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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3805-19**

REBECCA DREHER,

Plaintiff-Appellant,

v.

KENNETH ROSS, ESQ., and
COMEGNO LAW GROUP, PC,

Defendants-Respondents.

Argued February 3, 2022 – Decided April 22, 2022

Before Judges Summers and Vernoia.

On appeal from the Superior Court of New Jersey,
Burlington County, Law Division, Docket No. L-
2137-19.

Mark J. Molz argued the cause for appellant.

William T. McGloin argued the cause for respondents
(Connell Foley LLP, attorneys; William T. McGloin, of
counsel and on the brief).

PER CURIAM

Plaintiff Rebecca Dreher appeals the motion court's Rule 4:6-2(e) dismissal with prejudice of her first amended complaint alleging professional negligence, legal malpractice, breach of fiduciary duty, fraud, and other causes of action against defendants Kenneth Ross, Esq. and Comegno Law Group (CLG). We affirm the dismissal order because the court properly held that defendants did not owe Rebecca any duty in their preparation of a power of attorney and a last will and testament for Rebecca's¹ mother Dorothy Dreher.

In 2013, Ross prepared a power of attorney for Dorothy, naming her only surviving son, David Dreher, as her attorney-in-fact. Almost a year later, Ross prepared Dorothy's last will and testament, which designated David as executor and devised eighty percent of the tangible personal property from Dorothy's estate (the estate) to David with the remaining twenty percent going to Rebecca.

In 2015, Rebecca had concerns over David's exercise of the power of attorney when he expended Dorothy's assets for his and his immediate family's benefit. Rebecca's counsel wrote to Ross asking if he prepared a will or any estate documents for her mother and, if so, to provide her with a copy of Dorothy's will. Ross wrote back, stating he and his firm were "not in a position

¹ For convenience and to avoid confusion, we refer to the Dreher family members by their first names because they share a surname. We mean no disrespect.

to acknowledge if Dorothy . . . [was] a client, or if [they] ha[d] prepared any estate documents for [her]."

After Dorothy died in 2016, Rebecca filed suit in the Chancery Division contesting her mother's will and seeking return of estate assets that David allegedly used for his and his immediate family's personal expenses. After the parties reached a settlement, Rebecca sued defendants in the Law Division alleging that she suffered damages as a third-party beneficiary from the negligent advice they gave David resulting in his monetary gifts to himself and his immediate family from Dorothy's assets. Rebecca also alleged defendants "willfully, intentionally[,] and/or maliciously facilitated a fraud upon [her] in concert with" David based on defendants' refusal to disclose aspects of their representation of Dorothy, including drafting Dorothy's will and their negligent advice to her brother. She also claimed defendants "failed to complete [their] duties to the estate" and disburse the estate's assets to her in accordance with her settlement with David and the estate.

In lieu of filing an answer, defendants moved under Rule 4:6-2(e) to dismiss Rebecca's complaint. On December 20, 2019, the court entered an order dismissing the complaint with prejudice except for the fraud claim, which was dismissed without prejudice, together with a statement of reasons.

While the court rejected defendants' argument that the complaint should be dismissed under the entire controversy doctrine, it reasoned there was no basis for Rebecca's legal malpractice claim against defendants because they did not represent her and she did not establish that "[d]efendants believed, or had reason to believe, [she] relied on [their] performance of their duties or that [she] was an intended beneficiary of their work for Dorothy . . . and David." Particular to the power of attorney, the court explained that Rebecca was not mentioned in the document; the only references to Dorothy's "issue" were "to articula[te] a class of persons to whom David . . . could make gifts . . . [and] did not . . . explicitly entitle [Rebecca] to receive any particular gift."

The court determined the negligent advice claim was not a legal cause of action because defendants merely advised David that he could gift money from the estate to himself and his family members while his mother was living, "not that [he] was required to" do so. Because Rebecca did not allege that Ross's counsel to Dorothy and David was meant to confer a benefit to her, "she [could not] establish [that] she was an intended beneficiary of [R]oss[']s performance of his [legal representation]." Rebecca also failed to allege that Ross knew or had reason to know that she relied on his advice. The court stressed that Rebecca's complaint acknowledged she "was not told anything by [d]efendants"

when she inquired about where David received the money for an addition to his home. Consequently, the court found she failed to establish defendants owed a duty to her.

Addressing Rebecca's fraud claim, the court found that her generalized allegations did not satisfy the legal standards for fraud because she "fail[ed] to allege [d]efendant[s] made a material misrepresentation to [her] and that [d]efendant[s] intended [Rebecca] rely on such a misrepresentation." However, "given the liberal pleading standards," her fraud claim was dismissed without prejudice. Rebecca was afforded thirty days to file an amended complaint to set forth a viable fraud claim.²

After Rebecca filed a first amended complaint, defendants again moved under Rule 4:6-2(e) to dismiss her complaint with prejudice. The court issued an order and statement of reasons on May 13, 2020, granting the motion.

