IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

THE BANK OF NEW YORK *et al*.	:	
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Plaintiffs	:	
	:	
v.	:	Case No.: CAL 02-21119 [*2003 MDBT 9*]
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	:	
RONALD SHEFF *et al.*	:	
	:	
Defendants.	:	

OPINION AND ORDER OF COURT

Before the Court are Defendants Ronald Sheff, Kimi Murakami, and Piper Rudnick LLP's ("Defendants") Motion For Summary Judgment, filed on June 5, 2003, and Plaintiffs The Bank of New York as Trustee, Eaton Vance Municipal Bond Fund, National Municipals Portfolio, High Yield Municipals Portfolio, and Maryland Municipals Portfolio's ("Plaintiffs") Opposition thereto, filed on July 3, 2003. This Court heard oral arguments on Defendants' Motion on July 15, 2003.

FACTS

On May 13, 1993, Prince George's County ("The County") issued $50 million in tax-exempt revenue bonds. The County acted as a conduit in the transaction and issued the bonds to raise funds for a private borrower, Greater Southeast ("The Borrower").[1] The County's role in the transaction was merely to afford the Borrower and Bondholders the benefit of a tax-exemption. The Borrower, in exchange, assumed all responsibility to repay the bondholders, of whom The Bank of New York became Trustee.[2] As collateral, the Borrower agreed to grant the Trustee a security interest in its receipts, including its accounts receivable.

In order for the bondholders' security interest to have priority over other potential creditors, it would have to be perfected. Perfection requires the filing of UCC-1 statements in the appropriate jurisdictions, as well as the filing of continuation statements, if necessary. The parties, after negotiations, determined that the Borrower would bear the burden of filing all necessary financing statements, including continuation statements. This decision was memorialized in three of the final transaction documents, the Master Trust Indenture[3], the Loan

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[1] All parties to the transaction were represented by counsel: the County was represented by Robert Ostrom of Knight, Manzi, Brennan, Ostrom & Ham, and it also retained Piper & Marbury, now Piper Rudnick LLP, ("Piper") to act as bond counsel to Prince George's County; the Borrower was represented by Grossberg Yochelson; and the original Trustee retained Jessamy, Fort & Botts.

[2] NationsBank was the original Trustee for the bondholders; however, The Bank of New York became Trustee when it purchased NationBank's trust department in December 1995.

[3] "...the [Borrower] shall keep, record, and file, at the expense of the [Borrower], all necessary financing statements and continuation statements or other renewals thereof..."

Agreement[4], and the Indenture of Trust[5], all of which expressly placed the obligation to file financing statements and continuation statements *solely* upon the Borrower.

A significant amount of work was required before these transaction documents were finalized. Piper, acting as bond counsel, drafted and circulated most of the documents which are now relevant to the resolution of the present dispute.[6] In addition, Piper either filed or caused to be filed financing statements in Maryland (specifically, in Baltimore and Prince George's County), but did not file financing statements in the District of Columbia. Thus, the Bondholders had a perfected security interest in Maryland, but no perfected security interest in D.C. For reasons the reliance upon which Plaintiffs and Defendants would later disagree, no one who was a party to these transactions would notice in a sufficient amount of time that perfection was not completed in D.C.

Meanwhile in the four years following the closing of the bond transactions, the Borrower, which was in financial distress, sold $15 million of its accounts receivable to another company, Daiwa Healthco-2, LLC ("Daiwa"). As an incentive for Daiwa to participate in the transaction, Daiwa required that it be allowed to obtain a first priority security interest in the District of Columbia receivables. This requirement was evidenced in transaction

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[4] **"...The Borrowers shall keep, record, and file at the expense of the Borrowers, all necessary financing statements and renewals thereof..."**

[5] **"...the Borrowers shall file such continuation statements as may be required..."**

[6] **Piper drafted and circulated *inter alia*: a detailed Closing Index in which it assigned to itself the "Responsibility" for the financing statements; the Maryland financing statements; financing statements for filing in Baltimore and Prince George's County; and Closing Instruction Sheets.**

documents which were sent by Daiwa to The Bank of New York weeks before closing.[7] Plaintiffs believed at that time that the Trustee had no discretion to approve or disapprove this sale to Daiwa, so it did nothing and the sale went through as planned.[8] Daiwa quickly perfected its security interest in D.C.

The Borrower continued to experience financial problems. In 1998, the Borrower issued its audited financial statements for the calendar year 1997 which disclosed the sale of certain receivables to Daiwa. Plaintiffs contend that this disclosure prompted Eaton Vance to inquire about this sale. Plaintiffs further contend that, in December of 1998 or January 1999, Plaintiffs learned that the Trustee's security interest was not perfected in D.C., and that Daiwa did have a perfected security interest in the same collateral in D.C. Despite efforts to replace the collateral sold to Daiwa, all negotiations failed and on May 26, 1999, The Bank of New York issued a Notice of Default. Almost immediately, the Borrower initiated bankruptcy proceedings in the District of Columbia.

The Bankruptcy Court witnessed a battle between Daiwa and Plaintiffs over who had a priority and a perfected security interest in the D.C. accounts receivable. Daiwa argued that it held the only perfected security interest because it was the only party to have filed financing statements

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[7] The documents provided that "[n]o effective financing statement or other instrument similar in effect covering any Receivable...is on file in any recording office, except those filed in favor of [Daiwa] relating to the Agreement." 4/3/97 Agreement at III-2.

[8] Plaintiffs also contend that the Trustee did not review or analyze the draft Daiwa agreement, although Plaintiffs do not dispute that it was sent a copy of the agreement.

in D.C. Plaintiffs argued that Daiwa was not entitled to have priority because it had knowledge when it entered into the agreement with the Borrower that the Trustee had made a good-faith mistake in not filing the financing statements in D.C. Daiwa, in turn, argued that even if the good-faith exception applied, the Trustee's priority lapsed when no continuation statements were filed on or before May 13, 1998. The Bankruptcy Court ultimately agreed with Plaintiffs that the good-faith exception applied, however, it adopted Daiwa's argument that the Plaintiffs lost their priority status when they failed to file continuation statements.

Subsequent to, and perhaps at least in part because of, the Bankruptcy Court's ruling, the parties settled. The settlement included the granting of a release of liability as to the parties involved in the bankruptcy proceedings *and their counsel*. Piper was not involved in the bankruptcy proceedings.

Plaintiffs contend that the record of the Bankruptcy proceedings makes it clear that Piper was to blame for the failure to timely perfect the security interest of the Plaintiffs in the District of Columbia. On November 23, 2001, Plaintiffs sued Piper and Rudnick, LLP, and two attorneys that worked at Piper at the time of the bond transaction, Ronald Sheff and Kimi Murakami. The D.C. Superior Court dismissed the suit, and Plaintiffs re-filed the instant case in the Circuit Court for Prince George's County, Maryland in August 2002, alleging attorney malpractice.

On June 5, 2003, Defendants moved for Summary Judgment arguing that all of the relevant transaction documents specify that the Borrower, not the Defendants, was responsible for filing all necessary financing statements. The Defendants also contend that the record of this case before the Court shows that there is no dispute that Plaintiffs were on notice of their potential claim more than three years before they brought it; and that Plaintiffs' hypothetical damages scenario could not take place. Although this case can be decided solely on the issue of whether Defendants owed a duty to Plaintiff, the Court also concludes that the Statute of Limitations bars the Plaintiffs from recovery in this case.

STANDARDS FOR SUMMARY JUDGMENT

Summary judgment should be granted if Defendants prove "that there is no genuine dispute as to any material fact and that [they are] entitled to judgment as a matter of law." Maryland Rule 2-501(a). In addition, summary judgment is a critical tool for controlling complex litigation, and "a trial court should not be reluctant to grant a motion for summary judgment in an appropriate case. *Bond v. NIBCO, Inc.,* 96 Md. App. 127, 623 A.2d 731, 735 (1993). Regarding the issue of duty, this Court holds that there is no dispute as to any material fact and that this case may be decided as a matter of law.

DISCUSSION

Plaintiffs contend that there is a genuine issue of material fact as to the identity of Defendants' client, offering the proposition that Defendants did not represent the County only, but "rather represented the transaction" "as bond counsel." Plaintiffs take this position based on the opinions of both lay witnesses and expert witnesses cited on pages 21-23 of the Plaintiffs Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment. Thus, Plaintiffs *argue* without citing any authority other than the lay and expert opinions referenced, *supra*, that there is a disputed issue of material fact as to whether Defendants owed a duty of care to Plaintiffs arising out of Defendants "neutral representation of the transaction."

This Court holds to the contrary for the same reasons and grounds as recently cited by the Court of Appeals on June 16, 2003 in *Suzette Hemmings v. Pelham Wood Limited Liability Limited Partnership et al.*, 375 Md. 522, 535, 826 A.2d 443 (2003), "[W]hether one party owed a duty to another requires a *legal* determination based on statutes, rules, principles, and precedents. It is ordinarily for the Court, rather than the jury to decide." (Emphasis added). It is "*entirely a question of law,* to be determined by this Court by reference to the body of statutes, rules, principles, and precedents which make up the law...." *Id., citing* W. Page Keeton, et al. *Prosser & Keeton on Torts* § 37, at 236 (5th ed., 1984)(emphasis added). It is, therefore, not an issue of fact at all and, for that reason, not to be decided by a factfinder based on the opinions of witnesses whether they be lay witnesses or expert witnesses.

Plaintiffs further contend that this Court need not determine the identity of Defendants' client since the Defendants "undertook a duty for the benefit of the Bondholders related to the financing statements." They do so based authority cited in Maryland cases involving claims of negligent representation (not plead in the case *sub judice* and cases from other jurisdictions. These cases are either easily distinguished and/or not applicable.

Plaintiffs would have this Court hold that Defendants owed Plaintiffs a duty of care because there is a sufficiently "intimate nexus" between the parties. *Id.*, *citing, inter alia, Weisman v. Connors,* 312 Md. 428, 446-448, 540 A.2d 783, 792-793 (1998). Unfortunately, Plaintiffs theory is awaiting authority to support it, and its facts are awaiting a theory to fit them. This Court declines to hold as urged by the Plaintiffs as a matter of law.

As the Court of Appeals has stated, "regardless of whether a plaintiff brings an attorney malpractice action in contract or tort, he must allege and prove the existence of a duty between the plaintiff and the defendant in the first instance. Once the plaintiff satisfies this threshold requirement, he must then allege and prove the remaining elements of each theory of recovery to establish liability." *Flaherty v. Weinberg,* 303 Md. 116, 134, 492 A.2d 618, 627 (1985).

Generally, all a plaintiff must show to prove that a duty existed is that an attorney-client relationship existed between the parties. *Ferguson v. Cramer,* 116 Md. App. 99, 112, 695 A.2d 603, 609 (1997), *aff'd*, 349 Md. 760, 709 A.2d 1279 (1998). However, nonclients may recover for attorney malpractice under certain circumstances, but "if the risk created by negligent conduct is merely one of economic loss, 'no tort duty will be found absent a showing of privity or its equivalent.'" *Noble v.* Bruce, 349 Md. 730,740, 709 A.2d 1264, 1269 (1998) *citing Jacques v. First Nat'l Bank,* 307 Md. 527, 537, 515 A.2d 756, 761 (1986).

As a general rule, Maryland adheres to the strict privity rule in attorney malpractice cases to determine whether a duty existed. The sole exception to the rule is the third-party beneficiary theory. *Flaherty*, 303 Md. 116 at 130.

In *Flaherty*, the Court of Appeals summarized the law in Maryland as follows:

> ...Maryland, as a general rule, adheres to the strict privity rule in attorney malpractice cases. The sole exception that we have recognized to this rule is the third party beneficiary theory...Thus, to establish a duty owed by the attorney to the nonclient, the latter must allege and prove that the intent of the client to benefit the nonclient was a direct purpose of the transaction or relationship. In this regard, the test for third party recovery is whether the intent to benefit actually existed, not whether there could have been an intent to benefit the third party. If the third party alleges and proves the remaining elements of a negligence cause of action, he can recover against the attorney in negligence.

Flaherty, 303 Md. at 130-131.

It is apparent from the record that Defendants' client was Prince George's County, *not* the Plaintiffs in this suit.[9] Indeed, there is no competent evidence to the contrary, and therefore, no dispute as to that fact based on the record in this case. Under *Flaherty*, absent strict privity between Plaintiffs and Defendants, the nonclient Plaintiffs must allege and prove that the intent of Prince George's County (the client) to benefit the Plaintiffs (nonclients) was a direct purpose of the bond transaction. *Id.* If Plaintiffs can show this intent, then they will fall into the third-party beneficiary exception to strict privity as set forth in *Flaherty*. *Id.* Unless the Plaintiffs are able to assert third-party beneficiary status, then they will not have fulfilled their burden of establishing that Defendants owed them a duty. *Id.* Absent this duty, Plaintiffs are unable to sustain an action for negligence. This Court holds that such is the case here.

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[9] As counsel for the Defendants stated at the Motions Hearing on this matter on July 15, 2003, "[t]he official statement says Piper & Marbury is bond counsel to Prince George's County. I don't know how [the Plaintiffs] could have thought something else when they were buying these bonds. That's what they were told. At the end of the day, who our client was, that's a relationship formed by contract, and the terms of that contract are defined by the parties, there is unanimity about who the client was. One thing is absolutely clear, we weren't representing them." Transcript of Proceedings at M-7. The Court agrees.

At the hearing on the Motion for Summary Judgment, this member of the Court asked the attorney for Plaintiffs, Mr. William A. Davis, Esquire, whether his clients fall into the third-party beneficiary exception to the strict privity rule:

> THE COURT: Is your client a third-party beneficiary alternatively, or otherwise?
> MR. DAVIS: I think we probably are, Your Honor, but the reason we haven't pushed it here is because we think the other theories are much stronger. We think [Defendants] have undertaken directly to [perform a duty], and so going this securities route of third-party beneficiary didn't make any sense to us.
> Transcript at M-81.

Because the Complaint does not set forth allegations that Plaintiffs were third-party beneficiaries and because Plaintiffs have not pursued either in their pleadings or even in their arguments in opposition to this Motion the theory that they are third-party beneficiaries, this Court sees no need to further analyze or discuss whether Plaintiffs fall into the third-party beneficiary exception to the strict privity rule.

The "other theories" asserted by Plaintiffs to support the finding of an existence of a duty are not recognized by Maryland law in cases alleging attorney malpractice as the sole route to recovery. As discussed *supra,* Plaintiffs argue that Defendants "assumed a duty" to Plaintiffs, and that a sufficient intimate nexus existed between the parties to support the finding that such a duty existed. As is evidenced by the final transaction documents, the duty to file financing statements and continuation statements was expressly assigned to the Borrower.

Plaintiffs contend, however, that Defendants' actions were contrary to the obligations

and responsibilities set forth in these documents, and therefore, Defendants assumed the duty to file financing statements in all necessary jurisdictions since they caused the filings to be made in Maryland. This Court obviously does not reach the factual issue of whether Defendants assumed this duty in deciding this Motion for Summary Judgment. The Court does hold that even if they did, the theory that this would afford the Plaintiffs a basis for the relief they are requesting has to date been rejected by the Court of Appeals in favor of the strict privity rule.[10] *Flaherty,* 303 Md. at 123.

In addition, the Court of Appeals has also made it clear that, although the "intimate nexus" theory is applicable in certain cases, if the risk created by negligent conduct is merely one of economic loss, strict privity or its equivalent is required in order to maintain a legal malpractice case. *Noble,* 349 Md. at 740. Indeed, this case of attorney malpractice is concerned solely with economic loss sustained by the Plaintiffs so strict privity or its equivalent is required here. This Court holds that, based on the record of this case, there is no evidence before the Court of either strict privity or its equivalent between Plaintiffs and

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[10] **In a footnote, the *Flaherty* Court stated, "Other theories, less well accepted, include the assumption of duty theory...Under the assumption of duty theory, once an attorney gratuitously promises to act for the benefit of another and he actually undertakes to fulfill that promise, the attorney is held to a duty of care in fulfilling that promise. To establish a duty between the attorney and a third party, the third-party plaintiff must show that an attorney undertook an action and that the third party's injuries were a foreseeable result of the negligent performance of that action. This theory, however, has evidently not been adopted by any jurisdiction in the context of attorney malpractice." *Flaherty*, 303 Md. at 123. This Court agrees.**

Defendants. Therefore, as a matter of law, it is undisputed that no such relationship existed between the parties in this case.

Plaintiffs argue that Maryland law has not specifically spoken on the issues of duty that arise in this case and that the facts as alleged here support the finding that a duty existed between the parties. Transcript at M-80. This Court disagrees and finds that Maryland law is clear on the issue of an attorney's duty to a nonclient and that there existed no duty between Plaintiffs and Defendants in this case. Because Maryland law is clear, this Court declines to discuss the cases offered by the Plaintiffs that have been decided in other jurisdictions.[11]

From all accounts, it was the duty of the Borrower to file financing statements and continuation statements in all necessary jurisdictions. The fact that Defendants caused financing statements to be filed in Maryland does not negate the duty of the Borrower to file financing statements or continuation statements in D.C. In addition, no attorney-client relationship existed between Plaintiffs and Defendants and there was no strict privity between the parties. There also has been no showing that Plaintiffs are able to utilize the third-party

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[11] **The out-of-state cases offered by Plaintiffs include: *Schwartz v. Greenfield, Stein & Weisinger,* 90 Misc.2d 882, 396 N.Y.S.2d 582 (1977); *Kremser v. Quarles & Brady, L.L.P.*, 201 Arix.413, 36 P.3d 761 (2002); *Collins v. Binkley,* 750 S.W.2d 737 (Tenn. 1988); *Burke v. Frabizzio,* 1982 WESTLAW 593177 (Del. Super. Nov. 3, 1982); *Simmerson v. Blanks,* 149 Ga. App. 478, 480, 254 S.E.2d 716, 717-718 (1979); *Stewart v. Sbarro,* 142 N.J.Super. 581, 588, 362 A.2d 581, 588 (1976); and *Lawall v. Groman,* 180 Pa. 532, 540 37 A. 98, 99 (1897). In their Reply Memorandum of Law in Support of Defendants' Motion for Summary Judgment, Defendants argue that these cases do not support Plaintiffs' claims.**

beneficiary exception to the strict privity rule. Since Plaintiffs have not shown that strict privity or its equivalent existed, Defendants owed no duty to Plaintiffs regarding the filing of financing statements. Absent the existence of this duty, Plaintiffs are unable to maintain a negligence action. In addition, as noted earlier, this Court holds for the reasons stated in Defendants Motion for Summary Judgment and in Oral Argument before this Court that the Plaintiffs claims are barred by the applicable Statute of Limitations, Maryland Code (1974, 2002 Repl. Vol.), Courts & Judicial Proceedings Article, § 5-101.

Having found that Defendants owed no duty to Plaintiffs with respect to the filing of financing statements in the District of Columbia and that the Plaintiffs' claims are barred by the applicable Statute of Limitations, it is this 10th day of September, 2003, in the Circuit Court for Prince George's County

ORDERED, that Defendants' Motion for Summary Judgment be and hereby is GRANTED; and it is further

ORDERED, that this case is closed statistically.

/s/
Judge Steven I. Platt

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