SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1314-21

WILLIAM KIANKA, JR.,

Plaintiff-Appellant,

v.

KATHARINE ERRICKSON, ESQ., and ERRICKSON LAW OFFICES, LLC,

Defendants-Respondents.

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Submitted October 18, 2022 – Decided December 12, 2022

Before Judges Messano, Gilson, and Rose.

On appeal from the Superior Court of New Jersey, Law Division, Hunterdon County, Docket No. L-0270-21.

Peter A. Ouda, LLC, attorney for appellant (Peter A. Ouda, of counsel and on the brief).

Kaufman Dolowich & Voluck, LLP, attorneys for respondents (Robert A. Berns and Timothy M. Ortolani, of counsel and on the brief).

PER CURIAM

Plaintiff William Kianka, the beneficiary of a will, sued a lawyer and her firm alleging defendants had breached a fiduciary duty owed to him in preparing a revised will that was subsequently contested. We affirm the order granting summary judgment to defendants and dismissing plaintiff's complaint with prejudice because plaintiff was not the lawyer's client and plaintiff made no showing of a special relationship establishing a fiduciary obligation owed to him.

I.

We summarize the facts from the record, viewing them in the light most favorable to plaintiff, the party opposing summary judgment. See Richter v. Oakland Bd. of Educ., 246 N.J. 507, 515 (2021) (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)). In doing so, we note that the material facts are undisputed because plaintiff admitted that the facts set forth in defendants' statement of material facts were accurate. Although plaintiff submitted a statement of additional facts, those facts do not relate to or dispute the lack of his direct relationship with defendants.

Jack Kisthardt hired defendants Katharine Errickson, Esq. and her firm, Errickson Law Offices, LLC (collectively, defendants) to prepare his will. Plaintiff was the nephew of Kisthardt.

On June 2, 2017, Kisthardt executed a will prepared by Errickson that named plaintiff and Deborah McCarthy as beneficiaries (the Original Will). The Original Will named McCarthy as executor and William Wilton as alternate executor.

A few weeks later, on June 26, 2017, Kisthardt executed a revised will that he had instructed Errickson to prepare (the Revised Will). The Revised Will kept plaintiff and McCarthy as co-beneficiaries of Kisthardt's estate but named Wilton as executor and McCarthy as alternate executor.

Kisthardt died on May 17, 2019. A few weeks later, Wilton submitted the Revised Will to the surrogate's office for probate as Kisthardt's last will and testament.

In October 2019, McCarthy filed an order to show cause and verified complaint challenging the validity of the Revised Will and contending that she should be named as executor. Wilton opposed McCarthy's action and plaintiff voluntarily intervened in the will dispute action.

Approximately a year later, Wilton, McCarthy, and plaintiff settled the will dispute, and they submitted a consent order that was entered by the Chancery court on August 31, 2020. Under the consent order, McCarthy agreed not to be executor, Wilton agreed to withdraw as executor and was paid a

commission, and Robert Shanahan, Esq., was appointed as administrator to oversee Kisthardt's estate.

Shortly thereafter, plaintiff sued Errickson and her law firm alleging that defendants were negligent in overseeing the execution and probation of the Revised Will (the First Action). Plaintiff asserted that the will dispute had needlessly diminished Kisthardt's estate because the estate has incurred extra legal fees and commissions and the estate would incur higher costs with Shanahan as the administrator. Plaintiff also claimed that he had been damaged by paying legal fees in intervening and participating in the will dispute.

Defendants moved to dismiss the First Action. On April 14, 2021, the Chancery court granted that motion dismissing without prejudice the complaint in the First Action. The court held that defendants were not plaintiff's attorneys and, as the attorneys who prepared Kisthardt's wills, they owed no duty to plaintiff who was a beneficiary of the wills.

Two months later, in June 2021, plaintiff filed a new complaint against defendants under a new docket number (the Current Action). The complaint in the Current Action alleged essentially the same facts and sought the same damages as the complaint in the First Action. The complaint in the Current Action added an express cause of action for breach of fiduciary duty.

Defendants moved for summary judgment, arguing that they owed no duty to plaintiff and plaintiff could not prove that defendants caused him any damage arising out of the settlement of the will dispute. After hearing argument, on November 23, 2021, the same judge who had presided over the will dispute and had dismissed the First Action, issued a written opinion and order granting defendants' motion. The Chancery court reasoned that even if plaintiff could establish that defendants owed him a duty, plaintiff had not shown any damages proximately caused by defendants. Consequently, the court dismissed the complaint in the Current Action with prejudice. Plaintiff now appeals from the November 23, 2021 order dismissing the complaint in the Current Action.

II.

On appeal, plaintiff argues that the Chancery court erred in granting summary judgment to defendant. He contends that his damage claims are not barred by the settlement of the will dispute action and he can prove a claim for breach of a fiduciary duty against defendants. We do not need to reach the damage issue. Instead, we hold that plaintiff did not show a special relationship with defendants and, therefore, he cannot bring a breach of fiduciary duty claim against the lawyer who represented his deceased uncle, but not him.

A. Our Standard of Review.

Appellate courts review a grant of summary judgment "de novo and apply the same standard as the trial court." Rios v. Meda Pharm., Inc., 247 N.J. 1, 13 (2021). Summary judgment must be granted "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 challenged and that the moving party is entitled to a judgment or order as a matter of law." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016) (quoting R. 4:46-2(c)). "An issue of material fact is 'genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.'" Grande v. Saint Clare's Health Sys., 230 N.J. 1, 24 (2017) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)).

B. A Fiduciary Duty.

"A fiduciary relationship arises between two persons when one person is under a duty to act for or give advice for the benefit of another on matters within the scope of their relationship." F.G. v. MacDonell, 150 N.J. 550, 563 (1997) (citing Restatement (Second) of Torts § 847 cmt. a (1979)). "[A] lawyer serves

in a fiduciary role to a client . . . ." Delaney v. Dickey, 244 N.J. 466, 484 (2020). "'All fiduciaries are held to a duty of fairness, good faith and fidelity, but an attorney is held to an even higher degree of responsibility in these matters than is required of all others.'" Id. at 485 (quoting In re Honig, 10 N.J. 74, 78 (1952)). "Above all else, a lawyer's fiduciary role requires that the lawyer act fairly in all dealings with the client." Ibid.

"Generally, an attorney owes a duty only to his or her client . . . ." Est. of Albanese v. Lolio, 393 N.J. Super. 355, 368 (App. Div. 2007). "The absence of a direct relationship between an attorney and a nonclient ordinarily negates the existence of any duty and, by extension, affords no basis for relief." LoBiondo v. Schwartz, 199 N.J. 62, 101 (2009). "[A]ttorneys may owe a duty of care to non-clients when the attorneys know, or should know, that non-clients will rely on the attorney's representations and the non-clients are not too remote from the attorneys to be entitled to protection." Petrillo v. Bachenberg, 139 N.J. 472, 483-84 (1995). Whether a duty is owed to a non-client is a question of law to be determined by the court. Fitzgerald v. Linnus, 336 N.J. Super. 458, 468 (App. Div. 2001). In determining if a duty exists, courts will consider "the relationship of the parties, the nature of the risk, and the public interest in the proposed solution." Albanese, 393 N.J. Super. at 369 (quoting Barner v. Sheldon, 292

N.J. Super. 258, 261 (Law. Div. 1995), aff'd, 292 N.J. Super. 157 (App. Div. 1996)).

An attorney retained to prepare a will generally owes a duty only to the testator. See Barner, 292 N.J. Super. at 265-66. Similarly, "an attorney retained for an estate 'generally' represents the executor or executrix as a fiduciary, and not the estate as an entity." Est. of Spencer v. Gavin, 400 N.J. Super. 220, 246 (App. Div. 2008) (citing Albanese, 393 N.J. Super. at 374). The absence of an attorney-client relationship does not necessarily bar a claim by a beneficiary provided there is an independent duty owed to the beneficiary. See Albanese, 393 N.J. Super. at 372; Fitzgerald, 336 N.J. Super. at 468; Barner, 292 N.J. Super. at 261.

The material undisputed facts in this case establish that defendants owed no fiduciary duty to plaintiff. Defendants were retained by Kisthardt to draft his wills. Plaintiff complains of alleged deficiencies in executing the Revised Will, which he alleges caused a dispute concerning who should serve as executor. Plaintiff was never named as an executor. Instead, the will dispute was between McCarthy and Wilton as to who should be the executor of the estate. Plaintiff's position as beneficiary was never at issue. Consequently, plaintiff cannot

identify a special relationship that would allow him to bring a claim against Errickson and her law firm.

Plaintiff cites to and primarily relies on a 1988 federal district court decision. See Rathblott v. Levin, 697 F. Supp. 817 (D.N.J. 1988). In Rathblott, the federal court tried to predict where New Jersey law would go on the issue of the duty owed by attorneys who prepared a will to a beneficiary. The court denied summary judgment in that case finding that there were material issues of disputed facts concerning the foreseeable harm to the beneficiary, causation, and damages. Since Rathblott was issued, New Jersey law has evolved, and we have held that a special relationship must be shown to a beneficiary to establish a duty by an attorney drafting a will. See Albanese, 393 N.J. Super. at 369.

Plaintiff concedes that he was not defendants' client. Indeed, he did not challenge the dismissal of his complaint in the First Action. As already noted, that First Action was dismissed because plaintiff showed no special duty owed by defendants to him. In the complaint in the Current Action, plaintiff alleged no new facts; rather, he merely identified his cause of action as a breach of fiduciary duty.

More critically, in opposing the motion for summary judgment, plaintiff pointed to no material fact establishing a special relationship between

defendants, who prepared Kisthardt's wills, and plaintiff, who was a beneficiary under the wills. An allegation is not enough to defeat summary judgment; the non-moving party "must produce sufficient evidence to reasonably support a verdict in [his] favor." Invs. Bank v. Torres, 457 N.J. Super. 53, 64 (App. Div. 2018), aff'd as modified, 243 N.J. 25 (2020). Plaintiff did not certify that he had any direct dealings with defendants when they drafted his uncle's wills. He also failed to identify any facts that defendant knew or reasonably should have known that they were undertaking a duty to protect him from a dispute that might arise between the executor and the alternate executor. Because plaintiff was not defendants' client, the risk of a dispute over the executor was too attenuated to create a fiduciary duty to plaintiff who was a beneficiary. Our holding in this regard is based on the material undisputed facts of this case. In short, although there maybe circumstances when an attorney who drafts a will owes a duty to a beneficiary; this case does not present those circumstances.

Affirmed.