2014 IL App (2d) 131220-U
No. 2-13-1220
Order filed October 15, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

TRI-G, INC.,	)	Appeal from the Circuit Court
	)	of McHenry County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 08-LA-42
	)	
THOMAS W. GOOCH & ASSOCIATES,	)	
WYSOCKI & GOOCH,	)	
THOMAS W. GOOCH III,	)	
JOHNSON, LEAHY & MENGELING, and	)	
DANIEL A. MENGELING,	)	Honorable
	)	Michael T. Caldwell,
Defendants-Appellees.	)	Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices Hudson and Spence concurred in the judgment.

¶ 1 *Held*: The trial court did not err in granting defendant attorneys summary judgment in client's action for legal malpractice and breach of contract, because client's action was a compulsory counterclaim that should have been raised in response to the attorneys' liens.

¶ 2 Plaintiff, Tri-G, Inc., brought a legal malpractice action against its former counsel, Burke, Bosselman and Weaver (BBW) after BBW failed to prosecute an action against a bank. Defendants, Thomas W. Gooch & Associates, Wysocki & Gooch, and Thomas W. Gooch III

(collectively, Gooch) and Johnson, Leahy & Mengeling and Daniel A. Mengeling (collectively, Mengeling) represented plaintiff against BBW under a "split-fee" agreement.

¶ 3 A jury found that BBW had been negligent in handling plaintiff's action against the bank and that, but for the negligence, plaintiff would have recovered $1,168,775 in compensatory damages and an equal sum in punitive damages. Accordingly, the jury returned a verdict in favor of plaintiff and against BBW for $2,337,550, which was more than three times the amount plaintiff had asked for.

¶ 4 BBW appealed and plaintiff cross-appealed to this court, where plaintiff was additionally represented by Edelman, Combs, Latturner & Goodwin, LLC ("Edelman"). *Tri-G v. Burke, Bosselman and Weaver*, 353 Ill. App. 3d 197 (2004) (*Tri-G I*). We rejected BBW's assertion that the lost compensatory damages were not supported by the record and improperly exceeded plaintiff's prayer for relief (*Tri-G I*, 353 Ill. App. 3d at 222-23) and plaintiff's claim for lost prejudgment interest (*Tri-G I*, 353 Ill. App. 3d at 223-24).

¶ 5 BBW and plaintiff each filed a petition for leave to appeal (PLA) in the supreme court, but BBW's PLA did not mention the lost compensatory damages. *Tri-G v. Burke, Bosselman and Weaver*, 222 Ill. 2d. 218 (2006) (*Tri-G II*). In response to plaintiff's cross-appeal for prejudgment interest, the supreme court allowed BBW to renew its argument that the compensatory damages were excessive. *Tri-G II*, 222 Ill. 2d. at 241-42. The supreme court agreed and reduced the compensatory damages to $748,562, reversed outright the punitive damages, and entered a remittitur, which plaintiff accepted. *Tri-G, II*, 222 Ill. 2d at 268. In turn, plaintiff filed this separate legal malpractice action against Gooch and Mengeling for their representation in the suit against BBW.

¶ 6 The BBW matter was remanded to the trial court for resolution of plaintiff's attorney fee claim against BBW. To obtain a share of those fees, Gooch and Edelman filed attorney liens against plaintiff. While plaintiff's legal malpractice claims against Gooch and Mengeling were pending, BBW, plaintiff, Gooch, and Edelman entered into a settlement agreement and release in which BBW agreed to pay $310,000 to plaintiff, $50,000 to Gooch, and $40,000 to Edelman.

¶ 7 The trial court granted Gooch and Mengeling summary judgment on plaintiff's malpractice claims, concluding that (1) the settlement of plaintiff's attorney fee claim against BBW also released Gooch and Mengeling from any potential claims arising from its representation; (2) *res judicata* bars plaintiff's present action because the settlement is a final determination on the merits; (3) plaintiff waived its claims in the present action by consenting to the remittitur; and (4) plaintiff's filing of the PLA and cross-appeal in *Tri-G II*, and not Gooch and Mengeling's representation at trial, was the proximate cause of the reduction of the judgment against BBW.

¶ 8 Plaintiff appeals, and we affirm the judgment on the ground that *res judicata* bars plaintiff's cause of action. Plaintiff's present legal malpractice action against Gooch and Mengeling is a compulsory counterclaim that should have been brought in the BBW litigation in response to Gooch's attorney lien. Our resolution of the *res judicata* issue obviates the need to consider plaintiff's remaining arguments.

¶ 9 I. BACKGROUND

¶ 10 A. Plaintiff v. Elgin Federal Bank

¶ 11 This case has a decades-long history. Plaintiff brought the legal malpractice action against BBW to recover damages it sustained as a result of BBW's failure to prosecute a complaint plaintiff had previously filed against Elgin Federal Bank. Plaintiff's claim against the

bank arose from certain construction loans plaintiff received to build residential homes in a development known as Huntington Point. Plaintiff's complaint, filed in 1981, alleged breach of contract, common law fraud, and violation of the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (Ill. Rev. Stat. 1983, ch. 121 1/2, par. 261 *et seq.* (now 815 ILCS 505/1 *et seq.* (West 2012))).

¶ 12 Trial was postponed for several years, during which time plaintiff was represented by a succession of law firms. Eventually, a May 11, 1987, trial date was set by the court. Approximately three months before the trial was scheduled to begin, plaintiff retained BBW to handle the case. The attorney from BBW assigned to represent plaintiff did not file an appearance, however, until May 4, 1987. When the case was called for trial as scheduled the following week, the attorney answered "not ready."

¶ 13 Because the attorney was not prepared to proceed, the trial court dismissed plaintiff's case with prejudice. Plaintiff, still represented by BBW, appealed the dismissal. On November 13, 1987, the appellate court dismissed the appeal *sua sponte* on the grounds that plaintiff had failed to comply with a previous order of that court.

¶ 14 Plaintiff subsequently replaced BBW with new legal counsel, who filed a second complaint against the bank. The new complaint alleged the existence of oral construction loan contracts between the parties, numerous breaches by the bank of those contracts, and fraud. On the bank's motion, the trial court dismissed the complaint based on *res judicata*. The court also imposed sanctions against plaintiff and its attorneys. The appellate court affirmed. *Tri-G, Inc. v. Elgin Federal Savings & Loan Association*, 182 Ill. App. 3d 357 (1989).

¶ 15 B. Plaintiff v. BBW

¶ 16 1. Circuit Court

¶ 17 With the failure of its substantive claims against the bank, plaintiff looked to BBW for recourse. In 1989, plaintiff filed a legal malpractice action against the law firm. It voluntarily dismissed that action in 1994 and refiled it in 1995. BBW succeeded on a motion to dismiss the complaint, but this court reversed the ruling, and the matter proceeded to a trial on the merits. *Tri-G, Inc. v. Burke, Bosselman & Weaver*, No. 2-96-0980 (1997) (unpublished order under Supreme Court Rule 23).

¶ 18 At the conclusion of the evidence, the trial court instructed the jury on five specific categories of damages, with their respective elements, sought by plaintiff. In its closing argument, plaintiff sought damages in the following amounts: $75,787 for breach of the construction loan agreements; $21,675 for breach of the land loan agreement; $10,000 for breach of the escrow agreement; $361,000 for fraud that resulted in loss of profits on the 23 vacant lots; and $280,000 for fraud that resulted in lost profits on the 14 partially completed lots. These sums totaled $748,562.

¶ 19 The jury ultimately returned a verdict in favor of plaintiff for $2,337,550, which was more than three times the amount plaintiff asked for. In four special interrogatories, the jury found that: (1) BBW was negligent in representing plaintiff in the underlying case; (2) BBW's negligence proximately caused plaintiff to lose the underlying case; (3) had plaintiff prevailed in the underlying case, it would have recovered a verdict against the bank for $1,168,775 in compensatory damages; and (4) had plaintiff prevailed in the underlying case, the bank would have been required to pay an additional $1,168,775 in punitive damages.

¶ 20 BBW filed a posttrial motion seeking alternative forms of relief. Plaintiff filed a posttrial motion in which it requested prejudgment interest and an award of attorney fees and costs pursuant to the Consumer Fraud Act. Both motions were denied.

¶ 21 2. Appellate Court

¶ 22 BBW appealed the judgment, and plaintiff cross-appealed the denial of prejudgment interest. Plaintiff was represented by Gooch, Mengeling, and Edelman. Among other claims, BBW pointed out that plaintiff's itemized compensatory damages were only $748,562 and that the award should be reduced at least to what plaintiff requested. *Tri-G I*, 353 Ill. App. 3d at 222.

¶ 23 This court rejected BBW's argument that the amount of compensatory damages awarded to plaintiff was not supported by the record and exceeded the amount requested by plaintiff. *Tri-G I*, 353 Ill. App. 3d at 222-23. We upheld the award of punitive damages to plaintiff (*Tri-G I*, 353 Ill. App. 3d at 226-32) but rejected plaintiff's claim for prejudgment interest (*Tri-G I*, 353 Ill. App. 3d at 223-24). Finally, we reversed the trial court's denial of plaintiff's request for attorney fees and costs pursuant to the Consumer Fraud Act and ordered the cause remanded to the trial court to allow plaintiff to request attorney fees and costs incurred in bringing the consumer fraud claim. *Tri-G I*, 353 Ill. App. 3d at 224-26.

¶ 24 3. Supreme Court

¶ 25 BBW and plaintiff filed PLAs, which were granted. Plaintiff was primarily represented by Edelman, and also Gooch, who presented the oral argument. Apparently, Mengeling's representation of plaintiff before the supreme court was minimal at most.

¶ 26 BBW's PLA challenged only the punitive damage award, but in response to plaintiff's PLA and cross-appeal for prejudgment interest, the supreme court allowed BBW to renew its argument that the compensatory damages were not supported by the evidence and exceeded the amount requested by plaintiff. The supreme court characterized plaintiff's cross-appeal for prejudgment interest on the compensatory damage award as a tactical decision that "entitled [BBW] to 'seek and obtain any relief warranted by the record on appeal without having filed a

separate petition for leave to appeal or notice of cross-appeal or separate appeal.' " *Tri-G II*, 222 Ill. 2d at 241-42 (quoting Ill. S. Ct. R. 318(a) (eff. Feb. 1, 1994)).

¶ 27 BBW argued that (1) it was denied procedural due process when plaintiff was permitted to amend its complaint to add allegations regarding lots not specified in the 1981 complaint, (2) the amount of compensatory damages awarded was not supported by the record and exceeded the amount requested by plaintiff, and (3) the award of lost punitive damages was erroneous. The supreme court reduced the compensatory damage award and reversed the punitive damage award. *Tri-G, II*, 222 Ill. 2d at 268.

¶ 28 On June 22, 2006, the court entered a remittitur of $420,213 on the compensatory damage award and affirmed the judgment entered in favor of plaintiff for the reduced amount of $748,562. The court ruled that, if plaintiff did not consent to the entry of the remittitur within 21 days, the cause would be remanded to the trial court for a new trial solely on the issue of damages. *Tri-G, II*, 222 Ill. 2d at 268. The court denied plaintiff's petition for rehearing on September 25, 2006.

¶ 29 4. Remand to Circuit Court

¶ 30 On September 27, 2006, plaintiff consented to the remittitur and the reduced judgment of $748,562. The supreme court fully resolved all of plaintiff's claims against BBW, with one exception. In *Tri-G I*, this court reversed the trial court's denial of plaintiff's request for attorney fees and held that, on remand, plaintiff would be allowed to request fees and costs incurred in prosecuting the Consumer Fraud Act claim. The cause was remanded to the trial court for consideration of plaintiff's attorney fee claim against BBW.

¶ 31 In a separate proceeding, on February 11, 2008, plaintiff filed its original complaint for legal malpractice and breach of contract against Gooch and Mengeling. Plaintiff amended the complaint on August 28, 2008.

¶ 32 On September 3, 2008, the trial court in the BBW matter entered an agreed order memorializing an agreement between BBW, plaintiff, Gooch, Mengeling, and Edelman, relating to the attorneys' petitions for adjudication of the liens. The order states "the parties having engaged in prehearing settlement discussions and having reached an agreement resolving all issues and the court being otherwise advised of the premises," BBW was to pay $50,000 to Gooch and $40,000 to Edelman within 30 days in settlement of the lien claims against plaintiff. Plaintiff was required to execute a general release and settlement to effect a turnover of funds from BBW to the parties. The court continued the matter for status to October 3, 2008.

¶ 33 Accordingly, on October 3, 2008, BBW, plaintiff, Gooch, and Edelman signed a document labeled "Settlement Agreement and General Release" relating to plaintiff's claim against BBW for attorney fees. The document states that the agreement is "by and between Burke, Bosselman & Weaver ('BBW') on the one hand, and Tri-G, Inc., Russell Geschke, Irene Geschke, Thomas W. Gooch III, Thomas W. Gooch & Associates, the Law Offices of Thomas W. Gooch, and Edelman, Combs, Latturner & Goodwin, LLC, on the other."

¶ 34 Paragraph F of the agreement recites that, "[t]his case was remanded to the trial court for consideration of said claim by Tri-G for attorney fees (the 'Attorney Fee Claim'), and Tri-G also sought to recover its 'court costs' under the original judgment (the 'Court Costs Claim')." Paragraph I recites that, "after a settlement conference *** in which the parties tentatively agreed to settle the Attorney Fee Claim and the Court Costs Claim, a dispute arose between Tri-G and its lawyers, Thomas W. Gooch, Thomas W. Gooch & Associates, The Law Offices of Thomas

W. Gooch, and Edelman Combs, Latturner & Goodwin, LLC, which resulted in notices of liens filed by those attorneys claiming liens in the amount of 40% of any recovery under the settlement (the 'Attorney Lien Claims')." Paragraph J then recites that "[t]he parties wish to fully and finally, settle, resolve, and compromise any and all differences or disputes that may exist between them, including but not limited to the Attorney Fee Claim, the Court Costs Claim, and the Attorney Lien Claims."

¶ 35 Paragraph 3 of the agreement provides that BBW would pay a total settlement of $400,000 in the following amounts: (1) $310,000 to plaintiff, (2) $50,000 to Gooch, and (3) $40,000 to Edelman. Paragraph 4 provides that the agreement is "intended to settle and resolve any and all differences or disputes that may exist," including but not limited to claims related to the suit between plaintiff and BBW, plaintiff's attorney fee claim against BBW, and the attorney lien claims by Gooch and Edelman against plaintiff. The claims were between (1) "on the one hand," BBW and (2) "on the other hand" plaintiff and its attorneys, Gooch and Edelman and "all of their agents partners, associates trustees, officers, employees, insurers, attorneys, and representatives," which the agreement identified as "Tri-G and the Attorney Lien Releasing Parties."

¶ 36 In paragraph 5(a), BBW agreed to "release and discharge, and covenant not to sue, Tri-G and the Attorney Lien Releasing Parties from all claims of any kind that [BBW] may have against Tri-G and the Attorney Lien Releasing Parties and that arose prior to the date of this Agreement, except for claims arising under and by virtue of a breach of this Agreement." In paragraph 5(b), plaintiff, Gooch, and Edelman agreed to "release and discharge and covenant not to sue [BBW] from all claims of any kind that the Tri-G and the Attorney Lien Releasing Parties

may have against [BBW] and that arose prior to the date of this Agreement, except for claims arising under and by virtue of a breach of this Agreement." Paragraph 5 concludes as follows:

> "It is the intention of the parties that the foregoing releases be general and unconditional releases. As used herein, the terms 'claim' or 'claims' mean any and all manner of action or actions, causes of action, suits, demands, counterclaims, damages (whether general, special, or punitive), debts, liabilities, demands, obligations, costs, expenses, losses, attorneys' fees, liens, and indemnities of any kind and nature whatsoever, whether known or unknown, suspected or unsuspected, and whether based on contract, tort, statute, or other legal or equitable theory of recovery that arose prior to the date of this Agreement."

¶ 37 Also on October 3, 2008, the trial court entered a stipulation and agreed order of dismissal signed by BBW, plaintiff, Gooch, and Edelman. The order states that, following a settlement conference, the parties finalized and documented their settlement, agreed to dismiss the matter with prejudice, and withdrew all the motions related to the settlement.

¶ 38 C. Plaintiff v. Defendants

¶ 39 At the time of the settlement, plaintiff's four-count amended complaint was pending. The amended complaint alleged legal malpractice and breach of contract separately against Gooch and Mengeling in that they were careless and negligent and breached their legal representation agreement by (1) failing to seek or plead damages in their present cash value; (2) failing to develop evidence, including expert or economist testimony, regarding present value damages; (3) failing to instruct the jury properly on the present value of damages; (4) failing to move to convert all damages to present value; (5) failing to put plaintiff in the same position it would have been, by present value conversion, in the underlying claim, but for the underlying negligence of BBW; (6) failing to instruct the jury on all itemized damages, leaving the jury to

speculate on the value; (7) failing to instruct the jury or pray for relief in the amount plaintiff paid to purchase the land and develop it into 24 separate lots; and (8) failing to instruct the jury or pray for relief in the amount of the loss of money paid by plaintiff in opening waivers for 14 houses. The amended complaint alleges that the acts and omissions caused pecuniary injury including (1) the value of all damages as "converted/translated" to their present case value, (2) $420,213, which represents the amount of the underlying damage award that was reduced due to an improper prayer for relief and jury instructions, plus the increase in that amount's present cash value, and (3) any and all postjudgment interest which may have accrued to said amounts.

¶ 40 The trial court granted Gooch and Mengeling summary judgment, concluding that (1) the settlement of plaintiff's attorney fee claim against BBW also released Gooch from any potential claims arising from its representation; (2) *res judicata* bars plaintiff's present action because the settlement is a final determination on the merits; (3) plaintiff waived any malpractice claim against Gooch and Mengeling by consenting to the remittitur; and (4) plaintiff's filing of the PLA and cross-appeal for prejudgment interest in *Tri-G II* was the proximate cause of the reduction of the compensatory damages against BBW.

¶ 41 II. ANALYSIS

¶ 42 Plaintiff appeals from the summary judgment entered for defendants. The purpose of summary judgment is not to try a question of fact but, rather, to determine whether a genuine issue of material fact exists. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). Summary judgment is appropriate where the pleadings, affidavits, depositions, and admissions on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012); *Klitzka v. Hellios*, 348 Ill. App. 3d 594, 597 (2004). In

reviewing a grant of summary judgment, this court must construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the nonmoving party. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Where reasonable persons could draw divergent inferences from the undisputed material facts or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 114 (1995). If a party moving for summary judgment introduces facts that, if not contradicted, would entitle him to a judgment as a matter of law, the opposing party may not rely on his pleadings alone to raise issues of material fact. *Klitzka*, 348 Ill. App. 3d at 597.

¶ 43 The summary judgment procedure is to be encouraged as an aid in the expeditious disposition of a lawsuit. *Adams*, 211 Ill. 2d at 43. However, summary judgment is a drastic means of disposing of litigation and should not be granted unless the movant's right to judgment is clear and free from doubt. *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 280 (2007). Where a case is decided through summary judgment, our review is *de novo*. *Schultz v. Illinois Farmers Insurance Co.*, 237 Ill. 2d 391, 399-400 (2010).

¶ 44 The basic principles governing legal malpractice claims are well established: 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. *Tri-G II*, 222 Ill. 2d at 225-26.

¶ 45 The injury in a legal malpractice action is not a personal injury, nor is it the attorney's negligent act itself. Rather, it is a pecuniary injury to an intangible property interest caused by the attorney's negligent act or omission. The fact that the attorney may have breached his duty of care is not, in itself, sufficient to sustain the client's cause of action. 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. The existence of actual damages is therefore essential to a viable cause of action for legal malpractice. *Tri-G*, 222 Ill. 2d at 226.

¶ 46 The theory underlying a cause of action for legal malpractice is that the plaintiff client would have been compensated for an injury caused by a third party, absent negligence on the part of the client's attorney. Where the alleged legal malpractice involves litigation, no actionable claim exists unless the attorney's negligence resulted in the loss of an underlying cause of action. If the underlying action never reached trial because of the attorney's negligence, the plaintiff is required to prove that but for the attorney's negligence, the plaintiff would have been successful in that underlying action. A legal malpractice plaintiff must therefore litigate a "case within a case." *Tri-G*, 222 Ill. 2d at 226.

¶ 47 The "case within a case" on which plaintiff's malpractice claim is predicated was plaintiff's cause of action against BBW. That cause of action arose from BBW's representation of plaintiff against Elgin Federal Bank involving the Huntington Point residential real estate project. The jury awarded plaintiff $1,168,775 in compensatory damages, and an equal amount in punitive damages, for BBW's failure to prosecute the action against the bank. However, our supreme court ruled that the trial court's use of defective jury instructions and plaintiff's limited prayer for relief compelled reduction of the compensatory damages to $748,562. The court also reversed the punitive damage award, but that ruling is not at issue in this appeal.

¶ 48 Plaintiff's theory is that it would have received at least an additional $420,213 for the injury caused by BBW, absent negligence on the part of Gooch and Mengeling. Plaintiff asserts that their negligence on appeal resulted in a partial loss of the underlying cause of action against

BBW. On a similar note, plaintiff argues that Gooch and Mengeling negligently refused to retry the issue of damages, which denied plaintiff a full recovery.

¶ 49 A. Release

¶ 50 The parties dispute whether the settlement agreement signed by BBW, plaintiff, Gooch, and Edelman released the parties from any and all claims related to the BBW litigation, including plaintiff's malpractice and contract claims against Gooch and Mengeling. Gooch argues that the settlement released him from all liability, and Mengeling contends that the settlement applies to him due to his partnership with Gooch. Plaintiff argues that the release resolved only (1) plaintiff's attorney fee claim against BBW arising from BBW's consumer fraud and (2) the attorney lien claims of Gooch and Edelman based on that claim. We agree with plaintiff.

¶ 51 A settlement agreement is a release governed by contract law. *Gassner v. Raynor Manufacturing Co.*, 409 Ill. App. 3d 995, 1006 (2011). When interpreting a contract, the court gives effect to the parties' intentions, which are best indicated by the plain meaning of the words of the contract. *Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (2007). If the words in the contract are clear and unambiguous, we must give them their plain, ordinary, and popular meaning. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). But if the language of the contract is ambiguous, we may look to extrinsic evidence to determine the parties' intent. *Thompson*, 241 Ill. 2d at 441. Language in a contract is ambiguous if it is "susceptible to more than one meaning." *Thompson*, 241 Ill. 2d at 441. The parties' disagreement over the contract's interpretation does not establish ambiguity. *Intersport, Inc. v. National Collegiate Athletic Association*, 381 Ill. App. 3d 312, 319-20 (2008). Rather than focusing on one clause or provision in isolation, we must read the entire contract in context and construe it as a whole,

viewing each provision in light of the other ones. *Gallagher*, 226 Ill. 2d at 233. We review a contract's interpretation *de novo*. *Carr v. Gateway, Inc.*, 241 Ill. 2d 15, 20 (2011).

¶ 52 The parties agree that the settlement agreement is unambiguous but disagree over its meaning. BBW, plaintiff, Gooch, and Edelman signed the agreement, but the plain, ordinary, and popular meaning of the language indicates the parties intended a two-way release between BBW on one side and plaintiff and its attorneys on the other. The agreement twice states that the release is by and between BBW "on the one hand" and plaintiff, Gooch, and Edelman "on the other." Consistent with this two-sided interpretation, paragraph 5(a) provides that BBW agrees to release plaintiff, Gooch, and Edelman; and paragraph 5(b) provides that plaintiff, Gooch, and Edelman agree to release BBW. Although the agreement specifies the underlying dispute between plaintiff and BBW, the agreement does not mention plaintiff's present cause of action for malpractice and breach of contract against Gooch and Mengeling, which was pending at the time of the agreement. In fact, the agreement does not even mention Mengeling but includes Edelman, who is not a party in this action.

¶ 53 Defendants emphasize broad language that, when viewed in isolation, could be interpreted as a release of any and all claims between all the parties, including plaintiff's present malpractice and contract claims. Paragraph J recites that "[t]he parties wish to fully and finally, settle, resolve, and compromise any and all differences or disputes that may exist between them, including but not limited to the Attorney Fee Claim, the Court Costs Claim, and the Attorney Lien Claims." Paragraph 4 provides that the agreement is "intended to settle and resolve any and all differences or disputes that may exist," including but not limited to claims related to the suit between plaintiff and BBW, plaintiff's attorney fee claim against BBW, and the attorney lien claims by Gooch and Edelman. Finally, paragraph 5 concludes that "[i]t is the intention of the

parties that the foregoing releases be general and unconditional releases. As used herein, the terms 'claim' or 'claims' mean any and all manner of action or actions, causes of action, suits, demands, counterclaims, damages (whether general, special, or punitive), debts, liabilities, demands, obligations, costs, expenses, losses, attorneys' fees, liens, and indemnities of any kind and nature whatsoever, whether known or unknown, suspected or unsuspected, and whether based on contract, tort, statute, or other legal or equitable theory of recovery that arose prior to the date of this Agreement."

¶ 54 Defendants take these provisions out of context, as the remainder of the agreement shows the parties' intent that the release should apply to plaintiff's attorney fee claim against BBW, and the attorney lien claims of Gooch and Edelman, who sought a portion of the settlement amount. The agreement recites that the parties tentatively agreed to settle plaintiff's attorney fee claim against BBW, but Gooch and Edelman filed liens claiming a 40% interest in the settlement amount. The agreement then provides for a distribution of the settlement from BBW to plaintiff, Gooch, and Edelman. Aside from the claims of Gooch and Edelman to the settlement amount, the agreement does not provide for a release from any claims by plaintiff against its attorneys relating to their representation against BBW.

¶ 55 The agreement does not suggest an adversarial relationship between plaintiff and Gooch and Mengeling to which a release would apply. Reading the entire contract in context and construing it as a whole, we conclude that the language unambiguously shows the parties' intent that the release applies to plaintiff's attorney fee claim against BBW and the attorney lien claims of Gooch and Edelman. Thus, the terms of the release do not support the summary judgment entered for defendants. Even though plaintiff's malpractice and contract claims were not

addressed in the settlement, we conclude, for the following reasons, that plaintiff should have raised them at the time, and therefore they are barred by *res judicata.*

¶ 56 B. *Res Judicata*

¶ 57 Gooch and Mengeling contend that the settlement and release in the BBW matter constitutes a resolution on the merits of the present suit against them, and therefore, the doctrine of *res judicata* supports the summary judgment. Plaintiff responds that *res judicata* does not apply because the settlement of the underlying BBW matter involved parties, claims, and operative facts that are different from the present action.

¶ 58 *Res judicata* promotes judicial economy by preventing repetitive litigation and also protects parties from being forced to bear the unjust burden of relitigating essentially the same case. *Arvia v. Madigan*, 209 Ill. 2d 520, 533 (2004). Under the doctrine of *res judicata*, a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008). *Res judicata* bars not only what was actually decided in the first action, but also whatever could have been decided. *Hudson*, 228 Ill. 2d at 467. Three requirements must be satisfied for *res judicata* to apply: (1) the existence of an identity of cause of action; (2) the parties or their privies are identical in both actions; and (3) the rendition of a final judgment on the merits by a court of competent jurisdiction. *Hudson*, 228 Ill. 2d at 467.

¶ 59 In Illinois, counterclaims are generally permissive rather than mandatory, and therefore, a defendant generally may raise his claim against the plaintiff in the original action by way of a counterclaim or by way of a separate action. *Kasny v. Coonen and Roth, Ltd.*, 395 Ill. App. 3d 870, 873 (2009); *Corcoran-Hakala v. Dowd*, 362 Ill. App. 3d 523, 530-31 (2005); Restatement (Second) of Judgments § 22(1) (1982). The rationale behind this rule is that a defendant should

not be required to assert his or her claims in the forum chosen by the plaintiff but should be allowed to bring suit at a time and place of his or her own selection. Restatement (Second) of Judgments § 22, Comment a, at 185-86 (1982). However, in this district, the law is settled that an attorney's claim for fees and a client's claim for malpractice are deemed to be a single cause of action, such that a counterclaim ordinarily is mandatory. *Kasny*, 395 Ill. App. 3d at 874.

¶ 60 This is not to say, however, that *res judicata* necessarily applies. Because the doctrine bars only those claims that could have been raised, *res judicata* extends only to claims that could have been presented by the exercise of due diligence. *Kasny*, 395 Ill. App. 3d at 874. The mere fact that a claim exists does not establish that a litigant exercising due diligence would discover it. If a claim exists and the litigant does not discover it despite his due diligence, *res judicata* does not apply, which is consistent with the notion that *res judicata*, at its core, is a doctrine of equity, not law. *Kasny*, 395 Ill. App. 3d at 874.

¶ 61 First, there is an identity of causes of action between Gooch's attorney lien claim in the underlying BBW matter and plaintiff's malpractice and contract claims in this case. The agreement recites that the parties tentatively agreed to settle plaintiff's attorney fee claim against BBW, but Gooch and Edelman filed liens claiming a 40% interest in the settlement amount. The agreement then provides for a distribution of the settlement from BBW to plaintiff, Gooch, and Edelman. The settlement and release do not mention plaintiff's malpractice and contract claims against Gooch and Mengeling, but those claims are compulsory counterclaims that plaintiff should have brought in response to Gooch's attorney lien in the BBW action. There is no dispute that plaintiff knew of its present claims against Gooch and Mengeling because they were pending in the trial court at the time plaintiff entered into the agreement. *Res judicata* bars not only what

was actually decided in the settlement and release in the BBW action, but also whatever could have been decided, including plaintiff's malpractice and contract claims.

¶ 62 *Res judicata* bars a subsequent action only if the successful prosecution of the action would in effect nullify the judgment entered in the prior litigation. *Corcoran-Hakala*, 362 Ill. App. 3d at 531; Restatement (Second) of Judgments § 22(2)(b) (1982). In the settlement agreement and corresponding order of dismissal, plaintiff conceded that Gooch was entitled to $50,000 for fees related to plaintiff's consumer fraud claim against BBW. If plaintiff were to prevail on its present malpractice and contract claims against Gooch and Mengeling, the judgment would nullify the settlement between plaintiff and Gooch in the BBW litigation.

¶ 63 Second, the parties or their privies are identical in both actions. Due to Gooch and Mengeling's joint representation of plaintiff in the BBW matter, Mengeling qualifies as an "agent or partner" of Gooch, who is a party to the settlement agreement. The agreement applies to Gooch and "all of their agents, partners, associates, trustees, officers, employees, insurers, attorneys, and representatives, and all of their successors and assigns." Plaintiff concedes the point in the amended complaint, stating that "[a]t all times relevant, upon information and belief, [Mengeling] was acting individually and/or as partner and/or as an agent of all remaining defendants, including Gooch." Because plaintiff had the opportunity and obligation to address the malpractice and contract claims against Gooch at the time of the attorney lien settlement, plaintiff had the opportunity and obligation to address the same claims against Mengeling.

¶ 64 Third, the trial court's orders memorializing the settlement agreement and release qualify as a final judgment on the merits by a court of competent jurisdiction. On September 3, 2008, the trial court entered an agreed order between BBW, plaintiff, Gooch, Mengeling, and Edelman, relating to the attorneys' petitions for adjudication of the liens. The order states, "the parties

having engaged in prehearing settlement discussions and having reached an agreement resolving all issues and the court being otherwise advised of the premises," BBW was to pay $50,000 to Gooch and $40,000 to Edelman within 30 days in settlement of the lien claims against plaintiff. Plaintiff was required to execute a general release and settlement to effect a turnover of funds from BBW to the parties. The court continued the matter for status to October 3, 2008, at which time BBW, plaintiff, Gooch, and Edelman signed the formal settlement agreement and release. Also on that date, the court entered a stipulation and agreed order of dismissal, formally terminating the BBW litigation. The agreement and order of dismissal settled the attorney lien claims, without plaintiff raising its compulsory counterclaims for legal malpractice and breach of contract against Gooch and Mengeling.

¶ 65 C. Remittitur and PLA

¶ 66 Plaintiff also argues that (1) factual issues exist regarding whether the remittitur or defendants' errors in the BBW trial and refusal to retry the damages issue was the proximate cause of the reduction of plaintiff's compensatory damages; (2) the consent to remit did not waive plaintiff's right to seek damages for legal malpractice and breach of contract; (3) Gooch is equitably estopped from arguing waiver because he advised plaintiff to accept the remittitur and refused to retry the damages issue; and (4) any waiver resulting from the remittitur does not apply to the increase in the present value of the remitted damages that were claimed in the amended complaint. Alternatively, plaintiff argues that (1) factual issues exist regarding whether (a) the PLA filed in *Tri-G II* or (b) defendants' errors in the BBW matter and refusal to retry the damages issue was the proximate cause of the reduction of plaintiff's compensatory damages; (2) Gooch is equitably estopped from arguing waiver because he represented plaintiff in *Tri-G II*; and (3) any waiver resulting from the filing of the PLA does not apply to the increase in the

present value of the remitted damages that were claimed in the amended complaint. We need not consider these remaining arguments because *res judicata* supports the entry of summary judgment for Gooch and Mengeling.

¶ 67 III. CONCLUSION

¶ 68 We hold that the settlement agreement and release between BBW on the one hand and plaintiff and its attorneys on the other does not apply to plaintiff's cause of action for malpractice and breach of contract against Gooch and Mengeling. However, plaintiff's malpractice and breach of contract claims were compulsory counterclaims that should have been filed in response to Gooch and Mengeling's attorney liens in the BBW litigation. Rather than pursuing its malpractice and contract claims as counterclaims to Gooch's attorney lien claim, plaintiff settled Gooch's attorney lien claim for $50,000, while remaining silent on its pending cause of action. *Res judicata* bars not only what was actually decided in the settlement and release in the BBW action, but also whatever could have been decided, including plaintiff's malpractice and contract claims. Because the settlement agreement resolved Gooch and Edelman's attorney liens without plaintiff raising its malpractice and contract claims against Gooch and Mengeling as compulsory counterclaims, *res judicata* bars plaintiff's present action as it could have been decided by settlement or a trial in the underlying BBW matter. See *Hudson*, 228 Ill. 2d at 467.

¶ 69 For the reasons stated, the summary judgment entered for defendants is affirmed.

¶ 70 Affirmed.