IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Helen Basista, individually and as parent and legal guardian of her three minor children, Candice Basista, Crystal Basista, and Nicholas Basista,	)	
Plaintiffs,	)	No. 12 L 650
v.	)	
David Alms,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

An estate attorney owes no duty to a non-client third-party unless the attorney-client relationship's primary purpose and intent is to benefit or influence the non-client third party. The plaintiffs fail to plead that the purpose and intent of the relationship between the attorney-defendant and his client-trustee was to benefit the plaintiffs as non-client third-parties. Without such an allegation, the plaintiffs fail to plead that the defendant owed them a duty; consequently, their sixth-amended complaint must be dismissed with prejudice.

Facts

In February 1992, John and Virginia Basista retained attorney David Alms to draft a joint, revocable living trust for the benefit of their children, their children's spouses, and grandchildren then living. Alms drafted the trust soon thereafter. The trust did not include as beneficiaries any grandchildren who might be born after the trust's creation.

In 1994, John and Virginia's son, Stephen, married Helen. Between 1996 and 2000, Stephen and Helen had three children, Candice, Crystal, and Nicholas. In November 2002, John died. At the time of John's death, Helen, Candice, Crystal, and Nicholas were not trust beneficiaries. In October 2003, Virginia retained Alms to modify the trust to include the four. Alms recommended amending the trust, which he did by rewriting article 12. Under the amended article, Helen would receive 10% of the trust assets while Candice, Crystal, and Nicholas would each receive 2% of the trust assets.

In approximately July 2005, Virginia asked Alms to amend the trust, again, so that Helen's 10% share of the trust would go to Candice, Crystal, and Nicholas.

Alms amended the trust such that Candice, Crystal, and Nicholas would each receive 5.33% of the trust assets, while Helen would receive nothing. On September 12, 2005, Virginia died.

At some undisclosed time after Virginia's death, Kathleen Basista[1] retained Alms as her attorney in her role as the trust's trustee and the estate's executor. At some other undisclosed time after Virginia's death, Kathleen distributed the trust's assets to the beneficiaries, including her. On July 11, 2006, Alms confirmed to Helen's divorce attorney that Candice, Crystal, and Nicholas were each entitled to 5.33% of trust assets after expenses.[2]

From September 2012 to January 2013, an unnamed entity conducted an accounting of the trust's assets. The accounting concluded that Kathleen had converted $400,000 of trust assets for her and her husband's use. The distributions Kathleen had made were vastly out of proportion to the percentages provided for in the trust, with virtually nothing going to Candice, Crystal, and Nicholas despite their collective 16% interest. Kathleen also permitted the trust's dissipation by failing to maintain various trust assets including real property, collect rents, pay taxes, sell in a timely manner, and account honestly for revenues collected.

Helen's sixth-amended complaint raises one cause of action for legal malpractice against Alms. Helen claims that Stephen, Candice, Crystal, Nicholas and she were each an intended beneficiary of the estate and that Alms had a duty to provide them with legal services within the professional standard of due care. Alms breached that duty by, among other things, advising Kathleen that her distributions were improper, but failing to prevent them.

Alms filed a motion to dismiss the sixth-amended complaint, arguing that: (1) Helen has failed to allege the existence of a duty owed by Alms to her and her children; and (2) Helen can never establish such a duty because representing the third-party beneficiaries' interests would have conflicted with Alms' primary interest of assisting Kathleen in administering the trust. Helen responded to the motion. Alms filed a reply brief.

Analysis

Alms brings his motion to dismiss pursuant to Code of Civil Procedure section 2-615. 735 ILCS 5/2-615. A section 2-615 motion attacks a complaint's legal sufficiency. *DeHart v. DeHart*, 2013 IL 114137, ¶ 18. Such a motion does not raise affirmative factual defenses, but alleges only defects appearing on the face of the complaint, *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484-85 (1994), which

[1] The sixth-amended complaint fails to indicate Kathleen's familial relationship to the plaintiffs.
[2] The sixth-amended complaint fails to indicate whether Stephen and Helen had divorced before or after Virginia's 2005 request to Alms to amend the trust.

must be identified. 735 ILCS 5/2-615(a). A court is to consider only the complaint's allegations and nothing else. *See Illinois Graphics*, 159 Ill. 2d at 485. All well-pleaded facts and reasonable inferences must be accepted as true, *Doe v. Chicago Bd. of Ed.*, 213 Ill. 2d 19, 28 (2004), but not conclusions unsupported by facts. *Pooh-Bah Enterps., Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009). The paramount consideration is whether the complaint's allegations construed in the light most favorable to the plaintiff establish a cause of action for which relief may be granted. *Bonhomme v. St. James*, 2012 IL 112393, ¶ 34. If not, section 2-615 authorizes the dismissal of the cause of action. *DeHart*, ¶ 18; *Illinois Graphics*, 159 Ill. 2d at 488.

This dispute intersects the law governing legal malpractice and attorney-client relationships. A legal malpractice claim requires a plaintiff to allege: (1) an attorney-client relationship establishing an attorney's duty; (2) a negligent act or omission breaching that duty, (3) proximate cause of the injury; and (4) actual damages. *Northern Ill. Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 306 (2005), *citing Sexton v. Smith*, 112 Ill. 2d 187, 193 (1986). What constitutes an attorney-client relationship is more nuanced. In general, an attorney-client relationship is voluntary and contractual and requires the consent of both the attorney and the client. *In re Chicago Flood Litigation*, 289 Ill. App. 3d 937, 941 (1st 1997). The relationship also typically requires paying a fee or promising to pay one, *Corti v. Fleisher*, 93 Ill. App. 3d 517, 521 (1st Dist. 1981), and the mutual understanding that the client authorizes the attorney to act on the client's behalf. *Simon v. Wilson*, 291 Ill. App. 3d 495, 509 (1st Dist.1997).

It is, however, possible for an attorney-client relationship to exist between an attorney and a non-client third-party. *See Pelham v. Griesheimer*, 92 Ill. 2d 13, 20-21 (1982). Courts have understandably been reluctant to find that attorney-client relationships exist with non-client third-parties. The danger is that an expansive definition of the attorney-client relationship could impose on an attorney fiduciary and professional duties and expose an attorney to potential risks and liabilities greater than the attorney had bargained for with the client. *See id.* at 20. And even in instances in which an attorney owes a duty to a non-client third-party, the attorney's duty to the client still remains paramount. *Id.*

In non-adversarial proceedings, courts have often employed a balancing approach to assessing a relationship between an attorney and a non-client third-party, including such factors as:

> the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct and the policy of preventing future harm.

Id. at 22, *citing Blakanja v. Irving*, 49 Cal 2d 647, 650 (1958). Even with this multifaceted analysis, "the predominant inquiry has generally resolved to one criterion: Were the services intended to benefit the plaintiff?" *Pelham*, 92 Ill. 2d at 22. The *Pelham* court identified non-adversarial activities as drafting a will naming intended beneficiaries, *id.*, because such tasks represent a convergence of interests between the client and the non-client third-party.

In contrast, the inherent tension between an attorney's duty to a client and potential duty to a non-client third-party is laid bare in adversarial proceedings. As the *Pelham* court explained:

> In the area of legal malpractice the attorney's obligations to his client must remain paramount. In such cases the best approach is that the plaintiffs must allege and prove facts demonstrating that they are in the nature of third-party intended beneficiaries of the relationship between the client and the attorney in order to recover in tort. By this we mean that to establish a duty owed by the defendant attorney to the nonclient the nonclient must allege and prove that the intent of the client to benefit the nonclient third party was the primary or direct purpose of the transaction or relationship.

Id. at 20-21 (citations omitted).

In this case, the plaintiffs allege that Alms owed them, "the duty to provide legal services to . . . Helen, and the three Grandchildren [sic] within the professional standards of this state and with the exercise of due care." Cmplt. at ¶ 23. Without more, this is not an allegation but an unsupported legal conclusion. What the plaintiffs fail to allege is that Kathleen's intent to benefit them was the primary or direct purpose of her attorney-client relationship with Alms. Without a factual allegation that Kathleen's intent in retaining Alms was primarily to benefit the plaintiffs, their complaint fails to plead the existence of an attorney-client relationship, the necessary first element to any legal malpractice cause of action. Alms' section 2-615 motion to dismiss must, therefore, be granted.

Alms goes further, arguing that the plaintiffs can never prove that he owed them a duty because of the adversarial relationship that existed between Kathleen as trustee and the plaintiffs. It must be noted that Alms incorrectly identifies this argument as authorizing a section 2-615 dismissal. An argument that a plaintiff can never prove its case is in the nature of an affirmative defense and, therefore, lies beyond the complaint's four corners. Since the affirmative defense is affirmative matter, this argument should have brought pursuant to Code of Civil Procedure section 2-619(a)(9). 735 ILCS 5/2-619(a)(9). Even with that pleading error, Alms' argument has currency.

Alms' argument about conflict raises two distinct issues: scope of work and timing. As to the first, the role of an estate attorney been summarized as follows:

> The purposes of administrating an estate are to conserve the personal assets of the estate, including the collection of all debts due to the decedent; to pay all debtors and taxes owed by the decedent and her estate; and to properly distribute the residue among the heirs at law according to the terms of the decedent's will or, absent a will, the statute of descent and distribution.

Lis v. Kwiatt & Rueben, Ltd., 365 Ill. App. 3d 1, 9 (1st Dist. 2006) (citations omitted). Thus, by definition, the scope of an estate attorney's work is not solely or primarily to distribute a trust's assets to named beneficiaries.

Given the sixth-amended complaint's allegations, the plaintiffs will never succeed in pleading or proving that Alms' primary duty was to them and, therefore, would not be conflicted in his role as Kathleen's attorney. It is undisputed that, regardless of Kathleen's self-dealing, Candice, Crystal, and Nicholas were each to have received 5.33% of the trust assets, or a combined 16% of the total. The plaintiffs do no allege that their combined share was the largest block of the trust assets to be distributed. Had their percentage been 50% or greater, they would be in a much better position of arguing that the primary purpose of the attorney-client relationship between Alms and Kathleen was to benefit the plaintiffs. As it is, their relatively low percentage leads to the conclusion that Alms faced potential conflicts with each of the named trust beneficiaries.

As to timing, it is plain that a task that starts out as non-adversarial could become adversarial. Such was the case in *Neal v. Baker*, 194 Ill. App. 3d 485 (5th Dist. 1990). There, a bank hired Baker as its attorney in administering an estate, *id.* at 486, a seemingly non-adversarial task. Yet Neal later sued Baker for malpractice based on his alleged acts and omissions. *Id.* As the court noted, in hindsight,

> [i]t is obvious that defendant could not have been hired with the intent to directly benefit Anna Neal when the adversarial nature of the relationship between Anna Neal and the attorney becomes evident. In this case, for example, Anna Neal contested the defendant's position that she should pay the inheritance tax as opposed to the estate. In such a situation, which is not uncommon in administering estates, the beneficiary becomes the opposing party in an adversarial forum.

Id. 488. As *Neal* makes plain, an adversarial position between an attorney and a non-client third-party could arise at any point during the administration of a trust.

Since an attorney's paramount duty runs to the client, it is impossible for an attorney to give primacy to a non-client third-party's minority adverse interests whenever they arise. To find otherwise would require estate attorneys to withdraw at the most fragile suggestion of a conflict with a named trust beneficiary, effectively extinguishing nearly all attorney-client relationships in trust administration. Such a result is untenable. Alms' argument, correctly identified under section 2-619(a)(9), requires a dismissal of the sixth-amended complaint.

It should be noted that the plaintiffs had previously filed a case against Kathleen and Alms in the Chancery Division in 2010, 10 CH 39246, and this one in the Law Division in 2012. After the plaintiffs settled with Kathleen, Judge Rita M. Novak dismissed the Chancery Division case except for the legal malpractice cause of action against Alms. On February 21, 2013, Judge Novak transferred that remaining cause of action to the Law Division. This brief history indicates that for nearly four years the plaintiffs have tried but failed to plead a legal malpractice cause of action. It is evident that they are unable to do so. For that reason,

IT IS ORDERED THAT:

1. The defendants' motion to dismiss is granted;
2. This case is dismissed with prejudice; and
3. The 18 February 2014 return date at 11:00 a.m. is stricken.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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