

**Templeton v Roach**

2022 NY Slip Op 35018(U)

June 28, 2022

Supreme Court, Westchester County

Docket Number: Index No. 58153/2021

Judge: Alexandra D. Murphy

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER  
PRESENT: HON. ALEXANDRA D. MURPHY, J.S.C.**

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ADAM TEMPLETON,

Plaintiff,

– against –

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MATTHEW N.L. ROACH, THE LAW OFFICES OF  
MATTHEW N.L. ROACH P.C., JM&R FUNDING LLC,  
STEINVURZEL & LEVY LAW GROUP, ALEXANDER M.  
LEVY,

**Motion Seq. 3, 4, 5 & 6**

**DECISION & ORDER**

Defendants.  
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In this action to recover damages for, inter alia, legal malpractice, (1) the defendants Steinvurzel & Levy Law Group and Alexander M. Levy move to dismiss the complaint pursuant to CPLR 3211(a)(1) & (7) (motion seq. 3); (2) the defendants Matthew N.L. Roach and The Law Offices of Matthew N.L. Roach P.C. move to dismiss the complaint pursuant to CPLR 3211(a)(1)(3) & (7) (motion seq. 4); and (3) the plaintiff cross-moves to amend the complaint pursuant to CPLR 3025(b) (motion seq. 5 & 6):

**Papers Considered**

**NYSCEF Doc. 42-77; 92-96**

1. Notice of Motion/Affirmation of Jonathan B. Isaacson, Esq./Exhibits A-J/Affidavit of Alexander M. Levy, Esq.;
2. Notice of Motion/Affirmation of Shari Sckolnick, Esq./Exhibits A-F;
3. Notice of Cross-Motion/Affirmation of Charles Wallshein, Esq./Exhibits A-D;
4. Notice of Cross-Motion/Affirmation of Charles Wallshein, Esq./Exhibits A-D;
5. Memorandum of Law in Opposition and Reply;
6. Affirmation of Jonathan B. Isaacson, Esq. in Opposition to the Cross-Motion and in Reply.

**Factual and Procedural Background**

The plaintiff Adam Templeton commenced this action against the defendants Matthew N.L. Roach, the Law Offices of Matthew N.L. Roach (hereinafter collectively referred to the Roach defendants), JM&R Funding, LLC (JM&R), Steinvurzel & Levy Law

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Group and Alexander M. Levy (collectively referred to as S&L) seeking damages for legal malpractice based upon counsels' failure to appear at a hearing in an underlying foreclosure action.

#### *The Foreclosure Action*

In August 2010, JM&R issued a loan to the non-party Paula Atkinson Fuller in the amount of \$265,000. The note was secured by a mortgage on the property located at 180-31 Linden Blvd. in Queens County owned by Fuller. The plaintiff entered into a participation agreement with JM&R by which he became an investor and participant in the Fuller loan.

Fuller defaulted on the mortgage payments. JM&R retained the Roach defendants to represent it in a foreclosure action commenced in Queens County entitled *JM&R Funding, LLC v. Atkinson-Fuller, Index No. 3308/2012*. The Roach defendants retained S&L as counsel to assist with the foreclosure action.

Within the foreclosure action, S&L moved for a judgment of foreclosure and sale on behalf of JM&R. Fuller opposed the motion and cross-moved to dismiss the foreclosure action based upon improper service. In an order dated November 26, 2018, the Supreme Court, Queens County (Taylor, J.) set the foreclosure action down for a Traverse hearing. Neither the Roach defendants nor S&L appeared at the adjourned date for the hearing. As a result, the same Court dismissed the foreclosure action. S&L thereafter commenced a second foreclosure action on behalf of JM&R, which is pending in Queens County.

#### *This Legal Malpractice Action*

The plaintiff commenced this action with the filing of a summons and complaint and a first amended complaint asserting six causes of action. The first, second and sixth causes of action are against JM&R. The third cause of action asserts a legal malpractice claim against the Roach defendants. The fourth cause of action is asserted against the Roach defendants and S&L alleging that they were negligent for failing to appear at the Traverse hearing. The fifth cause of action seeks punitive and treble damages against S&L.

#### *Motions*

The S&L defendants move to dismiss the complaint pursuant to CPLR 3211(a)(1) & (7). Levy submits an affirmation averring that the S&L defendants never represented the plaintiff in any legal matter referred to in the complaint, never entered into a retainer agreement with the plaintiff, never issued an invoice for legal services to the plaintiff, never communicated with the plaintiff and had no knowledge of the plaintiff's alleged investment.

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The Roach defendants move to dismiss the complaint pursuant to CPLR 3211(a)(1)(3) & (7). The Roach defendants similarly argue that they have no attorney-client privilege or privity-like relationship with the plaintiff.

The plaintiff opposes the motions and filed two separate cross-motions for leave to amend the complaint pursuant to CPLR 3025(b) asserting actual damages against the defendants.

### Discussion

A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted only where the documentary evidence utterly refutes the complaint's factual allegations, conclusively establishing a defense as a matter of law (*Gorbatov v Tsirelman*, 155 AD3d 836 [2d Dept 2017] citing *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Cavaliere v 1515 Broadway Fee Owner, LLC*, 150 AD3d 1190, 1191 [2d Dept 2017]).

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, "the court must liberally construe the complaint, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Minovici v Belkin BV*, 109 AD3d 520 [2d Dept 2013]; see *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Treeline 990 Stewart Partners, LLC v RAIT Atria, LLC*, 107 AD3d 788, 791 [2d Dept 2013]).

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 a plaintiff to sustain actual and ascertainable damages (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007] citing *McCoy v Feinman*, 99 NY2d 295, 301-302 [2002]). To establish causation, a plaintiff must show that they 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]).

"New York courts impose a strict privity requirement to claims of legal malpractice; an attorney is not liable to a third party for negligence in performing services on behalf of his client" (*Fed. Ins. Co. v N. Am. Specialty Ins. Co.*, 47 AD3d 52, 59 [1st Dept 2007] quoting *Lavanant v Gen. Acci. Ins. Co.*, 164 AD2d 73 [1st Dept 1990]). "[A]bsent an attorney-client relationship, a cause of action for legal malpractice cannot be stated" (*Fed. Ins. Co. v N. Am. Specialty Ins. Co.*, 47 AD3d at 59; *Moran v Hurst*, 32 AD3d 909, 910-911 [2d Dept 2006] [holding that to recover damages for legal malpractice, a plaintiff must prove, inter alia, the existence of an attorney-client relationship]).

Here, the documentary evidence utterly refutes the allegations in the complaint and conclusively establishes as a matter of law that there is no attorney-client relationship between the Roach defendants and the plaintiff or S&L and the plaintiff. While the plaintiff may have been an investor in JM&R or in JM&R's loan to Fuller, such status does not confer an attorney-client relationship. Indeed, a partnership or corporation's attorney

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represents the partnership or the corporate entity, not the shareholders or individual partners (see *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553 [2009]). Furthermore, for the same reasons, the complaint fails to state a cause of action for legal malpractice against the Roach defendants or S&L.

The plaintiff's contention that an attorney-client relationship is established because he paid the legal fees on behalf of JM&R is without merit because as an attorney-client relationship does not depend on the payment of fees (see *Moran v Hurst*, 32 AD3d 909 [2d Dept 2006]). Furthermore, neither the first amended complaint nor the proposed second amended complaint identify any purported negligent misrepresentation made by the legal defendants to the plaintiff to support any claim of near privity or negligent misrepresentation (see *Zinnanti v 513 Woodward Ave. Realty, LLC*, 105 AD3d 736 [2d Dept 2013]).

With respect to the plaintiff's motions to amend the complaint, it is well settled that leave to amend a pleading should be freely given if the proposed amendment is not palpably devoid of merit (see *Spodek v Neiss*, 104 AD3d 758 [2d Dept 2013]). Here, the proposed amendment asserts alleged actual damages and is palpably insufficient to establish an attorney-client relationship among the parties.

The plaintiff's remaining contentions have been considered by the Court and found to be without merit.

Accordingly, it is

**ORDERED** that the motion of the defendants Steinvurzel & Levy Law Group and Alexander M. Levy to dismiss the complaint pursuant to CPLR 3211(a)(1) & (7) is GRANTED, and the complaint is DISMISSED insofar as asserted against them (motion seq. 3); and it is further

**ORDERED** that the motion of the defendants Matthew N.L. Roach and The Law Offices of Matthew N.L. Roach P.C. to dismiss the complaint pursuant to CPLR 3211(a)(1)(3) & (7) is GRANTED, and the complaint is DISMISSED insofar as asserted against them (motion seq. 4); and it is further

**ORDERED** that the plaintiff's cross-motions to amend the complaint pursuant to CPLR 3025(b) are DENIED (motion seq. 5 & 6).

Counsel for all remaining parties shall appear virtually for a Settlement Conference on **September 22, 2022 at 10:00 a.m.** Counsel will receive a TEAMS link prior to the conference from the part clerk Brenda Jordan-Williams.

Dated: White Plains, New York  
June 28, 2022

  
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HON. ALEXANDRA D. MURPHY, J.S.C.

H: CIVIL ALPHABETICAL MASTER LIST/Templeton v. Roach