

STATE OF MICHIGAN  
COURT OF APPEALS

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JOHN SEXTON,

Plaintiff-Appellant,

v

SCOTT J. SUMNER,

Defendant-Appellee.

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UNPUBLISHED

August 24, 1999

No. 204192

Macomb Circuit Court

LC No. 96-001406 NM

Before: Doctoroff, P.J. and Markman and J.B. Sullivan\*, JJ.

PER CURIAM.

In this legal malpractice action, plaintiff appeals as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff alleged that defendant committed legal malpractice by failing to bring suit on a promissory note and by failing to include certain property in a replevin action. On appeal, plaintiff asserts that the trial court erred in granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We disagree. A trial court's grant of summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Michigan Mutual Ins Co v Dowell*, 204 Mich App 81, 85; 514 NW2d 185 (1994). The motion is properly granted when, except with respect to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* The trial court must consider the documentary evidence submitted by the parties and, giving the benefit of reasonable doubt to the nonmovant, must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Id.*

A plaintiff in a legal malpractice action has the burden of proving 1) the existence of an attorney-client relationship, 2) negligence in the legal representation of the plaintiff, 3) that the negligence was the proximate cause of an injury, and 4) the fact and extent of the injury alleged. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994). When an attorney-client relationship

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

exists, an attorney has a duty to “use reasonable skill, care, discretion and judgment in representing a client.” *Simko v Blake*, 448 Mich 648, 656; 532 NW2d 842 (1995). Here, plaintiff contends that the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(10) because genuine issues of material fact existed with respect to the scope of the attorney-client relationship. We disagree.

In support of his motion for summary disposition, defendant submitted a retainer agreement signed by the parties on May 11, 1993. The agreement indicated that defendant agreed to provide legal services to plaintiff with respect to a replevin action. There was no mention in the retainer agreement of an agreement to bring suit on the promissory note. Plaintiff asserts that the retainer agreement was ambiguous because it did not describe the property involved in the replevin action or the parties to be sued. The primary goal of contract interpretation is to ascertain the parties’ intent. *Zurich Ins Co v CCR & Co (On Reh)*, 226 Mich App 599, 603; 576 NW2d 392 (1997). If a contract is clear and unambiguous, its construction is a question of law for the court. *Id.* at 604. If, on the other hand, the court initially determines that a contract term is ambiguous because it is “subject to more than one possible construction within the four corners of the document,” but an inquiry into the surrounding circumstances resolves the ambiguity, the court must make that inquiry in order to properly perform its interpretive function. *Id.* at 607. Only if a court determines that a contract is ambiguous after making this initial inquiry does the interpretation of the contract become a question of fact for the jury. *UAW-GM v KSL Recreation Corp*, 228 Mich App 486, 491-492; 579 NW2d 411 (1998).

Here, we agree that the retainer agreement is ambiguous to the extent that it does not describe the property to be included in the replevin action. However, in addition to the retainer agreement, defendant submitted his deposition testimony, which indicated that, the day before the retainer agreement was signed, defendant filed a replevin complaint with respect to a list of property attached to the complaint as Exhibit A, and that plaintiff had reviewed the complaint. Evidence that plaintiff reviewed the replevin complaint that referred only to the Exhibit A property and, the next day, signed a retainer agreement referring only to a replevin action, supports defendant's position that the scope of the attorney-client relationship was limited to a replevin action regarding the property described in Exhibit A attached to the complaint. In addition, defendant presented evidence that plaintiff never produced proof of ownership of the additional property, which was required if defendant was to bring suit on the basis of the additional property. Thus, defendant sufficiently supported his summary disposition motion with documentary evidence showing that the attorney-client relationship was limited to the replevin action regarding the Exhibit A property.<sup>1</sup>

A party opposing a motion for summary disposition may not rest on the allegations in his pleadings but is required to submit documentary evidence showing a genuine fact issue for trial. MCR 2.116(G)(4). Plaintiff has presented no documentary evidence to show that the scope of the attorney-client relationship extended beyond a replevin action regarding the property described in the list attached to the complaint as Exhibit A. Thus, plaintiff has failed to raise a genuine fact issue with respect to the scope of the attorney-client relationship and the trial court properly granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(10).

Plaintiff next argues that the trial court erred in concluding that there existed no genuine issue of material fact with respect to whether the alleged negligence caused plaintiff's damages. In light of our

conclusion that the trial court properly determined that plaintiff failed to raise a genuine fact issue regarding the scope of the attorney client relationship, we need not review this issue. However, we note that the trial court correctly concluded that plaintiff failed to demonstrate a fact issue with respect to whether defendant's actions caused the alleged damages. When defendant withdrew from the case, successor counsel could have taken steps in the trial court to amend the complaint to include the additional property and the promissory note, which, as noted by the trial court in the underlying case, was never done. Furthermore, plaintiff has not demonstrated that collateral estoppel or res judicata would have prevented successor counsel from bringing a separate action on the basis of the additional property and the promissory note. Thus, because plaintiff presented no evidence that defendant's actions were the cause of his alleged damages, the trial court properly granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(10).

Affirmed.

/s/ Martin M. Doctoroff

/s/ Stephen J. Markman

/s/ Joseph B. Sullivan

<sup>1</sup> Plaintiff further asserts that the trial court erred in considering a letter written by defendant to plaintiff on December 6, 1993, as evidence that the scope of the attorney-client relationship was limited to the replevin action regarding the Exhibit A property. Plaintiff asserts that the letter "constitutes no more than a self-serving declaration." Nevertheless, we find no error in the trial court's mention of the letter in a footnote in its opinion.