

[Cite as *Consol. Church Fin. Co. v. Geauga Sav. Bank*, 2011-Ohio-1360.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94715

**CONSOLIDATED CHURCH
FINANCIAL CO., ET AL.**

PLAINTIFFS-APPELLANTS

vs.

GEAUGA SAVINGS BANK, ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-686107

BEFORE: S. Gallagher, J., Boyle, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: March 24, 2011

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SEAN C. GALLAGHER, J.:

{¶ 1} Appellants Consolidated Church Financial, LLC (“Consolidated Church”) and Dale Edwards appeal the January 29, 2010 judgment of the Cuyahoga County Court of Common Pleas. For the reasons stated herein, we affirm the judgment of the trial court.

{¶ 2} Appellants filed a complaint on February 27, 2009, against appellees Geauga Savings Bank (“GSB”) and Anthony A. Cox, alleging claims of fraudulent

inducement and legal malpractice in connection with an assignment and indemnity agreement entered on March 26, 2004. The agreement was prepared by Cox, who was the attorney for GSB. Dale Edwards is the president of Consolidated Church.

{¶ 3} Pursuant to the agreement, in consideration of the payment of \$225,000 from Consolidated Church, GSB assigned certain rights and interests to Consolidated Church, including a judgment GSB obtained against Harvest Missionary Baptist Church (“Harvest”) and other parties. The agreement specifically provided that it was made without representations or warranties of any kind, including warranties as to the enforceability of the subject indebtedness. It also contained a release of all claims against GSB and its agents. Further, Consolidated Church agreed to indemnify and hold harmless GSB and its agents against future claims.

{¶ 4} Under their claim for fraudulent inducement, appellants allege that at the time the agreement was entered, GSB was aware of a separate lawsuit that “related directly” to the assignment agreement but did not disclose this information to appellants. That lawsuit was *Mitchell Jackson, et al. v. Artis Caver, et al.*, Cuyahoga Common Pleas Court Case No. CV-525146 (“the *Jackson* case”). GSB was not a party to the *Jackson* case.

{¶ 5} Under their claim for legal malpractice, appellants allege that Cox had simultaneously represented GSB and appellants in connection with the assignment transaction. Cox denied this allegation and filed a counterclaim against Consolidated Church for unpaid legal fees arising from legal services rendered in connection with

various litigation from August 2004 to March 2007, which was after the agreement had been entered and unrelated thereto.

{¶ 6} GSB filed a motion for judgment on the pleadings with regard to the fraudulent inducement claim. The trial court granted the motion in May 2009, and GSB was dismissed from the action.

{¶ 7} Cox filed a motion for judgment on the pleadings and a motion for summary judgment. On January 29, 2010, the trial court granted judgment on the pleadings to Cox on the fraud claim, and granted summary judgment to Cox on the legal malpractice claim and the counterclaim for attorney's fees. Appellants filed this appeal from that judgment.

{¶ 8} Under their first assignment of error, appellants claim "[t]he trial court erred when it granted appellee Geauga Savings Bank's motion for judgment on the pleadings." As an initial matter, we shall address GSB's argument that we lack jurisdiction to consider the merits of the appeal against it.

{¶ 9} The notice of appeal filed in this matter only designated the January 29, 2010 judgment, which granted judgment on the claims involving Cox. GSB argues that this court should not address the merits of the appeal against it because the notice of appeal did not reference the trial court's judgment entry granting GSB's motion for judgment on the pleadings. GSB refers to App.R. 3(D), which states, in pertinent part, that the notice of appeal "shall designate the judgment, order or part thereof appealed from[.]"

{¶ 10} In *Transamerica Ins. Co. v. Nolan* (1995), 72 Ohio St.3d 320, 649 N.E.2d 1229, syllabus, the Ohio Supreme Court held: “Pursuant to App.R. 3(A), the only jurisdictional requirement for a valid appeal is the timely filing of a notice of appeal. When presented with other defects in the notice of appeal, a court of appeals is vested with discretion to determine whether sanctions, including dismissal, are warranted, and its decision will not be overturned absent an abuse of discretion.” A court of appeals has discretion to determine the appropriate sanctions, if any, for an otherwise defective notice of appeal. *Id.* at 322. This court has consistently declined to review a judgment or order that is not designated in the notice of appeal. See, e.g., *TJX Cos. Inc. v. Hall*, 183 Ohio App.3d 236, 2009-Ohio-3372, 916 N.E.2d 862, ¶ 43-44, appeal not allowed, 124 Ohio St.3d 1417, 2009-Ohio-6816, 919 N.E.2d 216; *State v. Pond*, Cuyahoga App. No. 91061, 2009-Ohio-849; *Harrison v. Creviston*, 168 Ohio App.3d 349, 2006-Ohio-3964, 860 N.E.2d 113.

