UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ERIC PERKINS, AS CHAPTER 7 TRUSTEE OF THE ESTATE BANKRUPTCY OF JAE JUNG PARK,

Plaintiff,

10 Civ. 5655 (CM)

-against-

AMERICAN TRANSIT INSURANCE COMPANY, NORMAN VOLK & ASSOCIATES, P.C., BAKER, MCEVOY, MORRISSEY & MOSKOVITS, P.C., and RUSSO, KEANE & TONER LLP,

Defendants.

----------x

DECISION AND ORDER

McMahon, District Judge.

This case is about a massive personal judgment arising out of a car accident in the Bronx that occurred well over a decade ago. The judgment debtor, Jae Jung Park ("Park"), was forced into bankruptcy as a result of the judgment, which far exceeded his insurance policy limits. Plaintiff Eric Perkins, the trustee of Park's bankruptcy estate, now claims that Park's insurer and the three law firms that were involved at various times in Park's defense (the "Law Firm Defendants") did Park wrong. Specifically, Plaintiff brings breach of contract/duty to make reasonable efforts at settlement and breach of fiduciary duty claims against Defendant American Transit Insurance Company ("ATIC"). Plaintiff also brings breach of fiduciary duty and legal malpractice claims against each of the Law Firm Defendants. Plaintiff has moved for summary judgment on the two counts against ATIC.

All Defendants have moved for summary judgment on Plaintiff's substantive claims. All Defendants have also brought cross-claims for indemnification and contribution against each other and now move for summary judgment on those cross-claims.

For the reasons set forth herein, Plaintiff's motion for summary judgment against ATIC is DENIED. ATIC's motion for summary judgment against Plaintiff is DENIED IN PART and GRANTED IN PART. ATIC's motion for summary judgment against RKT is DENIED. NVA and BMM&M's motions for summary judgment are GRANTED. RKT's motion for summary judgment against Plaintiff is GRANTED IN PART and DENIED IN PART. RKT's motion for summary judgment against ATIC is DENIED. All cross-claims against NVA and BMM&M for indemnification and contribution are DISMISSED.

BACKGROUND[1]

1. The Parties

Plaintiff Eric Perkins is the court-appointed trustee of the Estate in Bankruptcy of Jae Jung Park, a New Jersey resident. Plaintiff was appointed by the Bankruptcy Court of the District of New Jersey.

Defendant ATIC is a New York corporation engaged in the insurance business.

Defendant Norman Volk & Associates, P.C. ("NVA") is a New York law firm and domestic professional corporation.

Defendant Baker, McEvoy, Morrissey & Moskovitz, P.C. ("BMM&M") is a New York law firm and domestic professional corporation that formed in August 2005 to assume the defense of ATIC insureds who were then represented by NVA. The named partners of

[1] The following facts are drawn from the pleadings and the record on the parties' summary judgment motions. They are undisputed unless otherwise noted. All citations to the declaration of Steven T. Halperin ("Halperin Decl.") refer to the Declaration in Opposition to All Defendants' Motions for Summary Judgment found at Docket No. 155.

BMM&M – Stephen Baker, John McEvoy, Colin Morrissey, and Ronit Moskovits – are former employees of NVA, but were never officers or directors of NVA.

Defendant Russo, Keane & Toner LLP ("RKT") is a law firm and limited liability partnership licensed in New York.

2. Jurisdiction and Choice of Law

This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1332. There is diversity among the parties and the amount in controversy exceeds $75,000.

The parties apparently agree that New York law applies in this case.

3. Facts

A. The Underlying Car Accident

On September 30, 2001, Park was involved in an automobile accident with another vehicle in Bronx County, New York. The front of Park's vehicle struck the rear of a vehicle operated by Edwin Moreira, who was traveling with his pregnant wife, Maria Moreira (together, the "Moreiras"). On May 7, 2002, the Moreiras filed suit against Park in the Supreme Court of New York, Bronx County, seeking monetary damages for medical, hospital, and other expenses incurred as a result of the accident.[2]

Park's vehicle was insured under an insurance policy issued by ATIC, with liability coverage in the amount of $100,000 per person and $300,000 per accident.

ATIC assigned the Moreira suit to Leroy Piper ("Piper"), an ATIC claims representative; he was the only such representative to work on the case. Piper established a $3,500 reserve on the Moreiras' case, the minimum reserve ATIC could set on a case.

[2] The Moreiras initially brought suit for injuries suffered by Edwin Moreira, Maria Moreira, and their then-unborn son, Andrew Moreira. (Halperin Decl., Ex. D.) Andrew Moreira's claim was apparently dropped at some point. (Plaintiff's Memorandum of Law in Support of Summary Judgment ("Pl's Support Memo") at 5.)

On August 6, 2002, Piper sent a letter to Park acknowledging receipt of the summons and complaint in the Moreira suit and advising him that the matter would be defended by NVA. ATIC claims that Piper also advised Park that the demand in the Moreira suit was $1 million per plaintiff, in excess of Park's policy limits, and that any additional insurer should be put on notice. (ATIC's Local Rule 56.1 Statement ("ATIC's 56.1 Stmt") ¶ 11.) ATIC claims further that Piper told Park in the letter that he might wish to retain personal counsel at his own expense and that ATIC would not be responsible for any judgment exceeding Park's policy coverage. (*Id.*) The August 6, 2002 letter is attached to the declaration of Jonathan B. Bruno ("Bruno Decl."), one of ATIC's attorneys, at Exhibit C. It states exactly what ATIC represents it to state.

Plaintiff asserts that he has searched ATIC's document production and cannot not identify the August 6 letter. (Plaintiff's Counter-Statement to ATIC's 56.1 Statement ("Pl's ATIC Cntr-Stmt") ¶ 11.) Plaintiff also claims to be unable to locate any deposition testimony with respect to the letter. (*Id.*) Nevertheless, in his counter-statement, Plaintiff acknowledges that Park received the August 6 letter. (*Id.* ¶ 10.) Plaintiff then admits that Park was aware that the Moreiras' demand exceeded his policy limits, that he should think about retaining personal counsel, and that ATIC would not cover a judgment in excess of his policy limits. It is, therefore, undisputed that Park was on notice of the demand and that he was warned of ATIC's position.

B. NVA's Pre-Trial Representation of Park/ATIC

i. ATIC Retains NVA in the Moreira Suit

It is not disputed that ATIC retained NVA to handle pre-trial proceedings in the Moreira suit, including answering the complaint and managing fact discovery. NVA asserts that ATIC planned to use a different law firm for the trial of the Moreira suit, because NVA did not handle

ATIC's trial work at that time. (NVA's Local Rule 56.1 Statement ("NVA's 56.1 Stmt") ¶ 3.) Plaintiff (who has no particular reason to know, since Park did not retain counsel) insists that NVA handled pre-trial proceedings until the firm "ceased to exist" at "some point before October 2005" (Pl's 56.1 Stmt ¶ 21), whereupon BMM&M took over for NVA in the Moreira suit. (Plaintiff's Counter-Statement to NVA's 56.1 Statement ("Pl's NVA Cntr-Stmt") ¶ 3; Pl.'s 56.1 Stmt ¶¶ 11, 21-22.)

On or about November 1, 2002, the Moreiras served Park with a bill of particulars, which made various allegations with respect to the injuries they had sustained in the accident. (Bruno Decl., Ex. E.)

At some point in April 2003, Dr. Andrew Ivanson, a board certified neurologist, performed independent medical examinations ("IME") of the Moreiras. Dr. Ivanson concluded that both Edwin and Maria Moreira's spinal injuries were of the sprain/strain variety, not permanent, and not indicative of a neurologic disability. Dr. Ivanson also noted that Edwin Moreira had returned to work and could work without any restrictions.

On June 30, 2003, the Moreiras filed a Note of Issue, indicating that discovery had been completed and the case was ready for trial. Nonetheless, as is frequent in these kinds of cases, the Moreiras moved for summary judgment on liability and Park moved for summary judgment on the issue of whether the Moreiras suffered "threshold injuries" within the meaning of Section 5102(d) of the New York Insurance Law.

ii. The First Settlement Demand

Following a July 23, 2003 court conference (at which time NVA was still counsel of record), Steven Baker, Esq. ("Baker") (then of NVA, now of BMM&M) made a notation in NVA's legal notes to the effect that the Moreiras' counsel conveyed a settlement demand in the

amounts of $90,000, $75,000, and $25,000 for the three Moreiras (the "First Settlement Demand"). (Halperin Decl., Ex. G-3.) ATIC asserts that NVA never advised it of this settlement demand. (ATIC's 56.1 Stmt ¶¶ 20-21.) Plaintiff suggests, but does not say outright, that Piper/ATIC were aware of this low settlement offer. (*See* Pl's ATIC Cntr-Stmt ¶¶ 20-21.) The evidence supports neither conclusion, because it is equivocal.

Baker testified that while he had no recollection of communicating any particular or specific offers to ATIC, it was his custom and practice to tell ATIC about settlement offers, and he had no reason to believe that he did not follow that custom and practice with respect to the First Settlement Demand. (Halperin Decl., Ex. U at 55-56, 59-60.)

Piper's testimony is equivocal. When asked if he had any recollection of anybody from NVA telling him that a demand had been made on the file, Piper responded that he could not recall. (Halperin Decl., Ex. R. at 104-05.) However, elsewhere in his deposition, Piper testified that the $90,000, $75,0000, and $25,000 settlement offers were not brought to his attention. (*Id.* at 101.) Indeed, Piper testified that, prior to the verdict in the Moreira suit, "No one suggested [settlement]. First of all, [the Moreiras] were looking for the policy and beyond, and nobody suggested that we should pay anything below that, and it wasn't a policy case in our opinion." (*Id.* at 97.) Piper also testified that he "wasn't told about any demands" by any of the firms that represented ATIC and Park. (*Id.* at 210.) Nor was it Piper's custom or practice to review NVA's legal notes, even though they were stored on ATIC's legal department's (i.e., NVA's)[3] system

[3] Piper testified that he considered NVA (and, later, BMM&M) to be ATIC's in-house counsel/legal department. (Halperin Decl., Ex. R at 25-28, 41-43, 45, 99.) Plaintiff points to no other evidence in the record that suggests that NVA (or BMM&M) was a department or component of ATIC. Indeed, Plaintiff has sued NVA as an independent entity, and the Court treats it as such. It is clear to the Court that NVA was an independent law firm on retainer with ATIC to handle all of ATIC's pre-trial litigation, a common arrangement in the insurance industry. In any event, the exact nature of ATIC's relationship with NVA has no bearing on the outcome of these summary judgment motions.

and he had access to them. (*Id.* at 99-100.) Piper is no more specific about the nature of his access to NVA's legal notes.

There is no evidence that any other ATIC personnel were aware of the First Settlement Demand.

On April 14, 2005, Justice Norma Ruiz of the Bronx County Supreme Court granted the Moreiras' motion for summary judgment on liability and denied Park's cross-motion for summary judgment on the issue of whether the Moreiras suffered "threshold injuries" within the meaning of Section 5102(d) of the New York Insurance Law. (Halperin Decl., Ex. H.) Justice Ruiz held that the "conclusory statements" contained in Dr. Ivanson's affirmation were insufficient to establish that Park was entitled to judgment as a matter of law on the issue of whether the Moreiras had suffered such injuries. (*Id.*) The Moreira suit was going to trial on the Insurance Law issue and damages.

iii. The Second Settlement Demand

On May 3, 2005, Baker entered a legal note into NVA's system, which stated that "Demand is our policy however he will settle it well [within] our policy limits. I think he is looking at something well in the 40s but maybe a little pricy [sic] on this" (the "Second Settlement Demand"). (Halperin Decl., Ex. G-3.)

ATIC claims that NVA failed to communicate this settlement offer to it, as well, which, of course, Plaintiff contests. (ATIC's 56.1 Stmt ¶ 24; Pl's ATIC Cntr-Stmt ¶¶ 24-25.) In support of their respective contentions, both ATIC and Plaintiff rely on the same testimony from Baker and Piper that they did with respect to the First Settlement Demand. Again, the evidence does not support either conclusion, because it is contradictory.

Baker, predictably, testified that while he had no recollection of communicating any particular offers to ATIC, it was his custom and practice to do so, and he had no reason to believe that he did not in this instance. (Halperin Decl., Ex. U at 55-56, 59-60.)

Piper's testimony about the Second Settlement Demand is equivocal in the same ways that his testimony with respect to the earlier settlement offer were: he says, at one place, that he cannot recall if NVA communicated the settlement offer to him and, in another, that none of the Law Firm Defendants ever informed him of the Moreiras' settlement demands. (*See* Halperin Decl., Ex. R. at 97, 99-100, 104-105, 210.)

Once again, there is no evidence that any other ATIC personnel were aware of the Second Settlement Demand.

C. The Substitution of Counsel

On July 7, 2005, ATIC substituted RKT for NVA as the attorney of record in the Moreira suit. The substitution form filed with the Bronx County Supreme Court is attached to the declaration of Andrew S. Kowlowitz ("Kowlowitz Decl."), one of NVA's attorneys, at Exhibit E. Exhibit F to the Kowlowitz declaration is a form, dated July 6, 2005 and signed by ATIC, approving of the substitution of RKT.

Plaintiff and NVA disagree over whether this substitution formally terminated NVA's representation of Park – i.e., whether NVA's attorney-client relationship with Park came to an end as of July 7, 2005. (Pl's ATIC Cntr-Stmt ¶ 29; NVA's 56.1 Stmt ¶¶ 8-9; Pl's NVA Cntr-Stmt ¶¶ 8-9.) This is, however, a non-dispute.

As noted above, Plaintiff also maintains that, at some point prior to the substitution of RKT for NVA, BMM&M took over Park's defense, because NVA ceased to exist. (Pl's 56.1 Stmt ¶¶ 11, 21.) BMM&M, for its part, denies that it ever had anything to do with the Moreira

suit; indeed, that is the crux of its defense. (*See generally* BMM&M's Memorandum of Law in Support of its Motion for Summary Judgment ("BMM&M's Support Memo"); BMM&M's Local Rule 56.1 Statement ("BMM&M's 56.1 Stmt").)

In support of his position, Plaintiff cites to an order of the Supreme Court of New York, New York County, substituting BMM&M as the attorney of record "in all pending actions and proceedings in which [NVA] represent the policyholders and insureds of [ATIC]."[4] (Halperin Decl., Ex. G-1 at 2.) But that order is dated October 12, 2005 – three months after RKT took over from NVA as counsel on Park's file. (*Id.*) Plaintiff insists, in his Local Rule 56.1 Statement, that the blanket substitution order is dated July 7, 2005 (Pl's 56.1 Stmt ¶ 21), but that is plainly incorrect – the order speaks for itself. There is no issue of fact; BMM&M was never counsel of record, and NVA ceased to be counsel of record on July 7, 2005. From that point on, RKT assumed all obligations on Park's file. There is no evidence otherwise.

D. Dr. Ivanson's Unavailability

On February 11, 2005, Dr. Ivanson was indicted in the Eastern District of New York for no-fault insurance fraud in an unrelated matter. On May 19, 2005, a legal note was entered into NVA's system, indicating that Dr. Ivanson would not be available to testify at trial. (Halperin Decl., Ex. G-3.)

RKT asserts that it too intended to call Dr. Ivanson as a witness in the Moreira suit, but ultimately decided not to after learning of the doctor's indictment. (RKT's Local Rule 56.1 Statement ("RKT's 56.1 Stmt") ¶¶ 24-26.) Instead, RKT determined that it could go to trial (and win) with no other expert medical testimony than that of Dr. A. Robert Tantleff, a radiologist

[4] The order required that notice of the order be served on the "Clerks of the Courts where [NVA] presently represent parties in pending actions"; thus, it theoretically would have extended to the Bronx County Supreme Court, where the Moreira suit was pending. (Halperin Decl., Ex. G-1 at 2.)

who reviewed the Moreiras' medical records, but did not examine the Moreiras themselves. (*Id.* ¶ 28.) After reviewing diagnostic films taken of the Moreiras, Dr. Tantleff concluded that there was no objective evidence of injury to support the symptoms from which they claimed to be suffering; he so testified at trial. (*See* Halperin Decl., Ex. K at 3.)

ATIC asserts that RKT did not advise Piper that Dr. Ivanson was unavailable to testify until October 27, 2005 – i.e., after the trial was over.[5] (ATIC's 56.1 Stmt ¶¶ 30, 47.) Plaintiff again suggests, but does not say outright, that Piper/ATIC were aware of Dr. Ivanson's unavailability. (Pl's ATIC Cntr-Stmt ¶¶ 30, 47.) Piper's testimony is again equivocal and thus does not support either conclusion.

At one point in his deposition, Piper could "not recall" if any legal counsel brought to his attention that ATIC would not be able to call Dr. Ivanson at trial – which leaves open the possibility that Piper was informed and simply forgot. (Halperin Decl., Ex. R at 119.) At another point in his deposition, however, Piper testified that he was not aware that Dr. Ivanson would not be testifying at the time of trial and only became aware "long after the trial" that the doctor was unavailable and had not in fact been called (Piper does not indicate how he eventually became aware that Dr. Ivanson was not called at trial). (*Id.* at 109.) Piper also testified that he "wasn't told [by RKT] that our IME doctor, Dr. Ivanson, would not be able to testify." (*Id.* at 210.) Taken together, these last two statements suggest that Piper is certain that he was *not* told about Dr. Ivanson until long after the trial.

There is no evidence that any other ATIC personnel were aware of Dr. Ivanson's unavailability.

[5] ATIC also asserts that NVA never advised Piper that Dr. Ivanson was unavailable to testify. (ATIC's 56.1 Stmt ¶ 28.) Ultimately, this is irrelevant, because, as discussed below, Plaintiff's claims against NVA are time-barred and duplicative.

It is undisputed that RKT made no application to the Bronx County Supreme Court for a second IME after RKT determined that Dr. Ivanson should not testify at trial. RKT claims that it did not do so because the application would likely have been denied, given that discovery was at that point complete, a note of issue had been filed, and a trial date had been set. (RKT's 56.1 Stmt ¶ 27; ATIC 56.1 Stmt ¶ 31.) Plaintiff argues that RKT's failure to apply for a second IME was a violation of "good practice," and offers expert testimony that the application would likely have been granted, even so close to trial. (Plaintiff's Counter-Statement to RKT's 56.1 Statement ("Pl's RKT Cntr-Stmt") ¶ 28; Halperin Decl., Ex. DD.)

E. The Bad Faith Letter

On the eve of trial, on October 5, 2005, the Moreiras' counsel sent a letter to ATIC to place the company on notice that they intended to hold ATIC responsible "for damages in bad faith for [its] failure to make a fair and reasonable offer towards settlement of the case" (the "Bad Faith Letter"). (Bruno Decl., Ex. L at 1.) The Bad Faith Letter constituted a "final opportunity for [ATIC] to settle damages in this case within [ATIC's] insured's underlying policy limits." (*Id.*) The Bad Faith Letter also stated that "Should the jury render a damages verdict in excess of all available insurance coverage, we shall proceed against your insured's assets and income for any verdict in excess of said coverage, in addition to pursuing all our remedies in bad faith." (*Id.*) On October 12, in the midst of trial, Piper made a note that ATIC had received the Bad Faith Letter and that the letter requested settlement within the policy limits. (Bruno Decl., Ex. G.)

ATIC claims that the Bad Faith Letter did not contain the correct claim number and made no settlement demand. (ATIC's 56.1 Stmt ¶ 34.) Park's file number was 617382 (Bruno Decl., Ex. C); the Bad Faith Letter refers to a file number of 617232. (*Id.*, Ex. L.) Nevertheless, the

Bad Faith Letter does refer to the correct case name (Edwin and Maria Moreira v. Jae Jung Park) (*id.*), and ATIC's assertion that the Bad Faith Letter did not make a settlement demand is idiotic. The letter could not be plainer in making a demand for settlement.

There is no dispute that the Moreiras' counsel also sent the Bad Faith Letter to NVA (even though it was no longer counsel of record) and RKT. Prior to trial, the RKT attorney handling the Moreira suit, Christopher Mehno ("Mehno"), had a conversation with ATIC in which he indicated that he had a "good shot" at prevailing at trial and therefore ATIC should not settle the case. (Bruno Decl., Ex. P at 97-98.) Indeed, Mehno put the odds of a defense verdict or a verdict within the policy limits at 70 to 80%. (*Id.* at 120.)

F. The Trial

On October 7, 2005, the Moreira suit went to trial before a jury in the Bronx Country Supreme Court, Justice Sallie Manzanet presiding. On October 18, the jury rendered a verdict in favor of the Moreiras, finding that they had sustained a "permanent consequential limitation" of a body organ or member and awarding them $1.5 million in damages.

G. Post-Trial Proceedings

On September 8, 2006, following a post-trial motion made by RKT, Justice Manzanet reduced the damages award to $944,335.00, plus interest, and entered judgment against Park. (Halperin Decl., Ex. L.)

On October 13, 2006, RKT filed a timely notice of appeal from Justice Manzanet's judgment on the grounds of excessiveness. RKT never perfected the appeal. RKT claims that it could not have done so, because the Bronx County Supreme Court's reporting service advised it that the stenographic records for the first day of the trial were missing. RKT did not petition the Appellate Division (First Department) to accept the appeal without a full transcript.

On April 8, 2008, the Appellate Division dismissed Park's appeal for failure to prosecute.

H. Settlement with No Release for Park

On June 24, 2008, RKT wrote to ATIC, seeking authorization to tender Park's policy limits to settle the underlying action. (Halperin Decl., Ex. X.) RKT also noted the following:

> "plaintiff refused to give us a release on [Park's] behalf . . . . Plaintiff's counsel has intimated that he would release [Park] in exchange for an assignment of [Park's] rights against ATIC. I see very little risk to ATIC inasmuch as the Court had recommended $40,000 for each plaintiff and plaintiffs' attorneys steadfastly refused to settle the case due to their belief that there was excess coverage."

(*Id.*)

The same day, RKT obtained Park's written consent to ATIC's settlement, also informing him that ATIC did not obtain a release in his favor and the Moreiras could target his personal assets after ATIC tendered the policy limits. (Bruno Decl., Ex. K.)

ATIC ultimately authorized settlement up to the policy limits, plus interest, and, on July 24, 2008, paid $255,250.00 to the Moreiras to settle the underlying action.

In August 2009, the judgment against Park was domesticated to New Jersey. Park lacked the assets to meet this debt and, in April 2010, filed for bankruptcy in the District of New Jersey.

I. Park's Alleged Excess Insurance Policy

On August 23, 2002, Park executed an affidavit (at whose behest is unclear) indicating that, at the time of the accident, he had a $1 million excess insurance policy issued by Lloyd's of London. (Bruno Decl., Ex. D.)

On November 21, 2005, the Moreiras' counsel made a motion for an order to conduct an independent examination of an official from Lloyd's of London regarding Park's excess insurance coverage. On December 19, RKT reported this to ATIC. (Bruno Decl., Ex. K.)

RKT's report also indicates that Park's excess insurance policy was canceled prior to the accident. (*Id.*) It is unclear what came of the Moreiras' motion; however, as noted above, it appears that the Moreiras believed that Park had excess coverage as late as June 2008. (Halperin Decl., Ex. X.)

In any event, none of the parties has submitted Park's alleged excess insurance policy, nor has Lloyd's had anything to do with this suit. If Park did have $1 million in excess coverage at the time of the accident, there would have been no need for this litigation, because the Moreiras presumably would have been able to collect their judgment from Lloyd's rather than Park personally. Thus, I must assume that Park had no excess coverage at the time of the accident.

4. Procedural History

On July 16, 2010, the Bankruptcy Court appointed Robert Kaminski, Esq. ("Kaminski"), who had represented the Moreiras in the underlying suit, as Special Counsel for Plaintiff. On July 26, Plaintiff filed the present action. On December 1, Plaintiff filed an Amended Complaint, alleging breach of contract/duty to make reasonable efforts at settlement against ATIC, breach of fiduciary duty against all Defendants, and legal malpractice against the Law Firm Defendants.

On October 24, 2011, Magistrate Judge Ronald L. Ellis disqualified Kaminski as counsel for Plaintiff. On January 27, 2012, Halperin & Halperin PC appeared as counsel for Plaintiff.

On June 1, 2012, Plaintiff moved for summary judgment against ATIC on the first and second causes of action of the Amended Complaint – i.e., breach of contract/duty to make reasonable efforts at settlement and breach of fiduciary duty. On June 8, BMM&M moved for summary judgment against Plaintiff and all cross-claimants, or, in the alternative, summary

judgment on BMM&M's cross-claims against RKT. On June 12, NVA, ATIC, and RKT moved for summary judgment against Plaintiff and all cross-claimants. All motions are disposed of in this decision.

