

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

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|---------------------|---|--------------------------|
| CALVIN OAKES, |) | |
| |) | |
| Plaintiff |) | |
| |) | |
| v. |) | C.A. No. N10C-04-146 DCS |
| |) | |
| JOHN A. CLARK, III, |) | |
| |) | |
| Defendant |) | |

Submitted: June 6, 2012
Decided: November 2, 2012

*Upon Defendant's Motion for Summary Judgment
Motion **GRANTED***

MEMORANDUM OPINION

Appearances:

Lawrence A. Ramunno, Esquire, Wilmington, Delaware
Attorney for Plaintiff

Jeffrey M. Weiner, Esquire, Wilmington Delaware
Attorney for Defendant.

STRETT, J.

Introduction

Defendant John A. Clark, III, (“Clark”), moves for summary judgment against the action for legal malpractice brought by Plaintiff Calvin Oakes, (“Oakes”), on the grounds that the action is barred based upon the doctrine of *res judicata* and/or collateral estoppel and that Oakes has failed to state a claim upon which relief can be granted. The Court finds that *res judicata* does not apply but grants summary judgment pursuant to Rule 56 on the grounds that there is no genuine issue of material fact.

Factual and Procedural Background

Oakes married Rose Oakes, (“Rose”), in 1986, and they had two children. Rose was the breadwinner working full-time for DuPont, and Oakes was the homemaker and caregiver for the children. Oakes also worked outside of the home as a part-time handyman, and, in 2001, as a sub-contractor for a large Delaware homebuilder, Capano Homes.

In October 2005, Oakes and Rose separated, and Oakes obtained a full-time job with E. Martin Construction. In 2006, Oakes and Rose divorced. Oakes received income from his job, child support, and unemployment benefits.

In 2008, hearings were held in Family Court on matters ancillary to the divorce—property division, alimony, and attorneys fees and costs. Oakes hired Clark to represent him at the hearings.

The Family Court found that Oakes was “evasive and untruthful regarding his income,” ordered an equal division of marital property, and denied Oakes’ request for alimony.¹ The Family Court found that sufficient evidence existed to show that Oakes had a position of authority with A&J Enterprise, Inc., (“A&J”), from which he received income in addition to his other employment. The decision was upheld by the Supreme Court.² In his continued attempt to alter the Family Court decision regarding the property division, Oakes appealed a second time to the Supreme Court. And, again, the Supreme Court affirmed the Family Court’s decision.³

Still dissatisfied, Oakes filed a lawsuit in this Court against Rose, her lawyer, and a paralegal who worked for Rose’s employer. He alleged various claims including bad faith, fraud, and legal malpractice. Oakes’ claims were

¹ *Olsen v. Olsen*, 971 A.2d 170 (Del. 2009).

² *Id.* (finding that Oakes contradicted himself under oath and willfully attempted to conceal the actual amount of his income).

³ *Owens v. Owens*, 11 A.3d 228 (Del. 2011).

dismissed by this Court,⁴ and the decision to dismiss was affirmed by the Supreme Court.⁵

Oakes also filed the instant action for legal malpractice and professional negligence against his own attorney, Clark, because he is dissatisfied with the outcome of his property division/ancillary proceeding in Family Court. Oakes claims that Clark failed to depose and question Rose regarding pre-marital debts and the value of her 401(k) account, subpoena records regarding Rose's 401(k) account, discuss strategy, present financial documents regarding loans taken out by Oakes, and interview other witnesses who Oakes believes were necessary including Oakes' children and his friend and accountant, Dan Caputo. This Court dismissed Oakes' malpractice and negligence action against Clark, but the Supreme Court reversed and remanded for further proceedings apropos of a summary judgment motion.⁶

Contentions of the Parties

Clark, here, moves for summary judgment asserting that, since the Family Court found Oakes' testimony to be evasive and untruthful, collateral estoppel and/or *res judicata* preclude Oakes from claiming "that an attorney did not prepare

⁴ *Oakes v. Oakes, et al.*, C.A. No. 10C-04-145, J. Streett (Del. Super. Oct. 13, 2010).

⁵ *Oakes v. Oakes, et al.*, 15 A.3d 217 (TABLE) (Del. Feb. 16, 2011) (stating that Oakes had a "full and fair opportunity to litigate" his ancillary matter in Family Court and, thus, he was "jurisdictionally barred and collaterally estopped from attempting to relitigate th[e] issue in Superior Court").

⁶ *Oakes v. Clark*, 31 A.3d 76 (TABLE) (Del. 2011).

[him] to be forthright and truthful.”⁷ Clark also contends that Oakes, in claiming that Clark should have subpoenaed documents that do not exist, has not presented a genuine issue of material fact.

Oakes contends that Clark’s alleged deficiencies in representing him in his property division matter caused the Family Court to find that Oakes was evasive, prevented a full and proper presentation of his case, and reduced the amount that the Court would have awarded him.

Discussion

A moving party is entitled to summary judgment as a matter of law when there is no genuine issue of material fact.⁸ In determining summary judgment, a court shall view the facts in the light most favorable to the non-moving party.⁹

Res Judicata

The doctrine of *res judicata* bars the consideration of conclusions of law already determined in a previous suit so as to prevent unnecessary litigation “by limiting parties to one fair trial of an issue or cause of action.”¹⁰ *Res judicata* gives preclusive effect where:

⁷ Clark’s Opening Brief, p. 21 (Apr. 18, 2012).

⁸ Super. Ct. Civ. R. 56(c); *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979); *Snyder v. Baltimore Trust Co.*, 532 A.2d. 624, 625 (Del. Super. 1986).

⁹ *Snyder* at 625.

¹⁰ *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 191-192 (Del. 2009).

- 1) The original court had jurisdiction over the subject matter and parties;
- 2) The parties to the original action were the same as or in privity with the parties of the instant action;
- 3) The original action or issue decided therein was the same as that of the instant action;
- 4) The issue in the prior action was decided against the appellant in the instant action; and
- 5) The judgment in the prior action was final.¹¹

Consideration of a legal issue that had not yet been decided in a previous action, however, is not barred.¹² “Under the doctrine of *res judicata*, a party is foreclosed from bringing a second suit based on the same cause of action after a judgment has been entered in a prior suit involving the same parties.”¹³

In this matter, as to *res judicata*, the present action involves different parties than the action litigated in the Family Court—for the first time, Clark, Oakes’ divorce attorney, is named as the defendant. And, the cause of action brought here—legal malpractice—differs from the property division action determined by Family Court pursuant to the Oakes’ divorce matter. Moreover, the issue decided in the Family Court action was whether Oakes received alimony and how the marital assets would be divided. In the instant case, the Court is asked to determine something quite different—whether Clark’s actions in representing Oakes as to the property division in the Family Court matter constitute negligence or legal malpractice. Therefore, since the parties to the two actions are different, the issues are different, and the cause of action is different, the elements required

¹¹ *LaPoint*, 970 A.2d at 192.

¹² *Id.*

¹³ *Betts v. Townsends, Inc.*, 765 A.2d 531, 534 (Del. 2000).

for a finding of *res judicata* have not been met. Thus, the suit is not barred by the doctrine of *res judicata*.

Collateral Estoppel

The related doctrine of collateral estoppel prevents the re-litigation of issues of fact determined by a previous court in a subsequent action involving the same parties even where the cause of action differs.¹⁴ For collateral estoppel to bar consideration of an issue of fact:

- 1) The issue of fact previously decided must be the same as the one presented in the subsequent action;
- 2) The prior action must be a final adjudication on the merits;
- 3) The party against whom the doctrine is invoked was the same party in the prior action; and
- 4) The party against whom the doctrine is invoked “had a full and fair opportunity to litigate” said issue of fact in the previous action.¹⁵

The very nature of a legal malpractice claim by an aggrieved client, however, encompasses a claim that said client did not have a full and fair opportunity to litigate where the alleged negligence prevented the client from fully presenting a defense.¹⁶ Therefore, under the doctrine of collateral estoppel, a client is not precluded from rearguing an issue of law decided adversely to such client due to alleged attorney neglect.¹⁷

¹⁴ *Id.*; *Chambers Belt Co. v. Tandy Brands Accessories, Inc.*, 2012 WL 3104396 (Del. Super. July 31, 2012).

¹⁵ *Betts* at 535.

¹⁶ *See Avon Dev. Enterprises Corp. v. Samnick*, 730 N.Y.S.2d 295, 297 (2001).

¹⁷ *Id.*

Here, the legal malpractice action is not barred on the grounds of collateral estoppel. The factual findings of the Family Court regarding Oakes' evasiveness and dishonesty regarding his earnings based upon the evidence brought forth is not the same as the factual issue in this matter. This Court must accept the prior court's conclusion that Oakes was untruthful about his income and that his untruthfulness is the reason that the prior court denied awarding him alimony and denied him a larger share of the marital assets.¹⁸ Instead, the issue here is whether Clark neglected a duty owed to Oakes during his representation of him in the Family Court matter and whether that alleged neglect caused Oakes to suffer a loss. Thus, since Oakes asserts that his defense was incomplete due to alleged attorney neglect, he is thereby contending that he did not have a full and fair opportunity to litigate his Family Court claim. Therefore, collateral estoppel does not preclude Oakes' claim.

Legal Malpractice

Pursuant to Delaware law, a valid action for legal malpractice must pass the following three-prong test:

- 1) Employment of the attorney;
- 2) Neglect of a professional duty by the attorney; and
- 3) Loss resulting from the attorney's neglect.¹⁹

¹⁸ See *Betts* at 534-35.

¹⁹ *HealthTrio, Inc. v. Margules*, 2007 WL 544156, *9 (Del. Super. Jan. 16, 2007).

In addition, in order to sustain the loss element, a plaintiff must demonstrate that, but for the attorney's neglect, the plaintiff would have been successful.²⁰

Applying the three-prong test, the first prong is not contended—Clark was employed by Oakes. As to the second prong, determining whether Clark neglected a duty is unnecessary if a loss did not result from it. Thus, the Court's analysis hinges on the third prong for legal malpractice—whether there was a loss. To sustain the loss element, Oakes must demonstrate that he would have been successful in his Family Court matter but for the alleged attorney neglect.

In Oakes' property division matter, the Family Court listened to and observed Oakes during the hearing. The Family Court determined that Oakes was evasive, untruthful, and contradictory when he testified under oath. Based on the totality of his presentation, the Family Court did not grant him alimony or more than an equal share of the marital property.

The Family Court decision was based on Oakes' presentation of himself.

Examples of Oakes' untruthfulness include:

- Oakes' denial of any association with A&J where evidence showed that he signed a contract on behalf of A&J and used an A&J debit card to pay for personal expenses.²¹
- Oakes' concealment of his actual income by contradictions and evasiveness during his testimony where evidence indicated that he underreported his income for tax purposes.²²

²⁰ *Id.*

²¹ *Olsen* at 172-3.

²² *Id.* at 175-7.

- Oakes' denial of ever being paid by A&J where evidence showed that he endorsed dozens of checks from A&J and where one check was made payable to the U.S. Treasury in the exact amount of Oakes' tax liability.²³

As a result, Oakes is hard pressed to assert, here, that the Family Court would have overlooked his untruthfulness if his attorney had presented his case differently.

Oakes does not come close to showing that he would have been successful but for the alleged neglect. Thus, this Court finds that Oakes did not suffer any loss due to alleged neglect by Clark.

Oakes asserts a loss of monies from Rose's 401(k) account. He argues that Clark neglected a duty by failing to question Rose regarding the amount in her 401(k) account. The Family Court, however, found that any loans taken from Rose's 401(k) account were used to pay marital debts. Hence, cross-examination of Rose on the size of her 401(k) would not have inured to Oakes' financial benefit. Oakes also asserts a loss from Rose's 401(k) account due to Clark's alleged failure to independently ascertain the account records. He argues that Clark neglected a duty by failing to subpoena sufficient records regarding Rose's 401(k) account. The Family Court, however, found that such records were subpoenaed and that the earliest available records were produced. Since it is already determined that the subpoena was sufficient and that the 401(k) monies paid marital debt, there could be no resultant loss. Thus, Oakes has not

²³ Clark's Opening Brief, p. 12 (Apr. 18, 2012) (quoting Family Court Decision and Order, Waserstein, J, (June 23, 2008)).

affirmatively shown that he would have been successful if Clark had obtained additional records or questioned Rose regarding her account.

Oakes next asserts that he suffered a loss because his children had information about Rose's "embezzlement of marital assets."²⁴ He argues that Clark neglected a duty by failing to call Oakes' children as witnesses. The Family Court, however, found that Rose's loans from her 401(k) account, regardless of how or under what alleged pretenses they were withdrawn, were used to pay marital debt. As such, any potential testimony of the children disparaging their mother could not financially benefit Oakes. So, again, Oakes fails to demonstrate that he would have been successful had Clark questioned the children as witnesses. Thus, without such demonstration, Oakes sustains no loss from any alleged neglect on Clark's part.

Finally, Oakes asserts a loss of alimony and/or a greater portion of the marital property because Clark did not have Oakes' friend/accountant, Caputo, testify at the hearing. Oakes contends that Caputo has relevant information about Oakes' income and that Clark was negligent in failing to call or question him. The Family Court, however, found that it had no means to correctly calculate Oakes' income and that inability to accurately calculate Oakes' income was directly due to Oakes' contradictions. It found that Oakes was "consistently evasive and

²⁴ Affidavit of Oakes (May 18, 2012).

untruthful with regard to his employment.”²⁵ The record provides the following regarding Oakes’ lack of candor in the Family Court matter:

The Court found that Husband was not credible on the issue of his income, noting that he contradicted himself under oath several times and . . . because of [his] obfuscation, the Court could not properly calculate his income.²⁶

Furthermore, despite Oakes’s claims that he was not associated with A&J, the Family Court found that he played “some authoritative role in A&J,” and the record reflects that Oakes admitted that he used “a debit card connected to A&J accounts.”²⁷ The Family Court also stated that Oakes failed “to provide the Court with information regarding his connection to A&J” even though he “was granted multiple chances” to do so.²⁸

Although [Oakes] claimed that he only received income from E.M.C., child support, and unemployment benefits following the separation, Wife introduced evidence at the hearing showing that Husband had worked as a subcontractor for a developer for the last four years . . . dozens of checks drawn from A&J’s bank account, signed and endorsed by Husband, which were paid to cash, his son, his former brother-in-law and E.M.C. and that were also used to pay for Husband’s personal expenses . . .²⁹

²⁵ *Olsen* at 174.

²⁶ *Id.* at 175-6.

²⁷ Clark’s Opening Brief, p. 13 (Apr. 18, 2012) (quoting Family Court Decision and Order, Waserstein, J. (June 23, 2008)). Oakes’ Opposition to the Motion for Summary Judgment, p. 9 (May 18, 2012) along with Caputo’s affidavit provide that Caputo was deposed on Dec. 6, 2007, but was not asked any questions by Clark. In addition, the Family Court stated that Caputo was not called as a witness during the property division hearing per an agreement of counsel although Clark did attempt to introduce portions of the deposition of Caputo into evidence. Clark’s Reply Brief, p. 10 (June 1, 2012) (quoting Family Court Decision and Order, Waserstein, J. (June 23, 2008)). Considering the fact that Clark was apparently aware of the information offered by Caputo but neither questioned him during his deposition nor called him as a witness, Caputo’s absence from the hearing was arguably attorney strategy, not neglect.

²⁸ *Id.*

²⁹ *Olsen* at 172-3.

Moreover, Oakes' protestations in his opposition to the summary judgment motion and Caputo's affidavit attached thereto do not establish that Caputo would have rehabilitated Oakes' credibility or that Caputo would have provided testimony that would negate the Family Court's finding that Oakes had an authoritative role in A&J. Oakes was "impeached with A&J company checks that he signed" despite maintaining that he had no connection with the company.³⁰ Indeed, although Caputo's affidavit avers that Oakes' money was, in fact, not earned income but loans, it does not refute the Family Court's finding that Oakes had an "authoritative role."³¹ Thus, Oakes' claim that testimony from Caputo can shed light on the true nature of his income fails to address Oakes' credibility problem. Caputo's affidavit does not shed light on Oakes' statements in Family Court as to his denial of a connection with A&J and his denial of ever being paid from A&J. Oakes' property division resulted from his wholly independent dishonesty regarding his income and his employment. Oakes has not shown that but for Caputo's failure to testify Oakes would have succeeded in convincing the Family Court that he was not connected to or paid by A&J. Thus, Oakes did not suffer a loss from any alleged attorney neglect.

³⁰ *Olsen* at 176.

³¹ No promissory note, however, has been presented.

Conclusion

Therefore, because there are no genuine issues of material fact and because Oakes has not demonstrated that he suffered any loss resultant from any alleged neglect on the part of Clark, the Court finds for Clark.

ACCORDINGLY, Clark's motion for summary judgment is **GRANTED**.
IT IS SO ORDERED.

Streett, J.