SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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LEONID RAYTBURG and ANTHONY FIERRO,

Plaintiffs,

-against-

JOHN VANDER NEUT,

Defendant,

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JOHN VANDER NEUT,

Third-Party-Plaintiff,

-against-

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, KLEINMAN, SALTZMAN & BOLNICK, P.C., LAURENCE D. KLEINMAN, ESQ., ADONIS ABSTRACT, LLC, ROBERT E. DELVICARIO, JR., GALINA BRAIMAN and JOHN DOES 1-3,

Third-Party-Defendants,

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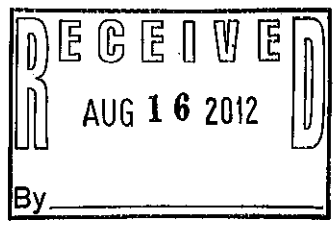
Index No.:22952/10
Motion Date: 4-30-12
Motion Cal. Nos.: 21-25



DECISION/ORDER

The following papers numbered 1 to _14__ were read on these motions:

Papers:

Plaintiffs' Motion for Summary Judgment:	1
Notice of Motion	2
Affidavits/Affirmations/Exhibits.....	3
Answering Affirmations/Affidavits/Exhibits.....	
Reply Affirmations/Affidavits/Exhibits.....	
Other.....	
Motion to Quash:	4
Notice of Motion	5
Affidavits/Affirmations/Exhibits.....	6
Answering Affirmations/Affidavits/Exhibits.....	
Reply Affirmations/Affidavits/Exhibits.....	
Other.....	

Papers:	Numbered:
Motion to Dismiss - by Kleinman, Saltzman & Bolnick, P.C. and Kleinman	
Notice of Motion	
Affidavits/Affirmations/Exhibits	7
Answering Affirmations/Affidavits/Exhibits	8
Reply Affirmations/Affidavits/Exhibits	9
Other	
Motion to Dismiss - by Old Republic National Title Insurance Company:	
Notice of Motion	
Affidavits/Affirmations/Exhibits	10
Answering Affirmations/Affidavits/Exhibits	11
Reply Affirmations/Affidavits/Exhibits	12
Other	
Motion to Disqualify :	
Notice of Motion	
Affidavits/Affirmations/Exhibits	13
Answering Affirmations/Affidavits/Exhibits	14
Reply Affirmations/Affidavits/Exhibits	
Other	

Upon the foregoing papers the motion and cross-motion are decided as follows:

In this legal malpractice action, five motions are before the Court. In the first motion, plaintiffs LEONARD RAYTBURG and ANTHONY FIERRO move for summary judgment against defendant, JOHN VANDER NEUT. In the second motion, third-party defendant, OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, in its capacity as a non-party, moves to quash a subpoena. In the third motion, defendant JOHN VANDER NEUT moves to disqualify the firm of third-party defendants, KLEINMAN, SALTZMAN & BOLNICK and LAURENCE D. KLEINMAN from representing the plaintiffs in this action. In the fourth motion, third-party defendants, KLEINMAN, SALTZMAN & BOLNICK and LAURENCE D. KLEINMAN, move, *inter alia*, to dismiss the third-party action as against them. In the fifth, third-party defendant, OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, moves to dismiss the third-party action as against it. The five motion are consolidated for disposition.

BACKGROUND:

The plaintiffs, LEONID RAYTBURG and ANTHONY FIERRO agreed to loan the sum of $350,000.00 to 1916 Mermaid Ave. Corp. (Mermaid). In order to secure the loan, third-party

defendant, GALINA BRAIMAN, a shareholder in 1916 Mermaid Ave. Corp., gave the plaintiffs a mortgage on real property owned by 1916 Mermaid Ave. Corp located at 1916 Mermaid Avenue, Brooklyn, New York. Defendant, JOHN VANDER NEUT, an attorney, represented the two plaintiffs at the closing of the loan and mortgage. OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY provided the two plaintiffs with title insurance .

In March of 2007, 1916 Mermaid Ave. Corp defaulted on the loan by failing to provide proof of insurance on the mortgaged property and by failing to make payments due and owing under the loan. Following the default, plaintiffs LEONID RAYTBURG and ANTHONY FIERRO began taking steps to foreclose the mortgage. In response, Dr. Daniel Bernstein, as an officer and director of 1916 Mermaid Ave. Corp., brought an action in this Court (Bernstein v. Braiman - Index # 15283/2007) seeking, *inter alia*, a judgment voiding the mortgage on the ground that GALINA BRAIMAN lacked the authority to take out the loan and to give the mortgage. Plaintiffs LEONID RAYTBURG and ANTHONY FIERRO were named as defendants in the action and were represented by third-party defendants KLEINMAN, SALTZMAN & BOLNICK, P.C. and LAWRENCE D. KLEINMAN. LAWRENCE D. KLEINMAN was the lead attorney on the case. KLEINMAN, SALTZMAN & BOLNICK, P.C. are the attorneys representing the plaintiffs in this action.

Pursuant to decision dated June 15, 2010, Justice Carolyn E. Demarest decided the action in Dr. Bernstein's favor and held that he was entitled to a declaratory judgment that the mortgage upon the property was void "to the extent of reducing such lien to $65,611.60 paid at closing in satisfaction of debts of Mermaid, less any sums previously paid upon such mortgage obligation." Justice Demarest concluded that GALINA BRAIMAN was not vested with authority to take out the loan or to mortgage the property.

The plaintiffs, LEONID RAYTBURG and ANTHONY FIERRO commenced this legal malpractice action claiming that defendant JOHN VANDER NEUT negligently represented them in the underlying transaction and are seeking damages that they claim resulted from his malpractice. During the pendency of the action, defendant JOHN VANDER NEUT commenced a third-party action naming various third-party defendants, including OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, KLEINMAN, SALTZMAN & BOLNICK, P.C., LAURENCE D. KLEINMAN, ESQ., ADONIS ABSTRACT, LLC, ROBERT E. DELVICARIO, JR., GALINA BRAIMAN and JOHN DOES 1-3.

I.
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT JOHN VANDER NEUT:

To prevail in an action for legal malpractice, a plaintiff must submit proof that: (1) the attorney was negligent; (2) the negligence was the proximate cause of the loss sustained; and (3) the plaintiff sustained actual damages as a result of the attorney's negligence *(see Khadem v. Fischer & Kagan,* 215 A.D.2d 441; *Franklin v. Winard,* 199 A.D.2d 220). Generally, to

establish that an attorney was negligent, a plaintiff must generally present expert testimony establishing the applicable standard of care from which the defendant allegedly deviated (*see Estate of Nevelson v. Carro, Spanbock, Kaster & Cuiffo,* 259 A.D.2d 282, 283; *Zasso v. Maher,* 226 A.D.2d 366, 367, *Greene v. Payne, Wood, and Littlejohn,* 197 A.D.2d 664, 666; *Orchard Motorcycle Distributors, Inc. v. Morrison Cohen Singer & Weinstein, LLP,* 49 A.D.3d 292, 293; *Merlin Biomed Asset Management v. Wolf Block Schorr & Solis–Cohen,* 23 AD3d 243). Only in circumstances where the "ordinary experience of the fact finder provides sufficient basis for judging the adequacy of the professional service" will the requirement that plaintiff come forward with expert evidence on the professional's duty of care be dispensed with (*S & D Petroleum Co. v. Tamsett,* 144 A.D.2d 849, 850, *citing Kulak v. Nationwide Mut. Ins. Co.,* 40 N.Y.2d 140, 148).

Here, since the ordinary experience of the fact finder does not provide a sufficient basis for judging the adequacy of the professional services provided by defendant JOHN VANDER NEUT, to prevail in its motion for summary judgment, it was incumbent upon the plaintiffs to submit the affidavit of an expert establishing the elements of a cause of action for legal malpractice as a matter of law. In support of their motion for summary judgment, plaintiffs submitted the affidavit of Joseph N. Friedman, an attorney duly licensed to practice law in this State. Mr. Friedman appears to be a suitable expert and stated in his affidavit that the standard of care that be believes defendant JOHN VANDER NEUT deviated from. However, Mr. Friedman's entire opinion was based on inadmissible hearsay.

"It is well settled that, to be admissible, opinion evidence must be based on one of the following: first, personal knowledge of the facts upon which the opinion rests; second, where the expert does not have personal knowledge of the facts upon which the opinion rests, the opinion may be based upon facts and material in evidence, real or testimonial; third, material not in evidence provided that the out-of-court material is derived from a witness subject to full cross-examination; and fourth, material not in evidence provided the out-of-court material is of the kind accepted in the profession as a basis in forming an opinion and the out-of-court material is accompanied by evidence establishing its reliability" (*Wagman v. Bradshaw,* 292 A.D.2d 84, 86-87). Mr. Friedman unequivocally stated in his affidavit that his "opinion as an attorney practicing in the real estate field is based solely for the purpose of this motion, on Judge Demarest's decision, the judgment rendered thereon and her findings." These materials do not fall within any of the above four categories set forth in *Wagman.* Indeed, the statements contained in these materials are rank hearsay in that they clearly being offered by the plaintiffs "to prove the truth of the matter asserted therein" (*Gelpi v. 37th Ave. Realty Corp.,* 281 A.D.2d 392, 392; *see also Quinche v. Gonzalez* 94 A.D.3d 1075, 1075).

Moreover, Justice Demarest's factual and legal findings can not be given collateral estoppel effect in the action. For collateral estoppel to be invoked, "[t]here must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling" (*Buechel v. Bain,* 97 N.Y.2d 295, 303–304; *cert. denied* 535 U.S. 1096; *see*

Tydings v. Greenfield, Stein & Senior, LLP, 11 N.Y.3d 195, 199). Further, collateral estoppel is available "only when it is clear that the prior determination squarely addressed and specifically decided the issue" (*O'Connor v. G & R Packing Co.,* 53 N.Y.2d 278, 280). Here, defendant JOHN VANDER NEUT was not a party to the underlying action and thus was not given a full and fair opportunity to contest Justice Demerast's findings and conclusions. More importantly, the issue of whether he committed legal malpractice was never squarely addressed and specifically decided in the action.

For the above reasons, the Court gives no weight to Mr. Friedman's affidavit. Thus, the Court finds that plaintiffs did not meet their burden of establishing their prima facie entitlement to summary judgment. For this reason, the motion must be denied without regard to the sufficiency of the defendant's papers in opposition (*see Alvarez v. Prospect Hosp.,* 68 N.Y.2d 320; *Sut v. City Cinemas Corp.,* 71 AD3d at 759; *Medina v. La Fiura Dev. Corp.,* 69 AD3d 686, 686–687).

II.
MOTION BY THIRD-PARTY DEFENDANTS, KLEINMAN, SALTZMAN & BOLNICK AND LAURENCE D. KLEINMAN PURSUANT TO CPLR 3211(a) 1 AND (7) TO DISMISS AND FOR SANCTIONS:

Defendant /third-party plaintiff JOHN VANDER NEUT alleged in the third-party complaint that third-party defendants KLEINMAN, SALTZMAN & BOLNICK and LAURENCE D. KLEINMAN were negligent in their representation of the plaintiffs in the action entitled Bernstein v. Braiman and that the damages the plaintiffs are alleging in this lawsuit were wholly or partially the result of such negligence. The third-party complaint alleges claims against KLEINMAN, SALTZMAN & BOLNICK and LAURENCE D. KLEINMAN for contribution and indemnity.

When evaluating the sufficiency of a pleading when considering a motion made pursuant to CPLR 3211(a)(7), "the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference" (*EBC I, Inc. v. Goldman, Sachs & Co.,* 5 N.Y.3d 11, 19; *see Matter of Haberman v. Zoning Bd. of Appeals of City of Long Beach,* 94 A.D.3d 997; *East Hampton Union Free School Dist. v. Sandpebble Bldrs., Inc.,* 66 A.D.3d 122, 125, *affd.* 16 N.Y.3d 775). Whether the party asserting the claim can ultimately prove the allegations is not relevant (*see EBC I, Inc. v. Goldman, Sachs & Co.,* 5 N.Y.3d at 19; *Knutt v. Metro Intl., S.A.,* 91 A.D.3d 915, 915–916).

To state a cause of action for contribution, a third-party plaintiff need only allege facts showing that a third-party defendant owed a duty of reasonable care to the injured plaintiff and that a breach of that duty contributed to plaintiff's alleged damages (*see Guerra v. St. Catherine of Sienna,* 79 A.D.3d 808, 809; *Baratta v. Home Depot USA,* 303 A.D.2d 434, 435, 756 N.Y.S.2d 605; *see also Roach v. AVR Realty Co., LLC,* 41 A.D.3d 821, 824, 839 N.Y.S.2d 173; *Torchio v. New York City Hous. Auth.,* 40 A.D.3d 970, 971, 836 N.Y.S.2d 674). In the third-

party defendant, defendant/third-party plaintiff JOHN VANDER NEUT alleged that third-party defendants KLEINMAN, SALTZMAN & BOLNICK and LAURENCE D. KLEINMAN represented the plaintiffs in the action entitled Bernstein v. Braiman. These allegations sufficiently demonstrate that a duty was owed by third-party defendants KLEINMAN, SALTZMAN & BOLNICK and LAURENCE D. KLEINMAN to exercise reasonable care in their representation of the plaintiffs in that action. The third party complaint also contains allegations to the effect that third-party defendants KLEINMAN, SALTZMAN & BOLNICK and LAURENCE D. KLEINMAN breached their duty of reasonable care to the plaintiffs and that some of the damages being alleged by the plaintiffs in this lawsuit were caused by such breach. Thus, the third-party complaint sufficiently states a cause of action against third-party defendants KLEINMAN, SALTZMAN & BOLNICK and LAURENCE D. KLEINMAN for contribution.

With respect to defendant/third-party plaintiff's claim against KLEINMAN, SALTZMAN & BOLNICK and LAURENCE D. KLEINMAN for common law indemnity, since third-party plaintiff JOHN VANDER NEUT was sued for his own active negligence, and not based on a theory of vicarious liability or a non-delegable duty, he is not entitled to common-law indemnification from third-party defendants KLEINMAN, SALTZMAN & BOLNICK and LAURENCE D. KLEINMAN (*see Nesterczuk v. Goldin Management, Inc.,* 77 A.D.3d 800, 805, 911 N.Y.S.2d 367, 372; *Esteva v. Nash,* 55 A.D.3d 474, 475, 866 N.Y.S.2d 186).

Accordingly, the motion of third-party defendants KLEINMAN, SALTZMAN & BOLNICK and LAURENCE D. KLEINMAN to dismiss the third-party action is granted to the extent that the cause of action for common-law indemnification is hereby **DISMISSED**.

III.
THE MOTION BY THIRD-PARTY DEFENDANT, OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, TO DISMISS:

In his third-party complaint against OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, defendant/third-party plaintiff JOHN VANDER NEUT alleges causes of action for both contribution and common-law indemnity. To sustain a third-party cause of action for contribution, a third-party plaintiff is required to allege facts, which if true, demonstrate that the the third-party defendant owed either the third-party plaintiff or the plaintiff a duty of reasonable care independent of any contractual obligation *(Guerra v. St. Catherine of Sienna,* 79 A.D.3d 808, 809, 913 N.Y.S.2d 709, 710 - 711, *citing Baratta v. Home Depot USA,* 303 A.D.2d 434, 435, 756 N.Y.S.2d 605; *see also Roach v. AVR Realty Co., LLC,* 41 A.D.3d 821, 824, 839 N.Y.S.2d 173; *Torchio v. New York City Hous. Auth.,* 40 A.D.3d 970, 971, 836 N.Y.S.2d 674). Here, there are no facts alleged in the third-party complaint demonstrating that OLD REPUBLIC owed such as duty to either VANDER NEUT or to the plaintiffs.

With respect to third-party plaintiff's claim against Old Republic for common-law indemnification, since third-party plaintiff JOHN VANDER NEUT was sued for his own active negligence, and not based on a theory of vicarious liability or a non-delegable duty, he is not

entitled to common-law indemnification from Old Republic (*see Nesterczuk v. Goldin Management, Inc.*, 77 A.D.3d 800, 805, 911 N.Y.S.2d 367, 372; *Esteva v. Nash,* 55 A.D.3d 474, 475, 866 N.Y.S.2d 186).

Accordingly, OLD REPUBLIC'S motion to dismiss the third-party complaint as against it must be **GRANTED.**

IV.
MOTION BY DEFENDANT JOHN VANDER NEUT TO DISQUALIFY KLEINMAN, SALTZMAN & BOLNICK AND LAURENCE D. KLEINMAN AS PLAINTIFFS' ATTORNEYS:

"A party's entitlement to be represented in ongoing litigation by counsel of its choice is a valued right" (*Hudson Val. Mar., Inc. v. Town of Cortlandt,* 54 A.D.3d 999, 1000; *see S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.,* 69 N.Y.2d 437, 440; *Wolfson v. Posner,* 57 A.D.3d 979, 980). However, pursuant to rule 3.7 of the Rules of Professional Conduct (22 NYCRR 1200.0), unless certain exceptions apply, "[a] lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact" (Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.7; *see Falk v. Gallo,* 73 A.D.3d 685, 686, 901 N.Y.S.2d 99; *see also S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.,* 69 N.Y.2d at 445–446, 515 N.Y.S.2d 735, 508 N.E.2d 647).

Although not binding upon the courts, this advocate-witness rule "provide[s] guidance ... for the courts in determining whether a party's attorney should be disqualified" (*Falk,* 73 AD3d at 686; *see also S & S Hotel Ventures Ltd. Partnership,* 69 N.Y.2d at 443–445). In order to disqualify counsel, a party moving for disqualification must demonstrate that (1) the testimony of the opposing party's counsel is necessary to his or her case, and (2) such testimony would be prejudicial to the opposing party (*see S & S Hotel Ventures Ltd. Partnership v. 777 S.H.,* 69 N.Y.2d at 446, 515 N.Y.S.2d 735, 508 N.E.2d 647; *Daniel Gale Assoc., Inc. v. George,* 8 A.D.3d 608, 609, 779 N.Y.S.2d 573). When determining if the attorney's testimony is necessary, the Court must take into account such factors as "... the significance of the matters, weight of the testimony, and the availability of other evidence" *(S & S Hotel Ventures, Ltd. Partnership v. 777 S.H.Corp., supra.*) Any question relating to whether an attorney should be disqualified should be resolved in favor of disqualification (*Stober v. Gaba & Stober, P.C.,* 259 A.D.2d 554).

Here, since KLEINMAN, SALTZMAN & BOLNICK and LAURENCE D. KLEINMAN are third-party defendants, it goes without saying that their testimony will be necessary defendant's/third party plaintiff's claims against them. In the Court view, their testimony will also be prejudicial to the plaintiffs. Indeed, it is inconceivable that a lawyer and his law firm who are parties in a lawsuit can represent another party to the lawsuit.

Accordingly, KLEINMAN, SALTZMAN & BOLNICK and LAURENCE D. KLEINMAN are hereby disqualified from representing the plaintiffs in this action.

V.
OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY'S MOTION TO QUASH:

The motion of OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY to quash the subpoena duces tecum dated August 29, 2011 is granted. The subpoena was facially defective and subject to being quashed because it neither contained nor was accompanied by an affirmation setting forth the language mandated by CPLR 3101(a)(4) (*see Needleman v. Tornheim* 88 A.D.3d 773, 774-774; *Kooper v. Kooper,* 74 A.D.3d 6, 13; *Matter of American Express Prop. Cas. Co. v. Vinci,* 63 A.D.3d 1055, 1056; *Wolf v. Wolf,* 300 A.D.2d 473; *Knitwork Prods. Corp. v. Helfat,* 234 A.D.2d 345, 346).

That fact that the motion to quash was made more than 30 days after service of the subpoena is of no moment since the facial insufficiency of the subpoena is "an issue of law which appears on the face of the record and which could not have been avoided if raised at the proper juncture" (*Parry v. Murphy,* 79 A.D.3d 713, 715; *see Needleman v. Tornheim, supra.; Williams v. Naylor,* 64 A.D.3d 588, 588–589; *Block v. Magee,* 146 A.D.2d 730, 732–733).

For all of the above reasons, it is hereby

ORDERED that plaintiffs' motion for summary judgment is **DENIED;** and it is further

ORDERED the motion of third-party defendants KLEINMAN, SALTZMAN & BOLNICK and LAURENCE D. KLEINMAN to dismiss the third-party action is GRANTED solely to the extent that the third-party cause of action for common-law indemnification is **DISMISSED;** and it is further

ORDERED that the motion of OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY to dismiss the claims asserted against it in the third-party complaint is **GRANTED;** and it is further

ORDERED the motion of the defendant/third-party plaintiff JOHN VANDER NEUT to disqualify KLEINMAN, SALTZMAN & BOLNICK and LAURENCE D. KLEINMAN from representing the plaintiffs in this action is **GRANTED;** and it is further

ORDERED motion OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY to quash the subpoena deuces dated August 29, 2011 is **GRANTED,** and it is further

ORDERED that the motions are in all other respects **DENIED.**

This constitutes the decision and order of the court.

HON. PETER P. SWEENEY, J.S.C.

Dated: August 9, 2012

S/

PETER P. SWEENEY, A.J.S.C.