STATE OF MICHIGAN

COURT OF APPEALS

KENDALL FOREST LTD.,

Plaintiff-Appellant,

v

JERRY M. ELLIS and COUZENS, LANSKY FEALK, ELLIS, ROEDER & LAZAR, P.C.,

Defendants-Appellees.

UNPUBLISHED
February 21, 1997

No. 183818
Oakland Circuit Court
LC No. 93-466553

Before: White, P.J., and Griffin and D.C. Kolenda,* JJ.

PER CURIAM.

Plaintiff appeals from two circuit court orders granting summary disposition pursuant to MCR 2.116(C)(10) in this legal malpractice action. We affirm.

Plaintiff purchased an apartment complex in Kalamazoo, Michigan from Kendall Manor Associates pursuant to a land contract in September 1986. The purchase price was $1,372,500 and plaintiff made a down payment of $172,500, leaving a balance of $1,200,000. Kendall Manor's interest as the land contract vendor was subject to an underlying mortgage held by the Federal Home Loan Mortgage Corp. (FHLMC).

In July 1989, Kendall Manor commenced a foreclosure action against plaintiff in the Kalamazoo circuit court, alleging that plaintiff defaulted on the land contract. Plaintiff denied defaulting and continued to tender payments through September 1989. Kendall Manor refused the payments and the foreclosure action continued. In the meantime, Kendall Manor defaulted on its mortgage payments to the FHLMC, and FHLMC commenced a foreclosure by advertisement. The foreclosure sale occurred on December 13, 1989.

Since plaintiff had a significant equity in the property it wanted to protect, it entered into an agreement in February 1990 with Kendall Manor and the FHLMC to make direct payments on the underlying mortgage. Pursuant to this agreement plaintiff made payments to the FHLMC totalling

* Circuit judge, sitting on the Court of Appeals by assignment.

approximately $200,000. However, these payments did not stop the FHLMC from pursuing the foreclosure against Kendall Manor.

In June 1990, with Kendall Manor's redemption period about to expire, Kendall Manor moved for summary disposition in its foreclosure action against plaintiff. Kendall Manor asserted plaintiff's default under the land contract and Kendall Manor's need to have immediate possession of the property in order to effect a re-finance and redeem the property before the expiration of the redemption period on June 13, 1990. The Kalamazoo Circuit Court entered a judgment of foreclosure on June 4, 1990, found that there was $1,102,300 due on the land contract, and authorized a foreclosure sale to be held after June 11, 1990. On the following day, the Kalamazoo Circuit Court granted an equitable writ of possession turning the property over to Kendall Manor. Kendall Manor re-financed the property with a new mortgage from Old Kent Bank and paid off the FHLMC. Kendall Manor owed Old Kent Bank about the same amount as plaintiff owed Kendall Manor.

Plaintiff had the property appraised, and it was valued at $1,950,000. On July 17, 1990, prior to the foreclosure sale, plaintiff filed a bankruptcy petition under Chapter 11, and also filed an emergency motion seeking a turnover of possession of the property to the estate. Plaintiff had retained Ellis and defendant law firm in the bankruptcy proceeding for the purpose of obtaining a stay so as to delay the foreclosure sale of the apartment complex. At the hearing on plaintiff's emergency motion, the parties agreed to a preliminary order regarding management of the property, under which Kendall Manor was authorized to collect the rents, maintain the property, and make its underlying mortgage payments to Old Kent Bank. Notwithstanding the preliminary order, Kendall Manor sought to lift the automatic stay so that it could hold a foreclosure sale and continue its foreclosure proceeding.

The Bankruptcy Court, after hearing oral argument, lifted the stay, stating:

> The entry of the Judgment by the Kalamazoo County Circuit Court has terminated the Debtor's [Kendall Forest] rights under the land contract, save, [sic] for the statutorily created right to redeem the property.
>
> The executory contract, as an executory contract, no longer exists. The Stay is lifted.

I

After Ellis' efforts in the bankruptcy court were unsuccessful, plaintiff brought the instant legal malpractice action in circuit court, alleging that Ellis failed to properly argue that the land contract was an executory contract. The circuit court granted defendants summary disposition under MCR 2.116(C)(10), holding that Ellis had in fact argued that the land contract was executory. Plaintiff then amended his complaint and alleged that Ellis committed malpractice by failing to file a plan of reorganization simultaneous to the bankruptcy petition, which would have allowed plaintiff to cure any default on the land contract. The circuit court granted summary disposition pursuant to MCR 2.116(C)(10), holding that a different result would not have obtained had defendants filed a plan of reorganization. Plaintiff appeals from these rulings.

We review a trial court's summary disposition determination de novo. *Lytle v Malady*, 209 Mich App 179, 183-184; 530 NW2d 135 (1995). A motion for summary disposition pursuant to MCR 2.116(C)(10) may be granted where, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *York v 50th Dist Court*, 212 Mich App 345, 349; 536 NW2d 891 (1995). Such a motion tests the factual basis of the claim. A court reviewing the motion must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence in favor of the nonmoving party and grant it the benefit of any reasonable doubt. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993).

