

Giraldo v Wright

2021 NY Slip Op 33162(U)

November 19, 2021

Supreme Court, Queens County

Docket Number: Index No. 721450/20

Judge: Timothy J. Dufficy

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

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MILDRED CONDE GIRALDO, JOSE GIRALDO,
DOUBLE APPLE CLEANING CORP D/B/A
BIG APPLE LAUNDRY DEPOT and GOLD COIN II
LAUNDRY CORP.,

Plaintiffs,

Index No.: 721450/20

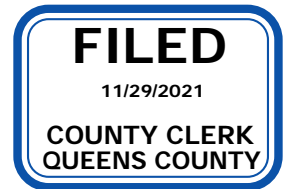
Mot. Date: 9/14/21

-against-

Mot. Seq. 1

RICHARD WRIGHT; THE LAW OFFICES OF
RICHARD WRIGHT P.L.L.C.,

Defendants.



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The following papers were read on this motion by plaintiffs for: an order granting plaintiffs summary judgment on the issue of liability; and for an order directing that an inquest on damages be held in abeyance pending the determination of the application in the underlying case, *Arkady Sandler v Mildred Conde Giraldo, et al*, Supreme Court, Queens County Index No. 703263/16.

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits.....	EF 5-13; 15-16
Answering Affidavits.....	EF 19-23
Replying Affidavits.....	EF 24

Upon the foregoing papers, it is ordered that the motion is denied.

Plaintiffs move for: an order granting plaintiffs summary judgment on the issue of liability; and for an order directing that an inquest on damages be held in abeyance pending the determination of the application in the underlying case, *Arkady Sandler v Mildred Conde Giraldo, et al*, Supreme Court, Queens County Index No. 703263/16.

As an initial matter, that branch of the plaintiffs' motion for an order directing that an inquest on damages be held in abeyance pending the determination of the application in the underlying case, *Arkady Sandler v Mildred Conde Giraldo, et al*, Supreme Court, Queens County Index No. 703263/16, is denied as moot, as a determination was rendered by Hon. Marguerite A. Grays in a decision/Order, dated March 9, 2021.

Plaintiffs, Mildred Conde Giraldo, Jose Giraldo, Double Apple Cleaning Corp d/b/a Big Apple Laundry Depot and Gold Coin II Laundry Corp., commenced this action against defendants, Richard Wright and The Law Offices of Richard Wright P.L.L.C., to recover damages for legal malpractice by defendants. Plaintiffs alleges that they retained the services of defendants to defend them in the lawsuit, entitled *Arkady Sandler v Mildred Conde Giraldo, et al*, Supreme Court, Queens County Index No. 703263-2016 (the *Arkady Sandler* Action), and that defendants subsequently failed to appear at a Preliminary Conference, a Compliance Conference, or an Inquest, which Inquest resulted in a money judgment being entered on default as against plaintiffs herein.

The record reflects that defendants, Richard Wright and The Law Offices of Richard Wright P.L.L.C., herein have made two (2) applications to vacate the judgment after inquest in the *Arkady Sandler* action, both of which were denied by Hon. Marguerite A. Grays (See Orders of Justice Grays dated March 11, 2020 and March 9, 2021).

As to the branch of plaintiffs' motion seeking an order granting them summary judgment on the issue of liability is denied

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be

genuine and not feigned (*Gervasio v DiNapoli*, 134 AD2d 235 [2d Dept 1987]).

To establish a claim for legal malpractice, the plaintiffs must demonstrate that, but for the attorney's negligence, they would have prevailed on the underlying action or not sustained any damages (*see Siciliano v Forchelli & Forchelli*, 17 AD3d 343 [2d Dept 2005]; *Adamopoulos v Liotti*, 273 AD2d 260 [2d Dept 2000]). For the defendants to obtain summary judgment on a legal malpractice claim, they must establish, through the submission of evidentiary proof in admissible form, that the attorney did not fail to exercise that degree of care, skill and diligence commonly possessed and exercised by a member of the legal community (*see Tortura v Sullivan Papain Block McGrath & Cannavo*, 21 AD3d 1082 [2d Dept 2005]; *Greene v Payne, Wood & Littlejohn*, 197 AD2d 664 [2d Dept 1993]). "[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 plaintiff to sustain actual and ascertainable damages" (*Rudolph v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007], quoting *McCoy v Feinman*, 99 NY2d 295, 301-302 [2002]).

Plaintiffs presented a *prima facie* entitlement to summary judgment as a matter of law. Plaintiffs presented evidence that but for defendants' negligence, the plaintiffs would not have suffered damages (*see Caires v Siben & Siben, LLP*, 2 AD3d 383 [2d Dept 2003]). Plaintiffs established the defendants' negligence by showing that the defendants failed to appear at a Preliminary Conference, a Compliance Conference, and an Inquest, in the underlying action, which defaults in appearance were not excused by the Court, despite multiple applications to have such defaults excused. Additionally, through the submission of such evidence including, *inter alia*, an Order of Hon. Marguerite A. Grays, dated November 7, 2016, wherein Justice Grays decided a motion for summary judgment in lieu of complaint seeking summary judgment in the *Arkady Sandler* action, based on movants failure to pay a promissory note, by finding that the instant plaintiffs demonstrated that there are triable issues of fact (in that they profered such defenses as misrepresentation), the plaintiffs established that, had the defendants not been negligent, the plaintiffs would not have suffered damages.

In opposition, defendants Richard Wright and The Law Offices of Richard Wright P.L.L.C. presented sufficient evidence in admissible form to demonstrate that there are triable issues of fact precluding summary judgment. At this preliminary stage of litigation, prior to the taking of examinations before trial, etc., and, in light of Justice Grays' Order, dated November 7, 2016, it cannot be determined as a matter of law that, had the defendants not been negligent, the plaintiffs would not have suffered damages.

As there are triable issues of fact on summary judgment, a trial is necessary. Thus, plaintiffs' motion for summary judgment on liability is denied.

Accordingly, it is

ORDERED that the branch of motion by plaintiffs for an order granting the plaintiffs summary judgment on the issue of liability is denied; and it is further

ORDERED that the branch of the motion for an order directing that an inquest on damages be held in abeyance pending the determination of the application in the underlying case, *Arkady Sandler v Mildred Conde Giraldo, et al*, Supreme Court, Queens County Index No. 703263/2016 is denied, as moot.

The forgoing constitutes the decision and order of the Court.

Dated: November 19, 2021



TIMOTHY J. DUFFICY, J.S.C.