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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN Justice PART 7

DAVID S. DINHOFER, M.D.,

Plaintiff,

- against-

MEDICAL LIABILITY MUTUAL INSURANCE COMPANY; FAGER & AMSLER, LLP; DONALD FAGER & ASSOCIATES; BROWN & TARANTINO, LLC; DONALD J. FAGER; EDWARD J. AMSLER; JEFFREY S. ALBANESE; DENNIS GRUTTADARO; PHYLIS HINES; BETH MURPHY; LOUIS NEUBURGER; PAM KNOOP; RONALD FEMIA,

Defendants.

INDEX NO. 602456/2009

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to 7, were read on this motion for summary judgment, pursuant to CPLR 3212, by defendants Brown & Tarantino, LLC, Jeffrey S. Albanese, Dennis Gruttadaro, and Phyllis Hines.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits (Memo)	3, 4, 5
Replying Affidavits (Reply Memo)	6, 7

FILED
FEB 02 2011
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ■ No

This is an action for money damages by plaintiff David S. Dinhofer, M.D. ("plaintiff"), a physician, against his former professional liability insurer, prior counsel, and individuals related to those entities, stemming from the settlement of an underlying medical malpractice action. The plaintiff in the malpractice action alleged that plaintiff deviated from accepted medical standards by failing to diagnose a cancerous lesion when he interpreted a CT scan and that his deviation was a substantial factor in a delayed diagnosis leading to the patient's death. Defendants are Medical Liability Mutual Insurance Company ("MLMIC"); Fager & Amsler, LLP

("Fager & Amsler"); Donald Fager & Associates ("Fager & Assoc."); Brown & Tarantino, LLC ("Brown & Tarantino" or "B&T"); Donald J. Fager ("Fager"); Edward J. Amsler ("Amsler"); Jeffrey S. Albanese ("Albanese"); Dennis Gruttadaro ("Gruttadaro"); Phyllis Hines ("Hines"); Beth Murphy ("Murphy"); Louis Neuburger ("Neuburger"); Pam Knoop ("Knoop"); and Ronald Femia ("Femia") (collectively "defendants"). The parties have not completed discovery and the Note of Issue has not been filed.

Before the Court is a motion for summary judgment (motion seq. 002), pursuant to CPLR 3212, filed by Brown & Tarantino, Albanese, Gruttadaro, and Hines (collectively "the B&T defendants").[1] The B&T defendants are the lawyers that represented plaintiff in the underlying medical malpractice action. They move for summary judgment dismissing the complaint as against them on the grounds that there are no genuine issues of material fact and the documentary evidence provides a complete defense. Plaintiff opposes the motion as premature since discovery is incomplete, and on the basis that there are disputed issues of fact that preclude summary judgment.

BACKGROUND

In support of their summary judgment motion, the B&T defendants submit, *inter alia*, an affidavit of Albanese; the MLMIC insurance policy; plaintiff's deposition; plaintiff's Consent to Settle; and a Stipulation of Discontinuance and General Release. In opposition, plaintiff submits, *inter alia*, his own affidavit and portions of his tax returns from the years 2003 through 2008. Both sides also submit copies of relevant correspondence and emails between the parties. The following facts are undisputed.

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[1]A separate summary judgment motion (motion seq. 001) was filed by MLMIC, Fager & Amsler, Fager & Assoc., Fager, Amsler, Neuburger, Murphy, Knoop, and Femia (collectively "the MLMIC defendants"), which the Court granted in an earlier decision on the grounds of equitable estoppel and ratification. The MLMIC defendants consist of plaintiff's former liability insurer, MLMIC, and various of its officers, directors, and employees; the servicing company for MLMIC; a law firm that serves MLMIC; and a member of the advisory committee that MLMIC named for a dispute resolution proceeding in the underlying action.

Plaintiff is a radiologist licensed to practice medicine in New York and four other states. In 2002, plaintiff bought a Physicians and Surgeons Professional Liability Insurance Policy ("the Policy") from MLMIC, a professional liability insurer for physicians, surgeons, and other health care professionals. Under the terms of the Policy, MLMIC was required to obtain plaintiff's "written, unconditional consent" in order to settle a claim (*see* Not. of Mot., Ex. A, Section IV.2.a). The Policy also set forth an arbitration-like dispute resolution procedure in the event that plaintiff refused to consent unconditionally.

In August 2005, plaintiff was named as a co-defendant in a medical malpractice action entitled *Edwards v University of Rochester, et al.* ("the Edwards Action"). The complaint alleged that plaintiff, among other co-defendants, departed from accepted standards in the medical profession by failing to properly diagnose and treat a malignant lung tumor that Earl Edwards ("Edwards") was suffering from. MLMIC hired the law firm of Brown & Tarantino to represent plaintiff in the action, and also retained Brown & Tarantino to represent three other co-defendants in the same case who were also MLMIC-insureds -- Clifton Springs Hospital & Clinic ("Clifton Springs"), Greater Rochester Vascular and General Surgeons, LLP ("Greater Rochester"), and Marvin Lederman, M.D. ("Lederman").[2]

Albanese, an associate at B&T, was involved in the day-to-day management of the defense of the Edwards Action. He claims that he personally met with plaintiff on at least two occasions to discuss the litigation, and that in accordance with his usual custom and practice he would have advised plaintiff during their initial meeting that B&T represented multiple co-defendants. Albanese also claims that he informed plaintiff by email that Lederman was a MLMIC-insured, and that the deposition transcript and discovery responses further revealed the joint representation.

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[2]Edwards discontinued his action against Clifton Springs and Greater Rochester on April 15, 2008.

Plaintiff alleges that he was not aware that B&T also represented Clifton Springs, Greater Rochester, and Lederman. He claims that Albanese never informed him that B&T represented any other co-defendants, nor discussed anything with him about a potential conflict of interest. He also disputes that B&T's documentary evidence establishes that he knew about the joint representation.

On March 5, 2007, Edwards' attorney expressed an interest in settling the Edwards Action. According to Albanese, B&T concluded that the prospect of successfully defending plaintiff was poor after obtaining medical reviews from three independent physicians, in addition to an in-house review conducted by a MLMIC physician. Each of the physicians purportedly concluded that plaintiff deviated from accepted medical standards. Plaintiff disputes the findings of the physicians and claims that B&T withheld information about such reviews.

On September 6, 2007, MLMIC requested plaintiff's consent to settle the Edwards Action. Plaintiff did not initially give his unconditional, written consent. However, on October 26, 2007, he signed a Consent to Settle form authorizing MLMIC to settle the case. The settlement was finalized five months later. At the time of settlement, the co-defendants had not reached an agreement as to the apportionment of the amount that would be paid to Edwards and the matter was submitted to an arbitration proceeding. On March 10, 2007, Judge Raymond Cornelius issued an Award of Arbitration apportioning 40% liability to plaintiff and Lederman, with the remaining 60% apportioned to two non MLMIC-insured co-defendants. Of the 40% liability, plaintiff was apportioned 30% liability, resulting in a $135,000 share of the settlement.

The parties thereafter executed a General Release on March 18, 2008, and a Stipulation of Discontinuance that discontinued the Edwards Action with prejudice on March 19, 2008. Plaintiff paid nothing out of his own pocket to settle the Edwards Action, and he has not reimbursed MLMIC for the $135,000 that it paid to settle the case on his behalf. As required

under law, MLMIC reported the settlement to the National Practitioners Data Base shortly after the settlement was finalized.

On May 6, 2009, plaintiff's counsel wrote to defendants and, for the first time, expressed plaintiff's intent to revoke his consent to settle. Plaintiff claimed that he discovered documentation demonstrating that his consent was procured by false representations and fraudulent concealment of material facts. On August 10, 2009, plaintiff commenced the present action alleging that he was coerced into giving his consent to settle because defendants, *inter alia*, concealed the fact that the same counsel represented multiple co-defendants in the Edwards Action. The complaint asserts causes of action against the B&T defendants for legal malpractice, fraud, deceptive business practices in violation of GBL § 349, and attorney misconduct violating Judiciary Law § 487.

As to damages, plaintiff alleges that his earnings were significantly reduced immediately following the release of information regarding the settlement. He submits portions of his tax returns indicating that his adjusted gross income averaged $309,351 per year for the five years preceding publication of the settlement (years 2003 through 2008), and was only $173,241 in 2008. He claims that this reduction of over $100,000 "cannot be explained by any other rationale" (Dinhofer Aff. ¶¶ 38). Plaintiff also alleges that he had no problem finding work prior to the settlement, but that "once the word was out" he began having difficulty getting recruiters to return his phone calls and was told that his settlement history was causing them to have difficulty placing and credentialing him. He purportedly had to borrow money from his parents to pay his mortgage, buy groceries, and otherwise maintain his household; and he had to move to Brooklyn to accept a job that he had previously declined. He lost his mammography credentialing because of lost work opportunities, and he tried to get insurance from MLMIC but was turned down. He did not receive an estimate for high risk insurance because he did not submit an application, but he learned from a potential employer that he would have to pay

$80,000 or more for such insurance which he could not afford. Plaintiff asserts that there is "no other reasonable explanation for this dilemma," and that he is "certain that [his] reduced earnings are, and will continue to be, caused by that unjust settlement" (*id.* ¶ 42).

DISCUSSION

The B&T defendants argue that they are entitled to summary judgment dismissing all causes of action against them, as a matter of law, because plaintiff cannot prove that their conduct was the "but for" proximate cause of any alleged loss plaintiff may have sustained by settling the Edwards Action. They contend that plaintiff was in fact aware of the joint representation, and, in any event, that he cannot demonstrate how the outcome would have been any different since four independent physicians each concluded that plaintiff deviated from accepted medical standards. They also argue that plaintiff's alleged damages are speculative and incapable of proof. They further assert that the remaining claims must be dismissed since they are duplicative of the legal malpractice cause of action.[3]

Plaintiff argues that summary judgment is premature since there is outstanding discovery, as defendants have not complied with his discovery demands. Plaintiff also argues that there are disputed issues of fact that preclude summary judgment. In particular, he disputes the B&T defendants' contention that he was aware of the joint representation. He also challenges the conclusions of the four physicians, and argues that their opinions should be scrutinized through discovery. On the question of damages, he argues that his earnings were, and continue to be, significantly reduced as a result of the settlement and that such a reduction cannot be explained by any other rationale.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party

[3]The B&T defendants additionally argue that plaintiff has ratified his consent to settle. The Court will not address this issue in view of the findings herein.

moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied *(see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

"An action for legal malpractice requires proof of three elements: (1) that the attorney was negligent; (2) that such negligence was a proximate cause of plaintiff's losses; and (3) proof of actual damages" (*Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005]; *see also AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]). Such an action is viable, despite settlement of the underlying action, if it is alleged that settlement of the action was effectively compelled by the mistakes of counsel (*see Katebi v Fink*, 51 AD3d 424, 425 [1st Dept 2008]). In order to obtain "summary judgment dismissing a complaint in an action to recover damages for legal malpractice, a defendant must demonstrate that the plaintiff is unable to prove at least one of the essential elements of its legal malpractice cause of action" (*Boone v Bender*, 74 AD3d 1111,

1112-13 [2d Dept 2010] [quotations omitted]).

To establish the element of proximate cause, a plaintiff must demonstrate that "'but for' the attorney's negligence, the plaintiff would either have been successful in the underlying matter or would not have sustained any ascertainable damages" (*Barbara King Family Trust v Voluto Ventures LLC*, 46 AD3d 423, 424 [1st Dept 2007]). "The failure to establish proximate cause mandates the dismissal of a legal malpractice action, regardless of the attorney's negligence" (*Brooks*, 21 AD3d at 734). Moreover, speculative or conclusory damages cannot be a basis for legal malpractice (*see Pellegrino v File*, 291 AD2d 60, 63 [1st Dept 2002]). "Mere speculation about a loss resulting from an attorney's alleged omission is insufficient to sustain a prima facie case of legal malpractice. The damages alleged must be actual as well as ascertainable" (*Brooklyn Law School v Great Northern Ins. Co.*, 283 AD2d 383, 383 [1st Dept 2001] [citation omitted]). "If there are no damages, there can be no cause of action" (*Zletz v Outten & Golden, LLP*, 18 AD3d 322, 323 [1st Dept 2005]).

The Court finds that the B&T defendants have made a prima facie showing of entitlement to judgment as a matter of law dismissing plaintiff's legal malpractice cause of action. The gravamen of plaintiff's claim against the B&T defendants is that they committed legal malpractice by concealing a potential conflict of interest arising from the firm's representation of multiple MLMIC-insureds in the Edwards Action. It well-settled law, however, that a "conflict of interest, even if a violation of the Code of Professional Responsibility, does not by itself support a legal malpractice cause of action" (*Sumo Container Station, Inc. v Evans, Orr, Pacelli, Norton & Laffan, P.C.*, 278 AD2d 169, 170 [1st Dept 2000]; *see also Schafrann v N.V. Famka, Inc.*, 14 AD3d 363, 364 [1st Dept 2005]; *Gonzalez v Ellenberg*, 2004 WL 2812884, at *5 [Sup Ct NY County 2004] [defendants' representation of physician in underlying medical malpractice action at the same time they served as counsel for MLMIC did not constitute legal malpractice]).

Moreover, even if there was a breach of a duty to disclose a conflict of interest, plaintiff

must still establish that such a conflict caused an "actual and ascertainable" injury proximately caused by the B&T defendants' purported negligence (see *Brooklyn* Law, 283 AD2d at 383). Here, plaintiff does not dispute that, as a result of the settlement, he has received the benefits of the general release of liability for all claims arising from the Edwards Action. He paid nothing out of pocket to settle the case, and he has not reimbursed MLMIC for the $135,000 that it paid to Edwards on his behalf (*see Holschauer v Fisher*, 5 AD3d 553, 554 [2d Dept 2004] ["The fact that the plaintiff subsequently was unhappy with the settlement obtained by the defendant does not rise to the level of legal malpractice."]).

In any event, the B&T defendants have prima facie demonstrated that plaintiff cannot establish actual damages, an essential element of his malpractice claim. The damages alleged by plaintiff -- reduced income, lost job opportunities, loss of credentialing, and potential increased insurance premiums – are too speculative and incapable of being proven with any reasonable certainty (*see Brooklyn Law*, 283 AD2d at 383*; Dweck Law Firm, LLP v Mann*, 283 AD2d 292, 294 [1st Dept 2001]; *Zarin v Reid & Priest,* 184 AD2d 385, 387-88 [1st Dept 1992]).

In opposition, plaintiff has failed to raise a triable issue of fact sufficient to defeat summary judgment. Although plaintiff argues that there is "no other reasonable explanation" for his alleged losses, his proof on damages fails to rebut the B&T defendants' prima facie showing that his claimed damages are incapable of proof beyond mere speculation (*see Dweck*, 283 AD2d at 293-94; *Pere v St. Onge*, 15 AD3d 465, 466 [2d Dept 2005]). Therefore, as plaintiff has failed to raise an issue of fact on at least one of the essential elements of his claim, dismissal of the legal malpractice cause of action is warranted *(see Boone*, 74 AD3d at 1112-13).

The Court further finds that the B&T defendants have established their entitlement to judgment as a matter of law dismissing the remaining causes of action for fraud and violations of GBL § 349 and Judiciary Law § 487. These claims are duplicative of the legal malpractice claim since they arise from the same facts and do not allege distinct damages (*see Carl v Cohen*, 55 AD3d 478, 478-79 [1st Dept 2008]; *Reyes v Leuzzi*, 2005 WL 3501578, at *4 [Sup Ct, NY

County 2005]). Furthermore, the Judiciary Law § 487 claim does not allege the requisite pattern of wrongdoing or deceit necessary to sustain such a claim (*see Pellegrino*, 291 AD2d at 64). Nor can plaintiff establish the applicability of GBL § 349 (*see Denenberg v Rosen*, 71 AD3d 187, 194 [1st Dept 2010]).

Finally, plaintiff's argument that the summary judgment motion is premature is unavailing. Plaintiff has not demonstrated that facts essential to justify opposition to the motion are within the B&T defendants' exclusive knowledge or that discovery might lead to facts relevant to the issues before the Court (*see Duane Morris LLP v Astor Holdings Inc.*, 61 AD3d 418, 418 [1st Dept 2009]; *Hariri v Amper*, 51 AD3d 146, 151-52 [1st Dept 2008]; *Bailey v New York City Transit Auth.*, 270 AD2d 156, 157 [1st Dept 2000]). "The mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion" (*Flores v City of New York*, 66 AD3d 599, 600 [1st Dept 2009]).

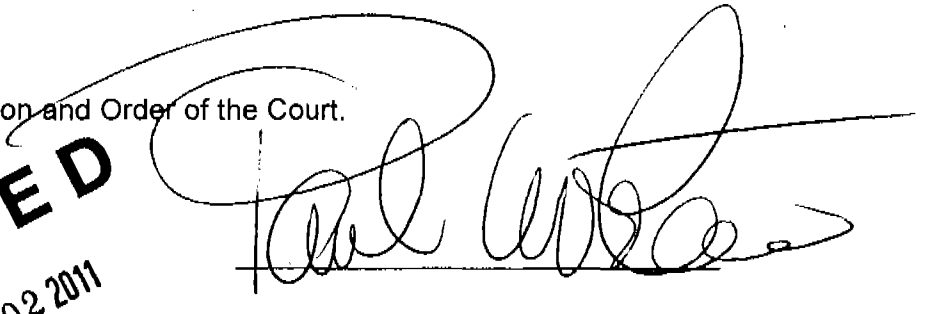
The Court concludes that the B&T defendants have established their entitlement to judgment as a matter of law dismissing all causes of action as against them. Accordingly, the B&T defendants' motion for summary judgment is granted.

For these reasons and upon the foregoing papers, it is,

ORDERED that the B&T defendants' motion for summary judgment is granted, and the complaint is dismissed in its entirety as against Brown & Tarantino, Albanese, Gruttadaro, and Hines; and it is further,

ORDERED that the B&T defendants shall serve a copy of this order, with notice of entry, upon all parties.

This constitutes the Decision and Order of the Court.



Dated: December 27, 2010

Paul Wooten J.S.C.

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