

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

EDWARD BENEVILLE, JR. and :
WINCHESTER INSURANCE COMPANY, :
 :
Plaintiffs, :
 :
v. : Civil Action No. 03-474 JJF
 :
FRANCIS G.X. PILEGGI, :
ESQUIRE, FOX ROTHSCHILD, LLP, :
JURISTAFF, INC., and RICHARD :
M. UNTERBERGER, :
 :
Defendants. :

Kevin W. Gibson, Esquire of GIBSON & PERKINS, P.C., Wilmington,
Delaware.
Attorney for Plaintiffs.

Jeffrey M. Weiner, Esquire of LAW OFFICES OF JEFFREY M. WEINER,
Wilmington, Delaware.
Attorney for Defendants Francis G.X. Pileggi, Esquire, and Fox
Rothschild, LLP.

Daniel A. Griffith, Esquire of MARSHALL, DENNEHEY, WARNER,
COLEMAN & GOGGIN, Wilmington, Delaware.
Attorney for Defendant Richard M. Unterberger, Esquire.

MEMORANDUM OPINION

April 2, 2004

Wilmington, Delaware

Farnan, District Judge.

Presently before the Court are two motions, The Motion To Dismiss Plaintiffs' Complaint Filed By Defendants Pileggi/Fox, Rothschild (D.I. 4) and Defendant, Richard M. Unterberger, Esquire's Motion To Dismiss Plaintiffs' Complaint Pursuant To Federal Rule Of Civil Procedure 12(b)(6). (D.I. 9.) For the reasons discussed, the Court will deny the Motions.

BACKGROUND

Plaintiffs Edward B. Beneville, Jr. and Winchester Insurance Company¹ initiated this lawsuit alleging that Defendants Francis G.X. Pileggi, Esquire, and Richard M. Unterberger, Esquire, committed legal malpractice by failing to inform Mr. Beneville, of material changes in a business transaction document, the First Union Escrow Agreement (the "First Union Agreement"). Mr. Beneville, along with a business associate, Michael York, were shareholders in a general insurance agency, the CARNET Holding Corporation ("CARNET"). Mr. Beneville and Mr. York introduced a concept in the automobile insurance agency industry which Plaintiffs describe as an "over-whelming success." (D.I. 1 at ¶ 14.) Due to this success, Mr. Beneville sought to sell his shares of CARNET. On or about October of 2000, PC Group Acquisition I, Inc. (the "PC Group") indicated an interest in

¹ Where appropriate, the Court will refer to Mr. Beneville and Winchester Insurance Company collectively as "Plaintiffs."

acquiring Mr. Beneville's shares in CARNET and prepared a Stock Purchase Agreement for their purchase. Mr. Beneville retained Mr. Pileggi to represent him in this transaction. Mr. Pileggi is an attorney in the law firm Fox, Rothschild, O'Brien and Frankel, LLP ("FROF").²

The Stock Purchase Agreement provided that the PC Group would purchase 77% of the shares of CARNET, 48.05% of which was owned by Mr. Beneville. In addition, the Stock Purchase Agreement provided that the PC Group would purchase a one million dollar life insurance policy for Mr. Beneville. According to the Stock Purchase Agreement, the purchase price for the shares of CARNET were to be paid with \$194,583 down, with the remaining sum of \$1,730,417 to be secured by, in addition to various agreements and guarantees, a Promissory Note. The Promissory Note was to be secured by an escrow account to be established at First Union Bank (the "First Union Account"). The First Union Account was created and governed by the terms of the First Union Escrow Agreement (the "First Union Agreement").

The initial draft of the First Union Agreement provided that the PC Group would make monthly deposits in the First Union Account of a sum equal to 4.5% of the earned premium for the first year and four percent of the earned premium for subsequent

² Also working for FROF during the negotiation and sale of Mr. Beneville's CARNET shares was Mr. Unterberger, who is an employee of Juristaff, Inc., a legal staffing firm.

years. Mr. Beneville reviewed this draft of the First Union Agreement and did not object to its terms. Subsequent drafts of the First Union Agreement, however, reflect a change in the wording from "earned premium" to "annualized net income" (the "Changes"). The Changes substantially reduced the amount of money the PC Group was required to deposit in the First Union Account.

Multiple drafts of the First Union Agreement, all containing the Changes, were exchanged between the PC Group and Mr. Pileggi. Mr. Pileggi forwarded these drafts to Mr. Beneville for review; however, Mr. Pileggi did not bring the Changes in the forwarded drafts to Mr. Beneville's attention. Each forwarded draft instructed Mr. Beneville to review, and if agreed to, sign and return the draft to Mr. Pileggi. Mr. Beneville signed and returned each forwarded draft of the First Union Agreement, the last of which was executed by all parties between June 5 and June 8 of 2001. (D.I. 1 at ¶ 50.)

