SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID B. COHEN **PART** 58

Justice

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INDEX NO. 156729/2019

HAZEL CARASCO,

Plaintiff,

MOTION SEQ. NO. 003

- v -

MICHAEL S. SCHLESINGER, MORELLI LAW FIRM, LLPC, and JULIEN & SCHLESINGER, P.C.,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68 were read on this motion to/for SUMMARY JUDGMENT.

In this legal malpractice action commenced by Hazel Carasco, defendants Michael S. Schlesinger and Morelli Law Firm PLLC move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff opposes the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

On or about December 8, 2014, plaintiff signed a retainer agreement with defendant law firm Julien & Schlesinger ("J&S"). Doc. 1 at par. 21; Doc. 46. Pursuant to the agreement, J&S was to represent plaintiff in connection with personal injuries she sustained when she tripped and fell at Second Avenue and 58th Street in Manhattan on October 31, 2014 ("the accident"). Doc. 1 at par. 22; Doc. 46.

At her 50-h hearing in May 2015, plaintiff, who was represented by defendant Michael S. Schlesinger, then an associate attorney for J&S, testified, inter alia, that she was injured at the intersection of 58th Street and Second Avenue when she fell on an uneven road surface which was elevated approximately two inches around a metal plate in the roadway. Doc. 49 at 6-7, 11-15. She had never seen the plate or the uneven section of the roadway prior to the accident and knew of no prior complaints about the same. Doc. 49 at 15-16.

It is undisputed that, on January 6, 2016, Schlesinger, was no longer an employee of J&S, which ceased operations in 2015, became an associate at defendant Morelli Law Firm, PLLC ("MLF"). Doc. 39 at pars. 22, 27. On or about January 28, 2016, plaintiff commenced a personal injury action in this Court styled *Hazel Carasco v City of New York, Consolidated Edison Company, and Halcyon Construction Company, et. al.*, under Ind. No. 105779/16 ("the underlying action"). Doc. 1 at par. 24; Doc. 47. The summons and complaint in the underlying action listed counsel for plaintiff as "Michael S. Schlesinger of the Schlesinger Law Firm, P.C." Doc. 47.

On January 30, 2017, Schlesinger, in his individual capacity, executed a stipulation adjourning a motion in the underlying action. Doc. 64.[1]

On March 10, 2017, plaintiff wrote to Schlesinger at MLF to ask why he had apparently ceased representing her in the underlying action. Doc. 61.

Between February 2017 and July 2018, this Court (d'Auguste, J. and Tisch, J.) issued orders dismissing the underlying action against the defendants therein based, inter alia, on plaintiff's failure to provide discovery. Doc. 54.

[1] Although the stipulation is actually dated January 30, 2016, this appears to be a typographical error.

On November 16, 2017, plaintiff obtained her original legal file in the underlying action from Schlesinger and signed an acknowledgment that she had done so. Doc. 48.

On July 10, 2019, plaintiff commenced the captioned legal malpractice action against Schlesinger, MLF, and J&S. Doc. 1. In her complaint, plaintiff alleged, inter alia, that Schlesinger told her that MLF would represent her in the underlying action. Doc. 1 at pars. 26-27; Doc. 39 at par. 22. She further alleged that, as a result of the negligence of J&S, MLF, and Schlesinger, including failing to appear at court conferences, comply with discovery orders, and oppose motions, her meritorious complaint in the underlying action was dismissed on July 26, 2018. Doc. 1 at par. 27-38, Doc. 54.

Schlesinger joined issue by his answer filed November 11, 2019, in which he denied all substantive allegations of wrongdoing and set forth several affirmative defenses. Doc. 10.

By order entered February 21, 2020, this Court denied MLF's motion to dismiss the complaint for failure to state a cause of action. Doc. 16.

MLF joined issue by its answer filed November 5, 2020, in which it denied all substantive allegations of wrongdoing and set forth several affirmative defenses. Doc. 21.[2]

Plaintiff's Deposition Testimony

At her deposition in December 2020, plaintiff testified that her accident occurred when she tripped on the roadway at 58th Street and Second Avenue and "fell very hard on [a] metal plate in the road." Doc. 42 at 25, 28-29, 43. There were "stones around" the area in which she fell, which, she believed, indicated that repairs were being done at that location. Doc. 42 at 28. She maintained that she fell because "[t]he roadway was uneven." Doc. 42 at 28. The raised portion of the roadway was right next to the metal plate. Doc. 42 at 45-46. She did not see the

[2] J&S has not appeared or answered in this action.

raised portion of the roadway, which she estimated was 2-3" high, until after her accident. Doc. 42 at 51-52, 57-58.

Plaintiff recalled that, in December 2014, she entered into a retainer agreement with J&S pursuant to which that firm was to represent her in connection with the accident. Doc. 42 at 14-15, 98-99, 111. The retainer agreement did not specifically state that plaintiff was to be represented by Schlesinger. Doc. 42 at 104. She admitted that she did not have a retainer agreement with MLF. Doc. 42 at 15, 120-121.

In 2016, Schlesinger advised plaintiff that J&S had dissolved and that he was joining MLF. Doc. 42 at 108-109, 111-112. Plaintiff "presumed" that when Schlesinger went from J&S to the MLF, there was a continuation of the retainer agreement she had with J&S. Doc. 42 at 16-18. Schlesinger never specifically told plaintiff that MLF represented her; he merely stated that he was representing her and that he worked for MLF. Doc. 42 at 18-19. Plaintiff did not communicate with, or receive legal advice from, anyone from MLF other than Schlesinger but recalled receiving communications from Schlesinger on MLF letterhead and met with Schlesinger at MLF's offices on 3-4 occasions. Doc. 42 at 23-24, 118-120, 144-145, 153. Therefore, she claimed she was led to believe that MLF represented her, although she never entered into a retainer agreement after that which she had with J&S. Doc. 42 at 18-19, 116-117, 134, 164.[3] Plaintiff maintained that Schlesinger never told her that he could no longer represent her because he had joined MLF. Doc. 42 at 117.

[3] Plaintiff also testified, however, that, as early as April 2016, Schlesinger told her that MLF was reluctant to take her case and that he would do his best to find her a lawyer. Doc. 42 at 118-119, 132-135. However, she never attempted to find a new attorney. Doc. 42 at 129-130.

On November 16, 2017, plaintiff signed an acknowledgment that she had taken possession of her file from MLF. Doc. 42 at 150-151; Doc. 48.[4] She insisted, however, that taking possession of the file had nothing to do with a search for a new attorney. Doc. 42 at 153.

Plaintiff further testified that, on two or three occasions, Schlesinger failed to appear for court appearances in the underlying action and, when he did so, court personnel tried to contact him at MLF. Doc. 42 at 155-157.

Schlesinger's Deposition Testimony

At his deposition in March 2021, Schlesinger testified, inter alia, that he assisted in doing intake on plaintiff's case at J&S and that he represented plaintiff at her 50-h hearing. Doc. 43 at 22. Between the time J&S ceased operations in 2015 and the time he began working at MLF, Schlesinger did not know what, if anything, was going on in the underlying action. Doc. 43 at 24. However, when plaintiff reached out to him, he drafted a summons and complaint on her behalf in that action despite telling her, after he joined MLF, that his new firm would not represent her. Doc. 43 at 28-32. Schlesinger did not have his own firm at the time he filed the summons and complaint. Doc. 43 at 51. Nor did he work at any law firm between the time he left J&S and the time he began working at MLF. Doc. 43 at 17. He further testified that the complaint in the underlying action was dismissed due to "nonappearance of the plaintiff" and that, each time he was notified of a court appearance, he told plaintiff to "get an attorney to start appearing on her behalf." Doc. 43 at 61-62.

MLF's Deposition Testimony

Benedict Morelli, the owner of MLF, was deposed in July 2021. Doc. 44 at 6. He testified that Schlesinger was an associate at the firm in 2017. Doc. 44 at 7-8. When Schlesinger

[4] The acknowledgement actually reflects that plaintiff obtained the file from Schlesinger. Doc. 48.

joined the firm, he spoke to Morelli about working on cases he had from J&S. Doc. 44 at 11-12. Schlesinger spoke to Morelli about the underlying action and Morelli told him that he did not want the case. Doc. 44 at 13. Morelli said that employees of MLF were not permitted to work on cases with their own individual retainer. Doc. 44 at 15. However, he conceded that he was aware that Schlesinger met with plaintiff at MLF's offices and that Schlesinger told her that he did not represent her and that MLF would not accept her case. Doc. 44 at 17, 20. He also admitted that he knew that Schlesinger had appeared on at least one court conference in plaintiff's case. Doc. 44 at 20. Morelli further admitted that, when the underlying action was dismissed, MLF received a copy of the order with notice of entry and that Schlesinger communicated with plaintiff using MLF's email. Doc. 44 at 22-24. He insisted that he never met or communicated with plaintiff and that plaintiff did not have a retainer with MLF. Doc. 44 at 19, 26.

Plaintiff filed a note of issue and certificate of readiness on November 4, 2021. Doc. 36.

Defendants Schlesinger and MLF now move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Docs. 37-51. In support of the motion, the movants assert that the claims against MLF must be dismissed since that firm never had an attorney-client relationship with plaintiff. Doc. 38. They further assert that the claims against MLF and Schlesinger must be dismissed because the evidence establishes that plaintiff would not have prevailed in the underlying action. Doc. 38. In support of this contention, they maintain that plaintiff merely speculated as to the cause of her fall and that there was no proof that the defendants in the underlying action created or had notice of the allegedly dangerous condition. Doc. 38. MLF and Schlesinger also contend that the complaint must be dismissed since plaintiff's accident occurred due to an open and obvious condition. Doc. 38.

In support of the motion, Schlesinger submits an affidavit in which he attests that, although eCourts and eLaw websites listed MLF as counsel for plaintiff in the underlying action, this was a "clerical error" which was "outside of [his] control and outside of the control of [MLF]." Doc. 50. He further represents that, after the captioned action was commenced, a clerk at 60 Centre Street advised him that "when an attorney electronically files on NYSCEF, the filing system will automatically associate the filing with the attorney's listed firm/address, regardless of the content of the filed document and/or the capacity in which the attorney filed it. Doc. 50.

In opposition, plaintiff argues that MLF and Schlesinger fail to establish their entitlement to summary judgment dismissing the complaint. Doc. 53. Specifically, plaintiff argues that MLF is not entitled to summary judgment because an attorney-client relationship existed between MLF and plaintiff despite the absence of a retainer agreement and MLF was vicariously liable for the acts of its employee Schlesinger. Doc. 53. Plaintiff further asserts that MLF and Schlesinger fail to establish as a matter of law that plaintiff would not have prevailed in the underlying action. Additionally, plaintiff maintains that even assuming arguendo, that the condition which caused her accident was open and obvious, this would merely relieve the defendants in the underlying action of their duty to warn of a dangerous condition but would not eliminate the requirement that they maintain the roadway in safe condition. Doc. 53.

In reply, movants reiterate their argument that the complaint must be dismissed because plaintiff would not have prevailed in the underlying action insofar as she merely speculated as to the cause and location of her accident. Doc. 67. They also reiterate their contentions that there is no evidence that defendants in the underlying action created or had notice of the alleged

condition and that the complaint must be dismissed against MLF since it had no attorney-client relationship with plaintiff. Doc. 67.

LEGAL CONCLUSIONS

A party moving for summary judgment pursuant to CPLR 3212 "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the moving party has met this prima facie burden, the burden shifts to the non-moving party to furnish evidence in admissible form sufficient to raise a material issue of fact (*Alvarez*, 68 NY2d at 324). The moving party's "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*).

MLF

MLF is not entitled to summary judgment on the ground that the plaintiff could not have prevailed in the underlying action. Contrary to movants' contention, the plaintiff did not speculate about the cause of her fall but rather testified that she fell on an uneven roadway which was elevated approximately 2" above an adjacent metal plate in the road. Nor did movants demonstrate that there was no proof that the defendants in the underlying action created or had notice of a dangerous condition. Although discovery in the underlying action may have yielded evidence of the creation and/or notice of the condition, the dismissal of the underlying action renders this Court unable to analyze those issues. Finally, although movants assert that plaintiff's accident occurred due to an open and obvious condition, this did not relieve the

defendants in the underlying action from maintaining the area in question in a reasonably safe condition (*See Matos v Azure Holdings II, L.P.*, 181 AD3d 406 [1st Dept 2020]).

MLF has, however, established its prima facie entitlement to summary judgment by demonstrating that it did not have an attorney-client relationship with plaintiff. One of the elements of a legal malpractice claim is the existence of an attorney-client relationship (*See Lindsay v Pasternack Tilker Ziegler Walsh Stanton & Romano, LLP*, 129 AD3d 790, 792 [2d Dept 2015]). Here, MLF demonstrates that it did not have a retainer agreement with plaintiff; plaintiff concedes that Schlesinger never told her that she was represented by MLF; Schlesinger and Morelli both testified that MLF refused to accept plaintiff's case; and plaintiff did not communicate with, or receive legal advice from, anyone from MLF other than Schlesinger, who, although not mentioned in the retainer agreement signed by J&S, filed plaintiff's complaint in the underlying action as Michael Schlesinger of "The Schlesinger Law Firm, P.C." Thus, the burden shifts to plaintiff to raise a material issue of fact to defeat MLF's motion.

Plaintiff fails to raise an issue of fact regarding whether she was represented by MLF. The sole retainer agreement she signed in connection with the underlying action was with J&S. Plaintiff's presumption that there would be a continuation of the retainer agreement she signed with J&S when Schlesinger moved to MLF is insufficient to raise an issue of fact (*See Davis v Cohen & Gresser, LLP*, 160 AD3d 484, 486 [1st Dept 2018] *citing Pellegrino v Oppenheimer & Co., Inc.*, 49 AD3d 94, 99 [1st Dept 2008] ["a party cannot create the relationship based on his or her own beliefs or actions"]; *Jane St. Co. v Rosenberg & Estis*, 192 AD2d 451, 451 [1st Dept 1993], *lv denied* 82 NY2d 654 [1993] [plaintiff's unilateral beliefs and actions do not confer upon it the status of client"]). Plaintiff conceded at her deposition that Schlesinger never told her that MLF represented her, but rather that he was representing her and that he worked for

MLF. Plaintiff even conceded that Schlesinger told her as early as April 2016 that MLF was reluctant to take her case and there is no evidence that plaintiff was ever told that MLF agreed to represent her. Therefore, MLF is entitled to summary judgment dismissing the complaint against it (*See Jones v. Lopez*, 12 Misc 3d 1184[A], 2006 NY Slip Op 51444[U] [Sup Ct. Bronx County 2006] [plaintiff failed to establish that the defendant law firm explicitly undertook to perform a service for her, either orally or in writing]).

This Court acknowledges that plaintiff met with Schlesinger at MLF's offices on 3 or 4 occasions, that MLF appeared as counsel of record on eLaw and/or eCourts, evidently because Schlesinger was affiliated with the firm, and that plaintiff received email correspondence from Schlesinger via MLF's email server. While the foregoing facts may be some indicia that MLF represented plaintiff, this Court finds that they do not raise a material issue of fact regarding whether she had an attorney-client relationship with the firm given the conclusions in the previous paragraph (*See generally Theroux v Resnicow*, 2021 NYLJ LEXIS 686 [Sup Ct New York County 2021] [Lebovits, J.] [in ruling whether emails were protected by attorney-client privilege, this Court held that no attorney-client relationship existed where, as here, there was no retainer or letter of engagement, no fees were paid, the attorneys did not appear on behalf of the alleged client, and the attorneys' names were not on any of the documents filed in the action]).

Contrary to plaintiff's contention, MLF is not vicariously liable for acts committed in furtherance of Schlesinger's personal motives and not in furtherance of MLF's business (*See Esposito v Isaac*, 54 Misc3d 134[A] [App Term 1st Dept 2017] [*citation omitted*]).

Schlesinger

Schlesinger fails to establish his prima facie entitlement to summary judgment dismissing the complaint. Although Schlesinger did not personally have a retainer agreement or letter of

engagement with plaintiff, he represented plaintiff at her 50-h hearing on behalf of J&S and assumed her representation in the underlying action by filing the summons and complaint therein as Michael Schlesinger of "The Schlesinger Law Firm, P.C." which, said documents indicated, was the "Attorney[ ] for the Plaintiff."

It is well settled that "an attorney must seek leave of the court to be relieved as counsel for a client based upon good cause, unless a consent to change attorneys signed by the client has been filed (CPLR 321 [b][2]; Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.16[d])." (*Grant v Mendez*, 2013 NY Slip Op 33750[U], *3 [Sup Ct, Westchester County 2013]). In *Grant*, the court held that an attorney acted improperly by advising his client that he was going to withdraw from representing him without obtaining the client's signed consent or seeking a court order relieving him as counsel and that the attorney had an obligation to continue representing the client until such time as he was formally relieved as counsel.

Schlesinger maintains, in essence, that he drafted the complaint for plaintiff as an accommodation. However, he fails to acknowledge his responsibility to continue representing her until such time as he successfully moved to be relieved as counsel or was discharged as counsel by plaintiff. Although Schlesinger told plaintiff that MLF would not take her case, and that she should retain new counsel, this did not fulfill his legal obligation to sever his ties with her. Thus, he remained responsible for representing her in the underlying action which, he admits, was dismissed due to "nonappearance of the plaintiff."

Additionally, summary judgment cannot be granted to Schlesinger as a matter of law since he himself created a material issue of fact. Specifically, although Schlesinger testified that he did not have his own firm at the time the underlying action was commenced and that he did not work for any firm between the time he left J&S and the time he began working for MLF, the

summons and complaint in the underlying action clearly reflect that they were filed by Michael Schlesinger of "The Schlesinger Law Firm, P.C."

Nor is Schlesinger entitled to summary judgment on the ground that the plaintiff could not have prevailed in the underlying action. This conclusion is based on the same reasoning as that discussed previously in connection with MLF's contention in this regard. With respect to Schlesinger, however, this Court adds that the alleged absence of evidence of the creation of the defect or notice of the defect may be attributable to his failure to prosecute the underlying action on plaintiff's behalf.

The parties' remaining contentions are either without merit or need not be addressed in light of the findings above.

Accordingly, it is hereby:

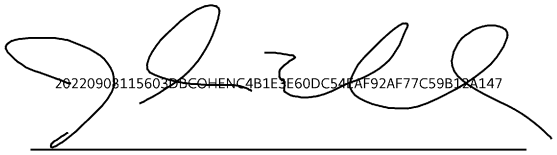
ORDERED that the motion for summary judgment by defendants Michael S. Schlesinger and Morelli Law Firm seeking summary judgment dismissing the complaint pursuant to CPLR 3212 is granted to the extent that the complaint is dismissed against defendant Morelli Law Firm, and is otherwise denied; and it is further

ORDERED that the claims against defendant Morelli Law Firm are severed and the balance of the action shall continue as against defendant Michael S. Schlesinger; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant Morelli Law Firm dismissing the claims made against it them in this action, 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 Clerk shall amend the caption accordingly; and it is further

ORDERED that, within 20 days of the entry of this order, counsel for defendants Michael S. Schlesinger and Morelli Law Firm, PLLC shall serve a copy of this order with notice of entry upon plaintiff and upon the Clerk of the Court (60 Centre St., Room 141B) and the Trial Support Office (60 Centre St., Rm. 158M) in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on this court's website at the address www.nycourts.gov/supctmanh).



9/8/2022
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE