

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

INDUSTRIAL QUICK SEARCH, INC.;
and MICHAEL MEIRESONNE,

Plaintiffs,

Case No. 12-08354-NMB

vs.

HON. CHRISTOPHER P. YATES

LESLIE C. MORANT; LAW WEATHERS
and RICHARDSON, P.C.; and A.J.
BIRKBECK,

Defendants.

_____/

OPINION AND ORDER GRANTING SUMMARY DISPOSITION TO
DEFENDANTS MORANT AND LAW WEATHERS AND RICHARDSON

The decision to appeal an adverse ruling from a trial court to a court of appeals ordinarily is regarded by attorneys as a riskless endeavor because the result rarely can get worse for the appellant. Although the worst-case scenario for the appellant usually is an affirmance of the trial court's ruling, the decision here to proceed with an appeal resulted in hundreds of thousands of dollars in sanctions imposed at the direction of our Court of Appeals. To make matters worse, the plaintiffs in this case – Industrial Quick Search, Inc. (“IQS”) and Michael Meiresonne – passed up an offer made after oral argument to settle the case and a related matter at no cost. Still stinging from the disastrous outcome in that case, IQS and Meiresonne filed a legal-malpractice action against their attorneys, Defendants Leslie Morant, A.J. Birkbeck, and the firm Law Weathers and Richardson, P.C. (“Law Weathers”). The Court concludes that Attorney Morant and Law Weathers are entitled to summary disposition under MCR 2.116(C)(10), and the Court need not address the claim against Attorney Birkbeck, who has reached a resolution of his dispute with the plaintiffs.

I. Factual Background

“A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.” Corley v Detroit Bd of Educ, 470 Mich 274, 278 (2004). In evaluating such a motion, the Court “considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties.” See id. Here, the Court has the additional benefit of reviewing the facts as described in the unpublished decision from our Court of Appeals that gave rise to this legal-malpractice action. See Industrial Quick Search, Inc v Terry, No 284163 (Mich App Feb 11, 2010). Thus, the Court will set the factual background of this dispute by relying upon the facts described in the Terry opinion and supplementing those facts as necessary with the evidence presented by the parties.

“On August 3, 2006, Judge Robert Owens of the United State District Court for the Southern District of New York entered a default judgment on the issue of copyright infringement against [IQS] in Thomas Publishing Co v Industrial Quick Search, Inc, Doc No 02-CIV-3307(RO) [“Thomas I”].” Terry, No 284163, slip op at 1. “He did so because he found that [IQS] had directed [Christopher] Terry, its then-employee, and had shown him how, to plagiarize for its commercial benefit valuable materials copyrighted from Thomas Publishing Company [“Thomas Publishing”]; that Mr. Terry had followed the instructions given to him; and that, to thwart discovery, IQS had deliberately destroyed numerous documents critical to determining the scope and effect of its plagiarism.” Id. at 1-2. “In other words, Judge Owen found so-called “spoliation” which was severe enough to warrant the sanction of a default judgment.” Id. at 2. One year later, IQS filed suit against Terry in the Kent County Circuit Court “claiming that Mr. Terry had defamed it by falsely reporting to [Thomas Publishing] that his plagiarism had occurred at the direction of IQS.” Id. On February 20,

2008, Judge Dennis Kolenda issued an order dismissing IQS's claim against Terryyn pursuant to the doctrine of collateral estoppel, but Judge Kolenda noted that Michigan law was not particularly clear on that legal principle. Consequently, Judge Kolenda predicated his analysis upon what he predicted the "superior courts will do." See Defendant Leslie C. Morant and Law Weathers and Richardson's Brief in Support of Their Motion for Summary Disposition, Exhibit 11 (Order at 5). In the wake of Judge Kolenda's ruling, and based upon the advice of its attorneys, IQS filed an appeal in our Court of Appeals on the issue of collateral estoppel.

While the Kent County case was pending in our Court of Appeals, Thomas Publishing filed a second action against IQS in the United State District Court for the Southern District of New York ("Thomas II"), and IQS hired a collaborative group of attorneys to provide legal representation in New York and Michigan. Attorney A.J. Birkbeck choreographed the legal representation across the various cases, Attorney Leslie Morant of Law Weathers provided representation in Kent County, and other attorneys assisted with legal representation in New York. On February 3, 2010, our Court of Appeals heard oral arguments in the Kent County appeal. By all accounts, Judge Michael J. Talbot made clear his discontent with IQS for filing a lawsuit against Terryyn, its former paid intern, in its attempt to recover damages that it had been ordered to pay in the Thomas I action.

On February 5, 2010, Attorney Birkbeck attended a settlement conference in New York for the Thomas II matter, and Attorney James Rittinger presented IQS with a global walk-away offer. Pursuant to that offer, Rittinger agreed that Thomas Publishing would dismiss the Thomas II lawsuit in exchange for IQS's dismissal of the pending appeal from Kent County. See Defendant Birkbeck's Reply to Plaintiffs' Response to Birkbeck's Motion for Summary Disposition, Exhibit 12A (e-mail from Kalpana Nagampalli dated February 5, 2010). The parties dispute whether Attorney Morant

was advised of the walk-away offer, but the parties agree that IQS chose to reject that proposal. On February 11, 2010, our Court of Appeals rendered its decision on the Kent County appeal, affirming Judge Kolenda's order (albeit on different grounds) and *sua sponte* directing imposition of a sanction of actual and punitive damages against IQS in an amount to be determined by the trial court. Terryn, No 284163, slip op at 5. On remand, Judge Mark A. Trusock entered a judgment against IQS in the amount of \$364,894.00, which the parties later settled for \$334,891.00.

This chain of events prompted Plaintiff IQS and its principal, Plaintiff Michael Meiresonne, to file the present lawsuit for legal malpractice against Attorney Birkbeck, Attorney Morant, and Law Weathers on September 7, 2012. As trial drew near, the plaintiffs reached a settlement with Attorney Birkbeck, but the legal-malpractice claim against Morant and Law Weathers remains. The plaintiffs contend that Attorney Morant and Law Weathers committed malpractice by recommending that IQS appeal Judge Kolenda's order dated February 20, 2008, and by failing to recommend that IQS accept Attorney Rittinger's global walk-away offer in February of 2010. In response, Attorney Morant and Law Weathers have moved for summary disposition under MCR 2.116(C)(10).

II. Legal Analysis

“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.” See West v Gen Motors Group, 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. Here, the record reveals that Attorney Morant and Law Weathers are entitled to judgment as a matter of law.

To prevail on their claim for legal malpractice, the plaintiffs must demonstrate “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.” Kloian v Schwartz, 272 Mich App 232, 240 (2006). Attorney Morant and Law Weathers assert an entitlement to summary disposition under MCR 2.116(C)(10) because the plaintiffs have offered no evidence that either Attorney Morant or Law Weathers acted negligently during their legal representation of IQS in the Kent County matter.

Plaintiffs IQS and Meiresonne base their legal-malpractice claim on two theories. First, they contend that the defendants committed malpractice when they recommended that IQS appeal Judge Kolenda’s order of February 20, 2008. In that order, Judge Kolenda dismissed IQS’s claims against Terryn, but specifically noted that that decision – premised upon the doctrine of collateral estoppel – was based upon what Judge Kolenda predicted Michigan’s “superior courts will do” because Judge Kolenda could not find any binding precedent to guide his decision. See Defendant Leslie C. Morant and Law Weathers and Richardson’s Brief in Support of Their Motion for Summary Disposition, Exhibit 11 (Order at 5). Accordingly, Attorney Morant and Law Weathers had reason to believe that an appeal could yield a reversal of Judge Kolenda’s decision. Because “an attorney cannot possibly be required to predict infallibly how a court will rule[,]” see Simko v Blake, 448 Mich 648, 658 (1995), Attorney Morant and Law Weathers did not commit malpractice by recommending that IQS appeal a decision that was reached without the benefit of binding precedent. Further, the defendants had no reason to anticipate an atypical *sua sponte* sanction from our Court of Appeals. See Terryn, No 284163, slip op at 5. Thus, Attorney Morant and Law Weathers did not commit legal malpractice by recommending that IQS appeal Judge Kolenda’s decision of February 20, 2008.

Second, Plaintiffs IQS and Meiresonne allege that the defendants committed malpractice by failing to recommend acceptance of the walk-away offer proposed by Attorney Rittinger shortly after oral arguments took place in our Court of Appeals in February of 2010. The Court rejects that theory because the evidence presented by the parties establishes that Attorney Morant had no involvement in the decision to reject the walk-away offer. Morant was but one of the many attorneys retained by IQS between 2008 and 2010, and his role was to provide legal services solely in connection with the Kent County lawsuit. Attorney Birkbeck and Morant disagree about whether the former informed the latter of the offer, compare Defendant A.J. Birkbeck's Motion for Summary Disposition, Exhibit R (Deposition of A.J. Birkbeck at 55-56) with Deposition of Leslie Morant at 45,* but that dispute makes no difference because Morant was not involved in the discussions leading up to the decision to reject the walk-away offer. See Defendant Birkbeck's Reply to Plaintiffs' Response to Birkbeck's Motion for Summary Disposition, Exhibits 12A, 13C, 14B, 15B, 15G, 15H, 15K, 17A (e-mail traffic between IQS counsel discussing walk-away offer without copying Morant); see also id., Exhibit 12C (e-mails between Meiresonne and Birkbeck indicating that Meiresonne did not want walk-away offer explained to Morant). Birkbeck even testified that if Morant had known about the walk-away offer, Morant would likely have encouraged IQS and its team of attorneys to accept the offer in light of the beating that IQS took in our Court of Appeals on February 3, 2010. See Defendant A.J. Birkbeck's Motion for Summary Disposition, Exhibit R (Deposition of A.J. Birkbeck at 93). And beyond that, Meiresonne himself even testified that Morant was not involved in IQS's decision to reject the offer. See Defendant A.J. Birkbeck's Motion for Summary Disposition, Exhibit A (Deposition of Michael

* The Court obtained some of this evidence from Defendant Birkbeck's motion for summary disposition, but none of the parties supplied a copy of Defendant's Morant's deposition, so the Court must rely upon excerpts of that deposition contained in Morant's brief.

L. Meiresonne at 231). Instead, Attorney Birkbeck convinced IQS to reject the offer. See id. at 170. Thus, the record clearly establishes that Morant and Law Weathers were not involved in the decision to reject the walk-away offer, so the plaintiffs cannot sustain a claim for malpractice against Morant and Law Weathers based upon their involvement in the rejection of the walk-away offer.

Finally, the Court must grant summary disposition under MCR 2.116(C)(10) in favor of Law Weathers on its counterclaim for account stated, which encompasses the outstanding attorney fees and expenses incurred by IQS in connection with the Kent County lawsuit and subsequent appeal. According to Michigan law, an “account stated ‘is a contract based on assent to an agreed balance, and it is an evidentiary admission by the parties of the facts asserted in the computation and of the promise by the debtor to pay the amount due.’” See Fisher Sand and Gravel Co v Neal A Sweebe, Inc, 494 Mich 543, 557 (2013). Thus, the Court must accept an affidavit of account stated filed with the complaint as “prima facie evidence of such indebtedness, unless the defendant with his answer, by himself or agent, makes an affidavit and serves a copy thereof on the plaintiff or his attorney, denying the same.” See MCL 600.2145. Here, Law Weathers is entitled to summary disposition on its claim for attorney fees and expenses incurred in connection with its representation of IQS and Meiresonne in the Kent County lawsuit and appeal, but IQS has filed an affidavit denying the amount owed on the account stated. Accordingly, because summary disposition is appropriate under MCR 2.116(C)(10) when, “[e]xcept as to the amount of damages, there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law[.]” see MCR 2.116(C)(10), the Court must grant summary disposition in favor of Law Weathers on its claim for account stated, but the Court must leave the final determination of the amount owed on the account stated for resolution at an evidentiary hearing.

III. Conclusion

For the reasons set forth in this opinion, Plaintiffs IQS and Michael Meiresonne cannot sustain a legal-malpractice claim against Attorney Morant and Law Weathers because Morant and Law Weathers were not negligent in advising IQS to appeal Judge Kolenda's order of February 20, 2008, and because neither Morant nor his law firm had any involvement in the decision to reject the February 5, 2010, walk-away offer. Therefore, the Court must grant Morant and Law Weather summary disposition under MCR 2.116(C)(10) with respect to the claims against them. Further, the Court must grant summary disposition to Law Weathers under MCR 2.116(C)(10) with respect to its counterclaim for account stated against IQS and Meiresonne. But because IQS and Meiresonne have submitted an affidavit challenging the amount due, the Court must leave the issue of damages for resolution at an evidentiary hearing.

IT IS SO ORDERED.

Dated: August 7, 2014



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