

Lubrano v Lubrano

2025 NY Slip Op 31836(U)

May 6, 2025

Supreme Court, Kings County

Docket Number: Index No. 508420/2024

Judge: Peter P. Sweeney

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At an IAS Term, Part 73 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6th day of May, 2025.

P R E S E N T:

HON. PETER P. SWEENEY,

Justice.

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GIUSEPPE LUBRANO,

Plaintiff,

-against-

Index No.: 508420/2024

Mot. Seq. Nos. 2-7

EKATERINA LUBRANO, MARY GRACE CONDELLO ELISABETH, ESQ., AARON EAGLE, BERGEN BASIN REALTY, LLC, RACHEL M. VASSERMAN, ESQ., KORENBLIT & VASSERMAN, PLLC, RONGJIN CHEN, CHRISTINE XIAO XIANG XU, CHALLENGER ABSTRACT LLC,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>25-32 44-52 57-61 36, 62 64-71 72-73</u>
Opposing Affidavits (Affirmations) _____	<u>81-92, 94 77</u>
Affidavits/Affirmations in Reply _____	<u>79</u>
Plaintiff's Memoranda of Law _____	<u>95 37 74</u>
Attorney Condello's Memorandum of Law _____	<u>93</u>

Upon the foregoing papers, in this action by plaintiff Giuseppe Lubrano, appearing pro se, against defendants Ekaterina Lubrano, Mary Grace Condello Elisabeth, Esq. (Attorney Condello), Aaron Eagle, Bergen Basin Realty, LLC, Raquel M. Vasserman, Esq. s/h/a Rachel M. Vasserman (Attorney Vasserman), Korenblit & Vasserman, PLLC

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[*1]

(Korenblit & Vasserman), Rongjin Chen, Christine Xiao Xiang Xu, and Challenger Abstract LLC (Challenger), plaintiff purports to allege causes of action for legal malpractice, fraud, violation of court order, breach of fiduciary duty/contract, illegal transfer of deed, illegal marketing of property, illegal sale of real property, mortgage fraud, work without a permit, illegal sale of personal property, illegal destruction of personal property, illegal prevention of employment, intentional infliction of emotional distress, and negligent infliction of emotional distress. Plaintiff seeks compensatory and punitive damages of no less than \$3,000,000.

Attorney Condello moves, under motion sequence number two, for an order, pursuant to CPLR 3012 (b), dismissing plaintiff's action as against her (NYSCEF Doc No. 25).

Attorney Vasserman and Korenblit & Vasserman (collectively, the K&V defendants) move, under motion sequence number three, for an order, pursuant to CPLR 3012 (b), dismissing plaintiff's action as against them (NYSCEF Doc No. 44).

Challenger moves, under motion sequence number four, for an order, pursuant to CPLR 3012 (b), dismissing plaintiff's action as against it (NYSCEF Doc No. 57).

Plaintiff moves, by order to show cause, under motion sequence number five, for an order: (1) granting him leave to file his complaint within 24 hours from the decision of his poor person application and reactivating his NYSCEF account; (2) declaring that defendants' failure to respond to the summons with notice within 20 days, and the failure of some defendants to respond at all, and the blockage of the NYSCEF account justifies the allowance of his complaint filing; (3) declaring that the NYSCEF account blockage,

pending the approval of his poor person motion, was the reason for the delay that prevented his timely service of the complaint; (4) declaring that Attorney Condello's email service of her motion to dismiss was improper, and that future service from him alone should be allowed electronically upon the granting of his poor person application; (5) declaring that the actions of defendants, including Attorney Condello, Attorney Vasserman, and Aaron Eagle, constitute fraud and misrepresentation, thereby warranting their prosecution by the District Attorney's Office; and (6) declaring that the sale of his personal property worth more than \$50,000, without his knowledge or consent, was illegal, and that appropriate measures by the District Attorney's Office should be taken to rectify this fraud (NYSCEF Doc No. 62).

The K&V defendants move, under motion sequence number six, for an order: (1) pursuant to CPLR 1006 (b) and 2601, directing Korenblit & Vasserman, as escrow agent and stakeholder, with no interest in \$57,096.74 being held in escrow by it, to deposit such funds into court by paying them to the Clerk of the Court, for the Supreme Court, Kings County; and (2) pursuant to CPLR 1006 (b), discharging the K&V defendants from any further liability to plaintiff with respect to the \$57,096.74 once Korenblit & Vasserman deposits the \$57,096.74 into court (NYSCEF Doc No. 64).

Plaintiff cross-moves, under motion sequence number seven, for an order: (1) disbarring Attorney Vasserman, or, in the alternative, suspending her from the practice of law, pending a full hearing on the serious ethical violations and misconduct alleged by him; (2) denying the K&V defendants' motion, under sequence number six, which seeks to deposit \$57,096.74 with the Kings County Clerk; (3) directing the K&V defendants to

bring any further motions regarding the \$57,096.74 in the matrimonial court, where the original orders regarding the sale of the marital residence and the distribution of its proceeds were issued; and (4) imposing sanctions against the K&V defendants (NYSCEF Doc No. 72).

Facts and Procedural Background

Plaintiff and Ekaterina Lubrano were married on April 5, 2018. One child was born of the marriage in April 2019. On February 28, 2018, plaintiff and Ekaterina purchased the marital residence, which is located at 2056 East 61st Street, Brooklyn, NY 11234. On July 15, 2020, plaintiff filed an action against Ekaterina, seeking a divorce, pursuant to Domestic Relations Law § 170 (7), and ancillary relief (*Lubrano v Lubrano*, Sup Ct, Kings County, index No. 550642/2020) (the divorce action).

By a decision and order dated November 18, 2020, Justice Esther M. Morgenstern, in Part IDV2,¹ awarded temporary custody of plaintiff and Ekaterina's minor child to Ekaterina and plaintiff was given visitation, which was later ordered to be supervised (NYSCEF Doc Nos. 26, 364). By a decision and order dated December 21, 2020, Justice Morgenstern awarded exclusive occupancy of the marital residence to Ekaterina, plaintiff was ordered to pay \$200 biweekly to Ekaterina for unallocated support, beginning on January 1, 2021, subject to reallocation, and plaintiff was directed to continue to pay \$375 per month for the upkeep of the marital residence (NYSCEF Doc No. 78).

¹ The Integrated Domestic Violence (IDV) Part consolidates multiple legal cases related to the same family or individual into one court, addressing criminal, family, and matrimonial cases simultaneously.

There were alleged incidents of domestic violence by plaintiff against Ekaterina. Plaintiff was arrested following an alleged incident that occurred on or about March 18, 2020, and charged with criminal possession of a weapon. On July 13, 2021, plaintiff agreed to a conditional plea and plead guilty to criminal possession of a firearm (Penal Law § 265.01-b [1]), an E felony, and criminal possession of a weapon in the fourth degree (Penal Law § 265.01 [1]), a misdemeanor, and upon successful completion of the TASC APIP program, the court would dismiss the felony plea and plaintiff would receive a conditional discharge and a five-year order of protection in favor of Ekaterina (NYSCEF Doc No. 476 at 13).

By a retainer agreement dated February 7, 2022, Ekaterina retained Attorney Condello in the divorce action, in substitution for her prior attorney² (NYSCEF Doc No. 390, in the divorce action). By a decision and order dated January 25, 2023, Justice Morgenstern permitted Ekaterina to list the marital residence for immediate sale and directed that the proceeds of the sale be held in escrow by plaintiff's counsel until the issue of equitable distribution was addressed at trial (NYSCEF Doc No. 399, in the divorce action). By an order dated July 19, 2023, Justice Morgenstern again stated that Ekaterina was permitted to list the marital residence for immediate sale, and noted that such sale was justified due to plaintiff's noncompliance with numerous prior orders which had delayed the case since its commencement in 2020 (NYSCEF Doc No. 463, in the divorce action).

² Attorney Condello was Ekaterina's third attorney in the divorce action.

Justice Morgenstern also directed that the proceeds of the sale be held in escrow by the Kings County Clerk's Office until trial (*id.*).

On March 13, 2023, Justice Morgenstern commenced the trial in the divorce action. On July 19, 2023, the trial continued with plaintiff appearing pro se after his attorney withdrew from the case. However, Justice Morgenstern immediately stopped the trial upon plaintiff's first ever request that he be provided with the services of an Italian language interpreter during his direct testimony. The case was then adjourned to September 13, 2023, at 10:00 a.m. for an all-day continued trial.

On September 13, 2023, Ekaterina and her attorney, Attorney Condello, as well as the newly appointed Attorney for the Child (AFC), Brad Nacht, Esq., and the Italian language interpreter appeared in IDV2 for the continued trial. The trial was scheduled to commence at 10:00 a.m., and Justice Morgenstern waited until 11:30 a.m. to call the case. Plaintiff failed to appear and failed to provide a reasonable excuse for his non-appearance. Justice Morgenstern then proceeded to inquire on grounds on Ekaterina's August 27, 2020 answer and counterclaim based upon plaintiff's default.

In a Decision and Order on Default dated October 4, 2023 (NYSCEF Doc No. 476, in the divorce action), Justice Morgenstern awarded Ekaterina a final order of sole legal and physical custody of the child and directed that plaintiff's visitation was to continue to be supervised with Comprehensive Family Services (CFS) with plaintiff paying for this cost. She further ordered that plaintiff shall continue to pay \$200 bi-weekly in child support to Ekaterina through the Support Collection Unit (SCU).

Justice Morgenstern also ordered that Ekaterina was permitted to sell the marital residence, with the proceeds of the sale of the property to be shared by the parties 50/50 subject to any support arrears owed by plaintiff pursuant to the December 21, 2020 order. She set forth that as of September 13, 2023, Ekaterina indicated that plaintiff owed her arrears in the amount of \$12,395,³ and ordered that, as such, \$12,395 was to be paid directly to Ekaterina from plaintiff's share of the proceeds from the sale of the marital residence. She further vacated the order dated January 25, 2023 insofar as it directed the proceeds of the sale to be held in escrow by the Kings County Clerk's Office. In addition, Justice Morgenstern permitted Ekaterina to sell the marital vehicle with the parties equally sharing the proceeds of the sale. She also directed Attorney Condello to submit invoices and she would determine the counsel fee award to be paid by plaintiff in conjunction with signing the Judgment of Divorce. Justice Morgenstern directed that the note of issue be filed immediately.

Justice Morgenstern granted a Judgment of Divorce, pursuant to Domestic Relations Law § 170 (7), and directed Ekaterina to submit the Findings of Fact and Conclusions of Law, as well as the proposed Judgment of Divorce and all necessary documents by December 4, 2023. Attorney Condello, on behalf of Ekaterina, submitted the Findings of Fact and Conclusions of Law, as well as the proposed Judgment of Divorce and all necessary documents on November 28, 2023 (NYSCEF Doc Nos. 478-482, in the divorce

³ This amount was later corrected to \$12,375.

action). In November 2023, Ekaterina entered into a contract of sale with Rongjin Chen and Christine Xiao Xiang Xu, to sell them the marital residence.

On December 12, 2023, Justice Morgenstern issued an Addendum to the October 4, 2023 Decision and Order (NYSCEF Doc No. 485, in the divorce action). In this Addendum, Justice Morgenstern noted that on December 4, 2023, Ekaterina had uploaded attorney invoices dating from the commencement of the case to the present for the court's review. After consideration of the invoices submitted by Ekaterina, as well as the lengthy history of this case, Justice Morgenstern awarded attorney's fees to Attorney Condello, in the amount of \$10,000. Justice Morgenstern directed that if plaintiff did not make this payment directly to Attorney Condello within 30 days, it would be taken out of plaintiff's share of the proceeds of the sale of the marital residence.

Additionally, in the Addendum, Justice Morgenstern noted that her October 4, 2023 Decision and Order on Default, as stated on the record during the inquest, did not clarify the arrears owed by plaintiff for child support and the arrears owed towards the carrying charges on the marital residence. Justice Morgenstern set forth that on October 4, 2023, Attorney Condello had provided that the correct amount of arrears owed by plaintiff for child support was \$12,375 and the correct amount of arrears owed by plaintiff for the carrying costs of the marital residence was \$7,368.94.⁴ Justice Morgenstern, therefore, amended her October 4, 2023 Decision and Order on Default to reflect the correct amount of arrears.

⁴The court notes that the Addendum mistakenly stated that amount of arrears owed by plaintiff for child support was \$7,368.94 and that the amount of arrears for the carrying costs of the marital residence owed by plaintiff was \$12,375, rather than vice versa.

The Judgment of Divorce was signed by Justice Morgenstern on December 7, 2023 and was filed with the Kings County Clerk on December 13, 2023 (NYSCEF Doc No. 486, in the divorce action). It set forth, among other things, that pursuant to the October 4, 2023 Decision and Order on Default and the December 12, 2023 Addendum, Ekaterina shall sell the marital residence with the proceeds of the sale of the property to be shared by the parties 50/50, subject to any arrears owed by plaintiff pursuant to the December 21, 2020 order, which shall be paid from plaintiff's share of the sale proceeds of the marital residence.

Ekaterina used Bergen Basin Realty, LLC, as the real estate brokerage firm, and Aaron Eagle, as the broker for Bergen Basin Realty, LLC, to market the marital residence for sale. Challenger was the title company which performed the title search and issued the title report for the marital residence. Attorney Vasserman is a partner in Korenblit & Vasserman, PLLC, which is the law firm that represented Ekaterina in connection with the sale of the marital residence and conducted the closing of the sale.

On December 21, 2023, plaintiff filed an appeal from the October 4, 2023 Decision and Order on Default and the December 7, 2023 Judgment of Divorce. On January 28, 2024, plaintiff moved, by order to show cause, under CPLR 5015, to vacate the default judgment against him dated September 13, 2023 and the December 7, 2023 Judgment of Divorce, to stay the sale of the marital residence, and to give him access to the marital residence to retrieve his personal belongings (NYSCEF Doc No. 506, in the divorce action).

On February 12, 2024, during which time no stay of the Judgment of Divorce was in effect, the marital residence was sold for a total amount of \$680,000 to Rongjin Chen

and Christine Xiao Xiang Xu, as the purchasers. On that day, a deed was executed by Ekaterina in favor of Rongjin Chen and Christine Xiao Xiang Xu (NYSCEF Doc No. 87). Plaintiff did not execute the deed since it was not deemed necessary due to his default and the terms of the Judgment of Divorce. The net proceeds of the sale of the marital residence following the mortgage payoff, and payment of all costs, expenses, and fees was \$173,681.36. Pursuant to the Judgment of Divorce, the October 4, 2023 Decision and Order on Default, and the December 12, 2023 Addendum to the October 4, 2023 Decision and Order, plaintiff was entitled to 50% of the net proceeds in the amount of \$86,840.68 minus \$12,375.00 in outstanding child support, Ekaterina's attorney's fees in the amount of \$10,000, and the carrying costs of the marital residence in the amount of \$7,368.94. This amount totaled \$57,096.74.

Following the sale, the K&V defendants attempted to distribute the \$57,096.74, which was plaintiff's share of the net sale proceeds to him, but he rejected them. Korenblit & Vasserman, PLLC is continuing to hold these funds for plaintiff in its escrow account.

By a decision and order dated March 4, 2024, following the concluded sale of the marital residence, Justice Sharon A. Bourne-Clarke granted plaintiff's motion to vacate the December 7, 2023 Judgment of Divorce, pending a hearing in this matter on March 18, 2024 (NYSCEF Doc No. 509, in the divorce action). Justice Sharon A. Bourne-Clarke also stayed all prior orders, pending the appeal filed in the Appellate Division, Second Department. Justice Sharon A. Bourne-Clarke further ordered that Ekaterina shall not engage in any enforcement mechanisms under the December 7, 2023 Judgment of Divorce,

and, as such, that the marital residence shall not be sold, nor shall Ekaterina dispose of any of plaintiff's marital property or personal property.

On April 29, 2024, the Appellate Division, Second Department, granted a motion by Ekaterina to stay enforcement of so much of Justice Bourne-Clarke's March 4, 2024 order as vacated the Judgment of Divorce entered on December 13, 2023, stayed enforcement of all prior orders pending a hearing and determination of the appeal from the Judgment of Divorce, and directed that the marital residence shall not be sold, to the extent that it stayed the March 4, 2024 order, pending a hearing and determination of the appeals, on condition that the appeal was perfected on or before May 29, 2024 (NYSCEF Doc No. 89).

Plaintiff had brought a CPLR article 78 proceeding to compel Justice Morgenstern to vacate her October 4, 2023 Decision and Order on Default, and to recuse herself from presiding over the divorce action, and applied for poor person relief. By a decision, order, and judgment dated May 8, 2024, the Appellate Division, Second Department, granted Justice Morgenstern's motion, pursuant to CPLR 3211 (a), to dismiss the petition for failure to state a cause of action, and dismissed the proceeding (*Matter of Lubrano v Morgenstern*, 227 AD3d 808, 808 [2d Dept 2024]).

Plaintiff thereafter brought another proceeding pursuant to CPLR article 78, to compel Justice Sharon Bourne-Clarke to void the sale of the marital residence, to provide information regarding certain alleged communications with Attorney Vasserman, and to hold a hearing regarding any such communications. By a decision and order dated March 26, 2025, the Appellate Division, Second Department, granted a motion by Attorney

Vasserman, pursuant to CPLR 3211 (a), to dismiss the petition insofar as asserted against her, inter alia, for failure to state a cause of action, denied plaintiff's petition, and dismissed the proceeding on the merits (*Matter of Lubrano v Clarke*, ___ AD3d ___, 2025 NY Slip Op 01809; 228 NYS3d 493, 494 [2d Dept 2025]).⁵

On March 22, 2024, plaintiff commenced the instant action by filing a summons with notice (NYSCEF Doc No. 1). On March 26, 2024, plaintiff attempted to effectuate service of the summons with notice upon Attorney Condello by leaving the summons with notice at the front desk of her office (NYSCEF Doc. No. 8). On March 25, 2024, plaintiff attempted to effectuate service of the summons with notice upon the K&V defendants and Challenger by leaving the summons with notice at the front desks of their respective offices (NYSCEF Doc No. 9). The process servers' affidavits do not state these deliveries of the summons with notice were followed by a mailing of the summons with notice nor has it been shown that proof of such service was filed with the clerk of the court within 20 days of either such delivery or mailing, whichever was effected later (*see* CPLR 308 [2]).⁶

⁵ It is noted that in addition to these proceedings, on August 23, 2022, plaintiff had filed an action entitled *Giuseppe Lubrano, et al v Esther Mickey Morgenstern, et al* (CV-22-4987 [ED NY 2022]) in federal district court (the Federal action) against 17 named defendants who were involved in the divorce action or his arrest, including Attorney Condello and Justice Morgenstern (NYSCEF Doc No. 29). As against Attorney Condello, the Federal action alleged civil rights violations, pursuant to 42 USC § 1983 and the United States Constitution, and the complaint also asserted allegations sounding in legal malpractice, negligence, and intentional infliction of emotional distress. On August 14, 2023, United States Magistrate Judge Cheryl L. Pollack issued a report and recommendation finding that the Federal action should be dismissed in its entirety without leave to amend (NYSCEF Doc No. 30).

⁶ Plaintiff's argument that these defendants did not timely appear in this action is devoid of merit. CPLR 320 (a) provides that if the summons was served pursuant to CPLR 308 (2), "the appearance shall be made within thirty days after service is complete." Service is not complete until 10 days after the filing of proof of service, which must occur within 20 days of either delivery or mailing, whichever is effected later.

On April 15, 2024, Attorney Condello, by her counsel, Furman Kornfeld & Brennan LLP, served a Notice of Appearance and Demand for Complaint via NYSCEF (NYSCEF Doc No. 11). Pursuant to CPLR 3012 (b), as noticed in the Demand for Complaint, plaintiff's deadline to serve a complaint in this action on Attorney Condello was 20 days after service of this demand, which was on May 6, 2024. That date passed without any service or filing of a complaint by plaintiff. Consequently, on May 16, 2024, Attorney Condello filed her motion, under motion sequence number two, seeking dismissal of plaintiff's action as against her.

On April 29, 2024, the K&V defendants appeared in this action, by their attorneys, Kaufman Dolowich & Voluck, LLP, and demanded service of plaintiff's complaint, pursuant to CPLR 3012, within 20 days of this demand (NYSCEF Doc No. 14). In addition to serving plaintiff with this demand on NYSCEF (NYSCEF Doc No. 48), Jason M. Myers, Esq., a partner in Kaufman Dolowich & Voluck, LLP, personally emailed a copy of the Demand for Complaint to plaintiff's personal email account (NYSCEF Doc No. 49). No response was received from plaintiff. The Demand for Complaint states, on its face, that plaintiff was to serve a copy of his complaint, pursuant to CPLR 3012, within 20 days of this demand, making May 20, 2024 the deadline for service of the complaint. Plaintiff failed to serve or file a complaint within this statutory deadline. Consequently, on July 18, 2024, the K&V defendants filed their instant motion, under motion sequence number three, seeking dismissal of this action pursuant to CPLR 3012 (b) (NYSCEF Doc No. 44).

Challenger filed a Notice of Appearance and Demand for a Complaint on April 19, 2024 and served plaintiff via NYSCEF (NYSCEF Doc No. 60). This Demand for a

Complaint stated that Challenger demanded, pursuant to CPLR 3012 (b), that plaintiff serve a copy of the complaint upon Challenger's attorney within 20 days after service of this demand, which was May 9, 2024. No complaint was timely served by May 9, 2024. Consequently on July 31, 2024, Challenger filed its instant motion, under motion sequence number four (NYSCEF Doc No. 57).

On June 25, 2025, plaintiff filed a complaint on NYSCEF (NYSCEF Doc No. 39). Plaintiff's complaint purports to allege 14 causes of action, namely, a first cause of action for malpractice, a second cause of action for fraud, a third cause of action for violation of court order, a fourth cause of action for breach of fiduciary duty/contract, a fifth cause of action for illegal transfer of deed, a sixth cause of action for illegal marketing of property, a seventh cause of action for illegal sale of real property, an eighth cause of action for mortgage fraud, a ninth cause of action for work without a permit,⁷ an eleventh⁸ cause of action for illegal sale of personal property, a twelfth cause of action for illegal destruction of personal property, a thirteenth cause of action for illegal prevention of employment, a fourteenth cause of action for intentional infliction of emotional distress, and a fifteenth cause of action for negligent infliction of emotional distress. On August 2, 2024, the court signed plaintiff's instant order to show cause, under motion sequence number five, seeking, among other things, an extension of time for filing his belated complaint (NYSCEF Doc No. 62).

⁷ This cause of action is directed solely as against Rongjin Chen and Christine Xiao Xiang Xu.

⁸ There is no tenth cause of action.

On August 15, 2024, the K&V defendants filed their motion, under motion sequence number six (NYSCEF Doc No. 62). On August 26, 2024, plaintiff filed his cross-motion, under motion sequence number seven (NYSCEF Doc No. 72).

Discussion

CPLR 3012 (b) provides, in pertinent part, as follows:

“Service of complaint where summons served without complaint. If the complaint is not served with the summons, the defendant may serve a written demand for the complaint within the time provided in subdivision (a) of rule 320 for an appearance. Service of the complaint shall be made within twenty days after service of the demand. Service of the demand shall extend the time to appear until twenty days after service of the complaint . . . The court upon motion may dismiss the action if service of the complaint is not made as provided in this subdivision . . .”

Here, it is undisputed that the complaint was not timely served within 20 days after service of the Demand For Complaint upon plaintiff by Attorney Condello, the K&V defendants, and Challenger. “To avoid dismissal of an action for failure to timely serve a complaint after a demand for the complaint has been made pursuant to CPLR 3012 (b), a plaintiff must demonstrate both a reasonable excuse for the delay in serving the complaint and a potentially meritorious cause of action” (*Lobel v Hilltop Vil. Coop., No. 4*, 138 AD3d 938, 939 [2d Dept 2016]; *see also Mazzola v Village Hous. Assoc., LLC*, 164 AD3d 668, 669 [2d Dept 2018]; *Khamis v Corporate Transp. Group, Ltd.*, 135 AD3d 825, 826 [2d Dept 2016]; *Telian v Freund*, 129 AD3d 828, 828 [2d Dept 2015]; *Carducci v Russell*, 120 AD3d 1375, 1375-1376 [2d Dept 2014]; *Mitrani Plasterers Co., Inc. v SCG Contr. Corp.*, 97 AD3d 552, 552 [2d Dept 2012]; *Amodeo v Gellert & Quartararo, P.C.*, 26 AD3d 705, 706 [3d Dept 2006]).

Plaintiff, in his motion, under motion sequence number five, contends that he is entitled to an order declaring that defendants' failure to respond to the summons with notice within 20 days, and the failure of some defendants to respond at all, justifies the allowance of a belated complaint filing by him. This contention is without merit. Attorney Condello, the K&V defendants, and Challenger timely served notices of appearance in this action, pursuant to CPLR 320 (a).

Plaintiff further proffers as an excuse for his failure to timely serve a complaint in response to the Demands for a Complaint served by Attorney Condello, the K&V defendants, and Challenger, that he could not file a timely complaint since his NYSCEF account was blocked, pending the approval of his motion to prosecute this action as a poor person, which he had filed under motion sequence number one.⁹ However, the docket did not become locked from filing due to plaintiff's failure to pay the \$210 fee to obtain an index number until May 16, 2024, which was 10 days after plaintiff already missed the deadline to serve a complaint upon Attorney Condello (NYSCEF Doc No. 94). Notably, on May 6, 2024, the very date by which plaintiff's complaint was due pursuant to Attorney Condello's Demand for Complaint, plaintiff filed five different exhibits on NYSCEF (NYSCEF Doc Nos. 17-21). Plaintiff had also already missed the deadline of May 9, 2024 to serve a complaint upon Challenger before May 16, 2024.

The deadline for plaintiff's service of a complaint on the K&V defendants was not until May 20, 2024, after the NYSCEF docket was locked. Plaintiff first filed his complaint

⁹ The order permitting plaintiff's prosecution of this action as a poor person was granted on June 21, 2024 (NYSCEF Doc No. 34).

on NYSCEF on June 25, 2024, four days after his poor person status was granted on June 21, 2024 (NYSCEF Doc No. 34).

Furthermore, plaintiff was required to serve a complaint pursuant to CPLR 3012 (b), and was not limited to filing a complaint on NYSCEF to accomplish service of his complaint. Thus, regardless of whether NYSCEF had locked the docket, plaintiff had the option of serving the K&V defendants, as well as serving Attorney Condello and Challenger, at the offices of their respective attorneys, which were listed in their Demands for a Complaint (*see* CPLR 2103).

Plaintiff, in motion sequence number five, also contends that Attorney Condello's email service of her motion to dismiss was improper. This contention lacks merit. In an e-filed action, service of a motion occurs simultaneously with its filing (*see* 22 NYCRR 202.5-b [f] [2] [ii] ["An e-filing party causes service of an interlocutory document to be made upon another party participating in e-filing by filing the document electronically"]). Thus, the court finds that plaintiff has not demonstrated a reasonable excuse for his delay in serving the complaint.

Moreover, plaintiff has also failed to demonstrate a potentially meritorious cause of action. Plaintiff has not submitted an affidavit of merit, but the court shall utilize plaintiff's proposed verified complaint as an affidavit by him (*see* CPLR 105 [u]).

Plaintiff's first cause of action for malpractice fails to state a claim against Attorney Condello or the K&V defendants since they were not plaintiff's attorneys and did not represent plaintiff or provide any services to him. The law is well-established that "the absence of any attorney-client relationship bars an action for attorney malpractice"

(*Seaman v Schulte Roth & Zabel LLP*, 176 AD3d 538, 539 [1st Dept 2019], quoting *Cabrera v Collazo*, 115 AD3d 147, 153 [1st Dept 2014]; see also *Gorbatov v Tsirelman*, 155 AD3d 836, 840 [2d Dept 2017]). Plaintiff also asserts this malpractice claim as against Challenger, which is not a law firm, by alleging that it provided inaccurate title research information to Korenblit & Vasserman and Attorney Vasserman, leading them to believe that the marital residence could be sold without his consent, approval, and signature. Such a claim is not viable since Challenger was not hired by plaintiff, owed no duty to plaintiff, and did not provide plaintiff with any inaccurate information. Furthermore, the Judgment of Divorce permitted the marital residence to be sold by Ekaterina, without plaintiff's consent, approval, or signature.

Plaintiff's second cause of action for fraud does not allege any misrepresentation that he relied upon, but, instead, alleges that the matrimonial court was defrauded. Specifically, plaintiff alleges that Attorney Condello intentionally misled Judge Morgenstern, "making believe" that the marital residence was going into foreclosure, and that this information led her to issue an order for the immediate sale of the property (NYSCEF Doc No. 39 at paragraph 70). However, Justice Morgenstern, in her July 19, 2023 order, stated she was permitting Ekaterina to list the marital residence for immediate sale due to plaintiff's noncompliance with numerous prior orders which had delayed the case since its commencement in 2020.

Plaintiff further alleges that Attorney Vasserman misled Justice Bourne-Clarke regarding the closing procedure, terms of sale, mortgage payoff, and distribution of the

proceeds, but does not plead how she was misled or that she relied upon these alleged misrepresentations with respect to issuance of any specific order.

Plaintiff has also failed to plead the requisite elements to state a claim for fraud and has failed to state the circumstances constituting the wrong in sufficient detail pursuant to CPLR 3016 (b) (*see Carr v Hayes*, 92 AD3d 534, 535 [1st Dept 2012], *lv denied* 19 NY3d 802 [2012], *rearg denied* 19 NY3d 951 [2012]). Thus, plaintiff's second cause of action for fraud fails to state a viable claim.

In addition, with respect to plaintiff's claim of fraud, plaintiff's motion, under motion sequence number five, must be denied insofar as it seeks an order declaring that the actions of Attorney Condello and Attorney Vasserman constitute fraud and misrepresentation, thereby warranting their prosecution by the District Attorney's Office.

Plaintiff's third cause of action for violation of a court order fails to state a cognizable cause of action. Plaintiff alleges that Attorney Vasserman proceeded with the sale of the marital residence in violation of Justice Bourne-Clarke's March 4, 2024 order vacating the default judgment and staying such a sale. However, Justice Bourne-Clarke rendered such March 4, 2024 order after the marital residence was already sold on February 12, 2024.

Plaintiff fourth cause of action for breach of fiduciary/contract is directed as against Attorney Vasserman. However, plaintiff does not allege that he had any contract with Attorney Vasserman. Plaintiff alleges that Attorney Vasserman failed to act in the best interest of the parties, in good faith, and loyalty. Plaintiff has not pleaded the existence of any fiduciary relationship between him and Attorney Vasserman in order to properly allege

such a claim (*see GMP Fur Trade Fin., LLC v Brenner*, 169 AD3d 649, 650 [2d Dept 2019]). Thus, this claim fails to state a cause of action.

Plaintiff's fifth cause of action for illegal transfer of the deed, plaintiff's sixth cause of action for illegal marketing of the property (which is directed at Aaron Eagle and Bergen Basin Realty LLC and not the moving defendants), and seventh cause of action for illegal sale of the property, are not meritorious since the transfer, marketing, and sale of the marital residence were performed pursuant to court orders. Plaintiff's eighth cause of action for mortgage fraud as against Attorney Vasserman alleges that she committed mortgage fraud because she failed to comply with mortgage terms, but does not allege with what terms she did not comply or how this constituted mortgage fraud. Plaintiff's ninth cause of action for work without a permit is directed as against the purchasers of the marital residence, and not the moving defendants. Thus, none of these causes of action show a potentially meritorious claim.

Plaintiff's eleventh cause of action for illegal sale of personal property and twelfth cause of action for illegal destruction of personal property are largely directed against the purchasers of the marital residence, and to the extent that Ekaterina did not allow him to remove his personal property before the sale, this issue is appropriately addressed in the divorce action. Plaintiff's motion, under motion sequence number five, insofar as it seeks an order declaring that the sale of his personal property was illegal and that appropriate measures should be taken to rectify this fraud by District Attorney's Office, is denied.

Plaintiff's thirteenth cause of action for illegal prevention of employment, which alleges that due to the denial of access to his personal belongings, he was prevented from becoming employed, does not state a cognizable claim.

Plaintiff's fourteenth cause of action for intentional infliction of emotional distress fails to state a viable cause of action. In order to allege a cause of action for intentional infliction of emotional distress, a plaintiff must plead the requisite elements of: (1) "extreme and outrageous conduct"; (2) "an intent to cause -- or disregard of a substantial probability of causing -- severe emotional distress"; (3) "a causal connection between the conduct and the injury"; and (4) "the resultant severe emotional distress" (*Lau v S & M Enterprises*, 72 AD3d 497, 498 [1st Dept 2010], *lv dismissed in part, denied in part* 16 NY3d 767 [2011]). Conduct is extreme and outrageous if it is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*164 Mulberry St. Corp. v Columbia Univ.*, 4 AD3d 49, 56 [1st Dept 2004], *lv dismissed* 2 NY3d 793 [2004] [internal quotation marks omitted]). Plaintiff has not asserted that the moving defendants intended to cause him severe emotional distress or engaged in any extreme and outrageous conduct. Rather, they were acting pursuant to the terms of the December 7, 2023 Judgment of Divorce.

Plaintiff's fifteenth cause of action for negligent infliction of emotional distress also does not state a meritorious claim. "A cause of action to recover damages for negligent infliction of emotional distress generally requires a plaintiff to show a breach of a duty owed to him [or her] which unreasonably endangered his physical safety, or caused him to

fear for his [or her] own safety” (*Sacino v Warwick Val. Cent. Sch. Dist.*, 138 AD3d 717, 719 [2d Dept 2016]). Plaintiff has failed to show any actions by the moving defendants which breached the general duty of care owed to him or caused him to fear for his physical safety.

Thus, plaintiff has not set forth any facts which would demonstrate a potentially meritorious cause of action against the moving defendants (*Carducci*, 120 AD3d at 1376). Therefore, inasmuch as plaintiff has failed to show a reasonable excuse for his delay in serving the complaint or a potentially meritorious cause of action, his action as against Attorney Condello, the K&V defendants, and Challenger must be dismissed pursuant to CPLR 3012 (b). Plaintiff’s motion, under motion sequence number five, is denied in its entirety.

As to motion sequence number six, Attorney Vasserman attests that subsequent to the closing, plaintiff contacted her office and her office attempted to remit the sum of \$57,096.74 to him, but he refused to accept this payment (NYSCEF Doc No. 70). Korenblit & Vasserman, PLLC is holding \$57,096.74 in its escrow account. The K&V defendants wish to deposit these funds into court since they have no claim to them and wish to be relieved of any liability pertaining to the \$57,096.74. Plaintiff, in motion sequence number seven, opposes the K&V defendants’ motion.

