NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 0377

KIRK WHARTON

VERSUS

MICHAEL T. BELL, THE LAW OFFICES OF MICHAEL T. BELL, LLC and XYZ INSURANCE COMPANY

Judgment Rendered: OCT 25 2010

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On Appeal from the Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket No. 563322

Honorable William A. Morvant, Judge Presiding

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McCLENDON, J.

In this action for legal malpractice, the trial court granted the malpractice insurer's motion for summary judgment and dismissed all of plaintiff's claims with prejudice. We reverse and remand.

FACTS AND PROCEDURAL HISTORY

The Underlying Suit

On January 30, 2006, Mortgage Electronic Registration Systems (MERS) filed a Petition for Executory Process with Benefit of Appraisement and Waiver of Three Day Demand against the plaintiff, Kirk Wharton, seeking to foreclose on a piece of immovable property located in East Baton Rouge Parish. On February 6, 2006, a writ of seizure and sale was issued. Thereafter, Wharton retained the services of Michael T. Bell, of the Law Offices of Michael T. Bell, LLC, who filed an answer to the petition for executory process on June 2, 2006. Subsequently, the scheduled sale of the property was cancelled and rescheduled and cancelled and rescheduled again by MERS. The property was eventually sold by judicial sale to MERS on September 20, 2006.

On January 24, 2007, Wharton, still represented by Bell and his law firm, filed a Petition for Injunctive Relief. In the petition, Wharton alleged that because of Hurricane Katrina on August 29, 2005, the governor of Louisiana issued an executive order deferring mortgage payments for ninety days. Wharton asserted that throughout September 2005, he tried to contact MERS to no avail, but that in October 2005, he was able to make contact with MERS and an agreement was reached to defer his mortgage payments for ninety days. Wharton further contended that in December 2005 and again in January 2006, payments that he sent to MERS were returned without explanation. Lastly, Wharton averred that the executory process petition was filed without his knowledge and that MERS failed to properly notify him of the proceeding and

seized and sold his property. Wharton sought injunctive relief, as well as damages based on the unfair, deceptive, and unlawful conduct of MERS.[1]

On September 18, 2007, Wharton, through new counsel, filed an eighty-two-paragraph Reconventional Demand to Annul and Set Aside Sheriff's Sale and for Damages and Third Party Petition for Damages, against MERS and Aurora Loan Services, LLC (Aurora), the servicing agent for the holder of the note. Wharton asserted the wrongful seizure and sale of his property, contending that there was a missing link in the assignment of the note rendering the sale an absolute nullity. Wharton further maintained that he was not in default. Additionally, Wharton alleged breach of contract and intentional and negligent misrepresentation by MERS and Aurora, as well as fraudulent misrepresentation, fraud, unfair trade practices, and conversion by Aurora. Besides seeking to set aside and annul the judicial sale, Wharton also requested special and general damages.

On August 27, 2008, a joint motion and order of dismissal was filed by MERS and Wharton, in which the parties stated that the case had been settled, the sheriff's sale had been annulled, and that they desired to dismiss the action. The trial court signed the order on September 8, 2008, dismissing the entire proceeding with prejudice.

The Malpractice Suit

On January 23, 2008, Wharton filed a petition for damages against Bell, his law firm, and XYZ Insurance Company (XYZ), their professional liability insurer. Continental Casualty Company (Continental) was later substituted for XYZ by Wharton's First Supplemental and Amended Petition for Damages filed on October 30, 2008. In his petition, Wharton alleged that Bell was retained in May 2006 to represent him in the executory process proceeding. Wharton asserted that had Bell "acted in a reasonably prudent and diligent manner and in accord with professional legal standards," defenses to the executory process proceeding

[1] Because the property was previously sold, no action was taken on the request for injunctive relief.

existed such that the judicial sale could have been enjoined. Wharton contended that because of Bell's negligent representation, he sustained extensive damages. Bell filed an answer on March 14, 2008, which generally denied the allegations of the petition. Thereafter, Wharton unsuccessfully sought discovery from Bell and filed a Motion and Order to Deem Facts Admitted and to Compel Responses to Interrogatories, Requests for Admissions, and Request for Production of Documents. Following an October 20, 2008 hearing, at which there was no opposition, the trial court granted Wharton's motion to compel and granted his motion to deem certain facts admitted. A copy of Plaintiff's Requests for Admission of Facts to Defendant, Michael T. Bell, is included in the record. On February 19, 2009, Continental answered the supplemental and amended petition and specifically urged the doctrines of equitable estoppel, detrimental reliance, and waiver.

Thereafter, on September 1, 2009, Continental filed a motion for summary judgment, contending that because of Wharton's settlement and dismissal of his claims in the underlying foreclosure proceeding, he was barred from pursuing the instant case. Continental also asserted that Wharton failed to produce evidence supporting his damage claims, requiring those claims to be dismissed.[2] Following a hearing, the trial court granted Continental's motion for summary judgment and dismissed all of Wharton's claims with prejudice. Judgment to that effect was signed on November 16, 2009, and Wharton appealed.

DISCUSSION

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. **Gonzales v. Kissner**, 08-2154, p. 4 (La.App. 1 Cir. 9/11/09), 24 So.3d 214, 217. The summary judgment procedure is favored and is designed to secure the just, speedy, and inexpensive determination of every action. LSA-C.C.P. art. 966A(2); **Aucoin v. Rochel**, 08-1180, p. 5 (La.App. 1 Cir. 12/23/08), 5 So.3d 197, 200,

[2] A third basis for the summary judgment motion, based on a claim of peremption, was also raised by Continental, but that claim was denied by the trial court and is not a subject of this appeal.

writ denied, 09-0122 (La. 3/27/09), 5 So.3d 143. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to material fact and that mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966B. Appellate review of summary judgment is *de novo,* using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. **Boudreaux v. Vankerkhove**, 07-2555, p. 5 (La.App. 1 Cir. 8/11/08), 993 So.2d 725, 729-30.

On a motion for summary judgment, the burden of proof is on the mover. If, however, the mover will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the mover's burden on the motion does not require that all essential elements of the adverse party's claim, action, or defense be negated. Instead, the mover must point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the adverse party must produce factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the adverse party fails to meet this burden, there is no genuine issue of material fact, and the mover is entitled to summary judgment. LSA-C.C.P. art. 966C(2); **Gonzales**, 08-2154 at p. 5, 24 So.3d at 217-18.

In ruling on a motion for summary judgment, the trial court's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. **Guardia v. Lakeview Regional Medical Ctr.**, 08-1369, p. 3 (La.App. 1 Cir. 5/8/09), 13 So.3d 625, 628. A trial court cannot make credibility decisions on a motion for summary judgment. **Monterrey Center, LLC v. Ed.ucation Partners, Inc.**, 08-0734, p. 10 (La.App. 1 Cir. 12/23/08), 5 So.3d 225, 232. Despite the legislative mandate that summary judgments are now favored, factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, and all doubt must be resolved in the opponent's favor.

Willis v. Medders, 00-2507, p. 2 (La. 12/8/00), 775 So.2d 1049, 1050. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is "material" for summary judgment purposes can be seen only in light of the substantive law applicable to the case. **Guardia**, 08-1369 at p. 4, 13 So.3d at 628.

To establish a prima facie case for legal malpractice, a plaintiff must prove there was an attorney-client relationship, the attorney was guilty of negligence in his handling of the client's case or professional impropriety in his relationship with the client, and the attorney's misconduct caused the client some loss or damage. **Costello v. Hardy**, 03-1146, p. 9 (La. 1/21/04), 864 So.2d 129, 138; **Sherwin-Williams Co. v. First Louisiana Const., Inc.**, 04-0133, p. 3 (La.App. 1 Cir. 5/6/05), 915 So.2d 841, 844. Failure to prove any one of these elements is fatal to the claim. **Khan v. Richey**, 40,805, p. 5 (La.App. 2 Cir. 4/19/06), 927 So.2d 1267, 1271, writ denied, 06-1425 (La. 11/3/06), 940 So.2d 662. Additionally, a plaintiff can have no greater rights against attorneys for the negligent handling of a claim than are available in the underlying claim. **Costello**, 03-1146 at pp. 9-10, 864 So.2d at 138.

In its oral reasons for judgment, the trial court concluded that Wharton could not "meet his burden of proof as to the third and final element of the malpractice claim, that is, that damages were incurred." The trial court determined that based on the record before it, "the settlement indicates plaintiff has been compensated for those damages claimed to have [been] incurred." Accordingly, the court granted the motion for summary judgment filed by Continental on behalf of Bell and dismissed Wharton's suit with prejudice.

In this appeal, Wharton maintains that his claim against Bell should not be barred simply because he was proactive in mitigating his damages by settling the underlying claim. Wharton further argues that the trial court erred in granting the summary judgment as a genuine issue of material fact remains as to damages. He also contends in his brief that Bell caused Wharton to incur

damages not covered in the settlement due to Bell's failure to take proper action, stating as follows:

> Had Michael Bell taken the action he was first hired to do, the matter could have been resolved more quickly and without the loss of possession. However, because the property was actually taken, his tenants evicted, and his title divested, the damages were that much greater and the mental anguish was that much greater for Kirk Wharton.

Wharton asserts that in his opposition he provided sufficient proof of damages to satisfy his burden at trial.

In support of its motion for summary judgment, Continental submitted copies of certain pleadings from the executory process proceeding, including the petition, writ of seizure and sale, answer, petition for injunctive relief, the reconventional demand, and the joint motion and order for dismissal. Also in support of its motion, Continental submitted copies of an excerpt from the deposition of Wharton with exhibits, responses to interrogatories and requests for production of documents, the Settlement Agreement & Release of Claims, and the Secretary of State listing for ACW Investments, LLC.

In opposition to the motion, Wharton submitted various documents, including his affidavit, the affidavit of his second attorney regarding attorney fees incurred, copies of the settlement agreement with MERS and Aurora, his discovery responses with attachments, leases for the four-rental units on the property, and correspondence between Bell and Aurora.

Initially, we point out that in paragraphs 15 and 16 of the settlement agreement Wharton clearly reserved his rights against the defendants. Paragraph 16 provides, in pertinent part:

> Reservation of Rights: Mr. Wharton hereby specifically reserves all rights which he has or may have against his former counsel, Michael T. Bell, The Law Offices of Michael T. Bell LLC, and/or his or its insurer, arising under or in connection with the Executory Process Proceeding, the Sheriff's Sale, said counsel's representation of Mr. Wharton, and including but not limited to all causes of action which Mr. Wharton has brought or which he may bring in the matter entitled Kirk Wharton v. Michael T. Bell, The Law Office of Michael T. Bell LLC, and XYZ Insurance Company, 19th Judicial District Court for the Parish of East Baton Rouge, State of Louisiana, No. 562322.

Additionally, Wharton's affidavit included the following:

> I eventually settled my claim against Aurora/Mers on July 31, 2008. In the receipt and release I specifically reserved any and all rights that I would have against Michael Bell and his law firm and insurer. I settled with Aurora/Mers to mitigate my damages. At the time, I could not finance a vehicle, my lines of credit were either closed, limited or the interest rate shot up above 25%. All the while, I still paid for insurance on property I did not own upon Bell's advise [sic] and incurred utility expenses all of which were not covered when I settled with Aurora/Mers. Also, I suffered some loss of rental income due to the fact that the tenants moved out. I did not fully recover this loss from Aurora/Mers in settlement.

Thus, the settlement document in the underlying matter did not *per se* bar Wharton's claims in this case. Nevertheless, the defendants contend that because of the settlement, Wharton is equitably estopped from asserting this legal malpractice claim.

The theory of detrimental reliance, also referred to in the jurisprudence as promissory or equitable estoppel, is codified at LSA-C.C. art. 1967, and provides, in pertinent part:

> A party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying.

Barnett v. Saizon, 08-0336, pp. 9-10 (La.App. 1 Cir. 9/23/08), 994 So.2d 668, 674. The doctrine of detrimental reliance is designed to prevent injustice by barring a party from taking a position contrary to his prior acts, admissions, representations, or silence. **Suire v. Lafayette City-Parish Consol. Gov't,** 04-1459, p. 31 (La. 4/12/05), 907 So.2d 37, 59. To establish detrimental reliance, a party must prove three elements by a preponderance of the evidence: (1) a representation by conduct or word; (2) justifiable reliance; and (3) a change in position to one's detriment because of the reliance. **Id.**, 04-1459 at p. 31, 907 So.2d at 59. The basis of detrimental reliance is "the idea that a person should not harm another person by making promises that he will not keep." **Id.** It is difficult to recover under the theory of detrimental reliance, because estoppel is not favored in our law. **Barnett**, 08-0336 at p. 10, 994 So.2d at 674. We agree with the plaintiff that equitable estoppel does not apply in this matter.

We can find no justifiable reliance or change in position by the defendants to their detriment because of the settlement.

Further, this matter is factually distinguishable from the fifth circuit's decision in **Gross v. Pieno**, 04-820 (La.App. 5 Cir. 12/28/04), 892 So.2d 662, writ denied, 05-0218 (La. 4/22/05), 899 So.2d 582, wherein the court found that the plaintiffs were equitably estopped from pursuing a legal malpractice claim against their former attorney after a settlement in the underlying action. In that case, the plaintiffs settled their lawsuit while a hearing was pending to determine if the case had been abandoned for non-prosecution. The appellate court stated that "the plaintiffs, by failing to participate in the hearing on the abandonment motion, precluded the opportunity to litigate the abandonment issue." **Id.**, 04-820 at p. 6, 892 So.2d at 665. Thus, the proceedings were cut short by the settlement making it impossible to determine whether the attorney had in fact caused any harm to his clients. To the contrary, this record is much more extensive and contains factual support for the harm that Wharton allegedly suffered and that he attributed to Bell, that is, the wrongful judicial sale of his property. Further, and most importantly, this harm occurred prior to Wharton's settlement of the underlying claim, unlike the facts in **Gross**.

The defendants also maintain a lack of damages by Wharton in this matter. The trial court agreed, concluding that Wharton had been compensated in the settlement for the damages he claimed were incurred. We disagree. Wharton is seeking damages beyond that which he received in the settlement with MERS and based on the separate acts of Bell and his law firm.[3]

[3] Even were we to focus on the damages issue, as did the trial court, it appears that Wharton was not barred from proceeding forward, based on the supreme court's reasoning in the **Costello** case. In **Costello**, plaintiff filed suit to set aside her late son's will based on the defendant attorney's failure to include an annual stipend to her as per his wishes. Despite the settlement of her suit for the full amount of the annual stipend, the supreme court indicated that Mrs. Costello may have been able to prevail on her separate malpractice action against the attorney if she had produced evidence of other damages. However, "Mrs. Costello failed to produce any factual support for her damage claim. No evidence of mental anguish or emotional distress was offered." Mrs. Costello's unsupported allegations as to other damages were insufficient to sustain her burden. **Costello**, 03-1146 at p. 11, 864 So.2d at 139. In this matter, however, Wharton has produced some factual support for his damage claim.

Louisiana Civil Code Article 2324B provides that in non-intentional cases, liability for damages caused by two or more persons shall be a joint and divisible obligation. Each joint tortfeasor shall not be liable for more than his degree of fault and shall not be solidarily liable with any other person for damages attributable to the fault of that other person. This provision abolishes solidarity among non-intentional tortfeasors, and makes each non-intentional tortfeasor liable only for his or her own share of the fault, which must be quantified pursuant to Article 2323. **Dumas v. State ex rel. Dept. of Culture, Recreation & Tourism**, 02-0563, p. 11-12 (La. 10/15/02), 828 So.2d 530, 537. Thus, the factfinder is required to determine the percentage of fault of all persons causing injury to plaintiffs. If the factfinder concludes that plaintiff's damages were caused by more than one person, then each joint tortfeasor is only liable for his degree of fault and cannot be held solidarily liable with another tortfeasor for damages attributable to that other tortfeasor's fault. **Id.**, 02-0563 at p. 15, 828 So.2d at 539.

In the present case, Wharton has asserted that he was injured by the distinct actions of Bell and his law firm in failing to stop the judicial sale. These actions were subsequent to the original wrongful seizure by MERS. Thus, arguably, the actions of both MERS and Bell caused Wharton harm. Consequently, Wharton asked for damages based on the separate harm caused by Bell. Wharton has produced at least some evidence of damage that he suffered because of the wrongful judicial sale, which was not part of the settlement with MERS.[4] Further, no fault has been allocated to any party, and no damages have been assessed to anyone. Wharton has produced factual support to create a genuine issue of material fact as to what, if any, damages were suffered due to the actions of Bell and his law firm.

[4] For example, Wharton submitted the affidavit of his second attorney that showed that he incurred almost $19,000 in attorney fees in connection with the foreclosure proceeding. In the settlement, the lender paid only $12,000 in attorney fees.

For these reasons, we conclude that the settlement agreement does not bar Wharton's claims against the defendants, and the trial court erred in granting Continental's motion for summary judgment.

CONCLUSION

For the above reasons, and based upon our *de novo* review, we conclude that summary judgment was inappropriate in this matter. Genuine issues of material fact exist as to the issue of the damages incurred by the plaintiff, Kirk Wharton, as a result of the acts or omissions of Michael Bell or his law firm. Accordingly, the summary judgment in favor of the defendant, Continental Casualty Company, is hereby reversed and the case is remanded for proceedings consistent with this opinion. The costs of this appeal are assessed to Continental.

REVERSED AND REMANDED.