

# Seidman v Einig & Bush, LLP

Supreme Court of New York, Appellate Division, Second Department

June 28, 2017, Decided

2015-05484

## Reporter

151 A.D.3d 1095 \*; 59 N.Y.S.3d 44 \*\*; 2017 N.Y. App. Div. LEXIS 5177 \*\*\*; 2017 NY Slip Op 05257 \*\*\*\*; 2017 WL 2800391

[\*\*\*\*1] Sheldon Seidman, Respondent, v Einig & Bush, LLP, et al., Appellants. (Index No. 17259/11)

**Counsel:** [\*\*\*1] Traub Lieberman Straus & Shrewsberry LLP, Hawthorne, NY (Jonathan R. Harwood and J. Patrick Carley III of counsel), for appellants.

Berg & David, PLLC, Brooklyn, NY (Abraham David of counsel), for respondent.

**Judges:** RANDALL T. ENG, P.J., JOHN M. LEVENTHAL, LEONARD B. AUSTIN, JEFFREY A. COHEN, JJ. ENG, P.J., LEVENTHAL, AUSTIN and COHEN, JJ., concur.

## Opinion

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[\*\*45] [\*1095] In an action to recover damages for legal malpractice, the defendants appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Schmidt, J.), dated March 2, 2015, as denied their motion for summary judgment dismissing the complaint.

Ordered that the order is affirmed insofar as appealed from, with costs.

"In an action to recover damages for legal malpractice, a [\*1096] plaintiff must demonstrate 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 plaintiff to sustain actual and ascertainable damages" (*Rudolf v Shayne*,

*Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442, 867 NE2d 385, 835 NYS2d 534 [2007], quoting *McCoy v Feinman*, 99 NY2d 295, 301, 785 NE2d 714, 755 NYS2d 693 [2002]). "To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but [\*\*\*2] for the lawyer's negligence" (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d at 442). "For a defendant in a legal malpractice action to succeed on a motion for summary judgment, evidence must be submitted in admissible form establishing that the plaintiff is unable to prove at least one of these essential elements" (*Shopsin v Siben & Siben*, 268 AD2d 578, 578, 702 NYS2d 610 [2000]; see *Eisenberger v Septimus*, 44 AD3d 994, 845 NYS2d 102 [2007]).

Here, the Supreme Court properly denied the defendants' motion for summary judgment dismissing the complaint (see *Rosenstrauss v Jacobs & Jacobs*, 56 AD3d 453, 454, [\*\*46] 866 NYS2d 757 [2008]; *Velie v Ellis Law, P.C.*, 48 AD3d 674, 675, 854 NYS2d 137 [2008]; *Pedro v Walker*, 46 AD3d 789, 790, 847 NYS2d 666 [2007]). The defendants failed to make a prima facie showing of their entitlement to judgment as a matter of law since they failed to show that the plaintiff was unable to prove at least one of the essential elements of his legal malpractice cause of action (see *Rosenstrauss v Jacobs & Jacobs*, 56 AD3d at 454; *Velie v Ellis Law, P.C.*, 48 AD3d at 675; *Pedro v Walker*, 46 AD3d at 790). Thus, we need not address the sufficiency of the opposing papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 476 NE2d 642, 487 NYS2d 316 [1985]). Eng, P.J., Leventhal, Austin and Cohen, JJ., concur.