

Adaimy v. Alberstone & Evangelatos, No. B148925 (Cal.App. Dist.2 03/26/2002)

[1]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND
APPELLATE DISTRICT DIVISION EIGHT

[2]

No. B148925

[3]

2002.CA.0002788

[4]

March 26, 2002

[5]

EDMOND A. ADAIMY ET AL., PLAINTIFFS AND APPELLANTS,

v.

ALBERSTONE & EVANGELATOS ET AL., DEFENDANTS AND RESPONDENTS.

[6]

APPEAL from a judgment of the Superior Court of Los Angeles County. Soussan G.
Bruguera, Judge. Affirmed. (Los Angeles County Super. Ct. No. BC230016)

[7]

Ernest J. Franceschi, Jr., for Plaintiffs and Appellants. Haight, Brown & Bonesteel, John
Sheller and Filomena Meyer for Defendants and Respondents.

[8]

The opinion of the court was delivered by: Cooper, P.J.

[9]

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

[10]

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying
on opinions not certified for publication or ordered published, except as specified by rule
977(b). This opinion has not been certified for publication or ordered published for
purposes of rule 977.

[11]

Edmond A. Adaimy, Subhi Zhili and E.S.S. Ent. 100, Inc. (collectively, "plaintiffs" or
"appellants") appeal following the trial court's grant of summary judgment in favor of
plaintiffs' former counsel, Alberstone & Evangelatos and Dale Alberstone and Andrew
Evangelatos (collectively, "defendants" or "respondents"), whom plaintiffs sued for legal
malpractice. Respondents had defended appellants in an underlying lawsuit. Plaintiffs do
not complain about respondents' representation or the result in the underlying lawsuit.
Rather, the gravamen of their complaint against former counsel is that their attorneys did
not garner the \$50,000 deposit partially at issue in the underlying lawsuit to pay part of
their attorney fees, which plaintiffs were awarded as prevailing parties in the underlying
litigation. Agreeing with the trial court there is no triable issue of material fact, we shall
affirm.

[12]

PROCEDURAL HISTORY AND STATEMENT OF FACTS

[13]

The underlying lawsuit

[14]

Respondents were hired to defend appellants in *Platinum Club, Inc. v. Adaimy et al.*, Case No. 202178. Appellants owned a so-called gentlemen's club called "The Playpen," which the Platinum Club sought to purchase. *fn1 The Platinum Club as prospective buyer deposited \$50,000, the disposition of which is critical to the litigation in the case at bench.

[15]

When the efforts of The Platinum Club, represented by Thomas Sardoni, to acquire The Playpen failed, the Club sued appellants for breach of contract and specific performance. Appellants cross-complained against the Platinum Club, the escrow company, and Platinum's principal Bruce D. Lindsey for breach of contract, constructive trust, declaratory relief, and money had and received. Appellants claimed "immediate possession and ownership of" the \$50,000 deposit.

[16]

During discovery in the underlying lawsuit, counsel for both parties stipulated regarding temporary disposition of the \$50,000. Attorney Alberstone stated during the deposition of Evelina Scala, the escrow officer: "We've agreed off the record - and I'll try and recite this on the record now - between plaintiff and defendants that the \$50,000 that is now being held by Allan Erdy Escrow . . . will be disbursed by Allan Erdy Escrow to Thomas Sardoni, the attorney for plaintiff [Platinum Club] in this case, and Mr. Sardoni will immediately, upon receipt, deposit those funds into an interest-bearing account for the benefit of both parties until the resolution of this case or settlement of this case; that no funds will be withdrawn from that account or disbursed out of that account except upon either order of the court or upon the joint signatures of Mr. Sardoni or someone who acts on behalf of Mr. Sardoni and the signature of either Edmond Adaimy or Subhi Zhili. So, in other words, the funds will remain in that account and not be removed until the court either orders that that occur or until there be at least two signatures for that removal: One is from Mr. Sardoni or his representative, and the other is from either Mr. Adaimy or Mr. Zhili. And Mr. Sardoni will hold this essentially as an escrow officer, I suppose."

[17]

Immediately thereafter, and "based on that stipulation," Mr. Alberstone stated the lawsuit against Allan Erdy Escrow would be dismissed as soon as the funds had been transmitted to Mr. Sardoni.

[18]

A bench trial proceeded on the complaint and cross-complaint in the underlying lawsuit. The trial court found the Platinum Club had not met its burden of proof regarding either specific performance or recovery for damages on breach of contract. The decision was based in part on the court's finding plaintiff had not established its financial ability to perform. Moreover, plaintiff attempted to change the terms of the transaction, which would be an anticipatory breach of the contract. However, the court found the evidence on alter ego to be insufficient to allow piercing the corporate veil.

[19]

Regarding appellants' cross-complaint, the court asked for additional briefing regarding "the claim of the cross-complainant for \$50,000 that is deposited in escrow." The court observed there "is an issue as to whether it is appropriate liquidated damages or it is a penalty." Attorney Alberstone asked for an opportunity to file additional briefing on alter ego, stating "if the court does not find the alter ego theory, you could give us any

judgment in the world you want against the corporation and it is utterly worthless." He also asked that the nonfinding of alter ego be without prejudice to a postjudgment hearing on the issue. The court encouraged the litigants to "talk to each other" about the \$50,000 deposit.

[20]

The parties filed posttrial briefs regarding disposition of the \$50,000 deposit. The Platinum Club argued that the clause was not to be viewed as a valid and enforceable liquidated damages agreement and, even if it was, it could be enforced only after escrow opened and escrow never opened.

[21]

The matter was heard January 20, 2000. The trial court found that by the very terms of the agreement of the parties, the \$50,000 deposit was not even required to be paid until escrow was opened and was to be returned if escrow was not opened. Moreover, the court did not find the clause to be one for liquidated damages. Thus, the court found the \$50,000 should be returned to the Platinum Club. In addition, the court specifically found that "defendants [Almaidy et al.] are the prevailing party and are entitled to recover costs."

[22]

Attorney Alberstone again attempted to argue alter ego. The court declined to make its alter ego finding "without prejudice," as counsel requested, but stated that the propriety of reopening that issue could be argued at a later date.

[23]

The day after the hearing, attorney Alberstone sent appellants a letter setting forth the court's reaffirmation of its alter ego ruling and its refusal to characterize the \$50,000 deposit as liquidated damages. The January 21 letter continued: "As I discussed with Dino [Subhi Zhili] following the hearing, I do not believe that it would make economic sense for you to pursue an appeal of the judge's decision or to pursue a recovery of your costs and attorney's fees (which would require another motion and court appearance) because Platinum Club does not conduct business and is insolvent. Further, long before you would be able to recover any money under the Judgment, Lindsey would surely cause the corporation to use the \$50,000 to repay the \$135,000 indebtedness that, according to the testimony, Platinum Club owes to William Haggerty for his multiple loans. [¶] Dino confirmed to me that neither of you want[s] to pursue an appeal nor spend any more money trying to recover costs or fees. Accordingly, and unless I hear from you to the contrary, I will not appeal the case or pursue recovery of costs or fees." (Italics added.)

[24]

Judgment was entered in the underlying lawsuit on February 15, 2000. The judgment was for appellant on the complaint and for cross-defendants Platinum Club, Inc., and Bruce D. Lindsey on the cross-complaint. The court decreed that appellants "are the prevailing parties" and shall recover from Platinum Club their "costs of suit, including reasonable attorney's fees"

[25]

Respondents sue for fees

[26]

After the conclusion of the underlying action, respondents requested their outstanding fees of \$8892.18. *fn2 When appellants did not pay, respondents filed suit for the recovery of attorney's fees and costs on March 15, 2000. Respondents' first amended complaint for breach of contract, quantum meruit, open book account, and account stated was filed March 28, 2000. The parties stipulated to the sending and receipt of various correspondence between the parties; the payments made and costs advanced; and the amount of \$8,892.12 due, subject to any offset or other affirmative defense.

[27]

The complaint in the case at bench

[28]

On May 16, 2000, plaintiffs filed a complaint for breach of contract, negligence (legal malpractice), and breach of fiduciary duty. The complaint was principally based on counsel's failure to file a motion for an award of attorney fees, a memorandum of costs, and a notice of appeal from the underlying trial court's adverse ruling on plaintiffs' claim they were entitled to breach of contract damages and/or forfeiture of the Platinum Club's \$50,000 deposit. Plaintiffs sought damages in excess of \$80,000 as well as punitive damages, attorney fees, and costs.

[29]

Respondents demurred to the complaint, challenging the third cause of action for breach of fiduciary duty and the plea for punitive damages. The record indicates that appellants agreed to dismiss their breach of fiduciary duty cause of action and the punitive damages claim.

[30]

Cross-motions for summary judgment

[31]

Respondents filed a motion for summary judgment or in the alternative summary adjudication (MSJ) listing 78 separate facts and attaching numerous exhibits. The facts set forth the history of the attempted Playpen deal, including Platinum's lack of funds to purchase the business prior to escrow; *fn3 the underlying litigation; and the court's decision that the \$50,000 did not constitute liquidated damages. The facts relied upon by respondents included their representation that counsel told Zhili, who was present at the hearing, "that it would not be worth their while to pursue an appeal on the liquidated damages issue because of his belief that given Platinum's financial condition, the \$50,000 would probably be long gone before the appeal was over;" [*fn4] that counsel told Zhili it would not be worth their while to pursue an appeal on their cross-complaint because that part of the judgment was supported by substantial evidence; and Zhili agreed it would not be worth their while to pursue an appeal on their cross-complaint and told counsel neither he nor Mr. Adaimy wanted to spend more money appealing the case.

[32]

Similar "undisputed facts" were set forth regarding costs and attorney fees. Moreover, one of the "undisputed facts" relevant to this appeal set forth by respondents is that on January 21, 2000, the day after the hearing and the conversation, counsel wrote to both clients reiterating his belief it would not make economic sense for them to pursue an appeal, attorney's fees or costs.

[33]

On December 29, 2000, appellants filed their own MSJ or in the alternative motion for summary adjudication of issues. The issues for which appellants sought adjudication were: 1) Whether defendants owed plaintiffs a duty as a matter of law to perfect the judgment which they obtained on behalf of plaintiffs by filing a Memorandum of Costs and Motion for Attorney Fees after plaintiffs were declared the prevailing parties; and 2) Whether defendants owed plaintiffs a duty as a matter of law to attempt to secure the opposing parties' \$50,000 deposit in the underlying litigation to satisfy any award of costs and attorney fees.

[34]

Respondents filed opposition to appellants' motion and an additional separate statement. They argued that undisputed evidence showed they did not, as a matter of law, owe a duty to pursue costs and fees in the underlying action. First, the act of filing a memorandum of costs or a motion for fees is not the procedural type of right an attorney can make; the client retains the right to make ultimate decision on matters affecting substantive rights, such as those involved in the case at bench. Second, even countering appellants' argument that they never withheld consent if such consent was necessary, respondents argued that no admissible evidence had been presented to support that position. To the contrary, respondents argued the evidence demonstrates that appellants instructed counsel not to pursue costs and fees.

[35]

Moreover, according to respondents, appellants failed to set forth competent evidence that respondents erred in failing to "impound" the \$50,000 deposit. They did not show a legal maneuver was available to do so or would have prevailed, especially in light of the stipulation between the underlying parties regarding the \$50,000 being returned without any deduction or offset. Finally, respondents claimed that appellants had not shown that, but for respondents' alleged omissions, the proper handling of the underlying lawsuit would have resulted in a collectible judgment. (*Marshak v. Ballesteros* (1999) 72 Cal.App.4th 1514; *DiPalma v. Seldman* (1994) 27 Cal.App.4th 1499, 1507.) A declaration by attorney Alberstone in support of the opposition added that, given the contents of the stipulation regarding the \$50,000, he would both be breaching that contract and engaging in unethical behavior if he asked the judge to impound those funds.

[36]

Appellants filed their own "statement of genuine issues" in opposition to defendants' MSJ. The response objected to many facts as irrelevant and disputed many others. As to respondents' "alleged uncontroverted facts" number 77 and 78, *fn5 appellants responded: "Objection. This is not a `fact' suitable for summary adjudication and is nothing more than an argumentative statement. The objection notwithstanding is disputed." Nevertheless, there was no fact presented in reply to number 77 and 78 disputing the lack of evidence in that document.

[37]

Both appellants filed identical declarations. Because of the issues raised on appeal, we set forth the content of their declarations: *fn6

[38]

Paragraph 1 of each declaration recited that "contrary to the declaration of Dale Alberstone . . . , I never instructed him oral, (sic) in writing or by an other means not to

file a Memorandum of Costs or to fix the amount of attorney fees following the Court's ruling that he would be entitled to recover same."

[39]

The declarations continued:

[40]

"2. Moreover, Mr. Alberstone never revealed to me the exact wording of the stipulation related to the \$50,000 deposit nor did he ever indicate to me that there was nothing in that stipulation to preclude me or my co-plaintiffs from asking the Court to award me that money in satisfaction of costs and attorney fees irrespective of the fact that the Court agreed with The Platinum Club that the deposit was not a liquidated damages.

[41]

"3. Mr. Alberstone never advised me that a Memorandum of Costs was a pre-printed form that required minimal effort to fill out and that a motion to fix the amount of attorney fees would essentially involve nothing more than the preparation of a short memorandum to which would be attached Mr. Alberstone's computerized billing and accounting records such as what is found at Exhibit 28(e).

[42]

"4. Although I did not desire to expend a significant amount of money pursuing collection of an award of costs and attorney fees, it certainly was not my desire to forfeit my right to have these amounts fixed as part of the judgment so that my right to pursue same in the future would be preserved.

[43]

"5. My co-plaintiffs and I paid Mr. Alberstone and his firm approximately \$90,000 in conjunction with The Platinum Club litigation. Given the fact that the filing of a Memorandum of Costs together with the motion to fix attorney fees would be a relatively simple and inexpensive filing, it would be unreasonable for either myself or my co-plaintiffs to forfeit our right to recover these substantial sums by instructing Mr. Alberstone as he has alleged not to make these simple and inexpensive filings.

[44]

"6. In fact, after the date that Mr. Alberstone alleges that I purportedly instructed him not to incur further costs, Mr. Alberstone proceeded to prepare and file a judgment and Notice of Entry of Judgment for which I was billed. Please see Exhibit 28(e).

[45]

"7. That after preparing the judgment and filing and serving the Notice of Entry of said Judgment without my knowledge or consent, Mr. Alberstone never informed me that I had only a limited amount of time thereafter to file a Memorandum of Costs and motion to fix the amount of attorney fees, and that failure to do so would permanently bar me from recovering these costs and attorney fees in the future.

[46]

"8. As a result of Mr. Alberstone's failure to file the cost bill and motion for attorney fees and to argue that the deposit should be used in satisfaction thereof[,] I together with my co-plaintiffs have lost the right to recover the \$90,000 we paid to Alberstone."

[47]

Respondents' reply to the opposition emphasized that, even if one could find a triable issue as to whether appellants ever instructed counsel not to file a memorandum of costs

or to fix the amount of attorney fees, appellants would still lose. Respondents argued that "it nevertheless remains undisputed that Plaintiffs did not affirmatively instruct Mr. Alberstone to pursue costs and fees even after their admitted receipt of Mr. Alberstone's January 21, 2000 correspondence." The letter, the content of which is set forth above, was mailed separately to Adaimy (and E.S.S. Ent. 2000, Inc.) and to Zhili, and ended:
[48]

"Dino [Zhili] confirmed to me that neither of you want to pursue an appeal nor spend any more money trying to recover costs or fees. Accordingly, and unless I hear from you to the contrary, I will not appeal the case or pursue recovery of costs or fees." (Italics added.)

[49]

The trial court's decision

[50]

The summary judgment motions were heard on January 18, 2001. The court began its 6-page minute order with a summary of its view of the facts: "In this case, plaintiffs, who prevailed in the underlying action, recognized that they had little or no chance of obtaining costs and attorney fees from the insolvent cross-defendant and did not wish to incur more legal fees (they had an \$8000.00 outstanding balance) in attempting to do so or in filing an appeal on the issue of liquidated damages. [Therefore,] they looked to another source of recovery for their attorney fees, specifically their attorneys, who, on the instructions of their clients, did not file a cost bill/motion for attorney fees or an appeal."

[51]

After setting forth the elements of plaintiff's causes of action for breach of professional negligence, the court concluded that respondents had "met their burden of establishing that they had no duty to file an appeal . . . [because the Adaimy parties] have expressly admitted that they instructed Alberstone not to file an appeal (Defendant's Separate Statement, number 55.)" Moreover, the court concluded there was no issue of material fact regarding whether Alberstone was instructed not to file a cost bill/motion to fix attorney fees. The trial court refuted appellants' reading of Alberstone's deposition, stating it "mischaracterizes the testimony" As for paragraph 5 of appellants' declarations, the court stated the declarations "contain no facts disputing this issue, merely argument and opinion" and, further, the declarations "are contradicted by their prior admissions and stipulations (see defendants exhibits 26 and 33 through 38). The evidence shows that plaintiffs told their counsel that they did not want to pursue an appeal nor spend any more money to recover costs or fees, that counsel confirmed the clients' decision and that counsel would comply with the clients' wishes unless instructed otherwise. Plaintiffs put forth no evidence to contradict the undisputed evidence that plaintiffs never instructed defendants to pursue costs and fees or to file an appeal (defendants' Separate Statement, numbers 66 through 75." *fn7

[52]

Just as the court found summary adjudication on the negligence claim, so it found respondents entitled to summary adjudication on the breach of contract claims "as all undisputed admissible evidence shows plaintiffs had instructed defendants not to pursue further activity in the litigation, including pursuing fees and costs and an appeal." In addition, the court found "no material factual dispute with respect to the lack of provable collectible damages," an element of professional negligence where the alleged

malpractice consists of mishandling of a client's claim. (*DiPalma v. Seldman*, supra, 27 Cal.App.4th 1499, 1507). Without any evidence of Platinum's solvency, the court concluded that the negligence action "cannot survive."

[53]

Judgment for respondents was entered January 31, 2001. The judgment specified that "Defendants shall have and recover from said Plaintiffs disbursements and costs of suit in the sum of \$1,142.75 pursuant to law." Appellants filed their notice of appeal from the judgment.

[54]

CONTENTIONS ON APPEAL

[55]

Appellants contend: 1. The trial court violated the fundamental rule of summary judgment that declarations must be liberally construed in favor of the party opposing summary judgment. 2. Contrary to Mr. Alberstone's contention, the stipulation of counsel pertaining to the \$50,000 deposit did not prohibit its use to satisfy a judgment for costs and attorney fees. 3. Defendants' contention that he was directed by his clients not to file the subject cost bill/motion to fix attorney fees is refuted by his own deposition testimony. 4. Counsel owed a duty to perfect the judgment obtained in favor of his clients. 5. Alberstone's failure to make any effort whatsoever to secure the \$50,000 deposit constitutes negligence as a matter of law.

[56]

Respondents argue the trial court properly granted summary judgment in that there was no triable issue of fact 1) on the element of breach because it was undisputed that appellants instructed Alberstone not to pursue costs and fees and 2) on the element of causation because appellants produced no evidence that any monetary award against Platinum would have been collectible.

[57]

DISCUSSION

[58]

1. Standard of review.

[59]

The court in *Arnold v. Dow Chemical Co.* (2001) 91 Cal.App.4th 698, 707, recently set forth the standard of review for summary judgments: "Summary judgment is granted if all the submitted papers show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant seeking summary judgment has met the burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action cannot be established or that an affirmative defense to that cause of action exists. (Code Civ. Proc., § 437c, subd. (n); see *Rowe v. Superior Court* (1993) 15 Cal.App.4th 1711, 1724 [.] Once the defendant's burden is met, the burden shifts to the plaintiff to show that a triable issue of fact exists as to that cause of action. (Code Civ. Proc., § 437c, subd. (o).) The plaintiff must set forth specific facts showing that a triable issue of material fact exists. (*Ibid.*)

[60]

"In reviewing the propriety of a summary judgment, the appellate court independently reviews the record that was before the trial court. [Citation.] We must determine whether

the facts, as shown by the parties, give rise to a triable issue of material fact. [Citation] In making this determination, the moving party's affidavits are strictly construed while those of the opposing party are liberally construed. (Ibid.)"

[61]

2. The trial court did not err in granting summary judgment.

[62]

Appellants first contend that Mr. Alberstone's declaration mischaracterizes the stipulation regarding the \$50,000 deposit with Mr. Sardoni that was entered on the record during the deposition of Evelina Scala. Appellants are correct that the oral stipulation, unlike Mr. Alberstone's declaration purporting to set forth the stipulation, does not state "that the entire \$50,000 deposit, without offset or deduction of any could, could and would immediately be disbursed by Mr. Sardoni to Platinum if the judge determined that the deposit was not liquidated damages." Rather, the entirety of the oral stipulation provides:

[63]

"We've agreed off the record - and I'll try and recite this on the record now - between plaintiff and defendants that the \$50,000 that is now being held by Allan Erdy Escrow . . . will be disbursed by Allan Erdy Escrow to Thomas Sardoni, the attorney for plaintiff [Platinum Club] in this case, and Mr. Sardoni will immediately, upon receipt, deposit those funds into an interest-bearing account for the benefit of both parties until the resolution of this case or settlement of this case; that no funds will be withdrawn from that account or disbursed out of that account except upon either order of the court or upon the joint signatures of Mr. Sardoni or someone who acts on behalf of Mr. Sardoni and the signature of either Edmond Adaimy or Subhi Zhili. So, in other words, the funds will remain in that account and not be removed until the court either orders that that occur or until there be at least two signatures for that removal: One is from Mr. Sardoni or his representative, and the other is from either Mr. Adaimy or Mr. Zhili. And Mr. Sardoni will hold this essentially as an escrow officer, I suppose." The declarations of Alberstone and Sardoni, counsel for the opposing parties in the underlying litigation, add a provision that the entire deposit, without offset or deduction of any kind, would be immediately disbursed if the judge determined that the deposit was not liquidated damages.

[64]

Appellants further claim that there was a material issue of fact regarding whether they directed Alberstone not to file the subject cost bill/motion to fix attorney fees. Even if there was, it seems undisputed that appellants did not reply to the January 21 letter in which Alberstone set forth his understanding of what his clients wanted and asked them to reply if they wanted him to proceed: "As I discussed with Dino [Subhi Zhili] following the hearing, I do not believe that it would make economic sense for you to pursue an appeal of the judge's decision or to pursue a recovery of your costs and attorney's fees (which would require another motion and court appearance) because Platinum Club does not conduct business and is insolvent. Further, long before you would be able to recover any money under the Judgment, Lindsey would surely cause the corporation to use the \$50,000 to repay the \$135,000 indebtedness that, according to the testimony, Platinum Club owes to William Haggerty for his multiple loans. [¶] Dino confirmed to me that neither of you want[s] to pursue an appeal nor spend any more money trying to recover costs or fees. Accordingly, and unless I hear from you to the contrary, I will not appeal the case or pursue recovery of costs or fees."

[65]

The only response by appellants to the impact of this letter is to point out that, after sending the letter, counsel nevertheless took steps to enter the judgment favorable to his clients and bill them for that work. Those subsequent steps do not amount to authorization by the clients to appeal or pursue costs or fees. Nor, as contended by appellants, in light of the undisputed receipt of the letter and appellants' lack of response, did counsel have a duty either to appeal or to pursue recovery of costs or fees.

[66]

Finally, appellants have failed to establish how the \$50,000, if disbursed to Sardoni's clients in the underlying litigation, could be recouped in a timely way given the other creditors awaiting payment from the Platinum Club. Nor have appellants countered the Platinum Club's lack of financial wherewithal. As the court stated in *DiPalma v. Seldman*, supra, 27 Cal.App.4th 1499, 1506-1507, "One who establishes malpractice on the part of his or her attorney in prosecuting a lawsuit must also prove that careful management of it would have resulted in a favorable judgment and collection thereof, as there is no damage in the absence of these latter elements. (*Campbell v. Magana* [(1960)] 184 Cal.App.2d [751,] 754; see BAJI No. 6.37.5.) In *Campbell*, the plaintiff filed a personal injury action but defendant attorneys negligently allowed the mandatory five-year period for bringing the case to trial to run. (*Campbell v. Magana*, supra, 184 Cal.App.2d at pp. 759-760.) Nonetheless, the plaintiff was not damaged by counsel's malpractice because she had no good cause of action against the defendant in the underlying action. (*Id.*, at p. 763.) Therefore, careful management of the underlying action would not have resulted in recovery of a favorable judgment. (*Id.*, at p. 754.)

[67]

"However, the element of collectibility does not apply to every legal malpractice action. An attorney's liability, "as in other negligence cases, is for all damages directly and proximately caused by his negligence." [Citations.] It is only where the alleged malpractice consists of mishandling a client's claim that the plaintiff must show proper prosecution of the matter would have resulted in a favorable judgment and collection thereof." This is such an action. If the clients could not have recovered financially absent the alleged malpractice, their cause of action fails.

[68]

DISPOSITION

[69]

The judgment is affirmed. Respondents to recover costs on appeal.

[70]

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

[71]

We concur:

[72]

RUBIN, J.

[73]

BOLAND, J.

Opinion Footnotes

[74]

*fn1 The two individuals, Adaimy and Zhili, were 50/50 shareholders in E.S.S. Ent. 2000, Inc., the corporation that owned the Playpen.

[75]

*fn2 Prior to trial in the underlying lawsuit, respondents reminded appellants of their fees due, then \$9,175, without which respondents would be unable properly to prepare for trial. As discovery continued, respondents asked for payment in advance for the estimated cost of several depositions and stated the depositions would be canceled if the payment was not received.

[76]

*fn3 A section of the undisputed facts was devoted to "Platinum's Financial Condition," including its initial funding and Platinum's bleak financial condition as the underlying litigation progressed. Therefore, under the terms of their agreement, when the trial court ruled his client was entitled to receive a return of the Deposit because escrow was never opened and the Deposit was not liquidated damages, Sardoni was allowed immediately to disburse the entire Deposit to the Platinum Club. And, according to Mr. Sardoni, given the verbal agreement, "it would have been inconsistent with and a breach of the agreement for Mr. Alberstone to have sought to block the disbursement of the Deposit to my client" by requesting the court to impound or hold up disbursement for any purpose including "as offset for satisfaction of any attorney's fees or court costs which the court awarded to Adaimy." Sardoni also opined it would have been unethical to do so given the agreement relating to release of the deposit from escrow.

[77]

*fn4 In addition, fact number 63 asserted: "Mr. Sardoni agreed to the release of the \$50,000 deposit to him only subject to the condition that should the Court determine that the deposit did not constitute liquidated damages, the entire deposit - without deduction or offset - could and would be immediately disbursed to Platinum." This "fact" was supported by the Alberstone and Sardoni declarations. The Alberstone declaration explained his understanding of the stipulation regarding Mr. Sardoni's holding the \$50,000: "One of those conditions was that the entire \$50,000 deposit, without offset or deduction of any kind, could and would immediately be disbursed by Mr. Sardoni or Platinum if the judge determined that the deposit was not liquidated damages." (Italics in original.) Mr. Sardoni concurred that, in discussing the disposition of the \$50,000 then with the escrow officer, Sardoni "would only agree to the release if my client would be entitled to receive the entire Deposit, without any deduction or offset whatsoever, upon a determination by the trial court that the Deposit was not liquidated damages." Moreover, Sardoni declared he "would have never agreed to a disbursement of the Deposit out of Escrow if it could or would be applied as an offset to anything following a determination that it was not liquidated damages. Simply stated, if the court determined that the Deposit was not liquidated damages, the arrangement I. made with Mr. Alberstone was that my client was to immediately receive 100% of the Deposit." The oral stipulation was "to facilitate the terms of my said oral agreement with Mr. Alberstone." Fact number 63 was disputed by appellants, who cited Exhibit 8, the deposition containing the oral stipulation,

the same exhibit cited by Alberstone as containing "pertinent excerpts" of the deposition in which their agreement was referenced.

[78]

*fn5 Fact number 77 asserted: "Adaimy Parties have no evidence to prove that they instructed Mr. Alberstone to pursue costs or fees or that they told him they were willing to pay Mr. Alberstone to do so." Fact number 78 asserted: "The Adaimy Parties have no facts to support their contention that a legal procedure was available to prevent the disbursement of Platinum's \$50,000 deposit after the Court had rendered its judgment in the Underlying Action."

[79]

*fn6 In addition to the declarations filed by appellants, they argued that Alberstone's own deposition established that Adaimy did not tell him not to pursue a motion for attorney fees.

[80]

*fn7 The court reemphasized the point later in its minute order: "Plaintiffs do not provide any evidence that they requested that defendants pursue these rights and that defendants failed to do so. Plaintiffs' evidence in opposition to defendants' declarations that plaintiffs opted not to pursue further litigation and incur further costs is ineffective to raise a triable issue of material fact. The declarations of plaintiffs merely state that it would not have been reasonable for plaintiffs to forfeit our right to recover these substantial sums by instructing Mr. Alberstone as he has alleged not to make these simple and inexpensive filings' (Zhili and Adaimy declarations, paragraph 5.) Nowhere do plaintiffs state that defendants did not provide information about further steps to be taken in the litigation, including the possibility of obtaining fees and costs. The undisputed evidence establishes that plaintiffs, who were already in arrears in their legal fees, did not wish to incur additional legal fees where there was virtually no likelihood of success."