

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

D17380
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_____AD3d_____

Argued - November 28, 2007

ROBERT A. SPOLZINO, J.P.
STEVEN W. FISHER
JOSEPH COVELLO
WILLIAM E. McCARTHY, JJ.

2006-05023

DECISION & ORDER

Lewis Z. Wright, appellant, v Meyers &
Spencer, LLP, et al., respondents.

(Index No. 106743/05)

Robbins & Associates, P.C., New York, N.Y. (James A. Robbins of counsel), for
appellant.

Kaufman Borgeest & Ryan LLP, New York, N.Y. (A. Michael Furman and
Kristopher M. Dennis of counsel), for respondents.

In an action to recover damages for legal malpractice and breach of contract, the
plaintiff appeals from an order of the Supreme Court, Westchester County (Colabella, J.), entered
March 22, 2006, which granted the defendants' motion pursuant to CPLR 3211 to dismiss the
complaint.

ORDERED that the order is affirmed, with costs.

The evidentiary facts, as pleaded in the complaint and amplified in the plaintiff's
affidavit in opposition to the defendants' motion to dismiss, establish that any legal malpractice cause
of action necessarily accrued prior to the filing of the plaintiff's bankruptcy petition (*see McCoy v
Feinman*, 99 NY2d 295, 301; *Iser v Kerrigan*, 37 AD3d 662, 663). Therefore, upon commencement
of the plaintiff's bankruptcy proceeding, the malpractice cause of action became "property of the
estate" pursuant to the Bankruptcy Code (11 USC § 541[a][1], [7]; *Winick & Rich, P.C. v Strada
Design Assoc., Inc.*, 326 BR 229, 235-237). Accordingly, this action may not be maintained by the
plaintiff in his individual capacity, and the complaint should have been dismissed pursuant to CPLR

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3211(a)(3) for lack of legal capacity to sue (*see Williams v Stein*, 6 AD3d 197, 198).

Contrary to the plaintiff's contention, the fact that the Supreme Court dismissed the complaint on other grounds and treated the capacity issue as "academic," does not preclude our review of the matter (*see e.g. Maguire v Beyer*, 31 AD3d 621, 622; *Matter of Broda v Monahan*, 309 AD2d 959, 961; *Re/Max Homes and Estates v Leist*, 308 AD2d 439, 440) in the interest of judicial economy, since the issue was clearly raised by the defendants in their motion and was fully briefed by the parties.

The plaintiff's cause of action alleging breach of contract, which was duplicative of the legal malpractice claim and arose from the same facts, was also properly dismissed (*see Shivers v Siegel*, 11 AD3d 447).

In light of our determination, we do not reach the parties' remaining contentions.

SPOLZINO, J.P., FISHER, COVELLO and McCARTHY, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court