STATE OF MICHIGAN

COURT OF APPEALS

GREGORY D. SHANNON, M.D., NANCY SHANNON, M.D., and 1650 HASLETT ROAD, L.P., Plaintiffs-Appellants,	UNPUBLISHED January 20, 2009
v	No. 275991 Ingham Circuit Court
FOSTER, SWIFT, COLLINS & SMITH, P.C., and STEVEN L. OWEN, Defendants-Appellees.	LC No. 05-000349-NM

Before: Gleicher, P.J., and Fitzgerald and Hoekstra, JJ.

Fitzgerald, J. (*dissenting*).

I respectfully dissent because I believe that the trial court properly granted summary disposition in favor of defendants on the basis that the attorney-judgment rule barred the malpractice claims.

This case arises out of defendants' representation of plaintiffs with respect to a commercial real estate closing. In the fall of 2002, plaintiff Nancy Shannon, M.D., sought to purchase a building within which to operate her medical practice. On November 10, 2002, her then husband, plaintiff Gregory D. Shannon, M.D., signed an agreement to purchase a building located at 1650 Haslett Road in Haslett, Michigan, to house the practice and possibly other tenants.[1] The agreement contemplated the purchase of a completed building exterior, which would then allow plaintiffs to seek bids to have the interior of the building finished, i.e., the "interior buildout." Plaintiffs retained defendant Steven L. Owen to represent them regarding the transaction.

At the March 17, 2003, closing, Gregory realized that the bids for the interior buildout were significantly higher than anticipated and refused to proceed with the closing because of financial constraints. Ultimately, Gregory closed on the building on March 24, 2003, after negotiating a reduced sales price. After plaintiffs' contractor began working on the interior

[1] Nancy signed the agreement only as a witness and not as a purchaser.

buildout, plaintiffs discovered defects in the construction of the building. Plaintiffs thereafter filed a legal malpractice claim against Owen and his law firm,[2] defendant Foster, Swift, Collins & Smith, P.C.

To state a claim for legal malpractice, a plaintiff must show: "(1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was the proximate cause of an injury; and (4) the fact and extent of the injury alleged." *Manzo v Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004). To establish proximate cause, a plaintiff must show that the defendant's act was the cause in fact of the injury. *Id.* A plaintiff is required to "'present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred.'" *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 614; 563 NW2d 693 (1997), citing *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994).

Plaintiffs based their legal malpractice claim in part on their contention that Owen failed to properly advise them regarding their ability to forego the transaction at the March 17, 2003, aborted closing. When Gregory asked what would happen if he refused to close the transaction, Owen advised him that he could be sued for breach of contract. At his deposition, Owen recalled reviewing the purchase agreement and determining that Gregory could be subject to a specific performance claim or a claim for money damages if he refused to close.

I would hold that the attorney-judgment rule bars plaintiffs' malpractice claim stemming from Owen's advice regarding the possibility of a lawsuit. "An attorney is obligated to use reasonable skill, care, discretion and judgment in representing a client[,]" but has no "duty to insure or guarantee the most favorable outcome possible." *Simko v Blake*, 448 Mich 648, 656; 532 NW2d 842 (1995) (internal quotation marks and citation omitted). An attorney must act in accordance with the ability of an average legal practitioner and is not bound to exercise extraordinary diligence. *Id.* at 656-657. "Where an attorney acts in good faith and in honest belief that his acts and omissions are well founded in law and are in the best interest of his client, he is not answerable for mere errors in judgment." *Id.* at 658.

Here, Owen rendered the advice in good faith and it is well founded in law. This Court has previously recognized that specific performance and money damages are both appropriate remedies for breaches of contracts involving the sale of land. See, e.g., *Zurcher v Herveat*, 238 Mich App 267, 283-285; 605 NW2d 329 (1999). Thus, Owen's advice is consistent with prevailing Michigan law and cannot support plaintiffs' claim. *Simko, supra* at 656.

Plaintiffs also argue that Owen erroneously advised them that they could be liable for the Therapy Institute lease if they refused to close. Owen did not recall advising plaintiffs as such. In any event, even if Owen offered such advice, it similarly cannot form the basis of a legal malpractice claim pursuant to the attorney-judgment rule. Gregory acknowledged receiving a

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[2] Plaintiffs' complaint also alleged a breach of fiduciary duty claim, but that claim is not at issue in this appeal.

proposed lease for space within the building from The Therapy Institute. The facsimile cover sheet specifically stated, "Not binding because it was not signed by landlord [;] Terms and Conditions could be changed [.]" Gregory testified that he knew that the lease had never been executed and that nobody identified as a "landlord" had ever signed it. Nevertheless, he testified that Owen advised him that he could be held responsible for the lease since the owner of the building did not act on the offer to lease the space only because Gregory was purchasing the building. Assuming that Owen advised plaintiffs as such, he was explaining the potential damages that could result if Gregory failed to close on the property. Lost income from a prospective lessor could conceivably constitute an element of damages if Gregory had refused to proceed with the sale. Accordingly, Owen acted in good faith and exercised reasonable judgment in advising Gregory of this possible consequence of his proposed course of action. *Simko, supra* at 656, 658. To the extent that Owen's advice may have been incorrect, his mere error in judgment is not actionable. *Id.* at 658.

Plaintiffs also contend that Owen erroneously advised Gregory to close on the building because it was incomplete at the time of closing. Both Gregory and Owen testified, however, that the agreement provided that Gregory would purchase an incomplete building and receive a price reduction of $80,000 as a result. Indeed, Owen understood that the fact that the building was incomplete was not a sufficient reason to delay closing because the reduced price reflected this fact. Thus, Owen advised Gregory in good faith and exercised reasonable judgment. *Simko, supra* at 656, 658.

Further, to the extent that plaintiffs argue that Owen improperly advised Gregory to close on the building despite construction defects, the deposition testimony reveals that the defects were discovered only after the March 24, 2003, closing. Gregory testified that the construction defects were unknown until plaintiffs' contractor began the buildout process. In addition, Nancy testified that although there existed unspecified "irregularities" before closing, construction defects were not discovered until after the closing "when the subcontractors started moving in to do things . . . ." Therefore, Owen could not possibly have advised plaintiffs regarding defects that were undiscovered.

Plaintiffs further base their malpractice claim on Owen's alleged failure to properly advise them regarding the terms of the purchase agreement, including the "as is" and "with all faults" clauses, the time limitations for inspections, and the clauses included in the multiple addendums to the agreement. Although there is some disagreement between the parties whether plaintiffs retained Owen to represent them before or after executing the purchase agreement, we assume for purposes of this appeal that Gregory and Nancy retained Owen before they signed the purchase agreement as a purchaser and witness, respectively.

Plaintiffs also fail to show that Owen's alleged failures proximately caused their damages. With respect to the "as is" and "with all faults" provisions, plaintiffs have not shown that Owen's alleged failure to advise caused them to purchase a building that they otherwise would not have purchased. This is particularly true in light of the fact that plaintiffs did not discover any construction defects until after the closing. In addition, regarding plaintiffs' opportunity to inspect the premises, Gregory testified that he was aware that he had the right to inspect the premises and that his architect and several contractors inspected the building before the March 24, 2003, closing. Further, with respect to the clauses in the addendums, plaintiffs fail to specifically indicate how Owen failed to properly advise them. Plaintiffs do not point to any

particular provision in the addendums or indicate how the provisions caused them harm. Therefore, regarding the alleged "onerous" provisions of the purchase agreement and addendums, plaintiffs have not presented substantial evidence from which a jury could conclude that more likely than not, their injuries would not have occurred but for Owen's alleged failure to advise. *Pontiac School Dist, supra* at 614.

Plaintiffs also maintain that a conflict of interest existed by virtue of the fact that Owen's law firm, defendant Foster, Swift, Collins & Smith, P.C., represented the builder and developer of the property, Vlahakis Realty. Again, plaintiffs have failed to establish that the alleged conflict proximately caused them injury. Owen alerted plaintiffs to the potential conflict in his initial letter to plaintiffs, dated December 13, 2002. Nancy testified that, even at the time of her deposition, she did not understand why there would exist a conflict of interest merely because Owen's law firm represented Vlahakis. Owen testified that his firm ceased representing Vlahakis at some point, but he did not know whether that occurred before the March 24, 2003, closing in this case. Thus, it is possible that his firm did not even represent Vlahakis at the time of closing.

I would affirm.

/s/ E. Thomas Fitzgerald