IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

KS Trucking Enterprise, Inc.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	No. 14 L 539
J. Nicolas Albukerk, individually, and Albukerk & Associates, LLC,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

A legal malpractice cause of action requires an attorney-client relationship, a breach of duty, and proximate causation. An attorney does not breach a duty by failing to file motions that cannot achieve a client's desired result, and proximate cause is wanting if a client's failure to retain new counsel causes the client's injury. Further, an attorney-client relationship does not exist if an attorney properly withdraws. For these reasons, the defendant's motion to dismiss the second-amended complaint must be granted with prejudice.

FACTS

On April 1, 2009, Kemal Hodzic, on behalf of KS Trucking Enterprise, Inc., executed an application for a workers' compensation and employers' liability insurance policy offered by Zenith Insurance Company. Zenith is a California corporation that at the time was not registered with the Secretary of State to do business in Illinois. Zenith, nonetheless, approved the application and issued a policy for coverage from May 1, 2009 to May 1, 2010. Zenith charged a policy premium of $155,662, plus a $1,572 surcharge issued by the Illinois Industrial Commission, for a total cost of $157,234. KS subsequently made $23,351 in premium payments, but failed to pay the $133,883 balance.

On March 29, 2011, Zenith filed a complaint against KS – 11 M1 122732 – in the Circuit Court of Cook County, First Municipal Division. Zenith sued KS for breach of contract based on KS's failure to pay the $133,883 owed to Zenith for the policy premium. On April 20, 2011, Zenith served a summons and the complaint by substitute service on Hodzic, KS's registered agent.

On April 24, 2011, KS retained Albukerk & Associates LLC[1] to represent KS in the litigation. Two days later, Albukerk filed an appearance for KS. On July 18, 2011, Albukerk filed a motion to dismiss Zenith's complaint against KS based on insufficient pleading. *See* 735 ILCS 5/2-615. The motion did not, however, seek dismissal based on Zenith's lack of standing as an unregistered foreign corporation, *see* 735 ILCS 5/2-619(a)(2), or to quash service based on the prohibition against serving a corporation's registered agent by substitute service. *See* 735 ILCS 5/2-301(a-5).

On August 23, 2011, the judge hearing the 2011 case granted KS's 2-615 motion to dismiss without prejudice. On October 7, 2011, Zenith filed an amended complaint. On November 1, 2011, Albukerk filed for KS, once again, a motion to dismiss the amended complaint based on insufficient pleading. The motion, once again, did not argue that Zenith lacked standing or that the service of process should have been quashed. On January 17, 2012, the same judge granted the motion to dismiss the amended complaint.

On March 6, 2012, Zenith filed a second-amended complaint. Rather than file a third motion to dismiss, Albukerk, on May 31, 2012, filed a motion to withdraw as KS's counsel. On June 21, 2012, the same judge granted Albukerk's motion. Later that day, Albukerk notified Hodzic by certified mail and e-mail of the day's events. The correspondence from Albukerk to Hodzic states, in part:

> Please find attached the order entered on today's date. Please be aware that we were given leave by the court to

[1] This court refers to both defendants as Albukerk.

> withdraw from your case as specified on the order herewith. You must appear in court in 28 days on August 16, 2012 with a new attorney to file an appearance. In addition please be aware that you have a pending balance for services provided regarding the above captioned case kindly review and send payment to settle amount.[2]

Attached to the letter was an invoice for $7,906 in unpaid legal services. A return receipt indicates that on June 23, 2012 someone signed for and accepted the certified mail from Albukerk to Hodzic.

On July 3, 2012, Albukerk, once again, wrote and e-mailed Hodzic a letter. The correspondence states that KS had failed to send Albukerk an executed copy of the April 24, 2011 attorney-retention contract, despite e-mail records indicating that a contract exists. The letter further indicates that KS had still failed to pay the $7,906 owed to Albukerk. The letter warns Hodzic that if KS does not pay the full amount within two weeks, Albukerk will file a lawsuit against KS for the amount owed.

KS failed to obtain new counsel and failed to appear at the August 16, 2012 case management conference. That is a fair inference because on that date the judge entered an order of default and a $133,883 judgment in Zenith's favor for the unpaid premium. One week later, on August 23, 2012, Albukerk and KS agreed to resolve KS's outstanding bill for legal services for a reduced sum of $2,000. Albukerk memorialized the agreement in a handwritten note at the bottom of the July 3, 2012 letter stating, in part, that, "with this payment of $2,000.00, all debt to me is extinguished and I hold KS Trucking harmless. Since you don't want to pay a lawyer you must settle this case on your own – we are no longer your lawyer." Below the handwritten note are Albukerk's initials. To the left of his note is an arrow pointing to the underlined and handwritten initials of another person. Below those initials is the sentence, "Good luck!" which appears to be in Albukerk's handwriting.

---

[2] Since each of the quoted e-mails contains numerous grammatical errors, this court will quote the statements directly and omit all error indications, *i.e.*, [*sic*].

Despite the notice that Albukerk was no longer KS's attorney, KS informed Albukerk in an August 29, 2012 e-mail that: "[W]e never went to court and we got a not that says 'an order for default was entered on 8/16' what does this mean? And what are our options?" Albukerk responded later that day:

> The default means they have a little piece of paper saying you owe the entire amount that the Plaintiff is asking for b/c u didn't go to Court and therefore the court found you guilty. Technically you could vacate or un-do the default order if you go to court no later than September 15th and tell the court your good reason for not showing up in court last month. From a negotiating stand point it would probably be a good idea to vacate the default. With the default their attorneys can seize your bank accounts and eventually your assets If you settle with the Plaintiff for some figure, whatever that figure is, then obviously, the default will be irrelevant.

Hodzic responded: "First thing to do is to vacate though right?" to which Albukerk replied, in part: "that's what I'd do if I were still your attorney." Hodzic then asked: "How many hours would you bill for that" to which Albukerk wrote: "4 hours, the real hassle is going to the clerks office and standing in line."

The next day, August 30, 2012, Hodzic e-mailed to Albukerk: "How about $500." Albukerk responded, in part: "deal!" On September 5, 2012, Albukerk e-mailed to Hodzic: "OK, see the attached this is the motion we'll file. Of course we'll need both our payment and the filing fee – $60 – before we file." KS paid Albukerk the next day and Albukerk confirmed in an e-mail that he would file the motion to vacate.

On September 7, 2012, Albukerk filed the motion to vacate, but failed to file a new appearance as KS's attorney. Zenith, however, raised no objection. On September 21, 2012 the court granted the motion and vacated the default judgment.

On October 2, 2012, Albukerk followed up by writing to Hodzic: "remember you don't have a lot of time. Make sure you get any agreement in writing and signed by an authorized person. Good luck and let me know your progress." Hodzic responded: "They haven't called me. Should I reach out to them?" Albukerk replied: "Yes. they won't reach out to you b/c their attorneys want to keep earning money so they don't want you to settle." On November 14, 2012, Albukerk e-mailed Hodzic: "I hope you've settled this case already. I received a call from opposing counsel and they said that if I'm not your lawyer that they would simply get another default judgement against you for the full amount. Your window is closing. You need to settle this suit quickly – happy holidays."

On December 11, 2012, Albukerk e-mailed Hodzic apparently from court, stating: "Your case is in Court right now, did you settle it? As you know I am no longer your attorney in this matter – don't want to see you get hosed w/ a default judgment." Zenith had, in fact, presented a second motion for default, which the judge entered as well as a judgment for $133,883. On January 31, 2013, Zenith issued a citation to discover KS's assets. The citation proceedings resulted in a satisfaction of the $133,883 judgment.

The last communication in the record is an e-mail from Hodzic to Albukerk dated January 14, 2013. The e-mail stated: "In a nut shell someone owes us money and now he filed bankruptcy. We received a letter that there will be a meeting of creditors. How do those work and what would it cost for you to attend that meeting for us?"

