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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1450-16T4

VIJAYALAKSHIM RAMAN and
TITO KRISHNAMURTHY,

Plaintiffs-Appellants,

v.

LAW OFFICES OF JOHN E. CLARKE,
LLC, and JOHN E. CLARKE, ESQ.,

Defendants-Respondents.

Argued March 6, 2018 – Decided May 14, 2018

Before Judges Hoffman and Mayer.

On appeal from Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-1429-16.

Barry D. Epstein argued the cause for appellants (The Epstein Law Firm, PA, attorneys; Barry D. Epstein, of counsel and on the briefs; Michael A. Rabasca, on the briefs).

Melissa J. Kanbayashi argued the cause for respondents (Marks, O'Neill, O'Brien, Doherty & Kelly, PC, attorneys; Melissa J. Brown, on the brief).

PER CURIAM

Plaintiffs Vijayalakshim Raman and Tito Krishnamurthy[1] appeal from the October 27, 2016 Law Division order dismissing their legal malpractice complaint against their former attorneys, Law Offices of John E. Clarke, LLC and John E. Clarke, Esq. (defendants). Plaintiffs' complaint alleged that defendants negligently or otherwise inappropriately represented them in a lawsuit concerning two 2011 auto accidents. Among other things, plaintiffs asserted that defendants "failed to appreciate the existence, nature and extent of . . . Tito['s] per quod claims . . . [and] improperly advised plaintiffs[,] for the first time on the eve of trial[,] that they were responsible to pay over $25,000 in advance of the trial to secure treating and/or expert physicians' testimony . . . ." Plaintiffs contend defendants' negligence forced them "to accept a settlement figure which was far less than the full and fair value of the case."

The motion judge dismissed plaintiffs' legal malpractice case based upon principles of judicial estoppel and preclusion, predicated on plaintiff's voluntary assent to the terms of the settlement on the record. The judge dismissed the case on that basis, before the completion of any discovery and without

[1] For ease of reference, we refer to Vijayalakshim Raman individually as plaintiff, and her husband Tito Krishnamurthy individually as Tito. We refer to the couple, jointly, as plaintiffs.

conducting an evidentiary hearing. For the reasons that follow, we vacate the order of dismissal and remand this matter to the trial court for further proceedings.

I

Plaintiff sustained injuries in two separate motor vehicle collisions in 2011 – the first occurred on April 1 and the second occurred on August 8. In both accidents, another driver rear-ended plaintiff's vehicle. Plaintiff retained defendants, who filed one suit for both accidents. According to plaintiffs' malpractice complaint, defendants represented "that they were capable of properly representing [plaintiffs'] interests and [would] otherwise conduct themselves pursuant to the applicable standards of care . . . ."

On July 20, 2015, just before the start of jury selection, the accident cases settled for a combined total of $60,000 – $20,000 from the driver in the first accident and $40,000 from the driver in the second accident. Plaintiff underwent questioning before the trial judge to confirm she accepted the settlement. When asked if she desired to accept the $60,000 settlement, plaintiff responded, "Yeah, because I have no choice." In later questioning, plaintiff returned to this sentiment, stating, "I have no other choice. I don't have any options." Plaintiff expressed concern about unpaid medical bills, explaining she did

not "want any hassle later on." Plaintiff eventually confirmed to the court that she wanted to accept the settlement; however, the trial judge did not make any findings regarding her testimony.

Plaintiffs then retained their present counsel and filed this legal malpractice action against defendants in April 2016. In lieu of a responsive pleading, defendants moved to dismiss plaintiffs' complaint for failure to state a claim upon which relief may be granted, pursuant to Rule 4:6-2(e). Defendants argued the doctrine of judicial estoppel "prevents a party from asserting a position in one case and then taking a contrary position in another case." Defendants argued plaintiff's statements to the court, at the time of the settlement of her accident cases – that she understood the terms of the settlement, that she accepted the terms of the settlement, and that she "was satisfied with the legal representation provided by [defendants]" – prohibited plaintiffs from pursuing legal malpractice claims against defendants, as a matter of law.

The court heard oral argument on October 27, 2016. The trial judge essentially accepted defendants' argument and entered an order granting defendants' motion and dismissing plaintiffs' complaint with prejudice. This appeal followed.

II

Rule 4:6-2(e) provides that a complaint may be dismissed for "failure to state a claim upon which relief can be granted . . . ." This Rule tests "the legal sufficiency of the facts alleged on the face of the complaint." Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989) (citation omitted).

On a motion to dismiss, a plaintiff need not prove the case, but need only "make allegations which, if proven, would constitute a valid cause of action." Kieffer v. High Point Ins. Co., 422 N.J. Super. 38, 43 (App. Div. 2011) (quoting Leon v. Rite Aid Corp., 340 N.J. Super. 462, 472 (App. Div. 2001)). On such a motion, plaintiff is entitled to "every reasonable inference of fact." Printing Mart, 116 N.J. at 746 (citing Indep. Dairy Workers Union v. Milk Drivers & Dairy Emp. Local 680, 23 N.J. 85, 89 (1956)).

A reviewing court must "search[] the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Ibid. (quoting Di Cristofaro v. Laurel Grove Mem. Park, 43 N.J. Super. 244, 252 (App. Div. 1957)). This review should be "at once painstaking and undertaken with a generous and hospitable approach." Ibid.

A motion to dismiss should only be granted in "the rarest of instances." Kieffer, 422 N.J. Super. at 43 (App. Div. 2011)

(quoting Printing Mart, 116 N.J. at 772). Only when "even a generous reading of the allegations does not reveal a legal basis for recovery" should the motion be granted. Ibid. (quoting Edwards v. Prudential Prop. & Cas. Co., 357 N.J. Super. 196, 202 (App. Div. 2003)).

Before addressing the motion court's dismissal order, we find it appropriate to review relevant cases addressing how concepts of judicial estoppel can preclude a litigant from pursuing a legal malpractice action against former counsel after a litigant agrees to settle an underlying action. As a general matter, judicial estoppel precludes a party from advocating "a position contrary to a position it successfully asserted in the same or a prior proceeding." Kimball Int'l, Inc. v. Northfield Metal Prods., 334 N.J. Super. 596, 606 (App. Div. 2000) (citation omitted). The doctrine protects "the integrity of the judicial process." Ibid. (citation omitted). It is considered "an 'extraordinary remedy,' which should be invoked only 'when a party's inconsistent behavior will otherwise result in a miscarriage of justice.'" Ali v. Rutgers, 166 N.J. 280, 287-88 (2000) (quoting Kimball, 334 N.J. Super. at 608).

Our courts have applied these principles in cases involving legal malpractice actions filed against former counsel after a client settled the underlying case. In Ziegelheim v. Apollo, 128

N.J. 250 (1992), a divorced wife sued her former attorney for malpractice for allegedly providing her inadequate legal advice that led her to accept a settlement for less than she allegedly should have received. Id. at 257. After the defendant attorney negotiated a divorce settlement, the plaintiff stated on the record that she "understood the agreement, that [she] thought it was fair, and that [she] entered into it voluntarily." Ibid. In the malpractice suit, the plaintiff provided an expert report to the court, which indicated she could have received "upwards of fifty percent of the marital estate" and that the defendant attorney should not have counselled her to take a lower amount. Id. at 262.

The trial court granted summary judgment for the former attorney. Id. at 260. The plaintiff appealed and we affirmed in relevant part, finding the plaintiff understood the settlement and voluntarily entered into it; however, our Supreme Court reversed, holding that a fact-finder could have determined the defendant attorney had acted negligently based on the report of the plaintiff's expert. Id. at 262. The Court specifically rejected a rule followed in another jurisdiction, which bars recovery in legal malpractice suits unless a plaintiff can demonstrate actual fraud by the attorney. Ibid. The Court held that, although New Jersey generally favors settlements in litigation, clients

nonetheless "rely heavily on the professional advice of counsel when they decide whether to accept or reject offers of settlement, and we insist that the lawyers of our state advise clients with respect to settlements with the same skill, knowledge, and diligence with which they pursue all other legal tasks." Id. at 263. The Court found no reason to apply "a more lenient rule." Ibid.

Additionally, the Court in Ziegelheim declared that the plaintiff's acquiescence to the settlement on the record did not bar her legal malpractice suit under the doctrine of issue preclusion. Id. at 265. It held, "The fact that a party received a settlement that was 'fair and equitable' does not mean necessarily that the party's attorney was competent or that the party would not have received a more favorable settlement had the party's incompetent attorney been competent." Ibid. The Court further held that the defendant's alleged failure to discover some of the plaintiff's former husband's hidden marital assets may have "led to the improvident acceptance of the settlement . . . ." Id. at 266.

Significantly, the Court in Ziegelheim cautioned that it was not "open[ing] the door to malpractice suits by any and every dissatisfied party to a settlement." Id. at 267. To prevent unmeritorious claims of malpractice, the Court encouraged

litigants to place settlements on the record, and required that "plaintiffs must allege particular facts in support of their claims of attorney incompetence and may not litigate complaints containing mere generalized assertions of malpractice." Ibid. In addition, the Court added this cautionary note: "The law demands that attorneys handle their cases with knowledge, skill, and diligence, but it does not demand that they be perfect or infallible, and it does not demand that they always secure optimum outcomes for their clients." Ibid. With that balancing of interests in mind, the court reversed the dismissal on summary judgment.

In Newell v. Hudson, 376 N.J. Super. 29 (App. Div. 2005), we held that a divorce client who made "generalized assertions of malpractice" was estopped from pursuing a legal malpractice suit against her former attorney. Id. at 43, 47 (citation omitted). There, the attorney had described in detail to the client her proposed alimony settlement, and advised her that it was unlikely she would receive permanent alimony. Id. at 32. In addition to stating on the record that she voluntarily entered into the settlement agreement, the client accepted the limited duration alimony, noted that if the case went to trial she might receive more or less alimony, that the "agreement was a compromise but was a fair deal," and had discussed the settlement carefully with her

attorney "at great length." Ibid. The client later hired a new attorney to seek reconsideration of the alimony settlement, but the Family Part denied the motion. Id. at 33. The client then sued her former attorney in a counterclaim for legal malpractice.

We upheld the dismissal of the malpractice claim in Newell, distinguishing it from the factual setting presented in Ziegelheim. In Newell, the attorney had adequately negotiated and explained the settlement agreement, whereas in Ziegelheim a "vulnerable litigant" had "unknowingly enter[ed] into an inadequate settlement . . . ." Id. at 44. We found that the client in Newell had changed her mind, in which case there was no malpractice; at worst, she had lied during the matrimonial proceeding in order to later succeed in a malpractice claim, in which case she was judicially estopped from doing so. Id. at 46-47. We upheld the dismissal of the client's counterclaim because her action was the type of "self-serving behavior . . . that the doctrine of judicial estoppel is designed to prevent." Id. at 47.

Our Supreme Court again examined these principles in Puder v. Buechel, 183 N.J. 428 (2005). In that case, the Court held that a matrimonial client who had entered into a divorce settlement was judicially estopped from suing her former attorney for legal malpractice because she attested, when her counsel and the court

placed the divorce settlement on the record, that the settlement was "'acceptable' and 'fair.'" Id. at 437.

Most recently, in Guido v. Duane Morris LLP, 202 N.J. 79 (2010), the Court clarified the appropriate analysis for such cases in a fact pattern outside of the context of a divorce settlement. There, the plaintiff, a corporate officer, sued his former law firm for malpractice, alleging the firm did not adequately disclose to him the stock disadvantages that would accompany a settlement. Id. at 83.

Initially, the plaintiff, as the majority shareholder of a corporation, sued the corporation, alleging governance concerns. Ibid. Prior to settlement, the law firm sent the plaintiff a letter advising against any settlement because it could implicate his rights as a shareholder. Id. at 83-84. The court ordered mediation, where it was eventually dismissed without prejudice. Id. at 84. A year later, the plaintiff in Guido brought a similar lawsuit against the corporation, and the court again referred the action to mediation. Ibid. The plaintiff ultimately settled, but was not warned again of the voting implications of that settlement. Id. at 84. However, the plaintiff affirmed in court that he understood the terms and did not have any concerns. Ibid. The plaintiff then brought a malpractice action against his former law

firm for failing to warn him about the voting implications. Id. at 85-86.

Although the trial court initially granted the law firm summary judgment, it later vacated the decision on reconsideration, instead finding there was a genuine issue of material fact as to whether the law firm properly informed the plaintiff about the voting impact of the settlement. Id. at 86-87. We granted leave to appeal and affirmed. Id. at 87. Our Supreme Court then granted leave to appeal and affirmed. Id. at 90-91.

In analyzing the facts in Guido, the Supreme Court reemphasized the "bedrock principles" that apply in a legal malpractice case. Id. at 92. First, the Court reaffirmed that Ziegelheim still controls how settlement testimony impacts a later legal malpractice claim, reiterating that "the fact that a party received a settlement that was 'fair and equitable' does not mean necessarily that the party's attorney was competent or that the party would not have received a more favorable settlement had the party's incompetent attorney been competent." Id. at 93 (citing Ziegelheim, 128 N.J. at 265).

In these respects, the Court in Guido limited the scope of Puder:

> When viewed in its proper context – that Puder represents not a new rule, but an equity-based exception to Ziegelheim's general rule – the rule of decision applicable here is clear: unless the malpractice plaintiff is to be equitably estopped from prosecuting his or her malpractice claim, the existence of a prior settlement is not a bar to the prosecution of a legal malpractice claim arising from such settlement.
>
> [Id. at 94.]

Further, the Court in Guido enumerated two additional considerations that are important in the legal malpractice context:

> Thus, if required to prevent injustice by not permitting a party to repudiate a course of action on which another party has relied to his detriment[,] . . . our courts will intervene and preclude a party from advancing a claim. In a closely related vein, where a party has prevailed on a litigated point, principles of judicial estoppel demand that such party be bound by its earlier representations.
>
> [Ibid. (alteration in original) (internal citations omitted).]

In affirming the trial court's ultimate ruling in Guido requiring a fact-finding hearing, the Court distinguished the case from Puder because the plaintiff in Guido did not testify he was "satisfied" with the settlement or opine whether it was "fair and adequate." Id. at 95. Rather, the colloquy regarded whether the plaintiff "understood" the agreement or was subject to any

impediments that would prevent him from understanding it. Ibid. Given the presence of a genuine dispute of material fact, the Court remanded the Guido matter to the trial court to resolve the contested factual issue. Id. at 95.

III

Applying these principles, we conclude from the limited record that genuine disputed issues of fact require resolution before the trial court can determine whether principles of judicial estoppel or preclusion apply here to bar plaintiffs from proceeding with their legal malpractice claims.

The trial judge's brief comments explaining his decision indicate he mistakenly believed the Court's holding in Puder required him to dismiss plaintiffs' case. The judge stated, "If I don't dismiss this case I'm basically telling the New Jersey Supreme Court[, ']I don't care what you wrote in Puder.[']" Notably, the judge did not address Guido, where the Court affirmed the trial court's decision to proceed with fact-finding, distinguishing the case from Puder because the plaintiff in Guido did not testify he was "satisfied" with the settlement or opine whether it was "fair and adequate." Id. at 95. Similarly, plaintiff in this case did not testify she was "satisfied" with the settlement or opine whether it was "fair and adequate." Ibid.

Among other things, the record is unclear or disputed concerning such issues potentially relevant to an equitable assessment as: (1) what exactly defendants advised plaintiff about her responsibility to pay over $25,000 in advance for expert witness testimony; (2) when plaintiff was told about the $25,000 payment; (3) what, if anything, the fee agreement between plaintiff and defendants provided regarding advance payment for expert witness testimony; and (4) what plaintiff was told, if anything, about the significance of placing the settlement on the record.

Given the existence of these disputed or unknown facts critical to a fair analysis of the relative equities involved, we remand the matter for the parties to conduct discovery and for appropriate fact-finding thereafter. Cf. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) (analogously disfavoring dismissal on summary judgment where there are genuine issues of material fact).

Following the completion of discovery, defendants may renew their motion to dismiss the action on the grounds of judicial estoppel and preclusion. Plaintiff may then respond to that motion. The court may conduct an evidentiary hearing, if credibility determinations are required, and consider whether plaintiffs' claims equitably should be dismissed in light of the applicable case law including, most recently, the Court's guidance

in Guido. The equitable issues are for the court to decide, and not for a jury. See Sun Coast Merchandise Corp. v. Myron Corp., 393 N.J. Super. 55, 87 (App. Div. 2007) (recognizing that the "ultimate determination of equitable matters is for the judge alone to decide"). In remanding the case, we by no means intimate an appropriate outcome. Nor do we intend on this incomplete record and in the absence of credibility findings to impugn the efforts of plaintiffs' former counsel. We merely hold that it was premature for the motion court to have dismissed this case in its present posture.

Vacated and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION