

IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00857 COA

JOE H. SANDERSON AND MARTHA SANDERSON

APPELLANTS

v.

LEM G. ADAMS, III

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. ROBERT L. GOZA

COURT FROM WHICH APPEALED: RANKIN COUNTY CIRCUIT COURT

FOR APPELLANTS:

LUKE DOVE

ATTORNEY FOR APPELLEE:

J. FRED SPENCER, JR.

NATURE OF THE CASE: LEGAL MALPRACTICE

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT IN FAVOR OF ADAMS

BEFORE THOMAS, P.J., KING, AND MCMILLIN, JJ.

THOMAS, P.J., FOR THE COURT:

SUMMARY

Joe Sanderson, ("Joe"), and Martha Sanderson, (Martha"), filed a complaint against Lem Adams for alleged legal malpractice arising out of the preparation and recording of a deed transferring a parcel of real property from Joe to Martha. After the Sandersons failed to respond to Request for Admissions, the trial court granted Adams' motion for summary judgment. The Sandersons appealed this judgment, assigning two issues as error:

- I. DID THE SANDERSONS PROVE A PRIMA FACIE CASE OF LEGAL MALPRACTICE, and
- II. WERE THERE ANY GENUINE ISSUES OF MATERIAL FACT?

FACTS

In April of 1987, Joe requested that Adams prepare four warranty deeds to transfer four parcels of real property from Joe to Martha. Adams prepared deeds for three of the parcels, and Joe, who is a licensed attorney, signed the deeds. Adams did not hold a formal closing, nor did any money pass through his trust account in relation to this transfer of title. Martha paid no monetary consideration to Joe in exchange for title to these properties.

At the time these deeds were prepared, Joe had outstanding personal guaranties on behalf of Four-O Inc., ("Four-O"), a television station which was on the verge of bankruptcy. Although Joe was unable to meet his financial obligations under the personal guaranties, he sought to transfer four unencumbered properties to his wife, Martha.

After Four-O sought bankruptcy protection in 1988, Joe was sued on his personal guaranties on at least two occasions-- by Deposit Guaranty National Bank and by Harris Corporation. In its complaint, Deposit Guaranty sought to have the transfers of the three parcels of property in May 1987, set aside as fraudulent conveyances. However, the matter was settled, and the parties stipulated that the transfers were not fraudulent. Harris Corporation filed suit against Joe on a guaranty of a Four-O debt due on June 1, 1987, and a judgment was entered in its favor. Since Joe was still the record owner of the fourth parcel, the fourth parcel was subject to the judgment.

The Sandersons filed suit against Adams, alleging that as a result of his failure to prepare the fourth deed, they were unable to place that property outside the reach of Joe's creditors. The trial court granted Adams' motion for summary judgment and entered the following final judgment:

THIS CAUSE came on for hearing on the Motion for Summary Judgment of the defendant, Lem G. Adams, III, ("Adams") and the court having considered the Motion together with supporting exhibits, the response of the plaintiffs with supporting exhibits, the briefs of both parties, and arguments of counsel finds that there are no triable issues of fact and the Motion should be granted based on the findings of fact and conclusions of law set forth below.

This is a legal malpractice action in which Joe and Martha Sanderson sued Adams for his alleged legal malpractice in failing to prepare a deed to a tract of property located in Rankin County, Mississippi. The following facts are undisputed.

On or before May 8, 1987, plaintiff, Joe Sanderson, requested that Adams prepare four (4) separate deeds to transfer four (4) different tracts of property Joe Sanderson owned to his wife, Martha Sanderson. Adams prepared three (3) deeds for Joe Sanderson Purporting to convey three of the properties to Martha Sanderson. Adams did not prepare one deed covering the property at issue in the complaint. At the time Joe Sanderson made his request of Adams he had outstanding personal guaranties on behalf of Four-0, Inc. d/b/a Gulf Coast Television station ("Four-O) and "Four-O" was experiencing financial difficulty. At that time Sanderson lacked the financial ability to honor his guarantees of the Four-O debts.

The four (4) properties for which Joe Sanderson asked Adams to prepare deeds were not encumbered by any deeds of trust or other liens. Martha Sanderson paid no monetary consideration whatsoever to Joe Sanderson for the deeds to the properties at issue and the transfers were not made to satisfy any lien or debt Joe Sanderson owed Martha Sanderson. No formal closing was held.

In August of 1989, a judgment in favor of Harris Corporation in the amount of \$366,081.00 was entered against Joe Sanderson in the United States District Court for the Southern District of Mississippi, Southern Division, based on his personal guarantee of a Four-O debt.

Joe Sanderson's complaint states that had Adams prepared the deed to the property at issue Joe Sanderson would have placed this property outside the reach of his creditors and he would not be faced with the threat of execution on the property by Harris Corporation. Since the date of the proposed transfer, Joe Sanderson has continued to pay ad valorem taxes on the property for all years but one since 1987 and has exercised ownership and control over the property.

Under the undisputed factual situation presented, the plaintiffs' claim of negligence against Adams cannot be sustained as a matter of law. First, although Joe Sanderson requested Adams to prepare the deed, Joe Sanderson knew that Adams had not prepared the deed and further knew that he had not been paid for the deed. This is not a situation where a deed that Adams prepared misdescribed the property, rather the situation is that the deed was simply not prepared, and Sanderson knew, or should have known, the deed had not been prepared.

Second, the Court finds from the undisputed evidence in the record that it is clear that the purported transaction was intended to place the property outside the reach of Joe Sanderson's creditors. It is clear that the proposed transaction was not an arms length transaction. Indeed the three deeds that Adams did prepare were later attacked as fraudulent in a lawsuit by one of Joe Sanderson's creditors. That lawsuit was settled with a stipulation between the parties to that lawsuit that those conveyances were not fraudulent; however, that stipulation is not binding on the Court in this case. The Court therefore finds that on the record presented, the transaction through which Joe Sanderson was to convey the property at issue in this lawsuit was intended to be fraudulent as to Joe Sanderson's creditors. Accordingly, Adams cannot be held liable for malpractice because the purported fraudulent conveyance did not occur.

Finally, it is clear that even if the actions or inactions of Adams were negligence, the acts were not the proximate cause of any loss to Joe Sanderson or Martha Sanderson. Joe Sanderson intended to divest himself of his ownership in the property without receiving any monetary consideration. Thus, he has suffered no loss. Martha Sanderson was never paid any monetary consideration for the proposed conveyance. Thus, she has suffered no loss. The Court finds that plaintiffs' claims against

Adams are not viable under the laws of the state of Mississippi. Accordingly, plaintiffs' claims against the defendant Lem G. Adams, III must be dismissed with prejudice.

The Sandersons have appealed the trial court's granting of summary judgment.

ANALYSIS

This Court conducts a de novo review of the record to determine whether the trial court properly granted a motion for summary judgment. *Nationwide Mut. Ins. Co. v. Garriga*, 636 So. 2d 658, 661 (Miss. 1994); *Pace v. Financial Sec. Life*, 608 So. 2d 1135, 1138 (Miss. 1992); *Short v. Columbus Rubber & Gasket Co.*, 535 So. 2d 61, 63 (Miss. 1988). The de novo review includes viewing the evidentiary matters in the light most favorable to the nonmovant. *Garriga*, 636 So. 2d at 661. The movant has the burden of showing that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. *Daniels v. GNB, Inc.*, 629 So. 2d 595, 599 (Miss. 1993). However, this burden on the moving party is one of production and persuasion, not of proof. *Seymour v. Brunswick Corp.*, 655 So. 2d 892, 894-95 (Miss. 1995). The Sandersons assert that the trial court improperly granted summary judgment for two reasons which we will address in the following order: (1) whether the Sandersons proved a prima facie case of legal malpractice sufficient to overcome Adams' motion for summary judgment; and (2) whether there were genuine issues of material fact about whether (a) the attempted transfer was fraudulent in nature and (b) the fourth deed was ever prepared.

I. DID THE SANDERSONS PROVE A PRIMA FACIE CASE OF LEGAL MALPRACTICE?

The elements of a legal malpractice claim are as follows: (1) a lawyer-client relationship, (2) negligence on the part of the lawyer in handling his client's affairs entrusted to him, (3) proximate cause, and (4) injury. *Century 21 Deep S. Prop., Ltd. v. Corson*, 612 So. 2d 359, 373 (Miss. 1992) (citation omitted). Since there is no question regarding the existence of the attorney-client relationship, the Sandersons must prove only the remaining three elements. We will address the elements of proximate cause and injury.

In order to prove proximate cause, the Sandersons must show that but for Adams' negligence, they would have successfully transferred the property to Martha. *Id.* They are unable to do so, because the transfer was a fraudulent conveyance and, therefore, void as a matter of law.

In Mississippi, any conveyance of land made with the intent or purpose to delay, hinder, or defraud creditors is utterly void. Miss. Code Ann. § 15-3-3 (1972). In determining whether a conveyance is fraudulent, the trial court should look to certain "badges of fraud" such as the inadequacy of the consideration, a transaction not in the ordinary course of business, secrecy, insolvency of the grantor, transfer of all of the grantor's property, retention of possession, relationship of the parties, and transfer to a person having no apparent use for the property. *Barbee v. Pigott*, 507 So. 2d 77, 85 (Miss. 1987) (citation omitted).

In the instant case, Joe attempted to convey the property to his wife at a time when he was insolvent. Martha paid no monetary or other consideration for the property. There was no actual "closing" of

the transaction. The other three conveyances were attacked as fraudulent in the Deposit Guaranty lawsuit which was settled.

The Sandersons assert that since the parties to the Deposit Guaranty lawsuit entered a stipulation that the transfers were not fraudulent, the trial court in this action was bound to accept the stipulation as binding. However, we agree with the trial court that it was not bound to accept the stipulation. The stipulation was part of a negotiated settlement, and furthermore, even assuming it had some weight, it was relevant only to the three recorded deeds and not to the fourth, because the fourth deed, the subject of this lawsuit, was not a part of the Deposit Guaranty lawsuit.

II. WERE THERE ANY GENUINE ISSUES OF MATERIAL FACT?

The Sandersons argue that there are two material facts in dispute, and the trial court, therefore, erred in granting summary judgment. The trial court may grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of a material fact and that the moving party is entitled to judgment as a matter of law." M.R.C.P. 56. A fact is material "if it tends to resolve any of the issues, properly raised by the parties." *Morgan v. City of Ruleville*, 627 So. 2d 275, 277 (Miss. 1993). If reasonable minds on a jury could differ on such a fact, summary judgment should not be granted. *Strantz ex rel Minga v. Pinion*, 652 So. 2d 738, 741 (Miss. 1995).

A. Was the attempted transfer fraudulent in nature?

The trial court properly ruled that there was no genuine issue as to whether the transfer was fraudulent. The undisputed facts prove that Joe attempted to transfer the property to his wife at a time when he was unable to honor his guaranties of the Four-O debts. Martha did not pay Joe for the transfer, nor was the transfer made to satisfy any outstanding debt or lien in favor of Martha. There was also no formal closing of the transaction. The transaction was not at arms-length.

The Sandersons failed to respond to a request for admissions filed by Adams, and, therefore, the responses are deemed admitted. Under Rule 36, a "matter is admitted unless, within thirty days after service of the request . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter . . ." M.R.C.P. 36(a). The Rule further provides that "any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." *Id.* (b).

Because the Sandersons failed to respond and further failed to ever request the court to permit withdrawal of the admissions, the admissions are conclusively established in this case. The admissions provide that the property was not transferred in exchange for monetary consideration or in satisfaction of a debt Joe owed to Martha. If we accept the request for admissions as admitted, then there is no reason for the transfer other than a fraudulent attempt to avoid his creditors.

Even if we accept the late responses, the only admission which is potentially helpful to the Sandersons in avoiding summary judgment is the response to Request Number 15. Request Number 15 states, "Martha Sanderson paid no monetary consideration to Joe Sanderson for the proposed deed to the property at issue in this lawsuit." The response was, "Admitted, but such conveyance by Joe Sanderson was for valuable consideration." However, the Sandersons failed to specify any other

consideration in their response and submitted no proof of any other consideration in the form of affidavits or otherwise.

In a summary judgment proceeding, the plaintiff must rebut the defendant's claim (i.e., that no genuine issue of material fact exists) by producing supportive evidence of significant and probative value on the issues on which he bears the burden of proof at trial. *Palmer v. Biloxi Regional Medical Ctr.*, 564 So. 2d 1346, 1355-56 (Miss. 1990). In other words, the Sandersons must produce evidence showing that Adams' alleged negligence was the proximate cause of their injury. However, "[m]ere allegation or denial of material fact is insufficient to generate a triable issue of fact and avoid an adverse rendering of summary judgment. More specifically, the plaintiff may not rely solely upon the unsworn allegations in the pleadings, or 'arguments and assertions in briefs or legal memoranda.'" *Id.* (citations omitted).

Since the Sandersons failed to provide the court with any evidence of any consideration or any other evidence that the transaction was not fraudulent, the trial court properly granted summary judgment in this matter.

B. Was the fourth deed ever actually prepared?

Although the Sandersons attempt to create an issue of fact regarding whether the fourth deed was ever prepared, this issue is not material. A fact is material "if it tends to resolve any of the issues, properly raised by the parties." *Morgan v. City of Ruleville*, 627 So. 2d 275, 277 (Miss. 1993). It does not matter whether the fourth deed was actually prepared and not filed or just never prepared because, even if the deed had been prepared and recorded, the deed, since it was fraudulent, was void as to any of Sanderson's creditors. For this reason, the Sandersons cannot prove that they were damaged by Adams' alleged negligence. Since this is an essential element of their claim of legal malpractice, the trial court properly granted summary judgment in Adams' favor.

**THE JUDGMENT OF THE CIRCUIT COURT OF RANKIN COUNTY IS AFFIRMED.
ALL COSTS ARE ASSESSED TO THE APPELLANTS.**

**FRAISER, C.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND SOUTHWICK, JJ.,
CONCUR.**

BRIDGES, P.J., AND PAYNE, J., NOT PARTICIPATING.