

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

Dan Cosic, et al.

Court of Appeals No. OT-10-028

Plaintiffs

Trial Court No. 08 CV 575 H

v.

Gary Milkovich, et al.

Appellants

v.

Richard Gillum, et al.

DECISION AND JUDGMENT

Appellees

Decided: April 15, 2011

* * * * *

Daniel F. Lindner, for appellants.

David A. Schaefer and Kimberly A. Brennan, for appellees.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Third-party plaintiffs-appellants, Gary Milkovich and Anchors Away Properties, LLC, appeal the February 4, 2010, and June 7, 2010 judgments of the Ottawa

County Court of Common Pleas which granted summary judgment to third-party defendants-appellees, Richard R. Gillum and Kocher & Gillum. Because we find that no genuine issues remain for trial, we affirm.

{¶ 2} A history of the facts is as follows. During all times relevant herein, appellant Milkovich was the principal owner and member of Anchors Away Properties, LLC ("Anchors Away.") In 2004, Anchors Away took title to property located at 252 West Lakeshore Drive, Port Clinton, Ohio ("the property.") In April 2007, Dan Cosic, appellant Milkovich, and John Schwinkendorf, entered into a real estate purchase agreement to buy the property for \$1.8 million. The listing agent, John Rader, as a commission, was to receive \$10,000 and a five percent interest in the new ownership group that was ultimately purchasing the property. Thereafter, the parties entered into an operating agreement as Beachfront Resort, LLC ("Beachfront.") Schwinkendorf then assigned his interest to Milkovich.

{¶ 3} On June 7, 2008, the parties entered into a Memorandum of Understanding ("MOU") which set forth the parties' rights and responsibilities regarding the sale of the property. Notably, the parties agreed that Milkovich, and/or Anchors Away, would not attempt to dispose of any of its assets to anyone or any entity other than Beachfront.

{¶ 4} In order to raise funds for development on the property, Cosic and Rader secured a buyer for the restaurant on the property. Thereafter, business relations broke down and Milkovich and Anchors Away entered into negotiations to directly sell the restaurant property and keep the proceeds from the sale.

{¶ 5} Cosic and Rader commenced an action for money damages requesting that they receive their portion of the proceeds based upon sums they invested in the property. The complaint also requested that an equitable lien be placed on the property. The complaint included a description of the property which invoked the lis pendens statute, R.C. 2703.26.

{¶ 6} Appellant Milkovich's attorney sent a letter to appellee, Richard Gillum, the plaintiffs' attorney, requesting that the complaint be amended to remove the legal description of the property. The attorney explained that because the property was not the essence of the dispute, Gillum had improperly "clouded" the title. In response, Gillum acknowledged that the complaint triggered the lis pendens statute but refused to remove the legal description of the property because of the claim for an equitable lien on the property. Thereafter, appellees filed an amended complaint which again invoked the lis pendens statute.

{¶ 7} On December 8, 2008, appellants filed their answer, counterclaim, and a third-party complaint naming appellees. In their complaint, appellants first requested declaratory judgment quashing lis pendens and quieting title to the property. Appellants alleged that appellees "wrongfully and maliciously" invoked the lis pendens statute and, thus, caused the sale of the restaurant portion of the property to fail. Appellants alleged slander of title, abuse of process, and tortious interference with the real estate contract.

{¶ 8} On April 7, 2009, appellants filed a motion for partial summary judgment requesting, inter alia, that the court grant their request to quash the application of the lis pendens statute and quiet title to the property.

{¶ 9} On April 28, 2009, appellees filed a motion for summary judgment. Appellees first argued that, as legal representatives of plaintiffs, they are immune from liability to third-parties for good faith acts done on behalf of their clients. Alternatively, appellees argued that the evidence fails to establish appellants' claims set forth in the third-party complaint. Specifically, appellees argued that the slander of title claim was premature and hinged on the court's determination that the MOU created an equitable lien on the property. Regarding abuse of process, appellees contend that the proceedings have in no way been perverted to accomplish an "ulterior purpose." Finally, as to the tortious interference claim, appellees contend that they have had no contact with the potential buyer of the property and that, in filing the complaint, it was done in good faith and merely to enforce the equitable lien.

{¶ 10} In their memorandum in opposition, appellants stressed that every argument advanced by appellee Gillum turned on his subjective intent and that the question of a party's intent is, invariably, a question of fact. Further, questioning appellees' intentions, appellants stated that appellee Gillum was first hired by Milkovich to prepare the assignment of membership interest from Schwinkendorf to Milkovich. Milkovich paid him with a personal check. Appellants stated that Gillum then "switched teams" and began representation of Cosic and Rader. Appellants again argued that

lis pendens was not to be used in the case because only money, not property was at issue. Based on this fact, appellants contended that appellees improperly invoked lis pendens that "placed an impermissible cloud on the title of the property."

{¶ 11} While appellees' motion for summary judgment was pending, appellants sought leave to file an amended counterclaim based on "newly obtained evidence." Appellants argued that appellees previously provided legal counsel to Milkovich regarding the same matter. Thus, appellants were granted leave to amend their complaint and add a claim for breach of fiduciary duty.

{¶ 12} On February 4, 2010, the trial court granted appellees' motion for summary judgment finding that appellees invoked the lis pendens statute in good faith. The court further found that appellants' motion for partial summary judgment as to their request that the court quash the lis pendens claim was well-taken. The court concluded that lis pendens could not be invoked until after an equitable lien had been placed on the property.

{¶ 13} Thereafter, appellees filed a second motion for summary judgment as to appellants' additional claim for breach of a fiduciary duty. Appellees stated that although Milkovich hired Gillum, at Cosic's suggestion, to draft a transfer of membership interest, he never had any direct contact with Gillum and had no contact with him by either telephone or email. Gillum stated that he believed that he was being retained by Beachfront. Thus, because there was no attorney-client relationship between them, Gillum owed no duty to Milkovich.

{¶ 14} In response, appellants argued that in addition to Gillum drafting the assignment of membership interest he drafted the MOU which was the basis of the plaintiffs' complaint. Appellants further argued that Gillum proceeded with the lawsuit despite appellants' attorney's letter informing him that the claims were not supported by evidence and were frivolous.

{¶ 15} On June 7, 2010, the trial court entered its judgment granting appellees' motion for summary judgment. The court noted the minimal contact Gillum had with Milkovich regarding the assignment of interest. Further, as to the MOU, the court stated that it was plaintiffs who brought the MOU to Milkovich and that it represented their understanding of the business venture. The court determined that there was no attorney-client relationship between appellees and Milkovich. The court then dismissed the counterclaim.

{¶ 16} On July 16, 2010, plaintiffs filed a notice of dismissal of the claims against appellants. Appellants then filed a notice of appeal.

{¶ 17} Appellants now raise the following assignment of error for our consideration:

{¶ 18} "I. The trial court should have denied Gillum's first motion for summary judgment, because Gillum's defense of qualified privilege and appellants' claims of slander of title, tortious interference and abuse of process all rest solely upon the factual determination of Gillum's subjective intent: Did Gillum act intentionally and/or with

malice. Evidence presented indicates that Gillum acted with malice and/or with intent to injure appellants."

{¶ 19} Although appellants delineate only one assignment of error relating to the trial court's first award of summary judgment to appellees, they make arguments relating to the second award of summary judgment. As did appellees, we will examine both judgments.

{¶ 20} We review de novo the trial court's ruling on the summary judgment motions. *Conley-Slowinski v. Superior Spinning & Stamping Co.* (1998), 128 Ohio App.3d 360, 363.

{¶ 21} Appellants first argue that the question of whether appellees acted with malice and, thus, are not entitled to immunity, is necessarily a fact question that cannot be disposed of through summary judgment. In *Scholler v. Scholler* (1984), 10 Ohio St.3d 98, paragraph one of the syllabus, the Supreme Court of Ohio held that "[a]n attorney is immune from liability to third persons arising from his performance as an attorney in good faith on behalf of and with the knowledge of his client, unless such third person is in privity with the client or the attorney acts maliciously."

{¶ 22} Appellants cite *Ball v. British Petroleum Oil* (1995), 108 Ohio App.3d 129, for their argument that the question of malice is best left to a jury. In *Ball*, this court examined whether an alleged defamatory statement made in the workplace was privileged. We stated that in order to survive summary judgment, a plaintiff must show "sufficient facts" demonstrating malice. *Id.* at 135. In *Ball*, we determined, inter alia,

that the appellant failed to present sufficient facts that the plant manager acted with "actual malice"; thus, the court's grant of summary judgment to the manager was not in error. *Id.* We noted only that the *ultimate* question of malice is best left to a jury. *Id.*

{¶ 23} In the present case, we agree that appellants failed to present sufficient facts to create an issue of fact as to Gillum's malice in invoking the lis pendens statute. Appellants claim the letters sent by their counsel establish that Gillum knew that the claims he was asserting on behalf of his clients were improper. Obviously, these letters set forth appellants' view of the case; these opinion letters did not require that plaintiffs, through their attorney, abandon their claims. Gillum supports his arguments by affidavit and certain portions of his deposition where he states that he invoked the lis pendens statute in good faith.

{¶ 24} Appellants also argue that a question of fact remains as to whether Gillum owed appellants a fiduciary duty. As the parties correctly note, an attorney owes a fiduciary duty to his or her client. As set forth by the Eighth Appellate District:

{¶ 25} "In determining whether an attorney-client relationship exists, the court must determine 'whether the putative client reasonably believed that he had entered into a confidential relationship with the attorney.'" *Stuffleben v. Cowden*, 8th Dist. No. 82537, 2003-Ohio-6334, ¶ 21, quoting *Lillback v. Metro. Life Ins. Co.* (1994), 94 Ohio App.3d 100, 108.

{¶ 26} "Further, 'An essential element * * * is the determination that the relationship invoked such trust and confidence in the attorney that the communication

became privileged and, thus, the information exchanged was so confidential as to invoke an attorney-client privilege.' Moreover, the putative client must have 'reasonably believed that the relationship existed and that the attorney would therefore advance the interests of the putative client.'" *Id.*, quoting *David v. Schwarzwald, Robiner, Wolk & Rock Co., L.P.A.* (1992), 79 Ohio App.3d 786, 798.

{¶ 27} Upon review, we find that the record does not support a reasonable belief that appellants were represented by appellees. Milkovich had no direct contact with Gillum. Cosic suggested that they use the firm to draft the transfer of interest agreement. The form was drafted at arms length without any counsel or advice given. It was either mailed or given to Cosic. The invoice was directed to Beachfront. Milkovich did pay appellees with a personal check but stated that he did so only because he had more money in his personal account. There was no relationship of trust or confidence.

{¶ 28} Accordingly, we conclude that appellees were entitled to immunity as to appellants' claims of slander of title, tortious interference with contract, and abuse of process and that appellees had no fiduciary relationship with appellants. Appellants' assignment of error is not well-taken.

{¶ 29} On consideration whereof, we find that substantial justice was done the parties complaining and the judgment of the Ottawa County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellants are to pay the costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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