

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

D33971
H/prt

_____AD3d_____

Argued - January 24, 2012

MARK C. DILLON, J.P.
ANITA R. FLORIO
CHERYL E. CHAMBERS
SHERI S. ROMAN, JJ.

2011-00845
2011-04015

DECISION & ORDER

Michael C. Verdi, respondent, v
Jacoby & Meyers, LLP, et al.,
appellants.

(Index No. 10674/07)

Furman Kornfeld & Brennan LLP, New York, N.Y. (A. Michael Furman and Joshua B. Sandberg of counsel), for appellants.

Sobel, Ross, Fliegel & Stieglitz LLP, New York, N.Y. (Michael P. Stieglitz of counsel), for respondent.

In an action to recover damages for legal malpractice, the defendants appeal, as limited by their brief, from (1) so much of an order of the Supreme Court, Nassau County (Murphy, J.), dated December 1, 2010, as denied their motion for summary judgment dismissing the complaint, and (2) so much of an order of the same court dated March 24, 2011, as, in effect, upon reargument, adhered to so much of the order dated December 1, 2010, as denied their motion for summary judgment dismissing the complaint.

ORDERED that the appeal from the order dated December 1, 2010, is dismissed, as the portion of the order appealed from was superseded by so much of the order dated March 24, 2011, as, in effect, upon reargument, adhered to the original determination denying the defendants' motion for summary judgment dismissing the complaint; and it is further,

ORDERED that the order dated March 24, 2011, is affirmed insofar as appealed from;

February 14, 2012

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and it is further,

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

“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” (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442, quoting *McCoy v Feinman*, 99 NY2d 295, 301-302 [internal quotation marks omitted]; see *Bells v Foster*, 83 AD3d 876). “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 at 442; see *Bells v Foster*, 83 AD3d 876). “To succeed on a motion for summary judgment, the defendant in a legal malpractice action must present evidence in admissible form establishing that the plaintiff is unable to prove at least one of these essential elements” (*Alizio v Feldman*, 82 AD3d 804, 804).

The Supreme Court properly, in effect, upon reargument, adhered to its original determination denying the defendants’ motion for summary judgment dismissing the complaint, since the defendants failed to make the requisite showing of their prima facie entitlement to judgment as a matter of law (see *Bells v Foster*, 83 AD3d 876; *Alizio v Feldman*, 82 AD3d 804; *Ippolito v McCormack, Damiani, Lowe & Mellon*, 265 AD2d 303; *Ostriker v Taylor, Atkins & Ostrow*, 258 AD2d 572).

DILLON, J.P., FLORIO, CHAMBERS and ROMAN, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court