

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

CYNTHIA HELFER,

Appellant

v.

MELAINE ROTHEY, ESQUIRE AND JONES,
GREGG, CREEHAN & GERACE, LLP,

Appellees

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1777 WDA 2012

Appeal from the Order entered October 12, 2012,
in the Court of Common Pleas of Allegheny County,
Civil Division, at No(s): GD-11-006556

BEFORE: FORD ELLIOTT, P.J.E., ALLEN, and COLVILLE*, JJ.

MEMORANDUM BY ALLEN, J.:

FILED OCTOBER 15, 2013

In this legal malpractice action, Cynthia Helfer ("Appellant"), appeals from the trial court's order granting summary judgment in favor of her former divorce counsel, Melaine Rothey, Esquire, and Jones, Gregg, Creehan & Gerace, LLP, ("Attorneys"). We affirm.

The trial court explained:

[Appellant] has appealed our order dated October 11, 2012, which granted [Attorneys'] Motion for Summary Judgment. [Appellant] is a former client of [Attorneys]. Ms. Rothey was the lawyer who handled [Appellant's] divorce. During the course of the Equitable Distribution proceedings, Ms. Rothey and Counsel for [Appellant's husband] reached a Stipulation as to the valuation of [Appellant's husband's] company. [Attorneys withdrew from representation and new

*Retired Senior Judge assigned to Superior Court.

counsel entered an appearance for Appellant]. It was later discovered [by new counsel for Appellant] that [Appellant's husband] had lied regarding certain aspects of the company's inventory [because husband intentionally failed to produce amended tax returns showing the true inventory]. When this was discovered, the Family Division Judge vacated the Stipulation.

Trial Court Opinion, 2/8/13, at 1 (unnumbered).

The underlying action was initiated on April 7, 2011, when Appellant filed a writ of summons. On July 20, 2011, Appellant filed her complaint alleging Attorneys failed to conduct proper discovery regarding the value of her husband's two companies ("the business"). *See generally*, Appellant's Complaint, 7/20/11. Appellant claimed that Attorneys improperly entered into the April 9, 2009 stipulation valuing the business at a lesser amount than its actual worth. *Id.* The stipulation relied, *inter alia*, on the business' original 2007 tax returns, which Appellant's husband had filed for the fiscal year ending on March 31, 2008. *Id.* at 2-3 (unnumbered). Two months after the entry of the stipulation, on June 8, 2009, Appellant's husband filed an amended tax return showing a higher inventory value. *Id.* at 3 (unnumbered). Attorneys deposed Appellant's husband in November of 2009. *Id.* Appellant averred that Attorneys "did not timely discover the filing of the amended tax return nor question husband about the amended tax return during his deposition taken in November of 2009." *Id.*

Appellant avers she "discharged" Attorneys in December of 2009, after which Ronald T. Conway, Esquire entered his appearance for Appellant. *Id.* Attorney Conway moved, *inter alia*, to vacate the stipulation. *Id.* On April

18, 2011, following equitable distribution hearings, Special Master Patricia Miller issued a report and recommendation vacating the portion of the stipulation valuing the business without the benefit of the amended tax return. *Id.* at 3-4; *see also generally* Exhibit B to Appellant's Complaint, Special Master Patricia Miller's Report and Recommendation, 4/18/11.

Attorneys filed an answer and new matter to Appellant's legal malpractice action on December 2, 2011. *See generally* Docket Entries. Appellant replied on January 27, 2012. *Id.* On August 28, 2012, Attorneys moved for summary judgment. *Id.* Appellant opposed Appellant's motion for summary judgment on October 2, 2012. *Id.* On October 12, 2012, the trial court granted summary judgment in favor of Attorneys. *See Order*, 10/12/12, at 1. Appellant filed this timely appeal. The trial court and Appellant have complied with Pa.R.A.P. 1925.

Appellant presents the following issues for our review:

1. Whether the trial court committed an error of law and/or abuse of discretion in its order granting [Attorneys'] Motion for Summary Judgment based on a lack of causal connection between the damages claimed by [Appellant] and the conduct of [Attorneys]?
2. Whether the trial court committed an error of law and/or abuse of discretion in its order granting [Attorneys'] Motion for Summary Judgment based on a preclusion of a finding of breach of the applicable standard of due care because of an alleged intentional concealment of an amended tax return by a third-party?

Appellant's Brief at 4.

Because Appellant's issues are interrelated, we address them together. In reviewing Appellant's challenge to the trial court's grant of summary judgment, we recognize that:

Our scope of review...[of summary judgment orders]...is plenary. We apply the same standard as the trial court, reviewing all the evidence of record to determine whether there exists a genuine issue of material fact. We view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law will summary judgment be entered.

Motions for summary judgment necessarily and directly implicate the plaintiff's proof of the elements of his cause of action. Summary judgment is proper if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury. Thus a record that supports summary judgment will either (1) show the material facts are undisputed or (2) contain insufficient evidence of facts to make out a *prima facie* cause of action or defense and, therefore, there is no issue to be submitted to the jury. Upon appellate review we are not bound by the trial court's conclusions of law, but may reach our own conclusions. The appellate Court may disturb the trial court's order only upon an error of law or an abuse of discretion.

Chris Falcone, Inc. v. Ins. Co. of the State of Pennsylvania, 907 A.2d 631, 635 (Pa. Super. 2006) (internal citation omitted).

In addition:

"[A]n action for legal malpractice may be brought in either contract or tort." *Garcia v. Community Legal Servs. Corp.*, 362 Pa. Super. 484, 524 A.2d 980, 982 (1987). The elements of a

legal malpractice action, sounding in negligence, include: (1) employment of the attorney or other basis for a duty; (2) failure of the attorney to exercise ordinary skill and knowledge; and (3) that such failure was the proximate cause of the harm to the plaintiff. *Bailey v. Tucker*, 533 Pa. 237, 621 A.2d 108, 112 (1993).

Wachovia Bank, N.A. v. Ferretti, 935 A.2d 565, 570-571 (Pa. Super. 2007). Mindful of the foregoing, we affirm the trial court's determination that Attorneys are entitled to summary judgment.

The April 9, 2009 stipulation was entered into two months *before* Appellant's husband amended his 2007 business tax returns on June 8, 2009, reflecting a higher value to the business. Therefore, we do not find that the Attorneys failed to "exercise ordinary skill and knowledge" in entering into the stipulation. ***Ferretti, supra***. While Appellant argues that "the Stipulation was entered into prematurely," and should have instead followed her husband's deposition and supplemental interrogatories and/or requests for production, we have explained that an attorney "is not expected to be infallible." Appellant's Brief at 15; ***Collas v. Garnick***, 624 A.2d 117, 120 (Pa. Super. 1993).

Furthermore, the stipulation was vacated, and a new hearing was conducted in which the 2007 amended tax returns were considered. Since the Special Master's assessment of Appellant's marital estate subject to equitable distribution considered the amended 2007 business tax returns, we are not persuaded that Appellant suffered harm from which to sustain a legal malpractice action. *See generally* Report and Recommendation of the

Special Master, 4/18/11; **see also Myers v. Robert Lewis Seigle, P.C.**, 751 A.2d 1182, 1184 (Pa. Super. 2000) (appellant required to prove actual loss due to attorney's breach of duty of care).

Appellant maintains that she suffered financial harm from the partially vacated stipulation. Specifically, Appellant argues that "for the Stipulation to have been partially vacated required [Appellant] to expend approximately \$90,000 in legal fees to litigate the issues." Appellant's Brief at 14. Appellant does not support this assertion with any citation to the record. Indeed, our review of the certified record does not show any document that specifically sets forth the fees that were incurred by Appellant as a result of Attorneys' breach of their standard of care. Also, the certified record fails to show that Appellant paid all her legal fees. Appellant's bald assertion of additionally incurred legal fees is insufficient to support her argument without any specific reference to the record or supporting documentation within the certified record. While we recognize that Appellant has provided a two volume reproduced record, we do not consider any material *de hors* the record. **See Commonwealth v. Kennedy**, 868 A.2d 582, 593 (Pa. Super. 2005) (explaining that, "[a]ny document which is not part of the official certified record is considered to be non-existent, which deficiency may not be remedied by inclusion in the reproduced record"). This is particularly so when Appellant's brief opposing summary judgment cites an amount closer to "\$80,000", while referencing an affidavit from Appellant's attorney that avers "it is estimated that at least Ninety thousand and 00/100 (\$90,000) of

