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

PRESENT: DEBRA A. JAMES Justice — PART 59

PETER ROSENTHAL,

Plaintiff,

- v -

WILENS & BAKER, P.C., and HOWARD YAGERMAN, ESQ.,

Defendants.

Index No.: 102121/03

Motion Date: 03/27/07

Motion Seq. No.: 01

Motion Cal. No.: 121

The following papers, numbered 1 to 6 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1, 2
Answering Affidavits - Exhibits	3
Replying Affidavits - Exhibits	4 - 6

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

Defendants move for summary judgment dismissing the complaint of plaintiff pro se, a former client of the firm in a matrimonial action.

Defendants argue that there is insufficient evidence in the record to support the "but for" causation element of plaintiff's legal malpractice claim. Defendants base their argument on the assertion that the plaintiff's incarceration for contempt and the matrimonial court's further rejection of plaintiff's request for a downward modification of child support was wholly due to

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

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

plaintiff's conduct and therefore the plaintiff is unable to establish that any alleged negligence of the firm in anyway caused plaintiff damage.

However, the defendants misread the authorities they rely upon for these propositions. In Perry v Klein, the Court considered a case of attorney malpractice similar to that alleged here and found

> Even assuming, arguendo, that all the above-described acts/omissions fall below the degree of skill exercised by an ordinary member of the legal community, in our view none are a proximate cause of plaintiff's damages as a matter of law. The only possible effects of the negligence asserted in the first and second categories above is that it resulted in plaintiff being held in contempt. However, a review of Family Court's decision revealed that it expressly credited plaintiff's testimony regarding Mohawk's precarious financial situation but nonetheless concluded that sufficient circumstances existed to hold plaintiff in contempt. That being the case, it is difficult to see how Klein's failure to present a more zealous defense would have changed the outcome of the contempt proceeding.

Perry v Klein, 198 AD2d 576, 577 (3d Dept 1993). Thus, the Court applied the standard test and found, following the completion of discovery, that causation was not proven. That is not this case however.

Here, a transcript of the December 14, 1999 hearing before Justice Berkman, submitted by the defendant in opposition to the motion, reveals that the court stated to defendants that they on behalf of the plaintiff had to submit detailed financial records to the court such as invoices and contracts and explanations

appurtenant thereto to sustain plaintiff's burden of demonstrating an inability to pay the support amount. The court requested the information be provided by January 18, 2000, with a further hearing to take place in February 2000. As conceded by defendants in their affidavit in support of their motion, the offer of proof was not submitted to the court by the January 18, 2000 deadline. By Order dated February 8, 2000, the court found the plaintiff guilty of criminal contempt and sentenced plaintiff to 7 days imprisonment. In the accompanying opinion, the court stated that "Finally, this court terminated the hearing, and ruled that it would not be reopened absent the submission of a detailed offer of proof. There has been no such offer: instead, defendant now invites the court to 'audit' his records, which is not the duty or proper burden of the court or [defendant's spouse]." In considering the subsequent motion to reargue filed by defendants on behalf of plaintiff, the court held in an Opinion and Order dated May 11, 2000, that "[d]efendants' counsel's claim that he sent a letter [that] was in search for clarification of the court's request for an offer of proof is also nonsense. Neither in that letter nor in the conference call between both counsel and this court did defense counsel request an extension of time to file his offer of proof. The court and plaintiff adhered to the agreed-upon-schedule; defendants did not." The court further criticized the law firm stating that

> "[t]he direct case he presented at the contempt hearing was patently insufficient to meet defendant's burden, so he now complains that plaintiff's attorney should have searched through defendant's records and questioned 'any number of documents []'. Given time to present a coherent offer of proof so as to show why the court should permit a reopening, he failed to do so because, he claims, the court misled him by not sending a letter saying that it really meant to adhere to the schedule set in open court. Even on this motion, he gives no specific reason why the court should go through the huge stack of documents annexed in a hunt for proof which will support defendant's position."

In imposing sanctions upon defendants, the court further stated that "defense counsel's ad hominem attacks against opposing counsel, while not critical to this court's sanction determination, underscore defense counsel's apparently purposeful failure to present appropriate evidence so as to achieve full resolution of the issues at the appropriate time and before the appropriate court."

Under these circumstances, summary judgment is not appropriate. Defendants' reliance upon precedents governing legal malpractice in criminal proceedings is misplaced in the present case concerning legal malpractice in a matrimonial action. In considering attorney malpractice claims in criminal matters, the Court of Appeals has set forth the following standard stating

> New York has traditionally applied a "but for" approach to causation when evaluating legal malpractice claims. To be sure, a defendant in a criminal proceeding might be able to prove malpractice by establishing that but for the negligent representation he would, for example, have invoked his 5th Amendment rights, or succeeded in

> suppressing certain evidence conclusive of his guilt. But, because he cannot assert his innocence, public policy prevents maintenance of a malpractice action against his attorney. This is so because criminal prosecutions involve constitutional and procedural safeguards designed to maintain the integrity of the judicial system and to protect criminal defendants from overreaching governmental actions. These aspects of criminal proceedings make criminal malpractice cases unique, and policy considerations require different pleading and substantive rules.

Carmel v Lunney, 70 NY2d 169, 173 -174 (1987) (emphasis added, citations omitted.)

See also Britt v Legal Aid Soc., Inc., 95 NY2d 443, 447-448 (2000) ("a criminal legal malpractice plaintiff cannot assert innocence while the criminal charges remain pending"). However, a criminal contempt finding in a matrimonial action does not involve the same constitutional and procedural protections available in a criminal prosecution because the proceeding is civil in nature. Therefore, the heightened pleading standard for legal malpractice in criminal actions should not apply to criminal contempt proceedings in civil actions as the policy considerations and protections available in criminal actions are absent in civil cases.

Applying the traditional "but for" causation standard to the facts presented on this motion, the court finds that defendants have fallen short of demonstrating their entitlement to summary judgment. On the evidence presented, a factfinder could determine that the defendants' failure to supply the court with the requested offer of proof as regards plaintiff's financial

status was the proximate cause of the court's finding the plaintiff in contempt and denying plaintiff's application for downward modification of the child support obligation. Instructive in this regard is the case of Suydam v O'Neill (276 AD2d 549 [2d Dept 2000]) wherein the Court considered on a summary judgment motion whether the failure of defendant attorney to submit a post-trial memoranda consisting of proposed findings of fact and conclusions of law, where such failure was remarked upon in the decision approved by the matrimonial court granting the relief sought by the plaintiff, raised an issue of fact as to the attorney's malpractice to be determined at trial. The Court stated

> "[o]n a motion for summary judgment to dismiss the action, a defendant must proffer admissible evidence establishing that the plaintiff is unable to prove at least one of the essential elements of his or her case. Here, the defendant failed to offer sufficient evidence to establish that the plaintiff would not have received a more favorable distribution of assets even had he submitted a post trial memorandum. Therefore, the motion for summary judgment was properly denied." Id. at 550 (citations omitted).

Defendants here have similarly failed to show that plaintiff would not have avoided imprisonment and would not have received a downward modification of the child support obligation but for the failure of defendants to submit the offer of proof promised to the court. Therefore, summary judgment shall be denied.

Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissing the complaint is DENIED; and it is further

ORDERED that the parties are directed to attend a preliminary conference on August 21, 2007, at 9:30 A.M., in IAS Part 59, Room 1254, 111 Centre Street, New York, New York 10013.

This is the decision and order of the court.

Dated: July 24, 2007 ENTER:

J.S.C.
DEBRA A. JAMES
J.S.C.