

**Di Giacomo v Levine**

2008 NY Slip Op 32993(U)

October 30, 2008

Supreme Court, Suffolk County

Docket Number: 007307/2008

Judge: John J.J. Jones

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 10 SUFFOLK COUNTY

Present:

HON. JOHN J.J. JONES, JR.

Justice

MOTION DATE: 6/12/2008

MOTION NO.: 001 - MG

002 - XMG    003 - XMG

-----X  
LISA DI GIACOMO a/k/a LISA DI GIACOMO-  
FRANGIONE and EUGENE FRANGIONE, :

Plaintiffs, :

-against- :

IRA LEVINE, ESQ., HANKIN HANDWERKER, & :  
MAZEL, PLLC, OLGA JOHANNA RODRIGUEZ, :  
ESQ., MICHAEL S. LANGELLA, P.C., MICHAEL :  
S. LANGELLA, ESQ. & STACY RINALDI GUZMAN, :  
ESQ., :

Defendants. :

-----X

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L'ABBATE, BALKAN, COLAVITA & CONTINI, LLP  
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STANTON & GUZMAN, LLP  
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Upon the following papers numbered 1 to 59 read on this motion by Hankin, Handwerker & Mazel, PLLC and Olga Johanna Rodriguez, Esq., the cross-motion by Ira Levine, Esq. And the cross-motion by the defendants Langella for dismissal of the complaint against them; Notice of Motion/Order to Show Cause and supporting papers 1-8; Notice of Cross Motion and supporting papers 9-27; 35-46; Answering Affidavits and supporting papers 28-34; 47-48; 49-51; Replying Affidavits and supporting papers 52-53; 54-55; 56-59; Other \_\_\_\_\_; it is

**ORDERED** that this motion by defendants, Hankin, Handwerker & Mazel, PLLC (HH&M) and Olga Johanna Rodriguez, Esq., for an order pursuant to CPLR 3211 (a) (1) and (7) dismissing the complaint of plaintiffs, Lisa DiGiacomo, also known as Lisa DiGiacomo Frangione, and Eugene Frangione, is granted; and it is further

**ORDERED** that the separate motion by defendant, Ira Levine, Esq., deemed herein to be a cross-motion, for dismissal of the complaint pursuant to CPLR 3211 (a)(1)(5)and (7) is granted; and it is further

**ORDERED** that the separate motion by defendants, Michael S. Langella, P.C. and Michael S. Langella (Langella), deemed herein to be a cross-motion, for an order pursuant to CPLR 3211 (a) (7) dismissing the complaint against them is granted, and the action is severed and shall otherwise continue against the remaining defendant.

Plaintiffs commenced this action to recover damages for alleged legal malpractice in defendants' handling of a personal injury claim on behalf of plaintiff Lisa DiGiacomo Frangione, who was involved in a motor vehicle accident on May 23, 2000. According to the allegations in the complaint, plaintiffs initially retained defendant Ira Levine, Esq., on or about May 29, 2002, and an action was commenced against Barbara Daniels, the owner and operator of the other vehicle involved in the underlying accident. While it is alleged in the complaint that on or about December 16, 2003, defendants HH&M were substituted as attorneys for the plaintiffs in place of defendant Levine, the record before this Court reveals that plaintiff Lisa Frangione executed a Consent to Change Attorney dated September 18, 2003 substituting HH&M as her attorneys in place of Levine. Depositions in the personal injury action were conducted on or about April 2, 2004, and Daniels testified that at the time of the accident she had been operating her vehicle in the course of her employment with Weight Watchers. Thereafter, HH&M moved for leave to withdraw as counsel for the plaintiffs. By order of the Court dated May 15, 2006 (Molia, J.), the motion was granted, counsel was directed to serve a copy of the order on plaintiffs on or before May 19, 2006, and the discharge was to be effective ten days after filing proof of service. In addition, the order set down July 12, 2006 as the date for jury selection. When plaintiffs failed to appear for jury selection on July 12, 2006, the matter was adjourned until July 19, 2006. The record before this Court reveals that plaintiffs again failed to appear on July 19, 2006, and upon oral application made on the record by defense counsel in the underlying action, the action was dismissed with prejudice by the Honorable Denise F. Molia.

The chronology of significant events is set forth in the order of the Court dated November 16, 2006 (Molia, J.) which denied plaintiffs' subsequent motion to vacate their default and

restore the action to the trial calendar:

Counsel for the plaintiff's [sic] was relieved as such by order of the court dated May 15, 2006. The order was served on the plaintiffs on May 16, 2006. The matter was stayed until June 15, 2006. The order further provided that the selection of a jury take place on July 12, 2006. Although plaintiffs were aware of the July 12, 2006 court date, they failed to appear and the matter was adjourned until July 19, 2006. Plaintiffs again failed to appear and the action was dismissed with prejudice pursuant to 22 NYCRR § 202.27.

The order indicates that the motion to restore the action to the trial calendar was made by the plaintiffs *pro se* and was submitted to the Court on September 21, 2006. The order sets forth that plaintiff "states that the non-appearance was unintentional as she relied on incorrect advise [sic]." The Court made no finding whether such explanation constituted a reasonable excuse for plaintiffs' default, however, but it noted that "the papers failed to present any proof regarding the merits of the action . . ." The motion to vacate plaintiffs' default in appearance for jury selection was denied. A subsequent motion made on behalf of the plaintiffs by the defendant Langella to renew and reargue the application to vacate the default was also denied by order of the Court dated June 18, 2007 (Molia, J.) upon a determination that the Court "neither overlooked or [sic] misapprehended relevant facts or misapplied any controlling principal of law."

By Decision and Order of the Appellate Division, Second Department, dated October 9, 2007, the denial of plaintiffs' motion to vacate their default in appearing for trial was affirmed. Again, no finding was made by the Court whether plaintiffs demonstrated a reasonable excuse for their default, it being noted that "plaintiff Lisa Di Giacomo Frangione attempted, in her affidavit, to articulate a reasonable excuse for the plaintiffs' failure to appear for trial. . ." However, because "there was nothing in her affidavit to establish that the plaintiffs had a meritorious cause of action", the denial of plaintiffs' motion was upheld.

Among the allegations set forth in the complaint is a claim that the failure to timely join as a party the defendant Daniels' employer, Weight Watchers, constituted malpractice. In addition, it is asserted that after HH&M were relieved as plaintiffs' counsel, the plaintiffs were represented by defendant Stacey Rinaldi Guzman, who had agreed to appear on plaintiffs' behalf but failed to do so. It is further alleged that in August 2006, plaintiffs "sought the legal assistance of and retained the defendants Michael S. Langella, P.C., and Michael S. Langella, Esq., for compensation for purposes of representing them in the underlying action . . ." and that defendant Langella obtained the plaintiffs' legal file from HH&M. Defendant Langella, it is claimed, appealed the denial of plaintiffs' motion to vacate the default, which was ultimately upheld by the Appellate Division.

To prevail on a claim of legal malpractice, "a plaintiff must demonstrate that the attorney failed to exercise the ordinary skill and knowledge commonly possessed by a member of the legal

profession' and that the attorney's breach of this duty proximately caused [the] plaintiff to sustain actual and ascertainable damages" (*Pedro v Walker*, 46 AD3d 789, 847 NYS2d 666 [2d Dept 2007], citing *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442, 867 NE2d 385, 835 NYS2d 534, quoting *McCoy v Feinman*, 99 NY2d 295, 301-302, 785 NE2d 714, 755 NYS2d 693). To the extent that plaintiffs seek to recover damages for defendants' failure to join Weight Watchers as a party defendant in the underlying action, such failure can not be held to constitute malpractice, since the omission did not cause plaintiff to sustain actual damages. Under New York law, to establish the elements of proximate cause and actual damages, where the injury is the value of the claim lost, the client must meet the "case within a case" requirement, demonstrating that "but for" the attorney's conduct the client would have prevailed in the underlying matter (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 272, 780 NYS2d 593 [1<sup>st</sup> Dept 2004], citing *Reibman v Senie*, 302 AD2d 290, 756 NYS2d 164 [2003]; *Zarin v Reid & Priest*, 184 AD2d 385, 386, 585 NYS2d 379 [1992]). The determinative event affecting the outcome of plaintiffs' case was clearly the plaintiffs' default in appearing when the case was called for jury selection. Put another way, even if the plaintiffs had named Weight Watchers as a defendant in the action, the outcome of the case would not have been any different. Thus, since plaintiffs can not demonstrate that they sustained actual damages as a result of the omission of Weight Watchers as a party defendant, plaintiffs can not recover under a theory that such omission constituted malpractice. Likewise, plaintiffs can not establish that they sustained actual damages as the result of any alleged failure to supplement the bill of particulars. Accordingly, the action must be dismissed against defendants Levine, HH&M and Rodriguez, as it is undisputed that those attorneys previously had been discharged from their representation of plaintiffs in the underlying action before the action was dismissed.

Insofar as the defendant Langella seeks dismissal of the complaint for failure to state a cause of action against him, it is alleged in the complaint that the plaintiffs retained the defendant Langella on or about August 8, 2006. Notwithstanding the indication that plaintiffs appeared *pro se* on the motion to vacate their default, the defendant Langella admits that he prepared and filed the Order to Show Cause and supporting papers in favor of plaintiffs' motion to vacate their default and restore the action to the trial calendar. The subsequent order of the Court dated November 16, 2006 (Molia, J.) denying the motion noted that the plaintiffs "failed to meet the legal standard to permit vacatur of their default" by failing to present any proof regarding the merits of the underlying action. While the defendant Langella does not dispute that the motion papers failed to demonstrate that the plaintiffs possessed a meritorious cause of action, the defendant contends that such failure can not be held to have been the proximate cause of plaintiffs' damages.

To recover damages for legal malpractice, the plaintiffs must establish that the attorney's negligence was a proximate cause of the loss sustained, that the plaintiffs incurred damages as a direct result of the attorney's actions, and that the plaintiffs would have been successful in the underlying action if the attorney had exercised due care (*Saferstein v Klein*, 250 AD2d 831, 672 NYS2d 799 [2d Dept 1998]). Here, there is no doubt that plaintiffs' actual damages, if any, were sustained when their action was dismissed for their failure to appear for trial. The issue

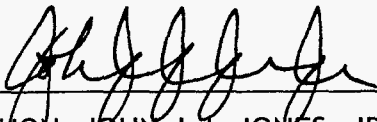
before this Court is whether, as a matter of law, it can be held that the alleged failure of defendant Langella to address the merits of plaintiffs' underlying claim was a proximate cause of plaintiffs' damages and whether plaintiffs would have been successful in vacating their default if Langella had exercised due care. For reasons set forth herein, this Court concludes that, as a matter of law, plaintiffs can not demonstrate that Langella's alleged negligence was a proximate cause of their damages and, therefore, the complaint fails to state a cause of action against the defendant Langella.

To vacate their default in appearing for trial, the plaintiffs were required to demonstrate both a reasonable excuse for the default as well as the merits of their claim, and a Court has discretion whether to accept law office failure as a reasonable excuse (*see Fleet Mech. Serv. Corp. v Romaz Props.*, \_\_\_ AD3d \_\_\_, 864 NYS2d 168 [2d Dept 2008]; *see also Watson v New York City Trans. Auth.*, 38 AD3d 532, 832 N.Y.S.2d 240 [2d Dept 2007]). In her papers submitted to the trial court in support of the motion to vacate plaintiffs' default, plaintiff Lisa DiGiacomo Frangione set forth the following as her excuse for the default:

After receiving notice that my attorneys Hankin, Handwerker & Manzel [sic] had been relieved on the case I contacted my cousin Stacey Rinaldi Guzman of the Law Office of Stanton & Guzman located at 585 Stewart Avenue, Garden City, NY. At that time, I discussed the case with my cousin and she advised me that she would consider handling the case and needed to discuss it with her partner. Additionally, my cousin was at all times fully aware of the pending court date and assured me that an adjournment would be obtained on my behalf. As a result, and based on said conversation I did not appear at the next scheduled court date of July 12, 2006. . .

It can not be established as a matter of law that plaintiff's explanation constituted a reasonable excuse for her default. Although the determination of what constitutes a reasonable excuse lies within the sound discretion of the trial court, movant must submit supporting facts in evidentiary form sufficient to justify the default (*see Incorporated Vill. of Hempstead v Jablonsky*, 283 AD2d 553, 725 NYS2d 76 [2d Dept 2001]). In this case, plaintiff's vague affidavit did not establish that plaintiffs' failure to appear for trial on two occasions was attributable to excusable law office failure (*see Grinkorn v Seeley*, 30 AD3d 376, 816 NYS2d 549 [2d Dept 2006]). Consequently, plaintiffs can not demonstrate as a matter of law that they would have prevailed on their motion even if they had shown the merits of the underlying claim.

DATED: 30 Oct. 2008



HON. JOHN J.J. JONES, JR.

J.S.C.

CHECK ONE:  FINAL DISPOSITION

NON-FINAL DISPOSITION