IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

KATHRYN FORTUNATO, et al.,	:	
Plaintiffs	:	**No. 1:17-cv-00201**
	:	
v.	:	
	:	**(Judge Kane)**
CGA LAW FIRM, and	:	
MARGARET DRISCOLL,	:	
Defendants	:	

MEMORANDUM

Before the Court is Defendants CGA Law Firm and Margaret Driscoll's motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). For the following reasons, the Court will grant in part and deny in part the motion.

I. BACKGROUND

This case concerns the estate planning of Wallace Fremont. At the time of his death in September 2015, Wallace Fremont was survived by his daughter Kim Fortunato, his son Peter Fremont, and three grandchildren, Alexander Fortunato, Elizabeth Fortunato and Kathryn Fortunato. (Doc. No. 1 ¶¶ 7, 26.) Prior to his death, Wallace Fremont transferred his financial accounts to Saly Ann Glassman at Merrill Lynch. (Id. ¶ 8.) The Merrill Lynch accounts were previously valued at approximately $1.1 million. (Id. ¶ 16.)

In 2014, Glassman allegedly recommended that Wallace Fremont contact the CGA Law Firm and Attorney Margaret Driscoll ("Attorney Driscoll") to discuss estate planning. (Id. ¶¶ 4-5, 12.) During the meeting with Attorney Driscoll, Wallace Fremont reportedly informed her that he wanted his son Peter Fremont's share of the estate reduced. (Id. ¶ 17.) At that time, Wallace Fremont's will left his entire estate to his two children, Kim Fortunato and Peter Fremont. (Id. ¶ 13.) On October 17, 2014, Wallace Fremont executed a revised Last Will and

Testament (the "Will") that provided Kim Fortunato with one-hundred percent of his real property and fifty percent of the residue of the estate, Peter Fremont with twenty percent of the estate's residue, and his three grandchildren collectively with thirty percent of the estate's residue. (Id. ¶ 23.) Attorney Driscoll allegedly assured Wallace Fremont and Kim Fortunato that the Merrill Lynch accounts were included in the residue of the estate. (Id. ¶ 25.)

However, following Wallace Fremont's death, Merrill Lynch informed Kim Fortunato that the accounts were designated as "transfer on death" accounts and that Peter Fremont and Kim Fortunato were designated beneficiaries of the Merrill Lynch accounts. (Id. ¶ 27.) As a consequence, the residue provision of the Will did not include the Merrill Lynch accounts. (Id. ¶ 28.) Rather, the Merrill Lynch accounts were designated 50% to Peter Fremont and 50% to Kim Fortunato. (Id. ¶ 27.) According to the complaint, Attorney Driscoll unsuccessfully attempted to persuade Peter Fremont to disclaim "30% of his 50% share" in the Merrill Lynch accounts to satisfy Wallace Fremont's intent to leave his three grandchildren with thirty percent of the Merrill Lynch assets. (Id. ¶ 29.)

On February 2, 2017, the three grandchildren, Kathryn Fortunato, Elizabeth Fortunato and Alexander Fortunato ("Plaintiffs"), filed a complaint against CGA Law Firm and Margaret Driscoll (collectively, "the CGA Defendants"). (Doc. No. 1.) In their complaint, Plaintiffs assert claims of legal malpractice and breach of contract against the CGA Defendants. (Id.) On March 29, 2017, the CGA Defendants filed a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (Doc. No. 7.) The motion has been fully briefed and is ripe for disposition.

II. LEGAL STANDARD

A. Federal Rule of Civil Procedure 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) allows a party to move for dismissal of a complaint on the grounds that a court lacks subject-matter jurisdiction over the claims. A motion to dismiss a case for lack of standing is properly brought under Rule 12(b)(1), because standing is a jurisdictional matter. Ballentine v. United States, 486 F.3d 806, 810 (3d Cir. 2007). When evaluating a Rule 12(b)(1) motion, a court must first determine whether the movant presents a facial or factual attack. In re Schering Plough Corp. Intron/Temodar Consumer Class Action, 678 F.3d 235, 243 (3d Cir.2012) (citation omitted). A facial challenge contests the sufficiency of the pleadings, meaning a court must consider the allegations of the complaint in the light most favorable to the plaintiff. Gould Elec., Inc. v. United States, 220 F.3d 169, 176 (3d Cir. 2000). By contrast, when reviewing a factual attack, a court may consider evidence outside the pleadings. Id. (citation omitted).

The Court construes the CGA Defendants' standing challenge to be a facial attack given that they provide no evidence outside the pleadings and that they maintain "Plaintiffs have failed to allege any basis whatsoever for standing." (Doc. Nos. 8 at 7; see Doc. No. 7 ¶ 8) (emphasis added). Pursuant to Rule 12(b)(1), the Court must accept as true all material allegations set forth in the complaint, and must construe those facts in favor of the non-moving party. Ballentine, 486 F.3d at 810 (citations omitted). When evaluating whether a complaint adequately pleads the elements of standing, a court applies the same standard of review as on a Rule 12(b)(6) motion to dismiss for failure to state a claim. In re Schering Plough, 678 F.3d at 243 (citation omitted). Accordingly, a plaintiff must assert facts that affirmatively and plausibly suggest that the pleader

has the rights he claims (here, the right to jurisdiction), rather than facts that are merely consistent with such a right. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007).

B. Federal Rule of Civil Procedure 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint, in whole or in part, for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Although Federal Rule of Civil Procedure 8(a)(2) requires "only a short and plain statement of the claim showing that the pleader is entitled to relief," a complaint may nevertheless be dismissed under Federal Rule of Civil Procedure 12(b)(6) if it "fail[s] to state a claim upon which relief can be granted." See Fed. R. Civ. P. 12(b)(6).

To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead enough facts "to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 663 (2009) (citing Twombly, 550 U.S. at 556). A court must accept as true all factual allegations in the complaint and all reasonable inferences that can be drawn from them, viewed in the light most favorable to the plaintiff. See In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 314 (3d Cir. 2010).

All civil complaints must set out "sufficient factual matter" to show that the claim is facially plausible, or they risk dismissal. See Fowler v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir. 2009). To determine the sufficiency of a complaint, the United States Court of Appeals for the Third Circuit has identified the following steps a district court must take when determining the sufficiency of a complaint under Rule 12(b)(6): (1) identify the elements a plaintiff must plead to state a claim; (2) identify any conclusory allegations contained in the complaint "not

entitled" to the assumption of truth; and (3) determine whether any "well-pleaded factual allegations" contained in the complaint "plausibly give rise to an entitlement for relief." See Santiago v. Warminster Twp., 629 F.3d 121, 130 (3d Cir. 2010) (citation and quotation marks omitted).

III. DISCUSSION

In their motion to dismiss, the CGA Defendants maintain that Plaintiffs lack standing to assert their claims of legal malpractice and breach of contract. (Doc. No. 7 at 2.) The CGA Defendants also contend that Plaintiffs' legal malpractice and breach of contract claims are not legally cognizable. (Id.) The Court turns first to the CGA Defendants' standing argument.

A. Standing

The CGA Defendants challenge whether Plaintiffs fall within the narrow class of third party beneficiaries to which Pennsylvania courts confer standing to bring a breach of contract claim. (Doc. No. 7 at 3.) Plaintiffs respond that they have standing to bring suit against the CGA Defendants for failing to effectuate the intent of Wallace Fremont. (Doc. No. 10.)

Under limited circumstances, a "named beneficiary in a will may assert a cause of action, on a third party beneficiary theory, for breach of contract against the attorney who drafted the will . . . ." Jones v. Wilt, 871 A.2d 210, 213 (Pa. Super. Ct. 2005) (citing Guy v. Liederbach, 459 A.2d 744, 751-52 (Pa. 1983)). Namely, a third party beneficiary has "standing to bring an action against the testator's lawyer to enforce a failed legacy where 'the intent to benefit [the third party] is clear and the promisee (testator) is unable to enforce the contract.'" Estate of Agnew v. Ross, 152 A.3d 247, 253 (Pa. 2017) (quoting Guy, 459 A.2d at 747.) This exception to the privity requirement reflects a belief that "persons who are named beneficiaries under a will and

who lose their intended legacy due to the failure of an attorney to properly draft the instrument should not be left without recourse or remedy . . . ." Guy, 459 A.2d at 752.

The Supreme Court of Pennsylvania has developed a two-prong test for determining who qualifies as a third party beneficiary:

> (1) the recognition of the beneficiary's right must be "appropriate to effectuate the intention of the parties," and (2) the performance must "satisfy an obligation of the promisee to pay money to the beneficiary" or "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."

Scarpitti v. Weborg, 609 A.2d 147, 150 (Pa. 1992) (quoting Guy, 459 A.2d at 751). "The circumstances which clearly indicate the testator's intent to benefit a named legatee are his arrangements with the attorney and the text of his will." Guy, 459 A.2d at 752.

For example, in Begley v. Rhoads & Sinon LLP, the Superior Court of Pennsylvania determined that a husband's estate had standing as a third party beneficiary to bring suit against his deceased wife's attorneys. No. 155 MDA 2014, 2015 WL 7432994, at *3-*4 (Pa. Super. Ct. Mar. 9, 2015). In that case, the wife was a "lifetime income beneficiary of a trust" and had the power to appoint the trust's assets by "specific reference" in her will. Id. at *1. The wife executed a will, "bequeathing the residue of her estate, including a general reference to powers of appointment, to [her h]usband. However, this [w]ill did not specifically reference the power of appointment contained" in the trust. Id. The attorneys allegedly failed to alert the wife of the will's inadequate power of appointment. Id. The husband later contacted the attorneys and sought a codicil that "specifically exercised the power of appointment in [the h]usband's favor." Id. The wife fell into a coma before the codicil was prepared, the wife never recovered from the coma, and the husband died shortly after filing a writ of summons against the attorneys. Id.

In its discussion of standing, the Begley Court inquired (1) whether the husband was a "named legatee;" and (2) whether "the circumstances of the relationship between the testator and

the attorney, as well the will itself, indicate the testator's intent to benefit the legatee." Id. at *2 (citing Guy, 459 A.2d at 751-52). The Court found that the complaint adequately satisfied both prongs of the analysis. Id. at *2-*3. First, the will allegedly bequeathed the estate's residue to the husband, "including all property subject to [w]ife's powers of appointment." Id. at *2. The husband therefore qualified as a named legatee. Id. Second, the Court found it reasonable to infer that the wife intended for the husband "to receive the assets" from the trust. Id. at *3. The Begley Court drew the inference by citing to following allegations: (1) the will "bequeathed all property subject to [w]ife's powers of appointment to [h]usband;" (2) the wife was allegedly unaware that "her Will was insufficiently specific" until the husband recognized the power of appointment issue; and (3) the wife allegedly expressed a desire to her attorneys to "leave all of her assets, save a $25,000 specific bequest to a cousin, to [h]usband." Id. The Begley Court concluded that the "allegations, taken as true, [were] sufficient to establish that Wife intended to appoint the assets of the [] [t]rust in favor of [h]usband." Id. As a result, the husband's estate in Begley was found to have standing as a third party beneficiary. Id.

However, the Superior Court of Pennsylvania reached the opposition conclusion in Hess v. Fox Rothschild, LLP. 925 A.2d 798, 801-02 (Pa. Super. Ct. 2007). In Hess, two named beneficiaries of a residual trust brought suit against the decedent's attorneys. Id. The decedent's will had established, inter alia, a regular marital trust – which provided for an "unlimited right to withdraw" the principal therefrom – and a residual trust. Id. The corpus left in the regular marital trust "would pass to the residuary trust" and, thereby, pass to the plaintiffs, the two residual beneficiaries ("beneficiaries"). Id. at 802. However, after the decedent passed, the decedent's husband withdrew five million dollars from the regular marital trust. Id. In their lawsuit, the beneficiaries maintained that their inheritance was improperly diminished by the

withdrawal, that the decedent's attorneys were negligent in drafting the will, and that the decedent's attorneys were "responsible for their diminished inheritance because the will did not reflect her testamentary wishes." Id. The Superior Court of Pennsylvania concluded that beneficiaries lacked standing to bring their claims. Id. at 808. The Hess Court determined that the beneficiaries' claim that the decedent's "true intent was to bequeath them a greater legacy than that afforded by the will" was insufficient to afford standing. Id. (emphasis in original). The Hess Court reasoned that the beneficiaries "did not plead that they lost their intended legacy as provided by the text" of the will. Id.

Here, the Court turns to the first prong of the third party beneficiary analysis: "whether the grant of standing would be appropriate to effectuate the intentions of the parties." Estate of Agnew, 152 A.3d at 261 (internal quotations omitted). According to the complaint, Wallace Fremont executed a Will providing that thirty percent of the "residue section" would pass to his grandchildren, Alexander Fortunato, Elizabeth Fortunato and Kathryn Fortunato. (Doc. No. 1 ¶¶ 7, 23.) The Court finds it is reasonable to draw the inference from Plaintiffs' allegations that Plaintiffs are named legatees. Thus, Plaintiffs have adequately alleged facts that, accepted as true, evidence Wallace Fremont's intent to benefit Plaintiffs.

Second, the Court turns to whether "the circumstances indicate that the promisee intend[ed] to give the beneficiary the benefit of the promised performance." Scarpitti, 609 A.2d at 150 (quoting Guy, 459 A.2d at 751). "Under this contract-type analysis, the attorney is the promisor, who promised to draft a will to effectuate the testator's intent to benefit the legatee, and the testator is the promisee, who intended that the legatee receive the benefit as a third-party beneficiary of the drafted will." Hess, 925 A.2d at 806 (citing Guy, 459 A.2d at 752). Here, Wallace Fremont's arrangements with Attorney Driscoll – as alleged in the complaint – indicate

his intent to bequeath a portion of the Merrill Lynch assets to his grandchildren. Specifically, Plaintiffs allege that Wallace Fremont "made it clear" to Attorney Driscoll that he intended to reduce Peter Fremont's share in the Merill Lynch accounts. (See Doc. No. 1 ¶ 17). Wallace Fremont and his daughter Kim Fortunato also allegedly informed Attorney Driscoll that Wallace Fremont intended that thirty percent of the Merrill Lynch assets would "go to the [g]randchildren." (Id. ¶ 24.) Attorney Driscoll knew of Wallace Fremont's intentions and reportedly assured him "that the assets in the Merrill Lynch accounts were included in the residue of the estate as set forth in Mr. Fremont's Will." (Id. ¶¶ 25, 37.) Plaintiffs also allege that the CGA Defendants "mistakenly believed that the assets in the Merrill Lynch accounts would pass to the beneficiaries through the residue provision of the Will." (Id. ¶ 39.)

The Court views the aforementioned circumstances analogous to Begley, rather than Hess. The alleged circumstances involving Wallace Fremont's arrangements with Attorney Driscoll and Attorney Driscoll's "mistaken[] belief[]" about the Merrill Lynch accounts permit this Court to reasonably infer that Wallace Fremont intended to give Plaintiffs the benefit of a portion the Merrill Lynch accounts. See Scarpitti v. Weborg, 609 A.2d 147, 150-51 (1992). The Court construes Plaintiffs' claim as one based on a failed legacy that passed outside the Will, see Julia v. Cerato, No. 3323 EDA 2013, 2015 WL 7573074, at *4 (Pa. Super. Ct. Jan. 9, 2015); Begley, 2015 WL 7432994, at *3-*4, rather than a claim that Wallace Fremont's "true intent was to bequeath them a greater legacy than that afforded by the will," Hess, 925 A.2d at 808. Accordingly, the Court finds that Plaintiffs have adequately alleged facts that plausibly suggest Plaintiffs are third party beneficiaries and that Plaintiffs have standing to bring suit against the CGA Defendants.

B. Professional Negligence and Breach of Contract Claims

The CGA Defendants also move for dismissal of Plaintiffs' professional negligence and breach of contract claims. (Doc. Nos. 7, 8.) The CGA Defendants argue that the professional negligence claim, as alleged in Count I of the complaint, must be dismissed for failure to state a claim. (Doc. No. 8 at 11-12.) The CGA Defendants reason that Plaintiffs have failed to allege an attorney-client relationship. (Id. at 12.) Plaintiffs concede that, under Pennsylvania law, "a party harmed by the negligence of an attorney cannot bring a legal malpractice claim based on a negligence theory if the party harmed did not have a relationship with the attorney." (Doc. No. 10 at 10.) Rather, Plaintiffs urge this Court not to "insulat[e] an attorney from a claim in negligence" but rather "loosen[]" the privity requirement. (Id. at 10.)

Indeed, the Supreme Court of Pennsylvania has "declined to eliminate the privity requirement in malpractice actions against attorneys based on negligence, and expressly held that a plaintiff 'must show an attorney-client relationship or a specific undertaking by the attorney furnishing the professional services . . . as a necessary prerequisite for maintaining such suits in trespass.'" Golden v. Cook, 293 F. Supp. 2d 546, 554 (W.D. Pa. 2003) (quoting Guy, 459 A.2d at 750). Here, Plaintiffs have not alleged that an attorney-client relationship existed between Plaintiffs and CGA Defendants. Accordingly, the Court will dismiss without prejudice Count I of the complaint for failure to state a claim.

As it relates to Plaintiffs' breach of contract claim, the CGA Defendants similarly urge the Court to dismiss Count II of the complaint for failure to state a claim. (Doc. No. 8 at 12-14.) The CGA Defendants argue that Plaintiffs merely recast their allegations of negligence as a breach of contract, Plaintiffs have failed to point to a specific contractual obligation that was violated, and Plaintiffs have blamed the "wrong individuals." (Id. at 13-15.) Plaintiffs respond

that a "breach of contract claim may properly be premised on an attorney's failure to fulfill his or her contractual duty to provide the agreed upon legal services in a manner consistent with the profession at large." (Doc. No. 10 at 11.)

Under Pennsylvania law, "if a plaintiff demonstrates by a preponderance of the evidence that an attorney has breached his or her contractual duty to provide legal service in a manner consistent with the profession at large, then the plaintiff has successfully established a breach of contract claim against the attorney." Gorski v. Smith, 812 A.2d 683, 697 (Pa. Super. 2002); accord Jani v. O'Meara, No. 3322 EDA 2015, 2016 WL 6820534, at *3 (Pa. Super. Nov. 18, 2016).[1] Here, Count II of the complaint alleges that the CGA Defendants' services were "not provided in a manner consistent with the profession at large" and that they "failed to effectuate the distribution of the bulk of Mr. Fremont's Estate as Mr. Fremont instructed them and as they knew he intended." (Doc. No. 1 ¶¶ 46, 48.) Therefore, the Court finds that Plaintiffs have adequately alleged a cause of action for breach of contract.

IV. CONCLUSION

For the foregoing reasons, the Court will grant in part and deny in part the CGA Defendants motion to dismiss. An order consistent with this memorandum follows.

[1] The CGA Defendants cite Knopick v. Connelly for the proposition that Pennsylvania law requires a plaintiff who "wishes to bring a professional malpractice claim under a breach of contract theory . . . [to] point to specific contractual obligations that the defendant allegedly violated." No. 09-1287, 2009 WL 5214975, at *5 (M.D. Pa. Dec. 29, 2009) (citing Saferstein v. Paul, Mardinly, Durham, James, Flandreau and Rodger, P.C., No. 96-4488, 1997 WL 102521, at *5 (E.D. Pa. 1997). Here, even if Plaintiffs were required to allege that the CGA Defendants "failed to follow a specific instruction of the client" in order to state a breach of contract claim, ASTech Int'l, LLC v. Husick, 676 F. Supp. 2d 389, 399 n.9 (E.D. Pa. 2009), Plaintiffs allege that Attorney "Driscoll and CGA failed to effectuate the distribution of the bulk of Mr. Fremont's Estate as Mr. Fremont instructed them and as they knew he intended." (Doc. No. 1 ¶ 48.)