STATE OF VERMONT

SUPERIOR COURT Washington Unit	CIVIL DIVISION No. 22-CV-1147

BOOKCHIN & DURRELL, P.C.,
Plaintiff,

v.

PORTER MEDICAL CENTER, INC., and THE UNIVERSITY OF VERMONT HEALTH NETWORK, INC.,
Defendants.

RULING ON DEFENDANTS' MOTION TO DISMISS

This is a most unusual case. Plaintiff law firm Bookchin & Durrell, PC. (B&D) provided legal representation to the tort-plaintiff in a medical malpractice case against, among others, Porter Hospital, Inc. and Porter Medical Center, Inc.[1] *Fisk v. Pitts*, No. 204-12-16 Ancv (Vt. Super. Ct.). B&D's hopes for compensation on a contingent fee basis were dashed when the jury found in favor of the tort-defendants and no damages were awarded. In this case, B&D is suing Defendants Porter Medical Center and The University of Vermont Health Network, Inc. claiming that their production of the tort-plaintiff's medical records before the malpractice suit was filed omitted a key document causing B&D to mistakenly believe that its client had a strong case.[2] Based on that mistaken belief, it undertook the representation on a contingency basis, which it would not have done had the key document been produced pre-suit. In this case, among other things, it hopes to recover its litigation expenses from the malpractice suit. It characterizes its claims in this case as breach of contract, negligence, negligent misrepresentation, breach of fiduciary duty, consumer fraud, and conversion. Defendants seek dismissal of all claims.

Allegations

The key document was a set of discharge instructions given to the tort-plaintiff after an emergency room visit. In the course of discovery, it eventually became apparent that an ultrasound for the following day had been ordered, which presumably complied with standard of care, and the tort-plaintiff was so advised in the actual discharge instructions provided to him. The tort-plaintiff did not show up for the ultrasound, which would have identified the blood clot that eventually led to the amputation of his leg.

Prior to filing the malpractice lawsuit, the tort-plaintiff's medical records were

[1] The malpractice litigation was undertaken by B&D and another law firm. B&D represents that the other law firm assigned its rights to bring the claims B&D asserts in this case to B&D and thus has no interest in this litigation.

[2] To be clear, the tort-plaintiff is not a party to this suit. The only plaintiff here is B&D.

requested from Defendants, which produced them. The records then produced, however, were incomplete and did not include the actual discharge instructions showing that an ultrasound had been ordered. B&D showed the records obtained to its medical expert, who advised that the omission of an ultrasound order and a discharge instruction as to it was malpractice and advised B&D to take the case on a contingency basis, which it did. The malpractice suit was filed in December 2016. That an ultrasound in fact had been ordered became apparent at the deposition of the emergency room doctor in November 2017. Documentation of discharge instructions reflecting that order first were identified and disclosed in May 2018. The jury trial was held in late May 2019.[3]

The complaint fairly reads as though B&D is attempting to turn a discovery dispute that should have been (and presumably was) handled under the discovery rules in the underlying litigation into a private claim by counsel for damages in this case. In its opposition to dismissal, B&D certifies that this is not so:

> This case is not about a discovery dispute. The dispute is over the lack of complete medical records provided to the Plaintiff before suit was ever filed. On the advice of Plaintiff's medical consultant, a lawsuit was commenced on an incomplete set of medical records. The allegations in the complaint detailed the events occurring after suit was filed mostly serve to illustrate the ineptitude of the Defendants and their counsel and to support a claim for punitive damages.

B&D's Opposition to Dismissal at 5 (filed July 5, 2022). The court accepts this assertion as a clarification of the complaint and thus understands the pre-suit request for records as simply an ordinary request for a patient's medical records from a medical provider by that patient, whether directly or through an agent, such as an attorney.

Analysis

B&D claims that Defendants' records production breached one or more "contracts" to produce the tort-plaintiff's complete set of records, that there was some kind of "special relationship" revealing that the initial production was negligent, that it amounted to a negligent misrepresentation on which B&D relied, that it breached a fiduciary duty, that it was an unfair method of commerce in violation of Vermont's Consumer Protection Act, 9 V.S.A. §§ 2451–2466, and that it amounts to conversion.

All these claims suffer an elementary defect. There are no allegations whatsoever that could support any inference that B&D ever was acting in any capacity other than as attorneys for their client. "[T]he relationship between attorney and client is that of agent and principal." *Agency of Nat. Res. V. Towns*, 168 Vt. 449, 453 (1998). Thus, whatever B&D did in the underlying litigation, or preliminary to it, it was doing as agent for its principal, the tort-plaintiff. If there were some way that Defendant's pre-suit records production could amount to breach of contract, negligence, negligent misrepresentation, breach of fiduciary duty, consumer fraud, or conversion, those claims would belong to the tort-plaintiff, not his attorney.

[3] If there were other malpractice claims submitted to the jury, B&D has not described them here.

All claims spring from a pre-suit request to Defendants for a complete set of the tort-plaintiff's medical records. B&D makes one highly conclusory allegation that *it* had one or more "contracts" with Defendants to that effect. See *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 10, 184 Vt. 1 (the court is not required to accept "[c]onclusory allegations or legal conclusions masquerading as factual conclusions" (citation omitted)). There are no allegations hinting at why anyone would need to have any sort of contract to obtain the patient's records—the patient had a right to them regardless. See 45 C.F.R. § 164.524 (access of individuals to protected health information). Nor are there any allegations explaining what the contracts may have been other than the cursory allegations that the records had simply been requested. The right to the records belonged to the patient. If B&D actually made the request with its client's authorization, it did so as his agent. If B&D somehow negotiated some kind of contract as a means to obtain those records, it did that as his agent. When an agent makes a contract with a third party for a principal, the parties to the contract are the third party and the principal, not the agent. Restatement (Third) Of Agency § 6.01.

The same problem pervades the rest of B&D's claims, all of which are torts. If any of those claims could properly apply in the circumstances of a patient's request for copies of his medical records, the medical provider's duties would run to the patient, not the patient's attorney.

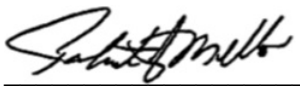
This problem with B&D's claims is pointed out throughout Defendants' motion and briefing. B&D simply ignores it, effectively placing itself in its client's shoes without explanation. This is insufficient. As to any allegations that might reveal some way in which the claims asserted in this case might belong to B&D, the complaint is far too conclusory to provide fair notice.

It is unnecessary to address Defendants' other arguments in support of dismissal.

Order

For the foregoing reasons, Defendants' motion to dismiss is granted. Counsel for Defendants shall submit a form of judgment. V.R.C.P. 58(d).

SO ORDERED this 29th day of September, 2022.



Robert A. Mello
Superior Judge