

**Bethelite Community Baptist Church, Inc. v Shiryak,
Bowman, Anderson, Gill & Kadochnikov, LLP**

2025 NY Slip Op 32826(U)

July 22, 2025

Supreme Court, New York County

Docket Number: Index No. 160036/2022

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. PAUL A. GOETZ **PART** **47**

Justice

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BETHELITE COMMUNITY BAPTIST CHURCH, INC., D/B/A
BETHELITE COMMUNITY BAPTIST CHURCH,

Plaintiffs,

INDEX NO. 160036/2022

MOTION DATE 11/07/2024

MOTION SEQ. NO. 003

- v -

SHIRYAK, BOWMAN, ANDERSON, GILL &
KADOCHNIKOV, LLP, MARK ANDERSON

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 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, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157

were read on this motion to/for JUDGMENT - SUMMARY.

In this legal malpractice action, plaintiff moves pursuant to CPLR § 3212 for summary judgment on its sole cause of action for legal malpractice, and defendants cross-move pursuant to CPLR § 3212 for summary judgment dismissing the complaint.

BACKGROUND

The Premises

Bethelite Community Baptist Church Inc. d/b/a Bethelite Community Baptist Church (the church) owns real property located at 36-38 West 123rd Street, New York, NY 10027 (the premises) (NYSCEF Doc Nos 72 ¶ 2; 77). The premises include a house of worship for the church’s members and other facilities, including a school, homeless shelter, and a residence for Pastor James Manning, the church’s spiritual leader (*id.* ¶ 3). The premises are tax exempt as a

house of worship, however, the church is still obligated to pay for water and sewer services (*id.* ¶ 4; NYSCEF Doc No 78).

The Tax Lien

Due to a dispute with the City, the church stopped paying its water and sewer charges in the early 1990s (*id.* ¶ 7). On June 17, 2002, the City placed a lien on the premises for \$100,549.54 (*id.* ¶ 8; NYSCEF Doc No 80). Three days later, the City assigned the lien to NYCTL 2002-A Trust and Bank of New York (the lienholder), as collateral agent and custodian (*id.* ¶ 9; NYSCEF Doc Nos 81, 82). By the tax lien certificate, the City assigned:

“all of the City’s right . . . to all real property taxes, assessments, sewer rents, sewer surcharges, water rents and other City charges that have prior to the date hereof become a lien against those certain parcels of real property . . . plus interest accruing thereon at the rate of eighteen percent (18%) per annum, compounded daily, or nine percent (9%) per annum, compounded daily, in the case of delinquent water and sewer liens . . . where the annual tax bill does not exceed \$2,750 . . .”

(NYSCEF Doc No 81).

The 2015 Referee Report

On September 17, 2009, the lienholder commenced an action against the church to foreclose on the lien (*id.* ¶ 12; *NYCTL 1998-2 Trust and the Bank of Mellon v Bethelite Community Baptist Church*, Index No 113197/2009). The church had not yet appeared in the matter, however, on May 6, 2015, the referee issued a report finding that the church owed \$1,028,939.34 on the lien; notably, the referee calculated this total by applying an interest rate of 18% (*id.* ¶ 14; NYSCEF Doc No 86 [the 2015 report]).

On January 25, 2018, the lienholder moved, *inter alia*, to confirm the 2015 report (*id.* ¶¶ 13-14). The church’s counsel at the time, Shaw & Binder PC (Shaw & Binder), opposed on the

grounds that the referee incorrectly applied an 18% interest rate, rather than 7-9% (*id.* ¶ 17; NYSCEF Doc No 94 [the S&B opposition] [citing NYC Admin Code §§ 11-306 and 22-224, setting real estate tax interest at 7% per annum; asserting that the church’s annual taxes are \$0 (i.e., it “does not exceed \$2,750”) and thus according to the certificate, the rate should be capped at 9%]). By decision and order dated June 18, 2019, the court granted the lienholder summary judgment on liability, but denied the part of its motion seeking to confirm the referee report because “[i]t is simply unfair to confirm a report issued prior to Bethelite’s appearance in this case,” and directed that the referee recalculate the amount owed by the church (*id.* ¶¶ 18-19; NYSCEF Doc No 96 [also noting Shaw & Binder’s argument “that plaintiffs delayed this case too long in an attempt to reap a windfall of interest,” as the \$100,549.54 lien grew to \$1,028,939.34 with interest]).

The 2019 Referee Report

The lienholder submitted papers to the referee, again requesting that an interest rate of 18% be applied (*id.* ¶ 20). However, the lienholder mistakenly mailed a copy of their papers to an outdated Shaw & Binder address, and the church missed its opportunity to argue for the 9% interest rate as it had done in its prior opposition (*id.* ¶¶ 21-22). As a result, a new report was issued, again applying an interest rate of 18%; thus, as of July 5, 2019, the church owed \$2,199,623.88 on the lien (*id.* ¶¶ 23-24; NYSCEF Doc No 98 [the 2019 report]).

On October 1, 2019, the lienholder moved to confirm the 2019 report (*id.* ¶¶ 25-26). Shortly thereafter, the church retained defendants Shiryak, Bowman, Anderson, Gill & Kadochnikov, LLP (SBAGK) and Mark Anderson Esq. to represent it (*id.* ¶ 27).

Plaintiff alleges that Anderson was aware of the arguments raised in the S&B opposition, and that Pastor Manning specifically requested that Anderson include those arguments when

opposing the lienholder’s motion to confirm the 2019 report (*id.* ¶¶ 29-30; NYSCEF Doc No 107).¹ However, on November 26, 2019, defendants filed opposing papers—without giving plaintiff an opportunity to review them beforehand—which did not substantively address the issue of the interest rate, merely stating that there were “serious issues with the referee’s calculation that are in direct contravention with precedent” (*id.* ¶¶ 31-35; NYSCEF Doc No 109 [the SBAGK opposition])².

By decision and order dated January 29, 2020, the court confirmed the 2019 report, noting that defendants “made no substantive argument regarding the referee’s calculations—offering a conclusory argument that ‘there are serious issues with the referee’s calculations’ is not enough” (*id.* ¶¶ 38-41; NYSCEF Doc No 117).

The church retained new counsel and appealed the January 29, 2020 order. By decision and order dated March 4, 2021, the First Department affirmed, noting that “[i]n opposing [the lienholder’s] motion to confirm the Referee’s report, [defendants] did not argue that the interest rate on the tax lien should be nine percent per annum” (*id.* ¶¶ 43-45; NYSCEF Doc No 118). Additionally, by decision and order dated February 4, 2022, the trial court denied the church’s motion to vacate the January 29, 2020 order because the church “failed to demonstrate the existence of ‘new evidence’ that would change the result reached and that it could not have been discovered with due diligence” (*id.* ¶¶ 46-48; NYSCEF Doc No 119).

¹ As defendants note, the email plaintiff cites from Pastor Manning to Anderson, in which he advises that the church’s “prior attorneys (Stuart Shaw) wrote and argued firmly that the 18% . . . was not applicable to our Not For Profit Tax Exempt standing,” was sent on November 26, 2019, the same day the opposition was due (NYSCEF Doc No 107). Defendants also note that Pastor Manning testified that he did not share Shaw & Binder’s work product with defendants (NYSCEF Doc No 144, pp. 108-09). Nevertheless, defendants accessed the case docket around the time the firm was retained (NYSCEF Doc No 148, p. 77).

² Anderson testified that he conducted extensive research regarding the appropriate interest rate and determined “in [his] professional opinion” that seeking a lower interest rate “was not the correct argument” (NYSCEF Doc No 148, pp. 136-40).

Expert Reports

Both parties submit reports prepared by legal experts who opine as to whether the phrase “the annual tax bill” as it appears on the tax lien certificate refers only to property taxes, or if it includes water and sewage fees (NYSCEF Doc Nos 121, 123). Since this matter presents a domestic legal question before the court, the legal expert opinions were not considered (*South32 Chile Copper Holdings Pty Ltd v Sumitomo Metal Min. Co., Ltd.*, 2025 NY Slip Op 02892 *2 [1st Dept 2025] [legal expert opinions appropriate to inform the court on matters of foreign law]).

Plaintiff also submits an expert report prepared by Rhona Liptzin, a certified public accountant, which outlines the “difference that plaintiff [] will be required to pay to satisfy [the] lien . . . based on the application of the interest rate of 18%, compounded daily from June 20, 2002, versus the amount [it] would have had to pay [] if the interest rate was 9%” (NYSCEF Doc No 122). However, “because [the] expert report was not sworn to under penalty of perjury, it [does] not constitute admissible evidence in support of the motion” (*Feuerman v Marriott Intl., Inc.*, 201 AD3d 566, 567 [1st Dept 2022]; CPLR § 2106).

DISCUSSION

“It is well settled that ‘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 demonstrate the absence of any material issues of fact’” (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [internal citations omitted]). “Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact

which require a trial of the action” (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010], citing *Alvarez*, 68 NY2d at 342).

“The court’s function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility” (*Meridian Mgmt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined “in the light most favorable to the non-moving party” (*Schmidt v One New York Plaza Co.*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*id.*).

“To establish a cause of action for legal malpractice, plaintiff must show that: (1) the attorney was negligent; (2) the attorney’s negligence was a proximate cause of plaintiff’s losses; and (3) plaintiff suffered actual damages” (*Springs v L&D Law P.C.*, 234 AD3d 422, 423 [1st Dept 2025] [quotation omitted]). As to negligence, “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” (*Aur v Manhattan Greenpoint Ltd.*, 132 AD3d 595, 595 [1st Dept 2015] [quotation omitted]). “An attorney’s conduct or inaction is the proximate cause of a plaintiff’s damages if but for the attorney’s negligence the plaintiff would have succeeded on the merits of the underlying action or would not have sustained actual and ascertainable damages” (*83 Willow, LLC v Apollo*, 187 AD3d 563, 563 [1st Dept 2020] [quotation omitted]). “Conclusory allegations of damages or injuries predicated on speculation cannot suffice for a malpractice

action” (*Philip S. Schwartzman, Inc. v Pliskin, Rubano, Baum & Vitulli*, 215 AD3d 699, 703-04, [2nd Dept 2023] [quotation omitted]).

Plaintiff argues that defendants breached their duty of care in filing the SBAGK opposition without objecting to the 18% interest rate employed by the referee, and but for this failure, the court would have determined that plaintiff owed 7-9% interest, rather than 18%; and this caused an actual and ascertainable loss, as the amount owed can be recalculated with the lower interest rate applied (NYSCEF Doc No 73, pp. 9-19). Defendants argue that the 18% interest rate was correctly applied to the tax lien; plaintiff’s financial liability stems from its own noncompliance with City directives to pay its outstanding water and sewer charges and its failure to mitigate damages; and that Anderson exercised “reasonable professional judgment in declining to advance the meritless argument that Bethelite was entitled to a reduced interest rate” (NYSCEF Doc No 128, pp. 15-24).

Initially, while defendants argue that “the courts repeatedly upheld the [18%] interest rate during the underlying litigation” and that “Plaintiff’s claims were consistently rejected on appeal” (NYSCEF Doc No 128), this mischaracterizes the history of the underlying case. In the June 18, 2019 order, the court specifically declined to confirm the 2015 report because plaintiff had not yet appeared in the action and directed recalculation of the interest rate (NYSCEF Doc No 96). In the January 29, 2020 order, the court confirmed the 2019 report because defendants “made no substantive argument regarding the referee’s calculations” (NYSCEF Doc No 117). The First Department affirmed, specifically noting that defendants “did not argue that the interest rate on the tax lien should be nine percent per annum” (NYSCEF Doc No 118). Finally, the trial court’s February 4, 2022 order denied the church’s motion to vacate because the church “failed to demonstrate the existence of ‘new evidence’ that would change the result reached and that it

could not have been discovered with due diligence” (NYSCEF Doc No 119). Thus, the issue of the interest rate was never fully litigated and considered on the merits.

Here, the tax lien certificate specifies that an 18% interest rate applies to the lien, except “in the case of delinquent water and sewer liens and real property taxes [] where the [property’s] annual tax bill does not exceed \$2,750,” in which case a 9% interest rate applies (NYSCEF Doc No 81). It is undisputed that the lien was issued because of plaintiff’s outstanding water and sewer fees, and not due to any real property taxes owed on the property, since it is tax-exempt. Plaintiff therefore argues that by the plain meaning of the certificate, plaintiff fell within the 9% interest category, as it had been “delinquent [in paying] water and sewer” charges and did not have an “annual tax bill” (NYSCEF Doc No 73). Defendants, however, note that “annual tax bill” is not defined in the NYC Admin Code and argue that “there is no statutory or factual basis for [the] claim” that Bethelite’s exempt status qualifies it for a 9% interest rate (NYSCEF Doc No 128). Defendants assert that the term “annual tax bill” encompasses “water and sewer charges [since they] are treated as real property obligations,” and that the public policy considerations of the City’s “ability to collect unpaid charges” would be undermined by permitting a lower interest rate to be applied (*id.*).

While “annual tax bill” is not defined by the Administrative Code, the term “tax” is defined as “[a] charge, usu[ally] monetary, imposed by the government on [] property . . . ‘to raise money for *public*, as distinguished from *private purposes*” (Black’s Law Dictionary [12th ed. 2024], *quoting* John F. Dillon, *Commentaries on the Law of Municipal Corporations*, 727-28 [3rd ed. 1881] [emphasis in original]). Houses of worship such as Bethelite are exempt from paying taxes, which raise money for the public, because they already provide a public benefit (*Matter of Greater Jamaica Dev. Corp. v New York City Tax Commn.*, 25 NY3d 614, 629 [2015])

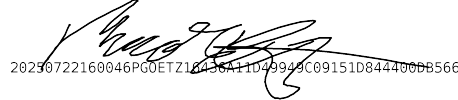
[“exemptions are provided for those charitable uses that benefit the public”]). Importantly, there is a distinction between taxes, which are based on *ownership*, and other charges, which are based on *usage*. Plaintiff’s water and sewer charges were not levied in order to “raise money for [the] public,” but rather to cover the costs of the utilities actually used. Therefore, the water and sewer charges are not part of plaintiff’s “annual tax bill” (*Travelers Ins. Co. v Cuomo*, 14 F3d 708 [2nd Cir 1993] [“Although there is no bright line between assessments that are taxes and those that are not, most courts agree that” the distinguishing factor is “the revenue’s ultimate use, asking whether it provides a general benefit to the public, of a sort often financed by a general tax,” or to defrays delineated costs], rev’d on other grounds *New York State Conference of Blue Cross & Blue Shield Plans v Travelers Ins. Co.*, 514 US 645 [1995]; *Cnty. Hous. Mgmt. Corp. v City of New Rochelle*, 381 F Supp 2d 313, 320 [SDNY 2005] [finding that a “refuse user fee” was a tax because it was “levied upon all owners of improved properties in the City, not just on those property owners who use the refuse collection services,” and analogizing same with a fire service protection fee which “constituted a tax . . . because liability for the fee was *based upon a resident’s property owner status instead of his use of the city service*”] [emphasis provided]).

In the context of a motion for summary judgment, a movant’s “burden of proof in a legal malpractice action is a heavy one” because they “must prove [] 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]). Plaintiff has met that heavy burden here. Had defendants raised the argument that plaintiff did not have an annual tax bill due to its tax-exempt status, the court would have determined that the lower interest rate applied. Defendants were negligent in failing to raise this argument, and this negligence proximately caused the entry of a significantly larger judgment amount against plaintiff.

CONCLUSION

Based on the foregoing, it is

ORDERED that plaintiff’s motion for summary judgment on its sole cause of action for legal malpractice is granted on liability³, and defendant’s cross-motion is denied.


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| <u>7/22/2025</u> DATE | | | | | <hr/> PAUL A. GOETZ, J.S.C. |
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| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input type="checkbox"/> REFERENCE |

³ As noted *supra*, though plaintiff filed a report by its accounting expert which provides a calculation of damages (NYSCEF Doc No 122), it is inadmissible and therefore was not considered.