DISCUSSION

1. Standard of Review

A party is entitled to summary judgment when there is "no genuine issue as to any material fact" and the undisputed facts warrant judgment for the moving party as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 247–48 (1986). On a motion for summary judgment, the court must view the record in the light most favorable to the nonmoving party and draw all reasonable inferences in its favor. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The moving party has the initial burden of demonstrating the absence of a disputed issue of material fact. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). Once such a showing has been made, the nonmoving party must present "specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e). The party opposing summary judgment "may not rely on conclusory allegations or unsubstantiated speculation." *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir.1998). Moreover, not every disputed factual issue is material in light of the substantive law that governs the case. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude summary judgment." *Anderson*, 477 U.S. at 248.

To withstand a motion for summary judgment, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. Instead, sufficient evidence must exist upon which a reasonable jury could return a verdict for the nonmoving party. Summary judgment is designed to flush out those cases that are

predestined to result in directed verdict. *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 907 (2d Cir.1997).

2. Plaintiff's Claims Against ATIC

A. Genuine Issues of Material Fact Remain with Respect to Plaintiff's Breach of Contract/Duty to Make Reasonable Efforts at Settlement Claim

"[A]n insurer may be held liable for the breach of its duty of 'good faith' in defending and settling claims over which it exercises exclusive control on behalf of its insured." *Pavia v. State Farm Mut. Auto. Ins. Co.*, 82 N.Y.2d 445, 452 (1993). This duty of good faith arises from the insurance contract itself. *Id.* The New York Court of Appeals has formulated the bad faith inquiry as follows:

> in order to establish a prima facie case of bad faith, the plaintiff must establish that the insurer's conduct constituted a "gross disregard" of the insured's interests – that is, a deliberate or reckless failure to place on equal footing the interests of its insured with its own interests when considering a settlement offer. In other words, a bad-faith plaintiff must establish that the defendant insurer engaged in a pattern of behavior evincing a conscious or knowing indifference to the probability that an insured would be held personally accountable for a large judgment if a settlement offer within the policy limits were not accepted.
>
> The gross disregard standard . . . strikes a fair balance between two extremes by requiring more than ordinary negligence and less than a showing of dishonest motives.

Id. at 453-54 (internal citation omitted).

A plaintiff arguing bad faith on the part of an insurer "must show that the insured lost an actual opportunity to settle the claim at a time when all serious doubts about the insured's liability were removed." *Id.* at 454 (internal citation, quotation marks, and editing omitted). And the potential recovery against the insured must far exceed the insured's policy limits. *Id.* However, even where no serious doubts as to liability remain and the claimed injuries are well beyond the insured's policy limits, an insurer is not necessarily obliged to accept a settlement

offer. *Id.* In reviewing such a case, the court "must assess the plaintiff's likelihood of success on the liability issue in the underlying action, the potential magnitude of damages and the financial burden each party may be exposed to as a result of a refusal to settle." *Id.* at 454-55. The court may also consider "the insurer's failure to properly investigate the claim and any potential defenses thereto, the information available to the insurer at the time the demand for settlement is made, and any other evidence which tends to establish or negate the insurer's bad faith in refusing to settle." *Id.* at 455.

Any doubt about liability ended after the April 14, 2005 summary judgment order found Park liable in the Moreira accident. (Halperin Decl., Ex. H.) After that, two opportunities to settle arose: after the Second Settlement Demand and after ATIC's receipt of the Bad Faith Letter.[6]

On the evidence before me, there is a genuine issue of fact concerning whether ATIC was aware of the Second Settlement Demand. Until that issue is resolved – by a jury – it is possible that ATIC had a "settlement opportunity" in May 2005.

There is no dispute that ATIC was aware of the Bad Faith Letter; it was sent directly to ATIC on the eve of trial, and, as noted above, Piper mentioned that he had seen it in a file note he entered in the midst of trial. (Bruno Decl., Ex. G.) Accordingly, the Bad Faith Letter constituted a settlement opportunity within the scope of *Pavia*. However, I cannot conclude that the *Pavia* bad faith factors cut definitively in favor of either Plaintiff or ATIC. That is an issue that must be left to the jury.

[6] ATIC's receipt of the Bad Faith Letter is the only settlement opportunity that Plaintiff mentions in his amended complaint (*see* Am. Comp. ¶ 29); Plaintiff presumably became aware of the other settlement opportunities after discovery.

There was an earlier settlement opportunity, namely the First Settlement Demand. It cannot be said that there were no serious doubts as to Park's liability on July 23, 2003. Discovery had been completed just a few weeks before and Justice Ruiz's conclusion that Park was liable as a matter of law was still almost two years away. Accordingly, I conclude that the First Settlement Demand was not "an actual opportunity to settle at a time when all serious doubts about the insured's liability were removed," as required by *Pavia*.[7]

In sum, there are a genuine issues of material fact concerning (1) whether ATIC was aware of the Second Settlement Demand and, if so, whether ATIC's failure to settle at that point constituted bad faith, and (2) whether ATIC's failure to settle after receiving the Bad Faith Letter constituted bad faith. Accordingly, Plaintiff and ATIC's motions for summary judgment on Count 1 of the Amended Complaint (breach of contract/duty to make reasonable efforts at settlement) are DENIED.

B. Plaintiff's Breach of Fiduciary Duty Claim Against ATIC Fails Because it is Duplicative

A breach of fiduciary duty claim must be dismissed as duplicative of a breach of contract claim if the parties owe each other no duty independent of the contract itself. *See Capital, S.A. v. Lexington Capital Funding III, Ltd.*, No. 10 Civ. 25, 2011 WL 3251554, at *11 (S.D.N.Y. July 28, 2011); *Balta v. Ayco Company, LP*, 626 F. Supp. 2d 347, 360-61 (W.D.N.Y. 2009); *Metro. West Asset Mgmt, LLC v. Magnus Funding, Ltd*, No. 03 Civ. 5539, 2004 WL 1444868, at *8 (S.D.N.Y. June 25, 2004). In other words, "a plaintiff cannot pursue a separate breach of

[7] There are also references, in Plaintiff's support brief (at 18) and in Plaintiff's legal malpractice expert's report (Halperin Decl., Ex. DD at 2), to another opportunity to settle that purportedly arose at a November 18, 2003 court conference. Plaintiff claims that this settlement offer was on the same terms as the First Settlement Demand. However, there is no evidence of this offer. Plaintiff's brief does not constitute evidence and the expert report does not cite any contemporaneous evidence that the First Settlement Demand was renewed a few months after it was made.

fiduciary duty claim based on allegations of fiduciary wrongdoing that 'are either expressly raised in plaintiff's breach of contract claim or encompassed within the contractual relationship by the requirement implicit in all contracts of fair dealings and good faith.'" *Balta*, 626 F. Supp. 2d at 360 (quoting *Brooks v. Key Trust Co. Nat'l Assoc.*, 809 N.Y.S.2d 270, 272 (3d Dep't 2006)).

Plaintiff's only allegation in support of his breach of fiduciary duty claim against ATIC is that ATIC, as Park's agent under the insurance agreement, "did not exercise due care and diligence in defending him in the underlying action." (Am. Compl. ¶¶ 44-46.) Plaintiff has pointed to no evidence in the record from which I could infer that ATIC owed Park some duty above and beyond one arising out of their contractual relationship. It is plain that Plaintiff is attempting to hold ATIC liable for two causes of action based on the exact same facts arising from ATIC's defense of Park in the Moreira suit. This he cannot do.

Plaintiff attempts to salvage his claim by arguing that there is a genuine issue of material fact as to whether "ATIC breached its fiduciary duty to Mr. Park by ceding all control of the settlement and trial functions to others." (Plaintiff's Memorandum of Law in Opposition to ATIC's Motion to Dismiss ("Pl's ATIC Opp'n") at 20.) ATIC's conduct with respect to Park's defense in the Moreira suit is inextricably linked to ATIC's contractual obligations. Thus, Plaintiff's argument is without merit.

Accordingly, Plaintiff's breach of fiduciary duty claim against ATIC is dismissed as a matter of law. We will go to trial on the breach of contract/duty to make reasonable efforts at settlement claim.

3. Plaintiff's Claims Against NVA Are Dismissed

Plaintiff sues NVA for legal malpractice. NVA argues that this claim is barred by New York's three-year statute of limitations for legal malpractice. NVA contends that its representation of Park came to an end on July 7, 2005, when RKT took over the defense of the Moreira suit. Plaintiff commenced this action on July 26, 2010, more than five years after NVA's attorney-client relationship with Park allegedly terminated. Thus, NVA argues, Plaintiff's legal malpractice claim is time-barred.

NVA also argues that Plaintiff's breach of fiduciary duty claim is duplicative of his legal malpractice claim.

I agree with NVA on both counts. Accordingly, NVA's motion for summary judgment dismissing the legal malpractice claim is GRANTED. For the reasons set forth above, Plaintiff's effort to extend NVA's representation past the date when it was replaced as counsel of record is unavailing. I agree that it might have been malpractice for NVA not to advise ATIC of the Second Settlement Demand, especially since the Moreiras sought the policy limits, but that failure occurred more than three years before this lawsuit was commenced.

A. Plaintiff's Legal Malpractice Claim Against NVA is Time-Barred

Under New York law, the statute of limitations for a legal malpractice claim is three years. N.Y. C.P.L.R. § 214(6). "An action to recover damages for legal malpractice accrues when the malpractice is committed," not when it is discovered by the client. *Shumsky v. Eisenstein*, 96 N.Y.2d 164, 166 (2001); *accord Scantek Medical, Inc. v. Sabella*, 583 F. Supp. 2d 477, 489 (S.D.N.Y. 2008). "[T]he key issue is when plaintiff's actionable injury occurred." *McCoy v. Feinman*, 99 N.Y.2d 295, 301 (2002).

New York's three-year statute of limitations for legal malpractice claims may be tolled under the continuous representation doctrine. "To invoke the continuous representation doctrine, a plaintiff must establish: (1) ongoing representation connected to the specific matter at issue in the malpractice action, and (2) clear indicia of an ongoing, continuous, developing and dependent relationship between the client and the attorney." *De Carlo v. Ratner*, 204 F. Supp. 2d 630, 636 (S.D.N.Y. 2002); *see also Daniels v. Lebit*, 749 N.Y.S.2d 149 (2d Dep't 2002) ("The continuous representation doctrine . . . appl[ies where] there is . . . evidence of [an] ongoing, continuous, developing, and dependent relationship between the [client] and the [attorney].").

Citing *McCoy*, Plaintiff argues that his claim was filed well within the three-year statute of limitations for legal malpractice, because Park did not suffer actionable injury until the Moreiras' judgment became enforceable against him – i.e., in August 2009, when the judgment was domesticated to New Jersey. But that is not when NVA allegedly committed malpractice.

The Court notes that "accrual is not delayed until the damages develop or become quantifiable or certain." *Woodson v. Am. Transit Ins. Co.*, 808 N.Y.S.2d 921 (N.Y. Sup. Ct. 2005). Accordingly, that the judgment in the underlying suit only became enforceable against Park when it was domesticated to New Jersey is irrelevant to the question of when Plaintiff's legal malpractice claim accrued against NVA; *McCoy* does not hold differently. Thus, the only inquiry is whether Plaintiff has rebutted in any way the July 7, 2005 substitution of counsel form (Kowlowitz Decl., Ex. E) that plainly replaced NVA with RKT. *See Shivers v. Siegel*, 782 N.Y.S.2d 752 (2d Dep't 2004) ("[T]he plaintiff's legal malpractice claim accrued no later than November 1998, when she discharged the defendant as her attorney."). The answer is no.

In the alternative, Plaintiff argues that there is a genuine issue of material fact as to whether NVA's representation of Park was "continuous" (and thus tolled the statute of

limitations) or terminated upon the appointment of RKT as trial counsel on July 7, 2005. In support of this argument, Plaintiff relies primarily on purported testimony from Baker (initially of NVA, now of BMM&M) "that in cases that RKT took over, [Baker's] firm would 'be available' and would review RKT's bills." (Plaintiff's Memorandum of Law in Opposition to the Law Firm Defendants' Motions for Summary Judgment ("Pl's Opp'n to Law Firm Defendants") at 12) (citing Halperin Decl., Ex. U at 26-27.) Citing *Frenchman v. Queller, Fisher, Dienst, Serrins, Washor & Kool, LLP*, 884 N.Y.S.2d 596 (N.Y. Sup. Ct. 2009), Plaintiff also contends that NVA could not have withdrawn as Park's counsel because it never notified him that it was withdrawing or provided him with reasonable notice of RKT's substitution.

The most that can be said of the Baker testimony upon which Plaintiff relies is that, *generally speaking*, (1) NVA would make itself available for "lay of the land" questions from RKT about ATIC cases after they were handed off for trial (in the rare event such questions arose) and (2) NVA would review RKT's bills "to make sure that the amount charged was appropriate and that there was some record of activity in the court system that day." (Halperin Decl., Ex. U at 26-27.) Indeed, Baker testified that, after the handoff, "We wouldn't stay involved with the case because we're no longer the attorneys in it. We didn't have a right to be involved." (*Id.* at 27.) It is clear from the context of Baker's testimony that he is not speaking specifically about the Moreira suit. However, even assuming that RKT reached out to NVA in this fashion in connection with that suit, and NVA obliged, this does not suggest that NVA's representation of Park continued beyond the July 7, 2005 substitution. (*See* Kowlowitz Decl., Exs. E, F.)

The attorney-client relationship is marked by an individual "contact[ing] an attorney in his capacity as such for the purpose of obtaining legal advice or services." *Priest v. Hennessy*,

51 N.Y.2d 62, 68-69 (1980). It is commonplace for law firms to have contact with each other for background purposes when a case is being transitioned from one to another; that does not rekindle the attorney-client relationship between the former firm and the client after it has been terminated. Nor does reviewing the bills of another law firm carry the hallmarks of legal advice or services to the original client. Indeed, in this instance, it appears that NVA would have reviewed RKT's bills as a service to *ATIC*, not to Park, because ATIC was apparently NVA's only client. (*See* Halperin Decl., Ex. U at 11.) Even viewing the record in the light most favorable to Plaintiff and drawing all reasonable inferences in his favor, Plaintiff has not presented evidence at all sufficient to undermine what is a crystal clear substitution of counsel. (*See* Kowlowitz Decl., Exs. E, F.)

Equally unavailing is Plaintiff's argument that a successful substitution of counsel never occurred because Park received no notice of it. Attached to the affidavit of Ronald W. Weiner, one of BMM&M's attorneys, at Exhibit D is a July 12, 2005 letter to Park from RKT informing him that RKT had taken over his defense in the Moreira suit. Even assuming that Park did not receive this letter, Plaintiff concedes that, "There is no dispute that ATIC controlled the defense of the case against Mr. Park." (Pl's Opp'n to Law Firm Defendants at 11.) Plaintiff also concedes that "Mr. Park looked to [ATIC] to provide a defense." (*Id.* at 11-12.) Under these circumstances, "The policyholder[] . . . impliedly authorize[s] the insurance compan[y] to act as [his] agent[] in obtaining a lawyer or lawyers for [the policyholder] as attorney or attorneys of record in the litigation[]. Such implied authority include[s] the power to change lawyers for the policyholder[], and, in the absence of revocation of the authority to retain or change [his] attorneys, the. . . insurance compan[y is] empowered to maintain legal proceedings for removal and substitution of attorneys without additional formal or specific consent of the policyholder[]

to the substitution." *Matter of Preferred Acc. Ins. Co. of N.Y. (Roesch)*, 78 N.Y.S.2d 674 (1st Dep't 1948).

Accordingly, it is irrelevant that Park, as the insured, may have been unaware of the substitution of RKT for NVA in the Moreira suit; *Frenchman* does not hold otherwise.

In sum, Plaintiff has not demonstrated that there is a genuine issue of material fact with respect to the date of NVA's termination as the attorney of record in the Moreira suit. The undisputed evidence in the record shows that NVA ceased to represent Park as of July 7, 2005. (*See* Kowlowitz Decl., Exs. E, F.) Plaintiff brought this action against NVA over five years after that date. Thus, Plaintiff's legal malpractice claim against NVA is barred under New York's three-year statute of limitations. N.Y. C.P.L.R. § 214(6).

B. Plaintiff's Breach of Fiduciary Duty Claim Against NVA is Time-Barred and Duplicative

Under New York law, the statute of limitations for a breach of fiduciary duty claim is three years where the plaintiff seeks damages alone, unless the claim is premised on fraud, in which case the limitations period is six years. *Kaufman v. Cohen*, 760 N.Y.S.2d 157, 164 (1st Dep't 2003). A six-year statute of limitations also applies where the plaintiff seeks equitable relief. *Id.*

Here, Plaintiff seeks damages alone – the balance of the judgment, the accrued interest, punitive damages, and various other costs and fees. (Am. Compl. Prayer ¶¶ 2-5.) Plaintiff does not seek equitable relief, nor does he allege fraud against NVA. Accordingly, the applicable statute of limitations is three years.

As discussed above, Plaintiff brought this action against NVA over five years after NVA's representation of Park came to an end. There is no evidence that Park had any

interaction whatsoever (let alone a fiduciary relationship) with NVA after July 7, 2005. Thus, Plaintiff's breach of fiduciary duty claim against NVA is time-barred.

Plaintiff's breach of fiduciary duty claim also must be dismissed because it is duplicative. Plaintiff's only allegation with respect to the Law Firm Defendants' alleged breach of their fiduciary duty to Park is that the Law Firm Defendants "did not exercise due care and diligence in defending [Park] in the underlying action." (Am. Compl. ¶ 46.) There are no more specific allegations in the Amended Complaint as to precisely what conduct constituted a breach of fiduciary duty. Instead, in his opposition to the Law Firm Defendants' motion for summary judgment, Plaintiff makes the vague and *unpleaded* allegation that NVA had a "major conflict[] of interest" in representing ATIC, apparently its sole client, and Park, ATIC's insured, at the same time. (Pl's Opp'n to Law Firm Defendants at 15.)

New York courts have routinely dismissed breach of fiduciary duty claims when such claims arise from the same facts as the plaintiff's legal malpractice claim and do not allege distinct damages. *See, e.g., Daniels v. Lebit*, 749 N.Y.S.2d 149 (2d Dep't 2002), *Mecca v. Shang*, 685 N.Y.S.2d 458 (2d Dep't 1999); *Sage Realty Corp. v. Proskauer Rose*, 675 N.Y.S.2d 14 (1st Dep't 1998); *CVC Cap. Corp. v. Weil, Gotshal, Manges*, 595 N.Y.S.2d 458 (1st Dep't 1993). Here, Plaintiff's legal malpractice and breach of fiduciary duty claims against NVA are premised on identical conduct, namely, NVA's failure both to reach a settlement in the Moreira suit and to obtain a second IME after it determined that Dr. Ivanson was unfit to testify at trial. (*Compare* Pl's Opp'n to Law Firm Defendants at 15, 17-18 *to id.* at 23.) Plaintiff alleges no separate set of facts upon which his breach of fiduciary duty claim against NVA could be based, nor does he allege distinct damages.

While Plaintiff is correct that an attorney breaches his fiduciary duty to his client when he breaches his duty of loyalty, *see Estate of Re v. Kornstein, Vesler & Wexler*, 958 F. Supp. 907, 924 (S.D.N.Y. 1997), Plaintiff has pleaded no facts upon which such a claim could be based. Plaintiff simply asserts, in conclusory fashion, that NVA had a major conflict of interest because ATIC was NVA's sole client. (Pl's Opp'n to Law Firm Defendants at 15.) Plaintiff does not even bother to point to any legal precedent holding that a lawyer retained by an insurer to represent an insured has a conflict of interest with the insured, which is hardly surprising, because it is the most commonplace of practices. When a real conflict might have arisen – when the Bad Faith Letter made apparent that the Moreiras intended to go after Park personally for any excess judgment – NVA was no longer counsel of record and thus owed Park no duty at all!

In sum, Plaintiff's breach of fiduciary duty claim against NVA must be dismissed as time-barred and duplicative.

4. Plaintiff's Claims Against BMM&M Are Dismissed

BMM&M argues that Plaintiff's legal malpractice claim must be dismissed because it never had an attorney-client relationship with Park. BMM&M also argues, like NVA, that Plaintiff's breach of fiduciary duty claim must be dismissed because it is duplicative of his legal malpractice claim.

I agree with BMM&M on both counts. Accordingly, BMM&M's motion for summary judgment is GRANTED.

A. BMM&M and Park Never Had an Attorney-Client Relationship

To establish a claim for legal malpractice under New York law, a plaintiff must prove, among other things, the existence of an attorney-client relationship between the plaintiff and the defendant law firm. *Waggoner v. Caruso*, 886 N.Y.S.2d 368 (1st Dep't 2009). "In determining

the existence of an attorney-client relationship, a court must look to the actions of the parties to ascertain the existence of such a relationship. The unilateral belief of a plaintiff alone does not confer upon him or her the status of a client. Rather, an attorney-client relationship is established where there is an explicit undertaking to perform a specific task." *Wei Cheng Chang v. Pi*, 733 N.Y.S.2d 471, 473 (2d Dep't 2001) (internal citation omitted).

Here, I have already determined that RKT was substituted for NVA as counsel for Park on July 7, 2005. (*See* Kowlowitz Decl., Exs. E, F.) It is undisputed that BMM&M did not come into existence, and start taking over NVA's ATIC cases, until August 2005. Accordingly, the Moreira suit could not have been among those NVA transferred to BMM&M – nor could the October 12, 2005 order substituting BMM&M for NVA in all pending ATIC cases have accomplished such a transfer. (*See* Halperin Decl., Ex. G-1.) Thus, Park and BMM&M never formed an attorney-client relationship. Indeed, it is undisputed, in the record before me, that there was no interaction at all, ever, between Park and BMM&M, and that NVA (up until July 7, 2005) and RKT (after July 7, 2005) were the only law firms who acted as counsel to Park during the litigation. (*See* BMM&M's Support Memo at 4-11.)

Plaintiff acknowledges that BMM&M's liability is necessarily tied to the assertion that NVA's attorney-client relationship with Park did not end with the substitution of RKT: "If [NVA] did not effectively withdraw from representing Mr. Park . . ., then [BMM&M] became Mr. Park's attorney when it took over all ATIC cases previously handled by [NVA]." (Pl's Opp'n to Law Firm Defendants at 14.) But Plaintiff also offers no evidence that BMM&M provided legal services to Park. Instead, Plaintiff's argument is premised on the theory that BMM&M necessarily took over representation of Park upon its creation or, at the latest, upon the

issuance of the October 12, 2005 order. (*See* Halperin Decl., Ex. G-1.) I have already found that argument to be entirely lacking in evidentiary support.

Plaintiff also argues, as it did with NVA, that BMM&M had an attorney-client privilege with Park because RKT sent BMM&M status reports on the Moreira suit after RKT was substituted as counsel. (*See id.*, Exs. X, Z.) However, as with NVA, these status reports are indicative of an ongoing attorney-client relationship between BMM&M and *ATIC*, not between BMM&M and Park.

In sum, Plaintiff has not demonstrated that there is a genuine issue of material fact with respect to whether BMM&M represented Park at any point in the underlying Moreira suit. The undisputed evidence in the record shows that BMM&M never formed an attorney-client relationship with Park. Accordingly, Plaintiff's legal malpractice claim against BMM&M is dismissed.

B. Plaintiff's Breach of Fiduciary Duty Claim Against BMM&M Is Moot

As I have already determined that BMM&M never had an attorney-client relationship with Park, BMM&M owed Park no duty and thus could not have committed any breach. The claim is dismissed.

5. Plaintiff's Claims Against RKT

A. Plaintiff's Legal Malpractice Claim

In his Amended Complaint, Plaintiff alleges that RKT committed legal malpractice by (1) failing "to present [at trial] any competent expert evidence by an expert clinician to support a defense based on 'serious injury/threshold" pursuant to the Insurance Law 5102" (Am. Compl. ¶ 51) and (2) failing "to perfect the appeal of the judgment against Park," which resulted in the appeal being dismissed (*id.* ¶ 53).

In his brief opposing RKT's motion for summary judgment, Plaintiff argues for the first time – apparently on the basis of the report of Plaintiff's legal malpractice expert, Ira Podlofsky, Esq. ("Podlofsky") (*see* Halperin Decl., Ex. DD.) – that RKT's failure both to advise Park of his right to obtain personal counsel and to secure a release for Park were additional instances of legal malpractice. (Pl's Opp'n to Law Firm Defendants at 20.) Plaintiff also argues in his opposition that RKT's failure to settle the Moreira suit within Park's policy limits was yet another example of legal malpractice.[8] (*Id.* at 24.)

Ordinarily, "An opposition to a summary judgment motion is not the time for a plaintiff to raise new claims." *Lyman v. CSX Transp., Inc.*, 364 Fed. Appx. 699, 701 (2d Cir. 2010) (quoting 5 Wright & Miller, *Federal Practice and Procedure* § 1183, 23 n. 9 (3d ed. 2004)). However, I deem the pleading amended to conform to the proof, because I agree that RKT may have committed malpractice in several ways identified by Mr. Podlofsky.

i. RKT's Failure to Call Dr. Ivanson Did Not Constitute Legal Malpractice

The elements of a legal malpractice claim are well settled under New York law: "To state a claim for legal malpractice under New York law, a plaintiff must allege: (1) attorney negligence; (2) which is the proximate cause of a loss; *and* (3) actual damages." *Achtman v. Kirby, McInerney & Squire, LLP*, 464 F.3d 328, 337 (2d Cir. 2006) (internal citation and quotation marks omitted) (emphasis in original).

"To properly plead negligence, a party must aver that an attorney's conduct fell below the ordinary and reasonable skill and knowledge commonly possessed by a member of his profession. A complaint that essentially alleges either an 'error of judgment' or a 'selection of

[8] The Amended Complaint mentions RKT's failure "to make a reasonable effort at settling the underlying action," but it does so in the context of arguing that RKT is "estopped from disputing the merits of defense based 'serious injury/threshold' [sic] pursuant to the Insurance Law 5102." (Am. Compl. ¶ 52.)

one among several reasonable courses of action' fails to state a claim for malpractice." *Id.* Indeed, "Where it is apparent that the attorney exercised reasonable judgment as to how to proceed . . . summary judgment should be granted." *Stonewell Corp. v. Conestoga Title Ins. Co.*, 678 F. Supp. 2d 203, 209 (S.D.N.Y. 2010). "The general rule is that 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.*, 554 N.Y.S.2d 487, 489-90 (1st Dep't 1990).

"[A]llegations that amount to nothing more than plaintiff's 'dissatisfaction with strategic choices . . . do not support a malpractice claim as a matter of law.'" *Hatfield v. Herz*, 109 F. Supp. 2d 174, 180 (S.D.N.Y. 2000) (quoting *Bernstein*, 554 N.Y.S.2d at 490). Courts should avoid "second-guessing . . . counsel's strategic judgment." *Pacesetter Commc'ns Corp. v. Solin & Breindel, P.C.*, 541 N.Y.S.2d 404, 406 (1st Dep't 1989); *accord Estate of Re v. Kornstein Veisz & Wexler*, 958 F. Supp. 2d 907 (S.D.N.Y. 1997).

Plaintiff seems more concerned with RKT's decision not to seek new IMEs of the Moreiras after Dr. Ivanson was indicted (discussed below) than RKT's decision not to call Dr. Ivanson himself at trial. Nevertheless, to the extent that Plaintiff's legal malpractice claim against RKT is premised on RKT's failure to call Dr. Ivanson at trial, it fails.

Courts have routinely held that the decision to call or not to call certain trial witnesses is a question of strategy that generally does rise to the level of malpractice. *See, e.g., Hatfield*, 109 F. Supp. 2d at 183 ("Because reasonable minds might differ as to the optimal strategy for trial, [the defendant attorney's] decision not to call [a particular witness] was not negligent."); *L.I.C. Commercial Corp. v. Rosenthal*, 609 N.Y.S.2d 301, 302 (2d Dep't 1994) ("[W]e find that the

defendant's determination not to call the witness in the underlying action was clearly a reasonable strategic decision which did not constitute malpractice.") (collecting cases).

RKT concluded that Dr. Ivanson's credibility was undermined by his indictment for no-fault insurance fraud. (RKT's 56.1 Stmt ¶¶ 25-26.) RKT decided that it could go to trial and win with Dr. Tantleff as its only medical expert, even though he had not examined the Moreiras. (RKT's 56.1 Stmt ¶ 28.) RKT nonetheless calculated the odds of a defense verdict or a verdict within the policy limits at 70 to 80%. (Bruno Decl., Ex. P at 120.) In the end, RKT was wrong and Park lost, but that does not mean that RKT committed malpractice by not calling Dr. Ivanson.

The one case that Plaintiff cites, *Tokio Marine and Nichido Fire Ins. Co v. Calabrese*, No. 07 Civ. 2514, 2011 WL 5976076 (E.D.N.Y. Nov. 28, 2011), is inapposite. There, Magistrate Judge Tomlinson merely held that premising a legal malpractice claim on an alleged failure to submit expert evidence was enough to survive a motion to dismiss. *Id.* at *4-5. She left open the possibility that the law firm defendant's "decision not to retain . . . expert witnesses . . . may have been a reasonable course of action and [thus] subject to dismissal on summary judgment." *Id.* at *5. In this case, RKT did call an expert – Dr. Tantleff – so the case is of no moment.

Assuming *arguendo* that RKT was negligent in failing to go to trial with Dr. Ivanson, Plaintiff has not raised a genuine issue of material fact with respect to causation. *See Provenzano v. Pearlman, Apat & Futterman, LLP*, No. 04 Civ. 5394, 2008 WL 4724581, at *5 (E.D.N.Y. Oct. 24, 2008). Causation in the legal malpractice context is governed by a strict "but for" test, whereby "the plaintiff must show that but for the attorney's negligence, what would

have been a favorable outcome was an unfavorable outcome." *Stonewell Corp.*, 678 F. Supp. 2d at 209; *accord Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 N.Y.3d 438, 442 (2007).

Plaintiff cites *Ruben v. Mason*, 387 F.3d 183 (2d Cir. 2004) for the proposition that causation in the legal malpractice context is a question of fact. Plaintiff then argues that he "has introduced evidence from which reasonable jurors can conclude that it was more probable that Mr. Park's injuries (verdict/judgment/bankruptcy) were caused by the law firm defendants' failure to present competent evidence on the threshold issue or to obtain a release for Mr. Park than that they were not." (Pl's Opp'n to Law Firm Defendants at 23.) Plaintiff does not, however, point out what that evidence is; there is not a single reference to the record in the section of Plaintiff's opposition brief dealing with the causation issue.

Based on the record before me, I cannot hold that a reasonable factfinder could conclude that *but for* RKT's failure to call Dr. Ivanson the jury would have returned a verdict of no damages or a verdict within Park's policy limits. In her summary judgment order, Justice Ruiz of the Bronx Count Supreme Court found Dr. Ivanson's testimony too "conclusory" to take the threshold injury question away from the jury. (Halperin Decl., Ex. H.) The weakness of Dr. Ivanson's testimony could only have been compounded by his indictment. Nothing in the record suggests his testimony would have saved Park's case. Moreover, RKT did present expert medical testimony, from a radiologist (Dr. Tantleff) who had reviewed diagnostic film taken of the Moreiras; this variable further muddies the causation analysis, because there was competent medical evidence from which the jurors could have concluded that the Moreiras' injuries were insignificant. The jury rejected that inference – perhaps because Dr. Tantleff never examined the Moreiras, perhaps for other reasons. But the fact that medical evidence to support a lesser

verdict was offered and accepted at trial makes it impossible to conclude that the absence of Dr. Ivanson's "conclusory" testimony caused Park to lose the case in this way.

Accordingly, there is also no genuine issue of material fact with respect to causation. To the extent Plaintiff's legal malpractice claim is premised on RKT's failure to call Dr. Ivanson, it must be dismissed.

ii. There Is a Genuine Issue of Material Fact as to Whether RKT's Failure to Seek New IMEs of the Moreiras Constituted Legal Malpractice

RKT contends that appealing to the Bronx County Supreme Court for new IMEs of the Moreiras would have been futile, since discovery was at that point complete, a note of issue had been filed, and a trial date had been set. (*Id.* ¶ 27.) Plaintiff, on the basis of expert testimony, counters that RKT's failure to apply for a second IME was a violation of "good practice." (Pl's RKT Cntr-Stmt ¶ 28.) Plaintiff also argues that the application would likely have been granted, even so close to trial, because the unforeseeable indictment of one's expert examining witness likely constituted "special, unusual or extraordinary circumstances" sufficient to reopen discovery. (Pl.'s Opp'n to Law Firm Defendants at 20; Halperin Decl., Ex. CC ¶ 51.)

While "there [has been] no showing [of] what . . . a substitute . . . expert witness, if any, would have testified to, and what impact, if any, such testimony would have had on the crucial issue[s]," *Pacesetter*, 541 N.Y.S.2d at 405-06, that is hardly surprising, because RKT made no effort to obtain a substitute expert witness. This arguably reveals "ignorance of the rules of practice" and/or "neglect [in] . . . defend[ing] [the] action." *Bernstein*, 554 N.Y.S.2d at 489-90.

It is obvious that the testimony of a physician who never saw the Moreiras, but who testified that their injuries were not serious, was insufficient to persuade the jury to rule for Park, or to award damages within the policy limits. The Moreiras, by contrast, called two treating

physicians (Drs. Zeven and Hauskenecht), both of whom had examined the injured parties. (Halperin Decl., Ex. K at 2-3.) There is expert evidence in the record that seeking new IMEs would have been sound defense practice, and that the court would likely have granted RKT's application, had it been made. If the application had been turned down, RKT could not be accused of malpractice; but by failing to make it, RKT left itself open to the claim. Whether RKT's failure to obtain new IMEs of the Moreiras constituted legal malpractice is for the jury to decide.

iii. RKT's Failure to Perfect Park's Appeal Did Not Constitute Legal Malpractice

It is undisputed that, through some administrative blunder at the Bronx County Supreme Court, the transcript for the first day of trial went missing. Both of the Moreiras apparently testified that day. (*See* Affidavit of J. Jay Young ("Young Aff.") (Docket No. 104), Ex. A at 6.)

RKT argues that it did not perfect Park's appeal because (1) it would have been extremely unlikely for the Appellate Division to hear the appeal with the trial record incomplete and (2) it concluded that there was a low likelihood of ultimate success on appeal, since the Appellate Division rarely reduces or reverses jury verdicts and/or judgments that have already reduced a jury's award. Indeed, RKT suggests its failure to perfect the appeal was a strategic decision. (*See generally* Young Aff. (Docket No. 104).)

While genuine strategic choices generally do not constitute malpractice, s*ee Hatfield*, 109 F. Supp. 2d at 180, a law firm cannot recast all of its failures as strategic choices to escape liability. RKT cites no legal authority for the proposition that the Appellate Division would not have heard the appeal on the basis of a missing transcript. Indeed, New York law provides for this exact contingency. CPLR Rule 5525(d) provides for "Statements in lieu of stenographic

transcript" where "no stenographic record of the proceedings is made." Within ten days after taking the appeal, the appellant need only "prepare and serve upon the respondent a statement of the proceedings from the best available sources, including his recollection, for use instead of a transcript." *Id.* The respondent then "may serve upon the appellant objections or proposed amendments to the statement within ten days after such service." *Id.* Finally, "The statement, with objections or proposed amendments, shall be submitted for settlement to the judge or referee before whom the proceedings were had." *Id.* There is no indication that RKT did anything like this. With such a clear remedy at its disposal, I conclude that RKT's failure to pursue it may well have constituted "ignorance of the rules of practice" and "neglect [in] . . . defend[ing] [the] action." *Bernstein*, 554 N.Y.S.2d at 489-90.

However, there is no genuine issue of material fact with respect to causation.

Where a failure to perfect an appeal is the basis for a legal malpractice claim, the "malpractice is the proximate cause of [the plaintiff's] damages if, but for [the attorney's] failure to perfect the [appeal], the Appellate Division would have reversed the finding of [the trial court]." *Ocean Ships, Inc. v. Stiles*, 315 F.3d 111, 117 (2d Cir. 2002). The plaintiff need not establish certain success on the theoretical appeal. *Id.* at 118 (2d Cir. 2002). "What is required is that '*the [j]udge* . . . determine what the appellate court would have done,' [*Katsaris v. Scelsi*, 453 N.Y.S.2d 994, 996 (N.Y. Sup. Ct. 1982)], using the same standards that the appellate court would have applied, *id.* at 397." *Ocean Ships*, 315 F.3d at 118 (emphasis added).

The Second Circuit has made clear elsewhere that this determination is indeed one for the court, not the jury:

> Upon our review of the decisional law of the lower courts of New York and consideration of the underlying rationale for such decisions, we conclude that the New York Court of Appeals would agree with the determination that the question

> of whether a plaintiff would have prevailed on appeal should be decided as a matter of law . . . . To rule otherwise – and hold that a jury should decide how an appellate court would have ruled – would misconstrue the very nature of appellate review."

Tinelli v. Reid, 199 F.3d 603, 606-07 (2d Cir. 1999).

I agree with RKT that it would have been extremely unlikely for the Appellate Division to reduce or reverse the jury's verdict and/or Justice Manzanet's post-trial judgment reducing the jury's award. Plaintiff does nothing to rebut RKT's argument other than to insist, citing *Ocean Ships*, that I should submit the issue to the jury, which is plainly incorrect. (*See* Pl's Opp'n to Law Firm Defendants at 22.) Plaintiff had an opportunity, in his opposition brief, to argue that the Appellate Division would likely have ruled in Park's favor; he failed to do so.

As RKT notes, to conclude as a matter of law that a jury verdict is not supported by sufficient evidence requires a conclusion "that there is simply no valid line of reasoning and permissible inferences which could possible lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial." *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 499 (1978). There is nothing in the record that suggests that the jury's verdict was patently unreasonable.

As RKT also notes, the Appellate Division generally defers to the trial court with respect to the excessiveness of a jury verdict. *See Hamroff v. Anderson*, 361 N.Y.S.2d 375 (1st Dep't 1974). There is nothing in the record that suggests that Justice Manzanet's post-trial judgment, which reduced the jury's verdict, was an abuse of her discretion.

Accordingly, I conclude, per *Ocean Ships* and *Tinelli*, that the Appellate Division would not have ruled in Park's favor and reduced or reversed the jury's verdict and/or the post-trial judgment reducing the jury's award. Thus, there is no genuine issue of material fact with respect

to causation. To the extent Plaintiff's legal malpractice claim is premised on RKT's failure to perfect Park's appeal, it must be dismissed.

B. Plaintiff's Breach of Fiduciary Duty Claim Against RKT Fails Because it is Duplicative

As noted above, Plaintiff's Amended Complaint is exceedingly vague as to *how* RKT (or indeed any of the Law Firm Defendants) breached its fiduciary duty to Park. In his opposition to the Law Firm Defendants, Plaintiff argues for the first time that "RKT's decision to proceed to trial with liability decided against Mr. Park and no examining expert witness was a substantial factor in Mr. Park's ultimate loss." (Pl's Opp'n to Law Firm Defendants at 15.) An opposition brief is not the place to raise new allegations. *See Lyman*, 364 Fed. Appx. at 701. Even if I were to consider this allegation, it is plainly duplicative of Plaintiff's legal malpractice claim and thus must be dismissed.

Plaintiff also argues for the first time in his opposition that RKT's failure to settle the Moreira suit within Park's policy limits reflected a major conflict of interest given the fact that ATIC had referred hundreds of cases to RKT over the years. (*See* Pl's Opp'n to Law Firm Defendants at 15-16.) Again, I will not consider an allegation raised for the first time in an opposition brief. *See Lyman*, 364 Fed. Appx. at 701. And even if I were to consider this unpleaded allegation, as noted above, Plaintiff uses RKT's failure to settle within Park's policy limits as one basis for his legal malpractice claim, thus rendering Plaintiff's breach of fiduciary duty claim duplicative once again. Accordingly, Plaintiff's breach of fiduciary duty claim against RKT must be dismissed.

6. Defendants' Cross-Claims for Indemnification and Contribution

Under New York law, dismissal of a plaintiff's claim against a defendant "necessarily defeats the cross claims for indemnification and contribution asserted" against that defendant. *Stone v. Williams*, 64 N.Y.2d 639, 642 (1984); *see also Tapinekis v. Rivington House Health Care Facility*, 793 N.Y.S.2d 484 (2d Dep't 2005). Accordingly, because I have granted NVA and BMM&M's summary judgment motions, and thus they are not liable to Plaintiff, the cross-claims against them for indemnification and contribution must be dismissed.

The two remaining defendants, ATIC and RKT, have also brought cross-claims for indemnification and contribution against each other. However, as liability on Plaintiff's remaining claims has not yet been determined, I cannot resolve ATIC and RKT's cross-claims at this stage of the proceedings. This must await trial.

CONCLUSION

For the reasons set forth above, Plaintiff's motion for summary judgment against ATIC is DENIED. ATIC's motion for summary judgment against Plaintiff is DENIED IN PART and GRANTED IN PART. ATIC's motion for summary judgment against RKT is DENIED. NVA and BMM&M's motions for summary judgment are GRANTED. RKT's motion for summary judgment against Plaintiff is GRANTED IN PART and DENIED IN PART. RKT's motion for summary judgment against ATIC is DENIED. All cross-claims against NVA and BMM&M for indemnification and contribution are DISMISSED.

The Clerk of the Court is directed to remove the motions at ECF No. 116, 120, 125, 129, and 134 from the Court's list of pending motions.

Dated: January 14, 2013

U.S.D.J.

BY ECF TO ALL COUNSEL