SHORT FORM ORDER

ORIGINAL

INDEX No. 15-601938
CAL. No. 17-02097 OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 3-16-18 (005 & 006)
ADJ. DATE 4-16-18
Mot. Seq. # 005 - MD
006 - XMD

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RICHARD DEMPSEY,

Plaintiff,

- against -

CHAVES & PERLOWITZ LLP and ANDREW LUFTIG,

Defendants.

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Upon the following papers numbered 1 to 58 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14 ; Notice of Cross Motion and supporting papers 16 - 55 ; Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers ___; Other memoranda of law 15, 56, 57 - 58 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants Chaves & Perlowitz LLP and Andrew Luftig for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's complaint is denied; and it is further

ORDERED that the cross motion by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment in his favor as to the liability of the defendants and awarding damages in the amount of $770,000 is denied.

This action was commenced to recover damages allegedly sustained by the plaintiff as the result of the failure of the defendants to properly structure and complete a tax-deferred sale of the plaintiff's real property in accordance with 26 U.S.C. § 1031. It is undisputed that the plaintiff was the previous owner of a commercial cooperative located at 49 West 24th Street, 8th Floor, New York, New York (49 West or the loft), that he and his wife, nonparty Mary Dinaberg (Dinaberg) decided to sell 49 West in the

Spring of 2013, and that they found a willing purchaser in June 2013. On July 10, 2013, the plaintiff retained the defendant Chaves & Perlowitz LLP (the law firm) and the defendant Andrew Luftig (Luftig) (collectively, the defendants) to represent him in the sale of 49 West. In an email dated July 18, 2013, the plaintiff's accountant provided the plaintiff with an estimate of the capital gains taxes due on the sale of 49 West and suggested that the plaintiff request that his attorneys insert "an option to execute the sale as a 'Section 1031 Exchange.'" The accountant also indicated that if the plaintiff was able to buy another property it might save him from having to pay a significant amount of taxes in 2013.

It is further undisputed that Dinaberg, who acted as the "point of contact" between the plaintiff and the defendants, sent an email to Luftig on the morning of July 18, 2013 asking him to insert an option in the contract regarding a Section 1031 Exchange, that Luftig immediately responded, "yes, of course," and that said option or clause for structuring the transaction as a Section 1031 tax-deferred exchange was inserted as paragraph 52 of the contract rider to the contract of sale regarding 49 West. To qualify for the tax deferral provided under 26 U.S.C. § 1031 (Section 1031), the taxpayer must meet several requirements, including the identification of a replacement property within 45 days after the closing of sale of the existing property together with the actual purchase of such property within 180 days of the transfer of the relinquished property, and that the taxpayer may not have actual or constructive receipt of the proceeds from the sale of the relinquished property. "Safe-harbor" provisions under regulations promulgated under Section 1031 do, however, provide that a taxpayer may use a "qualified intermediary" to facilitate a "like-kind" exchange and avoid impairment of the exchange including issues regarding the taxpayer/seller's actual or constructive receipt of the proceeds of the sale. A successful "like-kind exchange" under Section 1031 and the regulations promulgated thereunder results in the deferment of capital gains taxes otherwise payable on the sale of the first property until the sale of the replacement property.

On July 23, 2013, the contract of sale was executed by the plaintiff and the purchaser. In an email dated July 30, 2013, Dinaberg inquired of Luftig as to the closing date to enable her and the plaintiff to contact their real estate broker and view "new places" the same day. The closing of title to 49 West took place on August 6, 2013 and was handled by an associate at the law firm, Ami Wellman (Wellman). The total consideration paid by the purchaser was $2,713,028.99 and such consideration was credited on the closing statement as being paid to the plaintiff rather to any qualified intermediary as required by Section 1031.

On August 14, 2013, the defendants advised the plaintiff, after inquiry from Dinaberg, that the intended tax-deferred sale of 49 West pursuant to Section 1031 was lost due to the failure to pay the proceeds over to a qualified intermediary rather than to the plaintiff himself. According to the plaintiff, although the defendants suggested that the sale be re-done, the purchasers would do so only if a payment of $75,000 was made to them. The plaintiff refused to re-do the sale because the defendants asked him to pay $50,000 of the $75,000 payment and because he thought it would be a sham sale unacceptable to the IRS on fraud grounds. On January 15, 2014, the plaintiff paid $520,000 in federal income taxes and $250,000 in state income taxes, which amounts are allegedly attributable to the defendants' failure to properly place the proceeds of the sale in the hands of a qualified intermediary.

The plaintiff commenced this action by the filing of a summons and complaint on February 26, 2015. In his complaint, the plaintiff sets forth causes of action for legal malpractice and breach of contract. The defendants filed an answer with affirmative defenses on September 21, 2015. The defendants now move for summary judgment dismissing the complaint on the grounds, among other things, that neither the plaintiff nor Dinaberg ever indicated an intention to pursue a Section 1031 transaction, that they were not retained to provide advice regarding a Section 1031 transaction, that the plaintiff has not suffered actual and ascertainable damages, and that the cause of action for breach of contract should be dismissed as duplicative of the cause of action for legal malpractice.

In support of their motion, the defendants submit the pleadings, the transcripts of the deposition testimony of the plaintiff and Dinaberg, the subject retainer agreement, the contract of sale dated July 23, 2013, certain emails sent or received by the parties, and a copy of a revenue ruling issued by the United States Internal Revenue Service (IRS). At his deposition, the plaintiff testified that he purchased 49 West in 1979 or 1980, that the loft had been rented to a yoga studio for four years as of 2013, and that his real estate broker referred him to the defendants to handle the sale of 49 West. He stated that he spoke with Luftig by telephone, that he signed the retainer agreement, and that he learned from his accountant about the availability of deferring taxes through use of Section 1031. He indicated that he had not heard about Section 1031 prior to July 2013, that his accountant did not explain how Section 1031 works, and that he did not discuss Section 1031 with Luftig or anyone at the law firm prior to the July 18, 2013 email from his wife to Luftig asking him to insert a option to structure the sale of 49 West as a like-kind exchange (the option email).

The plaintiff further testified that, between July 18, 2013 when the option email was sent, and July 30, 2013 when the email indicating that he and Dinaberg were hoping to view "new places" with their broker on the day of the closing of title to 49 West was sent (the new places email), he never expressed to the defendants that he intended to structure the sale of 49 West as a Section 1031 like-kind exchange. He indicated that between July 30, 2013 and the closing of title on August 6, 2013, he did not remember having any conversation with the defendants, that Section 1031 was not discussed at the closing of title, and that prior to the closing of title he did not know how Section 1031 worked. He stated that he did not hear the term "qualified intermediary" before the closing of title, that his broker and his accountant did not mention that a qualified intermediary was needed in the sale of 49 West, and that the option email was his indication to the defendants that he wished the sale to be structured as a Section 1031 like-kind exchange.

The plaintiff further testified that he viewed a number of potential replacement properties on the day of the closing of title, that a few days later an associate of his broker informed him that the sale of 49 West was not structured as a like-kind exchange, and that he and Dinaberg had not asked about the possibility of structuring the sale as a like-kind exchange at the closing of title. He stated that the defendants never asked him for an additional legal fee to structure the deal as a like-kind exchange, and that the defendants realized their mistake and suggested that the closing be rescinded and re-done as a like-kind exchange. He indicated that the purchasers refused to agree to rescind the closing of title and re-do the transaction as a like-kind exchange without a payment of $75,000, that the law firm suggested that it would pay $25,000 of that amount to the purchasers if the plaintiff paid the balance, and that he rejected the idea of rescinding the closing because of the additional fee requested by the purchasers and

the advice of a number of people, including his accountant and a "1031 consultant," that the IRS might consider the re-do of the sale to be fraudulent.

At her deposition, Dinaberg testified that she and the plaintiff decided to sell 49 West because they were "short on cash," and that, after retaining a real estate broker, but before the closing of title on the loft, she spoke with Kevin Robbins (Robbins), a friend who was a financial advisor, about "financial planning in the abstract." She stated that the topic of Section 1031 never came up in that conversation, that after the closing of title she spoke with Robbins about the defendants suggestion to rescind and re-do the closing, and that Robbins said she and the plaintiff should not rescind because, if they were audited, the IRS would take the position that the rescission was merely to avoid paying taxes. She indicated that the July 18, 2013 email from their accountant with the anticipated taxes due on a simple sale of 49 West was the first time that she heard the term Section 1031 exchange, that their accountant only said that such a transaction would defer the taxes owed and help with estate planning, and that he did not explain the need for a qualified intermediary, but told her to tell the lawyer to do a Section 1031 exchange as the lawyer would do what was needed, although he mentioned "that there were restrictions."

Dinaberg further testified that she read paragraph 52 in the rider to the contract of sale for 49 West prior to it being signed by the plaintiff, that it was her understanding that a Section 1031 could be "activated" at any time, that the defendants never told her anything about the workings of Section 1031 or the need for a qualified intermediary, and that she did not ask the defendants to explain the mechanics of Section 1031 prior to the closing of title to 49 West. She indicated that she discussed the fact that she and the plaintiff were looking for a replacement property with Luftig, and possibly Wellman, that when she asked Luftig to put the Section 1031 option into the contract it meant that they intended to utilize a like-kind exchange, and that the new places email also indicated that they intended to structure the sale of 49 West as a like-kind exchange. She stated that she met Wellman for the first time at the closing of title for 49 West, that Section 1031 was not mentioned, and that her only question to Wellman was "is everything good," to which Wellman answered "yes."

Dinaberg further testified that an associate of their broker contacted Luftig after the closing of title because they had located a replacement property, that the associate emailed her and informed her that Luftig said that she and the plaintiff did not exercise the option to close pursuant to Section 1031 and could not do so now, and that she sent an email to Luftig questioning whether an option had been inserted into the contract because it was her understanding at the time that the plaintiff "could go back after the closing and claim a 1031." She stated that, after her email to Luftig, she spoke with Alan Perlowitz, a partner in the law firm, who suggested the aforementioned splitting of the cost of paying the purchasers of 49 West to re-do the sale, and that she received an email from the consultant that she spoke with after the closing who sent her a document entitled "Valid Unwindings and Rescissions For Tax Purposes," which indicated that, under certain circumstances, a transaction can be effectively unwound for tax purposes without a formal finding of rescission. She indicated that, in another email, the consultant offered to put her advisors in touch with an attorney who had worked with a number of clients who rescinded sales and later completed a like-kind exchange, and that, at some point, she instructed someone to tell the purchasers of 49 West that she and the plaintiff were not interested in a rescission and re-do of the sale.

The retainer agreement between the parties, dated July 10, 2013 and addressed to the plaintiff at the 49 West address, provides in pertinent part:

> We agree to represent you at a flat fee of $3,500.00 exclusive of disbursements, which include International telephone calls, faxes, photocopies, messenger and overnight delivery, travel time, postage, etc. Please note that our legal fee does not include any fees for powers of attorney, litigation or services which are considered out of the ordinary and not generally done in connection with a routine real estate closing.

Paragraph 52 of the rider to the contract of sale for 49 West provides that:

> Seller shall have the option to structure the transaction as a "Tax Free Exchange" under Revenue Code Section 1031, in which case the following shall occur: (a) An exchange trustee will be retained by the seller to act as a qualified intermediary for the purpose of facilitating the exchange; (b) Seller's Interest in the property and/or proceeds shall be assigned to the exchange trustee, together with an assignment of this agreement; and (c) the purchase price will be paid by the Purchaser to the exchange trustee to acquire the replacement property; Purchaser agrees to cooperate with Seller in connection with such tax free exchange, which Seller shall agree be (*sic*) accomplished without delay, expense or liability to the Purchaser.

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* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). 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, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). 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, 563 NYS2d 449 [2d Dept 1990]). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; ***Rebecchi v Whitmore***, *supra*).

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 ***Nelson v Roth***, 69 AD3d 912, 893 NYS2d 605 [2d Dept 2010]; ***Napolitano v Markotsis & Lieberman***, 50 AD3d 657, 855 NYS2d 593 [2d Dept 2008]). 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, 803 NYS2d 571 [2d Dept 2005]; ***Ippolito v McCormack, Damiani, Lowe & Mellon,*** 265 AD2d 303, 96 NYS2d 203 [2d Dept 1999]; ***Volpe v Canfield***, 237 AD2d 282, 654 NYS2d 160 [2d Dept 1997], *lv denied* 90 NY2d 802, 660 NYS2d 712 [1997]).

Initially, the defendants contend that they are entitled to summary judgment because the plaintiff and Dinaberg never requested any information about Section 1031, and never indicated an intention to pursue such a transaction. An attorney may be held liable for malpractice in failing to give proper advice to a client and "may not shift to the client the legal responsibility [he] was specifically hired to undertake because of [his] superior knowledge" (***Theresa Striano Revocable Trust v Blancato***, 71 AD3d 1122, 1124, 898 NYS2d 69 [2d Dept 2010], quoting ***Hart v Carro, Spanbock, Kaster & Cuiffo***, 211 AD2d 617, 619, 620 NYS2d 847 [2d Dept 1995]). It is undisputed that 49 West was commercial real property subject to a leasehold at the time the plaintiff retained the defendants. Generally, an attorney has a duty to investigate matters regarding the transaction he or she has been retained to handle (*see* ***Winters v Dowdall***, 63 AD3d 650, 882 NYS2d 100 [2d Dept 2009]; ***Hart v Carro, Spanbock, Kaster & Cuiffo***, *supra*; ***Farr v Newman***, 18 AD2d 54, 238 NYS2d 204 [4th Dept 1963]). Here, the defendants have failed to establish whether they investigated the nature of the plaintiff's real property, or whether they were aware of the subject tenancy, either of which might suggest the need to discuss the applicability and the elements of Section 1031, even absent the plaintiff's request for such an option in the contract. A law firm can be held liable for failing to make further inquiry when the facts and circumstances available to the law firm raise "red flags" about the transaction's eligibility for certain benefits (***Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP***, 115 AD3d 228, 980 NYS2d 95 [1st Dept 2014]). The defendants also failed to establish whether the request that Luftig insert a clause regarding Section 1031 put them on constructive notice that they should have done more than proceed to the closing of title absent some discussion with the plaintiff, Dinaberg or their accountant regarding Section 1031 and whether 49 West was eligible for a like-kind exchange.

In addition, where a defendant seeks summary judgment in an action for legal malpractice, the burden is on the movant to establish through expert opinion that he or she did not perform below the ordinary reasonable skill and care possessed by an average member of the legal community (*see* ***Cosmetics Plus Group, Ltd. v Traub***, 105 AD3d 134, 960 NYS2d 388 [2d Dept 2013]; ***Suppiah v Kalish***, 76 AD3d 829, 907 NYS2d 199 [1st Dept 2010]). The defendants have not submitted the opinion of an expert to establish that their performance of legal services met the standard of care applicable herein. Having failed to establish their prima facie entitlement to summary judgment on this issue, whether their conduct did or did not meet the required standard of care is a question for the trier of fact (*see* ***Greene v Payne, Wood and Littlejohn***, 197 AD2d 664, 602 NYS2d 883 [2d Dept 1993]; ***Milgram Thomajan & Lee, P.C. v Golden Gate Petroleum, P.C.***, 43 Misc 3d 68, 986 NYS2d 734 [App Term, 1st Dept 2014]).

The defendants next contend that they were not retained to provide advise regarding a Section 1031 transaction, that the plaintiff was consulting with his accountant for those purposes, that they were

retained to act as the plaintiff's real estate attorneys only, and that the plaintiff and Dinaberg did not request that the sale of 49 West be structured as a like-kind exchange. Here, the retainer agreement is ambiguous as to what is meant by a "routine real estate closing," and what duties the defendants owed to the plaintiff regarding advice and to communicate with the plaintiff's accountant. Where the scope of an attorney's duties is disputed or uncertain, a determination of preliminary issues of fact may be required to establish the relationship between the parties (*e.g.* ***Duque v Perez***, 95 AD3d 937, 944 NYS2d 586 [2d Dept 2012]; *see also* ***Genesis Merchant Partners, L.P. v Gilbride, Tusa, Last & Spellane, LLC***, 157 AD3d 479, 69 NYS3d 30 [1st Dept 2018]). In addition, as noted above, the defendants' contention that the failure of the plaintiff or Dinaberg to request that the sale of 49 West in a like-kind exchange is unavailing in the context of this motion for summary judgment.

In addition, the defendants contend that the plaintiff has failed to plead actual and ascertainable damages. In order to establish a prima facie case of legal malpractice, 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, 840 NYS2d 888 [2007]; ***Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer***, 8 NY3d 438, 835 NYS2d 534 [2007]; ***McCoy v Fienman***, 99 NY2d 295, 755 NYS2d 693 [2002]; ***Kluczka v Lecci***, 63 AD3d 796, 880 NYS2d 698 [2d Dept 2007]). That is, to maintain a cause of action for legal malpractice, a plaintiff must plead and prove ascertainable damage, and speculative allegations of damages are insufficient (***Janker v Silver, Forrester & Lesser, P.C.***, 135 AD3d 908, 24 NYS3d 182 [2d Dept 2016]; *see also* ***Randazzo v Nelson***, 128 AD3d 935, 9 NYS3d 394 [2d Dept 2015]). 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, 834 NYS2d 705 [2007]; ***Leder v Spiegel***, *supra*; ***Snolis v Clare***, 81 AD3d 923, 917 NYS2d 299 [2d Dept 2011]). It is undisputed that Section 1031 provides a method for the deferral of any capital gains tax on the appreciation of real property which is the subject of a like-kind exchange. Thus, the plaintiff herein is required to prove that he would not have been required to pay capital gains taxes at any time, or at least a lesser amount of taxes upon the sale of any properly acquired replacement property, had the sale of 49 West been structured as a like-kind exchange.

The defendants assert that the plaintiff cannot establish what the laws, rules and regulations governing capital gains will be on the sale of any replacement property, what his ultimate tax burden will be, and what the value of any replacement property will be when taxes actually become due, rendering the plaintiff's claim for damages "sheer and utter speculation." In making this argument, the defendants rely heavily upon ***Chang Yi Chen v Zhen Huang***, 43 Misc 3d 1207(A), 990 NYS2d 436 (Sup Ct, Kings County 2014), which found that damages based on payment of a Section 1031 deferred tax obligations are unenforceable under New York law. The court held that "[t]he tax consequence of such a deferral depend on many factors, including any change in the capital gains tax rate, IRS rules for determining capital gains, market forces affecting the value of the property, the plaintiff's ability to offset the gain against losses" (***Chen*** at *2) [citations omitted]). That is, because damages based on a failure to defer taxes are speculative, "any determination that [a party's] capital gains liability would be less at the time of a future sale [of the replacement property] ...is thus inherently speculative" (***Chen*** at *2, citing ***Farrar v Brooklyn Union Gas Co.***, 73 NY2d 802, 537 NYS2d 26 [1988]; ***Ashland Mgt. v Janien***, 82 NY2d 395, 604 NYS2d 912 [1993]; ***Solin v Domino***, 501 Fed Appx 19, 22 [2d Cir 2012]; ***Menard M. Gertler,***

M.D. P.C. v Sol Masch & Co., 40 AD3d 282, 283, 835 NYS2d 178 [1st Dept 2007). Thus, allowing a party damages simply based on their current paid tax liability would constitute a "windfall" to that party (***Chen*** at *2) [citations omitted].,

The defendants reliance on ***Chen*** is misplaced. A review of the relevant authority reveals that ***Chen*** is not dispositive herein. It has been held that, while the "out-of-pocket" damages rule applicable to actions involving claims of misrepresentation or fraud bars the recovery of taxes paid, "it does not bar recovery of such damages in connection with ... claims for negligence/malpractice, breach of contract or breach of fiduciary duty" (***Serino v Lipper***, 123 AD3d 34, 42, 994 NYS2d 64 [1st Dept 2014]; *see also* ***Fielding v Kupferman***, 65 AD3d 437, 885 NYS2d 24 [1st Dept 2009]).

It is well settled that, under the out-of-pocket rule the " '[t]he true measure of damage is indemnity for the actual pecuniary loss sustained as the direct result of the wrong,' " and that "[d]amages are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained.... [T]here can be no recovery of profits which would have been realized in the absence of fraud" (***Connaughton v Chipotle Mexican Grill, Inc.***, 29 NY3d 137, 142, 53 NYS3d 598 [2017], quoting ***Lama Holding Co. v Smith Barney***, 88 NY2d at 421, 646 NYS2d at 80). It is equally well settled that damages in a legal malpractice case are designed "to make the injured client whole" (***Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer***, 8 NY3d 438, 443, 835 NYS2d 534 [2007], quoting ***Campagnola v Mulholland, Minion & Roe***, 76 NY2d 38, 42, 556 NYS2d 239 [1990]).

As noted above, in holding that New York does not permit the recovery of taxes paid, ***Chen*** relies upon ***Menard M. Gertler, M.D. P.C. v Sol Masch & Co.***, *supra*, ***Apple Bank for Sav. v PricewaterhouseCoopers, LLP***, 23 Misc 3d 1126[A], 889 NYS2d 540 (Sup Ct, New York County 2009), *mod on other grounds*, 70 AD3d 438, 895 NYS2d 361 (1st Dept 2010), and ***Lama Holding Co. v Smith Barney***, 88 NY2d 413, 646 NYS2d 76 (1996). However, ***Lama*** involved an action for fraud which applied the out-of-pocket rule in determining the plaintiff's alleged damages. In addition, the court in ***Apple Bank*** found that, under certain circumstances, a plaintiff could recover damages for taxes paid based upon the failure of the defendant to give proper professional advice. In doing so, the court stated that "it appears that in determining whether back taxes and interest are recoverable in accounting malpractice actions, New York courts consider whether the plaintiff would have incurred the tax liability if they had not relied on the accountant's faulty advice. If the tax liability was inevitable, the recovery of taxes and interest is not permitted because it would create a windfall for the plaintiff. However, if the tax liability would have been avoided but for the erroneous advice, it appears that back taxes and interest would be recoverable in order to make the plaintiff whole." In ***Gertler***, an action for professional malpractice against an accountant, the court dismissed the complaint finding that the plaintiff failed to establish the applicable standards of professional practice, and simply stated "[m]oreover, taxes and tax interest are not recoverable under New York law (*see Alpert v Shea Gould Climenko & Casey*, 160 AD2d 67, 71-72 [1990])." ***Alpert*** was an action for fraud, wherein the court applied the out-of-pocket measure of damages.

Thus, it is determined that, if the plaintiff can establish that the defendants failed to meet the applicable standards of care herein, the measure of damages "is the difference in the pecuniary position of the client from what it should have been had the attorney acted without negligence" (***Flynn v Judge***, 149 AD 278, 280, 133 NYS 794 [2d Dept 1912]; *see e.g.* ***Serino v Lipper***, *supra*). That is, the tax consequences to the plaintiff as a result of any legal malpractice on the part of the defendants (*see e.g.* ***Tepper v Furino***, 239 AD2d 405, 659 NYS2d 43 [2d Dept 1997]; ***Alexsey v Kelly***, 205 AD2d 650, 614 NYS2d 736 [2d Dept 1994]; *see also* ***Citizens Federal Bank, FSB v U.S.***, 59 Fed. Cl. 507 [2004]).

However, mere conjecture, surmise or speculation is not enough to sustain a claim for damages (***Fiederlein v New York City Health and Hosps. Corp.***, 56 NY2d 573, 450 NYS2d 181 [1982]; ***Curry v Hudson Valley Hosp. Center***, 104 AD3d 898, 961 NYS2d 563 [2d Dept 2013]). Thus, a defendant in a legal malpractice action is not liable for a damage claim that is remote or speculative (*see* ***Rhodes v Honigman***, 131 AD3d 115, 116 NYS3d 324 [2d Dept 2015]; ***Giambrone v Bank of N.Y.***, 253 AD2d 786, 677 NYS2d 608 [2d Dept 1998]). Whether a claim for damages is remote or speculative is not based upon the difficulty in calculating the amount but involves the question whether they result directly from and as a natural consequence of the wrongful act (*see* ***E.J. Brooks Co. v Cambridge Sec. Seals***, 31 NY3d 441, 180 NYS3d 162 [2018]). A plaintiff is not required to prove his or her damages with mathematical certainty but only reasonable certainty (***E.J. Brooks Co. v Cambridge Sec. Seals***, *id.*; *cf.* ***New Kayak Pool Corp. v Kavinoky Cook LLP***, 125 AD3d 1346, 5 NYS3d 625 [4th Dept 2015][defendant established damages claimed incapable of being proven with any reasonable certainty]). Here, the defendants have failed to establish as a matter of law that the plaintiff has not suffered an adverse tax consequence herein by, for example, completely avoiding capital gains taxes through estate planning, or that the plaintiff cannot establish with reasonable certainty the amount of allegedly excessive taxes paid on the sale of 49 West. Thus, the defendants are not entitled to a dismissal of the complaint on the ground the plaintiff's damages are speculative (*see* ***M & R Ginsburg, LLC v Segal, Goldman, Mazzotta & Siegel, P.C.***, 90 AD3d 1208, 934 NYS2d 269 [3d Dept 2011]).

Finally, it is determined that the defendants have not established as a matter of law that the recovery of the capital gains taxes paid by the plaintiff would constitute a windfall. In holding that the recovery of taxes wold constitute a windfall, ***Chen*** relies upon ***Alpert v Shea Gould Climenko & Casey***, 160 AD2d 67, 559 NYS2d 312 (1st Dept 1990), ***Apple Bank for Sav. v PricewaterhouseCoopers, LLP***, *supra*, ***Lama Holding Co. v Smith Barney***, *supra*, and ***Gaslow v KPMG LLP***, 19 AD3d 264, 797 NYS2d 472 (1st Dept 2005). As discussed above, ***Apple Bank*** found that the recovery of a tax liability would only constitute a windfall if the tax liability was inevitable. Here, there is an issue of fact whether the capital gains taxes paid by the plaintiff were inevitably due. In addition, ***Alpert***, ***Lama***, and ***Gaslow*** were actions for fraud distinguishable on their facts. In ***Lama***, the court found that the plaintiff was not entitled to recover lost profits under the out-of-pocket rule, and in ***Glaslow***, the court found that the plaintiff had obtained the full use of his money as a result of the fraud, and that reimbursement of the taxes would put him in a better position had he not decided to remove funds previously enjoying tax-deferred protection. In ***Alpert***, the plaintiffs were subject to "substantial tax liability" prior to their action for fraudulent misrepresentation against the law firm that prepared tax opinion letters, and the court found that the equities militated against allowing the plaintiffs to recover interest payments made

to the IRS after certain deductions were disallowed when the plaintiffs had use of money during the time the plaintiffs were not entitled to it.

The defendants final contention is that the plaintiff's second cause of action for breach of contract should be dismissed as duplicative of his cause of action for legal malpractice. Where a cause of action is based on the same alleged conduct and seeks the same damages as a legal malpractice claim it is properly dismissed as duplicative of the malpractice cause of action (***Financial Servs. Veh. Trust v Saad***, 72 AD3d 1019, 900 NYS2d 353 [2d Dept 2010]; *see also* ***Betz v Blatt***, 116 AD3d 813, 984 NYS2d 378 [2d Dept 2014]). In his complaint, as well as his deposition testimony, the plaintiff alleges that Luftig "agreed to undertake [his] specific request that the sale of [49 West] meet the requirements of a 1031 tax free exchange" by acknowledging the receipt of the option email and the new places email. Here, there is a issue of fact whether said emails can form the basis of an express contract to obtain a particular result in this transaction (*see* ***IMO Indus. v Anderson Kill & Olick, P.C.***, 267 AD2d 10, 699 NYS2d 43 [1st Dept 1999]; ***Becker v Julien, Blitz & Schlesinger, P.C.***, 66 AD2d 674, 411 NYS2d 17 [1st Dept 1978], *appeal dismissed* 47 NY2d 761, 417 NYS2d 464 [1979]). In addition, there is an issue of fact whether said emails can form the basis of an implied contract to obtain a particular result in this transaction (*see* ***Dulberg v Mock***, 1 NY2d 54, 150 NYS2d 180 [1956]; ***Sage Realty Corp. v Proskauer Rose LLP***, 251 AD2d 35, 675 NYS2d 14 [1st Dept 1998]; ***Gunn v Mahoney***, 95 Misc 2d 943, 408 NYS2d 896 [Sup Ct, Erie County 1978]). In either case, if a promise to achieve a specific result exists, such claim is not considered duplicative of the malpractice claim (*see* ***Sage Realty Corp. v Proskauer Rose LLP***, *supra*; ***Kaplan v Sachs***, 224 AD2d 666, 639 NYS2d 69 [2d Dept 1996]; ***Saveca v Reill***, 111 AD2d 493, 488 NYS2d 876 [3d Dept 1985]).

Here, the defendants have failed to establish their prima facie 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, 850 NYS2d 201 [2d Dept 2008]). Accordingly, the defendants' motion for summary judgment is denied.

The plaintiff now cross-moves for summary judgment as to the liability of the defendants and an award of damages in the amount of $770,000. As set forth above, 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 (citations omitted). Generally, the plaintiff in a legal malpractice action must submit expert testimony setting forth the appropriate standard of professional care which the defendant was required to meet under the circumstances (***Healy v Finz & Finz, P.C.***, 82 AD3d 704, 918 NYS2d 500 [2d Dept 2011]; ***Northrop v Thorsen***, 46 AD3d 780, 848 NYS2d 304 [2d Dept 2007]; ***Zasso v Maher***, 226 AD2d 366, 640 NYS2d 243 [2d Dept 1996]).

In support of his cross motion, the plaintiff submits, among other things, the pleadings, the transcripts of the depositions of the parties and Wellman, the affidavits of Dinaberg, his expert witness, and his accountant, a copy of the yoga studio's sublease of 49 West, and a copy of his last will and

testament. In considering the plaintiff's cross motion, the testimony of the plaintiff and Dinaberg is adequately summarized above.

At his deposition, Luftig testified that he obtained his juris doctorate in 2004, that the law firm website indicated that the firm has a "strong expertise" in handling Section 1031 tax-deferred exchanges, and that he did not specifically have an understanding of how capital gains taxes can be deferred under Section 1031. He stated that he is not specifically familiar with how Section 1031 transactions are structured, that the law firm usually relies on an intermediary to handle that part of any transaction, and that he is aware that a like-kind exchange requires the property involved to be a commercial property which is sold and another property purchased within a certain amount of time. He indicated that it was not his practice to ask a client who was selling commercial property if they were familiar with Section 1031, if they resided in the property, if there was a tenant in the property, or if the client intended to use the proceeds of the sale to purchase another property.

Luftig further testified that the law firm's retainer letter enclosed an "informational letter" meant to gather general information from a client selling property, that the law firm did not use a different informational letter for "transactions that weren't residential," and that he never spoke with the plaintiff. He indicated that the request to insert a Section 1031 option in the option email sent by Dinaberg was not improper, that after he received the email he instructed Wellman to insert the option in the draft contract of sale, that he did not recall doing anything else, and that there was no reason that the sale of 49 West could not have been structured as a like-kind exchange. He stated that he had no communication with Dinaberg after the option email and did not explain to her how Section 1031 works, because she never requested going forward with a like-kind exchange and "some requests go away," and that he was not aware of any best practices that require an attorney to explain the requirements of Section 1031 at the outset of representing a client in a sale. Luftig further testified that he did not recall when he first learned that the plaintiff was not living at 49 West, or if he ever told Wellman that there was a commercial tenant occupying the loft, and that he was not aware of anything in Dinaberg's past experience which would reflect that she had knowledge about Section 1031. He stated that he did not know why Dinaberg wanted to see new places on the same day as the closing of title to 49 West, that he did not recall if he told Wellman that Dinaberg intended to do so after he received the new places email, and that the law firm charges a certain flat fee unless a transaction "was above and beyond an ordinary transaction." He indicated that litigation involving the transaction or the default by a client are two examples of issues that would trigger a higher legal fee, and that he did not know how the plaintiff and Dinaberg would know that a Section 1031 transaction would not be considered an "ordinary transaction." Luftig further testified that the law firm was never instructed to structure the sale of 49 West as a Section 1031 transaction, either directly by the client or by the client having his accountant get involved, or indirectly by discussing that the loft was an investment or that they were working to find "new property."

Wellman testified that she started working at the law firm in January 2013, that, while she was aware of the requirements of a like-kind exchange, the qualified intermediary "is really the liaison person who deals directly with the client" because she "is not a 1031 exchange specialist or a tax attorney or a CPA," and that specialists must be involved in the transaction to ensure that it is done correctly. She stated that she would ask for a copy of the lease if a client's property was occupied by a

tenant, that it was not her practice to ask if the client intended to use the proceeds of a sale to buy other property, and that she inserted a Section 1031 option in the subject contract of sale after Luftig said the seller may want to exercise that right, but that Luftig did not tell her to explain to the client "what a 1031 was." She indicated that she never explained to Dinaberg how Section 1031 works, that she never saw the new places email, or had a conversation with Dinaberg regarding the client's intention to see new places on the day of the closing of title to 49 West, and that she did not have a conversation with the plaintiff or Dinaberg regarding the distribution of the proceeds of the sale of 49 West at the closing of title. Wellman further testified that Section 1031 was not mentioned at the closing of title, that it is her understanding that a client knows what a like-kind exchange is when they request it to be included in a contract, and that she has no duty to explain the section to the client under that circumstance. She stated that she had never experienced a situation where a transaction had not been treated as a like-kind exchange and had subsequently been remedied.

At his deposition, Alan Perlowitz (Perlowitz) testified that he graduated law school in 1988, that he started the defendant law firm in 1997, and that he is the controlling partner in the firm. He stated that it was not the firm's practice on the "intake" of a client selling a condominium or cooperative to inquire whether they were interested in obtaining the benefits of a Section 1031 like-kind exchange, that the issue is typically raised by the client, and that he was told after the closing of title for 49 West that there were numerous IRS revenue rulings, as well as case law, that would permit the "unwinding" of a closed real estate transaction to enable it to be done as a like-kind exchange. He indicated that he spoke with Dinaberg and told her the steps required to "unwind" the sale of 49 West to enable it to be done as a like-kind exchange, including the fact that the purchasers had to consent, that he believes he had a number of telephone conversations with Dinaberg, at least one of which included her accountant, about the issues involved in unwinding the sale of 49 West, and that the purchasers initial response was that they wanted to be paid $75,000 to consent to the unwinding and subsequent second closing of title for the loft. Perlowitz further testified that, while he did not believe the law firm did anything wrong, he offered to pay $25,000 of the amount requested by the purchasers to ensure that the "clients" got what they wanted, and that he requested permission from them to negotiate with the purchasers to lower the amount demanded.

In his affidavit, Eugene C. Preston (Preston) swears that he is a certified public accountant who has provided accounting and tax services to the plaintiff and Dinaberg (the Dempseys) for many years, that he does not provide real estate transactional services, and that he has no experience in structuring a Section 1031 transaction. He states that the Dempseys informed him in July 2013 that they had accepted an offer and were in contract to sell 49 West, that he provided them with an estimated tax projection for the sale, and that he informed them of the availability of Section 1031. He indicates that he did not explain the mechanics or specific requirements of Section 1031, and that he referred them to the attorneys who were handling the real estate transaction.

In his affidavit, Andrew Albstein (Albstein) swears that he is a member of the New York bar and the senior member in the real estate department of a law firm in New York City, that he has represented "many hundreds of clients who have engaged in 1031 exchanges," and that "[b]ased on the information available to me to date, I have formed the following opinions to a degree of reasonable certainty." He opines that the defendants' "absence of advice" to the plaintiff at the initial stages of engagement or

intake that the plaintiff consider a 1031 exchange is a gross departure from the standard of care that an attorney of ordinary skill and diligence owed to the plaintiff. He states that the threshold issue on first contact with a client is to learn whether the property being sold is held for the productive use in trade or business or for investment purposes, and that, if so held, the attorney must inquire whether a 1031 exchange has been considered. He indicates that the law firm's informational letter did not request information that would reveal that the loft was not the plaintiff's residence, that the property was held for investment purposes, and that it was being rented to a commercial business.

Albstein further opines that the defendants' failure to explain the requirements of paragraph 52 and Section 1031 at the time the defendants agreed to include the option in the contract of sale is a gross departure from the standard of care that an attorney of ordinary skill and diligence owed to the plaintiff. He states that, because the concepts and requirement of Section 1031 are not self-evident, it was incumbent upon the defendants to explain to the plaintiff that all he had was the opportunity to exercise the option if several requirements were satisfied. Finally, Albstein opines that the defendants failure to notify or warn the plaintiff that his option to consummate a like-kind exchange would be extinguished absent the engagement of a qualified intermediary is a departure from the standard of care owed by an attorney to a client who has requested "1031 treatment."

In her affidavit, Dinaberg swears that, in July 2013, she and the plaintiff learned from Preston about the availability of deferring taxes on the sale of 49 West through Section 1031, and that, through estate planning and the transfer of property to her upon her husband's death and the marital exemption, "taxes might be avoided entirely." She indicates that it was their intention to undertake such a plan, that following the closing of title to 49 West "for $2,700,000, my husband and I ...were looking at ... rental units that were in the range of $1,400,000-1,700,000," and that they located an apartment in that price range on or about August 10, 2013. She states that she and her husband were in the process of making an offer to purchase said apartment when they discovered that the defendants "had not preserved our Section 1031 transaction option."

Initially, it is noted that, to the extent that it offers an opinion as to the defendants' negligence, the affidavit of Albstein, the plaintiff's expert, is improper (***Warshaw Burstein Cohen Schlesinger & Kuh, LLP v Longmire***, 106 AD3d 536, 965 NYS2d 458 [1st Dept 2013]; ***Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP***, 301 AD2d 637, 50 NYS2d 277 [1st Dept 2002]). While a plaintiff is required to submit an expert affidavit setting forth the appropriate standard of care, it is the function of the court to determine whether defendant's performance constituted malpractice (***Dimond v Salvan***, 78 AD3d 407, 909 NYS2d 725 [1st Dept 2010]; ***Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP***, *supra*).

Even assuming that the defendants failed in their duty to the plaintiff, the plaintiff has failed to establish his prima facie entitlement to summary judgment, as there is an issue of fact whether he has suffered actual and ascertainable damages herein. The plaintiff has failed to submit any evidence that the amount of capital gains tax due upon the sale of any replacement property, including the apartment allegedly identified after the closing of title to 49 West, can be determined with reasonable certainty (***E.J. Brooks Co. v Cambridge Sec. Seals***, *supra*; *cf.* ***New Kayak Pool Corp. v Kavinoky Cook LLP***, *supra*). In addition, it is noted that the plaintiff would be required to pay capital gains on the difference

between the amount received as proceeds from the sale of 49 West and the purchase price of the apartment allegedly identified as a potential replacement property in any case. More importantly, there is an issue of fact whether the plaintiff's alleged damages are speculative. Dinaberg's affidavit appears to acknowledge that, even with a successful like-kind exchange and estate planning, the ability to completely avoid taxes is perhaps speculative. Moreover, there are issues of fact whether the sale of 49 West could have been rescinded and re-done as a like-kind exchange.

Failure to make a prima facie showing of entitlement to summary judgment 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.***, *supra*). Accordingly, the plaintiff's motion for summary judgment is denied.

Dated: 9/27/18

THOMAS F. WHELAN, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION