

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 19

Mtn. Seq. 3

JORGE VEGA RUIZ,

Index No.: 22941/2018E

Plaintiff,

- against -

**DECISION and ORDER**

829 REALTY, LLC and ARSH GEN CONSTRUCTION  
CORP.,

Defendants.

and Third-Party action.

	<u>Papers Numbered</u>
Notice of Motion, Affirmation, Exhibits, Memorandum of Law in support	1, 2, 3, 4
Affirmation in Opposition, Exhibits	5, 6
Reply Memorandum	7

Upon the enumerated papers; and due deliberation; Third-Party Defendant MOLOD, SPITZ & DESANTIS' motion to dismiss is granted, in accordance with the annexed decision and order.

**Dated: March 11, 2020**

Hon.

**LUCINDO SUAREZ, J.S.C.**  
**LUCINDO SUAREZ, J.S.C.**

**Check one:**

- Case Disposed in Entirety
- Case Still Active

**Motion is:**

- Granted  GIP
- Denied  Other

**Check if appropriate:**

- Schedule Appearance  Settle Order
- Fiduciary Appointment  Submit Order
- Referee Appointment

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JORGE VEGA RUIZ,

Index No.: 22941/2018E

Plaintiff,

- against -

829 REALTY, LLC and ARSH GEN CONSTRUCTION  
CORP.,

Defendants.

**DECISION and ORDER**

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829 REALTY, LLC

Third-Party Plaintiff,

- against -

ACCEPTANCE INDEMNITY INSURANCE COMPANY  
and MOLOD, SPITZ & DESANTIS,

Third-Party Defendants.

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PRESENT: Hon. Lucindo Suarez

The issue presented in Third-Party Defendant MOLOD, SPITZ & DESANTIS' ("MOLOD") motion is whether it established its burden for a dismissal of the third-party complaint pursuant to CPLR §3211(a)(1) and (a)(7). This court finds in the affirmative.

Under CPLR §3211(a)(1), a dismissal may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law. *Seaman v. Schulte Roth & Zabel LLP*, 176 A.D.3d 538, 111 N.Y.S.3d 266 (1st Dep't 2019). Furthermore, it is well established that on a motion to dismiss pursuant to CPLR §3211(a)(7), the court must accept as true the plaintiff's factual allegations

and afford the plaintiff all favorable inferences in ascertaining whether the pleadings support relief on the basis of any reasonable view of the facts pled. *Aristy-Farar v. State of NY*, 29 N.Y.3d 501, 81 N.E.3d 360, 58 N.Y.S.3d 877 (2017).

The underlying complaint against MOLOD arises from personal injuries that Plaintiff purportedly sustained at Defendant/Third-Party Plaintiff 829 Realty, LLC's, ("829 Realty") property. Plaintiff alleges that at the time of loss he was working for a subcontractor, Sebastian H. Soriano Construction, to perform construction work at 829 Realty's property. Further, he alleges that while working thereat he was caused to fall off a scaffold rendering him injured. Upon receiving notice of the instant action, 829 Realty sought that Acceptance Indemnity Insurance Company ("AIIC"), its insurance company, indemnify and provide it a defense to the underlying action. AIIC disclaimed 829 Realty's request for coverage. Subsequently thereafter, 829 Realty filed a third-party complaint against MOLOD for what appears to be legal malpractice but also asserting claims of breach of a fiduciary duty, fraud, conspiracy and breach of contract.

Since the attorney-client relationship is both contractual and inherently fiduciary, a complaint seeking damages alleged to have been sustained by a plaintiff in the course of such a relationship will often advance one or more causes of action based upon the attorney's breach of some contractual or fiduciary duty owed to the client. *Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 A.D.3d 1, 865 N.Y.S.2d 14 (1st Dep't 2008). Therefore, courts dismiss breach of fiduciary duty causes of action when plaintiffs also asserts a legal malpractice cause of action wherein both are duplicative or similar, unless plaintiffs allege that an attorney defendant breached a promise to achieve a specific result. *Id.*; see also *Mamoon v. Dot Net Inc.*, 135 A.D.3d 656, 25 N.Y.S.3d 85 (1st Dep't 2016).

829 Realty does not allege that MOLOD breached a promise to achieve a specific result. It essentially argued that MOLOD took on dual representation of parties with conflicting positions. Furthermore, it argued that MOLOD breached a duty of representation and committed fraud by contacting Plaintiff prior to sending a retainer letter to 829 Realty. Lastly, 829 Realty argued MOLOD conspired with AIIC to deprive 829 Realty of insurance coverage, thereby, breaching a contractual duty. As such, this court finds that 829 Realty's causes of action sounding in breach of duty, fraud, conspiracy and breach of contract are duplicative to its legal malpractice claim therefore, requiring a dismissal of same. *See Keness v. Feldman, Kramer & Monaco P.C.*, 105 A.D.3d 812, 963 N.Y.S.2d 313 (2d Dep't 2013).

For a legal malpractice cause of action 829 Realty was required to: (1) provide proof of the attorney's negligence; (2) make a showing that the negligence was the proximate cause of his loss or injury; and (3) provide evidence of actual damages. *Pellegrino v. File*, 291 A.D.2d 60, 738 N.Y.S.2d 320 (1st Dep't 2002). Thus, to survive dismissal, the complaint must show that but for counsel's alleged malpractice, the plaintiff would not have sustained some actual ascertainable damages. *Id.* Therefore, the failure to establish proximate cause requires dismissal regardless whether negligence is established. *Id.*

Here, there was no showing that MOLOD acted negligently. 829 Realty's third-party complaint claims that: 1) MOLOD provided information to Defendant ACCEPTANCE INDEMNITY INSURANCE COMPANY ("AIIC"), which was used to ultimately disclaim; 2) that MOLOD failed to dispute the coverage disclaimer and 3) that MOLOD withdrew as counsel after the disclaimer by leave of court. 829 Realty argued that MOLOD's actions or omissions violated the attorney's ethical professional code of conduct. However, violations of the code of conduct do not equate to negligence in a legal malpractice claim. *See Kimm v. Chang*, 38 A.D.3d

481, 833 N.Y.S.2d 429 (1st Dep't 2007). 829 Realty failed to plead any facts that would establish that MOLOD was negligent or that any purported negligence proximately caused any damages to 829 Realty. As such, this court finds that 829 Realty's cause of action sounding in legal malpractice is without merit.

Accordingly, it is

ORDERED, that Third-Party Defendant MOLOD, SPITZ & DESANTIS' motion to dismiss is granted.

This constitutes the decision and order of the court.

Dated: March 11, 2020



Lucindo Suarez, J.S.C  
**LUCINDO SUAREZ, J.S.C.**