

STATE OF MICHIGAN
COURT OF APPEALS

LEITH DANOU, DANOU-GAPPY GROUP,
INC., and LEITH DANOU ENTERPRISES,
L.L.C.,

UNPUBLISHED
January 17, 2006

Plaintiffs-Appellants,

v

CUMMINGS, MCCLOREY, DAVIS & ACHO,
P.L.C., and WILLIAM G. SHANABERGER,

No. 262871
Wayne Circuit Court
LC No. 03-337852-NM

Defendants-Appellees.

Before: Murray, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's orders granting defendants' motions for summary disposition. We affirm.

I. Background and Procedural History

Plaintiffs allege that in 2001, they were interested in acquiring a nightclub owned by an entity known as the Bleu Room Experience, Inc. (Bleu Room). According to plaintiffs, they learned through a receiver, David Findling, that the Bleu Room had a creditor named Dr. Eric Seiger. Plaintiff Leith Danou contacted Seiger, expressing interest in acquiring the nightclub. It is undisputed that Seiger indicated that he was represented by defendant William Shanaberger, and arranged for a meeting between Danou, Shanaberger, and himself. According to plaintiffs, Shanaberger represented to Danou that Seiger was a creditor of the Bleu Room with a first priority, perfected security interest in all the assets of the nightclub, and advised that "the best way for Danou to pursue acquisition of Bleu Room would be through the purchase and assignment of Dr. Seiger's position as first secured creditor of Bleu Room." Plaintiffs further alleged that Shanaberger provided specific legal advice regarding the acquisition of the nightclub through the foreclosure of Seiger's security interest, and on the proposed structure of the transaction between Seiger and plaintiffs.

Regarding the issue of attorney fees, plaintiffs alleged that, initially, Shanaberger mentioned his hourly rate, but stated he would not charge plaintiffs for advice in setting up and implementing the transaction, and that he would "just do it so everyone would be happy." Later, Shanaberger asked plaintiffs to pay him \$1,500 (and which plaintiffs subsequently paid at the

closing) for assisting plaintiffs in obtaining Seiger's position, for the drafting of documents, for facilitating plaintiffs' acquisition of the liquor license, for aiding plaintiffs in taking control of the club by the end of the year, and for negotiating resolution of the lien claims against the Bleu Room. Alternatively, defendants aver that the payment of the fee was to reimburse Seiger for the fees charged in connection with the drafting of the assignment documents. It is undisputed that Shanaberger did in fact draft the documents relating to the assignment agreement; however, defendants deny that Shanaberger represented plaintiffs in any capacity or that Shanaberger provided them with legal advice. Further, the agreement entered into with plaintiffs and Seiger contained several provisions indicating separate representation, including a clause that Seiger and his agents (including his attorneys) made no representations or warranties with respect to the validity, legality, or enforceability of the assigned interests, a clause indicating it was plaintiffs' sole responsibility to investigate any and all aspects of the interests being assigned without the assistance of Seiger or his designees, a clause indicating that plaintiffs were represented by an attorney of their choosing, and a merger clause indicating that there were no other "agreements, understandings, or representations, oral or written, upon which the parties rely," and that the parties had entered into a fully integrated agreement.

Plaintiffs contend that Danou and his associates relied explicitly on Shanaberger's advice, that they believed he was providing them with legal advice, and that he was acting as their attorney. However, prior to the signing of the documents, Shanaberger advised plaintiffs that they should obtain the services of another attorney to review the documents on their behalf. Plaintiffs thereafter did indeed retain independent counsel to review the documents. Additionally, plaintiffs' attorney indicated by way of affidavit that he represented plaintiffs in connection with the assignment of Seiger's interest in a business, and that he represented plaintiffs at closing while Shanaberger represented Seiger at the closing. Plaintiffs claim that at no time prior to Shanaberger's "last minute" suggestion that another attorney be brought in did Shanaberger advise plaintiffs that he was not representing them nor did he disclose that he was general counsel for the Bleu Room or the "conflict inherent in his dual representation of Plaintiffs and Dr. Seiger."

