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 B&D'S MOTION TO ALTER OR AMEND THE JUDGMENT

Plaintiff law firm Bookchin & Durrell, PC, (B&D) represented a plaintiff in a medical malpractice case on a contingent fee basis. It took the case based on its view of the merits of the claim, as assessed based on the prelitigation production of medical records by the provider. The case turned out to have no merit; verdict for the defendants. In this case, B&D sought to recoup its litigation expenses from the records custodians on various legal theories all arising out of its position that a more accurate prelitigation records production would have caused it to realize that its then-potential client did not have a meritorious case, and it thus would not have taken the case, at least on a contingent fee basis. The court granted Defendants' motion to dismiss on September 29, 2022, and it entered judgment on October 4 over B&D's objection that it *really* had filed this suit not for its own benefit but on behalf of the tort-plaintiff, presumably to recover expenses that the tort-plaintiff had never incurred.

B&D now has filed a Rule 59(e) motion to alter or amend, once again assuming the posture of the party with the claim. It argues that the court should not have addressed agency law in its dismissal decision because Defendants never said the words "agent" or "principal" in the dismissal motion and agency law never came up. Regardless, it argues that an agent is empowered to sue third parties who contract with the principal in many circumstances. And finally, as to the tort claims, it argues that the court should have adopted a new duty protecting lawyers considering whether to take cases on a contingent fee basis from the risk of an incomplete prelitigation production by medical records custodians.

Defendants' dismissal motion was predicated throughout on the lack of any duty or contract right actionable by B&D due its relationship to its client or potential client and Defendants vis-à-vis the prelitigation records production. That relationship was one of agency, either as attorney or as a potential client's agent in requesting medical records from the provider. Agency law was at the root of these arguments. Regardless of the language used in the motion, the court's decision should not have caused any unfair surprise.

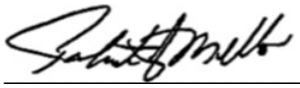
In its decision, the court also cited the general rule that an agent cannot sue on a contract between the principal and a third party. In its Rule 59(e) motion, B&D relies on a law review article from 1911 to make the uncontroversial point that this general rule has some limited exceptions. While true, it makes no difference here. There was no contract alleged in this case, and thus there was no way to reasonably infer that any such exception could possibly apply.

Finally, B&D asks the court to adopt a new duty protecting personal injury lawyers from the risk that records custodians might innocently but incompletely produce medical records of potential clients prior to the inception of an attorney–client relationship that causes the attorney to take a meritless case on a contingent fee basis. Neither in the current motion nor in B&D's opposition to dismissal did it hint at what "compelling social policy" could possibly support doing so. *Langle v. Kurkul*, 146 Vt. 513, 521 (1986). The court declines to adopt any such duty in the circumstances of this case.

Order

For the foregoing reasons, B&D's Rule 59(e) motion is denied.

SO ORDERED this 13th day of December, 2022.



Robert A. Mello
Superior Judge