IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
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MARIO ZEPHIR,	)	CASE NO. ST-07-SM-667
Plaintiff/Petitioner,	)	
vs.	)	ACTION FOR DEBT
JUDITH BOURNE,	)	
Defendant/Respondent.	)	

MEMORANDUM OPINION

I. INTRODUCTION

THIS MATTER is before the Court on Petitioner Mario Zephir's ("Petitioner," "Plaintiff," or "Mr. Zephir") Petition for Review filed December 9, 2010. In his Petition, Petitioner has requested that this Court review a Judgment entered by Magistrate Jessica Gallivan on November 29, 2010. For the following reasons, this Court will affirm the Magistrate's decision.

II. FACTUAL AND PROCEDURAL BACKGROUND

This case was initiated in the Small Claims Division of this Court on November 19, 2007, when Plaintiff filed a debt action against Judith Bourne, Esquire ("Respondent," "Defendant," or "Ms. Bourne"). Plaintiff sought reimbursement of $2,247.00 he paid to Attorney Bourne during the course of her representation of him in a custody matter.[1] He also sought $200.00 for time he spent in court and $2,500.00 for fees paid to his replacement counsel. In addition to her answer, Defendant filed a counterclaim in this action, requesting payment of outstanding legal fees from the Plaintiff in the amount of $2,590.50 for services provided. Upon assignment of the case, Magistrate Jessica Gallivan scheduled a hearing on November 8, 2010. At the hearing, the Court heard sworn testimony from both parties, and several documents were admitted into evidence for each side.

On November 29, 2010, Magistrate Gallivan entered an Order, which dismissed the Plaintiff's claims for reimbursement and granted Defendant's counterclaim. The Magistrate found that while Defendant failed to timely produce the court-ordered final pre-trial order and was absent at a scheduled court hearing, she did provide legal services to the Plaintiff. The Magistrate also found Defendant's final billing to be reasonable for work performed during that period, and Plaintiff failed to produce evidence to the contrary. Additionally, the Magistrate was not persuaded by Plaintiff's contentions that Defendant was not authorized to act on his behalf

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1 This matter arises from a child custody case in which the Defendant was legal counsel for the Plaintiff.

after July 23, 2007. Evidence admitted at the hearing suggested that Plaintiff had some knowledge of Defendant's legal performance on his behalf from the beginning of their arrangement through October 17, 2007.[2] Moreover, the evidence demonstrated that Plaintiff did not expressly terminate Defendant, but retained new counsel at some time before January 2008. For these reasons, the Magistrate dismissed the Plaintiff's claims and awarded the Defendant a judgment against the Plaintiff on her counterclaim in the amount of $2,590.00.

On December 9, 2010, Petitioner filed a petition for appeal, which was later followed by Respondent's motion for issuance of notice of deficiency on January 27, 2011. An Order was entered by the undersigned on April 19, 2011,[3] that required Petitioner to file proof of service of his appeal petition to Respondent and Magistrate Gallivan by May 2, 2011. Based on Petitioner's filings on May 2, 2011, the Court issued another Order, which ordered the Clerk of the Court to direct Mr. Zephir's petition to the Respondent and the parties to file written submissions or briefs to the Court within twenty days noting the facts and issues for review in this matter. On June 6, 2011, Respondent filed a Motion for Clarification.[4] No responsive brief or opposition has been filed by the Respondent in this review.

III. ANALYSIS

The issues before the Court for resolution are as follows: (1) whether the Magistrate erred in finding that Petitioner was not entitled to expenses from Respondent for court time and replacement counsel; and (2) whether the Magistrate erred in finding Respondent was entitled to payment for services rendered prior to Petitioner's written letter of termination.

A. Jurisdiction and Standard of Review.

This Court has jurisdiction to review judgments and orders issued by a Magistrate, which came before them pursuant to their original jurisdiction, as defined by V.I. CODE ANN. tit. 4, § 123(a) (2008). A judgment in a small claims action is a matter that a Superior Court judge may review if appealed.[5] A petitioner has ten (10) days to file a notice of appeal, otherwise their right to object to or appeal a Magistrate's judgment will be waived and the judgment becomes final.[6] In this instance, Petitioner timely filed his request to appeal the Magistrate's judgment, and this matter is properly before the Court.

When reviewing appealable orders from the Magistrate's Division, this Court is required to apply a mixed standard of review.[7] A Magistrate's findings of fact may be reversed only if they

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2 At the Small Claims hearing, Defendant admitted into evidence a settlement letter dated October 11, 2007, between Defendant and opposing counsel, which was mailed to the Plaintiff on or about October 11, 2007.

3 The Court issued an Order on April 1, 2011, and an Amended Order on April 5, 2011. However, based on the Petitioner's *pro se* response filing, it became apparent that further clarification by the Court was necessary. As a result, the Court issued an Order on April 19, 2011, regarding the filing requirements and deadlines.

4 In light of the disposition of this matter, the Motion for Clarification will be denied as moot.

5 SUPER. CT. R. 322.1.

6 SUPER. CT. R. 322.1(b), (c).

7 SUPER. CT. R. 322.3(b).

were clearly erroneous, while conclusions of law are afforded a plenary review.[8] Also, because this was a small claims case, this Court must be "mindful that the goal of the [Magistrate] was 'to do substantial justice between the parties.'"[9]

B. Petitioner's claim for legal malpractice sounds in tort, not contract, and he did not adequately establish the proximate cause of his alleged damages.

Petitioner argues that the Magistrate erred in finding that Respondent was not liable for expenses relating to his court time and replacement counsel fees and that he owes his former counsel additional monies.[10] According to his petition for review and supporting papers, Petitioner contends that Respondent failed to provide proper legal representation as promised under the parties' oral agreement. Specifically, Petitioner points to Respondent's failure to appear at a preconference hearing, failure to timely file a final pre-trial order, and lack of notice to Petitioner of the continuation of a trial date as evidence of her nonperformance under their agreement. According to Petitioner's letter, these events demonstrate that "I don't owe Attorney Bourne any money, she owes me."[11]

In reviewing Petitioner's petition and supporting papers, it is not clear what theory of liability is being presented. However, in light of the testimony provided at trial, and Virgin Islands precedent, Petitioner's claim is for legal malpractice sounding in tort, not contract.

Generally, when an attorney is hired by a client to provide legal representation, a consensual fiduciary relationship is formed between the parties.[12] Given the nature of this relationship, all agreements between an attorney and client are governed by the law of contracts and closely monitored by the Court for reasonableness.[13] Express agreements, whether written or oral, between the attorney and client are enforceable by the courts provided that the "agreements satisfy both general requirements for a contract and special requirements of professional ethics."[14]

When a client alleges that an attorney breached their agreement, an action for damages may be initiated by a client under a legal malpractice or breach of contract claim.[15] To prevail in a breach of contract action, a client must show: (1) an agreement, (2) a duty owed by the attorney, (3) a breach of agreement, and (4) damages.[16] However, in order to state a legal malpractice claim based on contract law, the client must show that the agreement contained a specific promise or undertaking by the attorney, and the claim is based on the breach of this

8 *Id.*

9 *Cape Air Int'l v. Lindsey,* 53 V.I. 604, 612 (V.I. 2010) (quoting SUPER. CT. R. 64).

10 On May 2, 2011, Plaintiff/Petitioner filed a handwritten document detailing the basis for his contention that Magistrate Gallivan's decision should be reversed.

11 Petitioner's Letter filed May 2, 2011 at p. 2.

12 *See Rainey v. Hermon*, S.Ct. Civ. No., 2011 WL 4738534 at *5 (V.I. Oct. 6, 2011); *see also* 23 WILLISTON ON CONTRACTS § 62:1 (4th ed. 2002).

13 *See Rojas v. Two/Morrow Ideas Enters.*, 53 V.I. 684, 696 (V.I. 2010).

14 *Rainey v. Hermon*, 2011 WL 4738534 at *2 (V.I. 2011) (*quoting McQueen, Rains, & Tresch, L.L.P. v. CITGO Petroleum Corp.*, 195 P.3d 35, 47 (Okla. 2008)).

15 *See, Ingvolstad v. Estate of Young*, 19 V.I. 115, 126-127(D.V.I., 1982).

16 *Arlington Funding Servs., Inc. v. Geigel,* 51 V.I. 118, 134-135 (V.I. 2009).

specific duty.[17] If there is no breach of such a specific promise or undertaking by the attorney, then the action will be construed as a tort legal malpractice claim.[18]

In this case, Petitioner and Respondent formed an oral contract for legal services. The terms of the contract were that Respondent would provide legal representation to Petitioner in a child custody case, and Petitioner would pay for services performed. Petitioner has not alleged nor does the evidence show that Respondent promised, orally or in writing, to achieve certain results in the child custody case. Additionally, there is no evidence that Respondent agreed to pay for expenses relating to Petitioner's court time or replacement of legal counsel.[19] Even though Petitioner has shown that Defendant did not perform certain legal services in a timely manner, it appears that these shortcomings were cured by Respondent or caused no serious harm to Petitioner's case. Given these circumstances, Petitioner is not entitled to monetary relief under a breach of contract claim.

To prevail in a legal malpractice case under tort law, a plaintiff must prove: "1) [an] attorney-client relationship giving rise to a duty, 2) breach of that duty, 3) the causal connection between the negligent conduct and the resulting injury and 4) actual damages."[20] A client must also prove that "the negligence was the proximate cause of the loss of a valid claim and actual damages."[21] But an attorney's one-time failure to appear in court or a single untimely filing of a motion or pleading without more does not constitute legal malpractice.[22]

From the testimony and evidence adduced at the hearing in this case, it is apparent that an attorney-client relationship was formed between the parties. This relationship, which was initiated by an oral agreement, imposed a duty on Respondent to exercise the ordinary care, skill, and diligence as exercised by other attorneys in the legal community.[23] Respondent's failure to timely file the court ordered document and nonappearance at a pretrial conference is negligent conduct. However, the misconduct alleged by Petitioner is not enough to satisfy all prongs of a legal malpractice claim. Petitioner needed to show more evidence of Respondent's allegedly neglectful conduct, causation, and actual damages to support his claim. Thus, Petitioner is not entitled to damages under a legal malpractice action.

Petitioner alleged in his complaint, and testified at trial, that Respondent failed to file a final pretrial conference order,[24] failed to appear at a hearing, failed to regularly communicate with him, and failed to file an opposition to a motion for continuance filed by his ex-wife. It appears that his argument is that these failures caused an adverse result to him in the custody

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17 *Id.* at 128-129; *Ingvolstad v. Estate of Young*, 19 V.I. at 127.
18 *See Id.*
19 Small Claims Hearing Tr. 15:11-12, November 8, 2010.
20 *Moorehead v. Miller*, 21 V.I. 79, 85, 102 F.R.D. 834, 838 (D.V.I. 1984).
21 *Id.* at 86, 102 F.R.D. 838.
22 *Dubreuil v. Witt*, 835 A.2d 477, 487 (Conn. App. Ct. 2003); *Burnside v. McCrary*, 384 So. 2d 1292 (Fla. Dist. Ct. App. 1980).
23 *Moorehead v. Miller,* 21 V.I. at 86, 102 F.R.D. at 838. *See also,* RESTATEMENT (SECOND)TORTS § 299A (1965).
24 It appears from the record that Attorney Bourne did prepare her portion of the final pretrial conference order, but did so beyond the court-ordered time frame.

matter. However, assuming that these failures could be construed as a breach of duty by Respondent, Petitioner did not provide any evidence that he would have obtained a different result in the custody battle absent these shortcomings.[25] In fact, his testimony indicated that even after he changed attorneys, he was unsuccessful in obtaining a new hearing or trial or a revised order regarding the custody of the child. While Petitioner's replacement counsel assisted Mr. Zephir in obtaining visitation, it appears that the process which led to Mr. Zephir's visitation was initiated by Respondent. It was through Respondent's efforts that Petitioner was able to speak with his children by telephone, which he had not done for several years previously. Therefore, Petitioner did not meet his burden of proving that Respondent was the proximate cause of any damages in this tortious legal malpractice action, and the Magistrate properly dismissed his direct action.

C. Magistrate did not err in finding Respondent was entitled to payment for services rendered prior to Respondent's written termination letter.

Petitioner argues that the Magistrate erred in finding that Respondent was entitled to payment of $2,590.00 on her counterclaim. According to Petitioner, he does not owe the Respondent for legal services performed after July 23, 2007, because (1) he represented himself from June 4, 2007, to September 2007, and (2) he received a receipt from Respondent in August 2006 which stated that there was no outstanding balance owed.[26] However, in her counterclaim and at trial, Respondent argued and testified that she continued to provide legal services to Petitioner until her receipt of the termination letter dated January 9, 2008. According to Respondent's testimony, she conducted negotiations and drafted a settlement agreement in the child custody case. Also presented were copies of Petitioner's portion of the joint final pretrial order, opposition to the motion for continuance filed by Petitioner's ex-wife in the custody matter, and a bill for services rendered in 2007 prior to Petitioner terminating Respondent.

Under Virgin Islands law, "when a client fails to pay an attorney's fees, that attorney may bring a breach of contract action to collect the unpaid fees."[27] In such an action, an attorney has the burden of proving not only an agreement existed between the parties but also the fairness and reasonableness of the fees being charged.[28] If a contract is found valid, it is binding on the

25 *See, Ignarski v. Norbut,* 648 N.E.2d 285, 288 (Ill. Ct. App. 1995) ("Plaintiff is required to establish that but for the negligence of counsel, he would have successfully prosecuted or defended against the claim in the underlying suit."); *Roberts v. Sokol,* 330 S.W.3d 576, 580 (Mo. Ct. App. 2011) ("[t]o establish a claim for legal malpractice, a plaintiff must prove that...but for the attorney's conduct the client would have been successful in the prosecution of the underlying claim."); *Fenster v. Smith,* 832 N.Y.S.2d 572, 573 (Sup. Ct. App. Div. 2007) ("the complaint against defendant Smith was properly dismissed since plaintiffs failed to demonstrate that they would have been successful in the underlying proceeding but for Smith's alleged malpractice."); *Tommy Gio, Inc. v. Dunlop,* 348 S.W.3d 503, 507 (Tex. Ct. App. 2011) ("When the plaintiff's allegation is that some failure on the attorney's part caused an adverse result in prior litigation, the plaintiff has the burden to prove that, but for his attorney's negligence, he would have prevailed in the underlying case.").

26 Small Claims Hearing Tr. 28:20, November 8, 2010; *See* Plaintiff's Letter filed April 27, 2011.

27 *Rainey v. Hermon*, 2011 WL 4738534 at *2 (V.I. 2011).

28 *Id.* See *also, Christian v. Joseph*, 23 V.I. 193, 198 (D.V.I. App. Div. 1987).

attorney and client.[29] However, when a charged fee is unreasonable, it will not be approved by the Court even though the parties agreed to the fee.[30]

In this case, the parties had a valid oral agreement with contract terms that Petitioner would pay Respondent for services rendered.[31] However, from the testimony and admitted evidence, it appears that Respondent's hourly rate and what legal services would be performed were not clearly communicated to the Petitioner at the inception of their agreement.[32] After further review of the evidence, several bills reflect specific professional services rendered by the Respondent to Petitioner. Many other receipts contain the amount Petitioner allegedly owed Respondent, but had not paid, and added an interest charge thereon. Even though the majority of Respondent's bills do not reflect the hourly billing rate, it is readily apparent that her initial hourly charge was $200.00 and later increased to approximately $284.00.[33] These hourly rates are reasonable within the Virgin Islands' legal community.

Furthermore, Petitioner presented no evidence that Respondent ceased providing legal services and communications with him after the July 23, 2007, hearing.[34] On the other hand, Respondent has presented evidence that shows she continued to work on Respondent's case until at least October 15, 2007.[35] Respondent introduced into evidence a copy of a settlement letter to opposing counsel dated October 11, 2007, which has a notation that a copy of the letter was also sent to the Petitioner. Petitioner has not presented evidence to rebut the inference that Respondent had continuously worked on his case from the inception of their agreement through October 15, 2007. While he did testify that the communication between the parties was scant at best, this testimony does not necessarily contradict the documentary and testimonial evidence of Respondent that she worked on Petitioner's behalf until the written termination. Given these facts, Respondent is entitled to payment of $2,590.00 from the Petitioner on her counterclaim.

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29 *Rainey v. Hermon*, 2011 WL 4738534 *2. In the Virgin Islands, Rule 1.5 of the American Bar Association's Model Rules of Professional Conduct, made applicable through Supreme Court Rule 203(a), establishes the reasonableness standard for attorney-client agreements.

30 *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 34 (2000).

31 While it is preferable for attorney-client agreements to be in writing, a written instrument is not absolutely required. MODEL RULES OF PROF'L CONDUCT 1.5(b).

32 Small Claims Hearing, Tr.: 29:25-30: 1-21, 32:15, November 8, 2010.

33 *See,* August 20, 2008 bill from Respondent to Petitioner.

34 *Id.*, Tr.: 60:3-21

35 *See* Defendant's exhibit no. 10.

IV. CONCLUSION

The Court finds no error in the Magistrate's dismissal of Petitioner's debt claim and finding that Respondent was entitled to payment of $2,590.00 on her counterclaim. Based on the record, the Magistrate's factual determinations and legal conclusions were correct on both the primary claim and counterclaim. Therefore, the Court will affirm the judgment of the Magistrate Division.

Dated: January 30, 2012

Hon. Adam G. Christian
Judge of the Superior Court
of the Virgin Islands

ATTEST:
Venetia H. Velazquez, Esq.
Clerk of the Court

By: Donna D. Donovan
Donna D. Donovan
Acting Court Clerk Supervisor 1/31/12