STATE OF MICHIGAN

COURT OF APPEALS

JACQUELINE TESSMER and PARMENTER FLORISTS, LLC, Plaintiffs-Appellants, v DAVID L. STEINBERG, DAVID L. STEINBERG, P.C., and SANDRA OSMER, Defendants-Appellees.	UNPUBLISHED March 31, 2005 No. 251474 Oakland Circuit Court LC No. 2002-038037-NM

Before: Meter, P.J., and Bandstra and Borrello, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition to defendants Steinberg and Steinberg, P.C., pursuant to MCR 2.116(C)(10), and the trial court's order partially denying plaintiffs' motion for reconsideration of the earlier order. We affirm.

This case arose because of the failure of a flower shop business in Birmingham. Parmenter Florists, LLC, was formed to purchase a flower shop, Parmenter & Blooms, from defendant Osmer. The LLC's members were plaintiff Tessmer; Joyce Steinberg, defendant Steinberg's wife; Sue Chupack, wife of Chuck Chupack, a friend and former client of defendant Steinberg; and Dan Zigo, Osmer's accountant. Chuck Chupack, Zigo, Tessmer, and defendant Steinberg were its managers. The LLC entered into a one-year consulting agreement with Osmer, after which she could purchase a twelve percent membership interest. Defendant Steinberg, an attorney, drafted the LLC's operating agreement, the purchase documents, and the consulting agreement with Osmer. Tessmer and Osmer had difficulty working together and ceased doing so after a short while. Tessmer closed the business several months later. Tessmer instituted the present case individually and on behalf of the LLC, alleging that defendants Steinberg and Steinberg, P.C., committed legal malpractice and breached a fiduciary duty to plaintiffs, and made fraudulent and negligent misrepresentations related to the purchase of the business.

Plaintiff Tessmer argues that the trial court erred in finding no question of fact as to the existence of an attorney-client relationship between herself and defendants Steinberg.

We review the trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). MCR 2.116(C)(10) provides,

"[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003).

In order to establish a claim of legal malpractice, a plaintiff must prove: (1) the existence of an attorney-client relationship, (2) negligence in the legal representation of the plaintiff, (3) that the negligence was the proximate cause of an injury, and (4) the fact and extent of the injury alleged. *Estate of Mitchell v Dougherty*, 249 Mich App 668, 676; 644 NW2d 391 (2002).

Tessmer argues that she and defendants Steinberg had an attorney-client relationship because she requested advice about the LLC's organization, and an explanation of all purchase documents. Tessmer contends that she regarded Steinberg as her lawyer because he made representations that he was representing her as part of his "free" service to the LLC. In support, Tessmer cites *Grace v Center for Auto Safety*, 72 F3d 1236, 1242 (CA 6, 1996), where the United States Court of Appeals for the Sixth Circuit stated that whether an attorney-client relationship exists focuses on a client's subjective belief that he is consulting the attorney in his professional capacity, and the client's intent to seek the attorney's professional legal advice. However, the record shows no evidence of an attorney-client relationship between Tessmer and defendants Steinberg. While Tessmer may have demonstrated a subjective intent to consult Steinberg in his professional capacity and seek legal advice, the record shows that she did so on behalf of the LLC rather than in an individual capacity. Because we cannot find that an attorney-client relationship existed, the trial court was correct in granting summary disposition on this issue.

Plaintiff Tessmer next argues that the trial court erred in finding that she was not entitled to rely on Steinberg's advice to pay Osmer's prior creditors, or his representations that the income generated by the LLC would support her wages. Because we conclude, as did the trial court, that no attorney-client relationship existed, Tessmer's argument fails. Even assuming all of the evidence in the light most favorable to plaintiff, we cannot find a question of fact evidencing an attorney-client relationship between Tessmer and defendants Steinberg that would support the asserted reliance. Therefore, the trial court properly granted plaintiff's motion for summary disposition on that issue.

Plaintiffs' final argument on appeal is that the trial court erred in granting summary disposition to defendants Steinberg under MCR 2.116(C)(10) on the basis that plaintiff Tessmer failed to comply with MCL 450.4510(b) before commencing the suit on behalf of the LLC. Plaintiffs argue that the written demand required under MCL 450.4510(b) was unnecessary because Zigo was not a member of the LLC and all other members had resigned from the LLC before the institution of this action. Plaintiffs contend that Zigo was never a member of the LLC because the payment of the capital contribution was a condition precedent to receipt of a membership interest, and therefore a question of fact exists as to whether plaintiff was bound by the requirements of MCL 450. 4510(b). We disagree with plaintiffs' analysis of MCL 450. 4510(b).

The record shows that Zigo was a member of the LLC despite his non-payment. MCL 450.4501 provides, in pertinent part:

> (1) A person is admitted as a member of a limited liability company in 1 or more of the following ways:
>
> (a) Upon the formation of the limited liability company, by executing and filing the articles of organization or by signing the initial operating agreement.

Because Zigo signed the initial operating agreement, he was a member of the LLC. The record also reveals that Zigo was also a manager of the LLC. Tessmer also held the dual roles of manager and member and, therefore, she was required to comply with the operating agreement and MCL 450.4510. That statute provides, in pertinent part,

> A member may commence and maintain a civil suit in the right of a limited liability company if all of the following conditions are met:
>
> (a) Either management of the limited liability company is vested in a manager or managers who have the sole authority to cause the limited liability company to sue in its own right or management of the limited liability company is reserved to the members but the plaintiff does not have the authority to cause the limited liability company to sue in its own right under the provisions of an operating agreement.
>
> (b) The plaintiff has made written demand on the managers or the members with the authority requesting that the managers or members cause the limited liability company to take suitable action.

The LLC's operating agreement vests its management in the managers, who each have one vote. The power to "commence prosecution or defend any proceeding in the Company's name" requires a majority vote. Although as a manager, Tessmer was authorized to bring the present action in the LLC's name, she needed Zigo's vote and needed to make a written demand on him. Because she did neither before filing suit for the LLC, Tessmer did not satisfy either MCL 450.4510(a) or (b). Thus, we find no error requiring reversal.

Further, we find that the trial court did not abuse its discretion in denying plaintiffs' motion for reconsideration on this issue. Plaintiffs presented no new or different arguments in support of their position; therefore, denial was proper under MCR 2.119(F).

Affirmed.

/s/ Patrick M. Meter
/s/ Richard A. Bandstra
/s/ Stephen L. Borrello