ORIGINAL

**SUPREME COURT-STATE OF NEW YORK**
**SHORT FORM ORDER**
**Present:**

**HON. TIMOTHY S. DRISCOLL**
**Justice Supreme Court**

----------x **TRIAL/IAS PART: 14**

**FIRST CHOICE PLUMBING CORP. and MALACY PLUMBING SUPPLY, INC.,**

**Plaintiffs,**

**Index No: 602921-15**
**Motion Seq. No. 1**
**Submission Date: 10/27/15**

**-against-**

**MILLER LAW OFFICES, PLLC,**

**Defendant.**

----------x

**The following papers have been read on this motion:**

**Notice of Motion, Affirmation in Support and Exhibits...x**
**Memorandum of Law in Support.....x**
**Affirmation in Opposition and Exhibits.....x**
**Affidavit of Z. Azulay and Exhibits.....x**
**Reply Affirmation and Exhibits.....x**
**Memorandum of Law in Further Support.....x**

This matter is before the court on the motion filed by Defendant Miller Law Offices, PLLC ("Miller" or "Defendant") on July 8, 2015 and submitted on August 27, 2015. For the reasons set forth below, the Court grants the motion and dismisses the Complaint.

BACKGROUND

A. Relief Sought

Defendant moves, pursuant to CPLR §§ 3211(a)(1), (5) and (7), for an Order granting Defendant's motion to dismiss the Complaint against it, with prejudice.

Plaintiffs First Choice Plumbing Corp. ("First Choice") and Malacy Plumbing Supply, Inc. ("Malacy") ("Plaintiffs") oppose the motion.

B. The Parties' Background

The Complaint (Ex. A to Colavita Aff. in Supp.), filed May 11, 2015, alleges as follows:

This case arises out of Miller's alleged negligent failure to prosecute two (2) mechanics' liens ("Liens"), in breach of its duty, as attorneys, to Plaintiffs, resulting in the extinguishment of

the Liens and the preclusion of Plaintiff's legal right to pursue and collect the sums owed and secured by the Liens. First Choice is a New York corporation that performs plumbing services in and around New York City. Malacy is a New York corporation that supplies plumbing equipment, fittings and furnishings in and around New York City.

Plaintiffs allege that Morris Heights Health Center, Inc. ("Morris"), a health services provider with medical centers in and around New York City, owns real property ("Property") located at 57 West Burnside Avenue, Bronx, New York, Block 3206, Lots 1001-1003. In or about 2009, Morris hired Glenman Industrial & Commercial Contractor Corp. ("Glenman"), as general contractor, to develop a health and medical center for the elderly on the Property, the Harrison Circle Project (the "Project"). Glenman, in turn, hired First Choice as subcontractor to provide plumbing services for the Project. Plaintiff provides a copy of the April 10, 2008 Glenman-First Choice Subcontract (Ex. 1 to Comp.). First Choice completed the plumbing services for the Project in or about 2010. First Choice hired Malacy as subcontractor to provide plumbing supplies for the Project. Malacy completed its subcontractor work for the Project in or about 2010. The Project was completed in or about 2010.

Glenman owed First Choice $471,000.00 for the plumbing services that First Choice performed on the Project. First Choice demanded payment but Glenman did not pay First Choice. On or about May 24, 2010, pursuant to New York Lien Law ("Lien Law") Article 2, Section 3, First Choice filed a mechanic's lien on the Project Property with the County Clerk of Bronx County in the amount of $471,000.00 ("First Choice Lien") (Ex. 4 to Comp.). Plaintiffs allege that, in or about 2011, First Choice hired Miller to pursue collection of the $471,000 and provided Miller with the relevant documentation regarding the Project and First Choice Lien.

On or about May 9, 2011, pursuant to the Lien Law, First Choice filed a one (1) year extension of its Lien. Plaintiffs allege that Miller knew, or should have known that, pursuant to Lien Law Article 2, Section 17, the First Choice Lien would be extinguished by operation of law unless First Choice foreclosed its Lien or obtained an additional court-ordered extension. Plaintiffs allege that Miller did not foreclose on the First Choice Lien within the prescribed time period and did not pursue a court-ordered extension of the First Choice Lien within the prescribed time period. Plaintiffs allege that Miller, instead, negligently permitted the First Choice Lien to lapse and be extinguished within the one (1) year extension period provided by Lien Law Article 2, Section 17. In or about May 2012, the First Choice Lien was extinguished

by operation of law, leaving First Choice unable to foreclose on its Lien to collect the $471,000.00 owed to it by Glenman.

Plaintiffs also allege that Glenman owed Malacy $152,847.00 for the plumbing supplies that Malacy provided to the Project. Malacy demanded payment but Glenman did not pay Malacy. On or about June 8, 2010, Malacy filed a mechanic's lien on the Project Property with the County Clerk of Bronx County in the amount of $152,847.00 ("Malacy Lien"). In or about 2011, Malacy hired Miller to pursue collection of the $152,847.00 and provided Miller with the relevant documentation regarding the Project and Malacy Lien.

On or about June 8, 2011, pursuant to the Lien Law, Malacy filed a one (1) year extension of its Lien. Plaintiffs allege that Miller knew, or should have known that the Malacy Lien would be extinguished by operation of law unless Malacy foreclosed its Lien or obtained an additional court-ordered extension. Plaintiff alleges that Miller did not foreclose on the Malacy Lien with the prescribed time period and did not pursue a court-ordered extension of the Malacy Lien within the prescribed time period. Plaintiff alleges that Miller, instead, negligently permitted the Malacy Lien to lapse and be extinguished within the one (1) year extension period provided by Lien Law Article 2, Section 17. In or about June 2012, the Malacy Lien was extinguished by operation of law, leaving Malacy unable to foreclose on its Lien to collect the $152,847.00 owed to it by Glenman.

On or about January 11, 2011, Glenman filed a Voluntary Petition in the United States Bankruptcy Court, Southern District of New York pursuant to Chapter 11 of the Bankruptcy Code (Ex. 5 to Comp.) ("Glenman Bankruptcy Action"). In or about January 2011, Plaintiffs were notified of the Glenman Bankruptcy Action. Plaintiffs allege that the Glenman Bankruptcy Action names First Choice and Malacy as "Disputed," "Contingent," and "Unliquidated" Creditors, reflecting that Glenman disputes the amounts owed to Plaintiffs. Plaintiffs allege that when a creditor is disputed, contingent or unliquidated, it must file a "Proof of Claim" (Comp. at ¶ 44) in the bankruptcy proceeding within the time prescribed by the Bankruptcy Court in order to substantiate the creditor's claim against the Debtor, citing U.S.C.S. § 1111(a) and Rule 3003(c)(2) of the Federal Rules of Bankruptcy. A disputed, contingent or unliquidated creditor that fails to file a Proof of Claim within the time allotted will not be treated as a creditor in the bankruptcy proceeding and will be foreclosed from collecting from the bankruptcy distribution of assets.

Plaintiffs allege that on November 18, 2011, the Bankruptcy Court ordered that all Proofs of Claim in the Glenman Bankruptcy Action be filed by January 13, 2012. In or about January 2011, First Choice notified Miller, its attorney, of the filing of the Glenman Bankruptcy Petition. Plaintiffs allege that Miller knew, or should have known, that First Choice must file a Proof of Claim by January 13, 2012 to collect against the Glenman Estate. Plaintiffs allege that Miller failed to appear on behalf of First Choice in the Glenman Bankruptcy Action, and failed to file a Proof of Claim on behalf of First Choice. As a result, pursuant to 11 U.S.C.S. § 502(b)(9), First Choice is barred from collecting the $471,000.00 against the Glenman estate. And, because Miller failed to file a timely Proof of Claim, First Choice's claim against Glenman is also discharged by operation of law, pursuant to 11 U.S.C.S. § 1328(a).

Similarly, in or about January 2011, Malacy notified Miller, its attorney, of the filing of the Glenman Bankruptcy Petition. Plaintiffs allege that Miller knew, or should have known, that Malacy must file a Proof of Claim by January 13, 2012 to collect against the Glenman Estate. Miller also failed to appear on behalf of Malacy in the Glenman Bankruptcy Action, and failed to file a Proof of Claim on behalf of Malacy. As a result, pursuant to 11 U.S.C.S. § 502(b)(9), Malacy is barred from collecting the $152,847.00 against the Glenman estate. And, because Miller failed to file a timely Proof of Claim, Malacy's claimagainst Glenman is also discharged by operation of law, pursuant to 11 U.S.C.S. § 1328(a). The Complaint contains four (4) causes of action against Miller alleging attorney malpractice in connection with 1) its failure to extend or foreclose on the First Choice and Malacy Liens, and 2) its failure to file a Proof of Claim on behalf of First Choice and Malacy.

In support of the motion, and its contention that there was no attorney-client relationship between Plaintiffs and Miller with respect to the Liens, Defendant provides copies of email exchanges between Defendant, Plaintiffs and an individual named Stephanie L. Soondar, Esq. at Construction Lien Consultants (Ex. F to Colavita Aff. in Supp.). Those emails consist of the following:

> 1) a July 10, 2011 2:40 a.m. email from Stephanie L. Soondar, Esq. at Construction Lien Consultants, LLC ("CLC") to First Choice which reads as follows:
>
> An FYI if you haven't already addressed the issue: to my knowledge the bar date for the Glenman Bankruptcy is July 20, 2011. That is in less than two weeks. If you haven't already, you need to immediately file a proof of claim to the court (SDNY, White Plains). Good luck. Sls.

2) a July 20, 2011 2:52 a.m. email from Miller to Yosi [1]and others reading as follows:

As I told Yossi in an email a few days ago, I did NOT prepare a proof of claim; upi [sic] told me that you were hiring someone to do that for you. Make sure you take care of this **TODAY**!!!

3) a July 20, 2011 3:10 a.m. email from Miller to Yosi reading as follows:

you guys (without discussing it with me) hired a company to help you collect. That company has an in-house lawyer who wanted to charge you $1500 to file the proof of claim. It is a ONE page document that takes about 15 minutes to prepare. I told you and Steve then (a few months ago) that it was way too much & I encouraged you to tell the company & the lawyer to reduce the fee. That was the last I heard of it until 2-3 days ago.

4) a July 20, 2011 3:15 email from Yosi to Miller reading as follows:

I have no words for your [sic] 100% right. Please tell me how I can get myself out of this? And is it possible for you to take over this case? Please jeff?

5) a November 13, 2012 email from Miller to Yosi and others reading as follows:

I've asked several times whether you settled the matter, extended the lien, etc. Please advise.

6) a November 14, 2012 email from Miller to Yosi and others reading as follows:

I didn't file the lien. I cannot extend the lien. Use whatever company you used to prepare/file the lien.

Defendant also provides a copy of a letter dated July 22, 2010 from Bruce R. Snyder, the Chief Executive Officer of CLC to Steven Diaz of First Choice regarding "$471,000 Lien Placed Against Morris Heights Health Center Inc., Property Address: 57 West Burnside Avenue, Bronx, New York" (Ex. G to Colavita Aff. in Supp.) which reads as follows:

Dear Steve:

Enclosed is a revised Contract for Services for your case against Morris Heights Health Center Inc./Glenman Construction. Please sign and return it as soon as possible.

Also enclosed is a Sample Contract for you to review and use in your future projects.

We look forward to working on your behalf and recovering your funds as rapidly as possible.

[1] "Yosi" is Yosi Azulay, an owner of First Choice.

Yours truly,

Bruce

Included as part of Exhibit G is a signed Contract for Services dated November 8, 2010 between CLC and First Choice signed by Yosi Azulay, President of First Choice and Dario S. Diaz, Vice President of First Choice. Pursuant to the Contract, First Choice authorized CLC to "proceed with the investigation, recovery and/or settlement of debts owed to [First Choice] reflected in Mechanic's Liens, Construction Claims and other overdue receivables (hereinafter "claims") as described in the Contract." The Contract also provides that CLC "agrees to put forth its best efforts to recover debt(s) owed to Client by engaging in" actions including "[s]ubmitting "Proof of Claim" forms for payment and performance bonds[.]"

Defendant notes, further, that the extensions of the First Choice Lien and Malacy Lien were filed by and through Speedy Lien, a company located on Old Country Road in Mineola, New York (*see* Exs. C and E to Colavita Aff. in Supp.). This evidence, Defendant submits, is further proof that there was no attorney-client relationship between Plaintiffs and Defendant regarding the Liens and their extensions.

Defendant also notes that the subcontract agreement (Ex. I to Comp.) was between First Choice, as subcontractor, and an entity called Glenman Industrial & Commercial Contractor Corp. as contractor. The Notice of the First Choice Lien (Ex. B to Colavita Aff. in Supp.) and extension of the First Choice Lien (Ex. C to Colavita Aff. in Supp.), however, name "Glenman Construction Corp." as the contractor. Similarly, the Notice of the Malacy Lien (Ex. D to Colavita Aff. in Supp.) and extension of the Malacy Lien (Ex. E to Colavita Aff. in Supp.) name "Glenman Construction Corp." as the contractor. Thus, Defendant contends, the First Choice and Malacy Liens were defective and void, and Plaintiffs would not have been able to recover on them.

Defendant contends that the Liens are also defective because the Liens, and their respective extensions, misidentify the owner of the Property. Counsel for Defendant affirms that the Liens and their extensions list the owner as "Morris Heights Health Center Inc." Colavita Aff. in Supp. at ¶ 35, referring to Exs. B, C, D and E to Colavita Aff. in Supp.). Defendant's Counsel affirms that Morris Heights Health Center Inc. sold its interest in the Property for valuable consideration by deed dated January 30, 2008, before the alleged work was performed and materials were supplied, to Morris Heights Senior Housing Development Fund Company,

Inc., a separate entity that paid valuable consideration for the Property (*see* Ex. H to Colavita Aff. in Supp.).

Defendant submits, further, that Plaintiffs could not have recovered their fees from Glenman because Defendants failed to substantially perform under their agreement with Glenman and, therefore, could not succeed on a cause of action for breach of that agreement. Defendants notes that although First Choice filed a Lien in the amount of $471,000, the claim of First Choice on the Bankruptcy Action schedule (Ex. 8 to Comp. at p. 17) is listed as $73,314. By letter dated April 2, 2010 from Glenman to Ziv Azulay ("Azulay") of First Choice (Ex. I to Colavita Aff. in Supp.), Glenman provided First Choice with a copy of the notice sent to it on March 29, 2010 regarding its default under the contract. In the letter, Glenman advised First Choice that it had defaulted under the contract by 1) failing to deliver toilets, sinks, fin tube heat and other fixtures to the project site; 2) failing to expedite repair of defective showers that were installed by First Choice; and 3) failing to provide sufficient manpower to the project. Glenman also advised First Choice that it had failed to cure the default within three (3) days, as required by the contract. With respect to First Choice's claim that lack of payment justified its default, Glenman advised First Choice that, pursuant to the contract, Glenman would make payment to First Choice 5 days after receiving payment from the owner. Glenman also advised First Choice that it would not release payment to First Choice "as you have created a potential damage claim of more than $100,000 (your estimate of the cost) by installing the wrong showers in 95% of the building." Defendant submits that this documentation establishes that First Choice failed to substantially perform under its agreement with the contractor and, therefore, could not have prevailed in an action to enforce its Lien.

In opposition, Azulay affirms that in 2001, he formed a plumbing company called Wagner-Ziv Plumbing & Heating Corp. ("Wagner-Ziv") of which he was the President and owner. In that capacity, Azulay hired Miller to perform legal services on behalf of Wagner-Ziv and paid him between $1,200.00 and $1,500.00 per month "to advise me on any and all legal issues affecting Wagner-Ziv" (Azulay Aff. in Opp. at ¶ 4). In 2008, Wagner-Ziv ceased doing business.

Azulay affirms that in 2008, his son Yosi Azulay started a plumbing company, specifically First Choice which Azulay describes as the "successor to Wagner-Ziv" (Azulay Aff. in Opp. at ¶ 6). Azulay affirms that, while operating First Choice, he continued to pay Miller between $1,200.00 and $1,500.00 per month " to advise me on all legal issues affecting First

Choice" (Azulay Aff. in Opp. at ¶ 7). As part of those monthly payments, Miller agreed to represent Malacy, a plumbing supply company owned and operated by Benjamin Twizer ("Twizer"), Azulay's son-in-law. Azulay affirms that he, his daughter Ashley Twizer, and his son Yosi were "the points of contact" between Malacy and Miller (Azulay Aff. in Opp. at ¶ 9). Azulary affirms that Miller was "general counsel" (Azulay Aff. in Opp. at ¶ 9) for First Choice and Malacy while they were performing work for Glenman on the Project. Azalay affirms that First Choice and Malacy "hired Attorney Miller to represent them at all relevant times to supervise the collection of outstanding receivables owed by Glenman for plumbing services and materials supplied on the Harrison Circle Project" (Azulay Aff. in Opp. at ¶ 11).

Azulay provides a time line of events relevant to First Choice's agreement to provide plumbing services to Glenman occurring between March 2008 and May 2010, including disputes regarding payment that prompted First Choice to cease working on the project. Azulay affirms that in or about May 2010, First Choice again ceased working on the project due to Glenman's continued failure to pay First Choice. Azulay affirms that the sum of $471,000 fairly reflects the agreed-upon price for the services rendered, which Glenman failed to pay. Azulay also affirms that the sum of $152,847.00 accurately reflects the cost of materials that Malacy provided to the project, which Glenman has not paid.

Azulay affirms that in 2010, he discussed Glenman's failure to pay First Choice and Malazy in connection with the Project with Miller and provided Miller with documentation and information regarding sums owed to Plaintiffs for the Project. Azulay affirms that Miller advised Plaintiffs to file mechanic's liens for the services and materials provided for the Project. In 2010, First Choice and Malazy filed their Liens and, Azulay affirms, it was "understood, at all times" (Azulay Aff. in Opp. at ¶ 34) that Miller would supervise the filing and handling of the Liens. In support of his contention that he provided Miller with documentation regarding the Liens, Azulay provides a a copy of a First Choice fax cover sheet dated May 27, 2010, addressed to Miller which reads as follows:

> Please find attached a copy of the Lien First Choice Put on Glennman.
>
> I understand they are also preparing one for Malacy which I do not have paperwork paperwork on yet.
>
> When I get it I will forward to you.
>
> Thanks.

Azulay affirms that on June 21, 2010, the Hanover Insurance Company ("Hanover") discharged the First Choice Lien by posting a $518,100.00 bond on behalf of Glenman (Ex. 4 to Azulay Aff. in Opp.). On the same day, Hanover discharged the Malacy Lien by posting a $168,131.70 bond on behalf of Glenman (Ex. 5 to Malacy Aff. in Opp.). Anzulay affirms that the Hanover bonds ensured that funds were available upon foreclosure of the First Choice and Malacy mechanic's liens. Plaintiffs allege, however, that Miller failed to timely foreclose on the Liens and, instead, allowed them to expire by operation of law. In the interim, Glenman declared bankruptcy, prompting First Choice and Malacy to hire Miller to protect their interest with respect to their claims against Glenman. Plaintiffs contend that due to Miller's failure to file a proof of claim in the Glenman Bankruptcy Action, Plaintiffs' claims against the Glenman estate are barred by operation of law.

Azulay also affirms that in or about October 2011, he contacted CLC regarding handling the Liens. On or about October 27, 2011, Anzulay sent to Miller a fax cover sheet which attached the CLC contract for his review (Ex. 6 to Azulay Aff. in Opp.). The fax cover sheet, which reflected that it was "Re: Lien Against Glenman Const." read as follows:

> Attn: Jeff
>
> Please look over the attached paperwork for the lien against Glenman Construction and let me know if this is good.
>
> Thank you.
>
> Ziv.

Azulay affirms that Miller "agreed to continue to supervise the handling of the mechanic's liens while CLC sought to collect the outstanding receivables" (Azulay Aff. in Opp. at ¶ 43).

Anzulay affirms that in 2014, he terminated his relationship with Miller because he was unhappy with his handling of Anzulay's legal matters regarding the Project and other matters. In 2015, Anzulay provided his new attorneys with the files regarding the Liens. Anzulay's new attorney advised Anzulay that the Liens had expired by operation of law due to the failure to foreclose on them or obtain additional extensions. Anzulay affirms that he is a lay person with no legal education and relied on Miller to protect Plaintiffs' interest in collecting sums due to them under the Project.

In reply, Defendant *inter alia* reaffirms its position that there was no attorney-client relationship between Miller and Defendants. Defendant notes that paragraph 5 of the contract between CLC and First Choice provides that First Choice agreed *inter alia* 1) to direct all communications from its debtor to CLC; and 2) to allow CLC to direct all communications and collections from the debtor to CLC. Defendant submits that the CLC Agreement establishes that First Choice hired CLC, not Defendant, to pursue collection of the First Choice Lien.

C. The Parties' Positions

Defendant submits that 1) in light of Plaintiffs' allegation that their claims against Glenman in the Bankruptcy Action were disallowed as a result of Miller's failure to file a Proof of Claim by January 13, 2012, Plaintiffs' respective causes of action accrued on that date and are time-barred in light of the applicable three (3) year statute of limitations; and 2) First Choice's claim based on Miller's failure to foreclose on the First Choice Lien and Miller's failure to pursue an extension of the First Choice Lien accrued on May 9, 2012 and are time-barred in light of the applicable three (3) year statute of limitations.

Defendant also submits that the documentary evidence demonstrates that there was no attorney-client relationship between Miller and First Choice or Malacy. Defendant contends that the documentary evidence demonstrates that 1) Plaintiffs did not retain Miller to file or extend the Liens; 2) the extensions of the First Choice and Malacy Liens were filed by and through Speedy Lien, a company located on Old Country Road in Mineola, New York (*see* Exs. C and E to Colavita Aff. in Supp.); and 3) First Choice retained Construction Lien Consultants, LLC, not Miller, to attempt to satisfy the debt represented by the First Choice Lien.

Defendant also contends that Plaintiffs cannot demonstrate that Miller proximately caused them to suffer damages because the Liens were facially defective and, therefore, no recovery could have been obtained on those Liens. Defendant contends that the Liens and extensions are defective because they 1) do not accurately reflect the name of the entity that entered into the subcontract agreement with First Choice; and 2) misidentify the true owner of the Property.

Defendant also submits that First Choice could not have recovered its fees from Glenman because First Choice failed to substantially perform under its agreements with Glenman. Accordingly, Defendant contends, First Choice could not have prevailed in an action to enforce its Lien.

Plaintiffs oppose the motion, submitting that the documentary evidence demonstrates that Miller supervised the filing and handling the Liens. Plaintiffs contend that 1) the Speedy Lien documentation only demonstrates that Plaintiffs used a lien consulting company to file the Liens and does not controvert Plaintiffs' allegation that they hired Miller to protect their interests with respect to outstanding Glenman receivables and to supervise Plaintiffs' recovery efforts, and provided Miller with documentation and information related to the Liens; 2) the Azulay affidavit explains that Miller was general counsel for First Choice and Malacy when they performed work on the Project; and 3) documentation, including faxes sent to Miller, support the finding that Miller agreed to supervise the filing and handling of the Liens. Plaintiffs also contend *inter alia* that 1) the errors in the Liens were not so significant that they would have prevented Plaintiffs from foreclosing on the Liens; and 2) Plaintiffs' alleged failure to perform under the subcontract agreement with Glenman, at a minimum, raises a question of fact that cannot be resolved on a motion to dismiss.

RULING OF THE COURT

A. Dismissal Standards

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), 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. *Bivona v. Danna & Associates, P.C.*, 123 A.D.3d 956, 957 (2d Dept. 2014), quoting *Alva v. Gaines, Gruner, Ponzini & Novick, LLP*, 121 A.D.3d 724 (2d Dept. 2014) (internal quotation marks omitted) and citing *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

A motion to dismiss a cause of action pursuant to CPLR § 3211(a)(1) may be granted only if documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law. *Bivona v. Danna & Associates, P.C.*, 123 A.D.3d at 957, citing *Indymac Venture, LLC v. Nagessar*, 121 A.D.3d 945 (2d Dept. 2014), quoting *Whitebox Concentrated Convertible Arbitrage Partners, L.P. v. Superior Well Servs., Inc.*, 20 N.Y.3d 59, 63 (2012).

On a motion pursuant to CPLR § 3211(a)(5) to dismiss a complaint as barred by the applicable statute of limitations, the moving defendant must establish, *prima facie*, that the time in which to commence the action has expired. *Beroza v. Sallah Law Firm, P.C.*, 126 A.D.3d 742 (2d Dept. 2015), quoting *Kitty Jie Yuan v. 2368 W. 12th St., LLC*, 119 A.D.3d 674 (2d Dept.

2014). The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is tolled or is otherwise inapplicable. *Beroza v. Sallah Law Firm, P.C.*, 126 A.D.3d at 742 citing, *inter alia*, *Kitty Jie Yuan v. 2368 W. 12th St., LLC*, 119 A.D.3d at 674.

B. Legal Malpractice

In an action for legal malpractice, the plaintiff must allege that the 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 duty proximately caused plaintiff to sustain actual or ascertainable damages. *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 N.Y.3d 438, 442 (2007), quoting *McCoy v. Feinman*, 99 N.Y.2d 295, 301-302 (2002) (internal quotation marks and citation omitted). To establish causation, the plaintiff must show that he would have prevailed in the underlying action, or would not have incurred any damages, but for the attorney's negligence. *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 N.Y.3d at 442.

Although neither an express agreement nor payment of a fee is essential to a finding of an attorney-client relationship, a plaintiff's unilateral beliefs and actions do not confer upon it the status of client. *Hansen v. Caffry*, 280 A.D.2d 704, 705 (3d Dept. 2001), *lv. app. den.*, 97 N.Y.2d 603 (2001). A court must look to the words and actions of the parties to ascertain the existence of such a relationship. *Nelson v. Kalathara*, 48 A.D.3d 528, 529 (2d Dept. 2008), citing Tropp v. Lumer, 23 A.D.3d 550 (2d Dept. 2005).

A cause of action to recover damages for nonmedical professional malpractice must be commenced within three years after the cause of action accrues. *Rodeo Family Enterprises, LLC v. Matte*, 99 A.D.3d 781, 783 (2d Dept. 2012), citing *inter alia* CPLR § 214(6).

C. Application of these Principles to the Instant Action

The Court grants the motion and dismisses the Complaint based on the Court's conclusion that the documentary evidence refutes Plaintiffs' allegation that there was an attorney-client relationship between Plaintiffs and Miller with respect to the Liens and their Extensions. That documentary evidence includes 1) the email from Stephanie L. Soondar, Esq. at CLC to First Choice which mentions the "bar date" for the Glenman Bankruptcy and advises First Choice of its need to "immediately file a proof of claim," 2) the email from Miller to Yosi and others reminding them that Plaintiffs had advised Miller that they were hiring someone other than Miller to prepare a proof of claim, 3) the email from Miller to Yosi which makes reference to the fact that Plaintiffs, without discussing the matter with Miller, hired a company to help them collect monies owed, 4) the email from Yosi to Miller in which Yosi concedes that he did

not handle the matter properly and asks Miller to "take over this case," which clearly implies that Miller was not previously responsible for the Liens and Extensions, 5) the email from Miller reminding Plaintiffs that he did not file the lien and could not extend the Lien and suggesting that Plaintiffs use "whatever company you used to prepare/file the lien" which is again consistent with the conclusion that Plaintiffs retained someone other than Miller to pursue their rights under the Liens and Extensions, 6) the letter dated July 22, 2010 from Bruce R. Snyder, the Chief Executive Officer of CLC to Steven Diaz of First Choice regarding the Lien which included a signed Contract for Services dated November 8, 2010 between CLC and First Choice signed by Yosi Azulay, President of First Choice and Dario S. Diaz, Vice President of First Choice, 7) the language in the CLC Contract which a) authorized CLC to "proceed with the investigation, recovery and/or settlement of debts owed to [First Choice] reflected in Mechanic's Liens, Construction Claims and other overdue receivables (hereinafter "claims") as described in the Contract;" and b) provided that CLC "agrees to put forth its best efforts to recover debt(s) owed to Client by engaging in" actions including "[s]ubmitting "Proof of Claim" forms for payment and performance bonds," and 8) the Lien Extensions which reflect that they were filed by and through Speedy Lien. Azulay's conclusory assertion that Plaintiffs retained Miller as "general counsel" for Plaintiffs and to "supervise" the Liens and Extension, which is inconsistent with the documentary evidence before the Court, is insufficient to support the existence of an attorney-client relationship between Plaintiffs and Defendant with respect to Plaintiffs' enforcement of their rights under the Liens and Extensions.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Complaint is dismissed.

ENTER

DATED: Mineola, NY
October 15, 2015

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
OCT 16 2015
NASSAU COUNTY
COUNTY CLERK'S OFFICE