2014 IL App (1st) 130661-U
No. 1-13-0661
March 31, 2014

THIRD DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

DEREK and STEVEN LURIE, Individually, And d/b/a AMERICAN ESCROW,	)	Appeal from the Circuit Court Of Cook County.
Plaintiffs-Appellants,	)	No. 10 L 011238
v.	)	The Honorable Jeffrey Lawrence, Judge Presiding.
PHILIP S. WOLIN, Individually, and d/b/a WOLIN, KELTER & ROSEN, LTD.,	)	
Defendants-Appellees.	)	

JUSTICE NEVILLE delivered the judgment of the court, with opinion.
Justices Pucinski and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: When a client, or an agent of a client, asks an attorney for advice as to how to conduct a business legally, and the attorney's bad advice leads the client to violate applicable laws, the client and agent's unclean hands do not prevent the client and its agent from suing the attorney for legal malpractice. The client may also recover for legal malpractice if the malpractice causes the client to settle a cause of action for an inadequate amount.

¶ 2 Derek and Steven Lurie sued Philip Wolin and his law firm, Wolin, Kelter & Rosen, for legal malpractice, alleging that Wolin gave bad advice to Derek and Steven and the corporation they owned, American Escrow. The trial court granted the defendants' motion to dismiss the complaint with prejudice, holding that Derek and Steven had unclean hands that barred them from recovering for the defendants' alleged malpractice. We find that Derek and Steven adequately alleged that they dirtied their hands only when they followed Wolin's bad legal advice, and therefore the defense of unclean hands does not justify the dismissal of the lawsuit on the pleadings. We also hold that defendants' representation of American Escrow does not justify dismissal with prejudice of the complaint, and Derek's signature on a settlement with an insurer does not foreclose the claim that bad legal advice led Derek to sign an unjust settlement with the insurers. Accordingly, we reverse the trial court's judgment and remand for further proceedings on the complaint.

¶ 3 BACKGROUND

¶ 4 Derek and Steven formed American Escrow to provide escrow services for homeowners. In February 2002, Derek hired a law firm "to represent American Escrow in connection with an assessment of [its] escrow practices." The law firm later took the name Wolin, Kelter & Rosen. In 2003, the year after Derek hired Wolin's law firm, Derek discovered that American Escrow's chief financial officer, Caren Dietz, had embezzled funds from American Escrow. Derek contacted the F.B.I. The investigation led to the conviction of Dietz for wire fraud.

¶ 5 Derek and Steven consulted Wolin about how American Escrow should address the embezzlement and the loss of funds needed to pay its liabilities. An accountant hired to investigate the misappropriated funds found that American Escrow lost $2.3 million due to

theft, overpayments, and other misconduct of Dietz. American Escrow filed claims with its insurers. In 2004, American Escrow settled the claims for $840,509.52.

¶ 6 Wolin, Kelter & Rosen continued to advise and represent American Escrow until February 2009. The states of Illinois, Indiana and Ohio filed lawsuits in 2009 and 2010, charging that the conduct of American Escrow and its officers from 2003 to 2009 violated consumer protection laws. Some homeowners from Pennsylvania filed a class action lawsuit against American Escrow, Derek and Steven in Pennsylvania. The Illinois, Indiana, Ohio and Pennsylvania courts entered default judgments against Derek, Steven and American Escrow.

¶ 7 In October 2010, Derek and Steven, both as individuals and doing business as American Escrow, sued Wolin and Wolin, Kelter & Rosen for legal malpractice. In the complaint, Derek and Steven alleged that from 2003 through February 2009, they followed Wolin's legal advice as they sought to maintain the business in a legally proper manner after they discovered the embezzlement. According to the complaint, Wolin advised them to use any funds available to pay immediate claims and sell services to more customers to cover the deficit the embezzlement caused. Wolin suddenly reversed his advice in February 2009, telling Derek and Steven that they should segregate new receipts. Derek and Steven alleged that following Wolin's advice from 2003 until February 2009 caused Derek, Steven and American Escrow to violate consumer protection laws. Because of the lawsuits filed against American Escrow, it lost the right to file for bankruptcy. Wolin also allegedly led Derek and Steven to believe that he filed several claims on behalf of American Escrow with their insurers, seeking to recover the full amount of the loss. Wolin persuaded Derek and Steven that signing the release when they received $840,509.52 would not affect their right to

receive funds to cover the full amount of the loss from other insurers. Derek and Steven alleged that when Derek signed the release, American Escrow lost its right to pursue reimbursement from its insurers for the full $2.3 million it lost due to embezzlement.

¶ 8 Wolin and Wolin, Kelter & Rosen moved to dismiss the complaint under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2012)) on grounds of (1) unclean hands, (2) collateral estoppel, and (3) no attorney-client relationship. The defendants also sought dismissal of claims related to the insufficient insurance recovery because Derek signed a form releasing all claims against all insurers in exchange for the payment of $840,509.52. In an order dated January 29, 2013, the trial court dismissed the complaint with prejudice, on grounds of unclean hands and collateral estoppel. Derek and Steven now appeal.

¶ 9 ANALYSIS

¶ 10 We review *de novo* an order granting a 2-619 motion to dismiss a complaint. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 368 (2003). On appeal, the defendants abandon the argument that the default judgments in the lawsuits against Derek, Steven and American Escrow collaterally estop Derek and Steven from suing the defendants for legal malpractice. We will consider the unclean hands defense, on which the trial court relied, and two defenses the trial court did not consider: defendants' argument that they did not work as attorneys for Derek and Steven, and the argument that the signed settlement with an insurer forecloses Derek and Steven from obtaining any relief for failure to recover more from the insurers.

¶ 11 Unclean Hands

¶ 12 Courts of many states, including Illinois, allow an attorney accused of malpractice to assert as a defense that his client has unclean hands. See, e.g., *Blain v. Doctor's Co.*, 222

Cal. App. 3d 1048, 1060-64, 272 Cal. Rptr. 250, 256-59 (1990) (client followed attorney's advice to lie under oath; unclean hands defense defeated suit for malpractice based on advice to lie); *Choquette v. Isacoff*, 65 Mass. App. Ct. 1, 4-7, 836 N.E.2d 329, 332-34 (2005) (same); *Evans v. Cameron*, 121 Wis. 2d 421, 427-28, 360 N.W.2d 25, 28-29 (1985) (same; exception to unclean hands rule noted for "circumstances in which the advice given by the attorney is so complex that the client would be unaware of the wrongfulness involved in following that advice"); *Alampi v. Russo*, 345 N.J. Super. 360, 368-71, 785 A.2d 65, 70-72 (2001) (client's testimony to factual basis for guilty plea based on conduct before he hired attorney precluded legal malpractice lawsuit alleging attorney negligently advised client to plead guilty). An Illinois court stated the general principle:

> "Where a party voluntarily elects to follow advice intended to extricate herself from a questionable situation, she comes to this court with unclean hands and may not seek relief from her wrongful conduct through a legal malpractice action." *Makela v. Roach*, 142 Ill. App. 3d 827, 832 (1986).

¶ 13 But the general principle has exceptions. *Bucci v. Rustin*, 227 Ill. App. 3d 779, 783-84 (1992). In *Herrick v. Lynch*, 150 Ill. 283 (1894), the attorney advised his client to give the attorney title to property and thereby prevent creditors from seizing the property. Our supreme court adopted the holding of the appellate court, which said:

> "We do not think, however, that, under the circumstances, there should be an application of that rule of equity which denies relief to one party against another when both have been engaged in a fraudulent transaction. The parties were not in *pari delicto*. One was legal adviser, the other client. The advice of the former being adopted, he procured title to the latter's interest

> in valuable real estate. Equity will not tolerate the idea that an attorney may make use of his peculiar power over his client to procure a contract which is illegal and contrary to public policy, and to then invoke the aid of the law to enable him to retain that which he has obtained through his fraudulent artifices." *Herrick*, 150 Ill. at 288.

¶ 14 A California court, citing *Herrick,* allowed a legal malpractice lawsuit to proceed despite the plaintiff's participation in a fraudulent transaction. The court said:

> "When the parties to the fraudulent transaction occupy a fiduciary relationship in regard thereto, such as client and attorney, and the client relies upon the advice and counsel of his attorney with relation thereto, it is held that the client is not in pari delicto with his attorney. Under such circumstances the attorney is deemed to be more culpable than his client." *Sontag v. Denio*, 23 Cal. App. 2d 319, 323, 73 P.2d 248, 251 (1937).

¶ 15 A New York court upheld the same exception:

> "It is a well-settled exception to the clean hands doctrine that one who, although at fault, is not equally at fault, will not be denied equitable relief. [Citation.] Where there is a confidential relationship between the parties, with one party relying upon the advice of another (citation), or where 'one party may naturally exercise an influence over the conduct of another' (*Boyd v. De La Montagnie*, 73 N.Y. 498, 502 [(1878)]) '[t]he parties do not stand on equal terms, and the [dominant party] cannot avail himself of the plea of *particeps criminis* on the part of the [relying party]' (*Boyd v. De La Montagnie*, 73 N.Y. 498, 503, supra). The attorney-client relationship is by

> definition a 'confidential' one. The relationship is presumptively 'unequal' and the attorney who counsels a client to behave illegally or fraudulently is more blameworthy than the client who follows such advice. In such a situation of unequal guilt, the plaintiffs will not be barred by the doctrine of unclean hands from seeking equitable relief." *Dillon v. Dean*, 158 A.D.2d 579, 580, 551 N.Y.S.2d 547, 547 (1990).

¶ 16 Derek and Steven point to the case of *Winstock v. Galasso*, 64 A.3d 1012, 430 N.J. Super. 391 (2013), as most similar to the case before this court. In *Winstock*, Richard Winstock sought to open a gaming club, but he wanted to ensure that the club complied with all applicable laws, including laws against operating a gambling resort. He sought advice from Galasso, an attorney. Galasso approved Winstock's business model and assisted Winstock with filing the necessary paperwork. The state charged Winstock with operating an illegal gambling resort. Winstock pled guilty to the charge, but he sued Galasso for legal malpractice that led Winstock to break the law. The appellate court held:

> "Richard Winstock's admissions at the plea hearing may be evidential in his civil claims of professional malpractice against defendant. His plea alone, however, does not preclude him *** from arguing that defendant's alleged professional negligence was a proximate cause of the damages [he] incurred by operating the [gaming club]. It is undisputed that defendant represented plaintiffs in filing the necessary documents to create the LLC and represented plaintiffs before the Dover Zoning Board of Adjustment to obtain approval to operate the club. However, whether defendant was the mastermind and chief choreographer of a plan to mislead the Board and

> conceal the club's true purpose as a gambling resort, as plaintiffs claim, or, as defendant alleges, he was simply following the directions given to him by plaintiffs, are material issues of fact that cannot be resolved by way of summary judgment." *Winstock*, 64 A.3d at 1029-30, 430 N.J. Super. at 418.

¶ 17 We find the reasoning of *Winstock* persuasive. In this case, as in *Winstock*, the allegations present material issues of fact concerning the extent to which Derek and Steven followed Wolin's advice, and whether they knew their actions in accord with that advice violated the law. See *Profit Management Development, Inc. v. Jacobson, Brandvik & Anderson, Ltd.*, 309 Ill. App. 3d 289, 302-03 (1999). Derek and Steven allege that they hired the defendants to help them act in accord with the law. Derek and Steven allege that instead of helping them recover from the embezzlement properly, the defendants advised them to perform acts that violated consumer protection laws. In accord with the persuasive authority of *Winstock*, and the general principles stated in *Herrick* and *Bucci* and cases from other states, we find that the doctrine of unclean hands does not provide grounds for dismissing this legal malpractice lawsuit.

¶ 18 Attorney-Client Relationship

¶ 19 Defendants next claim that they never worked for Derek and Steven. They claim that they represented and advised only American Escrow. Defendants do not explain why the complaint by Derek and Steven doing business as American Escrow does not suffice to state an attorney-client relationship, or why a simple amendment to add American Escrow as a plaintiff would not make the complaint viable.

¶ 20 Defendants contend that the reasoning of *Reddick v. Suits*, 2011 Ill. App. (2d) 100480, shows why this court should affirm the dismissal of Derek and Steven's complaint. In

Reddick, Reddick and others formed the corporation RPF, which was administratively dissolved in 2006. Reddick died in 2007, and his estate hired Suits for the limited purpose of having the corporation reinstated. *Reddick*, 2011 Ill. App. (2d) 100840, ¶¶ 18-19. The officers of RPF continued to conduct RPF's business pending reinstatement. A creditor of RPF sued RPF's officers in 2007, seeking to recover the balance of unpaid invoices. *Reddick*, 2011 Ill. App. (2d) 100840, ¶¶ 21-22. The estate and officers of RPF sued Suits for legal malpractice, alleging that he negligently failed to get RPF reinstated and he negligently failed to advise the officers of RPF of their potential personal liability if they conducted RPF's business before reinstatement of the corporation. The trial court dismissed the suit on grounds that Suits represented only RPF, and not its officers or Reddick's estate. The court further held that the corporation did not seek reinstatement for the benefit of its officers, who would only benefit incidentally from reinstatement. Thus, the court concluded that Suits did not owe the officers a duty as intended third-party beneficiaries of the attorney-client relationship between Suits and RPF.

¶ 21 We find *Reddick* distinguishable in several respects. Suits only represented RPF for reinstatement. He undertook no general duties as counsel for the corporation, unlike defendants here, whose work for American Escrow allegedly far exceeded the initial engagement to assess its escrow practices. According to the complaint, after the embezzlement, defendants took on the role of general counsel for American Escrow, advising the corporation and its officers on their legal responsibilities and how to maintain the business. In the course of seeking reinstatement, Suits did not advise RPF's officers to act in the ways that led to their liability, whereas Derek and Steven here allege that they violated consumer protection laws only when they followed defendants' advice.

¶ 22 A corporation acts only through its officers and agents. *Mier v. Staley*, 28 Ill. App. 3d 373, 378 (1975). Defendants allegedly advised American Escrow, by advising its officers, to take steps that violated American Escrow's duties to its clients, and the advice damaged American Escrow and made its officers personally liable for the violations of consumer protection laws. Nothing in *Reddick* or the other cases defendants cite immunize an attorney from liability for negligent advice he gives to his client, when that advice damages the client and its agents. We find that *Reddick* does not justify dismissal of this lawsuit.

¶ 23 Settlement

¶ 24 Finally, defendants maintain that the acceptance of the settlement with American Escrow's insurers forecloses Derek and Steven's claim that defendants committed legal malpractice when they advised Derek and Steven to accept the settlement. But the settlement of a claim does not, in itself, bar the client from suing for malpractice the attorney who represented him in the claim. *McCarthy v. Pedersen & Houpt*, 250 Ill. App. 3d 166, 172 (1993). "A lawyer may be held liable for negligence in the handling of a case that was ultimately settled by the client." *Merritt v. Goldenberg*, 362 Ill. App. 3d 902, 909 (2005) quoting *Thomas v. Bethea*, 351 Md. 513, 527, 718 A.2d 1187, 1194 (1998). Derek and Steven allege that they relied on Wolin's representations about the consequences of accepting the settlement offer. "A client ordinarily relies upon the representations of his attorney. Whether the failure of a client to read a particular document necessarily defeats a malpractice action is dependent upon the particular circumstances." *Sutton v. Mytich*, 197 Ill. App. 3d 672, 679 (1990); see also *Tuchowski v. Rochford*, 368 Ill. App. 3d 441, 444 (2006). We find the allegations of the complaint sufficient to state a claim for legal malpractice based on misrepresentations about the effect of the settlement Derek signed.

¶ 25 CONCLUSION

¶ 26 Derek and Steven have adequately alleged that they have unclean hands only because of defendants' bad legal advice, and, therefore, the defense of unclean hands does not justify dismissal of the complaint at the pleading stage. Defendants have not shown that their representation of American Escrow justifies the dismissal of this lawsuit with prejudice. Derek and Steven have adequately alleged that defendants' bad advice led them to sign an inadequate settlement. Accordingly, we reverse the trial court's judgment and remand for further proceedings.

¶ 27 Reversed and remanded.