David Grogins et al. v. Lampert, Williams & Toohey, LLC et al.

FSTCV106005879S

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF STAMFORD-NORWALK AT STAMFORD

2013 Conn. Super. LEXIS 538

March 11, 2013, Decided
March 11, 2013, Filed

NOTICE: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

CASE SUMMARY:

OVERVIEW: In this malpractice action, defendant was granted summary judgment because plaintiffs were required to disclose an expert who would testify as to defendant's alleged breaches of the standard of care in order to maintain their cause of action in count two against defendant and plaintiffs, despite having the opportunity, failed to do so.

OUTCOME: Defendant's motion granted as to counts two and three.

JUDGES: [*1] David R. Tobin, Judge Trial Referee.

OPINION BY: David R. Tobin

OPINION

MEMORANDUM OF DECISION

In their amended complaint dated September 20, 2011, the plaintiffs David A. Grogins and Belair Builders, LLC, assert various causes of action against the defendant law firm of Lampert William & Toohey, LLC, and attorneys, Philip J. Toohey and Gregory J. Williams. The causes of action arise out of the following allegations. In or around September 2004 Grogins entered discussions with third party David Karson concerning the formation of a joint venture in which the two would each contribute capital to purchase real property in Stamford, Connecticut, and develop two new single-family residences thereon. Grogins was to be responsible for all facets of the construction of the two homes. Upon the sale of each home, Grogins and Karson were to be paid their expenses proportionally with respect to the lot sold and "after payment of the maximum allowed mortgage on the lot." Thereafter each would receive half of the net profits.

During the course of his negotiations with Karson, Grogins retained the services of the defendant, Lampert, Williams & Toohey, LLC (the firm), a limited liability company registered in Connecticut [*2] that offered legal services to its clients. The firm assigned the defendant, Philip Toohey, a member and attorney at the firm, to represent Grogins. The scope of Toohey's representation

included structuring the transaction and drafting the agreement between Grogins and Karson.

On November 16, 2004, Karson, acting through a limited liability company known as Brooklanta Partners, LLC (Brooklanta), of which he was the sole member, purchased two adjoining lots in Stamford known as 12 Bel Aire Drive and 725 High Ridge Road. The lots were to be used for the joint venture. As part of the purchase, a blanket mortgage to Peoples Bank was recorded on November 16, 2004, in the amount of $720,000, encumbering both lots. The plaintiffs allege that Toohey did not inform Grogins of the blanket mortgage.

On December 1, 2004, in furtherance of the joint venture, Toohey formed the plaintiff, Belair Builders, LLC (Belair), a Connecticut limited liability company of which Grogins was the sole member. Belair was to handle the construction of the two homes. Toohey then drafted an agreement entitled "Construction Agreement for the Construction of a Home," which was executed upon the advice of Toohey by Grogins [*3] on behalf of Belair on April 6, 2005. Brooklanta countersigned through its member Karson. During the period December 2004 through September 2005, the plaintiffs constructed a 5,167 square foot residence on the lot at 12 Bel Aire Drive.

On March 14, 2006, Brooklanta refinanced the $720,000 mortgage to a new mortgage from BankUnited, FSB, in the amount of $732,000 and which was solely collateralized by the lot at 12 Bel Aire Drive. The plaintiffs allege that they were not made aware of that encumbrance. On September 13, 2006, Brooklanta further encumbered 12 Bel Aire Drive with a mortgage in the amount of $350,000 in favor of a Connecticut limited liability company known as 725 High Ridge Road, LLC. The plaintiffs allege that they were not made aware of that encumbrance.

In November 2006 a buyer offered to purchase the newly constructed home at 12 Bel Aire Drive for the sum of $1,100,000. Due to the nature of the joint venture agreement, however, Brooklanta was able to refuse to sell the property for that price unless the full amount of the $732,000 mortgage was paid from the sale. That same month, Toohey and the firm attempted to negotiate a settlement with Brooklanta on behalf of the [*4] plaintiffs but were ultimately unable to compel the sale of the property. In April 2007, Williams, also an attorney at the firm, began direct representation of the plaintiffs and filed a lawsuit on their behalf against Brooklanta. The facts alleged by the plaintiffs in the complaint do not indicate the status of that lawsuit, but do allege that Williams initiated the suit for the purpose of mitigating Toohey's malpractice. On June 17, 2009, the plaintiffs discharged the defendants.

The plaintiffs further allege that they would not have executed the joint venture agreement if they had known that the $720,000 mortgage was a blanket mortgage or that the agreement did not prevent Karson and Brooklanta from further encumbering the properties. The plaintiffs also allege that Toohey and the firm breached the duties they owed to the plaintiffs by failing to make the plaintiffs owners of the premises, failing to advise the plaintiffs to file a mechanics lien prior to commencing construction, failing to require that any mortgage on either property be spread out among the properties, failing to prepare or obtain a title report and failing to inform the plaintiffs of the nature of the mortgages [*5] on the property. Finally, the plaintiffs allege that Williams and the firm breached duties owed to the plaintiffs by failing to inform the plaintiffs of the firm's alleged malpractice and continuing to represent the plaintiffs in a suit against Karson and Brooklanta despite the potential for a conflict of interest created by the firm's alleged malpractice. The plaintiffs claim that as a result of the misconduct of the defendant they lost all of the funds they expended in constructing the residence on 12 Bel Aire Drive, a sum exceeding $650,000.

In count one, the plaintiffs bring a cause of action for legal malpractice against Toohey and the firm. In count two, the plaintiffs bring a cause of action for legal malpractice against Williams and the firm. In count three, the plaintiffs bring a cause of action for breach of fiduciary duty against Williams and the firm.

On August 15, 2012, the plaintiffs filed a disclosure of expert witness, naming Gregory Cava as their expert. The disclosure is accompanied by a copy of Cava's report. According to excerpts from Cava's deposition, submitted by Williams as an attachment to his motion for summary judgment, Cava offered no opinion as to the propriety [*6] of Williams' conduct in the course of his representation of the plaintiffs.

On November 13, 2012, Williams filed a motion for summary judgment (#139.00) asserting that there is no genuine issue of material fact and Williams is entitled to judgment as a matter of law as to counts two and three

because the plaintiffs have failed to notice an expert witness who will testify as to Williams' alleged malpractice.[1] The motion is accompanied by a memorandum of law (#140.00) and two exhibits--the plaintiffs' disclosure of expert witness and excerpts from Cava's deposition. On December 4, 2012, the plaintiffs filed their memorandum in objection, unaccompanied by exhibits. (#142.00.) Williams filed a memorandum in reply on December 7, 2012. (#143.00.) Argument was heard by the court on the short calendar on December 10, 2012.

1 Neither Toohey nor the firm join Williams on the present motion.

DISCUSSION

"Summary judgment is a method of resolving litigation when pleadings, affidavits, and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law . . . The motion for summary judgment is designed to eliminate [*7] the delay and expense of litigating an issue when there is no real issue to be tried." (Citations omitted.) *Wilson v. New Haven, 213 Conn. 277, 279, 567 A.2d 829 (1989)*. "*Practice Book §17-49* provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Brooks v. Sweeney, 299 Conn. 196, 210, 9 A.3d 347 (2010)*. "In ruling on a motion for summary judgment, the court's function is not to decide issues of material fact, but rather to determine whether any such issues exist." (Internal quotation marks omitted.) *Maltas v. Maltas, 298 Conn. 354, 365, 2 A.3d 902 (2010)*.

"The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. [*8] To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under *Practice Book §[17-45*]." (Internal quotation marks omitted.) *Ramirez v. Health Net of the Northeast, Inc., 285 Conn. 1, 11, 938 A.2d 576 (2008)*.

COUNT TWO: LEGAL MALPRACTICE

"As a general rule, for the plaintiff to prevail [*9] in a legal malpractice case in Connecticut, he must present expert testimony to establish the standard of proper professional skill or care . . . The requirement of expert testimony in malpractice cases serves to assist lay people, such as members of the jury . . . to understand the applicable standard of care and to evaluate the defendant's actions in light of that standard." (Internal quotation marks omitted.) *Grimm v. Fox, 303 Conn. 322, 329-30, 33 A.3d 205 (2012)*. "There is an exception to this rule, however, where there is such an obvious and gross want of care and skill that neglect is clear even to a lay person . . . Nevertheless, [t]he exception to the need for expert testimony is limited to situations in which the defendant attorney essentially *has done nothing whatsoever* to represent his or her client's interests . . ." (Citations omitted; emphasis added; internal quotation marks omitted.) *Id., 330*. "Finally, summary judgment [is] proper when [a] plaintiff alleging legal malpractice fails to establish [his] claim by expert testimony." (Internal quotation marks omitted.) *Id*.

Williams argues that because the plaintiff's only expert witness stated at his deposition that he has no opinion [*10] as to the propriety of Williams' representation of the plaintiffs, and because an expert's testimony is required in a legal malpractice claim, summary judgment is appropriate as to count two. More particularly, as shown by the defendant's supporting affidavits and exhibits, when Cava was asked at his

deposition: "And just so I'm clear, then you have no opinion and it's not your opinion that Mr. Lampert or Mr. Williams violated the standard of care; true?" Cava responded: "Not in their capacities, no, not as individuals."

The plaintiffs do not submit evidence to the contrary, but respond instead that Cava will testify that Toohey committed malpractice, and therefore it is for the jury to decide whether Williams committed further malpractice by not informing the plaintiffs of Toohey's misconduct. This is because, the plaintiffs argue, the jury will be presented with sufficient evidence to determine that Toohey committed malpractice and that Williams was aware of it, and a jury is competent to decide upon such evidence whether Williams was under an obligation to disclose his knowledge of Toohey's alleged malpractice.

The plaintiffs cite no directly applicable legal authority to support [*11] the above position, but instead point to the Appellate Court's decisions in *Caron v. Adams, 33 Conn.App. 673, 638 A.2d 1073 (1994)*, a medical malpractice case, and *St. Onge, Steward, Johnson & Reens, LLC v. Medica Group, Inc., 84 Conn. App. 88, 851 A.2d 1242 (2004)*, an action by an attorney to recover legal fees from his client. The plaintiffs maintain that the present case is like *Caron* and it is therefore for the jury to determine whether it was a breach of duty for Williams not to inform the plaintiffs of Toohey's alleged malpractice. As an alternative, the plaintiffs argue that in accordance with *St. Onge*, there is no bright line rule requiring expert testimony in malpractice cases and the court should not require expert testimony here.

Williams responds that a jury is unequipped to evaluate Williams' conduct without the assistance of expert testimony because the jury will need to decide whether a failure to disclose or report malpractice is malpractice itself. Such a determination requires testimony concerning the particular professional standard of care owed by an attorney who becomes aware that his firm may have committed malpractice.

In *Caron v. Adams, supra, 33 Conn.App. 673*, the court held that a hospital [*12] was not entitled to a jury instruction on the necessity of expert testimony in a negligence action that was based on the hospital's failure to establish or maintain a policy concerning informed consent. The court in *Caron*, after reviewing the facts before it, classified the claim as a claim for general negligence and accordingly did not require expert testimony. In *St. Onge, Steward, Johnson & Reens, LLC v. Medica Group, Inc., supra, 84 Conn.App. 88*, the court held that a law firm is generally required to present expert testimony supporting the reasonableness of its fees when it brings an action against its client for collection of attorneys fees. Both cases are inapposite here.

The plaintiff's reliance on *Caron v. Adams, supra, 33 Conn.App. 673* is misplaced because that case concerned allegations amounting to general negligence, whereas the allegations in count two of their complaint unequivocally allege professional negligence. In that count the plaintiffs allege that Williams owed a duty to the plaintiffs as their attorney, and that he breached that duty by not informing the plaintiffs of Toohey's alleged malpractice or that a conflict of interest may have existed. This is a specific [*13] allegation of a breach of the professional standard of care owed by an attorney to his client, not a general allegation of negligence that can be understood without expert testimony.

Similarly, *St. Onge, Steward, Johnson & Reens, LLC v. Medica Group, Inc., supra, 84 Conn.App. 88* is inapposite because the present case is not an action by an attorney to collect attorneys fees, and even if it were, *St. Onge* held that expert testimony is usually required.

Similarly, indirect testimony concerning Toohey's alleged malpractice is insufficient to satisfy the expert testimony requirement with respect to Williams because the allegations against Williams concern a different period of time and different acts. Absent legal authority or policy analysis to the contrary, which the plaintiff does not present, in such a case indirect testimony of a firm's general malpractice is insufficient to satisfy the expert testimony requirement with respect to an individual attorney of the firm. Without expert testimony, a jury would be left to decide the propriety of the separate specific acts taken by the individual attorney without any guidance by which to determine the standard of care applicable to those acts.

In [*14] the alternative, the plaintiffs argue, that in accordance with *Paul v. Gordon, 58 Conn.App. 724, 754 A.2d 851 (2000)*, no expert testimony is required because Williams' alleged negligence is so gross as to be clear to a jury. Williams responds that the gross negligence exception does not apply here because Williams did endeavor to protect the interests of the plaintiffs and that, in accordance with *Grimm v. Fox, supra, 303 Conn. 322,*

gross negligence consists of cases where the attorney does essentially nothing at all to protect the interests of his client.

In *Paul v. Gordon, supra, 58 Conn.App. 724*, the court held that no expert testimony was required in a case where the allegation against an attorney was that he had done absolutely nothing to protect the interests of the client because his conduct was so lacking in care and skill that the neglect would be clear even to a lay person. In *Grimm v. Fox, supra, 303 Conn. 335-36*, the court elaborated on the gross negligence exception set forth in *Paul v. Gordon*, stating: "[our] Appellate Court has upheld grants of summary judgment in favor of attorneys when disgruntled clients have sued for legal malpractice on the basis of an omission by their attorneys, [*15] but have failed to retain or disclose an expert witness to testify that such omissions breached the standard of care the attorneys owed to their clients . . . Although [each of these cases] . . . involved omissions and failures by the attorneys therein, the Appellate Court consistently has required a more significant failure or omission to warrant the application of the exception to the expert testimony requirement in legal malpractice cases." (Citations omitted.) Thus, *Grimm v. Fox, supra, 303 Conn. 330* explained that the exception to the expert testimony requirement is limited to cases where "defendant attorney essentially *has done nothing whatsoever* . . ." (Emphasis added; internal quotation marks omitted.)

In the present case, the plaintiffs allege in count two that Williams failed to inform the plaintiffs of Toohey's alleged malpractice. These allegations do not state so significant a failure or omission as to warrant the application of the gross negligence exception to the expert testimony requirement because they fail to allege that Williams has done nothing whatsoever. *Grimm v. Fox, supra, 303 Conn. 330*. Instead, additional allegations in the count specifically show that Williams [*16] did act by bringing suit against Karson and Brooklanta. Whether or not bringing the suit against Karson is characterized by the plaintiffs as self-serving, the fact remains that Williams did perform at least some acts on behalf of the plaintiffs, and his conduct therefore does not, under our state's law, amount to such a glaring lack of care so as to constitute gross negligence.

Consequently, the court finds that the gross negligence exception does not apply. The plaintiffs were therefore required to disclose an expert who will testify as to Williams' alleged breaches of the standard of care in order to maintain their cause of action in count two against Williams. Williams has submitted evidence showing that the plaintiffs, despite having the opportunity, have failed to do so. In the absence of any contest on the part of the plaintiffs, Williams has established that there is no genuine dispute of material fact with respect to count two and he is entitled to judgment as a matter of law.

COUNT THREE: BREACH OF FIDUCIARY DUTY

"Although every attorney-client relationship imposes a fiduciary duty on the attorney . . . a plaintiff cannot avoid his burden to present expert testimony to articulate [*17] the contours of that relationship by styling his cause of action as one for breach of fiduciary duty." (Citation omitted.) *Marciano v. Kraner, 126 Conn.App. 171, 178-79, 10 A.3d 572*, cert. denied, *300 Conn. 922, 14 A.3d 1007 (2011)*. In essence, the law of our state prevents litigants from circumventing, by creative pleading, the requirement of expert testimony because "in most cases, the determination of an attorney's standard of care . . . is beyond the experience of the average layperson, including members of the jury and perhaps even the presiding judge . . ." (Internal quotation marks omitted.) *Marciano v. Kraner, supra, 126 Conn.App. 179*.

In *Marciano v. Kraner, supra, 126 Conn.App. 180*, the court held that a plaintiff's "failure to present any expert testimony whatsoever as to the attorney-client relationship was fatal to his cause of action for breach of fiduciary duty." There, the plaintiff's allegations of breach of fiduciary duty were essentially the same as the plaintiff's allegations of legal malpractice. The court stated that "our review of the record discloses that the plaintiff's count for breach of fiduciary duty is basically nothing more than a carbon copy of his count for legal malpractice." *Marciano v. Kraner, supra, 126 Conn.App. 178*. [*18] Hence, the court concluded that, under those facts, the expert testimony requirement applied to the breach of fiduciary duty cause of action.

Williams argues that summary judgment is proper with respect to the allegations against him in count three because the allegations of breach of fiduciary duty in that count mirror the substance of the allegations in count two, and a plaintiff cannot avoid the requirement of expert testimony in a legal malpractice action by characterizing a claim as one of breach of fiduciary duty.

The plaintiffs respond that summary judgment is not proper with respect to count three because the present allegations of breach of fiduciary duty are separate and distinct. More particularly, the plaintiffs contend that the allegations in count three are that Williams breached the duty of loyalty he owed to the plaintiffs as their fiduciary when he did not inform the plaintiffs of the potential for a conflict of interest, and, therefore, the burden automatically shifts to Williams to show by clear and convincing evidence that his conduct with respect to the plaintiffs was fair. Williams responds that simply asserting the existence of a fiduciary relationship in a legal [*19] malpractice case is insufficient to overcome the requirement of expert testimony, and that because there remains no difference between the substance of the allegations in counts two and three, the absence of any expert testimony with respect to Williams requires summary judgment as to count three.

The court agrees with Williams that the allegations of breach of fiduciary duty contained in count three substantially mirror the allegations in count two, adding only that language which is required to allege the existence of a fiduciary relationship. In both counts the plaintiffs base their cause of action on Williams' alleged failure to advise the plaintiffs that Toohey had committed malpractice and that a conflict of interest was likely in the event that Williams or the firm continued to represent the plaintiffs. Despite the plaintiffs' attempts to characterize these allegations as a more specific breach of the duty of loyalty, the plaintiffs have failed to allege conduct which is substantially different from that which is the basis of their claims of legal malpractice. Thus, the plaintiff cannot overcome the requirement of expert testimony with respect to Williams' conduct as alleged [*20] in count three. In the absence of any such testimony, the court finds that Williams has demonstrated that he is entitled to summary judgment with respect to count three as a matter of law.

CONCLUSION

For the reasons stated above, the court grants defendant Williams' motion for summary judgment with respect to counts two and three.

David R. Tobin, Judge Trial Referee