Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-400

APRIL TERM, 2018

Stevens Law Office v. Clifford C. Heyer,* Michael Lane, Union Bank, Lyndall Heyer	}	APPEALED FROM:
	}	
	}	Superior Court, Lamoille Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 205-10-15 Lecv
		Trial Judge: Thomas Carlson

In the above-entitled cause, the Clerk will enter:

Defendant Clifford Heyer appeals from the trial court's order granting summary judgment to plaintiff Stevens Law Office on its claim for attorney's fees and denying defendant's motion for reconsideration. He raises numerous arguments. We affirm.[1]

This case stems from a dispute over the estate of defendant's mother and the disposition of the estate's primary asset, the Ski Inn in Stowe, Vermont. This case, and the related proceedings, have a very lengthy procedural history, which we do not recount in detail here. In granting summary judgment to plaintiff, the court adopted and incorporated by reference the procedural history and undisputed facts set forth in the trial court's November 2, 2016 ruling on defendant's related probate appeal. The court also relied on a December 27, 2012 trial court order resolving motions for contempt and sanctions in consolidated cases involving the operations of the Ski Inn. Those orders, as the trial court found, are final, and defendant is barred by the doctrine of collateral estoppel from continuing to pursue arguments resolved against him in those cases. See Trepanier v. Getting Organized, Inc., 155 Vt. 259, 265 (1990) (identifying elements of collateral estoppel).

With this in mind, the record indicates the following undisputed facts. Defendant's mother died in 2011, and defendant hired plaintiff to represent him in the probate case and other related actions. At the time of her death, defendant's mother was the sole owner of the Ski Inn. Defendant and his sister were joint beneficiaries of the residue of their mother's estate, which included the

[1] Defendant also purports to appeal from an October 17, 2017 judgment order against the Trustee of the Estate of Harriet Heyer. In this order, the court awarded judgment to plaintiff against the trustee for $57,538.78 in the hands of the Trustee. On October 31, 2017, defendant moved to set aside this judgment. The court denied the motion on November 2, 2017. Any appeal of this judgment order needed to be filed by December 3, 2017. On December 15, 2017, defendant filed a "corrected" notice of appeal in which he asserted that he made a typographical error by not including an appeal of the October 2017 decision in his earlier-filed notice of appeal. This is not a typographical error and the "corrected" notice of appeal does not operate retroactively to preserve defendant's right to appeal the October 17, 2017 ruling, as defendant appears to suggest. The notice of appeal was untimely under V.R.A.P. 4. We thus do not address any arguments related to the judgment order against the Trustee.

Ski Inn. Defendant wanted to continue operating the inn; his sister, the Executrix of the Estate, believed the inn should be sold because it was operating at a loss and in violation of a state fire safety closure order. probate court granted a license to sell the inn. Defendant, represented by plaintiff, tried to avoid the sale of the inn by repeatedly but unsuccessfully challenging the license to sell. Defendant, represented by plaintiff, also challenged through Vermont Rule of Civil Procedure 75 an order from the State Department of Fire Safety closing down the inn. In December 2012, the trial court dismissed the Rule 75 action and held defendant in contempt for continuing to operate the inn.

Defendant and the Estate then entered into a settlement agreement. Under the agreement, in exchange for a blanket waiver of claims against his sister and the Estate, defendant was given ninety days in which to purchase the inn. The agreement provided for the sale of the property if defendant did not timely exercise his right to purchase it. Defendant did not timely purchase the property and it was sold to a third-party in 2013. In January 2014, following several more months of dispute in the Estate focused on the accounting of sale proceeds and the calculation of the beneficiaries' distributive shares, plaintiff withdrew as defendant's attorney. Defendant subsequently appealed from the Probate Division's Amended Final Decree of Distribution, and in a November 2016 order, the trial court granted judgment as a matter of law to the Estate, upholding the Amended Final Decree. Among other things, the court rejected defendant's argument that the settlement agreement was invalid because he entered it under "economic duress." Although defendant filed a notice of appeal from this ruling, the appeal was dismissed on the merits due to defendant's failure to file a brief as ordered.

Plaintiff filed the instant action in October 2015, seeking to collect attorney's fees that defendant had incurred.[2] Defendant, proceeding pro se, counterclaimed for alleged professional negligence and breach of contract. Defendant's verified answer and counterclaim admitted that the total amount due to plaintiff as of October 1, 2015 was $96,876.20. Through his defenses and counterclaims, defendant asserted that plaintiff was negligently unsuccessful in challenging the license to sell and the closure order and thereby set defendant up to be under duress when he signed the settlement agreement. He also alleged he was otherwise negligently ill-advised concerning the settlement agreement by plaintiff. Defendant subsequently filed lengthy proposed amended answers and counterclaims, some almost one-hundred pages long, contrary to the court's orders. Although the court permitted defendant's third amended answer, it denied all of the proposed amendments to defendant's counterclaims, leaving the original counterclaims in place.

[2] Plaintiff's action originally sought to foreclose on a note and mortgage that defendant granted to plaintiff in January 2012 to secure defendant's obligation to pay attorney's fees. The mortgage purportedly encumbered the Ski Inn then being administered by the Estate. The inn was sold to a third-party in August 2013. Plaintiff's complaint also sought specific performance of supplemental security agreements signed by plaintiff and defendant in April 2013, including a Promissory Note and a Partial Assignment of defendant's Distributive Share. Specifically, plaintiff sought an order prohibiting defendant from pursuing his appeal in the Estate case as the appeal was depleting defendant's share of the Estate that had been pledged to plaintiff. Plaintiff originally brought its action against defendant, defendant's sister as Executrix of the Estate, a bank that also held a mortgage on the inn, and the third-party purchaser. The court later clarified that plaintiff amended its complaint to eliminate the bank as a defendant; defendant's sister was included as a party only as a trustee of the proceeds from the sale of the inn and that plaintiff had no independent claim against her individually or in her capacity with the Estate; and the third-party purchaser was granted summary judgment in January 2017, a decision that had become final. That judgment declared the mortgage of no further force and effect and it dismissed the foreclosure action.

Notwithstanding the court's rulings, in May 2017, defendant again moved to file a very lengthy "corrected Fourth Amended Counterclaim." The court denied the motion but stated that it would consider the verified allegations therein in the context of plaintiff's pending motions for summary judgment. The court noted that the proposed amendments did not alter the material substance of the counterclaims, only their expression.

For purposes of summary judgment, plaintiff sought the full amount of attorney's fees owed and enforcement of its lien and trustee process on the remainder of defendant's distributive share of his mother's estate. Plaintiff filed statements of undisputed material fact to accompany its summary judgment motions. Defendant did not formally reply in substance to the motions. The court granted him numerous extensions of time to do so. The court found that defendant had effectively briefed the legal issues in a prior pleading but it gave him until June 2017 to file any supplemental legal argument on the pivotal issues. In his earlier pleading, defendant indicated that he did not have a qualified expert prepared to testify as to plaintiff's alleged negligence. Defendant asserted that the court could find plaintiff negligent as a matter of law.

As noted above, in its summary judgment decision, the court adopted and incorporated by reference the procedural history and the undisputed facts set forth in a November 2016 decision. It also found additional facts to be undisputed by virtue of prior final orders, defendant's answer to plaintiff's complaint, and the terms of the settlement agreement referenced above. It was undisputed that the parties had an attorney-client relationship, governed by signed agreements, and those agreements entitled plaintiff to recover its attorney's fees. After being given the opportunity to consult with an independent attorney, defendant signed a Promissory Note and a Partial Assignment of Distributive Share to plaintiff in April 2013. The Partial Assignment secured the Note and "any additional attorney fees incurred in this matter," with the matter being the Estate. Defendant incurred legal fees of $96,876.20 as of October 1, 2015. Defendant's distributive share of the Estate was $89,783.87 as of September 7, 2015, subject to diminution due to ongoing expenses of the Estate in defending the settlement agreement.

Based on the undisputed facts and given defendant's admission to the legal fees incurred and owed, the court considered whether summary judgment was appropriate on plaintiff's claims and defendant's counterclaims. The court noted that defendant's affirmative defenses were essentially a paraphrase of his counterclaims. Thus, it considered defendant's negligence counterclaims, which were a combination of plaintiff's alleged "failure to advise" defendant of: (i) flaws in the original License to Sell that were later argued unsuccessfully to the court; (ii) the meaning and significance of the stipulation to Preliminary Injunction in the Eviction Action with respect to the Ski Inn; (iii) his grounds for challenging the Settlement Agreement consisting of "economic duress," "impossibility," and "unconscionability"; and (iv) his grounds for challenging the Estate accounting arising from the fact that the third-party buyer knew of defendant's claims and was therefore not a "bona fide purchaser" as contemplated by the Settlement Agreement. Defendant's counterclaims otherwise alleged ineffective pleading and argument in litigation of the License to Sell, the sale itself, and the fire safety issues raised in the Rule 75 action and the eviction action, and finally, failing to protect defendant in the drafting of the settlement agreement. The court concluded that defendant's legal malpractice claims failed both for lack of evidence of negligence and lack of evidence of causation.

The court rejected defendant's assertion that plaintiff's lack of care was "so apparent that only common knowledge and experience [were] needed to comprehend it," and that "expert testimony [was] not required." Estate of Fleming v. Nicholson, 168 Vt. 495, 497-98 (1998). The court explained that much of what defendant claimed that plaintiff "failed to advise" him of, and failed to make effectively, were arguments that three judges had already rejected. Defendant

offered no new evidence to suggest that those judges were mistaken. He merely rehashed arguments that had been lost again and again. The court observed that even if an "expert" were to opine that plaintiff failed to advise defendant of important arguments, no such expert could ever show that such failure caused defendant any harm because when the arguments were made ad nauseum, they were repeatedly found unpersuasive. With respect to the failure to advise as to the preliminary injunction, the court found that only common sense and experience were needed to comprehend an agreement and court order that prohibited any commercial occupancy of the inn. Where the subject of advice was so obvious, it explained, there was no need for advice. Additionally, the court concluded that any alleged negligence in drafting or advice in connection with the settlement agreement confronted prior findings and conclusions of the court that: (i) defendant entered into that agreement voluntarily without "economic duress" and instead as a reasonable quid pro quo exchange of opportunity for waiver; and (ii) the terms of the agreement that defendant complained of were in fact reasonable and clear. There could be no "obvious" negligence, the court explained, where the alleged harm had been determined to be nonexistent. The court also noted that there were a variety of claims of alleged negligence that clearly involved strategy in pleading and hearing. It concluded that any such strategic decision clearly required an expert to opine how the decision fell below the standard of care, and also caused defendant harm.

In sum, the court found it apparent that defendant had no obvious grounds for blaming his attorney for failing to advise him or for effectively making losing arguments or for actions that defendant chose to take voluntarily. Defendant proffered no expert testimony to prove that plaintiff was negligent or that any such negligence caused him any harm. Therefore, the court granted plaintiff's motions for summary judgment as to liability for its claim for attorney's fees owed, and it dismissed defendant's counterclaims with prejudice. On the day after the summary judgment order issued, defendant filed an eighty-nine-page "Affidavit in Support of Counterclaim," again restating his prior proposed amended counterclaims.

Two months later, in September 2017, defendant filed a motion for reconsideration. The court considered this a motion for "revision" prior to final judgment as no final judgment had yet been entered. Defendant raised arguments that the court had already considered and rejected, as well as new arguments. The court found no basis to reconsider its earlier decision and it denied the motion. It issued a final judgment order the same day. This appeal followed, although defendant continued to file materials with the trial court, including a motion to set aside the judgment. That motion, which defendant filed in December 2017, is not before us.

Essentially, defendant reiterates all of the arguments that he raised below, including the new arguments that he raised in his motion for reconsideration. He asserts that the court erred in relying on plaintiff's statement of undisputed material facts and on prior rulings. He maintains that the prior orders are "legal nullities." He also argues that the court should have found legal malpractice as a matter of law and it should have concluded that attorney Stevens withdrew from representing him without just cause and thereby forfeited his fees.

We review a grant of summary judgment using the same standard as the trial court. Richart v. Jackson, 171 Vt. 94, 97 (2000). Summary judgment is appropriate when, "taking all allegations made by the nonmoving party as true, there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." Id.; V.R.C.P. 56(a). "If a party . . . fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion," and "grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it." V.R.C.P. 56(e)(2), (3). We agree with the trial court's thorough and well-reasoned decision that plaintiff is entitled to summary judgment here.

Defendant asserts that the court should have ruled on his "notice of objection to plaintiff's undisputed facts," filed two months after the court granted summary judgment to plaintiff. The record reflects that the court repeatedly granted defendant extensions of time amounting to more than four months in which to file a proper response to plaintiff's statements of undisputed material fact. He did not do so. The court was not obligated to consider defendant's untimely filing. The record shows that the key facts in support of plaintiff's claim are undisputed. Plaintiff alleged, and defendant admitted, that defendant incurred attorney's fees of $96,876.20 as of October 1, 2015 that had not been paid. As detailed above, defendant did not identify sufficient evidence to support his defenses and counterclaims. See Ross v. Times Mirror, Inc., 164 Vt. 13, 18 (1995) ("Where the moving party does not bear the burden of persuasion at trial, it may satisfy its burden of production by showing the court that there is an absence of evidence in the record to support the nonmoving party's case. The burden then shifts to the nonmoving party to persuade the court that there is a triable issue of fact.").

We reject defendant's assertion that he established legal malpractice as a matter of law. "In a legal malpractice action, a plaintiff must prove that the attorney was in fact negligent and that this negligence was the proximate cause of the plaintiff's injury." Estate of Fleming, 168 Vt. at 497. Expert testimony is generally required "to: (1) describe the proper standard of skill and care for that profession, (2) show that the defendant's conduct departed from that standard of care, and (3) show that this conduct was the proximate cause of plaintiff's harm." Id. For all of the reasons identified by the trial court, this is not one of those unusual cases where a "professional's lack of care is so apparent that only common knowledge and experience are needed to comprehend it, [and] expert testimony is not required to assist the trier of fact in finding the elements of negligence." Id. We also reject defendant's assertion that the trial court should have acted as an "expert" on defendant's behalf. Additionally, the fact that defendant is pro se and proceeding in forma pauperis does not relieve him of his obligation of supporting his counterclaims, including with expert testimony if necessary. Although pro se litigants receive some leeway from the courts, they are still "bound by the ordinary rules of civil procedure." Vahlteich v. Knott, 139 Vt. 588, 591 (1981).

Defendant next contends that he did not admit that he had incurred $96,876.20 in attorney's fees as of October 1, 2015. He states that the court based its finding on a pleading defect that he as a pro se litigant was unaware of, and that he corrected this defect several months after the court granted summary judgment to plaintiff. The court did not err in relying on defendant's statement in his answer to plaintiff's complaint that he did "not challenge reasonableness of fees," nor did it err in refusing to allow defendant to argue otherwise months after the court had granted summary judgment to plaintiff.

Defendant also argues that the court should have granted his motion to amend his third amended answer to conform to the evidence, which he filed in October 2017. Having granted summary judgment to plaintiff many months earlier, the court did not err in denying this request.

Defendant next argues that the court misunderstood his argument as to the withdrawal of attorney Stevens, an argument defendant raised for the first time in his motion for reconsideration. Defendant raised his claim regarding Stevens' withdrawal for the first time in his motion for reconsideration. Reconsideration motions may not be used to raise new claims that could have been raised prior to the entry of judgment. In re SP Land Co., LLC, 2011 VT 104, ¶ 19, 190 Vt. 418. We thus do not address this argument.

We reject defendant's related assertion that Stevens had in fact been paid in the form of security interests to secure his attorney fee obligation by the time of his withdrawal, and thus,

could not have withdrawn for lack of payment. The fee agreements defendant signed with plaintiff called for monthly billing, authorized interest on overdue balances at the rate of one percent per month, and affirmed counsel's right to withdraw, subject to court approval, if defendant did not pay according to the terms of the agreements. The promissory note defendant signed in connection with his past due attorney's fees and the partial assignment of his distributive share do not on their face purport to supplant the parties' rights and obligations pursuant to the underlying fee agreements.

As he did below, defendant again argues that the prior rulings in related cases are "legal nullities." We reject this argument on the same grounds as the trial court. As the trial court explained:

> [D]efendant's 'jurisdictional defect' argument boils down to his five-year-old argument, rejected by both the probate and superior divisions in decisions now final, that the entire probate process was flawed from the start due to lack of standing and fraud and that the settlement agreement defendant signed should be voidable for duress.

Like the trial court, we see no such defect and we reject this argument.

We have considered all of the arguments raised by defendant and we find them all without merit. Plaintiff was entitled to summary judgment on its claim to recover unpaid attorney's fees.

Affirmed.

BY THE COURT:

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Beth Robinson, Associate Justice

_____
Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice