STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

LORA COLUCCI and YAR-LO, INC., d/b/a MERLE NORMAN COSMETICS,

Plaintiffs,

-against-

THOMAS J. RZEPKA, ESQ.; OSBORN REED & BURKE, LLP; BRESSLER & KUNZE; BURKE ALBRIGHT HARTER & REDDY, LLP; MOYER RUSSI & RANDALL, PC; AND LEOPOLD & ASSOCIATES, PLLC,

Defendants.

DECISION AND ORDER

Index # 903586-20

(Albany County Supreme Court, Motion Term)

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JUSTIN CORCORAN, J.S.C.

Introduction

Plaintiffs Lora Colucci ("Colucci") and Yar-Lo, Inc., d/b/a Merle Norman Cosmetics (collectively "plaintiffs") bring this legal malpractice suit against defendant Thomas J. Rzepka ("Rzepka") and several law firms that allegedly employed him, claiming that his negligent representation in a litigation matter against plaintiffs' former commercial landlord resulted in significant financial harm. Rzepka's former law firms move before answering pursuant to CPLR 3211 (a) (1), (5) and (7) to dismiss on grounds including that the claims are time-barred by the three-year statute of limitations under CPLR 214 (6), that the complaint fails to state a cause of action, and that the claims are barred by documentary evidence.

Plaintiffs oppose on several grounds, primarily that the suit is timely under *Grace v Law*. 24 NY3d 203 (2014). Specifically, plaintiffs argue that *Grace v Law* held that before an injured client may sue her lawyer for malpractice, she must first exhaust any appeal that is "likely to succeed." For reasons described below, the Court concludes plaintiffs' reliance on *Grace v Law* as a basis to defer suit is misplaced and that the claims against movants must be dismissed as time-barred.

Procedural background

Colucci owned and operated Yar-Lo, Inc, doing business as Merle Norman Cosmetics, a retail store located in Stuyvesant Plaza. As relevant here, the lease between the parties required Yar-Lo, the tenant, to maintain "plumbing fixtures." In 2004, the cosmetics store experienced problems with its sewage system resulting in floods and back-ups, exposing Colucci and the premises to mold, sewage, and toxins. Stuyvesant Plaza refused to fix the problems, which purportedly resulted from a faulty ejector pump. Colucci argued it was not a "plumbing fixture" and thus not an item she was required to maintain or repair. Colucci was diagnosed with medical problems after her exposure. Due to her health problems, she ceased retail operations and vacated the store in April 2005 after receiving a lease "buyout" of $10,000. Colucci filed a claim with Travelers, her commercial insurer, for "business interruption" but her claim was denied.

Colucci met defendant Rzepka in June 2006. She retained him on a contingency fee basis to file (1) an action against Travelers seeking business interruption coverage/benefits and (2) an action against Stuyvesant Plaza for breaching the lease and exposing her to toxins. Rzepka allegedly drafted a complaint in the Travelers action for Colucci to sign in December 2006; that case (which plaintiffs now allege was meritless and even frivolous) was dismissed in May 2014.[1]

On August 20, 2007, Rzepka filed an action in Schenectady County Supreme Court on behalf of plaintiffs against Stuyvesant Plaza seeking damages for Colucci's personal injuries and for the cosmetics store's business losses. The landlord answered and discovery apparently proceeded intermittently from 2007-2015. In March 2015, the trial court (Kramer, J.) set deadlines for plaintiffs to file a note of issue and for the parties to file dispositive motions. Discovery, including expert witness disclosure, was ordered to be completed by May 1, 2015 and summary judgment motions were ordered to be filed by August 1, 2015 in anticipation of trial in November 2015.

Stuyvesant Plaza complied with the court deadlines by serving expert disclosure related to plumbing and medical experts and by timely filing a motion for summary judgment. The landlord's experts opined *inter alia* that the components that caused the foul discharges in the store were "fixtures" that the tenant was responsible to maintain/repair and that Colucci's injuries were not caused by any toxins at the store. On the day before the August 14, 2015 return date of the landlord's dispositive motion, Rzepka obtained an adjournment of the return date to October 2, 2015, allowing extra time to submit opposition papers. Crucially, the extension was conditioned upon his apparent consent that the deadline for expert disclosure was not extended similarly, such that plaintiffs would not be permitted to disclose (or rely upon) expert opinions to oppose the motion or present opinions at trial. Plaintiffs claim Rzepka's consent, i.e. waiving the right to disclose any experts, without Colucci's knowledge or approval constituted professional malpractice and rendered plaintiffs powerless to rebut the landlord's *prima facie* showing. Colucci contends that she was not timely advised by Rzepka that the motion was pending or that the expert disclosure deadline expired.

Rzepka obtained yet another adjournment of the landlord's dispositive motion, this time until December 4, 2015. He wrote to Colucci on November 3, 2015 stating that he wanted to withdraw from representing her and her business in all matters then pending. He sought $12,000 for disbursements and stated he would move for an order allowing him to withdraw if required. Rzepka filed an order to show cause, returnable December 4, 2015, for permission to withdraw. Colucci signed a substitution form on December 7, 2015 which relieved Rzepka of further representation and terminated the attorney-client relationship. Rzepka's letter to Colucci and the substitution form suggest that he was practicing as a sole practitioner at the time. Before he withdrew, Rzepka filed a cross-motion for summary judgment and incomplete papers (including

[1] Yar–Lo Inc. sued Travelers, its insurance company, for damages under the business interruption coverage of its policy. Travelers was later awarded summary judgment dismissing that complaint based upon its unrefuted showing that the business had not been forced to close as a direct result of the malfunctioning sewage system, which the landlord had repaired by the end of 2004. *Yar–Lo, Inc. v Travelers Indem. Co.*, 130 AD3d 1402 (3d Dept. 2015). Rzepka represented plaintiffs in their case against Travelers. Plaintiffs claim that they were not entitled to business interruption coverage and that Rzepka enticed Colucci to pay him legal fees to pursue meritless litigation.

an unexecuted "affidavit" from a county health department engineer) opposing Stuyvesant Plaza's motion.

New counsel appeared for plaintiffs and filed papers in May 2016 opposing Stuyvesant Plaza's motion. Notwithstanding that the expert disclosure deadline had expired, the opposition included expert affidavits on issues including (1) the nexus between Colucci's injuries and exposure to toxins at the store and (2) the landlord's duty to maintain and repair the components that caused the sewage discharge.

On May 27, 2016, Judge Kramer conducted oral argument and read a decision from the bench granting Stuyvesant Plaza's motion for summary judgment dismissing the complaint. An order dismissing the complaint was entered on July 14, 2016. The trial court did not consider the affidavits of plaintiffs' experts, who were not timely disclosed pursuant to the scheduling order to which Rzepka had agreed. Plaintiffs, represented by present counsel, appealed.

In a decision issued January 11, 2018, the Appellate Division, Third Department affirmed the trial court (Kramer, J.). *Colucci v. Stuyvesant Plaza, Inc.*, 157 A.D.3d 1095, 1095–1097 (2018). The Appellate Division held that the trial court did not abuse its discretion in precluding plaintiffs from submitting expert affidavits and opinions in opposition to the dispositive motion and that Stuyvesant Plaza established *prima facie* that (1) it did not breach any duty to plaintiffs and (2) there was no causal relationship between Colucci's exposure to mold and sewage on the store premises and her personal injuries or economic loss.

Though the Appellate Division found that the trial court did not inappropriately decline to consider the expert affidavits submitted by plaintiffs, it nonetheless analyzed the content of two of the expert affidavits submitted by plaintiffs in opposition: (1) the affidavit of Colucci (on the issue of her economic loss) and (2) the affidavit of her treating physician (on the issue of a causal nexus between her exposure to toxins and her personal injuries). The court found that Colucci's opinions about her calculation of economic loss were properly disregarded due to tardy disclosure, but that her business degree and experience qualified her to render the opinions. The medical opinions of her doctor were precluded by late disclosure; his affidavit was also found to be too conclusory and vague to establish a causal relationship between Colucci's alleged exposure and specific illness. Ultimately, plaintiffs' inability to offer expert opinions to rebut the landlord's summary judgment motion was fatal to her claims. Plaintiffs allege that Rzepka's failure to timely retain and disclose proper experts thwarted adequate opposition to the motion. [2]

[2] In addition to mishandling the Stuyvesant Plaza litigation, Colucci alleges Rzepka acted negligently in representing her in two other state Supreme Court litigation matters, the case against Travelers described above and another which involved a premises liability case in which Colucci sought personal injury damages arising from a fall-down accident. In the premises liability action, Rzepka sued the premises owner on October 13, 2010; this case settled for a nominal sum after new counsel was substituted, purportedly due to Rzepka's ineptitude. As those claims involve even earlier alleged negligence, they are time-barred with respect to movants.

The legal malpractice complaint

In a complaint filed May 27, 2020, plaintiffs assert two causes of action seeking money damages from Rzepka arising from his alleged legal malpractice in plaintiffs' lawsuit against former landlord Stuyvesant Plaza. Plaintiffs also assert a cause of action seeking unspecified treble damages for Rzepka's allegedly fraudulent, deceptive conduct in violation of Judiciary Law §487, claiming Rzepka engaged in fraud and deceit in the Stuyvesant Plaza litigation, as well as the related action seeking compensation under a business interruption insurance policy issued by Travelers and the unrelated personal injury premises liability suit.[3]

The gravamen of plaintiffs' legal malpractice action is that Rzepka negligently failed to demonstrate through expert proof that (1) the sewage pit and ejector pump in the cosmetics store did not constitute "fixtures" that plaintiffs were obliged to repair; (2) exposure to toxins in the store caused Colucci's personal injuries; and (3) plaintiffs sustained quantifiable economic losses from closure of the cosmetics store. Plaintiffs allege Rzepka neglected his obligations (failing even to disclose the pending motion for summary judgment), missed several court discovery deadlines, consented to an extension of deadlines that foreclosed submission of necessary expert proof, and then withdrew as counsel when the motion was pending, with no plan to properly oppose it.

As against the defendant law firms, all based in Rochester, plaintiffs allege that Rzepka was affiliated with each of them during various years that the Stuyvesant Plaza litigation was pending, though there is no specific allegation of the basis for each firm's liability. The Court assumes, based on statements during oral argument, that plaintiffs claim that each firm is vicariously liable for the conduct of Rzepka under *respondeat superior* theories. Other than alleging the years that each law firm was affiliated with Rzepka, and that he worked on the Stuyvesant Plaza case during those times, the complaint contains no specific allegations about each movant.

The pending motions

The complaint alleges that Rzepka was employed by or affiliated with defendant Osborn Reed & Burke "during 2007 and other relevant dates when (he) was representing plaintiffs against Stuyvesant Plaza, Inc." ORB moves to dismiss the complaint pursuant to CPLR 3211 (a) (1), (5), and (7) claiming the claims are untimely, barred by documentary evidence, and that the complaint fails to state a cause of action. ORB relies in part on the affidavit of its managing partner attesting that Rzepka worked at the firm from April 20, 2006 through November 30, 2007 in an "of counsel" position, that he alone worked on plaintiffs' matters, and that he took his clients and cases with him when he left the firm.

[3] The complaint details Rzepka's alleged violations of §487 at paragraph 289. The allegations include that Rzepka failed to use a written retainer, "ghostwrote" a complaint in the Travelers case, submitted speculative discovery responses, fraudulently charged legal fees to prosecute a frivolous claim, commingled fees paid for different legal tasks, concealed the pending dispositive motion, failed to oppose the Stuyvesant Plaza matter competently and abandoned his client while the motion was pending.

Next, the complaint alleges Rzepka was employed by or affiliated with Bressler & Kunze "during 2007 through 2012 and other relevant dates when (he) was representing plaintiffs in litigation against Stuyvesant Plaza, Inc." BK moves to dismiss pursuant to CPLR 3211 (a) (5), (7) and (8) claiming the claims are untimely, that the complaint fails to state a valid cause of action, and that dissolution of the law firm partnership renders it immune from suit. BK relies in part on the affirmation of former partner Karl W. Kunze, Esq. concerning dissolution of the partnership.

The complaint alleges that Rzepka was employed by or affiliated with Burke Albright Harter & Reddy "during 2011 to 2013 and at other relevant dates when (he) was representing plaintiffs in the litigation against Stuyvesant Plaza, Inc." BAHR moves to dismiss the complaint pursuant to CPLR 3211 (a) (5), (7) and (8) arguing the claims are untimely and that the complaint fails to state a cause of action.

Finally, the complaint alleges that Rzepka was employed by or affiliated with Moyer Russi & Randall PC "during 2013 and at other relevant dates when (he) was representing plaintiffs in litigation against Stuyvesant Plaza, Inc." MRR moves to dismiss the complaint pursuant to CPLR 3211 (a) (5) and (7) arguing the claims are untimely and the complaint fails to state a cause of action.

Plaintiffs oppose all motions to dismiss. Defendant Rzepka has joined issue but has not moved to dismiss under CPLR 3211 (a). All movants state that the complaint seeks damages against Rzepka alone and that other than an allegation that each firm was somehow affiliated with Rzepka at certain times, there are no allegations about the basis for each firm's liability. Neither the pleading nor the oral argument suggests any theory of direct liability against movants nor is there any allegation that any lawyer except Rzepka represented plaintiffs.

