[* 1]

SHORT FORM ORDER

INDEX No. 14-18725
CAL. No. 17-01373OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice Supreme Court

MOTION DATE 12-14-17 (007)
MOTION DATE 1-31-18 (008)
ADJ. DATE 1-31-18
Mot. Seq. # 007 - MG; CASE DISP
008 - MD

----------X

JENNA PROVENZANO,

Plaintiff,

- against -

CELLINO & BARNES, P.C.,

Defendants.

----------X

CELLINO & BARNES, P.C.,

Third-Party Plaintiff,

- against -

LAW OFFICES OF CHRISTOPHER J. CASSAR, P.C., and CHRISTOPHER J. CASSAR, ESQ.,

Third-Party Defendants.

----------X

LAW OFFICES OF CHRISTOPHER J. CASSAR
Attorney for Plaintiff/Third-Party
Defendant Pro Se
13 East Carver Street
Huntington, New York 11743

HURWITZ & RINE, P.C.
Attorney for Defendant/Third-Party Plaintiff
535 Broad Hollow Road, Suite A-7
Melville, New York 11747

Upon the following papers numbered 1 to 59 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 to 44; Notice of Cross Motion and supporting papers 45-52; Answering Affidavits and supporting papers___; Replying Affidavits and supporting papers 53 to 60; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Cellino & Barnes, P.C. for summary judgment dismissing the complaint is granted; and it is further

ORDERED that the motion by plaintiff Jenna Provenzano for summary judgment is denied.

Plaintiff commenced this action to recover damages she allegedly suffered as a result of defendant's legal malpractice and breach of contract. Plaintiff alleges that she was involved in an accident in April 2010, and that she retained defendant Cellino & Barnes, P.C., to commence a negligence action to recover damages for the injuries she allegedly sustained. Although defendant commenced a court action on plaintiff's behalf, defendant failed to timely file a worker's compensation claim within one year of the accident. Plaintiff further alleges that she is permanently barred from commencing a worker's compensation claim and from recovering certain benefits to which she was entitled. Additionally, plaintiff claims that she sustained a loss totaling ten million dollars as a result of defendant's negligence. Defendant instituted a third-party action against plaintiff's current attorney; however, a stipulation discontinuing the third-party action was executed in June 2017.

Defendant now moves for summary judgment dismissing the complaint inasmuch as plaintiff did not retain it to file a workers' compensation claim. Defendant also contends that plaintiff did not have a viable claim for workers' compensation benefits, because plaintiff's alleged injury occurred after working hours while she was crossing a public roadway. Defendant submits the pleadings, plaintiff's deposition testimony, the retainer agreement, the deposition testimony of defendant's representative who handled plaintiff's case, and various documents concerning the settlement of the negligence action. Plaintiff opposes the motion and cross-moves for summary judgment awarding her $500,000 in damages. Plaintiff submits the retainer agreement, the affidavit of her expert, documents concerning her disallowed workers' compensation claim, and her deposition testimony.

Plaintiff testified that at the time of the vehicular accident, she was employed as a manager of the Banana Republic store located at the factory outlet center on Jericho Turnpike known as the Woodbury Common. She was a salaried employee; therefore, she was not required to clock in and out at work. On the day of the accident, she arrived to work at 8:00 a.m. and worked until approximately 5:10 p.m. When plaintiff finished working, she walked out of the store and headed to her car. While she was walking across Commons Road toward the employee parking lot, she was struck by a car, which approached her from behind. Commons Road was a public roadway, and the employee parking lot could be used by all employees who worked at the outlet center, as well as by the public who patronized the stores. Plaintiff contacted defendant law firm the day after the accident, and one of defendant's attorneys, Joseph Capetola, met with her two days later. During the first meeting, plaintiff retained defendant to bring a lawsuit against the driver of the vehicle. Approximately one week later, Capetola and plaintiff discussed workers' compensation. Capetola told plaintiff that she was not eligible for workers' compensation benefits, but did not give her a specific reason for his opinion. He also told her that she was not eligible for disability benefits because of her age. Plaintiff's aunt, who worked in the insurance industry, advised plaintiff to "push" Capetola to file the workers' compensation and disability claim, and plaintiff recalled at least four or five conversations with him about the subject. Capetola's response to her was that "we're not going to go that route." She "browsed" the retainer agreement that

she signed, and she understood that defendant would investigate her claim and bring a lawsuit arising out of the accident. Plaintiff discharged defendant in June 2012, and in May 2013, her new attorney filed a disability and workers' compensation claim on her behalf. The workers' compensation claim was denied as time barred; however, plaintiff's disability application was approved.

Capetola testified that he did not handle workers' compensation claims for defendant, and would refer any such claims to outside counsel. He recalled that during the intake interview with plaintiff, she told him that she was struck by a car after she finished work. He could not recall whether plaintiff inquired about a workers' compensation claim, or the number of times that he met with plaintiff. Capetola recalled that he assisted plaintiff in filing a no fault insurance claim. Plaintiff did not complain to Capetola about his handling of her accident case at any point during his representation.

The retainer agreement indicated that defendant's representation of plaintiff was "to prosecute [her] claim for injuries and damages sustained as a result of an accident . . . [and was] limited to all steps necessary to bring the action to trial, verdict or settlement and does not include appellate practice, Surrogate's and/or estate work, legal work pertaining to Medicare Set Aside issues, and legal work pertaining to Medicare lien evaluation." The scope of legal services to be provided included "initial and ongoing investigation of [the] incident; securing potential witnesses and evidence; gathering appropriate medical records, employment records, wage records, education records and other records; drafting, filing, and responding to appropriate court documents; selection and retention of experts and investigators as necessary; appearance at court proceedings, depositions and arbitrations; conducting settlement negotiations; preparing for trial as appropriate and necessary; and maintaining appropriate contact with the client throughout."

A letter dated July 15, 2011, and addressed to defendant stated that the driver's insurance company offered a settlement of $100,000 to plaintiff. Another letter from plaintiff's new attorney to defendant indicated that the matter settled for $140,000, and that $10,000 would be kept in an escrow account until plaintiff's legal malpractice action was resolved. Additionally, plaintiff filed a workers' compensation claim in August 2012, in which she stated that she "had left the store and was crossing the parking lot when [she] was struck by a motor vehicle." Her claim was disallowed on the ground that it was untimely, and an appeal ensued. By written decision dated May 12, 2013, the Workers' Compensation Board affirmed the disallowance of the claim. The Board found that it was unclear whether plaintiff's accident arouse out of and in the course of employment, and that plaintiff failed to show that her employer would not be prejudiced by the delay in making the claim. It does not appear that an appeal was taken from the Board's final determination.

It is well established that a legal malpractice claim requires that the plaintiff show that "the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession which results in actual damages to a plaintiff . . ., and that the plaintiff would have succeeded on the merits of the underlying action but for the attorney's negligence" (***AmBase Corp. v Davis Polk & Wardwell***, 8 NY3d 428, 434 [2007] [internal quotation marks omitted]; ***Mid-Hudson Val. Fed. Credit Union v Quartararo & Lois, PLLC***, 155 AD3d 1218, 1219-1220, 64 NYS3d 389 [3d Dept 2017]). To demonstrate causation, "a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's

negligence" (***Northrop v Thorsen***, 46 AD3d 780, 782, 848 NYS2d 304 [2d Dept 2007]; ***Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP***, 301 AD2d 63, 67, 750 NYS2d 277 [1st Dept 2002]; ***Pellegrino v File***, 291 AD2d 60, 63, 738 NYS2d 320 [1st Dept 2002]). Thus, "[e]ven if counsel improperly advises the client, the advice is not the proximate cause of the harm if the client cannot demonstrate its own likelihood of success absent such advice" (***Pellegrino v File***, 291 AD2d 60, 63, 738 NYS2d 320 [1st Dept 2002]; *see* ***Hill v Fisher & Fisher***, 203 AD2d 328, 610 NYS2d 848 [1994]; ***Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP***, 301 AD2d 63, 67, 750 NYS2d 277 [1st Dept 2002] ["a failure to establish proximate cause requires dismissal regardless of whether negligence is established"]; ***Parmisani v Grasso***, 218 AD2d 870, 629 NYS2d 865 [3d Dept 1995]). Additionally, "to succeed on a motion for summary judgment, the defendant in a legal malpractice action must present evidence in admissible form establishing that the plaintiff is unable to prove at least one of [the] essential elements" of a legal malpractice action (***Rehberger v Garguilo & Orzechowski, LLP***, 118 AD3d 767, 768, 988 NYS2d 70 [2d Dept 2014]).

Defendant contends that it was retained to pursue a tort action on plaintiff's behalf; therefore, it had no duty to bring a workers' compensation claim and plaintiff's complaint should be dismissed. Defendant made a prima facie showing that plaintiff retained its services to bring only a negligence action against the driver of the vehicle that struck her (*see* ***Block v Brecher, Fishman, Feit, Heller, Rubin & Tannenbaum***, 301 AD2d 400, 400, 753 NYS2d 84 [1st Dept 2003]). Plaintiff testified that when she inquired about a workers' compensation claim, defendant told her that she did not qualify for workers' compensation benefits and that he "was not going that route." Additionally, Capetola testified that he did not handle workers' compensation claims on defendant's behalf, and that he generally referred any such claims to outside counsel. There is no indication in the record that Capetola advised plaintiff that he would file a workers' compensation claim on her behalf and failed to do so.

Furthermore, defendant established that plaintiff could not prove that she would have prevailed in her workers' compensation claim even she had timely filed such a claim (*see generally* ***Davis v Klein***, 88 NY2d 1008, 1009 [1996]; ***Felix v Klee & Woolf, LLP***, 138 AD3d 920, 921, 30 NYS3d 220 [2d Dept 2016]). To have a viable claim for workers compensation benefits, an employee must show that he or she sustained injury arising out of and in the course of his or her employment (Workers Compensation Law § 10; *see* ***Neacosia v New York Power Auth.***, 85 NY2d 471, 475 [1995]). Thus, "[a]s a general rule, accidents occurring on a public street, away from the place of employment and outside working hours, are not considered to have arisen in the course of employment" (***Matter of Harris v New York State Off. of Gen. Servs.***, 13 AD3d 796, 796, 786 NYS2d 242 [3d Dept 2004]; *see* ***Husted v Seneca Steel Serv., Inc.***, 41 NY2d 140, 142 [1976]). However, "as the employee comes in closer proximity with his [or her] employment situs, there develops 'a gray area' where the risks of street travel merge with the risks attendant with employment and where the mere fact that the accident took place on a public road or sidewalk may not ipso facto negate the right to compensation" (***Matter of Cushion v Brooklyn Botanic Garden***, 46 AD3d 1095, 1095-1096, 847 NYS2d 307 [3d Dept 2007]). The Court of Appeals has established that the "test of compensability in this 'gray area' is whether the accident happened as an incident and risk of employment . . . That is, there must be (1) 'a special hazard at the particular off-premises point' and (2) a 'close association of the access route with the premises, so far as going and coming are concerned'" (***Matter of Harris v New York State Off. of Gen. Servs.***, 13 AD3d 796, 796, 786 NYS2d 242 [3d Dept 2004], quoting ***Husted v Seneca Steel Serv., Inc.***, 41 NY2d 140).

Where the injury that the plaintiff sustained is one that any passerby or member of the public could have sustained, a work-related hazard was not present and the injury did not arise out of and in the course of employment (***Matter of Harris v New York State Off. of Gen. Servs.***, 13 AD3d 796).

In the instant matter, "there was no evidence that a special hazard existed at the off-premises location where [plaintiff] was struck; rather, the risk of being struck by vehicular traffic in [that] location was shared by the public in general and was not specific to [her] place of employment" (***Matter of Fiero v New York City Dept. of Hous. Preserv. & Dev.***, 34 AD3d 911, 912, 823 NYS2d 290 [3d Dept 2006]). The record established that after plaintiff had completed work for the day, she was struck by a vehicle on a public roadway while she was walking toward her parked car. Plaintiff testified that area where she parked was an employee parking lot; however, that parking area was also accessible to the general public and patrons of the outlet center. Inasmuch as plaintiff could not establish the likelihood of success in her workers' compensation claim, defendant's conduct was not the proximate cause of the harm she sustained (*see* ***Pellegrino v File***, 291 AD2d 60, 63, 738 NYS2d 320 [1st Dept 2002]).

Defendant has also established that plaintiff's breach of contract claim is "duplicative of the legal malpractice cause of action because [it] arose from the same operative facts and did not seek distinct and different damages" (***Kliger-Weiss Infosystems, Inc. v Ruskin Moscou Faltischek, P.C.***, 159 AD3d 683, 685, 73 NYS3d 205 [2d Dept 2018]; ***Balan v Rooney***, 152 AD3d 733, 734, 61 NYS3d 29 [2d Dept 2017]). In opposition, plaintiff failed to raise an issue of fact (*see* ***Caires v Siben & Siben, LLP***, 2 AD3d 383, 384, 767 NYS2d 785 [2d Dept 2003]), and her cross motion was untimely.

Accordingly, defendant's motion for summary judgment dismissing the complaint is granted and the cross-motion is denied.

Dated: AUGUST 16, 2018

HON. JOSEPH C. PASTORESSA, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION