2015 IL App (1st) 14-3300-U

No. 1-14-3300

Fourth Division
December 3, 2015

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

	)	Appeal from the
LOXLEY JOHNSON,	)	Circuit Court of
	)	Cook County.
Plaintiff-Appellant,	)	
	)	No. 10 L 8478
v.	)	
	)	Honorable
STEPHEN MARK KOMIE, d/b/a/	)	Leon Wool,
KOMIE AND ASSOCIATES,	)	Judge Presiding.
	)	
Defendant-Appellee.	)	

JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

O R D E R

¶ 1 *Held*: Trial court did not err when it granted summary judgment in favor of defendant where defendant had no duty to represent corporation, for which plaintiff is the sole officer and shareholder and where the corporation was not a named plaintiff.

¶ 2 Plaintiff, Loxley Johnson, brought the present action for legal malpractice against defendant, Stephen Mark Komie. Plaintiff's complaint alleged both negligence and breach of contract. The trial court dismissed the breach of contract claim. Thereafter, defendant filed a motion for summary judgment arguing, *inter alia*, that he did not owe a duty to L.A.

Transportation (LAT), the corporation for which plaintiff is the sole officer and shareholder, and the court granted that motion. The court's order also stated that there was "no just reason to delay enforcement and appeal." Plaintiff now appeals, arguing that the trial court erred because: 1) he could present claims regarding LAT because he was being held liable for the acts of the corporation; 2) the January 2005 retainer agreement covered the administrative proceedings and did not terminate upon his indictment; 3) even if the retainer agreement was limited to the criminal case, defendant engaged in malpractice in that matter; and 4) defendant's counter-claim may still be pending in the circuit court but it is without merit. For the following reasons, we affirm the judgment of the trial court.

¶ 3 BACKGROUND

¶ 4 Plaintiff is the sole shareholder of LAT, a medical services corporation. In December 2004 the Illinois Attorney General sent him a letter informing him that the Attorney General received a referral from the Illinois State Police, Medicaid Fraud Control Unit, that plaintiff had committed Vendor Fraud and Theft. The letter explained that the Attorney General's office had not yet decided whether it would pursue an indictment against plaintiff and invited him or his attorney to contact the office with information.

¶ 5 Soon after, on January 31, 2005, plaintiff met with defendant and retained his representation in the matter. The attorney-client relationship was memorialized in a retainer agreement. The agreement was addressed to "Loxley Johnson," and stated that it was regarding the "Investigation of allegations of Medicaid Fraud by the Attorney General of Illinois." The contract also stated that, "due to the nature of the matter and because of the possibility of unforeseen circumstances, it is impossible to predict the course of an investigation, the nature and duration of the consultations, the criminal case, and any civil

law suit [*sic*] that may result." Consistent with the retainer agreement, plaintiff paid defendant $5,000 in advance for legal services.

¶ 6 During the Attorney General investigation, plaintiff, on advice of defendant, agreed to extend the statute of limitations, allowing the Attorney General more time to bring an indictment. The agreement, dated April 22, 2005, was drafted by defendant and indicates that it was entered into by "Loxley Johnson on behalf of L.A. Transportation (hereinafter 'Johnson')" and is signed by plaintiff. Defendant sent the agreement to the Assistant Attorney General working on the case and it was accompanied by a letter that stated it was regarding "Loxley Johnson and LA Transportation."

¶ 7 In June 2005, a Cook County Grand Jury indicted "Loxley Johnson d/b/a/ LA Transportation" for Vendor Fraud, Theft, and Public Aid and Mail Fraud. Plaintiff alleges that on or about June 14, 2005, he gave defendant documents regarding the alleged vendor fraud including the administrative Notice of Right to a Hearing from the Department of Public Aid in case number 03 MVH 034, dated July 16, 2003. The Notice stated that it was "IN THE MATTER OF L. A. Transportation, Inc, *** f/d/b/a Loxley Johnson." The Notice explained that the Bureau of Medicaid Integrity conducted an audit for the period of April 1, 2000, to March 31, 2002, and determined that it had overpaid L.A. Transportation f/d/b/a Loxley Johnson. There is no final order in the record for this administrative case.

¶ 8 Subsequently, on July 26, 2005, plaintiff and defendant entered into another retainer agreement and plaintiff paid defendant an additional $5,000. This agreement included the same language regarding the scope of representation as the first contract and was addressed to "Mr. Loxley Johnson." This contract specifically stated that it was regarding:

"People of the State of Illinois v. Loxley Johnson, No. 05 CR 16469

In the Circuit Court of Cook County, Illinois

Charges: Vendor Fraud/False Statement[.]"

¶ 9 On January 20, 2006, plaintiff received a letter from the Illinois Department of Healthcare and Family Services (Department) stating that it was suspending payments to him pursuant to the Illinois Public Aid Code, which allows it to temporarily withhold payments when a provider, or an individual who is a sole proprietor, officer, or 5% owner, is criminally indicted. 305 ILCS 5/12-4.25 (F-5) (West 2012). The letter explained that if plaintiff is convicted it would retain all of these payments, however, if he is not convicted, all payments would be released to him.

¶ 10 On July 10, 2008, plaintiff was sent a Notice of Right to a Hearing from the Department. The notice stated that it was "IN THE MATTER OF L. A. Transportation" in case number 07 MVH 135. It explained that during the period of April 1, 2004, to March 31, 2004, the Department made overpayments in the amount of $99,083.04, which it was seeking to recover. The notice also informed plaintiff that the Department would take administrative action to terminate LAT and Johnson's eligibility to participate as a vendor in the Medical Assistance Program.

¶ 11 According to the notice, LAT had a right to request a hearing within 10 days of receipt and an administrative hearing was scheduled for August 14, 2008, at 10:30 a.m. No one requested a hearing on LAT's behalf and LAT did not appear on August 14th. Consequently, LAT was defaulted and the Department's recommended decision against LAT imposing monetary damages and excluding LAT and plaintiff, personally, from the program became final.

¶ 12 On September 15, 2008, defendant filed a motion to withdraw as plaintiff's counsel. Defendant cited irreconcilable differences and alleged lack of payment for services. Thereafter, plaintiff retained and paid new counsel $11,000 for the criminal case. Plaintiff was acquitted of the Vendor Fraud, Theft, and Mail Fraud charges in August 2009.

¶ 13 On January 20, 2009, plaintiff was sent a third Notice of Administrative Hearing. The Notice was "IN THE MATTER OF L. A. Transportation, Inc. f/d/b/a Loxley Johnson" in case number 03 MVH 062. This Notice stated that The Bureau of Medicaid Integrity conducted an audit of vendor Loxley Johnson for the time period of April 1, 2000, to March 31, 2002, and determined that the Department overpaid $179,484.74. Plaintiff did not request a hearing and no one requested a hearing on his behalf. Therefore, when he failed to appear in this matter, he was defaulted and a judgment was entered against him personally for $179, 484.

¶ 14 Plaintiff filed a legal malpractice claim against defendant on July 23, 2012. "Loxley Johnson" was the only named plaintiff. The Fourth Amended Complaint contained two counts. Count I alleged that defendant was negligent in his representation of plaintiff and Count II alleged that defendant breached the retainer agreement contract. Plaintiff contended that he retained defendant to represent him in all actions that accrued from allegations of Medicare[1] fraud. In addition, plaintiff asserted that at the July 26, 2005, meeting, defendant "advised Plaintiff that the criminal case would be dispositive of the Administrative actions." Defendant, however, never filed an appearance in the administrative cases and plaintiff was defaulted. Plaintiff further contended that defendant owed him a duty of reasonable legal representation in the criminal and civil Medicare actions and included several allegations of

[1] Plaintiff uses "Medicare" and "Medicaid" interchangeably.

defendant's conduct that breached that duty. As a result, plaintiff claimed he suffered $497.787.48 in monetary damages. Plaintiff also alleged that this conduct was a breach of the retainer agreement contract.

¶ 15 In response to the complaint, defendant filed a counter-claim against plaintiff on May 10, 2012. Defendant requested monetary damages for plaintiff's alleged failure to pay the amount he owed defendant. Defendant claimed that the total bill for legal services was $28,985.25, plus interest and that plaintiff still owed defendant $23,985.25, plus interest.

¶ 16 On January 17, 2013, the trial court dismissed count II alleging breach of contract. Subsequently, defendant filed a motion for summary judgment, however the motion only addressed some of the remaining allegations in count I. Defendant argued, *inter alia*, that LAT is not a plaintiff in this case and that plaintiff, as a non-attorney, does not have standing to bring a lawsuit on its behalf. Moreover, defendant argued, there was no contract for representation between LAT and defendant and the administrative cases were against LAT, not plaintiff. Defendant further asserted that the "civil matters" mentioned in the retainer agreements are specific statutorily prescribed civil actions that arise from criminal convictions, and do not include administrative actions. Moreover, plaintiff did not plead the administrative judgments as losses until three years after the default judgments and therefore they are time barred by the two-year statute of limitations. There is no argument in the motion, however, regarding plaintiffs allegations that defendant was negligent in his representation of plaintiff as an individual in the criminal matter.

¶ 17 On September 29, 2014, the trial court granted defendant's motion for summary judgment. The order states, in relevant part, that "Defendant had no duty to defend L.A.

Transportation, Inc.[,] an Illinois corporation," and there is "no just reason to delay enforcement on appeal."

¶ 18 ANALYSIS

¶ 19 As an initial matter, to determine our jurisdiction we must address whether this is an interlocutory appeal or whether the case was completely disposed of in the trial court. Review of the record reveals that the trial court did not rule on defendant's counter-claim and did not rule on all of the allegations in plaintiff's complaint. Specifically, the court never issued a ruling on whether defendant was negligent in his representation of plaintiff in the criminal case in the circuit court. Moreover, the order from which plaintiff appeals includes Supreme Court Rule 304(a) language, which indicates that this appeal is interlocutory. Ill. S. Ct. R. 304 (a) (eff. Feb. 26, 2010). Accordingly, our review is limited to the findings and orders in the September 29, 2014, order from which plaintiff appealed.

¶ 20 In light of our determination that this appeal is interlocutory, we do not have jurisdiction to review plaintiff's arguments regarding non-final orders, including "whether the January 2005 agreement on the administrative cases continued past the indictment," "whether the July 2005 agreement involved malpractice," and whether defendant's counter-claim is without merit. *North Community Bank v. 17011 South Park Ave., LLC,* 2015 IL App 91st) 133672, ¶ 24. Additionally, we do not have jurisdiction to review whether the retainer agreement between plaintiff and defendant was limited to the criminal case and resulting civil actions or whether it also imposed a duty on defendant to represent plaintiff in the administrative actions and whether plaintiff could recover fees he paid defendant. *Id.*

¶ 21 Standing

¶ 22 Plaintiff contends that the court erred in granting summary judgment because: 1) he did not name LAT as a plaintiff; 2) there was no exploration of whether he had the authority to contract with defendant on behalf of the corporation; and 3) LAT was a one person corporation, thus, it did not need to be protected from unauthorized actions. Defendant responds that he was retained by plaintiff as an individual, not by LAT, and therefore, he had no duty to represent LAT. Moreover, plaintiff does not have standing to pursue damages allegedly sustained by LAT.

¶ 23 A trial court's order granting summary judgment is reviewed *de novo*. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). In making its decision, the court must construe all pleadings, depositions, admissions, and affidavits in the light most favorable to the non-moving party to determine whether any material fact exists that would preclude judgment as a matter of law. *Id.* 735 ILCS 5/2-1005(c) (West 2012).

¶ 24 To determine whether plaintiff has standing to bring these claims, we must ascertain whether plaintiff or LAT was the respondent in the administrative cases. We first note that LAT is not a named plaintiff in this lawsuit. In the complaint, plaintiff alleges defendant failed to appear in the three administrative actions, which resulted in $278,567.78 in default judgments.[2] The first and third administrative Notices of Right to a Hearing state they are "IN THE MATTER of L.A. Transportation *** f/d/b/a Loxley Johnson." Although they mention plaintiff, the notices clearly name LAT as the respondent. "[F]/d/b/a Loxley Johnson" merely identifies LAT as a vendor that once operated under another name. In fact, the second notice only refers to L.A. Transportation. As LAT was the respondent in these cases, any alleged damages for failing to appear in these actions were sustained, if at all, by

[2]Our review is limited to alleged damages suffered by LAT as a result of default judgments in the administrative hearings. The discussion does not relate to the loss of business damages plaintiff claims that are due to the January 20, 2006, suspension of payments, which was prompted by plaintiff's criminal indictment.

LAT, not plaintiff. Only the third administrative action states that the Department overpaid "Loxley Johnson." However, this action was commenced after defendant withdrew as plaintiff's counsel.

¶ 25 Plaintiff contends that he can personally allege damages suffered by LAT because he was the sole shareholder and officer. We disagree. A corporation is separate and distinct from its shareholders, even when there is a single shareholder. *Kopka v. Kamensky & Rubenstein*, 354 Ill. App. 3d 930, 936 (2004) (citing *Bevelheimer v. Gierach*, 33 Ill. App. 3d at 988, 993 (1975)). Furthermore, a shareholder cannot initiate a lawsuit as an individual to claim damages sustained by the corporation. *Small v. Sussman*, 306 Ill. App. 3d 639, 643 (1999). This is true despite the fact that the shareholder may be indirectly injured through a diminution in value of the shareholder's shares. *Id.*

¶ 26 Additionally, defendant argues that plaintiff cannot bring a lawsuit on behalf of LAT because he is not an attorney. It is long established that a corporation must be represented by an attorney. *Downtown Disposal Services, Inc. v. City of Chicago*, 2012 IL 112040, ¶ 17 (citing *Nixon, Ellison & Co. v. Southwestern Insurance Co.*, 47 Ill. 444,446 (1868)). A non-attorney corporate officer who files a lawsuit on behalf of a corporation in engaged in the unauthorized practice of law. *Id.* ¶ 19. Plaintiff points out that the purpose of this requirement is to protect the interests of the corporation because they may not always align with its officers. He asserts that this rule does not apply to LAT because he is the sole shareholder and officer so there is no concern that his interests are not aligned with LAT's. As noted above, plaintiff and LAT are separate entities, and therefore, even if plaintiff is the sole shareholder and officer, there may be occasions where their interests diverge. Plaintiff incorporated LAT and he cannot now claim that the law governing corporations does not

apply. It is axiomatic that "one who has created a corporate entity will not be permitted to disregard it to gain an advantage, which under it would be lost." *Earp v. Schmitz*, Ill. App. 382, 388 (1948). Moreover, *Downtown Disposal Services, Inc.*, which plaintiff cited, does not support this argument. *Id.* In that case, our supreme court held that even single shareholder corporations must be represented by an attorney. *Id.* ¶ 19. Plaintiff is not an attorney, and consequently, he cannot file a lawsuit on LAT's behalf.

¶ 27 Plaintiff also argues that because he was held personally liable for LAT's conduct, he has standing to bring claims on behalf of LAT. This argument is without merit. Although the Illinois Public Aid Code allows individuals to be penalized for corporate conduct (305 ILCS 5/12-4.25), the penalties imposed against plaintiff did not undo LAT's corporate status and authorize plaintiff to represent the corporation in court. We note that plaintiff was entitled to defend his own personal interests by representing himself or hiring an attorney in these matters.

¶ 28 Plaintiff asserts that even if he could not bring a lawsuit for damages sustained by LAT because he is not an attorney, he cured that defect when he hired an attorney. In support of this contention he cites *Downtown Disposal Services, Inc.*, where this court reasoned that a complaint initially filed by a non-attorney corporate officer was not void, but could be maintained where an attorney was subsequently hired to litigate the case. 2012 IL 112040, ¶ 38. We find *Downtown Disposal Services, Inc.* distinguishable from the instant appeal. In that case, the corporate officer named the corporation as the plaintiff and hired an attorney to represent the corporation before the majority of the proceedings had taken place. *Id.* Here, plaintiff did not name LAT as a plaintiff, but brought a lawsuit to recover damages allegedly

sustained by LAT in his own name. Additionally, unlike in that case, here, significant progress occurred before plaintiff hired an attorney.

¶ 29 Accordingly, the court did not err in granting summary judgment in favor of defendant because any alleged damages from the administrative actions were sustained by LAT, which is not a named plaintiff in this case. Additionally, plaintiff, as an individual and non-attorney, cannot bring a lawsuit on LAT's behalf.

¶ 30 Duty to LAT

¶ 31 Even if we were to find that plaintiff had standing to file a lawsuit on behalf of LAT, plaintiff's argument challenging summary judgment would still fail because defendant did not owe a duty to LAT. Plaintiff contends that LAT had an attorney-client relationship with defendant and the court erred in finding defendant did not owe LAT a duty.

¶ 32 To state a claim for legal malpractice, a plaintiff must establish: 1) an attorney-client relationship; 2) a duty owed by the attorney to the plaintiff arising out of that relationship; 3) defendant's breach of that duty; 4) a proximate causal relationship between the breach and the damages sustained by plaintiff; and 5) damages. *Majumdar v. Lurie*, 274 Ill. App. 3d 267, 270 (1995). Both the attorney and the client must consent to the formation of an attorney-client relationship. *People v. Clark*, 366 Ill. App. 3d 673, 678 (2008). The client must manifest his authorization for the attorney to act, and the attorney must indicate acceptance. *Id.* "Even when grounded in tort, [a legal malpractice] action arises out of either an express or implied contract for legal services. Consequently, because the scope of the duty owed by the attorney arises out of a contractual relationship, it is necessarily limited by the scope of the contract of engagement." (Internal citations omitted.*) Majumdar*, 274 Ill. App. 3d at 267.

¶ 33 Here, the clear language of the first retainer agreement states that it is between Loxley Johnson and Stephen Mark Komie. LAT is never mentioned. Furthermore, the administrative cases are not referenced, and there is nothing to indicate that these cases were contemplated by the parties when the agreement was made. Instead, the first contract explicitly states that it is regarding the Attorney General investigation of plaintiff for Medicaid fraud. There is no evidence that defendant was aware of any related administrative actions. Similarly, the second contract states it is between Mr. Johnson and Stephen Mark Komie and the administrative cases are not mentioned. Although plaintiff alleges that he gave defendant an administrative Notice of Right to a Hearing before they executed the second contract, this notice was from 2003, more than two years prior to the agreement.[3] In addition, the second contract is even clearer in its definition of the matter for which plaintiff retained defendant. It states that it is regarding the criminal case in the circuit court, *People of the State of Illinois v. Loxley Johnson*, and lists the case number as 05 CR 16469. Moreover, there is nothing to suggest that at the time the second contract was created, there was a pending administrative case for which defendant could have consented to represent LAT. Merely stating that the representation would extend to "resulting civil matters" in plaintiff's retainer agreement is not sufficient to show that LAT, a separate entity, manifested an intent for defendant to represent it in the administrative cases and that defendant indicated acceptance.

¶ 34 Nevertheless, plaintiff argues that LAT had an attorney-client relationship with defendant. We note that Plaintiff does not allege such a relationship with LAT in the complaint. To demonstrate the relationship, plaintiff points to: 1) the agreement to extend the

[3]Plaintiff contends that defendant had a duty to represent LAT in all three administrative actions. However, the first action was from 2003, more than two years before plaintiff retained defendant. In addition, the third administrative action commenced after defendant withdrew as plaintiff's counsel. Therefore, the only administrative action for which defendant could have possibly had a duty to represent LAT was the second action 07 MVH 035.

statute of limitations with the Attorney General, which indicates that Loxley Johnson was acting on behalf of LAT, 2) the 2003 Notice of Administrative Hearing, which he alleges he gave defendant, 3) the language in the contracts that extends representation to resulting civil cases, and 4) the fee log which includes time spent communicating with the Attorney General's office, which he contends was for the administrative cases. Plaintiff also maintains that he asked defendant about the administrative cases and defendant told him that the outcome of the criminal case would be dispositive of those matters.

¶ 35 We do not find that this evidence is sufficient to show that defendant consented to representing LAT in the administrative cases. First, the Attorney General agreement stating "Loxley Johnson on behalf of LAT," is not inconsistent with defendant's representation of plaintiff as an individual solely in the criminal case. Although plaintiff was indicted as "Loxley Johnson d/b/a LA Transportation," it is undisputed that the criminal charges were against plaintiff individually and not against LAT. Second, the administrative Notice of Right to a Hearing plaintiff allegedly gave defendant was from 2003, over two-years before plaintiff retained defendant. Third, "resulting civil cases" does not imply representation of LAT in the administrative cases. Rather, it extends the scope of representation of plaintiff from the criminal case to civil actions that could result from the criminal charges. Fourth, the communication with the Attorney General's office concerned the criminal case against plaintiff, not the administrative actions against LAT. At most, this evidence suggests that the administrative cases against LAT were related to the criminal case against plaintiff and that plaintiff was confused over the distinction between himself and the separate identity of LAT and between the criminal case and the administrative cases. Therefore, it does not impose a duty on defendant that is not created by the contract.

¶ 36 Plaintiff contends that if the language of the contract does not give rise to a duty for defendant to represent LAT in the administrative actions, defendant's behavior shows that the contract was modified to extend representation to these cases. Plaintiff argues defendant's consent to the modification is demonstrated by his "course of conduct consistent with acceptance." *Maher & Associates, Inc. v. Quality C*abinets, 267 Ill. Ap. 3d 69, 78 (1994). We disagree. In support, plaintiff offers only evidence of defendant's communication with assistant attorney generals. The Attorney General's office, however, investigated and prosecuted plaintiff in the criminal case, not the administrative cases.

¶ 37 Finally, plaintiff asserts that the court erred because it did not explore whether he had authority to contract for LAT. For the reasons discussed above, it is apparent that if plaintiff had this authority, he did not use it to retain defendant on LAT's behalf. Accordingly, the trial court did not err in finding that defendant did not have a duty to represent LAT.

¶ 38 CONCLUSION

¶ 39 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 40 Affirmed.