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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2013-CP-02-02032
Appellate Case No. 2014-000135

Moore Taylor & Thomas, P.A.,Appellant,

v.

Marsha Banks and Mary Guynn, Defendants,

Of whom Mary Guynn is the..... Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court properly dismiss the complaint for legal malpractice based on the lack of an attorney-client relationship? (Appellant's Issues B and D)
- II. Did the trial court properly dismiss the complaint after concluding that a closing attorney does not owe a duty to a third party who claims an oral interest in the proceeds of a sale? (Appellant's Issues A and C)

STATEMENT OF THE CASE¹

This is an action brought by a law firm seeking to collect a disputed legal fee owed by a client who is not a party to this case. The law firm of Moore Taylor & Thomas, P.A., (“Moore Taylor”) represented Susan Cain in a dispute against Warren Matha. (R pp. 9 – 10, ¶¶ 4, 9.) From the outset of the representation, Moore Taylor was concerned that Cain would not pay her legal fees. (R. p. 10, ¶ 7.) Moore Taylor periodically billed Cain for its services, but Cain “failed to pay the bills during the litigation.” (R. p. 10, ¶¶ 10, 11.)

Nonetheless, Moore Taylor continued representing Cain, and the case between Cain and Matha eventually settled. (R. p. 10, ¶ 13.) As part of the settlement, the parties agreed that the real property at the center of the dispute would be sold. (R. p. 10, ¶ 14.) Cain was the seller. (R. p. 44, lines 9-16.) Mary Guynn served as the closing attorney representing the purchaser. (R. p. 10, ¶ 15; p. 42, lines 21-25.)

The day before the closing, attorney Marsha Banks, who referred Cain to Moore Taylor, informed Moore Taylor that Cain disputed a portion of Moore Taylor’s legal bill. (R. pp. 10 – 11, ¶¶ 6, 17, 18.) By this time, Cain had stopped communicating with Moore Taylor. (R. p. 11, ¶ 17.)

On September 9, 2013, Moore Taylor filed this lawsuit against Banks and Guynn alleging negligence as to both defendants and misrepresentation as to Banks only.² The complaint included the affidavit of Michael J. Virzi, Esquire, whom Moore Taylor

¹ This is an appeal from an order granting a motion to dismiss. Under the applicable standard of review, the trial court and the appellate court must view the facts as presented in the complaint. Accordingly, the facts as stated above are based on the allegations in the complaint.

² Banks is not a party to this appeal.

retained as an expert witness pursuant to S.C. Code Ann. § 15-36-100 (Supp. 2013), the statute governing legal malpractice actions.

Moore Taylor alleges that Banks failed to advise Moore Taylor that it would never get paid. (R. p. 12, ¶ 26.) Moore Taylor alleges that Guynn failed to recognize Moore Taylor's interest in the proceeds of the sale and failed to withhold the proceeds from distribution. (R. pp. 11 – 12, ¶¶ 21, 27.) Moore Taylor alleges damages in the amount of \$55,653.45 plus prejudgment interest. (R. p. 12, ¶ 29.)

On October 15, 2013, Guynn moved to dismiss the complaint based on the lack of an attorney-client relationship with Moore Taylor and the lack of a duty owed to Moore Taylor. (R. pp. 19 - 25.) On November 13, 2013, a hearing was conducted. (R. p. 37.) On December 18, 2013, the trial court granted the motion to dismiss. (R. pp. 2 - 6.) Moore Taylor moved for reconsideration, but the motion was denied. (R. pp. 7 – 8; 32 - 36.) On January 15, 2014, Moore Taylor served the notice of appeal.

STANDARD OF REVIEW

“On appeal from a dismissal pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court—whether the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court.” *Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 176, 758 S.E.2d 501, 503 (2014). “The Court is required to view the allegations in the complaint in the light most favorable to the plaintiff and determine whether the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief under any theory of the case.” *Id.* “The Court may sustain the dismissal when ‘the facts alleged in the complaint do not support relief under any theory of law.’”

Id. (quoting *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 416 (Ct. App. 2003)).

ARGUMENT

The trial court's order should be affirmed. The trial court properly concluded that the complaint failed to state a claim because there was no attorney-client relationship between Moore Taylor and Guynn, and Guynn did not owe a duty to Moore Taylor as a matter of law. Moore Taylor was not a party to the real estate transaction in which Guynn served as the closing attorney for the purchaser, and Guynn had no duty to protect Moore Taylor's alleged interest in the proceeds of the sale, especially when the amount of legal fees owed was in dispute and Moore Taylor had not taken any action to perfect its interest.

Given the lack of an attorney-client relationship between Guynn and Moore Taylor, and the lack of any duty owed, the trial court properly dismissed the complaint.

A. The trial court properly dismissed the complaint based on the lack of an attorney-client relationship.

Moore Taylor brought this case as a legal malpractice action. The first and most essential element of a legal malpractice action is the existence of an attorney-client relationship. With no attorney-client relationship between Moore Taylor and Guynn, the trial court properly dismissed the complaint.

"A plaintiff in a legal malpractice action must establish four elements: (1) the existence of an attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) proximate cause of the client's damages by the breach." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). Accordingly, "[b]efore

a claim for malpractice may be asserted, there must exist an attorney-client relationship.”

Id.

South Carolina law protects attorneys from being sued by third parties. In general, “an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client.” *Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions*, 388 S.C. 394, 400, 697 S.E.2d 551, 554 (2010). Further, “an attorney owes no duty to a non-client unless he ‘breaches some independent duty to a third person or acts in his own personal interest outside the scope of his representation of the client.’” *Id.* at 400, 697 S.E.2d at 554 (quoting *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995)).

Here, the complaint fails to state a claim for legal malpractice because it fails to allege the existence of an attorney-client relationship between Moore Taylor and Guynn. Guynn represented the purchaser in a real estate transaction. She did not represent Moore Taylor and she had no relationship with Moore Taylor whatsoever. The lack of an attorney-client relationship is fatal to the cause of action for legal malpractice.

To get around the lack of an attorney-client relationship, Moore Taylor argues that this is not a legal malpractice case but an ordinary negligence case. This argument is undermined by the fact that prior to filing the complaint, Moore Taylor obtained an expert witness affidavit pursuant to S.C. Code Ann. § 15-36-100, the statute governing legal malpractice actions. The affidavit was attached to and incorporated into the complaint by reference. (R. p. 11, ¶ 22.) The affiant, Michael J. Virzi, opined that Guynn’s conduct fell below the standard of care expected of lawyers. (R. p. 17, ¶ 8.)

Likewise, the complaint alleges that Guynn breached “the standard of care for attorneys.” (R. p. 12, ¶¶ 27, 28.)

These allegations together with the affidavit of Michael J. Virzi establish that this is legal malpractice case and not an ordinary negligence case. Because this is a legal malpractice case, the plaintiff must establish the existence of an attorney-client relationship. Because the complaint does not allege the existence of an attorney-client relationship, the complaint fails to state a claim.

Accordingly, the trial court properly dismissed the complaint.

B. The trial court properly dismissed the complaint based on the lack of a duty.

Even if this is not a legal malpractice case but an ordinary negligence case, the trial court properly dismissed the complaint based on the lack of duty owed by Guynn to Moore Taylor.

“To sustain an action for negligence, it is essential the plaintiff demonstrate the defendant breached a duty of care owed to the plaintiff.” *Houck v. State Farm Fire & Cas. Ins. Co.*, 366 S.C. 7, 11, 620 S.E.2d 326, 329 (2005). “The existence of a duty owed is a question of law for the courts.” *Id.* at 11-12, 620 S.E.2d at 329. “In a negligence action, if no duty exists, the defendant is entitled to judgment as a matter of law.” *Id.* at 12, 620 S.E.2d at 329.

Under South Carolina law, an attorney does not owe any duties to non-clients unless the attorney “breaches some independent duty to a third person or acts in his own personal interest outside the scope of his representation of the client.” *Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions*, 388 S.C. 394, 400, 697 S.E.2d 551, 554 (2010) (quoting *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995)).

There is no authority in South Carolina for the proposition that a closing attorney representing the purchaser owes a duty to a third party claiming an oral interest in the proceeds of a sale. There is also no authority to support the proposition that a closing attorney has a duty to withhold from distribution a disputed, unsecured debt that is based on an oral representation. With no case law or statute creating a duty under the facts and circumstances of this case, the trial court properly dismissed the complaint.

The South Carolina Supreme Court has held that an attorney may be liable to a third party when the attorney acts as an escrow agent and has notice of a written assignment requiring funds to be distributed to the third party. *Moore v. Weinberg*, 383 S.C. 583, 681 S.E.2d 875 (2009). In *Weinberg*, an attorney distributed settlement proceeds in derogation of a written assignment that the attorney himself drafted. The court found that under the facts of that case, the attorney owed a duty to the third party by virtue of the attorney's role as an escrow agent, which was independent from the "attorney's status as a lawyer and distinct from duties that arise out of the attorney/client relationship." *Id.* at 588, 681 S.E.2d at 878.

In the case at hand, there was no written assignment directing the proceeds of the sale to be paid to Moore Taylor. Indeed, there was no writing whatsoever indicating that Moore Taylor had any right to the proceeds. The client actually disputed whether the legal fees were owed. With no written assignment or evidence of a secured interest, Guynn did not owe any independent duty to Moore Taylor. Guynn's duty was to her client, the purchaser of the property, and she was ethically bound to promptly distribute the proceeds of the sale to the seller. *See* Rule 1.15(d), RPC, Rule 407, SCACR (stating "a lawyer shall promptly deliver to the client or third person any funds or other property

that the client or third person is entitled to receive”). She did not owe a duty to a third party alleging an oral interest in the proceeds of the sale.

Nonetheless, the complaint alleges that Guynn was aware that “significant monies were owed” to Moore Taylor and that Moore Taylor “was to be paid out of the closing.” (R. pp. 10 - 11, ¶ 16.) The fact that Guynn was aware that Moore Taylor was owed money does not mean that Guynn had a duty to ensure that Moore Taylor got paid. The client, not Guynn, had the obligation to ensure that any legal fees owed were paid. Notice that a debt is owed to a third party and that the third party anticipates being paid out of the proceeds of a sale does not trigger a legal duty for a closing attorney to protect the third party’s interest. Additionally, as the complaint itself alleges, the client disputed the fee. So whether Moore Taylor was actually owed any money, and how much, was uncertain.

Further, the fact that Guynn allegedly knew about the dispute and knew that Moore Taylor claimed an interest in the proceeds did not trigger a duty in Guynn to act on Moore Taylor’s behalf. If recognized, such a duty would directly conflict with the closing attorney’s duty to satisfy any liens properly secured by the property at issue and to distribute the proceeds to the parties who are legally entitled to receive them. Additionally, the creation of such a duty would place closing attorneys in the impossible position of having to determine the existence, extent, and validity of a seller’s unsecured and disputed debts prior to distributing proceeds from a sale.

Moreover, the South Carolina Rules of Professional Conduct do not create a duty for closing attorneys to act on behalf of third parties alleging an oral interest in proceeds of a sale. Moore Taylor relies on Rule 1.15(e), which states:

When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Comment 4 to Rule 1.15 provides:

Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer *may have a duty under applicable law* to protect such third-party claims against wrongful interference by the client.

(Emphasis added.)

The comment to Rule 1.15 confirms that the rule does not create a duty. According to the comment, the duty must arise “under applicable law.” Because there is no applicable law creating a duty to protect a third party claiming an oral interest in proceeds of a sale, a duty does not arise by virtue of Rule 1.15(e) alone.³

The trial court did not, as Moore Taylor contends, rule that this case was barred by the statute of frauds. The trial court merely noted that “the statute of frauds may be implicated in a matter involving the sale of lands.” (R. p. 4.) The trial court referenced the statute of frauds when stating that the complaint failed to allege the existence of a written assignment or security interest in the proceeds of the sale. The court did not go so far as to rule that this case was barred because Moore Taylor's claim was not in writing. The court found that the claim was barred because there was no attorney-client relationship between Guynn and Moore Taylor, and Guynn did not owe any duties to Moore Taylor as a matter of law.

³ The South Carolina Supreme Court has declined to find that Rule 1.15 creates a duty to protect the lien of the opposing party's former attorney. *Byrd v. Wausau Underwriters Ins. Cos.*, 2011 WL 11748258 (S.C. 2011). This is an unpublished decision and has no precedential value.

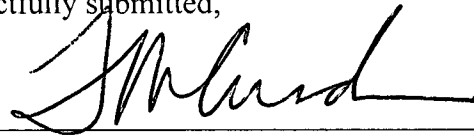
Finally, Moore Taylor is not without a remedy. Moore Taylor can pursue a cause of action against the client for any legal fees owed.

Because South Carolina law does not impose a duty upon closing attorneys to protect the interest of third parties alleging an oral interest in the proceeds of a sale, the trial court properly dismissed the complaint.

CONCLUSION

The trial court's decision should be affirmed. The complaint fails to state a cause of action for legal malpractice and fails to state a cause of action for ordinary negligence. Guynn did not have an attorney-client relationship with Moore Taylor and did not owe a duty to Moore Taylor. With no attorney-client relationship and no duty, the trial court properly dismissed the complaint.

Respectfully submitted,



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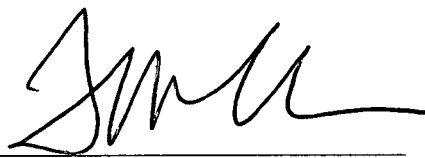
v.

Marsha Banks and Mary Guynn, Defendants,

Of whom Mary Guynn is the..... Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Brief of Respondent complies with Rule 211(b),
SCACR.



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PROOF OF SERVICE

I, the undersigned, of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for Respondent Mary Guynn, certify that I have served all counsel of record in this action with a copy of the Brief of Respondent by placing a copy of same in the U.S. Mail, on September 29, 2014, to:

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