

STATE OF MICHIGAN
COURT OF APPEALS

PETER E. SHEFMAN, Individually, and Assignee
of TERRACE LAND DEVELOPMENT
CORPORATION, a Michigan Corporation,

UNPUBLISHED
December 28, 2006

Plaintiffs-Appellants,

v

JAMES L. ELSMAN and LAW OFFICES OF
JAMES L. ELSMAN,

No. 271045
Oakland Circuit Court
LC No. 2004-062709-NM

Defendants-Appellees.

Before: Zahra, P.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

Plaintiffs appeal as of right the summary dismissal of their cause of action arising out of defendants' legal representation of plaintiffs. We affirm.

On December 1, 2004, plaintiffs filed their complaint, in propria persona, against defendants, alleging legal malpractice, breach of contract, breach of fiduciary duty, fraud, misrepresentation, unjust enrichment, and violation of the consumer protection act. Following several motions to dismiss and compel discovery, on March 9, 2006, defendants filed their motion for summary dismissal, arguing that plaintiffs could not establish a prima facie case of legal malpractice. Defendants indicated that they were retained, for less than three months, to represent plaintiffs in three matters: (1) defense of plaintiffs in a fee claim brought by plaintiffs' former attorneys, McConnell & Plamiere, (2) an appeal to this Court on an insurance claim, and (3) defense of plaintiffs in a fee claim brought by plaintiffs' former attorneys, Ernst & Associates. Defendants argued that, after plaintiffs failed to pay them, the attorney-client relationship deteriorated and, eventually, plaintiff Shefman fired defendants. Plaintiffs subsequently retained new counsel, who substituted for defendants in all three matters.

Defendants argued that plaintiffs could not establish a prima facie case of legal malpractice because (1) with regard to the McConnell matter, which was eventually dismissed, plaintiffs had several attorneys both before and after defendants and plaintiffs failed to produce any evidence of damages incurred while defendants served as defense counsel; (2) with regard to the insurance claim, which was decided by this Court on June 29, 2004, plaintiffs had several attorneys both before and after defendants, and there was no evidence that plaintiffs incurred damages while defendants served as appellate counsel; and (3) with regard to the Ernst matter,

defendants filed a counterclaim on plaintiffs' behalf on October 18, 2002, but new counsel was substituted in on December 16, 2002, and there was no evidence that plaintiffs lost any rights or incurred any damages while defendants served as plaintiffs' counsel.

And, defendants argued, all of plaintiffs' theories of liability were based on defendants' alleged inadequate legal representation; thus, they were all grounded in malpractice. For example: (1) plaintiffs' breach of contract claim was that "defendants failed to properly and competently represent his clients and prosecute the cases," (2) plaintiffs' breach of fiduciary duty claim was that "defendants failed to timely and competently perfect the [] insurance appeal," (3) plaintiffs' fraud claim was that "defendants represented the insurance lawsuit had merit," (4) plaintiffs' misrepresentation claim was that "defendants made material misrepresentations that they would properly, timely, completely represent all plaintiffs' claims," (5) plaintiffs' unjust enrichment claim was that defendants were retained for specific tasks and legal representation and were unjustly enriched, and (6) plaintiffs' consumer protection claim failed as a matter of law because attorneys are regulated by a board acting under statutory authority, MCL 445.904(1)(a). Thus, all of plaintiffs' claims arose out of the attorney-client relationship and were duplicative and redundant claims of professional negligence. But, because plaintiffs could not establish either a breach of duty or proximate cause with respect to the claims—because plaintiffs retained subsequent counsel for each of the underlying cases—defendants were entitled to summary dismissal of the action.

Plaintiffs responded to defendants' motion for summary disposition, arguing that (1) defendants were paid a retainer fee of \$18,000 and very little work was performed on the matters for which they were retained, and (2) defendants advised plaintiffs that they had a meritorious legal malpractice claim against Ernst & Associates, which was subsequently dismissed as frivolous resulting in sanctions against plaintiffs. Plaintiffs argued that the breach of contract claim was merely a fee dispute—defendants were paid to perform work which was not performed and so plaintiffs were entitled to the return of their retainer fee. Plaintiffs also argued that, if no contract existed, plaintiffs pleaded an unjust enrichment claim because defendants received fees that were not earned. With regard to the Ernst legal malpractice claim, plaintiffs could establish proximate cause because, but for defendants' advice, plaintiffs would never have pursued the claim and been subjected to sanctions.

Defendants replied to plaintiffs' response to defendants' motion for summary disposition, arguing that a review of plaintiffs' first amended complaint showed that the breach of contract claim alleged that defendants performed legal services in a negligent manner—not that fees were unearned. But, even if this claim was considered, defendants argued, plaintiffs could not establish a breach of either of the two fee agreements. Because it was undisputed that there were two fee agreements, there could be no claim for unjust enrichment. And, because plaintiffs abandoned their other claims of malpractice in favor of a "fee dispute" claim, the only surviving malpractice claim failed because defendants never filed a legal malpractice claim against Ernst & Associates for plaintiffs. Plaintiff Shefman filed the case against Ernst in propria persona on September 27, 2004, and it was dismissed as frivolous on December 7, 2005, because plaintiffs had already entered into a settlement agreement and release with Ernst on January 12, 2004. Defendants provided legal services to plaintiffs from September 25, 2002, through mid-December of 2002; thus, the lawsuit against Ernst was filed about two years after the attorney-client relationship ended.

After oral arguments on the motion and after taking the matter under advisement, on May 4, 2006, the trial court issued its opinion and order granting defendants' motion for summary disposition. The trial court noted that, while plaintiffs had alleged various causes of actions against defendants, all of the allegations arose from the legal representation. Therefore, the breach of contract, breach of fiduciary duty, fraud, misrepresentation, unjust enrichment, and violation of the consumer protection act claims were summarily dismissed. The remaining claim was the legal malpractice claim which was summarily dismissed because plaintiffs failed to establish a breach in duty, i.e., that defendants did not exercise reasonable skill, care, discretion, and judgment in representing plaintiffs. And, plaintiffs failed to show how any alleged malpractice by defendants was the proximate cause of any damages. Accordingly, the case was dismissed in its entirety. Plaintiffs' motion for reconsideration was denied and this appeal followed.

Plaintiffs argue that the trial court should not have dismissed their breach of contract claim because defendants performed next to no work on the matters for which they were retained. After de novo review of the trial court's summary dismissal of this matter, we disagree. See *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

The trial court dismissed the breach of contract claim, as well as the other claims, because review of plaintiffs' first amended complaint revealed that all of these claims were premised on defendants' purported failure to properly provide legal representation to plaintiffs, i.e., legal malpractice. In particular, plaintiffs' breach of contract allegations included:

27. Defendants' failed to properly and completely represent his clients and prosecute the cases *McConnell & Palmiere v Peter Shefman and Peter Shefman et al. vs Auto-Owners Insurance Company* Michigan Appeal for necessary insurance coverage afforded his client pursuant [sic] his client's commercial insurance policy, failed to inform their clients of their rights and time limits, abandoned Plaintiffs' and client uninformed and with insufficient time to properly protect their interests which resulted in major legal expenses and huge losses.

28. Defendants' [sic] knew that "time was of the essence" and Plaintiffs' [sic] total reliance on defendants' knowing their client's very survival were at risk and yet still abandoned them unprepared an [sic] without any guidance following the defendants' incompetent and negligence [sic] representation.

It is apparent that the gravamen, or true nature, of plaintiffs' claim was not a contract fee dispute, but defendants' alleged "incompetent" and negligent representation. See *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005); *Manning v Amerman*, 229 Mich App 608, 613; 582 NW2d 539 (1998). Therefore, the trial court properly dismissed this claim.

Next, plaintiffs argue that the trial court erred in dismissing plaintiffs' unjust enrichment claim but it is undisputed that there was an express contract, in fact two contracts, between the parties; thus, this claim is without merit. See *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003).

Plaintiffs also argue that the trial court erred in holding that they failed to present evidence of a breach of duty because that issue was not raised by defendants in their motion for

summary disposition. But, the issue was raised and argued by defendants. Plaintiffs' assertion that defendants only argued that plaintiffs could not establish proximate cause is without merit. Defendants explicitly argued that (1) with regard to the insurance appeal, the proper actions were taken before plaintiffs secured new counsel thus "there exists no genuine issue of material fact that [defendants] did not breach any duty to [plaintiffs] . . . ;" (2) with regard to the McConnell case, defendants argued that plaintiffs had not established that defendants breached any duties in the two to three months that defendants represented plaintiffs in that claim, and (3) with regard to the Ernst case, defendants argued that they filed an answer to the complaint against plaintiffs, as well as affirmative defenses, a counterclaim, a discovery demand, and a reservation of malpractice claim notice; thus, plaintiffs' failure to articulate any specific breach of duty was fatal to the claim. In sum, defendants argued in their motion for summary dismissal that plaintiffs failed to establish that defendants breached any duties owed and the trial court agreed. We agree, too, and conclude that the dismissal of plaintiffs' legal malpractice claim on this ground was proper.

Finally, plaintiffs argue that the trial court erred in concluding that plaintiffs could not establish proximate causation because plaintiff Shefman's affidavit indicated that he followed defendants' legal advice and filed a claim against Ernst that was subsequently dismissed with sanctions because it was deemed frivolous. Although we need not consider this claim in light of our holding that plaintiffs failed to establish that defendants breached any duties owed to plaintiffs, we conclude that, again, this claim is wholly without merit. It is undisputed that plaintiffs filed the Ernst case in September of 2004, after having entered into a settlement agreement and release with Ernst in January of that same year, which was almost two years after defendants ceased being plaintiffs' counsel. In other words, the lawsuit was deemed frivolous because plaintiffs had already entered into a settlement agreement with Ernst months before filing their legal action, and about two years after defendants purportedly rendered any advice on the matter. Thus, the dismissal of plaintiffs' legal malpractice claim on this ground was proper. Accordingly, the trial court's summary dismissal of all of plaintiffs' claims against defendants was appropriate.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Bill Schuette