

**Ozimek v DiJoseph**

2020 NY Slip Op 31894(U)

June 18, 2020

Supreme Court, New York County

Docket Number: 156095/2018

Judge: W. Franc Perry

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

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NANCY OZIMEK, DANIEL OZIMEK,
Plaintiff,

INDEX NO. 156095/2018
MOTION DATE 11/20/2019
MOTION SEQ. NO. 003 004

- v -

ARNOLD DIJOSEPH, THE LAW OFFICE OF ARNOLD E.
DIJOSEPH P.C., MITCHEL ASHLEY, THE ASHLEY LAW
FIRM PLLC,

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 51, 52, 53, 54, 55,
56, 57, 58, 81, 82, 83, 84, 85, 86, 87, 89, 90, 92

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 59, 60, 61, 62, 63,
64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 88, 91, 93

were read on this motion to/for DISMISSAL.

This is a legal malpractice action stemming from the Defendants' representation of Plaintiff
Nancy Ozimek ("Ozimek") in a prior medical malpractice action. In motion sequence 003,
Defendants Mitchel Ashley, Esq., and the Ashley Law Firm, PLLC, (collectively, "Ashley" or the
"Ashley Defendants") move to dismiss the Amended Complaint against them for failure to state a
claim. Similarly, in motion sequence 004, Arnold DiJoseph, Esq., and the Law Office of Arnold
DiJoseph, PC, (collectively, "DiJoseph" or the "DiJoseph Defendants") move to dismiss the
Amended Complaint against them based upon documentary evidence and for failure to state a
claim. The motions have been fully submitted.

BACKGROUND

The crux of this legal malpractice suit revolves around Defendants' legal strategy and
decision to discontinue the underlying medical malpractice suit against one defendant: Dr.

Shashikant Kulkarni. In the underlying 2010 medical malpractice suit, Defendants represented Ozimek and her husband and Plaintiff herein, Daniel Ozimek, against Staten Island Physician Practice (“SIPP”), Taksin Ratnarathon, M.D., Robert Andrews, M.D., Sharila Krishnan, M.D., and Shashikant Kulkarni, M.D. (collectively, the “prior defendants”). (NYSCEF Doc No. 10.) In that action, Plaintiffs alleged that the prior defendants failed to diagnose and treat breast cancer in Ozimek and departed from the minimum standard of care for radiologists.

As stated in the Amended Complaint, Ozimek has a family history of cancer and would regularly be examined by radiologists. (NYSCEF Doc No. 44 at ¶ 10-11.) On March 10, 2007, she underwent a mammogram at SIPP, which was studied by Dr. Kulkarni. Shortly thereafter, Kulkarni sent two letters to Ozimek requesting a follow-up visit after he expressed concern with a finding from the mammogram. (*Id.* at 15.) However, Kulkarni left the employ of SIPP on July 6, 2007 (*Ozimek v Staten Is. Physicians Practice, P.C.*, 101 AD3d 833, 835 [2d Dept 2012]) and when Ozimek returned to SIPP for her follow-up visit on July 10, 2007, her mammogram was performed and read by Dr. Ratnarathorn. (NYSCEF Doc No. 44 at ¶ 17.) Ratnarathorn noted nodules in both breasts and on July 27, 2007, Ozimek returned for a sonogram. Ratnarathorn concluded that all cysts and nodules were benign and recommended a routine follow-up in one year’s time. (*Id.* at ¶¶ 18-20.)

Ozimek returned to SIPP on August 9, 2008, when Dr. Andrews stated that the findings continued to be benign in appearance and scheduled another one-year routine follow-up. (*Id.* at 21.) However, Ozimek began to show symptoms of and was ultimately diagnosed with breast cancer in 2009. (*Id.* at ¶ 23-24.) She underwent “oncological lung procedures, removal of the right breast, removal of the lymph nodes, and partial liver excision.” (*Id.* at ¶ 25.)

In early 2010, after retaining Powers & Santola as legal counsel, Ozimek commenced the underlying action in Supreme Court, Richmond County, and retained Dr. Ellen Czajka to render an expert opinion on Ozimek's medical care. (NYSCEF Doc No. 67.) On June 21, 2011, Dr. Kulkarni was dismissed from the case based on the statute of limitations. (NYSCEF Doc No. 44 at ¶ 30.) Plaintiffs replaced Powers & Santola with the Ashley Defendants in August 2012, who then suggested that the DiJoseph Defendants be retained as co-counsel. (NYSCEF Doc No. 44 at 36-38.) Then, on December 12, 2012, the Second Department reversed the dismissal of Dr. Kulkarni based on the continuous treatment doctrine. (*Ozimek*, 101 AD3d at 835.)

The claims against Dr. Kulkarni were discontinued pursuant to a stipulation dated February 7, 2013. (NYSCEF Doc No. 83.) After additional motion practice, the Plaintiffs attended a mediation with SIPP, Dr. Krishnan, and Dr. Andrews, and agreed to a settlement as to those defendants, in the amount of \$441,600.00 (NYSCEF Doc No. 70), while the case continued as to Dr. Ratnarathon. The current Defendants all withdrew from the case, Plaintiffs retained Joseph Lichtenstein as counsel, and Plaintiffs settled the claims asserted against Dr. Ratnarathon in the amount of \$300,000.00. (NYSCEF Doc No. 79 at 12-13.)

Plaintiffs commenced this lawsuit on June 29, 2018 and filed their Amended Complaint on February 27, 2019. (NYSCEF Doc Nos. 1, 44.) Pending before the court are the Defendants' motions to dismiss.

### DISCUSSION

It is well established that “[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction.” (*Leon v Martinez*, 84 NY2d 83, 87 [1994].) On a pre-answer motion to dismiss a complaint for failure to state a cause of action, pursuant to CPLR 3211 [a] [7], “the court should accept as true the facts alleged in the complaint, accord plaintiff the

benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory.” (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 121 [1st Dept 2002].) However, the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts. (*See Bishop v Maurer*, 33 AD3d 497 [1st Dept 2006]; *Igarashi v Higashi*, 289 AD2d 128 [1st Dept 2001].)

To state a cause of action for legal malpractice, a plaintiff must allege “the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and actual damages.” (*O’Callaghan v Brunelle*, 84 AD3d 581, 582 [1st Dept 2011].) “A failure to establish proximate cause requires dismissal regardless of whether negligence is established.” (*Mallow, Konstam, Mazu, Bocketti and Nisonoff, P.C. v Zeidman*, 2015 WL 4078529, \*1 [Sup Ct, NY County 2015].) 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 attorney’s negligence. (*See Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 441 [2007].) “In cases presenting a valid claim of legal malpractice, the claimed actual and ascertainable damages have been clearly calculable. In contrast, summary judgment dismissing the legal malpractice claim has been granted where the asserted damages are vague, unclear, or speculative.” (*Gallet, Dreyer & Berkey, LLP v Basile*, 141 AD3d 405, 406 [1st Dept 2016], *comparing Rudolf*, 8 NY3d 438 [2007] *with Bellinson Law, LLC v Iannucci*, 102 AD3d 563 [1st Dept 2013].)

Defendants move to dismiss the Amended Complaint on the grounds that Plaintiffs fail to plead specific factual allegations to establish the necessary elements of a legal malpractice claim. Additionally, they argue that the breach of fiduciary duty claim is duplicative of the malpractice claim because they are both based on the same facts and seek identical damages.

Plaintiffs counter that they have sufficiently pled all elements of the malpractice claim and that they were “proximately damaged[.]” (NYSCEF Doc No. 86 at 24.) Additionally, they state that DiJoseph’s decision to discontinue the action against Kulkarni lacked a strategic explanation and, in support, cite to the Czajka expert opinion, which, they argue, states that Kulkarni was negligent. (*Id.* at 16-20.)

The court finds that Plaintiffs fail to allege sufficient facts to withstand the Defendants’ motions to dismiss the legal malpractice claim, in that Plaintiffs fail to establish the requisite elements of proximate cause and actual damages. Plaintiffs allege that the discontinuance of Kulkarni resulted in a lack of discovery and evidence, which they claim weakened their case as to the rest of the prior defendants, and resulted in a lower settlement figure. (NYSCEF Doc No. 86 at 15.) However, even accepting the facts in the Amended Complaint as true, plaintiffs fail to allege a cognizable claim for legal malpractice. Plaintiffs merely speculate that they could have had “better leverage in negotiations,” but the submissions do not meet the legal standard necessary to allege a claim for legal malpractice, nor do the speculative claims justify a conclusion that Plaintiffs “would have achieved a more favorable [settlement] result[.]” (*Gallet, Dreyer & Berkey, LLP*, 141 AD3d at 406-07.) “The fact that the plaintiff[s] subsequently [were] unhappy with the settlement obtained . . . does not give rise to the level of legal malpractice.” (*Center for Biomedical Studies, Inc. v Berger & Sklaw, LLC*, 2017 WL 3084985, \*8 [Sup Ct, NY County 2017]; *see also 188-190 Eighth Ave. Housing Development Fund Corp. v Filemyr*, 2014 WL 1961924 [Sup Ct, NY County 2014].) Accordingly, the court grants both Defendants’ motions to dismiss the legal malpractice claims against them.

Lastly, the breach of fiduciary duty claims are based on the same factual allegations as the claims for legal malpractice and are therefore duplicative. As such, Defendants’ motion to dismiss

those claims is granted. (*Chan v Annuziato*, 2016 WL 5869568, \*4 [Sup Ct, NY County], citing *Cobble Creek Consulting, Inc. v Sichenzia Ross Friedman Ference LLP*, 110 AD3d 550 [1st Dept 2013].)

**CONCLUSION**


Accordingly, it is hereby

ORDERED that motion sequence 003 of Defendants Mitchel Ashley and The Ashley Law Firm, PLLC, to dismiss the Amended Complaint is granted and the Amended Complaint is hereby dismissed in its entirety; and it is further

ORDERED that motion sequence 004 of Defendants Arnold DiJoseph and The Law Office of Arnold DiJoseph, PC, to dismiss the Amended Complaint is granted and the Amended Complaint is hereby dismissed in its entirety; and it is further

ORDERED that the Clerk enter judgment accordingly dismissing the Amended Complaint, with prejudice, with costs and disbursements to Defendants, as taxed by the clerk, upon submission by Defendants of an appropriate bill of costs.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

<u>6/18/20</u> DATE		 W. FRANC PERRY, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE