

Rosalie David and Steven David, Plaintiff(s)/, Petitioner(s),
v.
Mallilo & Grossman, Anthony Mallilo, Francesco Pomara, Jr. and Peter Gallanter, Defendant(s)/,
Respondent(s).

300574 TSN 2006
Civil Court of the City of New York, New York County
Decided on September 26, 2007

OPINION OF THE COURT

Manuel J. Mendez, J.

Upon a reading of the foregoing cited papers on this motion for partial summary judgment on liability and this cross motion for summary judgment dismissing the complaint it is the decision and order of this court that the motion is granted to the extent of finding defendants negligent as a matter of law, the cross motion is denied.

FACTUAL BACKGROUND *2

Plaintiff brings this legal malpractice action against the defendants for their failure to file a summons and complaint in the Supreme Court of the State of New York, thereby depriving them of the ability to obtain a significant monetary amount In damages for the injuries they sustained in a motor vehicle accident on January 25, 2003.

Plaintiffs are husband and wife. On January 25, 2003 plaintiff Steven David was operating his motor vehicle in which plaintiff Rosalie David was a passenger. While their vehicle was stopped in traffic it was struck in the rear by another vehicle, causing their vehicle to strike the vehicle in front and allegedly causing Rosalie David serious physical injuries, requiring surgery. Mrs. David was taken by ambulance from the scene of the accident to a local hospital where she was treated at the emergency room and later released. She was given pain killers and told to visit with her physician. Since she was in pain she visited her orthopedist, Dr. Jacob Rozbruch, on January 28, 2003.

Dr. Rozbruch had seen Mrs. David for an injury she had sustained to her right shoulder on January 20, 2003, five days before the automobile accident, when she tripped and fell on her right shoulder. When she visited him on January 28, he ordered an MRI which revealed a "full thickness tear of the rotator cuff" in the right shoulder. He suggested surgery to repair the injury, which was performed on February 6, 2003.

Plaintiffs contacted defendants approximately one week after the accident and retained them to prosecute their claim. Defendants were aware of the injuries sustained by Mrs. David, of the need for surgery to repair the injury and of the actual surgery performed on February 6, 2003. Despite knowing this, defendants filed their summons and complaint on June 27, 2003 in the Civil Court County of New York, demanding \$25,000.00 in damages, thereby limiting Mrs. David to a recovery of \$25,000.00 or less for her injuries.

The mistake was discovered during the latter part of the year 2003 and in March of 2004 defendants made a motion in Supreme Court New York county to transfer the action to that court and to increase the demand to \$1,000,000.00. The motion was denied by the Hon. Kibbie F. Payne by decision order dated May 14, 2004 in which he stated : "All of the facts on which plaintiff relies in support of the motion were known or available to plaintiff at the time the complaint was served. Thus, because plaintiff has failed to make a sufficient showing by explaining the delay in making the motion, or why the monetary jurisdiction of the Civil Court would be inappropriate under the circumstances, the application is denied...accordingly, the application is denied in all respects and the petition is dismissed without prejudice to renewal upon adequate papers." [see Exh D &E plaintiff's papers]. Justice Payne's decision was affirmed by the Appellate Division First Department by memorandum decision dated December 15, 2005 [See Exh. F & G plaintiff's papers].

Following the denial of the motion and affirmance of the decision, the automobile accident case was settled for \$25,000.00. Plaintiffs started this legal malpractice action against defendants by filing a summons and complaint in Supreme Court State of New York, County of *3 New York demanding \$750,000.00 for plaintiff Rosalie David and

\$100,000.00 for Steven David, as the amounts they would have recovered in the automobile accident case if it had been filed in the proper court.

Plaintiffs now move for an order granting partial summary judgment, declaring defendants liable as a matter of law to plaintiffs for legal malpractice, and setting this case down for an immediate trial for the determination of damages. Defendants cross move for an order granting them summary judgment and dismissing plaintiffs complaint. Defendants assert in their motion that plaintiff Rosalie David did not sustain a serious physical injury under [New York State Insurance Law § 5102](#) (d), because it cannot be ascertained if the rotator cuff tear was the result of the trip and fall on January 20, or the automobile accident on January 25, 2003.

In support of their cross motion defendants annex the affidavits of two physicians, Dr. James M. Liguori, a board certified neurologist and Dr. Anjani Sinha, an orthopedic surgeon.

Dr. Liguori is of the opinion that “ it is unclear as to the causal relationship of the motor vehicle accident dated January 25, versus the prior fall dated January 20, 2003.” Dr. Sinha is of the opinion that “ It cannot be determined whether the torn rotator cuff and the problem with her right shoulder is related to the accident or if it was a pre-existing, ongoing process.” In opposition to the defendants motion Plaintiffs submit the affidavit of Dr. Jacob D. Rozbruch, the treating orthopedic surgeon who is of the opinion that “ the second injury sustained on January 25, 2003 was the immediate cause of the rotator cuff tendon tear because of the significant change in her examination between the initial visit of January 24, 2003 and a subsequent visit of January 28, 2003.”

LEGAL ANALYSIS

The statute of limitations in a legal malpractice action is three years counting from the date the malpractice was committed, not when it was discovered. However the limitations period is tolled by the doctrine of continuous representation and does not begin to run until the attorney ceases representing the client on the matter which is the subject of the malpractice action. ([Sommers v. Cohen](#), 14 AD3d 691, 790 NYS2d 141 [2nd. Dept. 2005]). Although the cause of action accrued on June 27, 2003 the day defendants filed the summons and complaint in Civil Court, the limitations period was tolled until 2005 when defendants ceased representing plaintiffs in the action. The summons and complaint in this malpractice action was filed in May 2006, therefore it was timely.

“To recover damages for legal malpractice a plaintiff must prove that the attorney failed to exercise that degree of care, skill, and diligence commonly possessed and exercised by an ordinary member of the legal community. In addition, the plaintiff must establish that the attorney’s negligence was a proximate cause of the loss sustained, that the plaintiff incurred actual damages as a direct result of the attorney’s actions or inactions and that but for the attorney’s negligence, the plaintiff would have prevailed in the underlying action or would not have sustained any damages.” ([Bauza v. Livingston](#), 40 AD3d 791, 836 N.Y.S. 645, [2nd. Dept. *4 2007]). A plaintiff must prove three elements: (1) the attorney’s negligence,(2) that the negligence was the proximate cause of the loss sustained, and (3) actual damages. (4A NY Prac. Comm§ 77:37; [Between the Bread Realty Corp., v. Salans, Hertzfeld, Heilbron, Christy & Viener](#), 290 AD2d 380, 736 NYS2d 666 [1st. Dept. 2002]).

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. In essence, the plaintiff must prove a case within a case ([McKenna v Forsyth & Forsyth](#), 280 AD2d 79, 720 NYS2d 654 [4th Dept. 2001]; [Lindenman v. Kreitzer](#), 7 AD3d 30, 775 NYS2d 4 [1st. Dept. 2004]). Plaintiffs must prove first their entitlement to recover in the underlying automobile accident case, including the value of the lost judgment ([Bauza v. Livingston](#), 40 AD3d 791, 836 NYS2d 645 [2nd. Dept. 2007]).

Failure to demonstrate proximate cause requires the dismissal of a legal malpractice action regardless of whether the attorney was negligent ([Bauza v. Livingston](#), 40 AD3d 791, supra ; [Reibman v. Senie](#), 302 AD2d 290, 756 NYS2d 164 [1st Dept. 2003]). The plaintiffs must provide competent expert testimony on the question of proximate cause in order to avoid dismissal ([Tanel v. Kreitzer & Vogelmann](#), 293 AD2d 420, 741 NYS2d 221 [1st. Dept. 2002]). Plaintiffs therefore will be required to prove, through expert testimony that the underlying action meets the threshold requirements of the [New York State Insurance Law](#)§ 5102(d), or their claim for legal malpractice will be dismissed.

A settlement of the underlying claim does not preclude a subsequent action for legal malpractice where the settlement was effectively compelled by the mistakes of counsel ([Rau v. Borenkoff](#), 262 AD2d 388, 691 NYS2d 140 [2nd. Dept. 1999], thus plaintiffs are not precluded from bringing this action in legal malpractice against

defendants because they settled the underlying claim. This settlement took place because, as a result of the defendants actions in filing the summons and complaint in the Civil Court, they were limited in the amount of recovery against the original tortfeasors, the driver and owner of the offending vehicle.

When a cause of action is lost as a result of the attorney's negligence, the client's injury is measured by the amount that would have been collected on that lost cause of action ([Mckenna v. Forsyth & Forsyth, 280 AD2d 79, supra](#)). The plaintiff does not bear the burden of proving collectability of the judgment ([Lindenman v. Kreitzer, 7 AD3d 30, supra](#)).

Plaintiffs argue that by failing to file the summons and complaint in the Supreme Court defendants committed malpractice as a matter of law. This court agrees with plaintiffs argument. Defendants knew that plaintiff Rosalie David had been involved in a motor vehicle accident, that she was treated by an orthopedist, that a diagnosis of a torn rotator cuff of the right shoulder was made and that surgery was performed to repair the tear. The recovery for a torn rotator cuff with surgery could be worth much more than the amount demanded in the Civil Court Summons and Complaint. Knowing what defendants knew when they filed the pleadings in Civil Court ,this court can only conclude that defendants were negligent as a matter of law. Plaintiffs have met *5 their initial burden by establishing that defendants were negligent in failing to file the proper pleadings in Supreme Court. Defendants have failed to raise a triable issue of fact. Plaintiffs must now prove that they would be successful in the underlying action ([Williams v. Kublick, 302 AD2d 961, 754 NYS2d 804 \[4th Dept. 2003\]](#)).

Defendants argue that plaintiffs will be unable to meet the serious injury threshold of the Insurance Law. The defendants submit the affidavits of two doctors who are both of the opinion that it cannot be ascertained if the injury to the plaintiff's right shoulder is causally related to the accident of January 25, 2003. In response Plaintiffs submit the affidavit of the treating orthopedic surgeon who is of the opinion that the injury to plaintiff's right shoulder was caused by the accident of January 25, 2003. These affidavits are in conflict with each other and raise issues of fact for the trial court to decide. "It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits ([Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 NY2d 57, 268 NYS2d 18, 215 NE2d 341\[1966\]](#); [Sillman v. 20th Century-Fox Film Corp., 3 NY2d 395, 165 NYS2d 498, 144 NE2d 387 \[1957\]](#); [Epstein v. Scally, 99 AD2d 713, 472 NYS2d 318 \[1984\]](#)). Summary Judgment is "issue finding" not "issue determination"([Sillman, 3 NY2d 395, supra](#) ; [Epstein, 99 AD2d 713, supra](#)). It is improper for the motion court to resolve material issues of fact. These should be left to the trial court to resolve ([Brunetti, v. Musallam, 11 AD3d 280, 783 NYS2d 347\[1st Dept. 2004\]](#)). Accordingly defendants motion for summary judgment is denied.

CONCLUSION

Defendants are negligent as a matter of law in filing the pleadings in Civil Court and demanding \$25,000.00 in damages. When they filed the pleadings they knew that plaintiff Rosalie David had sustained a rotator cuff tear following the automobile accident of January 25, 2003, that surgery was required and performed on February 6, 2003 to repair this injury. As a result of their negligence plaintiffs were limited to recover only \$25,000.00 for an injury that could be worth much more. The fact plaintiff settled the underlying action for the \$25,000.00 demanded in the complaint does not preclude them from asserting this action for legal malpractice, the settlement was effectively compelled by the mistakes of counsel. Plaintiffs having established defendants negligence must now prove proximate cause and actual damages. They must prove that they were entitled to recover in the underlying case, that is, that a jury must find plaintiff Rosalie David sustained a serious injury within the meaning of [Insurance Law §5102\(d\)](#) as a result of the automobile accident, and the value of the lost judgment.

Accordingly, the motion for summary judgment is granted to the extent of finding defendants negligent as a matter of law. Parties shall appear for a trial where plaintiffs must prove that they are entitled to recover in the underlying automobile action and the value of the lost judgment. The defendants motion for summary judgment is denied. The conflicting physicians affidavits raise issues of fact that must be resolved at a trial. *6

This constitutes the decision and order of this court.

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