

**Decision from the New York State Court of
Appeals**

10/21/2025

(1 page)

State of New York

Court of Appeals

***Decided and Entered on the
twenty-first day of October, 2025***

Present, Hon. Rowan D. Wilson, *Chief Judge, presiding.*

Mo. No. 2025-302

James R. Caputo, &c.,

Appellant,

v.

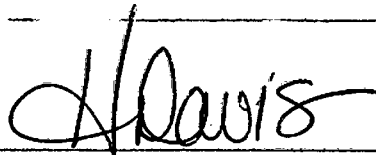
Richard S. Tubiolo, &c., et al.,

Respondents.

Appellant having moved for leave to appeal to the Court of Appeals in the above
cause;

Upon the papers filed and due deliberation, it is

ORDERED, that the motion is denied with one hundred dollars costs and
necessary reproduction disbursements.



Heather Davis
Clerk of the Court

800

CA 23-01338

PRESENT: SMITH, J.P., MONTOUR, GREENWOOD, AND KEANE, JJ.

JAMES R. CAPUTO, M.D., PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

RICHARD S. TUBIOLO, ESQ., BRYAN S.
KORNFELD, ESQ., AND HIRSCH & TUBIOLO, P.C.,
DEFENDANTS-RESPONDENTS.

JAMES R. CAPUTO, M.D., PLAINTIFF-APPELLANT PRO SE.

BARCLAY DAMON LLP, ROCHESTER (TARA J. SCIORTINO OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Elena F. Cariola, J.), entered July 21, 2023. The order and judgment granted the motion of defendants for summary judgment, dismissed the complaint and denied the cross-motion of plaintiff seeking, inter alia, leave to amend the complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff, a medical doctor, commenced this legal malpractice action alleging that defendants were negligent in their representation of plaintiff with respect to charges asserted against him by the New York State Office of Professional Medical Conduct (OPMC). Supreme Court granted defendants' motion seeking summary judgment dismissing the complaint and denied plaintiff's cross-motion seeking, inter alia, leave to amend the complaint to conform the pleadings to the proof and summary judgment on the complaint. We affirm.

We conclude that defendants met their initial burden on their motion (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "In order to establish their entitlement to judgment as a matter of law, defendants had to present evidence in admissible form establishing that plaintiff[] [is] 'unable to prove at least one necessary element of the legal malpractice action' " (*Seubert v Marchioni*, 112 AD3d 1370, 1371 [4th Dept 2013], lv denied 22 NY3d 865 [2014]), e.g., that defendants " 'failed to exercise that degree of care, skill and diligence commonly possessed by a member of the legal community' " (*Phillips v Moran & Kufta, P.C.*, 53 AD3d 1044, 1044-1045 [4th Dept 2008]; see *Scartozzi v Potruch*, 72 AD3d 787, 789-790 [2d Dept 2010]; see generally *Rudolf v Shayne, Dachs, Stanisci, Corker &*

Sauer, 8 NY3d 438, 442 [2007])). Here, plaintiff alleges that defendants deviated from the standard of care by failing to timely answer the statement of charges asserted by OPMC in a professional misconduct proceeding, and the evidence that defendants submitted in support of their motion establishes that defendants did not have an attorney-client relationship with plaintiff at the time of the default (see *Berry v Utica Natl. Ins. Group*, 66 AD3d 1376, 1376 [4th Dept 2009])). Plaintiff's unilateral belief that he was defendants' client is insufficient to confer that status upon him (see *id.*). We further conclude that defendants established that any negligence on their part was not a proximate cause of plaintiff's alleged damages (see *Dabiri v Porter*, 227 AD3d 860, 861 [2d Dept 2024]; *Casey v Exum*, 219 AD3d 456, 457 [2d Dept 2023])). In opposition to the motion, plaintiff failed to raise an issue of fact (see generally *Zuckerman*, 49 NY2d at 562).

We reject plaintiff's contention that the court abused its discretion in denying that part of his cross-motion seeking leave to amend the pleading to conform to the evidence pursuant to CPLR 3025 (c) (see generally *Broadway Warehouse Co. v Buffalo Barn Bd., LLC*, 143 AD3d 1238, 1240-1241 [4th Dept 2016]; *General Elec. Co. v Towne Corp.*, 144 AD2d 1003, 1004 [4th Dept 1988], *lv dismissed* 73 NY2d 994 [1989])). "Although leave to amend [a pleading] should be freely granted, it will not be granted if the proposed amendment is without merit or would cause prejudice to the opposing party" (*Fingerlakes Chiropractic v Maggio*, 269 AD2d 790, 791 [4th Dept 2000]; see generally *Guest v City of Buffalo, Dept. of Sts. Sanitation*, 109 AD2d 1080, 1081 [4th Dept 1985])). Here, plaintiff seeks to amend his complaint to include allegations that he had an attorney-client relationship with defendants on or before the deadline for submitting an answer to the charges in the professional malpractice proceeding. As previously noted, however, defendants established on their motion that plaintiff did not have an attorney-client relationship with defendants on or before the date the answer was due, and thus the proposed amendment is without merit (see generally *Knight v Realty USA.COM, Inc.*, 96 AD3d 1443, 1445 [4th Dept 2012])).

We have reviewed plaintiff's remaining contentions and conclude that none warrants modification or reversal of the order and judgment.

Leave to Amend Complaint

"Generally, leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party when the amendment is not patently lacking in merit, and the decision whether to grant leave to amend is committed to the sound discretion of the court" (*Thome v Benchmark Main Tr. Assoc., LLC*, 125 AD3d 1283, 1285 [4th Dept 2015] [internal citations and quotations omitted].) While a motion to amend is not ordinarily the proper vehicle for the determination of the merits of an issue (*see generally Acker v Garson*, 306 AD2d 609 [3d Dept 2003]), a proposed pleading amendment may be examined if it is palpably insufficient as a matter of law or on its face (*see generally Vista Properties, LLC v Rockland Ear, Nose & Throat Assoc., P.C.*, 60 AD3d 846 [2d Dept 2009]). In circumstances wherein the proposed amendment is palpably insufficient as a matter of law, patently devoid of merit, or plainly lacking in merit, leave to amend should be denied, and such denial does not constitute an abuse of discretion (*see generally Bryndle v Safety Kleen Sys., Inc.*, 66 AD3d 1396 [4th Dept 2009]).

With respect to establishing "a cause of action alleging legal malpractice, a plaintiff must prove, inter alia, the existence of an attorney-client relationship. To prove an attorney-client relationship, there must be an explicit undertaking to perform a specific task. It is well established that, with respect to attorney malpractice, absent fraud, collusion, malicious acts, or other special circumstances, an attorney is not liable to third parties, not in privity, for harm caused by professional negligence." (*Nelson v Roth*, 69

AD3d 912, 913 [2d Dept 2010] [internal citations and quotations omitted].) "Since an attorney-client relationship does not depend on the existence of a formal retainer agreement or upon payment of a fee, a court must look to the words and actions of the parties to ascertain the existence of such a relationship (*Nelson v Kalathara*, 48 AD3d 528, 529 [2d Dept 2008]).

Here, Plaintiff seeks to amend the complaint so as to include factual allegations pertaining to Defendants' purported failure to timely file an answer to the statement of charges and communicate with Plaintiff in further support of his malpractice claim. In support of his contention, Plaintiff contends that the attorney-client relationship commenced on May 16, 2014, at the time he initially contacted Defendants for the purpose of retaining the firm. Plaintiff avers that he was given negligent advice on May 19, 2014 which led to his default, and proof in support of this claim was not discovered by Plaintiff until April of 2022 when he was reviewing discovery. To be certain, Plaintiff contends that, during preparation for a deposition, he learned of an email address utilized by Defendant Richard Tubiolo (rtubiolo@aol.com), and thereafter quickly discovered exchanges within his own email account between himself and Defendant Tubiolo which occurred on or about and in between May 18-19, 2014 containing relevant and "damning" information unreclected by Plaintiff at the time of the filing of the complaint.

Assuming, arguendo, the Court did not have any concerns about the excuses offered by Plaintiff relative to his discovery of "damning" emails which had been in his

possession and the significant delay in raising this motion, Plaintiff has failed to allege or present any cognizable proof of the existence of an attorney-client relationship between himself and Defendants with respect to the filing of an answer. What is clear is that Plaintiff had a preliminary conversation with Defendant Tubiolo on a Friday, Plaintiff transmitted information to Defendants for their review, a couple of emails were exchanged, and a meeting between the parties took place four days after that initial phone conversation. At no point prior to May 20, 2014 did Defendants make implicit or explicit representations pertaining to the representation of Plaintiff. In fact, the email correspondence relied upon by Plaintiff, in this Court's estimation, lends credence to the opposite conclusion: that the Defendants overtly conveyed to Plaintiff that he should continue working on the answer due to time restraints. Moreover, and of particular import, there is no indication that the deadline for the answer and the ALJ's previous admonishment precluding any extensions was ever communicated to Defendants. Simply stated, Plaintiff's failure to timely answer is a result of his own failure to comply with the Notice served upon him. His own failure cannot be attributable or imputed to the Defendants since their representation did not commence until May 20, 2014 when Defendants undertook to serve as his attorneys. It is for all these reasons that Plaintiff's motion to amend the complaint must be denied as a cause of action and/or facts relative to the untimely filing of an answer are palpably without merit.

Summary Judgment

A party seeking summary judgment pursuant to CPLR § 3212 must make a *prima facie* showing of entitlement to judgment as a matter of law and submit sufficient evidence to demonstrate the absence of any material issue of fact (*Iselin & Co. Inc v Mann Judd Landau*, 71 NY2d 420 [1988]). The Court must view the evidence presented in the light most favorable to the nonmoving party (*Russo v YMCA of Greater Buffalo*, 12 AD3d 1089 [4th Dept 2004]). When faced with a motion for summary judgment, "a court's task is issue finding rather than issue determination," and thus the Court "must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of *every reasonable inference* and ascertaining whether there exists any triable issue of fact" (*Esposito v Wright*, 28 AD3d 1142, 1143 [4th Dept 2006] [emphasis added]). Further, a moving defendant must affirmatively demonstrate the merits of its defense and cannot meet its burden in moving for summary judgment by pointing to gaps in plaintiff's proof (*George Larkin Trucking Co. v Lisbon Tire Mart, Inc.*, 185 A.D.2d 614 [4th Dept 1992]). If the proponent demonstrates entitlement to summary judgment, the opposing party must then demonstrate, generally by admissible evidence, the existence of an issue of fact requiring a trial (*Zuckerman v City of New York*, 49 NY2d 851 [1985]).

"It is well established law that "[a]n action for legal malpractice requires proof of three essential elements: (1) the negligence of the attorney; (2) that the negligence was the proximate cause of the loss sustained, and (3) proof of actual damages" (*Prudential Ins. Co. of Am. v Dewey Ballantine, Bushby, Palmer & Wood*, 170 AD2d 108, 114 [1st Dept 1991],

aff'd 80 NY2d 377 [1992] [citations and quotations omitted]). "An attorney who undertakes to represent a client is expected to exercise a reasonable degree of skill and be familiar with the applicable rules of practice and the settled principles of law and is expected to exercise reasonable care in representing the client. Reasonable care means that degree of care commonly exercised by an ordinary member of the legal profession. However, an attorney is not a guarantor of a favorable result and (he, she) is not liable simply because the client did not achieve the best possible result or the result the client sought. Similarly, if an attorney explains to the client the nature of the risks involved in a certain course of action and the client elects to follow that course, the attorney is not responsible for the consequences as long as the attorney pursued the course using a reasonable degree of skill and care." (NY Pattern Jury Instr.--Civil 2:152.)

In the case at bar, Defendants have established a *prima facie* showing of their entitlement to summary judgment. As an initial matter, for all of the reasons set forth above, Plaintiff's failure to timely answer cannot serve as a basis for a malpractice claim. Turning next to Plaintiff's remaining contentions, Defendants have sufficiently established that there was no deviation from the standard of care. Defendants have submitted an expert affidavit for this Court's consideration (NYSCEF Docket No. 152). In sum, expert Michael J. Roach, Esq. opined that Plaintiff's assertions are entirely premised on speculation and unsupported proof. Mr. Roach stated that, "the extensive, multi-faceted nature of the charges, together with the evidence supporting those charges,

both as it applies to standard of care, codes of conduct and record keeping, constituted more than sufficient proof for a factfinder in this setting to find the Plaintiff guilty of the charges against him and for the panel to impose a penalty of revocation of the Plaintiff's medical license. This risk of revocation in this case was even more pronounced in light of [Plaintiff's] past OPMC Order." Accordingly, he continues, Plaintiff's subjective belief that he could have achieved a better result is unsupported by the record evidence and common sense. Mr. Roach further opined that, "the management of Dr. Caputo's case, the alacrity and zeal of counsel's involvement on the eve of the hearing, the efforts to remedy [P]laintiff's own default, the preparedness for the hearing, the exploration of settlement, the efforts to preserve some possibilities of future practice, the advocacy to avoid permanent revocation and pursuit of a Surrender Agreement were all reasonable and appropriate, and comported with the standard of care. In a nutshell, there was no deviation from the standard of care by the Defendants in their representation of the [P]laintiff. . . . [And,] to a reasonable degree of legal certainty . . . Defendants did not . . . [commit legal malpractice.]"

Likewise, Defendants correctly aver that Plaintiff has failed to demonstrate the purported breach of Defendants' duty proximately cause him to sustain actual and ascertainable damages (*see generally Kaplan v Conway and Conway*, 173 AD3d 452 [1st Dept 2019]). "In reference to the proximate cause element . . . the Plaintiff must allege specific factual allegations demonstrating that 'but for' the defendant's alleged negligence there

would have been a more favorable outcome in the underlying action. Speculation concerning different or better outcomes is not sufficient to sustain a cause of action for legal malpractice. Further, it is well settled that an attorney's decision to pursue one of several reasonable courses of action does not constitute malpractice even where the attorney's selection of one of several reasonable courses of action, when viewed in hindsight, appears to be an error in judgment." (*Curtis v Berutti*, 77 Misc 3d 327, 432-433 [Sup Ct, Orange County 2022]). Here, Plaintiff's speculative belief that he would have achieved a more favorable outcome had he proceeded to trial is wholly insufficient to sustain his burden of demonstrating proximate cause.

The burden now shifts to Plaintiff; however, he has failed to raise a triable issue of fact. In circumstances such as this, "[a]bsent an expert's affidavit, and given claims that, as pleaded, raise issues of professional standards and causation beyond the ordinary experience of persons who are not lawyers" summary judgment is proper (*see Tran Han Ho v Brackley*, 69 AD3d 533 [1st Dept 2010]; *see also Orchard Motorcycle Distributors, Inc. v Morrison Cohen Singer & Weinstein, LLP*, 49 AD3d 292 [1st Dept 2008] [summary judgment granted where plaintiff failed to submit expert affidavit delineating the appropriate standard of care]). Furthermore, "mere speculation about . . . an attorney's alleged [] [conduct] is insufficient to sustain a prima facie case of legal malpractice" (*Barbieri v Fishoff*, 98 AD3d 703 [2d Dept 2012] [citations and quotations omitted]). It is for all of these reasons that Defendants' motion for summary judgment is granted.

With respect to Plaintiff's motion for leave to file a late summary judgment motion, as he has failed to establish a showing of good cause for the delay, his application must be denied. In this Court's estimation, Plaintiff's election to proceed *pro se* is unpersuasive in support of his request for additional time. Likewise, that Defendants filed a summary judgment motion prior to Plaintiff does not lend credence to his justification for untimeliness inasmuch as Defendants' motion was filed five days prior to the statutory deadline, thereby giving Plaintiff nearly the entirety of the 120-day period to timely file without distraction. To that end, as it is undisputed that Plaintiff's cross motion for summary judgment is untimely, having been made 162 days after the filing of the note of issue (*see* NYSCEF Docket No. 67), it must therefore be denied "without consideration of the merits thereof." (*See generally Foo-Lu Co. v Rojas*, 160 AD3d 932 [2d Dept 2018].) Even assuming arguendo the timeliness of Plaintiff's motion, for all the reasons herein set forth, he has failed to establish *prima facie* entitlement to judgment for a professional misconduct claim (*see generally Barbieri* 98 AD3d 703).

Finally, the extent to which Plaintiff seeks to relief pursuant to Judiciary Law § 487 and the Rules of Professional Conduct (*see generally* 22 NYCRR §§ 1200.3.3 [f] [3]; 1200.3.4 [a] [1] and [3]; 1200.8.4 [a], [b], [c], [d] and [h]), on the facts before the Court, any application for summary judgment or to amend the complaint must be denied. Simply put, Plaintiff failed to allege the "essential elements of a cause of action under the statute, i.e., intentional deceit and damages proximately caused by the deceit" (*Jean v Chinitz*, 163

AD3d 497, 497 [1st Dept 2018] Nevertheless, assuming arguendo the absence of such a deficiency, "[p]unitive damages are recoverable in a [] [professional] malpractice action only where the defendant's conduct evinces a high degree of moral culpability or constitutes willful or wanton negligence or recklessness (*Kinzer v Bederman*, 59 AD3d 496, 497 [2d Dept 2009] [internal citations and quotations omitted] [plaintiffs' motion to amend the complaint to add a demand for punitive damages was palpably insufficient as a matter of law]). Contrary to Plaintiff's characterization of Defendants' conduct, it objectively falls well below the level of reprehensible conduct necessary so as to fall within the purview of conduct justifying punitive damages (*see e.g. Johnson v Proskauer Rose LLP*, 129 AD3d 59 [1st Dept 2015] [clients stated a claim to recover punitive damages for fraud against law firm and attorney that had assisted them in implementing a tax avoidance strategy]; *Cohen v Kachroo*, 115 AD3d 512 [1st Dept 2014] [client's allegations that attorney falsely represented that they sought to be relieved because they had not been paid and made coercive threats to client in an attempt to elicit additional remuneration were sufficiently egregious to state a claim]; *but c.f. Jean v Chinitz*, 163 AD3d 497 [1st Dept 2018] [complaint alleging that defendants were trying to conceal their negligence in having allowed plaintiff's medical malpractice action dismissed for noncompliance with discovery orders insufficient to substantiate claim for punitive damages]).

Accordingly, it is hereby

ORDERED and ADJUDGED that Defendants' motion for summary judgment pursuant to CPLR § 3212 is **GRANTED** in its conformance with this Decision; and it is further

ORDERED that the balance of Defendants' motion is **DENIED**; and it is further

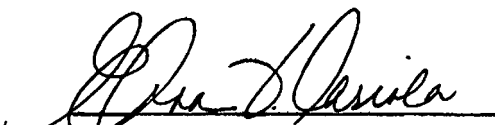
ORDERED that Plaintiff's Complaint alleging legal malpractice is dismissed in its entirety; and it is further

ORDERED that Plaintiff's cross motion is **DENIED** in its entirety.

Any prayers for relief not specifically addressed herein are **DENIED**.

The above constitutes the decision and order of the Court.

Dated: *July 21, 2023*


HON. ELENA F. CARIOLA
Supreme Court Justice

the purported breach of Defendants' duty proximately caused actual and ascertainable damages. Plaintiff generally opposes, asserting, in broad strokes, that Defendants have failed to meet their burden, or alternatively, the existence of a material issue of fact precludes summary judgment. Furthermore, Plaintiff cross moves this Court seeking leave to file a late motion for summary judgment. In support of his application, he cites the voluminous nature of Defendants' papers compounded by his *pro se* status as the bases for his inability to comply with the statutory deadline (*see generally* CPLR § 3212 [a]). Plaintiff implores the Court to excuse his untimeliness due to the merits of his application; to wit, he avers that the evidence establishes that had the Defendants informed him of his time to answer, or answered on his behalf, he would have had the opportunity to defend against the charges and he would have achieved a better outcome than the Surrender Agreement. Likewise, Plaintiff argues that had the Defendants provided him with option, particularly proceeding to a hearing before the Office of Professional Medical Conduct ("OPMC"), he would have achieved a better result.

Additionally, Plaintiff cross moves this Court seeking leave to file an amended complaint so as to include allegations relative to Defendants' failure to timely file an answer to the disciplinary charges with the OPMC.

Now, upon due consideration of Defendants' Notice of Motion for Summary Judgment (NYSCEF Docket No. 74), Affirmation in Support by Glenn Pezzulo, Esq. (NYSCEF Docket No. 76), Memorandum of Law in Support by Mr. Pezzulo (NYSCEF

Docket No. 75), Affidavit in Support by Richard S. Tubiolo, Esq. (NYSCEF Docket No. 137), Affidavit in Support by Bryan S. Kornfield, Esq. (NYSCEF Docket No. 142), Affidavit in Support by Matthew C. McCabe, M.B.A, J.D. (NYSCEF Docket No. 146), Affidavit in Support by Roger Olander, M.D. (NYSCEF Docket No. 151), Affidavit in Support by Michael J. Roach, Esq. (NYSCEF Docket No. 152), Affidavit in Support by C. Steven Wolf, M.D., FACEP (NYSCEF Docket No. 154); and

upon Plaintiff's Notice of Cross Motion (NYSCEF Docket No. 159), Affidavit in Support of Cross Motion and Opposition to Summary Judgment by James R. Caputo, M.D. (NYSCEF Docket No. 160), Memorandum of Law in Support of Cross Motion and Opposition to Summary Judgment by Dr. Caputo (NYSCEF Docket No. 161); Affirmation in Opposition to Plaintiff's Cross Motion and in Further Support of Summary Judgment by Mr. Pezzulo (NYSCEF Docket No. 165), Affidavit in Further Support of Summary Judgment by Gregory J. Huether, Esq. (NYSCEF Docket No. 167), Affidavit in Further Support of Summary Judgment by Richard S. Tubiolo, Esq. (NYSCEF Docket No. 168), Memorandum of Law in Opposition to Plaintiff's Cross Motion and in Further Support of Summary Judgment by Mr. Pezzulo (NYSCEF Docket No. 175), Affidavit in Reply by Dr. Caputo (NYSCEF Docket No. 179), Memorandum of Law in Reply by Dr. Caputo (NYSCEF Docket No. 178), all of the exhibits attached to the parties' papers (NYSCEF Docket Nos. 77-136; 138-141; 143-145; 147-150; 153; 155-157; 166; 169-174; 176; 181-188),

and the oral arguments proffered by the parties at a special term of this Court, the following constitutes its Decision and Order.

This action was commenced, by summons and complaint, on May 26, 2017. In the main, Plaintiff contends that Defendants negligently represented him with respect to charges asserted against him by the New York State Office of Professional Medical Conduct ("OPMC")

By way of background, in approximately March or April 2007, a disciplinary proceeding was commenced against Plaintiff, a medical doctor, by the OPMC which resulted in a determination that limited Plaintiff's medical license, ultimately suspending it for three years and placing him on probation for three years with a term of practice monitoring. On or about April 24, 2014, the disciplinary proceeding at the crux of this action was commenced against Plaintiff by OPMC. In sum, the charges sounded in gross negligence, gross incompetence, negligence on more than one occasion, fraudulent practice, moral unfitness, violating a term of probation (from the 2007 disciplinary proceeding) and failure to maintain records. The Notice provided to Plaintiff indicated that the hearing was scheduled to take place on May 29, 2014 and June 13, 2014. It further provided that an answer to each of the charges and allegations must be filed not less than 10 days prior to the hearing – no later than May 19, 2014. On May 15, 2014, Plaintiff appeared at a pre-hearing conference during which the ALJ made certain evidentiary determinations and further encouraged Plaintiff to be mindful of the requirements for

submitting an answer. The ALJ further explained that even if Plaintiff retained an attorney there would be no delays.

Following the May 15, 2014 pre-hearing conference, Plaintiff contacted Defendants seeking to retain the firm to represent him in conjunction with the disciplinary proceeding. On May 16, 2014 (a Friday), Plaintiff contacted Defendants and spoke with Defendant Tubiolo for the purpose of retaining the firm. Defendant Tubiolo indicated that he could not personally appear in the matter, and requested that Plaintiff transmit information about the disciplinary proceeding to the firm.

On May 18, 2014 (a Sunday), Plaintiff sent follow up email to Defendants which stated, "I will fax over the list of charges for which I am writing a quick answer in order to get it in hopefully tomorrow unless you feel it best to wait to talk to you." On May 19, 2014 at 11:48 a.m., Defendant Tubiolo sent an email to Plaintiff entitled "information" wherein he indicated that he was bringing in two additional attorneys and an appointment was scheduled for May 20, 2019. Plaintiff responded to this email at 12:51 p.m. asking "should I continue to work on an answer since the hearing is in ten days? Or do I wait until after meeting with the two tomorrow?" Shortly thereafter, Defendant Tubiolo responded "Jim, I would continue to work on the responses yourself and bring everything with you tomorrow. Time is short enough that we need to push as much preparation in a short time, thanks, Dick." At 4:30 p.m. on May 20, 2014, Plaintiff emailed again, "[h]ere is a draft of my Answer. Need to be out in a proper form which hopefully

your office can assist me with." On May 20, 2014 in the morning Plaintiff sent another email asking Defendants, "I was wondering if your office is in a position at this time to contact [the prosecutor] concerning the Answer and that it will be completed today?"

At the May 20, 2014 meeting, Plaintiff was already in default inasmuch as the answer needed to be filed the day prior. Immediately following the meeting, which culminated in Defendants representing Plaintiff, Defendants sent a letter to the prosecutor; however, the prosecutor thereafter sought a default and sent correspondence to that effect to the ALJ requesting that each charge be deemed admitted. In response thereto, Defendants advocated to the ALJ to accept the untimely answer. The ALJ ultimately determined that the Plaintiff was in default and the charges were deemed admitted and the hearing would be limited to the penalty phase. The prosecutor thereafter extended an offer to a no contest plea with a voluntary surrender.

On May 28, 2014, after consulting with Defendants, Plaintiff entered into a Surrender Agreement wherein he surrendered his medical license with no guarantee he would ever get his license back. The crux of Plaintiff's complaint against Defendants is that their negligent handling of the disciplinary proceeding, including their failure to timely answer, resulted in a negotiated disposition compelled by the mistakes of counsel that was based upon unreliable advice.

At a Term of the Supreme Court,
in and for the County of Monroe,
Hall of Justice, Rochester, New
York.

PRESENT: HON. ELENA F. CARIOLA
Supreme Court Justice

SUPREME COURT
STATE OF NEW YORK MONROE COUNTY

JAMES R. CAPUTO, M.D.,

Plaintiff,

-vs-

DECISION, ORDER &
JUDGMENT

RICHARD S. TUBIOLO, ESQ.,
BRYAN S. KORNFIELD, ESQ.,
HIRSH & TUBIOLO, P.C.,

INDEX No.: I2017005512

Defendants.

APPEARANCES:

JAMES R. CAPUTO, M.D.
Pro se

GLENN E. PEZZULO, ESQ.
Attorney for Defendants

Elena F. Cariola, J.

In an action for legal malpractice, Defendants move this Court, pursuant to CPLR § 3212, for an Order dismissing Plaintiff's complaint. In the main, Defendants contend that Plaintiff has failed to establish that Defendants deviated from the standard of care in their representation of Plaintiff. Further, Defendants aver, Plaintiff failed to establish that

**Decision, Order & Judgment from
Monroe County Supreme Court
of the State of New York**

7/21/2023

(16 pages)

**Additional material
from this filing is
available in the
Clerk's Office.**