

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

D36914
W/hu

_____AD3d_____

Argued - October 23, 2012

WILLIAM F. MASTRO, J.P.
REINALDO E. RIVERA
CHERYL E. CHAMBERS
PLUMMER E. LOTT, JJ.

2011-10916

DECISION & ORDER

Alfred Shirzadnia, appellant, v Salvatore A. Lecci,
respondent.

(Index No. 18287/04)

Jonathan A. Stein, P.C., Cedarhurst, N.Y., for appellant.

Law Office of Michael T. Lamberti, P.C., Woodbury, N.Y., for respondent.

In an action to recover damages for legal malpractice, the plaintiff appeals from an order of the Supreme Court, Nassau County (Feinman, J.), entered October 5, 2011, which granted that branch of the defendant's motion which was for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

The plaintiff commenced the instant action by the filing of a summons and complaint on December 28, 2004. By notice of motion dated February 15, 2005, the defendant moved for an order, inter alia, "pursuant to CPLR 3211 and 3212 dismissing the complaint upon the ground that there is documentary evidence which precludes plaintiff's complaint." In an order dated June 15, 2005, the Supreme Court denied that branch of the defendant's motion which was to dismiss the complaint pursuant to CPLR 3211, without addressing that branch of the motion which was for summary judgment. Following discovery, the defendant, by notice of motion dated June 9, 2011, moved for an order "pursuant to CPLR Rule 3211(a)(1) through (7) and 3212 dismissing the action." The Supreme Court granted that branch of the defendant's motion which was pursuant to CPLR 3212 for summary judgment dismissing the complaint.

The plaintiff's sole argument on appeal is that the Supreme Court should have denied

the defendant's motion as either an untimely motion for leave to reargue, or an improper successive motion for summary judgment. However, since the defendant's 2005 motion was made prior to the service of an answer, and the 2011 motion was made following the completion of discovery, the record supports the Supreme Court's determination that the 2005 motion was not properly characterized as one for summary judgment, and that, accordingly, the 2011 motion did not violate the rule against successive motions for summary judgment (*see Sutter v Wakefern Food Corp.*, 69 AD3d 844, 845; *see also Kimber Mfg., Inc. v Hanzus*, 56 AD3d 615, 616; *Williams v City of White Plains*, 6 AD3d 609). For similar reasons, the defendant's 2011 motion was not an untimely motion for leave to reargue.

MASTRO, J.P., RIVERA, CHAMBERS and LOTT, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court