BRUCE HOLVENSTOT, Plaintiff-Appellant,
v.
PAUL R. NUSBAUM and NUSBAUM, STEIN, GOLDSTEIN, BRONSTEIN & KRON, individually, jointly & severally, Defendants-Respondents.

No. **A-2987-08T3**.

Superior Court of New Jersey, Appellate Division.

Submitted August 31, 2010.
Decided September 21, 2010.

Law Office of Mark J. Molz, attorneys for appellant (Mark J. Molz, on the brief).

Nusbaum, Stein, Goldstein, Bronstein & Kron, P.A., attorneys for respondents (Lewis Stein, on the brief).

Before Judges Grall and Alvarez.

PER CURIAM.

Plaintiff Bruce Holvenstot appeals from an order granting defendants summary judgment and dismissing his complaint seeking damages for legal malpractice and misrepresentation. The defendants are Paul R. Nusbaum and his firm, Nusbaum, Stein, Goldstein, Bronstein & Kron. The malpractice charge is based on services rendered by Nusbaum to plaintiff's mother, Patricia Luz Holvenstot (Holvenstot), prior to her death in December 2000. The misrepresentation charge is based on an allegation that Nusbaum provided false information in opposition to a guardianship action that plaintiff filed in 1993. The evidential materials submitted on the motion demonstrate that defendants are entitled to judgment on both claims as a matter of law. Accordingly, we affirm.

The facts, viewed in the light most favorable to plaintiff, are as follows. In 1969, Nusbaum represented plaintiff in an action in municipal court. Nusbaum prepared a will for Holvenstot in 1984, in which she bequeathed her personal effects and the rest, residue and remainder of her estate to her four children in equal shares and nominated and appointed her daughter Patricia as executrix. Holvenstot suffered a stroke in January 1990. Holvenstot executed a new will prepared by Nusbaum on May 11, 1990, but did not designate a different executrix or provide for a different distribution of her residual estate.

Between September 1992 and May 1993, Holvenstot lived with plaintiff and his family. In May 1993, while Holvenstot was staying with her daughter Patricia, she again sought legal assistance from Nusbaum. On May 27, 1993, she executed a document granting her daughter Patricia power of attorney. In addition, because Holvenstot was not certain whether she had executed a codicil to her May 11, 1990 will while living with plaintiff, she executed a new will, which like her prior wills, named Patricia as the executrix and provided for an equal division of her residual estate among her four children.

On June 24, 1993, plaintiff, represented by Cynthia S. Earl, filed an order to show cause and complaint alleging that his mother was not competent to manage her affairs; he sought to have himself appointed as her guardian. Holvenstot, represented by Dillon, Bitar & Luther, opposed the appointment by asserting her competence. She supported that claim with certifications from medical doctors who had examined her and attested to her competence.

Holvenstot also presented a certification from Nusbaum, who described her state of mind when they met on May 27, 1993. According to Nusbaum, Holvenstot was clear, lucid and had a complete understanding of the issues involved. Recounting Holvenstot's various activities and endeavors over the many years he had known her, Nusbaum observed that although Holvenstot seemed to be "physically weakened as a consequence of her illness," she was as competent as she had been since he first knew her.

Nusbaum's certification, which is dated July 6, 1993, also includes a representation about the will Holvenstot executed on May 27, 1993 that plaintiff now claims is false. Referring to that meeting, Nusbaum stated:

> [I]t wasn't clear as to whether [Holvenstot], during the time that she had stayed with her son, [plaintiff,] had executed a Codicil to her Will executed on May 11, 1990 by which [Patricia] had been designated as sole executrix. She informed me that she wanted [Patricia] to be the sole executrix and as a consequence, a new Will was prepared containing the same terms as the 1990 Will and, again, designating [Patricia] as sole executrix.
>
> [(Emphasis added).]

Plaintiff contends that Holvenstot executed two wills on May 27, 1993, one consistent with her May 11, 1990 will and one that disinherited him.

On July 9, 1993, three days after Nusbaum signed his certification, Holvenstot handwrote a new will. In that will she leaves her estate to be divided among her three daughters and leaves one penny to her "poor, incompetent and demented son." There is no evidence that Nusbaum had any involvement in or knowledge of the will Holvenstot prepared when it was written.

On September 13, 1993, the judge deciding the competency case vacated the order appointing plaintiff temporary guardian of Holvenstot, revoked the letters of guardianship issued to plaintiff and ordered him to return Holvenstot's personal property in his possession to the office of Dillon, Bitar & Luther. The guardian action was "dismissed because the court [was] satisfied" that Holvenstot was "competent."

On September 30, 1993, Holvenstot again sought legal services from Nusbaum. She executed a will leaving "the rest, residue and remainder of [her] estate of every kind" to her daughters. Holvenstot signed on a line above her typed name. Her signature appeared beneath a typed attestation clause dated May 27, 1993.

