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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
NASSAU COUNTY - PART 19

Present: HON. WILLIAM R. LAMARCA
Justice

MICHELE COCHRANE,

Plaintiff,

-against-

STUART MOSHELL, ESQ
MOSHELL & MOSHELL, ESQS.,

Defendants.

Motion Sequence # 1
Submitted June 12, 2007
XXX

INDEX NO: 7134/06

The following papers were read on this motion:

Notice of Motion and Affidavit in Support 1
Affirmation in Support.....2
Affirmation in Opposition.....3
Affirmation in Reply.....4

Requested Relief

Defendants, STUART MOSHELL, ESQ. and MOSHELL & MOSHELL, ESQS., move for an order, pursuant to CPLR §3212, granting summary judgment dismissing the complaint, and for an award of costs, legal fees and sanctions, pursuant to Part 130 of the Rules of the Chief Administrative Judge. Counsel for plaintiff, MICHELLE COCHRANE, opposes the motion, which is determined as follows:

Background

By affidavit in support of the motion, STUART MOSHELL, ESQ. states that he and his law firm are accused of professional malpractice for failure to oppose a motion for summary judgment brought against plaintiff which resulted in a money judgment against her. MOSHELL relates that he was retained to represent plaintiff in 2001 in connection with a lawsuit brought by Citicorp Vendor Finance, Inc. which was attempting to collect damages against her, and he interposed an answer with cross-claim on her behalf in about December 2001. MOSHELL states that, in about July 2002, he was informed that plaintiff desired to discharge his law firm and to retain Richard Gluszak, Esq. as her new attorney. MOSHELL annexes exhibits that demonstrate a trail of correspondence between outgoing counsel and incoming counsel and plaintiff, whereby the Consent to Change Attorney Form was executed by all, dated August 22, 2002, and, as requested by Mr. Gluszak in his letter dated August 23, 2002, returned to him "for submission to the Court. (Exhibit "B" and "C" annexed to the moving papers). Thereafter, MOSHELL forwarded his files to new counsel, Mr. Gluszak, by cover letter dated September 12, 2002. In the correspondence, Mr. Gluszak indicated that he would attend the conference scheduled before Justice O'Connell on the following Monday and inform the Court of the substitution.

In January 2003, five (5) months after MOSHELL was substituted as counsel, Citicorp Vendor Finance brought a motion for summary judgment. Notwithstanding the above chronology of events, plaintiff alleges in her complaint that MOSHELL failed to file opposition papers on her behalf. Counsel states that, upon receipt of the motion papers in January 2003, he forwarded same to Mr. Gluszak by certified mail and had a conference call with the Court and the attorney for Citicorp, wherein he made everyone aware that he

no longer represented plaintiff and that Mr. Gluszak was her attorney. MOSHELL states that the motion was adjourned two (2) times thereafter, and Mr. Gluszak had sufficient time to submit opposition papers on plaintiff's behalf. It is MOSHELL's position that this lawsuit should never have been brought against him and his firm. MOSHELL asserts that his attorney attempted to persuade plaintiff's counsel to discontinue the action by providing proof of the facts alleged herein but counsel refused. MOSHELL urges that plaintiff's failure to withdraw the action constitutes malicious prosecution and, at the least, amounts to frivolous conduct which warrants the imposition of sanctions and an award of costs.

A review of the Complaint filed herein reflects that counsel for plaintiff allege that defendants failed to file papers in opposition to the motion for summary judgment which resulted in an Order and Judgment entered against plaintiff, on or about August 20, 2003, in the amount of approximately $90,000.00. No mention whatsoever is made of MOSHELL's substitution as plaintiff's counsel, in August 2002, a year prior to entry of judgment.

In opposition to the motion, counsel for plaintiff asserts that, although MOSHELL claims a consent to change attorney was executed, said form was not filed in the Court according to CPLR §321(b) nor served on the adversary, Citicorp. It is plaintiff's position that the specific requirements of the CPLR require that any changes of attorney be filed with the clerk in order to apprise both parties as well as the Court of this change. Counsel for plaintiff urges that MOSHELL's failure to do so should not be rewarded as an "Out" for him to avoid malpractice.

The Law

In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (*see, Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2nd Dept. 2001]. Indeed, "[e]ven the color of a triable issue, forecloses the remedy" *Rudnitsky v Robbins*, 191 AD2d 488, 594 NYS2d 354 [2nd Dept. 1993]). Moreover "[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate" (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2nd Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2nd Dept. 2000]; *see also S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]). Further, on a motion for summary judgment, the submissions of the opposing party's pleadings must be accepted as true (*see Glover v City of New York*, 298 AD2d 428, 748 NYS2d 393 [2nd Dept. 2002]). As is often stated, the facts must be viewed in a light most favorable to the non-moving party. (See, *Mosheyev v Pilevsky*, *supra).* The burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062, 601 NYS2d 463, 619 NE2d 400 [C.A.1993]; *Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 476 NE2d 642 (C.A. 1985); *Drago v King*, 283 AD2d 603, 725 NYS2d 859 [2nd Dept. 2001]). If the initial burden is met, the burden then shifts to the non-moving to come forward with evidence to demonstrate the existence of a material issue of fact requiring a

trial. (CPLR§ 3212, subd [b]; see also *GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 498 NYS2d 786, 489 NE2d 755 [C.A. 1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [C.A. 1980]). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. (*Mgrditchian v Donato*, 141 AD2d 513, 529 NYS2d 134 [2nd Dept. 1988]).

To establish a cause of action to recover damages for legal malpractice, a plaintiff must prove (1) that the defendant attorney failed to exercise that degree or care, skill and diligence commonly possessed by a member of the legal community, (2) proximate cause, (3) damages, and (4) that the plaintiff would have been successful in the underlying action had the attorney exercised due care (citations omitted). *Briggs v Berk,* 284 AD3d 423, 726 NYS2d 690 (2nd Dept. 2002); *cf., Mendoza v Schlossman*, 87 AD2d 606, 448 NYS2d 45 (2nd Dept. 1982).

Discussion

After a careful reading of the submissions herein, it is the judgment of the Court that MOSHELL and his firm performed all of what was expected of diligent counsel during the period of their retention. Once MOSHELL was discharged, it became the responsibility of new counsel to attend to all details, such as securing the file and responding to and filing all necessary papers on behalf of plaintiff. See, *Lewis v Bluestone*, 1999 NY Misc. Lexis 649. On the record herein, it is clear that plaintiff retained another attorney to continue litigating the actions on her behalf, and that she consented to the substitution. The Court rejects the argument of plaintiff's counsel that MOSHELL's representation continued because he failed to file the Consent to Change Attorney Form with the Court, pursuant

to CPLR §321(b)

> The purpose of CPLR 321(b) is "to afford protection to adverse parties, by eliminating disputes and uncertainty as to whether and when the authority of an attorney representing an opponent terminated", and it "has generally been construed to establish the authority of discharged counsel as to adverse parties and not as to the very party who discharged the attorney" (*Moustakas v. Bouloukos*, 112 AD2d 981, 983, 984). Plaintiff should not be able to find in CPLR 321(b) an excuse for his own lack of diligence.

MacArthur v Hall, McNIcol, Hamilton & Clark, 217 AD2d 429, 628 NYS2d 705 (1st Dept. 1995).

It is clear to the Court that incoming counsel Gluszak requested that the fully executed Consent to Change Attorney Form be returned to him and represented that he would file same with the Court. It is the judgment of the Court that, on any reading of the facts herein, MOSHELL has demonstrated his and his firm's entitlement to judgment as a matter of law and that plaintiff has failed to raise a triable issue of fact. Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment dismissing the complaint is granted and the action is dismissed together with al other pending motions (Motion Sequence #002); and it is further

ORDERED, that defendant's request for an award of counsel fees and sanctions is denied. Although plaintiff's argument that MOSHELL's failure to file the Consent to Change Attorney Form has been unsuccessful, the Court does not find that the action rises to the level of frivolous conduct as defined in 72 NYCRR § 130-1 of the Rules of Court.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: September 10, 2007

WILLIAM R. LaMARCA, J.S.C.

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