

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 17-02133

PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

ACCADIA SITE CONTRACTING, INC.,
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

LIPSITZ GREEN SCIME CAMBRIA LLP, AND
JOSEPH J. MANNA, INDIVIDUALLY AND AS
A PARTNER OF LIPSITZ GREEN SCIME
CAMBRIA LLP, DEFENDANTS-RESPONDENTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (PHILLIP A. OSWALD OF
COUNSEL), FOR PLAINTIFF-APPELLANT.

CONNORS LLP, BUFFALO (CHRISTOPHER J. LARRABEE OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered February 23, 2017. The order denied plaintiff's motion for partial summary judgment and granted defendants' cross motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the counterclaim and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action for legal malpractice alleging that defendants acted negligently while representing it in an action involving a construction dispute. We previously affirmed the order and judgment granting the motion of the defendant in the underlying action for summary judgment dismissing the complaint (*Accadia Site Contr., Inc. v Erie County Water Auth.*, 115 AD3d 1351, 1351-1353 [4th Dept 2014]). Contrary to plaintiff's contentions, we conclude that Supreme Court properly granted defendants' cross motion for summary judgment seeking dismissal of the complaint herein. Defendants established that they did not fail to exercise the appropriate degree of care, skill, and diligence in representing plaintiff, and that any breach of their duty could not have been a proximate cause of plaintiff's damages, and plaintiff failed to raise a triable issue of fact to defeat the cross motion (see *Chamberlain, D'Amada, Oppenheimer & Greenfield, LLP v Wilson*, 136 AD3d 1326, 1327-1328 [4th Dept 2016], *lv dismissed* 28 NY3d 942 [2016]; see generally *Zuckerman v City of New York*, 49 NY2d 557, 562

[1980])). Defendants concede in their brief that, prior to the issuance of the order on appeal, the parties settled their dispute over the attorneys' fees that were the subject of defendants' counterclaim. We therefore modify the order by granting that part of plaintiff's motion pursuant to CPLR 3211 seeking dismissal of the counterclaim.

Entered: June 8, 2018

Mark W. Bennett
Clerk of the Court