



action resulting from an incident on a bus. Mr. Gill filed a motion to dismiss alleging insufficient service of process and failure to state a claim upon which relief can be granted. Ms. Foxwell then filed a motion to amend her complaint.

After a hearing on the motions, the Commissioner of this Court issued her report recommending that the motion to dismiss be granted, based upon her findings that the complaint failed to state a claim upon which relief could be granted. The Plaintiff has appealed the Commissioner's findings and recommendations pursuant to Court of Common Pleas Civil Rule 112(A)(4)(iii).

### STANDARD OF REVIEW

A recommendation to dismiss a complaint for failure to state a claim upon which relief can be granted is a case dispositive determination. When reviewing a Commissioner's decision on a case-dispositive determination, the reviewing judge of the Court reviews the decision *de novo*.<sup>1</sup> A judge may accept, reject, or modify in whole or in part the findings or recommendations made by the Commissioner.<sup>2</sup> A judge may also receive further evidence or recommit the matter to the Commissioner with instructions.<sup>3</sup>

### DISCUSSION

#### A. Motion to Dismiss for Improper Service

In his motion to dismiss, Mr. Gill alleges that he is entitled to relief because service of Ms. Foxwell's complaint against him was improper.<sup>4</sup> According to Mr. Gill, he was "not served

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<sup>1</sup> Ct. Com. Pl. Civ. R. 112(A)(4)(iv).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Def.'s Mot. To Dismiss ¶ 1.

personally and no attempt at service was made at any dwelling of the defendant.”<sup>5</sup> Civil Rule 4(f)(1)(I) provides that service upon an individual shall be made:

to that individual personally or by leaving copies thereof at that individual’s dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering copies thereof to an agent authorized by appointment or by law to receive service of process.<sup>6</sup>

The Court acknowledges that service was improper on Mr. Gill as an individual. Mr. Gill was served at his place of business, not personally or at his dwelling. However, the Court agrees with the Commissioner that this mistake was not unreasonable under the circumstances. Mr. Gill previously represented Ms. Foxwell in his professional capacity. The Commissioner also found that Mr. Gill signed his motion as an attorney from the Law Office of Edward C. Gill, P.A., rather than as an individual.<sup>7</sup> Thus, Ms. Foxwell’s confusion was understandable. For these reasons, I concur with the Commissioner’s finding that the Court should deny Mr. Gill’s motion to dismiss on this ground.

#### **B. Motion to Dismiss for Failure to State a Claim**

Next, Mr. Gill contends that the complaint should be dismissed for failure to state a claim upon which relief can be granted pursuant to Civil Rule 12(b)(6).<sup>8</sup> The Court’s analysis of Rule 12(b)(6) motions has been summarized as follows:

The threshold a plaintiff must meet to survive a motion to dismiss for failure to state a claim is low. The Court must accept all well-pleaded allegations of fact as true and draw all reasonable inferences in the Plaintiff’s favor. Because Delaware is a notice pleading State, particularity in fact pleading is not required.

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<sup>5</sup> *Id.*

<sup>6</sup> Ct. Com. Pl. Civ. R. 4(f)(1)(I).

<sup>7</sup> Commissioner’s Findings Of Fact And Recommendation On Defendant’s Motion To Dismiss And Plaintiff’s Motion to Amend Complaint at 2 (hereinafter, “Commissioner’s Report”).

<sup>8</sup> Def.’s Mot. To Dismiss ¶ 3.

A plaintiff must only “plead enough facts to plausibly suggest that the plaintiff will ultimately be entitled to the relief [sought.]”<sup>9</sup>

Based on the limited facts presented in Ms. Foxwell’s complaint and amended complaint, the Commissioner identified causes of action for legal malpractice and breach of contract.<sup>10</sup> My review of the Commissioner’s Report indicates that her step-by-step analysis of these two issues is both thorough and accurate. Therefore, my analysis of the issues will mirror the Commissioner’s analysis. Moreover, since the Commissioner’s Report was incredibly detailed, I will only highlight the most relevant facts, as well as discuss any additional facts presented in Ms. Foxwell’s appeal.

### **1. Legal Malpractice**

[F]or the Plaintiff to maintain a legal malpractice action in Delaware, it must meet each prong of a three element test, which includes proving: “(1) the employment of an attorney; (2) the attorney’s neglect of a professional obligation; and (3) the resultant loss.” To prove the third element, the damages element, the plaintiff in a legal malpractice action must demonstrate that “but for his lawyers negligence, [he] would have been successful” in the underlying action.<sup>11</sup>

Here, it is undisputed that Mr. Gill represented Ms. Foxwell in the underlying Superior Court personal injury action. However, Ms. Foxwell has failed to adequately plead Mr. Gill’s neglect of his professional obligation. Court of Common Pleas Rule 9(b) states, “In all averments of fraud, negligence or mistake, the circumstances constituting fraud, negligence or mistake shall

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<sup>9</sup> *Sussex Pines Country Club, Inc. v. Kaspro*, 2012 WL 5387694, at \*1 (Del. Com. Pl. Oct. 11, 2012) (citing *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005); *In re Gen. Motors (Hughes) S’holder Litig.*, 897 A.2d 162, 168 (Del. 2006); *Desimone v. Barrows*, 924 A.2d 908, 928 (Del. Ch. 2007)) (quoting *Desimone*, 924 A.2d at 929 (citing *Bell Alt. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007))).

<sup>10</sup> Commissioner’s Report at 4.

<sup>11</sup> *HealthTrio, Inc. v. Margules*, 2007 WL 544156, at \*9 (Del. Super. Jan. 16, 2007) (quoting *Sanders v. Malik*, 1997 WL 817854, at \*2 (Del. Super. Nov. 21, 1997); *Trader v. Street*, 1997 WL 528043, at \*2 (Del. Super. Mar. 6, 1997)).

be stated with particularity.”<sup>12</sup> Ms. Foxwell consistently asserts that Mr. Gill breached their agreement when he withdrew from representation prior to the conclusion of her case. This action allegedly prevented Ms. Foxwell from obtaining new counsel because her trial date was too close for new counsel to adequately prepare. But, as the Commissioner states in her report, Ms. Foxwell has not actually explained how Mr. Gill was negligent.<sup>13</sup> Ms. Foxwell also fails to allege how “but for” Mr. Gill’s negligence, she would have been successful in the Superior Court action. Mr. Gill did not prevent Ms. Foxwell from pursuing the matter herself *pro se*. Her failure to do so or failure to do so adequately is her own fault, not Mr. Gill’s. It is also curious that the Superior Court permitted Mr. Gill to withdraw if it was supposedly improper.<sup>14</sup>

Ms. Foxwell also alleges on numerous occasions that Mr. Gill did not act as a professional lawyer should act. As the record and the Commissioner’s Recommendation indicate, the only specific allegation she makes in this regard is that Mr. Gill failed to inform her of a meeting she was supposed to attend.<sup>15</sup> Again, I have to agree with the Commissioner’s Recommendation on this point. Ms. Foxwell has failed to meet her burden of proof because she did not “explain whether or how her failure to attend this meeting caused her to lose her ability to recover damages from the bus incident.” For these reasons, I concur with the Commissioner’s finding that the Court should grant Mr. Gill’s motion to dismiss on this ground.

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<sup>12</sup> Ct. Com. Pl. Civ. R. 9(b).

<sup>13</sup> Commissioner’s Report at 5.

<sup>14</sup> Also curious are the attorney letters attached to Ms. Foxwell’s appeal in this Court. Ms. Foxwell claimed that she was unable to obtain counsel as a result of Mr. Gill’s withdrawal from representation. But, at least one attorney suggested that Ms. Foxwell should file for a continuance in Superior Court before the attorney would consider representing her. This correspondence indicates that Ms. Foxwell had a possible route for relief and did not pursue it. It also indicates Ms. Foxwell’s misunderstanding of the legal system. Even if Mr. Gill agreed to represent Ms. Foxwell until the end of the matter, his breach of that agreement does not mean that Ms. Foxwell can sit on her hands and disregard the legal process.

<sup>15</sup> Commissioner’s Report at 6.

## **2. Breach of Contract**

The Commissioner also identified a breach of contract claim in Ms. Foxwell's pleadings.<sup>16</sup> In Delaware, to establish a breach of contract claim, the plaintiff must establish "first, the existence of a contract, whether express or implied; second, the breach of an obligation imposed by the contract, and third, the resultant damage to the Plaintiff."<sup>17</sup> Where both legal malpractice and breach of contract are claimed:

"A contract claim must relate to conduct distinct from a tort claim. In the context of legal malpractice, a tort claim and a breach of contract claim are not alternative theories of recover for the same conduct. If they were, 'claims in tort and claims in breach of contract, at least within the context of service contracts, would be indistinguishable.'"<sup>18</sup>

I agree with the Commissioner's analysis with respect to this issue as well. Ms. Foxwell's claims are indistinguishable in this instance. Her main contention is that Mr. Gill was negligent for breaching their alleged agreement and leaving her without representation. Even in her appeal, in which Ms. Foxwell attempts to separate her claims, she fails to allege a distinct breach of contract claim. The claims are, for all intents and purposes, the same.

For these reasons, I find that Mr. Gill's motion to dismiss for failure to state a claim is granted on this issue.

### **Conclusion**

After a review of the pleadings and motion, the verbatim transcript of the hearing held in this matter, and the Commissioner's written recommendation, the Court finds that the Commissioner correctly determined that the allegations of the Plaintiff's complaint, when

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<sup>16</sup> *Id.* at 7.

<sup>17</sup> *Hudson v. Bank of America, N.A.*, 2014 WL 4693242, at \*7 (Del. Super. Sept. 16, 2014).

<sup>18</sup> *HealthTrio, Inc. v. Margules*, 2007 WL 544156, at \*11 (Del. Super Jan. 16, 2007) (quoting *F&G Assocs. v. Pomerantz*, 2000 WL 33155748 (Pa. Com. Pl. Jan. 18, 2000) (citations omitted)).

assumed true and viewed in the light most favorable to the Plaintiff, do not give rise to a recognizable cause of action against the Defendant under Delaware law. Thus, the Commissioner's recommendation is ACCEPTED, and the complaint is DISMISSED

**IT IS SO ORDERED this 13<sup>th</sup> day of DECEMBER, 2016.**



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CHARLES W. WELCH  
JUDGE