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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 X

ARACELIS POLANCO,

Plaintiff,

-against-

GREENSTEIN & MILBAUER, LLP,

Defendants X

Index No: **309653/2010**

DECISION AND ORDER

Present:
HON. KENNETH L. THOMPSON, JR.

The following papers numbered 1 to 7 read on this motion **for summary judgment**

No On Calendar of **November 13, 2015**	PAPERS NUMBER
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	**1, 2, 3, 4**
Answering Affidavit and Exhibits	**6**
Replying Affidavit and Exhibits	**7**
Affidavit	
Pleadings -- Exhibit	
Memorandum of Law	**5**
Stipulation -- Referee's Report --Minutes	
Filed papers	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendant moves pursuant to CPLR 3212 for summary judgment dismissing plaintiff's amended complaint. This is a legal malpractice action wherein plaintiff alleges that she agreed to settle her underlying personal injury action for $20,000 as a result of defendant's negligent legal advice.

> In order to sustain an action for legal malpractice, a plaintiff must prove the negligence of the attorney, that the negligence was the proximate cause of the loss sustained and actual damages *(Prudential Ins. Co. v Dewey, Ballantine, Bushby, Palmer & Wood,* 170 AD2d 108). An attorney is not, however, held to a rule of infallibility *(Grago v Robertson,* 49 AD2d 645). The issue of whether the specific conduct of Wallman & Kramer constituted malpractice requires a factual determination to be made by a jury *(see, Prudential Ins. Co. v Dewey, Ballantine, Bushby, Palmer & Wood, supra; Grago v Robertson, supra).*
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> *Gray v. Wallman & Kramer*, 184 A.D.2d 409, 413 [1st Dept 1992]).

Plaintiff's underlying action arose as a result of personal injuries sustained when lumber in the underlying defendant's store fell onto plaintiff's neck and back. Plaintiff retained

defendant to represent her in the underlying action. Defendant sent plaintiff to Continental Medical Inc., (Continental). Plaintiff went to mediation with her attorney, the defendant herein. Plaintiff testified that she told defendant counsel that she was in a lot of pain in her neck and that she did not want to settle the action until she had an MRI of the neck. Plaintiff further testified that defendant attorney advised her that it would not make a difference whether she had an MRI of her neck or not. He advised her to settle her underlying action to "get this over with." She further testified that defendant advised her that her case is "not a big case." (p. 82-83).

Defendant argues that it is a medical decision as to whether an MRI should be conducted, and that attorneys should not invade the province of physicians. However, the timing of a settlement, whether a case is a big case or a small case, and how a client should be advised regarding the settlement of her case, is a legal decision.

"'A claim for legal malpractice is viable, despite settlement of the underlying action, if it is alleged that settlement of the action was effectively compelled by the mistakes of counsel' " (*Tortura v Sullivan Papain Block McGrath & Cannavo, P.C.*, 21 AD3d 1082, 1083 [2005], quoting *Bernstein v Oppenheim & Co.*, 160 AD2d 428, 430 [1990]). Nonetheless, a plaintiff's conclusory allegations that merely reflect a subsequent dissatisfaction with the settlement, or that the plaintiff would be in a better position but for the settlement, without more, do not make out a claim of legal malpractice (*see Boone v Bender*, 74 AD3d 1111, 1113 [2010]; *Holschauer v Fisher*, 5 AD3d 553, 554 [2004])." *Benishai v. Epstein*, 116 A.D.3d 726, 727 [2nd Dept 2014]).

In the case at bar, there is an issue of fact as to whether the attorney negligently advised plaintiff to settle her action when she herself was complaining of significant pain in her neck and an MRI had not yet been taken of her neck. Plaintiff testified to specific advice given by defendant that arguably fell short of the degree of care, skill and diligence commonly associated

with the members of the New York legal community.

With respect to damages, an MRI revealed that plaintiff had a herniated disc at C6-C7, upon which she had subsequent surgery. Defendant submits the affirmation of Dr. Audrey Eisenstadt, to support defendant's argument that plaintiff's herniated disc was the result of degeneration and was not traumatically caused by plaintiff's injury from lumber falling upon her. However, Dr. Eisenstadt opines that "the association of the disc herniation with the 01/22/09 incident is uncertain." However, "[h]er acknowledgment that the "etiology is uncertain" and her inability to attribute a reason for the tear rendered her opinion that it was not caused by the accident "too equivocal to satisfy defendant's prima facie burden to show that [the tear] was not caused by a traumatic event." (*Glynn v. Hopkins,* 55 A.D.3d 498, 867 N.Y.S.2d 391 [2008])." *Linton v. Nawaz*, 62 A.D.3d 434, 439 [1st Dept 2009]).

Furthermore, plaintiff has submitted evidence that her injuries were worth considerable more than $20,000, creating an issue of fact as to whether she sustained actual damages due to any negligence on the part of her attorneys.

On a summary judgment motion the "court should draw all reasonable inferences in favor of the non-moving party and should not pass on issues of credibility." *(Dauman Displays Inc. v. Masturzo*, 168 AD2d 204 [1st Dept. 1990]). "It is settled that the function of a court on a motion for summary judgment is issue finding, not issue determination." *(Clearwater v. Hernandez*, 256 AD2d 100 [1st Dept. 1998]).

Accordingly, defendant's motion is denied as there are issues of fact.

The foregoing shall constitute the decision and order of the Court.

Dated: MAR 30 2016

KENNETH L. THOMPSON JR. J.S.C.