

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

D30893
H/kmb

_____AD3d_____

Argued - April 1, 2011

WILLIAM F. MASTRO, J.P.
REINALDO E. RIVERA
LEONARD B. AUSTIN
SHERI S. ROMAN, JJ.

2010-04117

DECISION & ORDER

Pistilli Construction & Development Corp., appellant,
v Epstein, Rayhill & Frankini, et al., respondents.

(Index No. 156/09)

Steinberg & Cavaliere, LLP, White Plains, N.Y. (Robert P. Pagano of counsel), for appellant.

Milber Makris Plousadis & Seiden, LLP, Woodbury, N.Y. (Lorin A. Donnelly 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, Queens County (Brathwaite-Nelson, J.), dated March 12, 2010, which granted the defendants' motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

“In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney ‘failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession’ and that the attorney’s breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages. To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer’s negligence” (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [citations omitted]).

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Here, in support of the defendants' motion for summary judgment dismissing the complaint, they demonstrated, prima facie, that the plaintiff was unable to establish that the alleged negligence of the defendants Epstein, Rayhill & Frankini (hereinafter the law firm) and Mona C. Haas proximately caused the loss sustained. In opposition, the plaintiff failed to raise a triable issue of fact. Accordingly, the Supreme Court properly dismissed the first cause of action alleging legal malpractice asserted against those defendants (*see Boone v Bender*, 74 AD3d 1111, 1112-1113; *Boglia v Greenberg*, 63 AD3d 973, 974; *Kotzian v McCarthy*, 36 AD3d 863).

Regarding the second cause of action, "[a] claim of vicarious liability cannot stand when 'there is no primary liability upon which such a claim of vicarious liability might rest'" (*Pereira v St. Joseph's Cemetery*, 54 AD3d 835, 837, quoting *Karaduman v Newsday, Inc.*, 51 NY2d 531, 546). Accordingly, the Supreme Court properly dismissed the second cause of action, which sought to hold the defendant Nationwide Mutual Insurance Company (hereinafter Nationwide) vicariously liable for the alleged malpractice of the law firm and Haas. Furthermore, the facts of this case do not give rise to an equitable estoppel claim against Nationwide, as it never assumed the defense of the plaintiff in the underlying action (*cf. Brooklyn Hosp. Ctr. v Centennial Ins. Co.*, 258 AD2d 491; *Touchette Corp. v Merchants Mut. Ins. Co.*, 76 AD2d 7, 12). Therefore, the Supreme Court also properly dismissed the plaintiff's third cause of action.

The plaintiff's remaining contention is without merit.

MASTRO, J.P., RIVERA, AUSTIN and ROMAN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court