

STATE OF MICHIGAN
COURT OF APPEALS

WOODCREST, L.L.C.,

Plaintiff-Appellant,

v

HONIGMAN MILLER SCHWARTZ & COHN,
L.L.P., and ANN L. ANDREWS,

Defendants-Appellees.

UNPUBLISHED
November 18, 2008

No. 279757
Gratiot Circuit Court
LC No. 07-010442-NM

Before: Murphy, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

In this action for legal malpractice premised on settlement of a judgment without plaintiff's authorization, plaintiff appeals as of right from a circuit court order granting defendants' motion for summary disposition. We affirm in part, reverse in part, and remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff is a limited liability company with a single member, Henry Goldstein. Defendants represented plaintiff in an underlying action in which plaintiff pursued a cross-claim against Giffels-Webster Engineers, Inc., for negligence in the design and installation of underground utilities. On February 21, 2006, following a jury trial on plaintiff's cross-claim, the court entered a judgment in favor of plaintiff and against Giffels-Webster for \$412,268.80, plus interest and costs. Between March 22, 2006, and April 3, 2006, counsel for Giffels-Webster and defendant Ann Andrews, who was representing plaintiff, engaged in settlement negotiations. In April 2006, Andrews allegedly advised the court in the underlying action that the parties were close to resolving all of the claims with a global settlement and release agreement. Plaintiff later discharged defendants on June 6, 2006, and denied the existence of a settlement.

Giffels-Webster subsequently filed a motion to enforce a settlement premised on the negotiations between Andrews and Giffels-Webster. On April 3, 2007, over plaintiff's objections, the court granted Giffels-Webster's motion.

Plaintiff's complaint in this case alleges that defendants committed legal malpractice in failing to inform plaintiff of the settlement negotiations, negotiating without plaintiff's knowledge or consent, and failing to protect its legal rights, resulting in loss of ability to collect the full judgment and additional attorney fees. Plaintiff alleges that it was never advised or

consulted in regard to settling with Giffels-Webster for only \$425,000. Plaintiff alleged a claim for breach of contract because defendants represented to plaintiff that the cost of litigation would not exceed \$100,000, when in fact the cost exceeded \$225,000. The breach of contract claim also refers to an express or implied agreement to “always act only in the interests of Plaintiff,” and alleges breach of that agreement by “refusing to act in the interests of Plaintiff, but instead acting in their own interest, resulting in a settlement to which Plaintiff did not or does not agree.”

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). With respect to the legal malpractice claim, defendants argued that summary disposition was appropriate pursuant to MCR 2.116(C)(7), because plaintiff was collaterally estopped from claiming that the amount of the settlement was inadequate. Defendants relied on a statement made by plaintiff’s new counsel to the court in the underlying action to the effect that plaintiff’s opposition to the motion to enforce the settlement agreement was *not* based on disappointment with the amount.

At a hearing in the underlying case, Patricia Walter, counsel for Giffels-Webster, explained the negotiations that had occurred between Giffels-Webster and Andrews. According to Walter, Andrews had been working on a global settlement agreement with all the other lien claimants, but was terminated as counsel for plaintiff before that was complete. Walter maintained that “the terms of the settlement were the four twenty-five and a way to protect Giffels from having to continue to litigate, which if the releases didn’t work, a dismissal would.” The court inquired as to who had a claim against Giffels-Webster, and Walter responded only Michigan Pipe and Valve, but the lien had been extinguished. The court suggested that it sign an order dismissing Giffels-Webster as a party and Giffels-Webster “pay the four twenty-five.” Walter responded, “I’m happy.”

THE COURT. Okay. Somebody’s not happy. Maybe more than one person is not happy. Let me find out who is not happy.

Let me start with you, Mr. Darnell [plaintiff’s counsel]?

MR. DARNELL. Thank you, Your Honor. Well, Your Honor, I think your questions – your questions to the Giffels-Webster is most revealing in that it’s difficult to figure out exactly what the agreement was. Because the e-mail—the e-mail saying—basically says we have to have indemnification, but there’s no language exchanged with regard to the indemnification. There’s no—there’s no contractual language to that at all.

There’s an e-mail from--

THE COURT. Is your opposition based on disappointment about the four hundred and twenty-five being inadequate?

MR. DARNELL. --No, Your Honor, it’s not.

THE COURT. Okay. Go ahead.

MR. DARNELL. It—it's actually not. It's that it doesn't resolve all the issues.

What—what Giffels-Webster is asking the Court to do is, I think, to write the contract itself, because the term of indemnification, at least to the other parties, has never been discussed, has never been written. There's simply no agreement.

Collateral estoppel is a basis for summary disposition pursuant to MCR 2.116(C)(7). *Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 36 n 5; 620 NW2d 657 (2000). This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Id.*, p 34 n 3. In addition, the applicability of collateral estoppel to bar a particular claim is a question of law that this Court reviews de novo. *Id.*, p 34.

Collateral estoppel generally requires three elements. *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004). A question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment. *Id.* The same parties must have had a full and fair opportunity to litigate the issue. *Id.* Mutuality of estoppel is generally required, but there are exceptions to the mutuality requirement. *Id.*, pp 683-684, 687-692. For collateral estoppel to apply, the ultimate issue to be determined in the subsequent action "must be identical, and not merely similar" to that involved in the first action. *Bd of Co Rd Comm'rs for the Co of Eaton v Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994).

Defendants do not clearly explain the connection between collateral estoppel and the dismissal of the legal malpractice claim. The issue whether defendants agreed to settle the underlying claim without plaintiff's consent was not litigated previously. The issue whether the February 21, 2006, judgment for \$412,268.80, plus costs and interest, was worth more than \$425,000 was not litigated previously. The thrust of defendants' argument seems to be that plaintiff's counsel's expression of lack of "disappointment" equates to plaintiff's satisfaction with the amount of the settlement; because plaintiff's satisfaction with the amount was established in the prior proceeding, plaintiff cannot establish that defendants' alleged actions caused any damages in this legal malpractice action.

Defendants' argument is flawed for several reasons. First, plaintiff's counsel's response did not indicate that plaintiff was satisfied with the amount. The court asked plaintiff's counsel, "Is your opposition [to the motion to enforce the settlement agreement] based on disappointment about the four hundred and twenty-five being inadequate?" Plaintiff's counsel's negative response merely indicates that the basis for the objection to Giffels-Webster's motion for entry of the purported settlement agreement was not "disappointment" concerning the amount. Second, even if plaintiff's counsel's statement indicated plaintiff's satisfaction, the issue was not "actually litigated" in the first action. An isolated response to a question by the court does not constitute "actual litigation" of an issue. Third, even if the response sufficed as actual litigation of an issue, the issues in the motion to enforce and in the legal malpractice action were not "identical." *Bd of Co Rd Comm'rs, supra*. Fourth, defendants' assertion that plaintiff had the opportunity to raise the issue of the purported absence of authority at the hearing on the motion to enforce, but failed to do so, overlooks a significant limitation on the applicability of collateral estoppel: "The doctrine of collateral estoppel does not apply to questions which might have been (but were not) litigated in the original action." *Schlumm v Terrence J O'Hagan, PC*, 173 Mich

App 345, 357; 433 NW2d 839 (1988), citing *Howell v Vito's Trucking & Excavating Co*, 386 Mich 37; 191 NW2d 313 (1971).

Because defendants did not establish a basis for summary disposition with respect to plaintiff's action for legal malpractice, the trial court erred in dismissing it.

With respect to plaintiff's breach of contract claim, plaintiff argues that defendants breached their contract because they had an implied duty to act in plaintiff's best interests, but instead settled the case without plaintiff's consent to ensure that their fee could be paid. Plaintiff argues that they established a "prima face breach of implied contract claim." However, as defendants argue, "a contract cannot be implied in law while an express contract covering the same subject matter is in force between the parties." *H J Tucker & Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 573; 595 NW2d 176 (1999). Accordingly, the trial court properly dismissed plaintiff's breach of contract claim.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Michael R. Smolenski