

<b>Silverman v Rogers McCarron &amp; Habas, PC</b>
2012 NY Slip Op 31285(U)
March 27, 2012
Sup Ct, Nassau County
Docket Number: 13418/11
Judge: F. Dana Winslow
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SCAN

**SHORT FORM ORDER  
SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**BERNARD SILVERMAN, RHONA SILVERMAN,**

**TRIAL/JAS, PART 3  
NASSAU COUNTY**

**Plaintiffs,**

**-against-**

**ROGERS McCARRON & HABAS, PC  
PATRICIA E. HABAS,**

**MOTION SEQ. NO.: 001  
MOTION DATE: 1/20/12**

**Defendants.**

**INDEX NO.: 13418/11**

**The following papers having been read on the motion (numbered 1-5):**

**Notice of Motion.....1**  
**Affirmation in Opposition.....2**  
**Reply Affidavit in Support of Motion.....3**  
**Memorandum of Law for Plaintiff.....4**  
**Memorandum of Law for Defendant.....5**

Motion by plaintiffs, Bernard Silverman and Rhona Silverman seeking an Order of this Court granting Summary Judgment against defendants, Rogers McCarron & Habas, PC and Patricia E. Habas, is determined as follows.

The instant motion arises from an underlying legal malpractice action. The defendant attorney firm and Ms. Habas represented the plaintiffs in a judgment collection action before this Court.

**FACTS**

The plaintiffs were awarded a judgment, in the amount of \$108,000 by the Supreme Court, County of Rockland under Index No. 1707/98 against debtor, Joseph Guccione. A transcript of the judgment was filed in office of the Clerk of the County of Nassau, effecting a lien against real property, situated therein at 841 Beckman Drive, North Bellmore, NY. The defendants were retained shortly thereafter for purposes of collection of this debt. The debtor, in 2001, filed a Chapter 13 petition, Case # 800-85189-288, in the Bankruptcy Court of the Eastern District of New York, and upon the debtor's motion, the amount of the judgment was reduced to \$35,000.

The plaintiffs, as represented by the defendants, commenced a special proceeding

before this Court in July, 2008, under Index No. 015726/08, seeking an extension of the lien against the subject premises, and to foreclose on the same. The plaintiffs noted that they were stayed from enforcing the judgment during the pendency of the bankruptcy petition and the extension sought was for the time period for which they were stayed from enforcement; two years and 168 days. Such motion was granted by an Order of this Court, dated September 29, 2008 by the Hon. Daniel Palmieri. The Order directed that the plaintiffs "settle judgment on notice." Thereafter, by deed dated January 10, 2010, the debtors conveyed their interest in the subject property to a third party for the purchase price of \$479,000 and the plaintiffs were not paid on the judgment from the proceeds.

Plaintiffs, commenced a special proceeding before this Court in June, 2011 seeking an Order granting extension of the validity period of the subject judgment lien and a further Order authorizing the Sheriff to sell the subject property. The third-party purchasers, presented evidence to this Court that the judgment lien was not extended. The Hon. Thomas Feinman, after hearing the matter, denied the plaintiffs' motion, while noting in his August 2, 2011 Order, that the plaintiffs failed to submit the judgment on notice as directed by the Hon. Daniel Palmieri in the September 29, 2008 Order. Consequently, the judgment was deemed abandoned.

In September, 2011, plaintiffs commenced an action against the legal defendants before this Court, sounding in legal malpractice against the defendants.

#### ARGUMENTS

Plaintiffs argue that the defendants contradicted themselves by first issuing them a letter indicating that they received the extension on the judgment lien against the property ( See Notice of Motion, Exhibit 4) and then writing two years later, claiming that they were unsuccessful in acquiring the extension ( see Notice of Motion, Exhibit 4). They also contend that when the subject property was sold, that they were the only judgment debtor encumbering the premises and that there were enough proceeds to pay their judgment. As such, the defendants' actions, or lack thereof, caused the judgment lien to expire and the property was able to be sold without satisfying the judgment.

The plaintiffs submit as supporting evidence: copies of the letters dated November 7, 2008 and April 9, 2010 from the defendant law firm; copies of the pleadings; and the Orders of this Court dated September 29, 2008 and August 2, 2011 by the Hon. Daniel Palmieri and the Hon. Thomas Feinman respectively.

Defendants argue that plaintiffs were unwilling to tender fees for further legal work in furtherance of the collection of the subject debt and they directed the defendants not to perform any further work. Defendants also note that they performed prior extensive legal service on plaintiffs' behalf without receiving a fee. Further, the plaintiffs have failed to meet their burden for summary judgment in that they have not furnished an

expert's affidavit setting forth the appropriate standard of care. Additionally, plaintiffs cannot establish that they would have attained or received the damages sought.

Defendants submit as evidence, a retainer agreement between the parties, executed only by Bernard Silverman; and an affidavit of defendant, Bruce A. Rogers, Esq.

#### DISCUSSION

The standards for summary judgment are well settled. A Court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is; therefore, entitled to summary judgment as a matter of law (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v. Journal-News*, 211 AD2d 626[2nd Dept. 1995]).

The burden on the party moving for summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of material issue of fact (*Ayotte v. Gervasio*, 81 NY2d 1062 [1993]). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320, *supra*; *Miceli v. Purex*, 84 AD2d 562 [2d Dept. 1981]). Once this initial burden has been met by movant, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form, sufficient to create material issues of fact requiring a trial.

In order to state a claim for legal malpractice the plaintiff must establish that the attorney's conduct fell below the ordinary reasonable skill and care possessed by an average member of the legal community ( see *Northrop v. Thorsen*, 46 AD3d 780 [2nd Dept 2007]). An action for legal malpractice requires proof of three elements: 1) the negligence of the attorney; 2) that the negligence was the proximate cause of the loss sustained; and 3) proof of actual damages. In order to show proximate cause, the plaintiff-client must establish that "but for" the attorney's negligence, the plaintiff would have prevailed in the matter at issue or would not have sustained any damages (*Levine v. Lacher & Lovell-Taylor*, 256 AD2d 147 [1st Dept 1998]).

Defendants cites *Greene v. Payne, Wood & Littlejohn*, 197 AD2d 664 ( 2<sup>nd</sup> Dept 1993) as authority for its argument that plaintiffs are not entitled to summary judgment as they are unable to establish that defendants failed to exercise the ordinary reasonable skill and knowledge commonly possessed by an attorney, due to their failure to offer expert testimony. This Court notes that under the circumstances of this case, however, the plaintiff need not produce expert testimony to establish that the defendant failed to exercise the requisite level of skill and knowledge ( see *Northrop v. Thorsen* , 46 AD3d 780 [2nd Dept 2007], *Sheehy v. New Century Mortg. Corp.* 690 F Supp2d 51 [EDNY 2010]).

The defendant's liability is premised upon his failure to comply with the rule, set forth in 22 NYCRR §202.48 requiring in relevant part:

“...[p]roposed orders of judgments, with proof of service on all parties where the order is directed to be settled on submitted notice, must be submitted for signature, unless otherwise directed by the court, within 60 days after the signing and filing of the decision that the order be settled or submitted...Failure to submit the order or judgment timely shall be deemed an abandonment of the motion or action, unless for good cause shown...”

As a matter of law, the defendant's disregard or ignorance of such a clearly defined and firmly established rule, fell below any permissible standard of due care ( see *Northrop v. Thorsen*, 46 AD3d 78 [2nd Dept 2007]).

This Court also notes that an attorney is not held to the rule of infallibility and is not liable for an honest mistake of judgment, where the proper course is open to reasonable doubt. As such, the selection of one among several reasonable courses of action does not constitute malpractice. Absent such “reasonable” courses of conduct found as a matter of law, a determination that a course of conduct constitutes malpractice requires findings of fact .

The general rule is that an attorney may be held liable for *ignorance of the rules of practice, failure to comply with conditions precedent to suit, or for his neglect to prosecute or defend an action* ( see *Bernstein v. Oppenheim & Co., P.C.*, 160 AD2d 428 [1st Dept 1990]). When an attorney is retained, it is the attorney's responsibility to conduct the matter properly and to know or learn the applicable law ( see *Hart v. Carro, Spanbock, Kaster & Cuiffo*, 211 AD2d 617 [2nd Dept 1995]).

Said another way, an attorney's lack of judgment and choice of legal strategy may not rise to the level of legal malpractice. However, omissions and neglect do not fall within the ambit of legal strategy. In applying the foregoing legal standard and the elements for a claim of legal malpractice to the case at bar, the Court, in its August 2, 2011 Order, notes that the September 29, 2008 Order “required the plaintiffs to submit a judgment on notice” and referred to that language as a clear directive ( see Notice of Motion, Exhibit 1). Moreover, according to the Court; “...[t]he plaintiffs clearly failed to submit the judgment on notice, and therefore, plaintiffs' attempt to extend the judgment lien was abandoned in 2008, and the [application to extend the validity period of the judgment lien on the property and authorizing the sheriff to sell the property] is a nullity.”( see Notice of Motion, Exhibit 1).

The record demonstrates that, but for the defendant's failure to comply with court-issued directive, the plaintiff's judgment lien would have been extended and in force at

the time of sale.

The defendants, in opposition, cite the plaintiffs' directives to cease all further legal work, including the service of the judgment on notice, as good cause for their omission. However, there are two troubling pieces of evidence. The defendants, by Derek J. Rolo, indicated in their November 7, 2008 letter issued to plaintiff, Bernard Silverman, that the judgment lien on the property had been extended and that they "will not seek to foreclose on Mr. Guccione's property without [plaintiff's] express authorization." ( see Notice of Motion, Exhibit 4) There is no mention of not seeking to settle the judgment on notice. Further, defendants are clearly claiming that they have completed the phase of the work in that they acquired the extension of the judgment. As already noted herein, the completion of the extension clearly included the settling of the judgment on notice.

The second piece of evidence, a letter dated April 9, 2010 issued to plaintiff, "Bernie" Silverman, indicated that they "were unable to obtain an extension on your lien against Mr. Guccione for the purpose of filing a foreclosure action on his home." The letter only refers to the extra costs associated with the foreclosure action, not the extension of the judgment lien."( see Notice of Motion, Exhibit 4).

It is noted that the defendants do not cite ignorance of the law nor do they claim an honest mistake in their understanding of the law and the Court's directive. As such, the plaintiffs have established the element of a cause of action in legal malpractice requiring a showing of negligence on the defendants' part.

However, the element of a cause of action in legal malpractice requiring proximate cause and ascertainable damages has not been clearly set forth. There is nothing in the record to support that the judgment lien had actually been reflected in a title report at the time of closing of title and/ or conveyance of the deed by the debtor to the third party, and/or that their judgment lien was the only encumbrance on the property.

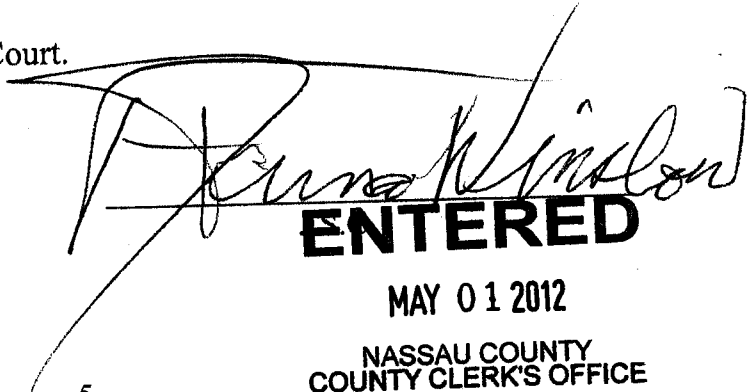
The plaintiffs' failure to demonstrate proximate cause and resulting damages, requires a denial of the instant motion regardless of whether the attorney(s) was negligent. A plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages but for the attorney's negligence (see *Gioeli v. Vlachos*, 89 AD3d 984 [2<sup>nd</sup> Dept 2011]).

Accordingly, plaintiff's motion is **denied** as to defendants, Rogers McCarron & Habas, P.C. Although it is noted that defendant, Habas , has not submitted opposition, this Court is not empowered to reach a determination as to this defendant, based on the foregoing.

This constitutes the Order of the Court.

Dated:

3/27/12

  
**ENTERED**  
MAY 01 2012  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE