

Herz v London Indusi LLP

2023 NY Slip Op 33683(U)

September 15, 2023

Supreme Court, Kings County

Docket Number: Index No. 510794/21

Judge: Ingrid Joseph

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 15th day of Sept, 2023.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS

-----X
LIBI HERZ AS ADMINISTRATOR DE BONIS NON OF THE ESTATE OF DAVID HERZ, ESTHER HERZ AS FORMER ADMINISTRATOR OF THE ESTATE OF DAVID HERZ, ESTHER HERZ AND LIBI HERZ,

Plaintiffs(s)

-against-

LONDON INDUSI LLP, RUSSO, KARL WIDMAIER CORDANO, PLLC, JOSEPH INDUSI, ESQ., CHRISTOPHER GERACE, ESQ., SINEL & OLESEN, PLLC AND ELLIOT SINEL, ESQ.

Defendants(s).

ORDER

Index No. 510794/21

Motion Seq. 1, 2, 3

-----X
The following e-filed papers considered herein:

Notice of Motion/Affirmation in Support/Memo in Support/
Affidavits Annexed/Exhibits Annexed/Reply.....
Affirmation in Opposition/Memo in Opposition/
Affidavits Annexed/Exhibits Annexed.....

NYSCEF E-filed docs

16-32; 110-113

68-84; 97-105; 106-107

Libi Herz, as Administrator De Bonis Non of the Estate of David Herz, Esther Herz, as Former Administrator of the Estate of David Herz, Esther Herz, and Libi Herz, (“Plaintiffs”) filed this instant action against Defendants on May 6, 2021 asserting causes of action for legal malpractice. In the complaint, Plaintiffs allege that Defendant Elliot Sinel, Esq. and his firm Sinel and Olesen, PLLC (Collectively “Sinel”) were retained by Plaintiffs to represent them in an underlying action to recover damages for medical malpractice, negligence, and wrongful death of David Herz,¹ who sustained a fall on January 4, 2013 while he was a resident of the Four Seasons Nursing Home. After his fall he was transported to Brookdale University Hospital and Medical Center and was pronounced deceased that same day. The Medical Malpractice action was filed on December 16, 2014, under Index Number 511915/2014.² The complaint additionally claims that in 2017, Plaintiffs retained Defendant Joseph Indusi, Esq., individually and as his interests may appear in the former firm of London Indusi, LLP

¹ David Herz was the husband to Esther Herz and father of Libi Herz.

² Following David Herz’s passing, Plaintiff Esther Herz became the Administrator of his estate and subsequently Libi Herz became Administrator and is currently the Administrator.

(“Indusi”), to represent them in a separate action to recover benefits from David Herz’s accidental death life insurance policy provided by Transamerica Financial Life Insurance (“The Transamerica Action”). That action was filed on January 26, 2017, under Index Number 501660/2017.³ Thereafter, a tentative settlement agreement between the parties in the Transamerica Action was held enforceable by Judge Larry D. Martin by order dated October 23, 2018. Judge Martin’s order was affirmed by the Appellate Division Second Department by an order dated May 29, 2019. As a result of the settlement agreement, Plaintiffs were barred from suing under a different cause of death theory in the Medical Malpractice case, and the action was dismissed by Judge Bernard J. Graham in an order dated October 6, 2020.

Plaintiffs now allege that Defendant Sinel was negligent in failing to advise them what the consequences of filing and settling a separate lawsuit would have on the Medical Malpractice Action and was also negligent in failing to preserve their appeal of Judge Graham’s order. Plaintiffs also allege that Defendants Indusi, Russo, Karl, Widmaier and Cordano, PLLC and Christopher Gerace (“RussoKarl and Gerace”) were negligent in settling the Transamerica Action without consent which eventually resulted in the barring of their Medical Malpractice Action. Plaintiffs state that but for RussoKarl and Gerace’s negligence, they would have recovered a substantial sum of money for decedent’s personal injuries and wrongful death.

Defendants Sinel (Motion Seq. 1), Indusi (Motion Seq. 2), and RussoKarl, and Gerace (Motion Seq. 3) move to dismiss Plaintiffs’ complaint pursuant to CPLR 3211(a)(1) and (a)(7).

Defendant Sinel, in his affirmation in support of his motion, argues that neither he nor his firm had knowledge that Plaintiffs retained separate counsel or filed a separate lawsuit until May of 2018 when he learned of the settlement in the Transamerica Action.⁴ Sinel argues that he had no duty to warn or advise Plaintiffs in the separate Transamerica Action and that Plaintiffs have failed to state a viable cause of action. Additionally, Sinel claims that the documentary evidence submitted shows that he tried to have the settlement vacated once he was substituted as counsel, but that Indusi’s actions in settling the Transamerica Action set off a chain of events that ultimately resulted in the Medical Malpractice Action being dismissed.⁵

In their opposition to Sinel’s motion, Defendants Indusi, RussoKarl and Gerace make the same argument which is that Sinel is attempting to transfer sole responsibility to them for the dismissal of the

³ At the time, Defendant Joseph Indussi, Esq. was a partner at London Indussi LLP and Defendant Christopher Gerace, Esq. was an associate at the firm. The London Indussi LLP firm has since ceased to exist. Defendants Joseph Indusi, Esq., and Christopher Gerace now work for Defendant RussoKarl.

⁴ It is unclear from the papers when or how Defendant Sinel became aware of the Transamerica Action, but the cease and desist letter was sent with the consent of Esther Herz and Sinel was then substituted as counsel on the Transamerica Action.

Medical Malpractice Action, but since they did not represent Plaintiffs in the Medical Malpractice Action, they had no duty to advise or counsel Plaintiffs regarding it. Indusi alleges that it was Sinel's actions, in failing to discontinue the Transamerica Action within the five months after being retained to work on it and also by abandoning Plaintiffs' appeal of Judge Graham's order, which caused the Medical Malpractice Action to be dismissed.

RussoKarl additionally argues that it is not a successor to the Indusi London LLP firm. It argues that the retainer agreement between Plaintiff Esther Herz and the Indussi law firm for the Transamerica Action was for the limited scope of prosecuting a claim against the insurance company for breach of contract regarding failure to pay out death benefits on an accidental death policy. RussoKarl and Gerace states that before discovery proceeded in the Transamerica Action, the parties entered into settlement negotiations and that on or around March 13, 2018, via an email exchange, the parties agreed to a settlement for the sum of \$12,500.00. However, before the parties were able to finalize the settlement documents, Esther Herz sent a cease and desist letter, dated May 8, 2018, to the Indusi firm, discharging them as her attorneys and substituting them with the Sinel firm that same day. RussoKarl and Gerace concede that Defendant Sinel appeared on the Plaintiffs' behalf in the Transamerica Action and attempted to rescind the settlement and proceed with discovery by filing a request for a preliminary conference on May 31, 2018. However, in July of 2018, Transamerica filed a motion seeking enforcement of the settlement agreement, which was granted in the October 23, 2018, order and affirmed by the Appellate Division Second Department by an order dated May 29, 2019. RussoKarl and Gerace state that after the defendants in the Medical Malpractice Action learned of the settlement in the Transamerica Action, they filed motions to amend their answers to add new affirmative defenses including judicial estoppel and election of remedies and to dismiss the Complaint on the ground that Plaintiffs could not recover for Medical Malpractice due to their assertion of accidental cause of death in the Transamerica settlement. On October 6, 2020, Hon. Bernard Graham granted defendants' motion holding that Plaintiffs could not assert a contrary cause of death after resolving the Transamerica Action. It is undisputed that Sinel filed a Notice of Appeal of the order but never perfected the appeal, which is now abandoned.

In opposition to Sinel's motion, Plaintiffs argue that Justice Graham's decision was wrong and would have been reversed if Sinel had appealed the decision. In his reply, Sinel asserts that Plaintiffs' claims that they would be successful on appeal are speculative. Sinel claims he acted in a manner that was reasonable and consistent with the law and that he conferred with Plaintiffs and was ultimately advised against moving forward with an appeal following Justice Graham's decision. Sinel additionally states that he was not obligated to pursue an appeal based on the terms of the retainer agreement.

With respect to Defendant Indusi's motion, Indusi, in his affirmation in support, argues that he cannot be liable to Plaintiffs because he never represented Libi Herz and he was never retained by

Plaintiff Esther Herz to represent the Estate or to counsel her at all regarding the underlying Medical Malpractice action. Indusi maintains that Esther Herz only retained him regarding collecting benefits under the Transamerica policy and that she brought that action as a beneficiary under the policy, not as a representative of her husband's estate. Additionally, Indusi claims that because the Transamerica Action settlement was enforced under the representation of Sinel, who replaced him, the transfer amounts to an intervening cause to Plaintiffs' legal malpractice claim. Furthermore, Indusi states that Plaintiffs cannot establish proximate cause against him because had Sinel filed a motion to voluntarily discontinue the action or in the alternative appealed the incorrect ruling of the Medical Malpractice action, it would have prevented the dismissal of the Medical Malpractice Action. Indusi also asserts that the firm London Indusi, LLP was dissolved in 2018 and cannot be sued, therefore, Plaintiffs claims against it should be dismissed.

In opposition to Indusi's motion, Defendant Sinel argues that he did not become the attorney of record until the consent was executed and filed with the court on May 31, 2018, and that at that point the Plaintiffs were already bound by an enforceable agreement as evidenced by the October 23, 2018, order. Sinel further states that despite his opposition and filing of a notice of appeal, the lower court's decision was affirmed by the Appellate Division Second Department.

In opposition to Indusi's motion, Plaintiffs argue that Indusi had a duty to advise Esther Herz regarding whether the Transamerica settlement was in her best interest. Plaintiffs also claim that Indusi's argument, that the alleged intervening acts of Sinel were the proximate cause of their damages, is irrelevant because a question of fact remains as to whether it was Indusi's negligence in settling the Transamerica Action that caused the Medical Malpractice Action to be dismissed.

With respect to RussoKarl and Gerace's motion, RussoKarl argue that there was never an attorney-client relationship established between Plaintiffs and the RussoKarl firm because Esther Herz never retained them nor was their firm involved in either of the underlying actions brought by Plaintiff. RussoKarl further denies Plaintiffs' allegations that their firm is a successor in interest to the Indusi firm and that Plaintiffs have failed to establish any fraud, collusions, malicious acts, or other special circumstances that would provide a basis for alleging privity existed between the firms for purposes of alleging that an attorney-client relationship existed. Additionally, RussoKarl states that Plaintiffs failed to plead "but for" causation and that the replacement of the Indusi firm with the Sinel firm in the Transamerica Action was an intervening cause mandating dismissal of the legal malpractice claims and that Sinel was ultimately negligent in failing to appeal Justice Graham's decision.

In opposition to RussoKarl and Gerace's motion, Sinel reiterates that that he did not become the attorney of record until after the Plaintiffs were already bound by an enforceable settlement agreement

and that despite his opposition and filing of a notice of appeal, the settlement agreement was deemed enforceable.

In opposition to RusoKarl and Gerace's motion, Plaintiffs argue that the RusoKarl firm is a successor in interest to the Indusi firm which not been negated by any evidence submitted by RusoKarl thus their claim against the firm must be allowed to stand at this time.

The issues before the court are whether Defendants have established Plaintiff's failure to state a viable cause of action against them and whether the Defendants have proffered sufficient documentary evidence to establish entitlement to dismissal of Plaintiffs' complaint against them.

Upon a motion to dismiss pursuant to CPLR 3211 (a)(1), dismissal is warranted where documentary evidence refutes plaintiff's factual allegations and establishes a defense as a matter of law (*Leon v Martinez*, 84 N.Y.2d 83 88 [1994]; *Goshum v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]; *Brio v Roth*, 121 A.D.3d 733 [2d Dept. 2014]). To constitute documentary evidence, the evidence must be "unambiguous, authentic, and undeniable," such as judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable (*Granada Condominium III Assn. v. Palomino*, 78 A.D.3d 996 [2d Dept. 2010]; *Prott v. Lewin & Baglio, LLP*, 150 AD3d 908 [2d Dept 2017]). An affidavit is not documentary evidence because its contents can be controverted by other evidence, such as another affidavit (*Xu v Van Zqienen*, 212 A.D.3d 872 [2d Dept. 2023]; *Phillips v Taco Bell Corp.*, 152 A.D.3d 806 [2d Dept. 2017]; *Fontanetta v John Doe 1*, 73 A.D.3d 78 [2d Dept. 2010]). Similarly, neither deposition testimony nor letters are considered documentary evidence within the intended meaning of CPLR 3211 (a)(1) (*Cives Corp. v George A. Fuller Co., Inc.*, 97 A.D.3d 713 [2d Dept. 2012]; *Integrated Const. Services, Inc., v Scottsdale Ins. Co.*, 82 A.D.3d 1160 [2d Dept. 2011]).

Where documentary evidence contradicts the allegations of the complaint, the court need not assume the truthfulness of the pleaded allegations (*West Branch Conservation Assn, Inc., v County of Rockland*, 227 A.D.2d 547 [2d Dept. 1996]; *Greene v Doral Conference Center Associates*, 18 A.D.3d 429 [2d Dept. 2005]); *Penato v. George*, 52 A.D.2d 939, 941 [2d Dept 1976]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137 [2017]; *Duncan v Emeral Expositions LLC*, 186 A.D.3d 1321 [2d Dept. 2020]; *Dinerman v Jewish Bd. of Family & Children's Services Inc.*, 55 A.D.3d 530 [2d Dept. 2008]; *Nisari v. Ramjohn*, 85 A.D.3d 987, 989 [2d Dept 2011]). The defendant bears the burden of demonstrating that the proffered evidence conclusively refutes plaintiff's factual allegations (*Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]; *Kolchins v Evolution Mkts. Inc.*, 31 NY3d 100 [2018]; *Goshen v Mutual Life Ins. Co. of NY*, 98 NY2D 314 [2002]).

A legal malpractice defendant seeking dismissal pursuant to CPLR 3211 (a)(1) must tender documentary evidence conclusively establishing that the scope of its representation did not include matters relating to the alleged malpractice (Id. at 39; *Zhang v Lau*, 210 A.D.3d 829 [2d Dept. 2022]; see also *Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman, & Dicker, LLC*, 38 A.D.3d 34 [2d Dept. 2006]).

In addressing Defendant Sinel's motion, the documentary evidence submitted includes the October 23, 2018, order confirming the settlement, the November 6, 2018, Notice of Appeal, the May 29, 2019, order by the Second Department Appellate Division affirming the settlement, and the October 6, 2020, order holding that Plaintiffs could not assert a contrary cause of death after resolving the Transamerica Action. The affidavits submitted in support of the Defendant's motion are not documentary evidence within the meaning of CPLR 3211(a)(1). The documentary evidence submitted establishes that the scope of the retainer agreement was limited to Sinel's representation in prosecuting the Medical Malpractice Action and utterly refute Plaintiffs' allegations that Defendant Sinel had a duty to warn them of the consequences that could result from the filing, settling and otherwise obtaining a judgment in the Transamerica matter. Additionally, Plaintiffs do not allege or provide evidence to establish that Defendant Sinel knew about the Transamerica Action before he was substituted in as counsel.

Accordingly, that branch of Defendant Sinel's motion seeking to dismiss Plaintiffs' Complaint pursuant to CPLR 3211(a)(1) is granted.

In addressing Defendant Indusi's motion, the documentary evidence submitted includes the retainer agreement, the Transamerica complaint, the March 19, 2019, decision, the consent to change attorney form, the motion to enforce the settlement agreement, the certificate of withdrawal, Defendant Sinel's opposition to the motion to enforce the settlement agreement in the underlying action, and his notice of appeal. The retainer agreement establishes that the scope of Indusi's representation was limited to prosecuting a claim for breach of insurance contract that occurred on or about November 12, 2015, involving the failure of Transamerica to pay Esther Herz a death benefit from David Herz's accidental death policy. However, the March 19, 2019 decision enforcing the settlement agreement references e-mail exchanges between Defendant Gerace, and the Transamerica counsel wherein Transamerica's counsel wrote in part "it will have no bearing on her PI lawsuit. Please get her signature," which seems to indicate that Indusi and/or Gerace may have known of the separate lawsuit while in negotiations with Transamerica. Therefore, Indusi has failed to satisfy his prima facie burden of utterly refuting the Plaintiff's factual allegations that he was negligent in settling the Transamerica Action ultimately barring their Medical Malpractice Action.

Accordingly, that branch of Defendant Indusi's motion seeking to dismiss Plaintiffs' Complaint pursuant to CPLR 3211(a)(1) is denied.

In addressing Defendants RusoKarl and Gerace's motion, the relevant documentary evidence submitted was the retainer agreement between Esther Herz and the Indusi Firm. The retainer agreement establishes that the scope of Indusi's representation was limited to prosecuting a claim for breach of insurance contract that occurred on or about November 12, 2015, involving the failure to pay a death benefit for David Herz on behalf of Esther Herz. The retainer agreement establishes that the RusoKarl firm was never retained or involved in any of the matters alleged by Plaintiffs. However, although Gerace argues that he had no duty to advise or counsel Plaintiffs regarding the Medical Malpractice Action, the Match 19, 2019 decision enforcing the settlement agreement references e-mail exchanges between Defendant Gerace, and the Transamerica counsel which seems to indicate that Indusi and/or Gerace may have known of the separate lawsuit while in negotiations with Transamerica. Therefore, Gerace has failed to satisfy his prima facie burden of utterly refuting the Plaintiff's factual allegations that he was negligent in settling the Transamerica Action ultimately barring their Medical Malpractice Action.

Accordingly, that branch of Defendant RusoKarl and Gerace's motion to dismiss pursuant to CPLR 3211(a)(1) is granted to the extent that the RusoKarl firm has satisfied its prima facie burden of utterly refuting the Plaintiff's factual allegations, conclusively establishing a defense as a matter of law.

When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*Leon* at 88; *Skefalidis v China Pagoda NY, Inc.*, 210 A.D. 3d 925 [2d Dept. 2022]); *Oluwo v Sutton*, 206 A.D.3d 750 [2d Dept. 2022]; *Sokol v Leader*, 74 A.D.3d 1180 [2d Dept. 2010]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (*Eskridge v Diocese of Brooklyn*, 210 A.D.3d 1056 [2d Dept. 2022]; *Zurich American Insurance Company v City of New York*, 176 A.D.3d 1145 [2d Dept. 2019]; *EBC I Inc. v Goldman, Sachs & Co.*, 5 NY3d [2005]).

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the burden never shifts to the non-moving party to rebut a defense asserted by the moving party (*Sokol* at 1181; *Rovello v Orofino Realty Co. Inc.*, 40 NY2d 970 [1976]). CPLR 3211 allows a plaintiff to submit affidavits, but it does not oblige him or her to do so on penalty of dismissal (*Id.*; *Sokol* at 1181). Affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint and such affidavits are not to be examined for the purpose of determining whether there is evidentiary support for the pleading (*Id.*; *Rovello* at 635; *Nonon* at 827). Thus, a plaintiff will not be penalized because he has not made an evidentiary showing in support of its complaint.

Unlike on a motion for summary judgment, where the court searches the record and assesses the sufficiency of evidence, on a motion to dismiss, the court merely examines the adequacy of the pleadings (*Davis v. Boenheim*, 24 NY3d 262, 268 [2014]). The appropriate test of the sufficiency of a pleading is whether such pleading gives sufficient notice of the transactions, occurrences, or series of transactions or

occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments (*V. Groppa Pools, Inc. v. Massello*, 106 AD3d 722, 723 [2d Dept 2013]; *Moore v Johnson*, 147 AD2d 621 [2d Dept 1989]).

To state a cause of action alleging legal malpractice, a plaintiff must allege that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused the plaintiff to sustain actual and ascertainable damages (*Rudolf v Shayne, Dachs, Stanisci, Corker, & Sauer*, 8 N.Y.3d 438 [2007]; *Philip S. Schwartzman, Inc. v Pliskin, Rubano, Baum, & Vitulli*, 215 A.D.3d 699 [2d Dept. 2023]; *Parklex Associates v Flemming Zulack Williamson Zauderer, LLP*, 118 A.D.3d 698 [2d Dept. 2014]). A cause of action for legal malpractice cannot be stated in the absence of an attorney-client relationship (*Windsor Metal Fabrications, Ltd. v Scott & Schechtman*, 286 A.D.2d 732 [2d Dept. 2001]). Generally, to plead causation, the plaintiff must allege that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the attorney's negligence (*Rudolf* at 442; *Philip S. Schwartzman, Inc.* at 703; *Parklex Associates* at 970). Furthermore, the claimed "actual and ascertainable damages" have to be clearly calculable (see *Rudolph; Gallet, Dreyer & Berkey, LLP v Basile*, 141 A.D.3d 405 [1st Dept. 2016]). Conclusory allegations of damages or injuries predicated on speculation cannot suffice for a malpractice action (*Philip S. Schwartzman, Inc.* at 704; *Katsoris v Bodnar & Milone, LLP*, 186 A.D.3d 1504 [2d Dept. 2020]; *Gall v Colon-Sylvain*, 151 A.D.3d 698 [2d Dept. 2017]).

In, *Grace v. Law*, 24 N.Y.3d 203 [2014], the Court of Appeals held that prior to commencing a legal malpractice action, a party who is likely to succeed on appeal of the underlying action is required to press their appeal beforehand. If the client is not likely to succeed, then they may bring a legal malpractice action without first pursuing an appeal (*Id.*). Consequently, a defendant in a legal malpractice action can assert that a plaintiff is now barred from bringing the action by establishing that the client failed to pursue an appeal in the underlying action, that would likely have been successful (*Id.*; see also *Buczek v Dell & Little, LLP*, 127 A.D.3d 1121 [2d Dept. 2015]).

Here, Plaintiffs have failed to plead a viable cause of action for legal malpractice. With respect to RusoKarl, Plaintiffs' conclusory statements that the RussoKarl firm is a successor in interest to the Indusi firm is insufficient to establish an attorney-client relationship and state a claim for legal malpractice. Plaintiffs have failed to allege specific facts upon which the existence of an attorney-client relationship or privity exists between themselves and the RussoKarl firm or establish that they would have prevailed in the underlying action but for RussoKarl's negligence.

Additionally, Plaintiffs have failed to plead actual and ascertainable damages. While Plaintiffs attach an expert affirmation and deposition testimony to support their claims that the acts of the individuals involved in the Medical Malpractice actions were negligent, Plaintiffs only state in a

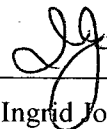
conclusory fashion that the Medical Malpractice action would have resulted in monetary recovery but for Sinel, Indusi, or RusoKarl and Gerace's negligence. Such allegations are insufficient to establish actual and ascertainable damages necessary to plead a cause of action for legal malpractice.

Plaintiffs also raised a separate argument that Sinel was negligent in failing to appeal Justice Graham's dismissal order. However, Sinel states that he conferred with Plaintiffs and ultimately advised against moving forward with an appeal following a review of Justice Graham's decision. Plaintiffs do not refute Sinel's claim or allege that the decision to not pursue an appeal with Sinel or another attorney was outside of their purview. The documentary evidence submitted also establishes that the scope of his representation did not include pursuing an appeal in the Medical Malpractice Action and that Sinel attempted to rescind the settlement once he was substituted in at counsel for the Transamerica Action. Consequently, Plaintiffs have not sufficiently pled that Defendant Sinel failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the breach of this duty proximately caused the Plaintiffs to sustain actual and ascertainable damages. Furthermore, in support of their alternate theory, Plaintiffs adopted and incorporated the arguments of Defendants Indusi, RusoKarl and Gerace's memorandums of law arguing that that the order was made in error and would have been reversed on appeal. By alleging that the appeal of the dismissal order would have succeeded, the Plaintiffs have failed to comply with the requirements of *Grace* (supra), which holds that the failure to pursue an appeal in an underlying action that was likely to succeed bars a legal malpractice action.

Accordingly, it is hereby

ORDERED, that Defendants Sinel (Motion Seq. 1), Indusi (Motion Seq. 2), and RussoKarl, and Gerace (Motion Seq. 3) motions to dismiss the Plaintiffs' Complaint are granted and the action is dismissed against all Defendants.⁶

This constitutes the decision and order of the court.



Hon. Ingrid Joseph, J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**

⁶ While Defendants Indusi and Gerace did not prevail on their motions to dismiss pursuant to CPLR 3211(a)(1), they did establish a right to dismissal under a theory of failure to state a cause of action pursuant to CPLR 3211(a)(7).