

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DARYL ROBERT BEGGS,

Plaintiff-Appellant,

v

KAREN VITORI and CRAIG TANK,

Defendants-Appellees.

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UNPUBLISHED

May 5, 2011

No. 295768

Wayne Circuit Court

LC No. 07-731776-NM

Before: SERVITTO, P.J., and HOEKSTRA and OWENS, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant Vitori's motion for summary disposition pursuant to MCR 2.116(C)(7) (collateral estoppel) and (8) (failure to state a claim), and granting defendant Tank's motion for summary disposition pursuant to MCR 2.116(C)(4) (lack of jurisdiction) and (7) (claim barred by the statute of limitations). We affirm in part, reverse in part, and remand for further proceedings.

Defendants are attorneys who represented plaintiff in criminal proceedings. Defendant Tank represented plaintiff at a district court hearing that concluded on October 18, 2005. Plaintiff later discharged Tank and signed a retainer agreement with Karen Vitori, P.L.L.C., on November 30, 2005. Defendant Vitori represented plaintiff at a trial where plaintiff was convicted of domestic violence. Plaintiff subsequently hired a new attorney who filed a motion for a new trial in district court on the ground that Vitori provided ineffective assistance of counsel. The district court denied the motion. Plaintiff then filed an appeal to the circuit court. On April 3, 2007, while the appeal was pending, the district court entered a stipulated order that dismissed the appeal with prejudice and set aside the conviction. The order further provided that plaintiff would plead no contest to a charge of disorderly person.

Plaintiff filed this action on November 30, 2007, alleging claims for legal malpractice and breach of contract against defendants Tank and Vitori. Defendants filed separate motions for summary disposition. Plaintiff filed a response to Vitori's motion, but not to Tank's motion. The trial court determined that the legal malpractice claim against Vitori was barred by collateral estoppel based on the district court's rejection of plaintiff's ineffective assistance of counsel claim in the criminal proceeding. The trial court granted summary disposition to Vitori with respect to the breach of contract claim because the retainer agreement was between plaintiff and Karen M. Vitori, P.L.L.C. The trial court determined that plaintiff's legal malpractice claim

against Tank was barred by the applicable statute of limitations because Tank's undisputed affidavit indicated that he was discharged on November 29, 2005, which was more than two years before this action was filed on November 30, 2007. Lastly, the trial court granted Tank summary disposition with respect to plaintiff's breach of contract claim for lack of jurisdiction for failure to meet the \$25,000 jurisdictional threshold. Plaintiff filed a motion for reconsideration, which the trial court also denied.

Plaintiff first argues that the trial court erred in concluding that collateral estoppel barred his legal malpractice action against Vitori. We agree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In addition, this Court reviews de novo questions of law, including the application of legal doctrines such as collateral estoppel. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

"Collateral estoppel, or issue preclusion, precludes relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). Collateral estoppel "requires that (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel." *Estes*, 481 Mich at 585.

Where the effectiveness of a criminal defendant's attorney is decided in a criminal case, collateral estoppel bars the criminal defendant from relitigating the issue in a civil suit for legal malpractice. *Barrow v Pritchard*, 235 Mich App 478; 597 NW2d 853 (1999). Where a judgment has been set aside, however, the former adjudication is not a "final judgment" for purposes of collateral estoppel. This point is recognized in the Restatement Judgments 2d, § 13, comment f, which states:

A judgment otherwise final for purposes of the law of res judicata is not deprived of such finality by the fact that time still permits commencement of proceedings in the trial court to set aside the judgment and grant a new trial or the like; nor does the fact that a party has made such a motion render the judgment nonfinal. This is the case even when a statute or rule of court provides that the judgment cannot be executed upon or otherwise enforced during the period allowed for making such a motion and the further period until the motion if made is decided. *The judgment ceases to be final if it is in fact set aside by the trial court*, as it would be upon the granting of a motion for a new trial. [Emphasis added.]

See also 46 Am Jur 2d, Judgments, § 449, p 739 ("[a] judgment that is vacated, reversed, or set aside on appeal is deprived of all conclusive effect").

In this case, as in *Barrow*, the district court in the criminal matter considered and rejected arguments that Vitori was ineffective. However, the critical distinction between this case and

decisions such as *Barrow* is that the conviction in this case was set aside by the district court. Defendant Vitori argues that collateral estoppel may apply because the district court's decision denying the motion for a new trial was not set aside. Thus, Vitori contends that even where a judgment is deprived of its conclusive effect, other orders that were entered in the case retain their conclusive effect. Vitori does not cite any authority for this position. We are unable to conclude that an order denying a motion for a new trial in a criminal case may be considered a "valid and final judgment" where the conviction itself has been set aside. Thus, we conclude that the trial court erred in determining that collateral estoppel barred plaintiff's malpractice claim against Vitori.

Plaintiff also argues that the trial court erred in dismissing his claim for breach of contract against Vitori. We disagree. This Court reviews de novo a trial court's decision on a motion for summary disposition and issues of law regarding the construction of a contract. *Shay v Aldrich*, 487 Mich 648, 656; 790 NW2d 629 (2010).

The retainer agreement that is the basis for plaintiff's breach of contract claim identifies the contracting parties as follows:

DARRYL ROBERT BEGGS (Client) employs and retains the law firm of  
KAREN M. VITORI, PLLC (Attorney) to represent client in the following matter

. . . .

Thus, the agreement unambiguously indicates that the contracting party is the limited liability company. "Once a limited liability company comes into existence, limited liability applies, and a member or manager is not liable for the acts, debts, or obligations of the company." *Duray Dev, LLC v Perrin*, 288 Mich App 143, 151; 792 NW2d 749 (2010), citing MCL 450.4501(3). Therefore, defendant Vitori is not individually liable for the company's obligations. MCL 450.4501(4).

On appeal, plaintiff also argues that defendant Vitori may be liable for breach of contract because she was a partially disclosed agent. Plaintiff did not raise this agency argument below. An issue not raised before the trial court is not preserved for appellate review. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). Although this Court may review an issue if the question is one of law and the facts necessary for its resolution have been presented, *id.* at 98-99, the existence of an agency relationship is a factual inquiry. Because the issue was not raised below and the question is not one of law for which the necessary facts have been presented, appellate relief is not warranted.

Plaintiff next challenges the trial court's dismissal of his legal malpractice claim against defendant Tank on the basis of the statute of limitations. "Pursuant to MCL 600.5805(6) and MCL 600.5838(2), a plaintiff must file a legal-malpractice action within two years of the attorney's last day of service to the plaintiff or within six months of when the plaintiff discovered or should have discovered the claim, whichever is later." *Wright v Rinaldo*, 279 Mich App 526,

534-535; 761 NW2d 114 (2008).<sup>1</sup> “Generally, when an attorney is retained to represent a client, that representation continues until the attorney is relieved of the obligation by the client or the court.” *Id.* (citation and internal quotation marks omitted).

Plaintiff’s allegations in counts I and II pertaining to defendant Tank do not refer to the date that representation was terminated. In count III, the legal malpractice claim against defendant Vitori, plaintiff alleges that “[o]n or about November 30, 2005, Defendant **TANK** was discharged as the Plaintiff [sic] counsel, and Plaintiff retained, hired, and contracted the services of Defendant **VITORI**[.]”

In support of his motion for summary disposition, defendant Tank submitted an affidavit in which he averred:

2. I was retained by Plaintiff, Darryl Beggs, to represent him in 2005.

3. On November 29, 2005, Darryl Beggs came to my office in Detroit and demanded possession of his file, and indicated to me that I was no longer his attorney, and that he was going to retain new counsel to represent him in the matter for which he had previously retained me.

4. I acknowledged his request and expressed to him my understanding that our attorney-client relationship had terminated, and turned the file over to him.

Plaintiff did not respond to defendant Tank’s motion. Relying on defendant Tank’s affidavit, the trial court granted Tank’s motion with respect to the legal malpractice claim because plaintiff’s action was filed on November 30, 2007, more than two years after plaintiff terminated the attorney-client relationship.

On appeal, plaintiff argues that the trial court was required to accept as true all of his well-pleaded allegations in the complaint and construe them in his favor, and thus was required to accept the allegation that Tank was not discharged until November 30, 2005, at the earliest. However, defendant Tank moved for summary disposition of the legal malpractice claim under MCR 2.116(C)(7). With respect to a motion under MCR 2.116(C)(7), “[t]he contents of the complaint are accepted as true *unless contradicted by documentation submitted by the movant.*” *Maiden*, 461 Mich at 119 (emphasis added). In light of defendant Tank’s affidavit, plaintiff’s reliance on the allegations in his complaint is misplaced. Further, because defendant Tank submitted an affidavit indicating that the representation ended on November 29, 2005, and no contrary evidence was submitted by plaintiff, the trial court did not err in finding that the legal malpractice claim was filed beyond the two-year limitations period.

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<sup>1</sup> Discovery of the claim is not at issue in this case.

Plaintiff also relies on an affidavit that he submitted in support of his motion for reconsideration to argue that the legal malpractice claim was timely filed. But because that affidavit was not filed until after the trial court granted summary disposition, it may not be considered. See *Maiden*, 461 Mich at 126 n 9; *Quinto v Cross & Peters Co*, 451 Mich 358, 366-367 n 5; 547 NW2d 314 (1996).

Plaintiff lastly argues that the trial court erred in dismissing his breach of contract claim against defendant Tank on the ground that the amount in controversy did not exceed the court's jurisdictional threshold of \$25,000. We disagree.

Subject-matter jurisdiction is a question of law that this Court reviews de novo. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 472; 628 NW2d 577 (2001). A circuit court does not have subject-matter jurisdiction over civil claims having an amount in controversy of less than \$25,000. *Id.* at 474-475. In analyzing whether the jurisdictional threshold has been met, this Court reviews the allegations in the complaint and considers the nature of the damages available under the claims. *Id.*

Plaintiff contends that the amount in controversy is greater than \$25,000 because he alleged that as a result of Tank's breach of contract, he was convicted of a bond violation. He notes that his complaint alleged that he incurred over \$21,000 in legal fees (including the amount for other attorneys) "to vindicate himself." He relies on *Farm Credit Servs of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 678-679; 591 NW2d 438 (1998), in which the Court recognized that "[d]amages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made" and that "[a] party to a contract who is injured by another's breach of the contract is entitled to recover from the latter damages for only such injuries as are the direct, natural, and proximate result of the breach."

This Court has recognized that a client may have a viable breach of contract action against his attorney where, for example, the allegations show a "special contract" by the attorney that his services would be above the level required by the standard of care. See *Brownell v Garber*, 199 Mich App 519, 524-526; 503 NW2d 81 (1993). However, allegations that an attorney inadequately represented the client generally sound in tort. *Aldred v O'Hara-Bruce*, 184 Mich App 488, 490-491; 458 NW2d 671 (1990). Assuming arguendo that plaintiff's allegations could support a breach of contract claim against Tank, the "direct, natural, and proximate result" of the alleged breach of the contract for legal representation in the conduct of the bond violation hearing and the personal protection matter would not include plaintiff's subsequent conviction, the negative consequences flowing from it, and the legal fees paid to other attorneys who represented plaintiff after defendant Tank. Plaintiff's attempt to meet the circuit court jurisdictional threshold depends on allegations that sound in tort, not contract. Thus, the trial court did not err in dismissing plaintiff's breach of contract claim against defendant Tank.

In sum, we affirm the dismissal of plaintiff's claims against defendant Tank and the dismissal of plaintiff's breach of contract claim against defendant Vitori, but reverse the trial court's dismissal of plaintiff's legal malpractice claim against defendant Vitori on the basis of collateral estoppel and remand for further proceedings with respect to that claim.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Deborah A. Servitto

/s/ Joel P. Hoekstra

/s/ Donald S. Owens