

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

1375

CA 09-01710

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND PINE, JJ.

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MELODY BARROWS AND TIMOTHY BARROWS,  
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

JAMES ALEXANDER AND PETER CATALANO,  
INDIVIDUALLY AND DOING BUSINESS AS  
ALEXANDER & CATALANO, LLP, ALEXANDER &  
CATALANO, LLC, ALEXANDER & CATALANO, LLP  
AND ALEXANDER & CATALANO, LLC,  
DEFENDANTS-RESPONDENTS.

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S. ROBERT WILLIAMS, PLLC, SYRACUSE (MICHELLE RUDDEROW OF COUNSEL), FOR  
PLAINTIFFS-APPELLANTS.

SMITH, SOVIK, KENDRICK & SUGNET, PC, SYRACUSE (MICHELLE M. DAVOLI OF  
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered June 8, 2009 in a legal malpractice action. The order denied plaintiffs' motion for leave to amend their complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this legal malpractice action, plaintiffs appeal from an order denying their motion for leave to amend the complaint to assert a cause of action under Judiciary Law § 487, pursuant to which they would be entitled to recover treble damages from an attorney who "[i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . ." In support of their motion, plaintiffs alleged that Peter Catalano (defendant), who represented plaintiffs in the underlying personal injury action, engaged in deceitful conduct during the course of this malpractice action, both with respect to plaintiffs and Supreme Court. We conclude that the court properly denied the motion inasmuch as the proposed amendment is patently lacking in merit (*see generally Anderson v Nottingham Vil. Homeowner's Assn., Inc.*, 37 AD3d 1195, 1198, *rearg granted* 41 AD3d 1324). Section 487 applies only "to an attorney acting in his or her capacity as an attorney, not to a party who is represented by counsel and who, incidentally, is an attorney" (*Oakes v Muka*, 56 AD3d 1057, 1058), and here defendant was not acting in his capacity as an attorney in the context of this legal

malpractice action (*see Gelmin v Quicke*, 224 AD2d 481, 482-483). Plaintiffs' reliance on *Kurman v Schnapp* (73 AD3d 435) is misplaced because the record in that case establishes that the defendant was acting in his capacity as an attorney when he engaged in the alleged deceitful conduct.

Finally, the contention of plaintiffs that the court erred in denying their motion for summary judgment is not properly before us because plaintiffs failed to take an appeal from the order denying that motion.