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SIXTH DIVISION
December 23, 2015

No. 1-15-1230

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

KS TRUCKING ENTERPRISE, INC., an Illinois Corporation Plaintiff-Appellant, v. J. NICOLAS ALBUKERK, Individually, and ALBUKERK & ASSOCIATES, LLC, Defendants-Appellees,	)	Appeal from the Circuit Court of Cook County. No. 14 L 539 Honorable John H. Ehrlich Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justice Hoffman and Hall concurred in the judgment.

ORDER

¶ 1 *Held*: Dismissal, with prejudice, of second amended complaint alleging legal malpractice is affirmed, where plaintiff failed to plead: (1) an attorney-client relationship had existed between the parties at the time the default judgment was entered, or (2) any causal connection between defendants' alleged prior negligence and the entry of the underlying judgment against plaintiff.

¶ 2 Plaintiff-appellant, KS Trucking Enterprise, Inc., an Illinois corporation, brought the instant lawsuit against defendants-appellees, J. Nicolas Albukerk, individually, and Albukerk & Associates, LLC (defendants). Plaintiff alleged that defendants' legal malpractice in connection with an underlying lawsuit caused a $133,833 default judgment to be entered against plaintiff. The circuit court dismissed plaintiff's second amended complaint, with prejudice, after it

concluded that plaintiff failed to plead: (1) an attorney-client relationship had existed between the parties at the time the default judgment was entered, or (2) any causal connection between defendants' alleged prior negligence and the entry of the underlying default judgment against plaintiff. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff filed its initial legal malpractice complaint against defendants on January 17, 2014, and an amended complaint on September 4, 2014. Defendants moved to dismiss the amended complaint for its failure to state a cause of action. On December 8, 2014, the circuit court entered an order dismissing the amended complaint without prejudice and granting plaintiff time to file another amended complaint. The circuit court's order also provided that, pursuant to section 606 of the Code of Civil Procedure (Code) (735 ILCS 5/2-606 (West 2014)), plaintiff "must attach all attorney-client agreements" to any such amended complaint.

¶ 5 On January 5, 2015, plaintiff filed its operative second amended complaint (hereinafter, complaint) against defendants, which included a number of exhibits containing relevant correspondence between the parties. Therein, plaintiff alleged that it was a trucking company that had been the defendant in an underlying breach of contract lawsuit filed by Zenith Insurance Company (Zenith), a foreign corporation that was not authorized to do business in Illinois. Nevertheless, according to the complaint, Zenith provided plaintiff with a policy of insurance—including workers compensation insurance—covering the period from May 1, 2009, to May 1, 2010. While the total premium for that policy was $157,234, plaintiff only paid Zenith a total of $23,351. Zenith filed the underlying beach of contract lawsuit seeking to recover the remaining $133,883 due under the policy, and served a copy of its complaint upon plaintiff via substitute

service upon a relative of plaintiff's registered agent. Plaintiff, thereafter, retained defendants to represent them in the underlying matter on or about April 24, 2011.

¶ 6 In response to Zenith's complaint, defendants filed a motion to dismiss which, notably, did not challenge the complaint on the grounds that: (1) Zenith, an unregistered foreign corporation, lacked standing to file suit in Illinois, or (2) substitute service of process upon a relative of plaintiff's registered agent was improper. Zenith's complaint was, however, dismissed without prejudice pursuant to defendant's motion to dismiss, as was Zenith's subsequent amended complaint. In its motion to dismiss the amended complaint, defendant again did not raise the issues of standing or improper service.

¶ 7 On March 6, 2012, Zenith filed a second amended complaint in the underlying matter. Defendants did not file a motion to dismiss that complaint, but rather filed a motion to withdraw as plaintiff's counsel. That motion was granted on June 21, 2012. Plaintiffs were notified of the order granting defendant's motion to withdraw in a certified letter sent the same day, in which defendant informed plaintiff that it needed to appear in court within 28 days "with a new attorney." Plaintiff was also asked to pay its outstanding balance with defendant. On July 3, 2012, via both certified mail and email, defendants again notified plaintiff that "although our office has been given leave to withdraw from your case, you still have an obligation to pay your pending bill."

¶ 8 According to the complaint, an order of default and a $133,883 judgment were entered against plaintiff in the underlying matter on August 16, 2012. The correspondence attached to the complaint further reflects that on August 23, 2012, plaintiff's $7,906 debt to defendants with respect to the fees previously incurred in the underlying matter was settled for $2,000, with

defendants informing plaintiff at that time that "[s]ince you don't want to pay a lawyer you must settle this case on your own—we are no longer your lawyer."

¶ 9 Nevertheless, plaintiff contacted defendants via email on August 29, 2012, to inform defendants that it "never went to court" and to inquire about a notice of default they had received. In an exchange of emails spanning two days, defendants—specifically Mr. Albukerk—advised plaintiff that "[i]f I was still your attorney" the best course of action would be to have the order of default vacated by the court and to then settle with Zenith for some lesser amount. Plaintiff and defendants then agreed on a fee of $500 for defendants to file a motion to vacate the default on behalf of plaintiff. In making that arrangement, defendants specifically informed plaintiff that "this only works if you guys settle the underlying matter" with Zenith. Plaintiff responded by indicating that it "would negotiate with them to settle."

¶ 10 Defendants filed the motion to vacate the default in early September of 2012, but only after ensuring that plaintiff had paid the required $500 fee upfront. The motion to vacate the underlying default was granted on September 21, 2012.

¶ 11 In email correspondence running from October to November of 2012, defendants informed plaintiff that it should settle the underlying matter quickly, as counsel for Zenith had contacted Mr. Albukerk and informed him that "if I am not your lawyer [then] they would simply get another default judgment against [plaintiff] for the full amount." On December 11, 2012, Mr. Albukerk emailed plaintiff and stated: "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 [with] a default judgment." According to the complaint, a second order of default and a judgment in the amount of $133,883 was in fact entered against plaintiff in the underlying matter on December

11, 2012. Zenith issued a citation to discover plaintiff's assets on January 31, 2013, which resulted in the satisfaction of the underlying $133,883 judgment against plaintiff.

¶ 12 In its complaint, plaintiff asserted that defendants were professionally negligent with respect to their representation of plaintiff in the underlying matter because defendants failed to: (1) raise the issues of improper service and Zenith's lack of standing in the initial motions to dismiss, (2) ensure that it was interacting with persons authorized to act on behalf of plaintiff, (3) comply with the requirements for properly withdrawing as plaintiff's attorney, or (4) notify plaintiff that it could not represent itself in court. Plaintiff further contended that defendants were negligent for causing "plaintiff to believe that it was adequately represented." Finally, plaintiff asserted that, while it had various other substantive defenses to Zenith's suit, due to defendants' negligence it "was unable to defend itself against the claims of Zenith Insurance, had the money removed from its corporate accounts through a citation to discover assets, and incurred excessive attorney fees and expenses for minimal work." The complaint sought damages in excess of $150,000.

Defendants filed a motion to dismiss plaintiff's complaint, pursuant to section 2-615 of the Code, in which defendants asserted that plaintiff's complaint failed to plead: (1) an attorney-client relationship had existed between the parties at the time the second default judgment was entered, or (2) that a causal connection existed between defendants' alleged prior negligence and the entry of the underlying judgment against plaintiff. The circuit court agreed with defendants' arguments, and dismissed plaintiff's complaint with prejudice in a written order entered on April 2, 2015. Plaintiff timely appealed from that dismissal.

¶ 13 II. ANALYSIS

¶ 14 Plaintiff's complaint was dismissed pursuant to defendants' section 2-615 motion to dismiss. A section 2-615 motion to dismiss attacks the legal sufficiency of a complaint and raises a question as to whether the complaint states a cause of action upon which relief may be granted. 735 ILCS 5/2-615 (West 2014). In ruling upon a section 2–615 motion to dismiss, a court must decide whether the allegations of the complaint, when viewed in the light most favorable to the plaintiff, are sufficient to state a claim upon which relief may be granted. *Givot v. Orr*, 321 Ill. App.3d 78, 84 (2001). A court accepts all well-pleaded facts and all reasonable inferences that may be drawn from those facts as true in making this determination. *Time Savers, Inc. v. LaSalle Bank*, N.A., 371 Ill. App. 3d 759, 767 (2007). However, a court cannot accept as true mere conclusions unsupported by specific facts, and exhibits attached to the complaint are considered part of the pleadings. *Phillips v. DePaul University*, 2014 IL App (1st) 122817, ¶ 24. Indeed, "[a]n exhibit attached to a complaint becomes part of the pleading for every purpose, including the decision on a motion to dismiss. [Citations.] Where an exhibit contradicts the allegations in a complaint, the exhibit controls. [Citation.]" *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 18. An order granting a section 2–615 dismissal is reviewed *de novo*. *Phillips*, 2014 IL App (1st) 122817, ¶ 24.

¶ 15 "To set forth an action for legal malpractice, a plaintiff must plead: '(1) the existence of an attorney-client relationship which establishes a duty on the part of the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause establishing that "but for" the attorney's negligence, the plaintiff would have prevailed in the underlying action; and (4) damages.' " *Timothy Whelan Law Associates, Ltd. v. Kruppe*, 409 Ill. App. 3d 359, 363 (2011) (quoting *Ignarski v. Norbut*, 271 Ill. App. 3d 522, 525 (1995)). A plaintiff must allege sufficient

facts to support each and every one of these elements to survive a section 2–615 motion to dismiss. *Merrilees v. Merrilees*, 2013 IL App (1st) 121897, ¶ 55.

¶ 16 We begin with the question of whether, and to what extent, plaintiff's complaint adequately pleads the existence of an attorney-client relationship which establishes a duty on the part of defendants. There is no dispute between the parties that the complaint properly alleged that defendants were retained to represent plaintiff in the underlying matter on or about April 24, 2011, and that this representation continued until defendants were allowed to withdraw as plaintiff's counsel on June 21, 2012. There is also no dispute that—at the very least—the complaint alleges that defendants were again retained to represent plaintiff on August 30, 2012, for the limited purpose of vacating the first default and judgment entered in the underlying matter, and that defendants succeeded in accomplishing that goal when the motion to vacate filed by defendants was granted on September 21, 2012.

¶ 17 Where the parties differ is on the question of whether the complaint pleads the existence of an attorney-client relationship between plaintiff and defendants at any other time or for any other purpose. The circuit court concluded that it did not, and we agree.

¶ 18 The sole allegation in the complaint that could arguably support plaintiff's contention that an attorney-client relationship existed at any other time is the assertion that "[a]fter the [first] default was entered, communications between the Plaintiff and Defendants continued, with Defendants providing plaintiff with legal advice and services on several occasions, related to the underlying litigation." As support for this assertion, the complaint cites to the email correspondence among the parties between August and December of 2012, attached as exhibits. However, an examination of that correspondence clearly belies this assertion, to the extent plaintiff claims it establishes any additional attorney-client relationship beyond the limited

purpose of vacating the first default and judgment entered in the underlying matter. And it is the content of those exhibits that control. *Gagnon*, 2012 IL App (1st) 120645, ¶ 18.

¶ 19 As discussed above, that correspondence began with plaintiff's email to defendants on August 29, 2012, informing defendants that plaintiff "never went to court" and inquiring about the notice of default plaintiffs had received. In an exchange of emails, Mr. Albukerk advised plaintiff that "[i]f I was still your attorney" the best course of action would be to vacate the order of default and settle with Zenith. Plaintiff and defendants then *mutually agreed* on a fee of $500, solely to cover the cost for defendants to file a motion to vacate the default on behalf of plaintiff. Mr. Albukerk specifically informed plaintiff that "this only works if you guys settle the underlying matter" with Zenith, and plaintiff responded by indicating that *it* "would negotiate with them to settle."

¶ 20 After the default order was successfully vacated, defendants informed plaintiff that it should settle the underlying matter because counsel for Zenith had contacted Mr. Albukerk and informed him that "if I am not your lawyer [then] they would simply get another default judgment against [plaintiff] for the full amount." On December 11, 2012, Mr. Albukerk emailed plaintiff and stated: "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 [with] a default judgment."

¶ 21 "The attorney-client relationship is a consensual relationship that forms when the attorney and the client both consent to its formation. [Citation.] The attorney must indicate an acceptance of the authority to work on behalf of the client, and the client must authorize the attorney to work on his behalf. [Citation.] 'An attorney's duty to a client is measured by the representation sought by the client and the scope of the authority conferred.' [Citation.]" *Wildey v. Paulsen*, 385 Ill. App. 3d 305, 311 (2008).

¶ 22 As the above recitation makes clear, the sole consensual attorney-client relationship pleaded in the complaint with respect to the period following defendant's withdrawal from the underlying matter involved defendants' acceptance of $500 to file a motion to have the default order vacated on behalf of plaintiff. The complaint contains no allegations or other factual support for any assertion that defendants indicated acceptance of authority to do any other work on behalf of plaintiff, or that plaintiff authorized any further work on its behalf. Thus, defendants' sole duty to plaintiff with respect to this time period involved seeking to have the first default order vacated, as that was the only representation plaintiff sought and the only authority conferred upon defendants was to complete that task. *Id.*

¶ 23 As the complaint itself acknowledges, defendants successfully completed this sole task. Thus, any assertions of purported negligence with respect to this time-period are irrelevant and insufficient to establish a claim of legal malpractice, as: (1) defendants had no duty to plaintiff other than to properly attempt to vacate the first default order, and (2) any possible negligence did not harm plaintiff, as the motion to vacate the first default was successful and defendants' sole duty was therefore performed successfully. *Merrilees,* 2013 IL App (1st) 121897, ¶ 55. (both allegations of a breach of a duty and damages resulting from that breach are required to support a claim for legal malpractice, and the absence of either is fatal to such a claim).

¶ 24 Plaintiff's suit for legal malpractice must therefore rise or fall based upon the assertions of negligence that allegedly occurred in the context of defendants' initial representation of plaintiff with respect to the underlying suit; *i.e.*, from on or about April 24, 2011, when defendants were first retained to represent plaintiff, to June 21, 2012, when defendants were granted permission to withdraw as plaintiff's counsel. With respect to this time period, plaintiff's complaint alleges only that defendants were negligent in that that defendants failed to: (1) raise

the issues of improper service and Zenith's lack of standing in the initial motions to dismiss, (2) insure that they interacted only with persons authorized to act on behalf of plaintiff for purposes of the underlying matter, and (3) comply with the requirements for properly withdrawing as plaintiff's attorney. These failures purportedly left plaintiff "unable to defend itself against the claims of Zenith Insurance." We address these contentions in reverse order.

¶ 25 Plaintiff's complaint specifically alleges that defendant "failed to comply with Illinois Supreme Court Rule 13 in filing the Motion to Withdraw." There are absolutely no other well-pleaded facts contained in the complaint supporting this assertion, where the complaint otherwise merely alleges that a motion to withdraw was both filed and granted. We therefore cannot accept as true such a mere conclusion unsupported by specific facts. *Phillips*, 2014 IL App (1st) 122817, ¶ 24. Indeed, the only other relevant information contained in the complaint with respect to defendants' withdrawal is the copy of defendants' June 21, 2012, certified letter, to which defendants attached the order granting defendant's motion to withdraw entered that day and which also informed plaintiff that it needed to appear in court within 28 days "with a new attorney." This letter actually complied with the requirements of Illinois Supreme Court Rule 13 (eff. Feb. 16, 2011), which provides: "If the party does not appear at the time the motion for withdrawal is granted, either in person or by substitute counsel, then, within three days of the entry of the order of withdrawal a copy thereof shall be served upon the party by the withdrawing attorney."

¶ 26 With respect to the assertion that defendants failed to insure that they interacted only with persons authorized to act on behalf of plaintiff for purposes of the underlying matter, not only are there no facts contained in the complaint to support this conclusion, there are no facts showing that anyone defendants interacted with were *not* persons authorized to act on behalf of plaintiff.

Again, we cannot accept as true such a mere conclusion unsupported by specific facts. *Phillips*, 2014 IL App (1st) 122817, ¶ 24.

¶ 27 Nor did plaintiff's complaint allege any facts showing how either of these instances of purported negligence caused it to incur any damages. As this court has recognized:

> "Because legal malpractice claims must be predicated upon an unfavorable result in the underlying suit, no malpractice exists unless counsel's negligence has resulted in the loss of the underlying action. [Citation.] Plaintiff is required to establish that but for the negligence of counsel, he would have successfully prosecuted or defended against the claim in the underlying suit. [Citation.] Damages will not be presumed, and the client bears the burden of proving he suffered a loss as a result of the attorney's alleged negligence. [Citation.]" *Ignarski v. Norbut*, 271 Ill. App. 3d 522, 525-26 (1995).

The complaint contains no additional well-pleaded facts connecting these purported acts of negligence with the entry of the order of default and judgment in the underlying case.

¶ 28 With respect to plaintiff's contention that defendants' improper failure to raise the issues of improper service and Zenith's lack of standing in the initial motions to dismiss, we again conclude that no sufficient connection has been pleaded between those purported acts of negligence and the unfavorable result and damages incurred in the underlying case. Plaintiff's own complaint alleges that it had various other substantive defenses to Zenith's breach of contract suit, and contains no factual assertion as to how those other substantive defenses were foreclosed by the purportedly improper failure of defendants to raise the issues of improper service and Zenith's lack of standing.

¶ 29 "It is the plaintiff's burden to plead facts which, if true, establish a proximate causal relationship between the negligence of the attorney and the damages alleged to have been

suffered as a consequence thereof. *Metrick v. Chatz*, 266 Ill. App. 3d 649, 654 (1994). Here, even assuming defendants should have and could have successfully moved to dismiss the underlying complaint for either of those two reasons, that failure did not leave plaintiffs "unable to defend itself against the claims of Zenith Insurance." It was plaintiff's failure to either timely settle the underlying matter or timely obtain new counsel to avert (nor vacate) the second default and to assert those substantive defenses on its behalf that caused plaintiff to suffer a loss in the underlying matter.

¶ 30 Finally, we note that plaintiff also contended that defendants' alleged legal malpractice caused it to incur "excessive attorney fees and expenses for minimal work." It is true that "[a] plaintiff in a legal malpractice case may recover attorney fees when the fees constitute an ordinary loss resulting from the attorney's negligence." *Nettleton v. Stogsdill*, 387 Ill. App. 3d 743, 749 (2008). Thus, a "legal malpractice plaintiff may recover as actual damages the attorney fees incurred as a result of the defendant's malpractice, so long as the plaintiff can demonstrate [it] would not have incurred the fees in the absence of the defendant's negligence." *Id.* at 753.

¶ 31 Again, however, "damages will not be presumed." *Ignarski*, 271 Ill. App. 3d at 525-26. Other than the bald assertion that plaintiff incurred "excessive attorney fees and expenses for minimal work," the complaint contains no facts to demonstrate why the fees were excessive or that plaintiff would not have incurred the fees in the absence of the defendants' alleged negligence. Moreover, we also note that this assertion appears to rely in part on the specific assertion contained in the complaint that plaintiff paid defendants both a retainer and $7,450 in connection with the underlying matter. The exhibits to the complaint, however, establish that defendants only paid defendants a $1,000 retainer, another $2,000 to settle its outstanding debt to defendants, and $500 for the filing of the motion to vacate the first default. Plaintiff's complaint

makes no effort to establish that this lower amount was excessive, or that it would not have incurred such fees in the absence of the defendants' alleged negligence.

¶ 32 III. CONCLUSION

¶ 33 For the foregoing reasons, we affirm the judgment of the circuit court, which dismissed plaintiff's second amended complaint with prejudice.

¶ 34 Affirmed.