UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:22-cv-02092-SKC

THORNTON HAMILTON LLC,

Plaintiff,

v.

OWNERS INSURANCE COMPANY; and
GIOMETTI & MERENESS P.C.,

Defendants.

DEFENDANT OWNERS INSURANCE COMPANY'S REPLY IN FURTHER SUPPORT OF ITS MOTION TO DISMISS DEFENDANT GIOMETTI & MERENESS, P.C. ON THE BASIS OF FRAUDULENT JOINDER (ECF NO. 21)

Defendant Owners Insurance Company ("Owners") submits its reply in further support of its Motion to Dismiss Defendant Giometti & Mereness, P.C. on the Basis of Fraudulent Joinder ("Motion") (ECF No. 21).

INTRODUCTION

Owners' Motion requests dismissal of Plaintiff Thornton Hamilton LLC's ("Plaintiff") claim against Owner's outside legal counsel, Giometti & Mereness, P.C. ("Giometti"), on the grounds that Giometti was fraudulently joined for the purpose of destroying diversity of citizenship amongst the parties. In its Motion, Owners established that Giometti owed no legal duty to Plaintiff. Owners further established that the "narrow set of circumstances" in which Giometti could be liable to a non-client such as Plaintiff do not exist here. Plaintiff does not—and cannot—allege that: (1) Giometti made any misrepresentation of a material fact (as opposed

to alleged opinions of law) without reasonable care; (2) such alleged representations were made for the benefit of Plaintiff or in the course of a business transaction with Plaintiff; or (3) Plaintiff justifiably relied on a misrepresentation to its detriment.

Rather than refute the substance of Owners' Motion or distinguish the authorities cited therein, Plaintiff's response offers contradictory and confusing statements regarding the basis of its claim against Giometti. Plaintiff fails to identify any material fact that was allegedly misrepresented by Giometti and, otherwise, fails to demonstrate how Giometti could possibly be found liable for negligent misrepresentation. Giometti has been fraudulently joined. The Motion should be granted.

ARGUMENT

I. GIOMETTI OWED NO LEGAL DUTY TO PLAINTIFF AND NO EXCEPTIONS TO THE STRICT PRIVITY RULE APPLY HERE

In its Motion, Owners demonstrated that Giometti owed no legal duty to Plaintiff. (ECF No. 21 at 3-5.) This conclusion is established under two separate legal principles. First, as the Colorado Supreme Court held in *Cary v. United of Omaha Life Ins. Co.*, 68 P.3d 462, 466 (Colo. 2003), "agents of the insurance company . . . do not owe a duty [of good faith and fair dealing], since they do not have the requisite special relationship with the insured." Plaintiff argues that the holding in *Cary* is inapplicable here because, unlike in *Cary*, no claims for breach of contract or bad faith breach of an insurance contract were brought against Giometti. This argument misses the point. As demonstrated by Plaintiff's response, Plaintiff's claim for negligent misrepresentation is apparently predicated on the notion that Giometti, as a representative of Owners, owed a duty of good faith and fair dealing to Plaintiff, which it allegedly breached. (*See* ECF No. 35 at 4-5, 7-10). However, as the Court explained, an agent/representative of an

insurance company does not owe any duty to an insured, absent a "special relationship" with the insured. *Cary*, 68 P.3d at 466-67. Here, Plaintiff alleges no such "special relationship" or other facts that could impose on Giometti a duty of good faith and fair dealing.

Next, under the strict privity rule, attorneys owe no duty of reasonable care to non-clients. (ECF No. 21 at 3-5.) *See Allen v. Steele*, 252 P.3d 476, 482 (Colo. 2011); *Bewley v. Semler*, 2018 CO 79, ¶ 18. Plaintiff concedes this point and does not dispute that Giometti, an attorney, represented Owners, not Plaintiff. (*See* ECF No. 35, 3-4.) Despite this concession, Plaintiff argues that, by labeling its claim against Giometti as one for "negligent misrepresentation," it is able to avoid the strict privity rule. However, as Owners established in its Motion, the "narrow set of circumstances" under which an attorney may be liable to a non-client are not applicable here. Plaintiff's response fails to demonstrate otherwise.

A. Giometti's Alleged Statements Cannot Constitute Misrepresentations of Material Fact

Owners demonstrated in its Motion that Plaintiff does not allege Giometti misrepresented any material ***facts***. Rather, the purported "negligent misrepresentation" claim is premised on Plaintiff's disagreement with Giometti about the law:

> 55. Giometti stated that the umpire, Chris Weis, had a prior criminal history and therefore he was not qualified to be an umpire under the Policy.
>
> 56. Defendant Giometti stated that Chris Weis' failure to disclose his prior criminal history required vacatur of the appraisal award.
>
> 57. No Colorado law, either statutory or case law, states that an umpire with a criminal history cannot act as an umpire for an appraisal under the Policy.
>
> 58. No Colorado law, either statutory or case law, or any relevant Colorado regulation, requires an umpire to disclose prior criminal history.
>
> 59. In the letter, Defendant Giometti, misrepresented the holdings of case law that was cited.

(Compl. ¶¶ 55-59; *see also id.* ¶¶ 93-96.) Owners further established that, based on Plaintiff's own allegations, it is impossible for Plaintiff to recover from Giometti given that such representations of law cannot support any claim for fraud or misrepresentation. (ECF No. 21 at 6-8.) *See Brodeur v. Am. Home Assur. Co.*, 169 P.3d 139, 153 (Colo. 2007).

In its response, Plaintiff cites to *Mehaffy, Rider, Windholz & Wilson v. Cent. Bank Denver, N.A.*, 892 P.2d 230 (Colo. 1995) for the proposition that "mixed statements of law and fact can constitute misrepresentations of material fact." Plaintiff's reliance on *Mehaffy* is misplaced. In *Mehaffy*, the negligent-misrepresentation claim arose from a letter issued by defendant-attorneys to the Central Bank of Denver relating to an urban renewal plan initiated by the Winter Park Town Council. *Mehaffy*, 892 P.2d at 233. To finance construction related to the renewal plan, the Town Council issued promissory notes and began negotiating with the Central Bank who was interested in purchasing the notes. *Id.* at 233. Before the Central Bank purchased the notes, certain governmental entities filed a lawsuit, claiming that the Town Council failed to make certain findings of fact required by C.R.S. § 31-25-107(4) in connection with the plan. *Id.* The Central Bank informed the underwriter that it would not purchase the notes if there was any risk that the lawsuit might succeed and cause a default on the notes. *Id.* To induce the Central Bank into purchasing the notes, attorneys for the Town issued opinion letters to the Central Bank, which stated, in relevant part:

> I am of the opinion that the Town and the Authority have adopted the Urban Renewal Plan in accordance with requirements of the laws of the State of Colorado and the Charter of the Town. In addition, I am of the opinion that the Town, in determining that the Project Area constituted a "blighted area" within the meaning of the Act, acted in compliance with applicable provisions of Colorado law and the Charter of the Town. Accordingly, I am of the opinion that insofar as the said litigation questions the adoption

> of the Urban Renewal Plan or the determination that the Project Area is a "blighted area," such allegations are without merit.

Id. at 237-38. Relying on these representations, the Central Bank purchased the notes. *Id.* at 234. Thereafter, the lawsuit against the Town was successful because it was undisputed that the Town Council failed to comply with C.R.S. § 31-25-107(4) in adopting the Plan. *Id.* Consequently, the notes went into default and the Central Bank sued. *Id.*

On appeal, the Colorado Supreme Court determined that the attorneys' letters made statements that may constitute statements of fact, not merely representations of law. *Id.* at 238. The Court noted that letters state that the Town complied with Colorado law, which includes C.R.S. § 31-25-107(4), before adopting the renewal plan. *Id.* However, under C.R.S. § 31-25-107(4), the Town Council was required to make specific factual findings before adopting the plan, and it was undisputed that the Town Council failed to make these findings. *Id.* Thus, the defendants in *Mehaffy* did not "appl[y] the law to the facts," as Plaintiff argues in its response. (ECF No. 35 at 6.) Rather, the defendants misrepresented material facts—that the Town Council had done something that it had not actually done—in their letters. *Mehaffy*, 892 P.2d at 238. It was this misrepresentation of ***fact*** that the Court found to be the critical component that allowed the negligent misrepresentation claim to survive dismissal.

Here, unlike in *Mehaffy*, Plaintiff's claim is not based on any alleged misrepresentations of fact, implicit or otherwise. The response states that "Giometti made representations in his letter concerning both facts and law." Yet Plaintiff fails to identify any such material fact that was allegedly misrepresented. Indeed, Plaintiff does not allege that Giometti misrepresented the fact that Mr. Weis has a criminal history that he did not disclose, nor does Plaintiff allege that Giometti misquoted any of the actual terms of the Policy. Instead, Plaintiff alleges that Giometti

"misrepresented the ***holdings*** of ***case law*** that was [sic] cited" in a letter. (Compl. ¶ 59 (emphasis added).) In other words, Plaintiff alleges that Giometti misrepresented what the law requires, namely, whether Mr. Weis' criminal history disqualifies him as an umpire and requires vacatur of the appraisal award under Colorado law.

Thus, as demonstrated in the Motion, Plaintiff's claim is based on alleged representations of law containing no factual ingredient. Such a factual component is necessary to maintain a claim for negligent misrepresentation. *See Broadeur*, 169 P.3d at 153; *Chacon v. Scavo*, 358 P.2d 614, 614-15 (Colo. 1960) (representations as to whether certain lots were usable as building sites required an interpretation of the relevant ordinances, and were not actionable because they were representations of law); *Two, Inc. v. Gilmore*, 679 P.2d 116 (Colo. App. 1984) (hotel owner's representation to plaintiff was an individual belief and opinion concerning the purchase, sale, and dispensation of liquor, and was a representation of law that was not actionable). Accordingly, Plaintiff's allegations create no possibility of recovery against Giometti.

