

<b>Berardi v Phillips Nizer, LLP</b>
2016 NY Slip Op 30860(U)
May 6, 2016
Supreme Court, New York County
Docket Number: 157690/2012
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 42

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ELIZABETH BERARDI,

Plaintiff

Index No. 157690/2012

v

PHILLIPS NIZER, LLP, and ELLIOT WIENER

DECISION AND ORDER

Defendants.

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**BANNON, J.:**

I. INTRODUCTION

In this legal malpractice action and action for a judgment declaring that the defendants overbilled the plaintiff for legal services, the defendants move pursuant to CPLR 3211(a)(1), (5), and (7) to dismiss the amended complaint. The court denies the motion.

II. BACKGROUND

In or about 2000, the plaintiff retained the defendant law firm, Phillips Nizer, LLP (the firm), to represent her in connection with an anticipated matrimonial dispute between the plaintiff and her husband, who had been married to each other since 1979. Based both on negotiations between the plaintiff and her husband and other information that the plaintiff provided to the firm, the firm drafted a postnuptial agreement, which the plaintiff and her husband executed on December 22, 2000. As relevant here, the prenuptial agreement provided that, if the plaintiff and her

husband were to be divorced, the plaintiff would be entitled to a 49% interest in several closely held corporations and a limited liability company in which the husband held a majority interest (the business entities), while the husband would be entitled to a 51% interest in those entities, which were primarily engaged in the provision of interstate bus transportation services. The remainder of the husband's property, including significant real property holdings, was to be divided equally between the plaintiff and him. The prenuptial agreement did not specify whether, in the case of dissolution of the marriage, the plaintiff would or could sell her interests in the business entities to the husband, to other shareholders or members, or to third parties or, alternatively, whether she would simply continue to hold the interests as a minority shareholder or member. The prenuptial agreement further provided that, in case of divorce, the husband would pay maintenance to the plaintiff "in a living standard comparable to that which he and she enjoy at the Effective Date" of the agreement, that is, December 22, 2000.

In 2005, the plaintiff's husband declared his intention to dissolve the marriage, at which point the plaintiff separately retained the firm to commence an action for a divorce and ancillary relief on her behalf. The firm commenced that action on May 27, 2005. The husband moved to vacate the postnuptial agreement. The plaintiff, represented by the firm, vigorously opposed the motion.

The Supreme Court denied the husband's motion and, after a trial on the merits of the remaining issues, a judgment of divorce incorporating that determination was entered on November 4, 2009. The plaintiff appealed from the judgment and, after discharging the firm as her attorney, withdrew the appeal. On August 6, 2010, the plaintiff commenced an action (the commercial litigation) against the husband and the business entities to recover damages for breach of the shareholder and member agreements and breach of fiduciary duty, and for an accounting for failure to pay dividends and otherwise compensate her in connection with her minority ownership interests in the business entities. The Appellate Division, First Department, ultimately directed the dismissal of the complaint in that action.

The plaintiff thereafter commenced the instant action.

### III. THE COMPLAINT AND AMENDED COMPLAINT

The first cause of action in the initial complaint sought damages for the defendants' alleged legal malpractice, asserting that they failed to exercise the degree of care, skill, and diligence commonly exercised by a member of the legal profession. Specifically, the plaintiff alleged that numerous agreements had been entered into before 2000 by prior shareholders and members of the business entities that expressly limited her ability to freely sell or trade her interest in those entities, thus diminishing their market value. The plaintiff averred that the defendants knew

or should have known about these restrictions and conditions, but nonetheless failed to advise her about the effect that these restrictions and conditions would have on her retention of a 49% minority interest in the business entities, and that they advanced a litigation strategy that rendered the postnuptial agreement unimpeachable, thus thwarting any opportunity that she might have had to compel her husband to offer her a more favorable cash buyout of her holdings. The first cause of action further alleged that the defendants committed legal malpractice inasmuch as they (a) had a conflict of interest in defending the postnuptial agreement that they had drafted, thus compromising their ability to properly advise the plaintiff in connection with her husband's motion to set aside the agreement, (b) failed to analyze whether pursuing equitable distribution under the Domestic Relations Law was a better alternative for the plaintiff than enforcing the postnuptial agreement, both as to her interest in the business entities and as to calculating her maintenance based on the standard of living she had as of 2005 or later, which was higher than her standard of living in 2000, (c) failed to advise the plaintiff to seek independent counsel in connection with any litigation strategy concerning the motion, (d) failed to obtain copies of the various shareholder and member agreements referable to the business entities and thereupon advise the plaintiff of the consequences of the restrictions set forth therein, and (e) failed at trial to seek

the admission into evidence of appraisals of the husband's real estate holdings that they had ordered and the plaintiff paid for, and necessitated the submission of an ultimately unsuccessful motion to reopen the trial to permit their admission.

The first cause of action alleges that "but for the aforesaid negligence, carelessness and legal malpractice" of the defendant, the plaintiff would have declined to oppose the husband's motion, and instead permitted the postnuptial agreement be set aside, thus allowing her to seek equitable distribution, which would likely have resulted in an award of 50% of the business entities, and placed her in a position to request a cash buyout that would have been of greater benefit than a retention of a minority interest in the entities. The plaintiff asserts that, had she been properly advised and allowed to follow that course, the commercial litigation against the ex-husband would have been unnecessary, and she would not have incurred attorneys' fees in pursuing that litigation. She further alleges that, but for the defendants' malpractice at the trial of matrimonial action, the trial court would have fixed the value of the husband's real property at a higher figure, yielding a larger distribution to her, and that she would not have incurred additional attorney's fees in the unsuccessful motion to reopen the trial and the initial pursuit of an appeal. The plaintiff also contends that she should be refunded the cost of the unused appraisals. In addition, the plaintiff

argues that, but for the defendants' malpractice in failing to permit the postnuptial agreement to be vacated, she was limited to a maintenance award of \$20,000 per month, reflecting her and the ex-husband's living standards as of 2000, rather than the enhanced standard they enjoyed in 2005 when the matrimonial action was commenced, or in 2009 when the judgment of divorce was entered.

The second cause of action in the initial complaint alleged that the defendants overbilled the plaintiff by charging excessive and unreasonable attorneys' fees.

In her amended complaint, the plaintiff adds a specific allegations to the first cause of action that, in 2005, the husband's counsel had provided a nonmatrimonial attorney at the firm with copies of the shareholder and member agreements referable to the business entities but, for at least two years, that attorney did not share that information with the defendant Elliot Wiener, an attorney with the firm who was the lead matrimonial lawyer assigned to the plaintiff's case. The amended complaint further asserts that, during that period of time, the firm did not appraise the value of the business entities, did not analyze the consequences of the restrictions on sale and transfer of shares and interests articulated in those agreements, or the difference in value between an immediate buyout of the shares and the plaintiff's retention of a minority interest in the business entities. The plaintiff alleges that, as a consequence of the nonmatrimonial attorney's

conduct, neither the firm nor Wiener had sufficient facts upon which to base their strategy in responding to the husband's motion to set aside the postnuptial agreement. The plaintiff further asserts, in a newly added second cause of action, that the firm's malpractice extended to its failure to properly supervise the nonmatrimonial attorney in connection with her conduct, as described in the first cause of action. The cause of action alleging overbilling was reiterated in the amended complaint as the third cause of action.

#### IV. THE DEFENDANTS' MOTION TO DISMISS

The defendants move to dismiss the amended complaint, contending that documentary evidence conclusively establishes a complete defense to the action (CPLR 3211[a][1]), the newly asserted second cause of action is time-barred (CPLR 3211[a][5]), and the amended complaint fails to state a cause of action (CPLR 3211[a][7]). In support of their motion, the defendants submit 99 exhibits, including not only the complaint and amended complaint, but also their answers to both of those pleadings, the net worth statements of the plaintiff and her ex-husband, a chart memorializing transfers of stock in the business entities, excerpts from the transcript of the trial in the matrimonial action, the 2000 and 2005 retainer agreements between the plaintiff and the firm, an affidavit of the plaintiff from 2005, numerous printouts of e-mails and copies of letters exchanged between the plaintiff

and the firm's attorneys concerning litigation strategy, as well as intraoffice e-mails generated by the firm's attorneys, the firm's billing invoices, the 2008 valuation of the business entities by the expert retained by the firm on behalf of the plaintiff, and numerous other papers, including affidavits, tax returns of the business entities, and items admitted into evidence as exhibits at the matrimonial trial. In opposition, the plaintiff submits her own affidavit. She also submits an affidavit of a former New York State Supreme Court Trial Justice who served in a matrimonial part in Westchester County, who opines that defendants departed from good and accepted legal practice in their handling of the plaintiff's legal affairs, along with 29 exhibits, including a 2015 report from a retained asset evaluation firm concluding that the plaintiff sustained a significant monetary loss by retaining a 49% ownership interest in the business entities rather than negotiating a buyout by the husband in 2005 or 2006, as well as pleadings from the matrimonial action and commercial litigation, the firm's invoices, and the like. In reply, the defendants submitted 14 additional exhibits, including e-mail messages and decisions in the matrimonial action and the commercial litigation.

#### A. The Elements of Legal Malpractice

"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 and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages. To establish

causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence." Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d 438, 442 (2007) (citations and internal quotation marks omitted).

B. CPLR 3211(a)(1)

Dismissal pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence submitted "utterly refutes plaintiff's factual allegations" (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; see Greenapple v Capital One, N.A., 92 AD3d 548, 550 [1st Dept 2012]), and "conclusively establishes a defense to the asserted claims as a matter of law" (see Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267, 270-271 [internal quotation marks omitted]). If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(1) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action. See High Definition MRI, P.C. v Travelers Cos., Inc., 2016 NY Slip Op 02027, \*1 (1<sup>st</sup> Dept 2016); McGuire v Sterling Doubleday Enters., L.P., 19 AD3d 660, 661-662, 799 NYS2d 65 (1st Dept 2005).

Most of the exhibits annexed to the defendants' papers do not constitute "documentary" evidence. In order for evidence to qualify as "documentary," it must be "unambiguous, authentic, and undeniable" (Fontanetta v John Doe 1, 73 AD3d 78, 84-86 [2<sup>nd</sup> Dept 2010]). Thus, although documents such as deeds, which reflect

out-of-court transactions and are essentially unassailable, qualify as "documentary evidence" within the intended scope of CPLR 3211(a)(1), affidavits and deposition testimony do not. See Granada Condominium III Assn. v Palomino, 78 AD3d 996, 997 [2<sup>nd</sup> Dept 2010]; Suchmacher v Manana Grocery, 73 AD3d 1017, 1017 (2<sup>nd</sup> Dept 2010); Fontanetta v John Doe 1, supra, at 86. Nor are reports, minutes of meetings, or transcripts of hearing testimony properly characterized as documentary evidence. See Fontanetta v John Doe 1, supra. The Appellate Division, Second Department, has also held that letters and e-mail correspondence do not constitute documentary evidence within the meaning of CPLR 3211(a)(1) (see Granada Condominium III Assn. v Palomino, supra; Fontanetta v John Doe 1, supra). The First Department has declined to posit a blanket rule excluding all correspondence from the definition of documentary evidence. Thus, although it has on occasion deemed certain letters and e-mail correspondence to constitute documentary evidence, it has done so only under circumstances where the course of correspondence, viewed as a whole, created or refuted the existence of a contractual relationship, and the various individual messages merely constituted an offer, a counteroffer, an acceptance, or a rejection, or set forth the terms of the subject contract. See Kolchins v Evolution Mkts., Inc., 128 AD3d 47, 57-58 (1<sup>st</sup> Dept 2015); Schutty v Speiser Krause, P.C., 86 AD3d 484, 484-485 (1<sup>st</sup> Dept 2011)]; Langer v. Dadabhoj, 44 AD3d 425, 426 (1<sup>st</sup> Dept

2007); WFB Telecom. v NYNEX Corp., 188 AD2d 257, 259 (1<sup>st</sup> Dept 1992). The letters and e-mails submitted by the defendants do not fall within this category but, rather, primarily reflect communications between the plaintiff and the attorneys at the firm concerning legal advice and strategy and updates on the course of the matrimonial litigation. Other letters and emails reflect communications amongst the attorneys at the firm, between the firm's attorneys and their adversaries, and between the firm's attorneys and retained experts. These writings do not establish any unassailable fact and, hence, are not to be characterized as "documentary evidence." In any event, none of them conclusively refute the allegations in the complaint or establish a defense to the complaint as a matter of law.

C. CPLR 3211(a)(5)

To dismiss a complaint pursuant to CPLR 3211(a)(5) on the ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. See Singh v Edelstein, 103 AD3d 873, 874-875 (2<sup>nd</sup> Dept 2013); DeStaso v Condon Resnick, LLP, 90 AD3d 809, 812 (2<sup>nd</sup> Dept 2011). The statute of limitations for a cause of action sounding in legal malpractice is three years. See Matter of R.M. Kliment & Frances Halsband, Architects [McKinsey & Co., Inc.], 3 NY3d 538 (2004). Where a defendant meets its initial burden in this regard, the burden then shifts to the

plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether he or she actually commenced the action within the applicable limitations period. See Jalayer v Stigliano, 94 AD3d 702, 703 (2<sup>nd</sup> Dept 2012); Williams v New York City Health & Hosps. Corp., 84 AD3d 1358, 1359 (2<sup>nd</sup> Dept 2011). Here, the defendants failed to satisfy their initial burden of establishing, prima facie, that the second cause of action in the amended complaint, which alleges that the firm negligently supervised the nonmatrimonial lawyer, was time-barred. Rather, that cause of action "merely expands" upon the prior pleading (Kandell v. Saunders, 224 AD2d 185, 186 [1<sup>st</sup> Dept 1996]; Pickholz v First Boston, 202 AD2d 277, 277 [1<sup>st</sup> Dept 1994]), which alleged that defendants knew or should have known about the restrictions and conditions arising from the pre-2000 shareholder and member agreements, but nonetheless failed to advise her about the consequences of her retention of a 49% minority interest in the business entities in light of those restrictions and conditions. The amended pleading asserts, with more particularity, that the nonmatrimonial lawyer had both possession of the agreements and actual knowledge of their contents at a time when that knowledge, if shared, would have altered the plaintiff's litigation strategy, but that, due to the failure of the firm's internal procedures for coordinating the work of their attorneys and overseeing that lawyer's involvement in the plaintiff's case, the knowledge was

withheld from the lead attorney and the plaintiff herself, to the plaintiff's detriment. Accordingly, the second cause of action relates back to the commencement of the action, and is not time-barred, since the allegations of the original complaint gave the defendants notice of the facts and occurrences giving rise to the new cause of action. See Pendleton v City of New York, 44 AD3d 733, 736 (2<sup>nd</sup> Dept 2007).

D. CPLR 3211(a)(7)

On a motion to dismiss pursuant to CPLR 3211(a)(7), the pleading is to be afforded a liberal construction (see, CPLR 3026). The facts as alleged in the complaint must be accepted as true, the plaintiffs accorded the benefit of every possible favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable legal theory. See Leon v Martinez, 84 NY2d 83, 87-88 (1994); Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., supra, at 270-271. Nonetheless, a complaint must "be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions" that form the basis of the complaint and "the material elements of each cause of action" (CPLR 3013). In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint. See Nonnon v City of New York, 9 NY3d 825, 827 (2007); Rovello v Orofino Realty Co., 40 NY2d 633, 635

(1976). Where, as here, the movant submits evidence beyond the complaint in support of a motion to dismiss pursuant to CPLR 3211(a)(7), the criterion is whether the proponent of the pleading has a cause of action, not whether he or she has stated one, but dismissal should not result unless "a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it." Guggenheimer v Ginzburg, 43 NY2d 268, 275 (1977).

The amended complaint states a cause of action to recover damages for legal malpractice, as the allegations, if proven, satisfy all of the elements of that cause of action. See Russo v Rozenholc, 130 AD3d 492 (1<sup>st</sup> Dept 2015). The amended complaint also states a cause of action sounding in negligent supervision, based, in part, on an alleged violation of Rule 5.1 of the Rules of Professional Conduct, which may constitute evidence of tortious misconduct. See William Kaufman Organization, Ltd. v. Graham and James, LLP, 269 AD2d 171 (1<sup>st</sup> Dept 2000). Moreover, those causes of action satisfy the notice requirements of CPLR 3013. The cause of action for a judgment declaring that the defendants overbilled the plaintiff, while not necessarily independent of the legal malpractice cause of action, likewise states a cause of action. "A motion to dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not

the question of whether the plaintiff is entitled to a favorable declaration' " Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie, 87 AD3d 1148, 1150 (2<sup>nd</sup> Dept 2011) , quoting Staver Co. v Skrobisch, 144 AD2d 449, 450 (2<sup>nd</sup> Dept 1988). "Thus, 'where a cause of action is sufficient to invoke the court's power to render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy, a motion to dismiss that cause of action should be denied'" (DiGiorgio v 1109-1113 Manhattan Ave. Partners, LLC, 102 AD3d 725, 728 (2<sup>nd</sup> Dept 2013), quoting Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie, supra, at 1150). Inasmuch as the defendants have not identified which allegations in the amended complaint that are asserted to be facts are not truly facts at all, and have not demonstrated that the purportedly nonfactual nature of any of the plaintiff's allegations is indisputable, the plaintiff has also shown that she "has" causes of action to recover damages for legal malpractice and for negligent supervision, and for a judgment declaring that the defendants overbilled her by virtue of their malpractice.

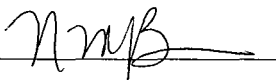
V. CONCLUSION

ORDERED that the defendants' motion is denied.

This constitutes the Decision and Order of the court.

Dated: 5-6-16

ENTER:



J.S.C.

**HON. NANCY M. BANNON**