

STATE OF MICHIGAN
COURT OF APPEALS

MARK W. NIEMANN,

Plaintiff-Appellee,

v

JOHN L. NIEMANN, MARY NIEMANN and
NIEMANN BROTHERS GREENHOUSE,
INCORPORATED,

Defendants-Appellees,

and

STEVEN E. SMITH, Court Appointed Receiver,

Appellee,

and

CALLIGARO & MEYERING, P.C.,

Appellant.

Before: SHAPIRO, P.J., and SAAD and SERVITTO, JJ.

PER CURIAM.

Appellant, Calligaro & Meyering, P.C., appeals the trial court's order regarding the distribution of receivership funds. Appellant challenges the portion of the order that bars it from asserting a claim for attorney fees against its former client, plaintiff, Mark W. Niemann. For the reasons set forth below, we affirm.

Appellant argues that the trial court erred in barring it from asserting a claim for attorney fees against plaintiff and in setting aside the attorney charging lien. We review for clear error the trial court's factual determination that there exists a conflict of interest. *Rymal v Baergen*, 262 Mich App 274, 316; 686 NW2d 241 (2004). Appellant's arguments that the trial court lacked jurisdiction over it and the trial court deprived it of due process are unpreserved and, thus, reviewed for plain error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

UNPUBLISHED
September 2, 2010

No. 288262
Wayne Circuit Court
LC No. 05-511163-CB

Plaintiff and defendant, John L. Niemann, are brothers. Defendant, Mary Niemann, is John's wife. This case arises out of a dispute between the brothers concerning a commercial greenhouse, Niemann Brothers Greenhouse, that had been in the Niemann family for generations. In 1994, the parents hired attorney Clinton Meyering of the appellant law firm to transfer their interest in the greenhouse to plaintiff and John. The sons were to redeem their parents' shares in the partnership, and the partnership would then enter into a land contract to purchase from the parents the land upon which the greenhouse sat. Plaintiff and John each secured 50 percent ownership in the partnership. In addition, the brothers formed a new corporation, defendant Niemann Brothers Greenhouse, Inc., which assumed ownership of the greenhouse's business assets, but not the land. The brothers were each 50 percent shareholders of the corporation. For Meyering's part, he structured the redemption of the parents' partnership shares, prepared the land contract, and incorporated the new corporation.

In 2005, plaintiff hired Eric Grimm of appellant law firm to sue defendants. Plaintiff alleged that, in 1996, John signed papers purporting to give a 1/3 interest in the corporation to defendant Mary, and reducing plaintiff's interest in the corporation from 1/2 to 1/3. John also allegedly signed papers purporting to transfer the land upon which the greenhouse sat from the partnership into the corporation. Plaintiff alleges that John signed the papers as part of a secret plan to deprive plaintiff of his interest in the greenhouse and the land. Plaintiff did not become aware of the transfers until late 2004.

The parties ultimately reached a settlement in November 2006. The trial court appointed a receiver and ordered that the assets of the corporation be sold and the proceeds split equally between plaintiff and John. Grimm worked on this case for approximately three months before he was disqualified on conflict of interest grounds. Grimm asserted an attorney charging lien¹ on plaintiff's recovery in the amount of approximately \$25,000 for legal services rendered.

Appellant challenges the portion of the trial court's September 19, 2008, order which provides: "the charging lien asserted by Calligaro & Meyering, P.C., is denied and that firm is barred from asserting a claim for attorney fees for the reasons stated on the record." The trial court barred appellant from recovering attorney fees on the ground that Grimm had been disqualified from representing plaintiff because of an alleged conflict of interest. Although the trial court did not articulate why it believed that a conflict of interest existed, presumably it accepted defendants' argument that MRPC 1.9 and MRPC 1.10 justified disqualification.

MRPC 1.9(a) provides as follows:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that

¹ The existence of an attorney's charging lien is recognized in Michigan common law. *George v Sandor M Gelman, PC*, 201 Mich App 474, 477; 506 NW2d 583 (1993). The attorney's charging lien creates a lien on a judgment, settlement, or other money recovered as a result of the attorney's services. *Id.*

person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

Furthermore, MRPC 1.10(a) provides, in pertinent part:

While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9(a), or 2.2.

Pursuant to MRPC 1.10(a), if Meyering would be disqualified from representing plaintiff on the basis of MRPC 1.9(a), Grimm, too, by virtue of his being part of the same firm, would also be disqualified.

At issue is whether the 1994 matter was “substantially related” to the instant matter for purposes of MRPC 1.9(a). In the 1994 matter, Meyering performed the following work for the relevant parties: he effectuated the transfer of the parents’ interest in the partnership to plaintiff and John; he effectuated the partnership’s purchase of the land upon which the greenhouse sat; and, he drafted the necessary paperwork to form plaintiff and John’s corporation. Here, the crux of plaintiff’s complaint alleges that John acted fraudulently and improperly by transferring the land on which the greenhouse sits from the partnership to the corporation, transferring a portion of his (plaintiff’s) interest in the corporation to defendant Mary, and terminating plaintiff’s employment with the corporation. Although the latter two claims do not relate to the 1994 matter, the first claim does because it implicates the intent behind, and purpose of, the documents prepared by Meyering. Indeed, appellant acknowledges that Meyering may have been called as a witness at trial to testify that the intention of the parties during the 1994 transactions was to ensure that the land was property of the partnership, not of the corporation.² Given these circumstances, this case is “substantially related” to the 1994 matter wherein Meyering represented the interests of plaintiff, John, and defendant corporation. Also, plaintiff’s interests in this case are materially adverse to the interests of Meyering’s former client, John.³ Particularly where the deferential “clearly erroneous” standard applies, we are not persuaded that the trial court erred in finding that MRPC 1.9 and 1.10 barred Grimm from acting as plaintiff’s counsel.

As a matter of public policy, an attorney who is disqualified on conflict-of-interest grounds is generally barred from receiving any fee from either of the opposed interests. *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 196-197; 650 NW2d 364 (2002). Accordingly, the

² Grimm could not be disqualified on the basis of this alone, as MRPC 3.7 provides that “[a] lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.”

³ Appellant’s argument, that Meyering never represented John, is unpersuasive. Meyering represented John as well as Mark in their efforts to form a corporation. And, in his capacity as counsel in 1994, he was in a position to learn information that could be used adversely against John here.

trial court did not err in holding that appellant is barred from recovering attorney fees from plaintiff.

Appellant asserts that the trial court lacked jurisdiction to enter a ruling barring it from collecting attorney fees from plaintiff. In light of our holding, appellant's jurisdiction argument does not warrant relief. Appellant's filing of an attorney charging lien might be construed as appellant itself placing the attorney fee issue before the court and voluntarily submitting to the court's jurisdiction. Appellant presents no authority for the proposition that a trial court lacks jurisdiction to make rulings regarding whether a party in a case before the court (here, plaintiff), and over whom the court has jurisdiction, is obligated to pay an attorney charging lien lodged against it. Even assuming that the trial court lacked jurisdiction to make the challenged ruling, appellant cannot demonstrate plain error. We have fully considered and rejected appellant's arguments on the merits of the trial court's ruling and conclude, as a matter of law, that appellant was disqualified from representing Mark Niemann. As noted, an attorney who is disqualified on conflict of interest grounds is not permitted to collect an attorney fee. Therefore, had appellant pursued attorney fees in a court with undisputed jurisdiction, there does not exist a reasonable probability that it could prevail in its pursuit. Indeed, this may be why counsel for appellant failed to appear at the hearing, despite his knowledge of the scheduled hearing.

Similarly, appellant's due process argument fails because appellant cannot establish plain error. Though appellant asserts that he received inadequate notice of the hearing on the receiver's motion to distribute receivership funds and that this gave him inadequate time to respond or appear, counsel conceded at oral argument that, despite the late notice, he could have attended the hearing to assert his claims or to seek further time to do so. He failed to do so. In any case, there is no reasonable probability that a different result on the attorney fee issue would have been reached. Again, an attorney who is disqualified on conflict of interest grounds is not permitted to collect an attorney fee.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Henry William Saad
/s/ Deborah A. Servitto