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Upon the foregoing papers it is ordered that the motion and cross motions are determined as follows:

The underlying action is for legal malpractice. The third-party plaintiffs seek contribution pursuant to CPLR Article 14 from third-party defendants in connection with the legal malpractice claim interposed by the plaintiff A&C Construction, Inc. of New York (A&C Construction). The facts giving rise to this litigation are that during the period of 2000 and before the defendants/third-party plaintiffs, Richard J. Flanagan, Flanagan & Cooke, P.C., and Flanagan, Cooke & French, LLP represented te plaintiff A&C Construction in various construction law and litigation matters. On April 10, 2002, the defendants/third-party plaintiffs commenced an action in Supreme Court, New York County, on behalf of the plaintiff against the New York City Housing Authority (NYCHA) for an alleged breach of contract. In October 2002, third-party plaintiffs withdrew as counsel for A&C Construction and were replaced by another attorney. Subsequently, the third-party defendants undertook the representation of A&C Construction in the action against the NYCHA, which continued until the action was ultimately disposed of in September 2005. In October 2004, A&C Construction commenced this action against defendants/third-party plaintiffs for legal malpractice in connection with their representation in the action against the NYCHA.

On August 8, 2008, the third-party action was commenced. After the third-party defendants failed to answer the third-party complaint, the third-party plaintiffs brought this motion for default. In response to the motion for a default judgment, the third-party defendants brought a motion to dismiss the third-party complaint for failure to state a claim or in the alternative to sever the third-party action from the main action.

The motion for a default judgment is denied. As discussed below, the court is granting the cross motion for leave to file an amended complaint. Inasmuch as upon the re-serving of the summons and complaint the third-party defendants will have twenty days to respond to answer, the motion for the default judgment motion is denied as academic.

Turning next to the motion to dismiss for failure to state a cause of action, a court must accept as true all the allegations in the complaint (*see Goldman v Metro. Life Ins. Co.*, 5 NY3d 561 [2005]). To establish a cause of action for legal malpractice, a plaintiff must prove that there was an attorney client relationship, that the defendant attorney failed to exercise the requisite skill, care and diligence commonly possessed by a member of the legal profession; the attorney's negligence was the proximate cause of the loss sustained; actual damages as a result of the negligence; and that but for the negligence, the plaintiff would have prevailed in the underlying action (*see Levy v Greenberg*, 19 AD3d 462 [2005]; *Pistilli v Gandin*, 10 AD3d 353 [2004]). To establish proximate cause the plaintiff must demonstrate that but for the attorney's negligence plaintiff would have prevailed on the matter in question or would not have sustained ascertainable damages. Here, the allegations in the third-party complaint states a cause of action for legal malpractice against the third-party defendant. The complaint alleges that the third-party defendants assumed the case that was originally brought by the third-party plaintiffs and that the third-party defendants were negligent in their handling of the case which caused or contributed to the plaintiff's loss. The argument that the lack of privity between the third-party plaintiffs and third-party defendants requires the dismissal of the third-party complaint is without merit. An attorney sued for malpractice may seek indemnification and/or contribution from a subsequently retained attorney for allegations that the subsequently retained attorney's actions contributed to or exacerbated the plaintiff's alleged loss (*see Schauer v Joyce*, 54 NY2d 1 [1981]). Therefore, the motion to dismiss the third-party complaint for failing state a cause of action is denied.

The branch of the third-party defendants' cross motion to strike the defendants/third-party plaintiffs answer for failure to comply with court orders is also denied. The third-party defendants do not have standing to ask for such relief. Furthermore, this drastic remedy is not appropriate in this case as the third-party defendants have not shown that the defendants/third-party plaintiffs; failure to comply with the discovery demands was willful, contumacious or in bad faith (*see Kesar v Green Ridge Enters.*, 30 AD3d 471 [2006]; *Denoyelles v Gallagher*, 30 AD3d 367 [2006]; *Foncette v LA Express*, 295 AD2d 471 [2002]). Additionally, the plaintiff have also failed to comply with prior court orders.

The branch of the cross motion to sever the third-party complaint is denied. The court has broad discretion in deciding whether to sever an action (*see McCrimmon v County of Nassau*, 302 AD2d 372 [2003]). Here, there are common factual and legal issues so that the interests of justice and judicial economy call for a single trial. The circumstances of this case are therefore of type that are suited for the resolution of one trial (*see Guilford v Netter*, 179 AD2d 901 [1992]).

Finally, turning to the cross motion by the third-party plaintiffs to amend their third-party complaint, leave to amend a pleading should be freely given absent prejudice to the other party, provided the amendment is not palpably insufficient (CPLR 3025[b]; *Ruddock v Boland Rentals*, 5 AD3d 368 [2004]; *Holchender v We Transport*, 292 AD2d 568 [2002]). First, the part of the motion to amend the caption is granted. CPLR 305(c) gives the court the authority to allow a summons to be amended, as long as no substantial rights of a party against whom the summons is issued are prejudiced (*see Willoughby v Yu Fashion Deli*, 278 AD2d 316 [2000]). This provision has been applied to allow a plaintiff to cure a misnomer in the naming of a defendant if there is evidence that the intended but misnamed defendant was properly served and that defendant would not be prejudiced by the granting of the amendment (*see Kingalarm Distribs. v Video Insights Corp.*, 274 AD2d 416 [2000]; *Ober v Rye Town Hilton*, 159 AD2d 16 [1990]). Here, the third-party plaintiffs should be allowed to cure the misnaming of Steve C. Okenwa, P.C. instead of C. Steve Okenwa, P.C. as C. Steve Okenwa, P.C. was properly served and there would be no prejudice to C. Steve Okenwa, P.C. if the amendment is granted. Furthermore, inasmuch as there has been no showing of any prejudice, the branch of third-party plaintiffs' cross motion to add new factual allegations to plead the claim of legal malpractice with particularity is granted (*see Aronov v Regency Gardens Apt. Corp.*, 15 AD3d 513 [2005]).

Accordingly, the motion for a judgment upon default is denied. The cross motion by the third-party defendants, including the requests for sanctions, is denied in its entirety. The cross motion by the third-party plaintiffs to amend the third-party complaint by correcting the caption and adding new factual allegations to plead the legal malpractice with particularity is granted. The caption of the third-party complaint is hereby amended to reflect the correction as follows:

RICHARD J. FLANAGAN, FLANAGAN, x
COOKIE & FRENCH, LLP and FLANAGAN
& ASSOCIATES, PLLC,

Third-Party Plaintiffs,

- against -

STEVE C. OKENWA and C. STEVE
OKENWA, P.C.

Third-Party Defendants.

x

The third-party plaintiffs are directed to serve a copy of this order with notice of entry within thirty days upon all parties and the Clerk of the Court of Queens County. The third-party plaintiffs are also directed to file and serve an amended third-party complaint in conformance with this order within twenty days after service of a copy of this order with notice of entry.

The third-party defendants are directed to serve an answer within twenty days after receipt of the amended third-party summons and complaint.

Dated: June 22, 2009

J.S.C.