

STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB-CV-09-018

Mark L. Randall, and
Randall Law Office, P.A.,

Plaintiffs,

v.

DECISION AND ORDER
(Motion to Dismiss)

J. Michael Conley,
Wenonah Wirick, and
Conley & Wirick, P.A.,

Defendants

This matter was heard on November 24, 2009, on Defendants' Motion to Dismiss. In their motion, Defendants contend that Plaintiffs' claims are barred by the doctrine of *res judicata*.

Factual/Procedural Background¹

Plaintiff Mark Randall is the sole shareholder of Plaintiff Randall Law Office, P.A. Defendants J. Michael Conley and Wenonah Wirick are attorneys employed by Defendant Conley & Wirick, P.A., a Maine corporation that provides legal services, with a principal place of business in Bath, Maine.

Prior to January 3, 2007, Defendant Conley was the sole shareholder of a law firm known as J. Michael Conley, P.A., the predecessor to Defendant Conley & Wirick, P.A. Beginning in 2004 and continuing into 2007, Defendants Conley and Wirick provided legal representation to Plaintiffs on several matters. While Defendants Conley, Wirick and the law firm were representing Plaintiff Randall on various legal matters, Defendant Conley explored with Plaintiff Randall the possibility of Plaintiff Randall purchasing shares in Defendant Conley's law firm.

¹ The facts as outlined herein are derived from the assertions made in Plaintiffs' Complaint, which assertions are deemed admitted for purposes of the motion to dismiss. *Doe v. Graham*, 2009 ME 88 ¶ 3, 977 A.2d 391, 394.

During the negotiations and discussions, Plaintiff Randall asked to review the books and records of the law firm, including tax returns, profit and loss statements, and balance sheets for a five year period. Defendant Conley told Plaintiff Randall that the law firm's records did not contain any information that would be useful in connection with Plaintiff Randall's potential purchase of shares and, therefore, he did not permit Plaintiff Randall to examine the records. Instead, Plaintiffs relied upon the assurances of Defendants Conley and Wirick, and entered into a Merger, Stock Purchase and Transition Agreement with Defendants Conley and Wirick (the Agreement).

Under the Agreement, Plaintiffs purchased 74.5 shares of common stock in the law firm. In consideration for the stock, Plaintiffs transferred to the law firm certain property. Plaintiffs allege that prior to the transfer of the stock, Defendant Conley made a number of misstatements about, and failed to disclose material information related to, the value of the law firm, the law firm's financial condition and the extent of its debt. Plaintiffs maintain that Defendant Wirick "materially aided" Defendant Conley's conduct by falsely "stating that the Law Firm was making plenty of money, had plenty of cases and was financially successful, [and] by failing to correct the untrue and misleading statements of Conley, and by not disclosing the material facts" that Defendant Conley is alleged to have omitted.²

The Agreement contains the following arbitration clause: "any and all disputes that may arise between or among [the parties] in the future over the terms of this Agreement shall be decided by binding Arbitration, if any Party demands arbitration."³ When a dispute arose between the parties, Defendants demanded arbitration pursuant to the arbitration clause contained within the Agreement. Plaintiffs then submitted a list of additional issues for arbitration. After a hearing, the arbitrator issued a

² Pls.' Compl. at ¶ 29.

³ Def.'s Exh. 1-A. As discussed more fully below, although the Court is mindful of the fact that generally the Court should not consider materials outside the pleadings in connection with a motion to dismiss under M.R. Civ. P. 12(b)(6), because Plaintiffs' Complaint references the Agreement and because the Agreement forms the basis for some of Plaintiffs' claims, the court can consider the Agreement without converting Defendants' Motion to Dismiss into one for summary judgment. *See Moody v. State Liquor & Lottery Comm'n*, 2004 ME 20, ¶ 8, 843 A.2d 43, 47.

decision, which was subsequently confirmed by the Court. Plaintiffs have appealed to the Maine Law Court from the Court's Decision and Order confirming the arbitration award.

During the pendency of the arbitration proceedings, Plaintiffs initiated the instant action. Plaintiffs' Complaint is comprised of two counts: (1) Violation of Maine's Uniform Securities Act, 32 M.R.S. §§ 16101-16702⁴; and (2) Legal Malpractice: Breach of Fiduciary Duty.

Discussion

I. Standard of Review.

A motion to dismiss pursuant to M.R. Civ. P. 12(b)(6) "tests the legal sufficiency of the complaint and, on such a challenge, 'the material allegations of the complaint must be taken as admitted.'" *Shaw v. Southern Aroostook Comm. Sch. Dist.*, 683 A.2d 502, 503 (Me. 1996) (quoting *McAfee v. Cole*, 637 A.2d 463, 465 (Me.1994)). When reviewing a motion to dismiss, this court examines "the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Id.* A dismissal under M.R. Civ. P. 12(b)(6) will be granted only "when it appears beyond a doubt that the plaintiff is entitled to no relief under any set of facts that he might prove in support of his claim." *Id.* (quoting *Hall v. Bd. of Env'tl. Prot.*, 498 A.2d 260, 266 (Me. 1985)).

II. Res Judicata and Collateral Estoppel.

Defendants argue that based on the arbitration award, the doctrine of *res judicata* bars Plaintiffs' claims. According to Defendants, the arbitration fully and finally resolved any and all claims relating to the Agreement and, therefore, the Court should dismiss Plaintiffs' Complaint.

⁴ Count I is asserted against Defendants Conley and Wirick in their individual capacities, and is not asserted against the law firm.

Res judicata “prevents the relitigation of matters already decided.” *Portland Water Dist. v. Town of Standish*, 2008 ME 23, ¶ 7, 940 A.2d 1097, 1099. The doctrine of *res judicata* is comprised of two distinct, though related, components: claim preclusion and issue preclusion. *Id.*

Claim preclusion prevents relitigation if: (1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been litigated in the first action.

Id. ¶ 8, 940 A.2d at 1100.

When considering whether a claim is barred, courts “apply a transactional test, ‘examining the aggregate of connected operative facts that can be handled together conveniently for purposes of trial to determine if they were founded upon the same transaction, arose out of the same nucleus of operative facts, and sought redress for essentially the same basic wrong.’” *Id.* (quoting *Norton v. Town of Long Island*, 2005 ME 109, ¶ 18, 883 A.2d 889, 895)). Under the doctrine of *res judicata*, “[s]uch a claim is precluded even if the second action relies on a legal theory not advanced in the first case, seeks different relief than that sought in the first case, or involves evidence different from the evidence relevant to the first case.” *Id.* (quotation marks omitted). Similarly,

[i]ssue preclusion, or collateral estoppel, prevents the relitigation of factual issues already decided if the identical issue was determined by a prior final judgment, and the party estopped had a fair opportunity and incentive to litigate the issue in a prior proceeding. Whereas claim preclusion is focused on the claims set forth in the prior proceeding, collateral estoppel concerns factual issues, and applies even when the two proceedings offer different types of remedies. Collateral estoppel can be applied to administrative proceedings as well as to court proceedings.

Id. ¶ 9, 940 A.2d at 1100 (internal citations and quotation marks omitted).

In this case, Defendants contend that Plaintiffs’ claims and/or factual assertions relating to Defendants’ alleged breach of fiduciary duty and the issuance of the stock either were, or could have been, adjudicated in the arbitration and, therefore, may not be relitigated in this action. Before the Court can determine whether *res judicata* or collateral estoppel bars Plaintiffs’ claims, the Court must first

determine whether either doctrine is applicable given that the arbitration award is the subject of Plaintiffs' appeal before the Maine Law Court, and given the nature of Plaintiffs' motion.

Preliminarily, the Court notes that the existence of a "final judgment" is a necessary element of both *res judicata* and collateral estoppel. Section 5940 of the Maine Uniform Arbitration Act provides that after an arbitration award is confirmed, the award may be "enforced as any other judgment or decree." 14 M.R.S. § 5940. In addition, the Law Court has explained that generally "a judgment is final for purposes of *res judicata* despite the pendency of an appeal." *Bartlett v. Pullen*, 586 A.2d 1263, 1265 (Me. 1991) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 13 comment 7 (1982)). Accordingly, the Court concludes that the arbitration award is, in fact, a final judgment for purposes of the application of *res judicata* or collateral estoppel.

The next issue is whether *res judicata* or collateral estoppel applies where a party seeks dismissal pursuant to M.R. Civ. P. 12(b)(6). "A Rule 12(b)(6) motion is appropriate to raise the affirmative defense of *res judicata* only if the facts establishing the defense appear on the face of the complaint." *Sargent v. Sargent*, 622 A.2d 721, 723 (Me. 1993). In addition to the allegations contained in the complaint itself, however, a court may also "consider official public documents, documents that are central to the plaintiff's claim, and documents referred to in the complaint . . ." *Moody v. State Liquor & Lottery Comm'n*, 2004 ME 20, ¶ 10, 843 A.2d 43, 48. *See also In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 14 (1st Cir. 2003).

In support of their motion, Defendants attach the Agreement, their demand for arbitration and list of arbitration issues, Plaintiffs' supplemental list of issues for arbitration, Plaintiffs' arbitration brief, and the arbitration award.⁵ Although the Court will consider the arbitration award and the Agreement, the other materials are neither public records, nor are they referenced or incorporated by Plaintiffs' Complaint. Therefore, to the extent that *res judicata* or collateral estoppel applies in this case, the bases

⁵ See Defs.' Mot. at Exhs. 1-5.

for the defenses must be evident from the face of the Complaint, the Agreement, or the arbitration award.

A. *Count I: Liability Under the Maine Uniform Securities Act (32 M.R.S. § 16509).*

Plaintiffs' claim under Section 16509 is predicated upon alleged misstatements or omissions relating to Plaintiff Randall's purchase of stock in the law firm.⁶ In other words, in order to prevail on their claim, Plaintiffs must demonstrate that the Defendants either made affirmative misrepresentations, or failed to disclose material information that they were required to disclose. As to Defendant Conley, the arbitration award directly addressed this issue. According to the arbitration award "[t]he evidence does not support a finding of fraud against Conley. Randall had ample opportunity to request information regarding the financial condition of the Conley firm and to then investigate the financial condition of the firm before signing the Transition Agreement." Because Defendant Conley's representations, or lack thereof, were clearly litigated during the arbitration proceeding in connection with Plaintiffs' accusations of fraud, Plaintiffs are collaterally estopped from litigating the issue again in this action. However, because it is not apparent from the arbitration award that the parties litigated Defendant Wirick's potential responsibility for any of the alleged misrepresentations, the Court cannot conclude at this stage of the proceedings that collateral estoppel bars Plaintiffs claims against Defendant Wirick.⁷

⁶ 32 M.R.S. § 16509 reads, in relevant part:

A person is liable to the purchaser if the person sells a security . . . by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing of the untruth or omission and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission.

Id.

⁷ Because the parties' agreement does not, in the Court's view, confer upon the arbitrator the jurisdiction to consider whether Defendants' violated the Maine Uniform Security Act during the negotiations that resulted in the formation of the Agreement, and because neither the Complaint, nor the arbitration award establish that any such allegations were made against Defendant Wirick, the Court cannot conclude that the claim was or should have been asserted in the arbitration proceeding. Accordingly, *res judicata* (claim preclusion) does not operate to preclude Plaintiffs' claim against Defendant Wirick.

B. *Count II: Legal Malpractice: Breach of Fiduciary Duties.*

Unlike Plaintiffs' claims regarding Defendant Conley's alleged misstatements or omissions, the arbitration award does not reflect that the parties litigated before the arbitrator Defendants' alleged breach of fiduciary duty. Consequently, the Complaint and related documents provide no basis upon which the Court could conclude that the doctrine of collateral estoppel bars Count II of Plaintiffs' Complaint. Application of *res judicata* (claim preclusion) is similarly inappropriate unless it is evident from the materials properly considered on a Rule 12(b)(6) motion that Plaintiffs' breach of fiduciary duty claim *could have been* litigated as part of the arbitration proceeding.

In this case, all claims relating to the terms of the parties' Agreement are subject to arbitration. Based on the face of Plaintiffs' Complaint, the conduct upon which Count II is grounded is not necessarily limited to Defendants' alleged misrepresentations. Instead, Count II includes allegations that Defendants acted as Plaintiffs' counsel in the negotiation of the Agreement and that Defendants, among other things, failed to "ensure that the transaction and terms [of the Agreement] were fair and reasonable to" Plaintiffs. Because these allegations suggest a duty and conduct that are unrelated to the parties' performance under the terms of the Agreement, the Court cannot conclude as a matter of law that the claim asserted in Count II could have or should have been litigated as part of the arbitration proceeding.

III. Whether Plaintiffs' Complaint Sufficiently States Claims Upon Which Relief Can be Granted.

Plaintiffs also contend that to the extent that Plaintiffs' claims are not barred by *res judicata* and/or collateral estoppel, Plaintiffs' Complaint should nevertheless be dismissed for failure to allege the necessary elements of their claims. In particular, Defendants argue that the sale of the stock is not subject to the Maine Uniform Securities Act because: (1) the sale did not directly or indirectly benefit the issuer and was therefore an "isolated nonissuer transaction"; and (2) it was made in connection with

a merger to which both the issuer and the other person were parties.⁸ Simply stated, given the current record, and given the applicable standard for dismissal, the Court cannot conclude that Defendants' alleged conduct is exempt from liability under the Act.

Defendants also argue that Plaintiffs have failed to allege a claim for legal malpractice. According to Defendants, because Plaintiffs do not allege in Count II that Defendants failed to satisfy the applicable standard of care for an attorney, but rather assert that Defendants breached a fiduciary duty, Plaintiffs "malpractice" claim fails as a matter of law. The Court's review on a motion to dismiss is not so exacting. As explained above, on a motion to dismiss, the Court reviews the allegations in the Complaint "in relation to any cause of action that may reasonably be inferred from the Complaint." *Saunders v. Tisher*, 2006 ME 94, ¶ 8, 902 A.2d 830, 832. Consistent with that analysis, Plaintiffs' Complaint asserts facts that would support a cognizable claim, and, therefore, Defendants are not entitled to the dismissal of Count II.

Conclusion

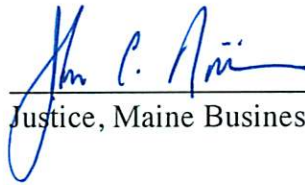
Based on the foregoing analysis, the Court orders:

1. The Court grants Defendant Conley's Motion to Dismiss as to Count I of Plaintiffs' Complaint. Judgment is, therefore, entered in favor of Defendant Conley and against Plaintiffs on Count I of Plaintiffs' Complaint.
2. The Court denies Defendant Wirick's Motion to Dismiss as to Count I of Plaintiffs' Complaint.
3. The Court denies Defendants' Motion to Dismiss as to Count II of Plaintiffs' Complaint.

⁸ See Defs.' Mot. at 12 (citing 32 M.R.S. §§ 16102(1), (18) & (19)).

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

Date: 12/31/09



Justice, Maine Business & Consumer Docket