STATE OF MICHIGAN

COURT OF APPEALS

FRASCO, CAPONIGRO, WINEMAN, & SCHEIBLE, PLLC,

Plaintiff/Counter-Defendant-Appellee,

v

IGC MANAGEMENT, INC.,

Defendant/Counter-Plaintiff/Third-Party Plaintiff-Appellant,

v

J. CHRISTIAN HAUSER,

Defendant/Third-Party Defendant-Appellee,

and

MURRAY CONNELL

Defendant.

UNPUBLISHED
April 16, 2013

No. 308405
Oakland County Circuit Court
LC No. 2010-109156-CK

Before: WILDER, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this legal malpractice action, defendant-appellant IGC Management, Inc. (IGC) appeals by right following a final order entered on January 13, 2012, by the Oakland County Circuit Court, MCR 7.203(A)(1), which granted summary disposition to appellee regarding the claim of legal malpractice and the demand for legal fees and costs.[1] We affirm.

[1] Murray Connell was dismissed from this action pursuant to a January 26, 2011 court order.

I. BASIC FACTS AND PROCEDURAL HISTORY

IGC retained Frasco, Caponigro, Wineman & Scheible, PLLC (FCWS), and FCWS attorney Christian Hauser (Hauser) to represent them in an underlying action to recover funds that should have been paid to it as a subcontractor but for the general contractor having absconded with the payments. FCWS and Hauser also represented other unpaid subcontractors. After the general contractor filed for bankruptcy, and the court determined that LaSalle Bank had a priority mortgage interest of over $3 million against assets of $1.3 million, the court ordered the subcontractors and the owners and financers of the project to mediation to see if the subcontractors might be able to recover some of their costs. FCWS and Hauser eventually negotiated an agreement settling all underlying claims (Settlement Agreement) in a 12-count second amended complaint. All the subcontractors other than IGC assented to the Settlement Agreement, but IGC was held bound to the Settlement Agreement by Hauser's signature despite that lack of assent. FCWS and Hauser commenced this action against IGC seeking attorney fees for their representation, and IGC counterclaimed for legal malpractice. The trial court granted summary disposition in favor of FCWS and Hauser in both actions.

II. ANALYSIS

IGC argues that the trial court erred when it did not find that Hauser committed malpractice as a matter of law by binding IGC to the Settlement Agreement without its consent. We disagree.

A trial court's factual findings are reviewed for clear error, and its legal conclusions are reviewed de novo. *Butler v Wayne County*, 289 Mich App 664, 671; 798 NW2d 37 (2010), lv den 488 Mich 1054; 794 NW2d 619 (2011).

Neither IGC nor FCWS dispute that Hauser signed the Settlement Agreement without IGC's consent, and that in so doing, Hauser breached the professional duties he owed to IGC. Settlement of a client's claim without the client's consent violates MRPC 1.2(a),[2] and can lead to disciplinary action. *In re Estes*, 390 Mich 585, 600; 212 NW2ds 903 (1973). But this Court has "rejected the argument that a violation of the Code of Professional Responsibility is negligence per se, in favor of the proposition that a code violation is rebuttable evidence of malpractice." *Beattie v Firnschild*, 152 Mich App 785, 793; 394 NW2d 107 (1986). "While the breach of [an] attorney's duty not to prejudice a client's substantive rights by settling a case without the client's consent has been said to amount to legal malpractice (see *Lysick v Walcom*, (1st Dist) 258 Cal App 2d 136; 65 Cal Rptr 406, 28 ALR3d 368), liability in such cases is more commonly held to rest on unfair dealing and bad faith rather than negligence." *See Ivy v Pacific Auto Ins Co* (1st Dist) 156 Cal App 652; 320 P2d 140. 26 Am. Jur. Proof of Facts 2d 703 (Originally published in 1981).

[2] MRPC 1.2(a) reads in relevant part: "A lawyer shall abide by a client's decision whether to accept an offer of settlement or mediation evaluation of a matter."

