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SHORT FORM ORDER

COPY

INDEX No. 08-7307
CAL. No. 11-02186OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 11-16-11 (#007)
MOTION DATE 3-21-12 (#008)
MOTION DATE 5-9-12 (#009)
ADJ. DATE 7-18-12
Mot. Seq. # 007 - MD
008 - MG; CASEDISP
009 - XMD

LISA DI GIACOMO a/k/a LISA DI GIACOMO-FRANGIONE and EUGENE FRANGIONE, Plaintiffs, -against- MICHAEL S. LANGELLA, P.C. and MICHAEL S. LANGELLA, ESQ., Defendants.	DANIEL A. ZAHN, ESQ. Attorney for Plaintiffs 1597 Grundy Avenue Holbrook, New York 11741 MILBER MAKRIS PLOUSADIS & SEIDEN, LLP Attorney for Defendants Michael S. Langella, P.C. & Michael S. Langella, Esq. 1000 Woodbury Road, Suite 402 Woodbury, New York 11797

Upon the following papers numbered 1 to 149 read on this motion to dismiss, and motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14, 43 - 84; Notice of Cross Motion and supporting papers 110 - 133; Answering Affidavits and supporting papers 15 - 38, 87 - 109, 134 - 137; Replying Affidavits and supporting papers 39 - 42, 140 - 149; Other memoranda of law 85 - 86, 138 - 139; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that this motion by the defendants for an order pursuant to CPLR 3216 dismissing the complaint for want of prosecution is denied, and it is further

ORDERED that this motion by the defendants for an order, pursuant to CPLR 3212, granting summary judgment dismissing the plaintiffs' complaint or, in the alternative, for an order capping the defendants' liability at $100,000, is granted to the extent that the defendants are granted summary judgment dismissing the complaint, and is otherwise denied as academic; and it is further

ORDERED that this cross motion by the plaintiffs for an order pursuant to CPLR 3212 granting summary judgment in their favor as to the defendants' liability, and striking the defendants' First, Second, Third, Fourth, Fifth, Sixth, Ninth, Tenth, Eleventh, Twelfth, Nineteenth[1], Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-First and Twenty-Second affirmative defenses is denied.

This action for legal malpractice was commenced to recover damages allegedly sustained by the plaintiffs as the result of the failure of the defendants to properly present a motion to vacate the dismissal of the plaintiffs' underlying action for personal injuries. On May 23, 2000, the plaintiff Lisa Di Giacomo Frangione (Di Giacomo) was involved in a motor vehicle accident. In May 2000, the plaintiffs retained Ira Levine, Esq. (Levine), to commence an action against Barbara Daniels (Daniels), the owner and operator of the other vehicle involved in the underlying accident. On September 18, 2003, the plaintiff executed a Consent to Change Attorney substituting Hankin, Handwerker & Mazel, PLLC (HHM) as her attorneys in place of Levine. Depositions in the personal injury action were conducted on or about April 2, 2004, and Daniels testified that at the time of the accident she had been operating her vehicle in the course of her employment with Weight Watchers. After the underlying action (or Daniels action) had been placed on the trial calendar, HHM moved for leave to withdraw as counsel for the plaintiffs. By order of the Court dated May 15, 2006 (Molia, J.), the motion was granted, counsel was directed to serve a copy of the order on the plaintiffs on or before May 19, 2006, and the discharge was to be effective ten days after filing proof of service. In addition, the order set down July 12, 2006 as the date for jury selection. When the plaintiffs failed to appear for jury selection on July 12, 2006, the matter was adjourned until July 19, 2006. The record before this Court reveals that the plaintiffs again failed to appear on July 19, 2006, and upon oral application made on the record by defense counsel in the underlying action, the action was dismissed with prejudice by the Honorable Denise F. Molia.

On or about August 9, 2006, the plaintiff retained the defendants to represent them in the underlying action. The defendants prepared and submitted an order to show cause dated August 10, 2006, seeking to vacate the plaintiff's default and to restore the case to the trial calendar. By order dated November 16, 2006, the Court (Molia, J.) denied the plaintiffs' motion to vacate their default and restore the action to the trial calendar, indicating:

> A default in appearing may be excused upon a showing of a reasonable excuse for the default and a meritorious cause of action (citation omitted). Plaintiff states that the non-appearance was unintentional as she relied on incorrect advise [*sic*]. However, the papers failed to present any proof regarding the merits of the action ...

A subsequent motion made on behalf of the plaintiffs by the defendants to renew and reargue the application to vacate the default was also denied by order of the Court dated June 18, 2007 (Molia, J.)

