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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

Phoenix Erectors, LLC

-v-

Edward M. Fogarty JR, et al.

INDEX NO. 100701/10

MOTION DATE

MOTION SEQ. NO. 06

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 8/14/13

LOUIS B. YORK, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2
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PHOENIX ERECTORS LLC,

Plaintiff,

Index No. 100701/10

-against-

EDWARD M. FOGARTY, JR., ESQ., LITCHFIELD CAVO, LLP and WHITE & MCSPEDON, P.C.,

Defendants.

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Louis B. York, J.:

In this action for legal malpractice, the following motions are before the court: (1) plaintiff Phoenix Erectors LLC's motion for summary judgment on the complaint (Seq. No. 6); and (2) defendant White & McSpedon, P.C.'s (W&M) motion for summary judgment dismissing the complaint (Seq. No. 7). The motions are here consolidated for determination.

I. Background

This action revolves around the alleged legal malpractice committed by defendant Edward M. Fogarty, Jr. (Fogarty), and, by extension, W&M, the firm with which he was at the time associated, in the prosecution of a claim against a surety, in an action involving the collection of a debt from the surety's principal.

A. Underlying Actions

Plaintiff is a construction company, which was hired as a

subcontractor by Hera Construction, Inc. (Hera) in connection with the construction of a monorail in Newark Airport, in New Jersey (project).

Hera was also the principal under a Subcontractor Labor and Material Payment Bond No. B99-020680 (bond), issued by Ulico Casualty Company (Ulico), as surety for amounts Hera was obligated to pay subcontractors on the project. The bond, which was for $1,600,000, contained a forum selection clause requiring that Ulico could only be sued in the United States District Court of the jurisdiction in which the bonded project was situated, here, New Jersey.

A pay dispute arose between Phoenix and Hera, in which Phoenix claimed it was due approximately $180,000. Apparently, Hera got wind of plaintiff's decision to commence a suit against Hera and Ulico in the New Jersey District Court, and commenced a peremptory suit against plaintiff in Supreme Court, Suffolk County, New York, in January 2002 (*Hera Construction, Inc. v Phoenix Erectors, LLC.*, Index No. 00044/02)(Suffolk County action), seeking damages for plaintiff's alleged failure to provide materials to the project.

Fogarty was retained by plaintiff to represent it in the Suffolk County action. Fogarty served an answer on Hera, on plaintiff's behalf, in April 2002.

Plaintiff obtained New Jersey counsel, John Rittley

(Rittley), to prosecute an action against Hera and Ulico in the United State District Court, District of New Jersey (New Jersey action). Besides bringing claims in the New Jersey action against Hera sounding in breach of contract, plaintiff brought a claim for payment against Ulico under the bond.

Fogarty moved to dismiss the Suffolk County action, claiming lack of jurisdiction and forum non conveniens. The motion, and a motion for reargument, were denied, based on a forum selection clause in the Hera-Phoenix contract calling for suits against Hera to be brought in Suffolk County.

Hera then moved in the New Jersey action to be dismissed from the action based on the same forum selection clause. This motion was granted, and the New Jersey action continued against Ulico without Hera.

At some point, Fogarty contacted Rittley to discuss adding Ulico to the Suffolk County action. The court notes that Ulico inserted a second affirmative defense in its answer, claiming that the New Jersey action should be dismissed, as the proper venue to settle disputes among plaintiff, Hera and Ulico was in Suffolk County, because Ulico's forum selection clause was subordinate to Hera's. Fogarty apparently never saw Ulico's answer in the New Jersey action.

Fogarty and Ulico's counsel discussed Ulico's insertion into the Suffolk County action. Apparently, Ulico refused to enter

into a stipulation to become a defendant in a direct action against it, but agreed to stipulate to becoming a third-party defendant in the Suffolk County action, waiving all jurisdictional defenses. Fogarty prepared a stipulation (the New York stipulation) to that effect, conditioned on a stipulation to be executed by Rittley on plaintiff's behalf, to discontinue the New Jersey action against Ulico, with prejudice (the New Jersey stipulation). Rittley claims to have been unaware that Hera, rather than plaintiff herein, was the plaintiff in the Suffolk County action, or that the New York stipulation provided that Ulico would only enter the action as a third-party defendant. The New York stipulation was executed in December 2003, while the New Jersey stipulation was executed on January 26, 2004. According to defendants, the statute of limitations against Ulico had run out before the New York stipulation was executed.

A jury trial was held in June 2005 in the Suffolk County action. Phoenix obtained a verdict against Hera in the sum of $131,000, and entered a judgment against Hera on January 23, 2007 for $194,340.30. Plaintiff also obtained a verdict against Hera's "alter-ego," Airflex Corp. (Airflex), in a related action, which it entered as a judgment in the sum of $189,872.30, on August 16, 2006.

On the record after the verdict was read, Fogarty was asked about the status of the third-party action against Ulico, at

which time Fogarty admitted that, under CPLR 1007, there was no viable third-party action against Ulico based on indemnification, since, by definition, a claim for indemnification by Ulico could only apply to sums Phoenix (the third-party plaintiff) might owe Hera, not sums Hera might owe Phoenix. Only a direct claim by Phoenix against Ulico could result in Ulico owing sums to Phoenix. It is noted by this court that it was Fogarty who informed the Suffolk County action court that "there is no evidence in this case to sustain a case against Ulico." Not. of Mot., Ex. PP, Transcript, at 11. The third-party claim was dismissed at that time.

Plaintiff outlines various attempts Fogarty made over the next four or so years to collect on the judgments against Hera and Airflex, all in vain. Fogarty kept in touch with Phoenix, and promised to keep working on enforcing the judgments. Plaintiff has not itself attempted to enforce the judgments, leaving the matter to Fogarty. Plaintiff has not collected any part of its judgments against either Hera or Airflex.

B. Procedural History of Present Action

Plaintiff commenced this action against Fogarty and W&M, Fogarty's firm at the time the events above unfolded, as well as against defendant Litchfield Cavo, LLP (LC), which firm Fogarty joined subsequent to obtaining the verdicts against Hera and Airflex, and with which he was associated while he attempted to

collect on the judgments. In the complaint, plaintiff, in its first cause of action, alleges that Fogarty and W&M were "negligent in the drafting of the New York Stipulation by failing to ensure that all of Phoenix's rights, claims and causes of action against Ulico were protected and preserved" (Notice of Motion, Ex. A., Complaint, ¶ 38), "by specifically limiting Phoenix's claims against Ulico to only those which may be brought in a third-party action." *Id.*, ¶ 39.

In the second cause of action, Phoenix focuses on defendants' alleged negligence in "the drafting of the Third-Party Complaint against Ulico by failing to ensure that all of Phoenix's rights, claims and causes of action against Ulico were protected and preserved" (*id.*, ¶ 45); the third cause of action involves the negligent drafting of the amended third-party complaint. The fourth cause of action alleges that defendants were negligent in voluntarily discontinuing the third-party action, and, by doing so, failing to preserve plaintiff's claims against Ulico.

Fogarty and LC moved to dismiss the complaint. Their motion was granted by order of this court. This decision was modified by the Appellate Division, First Department (90 AD3d 468 [1st Dept 2011]), which found that plaintiff had stated a cause of action against Fogarty for his failure to "protect and preserve plaintiff's claims against the surety company and that 'but for'

Fogarty's negligence in drafting the New York and New Jersey stipulations, and his corresponding failure to protect plaintiff's claims against the surety company, plaintiff would have been able to collect on its damages award against Hera." *Id.* at 469. The Court upheld the dismissal of the claim against LC "since there was no evidence that Cavo, as superseding counsel, either contributed to the loss or could have done anything to correct the errors of predecessor counsel." *Id.* For purposes of the decision, the Court held that Hera, after Fogarty's collection attempts, "proved to be judgment proof." *Id.* Plaintiff now moves for summary judgment on its complaint, alleging that there are no outstanding questions of fact that would show that Fogarty was not negligent in the execution of the New York stipulation, and in his dealing with Rittley in condoning the New Jersey stipulation,[1] and the consequent loss of a viable claim against Ulico. W&M moves for summary judgment as well, claiming that plaintiff has failed to provide evidence to support a cause of action for negligence against Fogarty or itself, and that, despite the Appellate Division decision, any fault which might be found against Fogarty should be assumed by LC, not itself. W&M's motion should be addressed first.

II. W&M Motion for Summary Judgment

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[1]It is noted that Fogarty did not draft the New Jersey stipulation; he only told Rittley to execute it.

It is noted that summary judgment is a "drastic remedy." *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 (2012). "[T]he '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 issues of fact from the case.'" *Meridian Management Corp. v Cristi Cleaning Service Corp.*, 70 AD3d 508, 510 (1st Dept 2010), quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Once the proponent of the motion meets this requirement, "the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial." *Ostrov v Rozbruch*, 91 AD3d 147, 152 (1st Dept 2012), citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 (1986). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1978); *Grossman v Amalgamated Housing Corporation*, 298 AD2d 224 (1st Dept 2002).

The standard to make a claim for legal malpractice is also well known. "[A]n action for legal malpractice requires proof of three elements: the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and proof of actual damages." *Schwartz v Olshan Grundman Frome & Rosenzweig*, 302 AD2d 193, 198 (1st Dept 2003); *see also*

Pellegrino v File, 291 AD2d 60 (1st Dept 2002). Negligence is shown if a plaintiff can demonstrate that "the attorney failed to exercise that degree of care, skill and diligence commonly possessed by a member of the legal profession, and that this failure caused damages." *Cosmetics Plus Group, Ltd. v Traub*, 105 AD3d 134, 140 (1st Dept 2013).

In order to show proximate cause, the plaintiff must show that "but for" the attorney's misfeasance, it would have attained a "more favorable result" in the underlying action. *Pozefsky v Aulisi*, 79 AD3d 467, 467 (1st Dept 2010); *see also Keness v Feldman, Kramer & Monaco, P.C.*, 105 AD3d 812, 813 (2d Dept 2013)(to make a case for malpractice, there must be a showing that but for the attorney's negligence, "there would have been a more favorable outcome in the underlying proceeding or that the plaintiff would not have incurred any damages"). If proximate cause is not established, the action must be dismissed "regardless of whether it is demonstrated that the attorney was negligent." *Schwartz v Olshan Grundman Frome & Rosenzweig*, 302 AD2d at 198.

W&M argues in its motion that plaintiff has failed to offer evidence to support a prima facie claim for legal malpractice against Fogarty or itself because it cannot show the necessary element of proximate cause. According to W&M, the negligence alleged herein is not any failure in the preparation of the

stipulations, or the failed prosecution of a claim against Ulico, but is, instead, plaintiff's failure to enforce the judgments it obtained against Hera and Airflex. According to W&M, Fogarty was successful in the actions against these parties, in that he obtained judgments against them, and plaintiff has no cause to fault his actions in doing so. Thus, W&M argues that plaintiff can only claim to have been damaged by Fogarty's malpractice if it can prove that it cannot collect on its judgments against these two parties. W&M proposes that plaintiff cannot make such a showing.

W&M provides the affidavit of an attorney, denoted as an expert in the area of the collection of judgments, in which he explores several hypothetical means that plaintiff could use to collect on the judgments, even at this late date. W&M insists that the Appellate Division's statement that Hera was judgment proof cannot be relied on to prove that fact, as, according to W&M's expert, time has shown that the statement is incorrect, and should not be binding.

W&M's creative summation of the gist of plaintiff's complaint does not reflect the actual cause of action plaintiff has brought, and which the Appellate Division recognized in its decision. Plaintiff is claiming that it would have obtained a better result in the underlying litigations if it had been able to pursue a direct action against Ulico in either New York or New

Jersey, because Ulico is a solvent company whose bond covered the subject matter of the payment dispute, and that a judgment against Ulico would have been a more favorable outcome for plaintiff, since the judgment obtained against Hera implicated Ulico's bond, so that the bond would have been available to pay that judgment.[2]

Plaintiff is alleging that Fogarty failed to protect plaintiff's valid and valuable action against Ulico, in that he should have either gotten a stipulation allowing for a direct action against Ulico in New York, waiving the statute of limitations, or, failing that, refused to permit Rittley to execute the New Jersey stipulation, so that the direct action could have proceeded against Ulico in New Jersey. Plaintiff is essentially faulting Fogarty for believing, without actual knowledge, that plaintiff could not sue Ulico in the New Jersey action without Hera, and not being aware that a third-party suit in New York was useless as a means to collect from Ulico.

W&M cannot push the blame for plaintiff's losses on LC. As

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[2]While both Fogarty and W&M argue that plaintiff never deposed Ulico, and so, cannot prove that a judgment against it would have been collectible, once the plaintiff in a legal malpractice action shows that the lost judgment had value (such as here, the existence of a bond covering the amount of the loss), it is the defendant's burden to prove uncollectibility. *See Lindenman v Kreitzer*, 7 AD3d 30 (1st Dept 2004). Plaintiff uses *Lindenman* in another context, to dubious effect, in opposition to W&M's motion to dismiss, but its relevance in the present context is patent.

the Appellate Division found, the negligence alleged happened on W&M's watch, and is attributable to them.

The foregoing shows that the proximate cause of plaintiff's injury was not the failure to collect on the New York judgments, but the failure to obtain a judgment against Ulico in one forum or another. Plaintiff has shown that such a judgment would have given it the more favorable result required to be shown in a legal malpractice action. W&M's motion must be denied.[3]

III. Plaintiff's Motion for Summary Judgment

Plaintiff submits that there are no questions of fact that "but for" Fogarty's negligence, plaintiff would have obtained a valid and valuable judgment against Ulico. Fogarty, in opposition to this motion, repeats W&M's argument that plaintiff did not sustain injury because it might still be able to collect on the judgments against Hera and Airflex. The court has found this argument untenable.

W&M, while again relying on the position it raised in its own motion for summary judgment as reason to deny plaintiff summary judgment, produces yet another theory against plaintiff's

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[3]The court notes that the enforcement scheme presented by W&M's denoted expert is complex and speculative, involving potential suits for fraudulent conveyance and other complications. This court is satisfied with the Appellate Division's statement that Hera was judgment proof, based on four years of Fogarty's futile attempts to collect from both Hera and Airflex. Plaintiff had the right to rely on its attorney's collection efforts, and should not be faulted for not taking over the execution on the judgments from Fogarty.

case: that plaintiff's injury stems wholly from the negligence of Rittley, not that of Fogarty.

W&M argues that Rittley was the only attorney actively negotiating with Ulico; was the attorney who wrongly interpreted that the New Jersey "entire controversy" doctrine would vitiate a claim against Ulico if Hera was not present in the case; who discontinued the New Jersey action without asking to review the New York stipulation, or without even knowing that plaintiff was the defendant in the New York action, not the plaintiff. According to W&M, it was "the discontinuance in New Jersey that was the sole proximate cause of the damages asserted by plaintiff, because had the New Jersey litigation proceeded, this case would not exist." W&M Memorandum in Opposition, at 2.

It is not this court's role to determine whether Rittley was negligent or not. Rittley handed the case over to Fogarty, but Fogarty had the obligation to "exercise that degree of care, skill and diligence commonly possessed by a member of the legal profession" (*Cosmetics Plus Group, Ltd. v Traub*, 105 AD3d at 140), and handle the matter so as to protect plaintiff's interests against Ulico, even if that meant challenging Rittley's belief that the action against Ulico could not proceed in New Jersey.

W&M's argument is reminiscent of the discussion in *Barnett v Schwartz* (47 AD3d 197 [2d Dept 2007), discussing the question of

whether an attorney's negligence must be "the" proximate cause of the injury, or merely "a" proximate cause. The Court in *Barnett* held that the "but for" formulation means that the attorney's negligence need only be found to be "a" proximate cause of the harm. *Id.* at 205. Of course, in negligence actions, there can always be more than one proximate cause. *See Hagensen v Ferro, Kuba, Mangano, Skylar, Gacovino & Lake, P.C.*, ___AD3d___, 2013 NY Slip Op 04980 (1st Dept 2013). In the present case, W&M cannot claim that Rittley was the sole proximate cause of plaintiff's injuries when Fogarty was unquestionably integral to the untenable procedural posture of plaintiff's claim against Ulico in New York.

Plaintiff has established that Fogarty was negligent in going ahead with a patently meritless claim against Ulico in New York, without making any attempt to see if a viable claim remained in New Jersey. It was Fogarty who gave the nod to Rittley to execute the New Jersey stipulation, ending the action there with prejudice, based on Fogarty's mistaken belief that he had preserved plaintiff's action against Ulico. As such, plaintiff has established Fogarty as a proximate cause of its damages, in that "but for" Fogarty's negligence in failing to preserve plaintiff's claim against Ulico, plaintiff could have obtained a valuable judgment against Ulico's bond. This is sufficient to warrant summary judgment in plaintiff's favor,

against both Fogarty and W&M.

IV. Conclusion

Accordingly, it is

ORDERED that the motion brought by plaintiff Phoenix Erectors LLC for summary judgment on the complaint is granted, and the Clerk is directed to enter judgment on the complaint in favor of plaintiff and against defendants Edward M. Fogarty, Jr., and White & McSpedon in the amount of $194,340.30, together with interest at the rate of 9 % per annum from the date of December 23, 2003, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the motion brought by defendant White & McSpedon, P.C. for summary judgment dismissing the complaint is denied.

Dated: 8/14/13

ENTER:

J.S.C.

LOUIS B. YORK J.S.C.