SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42M

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DARIO CIPOLLARO DE L'ERO,

Plaintiff,

- v -

NELSON, RIBINSON &EL ASHMAY PPLC, JONTHAN NELSON, and JOHN AND JANE DOE

Defendants.

INDEX NO. 152592/2022

MOTION DATE 05/29/2024

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, and 151

JUDGMENT - SUMMARY

APPEARANCES:

Diangi Law Firm, Richmond Hill, NY (Dario Cipollaro De L'ero, Esq., of counsel), for plaintiff.

Segal, McCambridge, Singer & Mahoney, Ltd., New York, NY (Illana S. Hanau, Esq., of counsel), for defendants.

HON. EMILY MORALES-MINERVA:

In this action for breach of contract and for legal malpractice, defendants NELSON, RIBINSON & EL ASHMAY PPLC, and JONTHAN NELSON move, by notice of motion (seq. no. 004), for an order granting them summary judgment dismissing the complaint of plaintiff DARIO CIPOLLARO DE L'ERO (see CPLR 3212 [governing summary judgment]). In support of the motion, defendants argue, among other things, that the legal malpractice fails for lack of proximate cause and that the breach of contract fails as

duplicative of the legal malpractice claim. Plaintiff opposes the motion.

For the reasons set forth below, the court grants defendants' application entirely and the complaint shall be dismissed.

BACKGROUND

It is undisputed that in the spring of 2018, plaintiff DARIO CIPOLLARO DE L'ERO (plaintiff) retained defendants NELSON, RIBINSON & El ASHMAY PPLC, and JONATHAN NELSON (defendants) as counsel to represent him in all matrimonial matters. Defendants then represented plaintiff in a divorce proceeding in New York State Supreme Court, New York County, and in a child support proceeding in Family Court, New York County.

In the divorce proceeding, the court (L. Drager, J.S.C.) issued a judgment of divorce (see New York State Unified Court System Electronic Filing System [NYSCEF] Doc. No. 124, certified copy of judgment of divorce, dated February 28, 2019). Among other things, the judgment dissolved the marriage of plaintiff to non-party ex-wife, decided custody and parenting time between said parents, and determined their responsibilities for child support (id.).

As to the former, the divorce judgment provides:

> "ORDERED AND ADJUGED that Plaintiff [DARIO CIPOLLARO DE L'ERO] shall pay to Defendant [ex-wife], as and for the support of [their] unemancipated child . . ., the sum of $3,200.00 (three thousand two hundred) dollars per month . . . in accordance with the parties' written agreement . . ."

(id.).

The divorce judgment also ordered and adjudged that the written agreement, dated November 14, 2018, survives, and that the parties shall "comply with all legally enforceable terms and conditions of said agreement as if such terms and conditions were set forth in" the divorce judgment (id. [emphasis added]).

Article VIII, section (f) of the separation agreement states:

> "The parties are aware of Domestic Relations Law [DRL] § 236 Part B (7) (d) which provides [for when] a child support order may be modified . . .. The Parties have opted out of the provisions of DRL § 236 Part B (7) (d) (ii) and (iii)"

(id. [emphasis added]).[1]

[1] Domestic Relations § 236 (B) (7) (d) directs: "Any child support order made by the court in any proceeding under the provisions of this section shall include, on its face, a notice printed or typewritten in a size equal to at least eight point bold type informing the parties of their right to seek a modification of the child support order upon a showing of:
(i) a substantial change in circumstances; or
(ii) that three years have passed since the order was entered, last modified or adjusted; or
(iii) there has been a change in either party's gross income by fifteen percent or more since the order was entered, last modified, or adjusted; however, if the parties have specifically opted out of subparagraph (ii) or (iii) of this paragraph in a validly executed agreement or stipulation, then that basis to seek modification does not apply."

The parties did not purport to "opt out" of their right, pursuant to Domestic Relations Law § 236 (b) (7) (d) (i), to seek modification of child support upon a substantial change in circumstances (see Domestic Relations Law § 236 [b] [7] [d] [quoted entirely below in n. 1]).

Indeed, asserting this ground, in 2020, plaintiff -- then represented by defendants -- filed a petition to modify his child support obligation in Family Court (NYSCEF Doc. No. 128, Petition for Modification of an Order of Support, dated June 11, 2020). Plaintiff's petition plainly asserted:

> "[S]ince the entry of the [divorce] judgment there has been a substantial change of circumstances in that, [plaintiff's] income is derived from his restaurant business and that for the past year, there has been a decline in business such that when the recent COVID-19 pandemic shut down New York City, [Plaintiff's] business and income was decimating leaving [Plaintiff] with little to no income"

(id. at ¶ 6 [emphasis added]).

Non-party ex-wife opposed the modification, and the support magistrate dismissed the petition.

In the findings of fact, the magistrate essentially opined that the written agreement in the divorce proceeding prohibited the courts from ever modifying the child support amount (see NYSCEF Doc. No 129, Findings of Fact, dated March 16, 2022). Explaining this finding, the magistrate quoted solely a part of

the last sentence in Article VIII, section (f) of the written agreement; that partial sentence reads: "'the child support will never go below $3,200 USD per month or above $3,200 USD per month . . .'" (id.; see also NYSCEF Doc. No. 148, separation agreement, dated November 14, 2018, p 15). The magistrate did not attempt to reconcile the quoted language with the remaining part of the paragraph in which the parties acknowledged the applicability of Domestic Relations Law § 236 (b) (7) (d) (i).[2]

Having had the petition dismissed, plaintiff declined to appeal the magistrate's order and replaced defendants, substituting them with counsel of record.

Plaintiff then commenced this action against defendants for breach of contract and legal malpractice, seeking $1,000,000.00 in damages. Defendants answered, asserting affirmative defenses including the failure to state a cause of action.

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[2] The entire paragraph provides: "SUPPORT MODIFICATION (f) The Parties are aware of Domestic Relations Law § 236 Part B (7)(d) which provides that a child support order may be modified if: (i) there has been a substantial change in circumstances; or (ii) three years have elapsed since the order was last entered, modified or adjusted; or (iii) there has been a change in either Party's gross income by fifteen percent or more since the order was last entered or adjusted. The Parties have opted out of the provisions of DRL§ 236 Part B (7) (d) (ii) and (iii) and Family Court Act § 451 (2) (b) (ii) and (iii). The Parties have agreed that the child support will never go below $3,200.00 USD per month or above $3,200.00 USD per month expect in connection with a cost of living adjustment ("COLA") as set forth below, and that all add-on percentages shall remain fixed. No other upward or downward modification shall apply to the child support agreed upon in this Agreement" (NYSCEF Doc. No. 148, separation agreement, dated November 14, 2018, p 15).

Following plaintiff's discovery delays, and motion practice, the court (N. Bannon, J.S.C.) (1) denied plaintiff's motion (seq. no. 001), seeking a protective order against interrogatories as "procedurally defective and without merit," and (2) granted defendants' cross-motion to compel plaintiff to respond to interrogatories and to serve a Bill of Particulars, finding plaintiff's complaint "largely bereft of facts" (NYSCEF Doc. No. 34, Decision and Order, dated December 22, 2022 [N. Bannon, J.S.C.] [emphasis added]). Plaintiff never served a bill of particulars and discovery delays continued.

Defendants then moved (motion seq. no. 003), for an order striking the complaint for plaintiff's failure to provide discovery and for an order imposing sanctions on plaintiff's counsel based on delays in conducting discovery (see NYSCEF Doc. No. 107, Decision and Order, dated February 20, 2024). Plaintiff opposed the motion and cross-moved for an extension of the deadlines for the filing of note of issue and the completion of discovery (id.).

Again -- noting plaintiff's delays in discovery -- the court (N. Bannon, J.S.C.) warned: "Plaintiff's counsel is reminded that he has a duty to his client to prosecute the case in a timely manner in accordance with the court's orders or, if he is unable to do so, to withdraw as counsel and allow new counsel to be retained" (id.). Justice Bannon then granted

defendants' motion to the extent of directing that the "the complaint shall be [automatically] dismissed unless the plaintiff completes all discovery and files a Note of Issue as directed [t]herein . . ." (id.). The court (N. Bannon, J.S.C.) also granted plaintiff's motion, in part, extending the deadline for filing note of issue to April 12, 2024, and the deadline for completion of all discovery to March 29, 2024 (id.).

Following plaintiff's filing of note of issue, defendants filed the subject motion (seq. no. 004) for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint (see CPLR 3212 [governing summary judgment]). Plaintiff opposes the motion entirely.

ANALYSIS

"Upon an application for summary judgment, the defendant is required to present evidence in admissible form establishing that the plaintiff is unable to prove at least one of these elements" (Bachman-Richards v Pomeroy, 220 AD3d 1136, 1137 [3d Dept 2023] [internal quotation marks, brackets and citations omitted]; see Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d 438, 442 [2007]; Kaufman v Med. Liab. Mut. Ins. Co., 121 AD3d 1459, 1460 [3d Dept 2014], lv denied 25 NY3d 906 [2015]; see also CPLR 3212 [b] [governing supporting proof on a motion

for summary judgment]). Where a defendant satisfies this threshold, the burden shifts to the plaintiff to submit competent proof raising a triable issue of fact (see Bachman-Richards, 220 AD3d at 1137; Buczek v Dell & Little, LLP, 127 AD3d 1121, 1123 [2d Dept 2015]).

To succeed on a legal malpractice claim, a plaintiff must demonstrate that (1) the defendant failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession, that (2) this failure was the proximate cause of actual damages to the plaintiff, and that (3) the plaintiff would have succeeded on the merits of the underlying action but for the attorney's negligence (see Rudolf, 8 NY3d at 442, citing McCoy v Feinman, 99 NY2d 295, 301-302 [2002]; see also Davis v Klein, 88 NY2d 1008, 1009-1010 [1996] [addressing causation in the context of legal malpractice]; Carmel v Lunney, 70 NY2d 169, 173 [1987] [addressing the same]; Pellegrino v File, 291 AD2d 60 [1st Dept 2022], lv denied 98 NY2d 606 [2022]; Prudential Ins. Co. v Dewey, Ballantine, Bushby, Palmer & Wood, 170 AD2d 108 [1st Dept 1991], affd 80 NY2d 377 [1992]; Franklin v Winard, 199 AD2d 220 [1st Dept 1993]).

A failure to establish proximate cause requires dismissal regardless if negligence is proven (see Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP, 301 AD2d 63, 67

[1st Dept 2002]). Absent plaintiff's likelihood of success in the underlying action, "counsel's conduct is not the proximate cause of the injury" (id.).

Applying these principles here, defendants have shown that -- given the plain and complete reading of the written agreement[3] -- it cannot be said that, but for defendants' alleged negligence, plaintiff would have succeeded before the magistrate. Further, while the magistrate dismissed plaintiff's petition for a support modification, defendants -- whom plaintiff immediately replaced following said finding -- are not why plaintiff failed to appeal the dismissal of his petition or failed to renew his application for a support modification.

In addition, plaintiff's contention -- that the written agreement prevents him from ever modifying his child support because of defendants' alleged negligence -- is based on a false premise. Nothing in the written agreement or divorce judgment prohibits the parties thereto from seeking a modification of child support, pursuant to Domestic Relations § 236 (B) (7) (d) (i). The black letter law remains:

> "the parties [have a right] to seek a modification of the child support order upon a showing of: (i) a substantial change in circumstances . . ."

[3] A contract must be construed in accordance with the parties' intent, generally discerned from the four corners of the document itself. Therefore, a written agreement that is complete, clear and unambiguous on its face, as here, must be enforced according to the plain meaning of its terms" (Rayham v Multiplan, Inc., 153 AD3d 865, 867 [2d Dept 2017]).

(Domestic Relations § 236 [B] [7] [d] [i]).

As for plaintiff's conclusory assertion of damages in the amount of $1,000,000.00, "speculative damages or conclusory claims of damage [are no] basis for legal malpractice" (Russo, 301 AD2d at 67).

The court next addresses plaintiff's claim for breach of contract. Here, too, defendants have established entitlement to summary judgment. This cause of action is "duplicative of the legal malpractice claim, since it arose out of the same set of facts as the alleged legal malpractice and did not involve distinct, additional damages" (Xiong Ping Tang v Marks, 133 AD3d 455, 456 [1st Dept 2015], citing Lusk v Weinstein, 85 AD3d 445, 446 [1st Dept 2011], lv denied 17 NY3d 709 [2011]; see also Rothstein v Krane LLP, 2024 NY Slip Op 30016 [U] [Sup Ct NY County 2024] [Gerald Lebovits, J.S.C.]).

In any event, as stated above, the claim of $1,000.000.00 in damages is conclusory without any allegations of facts to support any amount of loss (see generally Noise In The Attic Prods., Inc. v London Records, 10 AD3d 303, 307, 782 NYS2d 1 [1st Dept 2004] [providing that to state a cause of action for breach of contract, a plaintiff must allege: the parties entered into a valid agreement, plaintiff's performance, defendant's failure to perform and damages]).

Accordingly, it is

ORDERED that motion (seq. mo. 004) of defendants NELSON, RIBINSON & EL ASHMAY PPLC, and JONTHAN NELSON for an order granting them summary judgment is granted in its entirety; it is further

ORDERED that the complaint is dismissed; and it is further

ORDERED that the clerk of the court shall hence mark the file.

Date: May 01, 2025

Emily Morales-Minerva, J.S.C.

☑ Final Disposition

☑ Disposed