STATE OF MICHIGAN

COURT OF APPEALS

JOSEPHINE AVOLIO, THERESA CASASANTA, and DONALD AVOLIO, Plaintiffs-Appellants, v JAMES T. HOGAN and HOGAN & KIPKE, P.C., Defendants-Appellees.	UNPUBLISHED November 10, 2009 No. 287684 Macomb Circuit Court LC No. 2007-003777-NM

Before: Stephens, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

In this legal malpractice case, plaintiffs appeal as of right from the circuit court's order granting summary disposition to defendants, plaintiffs' former attorney and the firm through which he practices. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This case arises from litigation involving the dissolution of a partnership. Plaintiff Josephine Avolio is the widow, and successor in interest, of one of the original partners, Guy Avolio. Plaintiff Donald Avolio is Josephine's son, and plaintiff Theresa Casasanta is Josephine's daughter.

In 1998, the partnership sold a parcel of land, entitling the partners to shares of the proceeds. Plaintiffs report that there was some dispute over what percentage of the funds to be distributed to which Josephine was entitled, the figures in play being 10.858 percent, 11.47 percent, and 16.55 percent, but assert that "there never appeared to be any real question that Mrs. Avolio was a general partner, and that she was entitled to at least 11.47%." Defendants, conversely, report that a 1989 default judgment determined that Casasanta, then acting as personal representative of the estate of the deceased Guy Avolio, was liable for administrative expenses owed to the partnership, and that in light of this what is now plaintiffs' interest was reduced from 16.586 percent to 10.858 percent. Defendants further suggest that plaintiffs' preference for a percentage higher than 10.858 stems from their calculations in trying to include an allegedly uncredited capital contribution.

In litigation commencing in 2002, Josephine Avolio sued to establish her proper percentage of partnership distributions, and also to reclaim the aforementioned capital contribution, in the amount of $24,010.40. Her attorney for this purpose had an of-counsel relationship with Hogan & Kipke, P.C.

In March 2003, the partnership sent Josephine Avolio and Casasanta a letter stating that, "the total reserve amount [for Josephine] is currently placed at $138,589.73." A letter from the partnership's attorney to Josephine's attorney followed shortly thereafter, stating as follows:

> According to your client's K-1 Schedule dated 2001 for Josephine Avolio, it states the profit sharing percentage to be 11.47%. However, there may be some difficulty using this percentage due to a Court Judgment reducing Avolio's interest to 10.858% (supposedly dated 2/15/89—not provided). As such, my client has agreed to pay to Josephine Avolio (subject to . . . terms and conditions . . .) $138,589.73 based upon 11.47% interest in the partnership. In the interest of the settlement of the matters between our respective clients, I am also authorized to offer your client reimbursement of her claimed $24,010.40 that was allegedly paid to the partnership in 1986 . . . .
>
> Considering how old this alleged $24,010.40 miscalculation is and the 1989 Judgment incorporating your client's percentage to be less than that indicated here, it may benefit your client to resolve this matter in this fashion as opposed to the continued litigation of same.

The letter continued, "if there is any additional reserve there will be another distribution of the reserve amount based upon the percentages agreed to by the parties . . . ." The letter concluded, "this offer of settlement is hereby withdrawn if not accepted in writing by April 30, 2003." No settlement or payments comporting with this proposal followed.

Josephine's attorney retired, and Hogan took over the representation. Hogan testified on deposition that the letter proposing that the partnership pay Josephine $138,589.73, recognizing a partnership interest of 11.47 percent, along with the $24,010.40 capital reimbursement she claimed, was in the file and available for his review when he took over the case, but added that he did not remember reviewing it before meeting with Casasanta.

Early in 2004, the parties to that litigation settled. The agreement provides, in pertinent part, as follows:

> For and in consideration of the payment to me of the sum of $50,000 and other good and valuable consideration, I, Theresa Casasanta acting as attorney-in-fact for Josephine Avolio . . . have released and discharged and by these presence due for Josephine Avolio and Myself . . . release and acquit and forever discharge [the partnership] from any and all actions, causes of actions, claims or demands for damages, costs, expenses, compensation, consequential damages or any other thing whatsoever on account of, or in any other way growing out of, any and all know[n] and unknown possible claims and damages regarding [the underlying litigation] except as to future disbursements.

> It is also understood and agreed that all future distributions to Josephine Avolio shall be calculated using 11.47% as Josephine Avolio's interest in [the partnership].
>
> * * *
>
> I understand that this settlement is the compromise of a doubtful and disputed claim . . . .

On the advice of Hogan, plaintiffs agreed to those terms.

The partnership paid the $50,000 as promised, but plaintiffs demanded the $138,589.73 earlier held in reserve, which the partnership refused to pay. Josephine Avolio and Casasanta, through Hogan, filed suit to obtain the latter amount. However, the partnership obtained summary disposition in its favor on the ground that the earlier settlement had released any such claim. This Court affirmed, agreeing that the broad language releasing the partnership from other claims relating to the earlier litigation barred the claim. *Casasanta v Van Dyke-Shelby Land Dev & Co*, unpublished opinion per curiam of the Court of Appeals, issued July 20, 2006 (Docket No. 267807). This Court additionally rejected the arguments that the settlement agreement's reference to "future disbursements" referred to the amount earlier held in reserve for Josephine Avolio, *id*. at 2 n 1, and that Josephine's entitlement to $138,589.73 was never in dispute. *Id*. at 2 n 2. Plaintiffs assert that they lost their opportunity to take their appeal to our Supreme Court because Hogan mismanaged the timing of such action.

Plaintiffs filed this action in 2007, asserting that Hogan committed malpractice in failing to secure the $138,589.73 that had been held in reserve, in attempting to conceal his mistake and thus declining to raise any issues of ambiguity after the settlement was effectuated, in failing to preserve claims for breach of fiduciary duty, and in failing to see that a timely application for leave to appeal to the Supreme Court was filed. Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10).

In granting the motion, the trial court set forth the standards governing motions under (C)(7), determined that (C)(8) was not applicable because the parties relied on matters outside the pleadings, and then engaged in analysis relating to (C)(10).

The court held that the subject settlement and release agreement so clearly stated that it covered all claims that plaintiffs needed no legal advice to understand that aspect of it. The court further noted that plaintiffs retained the right to receive future distributions. The court held that the failure to raise any ambiguity issues was not malpractice because the settlement agreement was found to be unambiguous. The court then observed that this Court had held that the factual premise for the breach of fiduciary duty claim was erroneous,[1] and held that the broad language of release would have barred such a claim in any event, and that the failure to show malpractice on the part of Hogan obviated any vicarious liability on the part of Hogan & Kipke, P.C. The court declared that summary disposition was granted under MCR 2.116(C)(7) and (C)(10).

[1] See *Casasanta*, *supra*, unpublished opinion (Docket No. 267807), slip op at 2 n 2.

On appeal, plaintiffs argue that the trial court erred in granting defendants summary disposition in connection with the release provisions in the 2004 settlement agreement, and also that the court erred in granting summary disposition with respect to defendants' handling of the second underlying case.

Plaintiffs protest that no grounds for summary disposition under (C)(7) were shown. We need not concern ourselves with what may have been the trial court's inadvertence in citing MCR 2.116(C)(7), because we conclude that the court properly granted summary disposition under (C)(10).

This Court reviews a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

Plaintiffs argue that Hogan committed malpractice for failing to secure the $138,589.73 that was once held in reserve for Josephine Avolio, and in advising them to agree to a settlement that effectively guaranteed that that fund would never be made available to them. We disagree.

Whether to accept a settlement is the client's decision to make personally. See MRPC 1.2(a); *In re Makarewicz*, 204 Mich App 369, 373; 516 NW2d 90 (1994). The trial court observed that Casasanta personally attended the facilitation hearing that resulted in the settlement. It is now law of the case that the settlement agreement was plain and unambiguous. *Casasanta*, *supra*, unpublished opinion (Docket No. 267807), slip op at 2 and n 1. Indeed, in connection with the subject settlement agreement, this Court stated, "The term 'any and all' is the broadest classification, leaving no room for exceptions." *Id*. at 2. Because plaintiffs now stand legally charged with having agreed to unambiguous settlement terms releasing all claims, we reject the argument that Hogan committed malpractice for failing to explain any of those terms.

We further note that the April 1, 2003, settlement offer expired on its own terms for want of ratification, and the $50,000 settlement amount was well in excess of the allegedly uncredited $24,010.40 capital contribution claimed, and also that, despite plaintiffs' innuendoes, both that alleged capital contribution and the $138,589.73 in disbursements once held in reserve were matters of controversy, and that the 11.47 percent basis for calculating plaintiffs' future disbursements exceeded the 10.858 percent the partnership had a reasonable basis for asserting.

For these reasons, plaintiffs fail to show that their not having recovered $138,589.73 in addition to the $50,000 settlement resulted from legal malpractice.

Likewise, plaintiffs' assent to the plain and unambiguous settlement agreement, including its broad language of release, was the basis for the failure of their litigation to recover the $138,589.73 once held in reserve in addition to the $50,000 settlement proceeds, not any malpractice on Hogan's part. Further, because the settlement barred such additional recovery, no better advocacy in connection with the theory of breach of fiduciary duty, or attempting to take

the proceedings to our Supreme Court, would have improved plaintiffs' position, and so no damage resulted from any deficiency in Hogan's performance in those regards.

Finally, because plaintiffs fail to show that Hogan committed legal malpractice, the trial court properly held that Hogan & Kipke, P.C. bore no vicarious liability in the matter.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Donald S. Owens