SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **34M**

Justice

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INDEX NO. 101006/2015

MELANIE ENGLESE and STEVEN SISSKIND,

MOTION DATE 06/07/2022

Plaintiffs,

MOTION SEQ. NO. 007

- v -

STEVEN SLADKUS, ESQ., and WOLF, HALDENSTEIN, ADLER, FREEMAN & HERZ LLP,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 101, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 185, 187, 188, 189, 190, 191, 193

were read on this motion to/for SUMMARY JUDGMENT (BEFORE JOINDER).

Plaintiffs, Melanie Englese (Englese) and Steven Sisskind (collectively, plaintiffs), commenced this action against Steven Sladkus, Esq., and Wolf, Haldenstein, Adler, Freeman & Herz LLP (collectively, defendants), stemming from defendants legal representation of plaintiffs in another matter. Defendants now move pursuant to CPLR 3212 for summary dismissal of plaintiffs' claims sounding in legal malpractice and fee disgorgement. The motion is opposed. For the following reasons, the motion is denied.

In August 2006, plaintiffs purchased a condominium in Place 57 condominium, located at 207 E 57th St, New York, New York, for $1,725,000. When they moved in, plaintiffs allegedly discovered that the condominium contained "toxic mold conditions, resulting from defects in construction and maintenance, which ultimately forced Plaintiffs to move out of their home, and which cost them millions of dollars in damages" (NYSCEF doc. no. 150, verified complaint at ¶ 2). Plaintiffs and their children vacated the apartment in January 2009 and moved elsewhere. Plaintiffs attempted to resolve their dispute with the building and recover their asserted losses until August 2009, when they commenced the underlying action, *Englese v 205-209 East 57th St. Assoc., LLC* (Index No. 112012/2009), seeking $2 million in compensatory and $6 million in punitive damages. The original defendants were the building's sponsor and board of managers, but ultimately defendants brought in Bovis Lend Lease LBM Inc. as third-party defendant. Bovis commenced a second third-party action against Epic Mechanical Contractors, LLC., and plaintiffs' subrogee commenced an action against the sponsor and Bovis.

Around June 2010, plaintiffs, who originally had other counsel, met with defendant Steven Sladkus, Esq. (Sladkus) and other members of his firm, defendant Wolf, Haldenstein, Adler, Freeman & Herz LLP (Wolf Haldenstein). Plaintiffs contend that defendants,

> "specifically promised and, thereafter, repeatedly reassured Plaintiffs that Defendants would take all steps necessary to amend and/or supplement the summons and complaint to add additional defendants, including, but not limited to, the principals of the Sponsor and The Clarett Group, other affiliates of the Sponsor and The Clarett Group, and other entities associated with the design, construction and management of the Building, and additional causes of action against these defendants, and/or, if necessary, to commence a new action to name additional defendants or causes of action"

(*id.* at ¶ 50).

Plaintiffs allege that defendants repeatedly promised and assured them that they would investigate the matter thoroughly and bring claims against all responsible parties. Around July 2010, defendants took over as plaintiffs' attorneys.

Despite their assurances, defendants did not add additional responsible parties or causes of action in the underlying complaint. Further, plaintiffs state that defendants did not assess the financial viability of the sponsor and, by October 2011, the sponsor "had . . . already sold off the last of the retail space in the [apartment building]" and had "become a mere shell company with little to no assets from which Plaintiffs could collect to satisfy any judgment" (*id.* at ¶¶ 67, 68).

In March 2012, the parties to the underlying lawsuit attended a mediation, where the underlying defendants offered to buy back plaintiffs' apartment for $1.725 million, its initial purchase price, plus an additional $183,000. The complaint asserts that plaintiffs initially rejected the offer, but that they were forced to accept it because of defendants' failure to add critical parties and causes of action and to ascertain the liquidity of the sponsor. They assert that although they wanted more time to consider the offer, defendants "unduly pressured Plaintiffs to accept the low[-]ball settlement offer" (*id.* at ¶ 78) by, among other things, misrepresenting the market value of the apartment, telling them that the defendants had no assets and they would not recover anything if they did not accept the settlement, informing them that it was too late to add the proposed new parties, and threatening to withdraw as counsel in the middle of the negotiations if they rejected the offer. Around six months after the settlement, the sponsor sold the apartment for $2.4 million.

Plaintiffs started this action in June 2015, when they served a summons with notice on defendants. Plaintiffs filed their verified complaint on October 15, 2015. Initially, the complaint asserted five causes of action. However, defendants moved for pre-answer dismissal of the complaint. In her April 25, 2018, order, Justice Carmen Victoria St. George granted motion sequence 001 in part, and dismissed the second, third, and fourth causes of action (NYSCEF doc. no. 178). Thus, only the first cause of action, for legal malpractice, and the fifth cause of action, for fee disgorgement, remain.

In addition, in the order, the court converted the remainder of the motion to one for summary judgment, and it instructed the parties to address these final causes of action after the

conclusion of discovery.[1] On January 19, 2022, plaintiffs filed the note of issue and on January 31, 2022, they filed a demand for a jury trial (NYSCEF doc. nos. 137, 138). Defendants assert that, since the note of issue was filed, the parties have completed the discovery allowed in the interim order.[2]

Defendants argue that a legal malpractice claim asserts that (1) the attorney's conduct was negligent, measured by the standards applicable to members of the legal profession, (2) the negligence proximately caused the loss, and (3) plaintiff sustained actual damages (citing *Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 170 AD2d 108, 114 [1st Dept 1991], *affd* 80 NY2d 377 [1992]). They note that, in determining whether malpractice occurred, the court does not hold the attorney-defendant to the highest legal standard. Instead, she or he must be "competent and qualified" (NYSCEF doc. no. 182 at 5 [quoting *Harris v Barbera*, 163 AD3d 534, 535 (2d Dept 2018) (internal quotation marks and citation omitted)]). Further, defendants point out that attorneys may choose among more than one possible course of action, and that a client's dissatisfaction with the attorney's choice is insufficient to show malpractice. Finally, they contend that a client's dissatisfaction with a settlement is only a viable basis for a claim if the attorney's mistakes compelled an unsatisfactory settlement.

As for the first prong, defendants argue that plaintiffs have not shown negligence. They argue that their failure to add the Clarett Group and Veronica Hackett as defendants did not damage plaintiffs and also did not damage the settlement because there were no viable causes of action against these parties. They argue that the purchase agreement parties did not impose a duty on either Clarett Group or Hackett.[3] Moreover, they point out that they were going to add Hackett as a defendant if there was no settlement before JAMS (NYSCEF doc. no. 169; NYSCEF doc. no. 180, ⁋⁋, 4-9, 11).

Also, defendants contend that plaintiffs did not sign the settlement agreement under duress. Instead, they agreed to mediate before Shelley Rossoff Olsen of JAMS. The March 6, 2012, mediation lasted between 10 and 12 hours. Citing their own statement of material facts, defendants contend that plaintiffs fully understood they did not have to settle the lawsuit and they could continue to trial if they rejected the settlement (NYSCEF doc. no. 181). They note that plaintiffs accepted the sponsor's offer to buy back their "defective, flood-damaged, mold-

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[1] As a result of motion sequence number 003, a third defendant, Schwartz, Sladkus, Reich, Greenberg & Atlas LLP, was removed from the action and the caption (NYSCEF doc. no. 101).
[2] Defendants have moved separately to strike the note of issue, in motion sequence number 006 (NYSCEF doc. no. 139). Essentially, that motion notes that defendants have yet to file an answer, and therefore if the case moves forward the note of issue must be vacated and defendants must be able to file their answers. In addition, they assert that only limited discovery has transpired, and that the remainder of motion sequence 001 – the converted summary judgment motion – has not been briefed or decided. The latter argument is mooted by this decision.
[3] Defendants also contend that no claim arises against the sponsor under General Business Law § 349 because the attorney general has exclusive jurisdiction to prosecute under this law (citing *Thompson v Parkchester Apts. Co.*, 271 AD2d 311, 311 [1st Dept 2000]; *see Von Ancken v 7 E. 14 L.L.C.*, 171 AD3d 440, 441 [1st Dept 2019]). However, it does not appear that plaintiffs rely on the General Business Law.

infested and uninhabitable Apartment" for their original purchase price and to pay them an additional $183,000 (NYSCEF doc. no. 182, mem in support at 7). They state that they had recommended that defendants accept the offer, but that they "advised that the decision of whether to accept the offer was ultimately up to Plaintiffs" (NYSCEF doc. no. 181 at ¶ 63). They state that they did not threaten to quit in the middle of the mediation, but they stated that if plaintiffs did not settle the case, defendants would not continue to work for them unless they began making payments on their outstanding balance (*see id.*, ¶¶ 64-65; NYSCEF doc. no. 179, Sladkus aff at ¶¶ 15-16). Further, they cite to *767 Third Ave. LLC v ORIX Capital Mkts., LLC* (26 AD3d 216, 218 [1st Dept 2006]), in support of their argument that they had the legal right to demand payment and to withdraw as counsel if plaintiffs did not pay them. Defendants state that plaintiffs were aware of all their options, including the option to hire new counsel, when they voluntarily settled the case (citing *Reches v Sack & Sack, LLP*, 60 Misc 3d 1216 [A], 5 [Sup Ct, Kings County 2018]).

In further support of this argument, defendants point to Englese's statement at deposition that Sladkus told her that she could go to trial, but she would have to find another lawyer to represent her and her husband (NYSCEF doc. no. 148, p 240 lines 12-14). They also note that plaintiffs voluntarily participated in the mediation. They argue that their own statement of the material facts establishes that plaintiffs voluntarily settled the underlying lawsuit (NYSCEF doc. no. 181, ¶¶ 56-70).

In addition, defendants contend that after plaintiffs signed the agreement, defendants state, plaintiffs were eager to close on the apartment sale, further indicating their satisfaction with the settlement. Not only that, but they never repudiated the settlement and they accepted its benefits. Instead, after they signed the settlement agreement, plaintiffs urged defendants to finalize the agreement and close on the sale. Defendants note that during this period, plaintiffs "never raised any issues in writing about the settlement" (NYSCEF doc. no. 181 at ¶ 72). According to defendants, plaintiffs also did not express in writing that they were dissatisfied with defendants' work on the case. Additionally, they contend that plaintiffs cannot establish that they settled under duress because they waited a few years to file their lawsuit (citing *Kaminsky v Herrick, Feinstein LLP*, 59 AD3d 1, 13 [1st Dept 2008] [plaintiff's claim for rescission, based on the argument that he agreed to pay another party's legal fees under duress, was barred because he "implicitly ratified the agreement by waiting three years to seek its rescission"]).

As for the second prong, defendants allege that plaintiffs cannot establish that, but-for any negligence on the part of defendants, plaintiffs would have had a better outcome. Regardless of their failure to determine whether the sponsor was solvent, they argue, the sponsor paid plaintiffs $1,725,000, along with transfer taxes, closing costs, and $100,000. They additionally contend that their failure to amend the complaint in the underlying action to add the proposed additional parties did not harm plaintiffs because: (1) plaintiffs do not show a causal connection between this failure and their inability to attain a higher settlement or to gain a higher award at trial; and (2) the proposed new defendants did not owe a duty to plaintiffs. Moreover, defendants state that they informed plaintiffs they would add the new defendants if the case did not settle at mediation. Finally on this point, defendants assert that plaintiffs have adduced no evidence that they would have received a higher settlement but-for any alleged negligence. Defendants state

that plaintiffs' arguments on this issue are entirely speculative. Instead, they contend that plaintiffs merely were dissatisfied with the settlement after-the-fact.

According to defendants, plaintiffs also cannot satisfy the third prong. Specifically, they allege that plaintiffs cannot show that their failure to investigate the solvency of the sponsor was harmful. They contend that because the sponsor funded the $1,725,000 buyback and paid plaintiffs an additional $100,000, defendants' alleged failure did not result in damages.

As a final point, defendants seek dismissal of the cause of action for disgorgement. Specifically, they contend that because the legal malpractice claim has no merit, the disgorgement cause of action necessarily fails as well.

In opposition, plaintiffs note that defendants, as movants, must submit evidence that conclusively establishes their defense (citing, *e.g., Fricano v Law Offs. Of Tisha Adams, LLC*, 194 AD3d 1016, 1017 [2d Dept 2021]). They also must refute every element of plaintiffs' claim (citing, *e.g.*, *Rupert v Gates & Adams, P.C.*, 48 AD3d 1221, 1222 [4th Dept 2008]; *see Anisman v Nissman*, 117 AD3d 657, 657 [2d Dept 2014]). Further, plaintiffs state that, to the extent that defendants have raised credibility issues, such issues are best left to the factfinder at trial (citing, *e.g.*, *Hutchings v Yuter*, 108 AD3d 416, 417 [1st Dept 2013]). More specifically, plaintiffs allege that defendants' failure to provide an expert opinion is fatal to the summary judgment motion (citing *Cosmetics Plus Group, Ltd. V Traub*, 105 AD3d 134, 141 [1st Dept 2013]). They quote *Suppiah v Kalish* (76 AD3d 829, 832 [1st Dept 2010] [citations omitted]), which explains that the issues in a legal malpractice case,

> "are not part of an ordinary person's daily experience, and to prevail at trial, plaintiff will be required to establish by expert testimony that defendant failed to perform in a professionally competent manner. As this is a motion for summary judgment, the burden rests on the moving party—here, defendant—to establish through expert opinion that he did not perform below the ordinary reasonable skill and care possessed by an average member of the legal community. Also, defendant was required, on this motion, to establish through an expert's affidavit that even if he did commit malpractice, his actions were not the proximate cause of plaintiff's loss. By failing to submit the affidavit of an expert, defendant never shifted the burden to plaintiff."

Plaintiffs state that, because defendants did not submit an expert affidavit, they have not shown that they complied with the applicable standard of care or that any alleged malpractice did not proximately cause the loss.

Moreover, plaintiffs argue that the evidence defendants did submit – including the affidavits of the attorneys who worked on the case – is unpersuasive. Defendants rely, in part, on the statement in the Sladkus affidavit that "[t]he settlement offer was very good and I recommended to Plaintiffs that they accept it" (NYSCEF doc. no. 187, *14 [quoting NYSCEF doc. no. 179, ¶ 13]). The affidavit of Jared Paioff (NYSCEF doc. no. 180), who also worked on plaintiffs' case, merely states: (1) that Paioff drafted an amended complaint that he did not file;

and (2) that plaintiffs did not object when Paioff indicated that he would not file the new pleading unless and until the mediation did not result in a settlement. According to plaintiffs, these affidavits are conclusory and self-serving and therefore insufficient to establish defendants' right to relief (citing, *e.g.*, *Aur v Manhattan Greenpoint Ltd.*, 132 AD3d 595, 595 [1st Dept 2015]). Due to the above, plaintiffs argue that defendants have not satisfied their burden of proof (citing *Suppiah*, 76 AD3d at 832). Therefore, they are not required to oppose the motion.

Plaintiffs also state that they have the right to sue for malpractice notwithstanding their alleged ratification of the agreement, their failure to repudiate it afterwards, and their purported tardiness in commencing the lawsuit. They distinguish *Kaminsky*, upon which defendants rely. In *Kaminsky*, the plaintiff ratified a legal representation agreement when he continued to use the defendant as counsel for three years, at which point he rescinded the agreement (*see Kaminsky*, 59 AD3d at 13). Further, plaintiffs state that they accepted the settlement agreement because, given the negligence and misrepresentations of defendants, they believed it was the best deal possible for them (citing, *e.g.*, *Bernstein v Oppenheim & Co.* (160 AD2d 428, 430 [1st Dept 1990]). Plaintiffs distinguish several cases upon which defendants rely, noting that these cases were not ones for legal malpractice. Additionally, plaintiffs argue that defendants merely point to purported gaps in plaintiffs' proof, rather than demonstrate the merits of their own defense (citing, *e.g.*, *Quantum Corporate Funding, Ltd. v Ellis*, 126 AD3d 866, 871 [2d Dept 2015]). Plaintiffs suggest that these piecemeal efforts fail because they do not recognize that the individual allegations were aspects of defendants' overall negligence and cannot be evaluated independently.

Even if the court rejects all of plaintiffs' arguments and finds that the burden of proof has shifted, plaintiffs state that they have satisfied their burden through the Englese affidavit (NYSCEF doc. no. 188) and through expert affidavits. Citing *Greene v Payne, Wood & Littlejohn* (197 AD2d 664, 666 [2d Dept 1993]), plaintiffs note that the issue of legal malpractice generally raises a question for the jury. Plaintiffs state that this court must reject defendants' but-for argument, as plaintiffs have raised a triable issue regarding proximate cause. They state that it is defendants' burden on a summary judgment motion to establish that there was no viable cause of action against Clarett and Hackett. Further, they note that defendants' current legal argument that they could not have added the proposed parties and causes of action contradicts their earlier assurances to plaintiffs that defendants would make at least some of the changes if the case did not settle. Plaintiffs' experts have stated that the failure to properly assess the market value of the apartment is malpractice, and plaintiffs contend this is sufficient to raise an issue as to whether this failure was "a proximate cause" for plaintiffs' damages (citing *Barnett v Schwartz*, 47 AD3d 197, 204-205 [2d Dept 2007]; *see Global Bus. Inst. v Rivkin Radler LLP*, 101 AD3d 651, 652 [1st Dept 2012]).

The first of plaintiffs' expert affidavits is that of Thomas A. Torto, an attorney with 35 years of practical legal experience (NYSCEF doc. no. 189). Torto opines that defendants owed plaintiffs the duty to conduct due diligence regarding their apartment's value before they advised plaintiffs to settle the underlying lawsuit. He states that it was negligent of Sladkus to tell plaintiffs the settlement offer was a good one without either valuing the apartment or advising plaintiffs to obtain a valuation. Moreover, "with a reasonable degree of legal certainty, [Sladkus] failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member

of the legal profession and departed from good and accepted attorney practice" (*id.* at ¶ 9) when he advised them "to include an asset in a settlement without first ascertaining the present [-]day monetary value of the asset" (*id.* at ¶ 10). Further, he states that if the actual valuation was $2.4 million,[4] defendants' departure from the accepted practice proximately caused plaintiffs' financial loss.

Torto also opines that defendants improperly pressured plaintiffs into settling the case. According to Torto, at the mediation, Sladkus made "materially misleading" statements both about the sponsor's alleged insolvency and about "the expiration of the Statute of Limitations" against the parties that defendants had not added to the lawsuit (*id.* at ¶ 12). Based on his review of the documents, Torto opines that the statute of limitations had not expired, and that defendants did not investigate the solvency of the sponsor. This, too, was a departure from good and accepted attorney conduct. This pressure, coupled with the misrepresentations, also "result[ed] in actual and ascertainable damages" (*id.* at ¶ 13).

