

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-4647-08T3

VINCENT MORRIS,

Plaintiff-Appellant,

v.

BRICKFIELD & DONAHUE, PAUL B.  
BRICKFIELD and JOSEPH R. DONAHUE,  
individually, jointly and  
severally,

Defendants-Respondents.

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Argued February 22, 2010 - Decided April 14, 2010

Before Judges Baxter and Alvarez.

On appeal from the Superior Court of New  
Jersey, Law Division, Monmouth County,  
Docket No. L-5645-08.

Vincent Morris, appellant, argued the cause  
pro se.

John L. Slimm argued the cause for  
respondents (Marshall, Dennehey, Warner,  
Coleman & Goggin, attorneys; Mr. Slimm, on  
the brief).

PER CURIAM

Plaintiff Vincent Morris filed an action pro se against his  
former attorneys, defendants Brickfield & Donahue, Paul B.  
Brickfield (Brickfield) and Joseph R. Donahue. His complaint

was dismissed with prejudice on March 26, 2009, because he did not comply with the Affidavit of Merit Statute, N.J.S.A. 2A:53A-26 to -29. He appeals the dismissal and we affirm.

Plaintiff was convicted in Bergen County of second-degree usury. He subsequently hired Brickfield to represent him on a bail motion filed in the Appellate Division and the direct appeal of the conviction. Neither application had the desired outcome. Brickfield also represented plaintiff in the enforcement of a forfeiture settlement requiring the Bergen County Prosecutor's Office to return his Mercedes Benz automobile and \$210,000.

Brickfield's retainer agreement provided that plaintiff would pay \$45,000 as a "minimum fee."<sup>1</sup> It stated the firm would track the time expended on plaintiff's matters at the rate of \$300 per hour and bill him for additional moneys should the hours worked exceed the \$45,000 payment at that rate. Furthermore, the retainer agreement made plaintiff responsible for "disbursements," such as the cost of transcripts, filing fees, and "special mailing and transmittal services." Bills for

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<sup>1</sup> The retainer agreement did not require that the \$45,000 payment would be deposited into an attorney trust account. See In re Stern, 92 N.J. 611, 619 (1983); Michels, New Jersey Attorney Ethics—The Law of New Jersey Lawyering, §§ 8:4-3a at 122, 34:1 to 34:2 at 807-09 (GANN 2010).

"disbursements" would be sent monthly and were due upon receipt. The retainer agreement was signed by plaintiff and Brickfield on June 18, 2003.

In the first count of his December 1, 2008 complaint, plaintiff alleged that the fee charged was unreasonable and violated R.P.C. 1.5(a). In the second count, plaintiff alleged that defendants "failed to perform in accordance with our agreement."<sup>2</sup> Defendant's answer to the original amended complaint, which included a demand for an affidavit of merit, was filed on December 30, 2008.

Plaintiff asserts on appeal, as he did during oral argument before the motion judge, that his cause of action does not require an affidavit of merit as it makes only contract and not tort claims.<sup>3</sup> He couched the language of his complaint so as to fall within the six-year contract statute of limitations, N.J.S.A. 2A:14-1, as opposed to a malpractice action, which he believed would be barred by the two-year statute of limitations

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<sup>2</sup> Plaintiff's third count, raised in an amended complaint, sought relief under the Consumer Fraud Act, N.J.S.A. 56:8-1 to -184. Plaintiff does not dispute the dismissal of that count.

<sup>3</sup> Given the language of the complaint, no special case management conference pursuant to Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144, 147 (2003) would have been conducted as to the status of the affidavit of merit, as the complaint was deliberately drafted to sound in contract not professional malpractice.

for personal injuries. N.J.S.A. 2A:14-2. It is not clear if he was aware that claims for legal malpractice are included within the six-year limitations period set forth in N.J.S.A. 2A:14-1. Our decision affirming plaintiff's usury conviction issued on October 13, 2004. The order regarding the disputed forfeiture agreement issued October 16, 2003. To reiterate, his complaint was filed December 1, 2008.

Defendants' motion to dismiss was heard on March 20, 2009. Almost as an afterthought as oral argument was ending, plaintiff said to the motion judge that, should the court determine an affidavit of merit was required, he should be given "enough time" to obtain one because he acted upon the "assumption" that none was required. In a similar fashion, plaintiff requests in his reply brief that if we conclude that an affidavit of merit is necessary, we allow him "the (60) day extension as provided by N.J.S.A. 2A:53A-27."

On February 15, 2008, months prior to the filing of his complaint, plaintiff obtained a letter from an attorney stating that after reviewing the brief filed by defendants, it was his opinion that the ineffective assistance of counsel argument they raised on the direct appeal would have more properly been made in an application for post-conviction relief. See R. 3:22. The letter also opined: "the actual drafting of his brief I

estimate to have taken a lawyer or paralegal of normal competence no more than ten to fifteen hours of diligent attention."

The motion court's decision to dismiss relied almost exclusively upon Couri v. Gardner, 173 N.J. 328 (2002). In Couri, the plaintiff sought damages against a psychiatrist who released his preliminary report regarding visitation to the plaintiff's wife, and the child's guardian ad litem, without authorization. Id. at 330-31. The plaintiff contended this unauthorized dissemination of the report was a breach of contract. Ibid. The plaintiff did not file an affidavit of merit, and the trial court dismissed his complaint for his failure to do so on the basis that the action was actually for malpractice and not breach of contract. Id. at 331. We affirmed. Ibid.

The Supreme Court reinstated the complaint, however, as it determined the action was indeed for breach of contract and not malpractice. Id. at 335. The Court went on to definitively address the issue of whether the statute applies to breach of contract claims, which the Court determined it did not. Id. at 339. In doing so, it framed the question in this fashion: whether a claimant's "underlying factual allegations . . . require proof of a deviation from the professional standard of

care for that specific profession." Id. at 341. "If such proof is required," an affidavit of merit is necessary, unless some exception applies. Ibid.

We agree with the motion court's analysis in this case, that the underlying allegations require proof of a deviation from a professional standard of care. In order to establish that defendants charged him an unreasonable fee, plaintiff requires expert testimony.

It is not surprising that he obtained a letter from an attorney in support of his claims, as otherwise he could not prove that the amount charged was unreasonable. Plaintiff intended to rely upon the attorney's professional opinion that the brief filed on the direct appeal should not have taken more than ten to fifteen hours to prepare. Similarly, plaintiff relied on the letter's suggestion that defendants committed some impropriety by raising the ineffective assistance of counsel issue on direct appeal as opposed to post-conviction relief. The letter, however, does not satisfy the statutory requirements either as to form or substance. See N.J.S.A. 2A:53A-27. The document was not an affidavit. It does not state that, in the opinion of the author, there was a "'reasonable probability' of professional negligence." Ferreira, supra, 178 N.J. at 150.

In sum, in order to establish his claims, plaintiff must prove that the amount charged was excessive, and that the quantum and quality of work performed was worth less than the fee he paid. In order to prevail, he must show that defendants deviated from professional standards of care. Plaintiff's allegations require an affidavit of merit, unlike the facts in Couri, or the example provided in that case of a licensed professional who is sued by a patient who falls in his or her office. Id. at 341. See also Balthazar v. Atl. City Med. Ctr., 358 N.J. Super. 13, 27 (App. Div.), certif. denied, 177 N.J. 221 (2003) (causes of action that require proof of deviation from a standard of professional care require an affidavit of merit regardless of the "label").

Two additional points should be made. First, plaintiff is correct that an additional sixty days in which to supply an affidavit of merit is permitted by statute, N.J.S.A. 2A:53A-27. That extension, however, requires a showing of good cause. Ibid. No such showing has been made here. Self-representation is not the equivalent of good cause. Hyman Zamft & Manard v. Cornell, 309 N.J. Super. 586, 593 (App. Div. 1998). Plaintiff's ignorance of the law, if that is what occurred here, is neither an excuse for the omission nor good cause for an extension of time in which to comply with the statute. See Balthazar, supra,

358 N.J. Super. at 26 (citing Palanque v. Lambert-Woolley, 327 N.J. Super. 158, 164 (App. Div. 2000), rev'd on other grounds, 168 N.J. 398 (2001)).

Second, both during oral argument and in his written submissions, plaintiff suggests that the retainer agreement required defendants to supply him with monthly billings. We do not read the agreement in that manner, and because the agreement did not specify that the funds would be held in the attorney's trust account, no such billings were required by any rule of professional conduct. See In re Stern, supra, 92 N.J. at 619. Plaintiff confuses language in the agreement describing monthly billings for "disbursements" having to do with extraordinary expenses, over and above legal fees, with monthly billings which would document draws against the \$45,000. Similarly, plaintiff misconstrues the language in the agreement regarding the \$300 hourly rate. Had defendants exhausted the \$45,000 retainer and billed plaintiff for additional fees, the calculation would have been made at the rate of \$300 per hour. The agreement clearly states that the \$45,000 retainer was a "minimum fee" and that only in the event that retainer was completely depleted would plaintiff be charged additional money, and clarifies that the rate would be \$300 per hour. This language did not obligate defendants to send plaintiff monthly statements either.

As the motion court said, plaintiff "is not a babe in the woods. This is not somebody who was taken advantage by some high pressured attorneys. He knew exactly what he was doing and what he was getting into." Furthermore, the agreement was clear and explicit. In order to pursue this claim defendant requires an affidavit of merit, as his real challenge is that defendants deviated from a professional standard of care in the manner in which they charged and represented him.

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.



CLERK OF THE APPELLATE DIVISION