaintiff fails to state a cause of action for malpractice wherein he fails to meet the applicable standard for damages as his alleged damages are attorneys fees, and he also fails to meet the requirement of alleging causation. Additionally, plaintiff's claim for fraud is not distinguishable from his breach of contract claim, and defendants aver that the fraud claim is also is not plead with the requisite specificity of CPLR 3016(b).

In opposition, plaintiff argues that defendants' motion to dismiss complaint and compel arbitration should be denied. Plaintiff argues that the complaint clearly sets forth the malpractice on behalf of the law firm and the individual defendants.

STANDARD

CPLR 3211(a), provides that:

> "a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> [1] A defense is founded upon documentary evidence;

[7] The pleading fails to state a cause of action"

When determining a CPLR 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002], citing *Leon v Martinez*, 84 NY2d 83, 87 [1994] and *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]; CPLR 3026). "We also accord plaintiffs the benefit of every possible favorable inference" (*511 W. 232nd Owners Corp.*, 98 NY2d at 152; *Sokoloff v Harriman Estates Dev. Corp*, 96 NY2d at 414).

Concerning a 3211(a)(7) motion to dismiss for failure to state a cause of action, the "question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments'" (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). In order to defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (*see Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]).

Pursuant to CPLR 3211(a)(1), in order to prevail on a motion to dismiss based on documentary evidence, "the documents relied upon must definitively dispose of plaintiff's claim" (*Bronxville Knolls v Webster Town Ctr. Partnership.*, 221 AD2d 248, 248 [1st Dept 1995]; *Demas v 325 W. End Ave. Corp.*, 127 AD2d 476 [1st Dept 1986]). A CPLR 3211(a)(1) motion "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]; *see also Sempra Energy Trading Co. v BP Prods. N. Am., Inc.*, 52 AD3d 350, 350 [1st Dept 2008] [holding that it was proper for the complaint to be dismissed because the documentary evidence refuted the plaintiff's allegations for breach of

contract]).

DISCUSSION

In an action for malpractice, it requires proof of three elements:

> "the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and proof of actual damages (*Between The Bread Realty Corp. v Salans Hertzfeld Heilbronn Christy & Viener,* 290 AD2d 380, *lv denied* 98 NY2d 603; *Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood,* 170 AD2d 108, 114, *affd* 80 NY2d 377). In order to demonstrate proximate cause, plaintiff must establish that but for the attorney's negligence, plaintiff would have prevailed in the matter in question or would not have sustained any ascertainable damages (*Senise v Mackasek,* 227 AD2d 184, 185;*Stroock & Stroock & Lavan v Beltramini,* 157 AD2d 590, 591). The failure to establish proximate cause requires dismissal of the legal malpractice action, regardless of whether it is demonstrated that the attorney was negligent (*Tanel v Kreitzer & Vogelman,* 293 AD2d 420, 421;*Pellegrino v File,* 291 AD2d 60, 63, *lv denied* 98 NY2d 606)" (*Schwartz v Olshan Grundman Frome & Rosenzweig*, 302 AD2d 193, 198 [1st Dept 2003]).

However, a "'plaintiff is not obligated to show, at this stage of the proceedings, that [it] actually sustained damages. [It need] only plead allegations from which damages attributable to [defendant's conduct] might be reasonably inferred'" (*InKine Pharm. Co. v Coleman*, 305 AD2d 151, 152 [1st Dept 2003], quoting *Tenzer, Greenblatt, Fallon & Kaplan v Ellenberg*, 199 AD2d 45, 45 [1st Dept 1993]).

Plaintiff alleges that he has properly plead actual damages in that the law firm failed to file an appeal of the Guardian denial and instead commenced litigation which lead to a loss in disability retirement benefits in the amount of $400,000.00. Plaintiff avers that "'but for' the law firms' negligence in failing to file an appeal, the same, or better result would have been achieved without Plaintiff having been damaged in lost disability benefits" (Plaintiff Memorandum of Law, pg. 4). According to plaintiff, the law firm had 180 days to prepare a response to the Guardian denial, and the law firm should have done so which would have avoided the filing of litigation and his signing a new contingency retainer agreement. Additionally, plaintiff maintains that the

law firm's failure to contest the findings of Dr. Cheng, Guardian's examining physician, upon which Guardian's denial was based, constitutes malpractice. Plaintiff states that an appeal of the denial would have contained these arguments and would have attacked the basis of Dr. Cheng's findings and would have provided the findings of plaintiff's own treating physicians which was assembled and requested by Guardian but never provided by the law firm. Lastly, plaintiff claims that an appeal of the Guardian denial would have provided the trader/brokerage statements requested by Guardian, but never provided by the law firm, to establish plaintiff's entitlement to the maximum amount of benefits permitted under the policy. The Court finds that plaintiff's cause of action for legal malpractice, viewed liberally in his favor, has sufficiently pleaded this cause of action such that this portion of defendants' motion is denied (*see Garg v Wigler*, 34 Misc3d 160[A], 2012 NY Slip Op 50494[U] [App Term, NY County 2012]).

With respect to the defendants' claims that sufficient evidence was submitted pursuant to CPLR 3211(a)(1) to dispose of plaintiff's malpractice claim, such submissions raise triable issues of fact. A defense based on documentary evidence must dispose of the plaintiff's claims (*see Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]), and the defendants' submissions fail to do so.

Defendants maintain that plaintiff's fraudulent misrepresentations claim is not distinguishable from his breach of contract claim, and as such must be dismissed. To properly plead a fraud claim, a plaintiff must allege "'the making of a material misrepresentation, known to be false, made with the intention of inducing reliance on the part of the victim, on which the victim does in fact rely and, as a result of which, he sustains damages'" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Christopher Assoc.*, 257 AD2d 1, 9 [1st Dept 1999], quoting *Ippolito v Lennon*, 150 AD2d 300, 303 [1st Dept 1989]). Plaintiff alleges that the law firm told him that if he did not pay his outstanding bill of $19,000.00, they would withdraw from the case and told plaintiff that "he would get nothing" (Complaint at ¶ 23), that they would put an

"Attorney Lien" on the file (*id.* at ¶ 26), made plaintiff switch to a contingency fee agreement, and told plaintiff he had a very difficult case against Guardian that would take years of litigation to resolve (*id.* at ¶ 29). Plaintiff further avers that the defendants made these statements knowing they were false and were made for the purpose of having plaintiff rely on them. However, he fails to claim any specific damages or losses directly arising from the defendant's alleged conduct (*Northern Stamping, Inc. v Monomoy Capital Partners, L.P.*, 107 AD3d 427 [1st Dept 2013]). Furthermore, the law firm would have been within its rights to seek to withdraw as counsel for plaintiff's failure to pay his outstanding bill and to request a lien on plaintiff's file. Thus, the plaintiff's cause of action for fraudulent misrepresentation is dismissed.

Defendants move to compel arbitration on plaintiff's breach of contract claim, which they proffer is based on the allegations of excessive and improper billing on the basis that these allegations fall within the arbitration clauses contained within both retainer agreements. New York's Fee Dispute Resolution Program, codified at the Rules of the Chief Administrator of the Courts, part 137, expressly states the application of the Fee Dispute Resolution Program between attorneys and their clients does not apply to "claims involving substantial legal questions, including professional malpractice or misconduct" (22 NYRCC 137.1[b][3]). Here, although there are valid arbitration clauses in the retainer agreements, the plaintiff's allegations of attorney malpractice takes this case out of the application of the Fee Dispute Resolution Program. As such, this portion of the defendant's motion seeking to compel arbitration is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that the portion of the defendant's motion for an order dismissing plaintiff's cause of action for legal malpractice pursuant to CPLR 3211(a)(1) and (7) is denied; and it is further,

ORDERED that the portion of the defendants' motion for an order dismissing plaintiff's cause of action for fraud pursuant to to CPLR 3211(a)(1) and (7) and 3016(b) is granted; and it is further,

ORDERED that the portion of defendants' motion seeking to compel arbitration of the cause of action for breach of contract pursuant to CPLR 7503(a) is denied; and it is further,

ORDERED that counsel for plaintiff is directed to serve a copy of this Order with Notice of Entry upon the defendants; and it is further,

ORDERED that all parties are directed to appear for a Preliminary Conference on February 26, 2014 at 11:00 a.m. at 60 Centre Street, Room 341, Part 7.

This constitutes the Decision and Order of the Court.

Dated: 1/16/14

PAUL WOOTEN ***J.S.C.***

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**