2015 IL App (1st) 133786-U

No. 1-13-3786

SIXTH DIVISION
June 12, 2015

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CARDENAS MARKETING NETWORK, INC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 12 L 10659
	)	
WINSTON & STRAWN, LLP, and BRIAN HEIDELBERGER,	)	Honorable
	)	Randye A. Kogan,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

O R D E R

¶1 *Held*: Where the plaintiff filed a cause of action for legal malpractice, the trial court properly dismissed the plaintiff's second amended complaint, which failed to allege facts sufficient to establish proximate causation.

¶2 Plaintiff Cardenas Marketing Network, Inc. (CMN) challenges the trial court's dismissal of plaintiff's second amended complaint alleging legal malpractice against defendants Winston & Strawn, LLP, and Brian Heidelberger. The trial court found that plaintiff failed to allege facts sufficient to show that defendants' conduct proximately caused plaintiff's alleged injury. For the

reasons that follow, we affirm the judgment of the trial court.

¶3 I. BACKGROUND

¶4 In 2008, plaintiff CMN retained defendants Winston & Strawn, LLP, and Brian Heidelberger, one of its partners, to represent it in various entertainment industry related matters. In 2011, CMN sued defendants for legal malpractice, seeking recovery for damages allegedly sustained as a consequence of defendants' legal representation concerning CMN's agreement with another party to co-produce a performance by a musical group at a casino.

¶5 After amending its complaint, CMN alleged that it was promoting a musical group, Aventura, and entered into an oral agreement with Artie Pabon in October 2009 to co-produce a performance by Aventura at a casino in Connecticut on January 30, 2010. There is no allegation that defendants knew of this agreement or were in involved in its creation in any way. In order for CMN to present Aventura at the casino, CMN had to enter a co-promotion arrangement with Pabon, who had a contract with the casino to be the exclusive promoter of Latin oriented musical entertainment. CMN, however, was concerned about Pabon's reliability to pay based on his prior broken agreements with CMN, so Pabon offered to deliver to the casino a letter directing the casino to pay the proceeds of the performance to CMN.

¶6 CMN alleged it advised defendant Heidelberger that it required transactional safeguards for this concert, Pabon already owed CMN over $100,000, and CMN would not co-promote the January concert unless it was protected from any misuse of the gate proceeds by Pabon. Heidelberger prepared, on behalf of CMN, the text of a letter from Pabon to the casino, directing it to pay all the gate proceeds from the concert to CMN. Pabon modified the letter to omit the signature line for the casino and delivered it to the casino on November 5, 2009. The casino, however, refused to be bound by the letter of direction.

¶7 CMN and Heidelberger held telephone negotiations with the casino but the casino would not agree to be bound by the letter of direction. On November 12, 2009, Heidelberger gave CMN his assessment of the risk of proceeding with the October 2009 oral agreement. According to the emails in the record between Heidelberger and CMN (which were filed pursuant to a protective order to permit the court to consider the emails without causing CMN to waive the attorney-client privilege attached to the emails), Heidelberger gave no assurances and did not state that safeguards were in place.

¶8 On November 30, 2009, Pabon breached the October 2009 oral agreement by failing to make a required $125,000 payment to CMN. On December 5, 2009, CMN and Pabon entered a new oral agreement. The new terms provided that CMN would be the sole producer of the concert and would retain 100% of the gate proceeds and Pabon would be paid $3 for each paid concert ticket. The new terms also provided that the letter of direction would remain in effect so that the casino would pay the gate proceeds directly to CMN. There is no allegation that Heidelberger knew of the breach of the October agreement or the creation of the December agreement.

¶9 On the day of the concert, CMN served Pabon with a summons in a lawsuit CMN had previously filed arising out of past defalcations. There is no allegation that Heidelberger knew of that lawsuit or that CMN planned to serve the summons on Pabon while he still had the ability to revoke the letter of direction. After being served with CMN's lawsuit, Pabon told the casino that he was to receive all the gate proceeds, and the casino paid him. Pabon did not deliver any of the gate proceeds to CMN. When CMN demanded the funds from the casino, the casino refused to pay CMN because its exclusive contractual obligation was to Pabon. The casino also claimed to enjoy sovereign immunity from suit as an arm of a sovereign Indian nation. CMN sued Pabon for

the concert money in the Circuit Court of Cook County, but that action was dismissed for lack of personal jurisdiction over Pabon. CMN does not allege that it sued Pabon in any jurisdiction in which personal jurisdiction exists.

¶10 CMN alleged that defendants breached their duty to CMN by failing to establish any mechanism by which the casino would legally be required to pay the gate proceeds to CMN and not to Pabon, and by failing to properly advise CMN of the absence and futility of its remedies in the absence of such safeguards. Specifically, CMN alleged that if Heidelberger had been aware of the casino's sovereign immunity and had utilized readily available transactional safeguards then the casino would have paid the gate proceeds to CMN instead of Pabon. CMN argued examples of possible safeguards included making the letter of direction irrevocable, establishing a binding agreement to put the gate proceeds into an escrow account, causing a payment or performance bond to be issued, issuing an irrevocable letter of credit, or making CMN a party to or a third party beneficiary of an irrevocable letter of direction. CMN alleged that the language of the letter of direction was solely within the control of Heidelberger but the letter he drafted was insufficient to protect CMN against a subsequent revocation by Pabon. CMN alleged Heidelberger did not explain or discuss with CMN at any time what the letter of direction's effect would be if it was revoked, whether the letter should be made irrevocable, and whether the letter should contain other terms, such as the casino's waiver of sovereign immunity.

¶11 Defendants moved to dismiss the second amended complaint pursuant to section 2-615 of the Code of Civil Procedure (Code), 735 ILCS § 5/2-615 (West 2012), contending CMN failed to sufficiently allege the element of proximate causation to support its claim of legal malpractice. Specifically, defendants argued CMN failed to explain how defendants could have caused the casino to waive immunity or bind itself to pay the gate proceeds to CMN instead of Pabon.

Moreover, CMN, which admitted that it knew the casino refused to be bound by the letter of direction regarding the payment of gate proceeds, failed to show either how Heidelberger's emails represented assurances that the letter of direction was enforceable against the casino or how different advice from defendants would have altered CMN's conduct or resulted in a different outcome. Defendants also argued that CMN's claim was premature because, although CMN alleged that it could not sue Pabon in Illinois due to lack of personal jurisdiction, CMN did not allege that it lost the ability to recover the concert proceeds from Pabon.

¶12 The trial court granted defendants' motion to dismiss under section 2-615 of the Code, with leave for CMN to amend its second amended complaint. The trial court found that CMN failed to allege a sufficiently specific transactional safeguard that defendants should have provided to CMN and failed to allege it would have achieved any different result if advised differently by defendants. Thereafter, CMN stood on the allegations of its dismissed complaint, and the trial court entered a final and appealable agreed involuntary dismissal order. CMN timely appealed.

¶13 II. ANALYSIS

¶14 Because this matter was disposed of at the trial level upon the defendants' motion to dismiss pursuant to section 2-615 of the Code, the only question before this court is whether the dismissed complaint stated a cause of action upon which relief can be granted. *Metrick v. Chatz*, 266 Ill. App. 3d 649, 651-52 (1994). The issue presented is one of law; consequently, our review is *de novo*. *T & S Signs, Inc. v. Village of Wadsworth*, 261 Ill. App. 3d 1080, 1084 (1994). To plead a sufficient cause of action against an attorney for legal malpractice, the plaintiff client must allege facts establishing that the defendant attorney owed the plaintiff a duty of due care arising from the attorney-client relationship, the defendant breached that duty, and as a proximate result, the plaintiff suffered injury. *Northern Illinois Emergency Physicians v. Landau, Omahana &*

Kopka, Ltd., 216 Ill. 2d 294, 306 (2005). When viewing the sufficiency of a complaint, the court must accept as true all well-pleaded facts and all reasonable inferences that can be drawn from those facts. *Guinn v. Hoskins Chevrolet*, 361 Ill. App. 3d 575, 586 (2005).

¶15 In a legal malpractice action, "[t]he fact that the attorney may have breached his duty of care is not, in itself, sufficient to sustain the client's cause of action. Even if negligence on the part of the attorney is established, no action will lie against the attorney unless that negligence proximately caused damage to the client." *Northern Illinois Emergency Physicians*, 216 Ill. 2d at 306-07. Causation requires both proof of "cause in fact" and proof of "legal cause." *Thacker v. UNR Industries, Inc.*, 151 Ill. 2d 343, 354 (1992). Courts generally use two tests when considering cause in fact: the traditional "but for" test and the "substantial factor" test. *Id*. Under the but-for test, "a defendant's conduct is not a cause of an event if the event would have occurred without it." *Id*. Under the substantial-factor test, "the defendant's conduct is said to be a cause of an event if it was a material element and a substantial factor in bringing the event about." *Id*. at 354-55. Legal cause, on the other hand, " 'is essentially a question of foreseeability: a negligent act is a proximate cause of an injury if the injury is of a type which a reasonable man would see as a likely result of his conduct.' " *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 456 (1992) (quoting *Masotti v. Console*, 195 Ill. App. 3d 838, 845 (1990)).

¶16 Unlike in a litigation-based legal malpractice case, a plaintiff in a transaction-based legal malpractice case is not always required to prove a case-within-a-case to establish proximate cause. *Union Planters Bank, N.A. v. Thompson Coburn LLP*, 402 Ill. App. 3d 317, 344 (2010). "If an attorney's advice falls below the standard of reasonable legal services, any damages which proximately flow from the client's acceptance of that advice are recoverable in a negligence action against the attorney." *Metrick*, 266 Ill. App. 3d at 655. However, "an attorney's liability for

failing to advise a client of the foreseeable risks attendant to a given course of legal action is not predicated upon the impropriety of the recommended course of action; rather it is predicated upon the client's exposure to a risk that the client did not knowingly and voluntarily assume." *Id*. at 654-55. Consequently, to establish proximate cause in such a case, the plaintiff must plead and prove that had the undisclosed risk been known, the plaintiff "would not have accepted the risk and consented to the recommended course of action." *Id*. at 655.

¶17 On appeal, CMN asserts that it sufficiently pled the issue of proximate cause to withstand a section 2-615 motion to dismiss. Specifically, CMN alleged that it would not have promoted the concert without adequate transactional safeguards in place and defendants failed to advise CMN of the absence of its remedies and gave incompetent advice by representing to CMN that proceeding under the letter of direction was "probably sufficient" and "pretty low risk." CMN argues that if adequate safeguards were not possible, defendants should have advised CMN of that fact so CMN could have decided not to proceed to promote the concert. CMN argues defendants should have anticipated that CMN would have acted differently in its subsequent dealings with Pabon if defendants had advised CMN that no protections from Pabon were in place.

¶18 Concerning both cause in fact and legal cause, CMN asserts it alleged that it retained defendants for the express purpose of preventing Pabon from absconding with the gate proceeds and had informed defendants that transactional safeguards would be necessary because Pabon had broken various past agreements with CMN. CMN alleged that it informed Heidelberger that it would not co-promote the concert without adequate transactional protections in place, and proceeded to promote the concert "[i]n reliance on Heidelberger's advice and on the safeguards he claimed to have put in place." CMN also alleged that if Heidelberger had been aware of the casino's sovereign immunity and had put into place adequate transactional safeguards, then the

casino would have paid the gate proceeds to CMN and not to Pabon.

¶19 CMN argues that its conduct after defendants' creation of the letter of direction—*i.e.*, entering into a new oral contract with Pabon after he breached the first oral contract and serving him with a lawsuit before payment was due from the January concert—do not destroy the causal connection between defendants' involvement and CMN's loss because defendants should have reasonably anticipated that CMN's conduct was a result of its reliance on defendants' advice and statements concerning safeguards. CMN contends it established the element of proximate cause in this transaction-based legal malpractice type of case by pleading that it would not have accepted the risk and co-produced the concert with Pabon if CMN had known that no safeguards were in place to prevent Pabon from taking all the gate proceeds and if CMN had known that it would have no remedy against the casino due to sovereign immunity.

¶20 Defendants argue CMN has made allegations in its second amended complaint that defeat the element of proximate causation. See *Shelton v. OSF Saint Francis Medical Center*, 2013 IL App. (3d) 120628, ¶¶ 25, 27, 32 (a litigant can make allegations in its complaint that destroy or defeat its asserted cause of action); *accord Getty v. Hunter*, 166 Ill. App. 3d 453, 457 (1988). Specifically, CMN's allegations established that it had already entered an agreement with Pabon in October 2009 to co-promote the concert before defendants became involved in this matter in November 2009, and CMN knew before it decided to proceed to co-promote the January concert that Pabon had the ability to revoke the letter of direction and the casino refused to be bound by any agreement with CMN. Moreover, CMN did not plead that defendants recommended a course of action and did not allege that Heidelberger recommended anything after the casino told CMN that it refused to be bound to pay CMN directly. In addition, Heidelberger's emails did not say that any safeguards were put in place to guarantee CMN's payment by the casino and made no

recommendation for CMN to take any course of action.

¶21 We conclude that the trial court properly dismissed plaintiff's second amended complaint because CMN does not allege facts sufficient to show the complained-of advice from defendants exposed CMN to a risk that CMN did not knowingly and voluntarily assume. CMN has not alleged facts sufficient to show it would not have promoted the concert if defendants had warned CMN that Pabon could unilaterally revoke the letter of direction and the casino's sovereign immunity would prevent CMN from obtaining any recourse from the casino. Thus, the alleged facts fail to establish that defendants' acts were a proximate cause of CMN's loss. Before defendants became involved in November 2009 in drafting the letter of direction, CMN had already entered an agreement with Pabon in October 2009 to co-promote the concert and there is no allegation that the terms of that October 2009 agreement provided that Pabon would alter his exclusive agreement with the casino or somehow relinquish his rights under that exclusive agreement.

¶22 CMN's allegations establish that it knew the casino refused to be bound by the terms of the letter of direction and that Pabon retained the ability to revoke that letter. CMN did not allege that defendants left them with the false impression that the letter of direction was irrevocable, and CMN knew that Pabon retained the ability to revoke the letter of direction because when CMN entered a new oral contract with Pabon in December 2009, the new terms included Pabon's promise to CMN not to revoke the letter of direction. Despite CMN's awareness that its right to payment was in the hands of Pabon and Pabon retained the ability to breach his oral agreement, CMN nonetheless proceeded to produce the concert. Moreover, CMN alleges no facts explaining how defendants could unilaterally have compelled Pabon or the casino to agree to: be bound by an irrevocable letter of direction or an agreement to put the concert money into an escrow account;

cause a payment or performance bond to be issued; issue an irrevocable letter of credit; or make CMN a party to or a third party beneficiary of an irrevocable letter of direction. In addition, the complaint makes clear that CMN was aware such agreements had not been made with Pabon or the casino and CMN decided to proceed to co-produce the January concert anyway.

¶23 Furthermore, CMN's claim that Heidelberger gave CMN assurances that it was protected and that he had put safeguards in place to protect CMN is refuted by the record. According to the complaint and attached exhibits, Heidelberger's advice is comprised of an email string, filed under seal. Our review of this exhibit establishes that Heidelberger made no representation that he put safeguards in place or gave assurances that the casino would pay CMN the money. Rather, Heidelberger advised CMN only that the casino's refusal to sign the letter of direction based on its exclusive agreement with Pabon did not make sense because the letter did not create a contractual relationship between the casino and CMN. Heidelberger stated that he did not see how he could write anything more than CMN already had and that the casino's email confirmation that the letter of direction was sufficient for the casino to direct the funds to CMN's designated account "should probably be sufficient." When CMN asked Heidelberger to obtain an email reply from the casino that would legally bind the casino to its representation that it would turn all the funds over to CMN, Heidelberger responded that he had talked to the casino, it would not sign anything but would follow the letter's directive to pay the funds to CMN's account, and that Heidelberger thought it was a "pretty low risk."

¶24 In addition, CMN does not allege defendants gave any advice or had any involvement whatsoever regarding CMN's new December oral agreement with Pabon, which was the agreement he breached when he revoked the letter of direction and caused CMN's injury. Moreover, Heidelberger's advice about the low risk was made based on the facts extant at the time;

Heidelberger was not alleged to have been involved in or had knowledge of the series of events that led to CMN's injury: Pabon's breach of the first October agreement, CMN and Pabon's negotiation of a second agreement in December, CMN's decision to proceed to co-produce the concert, and CMN's decision to file a lawsuit against Pabon and serve him with process on the day of the concert when CMN knew it had only Pabon's oral promise not to revoke the letter of direction.

¶25 Under either the "but for" or the "substantial factor" test to establish cause in fact, CMN's complaint fails to allege facts sufficient to show a reasonable certainty that defendants' conduct caused CMN's injury. See *Mann v. Producer's Chemical Co.*, 356 Ill. App. 3d 967, 972 (2005) (cause in fact exists where there is a reasonable certainty that a defendant's acts caused the injury or damage). The cause of CMN's loss was not defendants' conduct but CMN's decision to proceed with the concert despite CMN's knowledge that the letter of direction remained revocable and the casino refused to be bound by it. CMN has not alleged facts to show how defendants reasonably could have bound the casino to a more complex, direct obligation to CMN when the casino would not be bound to a simple letter of direction from Pabon. Accordingly, CMN has not shown how, had its attorney acted differently, it would have avoided the injury it claims. See *Timothy Whelan Law Associates v. Kruppe*, 409 Ill. App. 3d 359, 364 (2011) (legal malpractice counterclaim was properly dismissed where the client did not allege facts explaining how he would have successfully opposed the issuance of the temporary restraining order if the attorney had not erred); *Governmental Interinsurance Exchange v. Judge*, 221 Ill. 2d 195, 221 (2006) (attorney's failure to perfect an appeal was not actionable where the appeal could not have been successful).

¶26 CMN also argues that defendants failed to advise it that the casino was immune to civil suit as an arm of a sovereign Indian nation. However, even if CMN had learned that the casino was immune to suit, that fact would have made no difference to the outcome here because CMN alleged that it knew the casino refused to be bound to any agreement that could have been enforced in any court. Accordingly, no injury flowed from the casino's alleged immunity.

¶27 We affirm the judgment of the circuit court dismissing plaintiff's legal malpractice cause of action under section 2-615 of the Code for failure to plead a cause of action. Because we affirm the trial court on this basis, we do not address defendants' argument that CMN's legal malpractice action is premature and subject to dismissal under section 2-619 of the Code, 735 ILCS § 5/2-619 (West 2012).

¶28 Affirmed.