

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KATHLEEN GORSKI DOWD, :
ADMINISTRATRIX OF THE ESTATE :
OF JAMES DOWD, AND KATHLEEN :
DOWD, IN HER OWN RIGHT, ET AL. :

Plaintiffs, :

v. :

RYAN WALSH, :
Defendant. :

CIVIL ACTION

J&J SNACK FOODS CORP. AND :
J&J SNACK FOODS CORP. HEALTH :
AND WELFARE PLAN, :

Plaintiffs, :

v. :

CAROLE KAFFRISSEN, ESQ., :
ET AL., :

Defendants. :

v. :

BLUE CROSS AND BLUE SHIELD :
OF NEW JERSEY, ET AL., :

Third Party Defendants :

NO. 98-5743

MEMORANDUM

R.F. KELLY, J.

AUGUST , 1999

Presently before the court is Third Party Defendants Blank Rome Comisky & McCauley and David N. Zeehandelaar's Motion to Dismiss the Third Party Complaint in the above-captioned case. Upon consideration of said Motion, and the response of the Third

Party Plaintiffs Carole F. Kafrissen, Law Offices of Carole F. Kafrissen, P.C., et al., the Motion will be granted and the matter will be dismissed with prejudice.

I. BACKGROUND

J&J Snack Foods Corporation ("J&J Snacks") is a New Jersey corporation that self-insures its employees under its Health and Welfare Plan (the "Plan"), a plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA"). J&J Snacks employed James Dowd as of the date of his death and during said employment, he was covered under the Plan. On June 23, 1995, James Dowd was involved in an automobile accident, and on June 26, 1995, he died from the injuries he sustained. As a result of his hospitalization, James Dowd incurred approximately \$83,000 in hospital bills for the injuries he received in the accident. The Plan advanced \$83,000 in hospital expenses for the benefit of Dowd and his dependents.

James Dowd's estate instituted a wrongful death action and a survivorship action against the driver of the vehicle that caused the automobile accident. The case was heard in this Court, and Dowd's estate and his wife were represented in the litigation by Carole F. Kafrissen, Esq. It was J&J Snacks' understanding that the Plan was entitled to a refund of the benefits from the proceeds of any recovery realized from the

underlying lawsuit.¹ The lawsuit was ultimately settled for \$975,000. The terms of the settlement allocated \$900,000 to the wrongful death claim and \$75,000 to the survivorship claim.

In this action, J&J Snacks and the Plan claim that Kafrissen, Dowd's Estate, Dowd's wife and other beneficiaries of the Dowd Estate are liable to J&J Snacks and the Plan for the \$83,000 in hospital expenses that were advanced for Dowd's medical expenses. These parties further allege that the allocation of the \$975,000 settlement proceeds was unreasonable, arbitrary, capricious, and/or fraudulent; that the allocation of \$75,000 to the survivorship claim was unreasonably low; and the allocation of the \$900,000 was unreasonably high. It is J&J Snacks' belief that the settlement was intentionally allocated in that manner so to defeat J&J Snacks' and the Plan's right to recover the \$83,000 advanced for Dowd's medical expenses.

Third-Party Plaintiffs have filed a Third-Party Complaint against Blank Rome and David N. Zeehandelaar, attorneys for J&J Snacks, asserting that the attorneys had a duty to notify Third-Party Plaintiffs that there was an \$83,000 claim asserted by J&J Snacks and/or the Plan. Third-Party Plaintiffs identify three letters sent to Kafrissen by Zeehandelaar and Blank Rome,

¹ Third-Party Defendants Blank, Rome, Comiskey & McCauley is a professional corporation. David N. Zeehandelaar is a licensed attorney with the Blank Rome law firm. Mr. Zeehandelaar was counsel for J&J Snacks, the company that employed the decedent.

as attorneys for J&J Snacks and the Plan. The letters are attached as Exhibits to the Third-Party Complaint and state that J&J Snacks had a subrogation lien against any proceeds from the wrongful death and survivorship suit.²

Currently before the Court is Blank Rome and Zeehandelaar's Motion to Dismiss the Third-Party Complaint. The Third-Party Plaintiffs filed their Complaint, asserting that Blank Rome and Zeehandelaar breached a duty to them, in that the letters sent did not inform Kafrissen that J&J Snacks was asserting "an ERISA claim or any other claim cognizable under Pennsylvania law." Thus, the Third-Party Complaint pleads a cause of action for negligence against Blank Rome and Zeehandelaar. For the reasons set forth below, Blank Rome and Zeehandelaar's Motion to Dismiss will be granted.

II. STANDARD

A motion to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), tests the legal sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). A court must

² Zeehandelaar's first letter is addressed to Kafrissen and states:

"Please note that this law firm is counsel for J&J Snack foods which, as you know, was Mr. Dowd's employer. Various medical benefits, totalling approximately \$83,000, were paid as a result of this incident. . . . Our claims administrator, Blue Cross/Blue Shield, has notified you of the subrogation lien that would attach to any proceeds obtained from a third party regarding this incident."

determine whether the party making the claim would be entitled to relief under any set of facts that could be established in support of his or her claim. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)(citing Conley, 355 U.S. at 45-46); see also Wisniewski v. Johns-Manville Corp., 759 F.2d 271, 273 (3d Cir. 1985). In considering a Motion to Dismiss, all allegations in the complaint must be accepted as true and viewed in the light most favorable to the non-moving party. Rocks v. City of Phila., 868 F.2d 644, 645 (3d Cir. 1989)(citations omitted).

III. DISCUSSION

Blank Rome and Zeehandelaar assert that they owed no duty to inform the Third-Party Plaintiffs of any claims pending. Blank Rome and Zeehandelaar assert that an attorney cannot be held liable for negligence to any other party other than his client. See Smith v. Griffiths, 476 A.2d 22, 26 (Pa.Super. 1984)(the attorney's only duty of care is to his own client); see also Sachs v. Levy, 216 F.Supp. 44 (E.D.Pa. 1963)(granting defendant's motion for judgment on the pleadings and holding that an attorney's negligence towards someone other than his client was not actionable); and Aetna Electroplating Co., Inc. v. Jenkins, 484 A.2d 134 (Pa.Super. 1984)(affirming a motion to dismiss complaint where plaintiff alleged that attorney's actions in representing his client prevented plaintiff from effectively collecting a debt; attorney not liable for harm

caused to a third person such as plaintiff).

As Blank Rome and Zeehandelaar correctly contend, it is well-settled that an attorney's only duty is to his or her own client. Third-Party Plaintiffs were not clients of Blank Rome or Zeehandelaar, and actually stood in a potentially adverse position to Blank Rome and Zeehandelaar's client.

Third-Party Plaintiffs do no more than respond by making general assertions while citing mainly to the wording of the Third-Party Complaint. They do, however, cite to Mentzer & Rhey, Inc. v. Ferrari, 532 A.2d 484, 486, in stating that Pennsylvania law "actually provides that in the absence of special circumstances, an attorney cannot be held liable for negligence to any party other than his client." Third-Party Plaintiffs follow this by stating that the averments of the Third-Party Complaint, accepted as true, demonstrate that special circumstances exist which entitle them to pursue a negligence action against Blank Rome. However, a more thorough reading of the Ferrari decision provides that because "appellant [Ferrari] is not in privity with plaintiff's attorneys, he has no cause of action against them. . . ." Id. Clearly, Blank Rome and Zeehandelaar are not parties in privity with Kafrisson or any of the Third Party Plaintiffs in this case.

Therefore, because Blank Rome and Zeehandelaar owed no duty to Third-Party Plaintiffs, the Third-Party Complaint

directed to Blank Rome and Zeehandelaar fails to state a claim upon which relief can be granted and will be dismissed pursuant to Fed.R.Civ.P. 12(b)(6).

An appropriate Order follows.

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Third Party Defendants	:
_____	:

ORDER

AND NOW, on this ____ day of August, 1999, upon consideration of the Third-Party Defendants Blank Rome Comisky & McCauley and David N. Zeehandelaar, Esquire's Motion to Dismiss Third-Party Complaint, and Third-Party Plaintiffs' response thereto, it is hereby ORDERED and DECREED that said Motion is GRANTED. It is further ORDERED and DECREED that Third-Party Plaintiffs' Third-Party Complaint is hereby DISMISSED with

prejudice.

BY THE COURT:

Robert F. Kelly, J.