FIFTH DIVISION
December 27, 2013

No. 1-12-1842

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PAUL ABRAMSON, Plaintiff-Appellant, v. CHUHAK & TECSON, P. C., Defendant-Appellee.	)))))))))	Appeal from the Circuit Court of Cook County. No. 11 CH 22779 Honorable Mary L. Mikva, Judge Presiding.

JUSTICE TAYLOR delivered the judgment of the court.
Presiding Justice Gordon and Justice Palmer concur in the judgment.

ORDER

Held: Plaintiff's first amended complaint was properly dismissed pursuant to section 2-615 of the Illinois Code of Civil Procedure when he failed to plead sufficient facts to state a cause of action for (1) fraudulent inducement into a fee agreement, (2) rescission, (3) breach of fiduciary duty, and (4) breach of contract. Plaintiff's complaint seeking a declaratory judgement action was

properly dismissed for failure to sufficiently plead that an actual controversy exists.

¶ 1 Plaintiff Paul Abramson filed suit against defendant, Chuhak & Tecson P.C., alleging that defendant induced him into paying an exorbitant fee for legal services. Plaintiff also alleged that defendant withdrew during representation and, pursuant to their fee agreement, the fee should be rescinded. Plaintiff further alleged that defendant breached its contractual and fiduciary duties to plaintiff. Following the filing of his initial complaint and first amended complaint, the trial court dismissed the amended complaint in its entirety with prejudice. On appeal, plaintiff argues that the trial court erred in dismissing his amended complaint because he pled sufficient facts to sustain his claims under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2010)). Additionally, plaintiff contends that the trial court erred in dismissing count I of his initial complaint for declaratory judgment. Plaintiff asks that we reverse the judgment of the trial court. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 This appeal arises from the trial court's granting of defendant's motion to dismiss plaintiff's amended complaint for failure to state a cause of action under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2010)). The following facts are gleaned from the submissions of the parties and the record. In June 2008, plaintiff met with defendant to discuss representation in a will contest against his deceased mother's estate. Plaintiff's prior attorney withdrew from representing him with just weeks remaining to file the will contest.

¶ 4 Defendant offered plaintiff hourly fees, which he declined, while requesting a one-third contingency fee. Defendant responded that it normally billed only hourly, but the Board of

Chuhak & Tecson, P. C., might consider a higher contingency fee. After board approval, plaintiff accepted defendant's one-half contingency fee offer.

¶ 5 Plaintiff and defendant entered into an attorney contingent fee agreement ("fee agreement") on July 2, 2008, in which the plaintiff retained defendant to represent him in prosecuting a claim of assets. Under the terms of the fee agreement, defendant agreed to a 50% contingency fee in lieu of charging an hourly rate. The fee agreement defined the scope of work and specifically excluded appeal and estate planning, and it also stated that defendant would take no fee if it withdrew during its representation. With respect to attorney fees the agreement provided as follows:

> "Attorney has advised Client [Abramson] that attorney fees in matters of this nature are not prescribed by law but are a matter of private Agreement. Attorney has advised Client that he will represent Client in prosecution of his claim on the basis of a contingent fee equal to one-half (1/2) of any money or property recovered on account of such claims and suits by compromise, suit, settlement, verdict, judgment or court order or decree. Money or property recovered on account of Client's claim shall include assets in which Jane Beber Abramson, Decedent, had an interest either individually, or as spouse of Floyd Abramson, and/or as heir/beneficiary/legatee of Sam Beber, Deceased, and/or Helen Beber, Deceased. In no event will the attorneys' fees be in excess of one-half (1/2) of any settlement, verdict, judgment or court order or decree, plus expenses."

¶ 6 The fee agreement also provided that "if Client wishes to have Attorney provide any legal services not within the scope of this agreement, a separate agreement between Attorney and

Client will be required." The fee agreement further required plaintiff to advance and maintain $15,000 as an expense retainer to cover ongoing costs of investigation, discovery and case preparation.

¶ 7 On August 5, 2008, defendant filed the will contest on behalf of plaintiff, asserting claims of lack of testamentary capacity, undue influence and tortious interference with inheritance expectancy. The will contest alleged that plaintiff's father exerted undue influence over plaintiff's mother, causing her to remove the plaintiff from her will. During the next ten months defendant engaged in written discovery and presented plaintiff for his deposition.

¶ 8 Defendant then advised plaintiff to participate in an early pre-trial mediation to seek a quick resolution. Plaintiff, agreeing, provided defendant with a pre-trial mediation submission prior to mediation, which included a family history and plaintiff's allegations of his father's dominance over his mother's life and estate. Plaintiff further indicated his belief of great wealth on his mother's side of the family. He also stated there had been a financially supportive relationship between plaintiff and his mother over the years. Plaintiff valued the estate at $75 million while indicating his father valued the estate at $25 million.

¶ 9 In the submission, plaintiff also alleged his father had been abusive and negligent throughout plaintiff's childhood. However, during the two days of mediation which began on June 29, 2009, plaintiff and his estranged father spoke at length for the first time in years, during which they agreed to sign the settlement agreement and move forward toward rebuilding a relationship.

¶ 10 From the first to the second day of mediation, the settlement award increased from

plaintiff's father's initial offer of $200,000 to $1 million. The mediation judge also valued plaintiff's share at $1 million. Initially, plaintiff stated that he would not sign any settlement agreement unless defendant agreed to reduce its contingency fee. Defendant refused, stating that it would stop representing plaintiff if he refused to sign the settlement agreement and plaintiff would not owe defendant anything per their fee agreement. On June 30, 2009, at the end of the two-day mediation, plaintiff did in fact sign the settlement agreement.

¶ 11 The settlement agreement provided that plaintiff would receive 50% of the total settlement amount and that defendant would receive the other 50% of the total settlement amount. Plaintiff and all will contestants provided general releases to each other through which they released all claims against each other that were asserted or could have been asserted with respect to prior or existing wills or trusts belonging to plaintiff's mother and father. Plaintiff stated that the terms and conditions of the agreement had been fully explained to him by his attorney and he fully understood the terms of the settlement.

¶ 12 The settlement agreement also contained a "no contact" provision which provided that plaintiff would not contact or communicate with any "Section 5 Releasee," which included his father. Nevertheless, plaintiff and his father continued contacting each other as they had agreed during and after the mediation conference, until sometime in early 2010, when his father's attorneys sent a cease-and-desist order to defendant requesting that plaintiff stop attempting to contact his father. In late 2010, defendant forwarded a second cease-and-desist letter to plaintiff which it had received from plaintiff's father's attorneys, again urging plaintiff to stop contacting his father. Thereafter, defendant informed plaintiff that it would not be representing him with

respect to the dispute surrounding the "no contact" provision.

¶ 13 Subsequently, plaintiff filed the instant suit. Plaintiff's initial three-count complaint alleged that he was entitled to recover defendant's legal fees of $500,000 pursuant to the fee agreement because defendant declined to represent him in his post-settlement dispute with regard to the "no contact" clause. Plaintiff sought recovery of the fees under three alternative theories: 1) a declaratory judgment that defendant withdrew its representation while it still owed a duty to perform, and thus must surrender the $500,000 it was previously paid; 2) an equitable estoppel claim in which he claimed that the defendant should be estopped from enforcing the fee agreement and that plaintiff was due a refund of the fees paid; or 3) a breach of contract claim in which he sought damages for defendant's alleged breach of the fee agreement.

¶ 14 Defendant filed a motion to strike and dismiss under section 5/2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2010)) which was granted. In an order dated December 5, 2011, the trial court stated that declaratory judgments are used to address disputes before steps are taken which would give rise to claims for damages and noted, "clearly such steps have already been taken in this case." As to count II, the court found that affirmative claims for equitable estoppel do not exist under Illinois law. Finally, as to count III, which rested on defendant's failure to represent him after plaintiff was alleged to have breached the "no contact" clause of the settlement agreement, the trial court further found this to be "simply not a breach of the fee agreement" by the defendant. Plaintiff requested and the trial court allowed plaintiff to amend.

¶ 15 Following the trial court's dismissal of his initial complaint, plaintiff filed a four-count

first amended complaint on January 27, 2012. Plaintiff's amended complaint alleged fraudulent inducement to enter the fee agreement, rescission of the fee agreement, breach of fiduciary duty, or, in the alternative, breach of contract claims.

¶ 16 Subsequently, defendant again filed a motion to dismiss the entire complaint under section 2-615. On May 29, 2012 the trial court entered an order granting defendant's motion with prejudice. In doing so, the court found:

> "[T]here's no fraud claim, which is required for Counts 1 and 2. There's simply not a fraudulent statement. * * * [T]he fee agreement specifically says they're going to investigate and see what kind of claim this is. * * * [T]here is simply nothing in this representation agreement which required the firm to represent the plaintiff in this case in reference to any alleged breaches of him of this settlement agreement that was entered into.* * *[T]here is an inherent conflict in any contingency arrangement with an attorney. As long as it is clearly spelled out in the representation agreement as it was in this agreement, and as long as the parties must approve any settlement before it is entered into, that conflict does not result in a breach of fiduciary duty. And that includes a settlement that has nonmonetary terms including nonmonetary terms that might be of some burden to the plaintiff."

It is from this judgment that plaintiff appeals.

¶ 17 ANALYSIS

¶ 18 On appeal, plaintiff contends that the trial court erred in granting defendant's motion to dismiss. Plaintiff argues he alleged sufficient facts in order to survive dismissal under section 2-

615, and therefore, challenges the trial court's dismissal of counts I through IV of his first amended complaint. Specifically, plaintiff first contends the trial court erred in dismissing his fraud in the inducement claim where he alleged that, by charging a high contingency fee, defendant implicitly and falsely represented to him that it considered his claim to be of high value. Second, plaintiff argues that the trial court erred in dismissing his rescission claim as he successfully pled defendant made a false statement upon which plaintiff relied to his detriment. Third, plaintiff maintains that he successfully alleged that defendant put its pecuniary interests ahead of plaintiff's legal interests and thus breached its fiduciary duty to plaintiff. Fourth, plaintiff contends that the trial court erred in dismissing his breach of contract claim because he successfully pled defendant breached the fee agreement. Finally, plaintiff argues that he successfully pled an action for declaratory judgment in his initial complaint and that the trial court erred in dismissing this claim because the court failed to find that the defendant continued to represent plaintiff in the post-settlement "no contact" clause dispute.

¶ 19 A motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2006)) challenges the legal sufficiency of the complaint. *Karimi v. 401 North Wabash Venture*, LLC, 2011 IL App (1st) 102670, ¶ 9 (citing *Dloogatch v. Brincat*, 396 Ill. App. 3d 842, 846 (2009)). In ruling on the motion, the court accepts as true all well-pleaded facts in the complaint as well as all reasonable inferences drawn therefrom. *Karimi*, 2011 IL App (1st) 102670, ¶ 9 (citing *Vitro v. Mihelic*, 209 Ill. 2d 76, 81 (2004)).

¶ 20 Dismissal under section 2-615 is proper if the pleadings and attachments, when construed in the light most favorable to the plaintiff, clearly show that plaintiff cannot prove any set of facts

that would entitle him to relief. *Board of Directors of Bloomfield Club Recreation Ass'n v. Hoffman Group, Inc*., 186 Ill. 2d 419, 424 (1999). Review of the trial court's dismissal of plaintiff's complaint pursuant to section 2-615 is *de novo*. *Doe v. McKay*, 183 Ill. 2d 272, 274 (1998).

¶ 21 Plaintiff's first contention is that the trial court erred in dismissing count I of his amended complaint, which alleges fraud in the inducement with regard to the fee agreement. In order to constitute fraud in the inducement, the defendant must have made a false representation of a material fact knowing or believing it to be false and doing it for the purpose of inducing the plaintiff to act. *Janowiak v. Teisi*, 402 Ill. App. 3d 997, 1006 (2010) (citing *Phil Dressler & Associates, Inc., v. Old Oak Brook Inv. Corp.*, 192 Ill. App. 3d 557, 584 (1989)). Plaintiff contends that, by charging an elevated contingent fee and a $15,000 expense retainer, defendant implicitly represented to him that it was going to treat his case as one having merit rather than as a "nuisance." Plaintiff further alleges that this was a false representation intended to induce him to sign the fee agreement. In making this contention, plaintiff relies on *Glazewski v. Coronet Ins. Co.*, 108 Ill. 2d 243, 250 (1985), for the proposition that to support a finding of fraud, "representations may be made by words, or by actions or other conduct amounting to a statement." In *Glazewski,* plaintiffs alleged that they were charged premiums for insurance coverage that had no value because they could never collect on it due to then current Illinois statutes. *Id*. The court found that the issuance of coverage by an insurance company in return for a premium is a tacit representation to the consumer that the coverage has value. *Id*. The court further found that the insurance company defendants had made a false representation as to the

value of the coverage by issuing it without disclosing that it had no value and thus plaintiff had alleged misrepresentation by conduct. *Id.* In the instant case, plaintiff argues that the elevated fee and the $15,000 expense retainer were a combination of words and actions or other conduct that amounted to a statement that defendant did not see the case as a mere nuisance and conveyed that the case had merit despite defendant's actual beliefs to the contrary. Plaintiff further contends that by omitting this material fact from plaintiff, defendant induced plaintiff to agree to an elevated fee agreement, thereby committing fraud in the inducement.

¶ 22 Conversely, defendant argues that when the fee agreement was signed, one of the provisions, section VIII, states in relevant part: "It is particularly agreed and understood that Attorney agrees to represent Client subject to Attorney's investigation of the circumstances surrounding Client's claim." According to defendant, that section expressly indicates that at the time the fee agreement was executed, defendant did not know what plaintiff's claim was about and therefore, could not have known whether the case had merit. Defendant further contends that defendant, not plaintiff, was the one under duress, when plaintiff told defendant that he needed immediate representation on an emergency basis because his previous attorney resigned and there were only a few weeks left in which a claim of assets could be filed. Moreover, defendant reiterates that it was plaintiff who refused to accept defendant's hourly rate, which is normally what defendant charged in this type of case, and that plaintiff would only accept a contingency agreement.

¶ 23 Nevertheless, plaintiff agues that he pled sufficient facts and reasonable inferences of false representation and adequate damages in lost case value and exorbitant and unconscionable

fees to survive a motion to dismiss under section 2-615 (735 ILCS 5/2-615 (West 2010)). Plaintiff argues that a finder of fact could infer that defendant engaged in misrepresentations as to how it viewed his case. We disagree. Based upon our review of the record, it is apparent that plaintiff, not defendant, is the party who sought and in fact insisted upon a contingent fee agreement. Moreover, it is apparent from the face of the agreement that the representation was "subject to [defendant's] investigation of the circumstances," thus indicating that defendant had not yet fully investigated the merits of plaintiff's claim. We simply do not see a fraudulent statement or fraudulent conduct here and thus, we find that the trial court did not err in dismissing count I of plaintiff's amended complaint.

¶ 24 We now discuss whether the trial court erred in concluding that plaintiff did not make a *prima facie* case for the remedy of rescission. In order to establish an equitable claim for rescission on the basis of fraud and misrepresentation, one must demonstrate: (1) a false statement of material fact; (2) known or believed to be false by the party making it; (3) intended to induce the other party to act; (4) acted upon by the other party in reliance upon the truth of the representations; and (5) damaging to the other party as a result. *Fogel v. Enterprise Leasing Company of Chicago*, 353 Ill. App. 3d 165, 171 (2004) (citing *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 496 (1996)); see *Puskar v. Hughes*, 179 Ill. App. 3d 522, 528 (1989) ("A court of equity may grant the remedy of rescission where there has been some fraud in the making of a contract, such as an untrue statement or the concealment of a material fact, or where one party enters into a contract reasonably relying on the other party's innocent misrepresentation of a material fact."). A misrepresentation is "material" if the party seeking rescission would have

acted differently had it been aware of the misrepresentation. *Fogel,* 353 Ill. App. 3d at 171-72 (citing *Miller v. William Chevrolet/GEO, Inc.*, 326 Ill. App. 3d 642, 649 (2001)).

¶ 25 Plaintiff contends he alleged sufficient facts to state a claim for rescission of the fee agreement. He argues that the fee agreement should be rescinded due to defendant's fraudulent misrepresentation inducing plaintiff to enter the elevated fee agreement. Defendant responds that there was no fraudulent conduct with respect to the fee agreement, as it was plaintiff's decision not to agree to an hourly rate and to insist on a contingent fee. For the reasons stated above, we again do not find that the fee agreement constituted a fraudulent statement, implicit or otherwise.

¶ 26 Further, rescission cannot be awarded where the parties cannot be returned to their pre-contract status. *Klucznik v. Nikitopoulos*, 152 Ill. App. 3d 323, 328 (1987). Restoration of the *status quo ante* initially requires the return of any consideration that has passed to the rescinding party under the contract. *Fogel*, 353 Ill. App. 3d at 173 (citing *Puskar v. Hughes*, 179 Ill. App. 3d 522, 528 (1989)). The only time an inability to return to the *status quo ante* will be excused is when "restoration has been rendered impossible by circumstances not the fault of the party seeking rescission, and the party opposing the rescission had obtained a benefit from the contract." *International Ins. Co. v. Sargent & Lundy*, 242 Ill. App. 3d 614, 629 (1993).

¶ 27 In this case, the parties agree that restoration of the *status quo ante* has been rendered impossible, since plaintiff signed the settlement agreement. Plaintiff alleges that he only agreed to the settlement agreement because defendant advised him to, against his best interests. Therefore, according to plaintiff, it is defendant's fault that he cannot return to the *status quo ante*, and the exception stated in *International Ins. Co.* should apply.

¶ 28 Defendant counters that plaintiff was informed he did not have to sign the settlement agreement. The record contains a copy of the settlement agreement, and it clearly shows that plaintiff initialed all sections. *Premier Elec. Constr. Co. v. Ragnar Benson, Inc.*, 111 Ill. App. 3d 855, 865 (1982) ("One is presumed to know the contents and meaning of the obligations he undertakes when he signs a written contract"). Defendant further argues that plaintiff cannot establish that "restoration has been rendered impossible by circumstances not the fault of the party seeking rescission." *International Ins. Co.,* 242 Ill. App. 3d at 629. Defendant contends that plaintiff's own actions in availing himself of defendant's services and voluntarily accepting a $1 million settlement have made it impossible to restore the *status quo ante*. We agree, and moreover, as we have found no fraudulent statement on the part of defendant, we agree that plaintiff has failed to state a cause of action for rescission.

¶ 29 We next turn to plaintiff's claims for breach. Plaintiff asserts that count III of his first amended complaint sufficiently pleads a cause of action for breach of fiduciary duty. To successfully state a claim for breach of fiduciary duty, it must be alleged that a fiduciary duty exists, that the fiduciary duty was breached, and that such breach proximately caused the injury of which plaintiff complains. *Prime Leasing, Inc., v. Kendig*, 332 Ill. App. 3d 300, 313 (2002) (citing *Martin v. Heinold Commodities, Inc*., 163 Ill. 2d 33, 53 (1994)).

¶ 30 Plaintiff contends that defendant breached its fiduciary duty to him on multiple occasions when it put its own interest in obtaining fees ahead of plaintiff's best interests in handling the will contest. He alleges three distinct incidents of breach. First, he claims that defendant induced him to pay an unconscionably high contingent fee. Second, he claims that defendant rushed into an

early mediation and induced him to sign a settlement agreement before discovery could be conducted on the value of his mother's estate. He alleges that if such discovery had occurred, it would have shown the value of the estate to be $75 million rather than $25 million, thus increasing his likely award. Third, he claims that defendant ignored his wishes when it recommended a settlement with a "no contact" clause despite plaintiff's express desire for contact with his father. We consider these contentions in turn.

¶ 31 Plaintiff first argues that defendant induced him to pay an excessive and unconscionable contingent fee. As discussed above, we agree with defendant that it was plaintiff's own desire to not contract for an hourly rate, but instead require a contingent fee arrangement.

¶ 32 Plaintiff next argues that defendant did minimalist legal work and rushed to an early mediation and settlement. However, the record shows that plaintiff was not forced into settlement but made an informed choice to sign the settlement agreement. When plaintiff initially said he would not sign the settlement agreement unless defendant reduced their contingency fee, defendant declined. It informed plaintiff that if he did not sign the settlement agreement, it would withdraw from representation, as it was entitled to do pursuant to section VIII of the fee agreement, and in that event plaintiff would not owe defendant any fees. Thus, it is clear that the plaintiff was aware he did not have to sign the settlement agreement but could have hired another attorney and continued to litigate the case. Defendant further maintains, and we agree, that signing the settlement did not reduce plaintiff's award, as evidenced by the fact that the mediation judge also valued the settlement at approximately $1 million. Moreover, any damages the plaintiff might claim in this regard would be purely speculative. In this regard, we agree with the

statement of the trial court, in its order dated May 29, 2012,

> "even if the estate were worth more, even if it were worth three times as much, that doesn't mean that the plaintiff would have either through litigation or a different settlement recovered three times as much because there are all sorts of other issues relative to his recovery beyond the value of his mother's estate."

We also find these allegations not to be specific numbers as plaintiff alleges, and as such insufficient to overcome dismissal under section 2-615.

¶ 33 Plaintiff's third contention is that by leaving in the "no contact" clause in the settlement agreement, defendant again breached its fiduciary duty. Plaintiff maintains that the firm recommended a settlement with a "no contact" clause when defendant was aware that the plaintiff wanted contact with his father and was having contact with his father, and that the settlement agreement was thereafter used to stop the plaintiff from reaching out to his father. Plaintiff readily admits he signed the clause, but says that he did so under the advice of counsel. Plaintiff further argues that defendant caused the post-settlement dispute, first by allowing the "no contact" clause in the settlement agreement, second by advising plaintiff to contact his father, and third by withdrawing from representation in the midst of the "no contact"dispute. However, as defendant points out, plaintiff has not alleged any damages resulting from defendant's actions in this regard. Moreover, plaintiff has not alleged that the conduct of the firm was the proximate cause of plaintiff's disappointment when his father refused contact with him. Thus, we find that the plaintiff has failed to sufficiently plead any facts in the amended complaint that would lead us to the conclusion that defendant breached its fiduciary duty, and therefore the trial court did not

err in dismissing count III.

¶ 34 Plaintiff's complaint similarly fails to state a cause of action for breach of contract. Under Illinois law, to properly plead a breach of contract claim, plaintiff must allege the existence of a valid contract, his performance under its terms, a breach by defendant, and resulting injury to plaintiff. *Akinyemi v. JP Morgan Chase Bank, N.A.*, 391 Ill. App. 3d 334,337 (2009) (citing *Van Der Molen v. Washington Mutual Finance, Inc*., 359 Ill. App. 3d 813, 823 (2005)).

¶ 35 Plaintiff argues that defendant breached the fee agreement when defendant allowed the "no contact" clause in the settlement agreement, advised plaintiff to continue to contact his father in contravention of the "no contact" clause, and then refused to represent him in the post-settlement dispute over the "no contact" clause. Defendant counters that the fee agreement provided merely that defendant would represent plaintiff in prosecuting a claim of assets. It also contained a clause by which the parties would discuss any further representation, namely, "if Client wishes to have Attorney provide any legal services not within the scope of this agreement, a separate agreement between Attorney and Client will be required." The trial court found in its order dated May 29, 2012 that pursuant to the fee agreement, the case went to mediation and a million-dollar settlement was obtained; thus, defendant fully performed under the terms of the fee agreement and that performance did not require endless post-settlement representation as to the settlement agreement.

¶ 36 The court had previously found no breach of the retainer agreement in its order of December 5, 2011. We note that the trial court specifically stated that:

"since the breach of contract claim rests on defendant's failure to represent plaintiff after

> he was alleged to have breached the settlement agreement, this was simply not a breach of the fee agreement. The facts as plead clearly indicate that defendant did represent plaintiff in the will contest and a $1 million settlement was obtained for plaintiff.*** The fee agreement was for prosecuting a claim of assets. The settlement agreement contains a myriad of nonfinancial covenants, such as non disparagement and confidentiality, in addition to the "no contact " provision. The terms of the fee agreement did not oblige defendant to defend plaintiff on a contention he breached one of these provisions that arose over a year after the settlement was signed. Indeed, the fee agreement explicitly states that 'If Client wishes to have Attorney provide legal services not within the scope of this agreement, a separate written agreement between Attorney and Client will be required.' "

We agree with the trial court that defendant's refusal to continue representing plaintiff after plaintiff breached the settlement agreement is not a breach of the fee agreement.

¶ 37 In support of its argument that plaintiff failed to raise a meritorious claim of breach of contract, defendant relies on *Partee v. Compton*, 273 Ill. App. 3d 721 (1995). In *Partee*, defendant suffered injury in an automobile accident. Compton and his wife (defendants) retained the legal services of plaintiff. *Id* at 722. The parties agreed in a written contingent fee contract that plaintiff and any co-counsel he associated with the case were to receive attorney fees equal to one-third of any amount collected by settlement or judgment. *Id.* At some point after settlement, defendants paid part of the fee and refused to pay the balance; plaintiff then filed suit. *Id.* at 723. The appellate court found that its review of the record indicated that defendants admitted to

entering into a contingent fee agreement with plaintiff for his legal representation in exchange for one-third of the amount collected by either settlement or judgment. *Id.* The court found that defendants were seeking to void a contract after reaping the benefits of its execution. *Id*. The court therefore refused to set aside the contingency fee agreement stating that "[t]o do otherwise would permit clients to receive the benefits of their contract and endorse their refusal to pay their attorney his fee." *Id*.

¶ 38 Similarly, in the case at bar, plaintiff has admitted that he hired defendant, they signed a contingency fee agreement, defendant prosecuted his claim, and he signed a settlement agreement. Like the *Partee* defendants, plaintiff fully reaped the benefits of the contract's execution. Accordingly, we conclude that plaintiff's claim for breach of contract lacks merit.

¶ 39 Plaintiff next argues that even if he did not state breach of fiduciary duty and contract claims, his allegations satisfy the pleading requirements for legal malpractice. We disagree. To be successful in a legal malpractice claim one has to allege: 1) the existence of an attorney-client relationship that establishes a duty on the part of the attorney; 2) a negligent act or omission that breached that duty; 3) proximate cause that establishes that but for the attorney's negligence, plaintiff would not have suffered an injury; and 4) damages. *Pelham v. Griesheimer*, 92 Ill. 2d 13, 18 (1982). As defendant correctly notes, plaintiff's assertion that decedent's assets had a value of $75 million and that he could have received a more favorable settlement, without any factual support, is mere speculation. The trial court pointed out in its order dated December 5, 2011, that "essential to a malpractice claim is the existence of actual monetary damages ***. " (quoting *Union Planters Bank v. Thompson Coburn LLP*., 402 Ill. App. 3d 317, 342 (2010)).

¶ 40 Plaintiff contends that as a result of defendant's negligent failure to properly investigate the estate value, he was pressured into accepting an inadequate settlement. Defendant counters that plaintiff was informed he did not have to settle and that defendant would withdraw as it was entitled to do under the fee agreement, and thus, plaintiff could not establish that he had to settle, which is fatal to any claim for professional negligence arising out of the settlement agreement. A malpractice action related to an allegedly poor settlement is only allowed "where it can be shown that the plaintiff had to settle for a lesser amount than she could reasonably expect without the malpractice." *Brooks v. Brennan*, 255 Ill. App. 3d 260, 271 (1994). Defendant points out that plaintiff did not allege that the other parties in the will contest would have settled his claim for a higher amount. Defendant also contends that plaintiff has failed to allege facts establishing that defendant was the proximate cause of any actual damages. See *I.C.S. Illinois Inc. v. Waste Management of Illinois, Inc.*, 403 Ill. App. 3d 211, 225 (2010) ("Where a plaintiff cannot establish that it would have obtained the contract but for the defendant's conduct, its damages are entirely speculative"). Defendant further asserts that plaintiff's beliefs as to the value of the estate and that he could have obtained a more favorable settlement constituted mere speculation. We agree and find plaintiff did not satisfy the elements for a legal malpractice claim.

¶ 41 Finally, plaintiff argues that the factual allegations of count I of his original complaint, in which he sought declaratory judgment against defendant, sufficiently established that an actual controversy exists in this case, and the trial court abused its discretion in dismissing the count for failure to satisfy the actual controversy requirement of a declaratory judgment action, (735 ILCS 5/2-701 (West 2002)). Plaintiff contends that, at the time he filed the instant suit, there was an

ongoing contractual relationship between the parties that created an actual controversy between them. Defendant argues that the contractual relationship between the parties ended when plaintiff signed the settlement agreement and the underlying estate proceeding concluded.

¶ 42 A declaratory judgment action requires (1) a plaintiff with a tangible, legal interest; (2) a defendant with an opposing interest; and (3) an actual controversy between the parties. *Northern Trust Company v. County of Lake*, 353 Ill. App. 3d 268, 273 (2004) (citing *Beahringer v. Page*, 204 Ill. 2d 363, 372 (2003)). For an actual controversy to exist, the case must present a concrete dispute admitting of an immediate and definite determination of the parties' rights, the resolution of which will aid in the termination of the controversy or some part thereof. *Northern*, 353 Ill. App. 3d at 273 (citing *Howlett v. Scott*, 69 Ill. 2d 135, 141-42 (1977)). The declaratory judgment process exists so that the court may address a controversy after a dispute has arisen but before steps are taken that would give rise to a claim for damages or other relief. *Northern*, 353 Ill. App. 3d at 273 (citing *Beahringer*, 204 Il. 2d at 372-73).

¶ 43 In this case, we note that plaintiff has clearly acknowledged in his briefs that defendant had withdrawn its representation of him by the time he filed the instant suit. Thus, we agree with defendant and with the trial court that there was no actual controversy between the parties. Plaintiff's arguments to the contrary are not convincing. Plaintiff first argues that even after he signed the settlement agreement, defendant continued to represent him in the dispute regarding the "no contact" clause. However, as has been discussed, defendant was under no contractual obligation to provide such representation to plaintiff, so its actions in this regard do not constitute an ongoing contractual relationship. Plaintiff next argues that, under *Stone v. Omnicom Cable*

Television of Illinois, 131 Ill App. 3d 210 (1985) a controversy exists if "the underlying facts and issues are not premature or moot." See also *West Side Organization Health Services Corporation v. Thompson*, 73 Ill App. 3d 179, 184 (1979) (citing *Kern v. Chicago & Eastern Illinois R. R. Co.*, 44 Ill. App. 2d 468, 473 (1963) (finding "[t]he question of when an actual controversy exists for purposes of declaratory judgment proceedings is analogous to the problem of determining when a controversy is or is not moot.")). We find these cases inapposite because they both deal with the validity of legislative enactments and appropriation and how these will affect plaintiffs' rights, whereas in the case at bar we are dealing with a contract formulated and signed by plaintiff and defendant.

¶ 44 The decision in *Karimi v. 401 North Wabash Venture, LLC*, 2011 IL App (1st) 102670, is instructive. In *Karimi,* this court affirmed the dismissal of a claim for declaratory relief, finding that no active controversy existed and the plaintiffs' claim should therefore be for breach of contract. *Karimi*, 2011 IL App (1st) 102670, ¶ 10. The plaintiffs defaulted on a condominium purchase agreement and the defendant-seller retained the plaintiffs earnest money. *Id.* ¶ 11. The developer thereafter sold the unit to a third party. *Id.* ¶ 11. The plaintiffs sought a declaration that the contract was still in effect. *Id*. ¶ 7. The *Karimi* court rejected plaintiffs' claim, explaining that an action for declaratory relief is improper where the plaintiff is attempting to enforce his or her rights "after the fact." *Id.* ¶ 10. Declaratory judgments are used to address disputes before steps are taken which would give rise to claims for damages. *Id.* ¶ 10. In the instant case, it is clear that such steps had already been taken and thus the claim for declaratory judgment was properly dismissed. See *Goldberg v. Valve Corp. Of America*, 89 Ill. App. 3d 383, 392 (1967) (claim for

damages that is compensable at law is not appropriate for declaratory judgment).

¶ 45 CONCLUSION

¶ 46 In light of the above, we conclude that counts I through IV of plaintiff's amended complaint, as well as count I of plaintiff's original complaint, failed to state a cause of action; as such, we cannot say that the trial court erred in granting defendants's motion to dismiss. Therefore, we affirm the judgment of the trial court.

¶ 47 Affirmed.