

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

THE FARMERS BANK OF WILLARDS, )  
a Maryland corporation, )  
 )  
Plaintiff, )  
 ) C.A. No. S09C-11-016 MMJ  
v. )  
 )  
JAMES P. BECKER and HUDSON, )  
JONES, JAYWORK & FISHER, LLC, a )  
Delaware limited liability company, )  
 )  
Defendants. )

Submitted: June 17, 2011  
Decided: August 19, 2011

**OPINION**

Defendants' Motion for Summary Judgment  
**DENIED**

William B. Wilgus, Esquire, Millsboro, Delaware, Attorney for Plaintiff

Collins J. Seitz, Jr., Esquire, Josiah R. Wolcott, Esquire (Argued), Connolly,  
Bove, Lodge & Hutz, LLP, Wilmington, Delaware, Attorneys for  
Defendants.

**JOHNSTON, J.**

Defendants James P. Becker, an attorney, and Hudson, Jones, Jaywork & Fischer, LLC (“Hudson Jones”), the law firm that employs Becker, move for summary judgment against plaintiff The Farmers Bank of Willards (“Farmers Bank”). Farmers Bank issued a revolving line of credit (“Line of Credit”) to Eric McGinnis, who employed Becker as counsel to secure the Line of Credit. McGinnis subsequently defaulted on his payments. Farmers Bank alleges that defendants committed legal malpractice, claiming that defendants: were obligated to inform Farmers Bank of McGinnis’s outstanding federal tax lien; and breached their duty to “perform the examination of title in a careful and competent manner.”

Defendants filed this Motion for Summary Judgment, arguing that: defendants did not have a duty to inform Farmers Bank about the tax lien; no attorney-client relationship arose between defendants and Farmers Bank; Farmers Bank has failed to establish that defendants’ actions were the proximate cause of its damages; and damages should be limited to the proceeds of Farmers Bank’s title insurance policy.

The Court finds that defendants owed Farmers Bank a duty as a matter of law. Therefore, defendants’ Motion for Summary Judgment must be denied.

## **FACTUAL AND PROCEDURAL CONTEXT**

In late 2005, McGinnis applied to Farmers Bank for the Line of Credit to finance McGinnis Construction, his custom homes business. Farmers Bank ran a credit check on McGinnis, discovering two State of Delaware tax liens. Nevertheless, Richard Brumbley, a Farmers Bank loan officer, sought approval of the Line of Credit through the Farmers Bank loan committee. On January 11, 2011, the committee approved the Line of Credit despite the State of Delaware tax liens and, what Brumbley described as, other “past credit problems.” As collateral, McGinnis agreed to grant Farmers Bank a first mortgage on a Milton, Delaware parcel of unimproved property (“Property”).

McGinnis contacted Becker, who had represented McGinnis in various real estate matters, to assist him with the Line of Credit settlement. Meanwhile, Farmers Bank prepared a commitment letter to memorialize its approval of the Line of Credit (“Commitment Letter”). The Commitment Letter provided that “[s]ettlement of the [Line of Credit] is subject to a satisfactory UCC, tax lien and judgment search acceptable to [Farmers] Bank and its attorneys.” The Commitment Letter also provided that “The Law Office of Jay Becker” was the “Settlement Agent,” and it was to

perform “the title examination and settlement for the real estate involved in th[e] transaction.”

According to sworn testimony, Farmers Bank considered Becker one of the “attorneys” that the Commitment Letter referenced; and Becker believed that the “attorneys” were Farmers Bank’s in-house counsel. Farmers Bank, however, did not staff in-house counsel.

Brumbley testified that, around this time, he called Hudson Jones and asked Becker to represent Farmers Bank. Brumbley, however, did not testify that Becker agreed to engage in an attorney-client relationship with Farmers Bank. After their conversation, Brumbley believed that Becker was Farmers Bank’s attorney. Becker testified that this conversation never took place. In addition, Farmers Bank president Christopher Davis testified that he believed Becker was Farmers Bank’s attorney. Becker, however, believed that he was merely Farmers Bank’s “title agent.” Defendants’ real estate expert, William Schab, Esquire, opined that Becker only represented McGinnis.

On January 16, 2006, Farmers Bank faxed the Commitment Letter to Penni e’Nama, Becker’s paralegal. The fax cover sheet instructed that Farmers Bank “must receive HUD and preliminary title opinion at least 48 hours prior to settlement date.”

In response, consistent with Sussex County real estate practice, Becker prepared a commitment to issue title insurance (“Title Insurance Commitment”) through First American Financial Corporation. To do so, Becker ordered a title search for the Property. The purpose of the title search was to guarantee that Farmers Bank had first priority lien position and an encumbrance-free title. Schab testified that the Title Insurance Commitment was for the benefit of McGinnis because it enticed Farmers Bank to grant the Line of Credit.

The title search revealed an outstanding federal tax lien recorded on November 28, 2005. Becker asked e’Nama to investigate the federal tax lien. E’Nama mistakenly reported to Becker that the lien had been released. McGinnis failed to disclose to Farmers Bank that this federal tax lien existed. Becker later admitted the error, testifying that he and e’Nama “just missed it.” On January 17, 2006, Becker issued the Title Insurance Commitment to Farmers Bank, which did not reference the federal tax lien.

On January 19, 2006, Farmers Bank and McGinnis closed the Line of Credit. Farmers Bank did not compensate Becker for his role in the transaction. At this time, Farmers Bank believed that it had a first priority lien on the Property. However, the federal lien held priority over Farmers Bank’s lien position because the federal lien was recorded on November 28,

2005. Also on January 19, 2006, First American provided Farmers Bank with a title insurance policy (“Policy”) on the Property.

A few months later, McGinnis began to miss payments on the Line of Credit. Nonetheless, after the Line of Credit matured, Farmers Bank renewed it without ordering an up-to-date credit report. McGinnis continued to miss payments.

As a result, Farmers Bank instituted foreclosure proceedings on the Property. Farmers Bank ordered a title search of the Property, which revealed the federal tax lien. First American, however, satisfied the federal tax lien as required under the terms of Farmers Bank’s title insurance policy. Thereafter, Farmers Bank assumed first priority lien position. Farmers Bank claims that it suffered additional damages because if it had known about the federal tax lien, it would not have approved the Line of Credit.

On November 9, 2009, Farmers Bank filed its complaint in this action, claiming that defendants were obligated to inform Farmers Bank about McGinnis’s outstanding federal tax lien and breached their duty to “perform the examination of title in a careful and competent manner.”

On April 4, 2011, defendants filed a motion for summary judgment.

## **STANDARD OF REVIEW**

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.<sup>1</sup> All facts are viewed in a light most favorable to the non-moving party.<sup>2</sup> Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.<sup>3</sup> When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.<sup>4</sup> If the non-moving party bears the burden of proof at trial, yet “fails to make a showing sufficient to establish the existence of an element essential to that party’s case,” then summary judgment may be granted against that party.<sup>5</sup>

## **DISCUSSION**

### ***Legal Malpractice and Liability to a Third-Party***

“[A] plaintiff in a legal malpractice action must plead and prove the existence of an attorney-client relationship, list the acts constituting negligence, show that the negligence was the proximate cause of the injury

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<sup>1</sup> Super. Ct. Civ. R. 56(c).

<sup>2</sup> *Hammond v. Colt Indus. Operating Corp.*, 565 A.2d 558, 560 (Del. Super. 1989).

<sup>3</sup> Super. Ct. Civ. R. 56(c).

<sup>4</sup> *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

<sup>5</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

and show the fact and extent of the injury.”<sup>6</sup> Whether an attorney-client relationship exists depends on the facts and circumstances of a particular case.<sup>7</sup> The most significant fact or circumstance is whether the attorney and client entered into an express agreement for legal services.<sup>8</sup> Without such an agreement, an attorney still may owe a duty to a non-client, as evidenced by the conduct of the parties.<sup>9</sup>

Generally, a “claim for professional negligence will fail when a third party brings an action against an attorney because beyond the duty owed to their client and the Court, no other duty is owed by an attorney.”<sup>10</sup> A duty to a non-client arises if “the complaining party can show there was fraud or collusion on the part of the attorney, privity of contract with the attorney or that they were an intended beneficiary of the attorney’s services.”<sup>11</sup> The Court will not, however, extend an attorney’s duty to a third-party when an adversarial relationship exists between the parties.<sup>12</sup>

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<sup>6</sup> *Milner v. Anders*, 2001 WL 637394, at \*4 (D. Del.) (citing *Walls v. Levinson*, 1990 WL 47346, at \*5 (Del. Super.)).

<sup>7</sup> *Id.* (citing *In the Matter of Berl*, 540 A.2d 410, 414 (Del. 1988)).

<sup>8</sup> *Id.*

<sup>9</sup> See *Conley v. Wolf, Block, Schorr & Solis-Cohen*, 463 F.Supp. 914, 919 (E.D. Pa. 1978).

<sup>10</sup> *Keith v. Sioris*, 2007 WL 544039, at \*6 (Del. Super.) (quoting *Nichols v. Twilley, Street & Braverman, P.A.*, 1991 WL 226777, at \*2 (D. Del.)).

<sup>11</sup> *Nichols*, 1991 WL 226777, at \*2.

<sup>12</sup> *Keith*, 2007 WL 544039, at \*6 (citing *Nichols*, 1991 WL 226777, at \*2).

### ***Parties' Contentions***

Defendants argue that they did not have an attorney-client relationship with Farmers Bank. Therefore, defendants contend, they owed no duty to Farmers Bank. Defendants assert that they only owed a duty to their client, McGinnis.

Farmers Bank responds that Becker represented McGinnis *and* Farmers Bank. Farmers Bank claims that a real estate transaction is not an adversarial proceeding, and therefore, an attorney can provide legal services to more than one party involved in the transaction. Farmers Bank asserts that issues of fact concerning whether defendants and Farmers Bank had an attorney-client relationship preclude summary judgment.

### ***Defendants and Farmers Bank did not establish an attorney-client relationship.***

Farmers Bank has not established that a genuine issue of material fact exists as to whether defendants and Farmers Bank established an attorney-client relationship. A fact is material if it “might affect the outcome of the suit under the governing law . . . .”<sup>13</sup> A dispute about a material fact is

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<sup>13</sup> *Anderson v. Liberty Lobby, Inc.*, 477 US 242, 248 (1986).

genuine if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”<sup>14</sup>

The facts must be viewed in the light most favorable to the non-moving party, in this case, Farmers Bank. The only issue of fact presented to the Court is whether Brumbley called Becker and asked him to represent Farmers Bank. Becker claims that this conversation never took place. Brumbley testified that he asked Becker to represent Farmers Bank, but did not assert that Becker agreed to engage in an attorney-client relationship. Therefore, notwithstanding the factual dispute, Farmers Bank has not established that there was an express agreement for legal services.

Even assuming Brumbley’s assertion is true, the parties’ conduct does not evidence an attorney-client relationship. The undisputed record reflects that: Becker briefly spoke with Brumbley on one occasion; Becker acted as “settlement agent” or “title agent,” issuing the Title Insurance Commitment to Farmers Bank; and Becker received no compensation from Farmers Bank. These circumstances, even considered together with Brumbley’s testimony that he asked Becker to represent Farmers Bank, do not establish an attorney-client relationship as a matter of law. Therefore, the factual dispute is neither genuine nor material.

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<sup>14</sup> *Id.*

For these reasons, the Court finds that defendants and Farmers Bank did not establish an attorney-client relationship. It is not necessary, however, that defendants and Farmers Bank have an attorney-client relationship in order for defendants to owe a duty to Farmers Bank.

***Defendants have not established that they did not owe Farmers Bank a duty as a matter of law.***

The Court will not extend an attorney's duty to a third-party when an adversarial relationship exists between the parties.<sup>15</sup> Whether a real estate settlement is an adversarial proceeding is an issue of first impression in Delaware. In *Keith v. Sioris*,<sup>16</sup> this Court found that an adversarial relationship existed between a mortgagee and a mortgagor *after* the mortgagee threatened foreclosure.<sup>17</sup> Here, neither party had threatened foreclosure when defendants allegedly committed malpractice.

In Delaware, an attorney may provide legal services to more than one party in a real estate transaction.<sup>18</sup> Defendants' expert, Schab, and Farmers

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<sup>15</sup> *Keith*, 2007 WL 544039, at \*6 (citing *Nichols*, 1991 WL 226777, at \*2); see also *Fed. Sav. and Loan Corp. v. Anderson*, 1990 WL 15276 (E.D. La.) and *Cramer v. Metro. Sav. Ass'n*, 357 N.W.2d 51 (Mich. App. 1983) (finding that an adversarial relationship existed between the parties during foreclosure proceedings); cf. *Flaherty v. Weinberg*, 492 A.2d 618 (Md. 1985) (finding that an adversarial relationship existed between the parties during the mortgage process itself).

<sup>16</sup> 2007 WL 544039.

<sup>17</sup> *Id.* at \*6.

<sup>18</sup> See *In re Mid-Atlantic Settlement Services, Inc.*, File No. UPL 95-15 (Board on the Unauthorized Practice of Law of the Delaware Supreme Court Mar. 8, 2000), *approved*, 755 A.2d 389 (Del. 2000) (TABLE).

Bank's expert, Richard Berl, acknowledge this. Schab explained that an attorney "could represent . . . the seller, the lender . . . all the parties; it's allowed." Berl testified:

If there's preparation of seller's documents, I think the settlement attorney represents the seller with respect to those documents. And if there is a lender, I believe, and our firm takes the position, that the settlement attorney represents the lender in complying with the lender's requirements for the transaction.

Because an attorney may provide legal services for more than one party in a real estate transaction, the Court finds that a real estate settlement—which does not involve foreclosure or threatened foreclosure—generally is not an adversarial proceeding for purposes of determining whether duties are owed to third parties. Therefore, if Farmers Bank could establish that Becker committed fraud or collusion, that it had privity of contract with Becker, or that it was an intended beneficiary of Becker's services, then defendants owed Farmers Bank a duty.

Farmers Bank does not assert—and the record does not support—that Becker committed fraud or collusion or that Farmers Bank was in privity of contract with Becker.

It appears, however, that Becker performed legal services for Farmers Bank's benefit. It is undisputed that the Title Insurance Commitment guaranteed Farmers Bank first priority lien position and an encumbrance-

free title. Schab testified that issuing the Title Insurance Commitment to Farmers Bank solely benefitted McGinnis because it enticed Farmers Bank to issue the Line of Credit. The Court finds this argument unpersuasive. While the Commitment may have enticed Farmers Bank to issue the Line of Credit, it certainly benefitted Farmers Bank.

The undisputed facts do not establish that the Title Insurance Commitment was not for Farmers Bank's benefit as a matter of law. Therefore, defendants have not shown that they did not owe a duty to Farmers Bank.

### ***Proximate Cause and Limitation of Damages***

Having found that defendants are not entitled to summary judgment as a matter of law on the issue of liability, the Court now turns to proximate cause and limitation of damages. Material factual disputes prevent summary judgment on both issues.

The overarching factual dispute is whether, or to what extent, Farmers Bank relied on the title search in deciding to grant McGinnis the line of credit. Defendants argue that Farmers Bank "should have discovered the existence of the outstanding federal tax lien . . . ." Additionally, Defendants assert that McGinnis was the superseding proximate cause of Farmers Bank's alleged damages because he defaulted on the Line of Credit.

Farmers Bank responds that it never would have issued the Line of Credit to McGinnis if it had known about the federal tax lien, which Becker failed to disclose. The Court finds that a material factual dispute exists regarding proximate cause.

The measure and extent of damages may depend upon the resolution of whether the failure to reveal the outstanding federal tax lien influenced Farmers Bank's extension of credit. Should the finder of fact determine that Farmers Bank is entitled to damages proximately caused by such detrimental reliance, the extent of those damages would be a question of fact.

### **CONCLUSION**

The Court holds that defendants are not entitled to summary judgment on the issue of whether defendants owed duties to Farmers Bank, in the course of performing legal services for closing a line of credit secured by real property. This ruling is based upon undisputed facts. Although a factual issue exists about whether an attorney-client relationship was discussed during a specific phone conversation, the Court finds that this issue is neither genuine nor material. The parties' course of conduct demonstrates that defendants performed legal services protecting the interests of Farmers Bank (the lender), as well as for the benefit of their formal client (the borrower).

Additionally, genuine issues of material fact exist, preventing summary judgment in favor of defendants, on the issues of proximate cause and whether Farmers Bank's damages should be limited to the proceeds of the title insurance policy.

**THEREFORE**, James P. Becker and Hudson, Jones, Jaywork & Fisher, LLC's Motion for Summary Judgment is hereby **DENIED**.

**IT IS SO ORDERED.**

/s/ Mary M. Johnston  
The Honorable Mary M. Johnston