

STATE OF MICHIGAN
COURT OF APPEALS

KAMLESH CHOPRA,

Plaintiff-Appellant,

v

ASHLEY GORMAN and ASHLEY GORMAN &
ASSOCIATES, PLC,

Defendants-Appellees.

UNPUBLISHED

May 25, 2010

No. 289275

Oakland Circuit Court

LC No. 2008-088796-NM

Before: METER, P.J., and MURRAY and BECKERING, JJ.

PER CURIAM.

In this legal malpractice action, plaintiff appeals as of right from the trial court's grant of summary disposition to defendant. We affirm.

Plaintiff filed a complaint on January 23, 2008, in which she alleged that she had claims against All-Tech Investment Group, Inc., and another defendant and that these claims were arbitrated and "decided against her interest." She hired defendant Ashley Gorman¹ to appeal the award under MCR 3.602(J). MCR 3.602(J)(1) states that "[a] complaint to vacate an arbitration award must be filed no later than 21 days after the date of the arbitration award." Plaintiff stated that the award was mailed to her on June 1, 2004, and that she received it approximately one week later. She stated that approximately 14 days after receiving it, she took it to defendant and requested that he file an appeal. Plaintiff alleged:

22. GORMAN, realizing that the initial filing could have been considered by the court to be past the 21 day appeal period, sought to avoid the potential tardiness by indicating that he was following the Complaint service rules contained in Section 12 of the Federal Arbitration Act, which states a court may vacate an arbitration award so long as its time line were [sic] followed, to wit: "[n]otice of a motion to vacate, modify, or correct an award must be served upon an adverse party or his attorney within three months after the award is filed or delivered." [Emphasis removed.]

¹ For ease of reference, we will refer to the singular "defendant" in this opinion.

23. The award was filed on the 1st of June, 2004 and, arguably, delivered in mid-June of 2004, so three months from that date would be the 1st of September, 2004 to, potentially, some time in mid-September, 2004.

24. GORMAN did not serve the Summon[s] and Complaint on the attorney for All-Tech until the 27th of September, 2004 – after the time for service which was specified in Section 12 of the Federal Arbitration Act.

Plaintiff alleged that defendant committed malpractice and caused her various damages because she lost her opportunity to have the arbitration award vacated when the trial court reviewing the action dismissed it.

On July 15, 2008, defendant moved for summary disposition under MCR 2.116(C)(8) and (10), stating:

Summary Disposition is appropriate because Plaintiff cannot establish proximate cause against Defendants for her claims, as Plaintiff's likelihood for success in her NASD [National Association of Securities Dealers] appeal was non-existent, and as such, Plaintiff cannot establish a claim for legal malpractice.

In a supporting brief, defendant indicated that plaintiff did not bring the arbitration award to him within the timeline specified in the Michigan Court Rules. However, defendant stated that

this motion does not ask the [c]ourt to consider these timing issues This motion is instead premised upon the fact that Mr. Gorman *cannot* be held liable for Chopra's failure to prevail, as the claim to set aside the arbitration award had no merit. [Emphasis in original.]

Defendant argued:

Overturing an arbitration award on appeal is difficult under Michigan law. This fact was well known to the litigious Chopra, as she had attempted, unsuccessfully, to do so before. In 2005, Chopra sought to vacate an arbitration award issued by the NASD under facts nearly identical to those in the underlying case in this matter. . . . Chopra was unsuccessful at the trial court level, whose decision was affirmed by the Court of Appeals without oral argument.

* * *

In her Motion to Set Aside the Arbitration Award, Chopra argued that the panel did not properly and fully review the information presented to it when rendering their Opinion. She offers no support, however, for this accusation, merely calling their decision "irrational." The fact that the panel had to sanction Chopra personally for her conduct at the proceedings speaks directly to her disillusion with the process itself and her inappropriate actions therein.

Chopra's unhappiness with the result of the arbitration is simply not grounds to set aside the award. Michigan courts may not entertain her

unsupported claim in the underlying action and cannot review the arbitrators' factual findings on the merits. . . . Chopra can offer no proofs that the arbitrators made any error of law. Therefore, she cannot overcome the high burden established by Michigan precedent to set aside an arbitration award

Plaintiff later, on July 30, 2008, filed with the trial court an affidavit from Edward Goodman, a certified public accountant, who stated that All-Tech acted fraudulently in the underlying action. On that same day plaintiff also filed an affidavit from Terrence Hall, an attorney, who stated that defendant breached the prevailing standard of care in failing to have the complaint to vacate the arbitration award timely served upon All-Tech. Plaintiff simply filed these affidavits with the court; they did not accompany a motion or brief.

The motion hearing took place on August 6, 2008. The trial court granted the motion, stating only that it was relying on the reasons vocalized by defense counsel. Defense counsel had argued that "there is no way she was going to get the arbitration award set aside" Counsel had stated:

This [c]ourt cannot substitute the judgment [sic] for the arbitrator's findings of fact or their decision, and that's basically all she wants for this [c]ourt to do and that's all she wanted the underlying court to do.

So there's no way she can establish the proximate connection, that is, that the alleged delay in serving the underlying complaint caused her any harm.

On August 20, 2008, plaintiff filed a motion for reconsideration, alleging that defendant had filed improper documents with its motion for summary disposition and had "failed to file any affidavit or deposition testimony to support" the motion. She also argued that "Plaintiff has properly demonstrated that Defendant's burden of proof was not met in his Motion for Summary Disposition" The trial court denied plaintiff's motion, stating that plaintiff "now seeks to address the merits of Defendant's causation argument, despite the fact that she utterly failed to do so in response to the original motion." The court indicated that plaintiff was not allowed, by way of her motion for reconsideration, to reargue her position using evidence or authority that should have been presented initially.

Plaintiff now argues that the trial court erred in granting defendant's motion for summary disposition. We review de novo a trial court's ruling concerning a motion for summary disposition. *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003). Defendant moved for summary disposition under MCR 2.116(C)(8) and (10), and the trial court did not specify the subrule on which it relied in granting the motion. In evaluating a summary disposition motion under MCR 2.116(C)(10), a court considers the "affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties" in the light most favorable to the party opposing the motion. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id.*

A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. . . . This Court reviews the trial court's decision on a motion brought under this rule . . . to determine if the

claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery. [*Smith v Kowalski*, 223 Mich App 610, 612-613; 567 NW2d 463 (1997).]

In a legal malpractice action, the plaintiff has the burden of establishing:

(1) the existence of 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. [*Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993).]

“Hence, a plaintiff in a legal malpractice action must show that but for the attorney's alleged malpractice, he would have been successful in the underlying suit.” *Id.*

Plaintiff contends that she established a genuine issue of material of fact by submitting the affidavit of attorney Hall.² In this affidavit, Hall stated, in part:

12. Defendant Gorman’s Complaint, in paragraphs 21 and 22, stated numerous irregularities with the Arbitration process which were the basis for the Appeal.

13. Defendant Gorman, in subsequent conversations with [plaintiff], and in my presence, stated that he felt that these irregularities in the arbitration were of sufficient importance to have a reasonable chance of permitting her to obtain a new arbitration, and justified her continued pursuit of her appeal.

14. Plaintiff Chopra, in reliance upon Defendant Gorman’s representations as to the viability of her case, continued to pay thousands of dollars to him until it was discovered, and admitted, that he had failed to have the Complaint filed in time.

15. It is inconsistent and inappropriate for Defendant Gorman, after extracting many thousands of dollars from [plaintiff], based [on] irregularities in the first arbitration, to now claim that such a case had no merit.

16. Defendant Gorman had a duty to properly serve Defendant All-Tech with the Complaint which was timely filed . . . , but he breached that duty by failing to have it timely served upon Defendant All-Tech.

² Plaintiff assumes that the trial court granted the summary disposition motion under MCR 2.116(C)(10).

17. It is my professional opinion that such a breach of duty was the result of Defendant Gorman's failure to live up to the standard of care expected of like attorneys who practice law in Oakland County, Michigan.

18. Plaintiff Kamlesh Chopra, as a proximate cause of Defendant Gorman's breaches of duty and standard of care, suffered a dismissal of her appeal from the Arbitration Award which was rendered against her, and in favor of Defendant All-Tech, and a loss of whatever recovery she could reasonably have expected as a result of a more proper arbitration (and/or litigation) of her claim.

Plaintiff contends that this affidavit established an issue of fact because of paragraph 18. Plaintiff argues that this paragraph established that defendant's malpractice caused plaintiff to incur damages. We disagree that this paragraph established an issue of fact. In paragraph 18, Hall simply stated that plaintiff suffered a loss "of *whatever recovery she could reasonably have expected* as a result of a more proper arbitration (and/or litigation) of her claim" (emphasis added). Hall did *not* opine that a particular recovery was likely to occur or set forth any facts establishing a probable recovery. Because we conclude that the affidavit, even if properly considered, did not establish an issue of fact, we need not address defendant's argument that the affidavit did not constitute a proper response to the motion for summary disposition.

Plaintiff argues that defendant was not entitled to summary disposition because he failed to support his motion with documentary evidence but instead merely argued that it is difficult to set aside an arbitration award. Plaintiff cites the following from *Berkeypile v Westfield Ins Co*, 280 Mich App 172, 177; 760 NW2d 624 (2008), rev'd on other grnds ___ Mich ___; 779 NW2d 793 (2010): "Initially, the moving party has the burden of supporting its position with documentary evidence, and, if the moving party does so, the burden then shifts to the opposing party to establish the existence of a genuine issue of disputed fact."

Plaintiff's argument is without merit. Defendant did indeed support his motion with documentary evidence. Most significantly, defendant attached to his summary disposition brief the arbitration award itself, as well as plaintiff's complaint for malpractice. Also, defendant moved for summary disposition under MCR 2.116(C)(10) *and* (C)(8), and this requirement of filing supporting evidence is not automatically applicable to motions filed under MCR 2.116(C)(8).³ See MCR 2.116(G)(3). Moreover, contrary to plaintiff's assertion, defendant did not merely argue that it is difficult to set aside arbitration awards; defendant specifically argued that the award in this particular case was not subject to being vacated and that plaintiff thus could not establish causation in her malpractice lawsuit.

Plaintiff next cites cases indicating that arbitration awards are indeed sometimes set aside. This recitation of cases is misplaced. It is not in serious dispute that there might be *some*

³ Supporting evidence is required for a motion filed under MCR 2.116(C)(10) and for any summary disposition motion "when the grounds asserted do not appear on the face of the pleadings." MCR 2.116(G)(3).

cases in which an arbitration award is set aside. The key issue is whether *the arbitration award at issue here* would have been set aside. The trial court concluded that either the pleadings alone or the pleadings plus the evidence failed to sufficiently allege or indicate that it would have been.

Plaintiff next argues that defendant attached improper documents to his brief in support of summary disposition. We decline to address this argument because it was not properly presented in the trial court. *Fast Air, Inc. v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Plaintiff only raised this issue as part of her motion for reconsideration, and this was insufficient to preserve the issue. *Farmers Ins Exchange v Farm Bureau Ins Co*, 272 Mich App 106, 117; 724 NW2d 485 (2006). At any rate, we note that plaintiff argues that defendant attached a document purporting to be a brief filed with the arbitration panel but that this document was not in fact considered by the panel. Plaintiff also argues that defendant attached a “petition to vacate the arbitration judgment and arbitration award” that was never in fact filed.⁴ Yet plaintiff makes no reasoned argument regarding how the trial court was materially misled by the substance of these documents. An appellant may not leave it to this Court to discover and rationalize the basis for his claims. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 220; 761 NW2d 293 (2008).

Plaintiff next mentions a motion to adjourn that she filed and makes a general complaint that the trial court had a pattern of ruling against her. She does not request any specific relief in connection with this argument, beyond stating that “[a]t a minimum, the trial court should have allowed Plaintiff additional time to marshal the documents necessary to support her cause of action.” However, plaintiff provides no reasoned argument and cites no pertinent authority for this requested relief. “This Court is not required to search for authority to sustain or reject a position raised by a party without citation of authority.” *Id.* The argument has been abandoned for purposes of appeal. *Id.*

Plaintiff next argues that paragraph 13 of Hall’s affidavit was sufficient to create an issue of fact.⁵ This paragraph states:

13. Defendant Gorman, in subsequent conversations with [plaintiff], and in my presence, stated that he felt that these irregularities in the arbitration were of sufficient importance to have a reasonable chance of permitting her to obtain a new arbitration, and justified her continued pursuit of her appeal.

We disagree that this paragraph created a question of fact. A causation theory must be based on established facts. *Pontiac School District v Miller, Canfield, Paddock & Stone*, 221 Mich App

⁴ Defendant admits that this latter document was wrongly attached to the brief but argues that it did not materially affect the substance of his arguments.

⁵ In her appellate brief, plaintiff also sets forth statements allegedly made by defendant to two other attorneys. We decline to consider these statements because (1) they were not presented to the court before the ruling on the motion for summary disposition and (2) they were not presented as legally admissible evidence but were simply set forth by plaintiff in the argument portion of her motion for reconsideration.

602, 614; 563 NW2d 693 (1997). Moreover, a mere possibility of causation is not sufficient to establish a plaintiff's legal malpractice claim. *Id.* at 615. There must be evidence from which a finder of fact could conclude that *more likely than not*, the defendant's conduct caused the plaintiff injury. *Id.* at 614. Defendant's statements regarding "a reasonable chance of . . . a new arbitration" were simply not sufficient to create a genuine issue of material fact regarding causation.

Plaintiff argues as follows with regard to the alleged irregularities^[6] in the arbitration proceedings:

If, in fact, the record revealed that the arbitrators recorded the overwhelming majority of the proceedings, then perhaps Defendant was overconfident in claiming that the arbitration should be vacated. But if a significant portion of the proceedings were not recorded, then perhaps Defendant was correct in stating that this rule violation provided a reasonable basis to vacate the arbitration award.

Evidently, plaintiff makes this argument to supplement her earlier claim that the trial court should have allowed plaintiff more time to respond to the summary disposition motion. However, she utterly fails to indicate *how the additional records would have benefited her case*. Plaintiff does cite a pertinent case, *Davis v Detroit*, 269 Mich App 376; 711 NW2d 462 (2005), in making this supplemental argument. In *Davis, id.* at 379, the Court stated that "summary disposition is generally premature if granted before completing discovery regarding a disputed issue" However, the Court also stated that "[m]ere conjecture does not entitle a party to discovery, because such discovery would be no more than a fishing expedition." *Id.* at 380. Despite the fact that plaintiff has presumably now had the time to obtain the pertinent records, she fails to indicate how those records would have benefited her case. Appellate relief is unwarranted.

Without dedicating a particular portion of her appellate brief to the issue, plaintiff also makes the statement that "the trial court erred in . . . denying Plaintiff's motion for reconsideration." We disagree. The motion for reconsideration merely attempted to present issues that could have been raised as part of the summary disposition proceedings. Therefore, the trial court did not abuse its discretion in denying the motion. *Charbeneau v Wayne Co Gen Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987).

Affirmed.

/s/ Patrick M. Meter
/s/ Christopher M. Murray
/s/ Jane M. Beckering

⁶ There was a question regarding whether the arbitrators adequately recorded the proceedings.