

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

D14145  
X/cb

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Argued - February 6, 2007

HOWARD MILLER, J.P.  
ROBERT W. SCHMIDT  
DAVID S. RITTER  
DANIEL D. ANGIOLILLO, JJ.

2006-00149  
2006-01501

DECISION & ORDER

Kimberly Goldberg, etc., et al., appellants, v  
James Michael Lenihan, et al., defendants, Matthew  
R. Kreinces, et al., respondents.

(Index No. 20001/03)

Dankner & Milstein, P.C. (Alexander J. Wulwick, New York, N.Y., of counsel), for appellants.

L'Abbate, Balkin, Colavita & Contini, LLP, Garden City, N.Y. (Matthew K. Flanagan of counsel), for respondents.

In an action to recover damages for legal malpractice, the plaintiffs appeal from (1) an order of the Supreme Court, Westchester County (Bellantoni, J.), dated December 6, 2005, which granted the motion of the defendants Matthew R. Kreinces and Katz & Kreinces, LLP, for summary judgment dismissing the complaint insofar as asserted against them, and (2) a judgment of the same court dated January 13, 2006, which, upon the order, is in favor of the defendants Matthew R. Kreinces and Katz & Kreinces, LLP, and against them, dismissing the complaint insofar as asserted against those defendants.

ORDERED that the appeal from the order is dismissed; and it is further,

ORDERED that the judgment is affirmed; and it is further,

ORDERED that one bill of costs is awarded to the respondents.

March 13, 2007

GOLDBERG v LENIHAN

Page 1.

The appeal from the intermediate order must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the action (*see Matter of Aho*, 39 NY2d 241). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see CPLR 5501[a][1]*).

“In order to establish a cause of action to recover damages for legal malpractice, a plaintiff must prove that (1) the attorney failed to exercise the care, skill, and diligence commonly possessed by a member of the legal profession, (2) the attorney’s conduct was a proximate cause of the loss sustained, (3) the plaintiff suffered actual damages as a direct result of the attorney’s actions or inaction, and (4) but for the attorney’s negligence, the plaintiff would have prevailed in the underlying action” (*Moran v McCarthy, Safrath & Carbone, P.C.*, 31 AD3d 725, 725; *Lichtenstein v Barenbaum*, 23 AD3d 440, 440; *Pistilli v Gandin*, 10 AD3d 353, 354). “For a defendant in a legal malpractice case to succeed on a motion for summary judgment, evidence must be presented in admissible form establishing that the plaintiff is unable to prove at least one of the essential elements” (*Moran v McCarthy, Safrath & Carbone, P.C.*, *supra* at 725-726; *Pistilli v Gandin*, *supra* at 354).

The defendants Matthew R. Kreinces and Katz & Kreinces, LLP (hereinafter collectively the defendants), demonstrated their prima facie entitlement to judgment as a matter of law by presenting evidence that Matthew R. Kreinces was not negligent in rendering legal services for the benefit of the plaintiffs in the underlying action and that, in any event, any negligence on his part was not a proximate cause of any loss to the plaintiffs. In rebuttal, the plaintiffs failed to raise a triable issue of fact.

Since the plaintiffs failed to raise a triable issue of fact as to an essential element of their legal malpractice claim, the Supreme Court properly granted the defendants’ motion for summary judgment dismissing the complaint insofar as asserted against them.

The plaintiffs’ remaining contentions need not be addressed or are improperly raised for the first time on appeal (*see Ali v Ahmad*, 24 AD3d 475, 476).

MILLER, J.P., SCHMIDT, RITTER and ANGIOLILLO, JJ., concur.

ENTER:

  
James Edward Pellegrino  
Clerk of the Court