

STATE OF MINNESOTA
COUNTY OF HENNEPIN

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DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Christopher Roller,

Plaintiff,

vs.

Wagner, Falconer & Judd, Ltd c/o Dan Smith,
Alexander Gese, Bosley Inc., Honorable Judge
Mark Boris

BY _____ DEPUTY
HENN CO. DISTRICT
COURT ADMINISTRATOR

Case Type: Civil Other
Court File No. 27-CV-09-22812

**ORDER GRANTING DEFENDANTS'
MOTIONS FOR SUMMARY JUDGMENT
AND DISMISSING THE CASE**

Honorable Susan N. Burke

INTRODUCTION

This matter came before the Court on April 12, 2010, on Defendants' motions for summary judgment. Plaintiff Christopher Roller appeared pro se. Defendant Wagner, Falconer & Judd, Ltd. was represented by Mark A. Solheim, Esq. Defendants Alexander Gese, and Bosley, Inc. were represented by Richard B. Allyn, Esq. Defendant Mark Boris did not appear.

Mr. Roller has filed a rambling Amended Complaint that contains numerous sensational allegations and claims. Many of the claims have no basis in law, and many of the allegations are contradictory in nature. In denying Defendant Wagner, Falconer & Judd, Ltd.'s (WFJ's) motion to dismiss for failure to state a claim, this Court noted that:

Although Mr. Roller's complaint contains numerous contradictory statements, Mr. Roller does allege that Mr. Smith has given him legal advice while at the same time molesting Mr. Roller's daughter and conspiring to murder Mr. Roller.

(Order Denying Defendants' Motion to Dismiss and Denying Defendant WFJ's Motion for Sanctions, March 5, 2010).

Based on those general and sensational allegations, the Court found that Mr. Roller pleaded sufficient facts to constitute claims for breach of fiduciary duty, assault, battery, and intentional infliction of emotional distress.

Upon the Defendants' motions for summary judgment, the Court now evaluates the evidence that has been produced regarding each claim. The Court finds that with respect to each claim, Mr. Roller has failed to produce any evidence to create a genuine issue of material fact for trial. For that reason, the Defendants' motions for summary judgment are granted, and the case is dismissed.

ANALYSIS

I. Summary Judgment Standard

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. When a summary judgment motion is brought, facts must be viewed in a light most favorable to the nonmoving party. Grondahl v. Bullock, 318 N.W.2d 240, 242 (Minn. 1982). Reasonable doubts must be resolved in favor of the nonmoving party. Nord v. Herreid, 305 N.W.2d 337, 339 (Minn. 1981). Summary judgment is "mandatory against a party who fails to establish an essential element of her claim." Lloyd v. In Home Health, Inc., 523 N.W.2d 2, 3 (Minn. App. 1994).

II. No Genuine Issues Of Material Fact Exist Regarding Whether Defendants Breached A Fiduciary Duty

Mr. Roller claims a conflict of interest with Dan Smith and Defendants. Specifically, Mr. Roller claims a conflict of interest arose when Dan Smith, an attorney at Defendant WFJ, and the other Defendants tried to murder Mr. Roller and molest Mr. Roller's daughter. Mr. Roller cited no common law or statutory authority to support his claim for a conflict of interest. In its Order denying Defendants' motion to dismiss, the Court found that Mr. Roller's conflict of interest claim amounted to a claim for breach of fiduciary duty.

In order to establish that Defendants breached a fiduciary obligation to Mr. Roller, Mr. Roller must produce evidence which shows that Mr. Roller and Defendants were in a fiduciary relationship and that Defendants breached a duty arising from that relationship. See Midland Nat'l Bank of Minneapolis v. Perranoski, 299 N.W.2d 404, 413 (Minn. 1980). The existence of a fiduciary relationship is generally a question of fact. Carlson v. SALA Architects, Inc., 732 N.W.2d 324, 331 (Minn. App. 2007), review denied (Minn. Aug. 21, 2007). Fiduciary relationships arise when one person trusts and confides in another who has superior knowledge and authority. Id. at 330. Traditionally, those owing fiduciary duties include general partners with limited partners, attorneys with clients, and trustees with beneficiaries. Commercial Assocs., Inc. v. Work Connection, Inc., 712 N.W.2d 772, 779 (Minn. App. 2006).

As a threshold matter, the Court must determine whether or not Mr. Roller has produced evidence which would establish an attorney-client relationship between Mr. Roller and Dan Smith or WFJ. Mr. Roller has not alleged an attorney-client relationship with Defendants Alexander Gese, Bosley, Inc., or Judge Mark Boris. An attorney-client relationship is created whenever an individual seeks and receives legal advice from an attorney in circumstances in which a reasonable person would rely on such advice. Gramling v. Mem'l Blood Centers of Minn., 601 N.W.2d 457, 460 (Minn. App. 1999).

Mr. Roller failed to produce any evidence to show the existence of an attorney-client relationship with Dan Smith or anyone at WFJ. In Alexander Gese's affidavit and Dan Smith's response to Mr. Roller's interrogatories, Defendants submitted evidence to the Court that they did not have an attorney-client relationship or a fiduciary relationship with Mr. Roller. Based on the evidence before the Court, there are no genuine issues of material fact that exist for trial as to whether Defendants had an attorney-client relationship with Mr. Roller or that they breached a

fiduciary duty to Mr. Roller.

III. No Genuine Issues Of Material Fact Exist Regarding Whether Defendants Assaulted Mr. Roller Or His Daughter

Mr. Roller further claims that Defendants attempted to murder him and molested his daughter. Mr. Roller cited no common law or statutory authority to support his claims of attempted murder and molestation. In its Order denying Defendants' motions to dismiss, the Court found that Mr. Roller's attempted murder and molestation claims amounted to claims for assault, battery, and intentional infliction of emotional distress.

In order to support a claim for assault, Mr. Roller must produce evidence which shows that Defendants unlawfully threatened Mr. Roller with bodily harm, and that Mr. Roller developed a reasonable apprehension of immediate bodily harm as a result of Defendants' threats. Dahlin v. Fraser, 288 N.W. 851, 852 (Minn. 1939).

Mr. Roller has failed to produce any evidence that Defendants ever threatened to murder him, or that Mr. Roller ever developed a reasonable apprehension of bodily harm. In Alexander Gese's affidavit and Dan Smith's response to Mr. Roller's interrogatories, Defendants submitted evidence to the Court that they did not unlawfully threaten Mr. Roller or cause Mr. Roller to develop a reasonable apprehension of immediate bodily harm. Based on this evidence, the Court finds that no genuine issue of material fact exists as to whether Defendants assaulted Mr. Roller.

Mr. Roller intimated that he might be bringing this action on behalf of his daughter. Still, Mr. Roller came forward with no evidence that anyone in this case molested or threatened his daughter in any way. In fact, there is no admissible evidence in the record as to the identity or existence of this daughter. Mr. Roller has not even made specific allegations about this claimed molestation, let alone come forward with evidence of its occurrence. Thus, there are no genuine issues of material fact as to whether Defendants assaulted a daughter of Mr. Roller.

IV. No Genuine Issues Of Material Fact Exist Regarding Whether Defendants Committed A Battery Against Mr. Roller Or His Daughter

In order to support a claim for battery, Mr. Roller must produce evidence which shows that Defendants caused an intentional, unpermitted, harmful or offensive contact with Mr. Roller. Johnson v. Morris, 453 N.W.2d 31, 40 (Minn. 1990). Again, Mr. Roller has failed to produce any evidence that Defendants ever caused an intentional, unpermitted, harmful or offensive contact with Mr. Roller or any of his daughters. In Alexander Gese's affidavit and Dan Smith's response to Mr. Roller's interrogatories, Defendants submitted evidence to the Court that they did not cause an intentional, unpermitted, harmful or offensive contact. Based on this evidence, the Court finds that no genuine issues of material fact exist for trial as to whether Defendants committed a battery against Mr. Roller or any of his daughters.

V. No Genuine Issue Of Material Fact Exists Regarding Whether Defendants Intentionally Inflicted Emotional Distress On Mr. Roller Or His Daughter

In order to support a claim for intentional infliction of emotional distress, Mr. Roller must produce evidence which shows that: (1) Defendants' conduct was extreme and outrageous; (2) the conduct was intentional or reckless; (3) Mr. Roller or his daughter suffered emotional distress; and (4) the emotional distress was severe. See Tibbets v. Crossroads, Inc., 411 N.W.2d 535, 538 (Minn. 1987). This outrageous conduct is "so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community." Id.

Mr. Roller failed to produce any evidence that Defendants attempted to murder him, molested his daughter, engaged in any conduct that was extreme, outrageous, intentional or reckless, or that he or his daughter suffered severe emotional distress.

In Alexander Gese's affidavit and Dan Smith's response to Mr. Roller's interrogatories, Defendants submitted evidence to the Court that they did not engage in extreme, outrageous

conduct or intentionally cause Mr. Roller or his daughter severe emotional distress. Based on this evidence, the Court finds that no genuine issues of material fact exist as to whether Defendants intentionally inflicted emotional distress on Mr. Roller or his daughter.

VI. Discovery Is Complete In This Matter

Finally, in his motion papers and letters to the Court, Mr. Roller contends that discovery is not complete in this matter. Specifically, Mr. Roller argues that the Court did not hear his motion to compel. Mr. Roller also argues that Defendants have not answered his questions. Finally, Mr. Roller argues that he did not have the chance to depose Defendants.

Mr. Roller did not file a formal motion to compel with the Court in this action. After the discovery deadline passed on January 31, 2010, Mr. Roller fax-filed a letter requesting a telephone conference to discuss discovery. Mr. Roller did not pay the fax filing fee, and therefore this Court did not consider that letter. Even if this Court had considered that letter, Mr. Roller only requested a telephone conference to discuss discovery and not a motion to compel. When Mr. Roller filed an informal letter entitled "Motion to Compel" on April 6, 2010, it was well over six weeks past the Court's dispositive and non-dispositive motion deadline. Therefore, the Court did not consider this letter. Thus, the Court did not have the opportunity to hear or review any alleged motion to compel Mr. Roller may have desired to bring.

Second, Mr. Roller contends that Defendants' refused to answer his interrogatories or answered his interrogatories in an evading and untruthful manner. On the contrary, the Court finds that Defendants appropriately answered each of Mr. Roller's interrogatories. As this Court stated in its January 19, 2010 letter to Mr. Roller and counsel, Defendants' answers were appropriate because Mr. Roller's interrogatories called for Defendants to make legal conclusions not within the scope of allowable discovery under Rule 26.02.

Third, at the hearing on this matter, Defendants informed the Court that they offered Mr. Roller the chance to conduct written depositions of Defendants on January 26, 2010. Defendants informed the Court that Mr. Roller refused to conduct written depositions at that time. At the hearing on this motion, Mr. Roller did not dispute this. Additionally, in response to Mr. Roller's numerous letters, the Court offered Mr. Roller the chance to conduct further written depositions past the discovery deadline and prior to the summary judgment hearing on April 12, 2010. Instead of providing Defendants with deposition questions, Mr. Roller provided only Defendant WFJ with a third set of interrogatories. Dan Smith of WFJ personally answered these interrogatories.

Finally, at the hearing on this matter, Mr. Roller challenged the Affidavit of Alexander S. Gese. Specifically, Mr. Roller argued that the affidavit is suspect and should not be reviewed by the Court because Abby Williams Gese, Mr. Gese's sister-in-law, notarized Mr. Gese's signature. Mr. Roller failed to cite any legal authority to support this argument. Because Mr. Roller has failed to cite any legal authority to support his argument, and because Mr. Gese's signature and the signature of notary Abby William Gese notary appear to comply with Minn. Stat. § 359.085, the Court will consider the Affidavit of Alexander S. Gese.

For these reasons, the Court finds that discovery is complete in this matter. There are no genuine issues of material fact for trial. The case should be dismissed.

V. Mr. Roller's Claims Against The Honorable Judge Mark Boris Should Be Dismissed

Mr. Roller also brings claims for fraud (conflict of interest), attempted murder, and molestation of his daughter against the Honorable Judge Mark Boris. The Court does not know who the Honorable Judge Mark Boris is. It does not appear he was served in this case. He has never made an appearance in this case. The claims against Mr. Boris are the same as those

asserted against the other defendants. After full discovery and a full hearing on those claims, Mr. Roller has no evidence in support of his claims. There are no issues remaining for trial. Defendant Boris should be dismissed.

VI. WFJ Should Also Be Dismissed For Insufficiency Of Service Of Process

Prior to its summary judgment motion, Defendant WFJ moved the Court to dismiss Mr. Roller's action against WFJ under Minn. R. Civ. P. 12.02(d). The Court did not address this motion in its Order denying Defendants' motion to dismiss.

Rule 12.02(d) provides that a party may raise the defense of insufficiency of service of process by motion prior to the filing of a responsive pleading. Before a court may exercise personal jurisdiction over a defendant, the procedural requirement of service of process must be satisfied. Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 104, 108 (1987). Service of process is "the procedure by which a court having venue and jurisdiction of the subject matter of the suits asserts jurisdiction over the person of the party served." Id. (quoting Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 444-45 (1946)). The existence of personal jurisdiction is a question of law. Patterson v. Wu Family Corp., 608 N.W.2d 863, 866 (Minn. 2000). The sufficiency of service of process is a question of law. See Stoebe v. Merastar Ins. Co., 554 N.W.2d 733, 735 (Minn. 1996). Where service of process is insufficient, a district court must dismiss the action. Lewis v. Contracting Northwest, Inc., 413 N.W.2d 154, 156 (Minn. App. 1987). The defense of insufficient service of process is waived if omitted from an answer or if omitted from a motion to dismiss under Rule 12. See Minn. R. Civ. P. 12.08(a); Patterson, 608 N.W.2d at 866.

Minnesota Rule of Civil Procedure 4.06 describes the requirements for proof of service of process in a civil action:

Service of summons and other process shall be proved by the certificate of the sheriff or other peace officer making it, by the affidavit of any other

person making it, by the written admission or acknowledgement of the party served, or if served by publication, by the affidavit of the printer or the printer's designee. The proof of service in all cases other than by published notice shall state the time, place, and manner of service. Failure to make proof of service shall not affect the validity of the service.

Additionally, Minn. R. Civ. P. 3.02 provides that "[a] copy of the complaint shall be served with the summons, except when the service is by publication as provided in Rule 4.04."

Defendant WFJ claims that Mr. Roller did not properly serve it with the Complaint in this action. Additionally, Defendant WFJ claims that Mr. Roller has not produced a pleading or affidavit that establishes that Mr. Roller served Defendant WFJ with process. Mr. Roller has not responded to Defendant WFJ's motion to dismiss for insufficiency of process in either his memorandum in opposition to WFJ's motion to dismiss or at the hearing on this matter.

The Court notes that on September 10, 2009, Mr. Roller filed a summons and complaint with the Court. Mr. Roller addressed his summons to Wagner, Falconer & Judd, Ltd, 1700 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402. Mr. Roller never filed or submitted an affidavit of personal service, service by mail, or service by publication on Defendant WFJ at this address. Additionally, at the hearing on Defendants' motion to dismiss, Mr. Roller did not argue that he personally served Defendant WFJ by mail, publication or otherwise. Mr. Roller did file an affidavit of personal service on (WFJ) via Prepaid Legal c/o Dan Smith, 2800 Wells Fargo Place 30 East Seventh Street, St. Paul, MN 55101 on March 16, 2010, four months after WFJ's motion to dismiss on December 8, 2009.

Based upon review of the file, record, and proceedings in this case, the Court finds that Mr. Roller has failed to show he properly served Defendant WFJ prior to Defendant WFJ's motion to dismiss under Minn. R. Civ. P. 12.02(d). Therefore, the Court grants Defendant WFJ's motion to dismiss Mr. Roller's Complaint for insufficiency of service of process under

Minn. R. Civ. P. 12.02(d).

In Peters v. Waters Instruments, Inc., 251 N.W.2d 114, 116 (Minn. 1977), the Minnesota Supreme Court explained the relevant factors for determining whether a case should be dismissed with or without prejudice:

An order of dismissal with prejudice must be justified by the facts and circumstances peculiar to each case. Kielsen v. St. John's Lutheran Hospital Assn., 177 N.W.2d 420 (Minn. 1970). Since a dismissal with prejudice is a drastic form of relief, it should be granted only in exceptional circumstances where there are "considerations of wilfulness and contempt for the authority of the court or the litigation process, in addition to prejudice to the parties involved." 2 Hetland and Adamson, Minnesota Practice, p. 195 (1970).

We stated in Firoved v. General Motors Corp., 152 N.W.2d 364, 368 (Minn. 1967):

An order of dismissal on procedural grounds runs counter to the primary objective of the law to dispose of cases on the merits. Since a dismissal with prejudice operates as an adjudication on the merits, it is the most punitive sanction which can be imposed for noncompliance with the rules or order of the court or for failure to prosecute. It should therefore be granted only under exceptional circumstances. The primary factor to be considered in determining whether to grant a dismissal with or without prejudice is the prejudicial effect of the order upon the parties to the action . . .

Because the Court also grants WFJ's motion for summary judgment, as explained above, the Court finds the special circumstances of this case make it appropriate to dismiss Mr. Roller's action with prejudice.

CONCLUSION

For the reasons stated above, Defendants' motions for summary judgment should be granted, and the case should be dismissed.

ORDER

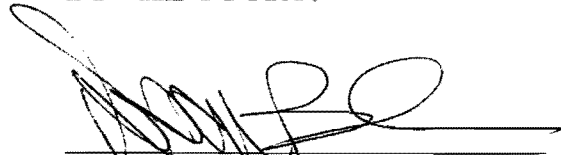
IT IS HEREBY ORDERED:

1. Defendant Wagner, Falconer & Judd, Ltd c/o Dan Smith's motion for summary judgment is **GRANTED**.
2. Defendants Alexander Gese and Bosley Inc.'s motion for summary judgment is **GRANTED**.
3. All claims against Defendant Mark Boris are **DISMISSED**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

Dated: 5/19/2010



SUSAN N. BURKE
Judge of District Court