SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0645-15T1

LAWRENCE V. LONGHI,

Plaintiff-Appellant,

v.

STARR, GERN, DAVISON & RUBIN, PC, and ALLAN R. MORDKOFF, ESQ.,

Defendants-Respondents,

and

WILLIAM B. JONES, II, ESQ., SIMIO & JONES, LLP, RICHARD SULES, ESQ., and STOCKSCHLAEDER MCDONALD & SULES, PC,

Defendants.

Argued October 24, 2017 - Decided November 14, 2017

Before Judges Carroll and Leone.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-5506-13.

Anthony Scordo, III argued the cause for appellant (Law Offices of Stueben & Scordo, attorneys; Mr. Scordo, on the brief).

Lisa Besson Geraghty argued the cause for respondent Starr, Gern, Davison & Rubin, PC, (Starr, Gern, Davison & Rubin, PC, attorneys; Ms. Geraghty, on the brief).

PER CURIAM

Plaintiff Lawrence V. Longhi appeals from summary judgment orders dismissing his legal malpractice action against defendants Starr, Gern, Davison, & Rubin, P.C. (Starr Gern or the Firm), Ronald Davison, Esq., Richard Welch, Esq., and Allan R. Mordkoff, Esq. For the reasons that follow, we affirm.

I.

Plaintiff's claim of legal malpractice arises out of a failed business relationship. Because this motion was decided under Rule 4:46, we recite the facts as presented by plaintiff, the non-moving party. Robinson v. Vivorito, 217 N.J. 199, 203 (2014) ("We derive the facts viewed in the light most favorable to plaintiff from the record submitted in support of and in opposition to defendants' motion for summary judgment.").

In March 2003, plaintiff, acting on behalf of his closely-held companies Afgamco, Inc. and Longhi Associates, Inc., entered into a Memorandum of Understanding (the Agreement) with the Michael Baker Corporation and Weidlinger Associates, Inc. (collectively referred to as the Baker Defendants) to jointly undertake infrastructure development projects in Afghanistan and share in

the profits. The Agreement specifically provided "a Joint Venture (JV) will be established to prosecute the work . . . . [Plaintiff] will be paid a commission based on the magnitude of the work secured." According to plaintiff, following the United States military intervention in Iraq, the Baker Defendants agreed to expand the scope of the Agreement to Iraq as well.

Plaintiff's relationship with the Baker Defendants deteriorated when he learned they accepted contracts from the U.S. Army Corps of Engineers to build army bases in Iraq for the Afghani army, a project valued at over two billion dollars. Plaintiff never received notice of these government contracts from the Baker Defendants.

The Underlying Litigation

Plaintiff maintained that the Baker Defendants procured contracts with the assistance of plaintiff and his companies but failed to advise plaintiff and his companies of the execution of the contracts or compensate them in accordance with the Agreement. Consequently, plaintiff retained Starr Gern as legal counsel to pursue a breach of contract action. The retainer agreement provided for compensation to Starr Gern on a contingent fee basis, and allowed the Firm to withdraw as counsel under certain conditions, including if Starr Gern determined that plaintiff's

case would not recover a judgment sufficient to warrant pursuing the litigation.

Starr Gern filed a complaint on behalf of plaintiff and his companies against the Baker Defendants in September 2005 (the underlying litigation). The complaint alleged, in pertinent part, breach of contract and fraud.

On April 30, 2007, Starr Gern provided plaintiff with a detailed memorandum containing "an overview of th[e] case as it [] stands from a factual, legal and procedural standpoint." The memorandum detailed available theories of recovery and concluded that

> even if [Starr Gern is] successful in gaining access to all the information we seek . . . . [t]his would require a significant investment of our own, [] but if we were to successfully develop the evidence [], the returns could be substantial, both in terms of likelihood of success and of eventual damages.

Four days later, on May 3, 2007, Starr Gern sent a letter notifying plaintiff the Firm was withdrawing as counsel, and that "in our meeting today it was agreed that you will engage new counsel to pursue this case." The letter also advised plaintiff his new counsel should "contact [Starr Gern] to make arrangements for the transition of professional responsibility[.]"

That same day, the Baker Defendants' counsel sent a letter to Starr Gern enclosing two contracts previously entered into

between the Baker Defendants and the U.S. Army Corps of Engineers Transatlantic Program Center. According to plaintiff, Starr Gern failed to divulge this information to plaintiff or his successor counsel.

In June 2007, Starr Gern filed a motion to be relieved as plaintiff's counsel on the basis that "irreconcilable differences" had developed in their relationship. Plaintiff responded by letter to the court, indicating his "dissatisfaction with the timing and justification for the withdrawal[,]" but also noting "that if [Starr Gern] do[es] not wish to represent me any longer, then I do not want them as my attorneys."

At this time, plaintiff had a pending discovery motion to compel the Baker Defendants to release contracts pertinent to the underlying suit, and a motion to extend discovery. After Starr Gern withdrew, the court stayed the case for forty-five days so plaintiff could retain new counsel. The court also sua sponte withdrew both discovery motions and allowed them to be refiled after the stay was lifted and new counsel retained.

Plaintiff retained new counsel in October 2007, but that firm subsequently withdrew in February 2008. Thereafter, plaintiff retained defendant Mordkoff, who had previously worked on the case at Starr Gern before leaving the Firm. According to plaintiff, neither Starr Gern, successor counsel, nor Mordkoff, ever re-filed

the motion to compel the Baker Defendants to release the contracts awarded to them in Afghanistan and Iraq.

At the close of discovery, the Baker Defendants moved for summary judgment. The court granted the motion, determining that

> federal [procurement] policy [ ] prohibits the use or employment of any person who is compensated on a contingency fee basis by government contractors to secure contracts with the federal government. . . . [E]ven if any Army Corps of Engineers contracts were obtained through plaintiff's efforts, federal [procurement] law bars plaintiff's claim for a finder's fee.
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> . . . .
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> Congress has provided two exceptions to this rule, bona fide employees and bona fide established commercial or selling entities. Plaintiff does not suggest that his efforts fall within either exception.
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> [(Emphasis added).]

The trial court dismissed the underlying action with prejudice on July 18, 2008. Plaintiff did not appeal.

The Malpractice Action

Plaintiff commenced the present legal malpractice action on January 13, 2013, alleging Starr Gern failed to disclose material information to him obtained in discovery, including the contracts enclosed with the May 3, 2007 letter from the Baker Defendants' counsel, and represented to the court and plaintiff that his lawsuit was meritless.

During the malpractice litigation, plaintiff produced an expert report authored by Michael P. Ambrosio,[1] who opined:

> the facts in the instant case clearly manifest the existence of the required elements to establish [d]efendant[s'] liability for legal malpractice.
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> . . . .
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> [Defendants] failed to properly advise [p]laintiff regarding his claims and failed to turn over to [p]laintiff or successor counsel material evidence of the existence of contracts that [the Baker Defendants] had obtained and . . . had agreed to pay [p]laintiff's company one third of the profits on those contracts.
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> Defendant Lawyers were negligent in their failure to properly respond to the alleged applicability of . . . 48 C.F.R. 3.400-3.4[06].[2]

At the conclusion of discovery, Starr Gern and its individual representatives, Davison and Welch, moved for summary judgment. The motion judge conducted oral argument and framed plaintiff's malpractice action as

> based on an allegation that Starr[] Gern [ ] failed to appraise [plaintiff] of [ ]

[1] In his December 29, 2014 report, Ambrosio identified himself as "an expert on the legal profession, legal ethics and legal malpractice." Among his qualifications, Ambrosio served as a Professor of Law at Seton Hall Law School for forty-four years, during which he taught a course in Professional Responsibility for thirty-six years.

[2] These regulations provide the exceptions to the bar of the federal procurement statute.

> correspondence evidencing contracts procured by the Baker [D]efendants . . . to which [plaintiff] allege[s] an entitlement to a finder's fee commission . . . [thereby] precluding [p]laintiff from procuring [] discovery.
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> . . . .
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> Plaintiff [further] contends that Starr Gern never advised [him] of any related federal statutes [pertinent to his case,] and never advised him on the subject. . . . Plaintiff alleges that by withdrawing when they did, Starr[] Gern knew that plaintiff and new [c]ounsel would never get fully and properly prepared in time for trial . . . and failed to turn over key documents necessary to successfully litigate the case[.]

On January 23, 2015, the court granted summary judgment in favor of Starr Gern, Davison, and Welch. The motion judge found:

> [t]he underlying case was dismissed because the contracts presented to the [c]ourt were between the Baker [D]efendants and the U.S. Army Corp[s] of Engineers. Finder's fees in connection with those contracts are specifically prohibited by the federal procurement statute[.] . . . So the [c]ourt found that plaintiff could not prevail as a matter of law and granted summary judgment for the Baker [D]efendants.
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> . . . .
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> [I]n granting summary judgment, the [c]ourt observed that plaintiff was unable to proffer any evidence of any contract that was awarded to the Baker [D]efendants as a result of plaintiff's effort, despite almost 900 days of discovery. <u>In addition, it is clear that the [c]ourt considered the exceptions to the federal procurement bar to a finder's fee.</u>

[(Emphasis added).]

Mordkoff thereafter moved for summary judgment, arguing plaintiff was collaterally estopped from seeking damages based on the court's ruling in the underlying action that the federal procurement law barred his breach of contract action against the Baker Defendants. The motion judge agreed, finding "this is a case where collateral estopp[el] does apply." On August 7, 2015, the judge entered an order dismissing the malpractice action against Mordkoff. Plaintiff now appeals the summary judgment orders.[3]

II.

When reviewing the grant of summary judgment, we analyze the decision applying the "same standard as the motion judge." Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)).

> That standard mandates that summary judgment be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving

[3] Plaintiff's notice of appeal also references a companion order entered on August 7, 2015, denying plaintiff's motion to extend discovery, which the court concluded was rendered moot by the entry of summary judgment. However, plaintiff has not briefed that issue. An issue not briefed is deemed waived. See Gormley v. Wood-El, 218 N.J. 72, 95 n.8 (2014).

> party is entitled to a judgment or order as a matter of law."
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> [Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016) (quoting R. 4:46-2(c)).]

"To defeat a motion for summary judgment, the opponent must 'come forward with evidence' that creates a genuine issue of material fact." Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014) (quoting Horizon Blue Cross Blue Shield of N.J. v. State, 425 N.J. Super. 1, 32 (App. Div.), certif. denied, 211 N.J. 608 (2012)), certif. denied, 220 N.J. 269 (2015). "[C]onclusory and self-serving assertions by one of the parties are insufficient to overcome the motion[.]" Puder v. Buechel, 183 N.J. 428, 440-41 (2005) (citations omitted).

In a legal malpractice action, "summary disposition is appropriate only when there is no genuine dispute of material fact." Ziegelheim v. Apollo, 128 N.J. 250, 261 (1992). "When no issue of fact exists, and only a question of law remains, [we] afford[] no special deference to the legal determinations of the trial court." Templo Fuente De Vida, supra, 224 N.J. at 199 (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

A legal malpractice action has three essential elements: "(1) the existence of an attorney-client relationship creating a duty

of care by the defendant attorney, (2) the breach of that duty by the defendant, and (3) proximate causation of the damages claimed by the plaintiff." Jerista v. Murray, 185 N.J. 175, 190-91 (2005) (quoting McGrogan v. Till, 167 N.J. 414, 425 (2001)).

The first element requires an attorney "to exercise on his client's behalf the knowledge, skill and ability ordinarily possessed and exercised by members of the legal profession similarly situated and to employ reasonable care and prudence in connection therewith." Lamb v. Barbour, 188 N.J. Super. 6, 12 (App. Div. 1982), certif. denied, 93 N.J. 297 (1983). At a minimum, an attorney must take "any steps necessary" to properly handle a case, including carefully investigating the facts, formulating a legal strategy, filing appropriate papers, and communicating with the client. Ziegelheim, supra, 128 N.J. at 260-61. The second element requires a breach of these duties. As to the third element, plaintiff must prove he suffered damages as a proximate consequence of defendants' breach of duty. Garcia v. Kozlov, Seaton, Romanini & Brooks, P.C., 179 N.J. 343, 357 (2004).

In the present case, there is no dispute that defendants owed plaintiff a duty of care. We thus focus our analysis on whether plaintiff adduced sufficient competent, credible evidence that defendants breached that duty and, if so, whether such breach was the proximate cause of plaintiff's damages.

Plaintiff contends Starr Gern breached its duty of care by (1) failing to disclose material information obtained during discovery; (2) failing to raise the federal procurement regulations in prosecuting the underlying matter; and (3) misrepresenting to both plaintiff and the lower court that the underlying lawsuit was meritless.

As to Starr Gern's "fail[ure] to disclose material discovery information[,]" plaintiff points to the two contracts Starr Gern received from the Baker Defendants' counsel in his May 3, 2007 letter. He argues Starr Gern never advised him or successor counsel it received those contracts, thus resulting in a breach of the Firm's duty of care. Plaintiff supports his argument with the May 3, 2007 letter that shows Starr Gern received the two contracts in discovery. In moving for summary judgment in the malpractice action, Starr Gern's counsel submitted a certification disputing the alleged non-disclosure. Thus, whether Starr Gern disclosed these contracts to plaintiff or successor counsel in the underlying action is a materially disputed fact.

As to Starr Gern's failure to inform plaintiff of federal procurement law and accompanying exceptions, it is well-established that "[i]gnorance of the law does not diminish [an attorney's] responsibility." In re Rosner, 113 N.J. 2, 16 (1988); see also Procanik by Procanik v. Cillo, 226 N.J. Super. 132, 150

(App. Div.) ("If the law is settled, [an attorney] is expected to know what it is and state it accurately."), certif. denied, 113 N.J. 357 (1988).

Here, Starr Gern compiled an eight-page memorandum providing plaintiff with "an overview of this case as it currently stands from [a] factual, legal and procedural standpoint." This analysis completely fails to address federal procurement policy or its exceptions. A reasonable juror could certainly conclude this omission was rooted in negligence and Starr Gern failed to properly advise plaintiff with respect to the merits of the underlying action.

Assuming Starr Gern was negligent in withholding the contract documents and failing to advise plaintiff on federal procurement law, we next address whether such negligence was the proximate cause of plaintiff's harm. For plaintiff to establish he was damaged by defendants' negligence, plaintiff must have proffered sufficient evidence that otherwise he would have prevailed and obtained damages in the underlying litigation. He thus must have proffered sufficient evidence that his companies fell within an exception to the bar of the federal procurement policy.

"To establish the requisite causal connection between a defendant's negligence and plaintiff's harm, plaintiff must present evidence to support a finding that defendant's negligent

conduct was a 'substantial factor' in bringing about plaintiff's injury, even though there may be other concurrent causes of the harm." Froom v. Perel, 377 N.J. Super. 298, 313 (App. Div.) (quoting Conklin v. Hannoch Weisman, 145 N.J. 395, 419 (1996)), certif. denied, 185 N.J. 267 (2005).

> The simplest understanding of [proximate cause] in attorney malpractice cases arises from the case-within-a-case concept. For example, if a lawyer misses a statute of limitations and a complaint is dismissed for that reason, a plaintiff must still establish that had the action been timely filed it would have resulted in a favorable recovery.
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> [Conklin, supra, 145 N.J. at 417.]

In granting summary judgment in the underlying action, the court found plaintiff failed to proffer evidence of any contract awarded to the Baker Defendants as a direct result of plaintiff's efforts that would entitle plaintiff to a commission. Arguably, however, a jury could find plaintiff's inability to produce the two contracts at issue resulted from Starr Gern's negligence in failing to disclose them. Moreover, in opposing Starr Gern's summary judgment motion in the malpractice action, plaintiff detailed the efforts of his companies that led to the procurement of the two contracts enclosed with the May 3, 2007 letter that were valued at over two billion dollars. Again, if accepted by a jury, this evidence could have supported a finding that Starr

Gern's negligence led to the dismissal of the underlying action and plaintiff was damaged as a result.

Nonetheless, we conclude that plaintiff's malpractice claims against all defendants fail because he did not adduce competent evidence that the underlying action against the Baker Defendants was not barred under federal procurement policy. To establish legal malpractice, plaintiff was "required to show that competent, credible evidence existed to support each of the elements of that negligence action[.]" Cortez, supra, 435 N.J. Super. at 598.

In granting summary judgment in the underlying action, the court concluded that federal procurement policy barred plaintiff's recovery. The court noted bona fide employees and bona fide established commercial or selling entities constituted exceptions to this policy, and "[p]laintiff does not suggest that his efforts fall within either exception."

Federal procurement policy, 41 U.S.C.A. § 3901,[4] requires that

> [e]very contract awarded after using procedures other than sealed-bid procedures shall contain a suitable warranty . . . by the contractor that no person or selling agency has been employed or retained to solicit or secure the contract on an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except for bona fide employees or bona fide established commercial or selling agencies the contractor maintains to secure business.

[4] The same policy exists under 10 U.S.C.A. § 2306.

[(Emphasis added).]

48 C.F.R. § 3.400 through 48 C.F.R. § 3.406 "provide[] policies and procedures that restrict contingent fee arrangements for soliciting or obtaining Government contracts to those permitted by 10 U.S.C.[A.] § 2306(b) and 49 U.S.C.[A.] § 3901." 48 C.F.R. § 3.400 (2017). Section 3.402(b) contains the exception which, plaintiff argues, would have allowed him to survive summary judgment in the underlying action had counsel properly researched and presented it. The exception permits "contingent fee arrangements between contractors and bona fide employees or bona fide agencies." 48 C.F.R. § 3.402(b) (2017).

A bona fide agency is "an established commercial or selling agency, maintained by a contractor for the purpose of securing business, that neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds itself out as being able to obtain any Government contract or contracts through improper influence." 48 C.F.R. § 3.401 (2017). Five factors are relevant in making this determination:

> (1) whether the fees are commensurate with the nature and extent of the services rendered by the company and not excessive as compared with the fees customarily allowed for similar services; (2) whether the company had adequate knowledge of the products and business of the party it contracted with; (3) whether there has been continuity in the relationship between the parties; (4) whether the company

> is an established concern; and (5) whether the arrangement is not confined to obtaining government contracts.
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> [Puma Indus. Consulting, Inc. v. Daal Assocs., Inc., 808 F.2d 982, 985 (2d Cir. 1987).]

Improper influence is defined as "any influence that induces or tends to induce a Government employee or officer to give consideration or to act regarding a Government contract on any basis other than the merits of the matter." Ibid.

Plaintiff argues that his closely-held companies, Afgamco, Inc. and Longhi Associates, Inc., fall within the exceptions to the bar of the federal procurement statute. However, plaintiff's certification in opposition to defendants' summary judgment motions in the malpractice action is silent on this issue and does not address any of the factors that would qualify him or his companies as bona fide employees or agencies. Plaintiff's expert, Ambrosio, did not submit a certification addressed to this point, and in his report he merely referenced "Exhibit A" to plaintiff's certification as "documentation" that "clearly demonstrates how [plaintiff's] company was a bona fide agency." "Exhibit A," in turn, is a copy of the March 17, 2003 Agreement that merely spells out the commission arrangement between plaintiff and the Baker Defendants and likewise does not address the factors that would demonstrate a regulatory exception.

In short, plaintiff failed to provide any competent factual support for his contention that he fell within an exception to the bar of the federal procurement policy. Consequently, he did not establish he was entitled to damages from the Baker Defendants in the underlying action, or that any legal malpractice by defendants in that action was the proximate cause of any loss.

Affirmed.