

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, LAW DIVISION**

Sean Dailey,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 20 L 448
	)	
Sam L. Amirante, individually and as agent of	)	
Sam L. Amirante & Associates, P.C.,	)	
	)	
Defendants.	)	
	)	

**MEMORANDUM AND ORDER**

The actual innocence rule in a legal malpractice cause of action based on a defense attorney’s services in a criminal case has a single recognized exception: an attorney’s intentional breach of a fiduciary duty with the intent to ensure the client’s conviction. The plaintiff asserts neither his innocence nor argues that his attorney intentionally sought his conviction. Since the complaint’s allegations do not satisfy the narrow exception to the actual innocence rule, the complaint must be dismissed with prejudice.

**Facts**

In March 2017, Sean Dailey was charged in Cook County with four counts of leaving the scene of a motor vehicle accident involving personal injuries. 625 ILCS 5/11-401. Case No. 17-CR-4672. Dailey hired Sam L. Amirante of Sam L. Amirante & Associates, P.C. (together Amirante) for his legal defense for \$20,000. Their agreement called for Amirante to use his experience and expertise to defend Dailey and achieve either a dismissal of the charges or a plea bargain, if necessary. At a Rule 402 conference, the judge recommended a three-year sentence, rejecting the prosecution’s suggestion of seven years. Dailey

accepted the plea bargain in lieu of a trial, and has served his time less good conduct credit.

On January 9, 2020, Dailey filed a complaint against Amirante with three causes of action stemming from the handling of Dailey's defense: breach of contract, professional malpractice, and breach of fiduciary duty. Dailey alleged that Amirante's disclosure of confidential facts to the judge in a Rule 402 conference eliminated Dailey's ability to assert his non-culpability in the motor vehicle collision. This disclosure limited his options for defense and forced him into the plea bargain. Dailey sought recovery of \$50,000 for loss of reputation, loss of freedom, and emotional distress. Dailey did not, however, claim innocence of the underlying criminal charges or request recovery of fees paid to Amirante.

On November 5, 2000, Amirante filed a motion to dismiss pursuant to Code of Civil Procedure section 5/2-619.1 on multiple grounds, including: (1) the separate counts for breach of contract and breach of fiduciary duty were duplicative of professional malpractice; and (2) Dailey failed to claim actual innocence of the criminal charges underlying the legal malpractice claim. On December 10, 2020, Dailey filed a motion for extension to respond by December 24, 2020, which this court granted. After a second, unanswered motion for extension on the December 24, Dailey ultimately filed his response on January 6, 2021. Amirante replied on January 21, 2021.

On February 10, 2021, this court dismissed the count for breach of fiduciary duty with prejudice as duplicative of professional malpractice. This court dismissed without prejudice the counts for breach of contract and professional malpractice as duplicative and as lacking an assertion of actual innocence. This court instructed Dailey to file an amended complaint by March 10, 2021. On that date, this court granted Dailey another filing extension to March 17. Dailey eventually submitted an amended complaint with a single count of breach of contract on March 24, 2021.

In the amended complaint, Dailey alleges that when he hired Amirante, Amirante told Dailey he had a special relationship with the

judge assigned to Dailey's case and "stated or implied" that the judge "owed [him] a favor." Amd. Cmpl. ¶ 6. Amirante separately promised to follow through on a motion to suppress evidence related to a photo lineup. Based on these assurances and Amirante's qualifications, Dailey paid Amirante a sum of \$20,000 for his defense.

Dailey further alleges that Amirante spoke with the judge assigned to Dailey's case separate from the Rule 402 conference. In this conversation, Amirante allegedly disclosed various facts about the case to the judge, including: Dailey's actual involvement in the motor vehicle collision and his level of intoxication at the time of the collision. After this conversation, Amirante allegedly informed Dailey that the judge was not interested in helping him and recommended a Rule 402 conference for a plea bargain. Dailey alleges he consented to the plea bargain conference in lieu of either the motion to suppress or the trial because Amirante's disclosures to the judge removed his ability to deny culpability for his charges.

On April 20, 2021, Amirante submitted a section 2-615 motion to dismiss the amended complaint because, among other issues, Dailey had failed, again, to claim his innocence of the underlying criminal charges. On May 19, 2021, Dailey filed a fourth motion for extension to respond by June 2, 2021, which this court granted. Dailey filed a response on June 16, 2021, largely duplicative of his January 6 response, claiming an exception to the actual innocence rule. On June 22, 2021, Amirante filed a reply.

### Analysis

The purpose of a section 2-615 motion is to dismiss legally insufficient claims. 735 ILCS 5/2-615. On review of a section 2-615 dismissal, a court takes "all well-pleaded facts in the complaint as true." *Herrera-Corral v. Hyman*, 408 Ill. App. 3d 672, 674 (1st Dist. 2011) (citing *R&B Kapital Dev., LLC v. North Shore Cmty. Bank & Trust Co.*, 358 Ill. App. 3d 912, 920 (1st Dist. 2005)). "The reviewing court must determine whether the allegations of the complaint, when interpreted in the light most favorable to the plaintiff, sufficiently set forth a cause of action on which relief may be granted." *Id.* The court must also

consider any reasonable inferences in favor of the complainant, “because a motion to dismiss merely tests the legal sufficiency of the allegations; it is not a determination on the merits of the claim.” *South Chicago Sav. Bank v. South Chicago Sav. Bank*, 178 Ill. App. 3d 545, 549 (1st Dist. 1988) (citing *Charles Hester Enters., Inc. v. Illinois Founders Ins. Co.*, 114 Ill. 2d 278, 286 (1986)). After review, “[a] dismissal should be granted only where the plaintiff can prove no set of facts to support the cause of action asserted.” *Herrera-Corral*, 408 Ill. App. 3d at 459 (citing *R&B Kapital*, 358 Ill. App. 3d at 920).

A cause of action for legal malpractice may be brought under a theory of either contract or tort law depending on the origin of an attorney’s duty to the client. *Collins v. Reynard*, 154 Ill. 2d 48, 50 (1992). Typically, a claim for breach of contract is appropriate if an attorney’s duty arises from a specific agreement with their client. *Id.* at 51; *Majumdar v. Lurie*, 274 Ill. App. 3d 267, 270 (1st Dist. 1995) (“Actions for breach of contract must allege facts sufficient to indicate the terms of the contract because the duty imposed by those terms gives rise to the breach.”); see, e.g., *Competitive Food Sys. v. Laser*, 170 Ill. App. 3d 606, 616 (2d Dist. 1988) (rehearing denial found breach of contract claim appropriate for attorney’s failure to meet contracted deadline). Alternatively, a legal malpractice claim under tort law is appropriate if an attorney’s duty arises from the expected professional obligations separate from the promises of a specific contract. *Collins*, 154 Ill. 2d at 50-51 (listing cases).

Recovery for a legal malpractice cause of action may also be sought under both contract and tort theories in the alternative. *Id.* at 50. This is common when the party is in doubt as to which of two or more statements of fact is true. *Majumdar*, 274 Ill. App. 3d at 273. Alternative counts are, however, inappropriate if the separate assertions are merely duplicative. *Id.* at 52. The unique nature of legal malpractice often blurs the distinctions between tort and contract. *Collins*, 154 Ill. 2d at 51. If a plaintiff identifies one theory, but their argument supports the other, the court may consider the complaint under both theories of contract and tort. See, e.g., *Pelham v. Griesheimer*, 92 Ill. 2d 13, 19 (1982) (breach of contract analyzed first under contract law and then as a tort).

While Dailey's amended complaint is presented as a single count for breach of contract, Dailey argues the existence of both contractual and tort duties owed by Amirante. Dailey added two specific promises resulting in the payment of \$20,000 in his amended complaint: (1) the judicial favor; and (2) the motion to suppress evidence. These promises will be first considered under a theory of breach of contract. The rest of Dailey's complaint focuses on Amirante's duty to "defend [Dailey] vigorously" and to "provide zealous, competent and effective representation." Amd. Cmpl., ¶¶ 20, 22. Dailey also mentions Amirante's "duty to devote due care and skill as [a] lawyer for Plaintiff Dailey" based on "the standard of effective legal representation." Amd. Cmpl., ¶¶ 25-26. These duties are couched in tort language related to the professional standard of attorney services and not to specific contractual terms; therefore, they should be handled as tort claims under a theory of legal malpractice.

### Breach of Contract

Dailey alleges he hired Amirante based in part on two promises: a judicial favor owed to Amirante by a judge, and the filing of a motion to suppress evidence. A breach of contract claim requires: (1) a valid and enforceable contract; (2) substantial performance by the plaintiff; (3) breach of that contract by the defendant; and (4) resultant damages. *Keystone Montessori Sch. v. Village of River Forest*, 2021 IL App (1st) 191992, ¶ 65 (citing *Rocha v. FedEx Corp.*, 2020 IL App (1st) 190041, ¶ 95)).

First, this court will not entertain the enforcement of any allegedly promised judicial favors. "A promise or other term of an agreement is unenforceable on the grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." *Keystone*, 2021 IL App (1st) 191992, ¶ 68 (quoting *1550 MP Road LLC v. Teamsters Local Union No. 700*, 2019 IL 123046, ¶ 33, quoting *K. Miller Constr. Co. v. McGinnis*, 238 Ill. 2d 284, 293 (2010), quoting Restatement (Second) of Contracts § 178 (1981)). The public's interest in an impartial judiciary clearly outweighs any

obligation related to the spending of a judicial favor. *See, e.g.*, Ill. S. Ct. R. Prof'l Conduct, R. 8.4 (d), (e) (prohibits a lawyer from either engaging in conduct prejudicial to the administration of justice or stating or implying improper influence over a government official); Ill. S. Ct. R. 61, 63 (encouraging a judge's independence and impartiality).

Second, Amirante's failure to file a motion to suppress evidence is encompassed within his performance as an attorney. Dailey agreed to pursue a plea deal instead of the motion to suppress evidence, thereby releasing Amirante from his obligation to file the motion. Dailey argues that he chose to pursue a plea only because of Amirante's disclosures to the judge; however, those disclosures would fall under a breach of professional standards rather than a breach directly related to his promise to file a motion.

### Professional Malpractice

The remaining complaints related to Amirante's professional duty as a lawyer are appropriately handled under tort law. For a legal malpractice case, the plaintiff must show the following elements: "(1) the existence of an attorney/client relationship; (2) a duty arising from that relationship; (3) a breach of that duty on the part of defendant/counsel; (4) proximate cause; and (5) damages." *Paulsen v. Cochran*, 356 Ill. App. 3d 354, 389 (1st Dist. 2005) (citing *Claire Assocs. v. Pontikes*, 151 Ill. App. 3d 116, 122 (1986)). A criminal defendant attempting to recover from a defense attorney's malpractice must also show their innocence of the underlying criminal charges. *Id.* This so-called "actual innocence rule" was adopted in Illinois as early as 1998 by both the First and Fifth Districts to prevent a person found guilty of a crime from profiting off of their criminal activity. *Kramer v. Dirksen*, 296 Ill. App. 3d 819, 821 (1st Dist. 1998); *Moore v. Owens*, 298 Ill. App. 3d 672, 674-75 (5th Dist. 1998) (both citing *Levine v. King*, 123 F.3d 580, 582 (7th Cir. 1997)).

In the past 23 years, Illinois courts have recognized only one exception to the actual innocence rule. *Herrera-Corral v. Hyman*, 408 Ill. App. 3d 672, 676-77 (1st Dist. 2011). When a lawyer "intentionally works to insure their client's conviction," the case is no longer a

traditional legal malpractice claim, and the plaintiff need not prove innocence of their underlying criminal charges. *Morris v. Margulis*, 307 Ill. App. 3d 1024, 1039 (5th Dist. 1999) (rev'd on other grounds). In *Morris*, a bank director discussed a pending fraud case with his attorney. *Id.* at 1029-30. One of the attorney's partners was negatively implicated in the director's defense. *Id.* The attorney declined to represent the director and proceeded to draft a list of suggested questions for the director's prosecution based on their confidential conversation. *Id.* at 1030. The court likened this action to a clear "betrayal" worthy of bypassing the actual innocence rule. *Id.* at 1039.

Like the director in *Morris*, Dailey claims his case warrants an exception to the actual innocence rule. Unlike the director in *Morris*, however, Dailey does not describe a lawyer who intentionally sought his conviction. Rather, Dailey states he hired Amirante specifically because of his connections with the assigned judge. Amirante's alleged private conversation with the judge was with the clear intent to ensure Dailey's release from his charges. The judge chose not to "help [Dailey] out." After his scheme failed, Dailey chose to pursue a plea deal as one of the contractually agreed outcomes of his relationship with Amirante. This result falls far short of the betrayal standard presented in *Morris*, in which an attorney intentionally helped the client's opponent because of a risk to the attorney.

The Seventh Circuit Court of Appeals has recognized a second exception to the actual innocence rule under Illinois law related to attorney's fees. See *Winneczek v. Nagelberg*, 394 F.3d 505, 508 (7th Cir. 2005); *Herrera-Corral*, 408 Ill. App. 3d at 677. "[A] fee dispute between a convicted criminal defendant and his former counsel does not entail the policy considerations which arise from a malpractice suit." *Winneczek*, 394 F.3d at 509. If the recovery sought is related to an overcharge, and not a conviction, the plaintiff is, therefore, not barred by the actual innocence rule. *Id.* Since Dailey's complaint stems from the consequences of his conviction and not the fee paid to Amirante, this exception does not apply.

Dailey's amended complaint fails to set forth a pursuable cause of action because he has failed either to claim his innocence or present a

valid exception to the actual innocence rule. It is, therefore, unnecessary for this court to consider the other elements of legal malpractice. A repleading is likewise unnecessary given the repeated inability or failure to claim actual innocence or a valid exception to the rule in both the original and amended complaints.

### Timeliness

As a final note, the court would like to address a continuing course of conduct by Dailey's attorney, Michael Greco. The timeliness of court actions benefits all parties and a failure to follow required deadlines can have dire consequences. There are two cases the court would like to highlight. First, the alternate grounds under which the Supreme Court reversed *Morris* was a one-week violation of the statute of limitations. 197 Ill. 2d at 38. Seven years of litigation, which laid the grounds for Greco's current leading argument, ended because of a single missed deadline. Second, a similar statute of limitations issue arose in the Seventh Circuit case *Lee v. Cook County*, 635 F.3d 969 (7th Cir. 2011). In that case, Judge Easterbrook, writing for the court, admonished and fined Greco for failing his clients through his inability to follow various deadlines, among other procedural errors. *Id.* at 974. Later, in 2015, the Illinois Supreme Court placed Greco on probation because of his untimely responses. *In re Michael Jeffrey Greco*, 13 PR 46.

While this decision does not turn on the statute of limitations, the court would be remiss not to address the multiple deadlines missed by Greco. After four motions to extend, three of which were approved, Greco failed to meet even those extended deadlines. The state court is typically more forgiving on procedural errors than federal court, because as a court of general jurisdiction it is preferable that cases are decided on their substance rather than dismissed on technicalities. At the same time, constant delays caused by the inaction of a single attorney place an unnecessary burden on all parties involved. Greco would do well to keep that in mind in any future cases before this court.



Conclusion

Based on the foregoing, it is ordered that,

1. The defendants' motion for dismissal is granted; and
2. The case is dismissed with prejudice.

  
John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

JUL 23 2021

Circuit Court 2075