

STATE OF MICHIGAN  
COURT OF APPEALS

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GRADY HUDSON,

Plaintiff-Appellant,

v

GERALD M. LORENCE,

Defendant-Appellee.

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UNPUBLISHED

September 23, 2010

No. 291714

Wayne Circuit Court

LC No. 07-724008-NM

Before: FITZGERALD, P.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

In this action for legal malpractice and breach of contract, plaintiff, proceeding in propria persona, appeals as of right from the trial court's order granting defendant's motion for summary disposition and dismissing each of plaintiff's claims. We affirm.

Plaintiff retained defendant in 2001 to represent plaintiff in post-conviction criminal proceedings. In 2002, the federal district court denied the writ for habeas corpus that defendant had filed on behalf of plaintiff. Defendant did not further appeal that decision. In July 2005, a state trial court denied a motion for relief from judgment filed by defendant. Defendant did not further pursue an appeal of that decision. On September 6, 2007, plaintiff filed this action, alleging that defendant breached the parties' agreement in several respects and committed malpractice. In lieu of filing an answer, defendant filed a motion for summary disposition based on the statute of limitation. The trial court denied the motion. Defendant later filed a second motion for summary disposition under MCR 2.116(C)(7), (8), and (10), but did not specifically rely on the statute of limitations. The trial court granted defendant's motion under MCR 2.116(C)(7) (statute of limitations) and (8) (failure to state a claim). This appeal followed.

This Court reviews a trial court's summary disposition decision de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Defendant moved for summary disposition under MCR 2.116(C)(7), (8), and (10). Although the trial court did not indicate that it was granting summary disposition under MCR 2.116(C)(10), defendant continues to rely on that subrule on appeal as an alternative basis for affirming the trial court's decision. Because we conclude that each of plaintiff's claims is subject to dismissal under MCR 2.116(C)(8) or (10), it is unnecessary to address whether summary disposition was proper pursuant to MCR 2.116(C)(7) based on the statute of limitations.

A motion under MCR 2.116(C)(8) tests the legal sufficiency of a plaintiff's complaint by the pleadings alone. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). All well-pleaded factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the allegations. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). The motion should be granted only if the claims are so clearly unenforceable as a matter of law that no factual development could justify recovery. *Patterson*, 447 Mich at 432. A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

Plaintiff's complaint alleged several theories of legal malpractice. The elements of a legal malpractice claim are: "(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 & Petrella & Assoc, PC*, 261 Mich App 705, 712; 683 NW2d 699 (2004).

In order to establish proximate cause, a plaintiff must show that a defendant's action was a cause in fact of the claimed injury. Hence, a plaintiff must show that, but for an attorney's alleged malpractice, the plaintiff would have been successful in the underlying suit. This is the "suit within a suit" requirement in legal malpractice cases. [*Id.*]

A claim for malpractice requires a showing of an actual injury caused by the malpractice, not just the potential for an injury. *Colbert v Conybeare Law Office*, 239 Mich App 608, 620; 609 NW2d 208 (2000). An attorney is not a guarantor of the most favorable possible outcome, and an attorney who acts in good faith and with an honest belief that his acts and omissions are well founded in law and in the best interest of the client, is not answerable for mere errors in judgment. *Mitchell v Dougherty*, 249 Mich App 668, 677; 644 NW2d 391 (2002). In general, a bad result is insufficient alone to establish an issue for the jury regarding professional negligence. *Woodard v Custer*, 473 Mich 1, 8; 702 NW2d 522 (2005).

Plaintiff argues that he brought a claim for malpractice because defendant indicated that he could represent plaintiff at a new trial, should plaintiff receive one, but then later advised him that he could not appear in that capacity. Even accepting this allegation as true, plaintiff did not allege in his complaint that he was entitled to a new trial or that defendant failed to represent him in a trial capacity in any matter. Thus, there is no basis for concluding that defendant either breached this alleged term of the parties' agreement or committed malpractice by failing to represent plaintiff in a trial matter. Summary disposition of this claim was warranted under MCR 2.116(C)(8).

Plaintiff also argues that defendant caused him to lose his right to appeal the federal district court's decision denying his writ of habeas corpus. Plaintiff's complaint alleges that defendant agreed to pursue an appeal but then abandoned it because he concluded that an appeal was without merit. However, the complaint lacks any allegations indicating that the failure to pursue an appeal resulted in an actual injury. That is, there are no allegations suggesting that an

appeal could have been successful or could have resulted in some form of relief. Thus, summary disposition of this claim was also proper under MCR 2.116(C)(8).

Plaintiff also argues that defendant committed malpractice by filing the motion for relief from judgment without first obtaining plaintiff's approval. Even assuming that the parties' agreement required defendant to first obtain plaintiff's approval before filing the motion, plaintiff's complaint does not contain any allegations indicating that this alleged malpractice resulted in an actual injury. Plaintiff explains that he wanted to approve any motion before it was filed because the court rules only allow him to file one motion for relief from judgment. However, plaintiff's complaint did not identify any legal issue that defendant failed to raise in the motion, nor did it allege any facts suggesting that plaintiff was harmed because, but for defendant's failure to raise a given issue, plaintiff lost his ability to pursue it. Similarly, plaintiff did not submit any documentary evidence to support his claim that he lost his right to pursue a potentially meritorious issue. Absent any allegations or evidence to support a conclusion that defendant's alleged conduct resulted in an actual injury, summary disposition of this claim was proper under MCR 2.116(C)(8) and (10).

Plaintiff also appears to argue that his complaint alleged independent claims for breach of contract. To establish a breach of contract, a plaintiff must first establish the elements of a contract. *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990). A valid contract requires "(1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). The plaintiff must then establish the breach of the contract and damages resulting from the breach. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). "Once a valid contract has been established, a plaintiff seeking to recover on a breach of contract theory must then prove by a preponderance of the evidence the terms of the contract, that the defendant breached the terms of the contract, and that the breach caused the plaintiff's injury." *In re Brown*, 342 F3d 620, 628 (CA 6, 2003).

Plaintiff argues that defendant breached their agreement by not representing him before the Michigan Supreme Court. Plaintiff's complaint alleges that defendant was retained to pursue "Plaintiff's Appeal of Right" in Docket No. 118655, before the state Supreme Court. However, appeals to the Supreme Court are by leave only. See MCR 7.301 and 7.302. Further, even if the parties' agreement required defendant's representation in the Supreme Court, plaintiff's complaint does not allege that defendant did not represent plaintiff in the Supreme Court on his leave application. Accordingly, plaintiff did not properly allege a claim for breach of contract on this basis. Further, we take judicial notice of this Court's public docket entries, which indicate that defendant filed an appearance in the Supreme Court on June 19, 2001. The Supreme Court thereafter denied plaintiff's application for leave to appeal. *People v Hudson*, 465 Mich 857; 632 NW2d 142 (2001). Thus, plaintiff's claim also lacks factual support. Accordingly, summary disposition of this claim was warranted under both MCR 2.116(C)(8) and (10).

Plaintiff also argues that defendant breached their agreement by not pursuing an appeal of the state court's decision denying the motion for relief from judgment. However, the submitted evidence indicates that any agreement by defendant to pursue an appeal of that matter was conditioned on plaintiff or his mother paying the filing fee. Plaintiff did not submit any evidence showing that the filing fee was paid or tendered. Thus, plaintiff did not establish a genuine issue of material fact with respect to whether any obligation by defendant to file an appeal in that

matter was triggered. Accordingly, defendant is entitled to summary disposition of this claim pursuant to MCR 2.116(C)(10).

Plaintiff also appears to argue that defendant breached their agreement by filing the motion for relief from judgment without first obtaining plaintiff's approval. As previously explained, however, even if the parties' agreement required plaintiff's approval before defendant filed the motion for relief from judgment, and defendant breached this term, plaintiff's complaint does not allege that he was damaged by this alleged breach, nor did plaintiff submit any evidence to factually support any claim that this alleged breach resulted in actual harm. Accordingly, summary disposition of this claim was warranted under both MCR 2.116(C)(8) and (10).

Affirmed.

/s/ E. Thomas Fitzgerald  
/s/ Jane E. Markey  
/s/ Jane M. Beckering