APPENDIX

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APPENDIX A

State of New York
Court of Appeals

Mo. No. 2019-569

[Filed September 12, 2019]

Warshaw Burstein Cohen Schlesinger & Kuh, LLP, Respondent,	)
v.	)
Eric A. Longmire, Appellant.	)

Present, Hon. Janet Difiore, *Chief Judge,* ***presiding.***

Decided and Entered on the twelfth day of September, 2019

Appellant having moved for leave to appeal to the Court of Appeals in the above cause;

Upon the papers filed and due deliberation, it is

ORDERED, that the motion is denied.

Judge Rivera took no part.

/s/ John P. Asiello
John P. Asiello
Clerk of the Court

APPENDIX B

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

New York County Clerk's
Index No. 116683/09

[Filed May 16, 2013]

Warshaw Burstein Cohen Schlesinger & Kuh, LLP, Plaintiffs-Respondent,	)
-against-	)
Eric A. Longmire, Defendant-Appellant.	)

ORDER

Tom, J.P., Andrias, Renwick, DeGrasse, JJ.

Schwartz & Ponterio, PLLC, New York (Matthew F. Schwartz of counsel), for appellant.

Rivkin Radler LLP, Uniondale (Evan H. Krinick of counsel), for respondent.

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered April 19, 2012, which granted plaintiff Warshaw Burstein Cohen Schlesinger & Kuh, LLP's (Warshaw) motion to dismiss defendant's

counterclaim for legal malpractice pursuant to CPLR 3211(a)(1) and (7), unanimously affirmed, with costs.

In this action seeking attorney's fees, defendant Eric A. Longmire filed a counterclaim for legal malpractice, alleging that plaintiff negligently failed to pursue a claim of race-based termination, in opposition to a summary judgment motion seeking dismissal of Longmire's federal employment discrimination lawsuit against his former employer.

The motion court properly dismissed the legal malpractice claim, as defendant failed to "meet the 'case within a case' requirement, demonstrating that 'but for' the attorney's conduct the [plaintiff] client would have prevailed in the underlying matter or would not have sustained any ascertainable damages" (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 272 [1st Dept 2004]; *see also Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]). Longmire failed to show that he would have established a prima facie case of race-based discrimination (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]; *see also McDonnell Douglas Corp. v Green*, 411 US 792, 802-804 [1973]).

First, Longmire failed to show that he was terminated, as he himself testified in the underlying suit that he voluntarily left his former employment. In addition, based on his own allegations in the complaint and his affidavit, if he was terminated at all, it was due to his refusal to testify on his employer's behalf in his employer's matrimonial proceedings, and it was not due to Longmire's race. Thus, Longmire would not have

prevailed on such a claim had Warshaw pursued it in opposing summary judgment.

Warshaw's decision not to move for reconsideration of the decision dismissing the underlying federal lawsuit was a strategic choice, and does not amount to legal malpractice because "[a]n attorney's 'selection of one among several reasonable courses of action does not constitute malpractice'" (*Rodriguez v Lipsig, Shapey, Manus & Moverman, P.C.*, 81 AD3d 551, 552 [1st Dept 2011], quoting *Rosner v Paley*, 65 NY2d 736, 738 [1985]).

The motion court correctly rejected Longmire's submission of an expert affidavit on the issue of whether Warshaw acted negligently (*see Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass*, 301 AD2d 63, 69 [1st Dept 2002]).

The court properly considered the documents submitted pursuant to CPLR 3211(a)(1) in concluding that they establish a defense to the malpractice counterclaim as a matter of law, as they show that Longmire would not have prevailed on any claim of race-based termination in the underlying federal suit (*Leon v Martinez*, 84 NY2d 83, 88 [1994]; *IMO Indus. v Anderson Kill & Olick*, 267 AD2d 10, 11 [1st Dept 1999]). Nor did the documents exceed the "scope" of documents that a court may review in ruling on a motion to dismiss, as "prior statements or averments of parties or their agents in the course of litigation that refute an essential element of a plaintiff's present claim may constitute documentary evidence within the meaning of CPLR 3211(a)(1)" (*Morgenthow & Latham v Bank of N.Y. Co.*, 305 AD2d 74, 80 [1st Dept 2003), *lv*

denied 100 NY2d 512 [2003]; *see also Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76 [1999], *affd on other grounds* 94 NY2d 659 [1999]).

Finally, although Longmire contends that the motion should have been denied pursuant to CPLR 3211(d) because, among other things, depositions had not yet been taken of Warshaw attorneys who handled the underlying suit, Longmire does not specify what facts warrant further discovery or how they are relevant to his opposition to the motion to dismiss his counterclaim.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 16, 2013

/s/_____
CLERK

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 8

Index No.: 116683/09

[Filed April 19, 2012]

WARSHAW BURSTEIN COHEN SCHLESINGER & KOH, LLP, Plaintiff,	)
- against -	)
ERIC A. LONGMIRE Defendant.	)

DECISION/ORDER

KENNEY, JOAN M., J.:

In this action seeking payment of legal fees in the amount of $268,000.00, defendant Eric A. Longmire (Longmire) has counterclaimed for legal malpractice and breach of contract. plaintiff, Warshaw Burstein Cohen Schlesinger &: Kuh,. LLP (Warshaw) now moves, pursuant to CPLR 3211(a)(1) and (7), to dismiss defendant's legal malpractice claim.

FACTUAL BACKGROUND

Warshaw was retained by Longmire to represent him in an action (the underlying action) against his

former employer, Wyser-Pratte Management Co., Inc. (WPMC), and its principal, Guy Wyser-Pratte (Mr. Pratte), after Longmire's employment ended in or around March 2004. Longmire, who worked for WPMC for about 13 years, claimed that he was wrongfully terminated and discriminated against because of his race.

Longmire is biracial. He describes himself as not appearing to be "from the African race," with a light complexion and sharp features, who is "frequently taken to be someone of Mediterranean or other non-Northern European heritage." Second Amended Complaint (SAC), Ex. 6 to Lee Aff. in Support of Motion to Dismiss (Lee Aff.), ¶ 20. Throughout his life, defendant has chosen to self-identify, or "pass," as white at his places of employment, and, generally, to keep his biracial background a secret in his professional life. *Id.*, ¶ 21; Longmire Aff. in Opp. to Motion to Dismiss (Longmire Aff.), ¶ 5. Longmire, now in his fifties, received both a BA and an MBA from Stanford University, and has spent much of his career working in the Wall Street financial industry. *Id.*, ¶ 4. According to Longmire, racial discrimination is common on Wall Street, and, in order to avoid such discrimination, he has kept his racial background "a closely guarded secret." SAC, ¶¶ 24-25; Longmire Aff., ¶¶ 5,7.

In 1989, Longmire was hired by GWP to work in the Risk Arbitrage Department at Prudential Bache Securities, Inc. (Prudential). After Prudential's Risk Arbitrage Department was closed in 1990, Mr. Pratte started WPMC, an independent risk arbitrage company

solely owned by Mr. Pratte, and invited Longmire to join him. Longmire started as a Research Analyst, and later served as Senior Managing Director, Assistant Portfolio Manger, and Director of Research.

Longmire alleged, in the underlying action, that during the time that Longmire worked at Prudential, Mr. Pratte did not know Longmire's racial background, and frequently used offensive racial epithets, such as "check for the niggers in the woodpile," to refer to looking for unforeseen investment risks. SAC, ¶¶ 27-29. Longmire claimed that, when he started working at WPMC, in or around 1991, he asked Mr. Pratte to stop using racial epithets, and to control the racist behavior of some of the white employees. *Id.*, ¶ 32. At about the same time, according to Longmire, he also told Mr. Pratte about his racial background and asked him to keep it secret. *Id.*, ¶ 33. Longmire alleged that, after he told Mr. Pratte about his racial secret, Mr. Pratte "disdained him," by refusing, in 1997, to give him time off for a honeymoon, and refusing, in 2002, to give him time off to receive treatment for broken shoulder. *Id.*, ¶¶¶ 54-55, 57-61. He also alleged that Mr. Pratte and other employees continued to make racially offensive remarks, and subjected him to a race-based hostile work environment. *Id.*, ¶¶ 45-49.

Longmire further claimed that Mr. Pratte used his knowledge of Longmire's "secret" racial background to underpay him, and, in late 2003 and early 2004, to "extort him to commit perjury" in Mr. Pratte's divorce proceeding against his wife, Vivien Wyser-Pratte (Mrs. Pratte). *Id.*, ¶¶ 81-85, 88-90. Longmire alleged that, in early January 2004, he had a conversation with Mr.

Pratte, during which Mr. Pratte asked Longmire to testify against Mrs. Pratte, who had threatened to expose Mr. Pratte in connection with an insider trading investigation, and to "lie" in his testimony. *Id.*, ¶¶ 93-95. Longmire alleged that, over the next few weeks, Mr. Pratte continued to demand that Longmire testify, and threatened to "out" him if he did not. *Id.*, ¶¶ 96, 102. Longmire did not testify in Mr. Pratte's divorce proceeding on behalf of Mr. Pratte, and instead submitted an affidavit on behalf of Mrs. Pratte, in June 2004, in which he attested that he often spoke with her on the telephone, and that she, among other things, tackled interpersonal issues between Mr. Pratte and him. *See* Longmire Aff., dated June 4, 2004, Ex. B to Lee Reply Aff., ¶ 4.

Following his conversation with Mr. Pratte in January 2004, and allegedly as a result of Mr. Pratte's threats and hostile, two-month "campaign to get [him] to commit a crime," Longmire decided that he had to leave the workplace, and, purportedly with the knowledge and agreement of WPMC's chief legal officer, he left the office of WPMC on January 22, 2004, and did not return. *Id.*, ¶¶ 105-106. Longmire was paid through January 31, 2004. When he received no compensation in February 2004, he contacted an attorney, provided by WPMC, who contacted an attorney for WPMC, and Longmire was apparently reinstated. He received his salary for March 2004, and then was terminated as of March 31, 2004. Longmire contended that, under similar circumstances, a white man was treated differently, and was given a paid leave of absence and then returned to work. *Id.*, ¶ 117. Longmire also contended that a white man replaced

him as Director of Research. *Id.*, ¶ 118. Mr. Pratte contended that Longmire quit, when he walked out on January 22, 2004 and did not contact him. Deposition of Mr. Pratte (Mr. Pratte Dep.), Ex. 19 to Schwartz Aff. in Opp. to Motion to Dismiss (Schwartz Aff.), at 143, 223-225, 232. Mr. Pratte testified that Longmire was reinstated in March 2004 to negotiate a settlement, and when no settlement was reached after a month, he was terminated. *Id.*, at 208-209, 226, 233-234.

In June 2004, Longmire retained Warshaw to represent him in legal proceedings against WPMC and Mr. Pratte. In November 2004, a complaint charging employment discrimination was filed with the United States Equal Opportunity Employment Commission (EEOC). The EEOC complaint was dismissed in March 2005 for lack of jurisdiction, because Wyser-Pratte did not employ 15 employees, as required to bring a claim under Title VII of the Civil Rights Act of 1964 (42 USC § 2000e), and Longmire was issued a "right to sue" letter. *See* EEOC letter, Ex. 11 to Longmire Aff. In July 2005, Warshaw filed a complaint on Longmire's behalf in the United States District Court for the Southern District of New York (federal complaint).

The federal complaint asserted causes of action for employment discrimination and retaliation, under the New York State Human Rights Law (Executive Law § 296), the New York City Human Rights Law (Administrative Code of the City of New York, § 8-107), and 42 USC § 1981, and, as against Mr. Pratte individually, for tortious interference with contract. The discrimination claims were based on allegations that Mr. Pratte threatened to, and eventually did, "out"

his racial secret when he did not agree to perjure himself in Mr. Pratte's divorce proceeding; that Mr. Pratte, by using and allowing other employees to use racial epithets, created a hostile work environment; that Longmire was paid less than white employees in positions similar to his; and that he was fired for refusing to agree to perjure himself in Mr. Pratte's divorce proceeding, was treated differently than a white man under comparable circumstances, and was replaced by a white man.

After extensive discovery and motion practice, Mr. Pratte and WPMC moved for summary judgment dismissing the case, and the motion was granted, by Opinion & Order dated September 6, 2007 (Stein, J.). Ex. 11 to Lee Aff. In his 34-page decision, Judge Stein held that the evidence was insufficient to sustain the claims of racial outing, hostile work environment, disparate pay, and retaliatory termination, or the tortious interference claim. The court found, among other things, that Longmire had no claim based on the alleged threats to reveal his racial background because his racial background was not a secret, and even if it had been, the threat to reveal it was not actionable. *Id.*, at 17. In addressing the alleged retaliatory termination, the court also found that, assuming that Mr. Pratte demanded false testimony from Longmire, "the basis for that demand was not Longmire's race, but rather his relationship with Mrs. Wyser-Pratte." *Id.*, at 30.

Warshaw filed an appeal of Judge Stein's decision on behalf of Longmire, although, due to a subsequent mediation process, it was not perfected, and Longmire's

time to appeal was extended. Warshaw represented Longmire in settlement negotiations, conducted with the assistance of a court-assigned mediator, through October 2008. Lee Aff., ¶ 24. WPMC and Mr. Pratte made a settlement offer to Longmire, to pay him $449,000, over two years, and provide a letter of reference and assistance with finding employment. *Id.*, ¶ 25. Warshaw recommended that Longmire accept the offer, but he did not, and mediation ended without any settlement agreement. Warshaw moved to withdraw as counsel for Longmire, and by order of the Court of Appeals, Second Circuit, dated October 31, 2008, Warsaw was relieved as counsel, and Longmire's appeal was reinstated and stayed for thirty days, to allow him to determine whether to retain new counsel or to continue without counsel. *See* Order, Ex. 15 to Lee Aff. Longmire then retained a new attorney, Daniel Abrams, and, in December 2008, Longmire agreed to settle his case for $449,00, the amount previously offered, but paid out over three years, and without any job search assistance. Lee Aff., ¶ 31. This action for attorneys' fees, and the countersuit for legal malpractice, followed.

DISCUSSION

It is well settled that, on a motion to dismiss pursuant to CPLR 3211(a)(7), the pleadings are to be liberally construed. *See* CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 (1994). The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Id.*, at 87-88; *see 511 W.*

232nd Owners Corp. v Jennifer Realty Co., 98 NY2d.144, 152 (2002). The court is not required, however, to accept as true "legal conclusions that are unsupportable based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]), or "'factual claims either inherently incredible or flatly contradicted by documentary evidence.'" *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 (1st Dept 1999) (citation omitted), *affd* 94 NY2d 659 (2000); *see Bishop v Maurer*, 33 AD3d 497, 498 (1st Dept 2006), *affd* 9 NYJd 910 (2007).

When extrinsic evidence is considered on a 3211(a)(7) motion, the criterion becomes whether the proponent of the pleading has a cause of action, not whether the proponent has stated one. *Guggenheimer v Ginzburg*, 43 NY2d.268, 275 (1977); *see Leon*, 84 NY2d at 88; *JFK Holding Co., LLC v City* of *New York,* 68 AD3d 477, 477 (1st Dept 2009). "If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action." *Zurich Depository Corp. v Iron Mtn. Info. Mgt., Inc.*, 61 AD3d 750, 751 (1st Dept 2009) (internal quotation marks and citation omitted). Under CPLR §3211(a)(1), dismissal is warranted if "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon,* 84 NY2d at 88; *see Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 (2007); *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 571 (2005); *Held v Kaufman*, 91 NY2d 425, 430-431 (1998).

"[P]rior statements or averments of parties or their agents in the course of litigation that refute an essential element of a plaintiff's present claim may constitute documentary evidence within the meaning of CPLR 3211(a)(1)." *Morgenthow & Latham v Bank of N.Y. Co., Inc.*, 305 AD2d 74, 80 (1st Dept 2003); *see Biondi*, 257 AD2d at 80-81 (documentary evidence included affirmations, exhibits, letter to court, complaint in prior federal action); *cf. Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 257, 271 (1st Dept 2004) (deposition and trial testimony and summary of prospective witness testimony did not conclusively establish defense). Further, "[a]n affidavit is an appropriate vehicle for authenticating and submitting relevant documentary evidence, and may provide 'connecting link[s]' between the documentary evidence and the challenged statements." *Muhlhahn v Goldman*, __ AD3d __, 939 NYS2d 420, 420 (1st Dept 2012) (internal citations omitted); *see Standard Chartered Bank v D. Chabbot, Inc.*, 178 AD2d 112 (1st Dept 1991); *see also Fenster v Smith*, 39 AD3d 231 (1st Dept 2007) (defendant's affidavit properly considered to negate factual allegations of complaint).

Whether a pleading is sufficient to state a cause of action for legal malpractice "pose[s] a question of law which [can] be determined on a motion to dismiss." *Rosner v Paley*, 65 NY2d 736, 738 (1985); *see Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 170 AD2d 108, 115 (1st Dept 1991), *affd* 80 NY2d 377 (1992); *Bernstein v Oppenheim & Co., P.C.*, 160 AD2d 428, 430 (1st Dept 1990). A claim for legal malpractice requires a plaintiff to demonstrate

both "that the attorney 'failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession' and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages." *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 (2007), quoting *McCoy v Feinman*, 99 NY2d 295, 301-302 (2002); *see Leder v Spiegel*, 9 NY3d 836, 837 (2007), *cert denied* 552 US 1257 (2008); *AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 (2007). "To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence." *Rudolf*, 8 NY3d at 442 (citations omitted); *see AmBase Corp.*, 8 NY3d at 434; *Brooks v Lewin*, 21 AD3d 731, 734 (1st Dept 2005).

Thus, "[a] plaintiff's burden of proof in a legal malpractice action is a heavy one. The plaintiff must prove first the hypothetical outcome of the underlying litigation and, then, the attorney's liability for malpractice in connection with that litigation." *Lindenman v Kreitzer*, 7 AD3d 30, 34 (1st Dept 2004). In other words, a "plaintiff is required to prove a 'case within a case'" (*Reibman v Senie*, 302 AD2d 290, 290 [1st Dept 2003] internal quotation marks and citation omitted]), which "is a distinctive feature of legal malpractice actions . . . [and] adds an additional layer to the element of proximate cause." *Lindenman*, 7 AD3d at 34 (internal quotation marks and citations. omitted); *see Sabalza v Salgado*, 85 AD3d 436, 437 (1st Dept 2011); *McKenna v Forsyth & Forsyth*, 280 AD2d 79, 82 (4th Dept 2001). "The failure to demonstrate

proximate cause mandates the dismissal of a legal malpractice action regardless of whether the attorney was negligent." *Leder*, 31 AD3d at 268; *see Pellegrino v File*, 291 AD2d 60, 63 (1st Dept 2002).

"Nor may speculative damages or conclusory claims of damage be a basis for legal malpractice." *Russo v. Feder, Kaszovitz, Isaacson, Weber, Skala & Bass*, 301 AD2d 63, 67 (1st Dept 2002); *see Leder*, 31 AD3d at 268; *Brooks*, 21 AD3d at 734; *Pellegrino*, 291 AD2d at 63. While, for purposes of a CPLR 3211(a)(7) motion to dismiss, "a pleading need only state allegations from which damages attributable to the defendant's conduct may reasonably be inferred" (*Lappin v Greenberg*, 34 AD3d 277, 279 [1st Dept 2006]), "speculation on future events . . . [is] insufficient to establish that the defendant lawyer's malpractice, if any, was a proximate cause of any such loss." *Brooks*, 21 AD3d at 734-735; *see Philips-Smith Specialty Retail Group II, L.P. v Parker Chapin Flattau & Klimpl, L.L.P.*, 265 AD2d 208, 210 (1st Dept 1999). Further, "[t]he lawyer's conduct must have caused damages that are actual and ascertainable." *Icahn v Todtman, Nachamie, Spizz & Johns, P.C.*, 2001 WL 11605821 *8, 2001 US Dist LEXIS 15487, *22-23 (SDNY 2001); *see Zarin v Reid & Priest*, 184 AD2d 385, 387-388 (1st Dept 1992). Moreover, where "subsequent counsel had a sufficient opportunity to protect the plaintiffs' rights by pursuing any remedies it deemed appropriate on their behalf" (*Katz v Herzfeld & Rubin, P.C.*, 48 AD3d 640, 641 [2d Dept 2008] [citations omitted]), any negligence of prior counsel cannot be the proximate cause of a plaintiff's alleged damages. *See Somma v Dansker & Aspromonte Assocs.*, 44 AD3d 376 (1st Dept 2007); *Golden v*

Cascione, Chechanover & Purcigliotti, 286 AD.2d 281 (1st Dept 2001).

In this case, Longmire's malpractice claim is based chiefly on allegations that Warshaw, in opposing defendants' summary judgment motion in the underlying action, failed to address the "primary claim in the case, which was that Longmire ultimately lost his job because of his race." Answer & Counterclaim, Ex. 20 to Lee Aff, ¶ 21 The counterclaim asserts that Warshaw "deviated from the applicable standard of care by treating the motion for summary judgment as a motion for partial summary judgment, and failing to identify for the District Court the existence of material facts requiring a trial." *Id.*, ¶ 27. Other alleged deviations include "a failure to rebut Wyser-Pratte's unsupported assertion that Mr. Longmire was asked to testify in Mr. Wyser-Pratte's divorce 'because of' Longmire's relationship with Mrs. Wyser-Pratte," and "a failure to allege a wrongful refusal to hire claim." *Id.* Longmire claims that had Warshaw acted "in accordance with the applicable standard of care, Mr. Longmire would have survived summary judgment and ultimately prevailed at trial against Wyser-Pratte and recovered an amount to be determined at trial." *Id.*, ¶ 28.

With respect to Longmire's allegation that filing a complaint with the EEOC was "completely unnecessary" (*id.*, ¶ 5) and a "waste of my time and money" (Longmire Aff. , at 14), he does not now argue that filing the EEOC complaint was malpractice, and alleges no damages as a result of filing the EEOC complaint. To the contrary, Longmire claimed that he

"gained several things" to use against Mr. Pratte as a result of the EEOC proceeding. *See* Letter dated March 8, 2005, Ex. 36 to Lee Aff. He also stated that he went to the EEOC because he wanted to keep the complaint confidential. *See* Longmire Aff., dated August 2005, Ex. 91 to Lee Aff., ¶ 2.

Longmire also does not allege that Warshaw was negligent in litigating any of the other claims in the underlying action, including racial outing, hostile work environment, disparate pay, retaliatory discharge, and tortious interference with contract, all of which were dismissed. Rather, Longmire focuses on his claim that he was terminated because of his race, which was not expressly addressed by WPMC and Mr. Pratt in their motion, or by the court, and asserts that Warshaw should have brought it to the attention of the court and argued that, in the context of the standards set out in *McDonnell Douglas Corp. v Green* (411 US 792, 802-804 [1973]), the evidence supported a prima facie case of discriminatory termination.

In support of its motion to dismiss, Warshaw contends that litigation of Longmire's claims in the underlying action was largely directed by Longmire and that the papers submitted in opposition to the summary judgment motion were closely reviewed, and revised, by Longmire, and submitted with his knowledge and approval, and that discriminatory termination was not his primary claim. Warshaw also contends that Longmire cannot show that he would have succeeded on a claim of discriminatory termination.

As numerous e-mails and other documents submitted on the instant motion make clear, Longmire worked closely with his counsel and played a significant role in decisions regarding the litigation of his claims against Mr. Pratte and WPMC, conducting his own research, framing the issues, suggesting claims, identifying relevant facts, and drafting, reviewing, and revising documents, including the pleadings and motion papers. *See e.g.* Exs. 27-30, 33, 37, 42, 45 to Lee Aff. However, notwithstanding Longmire's extensive involvement in the litigation of his case, he is not an attorney or someone with a sophisticated knowledge of the legal issues involved, and Warshaw "'may not shift to the client the legal responsibility it was specifically hired to undertake because of its superior knowledge.'" *Escape Airports (USA), Inc. v Kent, Beatty & Gordon, LLP*, 79 AD3d 437, 439 (1st Dept 2010), quoting *Hart v Carro, Spanbock, Kaster & Cuiffo*, 211 AD2d 617, 619 (2d Dept 1995); *see Cicorelli v Capobianco*, 90 AD2d 524 (2d Dept 1982), *affd* 59 NY2d 626 (1983).

It is, however, also clear from the documents submitted that Longmire's thinking about his case evolved over time. When he first retained Warshaw, Longmire, by his own acknowledgment, did not want to "out" himself to sue his employer, and wanted to find non race-based claims against WPMC and Mr. Pratte. Longmire Aff., ¶ 36. In correspondence with Warshaw, he described his case as a "simple one" -- that he was fired for refusing to commit perjury. *See* E-mail dated July 1, 2004, Ex. 31 to Lee Aff.; Letter dated July 4, 2004, Ex. 32 to Lee Aff. After his attorney "shot down" his suggestions for non race-based claims, he decided to

bring a race discrimination claim against WPMC and Mr. Pratte. Longmire Aff., ¶ 37. He claimed, generally, that he was "racially profiled" and "blackmailed" to commit a crime, and that Mr. Pratte's threats to "out" him amounted to racial discrimination. *See* Ex. 35 to Lee Aff.

As developed by Longmire and his attorneys, the discrimination claims in the federal complaint included hostile work environment, based on allegations that Mr. Pratte and other employees frequently used racial epithets; disparate pay, based on allegations that he was paid less than other similarly situated white employees; racial outing, based on Mr. Pratte's alleged threats to reveal Longmire's racial background; and retaliation and unlawful termination, based on allegations that Mr. Pratte's demand that he falsely testify in Mr. Pratte' s divorce proceeding was racially motivated, and that he was fired for refusing to testify.

Longmire's claim of discriminatory termination, although distinct from his retaliation claim, is based on most of the same allegations, that is, that he was racially profiled to commit an "illegal job assignment,"and that he was fired for refusing to do it. The essence of the claim is that Mr. Pratte used his knowledge of Longmire's biracial background, and his desire to keep it a secret from his co-workers and colleagues, to attempt to coerce him to testify; and that this race-based demand, and Longmire's refusal to comply with it, demonstrated that racial animus motivated his termination. He also alleges that there was no reason that Mr. Pratte singled him out to testify, from seven other employees, six of whom were

white and one Asian, other than his race. In addition, he alleges that he was replaced by a white man, and that he was treated differently than another white man who resigned, in November 2002, purportedly because he disagreed with an action the company was taking.

Even viewing the counterclaim in the light most favorable to Longmire, the allegations are insufficient to support a claim that Warshaw's negligence was a proximate cause of his failure to obtain a more favorable result in the underlying action. *See Held v Seidenberg*, 81 AD3d 616 (2d Dept 2011); *O'Callaghan v Brunelle*, 84 AD3d 581 (1st Dept 2011); *Tortura v Sullivan Papain Block McGrath & Cannavo, P.C.*, 21 AD3d 1082 (2nd Dept 2005). A review of the record shows that Longmire cannot establish that the result in the underlying action ultimately would have been different "even if the omitted evidence and arguments had been presented on the original motion." *Hutt v Kanterman & Taub, P.C.*, 280 AD2d 379, 380 (1st Dept 2001); *see Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP*, 301 AD3d 63, *supra*; *Palazzolo v Herrick, Feinstein, LLP*, 298 AD2d 372 (2d Dept 2002); *Dweck Law Firm, LLP v Mann*, 283 AD2d 292 (1st Dept 2002).

Under the familiar *McDonnell-Douglas* "burden-shifting" framework applicable to employment discrimination cases brought under federal, state, and local laws, a plaintiff has the initial burden of establishing a prima facie claim of unlawful termination by showing that "(1) he is a member of a protected class, (2) he was qualified for the position, (3) he was terminated from employment or suffered an

adverse employment action, and (4) the termination or other adverse action occurred under circumstances giving rise to an inference of discrimination." *Dickerson v Health Mgmt. Corp. of Am.*, 21 AD3d 326, 328 (1st Dept 2005), citing *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 (2004); *see McDonnell Douglas Corp.*, 411 US at 802-804; *Stephenson v Hotel Employees & Rest. Employees, Union Local 100 of AFL-CIO*, 6 NY3d 265, 270 (2006); *Ferrante v American Lung Assn.*, 90 NY2d 623, 629 (1997). This initial burden has been characterized as "de minimis." *See Wiesen v New York Univ.*, 304 AD2d 459, 460 (1st Dept 4003); *Schwalex v Squire Sanders & Dempsey*, 249 AD2d 195, 196 (1st Dept 1998); *Beyer v County of Nassau*, 524 F3d 160, 163 (2d Cir 2008). "It is not, however, nonexistent. If the plaintiff fails to establish any element of his *prima facie* case, summary judgment is appropriate." *Crews v Trustees of Columbia Univ.*, 452 F Supp 2d 504, 522 (SD NY 2006), *affd* 308 Fed Appx 518 (2d Cir 2009); *see Klings v New York State Ofc. of Court Admin.*, 2010 WL 1292256, *5, 2010 US Dist LEXIS 33434, *16 (ED NY 2010).

If the plaintiff establishes a prima facie case, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its employment decision. *See Stephenson*, 6 NY3d at 270-271; *St. Mary's Honor Ctr. v Hicks*, 509 US 502, 506-507 (1993); *Dickerson*, 21 AD3d at 328. If the employer articulates a legitimate, nondiscriminatory basis for its action, the burden shifts back to the plaintiff to prove that the employer's reasons are a pretext for discrimination, by showing "'*both* that the reason was false, *and* that discrimination was the real reason.'"

Ferrante, 90 NY2d at 630 (internal citation omitted) (emphasis in original). For plaintiff to prevail, "'[i]t is not enough . . . to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination.'" *Id.* (emphasis in original) "[E]ven if the employer's reason is 'unpersuasive, or even obviously contrived,' plaintiff always has the ultimate burden of proof to show that intentional discrimination has occurred under a consideration of all the evidence." *Id.* (internal citations omitted); *see Texas Dept. of Community Affairs v Burdine*, 450 US 248, 253 (1981); *Bailey v New York Westchester Sq. Med. Ctr.*, 38 AD3d 119, 123 (1st Dept 2007).

In the underlying action, it was not disputed that Longmire, as a biracial person, was a member of a protected class, and was qualified for the position that he held at WPMC. As to his termination, the parties disputed whether Longmire quit or was fired. However, assuming that Longmire was terminated, whether as of January 31, 2004 or March 31, 2004, the circumstances surrounding his termination, as found by the federal court and reflected in the record, did not give rise to an inference of discrimination. Judge Stein expressly found that race was not the basis for Mr. Pratte's demand that Longmire falsely testify, and that Longmire's relationship with Mr. Pratte's wife was the basis for the demand. *See* Opinion &: Order, Ex. 11 to Lee Aff., at 30. Although Longmire disputes this finding, evidence supports Judge Stein's conclusion, and Longmire offers no evidence that shows otherwise. Longmire acknowledged that he knew and "spoke often over the telephone" with Mrs. Pratte. *See* Longmire Aff., dated June 4, 2004 (June 2004 Aff.), Ex. B to Lee

Reply Aff., ¶ 4. In the June 2004 Aff., submitted to the court in the Wyser-Pratte divorce proceeding, Longmire attested that Mr. Pratte frequently discussed his personal life, including Mrs. Pratte, with him, and he detailed numerous conversations he had with Mr. Pratte, some time before the divorce proceeding commenced, about issues involving Mrs. Pratte. *Id.* ¶¶ 5, 14-19, 21-22. He also attested that, in May 2003, after he had a conversation with Mrs. Pratte, in which she discussed Mr. Pratte and the pressures he was under, Mr. Pratte asked him questions about the conversation. (*id.*, ¶¶ 9-12), and asked him to remember it, "because it could prove useful to him" (*id.*, ¶ 16), and to discuss the details of it with Mr. Pratte's lawyer. *Id.*, ¶ 24. Although Longmire claims that he was singled out because of his race, and no white employee was asked to testify, he neither alleges nor offers any evidence to show that any other employee had similar conversations, or a similarly familiar relationship, with Mrs. Pratte, or with Mr. Pratte. Likewise, he submits no evidence to demonstrate that he was similarly situated to employee Michael Kelly, the white man Longmire claims was given a one month paid leave of absence, and then rehired, after he allegedly resigned to protest a company action. The reasons for Kelly's resignation are disputed, as are the circumstances which followed, and, in any event, Longmire asserts that he did not resign, and he was paid for a month when he was not working. As Longmire has not shown "a reasonably close resemblance of the facts and circumstances" of his and Kelly's situations, he cannot establish disparate treatment. *See Octobre v Radio Shack Corp.*, 2010 WL 850189, *10, 2010 US Dist LEXIS 22997, *30-31 (SD

NY 2010); *Shah v Wilco Sys., Inc.*, 27 AD3d 169, 177 (1st Dept 2005). Longmire's claim that he was targeted because of his race is, therefore, not supported by the evidence, and does not raise triable issues of fact as to whether his alleged termination. was race-based.

Even if his replacement by a white man could be sufficient to make a prima facie showing of discrimination, Mr. Pratte articulated a nondiscriminatory reason for his termination, which was that he believed that Longmire quit or abandoned his position when he left on January 22, 2004. Mr. Pratte testified that Longmire was briefly reinstated in order to negotiate a settlement package, and that, when no settlement was reached, Longmire was terminated. Longmire does not deny that he left the office on January 22, and did not return to work at any time after that. Although he claims that this was suggested and approved by WPMC's chief legal officer, and that he intended to work from home, there is evidence that his then attorney was seeking a severance package for him, not a return to work. *See* Mr. Pratte Dep., at 226. Longmire's unsupported claims are insufficient to show both that the stated reason for his termination was false and the real reason was discrimination.

While there may be questions remaining about Longmire's employment status from January 22 through March 31, 2004, and about WPMC's business decisions to pay or not pay him during that time and after he was terminated, a "[p]laintiff does not raise a jury issue merely by showing that the employer's decision was arbitrary or unsupported by the facts."

Ioele v Alden Press, Inc., 145 AD2d 29, 36 (1st Dept 1989). It also is not enough "to show that the employer made an unwise business decision, or an unnecessary personnel move . . . [or] that the employer acted . . . with ill will." *Id.* (internal quotations and citation omitted); *see Alvarado v Hotel Salisbury, Inc.*, 38 AD3d 398, 398 (1st Dept 2007). A plaintiff must instead produce evidence that defendant did not in good faith believe the allegations against plaintiff and that the real motive for the termination was discriminatory animus toward plaintiff. *See Octobre*, 2010 WL 850189 at *9, 2010 US Dist LEXIS 22997 at *29; *Dorcely v Wyandanch Union Free Sch. Dist.*, 665 F Supp 2d 178, 201 (ED NY 2009); *Hardy v General Elec. Co.*, 270 AD2d 100, 703 (3d Dept 2000). Longmire has not produced sufficient evidence to show that the real motive for his termination was discriminatory animus. *See Jordan v American Intl. Group, Inc.*, 283 AD2d 611, 612 (2nd Dept 2001); *Hirschfeld v Institutional Investor, Inc.*, 260 AD2d 171, 171-172 (1st Dept 1999).

As evidence does not show that a different strategy would have resulted in a different outcome and that he would have prevailed in the underlying action, any negligence of Warshaw would not be the proximate cause of any damages. Further, his assertions that he would have received more at trial than he obtained by settling the case are merely speculation. *See Rodriguez v Lipsig, Shapey, Manus, & Moverman, P.C.*, 81 AD3d 551, 552 (1st Dept 2011); *Somma*, 44 AD3d at 377; *Brooks*, 21 AD3d at 734-735; *Feldman v Jasne*, 294 AD2d 307, 307 (1st Dept 2002). Longmire does not allege how a higher settlement could have been achieved, what that higher settlement would have

been, or how Warshaw's negligence forced him to accept the settlement amount. Thus, Longmire fails to plead proximate cause.

As to whether Warshaw should have moved for reconsideration of Judge Stein's decision instead of appealing it, Warshaw made a strategic decision, in view of the judge's findings, and the "selection of one among several reasonable courses of action does not constitute malpractice," even if the attorney committed an error of judgment. *Rosner*, 65 NY2d at 738; *see Dimond v Salvan*, 78 AD3d 407, 408 (1st Dept 2010); *Mars v Dobrish*, 66 AD3d 403, 403 (1st Dept 2009); *Hand v Silbermans*, 15 AD3d 167, 167 (1st Dept 2005). Moreover, Longmire retained his right to appeal, and his rights were protected by succeeding counsel. *See Katz v Herzfeld & Rubin, P.C.*, 48 AD3d 640, *supra*; *Somma v Dansker & Aspromonte Assocs.*, 44 AD3d 376, *supra.*

Finally, Longmire's reliance on the affidavit of another attorney to provide an expert opinion on the standard of care for litigating employment discrimination claims, is unavailing. "Essentially, the affiant-attorney was offering a legal opinion as to what performance or absence thereof constitutes legal malpractice. But making those determinations is the function of a court." *Russo*, 301 AD2d at 68; *see Laddcap Value Partners, LP v Lowenstein Sandler PC*, 2009 WL 727781, 2009 NY Misc LEXIS 3689, *26, 2009 NY Slip Op 30540(U) (Sup Ct, NY County 2009).

"An expert may not be utilized to offer opinion as to the legal standards which he believes should have governed a party's conduct." *Russo*, 301 AD2d at 69; *see*

Colon v Rent-A-Center, Inc., 276 AD2d 58, 61 (1st Dept 2000). Thus, courts "do not rely on an attorney's affidavits to tell . . . [them] what constitutes malpractice. *Russo*, 301 AD2d at 69; *see Gersten v Lemke*, 2010 WL 5044074, 2010 NY Misc LEXIS 5851, *11, 2010 NY Slip Op 33317(U), **5 (Sup Ct, NY County 2010).

Accordingly, it is

ORDERED that the motion of plaintiff Warshaw Burstein Cohen Schlesinger & Kuh, LLP is granted and the first counterclaim is dismissed, and it is further

ORDERED that the remaining claims are severed and shall continue; and it is further

ORDERED that the parties proceed to mediation, forthwith.

Dated: April 16, 2012

ENTER:

/s/ Joan M. Kenney
HON. JOAN M. KENNEY, J.S.C.