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Summer v. Allran, 394 SE 2d 689 - NC: Court of

394 S.E.2d 689 (1990)

100 N.C. App. 182

Mary Anne SUMMER, Plaintiff,

v.

William J. ALLRAN, III and Allran & Allran, Defendants.

No. 8926SC1114.

Court of Appeals of North Carolina.

August 21, 1990.

690 *690 Tucker, Hicks, Hodge and Cranford, P.A. by John E. Hodge, Jr. and Fred A. Hicks, Charlotte, for plaintiff-appellant.

Bailey & Dixon by David M. Britt, Gary S. Parsons and Alan J. Miles, Raleigh, and Carpenter & James by James R. Carpenter, Gastonia, for defendants-appellees.

WELLS, Judge.

Plaintiff argues on appeal that the trial court erred in granting defendants' motion for directed verdict at the close of all the evidence. She contends that the evidence of attorney malpractice was sufficient to go to the jury. For the reasons which follow, we disagree.

In ruling on a motion for directed verdict, the trial court must view the evidence in the light most favorable to the nonmovant, resolving all conflicts in his favor and giving him the benefit of every inference that could reasonably be drawn from the evidence in his favor. [West v. Slick, 313 N.C. 33, 326 S.E.2d 601 \(1985\)](#) and cases cited therein. Only where the evidence, when so considered, is insufficient to support a verdict in the nonmovant's favor should the motion for directed verdict be granted. *Id.* Applying these principles to the present case, defendants are not entitled to a directed verdict unless plaintiff has failed as a matter of law to show actionable negligence. [Everhart v. LeBrun, 52 N.C.App. 139, 277 S.E.2d 816 \(1981\)](#).

In order to show actionable negligence in a legal malpractice action, the plaintiff must prove by the greater weight of the evidence that the attorney breached the duties owed to his client as set forth by [Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144 \(1954\)](#), and that this negligence proximately caused damage to the plaintiff. [Rorrer v. Cooke, 313 N.C. 338, 329 S.E.2d 355 \(1985\)](#). Specifically, when a plaintiff brings suit for legal malpractice, plaintiff must show that but for the negligence of defendant, plaintiff would have suffered no "loss." In order to meet this burden, plaintiff must prove three things: (1) that the original claim was valid; (2) it would have resulted in a judgment in plaintiff's favor; and (3) the judgment would have been collectible. *Id.*; see also [Bamberger v. Bernholz, 326 N.C. 589, 391 S.E.2d 192 \(1990\)](#) (reversing [96 N.C.App. 555, 386 S.E.2d 450 \(1989\)](#) for reasons stated in dissenting opinion of Lewis, J.)

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In this case plaintiff contends that as a result of negligent legal representation by defendant Allran and his law firm, she suffered "loss" in the form of lost alimony, reduced child support, and an inadequate share of the couple's marital property. Plaintiff's contentions must fail, however, because the record reveals that plaintiff's claims have already been addressed and that, in fact, the resulting judgments either were not in plaintiff's favor or were settled by mutual agreement between plaintiff and Garry Summer. Plaintiff testified that a few months after signing the separation agreement drafted by defendant Allran, she filed suit against her former husband in Mecklenburg County. In that action, plaintiff asked for equitable distribution of marital property, *691 temporary alimony and "subsistence" and for the separation agreement to be set aside. The case was transferred to Gaston County. An order was issued in Gaston County dismissing the claims for temporary alimony and "subsistence" and granting the claim for setting aside the separation agreement. A subsequent order dated 7 April 1983 was also entered in Gaston County. It addressed issues including custody, possession of the marital residence until the minor child entered college, and a timetable for the sale of two residences (the marital home and a rental house) owned by plaintiff and Garry Summer. The order also stated that pending sale of the residences, Garry Summer would receive the rental income and apply it to monthly payments against the residences in satisfaction of plaintiff's obligation toward the encumbrances, and ordered that upon the sale of either of the residences, the proceeds from the sale would be distributed in accordance with the provision of the separation agreement. No other order was entered in that case and plaintiff did not appeal from any of the trial court's rulings. Finally, there was also testimony by Martin Brackett, Garry Summer's divorce attorney, to the effect that at some point in November 1984 an agreement was reached between plaintiff and Garry Summer concerning various aspects of their property settlement. This agreement was reached prior to final hearing on the matters and became part of a consent order entered with the court in June 1985.

On these facts we must agree with the trial court that the evidence, even when taken in the light most favorable to plaintiff, is insufficient to establish that negligence on the part of defendants was the proximate cause of any damages sustained by plaintiff. Rather, the evidence shows that plaintiff was, in fact, unable to prevail with regard to two of her claims—alimony and increased child support—that she in effect "settled" the equitable distribution claim by reaching an out-of-court property agreement which was later incorporated into a consent order. By entering into the consent order disposing of her property claims against her former husband, plaintiff lost her right to assert a negligence claim against defendants concerning distribution of marital property. See [Stewart v. Herring, 80 N.C.App. 529, 342 S.E.2d 566 \(1986\)](#); Compare [McCabe v. Dawkins, 97 N.C.App. 447, 388 S.E.2d 571 \(1990\)](#). Proximate cause being necessary to establish actionable negligence, plaintiff's failure to show proximate cause entitled defendants to a directed verdict as a matter of law.

Affirmed.

EAGLES and GREENE, JJ., concur.

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