DiCLEMENTE v. JENNINGS

No. A-0900-10T1

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ALBERT DICLEMENTE,. Plaintiff-Appellant, v. PATRICK J. JENNINGS, ESQ., Defendant-Respondent, and JEFFREY T. CARNEY, ESQ., Defendant.

Superior Court of New Jersey, Appellate Division.

Argued November 14, 2011.

Decided November 16, 2012.

Attorney(s) appearing for the Case

Benjamin D. Light argued the cause for appellant (Aromando, Light & Croft, attorneys; Mr. Light, of counsel and on the brief).

Christopher J. Carey argued the cause for respondent (Graham Curtin, attorneys; Mr. Carey, of counsel; Patrick J. Galligan and Anthony Longo, on the brief).

Before Judges A. A. Rodríguez, Ashrafi and Fasciale.

NOT FOR PUBLICATION

PER CURIAM.

Plaintiff Albert DiClemente appeals from an order for summary judgment dismissing his legal malpractice and other claims against defendant Patrick Jennings. We affirm.

DiClemente solely owned and operated a home renovation business named Titan Contracting, LLC. Attorney Jennings represented DiClemente and Titan in litigation brought by Gail Lindsley, a recently-divorced woman who sold DiClemente her home. As consideration for the sale, DiClemente offered Lindsley cash and free renovations to the basement apartment into which she intended to move. Eight months after the sale, Lindsley filed suit in the Chancery Division to rescind the sale and for other equitable and monetary relief. She alleged that DiClemente had defrauded her and that the contract of sale was unconscionable.

After several months of litigation, DiClemente settled the lawsuit with Lindsley. He then filed a malpractice complaint against the two attorneys who successively represented him in that litigation, Jennings and Jeffrey Carney. He alleged that Jennings had failed to bring a timely motion to discharge a lis pendens filed by Lindsley against the subject real estate, and as a result, two potential contracts he had obtained to resell the property were canceled by the buyers. He also alleged that Jennings had defamed him and intentionally or negligently caused him severe emotional distress.

After discovery was conducted, Jennings moved for summary judgment, and DiClemente cross-moved for partial summary judgment on his central allegation of attorney negligence. The trial court denied DiClemente's cross-motion and granted summary judgment to Jennings, dismissing the complaint against him in its entirety. DiClemente then settled with Carney and filed this appeal.

I.

In reviewing a grant of summary judgment, we apply the same standard under Rule 4:46-2(c) that governs the trial court. Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007). We must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

We view the facts most favorably to DiClemente as the party opposing the summary judgment that was granted. At the same time, in a legal malpractice case such as this involving a "suit within a suit," Lieberman v. Emp'rs Ins. of Wausau, 84 N.J. 325, 342 (1980), we must consider the nature of the disputed issues in the underlying case as relevant to the allegations of attorney negligence. The Lindsley suit was settled;

consequently, disputed facts in that matter were never established by a judicial proceeding or otherwise. We must view the facts cognizant of the unresolved disputed issues that Jennings was required to address in representing DiClemente.

DiClemente formed Titan in January 2005 as a limited liability company to conduct his construction business. He met Lindsley through her son-in-law near the same time. Lindsley had become divorced in 2004, and she had obtained sole ownership of the marital home in Harrington Park in which she had lived for twenty-five years. DiClemente learned that a contract she had for the sale of the home for $412,000 had been canceled because an underground oil storage tank existed on the property. He also learned that she had subsequently paid a substantial sum to have the storage tank removed. DiClemente offered to buy Lindsley's home with the intent to renovate and resell it at a profit. He offered her $300,000 in cash and told her he would complete, at no charge, renovations she desired for a basement apartment in Dumont to which she was moving. He provided a written proposal for renovating the apartment, but the proposal contained no prices or cost estimates. According to Lindsley, DiClemente told her orally that the apartment renovations would have cost her $89,000, and so, she would receive $389,000 in total value for her Harrington Park home without the need to pay a realtor's commission.

Lindsley and DiClemente signed a contract for the sale of the home in July 2005. The contract stated a selling price of $300,000 without making reference to renovation of the Dumont apartment. A rider to the contract identified attorney Gregory Mueller as representing DiClemente in the sale. Mueller had offices at 26 Franklin Street in Tenafly and had prepared the contract. Attorney John McCann, with offices at the same Tenafly address, was listed in the rider as Lindsley's attorney. Lindsley had never met or spoken with McCann before signing the contract. According to Lindsley, she told DiClemente she had an attorney, but she "was informed that this was a simple transaction and would go much smoother if [she] used the lawyer that [DiClemente] recommended."

The closing took place on September 14, 2005. Lindsley had expected to net about $167,000 after paying off a mortgage loan, but she did not receive cash proceeds in that amount. According to Lindsley, DiClemente induced her to accept a promissory note in the amount of $150,000 that he executed on behalf of Titan. DiClemente allegedly told Lindsley that she would benefit more by lending cash proceeds of the sale to Titan than by depositing the money in a bank account. Titan offered a slightly better interest rate than bank rates. At the closing, attorney McCann issued a check for $150,000 from his trust account made payable directly to DiClemente, and Lindsley received an unsecured promissory note from Titan for the $150,000 loan. DiClemente did not provide a personal guarantee for the note.

Mueller prepared a HUD-1 Uniform Settlement Statement and both DiClemente and Lindsley executed it at the closing. It made no reference to a loan to Titan. It also did not account for Lindsley's payoff of a mortgage loan. The HUD statement indicated that Lindsley had received $297,480.22 at the closing in addition to a $1,000 deposit DiClemente had paid earlier. However, McCann's trust account ledger showed that Lindsley had actually received $17,968.64 in cash at the closing.

Through Titan, DiClemente did renovation work on both the Harrington Park property and on Lindsley's Dumont apartment. Six months after the sale, on March 16, 2006, DiClemente used the Harrington Park property as collateral to obtain a mortgage loan of $600,000. In the loan application, DiClemente declared that the property had a value of $750,000 and that he personally had employment income of $26,000 per month. At that time, DiClemente was receiving Social Security Disability benefits, and he had not filed federal income tax returns for several years. As additional support for the loan application, DiClemente presented a letter on apparent letterhead of an accounting firm stating that its signer was familiar with DiClemente and Titan as their accountant and confirming that DiClemente was employed as a contractor/builder for the past ten years. When the accountant was later deposed, he testified that he had not signed or written the letter and that he had no knowledge of DiClemente or Titan. DiClemente used the $600,000 loan to pay off a mortgage loan on his own home in Dumont, and he personally received the balance of more than $124,000 in loan proceeds.

By the beginning months of 2006, Lindsley had become dissatisfied with the progress of the renovation work on her apartment, and she contacted attorney McCann to complain. According to Lindsley, McCann told her he could not assist her because he was representing DiClemente in other matters.

On April 13, 2006, attorney Mueller wrote to Lindsley, requesting that she provide a list of items in her Dumont apartment that she believed needed further work. On the same date, DiClemente called Lindsley and also asked her to provide such a list. During the telephone conversation, which DiClemente recorded without Lindsley's knowledge, Lindsley made comments indicating her general satisfaction with the renovation work on her apartment.

Sometime in 2006, Lindsley discussed the matter with an attorney of her own choosing, Michael Monaghan. On May 15, 2006, Monaghan filed a verified complaint and obtained an order to show cause on behalf of Lindsley in the Chancery Division, Bergen County. Lindsley's complaint asserted eight counts pertaining to the Harrington Park property, three of which sought rescission or reformation of the transaction and other equitable relief. In the first count, Lindsley alleged "failure [of DiClemente] to act in good faith and fair dealing," and she sought reformation of the contract of sale, return of title, rescission, and monetary damages. In the fifth count, she alleged "fraud, deception, false pretense, [and] false promise," and she

sought rescission, reformation, and damages. In the eighth count, she alleged breach of contract and sought rescission and damages. On May 18, 2006, Monaghan filed a notice of lis pendens with the Bergen County Clerk.

On the return date of Lindsley's order to show cause, June 23, 2006, the judge of the Chancery Division heard argument and ultimately denied Lindsley's application for restraints to be placed on the sale, transfer, or encumbering of the Harrington Park property. The judge found that Lindsley had not met the legal requirements for injunctive relief in accordance with Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982), but he also stated that the transaction "raised a question" and that Lindsley's submissions presented "a close legal issue." In explaining his decision, the judge stated that restraints were not necessary because Lindsley's alleged interest in the property would be protected by the lis pendens that had been filed.

DiClemente was advised to hire another attorney because Mueller's involvement in the sale transaction created a disqualifying conflict of interest. DiClemente retained Jennings as his attorney in late June 2006. According to DiClemente, Jennings reviewed Lindsley's complaint and advised him that the lawsuit was frivolous and that he would get the lis pendens discharged and the case dismissed.

The next hearing in the Chancery Division was held on August 18, 2006. The judge again denied Lindsley's request for an injunction. Thereafter, DiClemente and Jennings discussed the need to discharge the lis pendens, but Jennings did not file a motion seeking that relief until January 17, 2007, five months later. During that lapse of time, asserts DiClemente, he lost two opportunities to sell the Harrington Park property at favorable prices.

On August 31, 2006, DiClemente signed a contract with buyers named Khurana to sell the property for $675,000. On September 18, 2006, the Khuranas' attorney canceled the contract, allegedly because he learned that a lis pendens had been filed. On November 21, 2006, DiClemente entered into a contract with a buyer named Carr to sell the home for $585,000. Carr's attorney canceled the contract on January 19, 2007, again, because of the lis pendens.

DiClemente terminated the services of Jennings as his attorney in January 2007. He then retained attorney Carney. The motion Jennings had filed to discharge the lis pendens was never decided by the Chancery Division judge. Instead, DiClemente settled the case with Lindsley.

In the course of DiClemente's deposition by attorney Monaghan on March 1, 2007, DiClemente revealed that he had not filed federal income tax returns for several years. At a break in the deposition, Carney allegedly confronted DiClemente about the possibility of criminal prosecution and threatened that he could be imprisoned. DiClemente claims that he was frightened by the threat and debilitated by his psychological

disorder. He initiated settlement discussions after the break in the deposition and reached an agreement with Lindsley the same day. The settlement required that DiClemente repay the $150,000 note he executed on behalf of Titan, plus interest of about $4,500, and also that he repay another $150,000 to Lindsley, both payments to be made within 120 days.

In March 2008, DiClemente filed his malpractice complaint against Jennings and Carney.

II.

To prove a cause of action for legal malpractice, the plaintiff must demonstrate by a preponderance of the evidence "1) the existence of an attorney-client relationship creating a duty of care upon the attorney; 2) that the attorney breached the duty owed; 3) that the breach was the proximate cause of any damages sustained; and 4) that actual damages were incurred." Sommers v. McKinney, 287 N.J.Super. 1, 9-10 (App. Div. 1996); accord Jerista v. Murray, 185 N.J. 175, 190-91 (2005). "[P]roximate cause is satisfied where the negligent conduct is a substantial contributing factor in causing the loss." Lamb v. Barbour, 188 N.J.Super. 6, 12 (App. Div. 1982), certif. denied, 93 N.J. 297 (1983).

Here, DiClemente argues that the trial court erred in dismissing his legal malpractice claim because Jennings promised to file a motion to discharge the lis pendens in August 2006 but did not file the motion until January 2007, causing DiClemente to lose the two contracts to sell the property. As part of his response, Jennings asserts that neither the Khurana contract nor the Carr contract was actually viable for the sale of the home, and that DiClemente would not have profited from either sale had it been completed. Jennings contends that repayment of the $600,000 mortgage loan and other necessary expenditures would have resulted in no net proceeds of either sale payable to DiClemente. DiClemente replies that he nevertheless was compelled to pay $150,000 to settle the Lindsley lawsuit beyond his debt to Lindsley, and thus he suffered damages as a result of Jennings's inaction.

We need not decide whether DiClemente suffered monetary losses from the cancellation of the two contracts. We agree with the trial judge in the malpractice action that there was no realistic possibility that Jennings might have obtained relief from the Chancery Division to permit those sales to be completed before January 2007, when Jennings filed a motion to discharge the lis pendens.

DiClemente argues that the Chancery Division would have been compelled to discharge the lis pendens immediately pursuant to the provisions of N.J.S.A. 2A:15-7. The two subsections of that statute distinguish notices of lis pendens based on a "written instrument" and those that are not so based.[1] DiClemente asserts that Lindsley had no written instrument supporting her claim to an interest in the Harrington Park property and that she failed to show a probability of success on her claim for rescission of the deed and sales contract.

He argues that the Chancery Division would have been required to apply N.J.S.A. 2A:15-7b and to discharge the lis pendens "forthwith."

Jennings responds that the contract of sale and the promissory note constituted "written instruments" through which Lindsley was claiming an interest in the Harrington Park property.

Both parties agree that whether the lis pendens might have been discharged more promptly is a question of law to be determined by the court in the malpractice action on the motions for summary judgment. In other words, the trial judge in the malpractice action was required to place himself in the position of the Chancery Division judge in the Lindsley lawsuit and to determine whether a motion to discharge the lis pendens would have been granted had it been filed in August or September 2006.

We need not decide whether the term "written instrument" we have quoted from N.J.S.A.2A:15-7a applies to an executed contract for the sale of real property or to an unsecured promissory note. We agree with the conclusion of the trial judge that, under either subsection of N.J.S.A. 2A:15-7, the lis pendens would not have been discharged in time to avoid the cancellation of the Khurana and Carr contracts for sale of the property.

The monetary value of the renovation work on both the Harrington Park property and the Dumont apartment was the subject of much dispute in the Lindsley litigation and, later, in the malpractice summary judgment record.[2] Jennings contends that there were disputed issues of fact in the Lindsley litigation regarding how much DiClemente had expended to renovate the home and thus whether the contract of sale with Lindsley was voidable as an unconscionable contract because of the disparity in selling prices within a matter of months. The parties have also argued at length regarding whether or not the remedy of rescission was potentially available to Lindsley. DiClemente contends that rescission was not an available remedy because the sale had been completed and the parties could not have been restored to the positions they held before the September 2005 closing. See Hilton Hotels Corp. v. Piper Co., 214 N.J.Super. 328, 336-37 (Ch. Div. 1986); Fravega v. Sec. Sav. & Loan Ass'n, 192 N.J.Super. 213, 224 (Ch. Div. 1983); cf. O'Boyle v. Fairway Prods. Inc., 169 N.J.Super. 165, 167 (App. Div. 1979) (the adversely affected party would be entitled to have a lis pendens discharged if he can demonstrate entitlement to summary judgment to the effect that plaintiff in fact and in law had no right to a lien or to a claim affecting the title to the realty).

We need not resolve these disputed issues to reach our conclusions. Suffice it to say that factual and legal disputes in the Lindsley litigation were presented as a defense by Jennings in the malpractice litigation and as explaining one of the reasons that Lindsley's lis pendens would not have been immediately discharged.

Although the Chancery Division declined twice to grant Lindsley affirmative relief in the form of restraints against the property, the court described the matter as a close case and acknowledged that a lis pendens could be filed as protection for Lindsley. The judge was aware that the sale transaction between Lindsley and DiClemente included several irregularities, such as a price shown on the sale documents substantially below the appraised value of the home, consideration in the form of renovation services that was not noted in the sale documents or at the closing, an eleventh-hour substitution of a $150,000 unsecured note by a limited liability company and without a personal guarantee of payment by the purchaser of the Harrington Park home, and, particularly important, DiClemente's allegedly causing Lindsley to obtain attorney representation for the sale by an attorney with offices at the same location as DiClemente's attorney and with whom DiClemente apparently had a relationship.

It is highly unlikely that the Chancery Division would have acted as promptly as DiClemente wished to alter the status quo and to allow the property to be conveyed. More likely, the court would have granted the parties an opportunity to obtain some discovery and to gather evidence pertinent to these irregularities. In fact, according to a certification of attorney Carney, who replaced Jennings as DiClemente's attorney, the Chancery Division judge determined at a case management conference held on February 8, 2007, that he would hold in abeyance the pending motion to discharge the lis pendens so that the parties could take depositions and conduct further discovery in preparation for an April 2007 trial date.

Alternatively, even if the Chancery Division was required to discharge the lis pendens forthwith in accordance with N.J.S.A. 2A:15-7b, it could have employed its equitable powers to protect Lindsley's interests in other ways that would have prevented DiClemente's immediate sale of the property. For example, the Chancery Division might have reconsidered Lindsley's application for equitable restraints, either on the sale of the property or on disbursement of the proceeds of the sale. Because the sale would have required an immediate disbursement at the closing of $600,000 to pay off the mortgage loan DiClemente had obtained, such restraints would have prevented a closing on a potential sale to the Khuranas or to Carr.

Related to the last point, DiClemente contends on appeal that Jennings also committed malpractice by failing to advise him that attorney Monaghan had communicated a willingness to discharge the lis pendens voluntarily in exchange for DiClemente's agreement to place in escrow the proceeds of a sale to potential buyers of the home. Jennings responds that the proposal for an escrow was not a viable option because Monaghan suggested it before he knew that DiClemente had encumbered the property with a mortgage loan of $600,000 that would have to be paid off with the proceeds of a sale. Monaghan so declared in a certification he filed, and he also testified in deposition in the malpractice action that his earlier willingness to accept an escrow arrangement was discussed in the courthouse in the presence of DiClemente.

According to DiClemente's own contentions, the net proceeds to him of a sale to the Khuranas at $675,000 would have been about $26,250, far less than Lindsley's claims. Jennings argues that even that amount was not available to DiClemente because of additional improvements of the property valued at $55,000 that the Khuranas sought, and also because the proceeds of a sale to the second buyer, Carr, at the $585,000 contract price would not even have been sufficient to pay back the $600,000 mortgage DiClemente had obtained. Whether the home could have sold to one or the other of the two buyers in 2006 or 2007, escrowing of the proceeds would not have been an acceptable option that would have satisfied Lindsley's attorney and led to voluntary discharge of the lis pendens.

In sum, under the circumstances of the Lindsley lawsuit, where the sale transaction had obvious irregularities, and where application of the lis pendens statute was in dispute, several months of sorting out the facts and the law would have been the most likely result of an earlier motion to discharge the lis pendens. We conclude, as did the trial judge, that the alleged negligence of Jennings in failing to file a prompt motion to discharge the lis pendens did not cause DiClemente's loss of the two potential contracts to resell the property. There being no disputed issue of fact as to whether the alleged malpractice was a proximate cause of DiClemente's losses, his malpractice claims were properly dismissed.

III.

DiClemente has not made any argument on appeal with respect to dismissal of his cause of action for defamation. We deem that claim to have been abandoned. Drinker Biddle & Reath, LLP v. N.J. Dep't of Law & Pub. Safety, 421 N.J.Super. 489, 496 n.5 (App. Div. 2011).

With respect to his causes of action for intentional or negligent infliction of emotional distress, DiClemente contends that the trial court erred in granting summary judgment to Jennings because there were disputed issues of fact shown in the summary judgment record. Without recounting the details of his claims, DiClemente alleged that he had suffered for many years from psychological disability and that Jennings inflicted severe emotional distress upon him by ridiculing him, his educational level, and his handwriting, by signaling a suspicion that he had engaged in wrongdoing, and otherwise by treating him badly in the course of their attorney-client relationship.

To prove a claim for intentional infliction of emotional distress, a plaintiff's burden of proof must meet an "elevated threshold" that is satisfied only in extreme cases. Ingraham v. Ortho-McNeil Pharm., 422 N.J.Super. 12, 21 (App. Div. 2011) (quoting Griffin v. Tops Appliance City, Inc., 337 N.J.Super. 15, 23 (App. Div. 2001)), certif. denied, 209 N.J. 100 (2012). The elements of the common law cause of action for intentional infliction of emotional distress were set forth definitively in Buckley v. Trenton Saving Fund

Society, 111 N.J. 355(1988). First, plaintiff must prove that defendant acted intentionally or recklessly. Id. at 366. Defendant must intend "both to do the act and to produce emotional distress," or he must "act[] recklessly in deliberate disregard of a high degree of probability that emotional distress will follow." Ibid.

Second, defendant's conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Ibid. (internal quotation marks omitted). Third, plaintiff must prove defendant's conduct was a proximate cause of plaintiff's emotional distress. Ibid. Fourth, "the emotional distress suffered by plaintiff must be so severe that no reasonable [person] could be expected to endure it." Id. at 366-67 (internal quotation marks omitted).

We have reviewed DiClemente's factual allegations made in support of his claims of intentional or negligent infliction of emotional distress. We find his contentions on appeal to be without sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E). The trial court correctly dismissed those causes of action.

Affirmed.

FootNotes

1. N.J.S.A. 2A:15-7 states in relevant parts:a. In an action to enforce or declare rights in, or concerning, or for partition of real estate, wherein plaintiff's claim arises out of a written instrument, which instrument either is executed by defendant and identifies such real estate or appears of record with respect to the title thereto... any person claiming title to, interest in or lien upon the real estate described in the notice through any defendant in the action as to which the notice is filed shall be deemed to have acquired the same with knowledge of the pendency of the action, and shall be bound by any judgment entered therein, as though he had been made a party thereto and duly served with process therein.b. In an action other than one specified in subsection a.... Any party claiming an interest in the real estate affected by the notice of lis pendens may... file with the court... a motion for a determination as to whether there is a probability that final judgment will be entered in favor of the plaintiff sufficient to justify the filing or continuation of the notice of lis pendens. The plaintiff shall bear the burden of establishing such probability. The court shall, after hearing and within 10 days, enter a determination as to whether there is a sufficient probability that final judgment will be entered in favor of the plaintiff. If the court determines that there is a sufficient probability of final judgment in favor of the plaintiff, the notice of lis pendens shall be continued of

record and shall have the same effect as provided in subsection a. If the court fails so to determine, the court shall forthwith order the notice of lis pendens discharged of record.[Emphasis added.]

2. At the time of the order to show cause hearing in May 2006, DiClemente claimed he had expended $250,000 for renovation of the Harrington Park property, thus justifying his asking price of $749,000, which was later reduced to $699,000. At the August 2006 hearing in the Chancery Division, that figure had decreased to $150,000. In discovery, DiClemente produced documentary support for only $11,876 in expenditures on the Harrington Park renovations, apart from a series of checks on Titan's account totaling $64,000 and made payable to "cash" that DiClemente claimed were issued to fund renovation of the property. Even with those checks, the cost of the renovation would have been less than $76,000.