STATE OF MICHIGAN

COURT OF APPEALS

ARZELLA KNIGHTON,

Plaintiff-Appellant,

v

DAVID A. GOLDENBERG, GOLDENBERG & GELLER, MANUEL L. PAPISTA and LIPTON, PAPISTA, COHEN & ALLI, P.C.,

Defendants-Appellees.

UNPUBLISHED
August 18, 1998

No. 199541
Wayne Circuit Court
LC No. 95-528947 NM

Before: Markman, P.J. and Saad and Hoekstra, J.J.

PER CURIAM.

In this legal malpractice action, plaintiff appeals as of right from an order granting defendants' motions for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). In addition, plaintiff contends that the trial court abused its discretion in denying her motion to amend her complaint to add additional acts of negligence. We affirm.

I. FACTS AND PROCEEDINGS

In January 1986, plaintiff executed several documents, including a promissory note, in contemplation of a mortgage loan from Diamond Mortgage Corporation. At the time of the closing, Diamond Mortgage informed plaintiff that no loan proceeds would be disbursed until the promissory note was sold to an investor. On or about February 3, 1986, unbeknownst to plaintiff, the mortgage note was assigned to William K. Stradtner, Sr., and the mortgage was recorded. Plaintiff, however, never received any money in exchange for the executed note and mortgage. After initial attempts to inquire about the status of her loan monies, plaintiff heard news reports about the Diamond Mortgage scandal and abandoned her efforts. It was not until mid-April, 1989, that plaintiff discovered the recorded mortgage when she tried to sell her house. Stradtner eventually foreclosed on the note.

After discovering the encumbrance on her property, plaintiff sought the advice of attorney Manuel L. Papista of the firm Lipton, Papista, Cohen & Alli, P.C. ("Lipton, Papista"). Papista, who

had previously represented plaintiff in other matters, decided that plaintiff required the expertise of a litigator, and referred plaintiff to defendant, David A. Goldenberg, an attorney "of counsel" to Lipton, Papista.

In November, 1989, Goldenberg filed suit on plaintiff's behalf against Stradtner in federal court. Plaintiff's complaint sought rescission of the loan transaction under the provisions of the Truth in Lending Act (hereinafter referred to as "TILA"), 15 USC 1601 *et seq*. When the federal court indicated that it was inclined to dismiss plaintiff's TILA rescission claim on statute of limitations grounds, Goldenberg voluntarily dismissed plaintiff's federal court complaint pursuant to a stipulation with Stradtner's counsel. Goldenberg then filed a complaint in state court, without asserting the TILA claims.

Plaintiff prevailed on summary disposition in the trial court, but ultimately lost on appeal. In an unpublished, per curiam opinion, this Court held that plaintiff could not assert a lack of consideration argument against Stradtner because the note was a negotiable instrument and Stradtner was a holder in due course.[1] In a footnote, this Court acknowledged the theoretical merit of a TILA rescission claim, but noted that plaintiff's counsel stipulated to the dismissal of this claim in the earlier federal court suit. *Id.*

One year later, plaintiff filed this legal malpractice suit. She alleged that defendants were negligent in their legal representation when they stipulated to dismissal of her TILA rescission claim, despite the district court's warning that the claim was time-barred, because defendants could have avoided the statute of limitations by pleading an equitable tolling exception. Plaintiff also made a "negligent referral" allegation against Papista. The trial court granted defendants' motions for summary disposition based upon a finding that even if defendants had argued the doctrine of equitable tolling, plaintiff's federal court complaint still would have been dismissed because equitable tolling cannot be asserted to toll the three-year limitation period applicable to TILA rescission claims. Plaintiff unsuccessfully moved to amend her complaint to add additional claims regarding various arguments defendants might have raised to avoid the statute of limitations. Consequently, this appeal ensued.

II. ANALYSIS

Plaintiff asserts that the trial court abused its discretion when it precluded plaintiff from amending her complaint to add additional allegations of negligence against defendants based upon a finding that the contemplated amendments were untimely. The grant or denial of leave to amend is within the trial court's discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). This Court will not reverse a trial court's decision regarding leave to amend unless it constituted an abuse of discretion which resulted in injustice. *Id.* Though the court incorrectly ruled, in our judgment, that the amendments were untimely[2], we nonetheless affirm the court's ruling because her proposed new claims were futile.[3] *Boyle v Odette,* 168 Mich App 737, 746; 425 NW2d 472 (1988). As a matter of law, plaintiff could not have prevailed on any of her proposed theories.

In order to prevail in a legal malpractice action, the plaintiff must establish: (1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was a proximate cause of the injury; and, (4) the fact and extent of the injury alleged.

Charles Reinhart Co v Winiemko, 444 Mich 579, 585; 513 NW2d 773 (1994). With respect to the proximate cause element, plaintiff must show that but for the attorney's alleged malpractice, she would have been successful in the underlying suit. *Id.* at 586. This is the "suit within a suit" concept and it requires that the plaintiff accomplish "the difficult task of proving two cases within a single proceeding." *Id.* at 586.

Raising equitable estoppel/equitable tolling and lack of consummation of the transaction to avoid Stradtner's statute of limitations defense would have been futile because these theories have not been successfully employed to avoid the absolute three-year limitation period applicable to TILA *rescission* claims—they apply only to TILA *damage* claims. See *Shaw v Federal Mortgage & Investment*, 178 BR 380 (1994); *Thomas v Leja*, 187 Mich App 418, 419; 468 NW2d 58 (1991); *Stone v Mehlberg*, 728 F Supp 1341, 1347 (WD Mich, 1990); *King v California*, 784 F2d 910, 914 (CA 9, 1986); *Rudisell v Fifth Third* Bank 622 F2d 243, 247 (CA 6, 1980); *Rodriguez v County Lumber and Supply Co, Inc*, 460 F Supp 810, 811 (ND IL, 1978); *Jamerson v Miles*, 421 F Supp 107, 110 (ND Texas, 1976).

Similarly, plaintiff's proposed "informed consent" theory regarding the Papista to Goldenberg referral would have been futile because plaintiff could not prove that lack of informed consent was the proximate cause of her damages. By analogy see, e.g., *McPhee v Bay City Samaritan Hospital*, 10 Mich App 567, 572; 159 NW2d 880 (1968). Plaintiff cannot demonstrate that she would have prevailed if Papista had informed her of Goldenberg's alleged lack of TILA experience because she would also have to show whom she would have selected as her attorney and how this attorney could have successfully handled her claims. All this would be sheer speculation.

In another proposed amendment, plaintiff argued that defendants could have avoided any statute of limitations issues by pursuing rescission as a recoupment remedy to Stradtner's foreclosure action in lieu of affirmatively seeking rescission under TILA. She cites case law which has held that the three-year limitations period is not applicable to rescission claims raised in the recoupment remedy context. See, e.g., *Fidler v Central Cooperative Bank*, 210 BR 411, 419-420 (1997); *Botelho v Citicorp Mortgage, Inc*, 195 BR 558, 556-567 (1996); *Shaw, supra*, 380; *Federal Deposit Insurance Corp v Ablin*, 177 Ill App 3d 390; 532 NE2d 379 (1988); *Dawe v Merchants Mortg & Trust Corp*, 683 P2d 796 (Colo, 1984). Authority for this principle has been effectively overruled by the United States Supreme Court's decision in *Beach v Ocean Federal Bank*, __ US __; 118 S Ct 1408; __ L Ed 2d __ (1998). The United States Supreme Court clearly held that mortgagors *could not* assert a right to rescind as a recoupment defense in a foreclosure action brought by the mortgagee more than three years after the consummation of the transaction. This decision specifically stated that previous court decisions to the contrary—including cases cited by plaintiff—were erroneous. Therefore, this amendment would also have been futile.

With respect to the trial court's granting of summary disposition as to the claims alleged in plaintiff's original complaint, we find no error. Even if Goldenberg had argued the doctrine of equitable tolling in the federal court, it would not have been successful. As mentioned above, equitable tolling theories have not been successfully employed to avoid the absolute three-year limitation period

applicable to TILA rescission claims. See *Shaw, supra*; *Thomas, supra*; *Stone, supra*; *King*, supra; *Rudisell, supra; Rodriguez, supra*; *Jamerson, supra*.

Summary disposition was also proper as to the claim that Papista and/or Lipton, Papista negligently referred plaintiff to Goldenberg. This jurisdiction has not recognized a cause of action for negligent referral in the context of a legal malpractice action. If such a cause of action did exist, plaintiff's claim would nonetheless fail for lack of evidence that Papista and/or Lipton, Papista had knowledge of any facts that would indicate that Goldenberg was incompetent to handle the TILA matter or that he would commit legal malpractice.

Affirmed.

/s/ Stephen J. Markman
/s/ Henry William Saad
/s/ Joel P. Hoekstra

[1] *Knighton v Stradtner*, unpublished opinion per curiam of the Court of Appeals, issued November 9, 1994 (Docket No. 148625).

[2] Here, undue delay was not a sufficient reason to deny the motion to amend. Although plaintiff did not move to amend until discovery was closed and mediation, defendants have not shown that the amendments would prejudice their position. The additional theories were legal in nature, and defendants would have been able to research the theories in time for mediation and trial.

[3] However, we affirm because this Court will not reverse a trial court's decision if the right result is reached for the wrong reason. *Schellenberg v Rochester Elks*, 228 Mich App 20, 46-47; 577 NW2d 163 (1998); *Holland Home v. City of Grand Rapids* 219 Mich App 384, 400; 557 NW2d 118 (1996).