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[1] The defendants' answer contains an error in numbering, setting forth a "Thirteenth, Nineteenth, and Sixteenth" affirmative defense in that order, and then continuing in proper numerical order repeating a second Nineteenth affirmative defense. The Court will follow the plaintiff's lead and refer to the affirmative defenses as the defendants have labeled them.

upon a determination that the Court "neither overlooked or [*sic*] misapprehended relevant facts or misapplied any controlling principal of law." By Decision and Order of the Appellate Division, Second Department, dated October 9, 2007, the denial of plaintiffs' motion to vacate their default in appearing for trial was affirmed. It appears that no finding was made by the Court whether the plaintiffs demonstrated a reasonable excuse for their default, it being noted that "plaintiff Lisa Di Giacomo Frangione attempted, in her affidavit, to articulate a reasonable excuse for the plaintiffs' failure to appear for trial. . ." However, because "there was nothing in her affidavit to establish that the plaintiffs had a meritorious cause of action", the denial of plaintiffs' motion was upheld.

On February 20, 2008, the plaintiffs commenced this action for legal malpractice against Levine, HHM, Stacy Rinaldi Guzman, Esq. (Guzman), and the defendants. Among the allegations set forth in the complaint is a claim that the failure to timely join Weight Watchers (Daniel's employer) as a party in the underlying action constituted malpractice. In addition, it is asserted that after HHM was relieved as plaintiffs' counsel, the plaintiffs were represented by Guzman, who had agreed to appear on the plaintiffs' behalf to obtain an adjournment of the July 12, 2006 court date, but failed to do so. It is further alleged that the defendants failed to include an affidavit of merits with the motion to vacate the dismissal of the plaintiffs' underlying action resulting in its denial, and the loss of the plaintiffs' ability to recover damages for their injuries.

In early 2008, Levine, HHM, Guzman and the defendants separately moved to dismiss the plaintiffs' complaint on the grounds, among other things, that it failed to state a cause of action. By order dated October 30, 2008, the undersigned granted the motions of Levine, HHM and the defendants, dismissing the complaint against them. By order entered on January 12, 2009, the undersigned granted Guzman's motion, dismissing the complaint against her. After the plaintiffs' appealed from the judgments entered pursuant to those orders, the Decision and Order of the Appellate Division, Second Department, dated September 14, 2010, affirmed the dismissal of the complaints against Levine, HHM and Guzman, and reversed that branch of the order dismissing the complaint against the defendants. In a stipulation dated June 15, 2011, the parties agreed to amend the caption to reflect the dismissals in favor of Levine, HHM and Guzman. Said stipulation was so ordered on July 13, 2011, and filed with the Clerk of the Supreme Court on July 18, 2011.

Thereafter, the action proceeded against the defendants and, after all discovery was completed, a compliance order dated September 7, 2011, directed the plaintiffs to file a note of issue on or before October 7, 2011. The computerized records maintained by the Court reflect that the plaintiffs filed a note of issue on October 28, 2011, resulting in the caption set forth above.[2]

The defendants now move pursuant to CPLR 3216 to dismiss the action for want of prosecution (# 007), and pursuant to CPLR 3212 for summary judgment dismissing the complaint (# 008). The defendants move to dismiss the complaint for want of prosecution based on the plaintiffs' failure to timely file the note of issue in accordance with the compliance conference order of this Court dated

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[2] The Court notes that the plaintiffs' cross motion includes a request to amend the caption which is academic as explained herein.

September 7, 2011 which reads in pertinent part: "ORDERED that the plaintiff shall file a note of issue, together with a copy of this order, on or before 10/7/11. Failure to file the note of issue in accordance with this order may result in the imposition of sanctions attendant with defaults, including dismissal pursuant to CPLR 3216 if applicable ..."

A court may not dismiss an action based on neglect to prosecute unless the statutory conditions of CPLR 3216 are met (***Delgado v New York City Housing Authority,*** 21 AD3d 522, 801 NYS2d 43 [2d Dept 2005]***; Murray v Smith Corp.***, 296 AD2d 445, 744 NYS2d 901 [2d Dept 2002]*; see also* ***Ratway v Donnenfeld,*** 43 AD3d 465, 841 NYS2d 597 [2d Dept 2007]; ***Heifetz v Godoy,*** 38 AD3d 605, 832 NYS2d 261 [2d Dept 2007]; ***Gonzalez v Leybovich,*** 36 AD3d 756, 830 NYS2d 197 [2d Dept 2007]). CPLR 3216 provides, in pertinent part:

> (b) No dismissal shall be directed under any portion of subdivision (a) of this rule and no court initiative shall be taken or motion made thereunder unless the following conditions precedent have been complied with:
>
> (1) Issue must have been joined in the action;
>
> (2) One year must have elapsed since the joinder of issue;
>
> (3) The court or party seeking such relief, as the case may be, shall have served a written demand by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand, and further stating that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him for unreasonably neglecting to proceed.

The Court in its discretion declines to strike the complaint based on the mere fact that the note of issue was filed after the date set forth in the compliance conference order. Here, the order merely set a date for the filing of a note of issue and did not indicate that the failure to comply with the demand would serve as the basis for a motion to dismiss the action. Thus, the compliance conference order is not deemed a 90-day demand in accordance with CPLR 3216 (***O'Connell v City Wide Auto Leasing***, 6 AD3d 682, 775 NYS2d 543 [2d Dept 2004]).

More importantly, a compliance conference order which requires that a note of issue be filed in less than ninety days cannot be deemed a ninety day demand pursuant to CPLR 3216 (***Gladman v Messuri***, 71 AD3d 827, 895 NYS2d 839 [2d Dept 2010]; ***Delgado v New York City Housing Auth.***, *supra*; ***Ratway v Donnenfeld***, *supra*). Even where a court indicated that the failure to file a note of issue will serve as the basis for a CPLR 3216 motion, the relevant compliance orders provided for a minimum of ninety days to comply with the order of the court (***Bort v Perper***, 82 AD3d 692, 918 NYS2d 151 [2d Dept 2011] (six months); ***Rocha-Silva v St. John's Hosp.***, 70 AD3d 1025, 894 NYS2d 767 [2d Dept 2010] (six months); ***Anjum v Karagoz***, 48 AD3d 605, 852 NYS2d 354 [2d Dept 2008] (90 days);

Bowman v Kusnick, 35 AD3d 643, 827 NYS2d 258 [2d Dept 2006] (four months); ***Mahler v Torres***, 25 AD3d 669, 811 NYS2d 723 [2d Dept 2006] (four months); ***Giannoccoli v One Cent. Park W. Assoc.***, 15 AD3d 348, 790 NYS2d 159 [2d Dept 2005] (four months).

In addition, CPLR 3216 (b) provides that no dismissal shall be directed unless issue has been joined, and one year has elapsed since the joinder of issue. It is undisputed that issue was joined by the defendants by service of an answer on or about October 26, 2010, less then one year before the failure of the plaintiffs to file a note of issue herein. Accordingly, the defendant's motion to dismiss the complaint for want of prosecution is denied.

The Court now turns to the defendants' motion (# 008) for summary judgment dismissing the complaint. 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 eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

At his deposition, the defendant Michael S. Langella (Langella) testified that he was retained by the plaintiffs on or about August 9, 2006, to attempt to vacate the dismissal of the underlying action, to restore the action to the trial calendar, and to litigate that action. He decided to move by order to show cause as quickly as possible to avoid a claim by Daniels that she was prejudiced in the interim. Langella indicated that he was aware of the legal standard required to vacate a default, and that his affirmation and the affidavit of Di Giacomo, submitted in support of the order to show cause, established that the plaintiffs had meritorious causes of action against Daniels. He acknowledged that the order to show cause did not state how the accident happened, and that the court order denying the motion stated that it was denied because it did not contain any proof regarding the merits of the plaintiffs' action against Daniels. Langella further testified that he was aware of the facts surrounding the dismissal of the Daniels action, and that the case had been on the trial calendar and adjourned a number of times. He indicated that he spoke with Levine by telephone to corroborate the plaintiffs' claim that Di Giacomo had spoken with Guzman to obtain an adjournment of the July 12, 2006 court date, that he did not advise the plaintiffs that they had a legal malpractice claim against Levine, and that he did not receive the plaintiffs' file from HHM until October 10, 2006. He stated that he handled a subsequent motion to reargue the denial of the order to show cause differently, attaching a doctor's affirmation and Levine's affirmation. Langella testified that the written retainer signed by the plaintiffs provides that he and his firm were going to represent them to collect compensation for their injuries in the car accident, and to sue any persons or entities that may be liable to them for damages under the law. He indicated that the retainer stated that the plaintiffs would be responsible for the costs of any appeals, but that he did not charge them for the costs of the two appeals that he prosecuted on their behalf in the Daniels action. He stated that "based on the circumstances here, I believed that it was my obligation to undertake those costs and

responsibilities." He believed that Di Giacomo should have been compensated for the injuries that she suffered in the car accident. Langella further testified that the plaintiffs' actions did not contribute to the denial of the motion to vacate their default, that he was not aware of any third party that would be responsible for the plaintiffs' damages during his representation of them, that he was not aware of any issues regarding privity of contract regarding the subject retainer, and that he is not claiming that he made any errors in judgment in representing the plaintiffs. He further stated that he had no knowledge that would indicate that the plaintiffs are not the real parties in interest in this action, and that he did not have any facts that would support a claim that this action is barred by the statute of limitations, or that the plaintiffs lack standing to bring this action.

The defendants submit an expert opinion indicating that they exercised good judgment and reasonable care and diligence in representing the plaintiffs in the Daniels action. In his affidavit dated February 23, 2012, Ralph A. Catalano, Esq. (Catalano), swears that he reviewed most, if not all, of the pleadings and proceedings in the Daniels action, that Langella's actions did not constitute professional malpractice, and that none of the alleged failures by the defendants were the proximate cause of the plaintiffs' damages. He states that the dismissal of the Daniels action "in fact occurred due to Plaintiffs' own fault before [Langella] was even retained," and that Langella was not retained to prosecute a legal malpractice action. Catalano further swears that Langella exercised good judgment in making the motion to vacate the default as quickly as possible in order to convince the Court that the plaintiffs did not intend to abandon their action, and based on the fact that the previous attorney would not release the plaintiffs' file to the defendants. He states that Langella moved to reargue the denial of the motion to vacate the plaintiffs' default and filed an appeal of the Court's decision, and that Langella annexed an affirmation from Levine to augment the plaintiffs' excuse for the default, and a doctor's affirmation "to attempt to show merit to Plaintiffs' claims." Catalano indicates that, even if the defendants had established that the plaintiffs had a meritorious cause of action against Daniels, "it would still remain entirely speculative whether the Court would have exercised its remaining discretion to permit the default to be vacated."

For a defendant in a legal malpractice case to succeed on a motion for summary judgment, evidence must be presented in admissible form establishing that the plaintiff is unable to prove at least one of the essential elements of a malpractice cause of action (***Napolitano v Markotsis & Lieberman***, 50 AD3d 657, 855 NYS2d 593 [2d Dept 2008]; ***Olaiya v Golden***, 45 AD3d 823, 846 NYS2d 604 [2d Dept 2007]; ***Caires v Siben & Siben***, 2 AD3d 383, 767 NYS2d 785 [2d Dept 2003]; ***Ippolito v McCormack, Damiani, Lowe & Mellon,*** 265 AD2d 303, 696 NYS2d 203 [2d Dept1999]). To establish a cause of action to recover damages for legal malpractice, a plaintiff must prove (1) that the defendant attorney failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community, (2) proximate cause, (3) damages, and (4) that the plaintiff would have been successful in the underlying action had the attorney exercised due care (***Tortura v Sullivan Papain Block McGrath & Cannavo, P.C.***, 21 AD3d 1082, 803 NYS2d 571 [2d Dept 2005]; ***Ippolito v McCormack, Damiani, Lowe & Mellon,*** *supra*; ***Iannarone v Gramer,*** 256 AD2d 443, 682 NYS2d 84 [2d Dept 1998]; ***Volpe v Canfield,*** 237 AD2d 282, 654 NYS2d 160 [2d Dept 1997], *lv denied* 90 NY2d 802, 660 NYS2d 712 [1997]). Here the defendants have established the plaintiffs' inability to prove that they would have been successful in the underlying action, or that the defendants were the proximate cause of their inability to recover damages therein.

A party seeking to obtain relief from an order entered upon his or her default must demonstrate a reasonable excuse for the default and a meritorious defense to the action (*see* CPLR 5015(a) 1); ***Chechen v Spencer***; 68 AD3d 801, 889 NYS2d 474 [2d Dept 2009]; ***Brownfield v Ferris***, 49 AD3d 790, 855 NYS2d 565 [2d Dept 2008]; *see also* ***Hageman v Home Depot U.S.A., Inc.***, 25 AD3d 760, 808 NYS2d 763 [2d Dept 2006]). The determination of what constitutes a reasonable excuse lies within the trial court's sound discretion (*see* ***Khanal v Sheldon***, 74 AD3d 894, 904 NYS2d 453 [2d Dept 2010]; ***Hageman v Home Depot U.S.A., Inc.***, *supra*; ***Scarlett v McCarthy***, 2 AD3d 623, 768 NYS2d 342 [2d Dept 2003]; ***Darrell v Yurchuk***, 174 AD2d 557, 572 NYS2d 643 [2d Dept 1991]). In addition, a Court has discretion whether to accept law office failure as a reasonable excuse (*see* ***Fleet Mech. Serv.Corp. v Romaz Props.,*** 54 AD3d 995, 864 NYS2d 168 [2d Dept 2008]; *see also* ***Watson v NewYork City Trans. Auth.,*** 38 AD3d 532,832 N.Y.S.2d 240 [2d Dept 2007]). In her papers submitted to the trial court in support of the motion to vacate plaintiffs' default, Di Giacomo set forth the following as her excuse for the default:

> After receiving notice that my attorneys Hankin, Handwerker & Manzel [*sic*] had been relieved on the case I contacted my cousin Stacey Rinaldi Guzman of the Law Office of Stanton & Guzman located at 585 Stewart Avenue, Garden City, NY. At that time, I discussed the case with my cousin and she advised me that she would consider handling the case and needed to discuss it with her partner. Additionally, my cousin was at all times fully aware of the pending court date and assured me that an adjournment would be obtained on my behalf. As a result, and based on said conversation I did not appear at the next scheduled court date of July 12, 2006 ...

Here, the plaintiffs cannot establish as a matter of law that Di Giacomo's explanation constituted a reasonable excuse for her default, and that the Court would have vacated her default "but for" the alleged legal malpractice on the part of the defendants. In order to establish a prima facie case of legal malpractice, a plaintiff must demonstrate that the breach of the attorney's duty proximately caused the plaintiff actual and ascertainable damages (*see* ***Leder v Spiegel***, 9 NY3d 836, 840 NYS2d 888 [2007]; ***Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer***, 8 NY3d 438, 835 NYS2d 534 [2007]; ***McCoy v Fienman***, 99 NY2d 295, 755 NYS2d 693 [2002]; ***Darby & Darby, P.C. v VSI Intl Inc***., 95 NY2d 308, 716 NYS2d 378 [2000]; ***Kluczka v Lecci***, 63 AD3d 796, 880 NYS2d 698 [2d Dept 2007]). Moreover, the plaintiff is required to prove that, "but for" the attorney's negligence, the plaintiff would have prevailed on the underlying cause of action (*see* ***AmBase Corp. v Davis Polk & Wardwell***, 8 NY3d 428, 834 NYS2d 705 [2007]; ***Leder v Spiegel***, *supra*; ***Snolis v Clare***, 81 AD3d 923, 917NYS2d 299 [2d Dept 2011]; ***Weil, Gotshalt & Manges, LLP v Fashion Boutique of Short Hills, Inc.***, 10 AD3d 267, 780 NYS2d 593 [1st Dept 2004]; ***Shopsin v Siben & Siben***, 268 AD2d 578, 702 NYS2d 610 [2d Dept 2000]). Thus, the plaintiffs here are required to prove that the Court would have vacated their default in the Daniels action as a matter of law. A review of the record reveals that the defendants have established that the plaintiffs cannot meet this burden under any circumstances. It appears that the Daniels action was on the trial calendar a number of times before HHM was relieved as counsel, and that HHM's motion to withdraw was based, at least in part, on the plaintiffs' failure to cooperate with their attorneys. In addition, a review of the plaintiffs' opposition to the motion reveals that they can not demonstrate as a

matter of law that they would have established a "reasonable excuse," and thus that they would have prevailed on their motion to vacate their default, even if the defendants had established the merits of the underlying claim.

Accordingly, the defendants motion for summary judgment is granted and the complaint is dismissed.

The plaintiffs cross-move for summary judgment in their favor as to the defendants' liability, and to strike various affirmative defenses contained in the defendants' answer. In support of their motion, plaintiffs submit many of the exhibits included in the defendants' submission in support of their motion for summary judgment and an expert opinion indicating that the defendants clearly departed from the minimum standards of care, skill, knowledge and diligence commonly possessed by the legal profession while representing the plaintiffs in the Daniels action. However, nothing in the plaintiffs' submission changes the Court's findings herein that they are unable to prove that the Court would have found their proffered excuse to be reasonable as a matter of law, resulting in the vacatur of their default but for the defendants alleged legal malpractice. In addition, in light of the Court's findings herein, that branch of the plaintiffs' cross motion which seeks to strike the enumerated affirmative defense is denied as academic.

Accordingly, the plaintiffs' cross motion for summary judgment is denied.

Dated: 11 Oct. 2012

J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**