STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-13-206

PAUL LEVESQUE, et al,

Plaintiffs

v.

ORDER

DANIEL G. LILLEY, ESQ., et al,

Defendants

Before the court is a motion by plaintiffs to enforce a settlement agreement set forth on the record after a judicial settlement conference held on June 17, 2015 (Cole, J.).[1]

At the settlement conference, the parties agreed to the following terms: (1) a specified amount[2] would be paid by the Lilley defendants to the Levesques in full satisfaction of the Levesques' claims against the Lilley defendants; (2) the Lilley defendants' counterclaim for attorney's fees or alternatively for quantum meruit against the Levesques would survive; (3) $90,000 would be held in Flynn's IOLTA escrow account on behalf of the Levesques that would be used to satisfy the Levesques' liability, if any, to Lilley on the counterclaim; and (4) the Lilley defendants' third party claim against Flynn would be dismissed. Flynn would not be an actual party to the Lilley versus Levesque counterclaim, but he would defend the case and hold the $90,000 as an escrow agent to pay out any liability incurred by the Levesques. The Levesques would not be personally liable for any judgment Lilley obtained but would only be liable up to the $90,000 held in Flynn's IOLTA account. These terms were clearly and repeatedly set forth

[1] Although this case has been assigned to the undersigned, the motion to enforce the settlement agreement was originally assigned to C.J. Cole because he had presided over the settlement. The motion to enforce was reassigned to the undersigned on December 9, 2015.

[2] The court will not list the amount in question because that is the basis of the dispute.

on the record by the various parties on June 17, 2015. Justice Cole ultimately stated, "General release is to be executed consistent with the language here today." Tr. 10.

On September 8, 2015 the Levesques filed a motion to enforce the settlement, asserting that they had prepared a draft settlement agreement consistent with the terms set forth on the record but that the Lilley defendants were insisting on additional terms that had not been agreed. The Lilley defendants oppose the motion to enforce and have identified two areas of disagreement. First, they contend that the agreement should contain the standard confidentiality agreement which they contend is "implied in each and every settlement." Second, they contend there is a disagreement concerning the maximum amount of the fee that they may be entitled to if they prevail on their counterclaim.[3] At the time the motion to enforce and the Lilley defendants' objection to that motion were briefed, a transcript of the June 17, 2015 proceeding had not been prepared.

Since then the transcript has been prepared, and the court has the benefit of that transcript.

Discussion

"Settlement agreements are analyzed as contracts, and the existence of a binding settlement is a question of fact." *Estate of Snow*, 2014 ME 105, ¶ 11, 99 A.3d 278 (citing *Muther v. Broad Cove Shore Ass'n*, 2009 ME 37 ¶ 6, 968 A.2d 539). "In order to be binding, a settlement agreement requires the mutual intent of the parties to be bound by terms sufficiently definite to enforce." *Id.*

[3] In their reply memorandum the Levesques assert that the dispute with respect to the maximum potential amount recoverable by the Lilley defendants concerns the question of whether the Lilley defendants would be entitled to interest on any amount recovered.

There was no mention of confidentiality when the terms of the settlement were set forth on the record on June 17, 2015. There is no also indication anywhere in that discussion that settlement was in any way contingent on a confidentiality or nondisclosure provision. The Lilley defendants do not cite any authority for the proposition that a confidentiality agreement is implied in each and every settlement. In the court's view, although confidentiality provisions are frequently included in settlement agreements, they have to be bargained for and agreed to. *See, e.g., Grove Farm Distributors Inc. v. John Labatt Ltd.,* 888 F.Supp. 1427 (N.D. Ill. 1995), *aff'd mem.,* 134 F.3d 374 (7th Cir. 1998); *Loe v. Thomaston,* 600 A.2d 1090, 1092 (Me. 1991) (oral promise to keep settlement agreement confidential inconsistent with written release and thus unenforceable).

Accordingly, the Levesques are entitled to enforce the settlement and receive the agreed settlement amount without being made subject to any confidentiality provision. The terms assented to on June 17 are sufficiently definite to be enforced notwithstanding the absence of a written agreement. *See Muther v. Broad Cove Shore Ass'n*, 2009 ME 37 ¶ 8:

> [T]he transcript of the settlement agreement, without more, conclusively establishes the existence of a binding settlement agreement as a matter of law, and subsequent disputes that arose while attempting to reduce the settlement to a stipulated judgment did not affect the authority of the court to enforce the agreement through the entry of a judgment incorporating the terms previously stipulated to by the parties.

On the other issue raised – the maximum amount of the fee which the Lilley defendants may recover if they prevail on their counterclaim – representatives for all parties stated on June 17, 2015 that the total amount subject to the counterclaim was the $90,000 in Flynn's escrow account. *See* Tr. 4 (counsel for Flynn), 5 (counsel for Lilley defendants), 7 (counsel for the Levesques). The court therefore finds that the maximum amount of the fee to which the Lilley

defendants may be entitled if they prevail on their counterclaim was resolved on June 17, 2015 and the Lilley defendants are not entitled to reopen that issue.

Counsel for Flynn also expressly stated that the fee subject to the Lilley defendants' counterclaim "is limited to a maximum of $90,000, that there is no interest or costs associated with that $90,000. It's in escrow"). Counsel for the Lilley defendants then stated, "I think we're actually stating the same thing . . . . So I agree." Tr. 6. Although the stated agreement of counsel for the Lilley defendants was not necessarily directed to the interest and costs issue, his statement nevertheless manifested assent to the understanding set forth by counsel for Flynn. To the extent that the Lilley defendants are now seeking interest, therefore, they cannot deviate from the contrary terms set forth on the record.[4]

Accordingly, the Levesques are entitled to enforce the June 17, 2015 settlement. If there are any further disputes about the wording of general releases, counsel for the Levesques shall inform the court within 21 days, and in that event the court will enter a judgment pursuant to *Muther*, 2009 ME 37 ¶ 8, "incorporating the terms . . . stipulated to by the parties."

Counsel for the Levesques also argues that the opposition of the Lilley defendants was sufficiently baseless to merit sanctions. Given that the Lilley defendants did not have the transcript when they opposed the motion to enforce, the court denies that request.

When the court met with counsel for the Lilley defendants and counsel for Flynn after the settlement had been placed on the record on June 17, 2015, it understood that they believed that the issues raised by the Lilley defendants' counterclaim for all or part of the $90,000 in Flynn's escrow account could potentially be decided on summary judgment or on a stipulated record. If so, the necessary motion or motions should be filed within 60 days. Otherwise the counterclaim will be set for trial on the court's next civil trial term.

[4] It also bears emphasis that IOLTA accounts do not earn interest for the account holder.

The entry shall be:

Plaintiff's motion to enforce the June 17, 2015 settlement is granted. The Clerk is directed to incorporate this order in the docket by reference pursuant to Rule 79(a).

Dated: February 11, 2016

Thomas D. Warren
Justice, Superior Court

appeal.

ENTERED FEB 12 2015

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-13-206

STATE OF MAINE
Cumberland ss. Clerk's Office
FEB 03 2015
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TDW-CUM-02-03-15

PAUL LEVESQUE, et al,

Plaintiffs

v.

ORDER

DANIEL G. LILLEY, ESQ., et al,

Defendants

Before the court is the third motion by the Lilley defendants for leave to amend their counterclaim and their third party complaint.

The Lilley defendants are seeking to amend their counterclaims to add claims for breach of contract, quantum meruit, and unjust enrichment as well as a setoff claim and defense – all based on the theory that the Levesques breached an obligation to the Lilley defendants to adequately defend the original verdict on appeal. The Lilley defendants have existing breach of contract, quantum meruit, and unjust enrichment claims for the attorneys fees allegedly owed to them based on the ultimate settlement that was reached.[1]

The Lilley defendants are seeking to amend their third party complaint to allege that, in addition to their existing claims against Flynn for contribution, Flynn owed the Lilley defendants a duty of due care in defending the original verdict.

According to the Lilley defendants' motion, the triggering event for the proposed amendment was Daniel Lilley's deposition testimony on October 2, 2014 that he was not

[1] Under 24 M.R.S. § 2961, attorneys fees in medical malpractice actions that exceed certain percentages must be approved by the court, and it is therefore possible that any recovery by the Lilley firm on its existing counterclaim would subsequently require court approval.

just seeking a percentage share of the ultimate settlement in the case but was seeking to obtain recovery based on the original verdict before it was vacated on appeal.

The Levesques oppose the motion on the ground that there is no legal basis for any claim that they could be liable to the Lilley defendants based on the appeal. Flynn opposes the amendment on the ground that it is too late – an issue that is related to an additional dispute between the parties with respect to the deadline for designating experts.[2]

The court can find no legal basis, contractual or otherwise, for the claim that the Levesques owed any duty to the Lilley defendants in connection with the handling of the appeal.[3] The Lilley defendants did not handle the appeal, and therefore they have no quantum meruit claim for the value of services rendered in connection with the appeal. *See Dinan v. Alpha Networks Inc.*, 2013 ME 22 ¶ 19, 60 A.3d 792 (quantum meruit is for recovery of value of services or materials provided under implied contract). Since the Levesques lost the appeal, no benefit was conferred upon the Levesques that could form the basis for a claim of unjust enrichment. *See A.F.A.B. Inc. v. Town of Old Orchard Beach*, 620 A.2d 747, 749 (Me. 1992). Given the above, there is also no basis for a setoff claim or defense based on any alleged failure by the Levesques in connection with the appeal.

Accordingly, the motion to amend is denied as it pertains to the counterclaim.

With respect to the proposed amendment to the third party complaint, the court agrees with Flynn that the motion is untimely. The original deadline for amendments to the pleadings was December 12, 2013. Although there have been several extensions of

[2] That issue shall be addressed at a scheduling and Rule 26(g) conference which the court understands the clerk's office is attempting to arrange.

[3] The contingency fee contract between the Lilley firm and the Levesques is contained in the record as an attachment to Flynn's January 21, 2014 motion for judgment on the pleadings.

the pleadings was December 12, 2013. Although there have been several extensions of other deadlines in the scheduling order, that deadline was never extended.

One motion to amend the third party complaint was filed and granted after December 12, 2013. However, as the discovery deadline approaches, there is a point when deadlines on amendments to the pleadings should be enforced. This is particularly true in this case where the proposed amendment is not prompted by some newly discovered evidence obtained from an adverse party but by Mr. Lilley's statement at his deposition that he is seeking recovery based on the original verdict – a claim that should have been disclosed at the outset.[4]

In addition, the proposed amendment to the third-party complaint is based on the theory that Flynn "owed [the Lilley defendants] a duty to act with due care that would not impair Lilley's interest in the already obtained judgment." Proposed Amended Third Party Complaint, attached as Exhibit A to Lilley defendants' third motion for leave to amend, ¶ 20.

This issue has already been the subject of litigation between the parties, and the court previously found that Lilley may pursue third party claims against Flynn based on a duty of care that Flynn owed to the Levesques. *See* order dated June 9, 2014 at 2. However the principle that a lawyer cannot be held liable to third parties based on the performance of the lawyer's professional duties, *see DiPietro v. Boynton*, 628 A.2d 1019 (Me. 1993), forecloses the claim that Flynn owed any duty to the Lilley defendants with respect to the appeal.

[4] However, the court does not agree with counsel for Flynn that litigation relating to the appeal would significantly broaden the case. The Lilley defendants' first third-party claim against Flynn was (and remains) that Flynn is liable for contribution based on his negligent handling of the appeal. *See* Lilley defendants' June 20, 2013 third party complaint ¶ 4.

The Lilley defendants may therefore seek contribution from Flynn but are not entitled to any affirmative recovery against Flynn under their third party complaint.

The entry shall be:

The Lilley defendants' third motion for leave to amend their counterclaim and third party complaint is denied.

The Clerk is directed to incorporate this order in the docket by reference pursuant to Rule 79(a).

Dated: February 3, 2015

Thomas D. Warren
Justice, Superior Court

205 Newbury Street, Ground Floor
Portland, ME 04101

WALTER MCKEE ESQ
MCKEE BILLINGS LLC PA
133 STATE STREET
AUGUSTA ME 04330

Defendant's Attorney

MARK FRANCO ESQ
THOMPSON & BOWIE
PO BOX 4630
PORTLAND ME 04112-4630

Third Party Defendant's Attorney

LEE BALS ESQ
MARCUS CLEGG & MISTRETTA
ONE CANAL PLAZA SUITE 600
PORTLAND ME 04101-4035

Plaintiff's Attorney

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-13-206
TDW-CUM-06-09-14

PAUL LEVESQUE, et al,

Plaintiffs

v.

ORDER

DANIEL G. LILLEY, ESQ., et al,

Defendants

Before the court is a motion by third party defendant John Flynn for judgment on the pleadings dismissing the third party complaint and a motion by defendants and third party plaintiffs Daniel Lilley, Christian Foster, and the Daniel G. Lilley Law Offices (collectively, the Lilley defendants) to amend the third party complaint.

Judgment on the Pleadings

A motion for judgment on the pleadings tests the sufficiency of the complaint. 2 C. Harvey, Maine Civil Practice § 12:14. For purposes of a motion for judgment on the pleadings, as on a motion to dismiss, the material allegations of the third party complaint must be taken as admitted. The third party complaint must be read in the light most favorable to the Lilley defendants to determine if it sets forth elements of a cause of action or alleges facts that would entitle the Lilley defendants to relief against Flynn pursuant to some legal theory. See, e.g., In re Wage Payment Litigation, 2000 ME 162 ¶ 3, 759 A.2d 217.

Third Party Complaint Count 1 (Negligence/Contribution)

Count 1 of the third party complaint asserts a claim for negligence and contribution, based on the allegation that Flynn's handling of the appeal was negligent. Third Party Complaint ¶ 4.[1] Flynn argues this count must be dismissed under the principle that a lawyer cannot be held liable to third parties for the performance of the lawyer's professional duties. See DiPietro v. Boynton, 628 A.2d 1019, 1025 (Me. 1993). The problem with this argument is that the premise of the contribution claim is that Flynn violated the standard of care owed to his clients, the Levesques, and not to any third party.

Thus, the contribution claim is not based on any alleged duty owed to the Lilley defendants. The court concludes that if the Lilley defendants are found liable to the Levesques for professional negligence, the DiPietro principle would not prevent the Lilley defendants from seeking contribution from Flynn if they can prove that Flynn was professionally negligent in his handling of the Levesques' appeal.

Flynn also contends that he cannot, as a matter of law, qualify as a joint tortfeasor from whom contribution may be sought. The alleged harm to the plaintiffs, however, is based on the outcome of their case against Central Maine Medical Center. On that issue, if the Lilley defendants are held liable and can prove that professional negligence by Flynn caused or contributed to a result that was less favorable than otherwise would have been obtained, Flynn would qualify as a joint tortfeasor.[2]

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[1] In their opposition to Flynn's motion for judgment on the pleadings, the Lilley defendants argue that Flynn was also negligent in advising the Levesques to settle after the Law Court decision. See Lilley defendants' February 27, 2014 memorandum in opposition to Rule 12(c) motion at 8. This issue is addressed below in connection with the Lilley defendants' motion to amend the third party complaint.

[2] Paragraphs 5 and 6 of the third party complaint seem to suggest that the Lilley defendants may be seeking to have Flynn held liable to the Levesques even if the Lilley

Third Party Complaint Count 2 (Breach of Fiduciary Duty)

Count 2 of the third party complaint alleges that Flynn breached a fiduciary duty to the Lilley defendants. However, the third party complaint alleges that Flynn had terminated his employment with the Lilley defendants during the summer of 2010 and represented the Levesques on their appeal at a time when he was no longer employed by the Lilley defendants. Third Party Complaint ¶ 3. The alleged breach of fiduciary duty is alleged to have occurred after the appeal decision, when Flynn is alleged to have advised the Levesques that they had a potential malpractice claim against the Lilley defendants. Third Party Complaint ¶ 9.

Although the Lilley defendants allege that Flynn had a fiduciary duty to the Lilley defendants that "survived" Flynn's termination of employment, id., the court disagrees. Assuming that Flynn had a fiduciary duty to the Lilley firm while he was employed there,[3] the third party complaint does not contain any factual allegations that would support the continued existence of a fiduciary duty once the employment relationship was severed. The court can find no inherent basis in Flynn's relationship as a former employee that would conceivably give rise to a continuing fiduciary duty.

In addition, the Law Court has held that a general allegation of a fiduciary relationship is insufficient and that "the factual foundations of an alleged fiduciary relationship must be pled with specificity." Bryan R. v. Watchtower Bible and Tract

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defendants are not found to be negligent. The Levesques have not asserted any claim against Flynn, and count 1 of the third party complaint therefore cannot provide any relief other than contribution in the event that the Lilley defendants are held liable to the Levesques.

[2] The Lilley defendants allege that they placed trust and confidence in Flynn "while Flynn was employed by Lilley." Third Party Complaint ¶ 9.

While the court might be inclined to agree that a fiduciary relationship may have existed during Flynn's employment with the Lilley firm, this is not a foregone conclusion. Flynn has pointed to at least one decision from another jurisdiction holding that a lawyer who is employed by a law firm but who is not a partner is not subject to a fiduciary duty to the firm. Hess v. Kanoski & Associates, 668 F.3d 446, 455 (7th Cir. 2012) (applying Illinois law)

Society, 1999 ME 144 ¶¶ 20-22, 738 A.2d 839. No factual basis has been alleged for a continuing fiduciary relationship or for the assertion that "there was a great disparity of position and influence between Flynn and Lilley and this disparity favored Flynn." Third Party Complaint ¶ 9.[4]

It also bears emphasis that the fiduciary duty claim against Flynn is based on alleged advice given by Flynn to the Levesques at a time when Flynn was representing the Levesques. Unlike the contribution claim, which is based on an alleged violation of the standard of care owed by Flynn to his clients, the Lilley defendants' fiduciary duty claim is premised on an alleged duty owed to a party other than Flynn's clients. This claim runs squarely afoul of the general principle that, absent fraud or collusion, a lawyer is not liable to third parties for the performance of professional duties as an advocate for his clients. See DiPietro v. Boynton, 628 A.2d at 1025, citing Layman v. Layman, 578 A.2d 314, 316 (Md. App. 1990). Once he was no longer employed by the Lilley defendants, Flynn's duty was owed to his clients, not to his former employer.

Flynn is therefore entitled to judgment on the pleadings dismissing count 2 of the third party complaint.

Third Party Complaint Count 3

Count 3 of the third party complaint asserts a claim for tortious interference with contract or advantageous economic relationship, based on the theory that the Lilley defendants had a valid contract with the Levesques for attorney's fees which Flynn fraudulently induced the Levesques to breach.

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[4] As it relates to the time of Flynn's employment by the Lilley firm, when the Lilley defendants allege that the fiduciary relationship arose, the allegation that the disparity of position and influence favored Flynn runs counter to the usual dynamic in an employer-employee relationship.

To prevail on a claim of tortious interference with contract or advantageous economic relationship, the Lilley defendants must prove that a valid contract existed; that Flynn interfered with that contract by fraud; and that Flynn's interference proximately caused damages. Rutland v. Mullen, 2002 ME 98 ¶ 13, 798 A.2d 1104. To prove interference by fraud, the Lilley defendants must prove, inter alia, that (1) Flynn made a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether that representation was true or false. Id. ¶ 14.

In addition, M.R.Civ.P. 9(b) requires that in all averments of fraud, the circumstances constituting fraud shall be stated with particularity.[5] See James v. MacDonald, 1998 ME 148 ¶ 8, 712 A.2d 1054 (applying Rule 9(b) to tortious interference by fraud claim). The specific allegations in the third party complaint are that Flynn fraudulently induced the Levesques to breach the contract by

> among other things, making false representations of material facts concerning Lilley's alleged negligent prior handling of the Levesques' case, representations that Flynn knew were not true or were made in reckless disregard of the truth.

Third Party Complaint ¶ 14.

The allegation that Flynn engaged in fraud would remove the third party complaint from the principle that a lawyer is not ordinarily subject to liability to third parties for the performance of his professional duties to his clients. See Layman v. Layman, 578 A.2d at 316, cited in DiPietro, 628 A.2d at 1025. However, the Lilley defendants have failed to plead this count with the requisite particularity. In particular, the third party complaint does not allege the specific material facts which Flynn allegedly misrepresented to the Levesques.

[5] M.R.Civ.P. 9(b) provides that "the circumstances constituting fraud . . . shall be stated with particularity" but that intent, knowledge, or other condition of mind may be averred generally.

This is particularly important under the circumstances of the instant case because a lawyer is obligated to provide his clients with his best professional judgment and a lawyer cannot be held liable for advising a client that, in his opinion, the client has a legal malpractice claim against a former attorney. This is true whether or not the legal malpractice claim is ultimately successful. See Rutland v. Mullen, 2002 ME 98 ¶ 15 (assertions of legal claims, even if later proven invalid, are insufficient as a matter of law to support a finding of tortious interference by fraud). Indeed, if any lawyer who advises a client to resist a claim for breach of contract were subject to a claim of tortious interference, then every contract claim could be joined with a tortious interference claim against the opposing lawyer.

At a minimum, only if a lawyer makes misrepresentations of material facts and does so either knowingly or in reckless disregard of the truth can a tortious interference claim potentially be asserted. In this case, the Lilley defendants have not alleged any specific facts that Flynn is alleged to have knowingly misrepresented, and Flynn is therefore entitled to judgment on the pleadings on count 3 of the third party complaint.

Lilley Defendants' Motion to Amend

The Lilley defendants' motion to amend seeks to add a fourth count of the third party complaint, seeking contribution based on Flynn's allegedly negligent advice that the Levesques should settle their claim rather than pursue a new trial after the Law Court remand.[6] Without expressing any opinion as to the ultimate viability of that

[6] As far as the court can tell, there are a few other minor changes in the wording of the proposed amended third party complaint, but none are of any substance. However, certain words appear to have been inadvertently dropped from the second sentence of paragraph 3 of the proposed amended third party complaint, and that sentence is now missing a verb. The court will assume that paragraph 3 was intended to remain as set forth in the original third party complaint.

claim, the court concludes that the amendment sought at least states an additional claim for contribution based on alleged negligence and will allow the amendment.

The entry shall be:

1. Third party defendant Flynn's motion for judgment on the pleadings is denied as to Count 1 of the third party complaint (negligence/contribution) except to the extent that Count 1 seeks any relief other than contribution in the event that the Lilley defendants are held liable to the Levesques.

2. Flynn's motion is granted as to Counts 2 and 3 of the third party complaint (breach of fiduciary duty and tortious interference with contract), and judgment on the pleadings is entered dismissing those counts of the third party complaint.

3. The Lilley defendants' motion to amend the third party complaint is granted, without prejudice to any defenses that may be asserted by Flynn, who shall have 10 days from receipt of this order in which to file an answer to the amended third party complaint.

The Clerk is directed to incorporate this order in the docket by reference pursuant to Rule 79(a).

Dated: June 9, 2014

Thomas D. Warren
Justice, Superior Court

CLERK OF COURTS
Cumberland County
205 Newbury Street, Ground Floor
Portland, ME 04101

LEE BALS ESQ
MARCUS CLEGG & MISTRETTA
ONE CANAL PLAZA SUITE 600
PORTLAND ME 04101-4035

Attorney
Plaintiffs

MARK FRANCO ESQ
THOMPSON & BOWIE
PO BOX 4630
PORTLAND ME 04112-4630

Attorney
Third Party Defendant

WALTER MCKEE ESQ
MCKEE BILLINGS LLC PA
133 STATE STREET
AUGUSTA ME 04330

Attorney
Defendants

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-13-206
TDW - CMM - 2/14/2014

PAUL LEVESQUE, et al,

Plaintiffs

v.

ORDER

DANIEL G. LILLEY, ESQ., et al,

Defendants

Before the court is defendants' motion to dismiss the complaint filed by Paul and Ida Levesque.

For purposes of a motion to dismiss, the material allegations of the complaint must be taken as admitted. The complaint must be read in the light most favorable to the plaintiff to determine if it sets forth elements of a cause of action or alleges facts that would entitle plaintiff to relief pursuant to some legal theory. A claim shall only be dismissed when it appears beyond doubt that a plaintiff is not entitled to relief under any set of facts that he might prove in support of his claim. E.g., In re Wage Payment Litigation, 2000 ME 162 ¶ 3, 759 A.2d 217.

The defendants' motion contends that the Levesques' settlement of their claim against CMMC upon remand precludes the Levesques, as a matter of law, from proving that the judgment they initially recovered was based on negligence on the part of Dr. Rietschel as opposed to negligence on the part of CMMC nurses.[1] The court disagrees.

[1] The complaint does not allege that the claim against CMMC was settled on remand but defendants have pointed to a docket entry to that effect. The authenticity of the docket entry has not been challenged and plaintiffs do not dispute the existence of a settlement with CMMC. Accordingly, the docket entry may be considered on the motion to dismiss. Moody v. State Liquor & Lottery Commission, 2004 ME 20 ¶ 9, 843 A.2d 43.

On the face of the complaint it is at least possible that, through expert testimony or other evidence, the Levesques will be able to prove that it is more likely than not that the verdict they received at trial was based on Dr. Rietschel's negligence as opposed to negligence on the part of the CMMC nurses and that, once foreclosed from proceeding on the basis of Dr. Rietschel's negligence, the Levesques would have had a considerably weaker case if they had gone to a second trial.

The entry shall be:

Defendants' motion to dismiss is denied. The Clerk is directed to incorporate this order in the docket by reference pursuant to Rule 79(a).

Dated: February 13, 2014

Thomas D. Warren
Justice, Superior Court

)F COURTS
land County
Stree' round Floor
l, ME . .01

Def.

WALTER MCKEE, ESQ.
MCKEE BILLINGS LLC PA
133 STATE STREET
AUGUSTA, ME 04330

OF COURTS
land County
Street, Ground Floor
d, ME 04101

Plaintiff

LEE BALS, ESQ.
JENNIE CLEGG, ESQ.
MARCUS CLEGG & MISTRETTA PA
ONE CANAL PLAZA SUITE 600
PORTLAND, ME 04101-4035

Street, Ground Floor
l, ME 04101

3rd Party Def.

MARK FRANCO, ESQ.
THOMPSON & BOWIE
PO BOX 4630
PORTLAND, ME 04112-4630