STATE OF MICHIGAN

COURT OF APPEALS

ZERBO MULLIN & ASSOCIATES, P.C., Plaintiff-Appellant, v RICHARD J. ALEF L.L.M., P.C., and RICHARD J. ALEF, Defendants-Appellees.	UNPUBLISHED February 2, 2010 No. 286725 Oakland Circuit Court LC No. 2007-082540-NM

Before: Davis, P.J., and Fort Hood and Servitto, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's July 8, 2008 order granting summary disposition in favor of defendants, Richard J. Alef, LLM, P.C., and Richard J. Alef, with respect to plaintiff's legal malpractice claim. We reverse and remand this case to the trial court for further proceedings consistent with this opinion.

Plaintiff's malpractice claim arose out of Alef's representation of plaintiff during negotiations to purchase an accounting practice, Randel & Associates, P.C. In a separate, prior matter, litigation arose between Randel & Associates, plaintiff, and other parties involved in the purchase negotiations, after the deal collapsed when financing could not be secured. The collapse was apparently due to a third party's (Raguso) filing of a UCC-1 Financing Statement with respect to his interest in Zerbo's former business. On October 10, 2006, the trial court in this first case granted summary disposition against plaintiff, and ruled that the parties to the purchase agreed to a June 3, 2005 closing date. The trial court concluded that the April 27, 2005 purchase and escrow agreements executed by the parties were ambiguous with respect to the closing deadline, but

> it is beyond factual dispute that the parties subsequently agreed to a June 3 deadline. First, Alef's testimony and the subsequent May 18 letter agreement establish beyond factual dispute that the parties agreed that closing was to occur no later than May 25, and that this date was subsequently extended to June 3. This conclusion is further supported by Zerbo-Mullin's June 1 letter to Raguso, and subsequent responses to [Michael] Randel's letters. Such conduct, in short, is utterly inconsistent with the position Zerbo and [Mark] Mullin assert in their affidavits, and establishes the parties' agreement beyond factual dispute.

This first case was appealed, and a panel of this Court recently affirmed the trial court's ruling in part. *Randel & Assoc, PC v Zerbo Mullin & Assoc, PC*, unpublished opinion per curiam of the Michigan Court of Appeals, issued September 15, 2009 (Docket Nos. 274753, 279159). This Court agreed with the trial court that, although there was no closing date on the purchase agreement, "there was no genuine issue of material fact that a closing date of June 3, 2005, was agreed upon, and that Zerbo Mullin failed to perform by that date." *Id.*, unpub op at 7. In ruling, this Court relied upon Alef's deposition testimony and correspondence between the parties. *Id.*, unpub op at 7-8.

After the trial court's decision regarding the closing date of June 3, 2005, plaintiff commenced the instant malpractice action against Alef. In moving for summary disposition in the malpractice action, Alef argued that as a result of the trial court's decision that determined the closing date, collateral estoppel barred plaintiff's claim of malpractice. In addition, Alef argued that he could not be held liable because plaintiff terminated his representation on May 26, 2005, before the closing date. The trial court presiding over the malpractice matter[1] agreed, finding that plaintiff was collaterally estopped from relitigating the issue of the closing date because this issue was previously decided by the October 10, 2006 ruling in the first lawsuit. The trial court also found that "Defendants would not be liable for the alleged malpractice inasmuch as Defendants were replaced by other counsel before the June 3 closing date. Here, Plaintiff terminated the attorney-client relationship on May 26, 2005. Retention of an alternative attorney terminates the attorney-client relationship." This decision is the basis of the instant appeal.

This Court reviews a trial court's decision to grant or deny summary disposition pursuant to MCR 2.116(C)(10) de novo. *Universal Underwriters Ins v Kneeland*, 464 Mich 491, 495-496; 628 NW2d 491 (2001). This Court must view the affidavits, pleadings, and other documentary evidence in the light most favorable to plaintiff, and decide whether plaintiff has shown the existence of a genuine issue of material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996); MCR 2.116(C)(10). If no genuine issue of material fact exists, defendant is entitled to judgment as a matter of law. *Id.* The application of a preclusion doctrine (such as collateral estoppel) is an issue of law that is reviewed de novo. *Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 34; 620 NW2d 657 (2000).

Plaintiff first argues that the trial court erred in applying the doctrine of collateral estoppel to bar its malpractice[2] claim. We agree.

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[1] Oakland County Circuit Court Judge Nanci Grant presided over the case involving the purchase of the accounting practice, while Oakland Circuit Court Judge Colleen A. O'Brien presided over the instant malpractice matter.

[2] To establish legal malpractice, plaintiff must demonstrate: "(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." *Manzo v Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004) (citation omitted).

"Generally, for collateral estoppel to apply three elements must be satisfied: (1) 'a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment'; (2) 'the same parties must have had a full [and fair] opportunity to litigate the issue'; and (3) 'there must be mutuality of estoppel.'" *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004), quoting *Storey v Meijer, Inc*, 431 Mich 368, 373 n 3; 429 NW2d 169 (1988) (footnote omitted). There is an exception to the mutuality requirement where collateral estoppel is asserted defensively, as is the case here, in order to prevent a party from relitigating an issue where the party had a full and fair opportunity to litigate it in a prior suit. *Monat*, 469 Mich at 691-692.

The trial court's opinion and order granting summary disposition to Randel & Associates in the first lawsuit constitutes a valid final judgment. *Detroit v Qualls*, 434 Mich 340, 357 n 27; 454 NW2d 374 (1990). Alef was not, however, a party in the prior action. He did not represent plaintiff in that case, and he did not have a right to defend, control or appeal that action. *Monat*, 469 Mich at 683-684 n 2. Alef also was not a privy of a party to that action because he did not gain an interest in the prior action, after judgment, through one of the parties by way of inheritance or otherwise. *Howell v Vito's Trucking & Excavating Co*, 386 Mich 37, 43; 191 NW2d 313 (1971). Furthermore, Alef, the party asserting the doctrine of collateral estoppel, would not have been bound by the prior judgment, again, because he was not a party to that case. *Monat*, 469 Mich at 684-685.

In addition, in the first lawsuit, plaintiff did not have a full and fair opportunity to litigate the issue of Alef's alleged malpractice. Unlike the first lawsuit, the issue to be determined in the instant matter is not what date the parties agreed to close. This issue was litigated and decided in the first lawsuit, and plaintiff is not attempting to relitigate the issue here. Rather, the issue to be determined in the instant matter is whether Alef's actions, which led to the agreement to close on June 3, constituted legal malpractice. The issue of whether Alef's actions constituted malpractice were not actually nor necessarily determined when the trial court held that the closing date was in fact June 3, 2005. *Monat*, 469 Mich at 682-685.

Contrary to defendant's contention, and the trial court's finding in the instant matter, the trial court in the first lawsuit did not determine that the closing date was June 3, 2005 based solely on the parties' written agreements. Rather, the trial court concluded that the agreements were ambiguous, and in support of its finding of a June 3 closing date, cited Alef's testimony and a June 1 letter to Raguso. This Court similarly noted in its decision in the first lawsuit that the trial court found the purchase and escrow agreements ambiguous, and relied on Alef's testimony and other evidence in concluding that the closing was set for June 3. *Randel & Associates*, unpub op at 7.

The trial court in the first case made no findings as to whether Alef's legal representation was negligent or whether he acted without authorization from plaintiff (See, *Manzo*, 261 Mich App 712). For the application of collateral estoppel, the issues in the prior and subsequent actions must be the same, and have been both actually and necessarily litigated. *Qualls*, 434 Mich at 357. The issue "must be identical, and not merely similar" to the issue involved in the prior action. *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 340; 657 NW2d 759 (2002); *Bd of Co Rd Comm'rs for the Co of Eaton v Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994). Because the issue in the first lawsuit was not the same as that in the instant matter, and

the elements of collateral estoppel have not been met, the trial court erred in dismissing plaintiff's malpractice claim on that basis. *Monat,* 469 Mich at 691-692.

Moreover, plaintiff has demonstrated that a genuine issue of material fact exists regarding whether Alef committed malpractice. *Quinto,* 451 Mich at 362-363; MCR 2.116(C)(10). Alef testified that John Zerbo authorized him to call Eric Weiss, attorney for Randel, on May 26, 2005, to ask for more time. Alef left a voicemail message for Weiss on May 26, asking for an extension until June 3, because there were issues with the lender. According to Weiss, he and Alef spoke again on June 2, 2005, and in that conversation Alef told Weiss that the deal was dead. Weiss testified that if Alef had again requested additional time, Weiss would have considered recommending that Randel give plaintiff more time to close; "I mean if he said to me I need another week period, that's it, we'll put it in writing, whatever, I'm not going to kill a deal over a week." Furthermore, plaintiff's replacement counsel, Villarruel, testified that after Alef informed him on or about June 1, 2005 of the impending closing date, he asked Zerbo about the date. Zerbo testified that he did not know of the June 3 closing date, Alef never told him about it, and he never gave Alef permission to agree to that date. Mullin similarly testified that he had no knowledge of the June 3 closing date.

In the appeal of the first case, plaintiff argued for the first time that Alef did not have authority to bind plaintiff because he was only retained to draft the purchase agreements, not to negotiate the closing or a closing date. *Randel & Associates,* unpub op at 10. This Court opined, "Alef assumed a very active role in attempting to resolve the Raguso issue and close the sale between plaintiff and Zerbo Mullin. Zerbo Mullin has produced no evidence showing that Alef was not authorized to negotiate a closing date, and summary disposition would have been appropriate had Zerbo Mullin raised this issue below." *Id.* Thus, because the issue of whether the scope of Alef's representation included negotiating the closing was already litigated, we conclude that plaintiff is collaterally estopped from pursuing this particular aspect of its malpractice claim. *Monat,* 469 Mich at 691-692. However, plaintiff's remaining claims, among others, that Alef committed malpractice in agreeing to the June 3 closing date knowing that plaintiff would not be in a position to close and without plaintiff's knowledge, and that Alef should have asserted plaintiff had a reasonable time to close or that closing was contingent upon resolving the Raguso issue, were not raised or litigated at any point in the first action or on appeal. These other claims remain viable.

Plaintiff also argues that the trial court erred in concluding that Alef could not be liable for any malpractice because his representation was terminated from May 26, 2005, to June 6, 2005, i.e., at the time closing was supposed to take place. "Generally, when an attorney is retained to represent a client, that representation continues until the attorney is relieved of the obligation by the client or the court." *Mitchell v Dougherty,* 249 Mich App 668, 683; 644 NW2d 391 (2002). Retaining alternate counsel terminates the attorney-client relationship. *Id.* at 682-683. However, there is an exception to this rule where the attorney is retained to perform a specific legal service, such as the sale of a business. . . . In those circumstances, no formal discharge is required and the representation ceases when the specific legal service is completed." *Id.* at 684 n 6. Moreover, an attorney may not "cut off his liability for negligent acts [that occurred during the representation] by ending the attorney-client relationship before the harm caused by the acts reaches its full extent." *Teodorescu v Bushnell, Gage, Reizen & Byington,* 201 Mich App 260, 264-266; 506 NW2d 275 (1993).

We conclude that the trial court erred in granting summary disposition on grounds that Alef's representation was terminated before the June 3 closing date. Plaintiff presented evidence that Alef continued to represent plaintiff after the May 26, 2005 termination. "[A]n attorney often acts as his client's agent, and his authority may be governed by what he is expressly authorized to do as well as by his implied authority." *Uniprop, Inc v Morganroth*, 260 Mich App 442, 447; 678 NW2d 638 (2004). An agent's actions bind the principle where the actions fall within that agent's actual or apparent authority. *James v Alberts*, 464 Mich 12, 15; 626 NW2d 158 (2001). Alef testified that he agreed to the June 3 closing date on the day he was allegedly terminated, May 26, but agreed with Zerbo that he would call Weiss and try to bargain for more time, with Zerbo approving the June 3 date. Zerbo indicated he had no knowledge of this date and his malpractice action is based in large upon Alef's agreement to set June 3 as the closing date. The harm in Alef's actions leading up to and concluding with an agreement to a June 3 closing date did not reach their full extent until June 3, and Alef cannot claim that the termination of the attorney-client relationship prior to June 3 absolves him of all responsibility for the harm that resulted on that date. *Teodorescu,* 201 Mich App 264-266.

Finally, although Alef asserts that his representation was terminated on May 26, 2005, Weiss testified that he nonetheless had a conversation with Alef on June 2, after the alleged termination. Weiss stated that Alef did not inform him that new counsel represented plaintiff, and Alef told him that plaintiff had failed to arrange the financing and the deal was "dead." Thus, there is at least a question of fact as to whether Alef continued to represent plaintiff after May 26, 2005.

Reversed and remanded to the trial court for further proceedings. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto