SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2233-16T4

BEGELMAN, ORLOW & MELLETZ,

Plaintiff-Respondent,

v.

JONATHAN EHRLICH,

Defendant-Appellant.

Submitted February 14, 2018 – Decided May 4, 2018

Before Judges Alvarez and Currier.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Docket No. L-3237-14.

Peter A. Ouda, attorney for appellant.

Begelman & Orlow[1], respondent pro se (Jordan R. Irwin, on the brief).

PER CURIAM

Defendant Jonathan Ehrlich (Ehrlich) appeals from the December 14, 2016 grant of summary judgment to plaintiff Begelman, Orlow & Melletz. We affirm. We consider the points of error

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[1] Formerly known as Begelman, Orlow & Melletz.

Ehrlich argues on appeal to be so lacking in merit as to not warrant much discussion in a written opinion. R. 2:11-3(e)(1)(E).

On appeal, Ehrlich raises the following issues for our consideration:

> POINT I
> THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING BEGELMAN ORLOW'S MOTION FOR SUMMARY JUDGMENT.

Ehrlich is the principal beneficiary of his late uncle Richard D. Ehrlich's estate. In addition to Ehrlich, Richard was survived by Ehrlich's two siblings, his sister Pamela Venuto and his brother Todd Ehrlich. Although Richard, an estate and trust attorney, had no signed will that could be located after his death in 2009, Erhlich claimed to have found a copy of a purported will among his uncle's belongings. The unsigned document:

> was typed on traditional legal paper with Richard Ehrlich's name and law office address printed in the margin of each page. The document . . . include[s] in decedent's own handwriting, a notation at the right-hand corner of the cover page: "Original mailed to H.W. Van Sciver, 5/20/2000[.]" The document names Harry W. Van Sciver as Executor of the purported Will and Jonathan as contingent executor. Van Sciver was also named trustee, along with Jonathan and Michele Tarter as contingent trustees. Van Sciver predeceased the decedent and the original of the document was never returned.
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> [In re Estate of Ehrlich, 427 N.J. Super. 64, 68 (App. Div. 2012).]

The will devised the estate to Ehrlich, subject to specified bequests to Ehrlich's brother and sister, and another person. When the matter was tried, the General Equity judge admitted the document to probate as an original will, based on his interpretation of In re Probate of Will & Codicile of Macool, 416 N.J. Super. 298, 310 (App. Div. 2010).

On appeal, we agreed that "there is clear and convincing evidence that the unexecuted document challenged by appellants was reviewed and assented to by decedent and accurately reflects his final testamentary wishes. As such, it was properly admitted to probate as his [l]ast [w]ill and [t]estament." Ehrlich, 427 N.J. Super. at 75. We concurred that the document was properly admitted to probate because it advanced the testator's intent. Id. at 77.

In a dissent, Judge Stephen Skillman stated that he believed the statute, N.J.S.A. 3B:3-3, could not be reasonably construed to authorize the admission of the document to probate. Ibid. After his discussion of the relevant section, he stated that:

> In my view, Jonathan is entitled to prevail only if he can show, in conformity with the common law authority dealing with lost wills, that the unexecuted will found in the decedent's home is a copy of an original executed will sent to Van Sciver, which was lost and not revoked by the decedent. However, because this case was presented solely under N.J.S.A. 3B:3-3, the trial court did not make any findings of fact regarding these issues. Indeed, the trial court

> concluded that the copy of the will found in the decedent's home could be admitted to probate under N.J.S.A. 3B:3-3 "[e]ven if the original . . . was not signed by [the decedent]." Therefore, I would remand to the trial court to make such findings. I would not preclude the parties from moving to supplement the record to present additional evidence on the question whether the unexecuted copy of the will found in the decedent's home may be admitted to probate as a copy of the alleged executed original sent to Van Sciver.
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> [Id. at 83-84.]

Although Ehrlich prevailed on appeal, Ehrlich's siblings had the right to appeal to the Supreme Court because a dissent was filed with the majority opinion. In order to avoid protracted litigation, Ehrlich entered into a settlement agreement with them. By that juncture, Ehrlich had discharged Paul R. Melletz, Esquire, who had prevailed on appeal and in the trial court, and retained a new attorney who negotiated the settlement.

After the settlement, Ehrlich filed a legal malpractice suit against Melletz, who in turn filed this collection action against Ehrlich. Ehrlich's complaint alleged that Melletz's success representing him on appeal was based on an improper legal theory. He further contended that Melletz should have argued that the will was a lost will——the theory mentioned in the dissent. He also claimed that Melletz should have objected to the first interim accounting filed by the estate's temporary administrator and that

Melletz did not properly investigate and raise issues concerning a condominium in the Bahamas that might have been owned by the decedent.

On July 25, 2014, another court approved the temporary administrator's final account, rejecting the exceptions raised by Ehrlich as well as his application to be appointed executor. In that parallel proceeding, the estate was ordered to pay Melletz the balance he was owed. The court did not stay the fee award to Melletz pending the outcome of Ehrlich's malpractice case.

In ruling on the summary judgment motion, this judge found that a jury could not revisit Melletz's entitlement to fees since other finders of fact——judges——had already ruled on the issue. He also concluded that as a matter of law, the "lost will" theory mentioned in Judge Skillman's dissent, which Ehrlich insisted he urged his attorney to advance, was no better than the unsigned will theory. In his view, both had substantial weaknesses.

The lost will theory requires the proponent of the will to overcome a rebuttable presumption that the testator revoked his will. The judge opined that there was less than "clear and convincing evidence" to factually overcome that rebuttable presumption. The only support for the theory was that decedent was a trust and estate attorney who would likely not have forwarded his will to another for safe keeping without having it properly

signed and witnessed. Other than that premise, the judge observed nothing made one theory better than the other. Therefore, he concluded that as a matter of law a jury could not determine that one theory was better than the other. Nor did he consider it possible for Erhlich to establish the proximate cause of any damages. He opined that to conclude otherwise was "ultimately . . . nothing but rank speculation."

Summary judgment is granted where the legally competent evidence establishes that "there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c); see also Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). The trial court cannot decide disputed factual issues, only determine whether such factual disputes exist. Aqurto v. Guhr, 381 N.J. Super. 519, 525 (App. Div. 2005). We review a trial court's decision de novo, employing that same standard. Ibid. We view the facts in the light most favorable to the non-moving party. Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 374 (2010). Applying that standard, dismissal of the malpractice complaint is warranted.

The heart of Ehrlich's claim is his perspective that Melletz should have listened to him and pursued a lost will theory. He argues that had Melletz done so and prevailed, Ehrlich would not

have been vulnerable to an appeal of right to the Supreme Court, and had to settle the matter with his siblings. We do not agree for a number of reasons.

Even if Ehrlich had prevailed in the trial court on that theory, nothing would have prevented an appeal by his siblings. Ehrlich might have been faced with precisely the same quandary, had a dissent been filed on any hypothetical appeal. That rank speculation is no different than the rank speculation he engages in by asserting that he could have prevailed on the theory of a lost will, that his siblings would not have appealed that decision, and that if they had appealed, appellate review would have resulted in a unanimous decision.

The basic facts of this case have been described in two opinions, one published and one unpublished,[2] not to mention factual summaries from various trial judges. We see nothing in those factual summaries, or in the record, that would have overcome the rebuttable presumption that his uncle deliberately destroyed the will. The reality is that Melletz prevailed on the Macool theory, and in his dissent Judge Skillman only said the matter would require a remand in order to develop the record necessary to support that theory, if that were possible.

[2] In re Estate of Ehrlich, 427 N.J. Super. 64 (App. Div. 2012); In re Estate of Ehrlich, No. A-4714-11 (App. Div. June 11, 2013).

Ehrlich's position is somewhat unique. When litigants prevail in the trial court and on appeal, they are ordinarily satisfied with the legal representation they have received. Ehrlich's claim is based solely on the filing of the dissent, and the right of appeal to the Supreme Court the filing of the dissent created. That is simply not enough.

The trial judge reasonably exercised his discretion in accepting the opinion of Melletz's expert witness that there were substantial difficulties of proof in prevailing on a lost will theory. See Townsend v. Pierre, 221 N.J. 36, 52-53 (2015). Furthermore, the expert also opined that the damages stemming from Melletz's alleged malpractice were also unforeseeable——mainly Ehrlich's decision to retain another attorney, pay that attorney's fees, and settle the matter so no appeal to the Supreme Court could be taken. The judge's reliance on that opinion was not an abuse of discretion.

As a matter of law, we are satisfied that Ehrlich could not have proven his cause of action before a jury. Thus, the trial court properly granted summary judgment. That Melletz did not pursue an alternative theory is not legal malpractice.

The issue of the apartment in the Bahamas was one with which Ehrlich was fully apprised and familiar. He deliberately avoided mentioning it early on to the estate administrator in order to

prevent his siblings from appreciating the size of the estate while he was negotiating with them.

Affirmed.