2019 IL App (1st) 172133-U

Nos. 1-17-2133 & 1-17-2881 cons.

Order filed on February 13, 2019.

Modified upon denial of rehearing on March 26, 2019.

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ANNA F. WEAVER, Plaintiff-Appellant and Cross-Appellee, v. BRIGITTE SCHMIDT BELL and BRIGITTE SCHMIDT BELL, P.C., Defendants-Appellees and Cross-Appellants, (The Law Offices of Donald L. Johnson, Third-Party Respondent and Cross-Appellee).	)	Appeal from the Circuit Court of Cook County. No. 13 L 003467 The Honorable Kathy M. Flanagan, Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: A genuine issue of fact exists as to whether plaintiff was informed of the improper allocation of marital assets in her underlying divorce case. Accordingly, the circuit court erred in granting summary judgment in favor of defendants on plaintiff's legal malpractice claim. Additionally, the court abused its discretion in denying plaintiff leave to amend because the

amended complaint could have stated a cause of action. Finally, the court properly denied defendants' motion for sanctions.

¶ 2 These consolidated appeals pertain to plaintiff Anna F. Weaver's legal malpractice claim against defendants Brigitte Schmidt Bell and Brigitte Schmidt Bell, P.C. (the firm). Plaintiff appeals from the circuit court's orders granting summary judgment in favor of defendants, denying plaintiff's motion to reconsider and denying plaintiff's motion for leave to amend the complaint. Additionally, defendants appeal from the court's denial of their motion for sanctions against plaintiff and her original attorney in this matter. For the reasons to follow, we reverse the circuit court's judgment in plaintiff's appeal and remand for further proceedings. In defendants' cross-appeal, we affirm the circuit court's denial of sanctions.

¶ 3 I. BACKGROUND

¶ 4 A. Underlying Case

¶ 5 This case emanates from a complicated procedural history in the circuit court. Plaintiff's legal malpractice action arose from defendants' representation of her in an underlying divorce case against Donald Bergh (2011 D 00426).

¶ 6 Plaintiff and Bergh agreed to participate in an alternative to the traditional marriage dissolution proceedings, known as "collaborative law." See *e.g.* 750 ILCS 90/5(3) (West 2018). Plaintiff signed a Collaborative Law Participation Agreement, advising her of the benefits and risks of the process. Ultimately, plaintiff and Bergh agreed to settle their property rights through a negotiated and mediated Marital Settlement Agreement (MSA).

¶ 7 Four days before they signed the MSA, Bell emailed Bergh, stating:

> "Don: I am attaching an abbreviated versionof [*sic*] Exhibit A that shows only the accounts that are being divided. The machine automatically adds, and the totals are at the bottom. This doesn't seem to be what the two of you intended. Please double check the

numbers for me and let me know what should be changed. I thought Anna was getting 60% and you 40% of these marital assets (plus you get all your retirement). This has you getting a little less than 60% and Anna getting only about 43%. Please help me fix this."

Bergh responded, stating, "my understanding of our agreement is that we are splitting 60/40 these assets." Plaintiff, as well as Bergh's attorney, James R. Galvin, were copied on those emails, but never responded to them.

¶ 8 Under the MSA ultimately signed by the parties, Exhibit A titled as "Bergh/Weaver Marital Estate Allocation," listed the parties' total marital assets on lines 1 through 35 and indicated that plaintiff would receive 60% of those assets and that Bergh would receive 40% (60/40 split) under line 20. In addition, Exhibit A identified each party's respective share of assets apparently based on the 60/40 split. In order for Bergh to receive 40% of the assets, however, plaintiff had to pay him $440,000, which was identified as the "Settlement Amount (based on 60/40 split of agreed marital assets)" on line 31 under Exhibit A. Plaintiff and Bergh signed the MSA and the circuit court entered an order dissolving the marriage on April 5, 2011.

¶ 9 B. Legal Malpractice Claim

¶ 10 In 2013, plaintiff filed a one-count legal malpractice complaint against defendants, alleging that they were negligent in their representation of her in the collaborative law process, among other things. Defendants then moved for summary judgment, asserting that there was no evidence they gave "[p]laintiff bad legal advice," and that plaintiff could not establish causation or damages based on the testimony of her expert, Benjamin Hyink. In response, plaintiff asserted that defendants were negligent in drafting the MSA because it miscalculated her share of marital assets. Specifically, the MSA provided that plaintiff would receive 60% of the marital assets, yet she received only 55.4%, which was $213,977.73 less than she was entitled to receive under the

MSA. In support of her response, she attached her own affidavit, stating that she relied on Bell to properly calculate the division of marital assets under Exhibit A. She also attached Hyink's affidavit and prior deposition testimony. While Hyink's affidavit stated that plaintiff received only 55.4% of the marital assets, his prior deposition testimony stated that she received nearly 60% of the assets. In his deposition, Hyink had relied on a calculation provided by defendants' expert as to what that expert found the 60/40 split of marital assets would be. Following his deposition, Hyink performed his own calculation and discovered that the calculation made by defendants' expert was erroneous.

¶ 11 Defendants later moved for sanctions against plaintiff and The Law Offices of Donald L. Johnson, her original attorney in this legal malpractice action, under Illinois Supreme Court Rule 137 (eff. Dec. 29, 2017). Defendants asserted that plaintiff and her attorney initiated a legal malpractice action that had no factual or legal basis. Thereafter, plaintiff filed a motion for leave to amend the complaint (735 ILCS 5/2-616 (West 2016)) on June 2, 2017, to provide more specific allegations regarding defendants' negligence. A week later, the circuit court entered an order stating that plaintiff's motion would be presented at the next court date, June 12, 2017.

¶ 12 Instead of ruling on plaintiff's motion on that date, however, the court granted defendants' motion for summary judgment. The court ruled that plaintiff's claim that defendants miscalculated her share of the marital assets, improperly provided a new theory of recovery first raised in her response to their summary judgment motion. The court also found that plaintiff was informed of the imperfect calculation because she was copied on the email that Bell had sent to Bergh. In addition, the court ordered plaintiff to file a motion for leave to amend the complaint, despite that she had already filed one. Plaintiff nonetheless filed a second motion (735 ILCS 5/2-1005(g) (West 2016)) on July 12, 2017.

¶ 13 The court denied that motion, as well as plaintiff's motion to reconsider the summary judgment ruling, on July 24, 2017. The court subsequently denied defendants' motion for sanctions on November 8, 2017. All parties to this dispute appeal.

¶ 14 II. ANALYSIS

¶ 15 A. Plaintiff's Appeal

¶ 16 On appeal, plaintiff first contends that the circuit court erred in granting defendants' motion for summary judgment because defendants were negligent in drafting the MSA. Specifically, plaintiff asserts that defendants miscalculated her 60% share of marital assets under the MSA because she received only 55.4% of the marital assets. Thus, she received $213,977.73 less than she was entitled to receive under the MSA.

¶ 17 1. Summary Judgment

¶ 18 Summary judgment is warranted only where the pleadings, admissions on file, depositions and any affidavits, reveal no genuine issue of material fact so that the movants are entitled to judgment as a matter of law. *Ignarski v. Norbut*, 271 Ill. App. 3d 522, 525 (1995). "If the affidavits and other materials disclose a dispute as to any material issue of fact, summary judgment must be denied even if the court believes the movant will or should prevail at trial." *Id*. Furthermore, courts must strictly construe the record against the movants. *Id*. We review summary judgment rulings *de novo*. *Sandstrom v. De Silva*, 268 Ill. App. 3d 932, 935 (1994).

¶ 19 To establish legal malpractice, a plaintiff must show (1) the existence of an attorney-client relationship, establishing a duty on the part of the attorney; (2) a negligent act or omission, constituting a breach of that duty; (3) proximate cause; and (4) actual damages. *Lopez v. Clifford Law Offices, P.C.*, 362 Ill. App. 3d 969, 974-75 (2005). Even if an attorney's negligence is proven, the plaintiff must also prove that the attorney's negligence proximately caused her

damages. *Nettleton v. Stogsdill*, 387 Ill. App. 3d 743, 748 (2008). The issue of proximate cause in a legal malpractice action is ordinarily a question of fact decided by the jury. *Id*. at 753. As such, proximate cause should never be decided as a matter of law, unless the facts are undisputed such that reasonable persons could not reach different results or draw different inferences thereof. *Id*. A successful legal malpractice action places the plaintiff in the same position she would have occupied but for the attorney's negligence. *Id*. at 749.

¶ 20 Here, the circuit court granted defendants' motion for summary judgment on plaintiff's legal malpractice claim because there was no evidence that defendants breached their duty to plaintiff. In reaching its conclusion, the court found that plaintiff's claim that defendants miscalculated her share of marital assets amounted to an improperly-provided new theory of recovery first raised in her response to their summary judgment motion. The court noted that even if the new theory of recovery was permissible, plaintiff could not establish legal malpractice because she was informed of the imperfect calculation, stating, "[t]he evidence shows that the Plaintiff was informed that the split in assets would not be an exact or perfect 60/40 split, with her receiving less than 60%." Thus, "[t]he fact that the calculations therein were off, does not invalidate the agreement nor does it evince that the Defendant provided bad legal advice." Consequently, the court held there was no evidence of a breach of duty that proximately caused plaintiff's damages. We disagree.

¶ 21 In this case, plaintiff's claim that defendants miscalculated her share of marital assets did not provide a new theory of liability raised for the first time in her summary judgment response. In fact, defendants' summary judgment motion specifically acknowledged that Hyink's theories of liability included that "[p]laintiff should have received 60 percent of the marital assets and did not." Furthermore, plaintiff's claim did not improperly provide a new theory of recovery because

she moved to amend the complaint to specifically address that theory before summary judgment was granted. *Cf. Pagano v. Occidental Chemical Corp.*, 257 Ill. App. 3d 905, 911 (1994) (finding, the plaintiff's claim amounted to an improperly-provided new theory of recovery where he did not move to amend the complaint before or after summary judgment was granted, or at any stage of the proceedings before the lower court).

¶ 22 Defendants were also potentially negligent in drafting the MSA because, as the circuit court acknowledged, the "calculations therein were off." Thus, we cannot say there is no evidence that defendants breached their duty to plaintiff to draft an MSA correctly calculating her 60% share of the marital assets as contemplated by plaintiff and Bergh. Moreover, it is of no import that the breach of duty occurred in drafting the MSA, rather than in communicating with plaintiff by providing "bad legal advice," since it occurred with respect to the case itself. See *Lopez*, 362 Ill. App. 3d at 979. In reaching this conclusion, it is important to note that the validity of the MSA is irrelevant as to whether defendants were negligent in drafting it.

¶ 23 Similarly, we reject defendants' assertion that plaintiff is "judicially estopped from challenging the MSA." See *Wolfe v. Wolf*, 375 Ill. App. 3d 702, 705 (2007) (stating, for judicial estoppel to apply, the party estopped must have taken two factually inconsistent positions). While plaintiff signed an MSA stating she understood and agreed to the terms therein, *i.e.*, that she was to receive 60% of the marital assets, she has never taken a contrary position. Instead, she has challenged the application of the MSA because the provision misapplied and resulted in a miscalculation. *Cf. Larson v. O'Donnell*, 361 Ill. App. 3d 388, 397 (2005), *overruled on other grounds by Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334 (2007) (finding, the plaintiff took two factually inconsistent positions where he agreed to a specific dollar amount for child support under the MSA, but later claimed he did not understand those terms). Even if the calculation

found in Exhibit A was part of the MSA, it rendered the MSA internally inconsistent, meaning, the MSA stated both that she was to receive 60% and that she was to receive 55.4% of the marital assets. As plaintiff's present position remains consistent with the former, judicial estoppel does not apply.

¶ 24 That being said, defendants initially argued that "plaintiff *** agreed to receive *** 55.4% of the marital *assets* (emphasis added)" because she paid the $440,000 settlement amount to Bergh, however, they apparently abandoned that claim in their petition for rehearing, stating "the $440,000 settlement amount existed to ensure a 60/40 split of *one asset* – the parties' former marital residence – not 'all' assets." Nonetheless, the record contains sufficient facts indicating the parties' agreement was that plaintiff would receive 60% of the marital assets and that Bergh would receive 40%. For example, Bergh testified in his deposition, stating, "[m]y goal was to make it through the process as quickly and cleanly as possible and my proposal to Anna was that I take 40 and she take 60."

¶ 25 To the extent the court found that plaintiff "was informed that the split in assets would not be an exact or perfect 60/40 split, with her receiving less than 60%," this is quintessentially a question of fact for the jury to decide. As set forth above, Bell emailed Bergh regarding the calculation of marital assets, and while plaintiff was copied on that email, she never responded to it. Furthermore, Bell's email to Bergh suggested that Bell was attempting to correct the allocation of assets in stating, "[p]lease help me fix this." As such, a genuine issue of fact exists since there is a dispute as to whether plaintiff was informed of the imperfect calculation and whether she aware of it when she signed the MSA, thus precluding summary judgment.

¶ 26 Based on the foregoing, we conclude that the circuit court erred in granting summary judgment in favor of defendants.

¶ 27 2. Motion to Amend

¶ 28 Plaintiff next contends that the circuit court erred in denying her leave to amend. We agree.

¶ 29 Section 2-1005(g) of the Code provides in relevant part that, "[b]efore or after the entry of a summary judgment, the court shall permit pleadings to be amended upon just and reasonable terms." 735 ILCS 5/2-1005(g) (West 2016). Where the plaintiff seeks to amend a cause of action on which summary judgment was granted pursuant to section 2-1005(g), the depositions and affidavits must indicate that she can replead that claim under another theory. *Cook ex rel. Cook. v. AAA Life Insurance Co.*, 2014 IL App (1st) 123700, ¶ 40. In addition, we will not reverse the circuit court's denial of a motion to amend unless there has been an abuse of discretion, which occurs when a cause of action could have been stated if the amendment was permitted. *Id*.

¶ 30 To determine whether the circuit court abused its discretion, we must consider whether (1) the proposed amendment would cure the defective pleadings; (2) the other parties would sustain prejudice by virtue of the proposed amendment; (3) the proposed amendment was timely; and whether (4) previous opportunities to amend the pleading could be identified. *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992).

¶ 31 Here, the denial of plaintiff's motion for leave to amend was an abuse of discretion because the proposed amendment could have stated a cause of action for legal malpractice. First, the proposed amendment would have cured the defective pleading because it provided additional allegations of defendants' negligence, namely, that they miscalculated plaintiff's share of marital assets under the MSA. Those allegations arose from information that was obtained through discovery, including the depositions of both parties' experts, as well as Hyink's affidavit. Thus, the amendment would have expanded upon the causation and damages elements that were

argued to be deficient in plaintiff's original complaint. Second, defendants would not have been prejudiced by the proposed amendment because they had sufficient notice of plaintiff's intention to amend the complaint. As previously stated, plaintiff attempted to amend the complaint on two occasions, notably, once before summary judgment was entered. Third, for the same reasons, the proposed amendment was timely. It was also timely because plaintiff, pursuant to the circuit court's order, filed the second motion to amend prior to the ultimate hearing on the matter on July 24, 2017. Last, there were no previous opportunities to amend the complaint as set forth above. Under these circumstances, we find that the circuit court abused its discretion in denying plaintiff's motion for leave to amend the complaint.

¶ 32 B. Defendants' Cross-Appeal

¶ 33 Given the rulings set forth above, we affirm the denial of Rule 137 sanctions in defendants' cross-appeal. Rule 137 sanctions are appropriate only where the opposing party's complaint has no factual or legal basis. See Ill. S. Ct. R. 137 (eff. Dec. 29, 2017); *Patton v. Lee*, 406 Ill. App. 3d 195, 201-02 (2010); *Webber v. Wight & Co.*, 368 Ill. App. 3d 1007, 1032 (2006). Here, however, plaintiff's complaint and proposed amended complaint had both.

¶ 34 III. CONCLUSION

¶ 35 For the foregoing reasons, we reverse the circuit court's summary judgment order and remand to permit plaintiff to file an amended complaint. We affirm the court's judgment in all other respects.

¶ 36 Affirmed in part and reversed in part. Cause remanded.