SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **IAS MOTION 47EFM**

Justice

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INNOVATIVE RISK MANAGEMENT, INC.,

Plaintiff,

- v -

MORRIS DUFFY ALONSO & FALEY, JENNA MASTRODDI, EDWARD HARRINGTON

Defendants.

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INDEX NO. 151810/2017

MOTION DATE 11/09/2020, 11/09/2020

MOTION SEQ. NO. 006 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 187, 189, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 232, 233

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 188, 190, 227, 228, 229, 230, 231, 234, 235, 236, 237

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

In this legal malpractice action, plaintiff, a third-party administrator, Innovative Risk Management, Inc. (IRM) moves, pursuant to CPLR 3212, for partial summary judgment against defendants Morris Duffy Alonso & Faley, Jenna L. Mastroddi, Esq. and Edward Harrington, Esq. (collectively, Morris Duffy) (motion sequence no. 006).

Morris Duffy, moves, pursuant to CPLR 3212, for an order granting summary judgment and dismissing the complaint, which asserts claims of legal malpractice, breach of fiduciary duty and breach of contract (motion sequence no. 007).

BACKGROUND

Plaintiff is a third-party administrator for Arch Insurance Company (hereinafter, Arch) (Wasserman aff, NYSCEF Doc No. 146 ¶ 1). The case arises from defendants' representation of Arch's insureds, Emerson Express Co. Inc. (Emerson) and Danny Lee Fultz (Fultz), in a personal injury action related to a motor vehicle accident (*Earl C. Davis v Emerson Express Co., Inc.,* Sup Ct, Queens County, Index No. 302/2014) ("underlying action") (summons and complaint, NYSCEF Doc No. 1 ¶¶ 6-9). On August 7, 2013, Fultz, operating a tractor trailer owned by Emerson, was stopped at a stop sign, when it reversed into a vehicle occupied by Earl Davis (Davis), the driver, and Brenda Stratton (Stratton), a passenger (id., ¶¶ 16-17). Both sued Emerson and Fultz (*id*., ¶ 20). On January 31, 2014, FARA Insurance Services, the claims administrator for IRM and IRM's carrier, Arch, assigned Morris Duffy as defense counsel for the Stratton and Davis claims (FARA assignment email, NYSCEF Doc No. 160). Morris Duffy settled the Davis matter for $48,000.00 (defendants' memorandum of law in support of motion for summary judgment, NYSCEF Doc No. 186 at 14). The Stratton matter was scheduled for a damages only trial on June 7, 2016, after being awarded summary judgment on liability (NYSCEF Doc No. 1 ¶¶ 28, 42). It was not until the eve of trial, June 6, 2016, that Morris Duffy exchanged its expert reports for two medical experts, Dr. Bonomo and Dr. Rosenstadt, and a biomechanical expert, Dr. Toosi (*id*., ¶ 49). Immediately thereafter, plaintiff's counsel on the underlying matter moved to preclude all three experts (*id*., ¶ 57). Before the court could rule, Arch intervened and the Stratton matter was ultimately settled for $895,000.00 on June 10, 2016 (*id*., ¶ 84).

ARGUMENTS

Plaintiff alleges that defendants' failure to exchange timely expert reports, among other things, forced the carrier into an excessive settlement. It asserts that defendants were negligent in representing the insureds by ignoring court orders dated August 27, 2014 and January 14, 2015, which directed that expert reports be exchanged within 45 days of an independent medical exam or the note of issue (plaintiff's memorandum of law in support of motion for partial summary judgment, NYSCEF Doc No. 147 at 17). Even though Morris Duffy had retained its experts as early as 2015, it failed to disclose their experts or their reports, pursuant to CPLR 3101 (d), until the eve of trial a year later and failed to inform IRM of any discovery issues (*id*. at 16). IRM argues that underlying plaintiff's preclusion motion was sure to succeed, thereby leaving the insureds with only one expert, a radiologist, for a damages-only trial (*id*. at 15). IRM contends that the Stratton matter was defensible had defendants timely and properly exchanged its expert witnesses. Specifically, IRM alleges that a case could have been made that Stratton had pre-existing conditions and that her need for lumbar fusion surgery was questionable when the tractor trailer was traveling at a low rate of speed at the time of her accident (*id*. at 9).

In support of its motion, plaintiff submits the expert affidavit of Bennett Wasserman, Esq., who opines that defendants' actions, such as, failing to make a motion to dismiss for lack of "serious injury" and exchange timely CPLR 3101 notices, was a departure from good and accepted practice, commonly employed by an ordinary attorney (NYSCEF Doc No. 146 ¶ 99). He further opines that the settlement amount was in excess of the actual value of the underlying matter, which can be "inferred from prior cases of similar nature, from the Jury verdict report and from experience of experts in the field of personal injury law" (*id*., ¶ 90).

As a threshold matter, Morris Duffy alleges that IRM has no standing to sue for legal malpractice since there was never an attorney-client relationship between IRM and defendants, nor did they have a fiduciary relationship with, or duty to, IRM. Notwithstanding the threshold issue, it argues that it advised IRM that the Stratton matter had a settlement value of $155,000 to $175,000 and a potential verdict value of $325,000 to $350,000, but that IRM refused to grant authority for settlement (NYSCEF Doc No. 186 at 9). Its settlement recommendation increased to $575,000 to $650,000 after Stratton's lumbar fusion surgery, not including potential lost wages of approximately $32,000 (*id*.). IRM only authorized a maximum of $250,000 (*id*. at 17). Morris Duffy explains that multiple discovery motions were made in an attempt to obtain outstanding discovery and that any reason for delay in its expert disclosures was due to outstanding medical records that its experts were to needed review and decisions whether those experts would testify at trial (*id*. at 25; defendants' memorandum of law in opposition to plaintiff's partial summary judgment motion, NYSCEF Doc No. 226 at 15). Moreover, Morris Duffy argues that the breach of fiduciary duty and breach of contract claims are duplicative of the breach of legal malpractice claim and must fail (NYSCEF Doc No. 186 at 9). Lastly, defendants assert that IRM cannot show actual or ascertainable damages, since Arch paid the Stratton settlement, without any contribution from IRM (*id*. at 31).

DISCUSSION

"It is well settled that 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The motion must be supported by evidence in admissible form (*see Banco Popular N. Am. v Victory Taxi Mgmt.*, 1

NY3d 381, 384 [2004]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see* CPLR 3212). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the movant meets this initial burden, then the burden shifts to the opposition to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues (*De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]).

Legal malpractice is an attorney's failure to exercise "reasonable skill and knowledge commonly possessed by a member of the legal profession" (*Darby & Darby v VSI Intl.*, 95 NY2d 308, 313 [2000] [internal quotation marks and citation omitted]. An attorney may be held liable for "ignorance of the rules of practice, failure to comply with conditions precedent to suit, or for his neglect to prosecute or defend an action" (*Bernstein v Oppenheim & Co.*, 160 AD2d 428, 430 [1st Dept 1990]). To succeed on a claim for legal malpractice, the plaintiff must first establish the existence of an attorney-client relationship (*see* NY PJI 2:152, Comment I) and then: (1) the negligence of the attorney; (2) that the attorney's negligence was a proximate cause of the loss sustained; and finally, (3) that the plaintiff was damaged as a result of the attorney's actions (*Tydings v Greenfield, Stein & Senior, LLP*, 43 AD3d 680, 682 [1st Dept 2007], *affd* 11 NY3d 195 [2008]; *Bishop v Maurer*, 33 AD3d 497, 498 [1st Dept 2006], *affd* 9 NY3d 910 [2007]; *Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]). "A claim for legal malpractice may remain viable, despite settlement of the

underlying action, if settlement of the action was effectively compelled by the mistakes of counsel" (*Feldman v Finkelstein & Partners, LLP*, 131 AD3d 505, 506 [2d Dept 2015]).

I. Plaintiff's Partial Summary Judgment Motion

Plaintiff moves for summary judgment on the elements of negligence and proximate cause on its legal malpractice claim. In order to prove proximate causation, the plaintiff must establish a "case within a case" – that "but for" the alleged negligence, the plaintiff would have prevailed in the underlying action, or would not have sustained any "ascertainable damages" (*Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]; *Lieblich v Pruzan*, 104 AD3d 462, 462 [1st Dept 2013]). "A plaintiff's burden of proof in a legal malpractice action is a heavy one. The plaintiff must prove first the hypothetical outcome of the underlying litigation and, then, the attorney's liability for malpractice in connection with that litigation" (*Lindenman v Kreitzer*, 7 AD3d 30, 34 [1st Dept 2004]). The First Department has stated that:

> "[o]nly after the plaintiff establishes that he would have recovered a favorable judgment in the underlying action can he proceed with proof that the attorney engaged to represent him in the underlying action was negligent in handling that action and that the attorney's negligence was the proximate cause of the plaintiff's loss since it prevented him from being properly compensated for his loss"

(*id*.).

Here, plaintiff failed to establish that the underlying matter would have been successful or resulted in a more favorable judgment. Plaintiff avers that Arch was compelled to settle the underlying action for an unreasonable amount due to Morris Duffy's negligence in timely disclosing its experts. However, the record reflects that mediation was recommended, with a settlement value between $575,000 to $650,000 (litigation plan dated March 17, 2016, NYSCEF Doc No. 170 at 8). Thereafter, IRM's own report mirrors Morris Duffy's analysis, stating that the Stratton claim had an overall claim value of $700,000 to $1.2 million and the overall

settlement value between $550,000 to $750,000, without factoring in lost wages or liens (IRM Claim status report dated March 18, 2016, NYSCEF Doc No. 171 at 7). Stratton had undergone two surgeries and had been granted partial summary judgment on liability. Morris Duffy had advised that it was unlikely to succeed on a threshold or "serious injury" summary judgment motion given Stratton's "consistent treatment, MRI findings . . . and surgical recommendations" (NYSCEF Doc No. 170 at 9).

Plaintiff counsel's speculation, that Morris Duffy could have succeeded at trial had its experts testified that Stratton had pre-existing injuries and excessive surgeries for a low impact accident, is conjecture (*see Brooks*, 21 AD3d at 734-735 ["[S]peculation on future events is insufficient to establish that the defendant lawyer's malpractice, if any, was a proximate cause of any such loss"]; *see Pu v Mitsopoulos*, 2014 NY Slip Op 31038[U] [Sup Ct, NY County 2014] ["That plaintiff was unable to win [an] . . . unwinnable case does not establish that he was negligent"]). It is also speculative to assume that the underlying action could have settled for less than $895,000, or that, if the case had gone to trial, there would have been a defense verdict or an award lower than $895,000 when IRM's own analysis of the overall claim value was between $700,000 to $1.2 million. "Conclusory allegations that merely reflect a subsequent dissatisfaction with the settlement, or that the client would be in a better position but for the settlement, without more, do not make out a claim of legal malpractice" (*Chamberlain, D'Amanda, Oppenheimer & Greenfield, LLP v Wilson*, 136 AD3d 1326, 1328 [4th Dept 2016], *lv dismissed* 28 NY3d 942 [2016]; *see also Holschauer v Fisher*, 5 AD3d 553, 554 [2d Dept 2004]).

As for plaintiff's expert affidavit, "expert witnesses should not be called to offer opinion as to the legal obligations of parties. . . . Expert opinion as to a legal conclusion is

impermissible" (*Colon v Rent-A-Center*, 276 AD2d 58, 61 [1st Dept 2000]). As discussed in *Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass* (301 AD2d 63, 69 [1st Dept 2002]), "[a]n expert may not be utilized to offer opinion as to the legal standards which he believes should have governed a party's conduct." Here, like in *Russo*, plaintiff relies on the affidavit of another attorney, "a supposed expert, . . . to establish why counsel's strategy and performance were incompetent. . . . But making those determinations is the function of the court" (*id*. at 68). In other words, "[w]e do not rely on an attorney's affidavits to tell us what constitutes malpractice" (*id*. at 69).

Accordingly, having failed to establish proximate causation, plaintiff's motion for partial summary judgment will be denied.

II. Defendants' Summary Judgment Motion

A. Legal Malpractice

The burden is on the defendant moving for summary judgment to present evidence in admissible form establishing that the plaintiff is unable to prove at least one of the three elements of a malpractice cause of action (*Crawford v McBride*, 303 AD2d 442, 442 [2d Dept 2003]). As a threshold matter, defendants argue that there was no attorney-client relationship between IRM and Morris Duffy. When no attorney-client relationship exists, a cause of action for legal malpractice cannot be stated (*Baystone Equities, Inc. v Handel-Harbour*, 27 AD3d 231, 231 [1st Dept 2006]; *Linden v Moskowitz*, 294 AD2d 114, 115 [1st Dept 2002], *lv denied* 99 NY2d 505 [2003]). "New York courts impose a strict privity requirement to claims of legal malpractice; an attorney is not liable to a third party for negligence in performing services on behalf of his client" (*Lavanant v General Acc. Ins. Co. of Am.*, 164 AD2d 73, 81 [1st Dept 1990], *affd* 79

NY2d 623 [1992]; *see D'Amico v First Union Natl. Bank*, 285 AD2d 166, 172 [1st Dept 2001], *lv denied* 99 NY2d 501 [2002]).

However, while "strict privity is generally required . . . a relationship of near privity may, in limited circumstances . . ., be sufficient to sustain a legal malpractice claim. The exception applies in cases of negligent misrepresentation" (*Federal. Ins. Co. v North Am. Specialty Ins. Co.*, 47 AD3d 52, 60 [1st Dept 2007] [internal citation omitted]). IRM relies on *Allianz Underwriters Ins. Co. v Landmark Ins. Co*. (13 AD3d 172, 173 [1st Dept 2004]), where an excess insurer, acting as an insured's equitable subrogee, was permitted to sue a law firm for legal malpractice in its representation of an insured. The court in *Allianz* held that near privity was properly alleged because the elements of negligent misrepresentation were stated (*id*. at 175). IRM argues that as subrogee to Arch, its relationship with Morris Duffy is one of near privity, sufficient enough for a legal malpractice claim to survive.

In a factually similar case, *Risk Control Assoc. Ins. Group v Maloof, Lebowitz, Connahan & Oleske, P.C.* (113 AD3d 522, 522 [1st Dept 2014]), identical arguments were raised and dismissed. In *Risk Control Assocs. Ins. Group*, the plaintiff, a claims administrator, brought a legal malpractice suit against the law firm retained to represent the insured in a personal injury matter. It also contended that by virtue of its near privity relationship, its claims should proceed. The plaintiff argued that as equitable subrogree of the insurer, it stood in its shoes and could maintain the action. However, the court found that it had no contractual obligation to pay for the loss in the personal injury action, nor did it sustain actual damages because of this obligation (*id*.). Furthermore, the plaintiff failed to allege facts sufficient to state an equitable subrogation cause of action against the law firm (*id.*).

Here, too, plaintiff, as a third-party administrator, with no contractual obligation to pay for the underlying settlement cannot claim to be in a relationship of near privity. Plaintiff's reliance on *Allianz Underwriters Ins. Co.* (13 AD3d at 173) and *Great Atl. Ins. Co. v Weinstein*, (125 AD2d 214, 215 [1st Dept 1986]), is contrary to its position and role as a third-party administrator. The doctrine of subrogation "is liberally applied for the protection of those who are its natural beneficiaries - **insurers** that have been compelled by contract to pay the loss caused by the negligence of another" (*Winkelmann v Excelsior Ins. Co.*, 85 NY2d 577, 581 [1995] [emphasis added]. Moreover, plaintiff's own motion exhibits indicate that Arch assigned its subrogation rights to "Programs Plus, a segregated portfolio cell of First Employers SPC," not IRM (emails regarding subrogation, NYSCEF Doc No. 228 at 2). IRM's attempt to cure the defect with the affidavits of Lisa Marecki, Vice President of Arch Insurance Company, and Wesley A. Harris, of IRM, is unavailing when Harris' affidavit states the assignment is designated from Arch to First Employers SPC and Marecki's affidavit states the assignment is designated from Arch to IRM (Harris aff, NYSCEF Doc No. 229 ¶ 11; Marecki aff, NYSCEF Doc No. 230 ¶ 8). Therefore, plaintiff can neither claim existence of an attorney-client relationship nor one of near privity.

In any event, the legal malpractice claim must nevertheless be dismissed since defendants have established, prima facie, that IRM sustained no damages. Indeed, a review of the complaint reveals that IRM was merely "proximately damaged" (NYSCEF Doc No. 1 ¶ 85) and did not contribute to the Stratton settlement (*see Risk Control Assocs. Ins. Group*, 113 AD3d at 522).

Accordingly, having shown that at least one element of the legal malpractice claim cannot be met, defendants' motion for summary judgment on the legal malpractice cause of action will be

granted (*see Zarin v Reid & Priest*, 184 AD2d 385, 387–388 [1st Dept 1992] [Damages resulting from an attorney's negligence in a legal malpractice action must be actual and ascertainable]; *Ressis v Wojick*, 105 AD2d 565, 567 [3d Dept 1984] ["Absent proof of actual damages, a claim for attorney malpractice is unsupportable"]).

B. Breach of Fiduciary Duty

A breach of fiduciary duty claim is duplicative of a legal malpractice claim when both are based upon the same facts and seek the same damages (*Cobble Cr. Consulting, Inc. v Sichenzia Ross Friedman Ference LLP*, 110 AD3d 550, 551 [1st Dept 2013]). Here, the breach of fiduciary duty claim is duplicative of the legal malpractice cause of action, since it arises from the same facts as those underlying the legal malpractice claim, and do not allege distinct damages (*see e.g. Sun Graphics Corp. v Levy, Davis & Maher, LLP*, 94 AD3d 669, 669 [1st Dept 2012] ["The causes of action for breach of contract, breach of fiduciary duty, and negligent misrepresentation are redundant of the legal malpractice claim, since they arise from the same allegations and seek identical relief"]; *Chowaiki & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600, 600-601 [1st Dept 2014]).

Accordingly, defendants' motion for summary judgment on the breach of fiduciary duty claim will be granted.

C. Breach of Contract

Defendants argue that they are entitled to summary judgment on the cause of action sounding in breach of contract because there is no contractual relationship between IRM and Morris Duffy. Plaintiff makes no argument in opposition, and while its complaint alleges that a contractual relationship was formed when IRM retained defendants, no evidence of same has been submitted (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 181-182 [2011][internal quotation marks and citation omitted] ["Generally, a party alleging a breach of

contract must demonstrate the existence of a . . . contract reflecting the terms and conditions of their purported agreement"]).

Accordingly, defendants' motion for summary judgment on the breach of contract claim will be granted.

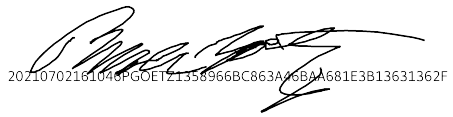
CONCLUSION

Based upon the foregoing, it is

ORDERED that plaintiff Innovative Risk Management, Inc.'s motion for partial summary judgment (motion sequence 006) is denied; and it is further

ORDERED that defendants Morris Duffy Alonso & Faley, Jenna L. Mastroddi, Esq. and Edward Harrington, Esq.'s motion for summary judgment (motion sequence 007) is granted and the complaint is dismissed with costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.



7/2/2021
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:	X	**CASE DISPOSED**			**NON-FINAL DISPOSITION**		
		GRANTED		**DENIED**	X **GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**