

No. 14-2308

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

| | | |
|-------------------------------------|---|-------------------------------|
| RONALD BECKER, |) | Appeal from the Circuit Court |
| |) | of Cook County. |
| Plaintiff-Appellant, |) | |
| |) | |
| v. |) | No. 14 L 122 |
| |) | |
| JEFFREY MICHAEL MCCARTHY (non-party |) | |
| to this appeal) and DIANE PANOS, |) | |
| |) | Honorable Jeffrey Lawrence |
| Defendant-Appellee. |) | Judge Presiding |

PRESIDING JUSTICE SIMON delivered the judgment of the court.
Justices Pierce and Liu concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly dismissed plaintiff's claim for legal malpractice that stemmed from defendant's postjudgment representation of plaintiff in a dissolution of marriage case. Plaintiff did not allege and could not prove any injury resulting from defendant's representation.

¶ 2 **BACKGROUND**

¶ 3 Plaintiff Ronald Becker was involved in a divorce case in Will County that began in 2007. He hired Jeffrey McCarthy to represent him. After the case was adjudicated, plaintiff hired

No. 14-0850

Defendant Diane Panos¹ to do some postjudgment work and defendant acted as additional counsel in that respect. Plaintiff's postjudgment challenges failed. Defendant sought and was given leave to withdraw as plaintiff's counsel and McCarthy continued on as plaintiff's attorney for purposes of appeal. On appeal, the judgment of dissolution was affirmed. Plaintiff then sued Jeffrey McCarthy, his original attorney, and defendant for legal malpractice. The trial court granted defendant's motion to dismiss and subsequently granted an order pursuant to Illinois Supreme Court Rule 304(a) permitting plaintiff to appeal the dismissal of defendant as a party. We affirm.

¶ 4 The issue on appeal is whether plaintiff has a claim against defendant for legal malpractice where plaintiff received an allegedly inequitable share of marital property. In particular, when dividing the assets, the trial court granted plaintiff ownership of the marital residence, and to balance that, granted his ex-wife an undivided interest in her 401(k) account. Around the time of trial, the parties had approximately \$157,000 equity in the home and the 401(k) account had a balance of \$156,103.55. However, by the time the divorce judgment was entered, the 401(k) account balance had reached \$316,418.75 while the value of the home remained unchanged. Therein lies plaintiff's protestation.

¶ 5 In its judgment of dissolution, the trial court held that the parties were both entitled to keep the vehicle that was in their respective possession at the time. The trial court then explained how the rest of the property was to be divided.

"The parties are to divide all other property equally, including any
outstanding tax refunds. In doing so [plaintiff] shall retain the

¹ All of the evidence appears to demonstrate that plaintiff's contractual relationship was with Panos & Associates, LLC and not Diane Panos individually. However, the issue of whether Panos can be held personally liable is not before us on appeal so we will simply refer to the defending party as "defendant."

No. 14-0850

marital residence and Wife shall retain her Caterpillar 401(k). ***

All other accounts shall be equally divided, using the value of each account as of the date of entry of judgment for purposes of such division."

¶ 6 The trial court entered its final judgment on November 19, 2009. On December 18, 2009, plaintiff, still represented by McCarthy, filed a motion entitled "Motion to Reconsider and/or Vacate." In that motion, plaintiff did not challenge the distribution of property as it related to the valuation of the house or the 401(k) account, though he claims he told McCarthy to do so. After the motion was filed, on February 4, 2010, plaintiff retained defendant as additional counsel to "move for reconsideration of certain aspects of the judgment in the Divorce Case." The engagement agreement, signed by both parties, indicates that the representation would concern a "motion to reconsider." Plaintiff alleges that he told Panos to seek clarification regarding the distribution of the house and 401(k), but that she likewise failed to do so. The motion, filed by McCarthy before defendant was retained, was denied. It is unclear from the record what role Panos actually played. On July 12, 2010, Panos filed a motion to withdraw as counsel. On August 13, 2010, plaintiff, still represented by McCarthy, appealed. The trial court granted Panos's motion to withdraw on August 27, 2010. On appeal, plaintiff alleged that the trial court committed a variety of errors in its judgment of dissolution, but did not raise any issue concerning the value of the 401(k). The judgment was affirmed. *In re Marriage of Becker*, 2012 IL App (3d) 100624-U (May 8, 2012).

¶ 7 While the appeal was pending, plaintiff was not cooperating with his ex-wife's attempts to enforce the judgment. Motions to compel were filed, and letters of direction and a rule to show

No. 14-0850

cause were issued. Plaintiff was insisting that the property should be equally split while his ex-wife was insisting that she keep her entire 401(k), that he keep the house, and that the rest of the property be evenly split. On March 5, 2012, two and a half years after the judgment of dissolution was entered, the trial court held a contempt hearing concerning plaintiff's failure to cooperate. Plaintiff, then represented by other attorneys James Podgorny and Mikal Stole, argued that the judgment was "not fair." The trial judge indicated that her intent was in line with the ex-wife's interpretation—that the house and 401(k) were specifically assigned, and, after that, the assets were to be divided evenly. Plaintiff then filed this malpractice case which, as to defendant, was dismissed by the trial court.

¶ 8

ANALYSIS

¶ 9 A section 2-619 motion to dismiss admits the legal sufficiency of the complaint. 735 ILCS 5/2-619. The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of the litigation. *Henry v. Gallagher* (In re Estate of Gallagher), 383 Ill. App. 3d 901, 903 (2008). Although a section 2-619 motion to dismiss admits the legal sufficiency of a complaint, it raises defects, defenses, or some other affirmative matter appearing on the face of the complaint or established by external submissions, which defeat the plaintiff's claim. *Ball v. County of Cook*, 385 Ill. App. 3d 103, 107 (2008).

¶ 10 To ultimately prevail in a legal malpractice case, a plaintiff must establish: (1) the defendant attorney owed the plaintiff client a duty of due care arising from an attorney-client relationship; (2) the attorney breached that duty; (3) the client suffered an injury in the form of actual damages; and (4) the actual damages resulted as a proximate cause of the breach. *Nelson v. Quarles and Brady, LLP*, 2013 IL App (1st) 123122, ¶ 28. A legal malpractice claim presents a

No. 14-0850

“case within a case” so there cannot be malpractice unless counsel's negligence has resulted in the loss of an underlying cause of action, or the loss of a meritorious defense if the attorney was defending in the underlying suit. *Id.*

¶ 11 Plaintiff's arguments fail because he brought them before the same judge that issued the judgment of dissolution and she rejected them. The trial judge stated on the record that it was her intent to treat the home and the 401(k) separately and then to divide up the remaining assets equally. Thus, defendant could not have committed malpractice for failing to make the exact same argument that the trial court considered and rejected. This is especially true where defendant was not even retained until after the judgment of dissolution was entered. Unlike a normal case where we would have to look at the trial court's order to determine its intent, here we have an unequivocal statement from the trial court that its intentions were exactly in line with the ex-wife's position. The trial court is in the best position to interpret its own orders. *Wilson v. Humana Hospital*, 399 Ill. App. 3d 751, 762 (2010). The trial judge made clear that if defendant had made the argument on plaintiff's behalf, it would not have mattered. Therefore, plaintiff could never prevail in a legal malpractice case against defendant because he has no injury resulting from the claimed omission.

¶ 12 Plaintiff argues that we cannot rely on the trial court's 2012 statements because the ruling is a nullity. Plaintiff contends that the divorce judgment on its face is ambiguous, and the trial judge could not resolve the ambiguity after the dissolution judgment was final. But plaintiff himself has referenced the trial judge's 2012 ruling multiple times in the record in this case. He has made admissions in the record in both cases that he raised the issue and that the trial court considered and rejected it. The trial court retained jurisdiction to enforce the judgment of dissolution, and the

No. 14-0850

record from that case is relevant and admissible here. The trial judge did not reject the argument as untimely, she rejected it on the merits. Whether we construe the trial judge's statements as collaterally estopping plaintiff from making his current claims, as defendant does, or we simply just consider the statements as competent evidence, there is uncontradicted proof in the record of the trial court's intended disposition of the property.

¶ 13 In his malpractice complaint, plaintiff failed to even allege what defendant's role was in the underlying litigation. In this appeal, plaintiff obfuscates defendant's role and continues to avoid the issue of what defendant actually did in the underlying litigation. In response to the motion to dismiss the malpractice case, plaintiff claimed that defendant was "hired to argue the motion for reconsideration." Presumably then, her role was to argue the motion that was already on file—a motion that did not include any mention of the 401(k) issue. On the other hand, defendant presented evidence that her role was simply to prosecute the existing motion to reconsider. The scope of her representation had nothing to do with valuing the 401(k) account, and the retention agreement states that it cannot be orally modified—negating plaintiff's allegation that he told defendant to get clarification on the 401(k) issue.

¶ 14 Moreover, even were we to resort to our own interpretation of the judgment, we would find as the underlying trial judge did, leaving plaintiff with no malpractice claim. Orders must be construed in a reasonable manner so as to give effect to the intention of the trial court. *Kiefer v. Rust-Oleum Corp.*, 394 Ill. App. 3d 485, 494 (2009). The plain language of the judgment is that, "[plaintiff] shall retain the marital residence and Wife shall retain her Caterpillar 401(k)." And that "[a]ll other accounts shall be equally divided, using the value of each account as of the date of entry of judgment for purposes of such division." Those sentences make clear that the 401(k)

No. 14-0850

account was specifically awarded to the wife and the home was specifically awarded to the husband. This is true even though the preceding sentence in the judgment of dissolution implies that all property will be divided equally. Judgments are construed in the same manner as other written instruments. *In re Marriage of Schinelli*, 406 Ill. App. 3d 991, 1002 (2011); 46 Am. Jur. 2d Judgments § 74. A general rule of legal interpretation is that specific designations control over general designations. See *Taylor v. Board of Educ. of City of Chicago*, 2014 IL App (1st) 123744, ¶ 42 (contracts); *Chicago Bears Football Club v. Cook County Dept. of Revenue*, 2014 IL App (1st) 122892, ¶ 50 (statutes); *In re Estate of Overturf*, 353 Ill. App. 3d 640, 645 (2004) (testamentary devises). The trial court took two specific assets and assigned them to specific parties. Then, the trial court stated that all *other* accounts were to be divided equally according to their value. Only the "other accounts" were subject to being valued at the date the judgment was entered. The house and the 401(k) were treated separately and were not subject to valuation at the time of judgment.

¶ 15 According to the complaint in this case, the value of the 401(k) account was and is dependent on the performance of Caterpillar's stock. In this case it went up, but it could have gone down. The house awarded to plaintiff could have increased in value as well. Simply because the judgment ended up disfavoring plaintiff does not mean he has a claim against his lawyers for malpractice. It also seems fairly apparent that the case is barred by the two-year statute of limitations for claims against attorneys (735 ILCS 5/13-214.3(b)). Defendant withdrew from representation in August 2010 at which time plaintiff knew of her alleged failure to follow his instructions. This case was not filed until January 2014. But that issue was not raised by the parties. Ultimately, plaintiff's claims against defendant are refuted by the record so the circuit

No. 14-0850

court did not err when it dismissed defendant from this case.

¶ 16

CONCLUSION

¶ 17 Accordingly, we affirm the judgment of the circuit court.

¶ 18 Affirmed.