On January 17, 2014, KS filed a single-count complaint against Albukerk and his law firm for legal malpractice based on Albukerk's alleged failures in conducting the *Zenith* litigation. On September 9, 2014, KS filed an amended complaint. On October 2, 2014, Albukerk filed a motion to dismiss the amended complaint for insufficient pleading. *See* 735 ILCS 5/2-615. The parties briefed the motion, and on December 8, 2014, this court granted Albukerk's motion and dismissed the amended complaint. This court dismissed the complaint without prejudice to allow KS to amend its complaint and attach all pertinent documents supporting KS's allegations that an attorney-client

relationship existed at the time of the entry of the second default order and judgment on December 11, 2012.

On January 5, 2015, KS filed its second-amended complaint. KS claims that Albukerk's conduct fell below the professional standard by failing to raise two absolute defenses: (1) Zenith never properly served KS since the Code of Civil Procedure prohibits substitute service on a corporation's registered agent; and (2) the Business Corporations Act barred Zenith as an unauthorized foreign corporation from filing suit in Illinois courts. KS also claims that Albukerk committed malpractice by: failing to: (3) notify KS prior to filing the motion to withdraw; (4) provide KS with the court order granting Albukerk's motion to withdraw and indicating the next court date; (5) notify KS that a default judgment would be entered if KS failed to get another attorney; (6) notify KS that a corporation must be represented by counsel; and (7) exercise a reasonable degree of skill in representing KS. KS alleges that Albukerk's failures caused the court to enter the default order against KS and grant Zenith the $133,883 judgment. As ordered by this court, KS attached three exhibits to its second-amended complaint comprising various documents that KS alleges establish the existence of an attorney-client relationship. Those documents have previously been set out in this factual recitation in chronological order.

Albukerk filed a motion to dismiss KS's second-amended complaint. *See* 735 ILCS 5/2-615. The motion presents two arguments: (1) an attorney-client relationship did not exist between Albukerk and KS on December 11, 2012 when the court entered the default and judgment orders; and (2) Albukerk's alleged negligent acts did not proximately cause the court to enter those orders. KS responds in three ways: (1) Albukerk should have sought to dismiss Zenith's complaint with prejudice from the outset since it lacked standing and Zenith had failed to obtain proper service on KS; (2) Albukerk failed to withdraw properly from the case; and (3) Albukerk did not withdraw after the September 21, 2012 court proceeding but provided KS with legal advice continuously throughout the litigation.

ANALYSIS

I. Procedural Matters

The contents of KS's second-amended complaint and Albukerk's motion to dismiss necessitate a discussion of proper pleading before this court may consider the substance of the parties' arguments. A section 2-615 motion to dismiss attacks a complaint's legal sufficiency. *See DeHart v. DeHart*, 2013 IL 114137, ¶ 18. Such a motion does not raise affirmative factual defenses, but alleges only defects appearing on the face of the complaint. *See Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484-85 (1994). A section 2-615 motion must identify the complaint's defects and specify the relief sought. *See* 735 ILCS 5/2-615(a) (2008).

A court considering a section 2-615 motion is to consider only the allegations presented in the pleadings. *See Illinois Graphics*, 159 Ill. 2d at 485. All well-pleaded facts and reasonable inferences arising from them must be accepted as true, *see Doe v. Chicago Bd. of Ed.*, 213 Ill. 2d 19, 28 (2004), but not conclusions unsupported by facts, *see Pooh-Bah Enterps., Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009). Conclusory statements cannot state a cause of action even if they generally inform the defendant of the nature of the claims. *See Adkins v. Sarah Bush Lincoln Health Cntr.*, 129, Ill. 2d 497, 519-20 (1989). The paramount consideration is whether the complaint's allegations construed in the light most favorable to the plaintiff are sufficient to establish a cause of action for which relief may be granted. *See Bonhomme v. St. James*, 2012 IL 112393, ¶ 34. If not, section 2-615 authorizes the dismissal of a cause of action. *See DeHart*, ¶ 18; *Illinois Graphics*, 159 Ill. 2d at 488.

In contrast, a section 2-619 motion to dismiss authorizes the involuntary dismissal of a claim based on defects or defenses outside the pleadings. *See Illinois Graphics*, 159 Ill. 2d at 485. The motion must be directed against an entire claim or demand. *See id.* If the basis for the motion does not appear on the face of the complaint, the motion must be supported by an affidavit. *See* 735 ILCS 5/2-619(a). A court considering a section 2-619 motion is to construe the pleadings and supporting documents in a light most favorable to the nonmoving

party. *See Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). All well-pleaded facts contained in the complaint and all inferences reasonably drawn from them are to be considered true. *See Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 488 (2008). A court is not to accept as true those conclusions unsupported by facts. *See Pooh-Bah*, 232 Ill. 2d at 473.

One of the enumerated grounds for a section 2-619 motion to dismiss is that the claim is barred by affirmative matter that avoids the legal effect of or defeats the claim. For purposes of a section 2-619(a)(9) motion, "affirmative matter" is something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint. *See Illinois Graphics*, 159 Ill. 2d at 485-86. While the statute requires that affirmative matter be supported by affidavit, some affirmative matter has been considered to be apparent on the face of the pleading. *See id.*

As this discussion suggests, the mislabeling of motions to dismiss based on the Code of Civil Procedure's authorizing provisions is not uncommon. Illinois courts have responded to these errors by holding that a court may consider a mislabeled motion to dismiss as if it had been brought under the correct authorizing provision as long as a plaintiff is not prejudiced by the defendant's improper labeling. *See Safford-Smith, Inc., v. Intercontinental East, LLC*, 378 Ill. App. 3d 236, 240 (1st Dist. 2007), *citing Gouge v. Central Ill. Pub. Serv., Co.*, 144 Ill. 2d 535, 541-42 (1991). Such a reasoned principle permits courts to proceed expeditiously to address the merits of a motion instead of requiring a party to file an amended motion and the circuit court to issue a new briefing schedule and ruling date.

This court's December 8, 2014 order dismissing without prejudice KS's amended complaint required KS to attach to any future amended complaint the documents on which KS based its argument that an attorney-client relationship existed between Albukerk and KS. *See* Motion to Dismiss, Ex. B, *citing* 735 ILCS 5/2-606. As ordered, KS attached to its second-amended complaint exhibits A-C, which are various supporting letters, billing invoices, and e-mails between

Albukerk and KS. Albukerk, in turn, properly attached to its motion to dismiss the second-amended complaint and all exhibits. *See* Motion to Dismiss, Ex. C.

The exhibits KS attached to the second-amended complaint do not constitute affirmative matter that would otherwise classify Albukerk's motion to dismiss as one brought pursuant to Code of Civil Procedure section 2-619(a)(9). Rather, "[a]n exhibit attached to a complaint becomes part of the pleading for every purpose, including the decision on a motion to dismiss. Where an exhibit contradicts the allegations in a complaint, the exhibit controls." *Steenes v. Mac Prop. Mgmt., LLC*, 2014 IL App (1st) 120719, ¶ 16 (internal citations omitted), *quoting Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 18. In this case, since the exhibits KS attached to the second-amended complaint are, in fact and as a matter of law, part of the complaint, they do not constitute extrinsic affirmative matter. In short, Albukerk's motion is properly authorized by section 2-615 and not section 2-619.

II. Substantive Matters

The tort of legal malpractice is unusual because it blurs the distinction between tort and contract, permitting a remedy to be pleaded in the alternative. *See Collins v. Reynard*, 154 Ill. 2d 48, 50 (1992). Regardless of the theory, a legal malpractice cause of action requires a plaintiff to plead: (1) the existence of an attorney-client relationship in which the attorney owed the client a duty; (2) an act or omission constituting a breach of that duty; (3) proximate cause, that is, but for the attorney's negligence, the plaintiff would have prevailed in the underlying action; and (4) damages. *See Timothy Whelan Law Associates, Ltd. v. Kruppe*, 409 Ill. App. 3d 359, 363 (2d Dist. 2011), *quoting Ignarski v. Norbut*, 271 Ill. App. 3d 522, 525 (1st Dist. 1995). A cause of action for legal malpractice is, therefore, litigation about a case within a case. *See Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 226 (2006).

The theory underlying the tort of legal malpractice is that the plaintiff-client would not have been injured absent the defendant-attorney's negligence. *See id.* If the alleged legal malpractice arose

from past litigation, an actionable claim exists only if the attorney's negligence resulted in the loss of that prior case. *See id.* Similarly, if the plaintiff-client's legal malpractice claim alleges that the case-within-a-case never reached trial because of the defendant-attorney's negligence, the plaintiff-client is required to prove that but for the defendant-attorney's negligence, the plaintiff-client would have been successful in the earlier action. *See id.*

A. Albukerk Fulfilled Its Duty Between April 24, 2011 And June 21, 2012 Or, If It Failed, The Breach Did Not Proximately Cause KS's Injury.

KS's second-amended complaint claims that Albukerk acted negligently by, among other things, failing to: (1) challenge Zenith's improper service on KS since a corporation's registered agent may not be served by substitute service; and (2) dismiss *Zenith*'s complaint with prejudice since Zenith was not authorized to do business in Illinois. Albukerk's motion to dismiss the second-amended complaint does not directly address these failures under a duty analysis. Rather, Albukerk argues that any failures on its part did not proximately cause the court to enter the second default judgment on December 11, 2012. This court must consider both the duty and the proximate cause arguments.

As to KS's first duty argument, Illinois law is unmistakably clear that a private corporation may not be served by substitute service on a corporate agent. *See Capitol One Bk., N.A. v. Czekala*, 379 Ill. App. 3d 737, 746 (3d Dist. 2008). Rather, substitute service on a corporation may only occur by serving the Secretary of State. *Id.*, *citing* 805 ILCS 5/5.25. As to KS's second duty argument, the Illinois Insurance Code explicitly prohibits the sale of insurance by unauthorized foreign corporations. As provided: "It shall be unlawful for any company to enter into a contract of insurance as an insurer or to transact insurance business in this State, without a certificate of authority from the Director [of the Department]." 215 ILCS 5/121.[3] The Business Corporations Act goes further by restricting foreign corporations' use of

[3]The contract entered into by the unauthorized foreign corporation is, nonetheless, considered valid. *See* 805 ILCS 5/13/70(b).

Illinois courts. That statute provides: "No foreign corporation transacting business in this State without authority to do so is permitted to maintain a civil action in any court of this State, *until the corporation obtains that authority*. . . ." 805 ILCS 5/13.70(a) (emphasis added). Foreign corporations may apply for authority to transact business according to the statute. *See* 805 ILCS 5/13.15.

Both of KS's duty arguments are based on the same invalid presumption – that Zenith's lawsuit could have been dismissed with prejudice had Albukerk filed the right initial motion. The Business Corporations Act explicitly provides the means by which a foreign corporation may obtain authority to bring suit in Illinois. It is inconceivable that, given a statutory safe harbor, any circuit court would grant a motion to dismiss with prejudice for lack of authority. Indeed, it might be an abuse of discretion to enter such an order. Rather, a circuit court would grant the motion to dismiss but without prejudice and give the foreign corporation sufficient time to obtain the authority necessary to bring suit. In the same vein, and absent particular circumstances, no circuit court would deny an authorized foreign corporation the opportunity to re-serve an Illinois corporate defendant by proper means.

Had Albukerk filed the motion to dismiss that KS now claims should have been filed, that motion would, at most, have provided Zenith the time necessary to obtain authorization to file a valid complaint and proper service on KS. The motion would not have resulted in a dismissal with prejudice. Taken to its logical conclusion, Albukerk could not have had a duty to file a motion to dismiss with prejudice seeking an unobtainable remedy. KS's duty argument leads nowhere.

Even if Albukerk had owed KS a duty to file the motion it now claims should have been filed, Albukerk's failure to do so did not proximately cause the court to enter the second default judgment. Proximate cause contains two elements: (1) cause in fact; and (2) legal cause. *See Krywin v. Chicago Trans. Auth.*, 238 Ill. 2d 215, 225-26 (2010). Cause in fact requires that the defendant's conduct be a material and substantial factor in bringing about the plaintiff's injury,

or that, in the absence of the defendant's conduct, the injury would not have occurred. *See id.* at 226. If a plaintiff's injury results from a third person's independent conduct, the issue is whether that intervening cause is a type that a reasonable person would see as a likely result of the complained-of conduct. *See Young v. Bryco Arms*, 213 Ill. 2d 433, 449 (2004). In other words, if the plaintiff's injury resulted from a third person's independent conduct, not the defendant's negligence, then the defendant's negligence is only a condition and not a proximate cause of the injury. *See Thompson v. County of Cook*, 154 Ill. 2d 374, 383 (1993); *In re Estate of Elfayer*, 325 Ill. App. 3d 1076, 1083-84 (1st Dist. 2001); *Ball v. Waldo Twnshp.*, 207 Ill. App. 3d 968, 973 (4th Dist. 1990). As to the second element, legal cause is present if the injury is of the type that a reasonable person would see as a likely result of his or her conduct. *See First Springfield Bk. & Trust v. Galman*, 188 Ill. 2d 252, 257-58 (1999); *Simmons v. Garces*, 198 Ill. 2d 541, 558 (2002); *Abrams v. City of Chicago*, 211 Ill. 2d 251, 258 (2004).

Albukerk's failure to file the motion to dismiss with prejudice that KS now argues should have been filed did not materially or substantially lead to the entry of the second default judgment. Had the motion been filed and granted, the case would have continued after Zenith had obtained authority to sue and properly served KS. In other words, the court did not impose the harsh penalty of a default judgment for KS's failure to file a particular motion, but because after September 21, 2012 KS failed either to appear and explain to the judge that it needed more time to hire a new attorney or have a new attorney appear at case management conferences and defend KS's position. Similarly, a reasonable person would not think a court would enter a default and judgment order because of a defendant's failure to file a particular motion. The proof is in the record. The court did not enter the two default and judgment orders when Albukerk attended case management conferences, but only after KS failed to appear in court to ask for more time to hire a new attorney or a new attorney failed to appear and defend KS.

In sum, Albukerk owed no duty to bring a motion on KS's behalf to dismiss the case with prejudice since that remedy was never available. And even if Albukerk had owed KS a duty to bring those motions, the

failure to do so did not proximately cause the court to enter either of the two default and judgment orders. Albukerk did not, therefore, commit malpractice as a matter of law between April 24, 2011 and June 21, 2012.

B. Albukerk Fulfilled Its Duty Of Limited Representation, But Otherwise Owed KS No Duty Between June 21 and December 11, 2012.

The second time period that this court must examine runs from June 21 to December 11, 2012. June 21 is the date, according to Albukerk, after which it no longer represented KS based on the court's order granting the motion to withdraw. In contrast, KS argues that the attorney-client relationship existed continuously to December 11, 2012, when the court entered the second default and judgment orders. As to this period, KS's second-amended complaint claims that Albukerk failed to: (1) ensure that KS personnel had authority to act on KS's behalf; (2) withdraw pursuant to Illinois Supreme Court Rule 13; (3) notify KS that it must be represented by counsel; (4) notify KS that it was inadequately represented; and (5) exercise reasonable care.

Albukerk argues that it owed KS no duty during this period because the Albukerk-KS attorney-client relationship had been terminated as of June 21, 2012. The second period of limited representation began on September 5, 2012 and ended on as soon as the court vacated the first default and judgment orders on September 21, 2012. KS argues in response that Albukerk failed to tell KS that: (1) KS had to hire new counsel; and (2) encouraged Hodzic into the unauthorized practice of law by appearing in court, filing a motion, and settling the *Zenith* litigation without an attorney.

Whether an attorney-client relationship exists in any particular instance requires a consideration of the universe of facts surrounding the parties' relationship. As it has been explained:

> The attorney-client relationship is a consensual relationship that forms when the attorney and the client both consent to its formation. The attorney must indicate an acceptance of

> the authority to work on behalf of the client, and the client must authorize the attorney's ability to work on his behalf. "An attorney's duty to a client is measured by the representation sought by the client and the scope of the authority conferred."

Wildey v. Paulsen, 2008 Ill. App. Lexis 277, at *9 (1st Dist., Mar. 31, 2008), *citing and quoting Simon v. Wilson*, 291 Ill. App. 3d 495, 509 (1st Dist. 1997). With these guidelines, the converse must also be true – that an attorney-client relationship does not exist if either the attorney does not accept authority to work on the client's behalf or the client does not authorize the attorney's work.