While the K&V defendants rely upon CPLR 1006, the interpleader statute, they have not brought an action for interpleader and there are no competing claimants for this fund (*compare Mahon, Mahon, Kerins & O’Brien, LLC v Moskoff*, 85 AD3d 738, 739 [2d Dept 2011], *lv denied* 17 NY3d 715 [2011]; *American Intl. Life Assur. Co. of N.Y. v Ansel*,

273 AD2d 421, 422 [2d Dept 2000]; *New York Life Ins. Co. v Lowy*, 40 AD3d 295, 297 [1st Dept 2007]). However, the K&V defendants have no interest in these monies, and there is no reason why the K&V defendants should be required to retain them in their escrow account. Pursuant to CPLR 2601, “[a] party paying money into court pursuant to the direction of the court is discharged thereby from all further liability to the extent of the money so paid in” (*see Sence v Atoynatan*, 142 AD3d 599, 599-600 [2d Dept 2016]; *Griffith v Michael Arounian PLLC*, 76 Misc 3d 1209[A], 2022 NY Slip Op 50858[U], *1 [Civ Ct, Kings County 2022]).

“Before a court grants an application allowing a party to pay sums into court, it must, in the first instance, have some legal basis for taking control of the funds” (*Lewis v Ganesh*, 83 Misc 3d 1292[A], 2024 NY Slip Op 51269[U], *2 [Sup Ct, Bronx County 2024], quoting *Matter of Amica Mut. Ins. Co. v Salecker*, 212 AD2d 865, 866 [3d Dept 1995]). Here, the K&V defendants state that plaintiff has refused to accept custody of these monies and the K&V defendants have no place to deposit them and wish to be relieved of the responsibility for them (*see American Intl. Life Assur. Co. of N.Y.*, 273 AD2d at 422). Significantly, the court in the divorce action has not ordered the release of the escrowed funds to plaintiff, and plaintiff, in his cross-motion, does not request the release of the escrowed funds to him.

Thus, in order to safeguard these funds, under these facts, an order permitting the K&V defendants to deposit the \$57,096.74, which are currently being held in escrow, with the Clerk of the Court, pursuant to CPLR 2601, is warranted.

While plaintiff contends that this motion by the K&V defendants should have been brought in the divorce action, the K&V defendants are not parties to the divorce action, and, therefore, could not seek relief in that action,¹⁰ whereas they were named as parties to this action brought by plaintiff. Plaintiff's action, as stated in the summons with notice, alleges, among other things, misappropriation of the proceeds of the sale of the marital residence (NYSCEF Doc No. 66), and plaintiff alleged, in his proposed complaint, that Attorney Vasserman "failed to follow [the] court order regarding the distribution of the proceeds" (NYSCEF Doc No. 39 at paragraph 98). Therefore, it was appropriate for the K&V defendants to seek this relief in this court.

Furthermore, since the sale of the marital residence has already taken place and the K&V defendants' motion concerns the distribution of the sale proceeds by Korenblit & Vasserman (who is not a party to the divorce action) to plaintiff, there is no reason why this issue would need to be determined in the divorce action, as opposed to being determined in this action. Moreover, even if the K&V defendants intervened in the divorce action to seek this relief, since both this action and the divorce action are in Kings County, the transfer and deposit of the escrowed funds would still be made to the Kings County Clerk. Thus, the court finds that the granting of the K&V defendants' motion, under motion sequence number six, is warranted. These funds should be held by the Kings County Clerk subject to the conclusion of the divorce action or further order of this court or the court in

¹⁰ The K&V defendants would have to move for leave to intervene, pursuant to CPLR 1013, in the divorce action and have that motion granted in order to seek the relief they seek here in the divorce action.

the divorce action (*see generally Jade Press v Packard*, 91 Misc 2d 820, 823 [Civ Ct, NY County 1977]).

Plaintiff's cross motion, under motion sequence number seven, insofar as it requests that the court immediately issue an order disbaring Attorney Vasserman, or, in the alternative, suspending her from the practice of law, pending a full hearing on claimed ethical violations and misconduct, and imposing sanctions upon the K&V defendants, is wholly without merit and must be denied. Plaintiff bases this request on his claim that the K&V defendants filed motion sequence number six in this court, rather than in the divorce action. As discussed above, such filing was appropriate, and did not constitute an ethical violation or misconduct or a reason to impose sanctions. Thus, plaintiff's request for this relief is denied.

Conclusion

Accordingly, Attorney Condello's motion, under motion sequence number two, the K&V defendants' motion, under motion sequence number three, and Challenger's motion, under motion sequence number four, for an order dismissing this action as against them, pursuant to CPLR 3012 (b), are granted.

Plaintiff's motion, under motion sequence number five, is denied in its entirety.

The K&V defendants' motion, under motion sequence number six, is granted pursuant to CPLR 2601; Korenblit & Vasserman, as an escrow agent, is ordered to deposit the sum of \$57,096.74, presently held by it in escrow, with the Clerk of this Court, within 20 days after service upon plaintiff of this decision and order with notice of entry thereon.

Said funds shall be held by the Kings County Clerk subject to the conclusion of the divorce action or further order of this court or the court in the divorce action.

Plaintiff's cross motion, under motion sequence number seven, is denied in its entirety.

Any issue raised and not addressed in this decision and order is denied.

This constitutes the decision and order of the court.

ENTER,
P.F.S.
J. S. C.

2025 MAY 19 A 10:51
KINGS COUNTY CLERK
FILED