



Kempf v. Magida

Supreme Court of New York, Appellate Division, Second Department

April 9, 2014, Decided

2012-11015

Reporter

116 A.D.3d 736 *; 982 N.Y.S.2d 916 **; 2014 N.Y. App. Div. LEXIS 2351 ***; 2014 NY Slip Op 2410 ****; 2014 WL 1377716

[****1] Michael Kempf et al., Respondents, v Kenneth S. Magida, Appellant. (Index No. 2643/05)

Prior History: [Kempf v Magida, 37 AD3d 763, 832 NYS2d 47, 2007 N.Y. App. Div. LEXIS 2350 \(N.Y. App. Div. 2d Dep't, 2007\)](#)

Core Terms

damages, summary judgment motion, legal malpractice, respondents', papers

Headnotes/Summary

Headnotes

Attorney and Client—Malpractice

Counsel: [***1] Furman Kornfeld & Brennan, LLP, New York, N.Y. (A. Michael Furman, Lynn M. Dukette, Evan W. Bolla, and Andrew Kowlowitz of counsel), for appellant.

Steven L. Kessler, New York, N.Y., for respondents.

Judges: WILLIAM F. MASTRO, J.P., RUTH C. BALKIN, ROBERT J. MILLER, HECTOR D. LASALLE, JJ. MASTRO, J.P., BALKIN, MILLER and LASALLE, JJ., concur.

Opinion

[*736] [**916] In an action to recover damages for legal malpractice, the defendant appeals from an order of the Supreme Court, Nassau [**917] County (Adams, J.), dated October 4, 2012, which denied his motion for summary judgment dismissing the complaint.

Ordered that the order is affirmed, with costs.

Contrary to the defendant's contention, he failed to present evidence in admissible form establishing that the plaintiffs were unable to prove at least one of the essential elements of a cause of action to recover damages for legal malpractice (see [Barnave v Davis, 108 AD3d 582, 969 NYS2d 139 \[2013\]](#); [Valley Ventures, LLC v Joseph J. Haspel, PLLC, 102 AD3d 955, 956, 958 NYS2d 604 \[2013\]](#); [Alizio v Feldman, 82 AD3d 804, 918 NYS2d 218 \[2011\]](#)). The defendant failed to affirmatively demonstrate the merits of his defense, and he could not sustain his burden merely by pointing out gaps in the plaintiffs' proof (see [Alizio v Feldman, 82 AD3d at 804](#)).

[***2] Since the defendant did not eliminate all triable issues of fact as to whether he failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession, and whether his alleged breach of this duty proximately caused the plaintiffs to sustain actual and ascertainable damages (see [Rudolf v Shayne, \[*737\] Dachs, Stanisci, Corker & Sauer, 8 NY3d 438, 442, 867 NE2d 385, 835 NYS2d 534 \[2007\]](#); [Barnave v Davis, 108 AD3d at 582-583](#); [Valley Ventures, LLC v Joseph J. Haspel, PLLC, 102 AD3d at 956](#); [Alizio v Feldman, 82 AD3d at 804](#)), he failed to sustain his prima facie burden on the motion, and his motion for summary judgment dismissing the complaint was properly denied. Mastro, J.P., Balkin, Miller and LaSalle, JJ., concur.

Motion by the appellant on an appeal from an order of the Supreme Court, Nassau County, dated October 4, 2012, to strike the respondents' brief, or stated portions of the respondents' brief, on the ground that they refer to matter dehors the record. By decision and order on motion of this Court dated October 10, 2013, the motion was held in abeyance and referred to the panel of Justices hearing the appeal for determination upon the argument or submission thereof.

Upon [***3] the papers filed in support of the motion and the papers filed in opposition thereto, and upon the argument of the appeal, it is

Ordered that the motion is denied. Mastro, J.P., Balkin, Miller

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and LaSalle, JJ., concur.

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