

STATE OF VERMONT
CALEDONIA COUNTY, S.S.

FILED
MAY 27 2010
CALEDONIA COURTS

GERALD DEVOST
Plaintiff

v.

DEBORAH T. BUCKNAM &
ASSOCIATES, P.C., DEBORAH T.
BUCKNAM, and GLORIA (DEVOST)
JACKSON,
Defendants

SUPERIOR COURT

Docket No. 19-1-09 Cacv

**DECISION ON MOTION FOR PARTIAL SUMMARY JUDGMENT
REGARDING COUNT 6 & COUNT 8**

This matter is before the court on Defendants' Deborah T. Bucknam & Associates, P.C. and Deborah T. Bucknam (hereinafter collectively referred to as Bucknam) motion for partial summary judgment. Plaintiff, Gerald Devost, filed this interpleader action January 22, 2009, joining Defendants who each may have a claim against the plaintiff for the \$87,500 deposited with the court. The defendants' "claims are such that the plaintiff is or may be exposed to double or multiple liability." V.R.C.P. 22. Defendant Bucknam filed a cross claim on April 27, 2009 and Defendant Jackson filed a cross claim on May 18, 2009. Defendant Bucknam filed this motion for partial summary judgment on November 19, 2009. On April 5, 2010 this court issued a decision regarding several counts at issue in the motion for partial summary judgment and requested further briefing with specificity on Count 6 and Count 8.

Summary judgment is appropriate when the evidence in record shows "that there is no genuine issue as to any material fact and any party is entitled to a judgment as a matter of law." V.R.C.P. 56(c)(3). In determining whether a genuine issue of material fact exists, the moving party has the burden of proof, and the court views the record in the light most favorable to the non-moving party, giving that party the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists. See *Travelers Ins. Cos. v. Demarle, Inc.*, 2005 VT 53, ¶ 3, 178 Vt. 570 (citing *Messier v. Metro. Life Ins. Co.*, 154 Vt. 406, 409, 578 A.2d 98, 100 (1990)). However, summary judgment is mandated where, after an adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an element essential to its case. *Poplaski v. Lamphere*, 152 Vt. 251, 254, 565 A.2d 1326, 1329 (1989).

FACTS

The relevant, undisputed facts were set out in this court's summary judgment decision issued April 5, 2010 as follows:

Defendant Bucknam is an attorney/legal professional corporation whose legal services were retained beginning in September 2005 by Defendant Jackson to represent Jackson in a divorce action. Defendant Jackson agreed to pay Defendant Bucknam fees and expenses related to those legal services. On September 9, 2006 the parties entered into an updated fee agreement which included an assignment clause. On September 21, 2006 Bucknam sent a letter to Jackson indicating an unpaid balance of \$17,000 and outlining certain specific requirements for continued representation. These included certain monthly payments, approval of the assignment agreement noted above, and that Jackson sign three notes and mortgages on her property. The letter represented that at the end of the divorce process, Bucknam would adjust the note to reflect the actual fees at the end of the divorce process. The letter also made certain statements regarding what Defendant Bucknam believed Jackson would be able to achieve from the court and the potential outcome of the case.

Jackson signed the promissory notes and mortgages requested in the September 21 letter. On September 4, 2008 Bucknam caused one of these mortgages to be recorded in the Canaan land records.

On January 22, 2009, Gerald Devost, Defendant Jackson's former husband and party to the divorce action brought this interpleader action pursuant to V.R.C.P. 22 on January 22, 2009 to determine which Defendant should receive the \$87,000 deposited by Devost with the court.

CONCLUSIONS

A professional negligence claim requires that the moving party "prove that the attorney was in fact negligent and that this negligence was the proximate cause of [the party's] injury. Generally, negligence of professionals is demonstrated using expert testimony to: (1) describe the proper standard of skill and care for that profession, (2) show that the defendant's conduct departed from that standard of care, and (3) show that this conduct was the proximate cause of plaintiff's harm." *Estate of Fleming v. Nicholson*, 168 Vt. 495, 497, 724 A.2d 1026, 1028 (1998) (internal citations omitted); see also *Fritzeen v. Gravel*, 2003 VT 54, ¶ 8, 175 Vt. 537 ("In order to sustain a legal malpractice claim, plaintiffs have the burden of proving that defendant was negligent and that this negligence was the proximate cause of harm to plaintiffs."). "'Damages' generally are defined as 'pecuniary compensation recoverable for injury or loss suffered through the unlawful act, omission, or negligence of another.'" *McCormick v. McCormick*, 159 Vt. 472, 479, 621 A.2d 238, 241 (1993) (citing *York v. Oregon State Correction Institution*, 59 Or.App. 708, 651 P.2d 1376, 1378 (Or.Ct.App.1982)). "An injury based on speculation about uncertain future events is no injury at all." *Hedges v. Durrance*, 2003 VT 63, ¶ 12, 175 Vt. 588 (noting that fear of future financial loss, or uncertainty, is not an

injury); see also *Bourne v. Lajoie*, 149 Vt. 45, 53, 540 A.2d 359, 364 (1987) (declining to award alleged missed-sale-opportunities damages to the plaintiff in a legal malpractice action where such damages were based on mere speculation and were unsupported by evidence of an actual offer from a prospective purchaser).

Jackson asserts that Bucknam owes her a duty not to (a) expose her to liability for slander of title, (b) hinder her full performance of the final divorce order, (c) retain security for more than the amount Bucknam reasonably can anticipate the Court will determine Jackson will owe Bucknam, or (d) retain mortgages on properties other than the part of the original Jackson property as long as she owes less than the value of the original Jackson property. As discussed in the April 5 opinion, there is no duty to refrain from over securing; (c) and (d) are not issues since there was neither duty nor breach.

Jackson claims the breach of these duties proximately caused her harm "as described in Count Five" complaining of breach of contract regarding mortgages. The suggested solution is a permanent injunction that Bucknam discharge the mortgages and reduce the amount of the note to no more than \$23,378.45. The only concrete injury identified is her inability to take loans on the property due to the Bucknam mortgage. She also alleges injury due to damage by exposure to liability for slander of title and inability to comply with the divorce decree.

Regarding exposure to liability, there has been no claim for slander of title. "To prove slander of title, a plaintiff must prove that a defendant falsely published a statement concerning plaintiff's title that caused special damages to the plaintiff and that defendant acted with malice." *Wharton v. Tri-State Drilling & Boring*, 2003 VT 19, ¶ 14, 175 Vt. 494. Jackson has neither shown damages nor provided any support for her assertion that exposure to liability for slander of title constitutes an injury. This court can identify no damages with regard to (a).

Regarding interference with compliance of divorce order, it remains unclear whether performance of the final divorce order was hindered. Jackson claims it was, but fails to provide any evidence supporting this claim. In its decision on Jackson's motion for relief from judgment in the divorce case, the court noted that "there is no indication that the parties did not comply with the terms of the Court's order." See Family Court Order, at 5, April 21, 2010, Docket No. 49-10-05 Exdm. Given the absence of any evidence showing that compliance with the divorce order was hindered in a way that impacted any of the parties, or this court can identify no damages with regard to (b).

Jackson also claims that Bucknam breached her fiduciary duty with regard to the mortgages. She asserts that Bucknam owed a duty to exercise the utmost honesty, good faith, fairness, integrity, and fidelity and breached this duty which caused the damages asserted in the previous counts. Breach of a fiduciary duty may be distinguished from professional negligence in that "[p]rofessional negligence implicates a duty of care, while breach of a fiduciary duty implicates a duty of loyalty and honesty." *Beverly Hill Concepts v. Schatz*, 247 Conn. 48, 57, 717 A.2d 724, 730 (1998).

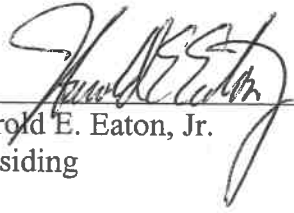
A breach of a fiduciary duty requires a fiduciary/agency relationship, a breach of the fiduciary duty, and damages resulting from that breach. See *Cooper v. Cooper*, 173 Vt. 1, 17, 783 A.2d 430, 443 (2001) (outlining the elements of aiding in the breach of a fiduciary duty). It is undisputed that an attorney stands in a fiduciary relationship with his client. See e.g. *Gilman v. Maine Mut. Fire Ins. Co.*, 2003 VT 55, ¶ 21, 175 Vt. 554; *In re Capriola*, 134 Vt. 548, 367 A.2d 689 (1976). Thus, Jackson must show that there was a breach of duty and damages.

Even taking as true Jackson's expert's testimony that Bucknam had a duty not to expose Jackson to liability for slander of title, or hinder full performance of the divorce decree, there is no evidence of damages with regard to the taking of the mortgages. Although Jackson claims that over securing caused her damages, there is neither duty nor breach associated with over securing. Thus, again, this court can identify no damages associated with the breach of fiduciary duty claim.

ORDER

Defendant Bucknam's motion for summary judgment on Count Six and Count Eight is **GRANTED**.

DATED May 25, 2010 at St. Johnsbury, Vermont.



Harold E. Eaton, Jr.
Presiding