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Citation #1

2007 US Dist Lexis 29038

LEXSEE

STEPHEN WILLIAMS, Plaintiff, v. L. THOMAS LAKIN and THE LAKIN LAW FIRM, P.C., Defendants.

Case No. 06-CV-0515-CVE-PJC

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

2007 U.S. Dist. LEXIS 29038

April 18, 2007, Decided

SUBSEQUENT HISTORY: Motion denied by Williams v. Lakin, 2007 U.S. Dist. LEXIS 52727 (N.D. Okla., July 20, 2007)

CASE SUMMARY:

PROCEDURAL POSTURE: The court entered default judgment for plaintiff client in his legal malpractice suit against defendants, an attorney and a law firm, but ordered an evidentiary hearing under Fed. R. Civ. P. 55(b)(2) to determine the appropriate measure of damages. Following the hearing, the client filed an amended and supplemental hearing memorandum in support of his claim for compensatory damages in the amount of \$ 3,752,601.80, plus post-judgment interest.

OVERVIEW: The client's complaint contained three separate claims for relief: (1) defendants were negligent in placing funds with a structured settlement company whose owner stole the company's assets; (2) defendants breached the fiduciary duty between attorney and client; and (3) defendants mishandled the client's claims against the structured settlement company and other liable parties. Based on his expert's affidavit, the client alleged that he should be awarded \$ 3,752,601.80 to compensate him for all unpaid amounts under his structured settlement agreement. The court applied Oklahoma law, using the "case within a case" doctrine to calculate damages. Entering judgment for the amount requested, the court found that the client bargained for tax-free payments, and the client produced expert testimony to prove the amount of the tax loss that would be incurred because of the structured settlement company's actions. The court concluded that the client had shown that he

would have been entitled to recover at least \$ 3,752,601.80 from the company if it were not for defendants' improper legal representation, and this was the proper measure of damages for the claims of legal malpractice.

OUTCOME: The court awarded damages in the amount of \$ 3,752,601.80 to the client on his claims for negligence and breach of fiduciary duty. A separate default judgment was entered.

CORE TERMS: structured, legal malpractice, settlement agreement, default judgment, recovered, lawsuit, amount of damages, settlement, tax-free, law firm, settlement payments, tax consequences, evidentiary hearing, monthly payments, fiduciary duty, entitled to recover, supplemental, malpractice, compensate, contacted, supplemental brief, appropriate measure, measure of damages, compensatory damages, full amount, underlying claim, attorney-client, mishandling, breached, briefing

LexisNexis(R) Headnotes

Civil Procedure > Pretrial Judgments > Default > Entry of Default Judgments

[HN1]The Federal Rules of Civil Procedure enable a court to order a hearing or supplemental briefing if it is necessary to take an account or to determine the amount of damages before entering a default judgment. Fed. R. Civ. P. 55(b)(2).

Civil Procedure > Pretrial Judgments > Default > Entry of Default Judgments

[HN2]After the entry of default judgment, the court can not review the merits of the plaintiff's claims, but can order a hearing on damages. If the complaint sets forth a sum certain, the court can enter default judgment for the amount of damages requested in the complaint without holding an evidentiary hearing. When a default judgment has been entered on claim for an uncertain amount of damages, all facts stated in the complaint are taken as true except for the factual allegations related to damages. A hearing on damages will be required unless the amount claimed is a liquidated sum or one capable of mathematical calculation.

Evidence > Procedural Considerations > Burdens of Proof > Allocation

Torts > Damages > Proof

Torts > Malpractice & Professional Liability > Attorneys

[HN3]Oklahoma recognizes a claim for relief for legal malpractice and a plaintiff must prove four elements to prevail: (1) there was an attorney-client relationship; (2) the attorney breached a duty to the client; (3) the attorney's actions proximately caused an injury to the client; and (4) the client suffered damages as a result of the attorney's actions. In a legal malpractice action, it appears that the Oklahoma Supreme Court would apply the "case within a case" doctrine to calculate the plaintiff's damages. Under this doctrine, a court must consider what damages the plaintiff would have recovered if his attorney had not committed legal malpractice when handling plaintiff's underlying claim. The United States Court of Appeals for the Tenth Circuit has adopted a similar approach when considering the appropriate measure of damages in a legal malpractice case.

Civil Procedure > Remedies > Damages > General Overview

[HN4]The United States Court of Appeals for the Tenth Circuit has indicated that the tax consequences of a judgment should be considered in certain circumstances when computing damages.

Civil Procedure > Remedies > Damages > General Overview

Evidence > Procedural Considerations > Burdens of

Proof > Allocation

[HN5]Taxes may be considered as an element of damages if the defendant's error deprived the plaintiff of tax-free income, but the plaintiff bears burden to prove the tax effects of the judgment.

COUNSEL: [*1] For Stephen Williams, Plaintiff: Charles T Schimmel, LEAD ATTORNEY, W Greg Wright, LEAD ATTORNEY, Hill Beam-Ward Kruse & Wilson, LLC, OVERLAND PARK, KS US; David H Herrold, LEAD ATTORNEY, Jack Neal Herrold, LEAD ATTORNEY, John Allen Bugg, LEAD ATTORNEY, Herrold Herrold & Co PC, TULSA, OK.

JUDGES: CLAIRE V. EAGAN, CHIEF JUDGE.

OPINION BY: CLAIRE V. EAGAN

OPINION

OPINION AND ORDER

Now before the Court is Plaintiff's Amended and Supplemental Hearing Memorandum Regarding Damages (Dkt. # 22). By written order, the Court granted plaintiff's motion for default judgment as to entry of default judgment, but the Court ordered an evidentiary hearing to determine the appropriate measure of damages (Dkt. # 15). Following the hearing, plaintiff filed the amended and supplemental hearing memorandum in support of his claim for compensatory damages in the amount of \$ 3,752,601.80, plus post-judgment interest.

I.

Plaintiff Stephen Williams was an employee of the Union Pacific Railroad Company ("Union Pacific"). On February 9, 1991, a train rolled over Williams' legs resulting in permanent disabilities. He contacted the Lakin Law Firm ("Law Firm"), specifically David Herndon, about a possible lawsuit [*2] against Union Pacific. Williams signed an attorney-client agreement with the Law Firm and, shortly thereafter, L. Thomas Lakin ("Lakin") took over as lead counsel on Williams' case. In 1995, Union Pacific agreed to settle the case. Before entering the settlement, Lakin advised Williams to place \$ 3 million of his settlement funds in a structured settlement arrangement with SBU, Incorporated ("SBU"). Lakin represented that Williams would receive periodic tax-free payments from SBU and his funds would be

secure with SBU. Williams claims that Lakin did not recommend any other structured settlement companies.

The settlement agreement between Union Pacific and Williams was in two parts. First, Williams agreed to accept \$ 4,100,000 as sickness benefits under the Railroad Unemployment Insurance Act, 45 U.S.C. § 351 *et seq.* Second, Williams would receive \$ 11,165.13 per month from November 20, 1995 to October 20, 2015 as part of a structured settlement agreement, and he would receive a lump sum payment of \$ 3 million when the monthly payments expired. Subsequently, Union Pacific paid SBU \$ 3 million to fund the structured settlement agreement and assigned its liability [*3] for making further payments to SBU. Union Pacific was released from any liability for future payments under the structured settlement agreement.

From November 1995 to June 2000, SBU made monthly payments to Williams as required by the agreement.¹ However, Williams did not receive a payment for July 2000. He learned that SBU closed when its owner, James R. Gibson, stole the company's assets. Williams also discovered that his funds had not been placed in a separate trust, that SBU was not bonded or insured, and that SBU failed to secure his funds through government bonds or other collateral. Lakin agreed to represent Williams in a lawsuit to recover his stolen settlement funds, and Williams claims that Lakin offered to represent him without charge. According to Williams, Lakin told him "not to worry and that [he] was going to get all [Williams'] payments due under the structured agreement. [Lakin] said that if [Williams] did not get all the payments through the case he was pursuing against SBU, [Williams] would be able to sue [Lakin] and his firm to get the rest." Dkt. # 22, Ex. 1, at 5. The lawsuit was pending from 2001 to 2004 in Madison County, Illinois, but Williams [*4] claims that Lakin rarely contacted him about the status of his case.

¹ Williams received \$ 648,494.03 in monthly payments from SBU during this time.

In October 2004, Williams was contacted by a lawyer from a different law firm who stated that he was representing Williams in his case against SBU. The lawyer stated that the Law Firm transferred the case to him and gave him full authority to handle the lawsuit, including the power to settle the case. Williams alleges that the new lawyer mishandled the case and settled Williams' claims against SBU without obtaining

permission from Williams. The new lawyer also charged Williams a fee for settling the case, even though Lakin originally agreed to represent Williams without charge. Through civil and criminal actions against SBU, Williams has recovered \$ 2,461,787.77 from SBU and its employees.

Williams filed this case against Lakin and the Law Firm alleging legal malpractice. The complaint contains three separate claims for relief: (1) defendants were negligent in [*5] placing funds with SBU; (2) defendants breached the fiduciary duty between attorney and client; and (3) defendants mishandled Williams' claims against SBU and other liable parties. Defendants waived service but failed to file a responsive pleading, and the Court has found that default judgment against defendants is appropriate. Williams claims that he expected to receive approximately \$ 6.6 million in tax-free payments from SBU under the structured settlement agreement, and his damages should be based on the full amount he expected to receive under his agreement with SBU. Based on the expert affidavit of Kurt V. Krueger, Ph.D., Williams alleges that he should be awarded \$ 3,752,601.80 to compensate him for all unpaid amounts under the structured settlement agreement with SBU.

II.

[HN1]The Federal Rules of Civil Procedure enable a court to order a hearing or supplemental briefing if "it is necessary to take an account or to determine the amount of damages" before entering a default judgment. Fed. R. Civ. P. 55(b)(2). In this case, the Court ordered a hearing to obtain additional information to determine the appropriate amount of damages on [*6] plaintiff's claims for legal malpractice and breach of fiduciary duty. As plaintiff's briefing suggests, there is no legal authority directly on point regarding the determination of damages for this case. Plaintiff asserts that he should be entitled to recover compensatory damages to place him in the position he would have been but for defendants' negligence. He claims that he should have recovered the full amount of unpaid structured settlement payments in his lawsuit against SBU but, due to defendants' mishandling of the case, he was forced to accept less than he was entitled to recover from SBU.

[HN2]After the entry of default judgment, the court can not review the merits of the plaintiff's claims, but can order a hearing on damages. *Olcott v. Delaware Flood Co.*, 327 F.3d 1115, 1125 n.11 (10th Cir. 2003). If the

complaint sets forth a sum certain, the court can enter default judgment for the amount of damages requested in the complaint without holding an evidentiary hearing. *KPS & Assocs., Inc. v. Designs by FMC, Inc.*, 318 F.3d 1, 18 (1st Cir. 2003); *Dundee Cement Co. v. Howard Pipe & Concrete Products., Inc.*, 722 F.2d 1319, 1323-24 (7th Cir. 1983). [*7] When a default judgment has been entered on claim for an uncertain amount of damages, all facts stated in the complaint are taken as true except for the factual allegations related to damages. *American Red Cross v. Cmty. Blood Ctr. of the Ozarks*, 257 F.3d 859, 864 (8th Cir. 2001). A hearing on damages will be required unless the "amount claimed is a liquidated sum or one capable of mathematical calculation." *United Artists Corp. v. Freeman*, 605 F.2d 854, 857 (11th Cir. 1979). In this case, the Court held an evidentiary hearing, because the amount of damages sought by plaintiff was not clear from the face of the complaint.

Although plaintiff cites cases from many jurisdictions in his supplemental brief, he does not refer to Oklahoma law concerning the proper measure of damages in a legal malpractice action. [HN3]Oklahoma recognizes a claim for relief for legal malpractice and a plaintiff must prove four elements to prevail: (1) there was an attorney-client relationship; (2) the attorney breached a duty to the client; (3) the attorney's actions proximately caused an injury to the client; and (4) the client suffered damages as a result of the attorney's actions. [*8] *Kimble v. Arney*, 2004 OK CIV APP 43, 90 P.3d 598, 602 (Okla. Civ. App. 2004). In a legal malpractice action, it appears that the Oklahoma Supreme Court would apply the "case within a case" doctrine to calculate plaintiff's damages. *Nicholas v. Morgan*, 2002 OK 88, 58 P.3d 775, 781 (Okla. 2002). Under this doctrine, a court must consider what damages plaintiff would have recovered if his attorney had not committed legal malpractice when handling plaintiff's underlying claim. *Worsham v. Nix*, 2004 OK CIV APP 2, 83 P.3d 879 (Okla. 2003) (plaintiff could recover emotional distress damages in legal malpractice action, because such relief was available in her underlying claim for fraud); *Kimble*, 90 P.3d at 603 (evidence was sufficient to support damages awarded in legal malpractice claim when plaintiffs established that they could have recovered the same amount if attorney had not committed malpractice). The Tenth Circuit has adopted a similar approach when considering the appropriate measure of damages in a legal malpractice case. *Nelson v. Boeing Co.*, 446 F.3d 1118, 1121 (10th Cir. 2006) (Title VII

plaintiff who loses his claim because of attorney's performance [*9] can file a legal malpractice claim to recoup the damages that would have been awarded in the Title VII case).

In this case, plaintiff claims that he should have recovered the full amount of his outstanding structured settlement payments from SBU in the underlying lawsuit. He also asserts that the structured settlement payments were intended to be tax-free, and he is entitled to additional damages to compensate him for the tax consequences of his attorney's alleged malpractice. Plaintiff argues that the Court should apply the proximate cause standard applicable to tort cases and, due to defendants' default, plaintiff must simply show that his alleged injuries naturally flow from defendants' breach of duty. *Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 159 (2d Cir. 1992); *Philip Morris USA, Inc. v. Castworld Products., Inc.*, 219 F.R.D. 494, 498 (C.D. Cal. 2003). However, he does not discuss Oklahoma law concerning the proper amount of damages in a legal malpractice case.

The allegations of plaintiff's complaint, accepted as true due to defendants' default, establish that defendants are liable to plaintiff for negligently placing [*10] \$ 3 million of his settlement with SBU and mishandling plaintiff's subsequent lawsuit against SBU. Based on the evidence provided in plaintiff's supplemental brief, plaintiff has shown that he expected to receive \$ 6,600,134 from SBU over the life of the structured settlement agreement. Through scheduled payments while the structured settlement agreement was in effect and from civil and criminal actions against SBU, plaintiff has recovered \$ 3,110,282 from SBU. Plaintiff has submitted the affidavit of Dr. Krueger to support his claim for damages. Dkt. # 22, Ex. 2. If the Court were to award lump sum damages based on plaintiff's expectation under the settlement agreement, Dr. Krueger asserts that the total damages would be \$ 3,489,853, plus \$ 2,326,569 for the tax liability on the damages award. Instead, Dr. Krueger discounted plaintiff's claim for damages to compensate for the effect of future investment, and he claims that it will take \$ 2,232,560.83 of present day funds to ensure that plaintiff receives the full value of the remaining structured settlement payments. Dr. Krueger also asserts that plaintiff should recover \$ 1,520,040.97 to offset the tax consequences of any judgment [*11] in this case, because the structured settlement agreement was negotiated to provide plaintiff tax-free monthly

payments.

Applying the "case within a case" doctrine, plaintiff is entitled to his claimed damages. The allegations of the complaint establish a *prima facie* case for legal malpractice against defendants for their initial decision to place funds with SBU and for defendants' subsequent actions in plaintiff's case against SBU. Plaintiff has shown that the damages he seeks in this case could have been recovered as relief in the underlying action against SBU. *Worsham*, 83 P.3d at 888; *Kimble*, 90 P.3d at 603. [HN4]The Tenth Circuit has indicated that the tax consequences of a judgment should be considered in certain circumstances when computing damages. *Cascade Energy & Metals Corp. v. Bank*, 896 F.2d 1557, 1581 (10th Cir. 1990) (district court should make express findings concerning its reasons for granting or denying damages stemming from adverse tax consequences of judgment). In this case, the Court finds that plaintiff bargained for tax-free payments for SBU, and he has produced expert testimony to prove the amount of the tax [*12] loss he will incur because of SBU's actions. See *Medcom Holding Co. v. Baxter Travenol Laboratories,*

Inc., 106 F.3d 1388, 1404-05 (7th Cir. 1997) ([HN5]taxes may be considered as an element of damages if the defendant's error deprived the plaintiff of tax-free income, but plaintiff bears burden to prove the tax effects of the judgment). In summary, Plaintiff has shown that he would have been entitled to recover at least \$ 3,752,601.80 from SBU if it were not for defendants' improper legal representation, and this is the proper measure of damages for plaintiff's claims of legal malpractice.

IT IS THEREFORE ORDERED that damages in the amount of \$ 3,752,601.80 shall be awarded to plaintiff on his claims for negligence and breach of fiduciary duty. A separate default judgment is entered herewith.

DATED this 18th day of April, 2007.

Claire V. Eagan, CHIEF JUDGE

UNITED STATES DISTRICT COURT

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