

STATE OF MICHIGAN
COURT OF APPEALS

SILAS T. MCADOO,

Plaintiff-Appellant,

v

LISA B. KIRSCH SATAWA,

Defendant-Appellee.

UNPUBLISHED

December 17, 2002

No. 234628

Oakland Circuit Court

LC No. 2000-022784-NM

Before: Kelly, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order that granted summary disposition to defendant pursuant to MCR 2.116(C)(10). Plaintiff had filed a claim against defendant, his former court-appointed attorney, alleging attorney malpractice. We affirm.

Plaintiff's argument on appeal is that, because the trial court found that plaintiff had stated a claim on which relief could be granted, the case was required to go to the jury, and therefore the trial court erred in granting defendant's summary disposition motion under MCR 2.116(C)(10). We disagree. Summary disposition may be granted against a claim on the ground that the opposing party has failed to state a claim on which relief can be granted. MCR 2.116(C)(8); *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). Summary disposition may also be granted against all or part of a claim or defense "when there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10).

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. A motion under MCR 2.116(C)(8) may not be supported with documentary evidence. All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions which may be drawn from the facts, and are construed in a light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

A motion for summary disposition under MCR 2.116(C)(10), on the other hand, tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When deciding a motion for summary disposition under MCR 2.116(C)(10) a court must consider, in addition to the pleadings, all affidavits, depositions, admissions and other documentary evidence submitted, and must construe all such evidence in a

light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). A motion for summary disposition under MCR 2.116(C)(10) must be supported by documentary evidence. MCR 2.116(G)(3)(b); *Meyer v City of Center Line*, 242 Mich App 560, 574; 619 NW2d 182 (2000). The moving party must specifically identify the issues having no disputed material facts. MCR 2.116(G)(4); *Maiden, supra*, 120. The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact material to the dispositive legal claims exists. *State Farm v Johnson*, 187 Mich App 264, 267; 466 NW2d 287 (1990). When the burden of proof “rests on the nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.” *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

We find that the trial court correctly granted defendant’s motion under MCR 2.116(C)(10), while denying defendant’s motion under MCR 2.116(C)(8). Our review of the record reveals that in deciding defendant’s motion under MCR 2.116(C)(8), the trial court looked solely to the pleadings submitted by the two parties and determined that plaintiff had stated a claim on which relief could be granted. In deciding defendant’s motion under MCR 2.116(C)(10), the trial court looked beyond the pleadings to the documentary evidence submitted by the parties and determined that plaintiff had failed to rebut the allegations raised in defendant’s motion, and that, accordingly, no genuine issue of material fact existed. The mere fact that the trial court denied defendant’s motion for summary disposition under MCR 2.116(C)(8) was not, standing on its own, sufficient to overcome defendant’s motion for summary disposition under MCR 2.116(C)(10).

With regard to the issue of legal malpractice, the rules governing an attorney’s duties and responsibilities to his client are well settled. An attorney has a duty to fashion a trial strategy that comports with prevailing Michigan law. *Simko v Blake*, 448 Mich 648, 656; 532 NW2d 842 (1995). However, an attorney has no duty “to insure or guarantee the most favorable outcome possible,” and an attorney is never required “to exercise extraordinary diligence, or act beyond the knowledge, skill, and ability ordinarily possessed by members of the legal profession.” *Id.* “Where an attorney acts in good faith and in honest belief that his acts or omissions are well founded in law and are in the best interest of his client, he is not answerable for mere errors in judgment.” *Id.*, 658.

Defendant submitted a detailed affidavit in support of her motion, fully setting forth the facts regarding her representation of plaintiff. Plaintiff then had the burden of showing by evidentiary materials that a genuine issue of material fact existed. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). In response to this obligation, plaintiff submitted affidavits focusing primarily on issues of trial strategy. Specifically, plaintiff asserted that defendant failed to call certain witnesses to testify on plaintiff’s behalf, and that defendant failed to make motions requested by plaintiff.

The decision to call a witness to testify is a tactical decision, and such decisions cannot constitute grounds for a legal malpractice action. *Simko, supra*, 448 Mich 660. The specific incidents of malpractice set forth in plaintiff’s affidavits with regard to defendant’s failure to call witnesses and defendant’s decision not to make certain motions requested by plaintiff do not establish a genuine issue of material fact. Plaintiff failed to meet his burden of rebutting defendant’s evidence and did not establish that a genuine issue of material fact existed.

We also recognize that “in professional malpractice actions, an expert is usually required to establish the standard of conduct, breach of the standard, and causation.” *Dean v Tucker*, 205 Mich App 547, 550; 517 NW2d 835 (1994). Plaintiff submitted the names of three potential experts, but failed to provide any specific facts about which those experts would testify, contrary to MCR 2.116(G)(4). See also *Bass v Combs*, 238 Mich App 16, 34-35; 604 NW2d 727 (1999). In response, defendant provided signed affidavits from each of plaintiff’s named experts stating that he or she had not been engaged as an expert witness by plaintiff. Accordingly, plaintiff could not sustain his case because he was required to have an expert who could testify to the alleged malpractice.

For all of these reasons, we conclude that the trial court correctly granted defendant’s motion for summary disposition under MCR 2.116(C)(10), and plaintiff’s appeal fails.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Kathleen Jansen

/s/ Pat M. Donofrio