
NO. 24390

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

RAYMOND P. CHAN and AMY S. CHAN, individually
and as trustees-in-dissolution of and successors-
in-interest to RC & AC ENTERPRISES, INC., a
dissolved Hawaii corporation, Plaintiffs-Appellant,

vs.

DANIEL F. S. LEE, Defendant-Appellee.

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 00-1-2104-07 GWBC))

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Plaintiffs-appellants Raymond P. Chan (Raymond) and Amy S. Chan (Amy), individually and as trustees-in-dissolution of and successors-in-interest to RC & AC Enterprise, Inc.¹ (RC & AC Enterprise), a dissolved Hawai'i corporation [hereinafter, Raymond, Amy, and RC & AC Enterprise are referred to, collectively, as the Chans], appeal from the first circuit court's² June 20, 2001 final judgment in favor of attorney/defendant-appellee Daniel S. Lee. The Chans assert that the circuit court erred in granting Lee's motion for summary judgment on the complaint, inasmuch as "plaintiff [sic] did not

¹ The parties also refer to RC & AC Enterprise, Inc. as RC & AC Enterprises, Inc. For the sake of consistency, we will use RC & AC Enterprise throughout this order.

² The Honorable Gary W.B. Chang presided over the matter at issue on appeal.

meet is [sic] burden to show that there is no genuine issue as to any material fact and that it was entitled to a judgment as a matter of law.”

Upon carefully reviewing the record and the briefs submitted and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve the Chans’ contentions as follows.

(1) In arguing that summary judgment was not proper, the Chans assert that there is a genuine issue of material fact as to the existence of an attorney-client relationship between Lee and themselves with respect to their purchase of the property, which is the subject of the instant case. “Whether and to what extent an attorney-client relationship is present is a question of fact.” Stender v. Vincent, 92 Hawai’i 355, 363, 992 P.2d 50, 58 (2000). The attorney-client relationship must exist during the alleged transaction or wrong to support a claim of legal malpractice. See 1 R. Mallen & J. Smith, Legal Malpractice § 8.3 at 565 (4th ed. 1996); Additionally:

In a legal malpractice action it is not sufficient merely to prove an attorney-client relationship existed with respect to some matters. It is necessary to establish that the relationship existed with respect to the act or omission upon which the malpractice claim is based.

Kurtenbach v. TeKippe, 260 N.W.2d 53, 56 (Iowa 1977) (emphasis added) (citations omitted).

As stated by the Washington Supreme Court in Bohn v. Cody, 832 P.2d 71, 75 (Wash. 1992):

The essence of the attorney/client relationship is whether the attorney’s advice or assistance is sought and

received on legal matters. See 1 R. Mallen & J. Smith[, Legal Malpractice] § 11.2 n. 18 [(3d ed. 1989)]; 7 Am. Jur. 2d Attorneys at Law § 118 (1980). The relationship need not be formalized in a written contract, but rather may be implied from the parties' conduct. In re McGlothlen, 99 Wash. 2d 515, 522, 663 P.2d 1330 (1983). Whether a fee is paid is not dispositive. McGlothlen, at 522, 663 P.2d 1330. The existence of the relationship "turns largely on the client's subjective belief that it exists". McGlothlen, at 522, 663 P.2d 1330. The client's subjective belief, however, does not control the issue unless it is reasonably formed based on the attending circumstances, including the attorney's words or actions. See 1 R. Mallen & J. Smith § 8.2 n. 12; Fox v. Pollack, 181 Cal. App. 3d 954, 959, 226 Cal. Rptr. 532 (1986); In re Petrie, 154 Ariz. 295, 299-300, 742 P.2d 796, 800-801 (1987).

(Emphases added.) The standard espoused in Bohn for determining the existence of an attorney-client relationship is in accord with the prevailing view of several of our sister jurisdictions. See Paradigm Ins. Co. v. Langerman Law Offices, P.A., 24 P.3d 593, 596 (Ariz. 2001); Fox v. Pollack, 226 Cal. Rptr. 452, 535 (Cal. Ct. App. 1986); Florida Bar v. Beach, 675 So. 2d 106, 109 (Fla. 1996); Warner v. Stewart, 930 P.2d 1030, 1036 (Idaho 1997); Oklahoma, ex rel. Oklahoma Bar Ass'n v. Rouse, 961 P.2d 204, 207 (Okla. 1998); In re Wyllie, 19 P.3d 338, 344 (Or. 2001); Breuer-Harrison, Inc. v. Combe, 799 P.2d 716, 727 (Utah Ct. App. 1990).

Applying the Bohn standard to the facts of the instant case and viewing the materials in the record in the light most favorable to the Chans, as this court is required to do on summary judgment, Hawai'i Cmty. Fed. Credit Union v. Keka, 94 Hawai'i 213, 221, 11 P.3d 1, 9 (2000), we conclude that Raymond's subjective belief that Lee acted as his, Amy's, and RC & AC Enterprise's attorney for purposes of the purchase of the fee to the property was not reasonably drawn under the attending

circumstances of the case. The record plainly evinces that the first two meetings between Lee and Raymond took place in the context of a business negotiation regarding Raymond's possible purchase of the fee where Lee, as holder of a debt owed to him by New York Diamond and as trustee of the property and, therefore, an interested party, was unquestionably acting on behalf of himself and the seller, i.e., New York Diamond and Masuda. Lee, therefore, clearly stood on the opposing side of Raymond as to the purchase of the fee. Moreover, notwithstanding Raymond's allegations of limited education and ability to speak English, the record evinces that, prior to the Chans' purchase of the fee in July 1994, Raymond had personally been involved in numerous real estate transactions in Hawai'i, including several purchases of investment properties. Furthermore, even giving Raymond the benefit of the doubt, it was only at the second of the negotiation sessions that Raymond allegedly formed a belief that Lee implicitly began acting as his attorney for purposes of the Chans' purchase of the fee to the property. This belief was based strictly on Lee's purported advice to use an assumption deed, a corporation to own title, and not to use escrow, as well as Lee's agreement to form RC & AC Enterprise. However, as for Lee's agreement to form RC & AC Enterprise, Raymond himself averred in his declaration that Lee only agreed to form RC & AC Enterprise after the parties had "worked out" the terms of the proposed purchase. Moreover, Lee, who was aware that Raymond was represented by counsel, i.e., Richard Ing, first suggested to

Raymond that he have Ing prepare the incorporation papers before reluctantly agreeing to do so himself.

With respect to Lee's advice regarding the manner in which to take title and purported advice regarding the assumption deed and use of escrow, the mere fact that Lee may have discussed these options with Raymond, without more, is insufficient to establish an attorney-client relationship. See Bohn, 832 P.2d at 365; Holland v. Lawless, 623 P.2d 1004, 1009 (N.M. Ct. App. 1981); Castillo v. First City Bancorporation of Texas, 43 F.3d 953, 958 (5th Cir. 1994); 1 R. Mallen & J. Smith, § 8.3 at 575. Apart from conclusory statements in Raymond's declaration as to his subjective belief that Lee acted as attorney for him, Amy, and RC & AC Enterprise with respect to their purchase of the fee, the Chans fail to adduce any facts relating directly or inferentially to establishing an attorney-client relationship as to this matter.

Additionally, it is undisputed that Lee took no part in the July 25, 1994 conveyance of the fee to the property from Masuda to the Chans. After Raymond and Amy executed the incorporation papers for RC & AC Enterprise in Lee's office on May 16, 1994, they had no further contact with Lee, and received only one invoice from Lee, dated May 26, 1994. That invoice, which is addressed to Raymond, specifically relates to the work Lee performed preparing the incorporation papers for RC & AC Enterprise.

Based on the foregoing, we hold that, even viewing the evidence as a whole in a light most favorable to the Chans, reasonable minds could reach only one conclusion, Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 108, 839 P.2d 10, 24 (1992), to wit, that Raymond's subjective belief that Lee was acting as attorney for him, Amy, and RC & AC Enterprise for purposes of their purchase of the fee to the property was not reasonably formed based on the attending circumstances of the case.

(2) The remaining contentions raised by the Chans lack merit. The Chans assert for the first time on appeal that, even if Lee did not formally represent them in connection with their purchase of the property, he essentially rendered "gratuitous" legal advice and should, therefore, be held to the same standard of care as if he were under formal retainer. Inasmuch as legal issues not raised in the trial court are ordinarily deemed waived on appeal, Ass'n of Apartment Owners of Wailea Elua v. Wailea Resort Co., 100 Hawai'i 97, 107, 58 P.3d 608, 618 (2002), we decline to address this argument. See Han v. Yang, 84 Hawai'i 162, 176-77, 931 P.2d 604, 618-19 (1997).

The Chans also contend that, even if Lee did not represent them with respect to their purchase of the property, Lee violated Hawai'i Rules of Professional Conduct (HRPC) Rule 4.3(b) (2001).³ The record indicates that, at the time Lee met

³ HRPC Rule 4.3(b) provides in pertinent part that:
(continued...)

Raymond, he believed Raymond was represented by counsel, specifically, Ing. Regardless, the HRPC provides that a “[f]ailure to comply with an obligation or prohibition imposed by a rule [of professional conduct] is a basis for invoking the disciplinary process[,]” Scope of the HRPC, paragraph 5 (2001) (emphasis added), not for invoking civil liability, see Scope of the HRPC, paragraph 6. Moreover, a violation of the HRPC does not alone give rise to any civil liability. In the Matter of Disciplinary Bd. of the Hawai’i Supreme Court, 91 Hawai’i 363, 984 P.2d 688 (1999); see Scope of the HRPC, paragraph 6 (2001).

Based on the foregoing, we hold that Lee was entitled to summary judgment as a matter of law with respect to the complaint. Therefore,

IT IS HEREBY ORDERED that the circuit court’s July 20, 2001 final judgment is affirmed.

DATED: Honolulu, Hawai’i, April 23, 2004.

On the briefs:

Jerry A. Ruthruff,
for plaintiffs-appellants

Jack C. Morse,
for defendant-appellee

³(...continued)

During the course of the lawyer’s representation of a client a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the lawyer’s client.