SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1921-16T3

MATTHEW ZUCARO and APK AUTO REPAIR CORPORATION,

Plaintiffs-Appellants,

v.

THE LAW OFFICE OF MICHAEL BOTTON, LLC, MICHAEL BOTTON, ESQ., and SANTANDER BANK, N.A. f/k/a SOVEREIGN BANK, N.A.,

Defendants-Respondents.

Argued May 8, 2018 – Decided May 23, 2018

Before Judges Yannotti, Carroll and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-2829-14.

Darryl T. Garvin argued the cause for appellants.

Milton Bouhoutsos, Jr., argued the cause for respondents The Law Office of Michael Botton, LLC and Michael Botton, Esq.

Michael D. Malloy argued the cause for respondent Santander Bank, N.A. f/k/a Sovereign Bank, N.A. (Finestein & Malloy, LLC,

attorneys; Michael D. Malloy and Corrine LaCroix Tighe, on the brief).

PER CURIAM

This appeal has its genesis in a business dispute between Jason McGee and Matthew Zucaro. The two men had previously formed a business relationship involving auto sales, repairs, and towing. While they acted as partners in these ventures, Zucaro formed a corporation, APK Auto Repair Corporation, which handled the repair work, and McGee formed APK Auto Brokers, Inc., which engaged in auto sales.

As of March 2011, and at all times relevant to this appeal, APK Auto Repair Corporation was the exclusive towing licensee for the Borough of Seaside Heights (Borough). Following the extensive damage caused by Superstorm Sandy in late October 2012, APK Auto Repair towed and stored approximately 300 vehicles, purportedly at the direction of Borough officials. APK Auto Repair billed Seaside Heights for its services. Although it engaged in negotiations with the Borough, the bill remained unpaid. Consequently, pursuant to a contingent fee agreement, Zucaro and McGee retained attorney Michael Botton to represent them and APK Auto Repair Corporation in a lawsuit against Seaside Heights to recover their outstanding fees and other damages.

On July 1, 2013, the lawsuit settled for $250,000. Botton received and deposited the settlement check into his attorney trust account on July 3, 2013.

On July 23, 2013, McGee went to Botton's law office and requested immediate distribution of the net settlement proceeds in the form of two checks, one payable to "APK Auto Repair" for $3471.85[1] and the other to "APK Auto" for $159,977.30. Botton issued the checks to McGee in accordance with his instructions. McGee then took the $159,977.30 check to Santander Bank and deposited it into a bank account for McGee's corporation, APK Auto Brokers, Inc. Upon deposit, a Santander employee purportedly endorsed the back of the check "APK Auto." Santander accepted the check for deposit, as McGee was an authorized signatory on both the APK Auto Brokers, Inc. and APK Auto Repair Corporation bank accounts. According to Zucaro, neither he nor APK Auto Repair Corporation ever received any part of the settlement proceeds.

The relationship between McGee, Zucaro, and their businesses unraveled, and McGee commenced an action against Zucaro that was

[1] This check was to satisfy an outstanding invoice owed by private investigator Barry Colicelli, for previously unpaid vehicle repairs, to be paid from the private investigator fees due to Colicelli.

tried separately in the Chancery Division.[2] Zucaro and APK Auto Repair Corporation (collectively, "plaintiffs") filed a third-party complaint (the "complaint") against Botton and Santander Bank. Specifically, plaintiffs sued Botton for legal malpractice, negligence, and breach of contract. They also asserted claims against Santander for conversion and breach of warranty under the Uniform Commercial Code (UCC), as well as simple negligence. Plaintiffs' claims against Botton and Santander were transferred to the Law Division and are the subject of the present appeal.

Santander filed a motion to dismiss, arguing that discovery was unnecessary to resolve plaintiffs' claims against it. Santander contended liability for conversion under N.J.S.A. 12A:3-420 attaches only where payment is obtained for "a person not entitled to enforce the instrument." Here, in contrast, McGee was an authorized signatory on the bank's accounts for both APK Auto Repair Corporation and APK Auto Brokers, Inc., and hence he was entitled to endorse and deposit checks into both accounts and to withdraw funds from them.

With respect to the remaining counts, Santander argued plaintiffs' UCC breach of warranty claim was "amorphous" because

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[2] The disputes between McGee and Zucaro that formed the basis of the Chancery Division action are chronicled in our unpublished opinion in McGee v. Zucaro, No. A-5005-15, issued simultaneously with this opinion.

it did not "identify what warranty [was] breached." Further, Santander argued plaintiff could not bring a separate claim for common law negligence because the UCC provides an exclusive remedy where a check has been converted.

On February 6, 2015, the trial court granted Santander's motion and dismissed plaintiffs' claims with prejudice. The memorializing order was unaccompanied by any oral explanation or written statement of reasons.

A period of discovery ensued with respect to plaintiffs' claims against Botton, following which Botton filed a motion for summary judgment. The trial court granted the motion on July 22, 2016, finding plaintiffs' breach of contract claim was "necessarily transformed into a professional negligence claim." The court concluded plaintiffs' failure to serve an expert report was fatal to their claim of professional negligence, and the common knowledge exception did not apply to excuse such failure.[3]

On appeal, plaintiffs challenge the February 6, 2015 order that dismissed their claims against Santander Bank. They also

[3] Notably, plaintiffs previously served an affidavit of merit, dated November 24, 2014, authored by James J. Bonicos, Esq., stating there "exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the legal work and practice that is the subject of [plaintiffs'] legal malpractice claims . . . fell outside acceptable professional standards for the practice of law."

challenge the July 22, 2016 order entering summary judgment in favor of Botton. Having considered plaintiffs' appellate arguments in light of the record and applicable legal principles, we find they lack sufficient merit to warrant extended discussion. R. 2:11-3(e)(1)(E). We add the following comments.

Santander moved to dismiss plaintiffs' claims on the basis that they failed to state a claim upon which relief could be granted. R. 4:6-2(e). Such a motion "may not be denied based on the possibility that discovery may establish the requisite claim; rather, the legal requisites for plaintiffs' claim must be apparent from the complaint itself." Edwards v. Prudential Prop. and Cas. Co., 357 N.J. Super. 196, 202 (App. Div. 2003). On appeal of a motion to dismiss for failure to state a claim under Rule 4:6-2(e), we apply a plenary standard of review and owe no deference to the trial court's conclusions. Rezem Family Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 114 (App. Div. 2011).

It is true, as plaintiffs contend, that in deciding the motion to dismiss, the judge made no findings. Rule 1:7-4(a) clearly states that a trial "court shall, by an opinion or memorandum decision, either written or oral, find the facts and state its conclusions of law thereon . . . on every motion decided by a written order that is appealable as of right[.]" See Shulas v. Estabrook, 385 N.J. Super. 91, 96 (App. Div. 2006) (requiring an

adequate explanation of the basis for a court's action). "Meaningful appellate review is inhibited unless the judge sets forth the reasons for his or her opinion." Strahan v. Strahan, 402 N.J. Super. 298, 310 (App. Div. 2008) (quoting Salch v. Salch, 240 N.J. Super. 441, 443 (App. Div. 1990)). The failure to provide findings of fact and conclusions of law "constitutes a disservice to the litigants, the attorneys and the appellate court." Curtis v. Finneran, 83 N.J. 563, 569-70 (1980) (quoting Kenwood Assocs. v. Bd. of Adjustment of Englewood, 141 N.J. Super. 1, 4 (App. Div. 1976)). We have recently stressed the continued importance of this requirement. Estate of Doerfler v. Federal Ins. Co., ___ N.J. Super. ___, ___ (App. Div. 2018) (slip op. at 5-6).

Ordinarily, the lack of findings of fact and conclusions of law would prevent any meaningful review, and we would be constrained to remand to the trial court for a sufficient statement of reasons. In this case, however, our plenary standard of review allows us to render a decision without the necessity of remanding the matter to the trial court.

Granting every indulgence to the facts stated in plaintiffs' complaint, and after carefully considering their arguments, we fail to see any viable cause of action against Santander Bank. It is undisputed that the bank's records list both Zucaro and McGee as "authorized signers" on the accounts for APK Auto Repair

Corporation and APK Auto Brokers, Inc. These proofs clearly defeat a claim for conversion under the UCC.

"The common law tort of conversion is defined as the 'intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.'" Bondi v. Citigroup, Inc., 423 N.J. Super. 377, 431 (App. Div. 2011) (quoting Chicago Title Ins. Co. v. Ellis, 409 N.J. Super. 444, 454 (App. Div. 2009)).

With respect to checks and other negotiable instruments, the UCC, as codified in New Jersey at N.J.S.A. 12A:3-420(a), provides "[a]n instrument is . . . converted if it is taken by transfer . . . from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment." (Emphasis added). See also Kuhn v. Tumminelli, 366 N.J. Super. 431, 444-45 (App. Div. 2004) (holding check cashing company properly cashed checks payable to an LLC where a member of the LLC who embezzled funds had apparent authority to endorse business checks).

As noted, the record indisputably establishes that APK Auto Repair Corporation and APK Auto Brokers, Inc. both maintained accounts at Santander Bank, and both McGee and Zucaro were

authorized to endorse checks drawn on those accounts. Thus, McGee had the authority to endorse the settlement check on behalf of either corporation. Moreover, Santander was authorized to deposit the check into either account, and to issue a check withdrawing monies from either account. Further, plaintiffs could not state a claim against the bank, as opposed to McGee, relative to McGee's subsequent use of the funds. Accordingly, their claims against Santander were properly dismissed.

Regarding plaintiffs' claims against Botton, our review of a ruling on summary judgment is de novo, applying the same legal standard as the trial court, namely, that set forth in Rule 4:46-2(c). Conley v. Guerrero, 228 N.J. 339, 346 (2017). Thus, we consider whether "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Town of Kearny v. Brandt, 214 N.J. 76, 91 (2013) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)). If there is no genuine issue of material fact, the inquiry then turns to "whether the trial court correctly interpreted the law." DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (citations omitted). We accord no deference to the trial judge's conclusions on issues of

law, which we review de novo. Nicholas v. Mynster, 213 N.J. 463, 478 (2013).

A claim for legal malpractice is "a variation on the tort of negligence" relating to an attorney's representation of a client. Garcia v. Kozlov, Seaton, Romanini & Brooks, P.C., 179 N.J. 343, 357 (2004). Generally, the testimony of an expert is required in legal malpractice cases to supply the standard of care against which the lawyer's conduct is to be evaluated. Stoeckel v. Twp. of Knowlton, 387 N.J. Super. 1, 14 (App. Div. 2006) (stating "[b]ecause the duties a lawyer owes to his client are not known by the average juror, a plaintiff will usually have to present expert testimony defining the duty and explaining the breach."); Taylor v. DeLosso, 319 N.J. Super. 174, 179 (App. Div. 1999). The existence of a duty of care and the standards defining such a duty are legal questions determined by the court as a matter of law. See Estate of Desir ex rel. Estiverne v. Vertus, 214 N.J. 303, 322 (2013); Ziegelheim v. Apollo, 128 N.J. 250, 261-62 (1992).

Plaintiffs do not dispute that their malpractice claim against Botton is unsupported by expert testimony. Instead, they contend their claim is subject to the common knowledge exception to that requirement. This exception applies "where the questioned conduct presents such an obvious breach of an equally obvious professional norm that the fact-finder could resolve the dispute

based on its own ordinary knowledge and experience and without resort to technical or esoteric information." Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C. v. Ezekwo, 345 N.J. Super. 1, 12 (App. Div. 2001), abrogated by Segal v. Lynch, 211 N.J. 230 (2012).

We are not persuaded by this argument. Rather, we conclude expert testimony was required to establish the standard of care Botton owed with regard to his distribution of the net settlement proceeds from the Seaside Heights lawsuit, and how Botton may have violated that standard by giving the settlement check payable to APK Auto to McGee, who Botton understood to be a partner in both APK Auto Repair Corporation and APK Auto Brokers, Inc.

Nor does the fact that plaintiffs also couch their claims against Botton in terms of breach of contract evade the requirement to present expert testimony. Specifically, plaintiffs allege Botton breached the retainer agreement by "fail[ing] to make payment of the net settlement proceeds to . . . APK Auto Repair Corporation and Zucaro." However, in the analogous context of the Affidavit of Merit statute, N.J.S.A. 2A:53A-26 to -29,[4] our Supreme

[4] Specifically, the Affidavit of Merit statute applies in an "action for damages for personal injuries . . . resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation . . . ." N.J.S.A. 2A:53A-27.

Court has stated, "[i]t is not the label placed on the action that is pivotal but the nature of the legal inquiry." Couri v. Gardner, 173 N.J. 328, 340 (2002). If the claim's "underlying factual allegations require proof of a deviation from the professional standard of care applicable to that specific profession," an affidavit of merit is required for that claim. Ibid.

Here, the motion judge aptly recognized that the label used for plaintiffs' breach of contract claim was not controlling. Simply put, there is no basis to conclude that Botton's actions did not involve or implicate his professional standard of care. While plaintiffs initially served an affidavit of merit, they subsequently failed to serve an expert report to support their claim that Botton acted improperly.[5] Consequently, plaintiffs' complaint against Botton was properly dismissed on summary judgment.

Affirmed.

[5] Following a trial in the underlying action between McGee and Zucaro, the Chancery judge found "[McGee] was well within his authority to direct attorney Botton to make the settlement funds payable to APK Auto and deposit the funds in [APK Auto] Brokers[, Inc.] and use them as he did." Before us, Botton argues this finding represents the "law of the case" and consequently plaintiffs lack standing to pursue their claim that Botton acted improperly. We need not reach this argument in light of our holding that plaintiffs' failure to produce a liability expert is fatal to their claims against Botton.