SHORT FORM ORDER

INDEX No. 02-19624
CAL. No. 06-02051-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 2-28-07
ADJ. DATE 5-2-07
Mot. Seq. #001 - MD

LORI ANN GALLETTI, Plaintiff,	:	SCHWARTZ & PONTERIO, PLLC Attorneys for Plaintiff 134 West 29th Street, Suite 1006 New York, New York 10001
- against -	:	
MARGIOTTA & RICIGLIANO, MICHAEL J. RICIGLIANO, JOSEPH M. MARGIOTTA and STEPHEN P BROWN, Defendants.	:	McMANUS, COLLURA & RICHTER, P.C. Attorneys for Defendants Forty-Eight Wall Street New York, New York 10005

Upon the following papers numbered 1 to 69 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 9 - 65 ; Replying Affidavits and supporting papers 66 - 69 ; Other__; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants, Margiotta & Ricigliano, Michael J. Ricigliano, Joseph M. Margiotta and Stephen P. Brown ("Defendants") for an order pursuant to CPLR 3212, granting them summary judgment dismissing plaintiff's complaint is denied.

This is an action to recover damages allegedly sustained by plaintiff, Lori Ann Galletti, for legal malpractice. Plaintiff retained the defendants' firm in 1993 to commence an action against National Westminister Bank ("NatWest") to recover damages for an alleged assault and robbery that was committed while she was using the bank's ATM at its South Hempstead, New York, branch on September 22, 1990. On February 22, 1995, plaintiff was deposed and requests for production of documents were exchanged. In January of 1998, John Principe, the attorney handling plaintiff's matter resigned from the firm. On August 16, 2000, NatWest served a demand pursuant to CPLR 3216, requesting that plaintiff resume prosecution of the action and file a note of issue within 90 days. In September of 2000, defendant Brown, a newly hired associate was assigned plaintiff's case. On November 22, 2000, NatWest sought dismissal of plaintiff's complaint pursuant to CPLR 3216, for failure to prosecute the action. By order dated, December 18, 2000 (McCaffrey, J.), NatWest's motion was granted without opposition. On December 21, 2000, defendant Brown, received a copy of the order with notice of entry. On January 19, 2001, defendants served a motion to vacate the order of dismissal based upon law office failure and to extend the time to file the Note of Issue. The defendants stated in

their motion to vacate the order of dismissal that the case file had been misplaced due to the departure of the attorney handling the matter and was only found after the defendants had received the order dismissing the complaint with notice of entry. Nevertheless, the motion to vacate was subsequently denied by order of the court dated March 22, 2001 (McCaffrey, J.). Following the dismissal, defendant Brown sent plaintiff a letter dated April 22, 2001, to inform her of the case's disposition. On July 22, 2002, plaintiff filed a complaint alleging legal malpractice and negligence stemming from the defendants failure to timely prosecute the plaintiff's underlying personal injury action against NatWest.

Defendants now move for summary judgment on the basis that notwithstanding their failure to timely prosecute the underlying personal injury action, the plaintiff underlying cause of action would have failed because she was unable to show that NatWest knew or should have known of prior incidents of assault and robbery at the ATM of the South Hempstead branch. Defendants also assert that plaintiff has failed to establish that "but for" the defendants purported negligence she would have prevailed in the underlying cause of action. Defendants submit the pleadings and the affidavit of Michael J. Ricigliano.

In opposition, plaintiff contends that the defendants' motion should be denied because the defendants have effectively conceded that they were negligent in the handling of plaintiff's underlying personal injury action and their negligence was the cause of the action's subsequent dismissal. Plaintiff also asserts that the defendants failed to obtain any discovery or conduct any investigation regarding her personal injury action against NatWest. Plaintiff submits, the pleadings, copies of the deposition transcripts of defendants, Michael J. Ricigliano, Joseph M. Margiotta and Stephen P Brown, affidavit of plaintiff, copy of the NatWest lawsuit docket sheet, copies of news articles and press releases of the mergers and acquisitions of NatWest Bank by Fleet Financial Inc and by FleetBoston and Bank of America, copies of deposition transcripts of Michael Winston, manager of the Bank of America's South Hempstead branch, Maria Harnois, senior investigator for Bank of America, copy of request to obtain Nassau County Police Department records regarding prior criminal incidents at NatWest's South Hempstead branch, copy of Nassau County Police Department response to request, affidavit of Marcia Galletti, affidavit of Marshall Coleman, plaintiff's expert, psychological evaluation of plaintiff by Beverly E. Martin, Ph. D, report of Edmund H. Mantell, Ph. D., plaintiff's lost of economic earnings expert, notice to admit, and plaintiff's retainer with defendants.

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 (*see,* ***Alvarez v Prospect Hospital***, 68 NY2d 320 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). The burden will then shift to the nonmoving party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]).

It is elementary that in order to establish a prima facie case of legal malpractice, a plaintiff must demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge that is commonly possessed by members of the legal profession and the attorney's actions were the proximate cause of the actual damages sustained by the plaintiff (***McCoy v Freinman***, 99 NY2d 295, 755 NYS2d 693 [2002]; ***Darby & Darby, P.C. v VSI Int'l Inc.***, 95 NY2d 308, 716 NYS2d 378 [2000]; ***McKenna v***

Forsyth & Forsyth, 280 AD2d 79, 720 NYS2d 654 [2001]). Moreover, plaintiff is required to prove that but for the attorney's negligence, the plaintiff would have prevailed on her underlying cause of action (***Williams v Kublick, Davoli, McMahon & Kublick, P.C.***, 302 AD2d 961, 754 NYS2d 804 [2003]; ***Carpenter v Weichert***, 51 AD2d 817, 379 NYS2d 191 [1976]). Thus, plaintiff is required to prove a "case within a case," which is a distinctive feature of legal malpractice actions arising from an attorney's negligence in the preparation or conduction of the underlying lawsuit (***McKenna v Forsyth & Forsyth***, *supra*; *see also*, ***Titsworth v Mondo***, 95 Misc. 2d 233, 470 NYS2d793 [1978]). What constitutes ordinary and reasonable skill and knowledge is to be measured at the time of the representation and if the rules are clearly defined at the time of the representation, an attorney's disregard of them is inexcusable (***Darby & Darby, P.C. v VSI Int'l Inc.***, *supra*; *see also*, ***Rosen v Paley***, 65 NY2d 736, 492 NYS2d 13 [1985]; ***Bernstein v Oppenheim & Co.***, 160 AD2d 428, 544 NYS2d487 [1990]). However, an attorney is not to be held to the rule of infallibility and is not liable for an honest mistake of judgment, especially where the proper course of action is subject to reasonable doubt (***Grago v Robertson***, 49 AD2d 645, 370 NYS2d 255 [1975]). Generally, an attorney may be held liable for ignorance of the rules of practice, failure to comply with conditions precedent, or neglect to prosecute or defend an action (***Bernstein v Oppenheim & Co.***, *supra*; ***Grago v Robertson***, *supra*).

Here, the defendants have failed to meet their burden of proof in establishing their entitlement to judgment as a matter of law (***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Zuckerman v City of New York***, *supra*; ***Andre v Pomeroy***, *supra*). Defendants have failed to establish that the plaintiff would not have been successful on her underlying cause of action against NatWest. Notwithstanding the fact that defendants never sought to depose any of NatWest's employees, defendants assert that plaintiff was unable to succeed on her underlying negligence claim against NatWest. The defendants' only proffer of evidence regarding plaintiff's inability to succeed on the merits of the claim is based upon the affirmation of defendant Ricigliano, who by his own testimony, admitted to not having any personal knowledge regarding the facts and circumstances surrounding plaintiff's original claim against NatWest for negligence. Therefore defendants have failed to submit sufficient proof in evidentiary form or proof that is of any probative value to establish that the underlying lawsuit was not actionable (***Morgano v Man-Dell Food Stores***, 259 AD2d 679, 686 NYS2d 867 [1999]; ***Rodriguez v Middle Atl. Auto Leasing***, 122 AD2d 720, 511 NYS2d 595 [1986]). In addition, defendants' assertion that plaintiff was unable to succeed to on her underlying negligence claim against NatWest is somewhat disingenuous, inasmuch as defendants never sought to depose any employee from NatWest or attempted to perform any investigatory discovery. Nor did defendants at any time prior to their failure to vacate the dismissal order seek to inform plaintiff that she had a nonviable claim based upon the law at the time of the robbery in 1990. Therefore, as a matter of law, the Court cannot say that plaintiff would not have prevailed on her underlying cause of action against NatWest, nor can it say that the defendants' actions were not a direct result of the damages sustained by the plaintiff or that defendants' actions did not fall below that of the ordinary reasonable skills possessed by an attorney (***Lanc v Donnelly***, 184 AD2d 840, 548 NYS2d 214 [1992]; ***John Grace & Co. v Tunstead, Schechter & Torre***, 186 AD2d 15, 588 NYS2d 262 [1992]; ***Pacesetter Communications Corp. v Solin & Breindel, P.C.***, 150 AD2d 232, 541 NYS2d 404 [1999]).

Moreover, it is undisputed that the defendants did not answer the CPLR 3216 demand sent to them by defense counsel for NatWest. Defendants neither dispute that they failed to oppose the motion for dismissal for failure to prosecute, or the fact that they failed to perform any sort of investigative research or discovery even though plaintiff's mother provided defendants with a letter containing the name of at

least one employee who may have had knowledge of prior security breaches at the South Hempstead NatWest branch. Although, defendant Brown stated that he relied upon an oral assurance that defense counsel for NatWest agreed to stipulate to a 30-day adjournment to allow them more time to respond to NatWest's CPLR 3216 demand, defendant Brown admitted that he never prepared a written stipulation to extend the time to answer or sent the court any written correspondence to apprise it of the agreement. Mr. Brown also testified that he had never handled a negligent security action before and that it he failed to make note of the CPLR 3216 demand's deadline on his new calendar. Furthermore, defendant Ricigliano admitted in his testimony that after Mr. Principe, the original attorney handling plaintiff's matter left the firm in 1998, no other attorney was assigned the case until Mr. Brown was given the case file in September of 2000. Therefore, questions of fact arise as to whether it was a dereliction of an attorney's ordinary and reasonable permissible standard of care to fail to perform any type of activity on a client's matter for over eight years or to allow important dates for submissions to pass without any action by the attorney on the client's behalf (***Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer***, 8 NY3d 438, 835 NYS2d 534 [2007]; ***Logalbo v Plishkin, Rubano & Baum***, 163 AD2d 511, 558 NYS2d 185 [1990]; ***Parksville Mobile Modular, Inc. v Fabricant***, 73 AD2d 595, 422 NYS2d 710 [1979]; *see also,* ***Kataris v Scelsi***, 115 Misc. 2d 115, 453 NYS2d 994 [1982]). Furthermore, the credibility of the affiants and the documentary evidence submitted create issues of fact that cannot be resolved on a motion for summary judgment.

Having decided that defendants have not met their burden, we need not address the sufficiency of plaintiff's opposition papers (***Perez v Hilarion***, 36 AD3d 536, 828 NYS2d 376 [2007]; ***Agha v Alamo Rent A Car***, 35 AD3d 639, 827 NYS2d 261 [2006]; ***Coscia v 938 Trading Corp.***, 283 AD2d 538, 725 NYS2d 349 [2001]).

Accordingly, defendants' motion for summary judgment is denied.

Dated: SEP 04 2007

J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**