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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ANNE DIERICKX,

Plaintiff and Appellant,

v.

KIRBY & MCGUINN, APC, et al.,

Defendants and Respondents.

D061008

(Super. Ct. No. 37-2010-00102176-
CU-PN-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Lisa Foster, Judge. Affirmed.

Anne Dierickx appeals from a summary judgment entered against her in this professional negligence action against her former attorneys Kirby & McGuinn, APC and Jana Logan (together, respondents). Dierickx contends the trial court erred in granting the motion and abused its discretion in denying her request for a continuance. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Dierickx, an attorney, invested \$155,000 in a business, Café 976, LLC (the Café) and became a 50 percent owner of the Café with Timothy O'Rielly.

Dierickx sued O'Rielly and his corporate entity, Toro Group, Inc. (Toro) for, among other things, breach of contract (the state action). In May 2006, O'Rielly filed for chapter 7 bankruptcy protection (the bankruptcy proceeding) and a third party, Sam Kholi, filed a notice of lien in the state action claiming that he had a security interest in the proceeds of any sale of the Café.

Dierickx retained respondents to represent her in the bankruptcy proceeding, and they filed an adversary action against O'Rielly in the bankruptcy proceeding on Dierickx's behalf. After O'Rielly's bankruptcy filing, Toro, through its new owner, Kholi, intervened in the state action to pursue dissolution of the Café. During the course of the bankruptcy proceeding, a settlement agreement was proposed between the bankruptcy trustee, Toro and Kholi. The bankruptcy court approved the settlement agreement.

Dierickx obtained relief from the automatic stay in the bankruptcy proceeding. She later settled the state action by purchasing Toro's 50 percent ownership interest in the Café, making her its sole owner. Dierickx's state action and adversary action were then dismissed.

In early October 2010, Dierickx filed this action for professional negligence and breach of fiduciary duty alleging that respondents: (1) failed to oppose the proposed settlement in the bankruptcy proceeding; (2) failed to oppose

continuances in the bankruptcy proceeding; (3) failed to serve O'Rielly's attorney with notice of the order granting relief from the bankruptcy stay; and (4) failed to advise her of, and gain her consent, concerning respondents' relationship with the bankruptcy trustee. In March 2011, respondents answered the complaint. In May 2011, they moved for summary judgment, alternatively summary adjudication, arguing Dierickx could not prove the elements of breach, causation or damages. In August 2011, the trial court granted the summary judgment motion on the ground Dierickx could not establish the damage element of her causes of action, finding that her damage claims were speculative and lacked evidentiary support. The court entered judgment in favor of the respondents and Dierickx timely appealed.

DISCUSSION

I. *Grant of Summary Judgment*

Dierickx contends the trial court erred in granting summary judgment because triable issues of material fact existed on essential elements of her claims, including damages. We disagree.

When a defendant moves for summary judgment, the defendant "bears the burden of persuasion that there is no triable issue of material fact and that [the defendant] is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) A defendant can satisfy this burden by showing one or more elements of the cause of action cannot be established. (*Ibid.*) This burden can be met through the opposing party's " 'factually devoid' discovery

responses from which an absence of evidence can be inferred." (*Scheidung v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64, 83.)

If the defendant meets its initial burden, the burden shifts back to the plaintiff to show that a triable issue of fact exists as to that cause of action. In doing so, plaintiffs cannot rely on the mere allegations in their pleadings, "but, instead, shall set forth the specific facts showing that a triable issue of material fact exists" (Code Civ. Proc., § 437c, subd. (p)(2).) We review a summary judgment motion by the same standards as the trial court, but independently determine as a matter of law the construction and effect of the facts presented. (*Santillan v. Roman Catholic Bishop of Fresno* (2008) 163 Cal.App.4th 4, 9.)

The essential elements of a legal malpractice claim are: "(1) breach of the attorney's duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a proximate causal connection between the negligent conduct and the resulting injury; and (3) actual loss or damage resulting from the negligence." (*Thompson v. Halvonik* (1995) 36 Cal.App.4th 657, 661.) The plaintiff must prove the causation element "according to the 'but for' test, meaning that the harm or loss would not have occurred without the attorney's malpractice[.]" (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1235, 1241.) Where, as here, the case involves settlement of litigation, "the plaintiff must prove his opponent in the underlying litigation would have settled for less, or that following a trial, plaintiff would have obtained a judgment more favorable

than the settlement." (*Orrick Herrington & Sutcliffe v. Superior Court* (2003) 107 Cal.App.4th 1052, 1054 (*Orrick*).

"Unless a party suffers damage, i.e., appreciable and actual harm, as a consequence of his attorney's negligence, he cannot establish a cause of action for malpractice. Breach of duty causing only speculative harm is insufficient to create such a cause of action. [Citation.] '[D]amages may not be based upon sheer speculation or surmise, and the mere possibility or even probability that damage will result from wrongful conduct does not render it actionable. [Citation.]' " (*Thompson v. Halvonik, supra*, 36 Cal.App.4th at pp. 661-662.)

Here, respondents argued that Dierickx could not prove she suffered any damages as a result of their alleged negligence because she achieved the goal of her litigation, acquiring the Café. Specifically, they presented evidence that Dierickx sought to purchase the Café for its fair market value in the state action. O'Rielly, as a co-owner of the Café, stated in May 2006 that he would accept \$205,000 in exchange for his 50 percent share of the Café, which at the time he valued at between \$375,000 and \$410,000. Ultimately, Dierickx settled the state action in March 2010 by purchasing the remaining 50 percent interest in the Café for \$65,000.

Respondents also submitted their requests for admissions propounded on Dierickx asking that she admit they caused her no damages and that she suffered no damages. In conjunction with the requests for admission, respondents served a set of form interrogatories, including form interrogatory No. 17.1, which required

Dierickx to identify all facts, witnesses and documents which supported her responses to the requests for admission which were not unqualified admissions. Dierickx responded to the request for admissions with denials and responded to form interrogatory No. 17.1 with objections that the interrogatory was vague, ambiguous, overbroad and burdensome.

In opposition to the summary judgment motion, Dierickx argued that she suffered damages because she paid for attorney fees, that she could have acquired the Café for less and that she had to split her profits every month until the state action settled. She submitted a declaration to support her arguments. Therein, Dierickx stated that she "suffered financially in that every month of delay was another month of profits generated by [her] work that had to be split with [whoever] had the membership shares. [She] also suffered financially from the continued attorney's fees incurred."

Dierickx's statements are conclusory and essentially amount to a contention that respondents' failure to oppose continuances in the bankruptcy proceeding delayed her acquisition of the Café and caused her to suffer damages. Dierickx, however, failed to present any evidence that O'Rielly sought continuances in the bankruptcy proceeding and that respondents failed to oppose the requests.

Moreover, while damages for legal malpractice may include fees paid to a second attorney to correct the first attorney's error, Dierickx does not allege such damages. (*Orrick, supra*, 107 Cal.App.4th at p. 1060, fn. 5.) Instead, Dierickx claims that she paid attorney fees to respondents and how much should be

refunded as a result of respondents' negligence can be established by an expert witness or the trier of fact. However, as the *Orrick* court pointed out, "the idea that the fees paid to the negligent attorney constitute tort damages, if credited, would lead to an absurd result" as "there would be no need to prove a better result in the underlying litigation, because damages would exist based on the mere acceptance of a fee for the services provided." (*Id.* at p. 1058.)

Finally, as the trial court sagely noted, it is difficult to see how Dierickx could have obtained a better result in the bankruptcy adversary proceeding when she indicated a willingness to purchase the remaining 50 percent interest in the Café for fair market value, represented to be \$205,000, but ultimately purchased the remaining half-interest in the Café for \$65,000.

Accordingly, the court properly granted summary judgment on the basis that Dierickx failed to raise a triable issue of fact that she suffered any damages as a result of the alleged malpractice and breach of fiduciary duties.

II. *Denial of Continuance*

Dierickx argues that the trial court erred by denying her request to continue the summary judgment hearing, claiming the motion was brought early in the litigation and that it was difficult for her to gather the evidence to oppose the motion as she was caring for her ill mother.

The summary judgment statute provides: "If it appears from the affidavits submitted in opposition to a motion for summary judgment . . . that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented,

the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due." (Code Civ. Proc., § 437c, subd. (h).) The party seeking a continuance must submit an affidavit or declaration showing that " '(1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts.' " (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254.)

Respondents filed their summary judgment motion in May 2011. In her written opposition to the motion, filed in July 2011, Dierickx did not submit an affidavit making the necessary showing for a mandatory continuance. Rather, at oral argument on the motion, Dierickx's counsel asked for a 60-day continuance to conclude discovery. Thus, we review the court's denial of Dierickx's continuance request for an abuse of discretion. (*Johnson v. Alameda County Medical Center* (2012) 205 Cal.App.4th 521, 532.)

Dierickx's counsel represented that expert testimony was necessary, he was new to the case, Dierickx was taking care of her mother and he needed respondents' discovery responses. However, as the trial court noted in denying the request, counsel failed to articulate what he could achieve or obtain in discovery, what discovery would yield on Dierickx's damages claim and what an expert may provide or who that expert might be. The court also noted that Dierickx failed to

supplement her discovery responses despite repeated promises to do so. On this record we cannot conclude that the trial court abused its discretion in denying Dierickx's request for a continuance.

DISPOSITION

The judgment is affirmed. Respondents are entitled to recover their costs on appeal.

McINTYRE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.