

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

D22487
W/kmg

_____AD3d_____

Submitted - February 24, 2009

REINALDO E. RIVERA, J.P.
DAVID S. RITTER
JOSEPH COVELLO
DANIEL D. ANGIOLILLO, JJ.

2008-01143

DECISION & ORDER

Carol Zorn, appellant,
v Rita K. Gilbert, etc., et al., respondents.

(Index No. 8768/01)

Robert M. Cohen, Ballston Lake, N.Y., for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, White Plains, N.Y. (Thomas A. Leghorn, Jay A. Wechsler, and Cathleen Giannetta of counsel), for respondents.

In an action, inter alia, to recover damages for legal malpractice, the plaintiff appeals from an order of the Supreme Court, Westchester County (Donovan, J.), entered January 3, 2008, which granted that branch of the defendants' motion which was pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to state a cause of action and denied her cross motion pursuant to CPLR 3025(b) for leave to serve and file an amended complaint.

ORDERED that the order is modified, on the law and in the exercise of discretion, (1) by deleting the provision thereof granting that branch of the defendants' motion which was pursuant to CPLR 3211(a)(7) to dismiss the first cause of action to recover damages for legal malpractice and substituting therefor a provision denying that branch of the motion, and (2) by deleting the provision thereof denying the plaintiff's cross motion for leave to serve and file an amended complaint and substituting therefor a provision granting the cross motion; as so modified, the order is affirmed, with costs to the plaintiff.

“Affording the complaint a liberal construction, accepting as true all facts alleged therein, and according the plaintiff the benefit of every possible inference” (*Dank v Sears Holding Mgt. Corp.*, _____AD3d_____, 2009 NY Slip Op 01188, *1 [2d Dept 2009], quoting *Love v Rebecca Dev., Inc.*, 56 AD3d 733, 733; see *Leon v Martinez*, 84 NY2d 83, 87), the complaint, as

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amplified by the plaintiff's affidavits (*see Sheroff v Dreyfus Corp.*, 50 AD3d 877, 878), adequately states a cause of action to recover damages for legal malpractice (*see Palo v Cronin & Byczek, LLP*, 43 AD3d 1127). Accordingly, the Supreme Court should not have dismissed the first cause of action contained in the original complaint (*see CPLR 3211[a][7]*).

Moreover, the plaintiff's cross motion for leave to serve and file an amended complaint should have been granted. "Leave to amend should be freely given absent prejudice or surprise" (*Rosicki, Rosicki & Assoc. v Cochems*, _____AD3d_____, 2009 NY Slip Op 01097, *3 [2d Dept 2009]). The proposed amendments, which relate to the plaintiff's claims alleging legal malpractice, were neither palpably insufficient nor patently devoid of merit, and there was no evidence that those amendments would prejudice or surprise the defendants (*see CPLR 3025[b]*; *Barnes Coy Architects, P.C. v Shamoan*, 53 AD3d 466, 467; *Lucido v Mancuso*, 49 AD3d 220, 222, *lv granted* _____AD3d_____, 2008 NY Slip Op 68750[U] [2d Dept 2008]).

RIVERA, J.P., RITTER, COVELLO and ANGIOLILLO, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court