DOCKET NO.: CV 17 6029852	:	SUPERIOR COURT
JONATHAN CARROLL, ET AL	:	JUDICIAL DISTRICT OF NEW LONDON
VS.	:	at NEW LONDON
ALBERT LYMAN, ET AL	:	OCTOBER 19, 2018

MEMORANDUM OF DECISION RE:
MOTION TO DISMISS THIRD PARTY COMPLAINT, #125

The third party defendant, Kristen M. Brandt, (Attorney Brandt), moves to dismiss the third party complaint filed by the defendants/third party plaintiffs, Irene Heege and CTRE, LLC, d/b/a Berkshire Hathaway Home Services New England Properties, claiming that the court lacks subject matter jurisdiction for the reason that the third party plaintiffs lack standing to assert the claims. For the reasons stated below, the court grants the motion to dismiss.

FACTS

The plaintiffs, Jonathan Carroll and Lorri Carroll, brought this action against the defendants, Albert Lyman, Karen Lyman, Irene Heege, and CTRE, LLC, d/b/a Berkshire Hathaway Home Services New England Properties (CTRE), alleging fraud, negligent misrepresentation, negligence per se, and a violation of the Connecticut Unfair Practices Act (CUTPA). The Carrolls had purchased property located at 439 Oxoboxo Dam Road, Montville, from the defendants, Albert and Karen Lyman on July 1, 2015. Heege and CTRE acted as the real estate broker and agent for the Lymans in the transaction. The property

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fronted on a lake, and the plaintiffs allege that according to a property listing created and advertised by Heege and CTRE it included direct lake frontage as well as a private dock. Attorney Brandt represented the Carrolls in the transaction.

After they purchased the property, the Carrolls learned that the pathway down to the lake as well as the dock were not on their property. The Carrolls allege that the Lymans, CTRE and Heege lied to them about the ownership of the dock, which was in fact located on their neighbor's property. The Carrolls filed suit against the Lymans, CTRE, and Heege.

On May 18, 2018, CTRE and Heege moved to implead Attorney Brandt, alleging that she "may be liable to [them] for all or part of the claims made by the [Carrolls]." The motion to implead was granted, and a third party complaint was filed on July 6, 2018.

The third party complaint is in two counts. The first count is labeled "Common Law Indemnification," claiming that Attorney Brandt was "negligent in not providing [the Carrolls] with a copy of the title search prior to the purchase and/or not explaining to [the Carrolls] the details of the title search. . ." Third party complaint, first count, ¶18. CTRE and Heege as the third party plaintiffs allege that Attorney Brandt is liable to them because of her alleged negligence.

The second count is labeled "breach of fiduciary duty." The third party plaintiffs allege that Attorney Brandt breached her fiduciary duty as counsel for the Carrolls in "not providing [the Carrolls] with a copy of the title search prior to the purchase and/or not explaining to her clients the details of the title search. . . and/or not giving the [Carrolls] the option to purchase an owners (sic) title insurance policy." Third party complaint, second

count, ¶¶ 25, 26. The allegations appear to set forth a claim that the direct and proximate cause of the losses and damages sustained by the plaintiffs was Attorney Brandt's breach of the fiduciary duty she owed to the Carrolls in her representation to them at the real estate closing.

DISCUSSION

"The standard of review for a court's decision on a motion to dismiss is well settled. A motion to dismiss tests, *inter alia*, whether, on the face of the record, the court is without jurisdiction. . . When a. . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessary implied from the allegations, construing them in a manner most favorable to the pleader. . . The motion to dismiss. . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone." (Internal quotation marks omitted.) *Gold* v. *Rowland*, 296 Conn. 186, 200-01, 994 A.2d 106 (2010).

"A motion to dismiss. . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court." *Caruso* v. *Bridgeport*, 285 Conn. 618, 627, 941 A.2d 266 (2008). "The motion to dismiss shall be used to assert (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, and (5) insufficiency of service and process. This motion shall always be filed with a supporting memorandum of law, and where appropriate, with supporting affidavits as

to facts not apparent on the record." Practice Book § 10-31(a). "[T]he question of subject matter jurisdiction, because it addresses the basic competency of the court, can be raised by any of the parties, or by the court sua sponte, at any time. . . Moreover, [t]he parties cannot confer subject matter jurisdiction on the court, either by waiver or by consent." (Internal quotations marks omitted.) *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 411, 518, 970 A.2d 583 (2009). "[T]he plaintiff bears the burden of proving subject matter jurisdiction, whenever and however raised." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *New London*, 265 Conn. 423, 430, n.12, 829 A.2d 801 (2003).

"Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless [one] has, in an individual or representative capacity, some real interest in the cause of action." *Gold* v. *Rowland*, supra, 296 Conn. 207. The burden of demonstrating that a party has standing to bring an action is on the plaintiff. See *Seymour* v. *Region One Board of Education*, 274 Conn. 92, 104, 874 A.2d 742, cert. denied, 546 U.S. 1016, 126 S.Ct. 659, 163 L.Ed.2d 526 (2005).

"Standing is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interest and that judicial decision which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented." (Internal quotation marks omitted.) *Burton* v. *Commissioner of Environmental Protection*, 291 Conn. 789, 802, 970 A.2d 640 (2009).

"[B]ecause the issue of standing implicates subject matter jurisdiction it may be a proper basis for granting a motion to dismiss. . . . [S]ee Practice Book § 10-31 (a) (1)." (Citation omitted.) *Electrical Contractors, Inc.* v. *Dept. of Education*, 303 Conn. 402, 413, 35 A.3d 188 (2012). "If . . . the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed." (Internal quotation marks omitted.) *Burton* v. *Dominion Nuclear Connecticut, Inc.*, 300 Conn. 542, 550, 23 A.3d 1176 (2011).

First count – common law indemnification

The defendant, Attorney Brandt, contends that the third party plaintiffs lack standing to assert a claim for common law indemnification. The defendant argues that although count one is identified as a claim for common law indemnification, it is a claim for professional negligence against an attorney, specifically for legal malpractice. The first count alleges that Attorney Brandt failed to adequately advise or inform her clients, the Carrolls, in their purchase of the property. The third party plaintiffs argue that the first count states a cognizable claim for common law indemnification.

To properly assert a claim for indemnification, a defendant must show that: (1) the party against whom the indemnification is sought was negligent; (2) that party's active negligence, rather than the defendant's own passive negligence, was the direct, immediate cause of the resulting injury; (3) the other party was in control of the situation to the exclusion of the defendant seeking reimbursement; and (4) the defendant did not know of the other party's negligence, had no reason to anticipate it, and reasonably could rely on the

other party not to be negligent. *Kaplan* v. *Merberg Wrecking Corp.*, 152 Conn. 405, 416, 207 A.2d 732 (1965). *Smith* v. *New Haven*, 258 Conn. 56, 66, 779 A.2d 104 (2001).

The first prong of the test for common law indemnification would be to determine whether Attorney Brandt can be said to have been negligent in relation to Heege and CTRE. It is axiomatic that a finding of negligence is predicated on the existence and breach of a duty. *Catz* v. *Rubenstein*, 201 Conn. 39, 44, 513 A.2d 98 (1986). The question of whether there is a duty is a matter of law for the court. *Murillo* v. *Seymour Ambulance Association, Inc.*, 264 Conn. 474, 479, 823 A.2d 1202 (2003). "[Our Supreme Court] has stated that the test for the existence of a legal duty of care entails (1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result [foreseeability], and (2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case. Additionally, a duty to use care may arise from a contract, from a statute, or from circumstances under which a reasonable person, knowing what he knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result from his act or failure to act." (Citation omitted; internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 539, 51 A.3d 367 (2012).

Determining when attorneys should be held liable to parties with whom they are not in privity is a question of public policy. 3 F. Harper, F. James & O. Gray, The Law of Torts

(2d Ed. 1986), § 18.6, p. 730. Normally, an action for negligence against an attorney requires privity of contract, and therefore, an action cannot lie in favor of a person other than the attorney's client even if that person has been adversely affected by the attorney's performance of the legal work. Attorneys do not owe persons other than their own clients a duty, and are therefore not liable to persons other than their clients for negligence acts. *Kawczyk* v. *Stingle*, 208 Conn. 239, 244, 543 A.2d 733 (1988). As the Supreme Court noted, "a central dimension of the attorney-client relationship is the attorney's duty of entire devotion to the interest of the client." Id. 246. The undisputed facts in this case clearly allege that Attorney Brandt was only retained to represent the Carrolls. Therefore, absent certain recognized exceptions, Attorney Brandt owed the Carrolls – and no one else – her undivided duty of loyalty and care.

A recognized exception to the above general rule is a showing by the third party seeking to recover from the attorney that he/she/it was the intended or foreseeable beneficiary of the attorney's services. Factors to consider to include whether the primary or direct purpose of the transaction the attorney undertook was to benefit the third party, foreseeability of the harm, the proximity of the injury to the conduct complained of, the policy of preventing future harm, and the burden on the legal profession that would result from imposition of the liability. Id., 244-45. This exception has most often been applied in cases brought by beneficiaries against counsel who allegedly negligently drafted a will or trust instrument. See *Stowe* v. *Smith*, 184 Conn. 194, 441 A.2d 81 (1981). Unlike third party beneficiary cases, the primary – and perhaps only purpose – of Attorney Brandt's

involvement in the purchase and sale of the subject property was for the benefit of the Carrolls, her clients.[1]

The predominant inquiry must focus on one criterion: whether the principal purpose of Attorney Brandt's retention to provide legal service to the Carrolls was for the benefit of Heege and CTRE. The answer is no. The court finds that in the absence of a duty owed by Attorney Brandt to Heege and/or CTRE, there can be no finding of negligence. Therefore, *even under a theory of common law indemnification*, the third party plaintiffs fail to satisfy the elements of such a claim.[2]

Second count – breach of fiduciary duty

The same analysis applies to the second count – breach of fiduciary duty. The second count alleges that Attorney Brandt was under a fiduciary duty to the Carrolls to "provide and explain to the [Carrolls] all information obtained by her with regards to the subject property." Third party complaint, second count, ¶ 22). "[Attorney] Brandt breached

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[1]Other exceptions to the general rule that attorneys should be held liable to parties with whom they are in privity include when an attorney engaged in an undertaking for the joint benefit of the two parties – buyer and seller – in a real estate transaction, and when an attorney has expressly, voluntarily assumed a gratuitous undertaking. *Chicago Title Ins. Co., et al* v. *Bologna, et al,* Superior Court, judicial district of Hartford, Docket No. CV 03-0825830, (November 9, 2006).

[2] The court also agrees with the third party defendant that the first count, although labelled as a claim for common law indemnification, is simply a claim for legal malpractice being asserted against Attorney Brandt. According to Heege and CTRE, Attorney Brandt is liable to them because of her alleged negligence in representing the Carrolls. Under the same analysis above, the first question is whether or not she owed a duty of care to a non-client. The court has analyzed this question in terms of the elements of common law indemnification. The result would be the same whether it was a claim for common law indemnification or a masked claim of legal malpractice. In any event, there is no duty, and therefore no standing to raise these claims by the third party plaintiffs.

her fiduciary duty as counsel for the [Carrolls][3] in not providing the Carrolls with a copy of the title search . . . and/or not explaining . . . the details of the title search . . ." Id. ¶24.

As analyzed above, neither Heege nor CTRE ever had an attorney-client relationship with Attorney Brandt, and as a result, she never owed them any legal duty. The third party plaintiffs, Heege and CTRE, lack standing to bring this third party complaint, depriving the court of subject matter jurisdiction.

CONCLUSION

For the reasons stated above, the motion to dismiss the third party complaint is granted.

Swienton, J.

[3] The third party complaint, second count, ¶ 24 states incorrectly that Brandt was acting as counsel for the plaintiff's (sic). The plaintiffs in the third party complaint would be Heege and CRTRE.