Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-339

MARCH TERM, 2010

Abatiell Associates, P.C.	}	APPEALED FROM:
	}	
v.	}	Rutland Superior Court
	}	
	}	
Deborah Nicholas	}	DOCKET NO. 394-6-05 Rdcv
		Trial Judge: William D. Cohen

In the above-entitled cause, the Clerk will enter:

Deborah Nicholas appeals from the trial court's order granting summary judgment to defendant Abatiell Associates, P.C. on her legal malpractice claim. She argues that, given the undisputed facts, the motion should have been denied. Alternatively, she asserts that a material fact remains in dispute. We affirm.

The facts giving rise to this action are as follows. In May 2001 Nicholas and her husband (now deceased) entered into a listing agreement with a broker, giving the broker the exclusive right to sell their property for a certain period. During the listing period, the broker conveyed several offers to the Nicholases, both of which the Nicholases rejected. The broker suspected that the Nicholases were negotiating directly with the couple who had made the first offer. In June 2003, the broker filed a complaint against the Nicholases, raising claims of breach of contract, breach of the implied covenant of good faith and fair dealing, and quantum meruit. The broker alleged that the Nicholases had refused to hear the terms of, or consider, the offer from the second prospective buyer. According to the broker, the Nicholases stated that they would not consider selling the property to anyone but the first prospective buyers, and they then negotiated directly with the first buyers. The broker maintained that the Nicholases' behavior amounted to an anticipatory repudiation of the listing agreement, and that the Nicholases had engaged in the conduct above in a bad faith attempt to deprive the broker of its opportunity to earn its brokerage fee under the agreement. A jury rejected the breach-of-contract claim, but found in favor of the broker on the breach of the implied covenant claim and awarded the broker $4000. The broker was also awarded attorney's fees as the prevailing party pursuant to the terms of the underlying listing agreement. We affirmed this decision on appeal. Harsch Props., Inc. v. Nicholas, 2007 VT 70, 182 Vt. 196.

An attorney from Abatiell Associates represented the Nicholases in the litigation above. In June 2005, Abatiell Associates filed a complaint against Nicholas, seeking to collect unpaid legal fees. Nicholas filed an answer and counterclaim, asserting that Abatiell Associates breached its contractual duty to provide competent legal services. The firm moved for summary judgment on the counterclaim in July 2008, and following a hearing, the court granted its request.

As relevant here, Nicholas argued that her attorney was negligent because he failed to file a motion to dismiss the broker's claim for breach of the covenant of good faith and fair dealing as duplicative of the breach of contract claim before it was submitted to the jury. Nicholas maintained that had the motion been filed, the claim would have been dismissed, and she would have prevailed at trial because the jury did not find for broker on its breach-of-contract claim. The superior court rejected this argument. It concluded that the claim would not have been dismissed as duplicative because the two claims were not based upon the same conduct. The contract claim, the court explained, was based upon conduct that would have breached the terms set forth in the listing agreement, while the remaining claim was based upon conduct that "violate[d] community standards of decency, fairness, or reasonableness." Additionally, the court observed, the jury found in Nicholas's favor on the breach-of-contract claim—it did not "recognize" both the contract and covenant claims and the broker did not get "two bites at the same apple." Thus, because Nicholas failed to proffer any evidence as to proximate cause, the court granted summary judgment to defendant. Nicholas appeals from this decision.

Nicholas argues that summary judgment was improperly granted. She asserts, as she did below, that the broker's underlying claims—as stated in the broker's verified complaint—were based on the same conduct. Thus, she maintains that the latter claim would have been dismissed as duplicative. In support of her position, Nicholas cites Monahan v. GMAC Mortgage Corp., where we stated in a footnote that "we will not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when the plaintiff also pleads a breach of contract based upon the same conduct." 2005 VT 110, ¶ 54 n.5, 179 Vt. 167. Nicholas also cites Hodge v. Town of Bennington, 43 Vt. 450 (1871), for the proposition that under Vermont law, "a party is not allowed to pursue duplicative causes of action," and that "when separate causes of action are based on the same conduct, the party is required 'to make an election between the two points, and be[] confined to one." (quoting Hodge at 457). Alternatively, Nicholas argues that there is a dispute of fact as to whether the claims were based on the same conduct.

We review an appeal from summary judgment de novo using the same standard as the trial court. Madden v. Omega Optical, Inc., 165 Vt. 306, 309 (1996). Summary judgment will be granted when there is no genuine issue of material fact and, when viewing the evidence in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3). As discussed below, we conclude that summary judgment was properly granted to defendant here. See Gallipo v. City of Rutland, 163 Vt. 83, 86 (1994) ("Summary judgment will be granted if, after an adequate time for discovery, a party fails to make showing sufficient to establish an essential element of the case on which the party will bear burden of proof at trial.").

To support her malpractice claim, Nicholas needed to prove that her attorney was negligent and that this negligence was the proximate cause of her injury. Estate of Fleming v. Nicholson, 168 Vt. 495, 497 (1998). In other words, she must show that "but for" her attorney's failure, she would have prevailed below. Knott v. Pratt, 158 Vt. 334, 336 (1992). She failed to make that showing.

We agree with the trial court that had a motion to dismiss been filed, it would have been denied. Nothing in Hodge, which predated the relevant rules of civil procedure, persuades us otherwise.* Under our liberal pleading rules, a party can present inconsistent claims and demand

* We note that Nicholas has taken language from Hodge out of context. According to Nicholas, Hodge requires parties who plead separate causes of action based on the same conduct to "make an

relief in the alternative or of several different types. V.R.C.P. 8(a); Spaulding v. Cahill, 146 Vt. 386, 389 (1985). Motions to dismiss for failure to state a claim are "disfavored and should be rarely granted." Bock v. Gold, 2008 VT 81, ¶ 4, 184 Vt. 575 (mem.). Indeed, dismissal is warranted "only when it is beyond doubt that there exist no facts or circumstances, consistent with the complaint[,] that would entitle the plaintiff to relief." Id.

In this case, even if we assume that the broker's claims were based on the same conduct, the claims could have been construed as alternative claims—the conduct either violated an express term or an implied term of the parties' agreement. In fact, the jury ultimately found only the latter violation, and Nicholas was not held liable twice for the same act. We agree with the trial court that Nicholas failed to establish that she suffered any injury from her attorney's alleged negligence, and summary judgment was therefore properly granted to defendant.

Affirmed.

BY THE COURT:

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice

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election between the two points, and be confined to one." In fact, taken in its proper context, this language refers to literal points on a roadway in a case where the plaintiff argued that the town failed to properly maintain its roads. The plaintiff in Hodge had been thrown from his carriage due to a rut in the road; his horse became startled, ran 100 yards down the road, plunged into a ditch, and died. The plaintiff claimed that the road was insufficient both at the point where the horse was killed and also where the axle of his carriage was broken. The town argued that the court should put the plaintiff to an election as to the points on the road and that the plaintiff could not go to the jury for both injuries. The trial court rejected this specific argument, as did this Court. Hodge, 43 Vt. at 457.

Nicholas also cites In re Miller, 168 Vt. 585, 586 (1998) (mem.), as support for his assertion that the purpose of requiring a plaintiff to elect one cause of action "is to prevent a litigant from taking 'two bites at the apple.' " In Miller, we addressed the timing of a litigant's motion to disqualify certain judges, and held that the motion was untimely. The only mention of "two bites at the apple" comes in a parenthetical reference to another case, and it does not appear relevant here. See id. (citing E. & J. Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280, 1295 (9th Cir. 1992) (allowing motions to disqualify judge after judgment would encourage parties to wait for a decision, and then if necessary move for disqualification "to get a second bite at the apple").