But What About But-For Causation? Challenging Legal Malpractice Claims for Lack of Proximate Cause

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Conventional wisdom dictates that a lawyer being sued for legal malpractice in New York will rarely win a motion to dismiss based on lack of causation. Nevertheless, the case law suggests that a motion challenging a plaintiff's proximate cause allegations can be a powerful tool.

New York courts have shown a consistent willingness to dismiss malpractice claims where a plaintiff impermissibly speculates about the causal link between a lawyer's alleged negligence and the plaintiff's damages. In addition, challenging causation allegations on a motion to dismiss can have collateral benefits, such as crystallizing issues for discovery or forcing a plaintiff to commit to a specific causation theory early in the case.

A plaintiff alleging legal malpractice must plead that the attorney failed to exercise the "ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession" and that the attorney's breach proximately caused the plaintiff to sustain damages. *Nomura Asset Cap. v. Cadwalader, Wickersham & Taft*, 26 N.Y.3d 40, 49 (N.Y. 2015). To establish proximate cause, a plaintiff must demonstrate that "but for" the attorney's negligence, the plaintiff either would have succeeded in an underlying action, or otherwise would not have sustained "actual and ascertainable" damages. Id.

Although proximate cause often involves issues of fact that cannot be decided as a matter of law, New York courts regularly and closely scrutinize allegations that are speculative in nature. For example, in *Heritage Partners v. Stroock & Stroock & Lavan*, the plaintiffs alleged that their counsel negligently failed to advise plaintiffs to pursue a Chapter 11 bankruptcy and that, had they been properly advised, plaintiffs would not have lost $80 million in an underlying real estate project. 133 A.D.3d 428, 428-29 (1st Dept. 2015).

In upholding dismissal of their claim, the First Department observed that plaintiffs' proximate cause allegations were "couched in terms of gross speculations on future events," including conjecture that plaintiffs would have obtained "debtor-in-possession financing in a troubled economic climate," and that certain counterparties would have agreed to personal liability. Id. at 429. The court found it completely speculative that plaintiffs would have overcome "these and other hurdles to obtaining Chapter 11 reorganization." Id.

In *Ramos v. Goldberg, Schudieri & Lindenberg, P.C.*, a housing cooperative brought an eviction action against a tenant, and the tenant countersued for a declaration that he owned the unit. 189

A.D.3d 420, 421 (1st Dept. 2020). After losing in the underlying litigation, the tenant sued his attorneys, arguing they should have called the housing cooperative's lawyer to testify about her knowledge of the closing at which plaintiff purportedly acquired his ownership interest. In dismissing the malpractice claim, the court ruled that plaintiff's causation theory was "speculative" because the plaintiff "offer[ed] no factual allegations as [to] how or why the testimony from the attorney could have established the validity of a transfer of the unit," and because the participants in the alleged transfer denied any involvement. Id.

Just last month, the U.S. Court of Appeals for the Second Circuit ruled that rejecting a plaintiff's proximate cause allegations as speculative on a motion to dismiss did not "usurp the jury's [fact-finding] role." *Zappin v. Supple*, No. 21-2873, 2022 WL 4241358, at *2 (2d Cir. Sept. 15, 2022).

In *Zappin*, the plaintiff, a disbarred former attorney, sued his counsel for failing to argue during several disbarment hearings that the attorney was innocent of certain misconduct. In affirming dismissal of the amended complaint, the Second Circuit held that the plaintiff's "conclusory allegation[s]" that he would not have been disbarred if counsel had asserted his actual innocence were insufficient to plausibly support proximate causation. Id.

These decisions are not outliers. There are many other recent decisions demonstrating the wisdom of considering early challenges to legal malpractice claims based on gross speculation regarding proximate cause. See, e.g., *Marinelli v. Sullivan Papain Block McGrath & Cannavo, P.C.*, 205 A.D.3d 714, 716 (2d Dept. 2022) (rejecting parents' claim that their attorneys negligently failed to request that a hospital return their deceased child's internal organs where the parents were speculating about how the hospital would have responded to such a request); *Hickey v. Kaufman*, 156 A.D.3d 436, 436-37 (1st Dept. 2017) (dismissing plaintiff's claim for lack of proximate cause because plaintiff's assertion that he would have recovered the full $3 million that he was owed during a bankruptcy filed by a nonparty "consist[ed] of gross speculations on future events" (quotations omitted)).

Moreover, speculation is not the only potential basis for challenging proximate cause at the pleading stage. Look for intervening, superseding events that may break the chain of causation as a matter of law. Examples include: (i) legal advice provided by other counsel retained by the client, see *Binn v. Muchnick, Golieb & Golieb, P.C.*, A.D.3d 598, 599 (1st Dept. 2020) (dismissing claims by former shareholders because retention of "separate counsel was an intervening and superseding cause of any damages"); (ii) the client's own guilt in an underlying proceeding, see *Magassouba v. Cascione, Purcigliott & Galluzzi P.C.*, 178 A.D.3d 509, 509-10 (1st Dept. 2019) (counsel's alleged negligence could not have been the "but for" cause leading to the dismissal of plaintiff's Section 1983 claim for false arrest, because the arrest was supported by probable cause); and (iii) the failure of a plaintiff to exhaust remedies in an underlying litigation, see *Rabasco v. Buckheit & Whelan, P.C.*, 206 A.D.3d 770, 771 (2d Dept. 2022) (because plaintiff failed to pursue an appeal in the underlying action, counsel was "not the proximate cause of the plaintiff's alleged damages").

Three Key Takeaways

Carefully Evaluate a Plaintiff's Proximate Causation Allegations. Don't overlook proximate cause as a potential ground for a motion to dismiss. Although courts often deny such motions,

there is ample case law supporting the dismissal of malpractice claims based on speculation and other deficiencies.

Don't Forget CPLR 3211(a)(1). As most litigators know, CPLR 3211(a)(1) permits the introduction of certain types of documentary evidence in support a motion to dismiss. This can be particularly helpful in challenging proximate cause allegations at the pleading stage if such evidence can help break the chain of causation between the attorney's alleged negligence and a plaintiff's damages. See, e.g., *Optical Commc'ns Groups v. Rubin, Fiorella & Friedman*, 145 A.D.3d 469, 470 (1st Dept. 2016) (holding that an order by the Second Circuit in underlying litigation constituted documentary evidence which "flatly contradict[ed] the legal conclusions and factual allegations in the complaint").

Consider Whether a Motion To Dismiss Will Aid Later Discovery. Don't underestimate the usefulness of clarifying a plaintiff's proximate cause theory early in the case. When a plaintiff's causation allegations are vague and/or conclusory, a carefully framed motion to dismiss can force the plaintiff to articulate facts and identify legal theories in an amended complaint that may not be evident from the plaintiff's initial allegations, and which can then be explored during discovery—and possibly defeated later on summary judgment.

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