

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

JAMES SINEX and BETTY )  
SINEX, )  
)  
Plaintiffs, )  
) C.A. No. 04C-12-256 MMJ  
v. )  
)  
SHIRLEY A. BISHOP and ROMIE )  
D. BISHOP, )  
)  
Defendants. )

**MEMORANDUM OPINION**

Submitted: July 21, 2005  
Decided: October 27, 2005

***Upon Third Party Defendants' Motions to Dismiss  
and  
Defendants' Motion to Consolidate***

Donald L. Gouge, Jr., Esquire, Wilmington, Delaware, Attorney for Plaintiff

Shirley A. Bishop and Romie D. Bishop, Defendants, Pro Se

Brian P. Murphy, Esquire, Third Party Defendant, Pro Se

Donald L. Gouge, Jr., Esquire, Third Party Defendant, Pro Se

Herb Clendaniel, Third Party Defendant, Pro Se

Stephen J. Milewski, Esquire, Heckler & Frabizzio, Wilmington, DE, Attorney for  
Third-Party Defendants Jean & Paul Lyle

Donald L. Gouge, Jr., Esquire, Wilmington, Delaware, Attorney for Third Party  
Defendants Kenneth and Edna Caudill

**JOHNSTON, J.**

The parties have filed the following motions: Motion to Dismiss Third Party Complaint Against Joan & Paul Lyle; Motion to Dismiss Third Party Complaint Against Kenneth & Edna Caudill; Motion to Dismiss of Third Party Defendant Herb Clendaniel; Motion to Dismiss Third Party Complaint Against Donald L. Gouge, Jr.; Motion to Dismiss Third Party Defendant Brian P Murphy; and Defendants' Motion for a Joint Hearing, Consolidation of Actions. This is the Court's decision on all of these motions.

### ***Procedural Context***

Plaintiffs James and Betty Sinex filed a complaint on December 22, 2004 against defendants Shirley and Romie Bishop. The nine-paragraph complaint alleges that the Bishops entered into an agreement to purchase the business Sinex Pools from plaintiffs for a purchase price of \$57,000. The complaint alleges that beginning May 2004, the Bishops failed to make the monthly payments required by the purchase agreement. Also as part of the agreement, the Bishops hired plaintiffs to perform certain services in exchange for a commission on the sale of any new swimming pool. Plaintiffs claim that the Bishops refused to pay plaintiffs commissions in the total amount of \$6,672.00 on six contracts.

Throughout all of these proceedings, Shirley and Romie Bishop have represented themselves *pro se*. In their nineteen-page answer, Shirley and Romie

Bishop deny the allegations in the complaint and counterclaim against James and Betty Sinex, and purport to join Donald L. Gouge, Jr., Esquire (attorney for plaintiffs) as counterclaim defendant. The counterclaim seeks: a declaration that the purchase agreement is “knoll [sic] and void”; monetary relief in an amount totaling \$3,310,588.70, plus 21% interest; “annual salary increases of 15% per annum for thirty years”; a no contact order against James Sinex; damages “solely” from Gouge in the amount of \$450,000 for actions alleged to have resulted in denial of a loan in that amount to the Bishops; and monetary damages totaling at least \$12 million, plus 21% interest, for material misrepresentations made by James Sinex, allegedly resulting in loss of wages to Shirley Bishop. The counterclaim also claims conduct amounting to physical assault by James Sinex.

Plaintiffs moved to amend the complaint to add Sinex Pools, Inc. as an additional defendant. That motion was granted.<sup>1</sup> Defendants’ subsequent motion to strike the amended complaint was denied. Plaintiffs also moved to strike the answer and counterclaim on the grounds that the pleading included redundant, immaterial, impertinent and scandalous matters. The Court granted plaintiffs’

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<sup>1</sup>When Sinex Pools, Inc. was added as a defendant, plaintiffs agreed to dismiss Romie Bishop because it is undisputed that Romie Bishop is not a party to the purchase agreement. Romie Bishop, however, vigorously defended his right to remain in the lawsuit and refused to agree to his voluntary dismissal. Because Romie Bishop is not a party to the contract at issue, his standing to assert any counterclaim or third party complaint is in question. For purposes of these motions, however, the Court will assume, without deciding, that Romie Bishop has standing.

motion to strike, and explained to defendants in open court in detail why the answer and counterclaim was improper. By Order dated May 12, 2005, the Court considered plaintiffs' motion to strike defendants' answer and counterclaim to the amended complaint, and granted the motion in part, holding that all characterizations of individuals as "unscrupulous," etc., were stricken.

Defendants filed a "Motion for an Order and of a Writ to Require Donald L. Gouge to Withdraw the Summary Possession Suit Filed by Him in J.P. Court 9 on the Behalf of the Plaintiffs an Issue Currently Pending Before this Court." The Court denied this motion as well, noting that the Superior Court does not have jurisdiction to dismiss an action filed in another court.

***Motions to Dismiss Third Party Defendants Caudill, Lyle, and Clendaniel  
(the "Individual Third Party Defendants")***

The motions to dismiss filed by third party defendants Joan & Paul Lyle, Kenneth & Edna Caudill, and Herb Clendaniel are based upon similar grounds. The Individual Third Party Defendants assert that the original complaint is limited to breach of contract and compensation issues.

Kenneth Caudill entered into a contract with Sinex Pools, Inc. to install a pool at the Caudill residence. The Caudills filed suit against Sinex Pools, Inc. (C.A. No. 04C-10-090WCC (the "Caudill Lawsuit")) and an amended complaint

was approved adding the Bishops individually as defendants. The Caudill Lawsuit alleges that the pool was not properly constructed by Sinex Pools, Inc. In the instant action, the portions of the counterclaim purporting to be a third party complaint against the Caudills claim that the Caudills engaged in a “civil conspiracy” to “make Sinex Pools Inc. incur extra expenses.” By refusing to pay for construction of the pool, the Bishops allege that the Caudills “filed a false suit”(the Caudill Lawsuit), resulting in unjust enrichment, and prevented Sinex Pools, Inc. from completing the pool.

The Lyles entered into a contract with the Bishops for installation of a pool at the Lyle residence. Although the Lyles allege that the pool was not properly constructed by Sinex Pools, Inc., the Lyles have not filed any legal action. The Bishops claim that the Lyles also engaged in a civil conspiracy and that the Lyles were unjustly enriched by the construction of the pool. Further, the Bishops assert that the Lyles made defamatory comments, resulting in the loss of income to Sinex Pools, Inc.

The portions of the counterclaim styled as a third party complaint against Herb Clendaniel allege that Clendaniel, t/a H & C Contractors, acted as the “replacement contractor on every job in dispute .” The Bishops claim that Clendaniel participated in the civil conspiracy and has been unjustly enriched by

“conducting work on open permits of Sinex Pools, Inc. for items contracted with Sinex Pools through the direct assistance of other Counter Complaint defendants.”

Clendaniel filed a *pro se* motion to dismiss, consisting of a general denial of all allegations made against him by the Bishops.

Superior Court Civil Rule 14(a) provides in pertinent part:

*When a defendant may bring in third party.* At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff’s claim against the third-party plaintiff.

The issue in this case is whether the purported third party defendants are or may be liable to the Bishops for all or part of the Sinex’ claims. The Sinex’ complaint seeks damages for breach of a purchase contract. None of the third party defendants are parties to the purchase agreement. Therefore, the third party defendants cannot be liable to the Sinex’ for breach of contract. In the same way, the compensation issues involve an agreement under which the Sinex’ were hired to perform certain services in exchange for a commission on the sale of any new swimming pool. None of the third party defendants have any legal responsibility to pay any commissions for such services.

Plaintiffs do not have a cause of action against the Third Party Defendants. Because plaintiffs could not have sued the third party defendants, the third party defendants cannot be joined in this lawsuit.<sup>2</sup> The Bishops have asserted what amount to separate and independent causes of action against the third party defendants, alleging civil conspiracy, defamation, and unjust enrichment.

Even when lawsuits arise from the same or related factual situations, separate and independent causes of action cannot be the basis for joining third party defendants.<sup>3</sup> The Bishops' claims against the Individual Third Party Defendants must be brought in separate actions. Joinder of additional parties is improper when joinder is not necessary to resolve the original claims.<sup>4</sup> Whether or not defendants breached the purchase agreement and whether or not defendants owe commissions to plaintiffs can be resolved without bringing the Individual Third Party Defendants into the litigation as parties.

### ***Civil Conspiracy***

A civil conspiracy is defined in Delaware as the combination of two or more persons or entities either for an unlawful purpose, or for the accomplishment of a

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<sup>2</sup>*Miller v. Ellis*, 122 A.2d 314, 318 (Del. Super. 1956).

<sup>3</sup>*Nesmith v. Lynn*, 377 A.2d 352, 353 (Del. 1977)

<sup>4</sup>*Clark v. Pearson*, 1992 WL 149498, at \*1 (Del. Super.).

lawful purpose by unlawful means, resulting in damage. Civil conspiracy, standing alone, is not an independent cause of action. There must be some underlying actionable tort by each individual defendant in order to obtain recovery on a civil conspiracy theory. It is not the conspiracy itself, but rather the underlying wrong that must be actionable, even without the alleged conspiracy.<sup>5</sup>

The third party complaint against the Caudills is based upon allegations that the Caudills refused to pay for construction of a pool and prevented Sinex Pools, Inc. from completing the pool. The Bishops appear to assert that the Lyles' failure to pay for construction of their pool was part of a civil conspiracy that also included defamatory statements. The civil conspiracy claims against Clendaniel allege that Clendaniel was directly assisted by the other third party defendants in "conducting work on open permits of Sinex Pools, Inc. for items contracted with Sinex Pools."

Having already determined that the Bishops' claims against the Individual Third Party Defendants must be brought in separate actions, the Court need not resolve the issue of whether the Bishops have failed to state a claim for civil conspiracy against any of the Individual Third Party Defendants. However, the

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<sup>5</sup>*Anderson v. Airco, Inc.*, 2004 WL 2827887, at \*2-3 (Del. Super.); *Connolly v. Labowitz*, 519 A.2d 138, 143 (Del. Super. 1986); *Nutt v. A.C. & S. Co., Inc.*, 517 A.2d 690, 694 (Del. Super. 1986).

third party complaint does not specifically allege any independent torts committed by any of the third party defendants. Additionally, the conspiracy allegations are not grounded in tort, but appear to be based upon assumptions of conspiratorial conduct, as evidenced by the coincidental timing of the alleged breaches of separate contractual agreements, defamation, and the amorphous “conducting work on open permits of Sinex Pools, Inc. for items contracted with Sinex Pools.”

### *Absolute Privilege*

At all times relevant to this lawsuit, Donald L. Gouge, Jr., Esquire represented plaintiffs. The Bishops’ many detailed allegations against Gouge can be summarized into five categories. (1) Acting as plaintiffs’ attorney, Gouge filed false and fraudulent pleadings against the Bishops. (2) As part of the complaint and in various court proceedings, Gouge made material misrepresentations. (3) Gouge engaged in civil conspiracy with other third party defendants. (4) Gouge gave free legal advice to many persons with the purpose of damaging the Bishops. (5) Gouge engaged in behavior unbecoming the legal profession.

The last two allegations do not state any cause of action. Unprofessional conduct is not actionable in a court of law. Individuals do not have standing to seek damages for unprofessional or unethical conduct. Additionally, rendering free legal advice cannot constitute the basis for a legal action by a third party.

In Delaware, the absolute privilege attaches to all statements made in the course of judicial proceedings. The privilege affords absolute protection upon a showing that the statements were issued as part of a judicial proceeding. The privilege is not confined to events inside a courtroom. Rather, the privilege extends to all communications relating to the litigation, including communications with witnesses and the drafting and filing of pleadings.<sup>6</sup>

The absolute privilege protects attorneys and participants in litigation from actions for defamation.

The purpose served by the absolute privilege is to facilitate the flow of communication between persons involved in judicial proceedings and, thus, to aid in the complete and full disclosure of facts necessary to a fair adjudication. To accomplish this goal, the privilege protects judges, parties, attorneys, witnesses and other persons connected with litigation from the apprehension of defamation suits, thus permitting them to speak and write freely, without undue restraint. Moreover, the protection afforded by the privilege is absolute; so long as the statement is pertinent to, and made in the course of, a judicial proceeding, *even a showing of malice* will not divest the statement of its immune status (emphasis in original).... As the *Nix* court pointed out, “the interest in encouraging a litigant’s unqualified candor as it facilitates the search for truth is deemed so compelling that the privilege attaches even where the statements are offered maliciously or with knowledge of their falsity.”<sup>7</sup>

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<sup>6</sup>*Nix v. Sawyer*, 466 A.2d 407, 410-11 (Del. Super. 1983).

<sup>7</sup>*Barker v. Huang*, 610 A.2d 1341, 1345 (Del. 1992).

The absolute privilege does not automatically extend to non-defamation tort claims.<sup>8</sup> However, the Bishops have not delineated in their pleading any other specific torts allegedly committed by Gouge. The substantive basis for the third party claims against Gouge are all the functional equivalent of defamation. However denominated, the Bishops claim that Gouge intentionally made derogatory false statements about them either in pleadings filed with the court or in communications relating to court proceedings. “To the extent that such statements were made in the course of judicial proceedings, they are privileged, regardless of the tort theory by which the [third party] plaintiff[s] seek[] to impose liability.”<sup>9</sup> Therefore, the Court finds that the absolute privilege applies to bar all third party claims against Gouge.

### ***Third Party Defendant Murphy***

The third party complaint against Brian P. Murphy alleges felony fraud and malpractice. “Felony fraud” appears to be grounded in alleged criminal conduct. Individuals do not have a private cause of action for damages purportedly suffered as a result of criminal conduct. Therefore, the third party claims of “felony fraud” must be dismissed.

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<sup>8</sup>*Id.* at 1347-48.

<sup>9</sup>*Id.* at 1349.

The malpractice claims are based upon Murphy's legal representation in connection with the sale of Sinex Pools to the Bishops. The counterclaim is internally inconsistent with regard to the issue of representation. The Bishops initially allege that Murphy acted as "attorney for all parties during the sale." In other sections, the counterclaim states that Murphy was acting as the Sinex' attorney. If Murphy did not represent the Bishops, they do not have standing to seek damages for legal malpractice. The record on this issue, however, is not sufficient at this time to resolve Murphy's motion to dismiss.

Murphy's motion to dismiss also states:

2. The plaintiffs, James and Betty Sinex, have no claim against the third-party defendant, Brian P. Murphy, therefore Brian P. Murphy cannot be joined as a third-party defendant in this case. [*Miller v. Ellis*, 122 A.2d 314 (1956)]
3. The defendant's, Bishops, filing a third-party complaint against Brian P. Murphy for 12 million dollars for "civil conspiracy" against them, "punitive nature", and "failure to perform up to the standards of his profession" is a blatant violation of Rule 11(b) in that it is being presented to the Court: (1) to harass the third-party defendant and cause unnecessary delay; (2) the claims are frivolous in the extreme; (3) there is no evidentiary support for these allegations; and (4) Brian P. Murphy, third-party defendant, believes the defendants absurd claims are in retaliation for Brian P. Murphy obtaining a \$6,054.47 judgment in Court of Common Pleas, [C.A. No. 04-12-422] on April 28, 2005, against both defendants for their failure to properly construct a swimming pool and failure to deliver related items paid for.

In evaluating a motion to dismiss, the Court must assume the facts in the light most favorable to the non-moving party. Considering the pleadings that have been filed in the light most favorable to the Bishops, the Court cannot grant Murphy's motion to dismiss with regard to the malpractice claims at this time.

### **CONCLUSION**

Plaintiffs do not have a cause of action against the third party defendants Lyle, Caudill and Clendaniel. Because plaintiffs could not have sued the third party defendants, the third party defendants cannot be joined in this lawsuit. Although all claims are alleged to have arisen from the same or related factual situations, separate and independent causes of action cannot be the basis for bringing third party defendants into this litigation. Joinder of additional parties is improper when joinder is not necessary to resolve the original claims. Whether or not defendants breached the purchase agreement and whether or not defendants owe commissions to plaintiffs can be resolved without bringing the Individual Third Party Defendants into the litigation as parties.

**THEREFORE**, the Motion to Dismiss Third Party Complaint Against Joan & Paul Lyle; Motion to Dismiss Third Party Complaint Against Kenneth & Edna Caudill; and Motion to Dismiss of Third Party Defendant Herb Clendaniel are hereby **GRANTED**.

The absolute privilege attaches to all statements made in the course of judicial proceedings. The privilege extends to all communications relating to the litigation, including communications with witnesses and the drafting and filing of pleadings. Although the absolute privilege does not automatically extend to non-defamation tort claims, the substantive basis for the third party claims against Gouge are all the functional equivalent of defamation. However denominated, the Bishops claim that Gouge intentionally made derogatory false statements about them either in pleadings filed with the court or in communications relating to court proceedings. Such statements are privileged, regardless of the theory by which the Bishops seek to impose liability.

**THEREFORE**, the Court finds that the absolute privilege applies to bar all third party claims against Gouge and Motion to Dismiss Third Party Complaint Against Donald L. Gouge, Jr. is hereby **GRANTED**.

Assuming the facts in the light most favorable to the non-moving party, the record is insufficient at this stage to fully evaluate Brian P. Murphy's motion to dismiss. **THEREFORE**, the Motion to Dismiss Third Party Defendant Brian P. Murphy is hereby **DENIED** as to legal malpractice claims; and **GRANTED** as to "felony fraud" claims, which are not civil in nature.

Having found that the Bishops claims against Kenneth & Edna Caudill must be brought as a separate action, *Caudill v. Sinex Pools, Inc.*, C.A. No. 04C-10-090(WCC), may not be consolidated with this case. **THEREFORE**, Defendants' Motion for a Joint Hearing, Consolidation of Actions is hereby **DENIED**.

**IT IS SO ORDERED.**

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The Honorable Mary M. Johnston

oc: Prothonotary - Civil Division