STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER YATOOMA, Plaintiff-Appellant,	UNPUBLISHED May 15, 2012
v	No. 302591 Oakland Circuit Court
MICHAEL I. ZOUSMER and NATHAN ZOUSMER, PC, Defendant-Appellees.	LC No. 2009-099905-CK

Before: K. F. KELLY, P.J., and WILDER and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants, attorney Michael I. Zousmer and Nathan Zousmer, PC, summary disposition pursuant to MCR 2.116(8) and MCR 2.116(10). We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff alleges defendants breached fiduciary duties owed to plaintiff as a shareholder of a closely-held corporation that defendants represented during bankruptcy proceedings. Specifically, plaintiff claims defendant Zousmer made statements to plaintiff outside of the bankruptcy hearing, inducing plaintiff not to contest the corporation's bankruptcy.

On June 19, 2006, plaintiff loaned United Soils, Inc. (USI) and its president Ron Omilian $230,000. The loan agreement provided plaintiff the option to convert the debt into equity on demand, granting plaintiff a 40 percent share of USI in return for waiving interest under the loan. It also gave plaintiff the right to reconvert his ownership interest back to debt and demand repayment thereafter. On the same day the loan agreement was executed, plaintiff exercised his option and gained his 40 percent interest in USI. On July 17, 2006, Omilian and plaintiff executed another loan agreement, equivalent to the earlier agreement, regarding the loan. Plaintiff again exercised his option on the same day. Plaintiff alleges that Omilian made numerous misrepresentations regarding the financial overview of USI.

Plaintiff claimed that he was kept in dark about the fact that USI was headed for bankruptcy. Plaintiff alleged that Omilian used several other companies to divert USI's assets and avoid paying its creditors. In support of his claim, plaintiff submitted the affidavit of USI's general manager, Randall Huber. Huber, who held 15 percent of USI's shares, believed that

Omilian intended to use two Louisiana companies to avoid USI's creditors and that Omilian planned to transfer all of USI's assets to the companies and have creditors pay the Louisiana companies instead of USI. Omilian planned to form other companies in Omilian's wife and childrens' names, transfer his personal assets to his wife, and then divorce her to protect those assets during his future personal bankruptcy proceedings. Because he believed that Omilian's actions were illegal, Huber informed plaintiff and Independent Bank, which was USI's largest creditor. Huber was later appointed the receiver in USI's bankruptcy and learned that Omilian was still operating his business as AKO Enterprises (AKO), which was formed in his daughter's name. Huber believed that Omilian formed AKO to divert USI's assets during its bankruptcy.

Omilian hired defendants to effectuate USI's Chapter 11 bankruptcy and, plaintiff claims, to allegedly allow Omilian to further drain USI's assets by controlling the bankruptcy proceedings. Defendant Zousmer prepared and filed a Chapter 11 bankruptcy on USI's behalf, but only had Omilian sign the bankruptcy petition. Plaintiff hired an attorney to "represent him as a creditor at the imminent December 11, 2006[,] bankruptcy court hearing." Outside the bankruptcy court that day, plaintiff notified defendant Zousmer that he owned 40 percent of USI at which time Zousmer allegedly responded that it was in plaintiff's best interest to support the bankruptcy because it would substantially reduce the amount of unsecured debt USI owed. Plaintiff testified that he talked with defendant Michael Zousmer:

> *Q*. [by defendant, questioning plaintiff] You mentioned that *you met me for the first time at that December 11, 2006 hearing; is that correct?*
>
> *A. That does sound right. That is what I recall.*
>
> *Q*. Do you recall the substance of any conversations you had with me at that time?
>
> *A*. I remember having a couple conversations with you at the courthouse. I believe – I guess I remember having several conversations with you at the courthouse.
>
> *Q*. I asked you the substance of those conversations.
>
> *A*. Well I remember one conversation in particular, you were explaining to me how the bankruptcy process works. You were communicating to me it was in our best interest, Randy's and mine, to support the bankruptcy; specifically, that the secured debt would be reduced to the value of the collateral, that the unsecured debt would be dramatically reduced.
>
> I asked if it could be eliminated. You said you've never seen a court approve a workout plan where they totally eliminate unsecured debt. I think we settled on the number of about 10 percent, that the unsecured debt could be reduced up to 10 percent of what it was. You and the other gentlemen you were with stated how we'd come out of United Soils – or United Soils would come out of bankruptcy [sic] viable, profitable company.

> You also communicated to me that it was in the bank's best interest not to oppose the bankruptcy, and we talked about why are they opposing the bankruptcy then, and you said that typically they don't understand the bankruptcy process or how or why it's in their best interest to cooperate with it.
>
> ***
>
> [You said t]hat you in fact were working on our behalf, that this was in our best interest. Whether we realized it or not, referring to Randy and I, this was in our best interest and you were working on our behalf effectively. [Emphasis added.]

Allegedly, Huber was supporting the bankruptcy only to assure that he remained a USI employee so that he had health care coverage for his wife, who had recently been diagnosed with cancer. Although Huber and plaintiff were shareholders of USI, plaintiff claims that Omilian and defendants did not disclose anything about the bankruptcy to him until it had begun. Plaintiff claims that defendants effectuated the bankruptcy for USI, despite knowing that plaintiff remained an outstanding shareholder. Through the bankruptcy sale, AKO gained nearly all of USI's assets. Omilian did not inform plaintiff that he could exercise his right of first refusal on the sale of USI's assets.

Plaintiff brought this case, alleging defendants breached fiduciary duties it owed plaintiff and that defendants fraudulently concealed information from plaintiff. Plaintiff later amended his complaint to add a claim for aiding and abetting the breach of fiduciary duties. Defendants moved the trial court for summary disposition and on January 28, 2011, the trial court issued an opinion and order granting defendants' motion pursuant to both MCR 2.116(C)(8) and MCR 2.116 (C)(10). The trial court found that plaintiff failed to allege that he placed his faith, confidence, or trust in defendants, and defendants, therefore, did not owe plaintiff a fiduciary duty.

The trial court recognized plaintiff's argument that a corporate attorney representing a closely held corporation generally owes fiduciary duties to each of the shareholders. It held, however, that plaintiff's failure to place faith, confidence, or trust in defendants shows that there was no fiduciary relationship. Absent a fiduciary relationship, the court reasoned, there could be no fiduciary duties. The court also found that plaintiff's claims failed because plaintiff admitted that he did not have contact with defendants, other than by fax, before the bankruptcy proceeding on December 11, 2006, and thus failed to present any evidence that an attorney-client relationship existed. The court also held that, because plaintiff failed to plead or prove that defendants had a duty to disclose any information to plaintiff, his fraud claim failed. Finally, the trial court held that plaintiff's aiding and abetting a breach of fiduciary duty claim failed because Michigan courts have not yet recognized this cause of action.

Plaintiff now appeals as of right.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition, reviewing the record in the same manner as the trial court to determine whether the movant was

entitled to judgment as a matter of law. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). When considering a party's motion under (C)(8), the court must construe the pleadings in the light most favorable to the nonmovant. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The moving party must specifically identify the matters that have no disputed factual issues, and it has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed material fact exists. *Id.* The existence of a disputed fact must be established by substantively admissible evidence, although the evidence need not be in admissible form. *Maiden*, 461 Mich at 121. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

III. ANALYSIS

A. BREACH OF FIDUCIARY DUTY

Plaintiff claims that defendants were acting as his attorney or otherwise owed him fiduciary duties, which they breached by fraudulently assisting Omilian in transferring USI's assets to other companies and inducing plaintiff not to contest the bankruptcy. Plaintiff argues that the trial court erred in granting defendants summary disposition because he presented a question of fact whether defendants breached fiduciary duties owed plaintiff. We disagree.

Generally, when an attorney represents a corporation, the attorney's client is the corporation, and not its shareholders. *Fassihi v Sommers, Schwartz, Silver, Schwartz & Tyler, PC*, 107 Mich App 509, 514-515; 309 NW2d 645 (1981) *Fassihi*, 107 Mich App at 514. However, the fact that an attorney represents a corporation does not preclude the attorney from additionally representing a shareholder personally. *Id*. In addition, "[a] fiduciary relationship arises when one reposes faith, confidence, and trust in another's judgment and advice[,]" regardless of whether that person is representing the other as an attorney. *Id*. at 514-515. "[W]hether there exists a confidential relationship apart from [the attorney-client relationship] is a question of fact." *Id*. at 515.

The parties do not dispute that USI was a closely held corporation. However, as the Court discussed in *Fassihi*, the fact that an attorney represents a closely held corporation does not necessarily mean that the attorney represented each individual shareholder. *Fassihi*, 107 Mich App at 514-515.

In *Fassihi*, two doctors each owned 50 percent of the shares in a professional corporation. They practiced radiology together for less than two years when the other shareholder decided

that he no longer wanted to practice with the plaintiff. The shareholder asked the defendant, who was the corporate attorney, how best to proceed in ousting plaintiff from the corporation. Defendant had drafted the documents for the professional corporation and had additional information regarding the shareholder's agreement with the hospital granting the shareholder sole responsibility for staffing its radiology department. Defendant assisted the shareholder in ousting plaintiff from the professional corporation. As a result, the plaintiff was no longer able to practice radiology at the hospital because he was no longer a member of a professional corporation. The plaintiff sued defendant for both legal malpractice and breach of fiduciary duties based on the defendant's failure to disclose to the plaintiff that he not only represented the corporation, but the other shareholder on an individual basis. The plaintiff alleged that the defendant and the other shareholder conspired to deprive him of a business opportunity. *Id*. at 512-514.

We held that the attorney's representation of the corporation did not by itself amount to representation of each individual shareholder, but that the close relationship and interactions between each shareholder and the attorney created a question of fact regarding whether the attorney owed an independent fiduciary duty to the shareholder because the shareholder placed his faith, confidence, and trust in the attorney:

> Although we conclude that no attorney-client relationship exists between plaintiff and defendant, this does not necessarily mean that defendant had no fiduciary duty to plaintiff. The existence of an attorney-client relationship merely establishes a per se rule that the lawyer owes fiduciary duties to the client.
>
> A fiduciary relationship arises when one reposes faith, confidence, and trust in another's judgment and advice. Where a confidence has been betrayed by the party in the position of influence, this betrayal is actionable, and the origin of the confidence is immaterial. Furthermore, whether there exists a confidential relationship apart from a well defined fiduciary category is a question of fact. Based upon the pleadings, we cannot say that plaintiff's claim is clearly unenforceable as a matter of law. [*Id.* at 514-515.]

Plaintiff cites *Fassihi* for the proposition that an attorney representing a closely held corporation has a fiduciary duty to its individual shareholders. We do not read *Fassihi* so broadly and conclude that whether a corporate attorney owes a fiduciary duty to individual shareholders is dependent on the facts and circumstances of each case. The attorney in *Fassihi* had an established relationship with both shareholders and worked for the corporation in a variety of ways, including drafting the agreements to form the professional corporation. The plaintiff in *Fassihi* dealt with the attorney on numerous occasions and believed that the attorney was working in his best interests as well as the best interests of the corporation. In contrast, plaintiff in this case met defendant Zousmer for the first time outside of the bankruptcy hearing on December 11, 2006. At that time, plaintiff approached defendant Zousmer and notified Zousmer of his ownership interest in USI. Plaintiff admitted during his deposition testimony that he was in regular consultation with at least two other attorneys at this time. There is simply nothing in the record to support plaintiff's claim that he placed his faith, confidence, and trust in defendants. The case at bar does not match the unique facts set forth in *Fassihi*.

We also note that, even if plaintiff could show a question of fact that he placed his faith, confidence, and trust in defendants, plaintiff did not act reasonably in doing so. As stated in *Beaty v Hertzberg & Golden, PC*, 456 Mich 247; 571 NW2d 716 (1997):

> To claim breach of fiduciary duty, there must be a situation in which the nonclient *reasonably* reposed faith, confidence, and trust in the attorney's advice. As is apparent, it is unreasonable for a nonclient to repose confidence and trust in an attorney when any of the interests of the client and the nonclient are adverse. Moreover, this Court has repeatedly declined to recognize a fiduciary obligation running to a potentially adverse party because such a duty would necessarily "permeate all facets of the litigation" and have a significantly deleterious effect on the attorney's ability to make decisions for the benefit of his client. [*Id.* at 260-261 (emphasis added) (citations and quotations omitted).]

We stress that plaintiff, by his own admission, appeared at the bankruptcy proceeding *as a creditor* and that he was represented by his own attorney at the time. He was also in regular consultation with two other attorneys. Defendant Zousmer was at the bankruptcy adversarial proceeding as a corporate attorney. While the interests of the corporation and its individual shareholders are tightly intertwined, they are not exact. One can imagine how a shareholder's interest (especially one who has extended credit to the corporation) may diverge from the corporation's. While plaintiff argues that defendants led him down the proverbial primrose path in suggesting that a bankruptcy would be amenable to all parties, he fails to set forth any evidence that defendant Zousmer's statement was anything other than a sincerely held legitimate and well-reasoned conclusion. Plaintiff was at the proceeding and represented by an attorney who was representing plaintiff in his individual capacity. Plaintiff, with separate counsel by his side, could not have reasonably believed that defendant Zousmer was representing his best interests. In fact, defendant Zousmer was acting on behalf of USI's best interests, not plaintiff's. Thus, it was not reasonable for plaintiff to repose confidence and trust in defendants. Accordingly, because plaintiff failed to reasonably place his faith, confidence, and trust in defendants, the trial court did not err in concluding that there was no breach of fiduciary duty.

B. FRAUD

Plaintiff also argues that the trial court erred in granting defendants summary disposition on plaintiff's fraud claim. We disagree.

"The elements of fraud are: (1) a material representation which is false; (2) known by defendant to be false, or made recklessly without knowledge of its truth or falsity; (3) that defendant intended plaintiff to rely upon the representation; (4) that, in fact, plaintiff acted in reliance upon it; and (5) thereby suffered injury. The false material representation needed to establish fraud may be satisfied by the failure to divulge a fact or facts the defendant has a duty to disclose." *Fassihi*, 107 Mich App at 516-517. An attorney's failure to disclose that he is dually representing the competing interests of two clients may serve as the basis for a fraudulent concealment action. *Id.*

In *Fassihi*, this Court held that the plaintiff stated a claim for fraud by claiming that the attorney-defendant breached a fiduciary duty he owed the plaintiff by colluding with a third-

party to deprive the plaintiff of a business opportunity. *Id.* at 518 n 8. Similarly, in this case, plaintiff alleges that defendants knowingly colluded with Omilian to perpetuate his fraud. However, where a plaintiff alleges fraudulent concealment, or "silent fraud," the plaintiff must first establish that the defendant owed the plaintiff a legal duty to disclose the facts or information. *US Fidelity & Guaranty Co v Black*, 412 Mich 99, 125; 313 NW2d 77 (1981).

As discussed above, plaintiff has failed to set forth a genuine issue of material fact that defendants owed him a fiduciary duty as they were not in a fiduciary relationship. Accordingly, because plaintiff has failed to show that defendants owed him a duty, the trial court properly granted summary disposition on plaintiff's fraud claim.

C. AIDING AND ABETTING A BREACH OF FIDUCIARY DUTY

Plaintiff next argues that the trial court erred in holding that Michigan law does not recognize a claim for aiding and abetting the breach of fiduciary duties. While we agree that the trial court erred in holding that Michigan does not recognize such a claim, we conclude that summary disposition in defendants' favor was appropriate.[1]

"Where a person in a fiduciary relation to another violates his duty as fiduciary, a third person who participates in the violation of duty is liable to the beneficiary." *LA Young Spring & Wire Corp v Falls*, 307 Mich 69, 106; 11 NW2d 329 (1943). "Michigan law does provide for a cause of action for aiding and abetting the breach of a fiduciary duty. Our Supreme Court has stated that a person who knowingly joins a fiduciary in an enterprise where the personal interest of the latter is or may be antagonistic to his trust becomes jointly and severally liable with him for the profits of the enterprise." *Echelon Homes, LLC v Carter Lumber Co*, 261 Mich App 424, 445; 683 NW2d 171 (2004), rev'd in part on other grounds 472 Mich 192 (2005) (citations and quotations omitted).[2]

Plaintiff argued that Omilian, as a fellow shareholder in a closely held corporation, violated his fiduciary duties of good faith and loyalty when he hired defendants to file bankruptcy for USI in an effort to defraud plaintiff of his share of USI. By assisting Omilian with the bankruptcy and inducing plaintiff not to contest the bankruptcy, plaintiff argues that

[1] We may affirm a trial court's decision where the decision is the right result, albeit for the wrong reason. *Fisher v Blankenship*, 286 Mich App 54, 70; 777 NW2d 469 (2009).

[2] See also *Carson Fischer, PLC v Std Fed Bank*, unpublished opinion per curiam of the Court of Appeals, issued February 8, 2005 (Docket No. 248125) rev'd in part on other grounds 475 Mich 851; 713 NW2d 265 (2006): "The essential elements required for aiding and abetting liability are: (1) that an independent wrong exist; (2) that the aider or abettor know of the wrong's existence; and (3) that substantial assistance be given to effecting that wrong . . .The alleged abettor is required to have the same degree of scienter as the person committing the actual fraud." While not binding precedential value, unpublished opinions may be instructive. MCR 7.215(C)(1).

defendants aided and abetted Omilian's violation of his fiduciary duty. However, plaintiff failed to present any testimony that defendants had knowledge that he was a shareholder. In an answer to defendants' interrogatories, plaintiff admitted that he possessed no evidence that, prior to December 11, 2006, defendants knew of plaintiff's claimed ownership interest in USI. We find no support in the record that defendants knew of plaintiff's status as a shareholder until the parties' first encounter outside of the bankruptcy courtroom. Accordingly, because plaintiff set forth no evidence that defendants knowing joined Omilian's efforts to defraud plaintiff, summary disposition in defendants' favor was warranted.

Affirmed. As the prevailing party, defendants may tax costs. MCR 7.219.

/s/ Kirsten Frank Kelly
/s/ Kurtis T. Wilder
/s/ Mark T. Boonstra