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6.3.10

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

PRESENT: Edmead PART 35

Justice

Garcia, Paul

v.

Issler, Harry

INDEX NO. 108654/08

MOTION DATE

MOTION SEQ. NO. 03

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the Issler defendants' motion for summary judgment is granted solely to the extent that plaintiff's claim that the full record was not submitted on appeal is dismissed. In all other respects, the motion by the Issler defendants dismissing the Complaint as asserted against them is denied; and it is further

ORDERED plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 6/1/10

HON. CAROL EDMEAD J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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PAUL GARCIA,

Index No. 106895/06

Plaintiff,

-against-

DECISION/ORDER

BERNS DEKAJLO & CASTRO, DEKAJLO LAW OFFICES, and LLOYD M. BERNS, ESQ., EUGENE CASTRO, ESQ., OLEH N. DEKAJLO, ESQ., HARRY ISSLER and HARRY ISSLER, PLLC,

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

This case brings to mind Charles Dickens's *Bleak House*.

The genesis of this legal malpractice action originates in 1988 at the World nightclub located in Manhattan, and comes to this Court after being "active" in one form or another, for the past 21 years.

Defendants Harry Issler ("Issler") and Harry Issler, PLLC (the "Issler firm") (collectively, the "Issler defendants") now move for summary judgment dismissing the Complaint of the plaintiff Paul Garcia ("plaintiff").

Factual Background

In December 1988, non-party David W. Ross ("Ross") allegedly had an accident and sustained injuries at the World Night Club (the "World" or "nightclub"), which was then jointly owned by Frank Roccio (Roccio) and Peter Frank (Frank). As a result, in November 1989, Ross brought suit against the World, El Mundo, Inc., and plaintiff, although plaintiff had not owned the World Club at the time of the accident. Plaintiff's then personal attorney, Oleh N. Dekajlo,

Esq. ("Mr. Dekajlo") of Berns Dekajlo & Castro ("Berns Dekajlo"), who had represented plaintiff in the sale of his interests in the World nightclub, allegedly received a copy of the Summons and Complaint in October or November 1989. Allegedly, Berns Dekajlo did not notify plaintiff that Ross had sued him personally.[1]

In August 1990, Ross moved for default judgment against plaintiff, alleging that plaintiff was personally served on November 2, 1989 at 333 Fifth Avenue, Apt 2D, New York, New York and failed to appear in the action. Berns Dekajlo did not oppose the motion and the Court granted default judgment against plaintiff on August 8, 1990 on the issue of liability.

Ross served upon Berns Dekajlo and upon plaintiff by certified mail, return receipt requested, notice of the inquest on damages to be held on November 12, 1991; plaintiff claims that Berns Dekajlo never notified him of the inquest, and that his signature on the return receipt was forged. The inquest was held where Mr. Dekajlo appeared on behalf of plaintiff. Justice Gammerman conducted the inquest and entered judgment against plaintiff for $1.25 million. Ross served a Notice of Settlement on Berns Dekajlo stating that the judgment would be filed on January 1, 1992, and Berns Dekajlo allegedly failed to notify plaintiff of same. Ross served notice of entry of the judgment upon Berns Dekajlo on December 1, 1992.

Thereafter, a Massachusetts sheriff served plaintiff with a summons indicating that a judgment had been entered against him, and plaintiff notified Berns Dekajlo claiming that he never heard of Ross's lawsuit.

In October 2001, Berns Dekajlo moved to vacate the judgment against plaintiff, which

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[1] It is alleged that Mr. Dekajlo advised Ross's attorney that plaintiff received the pleadings, and that if Ross discontinued the action, plaintiff would inform Ross who really operates the nightclub. On February 21, 1989, Ross's attorney declined to discontinue the action.

was granted on Ross's default. However, Ross's default was vacated and a traverse hearing on service of the pleadings upon plaintiff was held. A Traverse Hearing was held on December 11, 2002 by a Special Referee, at which Berns Dekajlo and plaintiff participated. By order dated December 10, 2003, the Court (York, J.) confirmed the Special Referee's Report finding proper service upon plaintiff (the "December 10, 2003 order").[2]

Thereafter, in March 2004, plaintiff retained the Issler defendants "for the purposes of appealing the order . . . dated December 10, 2003 and . . . bringing on a motion to renew and/or reargue the motion which was decided by the aforesaid order (the "Retainer Agreement").

On April 1, 2004, the Issler defendants moved to reargue the motion to confirm the Special Referee Report and appealed the December 10, 2003 order. The Court (York, J.) denied reargument, stating that the Special Referee's finding had substantial support. The Appellate Division, First Department affirmed the December 10, 2003 order.

