RENDERED: December 23, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002639-MR

MICHAEL E. TODD;
JANET L. TODD;
HENDERSON IMPLEMENT COMPANY;
AND ALAN CLAY TODD — APPELLANTS

v.

APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 03-CI-00247

RUSS WILKEY, ESQ.;
AND CASTLEN AND WILKEY,
P.S.C. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, TACKETT, AND VANMETER, JUDGES.

GUIDUGLI, JUDGE: In this legal malpractice action, Michael E. Todd appeals from the November 20, 2003, order of the Henderson Circuit Court on his motion to reconsider, in which the circuit court, again, concluded that dismissal of the legal malpractice action was appropriate. The issue before this Court is whether the bankruptcy estate or Mr. Todd, individually, is the real party in interest on the promissory notes. The Henderson

Circuit Court dismissed the legal malpractice action, with prejudice, because the real party in interest was the bankruptcy estate itself. We affirm.

In order to fully understand the case currently before this Court, a careful review of the underlying action is necessary. Between 1967 and 1975, Robert Miller Crenshaw executed a series of four promissory notes issued to Henderson Implement Company, a Kentucky corporation, owned by Michael E. Todd's father, now deceased. On June 19, 1995, Michael E. Todd filed a complaint in the Henderson Circuit Court against Mr. Crenshaw attempting to collect on the notes. Mr. Crenshaw filed a motion to dismiss for lack of privity, which was denied. Mr. Crenshaw then filed an answer denying liability on December 7, 1995. On December 31, 1996, the four promissory notes were assigned to Mr. Todd, by his mother, in an irrevocable spendthrift trust. No further action was taken to prosecute the claim until December 23, 1997, when the Henderson Circuit Court conducted a hearing on its "Show Cause Motion" to dismiss the claim for want to prosecute. At that time the case was retained on the active docket.

On February 11, 1998, Michael E. Todd and Janet Todd commenced a proceeding pursuant to Chapter 7 of the United States Bankruptcy Code by filing a Petition for relief under the Code with the United States Bankruptcy Court for the Western

District of Kentucky. Relief was granted and the appellee, Russ Wilkey, was appointed as the Bankruptcy Trustee.

No further action was taken to prosecute the collection of the notes until December 22, 1998, when the Henderson Circuit Court dismissed the case on its "Show Cause Motion," with leave to reinstate it within six months on a showing of a good faith intention to prosecute the case. On May 18, 1999, upon learning of the existence of the civil action pending in the Henderson Circuit Court, Mr. Wilkey, in his capacity as Trustee, filed a motion to substitute himself as the real party in interest and to reinstate the case on the active docket. On July 14, 1999, the court granted Mr. Wilkey's motion with the stipulation that pretrial steps be taken within thirty days or the court would dismiss the action with prejudice.

On August 24, 1999, Mr. Crenshaw filed a motion to dismiss because of the failure of the trustee to take pretrial steps as required by the court's order. The hearing was set for August 30, 1999, and when Mr. Wilkey failed to appear, the court dismissed the action with prejudice. On November 19, 1999, following a hearing and the denial of the trustee's motion to vacate the order, Mr. Wilkey filed a notice of appeal. On May 4, 2001, the Court of Appeals affirmed the Henderson Circuit Court's Order of Dismissal with prejudice, and on April 17,

2002, the Supreme Court of Kentucky denied Wilkey's motion for discretionary review.

On December 20, 2002, the Bankruptcy Court issued its Order on the summary judgment motion filed on December 11, 1998. The Bankruptcy Court held that the trust was a spendthrift trust and the trustee's duty to pay the debtors the trust income for support was discretionary and therefore, the income from the trust was not subject to the claims of the debtor's creditors.

The action underlying the present appeal was filed on April 7, 2003, by Michael E. Todd; Janet L. Todd; Henderson Implement Company, a Partnership; and Alan Clay Todd, Trustee of Michael E. Todd and Janet L. Todd, Irrevocable Trust; against Russ Wilkey and his PSC alleging legal negligence in failure to protect and collect the notes in question. On April 21, 2003, a motion to dismiss was filed on behalf of Mr. Wilkey on the grounds that none of the plaintiffs constituted real parties in interest. On May 19, 2003, plaintiffs filed their response to the motion to dismiss and on June 9, 2003, a hearing was held by the Henderson Circuit Court on the pending motion. The Henderson Circuit Court dismissed the legal malpractice action, with prejudice, on July 18, 2003, because the real party in interest was the bankruptcy estate itself.

