STATE OF MICHIGAN

COURT OF APPEALS

JOHN G. RUNCO,

Plaintiff-Appellant,

v

HARVEY I. HAUER, MARK SNOVER and HAUER & SNOVER, P.C.,

Defendants-Appellees.

UNPUBLISHED
July 25, 2013

No. 305611
Oakland Circuit Court
LC No. 2011-117381-NM

Before: BORRELLO, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM.

In this suit for legal malpractice, plaintiff John G. Runco appeals by right the trial court's order granting summary disposition in favor of defendants Harvey I. Hauer, Mark Snover, and Hauer & Snover, P.C. (collectively Hauer & Snover). Because we conclude that there were no errors warranting relief, we affirm.

I. LATE RESPONSE

Runco first contends that the trial court abused its discretion when it denied his request to file a late response to Hauer & Snover's motion for summary disposition. Specifically, he argues that, because his response was only a few hours late and comprised merely excusable neglect or an inadvertent error, the trial court should have granted him permission to submit it late. This Court reviews a trial court's decision to enforce its scheduling orders for an abuse of discretion. *Kemerko Clawson, LLC v RxIV, Inc*, 269 Mich App 347, 349; 711 NW2d 801 (2005). A trial court abuses its discretion when it selects an outcome that is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Hauer & Snover moved for summary disposition on March 30, 2011. At the time, Runco represented himself and had not registered with the court's electronic service system. He did not, therefore, receive the documents filed with the court. Runco hired a lawyer who filed an appearance with the court on April 4, 2011. The trial court also signed a scheduling order on March 30, 2011; in the order it required Runco to answer the motion for summary disposition by July 6, 2011. However, the court's clerk did not enter the order until April 7, 2011. Therefore, Runco had 97 days to respond as of the order's entry. Runco's lawyer admitted that he did not "review the docket entries that were there."

On May 25, 2011, Hauer & Snover moved to stay the proceedings; and, in their motion, they recited the court's scheduling deadline. Despite this, Runco did not file his response to Hauer & Snover's motion for summary disposition until the day after the deadline, July 7, 2011. Although the trial court refused to accept Runco's late response, it did allow his lawyer to orally argue against the motion at the hearing.

Trial courts have the authority to set reasonable deadlines in scheduling orders and may enforce those deadlines. See MCR 2.401(B)(2); *Kemerko Clawson*, 269 Mich App at 349-350. And, on this record, we cannot conclude that the trial court abused its discretion when it refused to accept Runco's late filing.

As a lay person, Runco's failure to apprise himself of the deadlines might be excused, but his lawyer's failure to examine the record and determine whether there were any deadlines cannot be similarly be excused. It is a "longstanding principle derived from agency" that a client will be "bound by the actions and inactions of that client's attorney that occurred within the scope of the attorney's authority." *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 455 n 1; 733 NW2d 766 (2006). This is particularly true here. The scheduling order was actually entered after Runco's lawyer made his appearance and Hauer & Snover reiterated those deadlines in their motion for a stay. Thus, Runco's lawyer had ample time to respond to Hauer & Snover's motion for summary disposition.

In addition, although the trial court refused to accept Runco's response, it did allow Runco's lawyer to orally argue against the motion. Because a trial court should consider evidence and arguments raised at a hearing on a motion for summary disposition, see *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 380; 775 NW2d 618 (2009) (noting that a party may orally refer to evidence contained in the record at the hearing), Runco's lawyer had the ability to contest Hauer & Snover's motion for summary disposition on the merits. That is, although the trial court exercised its discretion to reject the late filing, it nevertheless tempered that ruling by allowing Runco to argue against the motion at the hearing. Accordingly, the trial court's refusal was not tantamount to an outright dismissal.

On this record, the trial court's decision to reject Runco's response, but permit him to argue against the motion at the hearing, fell within the range of reasonable and principled outcomes. *Maldonado*, 476 Mich at 388.

II. SUMMARY DISPOSITION

Runco next contends that the trial court erred when it granted summary disposition in Hauer & Snover's favor because there was clear evidence that they committed malpractice by failing to move for the modification of Runco's spousal support provision from his divorce settlement. This Court reviews de novo a trial court's decision to grant summary disposition. *Barnard Mfg*, 285 Mich App at 369. This Court also reviews de novo a trial court's interpretation of a divorce judgment. *Neville v Neville*, 295 Mich App 460, 466; 812 NW2d 816 (2012).

"Judgments entered pursuant to the agreement of the parties are of the nature of a contract, rather than a judicial order entered against one party." *Massachusetts Indem and Life Ins Co v Thomas*, 206 Mich App 265, 268; 520 NW2d 708 (1994). And a consent judgment is as enforceable as a judgment on the merits:

> A consent judgment is in the nature of a contract, and is to be construed and applied as such. If no reasonable person could dispute the meaning of ordinary and plain contract language, the Court must accept and enforce contractual language as written, unless the contract is contrary to law or public policy. In general, consent judgments are final and binding upon the court and the parties, and cannot be modified absent fraud, mistake, or unconscionable advantage. [*Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008) (citations omitted).]

Runco and his former wife executed a settlement agreement on September 17, 2008, following mediation with Edward Gold. In the agreement, they acknowledged "that they have been advised of their respective rights and liabilities against and to the other and to all the property and estate of the other." In addition, they agreed that the spousal support was to be absolutely "non-modifiable": "No change in circumstances of either party, even if material in nature, shall alter the parties' respective obligations or rights hereunder. This spousal support obligation is absolute and does not terminate upon Wife's death or remarriage." They even agreed that the support obligation would "not be dischargeable by John Runco in any bankruptcy or like proceedings . . . ." Finally, they agreed that the document reflected their "entire agreement" and was voluntarily executed.

Gold also created a record of the settlement agreement and asked the parties regarding its content. In detailing the agreement of the parties Gold stated, "The amount of spousal support payable under this provision is not subject to modification for any reason whatsoever." Before closing the record, Gold asked both parties about their understanding and agreement with the terms. Runco denied that he was threatened, forced, or coerced into signing the settlement agreement. He acknowledged too that the agreement was "final and binding" and that only the provisions pertaining to the children were subject to future modification. The court then entered a judgment of divorce that incorporated the parties' settlement.

This Court has held that the parties to a divorce may agree to spousal support that cannot be modified. See *Rose v Rose*, 289 Mich App 45; 795 NW2d 611 (2010). "[I]f divorcing parties negotiate a settlement in which they clearly and unambiguously forgo their statutory right to petition for modification of spousal support, courts must enforce their agreement." *Id.* at 50. And, in the absence evidence of duress, waiver, estoppel, fraud or unconscionability, this Court must enforce such agreements as written. *Rory v Continental Ins Co*, 473 Mich 457, 470, 470 n 23; 703 NW2d 23 (2005). Here, the parties clearly and unequivocally waived their right to have the spousal support modifiable. *Staple v Staple*, 241 Mich App 562, 568; 616 NW2d 219 (2000).

Once the parties executed the settlement agreement and the trial court incorporated it into the judgment of divorce, it could not be modified absent a demonstration of fraud, duress, mutual mistake, or "such other causes as any other final judgment may be modified." *Marshall v Marshall*, 135 Mich App 702, 708; 355 NW2d 661 (1984); MCR 2.612(C). Runco impliedly

argues that the economic downturn was a mistake that could warrant modification. But, contrary to Runco's contention, contractual defenses such as that of mistake typically only apply "to a fact in existence at the time the contract is executed." *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 24; 331 NW2d 203 (1982). In other words, "the belief which is found to be in error may not be, in substance, a prediction as to a future occurrence or non-occurrence." *Id.*

While the downturn in the economy was significant it cannot be viewed as entirely unforeseeable. "When a party makes a deliberate, strategic choice to settle, [he] cannot be relieved of such a choice merely because [his] assessment of the consequences was incorrect." *United States v Bank of New York*, 14 F3d 756, 759 (CA 2, 1994). Because Runco "made a conscious and informed choice of litigation strategy [he] cannot in hindsight seek extraordinary relief. To hold otherwise would undermine the finality of judgments . . . ." *Id.* (citation omitted).

Runco's settlement agreement with his former wife unequivocally established that her spousal support was not modifiable. Because there were no circumstances that would warrant relieving Runco of his obligations under the settlement agreement, Hauer & Snover cannot be faulted for failing to seek modification. *In re CR*, 250 Mich App 185, 209; 646 NW2d 506 (2001) (stating that a lawyer has no obligation to make a meritless motion).

Runco also maintains that Hauer & Snover engaged in malpractice by failing to extend discovery, which resulted in the loss of his ability to argue that certain assets were acquired before his marriage. He asserts that the trial court's refusal to accept his untimely response precluded him from demonstrating the existence of a genuine issue of fact regarding the lack of discovery. He then concludes that he is not necessarily precluded from suing for malpractice just because he voluntarily entered into a settlement agreement in the underlying divorce action.

To establish legal malpractice, Runco had to prove the existence of an attorney-client relationship, negligence in the legal representation, that the negligence was a proximate cause of an injury, and the fact and extent of the injury. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). In order to establish proximate cause, he had to show "that but for an attorney's alleged malpractice, the plaintiff would have been successful in the underlying suit. This is the 'suit within a suit' requirement in legal malpractice cases." *Manzo v Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004), citing *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586-587; 513 NW2d 773 (1994).

As a general concept, Runco is correct that settlement is not a bar to a claim of legal malpractice. *Lowman v Karp*, 190 Mich App 448, 452-453; 476 NW2d 428 (1991). When a settlement is compelled by the plaintiff's lawyer's mistakes, the lawyer may be "held liable for causing the client to settle for less than a properly represented client would have accepted." *Espinoza v Thomas*, 189 Mich App 110, 123; 472 NW2d 16 (1991).

> "Where the termination is by settlement rather than by a dismissal or adverse judgment, malpractice by the attorney is more difficult to establish, but a cause of action can be made out if it is shown that assent by the client to the settlement was compelled because prior misfeasance or nonfeasance by the attorneys left no other recourse. . . . [T]he cause of action for legal malpractice must stand or fall on its

> own merits, with no automatic waiver of a plaintiff's right to sue for malpractice merely because plaintiff had voluntarily agreed to enter into a stipulation of settlement." [*Id.* at 124 (citation omitted).]

Runco's assertions on this issue are, however, problematic on two levels. Runco does not argue that Hauer & Snover failed to conduct discovery or negligently conducted discovery—he argues that they should have extended the period of discovery. Had discovery been extended, he believes, he could have made further discoveries about assets that he already owned, had access to, and which he ultimately received under the settlement. Runco's claims about what might have been revealed had there been further discovery is mere speculation, which cannot establish causation. *Craig v Oakwood Hosp*, 471 Mich 67, 87-88; 684 NW2d 296 (2004). On this record, there is no evidence that Hauer & Snover's purported failure to conduct further discovery harmed Runco.

The later transfer of the assets also cannot be attributed to any actions by Hauer & Snover. Rather, it was Runco's own conduct that resulted in the subsequent loss of these assets. Runco agreed in the settlement to secure his obligation to pay the spousal support and agreed that the trial court could enforce the security agreement through its contempt power. Because Runco admittedly did not comply with the payment schedule, his former wife initiated contempt proceedings and he ultimately had to grant her the power to transfer his assets to satisfy the debt.

Moreover, despite Runco's claim that Hauer & Snover failed to extend discovery, he has not demonstrated that the settlement agreement results were unfavorable to him regarding the award of property as he was awarded all income-generating properties and the Florida residence. His loss of the properties was directly attributable to his failure to comply with the settlement agreement and his subsequent agreement reached to avoid contempt charges, with which he also failed to comply. These causal factors are more directly related as the cause of the alleged injury.

Runco further asserts that Hauer & Snover committed legal malpractice by failing to assure that the correct status quo order was incorporated into the settlement agreement and that his ex-wife's abuse of the credit card resulted in Runco incurring a significant financial loss. Runco acknowledges that Hauer & Snover wanted to file a motion regarding his ex-wife's failure to comply with spending limits. Indeed, Hauer & Snover prepared a motion to enforce the lower court's order and, in the motion, asked to discontinue the credit card obligation. They also asked that Runco be given credit for the loss occasioned by Runco's ex-wife's abusive spending. This motion was dated one month after the settlement agreement. Hauer & Snover further presented evidence that they contacted Runco on three separate occasions about the motion and he instructed them not to file the motion.

Given this undisputed evidence, Runco cannot establish that his lawyers' acts or omissions caused the credit card losses. See *Craig*, 471 Mich at 87-88. Even if the incorrect status quo order was incorporated into the settlement agreement, Hauer & Snover plainly provided Runco with a viable option to enforce the correct terms, which he unilaterally rejected.

Finally, Runco claims that Hauer & Snover were negligent in their representation by failing to dispute a reduction in the sale price of his Florida residence and by acquiescing to the trial court's decision to order Runco to pay his ex-wife's attorney fees.

In the settlement agreement, Runco agreed that his ex-wife would have the ability to enforce his spousal support obligations through the court's contempt powers and agreed that he would pay any attorneys fees that she incurred in enforcing the settlement. After he failed to pay his support obligation, his ex-wife petitioned the trial court to enforce the support order. At that hearing, Runco admitted that he was in arrears and the trial court accordingly granted his ex-wife a power of attorney "to execute documents and sell the [Runco's] Florida property with any resulting net proceed received and applied toward the [arrearage.]"

Runco now alleges that Hauer & Snover should have challenged the ultimate sale price for the property as too low. But he cannot sustain his assertion because he cannot establish the requisite causal connection. Runco gave his ex-wife the authority to sell his property to cover his spousal obligation and he agreed to pay her fees at the subsequent post-judgment contempt proceedings. He, therefore, cannot now contend that any loss he has incurred is attributable to Hauer & Snover's acts or omissions rather than his own failure to comply with his agreements. *Craig*, 471 Mich at 87.

The trial court did not err when it granted Hauer & Snover's motion for summary disposition.

Affirmed. As the prevailing parties, Hauer & Snover may tax their costs. MCR 7.219(A).

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Michael J. Kelly