

**Devonshire Surgical Facility, LLC v Law Offs. of Leo Tekiel**

2013 NY Slip Op 33451(U)

December 16, 2013

Supreme Court, New York County

Docket Number: 105558/07

Judge: Cynthia S. Kern

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

Index Number : 105558/2007

DEVONSHIRE SURGICAL

vs

TEKIEL, LEO LAW OFFICES OF

Sequence Number : 004

SUMMARY JUDGMENT

PART \_\_\_\_\_

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

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

## FILED

DEC 19 2013

NEW YORK  
COUNTY CLERK'S OFFICE

is decided in accordance with the annexed decision.

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

DEC 18 2013

Dated: 12/16/13

CR, 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 55

-----X  
DEVONSHIRE SURGICAL FACILITY, LLC, ET AL  
Plaintiffs,

Index No. 105558/07

-against-

**DECISION/ORDER**

LAW OFFICES OF LEO TEKIEL AND  
LEO TEKIEL, ESQ.,

Defendants.

-----X  
LAW OFFICES OF LEO TEKIEL AND LEO TEKIEL, ESQ,

Third-Party Plaintiffs,

-against-

**FILED**

KENNETH I. KUTNER, ESQ. AND  
HOFFMAN EINIGER AND POLLAND, PLLC  
Third-Party Defendants.

DEC 19 2013

NEW YORK  
COUNTY CLERK'S OFFICE

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2,3
Replying Affidavits.....	4
Exhibits.....	_____

Plaintiffs have commenced the present action against their former attorneys for legal malpractice. They have brought the present motion for summary judgment, or, in the alternative, deeming certain facts established for all purposes in this action pursuant to CPLR section 3212 (e) and (g). For the reasons stated below, the motion is denied in its entirety.

The relevant facts are as follows. An attorney Paul Solda commenced an action on behalf of Dr. Chamberlin's medical practices, Devonshire Surgical Facility, LLC ("Devonshire) and Carnegie Hall Orthopedic Services, P.C. ("Carnegie"), in New York City Civil Court against Travelors Indemnity Co. (the "Travelors Action") in 2002. The Travelors Action sought payment for medical services rendered by Dr. Chamberlin's medical practices, Devonshire and Carnegie, to fourteen of Travelor's insureds under no fault insurance coverage. The defendants, Law Offices Of Leo Tekiel and Leo Tekiel, Esq. (the "Tekiel Defendants"), then assumed the representation in the Travelors Action from prior counsel in the matter, Paul Solda, and filed an amended summons and complaint. After the plaintiffs in the Travelors Action failed to respond to discovery requests which Travelors had served on them, Travelors filed a motion to dismiss the Travelors Action pursuant to CPLR section 3126 for the continued failure to provide the requested discovery in March 2004. After Travelors filed the motion to dismiss, former third party defendant Kenneth Kutner ("Kutner") sent a letter to Mr. Tekiel dated March 25, 2004 in which he requested, inter alia, that Mr. Tekiel furnish him with all captions and index numbers of actions already commenced so that Kutner could prepare substitution of attorney forms. In response to this letter, Tekiel sent Kutner correspondence dated March 26, 2004 which included a list of nineteen commenced actions with regard to the Tekiel Defendants' representation of Chamberlin's medical practices. The list included the Travelors Action and noted that a motion to dismiss was returnable on April 5, 2004 and that discovery had not been provided. On or about May 10, 2004, Kutner again sent a letter to Tekiel requesting that Tekiel adjourn Travelors' motion to dismiss so as to permit Kutner and his co-counsel to "finalize the anticipated substitution of attorneys in the case" being handled for Dr. Chamberlin. On May 11,

2004, on the return date of the motion to dismiss, the Tekiel Defendants, through per diem counsel, stipulated in the Travelors action to a self executing conditional order of preclusion if the requested discovery was not provided within sixty days. The stipulation also provided that Tekiel was to serve a copy of the stipulation to Kutner, successor counsel and Kutner was directed to serve a substitution of counsel within thirty days of receipt of the order. On July 9, 2004, Kutner sent another letter to Tekiel requesting that Tekiel forward all outstanding discovery demands and demands for bills of particular, etc. to Kutner. On July 12, 2004, the Tekiel Defendants delivered the files from the Travelors Action and other files to Kutner via messenger service. Kutner immediately delivered these boxes to the offices of Dr. Chamberlin. On or about August 4, 2004, Travelors filed a motion for summary judgment to dismiss the Travelors Action based upon the self executing order of preclusion. Tekiel submitted an affirmation in opposition to the motion in which he took the position that he was no longer the attorney of record in the case and that Kutner was handling the case. Based on these facts, he requested an adjournment of the motion for summary judgment. After not hearing any further from Kutner with respect to the substitution of counsel or the transfer of files, he made a motion to be relieved as counsel on or about September 25, 2004. In the motion to be relieved as counsel, Tekiel affirmed that Chamberlin had failed to respond to any of his requests to discuss the status of the Travelors Action or his request for documents to respond to Travelor's discovery demands. The court granted the motion of Tekiel to be relieved as counsel on October 1, 2004 and also granted a thirty day stay of the action so that plaintiffs could obtain new counsel. After the plaintiffs failed to retain new counsel, the court granted the motion for summary judgment dismissing the action made by Travelors without opposition.

After the Travelors Action was dismissed, plaintiffs brought the present action against the Tekiel Defendants for legal malpractice based on the dismissal of the Travelors Action. The plaintiffs allege that the Tekiel Defendants were negligent in their handling of the Travelors Action based on, *inter alia*, their failure to take any action on the case for eighteen months, their entering into a stipulation which provided for a conditional order of preclusion and their failure to provide the discovery requested. They argue that if the action had not been dismissed, they would have been successful in their prosecution of the Travelors Action.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). However, “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to defeat summary judgment. *Id.*

In order to state a claim for legal malpractice, “the plaintiff must plead factual allegations which, if proven at trial, would demonstrate that counsel had breached a duty owed 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 (1<sup>st</sup> Dept 2001). Moreover, “the client must plead specific factual allegations establishing that but for counsel’s deficient representation, there would have been a more favorable outcome to the underlying matter. *Dweck Law Firm, LLP*, 283 A.D.2d at 293. “Unsupported factual allegations, conclusory legal argument or

allegations contradicted by documentation, do not suffice.” *Id.*

In the present case, plaintiffs have failed to establish their right to summary judgment as a matter of law on their legal malpractice claim as they cannot establish that there would have been a more favorable outcome to the underlying matter but for the deficient representation of the Tekiel Defendants. The unfavorable outcome in the Travelors Action was the court granting summary judgment dismissing the action based on the failure of the plaintiffs to turn over discovery requested by Travelors in the action. For plaintiffs to be entitled to summary judgment, they would be required to establish that it was the Tekiel Defendants who were the proximate cause of the court granting summary judgment to Travelors. However, at the time that the Civil Court granted the summary judgment motion to dismiss the complaint based on plaintiffs’ failure to comply with the order of preclusion, the Tekiel Defendants were no longer representing plaintiffs as their motion to be relieved as counsel, served by order to show cause on plaintiffs, had already been granted. The court had also granted a stay giving plaintiffs an opportunity to obtain new counsel to oppose the summary judgment. Based on the foregoing, there is an issue of fact as to whether it was plaintiffs’ failure to obtain new counsel to represent them and oppose the motion after the Tekiel Defendants were relieved as counsel which was the proximate cause of the court granting summary judgment dismissing the action as opposed to any actions taken by the Tekiel Defendants. There are also disputed issues of fact as to who was responsible for the failure of plaintiffs to turn over the documents to Travelors in the underlying Travelors Action—whether the failure to turn over the documents was based on the inaction of the Tekiel Defendants or whether it was based on the refusal of plaintiffs to communicate with the Tekiel Defendants and their refusal to turn over the documents. Based on the foregoing disputed

