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

PRESENT: LOUIS B. YORK Justice PART 2

0105830/2003

SCHULMAN, STEPHEN B.
VS
FIERMAN, ROBERT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

SEQ 1

SUMMARY JUDGMENT

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
JUL 25 2005
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 7/19/05

LOUIS B. YORK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

Supreme Court of the State of New York
County of New York

Part 2

Index No. 105830/03

Decision/Order

STEPHEN B. SCHULMAN,

Plaintiff,

Present:
Hon. Louis B. York
Justice, Supreme Court

– against –

ROBERT FIERMAN,

Defendant.

In this action, plaintiff moves and defendant cross-moves for summary judgment. For the reasons below, the court denies both motions.

Plaintiff alleges that on December 31, 1990, for reasons that are not relevant in this lawsuit, his former law partnership, Levy Sonet & Siegel ("Levy") dissolved itself and reformed without him. In 1991, plaintiff sued Levy in an action entitled Schulman v. Levy Sonet & Siegel, Index No. 22113/91 ("Levy"). Neither party has submitted a copy of the complaint – which is not critical to this motion but would have assisted the court in its review of the current applications before the court. However, apparently, in Levy plaintiff contended that Levy, as newly formed, did not provide him with his fair share of profits; and, he sought an accounting to determine his proper share. It also appears that Levy counterclaimed for losses suffered by the partnership, for which plaintiff allegedly owed his proportionate burden.

According to plaintiff, his attorney on the 1991 action suffered a nervous

breakdown in 1999 and, therefore, could no longer represent him. Around September of 1999, Plaintiff retained Robert Fierman as his new counsel. At this time, defendant had moved to dismiss the case; and, apparently plaintiff – through Fierman – cross-moved to restore the nine-year-old case to active status. Fierman won the motion to restore on plaintiff's behalf. Ultimately, however, Levy prevailed on a summary judgment motion, which also sought an accounting; and, pursuant to a court decision, an accounting was directed. As a result of the accounting, it was determined that plaintiff owed Levy $40,605.00 plus interest from the date of dissolution.

Plaintiff argues that, in litigating the accounting issue, Fierman undisputedly was guilty of malpractice. First, plaintiff alleges that Fierman did not inform him of the motion for summary judgment until immediately before the final submission date. At this time, plaintiff states, Fierman advised him to sign an affidavit in opposition, which Fierman claimed would be sufficient to defeat the motion. Second, plaintiff alleges that the affidavit which Fierman prepared, and the remainder of the opposition papers, were grossly deficient. According to plaintiff, the papers completely ignored at least four inaccuracies in Levy's accounting. Plaintiff asserts that, "[b]ut for Fierman's failure to address these issues, judgment would not have been rendered against me." (Shulman Aff. at ¶ 12.) In fact, he alleges that, instead of finding that he owed Levy $40,605.00, the court would have found that Levy owed plaintiff $427,215.20. Thus, he concludes that Fierman's alleged malpractice caused him to sustain damages of $517,155.27. Moreover, in the current motion, he argues that Fierman's malpractice is so evident, and the damages are so clearly affixed at this amount, that summary judgment is warranted on his behalf.

Fierman, defendant in this lawsuit, disputes these statements and cross-moves for summary judgment on his counterclaims for unpaid legal fees of $56,000. Defendant concedes that he represented plaintiff in Levy. Except for this fact, however, his characterization of his representation differs dramatically from plaintiff's. First of all, defendant stresses that Levy was commenced in 1991, long before he assumed any responsibility for its litigation. Moreover, among other things, in 1997 – before he took over the case – the Levy lawsuit was marked off calendar based on the failure to appear in court on a calendared date; according to defendant, plaintiff and his former counsel also did little to prosecute the action before 1997. One of the few things that they did, he suggests, was to make a motion and file a brief - which defendant states that he prepared. When he did this work, defendant states, he was friends and colleagues with plaintiff; and, therefore, he not only did the work but agreed to defer payment for a number of years.

Also according to defendant, in September 1999, plaintiff begged him to take on the Levy lawsuit. Because plaintiff's former counsel had not moved to restore the action within a year of the time it was marked off calendar, Levy had moved to dismiss the action. Defendant alleges that initially he refused to take on the case because he had little experience with accounting actions. However, he continues, plaintiff assured him that he would do most of the work and would obtain an accountant for the accounting. Plaintiff allegedly stated that he could not handle the case on his own because he felt too personally about the matter, and that he could not hire a lawyer with more experience in the field because of the high retainer fee the specialist would charge. Finally, defendant states that plaintiff believed, and convinced him, that Levy

would settle if the case were restored. Therefore, plaintiff asserted, the matter would be simple despite the complexity of the accounting. Defendant says that he would not have taken on the case without these assurances by plaintiff.

Second, defendant states that plaintiff misled him when he made these assurances – in particular, when he stated that he would work with defendant as to certain critical issues and that the case would be easily resolved. Despite his promises and defendant's own exhortations, plaintiff failed to hire an expert accountant. An accountant, defendant notes, was necessary in this accounting action; and, plaintiff insisted that he choose the expert. Defendant states that even when voluminous discovery arrived from Levy and defendant wanted an accountant to go through it, plaintiff still had not retained the expert. Eventually, it appears that plaintiff stipulated that he would not use an expert for an accounting or at trial. Thus, according to defendant, plaintiff's own failure in this regard severely hampered defendant's ability to oppose Levy's accounting.

Ultimately, defendant states that plaintiff provided his own, informal accounting instead of a professionally prepared one – and then refused to allow him to show it to Levy's counsel in an attempt to settle the matter. Thus, defendant contends that plaintiff undermined the chance for settlement by failing to provide a settlement figure or to counter Levy's figures with adequate documents. Moreover, he alleges that even at his own deposition plaintiff failed to articulate any clear challenges to Levy's accounting, further hurting the case and hindering defendant's ability to develop a viable argument.

Third, defendant states that although nominally he was counsel to plaintiff in the Levy, "[a]t no time was [he] acting as a typical attorney representing a typical lay client.

It was never left to me to rely on my own judgment . . . . [Plaintiff] demanded to review every document, including letters to [the Referee] and to opposing counsel, and he made extensive modification to them before they were sent out." (Fierman Aff at ¶ 15.) Moreover, defendant states, starting early 2000 and until the end of the case, another lawyer, David Eizenman, served as strategist for the Levy lawsuit; and, according to defendant, was essentially the "lead counsel." (Fierman Aff at ¶ 16.) Either plalintiff or Eizenman reviewed every document from then on, he states; and, in addition, Eizenman argued a matter before the First Department although defendant had prepared the brief in question. Moreover, at depositions, plaintiff sat beside defendant and told him the questions to ask. Accordingly, because defendant was not in charge of the case, he states, he cannot be held solely responsible for the problems in its litigation.

Fourth, defendant challenges the allegation of plaintiff that his representation of *plaintiff was inadequate. He notes that he prevailed in his application to restore the* case to active status. In addition, he points out that Eizenman argued before the First Department on papers he prepared, and that the First Department affirmed the trial court's decision based in part on his papers. He also states that one of the alleged errors to which plaintiff points – defendant's failure to challenge the Saas receivable, the specifics of which are irrelevant here, but which was part of the Levy accounting – was not an error at all. In fact, he states that the First Department rejected plaintiff's subsequent attempt to challenge this aspect of the accounting.

In addition, defendant has counterclaimed for unpaid fees. According to defendant, even before he took on the matter formally he assisted in the Levy lawsuit.

Defendant explains that, in 1991 or 1992, he prepared a 32-page legal memorandum on behalf of plaintiff's former counsel in Levy. Defendant contends that he billed plaintiff $6,000 for the work and did not receive payment. According to defendant, plaintiff assured defendant that he would recover a large sum through the lawsuit and asked defendant to defer collection until its conclusion. Defendant states that he agreed to wait until the lawsuit had ended. Currently, in this litigation, he counterclaims for this unpaid amount, together with interest from 1991. Defendant seeks legal fees for his work in the Levy lawsuit on a quantum meruit basis. He acknowledges that he worked on Levy on a contingency basis, but states that this was due to Plaintiff's misrepresentations about the case. Therefore, he seeks to recover payment for his work at this time.

In general, a party who seeks summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any genuine material issues of fact from the case. The failure to make such a showing mandates denial of the motion . . . ." Rubenstein v. Columbia Presbyterian Medical Center, 139 Misc.2d 349, 350, 527 N.Y.S.2d 680, 681 (Sup. Ct. N.Y. County 1988). To prevail on a summary judgment motion for legal malpractice in particular, a plaintiff must "plead factual allegations which . . . demonstrate that counsel . . . breached a duty . . . to the client, that the breach was the proximate cause of the injuries, and that actual damages were sustained." Dweck Law Firm, LLP v. Mann, 283 A.D.2d 292, 293, 727 N.Y.S.2d 58, 59 (1st Dept. 2001). Thus, there are three parts to the test: proof that the attorney did not exercise the requisite degree of care, skill and diligence; proof that the attorney's negligence proximately caused the actual damages

sustained by his or her client; and, proof that but for the negligence, the client would have prevailed in the underlying action. Lefkowitz v. Lurie, 253 A.D.2d 855, 855, 678 N.Y.S.2d 345, 346 (2nd Dept. 1998). Finally, "mere errors of professional judgment" do not rise to the level of malpractice. Alter & Alter v. Cannella, 284 A.D.2d 138, 139, 726 N.Y.S.2d 33, 35 (1st Dept. 2001).

Here, factual issues remain with respect to all three prongs of this test. As to the first prong, the movant must show, "through the submission of evidentiary proof in admissible form, that the attorney did not exercise that degree of care, skill and diligence commonly possessed and exercised by a member of the legal profession." Deitz v. Kelleher & Flink, 232 A.D.2d 943, 944, 649 N.Y.S.2d 85, 86 (3rd Dept. 1996). To satisfy this standard, plaintiff has presented his own view on the purported deficiencies of defendant's representation. However, this is inadequate, as "the plaintiff in a malpractice case cannot rest on his allegations of what he views as deficiencies in defendant's conduct as his attorney, but must offer evidence to establish the standard of professional care and skill that defendant allegedly failed to meet. . . ." Kaye Scholer LLP v. Estate of Ginsburg ex rel. Ginsburg, 4 Misc.3d 1020(A), 791 N.Y.S.2d 870 (Sup. Ct. N.Y. County 2004)(avail at 2004 WL 1977623, *1)(quoting Hatfield v. Hertz, 109 F. Supp. 174 (S.D.N.Y. 2000)). Expert testimony generally is presented to prove that the attorney breached the applicable standard of professional care. Darby & Darby, P.C. v. VSI Intern., Inc., 178 Misc.2d 113, 117, 678 N.Y.S.2d 482, 486 (Sup. Ct. N.Y. County 1998). Thus, plaintiff's own self-serving arguments as to the adequacy of defendant's work are insufficient.

Moreover, defendant has argued that he performed the work in a satisfactory

fashion. For one thing, he points to the fact that he prevailed in the cross-motion to restore to show that his work was not inadequate. He has submitted documents supporting his contentions and showing his work. He also raises other arguments countering plaintiff's contention. Thus, even if plaintiff had satisfied his preliminary burden on this prong of the test, defendant has raised triable issues. Moreover, it is not clear that defendant's litigation errors, if they existed, constituted more than errors of professional judgment. Alter & Alter, 284 A.D.2d at 139, 726 N.Y.S.2d at 35.

Second, it is not clear whether defendant's negligence, if it existed, was the proximate cause of the loss. See In re Warsaski, 190 Misc.2d 553, 559, 739 N.Y.S.2d 883, 888 (Sur. Ct. N.Y. County 2002). For one thing, he alleges that he was not "lead counsel" and that, from the start, his role in the litigation was understood to be limited. In support, he submits copies of his drafts, with extensive markings by plaintiff and/or Eizenman. He also attests to the parties' conversations and conduct in this regard. As "the scope and extent of defendant's representation in [Levy] . . . is not entirely clear from the record . . .," Maddox v. Schur, 16 A.D.3d 873, 791 N.Y.S.2d 704, 705 (3rd Dept. 2005), there is a triable issue of fact here as well. In addition, defendant has attested in detail to plaintiff's alleged, obstructive conduct – his failure to obtain an accountant, for example, or to otherwise cooperate in the litigation. This raises a triable issue with respect to causation.

Third, plaintiff has not shown that "'but for' defendants' alleged negligence plaintiff would have achieved a more favorable result in the underlying . . . action." Wexler v. Shea & Gould, 211 A.D.2d 450, 451, 621 N.Y.S.2d 858 (1st Dept. 1995); see Wilson v. City of New York, 294 A.D.2d 290, 293, 743 N.Y.S.2d 30, 33 (1st Dept. 2002).

For example, although plaintiff states that defendant ignored four clear errors in Levy's accounting, defendant points out that the First Department rejected an argument as to one of these alleged errors. Defendant also raises other factual issues regarding this – issues that the documents regarding the parties' finances are insufficient to resolve at this juncture. Thus, because issues of fact remain as to whether plaintiff would have won the accounting action against Levy, summary judgment must be denied on this ground as well. DiPietro v. Seth Rotter, P.C., 5 A.D.3d 224, 224, 773 N.Y.S.2d 397, 398 (1st Dept. 2004).

Defendant's cross-motion for summary judgment is also denied. For one thing, for the reasons above, issues of fact remain on the legal malpractice claim; and, if plaintiff prevails in the lawsuit, he may seek a reduction or waiver of attorney's fees, or seek to set off his fees against his recovery. See Tabner v. Drake, 9 A.D.3d 606, 611, 780 N.Y.S.2d 85, 89-90 (3rd Dept. 2004). For another, defendant's uncorroborated statements regarding his fee arrangements are insufficient, without more, to justify an award at this point. Defendant states that he believes he had a written agreement to defer the $6,000 bill, but that he has misplaced it. For obvious reasons, this is insufficient to support his allegations as to the terms of the agreement. For a third, defendant concedes that, at least with respect to his work from 1999 on, he agreed to a contingency fee. He has failed to argue, with substantial evidentiary support, his reasons for altering his contingency fee arrangement; and, he has not provided any legal arguments supporting his right to alter the nature of his fee agreement at this juncture.

"Given the sharply contrasting versions of events, . . . triable issues of fact exist

which precludes summary judgment in favor of plaintiff[] on the issue of legal malpractice." Tabner, 9 A.D.3d at 610, 780 N.Y.S.2d at 89. Moreover, because of the pendency of the malpractice claims and questions concerning the parties' fee agreements, summary judgment is improper on the counterclaims as well. Therefore, it is

ORDERED that the motion and cross-motion for summary judgment are denied.

ENTER:

Dated: 7/19/05

Louis B. York, J.S.C.

LOUIS B. YORK