ANDREA MEYERS *v.* LIVINGSTON, ADLER, PULDA, MEIKLEJOHN AND KELLY, P.C.
(AC 32692)

Lavine, Beach and Bishop, Js.

Argued November 10, 2011—officially released April 17, 2012

(Appeal from Superior Court, judicial district of Hartford, Hon. Richard M. Rittenband, judge trial referee.)

Thomas P. Willcutts, for the appellant (plaintiff).

Proloy K. Das, with whom were *Bernard F. Gaffney* and, on the brief, *Richard F. Banbury*, for the appellee (defendant).

Opinion

BEACH, J. The plaintiff, Andrea Meyers, appeals from the summary judgment rendered by the trial court in favor of the defendant, Livingston, Adler, Pulda, Meiklejohn & Kelly, P.C. On appeal, the plaintiff claims that the court erred in granting the defendant's motion for summary judgment on the ground that the action was commenced beyond the applicable statute of limitations. We affirm the judgment of the trial court.

The record reveals the following. The defendant represented the plaintiff in an action against Shek Hong, Joanne Hong, Hontek Corporation and T.C. Specialty Products, Inc. While representing the plaintiff in that action, the defendant agreed to represent another client, Diane Thibodeau, who had similar claims against the same parties. The defendant joined the claims of the plaintiff and Thibodeau into a single legal action. On December 14, 1999, a settlement of the litigation was reported on the record. The terms of the settlement were reviewed in open court, and the plaintiff was canvassed by the court. In February, 2000, the defendant in that action filed a motion to enforce the settlement agreement because the plaintiff had declined to sign a release. By motion dated February 22, 2000, the defendant sought to withdraw its appearance on behalf of the plaintiff.[1] On February 25, 2000, the plaintiff executed the settlement agreement and release. The defendant received the settlement check and, after deducting a portion for attorney's fees and/or expenses owed, ultimately remitted the balance to the plaintiff.

The plaintiff served a one count complaint on February 21, 2006. The plaintiff claimed that the defendant was not entitled to an attorney's fee because its representation was unprofessional. She alleged that the defendant "breached its contract duties" to her by bringing about a settlement of the prior action in furtherance of Thibodeau's interests and against the interests of the plaintiff.[2] The defendant filed an answer and special defenses, in which it asserted, inter alia, that the action was barred by the statute of limitations.

The defendant filed a motion for summary judgment on the ground that the plaintiff's claim sounded in tort and was barred by the applicable three year statute of limitations; General Statutes § 52-577; or, in the alternative, that it was barred by the six year statute of limitations for contract claims. General Statutes § 52-576.[3] The court initially denied the defendant's motion, finding that the action, which was served on February 21, 2006, was initiated within the statute of limitations for contract claims, which began to run on February 25, 2000, when the plaintiff executed the settlement agreement in the underlying action.

In January, 2010, the court granted the defendant's motion to reargue the denial of its motion for summary

judgment. At reargument, the defendant argued that the plaintiff's complaint sounded in tort, not contract. The court vacated its prior ruling in which it had denied the defendant's motion for summary judgment and granted the motion for summary judgment, reasoning that the complaint sounded in tort and that the three year limitations period on tort actions had run. The court additionally found that if it were a contract action, it still was not commenced within the six year statute of limitations because the statute began to run on December 14, 1999, the date on which the alleged injury was inflicted, more than six years before the action was brought in February, 2006.

In June, 2010, the plaintiff filed a motion to reargue the court's granting of the defendant's motion for summary judgment. After reconsideration of the parties' arguments, the court denied the relief requested and affirmed its decision granting the defendant's motion for summary judgment. The court determined that the complaint claimed both legal malpractice and breach of contract and that because the plaintiff was fully aware of her claims by December 14, 1999, but did not bring the action until 2006, her claim was barred by both the three year legal malpractice and six year contract statutes of limitations. This appeal followed.

We first set forth the applicable standard of review. "[T]he scope of our review of the granting of a motion for summary judgment is plenary. . . . In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. . . . Although the party seeking summary judgment has the burden of showing the nonexistence of any material fact . . . a party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue. . . . Summary judgment may be granted where the claim is barred by the statute of limitations." (Citations omitted; internal quotation marks omitted.) *Rosenfield* v. *I. David Marder & Associates, LLC*, 110 Conn. App. 679, 684, 956 A.2d 581 (2008).

The plaintiff claims that the court erred in granting the defendant's motion for summary judgment based on its statute of limitations defense. The plaintiff contends that the court improperly determined that her cause of action had accrued on December 14, 1999. She asserts that her cause of action did not accrue until February 25, 2000, and thus service of the action on February 21, 2006, was within the six year statute of limitations for contract claims. Her argument appears to assume that her cause of action properly sounded in contract.[4]

In order to resolve the plaintiff's claim, we must first examine the complaint to determine the nature of the cause of action raised. Whether the plaintiff's complaint sounds in tort, contract or both depends on the allega-

tions in the complaint. "Interpretation of the pleadings is a question of law over which our review is plenary." *Weiner* v. *Clinton*, 106 Conn. App. 379, 384, 942 A.2d 469 (2008).

"Connecticut law recognizes that one may bring against an attorney an action sounding in both negligence and contract. . . . At the same time, one cannot bring an action in both negligence and contract merely by couching a claim that one has breached a standard of care in the language of contract. . . . [T]ort claims cloaked in contractual language are, as a matter of law, not breach of contract claims." (Citations omitted; internal quotation marks omitted.) Id., 383. "When a defendant's liability to a plaintiff is premised, however, on principles of tort law . . . the plaintiff may not convert that liability into one sounding in contract merely by talismanically invoking contract language in his complaint . . . and consequently a reviewing court may pierce the pleading veil to ensure that such is not the case. . . . Thus, in doing so, we look beyond the language used in the complaint to determine the true basis of the claim. . . . Whether the plaintiff's cause of action is one for malpractice depends upon the definition of that word and the allegations of the complaint. . . . Malpractice is commonly defined as the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services . . . . The elements of a breach of contract action are the formation of an agreement, performance by one party, breach of the agreement by the other party and damages." (Citations omitted; internal quotation marks omitted.) *Pelletier* v. *Galske*, 105 Conn. App. 77, 81, 936 A.2d 689 (2007), cert. denied, 285 Conn. 921, 943 A.2d 1100 (2008).

In her complaint, the plaintiff alleged that "[p]ursuant to the express and/or implied terms of the contract for legal services to represent the plaintiff in the lawsuit . . . [the defendant] owed to the plaintiff a duty of undivided loyalty and a duty to pursue and follow the plaintiff's interests, wishes and instructions in the prosecution of the lawsuit." The complaint alleged that the defendant breached its "contract duties" in that it "pursued the interests of Diane [Thibodeau] in derogation of the interests, wishes and instructions of the plaintiff in bringing about the settlement of the lawsuit; and/or . . . failed and/or refused to follow the express wishes and instructions of the plaintiff to reject the settlement offer in the lawsuit and to continue to prosecute the lawsuit."

A fair reading of the complaint reveals that the plaintiff did not allege a contract claim. In a true contract claim, "a plaintiff asserts that a defendant who is a

professional breached an agreement to obtain a specific result." *Caffery* v. *Stillman*, 79 Conn. App. 192, 197, 829 A.2d 881 (2003). The plaintiff does not allege in her complaint that the defendant breached a contract with the plaintiff for legal services by failing to obtain a specific result or to perform a specific task.[5] The unambiguous language of the parties' contract for legal services, which was attached as an exhibit to the defendant's motion for summary judgment, reveals that the contract did not promise a specific result or the performance of specific tasks.

Although the plaintiff invokes contract language in her complaint, analysis reveals that the claim functionally is one of professional negligence.[6] The plaintiff alleged in her complaint that the defendant acted tortiously on the ground that the joining of Thibodeau's claim and the settlement terms of the prior action served Thibodeau's interest rather than hers. The gravamen of the complaint is an allegation that the defendant breached its professional duties. The allegation fits squarely within the definition of a malpractice claim: "the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances . . . with the result of injury, loss, or damage to the recipient of those services . . . ." (Internal quotation marks omitted.) *Pelletier* v. *Galske*, supra, 105 Conn. App. 81. "[W]here the plaintiff alleges that the defendant negligently performed legal services . . . the complaint sounds in negligence, even though he also alleges that he retained him or engaged his services." (Internal quotation marks omitted.) Id., 83.

Because the sole cause of action in the complaint sounds in tort, it is governed by the three year statute of limitations set forth in § 52-577. We need not address the issue discussed by the plaintiff regarding the accrual date of her cause of action. Regardless of whether it accrued on February 25, 2000, or December 14, 1999, the plaintiff's initiation of an action in February, 2006, is well beyond the three year time bar.

The judgment is affirmed.

In this opinion LAVINE, J., concurred in the result.

[1] There is no claim in the complaint that the filing of the motion to withdraw constituted a breach of the representation agreement.

[2] The plaintiff specifically stated in her complaint that the defendant "breached its contract duties to the plaintiff in one or more of the following respects: (a) it pursued the interests of . . . [Thibodeau] in derogation of the interests, wishes and instructions of the plaintiff in bringing about a settlement of the lawsuit; and/or, (b) it failed and/or refused to follow the express wishes and instructions of the plaintiff to reject the settlement offer in the lawsuit and to continue to prosecute the lawsuit."

[3] The defendant argued that the alleged breach of contract occurred, if at all, on December 14, 1999.

[4] The defendant argues that the complaint can properly be read to state a cause of action in tort only; to this extent, it implicitly claims that the court erred in finding that the action sounded in both contract and tort. We note that the defendant filed a preliminary statement of issues stating an intent to raise alternate grounds for affirmance. Although the preliminary

statement of issues is phrased generally, it has not been contested, and the plaintiff had the opportunity to respond in a reply brief to the argument that the defendant made in its brief.

[5] The contract does, of course, specifically require representation; the plaintiff's claim is that the representation was executed unethically. This does not equate to no representation at all.

The dissent agrees that a claim alleging a failure to obtain a specific result pursuant to an agreement sounds in contract. *Caffery* v. *Stillman*, supra, 79 Conn. App. 197. We agree with the dissent that there may be other contractual duties set forth in an agreement. For example, a complaint alleging a refusal to perform specific tasks required by a contract also may set forth a contract claim. *Hill* v. *Williams*, 74 Conn. App. 654, 662, 813 A.2d 130, cert. denied, 263 Conn. 918, 822 A.2d 242 (2003). In either event, there is a specific result or task set forth in an agreement that the attorney has promised to do; an allegation that the attorney failed or refused to do that specific task may constitute a contract claim. The retainer agreement in the present case, however, does not require the defendant to do anything specific that the defendant did not do. The only task that the retainer agreement required the defendant to do was to represent the plaintiff. The plaintiff does not claim that the defendant failed to represent her at all. We do not agree with the dissent that an allegation that an attorney failed to follow a request of a client, in the absence of an agreement to do so, states a cause of action in contract in the context of professional negligence.

In *Caffery*, this court stated: "[T]he plaintiff claimed that the present case is indistinguishable from *Hill* v. *Williams*, [supra, 74 Conn. App. 662], in which we concluded that one of the plaintiff's counts did sound in contract and, thus, was not barred by the tort statute of limitations. Contrary to the plaintiff's assertions, our determination of the issue before us is not governed by the reasoning of *Hill*. In *Hill*, we found that the plaintiff had alleged that the defendant had promised to take specific actions that he later refused to undertake and that the plaintiff suffered damages as a result. Id., 659. Here, although the plaintiff alleged that the defendant had promised to bring a liability action against the city, the plaintiff does not claim that he sustained damages as a consequence of the defendant's failure to bring such an action. Rather, he claims that the promise to bring such an action was premised on an incorrect understanding of the law and that he suffered damages as a result of the defendant's failure to understand the limits of the legal remedy." *Caffery* v. *Stillman*, supra, 79 Conn. App. 197–98. Similarly, in the present case, the plaintiff claims that the *manner* in which the defendant performed its legal services was improper. An allegation that one failed to perform professional services with the proper degree of skill sounds in legal malpractice. See *Pelletier* v. *Galske*, supra, 105 Conn. App. 81.

[6] The concurrence is correct in noting that even if it were a contract claim, summary judgment is, nonetheless, appropriate.