² The court also addressed Rebecca's miscellaneous claims, which are not the subject of this appeal. Rebecca alleged defendants orchestrated a fraud against her with David, and that she was not paid pursuant to the Chancery Division settlement agreement. Defendants responded by challenging the factual and legal sufficiency of her allegation, and the court found she "failed to substantively respond to [their] arguments[] other than to note that [she] was burdened by additional attorney's fees" from the will contest litigation. The court concluded that defendants' arguments were deemed unopposed by Rebecca and dismissed them with prejudice because she did not substantively address their contentions, noting that it would have been "futile for [her] to attempt to cure the defects on these [allegations] by amendment."

The court initially noted that the first amended complaint violated its December 20, 2019 order that claims alleging "[d]efendants acted 'in concert' with David . . . be stricken" and not be realleged. The court then determined the amended fraud claim was dismissed with prejudice. The court reasoned that even assuming defendants' preparation of estate documents for Dorothy and their legal advice rose to the level of material misrepresentation, Rebecca did not specify how she relied on those documents and legal advice. Rather, when she contested the validity of the will, the distributions made from the estate, and "incurred attorney's fees and costs" associated with litigating this matter, Rebecca "demonstrated that she did not actually rely on said documents and legal advice." Moreover, Rebecca "suspected perhaps that there was a power of attorney" when she retained counsel and requested a copy of the document. Referring to the letter by Rebecca's counsel regarding representation of Dorothy, and seeking a copy of estate documents the court stressed Rebecca

clearly didn't rely upon the will because [Dorothy] was . . . still alive at that point in time . . . and if she was of the view that [Dorothy] . . . was not competent at that point in time, then [the court did not] know how [Rebecca] relied upon some document that wasn't published to her or to the court and it wasn't probated at that point in time, and so clearly [Rebecca] was engaged by counsel. She had no reliance upon anything that was done by [Ross]. There [] [was] no material

misrepresentation that he made to her upon which she relied.

Finally, the court determined that Rebecca's attempt to include an entirely new cause of action for "breach of fiduciary duty, fraud, and/or for any other causes of action allowed by law" was improperly pled and, thus, dismissed, since the court's December 20, 2019 order granted leave to file an amended complaint for the fraud claim only.

On appeal of the motion court's dismissal of Rebecca's first amended complaint, Rebecca raises the following points for our review:

POINT I

PLAINTIFF'S COMPLAINT SET FORTH A CAUSE OF ACTION FOR FRAUD.

POINT II

THIS DISMISSAL IN THIS MATTER SHOULD BE VACATED AND THE MATTER SHOULD BE REMANDED TO [THE] LAW DIVISION FOR DISCOVERY AND DISPOSITION.

We review the grant of a Rule 4:6-2(e) motion to dismiss a complaint for failure to state a cause of action de novo, applying the same standard under the rule that governed the motion court. Frederick v. Smith, 416 N.J. Super. 594, 597 (App. Div. 2010). We consider only "the legal sufficiency of the facts alleged on the face of the complaint." Nostrame v. Santiago, 213 N.J. 109, 127

(2013) (quoting Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989)).

The issue is simply "whether a cause of action is suggested by the facts." Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988). We "search[] the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Printing Mart-Morristown, 116 N.J. at 746 (quoting Di Cristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957)). In examining the relevant factual allegations in a plaintiff's complaint, we treat them as true and extend to a plaintiff all favorable inferences. See Craig v. Suburban Cablevision, Inc., 140 N.J. 623, 625 (1995).

Guided by these standards, we affirm substantially for the reasons set forth by the motion court in its cogent statement of reasons. We add the following comments.

Rebecca failed to assert a common law or equitable fraud claim against defendants. For a plaintiff to prevail on common law fraud claim, it "must [be] show[n] that [a] defendant: (1) made a representation or omission of a material fact; (2) with knowledge of its falsity; (3) intending that the representation or omission be relied upon; (4) which resulted in reasonable reliance; and that (5)

plaintiff suffered damages." DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 336 (App. Div. 2013). "Equitable fraud is similar to legal fraud," but "the plaintiff need not establish the defendant's scienter." Ibid. A "defendant's scienter" is the "defendant's knowledge of the falsity and intent to obtain an undue advantage." Ibid. "[P]laintiff must prove each element by 'clear and convincing evidence.'" Ibid. (quoting Stochastic Decisions, Inc. v. DiDomenico, 236 N.J. Super. 388, 395 (App. Div. 1989)).

Reiterating assertions from her first amended complaint, Rebecca argues that "Ross made knowing, material misrepresentations of fact" to her and that she "relied on . . . Ross . . . to comply with his professional duties and maintain the standard of care." She contends that Ross "[should have] compl[ied] with the ethical and legal standards of lawyers and not give[n] negligent advice [that] led to damages."

Rebecca failed to assert how defendants made material misrepresentations to her and how she relied on those misrepresentations. She makes no assertion that defendants conveyed a false statement or factual misrepresentation to her. Rather, Ross merely refused to disclose information concerning his firm's representation of their client, Dorothy. Ross had no duty to disclose that he represented Dorothy, and thus, his refusal to do so did not constitute a material

misrepresentation. Moreover, assuming Ross made material misrepresentations to her, Rebecca made only conclusory statements that she relied on his refusal to acknowledge if her mother was his client and if he had prepared any documents for her mother. Rebecca failed to specify how the alleged misrepresentations affected her.

Rebecca contends her complaint set forth a cause of action for legal malpractice. However, the argument is considered waived because she failed to brief the issue. See Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011). For the sake of completeness, however, we address the allegation, concluding Rebecca failed to establish a legal malpractice claim.

Legal malpractice claims are "grounded in the tort of negligence." Gilbert v. Stewart, 247 N.J. 421, 442 (2021) (quoting Nieves v. Off. of the Pub. Def., 241 N.J. 567, 579 (2020)). "Accordingly, the elements of a legal malpractice claim are: '(1) the existence of an attorney-client relationship creating a duty of care by the defendant attorney, (2) the breach of that duty by the defendant, and (3) proximate causation of the damages claimed by the plaintiff.'" Id. at 442-43 (quoting Nieves, 241 N.J. at 582). As the court held in its statement of reasons when it granted defendants' initial motion to dismiss, Rebecca failed to establish

a legal malpractice claim because she was not a client of defendants and was not owed a duty.

"The determination of the existence of a duty is a question of law for the court." Singer v. Beach Trading Co., 379 N.J. Super 63, 74 (App. Div. 2005) (quoting Petrillo v. Bachenberg, 139 N.J. 472, 479 (1995)). Because of our Supreme Court's "ordinary reluctance to permit non-clients to sue attorneys remains unchanged," Green v. Morgan Props., 215 N.J. 431, 460 (2013), finding an attorney owed a duty to a non-client "has been applied rather sparingly," only in "carefully circumscribed" holdings, LoBiondo v. Schwartz, 199 N.J. 62, 102, 116 (2009). The Court has held "the grounds on which any plaintiff may pursue a malpractice claim against an attorney with whom there was no attorney-client relationship [remain] exceedingly narrow." Green, 215 N.J. at 458.

"Whether an attorney owes a duty to a non-client third party depends on balancing the attorney's duty to represent clients vigorously, with the duty not to provide misleading information on which third parties foreseeably will rely." Petrillo, 139 N.J. at 479 (citations omitted). "In determining whether a duty exists, the court must identify, weigh and balance the following factors: the relationship of the parties; the nature of the attendant risk; the opportunity and ability to exercise care; and the public interest in the proposed solution." Davin,

L.L.C. v. Daham, 329 N.J. Super. 54, 73 (App. Div. 2000). The ultimate question is one of fairness. Innes v. Marzano-Lesnevich, 435 N.J. Super. 198, 213 (App. Div. 2014).

Indeed, we have recognized "[p]rivacy between an attorney and a non-client is not necessary for a duty to attach 'where the attorney had reason to foresee the specific harm which occurred.'" Ibid. (quoting Est. of Albanese v. Lolio, 393 N.J. Super. 355, 368-69 (App. Div. 2007)). In limited circumstances, a duty to a non-client has been found when the attorney knew, or should have known, that the non-client would rely on the attorney's representation and the non-client is not too remote from the attorney to be entitled to protection. Ibid.; accord Banco Popular N. Am. v. Gandi, 184 N.J. 161, 181 (2005) ("[T]he invitation to rely and reliance are the linchpins of attorney liability to third parties."). For example, we have imposed third-party liability on an attorney for negligent acts or omissions when third-party reliance on such acts was foreseeable. See, e.g., Atl. Paradise Assocs., Inc. v. Perskie, Nehmad & Zeltner, 284 N.J. Super. 678, 685-86 (App. Div. 1995) (finding cause of action by plaintiff-purchasers against defendant law firm where plaintiffs relied on misrepresentations in public offering statement).

Defendants represented Dorothy and David. There is no allegation that defendants rendered any negligent advice regarding Dorothy's power of attorney or the devise of her estate. Because Rebecca's claim of legal malpractice did not establish the required elements of an attorney-client relationship, it was correctly dismissed with prejudice.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION