STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: April 15, 2016]

JOHN C. PONTE, Individually and as Sole Shareholder of DREAM HOUSE MORTGAGE CORPORATION, a Rhode Island Mortgage Corporation that filed Articles of Dissolution on July 19, 2011	:	
VS.	:	**C.A. No. PC 2012-4240**
MARK DAVIS; MARTINEAU, DAVIS & ASSOCIATES, P.C., and LYNN C. ABBOTT	:	

DECISION

LANPHEAR, J. This matter is before the Court on Defendants' Motion to Dismiss the Second Amended Verified Complaint.

I

Facts and Travel

The underlying action arises out of alleged legal malpractice by Defendants Attorney Mark Davis (Attorney Davis), Martineau, Davis, and Associates, P.C. (MDA), and Attorney Lynn C. Abbott (Attorney Abbott) (collectively Defendants) of Plaintiffs John C. Ponte and Dream House Mortgage Corporation (Plaintiffs). Plaintiffs filed their Original Verified Complaint on August 17, 2012, naming Attorney Davis, MDA, R.C. Financial Services, LLC, and Rick Campbell as defendants.[1] See Defs.' Mem. Supp. Mot. Dismiss, Ex. A (Original Complaint). In their Original Complaint, Plaintiffs alleged that Attorney Davis was legal

[1] Defendants R.C. Financial Services, LLC and Rick Campbell have been dismissed from the instant case with prejudice.

counsel for Plaintiffs since 2009 and that both Attorney Davis and MDA were legal counsel representing Plaintiffs since 2010. Id. at ¶ 7.

Plaintiffs claim that while they were in the process of winding down the business affairs of Dream House Mortgage Corporation in May 2010, it was advised by Attorney Davis and MDA that it was in the best interests of Plaintiffs to dispose of a number of loans owned by them for $25,000.[2] Id. at ¶¶ 8-11. Plaintiffs claim that Attorney Davis and MDA exercised dominion and control over them and as a result Plaintiffs accepted the grossly inadequate sum of $25,000 for Dream House Mortgage Corporation's assets. Id. at ¶¶ 17-18. Plaintiffs' Original Complaint asserted the following claims: Restitution (Count I), Breach of Fiduciary Duty (Count II), Tortious Interference with Contractual Rights (Count III), Legal Malpractice (Count IV), Negligence (Count V), Fraud (Count VI), and Unjust Enrichment (Count VII).

On August 6, 2015, the Court granted Plaintiffs' Motion to Amend their Complaint, and on August 11, 2015, Plaintiffs filed their First Amended Verified Complaint. See Defs.' Mem. Supp. Mot. Summ. J., Ex. B (First Amended Complaint). Plaintiffs added Attorney Abbott as a defendant in their First Amended Complaint and alleged that she, along with Attorney Davis and MDA, represented Plaintiffs in a matter being adjudicated in the United States District Court. Id. at ¶ 29. Plaintiffs claim that Defendants charged them an hourly rate in excess of the rate stated in the parties' engagement letter/fee agreement, but Plaintiffs allege that they were unaware of this discrepancy when they paid their legal bill in full. Id. at ¶ 30. Plaintiffs further assert that Defendants failed to pay Attorney Brockmann, who Defendants subcontracted to assist with Plaintiffs' litigation in federal court, even though Plaintiffs paid the relevant invoices in full. Id.

[2] Plaintiffs allege that the combination of secured and unsecured loans were valued at approximately $1.4 million. Compl. ¶ 10.

at ¶ 34. Plaintiffs allege several other additional examples of Attorney Abbott's and MDA's legal malpractice as well. Id. at ¶¶ 36-38.

In total, Plaintiffs' First Amended Complaint included twelve (12) counts, including: Declaratory Judgment and Injunctive Relief (Count I), Restitution (Count II), Breach of Fiduciary Duty (Count III), Tortious Interference with Contractual Rights (Count IV), Legal Malpractice (Count V), Negligence (Count VI), Fraud (Count VII), Unjust Enrichment (Count VIII), Misrepresentation (Count IX), Diversion of Business Opportunity (Count X), Accounting (Count XI), and Civil Conspiracy (Count XII).

On September 4, 2015, Defendants filed a Motion to Dismiss Plaintiffs' First Amended Verified Complaint as to all claims pertaining to Attorney Abbott and all new allegations asserted against Attorney Davis and MDA as barred by the statute of limitations. Also, Defendants sought to dismiss Counts I, II, IV, VII, X, XI, and XII on the grounds that they failed to state claims upon which relief may be granted. See Defs.' Mem. Supp. Mot. Dismiss at 5. In response, Plaintiffs filed a motion to amend, which was granted by the Court. On or about January 6, 2016, Plaintiffs filed their Second Amended Complaint. Plaintiffs' Second Amended Complaint incorporates Counts I-XII as alleged in their First Amended Complaint, but the new complaint invokes the discovery rule pursuant to § 9-1-14.3(2) and pleads additional facts assumedly to shield their claims from dismissal for untimeliness. The additional relevant facts are as follows:

- In February 2013, Plaintiffs received billing invoices for the Aurora litigation that Plaintiffs had never seen before and that differed from the invoices that Plaintiffs had previously paid to Attorney Davis and MDA. Second Am. Compl. ¶¶ 34-35.

- In February 2014, during Attorney Abbott's deposition, Plaintiffs learned for the first time that Attorney Abbott was responsible for billing for the Aurora litigation. Id. at ¶ 36.
- In November 2014, during Attorney Brockmann's deposition, Plaintiffs learned for the first time that Attorney Brockmann may not have been paid by MDA for some of the legal services involved in the federal court action. Id. at ¶ 37.
- Plaintiffs learned for the first time in 2014, during Attorneys Davis' and Abbott's depositions, that counsel believed they represented Plaintiffs in one case on a contingency fee basis, when the fee agreement set forth a flat fee arrangement and Plaintiffs paid the flat fee. Id. at ¶ 40.
- In September 2012, after taking back possession of the loan portfolio, Plaintiffs learned for the first time that MDA and Attorney Abbott failed to correctly take "title action" on a loan in the portfolio in 2010, which resulted in Plaintiffs losing a security interest in the loan. Id. at ¶ 43.
- Plaintiffs learned, as a result of certain responses of Attorneys Davis and Abbott and MDA to the Disciplinary Counsel Complaint, that Attorney Abbott and MDA acted as settlement agent for "Ponte and Dream House relative to the so-called Empire Appraisals, Inc. litigation matter," but "failed and/or refused to detail and account for the receipt, use and/or disbursement of said settlement proceeds." Id. at ¶ 45.

In response to Plaintiffs' Second Amended Complaint, Defendants filed the instant Motion to Dismiss citing, *inter alia*, that the claims are time-barred because they were asserted after the three-year statute of limitations; that the discovery rule, which may toll the accrual date

of Plaintiffs' claims, does not apply; and, that Plaintiffs have failed to assert claims upon which relief should be granted.

II

Standard of Review

'"The sole function of a motion to dismiss is to test the sufficiency of the complaint."' Palazzo v. Alves, 944 A.2d 144, 149 (R.I. 2008) (citation omitted). Looking at the four corners of the complaint, this Court examines that pleading and assumes that the allegations contained in the plaintiff's complaint are true, viewing them in the light most favorable to the plaintiff. Barrette v. Yakavonis, 966 A.2d 1231, 1234 (R.I. 2009). '"A motion to dismiss is properly granted when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any set of facts that could be proven in support of the plaintiff's claim."' Audette v. Poulin, 2015 WL 8350473, at *2 (R.I. 2015) (quoting Ho–Rath v. R.I. Hospital, 115 A.3d 938, 942 (R.I. 2015)). When conducting this review, '"[this Court is] thus [] confined to the four corners of the complaint and must assume all allegations are true, resolving any doubts in plaintiff's favor."' DiLibero v. Mortg. Elec. Registration Sys., Inc., 108 A.3d 1013, 1015 (R.I. 2015) (quoting Narragansett Elec. Co. v. Minardi, 21 A.3d 274, 277 (R.I. 2011)).

III

Analysis

A

Count I As Against All Defendants

Defendants assert that Plaintiffs' claim for Declaratory Judgment & Injunctive Relief (Count I) pursuant to G.L. 1956 §§ 9-30-1 et seq. should be dismissed because Plaintiffs are not requesting that the Court rule on the legal rights or status of the parties, but rather are asking the

Court to determine the Defendants' liability for the underlying claims of negligence and legal malpractice. Defendants' assertion is persuasive. Section 9-30-1 states that the Superior Court "shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Sec. 9-30-1. However, invoking the Court's equitable powers for the purposes of establishing liability is inappropriate. See Employers' Fire Ins. Co. v. Beals, 240 A.2d 397, 400, 103 R.I. 623, 626 (1968) *abrogated on other grounds,* (holding that a declaratory judgment is an improper vehicle for relief if it would replace the need for factual determinations regarding liability to be made by the finder of fact).

Here, Defendants correctly argue that Count I of Plaintiffs' Second Amended Complaint is simply a recitation of the other causes of action asserted by the Plaintiffs. Specifically, Plaintiffs ask the Court to declare that: a) Attorney Davis and MDA engaged in conduct in variance with their obligations, and that conduct amounted to self-dealing and a conflict of interest; b) Attorney Davis and MDA engaged in conduct in violation of the Rhode Island Rules of Professional Conduct; c) Attorneys Davis and Abbott and MDA breached their respective fiduciary duties; d) Attorneys Davis and Abbott and MDA engaged in "fraudulent conduct" or otherwise misrepresented billings for legal work performed and/or the accounting relative to the handling of client funds and payments; e) Attorneys Davis and Abbott and MDA were negligent in performing their legal services; f) Attorneys Davis and Abbott and MDA engaged in a conspiracy to accomplish an "unlawful objective" in their legal representation; and g) & h) Plaintiffs are entitled to punitive damages, costs, and attorneys' fees.

This action is clearly for alleged legal malpractice and seeks the award of damages. Count I, requesting a declaratory judgment, requests that the Court make preliminary factual findings which would be appropriate for the finder of fact at trial. This is beyond the scope

intended by the Declaratory Judgments Act (R.I.G.L. ch. 9-30). It will not facilitate the termination of this action (which grows in complexity with each pleading). Plaintiffs cannot invoke the equitable jurisdiction of the Court as a substitute for their obligation of the burden of proof at trial. See Millett v. Hoisting Eng'r's Licensing Div. of Dep't of Labor, 377 A.2d 229, 233, 119 R.I. 285, 291 (1977) (citing 1 Anderson, Actions for Declaratory Judgments s 4 (2d ed. 1951)) ("The purpose of declaratory judgment actions is to render disputes concerning the legal rights and duties of parties justiciable without proof of a wrong committed by one party against another, and thus facilitate the termination of controversies."); see also § 9-30-12 ("This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered. The remedy provided by this chapter shall be cumulative and shall not exclude or prevent the exercise of any other right, remedy, or process heretofore allowed by law or by previous enactment of the legislature.").

Finally, declaratory relief is discretionary under the act. Sec. 9-30-6. To avoid increased complexity, confusion and additional costs to the parties the Court denies the Plaintiff's request for Declaratory Judgment. Plaintiffs' prayer for relief under §§ 9-30-1 et seq. is denied and Count I of the Second Amended Complaint is dismissed as to all Defendants.

B

Motion to Dismiss Counts II, IV, VII, X, XI is Time-Barred As Against Attorneys Abbott & Davis and MDA

Defendants argue that various causes of action, as to all Defendants, are time-barred because Plaintiffs failed to assert their claims within the requisite three-year statute of limitations. These claims pertain to the legal representation provided to the Plaintiffs by the

Defendants in 2009 and 2010. Suit was filed in August of 2012, but claims against Attorney Abbott were not asserted until August of 2015. Section 9-1-14.3 states in pertinent part:

> "Notwithstanding the provisions of §§ 9-1-13 and 9-1-14, an action for legal malpractice shall be commenced within three (3) years of the occurrence of the incident which gave rise to the action; provided, however, that:
>
> (1) . . .
>
> (2) In respect to those injuries due to acts of legal malpractice which could not in the exercise of reasonable diligence be discoverable at the time of the occurrence of the incident which gave rise to the action, suit shall be commenced within three (3) years of the time that the act or acts of legal malpractice should, in the exercise of reasonable diligence, have been discovered."

As indicated in the express language of this statute, the Plaintiffs must exercise reasonable diligence in prosecuting the claim and discovering the malpractice.[3] During oral argument Defendants' counsel contended that when a claim is beyond the three-year limit, the face of the complaint must demonstrate why the claim could not be timely discovered through the exercise of reasonable diligence. Plaintiffs' counsel countered that he was not the original counsel of record and thus, could not be certain about the precise reasons for the delay.

In claiming that the face of the complaint must disclose the justification for the delay, Defendants rely on Martin v. Howard, 784 A.2d 291, 297 (R.I. 2001). In Martin, the high court, after review of the plaintiff's complaint, concluded that "[the plaintiff] should have known by the end of May 1995 . . . about the nature of her alleged injuries and the defendants' role." 784 A.2d

[3] Our Supreme Court recognizes "an exception to the strict application of the statute of limitations in legal malpractice cases known as the 'discovery rule,' which is set forth in § 9-1-14.3(2). Mendes v. Factor, 41 A.3d 994, 1005 (R.I. 2012). The discovery rule exception serves "to protect individuals suffering from latent or undiscoverable injuries who then seek legal redress after the statute of limitations has expired for a particular claim." Sharkey v. Prescott, 19 A.3d 62, 66 (R.I. 2011) (quoting Canavan v. Lovett, Schefrin and Harnett, 862 A.2d 778, 783 (R.I. 2004)) (citation omitted).

at 297. Here, the Plaintiffs' Second Amended Complaint does not provide this Court with a definitive date of when Plaintiffs' claims accrued, like the time period noted by the court in Martin. Given the contentious nature of this case, this Court is of the opinion that completion of discovery is the fairest way to reach an eventual resolution of this dispute. This Court does not stay discovery.

The motion to dismiss Counts II, IV, VII, X, and XI as time-barred requires a more factual inquiry, and as such, would be more appropriate for a summary judgment motion. Accordingly, this portion of the motion to dismiss is denied without prejudice. As the Court continues to retain discretion to dismiss the complaint if the reason for the delay is not adequately set forth, Plaintiffs are advised to add appropriate language to the complaint forthwith, or risk future peril. See Barrette, 966 A.2d at 1235.

C

Counts II, IV, VII, X, XI, XII — 12(b)(6) Failure to State a Claim

Defendants argue that their Motion to Dismiss as to Counts II and XI should be granted because Restitution and Accounting are not causes of action but rather are mere remedies, and thus cannot be asserted as separate claims. "The terms restitution and unjust enrichment are interchangeable to denote a basis of civil liability, distinct from contract or tort, premised on the basic principle that someone who is unjustly enriched at the expense of another is subject to liability in restitution." Professor Colleen Murphy, R.I. Bar Journal Vol. 15, Recognizing Restitutionary Causes of Action & Remedies in Civil Litigation. "To recover for unjust enrichment, a claimant must prove: (1) that he or she conferred a benefit upon the party from whom relief is sought; (2) that the recipient appreciated the benefit; and (3) that the recipient accepted the benefit under such circumstances 'that it would be inequitable for [the recipient] to

retain the benefit without paying the value thereof.'" Dellagrotta v. Dellagrotta, 873 A.2d 101, 113 (R.I. 2005) (quoting Bouchard v. Price, 694 A.2d 670, 673 (R.I. 1997)).

Here, although this Court recognizes Plaintiffs' claim for Unjust Enrichment as a valid cause of action, as opposed to Defendants' insistence that it is merely a remedy, Plaintiffs assert claims for both Unjust Enrichment (Count VIII) and Restitution (Count II) in the Second Amended Complaint. Given that these claims are essentially the same cause of action, Count II is dismissed. The Court is presently inclined to amend Count VIII to contain a prayer for restitution, if the motion is brought promptly.

Additionally, our Supreme Court, pursuant to its equitable jurisdiction, has long recognized a cause of action of accounting. See Caton v. Caton, 59 A.2d 853, 856, 74 R.I. 208, 214 (R.I. 1948) ("It has been held that a bill in equity for an accounting 'imports an offer on the part of the complainant to pay any balance that may be found against him * * *."). In the instant case, Count XI for Accounting includes "(1) a short and plain statement of the claim showing that the [Plaintiffs] [are] entitled to relief, and (2) a demand for judgment for the relief [Plaintiffs] seek[]," which comports with Rule 8(a), and therefore, Defendants' Motion to Dismiss the Accounting claim is denied. Dellefratte v. Estate of Dellefratte, 941 A.2d 797, 798 (R.I. 2007). This Court finds that Plaintiffs' claim for an Accounting is a valid cause of action and therefore, Defendants' motion to dismiss as to Count XI is denied.

Regarding the 12(b)(6) motion as it applies to Plaintiffs' Fraud claim (Count VII), Plaintiffs have not specified the grounds for this cause of action as required by Rule 9(b) of the Superior Court Rules of Civil Procedure. During oral arguments, Plaintiffs acknowledged that they did not allege facts with specificity and thus, Defendants' motion to dismiss as to Count VII is conditionally granted. Plaintiffs are granted permission to move to amend Count VII by

enumerating specific facts in support of their fraud claim. If they fail to do so, Count VII will be dismissed.

As to the remainder of Defendants' argument that Counts IV, X, and XII fail to assert a claim upon which relief can be granted, the Court finds those contentions unpersuasive at this motion to dismiss stage. Although Defendants attempt to lead the Court into the study of minutia, pursuant to Rhode Island's liberal pleading standard, Plaintiffs have sufficiently pled facts that "give the opposing party fair and adequate notice of the type[s] of claim[s] being asserted," and Rule 8(a) of the Superior Court Rules of Civil Procedure do not require them to "plead the ultimate facts or precise legal theory upon which the claim is based." Dellefratte, 941 A.2d at 798. Accordingly, Defendants' motion to dismiss as to Counts IV, X, and XII is denied.

IV

Conclusion

In regard to the Second Amended Complaint, Count I is dismissed as to all Defendants. The motion to dismiss Counts II, IV, VII, X, and XI as time-barred is denied without prejudice. Plaintiffs are granted permission to move to amend Count VII by enumerating specific facts in support of their fraud claim. If they fail to do so within fifteen days of this Decision, Count VII will be dismissed. The remainder of Defendants' motion to dismiss as to Counts IV, X, and XII is denied.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	John C. Ponte, Individually and as Sole Shareholder of Dream House Mortgage Corporation, et al. v. Mark Davis, et al.
CASE NO:	PC 2012-4240
COURT:	Providence County Superior Court
DATE DECISION FILED:	April 15, 2016
JUSTICE/MAGISTRATE:	Lanphear, J.
ATTORNEYS:	
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