

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MICHAEL J. QUILLING, Receiver for
ABC VIATICALS, INC., and Related Entities,

Plaintiff,

v.

ERWIN & JOHNSON, LLP and
CHRISTOPHER R. ERWIN,

Defendants
Third-Party Plaintiffs,

v.

MILLS, POCOTZAK & COMPANY,
DMHS STALLARD and CHRISTOPHER
JOHN WILLIAM STENNING,

Third-Party Defendants.

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Case No.: 3:07-CV-1153-P-BF

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**REPLY BRIEF IN SUPPORT OF DMHS STALLARD AND
CHRISTOPHER JOHN WILLIAM STENNING’S MOTION TO DISMISS
THIRD PARTY COMPLAINT**

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REPLY BRIEF IN SUPPORT OF DMHS STALLARD AND CHRISTOPHER JOHN WILLIAM STENNING'S MOTION TO DISMISS THIRD PARTY COMPLAINT

DMH Stallard and Christopher John William Stenning (“Stenning”, and collectively “DMHS”) submit this Reply Brief in support of their Motion to Dismiss the Third Party Complaint (“TP Complaint”).

INTRODUCTION

Erwin & Johnson, LLP’s (“E&J LLP”) and Christopher R. Erwin’s (“Erwin”, and collectively “Plaintiffs”) Response is a transparent attempt to deceive this Court about their claims against DMHS. The deception begins when Plaintiffs improperly merge the identities and claims of Erwin and E&J LLP, referring to Erwin and the limited liability partnership collectively as “E&J”. The facts alleged in the TP Complaint and admissions in Plaintiffs’ Response require that each of their claims be treated separately. Erwin’s individual claims cannot survive since he has no standing to assert any of his individual claims against DMHS.

The allegations in the TP Complaint and admissions in the response also establish that Erwin and E&J LLP have failed to allege any contractual or attorney-client relationship with DMHS. First, the Complaint makes clear that to the extent DMHS entered into any attorney-client relationship it was with an entity not any individual. Erwin was *not* a contracting party nor a client. See TP Comp. ¶ 13 (Doc# 102). Erwin cannot ignore this fact merely by conflating the definition of Erwin and E&J LLP. Second, Erwin and E&J LLP admit they were *not* counsel for ABC, stating that: “E&J was not acting as ABC’s attorney. E&J was ABC’s escrow agent.” Resp. Br. p. 7 (Doc# 148). This was also true when E&J LLP sought to retain DMHS on behalf of ABC. Resp. Br. p. 12 (Doc# 148) (“E&J was acting as escrow agent when it retained DMHS...”). Consequently, Plaintiffs’ agency and sub-agency theory fails to survive scrutiny.

Third, Plaintiffs fail to acknowledge or intend to ignore that section 5 of the Escrow Agent

Agreement, which they cite for one of their affirmative defenses to ABC's Complaint (see Doc# 42, ¶ 69, Doc# 43, ¶ 69) contains the following exculpatory provision:

The Escrow Agent may consult with legal counsel of its selection as to any matter relating to this Agreement, and the Escrow Agent shall not incur any liability in acting in good faith in accordance with any advice from such counsel.

See Doc# 8-2 for full copy of Escrow Agent Agreement ("Escrow Agreement"). How inconvenient is it for Plaintiffs that the same document which they seek to use in their defense is also the same exact document that vitiates Plaintiffs' claims against DMHS? Section 5 of the Escrow Agreement betrays Plaintiffs' plans to obfuscate and deflect attention from their own failures and misconduct. This Court should stop this charade.

The predicate for all of Plaintiffs' claims against DMHS is that they relied in good faith on the advice of DMHS that the bonds were valid and enforceable under English law. Plaintiffs argue that "E&J is now being sued because the legal opinion was allegedly incorrect" Resp. Br. 12 and that "if the bonds had been valid, ABC's resources would have been sufficient to cover the premium reserve" that E&J LLP and Erwin were supposed to keep safe as the escrow agent. Resp. Br. p. 6 (Doc# 148). Plaintiffs essentially claim that their reliance on DMHS is a "plausible" reason there was insufficient funds to pay the premiums. However, any liability based upon Plaintiffs' reliance on DMHS is precisely the type of liability waived under the Escrow Agreement. Section 5 of the Escrow Agreement completely undermines the claims against DMHS. First, there can be no common law indemnity between E&J and DMHS, where Plaintiffs are contractually absolved from ANY liability stemming from its good faith reliance on any advice from DMHS. Second, there can be no legal malpractice claim or breach of fiduciary duty claim against DMHS when Plaintiffs are completely immune from incurring any liability from their reliance on DMHS. Third, while preposterous, there can be no claim for emotional distress because Erwin cannot experience emotional distress based upon good faith reliance on

DMHS when he knows he cannot be held liable for any failure of DMHS. Finally, there can be no contribution between Plaintiffs and DMHS because Plaintiffs will not incur any liability related to any conduct or advice from DMHS.

For these reasons and the additional reasons explained below, the Third Party Complaint should be dismissed without leave to re-plead another tall tale.

ARGUMENT

I. The Escrow Agreement Immunizes E&J LLP and Erwin From All Liability.

The Escrow Agreement provides that the “Escrow Agent shall not incur any liability in acting in good faith in accordance with any advice from counsel.” See Escrow Agreement, Doc# 8-2. E&J LLP is a party to the Escrow Agreement and Erwin admits that he too was acting only as ABC’s Escrow Agent.

This prophylactic provision prevents E&J LLP and Erwin from incurring any liability to ABC in this case based upon their reliance on any advice from DMHS. This silver bullet defeats each of Plaintiffs’ claims since they cannot, as a matter of law, incur any damages to ABC for relying on any advice provided by DMHS to ABC. In other words, if E&J cannot be held liable to ABC for faulty advice rendered by DMHS, the predicate of its purported third party action does not exist. This action is, in essence, legally and logically unsustainable.¹ Count I through V should be dismissed.

II. No Special Relationship Between Plaintiffs And DMHS Exists To Support A Reasonable Inference That DMHS Owed E&J Any Duty.

Plaintiffs cannot sue DMHS for breach of fiduciary duty in the absence of a relationship that would reasonably imply the existence of such a high duty. See generally, *Patterson v.*

¹ The Receiver for ABC has unequivocally stated that ABC is not suing Plaintiffs for any injury for mistakes regarding DMHS advice. See Affidavit of Receiver, Exh. B, Doc # 14-2. See also Docs# 70 and 133-4.

McMickle, 191 S.W.3d 819, 824 (Tex.Civ.App. 2006); See also *Lazy Acres Market, Inc. v. Tseng*, 152 Cal.App.4th 1431, 1435, 62 Cal.Rptr.3d 378, 381 (Cal.Ct.App. 2007). Similarly, Plaintiffs cannot sue for legal malpractice in the absence of an attorney-client relationship. *SMWNPF Holdings, Inc. v. Devore*, 165 F.3d 360, 364 (5th Cir. 1999); see also *Ex P Hartop*, (1806) 12 Ves 349; *Montgomerie and Others v. United Kingdom Mutual Steamship Assoc., LTD*, [1891] 1 Q.B. 370; *Jager v. County of Alameda*, 8 Cal.App.4th 294, 297, 10 Cal.Rptr.2d 293, 294 - 295 (Cal.Ct.App. 1992). Without sufficient facts to reasonably infer a fiduciary relationship or an attorney-client relationship between Plaintiffs and DMHS, counts II and III must be dismissed.

A. DMHS cannot be a “sub-agent” because E&J LLP and Erwin lacked authority to provide legal advice to ABC.

Plaintiffs argue that DMHS owes duties to both E&J LLP and Erwin because an agency relationship was created, such that DMHS was an “agent” or sub-agent of the Plaintiffs. Resp.

Br. p.6 The Restatement (Third) of Agency § 3.15 (Subagency) (2006) states that:

(1) A sub-agent is a person appointed by an agent to perform functions that the agent has consented to perform on behalf of the agent's principal and for whose conduct the appointing agent is responsible to the principal. The relationships between a subagent and the appointing agent and between the subagent and the appointing agent's principal are relationships of agency as stated in § 1.01

(2) An agent may appoint a subagent only if the agent has actual or apparent authority to do so.

An essential element of proof of agency is that the alleged principal has both the right to assign the agent's task and to control the means and details of the process by which the agent will accomplish the task.” *Johnson v. Owens*, 629 S.W.2d 873, 875 (Tex.Ct.App.1982); *Marriott Bros. v. Gage*, 717 F.Supp. 458, 460 (N.D.Tex.,1989) (“The alleged principal must have ‘both the right to assign the agent's task and to control the means and details of the process by which the agent will accomplish the task.’”); *Cardinal Health Solutions, Inc. v. Valley Baptist Medical Center*, 643 F.Supp.2d 883, 888 (S.D.Tex. 2008).

In other words, Plaintiffs must have authority from ABC to both perform legal services and to appoint DMHS as a sub-agent. Not surprisingly, and consistent with Plaintiffs' admission that they were not acting as *counsel* for ABC, neither the Escrow Agreement nor the Trust Agreement requests Plaintiffs to provide any legal services.² The rendering of a legal opinion is not within the scope of the authority, duties or obligations as ABC's escrow agent. Since Plaintiffs did not agree to provide ABC with a legal opinion, they could not appoint and delegate any obligation to provide a legal opinion to a sub-agent.

Further, Plaintiffs fail to address their lack of expertise and legal license to control the legal work of an English firm opining on English law. Thus they cannot satisfy another essential requirement for establishing a sub-agency relationship. Finally, Plaintiffs cite English and American cases to support the position that a solicitor can be the agent of another solicitor. They overlook their previous proclamation that they were not ABC's lawyer. See Resp. Br. p. 7 (Doc# 148). Accordingly, Plaintiffs mistakenly rely on cases which deal with legal counsel retaining other legal counsel to serve the legal needs of a common client. All the cases are distinguishable and undermine Plaintiffs' credibility to present relevant and focused arguments for the continuation of its charade. Accordingly, Counts II and III should be dismissed.

B. Plaintiffs cannot be a co-client with ABC because they were not asked to give their legal opinion about the enforceability of the Bonds under English Law.

Plaintiffs erroneously argue they were a co-client of DMHS. Resp. Br. p. 12. It is so preposterous, not even Plaintiffs affirmatively claim they were a client of DMHS, stating only that "both ABC and E&J *could have been* DMH Stallard's clients." Resp. Br. p. 12 (Doc# 148) "The duties of the escrow agent are those set out in the escrow agreement. As a general rule, the

² See Docket # 8-2 for full copy of Escrow Agent Agreement. See Docket # 8-3 for a complete copy of the Trust Agreement that E&J LLP and Erwin rely upon for their affirmative defenses in their answer, Doc.# 42, ¶ 69, doc# 43, ¶ 69. This Court may take judicial notice of the documents filed as part of the public record in this case.

escrow agent must act strictly in accordance with the provisions of the escrow agreement.” *U.S. v. Frick*, 588 F.2d 531, 4 Fed. R. Evid. Serv. 256 (5th Cir.1979).³

Indeed, the TP Complaint states only that E&J LLP was acting on behalf of ABC to retain the services of DMHS for the benefit of ABC. See TP Compl. ¶¶ 8, 9, 10 & 11. Erwin’s role was even more limited since he only called Stenning to discuss matters related to the work to be performed by DMHS. TP Compl. ¶¶ 11 & 12. The limited scope of Plaintiffs’ agency authority is confirmed by the Escrow Agreement, the Trust Agreement and the Plaintiffs’ judicial admission they were “Escrow Agents” only. As alleged in the TP Complaint, Plaintiffs were the escrow agent of ABC and E&J LLP fulfilled the request of its principal to act as an intermediary or “middleman” to contact and request DMHS to provide a legal opinion to ABC. There is no allegation that ABC requested E&J LLP or Erwin to provide their own legal opinion about English law. Hence, Plaintiffs could not be a co-client with ABC because they have no obligation to provide any legal services and they did not seek legal advice from DMHS on their own behalf. It is only ABC that wanted and requested legal advice from an English lawyer. Plaintiffs cannot transform their ABC errand boy status into that of a client of DMHS. Counts II and III should be dismissed.

III. Even If A Fiduciary Relationship Could Be Inferred, Plaintiffs Fail To Allege A Breach Of a Duty Because There Was No Conflict Of Interest To Be Disclosed.

Plaintiffs fail to explain what conflict of interest existed between DMHS’s engagement to provide a legal opinion to ABC and DMHS’s “on-going relationship” with Searles. See TP Compl. ¶ 12. Plaintiffs allege that DMHS failed to disclose potential conflicts of interest arising

³ The escrow agent has the absolute duty to carry out the terms of the agreement, including delivering the subject matter when the terms of the escrow have been fulfilled. *Albright v. Lay*, 474 S.W.2d 287, 291 (Tex.Civ.App.-Corpus Christi 1971, no writ). The ultimate disposition of the subject matter to the grantor or grantee is determined by the terms of the agreement, upon fulfillment of the necessary conditions. *Kell v. Gross*, 171 F.2d 715, 718 (5th Cir.), cert. denied, 338 U.S. 815, 70 S.Ct. 55, 94 L.Ed. 493 (1949); *Gambrell v. Tatum*, 228 S.W. 287, 289 (Tex.Civ.App.-Amarillo 1921, no writ).

out of a “relationship with the Searles.” TP Comp. ¶ 28. Claiming a conflict exists, without any more detail, is a threadbare recital of a cause of action and a conclusory statement, which will “not suffice.” *Ashcroft v. Iqbal*, 556 U.S. ----, 129 S.Ct. 1937, 1940, 173 L.Ed.2d 868 (2009).

Under English law, no conflict exists; thus, there can be no failure to disclose. Conflicts of interest involving English solicitors are governed by the Solicitor’s Code of Conduct 2007 (“Code of Conduct”). See www.sra.org.uk/solicitors/code-of-conduct/rule3.page (visited July 20, 2010). Rule 3 of the Code of Conduct governs conflicts of interest and provides, in pertinent part, that:

(2) There is a conflict of interests if:

(a) you owe, or your firm owes, separate duties to act in the best interests of two or more clients in relation to the same or related matters, and those duties conflict, or there is a significant risk that those duties may conflict; or

(b) your duty to act in the best interests of any client in relation to a matter conflicts, or there is a significant risk that it may conflict, with your own interests in relation to that or a related matter. *Id.*

Plaintiffs do not allege that the Searles were clients of DMHS with respect to the Albatross Bond and Xelion support letter. A conflict may only exist if the Searles were firm clients for “**the same or related matters**” and “those duties conflict, or there is a significant risk that those duties may conflict[.]” Plaintiffs’ conclusory allegations fail to allege a prima facie claim based on any purported conflicts of interest. *Iqbal*, 129 S.Ct. at 1940.

Tazza’s legal authority to bind Xelion on the support letter was the subject of DMHS’s legal opinion given to ABC. In essence, Plaintiffs also seek to transform a claim for negligence into an omission of a material fact. It is black letter law that a statement of opinion cannot also do the work of a misrepresentation or omission of material fact. *BP v. Marshall*, 288 S.W.3d 430, 443 (Tex.App.-San Antonio 1982, pet. filed) It is clear that the failure to “disclose” Tazza’s lack of authority cannot form the basis of an alleged breach of fiduciary duty. Count III must be

dismissed for failure to state any claim.

IV. Erwin Fails To State a Claim For Negligent Infliction Of Emotional Distress

Erwin does not dispute that neither Texas, England nor California recognize a claim for negligent infliction of emotional distress or reputational injury arising out of attorney negligence. Rather than concede this frivolous claim, Erwin attempts to circumvent his prior statements by claiming emotional distress claims can arise from something other than attorney negligence. Resp. Br. p.18. Erwin fails to recall the facts of his own claim and his admission that he is suing DMHS “for their erroneous advice, E&J’s reliance thereon, and the concomitant breaches of legal duties owed to E&J.” E&J Third Party Plaintiffs’ Response to DMH Stallard’s and Christopher John William Stenning’s Motion to Dismiss and Motion for Stay of Briefing and to Plaintiff’s Response (Doc# 136, p. 2).

Erwin strains his credibility even further by analogizing the alleged legal errors of DMHS to cases where mothers were robbed of their children and debtors were wrongfully declared bankrupt by a court of law. None of the cases cited by Erwin help his claim that DMHS’s failure to disclose an alleged conflict of interest is extreme and outrageous conduct.⁴ Erwin claims he would suffer “embarrassment and distress” if the insurance premiums were not paid. However, this does not constitute *extreme* and *outrageous* conduct. “Meritorious claims for intentional infliction of emotional distress are relatively rare precisely because *most human conduct*, even that which causes injury to others, cannot be fairly characterized as extreme and outrageous.” *Kroger Texas Ltd. Partnership v. Suberu*, 216 S.W.3d 788, 796 (Tex. 2006). (emphasis added)

⁴ Under English Law and Rule 3 of the Code of Conduct for English Solicitors, there was no conflict of interest to be disclosed by DMHS. E&J completely fails to cite any authority to support the conclusion that a conflict of interest existed in this case.

Erwin's persistence in attempting to salvage this specious tort claim is an indication that he is truly desperate to find another wallet to help pay for his own liability to ABC. The desperation is apparent in Erwin's failure to concede that he has no legally recognizable relationship with DMHS. Erwin did not execute any agreement with DMHS or ABC in his individual capacity. The allegations in the TP Complaint dispel the notion that Erwin personally retained DMHS to act as his counsel. E&J LLP is the only escrow agent and trustee. Erwin was merely a member of the E&J LLP. Erwin, as an individual, has no relationship with DMHS and thus there can be no duty owed or reasonable reliance by Erwin upon the advice of DMHS. Furthermore, Erwin as a member of the E&J LLP is insulated from liability in two ways. First the E&J LLP as a corporate entity protects him from any liability arising from the E&J LLP's reliance on DMHS. Second, Erwin could not suffer "embarrassment and distress" since the agreement he signed on behalf of E&J LLP with ABC provides complete immunity from any liability resulting from DMHS's opinion. Count IV should be dismissed.

V. E&J Can Seek No Contribution From DMHS Because It Is Impossible For E&J To Incur Liability Based Upon Its Reliance On DMHS.

The Escrow Agreement that E&J LLP had with ABC absolves Plaintiffs from any liability which might arise from their good faith reliance on DMH's opinion. See Doc# 8-2. Nonetheless, E&J believes they may be held liable for ABC's reliance on DMHS. This is wrong for the additional reason that no part of ABC's claim against Plaintiffs relies upon the due diligence report and opinion that DMHS prepared for ABC. Plaintiffs are subject to liability because they mismanaged or allowed LaMonda to steal the money that they were duty bound to preserve for ABC as the escrow agent. Plaintiffs are being sued because they violated their duties to ABC when they failed to 1) create separate escrow accounts to keep money for premium payments and 2) conserve enough money to make the policy premium payments. See ABC's Am. Compl., Doc# 41.

Although the alleged misconduct of Plaintiffs and DMHS relates to ABC's business, the particular facts regarding the conduct of Plaintiffs and DMHS do not intersect. ABC has admitted to this Court that it does not allege that Plaintiffs are or may be liable for any of the acts of DMHS alleged in ABC's complaint against E&J. See ABC's Resp. brief, Doc# 64, p. 5. and Docs.# 70 & 133-4. ABC has stated that the damages it seeks from E&J are exclusive of damages which might have been incurred due to DMHS's opinion and the lack of a valid and enforceable Albatross Bond or Xelion support letter.⁵ Am. Comp. Doc# 41 ¶ 16, Doc# 108, pp.5-7 and Doc# 14-2. Plaintiffs' contention to the contrary simply refuses to acknowledge that ABC is seeking damages from them on a basis that has no connection with DMHS. Nonetheless, when Plaintiffs allege in their TP Complaint that the reason they didn't conserve the money in the trust account was because they relied upon the advice of DMHS regarding the validity and enforceability of the bonds, they effectively plead themselves out of court because the Escrow Agreement absolves them from liability for the damages they seek to recover in the TP Complaint.

CONCLUSION

The premise of Plaintiffs' TP Complaint is that they and DMHS will be liable to ABC for the same injury in tort. This is impossible. First, Plaintiffs have no liability for DMHS's mistaken advice. Second, ABC has stipulated that Plaintiffs are not liable for any consequence of DMHS's opinion. Third, Plaintiffs admit they are not liable for their good faith reliance on the advice of DMHS. Thus, there can never be any liability to Plaintiffs on any of their claims. For all of the reasons stated herein, this Court should dismiss the TP Complaint with prejudice.

⁵ "The Receiver will not allege that Erwin & Johnson or Chris Erwin breached any duties by soliciting or relying upon the due diligence of DMH Stallard or Kit Stenning. We do not seek any damages for those acts..." Docs. #70 & 133-4, letter dated May 14, 2009 from counsel for ABC's Receiver to counsel for E&J.

Date: August 24, 2010

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on the 24th day of August 2010 to all known counsel of record listed below by means of the Court's electronic filing system as required by the Federal Rules of Civil Procedure:

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