STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB-CV-09-018

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Business and Consumer Docket

Mark L. Randall, and
Randall Law Office, P.A.,

Plaintiffs,

v.

DECISION AND ORDER
(Motion for Summary Judgment/
Motion to Dismiss)

J. Michael Conley,
Wenonah Wirick, and
Conley & Wirick, P.A.,

Defendants

This matter is before the Court on the Motion of J. Michael Conley, Wenonah Wirick, and Conley & Wirick, P.A. (Defendants) for Summary Judgment and on the Motion of Mark L. Randall and Randall Law Office, P.A. (Plaintiffs) to Dismiss Defendants' counterclaim. Through their motion, Defendants seek judgment on Plaintiffs' claims of legal malpractice and securities fraud, *see* 32 M.R.S. § 16509 (2010). Plaintiffs contend that Defendants' counterclaim is barred by the doctrine of res judicata.

Factual/Procedural Background

Plaintiff Mark Randall is the sole shareholder of Plaintiff Randall Law Office, P.A. Defendants J. Michael Conley and Wenonah Wirick are attorneys employed by Defendant Conley & Wirick, P.A., a Maine corporation that provides legal services, with a principal place of business in Bath, Maine.

Prior to January 3, 2007, Defendant Conley was the sole shareholder of a law firm known as J. Michael Conley, P.A., the predecessor to Defendant Conley & Wirick, P.A. Beginning in 2004 and continuing into 2007, Defendants Conley and Wirick provided legal representation to Plaintiffs on several matters. While Defendants Conley, Wirick and the predecessor law firm were representing Plaintiffs on various legal matters, Defendant Conley explored with Plaintiff Randall the possibility of Plaintiffs purchasing shares in Defendant Conley's law firm.

After some negotiation and discussion, Plaintiffs, Defendant Conley, Defendant Wirick, and J. Michael Conley, P.A. entered into a Merger, Stock Purchase, and Transition Agreement (the Agreement) by which they merged into a new firm called Conley, Randall & Wirick, P.A. Under the Agreement, Plaintiffs purchased 74.5 shares of common stock in the law firm. In consideration for the stock, Plaintiffs transferred to the law firm certain property. The Agreement contained a binding arbitration clause: "The parties agree that any and all disputes that may arise between or among them in the future *over of* [sic] *the terms of the Agreement* shall be decided by binding arbitration, if any Party demands arbitration."

The partnership broke down within a year of its formation. Defendants Conley and Wirick demanded arbitration of their dispute with Plaintiffs in January 2008. In their counter demand to arbitration, Plaintiffs identified both fraud and negligent misrepresentation as issues for arbitration.[1] In their arbitration case summary, Plaintiffs identified the elements of both causes of action:

> As with the case of fraud, [Randall] has a very strong claim for negligent misrepresentation with respect to entering into the Transition Agreement. Indeed, [Conley] and [Wirick] made misrepresentations to [Randall] regarding the

[1]Specifically, Plaintiff Mark Randall identified as issues for arbitration the "[i]ntentional or negligent misrepresentations by CRW, Conley and/or Wirick in connection with Mark Randall entering into the Agreement." (A.S.M.F. ¶ 55; Reply S.M.F. ¶ 55.)

financial health of the company, the company's debt, the lack of proper financial record keeping, and the failure to comply with tax laws.[2]

In addition, Plaintiffs identified "[b]reaches of fiduciary duty by Conley and/or Wirick" as an issue for the arbitration proceedings. In their case summary, Plaintiffs described the alleged breach of fiduciary duty as one of a corporate officer: "Conley and [] Wirick breached their fiduciary duties to the corporation by, inter alia, paying back loans to themselves before paying other corporate debts, causing the corporation to violate tax laws, and mismanaging the corporation's finances, expenses and revenues."

After an arbitration hearing, Plaintiffs were ordered to pay $134,500 to Defendants Conley and Wirick.[3] During the pendency of the action to enforce the arbitration award, Plaintiffs commenced this action alleging legal malpractice and securities fraud. Defendants filed a counterclaim alleging: 1) conversion of fees owed to Defendants Conley and Wirick by Plaintiffs; 2) unjust enrichment from Plaintiff Randall's unlawful retention of fees owed to Defendants Conley and Wirick; 3) fraud for false representations made by Plaintiff Randall to Defendants Conley and Wirick, prior to entering into the Agreement; and 4) a claim for punitive damages.

Discussion

1. Defendants' Motion for Summary Judgment

A party may obtain summary judgment if there is no genuine dispute as to any material fact and the party is entitled to judgment as a matter of law. M.R. Civ. P. 56(c). For purposes of summary judgment, a "material fact is one having the potential to affect the outcome of the suit."

[2] During his testimony at the arbitration hearing, Plaintiff Randall testified that: 1) although he requested five years of financial information from Defendants Conley and Wirick, he did not receive it; 2) he was not told that the firm was running a loss of $286,000; 3) he was not told that the firm's credit lines were maxed out; and 4) he was not able to review the firm's tax returns and practices.

[3] *See Randall v. Conley*, 2010 ME 68, ¶ 7, 2 A.3d 328, 330 (approving this confirmation of the arbitration award).

Burdzel v. Sobus, 2000 ME 84, ¶ 6, 750 A.2d 573, 575. A factual issue is genuine when there is sufficient supporting evidence for the claimed fact that would require a fact-finder to choose between competing versions of the facts at trial. *Inkel v. Livingston*, 2005 ME 42, ¶ 4, 869 A.2d 745, 747. If ambiguities in the facts exist, they must be resolved in favor of the non-moving party. *Beaulieu v. The Aube Corp.*, 2002 ME 79, ¶ 2, 796 A.2d 683, 685.

Defendants assert that the doctrine of res judicata bars Plaintiffs from asserting their legal malpractice and securities fraud claims because the current claims are identical to the claims previously litigated in arbitration. Defendants also argue that public policy favors a broad reading of the arbitration clause and Plaintiffs are judicially estopped from now asserting the narrowness of the arbitration clause.

Res judicata "prevents the relitigation of matters already decided." *Portland Water Dist. v. Town of Standish*, 2008 ME 23, ¶ 7, 940 A.2d 1097, 1099. The doctrine of res judicata is comprised of two distinct, though related, components: claim preclusion and issue preclusion. *See id.* "Claim preclusion prevents relitigation if: (1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been litigated in the first action." *Id.* ¶ 8, 940 A.2d at 1099 (quotation marks omitted). "Issue preclusion, also referred to as collateral estoppel, prevents the relitigation of factual issues already decided if the identical issue was determined by a prior final judgment, and . . . the party estopped had a fair opportunity and incentive to litigate the issue in a prior proceeding." *Macomber v. MacQuinn-Tweedie*, 2003 ME 121, ¶ 22, 834 A.2d 131, 138-39 (quotations marks and citations omitted).

The Law Court has explicitly held that "a valid and final award by arbitration has the same effects under the rules of res judicata . . . as a judgment of a court." *Beal v. Allstate Ins.*

Co., 2010 ME 20, ¶ 14, 989 A.2d 733, 739 (quoting 2 Restatement (Second) of Judgments § 84(1) (1982)). Typically, a transactional test applies to determine whether a claim is barred by pervious litigation, "examining the aggregate of connected operative facts that can be handled together conveniently for purposes of trial to determine if they were founded upon the same transaction, arose out of the same nucleus of operative facts, and sought redress for essentially the same basic wrong." *Portland Water Dist.*, 2008 ME 23, ¶ 8, 940 A.2d at 1100 (quotation marks omitted). This test is somewhat problematic in the context of arbitration because the scope of an arbitration proceeding is controlled by the parties' agreement to arbitrate, not by the general jurisdiction of a court. *See Nisbet v. Faunce*, 432 A.2d 779, 782 (Me. 1981) ("In general, parties to a dispute cannot be compelled to submit their controversy to arbitration unless they have manifested in writing a contractual intent to be bound to do so."). Whether an arbitration award bars a subsequent claim is determined by an examination of the scope of the arbitration agreement and an assessment of the claims that the parties in fact litigated during the arbitration proceeding.

As noted above, the parties' binding arbitration clause states: "The parties agree that any and all disputes that may arise between or among them in the future *over of* [sic] *the terms of the Agreement* shall be decided by binding arbitration, if any Party demands arbitration." (Supp. S.M.F. ¶ 2; Opp. S.M.F. ¶ 2 (emphasis added).) Not insignificantly, neither party challenged the scope of the agreement before the arbitrator. That is, neither party objected to litigating before the arbitrator any of the issues identified by the other party. The parties' approach is consistent with the broad interpretation of arbitration clauses recognized by the Law Court in *Westbrook Sch. Comm. V. Westbrook Teachers Ass'n*, 404 A.2d 204 (Me. 1979), where the Court wrote that public policy favors arbitration "unless it may be said with positive assurance that the arbitration

clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." 404 A.2d at 208 (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)); *accord Barrett v. McDonald Invs., Inc.*, 2005 ME 43, ¶ 16, 870 A.2d 146, 149-50.

Although Plaintiffs did not seek to exclude their securities fraud and legal malpractice claims from arbitration, Plaintiffs now maintain that prior to entering into the Agreement, Defendants made untrue material statements and failed to disclose material facts regarding the law firm in violation of Maine securities law. *See* 32 M.R.S. § 16509. Plaintiff Randall also alleges that Defendants Conley and Wirick, as his attorney before entering into the Agreement, breached their fiduciary duty to him because they neither ensured the transaction was fair and reasonable to him nor advised him to seek independent counsel. On their face, the claims for fraud and legal malpractice are unrelated to the *terms* of the Agreement; Plaintiffs' claims concern acts or omissions before the formation of the Agreement. The pending claims, therefore, arguably do not fall within the scope of the written arbitration clause. The Court's analysis does not, however, end with a comparison of the arbitration clause and the substantive claim.

At its core, res judicata is a bar to piecemeal litigation, preventing a plaintiff from "asserting in a subsequent lawsuit through grounds of recovery for the same claim that the litigant had a reasonable opportunity to argue in the prior action." *See Camps Newfound/Owatonna Corp. v. Town of Harrison*, 1998 ME 20, ¶ 12, 705 A.2d 1109, 1113-14 (quotation marks omitted). "Judicial economy, fairness to litigants and the strong public interest favoring finality [of judgments] demand that a plaintiff present all relevant aspects of his cause of action in a single lawsuit." *Id.*

While the authority of an arbitrator is generally limited to the written agreement of the parties, the parties may agree to allow the arbitrator to exceed that scope through their submissions. *See Am. Fed'n of State, County, and Mun. Emps., Council 93 v. City of Portland*, 675 A.2d 100, 103 (Me. 1996) (citing *High Concrete Structures, Inc. v. United Elec., Radio and Mach. Workers of Am., Local 166*, 879 F.2d 1215, 1218-19 (3d Cir. 1989)). For example, in *American Federation*, a collective bargaining agreement would have provided a less severe remedy than the one imposed by the arbitrator on an employee, but the arbitrator was given the authority in a joint submission to fashion his own remedy, and his remedy was upheld. *See Am. Fed'n*, 675 A.2d at 103.

Plaintiffs presented a claim of fraud[4] to the arbitrator, and the fraud alleged was not over the *terms* of the agreement, but a means to recover funds lent to the law firm based on fraud occurring prior to the creation of the firm. Although the parties did not explicitly agree in writing to arbitrate this claim, the governing statute does not require that an agreement to arbitrate be in writing. Instead, it provides that a party may not be *compelled* to arbitrate a dispute absent the party's express written agreement. *See* 14 M.R.S. §§ 5927-28 (2010); *Roosa v. Tillotson*, 1997 ME 121, ¶ 4, 695 A.2d 1196, 1197-98. In this case, the arbitrator clearly considered and ruled on Plaintiffs' fraud claim.[5] Now, Plaintiffs assert that the same acts constitute a fraudulent act that is in violation of the Maine Uniform Securities Act, 32 M.R.S. § 16509.

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[4] Plaintiff Mark Randall alleges he only presented claims of breach of contract and misrepresentation to the arbitrator. (Pls.' Opp'n to Summ. J. 10-11.) A review of the record reveals, however, that Plaintiffs clearly submitted the issue of both fraud and misrepresentation to the arbitrator.

[5] The Arbitrator concluded that: "The evidence does not support a finding of fraud against Conley. Randall had ample opportunity to request information regarding the financial condition of the Conley firm and to then investigate the financial condition of the firm before signing the Transition Agreement." (Randall Aff. Ex. A. at 1.)

The record is undisputed that the parties did not actually litigate the securities act claim before the arbitrator. The specific theory advanced does not, however, control application of the doctrine of res judicata. As the Law Court recognized in *Petit v. Key Bancshares of Maine, Inc.*, 635 A.2d 956, 959 (Me. 1993), "[a] subsequent suit that arises out of the same aggregate of operative facts is barred even though the second suit relies on a legal theory not advanced in the first case, seeks different relief than that sought in the first case, or involves evidence different from the evidence relevant to the first case." For example, in *Currier v. Cyr*, 570 A.2d 1205 (Me. 1990), because the parties' predecessors in title had litigated issues related to a public easement over a 20-foot strip of land, the subsequent landowners were precluded from litigating ownership of the underlying land as "the operative facts necessary to determine the outcome of the [predecessors'] claims would include evidence of the title to and use of the disputed strip of land." *Id.* at 1208.

In the present case, the operative facts necessary to determine whether Defendants Conley and Wirick fraudulently misrepresented their financial situation to Plaintiffs are the same facts that are necessary to determine whether their conduct constitutes a violation of the securities laws.[6] The only difference between the instant suit and the arbitration proceeding is that Plaintiff Randall now presents a legal theory (the statutory securities claim) that he did not present at arbitration. As explained above, a second suit "with factual allegations, legal theories and demands for relief different from those advanced in the first suit" is barred by res judicata

[6] At arbitration, Plaintiffs alleged that "[Conley] and [Wirick] made misrepresentations to [Randall] regarding the financial health of the company, the company's debt, the lack of proper financial record keeping, and the failure to comply with tax laws." (Supp. S.M.F. ¶ 15; Opp. S.M.F. ¶ 15.) In their complaint, Plaintiffs make the same allegations now; to wit:

- Defendants Conley and Wirick failed to disclose their failure to comply with tax laws (Compl. ¶ 26(a), (b));
- the firm's lines of credit were nearly maxed out (Compl. ¶ 26(c));
- the firm had substantial debt (Compl. ¶ 26(d));
- the firm had negative retained earnings in both 2005 and 2006, and substantial losses in 2006 (Compl. ¶ 26(e), (f), (g)).

when it could have been tried in the first suit. *See Beegan v. Schmidt*, 451 A.2d 642, 647 (Me. 1982). In other words, res judicata bars claims where a party is "seeking redress for essentially the same basic wrong [as was addressed in a prior proceeding]." *See Sebra v. Wentworth*, 2010 ME 21, ¶ 12, 990 A.2d 538, 543 (quotation marks omitted).

Here, the Court must decide whether the doctrine applies given that the fraud allegation was litigated by agreement in arbitration rather than in a prior court proceeding. The issue is thus: In the absence of an explicit agreement to litigate the statutory claim of securities fraud in arbitration, does res judicata bar such a claim when the parties agreed to and did litigate common law fraud and misrepresentation claims based on the same conduct that allegedly constitutes a violation of the securities act?

The principles and policy of the doctrine of res judicata militate in favor of application of the doctrine in this case, particularly because Plaintiffs identified fraud and misrepresentation as claims to be decided by the arbitrator and the parties did not expressly reserve the securities act claim from the scope of their agreement. Were it otherwise, a party could pursue the piecemeal litigation that the doctrine of res judicata is designed to prevent. In addition, insofar as a contrary conclusion would permit Plaintiffs to pursue a fraud based claim despite the arbitrator's adverse decision on Plaintiffs' fraud/misrepresentation claim, to allow Plaintiffs' securities act claim to proceed would be inconsistent with the Law Court's favorable view of arbitration and the need to preserve the integrity of legitimately obtained arbitration awards. *See Barrett*, 2005 ME 43, ¶ 16, 870 A.2d at 149-50. Plaintiffs submitted fraud to the arbitrator, the claim was decided against Plaintiffs, and Plaintiffs now seek to relitigate a claim for the same basic wrong based on the same set of operative facts. Res judicata precludes Plaintiffs from doing so, and

thus bars Plaintiffs' claim of securities fraud.[7]

The doctrine of res judicata does not, however, similarly bar Plaintiffs' claim of legal malpractice. First, because the claim of malpractice is not related to a "term" of the parties' agreement, the claim is not within the scope of the parties' written agreement. Furthermore, although the record supports the conclusion that the parties at least implicitly agreed to arbitrate Plaintiffs' breach of fiduciary claim, the Court is not convinced that the parties agreed to litigate or in fact litigated a claim based upon Defendants' alleged legal malpractice.[8] The essence of Plaintiffs' breach of fiduciary duty claim before the arbitrator was based on Defendants Conley and Wirick's alleged failure to satisfy their corporate obligations and responsibilities. Neither the allegations, nor the evidence at the arbitration hearing focused on whether an attorney-client relationship existed between Plaintiffs and Defendants, or on the scope of Defendants' professional responsibility to Plaintiffs. Not insignificantly, neither party presented the opinion testimony of legal expert witnesses, which testimony is generally required when a legal malpractice action is asserted. *See Johnson v. Carleton*, 2001 ME 12, ¶ 14, 765 A.2d 571, 575-76; *Corey v. Norman, Hanson & DeTroy*, 1999 ME 196, ¶ 13, 742 A.2d 933, 940. The Court cannot, therefore, conclude as a matter of law that Plaintiffs' legal malpractice claim was litigated or should have been litigated during the arbitration proceeding.

2. Plaintiffs' Motion to Dismiss

Plaintiffs have moved to dismiss Defendants' counterclaim alleging conversion, unjust enrichment, fraud/misrepresentation, and an entitlement to punitive damages. A motion to

[7] Because the Court concludes that res judicata bars the securities fraud claim, the Court will not address the arguments regarding judicial estoppel and election of remedies on that claim.

[8] The Court notes that alleged violations of the Maine Bar Rules were raised during in the course of arbitration. However, the alleged violations were not raised in the context of legal malpractice, nor did Plaintiffs present a legal malpractice claim to the arbitrator.

dismiss asserted pursuant to M.R. Civ. P. 12(b)(6) "tests the legal sufficiency of the complaint and, on such a challenge, the material allegations of the complaint must be taken as admitted." *Shaw v. S. Aroostook Comm. Sch. Dist.*, 683 A.2d 502, 503 (Me. 1996) (quotation marks omitted). When reviewing a motion to dismiss, this court examines "the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Id.* A dismissal under M.R. Civ. P. 12(b)(6) will be granted only "when it appears beyond a doubt that the plaintiff is entitled to no relief under any set of facts that he might prove in support of his claim." *Shaw*, 683 A.2d at 503 (quotation marks omitted).

The parties agree that Counts I and II of Defendants' counterclaim involve the same fees (two cases with fees of $226,000) that were the subject of the previous proceedings before the arbitrator, this Court, and the Law Court.[9] The claims asserted in Counts I and II are barred by the doctrine of res judicata. The Court will, therefore, dismiss Counts I and II of the counterclaim.

In Count III of the counterclaim, Defendants allege that Plaintiff Mark Randall knowingly and materially misrepresented the value of his contingent fee cases in 2007 to induce Defendants to enter into the Agreement. As explained above, under the plain language of the arbitration agreement, the matters that are subject to arbitration are limited to those related to the *terms* of the parties' Agreement. Insofar as Count III of Defendants' counterclaim is based at least in part on representations that Plaintiff Randall allegedly made before the formation of the Agreement, when viewed in the light most favorably to Defendants, *see Shaw*, 683 A.2d at 503, Count III of the counterclaim includes a claim outside the scope of the arbitration agreement. In

[9] *See Randall*, 2010 ME 68, ¶ 7, 2 A.3d at 330. (Countercl. ¶¶ 25-33; M. Dismiss 1-2; Defs.' Opp'n to M. Dismiss 1-2.).

addition, because Defendants' punitive damage claim is dependent upon Defendants' misrepresentation claim,[10] under the deferential standard at this stage of the proceeding, the Court cannot conclude that the punitive damage claim was subject to the arbitration agreement.[11]

Conclusion

Based on the foregoing analysis, the Court orders;

1. The Court grants Defendants' Motion for Summary Judgment on Count I of Plaintiffs' Complaint. The Court, therefore, enters judgment in favor of Defendants on Count I of Plaintiffs' Complaint.

2. The Court denies Defendants' Motion for Summary Judgment on Count II of Plaintiffs' Complaint.

3. The Court grants Plaintiffs' Motion to Dismiss as to Counts I and II of the counterclaim, and denies Plaintiffs' motion as to Counts III and IV of the counterclaim. The Court, therefore, dismisses Counts I and II of the counterclaim.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

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[10] *See Forbes v. Wells Beach Casino, Inc.*, 409 A.2d 646, 655 (Me. 1979) (in order to prevail on a punitive damages claim, a party must first succeed on an independent tort claim).

[11] At various points in their dispute, both parties have asserted that Plaintiffs' designation of issues for arbitration reflects the parties' intent for a broader application of the arbitration agreement than the plain language of the arbitration agreement suggests. Because the plain language of the arbitration agreement is not ambiguous, the Court will not consider extrinsic evidence of the parties' intent when interpreting the written arbitration agreement. *See Handy Boat Serv., Inc. v. Prof'l Servs., Inc.*, 1998 ME 134, ¶ 13, 711 A.2d 1306, 1309 ("Extrinsic evidence concerning a specific provision of an integrated agreement may not be considered unless the court determines the language of that provision to be ambiguous."). To the extent that either party argues that through their communications and actions the parties modified the scope of the arbitration agreement, a review of the record reveals that the significance of the parties' communications and actions is disputed. Accordingly, neither summary judgment, nor dismissal is appropriate even if either of the party's pleadings could be construed to seek enforcement of a broader arbitration agreement.