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

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**NICOLE E. GAVIN,**

**Plaintiff,**

**-against-**

**ANDREA & TOWSKY, LESLIE LOPEZ, individually, FRANK A. ANDREA, III, individually, and ROBERT L. TOWSKY, individually,**

**Defendants.**

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**IAS PART 15**
**Index No. 606737/2018**
**Mot. Seq. Nos. 001/002**

**DECISION AND ORDER**

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**LEONARD D. STEINMAN, J.**

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The following papers, in addition to any memoranda of law submitted by the parties, were reviewed in preparing this Decision and Order:

Defendants' Notice of Motion, Affirmation, Affidavits & Exhibits.....1
Plaintiff's Notice of Cross-Motion, Affirmation, Affidavit & Exhibits.....2
Defendants' Reply Affidavits.....3
Plaintiff's Reply Affirmation.....4

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This is a legal malpractice action relating to defendants' aborted representation of plaintiff in connection with injuries she allegedly sustained in a car accident. After representing plaintiff for nearly two years—but not having sued on her behalf—defendants purportedly terminated its relationship with plaintiff by sending her a letter via regular mail three months shy of the expiration of the statute of limitations. Plaintiff claims she never received the letter and that the statute of limitations passed before she learned that her counsel abandoned her. Defendants now move for summary judgment and argue that they are not at fault since they properly fired their client while her claim was still alive. Plaintiff cross-moves for summary judgment. For the reasons set forth below, defendants' motion is denied in part and granted in part. Plaintiff's cross-motion is denied.

## BACKGROUND

On August 30, 2012, plaintiff was involved in a two-car motor vehicle accident. She attests that her car was "t-boned" and pushed from the side across two lanes of oncoming traffic. Plaintiff gives no particulars of the accident, such as the circumstances leading to the accident, where it occurred, or its cause. [redacted] unauthenticated police accident report to her papers. That report reflects a statement from the other driver that "the sun was in her eyes" when she made a left turn leading to the collision.

Plaintiff asserts that as a result of the accident she suffered traumatic injuries, including brain trauma, leg paralysis and seizures and learned to walk again after six months of physical therapy. [redacted]

After first retaining the law firm of Napoli Bern to represent her in connection with the accident, plaintiff switched attorneys on May 29, 2013. On that date, after allegedly meeting with defendants Leslie Lopez, Esq. and Robert Towsky, Esq. of the defendant Andrea & Towsky law firm, plaintiff signed a retainer agreement with Andrea & Towsky and a Consent to Change Attorney form. Plaintiff contends that defendants never contacted her thereafter. When plaintiff contacted defendants she was allegedly told to be patient and that defendants were "working something out." Plaintiff asserts that she learned for the first time on December 15, 2017, long after the statute of limitations had expired, that defendants "dropped" her as a client pursuant to a June 2, 2015 letter purportedly mailed to her. Plaintiff alleges she never received a copy of the termination letter.

Defendants do not describe what acts they took on plaintiff's behalf during the approximately two-year period of their representation. Nor do they explain why they purportedly terminated the attorney-client relationship. Defendants attach a copy of an unsigned termination letter from Lopez as an exhibit to their papers and set forth their custom and practice in an affidavit of Evelyn Eng (submitted for the first time in reply) with

respect to mailing "such letters." The termination letter states:

> Dear Ms. Gavin:
>
> This letter shall serve as notice that this office will be closing our file regarding your accident case. Although you have treated with regard to the injuries you sustained as a result of your accident/incident, this office does not believe we will be able to assist you in the commencement of a lawsuit and through said process.
>
> Please be advised that you have the right to consult another attorney with regard to this matter. If you wish to pursue this matter, please consult a new attorney immediately as the time in which you can commence suit is three (3) years from the date of accident and will expire on August 28, 2015. In the event that you retain a new attorney, please have that individual contact my office and we will arrange for an orderly transfer of the file.
>
> I thank you for consulting our firm. If we can be of any service to you in the future, please do not hesitate to contact me. As always, should you have any questions or comments regarding any aspect of our representation, please do not hesitate to contact the undersigned.
>
> Very truly yours,
>
> Andrea & Towsky, Esq.
>
> Leslie Lopez

Defendants assert that the June 2, 2015 termination letter was mailed to plaintiff on that date via regular mail. Defendants do not explain the manner in which they obtained the unsigned termination letter attached to their motion papers. Towsky attests that in July 2016, he reviewed "the file materials maintained at A & T, including the computer file," and "confirmed that plaintiff's file had been handled by Lopez and that Lopez terminated the relationship with plaintiff on June 2, 2015." It is unclear if the law firm had a paper file concerning plaintiff's case at any time, whether a copy of the termination letter was placed in a paper file or whether it was the firm's custom and practice to place a copy of termination letters in a paper file. Eng's affidavit is silent concerning the firm's custom and practice relating to the retention (or not) of copies of signed firm letters—and termination letters in particular—after they are mailed.

Defendants do not contest that they failed to comply with 20 N.Y.C.R.R.

§ 691.20(a)(1), which required them to file a closing statement upon termination of plaintiff's retainer agreement. Defendants do not state if it was their custom and practice not to abide by this rule or if they failed to follow their custom and practice as it pertains to plaintiff in this instance. They do not explain why no closing statement was filed. Finally, defendants do not claim that they took any other steps to notify plaintiff that they were terminating the attorney-client relationship, such as meeting with plaintiff or calling her on the telephone.

**Legal Analysis**

It is the movant who has the burden to establish his/her/its entitlement to summary judgment as a matter of law. *Ferrante v. American Lung Assn.*, 90 N.Y.2d 623 (1997). "CPLR § 3212(b) requires the proponent of a motion for summary judgment to demonstrate the absence of genuine issues of material facts on every relevant issue raised by the pleadings, including any affirmative defenses." *Stone v. Continental Ins. Co.*, 234 A.D.2d 282, 284 (2d Dept. 1996). Where the movant fails to meet its initial burden, the motion for summary judgment should be denied. *U.S Bank N.A. v. Weinman,* 123 A.D.3d 1108 (2d Dept. 2014). The drastic remedy of summary judgment should be granted only if there are no material issues of fact. *Andre v. Pomeroy,* 35 N.Y.2d 361, 364 (1974).

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Zuckerman v. New York*, 49 N.Y.2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065 (1979).

To prevail in a legal malpractice action, a plaintiff must establish that (1) the defendants failed to exercise that degree of care, skill and diligence commonly possessed and exercised by an ordinary member of the legal community, (2) such negligence was the proximate cause of the actual damages sustained by the plaintiff, and (3) but for the defendants' negligence the plaintiff would have been successful in the underlying action. *Logalbo v. Plishkin, Rubano & Baum*, 163 A.D.2d 511 (2d Dept. 1990).

"Under New York law, to establish the element of proximate cause and actual damages, where the injury is the value of the claim lost, the client must meet the case within

a case requirement, demonstrating that but for the attorney's conduct the client would have prevailed in the underlying matter...." *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267, 271 (1st Dept. 2004).

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 claim. *Boone v. Bender*, 74 A.D.3d 1111 (2d Dept. 2011).

Defendants argue that they are not responsible for plaintiff's failure to file suit prior to the expiration of the statute of limitations because they terminated the attorney-client relationship three months prior to the expiration of the statute. Defendants cite to caselaw that recognizes that an attorney's obligations to a client ceases upon the termination of that relationship. But an issue of fact exists as to whether defendants ever terminated the relationship. Defendants and plaintiff contest whether defendants actually mailed a termination letter.

Plaintiff points to the following facts in support of her assertion that defendants never terminated the relationship and no termination letter was mailed: (a) plaintiff never received a letter notwithstanding that her mailing address remained constant; (b) defendants have not produced a signed termination letter despite the existence of other signed letters defendants have produced in connection with her case; (c) defendants did not file a retainer termination statement with the Office of Court Administration as required. Plaintiff also argues that logic dictates that such an important letter would not be sent by regular mail and that defendants' procedures for sending termination letters (as opposed to standard letters) remain unclear. It is also worth noting that one might reasonably expect defendants to notify plaintiff in person or by telephone if they desired to terminate the attorney-client relationship given defendants' ethical obligations, as more fully discussed below. Those ethical obligations have also long dictated that counsel not terminate the attorney-client relationship except upon good cause (*see Matter of Dunn*, 205 N.Y. 398 (1912); *J.M. Heinike v. Liberty National Bank*, 142 A.D.2d 929, 930 (4th Dept. 1988)), yet defendants have failed to set forth an explanation as to why they purportedly fired their client after representing her for nearly two years.

In support of their argument that they did terminate their relationship with the plaintiff, defendants rely upon the affidavit of Lopez who attests that she signed such a letter and gave it to Eng to mail. Defendants then rely upon their custom and procedures to establish the mailing and Ms. Eng's claimed recollection—nearly four years later—that the letter was mailed on June 2, 2015.[1] But as plaintiff argues, defendants do not set forth their custom and practice as it relates specifically to the manner in which they terminate client relationships and whether copies of signed letters would be retained.

Even if defendants are entitled to rely upon a presumption that the termination letter was received, plaintiff may rebut that presumption by establishing that the routine office practice of defendants was not followed or was careless. *See Nassau Insurance Co. v. Murray*, 46 N.Y.2d 828 (1978). One can infer that the practice was not followed in this instance if defendants did not follow other routine practices in connection with the termination of a client relation, such as filing a retainer termination statement with the Office of Court Administration (which this court assumes defendants routinely did given that it was their legal obligation to do so). That defendants may have been able to locate a letter on their computer system does not establish that the letter was actually signed and mailed—particularly if it is their practice to retain executed letters. Discovery is required to explore those practices.

Even assuming that defendants had good cause to withdraw from the attorney-client relationship and the termination letter was mailed, issues of fact exist as to whether defendants satisfied their obligation to avoid, to the extent reasonably practicable, forseeable prejudice to the defendant's rights. 22 N.Y.C.R.R. § 1200, Rules of Professional Conduct, Rule 1.16(e). Defendants were obligated to give *reasonable* notice and allow time for plaintiff to find new counsel. Whether it was reasonable to provide notice by regular mail after representing plaintiff for nearly two years—without a meeting, phone call or other steps taken to ensure the notice was received—is at least a question of fact.

[1] Defendants submitted the Eng affidavit on reply, which ordinarily is insufficient to satisfy a summary judgment movant's *prima facie* burden. *Central Mortgage Co. v. Jahnsen*, 150 A.D.3d 661 (2d Dept. 2017). But since it is apparent that the absence of the Eng affidavit in the initial moving papers was inadvertent and since plaintiff had an opportunity to reply to the affidavit, the court has considered it. *Id.*

And although defendants argue that three months was enough time for plaintiff to find new counsel, this too is at least a question of fact, especially since it took defendants nearly two years to decide they were *not* going to represent her. This court does not know whether defendants had obtained plaintiff's medical records, the police report and other items a new law firm might reasonably want to review before deciding to represent plaintiff (if they had, they did not give them to her as Rule 1.16(e) requires) and therefore cannot conclude as a matter of law that exposing plaintiff to a three-month deadline was not prejudicial.

For all of these reasons, defendants' motion is denied, except as it relates to the breach of contract claim and negligence claims. Because these claims are duplicative of the malpractice claim they are dismissed. *See Daniels v. Lebit* 299 A.D.2d 310, (2d Dept. 2002).

Plaintiff's cross-motion for summary judgment must also be denied. An issue of fact still remains as to whether plaintiff received the termination letter. If she actually received the letter, it becomes irrelevant that the form of notice may not have been reasonably designed to ensure receipt. And whether three months was sufficient time to retain new counsel remains an outstanding factual issue.

Even assuming, without deciding, that defendants' actions constituted malpractice as a matter of law, plaintiff has not established that she would have prevailed on the underlying negligence case and the extent to which she would have done so. This is because she has not adequately set forth the facts leading up to the accident, erased issues concerning comparative negligence, or provided medical testimony addressing proximate cause and no-fault threshold issues.[2]

[2] The uncertified police report upon which plaintiff relies for the circumstances of the accident is not competent evidence. *See e.g., Hernandez v. Tepan*, 92 A.D.3d 721 (2d Dept. 2012). Although there is Second Department caselaw that holds that admissions contained in uncertified police reports may be considered (*see Gezelter v. Pecora*, 129 A.D.3d 1021, 1023 (2d Dept. 2015)), this holding conflicts with the Court of Appeals' decision in *Williams v. Alexander*, 309 N.Y.283 (1955); *see also People v. Kennedy*, 68 N.Y.2d 569 (1986)(concerning importance of satisfying business record exception to hearsay rule). First, this court has no way of knowing that the police report is authentic. Second, the other driver's statement contained in the police report is classic double hearsay. Although the statement may constitute an admission, and thus an exception to the hearsay rule, one never gets to read the admission unless there is a hearsay exception that allows consideration of the report in the first instance. That is the job of the CPLR 4518 certification, which is absent here.

The parties are directed to appear for a Preliminary Conference on April 25, 2019 in the Preliminary Conference Part.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this court.

Dated: April 8, 2019
Mineola, New York

ENTER:

LEONARD D. STEINMAN, J.S.C.

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APR 10 2019
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