[* 1]

SCANNED ON 7/20/2007

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

PRESENT: _____ J.S.C. PART 2

Justice

Silberman

-v-

Resiman Abramson, PC.

INDEX NO. 104261/05

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION 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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
JUL 20 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 7/12/07

LOUIS B. YORK 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

Index No. 104261/2005

Part 2

Decision/Order

SILBERMAN, GAIL,

Plaintiff,

- against -

RESIMAN, ABRAMSON, P.C. and PAUL COOPERSTEIN,

Defendants.

Present:
Hon. Louis B. York
Justice, Supreme Court

Louis B. York, J:

Plaintiff, Gail Silberman, was injured in a car accident on March 22, 1983. She was a passenger in a taxi during a work-related task. She received four weeks intermittent lost time of $215 per week from the Workers' Compensation Board ("WCB"). The WCB then closed her case. During 1983-1991 she was employed at various jobs but allegedly could not meet productivity standards and has not worked since. In 1990 she was involved in another car accident and did not work for one week afterwards. Since the original accident she has been examined by various doctors. Dr. Fred Hochberg, M.D. treated her in 1987 and 1989; but he did not file a Workers' Compensation form in order to have her case reopened until he saw her again in 1991. Plaintiff hired Defendant law firm, Resiman, Abramson, P.C., to represent her in an attempt to receive additional compensation. Defendant Paul Cooperstein was the attorney who worked directly on her case. She attempted to obtain a ruling that she was "permanently partially disabled" based on her alleged continuing injuries from the 1983 accident. If she were declared "permanently partially disabled," she would receive more benefits due to her inability to maintain regular work.

During the hearing before the WCB, Dr. Hochberg testified regarding Plaintiff's medical

impairments. Dr. Hochberg stated he had determined that she had a mild to moderate disability. However, during his testimony, Dr. Hochberg said he was not aware of Plaintiff's 1990 car accident. Plaintiff's medical records relating to this accident were not presented at the hearing and have not been produced in this action as well. On January 17, 2002 the Workers' Compensation Law Judge ("WCLJ") found that Plaintiff had no further disability from the 1983 accident. In particular, the judge found the doctor's testimony not credible because he made his determinations without knowing about the 1990 accident.

After an appeal by Plaintiff, the WCB upheld the decision. Then on March 17, 2003, the WCB issued an amended decision still finding against Plaintiff but with the further explanation that Dr. Hochberg's lack of credibility and lack of medical records constituted enough to uphold the original decision. Sometime after she received these adverse rulings, Plaintiff hired new counsel and commenced this legal malpractice lawsuit against Defendants. Defendants now move for summary judgment. The motion is granted for the following reasons.

To prevail on her claim of legal malpractice, Plaintiff must "plead factual allegations which, if proven at trial, would demonstrate that counsel had breached a duty owed to the client, that the breach was the proximate cause of the injuries, and that actual damages were sustained." Dweck Law Firm, LLP v. Mann, 283 A.D.2d 292, 293, 727 N.Y.S.2d 58, 59 (1st Dept. 2001). Defendants have to disprove one of these three elements to succeed on their summary judgment motion. See Kotzian v.McCarthy, 36 A.D.3d 863, 863, 827 N.Y.S.2d 875, 876 (2d Dept. 2007), Fasanella v. Levy, 27 A.D.3d 616, 616, 810 N.Y.S.2d 675, 675 (2d Dept. 2006).

The first issue is whether the Defendants were negligent in their representation of Plaintiff. Several questions of fact must be answered to address this issue. The most important question is who was responsible for producing the medical records. Plaintiff claims that she gave Defendants an authorization to obtain her medical records relating to the 1990 accident. However, Defendants state that Plaintiff was responsible to produce them. Plaintiff counters that it is an attorney's duty to obtain all necessary documentation for trial. Although Plaintiff provides no legal support for her argument, it clearly "is the attorney's responsibility to diligently

maintain control over the discovery process...." Robert Matthew Levein, Note, A Practitioner's Guide: Federal Rule of Civil Procedure 26(a)-Automatic Disclosure, 47 SYRACUSE L. REV. 225, 244 (1996). Thus, Plaintiff has raised a question of fact relating to Defendants' liability for failing to produce the medical records to the WCB. Also, there is a question as to whether Defendants properly prepared Dr. Hochberg for his testimony. Plaintiff claims that if Defendants had prepared Dr. Hochberg, then he may have been a more credible witness. Therefore, Defendants have not disproved that they were negligent.

Second, Plaintiff must show proximate cause. Even if Plaintiff can show that Defendants committed negligence in her case, she cannot prevail unless she also demonstrates that but for the attorney's negligence, she would have prevailed in the hearing. See Flinn v. Aab, 167 A.D.2d 507, 507, 562 N.Y.S.2d 178, 179 (2d Dept. 1990). Thus, even though it may have been the responsibility of the Defendants to produce the medical records in question, Plaintiff still has to show that this negligence led to the WCB's decision against her.

> The WCB did reference the missing medical records in its decision:
>
> "[T]he carrier had the right to review her medical records relating to this intervening accident....based upon the claimant's failure to disclose the said medical records to the carrier, despite previous directions to make such records available, the WCLJ was entitled to make the inference that any current disability that the claimant has is related to that intervening accident."

In re Silberman, WCB Case #0832 1148 (Mar. 17, 2003) (amended decision). If Defendants had produced these medical records, perhaps the WCB would have made a different ruling. Its ruling stated that Plaintiff may have a disability, but the Board could not make a specific determination regarding whether there definitely was a disability and if it was solely from the 1983 accident. The records may have supported Plaintiff's claim that her disability was not worsened by the 1990 accident. However, the court has received no evidence to support this theory. Such speculation cannot be used to find proximate cause. "The plaintiff's mere assertion that the defendants' delay rendered her default judgment unenforceable, without a proffer of an

expert opinion in admissible form or the provision of some factual predicate for her assertion, was speculative and was insufficient to raise a triable issue of fact." Oberkirch v. Eichinger, P.C., 35 A.D.3d 558, 560, 827 N.Y.S.2d 192, 193 (2d Dept. 2006). If Plaintiff had produced the missing medical records and shown that they included information that would have led to a decision in her favor, then that would be satisfactory in raising a question for trial. However, at this time she has only made speculative, conclusory statements regarding Defendants actions and the alleged adverse affects they had on her case. Therefore, Plaintiff has not shown that Defendant's alleged malpractice led to the WCB's decision against her.

Plaintiff also has alleged that there was negligence regarding the settlement offer. In particular, according to Plaintiff, "Cooperstein failed to advise the client on the merits of the offer or the appropriateness of the offer" (Pl.'s Mem. Of Law, pg. 1). However, to receive damages in the amount of the offer, Plaintiff must show that she would have accepted the settlement if she had been properly informed. See Cannistra v. O'Connor, McGuinness, Conte, Doyle, Oleson & Collins, 286 A.D.2d 314, 316, 728 N.Y.S.2d 770, 772 (2d Dept. 2001). She has made no claim or indication that she would have accepted the offer if Defendants had not committed the alleged negligence. Without such an assertion by Plaintiff, she is precluded from trying to obtain these damages at a later point.

Defendants have satisfied their burden of disproving one of the elements of Plaintiff's claim. See Kotzian v. McCarthy, 36 A.D.3d 863, 863, 827 N.Y.S.2d 875, 876 (2d Dept. 2007). Therefore, it is

ORDERED that the motion is granted and the action is dismissed; and it is further

ORDERED that the clerk of the Court is directed to enter judgment accordingly.

Dated: 7/12/07

ENTER:

Louis B. York, J.S.C.