

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

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**CA 11-01929**

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

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CHRISTOPHER CATUZZA, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

DAVID RODRIGUEZ, ESQ., NOEMI  
FERNANDEZ-HILTZ, ESQ., AND THE LAW  
OFFICES OF NOEMI FERNANDEZ, PLLC,  
DEFENDANTS-APPELLANTS.

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DAMON MOREY LLP, BUFFALO (KARA M. ADDELMAN OF COUNSEL), FOR  
DEFENDANT-APPELLANT DAVID RODRIGUEZ, ESQ.

HURWITZ & FINE, P.C., BUFFALO (EARL K. CANTWELL OF COUNSEL), FOR  
DEFENDANTS-APPELLANTS NOEMI FERNANDEZ-HILTZ, ESQ., AND THE LAW OFFICES  
OF NOEMI FERNANDEZ, PLLC.

KEVIN T. STOCKER, TONAWANDA, FOR PLAINTIFF-RESPONDENT.

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Appeals from an order of the Supreme Court, Erie County  
(Frederick J. Marshall, J.), entered April 4, 2011 in a legal  
malpractice action. The order denied the motions of defendants for  
summary judgment.

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

Memorandum: Plaintiff commenced this legal malpractice action  
seeking damages allegedly resulting from defendants' negligence in  
their representation of him in an action against, inter alia, his  
former employer, the Erie County Water Authority (hereafter, ECWA  
action). The ECWA action was dismissed based upon plaintiff's failure  
to comply with discovery demands. Supreme Court properly denied the  
motion of defendant David Rodriguez, Esq. and the motion of defendants  
Noemi Fernandez-Hiltz, Esq. and The Law Offices of Noemi Fernandez,  
PLLC seeking summary judgment dismissing the complaint. Defendants  
moved for such relief on the ground that plaintiff could not have  
prevailed in the ECWA action, inasmuch as he failed to exhaust his  
administrative remedies by appealing the determination of the Hearing  
Officer in the prior proceeding pursuant to Civil Service Law § 72.  
Defendants, however, failed to establish as a matter of law that the  
complaint in the ECWA action would have been dismissed on that ground  
(see generally *Zuckerman v City of New York*, 49 NY2d 557, 562).  
Failure to exhaust administrative remedies is a defense that may be  
waived if not timely raised (see *Matter of Punis v Perales*, 112 AD2d

236, 238), and the defendants in the ECWA action did not raise that defense in their answer. Further, inasmuch as " 'the grounds urged for relief' and the remedies sought in [the ECWA action and the prior Civil Service Law § 72 proceeding] are separate and distinct," plaintiff did not fail to exhaust his administrative remedies with respect to the conduct of the defendants in the ECWA action (*Matter of Sokol v Granville Cent. School Dist. Bd. of Educ.*, 260 AD2d 692, 694).