SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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DAVID LAURENT,

Plaintiff,

- v -

EIGES & ORGEL PLLC,

Defendant.

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INDEX NO. 151023/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 39, 42

were read on this motion to/for DISMISS.

In this legal malpractice action commenced by plaintiff pro se David Laurent, defendant Eiges & Orgel PLLC moves, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the complaint. After a review of defendant's motion papers, as well as the relevant statutes and case law, the motion, which is unopposed, is granted.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff and his ex-wife Jennifer Laurent ("Jennifer") ("the Laurents") were married in New York State on June 2, 2000 and, in 2002, they moved to California. Doc. 20 at ¶¶ 10-11. In 2007, the couple had a child ("the child"). Id. In 2012, the Laurents obtained a divorce in California and stipulated to a Custody and Support Agreement ("CSA") executed in 2014. Id. at ¶¶ 12-13. Although the Laurents

thereafter reconciled and remarried in New York on June 2, 2015, they separated for good in November of that year. Id. at ¶¶ 14, 16.

In August 2016, the Laurents entered into a second CSA, which provided for joint custody and afforded plaintiff liberal visitation rights to plaintiff. Id. at ¶ 17. Plaintiff then commenced an uncontested divorce proceeding in this Court under Index No. 309374/2016. Id. at ¶ 20. A Judgment of Divorce was granted by this Court on November 2, 2016. Id. On November 21, 2016, Jennifer filed an emergency order to show cause ("OSC") seeking sole custody of the child, supervised visitation by plaintiff, and a restraining order against plaintiff based on allegations that he suffered from mental health issues. Id. at ¶ 21.

In December 2016, Fox Rothschild LLP, prior counsel for plaintiff, filed opposition to the first OSC. Id. at ¶ 26. The following month, Fox Rothschild LLP moved to withdraw as counsel for plaintiff. Id. at ¶ 35. After a hearing with this Court by telephone on January 13, 2017, during which plaintiff was represented by Fox Rothschild LLP, this Court (Cooper, J.) entered an interim order granting Jennifer sole custody, granting a temporary restraining order against plaintiff, and denying plaintiff visitation rights. Id. at ¶ 32.

On January 18, 2017, Jennifer filed a second OSC seeking an order of protection against plaintiff. Id. at ¶ 33. On January 25, 2017, this Court relieved

Fox Rothschild LLP as counsel for plaintiff. Id. at ¶ 35. On February 7, 2017, plaintiff engaged defendant Eiges & Orgel, PLLC as his attorneys. Id. at ¶ 36.

On January 29, 2020, plaintiff commenced the captioned action against defendant by filing a summons with notice. Doc. 1. Plaintiff subsequently filed a complaint sounding in legal malpractice, alleging, inter alia, that "if it were not for [defendant's] [g]ross [n]egligence, violations of the [s]tandard of [c]are, [p]ersonal [p]rejudice and [c]ontinued [c]ollusion with opposing counsel, none of the judgements or damages would have occurred and [plaintiff] would not be in this situation." Doc. 20 at ¶ 54. Plaintiff further alleged that defendant violated Judiciary Law § 487. Id. at ¶ 91. In addition to seeking, inter alia, compensatory damages and reimbursement of the fees he paid to defendant, plaintiff demanded punitive damages. Id. at ¶¶ 92-93.

In pleading his legal malpractice claim, plaintiff alleged that defendant mishandled his matrimonial case by assigning it to a young attorney with insufficient experience to be the primary contact on the case; failing to cite relevant statutes and assert certain legal arguments in opposition to Jennifer's second OSC; and failing to demand proof at trial (despite the fact that there was no trial). Id. at ¶¶ 37-42. He claimed that, on March 1, 2017, the Laurents and their attorneys attended a hearing at which Scott Orgel, one of defendant's name partners, counsel for Jennifer, and Justice Cooper purportedly met privately and discussed a potential settlement, the

terms of which included a forensic investigation & court appointed evaluator identical to that in an Article § 81 guardianship proceeding, as well as restricted visitation with the child for plaintiff, with Jennifer maintaining sole custody of the child. Id. at ¶¶ 43-44. Despite these efforts, however, plaintiff refused to agree to a settlement, which allegedly "forced" this Court to issue a second interim order which essentially incorporated the terms of the proposed settlement. Id. at ¶ 46. He also asserted that, at the same hearing, defendant made "simple arguments in favor of [his] position but then negated and prejudiced [his] case by finishing his argument with '… — But for the safety of the Child…'" Id. at ¶ 49.

After Justice Cooper's Part Clerk allegedly called plaintiff a "Duesche Bag" [sic], the latter allegedly asked defendant to file a motion to have Justice Cooper recuse himself due to his clerk's bias and defendant refused. Id. at ¶¶ 47-48.

