SCANNED ON 11/15/2005

[1]

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

PRESENT: KAREN S SMITH PART 44

Index Number : 602011/2000

GONZALEZ, NICHOLAS J.

VS

ELLENBERG, MICHAEL

Sequence Number : 011

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

Defendant Ellenberg and Ellenberg & Weber, LLP's motion and defendant Medical Liability Mutual Insurance Co's cross-motion are decided in accordance with the attached memorandum decision and order.

FILED

NOV 15 2005

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11-2-05

KSS

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - I.A.S. PART 44

----------X

NICHOLAS J. GONZALEZ,

Plaintiff,

-against-

Index No. 602011/00
Sequence #11
Decision and Order

MICHAEL ELLENBERG; ELLENBERG & HUTSON, LLP and MEDICAL LIABILITY MUTUAL INSURANCE COMPANY,

Defendants.

----------X

HON. KAREN S. SMITH

Defendants Michael Ellenberg's ("Ellenberg") and Ellenberg & Hutson, LLP's ("E & H") (hereinafter collectively referred to as the "Ellenberg defendants") motion for summary judgment dismissing the complaint against them is denied. Defendant Medical Liability Mutual Insurance Company's ("MLMIC") cross-motion for summary judgment dismissing the complaint against it is also denied.

Plaintiff Dr. Nicholas Gonzalez (hereafter referred to as "Gonzalez") brought the instant action for legal malpractice against the Ellenberg defendants, the attorneys who defended Gonzalez in a medical malpractice action (hereinafter referred to as the "Charell action") and his insurance carrier, MLMIC, who hired the Ellenberg defendants to represent Gonzalez in the Charell action.

The factual background of both the instant legal malpractice action and the underlying medical malpractice action against Gonzalez have been adequately set forth in this court's prior decision dated October 12, 2004. Therefore, they will not be reiterated in detail here. In that decision, the court denied the Ellenberg defendants' first motion for summary judgment. That motion was originally brought as a motion to dismiss pursuant to CPLR § 3211. Pursuant to CPLR § 3211 [c], this court converted the motion to a motion for summary judgment.

On March 30, 2005 MLMIC moved for summary judgment dismissing the complaint against it. On April 22, 2005 oral argument was held on MLMIC's motion at which time the court requested MLMIC to submit additional documents to the court with copies provided to the plaintiff. On or

about April 26, 2005, MLMIC submitted a Supplemental Reply Affirmation with additional documents. On or about May 2, 2005 plaintiff submitted opposition to the Supplemental Reply Affirmation. There were additional submissions on August 26, 2005 (by plaintiff), September 2, 2005 (by MLMIC), and September 21, 2005 (by plaintiff).

At the April 22, 2005 conference it was discovered that the note of issue had not been filed by plaintiff. As plaintiff's attorney is an out of state attorney appearing *pro hace vici*, unfamiliar with this court's rules, and as there had been some confusion due to the transfer of the case from a prior judge, the court extended plaintiff's time to file his note of issue. Upon learning that the note of issue had not yet been filed, the Ellenberg defendants informed the court and plaintiff of their intention to bring a second motion for summary judgment based on information obtained through the now completed discovery. The trial, which had been set for May 2, 2005, was adjourned until the note of issue was filed and the court ruled on both MLMIC's motion and the Ellenberg defendants' new motion for summary judgment. Plaintiff filed the note of issue on May 4, 2005. The Ellenberg defendants' new motion was submitted on September 22, 2005. Oral argument was held the following day.

The Ellenberg Defendants' Motion

In this action, Gonzalez complains that the Ellenberg defendants departed from accepted legal practice in their representation of the him in the Charell action by failing to, *inter alia,* (1) study and comprehend the medicine involved in the case in order to, among other things, be adequately prepared to cross-examine Ms. Charell's expert, (2) interview and/or depose certain experts and witnesses, (3) call certain expert witnesses to testify on behalf of the plaintiff at trial, and (4) commence an action against the Mt. Sinai doctors who, plaintiff claimed, were responsible for the injuries sustained by the Ms. Charell, (5) make objections during the trial and during summation, (6) to obtain Ms. Charell's Mt. Sinai hospital records, (7) to timely file a summary judgment motion and to object to the court's consideration of an unsigned affidavit in opposition to the summary judgment motion, and (8) to address certain key issues in a post trial motion filed in the Charell

action.[1]

In their current motion, the Ellenberg defendants once again seek dismissal of this legal malpractice action contending that plaintiff has failed to state a cause of action for legal malpractice. According to the Ellenberg defendants, all of the actions about which plaintiff complains were products of the Ellenberg defendants' legal judgment and, as such, do not constitute malpractice. In addition, the Ellenberg defendants assert that plaintiff cannot sustain his burden of proving that "but for" the alleged negligent acts complained of, the jury in the Charell action would have found in favor of Dr. Gonzalez.

It is well settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in an admissible form to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1987]). Once the movant has made such a showing the burden shifts to the party opposing the motion to produce evidence in an admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

In order to make a *prima facie* claim for legal malpractice, a plaintiff must establish that (1) the attorney's conduct fell below the ordinary and reasonable skill and knowledge commonly possessed by a member of the profession, (2) the attorney's conduct was the proximate cause of plaintiff's loss, and (3) the plaintiff sustained actual damages. (*Prudential Life Insurance Company of America v. Dewey Ballentine, Bushby, Palmer, and Wood, et. al*, 170 AD2d 108, 114 [1st Dept 1991], *aff'd* 80 NY2d 377 [1992].) To establish the proximate cause element, plaintiff must "... demonstrate that but for the attorney's alleged malpractice, the client would have prevailed in the underlying matter or would not have sustained any ascertainable damages."(*Weil Gotshal & Manges LLP v. Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 272 [1st Dept 2002]; *Davis v. Klein*, 88 NY2d 1008,1009 [1996]; *Estate of Nevelson v. Carro, Spanbock, Kaster & Cuiffo*, 259 AD2d 282, 284 [1st Dept 1999].) Actions or conduct which constitute an error of judgment or are found to

---

[1]In the October 12, 2004 decision, the court dismissed claims alleging that the Ellenberg defendants were negligent in failing to fully apprize Dr. Gonzalez of settlement discussions, or in conducting or defending depositions.

constitute one of several alternative ways in which a reasonable prudent attorney would proceed, are not actionable as legal malpractice. (*Kaye Scholer v. Estate of Moe Ginsburg,* NYLJ July 15, 2004, at 20, col 1 [Sup Ct NY County]; *Rosner v. Paley,* 65 NY2d 736 [1985]; *Geller v. Harris*, 258 AD2d 421 [1st Dept 1999].) A party moving for summary judgment dismissing the complaint in a legal malpractice action must present evidence, in an admissible form, establishing that the plaintiff is unable to prove at least one of the three elements of a legal malpractice cause of action. (*Crawford v. McBride,* 303 AD2d 442 [2d Dept 2003], *Hatfield v. Herz*, 109 F. Supp. 2d 174, 179 [S.D.N.Y. 2000].)

In support of the Ellenberg defendants' first summary judgment motion, Gonzalez provided the court with affidavits, both his own and those of other experts, while the Ellenberg defendants submitted only their attorney's affirmation and Ellenberg's self serving affidavit which contained bare legal assertions. In the instant motion, filed after discovery has been completed, the Ellenberg defendants submit the deposition testimony of defendant Ellenberg, letters between Susan Rapisarda (an associate attorney of E & H who worked with Ellenberg on the Charell action) and defendant MLMIC (Gonzalez's insurance carrier) concerning interviews with various experts, portions of the Charell trial transcript and other exhibits, including the deposition testimony of Dr. Dottino in the bankruptcy action filed by Dr. Gonzalez after the jury's verdict was rendered in the Charell action.

The Ellenberg defendants contend that these documents, taken together, show that: (1) defendant Ellenberg read the Aalders study provided to him by the plaintiff and reached a conclusion as to what it meant, (2) defendant Ellenberg formed an opinion based on his review of the case that his main strategies would be to offer testimony to support Dr. Gonzalez's treatment of Ms. Charell, which was to "watch and wait", i.e. to do nothing in relation to traditional treatments for cancer (such as radiation and chemotherapy) as one of the accepted practices in treating a patient with Ms. Charell's type and stage of cancer, and to focus on the defense that Ms. Charell assumed the risk of her injuries as she specifically had sought out Dr. Gonzalez as a practitioner of "alternative medicine", (3) Rapisarda interviewed various experts who supported Dr. Gonzalez's alternative treatment modality in general terms but who, with the exception of Dr. George Blackburn, were unable to testify to the efficacy of those treatments in the specific context of the treatment of Ms. Charell,(4) Ellenberg rejected calling Drs. Guesry and Jones as witnesses because they were unable

to address the specific standards of care in relation to the treatment of Ms. Charell, (5) Ellenberg changed his mind in calling Dr. Blackburn because on the eve of Dr. Blackburn's testimony Dr. Blackburn changed his opinion about what the standard of care was for Ms. Charell and Ellenberg believed that Dr. Blackburn's new opinion would have been detrimental to Dr. Gonzalez's defense, (6) Ellenberg decided not to depose Dr. Dottino nor the other Mt. Sinai doctors because he had concerns that their deposition testimony could be used against Dr. Gonzalez at trial, as permitted by CPLR § 3117 [a][4], (7) Ellenberg chose not to commence a third party action against the Mt. Sinai doctors because, in his opinion, it would result in too many parties ganging up and casting blame against Gonzalez, and (8) at trial, Ellenberg called an expert on the question of causation who testified that Ms. Charell's cancer had metasticized prior to her treatment by Dr. Gonzalez and, therefore, Dr. Gonzalez's treatments did not cause the metastasis nor Ms. Charell's subsequent injuries.

Based on these submissions, the Ellenberg defendants have made a *prima facie* showing that Ellenberg's actions constitute legal judgments relating to strategy which a reasonably prudent attorney might make and, therefore, are not actionable as legal malpractice. Not only has Ellenberg provided the court with the basis for his trial strategy, he has also provided the court with exhibits which support those decisions. For instance, Dr. Dottino's deposition testimony, taken during Gonzalez's bankruptcy proceeding, supports Ellenberg's decision not to depose or call Dr. Dottino as a witness, as it shows that Dr. Dottino would have testified adversely to Gonzalez on the question of the causation of Ms. Charell's injuries.

Since the Ellenberg defendants have made their *prima facie* showing of their entitlement to summary judgment as a matter of law, the burden shifts to plaintiff to show that there are disputed issues of fact which require a trial.

In opposition to the Ellenberg defendants' instant motion, Gonzalez submits, in addition to the affidavits submitted in opposition to the Ellenberg defendants' first summary judgment motion, affidavits from Dr. Gonzalez and Dr. Blackburn. When read together, these affidavits raise issues of fact as to whether Ellenberg did in fact, study and comprehend the medicine involved in the Charell case. If the claim is only that Ellenberg miscomprehended the medicine involved, i.e. made an error, that would not be actionable as legal malpractice. If, however, Ellenberg's failure to

comprehend the medicine was based on his failure to read and study the materials, and his judgment on who to call as witnesses at trial stemmed from that failure, that would be actionable as legal malpractice.

Dr. Hyman's affidavit, in which he states that he was fully prepared to testify in support of Gonzalez's treatment of Ms. Charell, read with Gonzalez's affidavit that Gonzalez provided Ellenberg with Dr. Hyman's name as a potential expert, raise a question as to whether Ellenberg's failure to call Dr. Hyman was based on Ellenberg's trial strategy or constitutes negligence. Plaintiff has also raised a issue of fact as to whether defendant's failure to call Drs. Guesry and Jones had a negative impact on the outcome of the Charell verdict. According to their affidavits, Drs. Guesry and Jones would have testified, in general terms, in favor of Dr. Gonzalez's alternative treatments. While defendant is correct that their testimony would not have addressed the issues of the standard of care as specifically related to Ms. Charell's treatment, their opinions could have been used to counteract the portrayal of Gonzalez as a charlatan, (see, *Charell v. Gonzalez*, 173 Misc2d 227 [Sup Ct NY County 1997], Justice Lehner's decision not to vacate the jury's verdict in the Charell action) and therefore raise a question of fact as to whether Drs. Guesry's and Jones's testimony might not have helped in bringing about a verdict in favor of Dr. Gonzalez. On the other hand, the affidavit from Dr. Blackburn, in which he states that he has no memory of what he said or what occurred in relation to his testimony in the Charell action, fails to raise any factual issues as to whether Ellenberg's failure to call Blackburn as an expert constituted negligence.[2]

The affidavits submitted by Gonzalez raise numerous factual disputes which require an assessment of the credibility of the potential trial witnesses in order to resolve. Without such an assessment, it cannot be said that reasonable jurors cannot conclude that Ellenberg's conduct, instead of constituting trial strategy and judgment, was negligent preparation of Gonzalez's case or that but for Ellenberg's failure to properly prepare and present Gonzalez's defense, the jury in the Charell action would have reached a verdict exonerating Gonzalez from liability. Issues of credibility are not