In the beginning of June, 2001, the PC Group failed to carry out various obligations that amounted to breaches of the Stock Purchase Agreement. Among these breaches were: 1) a failure to purchase the one million dollar life insurance policy for Mr. Beneville; and 2) a failure to pay certain amounts as required by the Stock Purchase Agreement. Following failed attempts at remedying the breaches, Mr. Pileggi and Mr. Beneville initiated

arbitration to resolve the dispute. In the arbitration submission prepared by Mr. Pileggi, he stated that the Changes were made without Mr. Beneville's knowledge. (D.I. 1 at ¶ 65, Ex. F.) Mr. Beneville prevailed in the arbitration; however, according to Plaintiffs there were insufficient funds to satisfy the award because the Changes resulted in the underfunding of the First Union Account, which was intended to secure a default by the PC Group.

Plaintiffs allege that, subsequent to the arbitration, Mr. Beneville received an e-mail from a secretary of the PC Group's attorney with a "red-lined" attachment of the First Union Agreement emphasizing the Changes. Plaintiffs allege that Mr. Pileggi was in possession of this red-lined draft of the First Union Agreement but failed to send it to Mr. Beneville and that Mr. Pileggi and Mr. Unterberger failed to notify Mr. Beneville of the Changes. Plaintiffs further allege that Mr. Pileggi and Mr. Unterberger failed to recognize the Changes' impact on the amount of security that would be available in the event of a default by the PC Group and that Mr. Pileggi unilaterally assented to the Changes. Plaintiffs assert that these acts amount to violations of Mr. Pileggi's and Mr. Unterberger's duty of care.

STANDARD OF REVIEW

A motion to dismiss tests the legal sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45-56 (1957). In

reviewing a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, courts “must accept as true the factual allegations in the [c]omplaint and all reasonable inferences that can be drawn therefrom.” Langford v. City of Atlantic City, 235 F.3d 845, 847 (3d Cir. 2000). A court will grant a motion to dismiss only when it appears that a plaintiff could prove no set of facts that would entitle him or her to relief. Id.

DISCUSSION

I. Whether The First Union Agreement May Serve As The Basis For Plaintiffs’ Claims

A. Parties’ Contentions

Defendants Mr. Pileggi and FROF (collectively the “Fox Rothschild Defendants”) contend that the Complaint fails to state a claim because Mr. Pileggi instructed Mr. Beneville to review and sign, if agreed to, numerous drafts of the First Union Agreement that contained the Changes. The Fox Rothschild Defendants contend that Mr. Beneville’s execution and return of these drafts bind Mr. Beneville to the contents of the Agreements. Further, the Fox Rothschild Defendants assert that Mr. Beneville’s failure to read the drafts of the First Union Agreement, that included the Changes, does not justify the avoidance of those Agreements. The Fox Rothschild Defendants maintain that because Mr. Beneville cannot avoid the First Union Agreement, he may not base a claim for legal malpractice on the

same.

The Fox Rothschild Defendants also contend that Plaintiffs cannot base their claims on the Changes because the First Union Agreement was not executed by the parties until June 8, 2001, a Friday, and Mr. Beneville notified the PC Group of its default on June 11, 2001, the following Monday (the first business day after the PC Group was obliged by the terms of the Stock Purchase Agreement to deposit funds in the First Union Account). Thus, the Fox Rothschild Defendants contend that the Changes cannot be the basis for the Plaintiffs' injury because the PC Group had defaulted on the Stock Purchase Agreement concurrently with the creation of the First Union Account. In addition, the Fox Rothschild Defendants contend that they never possessed the red-lined draft of the First Union Agreement.

In response, Plaintiffs contend that the parties agreed that the amount of money the PC Group would deposit in the First Union Account was to be calculated according to "earned premium" and not "annualized net income." Plaintiffs also contend that the question of whether Mr. Beneville carefully reviewed each draft of the First Union Agreement is irrelevant. Plaintiffs maintain that the key inquiry is whether Mr. Pileggi, as an experienced business transaction attorney, adequately represented and protected their interests. Plaintiffs assert that Mr. Pileggi's failure to send Mr. Beneville the red-lined draft of the First

Union Agreement emphasizing the Changes or to bring the Changes to the attention of Mr. Beneville were breaches of Mr. Pileggi's duty of care.

