

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

D33914
Y/prt

_____AD3d_____

Argued - December 6, 2011

REINALDO E. RIVERA, J.P.
RANDALL T. ENG
SHERI S. ROMAN
SANDRA L. SGROI, JJ.

2010-11175
2010-11176

DECISION & ORDER

Sally Schurz, appellant, v Martin H. Bodian,
et al., respondents.

(Index No. 15100/08)

Sanders, Sanders, Block, Woycik, Viener & Grossman, P.C., Mineola, N.Y. (Mark R. Bernstein of counsel), for appellant.

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

In an action to recover damages for legal malpractice, the plaintiff appeals, (1) as limited by her brief, from so much of an order of the Supreme Court, Nassau County (Marber, J.), entered October 12, 2010, as granted that branch of the defendants' motion which was for summary judgment dismissing the complaint, and (2) from a judgment of the same court dated October 29, 2010, which, upon the order, is in favor of the defendants and against her, dismissing the complaint.

ORDERED that the appeal from the order is dismissed; and it is further,

ORDERED that the judgment is affirmed; and it is further,

ORDERED that one bill of costs is awarded to the defendants.

The appeal from the intermediate order must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the action (*see Matter of Aho*, 39 NY2d

241, 248). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see* CPLR 5501[a][1]).

“To state a cause of action to recover damages for legal malpractice, a plaintiff must allege: (1) that the attorney ‘failed to exercise the ordinarily 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*, 86 AD3d 169, 176, quoting *Leder v Spiegel*, 9 NY3d 836, 837, *cert denied sub nom. Spiegel v Rowland*, 552 US 1257). “‘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’” (*Marino v Lipsitz, Green, Fahringer, Roll, Salibury & Cambria, LLP*, 87 AD3d 566, 566, quoting *Snolis v Clare*, 81 AD3d 923, 925). 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). If the defendant makes such a *prima facie* showing, the burden then shifts to the plaintiff to raise an issue of fact necessitating a trial (*see Marino v Lipsitz, Green, Fahringer, Roll, Salibury & Cambria, LLP*, 87 AD3d at 567; *Siciliano v Forchelli & Forchelli*, 17 AD3d 343, 345).

Here, the defendants established their *prima facie* entitlement to judgment as a matter of law by demonstrating that the plaintiff was unable to prove that she would have prevailed in the underlying action but for the defendants’ alleged negligence (*see generally Zelenaya v Rosengarten*, 301 AD2d 519, 520). In opposition, the plaintiff failed to raise a triable issue of fact (*see Levinstim v Parker*, 27 AD3d 698; *see also Molina v State of New York*, 46 AD3d 642; *Williams v Wal-Mart Stores, Inc.*, 10 AD3d 653). Accordingly, the Supreme Court properly granted the defendants’ motion for summary judgment dismissing the complaint (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320).

RIVERA, J.P., ENG, ROMAN and SGROI, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court