

SUPREME COURT OF THE STATE OF NEW YORK

NEW YORK COUNTY

CYNTHIA S. KERN
J.S.C.

PRESENT: _____ *Justice*

PART _____

Index Number : 154220/2012
GUSRAE KAPLAN NUSBAUM PLLC
vs
MUSCHEL, AARON
Sequence Number : 001
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 6/11/13

CK, J.S.C.
CYNTHIA S. KERN
J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
GUSRAE KAPLAN NUSBAUM PLLC,

Plaintiff,

Index No. 154220/2012

-against-

DECISION/ORDER

AARON MUSCHEL,

Defendant.
-----X

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff commenced the instant action seeking payment from defendant for allegedly outstanding legal fees. Plaintiff now moves for an Order pursuant to CPLR § 3211 (a)(1) and (7) dismissing defendant's counterclaims for malpractice, negligence and breach of contract. For the reasons set forth below, plaintiff's motion is granted.

The relevant facts are as follows. On or about December 29, 2000, defendant's father passed away and defendant and his two brothers, Mordechai and Ruben, were made co-executors of his estate (the "Estate"). A dispute arose among the brothers and they decided to appear before a Jewish Rabbinical Court (the "Beth Din") to seek a resolution of the issues relating to the Estate. On or about November 9, 2009, the Beth Din rendered a decision (the "November

Decision”) concerning two of their father’s properties: 734 and 736 Broadway, New York, New York (hereinafter referred to as the “Properties”), which was adverse to defendant. Thus, on or about October 15, 2010, defendant sought legal assistance and entered into an initial retainer agreement with plaintiff law firm Gusrae Kaplan Nusbaum, PLLC (“GKN”) (the “October Retainer”) to have the firm review the November Decision.

Less than a month after entering into the October Retainer, defendant’s brother Mordechai commenced a petition in the Supreme Court State of New York, County of Kings to confirm the November Decision (the “Confirmation Petition”). Thus, on or about November 15, 2010, defendant entered into a second retainer agreement with GKN to oppose the Confirmation Petition and represent him with respect to other aspects of the Beth Din proceedings (the “November Retainer”). Thereafter, GKN filed a cross-motion on behalf of defendant in the confirmation proceeding seeking discovery related to the November Decision. As set forth in the discovery motion, GKN intended to seek *vacatur* of the November Decision in opposition to the Confirmation Petition once the necessary discovery was obtained. However, on March 21, 2011, the petitioner failed to appear in court and the Confirmation Petition was marked off the court’s calendar and the cross-motion was rendered moot. Petitioner’s counsel sought a stipulation restoring the Confirmation Petition to the calendar, but defendant chose not to agree.

Until on or about September 8, 2011, the Properties were in bankruptcy and defendant sought GKN’s assistance in filing a notice of pendency on the Properties. However, upon initial research, GKN discovered that defendant had actually transferred his rights and interest in the Properties by deed approximately five years earlier in 2006. Thus, a notice of pendency was never filed.

On or about November 11, 2011, GKN filed an order to show cause on behalf of defendant in the Surrogate Court of the State of New York, Kings County (the "Surrogate Court") seeking an order declaring that all decisions and rulings by the Beth Din regarding the Estate be declared void and restraining the Beth Din from issuing any awards or decision with respect to the Estate. By order dated November 23, 2011, the Honorable Diana A. Johnson denied the order to show cause on the ground that the issues involved in the petition were "hopelessly entwined with claims involving religious principles and doctrines" and any restraint on the Beth Din would run "afoul of the prohibitions imposed by the First Amendment to the Constitution for the United States." Thereafter, in December 2011, GKN terminated its representation of defendant. At that time, defendant allegedly owed GKN \$42,349.46 in outstanding legal fees.

As defendant has not made payment on the allegedly outstanding legal fees, nor has he sought arbitration as to the amount, plaintiff commenced the instant action to recover said fees. In his answer, defendant asserted four counterclaims against plaintiff: (1) breach of contract; (2) breach of contract; (3) negligence; and (4) legal malpractice. While defendant brings these claims as four separate causes of action, all of them stem from plaintiff's alleged failure to vacate the November Decision and file a note of pendency on the Properties as well as its filing of the order to show cause, which defendant argues it knew or should have known was not going to be successful. Plaintiff now moves to dismiss these counterclaims on the grounds that they are without merit and documentary evidence demonstrates that many of the facts alleged by defendant are simply untrue.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed

to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). “[A] complaint should not be dismissed on a pleading motion so long as, when plaintiff’s allegations are given the benefit of every possible inference, a cause of action exists.” *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept 1990). However, “[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference.” *Morgenthau & Latham v. Bank of New York Company, Inc.*, 305 A.D.2d 74, 78 (1st Dept 2003) (quoting *Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81 (1st Dept 1999), *aff’d*, N.Y.2d 659 (2000)). In such cases, “the criterion becomes whether the proponent has a cause of action, not whether he has stated one.” *Id.* (internal quotations removed).

Here, as an initial matter, defendant has failed to adequately state a counterclaim for legal malpractice against plaintiff. It is well established that in order to state a claim for legal malpractice “the plaintiff must plead factual allegations which, if proven at trial, would demonstrate that counsel had breached a duty owed to the client [i.e. acted negligently], that the breach was the proximate cause of the injuries, and that actual damages were sustained.” *Dweck Law Firm, LLP v. Mann*, 283 A.D.2d 292, 293 (1st Dept 2001). Additionally, “the client must plead specific factual allegations establishing that but for counsel’s deficient representation, there would have been a more favorable outcome to the underlying matter. *Id.* “Unsupported factual allegations, conclusory legal argument or allegations contradicted by documentation, do not suffice.” *Id.* Moreover, the First Department has made clear that “[a]ttorneys may select among reasonable courses of action in prosecuting their clients’ cases without thereby committing malpractice, so that a purported malpractice claim that amounts only to a client’s criticism of counsel’s strategy may be dismissed.” *Id.*

In the present case, defendant's allegations fail to satisfy the elements necessary to maintain a counterclaim for legal malpractice as they are nothing more than conclusory legal arguments that are contradicted by documentary evidence. As an initial matter, neither plaintiff's failure to vacate the November Decision, nor its failure to file a notice of pendency on the Properties, amounts to negligence as such options were not available to plaintiff as a matter of law. In regards to the Confirmation Petition proceedings, at the time defendant retained plaintiff, more than ninety days had passed since the November Decision was rendered and a petition to vacate could only be made as a cross-petition on a petition to confirm the November Decision. *See CPLR § 7511(a)*. Since defendant's brother Mordechai failed to appear in court and the Confirmation Petition was marked off the calendar, plaintiff could no longer file a cross-petition on behalf of defendant to vacate the decision. Indeed, defendant had the option to sign a stipulation restoring the Confirmation Petition, but, for whatever reason, chose not to do so. Thus, the failure to vacate the November Decision was not caused by plaintiff's actions but was barred as a matter of law.

Similarly, plaintiff could not file a notice of pendency on the Properties as defendant no longer had an interest in the Properties when plaintiff undertook representation of defendant. It is well established that a notice of pendency cannot be filed where the party filing has "no right, title or interest in or to the real estate against which it is filed." *Braunston v. Anchorage Woods, Inc.*, 222 N.Y.S.2d 316, 317-18 (1961). In the present case, it is undisputed that defendant relinquished his interest in the Properties to his brother in 2006. Thus, plaintiff could not file a notice of pendency on defendant's behalf as a matter of law and the failure to file the notice of pendency cannot constitute negligence. Defendant's contention that a notice of pendency was

still viable in September 2011 as the deeds transferring his rights were held in escrow until November 23, 2011, is simply without merit. As an initial matter, during its representation of defendant, defendant never informed plaintiff of the fact that he signed away his interest in the Properties and that the deeds were being held in escrow until resolution of the Beth Din proceedings, nor does he allege such facts in his pleadings. Thus, even assuming such allegation was true, which pertinent case law and documentary evidence proffered by plaintiff seems to refute, it would still be insufficient to maintain defendant's counterclaim for malpractice as plaintiff cannot be deemed negligent by failing to act on facts that it did not know at the time.

Additionally, defendant's remaining contention that plaintiff's filing of the order to show cause constitutes malpractice amounts to nothing more than a criticism of counsel's strategy. Despite defendant's contention, it is well established that a court may resolve disputes involving religious institutions when the matters involved are not uniquely religious. *See, e.g., Park Slope Jewish Ctr v. Congregation B'nai Jacob*, 90 N.Y.2d 517 (1997). Thus, plaintiff's attempt to enjoin the Beth Din from making any further decisions regarding the Estate by filing an order to show cause on behalf of defendant was rooted in sound legal principles and the fact that said order was unsuccessful does not constitute malpractice.

Defendant's remaining counterclaims for negligence and breach of contract are merely duplicative of his malpractice claim and must be dismissed for the same reasons stated above. Accordingly, plaintiff's motion is granted and defendant's counterclaims are hereby dismissed. This constitutes the decision and order of the court.

Dated: 6/11/13

Enter: _____

CYNTHIA S. KERN
J.S.C.