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NO. COA09-1633

NORTH CAROLINA COURT OF APPEALS

Filed: 19 October 2010

WHD, L.P.,
Plaintiff

v.

Wake County
No. 08 CVS 7293

LAWYERS MUTUAL LIABILITY
INSURANCE COMPANY OF NORTH
CAROLINA and BRENT E. WOOD,
Defendants

Appeal by plaintiff from judgment entered 2 July 2009 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 17 August 2010.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by John W. Ormand III and Julia C. Ambrose; and Nickens, Keeton, Lawless, Farrell & Flack, LLP, by Thomas Farrell and Bradley W. Hoover, pro hac vice, for plaintiff-appellant.

Yates, McLamb & Weyher, L.L.P., by Dan J. McLamb, Barbara B. Weyher, and Susan T. Fountain, for defendant-appellee Lawyers Mutual Liability Insurance Company of North Carolina.

Nicholls & Crampton, P.A., by W. Sidney Aldridge, for defendant-appellee Brent E. Wood.

CALABRIA, Judge.

WHD, L.P. ("plaintiff") appeals the trial court's order granting summary judgment to Lawyers Mutual Liability Insurance Company of North Carolina ("Lawyers Mutual") and Brent E. Wood ("Wood") (collectively "defendants"). The trial court held that plaintiff was collaterally estopped from asserting that Wood's

negligent misrepresentations that led to plaintiff's \$1,000,000 binding arbitration award were covered by his Lawyers Mutual malpractice insurance policy. We affirm.

I. Background

A full background of the facts underlying the instant case can be found in *WHD, L.P. v. Mayflower Capital, LLC*, 195 N.C. App. 462, 673 S.E.2d 168, 2009 WL 368335, 2009 N.C. App. LEXIS 177 (2009) (unpublished). To ensure understanding of the issues in the instant case, an abridged version of this background follows.

In March 2000, Wood and others organized Mayflower Venture Capital Fund III, LLC ("Fund III") for the purpose of acquiring shares in the upcoming initial public offering of a company called BuildNet, Inc. ("BuildNet"). Wood was a partial owner, one of five fund managers, and the attorney for Fund III.

The fund managers induced plaintiff to invest \$1,000,000 in Fund III. Plaintiff was told that this money would be used solely to invest in BuildNet. However, the managers of Fund III actually invested this money unsuccessfully in other companies and eventually lost all of plaintiff's investment. Fund III ultimately filed for bankruptcy.

On 30 March 2005, plaintiff filed a Demand for Arbitration against the five fund managers of Fund III ("the arbitration demand"). Count III of the arbitration demand specifically asserted claims solely against Wood as an attorney for negligent misrepresentation and legal malpractice. The only remaining counts involving Wood involved claims against both Wood and all of the

other defendants. These claims against all defendants were claims for negligent misrepresentation, vicarious liability, and breach of fiduciary duty.

On 7 March 2007, plaintiff obtained an arbitration award against Fund III managers Wood, John D. Brothers ("Brothers") and Diane Pace ("Ms. Pace"), jointly and severally, for more than \$1,000,000, based on negligent misrepresentations made to plaintiff in connection with the solicitation, and subsequent misuse, of investment funds provided by plaintiff to Fund III. On 18 September 2007, the trial court confirmed and entered judgment on the arbitration award. This Court later affirmed that judgment. *See WHD, L.P., supra.*

Wood failed to pay the judgment entered against him. Wood's Lawyers Mutual legal malpractice insurance policy ("the policy") was his most valuable asset and the only asset from which plaintiff could satisfy its judgment against him. Therefore, in order to recover its judgment against Wood, plaintiff filed a claim against the policy. Plaintiff's claim was denied.

On 15 May 2008, plaintiff initiated an action against defendants in Wake County Superior Court, seeking, *inter alia*, a declaratory judgment. In its complaint, plaintiff requested (1) a declaration that Wood was entitled to coverage under the policy for his negligent misrepresentations which led to the arbitration award; and (2) a declaration that it was entitled to collect its full judgment against Wood from the policy.

On 17 September 2008, Lawyers Mutual filed a Motion for Summary Judgment. In this motion, Lawyers Mutual set out six separate grounds under which it believed it was entitled to judgment as a matter of law. Wood filed a similar motion on 27 May 2009. By stipulation of the parties, Lawyers Mutual's motion was set for hearing on the third, fifth, and sixth grounds asserted in its summary judgment motion. In the third ground, Lawyers Mutual alleged that the findings contained in the arbitration award barred plaintiff's coverage claim based on collateral estoppel and/or res judicata because the arbitration award contained "no liability on WHD's legal malpractice allegations against Wood." In the fifth ground, Lawyers Mutual alleged that findings in the arbitration award established as a matter of law that the policy's exclusion (g) applied to Wood's actions, and that, as a result, WHD was barred by collateral estoppel and/or res judicata from challenging the application of the exclusion in the instant case. Finally, the sixth ground alleged that the trial court lacked subject matter jurisdiction over WHD's claims due to collateral estoppel and/or res judicata.

A hearing on defendants' motions was conducted on 16 June 2009. On 2 July 2009, the trial court granted Lawyers Mutual and Wood's motions for summary judgment based on collateral estoppel. The trial court determined that plaintiff had previously litigated its claims of liability against Wood as an attorney during the arbitration hearing. Specifically, the trial court held that:

WHD had the opportunity to fully litigate its claims against Wood for malpractice as an

attorney in the arbitration. WHD lost its case in the arbitration as far as claims for malpractice and thus, WHD may not have another "bite at the apple" in this case as its claims against Wood are gone forever as a result of the arbitration award and decision. Accordingly, the Court will grant [Lawyers Mutual]'s motion for summary judgment on this basis alone.

Plaintiff appeals.

II. Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009).

The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact.

A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense. Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist.

Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a prima facie case at trial.

Edwards v. GE Lighting Sys., Inc., ___ N.C. App. ___, ___, 685 S.E.2d 146, 148 (2009) (citation omitted). We review an order allowing summary judgment *de novo*. *Id.*

III. Collateral Estoppel

Plaintiff argues that the trial court erred by granting summary judgment to defendants on the basis of collateral estoppel. We disagree.

"[I]f [an] agreement to arbitrate states that the decision of the panel is binding on the contracting parties, the award is final, and collateral estoppel will bar relitigation of the issues actually decided during the arbitration proceeding." *Murakami v. Wilmington Star News, Inc.*, 137 N.C. App. 357, 360, 528 S.E.2d 68, 70 (2000).

To successfully assert collateral estoppel as a bar to plaintiff['s] claims, defendant would need to show that the earlier suit resulted in a final judgment on the merits, that the issue in question was identical to an issue actually litigated and necessary to the judgment, and that both [defendants] and [plaintiff] were either parties to the earlier suit or were in privity with parties.

Turner v. Hammocks Beach Corp., 363 N.C. 555, 558-59, 681 S.E.2d 770, 773-74 (2009) (citation omitted). However, when collateral estoppel is asserted defensively, our Supreme Court has abandoned the requirement of mutuality. See *Thomas M. McInnis & Assoc. v. Hall*, 318 N.C. 421, 434, 349 S.E.2d 552, 560 (1986). "The party opposing issue preclusion has the burden to show that there was no full and fair opportunity to litigate the issues in the first case." *Miller Building Corp. v. NBBJ North Carolina, Inc.*, 129 N.C. App. 97, 100, 497 S.E.2d 433, 435 (1998) (internal quotations and citation omitted).

The trial court's order concluded that plaintiff's only claims against Wood as an attorney, designated as Count III of the arbitration demand, were rejected by the arbitration award, and thus, plaintiff's judgment against Wood did not require coverage under the policy. Plaintiff contends that the trial court incorrectly interpreted the arbitration award, and that, correctly construed, the facts and holdings contained in the arbitration award indicated that Wood was found liable as an attorney. Plaintiff believes that, under its interpretation of the arbitration award, Wood's actions fell within the coverage provision of the policy, and therefore, Lawyers Mutual was required to provide coverage for the actions of Wood that led to the award. In order to determine whether Wood's liability, as determined in the arbitration award, was covered under the policy, we first examine the scope of the policy's coverage.

Initially, we note the rules our Supreme Court has established for construing an insurance contract:

As with all contracts, the object of construing an insurance policy is to arrive at the insurance coverage intended by the parties when the policy was issued. If the parties have defined a term in the agreement, then we must ascribe to the term the meaning the parties intended. We supply undefined, nontechnical words . . . a meaning consistent with the sense in which they are used in ordinary speech, unless the context clearly requires otherwise. We construe all clauses of an insurance policy together, if possible, so as to bring them into harmony. We deem all words to have been put into the policy for a purpose, and we will give effect to each word if we can do so by any reasonable construction.

Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C., 364 N.C. 1, 9, 692 S.E.2d 605, 612 (2010) (internal quotations and citations omitted).

In the instant case, the coverage provision at issue is as follows:

To pay on behalf of any Insured (with respect only to any claim or claims first made against any Insured and reported to the Company during the policy period) all sums which such Insured shall become legally obligated to pay as money damages as compensation for actual monetary loss caused by any act or omission of any Insured in rendering or failing to render legal services for others while engaged in the practice of law as licensed by the State of North Carolina.

Under the plain language of the policy, coverage would not be triggered unless Wood was rendering legal services for others while engaged in the practice of law as licensed by the State of North Carolina. Thus, the policy would only cover actual monetary losses while Wood was acting in his capacity as an attorney. Indeed, neither party disputes that in order to trigger coverage under the policy, the arbitrator would have had to find Wood liable as an attorney in the arbitration award.

However, the parties each offer their own interpretation of the meaning of the arbitration award. Lawyers Mutual argues that the arbitration award only found Wood liable as a fund manager of Fund III. In contrast, plaintiff argues that the arbitration award found Wood liable as both fund manager and attorney.

"[I]n determining whether an insurer has a duty to indemnify, the facts as determined at trial are compared to the language of

the insurance policy. If the insurance policy provides coverage for the facts as found by the trier of fact, then the insurer has a duty to indemnify." *Id.* at 7, 692 S.E.2d at 611. Therefore, the question before this Court is whether the facts, as found in the facts and holding portions of the arbitration award,¹ indicate that Wood was found liable for any act or omission in rendering or failing to render legal services for others while engaged in the practice of law as licensed by the State of North Carolina.

Count III of the arbitration demand specifically asserted claims solely against Wood as an attorney for negligent misrepresentation and malpractice. These claims against Wood as an attorney were also extensively argued in plaintiff's post-arbitration hearing brief. The remaining counts involving Wood in the arbitration demand involved only claims against Wood and all of the other defendants for negligent misrepresentation, vicarious liability, and breach of fiduciary duty, and they did not attempt to uniquely identify Wood as an attorney.

While the arbitration award acknowledged that Wood acted as both a fund manager and the attorney of Fund III, Wood's specific role as an attorney was mentioned on only two occasions. First, the arbitration award described a conversation between Wood and one of plaintiff's executives regarding an SEC investigation of some of

¹ We note that both parties attempt to present additional evidence from the arbitration hearing to buttress their respective characterizations of Wood's role in inducing plaintiff to invest in Fund III. Since we are limited to reviewing the facts as found by the finder of fact, we did not consider any of this additional evidence.

Fund III's managers. Secondly, the arbitration award described an e-mail sent by Wood, as a fund manager and legal counsel of Fund III, that stated Wood's legal opinion that Fund III had not breached its duty to plaintiff and others by failing to invest funds contributed to Fund III in BuildNet.

However, Wood's conduct as an attorney was never mentioned in the arbitration award's ultimate determination of liability. The holding in the arbitration award regarding the liability of Woods, Brothers, and Ms. Pace to WHD is as follows:

(4) Respondents John D. Brothers, Diane Pace and Brent Wood are liable to WHD for negligent misrepresentation. Each of them, *either directly or through lack of proper supervision as a fund manager of Fund III*, was involved in supplying false information for the guidance and inducement of WHD in these business transactions and therefore must be subject to liability for the pecuniary loss caused to WHD by its justifiable reliance upon such false information. Brothers, Pace and Wood failed to exercise reasonable care in communicating this information, and in supervising the content of false information, provided to WHD and its agents. The information was communicated in the name of Fund III, and at least once from the fund managers of Fund III. *As the persons who controlled Fund III as fund managers*, and who possessed the ability to influence information given to WHD and other prospective investors, Respondents had both the opportunity, as well as the obligation, to insure that such information was accurate, true and correct. In this obligation, Respondents Brothers, Pace and Wood were negligent.

(Emphasis added). The arbitration award then concluded that "[a]ll claims not expressly granted herein are hereby denied."

It is clear from the language of the arbitration award's holding that the arbitrator found Wood liable solely as a fund

manager. The fourth paragraph of the holding repeatedly and specifically discussed Wood, Brothers, and Ms. Pace's roles as fund managers and how they were negligent in those roles. There was no discussion in this paragraph of the holding regarding Wood's role as an attorney, or any indication that Wood's liability was based upon his conduct as an attorney. Additionally, the fourth paragraph of the holding repeatedly referred to Wood, Brothers, and Ms. Pace collectively. The only shared characteristics of these three individuals were that they all served as fund managers of Fund III and that claims for negligent misrepresentation were made against all three of them as fund managers. Neither Brothers nor Ms. Pace were attorneys at that time.

Although plaintiff made a separate claim against Wood as an attorney, there is nothing in any part of the holding of the arbitration award that could be construed to indicate a separate liability for Wood in his role as an attorney. Because there was no express granting of plaintiff's claim against Wood as an attorney, the arbitration award clearly stated that the claim included in Count III of the arbitration demand was denied.

Consequently, we hold that the trial court correctly determined that collateral estoppel bars plaintiff from relitigating Wood's liability as an attorney for Fund III. Plaintiff clearly made a claim against Wood as an attorney in Count III of its arbitration demand, which required the issue to be actually litigated during the arbitration hearing. However, the arbitration award made no mention of Wood's position as an attorney

or of any liability for Wood as an attorney when it held that Wood, Brothers, and Ms. Pace were liable to plaintiff for negligent misrepresentation. Rather, it repeatedly referred to these three individuals solely as fund managers in its holding establishing their liability. Since the arbitration award was binding on plaintiff, it constituted a final judgment on the merits. Thus, all the elements of collateral estoppel were satisfied. This assignment of error is overruled.

IV. Conclusion

Plaintiff brought a claim against Wood for negligent misrepresentation and malpractice as an attorney in its Demand for Arbitration. However, the arbitration award indicated that Wood was found liable solely as a fund manager for Fund III and made no reference to Wood's additional role as an attorney when it discussed his liability. Consequently, plaintiff was collaterally estopped from attempting to relitigate Wood's liability as an attorney in a subsequent proceeding. Thus, the trial court's order granting summary judgment to defendants is affirmed. This disposition makes it unnecessary to address Lawyers Mutual's cross-assignment of error regarding exclusion (g) of the policy.

Affirmed.

Chief Judge MARTIN and Judge GEER concur.

Report per Rule 30(e).