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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIMEON GOLAR IA Part 24
Justice

CYNTHIA DIMOND, aka CINDY DIMOND, x

Plaintiff,

-against-

KAZMIERCZUK & MCGRATH, ESQS., JOS J. KAZMIERCZUK and JOHN P. MCGRATH, individually and as partners,

Defendants.
x

Index Number 15156 2003

Motion Date January 20, 2004

Motion Cal. Number 14

The following papers numbered 1 to 11 read on this motion by plaintiff for the entry of a money judgment in her favor against the defendants in the amount of $605,000; and upon the cross motion of defendants for summary judgment in their favor pursuant to CPLR 3212 or, in the alternative, for leave to renew their motion at the close of discovery.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Notice of Cross Motion - Affidavits - Exhibits .	5-9
Reply Affidavit - Exhibits	10-11

Upon the foregoing papers it is ordered that the motion is denied and the cross motion for summary judgment dismissing the complaint is granted.

Plaintiff, an attorney, commenced an action in 1994 seeking to recover for injuries she suffered to her hand when she opened a "pull-top" can of cat food. Plaintiff proceeded to trial on the matter asserting claims of design defect and strict products liability. While the jury rendered a verdict in her favor in the amount of $605,000, the defendant in that action promptly moved to set aside the verdict and further sought to strike the testimony of plaintiff's expert at trial. The court, in a decision dated January 17, 2001, found that plaintiff's expert was "not qualified to testify as an expert in the design of metal cans," and that, in the absence of expert testimony, plaintiff was unable to establish her claims of design defect. (Dimond v Heinz Pet Products Co.,

Sup Ct, Queens County, January 17, 2001, Posner, J., Index No. 12361/94.) This determination was affirmed on appeal, finding that "the Supreme Court correctly determined that the plaintiff's expert witness was unqualified to offer testimony relevant to the alleged design defect in defendant's product." (Dimond v Heinz Pet Products Co., 298 AD2d 426.) Plaintiff now brings the instant action seeking to recover against the defendants, her trial attorneys, on grounds of legal malpractice.

In support of her motion, plaintiff relies on the affidavit of her present attorney and related documents from the previous action, but fails to submit even her own affidavit to support her claims that defendants' actions constituted malpractice to the extent that the use of a different expert would have enabled her to recover. A plaintiff seeking to prevail in a malpractice action must show (1) a duty, (2) a breach of that duty, and (3) proof that actual damages were proximately caused by the breach of that duty. (Hatfield v Herz, 109 F Supp 2d 174, 178; citing Marshall v Nacht, 172 AD2d 727.) For a defendant to succeed on a motion for summary judgment, defendant must submit proof showing that plaintiff would be unable to prove at least one of these elements. However, where a court finds that counsel exercised reasonable judgment as to how to proceed, then no duty is breached and the malpractice claim may be dismissed as a matter of law. (Rosner v Paley, 65 NY2d 736; Rubinberg v Walker, 252 AD2d 466.)

Plaintiff alleges that defendants were negligent in not employing a different expert, one Dr. Robert I. Goldberg, who had been consulted by the first attorney who handled plaintiff's products liability action. Defendant John McGrath, plaintiff's attorney at trial, states in his affidavit that when he reviewed the file maintained by plaintiff's original counsel, which contained the deposition transcript of Dr. Robert I. Goldberg, he concluded that Dr. Goldberg would not make a credible witness. Defendant McGrath gave numerous reasons for this decision, including that Dr. Goldberg's deposition testimony revealed that he had never conducted scientific tests in relation to his conclusions, and that when questioned about his educational background, Dr. Goldberg did not have a degree in engineering or physics, but in fine arts and business management. Moreover, Dr. Goldberg testified that he had never worked for a can manufacturer and never designed any pull top cans. Finally, when questioned as to his claim that he had written "hundreds of articles," it was elicited that Dr. Goldberg had in fact only written a small number of articles related to attractive packaging for toys. Based upon the foregoing, defendant McGrath states that he elected not to use this individual as an expert witness at trial and that plaintiff, an attorney, agreed with this decision. (See, Hatfield v Herz, supra, at 181 [plaintiff, also an attorney, was satisfied with his legal representation until the unfavorable outcome].)

Defendants elected instead to proceed with Dr. Richard Brandt, who despite later being found "not qualified," had a degree in physics from the Massachusetts Institute of Technology, had taught courses in safety engineering, had testified previously in Federal Court, and who was specifically knowledgeable in metallurgy and mechanical engineering. Based upon the foregoing, defendants assert that there was no breach of duty to plaintiff in their selection of an expert witness.

Defendants further assert that plaintiff cannot establish causation on the speculative claim that the outcome would have been more favorable had counsel chosen Dr. Goldberg over Dr. Brandt. (Alter & Alter v Cannella, 284 AD2d 138; Marshall v Nacht, supra.) Defendants submit the affidavit of Robert L. Moore, Esq., the attorney for defendant Heinz Food Products Company on the underlying case. Mr. Moore stated that he conducted the non-party deposition of Dr. Goldberg, and concluded that he was not an appropriate expert. Mr. Moore states that it was his intention, had plaintiff had called Dr. Goldberg as a witness, to move to vacate such testimony.

In opposition to defendants' motion for summary judgment, plaintiff submits a recent affidavit from Dr. Goldberg who states only that while he remained available to testify, he was never contacted by defendants. Plaintiff also argues that defendants used a report by Dr. Goldberg in support of their motion to restore plaintiff's action to the calendar in 1999. However, neither of these arguments establish that defendants' tactical trial decisions fell below a reasonable standard of conduct. (Geller v Harris, 258 AD2d 421.)

Here, the court finds that defendant counsels' decisions were soundly within their professional judgment and discretion, upon which "even the most distinguished members of the profession may differ." (Byrnes v Palmer, 18 App Div 1, 4; and see, Rosner v Paley, 65 NY2d 736, supra.) It is now well established that choices in expert witness selection are particularly within the attorney's realm of reasonable discretion. (Geller v Harris, 258 AD2d 421, supra.) Selection among reasonable courses of action does not constitute legal malpractice. (Rosner v Paley, supra; Rubinberg v Walker, supra.) Plaintiff's remaining claims amount to little more than retrospective complaints about an unsuccessful result. (Rubinberg v Walker, supra; Hatfield v Herz, supra.)

Accordingly, the motion by plaintiff seeking money judgment in her favor is denied and the cross motion by defendants for summary judgment dismissing the claims against them is granted.

Dated: APR 07 2004

J.S.C.