ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-194

JANUARY TERM, 2010

Robert Lefebvre	}	APPEALED FROM:
	}	
v.	}	Orange Superior Court
	}	
Richard A. Cawley	}	DOCKET NO. 131-6-07 Oecv
		Trial Judge: Mary Miles Teachout

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

Plaintiff appeals from a jury verdict in favor of defendant in this legal malpractice action. We affirm.

In the late 1980's, plaintiff purchased a twenty-eight-acre-lot residential development called Plateau Acres. In 1989, plaintiff obtained an Act 250 land-use permit subject to certain conditions, including certification from a professional engineer that a specified amount of fill had been placed on lots twelve and thirteen of the development. Defendant did real estate work for plaintiff in connection with Plateau Acres for a ten-year period from the early 1990's until the early 2000's. In March 2002, plaintiff began construction on lots twelve and thirteen. Plaintiff testified at trial that he asked defendant at that time to ensure compliance with Act 250. Defendant testified that plaintiff made no such request, and that in fact plaintiff had been telling him for years that he (plaintiff) had taken care of the Act 250 issues. In July 2002, plaintiff entered into a purchase-and-sale agreement with a couple interested in buying lots twelve and thirteen, but the deal fell through after the couple's counsel discovered that an engineer had never certified the lots to be in compliance with Act 250. Plaintiff eventually sold the property to another party at a slightly lower price. Following the sale of the property, plaintiff called defendant to obtain the file on the Plateau Acres transactions. Plaintiff testified that defendant offered to sell him a copy of the file, but would not turn over the original file. Eventually, defendant gave plaintiff the original file.

In June 2007, plaintiff filed a complaint against defendant, alleging two counts of breach of contract and two counts of negligence based on defendant's failure to ensure Act 250 compliance and his refusal to turn over the file in a timely manner. In January 2008, defendant sought summary judgment on the grounds that plaintiff did not have expert testimony to support his claims. The superior court denied the motion primarily because the facts set forth in the record were too vague for the court to determine whether expert testimony was necessary. The court explicitly stated, however, that its decision was not intended to mean that plaintiff could

proceed to trial on any of his claims without an expert witness. In August 2008, plaintiff filed a motion for partial summary judgment in which he asked the court to instruct the jury that if it finds plaintiff proved he asked defendant to ensure Act 250 compliance, defendant had a duty to check on whether an engineer had filed a certificate of completion, to tell plaintiff to verify the certification of completion, or to tell plaintiff that he (defendant) would not get involved. Plaintiff later withdrew the motion after the parties stipulated to a similar instruction.

The case was tried in March 2009. At the close of plaintiff's case, defendant moved for a directed verdict on the issue of the return of the file, arguing that plaintiff had failed to produce an expert to establish the standard of care required of him. The court granted the motion, ruling that the claim regarding the file was in essence a negligence claim concerning defendant's duty as an attorney, and that plaintiff had failed to present evidence demonstrating a standard of care. At the close of evidence, the trial court provided the parties with draft jury charges and a special verdict form. Plaintiff objected to the exclusion of an instruction on breach of contract and renewed the objection after the jury was charged. The jury returned a verdict finding plaintiff fifty-four percent negligent and defendant forty-six percent negligent; accordingly, the court entered a judgment in favor of defendant. On appeal, plaintiff argues that the trial court erred by refusing to instruct the jury on breach of contract, by assigning the jury the task of calculating interest, and by denying plaintiff's motion for expenses incurred as the result of defendant's failure to make admissions to which he later stipulated.

Plaintiff's primary argument is that the trial court erred by refusing to instruct the jury on breach of contract concerning his claims that defendant failed to ensure Act 250 compliance and that defendant refused to return his file in a timely manner. Regarding the first claim, plaintiff testified that he could not remember the exact words he used, but he asked defendant "something like to make sure that the compliance of Act 250 was taken care of." Plaintiff further testified that defendant gave no indication that he would not do that, and that he "just took it for granted that he didn't say 'no,' that meant that he was going to do it." According to plaintiff, because of the informal method of communication between the parties over the years, and because there was no evidence that plaintiff had failed to pay a bill to defendant during the ten years or so that defendant did real estate work for plaintiff in connection with Plateau Acres, the jury could have reasonably found a contract under which defendant agreed to deal with any Act 250 problems in exchange for plaintiff's promise to pay for his services in the future. In plaintiff's view, his alleged oral request that defendant ensure Act 250 compliance was sufficient evidence of an express contract concerning a special obligation, and thus compelled the trial court to instruct the jury on his breach-of-contract claim.

We disagree. We have explained that "an action to recover for legal malpractice lies in tort, on the theory of the attorney's negligence." Bloomer v. Gibson, 2006 VT 104, ¶ 24, 180 Vt. 397. In this case, it is readily apparent that plaintiff's breach-of-contract claims were, as the trial court found, essentially a reformulation of his negligence claims. Indeed, plaintiff stated in the negligence count in his complaint that defendant had a duty to ask plaintiff whether plaintiff wanted him to ensure Act 250 compliance with regard to Plateau Acres lots; similarly, in his breach-of-contract count, he stated that "defendant never asked the plaintiff whether the plaintiff wanted him to make sure that future sales complied with Act 250," and further that defendant never told him that he would not do so after plaintiff asked him to take care of any Act 250 problems. In Bloomer, in rejecting a breach-of-contract claim, we stated:

> Plaintiff did not allege that defendant breached any special obligations contained in his employment contract with defendant. Indeed, he could not make such an allegation because the contract

> was oral and contained no specific or special obligations. In these circumstances, the superior court correctly labeled plaintiff's amended complaint as containing a tort claim veiled as a breach of contract claim.

Id. (quotation omitted). In this case, the alleged vague and general oral request, coupled with defendant's silence in response, is plainly not an express contract requiring defendant to take on special obligations outside of his duties in his capacity as plaintiff's attorney with respect to the residential development. See Smith v. Osmun, 165 Vt. 545, 546 (1996) (mem.) ("Before there is a contract, there must be initial assent to the terms. Vagueness and indefiniteness as to an essential contract term can preclude formulation of an enforceable contract." (citation omitted)).

Plaintiff fares no better with respect to his return-of-file claim. That claim is based on defendant's ethical duty as an attorney under the Vermont Rules of Professional Responsibility, as explicitly indicated in plaintiff's complaint, and thus is, at essence, a legal malpractice claim actionable upon a theory of negligence, not contract. See Envtl. Liners, Inc. v. Ryley, Carlock & Applewhite, 930 P.2d 456, 464 (Ariz. Ct. App. 1996) (stating that "[w]hen it is the gravamen of a legal malpractice claim that a lawyer has violated his implied duty to provide reasonably competent and ethical services, that claim sounds in tort, not in contract").

Given our resolution of plaintiff's primary claim of error, we need not address his argument that the trial court erred by assigning to the jury the task of calculating interest on any damages awarded. We will not presume, as plaintiff suggests, that the jury may have found in favor of defendant to avoid the task of performing multiple interest calculations going back to 2002. See Lewis v. Gagne, 123 Vt. 217, 219 (1962) ("There can be no assumption under our system of jurisprudence that the jury will disregard the instructions of the trial court.").

Finally, we reject plaintiff's contention that the trial court abused its discretion by refusing to award him expenses based on defendant's failure to admit two requests for admission. Under the pertinent rule, if a party fails to admit the truth of any matter which the requesting party later proves to be true, the requesting party may ask the court to require payment for reasonable expenses, including attorney's fees, incurred in making that proof. V.R.C.P. 37(c)(2). The court shall order payment unless it finds, in relevant part, that "the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or . . . there was other good reason for the failure to admit." Id. Here, plaintiff asked defendant to admit, in relevant part: (1) "As counsel to the plaintiff, if you did not intend to remedy a permit violation despite a request by the plaintiff, you had a duty to say you did not intend to remedy it"; and (2) "By the end of 1998, you knew that, at least under some circumstances, Land Use Permits under Act 250 required completion certificates." Defendant objected to each request "on the ground and to the extent that it calls for a legal conclusion." Defendant also indicated that he was denying the requests without waiving the aforementioned objections. Plaintiff later sought compensation for expenses incurred in proving these points, noting that defendant had ultimately acknowledged the points. In denying plaintiff's requests for expenses, the trial court stated that (1) defendant's response to the first request for admission was not improper, given that it concerned the scope of defendant's undertaking for plaintiff, a highly disputed factual issue, and that the existence of the phrase "despite a request by the plaintiff" in the request for admission could have been construed as defendant acknowledging that plaintiff had asked defendant to remedy any permit violation; and (2) the second admission involved a de minimus eight dollar expense. We conclude that, under the circumstances and for the reasons stated by the trial court, the court acted well within its discretion, in declining to award plaintiff expenses based on

defendant's response to the two noted requests for admission. See In re R.M., 150 Vt. 59, 64 (1988).

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice