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2015 IL App (1st) 142641-U

FIRST DIVISION
OCTOBER 19, 2015

No. 1-14-2641

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MANUEL NAVAR,	)	Appeal from the
Plaintiff-Appellant,	)	Circuit Court of
	)	Cook County.
v.	)	
	)	
TRIBLER, ORPETT and MEYER, P.C., a Professional	)	No. 12 L 10034
Corporation, and PANOS TOPALIS,	)	
	)	
Defendants-Appellees	)	
	)	Honorable
(Ana McNamara,	)	John H. Ehrlich,
Defendant).	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

- ¶ 1 *Held:* The plaintiff's third amended complaint against his former attorneys, premised on the attorneys' unsuccessful defense of plaintiff in a prior lawsuit, failed to state a cause of action and was properly dismissed where (1) plaintiff's breach of contract claim failed to identify any contractual term that was breached; (2) plaintiff's legal malpractice claim failed to plead breaches of duty rather than mere errors of judgment, or acts by attorneys that could have changed the result of the underlying "case within a case"; and (3) plaintiff's fraud claim was premised on non-actionable predictions and opinions. The trial court also did not abuse its discretion in denying plaintiff leave to file a fourth amended complaint.

¶ 2 Plaintiff-appellant Manuel Navar appeals from an order of the circuit court of Cook County dismissing the three counts of his third amended complaint asserted against the defendants-appellees, who consist of the law firm of Tribler, Orpett & Meyer, P.C. and an attorney at that law firm, Panos Topalis (together, "Tribler"). Navar also appeals from the denial of his request for leave to file a fourth amended complaint and the denial of his motion to reconsider.

¶ 3 BACKGROUND

¶ 4 This appeal arises from allegations of legal malpractice arising from Tribler's representation of Navar in a prior lawsuit, in which Navar was found liable to Dahlia Ponce (the Ponce lawsuit). On September 5, 2012, Navar filed the first of four complaints in this action against Tribler as well as defendant Ana McNamara, an attorney who represented Navar in the Ponce lawsuit after Tribler's representation ended. Navar's initial complaint contained two counts: a breach of contract count against both Tribler and McNamara, and a "professional malpractice" count against both Tribler and McNamara.

¶ 5 According to Navar's pleadings, the underlying Ponce lawsuit arose out of a real property transaction in July 2005 in which Navar had sold a residential property at 1008 N. Lawndale Street in Chicago (the property) to Ponce. Before the sale, Navar had obtained a City of Chicago Buildings Department zoning certificate stating that the property contained three dwelling units. According to Navar, he thus believed and represented to Ponce at the time of sale that the property at issue contained three dwelling units. After the sale, Ponce sued Navar for breach of warranty, breach of contract and fraudulent concealment, alleging that the property had, in fact,

contained only two lawful dwelling units. Navar subsequently retained Tribler to defend him in the Ponce lawsuit.

¶ 6 According to Navar, Tribler failed to successfully defend a motion for summary judgment by Ponce, which was decided in Ponce's favor in April 2009. The following month, a corresponding money judgment was entered against Navar in the amount of \$98,500. Navar subsequently ended Tribler's representation and retained attorney McNamara to represent him in an appeal from that judgment, which was ultimately unsuccessful.¹

¶ 7 According to Navar's original complaint, prior to the entry of summary judgment in Ponce's favor, Tribler had received settlement proposals from Ponce "which [Tribler] either did not relate to [Navar] or which they encouraged [Navar] to reject." Specifically, Navar alleged that Tribler knew that Ponce would have accepted payment of "approximately \$50,000-\$60,000" to settle the case, but Tribler had advised Navar to reject that proposal.

¶ 8 Navar's breach of contract count in the original complaint pleaded that Tribler "knew or should have known that [Navar] was exposed to a risk of an adverse judgment," and that settlement would better serve Navar's interests instead of continuing to defend the lawsuit. Navar pleaded that Tribler "breached their contractual duty to [Navar] by deterring him from settlement" and by "failing to guide him as to the comparative costs of settlement" or risking an adverse judgment by continuing to defend the lawsuit.

¶ 9 The original complaint's count for "professional malpractice" further alleged several negligent acts or omissions by Tribler, including failing to prepare Navar for his discovery

¹Each of the four complaints filed by Navar included allegations of breach of contract and professional malpractice against attorney McNamara. However, this appeal concerns only the trial court's dismissal of Navar's claims against Tribler. Navar's separate claims against McNamara remained pending.

deposition in the Ponce lawsuit; failing to "assess adequately the possibility of [Navar's] exposure to entry of judgment"; failure to "investigate and present defenses" to Ponce's summary judgment motion; and failing to advise Navar of the "comparative costs and risks" of settling or defending the suit.

¶ 10 On March 29, 2013, Tribler filed a motion to dismiss which first argued that the complaint improperly asserted "combined causes of action" against both Tribler and McNamara. With respect to the breach of contract count, Tribler further argued that Navar had failed to plead the elements supporting formation of a contract, noting that the complaint did not attach any written contract. Tribler's motion also argued that the malpractice claim was defective because it did not plead facts to show that, but for Tribler's conduct, Navar could have succeeded in defending the Ponce lawsuit.

¶ 11 On April 8, 2013, the trial court granted an oral motion by Navar "for leave to file an amended complaint addressing the deficiencies asserted in [Tribler's] motion to dismiss." On May 24, 2013, Navar filed his first amended complaint, which pleaded four counts, including separate counts of breach of contract and professional malpractice against Tribler and McNamara.

¶ 12 The first amended complaint added a number of allegations to support Navar's breach of contract claim against Tribler, including that Tribler had "assured Navar that they could and would succeed in defeating the Ponce lawsuit" and that Tribler "represented to Navar at the time of agreeing to represent him that the purpose of the representation *** was to eliminate or minimize any liability to Ponce." The amended complaint also alleged that Tribler "did not conduct any discovery or evidence depositions of Ponce or her witnesses, and did not sufficiently investigate the Ponce lawsuit to either defend the case successfully or advise and guide Navar as

to the value and means of settling the case." Navar's amended complaint claimed that, after entry of summary judgment in Ponce's favor, Tribler had demanded additional fees to prosecute an appeal. However, the amended complaint's next paragraph alleged that Tribler "advised Navar that they could not represent him further."

¶ 13 The amended complaint also revised Navar's allegations regarding opportunities to settle the Ponce lawsuit, alleging that Tribler received demands for settlement from Ponce for "a sum less than" the eventual judgment amount of \$98,500. The amended complaint acknowledged that Tribler advised Navar of "certain opportunities to settle" but "did not advise Navar of the probability of an adverse judgment" or of the "practical reasons for settling."

¶ 14 The first amended complaint alleged that Tribler "breached their contract" with Navar in numerous ways, including failing to settle the Ponce lawsuit. The first amended complaint's professional malpractice count further alleged that Tribler "failed to conduct sufficient discovery *** to defend effectively the Ponce lawsuit, and to resist entry of summary judgment." The malpractice count also alleged Tribler had failed to advise Navar as to the risks of defending the Ponce lawsuit and failed to "guide" Navar to effect a settlement of the underlying case.

¶ 15 On June 10, 2013, Tribler moved to dismiss the amended complaint. With respect to the breach of contract claim, Tribler argued that the amended complaint was still defective as it did not attach a written contract and did not contain allegations to establish "the formation of an oral contact and the terms thereof." Tribler also argued that Navar had not pleaded the existence of any contract terms corresponding to the various allegations of Tribler's wrongdoing. With respect to the professional malpractice count, Tribler again argued that Navar failed to state how he could have succeeded in the underlying action if Tribler had acted differently.

¶ 16 The appellate record does not reflect that Navar opposed the motion to dismiss. On June 19, 2013, the court granted Tribler's motion to dismiss the amended complaint without prejudice, allowing Navar to file a second amended complaint.

¶ 17 On July 17, 2013, Navar filed his second amended complaint, which significantly altered the language of the breach of contract claim. The second amended complaint pleaded that, on the basis of representations by Tribler "that the Ponce suit lacked merit and was defensible," Navar and Tribler had entered into an oral "engagement agreement." Navar further alleged that, in the course of representing Navar, Tribler "undertook" several obligations, including the duty to advise Navar "as to the possible and probable outcomes of," and reasons for settling, the Ponce lawsuit.

¶ 18 The breach of contract count of the second amended complaint again alleged that Tribler did not conduct sufficient discovery and failed to advise Navar as to "the value or efficacy of settling the Ponce suit." Navar alleged that Tribler had breached their contract in many ways, including by failing to advise Navar "of the probability of an adverse judgment," failing to "resist entry of summary judgment," and by failing to advise Navar to settle the Ponce lawsuit. The malpractice count pleaded similar failures, including Tribler's failure to apprise Navar "realistically of the probability of an adverse judgment," failure to "assess accurately" the strength of Ponce's claims, failure to "defend effectively" and "resist entry of judgment," and the failure to recommend and "guide effectively" Navar toward settlement prior to judgment.

¶ 19 On August 21, 2013, Tribler filed a motion to dismiss the second amended complaint which argued that Navar had made "no appreciable changes" to his prior pleading. Tribler argued that although Navar alleged an oral contract, he failed to plead its terms or to identify "any contractual duties that [Tribler] failed to uphold." Further, while Navar alleged that Tribler

"undertook" to perform certain tasks, Tribler argued that he had failed to allege that Tribler was "obligated to undertake any of these tasks pursuant to an oral agreement." Tribler further argued that, with respect to both causes of action, Navar had not pleaded how Tribler's acts had proximately caused Navar to sustain damages.

¶ 20 The record does not contain any opposition to Tribler's motion to dismiss the second amended complaint. On August 22, 2013, the court granted Navar leave to file a third amended complaint. On October 3, 2013, Navar filed his third amended complaint which, unlike his prior pleadings, asserted three counts against Tribler: breach of contract, professional negligence, and fraudulent misrepresentation.

¶ 21 The third amended complaint added certain allegations regarding the underlying real estate transaction with Ponce and the resulting lawsuit. Navar alleged that, at the time of the sale to Ponce, he had been represented by counsel at another law firm (Tellez & Boue), whose attorneys failed to advise Navar "that he should investigate, question or challenge the [City of Chicago] Zoning Certificate designation *** or that the number of dwelling units identified in the Zoning Certificate may be overstated, which could expose Navar to civil liability to the purchaser."

¶ 22 The third amended complaint also differed significantly in that, although Navar had previously pleaded an oral agreement with Tribler, the third amended complaint attached a written retainer agreement. The retainer agreement is in the form of a letter from Tribler to Navar dated November 6, 2007, which states that it "confirms [Navar's] engagement of [Tribler] to provide you with those legal services described below. When signed and returned, this letter will constitute a binding agreement regarding the terms of our representation."

¶ 23 The first provision of the retainer agreement is a "Scope of Representation" clause stating "[Tribler] will be engaged to represent [Navar's] interests" in the Ponce lawsuit and that Tribler's work would begin upon receipt of a \$5000 retainer from Navar. The following clause, entitled "Professional Undertaking," states: "While we will endeavor to represent your interests vigorously and efficiently, we cannot guarantee the outcome of any matter." A subsequent clause informs Navar that Tribler had "made no commitment to [Navar] concerning the maximum fees and costs that will be necessary to resolve" the matter and that Navar's obligation to pay legal fees "is not contingent on the ultimate outcome of the matter."

¶ 24 The concluding provisions of the retainer agreement state that the "letter sets forth our entire agreement with respect to this engagement" and requests Navar to indicate his approval by signing and returning the letter to Tribler. Although the copy of the retainer agreement attached to the complaint was not signed, Navar pleaded in the third amended complaint that he "accepted the terms of the Retainer Agreement and either executed the same *** or indicated orally his acceptance." Navar additionally pleaded that "The parties' engagement was, upon information and belief, a written agreement contained in the aforementioned Retainer Agreement, or alternatively on an unwritten or 'oral' agreement based substantially on the terms of the Retainer Agreement."

¶ 25 The third amended complaint proceeded to allege that: "in the course of agreeing to represent Navar," and "based upon the terms of the Retainer Agreement," Tribler "undertook" several tasks, including: "[T]o provide effective, reasonably accurate guidance and reasonably sound professional advice to Navar as to the possible and probable outcomes of the Ponce suit, to the steps and measures which should be taken in order effectively to defend the Ponce suit, and to the probable costs" of such measures. Navar similarly pleaded that Tribler "undertook" "to

attempt to secure a judgment *** in Navar's favor *** or alternatively to minimize the liability of Navar"; and "to advise Navar of opportunities to settle the Ponce suit" as well as "the reasons for settling."

¶ 26 After alleging that Tribler "assured Navar that they could and would succeed in defeating the Ponce suit," the breach of contract count proceeded to claim that Tribler "did not conduct sufficient discovery or evidence depositions of Ponce or her witnesses, and did not sufficiently investigate the Ponce lawsuit to either defend the case successfully or advise and guide Navar as to the value or efficacy of settling the Ponce suit."

¶ 27 With regard to settlement, Navar alleged that Tribler had received a demand which "would have entailed payment by Navar to Ponce in a sum less than \$98,500.00," the amount of the eventual judgment against him. Navar also alleged that Tribler had demanded certain payments in sums of \$6,000 and \$25,000 which "were to be used to remit to Ponce in settlement of the Ponce lawsuit." Navar claimed that Tribler "advised Navar of certain opportunities to settle," but "did not advise Navar of the probability of an adverse judgment in the sum ultimately entered" or of the "practical reasons" for settling. More specifically, Navar claimed that one of Tribler's attorneys had advised Navar "that he was going to offer \$25,000 [to Ponce] to settle the case," but that if Ponce refused, Tribler "would not undertake to make or entertain any further offers." Navar pleaded that he had been "interested in settling the Ponce lawsuit on reasonable terms, and never refused to make a settlement offer or accept a settlement demand that [Tribler] recommended." Navar further claimed that if Tribler had recommended a settlement proposal, he "would more probably than not have agreed to it."

¶ 28 The third amended complaint's breach of contract count also contained new allegations that Tribler "failed to facilitate Navar's compliance with outstanding discovery orders in the

Ponce lawsuit, and to notify Navar of the urgency of complying with discovery requests," which had resulted in the assessment of sanctions in the amount of \$2,844.00. In another new allegation, the breach of contract count pleaded that Navar had "requested guidance from [Tribler] as to whether they could pursue successfully the lawyer who represented him in the [real estate] closing" involving the sale of the property to Ponce. According to Navar, Tribler had "discouraged" Navar from suing his prior attorney because "the amount of that claim would be too small."

¶ 29 The third amended complaint pleaded that Tribler "breached their contact" with Navar in numerous ways, including by failing: (1) "to advise Navar of opportunities to settle the Ponce lawsuit on particular terms" and of the "advisability of settling" the lawsuit," (2) "to advise Navar as to the practical or economic reasons for settling;" (3) "to prepare adequately Navar's defense to the Ponce lawsuit"; (4) "to prepare Navar adequately for his discovery deposition" (5) "to comply [timely] with outstanding discovery requests resulting in imposition of discovery sanctions"; (6) "to take oral depositions of [Ponce] and of [Ponce's] witnesses"; (7) "to prosecute an appeal of the judgment entered"; (8) to keep [Navar] reasonably informed of the status of the Ponce suit, and of the entry of summary judgment against [Navar]."

¶ 30 Navar further premised the breach of contract action on Tribler's "failing to advise Navar of the possibility and probability of a judgment being entered in favor of Ponce" and "demanding additional fees to defend the Ponce suit and to prosecute the appeal," when Tribler "knew that such defense or such appeal would not be effective." Navar also pleaded a breach of contract based on Tribler's "discouraging Navar from filing a legal malpractice lawsuit" against his prior attorney, as well as and Tribler's "fail[ure] to remit to Ponce the sums collected from Navar purportedly for settlement of the Ponce suit." Navar pleaded that such "breaches of contract"

proximately caused damages in the form of the \$98,5000 judgment entered against him in the Ponce lawsuit.

¶ 31 The third amended complaint's second count, for professional malpractice, incorporated all earlier allegations, and alleged that Tribler owed Navar a "duty to advise and guide Navar as to the costs and probable outcomes of either defending or settling the Ponce lawsuit accordingly to the standard established by lawyers practicing in the same jurisdiction and practice area." Navar alleged that Tribler "would have and properly should have secured a favorable result in the Ponce lawsuit if they had conducted sufficient discovery and secured the necessary witnesses, testimony, documents and information." Navar further pleaded that he "would have resisted entry of summary judgment *** but for [Tribler's] failure to conduct the discovery and put forth *** genuine issues of material fact requiring denial of the motion for summary judgment."

¶ 32 The professional malpractice count, like the breach of contract count, also alleged that Tribler failed to inform Navar of the probability of an adverse judgment, and of "the advisability" and "necessity" of settling. Specifically, he pleaded although Navar could have settled for an amount less than \$98,500, Tribler had "encouraged Navar to resist" any settlement proposals calling for his payment of more than \$25,000 to Ponce. Navar further averred that he "was willing to pay to Ponce a sum of money to settle the case," although he did not specify any particular amount, and alleged that he had never "challenged, resisted or refused" any settlement proposal recommend by Tribler. Navar thus claimed that Tribler breached duties "to assess accurately the relative strengths" of the claims and defenses in the underlying case, to defend the case "effectively," and that Tribler failed to "guide" Navar to settle "on terms more favorable *** than those imposed by entry of the [\$98,5000] adverse judgment."

¶ 33 Navar pleaded that such "breaches of [Tribler's] duty of due care" proximately caused damages consisting of the \$98,500 judgment and fees paid by Navar to Tribler, "less any sum that Navar would have paid in settlement of the Ponce lawsuit." In addition, the professional malpractice count further alleged that Tribler additionally breached its duties in "permitting the delay in discovery resulting in imposition against Navar of \$2,844.00 in discovery sanctions."

¶ 34 Following the professional malpractice count, the third amended complaint—unlike Navar's three prior pleadings—also included a third count of fraudulent misrepresentation, which was "pleaded in the alternative" to the breach of contract count. The fraud count alleged that Tribler "knew at the time they made their statements to Navar that the Ponce lawsuit was defensible and would result in entry of judgment for [Navar] at trial, and that the order of summary judgment would be reversed on appeal, that those statements were false." Navar pleaded that he relied on Tribler's statements by paying fees totaling approximately \$47,000, and by defending the Ponce lawsuit instead of settling the case. Navar pleaded that his reliance was "justifiable, based on [Tribler's] evaluation of the case and expressed professional opinion that Ponce could not prevail in her lawsuit because she had not undertaken a professional inspection of the [property] and investigation of the number of legal dwelling units, and because Navar had relied appropriately on the City of Chicago Zoning Certificate." The fraud count sought damages in the amount of legal fees and expenses Navar had paid to Tribler.

¶ 35 On November 5, 2013, Tribler filed a motion to dismiss the third amended complaint. Tribler argued, as in its motions to dismiss earlier pleadings, that Navar had failed to plead the formation of a valid oral contract, including sufficiently definite terms thereof. Tribler argued that, although the complaint alleged many failures by Tribler based on what it "undertook" to do, those allegations did not set forth any contractual terms. Furthermore, to the extent Navar

pleaded a breach of a written contract, Tribler argued that Navar had failed to specify how any terms of the retainer agreement had been violated.

¶ 36 With respect to the professional malpractice count, Tribler argued that certain of Navar's claims pleaded purported breaches of duty that were not recognized by Illinois law, and that his claims otherwise failed to plead the element of proximate causation. To the extent Navar alleged that Tribler failed to inform him of the probability of an adverse judgment, to assess accurately the merits of the Ponce case, or to effect a settlement on terms more favorable than the eventual \$98,500 judgment, Tribler urged that it could not be held liable for failing to predict the outcome of the underlying case. Tribler argued that an attorney "is not liable for mere errors of judgment" and that since attorneys are not "guarantors of results for their clients," Tribler had "no duty to [Navar] to predict the outcome of the litigation" and advise him to settle the matter.

¶ 37 Separately, Tribler argued that the remaining malpractice allegations were deficient because they failed to plead how Tribler's alleged conduct proximately caused him to sustain damages. With respect to the alleged failure to guide Navar to settlement, Tribler noted that Navar "does not allege that he was willing to make a settlement offer that [Ponce] would have accepted." Tribler similarly argued that Navar had not pleaded how any failure to prepare him for his deposition, or Tribler's alleged failure to conduct sufficient discovery, would have caused a different result. Tribler urged that Navar failed to allege "what depositions should have been taken, what the deponents would have said or how this would have affected the outcome" of the Ponce lawsuit. Likewise, Tribler urged that Navar did not plead "what defense could have been maintained" that would have led to a different result.

¶ 38 With respect to Navar's fraud count, Tribler's motion to dismiss argued that Navar failed to plead the cause of action with sufficient particularity. Tribler additionally argued that

"misrepresentations as to future actions are not actionable," and thus the fraud claim could not be premised on Tribler's assurances to Navar that he would prevail in the Ponce lawsuit.

¶ 39 On January 27, 2014, Navar filed his response to the motion to dismiss the third amended complaint. In response to Tribler's contention that he had failed to identify breached contractual terms, Navar argued that an attorney's duties are contained in "the Rules of Professional Conduct, as well as the specific provisions of the retainer agreement." Navar argued that he pleaded the breach of an attorney's duty to provide the client with "sufficient information to make informed decision about potential settlement," and a "breach of [Tribler's] duty to guide [Navar] as to when, whether and for how much to settle."

¶ 40 With respect to the legal malpractice count, Navar argued that it stated a cause of action based on Tribler's failures to provide advice on settlement and "the probability of adverse judgment," failure "to conduct sufficient discovery and to resist" Ponce's motion for summary judgment, exposing Navar to discovery sanctions, and "failure to guide [Navar] as to the risks and costs of litigation." Navar argued that he had pleaded proximate cause in that Tribler's "faulty guidance and misapprehension of the underlying case" compromised Navar's chance to settle the case and resulted in entry of summary judgment. Navar argued that these allegations were not merely claims of mistaken judgment but constituted malpractice.

¶ 41 With respect to fraud, Navar disputed Tribler's contention that his allegations were not pleaded with specificity. Navar also argued that his fraud claim was not based on non-actionable statements concerning future conduct, but that he had alleged "*present* misrepresentations [by Tribler] as to [Navar's] legal position, which would come into fruition in the future when the Ponce lawsuit was disposed." Navar's opposition to the motion to dismiss concluded by requesting leave to amend "[i]f the court finds that any of the claims are insufficient at law."

¶ 42 On March 12, 2014, Tribler filed a reply memorandum which noted that Navar's response still failed to identify any contractual terms that were allegedly breached. With respect to the legal malpractice claim, Tribler argued that an attorney has no duty to predict the outcome of a case or to "guide" a client to settlement, arguing that if such duties were recognized "the losing party in litigation would possess a cause of action for attorney malpractice in virtually every instance." Moreover, Tribler reiterated that Navar had failed to plead how Tribler's purported failures had proximately caused Navar to lose the underlying action.

¶ 43 At a hearing on April 21, 2014, the court granted Tribler's motion to dismiss each of the three counts against Tribler in the third amended complaint, with prejudice, and also specifically denied Navar's request for leave to file an amend complaint. The court noted that the case remained pending with respect to the separate causes of action pleaded against attorney McNamara, which are not at issue in this appeal. The court also made an express finding that there was "no just reason to delay enforcement or appeal" of the order.

¶ 44 On May 21, 2014, Navar filed a motion for reconsideration reiterating his prior arguments and again requested leave to amend. Tribler responded on July 2, 2014, noting that Navar had offered no new legal arguments. On July 25, 2014, the trial court denied Navar's motion to reconsider. On August 25, 2014, Navar filed a notice of appeal.

¶ 45 ANALYSIS

¶ 46 We note that we have appellate jurisdiction pursuant to Illinois Supreme Court Rule 304(a) (eff. Jan. 1, 2006), as the trial court expressly found no reason to delay appeal notwithstanding that Navar's separate claims against McNamara remained pending.

¶ 47 The trial court's order granting a section 2-615 motion to dismiss is reviewed *de novo*. *Nelson v. Quarles & Brady, LLP*, 2013 IL App (1st) 123122, ¶ 27. "A motion to dismiss for

failure to state a cause of action pursuant to section 2-615 attacks the legal sufficiency of a complaint based on defects apparent on its face. (Internal quotation marks omitted.) *Id.* Such a motion should be granted "only if it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief. [Citations.] At this pleading stage, a plaintiff is not required to prove his case and need only allege sufficient facts to state all elements of the cause of action. [Citation.]" *Id.* "When reviewing a section 2-615 motion, we accept as true all well-pleaded facts and reasonable inferences that can be drawn from those facts" and "interpret the allegations in the complaint in the light most favorable to the plaintiff." *Id.* Under this standard, we proceed to review each of the asserted causes of action asserted in the third amended complaint.

¶ 48 First, we review whether the third amended complaint's breach of contract allegations. "In order to state a cause of action for breach of contract, a plaintiff must establish: (1) an offer and acceptance; (2) consideration; (3) definite and certain terms of the contract; (4) plaintiff's performance of all required contractual conditions; (5) defendants' breach of the terms of the contract; and (6) damage resulting from the breach." *Barille v. Sears Roebuck & Co.*, 289 Ill. App. 3d 171, 175 (1997). "[F]or an agreement to be legally binding, it must be reasonably definite and certain in its terms. When material terms and conditions are not ascertainable, there is no enforceable contract, even if the intent to contract is present." (Internal quotation marks omitted). *Midwest Builder Distributing, Inc. v. Lord & Essex, Inc.*, 383 Ill. App. 3d 645, 658 (2007). "Where a complaint alleging breach of contract fails to state essential allegations it is defective and its deficiency may not be remedied by liberal construction." *OnTap Premium Quality Waters, Inc. v. Bank of Northern Illinois, N.A.*, 262 Ill. App. 3d 254, 259 (1994).

¶ 49 In this case, we agree with Tribler that the breach of contract count in the third amended complaint was deficient because it failed to identify any specific term, either in a written or an

oral contract, which had been breached. Navar's breach of contract count alleges numerous failures, including failing to advise Navar of "reasons for settling" and to effectuate a settlement, failing to prepare Navar for his deposition or to take additional depositions, failing to comply with discovery requests, failing to prosecute an appeal of the adverse judgment entered against him, and failing to encourage him to sue his prior attorney from the original real estate transaction. Even assuming the truth of such allegations, Navar nevertheless fails to plead any corresponding *contractual* terms supporting a corresponding breach of contract claim.

¶ 50 Notably, Navar's count for breach of contract pleads that the "parties' engagement agreement" was either "a written agreement contained in" the retainer agreement, "or alternatively [was] an unwritten or 'oral' agreement based substantially on the terms of the Retainer Agreement." Under either premise, Navar fails to plead a breach of a contractual term.

¶ 51 To the extent Navar's claim is premised on the written retainer agreement, there is simply no term that is alleged to have been breached. Notably, the only two provisions of the retainer agreement specifically recited in the third amended complaint are the "scope of representation" and "professional undertaking" clauses. However, Navar fails to plead allegations that either clause was breached. The "scope of representation" provision simply states that Tribler will represent Navar in the underlying Ponce lawsuit, and that Tribler's "[r]esponsibility to provide legal services will be accepted and work will begin" upon Tribler's receipt of a retainer. Rather than state a breach of this provision, the third amended complaint acknowledges that Tribler "represent[ed] Navar in the Ponce suit from November 2007 through June 11, 2009."

¶ 52 Navar also fails to plead any breach of the "professional undertaking" clause, which provided, in its entirety, that: "While we will endeavor to represent your interests vigorously and efficiently, we cannot guarantee the outcome of any matter. We will have responsibility for your

representation, and will utilize as appropriate other lawyers and firm personnel, if necessary. If at any time you have question or concerns, please contact us." Navar does not allege any breach of this clause. If anything, its statement that Tribler "cannot guarantee the outcome of any matter" undermines Navar's allegations that he relied on Tribler's assurances of success in the Ponce lawsuit.

¶ 53 The third amended complaint also alleges that Tribler "undertook" numerous additional duties; yet these duties are simply not contained anywhere in the written retainer agreement. Specifically, Navar alleges that "based on" the retainer agreement, Tribler "undertook" to advise Navar "as to the possible and probable outcomes of the Ponce suit" and "steps and measures" needed to defend the suit, to "attempt to secure a judgment" in Navar's favor or otherwise to minimize his liability, and to advise Navar of opportunities to, and reasons for, settling the Ponce lawsuit.

¶ 54 Notwithstanding the contention that these obligations were "based upon the terms of" the retainer agreement, it is apparent from our review of that document that these obligations were not actually contained in the retainer agreement. Navar cannot purport to create additional contractual duties not contained in the retainer agreement by alleging that such duties were "based on" the written agreement. Indeed, the retainer agreement specifies that it "sets forth our entire agreement with respect to this engagement." Similarly, pleading that Tribler "undertook" such additional duties "in the course of agreeing to represent Navar" is *not* equivalent to pleading that these were, in fact, specific contractual duties. Notably, Navar had multiple attempts to plead identifiable contractual duties, but continued to rely on the vague, conclusory language that Tribler "undertook" such purported obligations. Thus, Navar failed to plead any breach of a written contract.

¶ 55 Navar likewise fails to plead any terms of any purported oral agreement that would support an actionable breach of contract. To the extent he pleads an oral agreement, he merely pleads that it was "based substantially on the terms of the Retainer Agreement prepared by [Tribler]." Nowhere does his breach of contract count plead *any* terms of an oral contract independent of the retainer agreement, let alone terms corresponding to Tribler's alleged acts or omission. Moreover, as noted above, the assertion that Tribler "undertook" certain duties does not substitute for allegations of explicit contract terms.

¶ 56 Notably, while Navar's appellate brief fails to identify any breached terms, he argues that his breach of contract claim should survive because "[a]n attorney's duties to a client are recounted by the Rules of Professional Conduct, as well as the specific provisions of the retainer agreement" and that such duties include the "duty to provide the client with sufficient information to make informed decisions about potential settlement." As support, he cites *First National Bank of LaGrange v. Lowrey*, 375 Ill. App. 3d 181, 196 (2007). That case is clearly inapplicable, as it discussed such attorney duties in the context of a legal malpractice action, not a breach of contract claim. See *id.*

¶ 57 We decline to find that a breach of contract claim may be maintained against an attorney based on violations of professional duties that are not contained in an actual contract. We also note that Navar's appellate brief separately cites additional cases supporting the proposition that a contract may be held enforceable even when certain terms are left unspecified. However, those cases do not suggest that a breach of contract action is sustainable where, as in this case, the plaintiff fails to identify a single contractual term that has been breached. As a breach of contract claim requires an identifiable breach of a contract term, we affirm the trial court's dismissal of this cause of action.

¶ 58 Next we address the dismissal of the third amended complaint's professional malpractice count. "To state a cause of action for legal malpractice, the plaintiff must allege facts to establish (1) the defendant attorney owed the plaintiff client a duty of due care arising from an attorney-client relationship, (2) the attorney breached that duty, (3) the client suffered an injury in the form of actual damages, and (4) the actual damages resulted in a proximate cause of the breach." (Internal quotation marks omitted). *Nelson*, 2013 IL App (1st) 123122, ¶ 28. "A legal malpractice suit is by its nature dependent upon a predicate lawsuit. [Citation.] Thus, a legal malpractice claim presents a 'case within a case.' [Citation.]" *Id.* There is no malpractice claim "unless counsel's negligence has resulted in the loss of an underlying cause of action, or the loss of a meritorious defense ***." *Id.*

¶ 59 Notably, with respect to determining whether the element of a breach has been met, Illinois courts have emphasized the distinction between actionable attorney negligence and non-actionable errors of attorney judgment. Our supreme court has stated: "It is clear that an attorney is liable to his client only when he fails to exercise a reasonable degree of care and skill; he is not liable for mere errors of judgment." *Smiley v. Manchester Insurance & Indemnity Co.*, 71 Ill. 2d 306, 313 (1978). Thus, "although the question of whether a lawyer has breached a duty to his client presents a factual question, courts have held that the issue may be decided as a matter of law under the doctrine of judgmental immunity which provides that an attorney will generally be immune from liability, as a matter of law, for acts or omissions during the conduct of litigation, which are the result of an honest exercise of professional judgment." (Internal quotation marks omitted). *Nelson*, 2013 IL App (1st) 123122, ¶ 31 (noting the doctrine "is consistent with Illinois law, which distinguishes between negligence and mere errors of judgment.").

¶ 60 In this case, several of the purported negligent acts alleged by Navar—specifically, claims arising from Tribler's failure to accurately assess the merits and predict the outcome of the Ponce lawsuit—amount to mere errors of judgment. Many of the allegations in Navar's legal malpractice claim amount to claims that Tribler inaccurately predicted how the court would rule in the Ponce suit. For example, Navar pleads that Tribler had an affirmative duty to advise him of as to "probable outcomes of either defending or settling the Ponce lawsuit" and to "assess accurately the relative strengths of Ponce's claims *** against Navar's defenses." Navar pleads that before summary judgment was entered against him, Tribler erroneously assured him that he could successfully defend the Ponce lawsuit and, that even after summary judgment, Tribler advised him that it "could secure reversal of the summary judgment order on appeal and proceed to successfully defend the case." Even assuming that Tribler made such statements, assessment of the probabilities of success that turn out to be erroneous constitute "mere errors in judgment." Attorneys are not guarantors of success.

¶ 61 Navar likewise fails to state a breach when he claims that Tribler failed to apprise him of "the advisability and necessity of settling the Ponce suit." Specifically, Navar alleges that although the case could have been settled for an amount less than the eventual \$98,500 judgment, Tribler "encouraged Navar to resist any settlement proposals which contemplated payment by Navar to Ponce of more than \$25,000." Navar's claims that Tribler failed to "guide effectively Navar to effect a settlement" for less than the eventual judgment, amount to an allegation that Tribler failed to accurately predict the monetary value of the case that would be assessed by the court. Again, this is an error in judgment, not a basis for malpractice liability.

¶ 62 Notably, Navar makes no allegation that Tribler failed to *communicate* any settlement offer, or that Tribler rejected any settlement offer without Navar's authorization. Rather, Navar

simply alleges that Tribler failed to *recommend* that he agree to a settlement that (in hindsight) would have cost him less than the eventual \$98,500 judgment. Thus, the alleged malpractice is simply that Tribler misjudged the merits of the case. Even if Navar's allegations are true, we decline to find that a plaintiff pleads negligence merely because his attorneys discouraged him from a settlement that, eventually, proved to be less than the client's assessed liability.

¶ 63 We also find the allegations of the malpractice count pertaining to the imposition of discovery sanctions do not plead an actionable breach of duty by Tribler. Navar pleads that Tribler "deviated from the standard of effective legal representation" in "permitting the delay in discovery, resulting in imposition against Navar of \$2,844.00 in discovery sanctions." The relevant allegations state that Tribler "failed to facilitate Navar's compliance with outstanding discovery orders in the Ponce lawsuit" and to "notify Navar of the urgency of complying with discovery requests to avert imposition of sanctions."

¶ 64 These statements do not plead an actionable failure by Tribler. Notably, the allegations do not plead that Tribler failed to inform Navar, or that Navar was actually unaware of, the discovery deadlines imposed by the court. Nor does he allege that he provided responsive information to his attorneys in a timely manner, and that Tribler then failed to produce the information promptly. Navar's allegations complain only that his attorneys did not warn him of the "urgency" of the "need to comply" to avoid potential sanctions. Navar does not point to any case suggesting that an attorney must not only inform the client of discovery deadlines, but also must additionally communicate the "urgency" of complying or the possibility of sanctions. Just as attorneys are not responsible for failing to predict the amount of an adverse judgment, we decline to find that failure to predict monetary sanctions for failure to comply with discovery pleads a breach amounting to malpractice.

¶ 65 Separately, we conclude that the remaining allegations in the legal malpractice count are deficient because they fail to satisfy the independent pleading requirement of how "actual damages resulted as a proximate cause of the breach." *Nelson*, 2013 IL App (1st) 123122, ¶ 28.

To meet this requirement, Navar had to plead facts sufficient to state how each alleged wrongful act or omission would have caused a different result in the underlying "case within a case." See *id.* Navar pleads in vague and general language that Tribler "should have secured a favorable result" in the underlying lawsuit "if [Tribler] had conducted sufficient discovery and secured the necessary witnesses, testimony, documents, and information" to defend the lawsuit. According to Navar, if such discovery had been conducted, Tribler "would have resisted" summary judgment by creating unspecified "genuine issues of material fact." However, despite having three prior attempts to do so, Navar's pleading fails to specify any particular testimony, document, or fact that Tribler allegedly failed to discover, or how such information would have created an issue of material fact precluding the entry of summary judgment against him.

¶ 66 Moreover, even assuming that discovery could have created an issue of fact sufficient to defeat summary judgment, Navar does not plead any particular defenses to the underlying lawsuit that could have ultimately resulted in judgment in his favor after trial. Navar pleads that in the underlying action, "Ponce had to prove that Navar misrepresented the number of legal dwelling units" in the subject property, but Navar does not identify any valid defenses that could have successfully avoided his liability to Ponce. To the contrary, his pleading appears to acknowledge that in the underlying real estate transaction, he had, in fact, erroneously represented to Ponce that the property contained three legal dwelling units. Although Navar's pleading suggests that he was relying on an erroneous zoning certificate, nowhere does he plead that this would constitute a viable defense. Rather, he fails to plead any defense that Tribler

could have raised that would have succeeded in avoiding liability. Because there is no malpractice "unless counsel's negligence has resulted in the loss of an underlying cause of action," (*id.* ¶ 28), Navar fails to plead a viable cause of action for legal malpractice and we affirm the dismissal of the professional malpractice count of the third amended complaint.

¶ 67 We wish to make clear that our agreement with the dismissal of the legal malpractice count should not be misconstrued as our approval of Tribler's alleged conduct in the Ponce lawsuit. Nonetheless, the allegations do not rise to the level of legal malpractice. Even if a complaint indicates that the client received legal representation that was far from stellar, a plaintiff must meet the threshold pleading requirements to state a cause of action for legal malpractice, including how the attorney's actions negatively affected the result of the "case within a case." Although Navar's allegations suggest that Tribler's efforts in conducting discovery, communicating with its client, and otherwise defending the Ponce lawsuit were less than ideal, none of his four pleadings alleged sufficient facts to state a viable claim for legal malpractice.

¶ 68 We also conclude that the third amended complaint failed to state an actionable claim for fraud against Tribler. Navar pleads that Tribler knowingly made false statements "that the Ponce lawsuit was defensible and would result in entry of judgment for [Navar] at trial," and that the summary judgment order entered against him would be reversed on appeal. Navar pleads that his reliance on such statements "was justifiable, based on [Tribler's] evaluation of the case and expressed professional opinion that Ponce could not prevail in her lawsuit."

¶ 69 "To state a cause of action for common-law fraud, a plaintiff must plead (1) a false statement of material fact; (2) knowledge or belief by the defendant that the statement was false; (3) an intention to induce the plaintiff to act; (4) reasonable reliance upon the truth of the

statement by the plaintiff; and (5) damage to the plaintiff resulting from this reliance." *Avon Hardware Co. v. Ace Hardware Corp.*, 2013 IL App (1st) 130750, ¶ 15.

¶ 70 Our case law has explained that a plaintiff must allege a *present* false statement to sustain a fraud claim. "Under Illinois law there is no action for promissory fraud, meaning that the alleged misrepresentations must be statements of present or preexisting fact, and not statements of future intent or conduct." *Abazari v. Rosalind Franklin University of Medicine and Science*, 2015 IL App (2d) 140952, ¶ 15. "[M]isrepresentations as to something to be done in the future generally do not constitute fraud." *Power v. Smith*, 337 Ill. App. 3d 827, 832 (2003). Similarly, mere predictions are non-actionable: "assurances as to future events are generally not considered misrepresentations of fact." *Id.* (holding that where contractor's fraud claim was premised on assurances from a business partner regarding a construction job, "[t]he predictions *** that the job would be profitable certainly are not representations as to a material fact" as such "predictions were simply [the defendant's] opinion"); see also *Avon Hardware*, 2013 IL App (1st) 130750, ¶ 17 (holding that "allegations related to projected sales figures *** are not actionable" and affirming dismissal of "claims involving statements of future performance.").

¶ 71 Furthermore, our court has clarified that mere statements of opinion are non-actionable, as "[a]n opinion is not a false statement of material fact and does not support an action for fraud." *Merrilees v. Merrilees*, 2013 IL App (1st) 121897, ¶ 30. "The basis of a fraud or negligent misrepresentation claim must be a statement of fact, not an expression of opinion." *Avon Hardware*, 2013 IL App (1st) 130750, ¶ 17.

¶ 72 In this case, Navar's fraud claim does not plead any false, present statement of fact made by Tribler, but is premised only upon Tribler's erroneous predictions of success in defending the underlying case and its related opinions regarding the merits of the case. First, the alleged

representations by Tribler assuring Navar that he would prevail in the Ponce lawsuit are clearly directed toward future events. Navar's appellate brief acknowledges that statements as to future events are generally not actionable, but attempts to distinguish his fraud allegations, contending that he has alleged "*present* misrepresentations as to [Navar's] legal position, which would come into fruition in the future when the Ponce lawsuit was to be disposed." We fail to see how a statement as to events that "would come into fruition in the future" can be construed as anything other than a non-actionable prediction.

¶ 73 Navar also attempts to rely on our supreme court's statement that although "the general rule denies recovery for fraud based on a false representation of intention or future conduct, *** there is a recognized exception where the false promise or representation of future conduct is alleged to be the scheme employed to accomplish the fraud." *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 334 (1977). *Steinberg* thus held that a fraud claim against a medical school by a rejected applicant could be premised on alleged misrepresentations by the school that applicants "will be evaluated on the basis of academic achievement," standardized test results, and other specified criteria. *Id.*

¶ 74 Navar argues that the exception noted in *Steinberg* applies because Tribler's false representations were "part of a scheme employed to perpetrate an active fraud upon [Navar], with the objective of generating legal fees." We find that *Steinberg* is inapposite. Significantly, the statements regarding future conduct that were held actionable in *Steinberg* were representations by the defendant medical school regarding *its own* promised future conduct in evaluating applicants, which it allegedly had no intention of carrying out. In contrast, the statements at issue in this case are not misstatements of future conduct to be done by Tribler, but rather Tribler's prediction as to how a *court* would ultimately decide the Ponce lawsuit. We

decline to hold that an attorney's incorrect prediction as to how a court will rule in a given matter constitutes fraud.

¶ 75 Moreover, to the extent that the fraud claim is based on purported assurances by Tribler that Ponce's lawsuit against Navar was "defensible," it alleges mere statements of opinion by Tribler as to the merits of the underlying case. Notably, this court has held that such legal opinions are not actionable. See *Merrilees*, 2013 IL App (1st) 121897, ¶ 34 (dismissing fraud claim against plaintiff's former divorce attorneys, premised on attorney's misstatements regarding "the value and nature of the marital estate," as "any representations to plaintiff by her attorney about whether property was marital or nonmarital was a legal opinion, not a fact, and thus was not actionable as fraud."). Similarly, Tribler's purported assurances that the Ponce lawsuit was "defensible" was undoubtedly a legal opinion, not a statement of fact. Indeed, the third amended complaint pleads that Navar relied on Tribler's "expressed professional *opinion* that Ponce could not prevail" in the underlying case. As Navar's cause of action for fraud failed to plead present statements of fact, that cause of action was properly dismissed.

¶ 76 Having concluded that the trial court properly dismissed each of the three causes of action asserted against Tribler in the third amended complaint, we address the trial court's denial of Navar's request to submit a further amended complaint. Section 2-616 of the Code of Civil Procedure provides that "[a]t any time before final judgment amendments may be allowed on just and reasonable terms." 735 ILCS 5/2-616(a) (West 2012). "Pursuant to section 2-616(a), a court considers four factors in determining whether to permit an amendment to the pleading, including whether: (1) the proposed amendment would cure a defective pleading; (2) the proposed amendment would surprise or prejudice the opposing party; (3) the proposed amendment was timely filed; and (4) the moving party had previous opportunities to amend." *In*

re Marriage of Lyman, 2015 IL App (1st) 132832, ¶ 51 (citing *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992)). "The plaintiff must meet all four factors, and if the proposed amendment does not state a cognizable claim, and thus, fails the first factor, courts of review will often not proceed with further analysis." (Internal quotation marks omitted). *Id.* "Where it is apparent even after amendment that no cause of action can be stated, leave to amend should be denied." *Id.* "The decision of whether to grant leave to amend a pleading rests within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion." *Id.*

¶ 77 On appeal, Navar argues that the trial court abused its discretion in denying his request to amend "without identifying any specific defect in the Third Amended Complaint, and without assessing whether further amendment might cure the unspecified deficiencies." Navar contends that because the trial court's order did not specifically discuss any of the four relevant factors or otherwise specify the basis for denying leave to amend, the court "acted arbitrarily" and "without regard to the potential merits of [Navar's] claim."

¶ 78 Considering the relevant factors, particularly in light of Navar's four prior failed attempts to state a cause of action against Tribler, we cannot say that the trial court abused its discretion in denying Navar's request to file a fifth pleading. Although the trial court did not discuss the four relevant factors, it is clear that Navar could not satisfy them. With respect to the first factor—whether the proposed amendment would cure a defective pleading—Navar failed to submit any proposed amendment and has otherwise failed to explain how he would address his pleading deficiencies. Rather, his briefing fails to acknowledge *any* pleading defects in the third amended complaint. Although Navar faults the trial court for not identifying pleading defects, he was undoubtedly aware of such defects in light of Tribler's motions to dismiss each of his four

complaints, and Navar has had several opportunities to correct them. As we conclude that Navar could not satisfy the first factor, we need not separately examine the three additional factors in order to affirm the denial of his request to file a fourth amended complaint. See *Lyman*, 2015 IL App 132832, ¶ 51.

¶ 79 Finally, Navar appeals from the July 25, 2014 order denying his motion for reconsideration. "Motions for reconsideration are meant to bring to a court's attention: (1) newly discovered evidence; (2) changes in the law; or (3) errors in the court's previous application of existing law." *RBS Citizens, National Association v. RTG-Oak Lawn, LLC*, 407 Ill. App. 3d 183, 193 (2011). "Orders denying a motion for reconsideration are reviewed under the abuse of discretion standard." *Id.* Navar's motion for reconsideration did not identify any newly discovered evidence or change in law but simply asserted that the trial court erred in rejecting the arguments Navar had previously raised in his opposition to Tribler's motion to dismiss the third amended complaint. As set forth above, the trial court properly dismissed each of the claims asserted against Tribler. Thus, we cannot conclude that the trial court's denial of Navar's motion for reconsideration was an abuse of discretion.

¶ 80 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 81 Affirmed.