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

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E,

Plaintiff,

Index No: _____ -

against-

F,

Defendant.

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PLAINTIFF'S MEMORANDUM OF LAW

IN OPPOSITION TO DEFENDANTS MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO CPLR 3211(a)(7)

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TABLE OF CASES

SUPREME COURT OF THE STATE OF NEW YORK
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E,

Plaintiff,

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-against-

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The Plaintiff respectfully submits this Memorandum of Law, in addition to his separate Affidavit in Opposition to the Motion made on behalf of the Defendant-Attorneys to dismiss Plaintiff's Complaint herein pursuant to CPLR 3211(a)(7).

I. PRELIMINARY STATEMENT

1. The Plaintiff E, filed a Complaint against Defendant-Attorneys F, on the grounds of Breach of Fiduciary Duty, Breach of Implied Contract, Breach of Covenant of Good Faith and Fair Dealing and Legal Malpractice claiming relief of punitive, compensatory and consequential damages, interest, costs and attorney's fees.

2. F filed a Memorandum of Law in Support of Motion to Dismiss E's Complaint. F sought dismissal of Plaintiff's causes of action of Breach of Fiduciary Duty, Breach of Implied Contract, and Breach of Covenant of Good Faith and Fair Dealing on the ground that they are duplicative of Legal Malpractice claim. F also sought dismissal of Legal Malpractice cause of action on the basis of failure to state a cause of action ***and defense is founded upon documentary evidence***.

3. E opposes F's Memorandum of law in support of Motion to Dismiss Complaint.

II. STATEMENT OF FACTS

1. In this action Plaintiff, E, filed a Complaint against the Defendant Law Firm F, on the basis of underlying grounds.

2. S, a New York based General Contracting Firm, subcontracted E to perform carpentry work at _____ under the sub-contract dated _____.

3. E obtained primary liability insurance from Q for an amount of $_____per occurrence and $_____in aggregate pursuant to Commercial General Liability policy no. _____ between _____-_____and policy no. _____between _____-____.

4. E also obtained excess insurance coverage from IC pursuant to Commercial Umbrella liability policy _____ for an amount of $_____.

5. M, was employed by E at relevant point of time as a carpenter. He alleges that he was injured at the construction site, while working, on _____. On the date of occurrence of alleged accident, Q and IC insurance policies were in force.

6. M's attorney advised S's Corporate Claims Manager V about M's claim through a letter dated _____. V forwarded the letter to A, representative of S's primary insurer, N. A, by a letter dated _____ and also informed Q of M's alleged accident and requested Q to provide indemnification to S in connection with M's claim.

7. M filed a personal injury action against S on _____. S filed a Third-Party Complaint on _____against E in order to implead E as a Third-Party Defendant in M's Personal Injury Action. F were retained as defense counsel by Q to represent E in the said Third Party Complaint. Thereafter, S filed a Declaratory Judgment action on _____against E, Q and IC. On _____, the Court held in S's Declaratory Judgment Action that Q was obligated to provide, on a primary basis, coverage and a defense to S. At the same time the Court also held that IC had no duty to provide coverage to and indemnify S.

8. Pursuant to E's Primary General Insurance Contract, for the period of _____ to _____, Q had a professional and a contractual duty to defend E in the litigation against M. Q assigned F to defend E in the aforementioned M action. E had absolutely no involvement in the decision to hire counsel on its behalf. That was the sole decision of Q.

9. The insurance contract in question dictated that Q provide written notice to E as soon as practicable that the General Liability Limits were exhausted. Q's assigned counsel to E and Q were obligated to collaborate and exchange information concerning the underlying claim for damages and provide E with written notice that said claim would exhaust the general policy limits. This obligation was to be discharges as soon as reasonable in order to allow E the opportunity to provide notice to the excess carrier of said coverage limits. The written notice of the exhaustion of the underlying

policy is a condition precedent to notifying the excess carrier. It is a neglectful act to issue a late written notice of exhaustion pursuant to the aforementioned policy.

