

**Brenner v Goldberg, Scudieri & Lindenberg, P.C.**

2020 NY Slip Op 31475(U)

May 15, 2020

Supreme Court, New York County

Docket Number: 156674/2013

Judge: Carol R. Edmead

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM**

*Justice*

-----X

STEVEN BRENNER,

Plaintiff,

- v -

GOLDBERG, SCUDIERI & LINDENBERG,  
P.C., GOLDBERG, SCUDIERI, LINDENBERG & BLOCK,  
P.C., ROBERT GOLDBERG, ALAN GOLDBERG, DAVID  
SCUDIERI, MARK LINDENBERG, PAUL BLOCK

Defendant.

-----X

**INDEX NO. 156674/2013**  
**MOTION DATE 02/28/2020**  
**MOTION SEQ. NO. 003**

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

ORDERED that the motion for summary judgment by defendants Goldberg, Scudieri & Lindenberg, P.C., Goldberg, Scudieri, Lindenberg & Block, P.C., Robert Goldberg, Alan Goldberg, David Scudieri, Mark Lindenberg, and Paul Block (Motion Seq. 003) is granted; and it is further

ORDERED that the cross-motion by Plaintiff to vacate the Note of Issue and Certificate of Readiness is denied; and it is further

ORDERED that the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Defendants shall serve a copy of this decision, along with notice of entry, on all parties within 20 days of entry.

## MEMORANDUM DECISION

In this legal malpractice action, Defendants move for summary judgment pursuant to CPLR § 3212 dismissing Plaintiff's complaint. Plaintiff opposes the motion and cross-moves for an order striking the Note of Issue and Certificate of Readiness pursuant to 22 N.Y.C.R.R. § 202.21, and compelling Defendants to comply with certain discovery demands pursuant to CPLR § 3124.

### **BACKGROUND FACTS**

This motion arises out of a legal malpractice action wherein Plaintiff asserts that Defendants failed to properly represent him in a landlord tenant, nonpayment action in Civil Court, New York County. Plaintiff asserts that Defendants failed to have the non-payment proceeding dismissed, and that he sustained damages in the form of a judgment for outstanding rent, as well as attorney's fees for subsequent counsel that he hired to rectify Defendant's alleged errors.

Plaintiff is the occupant of a rent-controlled apartment in a building owned by Capmar Realty ("Capmar"). Capmar commenced a non-payment action against Plaintiff in 2007; the matter was resolved by a stipulation between Capmar and Plaintiff, who represented himself *pro se* (NYSCEF doc No. 83). After Plaintiff allegedly failed to comply with the stipulation, Capmar commenced another non-payment action in Civil Court in 2010. Plaintiff hired Defendants to represent him in this 2010 proceeding (NYSCEF doc No. 70, ¶ 16).

At a court conference in May 2010, the parties entered into a stipulation wherein the parties agreed that the 2007 proceeding was never resolved, and that Plaintiff would comply with the outstanding rent payments. Plaintiff also agreed that he would provide Capmar with access to his apartment for inspections on certain dates (*id.* at ¶ 18).

In June 2010, the parties appeared before the Honorable David B. Cohen in Civil Court and negotiations commenced. During negotiations, all parties expressed interest in settling rather than proceeding to trial. However, Plaintiff maintained throughout negotiation discussions that he was not in arrears on his rent and did not owe Capmar any payments (*id.* at ¶ 19). The parties ultimately entered into a stipulation dated June 8, 2010 wherein Plaintiff was required to provide proof of rent payment by producing specifically numbered checks, and to trace another check or pay the amount for which that check was supposedly written. Plaintiff was also required to provide Capmar access to his unit and to produce a check for undisputed arrears in the amount of \$1,782.12. Capmar in return agreed to waive any arrears that were still outstanding under the prior 2007 stipulation (NYSCEF doc No. 89).

Plaintiff did not comply with the terms of this stipulation, but instead cancelled the check issued for the arrears, refused to allow Capmar access, and asked Defendants to “cancel” the stipulation (NYSCEF doc No. 70 at ¶ 21). Pursuant to Plaintiff’s directive, Defendants filed an Order to Show Cause on June 8, 2010 to vacate the stipulation, on the grounds that the stipulation erroneously calculated Plaintiff’s arrears (NYSCEF doc No. 92). Judge Cohen denied the motion to vacate the stipulation by decision dated July 27, 2010 (NYSCEF doc No. 93). Defendants suggested Plaintiff file an additional Order to Show Cause to prevent eviction, but Plaintiff refused (NYSCEF doc No. 70 at ¶ 28). Defendants served a Notice of Appeal of Judge Cohen’s decision on September 1, 2010. However, Plaintiff shortly thereafter fired Defendants as his counsel.

Plaintiff subsequently hired David Kaminsky & Associates, P.C. (“Kaminsky”) as his new counsel on September 12, 2010. Kaminsky moved for renewal and reargument of Plaintiff’s position that the June 8, 2010 stipulation should be vacated. By decision dated September 23,

2011, the Honorable Cheryl Gonzales vacated a portion of the stipulation that referred to the legal rent amount of Plaintiff's unit, as that amount had been lowered in the time since the stipulation was entered (NYSCEF doc No. 99). However, Judge Gonzales vacated no other portions of the stipulation, including the amounts of outstanding arrears.

Shortly thereafter, Plaintiff stopped paying Kaminsky and Kaminsky commenced a collection lawsuit against Plaintiff, which Plaintiff countered with a legal malpractice action. This matter was litigated for several years before a decision was issued by the Honorable Anthony Cannataro on May 8, 2018. Judge Cannataro dismissed the legal malpractice claim and ordered Plaintiff to pay Kaminsky outstanding legal fees totaling \$17,465.68 (NYSCEF doc No. 102). Judge Cannataro's decision also limited as a matter of law any damages Plaintiff could recover from Defendants to those charges for subsequent legal services rendered to Plaintiff by Kaminsky for successfully partially vacating the June 8, 2010 stipulation, but only to the extent that entering the stipulation constituted legal malpractice in the first place (*id.*).

Defendants now move for dismissal of Plaintiff's legal malpractice claim against them, in which Plaintiff argues that entering the 2010 stipulation cost him damages of subsequent legal fees, and that Defendants were poorly prepared in representing him and failed to use rent checks provided by Plaintiff as proof of his payment in court. Defendants argue that their actions are all firmly protected by the professional judgment rule. Defendants also contend that Plaintiff freely agreed with Defendants' strategy in pursuant of the June 8, 2010 stipulation. Defendants also argue that Plaintiff cannot recover in malpractice as he cannot demonstrate that he would have achieved a more favorable result in the 2010 non-payment action if not for Defendants' alleged malpractice. Plaintiff thus cannot demonstrate that any alleged negligence by Defendants was the proximate cause of his damages. Defendants also contend that Plaintiff is collaterally estopped

from arguing many of the issues in his complaint as they were already litigated and resolved by the many prior decisions and orders that have been issued in the history of this matter.<sup>1</sup>

Plaintiff, in addition to opposing Defendants' motion, cross-moves for an order pursuant to N.Y.C.R.R. § 202.21 vacating Plaintiff's Note of Issue and Certificate of Readiness, on the ground that this action is not ready to proceed to trial, and pursuant to CPLR § 3124, compelling the Defendants to comply with the Plaintiff's discovery demands for additional depositions. Plaintiff argues that the Note of Issue dated August 8, 2019 was filed only in response to a directive issued by this Court, despite the fact that discovery was incomplete. In opposition to the cross-motion, Defendants note that the time to vacate the Note of Issue has expired, and this Court has previously denied Plaintiff's applications to extend the time to file the Note of Issue, as well as Plaintiff's requests to adjourn dates for discovery.

### DISCUSSION

Summary judgment is granted when “the proponent makes ‘a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,’ and the opponent fails to rebut that showing” (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the proponent has made a prima facie showing, the burden then shifts to the motion's opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also, *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46

---

<sup>1</sup> Defendants separately note that defendant attorneys Mark Lindenberg and Paul Block are entitled to dismissal as all parties agree that they were not involved in the firm's representation of Plaintiff (NYSCEF doc No. 70, ¶ 73).

NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]). When the proponent fails to make a *prima facie* showing, the court must deny the motion, “‘regardless of the sufficiency of the opposing papers’” (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

Legal malpractice is an attorney’s failure to exercise reasonable skill and knowledge commonly possessed by a member of the legal profession (*Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 303-304 [2001]). An attorney may be held liable for ignorance of the rules of practice, failure to comply with conditions precedent to suit, or his neglect to prosecute or defend an action (*Bernstein v Oppenheim & Co.*, 160 AD2d 428, 430 [1st Dept 1990]). To succeed on a claim for legal malpractice, the plaintiff must show: (1) the negligence of the attorney; (2) that the attorney’s negligence was a proximate cause of the loss sustained; and (3) that the plaintiff was damaged as a result of the attorney’s actions (*Tydings v Greenfield, Stein & Senior, LLP*, 43 AD3d 680, 682 [1st Dept 2007]; *Bishop v Maurer*, 33 AD3d 497, 498 [1st Dept 2006], *affd* 9 NY3d 910 [2007]; *Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied* 128 SCt 1696 [2008]).

In order to prove proximate causation, the plaintiff must establish a “case within a case” – that “but for” the alleged negligence, the plaintiff would have prevailed in the underlying action, or would not have sustained any “ascertainable damages” (*Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]). “A plaintiff’s burden of proof in a legal malpractice action is a heavy one. The plaintiff must prove first the hypothetical outcome of the underlying litigation and, then, the attorney’s liability for malpractice in connection with that litigation” (*Lindenman v Kreitzer*, 7 AD3d 30, 34 [1st Dept 2004]). The First Department has stated that:

[o]nly after the plaintiff establishes that he would have recovered a favorable judgment in the underlying action can he proceed with proof that the attorney engaged to represent him in the underlying action was negligent in handling that action and that the attorney's negligence was the proximate cause of the plaintiff's loss since it prevented him from being properly compensated for his loss. (*id.*).

On a plaintiff's motion for summary judgment in a legal malpractice case, the plaintiff "will be entitled to summary judgment in a case where there is no conflict at all in the evidence, the defendant's conduct fell below any permissible standard of due care, and the plaintiff's conduct was not really involved" (*Selletti v Liotti*, 22 AD3d 739, 740 [2d Dept 2005]). On the other hand, for a defendant to succeed on a motion for summary judgment, evidence must be presented establishing that the plaintiff is unable to prove at least one of the elements of legal malpractice (*Ippolito v McCormack, Damiani, Lowe & Mellon*, 265 AD2d 303 [2d Dept 1999]).

Defendants argue that Plaintiff cannot establish a breach of duty of the applicable standard of care as their decisions are all protected by the professional judgment rule, and Plaintiff's allegations are contradicted by the evidentiary record. In New York, the general test for whether an attorney has complied with the standard of care in representation of a client is whether the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession. (*See Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]; *Millman v Blatt & Dauman, LLP*, 95 NYS3d 174 [1st Dept 2019]). The standard employed is not that of a highly skilled attorney but rather any attorney who is competent and qualified. Under this principle, which is commonly referred to as the "professional judgment" rule, allegations of errors in areas subject to professional discretion such as strategy and the selection of evidence are not actionable as claims of attorney negligence. Even if an attorney makes a mistaken decision or engages in a flawed strategy, the strategy must

be “palpably unreasonable” and incompetent in order to be actionable (See *Rodriguez v. Fredericks*, 213 AD2d 176 [1st Dep’t 2005]).

Here, the decisions made by Defendants during their representation of Plaintiff in the 2010 non-payment action all appear to be soundly protected by the professional judgment rule. Regardless of whether Plaintiff’s agreement to the 2010 stipulation was an error of judgment in hindsight, Defendants’ strategy is still protected as long as it was a reasonable course of action (See *Rosner v Paley*, 492 NYS2d 13 [1985]; *Dimond v Salvan*, 78 AD3d 407 [1st Dep’t 2010]; *Iocovello v Weingrad & Weingrad, LLP*, 4 AD3d 208 [1st Dep’t 2004]). The transcript of the 2010 court appearance before Judge Cohen reflects Plaintiff was in full agreement and support of entering the stipulation rather than proceeding to trial (NYSCEF doc No. 133, ¶ 14). Plaintiff now essentially argues he should not have agreed to the 2010 stipulation, but nothing suggests that it was highly unreasonable for Defendants to advise him to do so. Plaintiff has also offered no argument for why he would have been successful had the 2010 non-payment action not been resolved in the stipulation and gone on to trial; Plaintiff has only asserted that he should not have entered the stipulation as he was not behind on his rent.

It is well settled that actions for malpractice based on speculation about what may have happened are improper and subject to dismissal (See *Brookwood Cos., Inc. v Alston & Bird LLC*, 146 AD3d 662 [1st Dept 2017]), where the Appellate Division dismissed plaintiff’s arguments and noted they were based on “too many uncertainties to support a conclusion that there would have been a more favorable” result). The question of whether the stipulation was a reasonable legal strategy to pursue has also already been effectively litigated and decided. In his decision denying vacatur of the stipulation, Judge Cohen noted that Plaintiff “provided no legal basis for vacation of an extensively negotiated stipulation entered into with the benefits of counsel” (NYSCEF doc

No. 93). Judge Cohen further noted that while Plaintiff provided an alternative calculation of rent owed in his motion to vacate, he failed “to point out any mutual mistake in the calculation used in coming to the rent number agreed into the stipulation” that would require vacatur (*id.*)

Plaintiff also cannot demonstrate that he would have prevailed in the underlying action if not for Defendants’ alleged malpractice. To have succeeded in the non-payment action, Plaintiff must have proved that he was fully current in his payments to his landlord and not in arrears. However, Plaintiff did not dispute that he was behind in his rent at various points prior to the stipulation, including in testimony before Judge Cohen (NYSCEF doc No. 70, ¶ 66). Plaintiff also testified during deposition that the check history which he provided in court was missing multiple checks for which he was being sued (*id.*). Any negligence that may have occurred on the part of Defendants thus cannot be said to be the proximate cause of Plaintiff’s damages, as his damages stem from his failure to comply with a validly executed and enforced stipulation.

Plaintiff alleges, for instance, that Defendants failed to bring certain proofs of payment to court on June 8, 2010 (NYSCEF doc No. 70, ¶ 68). However, that mistake cannot be said to be the proximate cause of Plaintiff’s damages, which stem from him violating provisions of the stipulation, including canceling one of the rent checks and refusing his landlord access to his apartment for repairs. Plaintiff accuses Defendants of not using the alleged certain checks he brought to court as proof he made payments, but Plaintiff himself admits he is not sure which rental payments those checks were written for (NYSCEF doc No. 131, ¶ 7). Clearly, any argument that Defendants would have prevailed for Plaintiff by somehow using those unspecified checks as proof of payment is illogical. Plaintiff’s failure to present copies of checks that demonstrated full proof of payment for the rent owed is the sole cause of his loss and obligation to pay \$3,366.66

under the stipulation. His attorney's alleged failure to properly present unspecified checks to the court would not have sustained his damages and is not malpractice.

Plaintiff has also not presented any admissible proof rebutting Defendants' arguments but has merely submitted an unsubstantiated affidavit claiming that he paid rent and gave his attorneys the checks (NYSCEF doc No. 123). As discussed, Plaintiff has testified in both prior court appearances and depositions that he owed rent at various points in this litigation (NYSCEF doc No. 133, ¶ 9). Therefore, his current claim that he owed no rent cannot be considered by this Court (*See Lupinsky v Windham Construction Corp.*, 293 A.D.2d 317 [1st Dept. 2002]; *Joe v Orbit Industries, Ltd.*, 269 A.D.2d 121 [1st Dept. 2000]). Plaintiff's affidavit does not raise any issue of fact in opposition to Defendants' motion, as "a party cannot create an issue of fact by submitting a self-serving affidavit that contradicts prior sworn testimony" (*Benamati v McSkimming*, 8 A.D.3d 815 [3d Dept] [internal quotations omitted]). Therefore, his affidavit is insufficient to defeat Defendant's motion for summary judgment (*Sabato v Soffes*, 9 A.D.2d 297 [1st Dept. 1959]).

Given that Defendants have demonstrated that their representation of Plaintiff was reasonably in line with professional standards, and Plaintiff cannot show proximate cause or concrete ascertainable damages, two necessary elements of any legal malpractice claim, summary judgment is a proper remedy for Defendants and Plaintiff's complaint is dismissed.

As Defendants have demonstrated entitlement to summary judgment and dismissal of the case, Plaintiff's cross-motion to vacate the Note of Issue and Certificate of Readiness is denied as moot. The Court separately notes, however, that Plaintiff's time to file the Note of Issue and conduct discovery pursuant to various orders of this Court has long expired. Plaintiff is also collaterally estopped from making new arguments for why additional discovery is necessary as these issues have already been litigated before this Court and fully addressed and resolved.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the motion for summary judgment by defendants Goldberg, Scudieri & Lindenberg, P.C., Goldberg, Scudieri, Lindenberg & Block, P.C., Robert Goldberg, Alan Goldberg, David Scudieri, Mark Lindenberg, and Paul Block (Motion Seq. 003) is granted; and it is further

ORDERED that the cross-motion by Plaintiff to vacate the Note of Issue and Certificate of Readiness is denied; and it is further

ORDERED that the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Defendants shall serve a copy of this decision, along with notice of entry, on all parties within 20 days of entry.

5/15/2020

DATE

HON. CAROL R. EDM EAD, J.S.C.  
J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE