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Short Form Order

**SUPREME COURT - STATE OF NEW YORK**
**TRIAL TERM, PART 17 NASSAU COUNTY**

**PRESENT:**

***Honorable Karen V. Murphy***
**Justice of the Supreme Court**

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**MICHAEL C. VERDI,**

**Plaintiff(s),**

**-against-**

**JACOBY & MEYERS, LLP, JOHN F. DOWD, ESQ. and COLLEEN WILLIAMS,**

**Defendant(s).**

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**Index No. 10674/07**

**Motion Submitted: 10/20/10**
**Motion Sequence: 010, 011**

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XX
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

The defendants, move pursuant to CPLR §3212, for an order granting summary judgment dismissing the plaintiff's complaint.

The plaintiff cross-moves pursuant to CPLR §3212, for an order granting summary judgment as to the issue of liability and to set the within matter down for an Inquest as to damages.

On April 21, 2005, the plaintiff was involved in a motor vehicle accident whereby the vehicle he was operating was struck in the rear by the vehicle operated by Aaron Muntner and owned by Volvo Financial of North America [hereinafter Volvo]. Said accident occurred during the course of the plaintiff's employment as a pharmaceutical sales representative. As a result of this accident, the plaintiff sustained various injuries. On or about May 10, 2005,

the plaintiff retained the services of defendant law firm Jacoby & Meyers and their employees, John F. Dowd Esq. and Colleen Williams. Subsequently, on or about September 15, 2005, a consent to change attorney was executed whereby Jacoby & Meyers was substituted by Sobel, Ross, Fliegel & Suss. Plaintiff's new counsel commenced a personal injury entitled ***Verdi v. Muntner***, bearing Index Number 15347/2005. In or about March 2007, the personal injury action was settled against Muntner in the amount of $100,000, the full value of his policy limits. Thereafter, the plaintiff commenced the within legal malpractice action against his former counsel contending that they failed to timely assert a claim against Volvo, prior to the effective date of the Graves Amendment.[1]

The within applications for summary judgment respectively interposed by the plaintiff and the defendants herein subsequently ensued and are determined as set forth hereinafter.

In support of the defendants' application, counsel argues that prior to the effective date of the Graves Amendment, there was no medical evidence that demonstrated that the plaintiff had suffered a serious injury as contemplated by Insurance Law §5102(d) and accordingly no liability may attach to the defendants. Specifically, counsel argues that while the record contains a report from a Dr. Carroll, who examined the plaintiff on April 26, 2005 and who opined that the plaintiff had sustained a "herniated disc at L5-S1", said conclusion was later called into question by Dr. Carroll himself, who ordered additional tests to confirm said diagnosis. Counsel additionally argues that the defendants' decision to delay placing the plaintiff's personal injury claim into suit, until adequate medical proof as to a serious injury was obtained, was reasonable under the attorney judgment rule and did not constitute legal malpractice.

The plaintiff opposes the defendants' application and cross-moves for an order granting summary judgment as to the issue of defendants' liability. In opposing the defendants' application, counsel for the plaintiff argues that the medical evidence as adduced herein demonstrates that as a result of the subject accident the plaintiff sustained a herniated disc at the L5-S1 level and that the total amount of insurance coverage available from defendant Muntner was insufficient to adequately compensate the plaintiff for the injuries he sustained. Counsel additionally posits that in failing to file an action against Volvo prior to the effective date of the Graves Amendment, the moving defendants have forever precluded the plaintiff from recovering against a financially viable defendant, which would have been subject to vicarious liability as the lessor of the vehicle driven by Mr. Muntner.

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[1] The Graves Amendment was enacted by Congress and preempts the imposition of vicarious liability on lessors of automobiles for injuries which result from the negligent use and operation of a leased vehicle. It became effective on August 10, 2005.

In order to successfully assert an action sounding in legal malpractice, "a plaintiff must demonstrate that the attorney 'failed to exercise the ordinary reasonable 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" (***Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer***, 8 N.Y.3d 438, 8 N.Y.3d 438, 867 N.E.2d 385, 835 N.Y.S.2d 534 (2007) quoting ***McCoy v. Feinman***, 99 N.Y.2d 295, 785 N.E.2d 714, 755 N.Y.S.2d 693 (2002) at 301-302; ***Rosenstrauss v. Jacobs & Jacobs***, 56 A.D.3d 453, 866 N.Y.S.2d 757 [2d Dept., 2008]). "[T]o establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyers negligence" (***Boone v. Bender***, 74 A.D.3d 1111, 904 N.Y.S.2d 467 [2d Dept., 2010]).