Plaintiff then commenced this legal malpractice action against Berns Dekajlo and the Issler defendants. As against Berns Dekajlo, plaintiff alleges, *inter alia*, that this firm failed to oppose Ross's motion for default judgment and failed to notify plaintiff of same. Plaintiff alleges that he was not personally served in New York, because he was residing in California at the time of service. As against the Issler defendants, plaintiff alleges that these defendants failed to protect his interests as to the vacatur of the default judgment in that said defendants (1) did not include in the Record on Appeal any of the exhibits attached to the underlying motion papers

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[2] The Special Referee noted that plaintiff's "admission that he fit the physical description of the person identified in the affidavits of service as having been served, as well as his admission that he owned a coop apartment at the subject premises, but had not been subletting it at the time of service" (Report of the Special Referee, page 9, ¶ 4).

even though the exhibits formed part of the record upon which the Court (York, J.) confirmed the Special Referee's report; and (2) did not move to renew the prior motion and attempt to introduce new evidence which had not been included in Berns Dekajlo's motion to vacate or in opposition to Ross's motion to confirm the Special Referee's Report.

In support of their dismissal motion, the Issler defendants argue that plaintiff failed to demonstrate that "but for" the Issler defendants' alleged malpractice, he would have achieved a more favorable outcome in the underlying action. The Issler defendants claim that they correctly filed a motion to reargue rather than filing a motion to renew and reargue, since the "new evidence" *i.e.*, affidavits from plaintiff's California landlord, Jerry Monkarsh ("Monkarsh"), roommate, Anita Iverson ("Iverson"), and neighbor, William Plasskett ("Plasskett"), were already available to Berns Dekajlo when the Traverse Hearing was held and could have been reasonably discovered and presented at the time plaintiff opposed Ross's Motion to Confirm. Thus, procedurally (and ethically), the Issler defendants could not have argued that this was "new evidence," as such facts did not constitute newly discovered evidence within the meaning of CPLR §2221. Courts routinely deny a motion to renew where such motion is based on evidence, which, with due diligence, could have been discovered earlier or was already in the possession of the movant. Thus, renewal was inappropriate, as any such motion would not have contained any new facts unavailable at time of original motion.

Further, plaintiff would have been unable to provide a reasonable excuse for his failure to include this alleged "new evidence," on the prior motion. Plaintiff had no justification as to why Berns Dekajlo failed to present the affidavits and testimony of Monkarsh, Iverson or Plaskett, which were available as of October 2003 when Berns Dekajlo opposed Ross's Motion to

Confirm.

According to the Issler defendants, plaintiff's underlying file contained a letter, dated June 9, 2002, from Iverson attesting that she resided with plaintiff from September 1989 to 1992 in Malibu, California, and on March 3, 2010, Iverson testified as a non-party witness to this effect. Iverson also testified that while she was never previously contacted to give testimony on behalf of plaintiff in the Ross action, she would have been willing to provide an affidavit when the Traverse Hearing was held and when the Opposition to Ross's Motion to Confirm was made with respect to plaintiff's whereabouts in the fall of 1989. Berns Dekajlo failed to request an affidavit from Iverson at the time plaintiff opposed Ross's Motion to Confirm.

Further, as to Plaskett, on March 3, 2010, he testified that he lived in California next door to plaintiff in November 1989. Plaskett was available to provide an affidavit and testify in 2001 or 2002 at the time plaintiff opposed Ross's Motion to Compel as to plaintiff's whereabouts as of November 1989, but testified that he was not contacted to do so.

With regard to plaintiff's landlord Monkarsh, Monkarsh was not called by plaintiff herein as a non-party witness. However, plaintiff produced during discovery a letter from Monkarsh, dated November 14, 2001, that indicates that plaintiff was a tenant of Monkarsh in Malibu, California for four years beginning in October 1989. There is nothing indicating that Monkarsh was not available to provide an affidavit and/or testimony attesting to plaintiff's residence in November 1989 in opposition to Ross's Motion to Confirm the Special Referee's report in October 2003, as well as at the time of the underlying Traverse Hearing.

Plaintiff also testified that he asked Mr. Dekajlo what he "would need to prepare" and whether he "should [] bring in witnesses and . . . as much physical evidence as [he] could," and

was told "not to bother because the process server was dead." (The process server, John Barna ("Barna") was in fact live and well, and appeared at the Traverse Hearing.) Further, plaintiff testified that although Mr. Dekajlo did not tell him not to bring documents, he was told not "to bother to bring witnesses." Plaintiff also testified that even though he was not instructed to bring any documents to the hearing that he did in fact bring letters from Iverson and Monkarsh. Plaintiff's contention that he subsequently realized in hindsight that documentary evidence, including the affidavits of Iverson, Plaskett and/or Monkarsh, were needed and should have been included during the Traverse Hearing and/or in opposition to Ross's Motion to Confirm the Special Referee's Report does not constitute a reasonable justification for his failure to previously submit this alleged evidence, especially since he was represented by counsel at that time. As plaintiff failed to show that the affidavits of Plaskett, Iverson, and/or Monkarsh should have been offered on a motion to renew, has been only recently discovered, and was not available to plaintiff at the time of the underlying Opposition to Ross's Motion to Compel, plaintiff's legal malpractice claim against the Issler defendants for failing to move to renew is unsubstantiated, and must be dismissed.

Moreover, even had the underlying court granted leave to renew, which is speculative, plaintiff failed to demonstrate that he would have been successful upon renewal of the motion to confirm the Special Referee's Report, "but for" defendants' alleged negligence. There is no evidence that the three affidavits would have changed the Court's prior determination and confirmation. Plaintiff testified that he neglected to bring documents from California (*i.e.*, bank statements, voter registration, license, credit card statements, phone bill, etc.) to the Traverse Hearing. Further, even had plaintiff provided such documentation, plaintiff's "proof of being in

California at the time of alleged service on November 2, 1989 was weak at best, considering: plaintiff's multiple residencies in New York, Massachusetts and California; plaintiff's transient lifestyle as an actor/model; plaintiff's domicile in New York; and the relatively short airplane flight from California to New York. Iverson testified that plaintiff "was back and forth..." and Plaskett confirmed that plaintiff's "irregular profession" caused him to travel "back east"; Plaskett could not remember specifically if plaintiff was traveling in November 1989. Moreover, even had Iverson, Monkarsh, and/or Plaskett, been available to testify at the Traverse Hearing and/or to provide affidavits in Opposition to Ross's Motion to Confirm the Special Referee's Report, there is no indication that these witnesses would have recalled specifics as to plaintiff's whereabouts on the day that he was allegedly served in New York more than a decade prior. Further, the Special Referee's Report noted that the documentary evidence corroborated the testimony of the process server. The documents provided by Barna accurately described plaintiff. Further, Barna's inability to recognize plaintiff at the hearing and to recall details about plaintiff's building did not make his testimony incredible. The Special Referee further noted that plaintiff's admissions that he fit the physical description of the person described in the affidavits of service and that he owned the cooperative apartment at the time of service and was not sub-letting it were considered significant. Berns Dekajlo never ordered a transcript of the underlying Traverse Hearing, from which Special Referee could refresh his recollection in preparing his Report, nor for which the Court can now consider.

The Issler defendants further argue that the underlying Record on Appeal was complete, and included the exhibits attached to the underlying motion papers as part of the Record on Appeal. While all exhibits from the underlying motion papers (the record which was the basis

for plaintiff's underlying Appeal) were not initially included in plaintiff's 220 page Record on Appeal, defendants did include the exhibits in the submission of the 133 page Supplemental Record on Appeal. Thus, upon the filing of the Supplemental Record, the full Record on Appeal was complete.

Finally, plaintiff failed to establish actual damage by the attorney's conduct in order to establish a legal malpractice action. Plaintiff has not paid the default judgment in the amount of $1,250,000 plus interest and costs that was entered against him. While an attachment was placed on plaintiff's Massachusetts residency on October 2, 2001, to date, the property had not been seized nor has the property been sold. Thus, argues the Issler defendants, any alleged damages by plaintiff at this time are speculative and cannot substantiate a cause of action in legal malpractice. Even if plaintiff has sustained any damages, those alleged damages cannot be attributed to any acts by the Issler defendants, since plaintiff alleges that he was represented by Berns Dekajlo at the time the default was entered.[3] Moreover, plaintiff alleged that Berns Dekajlo failed to introduce competent evidence, which was available at the time of the Traverse Hearing or in his Opposition to Ross's Motion to Confirm the Special Referee's Report, attesting to his alleged whereabouts at the time he was allegedly served with process. Such evidence was never introduced by Mr. Dekajlo, although plaintiff asserts in his Complaint that he advised Mr. Dekajlo of the same. Specifically, plaintiff contends that he advised Mr. Dekajlo that at the time he was allegedly served in New York on November 2, 1989 that he was not in New York and had witnesses who were prepared to fly to New York from California in order to testify to the same.

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[3] The Massachusetts Court granted full faith and credit to the Ross's1992 New York judgment, where, after Ross filed a Massachusetts complaint in 2001 to enforce the foreign judgment in New York, plaintiff brought proceeding in New York to vacate the New York judgment.

Yet, Mr. Dekajlo advised plaintiff that such evidence would not be necessary at the Traverse Hearing. Thus, based upon plaintiff's own allegations against Berns Dekajlo, and the documentary evidence and testimony provided herein, the Issler defendants cannot now be held responsible for Berns Dekajlo's failures.

In opposition, plaintiff submits the Affirmation of Kevin Brennan, who states that the Issler defendants committed malpractice by failing to: (a) argue in the motion to reargue that Ross lacked a meritorious case against plaintiff by focusing exclusively on attacking the referee's report; (b) move to renew and include the three affidavits; and (c) move to renew and reargue the January 3, 2002 order granting plaintiff's motion to vacate the default judgment only to the extent of ordering a traverse hearing.

In the motion to reargue the December 10, 2003 Order, the Issler defendants could have argued that Ross's complaint did not support a theory of personal liability against plaintiff given that he was sued solely in his capacity as a shareholder of the World. Ross did not allege facts that would have pierced the corporate veil. Ross never claimed that plaintiff's control of the World nightclub was used to commit a fraud or wrong against Ross resulting in his injury. The Issler defendants also failed to argue that there was no evidence that plaintiff committed the assault or was in any way responsible for the person who did commit the assault. Moreover, there was no evidence that plaintiff individually owned or controlled the nightclub, which was owned and operated by the World. That plaintiff may have owned an interest or been an officer in the World would not make him liable for the torts of that corporation.

Moreover, plaintiff could have defeated Ross's inevitable argument that the court would not have had the authority to vacate under CPLR 5015(a). Plaintiff did not have to prove that he

had a valid excuse to vacate the default. The Supreme Court has the inherent authority to vacate an unjust default judgment - authority not dependent on or eradicated by the enactment of rule 5015. The Issler defendants did nothing to persuade the Court (York, J.) or the Appellate Division that Ross had no conceivable cause of action against plaintiff. Instead, Issler focused exclusively on attacking the referee's determination that plaintiff was not credible. Any lawyer exercising reasonable care would have seen that it was futile simply to appeal or to reargue that credibility finding.

Further, the three affidavits on renewal could have been the basis for the Court to reject the Special Referee's Report and find that plaintiff was not served properly in the Ross action. A referee's report is not binding as the Court remains the ultimate arbiter of the dispute. The court may confirm or reject, in whole or in part, the report of a referee, or may make new findings with or without taking additional testimony. Further, caselaw holds that newly submitted evidence can be considered in determining whether to confirm or reject the report of a referee. Had the Issler defendants moved to renew and included the three affidavits, the court would have considered these affidavits in determining whether to confirm or reject the referee's report. The three affidavits would have established that plaintiff was in California on Thanksgiving as he made Thanksgiving dinner, and that plaintiff watched the World Series in October 1989 and that such series did not end until the end of October 1989 because of the earthquake in California that year. The motion to renew would have afforded plaintiff an opportunity to include other evidence to show that Barna had described the building where he served plaintiff incorrectly. This evidence could have included photos of the building as well as an affidavit from the doorman. This additional evidence would have given the Court a basis to reject the referee's

findings that the process server was credible. These affidavits and other evidence would have provided the evidence that was lacking at the Traverse Hearing to support plaintiff's claim that he was living in California in November 1989 and would have presented the Court with additional evidence from which to reject the Referee's report and find that the purported service on plaintiff was improper.

Law office failure can be used as a reasonable justification for failing to present the new facts on the prior motion and courts have discretion to grant a motion to renew in the interest of justice even though all the requirements for renewal are not met. Plaintiff informed the Issler defendants that the reason Ivarson, Plaskett and Monkarsh did not testify at the Traverse Hearing was due to the erroneous advice by Berns Dekajlo that the process server died and that plaintiff did not need them to establish that he was living in California at the time of the alleged service. The Issler defendants should have used Berns Dekajlo's failure to provide proper advice to plaintiff as the reasonable excuse as to why this testimony was not provided at the traverse hearing. Failing to move to renew with this new evidence was legal malpractice.

Further, the Issler defendants failed to move to renew and reargue the January 3, 2002 order granting plaintiff's motion to vacate the default judgment only to the extent of ordering a Traverse Hearing. There is no evidence that the January 3, 2002 order was served with notice of entry. Service of the order with notice of entry commences the time within which the losing party has to move to reargue. The Issler defendants failed to research the law and move to renew and address both the motion resulting in the December 10, 2003 order and the original motion resulting in the Court's January 3, 2002 order even though their retainer agreement only stated that Issler was to make a motion to renew and/or reargue the court's December 10, 2003 order.

Had the Issler defendants moved to renew and reargue this order, they could have stressed the absence of a cause of action against plaintiff and plaintiff's right to judgment as a matter of law.

With respect to the element of proximate cause, the evidence establishes that had it not been for the Issler defendants' malpractice, the default judgment against plaintiff would have been vacated and the Ross Lawsuit against plaintiff would have been dismissed.

Further, the negligence of Issler led directly to plaintiff not being able to vacate the default judgment against him in the amount of $1,365,347.50, plus interest. The judgment entered against plaintiff has been domesticated in Massachusetts and Ross has levied against plaintiff's home in Massachusetts. Plaintiff has no further legal avenues to avoid paying the judgment. But for the Issler defendants' legal malpractice, the default judgment would have been vacated and plaintiff's home would not be in the process of being sold to satisfy the judgment.

In reply, the Issler defendants add that Plaintiff has made absolutely no attempt in Opposition or otherwise to show, (a) what facts or information were omitted from the papers he previously submitted in opposition to the prior motion to confirm, (b) why he and his prior counsel, defendant Dekajlo, previously failed these facts or information to Justice York's attention, or (c) why the underlying court would or should have relaxed the strict requirements applicable to a motion to renew under CPLR§2221. Plaintiff barely addresses the argument that he failed to show a reasonable justification for his failure to present such facts/evidence in his prior opposition. Plaintiff's argument that renewal could have been based upon Berns Dekajlo's purported "law office failure" fails to detail what specific acts constituted this "law office failure" to include the aforementioned affidavits in any opposition to the underlying motion to confirm. While plaintiff seeks to further blame Mr. Dekajlo for allegedly advising him that the process

server, Barna, had died, and that this advisement constitutes excusable "law office" failure, plaintiff's own testimony refutes this allegation. Plaintiff testified that Mr. Dekajlo never told him not to bring documents to support his claim to the Traverse Hearing. Plaintiff did bring a letter from Iverson and Monkarsh to the Traverse Hearing. Plaintiff's own failure to bring additional documentary evidence, and/or witness affidavits to the underlying Traverse Hearing, in no way can be contributed to any "law office failure."

Moreover, even had plaintiff failed to bring these documents to the Traverse Hearing, there is no indication that any purported "law office failure" prohibited or prevented plaintiff from including this "new evidence" in his opposition to Ross's Motion to Confirm. As a result of a 1999 amendment to the renewal statute, the court lacks discretion to grant renewal in the absence of a reasonable excuse. In nearly all of the cases where the First Department allowed new evidence even where no excuse has been proffered has been in cases where the evidence presented clearly warranted relief in favor of the moving party. Plaintiff's instant claim of "law office failure" aimed at Bern Dekajlo, without supporting documentation, does not establish that renewal was appropriate. A plaintiff's failure to show due diligence in attempting to obtain the statement before submission of the prior motion is fatal. The Issler defendants cannot be held accountable for not including a renewal as part of its underlying Motion to Reargue, as the three witnesses were readily available or could have been obtained at the time of plaintiff's original opposition to Ross's motion to confirm. Moreover, even if the Court would have accepted plaintiff's "law office failure" excuse, plaintiff failed to suggest how such additional evidence would have changed this Court's prior determination to confirm the Special Referee's Report.

Even had plaintiff provided the aforementioned documentation at the underlying

Traverse Hearing, in his opposition to Ross's motion to confirm, or in any motion to renew, plaintiff's "proof of being in California at the time of alleged service on November 2, 1989 was weak at best.

Further, plaintiff's argument, for the first time in opposition, that the Issler defendants failed to move to renew/reargue the Court's January 3, 2002 decision, which partially granted plaintiff's underlying motion to vacate the default, contradicts the express terms of the Retainer Agreement, which did not include this obligation. And, even had the Issler defendants and plaintiff entered into a general retainer, which they did not, wholly absent from the Complaint is any mention, let alone a factual allegation, that the Issler defendants were allegedly negligent based upon this purported failure. Accordingly, as plaintiff has raised this allegation for the first time in opposition to the instant motion, any unpleaded theories must not be considered by this Court. As plaintiff failed to comply with the proper procedural rules to assert additional allegations, the Court cannot accept any proposed amendment set forth in plaintiff's Opposition. In any event, any cause of action based upon this newly stated alleged failure would be subject to a dismissal. The Issler defendants could not have moved to reargue the January 3, 2002 decision. The Court partially granted plaintiff's prior motion to vacate the default, and as the successful moving party, plaintiff had an obligation to serve an order with notice of entry of the decision. If, as plaintiff alleges, an order with notice of entry was never filed, it was plaintiff's own failure alone, as it was his and/or Berns Dekajlo's sole responsibility for its filing and entry. The Issler defendants have not had an opportunity to review the underlying file in the Court's record room, which has not been produced. Thus, the Court should afford the Issler defendants an opportunity to supplement this Reply upon review of the file to determine if an order with notice of entry was

in fact filed. Even if the order with notice of entry was not filed by plaintiff, the Issler defendants cannot be held responsible for not doing so, as the Issler defendants were retained more than two years following the January 3, 2002 order. Plaintiff cannot now shift the blame onto the Issler defendants for plaintiff's own failure to timely move to reargue the January 3, 2002 decision.

Further, plaintiff failed to address the fact that the full record (by way of a Record on Appeal and Supplemental Record on Appeal) was, in fact, included in the submission of plaintiff's underlying Appeal the December 10, 2003 order. Therefore, plaintiff's silence as to this point is, in effect, a concession that this claim is improper and should be dismissed.

Further, the Court should not consider plaintiff's improper expert affirmation. Plaintiff and Brennan's self-serving statements are conclusory and speculative and merely feign a factual issue. Plaintiff retained Brennan for the sole purpose of opposing the instant motion and his affirmation conflicts with the Complaint. Moreover, plaintiff's reliance on an expert such as Brennan to establish a legal malpractice claim amounts to the assertion of an impermissible legal conclusion normally reserved for the Court's determination. Brennan's expert affirmation which sets forth after-the-fact criticisms of the Issler defendants' conduct and offers the legal conclusion that the Issler defendants committed legal malpractice should be rejected.

Finally, the judgment has not been satisfied. While a lien was placed on plaintiff's Massachusetts home, to date, the property had not been seized or sold. Thus, plaintiff's alleged damages at this time are at best speculative and cannot support a legal malpractice claim.

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §

3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 NY Slip Op 51390 [U] [Sup Ct New York County, 2003]). Thus, the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr., supra*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman, supra* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

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 of 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 (*Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 170 AD2d 108 [1st Dept 1991], *affd* 80 NY2d 377 [1992], rearg denied 81 NY2d 955 [1993]). To sustain a cause of action for legal malpractice, a party must show that an attorney failed to exercise "the ordinary reasonable skill and knowledge" commonly possessed by a member of the legal profession (*Darby & Darby, P.C. v VSI International, Inc.*, 95 NY2d 308 [2000]). To establish the elements of proximate cause and actual damages it must be shown that the plaintiff would have had a favorable outcome but for the attorney's negligence (*Davis v Klein*, 88 NY2d 1008 [1996]; *Carmel v Lunney*, 70 NY2d 169 [1987]). An attorney may be liable for his or her: ignorance of the rules of practice; failure to comply with conditions precedent to suit; neglect to prosecute or defend an action; and the failure to conduct adequate legal research (*Shopsin v Siben & Siben*, 268 AD2d 578 [2d Dept 2000]).

The Issler defendants entered into a retainer agreement with plaintiff and upon its execution, agreed to the express terms stated therein (*see Maysek & Moran, Inc. v S.G. Warburg & Co., Inc.*, 284 AD2d 203, 726 NYS2d 546 [1st Dept 2001]; *see e.g., Ginther v Scinta*, 31 AD3d 1135, 818 NYS2d 376 [4th Dept 2006]). Under the Retainer Agreement, the Issler defendants were "to act as [plaintiff's] attorney . . . for the purposes of appealing the order . . . dated December 10, 2003 and . . . bringing on a motion to *renew and/or reargue* the motion which was decided by the aforesaid order" (emphasis added). Thus, arguably, the Issler defendants had an

obligation to also renew the December 10, 2003 order. As such, the plain terms of the Retainer Agreement, while defeating plaintiff's claim that the Issler defendants had a duty to reargue the Court's January 3, 2002 order, arguably bound the Issler defendants to move to renew. Thus, it cannot be said that the Issler defendants had no obligation to move to renew the December 10, 2003 Order.

Further, contrary to Issler defendants' contention, it cannot be said, as a matter of law, that the Issler defendants did not commit legal malpractice by failing to move for renewal. It is uncontested that as relevant herein, a motion for leave to renew under CPLR 2221 "shall be based upon new facts not offered on the prior motion that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion." The motion to renew, when properly made, posits newly discovered facts that were not previously available or a sufficient explanation is made why they could not have been offered to the Court originally (*see discussion in Alpert v Wolf*, 194 Misc 2d at 133, 751 NYS2d 707; D. Siegel New York Practice § 254 [3rd ed. 1999]). Further, to vacate a default judgment, plaintiff would have had to "demonstrate both a reasonable excuse and a meritorious defense" (*Benson Park Associates, LLC v Herman*, 899 NYS2d 614 [1st Dept 2010] *citing Mutual Mar. Off., Inc. v Joy Const. Corp.*, 39 AD3d 417, 419, 835 NYS2d 88 [2007]). Thus, in order for the Issler defendants to move to renew, seeking to vacate the default judgment entered against the plaintiff, plaintiff *via* the Issler defendants would have to have shown not only a meritorious defense, but, that the three affidavits constituted newly discovered facts that were not previously available or a sufficient explanation as to why such affidavits "could not have been offered to the Court originally," and that such affidavits would have changed the Court's prior determination finding

proper service.

It is clear to this Court that upon renewal of the motion to vacate the default judgment, plaintiff would have established the first prong of vacatur, *i.e.*, he had a meritorious defense to Ross's Action. The documentary evidence established that plaintiff was not an officer nor did plaintiff have any interest in the World nightclub at the time of Ross's accident, and bore no responsibility for the injuries Ross sustained at the nightclub.

Further, contrary to the Issler defendants' contention, it cannot be said, as a matter of law, that the December 2003 order finding proper service upon plaintiff and consequently, jurisdiction, would have remained intact if the Issler defendants presented the three affidavits.

It appears that the three affidavits are "new" to the extent that they were not previously presented to the Court when confirming the Special Referee's Report finding jurisdiction. However, it also appears that these affidavits were previously available to plaintiff and Berns Dekajlo at the time the Traverse Hearing was held and later, when plaintiff opposed Ross's motion to confirm the Special Referee's Report. However, CPLR 2221 permits evidence known at the time of the original motion to be later introduced in a motion to renew where there is a "reasonable justification for the failure to present such facts on the prior motion." Where no valid excuse is offered, Courts generally deny the motion, reasoning that "[r]enewal is not available as a 'second chance' for parties who have not exercised due diligence in making their first factual presentation" (*Clarendon Nat. Ins. Co. v Gonzalez*, 10 Misc 3d 1056, 814 NYS2d 560 [Sup Ct Nassau County 2005] *citing Rubinstein v Goldman*, 225 AD2d 328, 638 NYS2d 469 [1st Dept 1996]). Law office failure may serve as a reasonable excuse for a movant's failure to submit the known evidence at the time of an original submission (*Cruz v Castanos*, 10 AD3d

277, 781 NYS2d 23 [1st Dept 2004] ["Given plaintiffs' reasonable excuse of law office failure for this inadvertent omission and the absence of a showing of prejudice to defendant, plaintiffs' motion to renew based on submission of these exhibits should have been granted (*Telep v Republic El. Corp.*, 267 AD2d 57, 58, 699 NYS2d 380)). Arguably, the legal malpractice of plaintiff's attorney may likewise constitute a reasonable excuse for plaintiff's failure to present the three affidavits at the Traverse Hearing or in his opposition to confirm the Special Referee's Report.

That plaintiff was represented by counsel, does not render the excuse unreasonable, where plaintiff claims that said counsel was incompetent and overrode plaintiff's attempts to introduce additional evidence to support plaintiff's claim that he was in California at the time of purported service of process. And, it cannot be said that such argument, if raised by the Issler defendants, would not have been deemed unreasonable by the Court.

Thus arguably, the Issler defendants could have used Berns Dekajlo's failure to provide proper advice, or its erroneous advice to plaintiff, as a reasonable excuse as to why the three affidavits were not previously provided (*see Martinez v New York City Transit Auth.*, 183 AD2d 587, 584 NYS2d 8 [1st Dept 1992] (stating "While we concur fully in the Motion Court's condemnation of plaintiffs' counsel's derelictions, on balance, the plaintiffs should be afforded their day in court despite the egregious law office failure of their attorneys")). Therefore, the Issler defendants failed to demonstrate that they were precluded, as a matter of law, from asserting a "reasonable justification for [plaintiff's] failure to present" the three affidavits on plaintiff's initial opposition to Ross's motion to confirm the Special Referee's Report or at the Traverse Hearing. Nor can it be said, as a matter of law, that plaintiff did not exercise due

diligence in making his first factual presentation, when he advised Berns Dekajlo of the availability of the additional testimony, but was allegedly erroneously advised that such additional testimony was unnecessary.

Turning to whether the three affidavits would have changed the determination, the Court is mindful that the crux of this issue would have resulted in the vacatur of default. It bears noting that when considering to vacate a default judgment, there is a strong public policy in favor of deciding cases on the merits (*see DFI Communications, Inc. v. Golden Penn Theatre Ticket Serv.*, 87 AD2d 778, 449 NYS2d 485 [1st Dept1982]; *Green v Redeemed Christian Church of God Tabernacle of Restoration*, 23 Misc 3d 137, 886 NYS2d 70 [NY Sup App Term 2009]; *Mitchell v Mid-Hudson Medical Assocs. P.C.*, 213 AD2d 932, 624 NYS2d 70 [3d Dept 1995]). The Special Referee found plaintiff's testimony that he was in California at the time of purported service of process, insufficient. However, whether the additional affidavits stating that plaintiff was in fact in California at the time service was purportedly made upon plaintiff in New York would have been considered on renewal and supported plaintiff's testimony tip in favor of this policy considerations.

A Special Referee's Report may be confirmed or disregarded, in part or in toto, and the Court may make new findings (*Jan S. v Leonard S.*, 26 Misc 3d 243, 884 NYS2d 848 [Sup Ct New York County 2009]). "Courts of New York generally "will look with favor upon a Referee's report, inasmuch as the Referee, as a trier of fact, is considered to be in the best position to determine the issues presented" (*id*). "It is well settled that the report of a Special Referee shall be confirmed whenever the findings contained therein are supported by the record and the Special Referee has clearly defined the issues and resolved matters of credibility" (*id.*

citing Nager v Panadis, 238 AD2d 135, 135-36, 655 NYS2d 946 [1st Dept 1997]). "However, the court is not bound by the referee's recommendation and his or her determination" (*id. citing 855 RBC Capital Markets Corp. v Bittner*, 24 Misc 3d 728, 877 NYS2d 877 [Sup Ct New York County 2009]). "A judge has the discretion to 'confirm or reject, in whole or in part ... the report of a referee'" (*Jan S. v Leonard S.*, *citing* CPLR 4403) and the Court may "make new findings with or without taking additional testimony; and may order a new trial or hearing" (*id*). Given that the Court could have considered new evidence in deciding whether the confirm or reject the Special Referee's Report (*see e.g., Olstein v Olstein*, 309 AD2d 697, 766 NYS2d 189 [1st Dept 2003] (new evidence could be considered on a motion to reject a Special Referee's report concerning whether wife had remarried within meaning of their separation agreement); *see also A. Brod, Inc. v Worldwide Dreams, LLC*, 5 Misc 3d 1012, 798 NYS2d 707 [Sup Ct New York County 2004] (the Court has discretion to consider new evidence regardless of the findings of the Special Referee)), the Court could have considered the three affidavits in opposition to Ross's motion to confirm, and the Issler defendants could have argued that Berns Dekajlo committed malpractice in failing to submit these affidavits earlier. Specifically, the Court could have considered the assertion that Ivarson would have averred that she was plaintiff's roommate beginning in October 1989 when they began sharing an apartment in Malibu, California. Monkarsh would have also confirmed that plaintiff was renting an apartment in Malibu, California beginning in October 1989.

With the additional affidavits considered in light of the public policy favoring disposition of cases on the merits, and the fact that plaintiff bore no responsibility for Ross's injuries at the World nightclub, it cannot be said, as a matter of law, that plaintiff would not have obtained a

vacatur of the default judgment if the Issler defendants submitted the three affidavits on renewal.

The Court also notes that plaintiff presented sufficient facts to raise an issue as to whether the Issler defendants' failure to move to renew based on the three affidavits was a proximate cause of the Court's October 10, 2004 order upholding the default judgment against plaintiff. And, the record supports the plaintiff's claim that but for the Issler defendants' failure to renew and seek vacatur of the default judgment, plaintiff would have been successful in obtaining a dismissal of the Complaint against him. Therefore, the record indicates that plaintiff would have obtained a favorable result in the Ross action.

Finally, the record indicates that an attachment was been placed on plaintiff's Massachusetts house, and plaintiff's house is in the process of being sold to satisfy the default judgment. Thus, it cannot be said that plaintiff's damages are speculative and cannot support a legal malpractice claim.

Conclusion

Based on the above, it is hereby

ORDERED that the Issler defendants' motion for summary judgment is granted solely to the extent that plaintiff's claim that the full record was not submitted on appeal is dismissed. In all other respects, the motion by the Issler defendants dismissing the Complaint as asserted against them is denied; and it is further

ORDERED plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: June 1, 2010

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD