



Naify v. Goodman

2005 | Cited 0 times | California Court of Appeal | June 20, 2005

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In these consolidated appeals, Lily Cates Naify challenges judgments in favor of two law firms and attorneys associated with those firms, entered after the trial court granted summary judgment on Naify's malpractice claims. The court ruled that Naify failed to establish triable issues of fact on the issues of causation and damages, and was also equitably estopped from pursuing her claims. We affirm. Naify fell well short of showing any recoverable damages.

BACKGROUND

Lily married Marshall Naify in September 1999; the following April, he died. Shortly before their marriage, Marshall amended his revocable trust to provide a \$10 million distribution to Lily if they were married and living together at the time of his death. The amendment made clear that Marshall was "making no other provision for her," and that if she "in any manner, directly or indirectly, contests or attacks either Grantor's Will or this instrument, or any of their provisions in any legal proceeding that is designed to thwart Grantor's wishes as expressed herein or in his Will," her share in the trust estate would be revoked. Marshall executed parallel provisions in a codicil to his will.

Lily did not believe Marshall would have left her only \$10 million, and retained counsel to pursue claims testing that limited distribution, seeking a share of a trust established by Marshall's father, pursuing her right to continue living in the couple's house, and asserting her right to certain gifts she claimed Marshall had made to her, including some race horses. Lily retained Andrew Goodman, of Kurzman, Eisenberg, Corbin, Lever & Goodman, LLP, and followed his recommendation that she also retain Thomas Worth of McCutcheon, Doyle, Brown & Enerson, LLP.

In October 2000, an attorney for Marshall's trustee informed Goodman and Worth that any attempt by Lily to pursue her claims would violate the no-contest clauses of the trust and the codicil. The attorneys for the two sides had some settlement discussions, in which Lily's demands for \$5 million, and then \$4.5 million, were rejected. The trust first offered something in the \$1 million range, then \$2 to \$2.5 million. In a letter to Lily dated December 22, 2000, Worth sent his client petitions to sign that would obtain a court determination on whether her claims violated the no-contest clauses.



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Worth noted he and Goodman had decided not to include the personal property claims in the petitions, to avoid "unduly complicating" the requests for declaratory relief. He described the state of the settlement negotiations as follows:

"In the meantime, we will continue to discuss with the attorneys for the Michael Naify Trust whether they would be interested in paying you a cash amount (in addition to the \$10,000,000 bequest) which would represent the current value of your interest in the Michael Naify Trust. As you know, we have offered for you to accept \$4.5 million for that interest, which they have turned down, saying that they would be willing to pay you \$2.0 million to \$2.5 million instead. As you know, I discussed that counter offer with Andy, and he has discussed it with you; I have reported back to their attorney that it is unacceptable. If at some point they were to come back with a better offer, you could consider at that time whether settling all the proceedings in exchange for that payment (plus the \$10,000,000 bequest) would be appropriate. In the meantime, we will continue to pursue these proceedings in the probate court."

In April 2001, the probate court ruled that Lily's claims would trigger the no-contest clauses of the trust and the codicil. In June 2001, Lily agreed to settle her claims for \$10,127,197.13. The amount above \$10 million compensated Lily for her attorney fees. Lily filed this malpractice action in June 2002, charging respondents with various derelictions of duty in pursuing her claims against Marshall's estate. The complaint sought damages for the loss of "several gifts," including "race horses and . . . various personal property," and for the difference between the \$12.5 million "Settlement Offer" (including the \$10 million trust distribution) and the amount Lily actually received. Lily claimed she had lost the right to pursue her claims against Marshall's estate, and "could expect a more favorable outcome of the Underlying Action if competent services had been provided."

DISCUSSION

Summary judgment is properly granted when the papers show there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision independently, considering all the evidence offered by the parties and the uncontradicted inferences the evidence reasonably supports. When a moving defendant has shown that one or more elements of a cause of action cannot be established, the burden shifts to the plaintiff to establish a triable issue. The plaintiff may not simply rely on the allegations of her pleadings, but must provide specific facts showing a triable issue of material fact as to the element or elements in question. (Code Civ. Proc., § 437c, subd. (p)(2); *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477.)

"A plaintiff alleging legal malpractice in the prosecution or defense of a legal claim must prove that, but for the negligence of the attorney, a better result could have been obtained in the underlying action. [Citation.] The purpose of this methodology is to avoid damages based on pure speculation



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and conjecture." (Orrick Herrington & Sutcliffe v. Superior Court (2003) 107 Cal.App.4th 1052, 1057.)

The \$2 to \$2.5 million "settlement offer" was Naify's most substantial damage claim. In their moving papers, respondents noted Naify's deposition testimony that she knew of no evidence Marshall's trust would have been willing to pay her more than she eventually received, and also that she did not know if she would have accepted an offer of from \$2 to \$2.5 million. Respondents provided a declaration from the attorney who proffered these figures, stating that while he was generally authorized to entertain settlement discussions, he had no "specific authority to make any binding offer of settlement at any particular dollar amount." Another attorney for the trust testified at deposition that "an offer to settle with a specific amount that was authorized . . . that never happened to my knowledge." These showings shifted to Naify the burden of establishing a triable issue regarding the availability of a more favorable settlement.

Naify argues she could have obtained a better result had her attorneys advised her to accept the \$2 to \$2.5 million, but fails to identify any evidence of a firm offer that could have led to a settlement for any specific amount. A settlement proposal, like any contract offer, must be reasonably certain for acceptance to result in an enforceable agreement. (Weddington Productions, Inc. v. Flick (1998) 60 Cal.App.4th 793, 810-811.) A proposal that merely suggests the terms of a possible contract is insufficient. (City of Moorpark v. Moorpark Unified School Dist. (1991) 54 Cal.3d 921, 930.) "Whether a contract term is sufficiently definite to be enforceable is a question of law for the court." (Ladas v. California State Auto. Assn. (1993) 19 Cal.App.4th 761, 770, fn. 2.) Clearly, Naify could not have reached an enforceable settlement by accepting an "offer" ranging from \$2 million to \$2.5 million. Her claim that respondents are estopped from denying the existence of a firm offer, because the December 22 letter characterized the trust's proposal as a "counter offer," is absurd. The letter is reasonably understood as a report on the early stage of negotiations, before any firm offer was made.

On appeal, Naify identifies a few other claims for damages that should have survived the summary judgment motions, but her arguments on these points are cursory and without merit. In a footnote, she suggests respondents should have advised her not to pursue her claims at all, in which case she would have had the use of the \$10 million bequest earlier. This claim was not presented in the complaint, and therefore respondents were under no obligation to address it. (Government Employees Ins. Co. v. Superior Court (2000) 79 Cal.App.4th 95, 98-99, fn. 4.)

In a reply brief, Naify claims interest on a bequest is authorized by the Probate Code beginning one year after the testator's death, and notes the trustee had discretion to provide interest under the terms of the trust. Respondents refuted the lost interest claim in their moving papers by noting Marshall's trust provided that deferred distributions would be deemed to have taken place at the time of his death, and authorized the trustee to withhold the payment of interest on any property subject to conflicting claims. Naify makes no attempt to establish the likelihood of the trustee exercising his discretion to pay her interest under these controlling clauses. Her claim for lost interest is thus "pure speculation and conjecture." (Orrick Herrington & Sutcliffe v. Superior Court, *supra*, 107 Cal.App.4th



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1052, 1057.)

Naify contends the value of one of the horses Marshall had given her ("Manistique") was "a concrete and provable damage claim." In their moving papers, respondents noted Naify's deposition testimony that the horse was never registered in her name, and conceding that she did not press her claim after Marshall's death when Manistique was purchased by a corporation and then sold at auction. They also pointed out that if Naify had pursued her claim to any of the gifts she alleged Marshall had given her, she would have violated the no-contest clauses. Naify directs us to nothing in the record showing she might have recovered anything for Manistique, or that she could have pursued a claim to any gift without violating the no-contest clauses. Mere speculation that she may have received something in settlement for Manistique is insufficient.

Naify spends many pages in her briefs contending that respondents breached their duties to represent her competently. These arguments are irrelevant. Without damages, Naify cannot maintain a legal malpractice cause of action. She identifies no triable damages issue, and therefore we must conclude the trial court properly entered summary judgment.

DISPOSITION

The judgments are affirmed. Respondents shall recover their costs on appeal.

We concur: Corrigan, Acting P. J., Pollak, J.