Plaintiff further alleged that, on March 17, 2017, after an email exchange with defendant, "not only was [defendant] bias[ed] towards [plaintiff], [it] was very likely colluding with opposing counsel; spreading false information; disclosing confidential attorney/client communication; and acting with a clear conflict of interest." Id. at ¶ 52. The same day, defendant was allegedly terminated by plaintiff "for cause." Id. at ¶ 53.

On March 29, 2017, plaintiff, appearing pro se, moved unsuccessfully to have Justice Cooper recuse himself or be disqualified from hearing the case. Id. at ¶ 55.

In June 2017, this Court ordered the appointment of an 18b attorney for plaintiff. Id. at ¶ 56. In July 2017, plaintiff moved unsuccessfully for a modification of his child support obligations. Id. at ¶ 57. Jennifer then filed a third OSC, seeking to hold plaintiff in contempt for failing to pay support in accordance with the 2016 CSA. Id. at ¶ 58. At a September 2017 hearing before this Court, plaintiff's 18b counsel sought to be relieved due to a breakdown in his relationship with the plaintiff. Doc. 26 at 3-18. This Court adjourned the pending motions (Id. at 12-23) and, on October 25, 2017, the next hearing date scheduled by this Court, the plaintiff failed to appear. Doc. 27. The following day, Justice Cooper issued an order in the divorce proceeding, filed with the clerk on November 16, 2017 ("the final order"), which resulted, inter alia, in plaintiff's loss of joint custody, a 5 year order of protection in favor of Jennifer and the child, a money judgment, sanctions for contempt, and the awarding of fees, costs, and expenses to Jennifer. Id.

On October 17, 2018, plaintiff again failed to appear in connection with a fourth OSC filed by Jennifer seeking permission to relocate with the child to Florida, and the request to relocate was granted by this Court. Doc. 29. In December 2019, plaintiff filed two motions to set aside his defaults, which were both denied. Doc. 20 at ¶ 72. By order entered December 13, 2019, this Court held that plaintiff's motion "to vacate a prior judgment, [was] denied as without merit because he failed to meet his burden under applicable law." Doc. 30. By order entered January 22, 2020, this

Court held that "plaintiff has failed to offer a reasonable excuse for his failure to appear on October 25, 2017, the date on which the order of protection was granted on default." Doc. 31. Additionally, plaintiff failed to offer any explanation for his delay of over two years in seeking to vacate his default. Thus, held this Court, plaintiff "failed to demonstrate an excusable default warranting the vacatur of the order. . ." Doc. 31.

On May 4, 2020, plaintiff filed the instant motion to dismiss the complaint. Doc. 23. Pursuant to a stipulation filed June 3, 2020, the parties agreed to adjourn the motion from June 5, 2020 until July 22, 2020; plaintiff was to file opposition to the motion by June 30, 2020; and defendant was to file a reply by July 21, 2020. Doc. 39. On June 30, 2020, the date on which plaintiff's papers were due, he filed on NYSCEF a correspondence labeled "Emergency Request For Adjournment" but did not mail or email the request to Part 2. Doc. 42. In the correspondence, plaintiff requested that the motion be adjourned until July 10, 2020. Doc. 42. While taking a routine inventory of its open motions on July 23, 2020, this Court discovered that plaintiff still had not filed opposition to the motion and emailed counsel for both parties to ascertain whether plaintiff still intended to oppose the same and, if so, whether defendant would consent to a further adjournment. Plaintiff failed to answer the email but defendant's attorney represented that, on June 30, 2020, he had emailed plaintiff a stipulation adjourning the motion until August 4, 2020 and that plaintiff

failed to return the same despite representing that he would do so. Defendant's attorney also agreed to a further adjournment of the motion with certain conditions, including, inter alia, that the adjournment would be final, but plaintiff never responded to counsel's proposal. On July 24, 2020, this Court, in yet another attempt to accommodate plaintiff, emailed him to ask whether he would accept defense counsel's proposal and warned plaintiff that, if he did not respond by noon on July 27, 2020, the motion would be taken on submission without opposition. Since this, too failed to prompt a response from plaintiff, the motion was submitted without opposition.

LEGAL CONCLUSIONS:

In determining a motion to dismiss pursuant to CPLR 3211, "the pleading is to be afforded a liberal construction. [The court is to] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994) (internal citations omitted). A pleading will be dismissed if it fails to state a cause of action. *See* CPLR 3211 (a)(7). Moreover, a motion to dismiss a complaint pursuant to CPLR 3211 (a)(1) may be granted when the documentary evidence submitted utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the

claims as a matter of law. *See Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002); *Ladenburg Thalmann & Co. v Tim's Amusements,* 275 AD2d 243, 246 (1st Dept 2000).

Plaintiff's Legal Malpractice Claim

> A claim for legal malpractice requires that a plaintiff allege facts that, if proven at trial, would 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" (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007] [internal quotation marks and citation omitted]; *see Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271-272 [1st Dept 2004]).

Kaplan v Conway & Conway, 173 AD3d 452, 452 (1st Dept 2019).

To establish proximate cause in a legal malpractice action, the plaintiff must establish that he or she would not have sustained damages "but for" the attorney's negligence. *See Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d at 442. Failure to make this showing will result in the dismissal of the claim regardless of whether attorney was negligent. *See Snolis v Clare*, 81 A.D.3d 923, 925 (2d Dept 2011). "Unsupported factual allegations, conclusory legal argument or allegations contradicted by documentation, do not suffice" to state a cause of action for legal malpractice. *Dweck Law Firm v. Mann*, 283 A.D.2d 292, 293 (1st Dep't 2001).

Given plaintiff's own actions during the course of the proceedings before Justice Cooper, he cannot demonstrate that, but for defendant's negligence, the final order would not have been entered against him. *See Knox v Aronson, Mayefsky & Sloan, LLP,* 168 AD3d 70, 75 (1st Dept 2018) (citations omitted) (legal malpractice claim dismissed where plaintiff's alleged damages were caused not by legal advice but by her own failure to comply with terms of a settlement). This is evident from the fact that the final order, granting Jennifer's pending motions for custody, an order of protection, and contempt, were granted upon default immediately following plaintiff's to appear for a hearing on October 25, 2017 which resulted, inter alia, in his loss of joint custody, a 5 year order of protection in favor of Jennifer and the child, a money judgment, sanctions for contempt, and the awarding of fees, costs, and expenses to Jennifer. In fact, plaintiff concedes in the complaint that the final order was entered upon his default. Doc. 20 at ¶¶ 64-65. Additionally, as defendant correctly notes, causation is absent here since defendant was terminated from representing plaintiff in March 2017, some seven months before the issuance of the final order. Doc. 20 at ¶¶ 53, 64-65; Doc. 27.

Despite plaintiff's claims that defendant was negligent in assigning a junior attorney to work on the case, that defendant conspired with opposing counsel against him, and failed to make certain legal arguments, these contentions are utterly conclusory and do not change the fact that his failure to appear led to the issuance

of the final order. In any event, it has long been held that "[a]ttorneys may select among reasonable courses of action in prosecuting their clients' cases without thereby committing malpractice" (*Dweck Law Firm*, 283 A.D.2d at 293) and that "a client's disagreement with its attorney's strategy does not support a malpractice claim, even if the strategy has flaws." *Brookwood Cos., Inc. v. Alston & Bird, LLP*, 146 A.D.3d 662, 667 (1st Dep't 2017). Additionally, as defendant asserts, its representation inured to the benefit of plaintiff since defendant was able to negotiate supervised visitation of the child, whereas plaintiff previously was not permitted any visitation at all. Doc. 20 at ¶¶ 32, 43-44.

Plaintiff's claim pursuant to Judiciary Law §487 must also be dismissed.

> Relief under a cause of action based upon Judiciary Law § 487 "is not lightly given" (*Chowaiki & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600, 601, 982 NYS2d 474 [1st Dept 2014]) and requires a showing of "egregious conduct or a chronic and extreme pattern of behavior" on the part of the defendant attorneys that caused damages (*Savitt v Greenberg Traurig, LLP*, 126 AD3d 506, 507, 5 NYS3d 415 [1st Dept 2015]). Allegations regarding an act of deceit or intent to deceive must be stated with particularity (*see Armstrong v Blank Rome LLP*, 126 AD3d 427, 427, 2 NYS3d 346 [1st Dept 2015]); the claim will be dismissed if the allegations as to scienter are conclusory and factually insufficient (*see Briarpatch Ltd., L.P. v Frankfurt Garbus Klein & Selz, P.C.*, 13 AD3d 296, 297-298, 787 NYS2d 267 [1st Dept 2004], *lv denied* 4 NY3d 707, 829 NE2d 674, 796 NYS2d 581 [2005]; *Agostini v Sobol*, 304 AD2d 395, 396, 757 NYS2d 555 [1st Dept 2003]).

Facebook, Inc. v DLA Piper LLP (US), 134 AD3d 610, 615 (1st Dept 2015).

Here, plaintiff's allegations of wrongdoing by defendant are utterly conclusory. Although he claims that defendant attempted to negotiate a settlement without his consent, plaintiff declined to accept the terms of the settlement and, thus, cannot prove that any violation of the statute proximately caused him any harm. Nor has plaintiff pleaded any pattern of willful or egregious conduct sufficient to support a claim under the statute. *See Kaminsky v Herrick, Feinstein LLP*, 59 AD3d 1, 13 (1st Dept 2008), *lv denied* 12 NY3d 715 (2009).

Finally, the complaint lacks the requisite allegations of egregious conduct or moral turpitude necessary to support punitive damages. *See Denenberg v Rosen*, 71 AD3d 187, 196 (1st Dept 2010).

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion to dismiss by defendant Eiges & Orgel PLLC is granted and the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that counsel for the defendants shall serve a copy of this order, with notice of entry, upon counsel for plaintiff, as well as on the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (access*ible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)]; and it is further

ORDERED that this constitutes the decision and order of the court.

8/10/2020
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE