2013 IL App (1st) 120546-U

Third Division
March 13, 2013

No. 1-12-0546

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FRANK PORRO,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	09 L 12582
	)	
NICHOLAS ESPOSITO and MARK SCHRAMM,	)	Honorable
	)	Randye A. Kogan,
Defendants-Appellees.	)	Judge Presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justices Sterba and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: When a plaintiff, in a complaint, alleges facts that could support a finding that he lost a valuable lawsuit because of his attorney's negligence, he has stated a cause of action for legal malpractice.

¶ 2 Frank Porro sued Nicholas Esposito and Mark Schramm for legal malpractice. Esposito and Schramm moved to dismiss Porro's third amended complaint for failure to state a claim for relief. The trial court dismissed Porro's complaint with prejudice. We find that

Porro's third amended complaint adequately states a claim for legal malpractice. Accordingly, we reverse and remand for further proceedings on the complaint.

¶ 3 BACKGROUND

¶ 4 Because this case arises on the dismissal of Porro's third amended complaint for failure to state a cause of action, we assume the truth of the facts alleged in the complaint. *Connick v. Suzuki Motor Co. Ltd.*, 174 Ill. 2d 482, 490 (1996). According to the third amended complaint, in 1996, Christian Han drove a car into a car stopped at an intersection in Chicago. Porro, a passenger in the car Han hit, sustained injuries that required medical care. Two weeks after the accident, Porro hired attorneys Esposito and Schramm to represent him in legal proceedings to recover compensation for the injuries Han caused.

¶ 5 Esposito and Schramm filed a complaint for Porro against Han in 1998. They voluntarily dismissed the lawsuit in 1999 and timely refiled the lawsuit in April 2000. They hired a process server who swore that he went to the address given for Han, and left a copy of the complaint there, with a man named Gamel Sahli. When Han failed to respond to the summons, Esposito and Schramm obtained a default judgment against Han. At the prove-up, in November 2000, the trial court held that Porro proved damages of $35,220, and entered a judgment against Han for that amount. Schramm told Porro that he and Esposito would soon try to collect the judgment.

¶ 6 Porro called Esposito and Schramm several times in 2001 and 2002 to check on the status of their collection efforts. Esposito and Schramm told Porro not to worry about collection, because his judgment would earn 9% interest as long as Han left it unpaid. In a

three week period in August and September 2002, Porro called Esposito and Schramm repeatedly, and left messages that provoked no response. Esposito and Schramm answered a letter from Porro in September 2002, again assuring Porro that they were trying to collect the judgment. Porro continued to call Esposito and Schramm periodically over the following years. In 2006, Esposito brought his car to Porro's auto repair shop. Porro repaired the car free of charge, to encourage Esposito to renew collection efforts. Esposito told Porro he would look into the case, but Porro heard nothing further from Esposito and Schramm.

¶ 7 In November 2007, Porro hired a new attorney to collect the judgment. The attorney served Han with a citation to discover assets in 2008. Han moved to vacate the judgment for failure to serve him with process. The new attorney obtained from Esposito and Schramm the affidavit from the process server who claimed he served process at Han's address in May 2000. Han responded that he lived in Chicago at the time of the car accident in 1996, but he moved to Florida in March 2000. The address given on the process server's affidavit identifies the apartment building where Han lived until 2000, but the process server left the summons in a unit where Han never lived. Han did not know Gamel Sahli. Han moved to a new address in Chicago when he returned to the city late in 2000.

¶ 8 The trial court granted Han's motion to vacate the judgment. Porro, through his new attorney, refiled the lawsuit against Han, but the trial court dismissed the lawsuit due to Porro's failure to serve process on Han within a reasonable time. See Ill. S. Ct. R. 103(b) (eff. July 1, 2007).

¶ 9 Porro sued Esposito and Schramm for legal malpractice and breach of contract,

alleging that the defendants had a duty to take steps that would have timely shown that they had not obtained service on Han prior to the default judgment, and that they breached their duties when they falsely told Porro that they were continuing to work on his case. Porro alleged that if Esposito and Schramm had sought to enforce the default judgment in 2000 or 2001, they would have discovered the lack of proper service in time for Porro to have obtained a valid judgment against Han. By falsely telling Porro that they were attempting to collect the judgment, they discouraged Porro from taking the steps he needed to take to obtain and collect a valid judgment against Han. Porro prayed for a award of damages in the amount of the default judgment he obtained against Han, or for actual damages which Porro would prove at trial.

¶ 10 Esposito and Schramm moved to dismiss the third amended complaint for failure to state a claim for relief. See 735 ILCS 5/2-615 (West 2010). At the hearing on the motion, the court emphasized repeatedly that Porro had not appealed from the Rule 103(b) dismissal of the complaint against Han in the underlying suit. The trial court granted Esposito and Schramm's motion to dismiss the complaint with prejudice. Porro moved for reconsideration, and attached a proposed fourth amended complaint to the motion. The trial court denied the motion for reconsideration. Porro now appeals.

¶ 11 ANALYSIS

¶ 12 When we review an order dismissing a complaint under section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2010)), we determine *de novo* whether the allegations of the complaint establish a claim for which the court may grant relief. *King*

v. First Capital Financial Services Corp., 215 Ill. 2d 1, 12 (2005). A complaint states a cause of action for legal malpractice if the plaintiff alleges facts showing "(1) the existence of an attorney-client relationship; (2) a duty arising from that relationship; (3) a breach of that duty; (4) causation; and (5) resulting damages." *Coughlin v. SeRine*, 154 Ill. App. 3d 510, 514 (1987).

¶ 13 Esposito and Schramm do not deny that they had an attorney-client relationship with Porro, or that the relationship imposed on them duties to represent Porro in his claim against Han. Porro alleged that Esposito and Schramm breached their duties when they failed to pursue collection of the default judgment they obtained against Han, and when they falsely told Porro that they were continuing to work on the case. By effectively withdrawing as Porro's counsel, without notice to Porro, Esposito and Schramm breached Rule 1.16(d) of the Rules of Professional Conduct (Ill. R.P.C. 1.16(d) (eff. Jan. 1, 2010)), which provides, "a lawyer shall not withdraw from employment until the lawyer has taken reasonable steps to avoid foreseeable prejudice to the rights of the client, including giving due notice to the client." See *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 352-53 (2000). The neglect of Porro's case could support a finding of malpractice. See *House v. Maddox*, 46 Ill. App. 3d 68, 72-74 (1977). Porro has adequately pled that Esposito's and Schramm's neglect of his case led him to lose a viable claim against Han. See *Visvardis v. Ferleger*, 375 Ill. App. 3d 719, 727 (2007).

¶ 14 Esposito and Schramm argue that the third amended complaint does not state a cause

of action because Porro used in his claim for relief an improper measure of damages. In support they cite *Wildey v. Paulsen*, 385 Ill. App. 3d 305 (2008). In that case, Wildey obtained a judgment against Springs in the underlying suit, but the court of appeals reversed the judgment and entered a final judgment in favor of Springs. Wildey then sued her lawyer, Paulsen, for malpractice that caused her to lose the underlying lawsuit, and Wildey sought damages in the amount of the original verdict against Springs in the underlying lawsuit. The trial court found that Paulsen committed malpractice, but it awarded Wildey as damages much less than the damages awarded by the trial court in the underlying lawsuit. Wildey appealed and the appellate court affirmed the judgment, finding that the trial court appropriately awarded Wildey only those damages that resulted from Paulsen's negligence. The trial court's original judgment in the case against Springs did not establish the amount of damages due to the malpractice because the appellate court had reversed that judgment. *Wildey*, 385 Ill. App. 3d at 315.

¶ 15 *Wildey* supports Esposito and Schramm's argument that the default judgment entered against Han does not establish the damages the court should award Porro due to Esposito and Schramm's alleged legal malpractice. However, *Wildey* also shows that the prayer for excessive damages need not lead to dismissal of the complaint. Instead, under *Wildey*, if the trial court here finds that Porro cannot prove that he suffered damages in the amount of the default judgment, the court should award Porro only those damages he proves. *Wildey* supports reversal of the judgment here.

¶ 16 The trial court held that Porro's failure to appeal from the judgment entered in Han's favor defeated Porro's claim against Esposito and Schramm for malpractice. However, Porro can prove that Esposito and Schramm's malpractice caused his loss, despite the lack of an appeal from the judgment in favor of Han, if he can show that because of the malpractice, an appeal from the judgment in favor of Han would not have succeeded. See *Governmental Interinsurance Exchange v. Judge*, 221 Ill. 2d 195, 211-12 (2006) (failure to appeal causes a party damages only if the appeal would have succeeded).

¶ 17 The trial court in the underlying action, *Porro v. Han*, 00 L 04720, dismissed the suit against Ham because Porro and his attorneys failed to exercise reasonable diligence in their efforts to serve a summons on Han. To succeed on an appeal from the underlying judgment, Porro would need to persuade the appellate court that his attorneys had exercised reasonable diligence in serving process on Han. The appellate court would consider "(1) the amount of time taken to obtain service; (2) the efforts of the plaintiff; (3) plaintiff's knowledge of the defendant's location; (4) the ease with which defendant's location could have been determined; (5) actual knowledge by the defendant of the pendency of the action as a result of ineffective service; (6) special circumstances affecting plaintiff's efforts; and (7) actual service on defendant." *Tischer v. Jordan*, 269 Ill. App. 3d 301, 307 (1995).

¶ 18 Eight years elapsed between the filing of the complaint and the actual service of process on Han. After Esposito and Schramm received a report from the process server in 2000 that he left process with someone with a different last name at Han's address, Porro's

attorneys made no effort for more than seven years to find Han or enforce the default judgment they obtained against Han. Although Esposito and Schramm did not know Han's correct address, the ease with which Porro's new attorney found Han indicates to this court that Esposito and Schramm could have located Han much sooner. Han actually did not know about the lawsuit. The mistaken return of service that the process server filed in 2000 provides the only special circumstance relevant to the Rule 103(b) dismissal, and Esposito and Schramm would have discovered that mistake within a reasonable time if they had taken steps to enforce the judgment. We agree with Porro that the appellate court would not have held that the trial court abused its discretion when it dismissed his lawsuit for the failure to serve process on Han. See *Tischer*, 269 Ill. App. 3d at 307; *Parker v. Piskur*, 258 Ill. App. 3d 344, 347 (1994). Thus, we find that Porro adequately pled facts that could support a finding that he would have lost an appeal from the dismissal of his lawsuit against Han, and that the legal malpractice of Esposito and Schramm caused Porro to lose his valuable claim against Han. Accordingly, we hold that the third amended complaint adequately states a claim for relief.

¶ 19 CONCLUSION

¶ 20 In this case, because Porro's third amended complaint adequately states a cause of action for legal malpractice, we reverse the dismissal of the complaint and remand for further proceedings in accord with this order.

¶ 21 Reversed and remanded.