STATE OF MICHIGAN

COURT OF APPEALS

SHELLY BERMAN,

Plaintiff-Appellant,

v

DEBORAH N. RIBITWER & ASSOCIATES, P.C. and DEBORAH N. RIBITWER, individually,

Defendants-Appellees.

UNPUBLISHED
August 17, 2004

No. 246870
Oakland Circuit Court
LC No. 2001-029561-NM

Before: Jansen, P.J., and Meter and Cooper, JJ.

PER CURIAM.

Plaintiff Shelly Berman appeals as of right the trial court's grant of defendants Deborah N. Ribitwer & Associates, P.C., and Deborah N. Ribitwer's motion for summary disposition pursuant to MCR 2.116(C)(10) and dismissal of plaintiff's complaint in this legal malpractice action.[1] We affirm.

I. Facts and Procedural History

In May of 1998, plaintiff retained defendant to represent her in a divorce proceeding instituted by her then-husband Andrew Berman, an heir to the Lasky Furniture business. At the time of the proceedings, the Bermans had been married eight years, had approximately $150,000 equity in their primary residence in Novi, and owned a condominium in Charlevoix which they rented for income.[2] The Bermans owned various stocks[3] and several recreational vehicles. Mr. Berman had recently opened a Furniture Express business with funds from the Berman Family

[1] We will refer to Ms. Ribtiwer, rather than her firm, as the singular defendant throughout this opinion.

[2] The value of the condominium is not part of the record.

[3] The value of the stocks is not part of the record. Mr. Berman asserted in his answers to interrogatories that plaintiff took all stock records. However, plaintiff has alleged in other litigation that Mr. Berman sold several stocks and transferred funds in an effort to conceal those assets.

Trust, and his annual income from that business amounted to $60,000. Plaintiff was a stay-at-home mother with a high school diploma and a real estate license who had never held a full-time job. The Bermans had accumulated credit card debt and lived well above their means due to cash infusions Mr. Berman's mother authorized from the family trust.

On the day depositions were scheduled to be taken of plaintiff and Mr. Berman, defendant asserts that the parties determined to enter into settlement negotiations. Plaintiff alleges that upon defendant's recommendation, she entered into a settlement agreement and signed a Consent Judgment of Divorce. The parties entered into this settlement without knowing their actual income for 1997 and 1998, as the preparation of the income tax returns for those years was part of the settlement.

Plaintiff was awarded $200 per week for six months as alimony. The Bermans agreed to joint physical and legal custody of their children, whose primary residence was to be with plaintiff, and plaintiff was awarded approximately $11,000 a year in child support. In lieu of her half interest in the marital home, plaintiff accepted a lump sum payment of $60,000, or forty percent of the equity in the home. The parties agreed to an equitable division of their tangible personal property and kept their individual IRAs and bank accounts. Mr. Berman was required to provide plaintiff with an insured car, health insurance and absolve plaintiff from all credit card debt. Mr. Berman received the primary residence, condominium and all interests in business ventures and stocks. Mr. Berman's interest in the family trust was excluded in the settlement as defendant determined that Mr. Berman was only entitled to advances made at the discretion of his mother, and therefore, was not a marital asset. As the parties entered into the settlement without the benefit of complete discovery, defendant included a disclosure clause in the Judgment of Divorce.[4]

Subsequent to the entry of the Judgment of Divorce, plaintiff retained substitute counsel, Kurt Schnelz, to handle continuing custody and child support matters. From a review of the income tax returns, Mr. Schnelz determined that Mr. Berman may have concealed assets during the divorce proceedings, including income from the family trust and several business ventures and stock dividends. As a result, plaintiff instituted both an action to modify the Judgment of

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[4] The clause is entitled "Disclosure of Assets" and provides:

> The parties by their signatures hereon state and affirm that each has disclosed all assets that each owns or has any interest in, whether held by him/her individually, by both of them jointly, or with any other person or entity for Plaintiff or Defendant or on his/her behalf or benefit. The property division set forth in this Judgment of Divorce are [sic] intended to be a distribution and allocation of all of the property of the parties. If either party has failed, either intentionally or unintentionally, to disclose any of his or her assets, the issue of property division may be reopened on the motion of either party to determine and resolve the distribution of any previously undisclosed assets. [Consent Judgment of Divorce, February 23, 1999, p 11.]

Divorce based upon Mr. Berman's fraud and brought the current legal malpractice action against defendant.

Plaintiff alleged that defendant failed to adequately engage in discovery in the divorce proceedings by compelling answers to interrogatories regarding assets, deposing Mr. Berman and consulting with experts resulting in defendant's failure to discover that Mr. Berman had concealed assets. Plaintiff also alleged that she assented to an inadequate settlement agreement based on defendant's representations that Mr. Berman had no money, that this was the best settlement she could receive, and that, if the case went to trial, plaintiff would owe defendant an exorbitant amount in attorney fees. In support of her assertion that she was coerced into settling, plaintiff relied on a letter she sent to defendant regarding her concern with the settlement amount and certain remarks she made before the trial court.[5] Defendant claimed that plaintiff agreed to the settlement to avoid the costs of trial and rushed to settle in order to marry her current husband, with whom she had engaged in an extra-marital affair.

Defendant moved for summary disposition of plaintiff's legal malpractice claim. The trial court found that there existed a genuine issue of material fact whether defendant's negligence actually harmed plaintiff, as the action to modify the Judgment of Divorce based on Mr. Berman's fraud had yet to reach a conclusion. Whether defendant adhered to the standard of care of a matrimonial attorney also presented a factual issue. However, the trial court granted defendant's motion, as plaintiff failed to establish that defendant's conduct was the proximate cause of her decision to sign the settlement agreement.[6]

II. Legal Analysis

This Court reviews a trial court's determination regarding a motion for summary disposition de novo.[7] A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's

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[5] On February 10, 1999, plaintiff stated before the trial court, "I do agree to the terms of the settlement as far as the financials that are in this judgment," and then expressed her concerns regarding the custody of the couple's two children. [Motion Transcript, February 10, 1999, pp 16-19.]

[6] Specifically, the trial court found:

> Plaintiff has failed to create a genuine issue of material fact that she was forced to settle due to Defendant's negligence. In fact, there's no evidence the Defendant's conduct left her with no viable option but to settle her case, and based on her testimony, she accepted the settlement agreement, in order to avoid facing the risk and expenses of proceeding with trial. Thus, the Court finds that she does not have a cause of action for legal malpractice under the rule in *Lowman* and *Espinoza*, based on her failure to show proximate cause. [Motion for Summary Disposition Transcript, January 22, 2003, p 18, citing *Espinoza v Thomas*, 189 Mich App 110; 472 NW2d 16 (1991); *Lowman v Karp*, 190 Mich App 448; 476 NW2d 428 (1991).]

[7] *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

claim.[8] "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in the light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists."[9] Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law."[10]

In order to establish a claim of legal malpractice, a 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 the proximate cause of an injury; and (4) the fact and extent of the injury alleged.[11] To establish causation, a plaintiff must show that, but for the attorney's alleged malpractice, she would have been successful in the underlying suit.[12] "However, an attorney does not have a duty to insure or guarantee the most favorable outcome possible."[13] A plaintiff's settlement of her claims is not an absolute bar to a subsequent legal malpractice action against her attorney in the underlying action.[14] It is more difficult to establish legal malpractice where the underlying action was settled. However, a plaintiff may show that her assent was compelled by her attorney's malpractice.[15]

It is true that defendant failed to conduct discovery into Mr. Berman's assets resulting in the gross under-estimation of his income. There is no record of the conversations between plaintiff and defendant leading up to plaintiff signing the settlement agreement. Therefore, it cannot be conclusively determined as a matter of law whether defendant convinced plaintiff to settle or whether plaintiff rushed to settlement. Defendant protected herself from potential liability, however, by including the disclosure clause in the Judgment of Divorce to allow for the reopening of the property settlement. In fact, plaintiff has taken the opportunity to pursue modification of the property settlement in other litigation.[16]

Furthermore, this was a marriage of short duration and plaintiff does not contend that defendant's negligence negatively affected the award of child support or custody. Plaintiff did

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[8] *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

[9] *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

[10] *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

[11] *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994).

[12] *Id.* at 586.

[13] *Simko v Blake*, 448 Mich 648, 656; 532 NW2d 842 (1995).

[14] *Espinoza*, *supra* at 122-124; 472 NW2d 16 (1991); *Lowman*, *supra* at 452-453.

[15] *Espinoza*, *supra* at 124, quoting *Becker v Julien, Blitz & Schlesinger, PC*, 95 Misc 2d 64, 66; 406 NYS2d 412 (1977), modified on other grounds 66 AD2d 674; 411 NYS2d 17 (1978).

[16] There is conflicting evidence whether plaintiff has determined to cease her attempt to modify the Judgment of Divorce. Plaintiff's decision to actually pursue this available remedy does not affect our disposition.

receive forty percent of the marital home. It is uncertain, especially in light of plaintiff's fault, that she would have received a larger amount had the divorce action proceeded to trial. Accordingly, even if defendant were negligent in her representation, plaintiff cannot show that she was actually harmed by entering into the settlement agreement or that she would be unsuccessful in her attempt to modify the property settlement. Accordingly, the trial court properly granted defendant's motion for summary disposition, although on different grounds.

Affirmed.

/s/ Patrick M. Meter
/s/ Jessica R. Cooper

I concur in result only.

/s/ Kathleen Jansen