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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-134

Filed: 5 September 2017

Buncombe County, No. 12 CVS 2333

LARRY HOLBERT, Plaintiff,

v.

RONALD G. BLANCHARD, BLANCHARD & NEWMAN, a partnership consisting of RONALD G. BLANCHARD and GREGORY A. NEWMAN, KATHERINE E. FISHER, and SIEMENS LAW OFFICE, PA, Defendants.

Appeal by plaintiff from order entered 7 July 2016 by Judge Richard L. Doughton in Buncombe County Superior Court. Heard in the Court of Appeals 7 June 2017.

Paul I. Klein, PLLC, by Paul I. Klein, for plaintiff-appellant.

Long, Parker, Warren, Anderson, Payne & McClellan, P.A., by Steve R. Warren, for defendants-appellees.

DAVIS, Judge.

In this case, we consider whether the trial court properly entered summary judgment as to the plaintiff's legal malpractice claim alleging that his attorneys negligently advised him to enter into a settlement agreement in connection with his divorce. Plaintiff Larry Holbert appeals from the trial court's order granting

summary judgment in favor of attorneys Ronald G. Blanchard and Katherine E. Fisher and their respective law firms, Blanchard & Newman and Siemens Law Office, P.A. (collectively “Defendants”). For the following reasons, we affirm.

Factual and Procedural Background

Holbert alleges that Defendants committed legal malpractice in connection with their representation of him in the underlying divorce case between him and his wife that was brought in Henderson County District Court. Therefore, we discuss below the relevant factual and procedural history of the divorce action before turning to the allegations and proceedings in the malpractice case from which this appeal arises.

I. Divorce Action

Holbert, a Henderson County businessman, began corresponding in 1996 with Margarita Belila (“Margarita”), who was then a resident of the Philippines. They eventually decided to marry, and Margarita arrived in North Carolina in late 2000 for that purpose.

At Holbert’s request, Margarita agreed to sign a prenuptial agreement. Holbert had originally arranged for attorney Farruk Ikbal to draft the agreement. However, as the date set for the marriage approached and the agreement had not yet been received from Ikbal, Holbert engaged another attorney, Ed Groce, to draw up a

prenuptial agreement. Holbert and Margarita signed that agreement on 7 February 2001.

Later that same day, the agreement drafted by Ikbal arrived in the mail. Holbert and Margarita proceeded to sign that document as well. A marriage ceremony was performed on 9 February 2001.

In September 2009, Holbert and Margarita got into an argument stemming from Holbert's suspicion that she had been stealing gold and silver from him. During the argument, Holbert pointed a gun at Margarita and stated, "[y]our brains will be all over the wall. Where is my gold and silver?" In October 2009, Margarita filed criminal charges in Henderson County District Court against Holbert along with a domestic violence complaint pursuant to Chapter 50B of the North Carolina General Statutes. In addition, she brought a civil action against him in which she sought divorce from bed and board, post-separation support, alimony, legal fees, and an equitable distribution.

In order to defend himself in the divorce action, Holbert retained Fisher, who subsequently engaged Blanchard to assist in her representation of Holbert. On 20 October 2009, Holbert, through his attorneys, filed a motion to dismiss Margarita's claim for equitable distribution on the ground that a prenuptial agreement had existed between the parties that barred her from seeking such a remedy.

A hearing on Holbert’s motion was scheduled for 10:00 a.m. on 6 April 2010. On that day, however, Holbert was suffering from various medical conditions, and his doctor had provided him with a written note excusing him from appearing in court. Blanchard telephoned Holbert several times during the morning and early afternoon hours to request that he come to the courthouse. After initially responding that he did not feel well enough to appear in court, Holbert eventually relented and arrived at the courthouse at approximately 2:00 p.m.

Upon his arrival, Holbert, several members of his family, and Blanchard met in a small room at the courthouse to discuss a proposed settlement between Holbert and Margarita. Holbert later testified that he did not remember the details of this conversation other than the fact that Blanchard urged him to enter into the proposed settlement. Following the meeting, a hearing was held before the Honorable Athena Fox Brooks in which she conducted a colloquy with both Holbert and Margarita to ensure that they understood the agreement and were entering into it voluntarily. The agreement was memorialized in a “Memorandum of Judgment/Order,” which was entered that day and bore the signatures of the parties, their counsel, and Judge Brooks. The terms of the agreement were subsequently incorporated into a more formal order that was entered by Judge Brooks on 6 May 2010.¹

¹ For the remainder of this opinion, we refer to the settlement agreement between Holbert and Margarita — as set forth in the trial court’s orders of 6 April 2010 and 6 May 2010 — as the “Settlement.”

The Settlement provided that Margarita would dismiss her Chapter 50B domestic violence complaint against Holbert as well as her requests for alimony, post separation support, and legal fees in connection with the divorce action in exchange for Holbert's agreement to pay her \$50,000 and waive any potential defenses to her claim for equitable distribution based upon the prenuptial agreements. On 9 April 2010, Holbert paid Margarita the \$50,000 required by the Settlement.

On 4 February 2011, Holbert filed a motion pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure requesting that the court vacate its orders memorializing the Settlement. Holbert's principal argument in this motion was that his poor health on 6 April 2010 had rendered him incompetent to knowingly and voluntarily enter into the Settlement.

Following a hearing on 14 February 2011, Judge Brooks denied Holbert's motion in an order entered 11 May 2011. The order included the following pertinent findings of fact:

11. On April 6, 2010, [Holbert] was accompanied by his daughter, his sister and his brother

12. On April 6, 2010, the parties, through their counsel, negotiated seeking to settle the issue of the motion to dismiss, and they did reach a settlement. This settlement was reflected in The Order, which was signed by [Margarita], her counsel, [Holbert], Blanchard and Fisher.

13. The parties then appeared in open court with their attorneys, and the undersigned questioned each

party. The Court takes judicial notice of her questioning at this time in that the undersigned always asks at least the following questions of each consenting party when presented in open court with a proposed consent order, i.e.: were you able to read and understand this?; have you had the ability to have your lawyer answer all your questions?; did you sign this of your own free will understanding what you signed?; do you understand that if I sign this today it becomes an order of the Court, enforceable by the Court?; is it your desire that I sign this today? Each question was asked by the Court of each party relative to The Order and each party answered each question affirmatively.

14. [Holbert] answered affirmatively under oath that both his daughter and his counsel had read The Order to [Holbert] and [he] understood it and had no questions about it.

15. The court had the opportunity to see and hear [Holbert] during the April 6, 2010, hearing and to listen to his speech and observe his manner. Had the Court any question as to [Holbert's] ability to fully understand what he was doing, the Court would not have signed The Order.

. . . .

17. During the interim 30 days between entry of The Order and the formal order, the attorneys for the parties prepared and reviewed and agreed upon the terms of the formal order, and there is no evidence that either party raised any question relative to the capacity of [Holbert] to knowingly consent to the entry of The Order.

. . . . During the hearing on April 6, 2010, this Court inquired of [Holbert] as to his understanding of and acquiescence to The Order that was entered that date and he reported to this Court that he understood the terms of The Order and that he consented to them.

B. Subsequent to questioning by the Court relative

to The Order, and before it was signed by the undersigned, Blanchard asked [Holbert] whether or not [he] understood the terms of the order and whether or not he wanted the order to be entered, and the response to these questions was all affirmative.

The order then concluded as follows:

3. On April 6, 2010, [Holbert] was capable of, had the cognitive function to and did consent to the entry of The Order.

4. [Holbert] ratified the order.

5. [Holbert] offered insufficient evidence to satisfy the Court that he was incompetent or lacking cognitive functioning at any time, including the various times that he ratified the order.

6. No evidence has been offered that The Order which was entered was consented to by mistake, inadvertence, surprise or excusable neglect.

7. The Court found no facts sufficient to show that The Order is void.

8. No evidence has been offered to satisfy the Court that there is any other reason for relieving [Holbert] from the operation of The Order.²

II. Legal Malpractice Action

On 14 May 2012, Holbert filed in Buncombe County Superior Court the legal malpractice case from which this appeal arises. In his sole claim, he alleged that Defendants engaged in professional negligence by advising him to agree to the

² The divorce action between Holbert and Margarita remains pending in the district court.

Settlement. Specifically, Holbert's complaint alleged that Defendants harmed him in the following ways:

17. Despite the ability of the two Pre-nuptial Agreements . . . to markedly diminish if not eliminate the financial consequences to Plaintiff of a divorce from his wife, the Defendants encouraged and persuaded Plaintiff to withdraw the agreements as defenses to the economic claims of the Plaintiff's former wife in her divorce action against Plaintiff.

18. Furthermore, the Defendants encouraged the Plaintiff to enter into a settlement agreement by which spousal support obligations would be waived by the ex-wife, in exchange for a \$50,000.00 payment, which the Plaintiff made.

19. The advice described hereinabove violated the standards of care for attorneys practicing in Hendersonville, North Carolina, Asheville, North Carolina, or similar communities, violated the duties that the Defendants . . . owed to the Plaintiff, and were the result of negligence and/or malpractice on the part of the Defendants.

Defendants filed an answer on 16 July 2012. On 28 April 2016, Defendants filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. A hearing on Defendants' motion was held before the Honorable Richard L. Doughton on 5 July 2016. On 7 July 2016, the trial court issued an order granting summary judgment in Defendants' favor and dismissing Holbert's lawsuit. Holbert filed a timely notice of appeal from that order.

Analysis

“On an appeal from an order granting summary judgment, this Court reviews the trial court’s decision *de novo*. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” *Premier, Inc. v. Peterson*, 232 N.C. App. 601, 605, 755 S.E.2d 56, 59 (2014) (internal citations and quotation marks omitted).

It is well established that “[t]he moving party has the burden of demonstrating the lack of any triable issue of fact and entitlement to judgment as a matter of law. The evidence produced by the parties is viewed in the light most favorable to the non-moving party.” *Hardin v. KCS Int’l, Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009) (internal citations omitted). We have held that “[a]n issue is ‘genuine’ if it can be proven by substantial evidence and a fact is ‘material’ if it would constitute or irrevocably establish any material element of a claim or a defense.” *In re Alessandrini*, 239 N.C. App. 313, 315, 769 S.E.2d 214, 216 (2015) (citation omitted).

In order to establish liability for legal malpractice, a plaintiff must prove “(1) that the attorney breached the duties owed to his client and that this negligence (2) proximately caused (3) damage to the plaintiff.” *Wood v. Hollingsworth*, 166 N.C. App. 637, 641-42, 603 S.E.2d 388, 392 (2004) (citation, quotation marks, and ellipsis omitted).

Here, Holbert has failed to forecast evidence from which a jury could conclude that Defendants committed legal malpractice in connection with their advice to him to enter into the Settlement. Although he pled in his complaint that Defendants' advice "violated the standards of care for attorneys practicing in Hendersonville, North Carolina, Asheville, North Carolina, or similar communities, [and] violated the duties that the Defendants . . . owed to [him]," Holbert did not offer sufficient evidence at the summary judgment stage to support his allegations.

It is undisputed that Holbert paid Margarita \$50,000 and waived his right to assert any available defenses under the prenuptial agreements *in exchange for* the valuable consideration of Margarita dismissing the domestic violence action against him as well as all of her claims in the divorce action except for her equitable distribution claim. Holbert did not present any evidence in response to Defendants' summary judgment motion to show the applicable standard of care in this context or how Defendants' advice fell outside of that standard.

Holbert has failed to point to any actual misrepresentations made by Defendants to him or offer evidence showing that they failed to explain to him that he was waiving any potential defenses he had based on the prenuptial agreements. Indeed, Holbert was unable to recall exactly what Blanchard said to him during the meeting preceding his decision to enter into the Settlement. Moreover, Judge Brooks found that "[Holbert] answered affirmatively under oath that both his daughter and

his counsel had read The Order to [Holbert] and [he] understood it and had no questions about it.”

Accordingly, because Holbert has failed to show a genuine issue of material fact, we must affirm the trial court’s order granting summary judgment. *See Frank v. Funkhouser*, 169 N.C. App. 108, 117, 609 S.E.2d 788, 795 (2005) (“[W]e conclude summary judgment was properly entered as plaintiff failed to present a sufficient forecast of evidence to present a jury question . . .”).

Conclusion

For the reasons stated above, we affirm the trial court’s 7 July 2016 order.

AFFIRMED.

Judges ELMORE and HUNTER, JR. concur.

Report per Rule 30(e).