

No. 1-16-3336

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ROBERT J. DEPKE and CHICAGO TECHNOLOGY LAW GROUP, LLC, as successor of Rockey, Depke, Lyons & Kitzinger,)	Appeal from the
)	Circuit Court
)	of Cook County.
)	
Plaintiffs-Appellants,)	
)	
v.)	No. 13 L 14570
)	
STANLEY KITZINGER; MCKNIGHT, KITZINGER, MCCARTY & PRABDIC, LLC; and PAIGE KITZINGER,)	Honorable
)	Patrick J. Sherlock,
Defendants-Appellees.)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Connors concurred in the judgment.

ORDER

¶ 1 **Held:** Plaintiffs’ claim for breach of fiduciary duty is precluded by the doctrine of collateral estoppel. We affirm.

¶ 2 This lawsuit arises out of a dispute between Paige Kitzinger and other members of her former law firm, then known as Rockey, Depke, Lyons & Kitzinger, LLC (the Rockey firm). Paige sued Robert J. Depke and the other members of the Rockey firm for dissolution, an accounting, and reformation (chancery action). See *Kitzinger v. Rockey*, No. 07 CH 16838 (Cir. Ct. Cook County, IL). Paige was represented in that case by her husband Stanley Kitzinger and

his law firm, McKnight, Kitzinger, McCarty & Pravdic, LLC (the McKnight firm). Depke and the Rockey firm moved to disqualify Stanley and the McKnight firm from representing Paige in the chancery action. The court denied that motion. The court ultimately ruled in favor of Depke and the Rockey firm, and the chancery action terminated. Depke then filed this lawsuit seeking monetary damages from Paige, Stanley, and the McKnight firm. Depke alleged that an attorney-client relationship existed between Depke and Stanley and the McKnight firm, and that those defendants breached their fiduciary duty to Depke by representing Paige in the chancery case. The circuit court granted summary judgment in favor of defendants. We affirm.

¶ 3

BACKGROUND

¶ 4 Plaintiff Depke is a patent attorney. Chicago Technology Law Group, LLC, the other named plaintiff, is his law firm. In 2006, Depke, a “contract partner,” and Paige, an associate, were employed at another intellectual property law firm. Depke decided to leave that firm and he asked Paige to join him to start a new law firm. Paige mentioned that her attorney husband, Stanley, had recently formed his own law firm and could be of some assistance to them.

¶ 5 Depke had a brief telephone conversation with Stanley and then met with both Stanley and Paige for lunch to discuss the formation of a new law firm. They discussed possible corporate structures for the new firm. Stanley explained the formation of his firm as an LLC and the advantages of that corporate structure. Depke discussed the business operation of a patent law firm, including his plan for compensation, revenue, and a capital contribution. Depke neither requested to retain Stanley as his attorney, nor did he compensate Stanley for the advice he received during the lunch meeting. Instead, Depke hired attorney Arnold Flank to form the new law firm, Depke & Kitzinger. Flank prepared and filed the articles of incorporation and registered the LLC.

¶ 6 Before Depke & Kitzinger began operating, another set of attorneys joined the venture and the firm changed its name to Rockey, Depke, Lyons & Kitzinger. Flank handled the amendments to the LLC articles and registration, and other matters involving the start-up of the Rockey firm. Stanley did not meet with the other new members of the Rockey firm to discuss the firm's formation or operation.

¶ 7 In June 2007, Paige announced that she was leaving the Rockey firm. Acting as his wife's attorney, Stanley filed the chancery action against Depke and the other members of the firm. Depke moved to disqualify Stanley as Paige's counsel, alleging that he had an attorney-client relationship with Stanley that prohibited him from representing Paige. After reviewing affidavits and Depke's deposition testimony, the court found that there was no attorney-client relationship between Depke and Stanley because Depke did not manifest an intent to authorize Stanley to act on Depke's behalf, nor did Stanley manifest his acceptance of the power to act on Depke's behalf. The court entered summary judgment in favor of Depke and the Rockey firm.

¶ 8 Depke filed neither a fee petition nor any counterclaim for damages based on breach of fiduciary duty or any other theory of recovery in the chancery action. Instead, Depke filed this lawsuit against Stanley, the McKnight firm, and Paige seeking recovery of the attorney fees and costs that the Rockey firm incurred in defending the chancery action. Depke alleged that he had an attorney-client relationship with Stanley and that his and the McKnight law firm's representation of Paige in the chancery action was a breach of fiduciary duty that violated the Illinois Rules of Professional Conduct. Count I alleged a breach of fiduciary duty against Stanley and the McKnight firm. Count II alleged a breach of fiduciary duty against Paige. Depke alleged malicious prosecution against all of the defendants in count III. In count IV, he alleged abuse of process against all the defendants. The circuit court dismissed counts III and IV, which were never replied. The court also dismissed Paige from the lawsuit and, although

Depke filed a notice of appeal from the order dismissing Paige, this court dismissed that appeal. See *Depke v. Kitzinger*, No. 1-15-2133 (Dec. 22, 2015).

¶ 9 Stanley and the McKnight firm moved for summary judgment, arguing that plaintiffs could not establish the elements for breach of fiduciary duty. On August 24, 2016, the circuit court granted summary judgment in favor of defendants, finding plaintiffs failed to present any evidence that it was defendants' legal representation that proximately caused the attorney fees and costs incurred in the chancery action. The court denied plaintiffs' motion to reconsider. This appeal followed.

¶ 10 ANALYSIS

¶ 11 Plaintiffs argue that the circuit court erred in entering summary judgment in favor of defendants. Plaintiffs contend that defendants breached their fiduciary duty by filing the chancery action on Paige's behalf, which proximately caused plaintiffs' injuries because "but for" the filing of the chancery action, plaintiffs would not have incurred damages. Plaintiffs also argue that the circuit court abused its discretion when it denied their motion to reconsider.

¶ 12 Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012). We review a circuit court's decision granting a motion for summary judgment *de novo*. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). In so doing, we must strictly construe the evidence against the party seeking summary judgment and liberally in favor of the opponent. *Id.* In its written opinion, the circuit court characterized the dispositive issue as the failure of plaintiffs to show that the damages sought were proximately caused by the alleged breach of fiduciary duty.

While the circuit court granted summary judgment on that particular ground, we may affirm on any basis warranted by the record. *Cwik v. Giannoulis*, 237 Ill. 2d 409, 424 (2010).

¶ 13 On appeal, defendants argue that plaintiffs are collaterally estopped from relitigating the issue of whether Depke and Stanley had formed an attorney-client relationship. Plaintiffs alleged in their complaint that “by virtue of the attorney-client relationship, a fiduciary relationship existed by and between Stanley Kitzinger, the McKnight Firm and Depke, whereby Stanley Kitzinger and the McKnight Firm owed Depke a high degree of fidelity, honesty and loyalty. As a result of Stanley Kitzinger’s and the McKnight Firm’s representation of Paige Kitzinger in the [chancery] lawsuit, each breached their fiduciary duty to Depke.”

¶ 14 Collateral estoppel is an equitable doctrine, the application of which precludes a party from relitigating an issue decided in a prior proceeding. *Nowak v. St. Rita High School*, 197 Ill. 2d 381, 390-91 (2001). The requirements for the application of collateral estoppel are: “(1) the issue decided in the prior adjudication is *identical* with the one presented in the suit in question, (2) there was a final judgment on the merits in the prior adjudication, and (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication.” (Emphasis in original.) *Id.* at 390 (citing *Du Page Forklift Service, Inc. v. Material Handling Services, Inc.*, 195 Ill.2d 71, 77 (2001)). “The party asserting the doctrine of collateral estoppel bears the ‘heavy burden’ of demonstrating with clarity and certainty what the prior judgment determined.” *Peregrine Financial Group, Inc. v. Martinez*, 305 Ill. App. 3d 571, 581 (1999) (quoting *People v. Zegiel*, 179 Ill. App. 3d 649, 651 (1989)). “The reviewing court has a duty to study the record to determine whether the trier of fact in the prior adjudication could have based its decision, verdict or judgment upon a matter other than that which the party asserting collateral estoppel attempts to preclude from consideration in the subsequent action.” *Id.* at 581-82.

¶ 15 Plaintiffs counter that collateral estoppel does not apply here because the motion to disqualify counsel in the chancery case was not a final order on the merits. While the order denying the motion to disqualify counsel was not a final judgment, the application of collateral estoppel merely requires “a final judgment on the merits in the *prior adjudication*.” *Nowak*, 197 Ill. 2d at 390. A final judgment in the chancery action occurred when the circuit court entered summary judgment in favor of Depke and the Rockey firm and against Paige.

¶ 16 All the elements of collateral estoppel are met here. The issue decided in the chancery action – whether there was an attorney-client relationship between Depke and Stanley and the McKnight Firm – is identical to the key issue presented in this case. In the chancery action, the circuit court determined that Depke did not form an attorney-client relationship with Stanley and the McKnight firm. Here, plaintiffs’ breach of fiduciary duty claim hinges solely around the allegation that Depke had an attorney-client relationship with Stanley and the McKnight firm. Finally, defendants in this case assert estoppel against Depke and the Rockey firm, who were parties in the prior adjudication.

¶ 17 Based on a plenary review of sworn evidence, the court hearing the chancery action provided a full and fair adjudication of whether an attorney-client relationship had been formed. Collateral estoppel bars plaintiffs from relitigating that issue in a second lawsuit under the rubric of breach of fiduciary duty. Accordingly, the circuit court did not err in granting summary judgment to defendants, and it properly denied plaintiffs’ motion to reconsider.

¶ 18 **CONCLUSION**

¶ 19 We affirm the judgment of the circuit court of Cook County.

¶ 20 Affirmed.