To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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EDJ REALTY INC.,

Plaintiff,

-against-

DECISION & ORDER
Index No. 67058/2016
Sequence No. 1

MARK A. SIEGEL, ESQ.

Defendant.

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WOOD, J.

The following papers were read and considered in connection with defendant attorney Mark A. Seigel, Esq. ("Siegel") motion to dismiss:

Siegel's Notice of Motion, Affidavit, Exhibits, Memorandum of Law.
Plaintiff's Counsel's Affirmation in Opposition, Plaintiff's Affidavit, Exhibits.
Defendants' Reply Memorandum of Law.

This action is to recover damages for alleged legal malpractice by defendant. By the instant motion, defendant moves pursuant to CPLR 3211(1) and (7) on the grounds that the documentary evidence provides a complete defense to plaintiff's claim, and plaintiff fails to state a cause of action. Plaintiff opposes the motion. Upon the foregoing papers, the motion is decided as follows:

It is well settled that pursuant to CPLR (a)(7) "upon a motion to dismiss [for failure to state a cause of action], the sole criterion is whether the subject pleading states a cause of action, and if, from the four corners of the complaint, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, then the motion will fail. The court must afford the pleading a liberal construction, accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory"[1] (Esposito v Noto, 90 AD3d 825 [2d Dept 2011]). However, this does not apply to legal conclusions or factual claims which were either inherently incredible or flatly contradicted by documentary evidence (West Branch Conservation Assn. v County of Rockland, 227 AD2d 547 [2d Dept 1996]). The standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (Sokol v Leader, 74 A.D.3d 1180, [2d Dept 2010]). However, if the court considers evidence submitted by a defendant in support of a motion to dismiss under CPLR 3211 (a) (7), a court may "freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint," and if the court does so, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (Leon v Martinez, 84 NY2d 83, 88 [1994]; Uzzle v Nunzie Ct. Homeowners Ass'n, Inc., 70 AD3d 928, 930 [2d Dept 2010]); Greene v Doral Conference Ctr. Assoc., 18 AD3d 429, 430 [2d Dept 2005]). Affidavits and other evidentiary material may also be considered to "establish conclusively that plaintiff has no cause of action" (Simmons v Edelstein, 32 AD3d 464, 465 [2d Dept 2006]).

Furthermore, a motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted only if the documentary evidence submitted by the defendant utterly refutes the factual

[1]Internal citations omitted.

allegations of the complaint and conclusively establishes a defense to the claims as a matter of law (Goshen v Mutual Life Insurance Co. of New York, 98 NY 2d 314 [2002]; First Keystone Consultants, Inc. v DDR Construction Services, 74 A.D.3d 1135, 904 N.Y.S.2d 113 [2d Dept 2010]). To qualify as documentary evidence, printed materials "must be unambiguous and of undisputed authenticity" (Fontanetta v John Doe 1, 73 AD 3d 78, 86 [2d Dept 2010]; Sobel v Ansanelli, 98 AD3d 1020, 1022 [2d Dept 2012]). On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, "the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Bua v Purcell & Ingrao, P.C., 99 AD3d 843, 845 [2d Dept 2012] lv to appeal denied, 20 NY3d 857, 984 NE2d 324 [2013]). Thus, the court's inquiry is not whether there is evidentiary support for the complaint (Leon v Martinez,84 NY2d 83 [1984]; International Oil Field Supply Services Corp. v. Fadeyi, 35 AD3d 372, [2d Dept 2006]).

To state a cause of action to recover damages for legal malpractice, a plaintiff must allege: (1) that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession; and (2) that the attorney's breach of the duty proximately caused the plaintiff actual and ascertainable damages' (Siwiec v Rawlins, 103 AD3d 703, 704 [2d Dept 2013]). "To survive dismissal, the complaint must show that, but for counsel's alleged malpractice, the plaintiff would not have sustained some actual ascertainable damages" (Simmons v Edelstein, 32 AD3d 464, 466 [2d Dept 2006]). Mere speculation about a loss resulting from an attorney's alleged omission is insufficient to sustain a prima facie case of legal malpractice (Giambrone v Bank of NY, 253 A.D.2d 786, 787 [2d Dept 1998]). Rather, plaintiff must prove that it was the attorney's negligence which

proximately caused the actual and ascertainable damages that resulted (Simmons v Edelstein, 32 AD3d 464 [2d Dept 2006]). In other words, "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" (Bells v Foster, 83 AD3d 876, 877 [2d Dept 2011]). A plaintiff is not obligated to show, on a motion to dismiss, that he actually sustained damages, and need only plead allegations from which damages attributable to the defendant's malpractice might be reasonably inferred (Rock City Sound, Inc. v Bashian & Farber, LLP, 74 AD3d 1168, 1171 [2d Dept 2010]).

Here, pursuant to a retainer agreement, EDJ retained Siegel to represent it, as plaintiff in a declaratory judgment as against Commissioner of New York State House and Community Renewal ("DHCR") and others, in Bronx Supreme Court under Index No. 260199/2013. ("The Bronx case"). That action revolved around a DHCR determination reducing rent and directing plaintiff to restore a patio area that was found to reduce a decrease in a required service to the tenant in that action. DHCR's General Counsel served a true copy of that decision which was entered in the office of the Bronx Clerk's office on November 14, 2013.

The current dispute revolves around that the notice of entry served by the DHCR which refers to a decision. Siegel argues that this notice of entry was defective and the time within which EDJ can serve a notice of appeal has not started to run. As a result, Siegel argues that nothing he did or did not do, can as a matter of law be the proximate cause of EDJ's claimed loss of the right to appeal form the November 2013 Decision and Order. Siegel also argues that he had no duty to file a notice of appeal under the Retainer Agreement, and there are no facts that EDJ would have prevailed of an appeal of the Bronx case.

The record shows that EDJ did file in the Bronx case, a motion seeking renewal and reargument. That court denied EDJ's motion as untimely, but even if the papers had been timely filed, the motion to reargue would still be denied because plaintiff had failed to demonstrate that the court overlooked or misapprehended any matter of fact or law in rendering its original decisions. The motion to renew was also denied.

EDJ appealed that decision to the First Department, and DHCR moved to dismiss the appeal. The First Department, in its decision, characterized said appeal from the order and judgment (one paper) of the Supreme Court, Bronx County entered on November 14, 2013. The First Department also noted that EDJ having cross-moved for an order determining the papers entered November 14, 2013, to be a "Decision" not an order, and thus, not appealable. The First Department wrote: "Now, upon reading and filing the papers with respect to the motion and cross motion, and due deliberation having been had thereon, It is ordered that the motion to dismiss the appeal is granted. The cross motion is denied in its entirety".

From this language, the First Department had considered EDJ's argument that the Bronx decision was not an order, and denied EDJ's cross motion. The Court of Appeals denied leave to appeal.

Accordingly, based upon the record and the arguments presented by the parties, accepting the facts alleged in the complaint as true, and according plaintiff the benefit of every possible favorable inference, the court concludes that within the four corners of the complaint a cognizable cause of action lies to recover damages for legal malpractice (Sokol v Leader, 74 AD3d 1180,1181 [2d Dept 2010]).

"If the alleged malpractice is based on the attorney's failure to perfect an appeal from an order dismissing a cause of action in an underlying action, the plaintiff must show that, had the

attorney perfected that appeal, the appeal would have been successful, the cause of action would have been reinstated, and the plaintiff would have prevailed on that cause of action in the underlying action" (McCluskey v Gabor & Gabor, 61 AD3d 646, 648, [2d Dept 2009]). Nonetheless, this is a motion to dismiss, not a summary judgment motion, and whether the complaint will later survive a motion for summary judgment, plays no role in the determination of a pre-discovery CPLR 3211 motion to dismiss (Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, 38 AD3d 34, 38 [2d Dept 2006]).

In light of these standards, and considering the circumstances of the case and the arguments advanced by the parties, and that it is a prediscovery motion to dismiss, not a summary judgment motion, the court finds that the complaint states a cause of action to recover damages for legal malpractice insofar as asserted against Siegel.

NOW THEREFORE, it is hereby

ORDERED, that defendant's motion to dismiss is denied.

All matters not herein decided are denied. Defendant is directed to serve a copy of this Decision and Order, with notice of entry, upon plaintiff, within 10 days of such entry, in accordance with NYSCEF protocols. This constitutes the Decision and Order of the court.

The Clerk shall enter judgment in accordance herewith.

Dated: September 18, 2017
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF