[Cite as *C & K Indus. Servs., Inc. v. McIntyre, Kahn & Kruse Co., L.P.A.*, 2009-Ohio-2373.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92233

C&K INDUSTRIAL SERVICES, INC., et al.

PLAINTIFFS-APPELLANTS

vs.

McINTYRE, KAHN & KRUSE CO., L.P.A., et al.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-551291

BEFORE: Rocco, P.J., Blackmon, J., and Dyke, J.

RELEASED: May 21, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANTS

Kenneth F. Seminatore
1715 Superior Building
815 Superior Avenue
Cleveland, Ohio 44114

ATTORNEYS FOR APPELLEES

Robert H. Eddy
Lori E. Brown
John T. Murphy
Monica A. Sansalone
Gallagher, Sharp, Fulton & Norman
1501 Euclid Avenue
Bulkley Building – 6th Floor
Cleveland, Ohio 44115

Mark F. Kruse
McIntyre, Kahn & Kruse Co., L.P.A.
The Galleria & Towers at Erieview
1301 East 9th Street, Suite 2200
Cleveland, Ohio 44114

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

KENNETH A. ROCCO, P.J.:

{¶ 1} Plaintiffs-appellants, C&K Industrial Services, Inc. and Karas Enterprises, Inc., appeal from a common pleas court order granting judgment on the pleadings in favor of defendants-appellees, McIntyre, Kahn & Kruse Co., L.P.A. and Robert McIntyre, on appellants' claims for legal malpractice. In three assignments of error, appellants argue that the court erroneously relied on materials outside the pleadings, misread those materials, and improperly decided issues which could not be determined on the pleadings. We find the court erred by granting judgment on the pleadings, so we reverse and remand for further proceedings.

{¶ 2} Appellants filed their complaint on January 5, 2005. They alleged that appellees provided legal services to appellants in connection with the bankruptcy of LTV Steel. The complaint discussed the bankruptcy proceeding and the contractual relationship between LTV and C&K. We summarize this background information here to provide the context for appellants' legal malpractice claims.

{¶ 3} According to the complaint, C&K had provided industrial cleaning services to LTV pursuant to a contract effective May 1, 1998. The contract provided that C&K was to be compensated in two ways, first, for the work it performed, and second, for the cost savings that LTV enjoyed. This savings component, the "Cost Savings Incentive," was calculated at 50 percent of the difference between C&K's actual charges and a negotiated annual "cap."

{¶ 4} After LTV filed for bankruptcy on December 29, 2000, C&K continued to provide LTV with services pursuant to the contract, on appellees' advice. LTV later rejected the contract with C&K.

{¶ 5} C&K, through appellees, filed an administrative expense claim against LTV in the bankruptcy proceeding. The claim was for $1,899,064, of which $1,447,703 was claimed under the Cost Savings Incentive. C&K justified the Cost Savings Incentive by arguing that its base prices on the contract were lower than the prices they charged to other customers. LTV sought discovery on this issue. On appellee's advice, C&K did not provide discovery of their third-party price databases, instead only providing summaries. "Unbeknownst to C&K," appellees repeatedly challenged LTV's right to discovery about the third-party pricing.

{¶ 6} LTV finally filed a motion to dismiss. The bankruptcy court denied the motion to dismiss, but sanctioned C&K by preventing it from offering any evidence of its third-party price rates at the hearing on its claim, and from

making any argument that LTV received favorable rates. C&K then discharged appellees and retained other counsel to litigate its claim. The bankruptcy court ultimately rejected C&K's claim.

{¶ 7} In the complaint, C&K raised three legal malpractice claims. First, it asserted that appellees did not competently represent its interests when they engaged in abusive discovery practices, causing C&K to lose its administrative expense claim. Second, it claimed that appellees breached their duty of due care to C&K by advising it to continue to work under the contract and assume the risk that it would not be paid. Third, it claimed that appellees breached their oral contract with C&K to provide it with competent legal counsel.

{¶ 8} Appellees answered and counterclaimed for their fees and expenses, asserting causes of action on an account, for breach of contract, and for unjust enrichment.

{¶ 9} This action was stayed pending final resolution of C&K's claim in the federal courts. It was restored to the active docket in May 2007. In December 2007, appellees filed a motion for judgment on the pleadings in which they asserted that appellants' claims were barred by collateral estoppel. Appellees asserted that the U.S. District Court's opinion on C&K's appeal from the bankruptcy court's denial of its administrative claim demonstrated that C&K had not lost its administrative claim against LTV because of appellees' actions. The common pleas court agreed and, in a seven-page opinion, granted

appellees' motion, finding no just cause for delay. Appellants have timely appealed from this ruling.

{¶ 10} We review the trial court's decision to grant judgment on the pleadings de novo. *Euvrard v. Christ Hosp. & Health Alliance* (2001), 141 Ohio App.3d 572, 575. "To grant a judgment on the pleadings, the trial court must construe the material allegations in the complaint, as well as reasonable inferences arising from them, in favor of the plaintiff and conclude beyond a doubt that the plaintiff can show no set of facts that would entitle him to relief." Id., citing *State ex rel. Midwest Pride IV, Inc. v. Pontious* (1996), 75 Ohio St.3d 565, 570.

{¶ 11} In *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, the Ohio Supreme Court held that a motion for judgment on the pleadings is restricted solely to the allegations in the pleadings. Unlike a motion to dismiss for failure to state a claim, a motion for judgment on the pleadings may not be converted to a summary judgment motion when matters outside the pleadings are submitted. *Minshall v. Cleveland Illuminating Co.*, Lake App. No. 2004-L-156, 2006-Ohio-2241, ¶15-18. The trial court in *Minshall* expressly converted the motion to a motion for summary judgment. On appeal, the plaintiff in that case was held to have waived this irregularity by failing to raise it in the common pleas court. Appellant here brought this issue to the trial court's attention and consequently preserved the issue for our review.

{¶ 12} The federal court opinion upon which appellees relied was not attached to the pleadings. It was attached to the motion for judgment on the pleadings not as legal authority, but as evidence that the issues raised in the complaint were conclusively decided against appellants in prior litigation. Such evidence cannot be considered on a motion for judgment on the pleadings. See, e.g., *Inskeep v. Burton*, Champaign App. No. 2007 CA 11, 2008-Ohio-1982, ¶17; *Carver v. Mack*, Richland App. No. 2005CA0053, 2006-Ohio-2840, ¶29. Therefore, the common pleas court erred by granting judgment on the pleadings. We reverse and remand for further proceedings.

Reversed and remanded.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, PRESIDING JUDGE

and ANN DYKE, J., CONCUR
PATRICIA ANN BLACKMON, J., CONCURS
IN JUDGMENT ONLY