[Cite as *McBroom v. Gertmenian*, 2018-Ohio-3884.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Gracie E. McBroom,	:	
Plaintiff-Appellant,	:	
		No. 18AP-204
v.	:	(C.P.C. No. 15CV-8577)
Russell M. Gertmenian et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on September 25, 2018

On brief: *Gracie E. McBroom*, pro se.

On brief: *Vorys, Sater, Seymour and Pease LLP*, *Daniel E. Shuey*, and *Damien C. Kitte*, for appellees.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Plaintiff-appellant, Gracie E. McBroom, appeals from two orders of the Franklin County Court of Common Pleas. The first dismissed her initial complaint for failure to state a claim and a subsequent order ruled in her favor on a counterclaim brought by defendants-appellees to have her declared a vexatious litigator pursuant to R.C. 2323.52.

I. Facts and Procedural History

{¶ 2} Appellant began this action with a complaint filed September 29, 2015 naming as defendants 103 attorney-partners in the law firm of Vorys, Sater, Seymour and Pease, including Frederick L. Ransier, III (collectively "appellees").

{¶ 3} Appellant's complaint alleges, generally, she is part-owner of real estate located at 573 Stambaugh Avenue in Columbus, Ohio, and that in 1986 attorney Ransier represented four heirs or beneficiaries of the estate of appellant's brother, Marshall J. Allen,

Sr., who also held an interest in the Stambaugh Avenue property. The complaint names these individuals as Marcella Adams, Mildred Logan, Louella Smith, and Marshall J. Allen, Jr. (hereinafter collectively "the heirs"). The complaint alleges the transfer of the estate's interest in the Stambaugh Avenue property to the heirs was not properly completed because Ransier did not serve appellant or the ten other contemporary co-owners with an estate letter required for completion of the transfer. The complaint further states appellant did not become aware until 2014 that title records recognized the heirs as part-owners and appellant then filed a quiet title action in the Franklin County Court of Common Pleas under case No. 14CV-3154 naming the heirs and various other relatives as defendants. The quiet title action also named Ransier as a defendant.[1]

{¶ 4} The complaint further avers that as a consequence of this quiet title action, Ransier filed a claim with his insurance carrier, Lumbermens Mutual Casualty Company, which shortly thereafter went into liquidation. Appellant, through Lumbermens' receiver in Illinois, filed a claim with the Ohio Insurance Guaranty Association in connection with liquidation, which was declined following dismissal of Ransier in the quiet title action.

{¶ 5} Following the conclusion of the quiet title action, appellant filed the present complaint, which alleges three causes of action, all generally arising from Ransier's representation of the heirs in 1986. The third claim also seems to attack the prior judgment in favor of Ransier personally in the quiet title case and combines this with a demand for a copy of Ransier's malpractice insurance policy.

{¶ 6} All claims against the other attorney defendants are based on a theory of respondeat superior, although Ransier did not join the Vorys firm until well after his participation in the estate matters, at which time he was practicing as a member of the law firm of Ransier and Ransier.

{¶ 7} Appellees filed a motion to dismiss appellant's complaint for failure to state a claim, pursuant to Civ.R. 12(B)(6), on October 7, 2015. On the same date, appellees filed a counterclaim seeking to have appellant designated a vexatious litigator under Ohio law based on her "habitual and persistent vexatious conduct against Defendants, and, in particular, Frederick L. Ransier, III, in that she has without reasonable grounds filed three

[1] Although the complaint in the present case makes no mention of this, it appears the quiet title action was resolved in appellant's favor with respect to the property interests of the four heirs. *McBroom v. Brumfield*, Franklin C.P. No. 14CV-3154.

separate civil actions in this Franklin County Court of Common Pleas asserting allegations of negligent misrepresentation and malpractice." (Counterclaim at 2.)

{¶ 8} Appellant filed a motion to compel production of the above mentioned insurance policy on October 14, 2015, coupled with a motion for summary judgment and her reply to appellees' motion to dismiss. Appellant filed an answer to the vexatious litigator counterclaim on November 2, 2015 and a motion for default judgment on her own claims on November 13, 2015. Appellant filed another motion for default judgment on December 1, 2015. The trial court entered an order denying the above motions on August 4, 2017. The court specifically noted with respect to appellant's continued demand for a copy of Ransier's insurance policy that appellees had provided the requested discovery.

{¶ 9} Appellees filed a motion for summary judgment on their vexatious litigator claim on July 1, 2016. On August 8, 2017, the trial court rendered a decision and entry granting appellees' motion to dismiss appellant's initial complaint. This order does not contain Civ.R. 54(B) language and the vexatious litigator counterclaim remained pending, so that no final appealable order yet existed in the case. On February 28, 2018, the trial court entered judgment in favor of appellant on appellees' counterclaim to have appellant declared a vexatious litigator. This is the final appealable order in the case.

II. Assignments of Error

{¶ 10} Appellant timely appealed from the trial court's final order and brings the following three assignments of error:

> I. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT AS TO THE TRIAL COURT SHOULD HAVE GRANTED MISTRIAL AND/OR FASHIONED ANOTHER APPROPRIATE REMEDY WHEN THE JUDGE WAS ON MEDICAL LEAVE THE JUDGE'S STAFF AND THE APPELLEE(S) CREATED THE ORDER AND JUDGMENT ENTRY TO BE GRANTED IN FAVOR OF THE APPELLEE(S), IN CASE NUMBER 15CVH-05-4465. WITH THIS IN MIND, SHOULD CIV.R. 54(B), BE USED TO STATE THAT MCBROOM BE DESIGNATED AS A VEXATIOUS LITIGATOR.
>
> II. THE TRIAL COURT ABUSE ITS DISCRETION AND ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT BY DISMISSING HER CASE, IGNORING THE DEFAULT JUDGMENT, AND SUMMARY JUDGMENT, FAILING TO

> TURN OVER THE MALPRATICE INSURANCE POLICY CLAIM FORM THAT WAS MAILED FROM THE OFFICE OF SPECIAL DEPUTY RECEIVER AND MAILED TO THE OFFICE OF OHIO GUARANTY ASSOCIATION CONCERNING MCBROOM.
>
> III. THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT WHEN APPELLANT HAD TO SOUGHT HELP FROM THE SUPREME COURT REQUESTING ANOTHER JUDGE, ONLY TO RECEIVE AN ANSWER FROM THE SUPREME COURT "STATING PROCEDURES EXIST BY WHICH A APPELLANT COURT MAY REVIEW AND, IF NECESSARY CORRECT – RULING MADE BY TRIAL COURT."

(Sic passim.)

{¶ 11} Appellees have not appealed from the trial court's adverse vexatious litigator determination. Therefore, we do not address appellant's arguments related to this aspect of the final judgment.

III. Discussion

{¶ 12} When reviewing a judgment on a Civ.R. 12(B)(6) motion to dismiss a complaint for failure to state a claim upon which relief can be granted, an appellate court's standard of review is de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶ 5. A Civ.R. 12(B)(6) motion is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548 (1992), citing *Assn. for the Defense of the Washington Local School Dist. v. Kiger*, 42 Ohio St.3d 116, 117 (1989). In considering the motion to dismiss, a trial court may not rely on allegations or evidence outside the complaint. *State ex rel. Fuqua v. Alexander*, 79 Ohio St.3d 206, 207 (1997). The trial court may only consider the complaint itself and any written instruments attached thereto by the plaintiff. *Cline v. Mtge. Electronic Registration Sys.*, 10th Dist. No. 13AP-240, 2013-Ohio-5706, ¶ 9; *Brisk v. Draf Industries, Inc.*, 10th Dist. No. 11AP-233, 2012-Ohio-1311, ¶ 10; *Park v. Acierno*, 160 Ohio App.3d 117, 2005-Ohio-1332, ¶ 29 (7th Dist.). Rather, " '[i]f a Civ.R. 12(B)(6) movant relies on evidence outside of the complaint and its attachments, then Civ.R. 12(B) specifies that the motion must either be denied or converted to a summary judgment motion, which would proceed under Civ.R. 56.' " *Brisk* at ¶ 10, quoting *Park* at ¶ 30, citing *Petrey v. Simon*, 4 Ohio St.3d 154, 156

(1983). The trial court may dismiss the case only if it appears beyond a doubt that the plaintiff can prove no set of facts entitling the plaintiff to recover. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975), syllabus.

{¶ 13} A trial court must presume all factual allegations contained in the complaint to be true and must make all reasonable inferences in favor of the non-moving party. *Jones v. Greyhound Lines, Inc.*, 10th Dist. No. 11AP-518, 2012-Ohio-4409, ¶ 31 (Sadler, J., dissenting), citing *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190 (1988). "[A]s long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 145 (1991). The court need not, however, accept as true any unsupported and conclusory legal propositions advanced in the complaint. *Morrow v. Reminger & Reminger Co. L.P.A.*, 183 Ohio App.3d 40, 2009-Ohio-2665, ¶ 7 (10th Dist.).

{¶ 14} A party may assert a statute of limitations defense through a Civ.R. 12(B)(6) motion to dismiss if the defense is apparent in the complaint and documents attached thereto. *Charles v. Conrad*, 10th Dist. No. 05AP-410, 2005-Ohio-6106, ¶ 24; *Stuller v. Price*, 10th Dist. No. 02AP-29, 2003-Ohio-583, ¶ 27.

{¶ 15} Appellant's first two assignments of error focus on the viability of her legal malpractice claims, although these assignments also address other issues that will be discussed separately below.

{¶ 16} Appellant's core claims sound in legal malpractice based on "negligent misrepresentation" by Ransier. In order to establish a cause of action for legal malpractice, appellant must demonstrate that: (1) the defendant attorneys owed her a duty or obligation, (2) there was a breach of that duty or obligation and the attorneys failed to conform to the standard required by law, and (3) there is a causal connection between the conduct complained of and her alleged damages or loss. *Vahila v. Hall*, 77 Ohio St.3d 421, 427 (1997); *Krahn v. Kinney*, 43 Ohio St.3d 103 (1989).

{¶ 17} "When the gist of a complaint sounds in malpractice, other duplicative claims are subsumed within the legal malpractice claim." *Illinois Natl. Ins. Co. v. Wiles, Boyle, Burkholder & Bringardner Co., L.P.A.*, 10th Dist. No. 10AP-290, 2010-Ohio-5872, ¶ 15, citing *Pierson v. Rion*, 2d Dist. No. CA23498, 2010-Ohio-1793, ¶ 14. "Indeed,"

'[m]alpractice by any other name still constitutes malpractice.' " *Id.*, quoting *Muir v. Hadler Real Estate Mgt. Co.*, 4 Ohio App.3d 89, 90 (10th Dist.1982).

{¶ 18} Of the above elements, the duty requirement of the first is typically established through the existence of some form of attorney-client relationship. *Illinois Natl. Ins. Co.* at ¶ 19, citing *Natl. Union Fire Ins. Co. v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, ¶ 10. While Ohio law acknowledges a very limited exception allowing a cause of action for legal malpractice in the absence of a discernable attorney-client relationship, that expansion of attorney liability occurs only in situations where the plaintiff is in privity with a client of the defendant-attorney, or where the defendant-attorney acted maliciously. *Scholler v. Scholler*, 10 Ohio St.3d 98 (1984), paragraph one of the syllabus.

{¶ 19} We first address the state of the complaint insofar as it concerns attorney Ransier personally, since he is somewhat differently situated from the other defendant attorneys. We conclude the trial court properly found the complaint fails to state a claim against Ransier.

{¶ 20} Appellant's complaint makes no allegation she was ever party to an attorney-client relationship with any appellees here. Her complaint alleges an attorney-client relationship existed between Ransier and the heirs and (possibly) Ransier and the estate of Marshall J. Allen, Sr. Ransier's alleged negligence in that representation arises from his purported failure to file or serve a letter connected to estate proceedings. Accepting, arguendo, that the complaint also sufficiently implies an attorney-client relationship between Ransier and that estate, Ransier's duty as legal counsel runs to the heirs and the estate, not appellant. Appellant's complaint must therefore sufficiently allege a duty attributable to Ransier through application of the limited exceptions of malice and privity set forth in *Scholler*.

{¶ 21} The complaint does not allege Ransier acted maliciously. In the context of a legal malpractice action, "malice might exist where an attorney's actions can be construed as exhibiting a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. * * * '[T]here needs to be something extraordinary, perhaps unethical conduct or conduct on the verge of fraud, before an attorney's conduct in furtherance of his client's goals could support a reasonable inference of malice.' " *Tye v. Beausay*, 2d Dist. No. 27416, 2017-Ohio-7943, ¶ 16, quoting *Omega Riggers & Erectors,*

Inc. v. Koverman, 2d Dist. No. 26590, 2016-Ohio-2961, ¶ 31-32. " '[M]alice, as a substitute for an attorney-client relationship, cannot be predicated on actions by the attorney that the attorney is permitted to take, or even negligently may take, as part of the representation' of a client." *Id.*, quoting *Omega Riggers* at ¶ 35. The present complaint makes no allegations of this magnitude in reference to Ransier's actions.

{¶ 22} Nor has appellant alleged facts that place her in privity with Ransier's actual clients. That exception has been very strictly construed: "[T]he privity substitute for lack of an attorney-client relationship has been extended only to undeniably-vested beneficiaries of an estate and to the limited partners of a partnership. The exception has not been extended to minor children affected by representation of a parent in a divorce or to potential beneficiaries of a will." *Omega Riggers* at ¶ 28, citing *Scholler*, and *Elam v. Hyatt Legal Servs.*, 44 Ohio St.3d 175 (1989), *Arpadi v. First MSP Corp.*, 68 Ohio St.3d 453 (1994), and *Simon v. Zipperstein*, 32 Ohio St.3d 74 (1987).

{¶ 23} *Simon* is particularly instructive on the present facts. In *Simon*, the defendant-attorney drafted an antenuptial agreement and a will for a client. After the client's death, one of the potential beneficiaries under the will brought an action against the attorney for malpractice because the inconsistently drafted documents allowed the surviving spouse to take under both the antenuptial agreement and the will. The Supreme Court of Ohio held that a potential beneficiary of a will was not in privity with the client-testator for purposes of suing the attorney who prepared the estate plan. "*Simon* * * * reflects how very narrow the privity exception is when there is no attorney-client relationship in a legal malpractice action." *Omega Riggers* at ¶ 25.

{¶ 24} On the basis of this authority, we agree with the trial court that based on the allegations in her complaint, appellant can prove no set of facts to establish that Ransier owed her a duty or obligation. Dismissal under Civ.R. 12(B)(6) was appropriate.

{¶ 25} For the remaining 102 attorney-partners in the case, resolution is simpler. Appellant's complaint names them as defendants on a theory of vicarious liability as principals and employers of their agent, Ransier.

{¶ 26} First, we have now affirmed the trial court's conclusion that the complaint does not state a claim against Ransier. Without liability attributable to the agent, there can be no vicarious liability on the part of the principals.

{¶ 27} Second, although the complaint alleges that Ransier is currently a partner with the Vorys firm, it does not allege he was so employed or associated at the time of the purported malpractice in 1986. To the contrary, appellant has attached to her complaint a 1986 letter from Ransier to the probate court on Ransier & Ransier letterhead, indicating Ransier's professional affiliation at that time. "[I]n order for an employer to be liable under the doctrine of respondeat superior, the tort of the employee must be committed within the scope of employment." *Byrd v. Faber*, 57 Ohio St.3d 56, 58 (1991). We find no theory of vicarious liability under which a *subsequent* employer can be held liable for the torts of an employee who held no position or connection with the employer at the time of the alleged negligence. Dismissal of the complaint against the other principals of the Vorys firm was therefore required.

{¶ 28} Aside from the malpractice issues, appellant's first two assignments of error raise several collateral matters. Appellant alleges in her second assignment of error the trial court improperly declined to grant her repeated motions for default judgment or summary judgment. Review of the pleadings in this case indicate there was no default, appellees having timely pleaded with a motion to dismiss in lieu of an answer. Civ.R. 12(A)(2); Civ.R. 55(A); *Stuller*. A review of appellant's motion for summary judgment supports the trial court's assessment that appellant supported this only with her own affidavit presenting conclusory legal assertions, rather than competent evidence satisfying Civ.R. 56(C). The trial court did not err in refusing to grant default judgment or summary judgment to appellant.

{¶ 29} Appellant's second assignment of error also asserts the trial court failed "to turn over the malpractice insurance policy claim form that was mailed from the office of the special deputy receiver and mailed to the office of the Ohio Guaranty Association." Appellant does not address the trial court's determination that appellees eventually provided the requested discovery. We find no error by the trial court in this respect.

{¶ 30} Based on the foregoing, we overrule appellant's first and second assignments of error.

{¶ 31} Appellant's third assignment of error asserts the trial court in some way abused its discretion based on appellant's affidavit of disqualification filed with the Supreme Court on September 16, 2016 and denied by entry on September 22, 2016. This

court is without authority to review the Supreme Court's decisions regarding an affidavit of disqualification filed in the Supreme Court. The Chief Justice of the Supreme Court of Ohio, or her designee, has exclusive jurisdiction to determine a claim that a common pleas court judge is biased or prejudiced. Article IV, Section 5(C), Ohio Constitution. R.C. 2701.03 provides the exclusive means by which a litigant may claim that a common pleas court judge is biased or prejudiced. *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463 (1956), paragraph three of the syllabus. A court of appeals is without authority to void a trial court's judgment on the basis of alleged bias. *Trott v. Trott*, 10th Dist. No. 01AP-852, 2002-Ohio-1077; *Beer v. Griffith*, 54 Ohio St.2d 440, 441-42 (1978); *State v. Dougherty*, 99 Ohio App.3d 265, 269 (3d Dist.1994). Appellant's third assignment of error is accordingly overruled.

IV. Conclusion

{¶ 32} In conclusion, we overrule appellant's three assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

LUPER SCHUSTER and HORTON, JJ., concur.