

MASSACHUSETTS LAWYERS WEEKLY

Divorce lawyer fends off ‘negotiating malpractice’ suit

Client alleges key term omitted from settlement

By: Pat Murphy ⌂ November 2, 2017



A lawyer could not be sued for malpractice based on an allegation that a post-divorce settlement she negotiated should have included a term capping her client’s open-ended obligation to make his ex-wife’s mortgage payments, a Superior Court judge has ruled.

The plaintiff, David Murray, retained defendant Ashley M. Greer in 2011 when his former wife filed a complaint for contempt. The wife’s complaint alleged he owed nearly \$30,000 in unpaid child support and health insurance premiums due under the terms of a 1998 divorce decree.

In his malpractice suit, the plaintiff claimed Green was negligent in failing to advise against his signing a settlement that did not include a term requiring the wife to sell her home by a date certain or limiting his obligation to make mortgage payments to a specific sum.

But Judge Mary K. Ames concluded that the defendant lawyer and her firm, Rudolph Friedmann in Boston, were entitled to summary judgment on the plaintiff’s legal malpractice claim. Specifically, the judge found that the plaintiff could not establish causation, i.e., that the omission of the mortgage limitation clause resulted in injury.

“The uncontradicted record evidence indicates [the wife] never had any intention of agreeing to include a provision in the Settlement that would have required her to sell the Property by a specific date,” Ames wrote. “Given this evidence, whether Murray could have obtained a different or better result is mere speculation.”

The nine-page decision is *Murray v. Greene, et al.*, Lawyers Weekly No. 12-133-17. The full text of the ruling can be ordered at [here](#). (The defendant’s name was misspelled as “Greene” in court records.)

Practical result?

The decision reflects some underlying realities of attempting to hold a lawyer liable for failing to ensure that a particular term is included in an agreement, said George A. Berman of Boston, who represented the defendant attorney and law firm.

“It is far easier to demand favorable contract terms than it is to obtain them,” Berman said. “Accordingly, the claim that an attorney failed to include more advantageous terms in a contract must be accompanied by proof that the other side would have agreed to them.”

Berman said such proof is “nearly impossible” to come by in most cases, whether the term was requested in negotiations and rejected, or never requested at all.



“Any other rule would make the standard of care require that one-sided terms, no matter how outlandish and unreasonable, be included in all negotiations in order to protect the attorney from a subsequent ‘negotiating malpractice’ claim,” he observed.

Charles P. Kazarian, a legal-malpractice plaintiffs’ attorney, said that whenever he gets a case in which the client claims his lawyer should have included a more favorable term in a deal, his first question to the client is whether there is any evidence that the other party would have signed an agreement that included the provision in question. The Boston lawyer said he was not surprised by the outcome in *Murray*.

“Not only is there no evidence that the wife would have agreed, there’s actually evidence to the contrary,” he said.

Without such evidence, Kazarian said, an alternative strategy is often in order.

“The best way to win a case like that is to prove that the lawyer failed to advise as to the pros and cons of rejecting the settlement because it was inadequate and instead go to trial,” Kazarian added.

Wellesley divorce lawyer Jonathan E. Fields suggested that if the plaintiff truly wanted to dispute the duration of mortgage payment obligation, he should have responded to the wife’s contempt action with the filing of a complaint in equity alleging mortgage overpayment.

“Maybe that would have at least given him leverage,” Fields said.

Worcester litigator Scott S. Sinrich said *Murray* presented a particularly bad set of facts for the plaintiff since it was a domestic relations matter that required the plaintiff to swear in open court that he understood the settlement agreement and accepted its terms.

“When it’s a private settlement, you have no idea what the lawyer says to the client and the client says to the lawyer,” said Sinrich, whose practice includes professional and legal malpractice.

Jessica G. Kelly of Boston, who represents lawyers and law firms in professional liability matters, said *Murray* is good news for defendants who have seen their ability to get out of legal malpractice cases via summary judgment and other dispositive motions eroded by recent decisions in other cases.

“Here, the judge made the right call in first finding no breach of duty and then no causation,” Kelly said. “That affirms longstanding principles that a legal malpractice plaintiff must prove that, absent the lawyer’s negligence, he or she would have obtained a better outcome.”

Joseph P. Crimmins represented the plaintiff. The Boston attorney did not respond to a request for comment.



“The best way to win a case like that is to prove that the lawyer failed to advise as to the pros and cons of rejecting the settlement because it was inadequate and, instead, going to trial.”

— Charles P. Kazarian, Boston



CHARLES
KAZARIAN

Post-divorce dispute

The plaintiff’s 1998 divorce decree required him to convey a property in Billerica to his wife so that she had a home in which to raise their three minor children. The plaintiff was also obligated to make the mortgage payments on the property.

While the plaintiff would later dispute that his obligation to make mortgage payments was open-ended, he in fact paid the mortgage continuously from 1998 through 2011.

In 2011, the wife filed a complaint for contempt alleging that the plaintiff owed \$22,500 in child support and \$5,815 in unpaid health insurance premiums. A mediator subsequently assisted the parties in negotiating a settlement of the dispute, with Green representing the plaintiff and the wife proceeding without representation.

Under the settlement, the wife forgave the \$22,500 the plaintiff owed for child support as well as the \$5,815 in unpaid health insurance premiums. In return, the plaintiff agreed to pay a \$9,000 property tax arrearage and a \$1,000 air conditioning bill.

In addition to agreeing to abide by his child support and health insurance obligations in the future, the plaintiff stated in the agreement that he would pay the mortgage on the wife’s home “until such time that the house is sold.” During the course of negotiations, the wife expressed an intent to sell the home because it was “too big.”

In his lawsuit against Green and her firm, the plaintiff alleged that the attorney was negligent for advising him to sign the settlement agreement when it did not include an additional provision either setting a deadline for the wife to sell the house or, in the alternative, limiting his mortgage obligation to a certain amount.

The plaintiff alleged that, because he followed Green’s advice, he made mortgage payments totaling \$22,100 until 2014, when he was forced to pay \$30,000 to terminate his mortgage obligation. The plaintiff further alleged that he incurred an additional \$23,000 in legal fees to resolve the matter.

Pure speculation?

In granting the defendants’ motion for summary judgment, Ames observed that proximate cause is an essential element of a legal malpractice claim, meaning the plaintiff had to show that the attorney’s breach of duty was the proximate cause of the damages alleged.

But the judge found the plaintiff had “nothing more than speculation” to support his claims against the defendant. As a threshold matter, Ames wrote, there was no evidence supporting the plaintiff’s claim that Green breached a duty to him during the course of negotiating the settlement by never asking the wife if she would agree to include a provision requiring her to sell the house by a specific date.

“At her deposition, [Green] testified that she asked [the wife] multiple times about including such a provision in the Settlement and that, each time she asked, [the wife] refused to contemplate including such a requirement, especially in light of the mediator’s position that [the wife] was not legally obligated to sell the Property,” Ames wrote.

The judge noted that because the plaintiff acknowledged he was not present during those negotiations, he had no evidence to refute the attorney’s deposition testimony.

Ames said the plaintiff also lacked evidence of causation. Specifically, the judge pointed out that a malpractice claim based on an allegation that an attorney failed to negotiate a particular provision in a contract must be supported by evidence that the other party to the transaction would have agreed to the provision.

On that point, the judge reemphasized that Green’s uncontradicted deposition testimony was that the wife steadfastly refused to agree to such a provision. Further, the wife testified that, while she had plans to eventually

sell the house, she never agreed to sell by a specific date.

The judge said the plaintiff only bolstered that evidence with his own testimony that neither the wife nor Green told him that the wife had agreed to sign an agreement that included a provision identifying a specific sale date.

“Murray read and understood the Settlement before signing it; he knew Paragraph 6 obligated him to pay the mortgage on the Property,” Ames wrote. “And, since he failed to present evidence adequate to demonstrate proximate cause, an essential element of his malpractice action, the Defendants are entitled to summary judgment.”

Murray v. Greene, et al.

THE ISSUE: Could a malpractice action be pursued against a lawyer based on an allegation that a post-divorce settlement she negotiated should have included a term capping her client’s open-ended obligation to make his former wife’s mortgage payments?

DECISION: No (Superior Court)

LAWYERS: Joseph P. Crimmins of Posternak, Blankstein & Lund, Boston (plaintiff)

George A. Berman, Timothy O. Egan and Courtney S. Winters, of Peabody & Arnold, Boston (defense)

RELATED JUDICIAL PROFILES

- AMES, MARY K.

LAWYERS WEEKLY NO. 12-133-17

Massachusetts Lawyers Weekly

- Attorneys – Legal malpractice – Causation

ORDERING FULL TEXT OPINIONS

To search the marketplace for this full text opinion, click the Lawyers Weekly Number below.

- 12-133-17

Please Note: Supreme Judicial Court and published Appeals Court opinions are not available for purchase, but can be accessed online by clicking on the full-text opinion link under “related articles.”

For information on ordering full text opinions, click [here](#).

Issue: NOV. 6 2017 ISSUE

YOU MIGHT ALSO LIKE



Exxon must disclose climate change info

© April 13, 2018

Landlord-tenant attorneys scrap over mandatory escrow

© April 12, 2018

‘Lost settlement opportunity’ suit not time-barred, judge says

© April 12, 2018

Copyright © 2018 Massachusetts Lawyers Weekly

10 Milk Street, Suite 1000,

Boston, MA 02108

(877) 615-9536