The plaintiff then moved the court to reconsider that decision, and on November 20, 2003, the circuit court again

concluded that dismissal was appropriate. The court noted that on July 14, 1999, "this court determined that the bankruptcy trustee was the real party in interest regarding the four promissory notes. There was a final decision on the merits." On December 3, 2003, Mr. Todd filed this appeal from the Henderson Circuit Court. We affirm.

Mr. Wilkey argues that the appellants are not the real parties in interest, and the actual real party in interest for the malpractice claim is the bankruptcy estate itself. Mr. Wilkey further argues that the malpractice action is in violation of the Bankruptcy Code because Mr. Wilkey, as trustee, was made the real party in interest in the original action when the case was reinstated on July 14, 1999. Appellants contend that the four notes were exempt from the bankruptcy estate by the December 20, 2002, order of the bankruptcy court.

Real Party in Interest

The issue of whether Mr. Todd is the real party in interest to bring the legal malpractice claim is resolved by 11 U.S.C. § 541(a)(7), which provides that any cause of action arising after the commencement of the case is still property of the bankruptcy trustee. This includes any claim for legal malpractice which might exist.

Any legal malpractice claim arising from the attorneys' advisement and handling of the debtors' bankruptcy

proceeding is properly characterized as property of the bankruptcy estate. In Re: Richman, 117 F.2d 1414, 1414 (4th Cir. 1997). In Richman, the debtor was unable to sue her bankruptcy attorney because the cause of action was property of the bankruptcy estate. Id. The bankruptcy trustee, as representative of the bankruptcy estate, has exclusive authority over the property of the estate including legal malpractice claims which stem from issues and assets involved in the bankruptcy proceedings. Id. Therefore, the legal malpractice claims that were derived from the bankruptcy estate were also owned by the estate.

The debtor was unable to sue her bankruptcy attorneys, whose omission of claims reduced the value of her underlying suit, because it was conceptually impossible to sever the malpractice action from the underlying suit which was property of the bankruptcy estate. In re: O'Dowd, 233 F3d 197, 203 (3rd Cir. 2000). Since the alleged malpractice would affect only the estate because it was property of the estate, and not the debtor personally, the debtor was unable to show she suffered any harm and could not maintain the action. Id. at 204. Only in the post-petition situation where the debtor is personally injured by the alleged malpractice, while the estate is concomitantly not affected, is it appropriate to assign the malpractice to the debtor. Id. at 204. (citing Osborn v. Durant Bank & Trust Co.

of Durant, Okla., 83 F.3d 433 (10th Cir. 1996)). Therefore, the alleged malpractice action was property of the bankruptcy estate because the debtor was not personally injured by the alleged malpractice.

Under 11 U.S.C. § 541(a)(7), the bankruptcy trustee, as representative of the bankruptcy estate, has exclusive authority over the property of the estate including any claim for legal malpractice stemming from issues and assets involved in the bankruptcy proceedings which arise after commencement of the case.

Similar to the malpractice claim which was property of the bankruptcy estate in In Re: Richman, any malpractice claim arising from the failure of Mr. Wilkey to prosecute on the promissory notes is property of the bankruptcy trustee, as the representative of the bankruptcy estate. Like the debtor in O'Dowd, who was unable to sue her bankruptcy attorneys because the malpractice action arose from the underlying suit which was property of the bankruptcy estate, Mr. Todd cannot sue Mr. Wilkey since the alleged malpractice would affect only the estate because it was property of the estate upon Mr. Wilkey's substitution by the Court as the real party in interest.

Therefore, Mr. Wilkey, the bankruptcy trustee, as representative of the bankruptcy estate, was the real party in interest upon the Court's substitution and as such he also owns

any claim for legal malpractice on the notes as a result of the bankruptcy proceeding.

Further, when Mr. Wilkey moved the Henderson Circuit Court to be substituted as the real party in interest, in his capacity as trustee, Mr. Todd made no objection. There was no motion to set the substitution aside, and Mr. Todd did not file a motion to reconsider to contest the substitution. Although Mr. Todd had ample opportunity to object to the substitution of Mr. Wilkey as the real party in interest, he never did so. This failure to object was likely because the action was already barred by the statute of limitations, KRS 413.090, which limits the payee's ability to demand collection of notes to 15 years from the date of maturity.

Legal Malpractice Elements – Attorney/Client Relationship

Even if this Court were to hold that Mr. Todd was personally injured by Mr. Wilkey's failure to prosecute on the notes, in order to establish a cause of action for legal malpractice in Kentucky, the plaintiff has the burden of establishing the following elements: (1) that there was an employment relationship with the defendant/attorney; (2) that the attorney neglected his duty to exercise the ordinary care of a reasonably competent attorney acting in the same or similar circumstances; and (3) that the attorney's negligence was the proximate cause of damage to the client. Stephens v. Denison,

Ky. App., 64 S.W.3d 297, 298-99 (2001). To prove that the negligence of the attorney caused the plaintiff harm, the plaintiff must show that he/she would have fared better in the underlying claim; that is, but for the attorney's negligence, the plaintiff would have been more likely successful. Marrs v. Kelly, Ky., 95 S.W.3d 856, 860 (2003).

The first element, which requires the existence of an attorney-client relationship, is not satisfied because Mr. Wilkey was not retained as counsel by the plaintiffs in the underlying civil action. Appellants rely on Kirk v. Watts, Ky. App., 62 S.W.3d 37 (2001)(Later modified in unrelated aspects by the Court of Appeals), to show that an individual, even if injured during or after a bankruptcy proceeding, has a legal right to recover from an attorney who fails to prosecute an unrelated claim. In Kirk, the plaintiff consulted with an attorney and signed a contract for representation regarding a sexual harassment suit against her former employer. Id. at 39-40. The plaintiff and her husband then approached and hired the same attorney to represent them in bankruptcy proceedings and were then instructed not to include the sexual harassment claim in the bankruptcy proceedings. Id. at 40. The attorney's failure to list the sexual harassment claim in the bankruptcy proceedings resulted in the court allowing the plaintiff

standing to file a legal malpractice claim against her attorney for failure to prosecute. Id.

Unlike the attorney-client relationship that was present in Kirk, Mr. Wilkey was not hired by Mr. Todd and did not enter into an attorney/client relationship with Mr. Todd during or after the bankruptcy proceedings. Mr. Wilkey was the trustee appointed by the United States Bankruptcy Court for the Western District of Kentucky for the purpose of liquidating the estate of Michael E. Todd and Janet Todd for the benefit, not of Mr. and Mrs. Todd personally, but rather of their unsecured creditors. This Court notes that the Henderson Circuit Court incorrectly referred to Mr. Wilkey as "Counsel for Plaintiff." Nowhere in the record is there any evidence that Mr. Wilkey was ever retained as counsel by Mr. Todd or had any connection with Mr. Todd other than as Trustee in Bankruptcy of his estate. Therefore, since there was no attorney-client relationship, Appellants failed to establish the first element required to have a cause of action against Wilkey for legal malpractice.

Even conceding that Mr. Wilkey did have an attorney-client relationship with Mr. Todd, the underlying claim did not result in any damage to appellants because collection of the promissory notes of Mr. and Mrs. Crenshaw was likely already barred by the statute of limitations at the time of the filing of the bankruptcy action. Therefore, Mr. Todd is unable to show

that he would have fared better in the underlying claim, but for Mr. Wilkey's negligence.

As previously stated, the Henderson Circuit Court correctly stated that Mr. Todd had a fair opportunity to object if he protested the substitution of Mr. Wilkey as the real party in interest in the circuit court action. In addition, as noted by the circuit court, Mr. Todd had already let the case go unprosecuted for four years before Mr. Wilkey became trustee and it is not apparent that justice would be served by revisiting the issue. Berrier v. Bizer, Ky., 57 S.W.3d 271 (2001).

For the foregoing reasons, we affirm the Judgment of the Henderson Circuit Court.

ALL CONCUR.

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