the legal fees charged involved discovering the amended tax returns, attempting to get discovery open and taking additional discovery.” Appellant’s Brief in Opposition to Motion for Summary Judgment, 10/2/12, at 7; *see also* Affidavit of Ronald T. Conway, Esquire, 10/3/12, at 1. Attorney Conway’s affidavit is likewise unsupported by any documentation, such as copies of itemized billing invoices. *Id.* Significantly, Attorney Conway’s affidavit states that “[m]uch of [his] legal fees noted above include legal work performed in getting the Stipulation vacated, at least in part.” Affidavit of Attorney Conway, 10/3/12, at 2. The affidavit does not specify what amount of the fees were expended on vacating the stipulation.

In contrast, the report and recommendation of the Special Master generally states that [Appellant] had “counsel fees from December 1, 2009 through March 23, 2011 totaling \$168,717...of which \$100,000 remains unpaid.” Report and Recommendation of the Special Master, 4/18/11, at 15. The Special Master determined, “[t]his litigation has been protracted and expensive for both parties and it does not appear to be the ‘fault’ of either party.” *Id.* The Special Master recommended that a counsel fee award of \$34,000 be paid by husband to [Appellant’s] counsel. *Id.* After considering the exceptions and cross-exceptions to the Special Master’s report and recommendation, the trial court adopted the recommendation, “which became a final order of the [family trial] court” on April 30, 2012. Attorneys’ Motion for Summary Judgment, Exhibit E, Order 4/30/12. The trial court emphasized:

[N]ot only was the Stipulation vacated by the Family Division Judge, the amount of counsel fees awardable to each side was decided by the Master and approved by that Judge. Any claims for fees related to the undoing of the Stipulation should have been presented at that time. Since the instant Complaint does not ask for that possible element of them, we assume [Appellant] realizes that those fees are not recoverable in this action where they either were sought in the divorce action or could have been sought there.

Trial Court Opinion, 2/8/13, at 2 (unnumbered), at n1. We agree, and based on our review of the certified record, affirm the trial court's determination that Attorneys were entitled to summary judgment. **See Myers, supra**, at 1184; **see also Schenkel v. Monheit**, 405 A.2d 493, 494 (Pa. Super. 1979) (internal citation omitted) ("The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm not yet realized does not suffice to create a cause of action for negligence. Hence, until the client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice.").

Appellant additionally argues:

[Attorneys'] contention that [Appellant's husband] not voluntarily testifying as to the accuracy of his March 31, 2008 federal tax return, and subsequent amendment, was intentional concealment, is a mischaracterization and does not preclude a finding of breach of the standard of care.

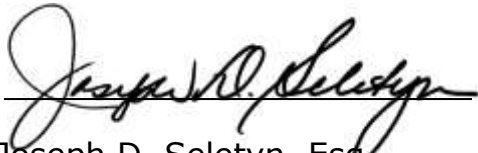
Appellant's Brief at 16. However, Appellant fails to cite any case law to support this argument. See Appellant's Brief at 16-18. Thus, we deem this argument waived and decline to address it. **See Giant Food Stores, LLC v.**

THF Silver Spring Development, L.P., 959 A.2d 438, 444 (Pa. Super. 2008) (“Appellant’s issue on appeal is waived because [Appellant] has failed to set forth in its appellate brief any citation to legal authority pertaining to [Appellant’s] argument”); **see also Korn v. Epstein**, 727 A.2d 1130, 1135 (Pa. Super. 1999) (“[A]rguments not *appropriately* developed are waived.”) (emphasis in original) (internal citations omitted).

In sum, the record contains “insufficient evidence of facts” to support Appellant’s legal malpractice action against Attorneys for entering into the April 9, 2009 stipulation. **Chris Falcone, Inc., supra**. We therefore affirm the trial court’s grant of summary judgment.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 10/15/2013