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2017 IL App (3d) 150514-U

Order filed February 6, 2017

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2017

MARK HEXUM,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
Plaintiff-Appellant,)	Peoria County, Illinois,
)	
v.)	Appeal No. 3-15-0514
)	Circuit No. 13-L-264
ROB PARKER and)	
PARKER & HALLIDAY,)	Honorable
)	Clarence M. Darrow,
Defendants-Appellees.)	Judge, Presiding.

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in dismissing the plaintiff's complaint for legal malpractice where the doctrine of collateral estoppel did not bar the action.

¶ 2 The plaintiff, Mark Hexum, appeals from the dismissal of his complaint for legal malpractice against the defendants, Rob Parker and Parker & Halliday. Mark contends that the trial court erred in finding that the doctrine of collateral estoppel barred the action.

¶ 3 **FACTS**

¶ 4 In October 2010, Mark filed a petition for dissolution of marriage from his spouse, Sherri Hexum. The matter proceeded to trial on the issues of property distribution and maintenance. During the trial, the court called a recess to allow the parties to discuss settlement.

¶ 5 While negotiations went forward, the parties requested that the trial court meet with counsel to discuss the issue of maintenance. The trial court stated that it would listen to the attorneys, but indicated that its comments would not be binding and a full trial would be held if the parties failed to reach an agreement. After counsel for both parties met with the trial court, the issues were reviewed with the parties and negotiations continued.

¶ 6 Eventually, Sherri's attorney informed the trial court that the parties had reached an agreement that Mark would pay \$6250 per month in maintenance and that, in addition, he would pay Sherri 35% of his yearly bonus pay and 35% of any stock options that he exercised. After the recitation of the terms of the marital settlement agreement, the trial court accepted the agreement and incorporated its terms into the final judgment of dissolution of marriage.

¶ 7 Subsequently, Mark retained new counsel and filed a motion to vacate the judgment of dissolution of marriage. In his motion, Mark alleged that after the attorneys discussed the issue of maintenance with the court, Mark's attorney (one of the defendants in this case) told Mark that the court indicated that it would impose maintenance at 50-60% of his gross income if the matter proceeded to trial. Mark alleged that the court either did not make that statement to Mark's counsel or the court was not informed of certain facts that may have impacted the court's statement. Mark claimed that he was forced to agree to \$6250 (37.5%) in maintenance to avoid financial devastation. As a result, Mark contended that he did not knowingly and voluntarily enter into the agreement because he felt coerced into accepting the terms of the agreement based on his counsel's representations. In addition, Mark claimed the agreement was unconscionable,

in part, because “[i]t was not realistically foreseeable that the Court was going to order 50-60% of his income as maintenance to [Mark’s former wife].”

¶ 8 The trial court held a hearing on Mark’s motion. Mark, the only witness to testify at the hearing, stated that he felt the agreement was “shoved down [his] throat and that was all-the only option [he] had.” Mark asserted that he did not realize that his entire paycheck would be used to pay maintenance and the mortgage, and that he was told by his former attorney that the trial court was leaning toward a maintenance figure of 50-60% of his gross income. *In re Marriage of Hexum*, 2013 IL App (3d) 120234-U, ¶ 10.

¶ 9 Following Mark’s testimony, Sherri moved for a directed verdict. The trial court granted her request and directed a verdict denying Mark’s motion to vacate the marital settlement agreement. In its written order, the trial court explained it considered “[w]hether [Mark] was misled by his attorney (and the attorney corroborates it)” when ruling on the motion. As to Mark’s claim that the agreement was unconscionable, the court noted that it never threatened or ordered maintenance in the amount of 50-60% of Mark’s gross pay. As to Mark’s claim that the agreement was coerced, the court made the following finding:

“Part of this claim is mixed with [Mark’s] dissatisfaction with his attorney for not speaking up or giving better advice. The Court of course does not know what transpired between [Mark] and his prior attorney. However the Court noted that [Mark’s prior attorney] was present and an active participant on 9-27-11 during the pronouncement. Additionally, the Court took time to inquire of both [Mark] and [Sherri] as to their concurrence and acceptance of the terms of the agreed judgment. Given that, it remains a mystery to suggest that this Court overlook such a sequence of questions and answers on [page] R25. There were no

overtones of coercion or hesitation when [Mark] concurred in the pronouncement. In fact, the Court specifically asked [Mark] if this was his free and voluntary act. [Mark] answered ‘yes.’ The Court recalls that [Mark] testified at the 12-5-11 hearing on his Motion to Vacate that he felt no other alternative but to agree. However, the Court notes that [Mark] stopped the pronouncement several times with his own remarks or questions, but there was no hesitation at the very moment when questioned by the Court as to his acceptance of the agreed judgment.”

The trial court concluded that the agreement was neither unconscionable nor coerced. Mark appealed.

¶ 10 On appeal, Mark argued, in relevant part, that the marital settlement agreement should be vacated on the ground of coercion. Mark also made a new argument on appeal that the agreement should be vacated on the ground of fraud. Both arguments were based on Mark’s assertion that “Sherri’s attorney and [Mark’s] attorney made false statements that the trial court would enter a judgment requiring him to pay 50-60% of his gross salary as maintenance if he refused to agree to a settlement.” *Id.* ¶ 23.

¶ 11 As to Mark’s claim of coercion, we concluded that the record contained no evidence that would rise to the level of coercion to justify vacating the settlement agreement. *Id.* ¶ 26. In rejecting Mark’s argument, we noted:

“Mark was well aware of the assets each of the parties held, was not unsophisticated in financial matters, was represented by competent counsel throughout the proceedings, was advised as to possible maintenance outcomes, and voluntarily and freely entered into the agreement before the trial court. Mark argues that his attorneys coerced him into the agreement by advising him that he

would be ordered to pay 50% of his gross income if he went to trial. However, Mark's own questions during the recitation of the terms of the agreement belie his argument that he was coerced into the settlement agreement. Mark asked several questions as did his counsel during the course of the September 27 hearing. Each time Mark interjected, the court discussed the matter either on or off the record. In some instances, both parties were given time to discuss the issues with their attorneys before the hearing continued. In addition, Mark specifically questioned the court regarding the subject of the modification of permanent maintenance. The court explained that maintenance was modifiable if a change in circumstance was shown and went off the record to further discuss the issue. Mark's participation and his interactive discussions with the court and the attorneys contradict his claim that counsel forced him to agree to a marital settlement agreement in which he agreed to pay 37.5% of his gross income as maintenance." *Id.*

¶ 12 With respect to Mark's claim of fraud, we initially found the argument forfeited because Mark failed to raise the issue in the trial court. However, we went on to find that, "[e]ven if the issue was not forfeited, the evidence Mark presented at the motion to vacate hearing failed to sustain an allegation of fraud." *Id.* ¶ 30. We then explained:

"The record shows no indication of fraud by either Sherri's counsel or Mark's counsel. At the hearing on the motion to vacate, Mark was the only witness to testify, and his self-serving testimony is not clear and convincing evidence that Sherri's attorney and his attorney made a false statement. Even if Mark's attorney informed Mark that he could be ordered to pay 50-60% of his income as maintenance if he went to trial, Mark failed to demonstrate that counsel knew the

statement was false when he made it. It appears that the trial court advised both attorneys during negotiations that there were several options as to the issue of maintenance. After discussing the case with the trial court, Mark's attorney discussed those options with Mark and advised him that he did not have to agree to a settlement on the issue of maintenance. Based on the record before us, Mark failed to present a meritorious claim of fraud." *Id.*

¶ 13 After Mark's unsuccessful appeal, he filed his complaint for legal malpractice, which is the subject of the instant appeal. The defendants are Mark's attorney and law firm that represented Mark in the divorce negotiations. In the complaint, Mark alleged that his attorney gave him negligent advice during the maintenance negotiations. Specifically, Mark alleged that his attorney made the false statement that the trial court was inclined to award 50-60% of Mark's gross income as maintenance, if the cause proceeded to trial. Mark claimed that his attorney's false statement (negligent advice) caused Mark to agree to pay Sherri 37.5% of his gross salary and 35% of his "STIP pay and stock options" as maintenance. If the matter had proceeded to trial, Mark claimed that the evidence presented would have supported a judgment that would require Mark to pay less maintenance than the amount he agreed to in the marriage settlement agreement.

¶ 14 The defendants moved to dismiss Mark's complaint for legal malpractice pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2014)) on the ground that Mark's claim was barred by collateral estoppel. The defendants asserted that the doctrine of collateral estoppel barred Mark from bringing this action because the denial of Mark's motion to vacate the marital settlement in the divorce proceedings (and affirmed on appeal) effectively decided the issue of the adequacy of the defendants' representation. The motion to dismiss also

argued that Mark's complaint should be dismissed for failing to sufficiently allege damages. Alternatively, the defendants asserted that Mark's jury demand should be stricken.

¶ 15 In response, Mark argued that collateral estoppel did not apply because the issues presented in the divorce proceedings were not identical to those raised in his legal malpractice complaint. In addition, Mark argued that the defendants' motion to dismiss was deficient because it failed to include any portion of the record from the divorce proceedings.

¶ 16 Ultimately, the trial court dismissed Mark's complaint on the ground that the issue had been fully litigated, decided, and appealed to this court in the divorce proceedings. The trial court did not reach the question of whether Mark's complaint should be dismissed on the grounds that it failed to sufficiently plead damages. The trial court also did not consider whether Mark's jury demand should be stricken.

¶ 17 Subsequently, Mark filed a motion to reconsider arguing that the trial court erred in granting the defendants' motion to dismiss because the trial court did not have the record of the divorce proceedings to consider when ruling on the motion to dismiss. Thereafter, the parties entered an agreed order that allowed the trial court to take judicial notice of the record from the divorce proceedings. The trial court subsequently denied Mark's motion to reconsider and Mark appeals.

¶ 18 After the parties submitted their briefs, this court entered an order striking portions of the appendix of Mark's brief that were not part of the trial court record and ordered Mark to submit the record from the divorce proceedings. Mark submitted the common law record, but did not submit the report of the proceedings from the divorce proceedings.

¶ 19 ANALYSIS

¶ 20 On appeal, Mark argues that the trial court erred in finding that his legal malpractice claim was barred by collateral estoppel. The doctrine of collateral estoppel “bars relitigation of an issue already decided the same case.” *People v. Tenner*, 206 Ill. 2d 381, 395 (2002). Collateral estoppel applies where: “(1) the issue decided in the prior proceeding must be identical to the one in the current suit; (2) the prior adjudication must have been a final judgment on the merits; and (3) the party against whom the estoppel is asserted must have been a party to, or must be in privity with a party to, the prior adjudication.” *Hope Clinic for Women, Ltd. v. Flores*, 2013 IL 112673, ¶ 77. The parties seeking to invoke the doctrine—in this case, the defendants—have the burden of meeting the three requirements. *People v. Jones*, 207 Ill. 2d 122, 139 (2003).

¶ 21 Here, the defendants have failed to satisfy the first requirement of collateral estoppel because the legal and factual determinations made in the divorce proceedings are not identical to those presented in the current legal malpractice suit. In the divorce proceedings, the trial court—and this court on appeal—considered whether the underlying divorce judgment was unconscionable, coerced, or the result of fraud. This required the trial court and this court to consider the following legal standards.

¶ 22 “A marital settlement agreement is unconscionable if there is an absence of a meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.” (Internal quotation marks omitted.) *In re Marriage of Baecker*, 2012 IL App (3d) 110660, ¶ 41 (quoting *In re Marriage of Steadman*, 283 Ill. App. 3d 703, 709 (1996), quoting *In re Marriage of Carlson*, 101 Ill. App. 3d 924, 930 (1981)). Coercion is defined as the imposition, oppression, undue influence, or the taking of undue advantage of the stress of another whereby one is deprived of his free will. *In re Marriage of Gorman*, 284 Ill. App. 3d 171, 180 (1996). To establish a claim of fraud, a party must show: “(1) false statement

of material fact known or believed to be false by the party making it; (2) intent to induce another party to act; (3) action by the other party in reliance on the truth of the statement; and (4) damage to the other party relying on such statement.” *In re Marriage of Roepenack*, 2012 IL App (3d) 110198, ¶ 33.

¶ 23 In contrast to the legal issues raised in the divorce proceedings, which involved unconscionability, coercion, and fraud, Mark’s complaint for legal malpractice alleged that the defendants committed malpractice by providing negligent advice to Mark in the divorce proceedings. “In a cause of action for professional malpractice, the plaintiff must prove the existence of an attorney-client relationship, a duty arising out of that relationship, a breach, causation and actual damages.” *Gelsomino v. Gorov*, 149 Ill. App. 3d 809, 813 (1986). While it is true that Mark’s arguments in the divorce proceedings were mixed with his dissatisfaction with the defendants’ legal representation, the legal question of whether the defendants committed legal malpractice was never decided in the divorce proceedings.

¶ 24 Further, in the divorce proceedings, neither the trial court nor this court made a factual determination that is material to Mark’s malpractice claim. To invoke the doctrine of collateral estoppel, “[t]here must have been a decision with respect to a specific fact in the prior judgment that was material and controlling in that case and also material and controlling in the pending case.” *Id.* at 812. “It must also conclusively appear that the matter of fact was so in issue that it was necessarily determined by the court rendering the judgment interposed as a bar by reason of such estoppel.” *People ex rel. Chicago & Eastern Illinois R.R. Co. v. Fleming*, 42 Ill. 2d 231, 235 (1969).

¶ 25 To establish his legal malpractice claim, Mark is required to prove his allegation that the defendants improperly prepared for trial and misinformed Mark regarding the trial court’s

alleged statement that if the matter proceeded to trial, it would impose a maintenance obligation of 50-60% of Mark's gross income. Mark would then be required to prove that the defendants' actions caused Mark to assent to the marital settlement agreement. These factual determinations were not made in the divorce proceedings. Instead, the court acknowledged that it did not know what occurred between Mark and his attorney. Although the trial court noted that it would consider "[w]hether [Mark] was misled by his attorney," the trial court did not make a factual determination on this question because it was not material to the issue of whether the marital settlement agreement was unconscionable or coerced. Furthermore, when Mark appealed from the divorce proceedings, we rejected Mark's argument that the marital settlement agreement was the result of fraud. Specifically, we found that the issue was forfeited because it was not raised in the trial court. We proceeded to find that even if the issue had not been forfeited, the record did not establish Mark's claim of fraud. *Hexum*, 2013 IL App (3d) 120234-U, ¶ 30. Significantly, we did not determine whether Mark's counsel made the alleged statement regarding the trial court's purported inclination to impose maintenance in the amount of 50-60% of Mark's gross income if the cause proceeded to trial. Consequently, we find that the issues decided in the divorce proceedings did not conclusively determine the factual questions of whether the defendants misled Mark and whether the defendants' action caused Mark to agree to the marital settlement agreement.

¶ 26 In reaching this conclusion, we reject the defendants' argument that Mark has forfeited his argument to the extent that it relies on the record from the divorce proceedings. In his response and at the hearing on the defendants' motion to dismiss, Mark argued that the defendants' motion should be denied because it failed to introduce the records from the divorce proceedings. Further, Mark specifically argued in his motion to reconsider that the trial court

erred in granting the defendants' motion to dismiss because the trial court did not have the record from the divorce proceedings. Thereafter, the parties stipulated that the trial court could take judicial notice of the record from the divorce proceedings. Consequently, we find it is not inappropriate for Mark to make an argument based on the record from the divorce proceedings.

¶ 27 Finally, we do not consider the defendants' alternative argument that the dismissal order should be affirmed because Mark's complaint failed to sufficiently allege damages. We also do not consider the defendants' argument that if the cause should be remanded, Mark's jury demand should be stricken. Because the trial court did not reach either issue, we offer no opinion on the merits of these arguments. Instead, we remand the matter so that the trial court can consider the defendants' remaining arguments.

¶ 28 **CONCLUSION**

¶ 29 The judgment of the circuit court of Peoria County is reversed and remanded.

¶ 30 Reversed and remanded.