Rel: January 17, 2020

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1180255

Ex parte Sonya C. Edwards and Edwards Law, LLC

PETITION FOR WRIT OF MANDAMUS

(In re: Ivan Keith Gray

v.

Sonya C. Edwards and Edwards Law, LLC)

(Jefferson Circuit Court, CV-17-904545)

STEWART, Justice.

Sonya C. Edwards and Edwards Law, LLC (hereinafter referred to collectively as "Edwards"), petition this Court

for a writ of mandamus directing the Jefferson Circuit Court ("the trial court") to enter a summary judgment in their favor in an action filed against them by Ivan Keith Gray. For the reasons expressed below, we grant the petition and issue the writ.

Facts and Procedural History

According to the materials submitted by the parties, Sonya previously represented Gray in proceedings in federal court. On June 24, 2015, after mediation and a settlement, those proceedings concluded with the entry of a final judgment. Thereafter, Gray sought to set aside the settlement, and Sonya terminated her representation of Gray.[1]

On October 27, 2017, Gray filed a complaint in the trial court against Edwards in which he alleged that Edwards had entered into a contract with Gray in June 2014 in which Sonya agreed to represent Gray in the federal proceedings in exchange for a contingency fee of 50%. Gray alleged that he paid a total retainer fee in the amount of $14,380.85 to cover expenses. According to Gray's complaint, when his federal case concluded, Edwards disclosed that the actual expenses amounted

[1]Despite the termination of her representation, Sonya was required to appear for various hearings in the federal court.

to $4,516.77, and Edwards, Gray alleged, owed Gray a refund of $9,864.08. In his complaint, Gray alleged that "on or about September 16, 2015," Edwards converted his retainer "despite repeated demands" for the return of the funds and that Edwards "breached the contract of employment and representation by converting the retainer funds" and "by paying herself/itself expenses not actually incurred."

Edwards moved to dismiss the action, and, after the trial court denied her motion, Edwards filed a petition for the writ of mandamus with this Court. On July 31, 2018, this Court summarily denied the petition without an opinion (case no. 1170895).

On November 9, 2018, Edwards filed a motion for a summary judgment in which she asserted, among other things, that Gray's claims were unauthorized at law and untimely. Edwards supported her summary-judgment motion with an affidavit. On November 27, 2018, Gray filed a response in opposition to Edwards's summary-judgment motion in which he asserted that he could not properly respond to Edwards's motion because he had been unable to take Sonya's deposition and because she had failed to respond to discovery. Gray also asserted that

Edwards informed him in a letter dated January 5, 2017, that she kept the remaining retainer funds as payment for the time spent on Gray's case. Gray did not support his response with any evidentiary material, and he did not file an affidavit pursuant to Rule 56(f), Ala. R. Civ. P.[2]

On November 27, 2018, Edwards filed a motion pursuant to Rule 56(e), Ala. R. Civ. P., seeking to strike Gray's response because it was not supported with evidence. On November 30, 2018, the trial court held a hearing on Edwards's summary-judgment motion.[3] On December 7, 2018, the trial court denied Edwards's summary-judgment motion without explanation. On December 26, 2018, Edwards filed this petition for a writ of mandamus.

Standard of Review

> "A writ of mandamus is an extraordinary remedy which requires a showing of (a) a clear legal right

[2]Rule 56(f) permits a trial court to deny a summary-judgment motion or to "order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had" if "it appear[s] from the affidavits of a party opposing the [summary-judgment] motion that the party cannot, for reasons stated, present by affidavit facts essential to justify the party's opposition."

[3]Although some evidence was received at that hearing, that evidence was relevant to potential sanctions and did not support the summary-judgment motion.

> in the petitioner to the order sought, (b) an imperative duty on the respondent to perform, accompanied by a refusal to do so, (c) the lack of another adequate remedy, and (d) the properly invoked jurisdiction of the court. Ex parte Bruner, 749 So. 2d 437, 439 (Ala. 1999)."

Ex parte McInnis, 820 So. 2d 795, 798 (Ala. 2001).

As a general rule, a petition for the drastic and extraordinary remedy of a writ of mandamus is not the means by which to seek review of the merits of an order denying a motion for a summary judgment. Ex parte Jackson, 780 So. 2d 681, 684 (Ala. 2000). This Court, however, has recognized a narrow set of circumstances in which a petition for a writ of mandamus is available to review an order denying a motion for a summary judgment. In Ex parte Hodge, 153 So. 3d 734, 749 (Ala. 2014), this Court considered a petition for a writ of mandamus involving the denial of a summary-judgment motion that had been premised upon a statute-of-limitations defense. This Court extended relief because the defendant had "demonstrated, from the face of the complaint, a clear legal right to relief and the absence of another adequate remedy." 153 So. 3d at 749. We explained that "mandamus [was] necessary in order to avoid the injustice that would result from the unavailability of any other adequate remedy." Id. See also Ex

parte U.S. Bank Nat'l Ass'n, 148 So. 3d 1060, 1065 (Ala. 2014); and Ex parte Sanderson, 263 So. 3d 681, 687–88 (Ala. 2018) (explaining that "[t]his Court has recognized that an appeal is an inadequate remedy in cases where it has determined that a defendant should not have been subjected to the inconvenience of litigation because it was clear from the face of the complaint that the defendant was entitled to a dismissal or to a judgment in its favor"(citing Hodge, 153 So. 3d at 749, and U.S. Bank, 148 So. 3d at 1065)).

Discussion

Edwards argues that the Alabama Legal Services Liability Act, § 6-5-570 et seq., Ala. Code 1975 ("the ALSLA"), is the "sole vehicle" under which Gray can assert a claim against her as a legal-service provider and that, because he pleaded in his complaint only claims of conversion and breach of contract, rather than asserting claims under the ALSLA, her summary-judgment motion on those claims should be granted. Edwards also argues that, even if Gray's claims are construed to be ALSLA claims, Gray's claims are barred by the two-year statute of limitations for ALSLA claims. See § 6-5-574.

Edwards's argument, insofar as she challenges the nature of the claims Gray pleaded, is akin to an argument challenging

a ruling on a Rule 12(b)(6), Ala. R. Civ. P., motion to dismiss for failure to state a claim, which is not reviewable by mandamus proceedings. See Ex parte Nautilus Ins. Co., 260 So. 3d 823, 831 (Ala. 2018)("[T]he denial of a motion to dismiss based upon Rule 12(b)(6) is not reviewable by a petition for a writ of mandamus."(citing Ex parte Kohlberg Kravis Roberts & Co., L.P., 78 So. 3d 959 (Ala. 2011))). Her argument that Gray's claims fall under the ALSLA and are subject to the two-year limitations period in the ALSLA is, however, reviewable by a petition for a writ of mandamus.

Gray argues that his claims do not fall within the scope of an ALSLA action and are, instead, claims of conversion and breach of contract that are subject to different limitations periods. It is well settled, however, that a legal-service-liability action under the ALSLA is the sole "form and cause of action against legal service providers in courts in the State of Alabama." § 6-5-573, Ala. Code 1975. See also Yarbrough v. Eversole, 227 So. 3d 1192, 1198 (Ala. 2017). An action under the ALSLA "embraces any form of action in which a litigant may seek legal redress for a wrong or an injury and every legal theory of recovery, whether common law or

statutory," against a legal-service provider. § 6-5-572(1), Ala. Code 1975.

Gray also argues that the ALSLA is inapplicable because, he says, his claims against Edwards arose after the conclusion of her legal services and do not involve allegations of the breach of the standard of care. The ALSLA is applicable "'only to lawsuits based on the relationship between "legal service providers" and those who have received legal services.'" Ex parte Daniels, 264 So. 3d 865, 869 (Ala. 2018)(quoting Cunningham v. Langston, Frazer, Sweet & Freese, P.A., 727 So. 2d 800, 804 (Ala. 1999)). In Yarbrough, this Court recognized that some claims that fall within the scope of the ALSLA do not require allegations or proof of an attorney's failure to exercise due care. 227 So. 3d at 1198. We noted that Yarbrough's legal-malpractice claims, although "different than the usual legal-malpractice action alleging a failure of counsel to exercise due care," were "subsumed under" the ALSLA, even though "the alleged wrongdoing ha[d] nothing to do with the negligent or omissive provision of legal services"; rather, "the alleged wrongdoing" was that the attorney and the law firm "accepted [the client's] payments for what they knew would be futile legal services." 227 So. 3d at 1197-98.

Gray's claims against Edwards arose out of the attorney-client relationship between Gray and Sonya; therefore, his claims fall under the ALSLA and its provisions. See Ex parte Daniels, 264 So. 3d at 869. See also Sessions v. Espy, 854 So. 2d 515 (Ala. 2002)(holding that clients could not bring common-law claims against an attorney because those claims arose out of the attorney-client relationship and were required to be brought under the ALSLA).

Pursuant to § 6-5-574(a) of the ALSLA, "[a]ll legal service liability actions against a legal service provider must be commenced within two years after the act or omission or failure giving rise to the claim." Although that statute provides exceptions in cases involving an undiscovered cause of action, Gray did not plead any facts suggesting fraud or otherwise assert that a cause of action could not reasonably have been discovered within the two-year limitations period.

Gray argues in his response brief, as he argued in his response to Edwards's summary-judgment motion and at the summary-judgment hearing, that he did not discover that Edwards was not returning his unused retainer funds until he received a letter from her in January 2017; he asserts that the two-year limitations period began to run at that point. He

offered no evidence in support of that assertion. Arguments of counsel and statements contained in motions and briefs are not evidence. Fountain Fin., Inc. v. Hines, 788 So. 2d 155, 159 (Ala. 2000). Our mandamus review is limited to whether Edwards has demonstrated that, based on the face of Gray's complaint, Gray's action is barred. Hodge, 153 So. 3d at 745-46.

Gray alleged in his complaint that Edwards committed the actions underlying his claims of conversion and breach of contract "on or about September 16, 2015." Accordingly, the "act or omission or failure giving rise to the claim" occurred on September 16, 2015, and that is the operative date from which to measure the two-year limitations period in § 6-5-574(a).[4] Gray did not file his action until October 27, 2017, which was beyond the two-year limitations period.

[4]We acknowledge that the determination of when a cause of action accrues has been the subject of disagreement and uncertainty. This Court has applied both the "damage approach," see Michael v. Beasley, 583 So. 2d 245 (Ala. 1991), and the "occurrence approach," see Ex parte Panell, 756 So. 2d 862 (Ala. 1999) (a plurality opinion), and Ex parte Seabol, 782 So. 2d 212 (Ala. 2000). See also Denbo v. DeBray, 968 So. 2d 983, 988-89 (Ala. 2006), and Coilplus-Alabama, Inc. v. Vann, 53 So. 3d 898 (Ala. 2010) (discussing the differing approaches). Our resolution of this mandamus petition does not require us to apply or to choose among the different approaches.

Accordingly, Edwards has demonstrated a clear legal right to have a summary-judgment entered in her favor.

PETITION GRANTED; WRIT ISSUED.

Parker, C.J., and Bolin, Wise, and Mitchell, JJ., concur.

Shaw and Bryan, JJ., concur in the result.

Sellers, J., dissents.

Mendheim, J., recuses himself.

SELLERS, Justice (dissenting).

I respectfully dissent. The Alabama Legal Services Liability Act, § 6-5-570 et seq., Ala. Code 1975 ("the ALSLA"), is not the exclusive remedy where, as here, Ivan Keith Gray is alleging conversion under a fee agreement, which is a contract between parties--one of whom appears to be an attorney--for remuneration. Because this action involves a contract dispute, not malpractice, Sonya C. Edwards and Edwards Law, LLC (hereinafter referred to collectively as "Edwards"), have not demonstrated from the face of the complaint that the action is barred by the two-year statute of limitations in the ALSLA.

The main opinion attempts to expand the application of the ALSLA to cover any claim so long as there is or has been an attorney-client relationship between the parties. But I note that § 6-5-572(1) of the ALSLA defines "legal service liability action" as: "Any action against a legal service provider in which it is alleged that some injury or damage was caused in whole or in part by the legal service provider's violation of the standard of care applicable to a legal service provider." (Emphasis added.) A careful review of the complaint reveals that this action has nothing to do with a

violation of any standard of care; rather, the action is a common contractual dispute between parties. Elevating the action to implicate the ALSLA because of the existence of an attorney-client relationship is improper. This Court has made clear that the ALSLA applies only to allegations of legal malpractice arising from the performance of legal services. See Fogarty v. Parker, Poe, Adams & Bernstein, LLP, 961 So. 2d 784 (Ala. 2006)(holding that the ALSLA applies only to allegations of legal malpractice, i.e., claims against legal-service providers that arise from the performance of legal services). See also Cunningham v. Langston, Frazer, Sweet & Freese, P.A., 727 So. 2d 800, 804 (Ala. 1999)(holding that "the ALSLA does not apply to an action filed against a 'legal service provider' by someone whose claim does not arise out of the receipt of legal services").

Finally, Rule 56(f), Ala. R. Civ. P., states: "Should it appear from the affidavits of a party opposing the [summary-judgment] motion that the party cannot, for reasons stated, present by affidavit facts essential to justify the party's opposition, the court may deny the motion for summary judgment ...." Although Gray could have filed an affidavit stating his reasoning for not filing an opposition to the motion for a

summary judgment, the trial court held a hearing on that very issue, received substantial briefing from both sides, heard arguments in open court, and issued an order. Thus, the need for filing an affidavit became irrelevant when the discovery issues were subsumed in the hearing culminating in an order. Accordingly, the trial court properly denied Edwards's motion for a summary judgment, apparently concluding that Gray should have the opportunity to depose Sonya C. Edwards in order to properly oppose Edwards's summary-judgment motion. Under these circumstances and at this juncture of the case, I do not agree that Edwards has demonstrated a clear legal right to a summary judgment in her favor.