

CHENEY v. FLOOD

NO. 13-P-259.

SUZANNE M. CHENEY,
vs.
JAMES W. FLOOD, JR.,¹ & another.²

Appeals Court of Massachusetts.
Entered: February 7, 2014.

By the Court (Katzmann, Vuono & Wolohojian, JJ.)

DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS RULE 1:28 ARE PRIMARILY ADDRESSED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, RULE 1:28 DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO RULE 1:28, ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

On April 30, 2010, Suzanne M. Cheney, the plaintiff, filed a complaint against James W. Flood, Jr., individually and as administrator of the estate of her stepfather Anthony R. Turco and against the Flood Law Office (collectively, Flood). In count I of her complaint, the plaintiff alleged that Flood committed legal malpractice because he knew or should have known that Turco wished the plaintiff and her two children to be the sole or principal beneficiaries of his estate. In count II, she alleged that she was entitled to recovery in quantum meruit for many services that she or her family performed for Turco during the last years of his life.

On September 24, 2010, in a memorandum of decision, a Superior Court judge allowed Flood's motion to dismiss the legal malpractice count pursuant to Mass.R.Civ.P. 12(b)(6), 365 Mass. 754 (1974), on the ground that the plaintiff failed to allege the existence of an attorney-client relationship between her and Flood. The judge dismissed the quantum meruit count on the ground that the plaintiff failed to allege that she performed services for Turco with the expectation that she would be paid for them. She stayed the dismissal of the quantum meruit count giving the plaintiff thirty days to amend it. On October 25, 2010, the plaintiff filed a motion to amend her complaint, which was allowed. On March 5, 2012, Flood filed a motion for summary judgment. A Superior Court judge allowed Flood's motion for summary judgment on the quantum meruit count and issued a judgment of dismissal on November 19, 2012. On December 19, 2012, the plaintiff filed her notice of appeal, appealing from the summary judgment decision only.

1. DISMISSAL OF PLAINTIFF'S LEGAL MALPRACTICE CLAIM PURSUANT TO MASS.R.CIV.P. 12(B)(6).

In her appellate brief, the plaintiff presents various arguments as to why the dismissal of her legal malpractice claim against Flood was improper. None of these arguments are before us as the plaintiff did not appeal from the dismissal of the legal malpractice count. Her only appeal was from the summary judgment on the quantum meruit count. Even if this were not the case, as discussed by the judge in the memorandum of decision, *Miller v. Mooney*, [431 Mass. 57](#), 61 (2000), would be dispositive of the plaintiff's legal malpractice claim.

2. SUMMARY JUDGMENT ON THE QUANTUM MERUIT COUNT.

In order to recover in quantum meruit, there has to be an underlying contract or agreement between the parties. *J.A. Sullivan Corp. v. Commonwealth*, [397 Mass. 789](#), 793-794 (1986). In the present case, the plaintiff did not allege an express agreement between her and Turco that she would provide services to him in exchange for being listed in his will as the beneficiary of his estate. Rather, she alleged that she 'always hoped that he would eventually have a little bit to pay back those things' or 'if there was something in his estate that would pay me.' See *Congregation Kadimah Toras-Moshe v. DeLeo*, [405 Mass. 365](#), 366-367 (1989) ('moral obligation is not legal obligation. . . . A hope or expectation, even though well founded, is not equivalent to either legal detriment or reliance').

With respect to the plaintiff being the beneficiary of his estate, Turco told the plaintiff 'from time to time that whatever he had would come to [her]' and 'he just assumed that it would come to [her]. . . .' As for the plaintiff, she 'assumed that it would come to me, and so I thought that he must have somehow done what he had to do to take care of that, if there was anything to do.'

This case is distinguishable from the two cases relied on by the plaintiff in which the plaintiffs were entitled to recovery in quantum meruit because in each of those cases, unlike in the present one, the plaintiff and the decedent entered into express agreements to provide services in exchange for being made beneficiaries of the estate. In *Green v. Richmond*, [369 Mass. 47](#), 49 (1975), the decedent, a wealthy bachelor, told the plaintiff that if she would agree to stay with him, he would bequeath his entire estate to her and the plaintiff agreed; the decedent acknowledged the original agreement to the plaintiff and others on several occasions thereafter; and the plaintiff kept her part of the agreement in reliance on the decedent's promise.

In *Hastoupis v. Gargas*, [9 Mass.App.Ct. 27](#), 34-35 (1980), 'the plaintiff and the decedent had struck an express bargain by which the decedent promised to the plaintiff one-half of his estate in exchange for the plaintiff's performing services for him until his death[,] [t]he plaintiff kept his part of the bargain and the decedent breached his.' See also *Northrup v. Brigham*, [63 Mass.App.Ct. 362](#), 369 (2005), where 'the plaintiff and [the decedent] formed an oral contract by which [the decedent] promised to leave [the plaintiff] the bulk of his assets and property and promised to sign a will, in return for which the plaintiff performed substantial services.'³

As to the plaintiff's claim that 'Flood should be equitably estopped from asserting any defense to [the plaintiff's] quantum meruit claim on an unclean hands basis,' it fails for the reason, if no other, that it was not raised below and is not properly before us. *Cuddyer v. Stop & Shop Supermkt.Co.*, [434 Mass. 521](#), 540 n.23 (2001).

Judgment affirmed.

FOOTNOTES

1. Individually and as administrator of the estate of Anthony R. Turco.
2. Flood Law Office, P.C.
3. Based on her factual allegations, some of the plaintiff's claims, such as the claim for her mother's funeral expenses pursuant to the agreement between her and Turco that he would pay half; the claim for small loans and expenses incurred by the plaintiff on his behalf which Turco agreed to repay; and the claim for the value of items left to the plaintiff by her mother which disappeared from Turco's apartment, would not be subject to recovery under the theory of quantum meruit, as they arose out of previously valid contract or tort claims. See *Boswell v. Zephyr Lines, Inc.*, [414 Mass. 241](#), 250 (1993) ('Recovery in quantum meruit presupposes that no valid contract covers the subject matter of a dispute. Where such a contract exists, the law need not create a quantum meruit right to receive compensation for services rendered').

