13CA0627 Macurdy v. Benson & Associates 03-20-2014

COLORADO COURT OF APPEALS

Court of Appeals No. 13CA0627
Weld County District Court No. 12CV850
Honorable Daniel S. Maus, Judge

Tom E. Macurdy,

Plaintiff-Appellant,

v.

Benson & Associates, P.C., a Colorado professional corporation; Douglas W. Benson, Esq.; and Heidi E. Storz, Esq.,

Defendants-Appellees.

JUDGMENT AFFIRMED

Division IV
Opinion by JUDGE BOORAS
Webb and Román, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced March 20, 2014

Tom E. Macurdy, Pro Se

Polsinelli PC, Stacy A. Carpenter, Joseph T. VanLandingham, Denver, Colorado, for Defendants-Appellees

Plaintiff, Tom E. Macurdy, appeals the trial court's C.R.C.P. 12(b)(5) dismissal of his claim for legal malpractice relief against defendants, Benson & Associates, P.C.; Douglas W. Benson, Esq.; and Heidi E. Storz, Esq. (collectively, Benson). We affirm.

I. Background

Macurdy owns a condominium that is part of a common interest community known as Blue Sky Condominiums (Blue Sky). All Blue Sky unit owners are dues-paying members of the Blue Sky Condominiums Homeowners Association, Inc. (the HOA). The HOA is organized as a nonprofit corporation.

The HOA retained Benson on a contingency fee basis to file a construction defect lawsuit related to the Blue Sky development (the underlying case). The fee agreement identified the client as the HOA.

Thereafter, Macurdy filed an action against Benson, the HOA, and the management company of the Blue Sky development. As relevant here, Macurdy asserted a legal malpractice claim against Benson, alleging that the complaint Benson filed in the underlying case was negligently and carelessly drafted to include

condominiums, such as Macurdy's, that were not damaged by the defective construction. Macurdy alleged that the complaint in the underlying case caused lenders to refuse financing for the purchase of any property in the Blue Sky development. Macurdy further alleged that, as a result of Benson's "negligence and carelessness," he was unable to sell his condominium, and the mortgage-holder foreclosed.

Benson filed a motion to dismiss under C.R.C.P. 12(b)(5), asserting that the HOA, and not Macurdy, is Benson's client, and that therefore, Macurdy cannot bring a professional negligence action against Benson as a nonclient third party. In response, Macurdy argued that Benson owes him a duty of care because he is a "de facto" client of Benson by virtue of Benson's representation of the HOA, of which Macurdy is a member, or, alternatively, because he is a third-party beneficiary of the fee agreement between the HOA and Benson by virtue of his membership in the HOA.

The trial court granted the motion to dismiss, concluding that, under the relevant provisions of the Colorado Common Interest Ownership Act (CCIOA), sections 38-33.3-101 to -401, C.R.S. 2013,

when the board of directors of a homeowners association retains an attorney on the association's behalf, the association is the attorney's client, "rather than the board members or the individual unit owners who comprise the [homeowners association] exclusive membership." The court emphasized that the fee agreement "states that the HOA, rather than its individual members or its board members," is Benson's client. The court thus concluded that the attorney-client relationship exists between the HOA and Benson, "rather than between all of the HOA's members" and Benson, and that there is no attorney-client relationship between Macurdy, as an individual HOA member, and Benson. Accordingly, the court ruled that Benson owed no duty of care to Macurdy and dismissed Macurdy's professional negligence claim against Benson.

The court certified this ruling pursuant to C.R.C.P. 54(b), and this appeal followed.

II. C.A.R. 28

Although Macurdy appears pro se on appeal, he is still bound by applicable rules of procedure. *See Yadon v. Southward*, 64 P.3d 909, 912 (Colo. App. 2002). Despite his signing a C.A.R. 32(f)

certificate of compliance with C.A.R. 28, Macurdy's brief failed to comply with C.A.R. 28(k) because it did not contain, for each issue raised, a statement of the applicable standard of review as required by C.A.R. 28(k). His briefs are therefore subject to sanctions, including dismissal. *See Bruce v. City of Colo. Springs*, 252 P.3d 30, 32 (Colo. App. 2010). We rely on the parties' compliance with the Colorado Appellate Rules because they "are not mere technicalities," but facilitate appellate review. *O'Quinn v. Baca*, 250 P.3d 629, 631 (Colo. App. 2010).

Nevertheless, in the interests of judicial economy and in facilitating a pro se litigant's access to the courts, we will consider the arguments he raised, to the extent we are able to discern them. *See Patterson Recall Comm., Inc. v. Patterson*, 209 P.3d 1210, 1220 (Colo. App. 2009) (concluding that failure to comply with C.A.R. 28 was "troubling," but nonetheless addressing merits).

III. C.R.C.P. 12(b)(5) Dismissal

Macurdy contends that the trial court erred in concluding that Benson owed him no duty of care and, thus, that Macurdy failed to state a claim against Benson upon which relief could be granted.

Macurdy urges that Benson owed him a duty of care based on two alternative arguments. First, Macurdy asserts that Benson owed him a duty of care because he is a "de jure" client of Benson by virtue of Benson's representation of the HOA, of which Macurdy is a member. Alternatively, Macurdy argues that Benson owed him a duty of care as a nonclient third-party beneficiary. We address and reject each contention in turn.

A. Standard of Review

We review de novo a trial court's dismissal of a claim under C.R.C.P. 12(b)(5). *State Farm Fire & Cas. Co. v. Weiss*, 194 P.3d 1063, 1065 (Colo. App. 2008). We accept all assertions of material fact in the complaint as true and view the allegations in the light most favorable to the plaintiff. *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 71 (Colo. 2004). "A motion to dismiss is properly granted when the plaintiff's factual allegations cannot support a claim as a matter of law." *Id.*

B. Legal Malpractice

Macurdy argues that the trial court erred in dismissing the legal malpractice claim by concluding that no attorney-client relationship exists between himself and Benson. We disagree.

To establish a legal malpractice claim, three elements must be proved: (1) the attorney owed a duty of care to the plaintiff; (2) the attorney breached that duty; and (3) the attorney proximately caused damage to the plaintiff. *Stone v. Satriana*, 41 P.3d 705, 712 (Colo. 2002).

"A party must prove the existence of an attorney-client relationship between the complaining party and the lawyer in order to prevail on a claim of legal malpractice." *Mehaffy, Rider, Windholz & Wilson v. Cent. Bank Denver, N.A.*, 892 P.2d 230, 239 (Colo. 1995).

It is undisputed that there is an attorney-client relationship between the HOA and Benson. Macurdy argues that by virtue of Benson's representation of the HOA, of which Macurdy is a member, an attorney-client relationship also exists between him and Benson. Macurdy has cited no authority, and we have found none, establishing a per se rule that by representing an

incorporated homeowners association, its attorney necessarily and automatically enters into an attorney-client relationship with each of the association's members. In light of the principles set forth below, we do not believe that representation of an incorporated homeowners association creates an attorney-client relationship with each member of the association. *See Sayyah v. Cutrell*, 757 N.E.2d 779, 786-87 (Ohio Ct. App. 2001).

The HOA is organized as a nonprofit corporation. *See* § 38-33.3-301, C.R.S. 2013 (CCIOA requires that a homeowners association be organized "as a nonprofit, not-for-profit, or for-profit corporation or as a limited liability company."). As a general rule, a nonprofit corporation is a legal entity separate from its members, *see Krystkowiak v. W.O. Brisben Cos.*, 90 P.3d 859, 866-67 (Colo. 2004), and the general rule appertains in the realm of attorney-client relationships. *See Zimmerman v. Dan Kamphausen Co.*, 971 P.2d 236, 241 (Colo. App. 1998) (the fact that an attorney represents a partnership does not, standing alone, create an attorney-client relationship with each of the partners); *Holmes v. Young*, 885 P.2d 305, 311 (Colo. App. 1994) (attorney representing

partnership was not thereby attorney for limited partner); Colo. RPC 1.13(a) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.").

The American Bar Association explains in the commentary accompanying its Model Rules of Professional Conduct, which the Colorado Rules of Professional Conduct are based, that "[a] lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent." Model Rules of Prof'l Conduct R. 1.7 cmt. 34; *see also* Restatement (Third) of the Law Governing Lawyers § 96 cmt. b (2000) ("By representing the organization, a lawyer does not thereby also form a client-lawyer relationship with all or any individuals employed by it or who direct its operations or who have an ownership or other beneficial interest in it, such as its shareholders."). The commentary accompanying the Colorado Rules of Professional Conduct acknowledges as well that "constituents of an organizational client" are not themselves clients of the lawyer just because the lawyer communicates and deals with

those constituents in their organizational capacity. Colo. RPC 1.13 cmt. 2. This principle also is reflected in the provision of the Colorado Rules of Professional Conduct that, "[i]n dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." Colo. RPC 1.13(f).

With these principles in mind, we now turn to the relevant provisions of CCIOA. CCIOA provides that a homeowners association, as a separate legal entity, has the power to "[i]nstitute . . . litigation . . . in its own name on behalf of itself or two or more unit owners on matters affecting the common interest community." § 38-33.3-302(1)(d), C.R.S. 2013. If the homeowners association, acting through its executive board, "institutes an action asserting defects in the construction of five or more units," the board is not required to disclose to the unit owners any "attorney-client communications or other privileged communications." § 38-33.3-303.5(1)(a), (3)(a), C.R.S. 2013. Similarly, the board "may hold

an executive or closed door session and may restrict attendance to executive board members and such other persons requested by the executive board" for the purpose of "[c]onsult[ing] with legal counsel concerning disputes that are the subject of pending or imminent court proceedings or matters that are privileged or confidential between attorney and client." § 38-33.3-308(3), (4)(b), C.R.S. 2013.

Construing these CCIOA provisions in conjunction with the principles set forth in the Model Rules of Professional Conduct and the Colorado Rules of Professional Conduct, we conclude, as did the trial court, that a homeowners association, as a separate legal entity, has the authority to retain counsel on its own behalf and that, when an attorney is retained on the association's behalf, an attorney-client relationship exists between the association, acting through its executive board, and the attorney, and that the individual members of the association are not per se clients of the association's attorney.

Here, the HOA, as a separate legal entity, acting through its executive board, retained Benson to institute the underlying case on behalf of the HOA. *See* § 38-33.3-302(1)(d). Specifically, the

HOA's president, vice president, and treasurer, in their official capacities as the HOA's officers, and on behalf of the HOA, signed the contingency fee agreement with Benson. The fee agreement identified the HOA — and not Macurdy or individual members of the HOA — as the client. The underlying action named the HOA — and not Macurdy or individual members of the HOA — as a party plaintiff. There is no allegation that Benson indicated to Macurdy that it was representing both him and the HOA at the time the fee agreement was signed in the underlying case or at any time thereafter. Further, any communication between Macurdy and Benson does not establish that he is a client of Benson. *See* Colo. RPC 1.13 cmt. 2.

Under these circumstances, we agree with the trial court that Macurdy failed to demonstrate, as a matter of law, the existence of any attorney-client relationship between himself and Benson. Accordingly, Macurdy's legal malpractice claim fails.

C. Third-Party Beneficiary

In the alternative, Macurdy argues that even if no attorney-client relationship exists, Benson breached a fiduciary duty owed to him as a nonclient third party. We are not persuaded.

Although the trial court did not address this issue in its dismissal order, we nevertheless choose to address it because it presents a question of law which we review de novo. Specifically, whether a defendant owes the plaintiff a duty of care is a question of law subject to de novo review. *Bath Excavating & Constr. Co. v. Wills*, 847 P.2d 1141, 1147 (Colo. 1993). If the court finds that the law does not impose a duty on the defendant to act for the plaintiff's benefit, the plaintiff's negligence claim must fail. *Ryder v. Mitchell*, 54 P.3d 885, 889 (Colo. 2002).

As a general rule, attorneys have no duty to act for the benefit of those who are not clients. *Turman v. Castle Law Firm, LLC*, 129 P.3d 1103, 1105 (Colo. App. 2006); *see also Accident & Injury Med. Specialists, P.C. v. Mintz*, 2012 CO 50, ¶ 26 ("Because a lawyer's loyalty is to his client, a lawyer does not owe fiduciary duties to non-client third parties."); *Glover v. Southard*, 894 P.2d 21, 23-24 (Colo. App. 1994) (declining to impose duty of care in favor of

beneficiaries named in testamentary documents drafted by attorney); *Schmidt v. Frankewich*, 819 P.2d 1074, 1079 (Colo. App. 1991) (attorney for corporation not liable to shareholders or guarantors in absence of fraud or malicious conduct); *In re Estate of Brooks*, 42 Colo. App. 333, 336-37, 596 P.2d 1220, 1222 (1979) (a trustee's attorney not liable to alleged beneficiary for breach of trust). Thus, absent fraudulent or malicious conduct, attorneys are not liable for negligent acts or omissions that may cause damage to third parties. *Turman*, 129 P.3d at 1105; *see also Allen v. Steele*, 252 P.3d 476, 482 (Colo. 2011); *Glover*, 894 P.2d at 23; *Schmidt*, 819 P.2d at 1079. This rule recognizes the nature of the adversarial relationship between a client's attorney and other parties; it protects the attorney's duty of loyalty and effective advocacy for the client; and it avoids creating potential liability to an unlimited number of third parties. *Turman*, 129 P.3d at 1105; *Glover*, 894 P.2d at 23; *Berger v. Dixon & Snow, P.C.*, 868 P.2d 1149, 1152 (Colo. App. 1993); *Schmidt*, 819 P.2d at 1079.

Even if we assume that Macurdy is a third-party beneficiary of the fee agreement between the HOA and Benson by virtue of his

membership in the HOA, Macurdy's action for damages falls within the general rule: Macurdy was not client of Benson; he sued for damages based on Macurdy's "negligence and carelessness" and did not allege fraudulent or malicious conduct. Although courts have recognized an exception to the general rule for certain negligent misrepresentations, *see Cent. Bank Denver, N.A. v. Mehaffy, Rider, Windholz & Wilson*, 865 P.2d 862, 864-66 (Colo. App. 1993), *aff'd*, 892 P.2d 230 (Colo. 1995), this exception does not apply here: Macurdy did not allege any negligent misrepresentation. *See Turman*, 129 P.3d at 1105-06.

We therefore conclude that Benson does not owe a duty of care to Macurdy as a nonclient third party.

IV. Amended Complaint

We also reject Macurdy's contention that the trial court erred in failing to grant his request to amend the complaint.

C.R.C.P. 15(a) allows a party to amend a complaint once, as a matter of course, before a responsive pleading is filed. *See Fladung v. City of Boulder*, 165 Colo. 244, 247, 438 P.2d 688, 690 (1968); *Macurdy v. Faure*, 176 P.3d 880, 883 (Colo. App. 2007). A motion

to dismiss, which Benson filed here, does not constitute a responsive pleading for purposes of the rule. *See Macurdy*, 176 P.3d at 883; *Davis v. Paolino*, 21 P.3d 870, 873 (Colo. App. 2001).

Pursuant to C.R.C.P. 15(a), Macurdy was not required to seek leave of the court to amend his complaint and could have filed an amended complaint at any time. However, Macurdy did not file an amended complaint during the period that the motion to dismiss was pending. Rather, in response to Benson's motion to dismiss, Macurdy included a request for leave to amend his complaint if the trial court determined that there was any merit to Benson's arguments. But Macurdy did not attach a proposed amended complaint to his responsive motion or articulate the amendments he would make to the complaint. Macurdy's failure to file an amended complaint may explain why the trial court did not rule on his request for leave to file an amended pleading.

More important, as indicated in Part III of this opinion, the allegations Macurdy now asserts he would add to the complaint do not support a negligence claim against Benson. Specifically, Macurdy argues that he would amend his complaint to add an

"alternate claim" that Benson "was apparently representing [Macurdy's] interest, somewhat, and that therefore [Benson] could be liable to Macurdy if he failed in that capacity." From what we can discern from Macurdy's argument on appeal, Macurdy would like to amend his complaint to add allegations that he is either a client or third-party beneficiary of Benson and thus was owed a duty of care. We have already rejected these allegations in Part III. Therefore, we conclude that these proposed amendments would not cure the defect in his claim for relief. Accordingly, even if we construe Macurdy's request to amend as effectively constituting an amended complaint, such amended complaint would not have altered the basis for dismissal discussed in Part III.

Therefore, under these circumstances, we conclude that the trial court did not err in failing to grant Macurdy's request to amend his complaint. *See Settle v. Basinger*, 2013 COA 18, ¶ 21 ("An amendment is futile if it would not withstand a motion to dismiss."); *Conrad v. Imatani*, 724 P.2d 89, 94 (Colo. App. 1986) (court may deny motion to amend complaint when amendment would be futile).

V. Conclusion

The judgment is affirmed.

JUDGE WEBB and JUDGE ROMÁN concur.