NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0501-15T1

HAPPY DAYS ADULT HEALTHCARE LLC, NEW HORIZONS BEHAVIORAL HEALTHCARE CENTERS, LLC, BRIAN KLEIMAN and RIVKA BASYA KLEIMAN, h/w and STEVEN KLEIMAN and RIVKA CHAYA KLEIMAN, h/w,

Plaintiffs-Appellants,

v.

OBERMAYER REBMANN MAXWELL & HIPPEL, LLP,

Defendant-Respondent.

Argued May 17, 2017 – Decided June 26, 2017

Before Judges Alvarez, Accurso and Lisa.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Docket No. L-2151-15.

Benjamin Folkman argued the cause for appellants (Folkman Law Offices, PC, attorneys; Mr. Folkman, of counsel; Eve R. Keller, on the brief).

Matthew A. Green argued the cause for respondent (Obermayer Rebmann Maxwell & Hippel, LLP, attorneys; Mr. Green and Michelle L. Ringel, on the brief).

PER CURIAM

This is the second appeal arising out of efforts by defendant Obermayer Rebmann Maxwell & Hippel, LLP to recover for services rendered to plaintiffs Brian and Rivka Basya Kleiman and Steven and Rivka Chaya Kleiman and the limited liability companies they control, plaintiffs Happy Days Adult Healthcare, LLC, and New Horizons Behavorial Healthcare Centers, LLC, in nine different matters between 2009 and 2012. In the prior appeal, we affirmed a jury verdict in favor of Obermayer. Obermayer Rebmann Maxwell & Hippel, LLP v. Brian Kleiman, et al., No. A-0786-15 (App. Div. May 19, 2017) (slip op. at 2). In this matter, the Kleimans appeal from an August 20, 2015 order dismissing their complaint against Obermayer for malpractice based on the entire controversy doctrine. Because we agree Judge Ragonese was correct that the Kleimans had a full and fair opportunity to litigate the claim in the first action and failed to do so, we affirm, substantially for the reasons expressed in the judge's comprehensive written opinion accompanying the order.

The background of this matter is set out in Judge Ragonese's opinion and, because we write solely for the parties, we have no need to recapitulate it here. The key facts are clear. Ralph Ferrara has represented the Kleimans in a variety

of matters since 2005, including in a General Equity case in Essex County, which the parties refer to as 300 Broadway. Ferrara was still representing the Kleimans in the 300 Broadway matter while the fee case and this suit were pending in the trial court.

In October 2012, Obermayer moved to disqualify Ferrara, then at Richardson & Patel, and his partner, Morgan Zucker, from defending the Kleimans in Obermayer's fee suit. The Kleimans opposed that motion. Because Ferrara was likely to be a necessary witness, having overseen the Kleimans' work at Obermayer, the court disqualified Ferrara, but permitted Zucker to continue to defend the Kleimans against Obermayer's claims.

In December 2012, the Kleimans moved to disqualify the Obermayer associate litigating the fee case against them because they claimed Obermayer "mishandled" their matters and they would be seeking a set-off against the fees Obermayer claimed were due and owing. Judge Silverman Katz denied the motion because the Kleimans had not asserted any malpractice or set-off claims in either their affirmative defenses or counterclaim and had not submitted an affidavit on the motion identifying the alleged malpractice. The judge made clear, however, that the motion was denied without prejudice to permit the Kleimans to cure those procedural deficiencies.

In October 2014, in advance of a January 2015 trial date, Obermayer moved to file a second amended complaint to specifically assert additional fees it claimed were owed on the 300 Broadway matter. The Kleimans opposed the motion claiming it was filed after the close of extended discovery and that they would be prejudiced by the late amendment. Judge Ragonese disagreed. Although acknowledging Obermayer's tardiness in asserting the claim, the judge found the parties had conducted discovery on the claim, which set forth the same facts and legal theories Obermayer had already asserted as affirmative defenses to the Kleimans' counterclaim. Accordingly, the judge permitted Obermayer to file its second amended complaint.

When the Kleimans filed their answer to the amended pleading in December 2014, they asserted, for the first time, affirmative defenses of set-off and that the claims were "barred or limited by [Obermayer's] professional negligence and malpractice." After the Kleimans' motion to dismiss the amended complaint was denied, Zucker moved to withdraw as their counsel, claiming he was in an irreconcilable conflict. Specifically, he claimed he could not assert a malpractice claim on behalf of the Kleimans based on Obermayer's representation of them in the 300 Broadway matter without also suing his partner Ferrara, who was

the billing attorney, responsible for all of the Kleimans' work when he was at Obermayer.

Judge Fratto denied the motion, first in December and then again in February when Zucker renewed it. Because the Kleimans had never set forth how they claimed Obermayer had been negligent, had never filed an affidavit of merit and did not have an expert report, Judge Fratto observed he was "hard pressed not to say that [the motion] appear[ed] to be an attempt to delay this trial." Ultimately, the judge refused to allow Zucker to withdraw on the basis of a malpractice claim never asserted in the more than two years the case had been pending.

Just before the rescheduled trial date in April 2015, Zucker moved again to withdraw as counsel, and the motion was again denied. Following unsuccessful motions for leave to appeal in this court and the Supreme Court, the fee suit finally went to trial in May 2015. On the first day of trial, the same counsel representing plaintiffs in this case, appeared for the Kleimans, individually, while Zucker continued to represent their business entities. Counsel on behalf of the Kleimans moved to stay the trial until the 300 Broadway case was completed or, alternatively, for leave to file an amended counterclaim for malpractice.

Judge Ragonese denied both motions as untimely. The judge also denied the Kleimans' oral motion to preserve their malpractice claims against Obermayer and exempt them from application of the entire controversy doctrine, or other principles of claim preclusion, including res judicata. The judge granted Obermayer's in limine motion to strike the Kleimans' affirmative defense of malpractice, based on their failure to produce an expert report in discovery.

While the fee suit was still being tried, the Kleimans filed the verified complaint for malpractice in this case and sought to have it consolidated with Obermayer's fee suit. Judge Ragonese denied that motion, and likewise denied the Kleimans' application to stay this suit until the 300 Broadway case was concluded. The jury returned its verdict in favor of Obermayer in its fee suit on June 11, 2015, which included a $58,366.15 award in quantum meruit relating to the 300 Broadway file. As noted, we recently affirmed the verdict in that case. Obermayer, supra, slip op. at 2.

Following entry of judgment in the fee suit, Obermayer moved to dismiss the complaint in this action based on res judicata, collateral estoppel and the entire controversy doctrine. Judge Ragonese granted the motion. In a comprehensive written opinion, the judge concluded that the

Kleimans' legal malpractice claim needed to have been litigated in the fee action because the claim for fees and the claim for malpractice "could be most soundly and appropriately litigated and disposed of in a single comprehensive adjudication."

The judge found that the Kleimans were aware of their malpractice claim against Obermayer since at least November 2014, yet did not do anything to actually assert the claim until the first day of trial in May 2015, when they brought on current counsel to seek to amend their counterclaim. Judge Ragonese concluded that the Kleimans' "failure to develop the claim in the [p]rior [a]ction makes it fair that they be precluded from asserting it in a later and separate action."

The Kleimans appeal, claiming that to require them to litigate their malpractice claim against Obermayer and Ferrara while Ferrara was still representing them in the 300 Broadway matter would have had a chilling effect on the attorney-client relationship and that they did not have a fair and reasonable opportunity to litigate the malpractice claim in the fee suit. We disagree.

The Kleimans first raised the specter of a malpractice claim against Obermayer in December 2012, six months after Obermayer filed the fee suit and three months after the court dismissed their answer and affirmative defenses in the 300

Broadway suit for their failure to comply with court orders. Thus at the point in time that Judge Silverman Katz denied the Kleimans' motion to disqualify the Obermayer associate representing the firm in the fee suit, the Kleimans were already aware of the claims they had against Ferrara and Obermayer arising out of Ferrara's representation of them in 300 Broadway. That motion was denied because the Kleimans had failed to plead a malpractice claim. Judge Silverman Katz, however, denied the motion without prejudice, making clear that if the Kleimans intended to assert a malpractice claim against Obermayer as an offset to the fee claim, they needed to amend their pleadings in order to do so.

The Kleimans, however, did not act until the last days of December 2014, in advance of a scheduled January 2015 trial date. And even then, it was not until five months later on the first day of the rescheduled trial that they took the steps to have separate counsel assert a counterclaim for malpractice against Obermayer and ask the court to either stay the action pending the conclusion of the 300 Broadway suit or sever and preserve their malpractice claim. Nothing prohibited the Kleimans from taking those steps in December 2012 after they were advised to amend their pleadings if they intended to assert a set-off to Obermayer's fee claim. Under those circumstances,

we have no hesitation in finding the trial court was correct to conclude the Kleimans had been provided a full and fair opportunity to litigate their malpractice claim against Obermayer when it 1) dismissed the Kleimans' affirmative defense of malpractice in the fee suit and 2) granted Obermayer's motion to dismiss the Kleimans' malpractice complaint in this case under the entire controversy doctrine.[1]

Further, we reject the Kleimans' claims that their malpractice claim was not ripe or that forcing them to assert it while Ferrara was still representing them in the 300 Broadway matter would have significantly interfered with their relationship. A claim for legal malpractice "accrues when an attorney's breach of professional duty proximately causes a plaintiff's damages." Grunwald v. Bronkesh, 131 N.J. 483, 492 (1993). There is no question but that the Kleimans were aware

[1] As a procedural matter, we also note our agreement with Obermayer that the denial of the Kleimans' motion to amend their counterclaim to assert a malpractice claim and the grant of Obermayer's in limine motion striking the malpractice defense in the first suit constituted a decision on the merits of that claim. The Kleimans' failure to appeal those rulings bars their malpractice claim here. See Velasquez v. Franz, 123 N.J. 498, 511 (1991) ("[A] judgement, not set aside on appeal or otherwise, is equally effective as an estoppel upon the points decided.") (quoting Reed v. Allen, 286 U.S. 191, 201, 52 S. Ct. 532, 534, 76 L. Ed. 1054, 1058 (1931)).

of their claim against Ferrara following the suppression of their answer and affirmative defenses in the 300 Broadway suit.[2] They also knew the ruling had caused them to suffer damages, although the full extent of those damages was not yet known because the matter was still pending. The 1) Kleimans' awareness of their claim, 2) their earlier attempt to disqualify Obermayer's counsel based on asserted negligence, which also implicated Ferrara, 3) that the fee suit was not the underlying action giving rise to the alleged malpractice, and 4) the Kleimans' ability to have taken the steps they took on the trial date, years earlier, readily distinguishes this case from Olds v. Donnelly, 150 N.J. 424, 440-43 (1997) and Sklodowsky v. Lushis, 417 N.J. Super. 648, 653-57 (App. Div. 2011).

The Kleimans were, in December 2012, both aware of their malpractice claim against Ferrara arising out of the 300 Broadway matter and advised of the necessity to assert it in the fee case. We thus agree they were provided a full and fair opportunity to litigate the claim against Obermayer in Obermayer's fee suit and failed to do so. We accordingly

[2] Brian Kleiman himself made the point clearly to Judge Fratto on Zucker's second motion to withdraw as counsel in the fee suit.

affirm, substantially for the reasons expressed in Judge Ragonese's thorough and thoughtful opinion of August 20, 2015.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION