

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU**

Present:

**Hon. Thomas Feinman**  
Justice

LOVINO, INC. d/b/a BODYLINE COLLISION and  
JOSEPH INDOVINO,

Plaintiffs,

- against -

LAVALLEE LAW OFFICES, RYAN BROWNYARD,  
ESQ. and KEITH A. LAVALLEE, ESQ.,

Defendants.

TRIAL/IAS PART 15  
NASSAU COUNTY

INDEX NO. 14530/08

MOTION SUBMISSION  
DATE: 9/20/10

MOTION SEQUENCE  
NO. 2

The following papers read on this motion:

- Notice of Motion and Affidavits.....   X
- Memorandum of Law in Support of Motion.....   X
- Affirmation in Opposition.....   X
- Memorandum of Law in Support of Opposition.....   X
- Reply Affirmation.....   X
- Memorandum of Law in Support of Reply.....   X

The defendants, Lavallee Law Offices, Ryan Brownyard, Esq. and Keith A. Lavallee, Esq., (collectively referred to as the "Lavallee Law Office"), move for an order pursuant to CPLR §3212 granting defendants summary judgment dismissing plaintiffs' complaint. The defendants submit a Memorandum of Law in support of their motion. The plaintiffs submit opposition and a Memorandum of Law in support of their opposition. The defendants submit a reply affirmation and a Memorandum of Law in support of the Reply.

Plaintiffs' action sounds in legal malpractice. The plaintiffs retained the Lavallee Law Office to represent the plaintiffs in the underlying action entitled *The BHI Group, Inc., formerly known as Beaudette Holdings, Inc. and Frank Zangara v. Joseph Indovino, Bodyline Collision, Inc., and Kim Tassinari*, in Supreme Court, County of Nassau, bearing Index Number 18817/03. The nature of the claim in the underlying action was conversion, unjust enrichment, and for monies had and received, as and against the underlying defendants in the sum of Two Hundred Thirty-Two Thousand Five Hundred and 00/100 Dollars, (\$232,500.00). On or about March 23, 2005, April 15, 2005 and May 23, 2005, a trial was held before the Honorable Justice Ute W. Lally, the issues were heard, and a Judgment was rendered on May 23, 2005 in favor the underlying plaintiffs against the underlying defendants, Joseph Indovino and Bodyline Collision, Inc., in the sum of Two Hundred Thirty-Two Thousand Five Hundred and 00/100 Dollars, (\$232,500.00), plus costs and disbursements.

A Judgment in the amount of Two Hundred Thirty-Two Thousand Five Hundred and 00/100 Dollars, (\$232,500.00), plus costs and disbursements in the amount of One Thousand Three Hundred Ninety-Five and 00/100 Dollars, (\$1,395.00), making a total of Two Hundred Thirty-Three Thousand Eight Hundred Ninety-Five and 00/100 Dollars, (\$233,895.00), was entered on July 1, 2005. The plaintiffs herein provide that they satisfied the Judgment.

The plaintiffs initiated this action seeking recovery of the sum of approximately Two Hundred Thirty-Two Thousand Five Hundred and 00/100 Dollars, (\$232,500.00), with interest from August 24, 2005, together with costs and disbursements of this action. The plaintiffs essentially allege that the defendants failed to discover and present to trial court all relevant evidence, to assert and litigate their defenses in the underlying action to the standards of ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession engaged in litigation practice, to execute a reasonable defense strategy, to ensure a complete and proper evidentiary record at the time of trial, and assert appropriate cross-claims and third-party claims for indemnification and damages and recovery of plaintiff's initial investment. As a result, plaintiffs claim they were forced to satisfy a judgment and commence a second litigation against Robert Tassinari and Kim Tassinari, incurring significant costs in doing so.

The plaintiff, Joseph Indovino, (hereinafter referred to as "Indovino"), owns an auto body shop, Lovino, Inc. d/b/a Bodyline Collision, (hereinafter referred to as "Bodyline"), with a business partner. Indovino is related to non-party, Robert Tassinari, (hereinafter referred to as "Tassinari"), by marriage as Tassinari married Indovino's wife's cousin. Apparently, Tassinari held himself out as a registered securities broker/dealer on or about October of 1994 and promised Indovino that he would make excellent profits if he would invest with Tassinari, and so, Indovino invested Two Hundred Ninety-Five Thousand and 00/100 Dollars, (\$295,000.00), with Tassinari. Thereafter, as time passed and Tassinari apparently failed to provide proof of Indovino's investment, or information concerning Indovino's investment, in January of 1998, Indovino demanded his money back from Tassinari. As a result, Tassinari wired the amount of Two Hundred Thirty-Two Thousand Five Hundred and 00/100 Dollars, (\$232,500.00), to a Bodyline account. Indovino submits the partial refund was used to repay mortgages taken out to fund the original investment and other bills. Unbeknownst to Indovino, the amount of Two Hundred Thirty-Two Thousand Five Hundred and 00/100 Dollars, (\$232,500.00), wired to the Bodyline account was not from an account owned by Tassinari, but from another investor known as the BHI Group, Inc., (BHI), and its principal, Frank Zangara, (Zangara), plaintiffs in the underlying action.

Indovino provides that approximately three months thereafter, Zangara approached Indovino at the Bodyline auto body shop and demanded the Two Hundred Thirty-Two Thousand Five Hundred and 00/100 Dollars, (\$232,500.00), back. Indovino avers that at that point, he contacted Tassinari on the phone, who in turn, spoke to Zangara, and when Zangara left the body shop, Indovino was left with the impression that Tassinari agreed to take care of it. On or about April 8, 1998 Zangara faxed a "signed release" to Bodyline. Indovino provides that he learned that Tassinari gave Zangara a check for Two Hundred Fifty and 00/100 Dollars, (\$250,000.00), to pay Zangara and BHI for the monies wired by BHI to the Bodyline account. Indovino submits that he "didn't give the matter another thought until nearly six years later, when BHI and Zangara sued Bodyline and deponent in this Court, seeking the recovery of the Two Hundred Thirty-Two Thousand Five Hundred and 00/100 Dollars, (\$232,500.00), that had been wired to Bodyline in January".

Indovino submits that he retained the Lavallee Law Office, and at "the very first consultation" he told the law office that Tassinari must be brought into the case, and provided a copy of the release from BHI and Zangara. The defendant, Ryan Brownyard, an attorney and associate at the Lavallee Law Office who was handling the lawsuit, avers that Indovino initially did not want to bring Tassinari into the case because of the familial relationship and Indovino relied upon the assurances of Tassinari that he would resolve the matter. Brownyard further provides that it was not until the time of trial in the underlying action, approximately five days prior, that Indovino changed his mind and wanted to bring Tassinari into the lawsuit. Brownyard refers to his notes to further demonstrate that Indovino changed his mind approximately five days prior to trial and asserts that his notes reflect Indovino's sister, Debra Grimaldo, called him and told Brownyard to implead Tassinari. The third-party complaint was thereafter prepared, however, Brownyard provides that the trial court Judge denied his request to stay the trial in light of the third-party action which sought the return of Indovino's initial investment from Tassinari, as well as indemnification from Tassinari in the event that Indovino was held liable to BHI and Zangara.

The plaintiff, Indovino's, affidavit flatly contradicts Brownyard's affidavit as Indovino avers that the Lavallee Law Office consistently hesitated to implead Tassinari, and avers that Brownyard's claim that he didn't want to implead Tassinari because he was a family member "is completely untrue", and from the inception of the lawsuit he insisted that Tassinari must be brought "in the case to set the record straight that Zangara and BHI had already received payment in full" from Tassinari. Indovino provides that he relied on his attorneys to provide him with his defenses and learned at the time of trial that Tassinari was not brought into the case, nor subpoenaed. The plaintiffs submit the affidavit of Debra Grimaldo who avers that Indovino advised her during the pendency of the underlying action that he repeatedly requested the defendant law firm to bring Tassinari, however, Indovino told her that the defendant law firm repeatedly dissuaded Indovino from doing so.

The plaintiffs claim, essentially, that the defendant law firm's failure to implead or subpoena Tassinari, and submit Zangara's release into evidence, crippled their ability to avail themselves to their defenses. The plaintiffs submit the affidavit of Tassinari who avers that if he had been called to testify, he would've testified that he paid BHI and Zangara Two Hundred Fifty Thousand and 00/100 Dollars, (\$250,000.00), on April 8, 1998 for the purpose of repaying BHI and Zangara in full for the funds previously wired to Bodyline, and that Zangara and BHI, thereafter, provided a release to Indovino and Bodyline for that purpose. Indovino submits the issues were clear, that Tassinari's testimony was important in order to avail plaintiffs of their defenses, and the defendants' failure to procure Tassinari's testimony, failure to commence a third-party action against Tassinari, and submit the release into evidence, was gross negligence causing plaintiffs to be subjected to a substantial judgment. As a result, plaintiffs retained new attorneys and initiated an action in the United States District Court, Eastern District of New York, entitled *Joseph Indovino and Bodyline Collision, Inc. v. Robert Tassinari and Kim Tassinari*, bearing Index Number CV-05-4167. The federal action alleges that the defendants stole Two Hundred Ninety-Five Thousand and 00/100 Dollars, (\$295,000.00), from the plaintiffs, and asserts claims of fraud, contribution, breach of fiduciary duty, unjust enrichment, moneys had and received, and conversion.

The defendants herein assert that the plaintiffs cannot establish a claim against the defendants as the plaintiffs cannot establish that the defendants breached any duty to them, or that any alleged breach was the cause of damages. The defendants submit that the evidence adduced in this matter clearly refutes the crux of plaintiff's claim, that the defendants' failed to timely commence a third-

party action against Tassinari in the underlying action. The defendants refer to defendants' documentation and notes created by Mr. Brownyard to confirm that it was not until approximately five days before trial that the plaintiffs first requested that Tassinari be impleaded. As plaintiffs are unable to demonstrate that the defendants breached any duty to them, with respect to its defense in the underlying action, the defendants argue plaintiffs' legal malpractice action is refuted.

"It is well established to prevail on a claim of legal malpractice, "a plaintiff must demonstrate that the attorney 'failed to exercise the ordinary 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 NY3d 438, 442, 835 NYS2d 534, 867 NE2d 385, quoting *McCoy v. Feinman*, 99 NY2d 295, 301-302, 755 NYS2d 693, 785 NE2d 714; see *Barnett v. Schwartz*, 47 AD3d 197, 848 NYS2d 663 [2d Dept., Dec. 11, 2007]; *Porello v. Longworth*, 21 AD3d 541, 799 NYS2d 918; *Dimond v. Kazmierczuk & McGrath*, 15 AD3d 526, 527, 790 NYS2d 219; *Ippolito v. McCormack Damiani Lowe & Mellon*, 265 AD2d 303, 696 NYS2d 203)." (*Pedro v. Walker*, 46 AD3d 789).

"For a defendant in a legal malpractice case to prevail on a motion for summary judgment, he or she must present evidence in admissible form establishing that the plaintiff is unable to prove at least one of the above-cited essential elements (see *Ippolito v. McCormack Damiani Lowe & Mellon*, 265 AD2d 303, 696 NYS2d 203; *Ostriker v. Taylor Atkins & Ostrow*, 258 AD2d 572, 685 NYS2d 470)." (*Id.*)

Here, the defendants submit that they have demonstrated, as a matter of law, that the plaintiffs clearly requested to implead Tassinari approximately five days prior to the time of trial, and therefore, plaintiffs cannot demonstrate that the defendants failed to timely commence a third-party complaint against Tassinari. However, the plaintiffs, in opposition to the motion, have raised several issues of fact regarding that matter.

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 165 NYS2d 498). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 413 NYS2d 141). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v. Goodson*, 200 NYS2d 627. The role of the court is to determine if bona fide issues of fact exists, and not to resolve issues of credibility. (*Gaither v. Saga Corp.*, 203 AD2d 239; *Black v. Chittenden*, 69 NY2d 665).

In light of the foregoing, as bona fide issues of fact exist, the defendants' motion for summary judgment is denied.

ENTER.

J.S.C.

**ENTERED**  
OCT 27 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

Dated: October 25, 2010

cc: McGinity & McGinity, P.C.  
Traub Lieberman Straus & Shrewsbury LLP