

STATE OF MICHIGAN
COURT OF APPEALS

CAROL STENLI, as Personal Representative of
the Estate of ARTHUR STENLI,

UNPUBLISHED
March 11, 2008

Plaintiff-Appellant,

v

ROBERT BAKER, P.C., and ROBERT BAKER.

No. 276143
Oakland Circuit Court
LC No. 05-070323-NM

Defendants-Appellees.

Before: White, P.J., and Hoekstra and Schuette, JJ.

PER CURIAM.

In this suit for legal malpractice, plaintiff Carol Stenli, as personal representative of the estate of her late husband¹, Arthur Stenli, appeals as of right the trial court's order granting summary disposition in favor of defendants Robert Baker and Robert Baker, P.C., pursuant to MCR 2.116(C)(10). Because we conclude that plaintiff failed to establish a genuine issue of material fact regarding whether Arthur was compelled by attorney negligence to accept settlement of the litigation underlying this suit, we affirm.

I. Basic Facts and Procedural History

This case arises from defendant Robert Baker's representation of Arthur Stenli in a suit for legal malpractice against attorney Douglas Keast. According to the complaint filed in this matter, Keast had been retained to represent Arthur in a prior suit to recover monies owed on a promissory note executed by Asaad and Marcell Alam in connection with the sale of a restaurant. At the trial of that matter, the district court dismissed the suit on motion by the defense following presentation of Arthur's case, concluding that the assignment of the note to Arthur was invalid, and that Arthur had been repaid through other financial dealings. Arthur retained Keast to appeal the district court's dismissal of his suit. According to Stenli, however, although repeatedly informing Arthur that an appeal of the matter was pending before the Macomb Circuit Court,

¹ Although the instant suit was brought by Arthur Stenli as plaintiff, Arthur died before resolution of the matter. As personal representative of his estate, plaintiff Carol Stenli was subsequently substituted as plaintiff by stipulation of the parties.

Keast in fact failed to timely file or otherwise competently pursue the appeal, resulting in its dismissal.

Arthur thereafter retained defendant Robert Baker to file suit against Keast and his law firm for malpractice in the handling of the Alam case. The circuit court granted summary disposition in favor of Keast, concluding that an appellate court would not have reversed the district court's rulings on the assignment and repayment issues, and that therefore Arthur was unable to show the requisite proximate causation, i.e., that, "but for" Keast's alleged malpractice, he would have prevailed in the underlying matters. A panel of this Court reversed, finding that the assignment was valid and that "Arthur had sustained his burden in showing that, but for Keast's negligence, he would have succeeded in the underlying law suit. *Arthur v Keast*, unpublished opinion per curiam of the Court of Appeals, issued February 25, 2003 (Docket No. 237741), slip op at 6. In lieu of granting leave to appeal, our Supreme Court vacated this Court's judgment and remanded for further proceedings, stating that Keast's representation at trial was not inadequate, that he established a prima facie case against the Alams at trial, that relief from the district court's finding a judgment was available by way of appeal, but that the question whether the appeal was lost due to Keast's alleged negligence had yet to be determined. Following remand, the parties participated in settlement negotiations during which Arthur agreed to settle the malpractice suit against Keast for \$150,000.

Arthur subsequently filed the instant suit for legal malpractice against defendants Robert Baker and Robert Baker, P.C. In his complaint, Arthur alleged that while Baker initially told him that he had a "great case," Baker negligently indicated during settlement negotiations that Arthur's inability to produce the original promissory note executed by the Alams so affected his case that he would not be able to win at trial. He further alleged that, relying on these statements by Baker, he settled the matter for an inadequate amount. Following discovery, the trial court granted summary disposition in favor of defendants on the ground given Arthur's acknowledgment that "other issues" affecting his case against Keast were discussed with and considered by him in determining whether to settle the matter, plaintiff had failed to establish that Arthur was compelled by Baker's allegedly negligent statement to accept settlement of the underlying litigation in lieu of trial.

II. Analysis

On appeal, plaintiff argues that the trial court erred in granting summary disposition in favor of defendants. Specifically, plaintiff argues that Arthur's deposition testimony made clear that while several factors concerning the likelihood of his prevailing at trial were discussed at facilitation, Baker's statement that he "didn't have a case" because he could produce only "a copy of the [p]romissory [n]ote" was the primary reason Arthur chose to settle the suit. In light of this testimony, plaintiff argues, a genuine issue of material fact concerning whether Baker's statements left Arthur with no other reasonable option but to settle the case existed, thereby precluding summary disposition under MCR 2.116(C)(10). We disagree.

A trial court's decision on a motion for summary disposition is reviewed de novo on appeal. *Brown v Mayor of Detroit*, 271 Mich App 692, 705; 723 NW2d 464 (2006). A motion filed under MCR 2.116(C)(10) tests the factual support for a claim, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003), and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, *Miller v Purcell*,

246 Mich App 244, 246; 631 NW2d 760 (2001). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rely on mere allegations or denials in the pleadings but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A genuine issue of material fact exists when the record, viewed in the light most favorable to the nonmoving party, leaves open an issue on which reasonable minds could differ. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

To establish a claim of legal malpractice, a plaintiff must show (1) an attorney-client relationship, (2) negligence in the legal representation of the plaintiff, (3) that the negligence was a proximate cause of an injury, and (4) the fact and extent of the alleged injury. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994). With regard to the second of these elements, it is not disputed that an attorney has a duty to exercise reasonable skill, care, discretion, and judgment in the conduct of the cause and representation of his or her client. *Simko v Blake*, 448 Mich 655, 656; 532 NW2d 842 (1995). Here, plaintiff alleges that Baker failed to exercise such skill, care, discretion, and judgment in his representation of Arthur during settlement negotiations. In doing so, plaintiff correctly notes that Arthur's decision to settle the underlying suit does not itself bar the instant suit for the alleged breach of this duty. Indeed, this Court has recognized that while it is generally more difficult to establish attorney malpractice in cases where the underlying action is terminated by settlement rather than involuntary dismissal or adverse judgment, "a cause of action can be made out if it is shown that assent by the client to the settlement was compelled because prior misfeasance or nonfeasance by the attorneys left no other recourse." *Espinoza v Thomas*, 189 Mich App 110, 124; 472 NW2d 16, (1991) (citation and internal quotation marks omitted); see also, *Lowman v Karp*, 190 Mich App 448, 451; 476 NW2d 428 (1991).

Thus, this Court held in *Lowman*, *supra* at 453-454, that the plaintiff was not precluded from maintaining an action for legal malpractice where her attorney's refusal to try the underlying case at a point too late for the plaintiff to obtain another attorney placed the plaintiff "in a position where settlement was her only reasonable choice despite her own reservations about the settlement." *Id.* at 452-453. In *Espinoza*, *supra* at 124, this Court likewise concluded that settlement of the underlying litigation did not preclude the plaintiff from maintaining a subsequent legal malpractice action where the attorney's failure to timely file the plaintiff's claim left the plaintiff with "no other recourse." These cases indicate, however, that to avoid summary disposition of her suit plaintiff was required to put forth evidence showing that deficient representation by Baker created a situation in which Arthur was compelled to accept a settlement because there existed no other reasonable recourse. In arguing that she has done so, and that summary disposition of her suit was therefore improper, plaintiff relies solely on Baker's allegedly negligent statement during facilitation that a copy of the promissory note on which Arthur relied to sue the Alams was "no good," and that he therefore "didn't have a case." For the reasons that follow, however, we find these facts insufficient to meet plaintiff's burden.

As recognized by the trial court, Arthur acknowledged that in addition to the subject statements, Baker discussed with him "other issues" concerning acceptance of the settlement offer versus going to trial. Furthermore, while Arthur also testified that Baker's statements concerning the importance of the promissory note was the "main reason" he agreed to accept the proffered settlement of \$150,000, he additionally acknowledged that there was no threat that

Baker would not try the case if settlement were rejected, and that he understood the risks inherent in submitting the matter for trial. Arthur's testimony in this regard does not support that he was compelled to accept a settlement of his claims as a result of the asserted negligence. Indeed, unlike *Espinosa*, where the defendant attorney's negligence seriously compromised the viability of any recovery, the purportedly negligent statements on which Arthur testified he relied did not themselves compromise the viability of recovery in the underlying suit against Keast. Thus, even when viewed in a light most favorable to plaintiff, Arthur's reliance on these statements in accepting settlement does not equate to the compulsion found by this Court in *Espinosa*.

Nor does the testimony support that, despite his reservations about the settlement, Arthur was put in a position where settlement was his "only reasonable choice." *Lowman, supra* at 453. Rather, when viewed in a light most favorable to plaintiff the evidence shows only that Arthur was required to choose between proceeding to trial knowing that he might receive less than the settlement offer or accepting the offer, and that he decided to accept his attorney's assessment of the merits and value of his case. Indeed, Arthur acknowledged at deposition that Baker at no time refused to proceed with a trial of the matter and there is no allegation that Baker was not prepared to competently do so. We therefore find that the trial court properly concluded that summary disposition of plaintiff's suit was appropriate because there existed no genuine issue of material fact that Arthur was left with no other reasonable course but to settle his suit against Keast.

Affirmed.²

/s/ Helene N. White
/s/ Joel P. Hoekstra
/s/ Bill Schuette

² In light of our resolution of this matter, we need not address defendants' alternative arguments for affirmance.