

**SUPERIOR COURT  
OF THE  
STATE OF DELAWARE**

**JOHN A. PARKINS, JR.**  
*JUDGE*

NEW CASTLE COUNTY COURTHOUSE  
500 NORTH KING STREET, SUITE 10400  
WILMINGTON, DELAWARE 19801-3733  
TELEPHONE: (302) 255-2584

James F. Harker, Esquire  
Eric J. Monzo, Esquire  
Cohen, Seglias, Pallas, Greenhall & Furman, P.C.  
1007 North Orange Street, Suite 1130  
Wilmington, Delaware 19801  
Attorneys for Plaintiffs

Herbert W. Mondros, Esquire  
Margolis Edelstein  
750 Shipyard Drive, Suite 102  
Wilmington, Delaware 19801  
Attorney for Defendants

**Re: Estate of Timothy Buonamici, Jr., Alfred Isaacs, Executor,  
and the Beneficiaries thereunder v. Salvatore Morici, CPA  
and Ostroff Fair & Company, P.C.  
C.A. No. 08C-10-231 JAP**

Submitted: February 19, 2009  
Decided: March 25, 2009

**Conditionally dismissed unless Count III is withdrawn.**

Dear Counsel:

This is, at bottom, a professional negligence case against an accountant, in which Plaintiffs seek money damages. There is little to distinguish this case from other professional negligence cases except for one

thing—the instant Plaintiffs have seen fit to include a questionable breach of fiduciary duty claim. This Court does not have jurisdiction to entertain a fiduciary duty claim. Accordingly, unless that claim is withdrawn, this action must be dismissed with leave to transfer to the Court of Chancery.

## **I. FACTUAL AND PROCEDURAL HISTORY**

Plaintiffs' complaint alleges that Eileen DeFelice, the then-guardian of her brother, Timothy Buonamici, Jr., engaged Defendants Salvatore Morici, CPA and Ostroff Fair & Company, P.C. to value Mr. Buonamici's interest in various limited liability companies, including Realty Enterprises, LLC, so that the companies could liquidate his holdings. Thereafter Defendants issued a report dated March 15, 1999, which valued Mr. Buonamici's equity interest in Realty Enterprises as \$14,400. On October 25, 2005, in connection with other litigation, Mr. Morici gave a deposition disclosing that his asset-based value calculation substantially undervalued Mr. Buonamici's interest in Realty Enterprises.

Plaintiffs' complaint, which seeks over \$200,000.00 in damages, plus attorneys' fees, contains three counts: (I) Negligence, (II) Negligent Misrepresentation, and (III) Breach of Fiduciary Duty. Defendants seek to dismiss the breach of fiduciary duty claim and the demand for attorneys'

fees. After oral argument the Court *sua sponte* questioned its jurisdiction to entertain the breach of fiduciary duty claim. The parties have made supplemental written submissions on the jurisdictional question. This is the Court's ruling.

## II. DISCUSSION

Count III of Plaintiffs' complaint alleges that "Defendants breached their fiduciary duties to Plaintiffs regarding the valuation of Timothy Buonamici, Jr.'s business interests, including the valuation of Realty Enterprises, LLC."<sup>1</sup> Defendants' originally contended that this count should be dismissed pursuant to Rule 12(b)(6) because "Plaintiffs have failed to allege sufficient facts from which a court could reasonably conclude Defendants' relationship with Plaintiffs was fiduciary in nature."<sup>2</sup> Defendants now assert that Count III must be dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction.<sup>3</sup>

This Court recently held that "[b]reach of a fiduciary duty is an equitable cause of action and the Court of Chancery has exclusive jurisdiction over [such claims]."<sup>4</sup> This is true even where the remedy sought

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<sup>1</sup> Compl., D.I. 1, at ¶ 48.

<sup>2</sup> Def. Mot. to Dismiss, D.I. 3, at ¶ 9.

<sup>3</sup> Def. Mar. 10, 2009 Letter to the Court, D.I. , 8, at 1.

<sup>4</sup> *Reybold Venture Group XI-A, LLC v. Atlantic Meridian Crossing, LLC*, 2009 WL 143107, at \*3 (Del. Super.) (rejecting the argument that "the Superior Court must

for the breach of fiduciary duty claim is money damages.<sup>5</sup> Although it appears, at first blush at least, that there are no factual allegations in the complaint to support Plaintiffs' claim that the defendant accountant owed a fiduciary duty to the guardian or ward, this Court lacks jurisdiction to decide the issue.

The question becomes whether the Court should dismiss Count III only or whether it should dismiss the entire matter. If the Court were to dismiss Count III only, Plaintiffs may transfer, as a matter of law, that claim to the Court of Chancery.<sup>6</sup> The breach of fiduciary duty claim seems closely intertwined with Plaintiffs' negligence and negligent misrepresentation claims because all three are predicated upon the same alleged wrongful acts. Given that Plaintiffs are entitled to transfer the dismissed claim to the Court of Chancery, dismissal of only Count III could lead to the parties litigating the same issues at the same time in the Court of Chancery (Count III) and this Court (Counts I and II). The far better course here is to dismiss the entire suit with leave to transfer it to the Court of Chancery. That court may, in its discretion, determine whether to exercise its ancillary jurisdiction over

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exercise jurisdiction over an equitable cause of action because [the breach of fiduciary duty claim] is 'inextricably related' to the legal causes of action asserted").

<sup>5</sup> *Id.* See also *Grace v. Morgan*, 2004 WL 26858, at \*2 (Del. Super.) (dismissing the plaintiffs claim for breach of fiduciary duty claim for lack of subject matter jurisdiction where the remedy sought was money damages).

<sup>6</sup> 10 *Del. C.* § 1902.

Plaintiffs' legal claims.<sup>7</sup> This approach avoids needless expense to the litigants and the possibility of conflicting judgments should the matter proceed simultaneously in both courts.

This Court is hopeful that Plaintiffs will re-examine the merits of their fiduciary duty claim and the necessity of prosecuting it. This Court has already expressed its doubts about whether Defendants owed a fiduciary duty to Plaintiffs. Moreover, it appears to the Court that in order to prevail on the fiduciary duty claim, Plaintiffs will have to prove facts that likely would entitle them to relief under their legal claims. In short, it appears to the Court that the fiduciary duty count adds little or nothing to Plaintiffs' claim while at the same time creating the potential for delay in resolution of the remaining claims.<sup>8</sup> Indeed, Plaintiffs state that they are concerned that a transfer "would result in a waste of time and judicial resources."<sup>9</sup> In order to avoid this "waste of time" Plaintiffs ask this Court to hear a claim over

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<sup>7</sup> *Those Certain Underwriters at Lloyd's London v. Nat'l Installment Ins. Servs., Inc.*, 2007 WL 1207106, at \*3 (Del. Ch.) (stating that under the "clean-up" doctrine the Court of Chancery "will exercise its discretion to hear the entire controversy if, for example, there are common issues of fact underlying both the legal and equitable claims or if doing so will avoid multiple lawsuits, promote judicial efficiency, avoid great expense and afford complete relief in one action").

<sup>8</sup> Assuming that the Court of Chancery finds that Plaintiffs have not alleged facts showing the existence of a fiduciary duty and dismisses that claim, that court is under no obligation to exercise ancillary jurisdiction over Plaintiffs' legal claims. Plaintiffs should therefore consider the prospect that this case could be transferred back to the Superior Court.

<sup>9</sup> Pl. Mar. 23, 2009 Letter to the Court, D.I. 9, at 2.

which it does not have jurisdiction. The solution to Plaintiffs' concern, however, lies in Plaintiffs' own hands.

Unless Plaintiffs voluntarily dismiss Count III on or before April 16, 2009, the entire matter will be dismissed for lack of jurisdiction with leave to transfer to the Court of Chancery.

**IT IS SO ORDERED.**

cc: Prothonotary