10. The date of the written notice to F is critical for E to obtain excess coverage.

11. F and Q became aware or should have been aware of the extent of M's injuries no later than _____, the date of M's deposition, or, in any event, no later than _____, the date of M's Supplemental Bill of Particulars. F were obligated to have an ongoing and continuous dialogues with Q concerning any claims in the M matter in order to properly discharge their duties relating to the required notice of exhaustion of the primary policy, if necessary.

12. In this the _____Bill of Particulars, M provided details regarding the nature and severity of his injuries, hospitalizations, and treatments, which had included two total knee replacements, as well as details regarding his alleged pain, suffering, and likely permanent physical limitations and impairments caused by his injuries. M also reported approximately $_____to date in special damages for health care providers, for which a lien may exist.

13. The _____ Bill of Particulars indicated that M last worked on _____, and remained totally incapacitated from employment from that date. Based upon the itemized hourly wage rates and benefits that M had been earning, pursuant to the union collective bargaining agreements under which M had been employed at the time of his injury, M was claiming lost earnings to date of $_____, and lost annuities and benefits to date of $_____.

14. In this _____ Deposition Testimony, M further detailed and described his injuries, treatments, surgeries, hospitalizations, and pain and suffering. Specifically, M testified that his injuries and damages included four hospitalizations, arthroscopic surgery on both knees, total knee replacements on both knees, prolonged periods of physical therapy and pain, permanent disability from work, as well as lost past and further income in excess of the amount already set forth in his _____Bill of Particulars.

15. In his _____ Supplemental Bill of Particulars, M stated that he remained totally disabled from employment and was claiming continuing lost wages, at the previous rates claimed, in addition to continuing lost wages into the indefinite future. The Supplemental Bill of Particulars also stated that M had been advised by his doctor to anticipate future knee surgeries at a cost of approximately $_____.

16. Pursuant to the duties owed as Counsel for E, F had an obligation to communicate directly with Q and E to put them on notice as to any significant developments as they related to the M litigation. Pursuant to the aforementioned damages, F clearly had an obligation to inform the aforementioned parties of the significant damages and knew or should have known that the facts triggered the exhaustion of the primary policy.

17. F knew that E had an excess policy to cover damages that would be triggered upon proper notice. They knew that the excess carrier was IC. They knew that lack of proper notification, based upon the knowledge of the scope of M's injuries, to IC would preclude E's access to the excess coverage and expose it to uninsured catastrophic losses.

18. Pursuant to the contract, F acknowledged its obligation to notice E, as to the exhaustion of the policy, and sent a letter as late as _____ advising E of the potential for an excess insurance trigger. Because of Q and F' late notice, E could not inform IC on a timely basis as to the exhaustion of the primary policy.

19. As a result of IC' s declination of coverage, E filed a Complaint seeking Declaratory Judgment against IC, the excess carrier, on _____ demanding that IC defend and indemnify E in M's Personal Injury Action. On _____, IC filed a Summary Judgement, the Lower Court granted IC's Summary Judgement Motion and dismissed E's Complaint by an Order and Judgment dated _____, determining that the notice to IC that the primary policy was exhausted was late. The Lower Court ruled that E knew or should have known that it was reasonably likely that M 's claim would exceed the _____dollar Q primary policy limit by no later than _____, the date of M 's deposition, or,

in any event, no later than _____, the date of M 's supplemental Bill of Particulars. The court observed that the IC policy required E to provide notice" as soon as practicable" of any claim or suit "which is reasonably likely to involve this policy". These terms obligated E to provide notice to IC when it became clear that a potential excess claim to IC when it became clear that a potential excess claim was likely to involve the IC policy, and not just when there was a evidence or substantiation that the primary policy was or would be exhausted. However, E could not notify IC timely as F failed to fulfil its obligation pursuant to the contract.

20. E is now exposed to any potential damages arising out of the M litigation that are in excess of $_____, as a direct result of F's inadequate representation of E. F had an obligation to coordinate with Q, to ensure that E received timely written notice as to the extent of M's "claims", specifically if there was evidence that the primary insurance policy would be exhausted. Due to such negligent conduct on the part of F, E did not receive timely notice that M's injuries exhausted the primary policy and thus could not timely notify IC that the excess policy was triggered.

21. F did not have a plausible cause for the aforementioned late notice. The belated notice of _____ by F exposed E to liability in the underlying Third-Party Complaint.

22. F continuously represented E on this very same matter, from which this malpractice claim arises, from at least _____ to _____.

23. On _____, E filed a Complaint against F on the grounds of Breach of Fiduciary Duty, Breach of Implied Contract, Breach of Covenant of Good Faith and Fair Dealing and Legal Malpractice claiming relief of punitive, compensatory and consequential damages, interest, costs and attorney's fees.

III. LEGAL ARGUMENTS

A. F'S MOTION FAILS TO MEET THE STANDARD FOR DISMISSAL

While denying the Motion to dismiss the Legal Malpractice complaint, the Appellate Court in *Green v Gross & Levin, LLP,* 101 A.D.3d 1079 (N.Y. App. Div. 2012), held that, "On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, a court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory." See also *Feldman v Finkelstein & Partners, LLP,* 76 A.D.3d 703 (N.Y. App. Div. 2010).

The Appellate Court in *Randazzo v Nelson, 128 A.D.3d 935 (N.Y. App. Div. 2015)*, held that, "Where a party offers evidentiary proof on a motion pursuant to CPLR 3211(a)(7), the criterion is whether the proponent of the pleading has a cause of action, not whether he or she has stated one." See also *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 46 A.D.3d 530 (N.Y. App. Div. 2d Dep't 2007).

Based upon the foregoing case laws, it is evident that E has sufficiently stated the causes of action for Legal Malpractice, Breach of Fiduciary Duty, Breach of Implied Contract and Breach of Covenant of Good Faith and Fair Dealing. As such, the Court must liberally construe the pleadings of the complaint and give E the benefit of every possible inference. F failed to meet the standards of dismissal of the Complaint by failing to provide evidentiary proof for refuting the allegations of the Complaint. Relying upon the above cited case law of *Randazzo*, E has satisfactorily fulfilled the criterion of having valid causes of action against F. E has adequately established well-founded and reasonable grounds against F which details the failure on the part of F to timely notify E regarding the exhaustion of primary policy. For that reason, E's Memorandum of Law in Opposition to F's Motion to Dismiss should be granted and F's Motion to dismiss E's Complaint should be denied.

B. THE FIRST, THIRD AND FOURTH CAUSES OF ACTION ARE NOT DUPLICATIVE OF THE LEGAL MALPRACTICE CLAIM

i. E's first cause of action of Breach of Fiduciary Duty in the Complaint for Legal Malpractice is not duplicative of the Legal Malpractice claim.

In *Sobel v Ansanelli,* 98 A.D.3d 1020 (N.Y. App. Div. 2012), the Appellate Court denied the branch of motion to dismiss alleging breach of fiduciary duty. The Court stated that the factual allegations are sufficient to state a cause of action sounding breach of fiduciary duty.

While granting the cause of action for breach of fiduciary duty, the Appellate Court in *Reiver v Burkhart Wexler & Hirschberg, LLP,* 73 A.D.3d 1149 (N.Y. App. Div. 2d Dep't 2010) held that the Supreme Court erred in granting that branch of the defendants' motion which was to dismiss the cause of action sounding in breach of fiduciary duty.

In *Weight v Day,* 134 A.D.3d 806 (N.Y. App. Div. 2015), the Appellate Court held that the dismissal of the cause of action alleging breach of fiduciary duty is not warranted on the ground that it is duplicative of the cause of action alleging accounting malpractice.

The Appellate Court in *Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker,* 56 A.D.3d 1 (N.Y. App. Div. 2008), held that the cause of action asserted as breach of fiduciary duty is not redundant because it is based upon different facts than those underlying the cause of action alleging legal malpractice.

Relying upon the above cited case laws, it E has amply proved that the cause of action for Breach of Fiduciary Duty is not duplicative of the legal malpractice claim. The sole reason is that the cause of action for Breach of Fiduciary Duty is grounded upon different set of facts as opposed to legal malpractice. E relied upon the advice of F by virtue of the contractual relation. In spite of having prior knowledge of M's injuries and related material information, F breached the fiduciary duty by failing to notify E about the exhaustion of primary policy. F also failed to disclose the material information to E. F inappropriately considered the cause of action for Breach of Fiduciary Duty duplicative of Legal Malpractice claim by failing to apprehend the different sets of facts and

legal principles on which the two causes of action were established.

ii. E's third cause of action of Breach of Implied Contract in the Complaint for Legal Malpractice is not duplicative of the Legal Malpractice claim.

Plaintiff stated a valid claim for breach of an implied in fact contract in *Evangelical Church v Calabrese Assoc., Inc.,* 2011 N.Y. Misc. LEXIS 974 (N.Y. Sup. Ct. Mar. 8, 2011). The Supreme Court held that, "An implied in fact contract may result as an inference from the facts and circumstances of the case, although not formally stated in words, and is derived from the presumed intention of the parties as indicated by their conduct." *Id.*

In *Watts v. Columbia Artists Management, Inc.*, 591 N.Y.S.2d 234 (N.Y. App. Div. 3d Dep't 1992), the Appellate Court held that, "A contract implied in fact rests upon the conduct of the parties and not their verbal or written words." The Court also held that, "The theories of express contract and of contract implied in fact are mutually exclusive." The Court further held that, "Whether an implied-in-fact contract is formed and, if so, the extent of its terms involve factual issues regarding the intent of the parties and the surrounding circumstances."

Q appointed F to represent E in M case pursuant to the contract between Q and E. This appointment of an attorney, consequently, established an attorney-client relationship between E and F. It an implied duty on the part of F to fairly represent E and disclose all available material information which would affect the interest of E. Likewise, F had an implied duty to provide E with timely notice. The failure to fulfil the term of the implied contract to timely notify led E to lose excess coverage and suffer damages. Such failure warrants a Legal Malpractice claim alleging Breach of Implied Contract against F.

iii. E's fourth cause of action of Breach of Covenant of Good Faith and Fair Dealing in the Complaint for Legal Malpractice is not duplicative of the Legal Malpractice claim.

The Appellate Court in *Gutierrez v Government Empls. Ins. Co.,* 136 A.D.3d 975 (N.Y. App. Div. 2016) held that, "Implicit in every contract is an implied covenant of good faith and fair dealing." The Court also held that, "The implied covenant of good faith and fair dealing is a pledge that neither party to the contract shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruit of the contract, even if the terms of the contract do not explicitly prohibit such conduct." *Id.* The Court further held that, "Such a cause of action is not necessarily duplicative of a cause of action alleging breach of contract." *Id.*

In *Pramer S.C.A. v Abaplus Intl. Corp.,* 76 A.D.3d 89, 103 (N.Y. App. Div. 2010), the Appellate Court modified Supreme Court's order of dismissal of plaintiff's implied covenant of good faith and fair dealing claim, finding it to be subsumed by the breach of contract cause of action. The Appellate Court further reinstated the breach of implied covenant of good faith and fair dealing cause of action.

The Case laws cited by Q can be distinguished as follows:

1. It is noteworthy to mention here that Q has cited *Mammon v. Dot Net Inc.*, 135 A.D.3d 656, 25 N.Y.S.3d 85, 88 (1st Dept. 2016), *Facie Libre Assocs. I, L.C.C. v. Littman Krooks, L.L.P.,* 125 A.D.3d 490, 4 N.Y.S.3d 16, 17 (1st Dept. 2015) and *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.,* 10 A.D.3d 267, 780 N.Y.S.2d 593, 596 (1st Dept. 2004), which merely focuse on dismissal of the cause of action for breach of fiduciary duty in legal malpractice claim. Q has deliberately disregarded the case laws in which the courts have denied the dismissal of the cause of action for breach of fiduciary duty on the ground that it is not duplicative of the legal malpractice cause of action as it is based on different facts underlying the legal malpractice claim. In furtherance, the myriad of case laws cited by Q are apparently distinguished in *Cherry Hill Mkt. Corp. v. Cozen O'Connor P.C.,* 118 A.D.3d 514 (N.Y. App. Div. 1st Dep't 2014) wherein the Appellate Court granted

the cause of action for breach of fiduciary duty in a legal malpractice claim. The Appellate Court stated that the cause of action for breach of fiduciary duty should not have been dismissed as duplicative of the malpractice causes of action. The Appellate Court further stated that the cause of action for breach of fiduciary duty was not based upon the same facts underlying the malpractice claims.

In re *Cherry Hill Mkt. Corp. v. Cozen O'Connor P.C.,*

> Plaintiffs (Cherry Hill Market Corporation and David Isaev (collectively Cherry Hill)) filed a legal malpractice suit against the defendants (the previous legal counsel, Cozen O'Connor P.C., and the particular attorney who worked on their matters, Howard Homstein). The dispute between them was as follows. Cherry Hill engaged the defendants to work on two matters, a zoning issue and a lawsuit in which Cherry Hill was the defendant (the Utrobin Action). The defendants agreed in a letter to cap their fees for the zoning matter at $150,000. However, the parties did not enter into any written agreement regarding fees for the Utrobin Action, nor did the defendants ever explain to Cherry Hill how fees would be computed and billed. Cherry Hill paid more than $300,000 in legal fees to defendants. At Cozen O'Connor's insistence, Cherry Hill paid approximately $83,000 of this amount directly to Howard Homstein, which Cozen O'Connor then did not acknowledge as paid in subsequent billing disputes. Cherry Hill alleges that the defendants did not adequately perform the agreed work in the zoning matter. It alleges that defendants did not prepare for, and missed the deadline for, a summary judgment motion in the Utrobin Action. Defendants moved to withdraw from the Utrobin Action on the basis of unpaid legal fees. Defendants filed a Motion to Dismiss Plaintiff's Complaint. Defendants represented to the court that they had charged reasonable fees and that Cherry Hill had not disputed these charges when in fact Cherry Hill had repeatedly done so. The trial court granted defendant's Motion to Dismiss. Plaintiff's appealed. Appellate Court denied defendants Motion to dismiss regarding the third cause of action sounding breach of fiduciary duty. The Appellate Court held that the cause of action for breach of fiduciary duty should not have been dismissed as duplicative of the legal malpractice cause of action. The Appellate Court further held that the cause of action for breach of fiduciary duty was based upon different facts underlying the legal malpractice claim.

2. The perusal of the case law cited by Q, *Sutch v. Sutch-Lenz,* 129 A.D.3d 1137, 11 N.Y.S.3d 281, 284 (3d Dept. 2015) reveals that it is a 3rd Department case law and is distinguishable factually and thus is fallacious. In *Sutch v. Sutch-Lenz*, initially a medical malpractice action was filed and later a

legal malpractice case was filed against the defendants. Regarding the legal malpractice claim, the Appellate Court held that the allegations of the legal malpractice complaint were insufficient to establish that the plaintiff had an attorney-client relationship with defendant. Consequently, the Appellate Court dismissed plaintiff's legal malpractice claim in the absence of an attorney-client relationship. The facts of the above cited case law are different than the case at bar. In the case at bar, E has filed a legal malpractice claim against the law firm appointed by Q to represent E in the M case. It is apparent that E and F had an attorney-client relationship. Thus, E's allegations sufficiently establish the attorney-client relationship with F. Also, another point of distinction is that there is no medical malpractice action in the case at bar.

3. The case law *Weight v. Day*, 134 A.D.3d 806, 20 N.Y.S.3d 640, 643 (2d Dept. 2015) cited by Q is factually and legally distinguished from the case at bar. In Q's above cited case law, the Court had decided on the matter of recovery of damages for accounting malpractice. The Appellate Court had dismissed the causes of action alleging breach of contract, breach of the covenant of good faith and fair dealing, and fraud on the ground that they were duplicative of accounting malpractice and breach of fiduciary duty causes of action. The case law deals with dismissal of other causes of action being duplicative of the accounting malpractice claim and not legal malpractice claim. The case at bar involves legal malpractice claim against the law firm appointed by Q to represent E. E is alleging legal malpractice against the law firm for not timely notifying the excess carrier of the exhaustion of the primary policy despite of having prior knowledge of the exhaustion.

Accordingly, E has sufficiently established that the causes of action of Breach of Fiduciary Duty, Breach of Implied Contract and Breach of Covenant of Good Faith and Fair Dealing are not duplicative of Legal Malpractice claim. E respectfully prays the Honorable Court to dismiss Defendant's Motion to Dismiss in its entirety.

C. THE LEGAL MALPRACTICE CAUSE OF ACTION SHOULD NOT BE DISMISSED

In *Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 A.D.3d 34 (N.Y. App. Div. 2d Dep't 2006), the Appellate Court held that, "A legal malpractice defendant seeking dismissal, must tender documentary evidence conclusively establishing that the scope of its representation did not include matters relating to the alleged malpractice."

The Court further held that, "A court cannot say, as a matter of law, that a legal malpractice action may never lie based upon a law firm's failure to investigate its client's insurance coverage or to notify its client's carrier of a potential claim." *Id.*

In re *Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*,

> A worker was seriously injured while performing demolition work at Shaya B. Pacific, LLC, the plaintiff insured's premises. As a result, the worker and his wife commenced a personal injury action against the insured and others. Plaintiff's primary carrier, Certain Underwriters at Lloyd's of London, retained the defendant, Wilson, Elser, Moskowitz, Edelman and Dicker, LLP to defend the plaintiff in the personal injury action. The principal issue was whether the law firm, retained by a primary carrier to defend the insured in a pending action, had any obligation to investigate whether the insured had excess coverage available and, if so, to file a timely notice of excess claim on the insured's behalf. The Court denied that branch of defendant's motion which was to dismiss the complaint. The Court also held that defendant has failed to tender documentary evidence establishing that the scope of its representation did not include matters relating to the alleged malpractice. The Court further disagreed with the defendant's contention that there is not authority according to which a legal malpractice action may be maintained against an attorney for failing to investigate an insurance coverage issue or for failing to notify a client's carrier of a potential claim. The Court, however, did not hold that an attorney may never be held liable for failing to discover available insurance coverage, the Court implied that had the availability of coverage been clear at the time of the representation, a different result would have been reached. The court also stated that a Court cannot say, as a matter of law, that a legal malpractice action may never lie based upon a law firm's failure to investigate its client's insurance coverage or to notify its client's carrier of a potential claim. The Court concluded by stating that same view is taken with respect to an attorney who is retained, not by the defendant directly, but by its carrier, while unreadily deciding upon a matter of law that a failure to investigate the existence of excess insurance coverage may never give rise to a legal malpractice

> action against an attorney retained directly by a defendant in a personal injury action.

In *Bey v Flushing Hosp. Med. Ctr.*, 95 A.D.3d 1152, 1153 (N.Y. App. Div. 2d Dep't 2012), the Appellate Court denied the defendant law firm's motion for summary judgment dismissing the complaint because the defendant law firm failed to establish, prima facie, that the plaintiff was unable to prove that he sustained actual and ascertainable damages sufficient to support a legal malpractice cause of action or that the defendant was the proximate cause of the plaintiff's injury. The Court while denying the defendants Motion to Dismiss held that, "In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages."

The Supreme Court in *Unitrin Auto & Home Ins. Co. v. Sullivan*, 2016 N.Y. Misc. LEXIS 178 (N.Y. Sup. Ct. Jan. 4, 2016), stated that when counsel is assigned to defend an insured, that attorney's relationship and allegiance is with and to the insured, not the insurer.

In *Superior Tech. Solutions, Inc. v Rozenholc*, 2013 N.Y. Misc. LEXIS 1423 (N.Y. Sup. Ct. Apr. 1, 2013), the Supreme Court stated that, "To maintain an action for malpractice, plaintiffs must show; (1) the negligence of the attorney; (2) that the negligence was the proximate cause of the loss sustained; and (3) proof of actual damages." The Court further stated that, "It requires plaintiff to establish that counsel failed to exercise the ordinary skill and knowledge commonly possessed by a member of the legal profession, and that but for the attorney's negligence the plaintiff would have prevailed in the matter. . . ." *Id*.

In *Endless Ocean, LLC v Twomey, Latham, Shea, Kelley, Dubin & Quartararo*, 113 A.D.3d 587 (N.Y. App. Div. 2014), the Appellate Court held that, "A motion to dismiss under 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, conclusively establishing a defense as a matter of law." See also *Martin v Claude Castro & Assoc. PLLC*, 2016 N.Y. Misc. LEXIS 2357 (N.Y. Sup. Ct. June 24, 2016).

In *Endless Ocean, LLC v Twomey, Latham, Shea, Kelley, Dubin & Quartararo* the Court denied attorneys motion to dismiss because the attorneys did not conclusively establish a defense as a matter of law. *Id*.

The Case laws cited by Q can be distinguished as follows:

1. Q has misled the Honorable Court by citing *AAA Sprinkler Corp. v. General Star National Ins. Co.*, 271 A.D.2d 331, 705 N.Y.S.2d 582 (1st Dept. 2000) and *Monarch Cortland v. Columbia Casualty Co.*, 224 A.D.2d 135, 646 N.Y.S.2d 904 (3d Dept. 1996) which state that the insured cannot shift its liability of timely notifying the excess carrier, of the exhaustion of the policy, upon the insurer. The case laws also state that the insured is contractually obligated to notify its excess carrier of the likelihood of a judgment in excess of the primary policy limits. In the case at bar, E in the legal malpractice complaint has not shifted its burden as alleged, of timely notifying the excess carrier about the exhaustion of the primary policy, upon Q. Instead E has alleged that, having prior knowledge of the possibility of exhaustion of the primary policy, F had the obligation to notify E of such possibility. Having failed to fulfil the obligation, the law firm has committed legal malpractice entitling E of the damages.

2. Perusal of the case law *Shaya B. Pacific, LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 A.D.3d 34, 827 N.Y.S.2d 231 (2d Dept. 2006), cited by Q, reveals that Q has captured the part favorable to them, but ignored the decision of the Court which is favorable to E. The issues and decisions of the court favors E in respect of the two questions. In the case law, an insurer retained an attorney in a claim to defend the interest of the insured as well. The first question was whether,

under ordinary circumstances, an attorney retained directly by a defendant in a personal injury action had any obligation to investigate the availability of insurance coverage for his or her client and to see that timely notices of claim were served; the second was whether, if such an obligation existed, it also bound an attorney who was retained to defend a personal injury action, not by the defendant directly, but by the defendant's carrier. On the first question, the Court disagreed the contention of the defendant law firm which contended that there is no authority in this State for the proposition that a legal malpractice action might be maintained against an attorney for failing to investigate an insurance coverage issue or for failing to notify a client's carrier of a potential claim. The Court relied upon a Court of Appeals case law, *Darby & Darby v VSI Intl.* (95 NY2d 308, 739 NE2d 744, 716 NYS2d 378 [2000]) and decided that as a matter of law, the court could not say a legal malpractice action might never lie based upon a law firm's failure to investigate its client's insurance coverage or to notify its client's carrier of a potential claim. On the second question, the court stated that it was not prepared to say that, as a matter of law, a failure to investigate the existence of excess insurance coverage may never give rise to a legal malpractice action against an attorney retained by the insurer to defend the insured.

Accordingly, despite the prior knowledge, F appointed by Q to defend E in M action, had failed to timely notify E of the exhaustion of the primary policy which warrants a Legal Malpractice claim against F. It is noteworthy to mention here that F failed to submit a documentary evidence refuting the factual allegations of E's Complaint. Therefore, F could not establish a defense as a matter of law to prevail in the Motion to Dismiss. For that reason, E respectfully prays the Honorable Court to allow Memorandum of Law in Opposition to F's Motion to Dismiss and consequently, deny F's Motion to dismiss Complaint in its entirety.

IV. CONCLUSION

For the foregoing reasons and the matters set forth in E's Affidavit in Opposition to F's Motion to Dismiss, the Motion of F to dismiss the Complaint should be denied in the entirety because F's Motion to dismiss is based on fallacious legal arguments which are untenable in law. E respectfully requests such other and further relief as the Court deems just and proper including an award of reasonable attorney fees and expenses.

Dated: New York, New York

_____ _____

_____

_____

E's Attorney