

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

-----X

LORENZO CARRASCO,

Plaintiff,

-against-

Index No.: 33108/02

Motion

Dated: July 18, 2006

Cal. No.: 3&4

PENA & KAHN, STEVEN L. KAHN, ESQ.,
JESUS PENA, ESQ., STEVEN G. EHRLICH,
P.C. and STEVEN G. EHRLICH, ESQ.,

Defendants.

-----X

The following papers numbered 1 to 15 read on these motions by defendants STEVEN G. EHRLICH, P.C. and defendants PENA & KAHN, STEVEN L. KAHN, ESQ. and JESUS PENA, ESQ. for summary judgment pursuant to CPLR § 3212.

	<u>Papers Numbered</u>
Notice of Motion, Affirmation, Exhibits.....	1-4
Notice of Motion, Affirmation, Exhibits.....	5-8
Affirmation in Opposition, Exhibits.....	9-11
Reply Affirmation.....	12-13
Reply Affirmation.....	14-15

Upon the foregoing papers, it is ordered that these motions are determined as follows:

Plaintiff commenced this action against defendants for legal malpractice. On October 12, 1999, plaintiff sustained severe injuries when he was struck by a falling object while outside his place of employment. Plaintiff initially hired defendants Pena & Kahn to represent him in a personal injury action, then hired defendant Steven G. Erlich, P.C. (hereinafter referred to as "Erlich") after Pena & Kahn withdrew from representation. Neither

firm commenced a personal injury action or filed a notice of claim with the New York City Transit Authority (hereinafter referred to as "NYCTA"). Plaintiff alleges that defendants' failure to investigate his claims, timely file a notice of claim or seek leave of the court to file a late notice of claim prevented him from recovering for his personal injuries and that he should be compensated for defendants' legal malpractice.

Defendants Pena & Kahn¹ move for summary judgment and dismissal of plaintiff's Complaint, arguing that they cannot be liable to plaintiff as a matter of law. Defendants argue that plaintiff never told them that he was struck by a metal object falling from the elevated train. Rather, plaintiff did not know what caused his injuries and did not identify any witnesses to his accident. Therefore, defendants had no good faith basis to file a notice of claim against NYCTA and cannot be liable for legal malpractice. Further, they present an affidavit from a NYCTA representative, who states that the NYCTA had no record of falling debris from the tracks or train at that location. Therefore, plaintiff cannot establish a breach of duty by defendants or a likelihood of prevailing on the merits of his claim.

Defendant Erlich cross-moves for summary judgment and dismissal of plaintiff's Complaint, arguing that it cannot be liable to plaintiff as a matter of law. Defendant claims that he was hired to represent plaintiff after Pena & Kahn withdrew, months after the 90 day notice period expired. Therefore, a motion to file a late notice of claim would not have been successful because there was no reasonable excuse for Pena & Kahn's failure to file a timely notice of claim and NYCTA did not have actual knowledge of the facts constituting plaintiff's personal injury claim. As plaintiff cannot establish he would have prevailed in the personal injury action, summary judgment is warranted.

Plaintiff opposes both motions, arguing that there are issues of fact in dispute. Plaintiff argues that defendants failed to properly investigate his claims and develop a meritorious personal injury case. He argues that he immediately told Pena & Kahn that he was struck by a metal object from the elevated train, which they failed to investigate and pursue. Plaintiff also presents the deposition testimony of non-party Pedro Abreu, who observed a metal object fall from the train and observed plaintiff fall to the ground. Pena & Kahn's failure to pursue this evidence and file a

¹Defendants Pena & Kahn, Steven L. Kahn, Esq. and Jesus Pena, Esq., are represented by the same counsel and for the purposes of this decision will be referred to as "Pena & Kahn."

notice of claim against NYCTA prevented plaintiff from prosecuting his personal injury claim and constitutes legal malpractice.

Plaintiff also argues that defendant Erlich committed legal malpractice by failing to file a motion to serve a late notice of claim. Plaintiff claims that he never met with Erlich and only spoke with him by telephone through a translator. Erlich failed to investigate and pursue a valid cause of action. Plaintiff argues that a motion to file a late notice of claim may have been successful because he had a meritorious claim and Erlich was hired only four months after expiration of the 90 day notice requirement. Plaintiff presents the expert affidavit of attorney Joel L. Getreu to establish that defendants failed to properly investigate the matter and file a notice of claim against NYCTA. Plaintiff also argues that he relies on the theory of *res ipsa loquitor* and therefore notice is not an issue.

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986].) Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact. (See *Zuckerman v. City of New York*, 49 NY2d 557 [1980].) It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2nd Dept. 1991].) However, the alleged factual issues must be genuine and not feigned. (*Gervasio v. DiNapoli*, 134 AD2d 235 [2nd Dept. 1987].)

To establish a claim for legal malpractice, the plaintiff must demonstrate that, but for the attorney's negligence, he would have prevailed on the underlying action or not sustained any damages. (See *Siciliano v. Forchelli & Forchelli* 17 AD3d 343 [2nd Dept. 2005]; *Adamopoulos v. Liotti*, 273 AD2d 260 [2nd Dept. 2000].) For the defendant to obtain summary judgment on a legal malpractice claim, he must establish, through the submission of evidentiary proof in admissible form, that the attorney did not fail to exercise that degree of care, skill and diligence commonly possessed and exercised by a member of the legal community. (See *Tortura v. Sullivan Papain Block McGrath & Cannavo*, 2005 WL 2382817 [2nd Dept. 2005]; *Greene v. Payne, Wood & Littlejohn*, 197 AD2d 664 [2nd Dept. 1993].) To succeed, defendant must also establish that plaintiff is unable to prove at least one of the essential elements of his claim. (*Lichtenstein v. Barenbaum*, 23 AD3d 440 [2nd Dept. 2005]; *Levy v. Greenberg*, 19 AD3d 462 [2nd Dept. 2005].)

Under General Municipal Law § 50-e, plaintiff may not commence

a tort action against a public corporation unless he files a notice of claim within ninety days after the claim arises. However, plaintiff may move for leave of the court to file a late notice of claim if he demonstrates a reasonable excuse for the failure to file a timely notice of claim, whether the municipality acquired actual knowledge of the essential facts constituting the claim within 90 days of its accrual or a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in maintaining its defense on the merits. (*Joseph v. New York City Transit Authority*, 237 AD2d 255 [2nd Dept. 1997].)

Defendants demonstrated a prima facie entitlement to summary judgment. Defendants proved that plaintiff could not sustain his claim of legal malpractice as there is no evidence that, but for defendants' negligence, he would have prevailed on the underlying action or not sustained any damages. (See *Siciliano v. Forchelli & Forchelli* 17 AD3d 343 [2nd Dept. 2005]; *Adamopoulos v. Liotti*, 273 AD2d 260 [2nd Dept. 2000].) Pena & Kahn established that they were not aware of any metal object falling from the train when they were hired by plaintiff and therefore could not have filed a notice of claim against NYCTA. Erlich established that by the time he was hired to represent plaintiff, too much time had passed to successfully move for leave to file a late notice of claim. Defendants also established that NYCTA had no actual knowledge of the essential facts of plaintiff's claim, as it has no records of complaints or metal objects falling from the train. (See *Gofman v. City of New York*, 268 AD2d 588 [2nd Dept. 2000]; *Turner v. Town of Oyster Bay*, 268 AD2d 526 [2nd Dept. 2000].)

Plaintiff failed to submit competent, admissible evidence to raise an issue of fact in rebuttal. (See *Spergel v. Rubenstein*, 243 AD2d 556 [2nd Dept. 1997].) Plaintiff's evidence does not establish that, but for defendants' negligence, he would have prevailed in the personal injury action. Plaintiff had no direct evidence that he was struck by a metal object falling from the train due to NYCTA's negligence. His eyewitness Pedro Abreu could not describe the object that fell in detail nor did he see it strike plaintiff. Rather, he testified only that he saw something fall from the train and saw plaintiff on the ground. The best description he was able to give of the object was that it was a door-size object as long as 5 feet 4 inches and 2-3 feet wide. However, he did not notice this item on the ground and did not identify it to anyone after plaintiff was injured. It is incredible that an object of that size could go unnoticed by Mr. Abreu or any of the witnesses at the scene.

Plaintiff's expert affidavit also failed to raise an issue of fact. (See *Caires v. Siben & Siben LLP*, 2 AD3d 383 [2nd Dept. 2005].)

2003].) He argues that Pena & Kahn should have investigated the matter more thoroughly but did not state that plaintiff's personal injury action would have been successful but for Pena & Kahn's malpractice. He also states in conclusory fashion that Erlich should have moved for leave to file a late notice of claim, but did not state that this failure was the direct cause of plaintiff's damages.

As plaintiff cannot demonstrate that he had a meritorious claim against NYCTA or that a motion to file a late notice of claim against NYCTA would have been successful, summary judgment is warranted.

Accordingly, defendants Steven G. Ehrlich, P.C. and defendants Pena & Kahn, Steven L. Kahn, Esq. and Jesus Pena, Esq.'s motions for summary judgment are granted and plaintiff's Complaint is dismissed. It is noted that the action against defendant Steven G. Ehrlich, Esq. had previously been discontinued.

Dated: August 15, 2006

Augustus C. Agate, J.S.C.