Short Form Order

Index No. 625917/2023

SUPREME COURT – STATE OF NEW YORK
PART 78 – SUFFOLK COUNTY

P R E S E N T:
Hon. Maureen T. Liccione
Justice Supreme Court

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ANGELA KOLYER,

Plaintiff,

-against-

DEAN JASON SALLAH and
THE SALLAH LAW FIRM, PC.

Defendants.

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Mot. Seq. No. 001 – MotD/CaseDisp
Orig. Return Date: 02/09/2024
Mot. Submit Date: 05/22/2024

PLAINTIFF'S ATTORNEY
SCHWARTZ & PONTERIO, PLLC
134 W. 29th Street, Suite 1001
New York, NY 10001

DEFENDANTS' ATTORNEY
GORDON REES SCULLY MANSUKHANI
1 Battery Park Place, 28th Fl
New York, NY 10004

Upon the reading and consideration of NYSCEF documents numbered 1, and 6 to 38, it is:

ORDERED that branch of defendants' motion for an Order dismissing plaintiff's complaint pursuant to CPLR 3211 (a) (7) is granted; and it is further

ORDERED and ADJUDGED that plaintiff's complaint is dismissed.

This is an action for legal malpractice against the defendants Dean Jason Sallah and the Sallah Law Firm P.C. (collectively defendants) regarding their representation of plaintiff Angela Kolyer (Angela) in post-judgment proceedings in the divorce action, *Angela Kolyer v Frank Kolyer* (Suffolk County Supreme Court, Index No. 8397/2013) (Kolyer Action).

The facts of this action are extensive. The Kolyer Action was commenced by Angela against Frank Kolyer (Frank) in 2013. On or about February 22, 2016, Angela and Frank signed a Stipulation of Settlement. The Stipulation of Settlement provided for two different calculations of Angela's share of Frank's pension depending on whether Frank retired on a regular pension or a disability pension. The Stipulation of Settlement also stated that the parties agreed that the Qualified Domestic Relations Order (QDRO) would include "specific language," which was inter alia, the following decretal paragraph:

> **ORDERED** that should the Participant retire on a disability retirement benefit from the Retirement System, the Retirement System in accordance with the formula devised in the case of *Majauskas v Majauskas*, 61 NY2d 481 (1987), is hereby directed to calculate a hypothetical service retirement benefit, based on the Participant's earnings and years of credited service. His retirement benefit shall be calculated in the same manner as a normal service pension would be calculated without any reduction for ordinary termination of employment. From this hypothetical service retirement benefit, the Retirement System is hereby directed to pay to the Alternate Payee that portion of the Participant's monthly retirement benefit which is equal to 50.00% of a fraction; and it is further

On or about July 28, 2016, the Court in the Kolyer Action signed a Judgment of Divorce, which was entered by the Suffolk County Clerk on August 16, 2016. The Judgment of Divorce incorporated by reference, but did not merge, the Stipulation of Settlement. Frank, a former New York City and Nassau County police officer, retired on disability pension on or about April 12, 2019.

In or about July 2019, pursuant to the Stipulation of Settlement, Angela retained Lexington Pension Consultants, Inc. (Lexington) to prepare a QDRO regarding Frank's pension to be submitted to the New York State and Local Retirement System (NYSLRS) and to be approved by the Court in the Kolyer Action.

On or about August 15, 2019, Angela retained defendants to represent her in post-judgment divorce proceedings in the Kolyer Action. Defendants prepared and filed a cross-motion in the Kolyer Action to, inter alia, compel Frank to cooperate in the preparation of a QDRO. On or about January 30, 2020, during the pendency of the foregoing motion practice, Lexington advised defendants that Frank requested a change to the 2nd Ordered paragraph in the QDRO that Lexington had prepared. The 2nd Ordered paragraph on page 3 of the QDRO read as follows with the change requested by Frank in bold (QDRO Amendment):

> **ORDERED** that should the Participant retire on a disability retirement benefit from the Retirement System, the Retirement System in accordance with the formula devised in the case of *Majauskas v. Majauskas*, 61 NY2d 481 (1987), is hereby directed to calculate a hypothetical service retirement benefit, based on the Participant's earnings and years of credited service **as of March 12, 2013 (the date of commencement of the action for divorce)**. His retirement benefit shall be calculated in the same manner as a normal service pension would be calculated without any reduction for ordinary termination of employment. From this hypothetical service retirement benefit, the Retirement System is hereby directed to pay to the Alternate Payee that portion of the Participant's monthly retirement benefit which is equal to 50.00% of a fraction; and it is further

Angela alleges that defendants did not inform her of the QDRO Amendment. On February 13, 2020, the Court in the Kolyer Action held a conference at which the QDRO was discussed. At the conference, defendants informed the Court that they accepted the changes Frank requested to the QDRO because the requested changes "don't affect the outcome of the QDRO" (NYSCEF Doc No. 12). Defendants prepared a Stipulation that provided that the QDRO with the QDRO Amendment would be submitted to NYSLRS for its approval, and signed the Stipulation allegedly without advising Angela of the changes Frank had requested. The Stipulation was so-ordered by the Court (Iliou, A.J.S.C.) and shows that Angela also signed it.

On or about September 9, 2020, the Court in the Kolyer Action signed the QDRO, which included the QDRO Amendment (Final QDRO). On or about December 8, 2020, NYSLRS sent a letter to defendants advising them that NSYLRS accepted the Final QDRO and that Angela would start receiving distributions after the NSYLRS calculated Angela's distribution. The December 8, 2020 letter included a written interpretation of the Final QDRO and stated that "if the interpretation is inconsistent with your object, an amended DRO must be served" (NYSCEF Doc No. 26). The written interpretation provided that Angela's share would be calculated using the hypothetical retirement allowance as of March 12, 2013; and that her share will be based "on the formula provided in the DRO: 50% of a fraction, for which the numerator is credited service accrued between 4/12/1997 and 3/12/2013, and the denominator is total service credited to [Frank] as of March 13, 2013" (*id.*).

On May 6, 2021, Angela discharged the defendants. On or about February 28, 2022, Angela began receiving $2,878.25 from NYSLRS as her monthly share of Frank's disability pension.

Subsequently, Angela received a number of letters from NYSLRS regarding the calculation of her benefit, specifically regarding the denominator of the marital formula. On or about September 19, 2022, NYSLRS advised Angela that, as a result of the Frank's request for a breakdown of benefits owed to Angela, the Final QDRO directed NYSLRS to calculate the hypothetical service retirement benefit using Frank's salary and service as of March 12, 2013, and that Frank's final average salary as of March 12, 2013 (i.e., the commencement date of the Kolyer Action) was $152,025.44, resulting in a reduction of Angela's marital share to $2,492.40 per month. On or about September 23, 2022, the NYSLRS informed Angela that it denied Frank's contest of the calculation of Angela's distribution specifically that the denominator of the marital formula should have been

his total service credit at retirement rather than the total service credit as of the date of commencement (i.e. as of March 12, 2013).

On or about October 12, 2022, NYSLRS sent another letter to Angela informing her that upon Frank's request for an administrative hearing to redetermine the monthly payment to Plaintiff, NYSLRS determined that they were required to use Frank's total service credit at retirement (April 12, 2019) as the denominator for the marital formula used to calculate Angela's benefit. The October 12, 2022 letter also stated that "it [was] regrettable that the DRO at issue was approved by the Retirement System in its current form" (NYSCEF Doc No. 28). On or about November 23, 2022, NYSLRS mailed another letter to Angela informing her that her monthly benefit was $1,926.51 after the recalculation indicated in the October 12, 2022 letter (denominator being the total service credit at retirement on April 12, 2019.

In her complaint, Angela argues that if defendants had not agreed to accept the changes Frank requested to the QDRO at the February 13, 2020 conference and had not signed the Stipulation, then the QDRO, without the changes requested by Frank, would have been signed by the Court and NYSLRS would have calculated Angela's share of Frank's pension based on his final average salary as of April 12, 2019, his actual date of retirement, rather than March 12, 2013, the date of commencement of the Kolyer Action. Angela contends that due to defendants' acceptance of the QDRO Amendment, NYSLRS calculated Angela's share of the pension using Frank's final average salary as of March 12, 2013, rather than his actual retirement date of April 12, 2019, causing Angela to receive less money per month than she would have been entitled to pursuant to the Stipulation of Settlement. Angela alleges that due directly to defendants' negligence and legal malpractice, she will continue to receive a lower monthly payment from NYSLRS until the death of either Angela or Frank.

Defendants now move for an Order: (1) dismissing Angela's complaint against the defendants pursuant to CPLR 3211 (a) (1) upon the grounds that a defense is founded upon documentary evidence, (2) dismissing plaintiff's complaint against the defendants pursuant to CPLR 3211 (a) (5) upon the grounds that the cause of action may not be maintained because of the statute of limitations, (3) dismissing plaintiff's complaint against the defendants pursuant to CPLR 3211 (a) (7) upon the grounds that plaintiff's complaint fails to state a claim upon which relief can be granted, and (4) granting such other and further relief as this Court deems just, proper, and equitable. Angela opposes the motion.

In considering a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), the complaint is to be afforded a liberal construction and the court must "accept the allegations as true and accord the plaintiff[ ] every possible favorable inference" (*Sassi v Mobile Life Support Servs., Inc.*, 37 NY3d 236, 239 [2021], quoting *Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 [2016]; *Aristy-Farer v State*, 29 NY3d 501, 509 [2017]). Giving plaintiff the benefit of all favorable inferences, which may be drawn from the pleading, the court determines only whether the alleged facts "fit within any cognizable legal theory" (*Sassi*, 37 NY3d at 239; *Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017]; *see Recine v Recine*, 201 AD3d 827, 830 [2d Dept 2022]). Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery (*Connaughton*, 29 NY3d at 142; *Pinnacle Cap., LLC v O'Bleanis*, 214 AD3d 913, 915 [2d Dept 2023]).

A court is permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211 (a) (7) (*Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]; *see* CPLR 3211 [c]). Where a party offers evidentiary proof and such proof is considered but the motion has not been converted to one for summary judgment, "the criterion is whether the proponent of the pleading has a cause of action, not whether [the proponent] has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it ... dismissal should not eventuate" (*Marinelli v Sullivan Papain Block McGrath & Cannavo, P.C.*, 205 AD3d 714, 715–16 [2d Dept 2022], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1997]; *see also Sokol*, 74 AD3d at 1181).

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 the plaintiff to sustain actual and ascertainable damages" (*Marinelli*, 205 AD3d at 716; *see Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]; *Attallah v Milbank, Tweed, Hadley & McCloy, LLP*, 168 AD3d 1026, 1027 [2d Dept 2019]).

Failure to establish proximate cause mandates dismissal of a legal malpractice action (*Simmons v Edelstein*, 32 AD3d 464, 466 [2d Dept 2006]). 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 (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]; *see Gall v Colon-Sylvain*, 151 AD3d 698, 700 [2d Dept 2017]; *Pellegrino v File*, 291 AD2d 60, 63 [2d Dept 2002]). Conclusory allegations of damages predicated on speculation cannot suffice for a malpractice action, and dismissal is warranted where the allegations in the complaint are merely conclusory and speculative (*Mid City Elec. Corp. v Peckar & Abramson*, 214 AD3d 646, 649, [2d Dept 2023]).

Here, even accepting the facts alleged in the complaint, as amplified by Angela's affidavit, as true, and according Angela the benefit of every possible inference, as the Court is required to do, the complaint failed to plead specific factual allegations demonstrating that, but for defendants' alleged negligence, Angela would have received a higher monthly payment from the NYSLRS. To the extent the complaint alleges that if the defendants had not agreed to accept the QDRO Amendment, then the NYSLRS would have calculated Angela's share of Frank's pension based on Frank's final average salary as of April 12, 2019, his actual date of retirement, rather than March 12, 2013, the date of commencement of the Kolyer Action, such allegations are conclusory and speculative (*see May Dock Lane, LLC v Harras Bloom & Archer, LLP*, 222 AD3d 635, 637 [2d Dept 2023]; *126 Main St., LLC v Kriegsman*, 218 AD3d 524, 525 [2d Dept 2023]).

Angela's contention rests on speculation that the Court in the Kolyer Action would had signed a QDRO without the QDRO Amendment despite Frank's request to include such a change and would have thus disregarded Frank's request or objection, and that the Court would have determined that a QDRO without such a proposed change was inconsistent with the language in the Stipulation of Settlement (*see Kraus v Kraus*, 131 AD3d 94, 100 [2d Dept 2015] ["If a QDRO is inconsistent with the provisions of a stipulation or judgment of divorce, courts possess the authority to amend the QDRO to accurately reflect the provisions of the stipulation pertaining to the pension benefits"] [internal quotation omitted]).

Most importantly, the damages cited by Angela rest on speculation that NYSLRS would have interpreted the 2nd Ordered paragraph without Frank's change to provide for the calculation of Frank's hypothetical service retirement based on Frank's earnings and years of credited service as of the date of Frank's retirement. Without the Frank's requested change, the QDRO would have stated the following, without specifying the date of the calculation of Frank's hypothetical service retirement benefit:

> **ORDERED** that should the Participant retire on a disability retirement benefit from the Retirement System, the Retirement System in accordance with the formula devised in the case of *Majauskas v Majauskas*, 61 NY2d 481 (1987), is hereby directed to calculate a hypothetical service retirement benefit, based on the Participant's earnings and years of credited service. His retirement benefit shall be calculated in the same manner as a normal service pension would be calculated without any reduction for ordinary termination of employment. From this hypothetical service retirement benefit, the Retirement System is hereby directed to pay to the Alternate Payee that portion of the Participant's monthly retirement benefit which is equal to 50.00% of a fraction; and it is further
>
> (NYSCEF Doc No. 1).

Angela in effect concludes in her complaint, as amplified by her affidavit, that if the QDRO had included the above language, then the NYSLRS would have "calculate[d] a hypothetical service retirement benefit, based on the Participant's earnings and years of credited service" *as of the date of the Participant's retirement* (*id.*). But such a conclusion is based on speculation as to how the NYSLRS would have independently decided to interpret the QDRO, especially since the QDRO would have been silent as to the date, and Frank would have presumably contested a calculation favorable to Angela. Furthermore, we are left to conjecture whether NYSLRS would have even approved such a QDRO, which would have been silent as of the date of calculation of the hypothetical service retirement benefit in the case of Frank retiring on a disability retirement benefit. Accordingly, Angela's contention that the alleged legal malpractice resulted in legally cognizable damages is conclusory and speculative, in as much as, it is premised on decisions that were within the discretion of the Court in the Kolyer Action and the NYSLRS (*see Denisco v Uysal*, 195 AD3d 989, 991 [2d Dept 2021]; *Bua v Purcell & Ingrao, P.C.*, 99 AD3d 843, 848 [2d Dept 2012]). As conclusory damages predicated on speculation cannot suffice for a malpractice claim (*see Pellegrino*, 291 AD2d at 64), defendants' branch of the motion dismissing the complaint for failure to state a cause of action pursuant to CPLR 3211 (a) (7) is granted.

The foregoing constitutes the decision, judgment and Order of the Court.

ENTER

DATE: September 20, 2024
Riverhead, NY

Maureen T. Liccione

HON. MAUREEN T. LICCIONE, J.S.C.

__X__ FINAL DISPOSITION ___ NON-FINAL DISPOSITION