

Reem Contr. v Altschul & Altschul
2020 NY Slip Op 32301(U)
July 13, 2020
Supreme Court, New York County
Docket Number: 104202/2011
Judge: Kelly A. O'Neill Levy
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

HON. KELLY O'NEILL LEVY

IAS PART 31

Justice

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REEM CONTRACTING, JONA SZAPIRO, REEM PLUMBING,
STEVEN STEIN

Plaintiff,

INDEX NO. 104202/2011

MOTION DATE _____

MOTION SEQ. NO. 014, 015

DECISION AND ORDER

- v -

ALTSCHUL & ALTSCHUL, MARK ALTSCHUL ESQ, COREY
DWORKIN ESQ,

Defendant.

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Hon. Kelly O'Neill Levy:

Motion Sequences 014 and 015 are consolidated for disposition. This legal malpractice action was commenced April 5, 2011. Note of Issue was filed February 3, 2020. Defendants timely submitted their motion for summary judgment on February 26, 2020 seeking \$44,638.07 plus interest from December 4, 2008. Plaintiffs timely submitted their motion on March 3, 2020 seeking judgment as to liability. A so-ordered stipulation dated March 12, 2020 extended the deadline for opposition papers to April 7, 2020. On March 20, 2020, the parties agreed to further extend the deadline for opposition papers to May 7, 2020. Plaintiffs timely submitted their Affirmation in Opposition to Defendants' motion relating to fees allegedly owed. Defendants chose not to oppose Plaintiffs' Motion for Summary Judgment as to liability.

"A legal malpractice claim requires a showing that the attorney was negligent, that her negligence proximately caused the loss in question, and that the plaintiffs sustained actual damages... To prevail on a summary judgment motion, the attorney must show that she exercised an "ordinary [degree of] skill and knowledge." *Mah v. 40-44 West 120th St. Associates, LLC*, 65

Misc.3d 1215(A) (1st Dep't 2019) (citing *Bishop v. Maurer*, 33 AD3d 497, 498 [1st Dept. 2006], *aff'd* 9 NY3d 910 [2007]; *Bakcheva v. Law Offs. of Stein & Assoc.*, 169 AD3d 624, 625 [2d Dept. 2019]). "While the issue of whether certain conduct constitutes legal malpractice is generally a factual determination to be made by the jury, a plaintiff will be entitled to summary judgment in a case where there is no conflict at all in the evidence, the defendant's conduct fell below any permissible standard of due care, and the plaintiff's conduct was not really involved." *Selletti v. Liotti*, 22 A.D.3d 739 (2d Dep't 2005).

"Expert testimony is normally needed to establish that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession." *Northrop v. Thorsen*, 46 A.D.3d 780 (2d Dep't 2011). To this end, Plaintiffs have submitted a signed expert report from Bennett J. Wasserman, Esq. which concludes in detail that Defendants were negligent and that there is a direct causal link between Defendants' negligence and actual damages that Plaintiff incurred:

The defendants' negligence, in the form of a failure to conduct a proper investigation, failure to retain a liability expert in a timely fashion, failure to secure a proper expert report in a timely fashion, and failure to properly oppose the underlying plaintiffs' motion for summary judgment, were all a substantial causative factor in the loss of plaintiffs' (underlying defendants') case and the loss of opportunity to have it resolved rather than dismissed. A full and appropriate effort in pre-trial discovery would have yielded expert evidence of the type set forth in the plaintiffs' informal audit which could easily have been utilized to defeat the underlying plaintiffs' motion for summary judgment. Likewise, whether before or after the summary judgment stage, a liability and damages presentation supported by proper expert evidence could have been utilized to promote a settlement, and, of course, defeat summary judgment and force a trial on the merits if settlement was not forthcoming. The malpractice defendants' failure to develop the case, and the concomitant failure to communicate with their clients about the case, was a substantial causative factor in bringing about the sizeable judgment which is at the heart of plaintiffs' damages... [D]efendants Mark Altschul, Corey Dworkin, and the Altschul & Altschul firm, departed from accepted standards of practice and care as it pertained to its conduct in the underlying matter by reason of the acts of omission and acts of commission as detailed above. It is further my opinion, within a reasonable degree of professional certainty, that these departures from the standards of care by the defendants was the proximate cause of the losses incurred by the plaintiffs...

Expert Report, Wasserman, p. 35. Defendants did not submit an expert report challenging these findings, nor did Defendant submit opposition papers explaining why the Court should otherwise not accept these findings. Plaintiffs have met their burden and Defendants have provided nothing to rebut a determination of liability.

This case presents an extraordinary situation where this Court can appreciate how Plaintiffs' expert came to the conclusion that Defendants' "failure to retain a liability expert in a timely fashion, failure to secure a proper expert report in a timely fashion, and failure to properly oppose the underlying plaintiffs' motion for summary judgment" was "a substantial causative factor" in a determination of liability that was potentially avoidable where, as here, Defendants' failure to retain a liability expert in a timely fashion, failure to secure an expert report in a timely fashion, and failure to oppose plaintiffs' motion for summary judgment are a substantial causative factor in determining liability.

Plaintiffs' motion for summary judgment as to liability is granted. The court directs an inquest to determine damages and fees. Plaintiffs shall serve a copy of this order, with notice of entry, and a note of issue and statement of readiness on the Clerk of the Trial Support Office within 60 Days of the date below. The Trial Support office shall, upon receipt of the note of issue, assign this matter to an appropriate Part for the inquest. Plaintiffs shall, once the inquest is scheduled, provide notice of the date to Defendants by regular and certified Mail.

As Defendants were negligent as a matter of law, Defendants' motion for fees is denied as "a negligent attorney is precluded from collecting a fee." *Campagnola v. Mulholland, Minion & Roe*, 76 N.Y.2d 38, 42 (1990).

Lastly, to the extent that Defendants have not paid to Plaintiffs the \$6,963.30 that this Court's March 16, 2020 Order directed them to pay by March 23, 2020, they are directed to do

so by July 20, 2020. Should Defendants fail to pay by July 20, 2020, the Clerk is directed to enter a money judgment against the Defendants and in favor of the Plaintiffs for the remainder of the amount due.

This constitutes the Decision and Order of the Court.

Dated:

ENTER:

July 13, 2020

Kelly O'Neill Levy

Hon. Kelly O'Neill Levy

**KELLY O'NEILL LEVY
JSC**