

Medical Liab. Mut. Ins. Co. v Roach

2007 NY Slip Op 30376(U)

March 16, 2007

Supreme Court, New York County

Docket Number: 0101030

Judge: Karen S. Smith

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. KAREN SMITH**

PART 44

Index Number : 101030/2004

MEDICAL LIABILITY MUTUAL

vs
ROACH, LAWRENCE C.

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion to/for Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2</u>
Replying Affidavits _____	<u>3</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

FILED
MAR 28 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/16/07

K. S. S.
HON. KAREN SMITH J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 44

-----X
MEDICAL LIABILITY MUTUAL INSURANCE
COMPANY,

Plaintiff,
-against-

Index No.: 101030/04
Motion Seq.: 002
Motion Date: 1/3/07

DECISION AND ORDER

LAWRENCE C. ROACH,
Defendant.

-----X
LAWRENCE C. ROACH,

Third-Party Plaintiff,
-against-

FILED
MAR 28 2007
NEW YORK
COUNTY CLERK'S OFFICE

PELTZ AND WALKER,
Third-Party Defendant.

-----X

PRESENT: KAREN S. SMITH, J.S.C.:

Third-party defendant Peltz and Walker's motion for summary judgment dismissing the third-party complaint against it is granted for the reasons set forth more fully below.

Third-party plaintiff Lawrence Roach (hereinafter "Roach") brought the instant third-party action to recover for damages he allegedly suffered as a result of third-party defendant Peltz and Walker's malpractice in its legal representation of him. In his third-party complaint, Roach alleges that Peltz and Walker committed legal malpractice when it, 1) settled the Rosario case against his wishes, 2) billed MLM for excessive work, 3) breached its fiduciary duty to him, and 4) failed to properly represent him in the matter, resulting in damages stemming both directly

from the underlying case and from damage to his reputation as a doctor. Peltz and Walker filed a third-party answer denying it committed malpractice and now brings this motion seeking summary judgment in its favor dismissing the third-party complaint, contending that Roach's allegations do not constitute legal malpractice as a matter of law.

In support of its motion, Peltz and Walker submit: 1) the third-party complaint; 2) its third-party answer; 3) a portion of Roach's medical liability insurance policy; 4) a copy of the mammography report allegedly signed by Roach, dated December 7, 1991; 5) a letter from Peltz and Walker to Timothy Howell, claims examiner for plaintiff Medical Liability Mutual, dated September 24, 1998; 6) the deposition testimony of Howell dated December 14, 2005; 7) the deposition testimony of Roach dated September 14, 2005; and 8) a letter by plaintiff Medical Liability Mutual to Roach dated August 18, 1994. Roach opposes the motion and submits the following documents: 1) the first-party complaint; 2) Roach's Notice of Appearance and Answer; and 3) the deposition of Steven Silverman, an attorney at Peltz and Walker who represented Roach.

The relevant facts are contained in the parties' moving papers and are discussed below. Roach, a physician specializing in radiology, held a medical malpractice liability insurance policy issued by Medical Liability Mutual Insurance Company (hereinafter "MLM"). When a complaint was filed against Roach in 1994 by Noemi Rosaria, alleging that he failed to properly analyze her mammogram films and misdiagnosed her breast cancer, MLM hired the law firm of Peltz and Walker to defend Roach under the terms of his liability policy. According to Roach, he never met with Steven Silverman, his attorney at Peltz and Walker, until the day of his deposition. He testified that he was not prepared for the deposition beforehand, and that

Silverman never met with him again in the nearly ten-year long litigation. Roach claims that he was never advised by his attorneys that he could hire his own counsel, that any amount paid by MLM would eventually be billed to Roach, or that MLM could settle the case without Roach's consent. In October 2002, the other defendants in the case reached a settlement agreement in the amount of \$340,000. At that time, MLM agreed to contribute \$25,000 toward the settlement amount to get Roach out of the case. MLM paid the \$25,000 settlement and Peltz and Walker's legal costs and fees. Under the terms of Roach's policy, his consent was not required for MLM to settle a claim, and MLM retained the right to recover from Roach any legal expenses, judgment or settlement amount paid out on his behalf. In the first-party action herein, MLM sought, and was granted, summary judgment against Roach for those expenses. The third-party complaint seeks damages from Peltz and Walker for their alleged legal malpractice.

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in an admissible form to demonstrate the absence of any material issues of fact. (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1987]). Once the movant has made such a showing, the burden then shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action. (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

It is well established that an action for legal malpractice requires proof of three elements: 1) negligence of the attorney; 2) that such negligence was the proximate cause of the loss sustained; and 3) proof of actual damages. (*Schwartz v. Olshan Grundman Frome & Rosenzweig et al.*, 302 AD2d 193, 198 [1st Dept. 2003] [internal citations omitted]; see also *Between the Bread Realty Corp. v. Salans Hertzfeld, Helbronn, Christy & Viner*, 290 AD2d 380 [1st Dept.

2002]). To establish proximate cause, it must be shown that the party would have prevailed in the underlying action or would not have sustained any ascertainable damages. (*Schwartz v. Olshan Grundman Frome & Rosenzweig et al., id.*). Even with a showing that the attorney was negligent in her representation, a lack of proximate cause requires dismissal of the action. (*Schwartz v. Olshan Grundman Frome & Rosenzweig et al., id.*; see also *Tanel v. Kreitzer & Vogeliman*, 293 AD2d 420, 421 [1st Dept. 2002]; *Reibman v. Senie et al.*, 302 AD2d 290, 291 [1st Dept. 2003]).

Peltz and Walker argues that Roach's first contention, that it settled the Rosario case over his objections, was neither negligent nor the proximate cause of his alleged injuries because it was MLM who settled the Rosario case and not the law firm. Peltz and Walker submits the deposition testimony of Timothy Howell, the claims adjuster who worked on Roach's case, in which he testifies that the claims committee which reviewed Roach's file for MLM made the decision to contribute "a small settlement" on Roach's behalf after learning that the co-defendant was settling. The reason, according to Howell, was that allowing Roach to proceed as the sole defendant in the case would expose him to potentially increased liability. Although Howell testifies that Peltz and Walker was notified of the decision, he states that Peltz and Walker did not participate in the meeting, was not consulted regarding the settlement, and that claims committees such as this one made settlement decisions regularly on behalf of MLM. Roach, in opposition, fails to submit any evidence contradicting the law firm's evidence that MLM settled the claim on its own, but merely alleges Peltz and Walker settled the case over his objection. Plaintiff's bold face assertions that Peltz and Walker made the settlement offer, are insufficient to raise a triable issue of fact about whether the settlement constitutes malpractice. (*See Amatulli v.*

Delhi Construction Corporation, 77 NY2d 525 [1991]).

In his complaint, Roach also contends that Peltz and Walker breached its fiduciary duty to him and failed to properly represent him in the Rosario matter, based on his allegations that the attorney assigned to represent him had very little contact with him throughout the litigation and on the firm's failure to seek summary judgment in Roach's favor. Roach testified in his deposition that the first time he met Steven Silverman, his attorney, was at his deposition for the Rosario action. He states that Silverman never prepared him to testify and that Silverman ignored his requests to be present at the depositions of other witnesses. While Roach contends that he and Silverman met only once, at Roach's deposition, he references several letter and phone call exchanges between them. At his deposition, Silverman recalled remarkably little about the case, but did not directly contradict Roach's testimony; rather, Silverman insisted that he could not say for certain when he met Roach or how much contact they had throughout the course of litigation. Peltz and Walker contend that this is insufficient, as a matter of law, to establish legal malpractice. The Court agrees. Even taking all of Roach's contentions in this regard as true, the allegations do not constitute legal malpractice. Roach does not allege that Silverman's failure to respond to Roach's communications and demands regarding the direction of litigation, even if found to be negligent, are the proximate cause of the Rosario matter's resolution or that they resulted in ascertainable damages to Roach. There is no evidence or allegation, for example, that, had Roach been present at the deposition of Rosario or any other witness, or had he been more prepared for his own deposition in that case, that MLM would have chosen not to settle the matter. Without evidence that Silverman's manner of representation effected the outcome of the matter or the damages sustained, Roach has failed to raise an issue of

fact warranting denial of summary judgment.

Roach's contention that Peltz and Walker should have sought summary judgment in his favor must likewise fail. At his deposition, Roach testified regarding his passport, which was marked as an exhibit, and states that it shows he left the country on December 7, 1991, the date that Roach was alleged to have signed Rosario's mammography report. Roach also testified that he never performed work at the clinic where Rosario's report was reviewed. It is based on this evidence that Roach claims Peltz and Walker should have filed a motion for summary judgment in his favor in the Rosario case. However, Peltz and Walker argue in their motion that Roach cannot demonstrate that a motion for summary judgment would have been likely to succeed, and thus cannot prove proximate cause. Peltz and Walker submit evidence that Roach's co-defendant in the Rosario matter testified in his deposition that Roach did, in fact, review films for the clinic in 1991, directly contradicting Roach's deposition testimony that he never performed such work. Whether his co-defendant's testimony is factually accurate or not, Roach was unlikely to succeed on any motion for summary judgment in the Rosario matter, as there were clear issues of fact raised by the conflicting testimony of Roach and his co-defendant. Roach submits no evidence which would have irrefutably proved his co-defendant's testimony to be false or inaccurate sufficient to meet his burden on a motion for summary judgment in the Rosario matter, nor does he submit copies of the relevant passport entries for consideration on this motion. In the instant matter, Roach's belief, alone - unsupported by any evidence in admissible form - that his passport would have conclusively exonerated him, is insufficient to raise an issue of fact necessitating a trial.

Roach's final contention, that Peltz and Walker billed MLM excessively, is neither

supported by any evidence nor a basis upon which a claim for legal malpractice may lie.

As Peltz and Walker has made a *prima facie* showing of entitlement to judgment as a matter of law by demonstrating that Roach's contentions either fail to state a cause of action sounding in legal malpractice or that the firm's actions on Roach's behalf were not the proximate cause of Roach's injury. As Roach has failed to raise an issue of fact through the submission of evidence in admissible form, Peltz and Walker's motion must be granted.

Accordingly, it is

ORDERED that the third-party defendant's motion for summary judgment dismissing the third-party complaint is granted and the Clerk is directed to enter judgment accordingly.

The foregoing constitutes the decision and order of this court.

Dated: March 16, 2007

ENTER:



Hon. Karen S. Smith, J.S.C.

FILED
MAR 28 2007
NEW YORK
COUNTY CLERK'S OFFICE