

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D13577  
W/nl

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Argued - December 19, 2007

REINALDO E. RIVERA, J.P.  
GABRIEL M. KRAUSMAN  
GLORIA GOLDSTEIN  
ROBERT J. LUNN, JJ.

2005-08189

DECISION & ORDER

Ann Kotzian, appellant, v Daniel McCarthy,  
et al., respondents, et al., defendants.

(Index No. 17376/04)

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Herman Kaufman, Port Chester, N.Y., for appellant.

Steinberg & Cavaliere, LLP, White Plains, N.Y. (Neil W. Silberblatt of counsel), for respondents.

In an action to recover damages for legal malpractice, the plaintiff appeals, as limited by her brief, from so much of an order of the Supreme Court, Westchester County (Barone, J.), entered July 8, 2005, as granted that branch of the motion of the defendants Daniel McCarthy and The McCarthy Law Firm, P.C., which was for summary judgment dismissing the complaint insofar as asserted against them.

ORDERED that the order is affirmed insofar as appealed from, with costs.

To establish a cause of action to recover damages for legal malpractice, a plaintiff must prove that (1) the attorney failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community, (2) the attorney's conduct was the proximate cause of the loss sustained by the plaintiff, (3) the plaintiff sustained damages as a direct result of the attorney's actions, and (4) the plaintiff would have been successful in the underlying action had the attorney exercised due care (*see Dimond v Kazmierczuk & McGrath*, 15 AD3d 526, 527; *Ippolito v McCormack, Damiani, Lowe & Mellon*, 265 AD2d 303; *Volpe v Canfield*, 237 AD2d 282, 283).

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Here, the defendants Daniel McCarthy and The McCarthy Law Firm, P.C., demonstrated their prima facie entitlement to summary judgment by establishing that the plaintiff was unable to prove at least one of the essential elements of the legal malpractice cause of action (*see Fasanella v Levy*, 27 AD3d 616; *Dimond v Kazmierczuk & McGrath, supra*; *Ostriker v Taylor, Atkins & Ostrow*, 258 AD2d 572). In opposition, the plaintiff failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). Therefore, the Supreme Court properly granted that branch of the motion of the defendants Daniel McCarthy and The McCarthy Law Firm, P.C., which was for summary judgment dismissing the complaint insofar as asserted against them.

We decline the request of the defendants Daniel McCarthy and The McCarthy Law Firm, P.C., to impose a sanction upon the plaintiff for pursuing an allegedly frivolous appeal (*see* 22 NYCRR 130-1.1).

RIVERA, J.P., KRAUSMAN, GOLDSTEIN and LUNN, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer  
Clerk of the Court