RENDERED: DECEMBER 6, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001033-MR

BETH[1] DARLENE SAMMET — APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 14-CI-00205

DENISE M. HELLINE — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, KRAMER, AND K. THOMPSON, JUDGES.

DIXON, JUDGE: Beth Sammet appeals the grant of summary judgment dismissing her counterclaims against Denise Helline, entered by the Oldham Circuit Court on June 7, 2018. Following a careful review, we affirm.

[1] The body of the notice of appeal states that the Appellant is "Berh" Darlene Sammet. Given that the spelling of Ms. Sammet's name throughout the proceedings has been "Beth," we choose to use this spelling in our Opinion.

BACKGROUND FACTS AND PROCEDURAL HISTORY

Denise represented Beth in a divorce proceeding in which the decree of dissolution was entered on August 3, 2011,[2] by the Oldham Family Court (herein referred to as the family court). In January 2014, per Denise's request, the family court allowed her to withdraw as Beth's counsel.

On April 1, 2014, Denise filed a complaint against Beth with the Oldham Circuit Court (herein referred to as the trial court) for breach of contract, seeking $29,627.98—plus interest—for unpaid legal fees for services rendered in the divorce proceeding. On May 2, 2014, Beth answered and counterclaimed, alleging a litany of legal malpractice claims. Of importance to the instant appeal are Beth's claims that Denise's failure to request and obtain documentation concerning the cash receipts for Integrated Solutions, Inc. (ISI)—an S-corporation owned solely by Beth and her former husband, Charles Sammet—for 2011 cost her more than $40,000, and that Denise's failure to request and obtain statements concerning Charles's frequent flyer miles cost her over 100,000 miles, worth at least $3,500.

The decree of dissolution awarded Charles ISI and Beth a cash payment or credit against other monies owed to Charles for her 50% marital interest in ISI, based on the family court's assigned value of $246,000 "plus any

[2] Beth incorrectly refers to this date as August 4, 2011, throughout her brief.

additional cash receipts received between May 31, 2011, and the distribution of funds." The funds from ISI were distributed in December of 2011. Beth claims that Denise's failure to obtain "additional cash receipts received between May 31, 2011, and the distribution of funds" cost her the value of those funds, which she estimates to be in excess of $40,000. However, Beth failed to produce "additional cash receipts received between May 31, 2011, and the distribution of funds" to demonstrate her damages, if any.

The family court evenly divided Charles's 600,000-plus frequent flyer miles. The trial court, in a discovery order entered February 11, 2016, noted that Beth testified no accounting was done but there was documentation shown to her for the October frequent flyer miles. The trial court further ordered:

> [Beth's] claim relates to depletion of the miles that her ex-husband [used] following a July 2010 status quo order. It will be incumbent upon her to prove her claim and unless she is able to produce documentation she will not be able to do so. The court orders her to produce the mileage she claims was depleted.

No documentation supporting Beth's counterclaim was produced.

Despite significant discovery squabbles presented to the trial court, substantial discovery was conducted, including four[3] depositions of Beth, written

[3] The first deposition was stopped and rescheduled because Beth failed to bring the requested documents indicated in the notice of deposition.

discovery, and the production of Denise's file and bills from Beth's divorce proceeding. Consequently, on February 8, 2018, Denise moved the trial court for summary judgment on Beth's counterclaims. After the matter was fully briefed, the trial court granted the motion for summary judgment on June 7, 2018. This appeal followed.

On appeal, Denise moved our Court to strike certain portions of Beth's brief. This motion was passed from a motion panel of our Court to the instant merits panel and is addressed in a separate order, entered contemporaneously with this Opinion.

STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR[4] 56.03. An appellate court's role in reviewing a summary judgment is to determine whether the trial court erred in finding no genuine issue of material fact exists and the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). A grant of summary judgment is reviewed *de novo* because factual findings are not at issue. *Pinkston v. Audubon Area*

[4] Kentucky Rules of Civil Procedure.

Community Services, Inc., 210 S.W.3d 188, 189 (Ky. App. 2006) (citing *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000)).

It is well-established that a party responding to a properly supported summary judgment motion cannot merely rest on the allegations in his pleadings. *Continental Casualty Co. v. Belknap Hardware & Manufacturing Co.*, 281 S.W.2d 914, 916 (Ky. 1955). "[S]peculation and supposition are insufficient to justify a submission of a case to the jury, and . . . the question should be taken from the jury when the evidence is so unsatisfactory as to require a resort to surmise and speculation." *O'Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006) (citation omitted). "'Belief' is not evidence and does not create an issue of material fact." *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990); *see also Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007) ("A party's subjective beliefs about the nature of the evidence is not the sort of affirmative proof required to avoid summary judgment."). Furthermore, the party opposing summary judgment "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 481 (Ky. 1991) (internal quotation marks and citations omitted). "[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible

for the respondent to produce evidence at the trial warranting a judgment in his favor." *Id.* at 480.

LEGAL ANALYSIS

On appeal, Beth presents multiple issues. Beth claims that discovery was incomplete; therefore, summary judgment was inappropriate. Beth also claims the factual issues concerning Denise's failure to follow Beth's instructions—regarding determining Beth's share of ISI's value and the depletion of Beth's share of Charles's frequent flyer miles—preclude a grant of summary judgment. We will address each issue, in turn.

First, Beth asserts that she is entitled to complete her discovery. However, as noted by the trial court in its order on Beth's motion to compel responses to discovery by Denise, entered August 13, 2018, Beth "does not state with specificity what Interrogatories or Production of Documents Requests Plaintiff has not responded to." The trial court was correct in also noting that "the Court does not have all the information needed to enter a motion to compel, or otherwise award sanctions." Similarly, Beth has failed to identify with specificity—in response to Denise's motion for summary judgment or on appeal—what further discovery was necessary to prove her claims. We will not search the record to construct Beth's argument for her, nor will we go on a fishing expedition to find support for her underdeveloped arguments. "Even when briefs have been

filed, a reviewing court will generally confine itself to errors pointed out in the briefs and will not search the record for errors." *Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979).

We further note that Denise's deposition and additional answers and responses to written discovery requests are largely irrelevant to Beth's counterclaims, even though she claims denial of access to these precludes a grant of summary judgment. The standard to prove legal malpractice is well-settled.

> Under the authority of the landmark decision of *Maryland Casualty Co. v. Price*, 231 F. 397 (4th Cir. 1916), appellant was required to prove in the legal malpractice suit (1) that [Denise] was employed by appellant; (2) that [s]he neglected [her] duty to exercise the ordinary care of a reasonably competent attorney acting in the same or similar circumstances; and (3) that such negligence resulted in and was the substantially contributing factor in the loss to the client.

Daugherty v. Runner, 581 S.W.2d 12, 16 (Ky. App. 1978). The only two issues of fact which could possibly preclude a grant of summary judgment on Beth's counterclaims in this case concern damages. No evidence of Beth's actual proof of loss has been produced. Considering the record as developed, with discovery produced by Beth, as well as copies of the divorce file and billing from Denise, there is nothing in either Denise's deposition or additional written discovery answers or responses from Denise which could create genuine issues of material fact sufficient to preclude summary judgment concerning damages relating to

either a loss from Beth's share of ISI's distribution or frequent flyer miles. Nor can Beth's argument that she does not have these items provide a basis for her claim that discovery is somehow not substantially complete, to avoid summary judgment, when she has had ample opportunity—over five years—to conduct discovery to establish even a scintilla of proof to support her counterclaims. Moreover, contrary to Beth's assertion, we have found no court-ordered "stay" of discovery, and Beth has referred us to none, which would have otherwise impeded her efforts to obtain discovery through any means available to her under our civil rules of procedure.[5]

"A summary judgment is only proper after a party has been given ample opportunity to complete discovery, and then fails to offer controverting evidence." *Pendleton Bros. Vending, Inc. v. Commonwealth, Fin. & Admin. Cabinet*, 758 S.W.2d 24, 29 (Ky. 1988) (citing *Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628 (Ky. App. 1979)). Beth had ample

[5] Beth refers to the trial court's handwritten addition to an order concerning a motion to compel entered April 29, 2016, which stated, "No response from Plaintiff to defendant's discovery requests shall be due until 30 days after Def's compliance." As previously mentioned, this in no way prevented Beth from utilizing the means available to her to conduct further discovery. Nor does this order run afoul of CR 26.04, which provides:

> Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

opportunity to obtain proof to support her counterclaims in the more than five years since the suit was filed, but she now complains because the efforts she made to conduct discovery do not support her counterclaims. Beth claims in her brief that she should have been allowed to depose Denise and her legal assistant, Caren Yarmuth, but fails to cite to any portion of the record on appeal demonstrating that she ever attempted to depose Yarmuth. Our review of the record indicates that Beth was not prevented by the trial court, or Denise, from deposing Yarmuth. Additionally, in view of the record, as previously discussed, neither the deposition of Denise or Yarmuth would have assisted Beth in proving her counterclaims as she already had Denise's entire case file, and neither deposition would produce the proof needed for Beth to establish her damages. Both parties acknowledge that for Beth to prove a claim of legal malpractice, she must demonstrate duty, breach, causation, and damages. To prove damages, Beth must produce cash receipts for ISI and frequent flyer statements from 2011 showing that miles were depleted in violation of the status quo order. She has produced neither.

Second, Beth argues that she presented evidence that Denise deviated from the recognized standard of care. Beth digresses into a discussion of whether expert or lay testimony is sufficient to prove her claims of legal malpractice. Regardless of whether the proof is expert or lay, the trial court correctly found that Beth did not produce sufficient proof to establish that Denise rendered ineffective

assistance of counsel, or that Beth sustained any damages because of Denise's representation. "We may assume malpractice . . . but every malpractice action does not carry with it a right to monetary judgment." *Mitchell v. Transamerica Ins. Co*., 551 S.W.2d 586, 588 (Ky. App. 1977) (citation omitted). "It is the law that a malpractice action against an attorney cannot be established in the absence of a showing that his wrongful conduct has deprived his client of something to which he would otherwise have been entitled." *Id*. As previously discussed, Beth has presented no proof of loss. Therefore, in the absence of the requisite proof to sustain her counterclaims, the trial court correctly granted summary judgment on those issues, dismissing Beth's counterclaims.

Third, Beth alleges that Denise failed to request and obtain Charles's frequent flyer statements.[6] Again, Beth fails to demonstrate that Denise's failure to obtain this data constitutes ineffective assistance of counsel or damaged her in any way. Despite a specific trial court order for her to produce proof of the mileage she claims that Charles depleted, Beth has failed to do so. In the absence of such proof, the trial court properly granted summary judgment on those issues, dismissing Beth's counterclaims.

[6] Denise disputes that the family court could even assign Beth half of Charles's frequent flyer miles, as such a transfer is not authorized by Delta pursuant to their program guidelines. Either way, Beth's failure to demonstrate loss is fatal to her counterclaims.

Upon careful review of the record, established over five years of discovery, it is clear there are no genuine issues of material fact. Therefore, the trial court properly granted summary judgment, dismissing Beth's counterclaims.

Therefore, and for the foregoing reasons, the order entered by the Oldham Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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