

STATE OF MICHIGAN
COURT OF APPEALS

VICTORIA EASTERDAY,

Plaintiff-Appellant,

v

SECRET WARDLE LYNCH HAMPTON
TRUEX & MORLEY, P.C., and
FRANK A. FLEISCHMANN,

Defendants-Appellees.

UNPUBLISHED
December 29, 2005

No. 262650
Eaton Circuit Court
LC No. 04-001622-NM

Before: Owens, P.J., and Saad and Fort Hood, JJ

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants' motion for summary disposition of her claims for legal malpractice and intentional infliction of emotional distress. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff filed a lawsuit against SBC Ameritech, Inc., and SBC filed a counterclaim. After SBC entered a default on the counterclaim, plaintiff's motion to set the default aside was taken under advisement; plaintiff was given ten days to file a proper affidavit of meritorious defense. Plaintiff timely filed an "affidavit of facts" to which SBC objected; the motion to set aside the default remained pending.

Thereafter, SBC moved to dismiss the complaint based on plaintiff's alleged failure to comply with a stipulated order compelling discovery. Prior to the hearing defendant Frank Fleischmann, a member of defendant law firm Secrest Wardle Lynch Hampton Truex & Morley, P.C. ("Secrest Wardle"), entered an appearance on behalf of plaintiff. SBC advised Fleischmann it would not waive a conflict which existed since Secrest Wardle was representing Ameritech on a different matter. Fleischmann telefaxed a letter to SBC's counsel, copying plaintiff, and stating that he would be unable to appear at the hearing. Although defendants provided a fax transmittal message confirmation, plaintiff claimed she did not receive the facsimile.

Although aware of Fleischmann's request to postpone, the trial court went forward with the hearing. SBC asserted that plaintiff had agreed in a stipulated order to dismissal with prejudice if certain discovery was not provided by a date certain. The trial court concurred. Thereafter, SBC requested action on the default entered against plaintiff on the counterclaim.

Plaintiff alleges that defendants Fleischmann and Secret Wardle did not take any action in response to SBC's request, and did not inform her of the request. The trial court entered an order stating that plaintiff's affidavit did not comply with the earlier order and that the motion to set aside the default was denied. A default judgment was entered against plaintiff. Fleischmann, but not plaintiff, was served with a copy of the order denying the motion to set aside the default, and was listed as the attorney of record for plaintiff on the default judgment.

Defendants sought summary disposition of plaintiff's complaint. Plaintiff alleged that defendants did not advise her that they would not be attending the hearing on the motion to dismiss, did not advise of a conflict, and did not take steps to remove themselves from representing her in the case. She also claims that defendants never advised her that the case had been dismissed or took steps to appeal the dismissal or have the case reinstated. Regarding the default, she alleges that defendants never advised her of the filings or proceedings, and never took any action to try to prevent the entry of a default. The trial court granted defendants' motion, concluding that plaintiff could not show she would have prevailed on the merits of the underlying claim.

Plaintiff concedes as much in her brief on appeal, stating:

[T]he truth is that no one can ever really know what would have happened in the *Easterday-Ameritech* lawsuit had Ms. Easterday actually been represented by counsel at the relevant and critical time period who did something more than lie to her about the status of the case.

In *Coleman v Gurwin*, 443 Mich 59; 503 NW2d 435 (1993), the Court stated: "a plaintiff in a legal malpractice action must show that but for the attorney's alleged malpractice, he would have been successful in the underlying suit," as anything less would allow for a judgment based on speculation. *Id.* at 63. Since plaintiff concedes that her chances of success in the underlying suit were at best speculative, summary disposition of the legal malpractice claim was proper.

Plaintiff makes a conclusory assertion that it was also error to grant summary disposition of the intentional infliction of emotional distress claim. We conclude that defendants' actions, if true, were egregious, but cannot say that they were "so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" such that, upon "recitation of the facts to an average member of the community," resentment would be aroused so as to lead that hypothetical person "to exclaim, 'Outrageous!'" Restatement Torts, 2d § 46, comment d, pp 72-73, quoted in *Bernhardt v Ingham Regional Medical Center*, 249 Mich App 274, 278; 641 NW2d 868 (2002). Accordingly, summary disposition of this claim was also proper.

Affirmed. However, we direct the Clerk of this Court to forward this opinion to the Attorney Grievance Commission for possible investigation.

/s/ Donald S. Owens
/s/ Henry William Saad
/s/ Karen M. Fort Hood