2011 IL App (1st) 101444-U

FOURTH DIVISION
August 25, 2011

No. 1-10-1444

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PATRICIA KRONER, Plaintiff-Appellant, v. DEER & STONE, P.C., an Illinois professional corporation, JEFFREY W. DEER, TRACY L. DAUSER, SULLIVAN, TAYLOR & GUMINA, and EMILY CARRARA, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 07 L 006784 Honorable James D. Egan, Judge Presiding.

ORDER

JUSTICE SALONE delivered the judgment of the court.
Justices Pucinski and Sterba concurred in the judgment.

HELD: The trial court properly entered summary judgment in legal malpractice action where the existence of actual damages is too speculative to establish a cause of action.

¶ 1 This appeal arises from an order of the circuit court granting defendants Deer & Stone,

P.C. (D&S) and Jeffrey Deer's (Deer) motion for summary judgment in a legal malpractice action stemming from a marital settlement agreement in an underlying divorce case. Plaintiff, Patricia Kroner, contends that summary judgment was improperly granted because she was not allowed to present expert testimony on damages.

¶ 2 BACKGROUND

¶ 3 On December 6, 2003, plaintiff filed a petition for dissolution of marriage against her then-husband Peter Kroner (Peter) in the circuit court of Will County. Plaintiff was represented by three other law firms before she was referred to D&S by another attorney and friend of her then-boyfriend, Kurt Eisenberg. On June 29, 2006, plaintiff entered into an attorney-client relationship with Deer and D&S. Trial was set for September 20, 2006 by court order prior to D&S filing its appearance. Subsequently, Tracy Dauser (Dauser), an associate at D&S, was assigned the case and prepared for trial although she did not receive the case file from the previous attorney until mid-August 2006. Dauser held several discussions with valuation expert Howard Ellison, regarding the status on his valuation of Peter's company Marketing Concepts (MC), an ongoing business engaged in buying and selling quantities of food and grocery items for retail and commercial outlets. This enterprise was the single largest marital asset in dispute. On August 11, 2006, Dauser filed a disclosure of expert witnesses, which included Ellison and three consultants from Blackman and Kallick, a firm newly retained by D&S to perform a fourth valuation of MC. By the set trial date, neither Ellison or the consultants from Blackman and Kallick had produced a written report on the valuation of MC. However, prior to the trial date Ellison told plaintiff and her attorneys that he valued MC in a range of $4

million to $9 million.

¶ 4 In September 2006, Dauser took a medical leave of absence, and subsequently Deer took over the case. The court ordered the trial continued to December 11, 2006. Plaintiff then retained Emily Carrara (Carrara) of Sullivan, Taylor and Gumina (STG) as additional counsel to assist in the dissolution proceeding, without any objection from Deer.

¶ 5 On the eve of trial, the parties engaged in settlement negotiations, and subsequently entered into a marital settlement agreement, which was incorporated into the judgment for dissolution of marriage granted on December 11, 2006. Carrara conducted the prove-up, and plaintiff testified that she believed the settlement to be "fair and reasonable", that she agreed to the settlement willingly, and that no one "forced or coerced" her to accept it. Pursuant to the marital settlement agreement, Peter's business was valued at $3 million and plaintiff was awarded a lump sum payment of $1.4 million. Additionally, plaintiff was awarded $1.2 million in maintenance to be paid out in the amount of $20,000 per month for a period of sixty months; the marital home free and clear of all debt; automobiles; personal property; contents of her own checking and savings account; and half of a six figure retirement account. The agreement also ordered Peter to provide for their college-age children's health insurance, college tuition, and living expenses.

¶ 6 Plaintiff filed a complaint for legal malpractice against her former attorneys D&S, Deer, Dauser, STG, and Carrara on June 29, 2007. Subsequently, Dauser was dismissed with prejudice, and Cararra and STG ultimately settled with plaintiff for $15,000.00. In her complaint, plaintiff alleged that defendants were negligent and breached their duty to plaintiff

with the following acts and omissions:

> "a. Failing to make the Divorce Petition ready for trial on December 11, 2006.
>
> b. Failing to enforce or petition the trial court to enforce the various court orders that were entered to protect Kroner and the marital assets.
>
> c. Failing to develop discovery, take the necessary depositions, and establish dissipation of marital assets on the part of Peter Kroner.
>
> d. Failing to disclose the opinions of Howard Ellison and otherwise establish the true value of the Marketing Concepts business.
>
> e. Entering into settlement discussions on the eve of trial without having adequately readied the case for trial, resulting in a vulnerable settlement position that disfavored Kroner.
>
> f. Pressuring Kroner to accept the settlement agreement, which determined the value of the Marketing Concepts business to be only $3 million, and which absolutely terminated Kroner's right to monthly maintenance after only sixty months."

Plaintiff further alleged that she suffered damages ranging from $2 million to $6 million based on the following: Peter was "awarded complete ownership of his business"; "the grossly understated

value of Peter's business was offset against Peter's remaining share of the marital estate"; Peter was "awarded a disproportionately higher share of the other marital assets and plaintiff was awarded a disproportionately lower share of the marital assets"; and plaintiff was "awarded a disproportionately low amount of monthly maintenance payments for a fixed period of time."

¶ 7 Defendants conducted a discovery deposition of plaintiff, the relevant portions stated herein. Plaintiff testified that she was in contact with Eisenberg, Deer, and Carrara regarding the status of her case, and at all times she expressed a desire to settle rather than going to trial. Plaintiff testified that on December 7, 2006, Eisenberg informed her of Peter's settlement offer[1], and stated "that that was the best that I was going to be able to do." Eisenberg further stated to plaintiff that "you don't want to go to trial", and when plaintiff asked why, Esienberg responded, "because it's costly, and it's not in your best interest." Plaintiff further stated that she spoke to Carrara who also recommended settling the case, however she also told plaintiff that she prepared to put her on the stand. Plaintiff did not speak to Deer about the settlement offer, nor did she communicate with him after December 5, 2006. Plaintiff then testified that she answered the questions at the prove-up honestly and truthfully, without any instruction from her attorneys. She further stated that she believed the settlement to be fair and equitable. Plaintiff then testified that she was aware of three separate valuations when she agreed to the marital settlement agreement. She stated that the valuation expert retained by Peter valued MC at $1.6 or $1.8 million. Jeffrey Brend, a valuation expert retained by plaintiff's second attorney (Thomas

[1]Peter's settlement offer became the terms of the marital settlement agreement entered by the court at the prove-up on December 11, 2006.

Grotta) valued MC's operating value at $7 million and Peter's individual interest at $3.7 million. Howard Ellison, an expert retained by plaintiff's third attorney (Vincent Cerri) valued MC ranging from $4 million to $9 million. Plaintiff testified that she accepted the marital settlement agreement because she was "pressured" by "the whole circumstance of the case", which she explained to mean that her attorneys were not ready for trial because they did not have a valuation of MC to use at trial and no accounting for Peter's income.

¶ 8 After completing plaintiff's deposition, defendants filed a motion for summary judgment. In their motion, defendants argued that summary judgment should be granted as a matter of law because plaintiff cannot prove actual damages. Defendants further contended that plaintiff's allegation that she was "pressured" into accepting the terms of the settlement agreement was barred by the doctrine of judicial estoppel.

¶ 9 Plaintiff responded, and argued that it was premature to determine whether the court in the divorce case would have granted a larger award to her because discovery was not yet closed in the instant case, and that she would present expert testimony to prove that the $3 million agreed valuation of MC was not a reasonable compromise.

¶ 10 The trial court in the instant case granted defendant's motion for summary judgment. It specifically found that although discovery had not concluded, "the existence of damages is so overwhelmingly speculative" because plaintiff cannot prove through expert testimony that but for defendants' negligence she would have received a larger award. The court further noted that plaintiff was aware of the range of valuations, and that she did not want to go to trial although Carrara stated that she was ready for trial.

¶ 11 Plaintiff's motion to reconsider was denied, and this timely appeal followed.

¶ 12 DISCUSSION

¶ 13 On appeal, plaintiff contends that summary judgment was improperly granted because she was not provided an opportunity to present expert witnesses who would offer testimony about the value of MC at trial. Plaintiff further argues that the court should have considered sections 503 and 504 of the Illinois Marriage and Dissolution of Marriage Act (735 ILCS 5/503; 5/504 (West 2006)) to determine whether plaintiff received a fair settlement.

¶ 14 Defendants maintain that plaintiff cannot prove actual damages, and in the alternative plaintiff is barred by the doctrine of judicial estoppel from now claiming that her divorce settlement was unfair.

¶ 15 Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2006); *Universal Underwriters Insurance Company v. Judge & James, Ltd.*, 372 Ill. App. 3d 372, 377-78 (2007). We review cases involving summary judgment *de novo*. *Universal Underwriters Insurance Company,* 372 Ill. App. 3d at 377-78.

¶ 16 In order to prevail in a legal malpractice action, a plaintiff must plead and prove the following elements: (1) the existence of an attorney-client relationship which establishes the attorney owed a duty to the client; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause establishing that "but for" the attorney's negligence, the plaintiff would

have prevailed in the underlying action; (4) actual damages. *Purmal v. Robert N. Wadington and Associates*, 354 Ill. App. 3d 715, 720-21 (2004).

¶ 17 Here, plaintiff entered into an attorney-client relationship with defendants on June 29, 2006. The list of expert witnesses filed by plaintiff on August 11, 2006 did not include the opinion of Ellison, and a supplemental disclosure had not been filed by the time of the set trial date. In properly disclosing controlled expert witnesses, plaintiff's attorneys were required to disclose the names of the experts and their subject matter, conclusions, and opinions that they will testify to at trial. Ill. S. Ct. R. 213 (eff. Jan. 1, 2007). Without concluding whether defendants breached their duty to plaintiff, we shall examine the issue of actual damages.

¶ 18 Even if there is negligent representation on the part of the attorney, the plaintiff must prove that the negligence proximately caused damage to the plaintiff. *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. App. 2d 294, 307 (2005). Plaintiff must establish that but for defendants negligence she would have received a larger share of the marital estate. *Weisman v. Schiller, Ducanto and Fleck, Ltd.,* 368 Ill. App. 3d 41, 52 (2006). Actual damages are never presumed in a legal malpractice action. *Northern Illinois Emergency Physicians,* 216 Ill. 2d 294 at 306-307. Damages are demonstrated by showing that the plaintiff suffered a monetary loss as a result of the attorney's negligence, and cannot be proved by mere speculation or conjecture. *Northern Illinois Emergency Physicians,* 216 Ill. 2d 294 at 306-307. When there is only a mere possibility of harm or the existence of damages is uncertain, then actual damages are too speculative, and the claim for malpractice must fail. *Northern Illinois Emergency Physicians,* 216 Ill. 2d 294 at 306-307; *Romano v. Morrisroe*, 326

Ill. App. 3d 26, 28 (2001).

¶ 19 Appellant argues that the trial court should have considered sections 503 and 504 of the Act, but we disagree. This is a guideline for the distribution of marital property and awarding of maintenance. The single issue in this case is whether MC could have been valued higher than $3 million by the divorce court.

¶ 20 Plaintiff claims that she was "pressured" into accepting the terms of the settlement offer because her attorneys did not have Ellison's valuation of MC to use at trial. Plaintiff's deposition testimony reveals that at the time she entered into the settlement agreement she was aware that Ellison valued the business ranging from $4 million to $9 million. Plaintiff's claim that the business should have been valued higher than $3 million is mere speculation based on the valuations ranging from $1.7 million to $9 million. There is nothing to suggest that valuing the business at $3 million was not a reasonable and fair compromise compared to the largely speculative range of valuations. Thus, there is uncertainty whether plaintiff would have been awarded a larger settlement. We agree with the trial court that damages are "too speculative" to establish a cause of action. *Glass v. Pitler*, 276 Ill. App. 3d 344 (1995). We conclude that summary judgment was properly entered in defendants' favor on this basis.

¶ 21 Defendants alternatively argue that plaintiff's claim is barred by judicial estoppel. Having already concluded in favor of defendants, we need not address this issue.

¶ 22 CONCLUSION

¶ 23 For the foregoing, the judgment of the circuit court is affirmed.

¶ 24 Affirmed.