NO. A10-716

State of Minnesota
In Court of Appeals

Peggy Greer,

Appellant,

v.

Professional Fiduciary, Inc.; Wells Fargo Bank, N.A.; Wells Fargo Investments, L.L.C. d/b/a Wells Fargo Private Bank Elder Services; and Ruth Ostrom,

Respondents.

BRIEF OF RESPONDENT RUTH OSTROM

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LEGAL ISSUE

Did the trial court correctly grant Ostrom's motion for judgment on the pleadings where Ostrom did not owe a legal duty to Plaintiff, a non-client, -- a ruling Plaintiff does not appeal -- and therefore Ostrom could not be liable to Plaintiff for an alleged breach of fiduciary duty?

STATEMENT OF THE CASE AND FACTS

Appellant Peggy Greer claims that Professional Fiduciary, Inc. ("PFI"), her former court-appointed guardian, and Wells Fargo Bank, N.A. and Wells Fargo Investments, L.L.C. d/b/a Wells Fargo Private Bank Elder Services (collectively referred to as the "Wells Fargo Defendants"), her court-appointed conservator, breached fiduciary duties owed to her (and committed other torts) while she was under their guardianship and conservatorship from March 2005 to July 2007. She also claims that PFI and its attorney, Ruth Ostrom, breached fiduciary duties (and in the case of PFI, committed other torts) by disclosing allegedly "confidential" information many months after the guardianship ended. The trial court's Order below provides an accurate summary of the underlying facts. (ADD 1-8). To avoid repeating those facts here, Ostrom simply adopts and incorporates those facts herein.

Ostrom answered Plaintiff's Complaint and then moved for judgment on the pleadings. The trial court, in its Order dated November 9, 2009, concluded that under the facts alleged by Plaintiff, Ostrom was immune from suit by Plaintiff, a non-client who was represented by several of her own lawyers, and dismissed Plaintiff's Complaint against Ostrom with prejudice. (ADD 22-25). The trial court also dismissed with prejudice Plaintiff's claims against the Wells Fargo Defendants and PFI arising out of

decisions they made while serving as Plaintiff's conservator and guardian, respectively, but denied PFI's motion to dismiss Plaintiff's claim that it breached its fiduciary duty by allegedly disclosing confidential information after it was discharged as Plaintiff's guardian. (ADD 25). Plaintiff petitioned the Minnesota Court of Appeals for discretionary review of the dismissed claims, which review was denied. (APP-538-539).

On March 18, 2010, the trial court issued an Order (1) directing entry of final judgment on the claims previously dismissed with prejudice by the trial court and (2) dismissing the remaining claims against PFI without prejudice. (APP 540-41). Judgment was entered on March 19, 2010 and Plaintiff filed this appeal on April 20, 2010. (APP-542-44).

ARGUMENT

PLAINTIFF'S ARGUMENT THAT OSTROM IS LIABLE TO HER, AS THE AGENT OF PFI, IS BOTH LEGALLY INCORRECT AND CONTRARY TO THE TRIAL COURT'S RULING THAT OSTROM IS IMMUNE FROM SUIT BY PLAINTIFF, A NON-CLIENT -- A RULING SHE HAS NOT APPEALED.

Respondent Ostrom's brief is short, largely because Plaintiff devoted only one and a half pages of her brief to her argument against Ostrom.

Standard of Review

"The only question on review of a judgment on the pleadings is whether the complaint sets forth a legally sufficient claim for relief." *Kellar v. VonHoltum*, 568 N.W.2d 186, 190 (Minn. Ct. App. 1997). Rule 12 motions to dismiss "can serve a useful purpose in disposing of legal issues with a minimum of time and expense to interested parties." *Highland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968, 973 (8th Cir. 1968).

In her Complaint, Plaintiff asserted a single claim against Ostrom for "breach of fiduciary duties" arising out of Ostrom's disclosure of allegedly "confidential family and medical information about Plaintiff." (APP 12-14). The district court correctly dismissed this claim with prejudice and in doing so made several rulings -- none of which Plaintiff attacks on appeal -- including that (1) Plaintiff cannot recover emotional distress damages from Ostrom because she failed to allege "willfulness" or "malice" on the part of Ostrom (ADD-22), (2) Ostrom is not liable to Greer, a non-client, based on the Minnesota Supreme Court's "strict privity requirement" for suits against attorneys for professional negligence (ADD-22), (3) the Restatement (Third) of The Law Governing Lawyers similarly does not contemplate a duty from attorney to non-client, absent the lawyer's commission of, or assistance of the commission of, a crime or fraud against the non-client (ADD-23), and (4) Plaintiff did not claim that she put her trust in, confided in, placed her confidence in, or relied on Ostrom in any capacity, as an attorney or otherwise (ADD-25).

As stated above, Plaintiff chose not to appeal, and barely even mentions in passing, these dispositive rulings by the trial court. They simply are not the basis of Plaintiff's appeal.

Instead, Plaintiff now asserts that the trial court erred in dismissing Ostrom, PFI's agent, because the court did not dismiss the same claim against PFI, the principal, which claim arises out of Ostrom's alleged conduct. Essentially, Plaintiff treats this case as if it is a personal injury action where an employee (agent), in the course and scope of her

employment with her employer (principal), runs over a pedestrian, thereby rendering both the employee and the employer liable, one individually, and one vicariously under the doctrine of *respondeat superior*. Plaintiff's attempt to invoke agency law to try and "backdoor" a claim against Ostrom is unavailing. She cannot simply ignore the trial court's ruling that Ostrom did not owe a legal duty to Plaintiff, a non-client, under the circumstances alleged.

While Plaintiff correctly quotes Minnesota common law regarding agency -- that an agent acting within the scope of her agency can be held personally liable *for the torts she commits* (Plaintiff's Brief, p. 17) (*citing Graff v. Robert M. Swendra Agency, Inc.*, 776 N.W.2d 744, 749 (Minn. Ct. App. 2009)) -- Plaintiff ignores the fact that Ostrom, the agent, *did not commit a tort against Plaintiff.* As the district court correctly ruled, absent extreme circumstances such as fraud or the commission of a crime (which were not alleged in Plaintiff's complaint), a lawyer is immune from suit by a non-client. (ADD22-23). Because Ostrom did not owe a legal duty to Plaintiff and therefore could not have committed a tort against her, Plaintiff's argument must be rejected.

Plaintiff's reliance on *Witzman v. Lehrman, Lehrman & Flom* of all cases is especially confounding. Not only does *Witzman*, an aiding and abetting case, not support Plaintiff's attempt to hold Ostrom jointly liable with PFI, the case in fact stands for exactly the opposite proposition -- that a professional cannot be liable for a client's breach of fiduciary duty unless a separate claim for "aiding and abetting" is pleaded and proven against the professional. 601 N.W.2d 179, 187 (Minn. 1999). Plaintiff certainly did not plead such a claim here.

CONCLUSION

This Court should affirm the trial court's dismissal of Plaintiff's Complaint against Ostrom. The trial court correctly ruled that Ostrom was immune from suit by Plaintiff, a non-client, under the alleged circumstances and Plaintiff has not appealed that ruling. She instead argues that agency law requires Ostrom to remain in this case. Of course, Plaintiff's argument is fundamentally flawed because Ostrom did not owe a legal duty to Plaintiff and therefore did not, and could not, commit a tort against her.

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Dated: 7/19/10

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