Discussion

Because the statute of limitations defense renders academic movants' alternative arguments, the Court first analyzes whether plaintiffs' legal malpractice claims against movants are time-barred after measuring the accrual of the claims and applying the continuous representation toll.

On a motion to dismiss under CPLR 3211 (a), the Court accepts the truth of the facts alleged in the complaint, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the alleged facts fit within any cognizable legal theory. *Faison v Lewis*, 25 NY3d 220 (2015) *citing Leon v Martinez*, 84 NY2d 83, 87-88 (1994).

"Statutes of limitations advance our society's interest in giving repose to human affairs." *Freedom Mortgage Corporation v Engel*, 2021 WL 623869, 2021 Slip Op. 01090 (NY Ct. of Appeals Feb. 18, 2021) (internal citation and quotation marks omitted). Determining when limitations begin to run requires a balancing of the interests of injured parties (who may not discover injuries until years after they are inflicted) with the defendants' right to a fair opportunity to defend claims against them before their ability to do so has deteriorated. *Snyder v Town Insulation, Inc.*, 81 NY2d 429, 435 (1993). An action to recover damages arising from

legal malpractice must be commenced within three years after accrual. CPLR 214 (6); *McCoy v Feinman*, 99 NY2d 295 (2002); *Lavelle-Tomko v Aswad & Ingraham*, 191 AD3d 1142, at *2 (3d Dept. 2021) quoting *Zorn v Gilbert,* 8 N.Y.3d 933, 933–934 (2007) (citation omitted). In legal malpractice cases arising out of civil proceedings, accrual occurs at the date of the malpractice, i.e. the date of the injury and not at the time that the injury is discovered. *Britt v Legal Aid Soc. Inc*, 95 NY2d 443, 446 (2000) *citing Glamm v Allen*, 57 NY2d 87, 93 (1982) and *Ackerman v Price Waterhouse*, 84 NY2d 535 (1994); *see also McCoy v. Feinman,* supra at 301; *Lavelle-Tomko v Aswad & Ingraham, supra.*

To obtain dismissal of the action based on the statute of limitations, defendants bear the initial burden of demonstrating that the time within which to commence expired, including establishing the date that the cause of action accrued. *Lavelle-Tomko, supra*, at *2 citing *Matter of Steinberg,* 183 AD3d 1067, 1070 (3d Dept. 2020); *Haynes v Williams,* 162 AD3d 1377, 1378 (3d Dept.), *lv denied* 32 NY3d 906 (2018); *Krog Corp. v Vanner Group, Inc.*, 158 AD3d 914, 915 (3d Dept. 2018). If defendants meet that initial burden, "the burden then shift[s] to ... plaintiff to raise a question of fact as to whether the statute of limitations has been tolled or was otherwise inapplicable." *Id. quoting Krog Corp. v Vanner Group, Inc., supra* at 916 (internal quotation marks and citations omitted); *see International Electron Devices (USA) LLC v Menter, Rudin & Trivelpiece, P.C.*, 71 AD3d 1512, 1512 (4th Dept. 2010). The continuous representation doctrine tolls the three-year statute of limitations until the attorney-client relationship ends in the underlying matter that gives rise to the malpractice claim. *Zorn v Gilbert*, 8 NY3d 933, 934 (2007), *McCoy v Feinman*, 99 NY2d at 306. The date on which the attorney-client relationship ends is best measured from the time the relationship is terminated in a method permitted by statute, CPLR 321; *see Farage v Ehrenberg*, 124 AD3d 159, 165-166 (2nd Dep't 2014). The Fourth and First Departments of the Appellate Division have applied the continuous representation toll to claims against law firms where the defendant-attorney formerly worked. *The New Kayak Pool Corp. v Kavinocky Cook LLP*, 74 AD3d 1852 (4th Dept. 2010); *HNH Int'l Ltd. v Pryor Cashman Sherman & Flynn LLP*, 63 AD3d 534 (1st Dept. 2009); *see Waggoner v Caruso*, 68 AD3d 1, 7 (1st Dept. 2009) *aff'd other grounds* 14 NY3d 874 (2010) (limitations period applicable to attorney's former law firm tolled during the time attorney continued representation at another law firm to avoid potential impleader for contribution or indemnification while case remained pending); *but see Ganess by Ganess v City of New York*, 85 NY2d 733 (1995) (Titone, J. concurring [questioning how continuous treatment toll should be applied without ongoing master-servant or principal-agent relationship]).

"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." *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 N.Y.3d 438, 442 (2007), *quoting McCoy v Feinman*, 99 NY2d 295, 301-302 (2002) (internal quotation marks and citations 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." *Id. citing Davis v Klein*, 88 NY2d 1008, 1009–1010 (1996); *Carmel v Lunney*, 70 N.Y.2d 169, 173 (1987). The client must show that she would have prevailed in the "case within the case" when the lawyer's malpractice arises from a civil litigation matter.

Movants argue that plaintiffs' claims against Rzepka accrued at the time of the alleged malpractice in 2015 when he missed deadlines for expert witness disclosure, submitted inadequate opposition to the landlord's dispositive motion, and otherwise failed to protect the client from suffering dismissal when proper lawyering purportedly would have avoided it. They contend that the toll for Rzepka's continuous representation ended when he was substituted out of the case on December 7, 2015 or when successor counsel appeared (i.e. no later than April 7, 2016), such that commencement on May 27, 2020 was beyond the three-year limitations period for professional malpractice under CPLR 214 (6).

Plaintiffs argue that under *Grace v Law*, Colucci was not *permitted* to commence her action until January 11, 2018 when the Appellate Division affirmed Judge Kramer's order granting summary judgment to Stuyvesant Plaza; plaintiffs contend this is the date of accrual of her legal malpractice claims and that the three-year limitations period expired January 11, 2021. Alternatively, plaintiffs assert that the limitations period began to run when the Court of Appeals denied plaintiffs' leave application on May 3, 2018, such that suit before May 3, 2021 would be timely.

To evaluate the competing arguments about the rule pronounced in *Grace*, it is helpful to review the underlying facts. The plaintiff John Grace retained two lawyers to prosecute a medical malpractice claim. Based on a misunderstanding of the negligent doctor's employment arrangements, the lawyers failed to timely sue the doctor and his university employer, instead suing in federal court the Veterans Administration facility where the doctor had treated Grace. The lawyers' errors resulted in summary judgment dismissing the complaint against the VA. Counsel advised Grace against appealing and also advised him to discontinue the only minor claim that survived against the VA. He agreed to discontinue the remaining claim and elected not to appeal District Court's dismissal of his complaint.

Grace then sued his lawyers for legal malpractice, claiming they negligently failed to timely sue the doctor and the university. The lawyer-defendants moved to dismiss Grace's legal malpractice claims on the grounds that the client waived them by (1) voluntarily discontinuing what remained of his medical malpractice action and (2) failing to appeal District Court's order that dismissed the bulk of his claims. One lawyer also moved to dismiss the legal malpractice action as time-barred, based upon his alleged withdrawal from representation, leaving the remaining lawyer to prosecute the claims. Supreme Court denied both of the defendants' motions for summary judgment, prompting an appeal to the Appellate Division, Fourth Department.

The Appellate Division rejected the defendants' contention that Grace waived or abandoned his legal malpractice claims by failing to appeal from District Court's order dismissing most of his claims or by discontinuing what remained of his medical malpractice action. In rejecting these arguments, the Fourth Department analyzed other cases in which a global settlement resulted in waiver of a legal malpractice action and declined the invitation to extend the waiver doctrine to create a *per se* rule that a party who discontinues an underlying action or forgoes an appeal thereby abandons his right to pursue a claim for legal malpractice.

The Fourth Department noted the novelty of the question presented, as well as the fact that other states had rejected the *per se* rule advocated by the defendant lawyers. *Grace v Law*, 108 AD3d 1173, 1176 *citing MB Indus., LLC v CNA Ins. Co.*, 74 So.3d 1173, 1176 (La. 2011) (Louisiana does not require appeal before malpractice claim is filed but defendant may assert failure to mitigate damages as affirmative defense); *Hewitt v Allen*, 118 Nev. 216, 217–218, 43 P.3d 345, 345–346 (Nev. 2002) (Nevada suspends accrual until underlying action including appeal is resolved but does not require client to appeal to state *prima facie* malpractice); *Eastman v. Flor–Ohio, Ltd.*, 744 So.2d 499, 502–504 (Fla. 1999) ; *Segall v Segall*, 632 So.2d 76, 78 (Fla. 1993) (Florida rejects bright line rule requiring complete appellate review as a condition precedent for pursuit of legal malpractice claim but failure to appeal may be deemed abandonment where appeal could prevent injury). The court justified its holding, in part, by noting that "such a rule would force parties to prosecute potentially meritless appeals to their judicial conclusion in order to preserve the right to commence a malpractice action, thereby increasing the costs of litigation and overburdening the court system." *Id.* (citation omitted).[4] Notably, the court also observed that *"[t]he additional time spent to pursue an unlikely appellate remedy could also result in expiration of the statute of limitations on the legal malpractice claim* ... [and that] requiring parties to exhaust the appellate process prior to commencing a legal malpractice action would discourage settlements and potentially conflict with an injured party's duty to mitigate damages." *Id.* (internal citations omitted) (emphasis added). Thus, the court concluded, with one justice dissenting, that the defendants failed to establish as a matter of law that any alleged negligence on their part did not constitute a proximate cause of Grace's damages. Separately, the Appellate Division found that Grace raised a triable issue of fact about whether the continuous representation doctrine applied to toll the statute of limitations as against one of his attorneys.

The Court of Appeals granted leave and affirmed. 24 NY3d 203 (2014). The Court recognized the existing, settled general proposition "that an attorney should be given the opportunity to vindicate him or herself on appeal of an underlying action prior to being subjected to a legal malpractice suit." *Id.* at 209. The issue presented was whether the client-plaintiff who sues in malpractice before attempting such vindication may be foreclosed from recovering upon a finding that the client failed to mitigate damages by foregoing *any* available nonfrivolous appeal or only those appeals that would have been likely to succeed. The Court concluded the "likely to succeed" test was preferable to the "nonfrivolous/meritorious" test in part because the latter "would require virtually every client to pursue an appeal prior to suing for legal malpractice." *Id.* at 211. The Court cited to Nevada, Florida, Louisiana and Utah cases that adopted the same general rule: that voluntary dismissal of an underlying appeal does not constitute "abandonment" of a legal malpractice claim where the appeal would be fruitless (*Hewitt v Allen, supra*) or conversely that the legal malpractice case is abandoned if the client does not obtain a final appellate decision that most likely would have corrected the lawyer's

[4] Grace argued to the Fourth Department that an injured client was not required to pursue all available remedies before proceeding with the legal malpractice action and that adopting the defendants' proposed rule would require the client to pursue costly and timely remedies to conclusion, at which point the statute of limitations for legal malpractice would likely have expired, leaving the client with no remedy at all. *See* Respondent Brief for Grace, 2013 WL 12234729, *18.

curable mistake (*Segall v Segall, supra* [other citations omitted]).[5] The Court not only agreed that the Appellate Division applied the proper standard "with a proximate cause element" but it also cited settled proximate cause cases summarizing how the "but for" causation analysis in legal malpractice requires the client to prove "a case within a case." *Id.* at 338 *citing Davis v Klein*, 88 NY2d 1008, 1009-1010 (1996); *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442-443 (2007); *McKenna v Forsyth & Forsyth*, 28 AD2d 79, 82 (4th Dept. 2001). This further supports the conclusion that *Grace* merely extended traditional proximate cause analysis to underlying civil litigation cases where the defendant-lawyer claimed that the "case within the case" could have been set right by a meritorious appeal.

Plaintiffs' argument is belied by the plain language of *Grace v Law*, its procedural history, the rules adopted by those states cited by *Grace*, the implications of the rule urged by plaintiffs, and another case in which the Court of Appeals has *expressly* pronounced special rules for accrual in legal malpractice cases arising from *criminal* litigation. *Britt v Legal Aid Soc., Inc., supra*, 95 NY2d 443 (2000) (in contrast to malpractice rising from civil litigation, a client's claim against his criminal lawyer for malpractice does not accrue until his conviction is vacated because his innocence is a substantive element of his claim). *Britt* demonstrates how the Court of Appeals expressed a substantive condition precedent to a justiciable claim of legal malpractice arising from a criminal proceeding. No such direction is articulated in *Grace v Law,* which merely clarifies how proximate cause defenses should be applied to cases arising in civil litigation where the client did not pursue an appeal before suing for malpractice. *See Buczek v Dell & Little, LLP*, 127 AD3d 1121, 1123-1124 (2d Dept. 2015) (under *Grace*, client's failure to pursue appeal allowed defendant to establish malpractice did not proximately cause damages).

The latest of plaintiffs' malpractice claims accrued in 2015. The toll expired when Rzepka ceased representation on December 7, 2015. The three-year limitations period for legal malpractice (and for the Judiciary Law §487 claim based on identical vicarious liability theories) against the firms expired, at the latest, on December 8, 2018. The summons and complaint were filed on May 27, 2020, such that the claims against the law firms are untimely and the remaining grounds for relief are academic. Nonetheless, each ground is addressed briefly to permit review.

"When considering a motion pursuant to CPLR 3211(a) (7) to dismiss a complaint for failing to state a cause of action, courts 'must afford the complaint a liberal construction, accept the facts as alleged in the pleading as true, confer on (the) plaintiff the benefit of every possible inference and determine whether the facts as alleged fit within any cognizable legal theory.'" *Graves v Stanclift, Ludemann, McMorris & Silvestri, P.C.*, 174 AD3d 1086, 1087 (3d Dept. 2019) quoting *New York State Workers' Compensation Bd. v Any–Time Home Care Inc.*, 156 AD3d 1043, 1046 (3d Dept. 2017) (internal quotation marks, brackets and citation omitted); *see NYAHSA Servs., Inc., Self–Ins. Trust v. Recco Home Care Servs., Inc.*, 141 A.D.3d 792, 794 (3d Dept. 2016). The favorable treatment accorded a pleading will not save a complaint that fails to assert facts in support of an element of the complaint or if the allegations and their inferences do not allow for an enforceable right of recovery. *Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141-142 (2017). "Regarding the elements of the claim, 'in an action to recover

[5] Some states expressly measure accrual from entry of final judgment, so the limitations period begins to run after the appeals are exhausted. In those states, a client's failure to prosecute an appeal may be cited on a case by case basis as failure to mitigate damages.

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 the plaintiff to sustain actual and ascertainable damages.'" *Id.* quoting *New York State Workers' Compensation Bd. v Program Risk Mgt., Inc.*, 150 AD3d 1589, 1593, (3d Dept. 2017) (internal quotation marks, brackets and citations omitted); and citing *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 (2007).

In contrast to the allegations against Rzepka individually, the complaint contains no specific allegations of active negligence by movants, much less any allegation of deceptive conduct sufficient to state a claim under Judiciary Law §487. The pleading also fails to allege any agency relationship between Rzepka and any firm from May-December 2015, when the acts of malpractice occurred.

A client's claim alleging a lawyer's violation of Judiciary Law §487 is subject to three-year statute of limitations if it is based on same conduct as legal malpractice claim and does not allege distinct damages. *Farage v Ehrenberg*, 124 AD3d 159, 169-170 (2d Dep't 2014); *see Commonwealth Land Title Insurance Company v ANM Funding LLC*, 2016 WL 11263666 (EDNY 2016) (fraud is not duplicative of malpractice, and subject to shorter limitations period, where the alleged intentional misrepresentation is more egregious that mere concealment or failure to disclose one's own malpractice). A claim under Judiciary Law §487 "must be pleaded with particularity and allege 'intentional deceit and damages proximately caused by the deceit.'" *Lavelle-Tomko v Aswad & Ingraham, supra*, 191 AD3d 1142 at *4 quoting *Jean v Chinitz*, 163 AD3d 497 (1st Dept. 2018). *See Betz v Blatt*, 160 AD3d 689, 695 (2d Dept. 2018) (internal citations omitted); *Facebook, Inc. v DLA Piper LLP* (US), 134 AD3d 610, 615 (1st Dept. 2015) (the claim will be dismissed if allegations as to scienter are conclusory and factually insufficient). The statute imposes liability for the making of false statements with scienter, an intent to deceive the court or a party, but does not extend to negligent acts or the filing of papers containing meritless legal arguments. *Bill Birds, Inc v Stein Law Firm*, 35 NY3d 173 (2020).

Movants contend that the statute does not contemplate vicarious liability on innocent or passive parties under *respondeat superior* because the statute imposes criminal penalties for violations. *See id.* (because a violation of the attorney misconduct statute is a crime, courts "must be circumspect to ensure that penal responsibility is not extended beyond the fair scope of the statutory mandate" [internal citation omitted]). The Court is skeptical that the law firms may be held liable under Judiciary Law §487 absent some alleged participation in the violation of the statute. Moreover, the complaint is bereft of any particularized allegation of how any of the movant firms engaged in conduct within the scope of Judiciary Law §487, such that a lack of specific pleading requires dismissal of the third cause of action against them under CPLR 3211 (a) (7).

Likewise, the pleading does not sufficiently state a cause of action for vicarious liability for legal malpractice under *respondeat superior*. "The doctrine of respondeat superior renders an employer vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of employment."

Stevens v Kellar, 112 AD3d 1206, 1207-1208 (3d Dept. 2013) quoting *Burlarley v Wal–Mart Stores, Inc.*, 75 AD3d 955, 956 (3d Dept. 2010) (internal quotation marks and citation omitted). Because the complaint does not allege that any firm employed Rzepka (or had another legally relevant relationship with him) when the alleged acts of malpractice occurred in 2015, it fails to state cause of action against the movant law firms.

However, the complaint is not susceptible to dismissal based upon documentary evidence under CPLR 3211 (a) (1). "A CPLR 3211(a)(1) motion 'may be appropriately granted only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law.'" *Sbarra Real Est., Inc. v Lavelle-Tomko*, 84 AD3d 1570, 1571 (2011) quoting *Jesmer v Retail Magic, Inc.*, 55 AD3d 171, 180 (2d Dept. 2008) and *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002); *see Berardino v Ochlan,* 2 AD3d 556, 557 (2d Dept. 2003). If the complaint asserted timely cognizable claims, plaintiffs would be entitled to discover facts about Rzepka's relationship with each law firm and the basis, if any, to impute Rzepka's negligence to them. The affidavits and other documentary proof related to dissolution of a partnership or Rzepka's alleged independence in practicing do not utterly refute plaintiffs' factual assertions, such that those grounds for dismissal are unavailing. Plaintiffs' allegations concerning agency or apparent agency are conclusory, but plaintiffs would be entitled to discover facts about Rzepka's relationship with prior law firms if the pleading otherwise stated a timely cause of action.

Conclusion

A lawyer's inaction is a substantial factor in causing his client's damages, as required to support a legal malpractice claim, if but for the lawyer's negligence, the client would have succeeded on the merits of the underlying action, or would not have sustained actual, ascertainable damages. *Grace v Law* did not alter the longstanding rules for defining accrual or applying tolls, nor did it create a new substantive element of a cause of action. It merely extended the "but for" analysis routinely applied to litigation-related legal malpractice to clarify that a client who likely could help herself avoid damages resulting from an adverse court order must attempt such appeal. Otherwise, the defendant-lawyer may establish as a defense that the harm sustained by his client was the product of judicial error, not legal malpractice, and that the injury likely would have been relieved by an appellate court. Indeed, *Grace* presented the choice of whether to apply the "but for" analysis to every nonfrivolous, unperfected appeal or only those appeals likely to succeed. The Court expressly chose the standard that is "most efficient and fair for all parties" by declining the invitation to require the client to press every appeal, no matter how unlikely to succeed, or risk a finding that her lack of diligence constitutes a fatal failure to mitigate her injury. In brief, *Grace v Law* was a case about proximate cause, not about accrual.

The rule urged by plaintiffs would require trial courts to decide whether a legal malpractice plaintiff's appeal that *actually failed* was nonetheless "likely to succeed" in hindsight. This would call upon trial courts to question the wisdom of appellate court decisions and apply some undefined subjective test of the reasonableness of the client's assessment that an appeal was "likely to succeed" after the Appellate Division actually held otherwise. It would also prolong litigation of the underlying case, especially where no interlocutory appeal is allowed, perhaps delaying the legal malpractice case even longer. On the other hand, if plaintiffs

had filed the legal malpractice action here before the appeal of Judge Kramer's order was perfected or decided, the malpractice action could have been stayed on consent (because even defendants would have benefited from revival of the Stuyvesant Plaza action) or by order.

Accordingly, for all of the reasons set forth above, it is hereby **ORDERED** that the motions by defendants Osborn Reed & Burke LLP; Bressler and Kunze; Burke Albright Harter & Reddy; and Moyer Russi & Randall for an order pursuant to CPLR 3211 (a) (5), (7) dismissing plaintiffs' complaint as against the moving defendants only is **GRANTED.** All other relief sought but not expressly granted is denied.

SO ORDERED.
ENTER.

Dated: Albany, New York
March 22, 2021

Justin Corcoran
Supreme Court Justice

03/22/2021

Papers Considered: Papers Numbered 9- 65 in the NYSCEF Docket
January 29, 2021 Oral Argument Transcript

This constitutes the Decision/Order of the Court. The Court has uploaded the original Decision/Order to the case record in this matter as maintained by the NYSCEF website whereupon it is to be filed and entered by the Office of the Albany County Clerk. Counsel for defendant Osborn Reed & Burke, LLP shall comply with the applicable provisions of CPLR 2220 and §202.5b(h)(2) of the Uniform Rules of Supreme and County Courts relating to service and notice of entry of the filed document upon all other parties to the action/proceeding, whether accomplished by mailing or electronic means, whichever may be appropriate depending on the filing status of the party.