NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1820-08T2

BARRY SABLE,

Plaintiff-Appellant,

v.

MARTY ABO, and ABO AND
COMPANY, L.L.C.,

Defendants-Respondents.

Argued January 4, 2010 – Decided January 20, 2010

Before Judges Yannotti and Chambers.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-3290-08.

Charles X. Gormally argued the cause for appellant (Brach Eichler L.L.C., attorneys; Mr. Gormally and Anthony M. Juliano, on the brief).

David J. Bloch argued the cause for respondents (L'Abbate, Balkan, Colavita & Contini, L.L.P., attorneys; Marie Ann Hoenings, of counsel; Mr. Bloch, on the brief).

PER CURIAM

Plaintiff Barry Sable appeals from an order entered by the trial court on October 24, 2008, dismissing his complaint with prejudice. We affirm.

I.

This appeal arises from the following facts. Plaintiff is the son of Harry Sable (Harry). In October 2003, Harry provided plaintiff with a power of attorney authorizing him to act as his financial and healthcare agent. In January 2005, plaintiff's brother Michael Sable (Michael) filed an action in the Chancery Division seeking, among other relief, a declaration that Harry was incapacitated and plaintiff's removal as Harry's financial and healthcare agent (the Harry Sable case or litigation).

On March 21, 2005, the Chancery Division held a pretrial hearing, after which it determined that Harry was incapacitated and appointed a temporary guardian for him. On March 20, 2006, the court entered an order which declared that plaintiff had acted improperly as Harry's agent by failing to administer, protect and preserve Harry's assets for his benefit and by converting certain of Harry's assets for his own use. The order also declared that plaintiff had failed to arrange for and monitor medical and caregiver services for Harry.

The Chancery Division's order further provided for the removal of plaintiff as Harry's financial and healthcare agent and the appointment of defendant Martin Abo (Abo), a certified public account, as temporary guardian of Harry's property. The order required Abo to conduct a review of the financial transactions undertaken with Harry's assets in the period after October 1, 2003, and to provide the court and all counsel with an accounting no later than June 5, 2006.

On March 31, 2006, Abo wrote to the court on behalf of defendant Abo and Company, L.L.C. to confirm the engagement to perform the accounting and consulting services. The letter stated in pertinent part that:

> [i]t must be understood that any reports, data, worksheets, or other documents prepared by us in connection with this engagement will be submitted solely to the Court and shall not be furnished to any other person or party, unless the Court so directs or requires. It is further understood that the Court shall determine the scope of the work to be performed by us, as well as the requirement for any appearances in court.

Thereafter, Abo provided the court with an interim report dated July 12, 2006, and a final report dated December 31, 2006. Included in the final report was a summary of the expenditures undertaken with Harry's assets for the period from October 1, 2003 to May 31, 2006. The summary indicated, among other things,

the expenditures that were reasonable and had underlying support and those for which documentation and/or appropriate support had not been provided. The court thereafter conducted a trial in the matter, at which Abo testified.

The court found that as of October 1, 2003, Harry lacked mental capacity to execute a will or other document or govern himself and manage his own affairs. The court further found that a confidential relationship existed between Harry and plaintiff, who had been primarily responsible for taking care of Harry and his finances and who held financial and health care powers of attorney at the time. The court additionally found that plaintiff had exerted undue influence over Harry and violated fiduciary duties owed to him. On January 31, 2007, the court entered judgments against plaintiff in the total amount of $715,040.97, for damages and costs arising from what the court described as plaintiff's egregious conduct.[1]

On June 18, 2008, plaintiff commenced this action in the Law Division. In his complaint, plaintiff alleged that the Chancery Division had relied upon defendants' report and Abo's testimony when it rendered its decision the Harry Sable case.

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[1] Plaintiff appealed from the judgments entered in the Harry Sable case. The judgments were affirmed. In re Sable, No. A-3743-06 (App. Div. February 11, 2009) (Slip op. at 35), certif. denied, 200 N.J. 370 (2009).

Plaintiff claimed that defendants failed to exercise the skill and knowledge normally professed by persons in the accounting profession when they performed the accounting and provided testimony in the Chancery Division action. Plaintiff also claimed that defendants' "actions and inactions" constituted negligent misrepresentations. Plaintiff sought compensatory damages of $715,040.97, plus punitive damages "in excess of" $1,000,000.

Defendants thereafter filed a motion to dismiss the complaint pursuant to Rule 4:6-2(e) for failure to state a claim upon which relief can be granted. Defendants argued that they are entitled to absolute immunity from liability on the claims asserted against them. They further argued that the doctrines of res judicata and collateral estoppel precluded plaintiff from pursuing his claims, and the claims were barred by N.J.S.A. 2A:53A-25.

The trial court considered the motion on October 24, 2008, and placed its decision on the record on that date. The court found that defendants were entitled to absolute immunity from liability in the matter. The court entered an order dated October 24, 2008, dismissing the complaint with prejudice. This appeal followed.

II.

Plaintiff first argues that the trial court erred by finding that defendants are entitled to immunity from liability on plaintiff's accounting malpractice and negligent misrepresentation claims. We disagree.

"It is well-settled that a witness in a judicial or quasi-judicial proceeding enjoys an absolute immunity from civil suit for his words and actions relevant to the judicial proceedings." Durand Equipment Co., Inc. v. Superior Carbon Products, Inc., 248 N.J. Super. 581, 583 (App. Div. 1991). "This absolute immunity is afforded even if 'the words are written or spoken maliciously, without any justification or excuse, and from personal ill will or anger against the party defamed." Id. at 583-84 (quoting DeVivo v. Ascher, 228 N.J. Super. 453, 457 (App. Div. 1988)).

Furthermore, the immunity "'is not limited to what a person may say under oath while on the witness stand. It extends to statements or communications in connection with a judicial proceeding.'" Id. at 584 (quoting DeVivo, supra, 228 N.J. Super. at 457). "The absolute immunity granted to witnesses is not designed to benefit the dishonest witness but to further the broad public interest in having witnesses who are unafraid to testify fully and openly." Id. at 585.

Here, the record shows that in the Harry Sable litigation, the Chancery Division appointed Abo to act as temporary guardian for Harry's property and required him to review and provide the court and the parties with an accounting of the financial transactions made on Harry's behalf in the period after October 1, 2003. Defendants submitted two reports to the court and Abo testified on the findings in his reports. In our judgment, defendants are entitled to absolute immunity for the actions taken and statements made during those judicial proceedings.

Plaintiff argues, however, that Levine v. Wise & Co., 97 N.J. 242 (1984), permits him to assert his claims against defendants. In Levine, the parties entered into an agreement selecting defendants to perform a valuation that would be binding upon them. Id. at 244. The trial court filed a consent order confirming the defendants' appointment to undertake the evaluation. Ibid. The plaintiff thereafter filed a lawsuit alleging, among other things, that the defendant had performed the valuation negligently and breached the contract as well as certain fiduciary duties. Id. at 245.

The Levine Court held that the defendants were not entitled to immunity merely because the trial court had entered an order confirming the parties' agreement selecting the defendants to perform the valuation. Id. at 252. The Court stated that "[a]

court-appointment is not a talisman for immunity." Ibid. The Court ruled that defendant had been "retained by the parties to perform a specific duty." Ibid. The Court said, the "duty was to apply established accounting principles to the financial facts as [the defendants] found them." Ibid.

In our view, plaintiff's reliance upon Levine is misplaced. Here, the parties in the Harry Sable litigation did not retain defendants to perform the forensic accounting, render reports and testify at trial. Defendants were appointed by the court and the appointment did not confirm an agreement between the parties to have defendants provide the services.

Moreover, the duties that defendants performed in the Harry Sable case were a matter of contract, but it was a contract between the court and defendants, not a contract between defendants and the parties to the litigation. Although defendants had a duty to apply established accounting principles to the financial facts as they found them, that duty was owed to the court, not to plaintiff or any other party to the case. Thus, Levine does not apply in these circumstances.

The decision in P.T. v. Richard Hall Mental Health Care Center, 364 N.J. Super. 561 (Law Div. 2002), also supports our conclusion that plaintiff's claims against defendants are barred by the litigation privilege. In P.T., the plaintiffs were the

non-custodial parent of a minor child and the child's paternal grandparents. Id. at 566-67. They alleged that the child's psychologist made an incorrect diagnosis that the child had been abused; campaigned with the child's mother in "a grossly negligent effort" to intervene in the matrimonial litigation involving the child's parents; and destroyed "any hope" for a relationship between the child and the plaintiffs. Id. at 568.

The trial court in P.T. held, among other things, that the defendants were entitled to immunity from liability arising from their communications and statements. The court found the defendants' communications and statements were "cloaked in the litigation privilege" because they were "made in the context of the litigation[.]" Id. at 583. The court stated:

> Similar to the status of a court-appointed expert, although admittedly not identical to the position enjoyed by a court-appointed expert, it is clear that recommendations made by [the therapist] either to the court system, or in the context of the order directing that she made her recommendations to the parties, fall within the litigation privilege. The rationale underlying the litigation privilege itself would be undercut were we to conclude that a therapist . . . in a setting such as this is not entitled to rely on that privilege. The privilege rests on the need to ensure complete candor and forthright, open and honest communication of [the therapist's] views based upon her evaluation and therapy with this child, all of which would be severely compromised were we to determine that the privilege does not apply here.

[Id. at 583-84.]

The court's rationale for applying the litigation privilege in P.T. applies here as well. In the Harry Sable litigation, the Chancery Court required a forthright and candid evaluation of the transactions undertaken with Harry's assets so that it could determine the damages resulting from plaintiff's exercise of undue influence over Harry and the breach of his fiduciary duties. Here, as in P.T., the court's ability to obtain such an evaluation would be "severely compromised" were we to conclude that defendants are not entitled to absolute immunity for the reports and testimony provided to the court.

III.

Plaintiff additionally argues that N.J.S.A. 2A:53A-25(b) permits him to assert claims against defendants for accounting malpractice and negligent misrepresentation. The statute provides in pertinent part that

> [n]otwithstanding the provisions of any other law, no accountant shall be liable for damages for negligence arising out of and in the course of rendering any professional accounting service unless:
>
> (1) The claimant against the accountant was the accountant's client; or
>
> (2) The accountant:
>
> (a) knew at the time of the engagement by the client, or agreed with the client after

> the time of the engagement, that the professional accounting service rendered to the client would be made available to the claimant, who was specifically identified to the accountant in connection with a specified transaction made by the claimant;
>
> (b) knew that the claimant intended to rely upon the professional accounting service in connection with that specified transaction; and
>
> (c) directly expressed to the claimant, by words or conduct, the accountant's understanding of the claimant's intended reliance on the professional accounting service; . . .

Plaintiff maintains that his claims satisfy all three prongs of N.J.S.A. 2A:53A-25(b)(2). Plaintiff says that defendants knew at the time they were engaged by the court that the accounting services would be made available to him. He asserts that defendants knew that he intended to rely upon the professional accounting services in connection with the transaction at issue in the Harry Sable case. Plaintiff also asserts that through their own conduct, defendants intended that he rely upon his professional services.

Again, we disagree. When defendants provided the accounting services to the court, they made clear that the services were being provided to the court for its use in the case. Indeed, in their engagement letter, defendants stated that the professional accounting services were being provided to the court and would

only be disseminated to others at the court's direction. Defendants understood that the court could rely, in whole or in part, on their reports and testimony.

In addition, defendants could not have intended that plaintiff would rely on their accounting services because the reports and testimony provided to the court contained findings that were adverse to him. Indeed, plaintiff had the opportunity to contest defendants' findings and present his own expert testimony and analysis on the issues addressed in defendants' reports and testimony. Thus, plaintiff's claims do not meet the requirements of N.J.S.A. 2A:53A-25(b)(2).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION