SCANLON v. DUKESS

NO. 13-P-495.

PETER J. SCANLON & others[1]

vs.

JEFFREY W. DUKESS & another.[2]

Appeals Court of Massachusetts.
Entered: February 27, 2014.

By the Court (Kafker, Milkey & Hines, 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

The plaintiffs (collectively, Scanlon), appeal from a summary judgment entered in favor of the defendants (collectively, Dukess) on Scanlon's legal malpractice claim. Scanlon argues that the judge erred in allowing summary judgment on the ground that Scanlon failed to show a causal link between Dukess's alleged incompetent legal advice and Scanlon's damages. We affirm.

1. *BACKGROUND.*

The following facts, viewed in the light most favorable to the nonmoving party, are drawn from the summary judgment record. Scanlon and Dukess, Scanlon's former attorney, had a long-established professional relationship in which Dukess represented Scanlon, a psychologist and real estate investor, for a number of years in the purchase and sale of real estate. One such transaction involved the sale of a property in Brockton (Brockton property) and the subsequent purchase of a property leased by a Walgreens in Taunton (Taunton property). The Taunton property was acquired in accordance with 26 U.S.C. § 1031 (2006), as the second half of an exchange (1031 exchange), allowing Scanlon to defer capital gains taxes on $1,085,000 earned from the sale of the Brockton property. Under this provision of the Internal Revenue Code, Scanlon was required to identify a replacement property within forty-five days of the sale of the Brockton property and to then close on the purchase of the replacement property within 180 days of the sale date. 26 U.S.C. § 1031(a)(3)(A)-(B). Scanlon sold the Brockton property on March 1, 2005, triggering the forty-five day identification deadline on April 15, 2005. 26 U.S.C. § 1031(a)(3)(A). He identified three potential replacement properties on or before the deadline. Of the three properties, one was sold and the other did not qualify for a 1031 exchange. Therefore, only the Taunton property remained as a property qualified for 1031 exchange benefits.

Scanlon first sought Dukess's advice about the purchase of the Taunton property in May, 2005, several weeks after the identification deadline had passed. Dukess reviewed the offering memorandum for the Taunton property and advised Scanlon of eighteen risk factors. Dukess, however, did not advise Scanlon that the lease lacked a condemnation clause. In the absence of a condemnation clause in the lease with Walgreens, which Scanlon would be bound to assume if he purchased the property, Walgreens was entitled to share in the proceeds from any future eminent domain taking. Scanlon completed his 1031 exchange by acquiring the Taunton property on August 26, 2005, the expiration date of the 180-day purchase period required by § 1031(a)(3)(B).

Approximately eighteen months after Scanlon purchased the Taunton property, the Commonwealth took the property by eminent domain. The Commonwealth paid a pro tanto award to Scanlon approximately seven months after the taking and settled on a final award approximately four years and six months after the taking. As allowed in the lease, Walgreens received a portion of the taking award.

Scanlon commenced the present legal malpractice action against Dukess seeking to recover damages allegedly resulting from Dukess's failure to inform Scanlon that the Walgreens lease lacked a condemnation clause. Scanlon claimed as damages the amount of the taking award that Walgreens received, the mortgage payments that Scanlon made between the taking and final settlement, attorney's fees and other costs arising out of Walgreens's claim of right to the award, and interest on the value of the property for the period between the taking and final settlement. In his brief, Scanlon argues that Dukess's failure to inform Scanlon of the absence of a condemnation clause caused Scanlon's damages because had he been given that information, he `would have either: (a) requested that Dukess attempt to renegotiate the Lease;[3] or (b) sought to acquire another 1031 replacement property.'

2. *DISCUSSION.*

We review a grant of summary judgment de novo. *Coviello v. Richardson*, 76 Mass.App.Ct. 603, 607 (2010). The standard of review is `whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law.' *Ibid.*, quoting from *Siebe, Inc.* v. *Louis M. Gerson Co.*, 74 Mass.App.Ct. 544, 548 (2009). `When asserting a claim for legal malpractice, a plaintiff bears the burden of proving that its attorney committed a breach of the duty to use reasonable care, that the plaintiff suffered actual loss, and that the attorney's negligence proximately caused such loss.' *Fiduciary Trust Co.* v. *Bingham, Dana & Gould*, 58 Mass.App.Ct. 245, 251 (2003), quoting from *Atlas Tack Corp.* v. *Donabed*, 47 Mass.App.Ct. 221, 226 (1999). `Because juries are uniquely qualified to . . . decide questions of causation, a plaintiff usually is afforded the right to have his claim tried before a jury.' *O'Connor v. SmithKline Bio-Science Labs., Inc.*, 36 Mass.App.Ct. 360, 363 (1994). Summary judgment is proper notwithstanding the general rule, however, when `the defendant has demonstrated that the plaintiff `has no reasonable expectation of proving an essential element' of his case.' *Ibid.*, quoting from *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991).

Scanlon challenges the allowance of Dukess's motion for summary judgment, arguing that the judge erred in ruling that the record lacked sufficient evidence to establish causation at trial.[4] Scanlon's causation argument is anchored in the assertion he could have purchased an alternate property and completed his 1031 exchange had he been advised by Dukess that the Walgreens lease did not contain a condemnation clause. To support his causation argument, Scanlon proffered an affidavit from an expert who stated that within the national database of eligible 1031 exchange properties, feasible alternatives were available to Scanlon. The expert affidavit, however, did not identify any such alternative property. There was no error.

Our examination of the summary judgment record leaves little doubt that Scanlon has no reasonable expectation of proving the requisite causal link between Dukess's legal advice and the claimed damages. The question is settled by our reading of the statute governing 1031 exchanges and the undisputed facts respecting the timing of Scanlon's request for legal advice from Dukess. The legal impediment to Scanlon's ability to prove causation is the forty-five day identification deadline in 26 U.S.C. § 1031(a)(3)(A), which provides that property shall not qualify for the exchange if `such property is not identified as property to be received in the exchange on or before the day which is 45 days after the date on which the taxpayer transfers the property relinquished in the exchange.' Because the statute prohibits the identification of an alternate property once the forty-five day deadline has passed, Scanlon's alternate course was not legally feasible. The factual impediment is Scanlon's admission that he did not seek Dukess's advice until after the identification deadline had passed. Thus, regardless of Dukess's advice, Scanlon's only possible course to complete the 1031 exchange was to purchase the Taunton property.[5] Accordingly, summary judgment was properly entered in favor of Dukess where Scanlon has failed to establish a causal link between his losses and Dukess's actions.[6] See *O'Connor*, *supra* at 363 ('If the evidence, viewed in the light most favorable to the plaintiff, established no more than a possibility of such a causal relationship, any resulting jury verdict would be based on speculation and could not stand').

Judgment affirmed.

Order denying motion for reconsideration affirmed.

FOOTNOTES

1. Scanlon Realty LLC and Taunton Broadway 1031 LLC.

2. Frenette & Dukess, Attorneys at Law.

3. Scanlon does not pursue on appeal the argument that he would have asked Dukess to renegotiate the Walgreens lease. He now maintains that the only issue `is whether Scanlon should be permitted to offer expert and factual testimony at trial that he could have purchased a comparable 1031 Exchange property had he been warned about the lack of a condemnation clause in the Lease.'

4. In granting summary judgment for Dukess, the motion judge relied principally on Scanlon's failure to identify any alternative property he could have purchased if he had been informed that the lease lacked a condemnation clause.

5. Scanlon's assertion in his postargument letter, that if he had been advised of the lack of a condemnation clause in the Walgreens lease, he `most likely would have purchased another. . . propert[y] . . . even if such investment would not have enabled Scanlon to defer taxes under Section 1031,' is belied by his brief on appeal and by the summary judgment record.

6. We agree with the motion judge's conclusion that `the record does not permit the conclusion that any negligence of the attorney caused an actual loss' because there is `no evidence of an actually-existing alternate course that would have prevented an actual loss.' However, as indicated in our analysis, we reach that conclusion for reasons different from those articulated by the motion judge.