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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Alfred JONES, Plaintiff-Appellant,
v.
Irving F. KEENE, Law Offices of Irving F. Keene, Independence Associates, Emanuel Ravet, and Leo Sklar, Defendants-Appellees.

No. 229281.

July 9, 2002.

Before: MARKEY, P.J., and TALBOT and ZAHRA, JJ.

UNPUBLISHED

PER CURIAM.

*1 Plaintiff appeals by right from an order granting summary disposition in favor of defendants. Plaintiff brought claims of fraud and unjust enrichment against all defendants and a claim of legal malpractice against defendants Keene and Law Offices of Irving F. Keene. We affirm.

Plaintiff first asserts that the trial court erred when in response to defendants' motions for summary disposition, it granted him only eight days to respond to defendants' motion briefs. We disagree. The court rules permit the trial court to modify its pretrial scheduling orders. MCR 2.401(B). In scheduling the motion for summary disposition, the court may issue a new scheduling order. MCR 2.116(G)(1). The court also is expressly given discretion in handling motion matters by MCR 2.119(E). The court rules permit a motion brought under MCR 2.116(C)(10) to be brought at any time. MCR 2.116(D)(3). We review a trial court's procedural decisions for an abuse of discretion. *Fast Air, Inc v. Knight,* 235 Mich.App 541, 550; 599 NW2d 489 (1999).

The scheduling order clearly gave plaintiff thirteen days to respond. Because the case had been on the court's docket for almost three years, the court was familiar with the facts and theories and did not need substantial briefing on any of the issues. Although he claimed the short time prevented him from filing numerous documents in support of his case, plaintiff presented no documents containing new information. The only information that appears new is a price calculation that purportedly shows plaintiff received far less for his land than defendants assert. Close examination of all the evidence, however, indicates that the new calculation includes the entire thirty-five feet of land from the road edge to the center, which is the amount the township had to acquire. However, the documents are erroneous to the extent that they imply plaintiff owned all that land; other documents prove that defendants owned the centermost thirty feet.

Plaintiff does not present anything more than conjecture that the trial court, contrary to its own statement, did not have sufficient time to consider the entire record. Likewise, he does not identify what material testimony he would have elicited from defendants' expert had he more time to depose him. Given the history of the case and the court's apparent familiarity with the issues, the court did not abuse its discretion in giving plaintiff thirteen days to submit his brief opposing the motion. *Id.*

Plaintiff next claims that Keene is liable to him for legal malpractice when his representation of plaintiff did not achieve the result plaintiff desired. We disagree. In order to state an action for legal malpractice, the plaintiff has the burden of adequately alleging the following elements: (1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the

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plaintiff; (3) that the negligence was a proximate cause of an injury; and (4) the fact and extent of the injury alleged. *Simko v. Blake,* 448 Mich. 648, 655; 532 NW2d 842 (1995). The causation element requires the plaintiff to show that but for the negligence, the outcome of the case would have been favorable to the plaintiff. *Radtke v Miller, Canfield, Paddock & Stone,* 453 Mich. 413, 424; 551 NW2d 698 (1996).

*2 In this case, there is little dispute that Keene represented plaintiff in the condemnation suit and that an attorney-client relationship existed between them. Although plaintiff's expert stated that Keene violated the rules of professional conduct, the trial court did not explore this contention. However, plaintiff incorrectly asserts that Keene could have contested the road improvements or prevented the township from taking his property. Once the township had a valid petition and held hearings, it could choose to act on that petition. Plaintiff attended the hearings but did not appeal the township's decision within thirty days as required by M.C.L. § 41.725 and M.C.L. § 41.726. The statute that plaintiff claims Keene could have invoked, M.C.L. § 213.56, would only permit Keene to object to the necessity of taking plaintiff's strip of land. Even if Keene could succeed in this argument (and plaintiff does not provide any evidence to support this presumption) and plaintiff could keep his property, it would still be adjacent to the road, and he would still be liable for the assessments. Because plaintiff complained about the assessments and not the actual taking, he would not have gained even if Keene could successfully argue on his behalf. Because Keene could not stop the road from being built, the only thing he could do was to try to get a good price for plaintiff's land. In this respect, his own interests and those of plaintiff were, indeed, the same. Plaintiff presented no evidence that he could have obtained a better price for the land or that he objected in any way to the proposed settlement. Plaintiff failed to prove that but for Keene's negligence, he would have had a more favorable outcome in his litigation. Likewise, he did not prove any damages; his damages from the condemnation proceedings would be limited to what resulted from that suit. Thus, the trial court did not err in granting defendants' motion because at least two of the four elements were not met.

Finally, plaintiff's argument that Keene breached his duty of representation by failing to complete the purchase of plaintiff's land is nonsensical. Keene's duty in representing plaintiff in the condemnation suit did not create in him an obligation to complete the purchase. Keene did not represent plaintiff in negotiating that deal, and the attorney-client relationship that existed on one specific matter did not create an obligation for Keene to act in plaintiff's interest in all of their dealings together. As this is plaintiff's sole argument for the causation element of his malpractice claim, he cannot meet his burden.

Plaintiff's fraud count likewise fails. Actionable fraud consists of the following elements: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. *M & D, Inc v. McConkey,* 231 Mich.App 22, 27; 585 NW2d 33 (1998). Where no affirmative representation has been made, the suppression of a material fact, which a party in good faith is duty-bound to disclose, is equivalent to a false representation. *Id.* at 28-29.

*3 None of the statements plaintiff identified were false representations, with the possible exception of expressing a wish to purchase his property. However, the parties had their purchase agreement in place to cover their dealings. That contract, by its own terms, contemplated the possibility that the purchase would not be consummated. Indeed, the agreement expired in July 1996 with plaintiff retaining defendants' $10,000 earnest money. That sum represented what the parties considered an equitable amount for defendants' failure to complete the agreement and for plaintiff's acceptance of the risk that the sale would not occur. Similarly, defendants did not have a duty to disclose any material facts that were not disclosed. Their purpose in negotiating the land deal, and the ultimate purchaser, were not things that had to be disclosed to plaintiff. See *Zaschak v. Traverse Corp,* 123 Mich.App 126, 130; 333 NW2d 191 (1983). The trial court thus did not err in granting defendants' motion on this count.

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We likewise do not find any merit to plaintiff's claim that defendants were unjustly enriched. Plaintiff apparently believed that by refusing to dedicate property for the road, he could prevent it from being constructed. This was not true; the township could act on the petition without plaintiff's cooperation. Any increase in the value of defendants' property was the result of their own work to encourage the township to approve the road, something they were well within their rights to do. See *Barber v. SMH (US), Inc,* 202 Mich.App 366, 375; 509 NW2d 791 (1993). Therefore, the trial court did not err in granting defendants' motion on the counts of fraud and unjust enrichment.

Finally, plaintiff asserts that the trial court erroneously based its decision on several statements in defendants' briefs that were hearsay, and thus should not have been considered. Plaintiff raised the issue of hearsay in defendants' brief during the hearing before the trial court, but only regarding one of the statements described in his brief on appeal; the issue is therefore preserved regarding that statement. *Reed v. St Clair Rubber Co,* 118 Mich.App 1, 7; 324 NW2d 512 (1982). We review the trial court's decision regarding admissibility of evidence for an abuse of discretion. *Dep't of Transportation v. VanElslander,* 460 Mich. 127, 129; 594 NW2d 841 (1999). We review unpreserved error and reverse only if it is a plain error and the substantial rights of a party are affected. *Wischmeyer v. Schanz,* 449 Mich. 469, 483; 536 NW2d 760 (1995).

When considering a motion for summary disposition brought pursuant to MCR 2.116(C)(10), the trial court must consider the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion. MCR 2.116(G)(5); MCR 2.116(G)(6). MCR 2.119(B)(1) further requires that an affidavit filed in support of or in opposition to a motion must: (a) be made on personal knowledge; (b) state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion; and (c) show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit. The affidavit does not serve to resolve issues of fact; its purpose is to help the court determine whether a genuine issue of material fact exists. *SSC Associates Ltd Partnership v Gen'l Retirement System of the City of Detroit,* 192 Mich.App 360, 364; 480 NW2d 275 (1991). Opinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule. *Id.* However, unlike a jury, a judge is presumed to possess an understanding of the law, which allows him to understand the difference between admissible and inadmissible evidence or statements of counsel. Thus, resultant error may be harmless. *People v. Wofford,* 196 Mich.App 275, 282; 492 NW2d 747 (1992).

*4 Plaintiff does not point to any actual evidence that the trial court was affected by any of the statements. For the most part, the statements are mere hyperbole and do not concern any material facts. The court's summary of events includes the fact that defendants petitioned the township to improve the road; the court succinctly described the connection between that and the condemnation suit. Plaintiff offers no more than conjecture that the court relied on or was influenced by the disputed statements. Nothing in the conclusions and reasoning of the court reveals any such reliance. Also, there is ample documentary evidence, uncontested by plaintiff, to support defendants' motions. Therefore, the court did not commit plain error affecting plaintiff's substantive rights.

We affirm.

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