

**Gajek v Schwartzapfel, Novick, Truowski & Marcus,
P.C.**

2014 NY Slip Op 32418(U)

September 8, 2014

Supreme Court, Suffolk County

Docket Number: 12-2375

Judge: Ralph T. Gazzillo

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ORDERED that the cross motion by the plaintiffs for an order pursuant to CPLR 3212 granting summary judgment in their favor as to the liability of the defendants Shwartzapfel, Novick, Truowsky & Marcus, P.C., Shwartzapfel Partners, P.C., Law Office of John W. DeBlasio and John W. DeBlasio or, in the alternative, holding that said defendants violated a duty to the plaintiffs which resulted in their medical malpractice action being dismissed is granted to the extent that it is determined that the defendants Shwartzapfel, Novick, Truowsky & Marcus, P.C., Shwartzapfel Partners, P.C. violated said duty, and is otherwise denied as set forth herein; and it is further

ORDERED that the motion by the plaintiffs, brought on by order to show cause, for an order lifting the automatic stay of discovery set forth in CPLR 3214 (b) and setting forth a schedule for discovery to proceed in this action is granted to the extent that the parties are directed to comply with the discover schedule herein, and is otherwise denied; and it is further

ORDERED that the parties remaining in this action shall provide all discovery, with the exception of depositions, included within the prior conference orders issued herein, and not previously provided, within 30 days of the service of this order with notice of entry, and it is further

ORDERED that the depositions of the plaintiffs shall be conducted within 60 days of the service of this order with notice of entry, that the depositions of the defendants remaining in this action shall be conducted within 90 days of the service of this order with notice of entry, and that all nonparty disclosure, including depositions if any, shall be completed within 120 days of the service of this order with notice of entry. No change in this discovery schedule will be granted without the approval of the undersigned.

This action was commenced to recover damages sustained by the plaintiffs due to the alleged legal malpractice of the defendants. It is undisputed that the plaintiffs retained the defendant Shwartzapfel Partners, P.C., allegedly wrongfully sued herein as Shwartzapfel, Novick, Truowsky & Marcus, P.C., (Schwartzapfel) to prosecute an underlying action against Southampton Hospital, among others. The plaintiff Jerzy Gajek (Gajek) was admitted to Southampton Hospital on April 26, 2003. While in the hospital, Gajek developed pressure ulcers, commonly known as "bed sores." In the underlying action, the plaintiffs allege, among other things, that the hospital failed to properly assess Gajek's risk of developing bed sores, and that the hospital failed to properly treat said condition.

It is also undisputed that, after it was commenced in October 2005, the underlying action (or medical malpractice action) was handled by an associate at Schwartzapfel, the defendant Jason J. Platt (Platt), that Schwartzapfel entered into an agreement with the law firm of Duffy, Duffy & Burdo to handle the matter as trial counsel (Trial Counsel) in September 2007, and that Trial Counsel entered into a stipulation marking the underlying action off of the trial calendar on December 5, 2007 for the purposes of completing outstanding discovery. In late March or April 2008, Platt left his employment with Schwartzapfel. Thereafter, Trial Counsel indicated that it was no longer interested in handling the medical malpractice action and Schwartzapfel entered into an agreement with the defendants Law Office of John W. DeBlasio and John W. DeBlasio (DeBlasio) to handle the matter. In early 2009, the defendants in the medical malpractice action moved to dismiss the action pursuant to CPLR 3404 on the grounds that the plaintiffs had failed to restore the case to the calendar within one year. By order dated

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October 19, 2009, the Supreme Court, Queens County (O'Donoghue, J.) denied DeBlasio's cross motion to restore the case to the calendar, and the complaint against Southampton Hospital was dismissed. Said order was appealed, and affirmed by the Appellate Division, Second Department.

The computerized records maintained by the Court reflect that a copy of a stipulation of discontinuance as to DeBlasio only, dated July 24, 2014, was filed with the Clerk of the Supreme Court on August 4, 2014 (*see* CPLR 3217 [a], [b]; Uniform Rules for Trial Cts [22 NYCRR] § 202.28). Accordingly, the plaintiffs cross motion against DeBlasio is denied as academic. The computerized records maintained by the Court also indicate that the parties have not, to date, moved to amend the caption of this action to reflect the above-noted discontinuance, and that a note of issue has not been filed herein.

Schwartzapfel and Platt now move for summary judgment dismissing the complaint and all cross claims against Platt. In support of their motion, the moving parties submit, among other things, the pleadings, Platt's affidavit, and copies of the preliminary conference order and two compliance conference orders issued in this action. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; *Rebecchi v Whitmore*, *supra*).

For a defendant in a legal malpractice case to succeed on a motion for summary judgment, evidence must be presented in admissible form establishing that the plaintiff is unable to prove at least one of the essential elements of a malpractice cause of action (*Napolitano v Markotsis & Lieberman*, 50 AD3d 657, 855 NYS2d 593 [2d Dept 2008]; *Olaiya v Golden*, 45 AD3d 823, 846 NYS2d 604 [2d Dept 2007]; *Caires v Siben & Siben*, 2 AD3d 383, 767 NYS2d 785 [2d Dept 2003]; *Ippolito v McCormack, Damiani, Lowe & Mellon*, 265 AD2d 303, 696 NYS2d 203 [2d Dept 1999]). To establish a cause of action to recover damages for legal malpractice, a plaintiff must prove (1) that the defendant attorney failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community, (2) proximate cause, (3) damages, and (4) that the plaintiff would have been successful in the underlying action had the attorney exercised due care (*Tortura v Sullivan Papain Block McGrath & Cannavo, P.C.*, 21 AD3d 1082, 803 NYS2d 571 [2d Dept 2005]; *Ippolito v McCormack, Damiani, Lowe & Mellon*, *supra*; *Iannarone v Gramer*, 256 AD2d 443, 682 NYS2d 84 [2d Dept 1998]; *Volpe v Canfield*, 237 AD2d 282, 654 NYS2d 160 [2d Dept 1997], *lv denied* 90 NY2d 802, 660 NYS2d 712 [1997]).

In his affidavit, Platt swears that he was employed as an associate at Schwartzapfel starting in March 2004, that the plaintiffs retained Schwartzapfel to represent them in the medical malpractice action, which was commenced on their behalf in Supreme Court, Queens County, and that he was assigned to handle the matter. He declares that he worked on the plaintiffs' medical malpractice action until September 2007, when it was transferred to Trial Counsel, and that he left his employment with Schwartzapfel "in late March or early April 2008." He states that, upon leaving Schwartzapfel, he had no further involvement with or responsibility regarding the medical malpractice action, and that, as an associate, he was not entitled to share in any legal fees generated therefrom.

Here, Platt has established his prima facie entitlement to summary judgment on the ground that his actions or inactions are not the proximate cause of the plaintiffs alleged injuries. It is well settled that, an attorney's alleged legal malpractice is not a proximate cause of a plaintiff's damages where "subsequent counsel had a sufficient opportunity to protect the plaintiffs' rights by pursuing any remedies it deemed appropriate on their behalf" (*Katz v Herzfeld & Rubin, P.C.*, 48 AD3d 640, 853 NYS2d 104 [2d Dept 2008]; see also *Alden v Brindisi, Murad, Brindisi, Pearlman, Julian & Pertz ("The People's Lawyer")*, 91 AD3d 1311, 937 NYS2d 784 [4th Dept 2012]; *Somma v Dansker & Aspromonte Assoc.*, 44 AD3d 376, 843 NYS2d 577 [1st Dept 2007]; *Ramcharan v Panser*, 20 AD3d 556, 799 NYS2d 564 [2d Dept 2005]; *Perks v Lauto & Garabedian*, 306 AD2d 261, 760 NYS2d 231 [2d Dept 2003]; *Albin v Pearson*, 289 AD2d 272, 734 NYS2d 564 [2d Dept 2001]). That is, an attorney cannot be held liable for legal malpractice where he or she was not representing the plaintiff at the time some period for performance of an action expired and "successor counsel had sufficient time" to complete the action (see *Ramcharan v Panser*, 20 AD3d at 557, 799 NYS2d at 566). It is undisputed that Schwartzapfel and DeBlasio had approximately eight months after Platt was no longer involved in the plaintiffs' medical malpractice action to move to restore the action to the trial calendar.

In opposition, the plaintiffs submit their cross motion for partial summary judgment against Schwartzapfel and DeBlasio which includes, among other things, Gajek's affidavit and the affirmation of counsel for the plaintiffs. In his affirmation, counsel does not dispute the facts set forth in Platt's affidavit, and he does not address the legal argument made that Platt cannot be held liable for legal malpractice as a matter of law. New York Courts have held that the failure to address arguments proffered by a movant or appellant is equivalent to a concession of the issue (see *McNamee Constr. Corp. v City of New Rochelle*, 29 AD3d 544, 817 NYS2d 295 [2d Dept 2006]; *Welden v Rivera*, 301 AD2d 934, 754 NYS2d 698 [3d Dept 2003]; *Hajderlli v Wiljohn 59 LLC*, 24 Misc3d 1242A, 2009 NY Slip Op 51849U [Sup Ct, Bronx County 2009]).

Instead, counsel for the plaintiff merely contends that Platt's motion for summary judgment is premature as neither Platt nor the other parties to this action have been deposed. Here, it is determined that Platt's motion for summary judgment is not premature as there is no evidentiary basis offered to suggest that discovery could lead to relevant evidence. "[S]ummary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (*Williams v Determination & J School Bus*, 69 AD3d 617, 893 NYS2d 133 [2d Dept 2010]; *Panasuk v Viola Park Realty*, 41 AD3d 804, 939 NYS2d 520 [2d Dept 2007]; *Gasis v City of New York*, 35 AD3d 533, 828 NYS2d 407 [2d Dept. 2006]). The mere hope or speculation that evidence sufficient to defeat Platt's motion for summary judgment may be uncovered as a result of his

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being deposed is an insufficient basis for denying the motion as to what that discovery would uncover (*see generally Lauriello v Gallotta*, 59 AD3d 497, 873 NYS2d 690 [2d Dept 2009]; *Kimyagarov v Nixon Taxi Corp.* 45 AD3d 736, 846 NYS2d 309 [2d Dept 2007]).

In his affidavit, Gajek swears, in pertinent part, that his last communication with Platt was on July 3, 2007, and that “[w]hile he was representing me in the case, it was marked off the calendar, which ultimately lead to its dismissal.” He further states that “I am informed by my counsel that Platt has not been deposed and that his motion should be denied as premature.”

The plaintiffs have failed to raise an issue of fact to defeat Platt’s motion for summary judgment. The motion is unopposed by DeBlasio. In addition, as correctly noted in Platt’s reply papers, he is still subject to oral examination before trial as a nonparty witness. Accordingly, the instant motion for summary judgment dismissing the complaint and all cross claims against Platt is granted.

The plaintiffs now cross-move for partial summary judgment as to the liability of Schwartzapfel and DeBlasio or, in the alternative, holding that said defendants violated a duty to the plaintiffs which resulted in their medical malpractice action being dismissed. As noted above, after the date of the making of this cross motion, the plaintiffs discontinued their action as to DeBlasio. Thus, the plaintiffs cross motion against DeBlasio is denied as academic. In support of their motion, the plaintiffs submit, among other things, the aforesaid affirmation of Gajek and affidavit of counsel for the plaintiffs, a copy of a letter to Schwartzapfel from the New York State Department of Health, and an affidavit from a physician licensed in New York.

In order to establish a prima facie case of legal malpractice, a plaintiff must demonstrate that the breach of the attorney’s duty proximately caused the plaintiff actual and ascertainable damages (*see Leder v Spiegel*, 9 NY3d 836, 840 NYS2d 888 [2007]; *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 835 NYS2d 534 [2007]; *McCoy v Fienman*, 99 NY2d 295, 755 NYS2d 693 [2002]; *Darby & Darby, P.C. v VSI Intl. Inc.*, 95 NY2d 308, 716 NYS2d 378 [2000]; *Kluczka v Lecci*, 63 AD3d 796, 880 NYS2d 698 [2d Dept 2007]). Moreover, the plaintiff is required to prove that, “but for” the attorney’s negligence, the plaintiff would have prevailed on the underlying cause of action (*see AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 834 NYS2d 705 [2007]; *Leder v Spiegel, supra*; *Snolis v Clare*, 81 AD3d 923, 917 NYS2d 299 [2d Dept 2011]; *Weil, Gotshalt & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 780 NYS2d 593 [1st Dept 2004]; *Shopsin v Siben & Siben*, 268 AD2d 578, 702 NYS2d 610 [2d Dept 2000]). Thus, the plaintiffs here are required to prove that they would have been successful in their medical malpractice action.

Here, the plaintiffs submit the affidavit of Kelly Johnson-Arbor, M.D. who swears that “it is my opinion with a reasonable degree of medical certainty that Southampton Hospital departed from good and acceptable standards of medical and nursing practices regarding the assessment, care and treatment of [Gajek’s] pressure ulcers.” She indicates that, on admission to the hospital, Gajek was “obese, dehydrated, diabetic, [and] likely malnourished”, that the hospital records indicate that he did not have any pressure ulcers on admission, and that he was intubated and sedated during his stay. Dr. Johnson-Arbor further opines that Gajek’s pressure sores “were substantially caused by the failure to turn and position at least every two hours” or provide pressure reducing devices. She acknowledges that the

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hospital records reveal at least two orders by a physician that Gajek should not be turned or positioned and that he should be kept off his back as much as possible.

The plaintiffs have failed to submit Gajek's medical records to enable the Court to determine whether they would have been successful in their medical malpractice action. The affidavit of Dr. Johnson-Arbor, as well as the letter from the NYS Department of Health, do not present a full picture as to what the hospital staff was doing to maintain Gajek's skin integrity, why there were physician orders that Gajek not be turned or positioned and how that contributed to his injuries, and whether Gajek's diabetic condition impacted the development of his pressure ulcers. These are but a few of the factual issues regarding the plaintiffs' medical malpractice action which cannot be resolved absent the submission of Gajek's medical records. The failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*).

In addition, Schwartzapfel has not yet had an adequate opportunity to conduct any discovery into relevant matters that are exclusively within the knowledge others to enable it to oppose this motion (*see* CPLR 3212 [f]; *Colombini v Westchester County Healthcare Corp.*, 24 AD3d 712, 808 NYS2d 705 [2d Dept 2005]; *Mazzola v Kelly*, 291 AD2d 535, 738 NYS2d 246 [2d Dept 2002]). Under these circumstances, where it is not further discovery that Schwartzapfel is seeking but rather initial discovery, the request cannot be characterized as speculative (*cf. Ellis v Child Devendra. Support Corp.*, 5 AD3d 430, 772 NYS2d 605 [2d Dept 2004]; *Rodriguez v City of New York*, 295 AD2d 590, 744 NYS2d 198 [2d Dept 2002]). Therefore, the instant motion for summary judgment is denied as premature (*see Rodriguez v DeStefano*, 72 AD3d 926, 898 NYS2d 495 [2d Dept 2010]). Accordingly, that branch of the plaintiffs' motion which seeks partial summary judgment as to Schwartzapfel's liability is denied as premature with leave to renew upon the completion of discovery as set forth herein.

The Court now turns to that branch of the plaintiffs' motion for partial summary judgment holding that Schwartzapfel violated a duty to the plaintiffs which resulted in their medical malpractice action being dismissed. It is undisputed that the plaintiffs retained Schwartzapfel to prosecute their medical malpractice action, that Schwartzapfel was ultimately responsible for the handling of the action, and that Schwartzapfel was in possession of the plaintiffs' file for approximately six months after Trial Counsel decided it did not wish to handle the plaintiff's case. In addition, the adduced evidence reveals that Schwartzapfel did not deliver the plaintiffs' file to DeBlasio until less than two months remained for those responsible to prosecute the plaintiffs' medical malpractice action to act to restore the case to the trial calendar, and the evidence suggests that Schwartzapfel did not advise DeBlasio of the outstanding order marking the action off the trial calendar.

This branch of the plaintiffs' motion seeks a determination that they have established the first of four elements which they must prove to hold Schwartzapfel liable for legal malpractice. As set forth above, a plaintiff must prove (1) that the defendant attorney failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community, (2) proximate cause, (3) damages, and (4) that the plaintiff would have been successful in the underlying action had the attorney exercised due care (citations omitted). Generally, the plaintiff in a legal malpractice action must submit expert testimony setting forth the appropriate standard of professional care which the defendant was

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required to meet under the circumstances (*Healy v Finz & Finz, P.C.*, 82 AD3d 704, 918 NYS2d 500 [2d Dept 2011]; *Northrop v Thorsen*, 46 AD3d 780, 848 NYS2d 304 [2d Dept 2007]; *Zasso v Maher*, 226 AD2d 366, 640 NYS2d 243 [2d Dept 1996]). However, there is an exception to that principle exists where the ordinary experience of the fact finder provides sufficient basis for judging the adequacy of the professional service, or “the attorney’s conduct falls below any standard of due care” (*Northrop v Thorsen*, 46 AD3d at 782; *Greene v Payne, Wood & Littlejohn*, 197 AD2d 664, 602 NYS2d 883 [2d Dept 1993]). It is well settled that the exception exists in those instances where an attorney ignores a well-established filing requirement (*Whalen v DeGraff, Foy, Conway, Holt-Harris & Mealey*, 53 AD3d 912, 863 NYS2d 100 [3d Dept 2008]; *Northrop v Thorsen, supra*). Tellingly, the exception has been held to apply where an action had been marked off the calendar and the attorney failed to timely restore it (*Butler v Brown*, 180 AD2d 406, 579 NYS2d 79 [1st Dept 1992]).

The plaintiffs contend that the order dated October 19, 2009 (O’Donoghue, J.) denying DeBlasio’s cross motion to restore the case to the calendar and dismissing the complaint against Southampton Hospital, and the decision affirming said order by the Appellate Division, Second Department, bar Schwartzapfel from re-litigating the issue of its duty to the plaintiffs. Here, despite the plaintiffs’ mistaken reliance on the doctrine of collateral estoppel, it is determined that they have established that Schwartzapfel violated its duty to exercise the requisite degree of care, skill, and diligence commonly possessed by a member of the legal community in handling the plaintiffs’ medical malpractice action. It is beyond dispute that the failure to comply with the terms of the order which marked the case off the trial calendar, and to move within the statutory time period to restore the case to the calendar establish that Schwartzapfel failed to prosecute the action and to meet any standard of care in handling the matter.

Having established their entitlement to partial summary judgment on the issue of Schwartzapfel’s breach of duty, it is incumbent upon Schwartzapfel to produce evidence in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto, supra*; *Rebecchi v Whitmore, supra*; *O’Neill v Fishkill, supra*). In opposition to the motion, Schwartzapfel submits the affirmation of its attorney who, in response to this particular issue, merely contends that the doctrine of collateral estoppel is not applicable, and that the plaintiffs “have offered no expert witness affidavit in support of their instant cross motion.” Counsel’s first contention is academic, and the second fails to raise an issue of fact requiring a trial regarding Schwartzapfel’s duty to the plaintiffs. Accordingly, that branch of the plaintiff’s motion which seeks partial summary judgment holding that Schwartzapfel violated a duty to the plaintiffs which resulted in their medical malpractice action being dismissed is granted.

The plaintiffs now move by order to show cause for an order lifting the automatic stay of discovery set forth in CPLR 3214 (b) and setting forth a schedule for discovery to proceed in this action. In light of the determinations herein, the request for an order lifting the automatic stay of discovery is deemed academic (CPLR 3214 [b]). It is noted that a preliminary conference order and two compliance conference orders have been issued in this action. In addition, this action was commenced more than two and one-half years ago and initial discovery has not adequately progressed. The plaintiffs essentially request a schedule setting forth the depositions of the parties, and limiting nonparty disclosure.

