

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 08-02071

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, GREEN, AND PINE, JJ.

DAVID YOUNIS, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

NORMAN J. MARTIN, ET AL., DEFENDANTS,
AND CHARLES FARRELL, DEFENDANT-APPELLANT.

HISCOCK & BARCLAY, LLP, SYRACUSE (MATTHEW J. LARKIN OF COUNSEL), FOR
DEFENDANT-APPELLANT.

BURKE AND BURKE, ROCHESTER (PATRICK J. BURKE OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered May 1, 2008 in a legal malpractice action. The order, insofar as appealed from, denied that part of the motion of defendant Charles Farrell to dismiss the legal malpractice claim against him.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: We affirm for reasons stated at Supreme Court. We add only that, contrary to the contention of Charles Farrell (defendant), the court applied the appropriate standard of review in denying that part of the motion to dismiss the claim for legal malpractice against him pursuant to CPLR 3211 (a) (7). In determining such a motion, "[t]he facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although . . . factual claims flatly contradicted by the record are not entitled to any such consideration" (*Gershon v Goldberg*, 30 AD3d 372, 373; see *Parola, Gross & Marino, P.C. v Susskind*, 43 AD3d 1020, 1021-1022). Although we agree with defendant that some factual claims by plaintiff in the complaint were contradicted by evidentiary material that he appended to the complaint, the record establishes that the court's decision to deny the motion was not predicated upon those factual claims.

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court