

2019 WL 4862171

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United States District Court, N.D. Illinois, Eastern Division.

WILLIAM J. STEVENS, Plaintiff,
v.
RICHARD SHARIF, Defendant,
and
THE ESTATE OF SOAD WATTAR, Counter-Plaintiff.

No. 15 C 1405
|
Filed: 09/30/2019

FINDINGS OF FACT & CONCLUSIONS OF LAW

Honorable [Thomas M. Durkin](#) United States District Judge

*1 Attorney William Stevens alleges that his former client, Richard Sharif, failed to pay him for legal services. Sharif has filed a counterclaim for malpractice against Stevens, and the Estate of Soad Wattar, Sharif's mother, has intervened. The case proceeded to a bench trial on November 5, 2018, R. 169, and the Court received evidence through November 16, 2018, R. 185. The Court orally found in Stevens's favor on his claim for legal fees on November 16, 2018. *See* R. 199 at 1495-1504.

The Court ordered post-trial briefing on Sharif's malpractice claim. Briefing was complete on February 11, 2019.

Pursuant to [Federal Rule of Civil Procedure 52\(a\)](#), this opinion sets forth the Court's findings of fact and conclusions of law on Sharif's malpractice counterclaim. These findings are based on the documentary evidence and trial testimony. They are also based on the Court's credibility determinations after observing the witnesses testify. All findings are made according to a preponderance of the evidence standard. For the following reasons, the Court finds in favor of Stevens on Sharif's malpractice claims, and judgment will be entered against Sharif and the Estate.

Background

Sharif had a business relationship with a company called Wellness International. That relationship soured, and Sharif sued Wellness in the Northern District of Texas. *See* 05 C 1367 (N.D. Tex.). During the course of that case, Sharif failed to participate in discovery. *See Sharif v. Wellness Int'l Network, Ltd.*, 2007 WL 9711724, at *2 (N.D. Tex. July 16, 2007). Sharif's failure to respond to requests for admission led them to be deemed admitted by the court. Those admissions in turn caused summary judgment to be entered against Sharif and in favor of Wellness in an amount of \$655,596.13. *See Sharif v. Wellness Int'l Network, Ltd.*, 2008 WL 5220526, at *1 (N.D. Tex. Dec. 12, 2008).

Due to that judgment, Sharif filed for bankruptcy in the Northern District of Illinois. *See* R. 192 at 77 (182:9-11). Stevens represented Sharif in the bankruptcy proceedings. During the bankruptcy case, Wellness filed an adversary complaint seeking a declaratory judgment that Sharif was the true owner of his mother's trust. *See* 09 A 00770 (Bankr. N.D. Ill.). As in Texas, Sharif engaged in discovery abuses that eventually led the bankruptcy court to sanction Sharif by entering judgment against him in the adversary proceeding, which led to the court declaring his mother's trust to be a part of Sharif's bankruptcy estate. *See* 09 A 00770, R. 53 (Bankr. N.D. Ill. July 6, 2010).¹ This in turn caused Sharif's bankruptcy petition to be denied.

Sharif, again represented by Stevens, appealed to the district court. *See Sharifeh v. Fox*, 2012 WL 469980, at *1 (N.D. Ill. Feb. 10, 2012). After the appeal was fully briefed, Stevens sought leave to file supplemental briefing arguing that the bankruptcy court lack jurisdiction to enter judgment in the adversary complaint, based on the Supreme Court's decision in *Stern v. Marshall*, 564 U.S. 462 (2011). *See Sharifeh*, 2012 WL 469980, at *10. The district court found that the argument had been waived, and affirmed the bankruptcy court. *Id.*

*2 Sharif, still represented by Stevens, appealed to the Seventh Circuit. *See Wellness Int'l Network, Ltd. v. Sharif*, 727 F.3d 751 (7th Cir. 2013). Stevens again waited until the reply brief to raise the *Stern* argument, and the Seventh Circuit stated that "[u]nder ordinary principles of waiver ... Sharif's argument is not preserved because he waited too long to assert it." *Id.* at 767. The Seventh Circuit held, however, that a *Stern* issue could not be waived and remanded to the district court. *Id.* at 773 ("In sum, we hold that under current law a litigant may not waive an Article III, § 1, objection to a bankruptcy court's entry of final judgment in a core proceeding.").

Wellness appealed. The Supreme Court reversed the Seventh Circuit and held that the *Stern* argument was waivable. *See Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1944 (2015) ("The entitlement to an Article III adjudicator is 'a personal right' and thus ordinarily 'subject to waiver[.]'"); *id.* at 1949 ("[W]e leave it to the Seventh Circuit to decide on remand whether Sharif's actions evinced the requisite knowing and voluntary consent, and also whether, as Wellness contends, Sharif forfeited his *Stern* argument below."). On remand, the Seventh Circuit held that Stevens had forfeited the *Stern* argument by waiting to raise it until the reply brief. *See Wellness Int'l Network, Ltd. v. Sharif*, 617 Fed. App'x 589, 590 (7th Cir. 2015) ("We conclude that Sharif forfeited his *Stern* argument when he was first before us.").

Sharif argues that Stevens committed malpractice in two ways: (1) by failing to produce documents to opposing counsel that Sharif tendered to him, ultimately leading the bankruptcy court to enter judgment against Sharif as a sanction for failing to comply with discovery orders; and (2) failing to properly raise an argument before the district court and court of appeals based on *Stern* that would have permitted the district court to review the bankruptcy court's entry of judgment against Sharif under a lower standard.

Analysis

"The basis of a **legal malpractice** claim is that, absent the former attorney's negligence, the plaintiff would have been compensated for an injury caused by a third party." *Stevens v. McGuireWoods LLP*, 43 N.E.3d 923, 927 (Ill. 2015). "To prevail on such a claim, a plaintiff must plead and prove that (1) the defendant attorneys owed the plaintiff a duty of due care arising from the attorney-client relationship; (2) the defendants breached that duty; and (3) as a direct and proximate result of that breach, the plaintiff suffered injury." *Id.* "To satisfy the element of proximate cause, the plaintiff must plead sufficient facts to establish that 'but for' the negligence of the attorney, the plaintiff would not have suffered actual damages." *In re Estate of Powell*, 12 N.E.3d 14, 22 (Ill. 2014). "Because **legal malpractice** claims must be predicated upon an unfavorable result in the underlying suit, no malpractice exists unless counsel's negligence has resulted in the loss of the underlying action." *Ignarski v. Norbut*, 648 N.E.2d 285, 288 (Ill. 1995); *see also Nelson v. Quarles and Brady, LLP*, 997 N.E.2d 872, 880 (Ill. App. Ct. 1st Dist. 2013) ("A **legal malpractice** suit is by its nature dependent upon a predicate lawsuit. Thus, a **legal malpractice** claim presents a 'case within a case.'" (internal citation omitted)). "Plaintiff is required to establish that but for the negligence of counsel, he would have successfully prosecuted or defended against the claim in the underlying suit." *Ignarski*, 648 N.E.2d at 288. "Damages will not be presumed, and the client bears the burden of proving he suffered a loss as a result of the attorney's alleged negligence." *Id.*

I. Document Production

*3 The Court first addresses Sharif's claim that Steven's committed malpractice by failing to produce documents in the bankruptcy proceedings that Sharif tendered to him. Sharif's trial testimony is the only evidence of such a failure by Stevens. The Court finds this testimony incredible. Sharif's deposition was taken at a point in the bankruptcy proceedings leading up to the court's entry of judgment against Sharif for failing to produce documents. Sharif never mentioned that Stevens failed to turn over documents Sharif had tendered. Indeed, Sharif testified that a number of production failures were his own fault. Specifically, he testified: that he did not look for or could not find many categories of responsive documents he had an obligation to produce; and that he failed to examine documents he produced to ensure their completeness. *See* Stevens Ex. 55 at 71:17–72:13; 81:18–83:5; 86:19–87:15; 88:14–90:2; 96:11-14; 101:4-7, 17-20; 166:14-21. This deposition was taken when Sharif knew that the bankruptcy judge was considering sanctioning him for discovery violations. If Sharif truly believed Stevens was at fault, he would have said so at this deposition.

Moreover, Sharif's failure to comply with document subpoenas and production orders during the bankruptcy case is part of a pattern of contempt for the legal process. It was Sharif's failure to produce documents during litigation in Texas that led to a judgment being entered against him, causing him to seek bankruptcy protections in the first place. This pattern of conduct, which Sharif admitted during his deposition, thoroughly undermines the credibility of his trial testimony implicating Stevens in the document production failures.

By contrast, Stevens credibly testified that he produced whatever documents Sharif tendered to him. He also gave extensive testimony about how those documents were assembled for production. The problem was Sharif did not give Stevens certain documents that should have been given to him. Stevens's expert reviewed the record of proceedings and Stevens's communications with Sharif and determined that Stevens exercised a reasonable degree of care and skill with respect to discovery in the bankruptcy court and the subsequent motion for sanctions. *See* R. 205-4 at 71-77 (pp. 3-9). The Court finds that this opinion is in accord with the underlying record and gives it great weight. It is unlikely that even a negligent attorney would allow a failure to produce documents that the client had actually tendered to result in the sanction of default judgment. It is plausible that an attorney would produce such documents late. It is not plausible that an attorney would not produce them at all, absent evidence of extenuating circumstances or animus towards the client. There is simply no such evidence in this case.

Therefore, the Court finds for Stevens on Sharif's malpractice claim based on Stevens's alleged failure to produce documents in discovery.

II. Forfeiture of the *Stern* Argument

Sharif also claims that Stevens was negligent in not raising a *Stern* argument before the district court or the court of appeals in a timely manner. As mentioned, to prove his malpractice claim, Sharif must show by a preponderance of the evidence that (1) Stevens violated the applicable standard of care, and (2) the violation proximately caused his injury. In other words, Sharif must show hypothetically that if Stevens had complied with the standard of care, judgment would not have been entered against Sharif in the bankruptcy proceedings. This is what is known as proving a "case within a case."

A. Standard of Care

According to Stevens's expert:

Because of the narrow scope of *Stern*, the uncertainty as to its impact, the likelihood that raising the argument would not have affected the outcome of the action, and the risk that making this argument would undermine Mr. Sharif's credibility, not making the argument was within the applicable standard of care.

R. 205-4 at 79 (p. 11). The Court finds this reasoning unconvincing. First, to the extent *Stern*'s holding is "narrow" in scope, it nevertheless cannot be disputed that *Stern* prohibits bankruptcy judges from issuing final judgment on certain issues, and instead limits them to issuing proposed findings. It also cannot be disputed that the standard of review for proposed factual findings is de novo, see 28 U.S.C. § 157(c)(1), whereas the standard of review for factual findings underlying a final judgment is clear error. See *In re Jahrling*, 816 F.3d 921, 924 (7th Cir. 2016) ("[O]n appeal from a final judgment in an adversary action on the dischargeability of a debt. ... [w]e review the bankruptcy court's findings of fact for clear error and its legal conclusions de novo."). And while there may have existed some "uncertainty as to [*Stern*'s] impact," Stevens was certainly aware of *Stern*'s potential impact by the time he sought leave to file a supplemental brief in the district court based on *Stern*'s holding. In his motion for leave, Stevens alluded to the potential impact of the different standards of review when he sought to present argument that "the bankruptcy court's order should only be treated as a report and recommendation and should not be treated as a final order." 10 C 5303, R. 28 at 1-2. Despite Stevens's awareness of *Stern*'s potential impact, he compounded his mistake in the district court briefing by repeating it on appeal. Stevens's attempt to raise *Stern* in both the district and appellate courts belies his argument that *Stern*'s scope is too "narrow" or "uncertain" to place his obligation to raise the argument within the standard of care.

*4 The expert's further contention that Stevens was justified in not raising the *Stern* issue because it "would undermine Mr. Sharif's credibility" is also belied by the fact that Stevens actually did raise the issue before the district and appellate courts. If Sharif's credibility was a legitimate basis to avoid raising a *Stern* argument, Stevens wouldn't have raised it at all.

Stevens has produced no other evidence that his failure to raise an issue that could have lowered the standard of review for a judicial decision that prejudiced his client was within the standard of care. Thus, the Court finds that Stevens violated the standard of care.

B. Proximately Caused Injury

Stevens argues that any breach of the standard of care did not proximately cause Sharif any injury for two reasons: (1) in the hypothetical case of Stevens timely raising the *Stern* argument and the bankruptcy court's final judgment being vacated on that basis, it is highly likely that the district court would have reached the same conclusion as the bankruptcy court; and (2) even if Stevens had not forfeited the *Stern* argument, Sharif and Stevens consented to the bankruptcy court's jurisdiction, and the decision to consent was within the standard of care.

1. Consent

Taking the second argument first, in reversing the Seventh Circuit's holding that a *Stern* argument cannot be waived, the Supreme Court also instructed the Seventh Circuit to consider whether Sharif consented to the bankruptcy court's jurisdiction. However, the Seventh Circuit found that Sharif had forfeited the argument because Stevens waited to raise it in the reply brief, and so the Seventh Circuit did not reach the question of consent.

If Stevens and Sharif consented to the bankruptcy court's jurisdiction (and that decision was within the standard of care), Stevens's failure to challenge the bankruptcy court's jurisdiction under *Stern* on appeal would be irrelevant. However, the record before the Court does not permit the Court to decide whether Stevens and Sharif consented to jurisdiction in the

bankruptcy court. Certainly, the timeline of events indicates that Stevens could have been aware of the potential of such an argument during the bankruptcy cases—i.e., before appeal to the district and appellate courts—and could have raised it then. The Ninth Circuit case underlying *Stern* was briefed and argued (on June 25, 2009) before the adversary complaint at issue in this case was filed (on August 24, 2009). And the Ninth Circuit’s decision was issued (on March 19, 2010) about four months before the bankruptcy court entered judgment against Sharif (on July 6, 2010).

But consent must be “knowing and voluntary,” meaning “the litigant or counsel was made aware of the need for consent and the right to refuse it.” *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1948 (2015). There is no evidence that Stevens or Sharif actually were aware of this possibility, let alone that the bankruptcy court made them aware of their right to consent or not.² The issue never came up during the trial testimony of either party. In the absence of a developed record on this issue, Stevens cannot defend his breach of the standard of care by arguing that Sharif gave prior consent to the bankruptcy court’s jurisdiction.

2. The Hypothetical “Case Within a Case”

*5 Generally, when a plaintiff claims that an attorney was negligent for failing to raise an issue on appeal, the salient question is whether the appellate court would have decided the appeal differently had the issue been properly raised. But here, Stevens does not contest that the Seventh Circuit would have held that the bankruptcy court lacked jurisdiction had he not forfeited that argument. This is of course because the Seventh Circuit actually did find that the bankruptcy court lacked jurisdiction before the Supreme Court reversed its holding that *Stern* issues cannot be forfeited. See *Wellness Int’l*, 727 F.3d at 775-76 (“[W]e hold that ... the bankruptcy court ... lacked constitutional authority to enter final judgment on [Wellness’s] alter-ego claim.”). Furthermore, the damages arise not directly from the Seventh Circuit’s decision, but from the underlying bankruptcy court decision entering judgment against Sharif. Sharif argues that but for Stevens’s negligence in forfeiting the *Stern* argument in the Seventh Circuit, he would have been able to challenge the judgment against him in the district court under a lower standard of review. The fact that Sharif’s injury was not immediately caused by Stevens’s negligence (i.e., it was not the Seventh Circuit decision that prejudiced him, but the chance to make an argument to the district court that the Seventh Circuit decision prevented) causes the Court to question whether the causal chain is sufficiently proximate.

It is unnecessary, however, to decide that particular issue, because Sharif has failed to prove by a preponderance of the evidence that a reasonable court would have decided his case differently than the bankruptcy court actually decided it. See *Nelson*, 997 N.E.2d at 894 (“[A] malpractice plaintiff is not required to demonstrate what award the *original judge* or jury would have made if no malpractice had occurred. Once a malpractice plaintiff has demonstrated that his attorney fell below a reasonable standard of professional conduct, the factfinder must determine what a *reasonable judge* or jury would have concluded and compare that conclusion to the actual resolution of the underlying action to determine damages.”).

In order to succeed on his malpractice claim, Sharif must prove that if Stevens had properly raised the *Stern* argument, he would have avoided the judgment imposed by the bankruptcy court. Sharif’s expert offers no opinion on this issue. And Sharif offers no argument, let alone evidence, that any court would have reached a different decision. He only argues that the district court *could* have reached a different decision than the bankruptcy court. But he makes no argument that a reasonable court *would* have made a different decision, which is necessary to prove proximate cause and damages.

It is likely that the reason Sharif has failed to make such an argument or produce any evidence in that regard is that the record of the proceedings in the bankruptcy court is entirely to the contrary. The bankruptcy court’s order recounts a pattern of failures by Sharif to comply with discovery requests and court orders, across a series of court actions, spanning many years, evincing contempt for the judicial process. Regarding the bankruptcy court proceedings in particular, the bankruptcy court described a long list of highly relevant documents Sharif failed to produce. Sharif’s failures to produce documents evinced not simply negligence, but an intent to hide the extent of his finances. Debtors must be thoroughly financially transparent in order to be entitled to the extraordinary relief of debt discharge available in the bankruptcy court. The lack of transparency on the level exhibited by Sharif merited judgment against him as an appropriate sanction.

The Court's findings against Sharif are bolstered by the unusual circumstances of this case—i.e., two courts have already passed judgment on the claim at issue here. Generally, in a malpractice case the court must determine what a reasonable court would have decided precisely because the attorney's negligence prevented a court from reaching whatever issue prejudiced the client. But here, as discussed, the prejudice to Sharif arises not from the failure of the Seventh Circuit to address the *Stern* argument but from the Seventh Circuit's decision preventing Sharif from having a second (or third) bite at the apple on the question of whether judgment was properly entered against him in the bankruptcy court. This means that this Court already has the benefit of opinions on the reasonableness of entry of judgment against Sharif from Judge Cox in the bankruptcy court, and Judge Leinenweber in the district court. Both judges assessed Sharif's actions and determined that they merited entry of judgment. True, Judge Leinenweber's assessment was constrained by the clear error and abuse of discretion standards of review, and that constraint is the heart of Sharif's claim. But Judge Cox's decision was made in the first instance, and Sharif has not given this Court any reason to believe that Judge Cox acted unreasonably. Moreover, even though Judge Leinenweber's decision was constrained by the standard of review, he noted that "it is clear, based on Sharif's own deposition, that he failed to turn over numerous categories of documents," and that Sharif did not "substantially compl[y] with the discovery requests." *Sharifeh*, 2012 WL 469980, at *9. The reasonable decisions of Judges Cox and Leinenweber serve to confirm this Court's independent finding that no reasonable court would have concluded otherwise. Sharif has failed to meet his burden of proof to demonstrate proximate cause by a preponderance of the evidence, so the Court finds for Stevens on Sharif's malpractice claim that was based on Stevens's forfeiture of the *Stern* argument.

Conclusion

*6 Therefore, the Court finds for Stevens on Sharif's malpractice claims. Judgment will be entered in an amount of \$150,000 for Stevens and against Sharif on Stevens's claim for attorney's fees. Judgment will also be entered for Stevens and against Sharif and the Estate on Sharif's malpractice claims.

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Footnotes

- ¹ The substance of the agreements as to the true ownership of the mother's trust were never addressed.
- ² Stevens's expert opines that the "Seventh Circuit likely would have found consent based upon many factors, including the active participation in the bankruptcy court and the acknowledgement that all the claims in the complaint against Mr. Sharif were core proceedings." R. 205-4 at 80 (p. 12). But while expert testimony is necessary to establish the standard of care, it is unclear whether expert opinion is relevant to the proximate cause and injury elements of a malpractice claim—i.e., determining what a reasonable court would have decided in the hypothetical "case within a case." See *Bourke v. Conger*, 639 F.3d 344, 348 (7th Cir. 2011) ("While the [expert] report discusses various ways in which the Appellees could have better represented Bourke's interests (e.g., by using their peremptory challenges, by questioning jurors for their opinions regarding the use of alcohol), this discussion only goes towards establishing that the Appellees breached their duty to Bourke, not causation. The [expert] report fails to identify facts that support its conclusion that the Appellees' alleged errors had any role in causing the jury to find Bourke guilty. This shortcoming prevents the [expert] report from creating a genuine, disputed issue of fact concerning causation. Because of this flaw and the fact that Bourke did not present the court with any other evidence relevant to this element of his prima facie case, it was appropriate for the district court to grant summary judgment against Bourke's claim."). Determining what a reasonable court would decide is what this Court does every day (particularly with respect to the Seventh Circuit, since that court's reasoning is binding on this Court). And in any event, Stevens's expert does not support his opinion with reference to any case law or the applicable standard for determining "consent." So Stevens's expert's report and testimony is not helpful on this issue.

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