2017 IL App (1st) 161450-U

FIFTH DIVISION
June 23, 2017

No. 1-16-1450

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

COURTNEY SMITH and SUSIE SMITH,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Cook County
	)	
v.	)	No. 15 L 7795
	)	
JOHNSON & SULLIVAN, LTD. and	)	Honorable
PETER ANTHONY JOHNSON,	)	Sheryl A. Pethers,
	)	Judge Presiding.
Defendants-Appellees.	)	

JUSTICE REYES delivered the judgment of the court.
Justice Hall concurred in the judgment.
Presiding Justice Gordon dissented.

ORDER

¶ 1 *Held*: Affirming the dismissal of a legal malpractice action where the amended complaint failed to sufficiently plead proximate cause.

¶ 2 Defendants Johnson & Sullivan, Ltd. (J&S), a law firm, and J&S attorney Peter Anthony Johnson (Johnson), represented plaintiffs Courtney Smith and Susie Smith in the sale of their residence located in Chicago. During the sale process, the defendants without notifying the plaintiffs granted the buyers' request for an extension of time with respect to a mortgage contingency. The plaintiffs allege that, as a result of the defendants' actions, they incurred

unnecessary and avoidable expenses in connection with their concurrent purchase of a new residence in Barrington, Illinois. After the circuit court of Cook County dismissed their amended legal malpractice complaint against the defendants, the plaintiffs filed this appeal. For the reasons discussed herein, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Following the dismissal without prejudice of their original complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)), the plaintiffs filed an amended legal malpractice complaint, alleging as follows. On or about August 30, 2013, the plaintiffs entered into a real estate contract (the First Agreement) with Kevin and Nisha Desai relating to the sale of the plaintiffs' property on Lincoln Avenue in Chicago (the Chicago property). The plaintiffs retained the defendants to represent them with respect to the sale of the Chicago property, and the Desais retained Cherie Thompson (Thompson) as their attorney. Pursuant to the First Agreement, the closing on the Chicago property was scheduled for November 1, 2013, and the Desais were to obtain a firm written mortgage commitment on or before October 4, 2013.

¶ 5 On September 9, 2013, the plaintiffs entered into a second real estate contract (the Second Agreement) to purchase the property on Otis Road in Barrington (the Barrington property). Pursuant to the Second Agreement, the closing on the Barrington property was scheduled for November 4, 2013, and the plaintiffs were to obtain a firm written mortgage commitment on or before October 9, 2013.

¶ 6 According to the amended complaint, the plaintiffs did not make the Second Agreement contingent upon the sale of the Chicago property because the firm mortgage commitment on the Barrington property was to be obtained five days after the Desais' firm mortgage commitment

was due. The plaintiffs intended to apply the sale proceeds from the Chicago property toward the down payment and closing costs on the Barrington property.

¶ 7 In a letter dated October 4, 2013, Thompson stated that the Desais had not yet obtained a firm mortgage commitment and requested an extension of the "mortgage and appraisal contingency dates" to October 18, 2013. Without notifying or consulting with his clients, Johnson signed the letter on October 7, 2013, thus approving the extension. According to the amended complaint, if Johnson had complied with his duty to keep the plaintiffs reasonably informed as to the status of the First Agreement, the plaintiffs "would have had five days, October 5 to October 9, 2013, to obtain a new buyer for the [Chicago property], seek an extension of the mortgage contingency or closing date set forth in the [Second Agreement] or to terminate or modify the [Second Agreement]."

¶ 8 The plaintiffs did not learn about the extension until October 18, 2013, when a letter from Thompson indicated that the Desais were unable to secure a loan commitment for the purchase of the Chicago property. The amended complaint provided that, at that point, it was no longer possible for the plaintiffs to find a new buyer for the Chicago property or to modify the Second Agreement. The Desais terminated the First Agreement on or about October 23, 2013.

¶ 9 After withdrawing funds from a retirement account to put toward the down payment and closing costs, the plaintiffs closed on the Barrington property on October 30, 2013. They continued to incur costs for the mortgage, utilities, insurance, and assessments at the Chicago property until its sale in early 2014.

