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Frances B. Bunzl Order on Defedant's Sutherland
Asbill & Brennan LLP Motion to Dismiss

Melvin K. Westmoreland
Fulton County Superior Court Judge

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Westmoreland, Melvin K., "Frances B. Bunzl Order on Defedant's Sutherland Asbill & Brennan LLP Motion to Dismiss" (2016).
Georgia Business Court Opinions. Paper 363.
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**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

**FRANCES B. BUNZL, SUZANNE BUNZL
WILNER, PATRICIA H. BUNZL, and ANNA R.
WILNER,**

Plaintiffs,

v.

**SUTHERLAND ASBILL & BRENNAN LLP,
BENNETT L. KIGHT, and ROBERT B. SMITH,**

Defendants.

**Civil Action File No.
2016CV270084**

ORDER ON DEFENDANTS’ MOTION TO DISMISS

This matter is before the Court on Defendants Sutherland Asbill & Brennan, LLP (“SAB”) and Robert B. Smith’s Motion to Dismiss Plaintiffs’ Complaint. Upon consideration of the pleadings and the briefs submitted on the Motion, the Court finds as follows:

It is well established that:

[A] motion to dismiss for failure to state a claim upon which relief may be granted should not be sustained unless (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought. ... In deciding a motion to dismiss, all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party's favor.

Scouten v. Amerisave Mortgage Corp., 283 Ga. 72, 73, 656 S.E.2d 820, 821 (2008) (quoting *Anderson v. Flake*, 267 Ga. 498, 501(2), 480 S.E.2d 10 (1997)); see also O.C.G.A. § 9-11-12(b)(6). “[A] trial court may properly consider exhibits attached to and incorporated in the pleadings in considering a motion to dismiss for failure to state a claim for relief.” *Hendon*

Properties, LLC v. Cinema Dev., LLC, 275 Ga. App. 434, 435 (2005). Defendants seek dismissal of Plaintiffs' legal malpractice claim because (1) Plaintiffs failed to plead the existence of an attorney-client relationship between SAB and Smith on one hand and Plaintiffs on the other and, even so, (2) any legal malpractice claim is barred under Georgia's four-year statute of limitation.

I. Existence of An Attorney-Client Relationship

Viewing the facts alleged in the Complaint as true, Plaintiffs have adequately pled an attorney client relationship sufficient to survive a motion to dismiss. "The law is clear that to make out a case of legal malpractice, a lawyer-client relationship must exist between the plaintiff and the defendant attorney." *Crane v. Albertelli*, 264 Ga. App. 910, 910 (2003) (dismissing claims against attorney who did not represent husband of client by virtue of his representation of his wife and son even if husband did have personal concern as to the outcome of his family members' appeals). "In that regard, an attorney-client relationship is personal, not vicarious." *Id.*

Here, the Complaint alleges generally that SAB has been serving as the Bunzl family's personal, business, estate, and exclusive legal counsel since the 1940s. Initially, Herbert Elsas of SAB served as the family's attorney. In 1959 and 1963, Herbert Elsas created three separate trusts for his lineal descendants and the lineal descendants of his two children, Suzanne Bunzl and Richard Bunzl. Herbert Elsas also drafted Walter Bunzl's will, which created a marital trust benefitting Walter's wife, Frances Bunzl, upon Walter Bunzl's death. Kight "became the new primary Sutherland attorney for the Bunzl family" when Herbert Elsas retired in the late 1980s. He also succeeded Elsas as trustee of the various Bunzl Trusts. The Complaint alleges that from the 1940s until early 2012, the members of the Bunzl family "were informed and believed that

Defendants Sutherland and Bennett Kight represented the Bunzl family as their legal counsel for all purposes.”

Smith is also an attorney employed by SAB. The Complaint alleges that as an attorney at Sutherland, Smith participated in Sutherland and Kight’s wrongdoing by providing conflicting descriptions of the ownership of the Upper Divide property, a property in North Carolina, and by failing to disclose the actual ownership of the Upper Divide property. They allege that in the 2000’s, Kight undertook several complex transactions involving trust assets without their informed consent. At the time of the transactions Plaintiffs understood that Kight, Smith, and other attorneys at Sutherland represented the Bunzl family and Bunzl trusts. The Complaint alleges that as their attorneys, Kight, Smith, and others at Sutherland should have reviewed and explained these transactions in writing to them and obtained their informed consent. They allege that Smith assisted Kight in covering up substantial theft of trust assets.

In early 2012, the Bunzl family terminated Sutherland’s representation after discovering purported fraudulent transactions for certain Bunzl Trusts. On March 14, 2012, Sutherland informed members of the Bunzl family that it had not done any work for either Frances Bunzl, Suzanne Bunzl Wilner, nor for family trusts or entities for their benefit in over 10 years with only one exception. Sutherland did represent Kight as executor of Richard’s will and in his capacity as trustee for the trust created by Richard for Patricia’s benefit, and some work on the Nellie Trust. However, Plaintiffs assert that they did not receive notice of Sutherland’s abandonment of them as clients in or around 2002.

While it will be Plaintiffs’ burden to show evidence to support their contention that SAB, Kight, and Smith all served as the personal attorneys for each of the four Plaintiffs, such evidence is not required at the motion to dismiss stage. Plaintiffs have sufficiently stated the

existence of an attorney-client relationship to sustain a legal malpractice claim against Defendants.

II. Statute of Limitations


Next, Defendants SAB and Smith contend that any legal malpractice claim is barred by the four year statute of limitations. A motion to dismiss is granted if it is apparent from the face of the complaint the claim is time-barred. *Bailey v. Kemper Group*, 182 Ga. App. 604, 606 (1987). In a legal malpractice action, the statute of limitations inquiry depends on “when did the alleged breach of duty occur” and whether the statute has been tolled for any reason. *Frates v. Sutherland, Asbill & Brennan*, 164 Ga. App. 243, 244, 296 S.E.2d 788, 790 (1982). It is undisputed “the statute of limitation for legal malpractice is triggered immediately upon the commission of the wrongful act.” *Villani v. Hughes*, 279 Ga. App. 618, 619 (2006) (quotation omitted). “The statute of limitations is tolled in malpractice actions when a defendant intentionally conceals an act of professional negligence from a plaintiff, causing the plaintiff to be deterred from bringing a claim.” *Hunter, Maclean, Exley & Dunn, P.C. v. Frame*, 269 Ga. 844, 846 (1998); see also O.C.G.A. § 9-3-96 (“If the defendant or those under whom he claims are guilty of a fraud by which the plaintiff has been debarred or deterred from bringing an action, the period of limitation shall run only from the time of the plaintiff’s discovery of the fraud.”). The issue of whether a statute of limitations had been tolled usually is a question of fact that should not be decided on a motion to dismiss. *See id*; see also *Hunter, Maclean* at 848 (noting that plaintiff must establish defendants’ intent to conceal or deceive as well as the deterrence of a plaintiff from bringing suit when underlying claim sounds in malpractice and not fraud).

Here, Plaintiffs allege Sutherland, Kight and Smith misrepresented and concealed information to conceal thefts from the Bunzl trusts. They allege their suspicions about Kight’s

mismanagement and theft of trust assets arose in 2011 and they only started receiving information upon which this action is based on in 2012. Therefore, facts could be presented within the framework of the Complaint that the statute of fraud was tolled until discovery of Defendants' fraud, which Plaintiffs allege was within the four years allowed under the statute of limitation to file a complaint.

As such, Defendants' Motion to Dismiss is **DENIED**.

SO ORDERED this 22nd day of March, 2016.



The Honorable Melvin K. Westmoreland
Superior Court of Fulton County
Atlanta Judicial Circuit