

STATE OF MICHIGAN
COURT OF APPEALS

JOHN G. BAJA,

Plaintiff-Appellant,

v

PETER J. BILL and COX, HODGMAN &
GIARMARCO, P.C.,

Defendant-Appellees.

UNPUBLISHED

September 19, 2006

No. 269686

Livingston Circuit Court

LC No. 05-021226-CK

Before: Davis, P.J., and Murphy and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition pursuant to MCR 2.116(C)(10) to defendants. We reverse and remand.

This case arises out of circumstances involving plaintiff's "family business," plaintiff's father's trust, and defendants' legal representation of all involved parties. In the 1970s and 1980s, plaintiff's father, John Baja¹ ("John") founded and opened a chain of restaurants known as the "Jonathan B Pubs," ownership of which he gradually transferred to his three children: plaintiff, Gregg Baja ("Gregg"), and Glenn Baja ("Glenn"). At some point, the family bought out Glenn's share of the "family business," and Glenn established his own business elsewhere. From that time on, Gregg and plaintiff were each fifty-percent owners of the Pubs. John removed Glenn from John's estate plan, the John Baja Living Trust ("the Trust"), at that time, but later re-included him. Defendants drafted the Trust. The Trust named John's three sons as trustees upon John's death or incapacity and primary beneficiaries after John's death. The Trust also contained an anti-alienation clause.

In 1998, after having suffered from gradually worsening Parkinson's disease for some time, John was diagnosed with Alzheimer's disease and medically declared incapable of handling his affairs. Only plaintiff wanted anything to do with taking care of John or John's

¹ The senior Baja was named "John Baja." Plaintiff is named "John Gary Baja," and apparently he uses, and is known by, the name "Gary." In this opinion, we follow the naming convention followed by the parties below.

affairs, so plaintiff took on sole responsibility for John. The Pubs were in financial distress at the time, and plaintiff also removed some \$880,000 from the Trust to keep them running long enough to sell them.² However, the deal did not succeed, and the money plaintiff removed was never recovered. Neither Glenn nor John had any ownership interest in the Pubs by this time.

When John died in 2001, defendants provided the sons with legal counseling regarding their responsibilities as trustees. The Trust owed approximately \$600,000 in taxes, but the sons had already distributed most of the remaining assets in the Trust, so the Trust itself could not pay the taxes. Glenn and plaintiff each paid one-third of the bill, but Gregg had already spent most of his money and could not afford his share. The sons agreed on a deal whereby plaintiff would pay Gregg's remaining tax burden in exchange for Gregg's interest³ in the two condominiums remaining in the Trust. Defendants drafted a Purchase Agreement³ to effectuate the deal. It is undisputed that the Purchase Agreement is legally unenforceable because it conflicts with the anti-alienation clause in the Trust, a fact defendants admittedly did not research or think to look into before drafting it.

Plaintiff actually paid \$195,000 of Gregg's tax obligation. At some point thereafter, Gregg and Glenn discovered how much money plaintiff had removed from the Trust for the purpose of supporting the Pubs. Gregg and Glenn terminated plaintiff's trusteeship, terminated plaintiff's and plaintiff's children's' rights to any of the remaining trust assets, and refused to repay the \$195,000 or perform their obligations under the Purchase Agreement. Plaintiff sued Gregg, Glenn, and the Estate in Wayne Circuit Court Case No. 03-323563-CK. Gregg and Glenn defended on the ground that plaintiff's own prior misconduct and wrongful removal of Trust assets precluded any right to relief. Legal enforceability of the Purchase Agreement was not raised at any time. A case evaluation award of \$20,000 was given in plaintiff's favor. The parties accepted that award, and the trial court entered an order dismissing the case.⁴

It is undisputed that none of the individuals involved in Case No. 03-323563-CK learned that the Purchase Agreement was unenforceable until *after* the final order of dismissal was entered. Plaintiff then commenced the present suit, alleging that defendants' negligence in drafting the Purchase Agreement caused him to be damaged because he would not have loaned any money to Gregg had he known of his inability to enforce the Purchase Agreement. The trial court granted summary disposition to defendants because although plaintiff "was injured by the failure of the agreement," defendants' "failure to mention the anti-alienation clause had nothing to do with that failure."

² There is some indication that Gregg may have known that plaintiff was borrowing from the Trust, but not the extent to which plaintiff was borrowing.

³ Defendants actually drafted two versions of this, but because the differences between them are irrelevant to this appeal, we refer only to one Purchase Agreement.

⁴ Although the parties' settlement agreement has not been provided to us, plaintiff's children apparently received their inheritances as part of it.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Under MCR 2.116(C)(10), we consider all evidence submitted by the parties in the light most favorable to the nonmoving party and grant summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id.*, 120-121. A legal malpractice claim requires a plaintiff to establish an attorney-client relationship, negligent legal representation, proximate causation of an injury by the negligence, and damages. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). Proximate causation in an ordinary legal malpractice case requires a plaintiff to show that “but for an attorney’s alleged malpractice, the plaintiff would have been successful in the underlying suit.” *Manzo v Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004).

Proximate causation in this case is difficult to separate from damages. Plaintiff does not allege here that defendants mishandled an underlying lawsuit. It appears that the trial court perceived plaintiff as alleging that his injury was his inability to *recover* the loan money or to compel his brothers to perform their obligations under the Purchase Agreement. Indeed, plaintiff’s voluntary relinquishment of his claims premised on the Purchase Agreement – at a time when he and his brothers all believed the Purchase Agreement to be enforceable – necessarily removed any causal connection between defendants’ negligence and plaintiff’s nonrecovery. However, plaintiff actually alleges that he “would not have paid his brothers’ share of taxes in the amount of \$195,000 had he known that the Purchase Agreement prepared by Defendants was legally ineffective.” In other words, plaintiff does not attempt to connect the negligence to his failure to recover the loan or compel performance, or even generally to the “failure of the agreement.” Rather, plaintiff argues that but for defendants’ negligence, he would not have extended the loan in the first place.

There exist genuine questions of material fact whether plaintiff would have loaned money to Gregg had defendants not negligently represented him. The entirety of the evidence submitted by the parties, when viewed in the light most favorable to plaintiff as the nonmoving party, sets forth far more than a “mere possibility” that plaintiff could establish at trial a causal connection between defendants’ negligent representation and his payment of Gregg’s tax obligation. See *Maiden, supra* at 121. Summary disposition therefore should not have been granted to defendants.

Reversed and remanded. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Bill Schuette