

STATE OF MICHIGAN
COURT OF APPEALS

ISAAC HOSKINS,

Plaintiff-Appellant,

v

MICHAEL F. MERRITT, NEAL D. NIELSEN,
JOHN W. DRURY and KIZER LAW FIRM,

Defendants-Appellees.

UNPUBLISHED

February 27, 1998

No. 199137

Livingston Circuit

LC No. 94-0014005-NM

Before: Michael J. Kelly, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

In this legal malpractice action, plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendants. We affirm.

Plaintiff first argues that the trial court abused its discretion in denying him the opportunity to make additional allegations against Nielsen in the first amended complaint. Plaintiff's first motion to amend the complaint contained no reference to additional allegations against Nielsen. However, at the hearing on the motion to amend the complaint, plaintiff attempted to incorporate additional claims against Nielsen. The trial court noted that these claims were not properly before the court and denied plaintiff's request to amend the complaint to add additional claims against Nielsen. Plaintiff was, however, allowed to amend his complaint with respect to the additional claims that he did set forth with particularity in his motion.

While it is true that leave to amend shall be freely given when justice so requires, MCR 2.118; *Terhaar v Hoekwater*, 182 Mich App 747, 751; 452 NW2d 905 (1995), the trial court did not violate this rule. Rather, the court allowed plaintiff's complaint to be amended to reflect the grounds raised in his motion to amend the complaint. With respect to claims not raised in the motion, but argued at the hearing, these claims were not stated in writing with particularity, and were therefore not properly within the motion to amend the complaint. MCR 2.119. Hence, the court did not abuse its discretion in denying plaintiff's request to amend the complaint to add additional claims against Nielsen. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997), citing *Dacon v Transue*, 441 Mich 315, 328;

490 NW2d 369 (1992); *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 658; 213 NW2d 134 (1973).

Next, plaintiff claims that the trial court abused its discretion in ordering plaintiff to pay costs and attorney fees associated with redeposing plaintiff. We disagree. It is clear from the record that plaintiff was fully aware of the grounds underlying the allegations included in his amended complaint at the time he filed his original complaint, and the delay which occurred in this case could have been avoided. Under these circumstances, the trial court properly conditioned its order granting plaintiff's motion to amend his complaint on plaintiff's reimbursement of costs incurred by the adverse parties. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997); *Stanke v State Farm Ins*, 200 Mich App 307, 320-321; 503 NW2d 758 (1993).

Plaintiff next claims that the trial court erred as a matter of law in granting defendants' motion to strike the second amended complaint and in later denying plaintiff's motion to file a second amended complaint. We disagree.

Under MCR 2.118(A)(1), a party may amend a pleading once "as a matter of course within 14 days after being served with a responsive pleading" Subsection (2) of that rule states that "[e]xcept as provided in subrule (A)(1), a party may amend a pleading only by leave of court or by written consent of the adverse party. Leave shall be freely given when justice so requires." MCR 2.118(A)(2).

Plaintiff was granted leave to amend "once as a matter of course," nine months after the original complaint was filed. An answer to the amended complaint was filed, and plaintiff then attempted to file a second amended complaint which was stricken by the trial court. Plaintiff argues that because his attempt to file a second amended complaint was made within fourteen days of defendant's "answer," the second amended complaint was improperly stricken. Plaintiff's argument defies logic. The language of the first sentence of MCR 2.118(A)(1) states that "[a] party may amend a pleading once as a matter of course," and the rule goes on to state that thereafter, a party will only amend a pleading with the permission of the court. MCR 2.118(B) then provides that once served with an amended pleading, the adverse party is required either to serve a responsive pleading pursuant to MCR 2.110(B) or state that its answer to the original complaint shall serve as the responsive pleading to the amended complaint. If that responsive pleading were then to start the fourteen day period within which a party can file an amendment "as a matter of course," the cycle would be perpetual. MCR 2.118(A)(2) was not intended, based on the unambiguous language of the rule, to allow a party to continue to amend his complaint as a matter of course. Accordingly, the trial judge did not err in striking plaintiff's second amended complaint which was filed without leave of court. Furthermore, after reviewing the record we conclude that the trial court's order denying plaintiff leave to file a second amended complaint was not an abuse of discretion. *Weymers, supra*, at 654, citing *Dacon, supra*, 328; *Fyke, supra*, 658.

Next, plaintiff argues that the trial court erred in denying plaintiff's motion for partial summary disposition. We disagree.

Plaintiff filed a motion for summary disposition pursuant to MCR 2.116(C)(9) and (10) on the basis that the \$18,000 attorney fee received by Nielsen was excessive. With respect to plaintiff's motion under MCR 2.116(C)(9), such a motion is tested solely by reference to the parties' pleadings. *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 47; 457 NW2d 637 (1990). "[W]hen . . . a material allegation of the complaint is categorically denied, summary [disposition] under [MCR 2.116(C)(9)] is improper. *Id.*, quoting *Pontiac School Dist v Bloomfield Twp*, 417 Mich 579, 585; 339 NW2d 465 (1983).

Plaintiff made a general allegation about the excessiveness of fees charged by "defendants" in his original complaint, but there was no specific reference to Nielsen in this respect. Specifically, in paragraph 38 of his complaint, plaintiff charged defendants with a breach of their legal, professional, ethical, and fiduciary duties, including but not limited to a duty to "charg[e] plaintiff a reasonable fee which is not clearly excessive." In response, Nielsen stated "[i]n answer to paragraph 38 of the Complaint, this Defendant denies the allegations contained therein, including the allegations in subparagraphs (a) through (f) and alleges that said allegations are not true." Accordingly, because Nielsen "categorically denied" the material allegation of the complaint that was the basis for plaintiff's motion for summary disposition, we find the trial court did not err in denying summary disposition with respect to whether Nielsen's fee was clearly excessive.

Plaintiff also claims that his motion for partial summary disposition pursuant to MCR 2.116(C)(10) should have been granted, because Nielsen committed such an obvious breach of professional standards that there was no issue of material fact with respect to whether \$18,000 was a reasonable fee under the circumstances. Reviewing the documentary evidence submitted by Nielsen and the lack thereof submitted by plaintiff, this Court finds that the trial court correctly denied plaintiff's motion for partial summary disposition because the evidence was sufficient to support a finding that reasonable minds could differ with respect to whether Nielsen's fee was clearly excessive.

Next, plaintiff argues that the trial court erred in granting defendants' motions for summary disposition. We disagree.

Defendants moved for summary disposition under MCR 2.117(C)(7), MCR 2.116(C)(8), and MCR 2.116(C)(10). Plaintiff's primary argument with respect to defendants' motion under MCR 2.116(C)(7), that the letter of acknowledgment does not constitute a "release" because it is not supported by adequate consideration, fails. As this Court has stated, the validity of a contract of release turns on the intent of the parties. *Paterek v 6600 Ltd*, 186 Mich App 445, 449; 465 NW2d 342 (1990). To be valid, a release must be fairly and knowingly made. *Id.* This Court explained that adequate consideration will be found when there is: (1) a legal detriment, (2) which induced plaintiff's promise to release defendant from liability, and (3) plaintiff's promise to release defendant from liability induced defendant to suffer the detriment. *Id.* As in *Paterek, supra*, 451, where this Court determined that a defendant's agreement to allow the plaintiff to play softball on its field was adequate consideration for the plaintiff's agreement to release the defendant from liability, defendants relied on plaintiff's promise to release them from liability in acting to sell plaintiff's property. Accordingly, the letter of acknowledgment was supported by adequate consideration.

Plaintiff also argues that the release was not signed fairly or knowingly. A release is not fairly made and is invalid if (1) the releasor was dazed, in shock, or under the influence of drugs, (2) the nature of the instrument was misrepresented, or (3) there was other fraudulent or overreaching conduct. *Id.*, 449. None of these elements was alleged by plaintiff. Moreover, plaintiff's argument that he was instructed by defendants to sign this document so that he could be released from jail does not merit a conclusion that this release was not entered into fairly or knowingly.

Next, we conclude that the trial court correctly ruled that plaintiff was estopped from claiming that the sale price of his properties was inadequate. *Bessman v Weiss*, 11 Mich App 528; 161 NW2d 599 (1968). In the letter of acknowledgment signed by plaintiff, plaintiff stated that the sale was undertaken under exigent circumstances. He acknowledged that by signing the letter, he approved the sale at the price stated in the closing documents. The letter further reiterated that plaintiff was making the decision to sell the property on his own, and that he was satisfied with the disbursement of the proceeds as indicated on the closing statements, which he had reviewed. Additionally, he stated that he was satisfied with the legal fees that were being charged. Defendants relied on this letter of acknowledgment in acting on behalf of plaintiff to sell his properties. Thus, plaintiff is estopped from now arguing that he did not approve the sale price or that he was dissatisfied with the decision to sell the properties.

Additionally, we reject plaintiff's claim that because defendants negotiated the terms of the sale before he signed the letter of acknowledgment, the letter of acknowledgment did not release defendants from liability. Plaintiff ratified defendants' actions by signing the sale documents and letter of acknowledgment. See *Langel v Boscaglia*, 330 Mich 655, 659-660; 48 NW2d 119 (1951); *Cuddahy Bros v Dock & Market*, 285 Mich 18; 280 NW2d 93 (1938); *Sullivan v Bennett*, 261 Mich 232; 246 NW 90 (1933); *David Scott Flour Mills v Saginaw Co Farm Bureau*, 237 Mich 657, 663-664; 213 NW 147 (1927); *Hutton v Roberts*, 182 Mich App 153, 162; 451 NW2d 536 (1989); *Gandy v Cole*, 35 Mich App 695, 703; 193 NW2d 58 (1971).

The trial court was also correct in ruling that defendant Merritt was not subject to liability in connection with the mortgage that he held on plaintiff's properties. Plaintiff argued that if Merritt had not held a lien on his property, plaintiff would have been able to obtain a surety on the \$50,000 bond and would have been released from jail. Plaintiff argues that because this encumbrance existed, however, the surety "deal fell through" and he was forced to remain in jail where he could not pay his mortgage. Consequently, plaintiff was later forced to sell his property in order to pay his mortgage, and but for Merritt's initial lien on the property, this would not have been the outcome. However, plaintiff submitted no evidence to support his position, and thus there was no question of material fact upon which reasonable minds could differ with respect to this issue.

Next, plaintiff argues that there is a question of material fact regarding whether plaintiff would have been successful in *Balbes v Hoskins* had Merritt not withdrawn from the case. Plaintiff claims that his due process rights were violated when he received no notice of the request for judgment when the default judgment was entered against him, and therefore he had an issue to appeal. Though this argument might have withstood summary disposition if factually correct, defendants submitted evidence that proof of service of the notice of default and proof of service of the notice of the hearing on motion

for entry of default judgment against plaintiff were both filed. Accordingly, plaintiff's unsupported claim did not create an issue of material fact upon which reasonable minds could differ, because the documentary evidence revealed that plaintiff was, in fact, served with notice.

Affirmed.

/s/ Michael J. Kelly

/s/ Harold Hood

/s/ Roman S. Gibbs