In order to state a claim for legal malpractice, the plaintiff has the burden of adequately alleging the following elements: (1) 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. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). A plaintiff proves malpractice by showing that the attorney failed to exercise reasonable skill, care, discretion, and judgment in the conduct and management of the client's case. *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 324; 532 NW2d 547 (1996). Often the most troublesome element of a legal malpractice action is causation. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994). Factual causation is established by showing that, but for the attorney's negligence, the client would have prevailed in the underlying suit. *Id*. This Court will not review the attorney's actions using perfect hindsight. *Radtke, supra* at 617.

II

Plaintiff first argues that a genuine issue of fact remained whether Ellis failed to properly argue in the bankruptcy proceeding that the land contract was executory in nature and remained executory under *Terrell v Allbaugh*, 892 F2d 469 (CA 6, 1989), i.e., that *Terrell* supported plaintiff's position. Under the circumstances presented here, we disagree.

We agree with plaintiff that Ellis' bankruptcy brief did not frontally or principally argue that *Terrell* supported plaintiff. Ellis' principal arguments on plaintiff's behalf were that the automatic stay should not be lifted because the debtor had an $850,000 equity in the property, Kendall Manor was adequately protected, and the property was necessary to enable the debtor to effect a reorganization under Chapter 11. Kendall Manor's brief had argued that upon the judgment of foreclosure, plaintiff no longer had any interest in the property. Ellis responded by arguing that, under Michigan law, the foreclosure of a land contract is conducted in the same manner as the foreclosure of a mortgage, and that plaintiff's interest in the property could not be extinguished absent a foreclosure sale and the expiration of the period of redemption. Ellis went on to argue that Kendall Manor's interest in the property as a land contract vendor was that of a lienholder, and was thus entitled only to adequate protection under the Bankruptcy Code. Ellis argued that Kendall Manor was managing the property, had the obligation to maintain the property, collect the rents and pay its mortgage payments, and that it could not therefore complain that it needed additional protection, and that, in any event, the existence of the $850,000 equity cushion constituted adequate protection.

Ellis' brief then addressed the issue of the contract's executory nature in response to defendant's argument that under *Terrell, supra,* a land contract is an executory contract and not a security device. Ellis' brief argued:

> The Defendant, however, points to the case of. *Terrell v Allbaugh,* 892 F2d 469 (6th Cir. 1989) to argue that a land contract is an executory contract and not a security device. The Defendant then points to a line of cases involving expired leases to argue the Debtor has no interest in the Property for this Court to protect for the estate.
>
> However, even if this land contract was treated as an executory contract, there is a substantial interest in the way of the Debtor's $850,000 equity to protect for this estate. . .
>
> Under Section 365(d)(2), a bankruptcy judge may order a trustee or debtor to determine within a specified time whether to assume or reject an executory contract or unexpired lease. The amount of time to be afforded the debtor is to be a "reasonable" one, as determined by the facts and circumstances of the particular case.
>
> * * *
>
> . . . Under Section 365(d)(2) the contract may be assumed or rejected at any time before the confirmation of a reorganization plan. This case is only forty-five days old. If the stay were to be lifted at this time, the Debtor's ability to reorganize would be destroyed, as its sole asset would be foreclosed upon and the estate would lose its $850,000 equity.

At oral argument in the bankruptcy court, Ellis stated that "under this executory contract, the rights of the Debtor to this property have not been extinguished prior to the filing of the Bankruptcy Petition."

Under these circumstances, we cannot agree that Ellis did not argue that the contract was executory. In any event, we note that the bankruptcy court ruled, and opposing counsel argued, that the contract was executory. Thus, even if Ellis failed to properly argue that the contract was executory, his failure to so argue did not cause plaintiff any damages. Accordingly, summary disposition under MCR 2.116(C)(10) was proper.

III

Plaintiff argues that the circuit court improperly granted summary disposition because a timely filed plan of reorganization would have deaccelerated and reinstated the land contract held by Kendall Manor, thus allowing plaintiff the opportunity to pay its obligation over time and realize its ownership equity.

In general, a debtor (plaintiff, in the underlying bankruptcy proceeding) may file a plan of reorganization within 120 days after the institution of bankruptcy proceedings. 11 USC § 1121. A plan of reorganization is a written memorandum providing for the distribution of the debtor's property as well as the payment of all creditors' claims. See 11 USC § 1123 *et seq*. Section 1124 of the bankruptcy code allows a debtor to cure the default of any "claim" or "interest." However, Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law. *Butner v United States*, 440 US 48, 54; 99 S Ct 914; 59 L Ed 2d 136, 141 (1979). [1]

We conclude that since the bankruptcy court had already determined that the Kalamazoo Circuit Court's judgment of foreclosure "terminated" any of plaintiff's rights under the land contract, the bankruptcy court likewise would have found that no "claim" or "interest" in the land contract existed since all rights were terminated. Accordingly, the circuit court did not err when granting summary disposition to defendants since the filing of a reorganization plan would not have led to a different result in the bankruptcy court.

Affirmed.

/s/ Helene N. White
/s/ Richard Allen Griffin
/s/ Dennis C. Kolenda

[1] Once a contract has been terminated by a state court the filing of a reorganization plan under chapter 11 cannot resuscitate those rights. *Moody v Amoco Oil Co*, 734 F2d 1200, 1214 (CA 7, 1984). See *In re Young* 48 BR 678 (ED Mich 1985)(claim or interest under the bankruptcy code means an "equity security interest" in property which is contingent upon state law).