---

[2] While statements as to what Dr. Blackburn said he would testify to originally and what statements were made by him on the eve of trial, allegedly evidencing his change of mind, are hearsay as to the facts contained in those statements, they are not hearsay in regards to Ellenberg's state of mind in making a decision whether or not to call Dr. Blackburn as a witness.

appropriate for resolution by a court on a motion for summary judgment (See, *Curtis Properties Corp. v. Grief Companies*, 212 AD2d 259{1st Dept 1995]. Since the role of the court in deciding a motion for summary judgment is to determine if any triable issues of fact exist rather than resolving factual disputes (*Sillman v. Twentieth Century- Fox Film Corp.*, 3 NY2d 395), summary judgment dismissing the instant matter against the Ellenberg defendants is not appropriate.

MLMIC's Motion

Gonzalez alleges that MLMIC was negligent in maintaining control of the litigation where there was an apparent conflict of interest and that, as a result of this negligence, the jury's verdict in the Charell action was far in excess of his coverage. Gonzalez further maintains that, as a result of the verdict itself and the adverse publicity in relation to the verdict, he lost contracts and other business opportunities which caused him to suffer further damages.

The conflict of interest Gonzalez cites as a basis for his claim against MLMIC, is the fact that some of the claims against Gonzalez in the Charell action were not covered by the insurance policy. Gonzalez argues that since MLMIC was aware that it would not have to indemnify Gonzalez if Gonzalez was found liable on the uncovered claims, it was in their financial interest to minimize Gonzalez's liability on the covered claims, even if that resulted in exposing Gonzalez to greater liability on the uncovered claims. Therefore, Gonzalez contends, that MLMIC had a conflict and should have yielded control of the defense to an attorney chosen by Gonzalez (*Ladner v. American Home Assur. Co.*, 201 AD2d 302, 304 [1st Dept 1994]), and that the failure to yield control of the Charell litigation, caused financial injury to Gonzalez. Gonzalez maintains that Ellenberg's trial strategy of concentrating on the assumption of risk defense, as opposed to calling witnesses in support of Gonzalez's treatment, was specifically calculated to minimize MLMIC's portion of the compensatory award, which left Gonzalez exposed to liability in an amount far in excess of the policy's coverage.

MLMIC claims that it cannot be held liable for Gonzalez's injuries as it is well settled that a liability insurer is not liable for the alleged legal malpractice of the attorneys it retains to defend an insured, citing *Feliberty v. Damon*, 72 NY2d 112 (1988). MLMIC further argues that the

exceptions to the rule in *Feliberty* are not present in the instant case as there is no evidence that MLMIC appointed incompetent counsel, interfered with the independent professional judgments of the Ellenberg defendants, or received and ignored Gonzalez's complaints about the services rendered by the Ellenberg defendants. However, MLMIC ignores that the insurer's liability in *Feliberty* was premised solely on vicarious liability. In the instant case, Gonzalez seeks to impose liability on MLMIC premised on an independent tort, in essence, a breach of fiduciary duty, which arose because MLMIC maintained control of the litigation in the Charell where MLMIC itself had an apparent conflict of interest. In her decision of August 22, 2001 (as modified by her March 27, 2002 decision), Justice Lebedeff held that there are questions of fact as to whether MLMIC improperly maintained control of the case. Based on Justice Lebedeff's decision, which is law of the case, and as appointing "conflicted counsel" is one of the exceptions in *Feliberty* to holding an insurer liable for the alleged malpractice of an attorney the insurer hires to represent its insured, this court denies MLMIC's cross-motion for summary judgment. The court notes, however, that as per Justice Lebedeff's August 22, 2001 decision on MLMIC's prior motion for partial summary judgment, MLMIC's liability is limited to $1,300,000, which is the sum in excess of Gonzalez's insurance coverage that was awarded by the jury in the Charell action.

Accordingly, both the Ellenberg defendants' motion for summary judgment and defendant MLMIC's cross-motion for summary judgment dismissing the complaint are denied..

Attorneys for plaintiff, the Ellenberg defendants, and defendant MLMIC are **ORDERED** to appear December 9, 2005 at 12:00 pm New York time) by phone (646 386-3370) for a pre-trial conference. Jury selection for the trial shall commence on Monday January 9, 2006. The parties are to report to the courtroom at 9:30 am on that day to be sent out to pick a jury.

This constitutes the decision and order of the court.

Dated: November 2, 2005
New York, New York

KAREN S. SMITH, J.C.C.