2011 WL 12375551 (Me.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Maine.
Penobscot County

Edward H. KING, Plaintiff,

v.

Jon HADDOW, Esq., Defendant.

No. CV2010140.
August 26, 2011.

(with incorporated Memorandum)

Plaintiff's Motion for Leave to Amend Complaint

Jed Davis, Esq. (Bar No. 1686), Jim Mitchell and Jed Davis, P.A., 86 Winthrop Street, Augusta, Maine 04330, 207-622-6339, for plaintiff.

The Plaintiff submits this Motion for Leave to Amend his Complaint pursuant to M.R. Civ. P. 15(a). For the reasons that follow, the Plaintiff's Motion should be granted.

M.R. Civ. P. 15(a) provides, *inter alia:*

> ... [A] party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires...

This means that, if the moving party is not acting in bad faith or for delay, the motion will be granted in the absence of undue prejudice. John W. Goodwin, Inc. v. Fox, 642 A.2d 1339, 1340 (Me. 1994)(quoting, Diversified Foods, Inc., 605 A.2d 609, 616 (Me. 1991)). See, e.g., Barkley v. Good Will Home Ass'n, 495 A.2d 1238 (Me. 1985) (it was **abuse** of discretion to deny plaintiffs a second opportunity to amend their complaint to state cause of action against executive director of charitable corporation, as there was no evidence of bad faith or dilatory motives on part of plaintiffs and executive director would not be prejudiced by having to defend in action in which he was originally named); McKinnon v. Tibbetts, 440 A.2d 1028 (Me. 1982) (hearing justice did not **abuse** discretion in permitting client to amend his complaint against attorney to include count for fraud and demand for exemplary damages, even though the motion was filed less than four weeks before trial, because attorney failed to show that amendment would prejudice him, and no evidence presented at hearing suggested that client was acting in bad faith or for delay).

Whether to grant a motion to amend the complaint is left to the discretion of the trial court. *Bernier v. Merrill Air Engineers,* 2001 ME 17, 122, 770 A.2d 97, 105; *Drinkwater v. Patten Realty Cop.,* 563 A.2d 772, 778 (Me. 1989).

Although a court may deny a motion to amend if it is untimely filed or filed for delay, action on the motion to amend should occur before the court entertains a dispositive motion. *Sherbert v. Remmel,* 2006 ME 116, 18, 908 A.2d 622, 624. In other words, although denial may be appropriate for late, dilatory, or ineffective filings, a trial court should ordinarily rule on a motion to amend before acting on a motion that could be dispositive of the original complaint. *Jones v. Suhre,* 345 A.2d 515, 518 (Me. 1975).

> When faced with both a motion for a summary judgment and a Rule 15(a) motion to amend pleadings, considerations of finality and judicial economy suggest that a court should dispose of the pending Rule

> 15(a) motion prior to entertaining a summary judgment. [citation omitted] Because an amended pleading may allege facts that are not addressed by the motion for a summary judgment, a court should rule first on the Rule 15(a) motion to ensure that the amending party is not unfairly precluded from specifying facts that could otherwise defeat a summary judgment....

Id. at 346.

In *Hayes v. Bushey*, 160 Me. 14, 196 A.2d 823 (Me. 1964), the plaintiff should have been afforded an opportunity "before trial to amend the complaint by adding an additional count in negligence if the plaintiff desire[d] to pursue this theory." *Id.* at 20, 826.

Leave To Amend Should Be Granted To Assert a Cause of Action for Legal Malpractice

In *Estate of Keatinge v. Biddle*, 2002 ME 21, 789 A.2d 1271, the United States District Court for the District of Maine, acting pursuant to 4 M.R.S.A. §57 and M.R. App. P. 25, certified the following question, among others, to the Maine Supreme Judicial Court:

> .... When the *holder* of a power of attorney engages a lawyer to perform legal services such as those relating to a sale of property owned by the grantor of the power, or legal services related to the *grantor's* commercial businesses, can the engagement ever result in an attorney-client relationship between the hired lawyer and the *grantor* of the power.

Id. at ¶2, 1273.

There, Kent Keatinge ("Keatinge") was the attorney-in-fact for his father, Murray Keatinge. In his capacity as attorney-in-fact, he obtained legal advice and services from an attorney. The question before the Law Court was whether that relationship gave Murray the right to sue the attorney for professional negligence.

The Law Court addressed the question of "whether an attorney-client relationship can ever be created between the attorney and the grantor of a power of attorney." *Id. [emphasis added]*. It held that "additional facts beyond the mere granting of a power of attorney are required to support the creation of an attorney-client relationship between the grantor and counsel retained by the holder." *Id.* at ¶16. The Court explained:

> .... Other courts that have found an attorney-client relationship to exist between the attorney and the grantor of a power of attorney have not adopted a per se rule, but rather have examined the particular facts establishing the elationship. *See, e.g., Simon v. Wilson*, 291 Ill.App.3d 495, 225 Ill. Dec. 800, 684 N.E.2d 791, 801 (1997) (holding an attorney-client relationship was established between the attorney and the grantor of a power of attorney because the power of attorney was granted for the specific purpose of estate planning and the attorney prepared a will for the grantor); *Albright v. Burns*, 206 N.J. Super. 625, 503 A.2d 386, 389 (App. Div. 1986) (finding an attorney-client relationship between the attorney and the grantor of a power of attorney where the attorney was aware of the conflict and potential harm but nonetheless accepted the proceeds of a stock sale and prepared a promissory note)....

Id. at ¶16, 1275-76.

In sum, the Law Court determined that "the mere fact that the person holding the power of attorney retains counsel does not create an attorney-client relationship between the attorney and the grantor.

> However, the question presented is whether an attorney-client relationship between the attorney and grantor can ever arise. That question must answer in the affirmative, because facts may develop in particular cases that could support a finding that such an attorney-client relationship between attorney and grantor has been created.

Id. at ¶19, 1276.

Here, Motion for Leave to Amend the Complaint should be granted [1] in the interests of justice where there is no evidence that this Motion results from bad faith or dilatory motive. Rather, in analyzing this case after the oral argument on the Defendant's Motion for Summary Judgment and conducting extensive legal research, the undersigned came upon the *Keatinge* case. It was at that time that the undersigned was first alerted to the potential legal malpractice claim the Plaintiff possessed against the Defendant. The undersigned therefore represents that this Motion is not the result of bad faith or dilatory motive.

Additionally, no prejudice would result to the Defendant from the granting of this motion. The parties conducted written discovery, but agreed to delay depositions and expert designations until the Court's decision on the Defendant's pending Motion for Summary Judgment. There have been no depositions conducted to date.

Furthermore, all of the facts on which the professional negligence claim would be based have been presented to the Court in the summary judgment motion. Thus, allowing the Plaintiff to add a claim for professional negligence would not disadvantage the Defendant in this litigation. There is therefore nothing new regarding the Plaintiffs amendment that would require further discovery.

Substantively, this Motion should be granted where, under Keatinge, there is at minimum a factual issue as to whether or not the Plaintiff has a direct legal malpractice claim against the Defendant. Keatinge holds that facts may arise in a case which give rise to a direct attorney-client relationship between the grantor of a power-of-attorney and an attorney retained by the holder. The Plaintiff believes this to be such a case.

Specifically, Beverly Pawlendzio (“Beverly”) set forth the following facts in her Affidavit in Opposition to the Defendant's Motion for Summary Judgment: The Plaintiff was an **elderly** man in poor health (B. Pawlendzio Aff., ¶4), who gave Beverly his Power of Attorney so that she “could handl and manage all of his financial maters” (Id. at ¶5). In 2008, when Beverly was considering lending the Plaintiffs life savings to Frank and Beverly for the “spec house,” the Plaintiff's financial security in the investment was o “paramount” importance to them (Id. at ¶6).

Frank ‘cleared’ the Plaintiffs investment in the house with the Defendant before accepting his money *(Id.)*. The Defendant was aware of the fact that the Plaintiff was **elderly** and that Beverly acted as his power o attorney (he had a copy of the Power of Attorney) (*Id.* at 1¶7). The Defendant understood that Frank and Beverly were acting in, and that his advice would be for, the Plaintiffs benefit (*Id.* at ¶9).

Therefore, when the Defendant advised the Pawlendzios that the Plaintiff's interests would be protected in bankruptcy by filing the mortgage document, they acted on his advice for what they believed to be the benefit of the Plaintiff (*Id.* at ¶10). At no time did the Defendant indicate that the Pawlendzios' and Plaintiff's positions were in conflict or that his advice was intended only to benefit the Pawlendzios and not the Plaintiff (*Id.* at ¶11).

It should be noted that one of the Defendant's anticipated arguments in opposition to this Motion will be that he had no direct contact with the Plaintiff, as he argued in his Motion for Summary Judgment. Looking at the Albright v. Burns decision cited by the Law Court, however, such argument is not dispositive. There, the New Jersey Superior Court, Appellate Division found sufficient basis to impose an attorney-client relationship between the grantor of a power of attorney and an attorney hired by the holder. This was so “even though there was an absence of contact between [the grantor] and [attorney hired].” 206 N.J.

Super. at 632, 503 A.2d at 389. Like Beverly, the holder of the power of attorney in Burns "was acting under the power of attorney [ ] obtained from [the holder. It was his duty to act in [the holder] best interests." Id. Like the Defendant here, the attorney there "was aware of the relationship and potential conflict." Id. Under "such circumstances," the Appellate Division held that the attorney's acceptance of proceeds of a stock sale "and his preparation of the promissory note were acts evidencing his acceptance of professional engagement on behalf of [the holder]'s interests." Id. The court further noted:

> .... While it is true those same acts can also be viewed as being carried out to protect [the holder]'s interests, rather than to protect [the grantor], we would be remiss not to construe such acts to provide the greatest possible public protection where, as here, the attorney was well aware of the conflict and potential for harm.

Id.

It is also anticipated that the Defendant will argue that he was unaware of Beverly's status as the Plaintiff's attorney-in-fact or that she was acting to secure his best interests. However, in this regard, the undersigned draws this Court's attention to the Defendant's response to the Plaintiff's Statement of Material Facts in Dispute #35, which references a May 6, 2008 letter to the Defendant in which Frank informed him that, "based on our last discussion, I feel we must document by recording these mortgages notes ASAP to secure" the interests of, inter alia, the Plaintiff (PSMF, ¶35). The Defendant admitted that Frank provided the subject note (Response, PSMF ¶35).

The Defendant also admitted without any qualification Paragraph 38 of the Plaintiff's Statement of Material Facts in Dispute regarding knowledge o Beverly's power of attorney:
When Frank Pawlendzio met with the Defendant in the fall of 2008 to go over the bankruptcy questionnaire, Frank brought a list of "Other Items/ Issues" that he wanted to, and did, discuss with the Defendant... . The first ite on the list stated: "Beverly has power of attorney over all her father's financial matters...." At least two of the items on "Exhibit B" to the Frank Pawlendzio Affidavit were included in the Bankruptcy Petition prepared by the Defendant, proving that he received 'Exhibit B" before he filed the Petition (not afterwards, as he claimed).

(Defendant's Response to PSMF, ¶38).

Moreover, the Defendant has admitted without qualification that the Plaintiff was Frank's father-in-law and **elderly**; and that Beverly became his power-of-attorney in 2002 (Defendant's Response to PSMF, ¶54).

These facts - all a part of the Summary Judgment record - provide ample basis on which to allege a claim for legal malpractice in the Plaintiff's Complaint. At minimum, they create a factual question as to whether or not the facts of this case support the conclusion that there was an attorney-client relationship between the Plaintiff, as grantor of the power of attorney, and the Defendant, an attorney retained and consulted by Beverly, as holder of the power of attorney on the Plaintiff's behalf.

Given the absence of bad faith on the part of the undersigned and of prejudice to the Defendant, the Plaintiff respectfully submits that there is no compelling reason to deny his motion.

WHEREFORE, the Plaintiff asks the Court to grant him leave to file and serve the Amended Complaint submitted herewith.

Dated: August 26, 2011

Jed Davis, Esq. (Bar No. 1686)

Attorney for Plaintiff

Jim Mitchell and Jed Davis, P.A.

86 Winthrop Street

Augusta, Maine 04330

207-622-6339

Footnotes

1 In accord with the law above cited, this Motion should be decided in advance of the Court's determination on the Defendant's pending Motion for Summary Judgment.