

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

HERMAN TRUST,)
)
 Plaintiff,) CI 13-1888
)
 v.) **ORDER**
)
 BRASHEAR 711 TRUST,)
)
 Defendant.)

HERMAN TRUST,)
)
 Plaintiff,) CI 13-1889 ←
)
 v.) **ORDER**
)
 BRASHEAR, L.L.P.,)
)
 Defendant.)

#35 FILED
IN DISTRICT COURT
DOUGLAS COUNTY NEBRASKA
OCT 11 2013
JOHN M. FRIEND
CLERK DISTRICT COURT

HERMAN TRUST,)
)
 Plaintiff,) CI 13-1898
)
 v.) **ORDER**
)
 KERMIT A. BRASHEAR,)
)
 Defendant.)

This matter is before the Court on the motion of the defendants pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(1), § 6-1112(b)(6) and § 6-1112(b)(7) arguing that the complaints filed by plaintiff in each of the above entitled matters should be dismissed. A hearing was held on the motion to dismiss on October 1, 2013. At the hearing, plaintiff was represented by James



Waldron and Christopher Tjaden, and defendants were represented by Steven Davidson. Evidence was adduced and, the court after reviewing the arguments and briefs of the parties, finds the motion to dismiss in each of the above entitled matters should be overruled and denied for the reasons outlined below.

Facts

Plaintiff filed complaints on March 7, 2013 against the defendants alleging defendant Brashear 711 Trust executed and delivered to plaintiff on January 17, 2011 a promissory note for a loan in the principal amount of \$764,000.00 and defendants, Brashear, L.L.P. and Kermit Brashear, executed written guarantees for the loan at the same time. Plaintiff alleges defendant Brashear Trust 711 has defaulted on the loan and seeks payment from all the defendants.

At the hearing on defendants' motion to dismiss, defendants offered and the court received into evidence an affidavit with attachments from Kermit Brashear. E1. Plaintiff also offered and the court received into evidence an affidavit with attachments from Robert Mooney, an attorney who is a partner with the law firm representing plaintiff. E2.

The affidavits and attachments show that Richard Herman, the trustee of plaintiff Herman Trust, was represented and advised in numerous legal matters for over thirty years by defendant Kermit Brashear and his law firm defendant Brashear, L.L.P. On January 17, 2011 the promissory note that is the center of plaintiff's complaints was executed by defendant Brashear 711 Trust to refinance defendant Kermit Brashear law firm's business debt. The loan was secured by written guarantees from defendant Kermit Brashear and his law firm, defendant Brashear, L.L.P. The promissory note was also secured by a deed of trust on the law firm's office building owned by defendant Brashear 711 Trust. Defendant Kermit Brashear prepared all the documents associated with the promissory note.

Subsequent to this loan, Richard Herman terminated his attorney-client relationship with defendant Kermit Brashear and retained his present counsel in August, 2012. His present counsel notified defendant Kermit Brashear by certified letter on October 26, 2013 that it was putting him on notice of a potential professional malpractice action being brought against him by plaintiff arising from the loan in January, 2011. Plaintiff being concerned about the two year statute of limitations for professional negligence, notified defendant Kermit Brashear in January 2013 that they would proceed forthwith with a professional negligence action against him unless

he signed a tolling agreement. On January 16, 2013 the parties signed a tolling agreement for one year. The tolling agreement is attached to each of the affidavits received into evidence and provides in part: “[The parties] . . . desire to defer immediate commencement of any litigation against Kermit A. Brashear or Brashear LLP **arising out of the alleged professional negligence** of Kermit A. Brashear in providing legal services and counsel to Herman” (Emphasis added). The tolling agreement also provides “the parties agree that the running of any statute of limitations or statute of repose under the laws of Nebraska or the laws of any other applicable jurisdiction, **with respect to any claim** by Herman against Kermit A. Brashear and Brasher LLP, will be tolled from the Effective Date for a period one year” (Emphasis added). Prior to the tolling agreement being signed, plaintiff insisted that defendant Kermit Brashear’s legal malpractice insurance carrier was notified and consented to the tolling agreement.

Legal analysis and ruling

Motion to dismiss pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(1)

Neb. Ct. R. Pldg. § 6-1112 (b)(1) provides that a party may move to dismiss a complaint for “lack of jurisdiction over the subject matter.” As I understand defendant’s argument, they argue the tolling agreement should be interpreted to mean plaintiff cannot bring any claim for a period of one year from the tolling agreement date of January 16, 2012. Therefore, since the plaintiff brought these actions prior to the one year period having elapsed, this court lacks subject matter jurisdiction.

First, the Nebraska Supreme Court in *Washington v. Conley*, 273 Neb. 908, 912-13, 734 N.W.2d 306, 310 (2007) stated:

It is well established . . . that there are two ways a party may challenge the court’s subject matter jurisdiction under rule 12(b)(1). The first way is a facial attack which challenges the allegations raised in the complaint as being insufficient to establish that the court has jurisdiction over the subject matter of the case. In a facial attack, a court will look only to the complaint in order to determine whether the plaintiff has sufficiently alleged a basis of subject matter jurisdiction. The second type of challenge is a factual challenge where the moving party alleges that there is in fact no subject matter jurisdiction, notwithstanding the allegations presented in the complaint. In a factual

challenge, the court may consider and weigh evidence outside of the pleadings to answer the jurisdictional question.

A motion to dismiss becomes a factual challenge to the court's subject matter jurisdiction when the moving party supports its motion by presenting affidavits or other evidence properly brought before the court. The party opposing the motion must then offer affidavits or other relevant evidence to support its burden of establishing subject matter jurisdiction.

Since the defendants and plaintiff have both offered evidence, I will consider the motion to dismiss for lack of subject matter jurisdiction as a factual challenge. The statute of limitations for a professional negligence claim is two years unless the plaintiff can show an exception applies. Neb. Rev. Stat. § 25-222 (Reissue 2008); *Guinn v. Murray*, 286 Neb. 584, ___ N.W.2d ___ (2013). However, the statute of limitations is five years for an action based on a breach of a written contract. Neb. Rev. Stat. § 25-205 (Reissue 2008). The promissory note was executed on January 17, 2011. Therefore, unless an exception applied, a professional negligence claim arising from the promissory note would have expired on January 16, 2013. In January of 2013, plaintiff's only concern then would have been the professional negligence statute of limitations. The plaintiff had many years left to bring a cause of action on the promissory note.

Further, the tolling agreement specifically states the parties "desire to defer immediate commencement of any litigation against Kermit A. Brashear or Brashear LLP **arising out of the alleged professional negligence** of Kermit A. Brashear in providing legal services and counsel to Herman" (Emphasis added). The subsequent clause in the tolling agreement that states "with respect to any claim," despite defendants' argument to the contrary, clearly refers to claims for professional negligence. I understand that Kermit Brashear was in part concerned with his reputation when he agreed to sign the tolling agreement. And certainly the bringing of these lawsuits could have some effect on his reputation. However, this does not change the fact that the reason for the tolling agreement was to ensure any professional negligence claims would not be time barred. The tolling agreement applied only to professional negligence claims and this is why plaintiff wanted defendant Kermit Brashear's legal malpractice insurance carrier on notice. Based on the evidence and arguments of counsel, I find defendants' motion to dismiss for lack of subject matter jurisdiction has no merit.

Motion to dismiss pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6).

Neb. Ct. R. Pldg. § 6-1112 (b)(6) provides that a party may move to dismiss a complaint if “the pleading fails to state a claim upon which relief can be granted.” In *Britton v. City of Crawford*, 282 Neb. 374, 803 N.W.2d 508 (2011), the Supreme Court stated: “Because a motion pursuant to § 6-1112(b)(6) tests the legal sufficiency of the complaint, not the claim’s substantive merits, a court may typically look only at the face of the complaint to decide a motion to dismiss. Dismissal under § 6-1112(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.” *Id.* at 379, 803 N.W.2d at 513. The Court in *Britton* went on to say: “However, § 6-1112(b) provides that when matters outside of the pleadings are presented by the parties and accepted by the trial court with respect to a motion to dismiss under § 6-1112(b)(6), the motion ‘shall be treated’ as a motion for summary judgment as provided in Neb. Rev. Stat. §§ 25-1330 to 25-1336 (Reissue 2008), and the parties shall be given reasonable opportunity to present all material made pertinent to such a motion by statute.” *Id.* Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Bamford v. Bamford, Inc.*, 279 Neb. 259, 777 N.W.2d 573 (2010).

Since the court accepted evidence outside the pleadings, the court will treat defendants’ motion to dismiss pursuant to § 6-1112(b)(6) as a motion for summary judgment. As outlined above, I do not find the evidence shows the tolling agreement should be interpreted as defendants’ argue. In fact, as outlined above, I find the opposite to be true. Therefore, defendants are not entitled to summary judgment.

Motion to dismiss pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(7).

Neb. Ct. R. Pldg. § 6-1112(b)(7) provides that a party may move to dismiss a complaint for “failure to join a necessary party.” “The presence of necessary parties to a suit is a jurisdictional matter that cannot be waived by the parties; it is the duty of the plaintiff to join all persons who have or may claim to have any interest that would be affected by the judgment.”

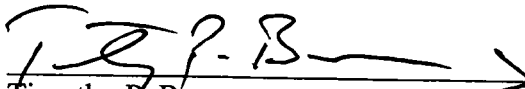
Pestal v. Malone, 275 Neb. 891, 894, 750 N.W.2d 350, 354 (2008). Defendants argue that all the parties should be joined in one action. While certainly the evidence against each defendant is overlapping, the plaintiff's complaints advance separate theories of recovery. The action against defendant Brashear 711 Trust is for default on a promissory note while the actions against defendants Kermit Brashear and Brashear L.L.P. are for their guarantees on the promissory note. Therefore, each defendant is not a necessary party in each of the actions filed by plaintiff. However, as discussed in my separate order on defendant Brashear 711 Trust's motion to consolidate pursuant to local rule 4-12 B, these actions may be able to be consolidated for trial at a later date.

IT IS THEREFORE ORDERED that the defendants' motions to dismiss are overruled and denied.

IT IS SO ORDERED.

Dated this 10 day of October, 2013.

BY THE COURT


Timothy R. Burns
District Court Judge

cc:

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