2012 IL App (1st) 111142-U

Third Division
May 16, 2012

No. 1-11-1142

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ZOHAR WATERWORKS, LLC and LVD ACQUISITIONS, LLC.,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellants,	)	
v.	)	08 L 006379
JENNER & BLOCK, LLC, JENNER & BLOCK, LLP, LISA LAUER and TERI LINQUIST,	)	Honorable Brigid Mary McGrath, Judge Presiding.
Defendants-Appellees.	)	

JUSTICE NEVILLE delivered the judgment of the court.
Justices Murphy and Salone concurred in the judgment.

ORDER

¶ 1 *Held*: Illinois law bars the sale of claims for legal malpractice to purchasers who suffered no loss due to the alleged malpractice.

¶ 2 Zohar Waterworks, LLC, (ZW) sued Jenner & Block, LLP, for legal malpractice in connection with a lease ZW signed for a building and some equipment. After ZW filed a petition for bankruptcy, some of its secured creditors created a new corporation, named LVD Acquisitions,

LLC (LVD), and LVD purchased ZW's assets, including ZW's cause of action against Jenner & Block. LVD then amended the complaint against Jenner & Block to add itself as a plaintiff. The trial court dismissed the complaint. LVD now appeals, but ZW and LVD do not challenge the trial court's decision to dismiss ZW's claims. LVD challenges only the dismissal of its claim against Jenner & Block.

¶ 3 We find that LVD has not alleged that it suffered any damages due to the alleged malpractice. The sale of the legal malpractice cause of action here, to LVD, violates Illinois law. Accordingly, we affirm the dismissal of the complaint.

¶ 4 BACKGROUND

¶ 5 In August 2005, ZW hired Jenner & Block to assist ZW with leasing some assets owned by MA 265 North Hamilton Road, LLC and MA Equipment 1 Leasing, LLC (collectively, MA). The leases that ZW signed provided that ZW bore sole responsibility for upkeep of the leased equipment and the leased premises in Ohio, and that ZW would not remove any leased equipment from the premises without MA's prior written consent.

¶ 6 ZW removed numerous pieces of equipment from the premises and shipped them to a different plant in 2006 and 2007. ZW told MA it intended to abandon the leased premises and move all its operations to a new location. MA sued ZW in Ohio for breach of contract, and in September 2008 the Ohio court entered a judgment in favor of MA, finding that ZW's breach of contract entitled MA to recover all the damages caused by the breach of contract. The court continued the case for determination of those damages. In June 2008, ZW sued Jenner & Block for legal malpractice. ZW claimed that Jenner & Block advised ZW to sign the leases without telling ZW about the provisions

that restricted ZW from moving equipment and that made ZW liable for upkeep of the leased premises.

¶ 7 In April 2009, ZW filed a bankruptcy petition. ZW claimed that it owed a total of about $73,000,000 to three secured lenders. An attorney for ZW identified the secured lenders as Zohar II 2005-1, Ltd., Zohar CDO 2003-1, Ltd., and Zohar III, Ltd. The three secured lenders chose to create a new corporation, LVD, to acquire all of ZW's useful assets. Zohar II 2005-1, Ltd., owns more than half of the equity in LVD, while the other two secured lenders split unequally all of the remaining equity. ZW sold its assets in an auction at which LVD submitted the highest bid. The bankruptcy court approved the sale on May 29, 2009. The assets sold under the contract included all causes of action ZW owned, including its cause of action against Jenner & Block for legal malpractice. However, LVD did not assume all of ZW's liabilities, and it never agreed to pay MA for ZW's breach of contract.

¶ 8 ZW amended its complaint against Jenner & Block to add LVD as a second plaintiff. According to the amended complaint, the Ohio court, in June 2009, entered a judgment against ZW and in favor of MA for more than $5,700,000 for the breach of contract. LVD and ZW further alleged in the complaint that the bankruptcy court completed its work on ZW's bankruptcy, and ZW has no assets. LVD and ZW admitted that MA has an uncollectible judgment, and neither ZW nor LVD will ever pay MA anything on the judgment MA obtained. According to the legal malpractice complaint, ZW suffered damages due to the malpractice in that in accord with the leases ZW paid for repairs and maintenance and to purchase the equipment it relocated; ZW paid attorney's fees for the cost of defending the Ohio lawsuit; and ZW suffered damages in that the Ohio court entered a

judgment against ZW for more than $5,700,000. LVD does not claim that it suffered any damages apart from the damages ZW sustained.

¶ 9 Pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2008)), Jenner & Block moved to dismiss the amended complaint on grounds that ZW no longer had any interest in the lawsuit and Illinois law barred the sale of ZW's legal malpractice claim to LVD. The trial court dismissed the complaint. LVD now appeals. ZW and LVD do not challenge the judgment against ZW.

¶ 10 ANALYSIS

¶ 11 We review *de novo* an order dismissing a lawsuit under section 2-619. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993). We must construe the pleadings and supporting documents in the light most favorable to LVD, the nonmoving party. *Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). We may affirm the judgment on any basis that has adequate support in the record. *In re Application of Cook County Treasurer*, 185 Ill. 2d 428, 436 (1998).

¶ 12 The parties agree that this court's decision in *Learning Curve International, Inc. v. Seyfarth Shaw LLP*, 392 Ill. App. 3d 1068 (2009), states some of the principles most applicable here. In *Learning Curve*, Learning Curve's shareholders negotiated a merger of Learning Curve with a corporation named RC2 while Learning Curve was defending itself against a claim that it had misappropriated trade secrets from PlayWood. To complete the merger, the shareholders agreed to the creation of an escrow account to hold sufficient funds to pay to PlayWood if any such payment proved necessary. The shareholders also agreed to reimburse RC2 for any claims against it as the successor to Learning Curve. A few months after the completion of the merger, the United States

Court of Appeals for the Seventh Circuit reversed a judgment entered in favor of Learning Curve in the PlayWood litigation, and remanded the case for the entry of a judgment in favor of PlayWood and the assessment of damages. The former shareholders of Learning Curve decided to sue Learning Curve's legal counsel for malpractice in the defense of PlayWood's claim, largely because Learning Curve's legal counsel underestimated Learning Curve's potential liability and overestimated Learning Curve's probability of success in the lawsuit. RC2 agreed that the former shareholders would take 90% of any recovery in the legal malpractice litigation and the former shareholders would control the litigation, to be brought in Learning Curve's name. *Learning Curve*, 392 Ill. App. 3d at 1072. Learning Curve agreed to settle the PlayWood litigation for almost $12,000,000, cleaning out the escrow account the shareholders created to protect RC2 from any loss due to the PlayWood litigation. The trial court dismissed the legal malpractice lawsuit because Learning Curve had effectively assigned its cause of action to its former shareholders, and Illinois law forbids the assignment of legal malpractice claims.

¶ 13 The appellate court agreed with the trial court that Learning Curve had assigned its legal malpractice claim, and Illinois law forbids such assignments, with some very narrow exceptions. The court followed some precedent from federal and other state courts that permitted the transfer of a legal malpractice cause of action as part of a merger, as long as the new plaintiff acquired all the obligations and liabilities of the corporation that claimed its attorneys committed malpractice, where the assignee suffered the loss due to the malpractice. See *Learning Curve,* 392 Ill. App. 3d at 1076-77; *Cerberus Partners, L.P. v. Gadsby & Hannah,* 728 A.2d 1057, 1059-60 (R.I.1999); *Richter v. Analex Corp.*, 940 F. Supp. 353, 358 (D.D.C.1996). Because the former shareholders of Learning

Curve had actually paid PlayWood the amount of the settlement Learning Curve reached with PlayWood, the court found that public policy permitted the assignment of the claim to the shareholders. *Learning Curve*, 392 Ill. App. 3d at 1077.

¶ 14 The court specified that Learning Curve, in its own name, could sue only for the loss it actually suffered, and since Learning Curve paid neither the settlement with PlayWood, nor any attorney's fees after the merger, Learning Curve could not sue for those damages. Learning Curve could sue for only the fees it paid the law firm before the merger. The court permitted the former shareholders to substitute themselves for Learning Curve as plaintiffs insofar as they sought to recover part of the settlement they paid and the attorney's fees they paid after the merger. *Learning Curve*, 392 Ill. App. 3d at 1079. Thus, with the substitution of the shareholders for Learning Curve in the claim for most of the damages, each party named as a plaintiff in the legal malpractice action could sue to recover only the amounts that party actually lost due to the alleged malpractice. *Learning Curve*, 392 Ill. App. 3d at 1079. As the court said, "To prevail on a claim for legal malpractice, a plaintiff must show that the alleged malpractice caused it actual damages." *Learning Curve*, 392 Ill. App. 3d at 1079. The *Learning Curve* court's observation accords with the principle stated in *Sterling Radio Stations, Inc. v. Weinstine*, 328 Ill. App. 3d 58, 64 (2002): "The legal malpractice action places the plaintiff in the same position he or she would have occupied but for the attorney's negligence. *** The plaintiff can be in no better position by bringing suit against the attorney than if the underlying action had been successfully prosecuted or defended."

¶ 15 Here, LVD has not sustained any damages due to the alleged malpractice. It purchased most of ZW's assets, but it does not claim that the alleged malpractice caused it to pay an excessive

amount for the assets it bought. It faces no liability due to the judgment against ZW. It did not pay ZW's attorney's fees. Any recovery for the malpractice would serve LVD strictly as a windfall, placing it in a better position than it would have been in if the attorneys had not committed malpractice. Without any loss due to the alleged malpractice, LVD cannot state a claim against Jenner & Block for malpractice. *Learning Curve*, 392 Ill. App. 3d at 1079; *Sterling Radio*, 328 Ill. App. 3d at 62-64.

¶ 16 LVD notes that the bankruptcy estate for ZW could have created a litigation trust to pursue the claim against ZW's attorneys, and the litigation trust might not pay over its recovery to MA even if its claim against Jenner & Block succeeded. However, LVD concedes that its shareholders did not create a litigation trust. The special rules applicable to litigation trusts do not apply here. See *In re Jennings*, 378 B.R. 678, 681-83 (Bankr. M.D. Fla. 2006). A litigation trustee stands in the shoes of the bankrupt party for pursuit of the bankrupt party's claim and for distribution of the proceeds to the bankrupt party's creditors. *Antioch Litigation Trust v. McDermott Will & Emery LLP*, 738 F. Supp. 2d 758, 780 (2010). Bankruptcy law limits the persons who have standing to act as litigation trustees. See *In re Railworks Corp.*, 325 B.R. 709, 715 (Bankr. D. Md. 2005). LVD does not claim that it meets the specific requirements for standing as a litigation trustee. Accordingly, because LVD cannot claim standing as a litigation trustee, and it suffered no loss, it lacks standing to bring this lawsuit.

¶ 17 LVD argues that the sale to LVD of ZW's assets, including the malpractice claim, gives LVD the right to assert ZW's loss as its own loss. LVD's argument conflicts with the reasoning of *Learning Curve* and the cases on which the *Learning Curve* court relied. See *Brandon Apparel*

Group v. Kirkland & Ellis, 382 Ill. App. 3d 273, 282 (2008); *Clement v. Prestwich,* 114 Ill. App. 3d 479, 480-81 (1983); *New Hampshire Insurance Co. v. McCann,* 429 Mass. 202, 206-07, 707 N.E.2d 332, 335 (1999). Illinois law, like the law of most jurisdictions, forbids the assignment of legal malpractice claims in all but specially restricted circumstances. *Learning Curve*, 392 Ill. App. 3d at 1074-77; *Clement*, 114 Ill. App. 3d at 480-81; *McCann,* 429 Mass. at 206-07, 707 N.E.2d at 335. The assignment here, as part of a sale of assets to a party who suffered no loss due to the malpractice, violates the general principle. *Learning Curve*, 392 Ill. App. 3d at 1074-77; *Clement,* 114 Ill. App. 3d at 480-81; *McCann,* 429 Mass. at 206-07, 707 N.E.2d at 335.

¶ 18 Finally, LVD claims that we should treat it like a litigation trust because ZW's three largest secured creditors, who stood to recover any amount that ZW could have won for its malpractice claim, together formed LVD. We will not aid the creditors in their efforts to avoid compliance with the specific requirements of bankruptcy law for the creation of a litigation trust and for the distribution of the assets of such a trust. LVD cites no precedent that allows a party to gain the benefit of a litigation trust without complying with the formalities for the creation of such a trust.

¶ 19 CONCLUSION

¶ 20 Because LVD suffered no damages due to the alleged legal malpractice, it cannot state a viable cause of action against Jenner & Block. Accordingly, we affirm the dismissal of the complaint.

¶ 21 Affirmed.