

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2013 IL App (4th) 120779-U

NO. 4-12-0779

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
May 3, 2013
Carla Bender
4th District Appellate
Court, IL

DAVID J. FLETCHER,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	Champaign County
WARD F. McDONALD, THOMAS LOCKMAN, and)	No. 11L31
MEYER CAPEL, P.C.,)	
Defendants-Appellees.)	Honorable
)	Jeffrey B. Ford,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Appleton and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Where no genuine issue of material fact was shown by plaintiff's complaint, the trial court did not err in granting defendants' motion for summary judgment.

¶ 2 In February 2011, plaintiff, David J. Fletcher, filed a *pro se* complaint against defendants, Ward F. McDonald, Thomas Lockman, and Meyer Capel, P.C., for legal malpractice and breach of fiduciary duty. In November 2011, defendants filed a motion for summary judgment. In February 2012, plaintiff filed a cross-motion for summary judgment. In April 2012, the trial court granted summary judgment in favor of defendants.

¶ 3 On appeal, plaintiff argues the trial court erred in granting defendants' motion for summary judgment. We affirm.

¶ 4 I. BACKGROUND

¶ 5 Plaintiff is the owner and developer of a residential conservation community

known as Woodbine Park Prairie Estates (Woodbine Park) near Mount Zion. Meyer Capel is a law firm in Champaign, and Ward McDonald is a partner and Thomas Lockman an associate at the firm.

¶ 6 In February 2011, plaintiff filed a *pro se* complaint against defendants, setting forth claims of legal malpractice (count I) and breach of fiduciary duty (count II). Plaintiff purchased the Woodbine Park land in 1991 and planned to develop the property in an environmentally sensitive way in 2004. In 2006, plaintiff created the Woodbine Park homeowners association (HOA) to carry out the environmental mission. In June 2008, a dispute arose between plaintiff and the HOA. In October 2008, plaintiff met with McDonald, Lockman, and Tyrone Thomas, seeking legal advice about selling lots to his sister, Sally Fletcher, transferring a lot to his friend Thomas, and settling a dispute between the HOA and himself. The complaint alleged McDonald agreed to represent plaintiff, Sally, and Thomas.

¶ 7 Sally contracted to buy 12 lots in October 2008. That same month, the HOA sued plaintiff and later added Sally as a defendant. The facts of this underlying litigation are set forth in *Woodbine Park Prairie Estates Homeowners Ass'n v. Fletcher*, 2011 IL App (4th) 100844-U. Plaintiff met with McDonald and Lockman about the Woodbine Park lawsuit, and they assured him they would represent him. In November 2008, plaintiff transferred a lot to Thomas, and McDonald was alleged to have represented both plaintiff and Thomas in connection with the transaction.

¶ 8 The complaint alleged neither McDonald nor Lockman responded to the complaint filed against plaintiff. From mid-October 2008 until February 2009, McDonald and Lockman sent emails to plaintiff, Sally, and Thomas giving legal advice and discussing legal

strategy. McDonald terminated the attorney-client relationship with plaintiff via email on February 24, 2009.

¶ 9 The complaint alleged McDonald and Meyer Capel billed plaintiff nearly \$50,000 for their work, and their departure forced plaintiff to hire new attorneys. Beginning in April 2009, counsel for the HOA "began demanding privileged documents through discovery requests." Efforts to resolve the issue proved unsuccessful.

¶ 10 In September 2009, the HOA's counsel, Christopher Ellis, filed a motion asking the trial court to rule on plaintiff's assertion that communications between him, Sally, Thomas, and their former attorney McDonald were privileged documents protected by the attorney-client privilege. The HOA's counsel attached an affidavit dated September 14, 2009, signed by McDonald, denying an attorney-client privilege existed between Meyer Capel, Thomas, and Sally. The complaint alleged McDonald's voluntary affidavit assisted plaintiff's "opponents in obtaining documents that were protected by the attorney-client privilege" and resulted in harm to plaintiff's interest in the same litigation in which defendants had previously represented him.

¶ 11 The complaint alleged Meyer Capel and McDonald refused a request to withdraw or amend the affidavit. As a consequence, plaintiff's attorneys were required to oppose the HOA's motion seeking the production of privileged communications between defendants and plaintiff, Thomas, and Sally. A Macon County judge ultimately denied the HOA's motion. The complaint alleged plaintiff "was forced to spend \$75,000 in legal fees to respond to the Defendant's unethical conduct in preparing and refusing to withdraw, or at a minimum, amend, an affidavit adverse to their client's interest in the same litigation in which they represented [plaintiff]."

¶ 12 In count I, plaintiff alleged defendants breached their duties under the attorney-client relationship, and committed acts or omissions constituting negligence, "by and among other things their decision to submit an affidavit adverse to [plaintiff's] interest waiving the attorney-client privilege for the benefit of the HOA." Plaintiff claimed he suffered damages in the amount of \$75,000. Plaintiff made a similar allegation in count II (breach of fiduciary duty), claiming defendants breached their fiduciary duty "and committed numerous acts or omissions constituting negligence by and among other things their decision to submit an affidavit adverse to [plaintiff's] interests for the benefit of [plaintiff's] party-opponent in the same litigation in which they represented [plaintiff]." Plaintiff claimed he suffered \$75,000 in damages.

¶ 13 In March 2011, defendants filed an answer to the complaint, asserted affirmative defenses, and set forth a counterclaim. Defendants denied ever having an attorney-client relationship with Sally or Thomas. Defendants also denied they did anything that caused plaintiff to incur \$75,000 or any amount in legal fees. Defendants claimed plaintiff asked them to settle the Woodbine Park lawsuit with his agreement to reverse the transfer of the 12 lots to his sister. Plaintiff eventually reneged on his proposal, and defendants terminated the attorney-client relationship as a result. In their counterclaim, defendants stated plaintiff retained Meyer Capel to represent him in connection with the Woodbine Park matter in October 2008. Defendants claimed plaintiff failed to pay \$33,833 in legal bills plus \$1,066 in interest.

¶ 14 In November 2011, defendants filed a motion for summary judgment. Defendants claimed plaintiff could not demonstrate "that but for the McDonald affidavit he would not have expended the same or more legal fees litigating his assertion of the attorney-client privilege." In support of their motion, defendants attached the affidavit of attorney Ellis, who stated plaintiff

had taken the position in the Woodbine Park litigation that Meyer Capel had represented both Sally and plaintiff. Ellis then sought testimony from McDonald and Lockman as to whether they had represented Sally and Thomas. As defendants were not immediately forthcoming with an argument to testify or give an affidavit, Ellis advised Meyer Capel attorney Richard West that he would require McDonald and Lockman to testify at an evidentiary hearing. McDonald ultimately provided an affidavit, stating Thomas was not employed by Meyer Capel and McDonald never considered Sally to be a client of the firm.

¶ 15 In February 2012, plaintiff filed a motion in opposition and a cross-motion for summary judgment. Plaintiff claimed defendants' malpractice "extended beyond defendants' inexcusable conduct in volunteering that affidavit." Plaintiff claimed defendants were negligent because they failed to advise him he could "easily resolve" the litigation by conveying the common area to the HOA. In addition, plaintiff claimed defendants were negligent for failing to move to dismiss the HOA's complaint and pursuing settlement negotiations "for which they had no authority."

¶ 16 In February 2012, defendants filed a reply in support of their motion for summary judgment and in opposition to plaintiff's cross-motion for summary judgment. Defendants asserted plaintiff's argument that defendants' malpractice extended beyond the affidavit fell outside the allegations set forth in his complaint. The only damage claim in plaintiff's complaint centered on McDonald's affidavit.

¶ 17 In April 2012, the trial court entered an order on motion for summary judgment. The court found the allegations of attorney-client privilege showing legal malpractice and breach of fiduciary duty were based on the following two paragraphs stated in McDonald's affidavit:

"Tyrone Thomas was not employed by Meyer Capel, A Professional Corporation, and, to the undersigned's knowledge, was an agent for Dr. David J. Fletcher at all relevant times.

That the undersigned never considered Sally Fletcher to be a client of Meyer Capel, A Professional Corporation, and in the undersigned's opinion no attorney-client relationship was ever formed with Sally Fletcher."

The court found plaintiff's alleged violation of the attorney-client privilege did not involve any type of privileged communications by plaintiff made in confidence. Further, plaintiff did not show how the identification of Sally as a person not believed to be a client by McDonald or Thomas not being an employee of defendants but believed to be plaintiff's agent was privileged. Since plaintiff's complaint "as based on the fact that McDonald's affidavit is the sole breach of duty regarding negligence" and plaintiff could not show any violation of the attorney-client privilege based on what was stated in the affidavit, he failed to state a claim. The court granted defendants' motion for summary judgment.

¶ 18 In May 2012, plaintiff filed a motion for reconsideration. In June 2012, the trial court denied the motion. In July 2012, the court found no just reason for delaying appeal of its order on the motion for summary judgment. See Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010) . This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 Plaintiff argues the trial court erred in granting defendants' motion for summary judgment by failing "to rule upon most allegations about breach of duty regarding negligence."

We disagree.

¶ 21 "Summary judgment is appropriate where 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Ioerger v. Halverson Construction Co.*, 232 Ill. 2d 196, 201, 902 N.E.2d 645, 648 (2008) (quoting 735 ILCS 5/2-1005(c) (West 2000)). "However, a plaintiff cannot defend against a motion for summary judgment by presenting evidence on issues which are not pleaded in his complaint." *Bauer v. Hubbard*, 228 Ill. App. 3d 780, 786, 593 N.E.2d 569, 573 (1992). On appeal from a trial court's decision granting a motion for summary judgment, our review is *de novo*. *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163, 862 N.E.2d 985, 991 (2007).

¶ 22 In his complaint, plaintiff set forth claims of legal malpractice and breach of fiduciary duty against defendants. "Generally, a claim against an attorney for breach of fiduciary duty falls under the rubric of professional malpractice." *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 351, 736 N.E.2d 145, 155 (2000).

"To prevail in an action for legal malpractice, a plaintiff must plead and prove the following elements: (1) an attorney-client relationship that establishes a duty on the part of the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause establishing that 'but for' the attorney's malpractice, the plaintiff would have prevailed in the underlying action; and (4) actual damages." *Mitchell v. Schain, Fursel & Burney, Ltd.*, 332 Ill. App. 3d 618, 620, 773 N.E.2d 1192, 1193-94

(2002).

In an action for legal malpractice, "actual damages are never presumed[, but] must be affirmatively established by the aggrieved client." *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 307, 837 N.E.2d 99, 107 (2005).

¶ 23 In plaintiff's complaint, the legal-malpractice claim contained the following three paragraphs:

"35. At all times relevant hereto, each of the Defendants had an attorney-client relationship with Dr. Fletcher, Sally Fletcher, and Thomas, and a duty to zealously represent their interests. Defendants also had a duty to, among other things, provide Dr. Fletcher with an informed understanding of his legal rights, obligations and their practical implications; to zealously represent him; to negotiate results that were advantageous to him; and to protect their confidential communication.

36. The Defendants breached those duties, and committed numerous acts or omissions constituting negligence by and among other things their decision to submit an affidavit adverse to Dr. Fletcher's interest waiving the attorney-client privilege for the benefit of the HOA.

37. Dr. Fletcher has suffered damages in and about the amount of \$75,000, as a result of the Defendants' legal malpractice."

Plaintiff's breach-of-fiduciary-duty claim contained the following three paragraphs:

"39. At all times relevant hereto, each of the Defendants had an attorney-client relationship with Dr. Fletcher, Sally Fletcher, and Thomas; to exercise skill, diligence, and care; to put forth their best effort on behalf of their clients; and to adhere to a high standard of honesty.

40. The Defendants breached those duties, and committed numerous acts or omissions constituting negligence by and among other things their decision to submit an affidavit adverse to Dr. Fletcher's interests for the benefit of Dr. Fletcher's party-opponent in the same litigation in which they represented Dr. Fletcher.

41. Dr. Fletcher has suffered damages in and about the amount of \$75,000, as a result of the Defendants' legal malpractice."

¶ 24 Here, plaintiff's complaint set forth two claims and specifically focused the allegations of legal malpractice and breach of fiduciary duty on the McDonald affidavit, which stated Thomas was not employed by Meyer Capel and Sally was never considered a client of the firm. Defendants had withdrawn from their representation of plaintiff in February 2009, and McDonald produced his affidavit in September 2009.

¶ 25 Rule 1.9(c)(2) of the Code of Professional Conduct (Ill. S. Ct. Code of Prof. Res., R. 1.9(c)(2) (eff. Jan. 1, 2010)) generally prohibits a lawyer from revealing information relating to the representation of a former client. First, McDonald's affidavit revealed Thomas was never

employed by Meyer Capel. The affidavit did not reveal any of plaintiff's confidences with his former attorneys. Plaintiff fails to explain how the employment, or lack thereof, of Thomas and Meyer Capel would constitute confidential information pertaining to Meyer's Capel representation of plaintiff.

¶ 26 Second, McDonald's affidavit indicated he did not consider Sally a client of Meyer Capel. The identity of an attorney's client is generally not protected information and disclosure of that identity does not violate counsel's ethical duties. See *People v. Williams*, 97 Ill. 2d 252, 295, 454 N.E.2d 220, 241 (1983) (stating the general rule that "the attorney-client privilege does not extend to the identity of an attorney's client unless he would be prejudiced in some substantial way"); *Shatkin Investment Corp. v. Connelly*, 128 Ill. App. 3d 518, 525, 470 N.E.2d 1230, 1235 (1984) (stating the identity of a client is not protected by the attorney-client privilege unless it is in the public interest or it will harm the client). Just as the identity of a client is not protected by the attorney-client privilege, the identity of Sally as a nonclient was not privileged information.

¶ 27 The evidence in this case indicates McDonald's affidavit did not reveal any privileged information between Meyer Capel and plaintiff. Thus, plaintiff failed to establish the affidavit constituted legal malpractice or breach of fiduciary duty. Moreover, attorney Ellis indicated McDonald provided the affidavit only after Ellis advised that he would compel McDonald and Lockman to testify at an evidentiary hearing if no affidavit was provided. Ellis also noted he would have deposed McDonald and Lockman had McDonald not provided an affidavit. As the information provided by McDonald was not privileged, plaintiff has offered no basis for blocking disclosure of the information contained in the affidavit.

¶ 28 Plaintiff argues he alleged defendants breached their fiduciary duty and committed legal malpractice "by and among other things" their decision to submit McDonald's affidavit. Now on appeal, plaintiff contends the trial court failed to consider those "other things" that he stated in his own affidavit. However, "[a] plaintiff fixes the issues in controversy and the theories upon which recovery is sought by the allegations in his complaint." *Pagano v. Occidental Chemical Corp.*, 257 Ill. App. 3d 905, 911, 629 N.E.2d 569, 574 (1994). It was neither the trial court's duty nor this court's duty to scour the pleadings, affidavits, and exhibits in an attempt to piece together the two counts in plaintiff's complaint and add heft to his legal claims to thereby save him from summary judgment. Plaintiff filed his complaint *pro se* and set forth two grounds for relief focused on the McDonald affidavit. He did not seek to amend the complaint, even after he retained a lawyer, to flesh out those "other things" to establish how other acts of malfeasance constituted legal malpractice and breach of fiduciary duty. See *Pagano*, 257 Ill. App. 3d at 911, 629 N.E.2d at 574 (stating the plaintiff's remedy is to move to file an amended complaint before summary judgment is granted). Accordingly, we will not address those "other things" that were not raised in plaintiff's complaint.

¶ 29

III. CONCLUSION

¶ 30

For the reasons stated, we affirm the trial court's judgment.

¶ 31

Affirmed.