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

PRESENT: O. PETER SHERWOOD PART 61
*Justice*

ROSOLINO MANGANO and ANNA MANGANO,

Plaintiffs,

-against-

MICHAEL MANTELL,

Defendant.

INDEX NO. 112764/07

MOTION DATE Sept. 21, 2009

MOTION SEQ. NO. 003

MOTION CAL. NO. 58

The following papers, numbered 1 to 10 were read on this motion for summary judgment

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1-3 |
| Answering Affidavits — Exhibits | 4-7 |
| Replying Affidavits | 8-9 |
| Sur-Reply Affidavit | 10 |

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, defendant's motion for summary judgment dismissing the complaint and plaintiffs' cross motion for summary judgment dismissing defendant's counterclaim are decided in accordance with the accompanying decision and order.



Dated: 12/23/09

O. PETER SHERWOOD, *J.S.C.*

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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ROSOLINO MANGANO and ANNA MANGANO

Plaintiff,

-against-

MICHAEL MANTELL,

Defendant.

----------X

DECISION AND ORDER

Index No. 112764/2007



O. PETER SHERWOOD, J.:

In this legal malpractice action, defendant Michael Mantell ("defendant" or "Mantell") moves for an order granting summary judgment in his favor dismissing the complaint. Plaintiffs Rosolino Mangano and Anna Mangano ("plaintiffs") oppose the motion and cross move for summary judgment in their favor dismissing defendant's counterclaim. For the reasons that follow, defendant's motion is granted, the complaint is dismissed and the cross motion is denied as academic.

***Procedural Background***

In their complaint, plaintiffs allege that Mantell's legal representation of them in an underlying landlord and tenant non-payment proceeding ("the underlying proceeding") constitutes legal malpractice and also that Mantell breached his contract with them by failing to provide adequate representation in the underlying proceeding. Defendant interposed a verified answer in which he generally denies the material allegations of the complaint, interposes eleven affirmative defenses and counterclaims for punitive damages in a sum not less than $500,000.00 on the ground that plaintiffs instituted this legal malpractice action in bad faith, with malice and to harass him when they have no basis in law or fact to proceed against him.[1]

The instant action was reassigned to this Part 61 on September 25, 2009 after: (1) discovery was allegedly completed, (2) plaintiffs had filed the Note of Issue, (3) defendant had moved to strike

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[1]Plaintiffs allege that prior to commencing this action they each executed a durable power of attorney naming their son Sam Mangano as their attorney-in-fact to act with respect to claims and litigation to enable him to act on their behalf in initiating this lawsuit (Dweck Sur-Reply Aff. ¶ 4).

the Note of Issue, and (4) the instant motion and cross motion were filed. Defendant sought to strike the Note of Issue on the ground that plaintiffs had not yet been produced for deposition. By decision and order dated November 20, 2009, the Court denied the motion to strike finding that discovery was stayed while the instant summary judgment motion was pending and that directing the conduct of the plaintiffs' depositions when the action could potentially be resolved would serve no useful purpose.

***The Underlying Landlord/Tenant Proceeding***

The underlying proceeding, which serves as the basis for this legal malpractice claim, is a nonpayment proceeding commenced in February 2004 by plaintiffs, as owners of a residential apartment building located at 462 Amsterdam Avenue, New York, New York ("the building"), against rent-stabilized tenant, Michael Burke ("Burke" or "tenant"), who had resided in apartment #5R in the building for over 30 years (*Mangano v Burke*, Index No: L&T #56681/04, Civil Ct. N.Y. Co.). At the time the underlying action was commenced, Burke, a 68-year-old senior citizen for whom Social Security provided his main source of income, was delinquent in the payment of two months rent at a monthly rate of $305.29 for total rental arrears of $635.58. Although the amount owed was not substantial, Mantell contends that Sam was more interested in regaining possession of the apartment given the low rent than in recovering the rental arrears and instructed him to do whatever was legally possible to evict Burke (Mantell Aff. ¶ 10). Thus, Mantell paints the underlying action as not just a simple non-payment proceeding, but as a more complex action to recover a low-rent, stabilized apartment from a long-term tenant. What began simply enough transformed over a three-year course of vigorously contested litigation into an expensive, time consuming and ultimately unsuccessful result for plaintiffs. In the end, Burke remained in the apartment, and plaintiffs paid Mantell approximately $40,000.00 in legal fees, and Burke, as the prevailing party in the underlying litigation, over $47,000.00 in attorney's fees. It appears that the unbalanced ratio between the amount at stake and the result obtained prompted the plaintiffs to initiate this legal malpractice action. However, an adverse result does not necessarily equate to malpractice. In determining whether Mantell is liable for legal malpractice, a detailed recitation of the course of the underlying proceeding is essential.

Mantell states that he specializes in landlord/tenant litigation. Plaintiffs initially retained him in 1999. Over the course of the next eight (8) years, he handled many landlord/tenant actions on their behalf (*id.* ¶¶ 3-6). Although plaintiffs were the owners of record of the building, Mantell contends that their son, Sam Mangano ("Sam"), handled most of plaintiffs' business affairs related to litigation and he dealt almost exclusively with Sam with respect to the underlying proceeding. Mantell did not have a written retainer agreement with plaintiffs. Plaintiffs agreed that Mantell would bill them at his hourly rate based upon the legal services he provided and would send monthly invoices to Sam's office (*id.* ¶¶ 5-6). He contends that plaintiffs never complained about either the quality of his services, the time expended or his fees.

Burke failed to timely appear in the underlying litigation. Mantell sought to obtain a warrant of eviction predicated upon such default. Plaintiffs' application for a warrant was rejected on two occasions for procedural defects. Plaintiffs appealed and the Appellate Term, First Department issued an order, dated July 12, 2004, directing the Civil Court to enter a judgment of possession in plaintiffs' favor and issue a warrant of eviction.

Following the Appellate Term order, Burke paid the rent arrears resulting in Mantell withdrawing the request to the Marshall to issue a warrant. In a letter dated July 19, 2004, Mantell advised Sam's secretary, Victoria Lipani of BM Group, Inc., of these events and requested a copy of Burke's lease so as to determine if it contained the standard clause for an award of attorney's fees incurred in the nonpayment proceeding. Mantell further advised that if it did, the next bill to the tenant should include the amount Mantell had billed to plaintiffs for the nonpayment proceeding and, if Burke did not pay the entire amount, further action would be taken to collect the amount of rent plus attorney's fees. Burke's check bounced resulting in Mantell restoring the proceeding to have the warrant of eviction issued. It was executed on August 12, 2004 and Burke was evicted.

Two days later, Burke *pro se* moved by Order to Show Cause to vacate his default and restore him to possession, claiming that he had not been properly served with the three-day notice. Although Mantell argued that such a defense was not cognizable after the execution of a warrant, the Court granted Burke's motion to the extent of setting the matter down for a traverse hearing. On the scheduled hearing date, the parties, now both represented by counsel, entered into a stipulation whereby the scheduled traverse hearing and Burke's Order to Show Cause were marked off the

calendar, Burke was restored to possession of the apartment provided he pay outstanding rental arrears in the amount of $2,492.32 and continue to pay ongoing use and occupancy at the rate of $305.29 per month during the pendency of the proceeding, and a motion schedule was set. It was agreed that if plaintiffs were successful on their reargument motion they could reexecute the warrant.

In the interim, Burke's attorney sought to have Mantell discontinue the proceeding, alleging "sewer service". Specifically, counsel averred that the person, "Ms. Cafuoco", upon whom service of the three-day demand is alleged to have been made, was an elderly white woman who died three years before such service and, in any event, did not meet the description contained in the affidavit of service which describes the skin color of the person served as "Black". Indeed, Burke stated that during his 30-year tenancy no black person had ever resided in the building. When Mantell did not respond to the request, Burke's attorney, in keeping with the stipulated schedule, filed a motion to dismiss the proceeding, for an award of attorney's fees incurred in defending the proceeding and a hearing to determine the amount of attorney's fees or, alternatively, for the conduct of a traverse hearing on the validity of service.

Mantell moved for leave to renew and/or reargue the order setting the matter down for a traverse on the ground that the Court lacked jurisdiction to restore Burke to possession after the warrant was executed except upon a showing of wrongful conduct on the part of plaintiffs or, alternatively, that the Court should provide him the opportunity to conduct an investigation, including the conduct of a deposition of Mr. Burke, to demonstrate Burke's fraudulent and deceptive conduct with respect to service. Burke strongly opposed the motion.

In an order dated October 15, 2004, the Housing Court (Ulysses B. Leverett. J.) rejected plaintiffs' argument and held that in appropriate circumstances it may vacate a warrant and restore a tenant to possession even after execution of the warrant. The Court held Burke's motion to vacate his default and dismiss this proceeding in abeyance pending the determination of personal jurisdiction after a traverse hearing. After several adjournments, some due to the non-appearance of the process server, and motion practice to quash a subpoena served upon Sam by Burke's attorney and Burke's cross motion to impose sanctions and fees[2], the traverse hearing was held before Judge

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[2]By order dated December 20, 2004, the Court (Sheldon J. Halprin, J.) granted the motion to quash the subpoena served upon Sam and denied Burke's cross motion for sanctions and fees.

Michelle D. Schreiber of the Housing Part of the New York County Civil Court. Finding that the process server lacked credibility, the Court concluded in a post-hearing written decision and order dated April 19, 2005, that plaintiffs did not sustain their burden of proof as to propriety of service and she dismissed the proceeding.

Mantell moved on plaintiffs' behalf for an order pursuant to CPLR § 4404 (b) for reconsideration and reversal of the Court's order following the traverse hearing. Burke separately moved by Order to Show Cause for reargument as to that branch of his motion as sought an award of attorney's fees. The Court (Schreiber, J.), by decision and order dated June 7, 2005, denied plaintiffs' motion for reconsideration as untimely, but, in any event, found that plaintiffs failed to demonstrate that the Court had overlooked any facts or relevant law in reaching its decision. The Court granted Burke's motion for leave to reargue and, upon reargument, found a judicial admission by plaintiffs concerning the attorney's fee in the lease (since the actual lease had not been produced) and, upon that basis, set the matter down for a hearing to determine the amount of attorney's fees.

Thereafter, Mantell pursued an appeal to the Appellate Term from so much of the June 7, 2005 order as granted Burke's motion for attorney's fees. The hearing on Burke's attorney's fees application was stayed while such appeal was pending. On December 14, 2006, the Appellate Term affirmed Judge Schreiber's order (*Mangano v Burke,* 14 Misc3d 126 [A] [App. Term. 1st Dept. 2006]).

In opposition to Burke's motion, Mantell took the position that Burke was not entitled to an award of attorney's fees as he had not counterclaimed for such an award, failed to produce the lease demonstrating his entitlement to recover attorney's fees and he had acted in bad faith throughout the proceeding putting plaintiffs to enormous expense by "abusing" the judicial system for his own economic gain. Shortly after the adverse ruling of the Appellate Term, Burke's application for attorney's fees was restored to the calendar and was ultimately settled by stipulation, dated January 9, 2007. The stipulation provided that plaintiffs would pay Burke the sum of $47,179.28 in full settlement of Burke's claim for attorney's fees, costs, and interest. Such amount was paid in full by the plaintiffs. In the settlement negotiations, plaintiffs were represented by a second attorney at Mantell's request for reasons that are not clear on this record.

***The Instant Action***

The gravamen of plaintiffs' claim is that Mantell was negligent in his representation of them in the underlying proceeding by: (1) failing to advise them of their potential liability for Burke's attorney's fees if they were unsuccessful in the underlying proceeding; (2) failing to request a copy of the lease prior to commencing the proceeding; (3) failing to retain a competent process server; (4) failing to properly file a Notice of Appeal from the order entered after the traverse hearing; and (5) permitting plaintiffs to continue with the underlying proceeding upon the false hope they would regain possession of the apartment. Essentially, plaintiffs contend that had Mantell exercised the proper skill and care in the practice of law they would not have sustained the substantial liability of approximately $87,000.00 in legal fees in the underlying proceeding.

Mantell now moves for summary judgment dismissing the complaint. He contends that this is simply a case about a former client displeased with an unfavorable outcome of litigation, namely having to retain a rent stabilized tenant in a valuable apartment and pay his attorney's fees, who belatedly expresses dissatisfaction the result by claiming that his attorney was negligent. Mantell avers that Sam directed the entire course of the underlying proceeding including whether to settle prior to the traverse hearing or proceed with the hearing and continue to contest Burke's being restored to possession. Mantell contends that it was Sam who determined that the adverse decision after the traverse should not be appealed. Mantell denies that at any time during the protracted litigation did he guarantee any particular result or outcome. Rather, he advised Sam of the pros and cons of taking particular actions, together with evaluating the strengths and weaknesses of the case. Mantell directs the court's attention to Sam's testimony at his deposition in which he acknowledged that defendant never promised him a hundred percent chance of success in the underlying litigation. In sum, Mantell argues that plaintiffs' complaint, as amplified by the bill of particulars, together with Sam's deposition testimony, consist of nothing more than conclusory, self-serving statements which do not establish any act or failure to act on his part which negatively influenced the underlying proceeding and that "but for" such actions or inactions plaintiffs would have succeeded in the underlying proceeding. Nor is there any other proof in the record to support their claim of negligence against him. Mantell also faults plaintiffs' failure, as named parties, to appear for depositions despite court orders.

In opposition to the motion and in support of their cross motion for summary judgment dismissing defendant's counterclaim, plaintiffs argue, in the first instance, that defendant's motion must be denied as untimely. To support this argument, plaintiffs observe that the preliminary conference order provided that dispositive motions were to be made within 45 days of the filing of the Note of Issue, which in this case was March 19, 2009, and, consequently, defendant's motion filed on June 12, 2009, thirty-nine (39) days after expiration of the 45-day time frame, is time-barred.

Plaintiffs also submit an affidavit from Sam in which he contends that throughout the underlying proceeding Mantell "continued to express to me that he felt * * * positive he could move forward with the Burke case and regain the apartment" (Sam's Aff. ¶ 5). He further states that: "[H]ad I been advised in a timely fashion that plaintiffs could be responsible for not only his attorneys' fees * * * and the attorneys' fees of Burke * * * , I never would have continued to pursue the claims * * * It was Mantell, through his multiple representations to me, that caused this otherwise simple nonpayment proceeding to spiral out of control and cost in excess of $87,000.00 and never regain possession of the apartment." (*Id.*). Sam references a letter, dated December 16, 2004, from Burke's attorney to Mantell advising that if plaintiffs decided to "cut their losses" and discontinue the proceeding, Burke would consent to such voluntary discontinuance of what he described as "not a winnable fight" and would not pursue a claim for reimbursement of his attorney's fees. On the basis of that letter, Sam contends that Mantell knew their chances of prevailing were slim, but still advised him to press on with the proceeding as he was sure they could regain possession of the apartment.

Plaintiff's attorney in his affirmation in support of the cross motion argues that the defendant's counterclaim should be dismissed as there is no cause of action in New York for punitive damages.

In reply, defendant contends that the untimeliness of his motion is attributable to plaintiffs' premature filing of the Note of Issue and his need to file a motion to strike the note of issue as discovery was not complete. He reiterates his position that plaintiff has failed to make out their claim of legal malpractice or to raise a triable issue that warranted denial of defendant's motion. Particularly, defendant states that plaintiffs fail to show how "but for" his negligence they would have been successful in the underlying proceeding. Mantell adheres to his contention that Sam

consistently pursued a "cost-benefit analysis" arguing that the cost of litigation was worth the benefit of regaining possession of the property and maintains that the litigation dragged on for three years at Sam's urging.

Defendant also raises a new argument that plaintiffs cannot prove that they sustained damages as a result of his actions. Mantell submits proof that all of his legal fees for services in the underlying proceeding were paid by various Mangano family corporate entities such as BM Group, Inc. or 462 Amsterdam, LLC and, as such, he claims that plaintiffs cannot prove that they were personally damaged. Defendant argues at length about the defectiveness of plaintiffs' opposition papers and cross motion on the ground that no affidavit is submitted from the name plaintiffs who have continued to refuse to be deposed and that Sam's affidavit may not serve as a substitute for an affidavit of an individual with personal knowledge. Defendant goes so far as to claim that the malpractice claims are being made by Sam in his individual capacity and not on behalf of his parents who defendant suggests may be ignorant of this lawsuit. Defendant urges this court to reject both plaintiffs' attorney's affirmation and Sam's affidavit as lacking probative value.

While acknowledging that there is no provision in the CPLR for a sur-reply, plaintiffs seek leave of the court to submit a sur-reply in order to address an argument raised for the first time in defendant's reply papers.

***Discussion***

***Timeliness of Defendant's Motion***

CPLR § 3212 (a) provides that in the absence of a court order or rule to the contrary, a motion for summary judgment "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of the court on good cause shown." Here, the preliminary conference order substantially shortened the CPLR 3212 filing clock to a 45-day post note of issue filing deadline. A motion court lacks discretion to entertain even non-prejudicial meritorious post note of issue summary judgment motions made after a court-imposed deadline even if made within the statutory maximum of 120 days except upon a showing of good cause. The Court of Appeals in *Brill v City of New York* (2 NY3d 648 [2004]) indicated that "good cause" for delay in making a motion required "a satisfactory explanation for the untimeliness - rather than simply permitting

meritorious nonprejudicial filings, however tardy * * * No excuse at all, or a perfunctory excuse cannot be 'good cause'" (at 652).

Defendant has articulated sufficient "good cause" for his late filing of the summary judgment motion. Although it is questionable whether the depositions of the individual plaintiffs are material, relevant or necessary to this action in light of the fact it is not disputed that nearly all of Mantell's dealings in the underlying proceeding were with Sam rather than with his parents, defendant had noticed and consistently sought to conduct such depositions. Nevertheless, plaintiffs filed the Note of Issue before such depositions were held. Defendant was then faced with the challenge of both timely moving to vacate the Note of Issue and also meeting an extremely abbreviated deadline for making a motion for summary judgment. He chose to first make the motion to vacate the Note of Issue since if he were successful and the Note of Issue were vacated, his time for moving for summary judgment would not begin to run until such time as the Note of Issue was re-filed. In reaching this determination, the Court notes that the delay in question is minimal.

***Plaintiffs' Legal Malpractice Claim***

The burden on a motion for summary judgment rests initially upon the moving party to come forward with competent proof in admissible form to demonstrate the absence of any material issues of fact and such party's entitlement to judgment as a matter of law (*see, e.g., Alvarez v Prospect Hosp.*, 68 NY2d 320 [1987]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). If this burden is not satisfied, the court must deny the relief sought regardless of the sufficiency of the opposing papers (*id.*). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action (*see, e.g., Zuckerman v City of New York*, 49 NY2d 557 [1980]). Mere conclusory statements, expressions of hope or unsubstantiated allegations are insufficient to defeat the motion (*see, Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]).

In a legal malpractice action, the movant must present admissible evidence establishing that plaintiff is unable to prove one of the elements of a malpractice cause of action (*see, Crawford v McBride*, 303 AD2d 442 [2d dept 2003]; *Suydam v O'Neill*, 276 AD2d 2000]). In order to prevail in an action to recover damages for legal malpractice, a plaintiff must establish that the defendant

attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession, and that such breach of this duty proximately caused the plaintiff to sustain actual and ascertainable damages (*see, Leder v Spiegel,* 9 NY3d 836, 837 [2007], *cert* denied 128 S Ct 1696 [2008]; *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer,* 8 NY3d 438, 442 [2007]). With respect to the element of causation, a plaintiff must show that he or she would have prevailed on the merits of the underlying action or would not have incurred any damages "but for" the attorney's negligence (*id.*). Thus, the plaintiff's burden in a legal malpractice case is a "heavy one. The plaintiff must prove first the hypothetical outcome of the underlying litigation and, then, the attorney's liability for malpractice in connection with that litigation" (*Lindeman v Kreitzer*, 7 AD3d 30, 34 [1st Dept 2004]). This means the plaintiff must prove a "case within a case" (*id.*). The plaintiff may prove either branch of the disjunctive on the element of causation (*see, Home Ins. Co. V Liebman, Adolf & Charme,* 257 AD2d 424 [1st Dept 1999]). Increased damages incurred by the client because of the attorney's negligence in handling an action or other matter can be charged to the attorney (*see, DePinto v Rosenthal & Curry,* 237 AD2d 482 [2d Dept 1997]).

However, an attorney's error in judgment or selection of one of several reasonable courses of action does not necessarily constitute legal malpractice (*see, Rosner v Paley,* 65 NY2d 736 [1985]). If a client's legal malpractice claim amounts only to criticism of counsel's strategy it may be dismissed as insufficient (*see, Palazzolo v Herrick, Feinstein, LLP,* 298 AD2d 372 [2d Dept 2002]).

Here, defendant in the first instance has established his prima facie case by demonstrating through his correspondence with plaintiffs' son, Sam, who was acting as their agent, that he advised plaintiffs continually through the course of the underlying proceeding of the actions he was taking, the pros and cons of the particular course of action and the likelihood of success. One of plaintiffs' negligence claims is that Mantell failed to file a Notice of Appeal from the adverse ruling after traverse. Prior to the traverse, Mantell wrote to Sam that "the chances of succeeding on the traverse are about 50/50, depending on the personality of the judge * * * If we win the traverse, we should be able to sustain landlord's right to possession. However, 35 years of experience has taught me that the system is not predictable" (Mantell Reply Aff. Ex. "I", 12/29/04 letter). Before the traverse hearing was completed, Mantell again wrote to Sam indicating "it is more likely than not that the

judge on the traverse, Judge Schreiber, will believe the process server and disbelieve Mr. Burke". However, Mantell went on to advise Sam what would happen if they lost on the traverse issue, to wit, that the case would be dismissed, and that they could then take an appeal. He specifically stated that in that event he "would not appeal until [Sam] obtained a second opinion, because of the great expense" (Mantell Reply Aff. Ex. "J", 2/11/05 letter). Again Mantell evaluates the chances of success stating that they had a "49 to 51 percent chance of winning the entire case" (*id.*) and states that Sam needed to decide whether to continue with the case "at considerably more cost, in which [plaintiffs'] chances of success [were] problematic, or simply drop the case and let the tenant go back in" (*id.*). It is the final paragraph of the letter that raises some question as to Mantell's advice to Sam or his strategy. He states that he "told the judge, in Court, that there was a conflict of interest between my client and myself, in that my client [Sam] is interested in what was economical, whereas I am interested in pursuing justice * * * preserving the rights of a landlord * * * not only [Sam's] right to possession, but expenses which [Sam] incurred because of the tremendous amount of time and effort [Mantall] had to put into this case because of the tenant's obviously disingenuous attempts to have the whole case thrown out by lying, after his intentional defaults" (*id.*). After the adverse decision on the traverse was rendered, Mantell wrote to Sam's secretary Vicki that an appeal of that order would likely be unsuccessful since it turned on an issue of witness' credibility which was generally left to the hearing judge to resolve. Review of this correspondence undermines plaintiffs' claim as to defendant's negligent failure to file a Notice of Appeal from the traverse given the assessment that such appeal had little chance of success and would be very costly.

Plaintiffs' claim as to Mantell's negligence in failing to request a copy of Burke's lease prior to commencing the underlying proceeding is puzzling since it is unclear how they were damaged as a result. Although it might have been advisable for Mantell to have a copy of the lease before making a claim for legal fees, he was apparently relying on experience that the standard boilerplate lease contains a provision for the recovery of attorney's fees to the prevailing party in a dispute arising from a residential lease. The Court is aware that the order finding that Burke was entitled to recover attorney's fees was predicated upon Mantell's statement as to such provision in the lease . Nevertheless, any claimed damages stemming from Mantell's failure are speculative at best.

Plaintiffs next contend Mantell was negligent in his choice of process server. The Court of Appeals has held that the duty owed by an attorney to exercise care in the service of process is nondelegable and accurate service of process is an integral part of the task that an attorney undertakes (*see, Kleeman v Rheingold,* 81 NY2d 270, 275 [1993]). Thus, an attorney is not permitted to evade responsibility for the negligence of a process server by relying on the general rule that a party who retains an independent contractor is not responsible for the independent contractor's negligent acts (*id.*). However, the fact that an attorney may be held vicariously liable for the acts of a process server does not automatically establish such attorney's liability. Here, it is reasonable to conclude that Mantell by choosing a licensed process server fulfilled his duty of due care in such selection unless it can be shown that such process server had a record of complaints and unreliability and, thus, that Mantell deliberately hired a disreputable server (*see, Feldman v Upton, Cohen & Slamowitz*, 190 Misc2d 637, 640 [Dist. Ct., Nassau Co. 2002]). There is no indication in the record of such disreputable conduct by the process server in question. Indeed, Mantell rather than acknowledging that the process server engaged in "sewer service", clearly believed that his process server conducted himself appropriately in effecting service. His correspondence with Sam, as well as the arguments he made in the underlying proceeding, make clear that he believed Burke perjured himself in denying that he was properly served and that the person who accepted service of process on his behalf had colluded with Burke in providing the process server with a false name of a deceased former tenant.

Even if it may be said that Mantell breached a duty owed to plaintiffs by his selection of a negligent process server, the element of causation is lacking. Given that the case involved a long-term and low income tenant who was a senior citizen, it is unlikely that "but for" Mantell's negligence with respect to service plaintiffs would have prevailed in the underlying proceeding. Courts are generally reluctant to deprive tenants of their leaseholds except where such harsh result is clearly warranted. At bar, the default in the payment of two months rent by a tenant of limited means, and in the absence of any ongoing record of chronic delinquency in the payment of rent, would likely not have resulted in the issuance of a warrant of eviction even if service was found to be proper.

Plaintiffs last two claims of negligence, *i.e.*, failing to advise them of their potential liability for Burke's attorney's fees if they were unsuccessful in the underlying proceeding and permitting plaintiffs to continue with the underlying proceeding upon the false hope they would regain possession of the apartment are equally without merit. Sam is an experienced and sophisticated businessman who was responsible for the day-to-day operation of his parents' real estate businesses involving several corporate entities. He had been involved in other landlord/tenant litigation and ostensibly was familiar with the standard leases which were provided to the tenants in the buildings which he managed. Such standard pre-printed leases generally contain reciprocal provisions for recovery of attorney's fees in actions arising out of the lease. In any event, the correspondence between Mantell and Sam supports a finding that Sam was apprised early on of the risk of having to pay Burke's attorney's fees if plaintiffs failed to prevail in the underlying proceeding. The question remains whether Mantell is primarily responsible for continuing to pursue a losing case at substantial cost in time and money to the plaintiffs. While Mantell may have been more optimistic in evaluating the odds of succeeding than the circumstances warranted, nothing in the record supports a finding that Mantell deceived plaintiffs about the likelihood of success. If blame for the exercise of poor judgment is to be fairly placed, it must be shouldered equally by both parties.

The Court declines to address defendant's arguments regarding plaintiffs' lack of proof as to damages which are raised for the first time in his reply papers (*see, Guzman v Mike's Pipe Yard,* 35 AD3d 266 [1st Dept 2006]).

The burden then shifts to plaintiffs to offer evidence in admissible form to show that there are material issues as to the elements of malpractice which defendant claims they are unable to prove (*Zuckerman v City of New York,* 49 NY2d 557, *supra*). In order to meet their burden on the duty of care, plaintiffs are generally required to submit proof in the form of an expert opinion to establish the standard of professional care and skill that defendant allegedly failed to meet (*see, Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo,* 259 AD2d 282 [1st Dept 1999]). However, the requirement of expert evidence may be dispensed with where the ordinary experience of the fact finder provides a sufficient basis for evaluating the adequacy of the professional service (*id.* at 283). Here, it is at least arguable if plaintiffs' position is credited that expert opinion is not necessary to evaluate defendant's duty to properly advise them of controlling legal precedents and the risks

associated with any course of action. However, plaintiffs fail to submit any evidentiary proof to raise a triable issue as to Mantell's alleged negligence or as to causation. Rather, it appears that the conduct which plaintiffs contend evidences negligence is simply a losing strategy, albeit, a very costly one. On that basis, plaintiffs' cause of action for legal malpractice must be rejected. While plaintiffs' regrets about this strategy is well founded, it is not a sufficient basis upon which to impose liability upon defendant.

With respect to the second cause of action for breach of contract, such claim is duplicative of the malpractice cause of action and must similarly be rejected.

In light of this determination, plaintiffs' cross motion to dismiss defendant's counterclaim shall be denied as moot.

***Conclusion***

Based upon the foregoing discussion, it is hereby

**ORDERED,** that defendant's motion for summary judgment dismissing the complaint is granted and the complaint is dismissed without costs or disbursements; and it is further

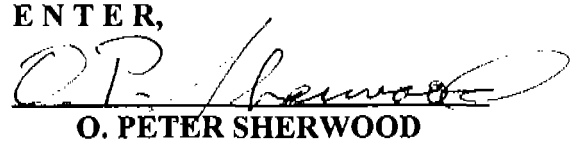
**ORDERED,** that the Clerk is directed to enter judgment accordingly; and it is further

**ORDERED,** that the plaintiffs' cross motion is denied as moot.

This constitutes the decision, order and judgment of the court.

**DATED: December 23, 2009**

**ENTER,**



**O. PETER SHERWOOD**
**J.S.C.**