

**Cabrera v Collazo**

2012 NY Slip Op 33551(U)

October 10, 2012

Supreme Court, Bronx County

Docket Number: 310248/11

Judge: Sharon A. Aarons

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF THE BRONX - PART IA-24**

-----X  
MILAGROS CABRERA, as Administrator of the  
Goods, Chattels and Credits which were of RAQUEL  
GUTIERREZ, deceased,

Plaintiff,

-against-

**DECISION/ORDER**  
Index No. 310248/11

SALVADOR COLLAZO, SHELLEY B. LEVY, as  
Executor of the Estate of CARY M. TANZMAN,  
deceased, and LAW OFFICE OF CARY M. TANZMAN

Defendants.

Present:  
**HON. SHARON A. AARONS**  
J.S.C.

-----X  
The following papers numbered 1 to 3 read on this motion to dismiss  
No. on the calendar of July 10, 2012

**Papers Numbered**

Notice of Motion, Affidavits and Exhibits Annexed.....1.....  
Answering Affidavits and Exhibits Annexed.....2.....  
Replying Affidavits and Exhibits Annexed.....3.....

Motion is decided in accordance with the annexed memorandum decision.

Dated: October 10, 2012

  
\_\_\_\_\_  
SHARON A. AARONS, J.S.C.



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 24

-----X  
MILAGROS CABRERA, as Administrator of the  
Goods, Chattels and Credits which were of RAQUEL  
GUTIERREZ, deceased,  
Plaintiff,

**Index No. 310248/11**  
Submission Date: 7/23/12

**DECISION and ORDER**

-against-  
SALVADOR COLLAZO, SHELLEY B. LEVY, as  
Executor of the Estate of CARY M. TANZMAN,  
deceased, and LAW OFFICE OF CARY M. TANZMAN

Present:  
**Hon. SHARON A.M. AARONS**

Defendants.

-----X  
Recitation, as required by CPLR § 2219(a), of the papers considered in the review of motion, as  
indicated below:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause and Exhibits Annexed-----	1
Affirmation in Opposition-----	2
Reply Affirmation-----	3

*Upon the foregoing papers the Decision and Order on the motion are as follows:*

Defendants, Shelley B. Levy, as executor of the Estate of Cary M. Tanzman, and the Law  
Office of Cary M. Tanzman, move to dismiss the complaint pursuant to CPLR § 3211(a)(1), on  
grounds of documentary evidence that decedent, Cary M. Tanzman, (Tanzman) was deceased at  
the time the statute of limitations expired in the underlying medical malpractice claim, and also  
move pursuant to CPLR § 3211(a)(7) to dismiss the complaint for failure to state a cause of  
action. Written opposition was submitted. Defendants' motion is granted in part and denied in  
part.

This legal malpractice action arose as a result of the failure to timely commence a  
medical malpractice/wrongful death action on behalf of the estate of decedent, Raquel Gutierrez,  
(Gutierrez). The complaint alleges two causes of action against the defendants for legal

malpractice and breach of contract.

The legal services of defendant, Salvador Collazo, (Collazo), was retained in November of 2008. Subsequently, the services of Tanzman was retained on March 11, 2010. There was a fee splitting arrangement between Tanzman and Collazo with respect to the underlying potential medical malpractice action.

It is undisputed that on November 4, 2010, plaintiff's time to file her underlying medical malpractice action expired and no action had been commenced by that date. Tanzman died on October 24, 2010, 11 days prior to the expiration of the statute of limitations. Therefore, Tanzman's representation of plaintiff "necessarily ended at the time of the attorney's death." *Glamm v. Allen*, 57 N.Y. 2d 87, 94 (1982). Movants argue that Tanzman and his law office did not commit legal malpractice as Tanzman died prior to the running of the statute of limitations.

While it is clear that a deceased attorney cannot be held liable for negligent omissions committed after the attorney is deceased, it is equally clear that an attorney can be held liable for negligent acts and omissions prior to the attorney's death. Plaintiff has alleged in paragraph 32 of the complaint that defendants had failed "to inform plaintiff, Milagros Cabrera, and/or an individual authorized to act on behalf of plaintiff decedent Raquel Gutierrez's Estate that they were incapable of taking all necessary steps and/or actions to prosecute the claim on behalf of plaintiff's decedent Raquel Gutierrez." It is undisputed that Tanzman died of cancer in Memorial Sloan-Kettering Cancer Center. Whether Tanzman was capable of informing someone connected to Gutierrez' estate of his inability to continue to represent the Gutierrez' estate, and whether Tanzman acted with "that degree of skill commonly exercised by an ordinary member of the legal community," (*Clissuras v. City of New York*, 131 A.D. 2d 717, 718, 517 N.Y.S. 2d 39

[1<sup>st</sup> Dept. 1987] quoting *Saveca v. Reilly*, 111 A.D. 2d 493, 494, 488 N.Y.S. 2d 876 [3d Dept. 1985]), cannot be determined as a matter of law at this stage of the litigation. In *Clissuras*, the legal malpractice action was dismissed against the attorney because the attorney had withdrawn from representation of the plaintiff “after arranging for her consultation with an actuary regarding her claim and after advising her of the four-month Statute of Limitations.” *Id.* at 719. The complaint herein alleges that no such advice regarding the impending expiration of the statute of limitations was provided.

With respect to that branch of the motion that seeks to dismiss the action for failure to state a cause of action, “[o]n a motion to dismiss, the court is not called upon to determine the truth of the allegations (*see, 19 Broadway Corp. v. Alexander's, Inc.*, 46 N.Y.2d 506, 509, 414 N.Y.S.2d 889, 387 N.E.2d 1205 [1979]). Rather, the complaint should be liberally construed in favor of the plaintiff (*see, Foley v. D'Agostino*, 21 A.D.2d 60, 65-66, 248 N.Y.S.2d 121 [1st Dept. 1964]) solely to determine whether the pleading states a cause of action cognizable at law (*see, Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17 [1977]).” (*Eastern Consolidated Properties, Inc. v. Lucas*, 285 A.D. 2d 421-422 [1<sup>st</sup> Dept. 2001]). Furthermore, “[i]n order to state a cause of action for legal malpractice, the complaint must set forth three elements: the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and actual damages.” (*Leder v. Spiegel*, 31 A.D.3d 266, 268, 819 N.Y.S. 2d 26 [1<sup>st</sup> Dept. 2006]).” Plaintiff has alleged all three elements of a legal malpractice cause of action, and has therefore stated a cause of action.

The breach of contract claim is “dismissed as duplicative since [it] arose from the same facts as the legal malpractice claim and allege similar damages.” (*InKine Pharm. Co., v.*

*Coleman*, 305 AD2d 151, 152, 759 N.Y.S. 2d 62 [1<sup>st</sup> Dept 2003]).

Accordingly, the motion of defendants, Shelley B. Levy, as executor of the Estate of Cary M. Tanzman, and the Law Office of Cary M. Tanzman, is granted to the limited extent that plaintiff's second cause of action for breach of contract is dismissed as against all defendants. The motion is otherwise denied with respect to the first cause of action for legal malpractice.

This is the Decision and Order of the Court.

Dated: October 10, 2012



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SHARON A. AARONS, J.S.C.