The signatures of the witnesses and notary on the self-proving affidavit have a different date, September 30, 1993. Nusbaum and Sergio G. Carro were the witnesses. Charlotte M. Thom was the notary who witnessed the signatures of Holvenstot, Nusbaum and Carro. The self-proving affidavit indicates that the will was executed, witnessed and notarized on September 30, 1993.

On April 27, 1995, Holvenstot executed a codicil to her will of September 30, 1993 that addresses the conflicting dates in that will. In pertinent part the codicil provides:

> I revoke that portion of the attestation clause on page 4 that provides "this 27th day of May 1993" and provide in lieu thereof, "this 30th day of September, 1993." I make this change because the revoked portion represents a typographical error in my Last Will and Testament, which I in fact executed on September 30, 1993, The self-proving affidavit correctly recites the date my Will was signed by me and attested by the witnesses.

After plaintiff raised a question about the dates in this litigation, which was commenced on June 27, 2007, Carro and Thom prepared certifications reciting their recollections of Holvenstot's signing of the will on September 30, 1993. The attorney who prepared and witnessed Holvenstot signing of the April 1995 codicil also prepared a certification. That attorney was not and is not associated with Nusbaum's firm. Those certifications support the conclusion that Holvenstot signed the will on September 30, not May 27, 1993, and that she signed the April 27, 1995 codicil to correct the error. It is also worth noting that the judge who found Holvenstot competent on September 13, 1993 rejected a second challenge to her competence on May 11, 1995.

A reviewing court affirms a grant of summary judgment when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Applying that standard, the order must be affirmed. Apart from the typographical error addressed in and corrected by the 1995 codicil, there is no evidence supporting plaintiff's claims that Holvenstot executed two wills on May 27, 1993 and Nusbaum filed a certification misrepresenting the terms of the only will that was signed on May 27, 1993. Accordingly, in the absence of any evidence that would permit a jury to find the misrepresentation plaintiff alleged, defendants were entitled to summary judgment on that claim.

Defendants were also entitled to judgment as a matter of law on plaintiff's legal malpractice claim, in which he asserts a breach of Nusbaum's duties that caused him damage. In short, this claim must fail because there is no evidence that would permit the jury to find an essential element of that claim — either an attorney-client relationship or some independent basis for concluding that Nusbaum and his firm owed a duty to plaintiff. See McGrogan v. Till, 167 N.J. 414, 425 (2001) (stating the elements essential to proof of this cause of action); Estate of Fitzgerald v. Linnus, 336 N.J. Super. 458, 468 (App. Div. 2001) (concluding that a legal malpractice claim "by a non-client [is sustainable] where an independent duty is owed" to the claimant). Plaintiff's only assertions relevant to his relationship with Nusbaum and the firm are that Nusbaum represented him in a matter in municipal court in 1969, that he went with his mother when she sought advice from Nusbaum about property she owned, and that he was an intended beneficiary of her

will.

The scope of the duty imposed on attorneys, like the degree of care, is "`considered . . . with reference to the type of service the attorney undertakes to perform.'" Fitzgerald, supra, 336 N.J. Super. at 467-68 (quoting Ziegelheim v. Apollo, 128 N.J. 250, 260 (1992)). By assuming responsibility for representing plaintiff in municipal court in 1969, Nusbaum did not undertake a broader and ongoing duty to his former client in unrelated matters. See City of Atl. City v. Trupos, 201 N.J. 447 (2010) (discussing the Rules of Professional Conduct relevant to successive representation and the limited nature of the continuing duty flowing from prior representation). In this regard, it suffices to note that there is nothing in this record that suggests any factual or legal connection between the 1969 municipal court action and Holvenstot's wills or guardianship proceeding. See id. at 467.

The attorney-client relationship relevant to the transactions at issue — the drafting of Holvenstot's wills and power of attorney — was between Holvenstot and Nusbaum. When an attorney undertakes to prepare a will, the attorney's professional and fiduciary duties are owed to the testator, not the testator's potential beneficiaries. Even when an attorney undertakes to represent the executor of a will, the attorney may not act in furtherance of the interests of the testator's beneficiaries when those interests are inconsistent with the testator's interests as expressed in the will. See Barner v. Sheldon, 292 N.J. Super. 157, 158 (App. Div. 1996) (concluding that defendant-attorneys had no duty to advise beneficiaries about the potential favorable tax impact to them if they disclaimed because that advice would conflict with the testator's intent).

Plaintiff contends that the summary judgment should not have been granted because he had not had an opportunity to depose Nusbaum before the motion was granted. We disagree. Where there is nothing that suggests that additional discovery could change the outcome, a motion for summary judgment may be granted. Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div.), certif. denied, 177 N.J. 493 (2003). That is the case here. The facts relevant to any relationship between defendants and plaintiff that would give rise to a duty are within plaintiff's knowledge, and the will plaintiff questions has been superseded by the April 1995 codicil that Holvenstot executed within weeks of a judicial determination that she was competent to manage her affairs.

Because we have concluded that summary judgment was properly granted on the bases discussed above, there is no reason for us to consider plaintiff's objections to the trial judge's determination based on the statute of limitations.

Affirmed.