

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

D32078
W/kmb

_____AD3d_____

Argued - June 23, 2011

PETER B. SKELOS, J.P.
ARIEL E. BELEN
L. PRISCILLA HALL
SHERI S. ROMAN, JJ.

2010-11106

DECISION & ORDER

Christine Marino, et al., respondents, v Lipsitz,
Green, Fahringer, Roll, Salibury & Cambria, LLP,
et al., appellants.

(Index No. 4037/08)

Abrams, Gorelick, Friedman & Jacobson, P.C., New York, N.Y. (Barry Jacobs and
Shari D. Sckolnick of counsel), for appellants.

Andrew Lavooft Bluestone, New York, N.Y., for respondents.

In an action to recover damages for legal malpractice, the defendants appeal from so much of an order of the Supreme Court, Westchester County (Lefkowitz, J.), entered November 1, 2010, as denied their motion for summary judgment dismissing the complaint.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, and the defendants' motion for summary judgment dismissing the complaint is granted.

“To state a cause of action to recover damages for legal malpractice, a plaintiff must allege: (1) that the attorney ‘failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession,’ and (2) that the attorney’s breach of the duty proximately caused the plaintiff actual and ascertainable damages” (*Dempster v Liotti*, _____AD3d_____, _____, 2011 NY Slip Op 04408, *4 [2d Dept 2011], quoting *Leder v Spiegel*, 9 NY3d 836, 837, *cert denied* 552 US 1257; see *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442).

August 9, 2011

Page 1.

MARINO v LIPSITZ, GREEN, FAHRINGER, ROLL, SALISBURY & CAMBRIA, LLP

“To establish the element of 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 attorney’s negligence” (*Snolis v Clare*, 81 AD3d 923, 925, *lv denied* _____NY3d_____, 2011 NY Slip Op 74720 [2011] ; *see Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d at 442; *Kluczka v Lecci*, 63 AD3d 796, 797; *Wray v Mallilo & Grossman*, 54 AD3d 328, 329).

“On a motion for summary judgment in the legal malpractice context, the defendant must ‘demonstrate that the plaintiff is unable to prove at least one of the essential elements of a legal malpractice cause of action’ (*Greene v Sager*, 78 AD3d 777, 779; *see Eisenberger v Septimus*, 44 AD3d 994; *Kotzian v McCarthy*, 36 AD3d 863). Once a defendant makes this prima facie showing, the burden shifts to the plaintiff to raise an issue of fact requiring a trial (*see Siciliano v Forchelli & Forchelli*, 17 AD3d 343, 345; *Schadoff v Russ*, 278 AD2d 222)” (*Dempster v Liotti*, _____AD3d at _____, 2011 NY Slip Op 04408, *6 [2d Dept 2011]).

Here, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the first cause of action alleging legal malpractice by demonstrating that the plaintiffs would be able to prove neither of the essential elements of that cause of action. In opposition, the plaintiffs failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Thus, the Supreme Court should have awarded the defendants summary judgment dismissing the first cause of action.

Further, the Supreme Court should have awarded the defendants summary judgment dismissing the second cause of action alleging breach of contract as duplicative of the legal malpractice cause of action (*see Scartozzi v Potruch*, 72 AD3d 787, 789; *Kvetnaya v Tylo*, 49 AD3d 608, 609; *Campbell v Tamsen*, 37 AD3d 636, 637; *Town of N. Hempstead v Winston & Strawn, LLP*, 28 AD3d 746, 749; *Ferdinand v Crecca & Blair*, 5 AD3d 538, 539).

SKELOS, J.P., BELEN, HALL and ROMAN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court