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

PRESENT: HON. PAUL G. FEINMAN PART 12

Index Number : 603449/2007
FRANKEL, ERIC
VS.
VERNON & GINSBURG, LLP
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. 603449/2007E
MOTION DATE
MOTION SEQ. NO. 004
MOTION CAL. NO.

this motion to/for

	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

MOTION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION AND ORDER.

Dated: October 20, 2011

Paul G. Feinman
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

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

----------X

ERIC FRANKEL, as Executor of the Estate of Gloria Frankel, deceased,

Plaintiff,

- against -

VERNON & GINSBURG, LLP, MEL B. GINSBURG,

Defendants.

----------X

Index No. 603449/2007E
Mot. Seq. No. 004

DECISION AND ORDER

For the Plaintiff:
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Papers considered in review of this motion:	**E-File Document Number**
Notice of motion, memorandum of law, Ginsburg affidavit and Noonan affirmation and annexed exhibits A - Z	34 - 39-9
Plaintiff's memorandum of law in opposition, Frankel affidavit with annexed exhibits A - I, and Heller affirmation in opposition with annexed exhibits A - H, Fierstein affirmation in opposition and Perone affirmation in opposition	42 - 46
Defendants' memorandum of law in reply, Noonan affirmation in further support and annexed exhibits AA - GG	49 - 51
Oral argument transcript	55

PAUL G. FEINMAN, J.:

Defendants, Vernon & Ginsburg, LLP and Mel B. Ginsburg (collectively referred to as "V&G"), move for summary judgment dismissing plaintiff's complaint in its entirety pursuant to CPLR 3212. Plaintiff, Eric Frankel, as executor of the estate of Gloria Frankel, opposes. For the reasons provided below, the motion is granted with respect to plaintiff's second, third and fourth causes of action and denied with respect to plaintiff's first cause of action.

Background

This is a legal malpractice action arising out of V&G's representation of Gloria Frankel in connection with claims she brought against her upstairs neighbors, Sanford and Suzanne Potters,

and her cooperative building, 71st Street Lexington Corporation. In 1995, the Potters remodeled their bathroom and installed a jacuzzi bathtub. Thereafter, leaks from the Potters' newly renovated bathroom caused damage to Frankel's apartment and Frankel complained that "deafening noises and vibrations" would emanate from the upstairs apartment whenever the Potters used their jacuzzi or shower (Doc. 38-7, *Potters v 71st Street Lexington Corp. and Gloria Frankel*, Sup Ct, NY County, Sept. 2001, index no. 103685/2001, mot. seq. no. 002). That same year, the Potters paid Frankel $1,818.00 to repair the damages although Frankel later claimed that flooding and leaks continued through 1997, but the Potters and the cooperative ignored her complaints. Frankel filed an action against the Potters in the Small Claims Part of the Civil Court of the City of New York in February of 1998, but subsequently discontinued the action. In May of 1998, Frankel filed an action in the Civil Court against the Potters and the cooperative. In September of 1999, Frankel retained V&G in connection with the May 1998 Civil Court action. In February of 2001, the Potters filed another action, this time in the Supreme Court, New York County, against Frankel and the cooperative asserting claims sounding in wrongful interference with contractual relations, indemnification and partial constructive eviction. Frankel asserted one cross claim against the cooperative and four counterclaims against the Potters. The counterclaims against the Potters included a property damage claim of $1,000,000.00, and a claim for damages caused by noises and vibrations emanating from the Potters' apartment, also for $1,000,000.00. In October 2004, the 2001 Supreme Court action resulted in a so-ordered settlement agreement. The amended complaint in the instant action alleges that this 2004 settlement was unauthorized and made contrary to the express instructions of Mrs. Frankel (Doc. 44-4, Am. compl. at ¶ 13). It does not appear that a motion to vacate the settlement was ever entered.

The amended complaint further alleges that

> "[d]uring the court of [V&G's] representation of Mrs. Frankel, [V&G], among other defalcations, failed to (a) take essential depositions and to obtain essential document discovery; (b) retain an acoustical expert to counter the acoustical expert retained by the Potters; (c) research and educate themselves regarding the subject matter of the litigation including, but not limited to, the Noise Code; (d) investigate the facts of the litigation, including the failure to obtain a complete inspection of the Potters' apartment; (e) address the lack of soundproofing, lack of waterproofing and change of flooring in the Potters' apartment including, but not limited to, the installation of noisy granite; (f) read and consider essential documents in the litigation; and (g) produce documents that were requested by the Potters and provided by Mrs. Frankel"

(*id.* at ¶ 12). Nine months after the settlement was so-ordered, in July 2005, Mrs. Frankel passed away. Plaintiff, Eric Frankel, is the son of the decedent Gloria Frankel and executor of her estate. He commenced the instant action on October 18, 2007.

The amended complaint asserts four causes of action against V&G sounding in: (1) legal malpractice; (2) breach of contract; (3) recovery of attorney's fees in connection with V&G's defendant of the motion to disqualify them as Gloria Frankel's counsel in the prior consolidated action; and (4) misrepresentation of V&G's prior experience with litigation cases involving noise complaints. The first cause of action alleges that V&G failed to exercise reasonable care and professional competence in litigating on behalf of Mrs. Frankel. Had such reasonable care have been exercised and had V&G not entered into an unauthorized settlement contrary to Mrs. Frankel's express directions, the amended complaint asserts, Mrs. Frankel would have prevailed against and recovered substantial damages from both the Potters and the cooperative building (*id.* at ¶ 16). As for the second cause of action, the amended complaint alleges only that V&G's "failure to represent the [p]laintiff in a reasonably competent manner constitutes a breach of their contractual obligations to [p]laintiff" (*id.* at ¶ 19).

The third cause of action claims that V&G improperly billed Mrs. Frankel for their time spent opposing a motion to disqualify V&G as counsel, alleging that this work was "not within the scope of their representation of Mrs. Frankel or of Mrs. Frankel's retainer agreement" (*id.* at ¶ 22).

That motion was filed by the Potters in the prior action on the eve of trial and sought to disqualify V&G because the Potters had consulted about the case with Darryl Vernon, another partner in V&G, prior to Frankel's retention of Ginsburg. The issue was eventually determined by the Appellate Division, First Department, in *Potters v 71st St. Lexington Corp.*, 8 AD3d 198 (1st Dept 2004). There, the Appellate Division held that it was a proper exercise of the IAS court's discretion to deny the eve-of-trial motion based on the prejudice it would cause to Frankel and the representations of Vernon that he had no recollection of the consultation and never spoke about it with either the partner or associate actively representing Frankel (*id.* at 199).

The fourth cause of action alleges that V&G never informed Mrs. Frankel that they "had no experience whatsoever in litigating cases involving noise" and "[t]hey were not aware even of the existence of the Noise Code, and had no idea that the retention of an acoustics expert was necessary in a litigation of this nature. Implicit in their agreement to representation Mrs. Frankel was [V&G's] representation that they were competent to handle this type of litigation" (Doc. 44-4, Am. compl. at ¶ 25). The amended complaint further alleges that "Mrs. Frankel would not have retained [V&G] had she been aware of [V&G's] inexperience in these matters" and that V&G "knew they were deceiving, and Mrs. Frankel was in fact deceived, by [V&G's] misleading representations and omissions regarding their professional qualifications" (*id.* at ¶ 27).

Analysis

On a motion for summary judgment, the movant bears the initial burden of establishing through competent evidence its entitlement to judgment as a matter of law by demonstrating the absence of material issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the "movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in

admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*see Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). The evidence is to be viewed in the light most favorable to the party opposing the motion (*see Brown v Muniz*, 61 AD3d 526, 531 [1st Dept 2009]).

1. Plaintiff's first cause of action for legal malpractice

In an action to recover damages for legal malpractice, the 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 plaintiff to sustain actual and ascertainable damages" (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]; quoting *McCoy v Feinman*, 99 NY2d 295, 301-302 [2002]). "To 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 lawyer's negligence" (*Rudolf*, 8 NY3d at 442). Damages in a legal malpractice case are designed to "make the injured client whole" and may include "litigation expenses incurred in an attempt to avoid, minimize, or reduce the damage caused by the attorney's wrongful conduct" (*Rudolf*, 8 NY3d at 443; citing *Campagnola v Mulholland, Minion & Roe*, 76 NY2d 38, 42 [1990]; *DePinto v Rosenthal & Curry*, 237 AD2d 482 [2d Dept 1997]).

The issues involved in a legal malpractice claim are "not part of an ordinary person's daily experience, and to prevail at trial, plaintiff will be required to establish by expert testimony that defendant failed to perform in a professionally competent manner" (*Suppiah v Kalish*, 76 AD3d 829, 832 [1st Dept 2010]). However, in the context of motion for summary judgment, the burden rests on the moving party - here, defendant - to establish through expert opinion that he did *not* perform below the ordinary reasonable skill and care possessed by an average member of the legal

community (*id.* at 832; citing *Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo*, 259 AD2d 282, 284 [1st Dept 1999] [prima facie right to judgment not established were defendants offered only conclusory, self-serving statements with no expert or other evidence]). A defendant moving for summary judgment is also required "to establish through an expert's affidavit that even if he did commit malpractice, his actions were not the proximate cause of plaintiff's loss" (*Suppiah*, 76 AD3d at 832). "Where the motion is premised on an argument that the plaintiff could not succeed on her claim below, it is defendant's burden to demonstrate that the plaintiff would be unable to prove one of the essential elements of her claim" (*Sabalza v Salgado*, 2011 NY Slip Op 04732, at *2 [1st Dept 2011]).

Here, in support of the instant motion, V&G offer the affidavit of defendant Ginsburg, a memorandum of law, and affirmation from V&G's attorney with various exhibits annexed. V&G does not, however, attempt to "establish through expert opinion that it did not perform below the ordinary reasonable skill and care possessed by an average member of the legal community" (*Suppiah*, 76 AD3d at 832). V&G also fails to establish, as required on this motion for summary judgment, that even if V&G did commit malpractice, its actions were not the proximate cause of plaintiff's loss (*id.*). Therefore, defendant has failed to satisfy its prima facie burden of establishing entitlement to judgment as a matter of law on plaintiff's first cause of action.

2. Plaintiff's second cause of action for breach of contract

Plaintiff's second cause of action, which alleges only that "[d]efendants' failure to represent the [p]laintiff in a reasonably competent manner constitutes a breach of their contractual obligations to [p]laintiff" is "nothing more than a rephrasing of the claim for malpractice in the language of breach of contract" (*Mitschele v Schultz*, 36 AD3d 249, 252 [1st Dept 2006]; *see also Sage Realty Corp. v Rose*, 251 AD2d 35, 38-39 [1st Dept 1998]). Accordingly, V&G's motion is granted to the

extent that plaintiff's second cause of action is dismissed.

3. Plaintiff's third cause of action based fees beyond scope of retainer agreement

Plaintiff's third cause of action alleges that V&G improperly billed plaintiff's decedent for "time spent opposing the motion to disqualify them" on the basis that it "was not within the scope of [V&G's] representation" (Doc. 39-1, Am. compl. at ¶ 22). In support of the instant motion, V&G argues that retainer agreement does not preclude V&G from charging for these services, and offers a copy of the retainer agreement entered into between Gloria Frankel and V&G (Doc. 39-2, Retainer agreement). In opposition, plaintiff argues that the decedent should not have to pay for a motion based on V&G's breach of the retainer agreement's express language that the parties "have discussed the details of this retention and you are satisfied that no conflict of interest exists which would prevent the firm from handling this matter" (Doc. 42, Plaintiff's opp. mem. of law at 22).

V&G's efforts in opposition to the disqualification motion in the underlying action were within the scope of the retainer agreement. There is no suggestion in the record that plaintiff's decedent objected to V&G continuing to represent her in this action after she became aware of the possible conflict of interest. Furthermore, defending against the motion was clearly in the decedent's best interests, considering that the Appellate Division, First Department, affirmed the IAS court's denial of disqualification in part because of the "severe prejudice" that would have been caused to the decedent if the motion was granted (*Potters v 71st Street Lexington Corp.*, 8 AD3d 198, 199 [1st Dept 2004]). Plaintiff has not meet his burden of establishing the existence of any material issues of fact. Accordingly, this branch of V&G's motion is granted and plaintiff's third cause of action is dismissed.

4. Plaintiff's fourth cause of action sounding in fraudulent misrepresentation

Plaintiff's fourth cause of action alleges that V&G never informed plaintiff's decedent that

its attorneys had "no experience whatsoever in litigating cases involving noise" and "[d]efendants knew they were deceiving, and Mrs. Frankel was in fact deceived, by [d]efendants' misleading representations and omissions regarding their professional qualifications" (Doc. 39-1, Am. compl. at ¶ 27). In support of the instant motion, V&G offers the affidavit of defendant Ginsburg, which describes his 30-year career in litigation, which he characterizes as "primarily focuse[d] on real estate litigation" (Doc. 36, Ginsburg affid. at ¶ 2). Ginsburg specifically avers that he has "prosecuted several noise cases" (*id.* at ¶ 9). This affidavit satisfies V&G's initial burden to demonstrate its prima facie entitlement to judgment, thus shifting the burden to plaintiff. However, plaintiff's opposition papers fail to address this cause of action and thus do not raise any issues of fact precluding summary judgment. Accordingly, this portion of V&G's motion is granted and plaintiff's fourth cause of action is dismissed.

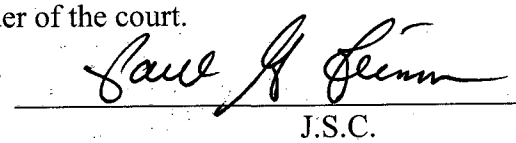
Accordingly, it is

ORDERED that the motion of Vernon & Ginsburg, LLP and Mel B. Ginsburg is granted to the extent that plaintiff's second, third and fourth causes of action are dismissed and otherwise denied; and it is further

ORDERED that the Clerk may enter judgment on the dismissed causes of action and sever and continue the first cause of action under this index number.

This constitutes the decision and order of the court.

Dated: October 20, 2011
New York, New York



J.S.C.

(2011 Pt 12 D&O_603449_2007_001_daz[sumjudg_legalmalp_fees].wpd)