B. Plaintiff Cannot Establish Any Justifiable Reliance on Giometti's Alleged Representations

Owners' Motion confirmed that, as a matter of law, Plaintiff cannot have justifiably relied on Giometti's alleged misrepresentations about the "holdings of case law" because, as the Colorado Supreme Court held in *Chacon v. Scavo*, representations about the law "can be tested by ordinary vigilance and attention." 359 P.2d 614, 22-23 (Colo. 1960). Plaintiff is unable to distinguish *Chacon* and makes no attempt to do so. Instead, Plaintiff pretends *Chacon* and its progeny do not apply by regurgitating its flawed argument that "Giometti misrepresented statements of law and fact." Again, Plaintiff fails to identify any ***fact*** that was allegedly misrepresented by Giometti. As shown in the Complaint, the only alleged misrepresentations

were statements about the holdings of case law or the meaning of an insurance contract. Thus, as establish in the Motion, it is impossible for Plaintiff to establish justifiable reliance. Giometti has been fraudulently joined.

C. Plaintiff Cannot Meaningfully Distinguish *Allen* or *Templeton* and, Otherwise, Fails to Establish that the Alleged Representation were for Plaintiff's Benefit

In its Motion, Owners established that Giometti was fraudulently joined because the alleged misrepresentations were not made for Plaintiff's benefit or to guide Plaintiff in its own "business transaction." (*See* ECF No. 21 at 9-11.) The Motion explained that this conclusion is compelled by the Colorado Supreme Court's decision in *Allen v. Steele*, 252 P.3d 476 (Colo. 2011), as well as the Tenth Circuit's decision in *Templeton v. Caitlin Speciality Ins. Co.*, 612 Fed. Appx. 940 (10th Cir. 2015).

Plaintiff's response fails to meaningfully distinguish *Allen* or *Templeton*, or provide any valid reason as to why those holdings are inapplicable here. Plaintiff merely argues that here, unlike *Allen* and *Templeton*, "[t]here was no arbitration or civil lawsuit at issue at the time Giometti drafted his letter." However, Plaintiff's own allegations prove refute that contention. The Complaint alleges, "relying on Defendant Giometti's representations, Plaintiff sent a letter agreeing to voluntarily vacate the appraisal award ***due to the threat of litigation contained in Defendant Giometti's letter***." (Compl. ¶ 61 (emphasis added).) Just as the *Allen* defendants made representations in the context of a potential civil lawsuit, Giometti's alleged representations of law were made in the context of the threatened litigation. Thus, consistent with *Allen*, Giometti's alleged representations were not made in "a business transaction" or for Plaintiff's benefit. *See Allen*, 252 P.3d at 484; *Templeton*, 612 Fed. Appx. at 954; *Nelson v. Csajaghy*, 2015 WL

4035876, at *14 (D. Colo. May 28, 2015) (dismissing negligent misrepresentation claim brought against attorney where alleged conduct were made while represented clients adverse to plaintiff in a prior lawsuit).

Plaintiff also argues that "Giometti was not providing guidance on a statute of limitations, or anything for that matter, related to civil litigation." (ECF No. 35 at 9.) Notwithstanding the fact that Giometti's letter did, in fact, relate to potential civil litigation, Plaintiff is correct in noting that Giometti was not providing any guidance to Plaintiff. And Plaintiff makes no effort to demonstrate how Giometti's alleged representations were made for Plaintiff's benefit. The fact that Giometti's representations were not made for Plaintiff's benefit or guidance further establishes the impossibility of Giometti being found liable in state court. Restatement (Second) of Torts § 552(2); *First Interstate Bank of Denver, N.A. v. Berenbaum*, 872 P.2d 1297, 1301 (Colo. App. 1993) (affirming dismissal of negligent misrepresentation claim against attorney, noting, "[t]here is no allegation that [attorney] furnished any legal opinion at the request of [client] ***for the benefit of*** [plaintiff].") (emphasis added).

The only "reasonable inference" that can be drawn from the allegations in the Complaint is that Giometti's letter was not issued for the benefit of Plaintiff or to induce a mutually-beneficial business relationship; rather, it was sent in an adversarial context in anticipation of litigation. (Compl. ¶ 60.) Thus, even when Plaintiff's allegations are viewed in a light most favorable to Plaintiff, Giometti cannot be liable for negligent misrepresentation. Giometti has been fraudulently joined and must be dismissed.

CONCLUSION

The Court should grant Owners' motion in its entirety and dismiss Giometti on the basis of fraudulent joinder.

Dated: October 25, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE (CM/ECF)

I HEREBY CERTIFY that on October 25, 2022, I electronically filed the foregoing **REPLY IN FURTHER SUPPORT OF ITS MOTION TO DISMISS DEFENDANT GIOMETTI & MERENESS, P.C. ON THE BASIS OF FRAUDULENT JOINDER (ECF NO. 21)** the Clerk of Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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