

STATE OF VERMONT
CALEDONIA COUNTY, S.S.

FILED
APR 11 2010
CALEDONIA COUNTY

GERALD DEVOST
Plaintiff

SUPERIOR COURT

v.

Docket No. 19-1-09 Cacv

DEBORAH T. BUCKNAM &
ASSOCIATES, P.C., DEBORAH T.
BUCKNAM, and GLORIA (DEVOST)
JACKSON,
Defendants

DECISION ON MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter is before the court on Defendants' Deborah T. Bucknam & Associates, P.C. and Deborah T. Bucknam (hereinafter collectively referred to as Bucknam) motion for summary judgment. Plaintiff, Gerald Devost, filed this interpleader action January 22, 2009, joining Defendants who each may have a claim against the plaintiff for the \$87,500 deposited with the court. The defendants' "claims are such that the plaintiff is or may be exposed to double or multiple liability." V.R.C.P. 22. Defendant Bucknam filed a cross claim on April 27, 2009 and Defendant Jackson filed a cross claim on May 18, 2009. Defendant Bucknam filed this motion for partial summary judgment on November 19, 2009.

Summary judgment is appropriate when the evidence in record shows "that there is no genuine issue as to any material fact and any party is entitled to a judgment as a matter of law." V.R.C.P. 56(c)(3). In determining whether a genuine issue of material fact exists, the moving party has the burden of proof, and the court views the record in the light most favorable to the non-moving party, giving that party the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists. See *Travelers Ins. Cos. v. Demarle, Inc.*, 2005 VT 53, ¶ 3, 178 Vt. 570 (citing *Messier v. Metro. Life Ins. Co.*, 154 Vt. 406, 409, 578 A.2d 98, 100 (1990)). However, summary judgment is mandated where, after an adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an element essential to its case. *Poplaski v. Lamphere*, 152 Vt. 251, 254, 565 A.2d 1326, 1329 (1989).

FACTS

The undisputed facts, relevant to this summary judgment motion are as follows. Defendant Bucknam is an attorney/legal professional corporation whose legal services were retained beginning in September 2005 by Defendant Jackson to represent Jackson in

a divorce action. Defendant Jackson agreed to pay Defendant Bucknam fees and expenses related to those legal services. On September 9, 2006 the parties entered into an updated fee agreement which included an assignment clause. On September 21, 2006 Bucknam sent a letter to Jackson indicating an unpaid balance of \$17,000 and outlining certain specific requirements for continued representation. These included certain monthly payments, approval of the assignment agreement noted above, and that Jackson sign three notes and mortgages on her property. The letter represented that at the end of the divorce process, Bucknam would adjust the note to reflect the actual fees at the end of the divorce process. The letter also made certain statements regarding what Defendant Bucknam believed Jackson would be able to achieve from the court and the potential outcome of the case.

Jackson signed the promissory notes and mortgages requested in the September 21 letter. On September 4, 2008 Bucknam caused one of these mortgages to be recorded in the Canaan land records.

On January 22, 2009, Gerald Devost, Defendant Jackson's former husband and party to the divorce action brought this interpleader action pursuant to V.R.C.P. 22 on January 22, 2009 to determine which Defendant should receive the \$87,000 deposited by Devost with the court.

CONCLUSIONS

Defendant Bucknam first claims that Defendant Jackson's cross claims exceed the court's jurisdiction in interpleader. Citing V.R.C.P. 22, associated Reporter's Notes, and the U.S. Supreme Court case *State Farm Fire & Cas. Co. v. Tashire*, Defendant Bucknam essentially claims that if the cross claim exceeds interpleader limitations, it is invalid. 386 U.S. 523 (1967).

"The object of interpleader is that the conflicting claimants shall litigate the matter among themselves without involving the stakeholder in their controversy." *Walker Process Equip. Co. v. Cooley Building Corp.*, 129 Vt. 333, 338, 278 A.2d 714, 717 (1971). Its purpose "is to relieve the stakeholder of vexatious and multiple suits." *Messier v. Metropolitan Life Ins. Co.*, 154 Vt. 406, 578 A.2d 98 (1990). The stakeholder, Mr. Devost, filed an interpleader case against defendant Bucknam on the issue of to whom he owed the \$87,500 payment.

Defendant Bucknam correctly states that the Reporter's Notes to Rule 22 say "interpleader is not available as a means by which a potential defendant can force all claimants against him into a single proceeding." Reporter's Notes, V.R.C.P. 22. However, Defendant Bucknam misconstrues this statement. The Reporter's Notes reference the example of a defendant in a tort claim forcing all potential plaintiffs into one proceeding. This scenario is similar to *State Farm Fire & Cas. Co. v. Tashire*, the case upon which Defendant Bucknam relies. *Tashire* is about federal statutory interpleader, to which there is no Vermont analogue. The federal interpleader rule, Rule 22(a), however, is identical to Vermont Rule 22 for all material purposes.

In discussing the relationship between joinder, counterclaims, and cross-claims under the federal rule, Wright and Miller have said:

When interpleader is brought under Rule 22, process will have been served on all the claimants within the usual limits prescribed by the federal rules and there is no difficulty in allowing the claimants to assert cross-claims against each other, as in any other civil action, assuming, of course, the requirements of Rule 13(g) are met. Normally, the addition of a cross-claim will not pose any difficulties or unduly complicate the action because Rule 13(g) requires the claim to arise out of the transaction or occurrence or relate to the property that is the subject matter of the original interpleader action. Because of that relationship, the cross-claim may be brought under the court's supplemental subject-matter jurisdiction. If the claim does not meet the Rule 13(g) transaction requirements, then jurisdiction also will not lie. Should anyone feel prejudiced by the interjection of the cross-claim, relief can be sought by a motion under Rule 42(b) for separate trials. Dismissal, however, would be improper.

7 Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 1715. Plaintiff Devost properly filed this interpleader action. Defendant Bucknam filed a cross claim against Defendant Jackson who also filed a cross claim. The claims meet the V.R.C.P 13 transaction requirements. This court has jurisdiction.

Defendant Bucknam also claims that the court should enforce a provision in the parties' agreement regarding billing disputes. The fee agreement outlines a process by which the client may dispute items on the bill the client believes are in error, making clear that the client's rights are preserved only by responding in writing within sixty days of billing. Jackson claims this is an attempt by Bucknam to improperly limit its future liability. Bucknam responds that it does not go so far as to limit malpractice liability and, in fact, is more akin to a forum selection clause or the type of fee dispute provision encouraged in the Vermont Rules of Professional Conduct.

If the rules encourage any fee dispute provisions, they encourage "procedures for resolution of fee disputes, *such as arbitration or mediation*" which must be complied with when mandatory. V.R.P.C. 1.5, Comment 9 (emphasis added). The agreement at issue does not require arbitration or mediation but outlines a mechanism by which the client flags potential accounting errors and the attorney reviews the bill for errors.

A more closely analogous case notes that a "fee dispute or a disagreement as to the attorney's fee is not only found when the former client complains as to time billings on a line by line basis." *Messenger v. Deem*, 893 N.Y.S.2d 434, 438 (N.Y. 2009). Where a client disputes the reasonableness of fees rather than the accounting of fees, the issue becomes more complex and potentially inappropriate or even impossible for an audit to resolve the issue. In that case "arbitrators are entrusted to determine the reasonableness of fees for professional services. . . . The 'reasonableness' of the fee cannot be limited to

disputes as to whether an attorney should have charge '1.0 hours of billing time' instead of '1.2 hours of billing time.' If such were the case a simple audit of the bill would be all that was necessary. Instead, arbitrators are given authority to evaluate and make a subjective finding of reasonableness. For something to be reasonable it must be fair and proper under the circumstances." *Id.*

It is more of the simple audit scenario that the parties' agreement addresses, where a line by line audit of the bill would be appropriate. It provides for no outside reviewer such as the arbitrator or mediator encouraged by the V.R.P.C. The dispute is not over whether 0.2 hours was properly billed but over whether the charges as a whole were reasonable. Furthermore, as Jackson argues, she was not independently represented at the time she reviewed her legal bills and had no way of knowing that the allegedly exorbitantly high fees may have been out of the ordinary. The fee agreement does not preclude the court from hearing the case at this time.

Defendant Bucknam next claims it is entitled to summary judgment on Counts Four and Seven of Defendant Jackson's complaint. In those counts Defendant Jackson makes a series of specific claims. First, Bucknam's misrepresentation of the quality of its work was a deceptive act or practice prohibited by 9 V.S.A. § 2453. In reliance on these acts, Jackson paid Bucknam fees and other expenses. By offering to continue to represent Jackson while it knew the recorded mortgage included false statements, Bucknam committed a deceptive and unfair act under 9 V.S.A. § 2453. By continuing to represent Jackson pursuant to terms of an agreement that Bucknam allegedly believed gave it more power than represented, Bucknam committed deceptive and unfair acts and practices. Finally, as a result of these deceptive or unfair acts or practices, Bucknam is liable to Jackson for any fees and expenses paid. 9 V.S.A. § 2461(b).

Bucknam asserts that the allegedly unfair or deceptive acts are not covered by the Vermont's Consumer Fraud Act, 9 V.S.A. § 2453 (CFA). The dispute over whether they would be covered centers on the question of whether the alleged acts were part of the "commercial, entrepreneurial aspects of law" as opposed to "professional judgment based upon . . . legal knowledge and skill." See *Kessler v. Loftus*, 994 F.Supp. 240, 242-43 (D. Vt. 1997).

The CFA prohibits "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." 9 V.S.A. § 2453(a). Since the practice of law involves commerce, and business aspects of professional trades fall within the scope of the Federal Trade Commission Act which guides application of the CFA, the CFA applies to certain aspects of the legal profession. See *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 645, 105 S.Ct. 2265 (1985); *American Medical Ass'n v. FTC*, 638 F.2d 443, 448 (2d Cir. 1980). The question is "whether a particular attorney representation constitutes a 'material representation, practice or omission' made in commerce for purposes of a CFA claim." *Kessler v. Loftus*, 994 F.Supp. 240, 242 (D. Vt. 1997); see also *Webb v. Leclair*, 2007 VT 65, ¶¶ 22-23, 182 Vt. 559 (adopting *Kessler* and discussing the difference between fact and opinion and the historical connection between the tort of fraud and misrepresentation of fact).

Kessler quotes two Vermont trial court opinions that the federal court found persuasive. This court also finds those opinions persuasive as well as relevant to the case at bar. “[R]epresentations made by an attorney to a client are exempt from CFA if they fall within the definition of the actual practice of law . . . [defined as] those matters requiring the professional judgment of an attorney based upon his or her legal knowledge and skill.” *Kessler*, 994 F.Supp. at 242-42 (citing *Jackson v. Triggs*, No. S503-94 CnC, 1 Vt. Trial Ct.Rep. 69 (Vt.Super. Apr. 10, 1996)). Even grossly incompetent advice that is an inaccurate opinion “is not a deceptive act of practice in commerce.” *Id.* (citing *Whitcomb v. Davis*, No. 179-10-930SCv, 1 Vt. Trial Ct.Rep. 113, 133 (Vt.Super. Nov. 5, 1996)). Although the Vermont Supreme Court has not comprehensively addressed the issue of the CFA and professional representations, the Court distinguished between “representations of legal *opinions* and representations of *fact* relating to the law as it exists.” *Winton v. Johnson & Dix Fuel Corp.*, 147 Vt. 236, 240, 515 A.2d 371, 373-74 (1986) (emphasis original). The Court explained that

[t]he first involves the legal meaning and effect of a statute, court ruling, document, instrument or other source of law, while the latter involves statements that imply the existence of accurate and readily ascertainable facts that either concern the law or have legal significance, but which are not part of the law themselves.

Id. at 240. The case at bar is not a simple controversy over whether a statement was a representation of legal opinion or fact; it is considerably more complex and based on a series of acts, representations, conversations, payments, and alleged agreements. However, for the purposes of Count Four and Count Seven, the essential question is whether Defendant Bucknam was engaging in the commercial, entrepreneurial aspects of the practice of law such as advertising, billing and collection practices, fee arrangements, and methods of obtaining, retaining and dismissing clients. See *Kessler*, 944 F.Supp. at 243. Viewing the facts in the light most favorable to the non-moving party, it is possible that there could be a claim under the CFA. If the fact finder concludes that Defendant Bucknam “acted for the purpose of increasing profits or gaining clients, then [its] acts were entrepreneurial in nature.” *Eriks v. Denver*, 118 Wash.2d 451, 464, 824 P.2d 1207, 1214 (1992). “Determining whether [Defendant Bucknam] acted for entrepreneurial purposes is a question of fact.” *Id.* at 465. Summary judgment is not appropriate on Counts Four and Seven.

Defendant Bucknam next asserts it should be granted summary judgment on Count Five, breach of contract regarding mortgage. The dispute essentially centers on the question of what is the controlling contract and the applicability of the doctrine merger by deed. Defendant Jackson claims a letter from Defendant Bucknam to Defendant Jackson dated September 21, 2006 controls. Defendant Bucknam claims that the unsigned letter was no contract, but if the letter were a contract merger by deed applies and the note controls.

Defendant Bucknam accurately describes the doctrine of merger by deed but does not correctly apply the doctrine to this case. The rule “is not as broad and absolute as some

abbreviated statements of the doctrine might indicate. . . . The crucial issue in determining whether there has been an integration is whether the parties intended their writing to serve as the exclusive embodiment of their agreement.” 77 Am. Jur. 2d Vendor and Purchaser § 244. Furthermore, “[w]here there are stipulations in the preliminary contract or contracts of which the conveyance is not a performance, the question of whether such stipulations are merged in the deed depends upon whether the parties intend a waiver, surrender, or other discharge of such stipulations, that is, upon whether the parties intend to accept the deed as full performance of the entire preliminary contract or contracts.” *Id.* See e.g. *Black v. Evergreen Land Developers, Inc.*, 75 Wash.2d 241, 248-49, 450 P.2d 470, 475 (1969).

In the case at bar, the conveyance was not the performance. The parties had an agreement to perform legal services in exchange for payment. The mortgage merely acted as security for that agreement; it does not concern the performance of the obligation. The doctrine of merger by deed does not apply.

The question of whether there was a breach of contract then necessarily turns on what is the controlling contract. “Whether there was a meeting of minds is a question of fact. . . . [I]n cases in which the terms of a contract are ambiguous, disputes concerning the agreed-upon terms and conditions are issues of fact.” *Vermont Yankee Nuclear Power Corp. v. Department of Taxes*, 2010 VT 24, ¶ 18, ___ A.2d ___ (internal citations omitted). However, whether a contract is ambiguous is a question of law. See *Kim v. Kim*, 173 Vt. 525, 526, 790 A.2d 381, 382 (2001) (citing *Isbrandtsen v. North Branch Corp.*, 150 Vt. 575, 577, 556 A.2d 81, 83 (1988)). The parties disagree not only over what is the controlling contract but also over specific terms; they disagree about the meaning of “adjust” the amount of the notes, the total amount the parties intended mortgages to cover, and Defendant Bucknam’s authority to adjust the mortgage. Viewing the record in the light most favorable to the non-moving party, and giving that party the benefit of reasonable doubts and inferences, genuine issues of material fact exist and it is not appropriate to grant summary judgment on Count Five.

Finally, Defendant Bucknam asserts it should be granted summary judgment on Count Nine, breach of duty regarding malpractice insurance. Defendant Jackson claims that Bucknam’s cancelling its malpractice insurance was a breach of a duty, and an act of intentional or reckless disregard of Jackson’s rights since Jackson was the intended third party beneficiary of the malpractice insurance policy. Defendant Bucknam counters that the insurance policy is simply a contract and modifying or cancelling the contract was well-within its constitutional freedom of contract.

“In general, direct actions against the insurer by persons other than the insured are prohibited because of the absence of privity of contract” unless there is a statute or contract clause giving the third-party that right. *Korda v. Chicago Ins. Co.*, 2006 VT 81, ¶ 25, 180 Vt. 173 (citing 16 L. Russ & T. Segalla, *Couch on Insurance* 3d § 222.5, at 104-10 to 104-12 (3d ed. 2000)). Vermont is not a “direct-action” state, it has no statute allowing third-party in this situation direct action claims against an insurer. But see 8

V.S.A. § 4203(3) (giving an injured party the right of direct action to enforce a judgment against the insured where the insured is insolvent or bankrupt).

Absent explicit authorization that the injured party is a third-party beneficiary or other real party in interest, there is no privity of contract and the injured may not bring suit. See e.g. *Smedberg v. Detlef's Custodial Service, Inc.*, 2007 VT 99, 182 Vt. 349. See also V.R.C.P. 17. "In order for a third party to enforce a policy of insurance, it must be demonstrated that the parties intended to insure the interest of [the third party] who seeks to recover on the policy. . . . The intention to benefit the third party must appear from the four corners of the instrument, and [t]he intention to cover the third party must be that of both parties to the insurance contract." *State v. Liberty Mut. Ins. Co.*, 23 A.D.3d 1084, 803 N.Y.S.2d 865 (N.Y. 2005) (internal citations omitted, alterations original). Other non-direct actions states have only allowed action by a third party where the contract indicates with "objective clarity" that the benefit was established. See *Vidimos v. Laser Lab, Ltd.*, 99 F.3d 217, 220 (7th Cir. 1996) (finding a genuine issue of material fact regarding the status of an potential third party beneficiary where the contract at issue was a permissible delegation of a previous contract to which the third party was an actual party). "[T]he fact that a third party would be benefitted by performance of the contract is not enough to give him the status of a third party beneficiary." *Id.*

Defendant Jackson claims nothing more than she would be benefitted by the performance of the contract. Without objective clarity from within the four corners of the instrument that Defendant Jackson was the intended third-party beneficiary of the insurance policy, there is no third-party claim. The liability insurance policy is a contract for the benefit of the insured. See 43 Am. Jur. 2d *Insurance* § 4. There is no evidence that this insurance policy was intended to benefit anyone but Defendant Bucknam. Summary judgment is granted to Defendant Bucknam as to Count Nine.

Defendant Jackson maintains that Defendant Bucknam breached her professional duty of care by taking the mortgages in a claim of professional negligence. Defendant Jackson also maintains that Defendant Bucknam breached her fiduciary duty by taking the mortgages in a claim of breach of fiduciary duty.

A claim of negligence requires (1) a duty, (2) breach, (3) causation, and (4) damages. Black's Law Dictionary (8th ed. 2004). A claim of breach of fiduciary duty requires (1) the existence of a fiduciary duty between the parties, (2) the breach of that duty, and (3) damages suffered as a result of the breach. See *DDCLAB Ltd. v. E.I. DuPont De Nemours and Co.*, 2005 WL 425495, *8 (S.D.N.Y. Feb. 18, 2005) (citing *Cramer v. Devon Group, Inc.*, 774 F.Supp. 176, 184 (S.D.N.Y.1991)). Since, as discussed above, no duty exists that would prevent Bucknam from securing the debt owed it, there is no breach of duty with regard to taking the mortgages as security for the debt owed under the disputed contract.

However, Defendant Jackson also alleges professional negligence and breach of fiduciary duty for exposing Jackson to liability for slander of title and hindering full performance of the divorce order. For several reasons, based on the record before it, the court cannot

make a determination on these issues. There appears to be a dispute regarding whether the deed recorded by Defendant Bucknam was for solely the “Jackson Lodge” or the entire “Original Jackson Property” which Defendant Jackson claims includes more property than the Lodge. This could impact whether Defendant Bucknam is liable for exposing Defendant Jackson to liability for slander of title or hindering full performance of the final divorce order. This dispute cannot be resolved on the current record.

It is also unclear based on the pleadings whether there is an independent cause of action in Count 6 and Count 8. Many courts have held that professional negligence and breach of a fiduciary duty are distinct claims. See e.g. *Beverly Hill Concepts, Inc. v. Schatz v. Schatz*, 247 Conn. 48, 56-57, 717 A.2d 724, 730 (1998) (explaining that professional negligence implicates a duty of professional care while breach of fiduciary duty implicates a duty of loyalty and honesty); *Vaxion Therapeutics, Inc. v. Foley & Lardner LLP*, 593 F.Supp.2d 1153, 1169 (S.D.CA 2008) (“Under California law breach of fiduciary duty is a species of tort distinct from a cause of action for professional negligence.”). However, the two are not automatically distinct causes of action. Where the breach of fiduciary duty claim merely tracks the allegations of defendant's legal malpractice claim and does not allege any independent intentional tort, is duplicative and warrants dismissal. See *CVC Capital Corp. v. Weil, Gotshal, Manges*, 192 A.D.2d 324, 595 N.Y.S.2d 458 (1993). Where claims arise from the same facts and do not allege distinct damages, such claims are likely duplicative. Cf. *Mecca v. Shang*, 258 A.D.2d 569, 570, 685 N.Y.S.2d 458, 460 (N.Y. 1999) (affirming dismissal of claims of fiduciary duty and fraud since they arose from the same facts and resulted in the same damages as a legal malpractice claim).

Defendant Bucknam’s motion for summary judgment remains open for further briefing from both parties and to sufficiently develop the record on Count 6 and Count 8. This includes briefing, with specificity, the elements of each claim.

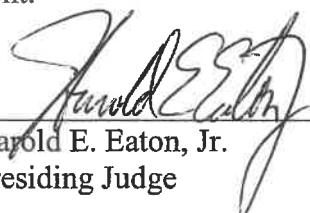
ORDER

Defendant Bucknam’s motion for summary judgment on Count Six and Count Eight remains open for further briefing and later decision. The parties have 30 days to submit additional briefings to this court.

Defendant Bucknam’s motion for summary judgment on Count Nine is GRANTED.

Defendant Bucknam’s motion for summary judgment on Count Four, Count Five and Count Seven is DENIED.

DATED April 5, 2010 at St. Johnsbury, Vermont.



Harold E. Eaton, Jr.
Presiding Judge