STATE OF MICHIGAN

COURT OF APPEALS

JOHN HAMILTON,

Plaintiff-Appellant,

v

ALLAN S. RUBIN and ALLAN S. RUBIN, P.L.L.C.,

Defendants-Appellees.

UNPUBLISHED
June 27, 2006

No. 258917
Wayne Circuit Court
LC No. 04-402221-CZ

Before: Cooper, P.J., and Neff and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition. We affirm.

Plaintiff commenced this action, alleging that defendant Allan Rubin,[1] an attorney, violated matters protected by the attorney/client privilege when testifying at a deposition taken in connection with litigation in Nevada, in which Edward Gardocki, plaintiff's business associate, had accused defendant of fraud, conspiracy, and legal malpractice arising from the sale of a business interest in Nevada.

Plaintiff first argues that the trial court erred in finding that defendant was entitled to witness immunity for statements made in his 2003 deposition.

A trial court's grant of summary disposition is reviewed de novo, on the entire record, to determine whether the prevailing party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Although defendants moved for summary disposition under MCR 2.116(C)(8), it is clear that the trial court looked beyond the pleadings when granting defendants' motion. Therefore, MCR 2.116(C)(7) and (C)(10) are the appropriate subrules to apply.

[1] Because the liability of defendant Rubin's law practice, Allan S. Rubin, P.L.L.C., is derivative, the singular "defendant" is used to refer to defendant Allan Rubin only.

When reviewing a dismissal on the basis that a claim is barred because of immunity, MCR 2.116(C)(7), this Court must accept all well pleaded allegations as true—unless contradicted by other evidence—and construe them in favor of the nonmoving party. *Maiden*, *supra* at 119. The court must consider the affidavits, depositions, admissions, and any other documentary evidence submitted by the parties, to determine whether there is a genuine issue of material fact. MCR 2.116(G)(5); *Maiden*, *supra* at 119. If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of the facts, then the question of whether a claim is barred is an issue of law. *Id.* However, if a question of fact exists such that factual development could provide a basis for recovery, dismissal is inappropriate. *Guerra v Garratt*, 222 Mich App 285, 289; 564 NW2d 121 (1997).

When reviewing a motion brought under MCR 2.116(C)(10), the court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996). A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence. *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 398-399; 491 NW2d 208 (1992).

"Statements made during the course of judicial proceedings are absolutely privileged, provided they are relevant, material, or pertinent to the issue being tried." *Maiden*, *supra* at 134. "Falsity or malice on the part of the witness does not abrogate the privilege." *Id*. "The privilege should be liberally construed so that participants in judicial proceedings are free to express themselves without fear of retaliation." *Id*.

Depositions are given under oath, are transcribed or otherwise recorded, and are regulated by the court rules. See MCR 2.304(A); MCR 2.305 to MCR 2.308. Attendance and production of evidence may be compelled by use of a subpoena, and disputes are resolved by the trial judge or a magistrate. See MCR 2.306. There is no dispute that defendant's challenged deposition was taken pursuant to a judicial proceeding, specifically a lawsuit filed against defendant in which Edward Gardocki, plaintiff's business associate, accused defendant of fraud, conspiracy, and legal malpractice. Thus, we agree with the trial court that defendant's statements in his deposition were made in the course of a judicial proceeding. Cf. *Timberlake v Heflin*, 180 W Va 644, 647-648; 379 SE2d 149 (1989) (admissions concerning the existence of a contract, made during "judicial proceedings," including statements made in a deposition, will render statute of frauds inoperative); see also *Higgins v California Prune & Apricot Growers, Inc*, 282 F 550, 559 (CA 2, 1922) (witnesses are immune from service of process during judicial proceedings, including depositions).

Plaintiff argues that even if defendant's deposition testimony was made in the course of a judicial proceeding, the challenged testimony was not relevant, material, or pertinent to the issues raised in the Nevada litigation and, therefore, is not protected. Contrary to what plaintiff asserts, defendant did not gratuitously inject plaintiff into the litigation. Rather, the record discloses that plaintiff was intricately involved in Gardocki's purchase of Robert's Katzman's business interest from the beginning. Indeed, plaintiff was deposed in connection with related Michigan litigation involving this transaction a full year before defendant was deposed. Plaintiff himself admitted that Ronald Sweatt had approached him to discuss a potential sale, and that

plaintiff and Gardocki both met with Katzman to explore the matter further. Plaintiff also admitted that he encouraged the sale because he believed that Gardocki would be a good partner for Sweatt.

Although plaintiff asserts that his ownership of various businesses was not relevant to the Nevada litigation, as further discussed *infra*, that information also was not privileged because it was a matter of public record, and because plaintiff himself had already testified to it. Thus, even if the information was not relevant to the Nevada lawsuit, defendant was under no ethical obligation not to disclose it. Nonetheless, we agree with the trial court that the information was relevant to the Nevada litigation because it was necessary to establish the context of the dispute and the relationship of the various parties. Plaintiff has failed to overcome the presumption of relevance.

We agree with defendant that his opinion concerning plaintiff's involvement in the transaction was relevant to Gardocki's claims that defendant had engaged in a conflict of interest, and committed fraud, conspiracy, and malpractice. Defendant testified that he recognized the potential for a conflict of interest because he suspected plaintiff's involvement, and did everything he could to avoid it. Thus, even if defendant's opinions and mental impressions were privileged, they were relevant to the Nevada lawsuit and, therefore, defendant is immune from liability arising from his testimony.[2]

Plaintiff argues that attorneys are not ordinary witnesses, and that the Michigan Rules of Professional Conduct ("MRPC") instead impose upon an attorney an obligation not to disclose any information concerning a client. Plaintiff acknowledges that defendant was entitled to defend himself in the Nevada litigation, but claims he was not entitled to insert plaintiff into the dispute for the purpose of pressuring Gardocki into dismissing his claims against defendant.

Whether the attorney/client privilege applies is a question of law reviewed de novo. *Krug v Ingham Co Sheriff's Office*, 264 Mich App 475, 484; 691 NW2d 50 (2004).

The rule of confidentiality, MRPC 1.6(b)(1), provides that "[e]xcept when permitted under paragraph (c), a lawyer shall not knowingly . . . reveal a confidence or secret of a client." However, MRPC 1.6(c)(5) provides that "[a] lawyer *may reveal . . . confidences or secrets necessary* to establish or collect a fee, or *to defend the lawyer* or the lawyer's employees or associates *against an accusation of wrongful conduct.*" (Emphasis added).

The scope of the attorney/client privilege is "narrow," and covers "only . . . confidential communications by the client to his attorney, which are made *for the purpose of obtaining legal advice*." *Krug*, *supra* at 484-485 (internal quotations and citations omitted); see also *People v Compeau*, 244 Mich App 595, 597; 625 NW2d 120 (2001). Further, the privilege protects

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[2] Because we conclude that defendant is entitled to witness immunity, plaintiff's tortious interference claim, which is likewise predicated on defendant's deposition testimony, was also properly dismissed.

communications, not facts. *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 619-620; 576 NW2d 709 (1998). Thus, matters of public record are not confidential and, therefore, are not privileged. *Id*. at 620. Similarly, the identity of a client is not privileged unless disclosure would reveal the substance of confidential communications. See *Ravary v Reed*, 163 Mich App 447, 453-455; 415 NW2d 240 (1987); see also *Yates v Keane*, 184 Mich App 80, 83-84; 457 NW2d 693 (1990).

The initial comments to MRPC 1.6 state:

> The principle of [attorney] confidentiality is given effect in two related bodies of law, the client-lawyer privilege[, or attorney/client privilege,] . . . in the law of evidence and the rule of confidentiality established in professional ethics. The client-lawyer privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. [Conversely,] [t]he rule of client-lawyer confidentiality applies in situations *other than those* where evidence is sought from the lawyer through compulsion of law. [Emphasis added.]

Under the heading "Disputes Concerning Lawyer's Conduct," the comments to MRPC 1.6 state that "[t]he lawyer's right to respond arises when an assertion of complicity or other misconduct has been made." Thus,

> *[i]f the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil*, criminal, or professional disciplinary *proceeding, and can be based* on a wrong allegedly committed by the lawyer against the client, or *on a wrong alleged by a third person*, for example, a person claiming to have been defrauded by the lawyer and client acting together. [*Id*. (emphasis added).]

Plaintiff argues that defendant improperly disclosed that: (1) plaintiff had been sued for nuisance, (2) plaintiff entered into a consent judgment concerning the nuisance, (3) plaintiff owned various corporations and maintained a trust, (4) defendant suspected plaintiff of being the real party in interest in the purchase of Katzman's interest in Motor City III, (5) defendant distrusted plaintiff, (6) plaintiff's agents were planning to "steal the property" by purchasing the Sweatts' interest in a tax sale, and (7) plaintiff made several telephone calls to defendant that confirmed that plaintiff was the real party in interest behind the purchase.

Concerning items 1 through 3, plaintiff himself, in his 2002 deposition in the Sweatts' Michigan lawsuit against Katzman and Gardocki, disclosed his ownership of various business establishments, the fact that ownership was held in the name of the Hamilton Family Partnership, and the fact that defendant represented him and his businesses in various matters. Thus, any alleged privilege concerning these matters was waived by plaintiff. Additionally, plaintiff does not dispute defendant's testimony that these were matters of public record. Such information is not privileged. *Reed Dairy Farm, supra* at 620. Similarly, the fact that defendant represented plaintiff and some of his businesses is not, itself, privileged. See *Ravary, supra* at 453-455. With regard to item 7, there is no suggestion that plaintiff made the referenced telephone calls

for the purpose of seeking legal advice. Thus, this item is not privileged. *Krug*, *supra* at 484-485.

Items 4 through 7 concern defendant's impressions and opinion of the facts surrounding Gardocki's purchase of Katzman's interest. However, the facts of the transaction—including what defendant knew, what he believed, and what he did—are at the heart of Gardocki's claims that defendant improperly represented both him and Katzman, and was therefore liable for fraud, conspiracy and malpractice. Defendant was entitled to respond to those claims.

Furthermore, even if defendant violated the rule of confidentiality, "[t]he rules do not . . . give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with an obligation or prohibition imposed by a rule." MRPC 1.0(b). Rather, violations are subject to disciplinary proceedings by the attorney grievance commission. See MRPC 1.0(b); MRPC 8.3(a).[3]

For these reasons, the trial court properly granted defendants' motion for summary disposition.[4]

Affirmed.

/s/ Jessica R. Cooper
/s/ Janet T. Neff
/s/ Stephen L. Borrello

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[3] While ethical violations may also constitute malpractice, there is no evidence that defendant represented plaintiff with regard to the purchase of Katzman's interest. See *Beattie v Firnschild*, 152 Mich App 785, 791; 394 NW2d 107 (1986).

[4] Plaintiff's mere statement that the trial court's findings were inadequate is insufficient to properly present this issue for our review. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001). In any event, "[f]indings of fact and conclusions of law are unnecessary on motions unless findings are required by the particular rule." MCR 2.517(A)(4). Moreover, our review is de novo. Thus, we find no merit to this issue.