

ORIGINAL

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

ROBERT LoRUSSO, AND OMER NALBANT and
ALIMA NALBAMT, as Administrators of the ESTATE OF
EDDY NALBANT, deceased,

Plaintiffs,

Index No. 607925/2017
Sequence # 001

- against -

Part 18
1/19/18

BERKMAN, HENOCH, PETERON, PEDDY &
FENCHEL, P.C.;

Defendants.

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Upon the foregoing papers the motion of defendant for an Order pursuant to CPLR Section 3211(a)(1) and (7), dismissing the complaint is granted as determined below.

The instant action asserts three causes of action sounding in legal malpractice, including causes of action for negligence, breach of contract and lost profits, concerning the defendant, Berkman Henocho, Peterson, Peddy & Fenchel, P.C.'s (hereinafter "Berkman") representation of the plaintiffs, Robert LoRusso, Omer Nalbant and Alima Nalbant, as Administrators of the Estate of Eddy Nalbant, to recover on the default of a promissory note held by defendant Robert LoRusso and decedent Eddy Nalbant, against individuals named Helaine Lazzaruolo and Carmelo DeLuca, concerning real property located in Melville, New York (hereinafter "subject property"). The Verified Complaint alleges that Berkman was retained in April 2006 to represent them in the foreclosure proceeding of the subject property and that as a result of Berkman's negligence forthwith, plaintiffs have been damaged from the delay of resolution of the foreclosure action.

Defendant contends that the instant action must be dismissed because plaintiffs have failed to set forth the requisite proof required to allege a legal malpractice claim and that plaintiff's breach of contract claim is duplicative. Specifically, defendants contend that plaintiffs have failed to establish that Berkman proximately caused them any damages, asserting that plaintiffs had over one year, subsequent to Berkman's discharge as their counsel in August 2014, to commence a

foreclosure action against the subject property and prior to the expiration of the statute to limitations for such a claim.

In support of its application, movant submits, *inter alia*, copies of the pleadings, the promissory note subject in the alleged foreclosure action, a certified copy of the deed to the subject property, and the consent to change attorney form.

Plaintiffs oppose, contending that there are credible allegations of legal malpractice based upon Defendant's actions in delaying the foreclosure proceeding and their inability to bring the foreclosure action on behalf of plaintiffs.

"To establish a cause of action to recover damages for legal malpractice, a plaintiff must prove (1) that the defendant attorney failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community, (2) proximate cause, (3) damages, and (4) that the plaintiff would have been successful in the underlying action had the attorney exercised due care (*see Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 N.Y.3d 438, 442, 835 N.Y.S.2d 534, 867 N.E.2d 385; *Siracusa v. Sager*, 105 A.D.3d 937, 938, 963 N.Y.S.2d 364; *Markowitz v. Kurzman Eisenberg Corbin Lever & Goodman, LLP*, 82 A.D.3d 719, 917 N.Y.S.2d 683). To establish proximate cause, it must be demonstrated that a plaintiff would have prevailed in the underlying action but for the attorney's negligence (*see Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 N.Y.3d at 442, 835 N.Y.S.2d 534, 867 N.E.2d 385)." *Grant v. La Trace*, 119 A.D.3d 646, 990 N.Y.S.2d 227 [2d Dept. 2014].

"A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted only if the documentary evidence submitted by the moving party "utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law" (*Kopelowitz & Co., Inc. v. Mann*, 83 A.D.3d 793, 796, 921 N.Y.S.2d 108; *Fontanetta v. John Doe 1*, 73 A.D.3d 78, 83, 898 N.Y.S.2d 569)." *Harris v. Barbera*, 96 A.D.3d 904, 947 N.Y.S.2d 548 [2d Dept. 2012].

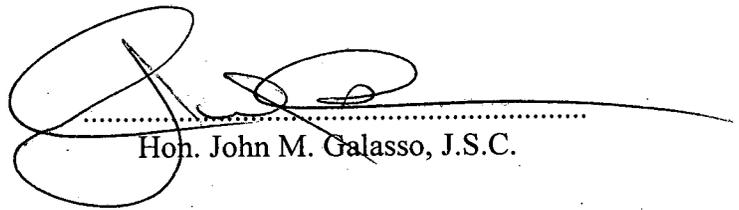
On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the sole criterion is whether the pleading states a cause of action. *See, Weiner v. Lenox Hill Hospital*, 193 A.D.2d 380 [1993]. On a motion to dismiss a complaint the court accepts the facts alleged as true and determines whether the facts alleged by the plaintiff fit within any cognizable legal theory. *See, MRI Management Recruiters of Mohawk Valley, Inc. v. Cowan*, 277 A.D.2d 921 [2000].

Applying the aforesaid standards to the plaintiffs' complaint and the allegations asserted therein against the defendant, this Court finds that plaintiffs have failed to sufficiently state a cause of action for legal malpractice. In as much as the allegations contained in the complaint do not allege that plaintiffs were unable to foreclose on the subject property due to defendant's actions, there is no allegations that plaintiffs were unable to obtain a favorable outcome. While plaintiff's complaint alleges that the delay in not being able to foreclose "thus far" and that defendant "failing

to promptly prosecute” caused them damages, there is no allegation that defendants acted outside of the standards of care, skill and diligence, to cause damages proximately caused by not obtaining the foreclosure. Likewise, the plaintiffs’ remaining causes of action are also dismissed as arising from the same facts as the legal malpractice claim. *See, Tortura v. Sullivan Papain Block McGrath & Cannavo, P.C., 21 A.D.3d 1082, 1083, 803 N.Y.S.2d 571, 572 [2d Dept. 2005].*

This constitutes the decision and Order of the Court. Any relief not expressly granted herein is denied.

March 13, 2018



Hon. John M. Galasso, J.S.C.

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ENTERED
MAR 19 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE