STATE OF MICHIGAN

COURT OF APPEALS

PLANET BIG BOY, INC.,

Plaintiff-Appellant,

v

MATTHEW C. BROWN,

Defendant-Appellee.

UNPUBLISHED
September 23, 2004

No. 248818
Oakland Circuit Court
LC No. 2002-042947-NM

Before: Murphy, P.J., and O'Connell and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) in this action involving a claim of legal malpractice arising out of an attempted purchase of Big Boy restaurants. We affirm.

In November 1998, plaintiff's principals began negotiating with Elias Brothers for the purchase of nine Big Boy restaurants. In late January 1999, they retained defendant on a limited basis to assist them in reviewing and revising documents, including an initial letter of intent they had negotiated with Elias Brothers and the ensuing purchase agreement. Defendant drafted a provision in the letter of intent making plaintiff's earnest money deposit fully refundable in the event that plaintiff could not obtain financing.

In February 2000, after the terms of the letter of intent were agreed upon, one of plaintiff's principals paid Elias Brothers a deposit of $360,000. The purchase agreement entered into by plaintiff and Elias Brothers in July 2000, acknowledged that plaintiff had paid this deposit, which was to be applied at closing to initial franchise fees. Further, the agreement provided that plaintiff's obligations were subject to the satisfaction of certain conditions, including that plaintiff obtain financing, and that if any condition was not satisfied to plaintiff's reasonable judgment, plaintiff had the option to waive the condition or to terminate the purchase agreement and receive a full refund of its deposit.

Plaintiff sought financing, but was unable to obtain it without the personal guarantees of its principals. Plaintiff found this unacceptable. In October 1999, plaintiff sent Elias Brothers a letter seeking a refund of its deposit because the financing contingency had not been met. Defendant drafted this letter for signature by one of plaintiff's principals. Elias Brothers returned $50,000 to plaintiff, but maintained that plaintiff was not entitled to a refund because

the financing contingency had been met. Elias Brothers also informed plaintiff that it was prohibited from returning any additional funds by its financial condition. Plaintiff explored settlement possibilities with Elias Brothers, with defendant drafting a letter in August 2000 on behalf of plaintiff seeking franchise rights abroad or certain Michigan restaurants in exchange for the balance of the deposit. Ultimately, plaintiff's attempts to resolve this matter were unsuccessful. Elias Brothers filed for bankruptcy in October 2000. Plaintiff made no further efforts to obtain a refund of the remainder of its deposit from Elias Brothers.

Plaintiff filed suit alleging that defendant committed legal malpractice by failing to advise plaintiff to have the deposit money escrowed. Defendant denied that he was requested to give any advice as to escrowing the funds. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), asserting that there is no legal requirement that deposits be placed in escrow, that his representation of plaintiff was in accord with local practice, and that any alleged failure to advise plaintiff to have the deposit held in escrow was not the cause of plaintiff losing its deposit money. The trial court granted defendant's motion, concluding that defendant had no duty to advise plaintiff that the funds should be escrowed. The court also found that plaintiff failed to present any evidence to create a question of fact as to causation because it was undisputed that Elias Brothers would not have agreed to an escrow, that Elias Brothers' bankruptcy was not foreseeable, and that plaintiff could not establish that it was entitled to refund of the deposit under the terms of the agreement.

Plaintiff first argues that the trial court should not have granted defendant's motion for summary disposition because genuine issues of material fact remained as to whether defendant's duty included advising plaintiff that the deposit should be escrowed. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW2d 151 (2003); *Rice v Auto Club Ins Ass'n,* 252 Mich App 25, 30; 651 NW2d 188 (2002). In reviewing the trial court's decision, this Court must review the record in the light most favorable to the nonmoving party. *Dressel, supra* at 561. The moving party under MCR 2.116(C)(10) must identify the issue to which it believes no genuine issue of material fact exists and has the initial burden of supporting his position by affidavits, pleadings, depositions, admissions, and other documentary evidence. MCR 2.116(G)(3)(b)&(4); *Veenstra v Washtenaw Country Club,* 466 Mich 155, 163; 645 NW2d 643 (2002). The nonmoving party may not rely on mere allegations in order to demonstrate that there is a genuine issue of material fact for trial. MCR 2.116(G)(4); *Rice, supra* at 31. Rather, the existence of a disputed fact must be determined by admissible evidence proffered in opposition to the motion. MCR 2.116(G)(5)&(6); *Veenstra, supra* at 163. Summary disposition is appropriate where the proffered evidence fails to establish a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Veenstra, supra* at 164; *Rice, supra* at 31.

The plaintiff in a legal malpractice action has the burden of proving: (1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was a proximate cause of an injury; and (4) the fact and extent of the injury alleged. *Charles Reinhart Co v Winiemko,* 444 Mich 579, 585-586; 513 NW2d 773 (1994). In *Simko v Blake,* 448 Mich 648, 655-656; 532 NW2d 842 (1995), our Supreme Court further explained the proper analysis regarding a legal malpractice action.

> The first element the plaintiff must prove is "duty." "Duty" is any obligation the defendant has to the plaintiff to avoid negligent conduct. In negligence actions, the existence of duty is a question of law for the court.
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> In legal malpractice actions, a duty exists, as a matter of law, if there is an attorney-client relationship. "*Whenever an attorney or solicitor is retained in a cause*, it becomes his implied duty to use and exercise reasonable skill, care, discretion and judgment in the conduct and management thereof." In the instant case, the parties admitted that an attorney-client relationship existed between Mr. Simko and Mr. Blake. Thus, the issue is not whether a duty existed, but rather the extent of that duty once invoked. [Emphasis in original; citations omitted.]

Here, the question also concerns the extent of defendant's duty. An attorney has a duty to exercise reasonable skill, care, discretion, and judgment in representing a client and to act as would an attorney of ordinary learning, judgment, or skill under the same or similar circumstances. *Mitchell v Dougherty*, 249 Mich App 668, 677; 644 NW2d 391 (2002). "However, an attorney is not a guarantor of the most favorable possible outcome, nor must an attorney exercise extraordinary diligence or act beyond the knowledge, skill, and ability ordinarily possessed by members of the legal profession." *Id.* Mere errors in judgment are generally not grounds for malpractice, where the attorney acts in good faith and exercises reasonable skill, care, and diligence. *Simko, supra* at 658.

Plaintiff alleged in its complaint a single basis for its malpractice claim: "[A] reasonable and prudent attorney would have advised [p]laintiff that the deposit given to Elias Brothers Restaurants, Inc. should have been held in escrow and not paid to Elias Brothers Restaurants, Inc." In support of his motion for summary disposition, defendant submitted detailed affidavits and accompanying documents from two experts indicating that the normal and customary practice in commercial transactions, such as the one between plaintiff and Elias Brothers and not one simply involving a real estate broker, is to deliver the deposit directly to the seller and not to place such deposits in escrow.

In response, plaintiff offered the affidavit of its expert, who asserted in cursory fashion that defendant breached the standard of care by failing to advise plaintiff to place the deposit in escrow. Plaintiff's expert failed to state with any particularity the basis for this conclusion. The substantive extent of the affidavit was as follows:

> [I]t is my opinion that the failure of Matthew Brown to advise his client that a deposit for commercial real estate, especially of the amount in this transaction, should be placed with a third-party escrow agent and not the sellers, constituted a breach of the standard of care for attorneys in the same or similar circumstances, i.e., legal malpractice.
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> [I]n my opinion, the legal malpractice was a proximate cause of the loss of the deposit.

The problem with the expert affidavit submitted by plaintiff, aside from its conclusory nature, is that the discussion of duty is made solely in the context of a "commercial real estate" transaction. The record makes clear that the proposed business transaction involved much more

than the sale of commercial real estate, but rather also included matters touching on franchise fees, remodeling, restaurant management rights and obligations, and the general transfer of a business. Indeed, the deposit was to be applied at closing for franchise fees. One of defendant's experts averred:

> In a transaction like the one between Planet Big Boy, Inc., and Elias Brothers Restaurants, Inc., the standard of practice does not require that a deposit be held in escrow or held by a third party. I understand that the original Letter of Intent proposed a non-refundable deposit and that the defendant negotiated on plaintiff's behalf to provide that the deposit was refundable. The Purchase Agreement provided that the deposit was to be applied to franchise fees and not to the real estate at closing.
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> Even in real estate transactions there is no specific standard of care regarding earnest money deposits. In transactions involving licensed real estate brokers, earnest money deposits are customarily held by a broker. In transactions without brokers it is customary for the seller to hold the earnest money deposit. In a business sale transaction, it is customary for the deposit (if any) to be held by the seller and to be refunded to the buyer in the event the contingencies are not satisfied or applied to the purchase price at closing."

The former chief executive officer for Elias Brothers stated in his affidavit that Elias Brothers did not escrow funds with a third party, but rather deposited them into their general fund. General counsel for Elias Brothers testified that she did not recall ever using an escrow account for deposits. This evidence further supports the affidavits submitted by defendant. The legal sources and citations noted by plaintiff in its brief also concern real estate transactions and brokers. The affidavit submitted by plaintiff wholly fails to squarely contradict defendant's experts and fails to relevantly address the type of transaction at issue. As such, plaintiff failed to present documentary evidence, necessary to create an issue of fact, showing that defendant did not exercise reasonable skill, care, discretion, and judgment in representing a client and did not behave as would an attorney of ordinary learning, judgment, or skill under the same or similar circumstances.

Moreover, plaintiff's proffered evidence, the expert's affidavit, did not contain sufficient detail. *Rose v National Auction Group*, 466 Mich 453, 470; 646 NW2d 455 (2002)("It is not enough to create a genuine issue of material fact to provide conclusory statements that a duty was breached."). An affidavit is insufficient to create a genuine issue of material fact if it is merely conclusory and devoid of details. *Quinto v Cross & Peters Co*, 451 Mich 358, 371-372; 547 NW2d 314 (1996). Therefore, the trial court did not err in ruling that there was no genuine issue of material fact as to whether defendant had a duty to advise plaintiff that the deposit should be placed in escrow. In the absence of proof of such a duty, there is no basis for plaintiff's malpractice action against defendant.[1]

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[1] We wish to make abundantly clear that we are not finding that defendant did not have a duty to
(continued…)

In light of our ruling, it is unnecessary to address the additional issues presented on appeal.

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Hilda R. Gage

(…continued)

act as claimed by plaintiff, but simply that plaintiff failed to submit sufficient evidence to show that such a duty exists.