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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-649

Rick Donato DeMartini,
Appellant,

vs.

Stoneberg, Giles & Stroup, P. A., et al.,
Respondents.

Filed October 24, 2011
Affirmed
Klaphake, Judge

Lyon County District Court
File No. 42-CV-09-850

Rick Donato DeMartini, Jr., Lamberton, Minnesota (pro se appellant)

Kevin K. Stroup, Stoneberg, Giles & Stroup, P.A., Marshall, Minnesota (for respondents)

Considered and decided by Schellhas, Presiding Judge; Klaphake, Judge; and Crippen, Judge.[*]

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

KLAPHAKE, Judge

Appellant Rick Donato DeMartini challenges the district court's order dismissing his claims against his former attorneys, respondents Stoneberg, Giles & Stroup, P.A., and Kevin Stroup, because appellant's affidavit of expert identification failed to meet the

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

requirements of Minn. Stat. § 544.42 (2010). Appellant argues that the district court erred because (1) the affidavit submitted was sufficient; (2) he should have been granted a 60-day "safe harbor" period to address any deficiencies in the affidavit; and (3) no expert affidavit was required for his causes of action for breach of contract and negligence.

Because appellant's affidavit of expert identification was insufficient and his claims of breach of contract and negligence are inextricably intertwined with his allegations of legal malpractice, we affirm.

D E C I S I O N

Affidavit of Expert Identification/Disclosure; Safe Harbor Provision

In an action asserting negligence or malpractice against certain professionals, including licensed attorneys, when expert testimony is required to establish a prima facie case, a plaintiff must submit two affidavits: (1) an affidavit of expert review served with the pleadings, stating that an expert qualified to testify at trial has reviewed the materials and believes that the defendant has deviated from the applicable standards of care, thus injuring the plaintiff; and (2) an affidavit of expert identification or disclosure, identifying the expert expected to testify and disclosing the substance of the expert's proposed testimony, to be served within 180 days after service of the complaint. Minn. Stat. § 544.42, subds. 2-4. The affidavit of expert review is not in question here. The district court determined that appellant's affidavit of expert identification was deficient and therefore dismissed his complaint.

“We review the district court’s dismissal of an action for procedural irregularities under an abuse of discretion standard. But where a question of law is present, such as statutory construction, we apply a de novo review.” *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209, 215 (Minn. 2007) (citations omitted).

In a matter involving legal malpractice, a plaintiff must establish (1) the existence of an attorney/client relationship; (2) legal negligence or breach of the attorney/client contract; (3) that the negligence or breach was the proximate cause of the plaintiff’s damages; and (4) but for the attorney’s conduct, the plaintiff would have been successful in the prosecution or defense of an action. *Fontaine v. Steen*, 759 N.W.2d 672, 677 (Minn. App. 2009). The latter three elements generally require expert testimony. *Id.* The expert affidavit must make a detailed disclosure of the expert’s anticipated testimony and is not satisfied by general or conclusory statements. *Schmitz v. Rinke, Noonon, Smoley, Deter, Colombo, Wiant, Von Korff & Hobbs, Ltd.*, 783 N.W.2d 733, 746 (Minn. App. 2010), *review denied* (Minn. Sept. 21, 2010).

Appellant’s expert, attorney Eric Cooperstein, provided an affidavit that identified the standard of care that an attorney owes when representing more than one client. He asserted that respondents breached that duty of care when it appeared that appellant’s interests and those of his wife, Rachel Fonss, were diverging in the mechanic’s lien action brought against them and their business by Clements Lumber. But he failed to identify how respondents’ breach was the proximate cause of appellant’s injury, the loss of his commercial property, or to explain how but for respondents’ breach, appellant

would not have been injured or would have been more successful in defending the action. Instead, Cooperstein stated generally:

> [Appellant] was deprived of the facts necessary to protect his business from his wife's malfeasance and deprived of the opportunity to seek to reopen the settlement within a reasonable time after it was approved by the court. At minimum, it is likely that [appellant] would have had the opportunity to insist that default notices under the settlement agreement be sent directly to him or [appellant] would have appointed an agent other than Fonss to receive default notices and protect [appellant's] interests.

At the time of the settlement, appellant, who was in federal prison, had instructed respondents to communicate with him through Fonss. Appellant and Fonss were still married, and Fonss did not file for dissolution until 18 months after the settlement agreement. According to Cooperstein's affidavit, Fonss did not default on payments under the settlement agreement until fall 2008, more than one year after the settlement agreement, and only after filing for dissolution. Both Fonss and appellant were individually served with notice of default in July 2008. *See Clements Lumber, Inc. v. DeMartini*, No. A08-2077, 2009 WL 2366176 (Minn. App. Aug. 4, 2009). At the time of the dissolution, the parties had almost $1 million in corporate debts, excluding potential tax liabilities. Most of the corporate assets had been sold by a receiver. The settlement agreement acted to remove the mechanic's lien from the parties' homestead, although there were other substantial liens against the homestead. Cooperstein's affidavit does not address how respondents' alleged deviation from the standard of care for representing more than one party caused this financial injury.

Although Minn. Stat. § 544.42, subd. 6(c), includes a "safe harbor" provision that permits a party to cure deficiencies in the affidavit within 60 days of receiving notice of the deficiencies, the supreme court has interpreted this to allow the curing of minor technical deficiencies that exist in an otherwise legally sufficient affidavit. *Brown-Wilbert*, 732 N.W.2d at 217-18. But an expert affidavit that does not meet the minimum standards of disclosure cannot be cured by relying *on the safe harbor provision. *Id.* In that regard, the supreme court stated:

> The existence of the cure provisions in subdivision 6 requires [that an otherwise sufficient affidavit not be rejected because of minor technical deficiencies]. But it is also undoubtedly true that an affidavit is not sufficient to satisfy the 180-day requirement if the deficiencies are so great that it provides no significant information. Any other interpretation would render the 180-day requirement meaningless.

Id. At a minimum, the expert affidavit must identify a standard of care, explain how the defendant's conduct deviated from that standard, and allege how the deviation from the standard of care caused the plaintiff's injury. *Id.* at 219. It is not enough to merely set out the facts: the affidavit "should set out how the *expert* will use those facts to arrive at opinions of malpractice and causation." *Id.* (quotation omitted). The affidavit here did not meet that minimum standard and therefore appellant cannot invoke the safe-harbor provision.[1] *See id.* at 216.

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[1] The Minnesota Supreme Court recently issued an opinion, *Wesely v. Flor*, ___ N.W.2d ___ (Minn. Sept. 7, 2011), which construes a similar expert identification affidavit required by Minn. Stat. § 145.682, subd. 6(c) (2010) and concludes that this statute provided a broader opportunity to amend an otherwise deficient affidavit. *Wesely* is not controlling here because in *Wesely*, the supreme court distinguished between Minn. Stat. § 145.682 and Minn. Stat. 544.42. *Wesely*, 2011 WL 3903193, at **9-10, n. 4.

We conclude that the district court did not err by dismissing appellant's complaint because the affidavit of expert identification was not sufficient and by concluding that the affidavit was so deficient that it could not be cured by invoking the safe-harbor provision.

Dismissal of Breach of Contract and Misrepresentation Claims

The district court concluded that "[appellant's] claims of breach of contract and negligen[t] [misrepresentation] are part and parcel of his legal malpractice claim" because these causes of action also require proof of causation as a material element. "Liability for breach of contract requires proof that damages resulted from or were caused by the breach." *Border State Bank v. Bagley Livestock Exch, Inc.*, 690 N.W.2d 326, 336 (Minn. App. 2004), *review denied* (Minn. Feb. 23, 2005). In any event, legal malpractice is usually described in the alternative as either negligence or breach of the attorney/client contract; the proof required in a legal malpractice claim is the same as that required to prove breach of contract. *See Schmitz*, 783 N.W.2d at 738. The allegations appellant relies on for these two causes of action are the same as those relied on for legal malpractice. In short, the district court correctly concluded that appellant's causes of action are merely alternative forms of pleading the same cause of action.

Finally, this court has thrice ruled that respondents did not commit fraud in negotiating the stipulated judgment. *See Clements Lumber, Inc. v. DeMartini*, No. A10-885, 2011 WL 589626, at *5 (Minn. App. Feb. 22, 2011); *Clements Lumber, Inc. v. DeMartini*, No. A08-2077 (Minn. App. Jan. 5, 2010) (order); *Clements Lumber, Inc. v.*

DeMartini, No. A08-2077, 2009 WL 2366176 at *2 (Minn. App. Aug. 4, 2009). This is the law of the case. *See Clements Lumber*, 2011 WL 589626 at *4.

Affirmed.