



Lynch v. Murphy

2008 | Cited 0 times | California Court of Appeal | September 18, 2008

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Defendant and cross-complainant Helen Lynch appeals the trial court's entry of summary judgment in favor of respondents, the law firm of Murphy, Pearson, Bradley & Feeney (MPBF) and Mark Perelman (Perelman), a partner with MPBF, on her cross-complaint against them alleging professional negligence, breach of fiduciary duty, equitable indemnity and contribution. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2005, plaintiff Brenlar Investments (Brenlar), doing business as Frank Howard Allen Realtors, brought this action against Lynch, a real estate salesperson associated with Brenlar, seeking indemnification and money damages. In its complaint, Brenlar alleged as follows: Lynch agreed to represent Barbara Crane, a 70-year old widow who had never bought a home before, in the purchase of a unit next door to her own in an apartment complex in Sausalito; Lynch had been involved in selling many of the units in the complex and was aware of significant defects, including dry-rot; Lynch concealed from Crane significant defects in the apartment for sale, including active termite infestation, dry rot, damaged siding, an outmoded furnace and an ongoing water leak in the bedroom. Additionally, Brenlar alleged Lynch forged Crane's name on a number of disclosures and sales documents to make it look like Crane purchased the apartment with knowledge of and despite these defects.

Brenlar's complaint further alleged: after close of escrow Peter Crane discovered substantial undisclosed defects in his mother's apartment requiring repairs estimated at in excess of \$250,000 and that Lynch admitted to Peter Crane she knew about the defects at the time of sale; Mrs. Crane filed a lawsuit against Brenlar and Lynch (Crane Litigation) alleging causes of action for, inter alia, concealment, deceit, negligent misrepresentation and breach of fiduciary duties; and, in October 2004, the Crane Litigation was settled at Brenlar's expense with no contribution from Lynch. On the basis of these allegations, Brenlar asserted causes of action against Lynch for equitable indemnity, comparative negligence, contribution and breach of contract.

Lynch denied all allegations in Brenlar's complaint and filed a cross-complaint against MPBF and



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Perelman, who represented Brenlar and Lynch in the Crane Litigation. The cross-complaint alleged as follows: In October 2004, Lynch and Brenlar entered into a Settlement Agreement that resolved the Crane Litigation for the amount of \$150,000; the Settlement Agreement contained a provision stating that Brenlar did not waive its rights against any third party, including Lynch, to bring an action for damages, indemnity or contribution arising from the events underlying the Crane Litigation; MPBF and Perelman advised and directed Lynch to execute the Settlement Agreement permitting Brenlar to sue her; and, respondents failed to disclose the conflict of interest posed by Brenlar's reservation of rights against Lynch and by continuing to represent Lynch in the Crane Litigation, MPBF and Perelman breached their fiduciary duty to Lynch. On the basis of these allegations, Lynch asserted causes of action against MPBF and Perelman for professional negligence and breach of fiduciary duty, including damages of attorney's fees and costs in defending against Brenlar's suit, as well as equitable indemnity and contribution.¹

In April 2007, MPBF and Perelman filed a motion for summary judgment seeking entry of judgment in their favor on Lynch's cross-complaint on the basis that Lynch could not establish the requisite causation for her causes of action. On August 6, 2007, the trial court filed its order granting respondents' motion for summary judgment on the cross-complaint. The trial court found the following material facts to have been established or admitted: Brenlar was insured by CNA under a claims made insurance policy for purposes of the Crane Litigation and Lynch was a covered individual under the same policy; MPBF was retained by CNA to represent both Brenlar and Lynch in the Crane Litigation; the Crane Litigation settled for \$150,000, with Brenlar paying \$75,000 and CNA paying \$75,000; and, Brenlar reserved its indemnity rights against Lynch as part of the Settlement Agreement.

Furthermore, in its summary judgment order the trial court quoted part of Lynch's response to respondents' undisputed material facts, which stated: "Lynch claims that a conflict of interest arose in the Crane Litigation in [MPBF's] representation of both herself and [Brenlar]. She asserts she was never informed of the conflict nor waived it. Lynch asserts that the reservation of rights by [Brenlar] in the Settlement Agreement and General Release would have been avoided if not for the conflict." Notwithstanding Lynch's contentions on this point, the trial court ruled that: "The undisputed facts before the Court establish that the Crane litigation could not have settled for less than the \$150,000 paid. The undisputed facts further establish that [Brenlar] 'would not have signed a settlement agreement that did not reserve its rights to seek contribution from Ms. Lynch.' Thus, Lynch has failed to produce evidence sufficient to create a triable issue of material fact on her contention that [Brenlar] would not have sued her for indemnity.

Indeed, Lynch concedes as 'true' [MPBF's] contention that 'Lynch cannot establish that [Brenlar] would ever have agreed to a settlement that included a waiver of its rights against her' (Citation)." Accordingly, the trial court concluded that "Lynch has failed to produce evidence sufficient to create a triable issue of material fact on her contention that [Brenlar] would not have sued her for indemnity" and therefore "has failed to prove the element of causation necessary in each of her



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claims against [MPBF] and Mark Perelman." Judgment in favor of MPBF and Perelman on Lynch's cross-complaint was entered on August 17, 2007. Lynch filed a timely notice of appeal on October 5, 2007.²

DISCUSSION

A. Applicable Legal Standards

We review the grant of summary judgment de novo. (Merrill v. Navegar, Inc. (2001) 26 Cal.4th 465, 476; Saelzler v. Advanced Group 400 (2001) 25 Cal.4th 763, 767.) A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) To obtain summary judgment, defendant must show "either that one or more elements of plaintiff's claim could not be established, or that there existed a complete affirmative defense to it. (Code Civ. Proc., § 437c, subds. (a), (o)(1), (2), (p)(2).)" (Martinez v. Chippewa Enterprises, Inc. (2004) 121 Cal.App.4th 1179, 1184.) The moving party bears the burden of persuading the court. (Ibid.) In assessing a motion for summary judgment, "[t]he moving party's affidavits are strictly construed while those of the opposing party are liberally construed." (Grant-Burton v. Covenant Care, Inc. (2002) 99 Cal.App.4th 1361, 1369.)

As to the claims at issue here, the Supreme Court reaffirmed in Viner v. Sweet (2003) 30 Cal.4th 1232 (Viner) that in a litigation malpractice action "the plaintiff must establish that but for the alleged negligence of the defendant attorney, the plaintiff would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred. The purpose of this requirement, which has been in use for more than 120 years, is to safeguard against speculative and conjectural claims. (Citation.) It serves the essential purpose of ensuring that damages awarded for the attorney's malpractice actually have been caused by the malpractice. (Citation.))" (Id. at p. 1241.)

The Viner court further explained: "Determining causation always requires evaluation of hypothetical situations concerning what might have happened, but did not.

[T]he crucial causation inquiry is what would have happened if the defendant attorney had not been negligent. This is so because the very idea of causation necessarily involves comparing historical events to a hypothetical alternative." (Viner, supra, 30 Cal.4th at p. 1242.) Accordingly, the court concluded that in a malpractice action the plaintiff "must show that but for the alleged malpractice, it is more likely than not that the plaintiff would have obtained a more favorable result." (Id. at p. 1244.) Viner makes clear that in order to overcome respondents' showing that she could not demonstrate causation, Lynch had to raise a triable issue of material fact on whether she would have obtained a more favorable result but for respondents' alleged malpractice.³

B. Analysis



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The trial court granted respondents summary judgment on Lynch's cross-complaint because Lynch failed to raise a triable issue of fact on causation.⁴ Lynch contends the trial court's ruling should be reversed because she provided adequate evidence on causation to defeat summary judgment. As evidence of causation [for legal malpractice and breach of fiduciary duty], Lynch relies upon statement Nos. 31-36 in her separate statement of undisputed material facts in opposition to summary judgment. Lynch asserts these statements establish that when Perelman counseled her regarding the Settlement Agreement he failed to inform her Brenlar intended to reserve its right to contribution and indemnification against her. Also, Lynch asserts she has established that before signing the Settlement Agreement she told Perelman she was willing to pay up to the \$75,000 deductible to end the Crane litigation, but he told her that it would not be necessary.

(a) Lynch's Declaration

Respondents contend this evidence is insufficient to defeat summary judgment because it is based for the most part on Lynch's own self-serving declaration, in particular her claims that she was willing to pay \$75,000 to settle the Crane Litigation. Accordingly, respondents say the trial court was entitled to disregard Lynch's declaration for purposes of summary judgment.

In fact, respondents objected to Lynch's declaration below when they filed their objections to Lynch's evidence in support of her opposition to summary judgment. In its summary judgment order, the trial court, citing *Biljac Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 1410 (*Biljic*), stated it would "disregard all portions of the evidence proffered by the parties that it finds to be incompetent or inadmissible." *Biljic*, however, had earlier been overruled by *Demps v. San Francisco Housing Authority* (2007) 149 Cal.App.4th 564, in which the First District Court of Appeal, Division Two, held that "a trial court presented with timely evidentiary objections in proper form must expressly rule on the individual objections, and if it does not, the objections are deemed waived and the objected-to evidence included in the record." (*Id.* at p. 578.) Thus, Lynch's declaration is part of the record on appeal.

(b) Lynch's Declaration as Evidence of Causation

The gravamen of Lynch's malpractice claim is that respondents breached their fiduciary duties by advising her to sign the Settlement Agreement without first informing her that it included a reservation of rights allowing Brenlar to sue her, and without first informing Brenlar that she was willing to contribute \$75,000 towards settlement of the Crane Litigation. Even assuming her declaration raises a triable issue of fact on whether respondents breached their fiduciary duty or duty of professional care, Lynch must do more to avoid summary judgment - she must raise a triable issue of fact that but for respondents' alleged breach of fiduciary duty or legal malpractice she "would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred." (*Viner*, *supra*, 30 Cal.4th at p. 1241; see also *Lazy Acres Market, Inc. v. Tseng* (2007) 152 Cal.App.4th 1431, 1436 ["A plaintiff alleging legal malpractice . . . must prove that, but for the



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negligence of the attorney, a better result could have been obtained in the underlying action."].)

In other words, Lynch must present some evidence that if respondents had informed Brenlar of her willingness to contribute \$75,000 towards settlement of the Crane litigation, Brenlar would not have reserved its rights against her in the Settlement Agreement. Lynch presents no such evidence. Indeed, the record evidence on this point indicates Brenlar would not have accepted the settlement absent a reservation of rights. Noreen Smith, Brenlar's Chief Financial Officer, testified in her deposition that Brenlar "expected [Lynch] to pay if, in fact, she forged documents" during sale of the apartment to Crane. Smith also stated she told Lynch directly that Lynch "needed to contribute to the closing of the case." Also, Smith stated Brenlar "would not have signed an agreement that did not get us a reservation of rights."

More importantly, there is no evidence, that Brenlar would have changed its position if respondents had informed Brenlar of Lynch's willingness to contribute \$75,000 towards the settlement. Lynch's counsel asserted at oral argument that \$75,000 would have indemnified Brenlar in full because it matched Brenlar's deductible under its insurance policy. However, Lynch offers no evidence of what Brenlar's response would have been to an offer of indemnification, and our review of the record fails to disclose any fact from which we might infer that Brenlar would have changed its settlement posture based upon such an offer. Indeed, Brenlar's reservation of rights was broader than mere indemnification and included the right to sue Lynch for "damages, indemnity, contribution, reimbursement or any other cause of action" In short, it is entirely a matter for speculation whether Brenlar would have surrendered its reservation of rights against Lynch in return for a contribution from her of \$75,000 towards settlement of the Crane litigation. Accordingly, Lynch has failed to raise a triable issue of fact showing that she would have obtained a better result absent respondents' alleged breach of fiduciary duty or professional negligence.

Orrick Herrington & Sutcliffe v. Superior Court (2003) 107 Cal.App.4th 1052 (Orrick), is analogous in this regard. In Orrick, plaintiff entered into a marital settlement agreement on Orrick's advice. Subsequently, plaintiff expended a considerable sum in legal fees with other attorneys in a futile attempt to set the agreement aside. Plaintiff sued Orrick alleging as damages the attorney fees he spent to remedy Orrick's errors. Orrick moved for summary judgment. In opposition, plaintiff submitted an affidavit of an expert stating that Orrick's conduct fell below the pertinent standard of care. The trial court denied Orrick's motion for summary judgment. (Id. at pp. 1055-1056.) The Court of Appeal issued a writ of mandate requiring the trial court to vacate its order. On the issue of whether Orrick's errors caused the damages claimed by plaintiff, the court noted plaintiff had "produced no evidence showing his ex-wife would have settled for less than she did, or that following a trial, he would have obtained a judgment more favorable than the settlement. . . . Instead he showed only that Orrick might have erred, exposing him to possible future claims." (Id. at p. 1058.) Similarly, in Marshak v. Ballesteros (1999) 72 Cal.App.4th 1514 (Marshak), the court of appeal noted that even if plaintiff could establish actual damages "he would not prevail. For he must also prove that his ex-wife would have settled for less than she did, or that, following trial, a judge would have entered



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judgment more favorable than that to which he stipulated. Plaintiff has not even intimated how he would establish one or the other of these results with the certainty required to permit an award of damages." (Id. at p. 1519.)

As in Orrick and Marshak, Lynch alleges no facts to show that but for respondents' alleged breach of fiduciary duty or professional negligence, she would have achieved a better result in the underlying action. Specifically, Lynch has not offered any evidence or intimated how she would establish that Brenlar would have settled the Crane Litigation without reserving its right to bring an action for damages against her in return for a contribution from her of \$75,000. Accordingly, we affirm the trial court's entry of summary judgment in favor of respondents on the grounds that Lynch's claims fail for lack of causation.

3. Equitable Indemnity and Contribution

Lynch states that the trial court's summary judgment order did not address her claims for equitable indemnity and contribution. Lynch asserts her "indemnity claims do not rest upon the same legal principles as [] the claims based on professional negligence and breach of fiduciary duty" and that she may seek equitable indemnity "without the need for first proving damages." She contends the trial court's failure to address these causes of action precludes summary judgment.

The trial court's failure to specifically address every cause of action is not fatal to its judgment. (Jimenez v. County of Los Angeles (2005) 130 Cal.App.4th 133, 140 ["[O]n appeal following summary judgment the trial court's reasoning is irrelevant," and . . . [w]e exercise our independent judgment as to the legal effect of the undisputed facts (citations) and must affirm on any ground supported by the record."].) Turning to the claims in question, we note the doctrine of equitable indemnity apportions responsibility among joint tortfeasors responsible for the same indivisible injury on a comparative fault basis. (See American Motorcycle Assn. v. Superior Court (1978) 20 Cal.3d 578, 598.) But the indemnification doctrine has no application to parties who are not joint tortfeasors. (Commercial Standard Ins. Co. v. Bank of America (1976) 57 Cal.App.3d 241, 246.) Here, there is no evidence respondents are joint tortfeasors with Lynch in any injury caused to Brenlar, the plaintiff in this action. Accordingly, the trial court properly entered judgment in favor of respondents on all claims brought against them by Lynch.

DISPOSITION

The trial court's judgment is affirmed. Appellant shall bear costs on appeal.

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

1. In her cross-complaint, Lynch also alleged claims of breach of contract and breach of the covenant of good faith and fair dealings against Brenlar, but those claims are not implicated here.



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2. Respondents' request for judicial notice (filed on May 2, 2008) of the judgment and statement of decision (SOD) in *Brenlar Investments, Inc. v. Lynch*, Marin County Superior Court Case No. 052980 (filed December 7, 2007), is denied. That SOD is the subject of a separate appeal in case No. A121044, *Brenlar Investments, Inc. v. Helen Lynch*, and does not concern us here.

3. On this point we reject Lynch's attempt to distinguish between her causes of action for legal malpractice and breach of fiduciary duty. Damage is an element common to both causes of action. (Cf. *Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 536 [elements of a cause of action for legal malpractice are: (1) the attorney's duty to use such skill, prudence and diligence as members of the profession commonly possess; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage] and *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086-1087 [elements of a cause of action for breach of a fiduciary duty are: (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach].) Lynch, however, asserts causation for damages for breach of fiduciary duty is assessed under a "substantial factor" test, not the "but for" test applicable to legal malpractice. But as the Viner court explained, "the 'substantial factor' test subsumes the traditional 'but for' test of causation." (Viner, supra, 30 Cal.4th at p. 1240.) In effect, the "substantial factor" test provides an exception to the "but for" test, and permits a plaintiff to prove causation where there are " 'concurrent independent causes' . . . [or] 'multiple sufficient causes' " of the harm. (Ibid.) Because this case does not involve concurrent independent causes, the "but for" test governs our review of Lynch's claims. (Ibid.)

4. Appellant asserts that respondents' were not entitled to summary judgment on the question of breach because their joint representation of herself and Brenlar in the Crane Litigation demonstrates a conflict of interest in breach of respondents' fiduciary duty to her. Appellant further asserts that she provided sufficient evidence of damages to avoid summary judgment, (1) because damages are presumed where a conflict is shown, and (2) because she incurred attorneys fees in defending against Brenlar's subsequent indemnity suit. We need not discuss these assertions because even assuming they have merit appellant must raise a triable issue on the element of "but for" causation to avoid summary judgment. (Viner, supra, 30 Cal.4th at p. 1244.)

