

Abramowitz v Bondi & Iovino

2007 NY Slip Op 32848(U)

September 7, 2007

Supreme Court, Nassau County

Docket Number: 6484-04/

Judge: Thomas Feinman

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

Hon. Thomas Feinman
Justice

DARRYL ABRAMOWITZ, INDIVIDUALLY AND
AS CHIEF EXECUTIVE OFFICER AND PRESIDENT
OF 23 KT. GOLD COLLECTIBLES, INC. (FORMERLY
KNOWN AS BLEACHERS CARD CORP.), and
23 KT. GOLD COLLECTIBLES, INC.,

Plaintiffs,

- against -

BONDI & IOVINO AND ANTHONY F. IOVINO, ESQ.
INDIVIDUALLY AND AS A MEMBER OF BONDI &
IOVINO,

Defendants.

TRIAL/IAS PART 22
NASSAU COUNTY

INDEX NO. 6484/04

X X X

MOTION SUBMISSION
DATE: 8/17/07

MOTION SEQUENCE
NO. 001

The following papers read on this motion:

- Notice of Motion and Affidavits..... X
- Memorandum of Law in Support of Motion..... X
- Affirmation in Opposition..... X
- Memorandum of Law in Support of Opposition..... X
- Reply Affirmation..... X
- Memorandum of Law in Support of Reply..... X

The defendants move for an order pursuant to CPLR §3212 granting the defendants summary judgment and dismissing plaintiffs' complaint against them. The defendants submit a Memorandum of Law in Support of the defendants' motion. The plaintiffs submit an affirmation and Memorandum of Law in Opposition to defendants' motion for summary judgment. The defendants submit a reply affirmation and Reply Memorandum of Law in further support of defendants' motion for summary judgment.

Plaintiffs have initiated this legal malpractice action claiming that the defendants were negligent with respect to prosecuting the underlying Supreme Court County of Nassau action entitled *23 KT. Gold Collectibles, Inc. v. Authentic Images, Inc., Frank Walsh and Avon Products, Inc.*, bearing Index Number 2072/02. The plaintiffs submit, and it is undisputed, that the defendants drafted opposition to defendant, Avon Products, Inc.'s, motion to dismiss, and the defendants admitted that they failed to serve and file the opposition papers to the aforesaid motion. A decision was rendered whereby the unopposed motion was granted and the plaintiffs' action, as and against the defendant, Avon Products, Inc., was dismissed. Thereafter a motion to renew and reargue was denied by way of the decision of the Honorable Daniel Martin dated March 25, 2003. The aforesaid order provides that the movant failed to annex an affidavit of merit. The defendants filed an appeal and later withdrew the appeal. Plaintiffs retained new counsel and litigation continued. Plaintiffs' new counsel secured a judgment entered June 10, 2004 against the remaining defendants, who defaulted, in the amount of \$4,337,500.00. Thereafter, plaintiffs initiated the instant action for legal malpractice.

The plaintiffs submit that have not yet collected on the judgment. However, the plaintiffs have not submitted any admissible evidence indicating or demonstrating why the plaintiffs have not yet collected the amount of the judgment. The plaintiffs do not show what steps were taken, if any, to enforce the judgment. The record herein is devoid of any evidence demonstrating that the judgment is unenforceable. The plaintiffs also submit that plaintiffs have incurred additional legal fees and expenses of approximately \$100,000.00, but have not submitted any proof whatsoever of such additional legal fees and expenses.

It is well settled that in order to establish a cause of action to recover damages for legal malpractice, a plaintiff must prove that (1) the attorney failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community, (2) the attorney's conduct was the proximate cause of the loss, (3) the plaintiff sustained damages as a direct result, and (4) the plaintiff would have been successful in the underlying action had the attorney exercised due care (*Diamond v. Kazmierczuk & McGrath*, 15 AD3d 526; *Magnacoustics, Inc. v. Ostrolenk, Faber, Gerb & Soffen*, 303 AD2d 561; *Ippolito v. McCormack, Damiani, Lowe & Melon*, 265 AD2d 303; *Volpe v. Canfield*, 237 AD2d 282).

In order to establish the elements of proximate cause and actual damages in a legal malpractice case, plaintiff must show that he or she would have a favorable outcome but for the attorney's negligence. (*Carmel v. Lunney*, 70 NY2d 169, *Zasso v. Maher*, 226 AD2d 366; *Hill v. Fisher*, 203 AD2d 328; *Zarin v. Reid & Priat*, 184 AD2d 385). The test is whether a proper defense would have altered the result of the prior action, and the selection of one among several reasonable courses of action does not constitute malpractice. (*Zarin v. Reid & Priat*, *supra*.) The rule in a legal malpractice action is that a plaintiff must demonstrate not only that actual damages have been sustained, but also that counsel's negligence was the proximate cause of the loss. (*Id.*)

Here, the defendants have submitted proof that plaintiff ultimately prevailed in the underlying action by obtaining a judgment in the amount of \$4,337,500.00. The defendants have demonstrated their *prima facie* entitlement to summary judgment by establishing that the plaintiffs are unable to prove at least one of the essential elements of the legal malpractice cause of action (*Diamond v. Kazmierczuk & McGrath*, *supra*; *DeGregorio v. Bender*, 4 AD3d 385; *Albanese v. Hametz*, 4 AD3d 379; *Ostriker v. Taylor, Atkins & Ostrow*, 258 AD2d 572).

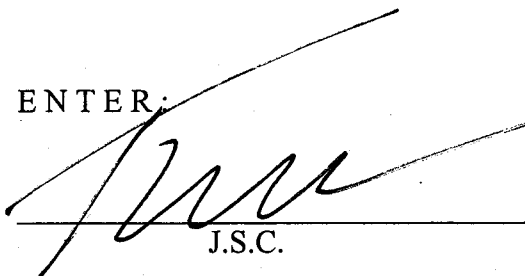
The plaintiffs, in opposition, have failed to raise a triable issue of fact. (*Alvarez v. Prospect Hosp.*, 68 NY2d 320). The plaintiffs' mere assertion that the judgment was not collected, alluding that the judgment was unenforceable, without a proffer of an expert opinion in admissible form, or some factual predicate for the assertion, is merely speculative and therefore, insufficient to raise a triable issue of fact. (*Oberkirch v. Eichinger*, 35 AD3d 558).

Apparently, it is the plaintiffs' position in the case at bar that merely because plaintiff cannot seek to enforce the judgment amount of \$4,337, 500.00, against Avon Products, Inc., in and of itself, constitutes an actual loss which satisfies a necessary element to recover damages for legal malpractice. However, there is no showing by the plaintiffs herein that the judgment is not enforceable in full against the parties that judgment has already been entered against. The record is totally devoid of any steps taken to seek to enforce said judgment, in whole or in part. The mere assertion that plaintiff has not collected on the judgment, without more, is insufficient to raise an issue of fact as to loss.

Mere speculation about a loss resulting from an attorney's alleged omission is insufficient to sustain a *prima facie* case of legal malpractice. (*Giambrone v. Bank of New York*, 253 AD2d 786). Damages must be "actual and ascertainable" resulting from the proximate cause of the attorney's negligence. (*Trimboli v. Kinkel*, 226 NY 147; *Zarin v. Reid & Priest*, 184 AD2d 385). Conclusory allegations, bold assertions or speculation are simply insufficient to successfully oppose a motion for summary judgment. (*Zuckerman v. City of New York*, 49 NY2d 557; *Rotuba Extruders v. Ceppos*, 46 NY2d 223). As plaintiffs have not offered proof that plaintiffs' judgment is unenforceable, or that plaintiffs incurred additional legal fees and expenses, plaintiffs' claim is too speculative.

In light of the foregoing, the defendants' motion for summary judgment is granted, and therefore, the plaintiffs' complaint is dismissed.

ENTER:



J.S.C.

Dated: September 7, 2007

cc: Epstein, Becker & Green, P.C.
D'Abbate, Balkan, Colavita & Contini, L.L.P.

ENTERED
SEP 12 2007
NASSAU COUNTY
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