RENDERED: MAY 30, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001893-MR

TOM AND DONNA SCATTOLONI — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 04-CI-001510

ROBERT L. HALLENBERG AND
WOODWARD HOBSON & FULTON, PLLP — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MOORE AND VANMETER, JUDGES.

MOORE, JUDGE: On appeal, Tom and Donna[1] Scattoloni (Scattoloni or Tom Scattoloni) appeal from an opinion and order of the Jefferson Circuit Court in which the trial court granted summary judgment in favor of Robert Hallenberg and Woodward Hobson & Fulton, PLLP, whom Scattoloni sued for legal malpractice.

[1] A review of the record reveals that Donna Scattoloni was not actively involved in any of the events leading up to the malpractice suit in this present case nor was she actively involved in the prosecution of that lawsuit or the present appeal.

On appeal, Scattoloni argues that the trial court ignored the evidence in the record that was favorable to his claims against Hallenberg. Finding that the trial court correctly granted summary judgment to Hallenberg as a matter of law, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1992, Tom Scattoloni purchased Fleming Wholesale, a wholesale floral company. Subsequently, in 1998, Scattoloni decided to sell Fleming. To that end, Scattoloni contacted the Walter J. Engel Company (WJEC) in August 1998 and entered into negotiations regarding selling Fleming to WJEC. According to the record, Scattoloni handled the negotiations with WJEC alone. He primarily negotiated the transaction with Richard J. White, Jr., a financial adviser hired by Walter J. Engel, III, WJEC's president. Scattoloni also negotiated with Engel at times. After approximately six months of negotiations, Scattoloni met with attorney Robert L. Hallenberg of Woodward Hobson & Fulton, PLLP in February 1999 regarding the potential sale of Fleming.

In their initial meeting, Scattoloni did not disclose to Hallenberg that he had received two offers to buy Fleming; he did not disclose the identity of either potential purchaser; he did not disclose that he was personally negotiating with WJEC; and he did not bring any documents regarding the sale of Fleming. According to Scattoloni, the purpose of the meeting with Hallenberg was to solicit "input with regards to whether or not the offers were the type of thing that [he] should undertake." Yet, in his deposition, Scattoloni admitted he never mentioned any actual offers. Moreover, according to Scattoloni, he and Hallenberg spoke

only in general terms regarding the sale of Fleming. And at the time of the initial meeting, Scattoloni did not ask Hallenberg to do anything. During the meeting, Hallenberg advised Scattoloni about the importance of having a "first in line security" provision or having other personal guarantees incorporated into any potential purchase agreement.

Despite his meeting with Hallenberg, Scattoloni continued to personally negotiate with White and Engle. Scattoloni neither spoke nor consulted with Hallenberg until the middle of May 1999, nearly three months after their meeting. During their second meeting, which lasted approximately an hour and a half, Scattoloni and Hallenberg discussed the ramifications of WJEC, a C corporation, acquiring Fleming, an S corporation; the importance and possible inclusion of security provisions such as personal and asset guarantees; and the benefits of "tag-along" agreements. After the second meeting with Hallenberg, Scattoloni personally continued negotiating the terms of the sale of Fleming to WJEC without consulting Hallenberg. After Scattoloni secured the final terms of the sale, Scattoloni approached Hallenberg to review the purchase agreement. Hallenberg did and suggested changes.

After Hallenberg reviewed the purchase agreement, Scattoloni and WJEC finalized the purchase in November 1995. The purchase agreement included a provision for delayed stock reimbursements to Scattoloni, a five-year lease regarding Fleming's building, and a three-year employment agreement for Scattoloni. For approximately the next three years, Scattoloni received various

payments outlined in the purchase agreement. However, WJEC failed to make the first stock reimbursement to Scattoloni because it was insolvent.

In February 2005, Scattoloni filed a legal malpractice suit against Hallenberg and Woodward Hobson & Fulton, PLLP in the Jefferson Circuit Court. Scattoloni alleged that Hallenberg had deviated from the standard of care for a lawyer by failing to advise Scattoloni about the necessity of including a default provision in the purchase agreement which would have returned Fleming to Scattoloni in the event WJEC defaulted on its obligations under the purchase agreement.

Hallenberg filed a motion for summary judgment claiming that Scattoloni could not prove "but for" causation. Moreover, Hallenberg argued: (1) that it was undisputed that Scattoloni had personally handled all the negotiations for the sale of Fleming; (2) that Scattoloni could not have negotiated a better deal that would have included a default provision; and (3) that even if a default provision had been included in the purchase agreement, it would not have prevented Scattoloni's loss.

According to the trial court,

> [a] court may decide causation in the context of a summary judgment motion as a matter of law when there [is] only one reasonable conclusion to be reached. *Lewis v. B & R Corp.,* 56 S.W.3d 432, 438 (Ky. App. 2003). Under the circumstances of the case, the Court agrees with [Hallenberg] that there is no evidence of record that "but for" [Hallenberg's] alleged malpractice, [Scattoloni] "(i) would have secured a deal including a default clause, (ii) WJEC would and could have signed a deal with a

> default clause, [and] (iii) that such a clause would have prevented [Scattoloni's] losses."

Consequently, the trial court granted judgment in Hallenberg's favor.

II. STANDARD OF REVIEW

When considering a motion for summary judgment, the trial court must view the record in a light most favorable to the party opposing the motion, in this case, Scattoloni, and must resolve all doubts in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). However, the party opposing the motion must present, at the very least, some affirmative evidence demonstrating the existence of a genuine issue of material fact that requires a trial. *Hubble v. Johnson,* 841 S.W.2d 169, 171 (Ky. 1992). The trial court should not grant summary judgment if any issue of material fact exists. *Steelvest,* 807 S.W.2d at 480. Normally, the issue of causation is a question of fact, but "where only one reasonable conclusion can be reached, a court may decide the issue of causation as a matter of law." *Lewis v. B & R Corporation,* 56 S.W.3d 432, 438 (Ky. App. 2001) (citations omitted).

On appellate review, we must determine whether the trial court correctly found that no genuine issue of material fact existed and that, as a matter of law, the moving party was entitled to judgment in its favor. *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky. App. 1996). Because findings of fact are not in issue, we review the trial court's decision *de novo*. *Id*.

III. ANALYSIS

To prove legal malpractice, Scattoloni is required to prove (1) that an employment relationship existed between him, as the client, and Hallenberg, as the attorney; (2) that Hallenberg, in his capacity as an attorney, failed in his duty to exercise the ordinary care that a reasonably competent attorney acting in the same or similar circumstances would; and (3) that Hallenberg's alleged negligence was the proximate cause of Scattoloni's damages. *Marrs v. Kelly,* 95 S.W.3d 856, 860 (Ky. 2003). To prove that Hallenberg's alleged negligence caused him harm, Scattoloni was required to prove that, but for Hallenberg's negligence, Scattoloni would have had a better result in the underlying claim. *Id*. In other words, Scattoloni was required to show that, absent Hallenberg's alleged negligence, Scattoloni would have negotiated a purchase agreement containing a default provision that would have prevented his losses.

We find that an attorney/client relationship existed between Scattoloni and Hallenberg. However, Scattoloni cannot meet the remaining elements for a legal malpractice case.

Scattoloni claims that he did nothing to limit Hallenberg's representation of him regarding the sale of Fleming. Turning to the record, we find that Scattoloni personally handled all the negotiations with WJEC for the sale of Fleming. The record demonstrates that this process took well over a year to complete. In that time, Scattoloni met with Hallenberg approximately two to three times for a total of approximately three to four hours. During their first meeting, Scattoloni only discussed the potential sale of Fleming with Hallenberg in general

terms. Furthermore, Scattoloni did not dispute that he had WJEC's financial information, which was less than stellar, yet Scattoloni never provided that information to Hallenberg.[2] While Scattoloni claims he did nothing to limit Hallenberg's representation, the record does not support this contention. In light of Hallenberg's limited representation and the dearth of case law supporting Scattoloni's assertions regarding duty, Scattoloni has presented no affirmative evidence that Hallenberg violated any duty owed to Scattoloni.

Regarding the issue of causation, Scattoloni was required to demonstrate some affirmative evidence that, absent Hallenberg's alleged negligence, Scattoloni, would have received the desired default provision. To support this contention, Scattoloni relies on his own self-serving assertion and his claim that Engel testified that Engel would have agreed to such a provision.

Turning to Engel's deposition, we find that Scattoloni's attorney asked if Engel would have had a problem with such a default provision and Engel replied, "That's a tough question. I don't know. I - - personally, yes, I - - I - - that's my nature, yes, I would have said that." However, Engel testified that both White, whom he had hired to handle the negotiations with Scattoloni, and Engel's attorney would have advised against the inclusion of such a default clause. Looking at Engel's testimony, we find that it does not constitute affirmative evidence that Scattoloni would have received that default provision; rather, Engel's testimony is nothing more than speculation. Furthermore, Scattoloni presents no

[2] According to the record, Scattoloni never supplied Hallenberg with any documentation regarding the sale except for a draft of the purchase agreement for Hallenberg to review.

affirmative evidence, other than his own speculation, that such a clause would have prevented his losses.

Moreover, the record clearly demonstrates that, after the purchase, Engel's bank had a first in line security interest in all of WJEC's assets including Fleming. Even if Scattoloni's desired default provision had been included in the purchase agreement, it would not have prevented Scattoloni's losses.

Considering the evidence in a light most favorable to Scattoloni and considering the lack of affirmative evidence supporting Scattoloni's assertions, we agree with the trial court's decision to grant judgment in Hallenberg's favor. Consequently, the opinion and order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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