

<b>Golia v Char &amp; Herzberg LLP</b>
2014 NY Slip Op 30985(U)
April 14, 2014
Supreme Court, New York County
Docket Number: 150349/13
Judge: Anil C. Singh
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61

-----X

STACEY GOLIA,

Plaintiff,

DECISION AND  
ORDER

-against-

Index No.  
150349/13

CHAR & HERZBERG LLP, EDWARD M.  
CHAR, ESQ. and STEVEN HERZBERG, ESQ.,

Defendants.

-----X

HON. ANIL C. SINGH, J.:

Plaintiff moves for entry of a default judgment against defendants pursuant to CPLR 3215. Defendants oppose the motion and cross-move for an order pursuant to CPLR 3012(d) extending defendants' time to appear, plead or otherwise respond to the complaint, or compel the acceptance of a pleading untimely served; and pursuant to CPLR 3211(a)(1), (7) and (8), an order dismissing the complaint.

Plaintiff Stacey Golia commenced the instant action by filing a summons and verified complaint on January 11, 2013. The complaint alleges that the defendants committed legal malpractice by: a) failing to properly notice an appeal on a judgment that was entered against plaintiff following a trial in Queens County Supreme Court; and b) mishandling proceedings before referees.

Defendant Steven Herzberg states in a sworn affidavit that the summons and complaint personally served upon him was “bare” – in other words, it did not contain an index number, filing date, or basis of venue. In light of such defects, he did not believe that a response to the summons and complaint was necessary. Nevertheless, Herzberg forwarded the summon and complaint immediately to his professional liability insurer, which appointed Mark Houseman as his counsel within two weeks. According to Herzberg, Houseman said he would attempt to stipulate to obtain an extension of time to respond to the complaint, but Houseman “voiced his frustration at the refusal of plaintiff’s counsel to respond to his repeated attempts at communication.”

The sworn affidavit of co-defendant Edward Char echoes Herzberg’s contentions.

In opposition, plaintiff contends that the summons and complaint that was served was not defective. However, even assuming for the sake of argument that there were certain omissions in the form of the summons, this is not a recognized defense or excuse for a lawyer’s failure to answer a malpractice complaint.

“It is the general policy of the courts to permit actions to be determined by a trial on the merits wherever possible, and for that purpose, a liberal policy is adopted with respect to opening default judgments so that the parties may have

their day in court to litigate issues” (73 N.Y.Jur.2d Judgments section 303).

“Since an opportunity to defend on the merits is in the interest of justice, it should be favored in determining a motion to open a default judgment” (Id.). “Supreme Court has broad discretion in gauging the sufficiency of an excuse proffered by a defendant who failed to serve timely an answer” (Cirillo v. Macy’s Inc., 61 A.D.3d 538, 540 [1<sup>st</sup> Dept., 2009]).

After careful consideration, we find that the defendants’ delay in this matter was not willful. In addition, plaintiff has failed to show any prejudice whatsoever resulting from the brief delay. Under such circumstances, it would clearly be unjust to enter a default judgment.

We turn next to the cross-motion to dismiss the complaint pursuant to CPLR 3211(a)(1), (7) and (8).

Defendants contend that the legal malpractice action should be dismissed because it: a) fails to set forth specific facts demonstrating that the court in the Queens County action decided any issue that would cause reversal in the Appellate Division; and b) the complaint fails to allege that, but for the alleged negligence of the defendants, plaintiff would have prevailed on the appeal.

On a motion pursuant to CPLR 3211(a)(1) and (7), we are required to accept all of the allegations in the complaint as true, and to draw all inferences from those

allegations in the light most favorable to plaintiff, unless the documentary evidence conclusively proves an alleged fact (Devash LLC v. German American Capital Corp., 104 A.D.3d 71, 76-77 [1<sup>st</sup> Dept., 2013]).

An action for legal malpractice requires three essential elements: (1) the negligence of the attorney; (2) that such negligence was the proximate cause of the loss sustained; and (3) actual damages (Global Business Institute v. Rivkin Radler LLP, 101 A.D.3d 651 [1<sup>st</sup> Dept., 2012]).

Here, the complaint alleges the following facts:

Plaintiff was represented by defendants in a case brought against her by her grandmother Sylvia Ann Rosenblatt in Queens County. Following a non-jury trial before a referee, the referee issued a twenty-two page Decision, finding for the grandmother and denying plaintiff's counterclaims for libel and abuse of process. At the conclusion of the Decision, the referee directed the plaintiff in that case (Sylvia Ann Rosenblatt) to "Settle Judgment on Notice," and to "Settle Judgment." Pursuant to the referee's direction, a judgment was settled on notice between the parties and their counsel. The judgment was signed by the Court on June 29, 2011, and entered on July 22, 2011.

The complaint alleges that the defendants advised plaintiff to appeal the referee's Decision, which she agreed to do. However, defendants failed to advise

the plaintiff that an appeal should have been filed from the judgment, and that it is settled law that no appeal may be taken from a Decision. The complaint alleges further that defendants improperly filed a Notice of Appeal with the Appellate Division from the referee's Decision, but not the judgment. According to the complaint, there were numerous meritorious issues raised by defendants on appeal from the referee's Decision, and if these issues had been properly raised on an appeal of the judgment, it is probable that such an appeal would have been successful. Subsequently, the Second Department, on its own motion, issued a decision and order, directing that the appeal be dismissed "on the ground that no appeal lies from a decision."

Finally, the complaint alleges that defendants' failure to pursue an appeal of the judgment, as well as their negligent handling of proceedings before two referees, constituted legal malpractice; that such malpractice caused financial damages; and that "but for" such malpractice, "it likely, and indeed probable, that plaintiff would have succeeded on her appeal of the judgment."

Viewing the allegations in the light most favorable to plaintiff, as we must at this early stage of the litigation, the Court finds that the complaint sufficiently states a cause of action for legal malpractice.

Accordingly, it is

ORDERED that plaintiff's motion for a default judgment is denied; and it is further

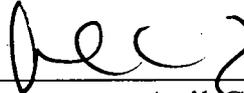
ORDERED that the cross-motion is granted to the extent that the time for defendants to appear, plead, or otherwise respond to the complaint is extended; and it is further

ORDERED that defendants are directed to file an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 320, 80 Centre Street, on June 4, 2014, at 9:30 AM.

The foregoing constitutes the decision and order of the court.

Date: April 14, 14  
New York, New York

  
\_\_\_\_\_  
Anil C. Singh

**HON. ANIL C. SINGH**  
**SUPREME COURT JUSTICE**