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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

JEFFREY G. PETRY,)	Appeal from the Circuit Court
)	of Winnebago County.
Plaintiff-Appellant,)	
)	
v.)	No. 08-L-277
)	
ROBERT C. POTTINGER and BARRICK,)	
SWITZER, LONG, BALSLEY, AND)	
VANEVERA,)	Honorable
)	J. Edward Prochaska,
Defendants-Appellees.)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Schostok concurred in the judgment.

ORDER

Held: The trial court properly granted defendants summary judgment on plaintiff's legal malpractice complaint: defendants fulfilled their only duty, which was to draft documents to effectuate the sale of a 50% interest in a company; although plaintiff asserted that defendants breached a duty to see to it that he also receive expected "control" of the company, he did not tie that failure to any specific damages.

¶ 1 Plaintiff, Jeffery G. Petry, appeals the trial court's order granting summary judgment in favor of defendants, Robert C. Pottinger and the law firm of Barrick, Switzer, Long, Balsley, and Vanevera (collectively, Pottinger). Petry alleged that Pottinger was negligent when he drafted a purchase

agreement under which Petry purchased 50% of the shares of a company. Pottinger was the attorney for the company and moved for summary judgment, alleging that there was no attorney-client relationship between himself and Petry; that Pottinger caused no damages, as Petry got what he sought from the agreement; and that the action was barred by principles of *res judicata*. We determine that summary judgment was appropriate on the issue of causation. Accordingly, we affirm.

¶ 2

I. BACKGROUND

¶ 3 This action arose from a business transaction in which Petry entered into an agreement with Frank Wehrstein, an owner of Dickerson Realtors, to purchase a 50% ownership in the company. Pottinger, the attorney for the company, drafted the stock purchase agreement, and the purchase took place. After disagreements about control of the company, Petry sought to dissolve it.

¶ 4 On July 10, 2008, Petry filed suit against Wehrstein and Pottinger in case number 08-L-256, alleging fraud in the course of negotiations and alleging that Pottinger aided and abetted Wehrstein in wrongful acts in connection with the sale. Pottinger moved to dismiss and, on February 6, 2008, that motion was granted, and the case was dismissed with prejudice. Petry appealed. In the meantime, on July 28, 2008, Petry filed the current action in case number 08-L-277. Later, on June 28, 2010, he entered into a settlement with Wehrstein and dismissed the appeal in case number 08-L-256. The settlement agreement included a provision that it did not release any claim arising out of the proceedings in case number 08-L-277. Pottinger was not a party to the settlement agreement. The record does not reflect whether he was representing the company at that time.

¶ 5 In the current action, Petry alleged that Pottinger was retained to draft an agreement to effectuate the sale of 50% of the stock to Petry and that Pottinger told him that he did not need to be

represented by separate counsel. Petry then alleged that Pottinger was negligent because he failed to disclose the implications of common representation of himself and Wehrstein, failed to disclose that the company engaged in improper employment tax practices, and failed to advise about financial losses that could be incurred because of those practices. He alleged that he suffered damages from a diminished value of the company. Pottinger moved for summary judgment, contending that there was no attorney-client relationship, that there was no causation as Petry got the 50% of the shares that he requested, and that the cause of action was barred by *res judicata*.

¶ 6 The materials presented to the court on the motion for summary judgment showed that, between August and September 2007, Petry met with Wehrstein on multiple occasions to discuss the transaction and, ultimately, Pottinger drafted a stock purchase agreement and related papers. Based on conversations with Wehrstein, Petry advised Pottinger of the purchase price and how the purchase would be structured. Petry received financial information and other information about the business from Wehrstein and met with Wehrstein's accountant to review the numbers for the transaction. He wanted to look at the corporate books but never was able to do so. However, he said that it was his choice to enter the agreement without seeing the books or reading the by-laws.

¶ 7 When Petry met with Pottinger, he was aware that Pottinger did legal work for the company. Petry admitted that he never requested that Pottinger or any member of his firm perform legal services for him or represent his interests in his purchase of the 50% interest in the company, and he never signed any documents authorizing Pottinger to represent him. He knew only that Pottinger was drafting the agreement and that Pottinger would be paid by the company. Petry believed that he paid 50% of Pottinger's fees because, although he was not an owner of the company when the work was performed, he became an owner by the time the bill was paid. On November 1, 2007, the

agreement was executed, and Petry received 50% of the shares of the company. Petry and Wehrstein were elected as directors and Wehrstein was elected president and secretary, something that Petry contended was against the by-laws.

¶ 8 Problems later arose between Petry and Wehrstein over control of the company. At his deposition, Petry spoke of disagreements he had with Wehrstein and of his belief that he would have a “say” or voting powers in the company, when he actually did not. He stated his belief that the stock sale agreement misrepresented this. He said that this was the only misrepresentation he felt was material to his decision to purchase the stock and stated that “the issue of control is what the lawsuit was all about, that’s it.” He also stated that he did not believe that anything in the agreement was enforced against him.

¶ 9 The trial court granted the motion for summary judgment on the basis of a lack of an attorney-client relationship, a lack of causation of damages, and *res judicata*. Petry appeals.

¶ 10 II. ANALYSIS

¶ 11 Petry contends that the trial court erred in granting summary judgment. He argues that he was damaged by Pottinger’s alleged negligent representation because he believed he was going to have a say in running the company and actually did not.

¶ 12 “Summary judgment is proper where, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 377 Ill. App. 3d 536, 542 (2007). “Whether the entry of summary judgment was appropriate is a matter we review *de novo*.” *Id.*

¶ 13 “The elements of a legal malpractice claim are: (1) the existence of 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 negligence, the plaintiff would have prevailed in the underlying action; and (4) actual damages.” *Lucey v. Law Offices of Pretzel & Stouffer, Chartered*, 301 Ill. App. 3d 349, 353 (1998).

¶ 14 “[T]o state a sufficient cause of action for legal malpractice in tort or contract, the plaintiff must plead facts establishing that the breach was the proximate cause of the alleged damages. [Citation.]” (Internal quotation marks omitted.) *Timothy Whelan Law Associates, Ltd. v. Kruppe*, 409 Ill. App. 3d 359, 365 (2011). To prove proximate causation in a legal malpractice case, the plaintiff must prove the underlying action and what the recovery would have been in that action absent the alleged malpractice. See *First National Bank of LaGrange v. Lowrey*, 375 Ill. App. 3d 181, 200 (2007). Thus, the plaintiff must establish that, but for the attorney’s negligence, he or she would not have suffered the alleged damages. *Id.*

¶ 15 The injury in a legal malpractice action is a pecuniary injury to an intangible property interest caused by the lawyer’s negligent act or omission. *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 306 (2005). For purposes of a legal malpractice action, a client is not considered injured unless he or she has suffered a loss for which he or she may seek monetary damages. *Id.* The fact that the attorney may have breached his or her duty of care is not, in itself, sufficient to sustain a cause of action. *Id.* “Even if negligence on the part of the attorney is established, no action will lie against the attorney unless that negligence proximately caused damage to the client.” *Id.* at 306-07. Thus, the existence of actual damages is essential to a viable cause of action for legal malpractice. *Id.* at 307.

¶ 16 Further, actual damages are never presumed. *Id.* Damages must be affirmatively established by the aggrieved client. *Id.* “Making that demonstration requires more than supposition or conjecture.” *Id.* “Where the mere possibility of harm exists or damages are otherwise speculative, actual damages are absent and no cause of action for malpractice yet exists.” *Id.*

¶ 17 Here, Petry alleged that Pottinger was hired to draft the necessary documents to effectuate the sale. He did not allege that Pottinger was hired to do anything more than that. There also is no dispute that Pottinger did indeed draft documents to effectuate the sale. Thus, there were no damages caused by Pottinger’s work, as Petry got exactly what Pottinger was contracted to do.

¶ 18 Even if Pottinger breached a duty by failing to disclose various issues, Petry never provided evidence that those failures caused damages. At his deposition, Petry outlined disagreements he had about control and operation of the company, stating that he did not know the effect of Wehrstein becoming both president and secretary, allegedly in violation of the company by-laws. But he admitted that he initially asked to see the company books, yet then willingly signed the contract without viewing either the books or the by-laws. By doing so, he cannot say that any later disagreement over material in the by-laws would not have occurred but for Pottinger’s alleged negligence.

¶ 19 Further, Petry has not tied Pottinger’s alleged negligence to specific monetary damages, stating instead that he “paid 2.3 million dollars for nothing at all,” when he actually obtained the 50% of the shares that he originally sought. Although his complaint spoke of diminishment in the value of the company, Petry did not provide evidence in the summary judgment materials to support that, and he said that his only issue was in regard to control of the company. He did not tie that lack of control to any monetary damage. Thus, there was no issue of material fact about causation of

damages. Petry cannot have been damaged by Pottinger's actions, when he got exactly what Pottinger had been hired to do and when he has not tied any of Pottinger's actions to a pecuniary loss.

¶ 20

III. CONCLUSION

¶ 21 The trial court properly granted summary judgment on the basis of a lack of causation of damages. Because we determine that summary judgment was appropriate on that basis, we do not discuss whether it was also appropriate on the basis of the lack of an attorney-client relationship or *res judicata*. The judgment of the circuit court of Winnebago County is affirmed.

¶ 22 Affirmed.