No. 1-18-0081

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PAUL ABRAM *Plaintiff/Appellant*, v. STEVEN A. MARDEROSIAN, *Defendant/Appellee*.	Appeal from the Circuit Court of Cook County, Illinois Circuit Court Number No. 17 L 5914 Judge Margaret Brennen, Presiding Notice of Appeal: January 5, 2018 Date of Judgment: December 19, 2017

BRIEF OF PLAINTIFF/APPELLANT PAUL ABRAMSON

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ORAL ARGUMENT REQUESTED

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

The motion for summary judgment that disposed of Plaintiff's legal malpractice claims only related to one small piece of the representation assumed by Marderosian and necessarily required the Circuit Court to resolve disputed questions of fact and ignore the full range of the representation. The Circuit Court erroneously resolved the disputed questions of fact by incorrectly holding the negligent acts were not alleged in the complaint *See* (C. 12) while at the same time repeatedly denying amendment to plead these negligent acts in detail.

This case involved an attorney's attempt to handle only a small piece of large, complicated litigation over a bitter family dispute spilling over many years and several cases while nonetheless providing advice on the full breadth of the litigation and not advising his client of the huge risks of his limited approach. As a result of only focusing on a small piece of the large complex claims, while still materially advising on other aspects, the negligent attorney bit off more than he could chew and provided poor advice and counsel on other parts of the litigation in which he occasionally appeared. Marderosian apparently could not say no to Paul Abramson ("Paul") when he asked for advice on other matters besides the claim against Chuhak Tecson ("CT") and as a result the lines were completely blurred as to what he was and was not working on, resulting in Marderosian being responsible for the entire interrelated legal morass he advised on. The motion for summary judgment

only addressed one part of one of the claims Marderosian represented Paul in and did not address the other matters. The Circuit Court acknowledged the motion for summary judgment was limited to one part of the representation and found amendment of the complaint would have been necessary to squarely address the negligence in other parts of the representation argued in response to the motion for summary judgement. (R. 32). The Court's own ruling supports the necessity of amendment that it twice erroneously denied.

In addition to the Court's erroneous denials of discovery and routine amendment of the complaint prior to answering affirmative defenses, the Circuit Court erred in ruling on the only issue actually ripe for judgment in determining that this Court's finding that a plaintiff did not allege a cause of action had preclusive effect on the merits of that cause of action if tried on the merits later.

JURISDICTION

This is an appeal from a final order of by the Circuit Court of Cook County that resolved all claims brought by each of the parties, and is, therefore, appealable under S.Ct. Rules 301 and 303. (A.4, C. 470.)

ISSUES PRESENTED FOR REVIEW

1. Whether the Circuit Court committed error in not allowing leave to file an amended complaint prior to answering amended affirmative defenses.

2. Whether the Circuit Court committed error by not allowing any discovery prior to Plaintiff responding to a motion for summary judgment.

3. Whether the Circuit Court committed error in not allowing leave to file amend after the motion for summary judgment was filed.

4. Whether the Circuit Court committed error in ignoring disputed questions of fact on summary judgement.

5. Whether the Circuit Court erred in finding a Court's limited holding that a cause of action was not pled had preclusive effect on the merits of the cause of action properly raised later.

STATEMENT OF FACTS

This is a legal malpractice claim arising from a legal malpractice claim and a host of other volunteered legal services surrounding a complicated and hotly litigated series of lawsuits.

During the course of the ill-defined, wide-ranging representation, Marderosian appeared on behalf of Paul or materially advised Paul in 2008-P-000335 (*Abramson v. Abramson I*), 2013-CH-17457 (*Abramson v. Abramson II*), and 2011-CH-22779 *Abramson v. Chuhak Tecson, P.C.* and in at least one complaint to the ARDC. (C. 406). The actual scope of the representation assumed by Marderosian though several cases is best explained with a chart:

Plaintiff	Defendant(s)	Case Number	Claims Alleged	Date Filed	Marderosian Involvement	Disposition
Paul	Floyd, Estate of Jane Abramson	2008-P-335	Undue Influence, Lack of Capacity, Tortious Interference	1/15/08	Appeared at hearing, failed to vacate order, advised on statute of limitations	Settled for $1,00,000 on 6/30/2009, Motion to Re-open estate presented by Mardarosian denied in March 2017.
Paul	Chuhak Tecson	2011-CH-22779	Declaratory Judgment, Equitable Estoppel, and Breach of Contract regarding representation in 2008 P 335	6/27/11	Marderosian acted as lead counsel throughout	Dismissed pursuant to 2-615 and affirmed on appeal on 12/27/13
Floyd	Paul	2013-CH-17457	Breach of Settlement Agreement entered in case number 2008-P-335	7/24/13	Marderosian advised Paul in negotiations and reviewed pleadings. Testified and waived privilege	Pending, Summary Judgment Granted as to Liability in favor of Floyd

(C. 406)

On April 16, 2011, Plaintiff retained Marderosian to provide legal services in recovering damages caused by CT in its representation of Paul. (C. 407). Prior to filing a complaint, Marderosian sent a demand to CT alleging legal malpractice. (C. 407).

On June 27, 2011, Marderosian filed a complaint seeking a declaratory judgment regarding the fee charged by CT, equitable estoppel, and breach of contract, seeking what amounted to a remittitur of the bulk of the fee charged by CT but not alleging legal malpractice. (*Id.*). Marderosian chose not to allege legal malpractice in order to avoid having to prove a "case within a case" and to avoid insurance defense counsel. (*Id.*) Despite demanding legal malpractice damages, Marderosian clearly stated on the record in *Abramson v. Abramson I* that he was not pursuing a legal malpractice claim on behalf of Paul against CT. (*Id.*).

Marderosian did not attempt to plead facts to state a claim for legal malpractice against CT and they were not present in the complaint. *(Id.*). On or about June 30, 2011, the statute of limitations expired as to CT providing negligent advice in recommending settling the underlying matter for 10% of the potential recovery without conducting necessary discovery and negligently drafting a settlement agreement.

On June 30, 2011, the legal malpractice statute of limitations expired as to a legal malpractice claim against CT resulting from negligently drafting the settlement agreement. Marderosian did not advise Paul prior to June 30, 2011 that his claims for legal malpractice would be time-barred if not pled as legal malpractice prior to June 30, 2011 and instead advised he could retain other counsel to pursue these after the statute of limitations had expired. (*Id.*). On August 20, 2013, Marderosian negligently advised Paul he still had time to

proceed with a legal malpractice claim for CT's advice regarding settlement. *Id.*

December 27, 2013, the Section 2-615 dismissal Marderosian's poorly stated claim against CT not stating facts supporting a claim for legal malpractice was affirmed on appeal.

On or about June 30, 2011, the time to vacate the judgment in the underlying action expired pursuant to 735 ILCS 5/2-1401. Marderosian did not advise Paul of the limitations period within which to attempt to vacate a judgment and instead advised Paul he could still vacate the settlement as of March 2014. (C. 408).

Marderosian continued to provide legal advice to Paul throughout his dealings with Floyd and Floyd's counsel, Novak and Macey throughout the pendency of the appeal of the claim against CT and thereafter. *(C.* 408). *Abramson II* turns on the validity and enforceability of Paul's settlement agreement with Floyd and the enforceability of a no-contact provision contained therein which Marderosian advised Paul on. *Id.*

Marderosian testified that he did not advise Paul the no-contact provision of the settlement agreement with Floyd was binding on him and that it in fact may have been waived. Marderosian testified as follows:

> Q. Did you ever express an opinion as to whether Paul Abramson was bound by the no-contact clause in the settlement agreement?
> A. I don't recall specifically. I don't – I don't -- I don't even know how to answer that. I don't believe I ever -- I don't believe I ever said that, Yeah, well, you're bound by that provision. I don't know that I ever said that.

> Q. Did you ever determine whether the no-contact clause in the settlement agreement was unenforceable?
> A. I mean, made a determination on that, no. I think I considered the possibility that it had been waived by his dad's conduct, that it might have been unenforceable for temporal reasons. But I don't think that I ever made a determination or came to a legal opinion about that.

(C. 408).

On or about February 21, 2013, Marderosian advised Paul to send a letter demanding Floyd pay his share of inheritance in excess of $2,000,000 in exchange for an agreement to abide by the prior settlement agreement. (*Id*). Marderosian admits to reviewing the demand before it was sent and was cc'd on it. *Id.* In response to the ill-advised demand, on or about March 15, 2013, Floyd filed a Motion to Enforce the settlement agreement's no contact provision and the motion was denied because the estate was closed. Marderosian appear on behalf of Paul at the hearing on the motion to enforce to make sure that Floyd's counsel "didn't try anything". (*Id.*).

On or about January 31, 2014, Marderosian told Paul he should pursue an ARDC claim against Floyd's attorney, Andrew Fleming, in light of Marderosian reading that that Fleming was censured by the ARDC for an unrelated matter. (C. 409).

But for Marderosian's negligent advice, Paul would not have sent a demand letter to Floyd's counsel or filed an ARDC complaint against Fleming, thus poking the hornet's nest of his wealthy father's top-flight litigators and resulting in the morass of *Abramson v. Abramson II*. (C. 409).

Plaintiff's complaint broadly alleged negligent acts in all four cases in which Marderosian provided legal services and the Motion for Summary Judgment only addressed *Abramson v. Chuhak Tecson, P.C.*

STANDARD OF REVIEW

Appellate courts' review of an order granting summary judgment is *de novo*. *Crum & Forster Managers Corp. v. Resolution Trust Corp*., 156 Ill. 2d 384, 390, 620 N.E.2d 1073 (1993). In reviewing a motion for summary judgment, the court must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party. *Kolakowski v. Voris*, 83 Ill. 2d 388, 398, 415 N.E.2d 397 (1980). Summary judgment "is a drastic means of disposing of litigation," and therefore it will only be upheld on review when the movant's right to the relief "is clear and free from doubt." *Purtill v. Hess*, 111 Ill. 2d 229, 240, 489 N.E.2d 867 (1986). Thus, it can be said that some weighing of the facts must be done by the reviewing court in order to rule on the propriety of the trial court's granting of a summary judgment motion.

An abuse of discretion standard applies to the Circuit Court's error in refusing Plaintiff leave to file an amended complaint. *Rifkin v. Bear Sterns & Co. Inc.* 215 Ill. 2d 466, 474 (2005).

De Novo review applies to the Court's erroneous decision not to allow discovery. Although a trial court's discovery order is ordinarily reviewed for a manifest abuse of discretion, the proper standard of review depends on the question that was answered in the trial court. *Norskog v. Pfiel*, 197 Ill. 2d

60,70, 755 N.E.2d 1 (2001). "If the facts are uncontroverted and the issue is the trial court's application of the law to the facts, a court of review may determine the correctness of the ruling independently of the trial court's judgment." *Id.*, 197 Ill. 2d at 70-71. *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578, 948 N.E.2d 132 (2011).

ARGUMENT

The Circuit Court erroneously misapplied basic tenants of Illinois Civil Procedure in order to deprive Paul of the opportunity to reach the merits of his complex claims by denying routine requests to file an amended complaint before the case was even at issue and denying routine discovery despite never entering a discovery sanction or an order closing discovery. By abusing its discretion and denying routine requests necessary for the administration of justice, the Circuit Court incorrectly narrowed the case to one issue of claim preclusion that was then incorrectly decided by finding a Court's holding the plaintiff's failure to even attempt to plead a cause of action equates to dismissal of the cause of action on the merits after a full hearing.

I. THE CIRCUIT COURT ERRED IN DENYING PLAINTIFF LEAVE TO FILE AN AMENDED COMPLAINT PRIOR TO ANSWERING NEW AFFIRMATIVE DEFENSES WHILE ALL DISCOVERY REMAINED OPEN.

This was a refiled action. Upon refiling, Plaintiff retained new counsel and asserted the same claims that were at issue in the original action and Defendant asserted new affirmative defenses not raised prior to refiling. (C. 31). Plaintiff filed a motion for leave to file an amended complaint just seven days after Plaintiff's motion to strike the new affirmative defenses was denied. (C. 183). The Court's allowance of the new affirmative defenses necessitated amendment of the complaint to focus on the full breadth of Marderosian's wide-ranging representation.

Plaintiff filed his routine motion for leave to file a first amended complaint on September 15, 2017, just five months after initially filing the complaint and seven days after the Court denied his motion to strike Defendant's newly asserted affirmative defenses. (C. 187).

The Circuit Court erroneously ignored controlling, Illinois Supreme Court, precedent providing that the refiling of a voluntarily dismissed count is a new distinct action. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 474, 889 N.E.2d 210, 217 (2008). An action refiled pursuant to section 13-217 is a new action, not a reinstatement of the old action. *Dubina v. Mesirow Realty Development, Inc.*, 178 Ill. 2d 496, 504, 687 N.E.2d 871, 875 (1997). Section 13-217 is remedial in nature and should be liberally construed in favor of hearing a plaintiff's claim. *Bryson v. News America Publications*, *Inc.*, 174 Ill. 2d 77, 106, 672 N.E.2d 1207, 1223 (1996).

A refiled action under section 13-217 is a new lawsuit and a plaintiff may raise additional theories of liability. *Apollo Real Estate Inv. Fund, IV, L.P. v. Gelber*, 398 Ill. App. 3d 773, 935 N.E.2d 949, 961 (1st Dist. 2009) (holding plaintiff's claims for unjust enrichment, raised for the first time in the refiled action, was timely raised within one year after the voluntary dismissal).

Pursuant to 735 ILCS 5/2-616(a) amendments to pleadings may be allowed on "just and reasonable terms" at any time before final judgment to enable the plaintiff to sustain the claim brought in the suit. "Generally, when a party asks to amend a complaint, leave to do so is freely given." *Keefe-Shea*

Joint Venture v. City of Evanston, 364 Ill. App. 3d 48, 62, 845 N.E.2d 689, 701 (2005).

Plaintiff's routine motion for leave to amend was brought very early in the litigation before the parties were even at issue pursuant to §2-616(a) of the Code of Civil Procedure, which provides:

> At any time before final judgment amendments may be allowed on just and reasonable terms, introducing any party who ought to have been joined as plaintiff or defendant, dismissing any party, **changing the cause of action or defense or adding new causes of action or defenses, and in any matter, either of form or substance**, in any process, pleading, bill of particulars or proceedings, **which may enable the plaintiff to sustain the claim for which it was intended to be brought** or the defendant to make a defense or assert a cross claim.

(emphasis added)

Loyola Academy v. S & S Roof Maintenance, Inc., 146 Ill. 2d 263, 586 N.E.2d 1211 (1992) sets the standard of when amendment of pleadings is allowed. The Court abused its discretion in denying the routine motion because Plaintiff satisfied each of the *Loyal* Factors.

> The factors to be considered in determining whether or not to permit an amendment to the pleadings are whether: (1) the proposed amendment would cure a defect in the pleadings; (2) the proposed amendment would prejudice or surprise other parties; (3) the proposed amendment is timely; and (4) there were previous opportunities to amend the pleading.

Loyola, *supra*

In this case, Plaintiff's attempted amendment satisfied all four *Loyola* factors: (1) it cures numerous defects in the original complaint; (2) there is no

prejudice or surprise where discovery remained open, the claims are not at issue, no trial date was set, nor had Defendant filed a Motion to Dismiss the original complaint; (3) the proposed amendment is timely since no deadlines had been set and the claims are not even at issue yet; (4) this was the first opportunity to the amend the pleadings within seven days of the Circuit Court denying Plaintiff's motion to strike new affirmative defenses.

The Circuit Court abused its discretion by erroneously conflating the prior action with this one and ignoring the effect of Defendant's new affirmative defenses raised for the very first time in the refiled action. As discussed more fully below, the failure to allow Plaintiff leave to file a timely amended complaint was dispositive of the claim and a complete abuse of discretion to railroad a Plaintiff in a complex case.

II. THE CIRCUIT COURT ERRED BY NOT ALLOWING DISCOVERY PRIOR TO HEARING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

Consistent with its unsound denial of Plaintiff's motion for leave to amend, the Court continued to railroad Plaintiff into a narrow claim by denying any discovery especially related to the never before asserted affirmative defenses prior to hearing a motion for summary judgment that asked the court to dispose of numerous questions of fact. (C. 403).

Just five months after Plaintiff filed his complaint and prior to the expiration of any applicable discovery deadlines, on September 25, 2017, Defendant brought a motion for summary judgment arguing several

affirmative factual matters relying on the emails drafted by the Defendant, Plaintiff's deposition transcript, several documents created by Defendant, and documents created by CT attorneys. (C. 206).

This case was still in the pleadings stages and no discovery has been taken by Plaintiff, to the extent the Court erroneously felt it was bound by discovery deadlines in the original action prior to voluntary dismissal (14 L 5650), non-opinion fact discovery was still open when the Plaintiff voluntarily dismissed his original complaint. (C. 197). Accordingly, there was absolutely no basis in the record to deny limited discovery of deposing the Defendant and his partner.

The motion for summary judgment argued in pertinent part that the parties agreed to a scope of representation that is inconsistent with the work actually performed by Defendant for Paul. (C. 207). The motion for summary judgment argued only that collateral estoppel applied to some of negligent acts and omissions alleged by Paul but did not address other matters in which Defendant provided legal services. (These other matters were discussed detail in proposed Plaintiff's Amended Complaint and as alleged in part in Plaintiff's original Complaint at ¶¶ 19, 20 detailing the fact that Marderosian appeared for Paul in another matter)(C. 9). The Circuit Court erred in denying Plaintiff leave to take any discovery where the record made clear that discovery was necessary to respond to new facts raised by Defendant and supported by his emails and documents drafted by Defendant. (C. 369) This factual argument

could not have been fairly responded to without discovery related to this issue. *Id.*

Supreme Court Rule 191(b) sets forth the procedure to be followed when a party believes that additional discovery is needed to properly respond to a motion for summary judgment. *Kane v. Motorola, Inc.*, 335 Ill. App. 3d 214, 224, 779 N.E.2d 302 (2002).

Specifically, Rule 191(b) provides:

> If the affidavit of either party contains a statement that any material facts which ought to appear in the affidavit are known only to persons whose affidavits affiant [has been] unable to procure by reason of hostility or otherwise, naming the persons and showing why their affidavits cannot be procured and what affiant believes they would testify to if sworn, with reasons for his belief, the court may make any order that may be just, either granting or refusing the motion, or granting a continuance to permit affidavits to be obtained, or for submitting interrogatories to or taking the depositions of any of the persons so named, or for producing papers or documents in the possession of those persons or furnishing sworn copies thereof.

Strict compliance with subsection (a) of this Rule is necessary to ensure that trial judges are presented with valid evidentiary facts upon which to base a decision. *Solon v. Godbole*, 163 Ill. App. 3d 845, 516 N.E.2d 1045 (3d Dist. 1987). The correct cure for the use of these supporting documents would have been to allow Plaintiff to take limited discovery including the deposition of Defendant, Steven Marderosian and his partner Kendra Marderosian.

Defendant's primary argument that was adopted by the Circuit Court in denying routine discovery was that Plaintiff (who was at that time being negligently advised by inexperienced counsel) refused to come to Chicago for

his deposition in 14 L 5650 despite no sanctions being entered in that matter and (after retaining competent counsel) Plaintiff appeared in Chicago for his deposition in this matter without objection. (C. 381). To deny Plaintiff the opportunity to depose the Defendant prior to responding to a Motion for Summary Judgment is a gross error where no discovery deadlines had passed and no discovery sanctions were entered. Affirming the Circuit Court would authorize ignoring basic rules of civil procedure in order to dispose of a complex claim just because a Plaintiff's legal malpractice claim is unsympathetic.

III. THE CIRCUIT COURT ABUSED ITS DISCRETION BY NOT GRANTING PLAINTIFF LEAVE TO AMEND HIS COMPLAINT AFTER THE MOTION FOR SUMMARY JUDGMENT WAS GRANTED.

735 ILSC 2-1005(g) provides: "Before or after the entry of a summary judgment, the court shall permit pleadings to be amended upon just and reasonable terms." Terms are considered to be just and reasonable if, by permitting the amendment, the ends of justice will furthered. *In re Estate of Hopkins*, 214 Ill. App. 3d 427, 574 N.E.2d 230 (2d Dist. 1991).

To determine whether a pleading amendment should be permitted after the entry of summary judgment, the appropriate standards to be met are whether the proposed amendment would cure the defective pleading, whether other parties would sustain prejudice or surprise by virtue of the proposed amendment, the timeliness of the proposed amendment, and whether plaintiff has had previous opportunities to amend the pleadings. *Lewis v. American Airlines*, 287 Ill. App. 3d 957, 678 N.E.2d 728 (1st Dist. 1997).

Subsection (g) does not require the court to allow the useless act of repleading claims on which it has already decided that summary judgment is required; amendment may be appropriate, however, where summary judgment is entered on the theory pleaded, but the depositions and affidavits indicate that another theory is viable. *Steinberg v. Dunseth*, 276 Ill. App. 3d 1038, 658 N.E.2d 1239 (4th Dist. 1995). In this case, although the facts were inartfully pled in the original Complaint adopted from predecessor counsel, Plaintiff sought leave to file an amended complaint detailing Marderosian's negligent representation outside the scope that could be summarily adjudicated based on collateral estoppel. As discussed above the proposed amendment, even after summary judgment would have been timely since discovery had barely begun and the claims were not even at issue, there was one previous opportunity to amend which was erroneously denied, and there would have been no prejudice at this early stage of the pleadings.

The Circuit Court erroneously failed to follow controlling analogous precedent, *In re Estate of Hoover*, 155 Ill. 2d 402, 615 N.E.2d 736, (1993), where the Illinois Supreme Court held, the trial court abused its discretion and should have allowed the plaintiffs to amend their complaint to allege a count of fraud in the inducement where allowing plaintiffs leave to amend would not have surprised or prejudiced the defendants since plaintiffs submitted the additional factual information in opposition to defendants' motion for summary judgment. *Id.* This is directly analogous to the present case where Plaintiff

addressed the additional facts supporting Marderosian's negligence outside of the limited scope addressed in the narrow motion for summary judgment. (C. 407). In addition, like this case, plaintiffs' motion to amend in *Hoover* occurred while this cause was still in the pleading stage, plaintiffs filed their motion to amend only 18 days after entry of summary judgment, and only amended their complaint on two prior occasions in response to defendants' claims of insufficient factual allegations. *In re Estate of Hoover*, 155 Ill. 2d at 407, 615 N.E.2d at 743. Like *Hoover,* this case was still in the pleadings stage and the request to amend was made immediately following entry of summary judgment on the narrow motion. This Court should follow analogous controlling precedent and find that the Circuit Court abused its discretion in refusing to allow leave to amend.

Evans v. United Bank of Illinois, N.A., 226 Ill. App. 3d 526, 589 N.E.2d 933, (2d Dist. 1992) is analogous and persuasive here where the trial court abused its discretion in denying plaintiff leave to amend complaint where the proposed amendment would have cured the defective pleading. In *Evans,* just like this case, there was nothing in the record to indicate that the defendant would sustain prejudice or surprise by virtue of proposed amendment, and it was the first opportunity for plaintiff to amend the complaint since defendant never filed a motion to dismiss the complaint for failure to state a cause of action. *Id.*

The *Evans* Court reasoned that *Hill* and *Loyola Academy* are inapplicable after summary judgment and instead choose to followed the well-settled

precedent of *Siebert v. Continental Oil Co.,* 161 Ill. App. 3d 891, 515 N.E.2d 728 (1st Dist. 1987). In *Siebert,* the court discussed the relationship between the then-recently enacted section 2-1005(g) and section 2-616. The court noted that the "just and reasonable" language of section 2-1005(g) was similar to the requirement of section 2-616 that the court permit amendments if it will further the ends of justice. *Id.,* 161 Ill. App. 3d at 895. Consequently, the court determined that the sections were compatible and that it should rely on the factors detailed in *Kupianen v. Graham*, 107 Ill. App. 3d 373, 437 N.E.2d 774 (1982) (which concerned section 2-616).

Applying *Kupianen,* the Court must first consider whether the proposed amendment would cure the defective pleading. *Id.,* 107 Ill. App. 3d at 377. The proposed amendment would have pled, as discussed in opposition to the motion for summary judgment that Marderosian did significant, negligent work for Paul outside the alleged scope of the engagement. (C. 407). These allegations would support a judgment for Paul even if Plaintiff was collaterally estopped from pursuing a claim within the alleged scope of the representation. Thus, plaintiff has satisfied the first factor as noted by the Circuit Court when ruling on the motion for summary judgment. *See* (R. 33).

Second, there is nothing in the record to indicate that defendant would sustain prejudice or surprise by virtue of the proposed amendment. *Id.,* 107 Ill. App. 3d at 377. The proceedings are still in the pleading stage as Defendant

has just new affirmative defenses. (C. 31). The proposed amendment was timely for the same reason.

Finally, just as in *Evans,* this was the first opportunity for plaintiff to amend his complaint, since defendant never filed a motion to dismiss the complaint for failure to state a cause of action after the refiling. *See Evans.,* 226 Ill. App. 3d at 533-535, 589 N.E.2d at 938-939. This Court should follow *Evans* and conclude that the trial court abused its discretion in denying plaintiff leave to amend his complaint.

IV. APPLYING *DE NOVO* REVIEW, THE ORDER GRANTING SUMMARY JUDGMENT SHOULD BE REVERSED, REGARDLESS OF AMENDMENT OF THE COMPLAINT, BECAUSE THE COURT IMPERMISSIBLY DECIDED DISPUTED ISSUES OF FACT AS TO DEFENDANT'S BREACH OF DUTIES FOR WORK PERFORMED AND ADVICE GIVEN OUTSIDE LIMITED SCOPE OF ENGAGMENT.

The motion for summary judgment argued collateral estoppel applies to some of Paul's claims but did not address other matters in which Defendant offered legal advice. (C. 412 specifically referencing work outside the alleged scope, and generally alleging negligence outside the defined scope of representation). Thus, even if this Court affirmed the ruling on the issue of collateral estoppel that does not dispose of Plaintiff's claims regarding advice given in other matters. (C. 415). The Circuit Court erroneously stretched a very narrow motion to a broad ruling completely disposing of Plaintiff's claims.

Marderosian apparently had a hard time saying no to Paul and volunteered advice on numerous issues outside of his claimed scope of representation. (C.

415). The law is clear that an attorney is liable for negligent advice even if he does not represent the client. *Lopez v. Clifford Law Offices, P.C.*, 362 Ill. App. 3d 969, 975 (1st Dist. 2005).

This case is directly analogous to *Lopez* where the attorney incorrectly advised the former client in a letter confirming his withdrawal from the case that a two-year limitations period was applicable, when in fact the limitations period was one year. *Lopez,* 362 Ill. App. 3d at 975. The client consulted another attorney within that one-year period, but he did not retain him. *Id.* This Court found the withdrawing attorney owed a duty to the former client when advising on the statute of limitations at the time of withdrawal. *Id.* This is analogous to the duty owed by Marderosian when advising on the time remaining to vacate the underlying judgment, the time to make a legal malpractice claim, the recommendation to send a demand letter to Floyd, or the recommendation to file an ARDC complaint against Floyd's counsel. (C. 405, C. 12)

The *Lopez* Court found that an attorney's duty of care applies to all matters he opines on even if after withdrawing, reasoning:

> It is axiomatic, as one court aptly put it, that the duty of an attorney encompasses protecting a client 'from self-inflicted harm." *Conklin v. Hannoch Weisman*, 145 N.J. 395, 412, 678 A.2d 1060, 1068 (1996). The court in Conklin recognized that "malpractice in furnishing legal advice is a function of the specific situation and the known predilections of the client," and the standard of care "must be tailored to the needs and sophistication of the client." *Conklin*, 145 N.J. at 413, 678 A.2d at 1069. The jurisdictions which considered attorney liability for incorrect legal advice, albeit not in the context of withdrawal, **generally look to whether the attorney was negligent in giving legal advice (elements of duty and breach) and whether the**

> **plaintiff relied to his detriment on the advice (elements of causation and damages)**. *See* Conklin, 145 N.J. at 420, 678 A.2d at 1072.

Id. at 974 (emphasis added).

This Court found that even though the negligent attorney did not have a duty to timely file the claims he still had a duty to correctly advise as to when the statute of limitations expired. *Id.* at 979 ("[I]t is of no import that the breach of duty occurred in communicating with the client rather than with respect to the case itself"). In this case, Plaintiff presents facts regarding numerous instances of incorrect advice that are not addressed in Defendant's motion for summary judgment including incorrectly advising Paul that additional time remained to vacate the judgment, additional time remained for Paul to pursue a legal malpractice claim, advising in Paul to demand money from his father.

Marderosian owes a duty for any advice he gave even if not within his supposed scope of representation. Where, as here, "an attorney undertakes a duty to one other than his client, he may be liable for damage caused by a breach of that duty to a person intended to be benefited by his performance." *Orr v. Shepard*, 171 Ill. App. 3d 104, 113, 524 N.E.2d 1105, 1111 (1st Dist. 1988). This Court should follow *Orr* thus Marderosian is liable for all advice negligently rendered to Paul regardless of his claimed scope.

But for Marderosian's negligence acts of: (1) not vacating the underlying settlement or advising Paul of the limitation; and (2) recommending Paul take

a very aggressive approach dealing with his father, *Abramson v. Abramson II* would not have been filed and Paul would not have suffered any damages. (C. 416). These issues were not addressed in Defendants' motion for summary judgment and there are no facts presented therein upon which the Circuit Court could possibly find as a matter of law that Marderosian was not negligent in his advising Paul outside of his representation in the narrow claim against CT. Rather than apply the law to the facts and deny the motion for summary judgment or even enter partial summary judgement, the Circuit Court blindly summarily disposed of numerous questions of fact raised in the complaint, detailed in response to summary judgment, and which Plaintiff repeatedly requested leave to highlight in a timely filed amended complaint.

V. APPLYING *DE NOVO* REVIEW, THE ORDER GRANTING SUMMARY JUDGMENT SHOULD BE REVERSED, REGARDLESS OF AMENDMENT OF THE COMPLAINT, BECAUSE THE COURT INCORRECTLY GAVE *RES JUDICATA* EFFECT TO A RULING ON A DISTINCT ISSUE NOT PREVIOUSLY PLED.

The Circuit Court erred in giving *res judicata* effect to an issue that was not actually litigated. CT was never sued for legal malpractice. Marderosian stated on the record, "To correct the record, it's actually a motion for breach of fiduciary duty and other claims, **it's not legal malpractice**." (C. 443) Marderosian is bound by his statement that he did not pursue legal malpractice. There can be no collateral estoppel of an issue Defendant admits was not actually litigated.

Marderosian's failure to allege a claim for legal malpractice against CT is the gravamen of Plaintiff's claim. Because legal malpractice was never alleged against CT there was never a ruling on the merits as to whether CT committed legal malpractice thus the Circuit Court erred as a matter of law that there was claim preclusion here. This Court held:

> Plaintiff's first amended complaint [filed by Marderosian] was properly dismissed pursuant to section 2-615 of the Illinois Code of Civil Procedure when he failed to plead sufficient facts to state a cause of action for (1) fraudulent inducement into a fee agreement, (2) rescission, (3) breach of fiduciary duty, and (4) breach of contract. Plaintiff's complaint seeking a declaratory judgement action was properly dismissed for failure to sufficiently plead that an actual controversy exists.

Abramson v. Chuhak & Tecson, P.C., 2013 IL App (1st) 121842-U, P1, 2013 Ill. App. Unpub. LEXIS 2942, *1, 2013 WL 6858463 (1st Dist. 2013).

Clearly, Marderosian did not allege legal malpractice against CT so claim preclusion does not apply to a future allegation of malpractice by CT properly pled in another matter.

Collateral estoppel may be applied as long as the party against whom application of the doctrine is sought is identical in both actions "and had a full and fair opportunity to litigate the issue which was necessarily determined in the prior proceeding." *Fried v. Polk Bros., Inc.*, 190 Ill. App. 3d 871, 879-880, 546 N.E.2d 1160, 1165 (2d Dist. 1989). In this case, Paul never had a full and fair opportunity to prove legal malpractice by CT because it was not alleged in the underlying complaint therefore the affirmative defense of collateral estoppel fails as a matter of law. (C. 411).

This Court found:

> Plaintiff next argues **[without support in the record]** that even if he did not state breach of fiduciary duty and contract claims, his allegations satisfy the pleading requirements for legal malpractice. We disagree. To be successful in a legal malpractice claim one has to allege: 1) the existence of an attorney-client relationship that establishes a duty on the part of the attorney; 2) a negligent act or omission that breached that duty; 3) proximate cause that establishes that but for the attorney's negligence, plaintiff would not have suffered an injury; and 4) damages. []As defendant correctly notes, plaintiff's assertion that decedent's assets had a value of $75 million and that he could have received a more favorable settlement, **without any factual support**, is mere speculation. The trial court pointed out in its order dated December 5, 2011, that "essential to a malpractice claim is the existence of actual monetary damages." [] [Plaintiff contends that as a result of defendant's negligent failure to properly investigate the estate value, he was pressured into accepting an inadequate settlement. Defendant counters that plaintiff was informed he did not have to settle and that defendant would withdraw as it was entitled to do under the fee agreement, and thus, plaintiff could not establish that he had to settle, which is fatal to any claim for professional negligence arising out of the settlement agreement. A malpractice action related to an allegedly poor settlement is only allowed "where it can be shown that the plaintiff had to settle for a lesser amount than she could reasonably expect without the malpractice." [] Defendant points out that **plaintiff did not allege that the other parties in the will contest would have settled his claim for a higher amount**. Defendant also contends that **plaintiff has failed to allege facts establishing that defendant was the proximate cause of any actual damages**. [] Defendant further asserts that plaintiff's beliefs as to the value of the estate and that he could have obtained a more favorable settlement constituted mere speculation. **We agree and find plaintiff did not satisfy the elements for a legal malpractice claim**.

Abramson v. Chuhak & Tecson, P.C., 2013 IL App (1st) 121842-U, P39-P40, 2013 Ill. App. Unpub. LEXIS 2942, *26-29, 2013 WL 6858463 (1st Dist. 2013) (emphasis added) (internal citations omitted).

The Circuit Court finding no claim for malpractice could possibly be proven in a later malpractice claim is a clear error where this Court only held that Marderosian did not allege a claim for malpractice in his complaint. Marderosian's defense in this action is that he never intended to file a claim for legal malpractice and that is exactly what this Court found. This Court did not find Plaintiff could not possibly assert a claim for legal malpractice instead it only found that none was pled by Marderosian thus his affirmative defense should have failed as a matter of law.

There was never a finding by any Court that there were no damages as a result of CT's negligence rather the only finding is that these facts were not pled. The only issue decided is what was pled rather than settling any factual question. Collateral estoppel does not apply to issues that might have been decided but were not, nor to matters incidentally decided that were not essential to support the judgment in the prior action. *Hassett Storage Warehouse*, I*nc. v. Board of Election* Commissioners, 69 Ill. App. 3d 972, 977-78, 387 N.E.2d 785, 790-91 (1979). The doctrine of collateral estoppel prevents the litigation of the same issue twice. Under that doctrine, a former judgment bars only those questions actually decided in the prior suit. *Decatur Housing Authority v. Christy-Foltz, Inc.*, 117 Ill. App. 3d 1077, 1082, 454 N.E.2d 379 (1st Dist. 1983). It is essential that there shall have been a finding of a specific fact in the prior judgment or record that is material and controlling in the pending case. It must also conclusively appear that the matter of fact was so

in issue that it was necessarily decided by the court rendering the judgment. If there is any uncertainty because more than one distinct issue of fact was presented, collateral estoppel will not apply. *Case Prestressing Corp. v. Chicago College of Osteopathic Medicine*, 118 Ill. App. 3d 782, 785, 455 N.E.2d 811 (1st Dist. 1983). The party asserting the preclusion bears the heavy burden of showing with clarity and certainty that the identical issue was decided in the prior case. *Best Coin-Op, Inc. v. Paul F. Ilg Supply Co*. 189 Ill. App. 3d 638, 661, 545 N.E.2d 481 (1st Dist. 1989). In this case, the Circuit Court erred because Marderosian failed to meet this high standard of clarity and certainty regarding an issue that was not litigated and no factual finding was made by any court.

Finally, even if the threshold elements of the doctrine were satisfied, and an identical common issue was found to exist between a former and current lawsuit, the Circuit Court erred it was not clear that no unfairness results to the party being estopped. *Kessinger v. Grefco, Inc.,* 173 Ill. 2d 447, 467-68, 672 N.E.2d 1149, 1158 (1996). It is axiomatic that circuit courts have broad discretion to ensure that application of offensive collateral estoppel is not fundamentally unfair to the party it is asserted against, even though the threshold requirements for collateral estoppel are otherwise satisfied. *Preferred Pers. Servs. v. Meltzer, Purtill & Stelle, LLC*, 387 Ill. App. 3d 933, 944-945 (1st Dist. 2009). In this case, where Paul is alleging Marderosian negligently failed to timely allege a claim for malpractice or advise him of the

risks of doing so, it is wholly unfair to allow Marderosian to claim as his defense essentially that this Court already found he failed to plead malpractice which is exactly what Paul claims Marderosian failed to do or warn him about! This is circular reasoning that if affirmed would allow negligent attorneys to escape liability in any case where they fail to plead a cause of action.

WHEREFORE, for the reasons stated herein, Plaintiff/Appellant, PAUL ABRAMSON, respectfully asks this Court to reverse the Circuit Court's entry of summary judgment, remand this case to the Circuit Court with instruction grant plaintiff leave to file an amended complaint and take discovery. In addition, Plaintiff asks that the Court accord any further relief that it deems just and appropriate under the circumstances.

Respectfully submitted,

PAUL ABRAMSON,
Plaintiff/Appellant

By: /s/ *Alexander N. Loftus*
One of His Attorneys

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Jeffrey L. Dorman, Esq.
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Dated: April 10, 2018

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 28 pages.

PAUL ABRAMSON
Plaintiff/Appellant,

By: /s/ *Alexander N. Loftus*
One of His Attorneys

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APPENDIX

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IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

Abramson
Plaintiff(s),

v.

Mardecosian
Defendant(s)

No. 17 L 3356

ORDER

This matter coming to be heard on Plaintiff's Motion for Leave to File Amended Complaint and Defendant's Motion for Summary Judgment, due notice given, and the Court fully advised, it is ORDERED:

T 5292 (1) Plaintiff's Motion for Leave is Denied;

(2) Plaintiff's oral request for Rule 304(a) language is Denied; a

Δ 4251 (3) A briefing schedule on Defendant's Motion for Summary Judgment to be entered by separate order;

(4) October 4, 2017 CMC is STRICKEN.

T 4331

Judge Margaret Ann Brennan
OCT 02 2017
Circuit Court - 1846

ENTERED:

Judge Margaret A. Brennan 1846

Atty. No.: 06347
Name: Johnson & Bell, Ltd. (RJ)
Atty. for: Defendant
Address: 33 W. Monroe
City/State/Zip: Chicago, IL 60603
Telephone: 312-372-0770

C 367

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IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

Abramson
Plaintiff(s),

v.

Meadowsman
Defendant(s)

No. 17 L 3356

ORDER

This matter coming to be heard on Plaintiff's Rule 191 Motion to Stay and Motion to Strike. It is hereby ordered

5368 (1) Plaintiff's motion to Stay is denied for the reasons stated in Defendant's Response.

(2) Plaintiff's Motion to strike is entered and continued. Defendant to respond on or

428 before 11-20-17.

Judge Margaret Ann Brennan

OCT 23 2017
Circuit Court - 1846

Atty. No.: 43671
Name: SLO Lobbies
Atty. for: P
Address: 10 S. LaSalle, 3500
City/State/Zip: Chicago, IL 60603
Telephone: 312-372-5396

C.C. MEM

ENTERED:

Judge Margaret A. Brennan 1846

C 403

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IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

Abramson
Plaintiff(s),

v.

Steven A. Marderosian
Defendant(s)

No. 17 L 3356

ORDER

This cause coming to be heard on Defendant's Motion for Summary Judgment, due notice given, and the Court fully advised on the premises, it is HEREBY ORDERED:

4022 ① Defendant's Motion for Summary Judgment is GRANTED for the reasons stated on the record.

5292 ② Plaintiff's oral motion for leave to file amended complaint is DENIED.

9208 ③ This is a final and appealable order.

Atty. No.: 06347
Name: Johnson & Bell, Ltd. (RJ)
Atty. for: Def.
Address: 33 W. Monroe
City/State/Zip: Chicago, IL 60603
Telephone: (312) 372-0770

C.C. MEM

ENTERED:

Judge Margaret A. Brennan 1846

Judge Margaret Ann Brennan

DEC 19 2017

Circuit Court - 1846

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Notice of Appeal (10/18/17) CCA 0256 A

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

County **DEPARTMENT,** Law **DIVISION/DISTRICT**

Paul Abramson

Plaintiff/ • Appellant Appellee

v.

Steven A. Marderosian

Defendant/ Appellant • Appellee

Reviewing Court No.:

Circuit Court No.: 17 L 3356

NOTICE OF APPEAL

(Check if applicable. See IL Sup. Ct. Rule 303(a))(3).

Joining Prior Appeal Separate Appeal Cross Appeal

Appellant's Name: Paul Abramson
• Atty. No.: 43761 Pro Se 99500
Atty Name: Alexander Loftus-Stoltmann Law Offices
Address: 10 S. LaSalle, Suite 3500
City: Chicago State: IL
Zip: 60606
Telephone: 312-332-4200
Primary Email: alex@stoltlaw.com
Secondary Email:
Tertiary Email:

Appellee's Name: Steven A. Marderosian
• Atty. No.: 06347 Pro Se 99500
Atty Name: Johnson & Bell
Address: 33 West Monroe Street., Suite 2700
City: Chicago State: IL
Zip: 60603
Telephone: 312-372-0770
Primary Email: jalalpourr@jbltd.com
Secondary Email: marconij@jbltd.com
Tertiary Email:

An appeal is taken from the order or judgment described below:

Date of the judgment/order being appealed: 12/19/17

Name of judge who entered the judgment/order being appealed: Margaret Brennan

Relief sought from Reviewing Court:

Reverse and remand judgment entered on December 19, 2017 and all prior orders made final therein.

I understand that a *"Request for Preparation of Record on Appeal"* form (CCA 0025) must be completed and the initial payment of $110 made prior to the preparation of the Record on Appeal. The Clerk's Office will not begin preparation of the ROA until the Request form and payment are received. Failure to request preparation of the ROA in a timely manner, i.e., at least 30 days before the ROA is due to the Appellate Court, may require the Appellant to file a request for extension of time with the Appellate Court. A *"Request for Preparation of Supplemental Record on Appeal"* form (CCA 0023) must be completed prior to the preparation of the Supplemental ROA.

To be signed by Appellant or Appellant's Attorney

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE COOK JUDICIAL CIRCUIT
COOK COUNTY, ILLINOIS

PAUL ABRAMSON
Plaintiff/Petitioner

Reviewing Court No: 1-18-0081
Circuit Court No: 2017L003356
Trial Judge: MARGARET BRENNAN

v.

STEVEN A. MARDEROSIAN
Defendant/Respondent

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