

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

RAKANN KARADSHEH; and TUSCAN
MEDITERRANEAN CUISINE, INC.,

Plaintiffs,

Case No. 12-05222-NMB

vs.

HON. CHRISTOPHER P. YATES

JOHN B. KEMPSKI; and JOHN B. KEMPSKI,
P.C.,

Defendants.

_____ /

OPINION AND ORDER ON CROSS-MOTIONS FOR SUMMARY DISPOSITION

In 2009, Akram Karadsheh set out to buy a restaurant for his son, Plaintiff Rakann Karadsheh. When Akram found a restaurant near Rakann's home that was being sold with a liquor license, Akram entered into a purchase agreement and began operating the restaurant, Tuscan Mediterranean Cuisine, Inc. ("TMC"), before the sale was closed. But Akram's enthusiasm turned to dismay over the course of the next year as issues with the liquor-license transfer arose and events led to the breakdown of the relationship between Akram and the seller. Although Akram eventually purchased the restaurant, he abandoned his plans to buy the liquor license, but not before expending a significant sum in his failed attempt to secure the license. Ultimately, Rakann and TMC filed this legal-malpractice action against the attorney who worked on the liquor-license transfer, Defendant John B. Kempinski, and his law firm. Now, after discovery has closed, the Court finds that the plaintiffs are entitled to summary disposition under MCR 2.116(C)(10) on some elements of the claim for legal malpractice. Nevertheless, genuine issues of material fact preclude the Court from completely resolving the issue of liability on the legal-malpractice claim. Therefore, the Court must proceed with a trial.

I. Factual Background

The parties have filed cross-motions for summary disposition based on MCR 2.116(C)(7) and (10). “A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence[,]” see Maiden v Rozwood, 461 Mich 109, 119 (1999), and the Court must accept the allegations of the complaint “as true unless contradicted by documentation submitted by the movant.” Id. Similarly, in reviewing a motion pursuant to MCR 2.116(C)(10), “a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties” in “the light most favorable to the party opposing the motion.” Id. at 120. Therefore, the Court will lay the factual background of this dispute by relying on the evidence submitted by the parties.¹

Akram Karadsheh has made his way in the world by owning and operating more than a dozen restaurants over the decades. See Defendants’ Brief in Support of Motion for Summary Disposition, Exhibit 2 (Deposition of Akram Karadsheh at 11). In 2009, Akram decided to help his son, Plaintiff Rakann Karadsheh, follow in his footsteps by facilitating the purchase of a new restaurant, Plaintiff TMC.² See id. at 36. Akram found a restaurant near Rakann’s home called Booth One Corporation (“Booth One”) and owned by Daniel Chudik that had been listed for sale and was linked to an existing liquor license. See id. at 35-36. On November 6, 2009, with the assistance of their realtors, Akram and Chudik negotiated the sale of the restaurant for \$100,000. See id. at 35. Akram then began the process of requesting a transfer of the Booth One liquor license through the Michigan Liquor Control

¹ Neither party has provided the Court with a concise recitation of the facts that give rise to this dispute, but the Court has done its best to muddle through the extensive exhibits in an attempt to make sense of the facts underlying this dispute.

² Although Rakann was established as the president of TMC, his father facilitated the details of the purchase. Rakann only knew “that we’re buying a business, and that him and his brother would be running it.” See Defendants’ Brief in Support of Motion for Summary Disposition, Exhibit 2 (Deposition of Akram Karadsheh at 56-57).

Commission (“MLCC”). Akram hired Defendant Kempiski to assist in this transfer process, which Akram apparently assumed would go smoothly. The events that unfolded over the course of the next year, however, proved his assumption wrong.

First, when Akram made his initial request for the liquor-license transfer, the MLCC informed Akram that the license was being held in escrow, and it would not be released until Booth One paid overdue taxes owed to several government agencies. Thus, Akram entered into a second purchase agreement on January 29, 2010, whereby he agreed to pay Booth One’s past-due taxes and buy the property at a reduced price. See Defendants’ Brief in Support of Motion for Summary Disposition, Exhibit 7. The Court cannot tell whether Defendant Kempiski was involved in negotiating the terms of the revised purchase agreement. Akram testified that he hired Kempiski in November of 2009, id., Exhibit 2 (Deposition of Akram Karadsheh at 14), but Kempiski testified that he was not involved with the negotiations surrounding the terms of the January 29, 2010, purchase agreement. Id., Exhibit 21 (Deposition of John B. Kempiski at 22). Regardless, Akram did eventually pay the past-due taxes. In the meantime, Akram was anxious to open the restaurant, so on May 28, 2010, prior to the release of the liquor license from escrow and before closing on the purchase agreement, Akram opened TMC. See id., Exhibit 1 (Deposition of Rakann Karadsheh at 52). To further complicate the transaction, Akram hired Daniel Chudik, the owner of Booth One, to serve as the chef at TMC. See id., Exhibit 2 (Deposition of Akram Karadsheh at 24, 112).

With the restaurant open, Akram continued on his quest to secure the transfer of Booth One’s liquor license. In order for TMC to use the liquor license before the parties closed on the sale of the restaurant, the MLCC required TMC to satisfy the outstanding tax liens, enter into a lease with Booth One, and enter into a management agreement with Booth One. Thus, Defendant Kempiski assisted with the negotiation and drafting of a lease agreement and management agreement. See Defendants’

Brief in Support of Motion for Summary Disposition, Exhibit 21 (Deposition of John B. Kempksi at 25-26). With these documents in place and the taxes paid, the MLCC agreed to release the escrowed liquor license on June 24, 2010, see id., Exhibit 19, and TMC began selling liquor.

Soon thereafter, the relationship between Akram and Chudik fell apart. Akram attributed that development to Chudik's change in attitude after entering into the management agreement, which had given Chudik a great deal of control over TMC's bank account and operations. See Defendants' Brief in Support of Motion for Summary Disposition, Exhibit 2 (Deposition of Akram Karadsheh at 23-24). The discord between Chudik and Akram reached the boiling point in late September of 2010, when Chudik tried to lock Akram out of the restaurant and terminate the management agreement. See id., Exhibit 2 (Deposition of Akram Karadsheh at 25) & Exhibit 20. Due to the increasingly acrimonious nature of the real-estate dispute, Defendant Kempksi informed Akram that he could no longer provide legal representation for Akram and TMC. See id., Exhibit 2 (Deposition of Akram Karadsheh at 140) & Exhibit 21 (Deposition of John B. Kempksi at 15).

Although Defendant Kempksi withdrew from the transaction in September 2010, the dispute between Akram and Chudik persisted. Akram continued to operate the restaurant, but Chudik wrote a letter requesting that the MLCC cancel the transfer of the liquor license on October 25, 2010. See Defendants' Brief in Support of Motion for Summary Disposition, Exhibit 23. The MLCC granted this request, but TMC continued to operate despite the loss of the liquor license. See id., Exhibit 1 (Deposition of Rakann Karadsheh at 54). Akram then filed a lawsuit against Chudik seeking specific performance of the purchase agreement and liquor-license transfer, and Akram ultimately obtained a default judgment against Chudik on December 8, 2010. See id., Exhibit 24. Despite that judgment, Akram chose to abandon his plans to purchase the Booth One liquor license, and due to a lack of cash flow, Akram closed TMC in the spring of 2011. See id., Exhibit 1 (Deposition of Rakann Karadsheh

at 52). Akram eventually purchased a different liquor license and reopened TMC in November 2011. Id. at 54.

The plaintiffs contend that Defendant Kempinski is to blame for this long series of unfortunate events. Therefore, acting with power of attorney for his son, Plaintiff Rakann Karadsheh, Akram and TMC filed this lawsuit against Kempinski and his firm for legal malpractice, seeking damages for lost revenues, loss of good will, loss of other funds, payment and assumption of the various Booth One tax liabilities, subsequent legal fees, mental anguish, and exemplary damages. This case is scheduled for trial on August 25, 2014, and the parties have submitted cross-motions for summary disposition in the hope of securing a resolution of their disputed issues prior to trial.

II. Legal Analysis

The parties have raised three issues in their cross-motions for summary disposition. First, the plaintiffs seek partial summary disposition pursuant to MCR 2.116(C)(10) with respect to Defendant Kempinski's alleged breach of his duty to provide sound legal advice. Second, Defendant Kempinski seeks summary disposition under MCR 2.116(C)(10) because, he contends, the plaintiffs cannot prove that his actions were the cause-in-fact of their injuries. Third, Kempinski requests summary disposition under MCR 2.116(C)(7) because collateral estoppel bars the plaintiffs' claim. "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." West v Gen Motors Corp, 469 Mich 177, 183 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." Id. Similarly, summary disposition is appropriate under MCR 2.116(C)(7) only if there remains no factual dispute. RDM Holdings, LTD v Continental Plastics Co, 281 Mich App 678, 687 (2008). Applying these standards, the Court shall address the parties' competing summary-disposition motions.

