Martin Assoc., Inc. v Illinois Natl. Ins. Co.
2019 NY Slip Op 34160(U)
September 3, 2019
Supreme Court, Bronx County
Docket Number: 42090/2014E
Judge: Ruben Franco

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 26

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MARTIN ASSOCIATES, INC.

-against-

ILLINOIS NATIONAL INSURANCE COMPANY

---------- X

Index No. 42090/2014E
Hon. **RUBÉN FRANCO,**
Justice Supreme Court

The following papers numbered 1 to ___ read on this motion, (Seq. No. 003) for **DISMISSAL,** noticed on **May 20, 2019**.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Respectfully Referred to: _____

Dated: _____

This motion is decided in accordance with the Memorandum Decision filed herewith.

Dated: SEPT 3, 2019

Hon. _____
RUBÉN FRANCO, J.S.C.

HON. RUBEN FRANCO

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1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTION IS..... ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
   ☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - IAS PART 26

MARTIN ASSOCIATES, INC.

Plaintiff,

-against-

ILLINOIS NATIONAL INSURANCE COMPANY, THE BURLINGTON INSURANCE COMPANY, T&H BROKERS INC., CAMACHO MAURO MULHOLLAND LLP, RUBIN, FIORELLA & FRIEDMAN LLP, DENISE A. PALMERI, and JOHN/JANE DOE Nos. 1-4

Defendants.

Index No. 42090/2014E

MEMORANDUM DECISION/ORDER

Rubén Franco, J.

Plaintiff brought this action for breach of contract and breach of fiduciary duty against Burlington Insurance Company (Burlington), for breach of contract, breach of fiduciary duty, and negligence as to T&H brokers Inc. (T&H), and legal malpractice as to Camacho Mauro Mulholland LLP (Camacho) and Rubin, Fiorella & Friedman LLP (Rubin). Plaintiff seeks to recover from defendants the loss of insurance proceeds under an excess liability policy issued by defendant Illinois National Insurance Company (Illinois), with regard to injuries sustained by Louis DeMetro in an underlying action (DeMetro action). Camacho, Rubin, and T&H each moved separately to dismiss the Amended Complaint (CPLR 3211). Each of the motions will be addressed in this Decision and Order.

Background

During March 2002, non-party the Dormitory Authority of the State of New York and plaintiff entered into a contract for plaintiff to perform certain heating, ventilation and air-conditioning work at Jacobi Medical Center. Pursuant to the contract, plaintiff was required to

provide certificates of insurance evidencing the existence of insurance in favor of the Dormitory Authority. Plaintiff's insurance needs were handled by T&H.

On June 7, 2006, DeMetro and his wife commenced the DeMetro action, against plaintiff and others in the Supreme Court, Bronx County, to recover damages for injuries which DeMetro sustained on October 19, 2005. In August 2006, plaintiff received the Summons and Complaint in the DeMetro action, and forwarded them to T&H, which notified Burlington, but not Illinois.

At the time DeMetro sustained his injury, plaintiff maintained a commercial general liability policy with Burlington, which provided liability insurance coverage up to an aggregate limit of $2,000,000, with a $1,000,000 limit per occurrence. Plaintiff also maintained an excess liability policy, which provided excess coverage with a limit of $10,000,000. Both policies were purchased and placed on behalf of plaintiff by, or at the direction of, T&H.

After investigation, Burlington undertook to provide a defense for plaintiff and retained Camacho as counsel to represent plaintiff in the DeMetro case. In September 2006, T&H received a facsimile from Swett & Crawford, which included an unsigned letter dated August 30, 2006, purportedly written by Burlington and incorrectly addressed to plaintiff at an address it did not maintain. The letter from Burlington asserted in part that plaintiff should immediately place its excess carrier on notice of the lawsuit. Plaintiff was not provided a copy of the letter from Burlington. T&H received the letter but did not notify Illinois. The Burlington policy provides that Burlington had a duty to notify plaintiff if DeMetro's claim might exhaust the limits of the insurance provided by Burlington. The endorsement states:

> If we conclude that, based on "occurrences," offenses, claims or "suits" which have been reported to us and to which this insurance may apply the...Each Occurrence Limit ... is likely to be used up in the payment of judgments or settlements, we will notify the first Named Insured, in writing, to that effect.

Burlington never provided a written notice to plaintiff at its proper address that the policy limits under the Burlington policy were likely to be exceeded as a result of the DeMetro claim. On December 14, 2009, Rubin replaced Camacho as counsel of record.

On March 8, 2016, in *Martin Assoc., Inc. v Illinois Natl. Ins. Co.* (137 AD3d 503 [1st Dept 2016]), the Court declared that Illinois has no coverage obligation to plaintiff in the DeMetro action. The Court noted that information disclosed to plaintiff's intermediaries, T&H, Camacho, and Rubin, between October 2006 and March 2011 suggested a reasonable possibility that the DeMetro action would exceed the $1,000,000 primary coverage, triggering plaintiff's obligation to notify Illinois, because the knowledge of the intermediaries is imputed to plaintiff, which also failed to notify Illinois in August 2006 when it received the notice of claim against Dormitory Authority and the Summons and Complaint. On May 16, 2018, the jury in the DeMetro action returned a verdict of $5,935,000 in damages, and determined that plaintiff was 50% negligent, resulting in damages to be paid by plaintiff of at least $1,967,500, as a result of the loss of the excess liability coverage.

On a motion pursuant to CPLR 3211 (a) (7), the Complaint must be liberally construed, the factual allegations set forth must be accepted as true, the plaintiff must be given the benefit of all favorable inferences therefrom, and the court must decide only whether the facts alleged fall under any recognized legal theory (*Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342 [2013]; *Lee v. Dow Jones & Co., Inc.*, 121 AD3d 548 [1st Dept 2014]). Affidavits may be considered freely "to preserve inartfully pleaded, but potentially meritorious, claims" in a Complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]; *Finkelstein Newman Ferrara LLP v Manning*, 67 AD3d 538, 540 [1st Dept 2009]). Vague and conclusory allegations are

insufficient to maintain a cause of action (*see Fowler v American Lawyer Media*, 306 AD2d 113 [1st Dept 2003]).

T&H Brokers Inc.

Starting in 2001 and continuing through 2013, T&H served as plaintiff's insurance broker making recommendations, providing advice, and overseeing the placement of insurance purchased for plaintiff. T&H does not have written contracts with its clients. T&H held itself out to plaintiff as experts in various aspects of the insurance coverage required by plaintiff, and provided services such as procuring the proper and necessary insurance, preparing necessary applications and paperwork, assisting plaintiff's in obtaining premium financing, determining plaintiff's insurance responsibilities under the terms of plaintiff's insurance contracts and job-related contracts entered into by plaintiff and confirming plaintiff's compliance, preparing and providing insurance certificates as necessary and communicating on plaintiff's behalf with regard to, among other things, notifying insurance providers of claims and occurrences which may implicate plaintiff's insurance coverage. T&H received a percentage of the premium on the insurance policies it placed.

Throughout its relationship with T&H, plaintiff's usual and customary business practice, as agreed to by T&H, was that whenever plaintiff would learn of an occurrence or claim, it would provide the information to T&H, who undertook to communicate such information to the appropriate insurance carriers, their representatives and/or agents. The arrangement between plaintiff and T&H included that all communications with an insurance carrier for purposes of providing notice of a claim or occurrence, was undertaken and administered exclusively by T&H on plaintiff's behalf. T&H undertook to communicate with insurers on plaintiff's behalf, including

notifying the appropriate insurance carriers of claims and occurrences and changes of address and T&H understood that plaintiff relied on it to submit notices of claims to plaintiff's insurers.

On August 23, 2006, T&H wrote to plaintiff and confirmed that it had "forwarded these legal papers to the appropriate insurance companies for handling" and that T&H would continue to provide the requisite notice and communication to the insurance carriers and invited plaintiff to "forward further correspondence to [T&H] for the proper distribution."

T&H forwarded the Notice of Claim it received from plaintiff to Burlington on or about April 28, 2006, utilizing a "First Report Acord Form," completed by T&H. However, T&H did not provide the Notice of Claim to Illinois, or otherwise notify Illinois.

Plaintiff's primary allegation is that T&H had undertaken to notify the appropriate insurance companies concerning any claims or occurrences related to insurance placed or purchased by plaintiff. Plaintiff views T&H as its agent, and as the broker that undertook to provide requisite notices to the insurance carriers, and that T&H breached its fiduciary duties to plaintiff. T&H had actual knowledge that plaintiff relied on it to promptly provide notices of claims to its insurers. This was the procedure followed on many occasions during the time T&H served as plaintiff's insurance broker.

Plaintiff contends that T&H breached its contractual obligations and fiduciary duty, and was negligent, by failing to provide the notice of the claim to Illinois; by failing to provide Burlington and Illinois with plaintiff's updated mailing address; by failing to provide plaintiff with copies of correspondence and information it received concerning the DeMetro action, including correspondence which was not addressed to plaintiff's correct address; by not promptly disclosing to plaintiff that it had failed to provide notice to Illinois on its behalf; and, by taking other action to address its failure without disclosing it to plaintiff.

The elements of a breach of contract cause of action are the existence of a contract, the plaintiff's performance of the contract, the defendant's breach of the contract, and resulting damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]; *see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 181-182 [2011]). The Complaint does not allege that a contract existed between plaintiff and T&H, that plaintiff performed, or that T&H breached specified obligations under a contract. Plaintiff fails to show the terms of an agreement and what specific terms were breached as of result of T&H's purported failure to act (*see Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]).

Although not alleged in the Complaint, in opposition plaintiff argues that the parties' course of dealings over many years resulted in an implied contract. In *Lapine v Seinfeld* (31 Misc 3d 736, 741 [Sup Ct, NY County 2011]), the court explained:

> The elements of an implied-in-fact contract are the same as the elements of an express contract: "consideration, mutual assent, legal capacity and legal subject matter." (*Maas v Cornell Univ.*, 94 NY2d 87, 94 [1999].) Conduct of the parties may manifest assent, and "a promise may be implied when a court may justifiably infer that the promise would have been explicitly made, had attention been drawn to it." (*Id.*) Under settled law, a contract will not be found to have been formed if it is "not reasonably certain in its material terms." (*Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 482 [1989]; *Edelman v Poster*, 72 AD3d 182, 184 [1st Dept 2010].)

The purported implied contract claims fail because a contract cannot be "implied in fact" where T&H made no promises to plaintiff (*see Miller v Schloss*, 218 NY 400, 406 [1916]). For there to be an implied contract there must be proof of a meeting of the minds (*I.G. Second Generation Partners, L.P. v Duane Reade*, 17 AD3d 206, 208 [1st Dept 2005]; *see AMCAT Global, Inc. v Greater Binghamton Dev.*, LLC, 140 AD3d 1370, 1372 [3rd Dept 2016]), and assent by the party to be charged (*see Miller v Schloss*, 218 NY at 407).

This theory is insufficient to state a breach of contract claim, which is affected by the Statute of Frauds (General Obligations Law § 5-701), which requires that if an agreement is not to be performed within one year, there must be a writing (*see Apostolos v R.D.T. Brokerage Corp.*, 159 AD2d 62, 64 [1st Dept 1990]). The Complaint does not set forth the evidentiary details necessary to argue that there is an implied contract (*see Gulf Ins. Co. v Transatlantic Reins. Co.*, 69 AD3d 71, 94 [1st Dept 2009]). Plaintiff does not allege that there was an agreement as to specific terms or that specific tasks would be undertaken for consideration. Plaintiff is attempting to impose a contractual obligation on a purported contract based on bare and conclusory allegations regarding alleged terms of an implied agreement, which is insufficient.

The elements of a claim for breach of fiduciary duty are: the existence of a fiduciary relationship, misconduct by the defendant, and damages directly caused by defendant's misconduct (*Castellotti v Free*, 138 AD3d 198, 209 [1st Dept 2016]). Pursuant to CPLR 3016 (b), "a plaintiff must plead this cause of action with particularity; conclusory allegations are insufficient" (*Schroeder v Pinterest Inc.*, 133 AD3d 12, 25 [1st Dept 2015]).

In *Scotto Princeton LLC v Felsen Assoc., Inc.* (11 Misc 3d 378, 380 [Sup Ct, Nassau County 2005]), the court explained:

> The purchase of an insurance policy through a broker does not give rise to a fiduciary relationship between the agent or broker and the customer. (*Paull v First UNUM Life Ins. Co.*, 295 AD2d 982 [4th Dept 2002]; ….) An insurance broker has the obligation to obtain the coverage requested by the customer within a reasonable period of time or to inform the customer of the broker's inability to obtain such coverage. (*Murphy v Kuhn*, 90 NY2d 266 [1997]; *Tappan Wire & Cable v County of Rockland*, 305 AD2d 665 [2d Dept 2003]; *Barco Auto Leasing Corp. v Montano*, 215 AD2d 617 [2d Dept 1995]; *Wied v New York Cent. Mut. Fire Ins. Co.*, 208 AD2d 1132 [3d Dept 1994].)

T&H undertaking to provide notices to insurance carriers does not create a fiduciary relationship, which is a relationship, which "exists between two persons when one of them is under a duty to

act for or to give advice for the benefit of another upon matters within the scope of the relation" that "is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). For example, in *Abetta Boiler & Welding Serv., Inc. v American Intl. Specialty Lines Ins. Co.* (2009 NY Slip Op. 30283[U] [Sup Ct, NY County 2009], *affd as mod* 76 AD3d 412 [1st Dept 2010]), the broker took affirmative steps to assume a heightened relationship. The special and extraordinary circumstances are not alleged in the Complaint in this action (*see Hersch v DeWitt Stern Group, Inc.*, 43 AD3d 644, 645 [1st Dept 2007]).

Plaintiff fails in its efforts to use the agency relationship between a broker and customer to create a fiduciary relationship. There are no allegations that fit within the definition of a fiduciary relationship (*see Cathy Daniels, Ltd. v Weingast*, 91 AD3d 431, 433 [1st Dept 2012]; *Hersch v DeWitt Stern Group, Inc.*, 43 AD3d 644, 646 [1st Dept 2007]).

The elements of a negligence claim are that there is the existence of a duty, a breach of that duty, and that plaintiff suffered an injury proximately caused by the defendant's breach (*Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 459 [1st Dept 2016]). As stated in *Voss v Netherlands Ins. Co.* (22 NY3d 728, 734 [2014]):

> As a general principle, insurance brokers "have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage" (*American Bldg. Supply Corp. v Petrocelli Group, Inc.*, 19 NY3d 730, 735 [2012] [internal quotation marks and citation omitted]). Hence, in the ordinary broker-client setting, the client may prevail in a negligence action only where it can establish that it made a particular request to the broker and the requested coverage was not procured.

Although T&H provided the requested coverage, plaintiff proposes to impose a duty on T&H for a gratuitous service, asserting that it was to be provided with care and accuracy. Plaintiff uses an implied contract theory, however, insurance brokers have no continuing duty to their

clients such that they can be held liable for negligence as alleged in the Complaint. T&H's duty was to provide coverage, which it did. It was plaintiff's responsibility to make sure the Illinois was notified, either through T&H or directly.

In any event, the breach of fiduciary and negligence claims are duplicative of the breach of contract claim as they are premised upon the same facts and seek identical damages (*see Chowaiki & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600 [1st Dept 2014]; *Wildenstein v 5H&Co, Inc.*, 97 AD3d 488 [1st Dept 2012]).

Camacho Mauro Mulholland LLP

Burlington appointed Camacho to represent plaintiff in the DeMetro action, requiring that Camacho keep plaintiff informed concerning the status of the action. Camacho issued regular reports to Burlington but did not provide copies of the reports to plaintiff. By letter, dated December 5, 2007, Camacho notified Burlington, but not plaintiff, that plaintiff's potential liability may exceed $1 million. Burlington did not notify Illinois about the DeMetro Action or Camacho's evaluation and did not notify plaintiff of its determination that its potential liability could exceed the limits of the Burlington policy.

Plaintiff contends that Camacho failed to exercise ordinary, reasonable skill and knowledge commonly possessed by a member of its profession in its representation of plaintiff by failing to inform plaintiff of the status of the DeMetro action, including its valuation of DeMetro's prospective damages; failing to inform the plaintiff that it had concluded that there was a reasonable likelihood that DeMetro's claim against plaintiff could exceed the $1 million occurrence limit on the Burlington policy; failing to inform plaintiff that it should notify Illinois and of the consequences of not doing so; and, failing to provide notice to Illinois on behalf of plaintiff.

Camacho relies on the admission in the Amended Complaint that Camacho's representation of plaintiff ended on December 14, 2009, when Camacho was replaced with Rubin. Camacho argues that any legal malpractice action that plaintiff might have asserted had to have been commenced within the three-year statute of limitations (CPLR 214 [6]), or at the latest by December 14, 2012 – three years after its representation of plaintiff ended. However, plaintiff's action was not commenced until January 21, 2014.

On a motion to dismiss pursuant to CPLR 3211 (a) (5) alleging that the statute of limitations has expired, the movant must establish, prima facie, that the time within which to commence the action has expired (*see MTGLQ Inv'rs, LP v Wozencraft*, 172 AD3d 644, 644 [1st Dept 2019]; *Ross v Jamaica Hosp. Med. Ctr.*, 122 AD3d 607, 608 [2nd Dept 2015]). Once established, "[t]he burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is inapplicable or whether the action was commenced within the statutory period (*Wilson v Southampton Urgent Med. Care, P.C.*, 112 AD3d 499, 500 [1st Dept 2013]), and the plaintiff must 'aver evidentiary facts establishing that the action was timely or … raise an issue of fact as to whether the action was timely' (*Lessoff v 26 Ct. St. Assoc., LLC*, 58 AD3d 610, 611 [2d Dept 2009])." (*MTGLQ Inv'rs, LP v Wozencraft*, 172 AD3d at 645).

A legal malpractice action accrues on the date the alleged malpractice was committed, not when it was discovered by the client (*see McCoy v Feinman*, 99 NY2d 295, 301 [2002]; *Shumsky v Eisenstein*, 96 NY2d 164, 166 [2001]; *Hahn v Dewey & LeBoeuf Liquidation Trust*, 143 AD3d 547 [1st Dept 2016]).

The statute of limitations for legal malpractice actions can be tolled based upon a continuing representation. The continuous representation doctrine tolls the statute of limitations where there is a mutual understanding of the need for further representation on the specific subject

matter underlying the malpractice claim. In other words, this doctrine tolls the statute of limitations while the attorney continues to represent the client as to the same matter underlying the malpractice claim (*see McCoy v Feinman*, 99 NY2d at 305-306; *Shumsky v Eisenstein*, 96 NY2d at 167; *Johnson v Proskauer Rose LLP*, 139 AD3d 59, 67 [1st Dept 2015]). It is the plaintiff's burden to show that the continuous representation doctrine, or another exception to the statute of limitations, applies or at least that there is a question regarding the dates or other facts (*see CLP Leasing Co., LP v Nessen*, 12 AD3d 226, 227 [1st Dept 2004]). In this action there was no tolling because there was no continuous representation once Camacho ceased representing plaintiff, which as the Amended Complaint acknowledges was December 14, 2009. Assuming that the statute of limitations began to run upon the termination of the attorney-client relationship (*see AQ Asset Mgt., LLC v Levine*, 119 AD3d 457, 463 [1st Dept 2014]), the statute of limitations expired three years after that date.

Plaintiff's argument that the legal malpractice action accrued on December 19, 2011, the date that Illinois disclaimed coverage is unavailing; that was the date plaintiff discovered the purported malpractice, which is not the appropriate accrual date.

Rubin, Fiorella & Friedman LLP

By letter, dated August 19, 2009, Rubin wrote to Burlington, asserting that Rubin was plaintiff's personal counsel and demanded that Burlington consent to Rubin assuming the defense of the DeMetro Action from Camacho. On or about December 14, 2009, Rubin replaced Camacho as counsel of record. Rubin determined that plaintiff's potential liability may exceed the limits of the Burlington policy, but did not notify plaintiff and did not notify Illinois until November 17, 2011, after inquiry from Burlington regarding whether Illinois had ever been placed on notice. Illinois disclaimed coverage by letter, dated December 19, 2011, on the grounds that plaintiff had

failed to provide timely notice. The disclaimer was addressed to Rubin and plaintiff but at an address plaintiff had not used since 2005. Rubin knew that plaintiff's address was incorrect, however, Rubin did not inform plaintiff of Illinois' disclaimer until August 2012. Moreover, Rubin failed to advise plaintiff that it may have viable causes of action as against T&H or Camacho as a result of the Illinois disclaimer.

Without plaintiff's knowledge, Rubin commenced a declaratory judgment action against Illinois in Supreme Court, Bronx County on behalf of plaintiff and Burlington (*Martin Associates, Inc., et al. v. Illinois National Insurance Co.*, Index No. 306779/12) asserting that Illinois was obligated to provide plaintiff with a defense in the DeMetro action. T&H and Camacho were not named in that action.

Plaintiff's alleges that Rubin was appointed by Burlington to represent plaintiff in the DeMetro action and to keep the plaintiff informed as to the status of matters. Defendant Denise A. Palmeri (Palmeri) was the primary attorney who handled the DeMetro action on behalf of Rubin. Plaintiff further claims that Rubin and Palmeri failed to exercise ordinary reasonable skill and knowledge, commonly possessed by a member of their profession in the performance of their representation of plaintiff by failing to inform plaintiff of the status of the DeMetro action, including their valuation of DeMetro's prospective damages; failing to inform plaintiff that they had concluded that there was a reasonable likelihood that DeMetro's claim could exceed the limits of the Burlington policy; failing to provide timely notice to Illinois on behalf of plaintiff; failing to notify plaintiff upon receipt of disclaimer of excess liability coverage by Illinois; failing to notify plaintiff that it may have causes of action against Burlington, T&H, and/or Camacho, as a result of their failure to provide notice; failing to notify plaintiff prior to commencing the declaratory

judgment action on plaintiff's behalf; and, failing to prosecute the declaratory judgment action after it was commenced.

In *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer* (8 NY3d 438, 442 [2007]), the Court stated:

> 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 (*McCoy v Feinman*, 99 NY2d 295, 301-302 [2002] [internal quotation marks and citation omitted]). 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 (*see Davis v Klein*, 88 NY2d 1008, 1009-1010 [1996]; *Carmel v Lunney*, 70 NY2d 169, 173 [1987]).

(*See also AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]; *Federal Ins. Co. v North Am. Specialty Ins. Co.*, 47 AD3d 52, 59 [1st Dept 2007]; *Leder v Spiegel*, 31 AD3d 266, 268 [1st Dept 2006]; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271-272 [1st Dept 2004]; *Schwartz v Olshan Grundman Frome & Rosenzweig*, 302 AD2d 193, 198 [1st Dept 2003]).

A motion to dismiss a Complaint under CPLR § 3211 (a) (1), will be granted only if the documentary evidence conclusively disposes of plaintiff's claim and resolves all factual issues (*see Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]; *Attias v Costiera*, 120 AD3d 1281 [2nd Dept. 2014]). The documentary evidence needed to support such a motion must be unambiguous, authentic, and undeniable (*see Dixon v 105 W. 75th St. LLC*, 148 AD3d 623, 626 [1st Dept 2017]). And even where the proffered evidence qualifies as documentary evidence, "[d]ismissal is warranted only if the documentary evidence submitted utterly refutes plaintiff's factual allegations and conclusively establishes a defense to the asserted claims as a matter of law" (*Amsterdam Hosp. Grp. v Marshall-Alan Assocs.*, 120 AD3d 431, 433 [1st Dept 2014]). While

"Judicial records, as well as documents reflecting out of court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case" (*Attias v Costiera, supra*, quoting *Fontanetta v John Doe I,* 73 AD3d 78, 84-85[2nd Dept 2012]), neither affidavits, deposition testimony, nor letters, are considered documentary evidence within the meaning of CPLR § 3211 (a) (1) (*Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 997 [2nd Dept 2010]). A connecting link, such as an affidavit, is an appropriate vehicle for authenticating the documentation submitted in support of the motion (*see Muhlhahn v. Goldman*, 93 AD3d 418 [1st Dept. 2012]; *Standard Chartered Bank v D. Chabbott, Inc.*, 178 AD2d 11 [1st Dept 1991]). The proponent for dismissal under CPLR 3211 (a) (1) submits the documents that it alleges will definitively defeat the cause of action (*see AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 5 NY3d 582, 590-591 [2005]; *Amsterdam Hospitality Group, LLC v. Marshall Alan Assoc., Inc.*, 120 AD3d at 433]).

The documentary evidence which Rubin relies on is the decision in *Martin Assoc., Inc. v Illinois Natl. Ins. Co.* (137 AD3d 503 [1st Dept 2016]), in which the Court held that Illinois' disclaimer of coverage based on late notice was proper and that plaintiff was obligated to provide notice upon receipt of two key documents in the DeMetro action – the Notice of Claim and the Summons and Complaint – which were both received by plaintiff three years before Rubin was retained. The Appellate Division decision and the court papers submitted in that matter demonstrate that plaintiff's obligation to provide notice to Illinois occurred when it was represented by Camacho, which was prior to Rubin's representation of plaintiff. The last document that Illinois referenced as the basis for its disclaimer for late notice, the Supplemental Bill of Particulars, was served nearly nine months before Rubin was retained. Even if Rubin had provided notice to the excess insurer on the date that Rubin was retained in relation to the DeMetro

action, the notification would still have been untimely, and the excess insurer would still have denied coverage based on late notice.

Plaintiff cannot demonstrate the proximate causation element to sustain a legal malpractice claim against Rubin. Plaintiff cannot establish that if Rubin had provided notice to Illinois when it was retained, the excess insurer would not have denied coverage, or that "but for" Rubin's alleged negligence, Illinois would not have disclaimed. The Complaint does not allege the elements of a legal malpractice claim (*see McCoy v Feinman*, 99 NY2d at 301-302; *Pozefsky v Aulisi*, 79 AD3d 467 [1st Dept 2010]; *Franklin v Winard*, 199 AD2d 220, [1st Dept 1993]; *Murray Hill Invs. v Parker Chapin Flattau & Klimpl*, 305 AD2d 228, 305 [1st Dept 2003]). The "but for" causation requirement necessitates that plaintiff prove "a case within a case," because it demands a hypothetical re-examination of the events at issue absent the alleged legal malpractice (*see Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD 3d 267, 272 [1st Dept 2004]; *Reibman v Senie*, 302 AD 2d 290 [1st Dept. 2003]).

Rubin was not negligent for failing to advise plaintiff that it may have causes of action against Camacho and others arising out of their failure to timely notify Illinois; as incoming counsel Rubin did not have an affirmative obligation to advise plaintiff of all potential legal malpractice claims against predecessor counsel.

While Burlington instructed Rubin to commence the action, however, Rubin's authority was rescinded, and Burlington advised that it would not pay Rubin for any further legal services in connection with the declaratory judgment action and relieved Rubin as counsel.

Notwithstanding all of Rubin's arguments in response to the allegations in the Complaint, the thrust of plaintiff's claim is that Rubin failed to serve Camacho and T&H in the November 2011 declaratory judgment action, resulting in the expiration of the statute of limitation in relation

to Camacho. Plaintiff abandoned its primary theory of liability that Rubin was negligent in failing to notify Illinois in 2009, in favor of alleging negligence for failure to include Camacho as a named defendant in the declaratory judgment action. This claim fails because Camacho was not a proper party in the declaratory judgment action which was brought to show that Illinois improperly disclaimed coverage. Camacho was not in privity with Illinois and was not an appropriate party to seek enforcement of the Illinois' obligations (*see Clarendon Place Corp. v Landmark Ins. Co.*, 182 AD2d 6, 8 [1st Dept 1992]).

The strategy in the declaratory judgment action was that Illinois improperly denied coverage. Including a malpractice claim against Camacho for failing to properly notify Illinois would have undermined the litigation. Second-guessing an attorney or the attorney's strategic choices is not actionable legal malpractice (*see Genet v Buzin*, 159 AD3d 540 [1st Dept 2018]; *Zarin v Reid & Priest*, 184 AD2d 385, 387 [1st Dept 1992]). To the extent that Rubin may be viewed as arguing a contrary position, this is permissible in defending a legal malpractice action (*see Schwartz v Public Adm'r of County of Bronx*, 24 NY2d 65, 71 [1969]; *Lyons v Medical Malpractice Ins. Assn.*, 275 AD2d 396, 397 [2nd Dept 2000]). Plaintiff has not pled the elements of a legal malpractice claim against Rubin.

Accordingly,

Defendant T&H Brokers Inc.'s motion to dismiss plaintiff's claims for breach of contract, breach of fiduciary duty and negligence, is granted;

Defendant Camacho Mauro Mulholland LLP's motion to dismiss plaintiff's claim for legal malpractice, is granted; and,

Defendant Rubin, Fiorella & Friedman LLP's motion to dismiss plaintiff's claim for legal malpractice, is granted.

This constitutes the Decision and Order of the court.

Dated: September 3, 2019

Rubén Franco, J.S.C.

HON. RUBÉN FRANCO