

No. 1-13-3427

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARK J. SCHACHT,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County
)	
v.)	09 L 11128
)	
JAMES R. GALVIN and SCHILLER, DUCANTO &)	Honorable
FLECK, LLP,)	Diane J. Larsen and
)	Ronald F. Bartkowicz,
Defendants-Appellees.)	Judges Presiding.

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Pucinski and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court properly dismissed counts for legal malpractice, breach of contract and estoppel against attorney and his law firm where plaintiff was not the attorney's client and was not the intended beneficiary of the attorney-client relationship between the attorney and plaintiff's ex-wife and where plaintiff failed to identify any enforceable promise defendants breached. The trial court further properly granted summary judgment in favor of defendants on plaintiff's fraud count where statement plaintiff identified was not false and constituted a non-actionable representation of law.

¶ 2 Plaintiff-Appellant Dr. Mark Schacht was married to Dr. Sari Hart when Hart informed him that she wanted a divorce. At the suggestion of Hart's attorney, defendant-appellee

James R. Galvin, Schacht (represented by his own lawyer) agreed to participate in the collaborative law process, an alternative to traditional marriage dissolution proceedings. When the process was not successful, the parties turned to litigation and Schacht later sued Galvin and his law firm, Schiller, Ducanto & Fleck, LLP (Schiller) (collectively, defendants), for legal malpractice and breach of contract. After multiple amendments and the assertion of additional claims, the trial court dismissed all but one claim and granted summary judgment in favor of defendants on the remaining claim. Because Schacht's appeal from these orders raises no meritorious issues, we affirm.

¶ 3

BACKGROUND

¶ 4

In late 2007 or early 2008 Hart retained Galvin, an attorney with Schiller, to represent her in marital dissolution proceedings. Hart advised Schacht that Galvin and his firm recommended a process known as collaborative law as an alternative to a traditional divorce.

¶ 5

Under the collaborative law process, the parties agree to have their attorneys and the parties work together to resolve issues relating to the division of assets and child custody. The process is intended to resolve issues more quickly, at a lower cost and without the aggravation and disagreements typically involved in litigation. In the event the process is unsuccessful and litigation ensues, both parties must retain other counsel.

¶ 6

Schacht agreed to enter into the collaborative law process in February 2008 and retained his own counsel. Both parties and their attorneys signed a collaborative law agreement. However, this alternative method of resolution failed and the marriage was dissolved through traditional divorce proceedings.

¶ 7

Schacht filed his original complaint against defendants on September 21, 2009. The complaint contained two counts denominated "Legal Malpractice" and "Breach of Contract."

In the legal malpractice count, Schacht alleged that as part of the collaborative law process defendants undertook duties not only to Hart, but to him as well. Schacht alleged that defendants committed legal malpractice during the course of the collaborative law process by (i) failing to prepare and proceed in a timely fashion, (ii) failing to attend various meetings or operate in good faith, (iii) causing the process to continue for over a year and (iv) increasing the overall cost of litigation. In his breach of contract count, Schacht further alleged that he was an intended third party beneficiary of the "contract entered into between [Schacht's] spouse and these defendants." It was unclear from this allegation whether the "contract" Schacht referred to was the retainer agreement between Hart and her attorneys or the agreement to engage in the collaborative law process. Schacht alleged that defendants breached the "contract" by failing to perform in a timely fashion or fulfill their obligations in good faith, and failing to respond to requests for information or exchange of materials.

¶ 8 Defendants moved to dismiss the complaint, but before the motion was briefed, Schacht filed a first amended complaint on January 22, 2010. The amended pleading contained an additional paragraph under the breach of contract count, in which Schacht alleged that Galvin, in violation of the collaborative law agreement, continued to advise and assist Hart after Schacht initiated litigation.

¶ 9 Defendants renewed their motion to dismiss. The trial court granted the motion with leave to replead.

¶ 10 In the second amended complaint, Schacht alleged in the legal malpractice count that he was a third-party beneficiary of Hart and Galvin's attorney-client relationship. Although Schacht added some new details to the allegations of legal malpractice, the substance of the allegations did not change. Namely, Schacht continued to allege that defendants committed legal malpractice because Galvin failed to personally appear at meetings, sending a junior

associate in his place, and did not respond to communications in a timely manner. The second amended complaint contained the additional allegation—repeated in both counts—that Galvin failed to terminate the collaborative law process in a timely manner when it became apparent that the process was not working. Schacht also attached a copy of the collaborative law agreement to the complaint.

¶ 11 The agreement provided that each party's attorney was independent and represented only one party in the process: "although our attorneys share a commitment to the Collaborative Law Process, each of them has a professional duty to represent his or her client competently and diligently, to exercise independent judgment, and to advocate for her or her client only." Multiple provisions in the agreement cautioned that there was no guarantee the process would be successful in resolving the dispute. The agreement allowed either party to terminate the process at any time with or without cause or reason. Finally, the agreement provided that if the parties later pursued litigation, the attorneys for both sides would be disqualified from representing their respective clients in the litigation.

¶ 12 The trial court initially granted defendants' motion to dismiss the second amended complaint with prejudice, but later granted Schacht's motion to reconsider, in part, ruling that the breach of contract count was dismissed without prejudice and with leave to replead. Schacht's motion to reconsider the dismissal of his legal malpractice claim was denied. Schacht then filed a third amended complaint and, without leave of court, added two new counts: breach of the implied covenant of good faith and fair dealing and fraud.

¶ 13 Schacht alleged that defendants breached the covenant of good faith and fair dealing by failing to exercise the discretion allowed under the terms of the agreement reasonably and with proper motive. Under the fraud count, Schacht alleged that defendants had induced him

to enter into the collaborative law agreement by fraudulently representing that it would be enforceable.

¶ 14 In addition, the breach of contract count in the third amended complaint referred to specific sections of the collaborative law agreement and included the additional allegations that Galvin failed to update Schacht promptly regarding original documents that were taken from the parties' home and failed to inform Schacht that the process was not going to lead to a collaborative solution.

¶ 15 Defendants filed another motion to dismiss, which, following a hearing, the trial court granted, again with leave to replead.

¶ 16 On April 15, 2011, Schacht filed his fourth amended complaint. The allegations related to the breach of the implied covenant of good faith and fair dealing count from Schacht's third amended complaint were incorporated into his breach of contract count. Schacht also added facts to his breach of contract count, alleging specific dates on which Galvin did not attend meetings or respond to communications.

¶ 17 Schacht, again without leave of court, added an estoppel count to the fourth amended complaint. The basis for this count was identical to the stated basis for the fraud count, namely, that, contrary to the position they took when the agreement was entered into, defendants took the position in defending Schacht's claims that the terms of the agreement were "so vague that they are incapable of being enforced against them." The complaint further alleged that either (1) defendants are bound by the agreement, or (2) they lulled Schacht into believing the agreement was enforceable, causing him to rely on the representation to his detriment. Schacht sought to estop defendants from denying the enforceability of the agreement.

¶ 18 Schacht amended his fraud count to include additional details regarding Galvin's alleged representations prior to the execution of the agreement and the fact that Galvin drafted the agreement. The fourth amended complaint further alleged that Schacht reasonably relied on Galvin's representations because Galvin drafted the agreement and claimed to have expertise in the collaborative law process.

¶ 19 Defendants again moved to dismiss and following a hearing on October 26, 2011, the trial court dismissed the breach of contract and estoppel claims with prejudice. The case proceeded solely on the fraud claim. Defendants later sought summary judgment on that count arguing that any statement made by Galvin to the effect that the agreement was enforceable was a statement of legal opinion and thus was not actionable.

¶ 20 At the hearing on the summary judgment motion, Schacht's attorney argued that the fraud count was not based on an alleged misrepresentation that the collaborative process itself would be binding, but rather on Galvin's representation that the agreement the parties signed was binding and enforceable. Counsel for Schacht characterized this representation as fraudulent because the agreement was, in fact, aspirational and the parties were not bound by any of its terms.

¶ 21 The trial court noted that the agreement prohibited Galvin from representing Hart in divorce proceedings if the collaborative law process was unsuccessful, and addressed allegations that Galvin had, in fact, represented Hart in the subsequent divorce. Counsel for Galvin informed the court this was not the case and that Galvin had withdrawn as Hart's counsel in the divorce proceedings.

¶ 22 The trial court granted defendants' motion for summary judgment, concluding that the alleged representation was a legal opinion and thus, not actionable as fraud. The court also

concluded that Schacht had not established reasonable reliance, a required element for a fraud claim. Schacht timely filed this appeal.

¶ 23

ANALYSIS

¶ 24

Dismissal of the legal malpractice, breach of contract and estoppel claims

¶ 25

The trial court granted defendants' motion to dismiss the legal malpractice, breach of contract and estoppel counts pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2012)). A section 2-615 motion attacks the legal sufficiency of the complaint based on defects apparent on the face of the pleading. *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 13. The relevant inquiry is whether the allegations, viewed in the light most favorable to the pleader, are sufficient to state a claim. *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 61. We review the trial court's order dismissing a complaint under 2-615 *de novo*, accepting as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Simpkins*, 2012 IL 110662, ¶ 13. A cause of action should be dismissed pursuant to section 2-615 only if it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief. *Id.*

¶ 26

Schacht first contends that the trial court erred in dismissing his count for legal malpractice. Schacht argues that because he was an intended beneficiary of Galvin and Hart's attorney-client relationship, the complaint alleged facts sufficient to state a cause of action for legal malpractice. We disagree.

¶ 27

The general rule in Illinois is that an attorney is liable for professional negligence only to his or her client, not to third parties. *Pelham v. Griesheimer*, 92 Ill. 2d 13, 19 (1982). A limited exception to the general rule requires that the nonclient prove that the *primary* purpose and intent of the attorney-client relationship was to benefit or influence the third

party. *Id.* at 21. This exception has chiefly been applied when an attorney has been retained to draft a will for the direct benefit of a third party. See, e.g., *McLane v. Russell*, 131 Ill. 2d 509 (1989); *Ogle v. Fuiten*, 102 Ill. 2d 356 (1984); *Jewish Hospital of St. Louis, Missouri v. Boatmen's National Bank of Belleville*, 261 Ill. App. 3d 750 (1994).

¶ 28 Here, Schacht's contention that Hart's primary purpose in retaining an attorney to assist in a collaborative divorce proceeding was to benefit or influence Schacht is specious. As this court has noted, it would strain the meaning of the "primary purpose and intent" language in *Pelham* to allow a third party to sue an attorney for malpractice simply because the third party may incidentally benefit from the attorney's representation of his client. *Schechter v. Blank*, 254 Ill. App. 3d 560, 567 (1993). Hart retained Galvin for the primary purpose of assisting her in a collaborative divorce proceeding. The fact that Hart and Galvin persuaded Schacht to participate in the collaborative law process does not transform Galvin and Hart's attorney-client relationship into one designed *primarily* to influence Schacht or impose on Galvin a legal obligation or duty of care to Schacht. An attorney naturally attempts to influence the adverse party as part of his obligation to represent his own client's best interests, but this does not mean that the primary intent and purpose of the attorney-client relationship is to influence the third party. Thus, the trial court correctly dismissed Schacht's cause of action for legal malpractice because no set of facts can be proved that would entitle Schacht to relief. Although it is doubtful whether the particulars of Schacht's allegations regarding Galvin's conduct during the collaborative law process could state a claim for legal malpractice under any circumstances, we need not discuss this issue.

¶ 29 Schacht next argues that the trial court erred in dismissing his breach of contract count. Schacht cites to specific provisions in the collaborative law process agreement that the parties would (1) rely on an atmosphere of honesty, cooperation, integrity and

professionalism, (2) make full, honest and timely disclosure of all information relevant to the dispute, and (3) promptly update information previously provided in which there has been a material change. Schacht further notes that under the agreement, counsel who represented the parties in the collaborative law process would be disqualified from representing the parties in a subsequent legal proceeding. Schacht argues that these provisions are definite enough to be enforced and, therefore, the trial court erred in dismissing the breach of contract count.

¶ 30 In Schacht's fourth amended complaint, he apparently sought to cure earlier defects in his complaint by including specific dates on which Galvin either failed to respond to emails or phone calls and sent a junior associate to a meeting in his place. Schacht also included the allegation that original investment documents had been removed from the house without his knowledge and not all of the documents had been accounted for. Schacht's allegations related to how defendants breached the agreement remained the same as in previous complaints. Schacht alleged that Galvin failed to provide full, honest and timely responses, failed to update Schacht promptly regarding the original documents that were removed from the home, failed to appear at meetings, and failed to timely terminate the collaborative law process. Finally, Schacht alleged that Galvin failed to withdraw from representing Hart even when he knew that a collaborative law solution was not possible.

¶ 31 We agree with defendants that the alleged breach of terms involving expressions of good faith, such as participating with honesty, cooperation, integrity and professionalism are not enforceable under Illinois law. See *Beraha v. Baxter Health Care Corp.*, 956 F.2d 1436, 1441 (7th Cir. 1992) (defendant's statement that it would do its "very best" was "merely a vague expression of goodwill and not an enforceable contractual promise); *Penzell v. Taylor*, 219 Ill. App. 3d 680, 688 (1991) (phrase "best efforts" too vague and indefinite to be an

enforceable contract term); *Titchener v. Avery Coonley School*, 39 Ill. App. 3d 871 (1976) (statement to employee regarding the hope that employment would continue for many years to come was too vague and indefinite to be enforceable). The bulk of Schacht's allegations supporting his breach of contract claim concern such amorphous undertakings that are too indefinite to support a cause of action.

¶ 32 Although Schacht also contends that certain unspecified documents were never accounted for, the only alleged breach as a result was that he failed to receive prompt updates regarding these documents, an allegation that lacks the specificity required to state a breach of contract claim. Schacht further fails to identify any provision of the agreement imposing an obligation on counsel to "account for" documents. Finally, Schacht's argument that Galvin failed to withdraw from representing Hart even when he "knew that a collaborative law solution was not possible" does not violate the any provision of the agreement, which requires only that an attorney withdraw from representing the client in subsequent legal proceedings. Although he suggests it in his brief on appeal, Schacht does not allege in the complaint that Galvin continued to represent Hart throughout divorce proceedings and, at the hearing on the motion for summary judgment, the trial court was informed that Galvin did, in fact, withdraw as Hart's counsel. No evidence in the record suggests otherwise. Therefore, because Schacht has not sufficiently alleged a breach of any definite and enforceable provision in the agreement, the trial court did not err in dismissing the breach of contract count with prejudice.

¶ 33 Schacht next claims the trial court erred in dismissing his estoppel count. Schacht argues that the basis for his estoppel claim is the fact that Galvin represented to Schacht that the agreement was enforceable, and then took the position in response to Schacht's complaint that the terms of the agreement were so vague that they were incapable of being enforced.

¶ 34 We need not reach the issue of whether a statement that an agreement is enforceable, a legal opinion, can form the basis of an estoppel claim because this count fails to state a cause of action on its face. The record shows that defendants have never taken the position that the agreement in its entirety is so vague that it is incapable of being enforced. In fact, Galvin testified at his deposition that he believed the provisions in the agreement regarding confidentiality and withdrawal of representation were binding and enforceable. Schacht continues to mischaracterize defendants' position that the terms of the agreement Schacht relies on are too vague and indefinite to support his breach of contract claim as an argument that *no* provision in the agreement is definite and enforceable. Defendants have never taken the position that the agreement in its entirety is unenforceable, thus rendering unnecessary an order estopping them from denying the enforceability of the agreement. Consequently, the trial court did not err in dismissing the estoppel claim.

¶ 35 Summary judgment on the fraud claim

¶ 36 Finally, Schacht contends the trial court erred in granting summary judgment in favor of defendants on the fraud count. Schacht claims that Galvin represented that the agreement was a valid contract capable of binding the parties while at the same time knowing that it was too vague to be enforceable and having no intention to honor its terms.

¶ 37 Summary judgment is appropriate when the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012); *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). "In determining whether a genuine issue as to any material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. A triable issue precluding summary judgment exists where the material facts are disputed or

where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts." *Id.* We review an order granting summary judgment *de novo. Id.*

¶ 38 The necessary elements to establish fraud are: (1) a false statement of material fact; (2) knowledge or belief by the defendant that the statement was false; (3) an intention to induce the plaintiff to act; (4) reasonable reliance upon the truth of the statement by the plaintiff; and (5) damage to the plaintiff resulting from this reliance. *Avon Hardware Co. v. Ace Hardware Corp.*, 2013 IL App (1st) 130750, ¶ 15.

¶ 39 At the outset, we note that Schacht's argument regarding his fraud count suffers from the same faulty premise as his claim for estoppel, *i.e.*, the claimed fraud is based on a mischaracterization of defendants' position in this litigation. Moreover, his argument relies on a seemingly willful misinterpretation of the reason his breach of contract count was dismissed. Even if Schacht established that defendants represented the agreement as enforceable and binding on the parties, the statement that they knew it was "too vague to be enforceable" is not supported by the record. As previously discussed, certain provisions in the contract involving goodwill and general statements related to such issues as timeliness and professionalism are too indefinite to be enforced. This does not mean that the agreement in its entirety is incapable of being enforced. As the trial court noted, had the parties been able to resolve their dispute through the collaborative law process and one party later refused to abide by the agreement, the other party would have been able to file suit to enforce the agreement. But even where the parties were unable to resolve their dispute through the process, as Galvin testified at his deposition, the confidentiality and withdrawal of representation provisions were definite and enforceable. Thus, even if Schacht could

establish that Galvin represented to Schacht that the agreement was enforceable, he has not established that such a representation was false.

¶ 40 Moreover, as the trial court correctly found, Schacht cannot establish that he reasonably relied on the representation. "Generally, one is not entitled to rely on a representation of law as both parties are presumed to be equally capable of knowing and interpreting the law." *Hamming v. Murphy*, 83 Ill. App. 3d 1130, 1135 (1980). The alleged misrepresentation involves the legal effect of the collaborative law agreement and is therefore a representation of law. Schacht, who we note was represented by counsel, is not entitled to rely on such a representation as the basis of a fraud claim. For the same reason, Schacht cannot establish that Galvin's representation regarding the enforceability of the agreement, assuming it was made, constitutes a representation of *fact* that can be redressed through a fraud claim.

¶ 41 Because Schacht cannot establish that defendants made a false statement of material fact upon which he was entitled to rely, the court properly granted defendants summary judgment on Schacht's fraud claim.

¶ 42 CONCLUSION

¶ 43 Because the primary purpose and intent of the attorney-client relationship between Galvin and Hart was not to benefit or influence Schacht, the circuit court correctly dismissed the legal malpractice count. Moreover, because Schacht did not identify any definite provisions in the agreement that had been breached, the breach of contract count was also properly dismissed. Schacht's estoppel claim had no basis in fact and sought relief that was unnecessary because the enforceability of the agreement was not disputed by the parties. Finally, the circuit court did not err in entering summary judgment in favor of defendants on the fraud count where Schacht could not establish the required elements of fraud.

No. 1-13-3427

¶ 44 Affirmed.