

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

D33277
C/ct

_____AD3d_____

Argued - November 7, 2011

PETER B. SKELOS, J.P.
RUTH C. BALKIN
RANDALL T. ENG
SANDRA L. SGROI, JJ.

2010-05745
2010-10051

DECISION & ORDER

Ellen Gelobter, plaintiff-appellant, v Aryeh Fox, etc.,
et al., defendants, Alisa Schiff, etc., et al., respondents;
G. Alexander Novak, nonparty-appellant.

(Index No. 11416/08)

Novak Juhase & Stern, LLP, Cedarhurst, N.Y. (G. Alexander Novak, nonparty-appellant pro se, and Kim Steven Juhase of counsel), for plaintiff-appellant and nonparty-appellant.

L'Abbate, Balkan, Colavita & Contini, LLP, Garden City, N.Y. (William T. McCaffery of counsel), for respondents Alisa Schiff and Schiff & Skurnik, PLLC.

Rosenberg Calica & Birney, LLP, Garden City, N.Y. (William J. Birney of counsel), for respondent Michael Gross.

McDonough & McDonough, LLP, Westbury, N.Y. (Diana Brusca McDonough of counsel), for respondent Jared W. Beshchel.

Steven J. Goldstein, Hicksville, N.Y., for respondent River Edge Land Services, Inc.

In an action, inter alia, to recover damages for legal malpractice, (1) the plaintiff appeals, as limited by her brief, from so much of an order of the Supreme Court, Nassau County (Marber, J.), entered May 6, 2010, as (a) granted those branches of the separate motions of the defendants Jared W. Beschel and River Edge Land Services, Inc., which were pursuant to CPLR 3211(a)(7) to dismiss the complaint insofar as asserted against each of them, (b) granted those

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branches of the motion of the defendants Alisa Schiff and Schiff & Skurnik, PLLC, and the separate motion of the defendant Michael Gross, which were for summary judgment dismissing the second and seventh causes of action insofar as asserted against each of them, and (c), in effect, granted those branches of the separate motions of the defendant Jared W. Beschel, the defendant River Edge Land Services, Inc., the defendants Alisa Schiff and Schiff & Skurnik, PLLC, and the defendant Michael Gross, which were for an award of sanctions against the plaintiff and her attorneys, and directed that a hearing be held on the amount of sanctions, and (2) the plaintiff and the nonparty, G. Alexander Novak, appeal from an order of the same court entered October 7, 2010, which denied the plaintiff's motion, denominated as a motion for leave to renew and reargue her opposition to the separate motions of the defendant Jared W. Beschel, the defendant River Edge Land Services, Inc., the defendants Alisa Schiff and Schiff & Skurnik, PLLC, and the defendant Michael Gross but, which was, in actuality, a motion for leave to reargue her opposition to those separate motions.

Motion by the defendant Michael Gross to dismiss the appeal from the order entered October 7, 2010, on the ground that no appeal lies from an order denying reargument. By decision and order on motion of this Court dated May 16, 2011, the motion was held in abeyance and was referred to the panel of Justices hearing the appeals for determination upon the argument or submission thereof.

Upon the papers filed in support of the motion, the papers filed in opposition thereto, and upon the argument of the appeals, it is,

ORDERED that the motion is granted and the appeal from the order entered October 7, 2010, is dismissed; and it is further,

ORDERED that on the Court's own motion, the notice of appeal from so much of the order entered May 6, 2010, as directed a hearing on the amount of sanctions is deemed an application for leave to appeal from that portion of the order, and leave to appeal is granted (*see* CPLR 5701[c]); and it is further,

ORDERED that the order entered May 6, 2010, is modified, on the law, (1) by deleting the provision thereof granting those branches of the motion of the defendants Alisa Schiff and Schiff & Skurnik, PLLC, and the separate motion of the defendant Michael Gross, which were for summary judgment dismissing the seventh cause of action insofar as asserted against each of them and substituting therefor a provision denying those branches of the separate motions, and (2) by deleting the provision thereof, in effect, granting those branches of the separate motions of the defendant Jared W. Beschel, the defendant River Edge Land Services, Inc., the defendants Alisa Schiff and Schiff & Skurnik, PLLC, and the defendant Michael Gross, which were for an award of sanctions against the plaintiff and her attorneys and directing a hearing on the amount of sanctions and substituting therefor a provision denying those branches of the separate motions; as so modified, the order entered May 6, 2010, is affirmed insofar as appealed from, and a subsequent order of the same court dated January 6, 2011, which, upon stated portions of the order entered May 6, 2010, *inter alia*, awarded costs in the form of attorney fees payable by the nonparty G. Alexander Novak is vacated; and it is further,

ORDERED that one bill of costs is awarded to the respondents Jared W. Beschel and
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River Edge Land Services, Inc., payable by the plaintiff.

The motion to dismiss the appeal from the order entered October 7, 2010, must be granted. The plaintiff's underlying motion, although denominated as one for leave to renew and reargue, was, in actuality, a motion for leave to reargue, the denial of which is not appealable (*see Coccia v Liotti*, 70 AD3d 747).

In order to prevail in an action to recover damages for legal malpractice, a plaintiff must establish that the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession, and that the breach of this duty proximately caused the plaintiff to sustain actual and ascertainable damages (*see Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442; *Malik v Beal*, 54 AD3d 910, 911; *Carrasco v Pena & Kahn*, 48 AD3d 395, 396). "To succeed on a motion for summary judgment dismissing the complaint in a legal malpractice action, the defendant must present evidence in admissible form establishing that the plaintiff is unable to prove at least one essential element of his or her cause of action alleging legal malpractice" (*Scartozzi v Potruch*, 72 AD3d 787, 789-790; *see Boglia v Greenberg*, 63 AD3d 973, 974; *Carrasco v Pena & Kahn*, 48 AD3d at 396).

The defendants Alisa Schiff and Schiff & Skurnik, PLLC (hereinafter together the Schiff defendants), who served as the plaintiff's attorney with respect to the drafting, and the execution by the plaintiff, of a contract to sell her home (hereinafter the contract of sale), and the defendant Michael Gross, who served as the plaintiff's attorney for the related real estate closing, failed to meet this burden. Contrary to the Supreme Court's conclusion, the Schiff defendants and Gross failed to demonstrate, prima facie, that the plaintiff did not sustain any actual or ascertainable damages as a result of their alleged negligence. The contract of sale provided that the purchase price of the plaintiff's home was \$615,000, with the plaintiff to credit the purchaser with the sum of \$155,000 at the closing. Approximately \$241,000 of the proceeds of the sale went to satisfy the plaintiff's mortgage, and the plaintiff received approximately \$216,000. The Schiff defendants and Gross failed to eliminate triable issues of fact as to the propriety of the \$155,000 credit to the purchaser and other disbursements made of the proceeds, and thus, as to whether the plaintiff should have obtained more money for the sale of her home than she received.

Gross further failed to eliminate all triable issues of fact as to whether he was negligent in his representation of the plaintiff during the closing by, inter alia, permitting certain disbursements to be made in a manner contrary to that provided for in the relevant documents, such as the agreement the plaintiff allegedly entered into with a broker, the defendant Aryeh Fox.

Aside from the contention that the plaintiff did not sustain any actual and ascertainable damages, the Schiff defendants argued only that they were entitled to summary judgment on the basis that their conduct was not the proximate cause of any damages to the plaintiff. The Schiff defendants failed to meet their prima facie burden on the issue of proximate cause, as they merely established, in this respect, that they did not participate in the real estate closing. However, this fact did not negate any negligence on their part in the drafting of the contract of sale, which the plaintiff signed under Schiff's representation, and in connection with alleged alterations made to the purchase price on the contract prior to the real estate closing. In other words, as the contract of sale had already been signed and altered before the real estate closing, contrary to the Schiff defendants'

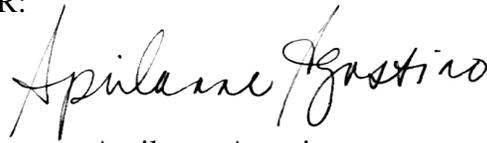
contention, they did not establish as a matter of law that Gross had “a sufficient opportunity to protect the plaintiffs’ rights” (*Katz v Herzfeld & Rubin, P.C.*, 48 AD3d 640, 641), such that Schiff’s conduct could not have proximately caused the plaintiff’s damages.

The Supreme Court further erred by, in effect, granting those branches of the separate motions of the defendant Jared W. Beschel, the defendant River Edge Land Services, Inc., the Schiff defendants, and Gross, which were for an award of sanctions against the plaintiff and her attorneys and directing that a hearing be held on the amount of sanctions. Conduct during litigation is frivolous and subject to sanction and/or the award of costs, as relevant here, when “it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law,” or it is undertaken primarily to “harass or maliciously injure another” (22 NYCRR 130-1.1; *see Greene v Doral Conference Ctr. Assoc.*, 18 AD3d 429, 431; *Tyree Bros. Envtl. Servs. v Ferguson Propeller*, 247 AD2d 376, 377). As evidenced by our determination of this appeal, the plaintiff’s commencement of the action and opposition to the motions to dismiss and for summary judgment were not completely without merit in law or fact, and were not intended primarily to harass or maliciously injure the defendants.

The plaintiff’s remaining contentions are without merit.

SKELOS, J.P., BALKIN, ENG and SGROI, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court