STATE OF MICHIGAN

COURT OF APPEALS

LYDIA LITSA WALKER,

Plaintiff-Appellant,

v

DIANN J. LANDERS,

Defendant-Appellee.

UNPUBLISHED
May 23, 1997

No. 190826
Kent Circuit Court
LC No. 94003044-NM

Before: Hoekstra, P.J., and Markey and J.C. Kingsley*, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition to defendant, the attorney who represented plaintiff during her divorce. Plaintiff filed a two-count complaint against defendant on August 9, 1994, alleging breach of contract and legal malpractice arising out of the divorce action that defendant brought on plaintiff's behalf. We affirm in part and reverse in part.

The first issue is whether the court erred in finding that defendant made no special contract with plaintiff to ensure that plaintiff's husband's life insurance policy would protect plaintiff's alimony award. We find no error. Although the trial court did not state whether it based its decision on MCR 2.116(C)(8) or (10), summary disposition was most likely granted pursuant to MCR 2.116(C)(10) because the trial court reviewed documentary evidence submitted by the parties before ruling on defendant's motion. MCR 2.116(G)(5); *Shirilla v Detroit,* 208 Mich App 434, 436-437; 528 NW2d 763 (1995). Accordingly, we review the trial court's grant of summary disposition de novo under MCR 2.116(C)(10) and examine all relevant affidavits, depositions, admissions, and other documentary evidence to determine whether there was a genuine issue of material fact and whether defendant was entitled to judgment as a matter of law. *Id.* at 437.

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* Circuit judge, sitting on the Court of Appeals by assignment.

In general, any action that seeks to recover damages for an attorney's failure to render competent advice must be brought as a malpractice action rather than in contract. See *Brownell v Garber*, 199 Mich App 519, 524-525; 503 NW2d 81 (1993). A breach of contract action may be brought against an attorney, however, where the client had a "special contract" with that attorney. See, e.g., *Stewart v Rudner*, 349 Mich 459, 465-476; 84 NW2d 816 (1957), and *Bessman v Weiss*, 11 Mich App 528, 531; 161 NW2d 599 (1968). Here, plaintiff alleged in her complaint that defendant stated, "you don't have to worry because he will have to carry life insurance to protect your alimony." Even construing the evidence in favor of plaintiff, this statement constitutes neither a special contract nor a special promise.

First, the factual allegations supporting the breach of contract action essentially repeat the factual allegations supporting the malpractice action. See, e.g., *Simmons v Apex Drug Stores*, 201 Mich App 250, 253; 506 NW2d 562 (1993). The standard of care that plaintiff claims defendant breached in violation of the alleged special contract is the same standard of care that plaintiff claims defendant breached in plaintiff's malpractice action. Despite the label plaintiff gives the claim, the type of interest harmed was not a breach of a special contract. *Seebacher v Fitzgerald, Hodgman, Cawthorne & King, PC*, 181 Mich App 642, 646; 449 NW2d 673 (1989).

Additionally, except for defendant's alleged statement that plaintiff's alimony would be secured by life insurance, plaintiff presents no other evidence that the parties entered into a special contract guaranteeing this result. In fact, the fee agreement between plaintiff and defendant asserts just the opposite proposition, i.e., that defendant "made no promises or guarantees regarding the outcome" of plaintiff's divorce action.

Finally, as we specifically stated in *Brownell, supra* at 525, merely undertaking representation does not constitute a warranty that the attorney will achieve the objective. Instead, an attorney only impliedly warrants that he or she will use ordinary care and diligence. *Id.* Here, because there is no genuine issue of material fact on which reasonable minds could differ regarding the existence of a special contract, the trial court properly granted summary disposition in favor of defendant.

The second issue is whether the trial court erred in holding that plaintiff's malpractice action was untimely because it was filed more than two years after July 22, 1992, the last date on which defendant provided and billed plaintiff for legal services related to the divorce. We agree that the trial court erred with respect to this close question.

Although defendant moved for summary disposition under MCR 2.116(C)(8) and (10), we review this issue de novo under MCR 2.116(C)(7). *Brown v Drake-Willock, Int'l*, 209 Mich App 136, 143; 530 NW2d 510 (1995). In reviewing the grant of defendant's motion pursuant to MCR 2.116(C)(7), we must accept all of plaintiff's well-pleaded allegations as true and construe them most favorably to plaintiff. *Grazia v Sanchez*, 199 Mich App 582, 583-584; 502 NW2d 751 (1993). Like the trial court, we must consider all affidavits, pleadings, depositions, admissions, and documentary evidence in determining whether defendant is entitled to judgment as a matter of law, and we will affirm

the grant of summary disposition where no factual development could provide plaintiff with a basis for recovery. See *Vargo v Sauer*, 215 Mich App 389, 398; 547 NW2d 40 (1996); *Grazia, supra*. Upon viewing the evidence in a light most favorable to plaintiff, we believe that defendant was not entitled to judgment as a matter of law because the trial court erred when it found that no factual dispute existed as to whether defendant continued, after July 22, 1992, to serve plaintiff in matters related to the divorce proceedings that form the basis for her malpractice claim.

Legal malpractice actions must be brought within two years of the date the attorney "discontinues serving the plaintiff in a professional or pseudo-professional capacity as to matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim," pursuant to MCL 600.5838(1); MSA 27A.5838(1),[1] or within six months after the plaintiff discovers or should have discovered the claim, whichever is later, MCL 600.5838(2); MSA 27A.5838(2). See also MCL 600.5805; MSA 27A.5805.[2] A lawyer discontinues serving a client when relieved of the obligation by the client or the court, *Stroud v Ward*, 169 Mich App 1, 6; 425 NW2d 490 (1988), or upon completion of a specific legal service that the lawyer was retained to perform, *Chapman v Sullivan*, 161 Mich App 558, 561-562; 411 NW2d 754 (1987).

We are cognizant, however, that questions governing the date that a cause of action accrues for statute of limitations purposes is a question of fact. *Flynn v McLouth Steel Corp*, 55 Mich App 669, 675; 223 NW2d 297 (1974). Thus, after reviewing the pleadings and evidence in a light most favorable to plaintiff, we believe that a material dispute exists as to the time at which defendant's representation of plaintiff in the "matter out of which the claim for malpractice arose" ceased.

Here, the judgment of divorce was entered on July 9, 1992. Defendant subsequently billed plaintiff for "preparation of verified statement and remit to Friend of the Court" on July 22, 1992, and plaintiff brought her legal malpractice action against defendant on August 9, 1994. According to the deposition excerpts that the parties attached to their briefs, plaintiff alleges that she made at least five telephone calls to defendant concerning the divorce judgment after July 1992. One call related to a June 9, 1993 letter that plaintiff received from the Friend of the Court inquiring whether she was cohabitating with an unrelated adult male. While it is undisputed that defendant did not bill plaintiff for these telephone calls, we believe that factual issues exist regarding whether defendant rendered legal advice and professional services to plaintiff during these conversations in connection with the underlying divorce action.

Further, after plaintiff's ex-husband passed away in September 1993, plaintiff contacted defendant, told defendant that she needed to speak with her regarding her claim again her ex-husband's estate for the balance of her alimony, scheduled an appointment for the two to discuss this matter, and went to defendant's office on October 1, 1993. At the appointment in defendant's office, defendant introduced plaintiff to attorney Joe Smigiel.[3] Defendant told plaintiff that attorney Smigiel would be able to handle any claims against the estate, left to attend another client meeting, and had defendant's secretary give plaintiff's file to Smigiel for his review. Apparently during that conference, Smigiel determined that the judgment of divorce did not include any language protecting plaintiff's right to receive alimony from her ex-husband's life insurance policy benefits. Plaintiff further stated that she paid

Smigiel $350.00 for services performed and to be performed. We can find no particulars, however, regarding whether Smigiel and defendant had a fee sharing or referral arrangement or whether defendant received some form of compensation as a result of this meeting.

Based upon these facts, plaintiff argues that her attorney-client relationship with defendant did not end until the meeting on October 1, 1993, when she first discovered that no insurance had been obtained by defendant. Until October 1, 1993, plaintiff "always felt" defendant was her attorney, as evidenced by the approximately five telephone calls that plaintiff made to defendant regarding alimony and cohabitation after the judgment of divorce was entered. Irrespective of plaintiff's subjective belief, upon reviewing plaintiff's deposition, we find that when taken in a light most favorable to plaintiff, the evidence supports her allegations that her professional relationship with defendant regarding her divorce continued beyond either the entry of the judgment of divorce or the last billed event in July 1992. Thus, we find that defendant is not entitled to judgment as a matter of law regarding the existence of an ongoing professional relationship after the divorce judgment was entered. Accord *Nugent v Weed*, 183 Mich App 791, 796; 455 NW2d 409 (1990).

Our decision is supported by well-recognized case law interpreting MCL 600.5838(1); MSA 27A.5838(1), holding that an attorney does not "discontinue servicing" his client for purposes of determining whether a malpractice claim has begun to accrue until the client or the court relieves the attorney of his obligation or until he "completes a specific legal service he was retained to perform." *Nugent, supra*. Here, after the judgment of divorce was entered, defendant continued to perform services and give plaintiff advice regarding the divorce, her alleged cohabitation and its effect on her receipt of alimony, and her ex-husband's life insurance policy that presumably guaranteed plaintiff's alimony award. In reality, these details must be resolved as part of the divorce process, despite defendant's assertion that the specific legal service ended when the judgment of divorce was filed. We also believe that defendant cannot escape liability by having another attorney speak to plaintiff when plaintiff scheduled an appointment with defendant to discuss her claim against her husband's estate for the life insurance proceeds. Assuming that defendant had not brought Smigiel into the picture but had instead discovered herself during the parties' meeting that the judgment of divorce was silent on the subject, defendant would be hard pressed to deny that she was continuing to serve plaintiff in a professional capacity regarding the divorce for purposes of MCL 600.5838(1); MSA 27A.5838(1).

Also, the fact that defendant did not bill plaintiff for any of the telephone conversations between the parties is not outcome determinative here. Cf. *Maddox v Burlingame*, 205 Mich App 446, 450-451; 517 NW2d 816 (1994) (the "act of sending a bill constitutes an acknowledgment by the attorney that the attorney was performing legal services for the client"). Although the fact that attorneys bill clients for services rendered is evidence of an attorney's continuing legal service, the absence of a bill does not necessitate our reaching the opposite conclusion. Otherwise, attorneys could avoid malpractice in large part by not billing clients for work after the attorney discovers the malpractice. While we do not sit as the trier of fact and determine that the telephone calls between the parties are prima facie evidence of defendant's continued provision of legal services, we believe that this issue, along with the effect of plaintiff's payment to attorney Smigiel (to whom defendant "referred" plaintiff),

precludes defendant from obtaining summary disposition regarding the date upon which plaintiff's malpractice action began to accrue.

Thus, in light of the standard of review for (C)(7) motions, the allegations contained in plaintiff's complaint, and the issues of fact raised in plaintiff's deposition that could provide plaintiff with a basis for recovery, summary disposition pursuant to MCR 2.116(C)(7) was inappropriate.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219 because neither party prevailed in full.

/s/ Jane E. Markey
/s/ James C. Kingsley

[1] MCL 600.5838(1); MSA 27A.5838(1) states, in pertinent part,

> a claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a stated licensed profession accrues at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim. [Emphasis added.]

Subsection 2 sets forth the six month period after the plaintiff discovers or should have discovered the claim, which is not at issue in this case. MCL 600.58382; MSA 27A.5838.

[2] MCL 600.5805(1) and (4); MSA 27A.5805(1) and (4) provide: "A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section. . . . Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice."

[3] Plaintiff's deposition testimony reveals that defendant did not tell plaintiff whether she and Smigiel were partners, that Smigiel and defendant merely shared office space, or that defendant was no longer representing her. Plaintiff only recalled that defendant could not attend the October 1, 1993 meeting because she had to meet with another client.