The record does not support a finding of unfair dealing or bad faith. It shows that Hauser intended to sign the Settlement Agreement on behalf of all claimants except IGC, that he expressly and repeatedly informed the facilitator that he was not authorized to sign on behalf of IGC, and that he requested that the facilitator place a separate line on the written agreement for IGC which would remain unsigned. The record before us does not permit a finding that Hauser committed malpractice as a matter of law, and we conclude therefore that the trial court did not err.

IGC next argues that the trial court erred in ruling that IGC was required to provide expert testimony as to the causation element of its legal malpractice claim, and that where IGC had presented undisputed evidence that would have allowed it to prevail on its claims in the underlying lawsuit, the court erred in granting FCWS summary disposition. We disagree.

The grant or denial of summary disposition is reviewed de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In doing so, an appellate court reviews the entire record. *Id*. Because the court considered evidence outside the pleadings, MCR 2.116(C)(10) provides the appropriate basis for this Court's review. *Driver v Hanley (After Remand)*, 226 Mich App, 558, 562; 575 NW2d 31 (1997). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issues regarding any material fact and that moving party is entitled to judgment as a matter of law." *West v General Motors Corp*, 469 Mich 117, 183; 665 NW2d 468 (2003). When deciding a motion under this section, "this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 681, 621; 689 NW2d 506 (2004). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183.

A legal malpractice plaintiff must prove (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. *Coleman v Gurwin*, 443Mich 59, 63; 503 NW2d 435 (1993). The "last two elements . . . proximate causation and damages, have proven to be problematic." *Basic Food Indus, Inc v Grant*, 107 Mich App 685, 691; 310 NW2d 26 (1981). To establish proximate causation in some instances, the plaintiff in a legal malpractice suit must show that "but for the attorney's alleged malpractice, [the plaintiff] would have been successful in the underlying suit." *Id*. The purpose of this "suit-within-a-suit" requirement is to "insure that the damages claimed to result from the attorney's negligence are more than mere speculation." *Coleman*, 443 Mich at 64.

IGC argues that the trial court's insistence on expert testimony as to the validity and enforceability of construction liens, the process for foreclosing on the liens and selling foreclosed property, and priority between construction liens and mortgage liens was inconsistent with the framework articulated in *Charles Reinhart v Winiemko*, 444 Mich 579; 513 NW2d 773 (1994) (establishing that, in legal malpractice cases, causation is to be determined by the court if it is a matter of law or by a jury if it is a fact issue).

After reviewing the record, it is this Court's opinion that IGC misconstrued the trial court's meaning. The central point of contention between the two parties revolves around whether IGC could have obtained a better result at trial than FCWS obtained for IGC in the Settlement Agreement. FCWS argues that a prior judicial determination that LaSalle Bank held a $3 million-plus priority mortgage interest against assets with an appraised value of $1.3 million rendered virtually worthless the liens held by the subcontractors on the project, including IGC. What the trial court found lacking was expert testimony explaining how, given these facts, IGC expected to achieve a better result than FCWS did. To avoid summary disposition under MCR 2.116(C)(10), IGC "must, by affidavits or as otherwise provided in this rule, *set forth specific facts* showing that there is a genuine issue for trial." MCR 2.116 (G)(4)(emphasis added). IGC steadfastly asserts that it could prevail, while failing to explain how that assertion could possibly be accurate, particularly in light of the undisputed facts strongly suggesting otherwise.

IGC concedes in its reply to FCWS's brief to this Court that its omission of expert testimony was intentional because if there are questions of fact, it should be allowed to proceed to trial to prove causation as part of its "suit-within-a-suit" burden. We disagree.

The "suit within a suit" concept "has vitality only in a limited number of situations," such as where an attorney's negligence prevents a client from bringing a cause of action . . . , where the attorney's failure to appear causes judgment to be entered against his client[,] or where the attorney's negligence prevents an appeal from being perfected." *Coleman*, 443 Mich at 64. IGC concedes that the instant case is not one of the enumerated situations. IGC maintains, however, that it is of the same general kind: "suit within a suit" concepts generally apply where an attorney's actions have been fatal to the claimant's position in the underlying case. IGC argues that because Hauser's signature bound IGC to the Settlement Agreement and barred further pursuit of its claims, the suit within a suit approach is applicable here. Furthermore, IGC argues that as long as it can show by trial that it could get a judgment amount on *any* of the charges listed in the 12-count second amended complaint that exceeds what it received from the Settlement Agreement, it will have met its "suit within a suit" burden for establishing proximate cause. IGC argues that it should be allowed to show that it can do this.

Presuming the suit within a suit approach to be applicable here, IGC still has not met its burden of providing sufficient admissible evidence to raise a genuine issue of material fact that a jury might resolve in IGC's favor. To survive summary disposition, IGC needed to do more than venture that, given the number and nature of charges against the owners and financers of the project, that (1) a judgment of some sort could be won, and (2) that it would be greater than the $41,359.05 awarded it by the Settlement Agreement. IGC failed to offer more than speculation regarding its probability of success.

With regard to the collectability of any judgment that IGC might win, IGC correctly argues that uncollectibility is an affirmative defense to a legal malpractice claim, and the burden of showing complete or partial uncollectibility is on the defendant. *Teodorescu v Bushnell*, 201 Mich App 260, 268; 506 NW2d 275 (1993). In the instant case, however, collectability or uncollectibilty is not an issue we need to address here because IGC fails to provide sufficient factual support of its claims to survive summary disposition and advance to trial. Because IGC has failed to meet its burden to set forth specific facts showing that there is a genuine issue for trial, we affirm summary disposition in favor of FCWS.

Finally, IGC argues that the trial court erred when it denied IGC's motion for summary disposition of FCWS's claim for legal fees and costs. We disagree.

An attorney has a right to fees for services performed pursuant to retainer. *Wyle v City Comm of Grand Rapids*, 297 Mich 365, 373; 297 NW 526 (1941). A client who does not challenge the existence of an attorney-client relationship or the fact that the attorney provided services for which payment is sought is liable for the stated amount. *Plunkett & Cooney PC v Capitol Bancorp Ltd*, 212 Mich App 325,329-330; 536 NW2d 886 (1995). Where a client hires a firm on a contingent basis, and the attorney-client relationship ends prior to completion of the services contracted for, "an attorney is entitled to compensation for the reasonable value of services rendered under a theory of *quantum meruit*. *Id*. at 330. An attorney may forfeit entitlement to a fee award under *quantum meruit*, but only if there has been a judicial determination of unethical conduct *Rippey* 280 Mich 233, 245; 273 NW 552 (1937); *Reynolds*, 222 Mich App 20; 564 NW 2d 467 (1997).

IGC argues that "[a]n attorney may not recover for services rendered if those service[s] are rendered in contradiction to the requirements of professional responsibility and inconsistent with the character of the profession," *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 197; 650NW 2d 364 (2002), and that the fees in question were realized solely because of FCWS's breach of its professional obligations to IGC. Granting summary judgment to FCWS on its fee claim, IGC contends, allows FCWS to benefit from its breach of duty.

Both IGC and FCWS agree that an attorney-client relationship arose in January 2007. From January 2007 until June 2009, FCWS provided professional services and advanced costs to IGC in the amount of $39,537.34. Neither IGC nor Connell have disputed that the costs and fees sought were incurred for their benefit and have no complaints of unethical conduct prior to Hauser's signing of the Settlement Agreement. There has been no judicial or other formal determination that FCWS attorneys engaged in unethical conduct at any point during their legal representation of IGC that would render the fees subject to forfeiture. For these reasons, we affirm the decision to grant summary disposition in favor of FCWS.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause