STATE OF MICHIGAN

COURT OF APPEALS

DEAN SOUDEN,

Plaintiff-Appellee,

v

DONALD L. BLEICH,

Defendant-Appellant,

and

JOHN P. WILLIAMS,

Defendant.

UNPUBLISHED
April 17, 2014

No. 314143
Oakland Circuit Court
LC No. 2012-124128-NM

Before: SERVITTO, P.J., and FORT HOOD and BECKERING, JJ.

PER CURIAM.

Defendant, Donald L. Bleich,[1] appeals by leave granted[2] an interlocutory order of the trial court granting in part and denying in part his motion for summary disposition associated with this legal malpractice action. On appeal, defendant argues that the trial court erred when it concluded that he was not entitled to summary disposition in regard to plaintiff Dean Souden's joint enterprise theory of liability. We reverse.

I. FACTS AND PROCEDURAL HISTORY

This case arises out of a divorce proceeding. Plaintiff initially filed suit against his ex-wife, Gwenda Souden ("Gwenda"), in Berrien County, seeking a judgment of divorce. Plaintiff retained defendant as his attorney. Against defendant's advice, plaintiff decided to voluntarily dismiss his complaint. Shortly after, on May 29, 2009, Gwenda filed a complaint against

[1] Although there are two defendants to this action, only Donald L. Bleich is a party to this appeal. Thus, all references to "defendant" are to Bleich alone.

[2] *Souden v Bleich*, unpublished order of the Court of Appeals, entered March 27, 2013 (Docket No. 314143).

plaintiff in Oakland County, seeking a judgment of divorce. Plaintiff brought the complaint to defendant, and defendant filed a special appearance, limited to contesting the issues of venue and jurisdiction in Oakland County. Defendant also filed an answer to the complaint, as well as a motion contesting venue and jurisdiction, on July 21, 2009.

On the same day, defendant contacted John P. Williams ("Williams"), an attorney located in Royal Oak. In a letter, defendant informed Williams that he did not believe arguing for a change of venue or lack of jurisdiction would be prudent, and asked Williams to "enter [an] appearance as co-counsel and handle the motion and the case if it's in Oakland County." Defendant also forwarded Williams a check in the amount of $500, which represented an unused portion of a retainer fee that plaintiff previously paid to defendant. The next day, July 22, 2009, a representative from defendant's office contacted plaintiff and provided plaintiff with Williams's name and telephone number. Plaintiff contacted Williams that day, and the two discussed the case generally. It was agreed that Williams would argue the motion regarding venue and jurisdiction.

On August 3, 2009, defendant sent plaintiff a letter stating the following:

> Dear Dean:
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> Please see enclosed Notice of Trial.
>
> I am suggesting that Mr. Williams handle this case if it stays in Oakland County. If the Judge transfers it here, I'll handle it.
>
> Mr. Williams knows the people up there, I don't. That's not good. So Mr. Williams should handle the case if it's in Oakland County.
>
> Please give me a call if you have any questions.

According to plaintiff, defendant "made it clear he wasn't going to travel to Oakland County. He didn't know anybody in Oakland County, [Williams] did, and so [Williams] would be representing us in the case in Oakland County."

Soon thereafter, plaintiff discussed with Williams the possibility of using mediation or arbitration to settle the divorce. When asked, Williams indicated that it was his belief that the motion regarding venue and jurisdiction would be unsuccessful. Plaintiff also contacted defendant via telephone, and asked his opinion regarding mediation and arbitration. According to plaintiff, defendant responded by stating that "there's no downside at this point." Plaintiff discussed possible mediators with Williams, and Williams expressed his desire to have a retired judge act as mediator. Plaintiff never discussed the selection of a mediator with defendant. Eventually, a retired judge was selected to mediate the dispute. Plaintiff and Williams prepared for the mediation, and when the mediation occurred, only Williams attended, as plaintiff expected. After mediation was unsuccessful, Williams advised plaintiff to agree to arbitration. Plaintiff did not consult with defendant regarding this decision, and agreed to go forward with arbitration. Plaintiff contacted defendant after the arbitration concluded and advised him of what had taken place; defendant wished plaintiff luck.

An arbitration judgment was provided on January 5, 2010, and the decision was unfavorable to plaintiff. Plaintiff first consulted with Williams, and the two discussed what action could be taken. Plaintiff spoke with Williams again a few days later, and Williams indicated that he was trying to organize a meeting with the arbitrator and Gwenda's attorney. At about the same time, plaintiff met with defendant and showed him the arbitration award. Defendant indicated his disagreement with the award and pointed out language in the arbitration agreement providing for a time limit on a motion for reconsideration of the judgment. According to plaintiff, "[defendant] told me [Williams] knew about this, and he handed it back to me." It was plaintiff's understanding that defendant had directed Williams to handle any subsequent action regarding the arbitration award.

However, Williams never filed a motion to reconsider the award. A judgment of divorce incorporating the award was entered on January 21, 2010. Plaintiff again contacted defendant, who responded that he was sorry Williams had not timely filed a motion for reconsideration of the arbitration award. Plaintiff asked defendant to recommend a malpractice attorney to assist plaintiff in pursuing a claim against Williams, and defendant provided a recommendation. Plaintiff and Williams later selected an appellate attorney who successfully appealed a portion of the arbitration agreement.

Thereafter, plaintiff filed suit against defendant and Williams. Plaintiff's complaint alleged that Williams's conduct during the mediation and arbitration proceedings, as well as his failure to timely file a motion for reconsideration of the arbitration award, caused plaintiff significant financial and emotional injuries. Plaintiff alleged that defendant was liable for Williams's acts and omissions under a theory of ostensible agency. Defendant moved for summary disposition; however, after hearing the parties' arguments, the trial court requested additional briefing. Plaintiff subsequently argued that defendant could be liable for Williams's conduct under a joint enterprise theory. The trial court granted defendant's summary disposition motion in regard to plaintiff's ostensible agency claim, but denied summary disposition regarding plaintiff's joint enterprise theory, finding that "[p]laintiff has come forward with sufficient evidence to create an issue of fact regarding whether [defendant] and Williams were engaged in a joint enterprise such that both can be liable for the alleged malpractice." Defendant filed an application for leave to appeal in this Court, and this Court granted leave to appeal to decide whether the trial court properly denied summary disposition in regard to plaintiff's joint enterprise theory of liability.

II. ANALYSIS

Defendant argues that the trial court erred when it denied his motion for summary disposition in regard to plaintiff's joint enterprise theory of liability. We agree.

"We review de novo a grant or denial of summary disposition." *Walters v Nadell*, 481 Mich 377, 381; 751 NW2d 431 (2008). A motion for summary disposition under MCR

2.116(C)(10)[3] tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). This Court "review[s] a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition "is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. See also MCR 2.116(C)(10). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). "The moving party has the initial burden of supporting its position with documentary evidence, but once the moving party meets its burden, the burden shifts to the nonmoving party to establish that a genuine issue of disputed fact exists." *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003) (quotation omitted). This Court may only consider "what was properly presented to the trial court before its decision on the motion." *Id*.

The terms "joint enterprise" and "joint venture" are sometimes used interchangeably. See, e.g., *First Public Corp v Parfet*, 468 Mich 101, 106; 658 NW2d 477 (2003); *Berger v Mead*, 127 Mich App 209, 215-216; 338 NW2d 919 (1983). A common thread in both defendant's and plaintiff's briefs, as well as the trial court's order, is the apparent combination of joint enterprise liability with the concept of a joint venture into a singular concept. However, joint ventures and joint enterprise liability are distinct concepts in the law.

"[A] joint venture is an association to carry out a single business enterprise for a profit." *Berger*, 127 Mich App at 214. A joint venture consists of six elements:

> (a) an agreement indicating an intention to undertake a joint venture;
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> (b) a joint undertaking of;
>
> (c) a single project for profit;
>
> (d) a sharing of profits as well as losses;
>
> (e) contribution of skills or property by the parties;
>
> (f) community interest and control over the subject matter of the enterprise. [*Id*. at 214-215 (quotation omitted).]

[3] Although defendant brought his motion under MCR 2.116(C)(8) and (C)(10), it is clear that the trial court decided the motion under MCR 2.116(C)(10) because the trial court relied on evidence beyond the pleadings in deciding the motion. See *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008).

Former cases have held that, if a joint venture existed, members of the joint venture could be held jointly and severally liable for the actions of other members of the joint venture. See *Meyers v Robb*, 82 Mich App 549, 553; 267 NW2d 450 (1978).[4]

In contrast, "[t]he rule of joint enterprise in negligence cases is founded on the law of principal and agent. A joint enterprise requires that every member have management and control of the enterprise, a right to be heard, and an equal right of control and joint responsibility for decision making and expenses." *Helsel v Morcom*, 219 Mich App 14, 21-22; 555 NW2d 852 (1996) (quotation marks and citations omitted).[5] Under a joint enterprise theory, "the negligence of one person is imputed to another to charge the latter with liability to a third person injured by reason of the negligence of the former." *McLean v Wolverine Moving & Storage Co*, 187 Mich App 393, 399; 468 NW2d 230 (1991). Thus, to impute liability to another under a joint enterprise theory, there exists no requirement that the parties share in profits and losses, as is required to establish a joint venture. *Id*. Cf. *Berger*, 127 Mich App at 214-215. Here, the parties expend much energy disputing whether plaintiff is required to demonstrate that defendant and Williams shared profits and losses. In the negligence context, there is no requirement that parties share profits before they may be found to have engaged in a joint *enterprise*. *Helsel*, 219 Mich App at 21-22. Thus, whether defendant and Williams shared profits is irrelevant to determining whether defendant may be held liable for Williams's conduct under a joint enterprise theory.

That said, the trial court erred when it determined that a question of fact existed regarding whether defendant could be vicariously liable for Williams's conduct under a joint enterprise theory. For a defendant to be held liable for the acts of another under this theory, "every member [must] have . . . an *equal* right of control and joint responsibility for decision making and expenses." *Id.* at 22 (emphasis supplied). Here, the record reveals that once Williams became involved in the divorce proceedings, defendant no longer had an equal right to control plaintiff's representation, nor did he share responsibility for decision-making. As plaintiff stated during his deposition, defendant "made it clear he wasn't going to travel to Oakland County. He didn't know anybody in Oakland County, [Williams] did, and so [Williams] would be representing us in the case in Oakland County." It was Williams who suggested mediation to plaintiff. Although plaintiff then sought defendant's opinion on utilizing this option, plaintiff only consulted with Williams regarding the selection of a mediator, and to prepare for the mediation, plaintiff consulted only with Williams. Although plaintiff had one conversation with defendant

[4] However, our Legislature has since abolished joint liability in most instances. MCL 600.2956.

[5] See also *Troutman v Ollis*, 164 Mich App 727, 733; 417 NW2d 589 (1987) ("The term 'joint enterprise' has been defined as the pursuit of an undertaking by two or more persons having a community of interest in the object and purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other . . . ."). The joint enterprise theory of liability is most frequently applied in the automobile negligence context. See, e.g., *Boyd v McKeever*, 384 Mich 501, 508-509; 185 NW2d 344 (1971); *Troutman*, 164 Mich App at 732; *Berger*, 127 Mich App at 216 n 5. However, it applies outside of this context as well. See, e.g., *Helsel*, 219 Mich App at 21-22.

approximately two weeks prior to the mediation, plaintiff could not remember the content of that discussion.

When it came time to resolve the divorce, only Williams attended the mediation, as plaintiff expected, and only Williams was consulted regarding whether to transition the proceeding to arbitration. After the arbitration award was determined, plaintiff first discussed the award with Williams. As plaintiff admitted at his deposition, he believed that Williams had been directed to handle any further action in regard to the arbitration award. Indeed, plaintiff stated that he and Williams decided to seek the assistance of another attorney, who successfully appealed the arbitration award.

Although plaintiff argues that defendant still controlled the proceedings, plaintiff only presented the trial court with evidence that plaintiff occasionally asked for defendant's opinion regarding the proceedings. Plaintiff presented no evidence that defendant actually directed or controlled the proceedings once Williams became involved. Although defendant's invoice to plaintiff demonstrates that defendant engaged in a few conversations with plaintiff after Williams was retained, the invoice also shows that, within a few days after Williams became involved, defendant's involvement was minimal. As such, plaintiff has not created a question of fact regarding whether defendant had "an equal right of control and joint responsibility for decision making and expenses[,]" *Helsel*, 219 Mich App at 22, in regard to the Oakland County proceedings out of which plaintiff's allegations of malpractice arise. Accordingly, plaintiff cannot impute liability for Williams's conduct to defendant under a joint enterprise theory. *Id*.

It is equally clear that there is no genuine issue of material fact concerning whether a joint venture existed between defendant and Williams. Plaintiff does not argue, nor does he provide any evidence, that Williams shared his profits with defendant. While it is true that defendant forwarded $500 to Williams, this money represented an unused portion of a retainer fee paid by plaintiff. As such, the money was plaintiff's property, as it had not been earned by defendant. See MRPC 1.15(g); State Bar of Michigan Ethics Opinion RI-69 (February 14, 1991). Thus, in forwarding this money to Williams, defendant was not sharing a profit he earned; rather, he was forwarding plaintiff's property to Williams. As plaintiff has provided no evidence that defendant and Williams shared profits with each other, plaintiff cannot establish the existence of a joint venture. *Berger*, 127 Mich App at 214-215.

Reversed and remanded for entry of an order granting summary disposition in favor of defendant Bleich regarding plaintiff's joint enterprise theory. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Karen M. Fort Hood
/s/ Jane M. Beckering