¶ 10 The plaintiffs alleged a single count of legal malpractice against Johnson and J&S. They assert that the defendants were negligent in failing to notify or consult with them, or to obtain their permission, with respect to the proposed extension of the mortgage contingency set forth in

the First Agreement. The amended complaint further alleged that the defendants negligently failed to advise the plaintiffs of the "foreseeable risks and consequences" associated with the extension.[1] According to the amended complaint, the plaintiffs incurred unnecessary expenses and damages as a direct and proximate result of the defendants' actions. The plaintiffs alleged that they were forced to take out a larger loan for the Barrington property than they would have needed had they been able to pay for the property using the proceeds from the First Agreement. The plaintiffs also asserted that the withdrawal of funds from retirement accounts generated tax penalties which they otherwise would not be required to pay.

¶ 11 The defendants filed a motion to dismiss the amended complaint pursuant to sections 2-615 and 2-619(a)(9) of the Code (735 ILCS 5/2-615 (West 2014); 735 ILCS 5/2-619(a)(9) (West 2014)). The defendants asserted that, at the time of the First Agreement, the condominium association for the Chicago property was distressed due to special assessments and various approved and potential capital expenditures. The defendants posited that these association-related issues placed the First Agreement at a greater risk of termination than in a typical transaction. The defendants also indicated that the plaintiffs did not inform them of any other pending or contemplated transaction, *i.e.*, the Barrington property purchase, when the plaintiffs retained them as counsel on the Chicago property sale in early September 2013. According to the defendants, the plaintiffs waived the home-sale contingency in the Second Agreement without their advice.

¶ 12 The defendants asserted that they initially learned of the Second Agreement on

[1] The amended complaint also alleged that the defendants negligently failed to advise the plaintiffs to seek an extension of certain dates in the Second Agreement. The plaintiffs acknowledge that this allegation was "inadvertently left" in the amended complaint, given that the order dismissing the original complaint directed them to "remove all mention" of the Second Agreement.

October 8, 2013, when Johnson was copied on an email from the plaintiffs' counsel on the Barrington property transaction. In an email to Courtney Smith dated October 17, 2013, Johnson stated that the Desais' financing was not complete, but "it's coming along." After receiving the October 18, 2013, correspondence regarding the Desais' inability to obtain a mortgage, the plaintiffs invoked their right under the First Agreement to attempt to obtain financing for the Desais under the same terms and conditions. Such efforts were unsuccessful. The defendants continued to represent the plaintiffs until the Chicago property was sold to other buyers in early 2014.

¶ 13 The defendants argued that the amended complaint should be dismissed pursuant to section 2-619(a)(9) because they performed with all reasonable care, did not breach any duty, and were not the proximate cause of any alleged damages. The defendants also sought dismissal pursuant to section 2-615 of the Code because the plaintiffs failed to state a cause of action or allege actual damages in the amended complaint.

¶ 14 In his affidavit appended to the dismissal motion, Johnson averred, in part, that "it is the custom and practice in real estate transactions for the mortgage contingency provision of a contract to be extended in order to accommodate buyer or lender delays." The affidavit further provided that, in granting the extension, J&S "made an informed good faith and tactical decision" based on the "strong likelihood" that the First Agreement would be terminated if the extension was denied.

¶ 15 In its order granting the motion to dismiss with prejudice, the circuit court set forth three reasons for dismissal: (1) the defendants' failure to notify, consult, or advise the plaintiffs prior to executing the letter agreement regarding the extension was not the proximate cause of the plaintiffs' damages; (2) the proximate cause of any alleged damages was the failure to make the

Second Agreement contingent on the sale of the Chicago property; and (3) any alleged damages "are too speculative." The plaintiffs filed this timely appeal.

¶ 16 ANALYSIS

¶ 17 As a threshold matter, we note that the defendants' appellate brief cites unpublished Rule 23 orders. "[N]either an appellant nor appellee can use a Rule 23 order to support any claim or argument in his or her brief." *Voris v. Voris,* 2011 IL App (1st) 103814, ¶ 17. Such citations are strictly prohibited (*id.*), and we disregard them for purposes of our analysis herein. Ill. S. Ct. R. 23(e) (eff. July 1, 2011) (stating that Rule 23 orders are "not precedential and may not be cited by any party except to support contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case"). We turn to the merits.

¶ 18 Although not styled as a "combined motion" under section 2-619.1 (735 ILCS 5/2-619.1 (West 2014)), the motion to dismiss invoked both sections 2-615 and 2-619(a)(9) of the Code. The order granting the motion does not indicate which statutory section was relied upon by the circuit court. A section 2-615 motion to dismiss attacks the legal sufficiency of the complaint. *In re Estate of Powell*, 2014 IL 115997, ¶ 12. Conversely, a section 2-619(a) motion to dismiss admits the legal sufficiency of the plaintiff's claim but asserts certain defenses or defects outside the pleadings which defeat the claim. *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55. See also 735 ILCS 5/2-619(a)(9) (West 2014) (providing for involuntary dismissal where the claim is barred by another affirmative matter avoiding the legal effect of or defeating the claim). As we may affirm the circuit court's dismissal upon any proper basis found in the record, we choose to consider the section 2-615 portion of defendants' motion. See *CNA International, Inc. v. Baer*, 2012 IL App (1st) 112174, ¶ 47.

¶ 19 When ruling on a section 2-615 motion, the court must accept as true all well-pleaded

facts in the complaint, as well as any reasonable inferences that may arise from them. *Estate of Powell*, 2014 IL 115997, ¶ 12. A complaint should be dismissed under section 2-615 only if it is clearly apparent from the pleadings that no set of facts can be proven that would entitle the plaintiff to recover. *Id*. The critical inquiry is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action on which relief may be granted. *Id*. We review an order granting section 2-615 dismissal *de novo*. *Id.*

¶ 20 The defendants sought dismissal of the plaintiffs' legal malpractice claim. To state a claim for legal malpractice, a plaintiff must plead and prove that the defendant attorneys owed the plaintiff a duty of due care arising from the attorney-client relationship, that the defendants breached that duty, and that as a proximate result, the plaintiff suffered injury. *Id.* ¶ 13. Even if the attorney's negligence is established, no action will lie against the attorney unless that negligence proximately caused actual damage to the client. *Id.*; *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 306-07 (2005). For purposes of our analysis, we will assume *arguendo* the existence of a duty and that a breach occurred, and will instead address the issue of proximate cause. See *Governmental Interinsurance Exchange v. Judge*, 221 Ill. 2d 195, 209-10 (2006).

¶ 21 Causation in a legal malpractice case requires both proof of "cause in fact" and proof of "legal cause." *Union Planters Bank, N.A. v. Thompson Coburn LLP*, 402 Ill. App. 3d 317, 343 (2010). Cause in fact can only be established when there is a reasonable certainty that the defendant's acts caused the damage or injury. *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 455 (1992). Courts generally use two tests when considering cause in fact: (1) the traditional "but for" test and (2) the "substantial factor" test. *Union Planters Bank*, 402 Ill. App. 3d at 343.

Under the "but for" test, a defendant's conduct is not a cause of an event if the event would have occurred without it. *Id*. Under the "substantial factor" test, the defendant's conduct is considered to be a cause of an event if it was a substantial factor and a material element in bringing about the event. *Id*.

¶ 22 "Legal cause" is a question of foreseeability: a negligent act is a proximate cause of an injury if the injury is of a type which a reasonable person would see as a likely result of his conduct. *Id*. See also *Huang v. Brenson*, 2014 IL App (1st) 123231, ¶ 27 (stating that a "defendant's actions are the legal cause of the plaintiff's injury where a reasonable person in the defendant's position could foresee the plaintiff's injury as a likely result of the defendant's conduct"). An injury will not be found to be within the scope of a defendant's duty if it appears "highly extraordinary" that the breach of the duty should have caused the particular injury. *Lee*, 152 Ill. 2d at 456; *Union Planters Bank*, 402 Ill. App. 3d at 343.

¶ 23 We agree with the dissent that the issue of "what is the proximate cause of damages" generally is a question of fact. Proximate cause may be determined as a matter of law, however, where the facts are undisputed and "there can be no difference in the judgment of reasonable persons as to the inferences that may be drawn from the facts." *Huang*, 2014 IL App (1st) 123231, ¶ 37. In the instant case, neither cause in fact nor legal cause has been – or can be – adequately pled.

¶ 24 The plaintiffs failed to make the Second Agreement contingent upon the First Agreement. Without any home-sale contingency in the Second Agreement, the plaintiffs assumed the risks associated with the delay or termination of the First Agreement. Furthermore, the plaintiffs did not inform the defendants of the existence of the Second Agreement until after the challenged extension had been granted. As the defendants were unaware of the upcoming Barrington

property purchase, they could not have known that the plaintiffs needed the proceeds from the Chicago property sale for the Barrington transaction. In addition, based on the allegations of the amended complaint, the termination of the First Agreement did not result from the defendants' conduct, but was instead due to the Desais' failure to obtain financing for their purchase of the Chicago property. To the extent that the plaintiffs continued to pay the expenses associated with the Chicago property, such expenses were not the result of the defendants' actions. Finally, as a matter of law, a reasonable attorney would simply not foresee that a two-week extension regarding a mortgage contingency likely would result in tax liability in a wholly-unrelated transaction based on his clients' withdrawal of their retirement funds.

¶ 25 In conclusion, the circuit court did not err in deciding that the defendants did not proximately cause the plaintiffs' damages. Because our review of the issue of proximate cause is sufficient to resolve this appeal, we need not discuss the parties' contentions regarding the issue of damages. As the plaintiffs have failed to plead facts that establish a cognizable claim for legal malpractice, we affirm the circuit court's dismissal with prejudice of their amended complaint.

¶ 26 CONCLUSION

¶ 27 The judgment of the circuit court of Cook County dismissing the amended complaint with prejudice is affirmed in its entirety.

¶ 28 Affirmed.

¶ 29 PRESIDING JUSTICE GORDON, dissenting.

¶ 30 I must respectfully dissent.

¶ 31 In the case at bar, the issue is not whether plaintiff sustained actual damages because it is undisputed that plaintiff did sustain actual damages. The issue is whether those damages were proximately caused by his lawyer's negligence, plaintiff's own conduct, the conduct of a third

party, or a combination of all three.

¶ 32 Proximate cause can be "that cause," "a cause" or "any cause" which produced the plaintiff's damages. *McDonnell v. McPartlin*, 192 Ill. 2d 505, 515 (2000). Generally, the issue of what is the proximate cause of damages is a question of fact to be determined based on the consideration of all of the evidence. *Governmental Interinsurance Exch. v. Judge*, 221 Ill. 2d 195, 210 (2006). " 'The issue of proximate causation in a legal malpractice setting is generally considered a factual issue to be decided by the trier of fact.' " *Judge*, 221 Ill. 2d at 210 (quoting *Renshaw v. Black*, 299 Ill. App. 3d 412, 417-18 (1998)). Our Illinois Supreme Court has explained that issues that could cause reasonable persons to reach different results should never be determined as questions of law. *Judge*, 221 Ill. 2d at 210. The debatable qualities of issues such as proximate cause, where fair-minded persons might reach different conclusions, emphasize the appropriateness of leaving such issues to a fact-finding body. *Judge*, 221 Ill. 2d at 210.

¶ 33 Although plaintiff may have a difficult time in proving his damages were a result of his lawyer's negligence in the present case, the question of proximate cause is a question of fact for the trier of fact to decide, not for the courts to determine on a motion to dismiss. I would reverse the circuit court of Cook County and deny the motion to dismiss.