The unilateral termination of an attorney-client relationship is fertile ground for future litigation. To avoid that possibility, an attorney terminating a client relationship must adhere strictly to the requirements provided in the Rules of Professional Conduct. Rule 1.16 explains general notice requirements and acceptable attorney conduct after the relationship has terminated:

> A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. . . .
>
> Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. . . .

Ill. R. Prof. Conduct 1.16(c) & (d).[4] Supreme Court Rule 13 provides greater detail as to notice requirements:

---

[4] KS's citation to *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 352-53 (1st Dist. 2000), is unhelpful because that case deals with Rule 1.9, not Rule 1.16.

> An attorney may not withdraw his appearance for a party without leave of court and notice to all parties of record, and, unless another attorney is substituted, he must give reasonable notice of the motion for leave to withdraw, by personal service, certified mail, or a third-party carrier, directed to the party represented by him at his last known business or residence address. Such notice shall advise said party that to insure notice of any action in said cause, he should retain other counsel therein or file with the clerk of the court, within 21 days after entry of the order of withdrawal, his supplementary appearance stating therein an address at which service of notice or other documents may be had upon him.
>
> The motion for leave to withdraw shall be in writing and, unless another attorney is substituted shall state the last known address of the party represented. The motion may be denied by the court if the granting of it would delay the trial of the case, or would otherwise be inequitable.

Ill. S. Ct. R. 13(c)(2) & (3).

KS's claims in its second-amended complaint and arguments in its response brief diverge sharply from the record established through the exhibits that are part of the complaint. First, KS misperceives the scope of any temporary attorney-client relationship that existed after Albukerk's June 21, 2012 correspondence informing KS that the court had granted Albukerk leave to withdraw from the case. Second, KS purposefully omits its failures to uphold its end of the relationship and to take responsibility for its decision to go it alone in the *Zenith* litigation.

The exhibits made part of the complaint lead inexorably to the conclusion that KS's method of dealing with contractual consequences is to duck rather than address them. In 2009, KS unilaterally decided to purchase workers' compensation insurance from a carrier unlicensed to do business in Illinois. That was an unwise decision. After only a few months, KS decided, also unilaterally, not to pay the premiums owed

under the insurance contract. That was another unwise decision and, not surprisingly, Zenith sought the benefit of its bargain by filing a lawsuit.

KS repeated this cavalier conduct with its own attorney. In April 2011, KS retained Albukerk for the *Zenith* litigation but, by July 2012, had failed to return to Albukerk an executed copy of the retainer agreement or to pay for any legal services. This was another unwise decision. Only a threatened lawsuit prompted KS to pay a substantially reduced sum, and Albukerk chose to cut its losses and terminate its relationship with KS.

The exhibits made part of the second-amended complaint establish in at least six ways that Albukerk terminated its relationship with KS in compliance with all applicable rules. First, the June 21, 2012 letter and e-mail attaching a copy of that day's court order explicitly informs Hodzic that the judge granted Albukerk's motion to withdraw and that KS must appear "in 28 days on August 16, 2012 *with a new attorney* to file an appearance." (Emphasis added). The letter could not be any clearer and in no way suggests that KS go it alone. Second, the handwritten note at the bottom of the July 3, 2012 letter states, in part, that, "we are no longer your lawyer," expressing, once again, the termination of the relationship. Third, the August 23, 2012 handwritten hold-harmless agreement identifies why the relationship broke down: "Since you don't want to pay a lawyer you must settle this case on your own – we are no longer your lawyer." While KS is correct that an attorney must represent a corporation in court, KS is wrong that a corporation must be represented by an attorney to settle a case. KS unilaterally decided not to retain a new attorney or to settle on its own. Fourth, the August 28-September 6, 2012 e-mail string contains Albukerk's use of the phrase, "if I were your attorney," indicating, once again, that the relationship had ended. The phrase also indicates that KS's new attorney should do the work, as opposed to KS, *i.e.*, "if I were you." Fifth, Albukerk's November 14, 2012 e-mail informed Hodzic that Zenith's counsel had called and indicated that if Albukerk were not KS's lawyer, "they would simply get another default judgement against you for the full amount. Your window is closing." That KS failed to heed that warning was another unwise decision. Sixth, Albukerk's December

11, 2012 e-mail warns Hodzic that the *Zenith* case is before a judge and reminds Hodzic that Albukerk is "no longer your attorney in this matter. . . ."

The same exhibits made part of the second-amended complaint establish that Albukerk provided KS with ample notice. They also establish Albukerk went beyond what would otherwise be expected by: (1) warning KS that it would be sued for lack of payment; (2) informing KS of court orders; (3) agreeing to assist the KS to vacate the first default and judgment orders; and (4) informing KS of case management dates. Albukerk's course of conduct certainly fulfilled its duties under the Rules of Professional Conduct and the Supreme Court Rules.

KS is also wrong by arguing that Albukerk's agreement to obtain a court order vacating the first default judgment reestablished the attorney-client relationship. The exhibits made part of the second-amended complaint indicate unequivocally that KS agreed to retain Albukerk a second time solely for the purpose of vacating the first default judgment and nothing else. Since an attorney's duty to a client is defined by the scope of the representation sought by the client and the authority conferred, KS explicitly proscribed the scope and length of the representation. In other words, Albukerk did not need to withdraw a second time because the parties had contractually agreed that the attorney-client relationship would cease as soon as Albukerk obtained an order vacating the default judgment. It is also of no moment that Albukerk failed to file a new appearance before filing the motion to vacate the default judgment. Such failure might have made the motion and court's subsequent order voidable, but the only party to complain – Zenith – did not.

Additionally, none of the communications after September 21, 2012 suggest that the Albukerk-KS attorney-client relationship continued. On October 2, 2012, Albukerk warned Hodzic that he, not Albukerk, needed to settle the case and asked to be kept abreast of "your" [KS's] not "his" [Albukerk's] progress. KS plainly understood that Albukerk was not KS's attorney because Hodzic failed to respond to Albukerk's October 2, November 14, and December 11, 2012 warnings and did not seek advice either before or after the court's entry

of the second default judgment. Indeed, the November 14 e-mail makes plain that even Zenith's attorneys understood that Albukerk no longer represented KS, and KS did not respond otherwise. Finally, the January 14, 2013 e-mail informed Albukerk that a KS business associate filed for bankruptcy and asked Albukerk how much he would charge to attend a creditors' meeting. That inquiry is identical to the August-September 2012 e-mails in which KS sought Albukerk's limited representation to vacate the first default judgment. Had the relationship continued to January 2013, Hodzic would not have needed, once again, to request representation from Albukerk for a limited purpose.

CONCLUSION

This is not a case of legal malpractice, but one of a penurious client that is unwilling to accept the fact that it made extremely bad choices and now seeks to blame the attorney for them. That is not the type of client conduct to be encouraged or incentivized by permitting a legal malpractice case to stand against an attorney who provided a client, and then an erstwhile client, with good advice and good representation.

Albukerk certainly could have filed various other motions to dismiss during the period in which it represented KS. Those motions would, however, have only provided Zenith with the opportunity to file amended complaints and would not have disposed of the claim that KS breached its contract with Zenith and owed it $133,883. Yet even if the failure to file the motions that KS now claims should have been filed constitutes legal malpractice, Albukerk's failures did not proximately cause KS's injury because those failures did not cause the court to enter the second default and judgment orders. KS can only blame itself for failing to heed the good advice of its former counsel and either settle the case or retain a new attorney to attend court appearances.

The exhibits made part of the second-amended complaint further establish that Albukerk properly and unambiguously terminated the attorney-client relationship. KS plainly proscribed the brief subsequent relationship to end as soon as Albukerk obtained a court order vacating

the first default and judgment orders. Albukerk succeeded in achieving that goal. That KS was unwilling to pay for Albukerk's continued legal services was a business decision that KS refuses to accept. Again, that is not the type of client conduct that should be condoned through a legal malpractice suit against a former attorney who appropriately conducted the litigation until the attorney-client relationship ended.

For those reasons presented above, it is ordered that:

1. Albukerk's 2-615 motion to dismiss is granted with prejudice; and
2. The April 3, 2015 ruling date is stricken.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

APR 02 2015

Circuit Court 2075