The second affidavit is that of Ronald M. Gold, a State certified general real estate appraiser (NYSCEF doc. no. 190). He submits a copy of his appraisal report (*id.* at **2-42), information about his credentials (*id.* at **43-55), and articles attesting to the value of apartments in the area during and around the period in question (*id.* at **56-86). Gold did not personally inspect the building or the apartment on the settlement date or thereafter, but he noted its condition and deducted $68,350 as the estimated cost of the remaining repairs. He considered eight comparable unit sales that occurred in 2011 and 2012 in the building, adjusting the sales prices based on the location of the apartments, the views, and other factors. His conclusion that the value of the apartment, after the deduction, would have been around $2,374,475 when the parties signed the settlement agreement.

Finally, plaintiffs note that defendants argue the disgorgement cause of action must be dismissed because there is no merit to the legal malpractice claim. However, plaintiffs contend that there is merit to the malpractice cause of action. Accordingly, they argue that the motion should also be denied as it relates to the disgorgement claim.

In their reply, defendants assert that plaintiffs improperly have asserted a "new" argument – that defendants should have appraised the apartment or told plaintiffs to get an appraisal. They also argue that Gold's appraisal is unreliable because he conducted it years later, without viewing the apartment or the building, and because he described the apartment as "slightly worn." Defendants note that, instead, plaintiffs testified and otherwise presented evidence that the apartment was uninhabitable.

They argue that plaintiffs' response to their statement of facts (NYSCEF doc. no. 191) was paltry and inadequate and lacked ample citations, and therefore the court should exercise its discretion and accept the allegations in defendants' statement as true (citing, *e.g.*, *EBC I, Inc. v Goldman Sachs & Co.*, 91 AD3d 211, 220 [1st Dept 2011]). They claim that the real reason plaintiffs settled was not that they were under duress, but that they could not afford to retain defendants as counsel any longer. They argue that the statements regarding coercion in the

[4] Torto states he was advised that this was the value.

Englese affidavit are conclusory and self-serving and they contradict the statements in her deposition, and therefore the court should disregard them (citing *Harty v Lenci*, 294 AD2d 296, 298 [1st Dept 2002] [where moving party properly supports its summary judgment motion, an affidavit by the opposing party that contradicts its sworn testimony is not sufficient to defeat the motion]). They contend that they need not submit an expert affidavit because the factfinders can evaluate plaintiffs' claims based on their ordinary experience (citing, *e.g.*, *Boye v Rubin & Bailin, LLP*, 152 AD3d 1, 9 [1st Dept 2017] [where court in underlying litigation had ruled on whether claims were time-barred, there was no need to present expert affidavits on this issue]).

In addition, defendants state that expert affidavits are only required where specialized legal matters are at issue. In support, they cite cases which refer to the complexities of the matters at hand in those cases. Defendants also contend that plaintiffs' experts only address a new argument in their statements and therefore the affidavits should be disregarded. Further, they state that they had no obligation to evaluate the property before advising plaintiffs that the settlement would yield more money than they could make if they sold the property. They contend that the cases upon which plaintiffs rely are distinguishable because they hold that attorneys must conduct due diligence when they represent clients in connection with the purchase of property.

Also, defendants contend that plaintiffs have not adequately rebutted defendants' position that there was no duress. They state that because they had the right to withdraw as counsel, their alleged threat to do so cannot constitute duress. They claim that plaintiffs have abandoned the theory that defendants were negligent because they did not investigate the sponsor's solvency and they did not add more parties and causes of action to the lawsuit. They state that plaintiffs have not shown that the addition of the Clarett Group and Hackett to the underlying action would have benefited them. They reiterate that plaintiffs have not shown damages or proximate cause.

The Court has carefully considered the arguments of the parties, and, after such consideration, it concludes that defendants have not satisfied their prima facie burden. In seeking summary judgment in a legal malpractice case, the moving party "must present evidence establishing, prima facie, that it did not breach the duty to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession, or that the plaintiff did not sustain actual and ascertainable damages as a result of such deviation" (*Lieberman v Green*, 190 AD3d 715, 716 [2d Dept 2021] [internal quotation marks and citation omitted]). Plaintiffs are correct that here, where defendants are seeking summary judgment, they must submit expert testimony in support of their motion (*see Suppiah*, 76 AD3d at 832; *e.g.*, *Orchard Motorcycle Distribs., Inc. v Morrison Cohen Singer & Weinstein, LLP*, 49 AD3d 292, 292-293 [1st Dept 2008]).

The conclusory assertion by defendants that they were not negligent is not enough to support a summary judgment application (*see Aur*, 132 AD3d at 595). "Where the only support for a defendant's motion for summary judgment dismissing a cause of action for legal malpractice consists of the defendant's 'conclusory, self-serving statements with no expert or other evidence which would tend to establish, prima facie, that [defendant] did not depart from the requisite standard of care," the burden does not shift to plaintiff to rebut the defendant's case (*Drazek v Napoli, Bern, Ripka, LLP*, 23 Misc 3d 11, 13 [App Term, 2d Dept 2009], quoting

Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo, 259 AD2d 282, 284 [1st Dept 1999]; *see Nuzum v Field*, 106 AD3d 541, 541 [1st Dept 2013] [However, plaintiff's failure to provide an expert affidavit as to the standard of care and professional competence in this area, to rebut defendant's expert affidavit, is fatal to her claim]).

The Court rejects defendants' position that the issues at hand are so ordinary that expert testimony is not necessary to establish the lack of negligence. This exception is a limited one that generally applies in "cases where an attorney ignores a well-established filing or notice requirement or the attorney breaches an express promise to achieve a particular result" (*Schlenker v Cascino*, 39 Misc 3d 1216 [A] [Sup Ct, Albany County 2013]; *see S&D Petroleum Co. v Tamsett*, 144 AD2d 849, 850 [3d Dept 1988] [allegation that defendant did not file a required security agreement was sufficient absent expert testimony]). In *Northrop v Thorsen* (46 AD3d 780, 782 [2d Dept 2007]), expert testimony was not needed to show that an attorney's noncompliance with a clear requirement of the Worker's Compensation Law was malpractice. The other cases upon which defendants rely are also distinguishable. In *Board of Mgrs. of Bridge Tower Place Condominium v Starr Assoc. LLP* (111 AD3d 526, 527 [1st Dept 2013]), the court found that a prior ruling on the issue in question negated need for expert testimony (*see also 767 Third Ave.*, 26 AD3d at 218 [refusing to void contract where defendant had challenged plaintiffs' right to an assignment, because plaintiffs had no legal right to the assignment in question]; *Serhofer v Groman & Wolf* (203 AD2d 354, 354 [2d Dept 1994] [contract case where expert testimony was unnecessary]).

Here, plaintiffs argue in part that defendants' legal advice before and during the settlement was malpractice. "This court is skeptical . . . that defendants' legal position in the underlying action . . . are part of an ordinary person's daily experience" (*Flanagan Law, PLLC v Perno*, 70 Misc 3d 1201 [A] [Sup Ct, New York County 2020] [internal quotation marks and citation omitted]). To the extent that defendants cite cases in which more complex claims required expert testimony, such cases are not persuasive. Those cases do not state that – or stand for the proposition that – any case less complicated does not need expert testimony.

Even if the court were to conclude that defendants did not have to submit expert testimony, it would deny summary judgment. Defendants rely heavily on the fact that plaintiffs voluntarily settled the underlying case and never challenged the settlement. However, "[a] claim for legal malpractice is viable, despite settlement of the underlying action, if it is alleged that settlement of the action was effectively compelled by the mistakes of counsel" (*Bernstein v Oppenheim & Co., P.C.*, 160 AD2d 428, 430 [1st Dept 1990] [evaluating CPLR § 3211 motion]; *see Home Ins. Co. v Liebman, Adolf & Charme*, 257 AD2d 424, 424 [1st Dept 1999]). Additionally, plaintiffs contend that defendants negligently or deliberately misrepresented the apartment's value and misstated that the statute of limitations had expired with respect to the proposed additional defendants, and that these misrepresentations led plaintiffs to settle the case. Even if defendants are correct that they were not required to determine the apartment's value, there is an issue of fact. According to plaintiffs, defendants made affirmative representations to plaintiffs regarding the value of the apartment even though they had not done the necessary research. These allegations also support a legal malpractice claim (*see Polanco v Greenstein & Milbauer, LLP*, 150 AD3d 449, 450 [1st Dept 2017]; *Tuppatsch v LoPreto*, 137 AD3d 608, 608

[1st Dept 2016]). Plaintiffs' willingness to mediate and their awareness of their other options also does not entitle defendants to summary judgment.

Contrary to defendants' position, their threat to withdraw their representation can be the basis of a malpractice cause of action. *Bei Yang v Pagan Law Firm, P.C.* (75 Misc 3d 757 [Sup Ct, NY County 2022]), on which defendants rely for another point, supports plaintiffs' position here. In *Bei Yang*, the court there found that the plaintiff's allegation that attorneys coerced the settlement by threatening to withdraw from representation described an ethical breach and thus established an element of the malpractice claim. However, the court granted summary judgment dismissing the case due to the plaintiff's failure to show damages, which is another requirement (*id.*).

Nor can defendants credibly argue that plaintiffs waived their challenge by waiting so long to commence their lawsuit. It is undisputed that plaintiffs filed the case in a timely fashion. At her deposition, Englese stated that she filed the lawsuit one day before the statute of limitations expired because,

> "I'm a procrastinator. I have four kids. I work day and night. And for me it took me to the 11th hour to get the courage, the strength. And I filed pro se by myself. And I didn't want my husband to even know money was taken from him. So {sic} had the money on my own. . . . There was {sic} many reasons, which I don't know how much you want to know. But, in between all of that there was a miscarriage, pregnancies and surgery on ovaries and I did it when I could. But I knew that it would get done before the last day before it would be too late. That's all that mattered"

(NYSCEF doc. no. 148, p 269, line 15 – p 270, line 8).

Thus, plaintiffs have provided a reason for their delay. The parties' conflicting positions as to whether the delay showed that plaintiffs were happy with defendants' representation and regretted the settlement long after it transpired raise an issue of fact. It is also not persuasive that there is no written evidence, aside from some emails, suggesting that plaintiffs were unhappy with their representation. This, too, is an argument defendants can raise to the factfinder.

The court has considered all the parties' arguments in reaching this decision, even those not discussed in this decision. Primarily, it concludes that defendants merely have raised numerous issues of fact as to the strength of their positions and conduct in the underlying case, and as to plaintiffs' credibility. "[W]hether specific conduct constitutes [legal] malpractice normally requires a factual determination to be made by the jury" (*Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 170 AD2d 108, 115 [1st Dept 1991] [internal quotation marks and citation omitted], *affd* 80 NY2d 377 [1992]). Credibility, too, is reserved for the factfinder (*see Katz v 260 Park Ave. S. Condominium Assoc.*, 168 AD3d 615, 616 [1st Dept 2019]).

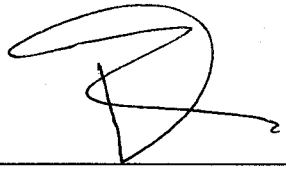
Accordingly, it is hereby

ORDERED that defendants' motion pursuant to CPLR 3212 for summary dismissal of the complaint is denied; and it is further

ORDERED that the parties shall appear for a conference on March 14, 2023 at 9:30 a.m. to address motion sequence 006; and it is further

ORDERED that plaintiffs shall serve a copy of this decision and order upon all parties, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.



2/21/2023
DATE

DAKOTA D. RAMSEUR, J.S.C.

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