{¶ 11} In this case, the trial court granted GSB’s motion for judgment on the pleadings in May 2009 and GSB was dismissed from the lawsuit. That judgment entry was not designated in the notice of appeal. The appeal was taken from the final judgment of the court entered on January 29, 2010, which resolved the claims involving Cox. While Cox and his counsel were served with the notice of appeal, it does not appear that GSB or its counsel were served with the notice of appeal. Also, appellants failed to file a praecipe and docketing statement with the notice of appeal. There was simply no indication that appellants intended to appeal the court’s decision to grant

judgment on the pleadings in favor of GSB, and the notice of appeal failed to apprise GSB that any appeal was taken from that decision. It was not until the delayed filing of the praecipe and docketing statement, in May 2010, that any indication was given that appellants intended to appeal the ruling on their claim against GSB. Under the circumstances herein, we exercise our discretion and will not consider the assignment of error against GSB.

{¶ 12} Appellants' remaining assignments of error appeal the trial court's ruling on Cox's motions for summary judgment and motion for judgment on the pleadings, which resolved all claims in favor of Cox.

FRAUD CLAIM

{¶ 13} We review a ruling on a motion for judgment on the pleadings de novo. See *Coleman v. Beachwood*, Cuyahoga App. No. 92399, 2009-Ohio-5660. "In order to be entitled to a dismissal under Civ.R. 12(C), it must appear beyond doubt that [the nonmovant] can prove no set of facts warranting the requested relief, after construing all material factual allegations in the complaint and all reasonable inferences therefrom in [the nonmovant's] favor." *State ex rel. Toledo v. Lucas Cty. Bd. of Elections*, 95 Ohio St.3d 73, 74, 2002-Ohio-1383, 765 N.E.2d 854.

{¶ 14} Appellants' fraudulent inducement claim related to the nondisclosure of the *Jackson* case. The fraud claim was asserted solely against GSB. The only claim brought against Cox was for professional negligence or legal malpractice. Even if the

fraud claim had been asserted against Cox, we find that judgment on the pleadings was appropriately granted.

{¶ 15} The complaint in this matter asserts that Cox acted as GSB’s attorney with regard to the assignment agreement. He was clearly an agent of GSB. In granting Cox’s motion, the trial court determined that appellants were precluded from pursuing their fraud claim against Cox pursuant to the clear language of the assignment agreement.

The agreement specifically provides that it “is made without representations and warranties” and “without recourse against assignor, its officers and agents.” The agreement also contains a release of claims. These terms are undisputed.

{¶ 16} Nevertheless, on appeal, appellants argue that Cox owed them a duty to disclose pursuant to Ohio’s ethical rules. Because this issue was not raised in the trial court, we decline to consider it for the first time on appeal. Insofar as appellants argue that the trial court should have allowed additional opportunities for discovery, we find no merit to this argument. Accordingly, we find that the trial court properly granted Cox’s motion for judgment on the pleadings.

LEGAL MALPRACTICE CLAIM

{¶ 17} Next, we address the summary judgment ruling on the legal malpractice claim. Appellate review of summary judgment is de novo, governed by the standard set forth in Civ.R. 56. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Accordingly, we afford no deference to the trial court’s decision and independently review the record to determine whether summary judgment is appropriate.

Hollins v. Shaffer, 182 Ohio App.3d 282, 2009-Ohio-2136, 912 N.E.2d 637, ¶ 12. Under Civ.R. 56(C), summary judgment is proper when the moving party establishes that “(1) no genuine issue of any material fact remains, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and construing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made.” *State ex rel. Duncan v. Mentor City Council*, 105 Ohio St.3d 372, 2005-Ohio-2163, 826 N.E.2d 832, ¶ 9, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 18} In order to establish a legal malpractice claim relating to civil matters under Ohio law, a plaintiff must prove three elements: (1) existence of an attorney-client relationship giving rise to a duty, (2) breach of that duty, and (3) damages proximately caused by the breach. *Krahn v. Kinney* (1989), 43 Ohio St.3d 103, 538 N.E.2d 1058, syllabus. “The determination of whether an attorney-client relationship was created turns largely on the reasonable belief of the prospective client.” *Cuyahoga Cty. Bar Assn. v. Hardiman*, 100 Ohio St.3d 260, 2003-Ohio-5596, 798 N.E.2d 369, ¶ 10. In this case, the trial court found a lack of evidence to establish a reasonable belief that a relationship existed at the time the alleged malpractice occurred.

{¶ 19} In moving for summary judgment on the legal malpractice claim, Cox provided an affidavit in which he attested to the following material facts: (1) he represented GSB in prior proceedings against Harvest and obtained a judgment on behalf

of GSB in a foreclosure action; (2) in March 2004, he was approached by Edwards, who sought to purchase GSB's judgments against Harvest and the mortgage as part of an effort to avoid the sheriff's sale; (3) Edwards, through his company Consolidated Church, agreed to the assignment of the judgments against Harvest and of the note and mortgage for a purchase price of \$225,000; (4) Cox represented only GSB in the transaction and prepared the assignment agreement on the request of GSB; (5) at no time prior to or contemporaneous with the assignment agreement did Cox represent Consolidated Church or Edwards; (6) in a subsequent letter, dated March 29, 2004, Cox indicated that although the assignment agreement contained a release, GSB and Cox would aid appellants in defense of the purchased judgments and mortgage should they require such help in the future; (7) Cox was approached by Consolidated Church about representation in the summer of 2004, and the first date in which he represented Consolidated Church was on July 29, 2004. Cox provided supporting documentation to support the averments in his affidavit.

{¶ 20} In opposing Cox's motions, Edwards submitted an affidavit claiming that he established Consolidated Church at the direction of Cox for the sole purpose of purchasing the note and liens described in the assignment agreement, that Cox provided him with specific instructions, that Cox informed him that he would represent both GSB and Edwards's companies to accomplish the transaction, and that Cox sent Edwards a letter indicating he would continue to assist Edwards if issues arose concerning the transaction.

{¶ 21} We recognize that Edwards’s affidavit expresses his perception of an attorney-client relationship. Regrettably, his affidavit, without more, is insufficient to overcome the evidence offered by Cox and fails to create a factual issue as to whether there was an attorney-client relationship at the time of the assignment agreement. Edwards offered no supporting documentation to show any communications with Cox or other evidence corroborating the existence of an attorney-client relationship with regard to the assignment agreement. Further, the March 29, 2004 letter from Cox only evinces a future relationship. The letter states that the release language in the assignment agreement “[does] not mean that the bank and its representatives, including myself, will not cooperate and aid your company in defense of the purchased judgment and mortgage, should your company need our help and cooperation in litigation or otherwise in the future.” This letter does not establish or show an intent to establish an attorney-client relationship with Edwards or Consolidated Church. Rather, the plain language expresses the intention of GSB and Cox, as a representative of the bank, to aid appellants in the future should the need arise.

{¶ 22} Because there was a lack of sufficient evidence to establish that Edwards had a reasonable belief that an attorney-client relationship existed, we find that summary judgment was appropriately entered in favor of Cox on the legal malpractice claim.

COUNTERCLAIM

{¶ 23} Finally, we address the summary judgment ruling on Cox’s counterclaim for unpaid legal fees. In moving for summary judgment, Cox provided an affidavit in which

he stated that he represented Edwards and his companies between July 29, 2004, and March 2007, and that he was owed a final balance of \$11,050.25. In response, Edwards submitted an affidavit that offered nothing more than conclusory statements that Cox appeared on behalf of Consolidated Church in March 2007 and was unprepared, and that he did not owe Cox any legal fees. However, no evidence was presented to dispute the services that were rendered or that an outstanding amount was owed.

{¶ 24} This court has previously recognized: “Generally, a party’s unsupported and self-serving assertions, offered by way of affidavit, standing alone and without corroborating materials under Civ.R. 56, will not be sufficient to demonstrate material issues of fact. Otherwise, a party could avoid summary judgment under all circumstances solely by simply submitting such a self-serving affidavit containing nothing more than bare contradictions of the evidence offered by the moving party.” (Citation omitted.) *Davis v. Cleveland*, Cuyahoga App. No. 83665, 2004-Ohio-6621, ¶ 24. Accordingly, because appellants did not offer any evidence sufficient to establish a genuine issue of material fact, and because Cox demonstrated that no factual dispute remained as to the services rendered and amount of legal fees owed, the trial court properly granted summary judgment on Cox’s counterclaim.

{¶ 25} Appellants’ second and third assignments of error are overruled.

Judgment affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas 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.

SEAN C. GALLAGHER, JUDGE

COLLEEN CONWAY COONEY, J., CONCURS;
MARY J. BOYLE, P.J., CONCURS IN JUDGMENT ONLY