

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

D25383
C/hu

_____AD3d_____

Submitted - November 19, 2009

A. GAIL PRUDENTI, P.J.
JOSEPH COVELLO
PLUMMER E. LOTT
SANDRA L. SGROI, JJ.

2009-02020

DECISION & ORDER

Kelly Guzzello, plaintiff, v Steinberg, Finneo, Berger,
Barone & Fischhoff, P.C., et al., respondents, Michael A.
Montesano, P.C., et al., appellants, et al., defendant.

(Index No. 4841/08)

Vincent D. McNamara, East Norwich, N.Y. (Anthony Marino of counsel), for appellants.

L'Abbate, Balkan, Colavita & Contini, LLP, Garden, N.Y. (Scott E. Kossove of counsel), for respondents.

In an action to recover damages for legal malpractice, the defendants Michael A. Montesano, P.C., and Michael A. Montesano appeal, as limited by their brief, from so much of an order of the Supreme Court, Nassau County (McCarty, J.), entered February 6, 2009, as granted that branch of the motion of the defendants Steinberg, Finneo, Berger, Barone & Fischhoff, P.C., and Heath S. Berger which was for summary judgment dismissing the cross claims of the defendants Michael A. Montesano, P.C., and Michael A. Montesano insofar as asserted against them.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the motion of the defendants Steinberg, Finneo, Berger, Barone & Fischhoff, P.C., and Heath S. Berger which was for summary judgment dismissing the cross claims of the defendants Michael A. Montesano, P.C., and Michael A. Montesano insofar as asserted against them is denied.

The defendants Heath S. Berger and Steinberg, Finneo, Berger, Barone & Fischhoff, P.C. (hereinafter the Berger firm), failed to establish their prima facie entitlement to summary

December 15, 2009

Page 1.

GUZZELLO v STEINBERG, FINNEO, BERGER, BARONE & FISCHOFF, P.C.

judgment dismissing the appellants' cross claims insofar as asserted against them (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). Although Berger and the Berger firm established that the action insofar as asserted against them was time-barred, the appellants are not precluded from asserting the cross claims against Berger and the Berger firm (*cf. Sommer v Federal Signal Corp.*, 79 NY2d 540, 558; *Hill v Metropolitan Suburban Bus Auth.*, 157 AD2d 93, 100). Moreover, the Supreme Court improperly considered the argument of Berger and the Berger firm that they were entitled to summary judgment dismissing the appellants' cross claims insofar as asserted against them on the ground that the appellants, as successor counsel, had the opportunity to protect the plaintiff's rights. That argument was raised for the first time in the reply papers of Berger and the Berger firm (*cf. Matter of Harleysville Ins. Co. v Rosario*, 17 AD3d 677, 677-678). In any event, since, under the circumstances, the appellants cannot be considered successor counsel (*cf. Northrop v Thorsen*, 46 AD3d 780, 783; *Johnson v Berger*, 193 AD2d 784, 786; *Sucese v Kirsch*, 177 AD2d 890, 892), that argument is without merit. Accordingly, the court should have denied that branch of the motion of Berger and the Berger firm which was for summary judgment dismissing the appellants' cross claims insofar as asserted against them.

PRUDENTI, P.J., COVELLO, LOTT and SGROI, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court