B. Decision

As an initial matter, the Court concludes that Mr. Beneville's review and execution of multiple drafts of the First Union Agreement, that included the Changes, does not establish that Plaintiffs cannot state a claim of legal malpractice. The Fox Rothschild Defendants have presented the Court with no case holding that a plaintiff cannot establish a breach of an attorney's duty of care because the client failed to discover and object to changes in a complex document that the attorney was retained to negotiate, draft, and review.³ Moreover, the Court views the Fox Rothschild Defendants' arguments about Mr. Beneville's failure to object to the Changes as being directed at his contributory negligence and not a failure to allege breach of Mr. Pileggi's duty of care.

In addition, the Court finds the cases relied on by the Fox Rothschild Defendants to be inapposite to Plaintiffs' theories for recovery. The Fox Rothschild Defendants contend that Alabi

³ In addition, at this stage of the proceedings, the Court is without expert testimony establishing that Mr. Pileggi's actions do not constitute a breach of the appropriate standard of care. See Seiler v. Levitz Furniture Co., 367 A.2d 999, 1008 (Del. 1976) (holding that, in general, the standard of care can only be established through expert testimony).

v. DHL Airways, Inc., 583 A.2d 1358 (Del. Super. 1990), and Graham v. State Farm Mutual Automobile Insurance Company, 565 A.2d 908 (Del. Super. 1989), preclude Plaintiffs' recovery because Alabi and Graham reaffirm the fundamental contract principle that a party will be bound by the contents of an agreement they execute, even if they failed to inform themselves of the contents of the agreement. Alabi, 583 A.2d at 1362 (citations omitted); Graham, 565 A.2d at 913 (citations omitted). The Court concludes that Alabi and Graham are irrelevant to the claims in the instant case because Plaintiffs do not seek to avoid a contract or escape from certain provisions in an agreement; instead, Plaintiffs allege that Mr. Pileggi's failure to notify Mr. Beneville of the Changes amounted to a breach of a business transaction attorney's standard of care. Therefore, the Alabi and Graham courts' holdings that a party may not avoid a contract for failure to inform themselves of an agreements' provisions have no bearing on Plaintiffs' claims for legal malpractice.

Next, although the Court agrees with the Fox Rothschild Defendants that Plaintiffs' attachment of the red-lined draft of the First Union Agreement to their Complaint does not establish that they actually had possession of the red-lined draft but failed to provide it to Mr. Beneville, the issue of whether Mr. Pileggi actually had possession of this draft is heavily disputed

at this stage of the proceedings. As discussed above, in a motion to dismiss a court must accept as true the factual allegations in a complaint. Langford, 235 F.3d at 847. In the Complaint, Plaintiffs allege that Mr. Pileggi had possession of the red-lined draft of the First Union Agreement (D.I. 1 at ¶ 68), and accordingly, the Court concludes that the Fox Rothschild Defendants' contention that they never had possession of the red-lined draft does not entitle them to dismissal.

With respect to the Fox Rothschild Defendants' contention that the First Union Agreement cannot be the basis for Plaintiffs' claims because the PC Group defaulted on the Stock Purchase Agreement immediately following the parties' execution of the First Union Agreement, the Court concludes that dismissal based on the timing of the PC Group's default would be premature at this stage of the proceedings. First, the Court notes that the Fox Rothschild Defendants' assertion that the First Union Agreement was executed on June 8, 2001, one business day before the PC Group defaulted, is contrary to the facts alleged in the Complaint. In the Complaint, Plaintiffs allege that the First Union Agreement was executed by all parties between June 5 and June 8. (D.I. 1 at ¶ 50.) Taken as true as required in a motion to dismiss, the Changes could have caused Plaintiffs' injury because the First Union Agreement was executed prior to the PC Group's default. Moreover, on the undeveloped record in this

case, it is unclear whether there were subsequent attempts by the PC Group to cure its defaults. If the PC Group attempted to cure its defaults by depositing money in the First Union Account according to the terms of the First Union Agreement, the Changes would have affected the amount of money in the First Union Account available to secure any future default by the PC Group, and thereby qualify as a cause of Plaintiffs' injury.⁴

In sum, the Court concludes that the Fox Rothschild Defendants have not established that they are entitled to dismissal. They have not demonstrated that Mr. Pileggi's actions cannot constitute legal malpractice, that he never had possession of the red-lined draft of the First Union Agreement, or that the timing of the PC Group's default precludes the Changes from being a cause of Plaintiffs' injuries.

II. Whether Plaintiffs' Inability To Recover The Arbitration Award Can Be The Basis Of A Claim For Legal Malpractice

A. Parties' Contentions

The Fox Rothschild Defendants maintain that Plaintiffs cannot state a claim based on their inability to recover on the arbitration award because Mr. Pileggi diligently prosecuted Mr. Beneville's rights in the arbitration (which he won), and Mr. Beneville never moved to confirm his arbitration award.

⁴ In fact, by a letter dated June 11, 2001 (attached to the Complaint as Exhibit E (D.I. 1)), FROF notified the PC Group of its default and requested that the PC Group take whatever actions necessary to cure its default.

Therefore, the Fox Rothschild Defendants maintain that Plaintiffs cannot contend that the Changes were a cause of their inability to recover the arbitration award because the predicate step to satisfying such an award is its confirmation in a court of appropriate jurisdiction.

Further, as above, the Fox Rothschild Defendants contend that because the PC Group defaulted on the Stock Purchase Agreement immediately following the parties' execution of the First Union Agreement, the Changes cannot be a basis for the Plaintiffs' claim of injury.

Plaintiffs respond that their inability to recover the arbitration award is the result of Mr. Pileggi's failure to notify them of the Changes. Plaintiffs assert that there are no assets against which the arbitration award may be satisfied because the Changes resulted in an underfunding of the First Union Account.

B. Decision

The Court concludes that the Fox Rothschild Defendants have not established that the Plaintiffs' inability to recover the arbitration award cannot be a basis for their legal malpractice claim. As discussed above, the Court concludes that the date of the execution of the First Union Agreement and the following breach by the PC Group does not establish that Plaintiffs could prove no set of facts entitling them to relief. Additionally,

the Court cannot determine at this stage whether Plaintiffs confirmed the arbitrator's award. The parties dispute whether Plaintiffs moved for, and received, confirmation of the award. (D.I. 5 at 34; D.I. 15 at 14.) For these reasons, the Court will deny the Fox Rothschild Defendants' Motion to the extent they contend that Plaintiffs cannot base a claim on their inability to recover the arbitrator's award.

III. Mr. Unterberger's Motion To Dismiss

The Court will also deny Mr. Unterberger's Motion to Dismiss. (D.I. 19.) Mr. Unterberger moves for dismissal on the grounds that Plaintiffs' opposition brief to the Fox Rothschild Defendants' Motion ("Plaintiffs' Opposition Brief") does not discuss the basis for his liability. (D.I. 19 at 1, 2-3.)

Mr. Unterberger's arguments do not entitle him to dismissal because the absence of any discussion of his liability in Plaintiffs' Opposition Brief is irrelevant. As discussed above, a motion to dismiss tests the legal sufficiency of the complaint. Conley, 355 U.S. at 45-56. Accordingly, the key inquiry in resolving this Motion is whether the Complaint states a claim against Mr. Unterberger, not whether he is mentioned in Plaintiffs' Opposition Brief.

In addition, Mr. Unterberger did not file an opening brief accompanying, or joining with, the Fox Rothschild Defendants' Motion. Instead, Mr. Unterberger filed a brief following his

receipt of Plaintiffs' Opposition Brief, stating that all the arguments made by the Fox Rothschild Defendants apply "equally, if not more," to his situation. (D.I. 8.) Aside from being procedurally improper, the timing of Mr. Unterberger's filing makes it unsurprising that Plaintiffs' Opposition Brief does not discuss Mr. Unterberger's liability because he had not moved for dismissal until after he received Plaintiffs' Opposition Brief.

CONCLUSION

For the reasons discussed, the Court will deny The Motion To Dismiss Plaintiffs' Complaint Filed By Defendants Pileggi/Fox, Rothschild (D.I. 4) and Defendant, Richard M. Unterberger, Esquire's Motion To Dismiss Plaintiffs' Complaint Pursuant To Federal Rule Of Civil Procedure 12(b)(6). (D.I. 9.)

An appropriate Order has been entered.

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JURISTAFF, INC., and RICHARD :
M. UNTERBERGER, :
 :
Defendants. :

O R D E R

At Wilmington, this 31st day of March, 2004, for the reasons set forth in the Memorandum Opinion to be issued;

IT IS HEREBY ORDERED that:

- 1) The Motion To Dismiss Plaintiffs' Complaint Filed By Defendants Pileggi/Fox, Rothschild (D.I. 4) is **DENIED**;
- 2) Defendant, Richard M. Unterberger, Esquire's Motion To Dismiss Plaintiffs' Complaint Pursuant To Federal Rule Of Civil Procedure 12(b)(6) (D.I. 9) is **DENIED**.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE