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

PRESENT: JANE S. SOLOMON PART 55

Index Number : 120443/2003
BERTOLDO, PATRICK
vs
KRANGLE, DAVID B., ESQ.
Sequence Number : 002
SUMMARY JUDGMENT

IDEX NO. _____
OTION DATE 5/9/07
OTION SEQ. NO. _____
OTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-6
Answering Affidavits — Exhibits	7-10
Replying Affidavits	11

Cross-Motion: ☐ Yes ☒ No

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

NB 7-23-07 @ 2 PM
Pre Trial Conf set at
end of decision

FILED
JUN 27 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/20/07

J.S.C.
JANE S. SOLOMON

FOR THE FOLLOWING REASON(S):

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: IAS PART 55

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PATRICK BERTOLDO and LILLIA N. BERTOLDO,

Plaintiffs,

-against-

DAVID B. KRANGLE, ESQ., and PARKER & WAICHMAN, ESQS.

Defendants.

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Index No. 120443/03

DECISION AND ORDER

JANE S. SOLOMON, J.:

The defendants David B. Krangle, Esq. and Parker Waichman, Esqs. (defendants) move for an order, pursuant to CPLR 3212, granting summary judgment dismissing this action or, in the alternative, dismissing each cause of action severally on the ground that the plaintiffs cannot prove the essential elements of their legal malpractice claim. The motion is denied for the reasons below.

This is an action to recover damages for alleged malpractice committed by the defendants in an underlying pedestrian knockdown personal injury lawsuit. The plaintiff Patrick Bertoldo (Bertoldo), while crossing a street, was struck by a bus. Bertoldo has no memory of the accident. The trial in the underlying action resulted in a defendant's verdict on liability. The plaintiffs herein allege that, although liability was hotly contested in the underlying action, the defendants failed to call an easily locateable eyewitness to the accident.

In support of their motion for summary judgment, the

defendants argue that it was their trial strategy to litigate the issue of liability both by direct examination of the plaintiff Bertoldo, who had no memory, and by cross-examining the bus driver, who maintained that Bartoldo was not in the cross-walk when he walked into the side of the bus. The defendants argue that although their trial strategy may have been an error, it was merely a departure and not malpractice.

In opposition to the motion, the plaintiffs point out that for this litigation, they easily located and examined the eyewitness. The eyewitness testified that the turning bus struck Patrick Bertoldo while he was crossing with the light. The eyewitness immediately went to Mr. Bertoldo to comfort him, and used her cellular telephone to call both an ambulance, and Patrick Bertoldo's wife. The latter call was what eventually enabled the plaintiffs' counsel in this action to trace the eyewitness.

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 from the case (JMD Holding Corp. v Congress Fin. Corp., 4 NY3d 373 [2005]; Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers

(Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which requires a trial of the action. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (Zuckerman v City of New York, 49 NY2d 557 [1980]).

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 (Ippolito v McCormack, Damiani, Lowe & Mellon, 265 AD2d 303 [2d Dept 1999]), i.e., that the attorney failed to exercise that degree of care, skill, and diligence commonly possessed and exercised by members of the legal community, that the attorney's negligence was a proximate cause of the loss sustained by his client, and that the client incurred damages as a direct result of the attorney's actions (Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d 438 [2007]; Darby & Darby v VSI Intl., 95 NY2d 308, 313 [2000]). To establish causation, the plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyers' negligence (Davis v Klein, 88 NY2d 1008 [1996]).

"A plaintiff's burden of proof in a legal malpractice action is a heavy one. The plaintiff must prove first the hypothetical outcome of the underlying litigation and, then, the attorney's liability for malpractice in connection with that litigation" (Lindenman v Kreitzer, 7 AD3d 30, 34 [1st Dept 2004]). Only after the plaintiff establishes that he would have recovered a more favorable judgment in the underlying action can he or she proceed with proof that the attorney in the underlying action was negligent in handling that action and that the attorney's negligence was the proximate cause of the plaintiff's loss (Nazario v Fortunato & Fortunato, PLLC, 32 AD3d 692 [1st Dept 2006]).

Here, defendants have not shown as a matter of law that their failure to locate and call an eyewitness was a reasonable strategic decision. The witness was deposed in this action, and she gave testimony which could have been favorable to the plaintiffs' position in the underlying action. Defendants fail to explain on what basis they made a strategic decision to not call the eyewitness when they had never contacted her to ascertain the value of her testimony. The question of whether legal malpractice has been committed is ordinarily a triable factual issue (Guiles v Simser, 35 AD3d 1054 [3d Dept 2006]). Contrary to the defendants' assertion, the failure to call a witness can constitute malpractice (L.I.C. Commercial Corp. v

Rosenthal, 202 AD2d 644 [2d Dept 1994]).

The plaintiffs, on the other hand, offer an expert's affirmation, attesting with a reasonable degree of legal probability that in the underlying case, in which liability was hotly contested, the defendants departed from good and accepted standards of legal practice in failing to pursue, locate, interview, and disclose to defense counsel the name and address of a significant eyewitness to the incident, whose telephone number was available from the beginning. Indeed, the plaintiffs realized early on the importance of the eyewitness, and claim to have repeatedly but unsuccessfully pressed the defendants to subpoena the telephone records in order to locate the eyewitness. Accordingly, it is

ORDERED that the defendants' motion is denied, and counsel shall appear in Part 55, 60 Centre Street, Room 432, New York, NY on July 23, 2007 at 2 PM for a pre-trial conference.

Dated: June 20, 2007

ENTER:

J.S.C.

JANE S. SOL[redacted]