[Cite as *Ratonel v. Roetzel & Andress, L.P.A.*, 2015-Ohio-1166.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

LORNA B. RATONEL, et al.	:	
	:	
Plaintiffs-Appellants	:	Appellate Case No. 26259
	:	
v.	:	Trial Court Case No. 2011-CV-7832
	:	
ROETZEL & ANDRESS, LPA, et al.	:	(Civil Appeal from
	:	Common Pleas Court)
Defendants-Appellees	:	
	:	

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O P I N I O N

Rendered on the 27th day of March, 2015.

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FAIN, J.

{¶ 1} Plaintiffs-appellants Lorna Ratonel, Carmalor, Inc. and Carmalor Ohio, LLC [hereinafter collectively referred to as Ratonel] appeal from a summary judgment rendered in favor of defendants-appellees Mark Ropchock and the law firm of Roetzel & Andress, L.P.A. [hereinafter collectively referred to as Ropchock] on Ratonel's legal malpractice action. Ratonel contends that the trial court erred by finding that Ropchock did not represent her with regard to a property known as French Village. She also contends that the trial court erred by concluding that the representation was terminated.

{¶ 2} We conclude that there are genuine issues of material fact regarding whether Ropchock undertook representation of Ratonel regarding French Village, and also regarding whether that representation was terminated. Since we conclude that a reasonable jury could find from the evidence in this record that Ropchock's alleged malpractice was within the scope of his representation of Ratonel, we conclude that the trial court erred by rendering summary judgment.

{¶ 3} Accordingly the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings.

I. The Alleged Legal Malpractice

{¶ 4} This is an unfortunate case in which attorneys pursuing a legal malpractice claim are alleged, themselves, to have committed malpractice in pursuing that claim.

{¶ 5} In 2007, Ratonel engaged the services of attorney Gail Pryse and the law firm of Keating, Muething & Klekamp [KMK] to help Ratonel acquire a multi-family apartment complex in Dayton, Ohio, known as Holden House, as well as another

apartment complex in Nebraska, known as French Village. Ratonel claimed that KMK breached its professional duties with regard to the acquisition of these properties, thereby causing Ratonel to incur monetary losses.

{¶ 6} Ratonel engaged Ropchock to pursue a legal malpractice action against KMK. In March 2009, Ratonel and Ropchock entered into a written contract for the provision of legal services with regard to the Holden House transaction. The contract noted that the parties could agree to include additional services "not specified in this letter."

{¶ 7} On May 13, 2009, Ropchock, on behalf of Ratonel, filed a complaint against KMK. The complaint consisted of forty-one paragraphs, which related solely to Holden House, except for Paragraph 33(g), which stated:

> Defendants Pryse and KMK knew, or should have known, that another property for which they provided legal services, the French Village Apartments in Nebraska, was a "Limited Dividend Property." This means that Plaintiff can only receive a yearly, not monthly, income distribution from these apartments. Defendants Pryse and KMK failed to advise Plaintiff of this obvious, significant, material fact.

{¶ 8} The complaint made a general claim for damages in excess of $25,000, as well as for fees, costs and punitive damages.

{¶ 9} On September 21, 2009, Ratonel e-mailed Ropchock. Attached were copies of e-mails in which Ratonel had been informed of the impending loss of a large portion of the equity in French Village, due to financing issues.

{¶ 10} On October 19, 2009, Ropchock sent an e-mail to Ratonel, in which he

stated:

> I'm prepping for Carmichael but I found something interesting on another note. You sent me an e-mail on Sept 29th. It was from 8/13/07. It dealt with the financing of H.H.. Interestingly, [Pryse] recognizes that the HUD contract often doesn't last as long as the financing on the building, so the HUD contract "SHOULDN'T" (her words, all capitalized in her e-mail to you) pay at above market rates, b/c, naturally, the bank wouldn't loan based on something that might not be in existence in the future. EXACTLY. So why the hell would she let you buy a building, F.V., and not point out you were receiving above market rents, which she knew, or should have known, would expire in 18 months? Her statement with respect to H.H. I think is very damning to her when we get to the FV issue. . .

{¶ 11} On January 26, 2010, Ropchock sent Ratonel an e-mail to which he attached a copy of a settlement demand letter he had drafted. Most of the letter related to Holden House. However, the letter included the following statement about French Village:

> KMK's Liability for French Village
>
> The professional negligence claim against KMK concerning French Village is a different claim which flows from a separate act of negligence. KMK's negligence with respect to French Village was not revealed until well after this litigation had commenced, perhaps a month or two ago. My client was attempting to refinance French Village, in order to pull some of what she believed to be her million dollar equity in that facility. During that

review process, it was discovered that the HAP contract with the federal government, which, among other things, sets forth the rent payment amounts for French Village, stated that the rents for French Village would be reduced significantly, from above market rent levels to market rent levels. It is impossible for my client to renegotiate a higher above market rent with the government. She is simply going to be stuck with market rate rents. This has effectively reduced the value of French Village by half, from approximately $2,100,000 to $1,100,000. Gail Pryse was responsible for and in fact billed for reviewing the HAP contract. In her deposition, she admitted that she was not even aware that the rents were set to decrease. Accordingly, she did not, nor could she have advised my client of the rent decrease. In a document she was retained to interpret for my client, she failed to advise my client of basic, material, provisions of that document. She likely failed to do so either due to neglect, or due to her admitted unfamiliarity with HUD transactions.

Marked as an exhibit to Attorney Pryse's deposition is the attached e-mail from Alan Fershtman, which concedes "that it would be important for all of the HUD documents to be reviewed." Although that is another admission, frankly, it could go without saying. Pryse also admitted to reviewing the HAP contracts, and billed for their review. Attorney Buck may have also reviewed the same documents. Of course, we now know that KMK was not competent to handle a HUD real estate transaction as they have admitted as much. Pryse even told my client to obtain a

separate HUD counsel. However, note that she did not tell my client from the onset of the transaction, back in August, to obtain HUD counsel, but instead did not advise my client as to KMK's lack of competence until September 25, about the same time she had or was about to blow the inspection date for Holden House. In any event, it was not the responsibility of the HUD counsel, Hessel & Alouise, to advise my client as to the rental aspect of this transaction. As Pryse testified, Hessel & Alouise was brought on merely to make sure that all of the HUD documents were properly filed with HUD, including the management agreement and so on. Pryse admitted that she was responsible for any other due diligence concerning these transactions.

Regardless, it was important to review these documents, KMK billed for reviewing the documents, and KMK never advised my client as to the fundamental provisions of these documents, in this case, the imminent significant drop off in rents. Obviously, it would have been my client's decision whether or not to continue with the deal at the given price, but without any input from KMK as to the content of the HAP contracts, a review for which they billed, my client was denied the opportunity to even consider that decision, or to further negotiate the purchase price. KMK's negligence is once again undeniable. How an attorney can be responsible for reviewing a contract, bill for reviewing the contract, and not inform the client as to the significant provisions of that contract, specifically that the rent provisions in the contract would be significantly reduced, is almost

incomprehensible.

{¶ 12} The draft demand letter went on to state that Ratonel was making a demand of $1,200,000 for settlement of the French Village malpractice claim.

{¶ 13} Thereafter, on April 30, 2010, Ropchock sent an e-mail to Ratonel, in which he noted that Ratonel asserted two claims with regard to French Village. First, there was a claim that KMK failed to advise that the complex was a Limited Dividend Property. Ropchock opined that despite damage to Ratonel's cash flow [i.e., she could only take payment out once per year rather than every month], the damages would not be quantifiable. Second, Ropchock noted that Ratonel asserted a claim for a reduction of rent that would occur with regard to French Village. However, Ropchock went on to note that "it was almost impossible to find anyone willing to testify against KMK * * * so we have no liability expert." He informed Ratonel that without an expert it would not be possible to establish liability. He further informed Ratonel that they lacked an expert regarding damages because she could not afford to pay for an expert. Finally, Ropchock stated, "[i]n my opinion, at this time, there is no viable claim against KMK on FV. Please call me to discuss."

{¶ 14} On May 11, 2010, Ropchock sent a settlement demand letter to counsel for KMK, in which he omitted any mention of French Village. On August 8, 2010, an amended complaint was filed, which omitted mention of French Village.

{¶ 15} The case was tried to a jury in October 2010. Following the close of Ratonel's case, the trial court directed a verdict in favor KMK upon a finding that Ratonel failed to present competent evidence regarding proximate cause and damages.

Thereafter, the parties agreed to enter into a settlement agreement whereby, in exchange for Ratonel's agreement to forego an appeal, KMK would dismiss its counterclaim for attorney fees.

{¶ 16} Thereafter, Ratonel and Ropchock exchanged e-mails in which Ratonel stated that she did not understand what had happened to cause the trial to end, and that she did not agree to the settlement, which she felt Ropchock had pressured her into accepting. Ratonel then hired another law firm to initiate a lawsuit against Ropchock for legal malpractice.

II. The Course of Proceedings

{¶ 17} Following discovery, both parties filed motions for summary judgment. The trial court denied Ratonel's motion. The trial court denied Ropchock's motion with regard to the claims concerning Holden House, but rendered partial summary judgment in favor of Ropchock with regard to the claims concerning French Village. The trial court concluded that the alleged malpractice was outside the scope of Ropchock's representation of Ratonel, relying upon the omission of any language concerning French Village in the engagement letter, as well as the April 30, 2010 e-mail from Ropchock to Ratonel in concluding that Ropchock refused to represent Ratonel with respect to any claims regarding French Village. The trial court went on to note that even if the fact that Ropchock "did throw in a line" in the original complaint regarding French Village, gave rise to a reasonable belief that he intended to represent Ratonel on that claim, that belief "would have been extinguished by Defendant Ropchock's later communications delineating the reasons he was unwilling to pursue claims based on the French Village

acquisition." Dkt. 72, p. 13.

{¶ 18} At the request of the parties, the trial court certified, under Civ.R. 54(B), that there was no just cause for delay.

{¶ 19} Ratonel appeals.

III. There Are Genuine Issues of Material Fact Concerning whether the French Village Malpractice Claim Was within the Scope of Ropchock's Representation of Ratonel

{¶ 20} Ratonel raises the following two assignments of error:

> THE TRIAL COURT ERRED AS A MATTER OF LAW BY FAILING TO GRANT RATONEL'S MOTION FOR SUMMARY JUDGMENT BASED ON R & A'S NEGLIGENT ADVICE TO RATONEL THAT THEIR CLAIMS AGAINST KMK DERIVED FROM KMK'S PREPARATION OF THE PURCHASE AGREEMENT FOR FRENCH VILLAGE, WHICH OMITTED THE OPTION OF CONVENTIONAL FINANCING, WERE NOT VIABLE AND SPECULATIVE.
>
> THE TRIAL COURT ERRED BY COMPLETELY IGNORING UNCONTROVERTED FACTS WHEN IT FOUND THAT R & A "TERMINATED" THEIR REPRESENTATION REFERABLE TO FRENCH VILLAGE ON APRIL 30, 2010, SO GRANTING R & A'S MOTION FOR SUMMARY JUDGMENT.

{¶ 21} Ratonel contends that the trial court erred in determining that Ropchock declined to represent Ratonel with regard to French Village.

{¶ 22} Summary judgment is appropriate when the moving party demonstrates

that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion when viewing the evidence most strongly in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party. *Hudson v. Petrosurance, Inc*., 127 Ohio St.3d 54, 2010-Ohio-4505, 936 N.E.2d 481, ¶ 29; *Sinnott v. Aqua–Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, 876 N.E.2d 1217, ¶ 29. When reviewing a trial court's grant of summary judgment, an appellate court conducts a de novo review. *Grafton v. Ohio Edison Co*., 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). "De Novo review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland City Schools Bd. of Edn*., 122 Ohio App.3d 378, 383, 701 N.E.2d 1023 (8th Dist.1997), citing *Dupler v. Mansfield Journal Co*., 64 Ohio St.2d 116, 119–20, 413 N.E.2d 1187 (1980). Therefore, the trial court's decision is not granted deference by the reviewing appellate court. *Brown v. Scioto Cty. Bd. Of Commrs*., 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993).

{¶ 23} Absent an attorney-client relationship, a plaintiff may not maintain an action for legal malpractice. *New Destiny Treatment Ctr., Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011-Ohio-2266, 950 N.E.2d 157, ¶ 32. With regard to the determination of whether the relationship exists, "the law looks to the manifest intentions of the attorney and the prospective client. A relationship of attorney and client arises when a person manifests an intention to obtain legal services from an attorney and the attorney either consents or fails to negate consent when the person has reasonably assumed that the relationship has been established. Thus, the existence of an attorney-client relationship does not

depend on an express contract but may be implied based on the conduct of the parties and the reasonable expectations of the putative client." *Id.*, ¶ 26. In this case, there is no dispute that an attorney-client relationship existed.

{¶ 24} However, that does not end our inquiry because "an attorney only owes a duty to a client if the alleged deficiencies in his performance relate to matters within the scope of the representation." S*valdi v. Holmes*, 2012-Ohio-6161, 986 N.E.2d 443, ¶ 18 (10th Dist.). Thus, even when an attorney-client relationship is established, we must determine the scope of the representation provided. *Id.*

{¶ 25} As a general rule, the intent of the parties regarding the scope of representation is set forth in the engagement contract, which the parties are presumed to have read. *Pierson v. Rion*, 2d Dist. Montgomery No. 23498, 2010-Ohio-1793, ¶ 19 – 20. As noted above, the engagement letter executed by the parties was limited to Holden House, but stated other services could be agreed upon. No written agreement was executed with regard to French Village. However, a contract for services can be written, oral, express or implied. *Collett v. Steigerwald*, 2d Dist. Montgomery No. 22028, 2007-Ohio-6261, ¶ 33. Thus, we can look to the conduct of the parties to determine whether representation regarding French Village was agreed to by implication. *Id.*

{¶ 26} While the reference in the complaint to French Village was admittedly short, when combined with the e-mails regarding the French Village complex and the draft settlement sent to Ratonel for review, we disagree with the trial court's determination, as a matter of law, that Ropchock did not undertake representation in that regard. A reasonable jury could find, on this evidence, that Ropchock rendered legal advice on the matter and began to pursue the claim.

{¶ 27} The next issue is whether the e-mail of April 30, 2010 was sufficient to extinguish any reasonable belief that Ratonel held with regard to that representation. We also disagree with the trial court's conclusion on that issue. The e-mail in question did not, as claimed by Ropchock, unequivocally communicate an intent not to represent Ratonel on the matter. It framed the problems Ropchock perceived with regard to pursuing a claim for French Village, and set forth an opinion that the claim was not viable. It ended with a statement that Ratonel should call to discuss the matter.

{¶ 28} The trial court also relies upon the fact that during the deposition of Lorna Ratonel, she made several statements that Ropchock "refused" to include a claim regarding French Village. According to the trial court and Ropchock, this testimony made it clear that Ratonel was aware from the outset that Ropchock was not going to make a claim on that issue. From our review of the deposition, Ratonel's testimony can be taken to mean that up to, and even after, the filing of the amended complaint omitting French Village, she and Ropchock continued to have discussions about the need to include a claim for French Village. While Ropchock contends that Ratonel was free to obtain other counsel to pursue the matter, we note that there is no indication that he informed her that she should do so.[1] Furthermore, the evidence can be interpreted to indicate that Ratonel was not certain, until the amended complaint was filed just two months before trial, that Ropchock would not prosecute the claim. And even then, her testimony indicates that they continued to discuss the matter.

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[1] We question Ropchock's claim that Ratonel could have found new counsel to pursue the claim so close to the trial date.

{¶ 29} The issue may be close, but we conclude that summary judgment was not appropriate on the French Village malpractice claim. A jury could conclude that Ratonel had a reasonable belief that Ropchock was providing representation regarding French Village. A jury could also find that Ropchock rendered a legal opinion concerning the validity of maintaining a malpractice claim, upon which Ratonel reasonably relied to her detriment in choosing not to pursue the French Village claim with other counsel. Accordingly, the First and Second Assignments of Error are sustained.

IV. Conclusion

{¶ 30} Ratonel's assignments of error having been sustained, the partial summary judgment rendered against Ratonel on the French Village malpractice claim is Reversed, and this cause is Remanded for further proceedings.

. . . . . .

FROELICH, P.J., concurs.

HALL, J., dissenting,

{¶ 31} I agree with the trial court that there is no genuine issue of material fact that, Ratonel hired Roetzel & Andress, LPA, to pursue a claim against the law firm, and lawyers, of Keating, Muething and Klekamp (KMK) for alleged malpractice related to purchase of a building in Dayton, Ohio. KMK had previously represented Ratonel with regard to purchase of "a multi-family apartment complex in Dayton, Ohio ['Holden House'] and another in Grand Island, Nebraska ['French Village']." (Decision, Order and Entry filed May 16, 2014, at 2) In addition to the omission of representation regarding the French Village transaction from the engagement letter, in my view, the April 30, 2010

email, coupled with Ms. Ratonel's acknowledgement that Roetzel & Andress "refused" to handle the claim related to French Village unequivocally results in the conclusion that there is no genuine issue of material fact about the scope of representation. I would affirm.

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