

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MARK McCRAW,

Plaintiff,

v.

MEMORANDUM AND ORDER
06-C-86-S

LINDA S. MENSCH, LINDA MENSCH, P.C.
and ILLINOIS STATE BAR ASSOCIATION
MUTUAL INSURANCE COMPANY,

Defendants.

ILLINOIS STATE BAR ASSOCIATION
MUTUAL INSURANCE COMPANY,

Cross-Plaintiff,

v.

MARK McCRAW, LINDA S. MENSCH,
LINDA MENSCH, P.C., KURT NEUMANN,
SAMUEL LLANAS and KESHAW, INC.

Cross-Defendants.

Plaintiff Mark McCraw brings this legal malpractice against attorney Linda S. Mensch, her corporation Linda S. Mensch P.C. (collectively "Mensch") and her insurer Illinois State Bar Association Mutual Insurance Company. Jurisdiction is based on diversity of citizenship, 28 U.S.C. § 1332. The matter is presently before the Court on defendant Mensch's motion for summary judgment. The following facts are undisputed for purposes of the present motion.

FACTS

In 1983 Kurt Neumann and Samuel Llanas formed the musical group the BoDeans. They hired plaintiff to be manager of the BoDeans. Robert Griffin joined the band in 1985.

In 1985 the parties hired Mensch to draft documents memorializing their agreements for operating the band. Mensch prepared the documents necessary to form Keshaw, Inc. as a vehicle to manage the business operations of the BoDeans. Pursuant to a September 1, 1985 stock subscription agreement, Keshaw shares were owned equally by Neumann, Llanas, Griffin and plaintiff. Pursuant to the stock subscription agreement, any owner was obligated to offer the shares for repurchase by the corporation at book value if his employment with Keshaw was terminated.

In 1986 Neumann, Llanas and McCraw formed the Lla-Mann Music Partnership ("Lla-Mann") to administer publishing royalties for the BoDeans' songs and to distribute royalties among the partners. As the song writers, Neumann and Llanas were the owners of the copyrights to the songs. Mensch prepared a written partnership agreement which provided that Neumann and Llanas would convey their copyrights to Lla-Mann. The partnership agreement was never delivered to or signed by the partners. In the subsequent years Mensch registered numerous copyrights on BoDeans songs identifying Lla-Mann as the copyright owner.

From 1985 to 1990, during which the Bodeans released three

albums and experienced commercial success, McCraw was a shareholder and director of Keshaw and was employed by Keshaw as business manager. In April, 1990 Keshaw and plaintiff entered into a written five-year employment contract drafted by Mensch which prescribed McCraw's responsibilities and compensation. Between 1990 and 1995 the BoDeans experienced even greater success.

When plaintiff's employment contract expired by its terms in 1995 the parties attempted to negotiate a new agreement. While negotiations were underway plaintiff refused to continue working on an album then in production and threatened to sue the BoDeans. Mensch represented Keshaw, Nuemann, Llanas and Griffin in the negotiations. Plaintiff represented himself in the negotiations and understood that Mensch was not representing him in connection with the employment agreement. At the time plaintiff was a shareholder in Keshaw and a partner in Lla-Mann. In July 1996 McCraw signed a new employment agreement governing his future employment by Keshaw. The agreement provided for four years of post termination compensation. The agreement also provided that McCraw "would be accountable for [his] decisions and actions."

In April 2003, Mensch realized and informed plaintiff that written documentation necessary to transfer a copyright interest in BoDeans songs was not in place and therefore Lla-Mann had not become owner of most of the Bodeans songs. In April, 2003 Llanas verbally terminated plaintiff's employment and on May 7, 2003

termination was confirmed in a letter signed by Neumann, Llanas and Griffin. On June 1, 2004 Neumann and Llanas terminated all copyright licenses of their songs to Lla-Mann.

On September 17, 2003 Neumann, Llanas, Griffin and Keshaw sued McCraw alleging breach of contract, breach of fiduciary duty, theft and fraud. McCraw counterclaimed for breach of contract, post termination compensation and a declaration of his ownership interest in the BoDeans songs. In May 2005 an eight day jury trial was conducted in the case. The parties litigated, among other things, plaintiff's entitlement to post termination compensation and copyright ownership to the BoDeans songs. During the underlying litigation Neumann and Llanas maintained that they never intended or agreed to convey copyrights to Lla-Mann. The jury returned a verdict finding that McCraw had breached the employment contract but that the breach was not material. The trial Court ruled that Lla-Mann did not own the BoDeans copyrights due to a lack of written assignment.

After the trial court granted a motion for new trial on the contract claims, the parties agreed to settle the underlying litigation to avoid the cost of a second trial and appeal. In the settlement all parties reserved their right to proceed with claims against Mensch.

MEMORANDUM

Plaintiff McCraw alleges that Mensch was negligent in failing to properly obtain a written transfer of copyrights to Lla-Mann and in failing to advise plaintiff of a conflict of interest in connection with the negotiation of the 1996 employment agreement. Plaintiff also alleges that Mensch misrepresented the state of plaintiff's rights in the copyrights and the effect of the employment contract language concerning plaintiff's being accountable for his actions. Mensch moves for summary judgment on the malpractice claim arguing that the undisputed facts demonstrate that there was no attorney client relationship between Mensch and plaintiff and that there was neither negligent conduct nor demonstrable injury to plaintiff from Mensch's conduct. Mensch contends that the same lack of causal connection precludes a viable misrepresentation claim, that the alleged statements were true and that any reliance by defendant was unreasonable. Additionally, Mensch maintains that the financial interest necessary to support a claim for strict responsibility for misrepresentation is absent as a matter of law.

Summary judgment is appropriate when, after both parties have the opportunity to submit evidence in support of their respective positions and the Court has reviewed such evidence in the light most favorable to the nonmovant, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), Fed. R. Civ. P. A fact is material

only if it might affect the outcome of the suit under the governing law. Disputes over unnecessary or irrelevant facts will not preclude summary judgment. A factual issue is genuine only if the evidence is such that a reasonable factfinder, applying the appropriate evidentiary standard of proof, could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986). Under Rule 56(e) it is the obligation of the nonmoving party to set forth specific facts showing that there is a genuine issue for trial.

Legal Malpractice

To prevail on his claim for legal malpractice plaintiff must prove: 1) the existence of an attorney client relationship; (2) negligence by defendant Mensch; (3) that defendants' negligence was a proximate cause of injury; (4) the fact and extent of damages. Lewandowski v. Continental Cas. Co., 88 Wis. 2d 271, 276-78, 276 N.W.2d 284, 287 (1978). Defendant Mensch's brief focuses on the first and third elements.

AS a general rule, attorneys are liable only for negligent acts committed within the scope of the attorney client relationship. Beauchamp v. Kemmeter, 2001 WI App 5, ¶ 7, 240 Wis. 2d 733, 625 N.W.2d 297. The attorney client relationship is contractual and subject to the same analysis as other contract formation questions. Security Bank v. Klicker, 142 Wis. 2d 289,

295, 418 N.W.2d 27 (Ct. App. 1987). The relationship may be informal and implied from the words and actions of the parties. Id. An attorney may represent a general partnership without representing individual partners if the parties treated the partnership as an entity separate and distinct from the partners. Id. at 298. Whether and when an attorney client relationship exists depends on the contractual intent and conduct of the parties. Id.

A genuine factual issue exists concerning whether an attorney client relationship existed between Mensch and plaintiff at the time the Lla-Mann partnership was formed. Mensch conceded during her deposition testimony, that prior to the formation of Lla-Mann she was representing the individuals who would become partners. However, it is unclear whether she was representing all three individuals or whether she was representing only Llanas and Neumann, a position plaintiff maintained repeatedly during the underlying action when he asserted that Mensch was acting at all times as the attorney for Llanas and Neumann. The question of whether Mensch was representing plaintiff remains a factual issue for the jury.

Assuming this factual issue is resolved in favor of an attorney client relationship between Mensch and plaintiff at the time Lla-Mann was formed, plaintiff may be able to establish the additional elements necessary for a malpractice claim based on

defendant's failure to memorialize the copyright transfer in writing. Plaintiff's only argument in favor of summary judgment on this issue is that Neumann and Llanas would have refused to transfer their copyrights to Lla-Mann in any event. However, the intent of Llanas and Neumann with respect to copyright assignment in 1985 is far from clear or undisputed. Both plaintiff and Mensch believed, based on their personal discussions with Neuman and Llanas, that the authors fully intended to convey their copyright interests to Lla-Mann. This is evidenced by both testimony and the language of the unsigned partnership agreement drafted by Mensch. It is also demonstrated by Mensch's numerous copyright registration filings naming Lla-Mann as owner.

Balanced against this evidence is the contradictory testimony of Neuman and Llanas during the underlying litigation, nearly twenty years later after the relationship had soured, that they never intended to convey the copyrights. It is certainly possible that this testimony reflects a change of heart or financial self interest rather than their true intent in 1985. Of course, discerning the truth of such a matter is precisely the role of a jury. So while Mensch may successfully prove at trial that she was powerless to obtain a written transfer, that determination cannot be made as a matter of law.

Plaintiff's second theory of malpractice liability is that Mensch was negligent in making representations about the meaning of

the "accountable" language of the 1996 contract. There is no view of the facts which would entitle plaintiff to prevail on this theory. First, the evidence is unequivocal that there was no attorney client relationship between Mensch and plaintiff at that time. Plaintiff has repeatedly asserted that he was representing himself and was fully aware that Mensch was representing the interests of Llanas, Neumann and Keshaw in the negotiations and not his interests. Certainly there is no suggestion in the facts that plaintiff believed Mensch was representing him when she proposed the "accountable" language or when she opined as to its meaning.

Even assuming as plaintiff proposes, that there was a separate ongoing attorney client relationship between Mensch and plaintiff in connection with the Lla-Mann partnership, there is no causal connection between that relationship and any alleged injury. Plaintiff's expert suggests that Mensch was negligent in not giving plaintiff undivided loyalty in the negotiations and in not advising him that she was incapable of representing him under the circumstances. If her failure to so advise plaintiff somehow violated ethical responsibilities, it surely caused no injury to plaintiff who never believed that Mensch was representing him, advocating for him or being loyal to his interest during the negotiations.

Furthermore, there is no evidence that Mensch was wrong in her assessment of the effect of the "accountable" language in the

contract. Accordingly, there is no argument that Mensch's opinion itself was negligent or that it caused injury to plaintiff. There is no viable malpractice claim based on the 1996 contract negotiations.

Misrepresentation

A cause of action for misrepresentation, whether intentional, strict or negligent contains the following three elements: 1) the representation must be of a fact and made by the defendant; 2) the representation of fact must be untrue; and 3) plaintiff must believe such representation to be true and rely thereon to his damage. Whipp v. Iverson, 43 Wis. 2d 166, 169, 168 N.W.2d 201 (1969). To state a claim for strict liability plaintiff must prove two additional elements: (1) that the defendant made the statement from personal knowledge and (2) that defendant had an economic interest in the transaction in that defendant stood to make a financial gain if plaintiff entered into it. Green Springs Farms v. Kersten, 136 Wis. 2d 304, 331 n. 13, 401 N.W.2d 816 (1987).

Plaintiff fails to present any viable claim for strict liability because Mensch lacked an economic interest in plaintiff entering either the partnership agreement or the employment contract. There is no evidence which would suggest that Mensch received a financial benefit from plaintiff entering into these agreements or that her fees were somehow contingent on the signing

of either. The fact that the partnership agreement was never signed makes it apparent that her fees were not contingent. Plaintiff cites several cases holding that commissioned sales people have a financial interest in seeing a transaction closed which satisfies this strict responsibility element. Of course, Mensch was not being paid on commission so these cases are entirely inapposite.

Defendant Mensch is also entitled to summary judgment on the negligent misrepresentation claim based on the alleged representation concerning the effect of the "accountable" language in the 1996 employment contract for three independent reasons. First, the statement that the language would have no legal effect was not a statement of fact, but rather an opinion concerning its likely legal effect. A statement involving a matter of judgment is opinion which cannot sustain a misrepresentation claim. Consolidated Papers, Inc. v. Dorr-Oliver, Inc., 153 Wis. 2d 589, 594, 451 N.W.2d 456 (Ct. App. 1989). Mensch's statement that the language "was meaningless" was a mere prediction of how the language would be legally applied in the event of enforcement.

Second, even if the prediction of the legal effect of the contractual language could be deemed a fact there is nothing to suggest that it was false. In fact, the language was not found to be of legal significance at trial. Certainly the statement was not a representation that no argument to the contrary could be made.

Llanas and Neumann's unsuccessful argument to the contrary at trial does not demonstrate the inaccuracy of Mensch's assessment.

Finally, as a matter of law an attorney cannot be liable for negligent misrepresentations made to a non-client in the context of an arms length negotiation. Green Spring Farms, 136 Wis. 2d at 322. Under such a situation only a showing of intentional fraud can sustain a claim. Id. at 329. There is no dispute that plaintiff and Llanas, Neumann and Keshaw had interests adverse to each other during the negotiations. There is also no dispute that plaintiff was fully aware that Mensch was representing those adverse interests and not his. There is no viable claim for negligent misrepresentation against Mensch in that context.

Defendant Mensch may be liable, however, for negligently misrepresenting that the BoDeans' copyrights had been transferred to Lla-Mann. Mensch's argument for summary judgment is two-fold: (1) that his reliance on the statement was unreasonable because plaintiff could have easily discovered the error himself, (2) that no damages arose from the misrepresentation. Neither argument could sustain summary judgment in Mensch's favor. Whether the erroneous statement is so apparently false that it cannot be justifiably relied upon is generally a question of fact. Williams v. Rank & Son Buick, Inc., 44 Wis. 2d 239, 246, 170 N.W.2d 807 (1969). There are several facts which tend to establish that reliance was justified. At the time the representation was made

Mensch and plaintiff were not adverse to one another. Mensch held herself out as having expertise in the field. Under the circumstances it seems reasonable that plaintiff would accept her representation and feel no need to consult a second attorney.

Concerning the second argument, had Mensch properly advised plaintiff that the copyrights had not been transferred because there was no written agreement, plaintiff could have sought such a writing from Llanas and Neumann. The same factual issue which precludes summary judgment on the malpractice claim - whether Llanas and Neumann intended to transfer their rights to Lla-Mann - precludes summary judgment on this claim.

ORDER

IT IS ORDERED that defendant Mensch's motion for summary judgment is DENIED as it concerns the malpractice and negligent misrepresentation claims based on the alleged failure to transfer copyrights and is in all other respects GRANTED.

Entered this 22nd day of November, 2006.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge