

NOTICE

The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

SECOND DIVISION
March 4, 2003

No. 1-02-0209

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ROBERTA MIX,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 01 M 60070
)	
DAVID E. NEELY,)	Honorable
)	Martin E. McDonough,
)	Joseph M. Macellaio,
Defendant-Appellant.)	Judges Presiding.

O R D E R

Following a bench trial on December 17, 2001, the trial court found in favor of plaintiff Roberta Mix on her legal malpractice claim against defendant David Neely, an attorney, in the amount of \$5,000. Defendant appeals from this order as well as from the order entered May 11, 2001, in which the trial court denied his motion to reconsider the denial of his motion to dismiss and denied his motion for summary judgment. Although plaintiff has not filed a brief on appeal, we will consider the appeal pursuant to the principles set forth in First Capitol Mortgage Corp. v. Talandis Construction Corp., 63 Ill. 2d 128, 131-33 (1976).

On January 5, 2001, plaintiff filed a complaint against defendant, alleging that she retained his services on April 1,

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1998, paid him \$10,000, and met with him on five separate occasions in 1998, but that he did not render any legal services to her in return. Defendant filed a motion to dismiss, alleging that plaintiff failed to state a claim for legal malpractice upon which relief can be granted and that her claim was barred by the statute of limitations. On April 12, 2001, the trial court denied defendant's motion to dismiss.

On April 24, 2001, defendant filed a motion to reconsider and vacate the April 12, 2001, order, alleging that the trial court denied his motion without reading the pleadings and without a hearing. On April 24, 2001, defendant also filed a motion for summary judgment. On May 11, 2001, the trial court denied both motions, stating that the case must go to trial because the statute of limitations was a fact question to be decided by a trier of fact. We note that defendant improperly appealed the trial court's orders denying his pretrial motions. This court subsequently granted plaintiff's motion to dismiss defendant's appeal for lack of jurisdiction. Mix v. Neely, No. 1-01-1998 (2001) (dispositional order).

The trial court entered an order on December 17, 2001, finding that (1) defendant's affirmative defense of non-payment by plaintiff was not properly before the court because defendant did not file an answer or file the affirmative defense before trial, (2) plaintiff's claim that defendant did not provide the requested legal services on or before July 28, 1998, was without

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support, and (3) the second payment of \$5,000 was paid on or about September 4, 1998, but defendant did not provide the legal services that he agreed to provide. The record does not include a transcript or bystander's report of the proceedings of December 17, 2001.

On appeal, defendant asserts that, over his objection, he was forced by the trial judge to participate in a bench trial on December 17, 2001, and was denied an opportunity to answer the complaint or to raise the affirmative defense of non-payment by plaintiff. However, absent a transcript or bystander's report of the proceeding, defendant failed his burden, as appellant, of providing a sufficient record to support his claims of error. Foutch v. O'Bryant, 99 Ill. 2d 389, 391-92 (1984). Where, as here, doubts arise due to the incompleteness of the record, we will presume that the trial court ruled properly and acted in conformity with the law, having adequate evidence to support the decision it rendered, and resolve such doubts against the appellant. Foutch, 99 Ill. 2d at 392-94.

Next, defendant's appeal of the May 11, 2001 order, denying his motion for summary judgment and motion to reconsider the denial of his motion to dismiss, is not properly before this court. When a matter goes to trial after the denial of a motion for summary judgment, the order denying the motion for summary judgment generally merges with the judgment entered and cannot be appealed. Belleville Toyota v. Toyota Motor Sales, 199 Ill. 2d

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325, 355 (2002). The exception to the merger rule occurs when the summary judgment motion presents an issue of law for the court rather than an issue of fact for the jury. Belleville Toyota, 199 Ill. 2d at 356; Labate v. Data Forms, Inc., 288 Ill. App. 3d 738, 740 (1997).

Regarding a motion to dismiss, when a defendant allows an action to proceed to verdict, the doctrine of aider by verdict provides that the verdict will cure all formal and technical defects or clerical errors, as well as "'any defect in failing to allege or in alleging defectively or imperfectly any substantial facts which are essential to a right of action.'" Labate, 288 Ill. App. 3d at 740, citing Adcock v. Brakegate, Ltd., 164 Ill. 2d 54, 60-61 (1994). Even a substantial factual deficiency is insufficient to overcome the doctrine of aider by verdict. Labate, 288 Ill. App. 3d at 741. "Where the complaint sets out or implies the elements of a cause of action, it is immune from post-verdict attack." Labate, 288 Ill. App. 3d at 741.

Defendant raised the same issues in his motion to dismiss and his motion for summary judgment. In both motions, defendant argued that plaintiff (1) failed to state a claim upon which relief can be granted; (2) failed to attach a copy of the alleged contract; (3) failed to allege a proper claim of legal malpractice; (4) relied on conduct that occurred in 1998; (5) filed her claim after the statute of limitations had run; and 7) failed to file a timely legal malpractice claim.

Although defendant's motion for summary judgment raised several issues, the trial court focused on the statute of limitations as the basis for dismissing the motion, stating that the statute of limitations in this case was an issue of fact for the trier of fact to decide at trial. Because the discovery doctrine comes into play in this case, causing the date the statute of limitations began to run to be an issue of fact, the trial court's denial of defendant's motion for summary judgment merged into the verdict and we are unable to review it on appeal.

The doctrine of aider by verdict applies in this case. In his motion to dismiss, defendant argues that plaintiff failed to state a claim upon which relief can be granted. In defendant's brief in support of his motion to dismiss, defendant fleshes out his argument by asserting, among other things, that plaintiff failed to allege that he owed her a duty, that he breached his duty, or that she was damaged as a result. However, while these failures may be construed as "factual deficiencies," they are not sufficient to overcome the doctrine of aider by verdict. In her complaint, plaintiff alleged that she paid defendant \$10,000 for his legal representation, that she met with him on five separate occasions, but that defendant failed to render any legal services to her. Plaintiff's complaint sets out, or at least implies, the elements of a cause of action, and therefore is immune from post-verdict attack. This case went to trial, and the verdict in the case cured all formal and technical defects.

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For the foregoing reasons, the judgment of the trial court is affirmed.

Affirmed.

McBRIDE, P.J., with CAHILL and BURKE, JJ., concurring.