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SHORT FORM ORDER

INDEX No. 06-34683
CAL. No. 10-02202OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Supreme Court

Mot. Seq. # 001 - MG; CASEDISP

FABIAN PADILLA, as father and natural guardian of: GIOVANNIA PADILLA, Plaintiff, - against - GEORGE R. BISSELL, as Executor of the Estate of ROBERT F. MALERBA, Defendant.	MARK A. CUTHBERTSON Attorney for Plaintiff 434 New York Avenue Huntington, New York 11743 SCHONDEBARE & KORCZ Attorneys for Defendant 3555 Veterans Memorial Highway, Suite P Ronkonkoma, New York 11779

Upon the following papers numbered 1 to 18 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12 ; Notice of Cross Motion and supporting papers_; Answering Affidavits and supporting papers 13-15; Replying Affidavits and supporting papers 16-18 ; Other_; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the defendant George R. Bissell, as Executor of the Estate of Robert F. Malerba, for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted and the complaint is dismissed with prejudice.

This is an action sounding in legal malpractice arising out of an action for negligence relative to an automobile accident which occurred on January 23, 1992. On February 3, 1992, Fabian Padilla, as father and natural guardian of Giovannia Padilla, retained Robert F. Malerba, Esq. to prosecute an action for personal injury on behalf of his son, Giovannia Padilla and for the wrongful deaths of his other son, Alex Padilla, and his wife Cecilia Padilla. The action was commenced on March 23, 1992 against the defendants Linda C. Sansivieri, Du-Rite Interior Demolition & Removal Co., Inc., the Administrator of the Estates of Nelly E. Morales and Jesus Manuel, and the City of New York.

On or about September 6, 1992, Robert Malerba, Esq. settled the two wrongful death claims that were brought on behalf of the plaintiffs Alex Padilla and Cecillia Padilla. It is alleged that these two wrongful death claims were prematurely settled by Robert F. Malerba, Esq., creating a set-off problem pursuant to General Obligations Law §15-108 with respect to the continuing claims against the remaining defendants. Plaintiff claims that he was never advised of the consequences of the timing of the settlements and, consequently, was prevented from making a full recovery for the losses sustained. Robert F. Malerba died on or about October 9, 2005.

With regard to the claim that was brought on behalf of the surviving child, Giovanni Padilla, it is alleged in the plaintiff's verified bill of particulars that the amount of recovery to the infant plaintiff was the total sum of $1,285,000, of which $846,747 was paid for the benefit of the infant. The remainder was paid as attorney's fees to plaintiff's subsequent attorney Christopher Olson, Esq. pursuant to an infant compromise order, dated April 12, 2001 (Dollard, J.). The plaintiff claims in this legal malpractice action that but for the malpractice of the defendant Robert Malerba, Esq., the infant plaintiff would have recovered approximately $2,500,000.00.

The defendant, George R. Bissell, as Executor of the Estate of Robert F. Malerba, now moves for summary judgment dismissing the complaint on the basis that there is no evidence that Mr. Malerba's recommendation of the settlement for the wrongful death of Fabian Padilla's wife and other son in any way prejudiced Giovannia's Padilla's recovery as his action proceeded to trial and was settled with all the defendants in an amount that was not only satisfactory to Fabian Padilla but was also approved by the Hon. James P. Dollard, Justice of the Supreme Court, County of Queens, pursuant to an infant compromise order entered April 12, 2001.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.***, 79 AD2d 1014 [2nd Dept 1981]).

"In order to sustain an action sounding in legal malpractice, a plaintiff must show that the attorney failed to exercise the degree of care, skill and diligence commonly possessed members of the legal community, that the attorney's conduct was the proximate cause of the plaintiff's loss, that the damages were sustained as a direct result of the attorney's actions, and that the plaintiff would have otherwise been successful but for the attorney's negligence if the attorney had exercised due care" (***Davis et al v Klein et al,*** 88 NY2d 1008 [1996]; ***Lyons v Cronin & Byczek, LLP***, 2010 NY Slip Op 30006U [Sup. Ct. of New York, Suffolk County]; ***Lamanna v Pearson & Shapiro***, 43 AD3d 1111 [2nd Dept 2007]; ***Town of North Hempstead v Winston & Strawn, LLP,*** 298 AD3d 746 [2nd Dept 2006]). "Although it is well settled that on a motion for summary judgment the moving party has the burden of making a prima facie showing of entitlement to summary judgment as a matter of law and must offer sufficient evidence to show the absence of material issues of fact, on a summary judgment motion with regard to legal malpractice, the attorney-defendant need only show, in admissible form, that just one of the essential elements cannot be proven" (***Lyons v Cronin & Byczek, LLP***, supra).

Fabian Padilla testified at his examination before trial[1] that his son, Giovannia Padilla, was born on October 18, 1991 and currently attends Woodridge Technical School. His son was involved in an automobile

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[1] Although the copy of the transcript is unsigned, counsel for the defendant asserts in his affirmation, supported by a copy of the letter sent to the plaintiff pursuant to CPLR 3116(a), that the transcript was sent for signature, but was not returned signed. Therefore, this court will consider this transcript deeming the testimony contained therein admitted.

accident on January 23, 1991 in which Fabian Padilla's wife Cecilia, his other son Fabian, and his father-in-law Jesus Morales, all died. Approximately two weeks after the accident, he retained Robert Malerba, Esq. to commence a lawsuit to recover for damages for the deaths of his wife and son and for the injuries suffered by Giovannia Padilla. He agreed to an attorney's fee of approximately 33% and obtained Letters of Administration to proceed against the City of New York and the other drivers of the vehicles involved.

Mr. Padilla testified that in or about September, 1992, Mr. Malerba advised him by telephone that there was a settlement offer from State Farm in the amount of $100,000.00, but he did not know the total amount of insurance available or on whose behalf it was proffered. He stated that though he was not satisfied with the amount, he did accept the settlement offer, and Mr. Malerba told him he would try to get more money from the City. He continued that none of the settlement money was given to or used for the for the benefit of his son, Giovannia. Rather, he used it for funeral expenses, and, he added, that a portion of that settlement was for himself, also.

He testified that at some point, he hired another lawyer by the name of Gibson to take over the case, as defendant Malerba thought the case was "bad". Thereafter, Christopher Olson, Esq. who had worked with Malerba, took over the case.[2] In 1999, Christopher Olson went to trial in Queens County on the action against the construction company that owned a vehicle involved in the accident and against the City of New York. However, the defendants presented a settlement offer. He testified that he was satisfied with that settlement, agreed to it and ultimately received payment less attorney's fees. He testified that the approximately $800,000.00 settlement was for his son Giovannia, and was to be paid to Giovannia on his 18th birthday.

He accompanied his son and Christopher Olson, Esq, to an infant compromise hearing regarding approval of the settlement before a Supreme Court Justice in Queens County. A medical report concerning his son's condition was submitted at the time of the hearing. The settlement was approved by the Judge. He stated he never advised the Judge that he was not happy with the settlement. Upon receipt of the settlement check, he placed the money in several different banks. After his son turned 18, he invested the money in properties for his son.

A review of the Infant Compromise Order dated April 12, 2002 reveals that the settlement amount on behalf of "Giovannia" (Jovani) Padilla was $1,285,000.00, representing payment from State Farm Insurance Company on behalf of Nelly Morales, and Jesus Morales in the amount of $10,000.00; Empire Allcity on behalf of Linda Sansivieri and Du-Rite Interior Demolition & Removal Co., Inc. in the amount of $75,000.00; and the City of New York in the amount of $1,200,000.00. Out of the aggregate sum, less attorney's fees to Christopher Olson, $846,747.88 was paid to Fabian Padilla as the father and natural guardian of "Jovani Estefan Padilla," an infant, jointly with an officer of the various banks as set forth in the order. Fabian Padilla was ordered to "move

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[2] In the matter entitled ***Padilla v Sansivieri,*** 31 AD3d 64, the Appellate Division, Second Department noted that in 1991, outgoing counsel, the late Robert F. Malerba, was a partner, and incoming, Christopher Olson was an employee of the law firm of Malerba, Downes & Frankel (MD&F). Malerba and Olson entered into a written agreement which provided for the division of attorneys' fees between Olson and MD&F in the event that Olson left the firm and was thereafter retained by any of the firm's clients. The plaintiffs retained MD&F in 1992 on a contingent fee basis, and the firm commenced this personal injury action in 1993. In February 1999, Olson left MD&F, and in May, he was retained by the plaintiffs to continue the prosecution of the underlying action, after which time the cased was placed on the trial calendar. Also, in May 1999, Malerba was sentenced in the United States District Court for the Eastern District of New York upon his plea of guilty to a charge of conspiracy to commit mail fraud. In March 2000, Malerba was disbarred (see, ***Matter of Malerba***, 268 AD2d 25 [2000]).

promptly in Part 20 of the court for an Article 81 Guardianship of the infant." Fabian Padilla testified that he did not apply for guardianship of his son.

General Obligations Law (GOL) §15-108 was designed to foster settlements in multiple party tort cases by prescribing the effects of a settlement and altering the rules of law which were not conducive to the negotiating process; the effect of the statute is to permit a joint tortfeasor to buy his peace by terminating, completely, his rights and liabilities in the action. The benefit to non-settling joint tortfeasors is that they reap the benefit of trying a case against "an empty chair" and of reducing their own liability by the percentage of the empty chair's fault (***Tessler v Delta Environmental Consultants, Inc.***, 2008 NY Slip Op 31488U [Sup. Ct. of New York, Nassau County]).

GOL §15-108 provides in pertinent part:

> (a) When a release or covenant not to sue...is given to one of two or more persons liable or claimed to be liable in tort for the same injury,...it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under [New York's comparative negligence law Article 14] whichever is greatest .
>
> (b) A release given in good faith by the injured person to one tortfeasor as provided in subdivision (a) relieves him from liability to any other person for contribution as provided in [New York's comparative negligence law]....

It is undisputed that the instant action settled after jury selection, but before trial. Therefore, there is no issue with respect to set-offs, because all parties voluntarily settled. Thus, there was no verdict which would have entitled the non-settling party to reduce the amounts that would have been payable to the infant plaintiff (compare, ***Abrutina v Kumaran Bahuleyan, M.D.***, 159 AD2d 973 [4th Dept 1990].

Here, the admissible evidence establishes that a settlement was not entered into on behalf of Giovannia Padilla with State Farm on behalf of their insureds, Nellie Morales and Jesus Morales, Fabian Padilla's deceased wife's parents, prior to the April 12, 2001 infant compromise. Thus, there was no "settling tortfeasor" pursuant to GOL §15-108 and no apportionment of liability under New York's comparative negligence law. The plaintiff Fabian Padilla settled with State Farm, for the deaths of his wife, Cecilia Padilla, and his son Alex Padilla. A letter dated August 7, 1992 from State Farm Insurance, by Traci C. Foster, to Robert Malerba, Esq., reveals that the policy limits for the loss were offered in the amount of $50,000 each for Alex and Margaret (Cecilia) Padilla. The balance of the policy, $20,000.00, was to be disbursed among Giovannia Padilla, Linda Sansivieri and Martina Bruno. The copies of the general releases, each dated September 6, 1992, further indicate that Fabian Padilla received $50,000.00 each to settle the claims made by him on behalf of Cecilia Padilla and Alex Padilla as against Nellie Morales and Jesus Morales. There was no settlement on behalf of Giovannia Padilla at that time. No settlement was made on behalf of Giovannia Padilla from State Farm until the action went to trial and the settlement agreement was entered into with State Farm, and later approved in the infant compromise order. The record reflects liability limits of $20,000 for bodily injury were available, of which Fabian Padilla agreed to accept $10,000. The record does not reflect an allowance for a set-off with regard to State Farm or any other tortfeasor.

Upon reviewing the evidentiary submissions, it is determined that the plaintiff thereafter entered into a settlement agreement which was approved by the court handling the infant compromise proceeding. A settlement of an underlying claim does not preclude a subsequent action for legal malpractice where the

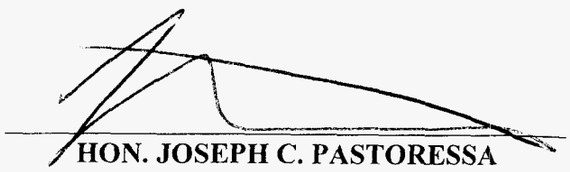
settlement was effectively compelled by the mistakes of counsel (***Kutner v Catterson***, supra). However, a plaintiff cannot base an action in malpractice upon the alleged mistakes of counsel prior to settlement, since their agreement to the terms of that settlement terminated the litigation (***N.A. Kerson Company, Inc. v Shayne, Dachs, Weiss, Kolbrenner, Levy***, 59 AD2d 551 [2nd Dept 1977]).

"A court-approved infant's settlement has the effect of a judgment, and can only be set aside on substantive grounds such as fraud, duress or mistake. Although a court-approved settlement of an infant's action is a complete bar to a subsequent action by the infant against the same defendant, such settlement does not bar the infant's subsequent action against the attorney who represented him or her in the prior action ... however, the infant is not required to seek rescission of a settlement to prosecute the subsequent action against the attorney where the infant seeks increased damages which are alleged could have been recovered in the underlying action" (***Fletcher v Livingston Hatch,*** 197 AD2d 775 [3rd Dept 1993]). The doctrine of judicial estoppel, or the doctrine of inconsistent positions, precludes a party who assumed a certain position in a prior legal proceeding, and who secured a judgment in his or her favor, from assuming a contrary position in another action simply because his or her interests have changed (***Baje Realty Corp v Cutler***, 32 AD3d 307 [1st Dept 2006]).

The defendant has demonstrated prima facie entitlement to summary judgment dismissing the complaint. Finally, in opposing the instant motion, the plaintiff has submitted an expert attorney affidavit, however, the plaintiff had failed to make any pre-trial disclosure of any putative expert opinion, and defendant was not made aware of the proffer of expert opinion until receipt of the plaintiff's expert's affidavit served in response to this summary judgment motion, which was brought on after note of issue and certificate of readiness had been filed. In such circumstance, the appellate division, second department has made clear that the court should not consider the expert's affidavit (see, ***King v Gregruss Management Corp.***, 57 AD3d 851; ***Construction by Singletree Inc. v Lowe***, 55 AD3d 861; ***Gerardi v Verizon New York, Inc.***, 66 AD3d 960). Even considering the expert affidavit, the plaintiff has failed to establish any extant issue of fact based on admissible evidence as opposed to speculation, conjecture, and surmise. Specifically, no evidence has been provided to support the assertion that because of the settlement of the wrongful death actions of Margaret and Alex Padilla the defendant City of New York offered "hundreds of thousands of dollars" less in settlement in anticipation of GOL 15-108 set offs should the case go to verdict. Such an assertion cannot be legally sustained on conjecture alone. In any event, even were the court to accept this premise, there is the even larger impediments to plaintiff's claims in the manifest lack of standing and bar of the applicable statute of limitations. The plaintiff herein lacks standing to challenge the settlement consequences in the separate wrongful death actions brought in his capacity as administrator of the respective estates of Margaret and Alex Padilla (see, ***Keeley v Tracy***, 301 AD2d 502) and even if standing were proper, allegations of malpractice in the wrongful death actions would be time barred (see, CPLR§214; ***Shumsky v Eisenstein***, 96 NY2d 164; ***Caiati v Kimel Funding Corp.***, 154 AD2d 639). Padilla freely entered into a settlement agreement which was approved by the court. Padilla assumed the position in the underlying action that he was satisfied with the settlement. The record does not raise a factual issue that settlement was forced due to a mistake by the defendant attorney, that there was anything that the defendant attorney did or did not do that undermined the plaintiff's position in the underlying action, or that he could have obtained a greater settlement in the underlying action. Thus, the plaintiff has "failed to demonstrate a triable issue of fact as to whether the settlement entered into was improvident or that the plaintiff would have been entitled to a more beneficial settlement, but for the defendant's misconduct" (see, ***Rogers et al v Ettinger,*** 163 AD2d 257 [1st Dept 1990]).

Accordingly, motion (001) by the defendant for summary judgment dismissing the complaint is granted.

Dated: June 14, 2011



HON. JOSEPH C. PASTORESSA

__X__ FINAL DISPOSITION ___ NON-FINAL DISPOSITION