NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3179-09T2

DONALD NIX AND DONALD NIX, LLC,

Plaintiffs-Appellants/
Cross-Respondents,

v.

MARTIN VERP, ESQ.; FRANCIS J. LEDDY, JR., ESQ., INDIVIDUALLY AND AS HIS INTERESTS APPEAR IN THE FIRM OF VERP & LEDDY, LLC; and VERP & LEDDY, LLC,

Defendants-Respondents/
Cross-Appellants.

Argued January 20, 2011 - Decided February 18, 2011

Before Judges R. B. Coleman and J. N. Harris.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-2782-07.

William W. Voorhees, Jr., argued the cause for appellants/cross-respondents.

Christopher J. Carey argued the cause for respondents/cross-appellants (Graham, Curtin, P.A., attorneys; Mr. Carey, of counsel and on the brief; Patrick J. Galligan and Theodore H. Hilke, on the brief).

PER CURIAM

This is a professional negligence action. Plaintiffs Donald Nix and Donald Nix, LLC (collectively Nix) seek remedies

against attorney Martin Verp[1] for failing to unearth the existence of a $176,000 municipal tax lien prior to Nix's acquisition of real property at a Sheriff's sale. After discovery expired, Verp moved for an order limiting Nix's damages by excluding the overlooked tax lien. The Law Division granted the motion. Nix responded with an unsuccessful motion for reconsideration and a motion for summary judgment to determine Verp's liability. The court entered an order finding only Verp & Leddy, LLC liable to plaintiff in the amount of $13,835, plus Saffer[2] counsel fees and costs. Following the submission of evidence relating to counsel fees and costs, a final order assessed $50,233.31 against Verp, and in favor of Nix and Nix's attorney, for such counsel fees and costs.

Nix appealed the orders limiting damages, denying reconsideration, and finalizing legal fees and costs. Verp's notice of cross-appeal limited itself to the final order that "assess[ed] legal fees and costs against [d]efendants pursuant to Saffer v. Willoughby." We part company with the Law Division's truncation of Nix's damages and reverse for further proceedings. Except to the extent that the final order may

[1] The defendants include Verp, his law partner Francis J. Leddy, Jr., and the law firm known as Verp & Leddy, LLC. For ease of reference, we will refer to all defendants collectively as Verp.

[2] Saffer v. Willoughby, 143 N.J. 256 (1996).

result in a larger reallocation of legal fees and costs to Nix, we affirm the cross-appeal.

I.

A.

For ten years, Nix had been a commercial tenant at 359-367 Hamilton Avenue in Paterson (the property) where he operated Nix Transportation, a bus company. In mid-2003, Nix received a telephone call from a representative of the Bank of New York (BNY), who inquired whether Nix was interested in purchasing the property for $5,000. Nonplussed by the asking price and attracted by the prospect of owning the property, Nix hired Verp to represent him in the acquisition.

At an early meeting with Nix, Verp explained that Nix would not actually be buying the property from BNY. Instead, Nix would purchase (through an assignment) BNY's mortgage, note, and existing foreclosure judgment,[3] and then bid at a Sheriff's sale in order to acquire the property. In a letter dated June 26, 2003, Verp sent Nix a proposed Assignment of Judgment, and indicated that although he had yet to complete a title search on the property, he would "proceed with everything necessary so you have clear title." Verp also requested payment in the sum of

[3] The actual owner and mortgagee of the property was JEMM Industries, Inc., as reflected in the Assignment of Judgment and Sheriff's deed.

$1,000 "to cover costs so that I can proceed to perfect title in your name."

On July 29, 2003, BNY assigned the mortgage, note, and foreclosure judgment to a Nix-controlled entity known as Tiffany Tours, Inc. (Tiffany Tours) for the sum of $5,000. More than one year later, on August 27, 2004, Tiffany Tours obtained a writ of execution and proceeded through the Sheriff of Passaic County to auction the property. On November 23, 2004, with Nix and Verp's partner defendant Francis J. Leddy, Jr. in attendance, a different Nix-controlled entity was the only bidder at the Sheriff's sale, resulting in its purchase of the property for $100. A deed memorializing the transaction was executed on December 6, 2004, conveying title of the property to defendant Donald H. Nix, LLC.[4]

Three days later, on December 9, 2004, Verp received for the first time a written, computer-generated Account Balance Summary from Kathleen J. Gibson (Gibson), Director of the Paterson Revenue Collection Division, indicating that unpaid municipal taxes and interest relating to the property for the

[4] We note that the Sheriff's deed listed the grantee as the LLC with a middle initial, "H," while the defendant LLC's name does not include the middle initial. None of the parties has addressed this discrepancy, and we assume that the grantee in the Sheriff's deed is the defendant LLC.

third and fourth quarters of 2004 totaled $8,984.10. That same day, Verp sent Nix a letter advising him of the tax situation.[5] Shortly thereafter, Nix appeared at the Paterson tax office to pay the $8,984.10, and was told for the first time that approximately $176,000 was due and owing for past due municipal taxes. Nix immediately contacted Verp, who was unaware of the additional amount of the municipal tax lien.

On April 4, 2005, Nix was notified by Paterson of a planned assignment of the tax sale certificate relating to the property to an outside investor. This notification contained an account summary that confirmed a balance due of unpaid taxes and interest of $176,366.89 dating back to 1993. After Verp requested a postponement of the assignment of the tax sale certificate, which was denied, Paterson transferred its rights to a third party. A tax sale certificate foreclosure action was commenced in August 2005. On April 7, 2006, Nix redeemed the tax sale certificate for $214.977.49.[6]

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[5] Nix testified that he was aware of the $8,984.10 owed in taxes at the time of the Sheriff's sale, even though the letter from Verp was dated two weeks after the sale. We proceed under the assumption that Nix was aware of the $8,984.10 municipal tax lien before bidding for the property at the Sheriff's sale and obtaining title.

[6] This amount represented the $182,250.47 lien amount, plus $31,711.58 in accrued interest, $986.44 in legal fees, and a $29.00 recording fee.

B.

In October 2008, Nix filed this professional negligence action against Verp alleging attorney malpractice, breach of fiduciary duty, and breach of contract for "failure to obtain a proper title search which would have revealed the existence of the tax lien." In answers to interrogatories, Nix averred that he would not have purchased the property had he known the true amount of the lien.

After discovery expired, Verp moved to limit damages to Nix's expenses and the cost of acquiring the Assignment of Judgment. On September 25, 2009, the motion court granted the motion, limiting Nix's damages "to the purchase price of the property at issue as well as any reasonable attorneys fees or costs that the court may see fit to award."

Nix filed a motion for reconsideration, which was denied, followed by a motion for summary judgment to establish liability and a fee hearing. On November 6, 2009, the court granted summary judgment in Nix's favor against Verp & Leddy, LLC in the amount of $13,835,[7] and ordered the submission of evidence

[7] Without conceding the correctness of the court's earlier motion limiting damages, Nix sought $13,984.10 in damages, which was the sum of the $5,000 paid for the Assignment of Judgment and the $8,984.10 tax obligation that was known at the time of the (continued)

relating to the reallocation of counsel fees. On February 19, 2010, the motion court entered a judgment awarding Nix and his attorney $44,685 in counsel fees and $5,548.31 in costs. This appeal followed.

II.

Because this appeal arises out of what essentially were motions for summary judgment, we review the motion court's decisions de novo, according no deference to the legal conclusions reached. Estate of Hanges v. Metro. Property & Cas. Ins. Co., 202 N.J. 369, 382 (2010). Summary judgment is appropriate when, viewing the facts in the light most favorable to the non-moving party, Hodges v. Sasil Corp., 189 N.J. 210, 215 (2007), "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact" and the moving party is entitled to judgment as a matter of law. R. 4:46-2(c).

We turn first to the motion court's ruling that limited damages. Nix urges that the trial court committed reversible error in constraining his recovery "to the purchase price of the property at issue as well as any reasonable attorney's fees or

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Sheriff's sale. We cannot explain why the motion court awarded $149.10 less.

costs," and he contends that Verp is liable for the full amount of the tardily discovered lien.

"[A] legal malpractice action has three essential elements: '(1) the existence of an attorney-client relationship creating a duty of care by the defendant attorney, (2) the breach of that duty by the defendant, and (3) proximate causation of the damages claimed by the plaintiff.'" Jerista v. Murray, 185 N.J. 175, 190-91 (2005) (quoting McGrogan v. Till, 167 N.J. 414, 425 (2001)). We are concerned only with the third element, as Verp neither disputed that an attorney-client relationship existed nor appealed the November 6, 2009 order imposing liability. See Pressler and Verniero, Current N.J. Court Rules, comment 6.1 on R. 2:5-1 (2011) ("[I]t is clear that it is only the judgments or orders or parts thereof designated in the notice of appeal which are subject to the appeal process and review.").

Notwithstanding our ultimate focus upon the proximate causation of damages, we note that the second element requires that Verp acted negligently, and breached his duty to Nix through the failure to discover Paterson's $176,000 municipal tax lien. Attorneys "owe a duty to their clients to provide their services with reasonable knowledge, skill, and diligence." Davin, L.L.C. v. Daham, 329 N.J. Super. 54, 72 (App. Div. 2000); see also Estate of Albanese v. Lolio, 393 N.J. Super. 355, 368

(App. Div.), certif. denied, 192 N.J. 597 (2007). As part of that duty, an attorney is obligated to communicate to his client all information necessary for the client to make informed decisions. Estate of Spencer v. Gavin, 400 N.J. Super. 220, 243 (App. Div.), certif. denied, 196 N.J. 346 (2008) ; Stoeckel v. Twp. of Knowlton, 387 N.J. Super. 1, 15 (App. Div.), certif. denied, 188 N.J. 489 (2006); RPC 1.4(b)-(c).

Here, Nix retained Verp for the express purpose of acquiring the property. Verp negotiated the Assignment of Judgment on behalf of Nix and represented Nix at the subsequent Sheriff's sale. From the start of representation, Verp assured Nix that he would "proceed with everything necessary so that you have clear title."

Rather than conduct a proper title search that would have disclosed the true amount of the municipal tax lien prior to either acquiring the Assignment of Judgment or bidding at the Sheriff's sale, Verp relied upon word-of-mouth from the Paterson Revenue Collection Division, which was wildly incomplete and inaccurate. Fortified by Verp's lack of contest to the determination of liability, we are convinced that reliance upon this informal communication deviated from the accepted standard of care. See Petrillo v. Bachenberg, 139 N.J. 472, 483 (1995) ("'[A]n attorney performing title work will be liable to

reasonably foreseeable persons who, for a proper business purpose, detrimentally rely on the attorney's work.'") (quoting Century 21 Deep South Props., Ltd. v. Corson, 612 So. 2d 359 (Miss. 1992)).

Nix must also show that Verp's professional breach proximately caused his claimed damages. Nix asserts that these damages equal the full amount of the latent lien plus interest, not just the inconsequential expenses incurred to acquire the Assignment of Judgment from BNY, pay off the known $8,984.10 municipal tax obligation, and purchase the property at the Sheriff's sale. Essentially, Nix seeks the benefit of the bargain, and a good bargain it was.

Verp counters that the motion court correctly limited Nix's damages to the so-called purchase price plus counsel fees because "[Nix] had the option to walk away from the transaction" when he learned of the additional municipal tax lien. Verp further contends that because the municipal tax lien existed in fact, "what [p]laintiffs believed they were getting simply did not exist," and they were chasing "a fantasy, an impossibility." Verp also argues that reimbursement to Nix in the amount of the overlooked municipal tax lien would constitute a windfall,

especially since the property's market value[8] was substantially greater than the municipal tax lien. Finally, Verp asserts that Nix failed to adequately mitigate damages, particularly because "after learning of the [municipal] tax lien on the [p]roperty in excess of $176,000.00, [Nix was] offered $200,000 to sell the [p]roperty [to a third party]." Although we do not dismiss all of Verp's mitigation arguments, we note that the record indicates the opposite factual circumstances: Nix and Verp did not learn of the $176,000 municipal tax lien until April 2005,[9] three months after receiving the $200,000 offer in January 2005. That being the case, we question Verp's claim that Nix had an economic incentive, animated by the as yet undiscovered gargantuan municipal tax lien, to sell at the time such modest offer was made.

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[8] Verp points out that an appraisal conducted as part of the litigation opined that the market value of the property was $750,000 on November 1, 2004, and $850,000 as of July 13, 2009.

[9] The record contains a letter that Verp wrote to Gibson, dated April 19, 2005, stating:

> Much to my shock and consternation, I received the enclosed notice dated April 4, 2005, indicating that there would be an assignment of the tax sale certificate. Needless to say, this is extremely embarrassing.

"The measure of . . . loss or the amount of damages recoverable against an attorney for . . . malpractice necessarily depends upon the nature of [the attorney's] undertaking for the client." Hoppe v. Ranzini, 158 N.J. Super. 158, 164 (App. Div. 1978). In fixing damages in actions based upon professional negligence, the measure is the amount that will put the "plaintiff in as good a position as he or she would have been had the" professional not breached. Saffer, supra, 143 N.J. at 271 (internal quotations and alterations omitted). The value the client lost or the amount the client had to pay is an acceptable measure of damages for professional negligence. Lieberman v. Empl'rs Ins. of Wausau, 84 N.J. 325, 342 (1980); Carbis Sales, Inc. v. Eisenberg, 397 N.J. Super. 64, 84-85 (App. Div. 2007). In addition to the foregoing principles, another measure of damages is acceptable: an amount that would place Nix in the position he would have occupied but for the negligence. That measure is the cost of replacing what was expected to be received when reliance was had on Verp's incomplete advice. The damages are the difference between the result sought and the actual result. See Gautam v. De Luca, 215 N.J. Super. 388, 397 (App. Div.), certif. denied, 109 N.J. 39 (1987) ("[T]he measure of damages is ordinarily the amount that the client would have received but for his attorney's negligence.").

The critical event in this case was the transfer of title to the property by the delivery of the Sheriff's deed in December 2004. At that time, none of the parties was aware of the stealth $176,000 municipal tax lien, but as part of his professional undertaking, Verp was required to be so aware. That was part of his promise to Nix to "perfect title in [Nix's] name," and to "proceed with everything necessary so that [Nix has] clear title." We do not agree that it could be so facile for Nix to cavalierly "walk away from the transaction." Had Verp's negligence been detected before the conveyance of the property into Nix's name, then walking away from the matter might have made economic sense and served to mitigate damages. Even then, however, particularly since Nix had been leasing the property for ten years and conducting his bus transportation business at the location, abandoning title might have been too much to ask in light of the tangible benefits of ownership.

Nix retained Verp to facilitate the acquisition of a certain property and perfect title. Nix accepted title believing the property to be encumbered by $8,984.10 in outstanding taxes, not $176,366.89. In its calculation of damages, the motion court focused on Nix's assertion that had he known about the $176,000 lien prior to obtaining title he would have backed out of the purchase, thus limiting his damages to

the monies expended up to that point. Importantly, that is not what occurred. Nix did not learn of the additional encumbrance on the property until after he closed title. At that point, options were either to satisfy the lien or sacrifice the property to foreclosure.

Decisional law steadfastly holds that where an attorney fails to discover a lien in connection with a title search, the attorney is liable for the amount of the lien. Hoppe, supra, 158 N.J. Super. at 164; see also Bayerl v. Smyth, 117 N.J.L. 412 (E. & A. 1937) (holding that the measure of damages due from an attorney to his client for negligence in passing as clear a title encumbered with liens is the amount necessary to pay off the liens); Jacobsen v. Peterson, 91 N.J.L. 404 (Sup. Ct. 1918) (in an action against an attorney who negligently omits to report a judgment lien upon real estate, where the client purchases such real estate in reliance upon the report without knowledge of such judgment, the measure of damages is the amount paid to remove the lien), aff'd, 92 N.J.L. 631 (E. & A. 1918).

The municipal tax lien in this case operated to deprive Nix of at least $176,000[10] in equity, regardless of the market value

[10] It appears that the $176,000 figure included the third and fourth quarters of 2004 tax arrears of $8,984.10. Nix was aware of this smaller amount when he went forward and bid at the Sheriff's sale. Thus, Nix's ultimate damage award must be fine-
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of the property. Nix did not receive what he had retained Verp to protect against, the latent erosion of Nix's residual investment; in other words, the diminution of the property's equity. The fact that the economic contours of the overall transaction were extraordinarily favorable to Nix —— after all, he only paid $5,000 to acquire the Assignment of Judgment and thereby control the timing of the Sheriff's sale, and had to bid a mere $100 to obtain title through the Sheriff's deed —— are not relevant. As noted in Bayerl:

> And even if the client sells the property at a higher price than he paid for it, including the amount of a judgment negligently overlooked by his attorney, such fact will not save the attorney from liability to his client for the amount of the judgment.
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> [Id. at 415.]

Application of these principles does not make the attorney an insurer of pie-in-the-sky expectations of the client. Rather, it simply operates to restore the client to the economic position that was anticipated all along. The Law Division's limitation of damages disregarded these firmly held principles and must be reversed.

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tuned to the evidence, and should not include the amount of the known 2004 municipal tax lien.

In returning this matter to the Law Division, we do not determine the exact amount of Nix's damages. Although the motion court's treatment of mitigation of damages was ultimately erroneous, we are insufficiently confident of the state of the record to command a particular result on remand.

The doctrine of mitigation of damages embodies the principle that a claimant should not be entitled to damages that reasonably could have been avoided. Covino v. Peck, 233 N.J. Super. 612, 617 (App. Div. 1989). The reasonableness of a non-breaching party's response to an attorney's negligence is measured by a subjective standard. Grubbs v. Knoll, 376 N.J. Super. 420, 437 (App. Div. 2005) (citing Covino, supra, 233 N.J. Super. at 617)).

In this case, as noted, Verp was specifically retained to facilitate the acquisition of the property for Nix. The purpose and scope of the representation were clear. Verp nonetheless contends that "[p]laintiffs were not obligated to buy," but "chose to in order to obtain the benefit that presented itself." Verp's contention is not factually supported by the record. Nix did not learn of the $176,000 lien until after the deed was executed and delivered to him. Once title passed, Nix's option was to pay the municipal tax lien in full, or lose the property to a tax sale certificate foreclosure action. We cannot say

that Nix's course of conduct was unreasonable as a matter of law. As in Covino, Nix was not required to give up the property he desired and paid for "in order to absolve defendant from damages." Covino, supra, 233 N.J. at 619, 617 ("[D]amages will be curtailed only when he is unreasonable in refusing or failing to take action to prevent further loss."). Even if Nix should have mitigated his damages by taking alternative steps —— other than walking away from the property —— before the tax sale certificate foreclosure action got well underway, this is a determination best suited for a jury, not the court. Prospect Rehab. Servs., Inc. v. Squitieri, 392 N.J. Super. 157, 168-69 (App. Div.), certif. denied, 192 N.J. 293 (2007) (plaintiff's duty to mitigate before pursuing a malpractice action was a factual question inappropriate for summary judgment). Verp has the right to assert, among any remaining defenses, that it was unreasonable for Nix to wait an additional year before redeeming the tax sale certificate.

Because we remand for further proceedings, it is unnecessary to address Nix and Verp's arguments concerning the calculation of Saffer-engendered counsel fees and costs. Suffice it to say that in vacating the September 29, 2009 order limiting damages, we also vacate the February 19, 2010 order awarding of counsel fee and costs. We do this out of

pragmatism, recognizing that Nix has incurred significantly more legal expenses in pursuing this appeal, and there will indubitably be additional counsel fees and costs incurred during the remand proceedings.

In his cross-appeal, Verp asserts that the fee agreement between Nix and his attorney is contrary to Rule 1:21-7, and as such, reallocation under Saffer is unwarranted. We disagree.

Rule 1:21-7 governs contingent fees and contingent fee agreements. This rule deals with fee arrangements between counsel and his client, not applications for fees under Saffer. See Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 358 (1995) ("[T]he reasonable counsel fee payable to the prevailing party under fee-shifting statutes is determined independently of the provisions of the fee agreement between that party and his or her counsel.").

Indeed, the award of counsel fees to a prevailing party under Saffer is not governed by contract, but rather by "what fee is reasonable, taking into account the hours expended, the lawyer's customary hourly rate, the success achieved, the risk of nonpayment, and other material factors." Id. at 358-59. As such, Verp's objection to the form of Nix's agreement with litigation counsel because it was "not approved" has no bearing on the court's independent award of fees.

Trial courts may employ the lodestar method in calculating counsel fee awards in legal malpractice actions. Packard-Bamberger, supra, 167 N.J. at 444-46. "The lodestar calculation is defined as the number of hours reasonably expended by the attorney, multiplied by a reasonable hourly rate." Id. at 445. Determining the lodestar is not a mechanical function. A trial court must "evaluate carefully and critically the aggregate hours and specific hourly rates advanced by counsel for the prevailing party to support the fee application." Rendine v. Pantzer, 141 N.J. 292, 335 (1995).

"'[N]o compensation is due for non-productive time.'" Ibid. (quoting Copeland v. Marshall, 641 F. Supp. 2d 880, 891 (D.C. Cir. 1980)). A trial court "'should exclude hours that are not reasonably expended. Hours are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. Further, the court can reduce the hours claimed by the number of hours spent litigating claims on which the party did not succeed.'" Ibid. (quoting Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990)). Moreover, the court "'can deduct hours when the fee petition inadequately documents the hours claimed.'" Ibid. While "[t]he use of contemporaneously recorded time records is the preferred practice to verify hours expended by counsel in connection with a counsel-fee

application," a court may award counsel fees based on reconstructed records. Szczpanski, supra, 141 N.J. at 367. However, where the record consists of reconstructed records, the trial court must scrutinize the records with "meticulous care." Id. at 368.

As to the reasonableness of hourly rates, the determination "need not be unnecessarily complex or protracted, but the trial court should satisfy itself that the assigned hourly rates are fair, realistic, and accurate, or should make appropriate adjustments." Rendine, supra, 141 N.J. at 337. Moreover, "[t]o take into account delay in payment, the hourly rate at which compensation is to be awarded should be based on current rates rather than those in effect when services were performed." Ibid. We commend to the discretion of the Law Division on the remand, unfettered by prior motion proceedings, the delicate function of appropriately carrying out the mandate of Saffer.

Verp's other arguments, including the contention that the Saffer doctrine is inapplicable to the case at bar and nonetheless unconstitutional, are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Reversed and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.