

upon which to base its decision are those in the Second Amended Complaint. Those allegations are summarized below, initially as to the law firm defendants and then as to Ace.

Factual Allegations Pertaining to Preti and MCM

Plaintiff Kaile Warren is the majority owner and controller of the Plaintiff corporate entities, Rent-A-Husband LLC, Rent-A-Husband Enterprises, LLC, and KW Enterprises, Inc. (Corporate Plaintiffs). (Compl. ¶ 1.)² In approximately April 2000, Preti began representing the Corporate Plaintiffs as corporate counsel and Warren as personal counsel. (Compl. ¶¶ 11, 13.) In 2002, after allegedly following advice from counsel, Plaintiffs began to raise business capital for Rent-A-Husband through a private offering that was designed and overseen by Preti. (Compl. ¶¶ 24-25.) Promissory notes and subscription agreements were issued through Plaintiffs Rent-A-Husband LLC and KW Enterprises, Inc. as part of the private offering. (Compl. ¶ 28.)

Plaintiffs allege that despite organizing and designing the private offering, Preti failed to ensure that the Rent-A-Husband private offering complied with all state and federal securities laws, to advise Plaintiffs to properly register promissory notes in compliance with the Maine Uniform Securities Act, to inform the Plaintiffs of the requirements for securities registration and licensing. (Compl. ¶¶ 28-31, 33-35.) After the SBA, with whom Plaintiffs were negotiating to obtain funding for the purpose of facilitating buy-in, buy-out of Rent-A-Husband by Ace, called into question the legality of the private offering in 2007 or 2008, Preti withdrew from further legal representation of Plaintiffs effective May 6, 2008. (Compl. ¶¶ 37-38, 44.)

Preti referred Plaintiffs to MCM, who, in June 2008, began representing the Plaintiffs as their corporate counsel and securities investigation counsel and acted as personal counsel to Warren regarding corporate matters, the securities investigation, and the eventual criminal case, which the

² All citations are to the Second Amended Complaint filed with Plaintiff's motion to amend, which is granted in a separate order.

State of Maine Office of Securities began investigating in the summer of 2008. (Compl. ¶¶ 46, 56-58.)

Plaintiffs allege that MCM inappropriately advised the Plaintiffs that Warren could properly and lawfully issue personal promissory notes to raise business capital for Rent-A-Husband. (Compl. ¶ 74.) Plaintiffs also allege that MCM inappropriately advised them to waive their attorney-client privilege with Preti and waive their Fifth Amendment rights. Plaintiffs also assert that MCM advised them to produce voluntarily information and records to the State of Maine that MCMC had not reviewed beforehand, despite knowing that these statements could be used against the Plaintiffs. (Compl. ¶¶ 48-49, 66, 68, 70-71.) Plaintiffs state that deficient legal advice led to the civil enforcement and criminal actions being brought. (Compl. ¶¶ 75, 77.) In January 2010, MCM moved to withdraw from further legal representation of the Plaintiffs based on a conflict of interest. (Compl. ¶ 78.)

As a result of the securities investigation, on December 11, 2009, plaintiff Warren was indicted for criminal violations of law stemming from the Rent-A-Husband private offering. (Compl. ¶ 51.) While the criminal matter was still pending the State of Maine filed a civil enforcement action against the Plaintiffs alleging securities violations. (Compl. ¶ 52.) On February 23, 2011, a consent judgment was entered into with the Plaintiffs, pursuant to which the criminal prosecution was dismissed with prejudice and Plaintiffs agreed to pay restitution to the State of Maine for the Rent-A-Husband investments of \$1,994,657.08 plus interest. (Compl. ¶¶ 54-55.)

Facts Pertaining to Ace

Between 2002 and 2008, Plaintiffs had a profitable partnership with Ace of Rent-A-Husband franchises within Ace stores in Maine, New Hampshire, and Massachusetts. (Compl. ¶¶ 79-82, 85.) Plaintiffs claim that Ace repeatedly expressed to Plaintiffs its interest and intention of purchasing Rent-A-Husband outright or, alternatively, of obtaining a controlling financial interest in it. (Compl.

¶ 87.) In November 2007, and again in January 2008, Ace met with Warren to discuss the potential buy-out or buy-in. (Compl. ¶ 88.)

Plaintiffs claim that Ace knew or reasonably should have known that Plaintiffs were continuing to raise business capital through a Rent-A-Husband private offering. (Compl. ¶ 90.) Ace met with a number of Rent-A-Husband investors, and negotiated some investors for Rent-A-Husband. (Compl. ¶ 91.) Ace also spoke with individuals at the SBA regarding the proposed partnership to help secure funding for Rent-A-Husband, and to facilitate the buy-in or buy-out of Rent-A-Husband. (Compl. ¶ 92.)

In March of 2008, Plaintiffs claim that Ace suddenly put the ownership stake of Ace in Rent-A-Husband on hold. (Compl. ¶ 93.) Although the potential buy-in or buy-out was suspended, Ace continued to stay in contact with the Plaintiffs and continued to state that the partnership would still happen. (Compl. ¶ 94.) Ace did this by issuing a letter acknowledging the success of the partnership between Rent-A-Husband and Ace, advising and encouraging Ace franchise stores to buy Rent-A-Husband franchises, and by providing Plaintiffs with funding, advise, counsel, research, and advertising assistance. (Compl. ¶ 95.) Plaintiffs claim they took innumerable steps to facilitate the buy-in or buy-out based on the repeated representations by Ace, but Ace never purchased an ownership stake in Rent-A-Husband although its franchise stores continues to have Rent-a-Husband franchises. (Compl. ¶¶ 97-99.) Plaintiffs allege that the issues regarding the legality of the private offering, the withdrawal of Preti as Plaintiffs' counsel, and the securities investigation all affected Ace's interest in obtaining an ownership stake in Rent-A-Husband. (Compl. ¶¶ 103-105.)

Plaintiffs claim that on or about October 2009, Ace made false statements to the media concerning the scope and extent of its business relationship with Plaintiffs, Ace's interest in obtaining an ownership stake in Rent-A-Husband, and Ace's knowledge of Rent-A-Husband investors. (Compl. ¶ 108.) Plaintiffs assert that the false statements further fueled the securities

investigation that resulted in criminal indictments and a civil enforcement action. (Compl. ¶ 109.) Plaintiffs also claim that during the pendency of the criminal prosecution, Ace made false statements to the Maine Securities Investigators and the Maine Attorney General's Office regarding the scope and extent of the relationship between Ace and Rent-A-Husband, the success of the tested pilot partnership, and Ace's interest in obtaining an ownership stake in Rent-A-Husband. (Compl. ¶ 110.) Plaintiffs claim this further fueled the securities investigation, criminal prosecution, and civil prosecution of Plaintiffs. (Compl. ¶ 110.)

PROCEDURAL BACKGROUND

Plaintiffs initiated this litigation in Cumberland County Superior Court on March 22, 2011, by filing a thirteen-count complaint alleging: 1) professional negligence (Count I) and breach of fiduciary duty (Count II) against Preti; 2) professional negligence (Count III) and breach of fiduciary duty (Count IV) against MCM; 3) defamation (Count V), false light (Count VI), negligent misrepresentation (Count VII), and intentional misrepresentation (Count VIII) against Ace; and 4) intentional infliction of emotional distress (Count IX), negligent infliction of emotional distress (Count X), vicarious liability (Count XI), punitive damages (Count XII), and "economic damages for restitution" (Count XIII) against all three defendants. On April 20, 2011, Plaintiffs amended their complaint and added a claim for promissory estoppel (Count XIV) against Ace. Both Preti and MCM filed answers to the First Amended Complaint. The case was assigned to Justice Wheeler.

Ace did not file an answer to the First Amended Complaint; instead, on May 2, 2011, Ace filed a M.R. Civ. P. 12(b)(6) motion to dismiss all claims against it along with its motion to sever. Justice Wheeler heard oral argument on the motion to dismiss and the motion to sever on August 4, 2011. On August 12, 2011, Plaintiffs moved to amend their complaint for a second time. Before any ruling on the pending motions could issue, the case was accepted for transfer to the Business

Court on September 14, 2011. The court granted Plaintiffs' motion to amend in an order dated October __, 2011.

DISCUSSION

Ace seeks, pursuant to M.R. Civ. P. 20 and 21, to sever the claims against it from the claims brought against Preti and MCM, essentially arguing that they were misjoined in the litigation. (*See generally* M. Sever.) Broadly, Ace argues that the basis for the claims against Preti and MCM are unrelated to the claims against Ace and thus joinder was improper. Ace has indicated throughout the pleadings that it intends to remove the case to federal district court should the severance be granted, and thus has requested a ruling on the motion to sever prior to the motion to dismiss. Plaintiffs counter that the Complaint sets forth facts establishing that Plaintiff Warren and the Corporate Plaintiffs began a successful business venture with Ace, Preti and MCM were hired to help grow that business through raising capital, and over the same time period and through various means, the Defendants together played a substantial role in destroying Plaintiffs' business enterprise.³

Pursuant to M.R. Civ. P. 21, “[p]arties may be dropped or added by order of the court on motion of any party . . . at an stage of the action and on such terms as are just. Any claim against a party may be severed and presented separately.” Because the Maine rule regarding severance is essentially identical to the federal rule,⁴ it is proper for the court to consider constructions of the

³ Plaintiffs also argue that Ace is a necessary party pursuant to M.R. Civ. P. 19, because Ace, Preti, and MCM have caused a total, indivisible injury to the Plaintiffs, that culminated from all of the Defendants' conduct. Even were that the case, it would necessarily mean that Ace is a necessary party pursuant to M.R. Civ. P. 19. Even presuming some form of joint liability, joint tortfeasors are not indispensable parties under Rule 19. *See Lebel v. Regan*, 192 A.2d 28, 30-31, 159 Me. 300, 304 (1963) (cited in 2 C. Harvey, MAINE CIVIL PRACTICE § 19.1 at 560 n.12 (3d ed. 2011)).

⁴ The federal rule on severance provides: “Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.” Fed. R. Civ. P. 21.

federal rule to aid in construing and analyzing the parallel Maine provision. *See Bean v. Cummings*, 2008 ME 18, ¶ 11, 939 A.2d 676, 680. Severance pursuant to Rule 21 provides a mechanism for dropping defendants when the requirements of permissive joinder under Rule 20 have not been met. *See McCormick v. Festiva Dev. Grp., LLC*, 269 F.R.D. 59, 60 (D. Me. 2010); 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1683 at 475 (3d ed. 2001). Thus to succeed on a motion to sever, Ace must show they were improperly joined in this matter.

The Maine Rules of Civil Procedure promote the free joinder of claims and parties to effectuate “the just, speedy and inexpensive determination of every action. M.R. Civ. P. 1; *see also* M.R. Civ. P. 18, 20; 1 Field, McKusick, & Wroth, *Maine Civil Practice* § 18.1 at 359-60 (2d ed. 1970).

The rule on permissive joinder of parties provides:

All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief within the subject-matter jurisdiction of the court in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences *and* if any question of law or fact common to all defendants will arise in the action.⁵

M.R. Civ. P. 20(a) (emphasis added). The so-called “same transaction prong” and the “common question prong” of Rule 20 are cumulative requirements. *See* 7 *Federal Practice and Procedure* § 1653 at 403-04.

In its motion to sever, Ace argues that Plaintiffs have not shown that the claims against them do not arise out of the same transaction or involve common questions of law or fact as those claims alleged against Preti and MCM. Although Ace attacks both prongs of permissive joinder, it is clear that at a minimum there are common questions of fact in the assessment of damages, as Plaintiffs seek similar types of damages from Ace, Preti, and MCM and allege that all Defendants caused a

⁵ The federal rule on permissive joinder is nearly identical to the Maine rule; it allows for the joinder of defendants in one action if “any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and . . . any question of law or fact common to all defendants will arise in the action.” Fed. R. Civ. P. 20(a)(2).

single indivisible harm to the Plaintiffs. See *Wyatt v. Charleston Area Med. Ctr., Inc.*, 651 F. Supp. 2d 492, 498 (S.D. W. Va. 2009) (explaining how apportionment of damages between defendants is a common question of fact). Thus, whether or not joinder is proper is based on the same transaction prong.

As noted, for permissive joinder, the “right to relief” must “aris[e] out of the same transaction, occurrence, or series of transactions or occurrences.” M.R. Civ. P. 20(a). Ace posits in its memo that “whether separate transactions or occurrences constitute a series is determined by examining whether there is some systemic pattern or logical relation between the tortious events.” (M. Sever 3 (quoting *Gruening v. Sucic*, 89 F.R.D. 573, 574 (E.D. Penn. 1981).) Ace argues the complaint alleges distinct torts committed by different defendants at different times. The test, however, is not based on the nature of the cause of action; the test is whether the right to relief arises out of the same series of transactions or occurrences. See *Jonas v. Conrath*, 149 F.R.D. 520, 523 (S.D. W. Va. 1993) (refusing to sever a malpractice claim against an optometrist from a breach of contract claim for non-coverage against the insurer when the incidents for each right to relief arose during the same time period); *Pepper v. SRO Concerts, Inc.*, No. 90 Civ. 5902 (MBM), 1992 U.S. Dist. LEIXS 2204, at *3-*5 (E.D.N.Y. Feb. 24, 1992) (refusing to sever legal malpractice claims brought by plaintiff clients and the attorneys’ counterclaims for unpaid fees from claims brought against various other defendants for breach of employment agreements which the attorneys had negotiated and drafted). But see *Gruening*, 89 F.R.D. at 573 (concluding that distinct torts committed at distinct times warranted severance of parties); *Pena v. McArthur*, 889 F. Supp. 403, 406 (E.D. Cal. 1994) (severing claims against an insurer for breach of fiduciary duty from claims against an uninsured motorist for personal injury based on the reasoning in *Gruening*).

In the present case, Plaintiffs allege that Preti and MCM were involved in advising Plaintiffs on how to raise capital in order to effectuate a buy-out with Ace, through corporate promissory

notes and personal promissory notes. Plaintiffs allege that Ace knew about Plaintiffs' attempts to raise capital, and used those attempts while meeting with investors of Rent-A-Husband and relied on the proceeds for its own self-promotion. Plaintiffs further allege that the issues regarding the legality of the private offering, the withdrawal of Preti as Plaintiffs' counsel, the legality of the personal promissory notes, and the securities investigation all affected Ace's interest in obtaining an ownership stake in Rent-A-Husband.

The court is cognizant that the only facts upon which it can make its decision are those in the complaint, allegations that have been untested and unchallenged as of yet. The court also notes that the claims for breach of fiduciary duty and legal malpractice brought against Preti and MCM make no mention of Ace at all, focusing solely on the allegedly inadequate advice that was provided to Plaintiffs. Read alone, those counts have nothing in common with any of the claims brought against Ace. Plaintiffs make much of the overlap in time and the effect of the civil and criminal proceedings, but it is less than clear to the court those facts give rise to Plaintiffs' causes of action against Ace or that these tortious actions are even logically related. The legal proceedings could be considered just a circumstance that forms the basis of knowledge for Ace's actions, or it could be considered an essential part of the privacy torts and misrepresentation claims alleged against Ace.

Nevertheless, based on these allegations in the complaint, the court cannot say at this point in the proceedings that the events giving rise to Plaintiffs right to relief do not "aris[e] out of the same transaction, occurrence, or series of transactions or occurrences." M.R. Civ. P. 20(a).

The court must thus deny Ace's motion to sever without prejudice. The parties are encouraged to conduct discovery in a manner that will expediently and fully explore the connection between the actions of Preti, MCM, and Ace, as Ace has indicated its intent to move for severance again with a more fully developed evidentiary record.

Based on the foregoing, Ace's motion to sever is DENIED without prejudice. Pursuant to M.R. Civ. P. 79(b), the clerk is hereby directed to incorporate this Order and Judgment by incorporation in the docket.

Dated October 25, 2011



A. M. Horton
Justice, Business and Consumer Court

Entered on the Docket: 10.25.11
Copies sent via Mail Electronically

BUSINESS AND CONSUMER COURT

**Kaile R. Warren, Jr. et al v. Preti, Flaherty, Beliveau & Pachios,
LLC et al
BCD-CV-2011-28**

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