STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1205

Fabian, May & Anderson, PLLP,
Respondent,

vs.

Paul Vollkommer,
Appellant.

Filed April 12, 2011
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CV-09-19527

John A. Fabian, III, Nicholas G.B. May, Fabian May & Anderson, PLLP, Minneapolis, Minnesota (for respondent)

John R. Graham, Quebec, Canada (for appellant)

Considered and decided by Worke, Presiding Judge; Peterson, Judge; and Shumaker, Judge.

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

Appellant former client challenges summary judgment in favor of respondent law firm awarding breach-of-contract damages and attorney fees for enforcement of the contract and the dismissal of his counterclaim related to fraud. Appellant contends that

(1) the district court erred in dismissing his counterclaim on the ground that Minn. Stat. § 481.07 (2010) does not create an independent cause of action, he did not allege fraud with particularity as required by Minn. R. Civ. P. 9.02, and he failed to state a claim upon which relief can be granted because the alleged misrepresentation claim was based on a prediction of a future occurrence; (2) legal-ethics rules are implied terms of every contract for legal services, and, therefore, genuine issues of material fact exist, requiring remand for fees due under a quantum meruit theory, subject to set-offs in favor of appellant; and (3) the contract term providing for recovery of attorney fees does not permit respondent law firm to collect in-house fees. We affirm.

FACTS

In July 2007, appellant Paul Vollkommer retained the law firm Nichols Kaster & Anderson, PLLP (NKA) to represent him in a dispute with Baldwin Township. At that time, John A. Fabian was the NKA attorney responsible for appellant's case. In July 2008, Fabian left NKA and, with two other attorneys, formed a new law firm, respondent Fabian May & Anderson, PLLP (FMA). Also in July 2008, NKA began a lawsuit on appellant's behalf. In September 2008, NKA withdrew from representing appellant.

In October 2008, appellant signed a contract retaining respondent to represent him in his dispute with Baldwin Township. The contract states that appellant will be charged for all work performed on his behalf at the prevailing hourly rate of the attorney or staff person performing the work and for all expenses incurred on his behalf. The contract defines the prevailing hourly rate as the rate at the time of service and states that rates are subject to change without notice during the course of representation. The contract

provides for monthly billing and states that payment is due on receipt of the billing statement. The contract requires appellant "to pay all costs of collection and attorney's fees incurred by [respondent] related to any failure by [appellant] to comply with the terms of this agreement, regardless of whether a suit is filed, including post-judgment fees and costs, if any."

Respondent billed appellant the following amounts: $1,803.20 in October 2008; $2,087.50 in November 2008; $5,586.16 in December 2008; $9,879.87 in January 2009; $14,950.71 in February 2009; and $25,914.34 in March 2009. Most of the services billed in the March invoice were performed in defending against separate summary-judgment motions by two Baldwin Township defendants.

In December 2008, appellant sent Fabian an e-mail claiming that some of the discovery work billed in the December invoice duplicated work that had been performed by NKA and that the parties had agreed to a reduced rate of $250 per hour for legal-assistant services. Fabian responded by e-mail, stating that there was no duplication of work, the previous discovery services related to preparing discovery requests and the current discovery services related to responding to discovery requests, and that the $300 rate charged in the December invoice was the reduced rate to which the parties had agreed.

Appellant objected to the fees charged in the March invoice, claiming that he had been induced to enter the contract with respondent by a representation that the total cost for legal representation, including trying the case, "would not be more than $40,000 to $50,000" and that the charges for defending against the summary-judgment motions

were, therefore, "highly confiscatory" and "highly suspect." Appellant sent respondent a letter with a check enclosed for payment of expenses charged on the March invoice and proposed a settlement of $12,044.50 for attorney fees. Respondent declined to settle but was willing to let appellant pay over time. Respondent stated that if its proposed payment plan was not acceptable to appellant, respondent intended to withdraw from representation. Appellant did not accept respondent's proposal, and respondent withdrew from representation in April 2009.

Respondent then began this breach-of-contract action against appellant to recover attorney fees due for representing appellant in the litigation against Baldwin Township and collection costs. Appellant filed a counterclaim, alleging that he was induced to enter the contract with respondent by the misrepresentation "that there was virtually no practical possibility" that the Baldwin Township action would be decided on summary judgment. The district court dismissed appellant's counterclaim, granted summary judgment for respondent, and awarded respondent attorney fees as part of its collection costs. The district court denied appellant's motion to vacate the summary judgment. This appeal followed.

D E C I S I O N

I.

The district court granted respondent's motion to dismiss appellant's counterclaim under Minn. R. Civ. P. 12.02(e) for failure to state a claim on which relief may be granted. When reviewing the dismissal of a pleading for failure to state a claim, an appellate court must determine only whether the pleading sets forth a legally sufficient

claim for relief. *Wiegand v. Walser Auto. Grps., Inc.*, 683 N.W.2d 807, 811 (Minn. 2004). A reviewing court must treat the allegations in the complaint as true and make all assumptions and inferences in favor of the nonmoving party. *Id.*; *St. James Capital Corp. v. Pallet Recycling Assocs. of N. Am., Inc.*, 589 N.W.2d 511, 514 (Minn. App. 1999). The standard of review is de novo. *Stead-Bowers v. Langley*, 636 N.W.2d 334, 338 (Minn. App. 2001), *review denied* (Minn. Feb. 19, 2002).

Before the district court, appellant argued "that the actionable fraud alleged in the counterclaim is not based on the common law, but on Section 481.07 of Minnesota Statutes which allows treble damages against lawyers who deceive their clients in connection with pending litigation in which such clients are parties." Minn. Stat. § 481.07 "does not create a new cause of action." *Love v. Anderson*, 240 Minn. 312, 316, 61 N.W.2d 419, 422 (1953). "The common law gives the right of action and the statute the penalty." *Id.* Because the statute does not create a new cause of action, the district court properly dismissed appellant's fraud claim under Minn. Stat. § 481.07 for failure to state a claim on which relief can be granted.

Because respondent interpreted appellant's counterclaim as alleging a common-law fraud claim, the district court also addressed whether the counterclaim stated a claim for common-law fraud. The district court concluded that the counterclaim was not pleaded with sufficient particularity and that, even if it was properly pleaded, it failed as a matter of law.

When pleading a fraud claim, "the circumstances constituting fraud . . . shall be stated with particularity." Minn. R. Civ. P. 9.02. Rule 9.02 does not specify what

constitutes sufficient particularity. But in addressing an argument that a complaint did not satisfy the requirements of rule 9.02 because the allegations of fraud were not pleaded with sufficient particularity, the supreme court stated that "[t]he requirements for a plea of fraud are satisfied when the ultimate facts are alleged." *Purdy v. Nordquist*, (*In re Estate of Williams*), 254 Minn. 272, 283, 95 N.W.2d 91, 100 (1959). And the Eighth Circuit Court of Appeals has explained with respect to rule 9(b) of the Federal Rules of Civil Procedure, which is the counterpart to Minn. R. Civ. P. 9.02, that "'[c]ircumstances' include such matters as the time, place, and contents of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby." *Murr Plumbing, Inc. v. Scherer Bros. Fin. Servs. Co.*, 48 F.3d 1066, 1069 (8th Cir. 1995) (quotation omitted). "The claim must identify who, what, where, when, and how. . . . Thus, the particularity required by [Federal] Rule 9(b) is intended to enable the defendant to respond specifically and quickly to the potentially damaging allegations." *U.S. ex rel. Costner v. United States*, 317 F.3d 883, 888 (8th Cir. 2003) (citation omitted), *cert. denied* 540 U.S. 875 (2003).

The counterclaim alleges:

> In order to induce [appellant] to enter the said contract of October 11, 2008, and to pay fees due thereunder, as otherwise he would not have done at all, [respondent], through Mr. Fabian, made a certain representation to [appellant] with intent to deceive him, knowing the contrary was true, to wit: that there was virtually no practical possibility that, by motion for summary judgment or otherwise, the case could be dismissed without trial by jury, or that the attempt would even be made. Thereby [respondent], acting through Mr. Fabian, committed an act of deceit prohibited by Section 481.07 of Minnesota Statutes.

The district court concluded:

> [Appellant], however, fails to state when these statements were made, in what context, or in what form they were made. As such, [respondent] cannot reasonably be expected to defend against the general assertion that at some time, at some place, in some form, [respondent] allegedly stated that he did not think there would be a summary judgment motion or dismissal without a trial by jury or that the attempt would be made.

For the reasons stated by the district court, appellant's counterclaim does not state a common-law fraud claim with sufficient particularity. The counterclaim does not state when or where the alleged statement was made and does not state whether the statement was oral or written.

The district court also determined that, regardless of the lack of particularity, the counterclaim failed to state a claim upon which relief can be granted because Fabian's alleged statement merely expresses an opinion about a possible future occurrence, rather than stating a past or present fact and, therefore, as a matter of law, does not constitute fraud. Citing W. Page Keaton, et al., *Prosser and Keaton on the Law of Torts* § 109, at 760 (5th ed. 1984), appellant argues that an exception to the rule that a fraud claim cannot be based on an opinion exists when parties stand in a relation of trust and confidence, such as the attorney-client relationship, and in that situation reliance on an opinion as to fact or law is justified. But appellant did not raise this issue in the district court and, instead, argued that it is not the law "that fraud is not actionable unless it relates only to the past or the present." Because this issue was not raised in the district court, we will not address it for the first time on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582

(Minn. 1988) (reviewing court generally must consider only issues that were presented and considered by district court in deciding matter before it, and party may not obtain review by raising same general issue litigated below but under a different theory).

II.

On appeal from summary judgment, we review the record to "determine whether there are any genuine issues of material fact and whether a party is entitled to judgment as a matter of law." *In re Collier*, 726 N.W.2d 799, 803 (Minn. 2007). A genuine issue of material fact exists if the evidence would "permit reasonable persons to draw different conclusions." *Gradjelick v. Hance*, 646 N.W.2d 225, 231 (Minn. 2002). We view the evidence in the record "in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

Appellant argues that the district court erred in concluding that the Minnesota Rules of Professional Conduct are not an implied term of every contract for legal services and denying recovery under the theory of quantum meruit. The existence of an express contract between the parties precludes recovery under the theory of quantum meruit. *Sterling Capital Advisors, Inc. v. Herzog*, 575 N.W.2d 121, 126 (Minn. App. 1998).

Appellant argues that respondent violated Minn. R. Prof. Conduct 1.5 which prohibits charging unreasonable fees, and Minn. R. Prof. Conduct 1.16(b), which governs withdrawing from representation. But the Preamble of the Minnesota Rules of Professional Conduct states that "[t]he rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability." Minn. R. Prof. Conduct Scope cmt. 20.

Violation of a rule does not give rise to a cause of action against a lawyer. *Id.* Because the rules of professional conduct do not give rise to a cause of action against an attorney and, therefore, are not an implied term of every contract for legal services, and because an express contract existed between the parties, the district court properly denied recovery under the theory of quantum meruit.

III.

Appellant argues that the term "attorney fees" in the contract between the parties should not include respondent's in-house attorney fees. Appellant raised this issue for the first time in his motion to vacate the judgment. The district court has discretion to grant relief from judgments under Minn. R. Civ. P. 60.02, and we will not reverse its decision absent an abuse of that discretion. *Pelletier Corp. v. Chas. M. Freidheim Co.*, 383 N.W.2d 318, 320 (Minn. App. 1986), *review denied* (Minn. May 16, 1986). "[F]ailure to defend on all possible theories is not a basis for vacating a judgment under rule 60.02." *Midway Nat'l Bank v. Bollmeier*, 474 N.W.2d 335, 339 (Minn. 1991). Because the issue was raised for the first time in the motion to vacate the judgment, the district court did not abuse its discretion in denying the motion.

The district court properly dismissed appellant's counterclaim and granted summary judgment for respondent and did not abuse its discretion in denying appellant's motion to vacate the judgment.

Affirmed.