When moving for summary judgment dismissing an action alleging legal malpractice, the moving defendants bear the burden of coming forth with admissible evidence that establishes that the plaintiff is unable to prove at least one of the essential elements, which comprise the cause of action (***Ippolito v. McCormack, Damiani, Lowe & Mellon***, 265 A.D.2d 303, 696 N.Y.S.2d 203 [2d Dept., 1999]; ***Boone v. Bender, supra***).

In the instant matter, the Court has reviewed the record and upon such review determines that the moving defendants have failed to demonstrate their entitlement to judgment as a matter of law. Here, the record reveals that prior to the effective date of the Graves Amendment, the defendants were clearly in possession of medical evidence, which while perhaps not dispositive as to the existence of a serious injury, was nonetheless less indicative that the plaintiff had sustained an injury as a result of the subject accident. Particularly, Mr. Dowd, the attorney employed by Jacoby & Meyers and assigned to the plaintiff's case, testified that in July of 2005, the defendants received a copy of the medical report from Dr. Illman, who conducted an IME in connection with the plaintiff's related workers' compensation case. Upon examination, Dr. Illman stated that the plaintiff was "totally disabled" having sustained a "herniation of L5-S1 to the left", which was causally related to the subject accident. Moreover, Mr. Dowd testified that he was cognizant of the Graves Amendment and the legal consequences thereof in early 2005.Thus, notwithstanding any infirmities, which may or may not attend Dr. Illman's report, given said evidence coupled with the defendants' admitted knowledge of the impending effective date of the Graves Amendment, the Court finds that the moving defendants have failed to demonstrate that they exercised ordinary and reasonable skill under the extant circumstances.

The Court now addresses the cross-motion interposed by the plaintiff, which seeks an order granting summary judgment as to the defendants' liability. The Court has reviewed the evidence proffered by the plaintiff in support of his cross-motion and upon said review finds that the plaintiff has failed to demonstrate the absence of material issues of fact as to whether

he would have prevailed on a personal injury action asserted against Volvo (***Levy v. Greenberg***, 19 A.D.3d 462, 798 N.Y.S.2d 443 (2d Dept., 2005);***Boone v. Bender, supra***). In the instant matter, counsel for the plaintiff strenuously contends that Mr. Verdi "sustained a herniated disc at the L5- S1 level" resulting from the subject accident. However, annexed to the plaintiff's motion papers is the report of Dr. John J. Labiak, M. D., the plaintiff's treating orthopedist. Dr. Labiak states that he reviewed "an MRI of the lumbar spine from August 2005" and compared the results thereof to those from an earlier lumbar MRI taken in April 2005. Dr. Labiak opined that based upon his comparison, said tests showed "similar results" and he rendered an impression of "Disc degeneration at L5-S1." Thus, as the plaintiff's own treating orthopedist, after reviewing two MRI's of the plaintiff's lumbar spine, does not opine that the plaintiff suffered from disc herniation at L5-S1, but rather states that there is disc degeneration at said levels, the Court finds there are questions of fact as to the nature of the injuries sustained by the plaintiff and whether same fall within the purview of Insurance Law §5102[d] (***Grossman v. Wright***, 268 A.D.2d 79, 707 N.Y.S.2d 233 [2d Dept., 2000]).

Based upon the foregoing, the defendants' application, interposed pursuant to CPLR §3212, for an order granting summary judgment dismissing the plaintiff's complaint is hereby Denied and the plaintiff's cross-motion, interposed pursuant to CPLR §3212, for an order granting summary judgment as to the issue of the defendants' liability, is hereby Denied.

All applications not specifically addressed herein are denied.

The foregoing constitutes the Order of this Court.

Dated: December 1, 2010
Mineola, N.Y.

Karen V. Murphy
J. S. C.

ENTERED
DEC 21 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE