

STATE OF MICHIGAN
COURT OF APPEALS

SANDRA STRONG,

Plaintiff-Appellant,

v

PHILIP VESTEVICH and VESTEVICH,
MALLENDER, DUBOIS & DRITSAS, P.C.,

Defendants-Appellees.

UNPUBLISHED
November 6, 2003

No. 240687
Oakland Circuit Court
LC No. 2001-034780-NM

Before: Kelly, P.J. and Cavanagh and Talbot, JJ.

PER CURIAM.

Plaintiff appeals an order granting summary disposition in favor of defendant in this legal malpractice case. We affirm.

I. Facts

Plaintiff retained defendant for legal representation in a divorce action filed against her husband, John Rogin who owned an automobile dealership and other business assets. For the purpose of settlement, the parties relied on the valuation of Rogin's dealership provided by Rogin's corporate attorney. When the divorce settlement was placed on the record, both parties indicated their choice to settle the divorce based on the valuation provided:

MR. McGINNIS (Rogin's attorney). I think we'd also like to make a record here, Judge. Both the parties acknowledge as part of the settlement is [sic] that they waive the right of formal discovery and valuation here on the part of Mr. Vestevich and myself. There has been no formal discovery as it relates to the values of the GM dealership or the other properties and I'd like this record to reflect that that [sic] the parties agreed to that and I would like that to be part of the record. Mr. Rogin, do you understand that? Nothing has been valued here as it relates to these numbers that we're placing on the record here today and you agree to that, sir?

MR. ROGIN. Yes.

MR. McGINNIS. Okay.

MR. VESTEVICH. And I likewise would ask my client if that is her understanding and agreement.

MS. ROGIN. Yes.

On the record, plaintiff answered “Yes” when asked if the terms of the settlement agreement were “acceptable and agreeable” to her. She also answered “Yes” when asked “Do you understand that this is a final and binding agreement.”

After the divorce settlement was placed on the record, defendant prepared a judgment of divorce with the following language:

IT IS FURTHER ORDERED that each party recognizes and accepts that formal discovery was not accomplished in this case, the parties being mutually confident of the truthfulness and accuracy of the disclosures made between them. *The parties have not requested or obtained appraisals of the various assets of this marriage, although fully advised by both counsel as to the potential for doing so. In spite of said advice, and in reliance upon the mutual representations made by and between the parties, such discovery and appraisals have been waived by both parties.* Each party represents and warrants that all assets have been fully disclosed herein, and that no assets exists in which either have an interest, except as described herein. [Emphasis added.]

Plaintiff signed this order, but it was never entered. Subsequently, plaintiff discovered that Rogin failed to disclose \$120,000 that he had in the bank. Plaintiff filed several motions seeking to reopen discovery. Although the trial court permitted additional discovery with regard to the hidden assets, it did not permit additional discovery with regard to the valuation of Rogin’s dealership. In the opinion and order ultimately entered, the trial court made the following findings of fact:

Plaintiff filed her complaint for Divorce on August 4, 1998. Prior to filing, the parties met with Bruce Knight, Defendant’s corporate attorney, to attempt to mediate a settlement. For purposes of settlement, the parties accepted valuations set forth in Plaintiff’s Exhibit 1, “Rogin Assets and Proposed Divorce Settlement.” The parties agreed to the valuations provided by Mr. Knight and further agreed that their intent was to divide the marital property equally. When the parties were close to settlement, Mr. Knight advised the parties to seek separate counsel. He referred Plaintiff to Philip Vestevich and Defendant to Donald McGinnis.

On March 11, 1999, the attorneys and parties appeared before the Honorable Linda Hallmark to put a settlement on the record. The settlement purported to incorporate all the terms agreed upon by the parties. Each party acknowledged on the record that he/she waived formal discovery as to the value of the martial assets.

In September 2001, plaintiff filed this malpractice claim against defendant alleging in pertinent part that defendant breached the standards of legal practice by failing to conduct

discovery regarding Rogin's assets and failing to advise plaintiff not to accept Rogin's valuation of the dealership. In November 2001, defendant filed a motion for summary disposition, under MCR 2.116(C)(7) and (C)(10), arguing that because plaintiff waived formal discovery, judicial estoppel and collateral estoppel barred her claim. In response, plaintiff admitted that she "waived her right to conduct discovery in open court on the record." But in an attached affidavit, plaintiff attested that before Rogin's attorney raised the discovery issue on the record, plaintiff had never discussed discovery with defendant. She also attested that she misunderstood the waiver and thought it meant that she was waiving her right to trial. She further attested that defendant did not try to dissuade her from waiving discovery.

The trial court granted defendant's motion under MCR 2.110(C)(10) applying judicial estoppel based on plaintiff's waiver. The trial court rejected plaintiff's affidavit finding it was contradicted by her previously sworn testimony. It further ruled that defendant had no duty to dissuade plaintiff from waiving discovery or agreeing to the settlement.

II. Analysis

Plaintiff argues that the trial court erred in granting summary disposition in favor of defendant. We disagree.

This Court reviews de novo a trial court's determination with regard to a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(C)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Id.* at 120.]

A claim of legal malpractice requires the plaintiff to plead and prove: (1) an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was a proximate cause of an injury; and (4) an injury. *Persinger v Holst*, 248 Mich App 499, 502; 639 NW2d 594 (2001), quoting *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995), quoting *Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993). An attorney has a duty to "use and exercise reasonable care, skill, discretion, and judgment with regard to the representation of the client . . ." *Persinger, supra* at 502. "[A]n attorney does not have a duty to insure or guarantee the most favorable outcome possible. An attorney is never bound to exercise extraordinary diligence, or act beyond the knowledge, skill, and ability ordinarily possessed by members of the legal profession." *Simko, supra* at 656.

The trial court did not err in granting summary disposition in defendant's favor. On the record at the divorce hearing, plaintiff voiced her understanding and agreement to enter into a settlement without "formal discovery" regarding the valuation of Rogin's dealership. Plaintiff then voluntarily entered into a settlement agreement based on the valuation provided. After the settlement was put on the record, plaintiff also signed a proposed judgment which stated that counsel advised her of the potential for conducting discovery, but chose she to rely on Rogin's

representations about his assets. In its final order, the trial court found that for purposes of settlement the parties agreed to accept the valuation provided by Rogin and waived formal discovery regarding the value of marital assets.

Thus, the record unequivocally shows that plaintiff acknowledged both that defendant advised her regarding discovery and that she chose to forego further discovery instead relying on Rogin's valuation in reaching a settlement. This action against defendant is nothing more than an attempt by plaintiff to revisit the issues in the divorce action to which she did not object when she had the opportunity to do so. Indeed, plaintiff not only failed to object, she affirmatively agreed both in writing and under oath.¹ Because the record is replete with plaintiff's admissions that she was informed of potential discovery but chose to base her settlement agreement on the valuation provided, she cannot create a genuine issue of material fact with her affidavit contradicting these admissions. Further, the standard of practice does not saddle defendant with responsibility for a client's bad choice when that choice was fully informed. See *Persinger, supra*. The trial court did not err in granting summary disposition to defendant because plaintiff failed to establish a genuine issue of material fact with regard to defendant's breach of his professional duty. We decline to address the other issues raised by plaintiff because they are not necessary to the resolution of this appeal.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot

¹ Plaintiff's desire to expedite the divorce is also evident in the lower court record. At the divorce hearing, she requested that the trial court "make the divorce effective today and now wait until a judgment is prepared and submitted to the Court."