2019 IL App (1st) 180025-U

SIXTH DIVISION
JANUARY 25, 2019

No. 1-18-0025

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PSI RESOURCES, LLC,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 16 L 6958
	)	
TODD C. LYSTER,	)	Honorable
	)	Patrick J. Sherlock,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: In this legal malpractice lawsuit, we affirm the entry of summary judgment in favor of defendant, plaintiff's former attorney. Plaintiff could not establish that it was damaged by defendant's alleged malpractice in failing to assert a timely breach of contract claim on behalf of plaintiff against a third party, as plaintiff could not establish that it could have recovered damages for the alleged breach of contract.

¶ 2 Plaintiff PSI Resources, LLC (plaintiff) appeals from the order of the circuit court of Cook County granting summary judgment in favor of its former attorney, defendant Todd C. Lyster. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 This is a legal malpractice action arising out of defendant's prior representation of plaintiff and its predecessor entities. Specifically, plaintiff asserts that defendant committed malpractice in failing to assert a timely breach of contract claim in prior litigation.

¶ 5 Plaintiff is the successor in interest to three dissolved corporations – Placement Solutions, Inc. (PSI), Technical Solutions, Inc. (TSI), and Legal Solutions, Inc. (LSI) (collectively, the corporations). David Thomas was a co-founder, partial owner and an officer of each of the three corporations. Thomas acknowledged that, at relevant times, the corporations had the "same ownership."

¶ 6 Stan Cavagnetto served as controller for each of the three corporations from the 1990s until 2011. Cavagnetto's accounting duties included depositing checks from the corporations' clients into their deposit accounts. Each of the three corporations had a separate deposit account with Cole Taylor Bank (Cole Taylor). Each of the three deposit accounts was governed by an account agreement, in which Cole Taylor agreed to exercise ordinary care with respect to the corporations' deposits.

¶ 7 Cavagnetto abruptly ceased working for the corporations in January 2011. Following Cavagnetto's departure, it was discovered that Cavagnetto had failed to file quarterly payroll tax returns with the IRS. Thomas discovered other financial irregularities, including suspicious charges incurred by Cavagnetto on a credit card account. It was also discovered that a "network drive" containing the corporations' accounting software was missing.

¶ 8 Thomas engaged an outside accountant, Ted Wolff, to review the companies' financial records. Wolff discovered that a number of checks for each of the three corporations had been

"misdeposited" into the wrong Cole Taylor deposit account. For example, certain checks intended for LSI or TSI had been erroneously deposited into the account for PSI.

¶ 9 In February 2011, Thomas sought legal advice from defendant. According to Thomas, he retained defendant to represent the corporations in all claims arising from Cavagnetto's misconduct, including potential claims against Cole Taylor.

¶ 10 In March 2011, each of the corporations executed an assignment for the benefit of creditors to Rally Capital Services, LLC (Rally). In April 2011, Rally sold and assigned the corporations' assets and causes of action to PSI Resources, LLC, plaintiff herein.[1]

¶ 11 In August 2011, defendant filed a lawsuit on behalf of plaintiff against Cavagnetto, asserting claims for misappropriation of funds, breach of contract, conversion and breach of fiduciary duty. However, that lawsuit did not assert any claims against Cole Taylor. Defendant withdrew from his representation of plaintiff on April 30, 2013. Defendant never filed any claims against Cole Taylor during his representation of plaintiff.

¶ 12 In February 2014, plaintiff, through new legal counsel, filed a single-count breach of contract complaint against Cole Taylor's successor in interest, MB Financial Bank, National Association, (MB). Plaintiff's complaint alleged that Cole Taylor breached the account agreements by permitting "misdeposits" of checks intended for each of the three corporations, resulting in funds being deposited into accounts for the other corporations. Specifically, plaintiff alleged that between October 2008 and March 2010, checks from PSI clients totaling $68,901.61 were "mis-deposited *** into accounts other than any accounts of PSI." Plaintiff similarly alleged that from August 2008 to March 2010, "LSI deposited checks" from its clients, totaling $117,483.98, but Cole Taylor "mis-deposited those checks" into other accounts. Plaintiff also

[1] Thomas testified that plaintiff was specifically formed in order "to bid on the assets of PSI, LSI and TSI" and that plaintiff is primarily owned by Thomas' wife, Tina.

alleged that between December 2007 and November 2010, checks from TSI's clients totaling $193,957.50 were "mis-deposited" into other accounts. Thus, in total, plaintiff alleged that the corporations sustained $380,343.09 in damages. Plaintiff pleaded that Cole Taylor failed to notify the corporations of the erroneous deposits, and that Cole Taylor's monthly account statements did not contain sufficient details to allow the corporations to discover the errors.

¶ 13 In March 2014, MB filed a motion to dismiss, arguing that plaintiff's claim was time-barred by the three-year limitation period governing claims arising from banking transactions involving negotiable instruments (810 ILCS 5/4-111 (West 2012)). In response, plaintiff argued that its lawsuit was governed by the 10-year limitation period for claims of breach of a written contract (735 ILCS 5/13-206 (West 2012)). Alternatively, plaintiff argued that, even if the three-year statute of limitations applied, that period was tolled pursuant to the discovery rule until June 2011, when the corporations first discovered the erroneous deposits.

¶ 14 In July 2014, the circuit court denied MB's motion to dismiss, finding that the discovery rule applied. MB moved to reconsider, arguing that plaintiff's allegations were insufficient to invoke the discovery rule. Plaintiff subsequently filed an amended complaint. MB moved to dismiss plaintiff's amended complaint, again arguing that the allegations did not support application of the discovery rule. In March 2015, the circuit court granted MB's motion to dismiss the lawsuit as untimely, and plaintiff appealed the dismissal to our court.

¶ 15 In April 2015—while plaintiff's appeal from the dismissal of its lawsuit against MB was still pending—plaintiff commenced the instant legal malpractice action against defendant, premised on defendant's failure to file claims against Cole Taylor during his representation of plaintiff. Defendant moved to dismiss the original complaint, arguing that it failed to adequately plead that "plaintiff would have prevailed in the underlying lawsuit" against Cole Taylor, but for

defendant's negligence. In September 2015, the circuit court granted that motion but allowed plaintiff to file an amended pleading.

¶ 16 In October 2015, plaintiff filed its amended complaint against defendant. That pleading alleged that defendant was retained in February 2011 to represent the corporations[2] in connection with claims against Cavagnetto "and all other parties responsible for inappropriate acts and/or omissions of Cavagnetto."

¶ 17 The amended complaint alleged that in June 2011, an outside accountant prepared a report that "found improprieties with respect to the companies' accounts receivables, and bank deposits and accounts, as a result of Cavagnetto's conduct." Plaintiff alleged that defendant and Thomas subsequently discussed "claims arising out of Cavagnetto's improper conduct, including the mis-depositing of checks *** and Cole Taylor's legal responsibility therefor." Plaintiff alleged that Thomas repeatedly "requested that [defendant] commence legal action against Cole Taylor for the improper deposits" but that defendant never did so.

¶ 18 The amended complaint alleged that, while defendant represented them, the corporations and plaintiff had "meritorious claims against Cole Taylor arising out of the improper deposits" that were not time-barred. Plaintiff pleaded that such claims would not have been dismissed if defendant had timely asserted them, and that his failure to do so breached his duties as an attorney and damaged plaintiff.

¶ 19 Defendant answered the amended complaint in November 2015. The parties subsequently filed a joint motion to stay the malpractice lawsuit against defendant, pending the resolution of plaintiff's separate appeal from the dismissal of its breach of contract action against MB. Accordingly, the instant malpractice action was stayed in April 2016.

[2] Plaintiff pleaded that, after the corporations' claims were assigned to plaintiff, defendant "continued to pursue those claims on behalf of [plaintiff] and provided legal representation to [plaintiff] with respect thereto until April 30, 2013."

¶ 20 In May 2016, our court issued an opinion in which we affirmed the dismissal of the lawsuit against MB as untimely. *PSI Resources, LLC v. MB Financial Bank, National Association*, 2016 IL App (1st) 152204 (the May 2016 opinion). In the May 2016 opinion, our court first held that plaintiff's breach of contract claim related to banking transactions involving negotiable instruments, and thus was governed by the three-year limitations statute. *Id.* ¶ 40. Our court rejected plaintiff's argument that the discovery rule tolled the limitation period. Our court "agree[d] with the circuit court that the monthly account statements provided by [Cole Taylor] provided sufficient information for plaintiff to be put on notice that wrongful conduct had occurred," such that the three-year limitation period was not tolled. *Id.* ¶ 49. Thus, we affirmed the dismissal of plaintiff's amended complaint against MB.

¶ 21 Notably, although our May 2016 opinion affirmed dismissal pursuant to the statute of limitations, it included a footnote observing that all of the erroneously deposited funds were accounted for among the three Cole Taylor deposit accounts:

> "Attached to plaintiff's complaint were three exhibits containing lists of checks that had been allegedly misdeposited. Adding the amounts of those checks results in $380,343.09 in misdeposited checks. However, these exhibits further show that all of the allegedly misapplied check deposits were deposited into one of the three corporations' bank accounts, meaning that all of the $380,343.09 was ultimately accounted for. Specifically, while there were $68,901.61 in checks that were not deposited into PSI's account, PSI also received $309,601.48 in deposits that should have gone to LSI or TSI. While there were $117,483.98 in checks

> that were not deposited into LSI's account, LSI received $23,290.66 in deposits that should have gone to PSI or TSI. Finally, while there were $193,957.50 in checks that were not deposited into TSI's account, TSI received $47,450.95 in deposits that should have gone to PSI or LSI." *Id.* ¶ 11, n. 1.

In another footnote, our court stated: "It is not clear whether the misdeposited checks were a result of Cavagnetto's malfeasance, given that no money was missing and it was all ultimately accounted for, albeit in the incorrect corporation's account." *Id.* ¶ 22, n. 3. A third footnote in the May 2016 opinion similarly stated: "it is unclear whether [Cavagnetto's] conduct had any relationship to the misdeposited checks as all of the money was accounted for, even if it was deposited into the wrong corporation's account." *Id.* ¶ 45, n. 4.

¶ 22 Following the issuance of our May 2016 opinion affirming the dismissal of plaintiff's breach of contract action, the stay of the instant malpractice action was removed.[3]

¶ 23 The parties in this action engaged in discovery, including depositions. Thomas was deposed in July 2017. Thomas testified that he helped found the corporations and was a partial owner. Thomas testified that Cavagnetto worked for the corporations as controller since the 1990s until his 2011 departure. During his tenure, Thomas believed Cavagnetto was a "hard-working, loyal, trusted employee," and Cavagnetto had not indicated any financial problems with the corporations.

¶ 24 Thomas testified that Cavagnetto had authority to make deposits into each of the corporations' accounts, but that he was supposed to keep "separate books and records" and was not authorized to deposit a check intended for one corporation into another corporation's

[3] At the time that the stay was removed, the case was renumbered from its original case number, 15 L 03420, to a new case number, 16 L 6958.

account. Thomas stated his belief that Cavagnetto "was aware of the fact that the deposits were being mis-applied and chose to disregard that."

¶ 25 Thomas discovered "financial irregularities" after Cavagnetto's departure. In Cavagnetto's office, he found "years' worth of credit card statements" for a company credit card, reflecting unpaid charges that did not appear to be legitimate business expenses.[4] Thomas testified that a forensic accounting firm, Dempsey Partners, later determined that there were $400,000 to $500,000 in missing payments from the corporations' clients that had never been deposited into the corporations' accounts.

¶ 26 Separately, Thomas testified regarding the "misdeposited" checks. Thomas acknowledged that such funds were not actually missing, but had simply been deposited into incorrect accounts:

> "Q. Now, were any of the checks that were deposited into *** when I say 'the checks,' I'm going to refer to the checks in question in this lawsuit.
>
> A. Okay.
>
> Q. Were any of those checks unaccounted for? Was there a missing check, or instance?
>
> A. Not to my knowledge.
>
> Q. So all the checks were deposited into either a PSI, TSI or LSI account?
>
> A. The checks that are the subject of this lawsuit, yes."

[4] Thomas testified that he reported the suspected fraud to the bank that issued the card, and that the bank "just forgave the balance."

¶ 27 Thomas also agreed that "all the checks [in] question were actually deposited into one of these three accounts." Thomas also acknowledged that he had the authority to transfer money between the accounts for PSI, TSI, and LSI. Thus, he agreed that, had he discovered that a check had been improperly deposited into another account, he could transfer the money to the correct account.

¶ 28 Also at his deposition, Thomas testified that he retained defendant to represent the corporations in claims related to the financial irregularities discovered after Cavagnetto's departure, including claims against Cole Taylor. Thomas testified that defendant "said we had a claim" against Cole Taylor regarding the erroneously deposited funds. Thomas recalled that defendant stated "that he would create the vehicle for all the claims with Cavagnetto and that other defendants would be brought in at the appropriate time." However, defendant never indicated when the "appropriate time" would be to assert a claim against Cole Taylor. Thomas testified that defendant withdrew from the representation, while the lawsuit against Cavagnetto was pending,[5] because defendant "felt he wasn't being paid on a timely basis."

¶ 29 During his deposition, Thomas was asked to describe the claim he wished to pursue against Cole Taylor. Thomas testified that he believed that each of PSI, TSI, and LSI suffered a loss each time that a check intended for it was deposited into one of the other two corporations' accounts. Thomas also testified that Cole Taylor's conduct damaged plaintiff because the erroneously deposited checks "enabled" or "facilitated the company sustaining losses" from Cavagnetto's conduct without the ownership becoming aware of it. Thomas testified that, had Cole Taylor not allowed Cavagnetto to deposit funds into the wrong accounts, Cavagnetto's

[5] Thomas testified that, after plaintiff hired new counsel, "we ended up dropping" plaintiff's lawsuit against Cavagnetto because "we couldn't find money" and "it just didn't seem that there was anything to pursue" from Cavagnetto.

misconduct "would have come to light very quickly," because Cavagnetto would not otherwise have been able to pay regular business expenses.

¶ 30 Defendant was also deposed. Defendant testified that Thomas hired him "to sue Mr. Cavagnetto" only, and specifically denied that Thomas ever instructed him to file any claims against Cole Taylor. Rather, he testified that Thomas "told [defendant] specifically to stay away from the bank" because Thomas "didn't want to rock the boat as to his relationship with them."

¶ 31 In August 2017, plaintiff identified two expert witnesses and subsequently disclosed their expert reports. Plaintiff's banking industry expert, Pat McElroy, Jr., opined in his report that Cole Taylor's employees "failed to use ordinary care when they accepted checks from deposits that were not payable to the owner of the accounts into which the funds were deposited."

¶ 32 Plaintiff also disclosed Kerry Haberkorn, a forensic accountant, and her expert report. Haberkorn's report indicated that she reviewed a 2013 report by the Dempsey Partners accounting firm, which had been prepared in conjunction with an insurance claim related to Cavagnetto's conduct. Dempsey Partners had concluded that Cavagnetto's conduct resulted in $451,400 in "employee theft damages" to the corporations for the years 2009 and 2010. Haberkorn opined that this calculation was "based on a reasonable methodology."

¶ 33 Haberkorn's report also included her opinion that the misdeposited checks may have contributed to Cavagnetto's theft. Haberkorn's report stated that, in 2009 and 2010, "Cavagnetto submitted a series of improper deposits to Cole Taylor" that were accepted. As a result, "PSI's account was funded with an additional $251,493 from checks that were payable to either LSI or TSI, while a total of $63,888 in checks payable to PSI were deposited into either the LSI or TSI accounts (net amount of $187,605)." Haberkorn opined that the "net amount" of $187,605 in misdeposited funds into the PSI account "allowed Cavagnetto to cover up a scheme commonly

known as lapping" which is "the crediting of one account through the abstraction of money from another account and is one of the most common methods of concealing receivables skimming." According to Haberkorn, "[w]ithout the mis-deposited funds of $187,605, PSI's bank account would have been overdrawn" as early as May 2009. Haberkorn's report proceeded to conclude:

> "If the PSI account was overdrawn at various points in 2009 and 2010, this might have raised a red flag to the bank and/or PSI and it is possible that Cavagnetto's lapping scheme could have been identified earlier than it did. If Cavagnetto's lapping scheme was discovered earlier, damages suffered by PSI, LSI and TSI likely would have been less than $451,400."

¶ 34 At her deposition in October 2017, Haberkorn was asked why her report stated that the misapplied deposits "might" have raised a red flag. She acknowledged: "I can't really, truly predict what would have happened if the deposits were made in another way." Haberkorn was also asked to explain her report's conclusion that, if the scheme was discovered earlier, damages suffered by PSI, LSI, and TSI "likely would have been less" than $451,400:

> "Q. So, the last sentence you said: If Cavagnetto's lapping scheme was discovered earlier, damages suffered by PSI, LSI, and TSI likely would have been less than 451,400. So, I'm going to focus on the 'likely would have been less than,' what do you mean by that?
>
> A. By that I mean that he was able to move that money around so that the bank balance was able to pay the expenses ***.

> But if he wasn't able to maintain that positive amount, perhaps he couldn't take as many accounts receivables checks.
>
> Q. So, do you have – are you able to state with a reasonable degree of accounting certainty how much it would have been damaged by?
>
> A. No, I did not perform analysis. I don't think it's an exact science kind of analysis because, again, we're talking about what might have happened but ***.
>
> Q. So, it's somewhere between zero and 451,400?
>
> A. Yes."

¶ 35 On October 5, 2017, defendant filed a motion for summary judgment on several grounds. Among these, defendant argued that plaintiff could not establish that it sustained actual damages from the alleged legal malpractice. On that point, the motion cited the footnote from our May 2016 opinion, which stated that "all of the allegedly misapplied check deposits were deposited into one of the three corporations' bank accounts, meaning that all of the $380,343.09 was ultimately accounted for." Defendant's summary judgment motion also cited Thomas' deposition testimony acknowledging that the corporations had common ownership, and that all checks at issue were deposited into one of their three accounts. Thus, defendant argued that plaintiff "did not sustain any actual damage, as required for a legal malpractice action."

¶ 36 Plaintiff filed its response on November 3, 2017. Among other arguments, plaintiff asserted that it could establish actual damages for "the value of each check taken by Cole Taylor and not properly deposited into the correct account." Further, citing Haberkorn's report, plaintiff argued that the erroneous deposits damaged plaintiff in that they "allowed Cavagnetto to

continue with his lapping scheme." Plaintiff's response additionally asserted that defendant could not rely on "dictum" in footnotes to our May 2016 opinion.

¶ 37 On December 1, 2017, the trial court heard oral argument on the motion for summary judgment. After discussing and rejecting the defendant's other proffered bases for summary judgment, the trial court issued its ruling as follows:

> "Which leaves us with whether PSI suffered any actual damages as a result of the malpractice, and here you've got a situation where money was deposited into various accounts all owned by the same owner of the company.
>
> The accounts, as the Appellate Court noted in footnotes, three footnotes, was all deposited into the accounts of the companies.
>
> The companies were certainly interrelated, but what happened was the money was then, at least according to the plaintiff, stolen by its comptroller or controller, and if that's true, that is the intervening act which takes away causation, and since the plaintiff can't prove any damages that resulted from the bank's breach of contract, summary judgment is appropriately entered in favor of [defendant]. So for those reasons, the motion for summary judgment is granted, and the case will be dismissed."

Thus, on December 1, 2017, the trial court entered an order granting summary judgment in favor of defendant "for reasons stated on the record."

¶ 38 On January 2, 2018, plaintiff filed a timely notice of appeal from the summary judgment order. Accordingly, this court has jurisdiction. Ill. S. Ct. R. 303 (eff. July 1, 2017).

¶ 39 ANALYSIS

¶ 40 Plaintiff posits several reasons why the circuit court's entry of summary judgment was erroneous. Plaintiff argues that the evidence in the record "clearly establishes a prima facie case" of legal malpractice, including proximate causation and damages. Plaintiff asserts that "but for the negligence of defendant," in failing to timely assert a breach of contract claim against Cole Taylor, the corporations would have prevailed in the underlying action that was eventually dismissed as barred by the statute of limitations.

¶ 41 As in the circuit court, plaintiff proffers two theories as to how it could have recovered breach of contract damages for Cole Taylor's conduct with respect to the improper deposits. First, plaintiff asserts that damages "at the most basic level for a contract action, were simply the value of the checks belonging to each of the three companies which were deposited at the bank but not credited to their separate accounts." That is, plaintiff suggests that damages equal the sum of all erroneously deposited checks among the three accounts.[6]

¶ 42 As a second theory of damages, plaintiff cites Haberkorn's opinion that Cavagnetto's theft "was enabled by Cole Taylor's failure to exercise ordinary care" and that "[h]ad Cole Taylor not breached its duties, *** PSI would have very quickly discovered the losses sustained." Plaintiff thus asserts that a "jury could find and apportion damages against Cole Taylor for its role in the losses incurred *** in connection with Cavagnetto's scheme."

[6] Plaintiff otherwise asserts that, even if Cole Taylor was "entitled to offset amounts wrongfully paid" to each of the corporations, "TSI and LSI were still negative in their accounts in a combined amount of $187,605, as calculated by Haberkorn" such that damages were at least that amount.

¶ 43 Plaintiff's brief elsewhere argues that, in contesting plaintiff's ability to prove actual damages, defendant cannot rely upon the footnotes in our May 2016 opinion indicating that the erroneously deposited funds were "ultimately accounted for." Plaintiff asserts that this language "was mere dictum and not binding in this case because the issue of whether the funds were ultimately accounted for" had not been actually litigated in the underlying case, and was not necessary to our court's decision.

¶ 44 Plaintiff additionally suggests that the trial court improperly granted summary judgment "on the basis that Cavagnetto's conduct was an intervening cause" that "broke the causation between Cole Taylor's conduct and the damages incurred by plaintiff." Plaintiff asserts that it did not have notice "that intervening cause would be an issue" in the case before the circuit court's ruling. Plaintiff nevertheless argues that "Cavagnetto's conduct was not an intervening act" because Cole Taylor should have foreseen his conduct. Alternatively, plaintiff asserts that the concept of intervening cause "has no application" to plaintiff's breach of contract claims against Cole Taylor, and that the trial court erred by "applying a tort causation doctrine to a contract action."

¶ 45 We begin our analysis with the well-settled standard of review. "The purpose of summary judgment is not to try a question of fact, but to determine whether a genuine issue of material fact exists. [Citation.] Summary judgment is proper where, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 305 (2005.) "Although summary judgment is appropriate if a plaintiff cannot establish an element of his claim [citation] it should only be granted when the

right of the moving party is clear and free from doubt. [citation.]" *Id.* at 305-06.

¶ 46 "We review a trial court's entry of summary judgment *de novo.* [Citation.]" *Vulpitta v. Walsh Construction Co.*, 2016 IL App (1st) 152203, ¶ 22. Furthermore, "this court reviews the judgment, not the reasoning, of the trial court, and we may affirm on any grounds in the record, regardless of whether the trial court relied on those grounds or whether the trial court's reasoning was correct. [Citation.]" *Id.*

¶ 47 We turn to the elements of plaintiff's legal malpractice claim. "To prevail on a legal malpractice claim, the plaintiff client must plead and prove that the defendant attorneys owed the client a duty of due care arising from the attorney-client relationship, that the defendants breached that duty, and that as a proximate result, the client suffered injury. [Citation.]" *Northern Illinois Emergency Physicians*, 216 Ill. 2d at 306.

¶ 48 Our supreme court has clarified that the injury element requires actual, pecuniary damages: "For purposes of a legal malpractice action, a client is not considered to be injured unless and until he has suffered a loss for which he may seek monetary damages. [Citation.]" *Id.* "Even if negligence on the part of the attorney is established, no action will lie against the attorney unless that negligence proximately caused damage to the client. [Citation.] The existence of actual damages is therefore essential to a viable cause of action for legal malpractice." *Id* at 306-07. "In order to recover damages ***, a plaintiff must establish what the result would have been in the underlying action which was improperly litigated by the plaintiff's former attorney. [Citation.]" *Goldfine v. Barack, Ferrazzano, Kirschbaum & Perlman*, 2014 IL 116362, ¶ 24. " '*Thus, a plaintiff's damages in a malpractice suit are limited to the actual amount the plaintiff would have recovered had he been successful in the underlying case.*' " (Emphasis in original.) *Id.* (quoting *Eastman v. Messner*, 188 Ill. 2d 404, 411-412 (1999)).

¶ 49 In this case, the alleged malpractice consists of defendant's failure to assert a timely breach of contract claim against Cole Taylor (or its successor, MB), in relation to the misdeposited funds. Thus, to establish damages caused by defendant's alleged malpractice, plaintiff needs to demonstrate that the underlying breach of contract claim, if timely filed, would have succeeded in recovering breach of contract damages.

¶ 50 In turn, we must consider whether, under the record before us, plaintiff could have proven the requisite elements of the breach of contract claim, including proof of damages for that claim. See *McCleary v. Wells Fargo Securities, L.L.C.*, 2015 IL App (1st) 141287, ¶ 19 ("In order to state a cause of action for breach of contract, a plaintiff must plead: (1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) a breach of the subject contract by the defendant; and (4) that the defendant's breach resulted in damages.").

¶ 51 "Damages are an essential element of a breach of contract action and a claimant's failure to prove damages entitles the defendant to judgment as a matter of law. [Citations.]" *In re Illinois Bell Telephone Link-Up II*, 2013 IL App (1st) 113349, ¶ 19. Our court has explained that breach of contract damages are limited to actual, measurable damages proximately resulting from the breach:

> "The basic theory of damages in a breach of contract action requires that a plaintiff 'establish an actual loss or measurable damages resulting from the breach in order to recover.' [Citation.] The proper measure of damages for a breach of contract is the amount of money necessary to place the plaintiff in a position as if the contract had been performed. [Citation.] However, the claimant should not be placed in a better position, providing a windfall

> recovery. [Citation.] Damages which 'naturally and generally result from a breach are recoverable.' [Citation.] Damages which are not the proximate cause of the breach are not allowed. [Citation.]" *Id.*

Furthermore, a plaintiff in a breach of contract case must "prove its damages to a reasonable degree of certainty, and accordingly the evidence it presents must not be remote, speculative, or uncertain." (Internal quotation marks omitted.) *Id.* ¶ 23.

¶ 52 The crux of plaintiff's underlying breach of contract claim in this case is that Cole Taylor—in breach of its account agreements requiring that it exercise ordinary care in handling deposits—allowed "misdeposits" of checks among the three deposit accounts for the three corporations in question, such that checks intended for deposit into one of the three accounts were incorrectly deposited into one of the two other accounts. Plaintiff posits two ways in which these misdeposits resulted in actual damages to the corporations. As explained below, we do not find that either theory would be viable to support breach of contract damages.

¶ 53 First, plaintiff suggests that the corporations suffered "straight contractual damages," equal to the value of the improperly deposited checks. According to plaintiff, "each entity has a claim against the bank for the value of each check which was taken by the bank and not deposited in its account or given credit for that check in its accounts." Under that theory, plaintiff argues that "Cole Taylor owed plaintiff $380,349.09 in actual damages," that is, the sum of the misdeposited checks.

¶ 54 As support for this theory of damages, plaintiff relies upon section 4-103(e) of the Uniform Commercial Code,[7] which provides that "the measure of damages for failure to exercise ordinary care in handling an item is the amount of the item reduced by an amount that could not have been realized by the exercise of ordinary care." 810 ILCS 5/4-103(e) (West 2016).

¶ 55 We reject this suggestion. Plaintiff's position ignores the undisputed reality that none of the misdeposited money was actually lost. The checks at issue were deposited into the wrong account, but (unlike the funds allegedly stolen by Cavagnetto), the deposited funds were not permanently lost. We note that, in his deposition, Thomas acknowledged that all of the misdeposited checks went to one of the three accounts for the companies. There is no indication from the record that plaintiff was deprived of the use of these funds.

¶ 56 Plaintiff's theory, in essence, seeks a recovery in the amount of funds that were "misdeposited" but were not actually lost. Such an award would violate the established proposition that breach of contract damages should not provide a "windfall recovery" that places plaintiff in a *better* position than if the contract had been performed. See *In re Illinois Bell Telephone Link-Up II*, 2013 IL App (1st) 113349, ¶ 19. Nothing in section 4-103(e) of the Uniform Commercial Code undermines this basic principle. To the contrary, the official comment to this subsection recognizes that: "Of course, it continues to be as necessary under subsection (e) as it has been under ordinary common law principles that, before the damage rule of the subsection becomes operative, liability of the bank *and some loss to the customer or owner must be established*." (Emphasis added.) 810 ILCS 5/4-103 (Uniform Commercial Code Comment, n. 6) (West 2016).

[7] Article 4 of the Uniform Commercial Code concerns bank deposits and collections. Section 4-103(a) provides that parties to an agreement "cannot disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care" in handling deposits. 810 ILCS 5/4-103(a) (West 2016).

¶ 57 There was no such loss in this case. As this court stated in footnotes to our May 2016 opinion, the misdeposited funds were "all ultimately accounted for, albeit in the incorrect corporation's account." 2016 IL App (1st) 152204, ¶ 22, n. 3. We acknowledge that the statements in these footnotes were not necessary to the disposition of that decision, which preceded the discovery in the instant malpractice case. To clarify, we do *not* mean to suggest that the footnotes in our May 2016 opinion have a preclusive effect on the issue of damages. Nevertheless, the record in this appeal independently confirms that the erroneously deposited funds were, in fact, accounted for. Plaintiff does not identify evidence from the record in this appeal establishing any actual loss of the funds at issue. To the contrary, the record, including Thomas' testimony, indicates that all of the funds at issue were accounted for and and remained accessible to the corporations. We simply cannot find that plaintiff suffered *actual* damages from the erroneous deposits, when none of those funds were, in fact, lost. We thus reject plaintiff's claim that it is entitled to "straight contractual damages" equal to the face value of the erroneously deposited checks.

¶ 58 We turn to plaintiff's alternative theory of breach of contract damages, which essentially asserts that the improper deposits enabled Cavagnetto to steal other funds from the corporations. This theory relies on the proposition that the erroneous deposits allowed Cavagnetto to continue his misconduct that would have otherwise been discovered earlier. Citing Haberkorn's opinion and Thomas's testimony, plaintiff argues that Cavagnetto's "lapping scheme was enabled by Cole Taylor's failure to exercise ordinary care. Had Cole Taylor not breached its duties, PSI's bank account would have been negative as early as May, 2009 *** and PSI would have very quickly discovered the losses *** because the company would have run out of money and been unable to hit payroll or pay business expenses." The claim appears to be that, by depositing

checks intended for the other two companies into PSI's account, Cavagnetto was able to meet PSI's expenses, concealing the fact that he was embezzling funds. Thus, plaintiff suggests that Cole Taylor can be held responsible for at least a portion of the funds stolen by Cavagnetto.

¶ 59 Keeping in mind that breach of contract damages must be actual, measurable, and proximately caused by the breach, we find this theory is too remote and speculative to support damages for Cole Taylor's alleged breach of contract. Even assuming that plaintiff could prove that Cole Taylor breached its obligations by allowing the "misdeposits," this damages theory requires a chain of inferences: specifically, that (1) without the erroneous deposits into PSI's account, Cavagnetto would not have been able to pay PSI's regular business expenses; (2) in turn, this would have raised a "red flag" to the corporations about Cavagnetto, leading to discovery of his "lapping scheme"; and (3) his scheme would have been discovered early enough to have prevented the loss of a measurable portion of the stolen funds.

¶ 60 This "red flag" theory is too uncertain to assess measurable damages proximately caused by Cole Taylor's alleged breach, as necessary to support a breach of contract action. *In re Illinois Bell Telephone Link-Up II*, 2013 IL App (1st) 113349, ¶ 19. This is apparent from the equivocal statements of plaintiff's own expert, Haberkorn, whose report opined that "If the PSI account was overdrawn ******* this *might have raised a red flag to* the bank and/or PSI and *it is possible* that Cavagnetto's lapping scheme could have been identified earlier." (Emphases added). With respect to the amount of resulting loss, Haberkorn's report simply states: "If Cavagnetto's lapping scheme was discovered earlier, damages suffered by PSI, LSI and TSI *likely would have been less than $451,400."* (Emphasis added). At her deposition, Haberkorn agreed that she could not state damages "with a reasonable degree of accounting certainty," and acknowledged: "I

don't think it's an exact science kind of analysis because, again, we're talking about what might have happened."

¶ 61 As evidenced by this testimony, the claim that the erroneous deposits of checks enabled Cavagnetto's theft does not lead to the certainty necessary to establish damages. Thus, under the record before us, plaintiff cannot prove that damages from Cavagnetto's "lapping scheme" were *proximately caused* by Cole Taylor's alleged breach of contract, or prove a measurable amount of damages related to that breach.

¶ 62 Accordingly, like the first theory, we also reject plaintiff's second theory of damages arising from Cole Taylor's alleged breach of contract. In turn, we find that plaintiff cannot establish that it was damaged by defendant's failure to timely raise a breach of contract claim against Cole Taylor during his representation. Plaintiff's inability to establish the damages element of the legal malpractice claim warranted summary judgment in defendant's favor, and we affirm the circuit court on this basis.

¶ 63 As we find that defendant was entitled to summary judgment on this ground, we need not discuss the merits of the parties' additional arguments, including whether the trial court improperly relied on an "intervening act" as a basis for granting summary judgment.

¶ 64 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 65 Affirmed.