Count One of the plaintiffs' third amended complaint alleges, in great detail, that Defendant Kempski and his law firm committed malpractice while working on the restaurant transaction. Such a claim requires proof of the following elements: "(1) the existence of an attorney-client relationship, (2) negligence in the legal representation of the plaintiff, (3) that the negligence was the proximate cause of an injury, and (4) the fact and the extent of the injury alleged." See Kloian v Schwartz, 272 Mich App 232, 240 (2006). "If there is an attorney-client relationship," which both sides agree existed in this case, "a duty to use and exercise reasonable care, skill, discretion, and judgment with regard to the representation of the client exists as a matter of law." See Persigner v Holst, 248 Mich App 499, 502 (2001). Specifically, "[a]n attorney has the duty to fashion such a strategy so that it is consistent with prevailing Michigan law." Simko v Blake, 448 Mich 648, 656 (1995). "However, an attorney does not have a duty to insure or guarantee the most favorable outcome possible." Id. Here, the plaintiffs seek summary disposition on Kempski's breach of duty, the defendants request summary disposition on the cause-in-fact component of the proximate-cause requirement, and the defendants rely upon the defense of collateral estoppel. The Court shall address these three issues in turn.

A. Breach of Duty.

The plaintiffs contend that the Court must grant partial summary disposition in their favor on the second element of the legal-malpractice claim, *i.e.*, negligence in the legal representation, because Defendant Kempski undisputedly breached seven duties he owed to the plaintiffs. Kempski's expert witness listed several duties that Kempski owed to the plaintiffs, and Kempski has admitted that he breached five of those duties. First, Kempski does not dispute that he breached his duty to determine the amount of the UCC and tax liens that were attached to the liquor license. See Defendants' Brief in Support of Motion for Summary Disposition, Exhibit 38 (Deposition of Sandra Cotter at 92, 112-113) & Exhibit 21 (Deposition of John B. Kempski at 181-182). Second, Kempski does not dispute that he

breached his duty to advise the plaintiffs about the potential successor tax liability before they entered into the management agreement. See id., Exhibit 38 (Deposition of Sandra Cotter at 111-112) & Exhibit 21 (Deposition of John B. Kempksi at 39). Third, Kempksi does not dispute that he breached his duty with respect to the drafting of the lease agreement. See id., Exhibit 38 (Deposition of Sandra Cotter at 114-115) & Exhibit 21 (Deposition of John B. Kempksi at 196). Fourth, Kempksi does not dispute that he breached his duty with respect to the drafting of the management agreement. See id., Exhibit 38 (Deposition of Sandra Cotter at 128) & Exhibit 21 (Deposition of John B. Kempksi at 256). Fifth, Kempksi does not dispute that he breached his duty to fully understand the process required by the MLCC to accomplish the transfer of the liquor license. See id., Exhibit 38 (Deposition of Sandra Cotter at 108, 120-121) & Exhibit 21 (Deposition of John B. Kempksi at 238-239). Consequently, the Court must grant partial summary disposition to the plaintiffs with regard to those five issues on which Kempksi has forthrightly made concessions.

But the Court cannot grant summary disposition with respect to the remaining two breaches of duties presented by the plaintiffs. First, although Kempksi had a duty to refrain from making knowing misrepresentations to the MLCC, Kempksi does not admit that he breached that duty. See id., Exhibit 21 (Deposition of John B. Kempksi at 50). Second, Kempksi obviously owed a duty to the plaintiffs to provide competent legal representation, but the Court cannot countenance the plaintiffs' sweeping allegation. Instead, the plaintiffs must allege specific duties that were breached. They have done so in several important respects, and those specific allegations stand as the permissible bases for their claim that Kempksi engaged in negligence in his representation of them.

B. Cause in Fact.

The defendants argue that the plaintiffs have failed to present evidence of cause in fact. In all negligence actions, the plaintiff must establish proximate cause, which “entails proof of two separate

elements: (1) cause in fact, and (2) legal cause, also known as ‘proximate cause.’” Skinner v Square D Co, 445 Mich 153, 162-163 (1994). “The cause in fact element generally requires showing that ‘but for’ the defendant’s actions, the plaintiff’s injury would not have occurred.” See id. at 163. “On the other hand, legal cause or ‘proximate cause’ normally involves examining the foreseeability of consequences, and whether a defendant should be legally responsible for such consequences.” See id. “A plaintiff must adequately establish cause in fact in order for legal cause or ‘proximate cause’ to become a relevant issue.” Id.

Akram Karadsheh, acting with a power of attorney for Plaintiff Rakann Karadsheh, has signed an affidavit stating: “Had Mr. Kempinski informed me or my son that an attempt to obtain a transfer of the escrowed Booth One liquor license by means of a management agreement with Booth One Corp. and Mr. Chudik would be comparatively expensive, time consuming, risky, or impossible, I would have recommended that my son not attempt to obtain the transfer of that license.” See Plaintiffs’ Response to Defendants’ Motion for Summary Disposition, Exhibit C. This affidavit is not notarized, but the Court finds ample support for that position in the deposition testimony of Akram Karadsheh. See Defendants’ Brief in Support of Motion for Summary Disposition, Exhibit 2. Consequently, the Court cannot grant summary disposition in favor of the defendants because the plaintiffs have created a genuine issue of material fact as to the cause-in-fact element of their legal-malpractice claim.

C. Collateral Estoppel.

Finally, the defendants insist that the plaintiffs should be estopped from litigating the issue of whether the management agreement effectively bound Booth One and Chudik to the sale of the liquor license. Collateral estoppel is designed to “eliminate costly repetition, conserve judicial resources, and ease fears of prolonged litigation.” See Nummer v Dep’t of Treasury, 448 Mich 534, 541 (1995). “Generally, the proponent of the application of collateral estoppel must show ‘that (1) a question of

fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel.” People v Trakhtenberg, 493 Mich 38, 48 (2012). Mutuality of estoppel “requires that in order for a party to estop an adversary from relitigating an issue that party must have been a party, or in privity to a party, in the previous action.” Monat v State Farm Ins Co, 469 Mich 679, 684 (2004). But in Michigan, “the lack of mutuality of estoppel should not preclude the use of collateral estoppel when it is asserted defensively to prevent a party from relitigating an issue that such party has already had a full and fair opportunity to litigate in a prior suit.” Id. at 691-692. Therefore, collateral estoppel serves as a mechanism of “issue preclusion,” see People v Gates, 434 Mich 146, 154 n 7 (1990), that can be invoked – at least defensively – even in the absence of mutuality of parties or their privies.

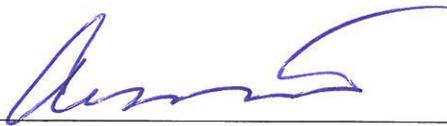
Here, the defendants have asked the Court to preclude the plaintiffs from relitigating the issue of whether the management agreement bound Booth One and Chudik to cooperate with the transfer of the liquor license. In 2010, Plaintiff TMC filed a lawsuit against Booth One and Chudik alleging that they had breached the purchase agreement and management agreement, and TMC requested specific performance of the January 29, 2010, purchase agreement. See Kent County Circuit Court Case No. 10-11456-CK. On December 8, 2010, the Court entered a default judgment requiring Booth One and Chudik to comply with the January 29, 2010, purchase agreement and to cooperate with the MLCC to accomplish the transfer of the liquor license, see Defendants’ Brief in Support of Motion for Summary Disposition, Exhibit 24, but the Court never actually ruled that Booth One and Chudik had breached the management agreement, as opposed to the purchase agreement. Therefore, the defendants cannot invoke the doctrine of collateral estoppel to prevent the plaintiffs from litigating the issue of whether the management agreement accomplished the purpose of binding Booth One and Chudik to cooperate with the liquor-license transfer.

III. Conclusion

For all of the reasons stated in this opinion, the Court shall grant partial summary disposition to the plaintiffs on several issues of duty and breach. That is, the defendants breached: (1) the duty to determine the amount of the UCC and tax liens attached to the liquor license; (2) the duty to advise the plaintiffs about the potential successor tax liability prior to entering into the management agreement; (3) the duty with respect to the drafting of the lease agreement; (4) the duty with respect to the drafting of the management agreement; and (5) the duty to fully understand the process required by the MLCC to accomplish the transfer of the liquor license. But there remains a genuine issue of material fact as to whether those breaches of duty were the cause in fact of the plaintiffs' injuries, *i.e.*, whether Akram Karadsheh would have continued to pursue the Booth One liquor license had he been properly advised about the risks and expense involved in the transfer. Furthermore, the defendants cannot invoke the doctrine of collateral estoppel to bar the plaintiffs from litigating the issue of whether the management agreement accomplished the purpose of binding Booth One and Chudik to cooperate with the liquor-license transfer. Therefore, the Court must deny the defendants' motion for summary disposition in its entirety.

IT IS SO ORDERED.

Dated: July 17, 2014


HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge