IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Daniel J. Nichter,	:	
Plaintiff-Appellant,	:	
v.	:	No. 14AP-811 (C.P.C. No. 13CV-12-13863)
Samuel H. Shamansky et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on May 21, 2015

The Stuhlbarg Law Practice, LLC, LPA, Steven F. Stuhlbarg and *Maribeth M. Mincey*, for appellant.

Reminger Co., LPA, Courtney J. Trimacco and *Holly Marie Wilson*, for appellees.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Plaintiff-appellant, Daniel J. Nichter ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of defendants-appellees Samuel H. Shamansky ("Shamansky") and Samuel H. Shamansky Co., LPA (collectively "appellees"). Because we conclude that appellant did not file his complaint within the applicable statute of limitations, we affirm.

{¶ 2} Appellant hired Shamansky to represent him in certain criminal cases before the Franklin County Court of Common Pleas. The full details of those criminal cases are not relevant to this appeal, but, as relevant here, in January 2012, appellant was sentenced to prison and ordered to write apology letters to several victims within 45 days. Appellant alleges that he timely prepared the apology letters and delivered them to Shamansky but learned on August 17, 2012, that Shamansky failed to forward the letters

to the victims. Appellant argues that his application for judicial release was denied in part due to the failure to comply with the judge's instructions regarding the apology letters.

{¶ 3} Appellant subsequently sent Shamansky a letter, dated December 17, 2012, ("December 17th letter"), indicating that appellant no longer wanted Shamansky to represent him on legal matters as of the date of the letter. Appellant indicated that he had retained other counsel and directed Shamansky to remove his name from the record as his representative. Shamansky filed a motion to withdraw on January 31, 2013, and the trial court granted the motion to withdraw on February 4, 2013. Appellant's subsequent counsel filed a notice of appearance on March 13, 2013.

{¶ 4} On December 27, 2013, appellant filed a complaint against appellees, asserting claims for legal malpractice, breach of contract, unjust enrichment, and fraud. Appellees filed a motion for summary judgment, asserting that the statute of limitations barred appellant's claim for legal malpractice and that appellant's other claims were subsumed by the legal malpractice claim. The trial court concluded that all of the claims related to appellant's allegations of legal malpractice and, therefore, were governed by the applicable one-year statute of limitations. The trial court further concluded that appellant's claim for legal malpractice accrued on December 17, 2012, and that appellees were entitled to summary judgment because appellant failed to bring his claims within one year of that date.

{¶ 5} Appellant appeals from the trial court's judgment, assigning a single error for this court's review:

> The trial court erred by awarding summary judgment in favor of Defendants-Appellees.

{¶ 6} We review a grant of summary judgment de novo. *Capella III, L.L.C. v. Wilcox,* 190 Ohio App.3d 133, 2010-Ohio-4746, ¶ 16 (10th Dist.), citing *Andersen v. Highland House Co.,* 93 Ohio St.3d 547, 548 (2001). "De novo appellate review means that the court of appeals independently reviews the record and affords no deference to the trial court's decision." *Holt v. State,* 10th Dist. No. 10AP-214, 2010-Ohio-6529, ¶ 9 (internal citations omitted). Summary judgment is appropriate where "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, and that conclusion is adverse to the party against whom the motion for summary judgment is made." *Capella III* at ¶ 16, citing *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, ¶ 6. In ruling on a motion for summary judgment, the court must resolve all doubts and construe the evidence in favor of the nonmoving party. *Pilz v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 04AP-240, 2004-Ohio-4040, ¶ 8. *See also Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 485 (1998) ("Even the inferences to be drawn from the underlying facts contained in the evidentiary materials, such as affidavits and depositions, must be construed in a light most favorable to the party opposing the motion."). Therefore, we undertake an independent review to determine whether appellees were entitled to judgment as a matter of law.

{¶ 7} Ohio law provides that an action for legal malpractice must be commenced within one year after the cause of action accrued. R.C. 2305.11(A). "[A]n action for legal malpractice accrues and the statute of limitations begins to run when there is a cognizable event whereby the client discovers or should have discovered that his injury was related to his attorney's act or non-act and the client is put on notice of a need to pursue his possible remedies against the attorney or when the attorney-client relationship for that particular transaction or undertaking terminates, whichever occurs later." *Zimmie v. Calfee, Halter & Griswold*, 43 Ohio St.3d 54 (1989), syllabus. Thus, in determining when the statute of limitations began to run, a court must determine: (1) when the client should have known that he or she may have an injury caused by his or her attorney and (2) when the attorney-client relationship terminated. *Smith v. Conley*, 109 Ohio St.3d 141, 2006-Ohio-2035, ¶ 4. The determination of the date a cause of action for legal malpractice accrues is a question of law that is reviewed de novo on appeal. *Ruckman v. Zacks Law Group, LLC*, 10th Dist. No. 07AP-723, 2008-Ohio-1108, ¶ 17.

{¶ 8} The trial court determined that at least one "cognizable event" occurred in August 2012, when appellant alleges he learned that Shamansky failed to send his letters of apology. The trial court further noted that other earlier events might also constitute cognizable events but that the termination of the attorney-client relationship occurred later and, therefore, triggered the one-year period for appellant to file his legal malpractice claim. The trial court concluded that the December 17th letter terminated the attorney-client relationship and began the statute of limitations period; because appellant

did not file his action within one year of December 17, 2012, appellees were entitled to summary judgment.

{¶ 9} The Supreme Court of Ohio has stated that the "question of when an attorney-client relationship for a particular undertaking or transaction has terminated is necessarily one of fact." *Omni-Food & Fashion, Inc. v. Smith*, 38 Ohio St.3d 385, 388 (1988). *See also Conley* at ¶ 9 ("We reaffirm our statement in *Omni-Food* that the date of termination of the attorney-client relationship is a question of fact and is to be determined by considering the actions of the parties."). Citing this declaration, appellant argues that summary judgment was inappropriate in this case because the parties disputed the date of termination, which constituted a genuine issue of material fact.

{¶ 10} While acknowledging the Supreme Court's declaration that, when an attorney-client relationship terminates is a question of fact, this court has previously held that " '[t]he question of when the attorney-client relationship was terminated may be taken away from the trier of fact * * * if 'affirmative actions that are patently inconsistent with a continued attorney-client relationship' have been undertaken by either party.' " *Ruckman* at ¶ 17, quoting *Steindler v. Meyers, Lamanna & Roman*, 8th Dist. No. 86852, 2006-Ohio-4097, ¶ 11 (internal quotation omitted). We conclude that appellant took affirmative actions that were patently inconsistent with a continued attorney-client relationship, and, therefore, this case was appropriate for summary judgment.

{¶ 11} Appellant's primary argument is that the trial court erred in granting summary judgment because the attorney-client relationship did not terminate until Shamansky filed his motion to withdraw on January 31, 2013. Therefore, appellant argues, his complaint for legal malpractice was filed within the one-year statute of limitations. In response, appellees argue that the December 17th letter terminated the attorney-client relationship by expressly and unequivocally indicating that appellant no longer wished to be represented by Shamansky as of the date of the letter.

{¶ 12} "Generally, the attorney-client relationship is consensual, subject to termination by acts of either party." *Columbus Credit Co. v. Evans*, 82 Ohio App.3d 798, 804 (10th Dist.1992). "A client may terminate the relationship at any time." *Id.* "Conduct which dissolves the essential mutual confidence between attorney and client signals the end of the attorney-client relationship." *DiSabato v. Thomas M. Tyack & Assocs. Co.,*

LPA, 10th Dist. No. 98AP-1282 (Sept. 14, 1999). "An explicit statement terminating the relationship is not necessary." *Triplett v. Benton*, 10th Dist. No. 03AP-342, 2003-Ohio-5583, ¶ 13.

{¶ 13} The trial court concluded that the December 17th letter terminated the attorney-client relationship and rejected appellant's argument that the relationship did not terminate until Shamansky filed his motion to withdraw, citing the *Conley* decision. *Conley* involved a legal malpractice claim that was filed after attorney Conley represented Smith in a criminal trial. Smith was convicted but, before sentencing, he allegedly discovered exculpatory evidence and asked Conley to request a new trial. *Conley* at ¶ 2. Conley disputed the value of the evidence; ultimately, Conley sent letters to Smith on August 26 and 28, 2002, memorializing an August 26, 2002 telephone conversation purporting to terminate the attorney-client relationship. *Id.* Smith filed a pro se motion for new trial on September 3, 2002, and Conley filed a motion to withdraw on September 6, 2002. Smith later alleged that the trial court did not rule on the motion to withdraw until April 11, 2005. *Id.*

{¶ 14} Smith filed a complaint against Conley for legal malpractice on September 5, 2003. The trial court granted summary judgment in favor of Conley based on the statute of limitations, finding that the cause of action accrued no later than September 3, 2002, when Smith filed his pro se motion for new trial. The court of appeals reversed, finding that the malpractice complaint was timely because the cause of action did not accrue until Conley filed his motion to withdraw on September 6, 2002. *Id.* at ¶ 3.

{¶ 15} The Supreme Court concluded that, with respect to determining when the cause of action accrued for purposes of R.C. 2305.11, the local rule governing motions to withdraw was administrative in nature and intended to advise the court that the attorney-client relationship had ended. *Id.* at ¶ 9. The rule did not govern termination of the attorney-client relationship. *Id.* The Supreme Court concluded that Conley clearly informed Smith that he could no longer represent him and would not file further actions on his behalf no later than August 28, 2002. This action, rather than the local rule providing for withdrawal of an attorney, determined the end of the attorney-client relationship. *Id.* at ¶ 10.

{¶ 16} Appellant argues that *Conley* is distinguishable because the motion to withdraw in *Conley* was simply a formalization of a termination that had already occurred; whereas, in this case, the motion to withdraw was necessary to complete the attorney-client relationship. Appellant claims that the December 17th letter could not terminate the attorney-client relationship because it contained instructions directing Shamansky to file a motion to withdraw. Appellant asserts that his subsequent counsel would not take on the case until Shamansky withdrew; therefore, Shamansky's withdrawal was a key precondition to proceed with pursuing a judicial release. Appellant characterizes the motion to withdraw as one final legal task that Shamansky was required to perform before the attorney-client relationship terminated.

{¶ 17} In support of his argument, appellant cites *Monastra v. D'Amore*, 111 Ohio App.3d 296 (8th Dist.1996). The court in *Monastra* found that a discharge letter from a client to her attorney was "merely one facet of the termination of the attorney-client relationship." *Id.* at 303. The letter also directed the attorney to turn over the papers related to the case to another attorney; the court found that the letter could be read to mean that the relationship did not terminate until those essential files were transferred to the new attorney. *Id.* at 303-04. The court also noted that the discharged attorney attended a pretrial hearing after receiving the discharge letter and conferred with the new attorney regarding videotapes and discovery problems. The discharged attorney's billing records included entries for services rendered at no charge on three dates after the discharge letter. *Id.* at 298. Finally, the court noted that the discharged attorney did not move to withdraw until more than a month after the date of the discharge letter, and the court granted the motion more than a week later. *Id.* at 304. Under these circumstances, the court found that summary judgment was inappropriate because there was a genuine issue of material fact as to when the attorney-client relationship ended. *Id.*

{¶ 18} Our decision in this case is guided by the Supreme Court's decision in *Conley*, rather than the Eighth District's decision in *Monastra*, which was decided a decade earlier. It is clear that a motion to withdraw is not required to terminate an attorney-client relationship. *See Triplett* at ¶ 14 ("Although the trial court did not officially grant appellee's motion to withdraw until May 11, 2001, an attorney-client relationship can be terminated prior to the trial court's granting of a notice of withdrawal."). The

Conley decision clarified that, when a motion to withdraw is filed, the date of filing of that motion is not dispositive in determining when an attorney-client relationship ends. In this case, unlike *Monastra*, there was no evidence that Shamansky continued to perform services for appellant after receiving the December 17th letter, such as attending a pretrial hearing or working with appellant's subsequent counsel in transitioning the representation. Despite appellant's characterization of the motion to withdraw as one final legal task that Shamansky was required to perform before the attorney-client relationship could end, we conclude that it was, instead, a natural consequence of appellant's termination of the attorney-client relationship. Because appellant had terminated the attorney-client relationship, Shamansky was required to file a motion to withdraw and would have been required to do so even if appellant had not explicitly instructed him to withdraw. Filing the motion to withdraw was not an ongoing legal service performed on behalf of appellant. As the *Conley* court explained, in this context, the local rule providing for withdrawal of a trial attorney is an administrative rule designed to notify the court that the relationship has ended. *Conley* at ¶ 9.

{¶ 19} As noted above, a client may terminate the attorney-client relationship at any time. *Evans* at 804. The date of termination of the attorney-client relationship is determined by considering the actions of the parties. *Conley* at ¶ 9. In the December 17th letter, appellant stated "I am no longer wanting you to represent me on my legal matters from the date of this letter." (Appellees' Motion for Summary Judgment, Exhibit O.) After directing Shamansky to withdraw from the case, appellant reiterated "I repeat, I no longer want you to represent me as my attorney." (Motion for Summary Judgment, Exhibit O.) We conclude that this constituted clear, unequivocal evidence of appellant's termination of the attorney-client relationship. *See Cotterman v. Arnebeck*, 10th Dist. No. 11AP-687, 2012-Ohio-4302, ¶ 18 (holding that attorney-client relationship terminated, at the latest, on the date when the client sent the attorney an email stating: "Your services are no longer needed in my case. You are hereby terminated as my legal counsel in the matter."). The language of the December 17th letter was patently inconsistent with a continued attorney-client relationship between appellant and Shamansky. *See Ruckman* at ¶ 17.

{¶ 20} Appellant further declared in the December 17th letter that he had retained other counsel. Although this statement appears to have been inaccurate because

appellant's subsequent counsel declined to take on the case until Shamansky had withdrawn, there is no evidence that Shamansky was aware of that stipulation by appellant's subsequent counsel. The December 17th letter did not advise Shamansky that his withdrawal was necessary for subsequent counsel to take the case; rather, it directly stated that appellant had new counsel. Moreover, the conditions imposed by appellant's subsequent counsel before undertaking the representation do not govern the terms of the attorney-client relationship between appellant and Shamansky. Retaining other counsel to work on the same matter is an act sufficient to terminate the attorney-client relationship. *See Burzynski v. Bradley & Farris Co., LPA*, 10th Dist. No. 01AP-782 (Dec. 31, 2001); *McGlothin v. Schad*, 194 Ohio App.3d 669, 2011-Ohio-3011, ¶ 15 (12th Dist.). *Compare Steindler v. Meyers, Lamanna & Roman*, 8th Dist. No. 86852, 2006-Ohio-4097, ¶ 14 ("[M]erely ask[ing] another law firm to look at her case and advise her as to whether she had any available options * * * did not function as an express termination of [an individual's] relationship with [her attorneys]."); *Feudo v. Pavlik*, 55 Ohio App.3d 217, 219 (8th Dist.1988) (holding that consultation with a second attorney about possible assistance with his case did not terminate an individual's attorney-client relationship with his first attorney when the first attorney was unaware of the consultation and continued to work on the individual's appeal during the relevant period). Likewise, we conclude that appellant's declaration to Shamansky that he had retained another attorney was inconsistent with a continued attorney-client relationship.

{¶ 21} Accordingly, the attorney-client relationship between appellant and Shamansky terminated on December 17, 2012. Because appellant did not file his complaint until December 27, 2013, more than one year after his cause of action accrued, appellees were entitled to judgment as a matter of law.

{¶ 22} Finally, appellant argues that his legal malpractice claim is separate and distinct from the other claims raised in his complaint. Therefore, he asserts that, even if his legal malpractice claim was barred by the one-year statute of limitations under R.C. 2305.11, the other claims subject to longer statutes of limitations should survive. Appellant urges this court to revisit our prior decisions addressing this issue.

{¶ 23} This court has previously held that "[a]n action by the client against an attorney for damages resulting from the manner in which the attorney represented the

client constitutes an action for malpractice within the meaning of R.C. 2305.11, regardless of whether predicated upon contract or tort or whether for indemnification or for direct damages." *Muir v. Hadler Real Estate Mgt. Co.*, 4 Ohio App.3d 89 (10th Dist.1982), syllabus. Thus, in cases where the substance of the complaint involved damages arising from an attorney's representation of a client, we have repeatedly held that the claims were subject to the one-year statute of limitations under R.C. 2305.11 regardless of the labels given to the causes of action in the complaint. *Illinois Natl. Ins. Co. v. Wiles, Boyle, Burkholder & Bringardner Co., LPA*, 10th Dist. No. 10AP-290, 2010-Ohio-5872, ¶ 15-17; *Triplett* at ¶ 6-7; *Polivka v. Cox*, 10th Dist. No. 01AP-1023, 2002-Ohio-2420, ¶ 2, fn. 1; *Rumley v. Buckingham, Doolittle & Burroughs*, 129 Ohio App.3d 638, 641-42 (10th Dist.1998). *Compare Endicott v. Johrendt*, 10th Dist. No. 99AP-35 (June 22, 2000) (holding that claims for misrepresentation, breach of contract by fraud, and breach of fiduciary duty by fraud were subsumed within legal malpractice claim but that a component of claim for intentional infliction of emotional distress was not subsumed with the malpractice claim because it involved actions and statements occurring well after the representation terminated).

{¶ 24} Appellant alleged that Shamansky breached an oral contract by failing to perform adequate legal services, by overcharging him and by refusing to refund a portion of the retainer paid to Shamansky. With respect to the alleged overcharges, appellant asserted in the alternative that Shamansky was unjustly enriched. Appellant also asserted that Shamansky made deliberately false and misleading statements guaranteeing favorable outcomes and representing that Shamansky had reached a deal with the prosecutor for probation. Each of these claims arises from Shamansky's representation of appellant within the attorney-client relationship, and, therefore, the trial court properly concluded that they were subsumed within the legal malpractice claim for purposes of determining the applicable statute of limitations. *See Illinois Natl.* at ¶ 17; *Sprouse v. Eisenman*, 10th Dist. No. 04AP-416, 2005-Ohio-463, ¶ 8 ("A client's claims that arise out of the manner in which an attorney represents the client within the attorney-client relationship, regardless of the names affixed to the theories of recovery or causes of action, are claims for legal malpractice.").

{¶ 25} For the foregoing reasons, appellant's assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

LUPER SCHUSTER and HORTON, JJ., concur.
