At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 22nd day of December, 2020.

PRESENT:
CARL J. LANDICINO, J.S.C.

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REGINA BENDER and ROYAL DAYCARE CENTER, LLC,
Plaintiffs,

Index No.: 521337/2019

-against-

DECISION AND ORDER

LAW OFFICE OF JOHN HARRINGTON, ESQ., AND JOHN HARRINGTON, ESQ.

Motions Sequence #2,

Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

	Papers Numbered (NYSCEF)
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	18-25
Opposing Affidavits (Affirmations)	27-31
Affirmation or Affidavit in Reply	33
Memoranda of Law	26, 34

After a review of the papers and oral argument the Court finds as follows:

This proceeding has been commenced by Plaintiffs Regina Bender and Royal Daycare Center, LLC (hereinafter referred to individually or collectively as the "Plaintiffs") against Defendants the Law Offices of John Harrington, Esq. and John Harrington, Esq. (hereinafter referred to individually or collectively as "the Defendants"). The Plaintiffs allege a cause of action for Legal Malpractice against the Defendants. The Plaintiffs contend that the Defendants committed legal malpractice in that they failed to serve a Notice of Claim upon the City of New York on behalf of the Plaintiffs.

The Defendants now move (motion sequence #1) pursuant to CPLR 3211(a)(1)(5) and (7) for an order 1) dismissing the Amended Complaint as time barred; or 2) dismissing the Amended Complaint in

its entirety for Plaintiff's failure to state a cause of action. The Defendants contend that the Plaintiff's legal malpractice claim is barred by the statute of limitations given that a legal malpractice claim would have accrued upon the expiration of the ninety day Notice of Claim service deadline. The Defendants argue that pursuant to CPLR § 214(6) the three year statute of limitations on a legal malpractice claim would have expired in October of 2018. The instant action was not commenced until September 27, 2019. What is more, the Defendants contend that the Plaintiffs have not stated a cause of action for legal malpractice as the Plaintiffs have not shown that the Defendants had an obligation to initiate a legal proceeding against the City of New York. In support of that contention, the Defendants point to the retainer agreement between the parties, and the particular facts of the underlying dispute. Finally, the Defendants contend that the Plaintiffs have not shown that they had a meritorious claim against the City of New York. The Defendants assert that the showing of a meritorious claim is necessary to support the legal malpractice claim.

The Plaintiffs oppose the motion. Specifically, the Plaintiffs contend that the statute of limitations in relation to the Plaintiff's breach of contract claim did not begin to run until one year and 90 days after July 2015. The Plaintiffs argue that they would have had a year and ninety days from July 2015 to commence an action against the City (October 2016). The Plaintiffs contend that the Defendant could have sought leave of Court to serve a late notice of claim during that time. Therefore, the Plaintiffs argue that the time to commence this action began to run from October of 2016. Accordingly, the Plaintiffs contend that their commencement of the instant proceeding in September of 2019, was within the applicable three year statute of limitations. The Plaintiffs also contend that they have sufficiently stated a cause of action for Legal Malpractice since the they claim that they had a viable and meritorious claim against the City of New York (the "City").

Failure to State a Cause of Action- CPLR 3211(a)(7)

The Court grants that aspect of the Defendants' application made pursuant to CPLR 3211(a)(7). "On a motion pursuant to CPLR 3211(a)(7) to dismiss for failure to state a cause of action, the court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Shah v. Exxis, Inc.*, 138 A.D.3d 970, 971, 31 N.Y.S.3d 512, 514 [2d Dept 2016]. "To state a cause of action to recover damages for legal malpractice, a plaintiff must allege: (1) that the attorney 'failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession,' and (2) that the attorney's breach of the duty proximately caused the plaintiff actual and ascertainable damages." *Dempster v. Liotti*, 86 AD3d 169, 176, 924 N.Y.S.2d 484, 489 [2d Dept 2011], *quoting Leder v. Spiegel*, 9 N.Y.3d 836, 872 N.E.2d 1194 [2d Dept 2007].

In the instant proceeding, the Plaintiffs have failed to sufficiently state a cause of action for legal malpractice. The Plaintiff's allegations do not serve to support a viable cause of action against the City. The Plaintiffs in the instant matter claim that the Defendant's legal malpractice was based upon his failure to serve a Notice of Claim upon the City. The underlying claim against the City purportedly involved the improper issuance of a certificate of occupancy. However, the Plaintiffs have not shown that they had the requisite relationship with the City necessary for them to maintain an action against the City.

First, the Plaintiffs' complaint does not allege direct contact with the City. "Here, the plaintiffs have failed to plead any type of direct contact between themselves and the City or the Department on which justifiable reliance may be predicated." *Abraham v. City of New York*, 39 AD3d 21, 26, 828 N.Y.S.2d 502 [2d Dept 2007]. "Furthermore, the plaintiff does not allege that a special relationship was formed because the defendants violated any statutory duty, or assumed positive direction and control in

the face of a known, blatant, and dangerous safety violation." *Thomas v. New York City Dep't of Educ.*, 124 AD3d 762, 763, 2 N.Y.S.3d 178 [2d Dept 2015].

In addition, "[t]he issuance of a certificate of occupancy and/or building permit is a governmental function for which a municipality may not be held responsible for damages." *Estrada v. The Town of Brookhaven*, No. 04-8659, 2009 WL 5072270 (N.Y. Sup. Ct. 2009), quoting *Okie v. Vill. of Hamburg*, 196 AD2d 228, 229, 609 N.Y.S.2d 986, 987 [4th Dept 1994]. Similarly in *Sposato v. Vill of Pelham*, the Court held that no special duty existed in such situations and that "the granting of a building permit 'is a discretionary determination and the actions of the government in such instances are immune from lawsuits.'" *Sposato v. Vill. of Pelham*, 275 AD2d 364, 365, 712 N.Y.S.2d 424 [2d Dept 2000], quoting *City of New York v. 17 Vista Assocs.*, 84 N.Y.2d 299, 642 N.E.2d 606 [1994]; *see also Newhook v. Hallock*, 215 A.D.2d 804, 626 N.Y.S.2d 300 [3rd Dept 1995]. As a result, the Plaintiffs have failed to state a cause of action against the Defendants since the Plaintiffs have failed to articulate that they had a viable cause of action against the City. Therefore, the motion is granted and the action is dismissed. Accordingly, the remaining arguments of the Defendant are academic.

Based on the foregoing, it is hereby ORDERED as follows:

Defendants' motion to dismiss the complaint (motion sequence #2) is granted.

This Constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.