

STATE OF MAINE

BUSINESS AND CONSUMER COURT

Cumberland, ss.

DAVID L. SAVELL,

Plaintiff

v.

Docket No. BCD-CV-14-34 ✓

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

Defendants

**ORDER ON MOTION TO DISMISS**

Defendants Duddy and Kelly, Remmel & Zimmerman [“the attorney Defendants”] have filed a Motion to Dismiss pursuant to M.R. Civ. P. 12(b)(6). Plaintiff opposes the motion.

The motion relies on several documents outside the pleadings, which the motion asks the court to consider without converting the motion into one for summary judgment. *See Moody v. State Liquor and Lottery Commission*, 2004 ME 20, ¶10, 843 A.2d 43, 48 (“official public documents, documents that are central to the plaintiff’s claim, and documents referred to in the complaint [can be considered] without converting a motion to dismiss into a motion for a summary judgment when the authenticity of such documents is not challenged”).

The Plaintiff’s opposition correctly points out that, because this is a Rule 12(b)(6) motion, all material factual allegations in the complaint must be taken as true, including the allegation that Plaintiff was represented by the attorney Defendants. Plaintiff also points out that whom the attorney Defendants represented in connection with the transactions at issue is a question of fact at least in part, and note that the attorney Defendants’ filing does not include

any documentation of whom the attorney Defendants represented in connection with the underlying transactions.

At a conference of counsel today, the motion was discussed, and the following additional points emerged:

- Plaintiff has a pending document request for the fee agreement(s) under which the attorney defendants provided legal services in connection with the entities and transactions mentioned in the complaint.
- Plaintiff intends to amend his complaint further in any event. Case law under Rule 12(b)(6) indicates that, even if the pending Motion to Dismiss were granted, the Plaintiff should be given leave to amend his complaint.

These additional points lead the court to conclude that, either the pending Motion to Dismiss should be converted into a summary judgment motion to enable the underlying facts to be developed further in the filings, or the court should simply exercise its discretion under the *Moody* decision to decline to consider the extrinsic documents on which the Motion to Dismiss relies.

The latter approach appears preferable, given that the current Motion to Dismiss might need to be revised as a result of the opportunity to amend the complaint to which the Plaintiff likely would be entitled, even were the Motion to Dismiss to be granted. Accordingly, the court declines to consider material extrinsic to the pleadings for purposes of the Motion to Dismiss. Considering the pleadings only, Plaintiff's current complaint plainly states a cognizable claim for attorney malpractice, so the Motion to Dismiss will be denied, without prejudice to the renewal of the attorney Defendants' arguments in a different context.

IT IS ORDERED AS FOLLOWS:

1. The Motion To Dismiss of Defendants Duddy and Kelly Rempel and Zimmerman is hereby denied, without prejudice to the renewal of the same argument in a further motion.

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

Dated June 16, 2014



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A. M. Horton  
Justice, Business and Consumer Court

Entered on the Docket: 6-16-14  
Copies sent via Mail  Electronically