Following the close of the transaction, plaintiffs apparently attempted to enforce and foreclose their "supposed first perfected security interest in Bleu Room." However, the Bleu Room filed for bankruptcy, and plaintiffs filed a proof of claim, claiming secured status in all assets of the debtor. An adversary proceeding was filed disputing plaintiffs' claim as a secured creditor, and was subsequently resolved, with the determination that plaintiffs' claim was unsecured because Seiger did not have a security agreement or a perfected security interest.

Defendants' initially brought a motion for summary disposition of plaintiffs' legal malpractice claim pursuant to MCR 2.116(C)(8) and (C)(10). Having heard oral argument on the motion, the trial court granted defendants' motion for summary disposition, determining that there was no attorney-client relationship between Danou and Shanaberger, either expressed or implied, as plaintiffs did, in fact, have independent counsel. In rendering its determination, the court noted its reliance upon the purchase agreement (specifically paragraphs 6, 7, and 9 along with the merger clause) as well an affidavit by plaintiffs' attorney that he represented Danou and the Danou-Gappy Group while Shanaberger represented Seiger only. The court concluded that any efforts expended by Shanaberger on behalf of Danou were ministerial in nature and that they did not give rise to an attorney-client relationship.

Defendants subsequently brought a second motion for summary disposition of plaintiffs' remaining claims, also pursuant to MCR 2.116(C)(8) and (C)(10). The trial court granted defendants' motion without elaboration.

II. Standard of Review

On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004). Pursuant to MCR 2.116(C)(8), this Court accepts all well-pleaded factual allegations as true and construes them in a light most favorable to the non-moving party. *Id.* Additionally, a motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 539; 683 NW2d 200 (2004). In reviewing motions under (C)(10), courts must consider the affidavits, pleadings, depositions, admissions, and any other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *Id.* at 539-540.

III. Analysis

A. Legal Malpractice¹

Plaintiffs first contend that the trial court erred in determining that there was no attorney-client relationship between plaintiffs and defendant Shanaberger. We disagree.

“In order to state a cause of action for legal malpractice, the plaintiff has the burden of adequately alleging the following elements: “(1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was a proximate cause of an injury; and (4) the fact and extent of the injury alleged.”” *Henry v Dow Chemical Co*, 473 Mich 63, 79 n 8; 701 NW2d 684 (2005). Regarding the attorney-client relationship, our Supreme Court has explained:

The rendering of legal advice and legal services by the attorney and the client's reliance on that advice or those services is the benchmark of an attorney-client

¹ Defendants contend that this Court lacks jurisdiction over this issue because plaintiffs failed to file a claim of appeal with respect to the trial court's January 27, 2004, order granting summary disposition. However, an appeal of right is only available from a final order, and the party appealing need only list the final order on its pleadings. *Dean v Tucker*, 182 Mich App 27, 30-31; 451 NW2d 571 (1990). As such, a party may properly raise any issue on appeal relating to the court's prior orders. *Dean, supra* at 31; see also, *Tomkiw v Saucedo*, 374 Mich 381, 385; 132 NW2d 125 (1965) (appeal from a final order permits the appellant to seek review of all interlocutory orders or decrees leading to the final order). Accordingly, this issue is properly before this Court.

relationship. The attorney's right to be compensated for his advice and services arises from that relationship; it is not the definitional basis of that relationship.

We agree with the authorities cited in 7 Am Jur 2d, Attorneys at Law, § 118, pp 187-188, that

“the relation of attorney and client is not dependent on the payment of a fee, nor is a formal contract necessary to create this relationship. The contract may be implied from conduct of the parties. The employment is sufficiently established when it is shown that the advice and assistance of the attorney are sought and received in matters pertinent to his profession.” [*Macomb Co Taxpayers Ass'n v L'Anse Creuse Pub Schools*, 455 Mich 1, 11; 564 NW2d 457 (1997); see also 7 Am Jur 2d, Attorneys at Law, § 136, p 189 (1997).]

Further, in *Maddox v Burlingame*, 205 Mich App 446, 450; 517 NW2d 816 (1994), this Court examined when the attorney-client relationship ends:

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). Retention of an alternative attorney effectively terminates the attorney-client relationship between the defendant and the client. *Stroud*, *supra* at 4.

We find that the trial court properly determined that no attorney-client relationship existed between plaintiffs and Shanaberger. As previously stated, an attorney-client relationship need not be express, as it may be implied from conduct of the parties. *Macomb Co Taxpayers, supra*. Here, such a relationship may not be inferred. Indeed, the following undisputed facts preclude a finding of an attorney-client relationship. First, plaintiffs were introduced to Shanaberger as Seiger's attorney. Second, despite plaintiffs' subjective belief that they were being represented by Shanaberger, in that he allegedly informed them that the “best way” to acquire the nightclub was through purchase of Seiger's security interest, it was Shanaberger who informed plaintiffs to obtain independent legal counsel to represent them in connection with the assignment. Third, plaintiffs were, in fact represented by independent legal counsel, who acknowledged that Shanaberger represented Seiger, not plaintiffs, in connection with the transaction and at closing. Fourth, plaintiffs executed the assignment agreement, which contained several provisions negating an attorney-client relationship between plaintiffs and defendants. Although it is undisputed that plaintiffs paid Shanaberger \$1,500, the payment of a fee is not, in and of itself, the decisive factor in determining whether such a relationship exists. *Macomb Co Taxpayers, supra*. We cannot conclude from these facts that the parties' conduct could reasonably be interpreted as creating an attorney-client relationship. Furthermore, the fact that plaintiffs did retain independent legal counsel to represent them with respect to the purchase agreement would have effectively terminated any attorney-client relationship that could have possibly existed between plaintiffs and Shanaberger. *Maddox, supra*. Thus, the trial court properly determined no attorney-client relationship existed between plaintiffs and Shanaberger.

B. Fraudulent and Innocent Misrepresentation and Breach of Fiduciary Duty

Although plaintiffs first contend that this issue was not properly before the trial court because it was initially raised in defendants' reply brief in connection with their original motion for summary disposition, we note that defendants did, in fact, file a second motion for summary disposition of plaintiffs' remaining claims. Because the trial court did not dismiss those claims until after both parties submitted briefs regarding this second motion for summary disposition, plaintiffs had a full opportunity to rebut defendants' claims.

With respect to plaintiffs' remaining claims, however, plaintiffs have failed to provide sufficient support for their argument relating to the trial court's dismissal of these claims. A party may not leave it to this Court to search for authority in support of its position by giving "issues cursory treatment with little or no citation of supporting authority." *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). Accordingly, we decline to address this sub-issue.

To the extent that plaintiffs incorporate their arguments relating to their claim of legal malpractice in their argument relating to their claim for breach of fiduciary duty, we similarly reject this argument. In their claim for breach of a fiduciary duty, plaintiffs alleged that defendants owed plaintiffs a fiduciary duty due, in part, to the "unique nature of trust and confidence reposed in Defendants by Plaintiffs," and that the duty encompassed the obligation to protect the interests of plaintiffs and to disclose all conflicts of interest. Because claims against attorneys brought on the basis of inadequate misrepresentation sound in tort and are grounded only in legal malpractice, plaintiffs' fiduciary duty claim cannot constitute a separate cause of action as it was subsumed by the malpractice claim. *Aldred v O-Hara-Bruce*, 184 Mich App 488, 490-491; 458 NW2d 671 (1990). Considering that the trial court's dismissal of plaintiffs' malpractice claim was correct, we conclude that the trial court's dismissal of the fiduciary duty claim was likewise proper.

Affirmed.

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly