STATE OF MAINE

BUSINESS AND CONSUMER COURT

Cumberland, ss

Location: Portland
Docket No.: BCD-CV-14-34

DAVID L. SAVELL,

Plaintiff

v.

THOMAS D. HAYWARD, KEN G. SIMONE, MICHAEL B. BRUEHL, MICHAEL A. DUDDY, and KELLY, REMMEL & ZIMMERMAN,

Defendants

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANTS MICHAEL DUDDY AND KELLY, REMMEL & ZIMMERMAN

This matter is before the court on Plaintiff David L. Savell's Motion for Summary Judgment in his favor on Count IX of his Third Amended Complaint. Count IX alleges that Defendants Michael A. Duddy and his law firm Kelly, Remmel & Zimmerman (collectively "Attorney Defendants") committed attorney malpractice and breached their duty owed to the Plaintiff.

Attorney Defendants have opposed Plaintiff's motion, and have also filed a cross motion for summary judgment as to all four counts pleaded against them in Plaintiff's Third Amended Complaint: Counts VI, VII, VIII, and IX. Defendants contend that the Plaintiff has failed to establish facts on these claims that would entitle him to judgment.

Factual Background

This suit arises out of Plaintiff's relationship with two corporate entities. The first is Sunbury Primary Care, P.A. ("SPC"). SPC was a medical practice serving members of the public and is comprised of three doctor shareholders ("Doctor Members"). (Pl.'s Supp. S.M.F ¶¶ 2-3; Defs.' Opp. S.M.F. ¶¶ 2-3.) At all relevant times, Plaintiff served as the chief executive officer of SPC. (Pl.'s Supp. S.M.F. ¶ 5; Defs.' Opp. S.M.F. ¶ 5.) The second entity is Sunbury Medical Properties, LLC ("SMP"). The only business of SMP has been the ownership and management of real property in Bangor, Maine where the medical business was located. (Pl.'s Supp. S.M.F. ¶ 11; Defs.' Opp. S.M.F. ¶ 11.) At all relevant times Plaintiff served as manager of SMP. In 2008, the Members of SMP voted to sell the Plaintiff an equal ownership Economic Interest in SMP for $5,200. (Pl.'s Supp. S.M.F. ¶ 16; Defs.' Opp. S.M.F. ¶ 16.) The Economic Interest provided the Plaintiff with a one-fourth interest in SMP and made him a one-fourth guarantor on debts owed to KeyBank.[1] (Pl.'s Supp. S.M.F. ¶ 17; Defs.' Opp. S.M.F. ¶ 17.)

From early February to mid-August 2013, the two entities negotiated with Eastern Maine Medical Center ("EMMC") for the sale of SPC's assets and for the sale of the real estate owned by SMP.[2] (Pl.'s Supp. S.M.F. ¶ 20; Defs.' Opp. S.M.F. ¶ 20.) On or about August 12, 2013, the shareholders of SPC and the members of SMP reached a tentative agreement for the sales of both companies for $4.6 million. The allocation of the sale price was $1 million for the sale of SPC's assets and $3.6 million for the real estate owned by SMP. (Pl.'s Supp. S.M.F. ¶

[1] Initially, the Plaintiff purchased a one-sixth interest. However, two members subsequently resigned from SMP. (Pl.'s Supp. S.M.F. ¶ 19; Defs.' Opp. S.M.F. ¶ 19.)

[2] The only significant asset owned by SMP was its real estate located at 133 Corporate Drive in Bangor. (Pl.'s Supp. S.M.F. ¶ 21; Defs.' Opp. S.M.F. ¶ 21.)

22; Defs.' Opp. S.M.F. ¶ 22.) On August 14, 2013, SPC and SMP sent a letter of acceptance of the tentative agreement. (Pl.'s Supp. S.M.F. ¶ 23; Defs.' Opp. S.M.F. ¶ 23.)

Going forward, SPC and SMP were represented by Defendant Duddy and his law firm Kelly, Remmel & Zimmerman. EMMC was represented by counsel from Eaton Peabody.[3] (Pl.'s S.M.F. ¶ 25.)

By mid-August, 2013, Plaintiff served as attorney Duddy's primary contact person for attorney Duddy's communications with SPC and SMP concerning the sales to EMMC. (Pl.'s Supp. S.M.F. ¶ 27; Defs.' Opp. S.M.F. ¶ 27.) On or about September 13, 2013, the Asset Purchase Agreement was signed by the parties. (Pl.'s Supp. S.M.F. ¶ 31; Defs.' Opp. S.M.F. ¶ 31.) Defendant Bruehl signed the Agreement on behalf of SPC in his capacity as Chair of SPC and Plaintiff signed in his capacity as Manager of SMP. The Doctor Members signed in their individual capacities as "physician owners." (Pl.'s Supp. S.M.F. ¶ 32; Defs.' Opp. S.M.F. ¶ 32.)

On September 27, 2013, Eaton Peabody informed Duddy that EMMC had determined that there were too many risks to proceed with the transaction as it was. As a result, the Agreement was amended. EMMC agreed to purchase the property for $3.95 million and sought to bifurcate the asset sale. Further, the sale price of SPC's assets was subject to reduction in the asset purchase price prior to closing and the net proceeds of SMP's real estate sale were to be held in escrow by Eaton Peabody to be used to satisfy any debts and liabilities associated with the asset closing. (Pl.'s Supp. S.M.F. ¶ 38; Defs.' Opp. S.M.F. ¶ 38.)

After closing on the sale of real estate by SMP on October 1, 2013, Eaton Peabody paid additional amounts from the escrow account to cover SPC pensions and payroll. (Pl.'s Supp. S.M.F ¶ 48; Defs.' Opp. S.M.F. ¶ 48.) After said payments, the balance remaining in the

[3] Defendants contend that while Attorney Duddy negotiated with EMMC with respect to the deal, the Plaintiff worked closely with operational personnel at EMMC regarding the transition of business. (Defs.' Opp. S.M.F. ¶ 25.)

escrow account as of October 24, 2013, was $387,530.20. (Pl.'s Supp. S.M.F. ¶ 49; Defs.' Opp. S.M.F. ¶ 249)

On October 9, 2013, Plaintiff sent an email to Attorney Duddy and noted that he wanted his money, the sum of $187,402 paid directly to him, leaving only $216,154 to cover SPC debts. (Pl.'s Supp. S.M.F. ¶ 50; Defs.' Opp. S.M.F. ¶ 50.) Plaintiff continued to repeatedly email Duddy concerning his share of the escrowed proceeds.[4] (Pl.'s Supp. S.M.F. ¶ 51; Defs.' Opp. S.M.F. ¶ 51.) For example, on October 14, 2013, Plaintiff contacted Duddy and requested his money before the end of business on Friday October 18, 2013. (Pl.'s Supp. S.M.F. ¶ 52; Defs.' Opp. S.M.F. ¶ 52.) Attorney Duddy responded to Plaintiff on October 14, 2013, indicating that he was out of the office, but would call the Plaintiff the next day. (Pl.'s Supp. S.M.F ¶ 53; Defs.' Opp. S.M.F. ¶ 53.) On the same day at 4:23 p.m., Duddy sent the doctors copies of one or more of Plaintiff's emails in which Plaintiff had requested the payment of his money. The email stated: "Gentlemen, please see the below email exchange with David. I need to talk with you about the arrangements you have made with David, and how you want to handle his expectation." (Pl.'s Supp. S.M.F ¶ 54; Defs.' Opp. S.M.F. ¶ 54.)

On October 21 and 22, 2013, Eaton Peabody told Duddy that EMMC would not close on the sale of assets by SPC unless the purchase was reduced to an amount sufficient only to pay SPC's then current liabilities, estimated to be about $400,000. EMMC indicated that if an

---

[4] An October 11, 2013 email from Plaintiff to Duddy reads:

> Additionally, I would like to have my share of the net proceeds received and placed in escrow after the medical Properties LLC closing. I am not sure what authority EMMC has to remain monies due an equal owner who is not part of [SPC] and definitely has not signed any personal guarantees for any outstanding [SPC] debt.
>
> Thank you for you anticipated cooperation.

(Pl.'s Supp. S.M.F. ¶ 51; Defs.' Opp. S.M.F. ¶ 51.)

appraisal revealed that the assets had a value less than $400,000 it would not purchase SPC assets.

Thereafter, on October 24, 2013, Plaintiff signed an authorization on behalf of SMP allowing Eaton Peabody to apply $372,774.16 of its funds held in escrow to satisfy amounts due or owed by SPC at the asset closing.[5] Said authorization was emailed to Attorney Duddy for review less than two hours before the closing. (Pl.'s Supp. S.M.F ¶ 62; Defs.' Opp. S.M.F. ¶ 62.) Plaintiff also signed the Second Amendment to the Asset purchase Agreement. Eaton Peabody sent the final draft of the Second Amendment to Duddy during the closing. (Pl.'s Supp. S.M.F. ¶ 63; Defs.' Opp. S.M.F. ¶ 63.)

At the time of closing on the sale of assets by SPC on October 24, 2013, SPC owed $759,223.56, including interest and legal fees, to Katahdin Trust Company on a promissory note and Line of Credit. (Pl.'s Supp. S.M.F. ¶ 68; Defs.' Opp. S.M.F. ¶ 68.) The Doctor Members were personal guarantors of both. (Pl.'s Supp. S.M.F. ¶ 69; Defs.' Opp. S.M.F. ¶ 69.) The funds available from the sale of assets were not sufficient to pay the debts owed to Katahdin Trust Company, and the escrowed SMP sales proceeds were applied to satisfy that debt. (Pl.'s Supp. S.M.F. ¶ 70; Defs.' Opp. S.M.F. ¶ 70.) As a result, Plaintiff has received no distribution or other financial benefit from the sale of real estate by SMP, except that his liability as a one-fourth co-guarantor, with the Doctor Members, on SMP's debt to KeyBank has been extinguished. (Pl.'s Supp. S.M.F. ¶ 75.)

Throughout November of 2013, Plaintiff contacted Duddy on a series of occasions. On November 4, 2013, Plaintiff sent Duddy an email listing various necessary accounting entries to be made in the companies' books, among the entries to be made was an unspecified amount owed to Plaintiff by SMP. (Pl.'s Supp. S.M.F. ¶ 80; Defs.' Opp. S.M.F. ¶ 80.) After an email

[5] The Plaintiff contends that he signed this document under the advice and guidance of Attorney Duddy. The Attorney Defendants deny this claim.

exchange concerning business accounting, Attorney Duddy responded to the Plaintiff: "Yes, let's continue with the close out stuff, and we'll ultimately get to your situation." (Pl.'s Supp. S.M.F ¶ 81; Defs.' Opp. S.M.F. ¶ 81.)

Plaintiff contends that the Attorney Defendants were representing his interests, and had a fiduciary duty to address the Plaintiff's claims and to inform the Plaintiff of the LLC's actions adverse to the Plaintiff's interests. The Attorney Defendants contend that no attorney-client relationship was established between the Plaintiff and the Defendants, and therefore that they owed the Plaintiff no duty for purposes of the professional malpractice claim in Count IX of the Third Amended Complaint. They also contend that they made no misrepresentations or committed tortious interference for purposes of Counts VI, VII and VIII of the Third Amended Complaint.

Standard Of Review

M.R. Civ. P. 56(c) instructs that summary judgment is warranted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any . . . show that there is no genuine issue as to any material fact set forth in those statements and that any party is entitled to a judgment as a matter of law." To survive a motion for summary judgment, the opposing party must produce evidence that, if produced at trial, would be sufficient to resist a motion for a judgment as a matter of law. *Rodrigue v. Rodrigue*, 1997 ME 99, ¶ 8, 694 A.2d 924. For purposes of summary judgment, "[a] material fact is one that can affect the outcome of the suit." *Burdzel v. Sobus*, 2000 ME 84, ¶ 6, 750 A.2d 573 (citing *Kenny v. Dep't of Human Services*, 1999 ME 158, ¶ 3, 740 A.2d 560); *see also McIlroy v. Gibson's Apple Orchard*, 2012 ME 59, ¶ 7, 43 A.3d 948. A genuine issue exists when sufficient evidence supports a factual contest to require a fact-finder to choose between competing versions of the

truth at trial. *See Prescott v. Tax Assessor*, 1998 ME 250, ¶ 5, 721 A.2d 169 (citing *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 48 (1st Cir. 1990)).

A party wishing to avoid summary judgment must present a *prima facie* case for each element of a claim or defense that is asserted. *See Reliance Nat'l Indem. v. Knowles Indus. Services*, 2005 ME 29, ¶ 9, 816 A.2d 63. "If material facts are disputed, the dispute must be resolved through fact-finding." *Curtis v. Porter*, 2001 ME 158, ¶ 7, 784 A.2d 18. When the court rules on a motion for summary judgment, "'[it] is to consider *only* the portions of the record referred to, and the material facts set forth, in the Rule 7(d) statements.'" *Handy Boat Serv., Inc. v. Prof'l Services, Inc.*, 1998 ME 134, ¶ 16, 711 A.2d 1306 (quoting *Gerrity Co. v. Lake Arrowhead Corp.*, 609 A.2d 293 (Me. 1992)). The court will view the evidence in light most favorable to the non-moving party. *See, e.g., Steeves v. Bernstein, Shur, Sawyer & Nelson, P.A.*, 1998 ME 210, ¶ 11, 718 A.2d 186.

Discussion

The four counts pleaded against the Attorney Defendants are Count VI, Tortious Interference with Contractual Relations; Count VII, Intentional Misrepresentation; Count VIII, Negligent Misrepresentation, and Count IX—Attorney Malpractice/Breach of Fiduciary Duty. This analysis addresses the last count first, and then the previous three, but first, a preliminary issue is addressed.

Issue of Ripeness and Existence of Loss

In another order issued this day regarding the pending motions involving the Doctor Defendants, the court noted that the Plaintiff has not shown that he has a present right to obtain any distribution from the LLC. That point may be dispositive of his claims against the Doctor Defendants, but does not affect his claims against the Attorney Defendants. In fact,

Plaintiff would say that, if he has no recourse against the Doctor Defendants, that only strengthens his claim against the Attorney Defendants for failing to protect his interests in a manner that would have given him meaningful recourse.

Count IX—Attorney Malpractice/Breach of Fiduciary Duty

Legal malpractice is the breach of the duty owed to a client by his or her attorney. *See Butler v. Mooers*, 2001 ME 56, 771 A.2d 1034; *Johnson v. Carleton*, 2001 ME 12, 765 A.2d 571. In legal malpractice cases, the plaintiff must show: "(1) a breach by the defendant attorney of the duty owed to the plaintiff to conform to a certain standard of conduct; and (2) that the breach of the duty proximately caused an injury or loss to the plaintiff." *Niehoff v. Shankman & Associates Legal Ctr., P.A.*, 2000 ME 214, ¶ 7, 763 A.2d 121, 124 (citing *Corey v. Norman, Hanson & DeTroy*, 1999 ME 196, ¶ 10, 742 A.2d 933).

Whether a duty exists is an issue of law to be determined by the court. *Fish v. Paul*, 574 A.2d 1365 (Me. 1990). Proximate cause exists in legal malpractice cases where "evidence and inferences that may reasonably be drawn from the evidence indicate that the negligence played a substantial part in bringing about or actually causing the injury or damage and that the injury or damage was either a direct result or a reasonably foreseeable consequence of the negligence." *Niehoff*, 2000 ME 214, ¶ 8, 763 A.2d 121 (citing *Merriam v. Wanger*, 2000 ME 159, ¶ 8, 757 A.2d 778). "The mere possibility of such causation is not enough, and when the matter remains one of pure speculation or conjecture, or even if the probabilities are evenly balanced, a defendant is entitled to judgment." *Merriam*, 2000 ME 159, ¶ 8, 757 A.2d 781.

The Attorney Defendants make a threshold argument about standing. They contend that the Plaintiff, as an economic interest holder in SMP, lacks legal capacity to bring the claims asserted. In support, Defendants cite the recent Law Court decision *Beaudry v. Harding*

for the proposition that: a member of an LLC has no basis to assert an individual claim against the LLC's attorney when the only harm alleged is not a harm personal to that member. 2014 ME 126, ¶ 5, 104 A.3d 134. In *Beaudry*, a member of an LLC brought an individual action against the LLC's attorney alleging that he negligently failed to maximize an insurance recovery on behalf of the LLC and caused the plaintiff to lose significant value in his distributive share. The Law Court affirmed that the plaintiff lacked the legal capacity to bring the claim, as he suffered no personal harm. Id. ¶ 5. In determining whether a personal harm is suffered, courts look to who suffered the harm and who would benefit from recovery. *See, e.g.*, *Kroupa v. Garbus*, 583 F. Supp. 2d 949, 952 (N.D. Ill. 2008). In *Beaudry*, the court determined that any recovery from the attorneys would flow to the LLC and not to the plaintiff individually. Thus, there was no personal harm. 2014 ME 126, ¶ 5, 104 A.3d 134.

However, *Beaudry* is distinguishable from this case. First, as a mere economic interest holder, the Plaintiff does not have the same avenues for relief as a member of an LLC. Second, the plaintiff in *Beaudry* challenged the attorneys' representation of the LLC. In this case, the Plaintiff's claims against the Attorney Defendants are not based on their representation of the LLC; they are based on his contention that the Attorney Defendants represented him personally and thus owe him a duty to protect and enforce his right to the receipt of a quarter-share of the SMP sale proceeds. If successful in his claims, it is the Plaintiff who would recover and not the LLC. Because the Plaintiff has alleged a personal harm, the court finds that he has standing to challenge the validity of the Defendants' alleged legal representation.

Thus, the analysis shifts to whether Plaintiff is entitled to summary judgment in his fabor on Count IX, and if not, whether he at least has made a *prima facie* showing sufficient to defeat the Attorney Defendants' motion for summary judgment on that count.

The first issue relates to whether the Attorney Defendants owed any duty to Plaintiff. In the negligence context generally, whether a duty of care exists is an issue of law to be determined by the court. *Fish v. Paul*, 574 A.2d 1365 (Me. 1990). The primary issue here is whether there was an attorney-client relationship between the Plaintiff and the Attorney Defendants.

In Maine, practicing attorneys owe their respective clients a duty to exercise the degree of skill, care, and diligence exercised by members of the legal profession. *Fisherman's Wharf Associates II v. Verrill & Dana*, 645 A.2d 1133, 1136 (Me. 1994). "The term 'client' includes one who is either rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him." M. R. Evid. 502 (a)(1). Courts have been reluctant to extend an attorney's duty of care to persons other than his or her client.[6] *Graves v. Webber*, No. RE-06-107, 2007 WL 1523505 (Me. Super. Feb. 5, 2007).

An attorney-client relationship is created when "(1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance" (the "*Mangan test*"). *Board of Bar Overseers v. Mangan*, 2001 ME 7, ¶ 9, 763 A.2d 1189 (adopting the New Hampshire definition of an attorney-client relationship). The Law Court has held that "[a]n attorney-client relationship does not require the payment of a fee or formal retainer but may be implied from the conduct of the parties." *Dineen*, 500 A.2d at 264-265 (quoting *Matter of McGlothlen*, 99 Wash.2d 515, 663 P.2d 1330 (1983)). The determination of whether such relationship exists is a factual determination. *Mangan*, 2001 ME 7, ¶ 7, 763 A.2d 1189 (citing *Dineen*, 500 A.2d at 264 (Me. 1985)).

[6] The policy behind the court's reluctance to expand the duty of care is to avoid potential conflicts of interest that may arise if an attorney owed a duty to persons not identified as clients.

In this case, there was no contractual fee agreement or engagement letter between the Attorney Defendants and the subject entities. Attorney Defendants contend that they represented only the corporate entities and were in communication with the Plaintiff and the Doctor Members only so far as to provide meaningful representation to the entities.

The Plaintiff contends that the Attorney Defendants induced him to seek opinions, instructions, and legal advice from them and as a result he signed documents allowing his share of proceeds to pay the debts of SPC and its shareholders. Plaintiff further contends that the Attorney Defendants failed to advise him to seek independent counsel with respect to the sale, the allocations of proceeds from the sale, or for the protections of Plaintiff's rights to a proportionate share of the net proceeds from the sale. Because the determination of whether an attorney-client relationship exists is a factual determination, the court analyses the record evidence below.

Plaintiff alleges that he sought legal advice and assistance from Attorney Duddy regarding his claim to distribution proceeds on multiple occasions and Attorney Duddy repeatedly told the Plaintiff that he would "deal" with Plaintiff's claims. Plaintiff contends that he relied on Mr. Duddy's statements and believed that his interests were being represented.

In support of this claim, the Plaintiff directs the court to a series of emails exchanged between the Plaintiff and the Attorney Defendants. On October 9, 2013, Plaintiff contacted Duddy and indicated, "I want my $187,402 paid directly to me, leaving only, $216,154 to pay [SPC] debts." (Pl.'s Supp. S.M.F. ¶ 50; Defs.' Opp. S.M.F. ¶ 50.) Plaintiff continued to email Attorney Duddy making personal requests and recommendations. For example, on October 11, 2013, Plaintiff indicated that he would like to have his share of the net proceeds placed in escrow after the SMP closing. (Pl.'s Supp. S.M.F. ¶ 51; Defs.' Opp. S.M.F. ¶ 51.) On October 14, 2013, he requested that Attorney Duddy make EMMC's legal counsel aware of the sum

owed to Plaintiff as a private investor. (Pl.'s Supp. S.M.F. ¶ 52; Defs.' Opp. S.M.F. ¶ 52.) On October 23, 2013, one day before closing, Attorney Duddy informed the Plaintiff that the sale price had been reduced. Upon the Plaintiff reminding Duddy that he believed he was owed roughly $200,000, Attorney Duddy responded "we'll deal with your issue later." (Pl.'s Supp. S.M.F. ¶ 59.) Attorney Duddy on another occasion said to Plaintiff "we'll ultimately get to your situation." (Pl.'s Supp. S.M.F. ¶ 81; Defs.' Opp. S.M.F. ¶ 81.)

In the above referenced emails the Plaintiff made multiple personal requests concerning money he believed was owed to him. However, the only action requested of Attorney Duddy was to bring the Plaintiff's claim to the Doctor Members. The court finds that this evidence is not enough to demonstrate that the Plaintiff sought legal advice or assistance. Mere requests and demands to relay information do not satisfy the first prong of the *Mangan* test. Such requests and inquiries are so common in the course of real estate transactions and litigation that expanding this prong would potentially leave counsel for corporate entities "in the untenable position of being subject to ill-defined professional responsibilities and create the reality of conflicting loyalties." *Estate of Keatinge v. Biddle*, 2002 ME 21, ¶ 15, 789 A.2d 1271.

In response to the Plaintiff's requests, Attorney Duddy forwarded the Plaintiff's emails to the Doctor Defendants to make them aware of the Plaintiff's concerns. In return, the Doctor Members asked for Attorney Duddy's advice as to the best course of action. Plaintiff contends that Attorney Duddy provided legal assistance by relaying his messages to the Members and complying with the Plaintiff's request. Plaintiff further contends, that at the very least, Attorney Duddy impliedly agreed to provide assistance by telling Plaintiff, on multiple occasions, that he would deal with his claims. The court disagrees. As counsel for the LLC, Attorney Duddy had an obligation to inform the Doctor Defendants of all outstanding claims so they could proceed in the best course of action for the LLC. "An attorney for a corporation

does not simply by virtue of that capacity become the attorney for . . . its officers, directors or shareholders." *Sheinkopf v. Stone*, 927 F.2d 1259, 1264 (1st Cir. 1991) (quoting 1 R.E. Mallen & J.M. Smith, Legal Malpractice § 7.6 (3d ed. 1989)). Moreover, the e-mail correspondence between Plaintiff and attorney Duddy does not indicate that Plaintiff thought Duddy was acting as his attorney—Plaintiff was not asking Duddy for advice; instead, Plaintiff was telling Duddy what he wanted from the LLC and the Doctor Defendants. For his part, Duddy was telling Plaintiff his concerns would be dealt with later—not something an attorney would tell his own client. If Plaintiff had truly believed that Duddy was his attorney, it is hard to believe Plaintiff would have allowed his own attorney to defer dealing with his concerns until later.

On the other hand, in light of the Plaintiff's requests for assistance, it would have been preferable had for attorney Duddy to have made it clear to the Plaintiff that the Attorney Defendants were not representing him and that he should seek his own counsel.[7] This was especially called for when Attorney Duddy learned that the Plaintiff might lose the distribution Plaintiff had repeatedly asked attorney Duddy to confirm would be paid.[8] However, even if this

---

[7] Pursuant to Rule 1.13 of the Maine Rules of Professional Conduct which governs the "[o]rganization as [a] [c]lient":

> (a) A Lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
>
> . . .
>
> (e) In dealing with the organization's directors, officers, employees, members, shareholders or *other constituents*, a lawyer shall explain the identity of the client as the organization when the lawyer knows or reasonably should know that the organization's interests may be adverse to those of the constituents with whom the lawyer is dealing.

[8] Comment 10 to Rule 1.13 of the Maine Rules of Professional Conduct states:

> There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict-of-interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide

was ethically called for, "[v]iolation of a[n] [ethical] rule [does] not itself give rise to a cause of action against a lawyer nor [does] it create any presumption in such a case that a legal duty has been breached." M. R. Prof. Conduct Preamble (20).

Further, this is not the type of situation where a viable claim might lie that the attorney should be held liable for the foreseeable reliance of a non-client. In Maine, the "general rule is that an attorney owes a duty of care only to his or her client." *Estate of Cabatit v. Canders*, 2014 ME 133, ¶ 21, __ A.3d__. While there are very narrow exceptions to this rule,[9] the Law Court has indicated that "[a]n attorney will never owe a duty of care to a non-client . . . if that duty would conflict with the attorney's obligations to his or her clients." *Id.* In this case, extending the attorney-client relationship and subsequently a duty of care to the Plaintiff would create a conflict of interest, given that the Plaintiff's goal of obtaining payment from the SMP sale proceeds was adverse to SMP as well as the Doctor Defendants.

Finally, the court finds that the Plaintiff is not entitled to relief under a theory that the Defendants breached a fiduciary duty to the Plaintiff, because no attorney-client relationship existed between the parties and the court sees no other basis for deemed the Attorney Defendants to have any fiduciary obligations to the Plaintiff. Therefore, the court grants the Defendants' Motion for Summary Judgment as to Count IX.

---

legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[9] In *Gagnon v. Dodwe*ll, then Superior Court justice Hjelm found a duty to exist where an attorney for an estate failed to effect the intent of the grantor in a deed and other testamentary documents. The plaintiff brought action against the attorney. Justice Hjelm distinguished *Nevin* because the transaction at issue in *Dodwell* was an inter-vivos conveyance. The plaintiff's claim against the attorney was not a claim to be asserted against the estate. While the plaintiff was not the attorney's client, the court determined that the attorney owed a duty to the plaintiff as the attorney knew the intent of the grantor and no conflict of interest arose as a result of the imposition of the duty. No. CV-04-245, 2006 WL 381882, at *2 (Me. Super. Feb. 1, 2006).

Counts VI, VII and VIII—Tortious Interference, Fraud/Intentional Misrepresentation, Negligent Misrepresentation

In addition to attorney malpractice, the Plaintiff brings three tort claims against the Attorney Defendants. For the reasons discussed below, the court grants the Defendants' Motion for Summary Judgment as to each claim.

In Count VI of Plaintiffs Third Amended Complaint, he contends that the Attorney Defendants, in concert with the Doctor Defendants, tortiously interfered with the Plaintiff's contractual relationship with SMP through fraudulent conduct. Said fraudulent conduct is alleged to have occurred when the Attorney Defendants failed to act after repeatedly indicating to the Plaintiff that his claim would be addressed. As a result of the alleged interference, Plaintiff sustained a loss equivalent to his one-fourth share of the net proceeds from the sale of real estate by SMP.

In Maine, to establish a claim for tortious interference with contractual relations, a plaintiff must prove the following: "(1) that a valid contract or prospective economic advantage existed; (2) that the defendant interfered with that contract or advantage through fraud[10] or intimidation; and (3) that such interference proximately caused damages."[11] *Currie v. Indus. Sec.*,

---

[10] Fraud requires the following:

(1) Making a false representation;
(2) Of a material fact;
(3) With knowledge of its falsity or in reckless disregard of whether it is true or false;
(4) For the purpose of inducing another to act or refrain from acting in reliance on it; and
(5) The other person justifiably relies on the representation as true and acts upon it to the damage of the plaintiff.

Rutland v. Mullen, 2002 ME 98, ¶ 14, 798 A.2d 1104. "Each of those elements must be proved by clear and convincing evidence." *Mariello v. Giguere*, 667 A.2d 588, 590 (Me. 1995).

[11] "Intimidation is not restricted to frightening a person for coercive purposes, but rather exists wherever a defendant has procured a breach of contract by making it clear to the party with which the

Inc., 2007 ME 12, ¶ 31, 915 A.2d 400 (*quoting Rutland v. Mullen*, 2002 ME 98, ¶ 13, 798 A.2d. 1104).

To make a showing of fraud, the Plaintiff must provide evidence that Attorney Duddy intentionally misled the Plaintiff with the purpose of inducing him to act or refrain from acting. In this case, Attorney Duddy told Plaintiff on multiple occasions that he would deal with his claims. In fact, Attorney Duddy did present information concerning the Plaintiff's claims to the Members of SMP. However, the Plaintiff has failed to demonstrate on this record that the Attorney Defendants made any intentional misrepresentation to Plaintiff. Attorney Duddy never promised Plaintiff his claim would be honored, or said anything other than words to the effect that Plaintiff's request would have to be deferred to, and dealt with, later. Because fraud is an essential element of a claim for intentional interference with contract, the court grants the Attorney Defendants' Cross-Motion for Summary Judgment as to Count IV.

In Count VII of his Third Amended Complaint, Plaintiff alleges that Attorney Defendants committed fraud by intentionally failing to inform the Plaintiff that he would not receive his one-fourth distribution of proceeds from the sale of real estate by SMP. Plaintiff further contends that he was induced by the Attorney Defendants into signing the authorization for the transfer of funds from the escrow account.

To prevail on a claim of fraudulent/intentional misrepresentation, the Plaintiff must show:

(1) that [the Defendants] made a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing plaintiff to act in reliance upon it, and (5) plaintiff[s] justifiably relied upon the representation as true and acted upon it to [their] damage.

---

plaintiff had contracted that the only manner in which that party could avail itself of a particular benefit of working with defendant would be to breach its contract with plaintiff."
Currie, 2007 ME 12, ¶ 31, 915 A.2d 400 (quoting *Pombriant v. Blue Cross/Blue Shield of Maine*, 562 A.2d 656, 659 (Me. 1989)) (citations omitted).

Mariello v. Giguere, 667 A.2d 588, 590 (Me. 1995) (citing *Guiggey v. Bombardier*, 615 A.2d 1169, 1173 (Me. 1992)).

In this case, Plaintiff has failed to demonstrate that the Attorney Defendants misrepresented any material fact or that the Plaintiff was fraudulently induced into signing any document. There is no evidence in the record indicating that the Attorney Defendants represented or supplied false information to the Plaintiff. Rather the evidence indicates that attorney Duddy simply told the Plaintiff that his concerns would be addressed later, presumably to get the EMMC transaction closed.

When Plaintiff signed the documents allowing SMP's sale proceeds to be applied to SPC's debt instead of being paid to SMP, he knew, first, that his request for payment, or at least assurance of payment, of his quarter-share was being deferred to a later date, and knew the import of what he was signing. "The law presumes, in the absence of fraud or imposition, that [the Plaintiff] read it, or was otherwise informed of its contents, and was willing to assent to its terms without reading it." *Hix v. E. S.S. Co.*, 107 Me. 357, 78 A. 379, 381 (1910); *see also Francis v. Stinson*, 2000 ME 173, ¶ 42, 760 A.2d 209, 217-18 ("As a matter of general contract law, parties to a contract are deemed to have read the contract and are bound by its terms."). In effect, by agreeing to sign without his demand for assurances having been met, he must be held to have knowingly assumed the risk that his demands would later be refused.

For similar reasons, the Attorney Defendants are entitled to summary judgment on Count VIII—Negligent Misrepresentation. In Maine a party will be held liable for negligent misrepresentation "if in the course of his business he supplies false information for the guidance of others in their business transactions, and the other party justifiably relies upon it to his pecuniary detriment." *Guiggey v. Bombardier*, 615 A.2d at 1173 (citing *Chapman v. Rideout*, 568 A.2d 829, 830 (Me.1990)); *see also Restatement (Second) of Torts* § 552. Whether a party made a

misrepresentation and whether the opposing party justifiably relied on a misrepresentation are questions of fact. *See McCarthy v. U.S.I. Corp.*, 678 A.2d 48, 53 (Me.1996); *Devine v. Roche Biomedical Labs., Inc.*, 637 A.2d 441, 446 (Me. 1994). "Additionally, liability only attaches if, when communicating the information, the party making the alleged misrepresentation "fails to exercise the care or competence of a reasonable person under like circumstances," an inquiry that is likewise for the fact-finder." *Rand v. Bath Iron Works*, 2003 ME 122, ¶ 13, 832 A.2d 771.

In this case, the record is devoid of evidence demonstrating that the Attorney Defendants supplied false information to guide the Plaintiff in a business transaction. It is quite true that silence can "rise[] to the level of supplying false information when such failure to disclose constitutes the breach of a statutory duty." *Binette v. Dyer Library Ass'n*, 688 A.2d 898, 903 (Me. 1996). But here, for reasons previously indicated, the Attorney Defendants were under no such duty.

Conclusion

Plaintiffs Motion For Summary Judgment on Count IX of the Third Amended Complaint is denied. Defendants' Cross-Motion for Summary Judgment on Counts VI, VII, VIII, and IX of the Third Amended Complaint is granted. Judgment is granted to Defendants Michael A. Duddy and Kelly, Remmel & Zimmerman.

Pursuant to M.R. Civ. P. 79, the clerk is hereby directed to incorporate this order into the docket by reference.

Dated February 27, 2015

A. M. Horton, Justice
Business & Consumer Court

Entered on the Docket: 3/2/15
Copies sent via Mail __ Electronically ✓